IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. CR-2155-2015**
	:	
vs.	**:**	
	:	**CRIMINAL DIVISION**
JAMES F. HOLMES,	**:**	
Defendant	**:**	**PCRA**

OPINION AND ORDER

AND NOW, this **17th** day of **February**, **2022**, the Court hereby enters the following Order and Opinion.

I. Factual History

At the time of trial, Misti Hill [hereinafter "Hill"], testified that in November 2014 she had a baby and on December 13, 2014, Hill began a conversation with a person known to her as Craig Jones on Facebook. N.T., 6/1/2017, at 56. At trial, Hill read into evidence several of the Facebook messages, admitted as Commonwealth's Exhibit 1, between herself and Craig Jones, which establish that Hill, her boyfriend named Beeley, Craig Jones, and at least one other unknown person met to have sex at a hotel prior to December 2014. *Id.* at 59-60. Specifically, a portion of the messages read:

> Jones: How's the baby?
> Hill: Good u
> . . .
> Jones: Are you still involved with him? [referring to Beeley]. He 5 now. [referring to Defendant's son]. And we want to f*** you every weekend and every day.
> Hill: Yes. But I want you to make him watch.
> Jones: Only if you lick you're [sic] daughter in front of us first.
> . . .
> Hill: Yes and u have anymore kids
> Jones: Yeah, we're trying for another. So trying to figure out what you want us to do. F*** you in front of our son or your bf?
> Hill: Both?
> Jones: Have you licked your daughter's p***y yet?

> Hill: No
> Jones: Going to?
> Hill: Idk. Do she suck your son?
> Jones: Will you want her when she's older + 4 or 5?
> Hill: No.
> . . .
> Jones: Because if you are, we will be honest with you. We have a deep interest in you. But we really do not want to be involved with him. Until you're ready to meet us solo. Well [sic] just hang back.
> Hill: Okay.
> Jones: Also, we want to do a baby with you. Are you interested in us? Or just want to f***?
> . . .
> Jones: got a phone? Txt me 267-634-1310. Def want to breed you.

Id. at 60-62.

At trial, the parties stipulated that it was Defendant who sent all of the above messages. *Id.* at 57. Hill testified that it was her idea to reach out to the Defendant in the first place, but did not do so prior to meeting with Trooper Jeffrey Vilello, the Commonwealth's affiant. *Id.* at 63. After the Defendant asked Hill to text message her, Hill provided Trooper Vilello with her phone to allow him to communicate with the Defendant through it. *Id.* at 64.

Trooper Vilello testified that in November of 2015, Hill began working for him to establish the real identity of Craig Jones, at which time Hill provided their Facebook conversations and access to her Facebook account. *Id.* at 80 and 87. At the request of the Defendant to switch from Facebook to text messaging, Trooper Vilello began utilizing Hill's cell phone to communicate with the Defendant. *Id.* at 88-89. A portion of those text messages were admitted into evidence as Commonwealth's Exhibit 2, 3, and 6, which were also read to the jury by Trooper Vilello. The parties stipulated that all text messages introduced into evidence were sent from the Defendant. *Id.*

During the conversation Defendant asks, "are you bringing your little woman?" *Id.* at

92. Trooper Vilello, posing as Hill, asks, "mine or my niece?" *Id.* Defendant asks for their ages to which Trooper Vilello responds that they are one (1) and six (6) and Defendant asks her niece's name and how she is "going to get" her. *Id.* Trooper Vilello says, "I babysit her." *Id.* Defendant states that he needs proof that Hill is "no bulls***" and asks her for a "pic of you and either your daughter or your niece, hand in your niece's panties or your finger in your daughter's p***y." *Id.* at 93. Later on in the conversation, Defendant again asks for a picture of Hill and her daughter with Hill's "tongue in her p***y." *Id.* at 94.

In addition to the written communications, Trooper Vilello placed two phone calls to Defendant on November 6, 2015 at which time Hill spoke to him. *Id.* at 99. The recordings were admitted as Commonwealth's Exhibit 4. During the second call, Defendant asks whether Hill wants to "take [her] daughter with [her]" and later asks, "What if we just wanted to adopt her and then if you wanted to leave us, then we just keep her?" Hill tells the Defendant that she wants to bring one of her friends, not her daughter. Defendant asks Hill how old her friend is and she says sixteen. Defendant again asks Hill, "what if we wanted to adopt the baby no matter what, would you let us?" Hill responds "no."

Trooper Vilello testified that the text message conversations between himself and Defendant lasted for approximately one month at which point Defendant asked Hill to meet him and spend a weekend with him. *Id.* at 96. Defendant was under the impression that Hill would be bringing a child with her and Trooper Vilello testified that Defendant was "pretty insistent that she bring the child." *Id.* at 97. On December 4, 2015, Hill boarded a bus with Trooper Vilello but not the child,[1] and upon exiting the bus, Defendant took Hill by the arm

[1] While Hill did not have her child with her, she carried a baby carrier with a doll inside and a blanket covering the doll. *Id.* at 103.

at which point he was taken into custody by Trooper Vilello. *Id.* at 103.

II. Procedural History

On June 2, 2017, following the two day jury trial, Defendant was found guilty of the following: Criminal Solicitation (Involuntary Deviate Sexual Intercourse with a Child); Trafficking in Minors; Criminal Solicitation (Sexual Assault); Criminal Solicitation (Sexual Exploitation of Children); Criminal Solicitation (Aggravated Indecent Assault of a Child); Criminal Solicitation (Sexual Abuse of Children); Criminal Use of a Communication Facility; and Criminal Solicitation (Indecent Assault). From the inception of the case through trial, Defendant was represented by Michael Morrone, Esquire.

On October 26, 2017, pursuant to Defendant's motion, Attorney Morrone was removed from the case and Ryan Gardner, Esquire was appointed as conflict counsel. On December 18, 2017, Defendant was sentenced to an aggregate period of incarceration of thirteen (13) years to twenty-six (26) years, followed by one (1) year of probation.[2] On December 28, 2017, Attorney Gardner filed a timely Post-Sentence Motion on Defendant's behalf. In lieu of argument, the parties agreed that the issues could be decided on briefs, and the Defendant was to submit a brief within ten (10) days of April 19, 2018. Upon Defendants failure to do so, the motion was denied on September 14, 2018 "by operation of law."

On October 5, 2018, Attorney Gardner, on behalf of the Defendant, filed a timely Notice of Appeal wherein the following issued were raised, relevant to the instant Petition:

1. The evidence was insufficient to sustain the verdict with regard to the crimes of solicitation and trafficking when the evidence demonstrated that it was impossible for the

[2] The Court's December 18, 2017 Sentencing Order was amended on February 26, 2018 to reflect this correct sentence.

targeted child to be available due to the child previously being removed from the custody of the biological Mother and Commonwealth witness, Misti Hill.

2. The evidence was insufficient to sustain the verdict because the Commonwealth failed to provide required discovery such as additional cell phone messages, and Facebook messages that would have allowed Defendant to properly present the defense of impossibility.

3. The evidence was insufficient to sustain the verdict, and Defendant cannot be found guilty due to the defense of entrapment where the [C]ommonwealth witness, Misti Hill, did operate at all times as an agent of the Commonwealth.

