

Pretrial

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5.1 CHAPTER OVERVIEW

This chapter, Pretrial, discusses the balance struck in Pennsylvania between protecting the rights of an accused and advancing the interests of the state during the time period between charging the defendant and the initiation of trial. Sections 5.2 and 5.3 address the powers of the state to restrict the accused's liberty prior to trial. Section 5.4 details the rights and duties of the state and the accused during pretrial discovery. The issues that arise during pretrial motion practice are discussed in Section 5.5. Finally, section 5.6 discusses the admissibility of evidence of the victim's past sexual conduct.

5.2 BAIL

The following section discusses bail and its applicability to defendants charged with misdemeanor and felony sex offenses. No specific provisions are made under Pennsylvania law regarding bail for those accused of sex offenses. This section will therefore set out the rules and procedures that are generally applicable to the issue of pretrial bail.

A. Historical Context and Current Practice

Historically, the Pennsylvania Constitution granted every defendant a right to bail with the exception of those who were charged with crimes punishable by death. *See Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829 (1972). Furthermore, the Pennsylvania Constitution was interpreted to prohibit preventative detentions for non-capital crimes. *Id.* Under this interpretation, the only proper consideration in setting bail for non-capital crimes was ensuring the defendant's presence at subsequent proceedings. *Id.*, 449 Pa. at 335-336, 296 A.2d at 834-835.

However, in 1998, Article 1, Section 14 was amended to read as follows:

All prisoners shall beailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or *unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community* when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

Pa. Const. art. I, § 14 (emphasis added).

Accordingly, it is now within the bail authority's power to deny bail if the bail authority determines that "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community." *Commonwealth v. Sloan*, 589 Pa. 15, 21, 907 A.2d 460, 463-464 (2006); *Commonwealth v. Jones*, 899 A.2d 353 (Pa.Super. 2006). As stated by the Pennsylvania Supreme Court in *Commonwealth v. Dixon*, 589 Pa. 28, 43, n. 12, 907 A.2d 468, 477, n.12 (2006):

A relatively recent amendment to Article I, Section 14 of the Pennsylvania Constitution permits courts to deny bail when "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person in the community." Pa. Const. Art. I, § 14. This constitutional provision supersedes the Rules of Criminal Procedure, and provides any court with the authority to deny nominal bail after 180 days if release would endanger the safety of any person. In this regard, in [*Commonwealth v. Sloan*, 589 Pa. 15, 907 A.2d 460 (2006)], a companion case being filed simultaneously with this matter, we have held that when a defendant is released on nominal bail in accord with Rule 600(E), reasonable conditions can be imposed to ensure a defendant's appearance at trial and to protect the public. The trial court's ability to deny bail altogether pursuant to Article I, Section 14, and its ability to set conditions for the release on nominal bail in accordance with our decision in *Sloan* is protective of the public interest, while this case is protective of a defendant's right to not be held indefinitely in pretrial detention. This strikes an appropriate balance between society's substantial interest in its safety and a confined defendant's substantial right to not be indefinitely held in pretrial confinement.

If bail is denied, the bail authority must set forth, on the record or in writing, the reasons for its decision. PA.R.CRIM.P., Rule 520, 42 PA. CONS. STAT. ANN.

1. **Bail and PA.R.CRIM.P. 600**

In a case in which the defendant was charged with numerous sexually violent crimes, the Superior Court held that defendant was not entitled to release on nominal bond under PA.R.CRIM.P. 600(E), given the Pennsylvania constitutional provision on bail, based upon the trial court's finding that no conditions of bail could assure the safety of the community.

Commonwealth v. Jones, 899 A.2d 353 (Pa.Super. 2006). Although the defendant had been charged with non-capital offenses, and had been held in pretrial incarceration for a period in excess of 180 days, it was permissible for the trial court to refuse bail; the trial court's finding that "no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community" trumped the nominal-

bond provision of Rule 600. *Id.* at 356. *See also Commonwealth v. Sloan*, 589 Pa. 15, 27 n.10, 907 A.2d 460, 467 n. 10 (2006).

Furthermore, Rule 600(E) does not bar a trial court from imposing non-monetary conditions, such as house arrest and electronic monitoring, on a defendant who is entitled to nominal bail but might otherwise be denied release under Article I, Section 1 of the Pennsylvania Constitution.

Commonwealth v. Sloan, 589 Pa. 15, 28, 907 A.2d 460, 468 (2006).

B. Issues Arising Under Pennsylvania Law

Since the wording of the amended Pennsylvania Constitution closely tracks that of the Bail Reform Act of 1984, it would appear to be prudent to base decisions regarding bail on factors similar to those in the Act. Furthermore, since the facial challenge was denied in part based upon the procedural safeguards provided by the Act, it would appear to be prudent to offer such safeguards even in the absence of clear Pennsylvania law on the issue. These safeguards include a full adversarial hearing and an expedited appellate review process.

Finally, it must be kept in mind that the failure of a defendant to admit culpability or assist in the investigation may not be used as a reason to impose additional or more restrictive conditions of bail on the defendant.

Pa.R.Crim.P., Rule 523(B), 42 PA. CONS. STAT. ANN. Accordingly, these factors are likely to be improper bases for denying bail outright.

1. Timing

In cases where the court determines the defendant can be safely released on bail, it may admit the defendant to bail on any day and at any time. A delay in determining whether to grant bail does not entitle a defendant to discharge unless the defendant sets forth specific allegations of prejudice. The mere allegation that the defendant was hindered in the preparation of a defense is not a sufficient allegation of prejudice. *Commonwealth v. Garcia*, 478 Pa. 406, 387 A.2d 46 (1978).¹

After an accused has been arrested, the Commonwealth or the defendant may request that the court set bail for any material witness. Pa.R.Crim.P., Rule 522, 42 PA. CONS. STAT. ANN. Witnesses may not be detained before the arrest of an accused, as the accused may never be arrested, leading to an indefinite detention. *Id.*, *Cmt.*

2. Factors for Bail Consideration

Once the court has determined that a defendant may be safely released on bail, it must set bail in relation to the likelihood that the defendant will flee the jurisdiction. *Ruckinger v. Weicht*, 514 A.2d 948 (Pa. Super. 1986). In making this determination, the court shall consider all available information

¹ For the minor judiciary's authority to set bail, *See* 42 PA. CONS. STAT. ANN., §§ 1123(a)(5), 1143(a)(1), and 1515(a)(4).

relevant to defendant's appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with conditions of the bail bond, including information about:

- the nature of offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty;
 - the defendant's employment status and history, and financial condition;
 - the nature of defendant's family relationship;
 - the length and nature of defendant's residence in the community, and any past residences;
 - the defendant's age, character, reputation, mental condition, and whether addicted to alcohol or drugs;
 - if the defendant has previously been released on bail, whether he appeared as required and complied with any bail conditions;
 - whether the defendant has any record of flight to avoid arrest or prosecution, or of escape or attempted escape;
 - the defendant's prior criminal record;
 - whether the defendant has any history of use of false identification; and
 - any other factors relevant to whether defendant will appear as required and comply with the conditions of the bail bond.
- Pa.R.Crim.P., Rule 523, 42 PA. CONS. STAT. ANN.

Anticipated criminal activity may be considered in setting the amount and terms of bail, in conjunction with the other considerations.

Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972). However, the failure of the defendant to admit culpability or assist in the investigation may not be used as a reason to impose additional or more restrictive conditions of bail on the defendant. Pa.R.Crim.P., Rule 523(B), 42 PA. CONS. STAT. ANN.

3. Bail Conditions

In releasing a defendant on bail, the court has five different options, any of which the court may exercise within its discretion:

1. ROR Bail;
2. Nonmonetary Conditions;
3. Unsecured Bond;
4. Nominal Bail;
5. Monetary Bail.

First, the court may release the defendant on recognizance, commonly referred to as “ROR” bail. Pa.R.Crim.P., Rule 524, 42 PA. CONS. STAT. ANN. This release is conditioned only upon the defendant’s written agreement to appear when required and to comply with all conditions of the bail bond as provided in Pa.R.Crim.P., Rule 526(A), 42 PA. CONS. STAT. ANN. *Id.*

Second, the court may release on nonmonetary conditions. Pa.R.Crim.P., Rule 527, 42 PA. CONS. STAT. ANN. Under this authority, the court may impose the following conditions:

- (1) reporting requirements;
- (2) restrictions on the defendant’s travel; and/or
- (3) any other appropriate conditions designed to ensure the defendant’s appearance and compliance with the conditions of the bail bond.

When a defendant poses a danger to another person, especially in case involving domestic violence, a “no contact” order is appropriate under this Rule. *Id.*, *Cmt.* These conditions must be stated with specificity on the bail bond. *Id.*

A third option available to the court is release on unsecured bond. Under this option, the court releases the defendant on the condition that the defendant agrees to be liable for a fixed sum should the defendant fail to appear at a required proceeding or comply with the conditions of bail. No money or security is required to be deposited. Pa.R.Crim.P., Rule 524, 42 PA. CONS. STAT. ANN.

