

## Defenses

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### 4.1 CHAPTER OVERVIEW

This chapter examines defenses applicable to sexual offenses. The defenses are arranged alphabetically by title and each defense includes a detailed discussion on applicability, elements, and burden of proof, along with other relevant issues.

### 4.2 ALIBI DEFENSE

#### A. Definition

An alibi defense is:

[A] defense that places the defendant at the relevant time at a different place than the scene involved and so removed therefrom as to render it impossible for him [or her] to be the guilty party.

**Commonwealth v. Mikell**, 556 Pa. 509, 517, 729 A.2d 566, 570 (1999). *See also*, Black's Law Dictionary 79 (8<sup>th</sup> ed. 2004) ("A defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time.").

#### B. Establishing the Defense

To successfully assert an alibi defense, a defendant need not show any "minimum or threshold quantum of physical separation" from the victim and the crime scene "so long as the separation makes it impossible for the defendant to have committed the crime." *See Commonwealth v. Roxberry*, 529 Pa. 160, 164, 602 A.2d 826, 828 (1992). As the Superior Court recently noted, there is no "magic distance" necessary for the defendant's separation from the victim and the crime scene; rather "all depends upon whether evidence is introduced that 'if believed, isolate[s] [the defendant] from all possible interaction with the victim and the crime scene.'" **Commonwealth v. Hall**, 867 A.2d 619, 637 (Pa. Super. 2005), *appeal denied*, 586 Pa. 756, 895 A.2d 549 (2006) (quoting **Commonwealth v. Collins**, 549 Pa. 593, 604, 702 A.2d 540, 545 (1997), *cert denied*, 525 U.S. 835 (1998)). *See also*, **Roxberry**, 529 Pa. at 164, 602 A.2d at 828 ("It is theoretically possible to assert an alibi even when a crime occurs in the same building where the accused is located.").

Furthermore, an alibi defense need not be corroborated; it can be established "solely by the unsupported testimony of the defendant." *Id.*, 529 Pa. at 165, 602 A.2d at 828. However, it is common for a defendant to present alibi witnesses or other evidence showing his or her presence away from the victim

and the crime scene in an effort to establish the defense. *See Commonwealth v. Pounds*, 490 Pa. 621, 631-632, 417 A.2d 597, 602 (1980).

### C. Statutory Notice Requirements

A defendant's right to present evidence of an alibi is not absolute. A Defendant must comply with the notice requirements set forth in Pennsylvania Rule of Criminal Procedure 573. Rule 573 is "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Commonwealth v. Fernandez*, 482 A.2d 567, 572 (Pa. Super. 1984).

Pa.R.Crim.P. 573(C)(1)(a), 42 PA.CON.S.TAT.ANN., provides, in pertinent part, the following:

(1) Mandatory:

(a) Notice of Alibi Defense: A defendant who intends to offer the defense of alibi at trial, within the time required for filing the omnibus pretrial motion under Rule 579, shall file with the clerk of courts notice specifying the intention to claim the defense of alibi, and a certificate of service on the attorney for the Commonwealth. The notice and certificate shall be signed by the attorney for the defendant, or the defendant if unrepresented. Such notice shall contain specific information as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

In accordance with Rule 573(C)(1)(d) of the Pennsylvania Rules of Criminal Procedure, 42 PA.CON.S.TAT.ANN., if the defendant fails to file and serve notice of the alibi defense, or omits any witness from the notice, the Court may:

- i. Exclude the testimony of any omitted witness; or
- ii. Exclude entirely any evidence offered by the defendant for the purpose of proving the defense (except testimony by the defendant); or
- iii. Grant a continuance to enable the Commonwealth to investigate such evidence; or
- iv. Make such other order as the interests of justice require.

The imposition of sanctions under Rule 573 is within the sole discretion of the trial court. *See Commonwealth v. Zimmerman*, 571 A.2d 1062, 1067 (Pa. Super. 1990), *appeal denied*, 529 Pa. 633, 600 A.2d 953 (1991), *cert. denied*, 503 U.S. 945 (1992).

#### D. Burden of Proof

The defendant “bears no burden of proof on alibi.” *Commonwealth v. Pounds*, 490 Pa. 621, 634 n.16, 417 A.2d 597, 603 n.16 (1980). In *Commonwealth v. Bonomo*, 396 Pa. 222, 151 A.2d 441 (1959), our Supreme Court stated that the

*Commonwealth has the burden of proving every essential element necessary for conviction. If the defendant traverses one of those essential elements by evidence of alibi, his evidence will be considered by the jury along with all the other evidence. It may, either standing alone or together with other evidence, be sufficient to leave in the minds of the jury a reasonable doubt which, without it, might not otherwise exist.*

*Id.*, 396 Pa. at 231, 151 A.2d at 446 (emphasis added). *See also, Commonwealth v. Rose*, 457 Pa. 380, 386, 321 A.2d 880, 883 (1974) (“[I]n Pennsylvania, the Commonwealth must yet prove beyond a reasonable doubt the defendant’s presence at the scene of the crime at the time it was committed.”)

#### E. Alibi Jury Instruction

The alibi instruction is designed to ensure that the jury understands that the burden of proof properly lies with the Commonwealth, as there is an inherent danger, without the instruction, that the jury will presume that the defendant has the burden to prove that the alibi is true. *See Commonwealth v. Collins*, 549 Pa. 593, 603, 702 A.2d 540, 544-545 (1997), *cert denied*, 525 U.S. 835 (1998). As our Supreme Court explained in *Commonwealth v. Pounds*, 490 Pa. 621, 417 A.2d 597 (1980), “[w]here an alibi defense is presented, such an instruction is necessary due to the danger that the failure to prove the defense will be taken by the jury as a sign of the defendant’s guilt.” *Id.*, 490 Pa. at 633-634, 417 A.2d at 603.

