APPENDIX 6

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v. No. 1722-2005

MICHAEL GEORGE DEEP,

Appellant.

Paul Pozonsky, J. October 9, 2007

OPINION PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1925(a)

On August 11, 2005, a Criminal Complaint was filed against Michael George Deep ("Appellant"), alleging that he committed an assortment of sexual offenses on his juvenile stepdaughter, Hannah Kennedy ("Victim"), from July 1999 through August 2005. The Criminal Complaint charged 87 counts of "Statutory Sexual Assault", 18 Pa.C.S.A. § 3122.1; 87 counts of "Rape by Forcible Compulsion", 18 Pa.C.S.A. § 3121(a)(1); 87 counts of "Involuntary Deviate Sexual Intercourse of a Person Less than 16 Years of Age", 18 Pa.C.S.A. § 3123(a)(7); 87 counts of "Sexual Assault", 18 Pa.C.S.A. § 3124.1; 86 counts of "Aggravated Sexual Assault", 18 Pa.C.S.A. § 3125; 87 counts of "Indecent Assault of a Person Less than 16 Years of Age", 18 Pa.C.S.A. § 3126(a)(8); 87 counts of "Endangering the Welfare of Children", 18 Pa.C.S.A. § 4304(a); and 87 counts of "Corruption of Minors", 18 Pa.C.S.A. § 6301(a)(1).

On August 24, 2005, the preliminary hearing of this matter was scheduled and, at that time, the Commonwealth and the Appellant reached an agreement, whereby 81 of 87 counts at each charge would be dismissed by the Commonwealth, in exchange for the

waiver of the preliminary hearing by the Appellant on six (6) of the remaining counts at each charge.

On October 23, 2006, the Appellant proceeded to a jury trial, on six (6) counts of "Statutory Sexual Assault", six (6) counts of "Rape by Forcible Compulsion", six (6) counts of "Involuntary Deviate Sexual Intercourse of a Person Less Than 16 Years of Age", six (6) counts of "Sexual Assault", six (6) counts of "Aggravated Sexual Assault", six (6) counts of "Indecent Assault of a Person Less Than 16 Years of Age", six (6) counts of "Endangering the Welfare of Children", and six (6) counts of "Corruption of Minors". After a week of testimony, the Appellant was convicted of two (2) counts of "Sexual Assault", two (2) counts of "Endangering the Welfare of Children", and two (2) counts of "Corruption of Minors". The Defendant was found not guilty of all the remaining charges. This Court deferred sentencing, pending a pre-sentence investigation ("PSI").

On March 22, 2007, following receipt and review of the PSI, this Court sentenced the Appellant as follows:

> On the charge of Sexual Assault, two counts, for a period of not less than five years, no more than 10 years on each count to run consecutively;
> On the charge of Endangering the Welfare of Children for a period of not less than one year, no more than seven years on each count to run consecutively;
> On the charge of Corruption of Minors, for a period of not less than one year, no more than five years on each count to run consecutively.
> All of the above sentences are to run consecutively; the [Appellant's] total sentence shall be not less than 14 years, not more than 44 years.

(Judgment of Sentence, 3/22/07, pp. 1-2).

On April 2, 2007, the Appellant filed timely Post-Sentence Motions.

On April 19, 2007, the Appellant filed an appeal to the Superior Court of Pennsylvania from his Judgment of Sentence.[1] This Court, in accordance with Pennsylvania Rule of Appellate Procedure 1925(b), directed the Appellant to file of record and serve upon this Court a Concise Statement of Matters Complained of on Appeal ("Concise Statement") within 14 days.[2]

On May 2, 2007, the Appellant filed and served upon this Court his Concise Statement. Therein, the Appellant raised four (4) grounds for a new trial: (1) after-discovered evidence; (2) erroneous rulings regarding the admissibility of certain evidence; (3) prosecutorial misconduct; and (4) a discovery violation under Pennsylvania Rule of Criminal Procedure 573, and *Brady v. Maryland*, 373 U.S. 83 (1963). The Appellant also challenged the legality of his sentence, pursuant to *Cunningham v. California*, --- U.S. ---, 127 S.Ct. 856 (2007), and its precedents.[3]

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[1] "If post-sentence motions are timely filed...the judgment of sentence does not become final for purposes of appeal until the trial court disposes of the motion, or the motion is denied by operation of law." *Commonwealth v. Rojas*, 874 A.2d 638, 642 (Pa.Super. 2005) (citing authorities). *See* Pa.R.Crim.P. 720(A)(2). "No direct appeal may be taken by a defendant while his or her post-sentence motion is pending." *Comment*, Pa.R.Crim.P. 720(A)(2). In *Commonwealth v. Borrero*, 692 A.2d 158 (Pa.Super. 1997), the Superior Court quashed the appeal and remanded the case because the appeal was filed during the pendency of post-sentence motions. 692 A.2d at 161. In the case *sub judice*, although the Appellant filed his appeal prematurely, before his Post-Sentence Motions could be ruled upon by this Court or denied as a matter of law, *Borrero* is distinguishable. Unlike *Borrero*, an appropriate order has been entered on the record (August 2, 2007), denying the Post-Sentence Motions of the Appellant by operation of law. *See* Pa.R.Crim.P. 720(B)(3)(a) ("Except as provided in paragraph (B)(3)(b), the judge shall decide the post-sentence motion, including any supplemental motion, within 120 days of the filing of the motion. If the judge fails to decide the motion within 120 days, or to grant an extension as provided in paragraph (B)(3)(b), the motion shall be deemed denied by operation of law."). Thus, in the case of the Appellant, post-sentence motions are not pending in the trial court. *See Commonwealth v. Little*, 879 A.2d 293, 295 n. 6 (Pa.Super. 2005) ("Little's notice of appeal was prematurely filed as his petition for reconsideration was still pending at the time he filed his notice of appeal. However...an order denying Little's petition for reconsideration was subsequently entered, and thus, we will entertain the appeal.").

[2] The entire text of Rule 1925 was amended on May 10, 2007, and the new text was made effective on July 25, 2007. The 2007 amendments, some of which are significant, "attempt to address the concerns of the bar raised by cases in which courts found waiver." *Comment*, Pa.R.A.P. 1925. "[T]he new provisions [of a rule of court] shall be construed as effective only from the date when the amendment became effective." 1 Pa.C.S.A. § 1953. Accordingly, waiver in the instant matter is governed by the prior language of Rule 1925, and the case law interpreting it, rather than the amended language.