Fourth, the court may release the defendant on nominal bail. Here, the defendant is required to deposit a nominal amount of cash (often \$1.00) and must designate another person, organization, or bail agency to act as a surety. *Id.*

Finally, the court may release the defendant on a monetary condition. Pa.R.Crim.P., Rule 528, 42 PA. CONS. STAT. ANN. The bail authority may consider the following when determining the monetary condition of bail: (1) the release criteria from Pa.R.Crim.P., Rule 523, 42 PA. CONS. STAT. ANN., and (2) the financial ability of the defendant. Pa.R.Crim.P., Rule 528(A), 42 PA. CONS. STAT. ANN. The amount of the monetary condition must be reasonable in light of the financial ability of the defendant. Pa.R.Crim.P., Rule 528(B), 42 PA. CONS. STAT. ANN. A 10% deposit may act as sufficient security for the entire monetary condition, and acceptable forms of security include: cash or cash equivalents, U.S. or Commonwealth of Pennsylvania bearer bonds, realty within the United States, and surety bonds under 42 PA. CONS. STAT. ANN. §§ 5741-5749. Pa.R.Crim.P., Rule 528(C)–(D), 42 PA. CONS. STAT. ANN.

Bail conditions may be modified any time prior to a preliminary hearing upon request of the defendant and with consent of the Commonwealth

attorney. Pa.R.Crim.P., Rule 529(A), 42 PA. CONS. STAT. ANN. In addition, bail conditions may be modified at the preliminary hearing upon the request of either party. *Id.* In deciding whether to modify a bail order, the issuing authority or Judge should evaluate the same factors that are to be considered when granting bail under Rules 523 and 524. Pa.R.Crim.P., Rule 529, 42 PA. CONS. STAT. ANN., cmt.

4. Modification

Once bail has been set or modified by a Judge of the Court of Common Pleas, it may not be modified thereafter except by a court of superior jurisdiction, or by the same judge or another judge of the Court of Common Pleas either at trial or after notice to the parties and a hearing. Pa.R.Crim.P., Rule 529(C), 42 PA. CONS. STAT. ANN.

In Municipal Court cases, an existing bail order may be modified prior to verdict by a Municipal Court judge in the same manner as a judge of the court of common pleas pursuant to Pa.R.Crim.P. 529(C), *cmt.*; Pa.R.Crim.P. 1011(A).

An existing bail order may be modified by a Judge of the Court of Common Pleas at any time prior to verdict upon motion by either party with notice to the opposing party and a hearing on the motion, or at trial or a pretrial hearing in open court on the record when all the parties are present. Pa.R.Crim.P., Rule 529(B), 42 PA. CONS. STAT. ANN. When bail is modified, the modification must be explained to the defendant and stated in writing or on the record by the issuing authority or Judge. Pa.R.Crim.P., Rule 529(D), 42 PA. CONS. STAT. ANN.

5. Bail After Conviction

After a defendant has been convicted, his right to bail is conditioned on the possible sentences flowing from the conviction(s), and whether sentencing has occurred. When a defendant has been convicted of an offense which is punishable by death or life imprisonment, the defendant shall not be released on bail. Pa.R.Crim.P., Rule 521(A)(1), 42 PA. CONS. STAT. ANN. In other cases, the standard used to determine eligibility for bail is based upon whether the aggregate of all possible sentences of imprisonment on all outstanding verdicts against the defendant in the same judicial district exceeds three (3) years. If the possible sentences don't exceed 3 years aggregate, the defendant has the same right to bail as he had prior to conviction. Pa.R.Crim.P., Rule 521(A)(2)(a), 42 PA. CONS. STAT. ANN.

If the possible sentences aggregated exceed 3 years, then the defendant has the same right to bail as before conviction unless the sentencing judge finds that: (i) that no condition of bail will reasonably ensure compliance with the bail bond; or (ii) that the defendant poses a threat to the community or himself. Pa.R.Crim.P., Rule 521(A)(2)(b), 42 PA. CONS. STAT. ANN.

After a defendant has been sentenced, the standard applicable is again predicated on the possible maximum length of sentence of imprisonment. If the sentence imposed includes imprisonment of less than 2 years, the defendant shall the same right of bail as he did prior to the conviction, unless the Judge modifies the bail order pursuant to Pa.R.Crim.P. 521(D). Pa.R.Crim.P., Rule 521(B)(1), 42 PA. CONS. STAT. ANN.

With the exception of capital and life imprisonment cases, Pa.R.Crim.P. 521(A)(1), 42 PA. CONS. STAT. ANN., if the sentence imposed includes possible imprisonment exceeding 2 years, bail may be granted at the discretion of the Judge. Pa.R.Crim.P., Rule 521(B)(2), 42 PA. CONS. STAT. ANN. After the defendant is sentenced and released on bail, the Judge may impose as a condition of bail that the defendant file a post-sentence motion or perfect an appeal within the time required by law. Pa.R.Crim.P., Rule 521(B)(3), 42 PA. CONS. STAT. ANN.

When a defendant is eligible for release on bail after conviction, the existing bail order may be modified by a Judge of the Court of Common Pleas, upon the Judge's own motion or upon motion of counsel for either party with notice to the opposing party, in open court on the record when all parties are present. Pa.R.Crim.P., Rule 521(D)(1), 42 PA. CONS. STAT. ANN. The decision to modify the bail order should be based on the same considerations relevant when first deciding to grant bail.² Pa.R.Crim.P., Rule 521(D)(2), 42 PA. CONS. STAT. ANN. Whenever bail is refused or revoked after conviction, the Judge must state on the record reasons in support of the decision. Pa.R.Crim.P., Rule 521(C), 42 PA. CONS. STAT. ANN.

6. Violation of Condition of Bail

Revocation: When a defendant violates a condition of the bail bond, he is subject to revocation of his release and/or a change in the conditions of the bail bond by the bail authority. Pa.R.Crim.P., Rule 536(A)(1)(a), 42 PA. CONS. STAT. ANN. Upon learning of a violation of a bail condition, the bail authority may issue a warrant for the defendant's arrest. Pa.R.Crim.P., Rule 536(A)(1)(b), 42 PA. CONS. STAT. ANN. If a defendant is detained pursuant to such a warrant, he may not be released except upon order of the person who issued the arrest warrant, or if that person is unavailable, upon order of the President Judge of the judicial district or such Judge as designated by the President Judge. Pa.R.Crim.P., Rule 536(A)(1)(d), 42 PA. CONS. STAT. ANN.

Furthermore, the bail authority may order the defendant or his surety to show cause why the defendant's release should not be revoked or the conditions of his bail modified. Pa.R.Crim.P., Rule 536(A)(1)(c), 42 PA. CONS. STAT. ANN. If the bail authority revokes or modifies the conditions of

² The considerations include the defendant's likelihood of fleeing the jurisdiction or whether the defendant is a danger to any other person, the community, or himself or herself. Pa.R.Crim.P., Rule 521, 42 PA. CONS. STAT. ANN.

the defendant's release, the bail authority must state in writing or on the record the reasons for so doing. Pa.R.Crim.P., Rule 536(A)(1)(e), 42 PA. CONS. STAT. ANN.

Forfeiture: When a monetary condition of release has been imposed, the bail authority may order any cash or other security submitted to a monetary condition of release forfeited pursuant to a violation of the conditions of the bail bond. Pa.R.Crim.P., Rule 536(A)(2)(a), 42 PA. CONS. STAT. ANN. The bail authority must state its reasons for doing so in writing or on the record. *Id.* Furthermore, written notice of the forfeiture must be provided to the defendant and any surety through personal delivery or delivery by both first class mail and certified mail at the last known address of the defendant and the surety. Pa.R.Crim.P., Rule 536(A)(2)(b), 42 PA. CONS. STAT. ANN. The forfeiture may not be executed until 20 days after notice has been provided to the defendant and surety. Pa.R.Crim.P., Rule 536(A)(2)(c), 42 PA. CONS. STAT. ANN.

The bail authority has the discretion to set aside a forfeiture if justice does not require the full enforcement of the forfeiture order. Pa.R.Crim.P., Rule 536(A)(2)(d), 42 PA. CONS. STAT. ANN. The decision to set aside a bail forfeiture "lies within the sound discretion of the trial court."

Commonwealth v. Mrozek, 703 A.2d 1052, 1053 (Pa. Super. 1997).

