IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA Appellee	:	
v.	:	No. 147 MDA 2015
JALENE R. McCLURE, Appellant	:	

APPELLANT'S APPLICATION FOR RELIEF PURSUANT TO RULE 123

NOW COMES the appellant, Jalene R. McClure, by and through her attorney Bernard F. Cantorna and files the following Application for Relief and states as follows:

1. On September 9 - 11, 2014, a jury trial was held in the above-captioned case and Jalene R. McClure was convicted of Aggravated Assault and Endangering the Welfare of Children.

2. On October 13, 2014, Jalene McClure filed a motion to have Judge Lunsford recused for sentencing in the above-captioned case. Grounds for that motion being facts which raised the appearance that the Judge did not sit fairly on the case. Grounds included communications, pictures and emails between the Judge and District Attorney's office.

3. At the recusal hearing, appellant requested the Judge recuse himself from hearing the recusal motion because he was a witness in regards to that legal issue.

4. Judge Lunsford summarily denied the motion to recuse and post-sentencing a right to know request led to the discovery of significant communications between the Judge and the District Attorney's office via text messages pre-trial, during trial and post-trial. (See Exhibit "A", Affidavit of Nicole E. Courter; and Exhibit "B" Defendant's Supplemental Post-Sentencing Motion)

5. Judge Lunsford filed an opinion in support of matters complained of on appeal in which he explains in detail, as a matter of "fact," the content and purpose of the questioned communications. These statements by the Judge were never the subject of a hearing, were never cross-examined and no opportunity existed for impeachment by extrinsic evidence. (See Exhibit "C")

6. A motion to preserve the actual text messages and have them produced and made part of the record was summarily denied by the Judge.

7. After the issuance of the Judge's opinion in support of matters complained of on appeal on April 30, 2015 , Ms. McClure's counsel became aware of after discovered evidence which is relevant to the recusal of Judge Lunsford, his ability to sit fairly on this criminal case and/or any criminal case, and Ms. McClure's fundamental right to a fair trial.

8. Attached and incorporated as Exhibit "D" is the affidavit of Maggie Miller which counsel received seven days ago. This affidavit and the testimony of Maggie Miller is directly relevant as to the independence of the trial court, the fundamental fairness of the proceedings, that District Attorney Stacy Parks Miller regularly used text messages to communicate directly to

Judge Lunsford during trial regarding evidentiary and legal issues.

9. This after acquired evidence is relevant to the issue that has already been raised in the post-sentence motion of Ms. McClure that Judge Lunsford had engaged in conduct that requires a new trial.

10. The attached exhibit and the testimony of Maggie Miller would have been probative and relevant to prove that the District Attorney and the court engage in ex parte communication during trials via text message, as the Verizon phone records would seem to indicate in the McClure case. (See Exhibit "D")

WHEREFORE, for all the foregoing reasons, the appellant moves the court for a remand to the trial Judge for an evidentiary hearing pursuant to Pennsylvania Rules of Criminal Procedure 720(D).

BRYANT & CANTORNA, P.C.

By,

Bernard F. Cantorna, Esquire
1901 East College Avenue
State College, PA 16801
(814) 238-4370 TEL
(814) 238-8016 FAX
PA Id No. 81794
Bcantorna@gmail.com

DATE: May 21, 2015

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CP-14-CR-1778-2012
	:	
JALENE R. McCLURE,	:	
Defendant	:	

AFFIDAVIT OF NICOLE E. COURTER

Nicole E. Courter, being duly sworn under oath, states as follows:

1. On October 23, 27 and 29, 2014, I forwarded Open Records Requests to the Centre County Commissioner's Office, at the request of Attorney Bernard F. Cantorna.

2. On November 7, 2014 I was forwarded an email from Tim Boyde, Director of Administrative Services. Said email included the Centre County Commissioner's Office's response to Attorney Bernard F. Cantorna's Right to Know Request. (Phone records for Judge Bradley P. Lunsford are attached hereto as Exhibit "AA")

3. The information produced included Verizon phone records for the following individuals: Judge Bradley P. Lunsford, District Attorney Stacy Parks Miller, Assistant District Attorney Nathan Boob and Assistant District Attorney Lindsay Foster.

4. I proceeded to highlight the entries on Judge Bradley P. Lunsford's phone records. I used the following colors to differentiate between the telephone numbers: purple for Assistant District Attorney Lindsay Foster; green for District Attorney Stacy Parks Miller and yellow for Assistant District Attorney Nathan Boob.

5. After highlighting all the entries, I proceeded to count the individual text messages and media messages received and sent between Judge Bradley P. Lunsford and members of the District Attorney's Office.

6. My calculations produced the following:

a. 364 text messages and 24 media messages were sent or received between the court and Assistant District Attorney Lindsay Foster between August 4, 2014 and September 8, 2014

b. 152 text messages and 1 media message were sent or received between the court and Assistant District Attorney Lindsay Foster from September 8, 2014 through September 11, 2014. Of those 152 text messages, 100 texts were sent or received between the hours of 8:00 a.m. and 5:00 p.m. Many of those at times when the court was on the bench and trial in session.

c. 195 text messages and 3 media messages were sent between the court and Assistant District Attorney Lindsay Foster from after the trial on September 11, 2014 to October 10, 2014.

d. Assistant District Attorney Nathan Boob sent or received text messages with the court 13 times prior to trial and 63 text messages and 8 media messages post-trial from September 11, 2014 to October 10, 2014.

e. District Attorney Stacy Parks Miller received or sent 17 text messages and 1 media message prior to trial; received 1 text message from the court during trial; and received or sent 44 text messages and 4 media messages post trial to October 10, 2014.

Nicole E Courter

Nicole E. Courter

DATE: November 7, 2014

814-380-XXXX Judge Lunsford [redacted]/Boob 404/Foster 470

Text

Date/Time	To/From	Direction	MSG Type	Charge
8/5/2014 9:31	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 9:49	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 10:11	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 10:12	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 10:17	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 10:19	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:09	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:20	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:23	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:26	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:26	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:26	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:27	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:27	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:29	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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8/5/2014 20:44	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:49	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:50	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:51	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:52	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:53	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:53	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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8/5/2014 20:54	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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8/5/2014 20:55	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:56	814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:57	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:58	814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00

EXHIBIT "AA"

boobies

8/5/2014 20:58 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 20:59 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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8/5/2014 21:03 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 21:04 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
8/5/2014 21:05 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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8/5/2014 21:08 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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8/5/2014 21:10 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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8/31/2014 22:36 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/1/2014 0:02 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 0:03 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 0:06 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 0:23 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 0:24 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 16:52 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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9/1/2014 17:01 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:01 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:03 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:03 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:03 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:04 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:04 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:04 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:05 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:05 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:05 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:06 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:06 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:06 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:06 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:07 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:07 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:08 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:09 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:10 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00

