IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-50-2003**
	:	**(03-10,050)**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
RICHARD WAYNE ILLES, SR.,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's judgment of sentence docketed on March 29, 2004 and its order denying Appellant's post sentence motions docketed on July 15, 2004. The relevant facts are presented in a manner most favorable to the Commonwealth as the verdict winner in this case.

Facts of the Case

Appellant, Dr. Richard Illes, met his wife Miriam in 1991 at the St. Louis University Medical Center where he was a resident in heart surgery. Miriam worked at the hospital as a perfusionist.[1] They knew each other about a year before they were a married. Appellant wanted to return to his home area of York Pennsylvania; thus, he obtained employment as a heart surgeon at a hospital there. Appellant felt he made enemies with a competing group of heart surgeons in York, who didn't want him in town, so he accepted a job with Susquehanna Health System in November 1994. Appellant was a cardiothoracic surgeon

1 This initial biographical information comes from a taped statement Appellant gave to the Pennsylvania State Police on February 10, 1999, which was marked as Commonwealth Exhibit 56-A. N.T., January 26, 2004

at the Williamsport Hospital. He and Miriam Illes lived at 138 Lamont Drive, Cogan Station, Lycoming County. Appellant and his wife had one child, Richard Illes, Jr. (hereinafter "Richie").

In 1998, Appellant and Miriam were experiencing significant problems with their marriage. Both parties consulted with attorneys. Miriam consulted with Attorney Steven Hurvitz. Appellant consulted with Attorney Janice Yaw. Miriam met with Attorney Hurvitz in February 1998. N.T., January 21, 2004 (Volume 2), at pp. 145-206. Miriam showed Attorney Hurvitz a letter she had received from Attorney Janice Yaw, in which Ms. Yaw announced she was retained by Dr. Illes to represent him in divorce proceedings and gave Mrs. Illes notice that Appellant was contending the parties were legally separated as of February 20, 1998. Id. at p. 156; see also Commonwealth's Exhibit 44. Miriam had traveled to Atlanta, Georgia to visit with her family on or about February 20 and Appellant claimed he and Mrs. Illes were separated as of that date and he had no intention of reconciling with her. N.T., January 21, 2004 (Volume 2), at p. 156.

Mrs. Illes told Attorney Hurvitz that she was very concerned about what would happen from that point forward. Id. at p .148. She talked to Attorney Hurvitz about custody of Richie, only age 4 at the time, and financial issues between the parties. Id. Dr. and Mrs. Illes had a substantial amount of money in a joint bank account and Attorney Hurvitz advised Mrs. Illes to withdraw the money from the account. However, Mrs. Illes was not comfortable doing this, so she indicated she would withdraw only one-half of the money from the account. Id. at p. 149.

Mrs. Illes next met with Attorney Hurvitz in March 1998. She told Mr. Hurvitz

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(Volume 5) at pp. 102-103.

that her husband had served her with a complaint for custody of Richie. The complaint accused her of permanently leaving the area with Richie when she visited her family in Atlanta. Id. at p. 150. Attorney Hurvitz defended Mrs. Illes in this custody action.

Shortly thereafter, it became apparent that Mrs. Illes and Dr. Illes were each contending they should be able to stay at the marital residence, without the other, and Attorney Hurvitz filed a divorce complaint on behalf of Mrs. Illes. Id. at pp. 153-154. Attorney Hurvitz also filed a petition for exclusive possession of the marital residence so Mrs. Illes could reside there with Richie. Id. at p. 155. Appellant filed a counter petition for exclusive possession of the residence. Id. Mrs. Illes decided she would move out of the marital residence to get away from Appellant because he refused to leave the residence. She also decided to withdraw her divorce complaint at this time. Id. at pp. 155-156.

After Mrs. Illes moved out of the marital home in late March 1998, Attorney Hurvitz filed a petition to the Lycoming County Family Court seeking child and spousal support fromAppellant. Id. at p. 158. Mrs. Illes rented a residence at Sheridan Street in Loyalsock Township, Lycoming County.

In May 1998 the parties attended a hearing before Lycoming County Master Gerald Seevers on the issues of child support and spousal support. Mr. Seevers entered a temporary court order on May 22, 1998. Commonwealth Exhibit 35. This order required Appellant to pay $1,150 for child support and $7,620 for spousal support monthly. This order was made retroactive to March 27, 1998.

Both Appellant and Mrs. Illes filed exceptions to the order. N.T., January 21, 2004 (Volume 2), at p. 130. The exceptions led to a hearing on July 21, 1998 concerning child

support and spousal support.[2] Id. at p. 131. On August 31, 1998 an order was entered from the hearing. See Commonwealth's Exhibit 36. This order found that Mrs. Illes was entitled to child and spousal support. The order awarded child support in the amount of $5,506 per month and spousal support in the amount of $7,840 per month. N.T., Volume 2, at p. 132. Those figures were to be paid to August 31, 1999. As of September 1, 1999, Mrs. Illes was given an earning capacity, which reduced the spousal support to $7,216 per month. Id. at p. 133. Pursuant to this order a wage attachment was issued on Dr. Illes' income. Id.; Commonwealth Exhibit 37. Both Appellant and Mrs. Illes filed exceptions to the August 31, 1998 order. Id. at p. 134.

On October 1, 1998 Appellant's Attorney, Janice Yaw, wrote a letter to Mrs. Illes' attorney indicating Dr. Illes wanted to quickly wrap up the divorce matter. The letter had an angry tone and accused Mrs. Illes of holding up the matter to receive extended spousal support. The letter told Attorney Hurvitz to not insult Dr. Illes' and Ms. Yaw's intelligence by maintaining Mrs. Illes was not trying to draw out the matter to receive spousal support. See Commonwealth Exhibit 45; N.T., Volume 2, at p. 164. However, Mrs. Illes' attorney testified there were significant differences between the parties on issues of marital property. Further, Attorney Hurvitz felt Dr. Illes had hundreds of thousands of dollars of property that Dr. Illes was trying to claim was not marital property, which actually was marital property. N.T., Volume 2, at p. 164. This concerned money Dr. Illes obtained in a medical malpractice action prior to the marriage. However, the money had been placed in a marital account. Mrs. Illes, through her attorney, was claiming that the money was in fact now marital. Id. at pp. 166-168.

2 At the hearing on July 21, 1998 Appellant tried to claim Mrs. Illes was not entitled to spousal support because she voluntarily left the marital residence in February to visit with her family. Mrs. Illes presented substantial

At this point settlement discussions stopped. Id. at p. 168.

On November 9, 1998, Appellant was served with a contempt petition for being in arrears on the support order. Id. at p. 135. On December 2, 1998 President Judge Clinton W. Smith held a hearing on the parties' exceptions and Judge Smith remanded the matter back to Master Gerald Seevers for a hearing on January 7, 1999.

On January 7, 1999 an evidentiary hearing was held before Master Seevers. Mrs. Illes' attorney, Steven Hurvitz, testified that Miriam had done "a lot of homework." She had documents showing Appellant had made significant withdrawals of money in January and February 1998. When Dr. Illes testified at the hearing, he was confronted with this information. Attorney Hurvitz described Appellant as being "perturbed" and "uncomfortable" with this questioning. Dr. Illes testified that it was not unusual for him to withdraw large sums of money from their accounts. He testified he had been taking gambling trips to Atlantic City. Attorney Hurvitz described the hearing as "a fairly heated day. I mean it was an uncomfortable day. He (Dr. Illes) was not very happy that day." Id. at pp. 172-173.

Approximately one week after this contentious hearing Miriam Illes was shot.

On January 19, 1999, within days of Mrs. Illes' murder, Janice Yaw wrote a letter to the Lycoming County Domestic Relations office on behalf of Dr. Illes, stating that Miriam Illes was now deceased and requesting that the wage attachment be removed from Dr. Illes. Id. at p. 140; See also Commonwealth Exhibit 41. Ms. Yaw also filed a petition to terminate child support and spousal support. See Commonwealth Exhibit 42.[3]

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evidence that Appellant was having a relationship with another woman outside the marriage. Id. at pp. 162-163.

[3] Barbra Hall, Lycoming County Domestic Relations Office described the spousal and child support award to Mrs. Illes as the largest award she had seen in Lycoming County since 1977 when she began working in the Domestic Relations Office. Id. at p. 145.

The Commonwealth produced additional evidence of the contentious relationship, which had developed between Mr. and Mrs. Illes.

Karen Young, the Assistant Manager of Northern Central Bank testified to a contact she had with Miriam Illes around February 20, 1998. N.T., January 22, 2004 (Volume 3), at pp. 23-27. Mrs. Illes came into the bank and made a $300,000 withdrawal from a joint account she had with Appellant. She withdrew one half of the money from the joint accounts. Later that day Appellant came into the bank. Appellant went directly to the Assistant Manager's desk, and he was "irate." Id. at p. 24. He was angry because the bank did not notify him of the withdrawal of money made earlier that day by his wife. She described Appellant as being "very angry" and she noticed he would not sit down. Id. at p. 24. Appellant then closed out the marital accounts and placed the remaining money in a new account in his name only.

Steven Warren Smith testified to a comment he heard Appellant make about his wife in June 1998. N.T., January 21, 2004 (Volume 2), at pp. 114-117. Mr. Smith was at a party at Joseph Mazzante's house. Mr. Smith overheard Dr. Illes refer to his wife when she walked in as an "evil woman" or "evil bitch." Id. at p. 115. He also heard Dr. Illes say something about a million dollars. Id. at pp. 116-117.

Norma Ulmer testified to comments she heard Appellant make in December of 1998. N.T., January 21, 2004 (Vol. 2), at pp. 206-221. Ms. Ulmer was at the home of Dr. Zama (the partner of Appellant at that time) helping him move. She was upstairs and she heard Appellant's voice. Ms. Ulmer was a nurse and was acquainted with Appellant and recognized his voice. She noted Appellant seemed very upset and the tone of his voice was faster and higher than she had ever heard before. Id. at p. 209. Dr. Illes was talking about his wife,

custody of his son and financial issues. She heard him say, "I wish the bitch were dead, my life would be a whole lot easier." Id.

Jeffrey Theis testified to comments made to him by Appellant in the spring of 1998. N.T., January 21, 2004 (Vol. 2), at pp. 221-225. Mr. Theis worked for the Susquehanna Health System, as did Appellant. Appellant asked to talk with him. Appellant told him he was forced to give $500,000 to his "f'n bitch Miriam." Id. at p. 222. Mr. Theis noted he had previously gone through a divorce but he was caught off guard by Appellant's comments.

Dr. Niche Zama testified to verbal comments made by Appellant about his wife. N.T., January 30, 2004 (Vol. 8), at pp. 37-122. Dr. Zama, like Appellant, is a cardiothoracic surgeon. Dr. Zama first met Appellant in a York Pennsylvania hospital. In August 1997 Dr. Zama moved to Williamsport to work with Appellant as a surgical associate at the Williamsport Hospital. Dr. Zama knew both Appellant and Miriam socially. He noted there was a time at the hospital when Appellant told him that things were not going well between him and Miriam. Id. at p. 40. Appellant noted he was involved in a formative relationship with another woman that worked with them. Id. Subsequently, Appellant told him that his relationship with Miriam was over and that she was moving out of the house. Id. at p. 41. During this time Appellant referred to his wife as a "wicked bitch." Id. at p. 42. Appellant commented about Miriam in "very angry terms". Id. at p. 43.

Dr. Zama also testified to the incident to which witness Norma Ulmer testified. He testified that in the fall of 1998 Norma Ulmer was at his residence when the doorbell rang and Appellant announced his presence. Ms. Ulmer went upstairs. Appellant then came in visibly upset. He started referring to his wife as a "bitch" who was making his life miserable. Id. at p. 44. He stated he wished she would just go away. Id. Dr. Zama testified Appellant

expressed feelings of anger against his wife for what he was going through because of the separation and divorce. Id. at p. 45.

The Commonwealth also presented two witnesses who testified to comments made to them by Miriam Illes that reflected the contentiousness and hostility developing between Mrs. Illes and Appellant leading up to January 1999. Leslie Smith, a friend of Miriam Illes, testified to a conversation she had with Mrs. Illes in the summer or fall of 1998, when the legal proceedings were unfolding between the parties. N.T., January 22, 2004 (Vol. 3), at pp. 4-23. Mrs. Illes looked haggard and thin. Id. at p. 10. Mrs. Illes also told the witness that Appellant had threatened her life if she got a dime of child support or if she got custody of Richie. Id. at pp. 11-12.

Similarly, Gordon Butler testified to statements made by Miriam Illes revealing the extreme contentiousness existing between Appellant and his wife. N.T., January 30, 2004 (Vol. 8), at pp. 28-36. Mr. Butler was the brother-in-law of Miriam Illes, being married to her oldest sister. Approximately three months before Miriam's murder, he had a conversation with Miriam regarding a confrontation she had had with Appellant. Miriam indicated she recently had an altercation with Appellant out in the front yard, which was very heated. She claimed Appellant came up on the porch and got in her face and said she could die. Id. at pp. 29-30.

In further support of its contention that Appellant had the intent and motive to commit this crime, the Commonwealth elicited testimony from James Swann. N.T., January 21, 2004 (Volume 2) at pp. 78-113. Mr. Swann is a physician's assistant and he first worked with Dr. Illes at the University of Texas in Gaveston. Mr. Swann developed a professional and social relationship with Dr. Illes. Mr. Swann would go hunting and fishing with Appellant. Mr. Swann also had occasion to target shoot guns with Appellant. Mr. Swann described

Appellant as being "a very good shot." Id. at p. 80. Appellant owned a lot of guns and he did work repairing guns. Id. at pp. 80-81. When Appellant moved to York, he called Mr. Swann and invited him to come work there. Mr. Swann came to York to work with Appellant. When Appellant moved to Williamsport, Mr. Swann came here to work with him. Mr. Swann continued his social friendship with Appellant.

In April or May 1997, Mr. Swann was going through a divorce. He characterized the divorces as being "pretty nasty." Id. at p. 83. Mr. Swann talked to Appellant about the amount of money the divorce was costing Mr. Swann in terms of attorney fees, temporary alimony and child support. Appellant's response to Mr. Swann was that if Appellant were facing these circumstances "he would take his wife out." Id. at p. 84.

The Commonwealth also presented testimony from Ann Ford, Assistant Vice President of the New York Life Insurance Company. N.T., January 21, 2004 (Volume 2), at pp. 57-71. Appellant had applied for life insurance through the American College of Surgeons in 1994. See Commonwealth's Exhibit 47. The policy also allowed members to enroll for life insurance on their spouses. Appellant had $750,000 in life insurance on him and had a $250,000 policy on his wife. N.T., January 21, 2004 (Volume 2), at p. 58. Mrs. Illes was the beneficiary of Appellant's policy and Appellant was the beneficiary of the policy on his wife's life. Id. at p. 59. On July 6, 1998, Appellant changed the beneficiary on his policy to his son Richie and to Katherine Swoyer, his new girlfriend. Id. at p. 59-60; see also Commonwealth Exhibit 48. Since Appellant was the member of the plan, only he could change beneficiaries; Mrs. Illes would not have been able to change her beneficiary. Id. at p. 61. Further, Ms. Ford testified Appellant, as the member, could have cancelled the life insurance on Miriam Illes at any time and stopped paying the premiums for that insurance. Id. Appellant did not do this.

Rather, he paid the premium on his wife's life insurance effective into 1999. He made the last premium payment on his wife's life insurance policy on December 4, 1998. Id. at pp. 60-62. This policy with Appellant as beneficiary was in effect on January 15, 1999 when Miriam Illes was murdered.

Ms. Ford testified that on February 4, 1999, Appellant made a claim on the policy covering Miriam Illes. Id. at p. 62. *See* Commonwealth Exhibit 49. Appellant initiated this claim by a telephone call to the insurance company. Id. at p. 63. However, the insurance company did not pay the claim of Appellant as this matter was under investigation. Id. at p. 68.[4]

Discovery of the Murder of Miriam Illes

On Friday, January 15, 1999, at about 5:00 p.m. Appellant came to his wife's home on Sheridan Street to pick up his son, Richie, for visitation with him that weekend. See Testimony of Nancy Miksch, N.T. January 20, 2004 (Vol 1), at pp. 74-80. Appellant was an hour late in picking Richie up. Miriam spoke with Appellant in front of the house and Richie left with Appellant. Richie was age 5 at the time. Ms. Miksch stayed with Mrs. Illes for an hour or two and this was the last time she saw her alive.

Dwayne Van Fleet, a neighbor and friend of both Appellant and Miriam, called Appellant around 7:17 p.m. and talked to Appellant on his cell phone. N.T. January 20, 2004 (Volume 1), at p. 118; see also Commonwealth Exhibit 3 (Mr. Van Fleet's cell phone record).

[4] The Commonwealth sought to put into evidence that the insurance company offered to pay the money to the guardian of Richie from Mrs. Illes' family, but Appellant refused this offer. At the time of trial the matter was in litigation between Appellant and the insurance company. Id. at pp. 64-66. The Court sustained Appellant's objection to the additional testimony because there was a significant dispute between Appellant and Mrs. Illes' family after Miriam died regarding custody and guardianship of Richie. The court felt such evidence might open up collateral issues. The court also believed the more relevant information was that Appellant made a claim to the life insurance company upon his wife's death. The court felt this evidence was directly relevant to show

Appellant told Mr. Van Fleet he was going to travel to the Honey Brook area and visit his family later that evening. Id. at p. 119. Mr. Van Fleet told Appellant to be careful because the roads were snowy and slushy. Appellant indicated he would still go to Honey Brook. Id. Mr. Van Fleet also noted in his testimony that he has traveled with Appellant in inclement weather and that Appellant is not intimidated by inclement weather in regard to his driving speed. Appellant drives at the speed limit or above in inclement weather. Id. at p. 131.

At 10:10 p.m. eastern time on the evening of January 15, 1999, Mary Dixon telephoned Miriam Illes. N.T., January 20, 2004 (Vol 1), at pp. 80-100. Ms. Dixon resided in Clancey, Montana, and she called Miriam at 8:10 p.m. Mountain time. Id. at pp. 80-81. Ms. Dixon talked to Miriam for 25 minutes. Id. at p. 81. Ms. Dixon then heard a noise in the background that sounded like a dish or glass breaking. She then heard Miriam say "Oh, my God," and she next heard some loud moaning. Id. She asked Miriam if she was all right and received no answer. Ms. Dixon then thought that the sounds might have been from some third party breaking into the phone call. Id. at pp. 82, 98. Ms. Dixon then hung up her phone. She called Miriam back and got a busy signal. Ms. Dixon then thought the phone lines might have gone down because there were storms that night. Id. at p. 82. Ms. Dixon tried to call back on Saturday morning. She received Miriam's answering machine and she left a message for Miriam to call her. Ms. Dixon produced her phone record in court. Commonwealth Exhibit 2. The record confirmed Ms. Dixon made the telephone call to Mrs. Illes at 10:10 p.m. eastern time. Id. at p. 84.

The Commonwealth called Charles Post, Director of Quality for V-Tech Advanced American Telephone, as a witness. N.T., January 20, 2004 (Volume 1), at pp. 101-

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Appellant's motive to kill his wife.

106, 110-115. Mr. Post testified that if Mrs. Illes' phone were off the hook a party calling her back would get a busy signal. Id. at p. 102. If the phone was left off the hook until the battery ran out, the base would lose contact with the hand set and the phone would register back on hook so other phones in the house could be called from a distant party. Id. at pp. 101-103. If an answering machine were hooked up in the house, after the phone battery went dead, the answering machine would pick up incoming calls. Id. at p. 103.

On Sunday, January 17, 1999, Susan Van Fleet became concerned about Miriam because Miriam did not come to church. Miriam was director of bible studies and Mrs. Van Fleet had to cover for her. Mrs. Van Fleet thought it odd that Miriam did not call her about not being able to attend. Susan and her husband Dwayne Van Fleet decided to go over to Miriam's home at 2440 Sheridan Street to check on her.

When the Van Fleets arrived at Miriam's home they noted the paper was on the porch and there was mail in her mailbox. They rang the doorbell and Miriam's dogs started barking. The Van Fleets then walked around the house. Mr. Van Fleet went by the rear kitchen window and saw Miriam lying on the floor. N.T., January 20, 2004 (Volume 1), at p.121. Mr. Van Fleet realized Miriam was dead. He conveyed this information to his wife and called 911. When Mr. Van Fleet went back to this window with the ambulance driver he noticed a hole in the window. Id. at p. 123.

Trooper William Holmes of the Pennsylvania State Police was called to respond to 2440 Sheridan Street. When he arrived personnel from the Loyalsock Township Fire Department were there and Officer Bonnell from the Montoursville Police Department was at the rear of the residence. N.T., January 20, 2004 (Vol. 1), at pp. 132-137.

Trooper Holmes found all exterior doors to the residence were locked. Id. at p. 133. Trooper Holmes gained entry into the home by forcibly opening the rear door to the garage. Trooper Holmes and members of the fire department forcibly opened a door into the residence.

Upon entering the residence Trooper Holmes found Miriam lying on the kitchen floor. Id. at p. 134. She was deceased. Commonwealth Exhibit 7 is a photograph of Miriam lying on the kitchen floor in the state in which she was discovered. There was a phone lying right beside her between her head and shoulder. Id. at p. 135. Trooper Holmes observed a bullet hole in the kitchen window. Id. There was glass on the counter area near the window.

Samuel Land, a forensic pathologist, conducted an autopsy on Miriam on January 18, 1999. N.T., January 20, 2004 (Vol. 1), at pp. 137-165. The autopsy report is Commonwealth Exhibit 8. As a result of the autopsy Dr. Land opined that Miriam died of a gunshot wound to the back. Id. at p. 145. The wound was at the left upper, outer back. The bullet had apparently passed through a plate of glass. Id. at p. 146. He noted that as a bullet passes through an intermediate target, such as a plate of glass, it begins to shatter in the air. The bullet then went through the left upper back of Miriam and fractured her left lateral ribs. Id. ; Commonwealth Exhibits 7, 8. There were many wound paths because there were multiple fragments of the bullet. The wound paths involved the lung; the sack surrounding the heart; the base of the left ventricle of the heart; the left atrium of the heart; the pulmonary arteries, which carry blood from the heart to the lungs; the aorta, which carries blood from the heart to the rest of the body; and the right upper lobe of the lung. Id. at p. 146. Concisely, Dr. Land found that there was a gunshot wound that struck Miriam in the left back, went into her chest and destroyed multiple vital organs. Id. at p. 147. Dr. Land opined that Miriam would only

have survived, without medical attention, seconds to minutes with this wound. Id. at pp. 148-149. Dr. Land referred to a gasping or wheezing sound, as described in Mary Dixon's testimony about her telephone call to Miriam, as a death rattle. He stated that when an individual dies and they have heart or lung failure their lungs begin to fill with fluid. When a person takes a breath, the fluid mixes with air and makes a gurgling noise. As the person expels the air and blood, it comes out as a rattle-like noise or a wheezing-type noise. This is commonly referred to as a death rattle. Id. at p. 149. Dr. Land also opined that, after being shot, Miriam could have made a statement such as oh my God, as testified to by Mary Dixon. She would have been able to vocalize, as there was still air in her lungs. She would not have died instantly from the shot, but she would have survived for only a short period of time. Id. at p. 151. Dr. Land was able to retrieve bullet fragments from the body of Mrs. Illes, which he turned over to the Pennsylvania State Police. Id. at pp. 152-153. Dr. Land believed Mrs. Illes was incapacitated and unconscious on the floor within seconds of being shot. Id. at p. 156.

Trooper Dean Kirkendall, who works with the forensic services unit at the Montoursville barracks, responded to the crime scene on January 17, 1999. N.T. January 20, 2004 (Vol. 1), at pp. 165-208. He went into the home and saw Mrs. Illes lying in a prone position in the northeast corner of the kitchen. There was a telephone to the left of her neck. The phone was a cordless phone. The bottom of the phone was next to her neck and the antenna was facing northwest. Id. at p. 169.

Trooper Kirkendall prepared a large poster board photograph depicting Mrs. Illes' home and the area surrounding her home to illustrate his findings about the crime scene. See Commonwealth Exhibit 23. The victim's residence is at 2440 Sheridan Street. Sheridan Street runs parallel with Reed Street. Lymehurst Parkway intersects Sheridan Street to the

west. Mrs. Illes' home is the fifth home down from Lymehurst Parkway. In back of Mrs. Illes' home between Sheridan and Reed Streets is a wooded gully with trees running parallel and south to the back of Mrs. Illes' home. To the west of the gully toward Lymehurst Parkway is a wooded area known as Bull Run. Bull Run runs parallel with Lymehurst Parkway and runs from the area below Reed Street to Sheridan Street. In back of the wooded gully is a tennis court with a chain fence surrounding it. The tennis court is south of Mrs. Illes' home and is just north of Reed Street. If one would walk just north of the wooded gully, they would be walking toward the south end of the homes on Sheridan Street, including Mrs. Illes' home. Bull Run continues beyond Reed Street, to the south of Reed Street, into a wooded area. There is a culvert that one can travel under Reed Street to cross into Bull Run as it approaches Sheridan Street.

Trooper Kirkendall observed tracks in the deep snow to the south of the victim's residence that come down to the property line. The tracks came from an area near the tennis court around a utility pole, which was 18 inches from the end of the hurricane fence. Id. at p. 173. The tracks went from the pole and down over the gully to a small tree facing the south end of Mrs. Illes' home. Id.. The tracks "had gone over behind the next residence, wound up to the embankment as though peering over it, back down, came back to the original place where they came down over the embankment behind the victim's residence and returned out towards the tennis courts." Id. at p. 174.

The bullet was fired from outside the residence and went through the kitchen window. Id. at pp. 174-175. When you look out of this window you look out toward the wooded gully. Id., at p. 175.[5]

There is a small tree, which Trooper Kirkendall refers to as an eight-inch tree in the wooded gully to the south of the victim's residence. Id. at p. 176. Trooper Kirkendall found footprints at the tree.[6] One footprint was directly in line with the tree. The Trooper measured it to be a foot from the tree and was on the embankment itself. Id. The footprint evidenced "a typical stance for someone using a barricade to shoot." Id. at p. 177. Trooper Kirkendall, who instructs firearm courses, opined that this would have been a right-handed person because "typically you extend your left foot to shoot with your right hand, your right foot to shoot with your left hand." Id. at p. 177.

Trooper Kirkendall noted that someone shooting from this tree would have a clear view of Miriam Illes' window. He further noted that this was one of the few places in this area where you could see into the house without the brush and shrubs along the top of the bank interfering. Id. at pp. 173-178. The distance of this location from the tree to the victim's house was 73 feet. Id. at p. 178.

Trooper Kirkendall opined that the footprints he observed in the snow showed that one person came in and went to the small tree and that one person left the area. Id. at p. 180. All the tracks observed were the same tracks. Id. The tracks had the same consistent horseshoe heel. Id. The tracks leaving the area went back by the tennis court. Id. at p. 181. The tracks then came out of Bull Run toward the southeast corner of Sheridan Street and

[5] Trooper Kirkendall, in his testimony, sometimes refers to the wooded gully as the dry streambed.
[6] The Troopers found a cigarette butt near the tree, which they seized as possible evidence. Id. at pp. 178-179.

Lymehurst Parkway. Id. The tracks started and ended on the hard road. Id. at p. 182. Trooper Kirkendall measured one of the footprints and it measured 13 inches. Id. at p. 183.

From Trooper Kirkendall's observations of the footprints he noted the individual making the footprints came into the area near Reed Street going under the Reed Street culvert, went up Bull Run to the wooded gully, turned up the streambed for about 50 feet, went up the embankment along the tennis court, and then went to the embankment where the 8-inch tree was directly behind the victim's house. Id. at p. 186.

When the individual left, Trooper Kirkendall testified that the tracks went 65 feet to the "cut bank" and then went over the embankment in the same place where the individual came down. Forty-five feet from the fence near the tennis court Trooper Kirkendall observed tracks that indicated a "stutter step" at which time the tracks then faced the tennis court. Id. at p. 187. The tennis court fence is ten feet high. Id. From the tennis court the tracks then came out on the southeast corner of Sheridan Street and Lymehurst Parkway where the tracks were lost on the hard road. Id. at pp. 181, 187; see also Commonwealth Exhibit 22 (videotape describing Trooper Kirkendall's testimony played for the jury by the prosecution). Id. at p. 189.

Trooper Kirkendall noted that the existing tracks, which came out towards Lymehurst Parkway did not continue on the other side of Lymehurst Parkway.[7] Id. at pp.192, 193. The tracks of the person coming out on Lymehurst Parkway seemed to indicate the person was pacing. Id. at pp. 193-194.

Trooper Dean Benedict, who also works with the forensic unit out of Montoursville, responded to the crime scene on January 17, 1999 with Trooper Kirkendall.

N.T. January 2004 (Vol. 1), at pp. 208-224. Trooper Benedict found a black object that appeared to be a silencer in the area inside of the tennis court. Id. at p. 209. He was retracing the footprints as they went away from the scene. He came to a spot where the tracks seemed to stop and turn toward the tennis court. Using his flashlight, Trooper Benedict observed the silencer inside the tennis court. Id. at pp. 209-210. Trooper Benedict noted there were no tracks inside the tennis court. Id. at p. 210; see also Commonwealth Exhibit 25, showing how silencer appeared in the snow. Trooper Benedict opined that the silencer was thrown over the fence and onto the tennis court. Id. at p. 222.