Therefore, the trial court's decision in this regard will only be overturned if it has misapplied the law, exercised "manifestly unreasonable judgment," or the decision is the result of "prejudice, bias, ill-will, or partiality." *Id.*

Generally, it is the surety's burden to establish that the surety's efforts had at least a substantial impact on the apprehension or return of the defendant. *Id.* Merely searching for the defendant is not sufficient. *Id.* at 1054. Essentially, the trial court must determine both the extent of the surety's efforts and the results flowing from the surety's efforts. *Id.* Finally, there is no arbitrary deadline for filing a petition for setting aside a forfeiture. **Commonwealth v. Mayfield**, 827 A.2d 462, 466 (Pa. Super. 2003). Instead, the trial court must concentrate on the surety's diligence in filing a motion to vacate bail forfeiture. *Id.*

Bail Piece: A surety may apply for a "bail piece" in order to apprehend a defendant who has violated the conditions of his bail. Pa.R.Crim.P., Rule 536(B), 42 PA. CONS. STAT. ANN. When granted, a "bail piece" authorizes the surety to privately apprehend and detain the defendant and bring him before the bail authority without delay. *Id.*; See also **Commonwealth v. Elmobdy**, 823 A.2d 180, 186 (Pa. Super. 2003), *appeal denied*, 577 Pa. 701, 847 A.2d 58 (2004).

C. Appellate Review

An order relating to bail is subject to review pursuant to Chapter 15 of the Pennsylvania Rules of Appellate Procedure:

Rule 1762. Release in Criminal Matters

...

- (b) Applications relating to bail when no appeal is pending:
- (1) Applications relating to bail when no appeal is pending shall first be presented to the lower court, and shall be governed by the Pennsylvania Rules of Criminal Procedure.
 - (2) An order relating to bail shall be subject to review pursuant to Chapter 15 (judicial review of governmental determinations). Any answer shall be in accordance with Rule 1516 (other pleadings allowed), and no other pleading is authorized. Rule 1517 (applicable rules of pleading) and Rule 1531 (intervention) through 1551 (scope of review) shall not be applicable to a petition for review filed under this paragraph.

(c) **Content.** An application for relief under subdivision (a) or a petition for review under subdivision (b) shall set forth specifically and clearly the matters complained of and a description of any determinations made by the lower court. Any order and opinions relating to the bail determination shall be attached as appendices.

(d) **Service.** A copy of the application for relief or the petition for review and any answer thereto shall be served on the judge of the lower court. All parties in the lower court shall be served in accordance with Rule 121(b) (service of all papers required). The Attorney General of Pennsylvania need not be served in accordance with Rule 1514(c) (service), unless the Attorney General is a party in the lower court.

...

(g) **Opinion of lower court.** Upon receipt of a copy of an application for relief under subdivision (a) or a petition for review under subdivision (b) that does not include an explanation for the bail determination, the judge who made the bail determination below shall forthwith file of record a brief statement of the reasons for the determination or where in the record such reasons may be found.

PA.R.A.P. 1762. *See also, Commonwealth v. Heiser*, 478 A.2d 1355, 1356 n.1 (Pa.Super. 1984). If an appeal is taken improvidently from an order of a government unit, the papers related to that appeal shall be regarded and acted upon as a petition for review. PA.R.A.P. 1503. Any court of the unified judicial system of the Commonwealth is considered a “government unit.” PA.R.A.P. 102. *See Commonwealth v. Jones*, 899 A.2d 353, 354 n.1 (Pa.Super. 2006).

5.3 NO CONTACT ORDERS INCLUDING PROTECTION FROM ABUSE ORDERS

The purpose of the Protection From Abuse Act, 23 PA.CON.S.TAT.ANN. § 6101 *et seq.*, is to protect the victims of domestic abuse, by preventing further abuse, through the use of quick and flexible procedures. *Commonwealth v. Snell*, 737 A.2d 1232, 1235 (Pa. Super. 1999); *See also Snyder v. Snyder*, 629 A.2d 977, 981 (Pa. Super. 1993).

The goal of the Protection from Abuse Act is protection and prevention of further abuse by removing the perpetrator of the abuse from the household and/or from the victim for a period of time.

McCance v. McCance, 908 A.2d 905, 908 (Pa.Super. 2006), quoting *Viruet v. Cancel*, 727 A.2d 591, 595 (Pa.Super. 1999).

The primary mechanism used by the Act is an order prohibiting contact between the victim and an alleged abuser. 23 PA. CONS. STAT. ANN. § 6108(a)(6). “No contact” orders contained as conditions in bail bonds should be viewed as having a similar purpose of prohibiting contact between the alleged abuser and the victim.

When a defendant allegedly violates a PFA order, the Act allows police or a plaintiff to file a charge of indirect criminal contempt against the defendant. 23 PA. CONS. STAT. ANN. § 6114(a). The primary goals of the contempt proceeding are to punish the contemnor and prevent any further abuse. *Commonwealth v. Snell*, 737 A.2d 1232, 1235 (Pa. Super. 1999).

5.4 DISCOVERY

Issues regarding pretrial discovery and inspection can be split into four related groups:

- Mandatory disclosures by the Commonwealth;
- Discretionary disclosures by the Commonwealth;
- Mandatory disclosures by the defendant; and
- Discretionary disclosures by the defendant.

Both parties are under a continuing duty to notify the opposing party of any additional evidence subject to either mandatory discovery or court ordered discretionary discover that is uncovered. Pa.R.Crim.P., Rule 573(D), 42 PA. CONS. STAT. ANN.

A. Disclosures that are Mandatory on the Commonwealth

Certain categories of information must be disclosed by the Commonwealth upon request by the defendant, in the absence of a protective order. As a general rule, the Commonwealth should exercise “the utmost good faith” in

responding to mandatory discovery requests. **Commonwealth v. Schwartz**, 615 A.2d 350, 358 (Pa. Super. 1992), *appeal denied*, 629 A.2d 1379, 535 Pa. 617. However, the Commonwealth is only required to disclose evidence which is within its control; it need not do the defendant's investigative work for him. **Commonwealth v. Miller**, 765 A.2d 1151 (Pa. Super. 2001).

In **Commonwealth v. Burke**, 566 Pa. 402, 781 A.2d 1136 (2001), the Supreme Court of Pennsylvania held that a **Brady**³ violation occurs when a prosecutor fails to disclose evidence favorable to the accused and known only to the police, even though the prosecutor is unaware of the existence of the evidence. *See also*, **Commonwealth v. Sullivan**, 820 A.2d 795, 802-803 (Pa. Super. 2003), *appeal denied*, 574 Pa. 773, 833 A.2d 143 (2003).

Additionally, it must be noted that the discovery of evidence, after trial has already begun, which directly contradicts the defendant's opening argument, has been held to be grounds for the declaration of a mistrial. **Commonwealth v. Montgomery**, 533 Pa. 491, 626 A.2d 109 (1993), *abrogated in part*, **Commonwealth v. Burke**, 566 Pa. 402, 781 A.2d 1136 (2001).

1. Exculpatory Evidence

First and foremost, the Commonwealth has a continuing duty to provide any exculpatory evidence. Pa.R.Crim.P., Rule 573(B)(1)(a), 42 PA. CONS. STAT. ANN.; **Brady v. Maryland**, 373 U.S. 83 (1963). This duty extends to exculpatory evidence that is relevant only in the punishment phase. Pa.R.Crim.P., Rule 573(B)(1)(a), 42 PA. CONS. STAT. ANN. Furthermore, this requirement extends to evidence that is relevant merely for impeachment purposes. **Commonwealth v. Morris**, 822 A.2d 684 (Pa. 2003).

In order to establish a violation of this requirement, a defendant must establish that:

- (1) the evidence was suppressed by the state;
- (2) the evidence at issue is favorable to the defendant; and
- (3) prejudice to the defendant arising from the violation.

Commonwealth v. Chambers, 570 Pa. 3, 28, 807 A.2d 872, 887 (2002), *cert. denied*, 504 U.S. 946 (1992), *citing* **Strickler v. Greene**, 527 U.S. 263, 281-282 (1999). The Commonwealth is responsible for disclosing evidence contained in the files of both the district attorney and the police agencies of the same government that is prosecuting the defendant.

Commonwealth v. Burke, 566 Pa. 402, 781 A.2d 1136 (2001). However, the Commonwealth does not violate this requirement if the defendant had "equal access to the information" and knew or could have known, through reasonable diligence, of the evidence. **Commonwealth v. Grant**, 572 Pa. 48, 55, 813 A.2d 726, 730 (2002), *clarified on denial of reargument* 573 Pa. 141, 821 A.2d 1246 (2002).

³ **Brady v. Maryland**, 373 U.S. 83 (1963).

2. Confessions or Inculpatory Statements

The second category of evidence that is subject to mandatory disclosure by the Commonwealth upon request involves any confession or inculpatory statements made by the defendant that are within the possession or control of the Commonwealth. Pa.R.Crim.P., Rule 573(B)(1)(b), 42 PA. CONS. STAT. ANN. The Commonwealth must also disclose the identity of the person(s) to whom such statements were made, if the information is within the possession or control of the attorney for the Commonwealth. *Id.*

3. Prior Criminal Record of the Defendant

The Commonwealth must also disclose any prior criminal record of the defendant of which the Commonwealth is aware. Pa.R.Crim.P., Rule 573(B)(1)(c), 42 PA. CONS. STAT. ANN. However, if defense counsel is aware of prior criminal convictions due to previous representation of the defendant, the Commonwealth does not commit a *per se* violation of the rule by failing to disclose such convictions. ***Commonwealth v. Elliott***, 549 Pa. 132, 700 A.2d 1243 (1997), *cert. denied*, 524 U.S. 955 (1998).