4. The evidence was insufficient to sustain the verdict because the results of the search conducted on Defendant's iPhone 4 were unlawfully obtained following the seizure of the phone due to the unreasonable seventeen month period that transpired between the phone seizure and search of the phone.

. . .

6. The verdict was against the weight of the evidence because the Commonwealth failed to prove that it was the intention of Defendant to commit the crimes of solicitation and trafficking as evidenced in part by Defendant's conversations with Misti Hill that he had no interest in sexually abusing children.

7. The verdict was against the weight of the evidence because the Commonwealth failed to prove that it was the intention of Defendant to commit the crimes of solicitation and trafficking as evidenced by Defendant's conversations with Misti Hill that he was aware of the fact that custody of the alleged targeted child had previously been removed from her by the Commonwealth.

The Trial Judge, the Honorable Dudley Anderson, issued his Opinion and Order pursuant to Rule 1925(a) suggesting that all of Defendant's issues raised on appeal be dismissed.

On May 21, 2019, Attorney Gardner won the Municipal Primary election for District Attorney in Lycoming County. On July 16, 2019, the Pennsylvania Superior Court issued a decision, affirming on all issues. On August 16, 2019, Attorney Gardner, on behalf of Defendant, filed a Petition for Allowance of Appeal. On November 5, 2019, Attorney Gardner won the Municipal Election for District Attorney in Lycoming County. On February 12, 2020, the Supreme Court of Pennsylvania issued an order denying Defendant's Petition for Allowance of Appeal.

On June 15, 2020, Defendant filed a pro se Petition for Habeas Corpus Review to Reinstate Petitioner's Direct Appeal, which the Court recognized as several Post-Conviction Collateral Relief Act [hereinafter "PCRA"] claims. Defendant was appointed an attorney, but that attorney later terminated his PCRA contract with Lycoming County and, on August 26, 2020, Trisha Hoover Jasper, Esquire was appointed as Defendant's new PCRA counsel. On October 29, 2020, Defendant was granted leave to withdraw his petition in order to later "file a more comprehensive PCRA that raises all of his issues." Defendant was given until March 2021 to refile.

On February 16, 2021, Defendant filed a pro se Petition for Post-Conviction Collateral Relief, and Attorney Jasper was reappointed as counsel pursuant to the Court's October 29, 2020 Order. Contained within the PCRA are ten (10) grounds for relief. On March 8, 2021, Defendant filed an amendment, adding two additional grounds.

On July 9, 2021, Attorney Jasper filed a Turner/Finley "No Merit Letter" as well as a

Petition to Withdraw as Defendant's counsel.[3] On December 17, 2021, Defendant filed a Motion to Remove ADA Kirsten Gardner and on December 29, 2021, an Oral Brief in Response to No Merit Claim.

A hearing and argument was held January 6, 2022. The Court notes that, while Defendant provided a lengthy list of witnesses relevant to his arguments, he failed to call any of them to testify at the time of the hearing. Defendant also did not testify himself.

III. Discussion

Before the Court are Defendant's PCRA and Motion to Remove ADA Kirsten Gardner, which are now ripe for decision. The Court will address each in turn.

a. Motion to Remove ADA Kirsten Gardner

Defendant argues that Assistant District Attorney Kirsten Gardner is conflicted from handling this matter because Defendant had some "adversarial" dealings with Attorney Gardner while she was employed by the Lycoming County Public Defender's Office. According to the Defendant, the communication between Attorney Gardner and himself related to a separate criminal case being handled by Attorney Gardner at that time, for which Defendant was acting as the other inmate's "jailhouse attorney." Attorney Gardner never represented Defendant and he has never discussed his own case with her. The Commonwealth indicated that Attorney Gardner has not worked on this case since its inception and that, while they feel there is no conflict, they would nevertheless voluntarily agreed to ensure Attorney Gardner does not do any work on the case.

Defendant also inquired as to the relationship between ADA Kirsten Gardner and

[3] Pursuant to *Com. v. Turner*, 544 A.2d 927, 928-29 (Pa. 1988) ("When, in the exercise of his professional judgment, counsel determines that the issues raised under the PCHA are meritless, and when the PCHA court

District Attorney Ryan Gardner. The Commonwealth confirmed that there is no familial relationship between the two.

For the reasons set forth above, Defendant's Motion to Remove ADA Kirsten Gardner is denied.

b. PCRA

In order to be eligible for relief under the PCRA, a petitioner must prove a number of facts by a preponderance of the evidence, including:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted: (i) currently serving a sentence of imprisonment, probation or parole for the crime;

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

. . .

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

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concurs, counsel will be permitted to withdraw and the petitioner may proceed pro se . . . .").

(viii) A proceeding in a tribunal without jurisdiction.

(3) That the allegation of error has not been previously litigated or waived.

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

42 Pa.C.S.A. § 9543(a).

As it relates to subparagraph (3) above, an issue has been "previously litigated" if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue" or "it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa.C.S.A. § 9544(a)(2) and (3). When the Superior Court affirms the trial court, and the Supreme Court denies allocatur, those issues are considered to have been "finally litigated." *Com. v. Dyson*, 378 A.2d 408, 411 (Pa.Super. 1977).

Initially, the Court notes that the Defendant remains incarcerated and therefore, meets the first prong under Section 9543. Defendant has raised a total of twelve (12) grounds for relief in his PCRA, with Ground 8 containing two parts. The Court will address each ground *seriatim*.

i. Ground 1: Lack of Intent

"The Defendant was denied his right, under the United States and Pennsylvania Constitutions, to Due Process in that he is actually innocent due to lack of intent." Defendant argues that the Commonwealth failed to prove he had the requisite mens rea to sexually harm a child because he did not believe that Hill actually had a child that was born in November 2014.

On his direct appeal, Defendant argued that "he did not have the specific intent to promote or facilitate a crime" and the Superior Court ruled that he failed to preserve this issue. *Com. v. Holmes*, 1671 MDA 2018, at *11-12 (Pa.Super. July 16, 2018). Defendant also argued, in a separate issue, that it was "factually impossible for him to have formed the necessary specific intent for his solicitation and trafficking convictions since [Hill] did not have custody of her daughter at the time of the communications at issue, and [Defendant] was aware of this fact." *Id.* at *14. The Superior Court declined to "scour the record" in search of evidentiary support of this issue and held that Defendant was not entitled to relief. *Id.* at *14-15.

Defendant's arguments here and at the time of his appeal, although slightly factually different, are nevertheless the same in theory. Here, Defendant argues that he knew Hill did not have another child in 2014 and therefore, commission of the crimes was impossible. On appeal, Defendant argued that he knew Hill's child had been removed from her custody and therefore, commission of the crimes was impossible. Even so, Defendant has again failed to identify where in the record such evidence or testimony exists. Additionally, this Court has reviewed the entire transcript and can find no such evidence. To the contrary, the Facebook messages from Defendant to Hill indicate that Defendant did in fact know that Hill had a baby when he asks her how the baby is doing, whether she had "licked her daughter's p***y" yet, and his insistence that she bring the baby with her to meet him.