At approximately 5:00 p.m. on January 17, 1999, Corporal Richard W. Bramhall, Jr. of the Pennsylvania State Police along with Trooper William Holmes proceeded to the residence of Dwayne Van Fleet to meet and interview Appellant. N.T. January 22, 2004 (Vol. 3) at pp. 45-90. At 5:20 p.m. they interviewed Appellant. Appellant indicated upon returning from the Honey Brook area he had gone to Miriam's house to return Richie, where he heard of his wife's death. Initially Appellant was visibly upset and crying. However, within five minutes as he was being questioned about his whereabouts on January 15th, his demeanor changed to matter of fact. Id. at p. 50.

Appellant related that on Friday, January 15th, he went to Miriam's house to pick up Richie for the weekend. He arrived about 5:00 p.m. He was supposed to be there at 4:00 p.m. He told Miriam he and Richie were going away for the weekend but he was unsure where. He said they would either be going up to his cabin to snowmobile or he would go to his sister and brother's place down in Honey Brook and Downingtown. Id. at p. 51. After leaving Miriam's place he went to his office and dictated some notes. He and Richie then went to a

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[7] This information could create an inference that the perpetrator got in a vehicle at or around this location.

Burger King to get some food to take home. They arrived back at his home between 6:30-7:00 p.m. After eating he called Miriam at 7:00 p.m. and he told her he and Richie would be going up to stay with his dad that weekend in Downingtown. He then began to pack for the trip. He and Richie left for the trip at 9:30 p.m. Id. at p. 52.

He said the travel was slow because the roads were bad due to ice. Richie became hungry along the way so he stopped at McDonald's in Lewisburg. He did not know the time he stopped. He did not mention in this statement that Richie used the restroom at McDonald's. Id. at p. 53. He decided he would have to stay at a hotel because of the weather and somewhere south of Selinsgrove he called his sister, Sue Kaufman, on his cell phone and told her because of bad roads he would not be down that night and he would stop and stay at a hotel. Appellant claimed he made this call at 11:30 p.m. Id. at p. 80. However, Appellant claimed he could not find a suitable hotel until he got to Harrisburg. Id. at p. 53.[8] They arrived in Harrisburg and stayed at the Hampton Inn on Route 283. They got in around 1:00 a.m. Id. at p. 53. Appellant stated he stayed at his sister Sue's house on Saturday night and on Sunday morning he went to his father's home in Downingtown. He got home around 4:00 p.m. At about 4:50 p.m. he and Richie went to Miriam's home.

Cpl. Bramhall then told Appellant he would like to speak to Richie. Appellant indicated it would be fine, but he wanted a child psychologist to be present for the interview. Thus, Cpl. Bramhall and Trooper Holmes were not permitted to speak to Richie on this occasion. Id. at pp. 65-66.

[8] Corporal Bramhall testified there were hotels in Shamokin Dam and Hummels Wharf, which were just north of Selinsgrove. There was "at least" a hotel/motel between Selinsgrove and Harrisburg. Id. at p. 54.

Cpl. Bramhall and Trooper Holmes also interviewed Appellant at the office of his attorney, George Lepley, on February 10, 1999. A tape recording was made of this conversation. Commonwealth Exhibit 56a. On February 10, Appellant remembered that he called his sister on January 15 before leaving for the Harrisburg area, and Dwayne Van Fleet called him to tell him the roads were icy and he should be careful. Appellant also indicated that when he stopped at McDonalds they ate the food in the car, but Richie went into McDonalds to go to the bathroom. He then became concerned McDonalds was getting ready to close since it was getting close to 11:00 p.m. Appellant also remembered before going to the Hampton Inn, they stopped at Sheridan Inn around 12:20 to 12:30 a.m., but there was a busload of peopled checking in at this time so they decided to go somewhere else and drove to a nearby Hampton Inn. On February 10, Appellant also acknowledged his ownership of several guns, including a variety of shotguns and rifles. He indicated he has 22-caliber ammunition up to 300 magnum. Appellant also noted that he makes wooden stocks for guns.

Both the Commonwealth and defense at trial stipulated to Commonwealth Exhibit 53a, which contained records from the Northeast Regional Climate Center for January 15, 1999 and Commonwealth Exhibit 53b, weather information for this date from Accu-weather. N.T., January 22, 2004 (Volume 3) at pp. 96-98. The Northeast Regional Climate Center records had data from airports at Williamsport, Selinsgrove and Harrisburg. Id. at p. 98. Cpl. John McDermott of the Pennsylvania State Police testified about the information in the reports. N.T., January 22, 2004, (Volume 3), at pp. 98-113. The record of the Williamsport Airport showed no precipitation on January 15, 1999 from 7:00 p.m. until midnight. Id. at p. 101. The last precipitation occurred at l0:00 a.m. on January 15. There was no precipitation listed for January 16. Id at p. 102. The Selinsgrove Airport showed no

precipitation from 8:00 p.m. to midnight. Id. at p. 102. The last listed precipitation in Selinsgrove is l0:00 a.m. January 15, 1999. Id. The Middletown/Harrisburg International Airport, which was very close to the Hampton Inn, reported no precipitation on January 15, 199 from 8:00 p.m. to l:00 a.m. Id. at p. 104. The last precipitation in the Harrisburg area is listed on January 15 at 11:00 a.m. as light snow, fog and mist. Id.

The Accu-weather records indicate a major winter storm continued to affect all the areas along Route 15 from Williamsport to Harrisburg well into the morning of January 15, 1999. Id. at p. 105. The storm ended between 10:15 – 11:30 a.m. Id. Total accumulation was 5-8 inches in the northern sections, 4-6 inches in the central sections, and 2 ½-5 inches in the southern sections. Id. at p. 106. The last precipitation in Williamsport on January 15, 1999 was at l0:00 a.m. Id at p. 106. No precipitation occurred in Williamsport from 8:00 p.m. January 15 to 11:00 a.m. on January 16. Id. at p. 107. Selinsgrove also reported no precipitation from 8:00 p.m. on January 15. Id. at p. 107-108. Harrisburg reported snow at 11:00 a.m. on January 15, but no precipitation was reported thereafter. Id. at p. 108.

The records, however, reflected that the storm that affected the entire area from Williamsport to Harrisburg was more difficult to clean up after than a normal storm because of the quantity of freezing rain and sleet that fell. Id. at p. 110. The records also indicate that freezing rain from the storm produced glaze and made commerce slow and travel hazardous. Id. at p. 111.

Brian Allen, a senior engineer with Verizon Wireless, was called by the Commonwealth to testify to the location of Verizon Wireless Towers to address the approximate location of the cell phone call Appellant made to his sister while traveling on traveling on Route 15 on January 15, 1999. N.T., January 11, 2004 (Volume 3), at pp. 140-

163. The records show the call in question was made at 11:24 p.m. Id. at p. 143. The call lasted for 49 seconds. Id. The tower used to make the call was numbered 212. Id. at 144; see also Commonwealth Exhibits 50, 51. The tower in question is called Montour Ridge Tower. Id. at p. 145. When a call is placed on a cell phone, the records can determine a general location where the call is made from by determining the tower used, but a precise location cannot be determined. Id. at pp. 145-146. Mr. Allen testified that Appellant's cell phone call made at 11:24 p.m. January 15, 1999 could have been made anywhere within the coverage area of this tower. Id. at p. 146. The Montour Ridge Tower covered an area from White Deer (which is located just north of Lewisburg) to just south of Selinsgrove around the Route 15 Selinsgrove bypass. Id. at pp. 147-148; see also Exhibit 52 (a coverage area map for the Montour Ridge Tower).

The Continuing Investigation by the Pennsylvania State Police

Corporal John McDermott and Trooper William Holmes directed the investigation by the Pennsylvania State Police. They also were the police prosecutors at trial. On Monday, January 18, 1999, just days after Miriam's murder, Appellant called the company that removed trash weekly from his residence located at 138 Lamont Drive and personally requested that they pick up his garbage the following day. Tuesday was the usual pick up day for his garbage. Appellant, during the phone conversation, indicated his garbage had not been picked up for a couple of weeks. N.T., January 22, 2004, (Volume 3), at pp. 186-193.

On January 22, 1999, Cpl. John McDermott of the State Police contacted Appellant's trash hauler. He talked to Kevin Peacock and he requested that when Mr. Peacock removed Appellant's trash, he would separate this trash and allow the state police to inspect it. N.T., January 22, 1999 (Volume 3) at pp. 193-194. Mr. Peacock agreed to do this, and this

was done for the trash pickups up to February 23, 1999, when Appellant moved from the Lamont Drive residence to the Mt. Crescent residence. Id. at p. 194. Cpl. McDermott's telephone call was too late to get the trash pickup requested by Appellant on January 19, 1999. Cpl. McDermott took the trash picked up by Mr. Peacock and the state police inspected it. Id.

On February 3, 1999, Cpl. David Young of Pennsylvania State Police searched the trash collected from Appellant's home on February 2, 1999. N.T., January 23, 2004 (Volume 4), at pp. 29-33. Cpl. Young found two opened tubs of super glue and he found a 2-¼" piece of small wire. Id. at p. 30; Commonwealth Exhibit 56.

On February 24, 1999, Trooper Dennis Haines searched Appellant's trash pickup and found, among other things, a rifle barrel. N.T., January 23, 2004, (Volume 4), at pp. 33-43. The rifle barrel, marked Commonwealth Exhibit 5, has six drill bit impressions on it. Id. at p. 35. In January 1999, Cpl. John McDermott sent the silencer found on the tennis court on January 17, 1999 to the state police crime lab. The lab broke down the silencer to see what its components were.[9] Cpl. McDermott received the report on the components of the silencer on February 12, 1999. N.T., January 23, 2004, (Volume 4), at pp. 50, 57-83. The components of the silencer included PVC pipe with end caps. Id. at pp. 58-59. The end caps had been glued to the PVC pipe. Id. at p. 52. There was black textured paint sprayed on the surface. The silencer was also made with crushed acoustical tile. Id. at p. 59. The silencer

9 Ballistics expert Cpl. Ernest Baltimore analyzed the silencer at the crime lab. N.T., January 26, 2004 (Volume 5), at pp. 48-100. Cpl Baltimore opined the item was a homemade silencer designed to be attached to the barrel of a firearm in order to diminish the sounds of discharges of the firearm. Id. at p. 56. The silencer is placed over the muzzle end of the barrel of a firearm. Id. at p. 56. Cpl. Baltimore disassembled the silencer to reveal the components of the silencer. He described end caps, PVC pipe covered with spotted paint, absorbent or filler material to surround the inner portion of the silencer, and wire. Cpl. Baltimore described the silencer as having 73 holes. The purpose of the holes is to allow the propellant gases to escape. Id. at pp. 58-59. Cpl. Baltimore also tested the silencer for the presence of lead. The test result was positive, which was consistent with a projectile having passed through the silencer. Id. at pp. 60-61.

had a piece of wire wrapped around a wire screen to hold the conduit. Id. There was a metal conduit, which was a metal piece of pipe that ran through the center of the silencer. Id. Numerous holes were drilled into the metal conduit. Id. at p. 60; see also Commonwealth Exhibit 64, which contained the components of the silencer found on the tennis court. Expanding foam was also utilized inside the silencer. N.T., Volume 4, at p. 63.

Cpl. McDermott noted that the metal conduit went through the center of the silencer. There were numerous drill holes in the conduit. Id. at p. 63. The holes went straight down through the pipes. Id. The holes were perfectly lined up. Id. There was a J channel cut in the conduit. Id. at p. 64. There was also duct tape in the silencer. Id. at p. 66. One of the end caps had stamping on it, which allowed the Cpl to determine it was manufactured by a company name NIPCO. Id. at p. 68. Cpl. McDermott believed that since the holes on the conduit went straight through, they in all probability would have been made with a drill press, as opposed to a hand drill. Id. at pp. 71-72. After determining the components of the silencer, Cpl. McDermott next sent the components to an F.B.I. laboratory to perform material analysis of the components. Id. at p. 62.

On February 23, 1999, the state police served search warrants on Appellant's residence at Lamont Drive, his new residence at Mt. Crescent and at his cabin in Potter County.

The residence on Lamont Drive had a workshop area. Trooper Robert Brown was the trooper who collector of the evidence. N.T., January 23, 2004, (Volume 4), at pp. 88-127. Wire that held together a role of linoleum flooring was seized from a basement storage room area. Id. at p. 91. A piece of wire lying under the linoleum was also collected. Id. In the workshop, the state police noticed debris on the floor, which appeared to be scraps of

acoustical tile and scarps of expandable foam. Id. at pp. 93-94.

The state police found PVC piping in the basement storage room. The end cap of the piping was manufactured by NIPCO. Id. at p. 99; see also Commonwealth Exhibit 83-83A (photographs of PVC piping in basement storage area and NIPCO end cap). The ceiling tile in the home differed from the acoustical tile bits found on the floor. N.T., Volume 4, at pp. 100-101.

Trooper Brown also collected duct tape from the basement. Id. at p. 119.

The state police seized various items on February 23, 1999 during the search of Appellant's new residence at Mt. Crescent. Trooper Phillip Davis seized a red Plano toolbox, which was full of tools. N.T., January 23, 2004 (Volume 4), at pp. 135-146. He also seized a Ruger 22 250 rifle with scope. Id. at p. 137. Cpl. Troy Hickman seized a drill bit box. Id. at p. 147. Cpl. Bramhall observed a .22 caliber semi-automatic Berretta handgun in a box in the basement. Although he did not seize this item, he did photograph it. See Commonwealth Exhibit 97. The end barrel of the Berretta had been cut off. See Commonwealth Exhibit 98. N.T., Volume 4, at pp. 158-159. Cpl. McDermott observed a paper back book in a drawer in the nightstand in the master bedroom entitled "They Write Their Own Sentences, F.B.I. Handwriting Analysis Manual." Id. at pp. 163-164. While Cpl. McDermott did not seize the book, he photographed the book because it seemed unusual to him. See Commonwealth Exhibit 100. Cpl. McDermott also testified that Appellant was not given the affidavits of probable cause used in the search warrants, because President Judge Clinton W. Smith sealed them, but Appellant was personally given the inventory forms for all the searches, which told him what was seized at each location. N.T., Volume 4, at pp. 162-163. Trooper Dean Benedict photographed some of the machines in the basement of the Mt. Crescent residence,

which included a drill press. Id. at 170; see also Commonwealth Exhibit 102A. Finally, Trooper Scott Henry testified he found a PVC pipe with a valve in a box at the Mt. Crescent residence. N.T., January 26, 2004, (Volume 5), at pp. 13-14; see also Commonwealth Exhibit 87. The writing on the collar of the pipe indicated "NIPCO 4804, one an one-half inch". N.T., Volume 5, at p.14. A photograph of this exhibit can be found at Commonwealth Exhibit 86.

Trooper Ronald Clark was involved in the search of Appellant's cabin in Cross Forks, Potter County on February 23, 1999. N.T., January 26, 20004 (Volume 5), at pp. 36-48. Trooper Clark seized the contents of a Eureka hand vacuum and the contents of the lint trap from the dryer. Id. at p. 37. He also seized five cans of expanding foam insulation. Id. at p. 38.

The Appearance of the Anonymous Letters

On Saturday, January 23, 1999, Cpl. Richard Bramhall had a phone conversation where Appellant told the Corporal that he wanted to put his Attorney George Lepley on the phone to provide some information to the state police. N.T., January 23, 2004, (Volume 4), at pp. 15-26. Attorney Lepley told Cpl. Bramhall that Appellant wanted him to know that when Appellant had been away and his house was locked, someone had entered his home. Id. at p. 16. Cpl. Bramhall asked Mr. Lepley for more details about the break-in and he then asked Attorney Lepley to put Appellant on the phone. Appellant told Cpl. Bramhall that when he returned to his house the day before he noticed some lights on, which were not on when he left. He also claimed that some things had been moved around the house. Id. at p. 19. Cpl. Bramhall asked Appellant if the house had an alarm system and he said it did, but the system was not activated. Id. at p. 22. Cpl. Bramhall told Appellant he would tell the crime supervisor, so he could assign a trooper to investigate. Id. Appellant told Cpl. Bramhall he

wanted to think about it and would get back to him. Id. at p. 23. Attorney Lepley called back and indicated Appellant did not want the state police to come to his house to investigate the alleged entry. Id. at p. 25; see also Commonwealth Exhibit 54 (voice mail from Mr. Lepley).

Shortly after the state police searched Appellant's properties on February 23, 1999, Appellant had a convention with Dwayne Van Fleet. N.T., January 26, 2004, (Volume 5), at pp. 137-14. Appellant told Mr. Van Fleet he was concerned about the items that the state police took pursuant to the search warrant. Appellant was concerned that he could easily be framed for the murder of Miriam because the items taken by the state police were common household items available in any home. Id. at pp. 137-138. Appellant then said he was concerned that someone had previously broken into his home and that items found in his home could "point the finger at him". Id. at p. 138. Appellant said he was concerned that someone who broke into his home might have planted items in his home. Id. at p. 139.

On or around March 1, 1999, someone from Appellant's attorney's office contacted the Pennsylvania State Police and informed them that George Lepley received an anonymous letter about the case. Cpl. Richard Bramhall responded to Attorney Lepley's office and was shown a letter written in pencil on plain white paper that had been in an envelope. N.T., January 28, 2004, (Volume 6), at pp. 5-17; see also Commonwealth exhibit 113-A (a photocopy of this original letter and envelope). The postmark on the envelope was February 27, 1999 from the Williamsport Post Office. N.T., Volume 6, at p. 7. The letter was addressed to Attorney George Lepley at his law firm address.

The letter was in block printing. The anonymous writer states: "I SHOT MIRIAM". The letter goes on to state the Lord ordered the writer to "HARVEST THE WICKED RACIST ONES OF THIS TOWN". The letter writer continues on to say that he or

she made it look like Dr. Illes murdered Miriam. The writer signed the letter:

> "SOLDIER OF EQUALITY
> SOLDIER OF GOD
> SOLDIER DEATH"

Cpl. Bramhall noted that he could see some streaks in the original letter:

> There were streaks across the page where
> the pencil had been wiped in some way.
> Why or with what, I don't know, but it was
> very obvious something had been wiped across the page.

Id. at p. 11. Cpl. Bramhall also noticed a hair stuck between the flap and the exterior of the envelope, with about one inch of the hair protruding into the interior of the envelope. Id.

Trooper Robert Brown removed the hair from the letter and he processed the letter for fingerprints, but was unable to obtain any usable fingerprints. N.T., January 28, 2004, (Volume 6) at pp. 18-19. Trooper Brown also noted that the effect of someone wiping the letter would potentially remove any fingerprints. Id. at p. 29.

On May 4, 1999, Attorney George Lepley received a second anonymous letter. Attorney Lepley's office contacted the state police. Trooper William Holmes went to Mr. Lepley's office. N.T., January 28, 2004 (Volume 6), at pp. 38-50. Trooper Holmes met with Mr. Lepley and he was given the letter and envelope. Id. at p. 39; see Commonwealth exhibit 115, 115-A (the original letter and envelope and a copy of it, respectively). The original letter was a single sheet of paper with writing on both the front and back. The copy contains two pages. Id. at p. 40. The affidavits of probable cause for the search warrants served on Appellant's premises on February 23, 1999, were unsealed before the date of the second anonymous letter. Id. at p. 41.

The second letter, like the first, was addressed to Attorney Lepley. The second

letter was also written pencil with block printing. It appeared to be the same type of writing as the first letter. Id. at p. 42.

In this letter the writer states "DR. ILLES COULD NOT HAVE BEEN THE KILLER OF HIS EVIL WIFE". The writer claims his "SUPERIOR INTELLECT" has fooled the authorities. The writer notes the errors in his last letter were deliberate to hide his identity. The writer then brags he has advanced degrees and is fluent in several languages, and that his IQ is twice as high as any police officer's. He indicates he is sorry he has ruined Dr. Illes' life. He then refers to the local newspaper's report that wire was found in the search of the Dr. Illes' trash, which matched the materials in the silencer. The writer goes on to state:

> I HAD FREE ACCESS TO HIS HOME WHILE HE WAS ON VACATIONS, AND USED MANY OF HIS SUPPLIES TO FABRICATE MY EQUIPMENT.

The writer closes by stating this will be his last letter since he is moving out of the area. The writer signs this letter:

> SOLDIER OF GOD
> SOLDIER OF EQUALITY
> SOLDIER OF DEATH

The postmark for the second letter was May 3, 1999. As with the first letter, the state police were not able to obtain usable fingerprints from the letter.

As previously stated in discussing the search of Appellant's current home at Mt. Crescent, Cpl. John McDermott took a photograph of a book he found on the nightstand in the master bedroom entitled, "The Write Their Own Sentences, The F.B.I. Handwriting Analysis Manual." After receiving the anonymous letters Cpl. McDermott recalled seeing this book in Appellant's home and obtained a copy of the book. N.T., January 28, 2004 (Volume 6), at pp. 65-73, 96-106; see also Commonwealth Exhibit 101. The book contains a discussion of

anonymous letters and disguised writing. N.T., Volume 6, at p. 68. The book also discusses anonymous letters being printed in pencil because pencil writing chemically inert and is not susceptible to chemical testing. Id. The book notes that hand printed letters are difficult for investigators to compare. Id. Corporal McDermott also noted the book contained some FBI case scenarios where anonymous letter were written. The fourth scenario involved some similarities to this case, as it concerned a wife being murdered, the husband was a suspect, and an anonymous letter was written implicating another person. Id. at pp. 70-72. On cross-examination, Cpl. McDermott acknowledged Appellant purchased the book in August 1998, before the murder of Miriam, because there was a dispute with Miriam regarding whether she had signed a malpractice settlement release. Id. at pp. 98-99.

The Commonwealth presented the testimony of James R. Fitzgerald, a special agent with the FBI. N.T., January 29, 2004 (Volume 7), at pp. 13-75. Mr. Fitzgerald is a member of the behavioral analysis unit, located at the FBI Academy in Quantico, Virginia. His duties concern the analysis of textual materials. He reviews letters or writings and provides what he referred to a forensic linguistic analysis. Id. at p. 14. Mr. Fitzgerald has a Master's degree and he is presently working on an advanced degree in linguistics. He also has had numerous in-service trainings in this area. He has taught courses in linguistics and published articles in the field of textual analysis. Id. at p. 15. Over the past eight years, he has worked on over a thousand cases involving textual material, mostly anonymous writings, and rendering opinions on this subject. Id. He has worked on several high-profile cases, including the case of Ted Kaczynski, known as the Unabomber. Mr. Fitzgerald headed up a Task Force, which analyzed known writings of Ted Kaczynski to anonymous writings. His findings were listed in a probable cause affidavit leading to Kaczynski's arrest. Id. at p. 16. Mr. Fitzgerald compares

two of more sets of documents, one known and one unknown, and compares them for authorship indicators. Id. at p. 21. The court deemed Mr. Fitzgerald as expert witness in text analysis. Id. at p. 22.[10]

In conducting his analysis, Agent Fitzgerald compared the two anonymous letters, which he listed as questioned documents, to approximately twenty known writings of Appellant. Id. at p. 24. After studying the documents, Agent Fitzgerald found certain similarities between the writings. Agent Fitzgerald found similarities in spacing between the questioned documents and the handwritten known documents. In the first anonymous letter, using the first the thirty-five words, he measured the average spacing between the non-punctuated words to be .35 inches. In the second anonymous letter, using the same format, he found the spacing between words to be .32 inches. Id. at pp. 24-30. Of the five handwritten samples of Appellant, Agent Fitzgerald took two of the documents, the vertical height of the lettering of which were similar to the questioned documents, and did the same analysis on them. He found the spacing on the first known document to be .34 inches. The spacing for the second known document was .37 inches. Id. at pp. 30-31. The agent further compared this to an F.B.I. database of thirteen writings with letter height similar to the previously compared documents and found these documents to average .19 inches of space between words. Id. at p. 32. Thus, Agent Fitzgerald concluded that the spacing of the anonymous letters and the known samples of Appellant's writing exhibited an idiosyncratic writing style and showed common

10 The court made a pre-trial ruling on the admissibility of Agent Fitzgerald's testimony allowing his testimony regarding the textual similarities between the anonymous letters and known handwriting specimens of Appellant. Although the court's ruling precluded Agent Fitzgerald to render an opinion before the jury that Appellant was the writer of the anonymous letters, the court felt Agent Fitzgerald's testimony would be helpful to the jury's evaluation of the issue of the anonymous letters. Thus, it found Agent Fitzgerald's comparison's admissible. Also, the court notes it gave the jury a cautionary instruction about Agent Fitzgerald's testimony at the beginning of his testimony. Id. at pp. 22-23.

writing style and habits between the two sets of documents. Id. at p. 33.

Next, Agent Fitzgerald found similarity and commonality in the questioned and known documents concerning the use of the words Lord and God. In both anonymous letters the writer made references to the Lord and God. Id. at p. 33. In the anonymous letters the listings of the Lord and God are within ten sentences of other and are consistent in using first Lord then God. Id. at p. 34. In the known writings, document K16 line 18 makes reference to Lord and line 20 makes reference to God. In document K17, line 31 refers to Lord and line 34 refers to God. Id. at pp. 35-36.

Agent Fitzgerald also made an observation concerning similarity of dates. In page two of the May 3, 1999 anonymous letter, the author writes the date, "January 16, 1999". In the known documents there were thirty-one references. In twenty-four of the written references by Dr. Illes, he wrote the date in the same way as the questioned document, with the month fully spelled out, then the numbered day of the week, then a comma, then a year fully expressed, beginning with nineteen and whatever year applied. Id. at pp. 36-38

Agent Fitzgerald noted a commonality of writing style in the anonymous letters and known letters of Dr. Illes concerning omission of words. For example, in the anonymous letter dated February 27, 1999, the writer states: "I even put the gun where they would it and think it was his." Obviously, the word find has been omitted. On the envelope for the anonymous letter dated February 27, 1999, which contains the address of Attorney Lepley, the word Pennsylvania is left out. In the known samples of Dr. Illes' writing, Agent Fitzgerald offered several examples of Appellant omitting words. In known writing K-4 Appellant states: "Thank you for having my wife and I visit with this past weekend". The word "you" is obviously left out. Likewise, in known document K-14, Appellant writes: "whom it concerns".

The word "may" apparently has been omitted between the words it and concerns. Id. at pp. 38-41. Agent Fitzgerald further noted that this phenomenon of omitting words like this, in the thousands of documents he has read is extremely rare. Id. at p. 42.

Agent Fitzgerald further notes the commonality between the questioned and known documents regarding the use of adjectives. In the anonymous letter dated May 3, 1999, the writer states: "I am quite disappointed." In known documents, on at least seven occasions, Appellant chose to use the same word, quite, when modifying certain other words. Id. at pp. 43-44. Agent Fitzgerald found the use of the word quite to be a "lexical choice," as other synonyms could have been used. Id. at p. 44. The witness noted that the use of the word quite seemed a habitual word, which Appellant used in his writings. Id.

Agent Fitzgerald also noted a similarity in punctuation in the unknown and known writing samples. In both anonymous letters, the writer starts off the letters with the name of the recipient of the letters, Lepley (George Lepley) with a dash after Mr. Lepley's name. Thus, the two letters start off as follows: "Lepley –". Agent Fitzgerald noted this to be an unusual use of punctuation. This unusual punctuation also appeared in the known documents, specifically K-l, K-9 and K-14[11], where there is a person's name listed with a dash immediately following the name. For example, in K-1 and K-9, Appellant writes "Miriam-" Id. at pp. 44-46.

Another example of unusual punctuation is the use of a double exclamation point in the anonymous letter dated May 5, 1999. In known writing K-4, Appellant uses a

11 The defense on cross-examination did discredit Agent Fitzgerald's use of K-14, which contains the name Amy and a dash after the name. Although this document was supplied by the state police to Agent Fitzgerald as a known writing of Appellant, it appears they were mistaken. K-14 rather appears to be another doctor, Dr. Demetri Poulis. The note at the bottom of this letter appears to be a note from Dr. Poulis to his secretary Amy telling her to draft a response letter. Id. at pp. 77-79. While Agent Fitzgerald's reference to K-14 appears to be mistaken, this

double exclamation point. Id. at pp. 46-47.

A final unusual punctuation similarity is noted in the anonymous letter dated February 27, 1999 where the word Lord is underlined for no apparent reason. Numerous examples of underlining are found in Appellant's known writings K-1 and K-2. Id. at pp. 47-48.

Dr. Nche Zama also presented testimony, which related to the anonymous letters. N.T., January 30, 2004, (Volume 8) at pp. 36-122. After the state police searched the Appellant's properties on February 23, 1999, Appellant told him the state police were trying to "nail" him for the murder of his wife. Id. at pp. 49-50. He said he travels a lot and when he comes home he has noticed his locks have been tampered with. Id. at p. 50. He told Dr. Zama someone could have come into his house and gotten materials to make the silencer or left stuff in the house that had been used to make the silencer to make it look like Appellant had murdered his wife. Id.