4. Identifications of the Defendant

Another category of evidence that the Commonwealth must disclose upon request, and in the absence of a protective order, pertains to any identification of the defendant by voice, photograph, or in-person identification. Pa.R.Crim.P., Rule 573(B)(1)(d), 42 PA. CONS. STAT. ANN. Although the Commonwealth must disclose that an eyewitness failed to identify the defendant in a pre-trial photographic array, a failure by the Commonwealth to disclose a pre-trial identification of defendant by photographic array was found to be harmless where the identity of the defendant was not at issue in the case. ***Commonwealth v. Davis***, 704 A.2d 650, 653 (Pa. Super. 1997), *appeal denied*, 553 Pa. 704, 719 A.2d 744 (1998), *cert. denied*, 525 U.S. 1026 (1998).

5. Results of Scientific Tests and Other Expert Evaluations

The Commonwealth, upon request, must also disclose the results and reports of scientific tests, expert opinions, polygraph examinations, and physical or mental examinations in the Commonwealth's control or possession. Pa.R.Crim.P., Rule 573(B)(1)(e), 42 PA. CONS. STAT. ANN. This provision does not require the Commonwealth to create a written summary of an expert's findings, if the expert has not prepared a written report. ***Commonwealth v. Blasioli***, 685 A.2d 151, 160 (Pa. Super. 1996), *aff'd*, 552 Pa. 149, 713 A.2d 1117 (1998).

The defendant's right to access an alleged victim's records held by an agency, hospital or rape crisis center is limited by any privilege that may protect the confidentiality of the alleged victim's records. ***Commonwealth v. Eck***, 605 A.2d 1248 (Pa. Super. 1992). Further, the Constitutional right to confront an accuser does not entitle a defendant to an unsupervised

review of psychiatric records of an alleged victim that are in the possession of the Commonwealth. Rather, the defendant is entitled to have the trial court conduct an *in camera* review of the Commonwealth's records, after which the trial court will determine the materiality of any documents in the possession of the Commonwealth. ***Commonwealth v. Byuss***, 539 A.2d 852 (Pa. Super. 1988).

In addition, as long as the Commonwealth promptly produces the results of any scientific test or evaluation, it does not violate the mandatory disclosure requirement by initially failing to diligently pursue the underlying test or evaluation. ***Commonwealth v. Smith***, 599 A.2d 1350 (Pa. Super. 1991).

6. Tangible Evidence

The Commonwealth must also disclose all tangible evidence in its possession. Pa.R.Crim.P., Rule 573(B)(1)(f), 42 PA. CONS. STAT. ANN. The rule provides a non-exhaustive list of examples such as documents, photographs, and fingerprints. *Id.* Audio cassette recordings have been treated as tangible evidence. ***Commonwealth v. Brocco***, 396 A.2d 1371 (Pa. Super. 1979). When faced with a discovery request for tangible evidence, the Commonwealth should exercise the utmost good faith in disclosing such evidence. ***Commonwealth v. Thiel***, 470 A.2d 145 (Pa. Super. 1983) (Commonwealth's failure to disclose tangible evidence that buttressed the credibility of its primary witness constituted a reversible error).

7. Transcripts and Recordings of Electronic Surveillance

Finally, the Commonwealth must produce the transcripts and recordings of any electronic surveillance and the authority under which such surveillance was authorized. Pa.R.Crim.P., Rule 573 (B)(1)(g), 42 PA. CONS. STAT. ANN.

B. Disclosures by the Commonwealth at the Discretion of the Court.

In all court cases, except as provided in Rule 230 for Investigating Grand Juries, a defendant may file a motion for pretrial discovery seeking the production of certain types of evidence that are not included under the mandatory discovery provisions. Pa.R.Crim.P., Rule 573(B)(2), 42 PA. CONS. STAT. ANN. The court has the discretion to permit or deny such discovery. *Id.*

The trial court exercising its discretion to grant or deny a request for discretionary discovery should be guided by the principle to allow as much discovery prior to trial as will, consistent with the protection of persons, effective law enforcement, the adversary system, and national security, provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process. ***Commonwealth v. Thiel***, 470 A.2d 145 (Pa. Super. 1983).

1. Names and Addresses of Eyewitnesses

The court may order the Commonwealth to disclose the names and addresses of any eyewitnesses known to the Commonwealth. Pa.R.Crim.P., Rule 573(B)(2)(a)(i), 42 PA. CONS. STAT. ANN.; **Commonwealth v. Jones**, 542 Pa. 464, 668 A.2d 491 (1995), *cert. denied*, 519 U.S. 826 (1996). This rule covers eyewitnesses only; there is no requirement that the Commonwealth reveal the names and addresses of all of its witnesses. **Commonwealth v. Colson**, 507 Pa. 440, 490 A.2d 811 (1985), *cert. denied*, 476 U.S. 1140 (1986), *abrogated in part*, **Commonwealth v. Burke**, 566 Pa. 402, 781 A.2d 1136 (2001). However, even if the Commonwealth does not intend to call an eyewitness to testify, it still must identify the witness in order to comply with court ordered discovery under this section. **Commonwealth v. Allen**, 429 A.2d 1113 (Pa. Super. 1981).

2. Verbatim or Substantially Verbatim Statements of Eyewitnesses

The Commonwealth may be ordered to disclose all written or recorded statements made by eyewitnesses. Pa.R.Crim.P., Rule 573(B)(2)(a)(ii), 42 PA. CONS. STAT. ANN. Furthermore, the Commonwealth may be ordered to disclose all substantially verbatim oral statements made by eyewitnesses. Pa.R.Crim.P., Rule 573(B)(2)(a)(ii), 42 PA. CONS. STAT. ANN. When there is a dispute over whether a writing is a substantially verbatim record, the court must examine the writing and make a finding. **Commonwealth v. Alston**, 864 A.2d 539, 547 (Pa. Super. 2004) (*en banc*). The assertion of work product privilege does not automatically remove such writings from the realm of discoverable material. *Id.*

- **Commonwealth v. Piole**, 636 A.2d 1143, 1145 (Pa. Super. 1994), *abrogated in part*, **Commonwealth v. Burke**, 566 Pa. 402, 781 A.2d 1136 (2001) (Mere notes taken by an officer while questioning a witness are insufficient; the statement must be substantially verbatim or be adopted by the witness).
- **Commonwealth v. Boczkowski**, 577 Pa. 421, 458, 846 A.2d 75, 97 (2004) (Commonwealth is not responsible for statements it was unaware of and that it did not possess).

The rule set forth by this section applies only to eyewitnesses, not to other witnesses. **Commonwealth v. Elliott**, 549 Pa. 132, 700 A.2d 1243 (1997), *cert. denied*, 524 U.S. 955 (1998) (pretrial statements made by victims of prior assaults perpetrated by defendant were not subject to this rule).

3. Verbatim or Substantially Verbatim Statements of Co-Defendants, Co-Conspirators or Accomplices

The Commonwealth may be ordered to disclose all written or recorded statements and substantially verbatim oral statements made by co-defendants, co-conspirators or accomplices. Pa.R.Crim.P., Rule 573(B)(2)(a)(iii), 42 PA. CONS. STAT. ANN. Whether the co-defendant, co-

conspirator or accomplice has been charged does not affect the court's power to order such discovery. *Id.*

4. Other Evidence Specifically Identified by the Defendant

The Commonwealth may be ordered to disclose “any other evidence specifically identified by the defendant, provided the defendant can [] establish that [the] disclosure would be in the interests of justice.” Pa.R.Crim.P., Rule 573(B)(2)(a)(iv), 42 PA. CONS. STAT. ANN. This includes

any information concerning any prosecutor, investigator, or police officer involved in the case who has received either valuable consideration, or an oral or written promise or contract for valuable consideration, for information concerning the case, or for the production of any work describing the case, or for the right to depict the character of the prosecutor or investigator in connection with his or her involvement in the case.

Id., cmt.

5. Experts the Commonwealth Intends to Call at Trial

If the Commonwealth intends to call an expert to testify at any proceeding, a motion may be made to the court to order such expert to prepare, and the Commonwealth disclose, a report. Pa.R.Crim.P., Rule 573(B)(2)(b), 42 PA. CONS. STAT. ANN. The report should state the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and conclusions. *Id.*

This rule is not intended to require a prepared report in every case. *Id., cmt.* Rather, the court should make a determination on a case-by-case basis as to whether a report is required. *Id.* Factors that are relevant are whether the parties are familiar with the expert and whether the expert testifies on the same subject routinely. *Id.*

C. Mandatory Disclosures by the Defendant

The defendant must disclose his intention to present either an alibi or insanity defense within the time required for filing an omnibus pre-trial motion. Pa.R.Crim.P., Rule 573(C), 42 PA. CONS. STAT. ANN. For a detailed discussion of what is required of a defendant under this rule, *See* Chapter 4.