For these reasons, Defendant's Ground 1 fails as he has failed meet his burden under prong two and three of Section 9543.

ii. Ground 2: Corpus Delicti

"The defendant was denied his right, under the United States and Pennsylvania

Constitutions, of due process based on the prosecution's failure to present sufficient evidence to support corpus delicti." Defendant argues that, because the Commonwealth failed to introduce evidence that a child born in November 2014 existed including introducing a birth certificate or other hospital documentation, the case should have been dismissed.[4]

Regarding *corpus delicti*, the Superior Court has held:

> The *corpus delicti* rule places the burden on the prosecution to establish that a crime has actually occurred before a confession or admission of the accused connecting him to the crime can be admitted. The *corpus delicti* is literally the body of the crime; it consists of proof that a loss or injury has occurred as a result of the criminal conduct of someone. The criminal responsibility of the accused for the loss or injury is not a component of the rule.
> **The historical purpose of the rule is to prevent a conviction based solely upon a confession or admission, where in fact no crime has been committed.** The *corpus delicti* may be established by circumstantial evidence.

Com. v. Hernandez, 39 A.3d 406, 410–11 (Pa.Super. 2012) (emphasis added).

The *corpus delicti* rule which, as evidenced by the above excerpt relates to confessions, is inapplicable here as there was no confession from the Defendant. Additionally, Defendant fails to point to Court's attention to any authority stating that the Commonwealth was required to introduce into evidence a birth certificate or other documentation proving birth, and this Court can find none. Despite this, the testimony during trial establishes that a child victim did in fact exist. On direct examination, the following exchange took place between the Commonwealth and Ms. Hill:

Q. Ms. Hill, do you have a daughter?
A. Yes.
Q. When was your daughter born?
A. November 5th, 2014.

[4] Defendant's reliance on *Summit v. Blackburn* is misplaced, as it is a 5th Circuit case.

N.T., 6/1/2017, at 56. Clearly, despite Defendant's assertions, Ms. Hill testified that she has a daughter born in November 2014. For these reasons, Defendnat has failed to meet prong two of Section 9543 and therefore, Defendant's PCRA is denied on Ground 2.

iii. Ground 3: Entrapment

"The Defendant was denied his right, under the United States and Pennsylvania Constitutions, of due process as a result of Entrapment by Matter of Law." Simply put, Defendant argues that Hill's and Trooper Vilello's actions constitute entrapment. Specifically, Defendant posits that Hill, among other things, "made criminal solicitations to the Defendant even though the Defendant never invited such conversations nor displayed a history of interest" and that Trooper Vilello "made an uninvited criminal solicitation to entrap the Defendant despite the fact that he Defendant rebuffed Hill when she made her uninvited solicitation."

On direct appeal, Defendant argued that he "sustained his burden of proving that his illegal conduct was the product of an entrapment carried out by law enforcement officials, as well as [Hill] who was acting as an agent for the police." *Holmes*, 1671 MDA 2018, at *16-17. In finding that Defendant was not entitled to relief on this issue, the Superior Court held that "the police did not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce [Defendant] to commit crimes so that the government could prosecute him . . . . [Defendant] had ample opportunity to not participate in the Facebook and text messages, to notify authorities, or just to sever his communication/relationship with [Hill]. He declined to do so, and, in fact, escalated the situation." *Id.* at *20.

The argument Defendant sets forth here is the exact same as that already decided by

the Superior Court. Therefore, Ground 3 of Defendant's claim has been "finally litigated" pursuant to prong three of Section 9543 and is denied.

iv. Ground 4: Unlawful Search and Seizure – Delay in Obtaining Search Warrant for iPhone 4

"The Defendant's rights, under the United States and Pennsylvania Constitutions, of due process and protection against unlawful search and seizure. This was done by the delaying to obtain a search warrant for the Defendant's iPhone4 over sixteen months after the device was seized at the time of the Defendant's arrest." On direct appeal, Defendant argued that the Commonwealth's delay in retrieving information from the iPhone caused unfair prejudice however, as discussed by the Superior Court, Defendant failed to proffer "how his defense would have changed had counsel been provided with the contents of [Defendant's] iPhone sooner. Also, inasmuch as the parties stipulated at trial that [Defendant] sent all of the Facebook and text messages at issue, it is unclear as to how [Defendant] was 'surprised' to learn of the content of the messages." *Id.* at *22. On this basis, the Superior Court held that Defendant was not entitled to relief.

As the issues presented on direct appeal and now are identical, this issue was "finally litigated" pursuant to prong 3 of Section 9543 and therefore, Defendant's PCRA is denied on Ground 4.

v. Ground 5: Unlawful Search and Seizure – Attempt to Access iPhone 4 Without a Warrant

"The Defendant's rights, under the United States and Pennsylvania Constitutions, of due process and protection against illegal search and seizure were violated. This occurred when the state attempted to access the Defendant's iPhone4 without a warrant and attempted

to circumvent due process in order to obtain the password to that device."[5] Defendant argues that on the day of his arrest, Trooper Vilello "examined" his cell phone a number of times and on two (2) occasions "demanded" that the Defendant provide him with the password for the cell phone, which the Defendant refused to provide. Defendant also purports to argue that the fact that Trooper Vilello failed to immediately place the cellphone in a sealed property bag was not proper.

It is settled that warrantless searches of cellphones conducted incident to an arrest are unconstitutional. *Riley v. California,* 570 U.S. 373 (2014). However, there is nothing stopping an arresting officer from asking a defendant for the password to their cellphone, absent any type of coercion or duress. Additionally, the Superior Court has held that, even when a cellphone is improperly viewed and searched incident to an arrest, the error is harmless when a valid warrant is subsequently issued to search the phone. *Com. v. Mosley*, 114 A.3d 1072, 1081 (Pa.Super. 2015).

Here, following Defendant's arrest, Trooper Vilello allegedly viewed "the Lock/Password screen" and "examined the phone a number of times and needed to bring the cellphone out of its 'sleep' or low powered state to full power up state to do this." Despite Defendant's assertion, there is no evidence that Trooper Vilello attempted to or actually successfully gained access to the cellphone, despite his alleged requests that Defendant provide the password. Additionally, even if he did gain access to and searched the phone without Defendant's consent, Trooper Vilello eventually did obtain a valid search warrant for

[5] The Turner/Finley No Merit letter submitted by Attorney Jasper indicates that this issue has already been litigated and decided by the Superior Court. However, this Court has reviewed the decision issued by the Superior Court and finds that the Superior Court has not decided this issue. While the Superior Court did discuss the sixteen (16) month delay in obtaining a search warrant for the cellphone (see PCRA Ground 4), it

it.[6] This argument is unpersuasive and moot.

Regarding Trooper Vilello's alleged failure to place Defendant's cellphone in an evidence bag immediately following his arrest, Defendant points to no authority requiring such action. Defendant is not alleging an issue regarding chain of custody and this is not a fact pattern where, for example, the Commonwealth used the fingerprints on the cellphone as evidence that it belonged to Defendant, therefore requiring the evidence bag to preserve them.