[3] In pertinent part, former Rule 1925 provides:

AFTER-DISCOVERED EVIDENCE

The Appellant claims that "evidence...submitted through victim impact statements" at sentencing established that the Victim suffered from serious mental disabilities, and that she engaged in self abuse and/or attempted suicide. (Appellant's Post-Sentence Motions ("PSM"), 3/22/07, p. 1, ¶ 4). The Appellant alleges that the Commonwealth never disclosed that information prior to or during trial. According to the Appellant, the "[h]istory of care and/or treatment and/or the existence of a mental infirmity on the part of the [V]ictim would [have been] relevant and [contributed] to the [in]credibility of the...[V]ictim's testimony", (PSM at 2, ¶ 6), and thus he "should have

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> (b) *Direction to file statement of matters complained of.* The lower court may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of matters complained of on appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

Pa.R.A.P. 1925(b). In *Commonwealth v. Lord*, 719 A.2d 306 (Pa. 1998), the Supreme Court held that the failure of an appellant to raise an issue in his concise statement, as ordered by the trial court, waives that issue on appeal. 719 A.2d at 309. "Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal. Rule 1925 is thus a crucial component of the appellate process." *Id.*, at 308. Therefore, "from this date (October 28, 1998) forward, in order to preserve their claims for appellate review, Appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. Any issues not raised in a 1925(b) statement will be deemed waived." *Id.*, at 309 (parenthetical language added). Here, the Concise Statement of the Appellant provides, *in its entirety*: "In response to your request for a detailed statement of issues to be raised on Appeal, we are advising the Court that the issues to be raised are the issues that were raised in the Post-Trial Motions." (Appellant's Concise Statement, 5/2/07, p. 1). "[A] Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." *Commonwealth v. Dowling*, 778 A.2d 683, 686-687 (Pa.Super. 2001). Furthermore, the familiarity of the trial court with the issues raised on appeal does not serve to satisfy the requirements of Rule 1925(b). *See Commonwealth v. Butler*, 812 A.2d 631, 633 (Pa. 2002) ("While the PCRA court was well acquainted with the claims raised in the PCRA petition, Appellant's failure to comply with the court's order to file a Rule 1925(b) statement compelled the court to speculate which of those claims Appellant would maintain on appeal. Bearing in mind the purpose of Rule 1925, this result is unsupportable."). Finally, "[a] 1925(b) statement should include a concise statement of each issue to be raised on appeal without reference to other documents." *Commonwealth v. Dodge*, 859 A.2d 771, 774 (Pa.Super. 2004). Reading together *Dowling* and *Butler* and *Dodge*, and observing that strict waiver under former Rule 1925(b) had been reaffirmed by the Supreme Court, *see Commonwealth v. Schofield*, 888 A.2d 771 (Pa. 2005), and *Commonwealth v. Castillo*, 888 A.2d 775 (Pa. 2005), this Court regards the Concise Statement of the Appellant as entirely inadequate. The Concise Statement of the Appellant does not satisfactorily identify the issues to be raised on appeal; in fact, it identifies no issues at all. It requires this Court to engage in wholesale conjecture, which clearly does not allow for thorough appellate examination. Nonetheless, given the unique procedural posture of this case, *see* footnote 1, and the recent amendments to Rule 1925, *see* footnote 2, this Court reluctantly does not make a general finding of waiver.

been advised of this situation during pre-trial proceedings and should be granted the right to explore and investigate [its] relevancy and [its] impact...." (PSM at 2, ¶ 7).

The finding of after-discovered evidence can be the source of a new trial where the evidence:

> (1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) is of such a nature and character that a different verdict will likely result if a new trial is granted.

Commonwealth v. Randolph, 873 A.2d 1277, 1283 (Pa. 2005) (quoting *Commonwealth v. McCracken*, 659 A.2d 541, 549 (Pa. 1995)). Stated differently, the court must be satisfied that the evidence "could not have been discovered until after the trial despite due diligence, is not used for merely cumulative or impeachment purposes, and is of such a nature that it would compel a different outcome." *Commonwealth v. Scott*, 470 A.2d 91, 93 (Pa. 1983) (citing cases).

Upon review, this Court concludes that the information regarding the mental status of the Victim does not constitute after-discovered evidence, but instead relates only to impeaching the credibility of the Victim. "After-discovered evidence will not form a basis for a new trial if it merely impeaches the credibility of a witness." *Commonwealth v. Goldblum*, 447 A.2d 234, 239 (Pa. 1982) (citing *Commonwealth v. Giacobbe*, 19 A.2d 71, 76 (Pa. 1941)). The Appellant has not met his burden of demonstrating that the information would not be used solely to attack the integrity of the Victim. In fact, the claim of the Appellant concedes that shortcoming, and the after-discovered evidence claim of the Appellant fails on the basis of its purpose.

ADMISSIBILITY OF EVIDENCE

The Appellant argues that the testimony of the sexual assault nurse examiner, Catherine Dames ("Nurse Dames"), should not have been received as an expert because an "appropriate foundation" had not been laid. (PSM, at 3, ¶ 1). The Appellant contends that "a new standard of expert testimony (sexual assault nurse examiner)" was allowed (PSM, at 3, ¶ 1) (parenthetical language added), and that "no such standard heretofore existed and the allowance of [Nurse Dames'] expert testimony without proper *Daubert* standards was an err [sp]." (PSM, at 3, ¶ 3). According to the Appellant, he had "no objection to [Nurse] Dames being qualified as a nurse examiner", but "would object to any medical diagnosis or opinions that would be offered." (TT, at vol. III, 114). Reduced to its essence, the Appellant claims that Nurse Dames testified regarding a medical diagnosis without proper foundation.

As a threshold matter, and contrary to the claim of the Appellant, Pennsylvania does not adhere to the test of expert testimony established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[4] In *Commonwealth v. Topa*, 369 A.2d 1277 (Pa. 1977), the Supreme Court adopted the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and in *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1044 (Pa. 2003), a majority of the Supreme Court flatly rejected *Daubert* and affirmed the validity of *Frye*. "After *Daubert* was decided, a number of state courts adopted the *Daubert* standard. We, however, have continued to follow *Frye*." *Grady*, 839 A.2d at 1044. Whereas the *Daubert* standard charges trial courts with the responsibility of acting as "gatekeepers" to exclude all unreliable expert testimony, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,

[4] In *Daubert*, the United States Supreme Court held that *Frye* was superseded in the federal courts by the adoption of the Federal Rules of Evidence. *Daubert, supra*, at 587.

147 (1999) (interpreting *Daubert*), through the application of a non-exclusive checklist of reliability factors, *Daubert*, 509 U.S. at 594-595, the *Frye* standard merely requires that the expert testimony "have gained general acceptance in the particular field in which it belongs." *Frye*, 293 F. at 1014.[5]

Moving to the substance of the claim, the Professional Nursing Law, 63 P.S. § 211, *et seq.*, provides the following definition of the practice of nursing:

> The "Practice of Professional Nursing" means diagnosing and treating human responses to actual or potential health problems through such services as casefinding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens as prescribed by a licensed physician or dentist. The foregoing shall not be deemed to include acts of medical diagnosis or prescription of medical therapeutic or corrective measures, except as performed by a certified registered nurse practitioner acting in accordance with rules and regulations promulgated by the Board.

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[5] The *Frye* standard does not apply "whenever science enters the courtroom", but instead only where a party seeks to introduce novel scientific evidence. *Blum v. Merrell Dow Pharmaceuticals*, 705 A.2d 1314, 1317 (Pa.Super. 1997). "Not every scientific opinion is either new or original—some are the kind that are offered all the time." *Commonwealth v. Dengler*, 843 A.2d 1241, 1243 (Pa.Super. 2004). "[T]o apply the *Frye* standard every time scientific experts are called to render an opinion at trial [would be] nothing short of Kafkaesque to contemplate." *Trach v. Fellin*, 817 A.2d 1102, 1110 (Pa.Super. 2003) (*en banc*). *Frye* is triggered only to determine if the relevant scientific community has generally accepted the principles and methodology employed, and not the conclusions ultimately reached, before the expert may testify. *Dengler*, *supra*, at 1243.
The claim of the Appellant does not implicate the *Frye* standard. The claim is directed at the conclusions of Nurse Dames, and not the principles and/or methodology employed, or the generally accepted views of the scientific community concerned with sexual-assault examinations. Therefore, the testimony of Nurse Dames is not subject to the evidentiary-screening function of *Frye*.
In the view of this Court, nor would the application of *Daubert* alter this outcome. The rejection of expert testimony is the exception rather than the rule, as *Daubert* does not work a "seachange over federal evidence law", and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). The *Daubert* standard is not expected to provide a mechanical objection to the testimony of every expert. *See Kuhmo Tire Co.*, *supra*, at 1176 (the trial courts are afforded "the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises."). "The focus, of course, must be solely on principles and methodology, not the conclusions they generate." *Daubert*, *supra*, at 595.