D. Disclosures by the Defendant at the Discretion of the Court.

In all court cases, the Commonwealth may file a motion for pretrial discovery seeking the production of certain types of evidence that are not included under the mandatory discovery provisions. Pa.R.Crim.P., Rule 573(C)(2), 42 PA. CONS. STAT. ANN. The court may order the defendant to disclose such evidence upon a showing by the Commonwealth that the evidence is material to its case and that the request is reasonable. *Id.*

The trial court exercising its discretion to grant or deny a request for discretionary discovery should be guided by the principle to allow as much discovery prior to trial as will, consistent with the protection of persons, effective law enforcement, the adversary system, and national security, provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process. *Commonwealth v. Thiel*, 470 A.2d 145 (Pa. Super. 1983).

1. Results or Reports of Physical or Mental Examinations and Scientific Tests

The defendant may be ordered by the court to disclose the results and reports obtained from physical or mental examinations, as well as the results and reports obtained from scientific tests, that the defendant intends to introduce as evidence in his case-in-chief. Pa.R.Crim.P., Rule 573(C)(2)(a)(i), 42 PA. CONS. STAT. ANN. The court may also order the defendant to disclose reports prepared by an intended that relate to the testimony of that witness. *Id.* However, the court may only order such discovery if the defendant has requested and received discovery under Pa.R.Crim.P., Rule 573(B)(1)(e), 42 PA. CONS. STAT. ANN. *Id.*

- *Commonwealth v. Faulkner*, 528 Pa. 57, 595 A.2d 28 (1991), *cert. denied*, 503 U.S. 989 (1992)(trial court did not abuse its discretion when it ordered defendant to produce the results of a psychiatric evaluation when defendant refused to submit to an examination by the Commonwealth's psychiatrist).

2. Names and Addresses of Eyewitnesses

The court may order the defendant to disclose the names and addresses of any eyewitnesses the defendant intends to call in his case in chief. Pa.R.Crim.P., Rule 573(C)(2)(a)(ii), 42 PA. CONS. STAT. ANN. However, the court may only order such discovery if the defendant has requested and received discovery pursuant to Pa.R.Crim.P., Rule 573(B)(2)(a)(i), 42 PA. CONS. STAT. ANN. *Id.*

- *Commonwealth v. Malone*, 514 A.2d 612 (Pa. Super. 1986) (Trial court erred in precluding testimony of eyewitness as Commonwealth did not file motion for pre-trial discovery).

3. Experts the Defendant Intends to Call at Trial

If the defendant intends to call an expert to testify at any proceeding, the court may order such expert to prepare, and the defendant disclose, a report. Pa.R.Crim.P., Rule 573(C)(2)(b), 42 PA. CONS. STAT. ANN. The report should state the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify, and a summary of the expert's opinions and conclusions. *Id.*

This rule is not intended to require a prepared report in every case. *Id., cmt.* Rather, the court should make a determination on a case-by-case basis as to whether a report is required. *Id.* Factors that are relevant are whether the parties are familiar with the expert and whether the expert testifies on the same subject routinely. *Id.*

E. Remedies

If a party violates the provisions of Rule 573, the court has the discretion to choose from several remedies. Pa.R.Crim.P., Rule 573(E), 42 PA. CONS. STAT. ANN. This discretion is considered broad. ***Commonwealth v. Jones***, 542 Pa. 464, 668 A.2d 491 (1995), *cert. denied*, 519 U.S. 826 (1996). However, this discretion is not unfettered. ***Commonwealth v. Burke***, 566 Pa. 402, 781 A.2d 1136 (2001).

1. Order Production or Inspection

The court may order the violating party to permit discovery or inspection. Pa.R.Crim.P., Rule 573(E), 42 PA. CONS. STAT. ANN.

- ***Commonwealth v. Simmons***, 541 Pa. 211, 662 A.2d 621 (1995) (production of letter written by defendant was the proper remedy for Commonwealth's violation of discovery order).

2. Grant a Continuance

The court may grant a continuance to allow the aggrieved party a chance to prepare for the newly discovered evidence. Pa.R.Crim.P., Rule 573(E), 42 PA. CONS. STAT. ANN. This remedy is generally the favored remedy for discovery violations. *See, e.g., Commonwealth v. Woodell*, 496 A.2d 1210 (Pa. Super. 1985), *appeal denied*. This is especially so when the only prejudice suffered by the defendant is surprise. ***Commonwealth v. Johnson***, 456 A.2d 988, 993 (Pa. Super. 1983).

3. Prohibit Introduction of Evidence Not Disclosed

The court may prohibit the party in violation from introducing undisclosed evidence at trial. Pa.R.Crim.P., Rule 573(E), 42 PA. CONS. STAT. ANN. The court may never preclude the defendant from testifying in his own defense. *Id.* Generally, a defendant is required to establish prejudice before this severe sanction is imposed. *See e.g., Commonwealth v. Manchias*, 633 A.2d 618 (Pa. Super. 1993), *appeal denied*, 539 Pa. 647, 651 A.2d 535 (1994) (Defendant not entitled to exclusion of Commonwealth witness where defendant did not establish prejudice.)

- ***Commonwealth v. Bonasorte***, 486 A.2d 1361 (Pa. Super. 1984) (Trial court properly suppressed Commonwealth's evidence in response to Commonwealth's failure to produce informant).

4. Any Other Remedy the Court Deems Just Under the Circumstances

The court may order any other remedy that it deems just under the circumstances. Pa.R.Crim.P., Rule 573(E), 42 PA. CONS. STAT. ANN. Included

under this provision is the discretion to order a new trial. ***Commonwealth v. Shelton***, 536 Pa. 559, 640 A.2d 892 (1994).

- ***Commonwealth v. Shelton***, 536 Pa. 559, 640 A.2d 892 (1994) (Commonwealth’s willful failure to disclose new information linking defendant to drug sales warranted the grant of a new trial).
- ***Commonwealth v. Johnson***, 456 A.2d 988 (1983) (Commonwealth’s failure to disclose defendant’s inculpatory statement required grant of new trial).

However, in order to receive the remedy of a new trial, a defendant must establish prejudice. ***Commonwealth v. Jones***, 542 Pa. 464, 668 A.2d 491 (1995), *cert. denied*, 519 U.S. 826 (1996). Therefore, it is generally necessary for the court to hold a hearing to take evidence and allow the opposing party a chance to respond before imposing severe sanctions.

Commonwealth v. Yost, 502 A.2d 216 (Pa. Super. 1985).

F. Protective Orders

Even with respect to mandated disclosures, either party may move the court for a protective order. Pa.R.Crim.P., Rule 573(F), 42 PA. CONS. STAT. ANN. The evidence to support a protective order must be “sufficient”, and may be made entirely in the form of a written statement reviewed by the court *in camera*. *Id.* If the court grants a protective order following an *in camera* showing, the entire text of the statement shall be sealed and preserved in the records of the court in order to allow for appellate review. *Id.*

At this time, there are no set standards for determining what is “sufficient” evidence to support a protective order. However, there is a safe harbor for trial courts, as any error in granting a protective order may be cured by granting the defendant a continuance in order to prepare for or investigate any difficulty caused by the late disclosure. *See Commonwealth v. Bonacurso*, 500 Pa. 247, 455 A.2d 1175, 1178 (1983), *cert. denied*, 462 U.S. 1120 (1983), *abrogated in part*, ***Commonwealth v. Burke***, 566 Pa. 402, 781 A.2d 1136 (2001); ***Commonwealth v. Brown***, 544 Pa. 406, 421, 676 A.2d 1178, 1185 (Pa. 1996), *cert. denied*, 519 U.S. 1043 (1996).

G. Work Product

To the extent that a document constitutes the opinions, theories, or conclusions of the attorney for either party, or agents for the attorney, it will not be required to be disclosed. Pa.R.Crim.P., Rule 573(G), 42 PA. CONS. STAT. ANN.

- ***Lepley v. Lycoming County Court of Common Pleas***, 481 Pa. 565, 393 A.2d 306 (Pa. Super. 1978) (Defense counsel’s recording of defendant’s preliminary hearing was not a privileged “work product”).
- ***Commonwealth, Dep’t of Transp. v. Taylor***, 576 Pa. 622, 841 A.2d 108 (2004) (Compulsory process clause does not entitle defendant to government agency’s work product).

- **Commonwealth v. Hetzel**, 822 A.2d 747 (Pa. Super. 2003), *appeal denied* 576 Pa. 710, 839 A.2d 350 (2003)(Photographs and dental tracings prepared by forensic odontologist at the request of defense attorney are protected work product).