9/1/2014 17:10 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:10 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:10 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:10 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:11 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:11 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:11 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:12 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:14 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:16 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:17 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/1/2014 17:19 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/1/2014 17:20 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/1/2014 17:22 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:22 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:22 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:22 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:23 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:24 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:29 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:35 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 17:36 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:03 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:05 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:08 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:09 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:22 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00

9/1/2014 18:26 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:26 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:29 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:30 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:39 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:40 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:42 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:46 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:46 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:50 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:53 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/1/2014 18:57 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/1/2014 18:57 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/2/2014 15:13 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/2/2014 15:17 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/2/2014 15:21 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/2/2014 15:25 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/2/2014 15:25 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/2/2014 15:46 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
[redacted]	ORIGINATING	IN NETWORK - SMS Message	$0.00
[redacted]	TERMINATING	IN NETWORK - SMS Message	$0.00
[redacted]	ORIGINATING	IN NETWORK - SMS Message	$0.00
[redacted]	TERMINATING	IN NETWORK - SMS Message	$0.00
[redacted]	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/3/2014 19:47 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/3/2014 19:47 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/3/2014 19:56 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00

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9/3/2014 20:00 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/3/2014 20:02 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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9/3/2014 20:06 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/3/2014 20:07 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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9/4/2014 20:55 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:03 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:03 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/4/2014 21:06 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/4/2014 21:07 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:07 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/4/2014 21:07 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:07 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:08 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:08 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:08 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:09 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00

9/4/2014 21:11 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:14 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:16 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/4/2014 21:22 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:22 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/4/2014 21:22 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/5/2014 11:23 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/5/2014 16:06 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/5/2014 16:36 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/5/2014 16:46 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/5/2014 19:24 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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9/5/2014 21:06 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/5/2014 21:07 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/5/2014 21:08 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/5/2014 21:08 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/5/2014 21:09 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00

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9/5/2014 21:16 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/5/2014 21:16 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/5/2014 21:18 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/6/2014 20:40 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/8/2014 15:45 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/8/2014 15:48 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/8/2014 15:56 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/8/2014 15:59 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/8/2014 16:15 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/8/2014 17:24 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/9/2014 9:07 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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9/9/2014 9:22 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/9/2014 9:23 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
[redacted]	ORIGINATING	IN NETWORK - SMS Message	$0.00

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9/10/2014 13:00 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 13:04 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/10/2014 13:06 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/10/2014 13:52 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 13:53 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 13:54 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 13:59 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:03 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:06 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:09 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:09 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:12 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:13 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:27 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:53 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/10/2014 14:54 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:56 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:57 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 14:57 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 15:15 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00

9/10/2014 16:46 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 16:51 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 16:58 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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9/10/2014 16:59 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 17:01 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 19:59 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:00 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:01 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:02 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:02 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:02 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:03 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:03 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:04 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:07 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:08 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:10 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:11 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:17 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:18 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:18 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:18 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/10/2014 20:20 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:20 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:21 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:21 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:21 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:21 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:21 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:22 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:22 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:22 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00

9/10/2014 20:23 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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9/10/2014 20:23 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:25 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/10/2014 20:35 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:37 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/10/2014 20:40 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:45 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:46 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 20:46 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/10/2014 21:20 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 4:45 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 7:06 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 7:12 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 8:46 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 9:02 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 10:56 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 11:19 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 11:20 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 11:21 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 11:21 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 11:21 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 11:23 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 11:23 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 11:30 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/11/2014 15:20 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/11/2014 18:12 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 18:51 814-404-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/11/2014 18:59 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/11/2014 20:00 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/11/2014 20:00 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/12/2014 18:39 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 18:41 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/12/2014 18:43 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 18:54 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 18:56 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 18:58 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 18:59 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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9/12/2014 19:00 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/12/2014 19:01 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 19:02 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 19:03 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 19:04 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 19:04 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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9/12/2014 19:13 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 19:14 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 19:18 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/12/2014 19:30 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/13/2014 11:59 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/13/2014 12:02 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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9/13/2014 13:15 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
9/13/2014 13:18 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/13/2014 13:19 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
9/13/2014 13:20 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00

9/13/2014 13:22 814-404-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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[redacted]	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/14/2014 7:35 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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[redacted]	ORIGINATING	IN NETWORK - SMS Message	$0.00
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[redacted]	ORIGINATING	IN NETWORK - SMS Message	$0.00

[redacted]	TERMINATING	IN NETWORK - SMS Message	$0.00
[redacted]	ORIGINATING	IN NETWORK - SMS Message	$0.00
[redacted]	TERMINATING	IN NETWORK - SMS Message	$0.00
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[redacted]	ORIGINATING	IN NETWORK - SMS Message	$0.00
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[redacted]	TERMINATING	IN NETWORK - SMS Message	$0.00
[redacted]	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/14/2014 18:05 814-470-XXXX	TERMINATING	IN NETWORK - SMS Message	$0.00
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9/14/2014 20:19 814-470-XXXX	ORIGINATING	IN NETWORK - SMS Message	$0.00
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[redacted]		TERMINATING	IN NETWORK - SMS Message	$0.00
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Picture/Video

Date/Time	To/From	Direction	MSG Type	# Attach	Rate Type
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8/17/2014 6:14	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
8/21/2014 18:02	814470XXXX@vzwpix.com	ORIGINATING	application/smil	2	DOM
[redacted]		ORIGINATING	application/smil	2	DOM
8/30/2014 10:35	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
8/30/2014 14:30	814470XXXX@vzwpix.com	TERMINATING	application/smil	3	DOM
8/31/2014 21:43	814470XXXX@vzwpix.com	TERMINATING	application/smil	3	DOM
8/31/2014 22:26	814470XXXX@vzwpix.com	ORIGINATING	application/smil	2	DOM
9/1/2014 0:23	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
9/1/2014 17:19	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
9/1/2014 17:33	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
9/1/2014 18:02	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
9/1/2014 18:22	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
9/1/2014 18:26	814470XXXX@vzwpix.com	TERMINATING	application/smil	2	DOM
9/1/2014 18:26	814470XXXX@vzwpix.com	TERMINATING	application/smil	3	DOM
9/5/2014 19:48	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
9/5/2014 20:57	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
9/5/2014 21:09	814470XXXX@vzwpix.com	TERMINATING	application/smil	3	DOM
9/6/2014 6:40	814470XXXX@vzwpix.com	TERMINATING	application/smil	2	DOM
9/6/2014 6:42	814470XXXX@vzwpix.com	TERMINATING	application/smil	2	DOM
9/6/2014 6:43	814470XXXX@vzwpix.com	TERMINATING	application/smil	2	DOM
9/6/2014 11:24	814470XXXX@vzwpix.com	ORIGINATING	application/smil	10	DOM
9/6/2014 11:30	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
9/6/2014 18:39	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
9/11/2014 14:40	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM
[redacted]		TERMINATING	application/smil	3	DOM
9/13/2014 14:52	814404XXXX@vzwpix.com	TERMINATING	application/smil	3	DOM
9/13/2014 19:19	814470XXXX@vzwpix.com	ORIGINATING	application/smil	3	DOM