63 P.S. § 212(1). In *Flanagan v. Labe*, 690 A.2d 183 (Pa. 1997), the Supreme Court examined Section 212(1) and observed that "although the statute permits nurses to *diagnose human responses* to health problems, it expressly prohibits them from providing *medical diagnoses*. Hence, it recognizes a firm distinction between a nursing diagnosis and a medical diagnosis." 690 A.2d at 184. The Supreme Court also stated the difference between a "nursing diagnosis" and "medical diagnosis", in accordance with Section 212(1):

> The proper scope of a nursing diagnosis is set forth through statutory definitions of the terms employed in 63 P.S. § 212(1), *supra*. "Diagnosing" is defined as "identification of and discrimination between physical and psychosocial signs and symptoms essential to effective execution and management of the nursing regimen." 63 P.S. § 212(4). "Human responses" are defined as "those signs, symptoms and processes which denote the individual's interaction with an actual or potential health problem." 63 P.S. § 212(6). Thus, a nursing diagnosis identifies signs and symptoms to the extent necessary to carry out the nursing regimen. It does not, however, make final conclusions about the identity and cause of the underlying disease.
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> The statute clearly states that the proper scope of nursing practice does not include acts of "medical diagnosis". ....
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> A medical diagnosis is commonly understood to be an identification of a disease based on its signs and symptoms. *See* Random House Dictionary (2d ed. unabridged 1987) (defining diagnosis for medical purposes as "the process of determining by examination the nature and circumstances of a diseased condition"); Webster's Third New International Dictionary (unabridged 1976) (defining "medical" as "concerned with physicians or the practice of medicine" and defining "diagnosis" as "the art or act of identifying a disease from its signs and symptoms"). *See also Commonwealth v. Green*, 251 Pa.Super. 318, 323, 380 A.2d 798, 801 (1977) ("Medical diagnosis ... entails a 'conclusion concerning a condition not visible but reflected circumstantially by the existence of other visible and known symptoms.' *Paxos v. Jarka Corp.*, 314 Pa. 148, 153-54, 171 A. 468, 471 (1934).").

Flanagan, 690 A.2d at 186. On the basis of the language of Section 212(2), the Supreme Court held that a nurse or other non-medical expert witness is not competent to testify as to a medical diagnosis. *Id.*

In the view of this Court, no medical diagnosis was at issue under the circumstances of the case *sub judice*. The testimony of Nurse Dames concentrated upon the general protocol of a sexual assault nurse examiner (Notes of Testimony, Trial ("TT"), October 23, 2006, vol. III, pp. 115-118), and her personal observations and findings as to the Victim. (TT, at vol. III, 119-125, 142-156). Nurse Dames never testified as to any medical diagnosis or treatment rendered by any physician of the Victim. Moreover, Nurse Dames specifically testified that she is charged with providing a "nursing opinion" or diagnosis, and that she is not trained to provide a medical opinion or diagnosis. (TT, at vol. III, 113-114, 134). To the extent that Nurse Dames used the term "sexual assault" in her testimony, she qualified her statements and clarified that she meant "vaginal penetration". (TT, at vol. III, 157-158). "Penetration could be one form of sexual assault." (TT, at vol. III, 159). In short, the testimony of Nurse Dames merely "identifie[d] signs and symptoms to the extent necessary to carry out a nursing regimen" as to the Victim, and did not amount to "the process of determining by examination the nature and circumstances of a diseased condition" of the Victim.

Even assuming, *arguendo*, that the testimony of Nurse Dames did constitute a medical diagnosis, its admission into evidence did not prejudice the Appellant. *See Daddona v. Thind*, 891 A.2d 786, 805 (Pa.Cmwlth. 2006) ("Only when the admission of the testimony is harmful or prejudicial to the complaining party will reversible error exist."). "[T]he question of whether a witness is qualified to testify as an expert is a

matter resting in the decision of the trial judge." *Commonwealth v. Conklin*, 897 A.2d 1168, 1174 (Pa. 2006) (citing *Commonwealth v. Marinelli*, 810 A.2d 1257, 1267 (Pa. 2002)). The decision of the trial court, to allow the admission of expert testimony into evidence, is not subject to reversal absent a clear abuse of discretion, *Daddona*, 891 A.2d at 805 (Pa.Cmwlth. 2006) (citing *Allegheny Ludlum Corp. v. Mun. Auth. of Westmoreland County*, 659 A.2d 20, 28 n. 14 (Pa.Cmwlth. 1995)), or the commission of an error of law. *Commonwealth v. Hetzel*, 822 A.2d 747, 761 (Pa.Super. 2003) (citing *Commonwealth v. Minerd*, 753 A.2d 225, 229 (Pa. 2000)).

The testimony of experts in Pennsylvania is governed under the following Rule of Evidence:

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pa.R.E. 702. "[I]n this Commonwealth...the standard for qualification of an expert witness is a liberal one." *In re K.C.F.*, --- A.2d ---, 2007 WL 1674275 (Pa.Super. June 12, 2007) (quoting *McClain v. Welker*, 761 A.2d 155, 156 (Pa.Super. 2000)). To qualify as an expert witness in a given field, "one must only 'possess more expertise than is within the ordinary range of training, knowledge, intelligence, or experience.'" *Freed v. Geisinger Medical Center*, 910 A.2d 68, 73 (Pa.Super. 2006) (quoting *Flanagan*, 690 A.2d at 185). "[T]he test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation." *Crystal Forest Associates, LP v. Buckingham Township Supervisors*, 872

A.2d 206 (Pa.Cmwlth. 2005) (citing *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995)).

In *McClain v. Welker*, *supra*, two minor children suffering from toxic lead poisoning sued the owner of a rental unit, charging that the poisoning was the result of ingesting lead-based paint in their rental home. The plaintiffs intended to introduce the expert testimony of a witness with a PhD in neuroscience and psychobiology, as evidence that they had undergone cognitive defects caused by lead poisoning. The defendant objected, and the trial court ruled that the proffered testimony regarding causation was not admissible because the expert witness did not possess a medical degree. *Id.*, at 156. The Superior Court reversed and remanded, based upon the liberal standard of expert-witness qualification in Pennsylvania:

> It is well established in this Commonwealth that the standard for qualification of an expert witness is a liberal one. The test to be applied when qualifying an expert witness is whether the witness has *any* reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trial of fact to determine. Finally, it is not necessary that an expert be a licensed medical practitioner to testify with respect to organic matters. [*Miller v. Brass Rail Tavern*, 664 A.2d 525, 528 (Pa. 1995)].
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> Hence, our Supreme Court has permitted an otherwise qualified non-medical expert to give a medical opinion so long as the expert witness has sufficient specialized knowledge to aid the jury in its factual quest.