So long as the defendant establishes an alibi defense, the trial judge may not remove the alibi issue from the jury’s consideration simply because the trial judge personally finds the evidence incredible. *See Commonwealth v. Roxberry*, 529 Pa. 160, 166, 602 A.2d 826, 828 (1992).

When instructing the jury, the trial court must make it clear that the defendant’s failure to prove alibi is not tantamount to guilt. *See Commonwealth v. Jones*, 529 Pa. 149, 151, 602 A.2d 820, 821 (1992). As such, a proper instruction “expressly informs the jury that the alibi evidence, either by itself or together with other evidence, could raise a reasonable doubt as to the defendant’s guilt and clearly directs the jury to consider this evidence in determining *whether the Commonwealth met its burden* of proving beyond a reasonable doubt that the crime was committed by the defendant.” *Id.* (quoting *Commonwealth v. Saunders*, 529 Pa. 140, 145, 602 A.2d 816, 818 (1992)).<sup>1</sup>

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<sup>1</sup> Thus, in giving this particular instruction, the trial judge need not “parrot” the exact language in *Pounds*, 490 Pa. at 633, 417 A.2d at 603, that alibi evidence “even if not wholly believed,” may raise a reasonable

Pennsylvania Suggested Standard Criminal Jury Instruction § 3.11 sets forth the alibi instruction as follows:

Obviously the defendant cannot be guilty unless he was at the scene of the alleged crime. The defendant has (testified) (offered evidence) that he was not present at the scene but rather was at \_\_\_\_\_. You should consider this evidence along with all of the other evidence in the case in determining whether the Commonwealth has met its burden of proving beyond a reasonable doubt that a crime was committed and that the defendant himself committed (or took part in committing) it. 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 minds. If you have a reasonable doubt of the defendant's guilt, you must find him not guilty.

When a defendant offers evidence of alibi and defense counsel argues alibi to the jury, the trial court's failure to give an alibi instruction is error. *See Commonwealth v. Gainer*, 580 A.2d 333, 337 (Pa. Super. 1990), *appeal denied*, 529 Pa. 645, 602 A.2d 856 (1992). *See also, Commonwealth v. Kolenda*, 544 Pa. 426, 432, 676 A.2d 1187, 1190 (1996) ("The strength of the Commonwealth's case does not render the absence of an alibi instruction harmless error.").

### 1. Limitation on Use of Instruction

A defendant is only entitled to an alibi instruction, however, where his or her "explanation places him at the relevant time at a different place than the scene involved and so far removed therefrom as to render it impossible for him to be the guilty party." *Commonwealth v. Collins*, 549 Pa. 593, 603, 702 A.2d 540, 545 (1997), *cert denied*, 525 U.S. 835 (1998). Accordingly, where the defendant's testimony places him or her close enough to the crime scene to have made it physically possible for the defendant to have committed the crime, an alibi instruction is not required. *Id.* *See also, Commonwealth v. Johnson*, 538 Pa. 148, 646 A.2d 1170 (1994) (no instruction is required where the defendant's testimony placed him within 150 feet of the crime scene).

### 2. Ineffective Assistance of Counsel: Lack of Instruction

Furthermore, defense counsel will be found constitutionally ineffective when alibi evidence is presented to the jury, but defense counsel fails to request an alibi instruction. *See Commonwealth v. Gainer*, 580 A.2d 333, 337 (Pa. Super. 1990), *appeal denied*, 529 Pa. 645, 602 A.2d 856 (1992).

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doubt. *Commonwealth v. Saunders*, 529 Pa. 140, 145, 602 A.2d 816, 818 (1992). *See also, Commonwealth v. Thomas*, 552 Pa. 621, 643, 717 A.2d 468, 479 (1998), *cert. denied*, 528 U.S. 827 (1999) (noting that in *Saunders* the Court held that the "even if not wholly believed" language from *Pounds* was "not necessary in an alibi instruction, and emphasized that an appellate court's inquiry into the adequacy of a jury charge must not focus on the presence of "magic words").

Likewise, counsel will be found constitutionally ineffective when he or she requests an alibi instruction, which the trial refuses to give, and defense counsel fails to preserve the court's error by objecting to the charge. *Id.*

### E. Rebuttal of Alibi Defense

An alibi defense can be rebutted simply by the victim's testimony. *See Commonwealth v. Brison*, 618 A.2d 420, 423 (Pa. Super. 1992) (finding that jury's evident acceptance of victim's testimony was sufficient to rebut defendant's alibi evidence and noting that "no other additional evidence" was needed to rebut defendant's alibi evidence). The Commonwealth may use any relevant and admissible countervailing evidence to rebut alibi evidence.

- ***Commonwealth v. Johnson***, 788 A.2d 985, 991 (Pa. Super. 2001) (noting that to rebut alibi witness's testimony that she and defendant lived together the Commonwealth could have presented "the testimony of neighbors that Appellant did not live there, or evidence that Appellant resided elsewhere").
- ***Commonwealth v. Days***, 784 A.2d 817, 822 (Pa. Super. 2001) (no error in permitting the Commonwealth to offer defendant's convictions for public drunkenness and criminal mischief, not as crimes of dishonesty or false statement, but to rebut the defendant's alibi evidence "after appellant used the convictions to victimize and alibi himself").
- ***Commonwealth v. Viera***, 659 A.2d 1024, 1029 (Pa. Super. 1995), appeal denied, 534 Pa. 713, 672 A.2d 307 (1996) (no error in permitting the Commonwealth to present the defendant's probation officer as a rebuttal witness to defendant's alibi evidence where parole officer did not elaborate as to crime which caused defendant to serve parole).
- ***Commonwealth v. Flood***, 627 A.2d 1193, 1201 (Pa. Super. 1993), *appeal denied*, 537 Pa. 617, 641 A.2d 583 (1994) (trial court did not abuse its discretion in allowing prosecution to reopen its case and submit rebuttal affidavit, which rebutted defendant's alibi, indicating that gun allegedly used by defendant had been purchased for him by his cousin).
- ***Commonwealth v. Marsh***, 566 A.2d 296, 301 (Pa. Super. 1989) (evidence of prior crimes admissible to show common scheme where the evidence was probative as it tended to rebut the defendant's alibi defense).