[redacted]		TERMINATING	application/smil	2 DOM
9/13/2014 21:29	814470XXXX@vzwpix.com	TERMINATING	application/smil	3 DOM
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[redacted]		ORIGINATING	application/smil	3 DOM
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9/21/2014 9:47	814404XXXX@vzwpix.com	TERMINATING	application/smil	2 DOM
9/21/2014 18:02	814404XXXX@vzwpix.com	TERMINATING	application/smil	3 DOM
9/21/2014 18:05	814404XXXX@vzwpix.com	TERMINATING	application/smil	2 DOM
9/21/2014 18:06	814404XXXX@vzwpix.com	TERMINATING	application/smil	2 DOM
9/27/2014 18:43	814404XXXX@vzwpix.com	TERMINATING	application/smil	3 DOM
9/27/2014 18:43	814404XXXX@vzwpix.com	TERMINATING	application/smil	3 DOM
[redacted]		ORIGINATING	application/smil	3 DOM

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CP-14-CR-1778-2012
	:	
JALENE R. McCLURE,	:	
Defendant	:	

DEFENDANT'S SUPPLEMENTAL POST-SENTENCING MOTION

NOW COMES the defendant, by and through her attorney Bernard F. Cantorna and files the following Supplemental Post-Sentencing Motion pursuant to Pa. R.Crim.P. 720(B)(1)(b) and states:

1. Ms. McClure was sentenced on October 31, 2014.

2. On November 7, 2014, Ms. McClure filed a timely post-sentencing motion within ten days of sentencing.

3. Ms. McClure reserved the right to file a supplemental post-sentencing motion based upon a review of the transcript.

4. Since the filing of the post-sentencing motion, additional grounds in support of Ms. McClure's motion for a new trial and re-sentencing have become available, which were not known at the time of post-sentence motions.

5. The court may, in its discretion, allow a supplemental post-sentencing motion to be filed. Pa. R.Crim.P. 720(B)(1)(b).

GROUNDS FOR POST-SENTENCE MOTION

6. Ms. McClure's post-sentence motion requested recusal of Judge Bradley P. Lunsford, a new trial and re-sentencing.

7. The original grounds for recusal of Judge Lunsford from sentencing were allegations that a personal relationship existed between Judge Lunsford and District Attorney Stacy Parks Miller and her office.

8. Specific examples of that relationship giving an appearance of impropriety included: social media postings on Sunday, September 14, 2014 depicting Judge Lunsford with Assistant District Attorney Nathan Boob and members of the district attorney's office; text messaging between the Judge and the district attorney's office from the time of jury selection through the date of conviction; and an ex parte communication between the Judge and trial counsel.

9. At a hearing held on the defendant's motion for recusal and the defendant's motion to preserve and produce evidence, these allegations by Ms. McClure were addressed.

10. During the course of the hearing, District Attorney Stacy Parks Miller filed a verified petition denying the specific allegations for recusal and at the hearing, reminded undersigned counsel of Rule 8.2, the Rules of Professional Conduct, prohibiting an attorney from making statements that he "knows to be false or with a reckless disregard as to its truth or falsity". (N.T. 10/30/2014, pg. 9)

11. During the course of the recusal hearing, undersigned counsel specifically indicated that:

Mr. Cantorna:	"I was advised that posted on social media were events that [were] clearly from the Color Run that . . . you (Judge Lunsford) and Mr. Boob, looked like you had participated in the Color Run.
Ms. Parks Miller:	False.
Mr. Cantorna:	I didn't see the pictures. I was also advised those pictures showed you and Mr. Boob at what was believed to be at Champs posing for

a picture, as well as - -

The Court: False. That is totally false.

Ms. Parks Miller: That is false too." (N.T. 10/30/2014 pg. 12-13)

12. Judge Lunsford specifically replied to the grounds for his recusal that social media pictures had been posted of he and Mr. Boob posing at the Color Run as follows:

> The Court: "This is ridiculous. There is no photo of Mr. Boob and I after the Color Run. I can guarantee you that. This is now speculation, innuendo. This is wrong. This is totally wrong. I mean, this is getting ridiculous. This is absolutely ridiculous. To say that because I saw two Assistant DA's at two separate events means that I am bias against this particular woman - -" (N.T. 10/30/2014, pg. 13)

13. In regards to whether there were text messages between Judge Lunsford and Nathan Boob or District Attorney Stacy Parks Miller, Judge Lunsford replied as follows:

> The Court: ". . . There are no text messages between me or either of these two prosecutors. None whatsoever. None. . ." (N.T. 10/30/2014, pg. 23)

> The Court: "I will reiterate, there are no text messages between me and these two. I swear to God." (N.T. 10/30/2014, pg. 25)

14. Attached and incorporated as Exhibit "A" and Exhibit "B" are pictures posted on Stacy Parks Miller's facebook page.

15. Exhibits "A" and "B" depict Judge Lunsford posing for a picture with Assistant District Attorneys Nathan Boob and Lindsay Foster at what appears to be Champs bar after participating in the Color Run on Sunday, September 14, 2014.

16. The following statements made by Judge Bradley P. Lunsford were patently false, evidenced a bias against Ms. McClure and perpetrated a fraud upon the court, Ms. McClure and her trial counsel:

a. A statement that "those pictures showed you and Mr. Boob at what was believed to be at Champs posing for a picture" was "False. That is totally

false." (N.T. 10/30/2014, pg. 13)

b. "This is ridiculous. There is no photo of Mr. Boob and I after the Color Run. I can guarantee you that. That is now speculation, innuendo. This is wrong. This is totally wrong. I mean, this is getting ridiculous. This is absolutely ridiculous."

17. District Attorney Stacy Parks Miller and Assistant District Attorney Nathan Boob would have known that the above referenced statements were false, since the photo clearly depicts Assistant District Attorney Nathan Boob posing with the Court and that the social media posting was from the District Attorney's facebook page. Ms. Parks Miller's statement that this information was posted on social media was "false"; that those pictures were taken at what appears to be Champs was "That was false too" were patently false and perpetrated a fraud upon the court, Ms. McClure and her trial counsel.

18. The Affidavit of Nicole E. Courter which is attached as Exhibit "A" to Defendant's Post-Sentencing Motion indicated the following text messages:

a. Assistant District Attorney Nathan Boob sent or received text messages with the court 13 times prior to trial and 63 text messages and 8 media messages post-trial from September 11, 2014 to October 10, 2014.

b. District Attorney Stacy Parks Miller received or sent 17 text messages and 1 media message prior to trial; received 1 text message from the court during trial; and received or sent 44 text messages and 4 media messages post trial to October 10, 2014.