Id., at 156-157 (some internal punctuation omitted). The Superior Court examined the qualifications of the witness, and concluded that he was "eminently qualified in his specialized field of study." *Id.* Moreover, the Superior Court found *Flanagan* distinguishable, as "the nurse in *Flanagan* never asserted that she had any pretension to specialized knowledge related to medical causation." *Id.* "Accordingly, on remand, [the

witness] should be permitted to render an expert opinion within the guise of Pa.R.E. 702 as to the causation of cognitive disorders." *Id.*, at 158.

In *Freed v. Geisinger Medical Center*, *supra*, the plaintiff brought a professional-negligence action against two medical institutions, complaining that the nursing staff of each institution failed to meet the standard of nursing care regarding pressure relief for a paralyzed and immobilized patient, which manifested into multiple pressure wounds and resulted in prolonged periods of hospitalization and rehabilitation. During trial, the nurse expert witness of the plaintiff was asked to state her opinion regarding the cause of the pressure wounds, and the defendants objected. The trial court sustained the objection. *Id.*, at 71. Although the trial court accepted the nurse as an expert regarding the proper standard of nursing care for an immobilized patient, *Id.*, at 73, it concluded that the nurse was not qualified to testify as to the causation of the pressure wounds because she was not a doctor. *Id.*, at 71. The Superior Court reversed and remanded. As in *McClain*, the Superior Court scrutinized the credentials of the expert witness:

> Based on [the nurse's] qualifications..., we conclude that she is competent to provide expert testimony not only on the standard of nursing care, but also on the causative relationship between breaches in the standard of care and Appellant's pressure wounds. Her education and experience provide her with "more expertise than is within the ordinary range of training, knowledge, intelligence, or experience" concerning the cause of pressure wounds. *Flanagan,* [ ] 690 A.2d at 185. Thus, we determine that the trial court abused its discretion by excluding her testimony as to causation of [the plaintiff's] pressure wounds. Therefore, we reverse the trial court's decision and remand for trial.

Id., at 75 (internal footnote omitted).

Thus, the precedents in *McClain* and *Freed* make clear that, notwithstanding *Flanagan*, a nurse or other non-medical expert witness may be competent to testify as to

causation, or a medical diagnosis, provided the witness possesses more knowledge than is otherwise within the typical range of training, knowledge, intelligence, or experience in the relevant field of study. *McClain* and *Freed* are consistent with the positive and established law of Pennsylvania, that licensing is not a requirement for qualification of an expert witness. *Ford ex rel. Pringle v. Philadelphia Housing Auth.*, 789 A.2d 360, 362 n. 3 (Pa.Cmwlth. 2001) (citing cases). "The mere fact the witness was not licensed to practice medicine in Pennsylvania did not *ipso facto* render him incompetent as a matter of law." *Commonwealth v. Davenport*, 295 A.2d 596, 600 (Pa. 1972). *See Commonwealth v. Morris*, 207 A.2d 921, 924 (Pa.Super. 1965) (no error to permit a hospital intern to testify as to cause of death, even though the intern was not yet licensed to practice medicine). Therefore, the lack of licensure more appropriately addresses the weight accorded to the testimony of the non-medical expert witness, as opposed to the competency of the non-medical expert witness. *Ford*, 789 A.2d at 362 n. 3. In further variance with *Flanagan*, a classification of nurses is statutorily authorized to perform acts of medical diagnoses. "A certified registered nurse practitioner may perform acts of medical diagnosis in collaboration with a physician and in accordance with regulations promulgated by the board (State Board of Nursing)." 63 P.S. § 218.2(b) (parenthetical language added).[6]

[6] A "certified registered nurse practitioner" is defined as "a registered nurse licensed in this Commonwealth who is certified by the board in a particular clinical specialty area." 63 P.S. § 212(12). The board may certify a licensed registered nurse as a certified registered nurse practitioner, in a particular clinical specialty area, "if the nurse satisfies the requirements established by this act and regulations promulgated by the board." 63 P.S. § 218.1(a). Those requirements include being "a graduate of an accredited, board-approved master's or post-master's nurse practitioner program", 63 P.S. § 218.1(b)(1)(i), and "hold[ing] certification as a certified registered nurse practitioner from a board-recognized national certification organization which required passing of a national certifying examination in the particular clinical specialty area in which the nurse is seeking certification by the board." 63 P.S. § 218.1(b)(1)(ii). The Commonwealth did not offer Nurse Dames as a certified registered nurse practitioner.

In the case *sub judice*, Nurse Dames testified that she is employed as a registered nurse at the Washington Hospital (TT, at vol. III, 105), that she has been serving as a sexual assault nurse examiner for approximately four (4) years (TT, at vol. III, 107), that she has obtained a certification from the International Association of Forensic Nurses, as well as other certifications regarding basic life support, intermediate life support, and advanced life support (TT, at vol. III, 107), that she has participated in peer review, wherein cases are shared with colleagues to discuss findings and non-findings for the purpose of enhancing learning (TT, at vol. III, 107), that she has taught approximately 500 other medical professionals regarding sexual-assault examinations (TT, at vol. III, 107), that she has performed approximately 191 sexual-assault examinations, including 91 examinations of children (TT, at vol. III, 107), and that she has previously been qualified as an expert witness in the field of sexual-assault examinations, in a court of common pleas of Washington County, Pennsylvania. (TT, at vol. III, 107). Nurse Dames testified as to her general education: "Obviously, [a] graduate from nursing school. I've gone on since then to earn my undergraduate degree..., [a] bachelor of science in nursing. Currently, I'm enrolled in [a] master's program for nursing and business. I also take additional education to be the sexual assault nurse examiner." (TT, at vol. III, 106). Nurse Dames also testified as to her education as a sexual assault nurse examiner:

> Back in 2002, I attended 40 hours of classroom time to learn about adult and adolescent sexual assault examinations, and also after that spent clinical time, approximately two months working under a physician to perform gynecological exams but also exams on sexual assaults to get experience there. Then I went on from there in 2004 to the additional classroom training for pediatric sexual

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A certified registered nurse practitioner also may "prescribe medical therapeutic or corrective measures if the nurse is acting in accordance with the provisions of section 8.3 (63 P.S. § 218.3)." 63 P.S. § 218.2(c) (parenthetical language added).

> assaults and spent a week in Harrisburg doing clinical time with a physician there performing those exams.

(TT, at vol. III, 106). Nurse Dames testified at length regarding her duties and responsibilities as a sexual assault nurse examiner: "I see people of all ages and...perform [a] head to toe physical exam on them and also a genital exam, collect any evidence that may or may not be there, if it's there, and treat them for any issues that may come up, like sexually transmitted disease, emergency contraceptive, that kind of stuff." (TT, at vol. III, 105-106). As a sexual assault nurse examiner, Nurse Dames is trained and required to make an assessment of the condition of the patient-victim (TT, at vol. III, p. 131, 132), to render an opinion regarding the condition of the patient-victim, for the purpose of further treatment (TT, at vol. III, 131), and to render an opinion regarding the cause of the injury or trauma of the patient-victim (TT, at vol. III, 132). Nurse Dames also testified that she is trained in the collection and documentation of forensic evidence (TT, at vol. III, 133), that she is required to operate under the direction of a physician (TT, at vol. III, 135), that she was operating under the direction of a physician in her assessment of the Victim (TT, at vol. III, 135), and that her findings and non-findings are extensively reviewed by physicians (TT, at vol. III, 139).