H. Privileges

1. Spousal Privilege

Pennsylvania has a statutorily enacted spousal privilege:

Except as otherwise provided in this subchapter, in a criminal proceeding neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial.

42 PA. CONS. STAT. ANN. § 5914. This statutory privilege “is substantially a reenactment of legislation dating back to 1887, which itself had roots in the common law.” **Commonwealth v. Chiappini**, 566 Pa. 507, 511, 782 A.2d 490, 492 (2001)(plurality). This privilege is only waivable by the spouse asserting the privilege. **Commonwealth v. May**, 540 Pa. 237, 656 A.2d 1335 (1995), *cert. denied*, 525 U.S. 1078 (1999).

- **Commonwealth v. Dubin**, 581 A.2d 944 (Pa. Super. 1990) (pretrial suppression of testimony of estranged wife was premature).

Communications between spouses during marriage are presumed to be privileged. **Commonwealth v. McBurrows**, 779 A.2d 509 (Pa. Super. 2001) (*en banc*). Therefore, the party seeking to admit such communications as evidence bears the burden of overcoming this presumption. *Id.*

Communications between spouses made in the presence of third parties are not privileged. “Generally, the presence of third parties negates the confidential nature of the communication.” **Commonwealth v. May**, 540 Pa. 237, 251, 656 A.2d 1335, 1342 (1995), *cert. denied*, 525 U.S. 1078 (1999) (defendant had no privilege in letters sent to his wife from prison after defendant signed form allowing for the inspection of his mail).

The privilege does not extend to the observations of a spouse’s conduct during marriage. **Commonwealth v. McBurrows**, 779 A.2d 509, 519 (Pa. Super. 2001) (*en banc*), *appeal denied*, 572 Pa. 732, 815 A.2d 632 (2002), *cert. denied*, 540 U.S. 829 (2003).

- **Commonwealth v. Newman**, 534 Pa. 424, 633 A.2d 1069 (1993) (wife’s knowledge of defendant’s companions and whereabouts on date of crime not privileged as knowledge was based on observation, not communication)

In **Commonwealth v. Spetzer**, 572 Pa. 17, 39, 813 A.2d 707, 720-721 (2002), the Pennsylvania Supreme Court found that the privilege did not extend to the statements made by the defendant to his wife regarding commission of past crimes, current criminal conduct, or plans for future

criminal conduct in a case involving the sexual abuse of stepchildren by the stepfather/defendant.

Furthermore, the statutory privilege does not survive death or divorce. ***Commonwealth v. Weiss***, 565 Pa. 504, 776 A.2d 958 (2001). However, the common law privilege survives divorce, ***id.***, and death, ***McBurrows***.

The Child Protective Services Law, 23 PA.CON.S.TAT.ANN. § 6301 *et seq.*, abrogates the spousal confidential communications privilege in all cases involving child abuse:

§ 6381. Evidence in court proceedings

...

(c) Privileged communications.—Except for privileged communications between a lawyer and a client and between a minister and a penitent, a privilege of confidential communication between ***husband and wife*** or between any professional person, including, but not limited to, physicians, psychologists, counselors, employees of hospitals, clinics, day-care centers and schools and their patients or clients, shall not constitute grounds for excluding evidence at any proceeding regarding child abuse or the cause of child abuse.

23 PA.CON.S.TAT.ANN. § 6381(c)(emphasis added). However, neither the Legislature nor the Pennsylvania Supreme Court has yet to definitively say that Section 6381(c) overrides 42 PA. CONS. STAT. ANN. § 5914 in a criminal case. *See Commonwealth v. Spetzer*, 572 Pa. 17, 39, 41, 813 A.2d 707, 722 (2002).

2. Medical or Counseling Records

The confrontation and compulsory process clause in the Pennsylvania Constitution provides a defendant greater protections than does the United States Constitution. *See Commonwealth v. Lloyd*, 523 Pa. 427, 567 A.2d 1357 (1989). In order to understand the differences, it is necessary to examine the historic context of Pennsylvania case-law, Supreme Court of the United States case-law, and statutory amendments enacted by the Pennsylvania legislature.

In 1985, the Pennsylvania Supreme Court held that the Commonwealth's interest in maintaining the confidentiality of records compiled by the Child Welfare Services did not override a defendant's right, under the United States Constitution, to confront and cross-examine witnesses against him. ***Commonwealth v. Ritchie***, 509 Pa. 357, 502 A.2d 148 (1985). However, the Supreme Court of the United States reversed the Pennsylvania Supreme Court in part. ***Pennsylvania v. Ritchie***, 480 U.S. 39 (1987). The Supreme Court of the United States held that, under the United States Constitution, an *in camera* review of the records was the proper method to balance a defendant's right to discover exculpatory evidence against the

Commonwealth's interest in maintaining the confidentiality of the records. *Id.* at 59-60.

Subsequently, the Supreme Court of Pennsylvania addressed the identical issue under the Pennsylvania Constitution. The Court held that, under the Pennsylvania Constitution, a defendant's right to confrontation and compulsory process overrode any non-statutory privilege asserted by the Commonwealth. ***Commonwealth v. Lloyd***, 523 Pa. 427, 567 A.2d 1357 (1989). Specifically, the Court found the lack of a statutory psychotherapeutic privilege important. *Id.* 523 Pa. at 431, 567 A.2d at 1359. In response to the result in ***Lloyd***, the Pennsylvania legislature amended 42 PA. CONS. STAT. ANN. § 5944 to explicitly cover psychiatric records. Accordingly, courts in subsequent cases have recognized that the absolute statutory privilege contained in 42 PA. CONS. STAT. ANN. § 5944 overrides the defendant's right to confrontation and compulsory process under the Pennsylvania Constitution. See ***Commonwealth v. Smith***, 606 A.2d 939 (Pa. Super. 1992), *appeal denied*, 533 Pa. 624, 620 A.2d 490 (1993). In contrast, Pennsylvania courts have employed balancing tests for statutory conditional privileges. See ***Commonwealth v. Reed***, 644 A.2d 1223 (Pa. Super. 1994), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995).

(a) **Patient – Physician Privilege**

Pennsylvania has codified a patient-physician privilege in civil proceedings. 42 Pa. Cons. Stat. Ann. § 5929. This privilege does not apply in criminal proceedings. *Id.*; ***Commonwealth v. Petrino***, 480 A.2d 1160 (Pa. Super. 1984), *cert. denied*, 471 U.S. 1069 (1985).

(b) **Patient – Psychiatrist / Psychologist Privilege**

The Pennsylvania legislature has enacted the following statutory privilege regarding communications between patients and psychiatrists/psychologists:

No psychiatrist or person who has been licensed under the act of March 23, 1972 (P.L. 136, No. 52), to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

42 PA. CONS. STAT. ANN. § 5944. Since this is an absolute statutory privilege, neither the Commonwealth nor the defendant has the power to subpoena such records without the patient's consent.

Commonwealth v. Smith, 606 A.2d 939 (Pa. Super. 1992), *appeal denied*, 533 Pa. 624, 620 A.2d 490 (1993).

(c) **Rape Counselor Privilege**

The Pennsylvania Legislature has enacted the following statutory privilege with respect to rape counselors:

No sexual assault counselor or an interpreter translating the communication between a sexual assault counselor and a victim may, without the written consent of the victim, disclose the victim's confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.

42 PA. CONS. STAT. ANN. § 5945.1(b)(1). A "sexual assault counselor" is defined as

[a] person who is engaged in any office, institution or center [offering assistance to victims of sexual assault and their families through crisis intervention, medical and legal accompaniment and follow-up counseling], who has undergone 40 hours of sexual assault training and is under the control of a direct services supervisor of a rape crisis center, whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault.

42 PA. CONS. STAT. ANN. § 5945.1(a). Furthermore,

[n]o coparticipant who is present during counseling may disclose a victim's confidential communication made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim.

42 PA. CONS. STAT. ANN. § 5945.1(b)(2).

These privileges are absolute privileges, and therefore override a defendant's right to confrontation and compulsory process. **V.B.T. v. Family Serv. of W. Pennsylvania**, 705 A.2d 1325 (Pa. Super. 1998); **Commonwealth v. Askew**, 666 A.2d 1062 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996).

- **Commonwealth v. Davis**, 543 Pa. 628, 674 A.2d 214 (1996) (rape counselor privilege prohibits disclosure not only of communications between victim and counselor, but also of records created during the course of the confidential relationship).