### G. Assessing the Credibility of an Alibi Witness

The assessment of the credibility of an alibi witness is the sole province of the fact-finder. *See Commonwealth v. Thomas*, 552 Pa. 621, 633, 717 A.2d 468, 478 (1998), *cert denied*, ***Thomas v. Pennsylvania***, 528 U.S. 827 (1999); 2 West's Pennsylvania Practice § 12.32, Alibi (2001).

### 4.3 CONSENT DEFENSE

#### A. Statutory Elements of Defense

Consent as a defense is set forth in the culpability section of the Crimes Code, which provides, in pertinent part, the following:

18 PA.CON.S.TAT.ANN. § 311.

(a) General rule.—The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

Section 311 is based upon **Model Penal Code § 2.11** (2001). “[C]onsent is an act of free will. It is not the absence of resistance in the face of actual or threatened force inducing a woman to submit to a carnal act; active opposition is not a prerequisite to finding lack of consent.” **Commonwealth v. Rough**, 418 A.2d 605, 608 (Pa. Super. 1980).

#### B. Burden of Proof

Several sex offenses require that the Commonwealth prove lack of consent. *See* 18 PA.CON.S.TAT.ANN. § 3121 (rape); 18 PA.CON.S.TAT.ANN. § 3123 (involuntary deviate sexual intercourse); 18 PA.CON.S.TAT.ANN. § 3124.1 (sexual assault); and 18 PA.CON.S.TAT.ANN. § 3126 (indecent assault). “While a defendant may assert consent as a defense, nevertheless, where lack of consent is an element of the crime, the defendant does not bear the burden of proving consent: *the Commonwealth bears the burden of proving lack of consent, beyond a reasonable doubt.*” **Commonwealth v. Prince**, 719 A.2d 1086, 1090 (Pa. Super. 1998) (emphasis in original).

#### C. Ineffective Consent

Under the Crimes Code, assent to a sexual encounter does not constitute consent if:

- (1) it is given by a person who is legally incapacitated to authorize the conduct charged to constitute the offense;
- (2) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;
- (3) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or
- (4) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.

18 PA.CON.S.TAT.ANN. § 311(c)(1)-(4).

- ***Commonwealth v. Erney***, 548 Pa. 467, 473-474, 698 A.2d 56, 59 (1997) (where victim has impaired physical and mental condition so as to be unable to knowingly consent, submission to intercourse is involuntary).
- ***Commonwealth v. Przybyla***, 722 A.2d 183, 186 n.5 (Pa. Super. 1998) (“Persons under 14 are presumed legally incapable of giving consent.”).
- ***Commonwealth v. Cordoba***, 902 A.2d 1280, 1286 (Pa. Super. 2006) (where defendant knew he was HIV-infected and nonetheless had sex with his victim without informing him of that fact, trial court was incorrect in concluding that defendant and victim had “consensual” relations as consent is ineffective when induced by deception, citing 18 PA.CONS.STAT.ANN. § 311(c)(4)).

#### D. Consent as a Valid Defense

Effective consent to sexual intercourse will negate a finding of forcible compulsion. See ***Commonwealth v. Karkaria***, 533 Pa. 412, 420, 625 A.2d 1167, 1170 (1993); ***Commonwealth v. Rhoades***, 510 Pa. 537, 554, 510 A.2d 1217, 1225 (1986).

#### E. Consent Inapplicable to Certain Sexual Offenses

In cases of rape, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, or indecent assault, consent is no defense if the victim is thirteen years of age or younger. See 18 PA.CONS.STAT.ANN. § 3121(c), *Rape of a child*; 18 PA.CONS.STAT.ANN. § 3121(d), *Rape of a child with serious bodily injury*; 18 PA.CONS.STAT.ANN. § 3123(b), *IDSI with a child*; 18 PA.CONS.STAT.ANN. § 3123(c), *IDSI with a child with serious bodily injury*; 18 PA.CONS.STAT.ANN. § 3125(a)(7), *Aggravated indecent assault*; 18 PA.CONS.STAT.ANN. § 3126(a)(7), *Indecent assault*.

In addition, victims who are over thirteen, but under sixteen, do not have the legal capacity to consent to sexual contact with an adult who is four or more years older than the victim and who is not married to the victim:

- 18 PA.CONS.STAT.ANN. § 3122.1 (under criminal statutory sexual assault statute, consent ineffective if victim is less than sixteen years-old and offender is four or more years older than victim and they are not married to each other).
- 18 PA.CONS.STAT.ANN. § 3123(a)(7) (under criminal involuntary deviate sexual intercourse statute, consent ineffective if victim is either less than thirteen years-old, or less than sixteen years-old and offender is four or more years older than victim and they are not married to each other).
- 18 PA.CONS.STAT.ANN. § 3125(a)(8) (under criminal aggravated indecent assault statute, consent ineffective if victim is either less than thirteen years-old, or less than sixteen years-old and offender is four or more years older than victim and they are not married to each other).

- 18 PA.CON.S.TAT.ANN. § 3126(a)(8) (under criminal indecent assault statute, consent ineffective if victim is either less than thirteen years-old, or less than sixteen years-old and offender is four or more years older than victim and they are not married to each other).

### 4.4 DURESS

#### A. Statutory Elements

Duress is “a threat of harm made to compel a person to do something against his or her will or judgment[.]” Black’s Law Dictionary 542 (8<sup>th</sup> ed. 2004).