19. The following statements were patently false and perpetrated a fraud:

a. A statement made by Judge Bradley P. Lunsford that: "there are no text messages between me or either of these two prosecutors(District Attorney Stacy Parks Miller and Assistant District Attorney Nathan Boob). None whatsoever. None." (N.T. 10/30/2014, pg. 23)

b. "I will reiterate there are no text messages between me and these two. I swear to God." (N.T. 10/30/2014, pg. 25)

20. As revealed in the Freedom of Information Act Request, text messaging between Judge Lunsford and Stacy Parks Miller occurred as follows: 17 text messages and 1 media message prior to trial; 1 text message from the court during trial; and 44 text messages and 4 media messages post trial to October 10, 2014.

21. As revealed in the Freedom of Information Act Request, text messaging between Judge Lunsford and Nathan Boob occurred as follows: Mr. Boob sent or received text messages with the court 13 times prior to trial and 63 text messages and 8 media messages occurred post-trial from September 11, 2014 to October 10, 2014.

22. For the court to make these statements and Ms. Stacy Parks Miller and Mr. Nathan Boob to not correct the record, allowed a fraud to be perpetrated upon the court, Ms. McClure and her trial counsel.

BRYANT & CANTORNA, P.C.

By,

Bernard F. Cantorna, Esquire
1901 East College Avenue
State College, PA 16801
(814) 238-4370 TEL
(814) 238-8016 FAX
PA Id No. 81794
Bcantorna@gmail.com

DATE: December 31, 2014

Karen

EXHIBIT

"A"

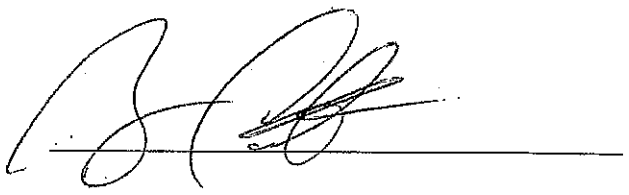
My personal favorite

Karen

bar day? Also, here are some Pictures from Poppy's FB page

VERIFICATION

Ms. McClure is presently unavailable to sign the verification, accordingly counsel signs the same on information and believe. I verify that the statements made in the foregoing are true and correct. I understand that false statements are made subject to the penalties of 18 Pa.C.S. 4904, relating to unsworn falsification to authorities.



IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CP-14-CR-1778-2012
	:	
JALENE R. McCLURE, Defendant	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within **DEFENDANT'S SUPPLEMENTAL POST-SENTENCING MOTION** was served by depositing the same with the United States Postal Service, postage prepaid, addressed to the following:

Stacy Parks Miller, Esquire
District Attorney
Centre County Courthouse
102 South Allegheny Street
Bellefonte, PA 16823

By: _____
Bernard F. Cantorna, Esq.
Attorney for Defendant

DATED: December 30, 2014

IN THE COURT OF COMMON PLEAS, CENTRE, COUNTY, PENNSYLVANIA
CRIMINAL LAW

COMMONWEALTH OF PENNSYLVANIA	:	CP-14-CR-1778-2012
	:	
VS.	:	
	:	
JALENE R. McCLURE,	:	
Defendant	:	

Attorney for the Commonwealth: *Stacy Parks Miller, Esquire*
Attorney for Defendant: *Bernard Cantorna, Esquire*

Lunsford, J.

OPINION REGARDING MATTERS COMPLAINED OF ON APPEAL

Presently before this Court is the appeal of Defendant, Jalene R. McClure (hereinafter "Defendant"). Ms. McClure was found guilty after a jury trial September 8, 2014 through September 11, 2014, of Aggravated Assault, Simple Assault, two counts of Endangering the Welfare of a Child, and Recklessly Endangering Another Person. Defendant filed Post Sentence Motions which were denied. She filed a Notice of Appeal on January 19, 2015. A timely Statement of Matters Complained of on Appeal was filed on February 9, 2015. Defendant petitioned to file a supplemental statement of matters complained of on appeal and was permitted to do so, over the objection of the Commonwealth, by Order entered April 14, 2015. The Supplemental Statement of Matters Complained of on Appeal was filed on April 17, 2015.

I. Recusal of trial judge

Defendant contends that the Court committed error when "he did not recuse himself *from the trial* in the above captioned case based upon the appearance of bias and bias as reflected in text messages between the Court and the District Attorney's office during trial; ex parte communications of the court; pictures of social media events posted online; and the court and district attorney's statements on the record which were patently false and perpetrated a fraud upon the court." Defendant's Statement of Matters Complained of on Appeal, 2/9/15, ¶ 1.

First, Defendant made no motion for recusal of the undersigned Judge *from the trial* and it was first raised following an unfavorable result at jury trial. To the extent that the Honorable Superior Court determines this issue has not been waived, this Court will address this issue. See Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority, 507 Pa. 204, 223, 489 A.2d 1291 (1985). Pursuant to the Code of Judicial Conduct, a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where the judge has a personal bias or prejudice concerning a party. Code of Judicial Conduct, Canon 3C. Though the undersigned Judge had communications, including text communications, with attorneys from the District Attorney's office after jury selection and prior to trial over the course of over one month, this does not mean that this Court has a personal bias or prejudice concerning the Commonwealth or against Defendant. The communications did not concern Defendant or her criminal case.

Defendant also complains of pictures of events posted on social media, specifically, a picture from the Color Run. The Color Run occurred after the trial so this could not possibly have been part of a determination to recuse from the trial. Defendant complains of a photo from about September 20, 2014, following a public concert, of the undersigned Judge, Assistant

District Attorney Nathan Boob, the Judge's administrative assistant and court reporter-- this photo was also taken after trial. Defendant further complains of what she characterizes as an "ex parte" communication between the trial Judge and defense counsel, Bernard Cantorna, which she contends occurred after the trial. Again, given the sequence of events, these issues could not have been considered as a reasons to recuse from the trial.

This undersigned Judge did not have a personal bias or prejudice regarding either party at the time of the trial (or any later time) which would cause him to *sua sponte* disqualify himself from presiding over the trial. Nor does he feel that is partiality could not have reasonably been questioned on the basis of communications with the District Attorney or members of her office. This Court maintains that fact that he did not *sua sponte* recuse should not be reversed on appeal.

> [The] standard of review of a trial court's determination not to recuse from hearing a case is exceptionally deferential. We recognize that our trial judges are 'honorable, fair and competent,' and although we employ an abuse of discretion standard, we do so recognizing that the judge himself is best qualified to gauge his ability to preside impartially. Commonwealth v. Bonds, 890 A.2d 414, 418 (*citing* Commonwealth v. Abu–Jamal, 553 Pa. 485, 720 A.2d 79, 89 (1998)).