NOTE: *Commonwealth v. Cody*, 584 A.2d 992 (Pa. Super. 1991), *appeal denied*, 527 Pa. 622, 592 A.2d 42 (1991) allows for an *in camera* review of rape counseling records for statements relating to the facts surrounding the alleged offense. However, in ***Commonwealth v. Askew***, 666 A.2d 1062 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996), the Superior Court held that the privilege was absolute and applied to both oral communications and written records:

The statutory sexual assault counselor privilege “prevents sexual assault counselors from disclosing confidential communications made to them by the victims of sex-related crimes.” *Commonwealth v. Gibbs*, 434 Pa. Super. 280, 284, 642 A.2d 1132, 1134 (1994). This privilege is absolute and applies to oral communication as well as written records created during the course of the confidential relationship. *Id.* The privilege prohibits the revelation of confidential communication obtained during counseling to both the Commonwealth and to the defendant.

666 A.2d at 1064–1065.

However, if the attorney for the Commonwealth is in possession of records subject to the rape counselor privilege, the defendant is entitled to the production of such records. ***Commonwealth v. Davis***, 650 A.2d 452 (Pa. Super. 1994), *aff’d*, 543 Pa. 628, 674 A.2d 214 (1996); ***Commonwealth v. Higby***, 559 A.2d 939 (Pa. Super. 1989), *appeal denied*, 525 Pa. 578, 575 A.2d 109 (1990).

- ***Commonwealth v. Askew***, 666 A.2d 1062 (Pa. Super. 1995), *appeal denied*, 546 Pa. 635, 683 A.2d 876 (1996), (the fact that victim gave counselor permission to reveal communications to police and to treating doctor did not waive privilege, as such disclosures were mandated by child abuse reporting requirements).

5.5 OMNIBUS PRE-TRIAL MOTIONS

An omnibus pre-trial motion is the method envisioned by the Rules of Criminal Procedure for resolving routine matters that commonly arise in criminal litigation. Generally, all pre-trial requests for relief should be included in a single omnibus pre-trial motion. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN. However, this rule is not intended to preclude other types of motions from being filed. *Id., cmt.* These other motions should, however, be filed at the earliest feasible time. *Id.*

A. Types of Relief

1. Continuance

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for continuance. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.*

2. Severance, Joinder, or Consolidation

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for severance, joinder, or consolidation. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.*

Although under the scheme set forth in the Rules of Criminal Procedure, ordinarily offenses or defendants charged in separate indictments or informations will be tried separately, pursuant to Pa.R.Crim.Pl 582(B), the District Attorney has the opportunity to serve a notice on the defendant(s) that the offenses or defendants will be tried together. In such situations, if challenged, the trial court must review the following standards:

- (1) Offenses charged in separate indictments or information may be tried together if:
 - (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
 - (b) the offenses charged are based on the same act or transaction.
- (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

Pa.R.Crim.P., Rule 582, 42 PA. CONS. STAT. ANN.

Also, the trial court may order severance of offenses or defendants, or provide other appropriate relief, if any party is prejudiced by offenses or defendants being tried together. Pa.R.Crim.P., Rule 583, 42 PA. CONS. STAT. ANN.

3. Suppression of Evidence

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for suppression of evidence. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.* If a defendant fails to raise a suppression issue in an omnibus pre-trial motion, he bears the burden of preserving the issue by establishing that the opportunity to argue for suppression did not previously exist or that the interests of justice require that the suppression motion be heard. ***Commonwealth v. Hubbard***, 472 Pa. 259, 372 A.2d 687 (Pa. Super. 1977), *overruled on other grounds*, ***Commonwealth v. Grant***, 572 Pa. 48, 813 A.2d 726 (2002).

The motion for suppression must state specifically and with particularity the evidence sought to be suppressed, the grounds relied upon for suppression, and the facts and events in support of such grounds. Pa.R.Crim.P., Rule 581(D), 42 PA. CONS. STAT. ANN. If the court deems that a hearing is necessary to resolve the motion to suppress, it must order a hearing to be held either prior to or at trial and provide the attorney for the Commonwealth a reasonable opportunity for investigation. Pa.R.Crim.P., Rule 581(E), 42 PA. CONS. STAT. ANN.

The hearing should ordinarily be held in open court, but outside the presence of the jury, if any. Pa.R.Crim.P., Rule 581(F), 42 PA. CONS. STAT. ANN. The hearing should be recorded. Pa.R.Crim.P., Rule 581(G), 42 PA. CONS. STAT. ANN. At the hearing, the Commonwealth has the burden of establishing that the challenged evidence was not obtained in violation of the defendant's rights. **Commonwealth v. West**, 834 A.2d 625, 629 (Pa.Super. 2003), *appeal denied*, 586 Pa. 712, 889 A.2d 1216 (2005); Pa.R.Crim.P., Rule 581(H), 42 PA. CONS. STAT. ANN.

Commonwealth v. Beaman, 846 A.2d 764 (Pa. Super. 2004), *aff'd*, 583 Pa. 636, 880 A.2d 578 (Pa. Aug 15, 2005) (when defendant challenges constitutionality of statute authorizing a search, the burden shifts to defendant as statutes are presumed constitutional).

If the defendant testifies at the hearing, he does not waive his right to remain silent at trial. Pa.R.Crim.P. 581(H). At the conclusion of the hearing, the Judge must enter on the record a statement of findings of fact and conclusions of law as to whether the evidence was obtained in violation of the defendant's rights. Pa.R.Crim.P., Rule 581(I), 42 PA. CONS. STAT. ANN.

- **Commonwealth v. Elmobdy**, 823 A.2d 180 (Pa. Super. 2003), *appeal denied* 577 Pa. 701, 847 A.2d 58 (2004)(It is trial court's province to pass on the credibility of witnesses and assign the weight to be given to their testimony).

If the court determines that the evidence shall not be suppressed, such ruling shall be final and binding at trial, except upon a showing of evidence which was previously unavailable. Pa.R.Crim.P., Rule 581(J), 42 PA. CONS. STAT. ANN. The defendant may always challenge the voluntariness of a confession before a fact-finder. Pa.R.Crim.P., Rule 581, 42 PA. CONS. STAT. ANN., *cmt.*; See **Commonwealth v. Cameron**, 780 A.2d 688 (Pa. Super. 2001).

4. Psychiatric Examination

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for a psychiatric examination. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.* At least one Common Pleas Court has held that a victim of a crime of sexual violence may be compelled to undergo a psychiatric evaluation pursuant to this rule if the defendant can establish the necessity

for the examination. ***Commonwealth v. Ramer***, 30 Pa. D.&C.3d 50 (1984). However, impugning the credibility of such a victim or attacking the competency and truthfulness of the victim are not compelling enough reasons to justify such an examination. *Id.*

5. Quashal of an Information

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for quashing an information. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.* In fact, all grounds for claiming that indictments or informations are defective must be stated in a pre-trial motion to quash, and if they are not, they are waived. ***Commonwealth v. Gemelli***, 474 A.2d 294 (Pa. Super. 1984).

- ***Commonwealth v. Parmar***, 672 A.2d 314 (Pa. Super. 1996), *aff'd*, 551 Pa. 318, 710 A.2d 1083 (1998) (claim that information or indictment charged defendant with wrong crime was waived for failure to include it in written pre-trial motion to quash).
- ***Commonwealth v. Slyman***, 483 A.2d 519 (Pa. Super. 1984) (Failure of district attorney to sign a criminal information, in violation of rule of criminal procedure, rendered information merely voidable, since the defect was susceptible of prompt cure by amendment).
- ***Commonwealth v. Finley***, 860 A.2d 132 (Pa. Super. 2004), *reargument denied* (Nov. 10, 2004) (quashal was not an appropriate remedy for illegal arrest).

6. Change of Venue or Venire

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for a change of venue or venire. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.* The standard to be followed by the trial court is stated in Pa.R.Crim.P. 584(A): “Venue or venire may be changed by ... (the trial court) when it is determined after hearing that a fair and impartial trial cannot be otherwise be had in the county where the case is currently pending.” Pa.R.Crim.P., Rule 584(A), 42 PA. CONS. STAT. ANN.

If the trial court determines that a change of venue or venire is necessary, then the order for the change must be certified “forthwith” to the Supreme Court; the Supreme Court will then designate the county of transfer, or the county from which the jury is to be impaneled. Pa.R.Crim.P., Rule 584(B), 42 PA. CONS. STAT. ANN.

7. Disqualification of Judge

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for the disqualification of a judge. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.* Any motion to disqualify or remove a trial judge should be first presented to the trial judge before whom the proceedings are being

tried. This way, the trial judge makes the determination in the first instance, which can be reviewed for an abuse of discretion by the appropriate appellate court. **Commonwealth v. Whitmore**, ___ Pa. ___, ___, 912 A.2d 827, 833 (2006).

8. Appointment of an Investigator

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for the appointment of an investigator. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.*

9. Pre-trial Conference

The omnibus pre-trial motion is an appropriate vehicle for filing a motion for a pre-trial conference. Pa.R.Crim.P., Rule 578, 42 PA. CONS. STAT. ANN., *cmt.*

10. Double Jeopardy

The issue of double jeopardy should usually be raised in pre-trial motions. **Commonwealth v. Johnson**, 466 A.2d 636 (Pa. Super. 1983).