At a later point in the investigation, the state police allowed Dr. Zama to read the anonymous letters. The first letter included a reference to Miriam Illes as a racist. Dr. Zama, who is black, knew Mrs. Illes for several years. He noted she never demonstrated any feelings of race towards him, directly or indirectly. He noted she overtly embraced him and she was not a racist. Id. at pp. 50-53.

Dr. Zama testified that in reading the second anonymous letter dated May 3, 1999, he felt the letter was describing him as being the one who committed the crime. Id. at p. 54. Dr. Zama believed the references in the letter to the perpetrator of the crime having advanced degrees, being fluent in several languages, and having access to Appellant's home

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does not diminish his references to K-1 and K-9, where Appellant punctuated his wife's name with a dash.

pointed to Dr. Zama. Id. at pp. 54-55. Dr. Zama also felt the letter's reference to the writer moving out of the area also pointed to him because he was making plans to move. Id. at p. 56. Dr. Zama felt the letters reference to a racial motive for the killing in combination with other information pointed to him as the perpetrator. Id. at pp. 56-57. Dr. Zama testified: "… these descriptions pointed directly at me and I couldn't think of anybody else that I knew from environments I lived in and worked who would have fit this description." Id. at p. 57. Thus, the writer of the anonymous letters appeared to be someone who knew Dr. Zama and was possibly trying to frame him for the murder of Miriam Illes.

The discovery of the Murder Weapon

On June 4, 1999, Matthew McKay was in the area of State Route 554, Sulphur Springs Road. See N.T., January 29, 2004, (Volume 7), at pp. 96-101. State Route 554 intersects Route 15 in South Williamsport. Mr. McKay was looking for minnows in a nearby creek. He found a small rifle lying along the creek bed. Id. at p. 97. He noticed it was loaded. He took the clip out and took the rifle to the South Williamsport Policeman, Terry O'Connell. Id. He also showed the officer where he found the gun. The gun was 15-20 feet off the road. The gun was on the bank of the stream. Id. at p. 98. Mr. McKay could see there was a bullet in the gun's magazine. Id. at p. 99.

Officer O'Connell observed the gun and looked at the clip. He noted it was a clip for a .22 Hornet, which is an unusual caliber. Id. at p. 102. Officer O'Connell realized the gun was found in state police territory, so he had county communications dispatch the state police and he turned over the gun to them. Id. at p. 103. Officer O'Connell described the barrel of the gun as being sawed off. The gun had a scope. It did not have a bolt. Id. at p. 108.

Trooper Jeffrey Barnes of the Pennsylvania State Police met Officer O'Connell

at the location where the gun was found and he brought the weapon back to the state police barracks. Id. at p. 110. The gun is Commonwealth Exhibit 120. Trooper Barnes found a live round in the clip. Id. at p. 111. The gun was taken back and entered into evidence at the barracks. At the time, Trooper Barnes did not know the gun related to the murder of Miriam Illes. The gun was found in the area where Route 554 veers off Route 15. Id. at pp. 112-113.

Trooper Scott Henry made contact with Mr. McKay and had him show where he found the gun. N.T., January 29, 2004 (Volume 7), at pp. 116-123. Trooper Brown accompanied them. The gun was found approximately fifty feet from the creed bed. Id. at p. 118. This location was approximately one-half mile from the Route 15 intersection. Id. at p. 119.

The state police through forensic examination by firearms examiner, Cpl. Ernest E. Baltimore, determined that the bullet fragment, lead bullet core and bullet jacket found in Mrs. Illes' body at autopsy, bore four lands and groves with a right twist. See N.T., January 26, 2004, (Volume 5), at p. 62. This means the bullet was fired from a firearm that had four lands and groves.[12] Cpl. Baltimore determined that the death bullet was a .22 center fire caliber class. Id. at p. 67. The bullet was consistent with a .22 Hornet. Id.

Cpl. John McDermott became aware of the rifle, which had been recovered by Trooper Barnes. He examined of the gun to see if it had any connection to the homicide of Miriam Illes. N.T., January 29, 2004, (Volume 7), at pp 12-156. Cpl. McDermott noted that the caliber of the gun was a .22 center fire class due to the .22 Hornet cartridge found in the weapon. This was the same caliber as the bullet that killed Miriam Illes. Id. at p. 124. The

12 Cpl. Baltimore also examined the pane of glass taken from Mrs. Illes' home, which had the bullet hole. This glass tested positive from lead. Id. at pp. 66-67.

gun itself had been altered. The barrel was ground down and there were numerous drill impressions throughout the barrel. Id. The stock appeared to have grind marks on it as well. Id. The barrel had a little screw sticking out of it. Id. at p. 125. Cpl. McDermott noted that the silencer found in the investigation could easily fit onto the barrel of this gun. Thus, he felt the gun could be connected to the murder of Miriam Illes. Id. The serial number of the gun was ground out and obliterated. Id. at p. 128. The gun had a Weaver detachable scope mount. The scope was a top mount scope mount. Id. at p. 129. However, the gun had holes consistent with a side mount scope mechanism. Id. at p. 130. In examining the grounded out area of the gun, where the manufacturer, model number and caliber would be printed, Cpl. McDermott was able to make out certain letters, part of an A, G and E. Id. at pp. 130-131. Part of wooden stock was ground down and the fore end of the stock was cut off. Id. at p. 131. A wire went through the trigger guard of the gun, which was unusual. Id. at p. 132. The caliber of the cartridge in the gun was a .22 Hornet. Id. at p. 133.

Cpl. McDermott then illustrated for the jury how the silencer found on January 17, 1999, outside of Mrs. Illes' residence, readily attached to the gun found on Sulphur Spring Road. The gun barrel goes up into the conduit. The silencer "slides over the barrel, it comes down to that screw, turn it and it's locked on." Id. at p. 135. The screw on the barrel of the gun fit into the J channel of the silencer. Id. at p. 136.

Cpl. McDermott also made a replica of the silencer found near Miriam Illes' residence. Commonwealth Exhibit 26. He constructed the replica using the same components found in the actual silencer. Cpl. McDermott then physically demonstrated for the jury how the silencer affixed to the gun. As Cpl. McDermott demonstrated he stated: "you turn it and it's locked on." Id. at p. 136.

In late December or early January 2004, Cpl. McDermott obtained a bolt from another savage model 23D rifle, which the state police had purchased. He inserted the bolt into the rifle found on Sulphur Springs Road because that rifle did not have a bolt when it was found. He then attached the replica silencer he had constructed. He test fired the weapon. The weapon functioned properly. He fired the weapon leaning against the side of a tree as described at the murder scene. Cpl. McDermott had a silhouette target seventy-five feet from the distance of the tree. The distance of the tree to the window of Miriam Illes' house was seventy-three feet. Cpl. McDermott did not make any adjustment to the scope of the weapon. He noted he was able to hit "the vital area of the silhouette target every time with this weapon as it is right now." Id. at pp. 150-151. Finally, Cpl. McDermott noted the way the barrel of the gun fit into the silencer conduit was another indication "that this particular weapon is for this particular silencer." Id. at p. 151.

Connecting the Murder Weapon to the Appellant

On January 4, 2000, Trooper William Holmes interviewed Jean Malatesta. N.T., January 29, 2004, (Volume 7), at pp. 157-189. Jean Malatesta is the sister of Joseph Kowalski. Id. at p. 157. The purpose of the interview at Ms. Malatesta's residence in Coatesville, Pennsylvania was to get some background information on Joseph Kowalski[13]. Id. Ms. Malatesta told the trooper that Joe Kowalski was a gunsmith in the military and he continued to work on guns his entire life. There were at least two gun cabinets in his home. He bought and sold guns frequently. He died in the summer of 1998. Ms. Malatesta gave the trooper a list of guns, which Joe Kowalski gave her within the last five years of his life and

13 The evidence in the case indicated that Appellant had a close relationship with Joe Kowalski. Although Appellant referred to Joe Kowalski as Uncle Joe, Appellant confided in Dwayne Van Fleet that Joe Kowalski was

prior to him entering the hospital. Id. at p. 158; Stipulation of Jean Malatesta.

At the conclusion of the interview, Ms. Malatesta showed Trooper Holmes a photograph. The photograph was Commonwealth Exhibit 133. Commonwealth Exhibit 133-A is a copy of this photograph. Commonwealth Exhibit 133-B is an enlargement of the photograph. The photograph depicts Joseph Kowalski standing in a field holding a ground hog in his left hand and holding rifle in his right hand with the stock of the gun resting on the ground. Id. at p. 160; Commonwealth Exhibit 133-B. The back of the photograph has the words "Runnemede, 1947, July 1947". Id. at p. 160. The photograph caught Trooper Holmes attention because he though the gun looked like the same model gun they had found off Sulphur Springs Road, near Route 15. Id. at p. 162. The gun in the photo was a right-handed action rifle. Id. Trooper Holmes noticed that the gun found on Sulphur Springs Road, Commonwealth Exhibit 120, is also a right-handed bolt-action rifle. Id. The gun in the photo had a side mount scope. The gun found on Sulphur Springs Road was drilled for a side mount scope. Id. at p. 163.

Trooper Holmes testified that the state police found several of the guns on the list. Joe Kowalski gave to Jean Malatesta in their search of Appellant's residence at Mt. Crescent and the search of the Appellant's residence in Spokane, Washington in December 2002. Id. at p. 165. A Savage model 23D gun was not on Joe Kowalski's list, which he gave to Jean Malatesta. Id. at p. 166. Appellant was the executor of Joe Kowalski's estate when he died in 1998. Id. at p. 188.

On October 27, 2000, Cpl. McDermott traveled to the former residence of Joe Kowalski. N.T., January 29, 2004, (Volume 7), at pp. 213-222. In the basement of this

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his father. N.T., January 21, 2004, (Volume 12), at pp. 50-51.

residence, Cpl. McDermott found a Weaver scope guide pamphlet.[14] Id. at p. 214. The pamphlet, Commonwealth's Exhibit 142, was a Weaver scope guide including detaching side mounts and attaching top mounts. Id. The mount on the murder weapon was a Weaver detachable top mount.[15] Id. The pamphlet found in Joe Kowalski's basement had a circulation date of March 1950. Id. at p. 215. The pamphlet contained a listing of guns for which the Weaver detachable top mount could be used. The weapons listed included the Savage 23D. Id. The pamphlet also listed particular numbered base mounts to be used, specifically numbers 15 and 16. The mounts on the murder weapon were numbered 15 and 16. Id. at p. 216. The position for the mount in the pamphlet listed as A and D, corresponded to the basic locations of the mounts found on the top of the murder weapon. Id. at pp. 217-218.

The Commonwealth presented the testimony of Diana Wright, a forensic examiner with the F.B.I. N.T., February 4, 2004, (Volume 11), at pp. 3-68, 80-93. Ms. Wright examines bullets and bullet fragments and does a physical exam and a chemical exam to compare bullets. Ms. Wright has PhD in chemistry. She also received training in bullet analysis. In this training, she personally visited ammunition-manufacturing plants. The court found Ms. Wright was qualified as an expert witness in the field of bullet lead analysis. Lead bullets have trace elements in their composition, which can be compared.

Ms. Wright received for analysis the bullet taken from Miriam Illes' body

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14 The gun found on Sulphur Springs Road had a "Weaver detachable" scope mount, mounted on the top of the gun. However, the gun had holes consistent with a side mount scope. Thus, at some point someone changed the gun to attach the Weaver detachable scope mount to the top of the gun The Weaver pamphlet, Commonwealth 142, contained instructions for placing the Weaver scope mount on top of the gun. The pamphlet expressly indicated the Weaver detachable scope mount could be used with the Savage 23-D rifle.

15 The gun found on Sulphur Spring Road had a Weave detachable scope mount mounted on the top of the gun. However, the gun had holes consistent with a side mount scope. Thus, at some point someone changed the gun to attach the Weaver detachable scope mount to the top of the gun. The Weaver pamphlet contained instructions for placing the Weaver scope mount on the top of the gun. The pamphlet expressly indicated the Weaver detachable scope mount could be used with the Savage 23D rifle.

during autopsy. This was Commonwealth Exhibit 8-B. The bullet was in three fragments, which were labeled P1, P2 and P3. Mrs. Wright opined P1, P2 and P3 were once an intact bullet. P2 was the lead core of the bullet. This is what is used for analysis.

Ms. Wright compared the death bullet to Commonwealth Exhibit 130-A, the cartridge found in the gun on Sulphur Springs Road. She found the two bullets were the same caliber and had the same physical characteristics. She then performed a chemical examination of the two bullets. This exam looked for the trace impurities present within the lead of each bullet. Ms. Wright determined that the Commonwealth Exhibit 130-A and 8-B (which came from the victim) were chemically and physically analytically indistinguishable from each other. In light of this finding, Ms. Wright was able to conclude that the two bullets were consistent with having originated from the same melt of lead and consistent with being manufactured together.

The Commonwealth presented expert witness Robert Greenleaf to prove the gun found on Sulphur Springs Road and the gun depicted in the photograph of Joe Kowalski were both Savage 23D model rifles. N.T., February 9, 2004, (Volume 13), at pp. 49-72. Mr. Greenleaf was a project engineer for the Savage arms in Westfield, Massachusetts from February 1964 until February 1988. Mr. Greenleaf has previously testified in court as an expert in firearms cases. Id. at p. 51.

On March 26, 2002, Mr. Greenleaf examined a firearm brought to him by the state police. This was the firearm the state police recovered from Sulphur Springs Road. Commonwealth Exhibit 120. After examining the gun, Mr. Greenleaf concluded that it was "an altered Savage model 23D, 22 Hornet Caliber rifle." N.T., February 9, 2004 (Volume 13), at p. 53. He noted the rifle had distinguishable Savage marks. Id. He noted the barrel still had

the letters A G E on it, the end of the word Savage. Id. at pp. 53-54. He also notes the magazine was unique for this model and caliber rifle. Id. at p. 54. The stock had a checkering pattern unique to Savage. Id. Mr. Greenleaf opined that the rifle was a Savage Model 23D. Id. at p. 55. Mr. Greenleaf, among other points, noted the magazine "is a giveaway, that is that magazine was dedicated to that particular design cartridge." Id. Mr. Greenleaf testified that the Savage model 23A was .22 long rifle caliber. The 23B was 2520 caliber rifle. The 23C was a 3220 caliber. The 23D, the last version manufactured, was a 22 Hornet caliber that was introduced in 1932. Id.

Mr. Greenleaf was also shown the blown up picture of Joe Kowalski holding a rifle in one hand and a groundhog in the other hand (Commonwealth Exhibit 133b). He opined that the rifle in the picture was an unaltered Savage model 23D rifle. Id. Mr. Greenleaf noted the height of the front site is an indicator that the rifle is a Savage 23D because the Hornet cartridge required a higher front site than other models. Id. at p. 56.

Mr. Greenleaf testified that the Savage Model 23D at manufacture was equipped with a side mount scope. Id. Thus, the rifle found at Sulphur Springs Road, which had a top mount scope was changed after manufacture. However, Mr. Greenleaf noted that this gun had holes on the side consistent with it having a side mount scope at manufacture. Id.

Mr. Greenleaf testified that the total number of Savage Mode 23D rifles sold from the inception of its production in 1932 until 1947, the date on the back of the Joe Kowalski photograph with the rifle, was 16,018. Id. at p. 59. Mr. Greenleaf also noted that the Savage 23D rifle was the best rifle available for shooting varmints, prairie dogs and groundhogs. Id. at. p. 70.

The Discovery of the Sneakers

On March 24, 2003, Trooper Holmes, Cpl. McDermott, Trooper Benedict and Trooper Henry went up to the area of Route 554, Sulphur Springs Road to do some additional searching near the area where they previously found the Savage 23D rifle. N.T., January 28, 2004, (Volume 7), at pp. 189-208. They searched an area basically parallel to Route 554. Id. at p. 190. The troopers found a pair of Reebok size 14 sneakers. Id. at p. 191. The sneakers were approximately 2/10 of a mile south of the location where the gun was found. Id. This location would have been a bit farther from where Route 15 intersects with Route 554.

The area around Route 554, as you leave Route 15, is a mountainous area. Id. at p. 192. The gun was discovered 5/10 of a mile from where Route 15 intersects with Route 554. Id. at p. 193. The sneakers were located 2/10 of a mile further up Route 554, or approximately 7/10 of a mile from Route 15. Id. Commonwealth Exhibit 136 is a photo of the left sneaker. Commonwealth Exhibit 137 is a photograph of the right sneaker. Id.

The sole pattern of the sneakers was similar to the tracks in the snow seen at Miriam Illes' residence on January 17, 1999. The heels had a horseshoe shape. Id. at pp. 195-196. The sneakers were a matching pair as to size and appearance. Id. at p. 196. The actual sneakers were marked Commonwealth exhibit 140. The soles measured 13 inches; the same as the measurement in Trooper Kirkendall's report of the crime scene. Id. at p. 197. The sneakers were found 58½ feet apart from each other. Id. at p. 203.

After transporting the sneakers to the state police barracks, Trooper Holmes noticed some hairs or fibers on the sneakers. Trooper Holmes asked Trooper Kirkendall to process the sneakers. Id at p. 198.

On March 24, 2000, Trooper Kirkendall collected hairs and fibers from the tongue area of both sneakers. Id. at pp. 209-210.

Sandra Wiersema, a forensic examiner with the F.B.I. with expertise in shoe print analysis, testified that she examined the Reebok sneakers (Commonwealth Exhibit 140), some photographs, and cast of a foot wear impression in August 2000. N.T., February 2, 2004, (Volume 9), at pp. 3-21. She compared the sneakers with the impression from the crime scene. Ms. Wiersema concluded that the impression from crime scene corresponded in design and approximate physical size with the sneakers found by the state police. Id. at p. 12. Ms. Wiersema testified that a shoe (sneaker) of the same size and same design as the sneakers found on Route 554 made the impression in the cast. Id. at 16. There was not enough detail in the cast for Ms. Wiersema to say that these particular sneakers made impression. Id. at 17.

Sandra Singer, Lab Director of the Pennsylvania State Police Regional Lab in Wyoming, testified she examined the sneakers. N.T., February 2, 1004, (Volume 9), at pp. 21-55. She examined the sneakers on March 31, 2000 for trace evidence. Id. at p. 25. Hairs previously collected from the sneakers were submitted to her. She determined through microscopic analysis that the hair was a human head hair. Id. at p. 26. She also determined that one hair submitted from Trooper Kirkendall was a pubic hair. Id. at p. 30. Both these hairs were Caucasian. Ms. Singer then put these hairs on slides so that DNA analysis could be conducted. Id. at p. 31. Ms. Singer also noted a blue animal fiber, which she put on a slide for further evaluation. Id. at pp. 32-33.[16]

Ms. Singer acknowledged on cross-examination that the head hair found on the sneaker was dissimilar from Appellant. Id. at p. 44. She also compared this hair to Richie Illes and found it dissimilar to the hair sample she had from Richie Illes, because of some difference

16 Ms Singer confirmed that the hair found in the anonymous letter did not match Appellant's hair. Id. at pp.37-38.

in color between the hairs. Id. at p. 47. However, in regard to the known sample of Richie Illes' hair, she only had five hairs, which she did not consider to be enough for a representative sample. Id. at p. 49. She also noted that difference in color between a known and a sample can be explained by the time of year the known sample was taken. For example in the summer, the sun can lighten hairs. Id. at p. 51.

Shelly Johnson of the Bode Technology Group performed DNA testing on the hairs obtained from the sneakers. N.T., February 2, 2004 (Volume 9), at pp. 75-132. Ms. Johnson is a senior forensic DNA analyst whose primary responsibility is mitochondrial DNA. Id. at p. 76. Mitochondrial DNA is DNA that is traced through the maternal line. The Bode Lab is certified to perform DNA testing. Id. at p. 78. The Bode Lab has performed DNA identification work on the World Trade Center in New York and Flight 587, which crashed outside Queens, New York. Id. at p. 84. Ms. Johnson received the evidence, which had been removed from the Reebok sneakers, in July 2000. Id. at p. 96. She received the hair from the top of the tongue of the left sneaker and pubic hair from the tongue inside the right sneaker. Id. at p. 97. She performed mitochondrial DNA testing on these samples. Id.

She was not able to obtain a result on the Caucasian pubic hair. This was because of the short length of the hair and degradation of the hair. Id. at p. 98. However, she did obtain a finding on the hair from the top of the tongue of the left sneaker. In comparing the DNA profile of this hair to the profile of a known sample of hair from Richie Illes, Ms. Johnson concluded she could not exclude Richie Illes as being a contributor for that sample. Id. at pp. 99-100. She explained this means there was no difference between Richie's DNA sequence and the data obtained from the hair on the sneaker. Id. at p. 100. She further explained she could exclude 97% of the population from this sequence; meaning 97% of the

population could not have contributed to this sample. Id. Ms. Johnson actually did two samples for Richie Illes- a hair sample and a saliva sample. They matched each other and they also matched the mitochondrial DNA of the hair from the tongue of the sneaker. Id. at p. 104. Only 3% of the population would be consistent with this DNA pattern.

Other Scientific Evidence

Karen Lanning, a forensic scientist in the F.B.I. Trace Evidence Unit in Quantico, Virginia, compared fibers found on the Reebok sneakers with fibers found in the search of the Appellant's Lamont Drive residence and Appellant's hunting cabin at Cross Forks. N.T., February 2, 2004, (Volume 9) at pp. 55-75. She was comparing these fibers for similarity. Ms. Lanning, in comparing the fiber, used a comparison microscope. Id. at p. 59. She then did florescent microscopy to see if the fibers fluoresced or not. Id. at pp. 59-60. She finally used a microspectrophotometer to confirm the fibers were of the same color. Id. at p. 60.

A fiber had been removed from the sneakers by Trooper Dean Kirkendall. See N.T., January 29, 2004, (Volume 7) at p. 120. The fiber from the hand vacuum seized by Trooper Ron Clark at the hunting cabin was described as purple fuzz fiber. See Commonwealth Exhibit 104-A; Trooper Clark's testimony at N.T, January 26, 2004 (Volume 5) at pp. 36-48. The acoustic tile and expandable foam was seized from the basement of Appellant's Lamont Drive residence. See Robert Brown's testimony N.T., January 23, 2004, (Volume 4), at pp. 88-127.

Ms. Lanning, in her comparison found blue wool fiber on the acoustic tile and foam. Id. at p. 59. Ms. Lanning found blue wool fiber on the item identified as the "purple fuzz." Id. Likewise, she found blue wool fibers on the glass microscopic slide, which

contained the fiber removed from the Reebok sneakers. Id.

Ms. Lanning testified all three fibers from these different sources exhibited the same characteristics and optical properties. Id. She opined that all three were consistent with originating from the same source. However, she did not know what the source was. Id. at p. 60.

Maureen Bradley, a forensic examiner with the F.B.I., examined components of the silencer found on January 17, 1999 and she compared these components with foam and fiber sweepings taken from the basement area of Appellant's Lamont Drive residence. N.T., February 4, 2004, (Volume 11), at pp. 93-134. Ms. Bradley first visually compared the items. Id. at p. 97. If the items were usually similar, she proceeded to instrumental examination to compare the chemical compositions of the materials from the suppressor and materials from Appellant's homes. Id. at p. 98. She used three different types of analytical instrumentation to evaluate the foam samples. Id. She used a Fourier transform infrared spectrometer to compare the items. Id. If there were differences, she would stop the process. If there were no differences, she would go on to use an instrumental exam, which gave her elemental information about the specimens she was comparing. Id. Again, if no differences were seen, she would go on to use a process called a pyrolysis gas chromatography mass spectrometry. This would provide organic information about the materials. Id. at pp. 99.

Based on these examinations, Ms. Bradley determined that the foam from the silencer was generally consistent in chemical composition with the other foams found at Appellant's home. Id. at p. 99. She could not say the foams came from the same source of foams. Id.

Ms. Bradley compared the plastic end caps of the suppressor with plastic

recovered from a drill bit. Id. at pp. 99-100.[17] Based on her analytical instrumentation she was not able to eliminate the end caps found in the suppressor as being a possible source of the white plastic pieces found on the drill bit and in the floor sweepings. Id. at p. 100.

Ms. Bradley compared the PVC pipe used in the silencer to other PVC pipe found in Appellant's residence. Id. at p. 101. Based on the composition of these three lengths of pipe she could not discern any differences. Id. at pp. 101-102.

Ms. Bradley also compared white plastic recovered from a metal box[18] and floor sweepings from the Lamont Drive residence to the PVC pipe in the silencer. Based on her exams she found these plastic pieces had the same chemical composition as the PVC pipe in the silencer. She opined that the plastic pieces could have come from the PVC pipe used in the silencer as they had the same chemical composition or they could have come from another source with the same chemical composition. Id. at pp. 102-103.

Michael Smith, a forensic metallurgist for the FBI, examined various samples of wire. N.T., February 4, 2004 (Volume 11), at pp. 134-181. Mr. Smith received a bachelor's degree in metallurgist engineering in 1986 and a PhD in material science engineering in 1992. Id. at p. 135. Mr. Smith has also worked in a wire manufacturing plant. Id. Mr. Smith compared several items in this case to determine if they might be from a common source of material. Id. at p. 136.

Mr. Smith first visually examined the items. He then took physical measurements of the items using a micrometer. Id. at p. 142. He photographed the items and

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17 The drill bit in question had come from the Red Plano toolbox, which came from Appellant's Mount Crescent residence. The Red Plano toolbox was Commonwealth's Exhibit 90. See, N.T., February 4, 2004 (Volume 11), at p. 182.

18 The metal toolbox that had PVC pipe shavings in it contained various drill bits was removed from Appellant's Mount Crescent residence. This was Commonwealth's Exhibit 93. See, N.T., February 4, 2004 (Volume 11) at p.

then he screened them using a technique called x-ray florescence. He also took a small clipping from the material being analyzed, digested it in an acid and ran it through an inductively coupled plasma atomic emission spectrometer. Id. at p. 145. This process reveals particular elements and produces an elemental profile of the steel. Id. at pp. 145, 147.

Mr. Smith examined wire from the silencer with wire recovered from Appellant's trash, wire found around a roll of linoleum in the basement of Appellant's Lamont Drive residence and wire found in the storage area under the basement steps. Id. at p. 149; Commonwealth's Exhibits 56, 72, and 73.

All the wire samples looked the same visually and physically. They all had a black oxide finish. They all were measured with a micrometer and were the same size. N.T., February 4, 2004 (Volume 11) at p.149. X-ray fluorescence was used. Mr. Smith then utilized inductively coupled plasma atomic emission spectrometry to reveal the elemental components.

In doing these tests Mr. Smith determined that the suppressor wires, the wire from the basement storage area, the wire from the roll of linoleum, and the wire found in Appellant's trash "were all analytically indistinguishable." Id. at p. 151. This means they all could have been cut from a common length of wire. Id. at p. 152.

Mr. Smith noted that normally most wire would not match other wire in terms of composition by the techniques used by Mr. Smith. Id. Mr. Smith testified: "…the essential thing to remember here is that many compositions are possible so that the chances of randomly selecting two totally unrelated heats of material whose compositions match is actually very small." Id. at p. 153. Mr. Smith concluded his testimony by stating:

Based on the analysis that were done, none of these

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> could be – If you were take any two of these samples, mix them up and hand them back to me without tags on them, I would have no way to tell you, which was which, just physically wouldn't be. There is no test I can run on these that will tell you they're different. No test I have at my disposal.

Id. When Mr. Smith was asked on cross-examination whether the wire, which he compared and found to be indistinguishable, could have originated from different sources, Mr. Smith indicated they would have to come from a common source. Id. at pp. 176-177. When defense counsel then asked Mr. Smith if a neighbor of Appellant or someone 100 miles away could have purchased the same wire, Mr. Smith answered: "It would be a remarkable coincidence from the standpoint of it would have to be the same time frame, same size, same whatever, but yes. Yes, it could be a hundred miles away, I agree with that. Id. at p. 177.

Thomas Musheno of the F.B.I. Technology Division, Forensic Audio, Video and Image Analysis Unit, testified concerning comparison of the rifle found on Sulphur Springs Road (Commonwealth Exhibit 12), the Joe Kowalski photograph of Mr. Kowalski holding a rifle (Commonwealth Exhibit 133), and an actual Savage Model 23D rifle, which the Pennsylvania State Police obtained from the Minnesota State Police. N.T., February 3, 2004, (Volume 10), at pp. 3-37. Mr. Musheno noted many similarities between the weapon found on Sulphur Springs Road and the weapon depicted in the Joseph Kowalski photograph. The consistencies included the trigger and trigger guard, the magazine release, the magazine port, the barrel, an iron site mount, the ejection port, and the safety. Id. at pp. 12-14. Mr. Musheno noted some inconsistencies he felt were explainable, such as the scope being different as one can remove a scope and put on another scope, there being no bolt on the weapon found in the stream, and the weapon in the stream being sawed off. Id. at pp. 14-15. However, due to

insufficient image detail in the Joseph Kowalski photo, Mr. Musheno could not testify the weapons were one and the same. Id at p. 15.

Next, Mr. Musheno compared these items to the Savage 23D rifle obtained from the Minnesota State Police. Mr. Musheno noted several consistencies between the weapon in the Kowalski photograph and the actual Savage 23D rifle, including the woodworking on the grip itself. Id. at pp. 17-19. The insistencies noted appeared explainable. There was a possible inconsistency between the bolts in the rifles, but Mr. Musheno felt this might have been due to the lighting in Mr. Kowalski's photo. Id. at pp. 18-19, 32.