The defense of duress is codified in Section 309 of the Crimes Code. Section 309 states the following:

(a) General rule.—It is a defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(b) Exception.—The defense provided by subsection (a) of this section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

18 PA.CON.S.TAT.ANN. § 309.

The elements necessary to establish duress as a defense are:

- i) there was a use of, or threat to use, unlawful force against the defendant or another person; and
- ii) the use of, or threat to use, unlawful force was of such a nature that a person of reasonable firmness in the defendant’s situation would have been unable to resist it.

*See Commonwealth v. DeMarco*, 570 Pa. 263, 272, 809 A.2d 256, 261-262 (2002). Duress is a defense to all criminal activity except first-degree murder. *See Commonwealth v. Morningwake*, 595 A.2d 158, 164 (Pa. Super. 1991), *appeal denied*, 529 Pa. 618, 600 A.2d 535 (1991).

#### B. Degree of Force Required

To establish the duress defense under Section 309, the force or threatened force does not need to be of present and impending death or serious bodily injury; rather, the relevant inquiry is

whether the force or threatened force was a type of unlawful force that “a person of reasonable firmness *in [the defendant’s] situation* would have been unable to resist.”

***Commonwealth v. DeMarco***, 570 Pa. 263, 272, 809 A.2d 256, 262 (2002).

The Pennsylvania Supreme Court in ***Commonwealth v. DeMarco***, 570 Pa. 263, 809 A.2d 256 (2002) noted that the foregoing test is a “hybrid objective-subjective one,” 570 Pa. at 273, 809 A.2d at 262, and explained that

the trier of fact must consider whether an objective person of reasonable firmness would have been able to resist the threat, it must ultimately base its decision on whether that person would have been able to resist the threat if he was subjectively placed in the defendant’s situation. Therefore, in making its determination, the trier of fact must consider “stark, tangible factors, which differentiate the [defendant] from another, like his size or strength or age or health.” MODEL PENAL CODE § 2.09 cmt. at 7 (Tent. Draft No. 10, 1960). Although the trier of fact is not to consider the defendant’s particular characteristics of temperament, intelligence, courageousness, or moral fortitude, the fact that a defendant suffers from “a gross and verifiable” mental disability “that may establish irresponsibility” is a relevant consideration. *Id.* at 6. Moreover, the trier of fact should consider any salient situational factors surrounding the defendant at the time of the alleged duress, such as the severity of the offense the defendant was asked to commit, the nature of the force used or threatened to be used, and the alternative ways in which the defendant may have averted the force or threatened force.

***DeMarco***, 570 Pa. at 273, 809 A.2d at 262.

### C. Exceptions to Duress Defense

#### 1. Recklessness

The duress defense is not available if the evidence establishes that the defendant recklessly placed himself in a situation where it was probable that he would be subject to duress. *See* 18 PA.CON.S.TAT.ANN. § 309(b). Our Supreme Court has defined “reckless” under Section 309 as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, *considering the nature and intent of the actor’s conduct and the circumstances known to him*, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe *in the actor’s situation*.

**DeMarco**, 570 Pa. at 273-274, 809 A.2d at 262 (citing 18 PA.CON.S.TAT.ANN. § 302(b)(3)) (emphasis in original). The determination of recklessness is also “a hybrid objective-subjective one.” *Id.*, 570 Pa. at 274, 809 A.2d at 262.

The trier of fact must decide whether the defendant disregarded a risk that involves a gross deviation from what an objective “reasonable person” would observe if he was subjectively placed “in the [defendant’s] situation.” 18 Pa.C.S. § 302(b)(3). Thus, in making its determination, the trier of fact must again take into account the stark tangible factors that differentiate the defendant from another person and the salient situational factors surrounding the defendant.

*Id.*, 570 Pa. at 274, 809 A.2d at 262-263.

### 2. Negligence

The defense of duress is also unavailable if a defendant were negligent in placing himself in a situation where he would be subjected to duress, whenever negligence suffices to establish culpability for the offense charged. *See* 18 PA.CON.S.TAT.ANN. § 309(b). *See also, Commonwealth v. Knight*, 611 A.2d 1199, 1205 (Pa. Super. 1992), *appeal denied*, 533 Pa. 657, 625 A.2d 1192 (1993). The Crimes Code defines negligence as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

18 PA.CON.S.TAT.ANN. § 302(b)(4).

## 4.5 IMPOSSIBILITY DEFENSE

### A. Factual v. Legal

#### 1. Factual Impossibility

“Factual impossibility denotes conduct where the objective is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing it about.” *Commonwealth v. Henley*, 504 Pa. 408, 410-411, 474 A.2d 1115, 1116 (1984).

Factual impossibility is not an available defense under the Pennsylvania Crimes Code. *See e.g., Commonwealth v. Timer*, 609 A.2d 572, 575 (Pa. Super. 1992) (conviction for conspiracy to purchase and/or possess

methamphetamine upheld even though a sale never took place and was never going to take place because the undercover officers posing as suppliers had no intention of actually providing the drug).

## 2. Legal Impossibility

Legal impossibility occurs “where the intended acts would not amount to a crime even if completed.” *Commonwealth v. Henley*, 504 Pa. 408, 411, 474 A.2d 1115, 1116 (1984). As set forth in Section 901 of the Crimes Code, legal impossibility is not a recognized defense to a charge of “attempt” in Pennsylvania. Section 901 provides, in pertinent part, the following:

(b) Impossibility.—It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the crime attempted.

18 PA.CON.S.TAT.ANN. § 901(b). Our Supreme Court in *Henley* concisely summarized the law in Pennsylvania when it stated that “if one forms intent to commit a substantive crime, then proceeds to perform all the acts necessary to commit the crime, and it is shown that completion of the substantive crime is impossible, the actor can still be culpable of attempt to commit the substantive crime.” *Id.*, 504 Pa. at 416, 474 A.2d at 1119.