Commonwealth v. Harris, 979 A.2d 387, 2009 Pa.Super. 160 (2009). Furthermore,

> Once this decision is made, it is final and the cause must proceed. The propriety of this decision is grounded in abuse of discretion and is preserved as any other assignment of error, should the objecting party find it necessary to appeal following the conclusion of the cause. If the cause is appealed, the record is before the appellate court which can determine whether a fair and impartial trial were had. *If so, the alleged disqualifying factors of the trial judge become moot.* (emphasis added)

Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority, 507 Pa. 204, 222-223, 489 A.2d 1291, 1300 (1985).

The text communications were not about this case (nor were they inappropriate communications concerning any other cases) and did not give either side a strategic or tactical advantage. The text messages did not constitute ex parte communications under the Code of Judicial Conduct, Canon 2.9. Canon 2.9 provides that a judge shall not initiate, permit, or consider ex parte communications made to the judge outside the presence of lawyers, concerning pending or impending matters unless the judge reasonably believes the party will not gain a procedural, substantive, or tactical advantage. Ex Parte Communications: Pa. C.J.C. 2.9. On the basis of text messages with the members of the District Attorney's office, no one could have "reasonably questioned" the Judge's impartiality under the Code of Judicial Conduct, Canon 2.11 regarding Disqualification, because the phone records were not made public until nearly two months following the trial in Defendant's Post-Sentence Motion. Defendant somehow had requested and received the Court's phone records through the Freedom of Information Act as contended in his Post Sentence Motion (filed November 7, 2014) and in the Supplemental Post Sentence Motion (filed on December 31, 2104) or the Right to Know Act as contended in Exhibit A attached to the Post Sentence Motion. In sum, the trial Judge had no personal bias or prejudice regarding a party, Defendant, or a party's attorney, Mr. Cantorna. Therefore, the Court maintains that there was no basis for the trial Judge to *sua sponte* recuse from presiding over the trial in this matter and no error was committed in failing to recuse.

II. Admission of testimony of Defendant's husband

Defendant contends this Court admitted improper testimony of her husband, Roger McClure, which was not relevant, unfairly prejudicial and "violated the Spousal Privilege Rule pursuant to 42 Pa.C.S.A. § 5917." She contends that "[e]vidence of a contentious divorce two years after the alleged incident was not probative of any fact material to the allegations that had

occurred two years before, were inflammatory and unfairly prejudicial. The probative value was outweighed by it's (*sic*) prejudicial effect." Defendant's Statement of Matters Complained of on Appeal, 2/9/15, ¶ 2.

Pursuant to 42 Pa. C.S.A. § 5917, which Defendant cited:

> Whenever any person has been examined as a witness, either for the Commonwealth or for the defense, in any criminal proceeding conducted in or before a court of record, and the defendant has been present and has had an opportunity to examine or cross-examine, if such witness afterwards dies, or is out of the jurisdiction so that he cannot be effectively served with a subpoena, or if he cannot be found, or if he becomes incompetent to testify for any legally sufficient reason properly proven, notes of his examination shall be competent evidence upon a subsequent trial of the same criminal issue. For the purpose of contradicting a witness the testimony given by him in another or in a former proceeding may be orally proved.

This section obviously does not pertain to spousal privilege.

To the extent that Defendant has not waived this issue, or Defendant will argue that Section 5914 is applicable, this Court maintains there was no violation of any privilege with regard to Roger McClure's testimony. In criminal proceedings, neither spouse shall be competent or permitted to testify to confidential communications made by one to the other, unless the privilege is waived. 42 Pa. C.S.A. § 5914. This privilege is held by the defendant spouse. Commonwealth v. Lewis, 39 A.3d 341, 346, 2012 Pa.Super. 17 (2012); *see also* Commonwealth v. McBurrows, 779 A.2d 509, 514, 2001 Pa.Super 164 (2001). (The court held that one spouse cannot divulge the confidential communications without the consent of the other spouse). However, Mr. McClure was not questioned about specific communications he had with Defendant, he was questioned about the Defendant's actions. The spousal privilege does not extend to observations of actions made by the spouse of the defendant spouse. Commonwealth v. Mattinson, 82 A.3d 386, 623 Pa. 174, (2012); McBurrows, 779 A.2d at 514. Additionally, a trial

court must determine whether a spouse's testimony would merely describe conduct of the other spouse that occurred in his or her presence or would disclose the conveyance of a message. Mattinson, 82 A.3d at 396.

Mr. McClure was questioned about statements he had made to a police officer, Detective Dale Moore concerning Defendant's spending habits around the time of the alleged incident and whether Defendant was exhibiting signs of a mental breakdown. The testimony the Prosecution sought to elicit concerned whether Mr. McClure had observed any signs indicating a mental breakdown, one of which involved incurring thousands of dollars in credit card debt, around the time of the alleged incident. Additionally, the Prosecution sought to verify if Mr. McClure had observed any conditions in Defendant's daycare that would indicate that Defendant was suffering a mental breakdown around the time of the alleged incident. This Court did not find that the Prosecution asked the witness any questions that involved communications between him and his wife and only asked about observable actions. Also, this Court did not find that the actions Mr. McClure observed conveyed any sort of message between the spouses. Therefore, this Court maintains the admission of Mr. McClure's testimony was not violative of 42 Pa. C.S.A. § 5914, confidential communications between spouses.

Defendant argues that a contentious divorce two years after the alleged incident is not relevant and is prejudicial. This Court does not disagree. However, the questions concerned the relevant time period of the incident and did not delve into any issues concerning their later divorce. Mr. McClure denied that Defendant had any breakdowns or that he discussed any previous breakdowns with Detective Moore in 2012. Tr. 9/9/14 at 107-108. Mr. McClure did agree there was credit card debt incurred during the time Piper Breon was injured; although, one

credit card referenced was also in his name. Id. at 108-109. Mr. McClure did not recall making any statement that he would tell people how Defendant's daycare was run. Id. at 109-112.

As to Defendant's arguments that the testimony was not relevant, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. Pa. R.E. 401. The Commonwealth's theory of the case was that Defendant was under stress at the time of the incident which led to her intentionally shaking Piper Breon. Accordingly, the Prosecution sought to introduce evidence that Defendant had acted in such a way that demonstrated she was under stress or suffering a mental breakdown. 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. Drumheller, 808 A.2d 893, 904, 570 Pa. 117 (2002), reargument denied, certiorari denied 539 U.S. 919. This Court determined that evidence concerning whether Defendant had suffered a mental breakdown or breakdowns prior to 2012, and whether Defendant had incurred thousands of dollars in debt near the time of Piper Breon's injuries, had a tendency to make the fact at issue, whether Defendant had been under stress during the relevant timeframe in 2010, more or less probable. Additionally, this Court found that evidence of how Defendant ran her daycare had a tendency to make the fact at issue more or less probable. For these reasons, this Court found Mr. McClure's testimony was properly admissible.