For the reasons set forth above, Defendant has failed to meet prong two of Section 9543 and therefore, his PCRA is denied on Ground 5.

vi. Ground 6: "Structural Errors"

"The Defendant was denied his rights, under the United States and Pennsylvania Constitutions, of due process and right to counsel. This was done through a number of structural errors." Defendant essentially sets forth four (4) arguments on this ground: 1. a Sheriff's Deputy was present during a private conversation during trial between himself and his counsel, which also gave the appearance that Defendant was under restraint; 2. Trooper Vilello remained seated at the Commonwealth's counsel table for the entire trial following his testimony; 3. Defendant was wearing his Lycoming County Prison wristband ID, which was visible to the jury and had a "distinctive" logo on it; and 4. his appeal counsel failed to notify Defendant that he was running for and eventually won the position of Lycoming County District Attorney, and then failed to withdraw as his attorney after assuming office. "A structural error is defined as one that affects the framework within which the trial

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does not discuss the alleged attempts to access the cellphone without a warrant.

[6] See Ground 11, *infra*, for discussion on the validity of the search warrant for the iPhone 4.

proceeds, **rather than simply an error in the trial process itself**. Structural errors are not subject to harmless error analysis." *Com. v. Martin*, 5 A.3d 177, 192 (Pa. 2010) (emphasis added). An example of a structural error is denial of counsel. *Id.* Based on this case law, Defendant's alleged errors are not "structural" in nature because they occurred during the trial process itself. However, in an effort to be complete, the Court will address each issue below.

We can address Defendant's first and third arguments together. Defendant argues that a Sheriff's Deputy accompanying him to speak with his attorney in the Trial Judge's Chambers and the wristband identifying him as a Lycoming County Prison inmate were structural errors because they gave the impression to the jury that he was in custody.

Defendant is correct that the "presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man, **except as the necessary safeguard and decorum of the court may otherwise require."** *Com. v. Neal*, 563 A.2d 1236, 1238 (Pa.Super. 1989) (internal citations omitted) (emphasis added). The Pennsylvania Supreme Court has affirmed trial court's decisions to proceed with trial proceedings even when a defendant is wearing prison garments because the garments were "not readily identifiable as prison clothing." *Com. v. Baker*, 511 A.2d 777, 784 (Pa. 1986). Additionally, the prohibition against prison garb is "based primarily upon the impact that the 'constant reminder of the accused's condition implicit in such distinctive, identifiable attire' might have upon the jury." *Com. v. Johnson*, 838 A.2d 663, 681 (Pa. 2003), *citing Estelle v. Williams,* 425 U.S. 501, 504–05 (1976).

In Lycoming County, it is common practice that at least one deputy, if not more, is present during jury trials at all times. Defendant also acknowledges that he was not in shackles when he was taken out of the Courtroom and into the Judge's Chambers. It was necessary, for safety purposes, for a Sheriff's Deputy to be present with the Defendant and his counsel while they were in the Judge's Chambers. It is also reasonable to believe that a Sheriff's Deputy would be present if *any* person were in the Judge's Chambers without the Judge present. While the Trial Judge had the alternative option of releasing the jury on a break, sending a Sheriff's Deputy to accompany the Defendant cannot be considered a "constant reminder" that Defendant was in custody, especially considering Defendant was with his attorney and otherwise appeared to be a free man.

Regarding the prison wristband, it is difficult for this Court to fully and accurately analyze this issue because it does not know exactly what the wristband looked like including its size, color, or insignia and because it does not know exactly what Defendant was wearing during trial, other than that he was in civilian clothing. For example, if Defendant was wearing a long sleeve shirt, he could have easily covered up the wristband. The Court notes that Defendant had a full opportunity on January 6, 2022 to present these details but failed to do so.

Even so, considering where the jury sits in relation to the Defendant, it is unlikely that the jury saw the wristband and, if they did, even more unlikely that they realized what it actually was. Even assuming the wristband was visible to the jury at all times, when considered with the overall appearance of Defendant's attire at the time of trial, the wristband is not "identifiable attire" and cannot be considered a "constant reminder" to the jury that Defendant was incarcerated. Additionally, requiring a defendant to wear a prison wristband is

a practical matter and a way to ensure the prison is able to keep track of the inmates.

Defendant also argues that the Deputy's presence "interfered with [his] ability to openly communicate with his lawyer." In the middle of Attorney Morrone's cross-examination of Trooper Vilello, Attorney Morrone asked to speak with his client about the questioning of the witness and the Court offered for them to use his office and sends "Jon"[7] with them. N.T., 6/1/2017, at 111. In the body of this Ground, Defendant fails to state exactly what, for example, would have been discussed had the Deputy not been present. However, in Defendant's Ground 8B argument, he states that he was unable to ask Attorney Morrone to explain what "prior bad acts" he referenced earlier in the trial.[8] This topic is something that could have easily been explained to Defendant at any other time, and it was clearly not pertinent that it be discussed at that very moment.

Again, Defendant had a full opportunity on January 6, 2022 to either testify himself regarding this issue or call Attorney Morrone as a witness to fully explain why Defendant was prejudiced by being unable to speak openly with his attorney, but he failed to do so. The Court will not speculate as to what other conversations, if any, Defendant wished to have with his attorney but could not due to the Deputy's presence. Further, the Deputy was in no way an interested party in the trial, and there is no evidence or suggestion that the Deputy disclosed to the Commonwealth, the Court, or the jury what discussions took place between the Defendant and his attorney.

Next, Defendant argues that he was prejudiced because Trooper Vilello was seated at

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[7] It is presumed that "Jon" is the Sheriff's Deputy.

[8] Prior to the trial beginning, Attorney Morrone and the Commonwealth's attorney discussed which messages between Defendant and Hill should come into evidence. Attorney Morrone was able to successfully argue that several of the messages should stay out of evidence because they referenced Defendant's prior bad acts.

the Commonwealth's Counsel Table during trial following his testimony, and was not sequestered. Pennsylvania Rule of Evidence 615 states that a court is not authorized to sequester a witness who is "an officer or employee of a party that is not a natural person (including the Commonwealth) after being designated as the party's representative by its attorney" or "a person whose presence a party shows to be essential to presenting the party's claim or defense." Pa.R.E. 615(b) and (c). Trooper Vilello was the Commonwealth's affiant and, as such, was a designated representative of the Commonwealth and was essential to the Commonwealth's claim. This is no different than Defendant's right to be seated next to his attorney for the entirety of the trial. For these reasons, Trooper Vilello's presence at the Commonwealth's table was appropriate.

The Court finds that none of the above scenarios were errors such that they "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place."

Finally, Defendant argues that he was prejudiced when his appeal counsel, Attorney Gardner, now District Attorney for Lycoming County, failed to notify Defendant that he was running for the position or that he was elected to the position. Defendant raises this issue more completely in Ground 10, and therefore the Court will address it *infra*.

Defendant has failed to meet his burden on prong two of Section 9543 and therefore, his claim is denied on Ground 6.

vii. Ground 7: Insufficiency of the Evidence Relating to Trafficking

"The Defendant was denied his right, under the United States and Pennsylvania Constitutions, of due process when he was found guilty of trafficing [sic] despite the

insufficiency of the evidence." Defendant argues that the evidence presented at trial was insufficient to sustain a guilty verdict of trafficking. Specifically, Defendant argues that the Commonwealth failed to prove that the Defendant asked Hill to bring her child to him for trafficking purposes.[9]

The Pennsylvania Supreme Court has held:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Com. v. Widmer, 744 A.2d 745, 751 (Pa. 2000) (internal citations omitted).