Mr. Musheno finally compared the rifle found on Sulphur Springs Road to the Savage 23D rifle obtained from Minnesota State Police. He noted many consistencies. Id. at pp. 19-20. The inconsistencies noted were explainable. Id. at p. 20.

Carlo Rosati, an FBI Firearms and Toolmaker Examiner, testified for the Commonwealth. N.T., February 3, 2004, (Volume 10), at pp. 41-42. Mr. Rosati examined the weapon found on Sulphur Springs Road and identified it as a Savage rifle in the .22 Hornet caliber and he specifically identified the rifle as a Model 23D. Id. at p. 47. He identified the rifling characteristics of the rifle to be four lands and grooves with a right twist. Id. at p. 48.

Mr. Rosati wanted to compare the rifle to an intact Savage Mode 23D rifle. Thus, he inquired firearm examiners around the country to try to find a Savage 23D and eventually he was contacted by a Minnesota State Police examiner who was able to make a Savage 23D firearm available to him. He obtained the rifle to do a side-to-side comparison with the rifle found by the Pennsylvania State Police. Id. at pp. 49-50. Mr. Rosati determined that the found rifle was most similar to the Savage Arms Model 23D. Id. at p. 52.

Mr. Rosati, noting the found Savage Model 23-D did not have a bolt, explained

that someone would discard a bolt because removing the bolt from the firearm would remove several aspects of possibility of identification to other evidence. Id. at p. 55.

Mr. Rosati noted that the Savage 23D was a firearm not produced in great numbers in comparison to other firearms. Id. at p. 59.

Mr. Rosati noted that the Savage 23D rifle found by the state police had had several alternation attempts made to it, with various drill holes made in the barrel. Id. at p. 63. One of the holes had a set pin put in place to allow it to lock a device on to it such as the silencer. Id.

The conduit for the silencer had holes drilled into it. The holes would have been drilled by some kind of drill machine. Id. at p. 63.

Mr. Rosati also examined the photograph of Joe Kowalski holding a rifle and a groundhog. Mr. Rosati opined that the rifle in the Kowalski photograph was most similar to a Savage Mode 23D rifle.[19] Id. at p. 66.

Mr. Rosati also examined the Winchester barrel, which the state police obtained from Appellant's trash at Lamont Drive (Commonwealth Exhibit 58). Mr. Rosati noted the barrel had various tool marks and "six different drill hole attempts." Id. at p. 70. However, since none of the holes went all the way through the chamber portion, he could not determine a true diameter of how big the drill bit was that made the particular attempts. Id. Mr. Rosati testified drill holes, such as on Commonwealth Exhibit 58, can be used to obliterate serial numbers on firearms. Id. at p. 74. Thus, he felt there was not legitimate purpose for the drill marks on the barrel. Id. at pp. 74-75.

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19 Even Appellant's own firearm expert witness, Fredrick Wentling, testified that the firearm being held by Joe Kowalski in the photograph was a Savage, most likely a Savage center fire class. Thus, Mr. Wentling

Detective Lanny Reed of the District Attorney's office obtained a drill bit box set that appeared to match the drill bit set the state police seized from Appellant's Mount Crescent home and provided it to Corporal John McDermott. See N.T., February 10, 2004 (Volume 14), at pp. 54-92. Detective Reed's drill bit set was marked Commonwealth Exhibit 176.

Fifteen drill bits were missing from the set seized from Appellant's home. Id. at 63; see also Commonwealth's Exhibit 93. Cpl. McDermott compared Detective Reed's complete drill bit set and Appellant's drill bit set with the conduit of the silencer and the murder weapon. N.T., Volume 14, at p. 64. Cpl. McDermott discovered that five of the drill bits missing from Appellant's set corresponded to holes in the conduit and one drill bit missing from Appellant's set corresponded to one of the holes drilled in the murder weapon. Id. at 64-65; see also Commonwealth Exhibit 178 (photograph of both the gun with the drill bit in the trigger guard and the metal conduit with four bits fitting into the holes in the conduit); Commonwealth Exhibit 179 (photograph of the rear area of the gun showing the trigger guard hole and a drill bit in the hole); Commonwealth Exhibit 180 (photograph of four drill bits missing from Appellant's box fitting into holes in conduit).

Testimony of Katherine Fostick

The Commonwealth called Katherine Fostick as a witness. N.T., January 28, 2004, (Volume 6), at pp. 106-165.

Ms. Fostick first met Appellant in 1992 when she was in training as a perfusionist. A perfusionist runs a heart and lung bypass machine during open-heart surgery.

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acknowledged the rifle in the photo was a Savage Model B, C or D rifle. N.T., February 16, 2004, (Volume 12-A), at pp 42-43.

Her contact with Appellant at this time was brief. In 1995, she was called by Miriam Illes to see if she would have an interest working at the Williamsport Hospital. In 1995, Ms. Fostick began working in the Williamsport Hospital. She came to work with Appellant. Id. at p. 109.

In February 1998, Appellant approached Ms. Fostick and told her he was separated from wife. Id. In March of 1998, they traveled to a medical meeting in Philadelphia and Ms. Fostick started a romantic relationship with Appellant. Id. at p. 110.

When Miriam Illes moved out of the marital residence at Lamont Drive, Ms. Fostick started staying with Appellant for some overnights. She moved into the residence with Appellant by May or June of 1998. Id. at pp. 110-111.

Around Thanksgiving 1998, Ms. Fostick decided she wanted to visit her family in the Midwest and she made arrangements to take the trip in January 1999 after the holidays. Id. at p. 111. A few weeks before she left on her trip, Appellant decided that he would take the week off from work despite the fact that he was not going with her. Id. at p. 112.

After the murder of Miriam Illes, Appellant told Ms. Fostick that he felt someone had a vendetta against him and that he was in danger. Id. at pp. 116-117. Ms. Fostick asked Appellant to turn on the alarm and security system in the house because she was frightened. However, Appellant refused to do this explaining that they were moving to another house and the he would have to sign a contract for six months to a one year to turn on the security system. Id. at p. 118.

After the searches of Appellant's residences on February 23, 1999, Appellant was very upset and he told Ms. Fostick the police would arrest him because of pressure from the media. Id. at p. 119.

Appellant obtained copies of the anonymous letters shortly after the police

received them. Just prior to the second letter being received by the police, the probable cause affidavits of the search warrants had been unsealed and Appellant was very fearful that he was going to be arrested. Id. at p. 121. Appellant claimed the letters could prove that he did not kill his wife. Id. Appellant also said he hoped the police would be able to find DNA evidence or fingerprints on the letters. Id. at p. 122.

In June 1999, Ms. Fostick and Appellant traveled to the office of Attorney William Costopoulos in Harrisburg, Pennsylvania. Attorney Costopoulos handed papers to Appellant. Appellant examined them and when Ms. Fostick asked him what the papers were he told her they were a list of countries with which the United States had extradition treaties. Id. at p. 127. Around this time in June, Appellant obtained a passport for his son Richie. Id. at p. 128.

Around this time, Appellant also purchased a book titled, "How to Hide Your Assets and Disappear." Id. at pp. 128-129.

There was an incident in July 1999 where Ms. Fostick took Richie to have his hair cut. The beautician cutting his hair noted that it looked like Richie was cutting his own hair. Ms. Fostick mentioned this to Appellant in passing. Later that same evening, Appellant told Ms. Fostick that Miriam's family might have cut Richie's hair to have it drug tested. Appellant then told Ms. Fostick that on the day he and Richie returned to Williamsport and learned Miriam had been murdered, Richie was inconsolable and he gave him a controlled substance to help him sleep. Id. at pp. 130-133.

Appellant also acknowledged to Ms. Fostick that as a teenage and throughout his life he had received guns from Joe Kowalski. Id. at p. 234. Appellant was the executor of Joe Kowalski's estate. Id. at p. 165.

Around the time of the murder of Miriam Illes, Appellant was seeking to leave the area and he was interviewing for a job in Flint, Michigan. Id. at p. 134.

On July 31, 1999, Ms. Fostick married Appellant. She and Appellant were married for two years and divorced. Id. at p. 135.

Toward the end of Ms. Fostick's marriage to Appellant, he referred to Ms. Fostick as a greedy bitch, just like Miriam, when he was angry with her. Id. at p.137.

The Time Line of the Crime

Trooper William Holmes on a number of occasions recorded drive time from the homicide scene to various points on the Route 15 south – the route that Appellant drove on the evening of January 15, 1999. N.T., February 4, 2004, (Volume 12), at pp. 148-211; N.T., February 9, 2004, (Volume 13), at pp 18-45, 72-108; see also Commonwealth Exhibit 157-175 (aerial photographs of portions of the drive).

On April 19, 1999, Trooper Holmes drove parts of the route, which would have been driven on January 15, 1999, and he recorded the drive times. He did not go up Sulphur Springs Road during this trip. He started this trip at 11:58 p.m. from Miriam Illes' home and he arrived at McDonalds in Lewisburg by 12.27 a.m. Id. at p. 152. This portion of the trip was approximately twenty-five miles. Id. at p. 152. This took twenty-nine minutes. Id. He traveled at the speed limit or less since there were no adverse weather conditions. Id. at p. 153.

The next portion of the trip was from McDonalds in Lewisburg to the southern end of Selinsgrove at the Selinsgrove bypass, where Route 15 turns into a four-lane highway. This portion of the trip was approximately twenty-nine miles. He arrived at this location at 12:50 a.m., so the total travel time to this location was fifty-two minutes. Id. at p. 154.

The next portion of the trip was from the Selinsgrove bypass to where Route

322 intersects with Route 15, and then form Route 322 to Route 81 north and Route 83 to the Union Deposit exit near where the Hampton Inn at which Appellant stayed was located. Id. The trooper arrived at approximately 1:52 a.m. The total trip took one-hour and five-four minutes to the Hampton Inn. Id. at p. 155.

On January 5, 2004, the trooper again drove this trip and timed it. Id. The trooper left from Reed Street near the victim's residence. The trooper noted the first remote area you would encounter on this trip would be where Route 15 south intersects with Sulphur Springs Road. Id. at p. 157; see also Commonwealth Exhibit 163. The gun was located approximately 2/10 of a mile from Route 15. The sneakers were located approximately 7/10 of a mile up from Route 15. Id. The trooper in driving the trip on January 5, 2004, included traveling up Sulphur Springs Road (Route 554). The trooper also simulated discarding the weapon and the sneakers. Id. at p. 158.

The trooper testified that it took him twelve to fifteen minutes to get to the area known as Allenwood on Route 15. Allenwood is the area where cell phone coverage for the Montour Ridge Tower would first start. Id. at p. 159. This area is before the McDonald's in Lewisburg. The trooper reached the McDonalds in Lewisburg in approximately thirty –three minutes on January 5, 2004, including the time he spent going up Sulphur Springs Road to simulate discarding the rifle and sneakers. Id. at p. 160. The trooper traveled at the speed limit or less. Id. It took the trooper approximately fifty-two minutes to travel from the crime scene to the Selinsgrove bypass. Id. at p. 161. The Selinsgrove bypass is at the southern end of the Montour Ridge Tower coverage area. Id. at p. 161. The Montour Ridge Tower includes the McDonalds in Lewisburg. Id. Allenwood would be the northern most part of the coverage area of the Montour Ridge Tower. Id. at p. 162.

On January 5, 2004, Trooper Holmes next drove from the Selinsgrove bypass of Route 15 south to the intersection Route 15 and Route 322 and then to Route 81 north, to Route 83 south, to the Union Deposit exit. From this exit, he drove to the Sheraton Hotel and then to the Hampton Inn. The trooper arrived at the Sheraton Hotel at 11:59 p.m., one hour and forty-seven minutes from the start of the trip. Id. at p. 163. The Sheraton Hotel is approximately one-half mile from the Hampton Inn. Id. It only was just a couple of minutes to go from the Sheraton Hotel to the Hampton Inn. Id. at p. 164. The total time of the drive, including the stops up Sulphur Springs Road was approximately one hour and fifty-one minutes. Id.

In Commonwealth Exhibit 175, Trooper Holmes next noted what he called verified events of January 15, 1999, the night Miriam Illes was killed. These events included phone calls from 7:00 p.m. to 7:23 p.m., verified by phone records either made or received at Appellant's residence at Lamont Drive. N.T., Volume 12, at p. 164. The next verified event on Commonwealth 175 would be from the phone record of Mary Dixon's phone call to Miriam Illes at 10:10 p.m. The call lasted twenty-seven minutes. The call would have ended when Ms. Dixon heard the noise from Miriam and then hung up the phone. The trooper estimated the time just after the shooting of Miriam Illes to be 10:35 to 10:37 p.m. Id. at p. 165. The next verified event on Commonwealth Exhibit 175 is the cell phone call Appellant made to his sister at 11:24 p.m. Id. This call was made somewhere in the area encompassing Allenwood to the Selinsgrove bypass. The final verified time listed by the trooper on Commonwealth Exhibit 175 is 12:57 p.m., the time Appellant checked into the Hampton Inn. Id. at p. 166. This time was verified through records at the Hampton Inn. Id. at p. 167. There were no adverse weather conditions on January 4, 2004 when the trooper made this trip. Id. at p. 182.

Trooper Holmes also did a final recording of drive times on January 15, 2004. Id. at p. 203. On this occasion, Trooper Holmes was trying to simulate conditions close to the night of the homicide. There was snow from the previous day, January 14 into January 15, 2004. At 10:35 p.m., Trooper Holmes and County Detective McCoy took up positions at the tree where the fatal shot was allegedly fired. Id. at p. 204. Trooper Holmes wore size fourteen sneakers. He normally wears a size ten - ten and one-half. They then started the trip following the tracks testified to earlier by Trooper Kirkendall. They stopped to simulate throwing the silencer. Trooper Holmes arrived at his vehicle at 10:38 p.m. Id. He drove a four-wheel drive SUV vehicle (as did Appellant). He then included in the drive the stops at Sulphur Springs Road. Id. at p. 206. He trooper drove by McDonalds at 11:12 p.m. N.T., Volume 13, at p. 44.

The roads had some snow cover. Trooper Holmes described the roads as being fairly typical when it snows in this area. Volume 12, at p. 210. The trip on January 25, 2004 continued up to the Selinsgrove bypass. Id. at p. 211. At 11:24 p.m., Trooper Holmes testified he was at an area known as Ted's Landing, at Shamokin Dam, near the strip leading up to Selinsgrove bypass. Id. This area is within the coverage area of the Montour Ridge Towers. Volume 13, at p. 98.

Trooper Holmes made a video recording of his trip on January 15, 2004. The tape depicted some snow and ice on the road and the berm. Id. at p. 79. The tape was played for the jury.

The Arrest of Appellant in the State of Washington

The state police obtained an arrest warrant for Appellant and in December 2002, they traveled to the State of Washington, where Appellant resided, and they arrested him for

the homicide of Miriam Illes.

On December 18, 2002, Trooper Holmes was involved in a search, pursuant to a search warrant, of Appellant's residence in Liberty Lake, Washington. N.T., February 4, 2004, (Volume 12), at pp. 17-40.

During this search, Trooper Holmes observed woodworking equipment, including a drill press. Id. at p. 18. This was the same drill press the trooper saw in Appellant's Pennsylvania home. Id. at p. 19. The trooper also observed a table saw and ban saw. Id.

Trooper Holmes also observed several firearms in Appellant's home. Trooper Holmes at this time had the list of Joe Kowalski's firearms, which Jean Malatesta had previously given to him. Id. In the search of Appellant's Washington home, Trooper Holmes found four guns, which were on the list provided by Jean Malatesta. Id. at pp. 20-24. One of the guns in fact had engraving with the initials of Joe Kowalski on the trigger guard. Id. at p. 23. Trooper Holmes also saw the book "How to Hide Your assets and Disappear" on the bookshelf in Appellant's Washington home. Id. at p. 24. Trooper Holmes seized Appellant's computer, which was in the office area of his home Id. at p. 25.

Trooper Scott Henry was involved in reviewing the contents of Appellant's computer seized in Washington State. N.T., February 10, 2004, (Volume 14), at pp. 29-54. Trooper Henry worked with state police computer crime analyst, Trooper Dale Young, in analyzing the contents of Appellant's computer. The troopers in doing this found an unfinished manuscript on the computer. The manuscript was entitled, "Heart Shot, Murder of a Doctor's Wife", with the author listed as Richard W. Illes, M.D. Id. at pp. 30-31; Commonwealth Exhibit 15l. Trooper Henry read the unfinished manuscript to the jury.

Volume 14 at pp. 32-49. In the manuscript Appellant describes his life with Miriam and he alludes to potential suspects for the murder. He then, while not saying the "killer" was himself, talked about the killer, his actions and his thought processes. For instance, Appellant indicates the "killer knew that the investigation would be difficult for the authorities". Id. at p. 39. Appellant discussed the killer on prior occasions waiting outside Miriam's house "waiting for the right shot to present itself." Id. He noted the occasion where Miriam Illes was killed was the seventh night the killer waited outside her home. Id. He described how earlier opportunities were foiled by unforeseen events, such as two weeks prior when Miriam's dogs smelled him "as the wind blew through toward the house, just as he was about to take aim." Id. He noted it was fortunate Miriam didn't call the police on that night because they may have found the tracks in the snow and warned her that some one may be stalking her. Id. at pp. 38-39.

Appellant also wrote in the manuscript that the killer had taken measures to throw the police off his trail and that his actions would "confound them and lead them down the wrong path multiple times." Id. at p. 41.

In the manuscript, Appellant vividly describes the shooting of Miriam Illes by the "killer'. He describes steadying the rifle on a tree limb while Miriam was talking on the phone at the time, having ten minutes to escape the area, his car being parked just down the street and then driving safely into the night. Id at p. 33. He describes discarding a cigarette into the snow just before shooting.[20]

The manuscript describes the "assassin" unscrewing the silencer and "walking to the portal of death" to confirm that no follow up shot was needed. Id. at p. 34. He

continued: "The killer made his way to the warmth of his waiting car and felt an almost orgasmic catharsis as he congratulated himself on another mission well done. After all, to him killing was better than sex." Id. Trooper Henry testified that the manuscript consisted of two chapters - Chapter one entitled, "The Shot No One Heard" and Chapter two, "The Road to Williamsport". Id. at pp. 32, 42. The manuscript only went so far as second chapter.

DISCUSSION

Appellant first contends that the court erred in permitting Leslie Smith to testify about a statement the victim made to the effect that she was afraid for her life if her husband was forced to pay any type of child support or spousal support. Ms. Smith testified that, in the late summer or early fall of 1998, she saw the victim at a social gathering at Sandra Persun's house. When Ms. Smith and the victim were in the kitchen, their conversation turned to the topic of the victim's divorce. N.T., January 22, 2004 (Volume 3), at pp. 4-5. During their conversation the victim stated she was afraid for her life because her husband told her that if she got a dime of child support he would kill her and that if she got Richie he would kill her. Id. at pp. 11-12. When Ms. Smith told the victim that her husband was just trying to scare her, the victim said something like, "No, he meant it." Id. at pp. 12-13.

Appellant claims this statement was hearsay and so far removed from the date of the victim's death that it was not relevant. The court found these statements were admissible under the state-of-mind hearsay exception to establish ill will, malice or motive for the killing. The court relied on Commonwealth v. Stallworth, 566 Pa.349, 781 A.2d 110 (Pa. 2001) and Commonwealth v. Fletcher, 561 Pa. 266, 750 A.2d 261 (Pa. 2000). In Stallworth, the trial court permitted the Commonwealth to introduce a Protection From Abuse (PFA) order

20 A cigarette butt was found by the police in the snow near the location of the shooting.

and the allegations the victim made against the appellant in the petition for the PFA. In his appeal, the appellant claimed the evidence was hearsay and not relevant. The Pennsylvania Supreme Court rejected the appellant's claims, finding the evidence was relevant and not hearsay because it was used "to show the victim's state of mind regarding the relationship between the appellant and her and the malice or ill-will she perceived." 566 Pa. at 364, 781 A.2d at 118. Similarly, in Fletcher, the Pennsylvania Supreme Court found a witness' statement that the victim told him he had f---ed up a package of dope that belonged to the appellant was relevant in establishing the victim's state of mind regarding his relationship with the appellant and admissible under the state-of-mind hearsay exception to establish ill will, malice or motive for the killing.[21] 561 Pa. at 293, 750 A.2d at 275-76. The court found the same rationale would apply to Mrs. Illes' statements to Ms. Smith.

In considering this issue, the court notes that the defense at trial was claiming that there was no significant or unusual acrimony between Appellant and his wife as a result of their separation, divorce and child custody litigation. Thus, Appellant had no reason or motive to kill his wife. In the defense opening statement to the jury, Appellant's attorney argued that the amount of money Appellant paid for support was miniscule compared to the Appellant's total income. Defense counsel argued that after mediation, Appellant agreed his wife could have primary custody of their child because of his busy work schedule. Defense counsel further argued that around Christmas time, shortly before Mrs. Illes was murdered, that Mrs. Illes was talking to people about getting back together with Appellant. See N.T., January 20, 2004, (Vol. I), at pp. 62-64. Thus, it became a crucial issue as to whether there was significant

21 Although Justice Saylor filed a dissenting opinion, which Justices Flaherty and Zappala joined, that would require the victim's out of court statement to directly indicate the declarant's state of mind at the time the

malice and ill will between Appellant and his wife at the timeframe leading up to the shooting of Mrs. Illes. Without this testimony, Appellant would have been able to paint for the jury a picture of basic harmony between himself and his wife unchallenged by evidence, which showed the victim's perception of significant anger, hostility and ill will that Appellant harbored for his wife around the time of the homicide. See Commonwealth v. Wright, 455 Pa. 480, 317 A.2d 271 (1974) (testimony by witness that child/victim of homicide previously told witness that defendant attempted to sexually abuse her admissible to show state of mind of victim to explain victim's actions at the time of her death in trying to escape from defendant by going onto an elevated window ledge from which she fell.) In Wright, the Pennsylvania Supreme Court held that "out of court statements which are offered to prove the declarant's state of mind are not within the interdiction of the hearsay rule." 455 Pa. at 486, 317 A.2d at 274. The Wright court further explained: "Such evidence is competent to show her state of mind, just as business conversations evidence the business competency of the conversing parties and just as threats reveal the apprehension of the person threatened and the intentions of the person threatening. 455 Pa. at 487, 317 A.2d at 274 (emphasis added); see also Commonwealth Sneeringer, 447 Pa.Super. 14, 668 A.2d 467 (1995), appeal denied 545 Pa. 65, 680 A.2d 1161 (1996).

Where a declarant's out-of-court statements demonstrate her state of mind, are made in natural manner, and are material and relevant, they are admissible pursuant to the exception. Commonwealth v. Collins, 550 Pa. 46, 59, 703 A.2d 418, 425 (1997)(citations omitted).

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statement was made for the statement to be admissible, the victim's statement in the case at bar directly indicated her state of mind regarding her fear of Appellant and his ill will toward her.

The Court believes the evidence in this case is distinguishable from the case of Commonwealth Laich, 566 Pa. 19, 777 A.2d 1057 (Pa. 2001), where the Pennsylvania Supreme Court overruled a trial court's ruling admitting a statement of a homicide victim to a third party, shortly before she was killed, that the defendant told her if he couldn't have her and if he caught her with another man, he would kill them both. The Pennsylvania Supreme Court noted that the defendant at trial admitted he killed the victims and the issue at trial was whether the defendant acted in the heat of passion after discovering his girlfriend having sexual relations with another man. Thus, the Supreme Court found no relevance to the victim's prior statement in light of the defense asserted at trial. In the instant case, Appellant denies he was the individual who murdered his wife. He claims there was no unusual ill will between himself and his wife and that he had no motive to commit the crime. The victim's state of mind was important to proving the malice and ill will that existed between the parties and hence was pertinent to the motive, which Appellant had to commit the crime.[22]

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22 The Court believes this evidence could also be admissible under Pa.R.E. 804(b)(6), Forfeiture By Wrong Doing. Appellant was engaged in legal proceedings with the victim pursuant to her support and divorce complaints. On January 7, 1999, Appellant and the victim appeared in the Lycoming County courts for a hearing on the issue of support. Appellant had filed exceptions to the support order initially entered. At the hearing on January 7, 1999, Mrs. Illes' attorney presented evidence about certain monies Appellant removed from joint accounts prior to the parties' separation. The victim's divorce attorney, Steven Hurvitz testified to these events at trial. He testified that his client, Mrs. Illes, believed Appellant had taken approximately $30,000 from a joint account. N.T., Wednesday, January 21, 2004, Volume 2, at pp. 169-173. Further, Mrs. Illes was also making claims against her husband for several hundred thousand dollars, which he had obtained prior to the marriage, but has been put into a marital account. Appellant was claiming the funds were not marital and that his wife could not obtain these funds. N.T. Wednesday, January 21, 2004. Vol. 2, at pp. 166-167.

The murder of Mrs. Illes occurred on January 15, 1999. Her body was discovered on January 17, 1999. On January 19, 1999, Appellant's attorney in the divorce matter sent a letter the Domestic Relations office asking that the support ordered against Appellant be suspended because of the death of Miriam Illes.

Obviously, with her death, Mrs. Illes could not be a future witness or litigant against her husband on any of the pending issues concerning support, marital property or child custody.

It should also be noted in this context that the Commonwealth produced a witness at trial, James Swann, who testified that he had a conversation with Appellant a year or two before Appellant's divorce with his wife where Appellant told Swann that he would kill his wife if he were ever involved in a divorce dispute with her. N.T.,

The court also does not believe the four to six months between the date the victim made these statements and the date of her death negates their relevance. Instead, the court believes this lapse of time was an issue for the jury to consider in determining the weight to be accorded this evidence.

Appellant also contends the court erred in permitting Gordon Butler, the victim's brother-in-law, to testify to statements the victim made to him that Appellant told her she could die. Gordon Butler testified that in September or October 1998 the victim and Richie met him and her sister in South Bend, Indiana for a football game. The victim asked to speak to Mr. Butler privately for a minute. She told him that she recently had an altercation with Appellant in her front yard and it was very heated; at one point, Appellant got in her face and said you know you can die. N.T., January 30, 2004 (Volume 8), at pp. 29-30. As with the statement made to Ms. Smith, the court found this statement was relevant and admissible to establish the victim's state of mind regarding her relationship with Appellant to show ill will, malice or motive for the killing. See Stallworth, supra; Fletcher, supra. Again, the court found the few months between the statement and the victim's death went to the statement's weight, not its admissibility.

January 21, 2004 (Volume 2), at p.84

It would appear the Commonwealth presented significant evidence that Appellant had killed his wife so she could not continue to litigate or witness against him in regard to the parties' divorce.

The court also notes Rule 804(b)(6) is identical to the federal rule of evidence. Under federal case law, it is not necessary that the intent be to prevent the witness from testifying in a particular proceeding; indeed there need not be a proceeding pending of which the witness could have testified at the time in question. See U.S. v. Miller, 116 F.3d 641, 668 (2d Cir. 1997), cert. denied, 524 U.S. 905, 118 S.Ct. 2063 (1998); M. Bernstein, Pennsylvania Rules of Evidence 837 (2005).

Appellant asserts the court erred in not permitting defense counsel to question James Swann regarding a substance abuse problem and his arrest concerning a substance abuse problem. Appellant's assertion is not completely accurate. The court permitted defense counsel to ask Mr. Swann whether he was having a substance abuse problem when he left Susquehanna Health System in 1997 and he responded in the negative. N.T., January 21, 2004 (Volume 2), at p. 107. Defense counsel then posed the question: "Isn't it true that sometime in Florida you were arrested for assaulting your girlfriend and charges got dropped because you went into a rehab?" Id. The Commonwealth objected to the question and the court sustained the objection. Counsel then came up to side bar and the court permitted defense counsel to make an offer on the record. The court then ruled defense counsel could ask the witness whether he went into rehab, but whether he assaulted somebody was not relevant. Id. at pp. 108-111. Defense counsel asked Mr. Swann whether he received inpatient or outpatient treatment for alcohol abuse and the witness replied that he did. Defense counsel then asked when that occurred and Mr. Swann thought it was late 1999. Id. at pp. 111-112.

The admissibility of evidence is a matter addressed solely to the discretion of the trial court and may be reversed only upon a showing that the court abused its discretion. Commonwealth v. Lacava, 542 Pa. 160, 174, 666 A.2d 221, 227 (1995). Under Pennsylvania law, only convictions for crimen falsi offenses are admissible to attack the credibility of a witness. Pa.R.E. 609; Commonwealth v. Randall, 515 Pa. 410, 528 A.2d 1326 (1987). . Criminal acts not resulting in a conviction are not admissible to impeach a witness' credibility. Commonwealth v. Fisher, 545 Pa. 233, 256, 681 A.2d 130, 141 (1996). In his question to the witness, defense counsel admitted the charges had been dropped. The court also notes that an assault is not a crime involving dishonesty or false statement. Commonwealth v. Williams,

524 Pa. 404, 573 A.2d 536 (1990). Therefore, the proffered information was not admissible to attack Mr. Swan's credibility.