III. Precluding defense witness from testifying regarding how the daycare was operated

Defendant complains that the Court precluded defense witnesses from testifying about how the daycare was run except on the date of the alleged incident. *See* Defendant's Statement of Matters Complained of on Appeal, 2/9/15, ¶ 3. After consideration of a Second Motion in

Limine filed by the Commonwealth on September 5, 2015, Defendant was prohibited from introducing inappropriate character evidence from her witnesses. *See* Tr. 9/8/14 at 27-30.

However, Defendant did elicit testimony from Jennifer Lindeman, Christina Welch, and Megan Warefield, former daycare clients. These witnesses testified regarding the daycare including witnessing Defendant caring for Piper Breon when she was fussy or screaming by trying to soothe her or putting her in a Pack-n-Play to "cry it out;" how many children were in the daycare around the time of August 18, 2010; whether Defendant was under any stress or if it appeared anything was wrong at the immediate time of the incident; whether Defendant had difficulty managing the daycare or children at the time; where the children were dropped off in the morning and what rooms the children would go to; how Defendant appeared and acted on the day in question; and Piper Breon's general temperament and formula feeding difficulties. Tr. 9/10/14, Testimony of Lindeman at 256-275; Welch at 275- 282; Warefield at 301- 207; and Bickle at 297.

Defendant was properly precluded from introducing past good behavior, character or trait of character to prove that on a particular occasion she acted in accordance with the character or trait of character pursuant to Pennsylvania Rule of Evidence 404. This Court ruled on this issue on the first day of the trial. Tr. 9/8/14 at 29-30. Defendant was never limited in calling character witnesses with regards to Defendant's reputation in the community for a specific trait. Id.

This Court maintains that restrictions placed on character evidence were in conformity with the Rules of Evidence and that Defendant was given latitude to discuss the running of the daycare during the relevant time period as noted above.

IV. Redacted statement of Ms. McClure

Defendant contends the Court erred in allowing the Commonwealth to present a redacted written statement of Defendant and, by redacting the statement, the Commonwealth was able to change the content of the statement from an explanation of an accident into an admission or confession to harming Piper Breon and not reporting the injury to her parents. Defendant contends this was a violation of Pennsylvania Rule of Evidence 106 and violated her right to a fair trial. *See* Defendant's Statement of Matters Complained of on Appeal, 2/9/15, ¶ 4.

Admissibility of evidence is within the discretion of the trial court and may only be reversed upon the showing that the court abused its discretion. Commonwealth v. Bryant, 57 A.3d 191, 2012 Pa.Super. 257 (2012) *citing* Commonwealth v. Simmons, 662 A.2d 621, 541 Pa. 211 (1995). Rule 106 states that if a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time. Pa. R.E. 106.

The written statement in question was a statement made by Defendant to a police officer regarding how Defendant believed the victim was injured and her role in the injury. *See* Exhibit 48 and 49. The redacted portion of that statement was the following:

> So, it never even occurred to me that the two were related. If I thought for even a second that Piper was hurt, I would have acted immediately. I always notify my parents when their child gets sick while in my care. I have had accidents happen before, but there was never any serious harm done to the child. I would have acted immediately had I thought that I had harmed Piper in any way whatsoever.

Tr. 9/9/14 at 19.

Under Pennsylvania Rule of Evidence, 106 a trial court has discretion to decide whether other parts, or other writings or recorded statements, ought in fairness to be considered contemporaneously with the proffered part. Id., Pa. R.E. 106, comment. Accordingly, this Court found it had the discretion to determine whether or not this statement was should be considered by the jury. This Court found the redacted statements to be hearsay, as such, this Court excluded the redacted part as hearsay.

Furthermore, if Defendant wanted to introduce her explanation as to why she did not report the accident, she could have taken the stand to do so. Allowing Defendant to forgo this option, and instead introduce self-serving statements she made to a police officer without giving the Prosecution a chance to cross-examine her would have been an allowance of unsanctioned hearsay. *See* Commonwealth v. Murphy, 493 Pa. 35, 425 A.2d 352, 356 (Pa. 1980) (The court determined that where a defendant at trial seeks to introduce their own statements at the time of their arrest to support their version of facts, it is clearly offensive to the theory of hearsay.); Commonwealth v. Benson, 10 A.3d 1268, 1274 (Pa. Sup. Ct. 2010) (The court held that the trial court did not abuse its discretion excluding exculpatory statements made by the defendant, following his arrest, to a detective. The defendant would not take the stand and the statements would be introduced through questioning the detective and would have been offered to prove the truth asserted.). Defendant should not be permitted to use Rule 106 to introduce exculpatory statements she made to a police officer, while she was under suspicion of perpetrating the crime, and avoid the Prosecution from cross-examining her. If Defendant wished to refute the implication of the statements, the proper procedure would have been to take the stand.

Additionally, Defendant alleges that the introduction of the redacted statement turned her explanation of an accident into an admission of harming the victim and failing to tell the parents.

However, the redacted portion of the statement does not refute that Defendant tripped while holding Piper Breon but did not realize there was any injury. The redacted portions are only statements by Defendant that she did not know the events were related and, if she had, she would have taken action. These statements were self-serving and even if they had been admitted they would still not have refuted the Prosecution's implication that Defendant had harmed the victim and failed to notify the parents. Therefore, this Court does not believe it abused its discretion or committed an error by allowing the self-serving parts of the statement to be redacted as no violation of Rule 106 occurred.

V. Testimony of Dale Moore

Defendant complains that Detective Dale Moore, from the Spring Township Police Department, was allowed to give testimony regarding oral and written statements Defendant made to him and was allowed to give opinion evidence as to whether the statements appeared truthful which Defendant contends was improper opinion evidence, hearsay and invaded the province of the jury. *See* Defendant's Statement of Matters Complained of on Appeal, 2/9/15, ¶ 5.

The Commonwealth asked Detective Dale Moore, the investigating officer, about his meeting with Defendant on June 24th at the Children and Youth Services office. Tr. 9/8/14 at 279. Defendant told Detective Moore and Mary Daniloff from the Centre County Children and Youth Services office, that she tripped over her flip flop and fell while holding Piper Breon and, when she fell forward, Piper hit her head on her infant carrier which was on the floor. Id. at 280-285. Defendant also demonstrated how she had tripped and fell while holding Piper. Id. at 282. The prosecutor asked Detective Moore, "[D]id you have any problems with what she said and showed you?" Id. at 286. He responded:

> Yes. Certainly. Again, most of the time I work with Children and Youth Services, being a 20-year veteran, I usually take the lead on the interview. After she had told us what she told us, after she demonstrated, I looked at Mary Daniloff and Mary started instantly, because being a mother ---

Id. He was asked, "[a]nd are you a father, too?" He replied, "[y]es. I am a father of two and a grandfather of three." The prosecutor asked, "[o]kay. Go ahead." Detective Moore continued,

> I looked at Mary and I could just see she wasn't buying it. And so, I just kind of took a moment and left her start. And basically, Mary said -- basically, she was insulted by the story is really how she characterized it, that Jalene had been babysitting professionally for 11 years, that she was reasonably bright, that she just didn't believe, first off, that if this had happened as the way she said it happened, that she wouldn't have called the parents, that she wouldn't have called for an ambulance. But I just remember Mary being very vocal that she certainly didn't believe it either.