Upon examination of the qualifications of Nurse Dames, this Court concluded that Nurse Dames was competent to render an opinion regarding her observations and findings as to the Victim. The knowledge and experience of Nurse Dames afforded her with "more expertise than is within the ordinary range of training, knowledge, intelligence, or experience" regarding sexual assaults. Moreover, Nurse Dames specifically testified to having a specialized knowledge relating to injury and trauma regarding sexual assaults. (TT, at vol. III, 135-137). In any event, the Appellant was

provided a full and adequate opportunity to cross-examine Nurse Dames and challenge her conclusions. (TT, at 157-180). The testimony of Nurse Dames was admitted in accordance with the applicable Rules of Evidence and relevant case law. Therefore, the Appellant suffered no prejudice, and the claim is without merit.

The Appellant also contends that it was reversible error to "allow[ ] the introduction of the evidence of a sexually transmitted disease which had been discovered in the [V]ictim one year after the alleged sexual assault." (PSM, at 3, ¶ 6). According to the Appellant, that evidence "lacked any probative value and was highly prejudicial and inflammatory", and thus violated his due process rights under both the Federal and State Constitutions. (PSM, at 3, ¶ 7).

The evidence to which the Appellant objects occurred during the testimony of Commonwealth expert witness Janet Squires, M.D. ("Doctor Squires"). Doctor Squires testified that she conducted a sexual-assault examination of the Victim (TT, at vol. III, 27), and as a means to corroborate or dispel the allegations of sexual assault, she tested the Victim for the presence of "[a]ny infection that is of a sexual nature", or sexually transmitted diseases. (TT, at vol. III, 41). The Victim tested positive for human papilloma virus ("HPV"). (TT, at vol. III, 44). Doctor Squires further testified that HPV is only acquired through a "sexual act" (TT, at vol. III, 45), and that such sexual act "most likely…would [involve] the penis of another human being or the genital of another human being." (SH, at 45). Doctor Squires concluded to a reasonable degree of medical certainty that the Victim had been sexually contacted by another person. (SH, at 51).

The law in Pennsylvania, regarding the preservation of an issue for purposes of appeal, is well-settled:

> In order to preserve an issue for appellate review, a party must make a timely and specific objection at the appropriate stage of the proceedings before the trial court. Failure to timely object to a basic and fundamental error will result in waiver of that issue. On appeal the Superior Court will not consider a claim which was not called to the trial court's attention at a time when any error committed could have been corrected. In this jurisdiction one must object to errors, improprieties or irregularities at the earliest possible stage of the adjudicatory process to afford the jurist hearing the case the first occasion to remedy the wrong and possibly avoid an unnecessary appeal to complain of the matter.

McManamon v. Washko, 906 A.2d 1259 (Pa.Super. 2006) (quoting *Hong v. Pelagatti*, 765 A.2d 1117, 1123 (Pa.Super. 2000)) (internal punctuation omitted).

The Appellant made no objection on the record to the introduction of the testimony of Doctor Squires, that the Victim had contracted a sexually transmitted disease. Therefore, the Appellant did not properly preserve the objection.

Even assuming, *arguendo*, that the Appellant did raise a timely and specific objection, he is not entitled to relief. "[T]he decision to admit or exclude evidence lies within the sound discretion of the trial court, and [an appellate court] may reverse only upon a showing of abuse of discretion or error of law." *Winshel v. Jain*, 925 A.2d 782, 794 (Pa.Super. 2007) (citing cases). "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused." *Englert v. Fazio Mechanical Services, Inc.*, --- A.2d ---, 2007 WL 2216370, ¶ 12 (Pa.Super. 2007) (quoting *Falcone, Inc. v. The Insurance Co. of the State of Pennsylvania*, 907 A.2d 631, 636 (Pa.Super. 2006)). Furthermore, "to constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party."

Jacobs v. Chatwani, 922 A.2d 950, 960 (Pa.Super. 2007) (quoting *Freed*, 910 A.2d at 72) (internal punctuation omitted).

"Admissibility depends on relevance and probative value." *Commonwealth v. Levanduski*, 907 A.2d 3 (Pa.Super. 2006) (quoting *Commonwealth v. Drumheller*, 808 A.2d 893, 904 (Pa. 2002)). "Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact." *Commonwealth v. Stallworth*, 781 A.2d 110 (Pa. 2001) (quoting *Commonwealth v. Crews*, 640 A.2d 395, 402 (Pa. 1994)).

In *Commonwealth v. McMaster*, 666 A.2d 724 (Pa.Super. 1995), the defendant was charged with sexually violating his four-year-old daughter. The trial court permitted the Commonwealth to present evidence that the victim had been infected with gonorrhea. *McMaster*, 666 A.2d at 728. The Superior Court affirmed.

> Instantly, even though the Commonwealth had no evidence that [the defendant] was the cause of the victim's infection, the fact that she had contracted gonorrhea tended to corroborate the occurrence of sexual abuse against the victim. The trial court did not err in determining that the evidence was relevant for that purpose. *Cf. Commonwealth v. Mayo*, 272 Pa.Super. 115, 121-122, 414 A.2d 696, 699 (1979) (in prosecution for rape, expert testimony concerning semen stains on the victim's bathrobe and the forcible removal of buttons from her bathrobe was admissible to corroborate victim's claim that forcible intercourse had occurred, despite lack of any connection between such evidence and the defendant).
>
> However, absent some evidence connecting appellant to the victim's infection, this evidence would not have tended to establish appellant's identity as the perpetrator of the sexual abuse against his daughter. Nevertheless, despite its potentially inflammatory nature, we are satisfied that the probative value of the evidence of the victim's gonorrhea infection outweighed its prejudicial impact. The defense in the instant case vigorously attacked the credibility

> of the victim's testimony and suggested that her claims of sexual abuse were incredible.

Id., at 729-730 (some internal punctuation omitted).

Upon review, this Court concludes that, in accordance *McMaster*, evidence that the Victim had contracted a sexually transmitted disease tended to make more probable the occurrence of the sexual assaults. Furthermore, it is observed that the trial court in *McMaster* excluded defense evidence that the defendant tested negative for gonorrhea. *McMaster*, 666 A.2d at 730. The Superior Court affirmed, finding no merit to the due-process and equal-protection challenges of the defendant. *See Id.*, at 731 ("Here, the records at issue were clearly inadmissible hearsay"; "It is equally clear that the trial court was correct in its application of 42 P.S. § 6151"; "The different treatment of medical records prepared at Pennsylvania facilities and those prepared in other states or countries bears a rational relation to a legitimate state interest and, therefore, does not violate principles of equal protection."). Contrary to the trial court in *McMaster*, this Court did permit the Appellant to introduce into evidence a medical prescription slip of Louis Brandstetter M.D., which indicated that the Appellant was examined on October 24, 2006, for HPV and found to be free of that disease. (TT, at vol. IV, 178-179). On balance, evidence that the Victim was infected with HPV tended to corroborate a matter at issue, and the introduction of that evidence clearly did not prejudice the Defendant, under the circumstances. The claim of the Appellant is meritless.