Appellant contends the evidence was relevant to show the witness was biased against Appellant. Evidence is relevant if it tends to make a fact at issue more or less probable than it would be without the evidence. Pa.R.E. 401; Commonwealth v. Scott, 480 Pa. 50, 54, 389 A.2d 79, 82 (1978). "Evidence that is not relevant is not admissible." Pa.R.E. 402. The defense contended that the witness was biased against Appellant because he fired Mr. Swann due to problems at work that Appellant suspected were related to alcohol.[23] N.T., January 21, 2004 (Volume 2), at pp. 107, 111. The only portion of defense counsel's offer that may tend to make it more probable that the witness had an alcohol problem in 1997 is the fact that he eventually entered rehab. The assault aspect of the offer, however, did nothing to further this inquiry and would only serve to unfairly prejudice the jury against this witness. Since this evidence was not relevant, the court properly excluded it under Rule 402 of the Rules of Evidence.[24]

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23 In his statement of matters complained of on appeal on this issue, Appellant states Swann's substance abuse problem was the reason he was discharged by Appellant. The defense, however, never produced any evidence to prove this statement. Neither Appellant nor anyone else in the hospital administration testified about the reason Mr. Swann was discharged. Although counsel questioned Mr. Swann on this issue, it is not counsel's questions, but the witness's response that constitutes evidence. Commonwealth v. Williams, 863 A.2d 505, 517 (Pa. 2004); Commonwealth v. Lacava, 542 Pa. 160, 182, 666 A.2d 221, 231 (Pa. 1995). Mr. Swann denied having a substance abuse problem when he left Susquehanna Health System in 1997.

24 In the last two sentences of his statement of matters complained of on appeal on this issue, Appellant states: "Witness Swan had testified that Defendant indicated that he would kill his wife if ever involved in a divorce dispute. This statement according to witness Swan occurred years before any controversy between Defendant and the victim." It is unclear to the court how these statements relate to the issue of whether the court erred in precluding defense counsel from questioning the witness about the assault charges. In the event the Appellant is attempting to raise a separate issue that the witness should not have been permitted to testify to Appellant's statements, the court would reject it. Mr. Swann testified that in April or May of 1997 he was discussing his divorce situation with Appellant and the amount of money it was costing him and Appellant stated that if he were under those circumstances he "would take his wife out." N.T., January 21, 2004, at p. 84. This statement was admissible under Pa.R.E. 803(25). The court believes the fact that the statement was made 10 or 11 months before the Illes divorce proceedings were initiated and approximately 19 or 20 months before Miriam Illes was killed would go to the weight of the evidence, but not its admissibility.

Appellant claims the court erred in allowing the testimony of Norma Ulmer that Appellant indicated to Dr. Zama that he wished Miriam Illes were dead when the statement was contradicted by Dr. Zama, the witness was unsure of what she heard and the statement was so far removed that it was of little or no value to the issue at hand. He also contends the witness indicated the statement occurred in December 1998 or January 1999, but Dr. Zama did not live at the location where Ms. Ulmer said the statement occurred at that time. As with the issue involving Mr. Swann, Appellant's assertions are not entirely accurate. For example, Appellant claims the witness was unsure of what she heard. Ms. Ulmer was firm in her testimony that she heard Appellant say, "I wish the bitch were dead, my life would be a whole lot easier." N.T., January 21, 2004 (Volume 2) at pp. 209, 220. She testified that she wasn't sure what **else** was said during Appellant's conversation with Dr. Zama, but that statement stuck out in her mind. Id. at pp. 209, 212-13, 220. She testified the gist of the conversation concerned Appellant's wife, custody of their son and financial issues. Id. at pp. 209, 213. She also believed Appellant was referring to his wife when he made the statement, but she wasn't positive. Id. at pp. 210-211. Thus, the record reflects the witness was sure Appellant made the statement, but she wasn't positive to whom Appellant was referring and couldn't say what else was said.

Similarly, Ms. Ulmer did not state in her trial testimony that the statement occurred in December 1998 or January 1999. In her direct testimony, Ms. Ulmer indicated Appellant made the statement sometime around September 1998. N.T., January 21, 2004 (Volume 2), at pp. 207-208. On cross-examination, defense counsel asked her whether she previously told the police it occurred around Christmas or New Year's. Id. at p. 214. Ms. Ulmer did not recall saying that to the police. Defense counsel then showed her an exhibit,

which indicated she made such a statement to the police in March 1999. Id. She acknowledged the exhibit showed she told the police the statement occurred around Christmas or New Year's. Then she explained when she realized there were boxes in Dr. Zama's house she realized the statement occurred earlier and Dr. Zama did not live in a place that had an upstairs around Christmas or New Year's. Although her previous statement to the police was admissible under Pa.R.E. 613 to impeach her credibility, it was not admissible as substantive evidence because it was not a statement given under oath, a writing signed and adopted by the witness or a verbatim contemporaneous recording of an oral statement. Pa.R.E. 803.1(1). . Thus, the record reveals Ms. Ulmer testified the incident occurred in the fall of 1998, not in December 1998 or January 1999.

Although both Dr. Zama and Ms. Ulmer testified Appellant made the statement in the fall of 1998, there were some differences in their recollections of what Appellant said. Dr. Zama testified Appellant was referring to Ms. Illes in derogatory terms, calling her a wicked bitch and saying she was giving him hell. N.T., January 30, 2004 (Volume 8), at pp. 42-43. Appellant was upset about what he felt he was going through because of the whole divorce or separation process and he said, "the bitch is making my life miserable; I wish she would just go away" or something to that extent. Id. at pp. 43-45. In comparison, Ms. Ulmer indicated Appellant said "I wish the bitch were dead; it would make my life a whole lot easier" and the gist of the conversation was about Appellant's wife, son and financial issues. These differences do not render either witness' testimony inadmissible. Both Dr. Zama's and Ms. Ulmer's testimony about Appellant's statement were admissible under Pa.R.E. 803(25). The differences in their testimony, the timing of the statement and everything else raised by

Appellant on this issue are factors the jury could consider in assessing the credibility of each witness' testimony, but it does not render the testimony inadmissible.

Appellant contends the court erred in not allowing the defense to question any witness and specifically Pennsylvania State Police witnesses regarding the book written by Norman Pregent and the accuracy of the book as compared to the manuscript written by Appellant. The court has found nothing in the record to support this contention. In fact, the court permitted defense counsel to question Trooper Scott Henry on this issue. N.T., February 10, 2004 (Volume 14) at pp. 51-52. Defense counsel asked Trooper Henry if Norman Pregent wrote a book concerning this murder. Id. at p. 51. The Commonwealth objected, but the court permitted Trooper Henry to answer. Id. Trooper Henry responded that he was aware of such a document, but he had not read it. Id. at p. 52. The court does not recall any other instance where the defense attempted to cross-examine a witness about Mr. Pregent's book or its contents and it could not locate one in the record.

Appellant alleges the court erred in not permitting defense counsel to question Mary Dixon concerning her husband's involvement with Miriam Illes, that her husband and Miriam Illes had spent time together in October of 1998 in Montana, that her husband was a pilot, that her husband was not interviewed by the Pennsylvania State Police and that her husband's location and alibi for the evening of Miriam Illes' death had not been even discussed by the Pennsylvania State Police. The defense wanted to infer that Mrs. Illes and Mr. Dixon were romantically involved and that Mr. Dixon was involved in Mrs. Illes' death. Defense counsel made two offers of proof. In the first offer of proof, defense counsel indicated he intended to ask questions of Mrs. Dixon about her husband's occupation, the circumstances under which he left the Williamsport area, his pilot's license and an incident in the hot tub

when Miriam visited them in October 1998. N.T., January 20, 2004 (Volume 1), at pp. 90-91. Defense counsel did not state what the "incident" in the hot tub was and from the offer it appears that Mrs. Dixon was in the hot tub with her husband and Mrs. Illes. Id. ("that Miriam went out there, got in the hot tub with **them**."). The court believed the offer was insufficient and defense counsel was on a fishing expedition. The next day, defense counsel made essentially the same offer. Defense counsel stated:

> We intend to ask questions of Mrs. Dixon about whether or not her husband had a pilot's license. Whether he was a doctor. I don't know that he was necessarily fired, kind of left employment here involuntarily. That he was --- they were close to Miriam. That she had been out there for visits in October, at least one visit in October. There (sic) some kind of notation in her diary about being in the hot tub and exclamation points after that.

N.T., January 21, 2004 (Volume 2), at p. 2. Again, the court found that the offer was insufficient. When an offer of proof fails to satisfy every element of a claim or defense, the trial court may properly preclude presentation of evidence on that claim or defense. See Commonwealth v. Capitolo, 508 Pa. 372, 379-81, 498 A.2d 806, 809-10 (1985); Commonwealth v. Billings, 793 A.2d 914, 916 (Pa.Super. 2002); Commonwealth v. Newman, 382 Pa.Super. 220, 230-31, 555 A.2d 151, 156 (1989). The court does not believe asking Mrs. Dixon whether her husband had a pilot's license would make him a suspect in this case. Even if Mr. Dixon had a pilot's license, that doesn't make it more probable than not that he was in Williamsport on the night of Mrs. Illes' murder. The Dixons lived in Montana in January 1999. Defense counsel's offer did not address whether Mr. Dixon owned his own plane or whether he chartered a plane on or about January 15, 1999. A pilot's license without a plane gets one nowhere. The defense also did not claim it had any witnesses who could testify they believed they saw Mr. Dixon in the Williamsport area. Without some additional information,

the jury could not infer Mr. Dixon was in Williamsport the night Mrs. Illes was murdered; they could only speculate. Similarly, the offer was insufficient to show that there was any romantic relationship between Mrs. Illes and Mr. Dixon. Mrs. Illes and the Dixons were friends. Even if true, Defense counsel's offer only showed that Mrs. Illes visited the Dixons in October 1998 and enjoyed some time in their hot tub with them. It did not show Mrs. Illes spent any time alone with Mr. Dixon, let alone that they were involved in any kind of illicit relationship.

Appellant contends the court erred in denying the portion of his omnibus pretrial motion that sought to suppress the contents of Appellant's trash because the Commonwealth searched and seized the property without a search warrant issued by a detached magistrate. The court cannot agree. At the time of the victim's death, Kevin Peacock was Appellant's garbage hauler until he moved from the Cody Country Development. N.T., May 2, 2003, at pp. 7-8, 13. Mr. Peacock would drive up Appellant's driveway and pick up the garbage that Appellant would put outside in two containers behind his house, near the garage. Id. at pp. 10, 14. Sometimes the garbage was loose; sometimes it was bagged. Id. at pp. 11, 15, 21. Sometimes the container had a lid on it and other times it would not. Id. at p. 18.

During their investigation, the police learned that Mr. Peacock was Appellant's garbage hauler. On January 22, 1999, the police contacted Mr. Peacock and asked him to keep Dr. Illes' garbage separate from the rest of the garbage he collected.[25] N.T., May 2, 2003, at pp. 9, 24, 27. Mr. Peacock consented to this request. Id. at p. 9. He picked up the Defendant's garbage and kept it separate from his other customers' garbage on approximately four occasions between January 26, 1999 and February 23, 1999. Id. at pp. 10, 24, 29. Mr. Peacock

25 They also asked Mr. Peacock if he noticed anything in the previous collection of the Defendant's garbage. Mr. Peacock said he saw a gun barrel sticking up out of the garbage can. Id. at 11.

would notify the police after he collected the Defendant's garbage and the police would obtain it from Mr. Peacock the next day. Id. at pp. 25, 29.

Mr. Peacock testified at the suppression hearing that he had taken items out of customers' garbage in the past. Id. at p. 12. He also testified that Dr. Illes never gave him any instructions regarding his garbage and he never said not to go through his garbage. Id.

The Court found there was no violation of Appellant's constitutional rights with respect to any evidence seized from his garbage. It is well established that "no one has standing to complain of a search and seizure of property that he has voluntarily abandoned." Commonwealth v. Shoatz, 469 Pa. 545, 553, 366 A.2d 1216, 1220 (1976). The Superior Court has held that "placing trash for collection is an act of abandonment which terminates any fourth amendment protection." Commonwealth v. Minton, 288 Pa.Super. 381, 391, 432 A.2d 212, 217 (1981). Therefore, the Court found the property was abandoned and the Defendant did not have standing to challenge any evidence seized from his garbage.

Even if Appellant had standing, the Court did not believe the seizure of items from Appellant's garbage violated his rights against an unreasonable search and seizure. To be entitled to such protection, Appellant must have a privacy interest in his garbage. The privacy test is two-fold: "the expectation must not only be 'actual (subjective),' but also one that 'society is prepared to recognize as reasonable.'" Commonwealth v. Cihylik, 337 Pa.Super. 221, 227, 486 A.2d 987, 990 (1985)(citations omitted). There is no testimony in the record to show that Appellant had an actual expectation of privacy in his garbage. Moreover, Courts have held that society does not find an assertion of privacy in one's garbage reasonable once it has been placed outside for collection. California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); Commonwealth v. Perdue, 387 Pa.Super. 473, 564 A.2d 489 (1988);

Cihylik, supra; Minton supra; see also Annotation, Searches and Seizures: Reasonable Expectation of Privacy in Contents of Garbage or Trash Receptacle, 62 A.L.R. 5th 1.

Defense counsel contended these cases were distinguishable because the garbage was outside the curtilage, where here the garbage was still within the curtilage. First, the Perdue case involved a garbage can within the curtilage.[26] Second, it is not clear that Appellant's garbage was within the curtilage. Although Mr. Peacock testified he drove up the driveway and walked around the garage to collect the garbage, it is not clear whether the garage was connected to the house or how close the garbage was to either structure. Even assuming the garbage was within the curtilage, the court did not believe society was prepared to recognize a privacy interest in **garbage** once it had been placed outside for collection. Once placed outside, the garbage could be exposed to the elements, animals and, potentially, other persons. For example, the wind could blow the lid off or an animal could knock the garbage can over, exposing its contents to the entire neighborhood, or a homeless person could forage through the garbage, looking for food or clothing. Furthermore, Mr. Peacock testified that garbage collectors occasionally take salvageable items from their customer's trash, with or without the customer's permission. Since Appellant abandoned his trash and did not have a reasonable expectation of privacy in it once he put it out for collection, a warrant was not necessary before Mr. Peacock could segregate it and turn it over to the police.

Appellant next asserts the court erred in ruling that defense counsel could not cross-examine Trooper Holmes regarding his direct examination that all times in his time study had been verified through his investigation and through his discussions with other individuals.

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26 The garbage can was under the porch of a church parsonage. Although it had not been placed in a location where the garbage collector would normally retrieve it, the Court still found no violation because the church,

Defense counsel claims he wanted to question Trooper Holmes about his failure to take into account statements by Appellant's son and the McDonald's employees. He also contends Trooper Holmes had taken into account all other hearsay statements in his investigation when giving his direct testimony and Appellant's alibi was confirmed by Susan Kaufman and Dollis Anderson along with hotel records. Initially, the court notes that Trooper Holmes did not mention his discussions with other individuals or their hearsay statements when giving his direct testimony. Trooper Holmes' testimony on direct examination only addressed Appellant's statements regarding his whereabouts on the night of the murder. N.T, February 5, 2004 (Volume 12), at pp. 148-167.[27] Earlier in its case-in-chief, the Commonwealth played an audiotaped statement Appellant made to the police. Appellant told the police he left his home at about 9:30 p.m. to drive to his sister's house in Honey Brook, Pennsylvania. He drove down Route 15 and stopped at the McDonald's in Lewisburg to get some food and for his son to go to the bathroom. He then continued driving south on Route 15. Somewhere between the stop at McDonald's and the Selinsgrove bypass, he called his sister to tell her he was going to look for a hotel, because the roads were bad. He stopped at the Sheraton Inn around 12:20 or 12:30 a.m., but did not get a room there because a bus load of people were checking in, so he checked into the Hampton Inn around 12:45 a.m. Trooper Holmes testified that Appellant's cell phone records verified that he made a phone call to his sister at 11:24 p.m. and the call utilized the Montour Ridge Tower. Id. at pp. 165-66. Trooper Holmes testified the Selinsgrove bypass was at the southern end of the Montour Ridge Tower coverage area, the McDonald's in Lewisburg was roughly in the center of that coverage area and Allenwood was at the north end

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parsonage and surrounding area was subject to public inspection.

27 Since these were statements of a party opponent, they were admissible as an exception to the hearsay rule under

of the coverage area. Id. at pp. 161-62. Trooper Holmes also testified records from the Hampton Inn on Union Deposit Road in Harrisburg verified he checked into the hotel at 12:57 a.m. There were no records to verify the time Appellant left his home[28] or when he went to the McDonald's in Lewisburg. Id at pp. 164-65. Mary Dixon's phone records confirmed Mrs. Illes' time of death was no later than 10:37 p.m. Id. at p. 165. Trooper Holmes conducted time studies to determine the distance and the time it would take to drive from the crime scene to the McDonald's in Lewisburg, the Selinsgrove bypass, and the hotels on Union Deposit Road.

On cross-examination, defense counsel wanted to question Trooper Holmes about statements Richie Illes and the McDonald's employees made when they were interviewed during the investigation of this case. The Commonwealth objected. The court held a sidebar conference and sustained the Commonwealth's objection. N.T., February 5, 2004 (Volume 12), at pp.195-198. "A trial court has broad discretion to limit the scope of cross-examination, and rulings regarding the scope of cross-examination may not be reversed absent a showing that the court abused that discretion." Commonwealth v. Gibson, 547 Pa. 71, 88, 688 A.2d 1152, 1160 (1997); see also Commonwealth v. Birch, 532 Pa. 563, 566, 616 A.2d 977, 978 (1992). The court precluded the proposed cross-examination for two reasons. First and foremost, the statements defense counsel sought to introduce were hearsay, and defense counsel did not offer any exception to the hearsay rule that would permit the introduction of these statements. Pa.R.E. 802 ("Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute."). Second, the

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Pa.R.E. 803(25).

28 None of the alibi witnesses had any information about the time Appellant began his trip, either.

Commonwealth's direct examination focused on whether the **times** given by Appellant could be verified with **records or documents**. N.T., February 9, 2004 (Volume 13) at pp. 5-7. Neither Richie's statement nor the statements of two of the three McDonald's employees gave a time when Appellant was at the McDonald's in Lewisburg. In fact, two of the McDonald's employees could not even confirm the date, let alone the time. Michael Bird told the police the gentleman in the photograph looked familiar, but he was not able to tell them from where he recognized him. N.T., February 12, 2004 (Volume 16) at pp. 90-91, 98-99. Deborah McGruger told the police the little boy in the picture looked familiar but the gentleman did not. She remembered seeing the little boy at McDonald's, but couldn't say whether the date was January 15, 1999 or not. Id. at pp. 141-43. Michelle Propka Newton was the only McDonald's employee who gave a time. When the police first showed her the photograph, she thought she recognized the people in the picture from Williamsport Hospital. The police then asked her if she saw them at McDonald's and she said she saw them come through the drive-thru at 7 p.m. Id. at pp. 193, 209. Since these statements were hearsay and they did not confirm or verify Appellant's statement that the time he was there was around 11:00 p.m. on January 15, 1999, the court does not believe it abused its discretion in prohibiting defense counsel from introducing Richie's statements and the statements of the McDonald's employees during cross-examination of Trooper Holmes. The court also notes it permitted defense counsel to ask Trooper Holmes whether he considered oral information from Appellant, Richie Illes or any other party, but counsel could not question Trooper Holmes about the content of any such statements. N.T., February 9, 2004 (Volume 13) at pp. 7, 19-21.

Appellant also asserts the court erred in not granting a mistrial due to a clear discovery violation and the hiding of evidence from the defense of Trooper Holmes regarding

the times studies that were conducted on January 15, 2004 and a videotape of said time studies regarding his trip form Williamsport to Selinsgrove and the Harrisburg area. Although defense counsel considered requesting a mistrial, he never requested one. On redirect examination, the Commonwealth elicited testimony from Trooper Holmes regarding activities he performed on January 15, 2004. Before beginning re-cross examination, defense counsel asked for a sidebar conference. N.T., February 5, 2004 (Volume 12), at p. 211. During the sidebar, defense counsel argued Trooper Holmes notes of his activities were mandatory discovery either as a scientific test or reciprocal alibi and the Commonwealth argued it was not discoverable under either of those theories. Id. at pp. 211-224. Defense counsel indicated at the very least he wanted a jury instruction, but he wanted to speak to his client about requesting a mistrial so he asked if the remedy could be addressed the next morning. Id. at pp. 212-13, 221-22. When defense counsel first noted during the Commonwealth's redirect examination that the defense did not have this information, the court indicated defense counsel would have the opportunity to review this information prior to conducting re-cross examination. Id. at pp. 201-03. Since it was at the end of the day, the court recessed for the day to give the defense time to review these materials. Id. at p. 212. There is nothing in the record to indicate defense counsel asked for a mistrial the next day of trial and the court does not recall defense counsel making such a request. Therefore, the court believes this issue is waived by defense counsel's failure to properly preserve it.

Even if defense counsel had requested a mistrial, the court would not have granted it. Due to inclement weather, the court did not conduct the trial on Friday, February 6, 2004. Trial resumed on Monday, February 9, 2004. Thus, defense counsel had several days to

review the materials before beginning re-cross examination of Trooper Holmes. The court also gave the following instruction to the jury before defense counsel began re-cross:

> "I should note to you that Defense Counsel was not aware of the January 15, 2004 information, nor did he have the police report about it when he was cross examining Trooper Holmes on Friday afternoon. The Court feels the Commonwealth should have provided that report before Mr. Lepley engaged in the cross examination of Trooper Holmes. Mr. Lepley has now been provided with that report. That puts him I think on a fair ability to confront that subject and he may now begin his recross examination."

N.T., February 9, 2004 (Volume 13) at pp. 17-18.

Whether to grant the extreme remedy of a mistrial is a matter within the sound discretion of the trial court. Commonwealth v. Boczkowski, 577 Pa. 421, 454, 846 A.2d 75, 94 (2004); Commonwealth v. Boxley, 575 Pa. 611, 623, 838 A.2d 608, 615 (2003); Commonwealth v. Begley, 566 Pa. 239, 271-72, 780 A.2d 605, 624-25 (2001). "Furthermore, a mistrial is not necessary if a court's cautionary instructions adequately cure any prejudice." Begley, supra. Given the court's cautionary instruction and the amount of time defense counsel had to review the materials, there was no prejudice to the defense and a mistrial was not warranted.

Appellant contends the court erred in failing to allow the videotaped interview of Richie Illes on September 14, 2000 to be played for the jury, as Richie "was unavailable and/or unable to testify due to a lack of memory, ability to recall and/or not being present in the Commonwealth of Pennsylvania." Defense counsel argued that the videotaped interview of Richie was admissible under the hearsay exceptions for either recorded recollection or former testimony. The court did not believe either exception was applicable in this case.

Miriam Illes was murdered on January 15, 1999. The police made numerous attempts to interview Richie, who was five years old. Appellant, however, refused to permit the police to speak to Richie unless several unreasonable conditions were met, such as the police had to provide the questions they wanted to ask Richie to Appellant and his counsel in advance of the interview and Appellant could not be the focus of the questioning. After much legal maneuvering, including litigating in the trial court whether Pennsylvania would recognize a family privilege similar to the privilege for confidential communications between spouses and the filing of a notice of appeal, the parties reached an agreement, and the police conducted a videotaped interview of Richie on September 14, 2000. Richie was a month shy of his seventh birthday.

Defense counsel subpoenaed Richie as a witness for trial. At this time, Richie was ten years old. Before Richie took the stand, there was a short discussion off the record in chambers so Richie could be introduced to the judge and counsel and he could become more comfortable with the situation in general. During this discussion Richie made a statement that his memory about that weekend was hazy. The court then conducted a conference on the record to discuss the procedure to be utilized to try to refresh Richie's recollection. N.T., February 10, 2004 (Volume 14), at pp. 105-118, 124-129. The court permitted defense counsel to play the videotaped interview from September 14, 2000 to see if it would refresh Richie's memory. After viewing approximately one-half of the tape, Richie did not want to view it any further. The jury was brought into the courtroom and defense counsel questioned Richie about his recollection of the weekend. Richie thought he went to his Aunt Sue's that weekend and he remembered seeing police cars at his mother's residence when they came back, but otherwise he really couldn't remember the trip to his Aunt Sue's or what he did that weekend. Id. at pp.

136-174. Defense counsel asked Richie if his September 14, 2000 statement helped him remember that weekend; Richie replied that it did not. Id. at pp. 160-164. Defense counsel then asked Richie if, when he was talking to the police, he was telling them what he remembered from that weekend, and Richie replied in the affirmative. Id. at p. 171. Richie also indicated he was telling the truth when he was talking to the police and he just couldn't remember it now. Id. at pp. 171-172. Defense counsel then sought to introduce the videotape as evidence and play it for the jury. Since it was late in the afternoon, the court released the jury and then held an argument on the admissibility of the videotape. Id. at pp. 178-190. The court ruled the videotape was inadmissible because a very young child made the statements approximately 20 months after the events occurred.[29] Id. at pp. 184-185.

The next morning, the court informed counsel that it had discovered a criminal case where a statement made nearly two years after the incident in question was admissible.[30] Although the court believed this case was distinguishable because the individual making the statement was involved in burying the murder victim, it permitted counsel to reargue the issue after they had the opportunity to review the case. At the second argument, defense counsel argued the statement was admissible under the Young case. Counsel also argued that the statement was admissible under the former testimony exception. N.T., February 11, 2004 (Volume 15), at pp. 212-216. The Commonwealth argued Young was distinguishable and the former testimony exception did not apply because it was an interview by the police, not cross-

29 The court questioned Richie's competency at the time of the videotape due to: (1) his tender years, (2) the fact that no one established on the videotape that he knew the difference between a truth and a lie or that he was aware of the consequences of telling a lie or his obligation to speak the truth; (3) Richie's statements were not given in a narrative or coherent fashion. The court explains the issue of Richie's competency in further detail in its discussion of the former testimony exception to the hearsay rule.

30 The case was Commonwealth v. Young, 561 Pa. 34, 748 A.2d 166 (1999).

examination by a prosecuting attorney in an adversarial setting. Id. at pp. 217-219. The court maintained its original ruling. N.T., February 12, 2004 (Volume 16), at pp. 3-5.

The admissibility of evidence is within the sound discretion of the trial court. Before a statement is admissible under the recorded recollection exception, the proponent must meet four requirements: (1) the witness must have firsthand knowledge of the event; (2) the statement must have been made at or near the time of the event and while the witness had a clear and accurate memory of it; (3) the witness must lack a present recollection of the event; and (4) the witness must vouch for the accuracy of the statement. Pa.R.E. 803.1(3); Commonwealth v. Young, 561 Pa. 34, 56, 748 A.2d 166, 177 (1999); Commonwealth v. Cargo, 498 Pa. 5, 10, 444 A.2d 639, 641 (1982). Under the facts and circumstances of this case, the court found that defense counsel could not meet the second requirement. Unlike Young, this case involves a small child who did not participate in or witness the murder. Richie was 5 years old when his mother was murdered and almost 7 years old when he was interviewed on September 14, 2000. Between his mother's death and the date of the interview, Richie was seen by three psychologists. Dr. Stanley Schneider saw Richie in the fall of 1999. During an in camera hearing to determine if statements Richie made to Dr. Schneider were admissible under the hearsay exception for statements made for the purpose of medical treatment or diagnosis, Dr. Schneider testified that either Appellant or his counsel asked him to find out what Richie remembered about the weekend his mother died. N.T., February 11, 2004 (Volume 15) at pp. 28-29. Dr. Schneider also testified Richie's memory about that weekend was "very vague" when he asked him about it during his final session on November 9, 1999. Id. at p. 25. Richie's memory also was vague in his taped interview with the police. For example, Richie wasn't sure if they got food from Burger King or McDonald's after his dad

picked him up, but he said his dad knew. At first he said they didn't stay overnight at Aunt Sue's, but then he said maybe they did. Richie said he went to the Van Fleets after they came home and saw police at his mom's house. When asked if Susan Van Fleet told him that, Richie said his dad did. Similarly, when asked how he knew his dad packed his clothes to go to Aunt Sue's, Richie replied because my dad told me. The Pennsylvania Supreme Court has long recognized that children are peculiarly susceptible to the world of make-believe and of suggestions. Rosche v. McCoy, 397 Pa. 615, 621, 156 A.2d 307, 310 (1959). Given Richie's age, the length of time between the incident and the videotaped interview, the fact that Richie was seen by three psychologists, Dr. Schneider's testimony that Richie's memory was very vague in the fall of 1999, and the fact that Dr. Schneider only inquired into Richie's memory of the weekend at the behest of Appellant or his attorney, the court was not convinced that Richie's statements in the videotaped interview on September 14, 2000 were made at or near the time of the event or when Richie had a clear and accurate memory.