11. Statute of Limitations

The issue of statute of limitations should be raised in a pre-trial motion to dismiss. **Commonwealth v. Groff**, 548 A.2d 1237 (Pa. Super. 1988).

12. Writ of Habeas Corpus

A petition for writ of habeas corpus is the proper pre-trial vehicle for testing the sufficiency of the Commonwealth's evidence. **Commonwealth v. Hock**, 556 Pa. 409, 728 A.2d 943 (1999). To survive such a petition, the Commonwealth's evidence need only be that measure of evidence, which, if accepted as true, would justify the conclusion that the defendant is guilty of the offense charged, i.e., a *prima facie* case. **Commonwealth v. Kohlie**, 811 A.2d 1010 (Pa. Super. 2002), *appeal denied*, 573 Pa. 709, 827 A.2d 1201 (2003).

B. Time for Filing

The omnibus pre-trial motion must be filed and served within 30 days after arraignment. Pa.R.Crim.P., Rule 579(A), 42 PA. CONS. STAT. ANN. The defendant may only evade this requirement by establishing (1) that the opportunity to file the motion did not previously exist; (2) that the defendant, defendant's attorney, or the Commonwealth was not aware of the grounds for the motion; (3) that the time for filing the motion was extended by court order for cause shown. *Id.*

- **Commonwealth v. Cosgrove**, 545 Pa. 71, 680 A.2d 823 (1996) (defendant could not challenge the jurisdiction of the Attorney General to prosecute until after formal arraignment).

- ***Commonwealth v. Thomas***, 444 A.2d 735 (Pa. Super. 1982) (defendant’s failure to object to scheduling of trial within 30 days of arraignment waived argument that such scheduling violated this rule).

C. Disposition of Motion

The Rules of Criminal Procedure provide that “[u]nless otherwise provided in these rules, all pretrial motions shall be determined before trial. Trial shall be postponed by the court for the determination of pretrial motions, if necessary.” Pa.R.Crim.P., Rule 580, 42 PA. CONS. STAT. ANN. Generally, pre-trial orders in criminal cases are not immediately appealable. ***Commonwealth v. Wills***, 476 A.2d 1362 (Pa. Super. 1984). However, the denial of a defendant’s motion to quash on double jeopardy grounds is immediately appealable. ***Commonwealth v. Buechele***, 444 A.2d 1246 (Pa. Super. 1982).

5.6 EVIDENCE OF VICTIM’S PAST SEXUAL CONDUCT

Pennsylvania’s Rape Shield Law is statutory in nature, and not a rule of evidence as it is under the Federal system. Pennsylvania’s Rape Shield Law states as the general rule that

[e]vidence of specific instances of the alleged victim’s past sexual conduct, opinion evidence of the alleged victim’s past sexual conduct, and reputation evidence of the alleged victim’s past sexual conduct shall not be admissible in prosecutions [for sexual offenses] except evidence of the alleged victim’s past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 PA. CONS. STAT. ANN. § 3104(a). Furthermore, the Rape Shield Law specifies that

[a] defendant who proposes to offer evidence of the alleged victim’s past sexual conduct pursuant to [the general rule] shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the standards set forth in [the general rule].

18 PA. CONS. STAT. ANN. § 3104(a).

A. Purpose

The purpose of this provision is to prevent a trial from shifting focus to the virtue and chastity of the victim from the defendant’s culpability for the charged crime. ***Commonwealth v. Fernsler***, 715 A.2d 435 (Pa. Super. 1998).

- ***In re M.K.***, 636 A.2d 198 (Pa. Super. 1994) (Rape Shield Law applies only to prosecutions relating to sexual offenses).
- ***Commonwealth v. Killen***, 545 Pa. 127, 680 A.2d 851 (1996) (evidence that victim made provocative statements and was in a jovial mood shortly after alleged assault was not evidence of victim’s sexual history and therefore was not subject to Rape Shield Law).
- ***Commonwealth v. Dear***, 492 A.2d 714 (Pa. Super. 1985) (evidence of victim’s prior convictions for prostitution was not admissible to show that victim consented to having sexual intercourse with the defendant).

“Past sexual conduct” of the victim includes the victim’s entire sexual history. ***Commonwealth v. Jones***, 826 A.2d 900 (Pa. Super. 2003). Therefore, the Rape Shield Law acts to exclude all past consensual sexual conduct or sexual conduct that is the result of nonconsensual or assaultive behavior unless there exists probative value that is exculpatory to the Defendant. ***Commonwealth v. Gaddis***, 639 A.2d 462 (Pa. Super. 1994), *appeal denied*, 538 Pa. 665, 649 A.2d 668 (1994).

- ***Commonwealth v. Jones***, 826 A.2d 900 (Pa. Super. 2003) (evidence that victim had been convicted of prostitution for acts with a third party that occurred after defendant’s arrest was evidence of victim’s past sexual conduct that was inadmissible when the evidence did not exculpate defendant and was not probative of victim’s willingness to commit sexual acts with defendant).
- ***Commonwealth v. Fink***, 791 A.2d 1235 (Pa. Super. 2002) (if victim’s prior sexual conduct does not involve defendant or involves defendant but consent is not an issue, then it must be relevant to show bias against the defendant or to attack the credibility of the victim).
- ***Commonwealth v. Guy***, 686 A.2d 397 (Pa. Super. 1996), *appeal denied*, 548 Pa. 645, 695 A.2d 784 (1997) (evidence of victim’s sexual history not admissible to prove that victim acted in conformity with past behavior).
- ***Commonwealth v. Reed***, 644 A.2d 1223 (Pa. Super. 1994), *appeal denied*, 540 Pa. 580, 655 A.2d 512 (1995) (Commonwealth should not use victim’s sexual history to attack defendant’s credibility if it desires to invoke the protections of the Rape Shield Law).

B. Prejudice or Bias – Admissibility

Evidence relating to an alleged victim’s sexual history is admissible under the Rape Shield Law if it tends to directly exculpate the defendant by showing, *inter alia*, bias, hostility, motive to lie or fabricate, evidence of a sexual encounter with another person on the date in question, or impeachment value through demonstrating a prior inconsistent statement. ***Commonwealth v. Guy***, 686 A.2d 397 (Pa. Super. 1996), *appeal denied*, 548 Pa. 645, 695 A.2d 784 (1997). If the court determines that the evidence of the victim’s prior sexual

history has some probative exculpatory value for the defendant, the court should conduct an *in camera* hearing to weigh the probative value against the prejudicial effect. ***Commonwealth v. Johnson***, 566 A.2d 1197 (Pa. Super. 1989), *aff'd*, 536 Pa. 153, 638 A.2d 940 (1994). The proponent of evidence concerning the victim's sexual history bears the burden of establishing the admissibility and relevance of the evidence under the Rape Shield Law. ***Commonwealth v. Weber***, 549 Pa. 430, 701 A.2d 531 (1997).

- ***Commonwealth v. Jones***, 826 A.2d 899 (Pa. Super. 2003) (evidence of victim's prostitution conviction for acts with a third party occurring after defendant's arrest was inadmissible under Rape Shield Law).
- ***Commonwealth v. Fernsler***, 715 A.2d 435 (Pa. Super. 1998) (evidence concerning juvenile victim's placement in treatment program for sexual assault on half-sister was admissible as it reflected a possible motive for victim to seek favorable treatment by fabricating charges against defendant, victim's father).
- ***Commonwealth v. Berkowitz***, 537 Pa. 143, 641 A.2d 1161 (1994) (evidence that victim and her boyfriend had argued over whether victim had been unfaithful was excluded by Rape Shield Law despite the fact that it provided possible motive for fabrication of charge).
- ***Commonwealth v. Stansbury***, 640 A.2d 1368 (Pa. Super. 1994) (evidence of previous sexual assaults by defendant on victim was admissible)(presence of pubic hairs from third party in victim's underwear while probative of defense theory that another person had sexual relations with victim, was not admissible as defendant admitted to having sexual relations with victim).
- ***Commonwealth v. Wall***, 606 A.2d 449 (Pa. Super. 1992), *appeal denied*, 532 Pa. 645, 614 A.2d 1142 (1992) (evidence of child victim's previous claims of sexual abuse by mother were admissible in prosecution against uncle who had custody of victim at time of alleged crime as it suggested motive for escaping discipline from custodian).
- ***Commonwealth v. Weber***, 549 Pa. 430, 701 A.2d 531 (1997) (defendant failed to establish relevance of victim's abortion and therefore evidence of the abortion was inadmissible).

C. Nonconsensual Sexual Conduct

Evidence of victim's prior nonconsensual conduct is not covered by the Rape Shield Law as it does not impugn the victim's reputation for chastity.

Commonwealth v. Johnson, 536 Pa. 153, 638 A.2d 940 (1994). Such evidence is evaluated under the general evidentiary rules. *Id.*; ***Commonwealth v. Fink***, 791 A.2d 1235 (Pa. Super. 2002).