PROSECUTORIAL MISCONDUCT

The Appellant contends that he is entitled to a new trial on the basis of prosecutorial misconduct. The Appellant argues that "during the course of the trial...the Commonwealth on a number of occasions through its prosecuting attorneys engaged

intentionally in behavior designed to unfairly and improperly influence the jury's attitudes, information and beliefs" and "engaged in behavior mocking the defense witnesses and overtly suggesting to the jury that the defense witnesses should not be believed." (PSM, at 3-4, ¶ 8). The Appellant maintains that "[t]his combination of improper and highly prejudicial opinion influencing behavior prevented [him] from obtaining a fair and impartial verdict from a jury of his peers." (PSM, at 4, ¶ 9).[7]

"A new trial is not mandated every time a prosecutor makes an intemperate or improper remark." *Commonwealth v. Guilford*, 861 A.2d 365, 371 (Pa.Super. 2004) (quoting *Commonwealth v. Ervin*, 766 A.2d 859, 864 (Pa.Super. 2000)) (internal punctuation omitted). "Generally, comments made by the district attorney do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." *Commonwealth v. Sampson*, 900 A.2d 887, 890 (Pa.Super. 2006) (quoting *Commonwealth v. Correa*, 664 A.2d 607, 609 (Pa.Super. 1995)). "[I]n reviewing

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[7] In *Wells v. Cendant Mobility Financial Corp.*, 913 A.2d 929 (Pa.Super. 2006), the plaintiff claimed that the trial court, "in the course of the trial below", committed five (5) unspecified "error[s] of law". 913 A.2d at 933 (citations omitted). The Superior Court found these claims waived, on the basis that they were "extremely vague, encompassing the entire proceedings without providing a hint as to when, where, or how the trial court committed its alleged errors." *Id.* In *Commonwealth v. Dowling*, *supra*, the defendant made the following argument on appeal: "Did the trial court err and deprive the [defendant] from receiving a fair trial by prohibiting counsel from cross-examining the complainant with respect to matters impeaching his credibility." *Id.*, at 686 (citations omitted). The Superior Court held the issue waived because it was "so vague as to prevent the court from identifying the issue to be raised on appeal." *Id.* Under the guidance of *Wells* and *Dowling*, the claim of the Appellant is subject to waiver. The claim implicates the complete trial of the Appellant, which lasted five (5) full days and included the testimony of 13 witnesses. The Appellant does seem to narrow the claim to the actions of the prosecutors in the course of the examination of defense witnesses. However, five (5) witnesses, including an expert witness, testified on behalf of the Appellant over the course of an entire day, and the claim does not articulate with any precision when, where, or how the prosecutors committed misconduct. Therefore, the claim is open-ended and bald and not sufficiently specific to permit meaningful appellate review. However, this Court does not make a specific finding of waiver, based upon the unique procedural posture of this case, *see* footnote 1, and the recent amendments to Rule 1925. S*ee* footnote 2.

prosecutorial remarks to determine their prejudicial quality, comments cannot be viewed in isolation...." *Sampson*, 900 A.2d at 890 (quoting *Correa*, 664 A.2d at 669). "Prosecutorial misconduct will not be found where the comments were based on the evidence or proper inferences therefrom or were only oratorical flair." *Guilford*, 861 A.2d at 371 (quoting *Commonwealth v. Hawkins*, 701 A.2d 492, 503 (Pa. 1997)).

Following a thorough examination of the entire record in the case *sub judice*, including the testimony of even non-defense witnesses, this Court has identified only one (1) instance of possible prosecutorial misconduct. During the cross-examination of defense expert witness Charles J. Carlini, M.D. ("Doctor Carlini"), the Appellant placed an objection on the record. "Your Honor, I'm going to object. I've watched counsel laugh. I have seen them make faces back and forth to each other and this kind of commentary is highly improper." (TT, at vol. IV, 150).

Under these circumstances, this Court concludes that the conduct of the prosecutors, although perhaps undignified, amounted to nothing more than oratorical flamboyance. In addition, the trial record reflects that such behavior occurred only once. Moreover, the Appellant has failed to demonstrate how the conduct of the prosecutors robbed the jury of its objectivity and even-handedness. Therefore, the prosecutorial-misconduct claim of the Appellant is frivolous.

DISCOVERY

The Appellant contends that the Commonwealth failed to comply with Pennsylvania Rule of Criminal Procedure 753(B)(1)(a), and the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). According to the Appellant, "Dr. Squires...testified that additional medical information, photographs and files [of the Victim] were maintained by

her office and not provided to the defense." (PSM, at 4, ¶12). The Appellant argues that these materials were discoverable under the Pennsylvania Rules of Criminal Procedure (PSM, at 4, ¶ 13), and "the failure of the government to disclose and provide the discovery information after an appropriate request had been lodged, was violative of [his] opportunity for a fair trial and his due process rights...." (PSM, at 4, ¶ 14).

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness", which "require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). In *Brady v. Maryland, supra*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. In *Giglio v. United States*, 405 U.S. 150 (1972), the rule of *Brady* was extended to include evidence that bears materially upon the credibility of a key prosecution witness. "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the] general rule." *Giglio*, 405 A.2d at 154 (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)) (internal punctuation omitted). In *United States v. Agurs*, 427 U.S. 97 (1976), the United States Supreme Court held that that the duty to disclose "equally arise[s] even if no request is made." 427 U.S. at 107. Thus, the prosecution is required to produce to the defendant all material evidence in its possession that tends to exculpate the defendant, including impeachment evidence that materially undermines the credibility of a critical prosecution witness. *Commonwealth v. Spotz*, 896 A.2d 1191, 1248 (Pa. 2006)

(citing *Commonwealth v. Burke*, 781 A.2d 1136, 1141 (Pa. 2001)). Rule 753 is a codification of the basic principle underlying *Brady* and its progeny. *Commonwealth v. Mejia-Arias*, 734 A.2d 870, 873 n. 5 (Pa.Super. 1999).[8]

"[T]he *Brady* rule was not intended as a rule of discovery in criminal cases." *Commonwealth v. Murphy*, 425 A.2d 352, 357 (Pa. 1981). "[T]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; ...the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded...." *Commonwealth v. Sullivan*, 820 A.2d 295 (Pa.Super. 2003) (quoting *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)) (some internal punctuation omitted). "[T]he rationale underlying *Brady* is not to supply a defendant with all the evidence in the Government's possession which might conceivably assist the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence *only* known to the Government." *Commonwealth v. Santiago*, 654 A.2d 1062, 1069 (Pa.Super. 1994) (quoting *Tate v. Wood*, 963 F.2d 20, 25 (2d Cir. 1992)) (some internal punctuation omitted).

> [T]he *Brady* rule is not an all-encompassing directive to the prosecution to disclose all evidence in its possession to a criminal defendant. The prosecution is not required under *Brady* to "make a complete and detailed accounting to the defense of all police investigatory work on a case," *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972), nor must the prosecutor "disclose possible theories of the defense to the defendant." *United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir.1988).

Commonwealth v. Appel, 689 A.2d 891, 907 (Pa. 1997). The prosecution also is not required to bring evidence to the attention of the defendant, if the evidence is readily obtainable by the defendant, *Commonwealth v. Rollins*, 738 A.2d 435, 445 n. 13 (Pa.

[8] Rule 753 was renumbered from Rule 305, effective April 1, 2001.

1999) (citing *Commonwealth v. Pursell*, 724 A.2d 293, 305 (Pa. 1998)), or if the defendant knew or could have discovered the evidence with reasonable diligence. *Spotz*, 896 A.2d at 1248 (citing *Commonwealth v. Morris*, 822 A.2d 684, 696 (Pa. 2003)).