The court also found the statement did not qualify under the former testimony exception. Defense counsel argued that Richie's videotaped statement should be considered former testimony because the interview was conducted in lieu of Richie testifying before the grand jury. The court could not agree. "The rationale for admitting former testimony is that cross-examination, the oath, the solemnity of the occasion, and the accuracy with which the statement was recorded assure a high degree of reliability." Commonwealth v. Melson, 432 Pa.Super. 1, 9, 637 A.2d 633, 637 (1994), quoting Packel and Poulin, Pennsylvania Evidence, §804.1 (West 1987).[31] To be admissible under the former testimony exception to the hearsay

31 The same quote is contained in the current edition of Pennsylvania Evidence. See Packel and Poulin, Pennsylvania Evidence (2d ed.), §804(b)(1)-1 (West 1999).

rule, the statement must have been given under oath or affirmation. Commonwealth v. Hall, 232 Pa.Super. 412, 417 n.4, 334 A.2d 710, 712 n.4 (1975). Richie was never placed under oath and he did not otherwise swear or affirm that he would tell the truth during the interview. Richie's competency to testify also was not established on the videotape. See Commonwealth v. Harvey, 571 Pa. 533, 548, 812 A.2d 1190, 1199 (2002)(when a child under the age of fourteen is called to testify, the competency of the minor must be independently established). Richie was never asked whether he knew the difference between the truth and a lie nor was he asked about the consequences of telling a lie. Richie also was not subject to cross-examination. Although members of the district attorney's office may have been observing the interview from a vantage point where they could observe Richie but he could not observe them, the police conducted the questioning. Without an oath, cross-examination or solemnity of the occasion, the court concluded the interview of Richie on September 14, 2000 could not be admitted under the former testimony exception of the hearsay rule.

Even assuming for the sake of argument that the court should have admitted the videotape and played it for the jury despite the deficiencies discussed above, the court believes any such error would be harmless because Richie could not give times for any event other than checking into the hotel in Harrisburg[32] and Richie's statements were cumulative of other evidence presented at trial. The key points in Richie's statements on which defense counsel focused were that the roads were icy, he and his dad stopped at McDonald's in Lewisburg, and they stopped at another hotel before checking into the Hampton Inn. All of these points were covered in other evidence introduced at trial.

32 Richie indicated they got to the hotel in which they stayed at 2:00 a.m. Hotel records proved Appellant and Richie checked into the Hampton Inn at 12:57 a.m.

All of these points were discussed in Appellant's audio taped statement. The police conducted an audio taped interview of Appellant in February 1999. That audiotape was played for the jury. In this tape, Appellant made statements about the following: 1) they stopped at McDonald's to get some food and for Richie to use the bathroom; 2) he believed it was around 11 p.m., because he was concerned about McDonald's closing; 3) the roads were icy; 4) he called his sister after they stopped at McDonald's to tell her they were going to get a hotel for the night; 5) he tried the Sheraton Inn first; 6) he had some trouble finding it, but Richie saw it and they went back; 6) there was a busload of people at the Sheraton so he decided to go somewhere else; and 7) he drove to the Hampton Inn and checked in around 12:45 a.m.

Evidence about the road conditions was also introduced through the testimony of Duane Van Fleet and Susan Kaufman and a stipulation. Duane Van Fleet testified that he called Appellant and told him the roads were icy sometime around 7 or 7:30 p.m. on January 15, 1999. Susan Kaufman testified she called Appellant to warn him about the roads. N.T., February 12, 2004 (Volume 16) at pp. 65-66. She also testified Appellant called her to tell her he was stopping at a hotel because the roads were horrible. Id. Phone records verified the fact that these phone calls had been made.

McDonald's employees testified that Appellant and/or his son looked familiar. One employee, Michelle Newton, testified she remembered seeing them going through the drive-thru and coming from the bathroom area on the night in question. Id. at pp. 198-199. Katie Fostick also testified that on at least one occasion when they were traveling south on Route 15 near the McDonald's in Lewisburg, Richie talked about having stopped at that McDonald's. N.T., January 28, 2004 (Volume 6), at p. 161.

Dulles Mary Anderson, an employee from the Sheraton Inn, corroborated Appellant's statements that he stopped at the Sheraton before checking into the Hampton Inn. Ms. Anderson testified she recognized Appellant and his son, and she told them to go to the Hampton Inn because there was a large ski group staying at the Sheraton. Id. at pp. 102-112.

Since there was evidence from other sources about the condition of the roads and the stops at McDonald's and the Sheraton Inn, the court believes Richie's videotaped statement was cumulative and Appellant was not prejudiced by its exclusion.

Appellant asserts the court erred in allowing the Commonwealth to present the testimony of Robert Greenleaf through a preliminary hearing transcript because Mr. Greenleaf was not unavailable and defense counsel did not have the opportunity to conduct a full and fair cross-examination of Mr. Greenleaf at the preliminary hearing. This court cannot agree.

Rule 804(b)(1) of the Pennsylvania Rules of Evidence permits the introduction of former testimony if the declarant is unavailable as a witness. Pa.R.E. 804(b)(1). That rule defines former testimony as "[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered … had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Pa.R.E. 804(b)(1). Unavailability includes situations where the declarant is unable to be present or to testify at the hearing because of a then existing physical illness or infirmity. Pa.R.E. 804(a)(4).

Mr. Greenleaf is a resident of Massachusetts. During trial, the Commonwealth received a phone call from Mr. Greenleaf, in which he indicated he could not travel to Pennsylvania to testify. The Commonwealth also received a faxed letter from Mr. Greenleaf's

physician confirming he could not travel to Pennsylvania. The court conducted in camera hearings with Mr. Greenleaf and Dr. Gartman to determine Mr. Greenleaf's availability. The court, counsel and the defendant were in chambers and the witnesses participated via separate telephone conference calls.

Mr. Greenleaf testified he had pain in his lower back and hips that was radiating into his left thigh. N.T., February 5, 2004 (Volume 12), at pp. 77-79. He didn't think he could drive or fly to Williamsport because he couldn't even walk to his mailbox, which was only 50 feet from his front door. Id. at p. 77. His doctors prescribed Tylenol with codeine and were referring him to a neurosurgeon to determine if surgery would be needed. Id. at pp.79-80. He also testified the pain was much worse on the day he testified than it had been earlier in the week. Id. at p. 81. Each step was now painful and he had to hold onto something to stabilize himself and keep from falling. Id. While he was testifying, the witness was sitting in a chair with a heating pad on his back. He indicated as long as he didn't move, he wasn't too bad, but he couldn't go to the airport and walk to the terminal, go through security or anything like that. Id. at p. 84.

Dr. Gartman testified Mr. Greenleaf was his patient. Mr. Greenleaf was complaining of back pain and left hip pain, with pain radiating into the front portion of the left thigh. N.T., February 5, 2004, at pp. 233-234. An MRI was performed on January 20, 2004, which showed herniated discs in the lumbar spine. Id. at p. 234. The MRI showed a disc protrusion at L3-L4, which could account for Mr. Greenleaf's symptoms, and a central and right-sided protrusion at L4-L5. Id. at pp. 234, 238. The protrusions could have been causing left L4 nerve root impingement and right L5 nerve root impingement. Id. at p. 238. Mr. Greenleaf was referred to a neurosurgeon to determine whether surgery would be necessary.

Id. at pp. 234-35. Dr. Gartman believed Mr. Greenleaf would be unable to travel by car or plane. Id. at p. 236.

Based on this testimony, the court found Mr. Greenleaf was unable to be present to testify at trial due to a physical illness or infirmity.

Defense counsel contends Mr. Greenleaf was available because he indicated that if a charter plane would pick him up at the municipal airport close to his home and fly him directly to Williamsport, he was willing to do so; it would just take him a while to walk to the witness stand, because he couldn't stand erect. N.T., February 5, 2004, at pp. 85-86. He also indicated he wouldn't necessarily enjoy it, because it would still be painful for him. Id. at p. 86. Defense counsel also noted that Dr. Gartman didn't see any contraindications from a medical standpoint to Mr. Greenleaf traveling in this manner. Id. at p. 239. The Commonwealth countered that it had already purchased a commercial airline ticket for Mr. Greenleaf and those types of arrangements could not be made. Id. at pp. 90, 93-94, 242. The Commonwealth argued such arrangements amounted to extraordinary lengths, which were not required before a witness could be found unavailable. Id. at p. 90. The court agreed with the Commonwealth. In Commonwealth v. Melson, 432 Pa.Super. 1, 637 A.2d 633 (1994), the Pennsylvania Superior Court stated: "The test for unavailability is whether the prosecution has made a good faith effort to produce the live testimony of the witness. The length to which the prosecution must go to produce the testimony is a question of reasonableness." Id. at 10, 637 A.2d at 638 (citations omitted). The Commonwealth made reasonable efforts to produce Mr. Greenleaf's testimony by providing him with commercial airline tickets. Mr. Greenleaf's back problems did not arise until after trial had already commenced. The court does not believe it would be practical or reasonable to require the Commonwealth to go to extraordinary efforts

and expense to make arrangements for a charter flight at the drop of a hat in the middle of a homicide trial. Furthermore, given Mr. Greenleaf's description of the pain he was experiencing and his inability to walk even short distances at his home, the court questions whether he could have endured even a charter flight.

Defense counsel also claims Mr. Greenleaf's preliminary hearing testimony should not have been admitted because counsel did not have a full and fair opportunity to cross-examine Mr. Greenleaf at the preliminary hearing. Specifically, defense counsel argued that he did not have a full opportunity for cross-examination because: (1) he did not have Mr. Greenleaf's report at the time of the preliminary hearing; (2) he did not have FBI Agent Musheno's report; and (3) he was precluded from asking Mr. Greenleaf about the differences between a Savage and a Winchester .22 Hornet rifle, the total number of Savage Model 23D .22 Hornet produced and whether Mr. Greenleaf was getting paid for his testimony.

The court rejected defense counsel's claims and found he had a full and fair opportunity to cross-examine Mr. Greenleaf for several reasons. First, although the defense did not have Mr. Greenleaf's report at the time of the preliminary hearing because it had not been authored yet, the report was not inconsistent with his preliminary hearing testimony. Second, the defense firearm's expert, who also testified at trial, was present at the preliminary hearing and was giving counsel advice on the questions to ask Mr. Greenleaf. Third, the Musheno report was indirect impeachment. Unlike Mr. Greenleaf, Mr. Musheno could not determine with the requisite degree of certainty whether the rifle in the photograph of Joe Kowalski was a Savage Model 23D .22 Hornet. Defense counsel brought out this fact during Mr. Musheno's trial testimony. N.T., February 3, 2004 (Volume 10), at p. 31. Therefore, defense counsel adequately impeached Mr. Greenleaf indirectly by eliciting this testimony

from Mr. Musheno. See Commonwealth v. Nelson, 652 A.2d 396, 399 (Pa.Super. 1995)(when the impeachment evidence is the statements of others as opposed to the witness's own prior inconsistent statement, one can adequately impeach the witness indirectly by calling other witnesses to contradict his testimony). Fourth, although the Magisterial District Judge sustained the Commonwealth's objection to a defense question regarding the differences between the front sight of a Winchester and a Savage rifle, the defense subsequently elicited testimony from Mr. Greenleaf on this topic. See Preliminary Hearing Transcript at pp. 277-80. Fifth, the defense never attempted to ask Mr. Greenleaf about the compensation he was receiving for his testimony or his age. Therefore, the court cannot find that the defense did not have the opportunity to inquire into these areas. Furthermore, the parties stipulated at trial that Mr. Greenleaf was 81 years old and he was paid $1250. N.T., February 17, 2004 (Volume 17), at pp. 99, 117.

The only area that defense counsel was precluded from inquiring was the total number of Savage Model 23D .22 Hornet caliber rifles sold by Savage Arms. On direct examination of Mr. Greenleaf at the preliminary hearing, the Commonwealth elicited testimony that 16,018 Model 23Ds sold between 1932 and 1947. Preliminary Hearing Transcript, at p. 274. The Commonwealth restricted its question to 1947 because that was the number (arguably the year) written on the back of the photograph of Joe Kowalski. On cross-examination, the defense sought to question Mr. Greenleaf about the total number of Model 23Ds produced and the total number sold. Mr. Greenleaf didn't know how many were produced. He went on to testify that the Model 23D was sold until 1948 or 1949, but he believed they were only made in the Utica plant, which shut down in 1946. It was not unusual for some guns to linger in the warehouse for several years after the last one was made, though.

Preliminary Hearing Transcript, at pp. 282-83. When defense counsel asked the total amount of sales, the Magisterial District Judge sustained an objection by the Commonwealth. During trial, however, the court permitted defense counsel to introduce, over the Commonwealth's objection, not only the total number of Model 23Ds sold, but also the number of Model 23As, Bs, and Cs. N.T., February 17, 2004 (Volume 17), at pp. 39-40.

Based on the foregoing, the court concluded Mr. Greenleaf was unavailable and defense counsel had a full and fair opportunity to cross-examine Mr. Greenleaf at the preliminary hearing, rendering his preliminary hearing testimony admissible at trial. See Commonwealth v. Wayne, 553 Pa. 614, 634-636, 720 A.2d 456, 465-66 (Pa. 1998); Commonwealth v. Elliott, 549 Pa. 132, 147-150, 700 A.2d 1243, 1250-52 (Pa. 1997); Commonwealth v. Nelson, 438 Pa. Super. 325, 329-32, 652 A.2d 396, 398-99 (Pa.Super. 1995). Moreover, the defense was not prejudiced by the few Magisterial District Judge's rulings that defense counsel argues limited his cross-examination, because information regarding Agent Musheno's report, the number of Model 23Ds sold and Mr. Greenleaf's age and compensation was presented at trial through the testimony of other witnesses and stipulations. Nelson, supra at 332 n.6, 652 A.2d at 399 n.6.

Appellant asserts the court erred in failing to honor the jurors request to hear all of the testimony reread concerning the hair (found on the sneaker) and by limiting that testimony to only the testimony of the Pennsylvania State Police troopers and by indicating to the jury that finding and preparing the testimony to be reread would take a great deal of time.

During deliberations, the jury wrote a note to the court, which stated: "hair testimony of finding the shoe till the path of the hair being analyzed." The court discussed the note with the parties. N.T., February 19, 2004 (Volume 19), at pp. 4-10. Everyone agreed the

note was ambiguous and neither the court nor the parties were quite sure what the jury was seeking. The parties agreed the court would draft a responsive note to the jury asking them to be more specific. The court drafted a note, which stated in relevant part: "We are unclear about your question concerning the hair. Can you clarify in a note what testimony you are requesting?" The court read the note to counsel and they agreed it could be submitted to the jury. The jury wrote back: "The hair – we want to know (any/all) testimony included this: From picking up the shoe to finding the hair in the shoe. The hair placed where? The hair sent where? The results of the hair." The court then discussed this note with counsel. Id. at pp. 11-18. Counsel for the Commonwealth did not think the jury understood what read back entailed. Id. at pp. 16-17. The court wanted to get a better handle on just what the jury felt would answer their question, because the court was not entirely clear what the jury wanted. Id. at pp. 11, 17. The court brought the jury into the courtroom and, in the presence of counsel and the defendant, the court asked, "Are you asking for read back of particular testimony concerning the hair?" Id. at p. 19. The foreperson responded, "Yeah, there was some questions regarding from the time the shoe was found from the hair was pulled from in the shoe, how the shoe got to wherever, how the hair was taken out, what it was placed in, where it was sent, kind of like the track of the hair that was found." Id. at pp. 19-20. The court then explained the read back process. Id. at pp. 20-21. Although the court indicated the read back could be potentially lengthy, it specifically told the jury that there was nothing wrong with doing read back and it would try to do anything that would be helpful to the jury. Id. The court just needed to pin down whether the jury was seeking read back and, if so, what witnesses they were asking to be read back. The court sent the jury back to the deliberating room to discuss these issues and to communicate their desires either through a written note or by going back into the courtroom.

Id. at pp. 22-23. The jury sent another note asking the following questions: "Who found the hair (Richie's) in the shoe? What was done with the hair when it was taken out of the shoe? What part of the shoe was the hair found in? Who examined it first? How many labs tested the hair? Are there reports we can read to all these questions or can they be answered?" As with the other notes, the court discussed this note with the parties. Before deciding whether any of the questions could be answered by agreement or stipulation, the court tried to determine what witness's testimony would be implicated by each question. Through discussion with counsel, the court determined that Trooper Holmes recovered the shoes, Trooper Kirkendall retrieved the hair, Sandra Singer from the State Police lab examined it microscopically and Shelley Johnson from Bode conducted DNA testing on the hair. The court then brought the jury into the courtroom and gave them this broad overview of the witnesses involved. Id. at pp. 42-44. The court then told the jury to submit a note if there was any witness from that overview that they wanted read back. The jury sent a note indicating they wanted Trooper Holmes' testimony on finding and transporting the sneakers and Trooper Kirkendall's statements on removal of the hair and placing the hair to go to the lab to be tested. With the agreement of counsel, the court sent a message to the jury through the tipstaves that it would take the court reporter 30-45 minutes to pull the notes of these witnesses and review them and as soon as that was completed the court would bring the jury into the courtroom for the read back of those witnesses. Id. at p. 47. Approximately an hour and a half later, the court brought the jury into the courtroom and the court reporter read back the testimony of Trooper Holmes and Trooper Kirkendall. Id. at pp. 48-50. The court confirmed from the foreperson that these two witnesses were the ones the jury wanted to hear and that the read back of these two witnesses answered their questions. Id. at pp. 49-50. The court also told

them if they changed their mind and/or needed anything further to let the court know. Id. at p. 50.

"[W]hether to grant a request from jurors for a reading of a portion of the trial testimony during deliberations for the purpose of refreshing its recollection rests within the discretion of the trial court." Commonwealth v. Johnson, 576 Pa. 23, 47-48, 838 A.2d 663, 677-78 (Pa. 2003); see also Commonwealth v. Small, 559 Pa. 423, 438-40, 741 A.2d 666, 674-675 (Pa. 1999); Commonwealth v. Peterman, 430 Pa. 627, 631, 244 A.2d 723, 726 (Pa. 1968). Within this discretion, the court may ask the jury to be more specific in its request. Commonwealth v. McBall, 316 Pa.Super. 493, 499, 463 A.2d 472, 475 (Pa.Super. 1983). If the court grants the request, the review of testimony must be conducted in open court in the presence of the parties and counsel; the court may not send out to the jury the testimony of any certain witness. Peterman, 430 Pa. at 631-32, 244 A.2d 726. If the review "does not place undue emphasis on one witness' testimony, no reversible error is committed." Id.

Here, the court conducted the review of the testimony in open court in the presence of the parties and counsel. The court read back the testimony of the two witnesses specified by the jury, i.e., Troopers Holmes and Kirkendall. The court did not read back the testimony of Sandra Singer or Shelly Johnson because the jury did not request those individuals. Once the jury was given the names of the witnesses who testified about the shoe, the jury only asked to hear read back of Trooper Holmes and Kirkendall.

The review of the testimony also did not place undue emphasis on any witness's testimony over others. This is not a situation where there were other witnesses who testified about finding the shoe or retrieving the hair. The court had the court reporter read back the entire testimony of Trooper Holmes and Trooper Kirkendall. The additional witnesses defense

counsel wanted read back dealt with the analysis of the hair, not finding the shoes and retrieving the hair. The jury's initial question focused on the path of the hair. Although one note mentioned the results, when the notes are taken as a whole, the jury's focus was on the path of the hair and not the results of the tests or analysis. Furthermore, when told the names of the potential witnesses for read back, the jury did not ask for Singer and Johnson. The court told the jury if they changed their mind or they needed anything else to let the court know. Although the jury subsequently asked for read back of Glen Kaufman's testimony and Trooper Holmes' testimony about his investigation in the Honeybrook area to connect the murder weapon to Joe Kowalski, the jury never asked for Sandra Singer or Shelly Johnson.

Defense counsel argued that the court discouraged the jury from hearing all the read back that it wanted by explaining the read back process and telling them that it could be lengthy and by requesting clarifications of their notes. The court cannot agree. The court merely explained the read back process and that it was not instantaneous. The court told the jury there was nothing wrong with doing read back and the court would try to do anything the jury thought would be helpful to it. N.T., February 19, 2004 (Volume 19) at pp. 20-21. The court does not believe its statements that read back could be potentially lengthy discouraged the jury from asking for read back. Not only did the jury ask for the specific witnesses it wanted read back on this issue, the jury subsequently asked for read back of Glen Kaufman's testimony and Trooper Holmes' testimony on other issues.

Appellant asserts the court erred in denying his post sentence motion. Appellant raised four issues in his post sentence motion. The first issue appellant raised was he was entitled to a new trial because the discharged alternate jurors were signaling a member of the jury during one or more of the times the jury was brought into the courtroom after

deliberations began to answer the jury's questions or to conduct read back.[33] Defense counsel called four witnesses in support of this issue: (1) Ronald Kaufman, Appellant's brother-in-law; (2) Susan Kaufman, Appellant's sister; (3) Romaine Lepori, Appellant's other sister; and (4) George Lepley, one of Appellant's co-counsel. Although defense counsel subpoenaed most, if not all, of the jurors and spoke to them prior to the start of the hearing, defense counsel did not call any of the jurors or alternate jurors as witnesses. See N.T., July 8, 2004, at pp. 3-6.

Ronald Kaufman testified that he observed some of the alternate jurors making hand signals to the pregnant juror. Mr. Kaufman was seated behind Appellant and his counsel. N.T., July 8, 2004, at pp. 57-58. Some of the alternate jurors were seated in chairs at the rear of the courtroom. Id. at pp. 53-54. The pregnant juror was in the first row of the jury box in the front of the courtroom. Id. at pp. 53, 60. Mr. Kaufman testified he observed the tall, male alternate juror give a thumbs down signal to the pregnant juror and the pregnant juror laughed. Id. at pp. 53-54. Mr. Kaufman did not know to what the thumbs down was in reference. Id. at p. 58.

Susan Kaufman testified she observed the pregnant juror who was seated in the front row of the jury box, probably in the third seat. Id. at p. 63. Her attention was drawn to the pregnant juror because she kept focusing on the alternate jurors in the back of the room. Mrs. Kaufman did not observe anything from the three alternate jurors. Id. at p. 64. She did, however, state she observed the pregnant juror laughing and looking back behind the prosecution where the three alternate jurors were seated. Id. at p. 65.

33 The alternate jurors were dismissed immediately before the jury began deliberations, but some of the alternate jurors were in the audience in anticipation of a verdict when the jury came into the courtroom with questions.

Romaine Lepori testified her sister told her to look at the jury because the pregnant juror was focused on the back of the room. Id. at p. 68. She acknowledged there were a lot of people, though. Id. at p. 70. She stated the pregnant juror wasn't laughing out loud, but she was snickering a little. Id. at pp. 68-69.

George Lepley stated that either during read back or before that when the jury was entering the courtroom, he saw the pregnant juror in the front row looking towards the prosecution, smiling, and doing something with her hands, perhaps waving. Id. at p. 75. He looked at the members of the District Attorney's Office, but nobody was paying any attention to her. Id. He then looked to the back of the courtroom and saw two or three of the alternates sitting in the last row. Id. He saw the younger male alternate with facial hair lifting his hand or just putting his hand down. Id. The alternate juror was looking at the pregnant juror and smiling at her. Id. It seemed to Mr. Lepley that they were communicating in some way. Id. On cross-examination, Mr. Lepley testified he couldn't recall if he discussed this matter with the court in chambers or not. Id. at p. 76. He also admitted he did not make any motions for relief or anything like that.[34] Id.

To prevail on this issue, Appellant must show: (1) the existence of extraneous influences which might have affected the jury during their deliberations; and (2) a reasonable likelihood of prejudice. Carter v. U.S.Steel Corp., 529 Pa. 409, 604 A.2d 1010 (Pa. 1992);

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34 In fact, Mr. Lepley mentioned the alleged signaling during a conference in chambers on February 20, 2004. N.T., February 20, 2004 (Volume 20A), at pp. 4-5, 9-10. During the conference, he never indicated he had any personal knowledge of signaling. Mr. Lepley asked the court to halt deliberations until the individuals could be put on the stand and he could find out how accurate the information was. Id. at p. 9. The court indicated if Mr. Lepley had a witness with first-hand knowledge, the court would certainly listen to what he or she had to say so everyone could get a handle on whether there was a problem or not. Id. at p.10. Mr. Lepley claimed he could not follow up on that information. Id. at p.10. Although Mr. Rude, an attorney with the McNerney Page law firm, might not have been available for an immediate hearing, the court believes Appellant's sisters and brother-in-law were present in the courtroom and available to testify.

Commonwealth v. Messersmith, 860 A.2d 1078, 1085 (Pa.Super. 2004). "In determining the reasonable likelihood of prejudice, the trial judge should consider 1) whether the extraneous influence relates to a central issue in the case or merely involves a collateral issue; 2) whether the extraneous influence provided the jury with information they did not have before them at trial; and 3) whether the extraneous influence was emotional or inflammatory in nature." Carter, 529 Pa. at 421-422, 604 A.2d at 1016-1017.

The court did not believe Appellant met his burden of proof and ruled against him at the end of the hearing. N.T., July 8, 2004, at pp. 111-112. It was not clear exactly what occurred, as there were variations in the witnesses' testimonies. The courtroom was packed throughout the trial and the spectators remained in the courtroom while the jury was deliberating in anticipation of a verdict. The court was not convinced that any of the alleged conduct of the alternate juror or the pregnant juror was directed at the other. Mr. Lepley candidly testified that when he first observed the pregnant juror smiling and doing something with her hands he thought it was directed toward the prosecutors. Even if the court were to accept the defense testimony that either the pregnant juror and the alternate juror waved at each other or the alternate juror gave the pregnant juror a thumbs down signal, the court does not find this evidence sufficient to show a likelihood of prejudice. The witnesses did not know to what the thumbs down referred and defense counsel did not call as witnesses the individuals allegedly signaling each other. Defense counsel argued that the signaling was intended to induce the juror to cast a vote of guilty. This is pure speculation. The alleged signaling is ambiguous at best. It wasn't emotional or inflammatory and was certainly a collateral issue. Thus, the court found the evidence was insufficient to warrant a new trial. See Commonwealth v. Chester, 557 Pa. 358, 382-384, 733 A.2d 1242, 1255 (Pa. 1999)(tipstaff or deputy sheriff's

uninvited response "well there's only one decision to make" in response to juror's remark "I hope we can reach a decision today" in reference to the penalty phase of a capital case was ambiguous and not of such a nature that it could be said without hesitation that the speaker intended to influence a decision adverse to the appellant); Commonwealth v. Sero, 478 Pa. 440, 447-448, 387 A.2d 63, 66-67 (Pa. 1978)(juror's deposition testimony that another juror indicated her husband had spoken to appellant's brother who allegedly told him appellant was not a religious person but began studying the Bible after his wife's death not sufficient to warrant a new trial).

The second issue raised in Appellant's post sentence motion was that information regarding the vote of the jury contained in its note to the court that is was deadlocked was somehow forwarded to the District Attorney's Office but not to defense counsel and, as a result, the District Attorney argued for the following: continuing deliberations Thursday evening into the late night; keeping the jury at the courthouse and together for meals on Friday, February 20, 2004; and continuing deliberations without any breaks for the jury. Defense counsel did not present any evidence on this issue at the hearing on the post sentence motion. Defense counsel did, however, mention that they believed the District Attorney's Office knew the split of the jury's vote during a conference in chambers on February 20, 2004. N.T., February 20, 2004 (Volume 20-A), at pp. 4-6. The court offered to take testimony on this issue at that time, but Appellant's attorneys did not take advantage of this opportunity. Id. at pp. 10, 13.

The court did not provide this information to counsel for either side and, in fact, told counsel on the record that it would not tell them what the split was. N.T., February 19, 2004, at pp. 51-52. The court also told the jury that they shouldn't reveal the numerical break

down of where they stand in their deliberations. Id. at p. 58. Everyone was speculating about the split. N.T., February 20, 2004 (Volume 20A), at pp. 4-15. In fact, the information allegedly conveyed by an assistant district attorney to the defense was that the split was 11-1 or 10-1, not 10-2. Id. at pp. 4, 11-12.

The court does not recall the prosecuting attorneys asking for late night deliberations or no breaks for the jury. Even if the prosecution made such arguments, the court was guided by the jury's preferences, not the prosecutors' arguments. For example, when the jury sent the court a note that they wanted to have the Glen Kaufman testimony heard or read back, the court told the jury it could be ready to do that in 10-15 minutes or they could recess for the evening and the read back could be done in the morning. See N.T., February 19, 2004, at p. 62. The jury wanted to recess and the court honored that desire. Id. Similarly, on Friday, February 20, 2004, the court was going to make arrangements for the jury to eat dinner at the Genetti and asked them in a note to let the court know the time they wanted to go to dinner, but the jury responded that they did not want to go to the Genetti; they wanted to order in if they were still here. Therefore, contrary to defense counsel's assertions, it was the jury who wanted to stay at the courthouse for dinner on Friday.[35]

The third issue raised in Appellant's post sentence motion was the jury allegedly deliberated during what should have been a dinner break on Friday, February 20, 2004. Defense counsel did not present any evidence to support the allegations in the motion. Since there was no basis in the record, the court simply denied this aspect of the motion.

35 The court routinely has food brought to the courthouse at lunchtime for juries that are deliberating. That practice was utilized in this case, as it had been in every other case the court has had.

In the final issue in Appellant's post sentence motion, defense counsel asserted the Commonwealth committed a Brady violation in that the District Attorney's office had exculpatory information from Steven A. Smith prior to trial relating to the alleged murder weapon and did not furnish that information to defense counsel or Appellant.