In order to meet its burden, the Commonwealth was required to prove, beyond a reasonable doubt, that the Defendant "entice[d], solicit[ed], advertise[d], harbor[ed], transport[ed], provide[d], obtain[ed] or maintain[ed] an individual if the person knows or recklessly disregards that the individual will be subject to sexual servitude," and that this violation "result[ed] in a minor being subjected to sexual servitude[] and "[was] part of a course of conduct subjecting minors to sexual servitude." 18 Pa.C.S.A. § 3011(a)(1) and (b).

Here, the Commonwealth presented evidence of a phone call between Defendant and Hill, at Exhibit 4, at which time they discuss the upcoming trip that Hill is supposed to make

[9] Defendant's PCRA Counsel indicates that this issue was already litigated and decided by the Superior Court. However, in reviewing the Superior Court's decision of July 16, 2019, it appears that the Superior Court did not decide whether the evidence was sufficient to sustain a trafficking conviction. *Holmes*, 1671 MDA 2018, at *12, FN 8 ("In his 'Statement of Questions Involved,' Appellant presented his first issue as challenging the sufficiency of the evidence for solicitation and trafficking; however, his first argument section develops a sufficiency argument as to solicitation only. Thus, we limit our analysis accordingly.").

to see the Defendant. N.T., 6/1/2017, at 100. During the call, Defendant explicitly and repeatedly asks if Hill wants to bring her daughter with her and when Hill hesitates, Defendant asks Hill, "What if we just wanted to adopt her and then if you wanted to leave us, then we just keep her?" and, "what if we wanted to adopt the baby no matter what, would you let us?" These statements, coupled with Defendant's expressed desire to see Hill perform sexual acts on minors and his promise to provide for Hill financially and to take her in as second wife, proves that Defendant intended to subject minors to sexual servitude. *Id.* at 93. But for Trooper Vilello and the Pennsylvania State Police's intervention, Defendant would have done just that. This Court believes that the evidence was sufficient to support the jury's guilty verdict on Trafficking Minors. Defendant has failed to meet prong two of the Section 9543 and his claim is denied on Ground 7.

viii. Ground 8A/Pre-Trial: Ineffective Assistance of Counsel

"The Defendant was denied his right, under the United States and Pennsylvania Constitutions, of effective assistance of counsel. The ineffective assistance was of such significance as to undermine the truth determining process to such a point that no reasonable adjudication of guilt or innocence could be made."

Defendant states that Attorney Morrone was ineffective prior to trial when he:

1. failed to raise the issue of not receiving the arrest warrant affidavit at the time of Defendant's arraignment;
2. failed to obtain any details of a potential "deal" prior to waiving Defendant's right to a preliminary hearing without his consent;
3. failed to intercede when Trooper Vilello "demanded" access to Defendant's cell phone;

4. allowed then District Attorney Eric Linhardt to “abuse” Defendant by using explicative words;
5. failed to object to the addition of a trafficking charge at the time of the preliminary hearing;
6. failed to make a motion to dismiss based on lack of proof of a victim and lack of evidence tying Defendant to any messages;
7. failed to follow up on discovery requests or provide Defendant with certain documents including Facebook messages from 2012 and messages from Hill’s boyfriend;
8. failed to object to “derogatory characterizations” and “false statements” regarding Defendant’s financial position at bail modification hearings;
9. failed to file several pre-trial motions including a motion for evidentiary hearing to reveal the lack of a victim and evidence linking Defendant to the text messages;
10. failed to file a motion to suppress evidence obtained from the iPhone 4 because a search warrant was not sought for several months and due to the lateness of the discovery;
11. failed to meet with Defendant to review discovery prior to trial; and
12. failed to argue the defense of entrapment.

Initially, the Court notes that legal counsel is presumed effective, and it is the Defendant’s burden to prove, by a preponderance of the evidence, the following three elements: (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) Appellant suffered prejudice because of counsel's

action or inaction. *Com. v. Spotz*, 18 A.3d 244, 259–60 (Pa.Super. 2011) (internal citations omitted). With regard to the second prong, a defendant must prove that "an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Com. v. Williams*, 899 A.2d 1060, 1064 (Pa. 2006). With regard to the third prong, a defendant must prove that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction. *Com. v. Dennis*, 950 A.2d 945, 954 (Pa. 2008).

We will address each of the above issues in turn. First, Defendant fails to point the Court to any authority that states that the affidavit in support of the arrest warrant must be provided to Defendant at the time of the preliminary hearing, and the Court is unable to find any such authority. Additionally, despite Defendant's assertions, Attorney Morrone and/or the Defendant himself must have eventually received it, since he argues in Ground 11 that it contained "falsities" and "misrepresentations."

Second, Defendant provides very little detail surrounding this issue. In reviewing the file, it appears that Defendant signed the standard form waiving his preliminary hearing, acknowledging that he had "reviewed the form, receive a copy, and [was] advised of all the scheduling dates for [his] case." Additionally, waiving a preliminary hearing does not preclude a defendant from negotiating a plea deal with the Commonwealth.

Third, this issue has already been discussed in Ground 5, *supra*. Additioanlly, Defendant has failed to provide any additional details regarding Trooper Vilello's "demand," despite being provided a full opportunity to do so on January 6, 2022.

Fourth, similarly to issue three, Defendant has failed to describe how now Judge Linhardt's actions or words, and Attorney Morrone's actions or inactions in response,

prejudiced him despite being provided a full opportunity to do so on January 6, 2022.

Fifth, the Trafficking in Minors charge was included in the initial Police Criminal Complaint, at page 2. Defendant and Attorney Morrone would have been aware of the Commonwealth's intent to prosecute the Defendant on this charge from the inception of the case. Based on this fact, it seems as through Attorney Morrone would have had nothing to object to at the time of the preliminary hearing, at least regarding the inclusion of the trafficking charge.

Sixth, this issue has already been discussed in Ground 2, *supra*, and therefore, any motion that Attorney Morrone failed to file, even if it was prejudicial, would not have been successful on the merits. Additionally, it was stipulated at trial that all text messages sent to Hill were from Defendant, rendering this argument moot.

Seventh, there is no record evidence whether these documents exist, whether they were received by Attorney Morrone, or whether they are even relevant or helpful to Defendant's case. Defendant had a full opportunity to establish these facts and failed to do so. Without this information, the Court cannot say one way or another whether Attorney Morrone was ineffective. It could just as easily be the case that Attorney Morrone reviewed these documents and determined, in his professional judgment, that they were harmful to Defendant's case. Either way, resolving this issue calls for speculation.

Eighth, Defendant fails to specify when these bail modification hearings took place and, even if he did, this Court does not have a transcript to review the alleged "derogatory characterizations" or "false statements" made. Despite that, though, the Court fails to see how statements made outside of the ears of a jury would prejudice the Defendant such that it would change the outcome of his trial.

Ninth, again, the issue regarding the lack of a victim has been resolved by this Court in Ground 2 and the parties stipulated at trial that all text messages sent to Hill were from the Defendant. This issue is moot.