In the context of an assault case, the Pennsylvania Superior Court, in *Commonwealth v. Lopez*, 654 A.2d 1150 (Pa. Super. 1995), similarly concluded that an attempt is established if the appropriate “intent” is shown: “if the accused intends to cause serious bodily injury to another, then proceeds to perform all of the acts necessary to do so, the accused can still be guilty of aggravated assault even though completing an aggravated assault is impossible.” *Id.*, at 1154.

## 4.6 INSANITY DEFENSE

### A. Availability

The insanity defense is only available to those defendants who come within the purview of Pennsylvania’s legal test for insanity. The insanity defense is not available simply because the defendant has a mental illness.

### B. Statutory Defense

Section 315 of the Crimes Code provides the general rule that

The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when the actor proves by a preponderance of evidence that the actor was legally insane at the time of the commission of the offense.

18 PA.CON.S.TAT.ANN. § 315(a). Section 315(b) further provides that

“[l]egally insane” means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.

Section 315 is a codification of the *M’Naghten*<sup>2</sup> test for insanity. *See Commonwealth v. Reilly*, 519 Pa. 550, 558-559, 549 A.2d 503, 507 (1988). Accordingly, “[u]nder *M’Naghten*, a defendant is legally insane and absolved of criminal responsibility if, at the time of committing the act, due to a defect of reason or disease of mind, the accused either did not know the nature and quality of the act or did not know that the act was wrong.” *Commonwealth v. Heidnik*, 526 Pa. 458, 466, 587 A.2d 687, 690 (1991).

### C. Burden of Proof

A defendant must prove insanity by a preponderance of the evidence. *See* 18 PA.CON.S.TAT.ANN. § 315(a); *Commonwealth v. Heidnik*, 526 Pa. 458, 466, 587 A.2d 687, 691 (1991); *Commonwealth v. Mitchell*, 576 Pa. 258, 274, 839 A.2d 202, 211 n.8 (2003). Our Supreme Court in *Commonwealth v. Reilly*, 519 Pa. 550, 549 A.2d 503 (1988), explained that

[i]n order for appellant’s attack upon section 315 to succeed, she must show that insanity negates the *mens rea* element of the offense charged. Although the burden is upon the Commonwealth to prove every element of its case, the Commonwealth is not required to prove facts which would counteract any justification or excuse the defendant may have had for the commission of the crime. Proof of facts which exonerate the accused from his guilt remain solely the province of the criminal defendant.

*Id.*, 519 Pa. at 564, 549 A.2d at 510 (internal citations omitted).

### D. *M’Naghten* Test

To establish insanity under *M’Naghten* a defendant must establish, by a preponderance of the evidence, one part of the following two part test: (1) at the time he or she committed the act, the defendant did not know the nature and quality of the act or (2) the defendant did not know that it was wrong. *See Commonwealth v. Demmitt*, 456 Pa. 475, 481, 321 A.2d 627, 631 (1974). “The nature of an act is that it is right or wrong. The quality of an act is that it is likely to cause death or injury.” *Commonwealth v. Young*, 524 Pa. 373, 391, 572 A.2d 1217, 1226 (1989), *cert denied*, 511 U.S. 1012 (1994).

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<sup>2</sup> *Regina v. M’Naghten*, 10 Cl. & Fin. 200, 8 Eng.Rep. 718 (1843).

The decision of the defendant's sanity is entirely within the discretion of the jury. **Commonwealth v. Zewe**, 663 A.2d 195, 198 (Pa. Super. 1995), *appeal denied*, 544 Pa. 629, 675 A.2d 1248 (1996). Furthermore, the Commonwealth can establish a defendant's sanity solely by lay witnesses even where a defendant has offered expert testimony as to his lack of sanity.

**Commonwealth v. Young**, 276 Pa. 409, 416, 419 A.2d 523, 526-527 (1980). "The Commonwealth may meet its burden by testimony concerning the defendant's actions, conversations, and statements at the time of the crimes from which the jury can infer that he knew what he was doing when he committed the crimes and that he knew that his actions were wrong." *Id.*, 276 Pa. at 418, 419 A.2d at 527.

#### E. Irresistible Impulse

"The doctrine of 'irresistible impulse' or in the modern psychiatric vernacular 'inability to control one's self', whether used to denote legal insanity, or as a device to escape criminal responsibility for one's acts or to reduce the crime or its degree, *has always been rejected in Pennsylvania.*" **Commonwealth v. Kuzmanko**, 709 A.2d 392, 398 (Pa. Super. 1998), *appeal denied*, 556 Pa. 705, 729 A.2d 1126 (1998) (quoting **Commonwealth v. Zettlemyer**, 500 Pa. 16, 34, 454 A.2d 937, 946, *cert denied*, 461 U.S. 970 (1983)). Accordingly, irresistible impulse is no defense to a criminal charge.

#### F. Diminished Capacity

"Diminished capacity is an extremely limited defense." **Commonwealth v. Singley**, 868 A.2d 403, 412 n.10 (2005). "In asserting a diminished capacity defense, a defendant is attempting to prove that he was *incapable* of forming the specific intent to kill; if the defendant is successful, first degree murder is mitigated to third degree." **Commonwealth v. Travaglia**, 541 Pa. 108, 124 n.10, 661 A.2d 352, 359 n.10 (1995), *cert denied*, **Travaglia v. Pennsylvania**, 467 U.S. 1256 (1984). Accordingly, diminished capacity may not be applied to crimes other than murder of the first degree. *See Commonwealth v. Swartz*, 484 A.2d 793, 796 n.7 (1984).

#### G. Guilty but Mentally Ill

Section 314 of the Crimes Code provides that

[a] person who timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found 'guilty but mentally ill' at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense.