Mr. Smith testified he had thrown away the gun, which the police found off of Sulphur Springs Road and used in the prosecution of the Appellant, in 1996 or 1997 when he was hunting deer out of season, because he saw the flashing lights of a police car and he believed it was headed his way. N.T., July 8, 2004, at pp. 25, 27, 30. Mr. Smith testified he sent letters to this effect to the state police or the District Attorney's office, to the public defenders office and to the court. The letter Mr. Smith wrote to the court was dated June 8, 2004. Id. at p. 17. The court forwarded copies of this letter to both the prosecution attorneys and defense counsel. Mr. Smith claimed he sent letters to the state police, District Attorney or Public Defender prior to the start of Appellant's trial in January 2004, but he couldn't give a date. Id. at pp. 19-22. Mr. Smith testified that he had a conversation about the rifle with Trooper Holmes prior to the start of trial. Id. at pp. 22-24, 41. Mr. Smith also stated he sent a letter to defense counsel before the trial began and he spoke to defense counsel or someone from their office somewhere around the same time that Trooper Holmes came and talked to him. Id. at pp. 38, 44. Generally, Mr. Smith did not know or could not remember dates or times events occurred. He indicated the serial numbers had been filed and tapped and the gun had been altered so that the grip and barrel were cut off and holes were cut in the end of the barrel. Id. at pp. 31-32. As far as the make or model of the gun, the only thing Mr. Smith could be sure of was that it was a 22. Id. at p. 33.

Trooper Holmes testified that he had a conversation with Mr. Smith on February 16, 2004. Id. at p. 82. He also testified that the first he, the state police or the district attorney's office knew about Mr. Smith's claims regarding the rifle was on February 15, 2004 when they received a copy of a letter Mr. Smith had sent to defense counsel. Id. at p. 83.

To establish a Brady violation, a defendant must show: (1) suppression by the prosecution (2) of evidence exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant. Commonwealth v. Robinson, 864 A.2d 460, 497 (Pa. 2005); Commonwealth v. Paddy, 569 Pa. 47, 64-65, 800 A.2d 294, 305 (Pa. 2002); Commonwealth v. McGill, 574 Pa. 574, 584, 832 A.2d 1014, 1019-1020 (Pa. 2003). "Because the purpose of the Brady rule is to ensure the defendant access to exculpatory evidence known only to the government, no Brady violation occurs if the evidence in question is available to the defense from nongovernmental sources or if the defendant knew, or with reasonable diligence could have known, of such evidence." Paddy, 569 Pa. at 65, 800 A.2d at 305 (citations omitted).

The court found no Brady violation in this case. Mr. Smith was not a good witness and the court did not find his testimony credible. Mr. Smith was combative on cross-examination. He didn't know or couldn't remember when he wrote the letters or spoke to Trooper Holmes. He couldn't remember to whom he spoke from the defense or when. He didn't know the make or model of the rifle. When interviewed by the police he did not remember the name of the person from whom he got the rifle. At the hearing he claimed he remembered the guy's first name was Herman, but he did not know his last name and told the prosecuting attorney, "That's for you guys to find out."

The court credited the testimony of Trooper Holmes that the prosecution did not know about Mr. Smith's allegations about the rifle until he received a copy of the letter Mr. Smith sent to defense counsel. N.T., July 8, 2004, at pp. 112-113. Since defense counsel had the information first, there clearly was no Brady violation. Paddy, supra.

The court also does not believe there is any prejudice to Appellant. To show prejudice, a defendant must show there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Commonwealth v. McGill, 574 Pa. 574, 584, 832 A.2d 1014, 1020 (Pa. 2003). Here, defense counsel knew about the evidence but did not call Mr. Smith as a witness. Defense counsel received the letter from Mr. Smith during trial. During a conference in chambers, the Commonwealth argued that the court should preclude Mr. Smith from testifying at trial because the defense did not have enough information to show that it was the same rifle. N.T., February 17, 2004, at pp. 104-106. The court indicated the evidence seemed to have some relevance and it was inclined to permit the testimony. Defense counsel never asked for a continuance or in any way indicated they were not prepared to call Mr. Smith. It appeared to the court that defense counsel simply chose not to call Mr. Smith. See N.T., February 17, 2004, at p. 131 (defense counsel indicated to Commonwealth that he was going to rest his case without calling Mr. Smith). Even if Mr. Smith had been called as a witness, the court does not think his testimony would have changed the outcome of this case, because the court believes the jury would not have found Mr. Smith's testimony credible.

Appellant alleges there was insufficient evidence to support the verdict and/or the verdict was against the weight of the evidence.

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. Commonwealth v. Davido, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. Murphy, 577 Pa. 275, 284, 844 A.2d 1228, 1233 (Pa. 2004); Commonwealth v. Ockenhouse, 562 Pa. 481, 490, 756 A.2d 1130, 1135 (Pa. 2000); Commonwealth v. May, 540 Pa. 237, 246-247, 656 A.2d 1335, 1340 (Pa. 1995). Circumstantial evidence can be as reliable and persuasive as eyewitness testimony and may be of sufficient quantity and quality to establish guilt beyond a reasonable doubt. Commonwealth v. Tedford, 523 Pa. 305, 322, 567 A.2d 610, 618 (Pa. 1989)(citations omitted). Circumstantial evidence alone is sufficient to convict one of a crime, including first-degree murder. Commonwealth v. Davido, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. May, 540 Pa. at 246, 656 A.2d at 1340; Commonwealth v. Gorby, 527 Pa. 98, 107, 588 A.2d 902, 906 (Pa. 1991).

In order to prove murder of the first degree, the Commonwealth must establish that: (1) a human being was unlawfully killed, (2) appellant did the killing and (3) the killing was done in an intentional, deliberate, and premeditated way. Commonwealth v. Davido, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. May, 540 Pa. 237, 246, 656 A.2d 1335, 1340 (Pa. 1995); Commonwealth v. Mitchell, 528 Pa. 546, 551, 599 A.2d 624, 626 (Pa. 1991).

The court does not believe there is any dispute that the evidence was sufficient to prove the first and third elements for first-degree murder. The evidence clearly established that a human being was unlawfully killed. Miriam Illes was found dead on the kitchen floor with a gunshot wound in her upper back. All the doors of her house were locked. There was a

bullet hole in the kitchen window. There is no question that someone shot Miriam Illes sniper style from outside of her home. Similarly, there was ample evidence to prove the killing was done in an intentional, deliberate and premeditated way. The killer walked through a culvert under Reed Street and along a wooded gully behind the victim's residence to position him 73 feet away with an unobstructed view through the kitchen window. The killer shot Miriam Illes in the upper back. Bullet fragments struck her heart and lungs, killing her within seconds to minutes. The killer then discarded a homemade silencer in a nearby tennis court. An intentional, deliberate and premeditated killing can be found where the evidence establishes the killer was lying in wait for his victim and/or he used a deadly weapon on a vital part of the victim's body. 18 Pa.C.S. §2502(d) (intentional killing defined as "killing by means of poison, or by lying in wait, or any other kind of willful, deliberate and premeditated killing."); see also Commonwealth v. Ockenhouse, 562 Pa. 481, 491, 756 A.2d 1130, 1135 (Pa. 2000).

Based on Appellant's assertions in paragraph 13 of his statement of matters complained of on appeal, the court believes the only element of first degree murder being challenged by Appellant is whether the evidence was sufficient to prove he was the killer. Although the evidence was circumstantial, the court believes it was sufficient for the jury to conclude that Appellant was the killer. The court has already set forth the facts in the light most favorable to the Commonwealth at the beginning of this opinion. Rather, than reiterate them in their entirety, the court will highlight some of the evidence in the following four categories: motive, means, opportunity, and consciousness of guilt.

Motive

The Commonwealth presented evidence to establish Miriam Illes was not a "wicked, racist one" as stated in the anonymous letters and that the person with motive to kill

her was Appellant. Like many other cases, the motive in this case was money and a desire to have a life without having to deal with an ex-spouse. In the spring of 1997, Appellant had a conversation with his friend and co-worker James Swann. Mr. Swann was going through a divorce and telling Appellant how much it was costing him in attorney fees and support. Appellant replied that if he were faced with those circumstances, he "would take his wife out." By March 1998, Appellant was involved in his own divorce proceedings. Miriam Illes withdrew $300,000, which was one-half of the total balance, from a joint bank account. Appellant was irate. By an order issued in August 1998, Appellant was directed to pay child support in the amount of $5,506 and spousal support in the amount of $7,216 and his income was subject to a wage attachment. In October 1998, Appellant wanted to wrap up the divorce, but felt Miriam and her attorney were dragging their feet just to collect spousal support for as long as possible. The parties could not resolve the distribution of the marital assets. Miriam Illes also was claiming a malpractice settlement worth hundreds of thousands of dollars was marital property. In November 1998, Miriam filed a contempt petition against Appellant. In December 1998, Appellant paid premiums to keep a $250,000 insurance policy on Miriam Illes in effect. On January 7, 1999, the parties again were before the family court hearing master on support issues. During this hearing, Appellant was annoyed and uncomfortable when being cross-examined about withdrawals from accounts and where certain monies had gone. Throughout the divorce, Appellant told friends and co-workers that Miriam was an evil woman, an evil bitch, a f---ing bitch and/or a wicked bitch to whom he was forced to give several hundred thousand dollars, that was making his life miserable and that he wished were dead or would go away. Within ten days of the last support hearing, Miriam Illes was murdered or, as Appellant would say, taken out. There also was evidence that, around the time

of the murder, Appellant was desirous of obtaining a new job and leaving the state of Pennsylvania. This would have been difficult for Appellant to do if his wife maintained custody over their son.

Within two days of the discovery of Miriam Illes' body, Appellant's divorce attorney sent a letter to the Lycoming County Domestic Relations Office to have the wage attachment removed and to get a refund of the support because Miriam Illes was dead. A couple of weeks thereafter, Appellant made a claim on the $250,000 life insurance policy.

Appellant stood to profit greatly from Miriam's death. He would no longer have to pay almost $13,000 per month in child and spousal support and, if her death could not be connected to him,[36] he would receive $250,000 in life insurance proceeds and would not be required to turn over any of the marital property to Miriam.[37]

Means

Appellant also had the means to kill Miriam Illes. The evidence presented by the Commonwealth linked Appellant to the gun, silencer and sneakers in this case. Off Sulphur Springs Road, which intersects with Route 15 south, the police recovered an altered Savage Model 23D .22 hornet caliber rifle and Reebok sneakers with a tread pattern matching footprints at the scene. There was a bullet still in the rifle. This bullet was compared to the bullet fragments from Miriam Illes' body. The bullet found in the rifle was analytically indistinguishable from the bullet fragments. The Savage Model 23D is rare. Savage ceased manufacturing Model 23Ds in the late 1940s and only sold about 17,000 of them. A

36 As Miriam's killer, the Slayer's Act would preclude Appellant from recovering the insurance proceeds and would permit Miriam Illes' estate to pursue equitable distribution of the marital property. 20 Pa.C.S. §8802; Drumheller v. Marcello, 516 Pa. 428, 532 A.2d 807 (1987).

37 Given the disparity between the parties' incomes and earning capacities, it is likely Miriam Illes would have received more than 50% of the marital assets. In fact, when discussing resolution of the distribution of marital

photograph from 1947 depicted Joe Kowalski, Appellant's uncle/biological father, holding a Savage Model 23D. The police also found a pamphlet for a scope mount that would fit a Savage Model 23D in Mr. Kowalski's residence. The pamphlet indicated the mounts for a Savage Model 23D would be number 15 and 16. The murder weapon had mounts numbered 15 and 16. Appellant also was the executor of Joe Kowalski's estate and had received guns from him during his lifetime. Appellant was a good shot and liked to work on guns. He had a workshop in the basement of his house with a drill press and woodworking tools. The police found a barrel of a gun that Appellant had cut off and attempted to drill.

The Reebok sneakers were found in the same general area off Sulphur Springs Road. The tread pattern matched the footprints at the scene of the crime. The police found hairs and fibers on the sneakers. Mitochondrial DNA testing was performed on a hair found in the tongue area of the sneaker. This hair had the same mitochondrial DNA as Richie Illes.

The silencer was found on a tennis court behind Miriam's house. Footprints that matched the Reebok sneakers lead up to the locked fence surrounding the tennis court. The silencer fits perfectly on the rifle found off Sulphur Springs Road. The rifle has a screw on the barrel that fits into the j-channel of the silencer. The silencer was made from PVC pipe, PVC end caps, wire, foam and acoustical tile. During the searches of Appellant's properties, the police found PVC pipe and end caps, wire, foam and crushed acoustical tile. They sent these materials to the FBI lab for comparison and they were consistent or analytically indistinguishable. Michael Smith testified it would be unusual for the wire to match if it were not from a common source. Mr. Smith stated: "…the essential thing to remember here is that many compositions are possible so that the chances of randomly selecting two totally unrelated

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assets, Appellant's attorney suggested Miriam receive 55% of the marital assets.

heats of material whose compositions match is actually very small." N.T., February 4, 2004 (Volume 11) at p. 153. When Mr. Smith was asked whether a neighbor of Appellant or someone living 100 miles away could have purchased wire from the same source as the wire used in the silencer, he conceded it was possible but would be a "remarkable coincidence." Id. at p. 177.

During the searches, the police also seized a set of drill bits. Several drill bits were missing from Appellant's set. Detective Lanny Reed obtained a complete set of drill bits to determine which bits Appellant was missing. Several of the drill bits Appellant was missing were the size of the holes drilled in the silencer and one of the holes drilled in the barrel of the gun.

Opportunity

Appellant also had the opportunity to kill Miriam. The week prior to the murder, Appellant took vacation time from work. His girlfriend Katie was in Kansas visiting her family. Although Appellant had custody of Richie that weekend, he purchased walkie-talkies on the day of the murder and, when Katie mentioned Richie had cut his own hair, Appellant claimed Miriam's family cut it to have it drug tested and said he had given Richie something to help him sleep, because he was upset about his mother's death.

Consciousness of Guilt

The Commonwealth also presented evidence to show Appellant's consciousness of guilt and other evidence that tended to show Appellant was guilty. Appellant received information from his attorney about which countries had extradition treaties with the United States and he possessed a book entitled How to Hide Your Assets and Disappear. He made a statement while incarcerated to the effect "I'm glad I got the bitch" or "I'm glad the bitch got

it." N.T., February 4, 2004 (Volume 12), at pp. 100-101. He had a manuscript he was authoring on his computer entitled "Heart Shot, Murder of a Doctor's Wife," which described the murder in this case. He possessed a book entitled "They Write Their Own Sentences," which dealt with handwriting analysis. The book contains a scenario similar to this case and notes that pencil is chemically inert and block printing is more difficult to identify the author than cursive handwriting. The anonymous letters sent to defense counsel in this case were written in pencil and block printing. There were also stylistic and/or linguistic similarities between the anonymous letters and Appellant's known writings. On the day Miriam's body was found, Appellant asked the police if it was a murder or a robbery and what evidence the police found before he knew anything about the cause of her death. He reported an alleged break-in at his residence, but would not permit the police to investigate it. Then the writer of the anonymous letter states he had access to Appellant's house. He makes a statement to the effect that he hopes the murderer writes another anonymous letter and shortly thereafter his attorney receives the second letter. He made a statement to Katie that he hoped the police would find DNA evidence on the anonymous letters so he would be exonerated. A hair was found in the glue on the flap of one of the envelopes in which an anonymous letter was sent. He wouldn't let the police speak to Richie unless unreasonable conditions were met such as the police had to provide him with a copy of the questions in advance.

From all the evidence the Commonwealth presented in this case and the reasonable inferences to be drawn from the evidence, the jury could conclude beyond a reasonable doubt that Appellant was the individual who murdered Miriam Illes. While the evidence against Appellant was circumstantial, the volume of circumstantial evidence presented by the Commonwealth was overwhelming in pointing to the perpetrator of the crime

being Appellant. No one else had any motive or reason to kill Miriam Illes. The jury could have appropriately concluded that Appellant's actions after the murder significantly corroborated the evidence, which showed Appellant committed this heinous crime. The jury had ample evidence to connect the murder weapon and the silencer to Appellant. The jury could have reasonably concluded that Appellant, fearing that the state police were closing in on him after the searches of his residences, wrote the anonymous letters to try and divert suspicion away from him. The circumstantial evidence, all pointing to Appellant, can only be explained away as numerous extraordinary coincidences if not accurately proving the guilt of Appellant. In sum, the state police, through extraordinary investigative efforts, amassed a significant circumstantial evidence case proving the guilt of Appellant.

Appellant also asserts that the verdict was against the weight of the evidence. This issue was not raised in the trial court; therefore it is waived. Pa.R.Cr.P. 607(A) and comment; Commonwealth v. Gillard, 850 A.2d 1273, 1277 (Pa.Super. 2004); Commonwealth v. Washington, 825 A.2d 1264, 1265-1266 (Pa.Super. 2003).

Even if this issue had been properly preserved, the court does not believe it would entitle Appellant to relief. An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. Commonwealth v. Sullivan, 820 A.2d 795, 805-806 (Pa.Super. 2003). A new trial is awarded only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. Id. at 806. The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. Id. Unlike a sufficiency claim, the trial court is under no obligation to view the evidence in the light most favorable to the Commonwealth. Similarly, the issue is not whether there was

evidence to support the verdict, but rather whether, notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or give them equal weight with all the facts is to deny justice. Id.

The jury's verdict in this case did not shock the court's sense of justice. Quite frankly, given the amount of circumstantial evidence in this case, the jury's verdict is not at all surprising.

Based on the alphabetical list contained in paragraph 14 of Appellant's statement of matters on appeal, it appears Appellant believes the evidence was insufficient and/or the verdict was against the weight of the evidence because there was DNA evidence that did not match Appellant and because he offered an alibi defense. There were reasons, however, for the jury to reject or discount this evidence. There were facts and circumstances from which the jury could conclude that the DNA evidence that did not match Appellant or Richie Illes was planted. The police found a cigarette butt near a tree behind Miriam's residence (the location where the shot was fired), a hair in the silencer, and a hair in the glue on the envelope of one of the anonymous letters. There was no evidence that the cigarette was smoked at the scene. The police did not find any ashes near the tree or burn marks in that area to show the cigarette had been put out. It wouldn't make sense for the shooter to smoke at the scene because it would make it more likely that he would be discovered. It would also be relatively easy to obtain a cigarette butt to plant at the scene. Many public buildings are smoke free and the only places people can smoke are designated areas outside the building. The DNA from the cigarette butt also did not match any other DNA in this case. One person cannot have 3 or 4 different DNA patterns. Each item that was tested for DNA had different DNA from the

other items. This reasoning also supports an inference that the hairs from the silencer and envelope were also planted.

In addition, the silencer was left at the scene where eventually it was sure to be found. Why would the shooter leave the silencer at the scene, but discard the sneakers and the rifle off Sulphur Springs Road? One explanation for this anomaly is that the murderer planted DNA evidence to confuse the police and try to create reasonable doubt for any trial. Furthermore, both the anonymous letters and Appellant's manuscript either expressly state or infer that the shooter was smarter than the police and the shooter was trying to mislead them.

The circumstances surrounding the hair on the envelope of one of the anonymous letters were also unusual. The envelope was wiped down for fingerprints and the envelope and stamp were wetted and not licked, but a hair was stuck in the glue of the envelope as if it had been placed there. Around the time the anonymous letters were received, Appellant stated to Katie his hope that the police would find DNA evidence from the letters that would exonerate him.

There were also reasons the alibi evidence was not weightier than the evidence the Commonwealth presented to support conviction. First, the only alibi evidence regarding the time Appellant left the Williamsport area was his own taped statement to the police. Appellant claimed he left his residence around 9:30 p.m. No one could verify this statement. When considered with the rest of his statement, Appellant's time line did not make sense. Appellant claimed the roads were bad and he called his sister and told her he was going to stop and get a hotel room. It stopped precipitating, however, before noon. Also, according to Appellant's version it took him approximately two hours to travel from his residence to the Selinsgrove bypass, but only an about an hour to travel from there to Union Deposit Road in

the Harrisburg area. The total trip took about 3 hours; this trip normally takes1 ½ - 2 hours. Appellant drives a Jeep Cherokee sport utility vehicle. Appellant's sister and his friend Duane Van Fleet both testified that bad weather doesn't affect the speed at which Appellant drives. Furthermore, Appellant could have stopped at hotels in Shamokin Dam instead of traveling another hour to the Harrisburg area. Second, although the phone records showed Appellant called his sister at 11:24 p.m., no one could verify where Appellant was at that time. He could have been anywhere between Allenwood and the Selinsgrove bypass. Third, the McDonald's witnesses either could not confirm the date or the time or their testimony differed from their previous statements. Mr. Bird could only testify that Appellant looked familiar. He did not know where he had seen him or the date or time. Ms. McGruger could only state that she remembered seeing Richie leaving McDonald's and how cute he was. She also could not say the date she saw him or the time. At trial, Ms. Newton claimed she saw Appellant and Richie come through the drive-thru and then she saw them near the restroom shortly after 11 p.m. when her parents came to pick her up. In her statements to the police prior to trial, however, Ms. Newton initially said she thought she recognized Appellant and his son from the Williamsport Hospital. When the police asked her if she had seen them in McDonald's, she said she saw Appellant go through the drive-thru around 7:00 p.m. and she remembered it because he was the customer who said inappropriate things. She did not mention seeing Appellant or his son near the rest room. Business was slow due to the weather and employment records from McDonald's showed Ms. Newton clocked out around 8 p.m. Ms. Newton claimed, however, she could not reach her parents to get a ride home, so she waited at McDonald's until 11 p.m. for them to pick her up when she was supposed to get off work. The assistant manager, however, testified that she was scheduled to work until close, which on that

night was midnight. Fourth, the Commonwealth presented evidence that Appellant could have committed the murder and stopped at McDonald's before the 11:24 phone call to his sister. Trooper Holmes' third time study was performed on January 15, 2004. The weather conditions were similar to the day of the murder. He started at 10:35 p.m. where the shooter was behind Miriam's residence. He discarded the silencer, walked back to his vehicle, drove out Sulphur Springs Road and discarded the weapon and sneakers and drove toward Lewisburg. He reached McDonald's by 11:12 p.m.

In light of the foregoing discussion, the court does not believe the DNA evidence or the alibi evidence was of greater weight than the evidence presented by the Commonwealth in support of the verdict in this case.

Appellant contends the court erred in not permitting him to introduce evidence regarding a threat by Miriam Illes to harm him in 1998. The court does not recall precluding the defense from presenting this evidence at trial and could not find such a ruling in the record. The only reference to this evidence that the court could find in the record was an argument regarding discovery of the police report pertaining to the alleged threat. After listening to arguments from both sides, the court ruled the police report should be disclosed to defense counsel. N.T., February 9, 2004 (Volume 13), at pp. 124-128.

If the court precluded this evidence as alleged by Appellant, it probably did so on hearsay and relevancy grounds. Although the court does not have a clear recollection of the evidence regarding the alleged threat, the court believes only Appellant and Mrs. Illes were present during this alleged incident. To get this evidence introduced without a hearsay problem, Appellant would need to present this evidence through his own testimony. Appellant, however, chose not to testify at trial.

The court also notes the defense in this case was an alibi, not self-defense. The victim's statements concerning Appellant were offered to show the contentiousness of the divorce proceedings and the ill will between Appellant and the victim. The evidence in question would only serve to buttress the Commonwealth's contentions that there was some animosity between Appellant and the victim and negate the defense argument that this was just another routine divorce case.

Appellant next asserts the court erred by permitting FBI supervising special agent James Fitzgerald to testify regarding textual analysis of the anonymous letters and Appellant's handwriting. In his sixth supplemental omnibus pretrial motion Appellant sought to preclude Agent Fitzgerald's testimony. At the argument on Appellant's motion, both counsel agreed there were no Pennsylvania criminal cases directly on point, but the Commonwealth submitted a federal case from New Jersey, United States v. Van Wyk, 83 F.Supp.2d 515 (D.N.J. 2000), affirmed 262 F.3d 405 (3rd Cir. 2001), cert denied 534 U.S. 826, 122 S.Ct. 66, 151 L.Ed.2d 33. In Van Wyk, the court permitted Agent Fitzgerald to testify regarding the comparisons of markers between the known writings of the defendant and the threatening communications sent to the victims, but precluded him from testifying to his conclusion as to the identity of the author of the unknown writings. This court found the Van Wyk approach persuasive and permitted Agent Fitzgerald to testify regarding the comparisons between Appellant's known writings and the anonymous letters. The court, however, precluded Agent Fitzgerald from stating any conclusion or opinion that Appellant was the author of the anonymous letters.

Although the court did not find any criminal cases where the Pennsylvania appellate courts addressed this issue, the Pennsylvania Supreme Court has permitted the

introduction of testimony regarding the stylistic or linguistic characteristics of writings in estate cases. See Young's Estate, 347 Pa. 457, 32 A.2d 901 (1943)(evidence that testatrix's common habit when signing her name was to preface her signature with the word "Mrs." was admissible evidence to support contention that document signed without that title was a forgery). In Estate of Ciaffoni, 498 Pa. 267, 446 A.2d 225 (Pa. 1982), the Pennsylvania Supreme Court found the lower court erred in precluding challengers to a will from introducing other wills by the same scrivener to show certain pages in the decedent's will were fraudulently substituted. The challengers sought to show elements of style common in the scrivener's other wills that were absent from the decedent's will. Although the Court did not expressly state expert testimony was admissible on this subject, it stated the following: "The exclusion of these comparison wills resulted in the disallowance of expert testimony which would have explained the significance of the stylistic deviations." 347 Pa. at 269, 446 A.2d at 226.

The court also notes that other jurisdictions have permitted the introduction of testimony regarding stylistic or linguistic comparisons. See United States v. Clifford, 704 F.2d 86 (3rd Cir. 1983)(Third Circuit Court held it was error for the district court to exclude correspondence offered to show stylistic similarities between correspondence and threatening letters); State v. Hauptmann, 115 N.J.L. 412,432-435, 180 A. 809, 822-823 (N.J. 1935)(comparison of ransom notes to genuine writings of the defendant admissible evidence tending to prove the defendant's guilt in Lindbergh kidnapping and murder case); In re Estate of Ridley, 151 Misc. 474, 273 N.Y.S. 48 (1934)(baptismal and death certificates purportedly signed by clergyman found to be forgeries based, in part, on evidence of stylistic differences); Josephs v. Briant, 115 Ark. 538, 548-549, 172 S.W. 1002, 1005 (1914)(lay witnesses permitted

to testify regarding the peculiar way individual spelled words and arranged them to prove letters were written by the individual).

The court also gave the following cautionary instruction to the jury immediately before Agent Fitzgerald testified:

> The term expert is not meant by the Court to automatically give credibility to a witness, that's going to be up to you. You as the jury determine credibility and who to believe and what's correct and what's right. As with any other witness, expert or non-expert, you will need to determine what credibility and weight you will give to an expert witness. You're not bound to accept the credibility or opinion of an expert witness.
>
> Again, as with any witness give the testimony of an expert witness whatever credibility and weight you feel it deserves.

N.T., January 29, 2004 (Volume 7), at pp. 22-23.

Finally, the court notes Agent Fitzgerald's testimony about the similarities in Appellant's prior writings and the anonymous letters was not overly technical so that the jury could not freely evaluate it and decide what import and weight it would have in their review of the case.

Given the court's instruction to the jury and the fact that Agent Fitzgerald was precluded from offering the conclusion or opinion that Appellant was the author of the anonymous letters, the court does not believe it was error to admit Agent Fitzgerald's testimony.

Appellant next contends the court erred in allowing the testimony of Diana Wright, an FBI expert in the field of comparative bullet lead analysis (CBLA). Appellant asserts CBLA was called into question in a study conducted by the National Research Council and defense counsel was not permitted to cross-examine Ms. Wright on the study because it

was released after she testified. Appellant also claims the court erroneously prohibited defense counsel from cross-examining Ms. Wright about another agent who had been indicted for falsely testifying in this area of expertise to conclusions similar to the ones Ms. Wright reached.

In his Omnibus Pre-trial Motion, Appellant sought to preclude the testimony of Diana Grant Wright pursuant to the Frye test. The court rejected counsel's arguments because: (1) this scientific evidence was not **novel**; (2) the alleged debate in the scientific community regarding CBLA pertained to the conclusions to be drawn from this analysis and not to the equipment or methodology used to test the samples; and (3) Appellant's contentions appeared to be issues for the weight or credibility of the evidence, not its admissibility. See Opinion and Order dated December 17, 2003, at pp. 9-11.

The FBI commissioned a study of CBLA through the National Research Council, which was published by the National Academy of Sciences. The study was titled "Forensic Analysis: Weighing Bullet Lead Evidence" (hereinafter NAS study). In late 2003, articles were reporting that the release of the study's findings was imminent. The court hoped the study would be released before trial commenced in this case, but it was not.

Ms. Wright testified at trial on February 4, 2004. She compared the bullet fragments from the victim's body with the bullet found in the Savage Model 23D .22 Hornet rifle. Ms. Wright determined that they were physically and chemically analytically indistinguishable, and she concluded that they were consistent with having originated from the same melt of lead. N.T., February 4, 2004 (Volume 11), at p. 17.