Tenth, as discussed in Ground 11, *infra*, a valid search warrant was in fact issued for the iPhone 4 and the Superior Court has ruled on the issue, or lack thereof, of the lateness of the search. Additionally, Defendant acknowledges that he filed his own motions to suppress on these issues since Attorney Morrone did not.

Eleventh, Defendant admits in his argument that Attorney Morrone did in fact meet with him the day before jury selection and for at least one day prior to trial. Even so, Defendant fails to disclose what information should have been discussed that would have changed the outcome of the trial. The Court notes that Defendant, in fact, did not testify at trial and was seated next to Attorney Morrone for the entirety of the trial and able to assist him.

Finally, the issue of entrapment has already been decided by the Superior Court and therefore, this issue is moot.

Defendant has failed to prove that he has suffered prejudice due to Attorney Morrone's actions or inactions and similarly, has failed to prove that, had Attorney Morrone proceeded in any of the ways suggested by Defendant, the outcome of the trial would have been any different. In fact, this Court is of the opinion that none of the above claims of ineffectiveness are relevant at all to the outcome of the trial. Defendant has failed to meet his burden under prong two of Section 9543 and therefore, his PCRA is denied on Ground 8A.

ix. Ground 8B/Trial and Post-Trial: Ineffective Assistance of

Counsel

"The Defendant was denied, under the United States and Pennsylvania Constitutions, his right to effective assistance of counsel from his attorney, Michael Morrone, Esq. The ineffective assistance was of such significance as to undermine truth determining to the point that no reliable adjudication of guilt or innocence could have taken place."

Defendant states that Attorney Morrone was ineffective during and after trial when he:

1. failed to explain what "prior bad acts" meant;
2. failed to sufficiently cross-examine Hill and Trooper Vilello;
3. failed to argue that the case should be dismissed due to the fact that there was no victim;
4. failed to object to Deputy stationed in front of doorway, which prevented Defendant from asking what "prior bad acts" meant;
5. failed to present entrapment as a defense;
6. failed to "file certain motions dealing with presenting an oral argument prior to sentencing and motions regarding the actual sentencing"; and
7. failed to appear for the Pre-Sentence Investigation.

The Court reiterates the principles of ineffective assistance of counsel set forth under Ground 8A, *supra*. The Court will address the above arguments in order. First, the Corut notes that the Commonwealth had twenty-three (23) pages of Facebook messages between the Defendant and Hill that it wished to introduce. Prior to trial, Attorney Morrone, the attorney on behalf of the Commonwealth, and the Trial Court painstakingly went through each page to ensure that no evidence of prior bad acts would come into evidence. The

evidence that Attorney Morrone was attempting to keep out of the record, and did successfully keep out, dealt with Defendant's alleged sexual assault of his young son. Certainly, this is not something that Defendant would want to the jury to hear about. Attorney Morrone's failure to explain this to Defendant may have been inconvenient for him but it is certainly not prejudicial in any way.

Second, Defendant provides a very long list of "facts" Attorney Morrone failed to cross-examine Hill and Trooper Vilello on. However, Defendant has failed to establish that any of them, even if proven as true, would have likely changed the outcome of the case.

Third, this Court has already determined that a victim did in fact exist. *See Ground 2, supra*. Fourth, this Court has already determined that the Deputy's presence was inapposite to the outcome of the trial. *See Ground 6, supra*. Fifth, the Superior Court has already decided that entrapment is not a successful defense. *See Ground 3, supra.* Sixth, Defendant does not identify what "motions" he is referring to and the Court will not speculate. Finally, Defendant has failed to establish how he was prejudiced by Attorney Morrone's absence at his Pre-Sentence Investigation.

Again, Defendant has failed to prove that he has suffered prejudice due to Attorney Morrone's actions or inactions and similarly, has failed to prove that, had Attorney Morrone proceeded in any of the ways suggested by Defendant, the outcome of any of the proceedings would have been any different. In Defendant has failed to meet his burden under prong two of Section 9543 and therefore, his PCRA is denied on Ground 8B.

x. Ground 9: Proper Venue and Impartial Tribunal

"The Defendant was denied his rights, under the United States and Pennsylvania

Constitutions, to the proper venue and impartial tribunal."[10] Defendant argues that the charges in this case should not have been brought in Lycoming County because he lives in Chester County, Hill lives in Columbia County, and the arrest took place in Berks County.

Regarding venue, the Pennsylvania Supreme Court has explained:

> Jurisdiction relates to the court's power to hear and decide the controversy presented. *Com. v. Bethea*, 828 A.2d 1066, 1074 (Pa. 2003). "[A]ll courts of common pleas have statewide subject matter jurisdiction in cases arising under the Crimes Code." *Id.* . . . Venue, on the other hand, refers to the convenience and locality of trial, or "the right of a party to have the controversy brought and heard in a particular judicial district." *Id.* . . . "Venue in a criminal action properly belongs in the place where the crime occurred." *Id*.
> . . .
> Venue challenges concerning the locality of a crime . . . stem from the Sixth Amendment to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution, both of which require that a criminal defendant stand trial in the county in which the crime was committed, protecting the accused from unfair prosecutorial forum shopping. Thus, proof of venue, or the locus of the crime, is inherently required in all criminal cases.
> . . .
> Because the Commonwealth selects the county of trial, we now hold it shall bear the burden of proving venue is proper—that is, evidence an offense occurred in the judicial district with which the defendant may be criminally associated, **either directly, jointly, or vicariously**. . . . Venue merely concerns the judicial district in which the prosecution is to be conducted; it is not an essential element of the crime, nor does it relate to guilt or innocence. Because venue is not part of a crime, it need not be proven beyond a reasonable doubt as essential elements must be. Accordingly, applying the preponderance-of-the-evidence standard to venue challenges allows trial courts to speedily resolve this threshold issue without infringing on the accused's constitutional rights. Like essential elements of a crime, venue need not be proven by direct evidence but may be inferred by circumstantial evidence.

Com. v. Gross, 101 A.3d 28, 32-34 (Pa. 2014) (parallel citations omitted).

In determining the proper county in which a criminal trial should take place,

[10] The Court notes that Pages 31 to 36 to Addendum C, Section 16 (Arguments and Discussion of Authorities) of Defendant's original PCRA are missing.

Pennsylvania Courts have looked to 18 Pa.C.S.A. § 102, which provides "that an individual may be convicted in a county if, among other things, his 'conduct which is an element of the offense or the result of which is such an element occurs within the [county].' Under § 102, then, venue is proper in a county where either an element of an offense **or** a required result occurs." *Com. v. Graham*, 196 A.3d 661, 664 (Pa. Super. Ct. 2018) (emphasis in original). *See also* 18 Pa.C.S.A. § 102(a)(1). Even if venue is improper, the case will not be dismissed unless the defendant raises the issue before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant. Pa.R.Crim.P. 109.

It appears from the file that the reason the charges were brought in Lycoming County was because Hill was present in the Montoursville Barracks of the Pennsylvania State Police with Trooper Vilello at the time the Defendant made the incriminating statement.[11] On November 4, 2015, Defendant "commanded, encouraged or requested" Hill to engage in specific conduct which would constitute a crime. Specifically, the Defendant requested that Hill engage in sexual acts with her one (1) year old daughter and/or six (6) year old niece. Had Hill complied, that conduct would have occurred in Lycoming County, where Hill was physically located.