"To establish a *Brady* violation, a defendant must show that: (1) the evidence was suppressed by the state, either willfully or inadvertently; (2) the evidence at issue is favorable to the defendant; and (3) the evidence was material, meaning that prejudice must have ensued." *Commonwealth v. McGill*, 832 A.2d 1014, 1019 (Pa. 2003) (citing *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999)).

The Commonwealth has no duty to disclose evidence to the defendant if it is not exculpatory. *Commonwealth v. Pirela*, 726 A.2d 1026, 1032 (Pa. 1999) (citing *Agurs*, 427 U.S. at 108-110). Exculpatory evidence is limited to "that which extrinsically tends to establish [the] defendant's innocence of the crimes charged, as differentiated from that which, although favorable, is merely collateral or impeaching." *Commonwealth v. Lambert*, 765 A.2d 306, 325 n. 15 (Pa.Super. 2000) (quoting *Commonwealth v. Hicks*, 411 A.2d 1220, 1222 (Pa.Super. 1979)).

For purposes of *Brady*, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Commonwealth v. Ferguson*, 866 A.2d 403, 407 (Pa.Super. 2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

> [M]ateriality is determined by different standards depending upon whether trial counsel made a specific or a general request for exculpatory evidence. For instance, where the defense gives the prosecution notice of exactly what the defense desires, the test of materiality is whether the evidence might have affected the outcome of the trial. *Commonwealth v. Moose*, 529 Pa. at 233, 602 A.2d at 1272,[9] quoting *United States v. Agurs*, 427 U.S. 97, 104,

[9] *Commonwealth v. Moose*, 602 A.2d 1265 (Pa. 1992).

> 96 S.Ct. 2392, 2398, 49 L.Ed.2d 342, 350 (1976). Where...a general, as opposed to specific, request for exculpatory evidence is made, the evidence is material if the omitted evidence creates a reasonable doubt that did not otherwise exist...." *Moose*, 529 Pa. at 233, 602 A.2d at 1272, quoting *Agurs*, 427 U.S. at 112, 96 S.Ct. at 2402, 49 L.Ed.2d at 355.

Commonwealth v. Green, 640 A.2d 1242, 1244-1245 (Pa. 1994). The mere probability that an item of undisclosed information might have assisted the defense, or might have affected the outcome of the trial, does not establish the materiality of that information, from a constitutional viewpoint. *Commonwealth v. Chambers*, 807 A.2d 872, 887 (Pa. 2002) (citing *Agurs*, 427 U.S. at 109-110). Thus, *Brady* does not compel the production of information "which is merely 'not inculpatory' and might therefore form the groundwork for some argument for the defendant." *Santiago*, 654 A.2d at 1071 (quoting *United States v. Kennedy*, 819 F.Supp. 1510, 1519 (D.Colo. 1993)). In determining the materiality of evidence withheld by the prosecution, an appellate court must "view the suppressed evidence's significance in relation to the record as a whole." *Id.*, at 1070 (quoting *United States v. Thornbrugh*, 962 F.2d 1438, 1444 (10th Cir. 1992)).

As a threshold matter, this Court observes that the Appellant has misidentified the subject-witness of his claim. A review of the trial record reveals that the Appellant cross-examined Nurse Dames, and not Doctor Squires, regarding the nondisclosure of certain additional medical information, photographs, and files of the Victim.

In the case *sub judice*, Nurse Dames testified that she tested the Victim for the presence of sexually transmitted diseases on August 8, 2005 (TT, at vol. II, 178), and that she compiled the results of those tests on August 16, 2005. (TT, at vol. II, 178). Nurse Dames further testified that the results of the gonorrhea-culture test did not become available for approximately seven (7) to ten (10) days, and therefore the results of that

test were not included in her report. (TT, at vol. III, 178-180). Nurse Dames did testify regarding the gonorrhea-culture test, including the results thereto. (TT, at vol. III, 146, 154-156, 177-180).

A review of the record indicates that prior to trial, on October 24, 2005, the Appellant generally requested the Commonwealth to produce all "favorable" evidence (Appellant's Request for Pretrial Discovery and Inspection ("PDI"), 10/24/05, at p. 1, ¶ 2), including "all charts, summaries, calculations, reports, drawings and notations, including computer printouts, intended for use by the Commonwealth as evidence, exhibits or to assist witness testimony at the time of trial." (PDI, at 3, ¶ 16). There is no dispute that the Commonwealth did provide the report of Nurse Dames, but which did not include the results of the gonorrhea-culture test. To the knowledge of this Court, at no time, either before or during trial, did the Appellant specifically request the Commonwealth to disclose those results. "Absence such a specific request, a prosecutor has the duty to make available to the defense evidence that is truly exculpatory, rather than merely favorable or arguably favorable." *Commonwealth v. Gee*, 467 Pa. 123 [131], 354 A.2d 875 [878] (Pa. 1976). "Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." *Com., Dept. of Trans. v. Taylor*, 841 A.2d 108, 117 n. 9 (Pa. 2004). Furthermore, "[a] piece of evidence cannot be said to be exculpatory, or potentially exculpatory, merely because the defense chooses to call it so." *Commonwealth v. Favinger*, 516 A.2d 1386, 1389 (Pa.Super. 1986) (internal punctuation omitted). Here, however, the Appellant fails to even make the claim that the results of the gonorrhea-culture test were exculpatory. The Appellant also fails to allege that the

outcome of the trial would have been different, had those results been disclosed. In any event, this Court finds no independent basis for holding those beliefs. Thus, there has been no deprivation of due process in accordance with the Fourteenth Amendment, or a discernible violation of Rule 573, and the claim of the Appellant is without merit. *See Santiago*, 654 A.2d at 1070 ("A rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.") (internal punctuation omitted).

LEGALITY OF SENTENCE

The Appellant finally contends that his Judgment of Sentence, as imposed by this Court, violates the Pennsylvania Sentencing Guidelines ("Guidelines"), as well as the Federal and State Constitutions. (PSM, at 5, ¶ 4). The Appellant argues that his sentence exceeds the standard range of the Guidelines ("Guidelines")(PSM, at 5, ¶1), that the standard range is mandatory (PSM, at 5, ¶ 2), and that *Cunningham v. California*, --- U.S. ---, 127 S.Ct. 856 (2007), "requires that any aggravated circumstance or matter that would enhance the exposure of a defendant to an increase sentence must be found by a jury and beyond a reasonable doubt." (PSM, at 5, ¶ 3). Therefore, the Appellant seeks a modification of his sentence.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that the Sixth Amendment to the United States Constitution[10] requires that, other than a prior conviction, *see Almendarez-Torres v. United States*, 523 U.S. 224, 239-347 (1998), "any fact that increases the penalty for a crime beyond the prescribed statutory

[10] In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Sixth Amendment right of trial by jury was found a fundamental right, and made applicable to the various States by virtue of the Fourteenth Amendment. 391 U.S. at 149.

maximum must be submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 490. A defendant may not be "expose[d]...to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483 (external footnote omitted). In *Ring v. Arizona*, 536 U.S. 584 (2002), the rule of *Apprendi* was affirmed and expanded to facts subjecting a defendant to the death penalty. 536 U.S. at 609. "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. ...[T]he Sixth Amendment applies to both." *Id.* In *Blakely v. Washington*, 542 U.S. 296 (2004), the argument that an exceptional sentence, under the state Sentencing Reform Act, was within the discretion of the sentencing judge as a result of a guilty verdict, was rejected. 542 U.S. at 304. The United States Supreme Court clarified that *Apprendi* was not limited only to sentences that exceeded the statutory maximum.