18 PA.CON.S.TAT.ANN. § 314(a). Section 314 defines "mentally ill" as "[o]ne who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." 18 PA.CON.S.TAT.ANN. § 314(c). A verdict of "guilty

but mentally ill” is not an insanity verdict, as the test for insanity is the *M’Naghten* test. See 18 PA.CONS.STAT.ANN. § 314(d).

Neither the defendant nor the Commonwealth is “required to prove that the defendant was mentally ill at the time of the commission of the offense.” *Commonwealth v. Sohmer*, 519 Pa. 200, 212, 546 A.2d 601, 607 (1988). Rather, the trier of fact assesses the evidence “produced as to the mental state of the defendant at the time of the offense whether the fact of his mental illness preponderates.” *Id.* In other words, when the defendant submits evidence as to his insanity, but the trier of fact finds that the defendant is *not* insane under the *M’Naghten* standard, the trier of fact may still find the defendant to be “guilty but mentally ill.”

Conversely, if a defendant cannot make out an insanity defense as a matter of law or fails to present evidence of mental illness, the defendant is not entitled to a “guilty but mentally ill” instruction. See *Commonwealth v. Henry*, 524 Pa. 135, 149, 569 A.2d 929, 935-936 (1990); *Commonwealth v. Faulkner*, 528 Pa. 57, 595 A.2d 28 (1991), *cert denied*, *Faulkner v. Pennsylvania*, 503 U.S. 989 (1992).

A defendant found “guilty but mentally ill” is sentenced exactly the same way as any other defendant found guilty of the criminal offense at issue. See 42 PA.CONS.STAT.ANN. § 9727(a) (“A defendant found guilty but mentally ill or whose plea of guilty but mentally ill is accepted under the provisions of 18 Pa.C.S. § 314 (relating to guilty but mentally ill) may have any sentence imposed on him which may lawfully be imposed on any defendant convicted of the same offense.”). The only difference is that the defendant found “guilty but mentally ill” may be entitled to treatment. See 42 PA.CONS.STAT.ANN. § 9727(b).

## 4.7 INTOXICATION

### A. Voluntary Intoxication

Section 308 of the Crimes Code provides the following:

Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense, except that evidence of such intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.

18 PA.CONS.STAT.ANN. § 308.

Section 308, however, does not render evidence of intoxication completely irrelevant, apart from reducing murder from a higher degree to a lower degree, as, in certain instances, evidence of intoxication is accepted as relevant. Our

Supreme Court explained in *Commonwealth v. Bridge*, 495 Pa. 568, 435 A.2d 151 (1981), that

if the accused seeks to offer his intoxication to prove that he did not perform the physical act required by the crime that he was unconscious at the time and therefore did not commit the deed this evidence is germane to the factfinders' inquiry and is properly submitted for their evaluation. In such cases, the issue can be neatly confined to the question of whether the accused was the perpetrator of the deed charged.

*Id.*, 495 Pa. at 573-574, 435 A.2d at 154. That being said, Section 308 firmly establishes that the actor's degree of sobriety is not relevant in establishing the absence of intent required to commit the crime charged. As the Superior Court stated in *Commonwealth v. Rumsey*, 454 A.2d 1121 (Pa. Super. 1983),

it is apparent that in amended § 308 the legislature in effect redefined the *mens rea* element of intentional or knowing crimes to include those cases where the putative offender performed the criminal act but was unable to form the criminal intent otherwise required solely because he was voluntarily drunk or drugged.

*Id.*, at 1122.

## B. Involuntary Intoxication

“The existence and scope of the defense of involuntary intoxication is not yet fully established in Pennsylvania law.” *Commonwealth v. Smith*, 831 A.2d 636, 639 (Pa. Super. 2003), *appeal denied*, 576 Pa. 722, 841 A.2d 531 (2003) (quoting Committee Note, PA.S.S.J.I. Crim. 8.308(c)). Involuntary intoxication evidence is like the insanity defense in that “the defendant is excused from criminality because intoxication affects the ability to distinguish between right and wrong.” *Id.*, at 639 n.2. Accordingly, “the mental state of an involuntarily intoxicated defendant is measured by the test of legal insanity.” *Id.*

In *Smith*, the Superior Court noted that

[t]he defense of involuntary intoxication has been recognized in other jurisdictions in four types of situations: (1) where the intoxication was caused by the fault of another (i.e., through force, duress, fraud, or contrivance); (2) where the intoxication was caused by an innocent mistake on the part of the defendant (i.e., defendant took hallucinogenic pill in reasonable belief it was aspirin or lawful tranquilizer); (3) where a defendant unknowingly suffers from a physiological or psychological condition that renders him abnormally susceptible to a legal intoxicant (sometimes referred to as pathological intoxication); and (4) where unexpected intoxication results from a medically prescribed drug.

*Id.*, at 639 (citing Phillip E. Hassman, Annotation, *When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge*, 73 A.L.R.3d 195 at § 2[a] (1976)). A key component to all four of these definitions is the “lack of culpability on the part of the defendant in causing the intoxication.” *Id.*

A defendant will not be excused from his or her behavior for intoxication resulting from the unwitting mixture of prescription drugs and alcohol. *See Commonwealth v. Smith*, 831 A.2d 636, 640 (Pa. Super. 2003), *appeal denied*, 576 Pa. 722, 841 A.2d 531 (2003), in which the Superior Court noted that “Pennsylvania law is consonant with the Model Penal Code’s definition and would not characterize intoxication produced by the voluntary consumption of a prescription drug and alcohol as ‘involuntary’ even if that consumption was without knowledge of a synergistic effect.”