Id. The Commonwealth inquired, "[o[kay what about you?" Defendant objected and the Prosecution was advised to move on from that line of questioning. The Commonwealth asked, "You ultimately charged Ms. McClure with the intentional crimes, the knowing, reckless crimes in this complaint then; correct? Id. at 289. Detective Moore answered in the affirmative. Id.

In context, it was obvious to the jury that, as the investigating and charging officer, Mr. Moore did not accept Defendant's explanation that a trip and fall accident occurred as true. Otherwise, Defendant would not have been charged with the crimes she faced. Furthermore, the jury was aware Defendant was charged with acting intentionally because they were given this information in the opening instructions. Detective Moore's responses were part of his account of the investigation leading up to Defendant being charged. The jury was instructed before the trial commenced and before deliberating that they were the ultimate fact finders and were responsible for assessing the veracity and credibility of witnesses. Therefore, this Court contends there was

no error in Detective Moore indicating that he did not accept Defendant's version of events as true.

VI. Dale Moore's demonstration of the description of the trip and fall

Defendant argues that Detective Moore should not have been allowed to demonstrate how Ms. McClure described the trip and fall to him and should not have been permitted to hold the CPR infant manikin. *See* Defendant's Statement of Matters Complained of on Appeal, 2/9/15, ¶ 6.

"The admissibility of evidence, including demonstrative evidence, rests largely within the discretion of the trial court." Harsh v. Petroll, 840 A.2d 404, 421 (Pa. Commw. 2003) *citing* Leonard v. Nichols Homeshield Inc., 384 Pa. Super. 1, 557 A.2d 743 (1989). "Generally, demonstrative evidence is admissible if its probative value outweighs the likelihood of improperly influencing the jury. Conditions must be sufficiently close to those involved in the accident to make the probative value of the demonstration outweigh its prejudicial effect." Pascale v. Hechinger Co. of Pa., 426 Pa.Super 426, 627 A.2d 750 (1993). Prejudicial effect does not mean "detrimental to a party's case" but rather "an undue tendency to suggest decision on an improper basis". House of Pasta, Inc. v. Mayo, 303 Pa.Super. 298, 449 A.2d 697 (1982).

In the instant matter, Detective Moore demonstrated what Defendant explained to him occurred when she tripped and stumbled and Piper Breon hit her head on the infant carrier. Tr. 9/9/14 at 282. The conditions of the demonstration were sufficiently similar to the incident being demonstrated because the actual infant carrier which Defendant contends the victim struck was utilized in the demonstration. Id. at 283. Also, the fact that Detective Moore held the CPR infant manikin as Defendant described holding the victim, lended similarity to the incident because Defendant described to Detective Moore how she held Piper Breon before and during the fall.

The jury was instructed that when Defendant showed Detective Moore how she fell, she was not holding a doll. Id. at 285. Therefore, this Court determined the demonstrative evidence had significant probative value and the conditions were similar enough to outweigh any prejudicial effect.

VII. Medical Evidence of Estropia

Defendant complains that the Commonwealth elicited evidence of Piper Breon's estropia which occurred two years after her injuries. She further contends that there was no medical evidence linking the condition to the injuries of August, 2010 and; therefore, it was not relevant and unfairly prejudicial. Defendant further complains that the Commonwealth offered evidence that the victim attended Easter Seals yearly and that her parents were fearful of possible reinjury to their daughter's head. Defendant contends that any relevance was outweighed by the unfair prejudice. *See* Defendant's Statement of Matters Complained of on Appeal, 2/9/15, ¶ 7.

The Commonwealth did not frame the question in a manner to elicit testimony regarding the estropia. Defense counsel had asked Piper Breon's mother on cross-examination if her daughter is currently "doing well." Tr. 9/8/14 at 163. On re-direct, the Commonwealth asked "what are her ongoing issues are as a result of her skull fracture and hematomas." Id. at 194. There was a sidebar discussion wherein defense counsel objected and noted that it would get into estropia. The attorney for the Commonwealth responded that she was not going into that. Thereafter the Commonwealth asked Ms. Breon,

> Q. Can you tell the jury, in terms of what kind of follow up care your daughter needs because of this head injury? What are the things that you have to do with her periodically because of the head injury?
> A. She needs to get evaluated periodically on her learning development because we were told we might not see signs of the head injury until she might get older and later on when she's in school and learning. So, she actually goes to Easter Seals and her

> early interventionist therapist teaches there so I know that she's always getting watched and making sure she's following with her developmental skills. But as she gets older and gets into elementary school, I mean, we're going to continually have to watch that. She -- her eyes go cross now, she's had to have eye surgery because of that. She still goes cross a little bit, she has to wear glasses. And we continually have to see the doctor down in Danville for that. And that's going to be ongoing probably forever.
> Q. And in fairness, they're not totally sure the eye crossing is from this, they can't rule it in or out?
> A. Correct.

Tr. 9/8/14 at 197-198. The Commonwealth did point out that estropia was never definitely linked to the head injury. Furthermore, the Commonwealth did not ask the expert, Thomas Wilson, M.D., the victim's treating ophthalmologist, any questions concerning estropia.

The Defendant also complains the Commonwealth offered testimony that the victim "attended Easter Seals yearly" and the "parents testified to their fear of possible reinjury to the head of their child." Defendant's Concise Statement of Matters Complained of on Appeal, 2/9/15, ¶ 7. However, defense counsel, asked Ms. Breon if Piper Breon was currently "doing well," (Tr. 9/8/14 at 163) the Commonwealth fairly had the opportunity on re-direct to inquire into Piper Breon's current issues stemming from the head injury. Furthermore, the nature and extent of Piper Breon's injuries are relevant as one of the elements of aggravated assault is serious bodily injury. The Commonwealth bears the burden of proving the serious bodily injury element beyond a reasonable doubt. Therefore, the nature of the victim's injuries was undoubtedly relevant and admissible. Pursuant to Pennsylvania's Standard Criminal Jury Instructions, the jury is directed:

> *First*, that the defendant caused serious bodily injury to *[victim]*. Serious bodily injury is bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ; and

> *Second*, that the defendant acted intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life.
>
> . . .
>
> Serious bodily injury means bodily injury that would create a substantial risk of death or that would cause serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Pennsylvania Standard Criminal Jury Instruction, 15.2702A. Also, defense counsel inquired with Mrs. Breon about a civil suit she filed and the specific causes of action averred in the Complaint. Tr. 9/8/14 at 188-191. This line of cross-exam did open the door to the Commonwealth inquiring about the damages alleged in the Complaint, including "ongoing care" in their re-direct. Therefore, this Court found no error in the very minimal mention of estropia or her mother's testimony that Piper Breon attends Easter Seals and that her parents are fearful of a subsequent head injury.