On cross-examination Ms. Wright acknowledged the following: (1) she could not conclude the bullets came from the same box; (2) a statement that analytically

indistinguishable bullets came from the same box would be inaccurate; and (3) she would not testify that something came from the same box. N.T., February 4, 2004 (Volume 11), at pp. 26-27. When asked if her testimony could be interpreted as the bullets may not have come from the same melt, Ms. Wright indicated they could have come from different melts, but the data she collected doesn't support that. Id. at p. 35. She explained that she wasn't definitely saying the bullets came from the same melt, but they were consistent with having come from the same melt more than they were likely to have from different melts. Id. She also indicated that even if they came from the same melt, hundreds of thousands of bullets could have the same composition and physical characteristics. Id. at p. 37.

On or about February 10, 2004, the NAS study was publicly issued. See "Critical report on bullet analysis issued" 10 February 2004. Retrieved 11 February 2004<http://msnbc.msn.com/id/4231717/>. On February 11, 2004, court staff retrieved a "pre-publication" copy of the NAS study from the Internet and provided copies to counsel for the prosecution and the defense. "Forensic Analysis: Weighing Bullet Lead Evidence," National Academy of Sciences (2004). Retrieved 11 February 2004< http://books.nap.edu/books/0309090792/html>. At the end of the day, the court held a conference with counsel. N.T., February 11, 2004 (Volume 15) at pp. 222-236. Defense counsel argued that Ms. Wright's testimony did not comport with the recommendations of the NAS study and requested that the court not be in session on Friday, February 13, 2004 so defense counsel could travel to Monroeville, Pennsylvania to consult with their expert. Counsel for the prosecution argued that Ms. Wright's testimony was consistent with the recommendations contained in the NAS study. Although the court reviewed its notes and believed Ms. Wright's testimony was generally consistent with the recommendations, the court

had the court reporter transcribe Ms. Wright's testimony in light of the dispute between the parties over her testimony. The court also did not conduct the trial on Friday, February 13, 2004, so defense counsel could consult with their expert as requested. See N.T., February 12, 2004 (Volume 16), at pp. 223-224. Defense counsel did not ask for any relief other than an opportunity to consult with their expert. Ultimately, defense counsel neither called their expert on CBLA nor attempted to recall Ms. Wright to question her about the NAS study. Perhaps that is because the NAS study does not eviscerate CBLA as asserted by Appellant.

Although the NAS study makes recommendations to make CBLA better and to make the results more understandable to the jury, it does not indicate the science is flawed or that it should not be introduced into evidence in a court of law. To the contrary, the NAS study concludes that in many cases such analysis "is a reasonably accurate way of determining whether two bullets come from the same compositionally indistinguishable volume of lead." The NAS study also finds that "the analytical technology used by the FBI – inductively coupled plasma-optical emission spectroscopy (ICP-OES)—is appropriate and is currently the best available technology for the application." The court also notes the Pennsylvania Supreme Court recently rejected a similar claim brought under the Post Conviction Relief Act (PCRA). See Commonwealth v. Fisher, 870 A.2d 864 (Pa. 2005). In Fisher, the petitioner claimed the NAS study was newly discovered evidence that showed comparative bullet lead analysis was imprecise and flawed and FBI Agent John Riley's testimony that analytically indistinguishable bullets typically come from the same box or from a box manufactured and packaged on the same date was unreliable. Based on the same language quoted by this court, the Pennsylvania Supreme Court rejected the petitioner's claims and found that because the NAS study did not

support the petitioner's assertions, it could not be used to satisfy the "newly discovered evidence" exception to the timeliness requirements of the PCRA. Id. at 870.

The court also believes Ms. Wright's testimony generally was consistent with the recommendations of the NAS study. For example, the NAS study indicates the data does not support any statement that a crime bullet came from, or is likely to have come from, a particular box of ammunition. On cross-examination, Ms. Wright testified a statement that analytically indistinguishable bullets came from the same box would be inaccurate and she would not testify that something came from the same box. N.T., February 4, 2004 (Volume 11) at pp. 26-27. Similarly, the NAS study finds that CBLA "is sufficiently reliable to support testimony that bullets from the same compositionally indistinguishable volume of lead (CIVL) are more likely to be analytically indistinguishable than bullets from different CIVLs." In her testimony, Ms. Wright stated the bullet fragments found in the victim's body were analytically indistinguishable from the bullet found in the Savage 23D Hornet rifle and they are consistent with having come from the same melt of lead. On cross-examination, she acknowledged it was possible they could have come from different melts, but it was more likely that they came from the same melt than from different melts. Id. at p. 35. Although the NAS study recommends acknowledging this possibility in the laboratory report and in direct examination, Ms. Wright acknowledged this possibility in her testimony, albeit on cross-examination. Furthermore, despite the study not being publicly released until on or about February 10, 2004, defense counsel had sufficient information (presumably from his expert and leaks about the NAS study) that he cross-examined Ms. Wright on these topics and other topics contained in the reports such as T-tests. Therefore, Appellant was not prejudiced. In light of the foregoing, the

court finds the NAS study does not render Ms. Wright's testimony unreliable nor does it require that Appellant receive a new trial.

The court also rejects Appellant's contention that counsel should have been permitted to cross-examine Ms. Wright about another FBI agent, Kathleen Lundy, who had been indicted for falsely testifying in this area of expertise. During cross-examination defense counsel asked Ms. Wright if she was aware that FBI examiners in the past had testified that a melt of bullets would be no larger than 280,000 bullets. N.T., February 11, 2004 (Volume 11), at p. 27. The prosecutor objected to what other persons may or may not have testified to. Id. The court suggested asking the witness if she agreed with that statistic. Id. When asked that question, Ms. Wright replied she needed to know the caliber and weight of the bullet before she could answer that question. Id. at p. 28. Defense counsel then asked Ms. Wright if she knew FBI examiner Kathleen Lundy. Id. After she stated she did, counsel asked if she knew of Ms. Lundy's testimony in a case in Kentucky where she testified that a melt of bullets would be no larger that 280,000 bullets. Id. Again, the prosecutor objected and questioned the relevance of Ms. Lundy's alleged former testimony to Ms. Wright's testimony. Id. The court sustained the objection because defense counsel was talking about a different witness, but indicated it would permit defense counsel to question Ms. Wright whether she believed 280,000 bullets could come from a melt. Id. Defense counsel, however, moved on and began questioning Ms. Wright about the article co-authored by William Tobin. Id. at pp. 28-29.

The court did not see how Ms. Lundy's testimony in a case from Kentucky was relevant to Appellant's case, and defense counsel failed to offer any explanation of how it would be relevant. The court believes Ms. Lundy may have been indicted for perjury or false swearing in connection with testimony she provided at a pre-trial hearing in a Kentucky case.

The court also believes Ms. Lundy may have admitted her testimony that a bullet company melted its own lead until 1996 was false and the company actually ceased melting its own lead in 1986. See "Expert Admitted to Perjury About Bullet-Lead Tests" Retrieved 23 April 2003. http://www.criminaljustice.org/public.nsf/Enews/2002e73?opendocument. If Ms. Lundy were a witness for the prosecution in this case, a conviction for perjury or false swearing would be admissible to impeach her credibility since it involves a crime of dishonesty within the last 10 years. The court, however, is not aware of any case law that would permit a witness to be impeached with the conviction of a co-worker or former co-worker. Since Ms. Lundy was not a witness and there was no testimony in this case regarding the date when any bullet company ceased melting its own lead, Ms. Lundy's indictment and/or conviction for false swearing was not relevant to this case.

Appellant next asserts the court erred in failing to grant a change of venue. The court cannot agree.

The determination of whether to grant a change of venue rests within the discretion of trial court and will not be disturbed on appeal absent an abuse of that discretion. Commonwealth v. Tharp, 574 Pa. 202, 218-219, 830 A.2d 519, 528-529 (Pa. 2003); Commonwealth v. Rucci, 543 Pa. 261, 283, 670 A.2d 1129, 1140 (Pa. 1996).

> Ordinarily, a defendant is not entitled to a change of venue unless he or she can demonstrate that the pretrial publicity resulted in actual prejudice that prevented the impaneling of an impartial jury. Prejudice will be presumed, however, if the defendant is able to show that he pretrial publicity: (1) was sensational, inflammatory, and slanted toward conviction rather than factual and objective; (2) revealed the defendant's prior criminal record, if any, or referred to confessions, admissions or reenactments of the crime by the defendant; or (3) derived from official police or prosecutorial reports. Even if the defendant proves the existence of one or more of these circumstances, a change of venue is not warranted unless the defendant also demonstrates the pretrial publicity was so extensive, sustained and pervasive that the community must be deemed

> to have been saturated with it, and that there was insufficient time between the publicity and the trial for any prejudice to have dissipated.

Tharp, 574 Pa. at 219, 830 A.2d at 529 (citations omitted).

Defense counsel requested a change of venue in the first omnibus pretrial motion. At the time scheduled for the hearing on the motion, counsel agreed to defer this issue to a time closer to trial. Defense counsel further indicated that if there weren't excessive pretrial publicity near the time of jury selection, they would attempt to select a jury in Lycoming County. See Opinion and Order dated December 17, 2003 at 18-19. Jury selection was scheduled for January 8, 2004. A Lycoming County jury was selected in approximately 2½ days. To the court's recollection, at no time prior to or during jury selection did counsel renew their request for a change of venue. Counsel also did not create any record to show the extent any publicity, let alone that it was of such a nature that a fair and impartial jury could not be selected in Lycoming County. Counsel also has not requested a transcript of the jury selection. See Pa.R.J.A. 5000.2(g)("The voir dire examination of jurors … shall be recorded, but not transcribed, unless otherwise ordered."). Since Appellant has not demonstrated actual prejudice or the nature and extent of any pretrial publicity, the court appropriately did not grant a change of venue in this case.

Appellant asserts the court erred in prohibiting Susan Kaufman from testifying that Richie Illes indicated that Appellant and he stopped at McDonald's and that he had a bowel movement at McDonald's, while he was being driven by Appellant from the Williamsport are to the Harrisburg area on the evening of the incident. Counsel argued this issue on February 12, 2004. N.T., February 12, 2004 (Volume 16) at pp. 14-22. Defense counsel indicated Mrs. Kaufman would testify that during her phone conversation with

Appellant, which occurred at 11:24 p.m. on the night of the murder, she heard Richie talking in the background and he mentioned he had been in McDonald's and went poop. The Commonwealth objected on the basis of hearsay. The Commonwealth also argued Appellant had violated the sequestration order by telling Mrs. Kaufman in a telephone conversation a few days earlier that he would "walk" if he could prove that he stopped at McDonald's on the night in question. The Commonwealth noted Mrs. Kaufman previously gave statements to the police and indicated she heard Richie in the background, but never made reference to him talking about McDonald's or going to the bathroom. Defense counsel argued he was offering this evidence to show Richie was awake and alert.[38] The court replied the witness could testify she heard Richie's voice to show he was awake and alert. Defense counsel then argued it was a prior consistent statement with Appellant's taped interview introduced by the Commonwealth in its case in chief. The court noted it was a different person; the offer was Mrs. Kaufman was going to testify about Richie's statements, not Appellant's. The court found the statement was hearsay and sustained the Commonwealth's objection.

The Pennsylvania Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). The proffered evidence meets this definition. Hearsay is not admissible, except as provided by a rule prescribed by the Pennsylvania Supreme Court or a statute. Pa.R.E. 802.

38 It was the Commonwealth's theory that Appellant drugged Richie and left him in the car, but listened for him with walkie-talkies while he committed the murder.

Defense counsel argued the statement was consistent with Appellant's taped interview, which the Commonwealth introduced into evidence and it was consistent with Richie's taped statement. Pa.R.E 613(c), which governs prior consistent statements states:

> **(c) Evidence of Prior Consistent Statement of Witness.** Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:
>
> (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or
>
> (2) having made a prior inconsistent statement, which the witness has explained or denied, and the consistent statement supports the witness' denial or explanation.

This rule is clearly inapplicable to the proffered evidence. To be admissible, Richie would have had to testify during the trial that Appellant and he stopped at McDonald's and he went to the bathroom. Richie, however, did not remember doing that. Defense counsel argued it was consistent with Richie's taped statement. That statement, however, also was inadmissible hearsay. Defense counsel also argued the evidence was consistent with Appellant's statement to the police. Although Appellant may have made a similar statement, the statement at issue was Richie's statement, not Appellant's. Even if the statement to which Mrs. Kaufman would testify had been Appellant's, Rule 613(c) still would not be applicable because Appellant did not testify at trial, so the opposing party did not have an opportunity to cross-examine him about the statement. Since the statement met the definition of hearsay and the prior consistent statement exception to the hearsay ruled argued by defense counsel was not applicable, the court properly prohibited Mrs. Kaufman from testifying regarding statements she allegedly overheard Richie saying in the background while she was on the phone with Appellant.

Appellant claims the court erred in not instructing the jury regarding his alibi defense. This argument is utterly without merit. The court gave the following alibi instruction, which was almost a verbatim reading of Instruction 3.11 of the Pennsylvania Suggested Standard Criminal Jury Instructions:

> Obviously the Defendant cannot be guilty unless he was at the scene of the alleged crime. The defense here is as I have alluded to the defense of alibi. You should consider this evidence along with all the other evidence in the case in determining whether the Commonwealth has met its burden of proving beyond a reasonable doubt that the crime was committed and that the Defendant himself committed the crime.
>
> The Defendant's evidence that he was not present either by itself or together with other evidence may be sufficient to raise a reasonable doubt of his guilt in your mind. If you have a reasonable doubt of the Defendant's guilt you must find him not guilty. And the defense contends that the Defendant was not present at the scene of the crime, but rather at the time in question the Defendant was on a trip traveling with his son towards the Harrisburg area to visit with his family members.

N.T., February 18, 2004 (Volume 18), at pp. 238-239. Prior to giving this alibi instruction, the court also instructed the jury that Appellant was presumed innocent and he was not required to prove his innocence. Specifically, the court stated:

> Furthermore, the Defendant is presumed innocent throughout the entire trial and unless and until you conclude based on a careful and impartial consideration of all the evidence that the Commonwealth has proven him guilty beyond a reasonable doubt.
>
> It is not the Defendant's burden to prove that he is not guilty. It is not the Defendant's burden to prove that he's innocent. Instead, it is the Commonwealth hat always has the burden of proving each and every element of a crime beyond a reasonable doubt.
>
> A person who is accused of a crime is not required to present evidence or prove anything in his own defense.

N.T., February 18, 2004 (Volume 18) at pp. 217-218. The Pennsylvania Supreme Court has found virtually identical jury instructions proper. Commonwealth v. Begley, 566 Pa. 239, 277-

280, 780 A.2d 605, 628-629 (Pa. 2001); Commonwealth v. Ragan, 560 Pa. 106, 123-125, 743 A.2d 390, 398-399 (Pa. 1999).

Appellant next contends the court erred in not permitting Heather Burcher to testify that her husband was a Pennsylvania state police trooper who participated in the investigation of this case, and her husband suspected Ms. Burcher of having an affair with Appellant. This issue was discussed at a sidebar conference and then in chambers on February 11, 2004. N.T., February 11, 2004 (Volume 15), at pp. 99-102, 104-110. Defense counsel indicated Ms. Burcher would testify that sometime in 1998 Trooper Burcher received an anonymous letter stating his wife was "awfully chummy" with Dr. Illes, Trooper Burcher confronted his wife with the letter and ultimately they divorced. Defense counsel wanted to use this testimony to impeach the entire Montoursville state police barracks and to show that there were other anonymous letters being sent so counsel could argue that somebody else sent this letter as well as the anonymous letters about Miriam Illes' murder.

The admissibility of evidence is a matter addressed solely to the discretion of the trial court and may be reversed only upon a showing that the court abused its discretion. Commonwealth v. Lacava, 542 Pa. 160, 174, 666 A.2d 221, 227 (1995). When an offer of proof fails to satisfy every element of a claim or defense, the trial court may properly preclude presentation of evidence on that claim or defense. See Commonwealth v. Capitolo, 508 Pa. 372, 379-81, 498 A.2d 806, 809-10 (1985); Commonwealth v. Billings, 793 A.2d 914, 916 (Pa.Super. 2002); Commonwealth v. Newman, 382 Pa.Super. 220, 230-31, 555 A.2d 151, 156 (1989).

The court did not believe defense counsel's offer was sufficient to make Ms. Burcher's proposed testimony relevant to this case. Trooper Burcher was **not** a witness in this

case. If Trooper Burcher had been called as a witness in this trial, this evidence might have been admissible to impeach his credibility or to show he was biased against Appellant. The alleged bias, however, is personal to Trooper Burcher, and the court did not think it could be imputed to the entire Montoursville state police barracks, at least not without additional information. There was nothing in the offer of proof to indicate that anyone at the barracks knew about the contents of the alleged letter, other than Trooper Burcher. The court also notes the parties were not even sure what involvement Trooper Burcher had in this case, although they believed at most he was involved in surveillance details a couple of times. To the court's recollection, no testimony or evidence about surveillance was presented against Appellant.

The court also did not believe the offer was sufficient to show someone else may have authored the anonymous letters about Miriam Illes' murder. Defense counsel claimed the letter that was sent to Trooper Burcher was either destroyed or lost. The court could not compare this letter to the anonymous letters, and there was nothing in defense counsel's offer of proof to show any similarities between the letters other than they were anonymous.[39] The court also believed it was highly unlikely that the same person authored the letters, because the author of the letters about the murder went to great pains to try to exonerate Dr. Illes whereas the alleged letter to Trooper Burcher was attempting to implicate him in an affair with the Trooper Burcher's wife.

In summary, the court believed this was an irrelevant, collateral matter. If Trooper Burcher was involved in this case, his involvement was tangential and did not lead to any evidence against Appellant. Any purported bias Trooper Burcher might have had against

39 Some of the notable characteristics of the anonymous letters about Miriam Illes' murder were: (1) they were written in pencil; (2) the words were hand printed in block letters; and (3) they were "signed" with three phrases –

Appellant was personal in nature, and there was no indication in the offer of proof that anyone else at the barracks knew about this alleged anonymous letter. Similarly, there was insufficient information in the offer of proof to show that the letters about Miriam Illes' murder and the letter to Trooper Burcher were authored by the same person and/or that it was someone other than Appellant.

Appellant alleges the court erred in not reviewing all the grand jury transcripts to ensure defense counsel received all information necessary to cross-examine and/or inspect the Commonwealth's witnesses. Counsel cited the following cases in support of this proposition: Commonwealth v. Howard, 375 Pa.Super. 43, 543 A.2d 1169 (1987); and Commonwealth v. Hamm, 474 Pa. 487, 378 A.2d 1219 (1977).[40] Although this issue does not specify the names of any witnesses to whom this allegation of error pertains, the court assumes this issue relates to the grand jury transcripts the Commonwealth discovered it inadvertently failed to provide to defense counsel.

In the second supplemental omnibus pretrial motion filed on or about April 30, 2003, defense counsel alleged that several witnesses had given testimony before the grand jury and that testimony had not been provided to the defense.[41] Defense counsel asked the court to require the Commonwealth to furnish all the grand jury testimony in this matter. In an order dated December 30, 2003, the court initially direct the Commonwealth to provide to defense counsel on or before January 12, 2004[42] copies of the transcripts of any witnesses it intended to call at trial in its case-in-chief. The Commonwealth sought reconsideration of this order,

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Soldier of Equality, Soldier of God, Soldier of Death – but the phrases weren't always in the same order.
40 The name of the case found at the citation given is Hamm, not Hanna as indicated in counsel's supplemental statement.
41 The motion did not name the witnesses.
42 The order stated January 12, 2003. This was a typographical error. The year should have been 2004.

arguing the order in essence required the Commonwealth to disclose its entire witness list to the defense prior to trial and violated Pa.R.Cr.P. 230(B) (2), which provided such testimony, is made available only after the direct testimony of the witness at trial. In an order dated January 7, 2004, the court granted the motion in part and denied it in part. Although acknowledging the language of Rule 230, the court required the Commonwealth to provide the transcript of each witness' grand jury testimony by 5:00 p.m. on the business day prior to the witness being called at trial, so the court would not have to recess the trial after each witness' direct testimony at trial to allow defense counsel to review the transcript prior to cross-examining the witness. The Commonwealth again sought reconsideration of the order regarding grand jury transcripts, this time seeking to provide defense counsel with only the portion of the transcript that would relate to the witness' testimony on the next trial day.[43] The court denied the second request for reconsideration in an order dated January 13, 2004.

On January 25, 2004, the Commonwealth discovered that it had not provided defense counsel with some grand jury transcripts relating to the testimony of Trooper Henry, Trooper Holmes, Corporal Bramhall and Corporal McDermott.[44] The Commonwealth promptly made copies of these grand jury transcripts and provided them to defense counsel later that same day. The next day when the trial resumed, defense counsel asked for a conference to put this issue on the record. N.T., January 26, 2004 (Volume 5), at pp. 4-9. The court indicated it would seem that the remedy would be to give defense counsel the

43 The Commonwealth expected to call the police investigators several times, each time on a different aspect of the investigation. The Commonwealth also sought to preclude disclosure of the portions of the transcripts where the witness discussed statements of third parties.

44 The dates these individuals were first called as a witness at trial are as follows: Trooper Holmes – January 20, 2004; Corporal McDermott – January 21, 2004; Trooper Henry – January 21, 2004; and Corporal Bramhall – January 22, 2004. They were called multiple times thereafter, both before and after defense counsel received the "missing" grand jury transcripts.

opportunity to go back and conduct further cross-examination of those witnesses. Id. at p. 8. The court gave defense counsel substantial leeway to cross-examine these witnesses beyond the scope of their direct examination when defense counsel represented that the subject matter of cross-examination related to the grand jury transcripts the Commonwealth initially failed to disclose. See Id. at pp. 119-131.

The court cannot agree with Appellant's allegations. First, defense counsel never requested that the court review the grand jury transcripts or any relief other than the additional cross-examination the court provided.

Second, the Hamm case does not support Appellant's allegations and, in fact, indicates in camera review is not appropriate. The Pennsylvania Supreme Court in Hamm concluded: "in camera review of the prior statements of Commonwealth witnesses by the trial court does not adequately protect the interests served by permitting the defense access to prior statements of Commonwealth witnesses." 474 Pa. at 498, 378 A.2d at 1225. The Pennsylvania Supreme Court held that upon request at trial defense counsel was entitled to examine in their entirety the prior statements of Commonwealth witnesses that were in the possession of the Commonwealth, subject only to a protective order upon a showing of good cause by the Commonwealth. 474 Pa. at 501, 378 A.2d 1226. Unlike the trial courts in Howard and Hamm, the court did not deny defense counsel's request. In fact, the court directed the Commonwealth to provide the grand jury testimony slightly earlier than Rule 230 provided.

Finally, Appellant cannot show any prejudice. It is clear from the record that the Commonwealth's failure to provide the grand jury transcripts at issue was inadvertent. As soon as the mistake was discovered, the Commonwealth rectified it by providing copies of the transcripts the same day. Before the fifth day of trial defense counsel had a copy of all the

"missing" grand jury transcripts. There were thirteen days of testimony at trial from the time the Commonwealth provided these transcripts to counsel's closing arguments. Each of the four police witnesses were called to testify after defense counsel received the transcripts. The primary purpose for disclosure of this type of information is cross-examination. Hamm, 474 Pa. at 498, 378 A.2d 1225. The court informed defense counsel that it appeared the remedy would be to allow him to further cross-examine these witnesses. The court permitted cross-examination beyond the scope of direct examination and over the objection of the Commonwealth when defense counsel represented the subject matter was revealed in the "missing" grand jury transcripts. See N.T., January 26, 2004 (Volume 5), at pp. 119-131. Neither Appellant nor his counsel have identified any instance where the court precluded counsel from cross-examining a witness based on these grand jury transcripts. They also did not request any other relief. For these reasons, Appellant's allegations do not entitle him to relief.

Appellant's final assertion is that the closing argument of the district attorney was inflammatory, inaccurate and extremely prejudicial. The court cannot agree.

Comments made by the prosecutor to the jury during closing arguments are not a basis for granting a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused that would prevent them from properly weighing the evidence and rendering a true verdict. Commonwealth v. Cox, 863 A.2d 536, 547 (Pa.2004); Commonwealth v. Johnson, 576 Pa. 23, 49, 838 A.2d 663, 679 (Pa. 2003); Commonwealth v. Weiss, 565 Pa. 504, 521-522, 776 A.2d 958, 968 (Pa. 2001); Commonwealth v. Pierce, 567 Pa. 186, 206, 786 A.2d 203, 215 (Pa. 2001). Any alleged improper comments must be examined in the context in which they were

made. Weiss, 565 Pa. at 522, 776 A.2d at 968. The prosecution is afforded reasonable latitude and may employ logical force and vigor as well as oratorical flair in arguing its version of the case to the jury. Id.; Cox, supra; Pierce, supra. The prosecutor also is permitted to respond to defense arguments. Weiss, supra; Cox, supra. The court also notes the prejudicial effect of improper comments may be cured by a cautionary instruction. Johnson, 576 Pa. at 49, 838 A.2d at 678.

The district attorney's closing argument is in the transcript of February 18, 2004 (Volume 18) at pages 118-213. There were only two objections made by the defense during the district attorney's argument. Both objections related to alleged inaccuracies in the prosecutor's statements. At the time of the first objection, the district attorney was discussing the letter Appellant's divorce attorney sent to Domestic Relations within two days of the discovery of Miriam Illes' body. The letter requested that the wage attachment against Appellant be removed and money be returned to him. The district attorney noted the body was found on Sunday, January 17, 1999, and "[b]y Tuesday he's been into his lawyer, he's had the letter sent, and he didn't just mail it over." N.T., February 18, 2004 (Volume 18), at p.132. Defense counsel objected and indicated there was no evidence that he was in to see his lawyer. Id. at pp. 132-133. The court sustained the objection. Defense counsel asked the court to tell the jury and the court stated the following in open court: "I will sustain the objection to the statement he was in to see his lawyer. There was no evidence that addresses that." Id. at p. 133. The court believes its statement to the jury remedied any misstatement made by the district attorney in this instance. Moreover, since the court gave the defense the relief it requested and the defense did not make any other objection on this issue or request any further relief, this instance cannot provide a basis for the grant of a new trial or any other relief.

The second objection occurred when the district attorney was discussing the testimony of Robert Greenleaf. The district attorney noted that the defense expert said Bob Greenleaf is the expert and began explaining what Mr. Greenleaf did to identify the weapon in the Joe Kowalski photograph. The district attorney said: "Bob Greenleaf said by looking at this photograph, looking at the blow-ups of the gun –" Id. at p. 196. At this point, defense counsel objected and asked to come to sidebar. Id. Defense counsel contended Mr. Greenleaf did not look at blow-ups. The district attorney believed that he did. Mr. Greenleaf's testimony was presented by reading a transcript of his preliminary hearing testimony into the record, because Mr. Greenleaf was unable to travel to Williamsport due to medical reasons. During counsels' arguments at sidebar, reference was made to the transcript. The district attorney and counsel for the defense both stated Mr. Greenleaf indicated he might have seen the blow-up of the Joe Kowalski photograph, it looked familiar, but he wasn't sure. Id. at pp. 197-198. Since Mr. Greenleaf did not definitively say he saw the blow-ups, the court told the prosecutor he should modify his statement. Id. at p. 198. The district attorney replied he would simply say the witness looked at the photo of Joe Kowalski's gun. When the district attorney resumed his closing argument, he stated Mr. Greenleaf testified he looked at the photo of Joe Kowalski's gun and based upon his view of that gun and the front site, he was able to tell that it was a Savage Model 23D. Id. at p. 199. The court believes this rectified any inaccuracy in the prosecutor's statement and, apparently, so did defense counsel because he did not ask for any relief. The court also does not believe this instance would justify relief because it was in response to the arguments of defense counsel. Despite Mr. Greenleaf's testimony that he might have seen the blow-up, defense counsel attacked Mr. Greenleaf's credibility by arguing he only had a little photograph unlike the other experts who had the blow-ups and could not

conclude the weapon was a Savage Model 23D and asserting Greenleaf's opinion that the weapon in the photograph was a Savage Model 23D was based on the Commonwealth paying him $1,250. Id. at pp. 31-32.

Considering the entirety of the district attorney's approximately 95-page closing argument, these two instances were minor, were corrected at the time, and would not have formed a fixed bias or hostility that would prevent the jury from properly weighing the evidence and rendering a true verdict. Appellant would not be entitled to relief based on any other statements in the district attorney's closing argument, because the failure raise the issue at trial results in waiver of the issue for appeal purposes. Commonwealth v. Mennyweather, 458 Pa. 12, 15-16, 329 A.2d 493, 495-496 (Pa. 1974); Commonwealth v. Stafford, 749 A.2d 489, 496 n.5 (Pa.Super. 2000); Commonwealth v. Banks, 450 Pa.Super. 555, 566, 677 A.2d 335, 341 (Pa.Super. 1996).[45]

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

cc: District Attorney
Craig P. Miller, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)

45 The court also has reviewed the entire closing argument and does not believe there were any instances that would justify Appellant's characterization of the closing argument as inflammatory, inaccurate or extremely prejudicial. The district attorney argued the evidence and reasonable inferences to be drawn from the evidence during his closing statement. Thus, his closing was not improper. See Commonwealth v. Cox, 836 A.2d 536, 547 (Pa. 2004)("Prosecutorial misconduct will not be found where the comments were based on the evidence or derived from proper inferences).