The defendant has the burden of proving the affirmative defense of involuntary intoxication by a preponderance of the evidence. *Id.* In *dicta*, the Court in *Smith*, where the defendant consumed alcohol and prescription drugs, noted that the trial court cannot take judicial notice that the combination of drugs and alcohol is capable of causing extreme intoxication. *Id.*, at 641. The Court noted that expert testimony is needed to establish intoxicating effect. *Id.*

## 4.8 MISTAKE OF FACT DEFENSE

### A. Statutory Elements of Defense

Section 304 of the Crimes Code sets forth the statutory elements of the defense as follows:

Ignorance or mistake as to a matter of fact, for which there is reasonable explanation or excuse, is a defense if:

- (1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required to establish a material element of the offense; or
- (2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

18 PA.CON.S.TAT.ANN. § 304.

“It is not necessary that the facts be as the actor believed them to be; it is only necessary that he have ‘a bona fide and reasonable belief in the existence of facts which, if they did exist, would render an act innocent.’” *Commonwealth v. Hamilton*, 766 A.2d 874, 879 (Pa. Super. 2001) (quoting *Commonwealth v. Lefever*, 30 A.2d 364, 365 (Pa. Super. 1943)). Where the mistake of fact is not reasonable, it is not a defense even if the defendant had a *bona fide* belief in its existence. *See* 18 PA.CON.S.TAT.ANN. § 304, Comment.

## B. Burden of Proof

When evidence of a mistake of fact is introduced, the Commonwealth retains the burden of proving the necessary criminal intent beyond a reasonable doubt. See **Commonwealth v. Hamilton**, 766 A.2d 874, 879 (Pa. Super. 2001). Simply put, the Commonwealth must prove either the absence of a bona fide, reasonable mistake, or that the mistake alleged would not have negated the intent necessary to prove the crime charged. *Id.* See also, **Commonwealth v. Namack**, 663 A.2d 191, 195 (Pa. Super. 1995).

## C. Applicability to Sex Offenses

In **Commonwealth v. Williams**, 439 A.2d 765 (Pa. Super. 1982), the defendant argued that the trial court should have instructed the jury that if he reasonably believed that the victim had consented to his sexual advances that he would then have a defense to the rape and involuntary deviate sexual intercourse charge. In other words, that his counsel should have requested a jury instruction regarding a reasonable mistake of fact, as to consent. The Superior Court rejected the defendant's argument stating:

The charge requested by the defendant is not now and has never been the law of Pennsylvania. The crux of the offense of rape is force and lack of victim's consent. When one individual uses force or the threat thereof to have sexual relations with a person not his spouse and without the person's consent he has committed the crime of rape. If the element of the defendant's belief as to the victim's state of mind is to be established as a defense to the crime of rape then it should be done by our legislature which has the power to define crimes and offenses. We refuse to create such a defense.

*Id.*, at 769 (internal citations omitted).

- **Commonwealth v. Farmer**, 758 A.2d 173 (Pa. Super. 2000), *appeal denied*, 565 Pa. 637, 771 A.2d 1279 (2001): request of mistake of fact instruction not warranted in rape and involuntary deviate sexual assault case where victim alleged physical violence.
- **Commonwealth v. Fischer**, 721 A.2d 1111 (Pa. Super. 1998): no mistake of fact instruction required, as per **Williams**, in "date rape" case where victim alleged physical violence and the defendant claimed he reasonably believed the rough sex was consensual.

## D. Mistake as to Age

A viable defense as to mistake of age is dependent on the age of the victim. If the victim is younger than fourteen years old there is no viable defense based on mistake of age. If, however, the victim is fourteen years old or older, a defendant can try to show, by a preponderance of the evidence, that he or she

reasonably believed the victim to be older than the critical age of criminality. This is codified at Section 3102 of the Crimes Code.

Section 3102 states the following:

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

18 PA.CON.S.TAT.ANN. § 3102. Section 3102 reflects the Pennsylvania legislature's decision that "one eighteen years of age or older who engages in sexual intercourse with a child below fourteen years of age does so at his own peril." **Commonwealth v. Robinson**, 497 Pa. 49, 54, 438 A.2d 964, 966 (1981).

If the victim is *older* than fourteen years of age, it is the *defendant's* belief which must be reasonable. See **Commonwealth v. Fetter**, 770 A.2d 762, 768 (Pa. Super. 2001), *aff'd*, 570 Pa. 494, 810 A.2d 637 (2002) (no error for trial court to not allow defendant to cross-examine fifteen year old victim as to whether *she* believed that she looked older than her actual age as "the victim's beliefs as to how old she looked is irrelevant to appellant's beliefs and knowledge of her actual age"). As noted, if the victim is under fourteen years of age, the defendant's belief that the victim was older is irrelevant. See **Commonwealth v. Hall**, 418 A.2d 623, 624 (Pa. Super. 1980) (defendant's testimony that victim stated that she was sixteen years old, when in fact she was thirteen, was not a viable defense as defendant's mistaken belief "was irrelevant" under Section 3102).

### E. No Conflict between Sections 3102 and 304 of the Crimes Code

As stated above, section 3102 of the Crimes Code provides:

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

18 PA.CON.S.TAT.ANN. § 3102. Section 304 provides:

Ignorance or mistake as to a matter of fact, for which there is reasonable explanation or excuse, is a defense if:

- (1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required to establish a material element of the offense; or
- (2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

18 PA.CON.S.TAT.ANN. § 304.

In *Commonwealth v. Robinson*, 399 A.2d 1084, 1087-1088 (Pa. Super. 1979), *aff'd*, 497 Pa. 49, 438 A.2d 964 (1981), the Superior Court held that Section 3102 was not invalid due to fact that it allegedly conflicted with, *inter alia*, Section 304 in light of fact that Section 3102 was a specific provision relating to sexual offenses and the other statutory provisions in question were previously enacted provisions dealing with general guidelines on culpability for the whole of the Crimes Code.

### 4.9 MISTAKE OF LAW

“Generally speaking, ignorance or mistake of law is no defense.” 18 PA.CON.S.TAT.ANN. § 304, Comment (1998). See also, *Commonwealth v. Cohen*, 538 A.2d 582, 584 (Pa. Super. 1988), appeal denied, 520 Pa. 581, 549 A.2d 914 (1988) (neither ignorance of the law or mistake of the law is a “defense to the commission of a crime.”).