Next, Defendant argues that the tribunal in Lycoming County demonstrated significant prejudice when: President Judge Nancy Butts made statements during Defendant's bail modification hearing regarding property he owned in New York, labeling him a flight risk and allowed Attorney Morrone to waive Defendant's appearance without Defendant's consent and improperly held over the charges for trial; Judge Dudley Anderson

[11] PCRA Counsel indicates that Hill and her daughter resided in Lycoming County, but the Court could find no evidence in the file of this fact. In fact, the Court is unable to find any evidence suggesting where Hill lived at

improperly allowed the jury to leave on a restroom break for twenty (20) minutes during trial; and Judge Eric Linhardt was the District Attorney at the time of Defendant's investigation and arrest and should have been recused from this matter.

First, there is no record evidence to support Defendant's allegations against President Judge Butts and Judge Anderson. Defendant was provided a full opportunity on January 6, 2022 to present evidence of same and failed to do so. Additionally, while Defendant is correct that Judge Linhardt was the District Attorney at the time these charges were brought, there is no evidence that Judge Linhardt presided over any hearing, conferences, arguments or otherwise related to this case since being elected to the Lycoming County bench.

For the reasons set forth above, prong 2 of Section 9543 is not met and Defendant's PCRA is denied on Ground 9.

xi. Ground 10: Right to Effective and Conflict-Free Counsel

"The Defendant's rights, under the United States and Pennsylvania Constitutions, to effective and conflict-free counsel by the Defendant's appellant counsel, Ryan Gardner, Esq., when he became procedurally conflicted. This occurred when Mr. Gardner failed to disclose to the Defendant of his intention, campaign, and being elected to the District Attorney's [DA] office of Lycoming County during the time he represented the Defendant's direct appeal." Defendant argues that, throughout his representation, Attorney Gardner failed to communicate fully with the Defendant and failed to notify him of his candidacy and subsequent successful election of Lycoming County District Attorney. Defendant states that he was notified that Attorney Gardner's partner, Christian Lovecchio, Esquire, had agreed to handle the case.

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the time of the commission of these crimes.

First, the Court reiterates the principles of ineffective assistance of counsel set forth under Ground 8A, *supra*. Attorney Gardner won the primary election while this case was still on appeal with the Superior Court. Following the Superior Court's decision, Attorney Gardner properly and timely filed a Petition for Allowance of Appeal with the Supreme Court and, prior to its denial, Attorney Gardner won the general election. There is no evidence in the file that Attorney Gardner ever formally withdrew from the case or that Attorney Lovecchio ever entered his appearance. However, upon his pro se filing of his initial PCRA, Defendant was appointed counsel to assist him with the PCRA process.

While the Court certainly understands Defendant's frustration, the fact remains that all of Defendant's appeal rights were preserved. While Defendant is correct regarding his citation to the Rules of Professional Conduct, no conflict existed at the time Attorney Gardner was running for office. Defendant does not claim that Attorney Gardner is now improperly handling this matter at the District Attorney, which would obviously be a conflict of interest.[12] Based on the above timeline, it cannot be said that Attorney Gardner "abandoned" the Defendant during his appeal. *See, i.e., Com. v. Bennett*, 930 A.2d 1264, 1274 (Pa. 2007) (finding that PCRA counsel abandoned the defendant when he failed to file a appellate brief on appeal). Additionally, Attorney Gardner's actions or inactions, i.e., failing to notify Defendant of his intention to run for District Attorney, would not have changed the outcome of Defendant's appeal to the Superior Court or the Supreme Court's denial of his Petition for Allowance of Appeal.

[12] "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more

Defendant has not proved that he suffered any prejudice from Attorney Gardner's actions or inactions or that there is a reasonable probability that the outcome of either the Superior Court's decision or the Supreme Court's denial of allocatur would have been different had Attorney Gardner notified Defendant of his campaign for District Attorney. Defendant has failed to meet his burden under prong two of Section 9543 and therefore, his claim under Ground 10 is denied.

xii. Ground 11: Right to Due Process – Challenge Truthfulness and Request Exculpatory Material

"The Defendant's right, under the United States and Pennsylvania Constitutions, to due process was denied. This occurred when the Defendant was denied his right to challenge the truthfulness and veracity of the recital to numerous affidavits. He was also denied the opportunity to access requested exculpatory material relevant to the outcome of the case."

First, Defendant argues that numerous items were not provided to him despite being requested including police interviews, statements, Facebook and text messages, phone and video recordings, and case notes. On direct appeal, Defendant specifically argued that the Commonwealth failed to provide exculpatory evidence that would have been "'material to the instant case'" as it relates to his defense of impossibility. *Holmes*, 1671 MDA 2018, at *16. The Superior Court denied Defendant relief on this matter due to Defendant's vague assertions. *Id.* Here, however, Defendant expands on this argument to include assertions that the additional evidence would prove, for example, Beeley and Hill were acting as agents for the State Police and that the police entrapped the Defendant.

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clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Pa.R.P.C. Rule 1.7(a).

"*Brady* does not require the disclosure of information 'that is not exculpatory but might merely form the groundwork for possible arguments or defenses,' nor does *Brady* require the prosecution to disclose 'every fruitless lead' considered during a criminal investigation. The duty to disclose is limited to information in the possession of the government bringing the prosecution . . . ." *Com. v. Roney*, 79 A.3d 595, 608 (Pa. 2013) (internal citations omitted). Similarly, "*Brady* is not violated when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from other sources. *Id.*, *citing Com. v. Smith,* 17 A.3d 873, 902–03 (Pa. 2011).

First, Defendant fails to establish whether the requested documents exist and, even if they do, whether they were in the possession of the Commonwealth. Some facts that Defendant alleges the additional evidence would prove, listed on pages A40 through A42 of his PCRA, are wholly irrelevant and immaterial to this case. For instance, the jury was already aware that Hill was working with Trooper Vilello to identify the Defendant, the events of Defendant's arrest are irrelevant to proving the elements of the crimes with which he was charged, and the Superior Court has already determined that Defendant's entrapment claim fails. Any evidence relating to Beeley Mead is irrelevant, as he did not testify at trial and was not even mentioned other than to identify him as Hill's boyfriend. Additionally, the majority of the evidence that Defendant requested could have been obtained by him.

Next, Defendant argues that he was not given the opportunity to "challenge the truthfulness and veracity" of Trooper Vilello's statements contained within the affidavits. Specifically, he states that Trooper Vilello "omitted facts from some of the affidavits and

made conflicting statements both between affidavits and within the affidavits themselves," and that Trooper Vilello wrote "falsehoods and misrepresentations of facts" in the affidavits.

Defendant has the *prima facie* burden of establishing that the affidavit contained a material misrepresentation "before inquiry [will] be constitutionally required by the Fourth Amendment. Thus without such a showing there is no Fourth Amendment mandate which would provide a defendant the right to a hearing to attempt to establish that the affidavit contained a false statement, even in a material part, where the affidavit on its face is sufficient to support a finding of probable cause." *Com. v. Miller*, 518 A.2d 1187, 1193 (Pa. 1986).