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring, supra,* at 602, 122 S.Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'") (quoting *Apprendi, supra,* at 483, 120 S.Ct. 2348)); *Harris v. United States,* 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi, supra,* at 488, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra,* § 87, at 55,[11] and the judge exceeds his proper authority.

[11] 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).

Id., at 303. "Whether the judge's authority to impose an enhanced sentence depends on finding a specific fact (as in *Apprendi*), one of several specific facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence" but only upon the sentencing judge "finding some additional fact", a practice that violates the Sixth Amendment. *Id.*, at 305. In *United States v. Booker*, 543 U.S. 220 (2005), the *Apprendi* holding was applied to the Federal Sentencing Guidelines and determined that their mandatory application contravened the Sixth Amendment. 543 U.S. at 233. That scheme, which as written had the force and effect of law, prevented sentencing judges from exercising broad discretion in imposing a sentence within a statutory range. *Id.* The United States Supreme Court made no distinction of constitutional importance between the Federal procedures and the Washington procedures under debate in *Blakely*. Both systems were deemed "mandatory and impose[d] binding requirements on all sentencing judges." *Id.*[12] Therefore, "everyone agrees" that if sentencing guidelines "could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id.* In *Cunningham v. California*, *supra*, the United States Supreme Court did little more than reiterate the "bright-line rule" of the *Apprendi* line of cases. *Id.*, at 868. "Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.'" *Id.* (quoting *Apprendi*, 530 U.S. at 490).

[12] Thus, *Blakely* commanded the constitutional holding that the Federal Sentencing Guidelines were subject to *Apprendi*.

In *Commonwealth v. Yuhasz*, 923 A.2d 1111 (Pa. 2007), the Supreme Court observed that the Guidelines recommend ranges of minimum sentences, based upon the type of offense, the prior criminal history of the defendant, and a variety of aggravating and mitigating circumstances. 923 A.2d at 1118. The intersection of the prior record score and the offense gravity score of the defendant, in accordance with the Basic Sentencing Matrix, determines the standard recommended minimum sentence. *Id.* (interpreting 204 Pa.Code § 303.16). If the sentencing court finds the presence of aggravating circumstances, the Guidelines recommend a sentence that is a specified amount of time greater than the upper limit of the standard range; if the presence of mitigating circumstances is found, a less than the lower limit of the standard range is advised. *Id.* (interpreting 204 Pa.Code § 303.13). The Supreme Court then discussed the sentencing scheme of Pennsylvania, in general.

> It is well established that the Sentencing Guidelines are purely advisory in nature. As this Court explained in *Commonwealth v. Sessoms*, 516 Pa. 365, 532 A.2d 775, 780-781 (1987), the Guidelines do not alter the legal rights or duties of the defendant, the prosecutor or the sentencing court. The guidelines are merely one factor among many that the court must consider in imposing a sentence. *Sessoms*, 532 A.2d at 781. Consequently, this Court explained: The defendant has no "right" to have other factors take pre-eminence or be exclusive; therefore, to have the guidelines considered, whatever they may provide does not change his rights. Likewise, the prosecutor has no "right" to have a particular sentence imposed. Most important, the court has no "duty" to impose a sentence considered appropriate by the Commission. The guidelines must only be "considered" and, to ensure that such consideration is more than mere fluff, the court must explain its reasons for departure from them. *Id.* Likewise, we explained in *Commonwealth v. Mouzon,* 571 Pa. 419, 812 A.2d 617, 621 (2002) (plurality), that despite the recommendations of the Sentencing Guidelines, the trial courts retain broad discretion in sentencing matters, and therefore, may sentence defendants outside the Guidelines." The only line that a sentence may not cross is the statutory maximum sentence. *See Mouzon,* 812 A.2d at 621 n. 4,

Commonwealth v. Saranchak, 544 Pa. 158, 675 A.2d 268, 277 n. 17.

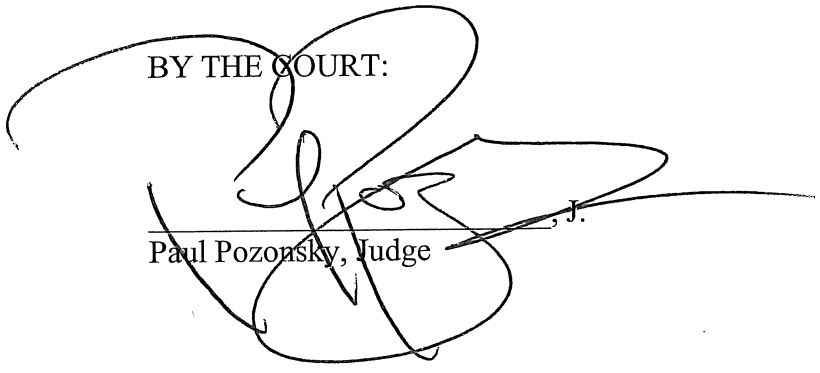
Id., at 1118-1119.

Based upon the foregoing, although a sentencing court is required to consider the Guidelines, *see* 42 Pa.C.S.A. § 9721(b) ("In selecting from the alternatives set forth in subsection (a) the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing....), nothing obligates a sentencing court to follow them. The Guidelines simply recommend the degree of discretion to the sentencing court; the range of a sentence is governed by statutes enacted by the General Assembly. Therefore, contrary to the argument of the Appellant, the standard range of the Guidelines is not mandatory, and the Sixth Amendment rights of the Appellant are not in jeopardy.

In the case *sub judice*, the Appellant was found guilty of two (2) felonies of the second degree (Sexual Assault), two (2) felonies of the third degree (Endangering the Welfare of Children), and two (2) misdemeanors of the first degree (Corruption of Minors). A felony of the second degree carries a maximum term of imprisonment of 10 years, *see* 18 Pa.C.S.A. § 1103(2); a felony of the third degree carries a maximum term of imprisonment of seven (7) years, *see* 18 Pa.C.S.A. § 1103(3); and a misdemeanor of the first degree carries a maximum term of imprisonment of five (5) years. *See* 18 Pa.C.S.A. § 1104(1). The maximum consecutive term of imprisonment that the Appellant faced was forty-four (44) years. This Court sentenced the Appellant to a term of incarceration

of not less than 14 years, not more than 44 years, the statutory maximum, which was authorized by statute and the verdict of the jury. *See* 42 Pa.C.S.A. §9721(a) ("In determining the sentence to be imposed the court shall…consider and select one or more of the following alternatives, and may impose them consecutively or concurrently"); *Commonwealth v. W.H.M., Jr.*, --- A.2d ---, 2007 WL 2381010, ¶ 30 (Pa.Super. August 22, 2007) ("[I]n imposing sentence, a trial judge has the discretion to determine whether, given the facts of a particular case, a given sentence should be consecutive to, or concurrent with, other sentences being imposed.") (citations omitted); *Commonwealth v. Meise*, 312 A.2d 48, 50 (Pa.Super. 1973) ("Where two sentences are imposed at the same time, the court has the power to make them consecutive.") (citations omitted). Furthermore, the presumption of the existence of any fact did not take place, and the burden of proof of the existence of any fact remained upon the Commonwealth at all times. The maximum punishment for the crimes committed was not altered or exceeded, nor was there the was no creation of a separate offense, allowing for a separate penalty, and therefore the claim of the Appellant must fail.

BY THE COURT:



_____, J.
Paul Pozonsky, Judge