In *Commonwealth v. Kratsas*, 564 Pa. 36, 764 A.2d 20 (2001), however, our Supreme Court noted that it had “no doubt that the due process provisions of the United States and Pennsylvania constitutions, at least in a narrow set of unique and compelling circumstances, would serve both as an exception to the maxim that mistake of law is no defense, ... and ultimately to foreclose a criminal prosecution.” *Id.*, 564 Pa. at 56, 764 A.2d at 31 (internal citations omitted).

### 4.10 STATUTE OF LIMITATIONS

The general rule is that offenses under the Crimes Code must be commenced within the limitations period specified by the Judicial Code, 42 PA.CON.S.TAT.ANN. §§ 5501-5574.

#### A. Raising the Defense of the Statute of Limitations

The proper method for Defense Counsel to raise the statute of limitations defense is in a pretrial omnibus motion. See *Commonwealth v. Groff*, 548 A.2d 1237, 1244 (Pa. Super. 1988). If the defense is not so raised it is waived. *Id.*, at 1245 n.8.

### B. Particular Sexual Offenses

The following sexual offenses, as mandated by 42 PA.CONS.STAT.ANN. § 5552(b.1), have 12 year statutes of limitations:

- Rape, 18 PA.CONS.STAT.ANN. § 3121
- Statutory sexual assault, 18 PA.CONS.STAT.ANN. § 3122.1
- Involuntary deviate sexual assault, 18 PA.CONS.STAT.ANN. § 3123
- Sexual assault, 18 PA.CONS.STAT.ANN. § 3124.1
- Aggravated indecent assault, 18 PA.CONS.STAT.ANN. § 3125
- Incest, 18 PA.CONS.STAT.ANN. § 4302
- Sexual abuse of children, 18 PA.CONS.STAT.ANN. § 6312

The following sexual offenses have, as mandated by 42 PA.CON.STAT.ANN § 5552(a), 2 year statutes of limitations:

- Indecent assault, 18 PA.CONS.STAT.ANN. § 3125
- Indecent exposure, 18 PA.CONS.STAT.ANN. § 3126

### C. Minority Tolling Provision

As provided by 42 PA.CONS.STAT.ANN. § 5552(c)(3), the following sexual offenses committed against a minor who is less than 18 years of age may be brought up to the latter of the following: 1) the applicable period of limitation provided by law after the minor has reached 18 years of age, or 2) the date the minor reaches 50 years of age:

- Rape, 18 PA.CONS.STAT.ANN. § 3121
- Statutory sexual assault, 18 PA.CONS.STAT.ANN. § 3122.1
- Involuntary deviate sexual intercourse, 18 PA.CONS.STAT.ANN. § 3123
- Sexual assault, 18 PA.CONS.STAT.ANN. § 3124.1
- Aggravated indecent assault, 18 PA.CONS.STAT.ANN. § 3125
- Indecent assault, 18 PA.CONS.STAT.ANN. § 3126
- Indecent exposure, 18 PA.CONS.STAT.ANN. § 3127
- Incest, 18 PA.CONS.STAT.ANN. § 4302
- Endangering welfare of children, 18 PA.CONS.STAT.ANN. § 4304
- Corruption of minors, 18 PA.CONS.STAT.ANN. § 6301
- Sexual abuse of children, 18 PA.CONS.STAT.ANN. § 6312(b)

*See also, Commonwealth v. Loudon*, 569 Pa. 245, 252-253, 803 A.2d 1181, 1185 (2002).

#### D. Tolling of the Statute of Limitations

Section 5554 of the Judicial Code provides that the period of limitations is tolled during the following periods:

42 PA.CON.S.TAT.ANN. § 5554.

- (1) the accused is continuously absent from this Commonwealth or has no reasonably ascertainable place of abode or work within this Commonwealth;
- (2) a prosecution against the accused for the same conduct is pending in this Commonwealth; or
- (3) a child is under 18 years of age, where the crime involves injuries to the person of the child caused by the wrongful act, or neglect, or unlawful violence, or negligence of the child's parents or by a person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent.

#### E. Commission of Offense

"An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the complicity of the defendant therein is terminated." 42 PA.CON.S.TAT.ANN. § 5552(d).

#### F. Commencement of Limitations Period

The commencement of the limitations period is on the day after the offense is committed. *See* 42 PA.CON.S.TAT.ANN. § 5552(d). The Judicial Code authorizes an exception to the limitations period in child sexual abuse cases, as stated in the above **Section C. Minority Tolling Provision**, tolling the limitations period for prosecution of enumerated sexual crimes until the child victim reaches eighteen years of age. *See Commonwealth v. Louden*, 569 Pa. 245, 252-253, 803 A.2d 1181, 1185 (2002); 42 PA.CON.S.TAT.ANN. § 5552(c)(3).

#### G. Commencement of Prosecution

Section 5552 of the Judicial Code requires that a prosecution be commenced prior to the expiration of the applicable statute of limitations. "[A] prosecution is commenced either when an indictment is found or an information under section 8931(b) (relating to indictment and information) is issued, or when a warrant, summons or citation is issued, if such warrant, summons or citation is executed without unreasonable delay." 42 PA.CON.S.TAT.ANN. § 5552(e).

#### H. Commencement of Prosecution: Invasion of Privacy

Notwithstanding the above noted provisions regarding the commencement of the limitations period for most crimes, a prosecution for a violation of 18

## Defenses

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PA.CON.S.TAT.ANN. § 7507.1, Invasion of Privacy, must be commenced within the following periods:

- (1) Typical commencement date: two years from the date the offense occurred.
- (2) Tolling of commencement date: if the victim did not realize at the time that there was an offense, within three years of the time the victim first learns of the offense.