An arrest warrant may be issued upon probable cause supported by at least one sworn affidavit, and the issuing authority may not consider any evidence outside of the affidavit. Pa. R. Crim. P. 513(b)(2). Before issuing a valid search warrant, a Judge must "be furnished with information sufficient to persuade a reasonable person that probable cause exists to conduct a search. The standard for evaluating a search warrant is a 'totality of the circumstances' test as set forth in *Illinois v. Gates,* 462 U.S. 213 (1983), and adopted in *Commonwealth v. Gray,* 503 A.2d 921 (1985). [The Judge] is to make a 'practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' The information offered to establish probable cause must be viewed in a common sense, non-technical manner. Probable cause is based on a finding of the probability, not a prima facie showing of criminal activity, and deference is to be accorded a [Judge's] finding of probable cause. *Com. v. Ryerson*, 817 A.2d 510, 513–14 (Pa.Super. 2003) (internal citations omitted).

Since the Defendant has failed to identify to *which* affidavits he is referring, the Court is left to speculate that they are the Affidavit dated December 3, 2015 to obtain the arrest warrant and the Affidavit dated May 4, 2017 to obtain the search warrant for his iPhone 4, which are the only affidavits available to this Court for review. In reviewing both of those Affidavits, the Court is of the opinion that Trooper Vilello established probable cause to arrest the Defendant and to search Defendant's iPhone 4.

We will begin with the affidavit in support of the arrest warrant. In this seven (7) page document, Trooper Vilello recounts how his investigation of Defendant began with the alleged sexual assault of a small boy and how he and Hill came to identify the Defendant considering the many aliases he has used. Trooper Vilello also types out relevant portions of the Facebook messages between Defendant and Hill between December 13, 2014 and December 31, 2014, some of which were read into the record during trial in part and were not conducted at Trooper Vilello's direction. The messages read in part:

> Hill: How old is he now [referring to Defendant's son]
> Jones: He's 5 now and we want to f*** you every weekend and every day.
> Hill: Yes, but I want u make him watch.
> Jones: Only if you lick you're daughter in front of us first
>
> . . .
>
> Hill: How much u pay
> Jones: $100
> Hill: I wouldn't do it alone.
> Jones: Unless you're bringing another girl then sorry
> Jones: Besides we are paying the $100 for you not him. Unless you have a young girl willing to hook up with us. We'd pay you for her.
> Hill: How young
> Jones: Up to you. And younger = more $, What age do you know you can get? What age do you THINK you can get but need time to check and work it out?

Trooper Vilello then recounts the text messages sent between Defendant and himself, using Hill's cell phone and specifically types out the messages, some of which were read into evidence at the time of trial, including Defendant's request for a picture of Hill with her finger in her daughter's vagina. Trooper Vilello also included some messages that were not read at trial. Trooper Vilello provides details of the travel arrangements Defendant made for both Hill and her one (1) year old daughter to take a bus to visit with him.

This Court is of the opinion that, given the messages from Craig Jones who Trooper Vilello identified as the Defendant, Trooper Vilello provided more than sufficient information to establish probable cause that Defendant committed the crimes with which he was charged.

In his twenty-two (22) page affidavit in support of the search warrant of Defendant's iPhone 4, Trooper Vilello details the start of a December 2014 investigation into Beeley Mead, Hill's boyfriend, at which point Mead described his sexual assault interactions involving Hill, another couple, and a young boy. Trooper Vilello then provides details into the investigation of Hill, who also describes the sexual encounter with Beeley, another couple, and the small boy. The next six (6) pages are taken from the affidavit of the arrest warrant and detail both the Facebook messages between Defendant and Hill and the subsequent text messages between Defendant and Trooper Vilello, while utilizing Hill's cell phone.

Trooper Vilello then describes the day of Defendant's arrest including the fact that, after getting off the bus, Defendant grabbed Hill by the arm and said, "come on Misti, let's go" and that Hill's last text messages to Defendant appeared on the iPhone 4 seized from Defendant's person. A subsequent search of Defendant's residence and interview of

Defendant's wife was conducted at which time she told police, among other things, that Defendant admitted to previously engaging in sexual activity with minors. The affidavit goes on to detail additional evidence gathered including child pornography found in Defendant's apartment, Facebook messages, cell phone records, and numerous others.

Similar to the above, Trooper Vilello provided more than sufficient information to establish that evidence of a child sexual assaults would be found on Defendant's iPhone 4.

Because both affidavits, on their face, are sufficient to support a finding of probable cause both for Defendant's arrest and for the search of Defendant's iPhone 4, Defendant did not have a constitutional right to a hearing to attempt to establish that the affidavits contained false statements. Nevertheless, despite being provided an opportunity to question Trooper Vilello on the facts contained in and allegedly omitted from the affidavits on January 6, 2022, Defendant has wholly failed to do so. For these reasons, Defendant has not met his burden under prong two of Section 9543 and his PCRA claim is denied on Ground 11.

xiii. Ground 12: Newly Available Exculpatory Evidence

"The unavailability, at the time of trial, of exculpatory evidence that has subsequently become available and would change the outcome of the trial had it been introduced." Specifically, Defendant states that the following exculpatory evidence would have changed the outcome of the trial:

1. Beeley Mead received a sentence reduction for his cooperation in the Defendant's case;

2. Trooper Vilello provided contradictory testimony regarding whether a child was present with Hill at the time of Defendant's arrest in testimony he provided at the time of the trial and subsequently in May of 2019; and

3. Trooper Vilello pulled over the Defendant's wife and mother-in-law and began questioning them about the case, but they referred him to their attorney.

First, the Court notes that Mead did not testify at trial and, in fact, was not even mentioned during trial other than when Hill indicated that he was her boyfriend. Second, this Court is unaware of any testimony provided by Trooper Vilello in May of 2019 and has no transcript of such. Third, there is no record evidence of Defendant's allegations relating to Trooper Vilello's questioning of the Defendant's family. Despite this, "a defendant seeking a new trial must demonstrate he will not use the alleged after-discovered evidence solely to impeach the credibility of a witness." *Com. v. Padillas*, 997 A.2d 356, 365 (Pa.Super. 2010).

For these reasons, Defendant has failed to meet prong two of Section 9543 and his PCRA is denied on Ground 12.

IV. Conclusion

As the Court has denied all of Defendant's above Grounds for relief, his PCRA is denied.

ORDER

AND NOW, this **17th** day of **February, 2022**, upon consideration of Defendant's Motion to Remove ADA Kirsten Gardner, and for the reasons set forth above, the Motion is **DENIED**. However, the Commonwealth has volunteered to ensure that Attorney Gardner does not participate in or do any work on this case.

Additionally, Defendant has failed to meet his burden of proof on all of the above grounds and therefore, his Petition for Post Conviction Collateral Relief is **DENIED** and Attorney Jasper's Motion to Withdraw is **GRANTED**.

Petitioner is hereby notified that he has the right to appeal this order to the

Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellate Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa. R.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office with the thirty (30) day time period, Petitioner may lose forever his right to raise these issues.

By The Court,

_____
Ryan M. Tira, Judge

cc: DA (M.Welickovitch)
James Holmes –
Trisha Jasper, Esq.
Gary Weber, Esquire
Alexandra Sholley – Judge Tira's Office