VIII. Alleged statement that the District Attorney felt there was insufficient evidence to bring charges "around October, 2010"

Defendant contends this Court committed error in prohibiting Defendant "from introducing evidence that the district attorney's office had reviewed relevant factual and medical evidence and determined that there was insufficient evidence to bring charges "around October 2010." She further complained the introduction of this evidence was relevant to the nature and quality of the investigation and the evidence that existed at that point in time. Id. Defendant's Statement of Matters Complained of on Appeal, 2/9/15, ¶ 8.

Defendant sought to introduce the testimony of Linda Shidell, a claims representative with Defendant's homeowner's insurance carrier. Tr. 9/9/14 at 238. According to an offer of proof, Ms. Shidell had called Detective Moore many times inquiring about the incident involving Defendant; she mentioned making six calls with the first one being made on August 2010. Id. at

238-240. On October 18, 2010, Detective Moore left her message "that [Defendant] was not being charged at that time because the District Attorney's office did not think there was enough evidence at that time for a conviction." Id. Even if the testimony would have been accurate, it was not relevant. A court "may properly preclude any evidence whenever its probative value is substantially outweighed by the danger of unfair prejudice, or if the trial judge determines that the evidence may confuse the issues or mislead the jury." Sprague v. Walter, 441 Pa.Super. 1, 656 A.2d 890 (1995) *citing* Daset Mining Corporation v. Industrial Fuels Corporation, 326 Pa.Super. 14, 22, 473 A.2d 584, 588 (1984). "Prejudice" for the purposes of this standard means "an undue tendency to suggest a decision on an improper basis". Id. *citing* Whyte v. Robinson, 421 Pa.Super. at 38–39, 617 A.2d at 383.)

It is the prerogative of the District Attorney to assess the quality of the evidence, continue to receive information including medical reports, and determine when and if there is enough evidence to get a conviction. The District Attorney's assessment only two months after the incident does not relevantly reflect on the Commonwealth's ability to meet their burden of proof on the date the jury heard the evidence. Whether or not there was enough evidence "at the time" of mid-October, 2010, was not relevant to the jury's consideration of whether there was enough evidence on the dates of the jury trial and the introduction of this testimony would have only misled and confused the jury. Therefore, this Court maintains there was no error in omitting this evidence as it was not relevant.

IX. Defendant's proposed jury instruction 3.21(a)

Defendant contends that this Court erred in failing to give jury instruction 3.21(a), Failure to Call Potential Witness. Defendant's Statement of Matters Complained of on Appeal, 2/9/15, ¶ 9. The Prosecution had hired two expert witnesses, Dr. Danielle K. Boal and Dr. Arabinda

Kumar Choudhary, to provide information regarding the injuries suffered by Piper Breon. The Prosecution did not call these two expert witnesses but instead called other expert witnesses. Because the Prosecution failed to call Dr. Boal and Dr. Choudhary, Defendant asked that the following instruction to be read to the jury:

> 3.21A Failure to Call Potential Witness
>
> 1. There is a question about what weight, if any, you should give to the failure of the Commonwealth to call Dr. Danielle K. Boal and Dr. Arabinda Kumar Choudhary as witnesses. Ordinarily, the jury should infer nothing from the mere failure of a party to call a potential witness.
>
> 2. If (however) three factors are present, and there is no satisfactory explanation for a party's failure to call a potential witness, the jury is allowed to draw a common sense inference that his testimony would have been unfavorable to that party. The three necessary factors are:
>
> *First*, the person is available to that party only and not the other;
> *Second*, it appears the person has special information material to the issue; and
> *Third*, the person's testimony would not be merely cumulative.
>
> 3. Therefore, if you find these three factors present, and there is no satisfactory explanation for the Commonwealth's failure to call Dr. Danielle K. Boal and Dr. Arabinda Kumar Choudhary to testify, you may infer, if you choose to do so, that his testimony would have been unfavorable to the Commonwealth.

This Court found it inappropriate to read this instruction to the jury. A missing adverse inference jury instruction is not mandated in every case in which a party neglects to call a potential witness. Commonwealth v. Taylor, 259 Pa.Super 484, 393 A.2d 929, 934 (1978). Defense counsel believed these two witnesses could only be called by the Prosecution and accordingly requested the missing adverse inference jury instruction. In order for missing witness adverse inference rule to be invoked against the Commonwealth, the witness must be available only to the Commonwealth and no other exceptions must apply. Commonwealth v. Evans, 444 Pa.Super. 545, 664 A.2d 570, 574 (1995). A witness who is "peculiarly within the

knowledge and reach" of one party is "available" to that party. Id. Also, the instruction is appropriate only when the missing witness's testimony will not be cumulative. *See* Commonwealth v. Barnosky, 264 Pa.Super 443, 400 A.2d 168 (1979).

This Court was not satisfied by Defendant's showing that these two witnesses were only available to the Prosecution. The Prosecution stated, and Defendant did not dispute that, Dr. Boal and Dr. Choudhary's contact information had been given to Defendant at least one year prior to the trial. Tr. 9/11/14 at 79. Defendant argued that these two doctors were "proprietary" to the Commonwealth. In order to determine whether a witness was available to both parties, the trial court must ascertain whether a witness was peculiarly within the knowledge and reach of one party. Commonwealth v. Evans, 444 Pa.Super. 545, 664 A.2d 570, 574 (1995). In this instance, there was no reason to believe that either Dr. Boal or Dr. Choudhary was peculiarly within the knowledge and reach of the Prosecution. Tr. 9/11/14 at 79. The Prosecution did not prevent Defendant from calling these doctors as witnesses. Defendant knew about the witnesses and did not attempt to contact either. Id. Instead, Defendant claimed they were 'proprietary witnesses' and that because the Prosecution had employed them, he assumed they would not have been available for him to call and did not contact them. Id. at 78-79.

Additionally, this Court found the adverse inference jury instruction was improper because the witnesses would have likely only presented information that was cumulative. If a witness's testimony would merely be cumulative, then it is not necessary to give an adverse inference jury instruction. *See* Commonwealth v. Evans, 444 Pa.Super. 545, 664 A.2d 570, 574 (1995), Commonwealth v. Manigault, 501 Pa. 506, 462 A.2d 239, 241 (1983). The Prosecution called two expert witnesses that supported their theory that Piper Breon sustained her injuries by being shaken. Based on the information available to the Court, it appeared that Dr. Boal and Dr.

Choudhary would have provided similar opinions rendering their testimony cumulative. It did not appear that either doctor would have supported Defendant's theory of the case; however, if Defendant had contacted the witnesses, he could have established that the testimony would not have been cumulative and would have been adverse to the Commonwealth's experts and in support of his client. Also, the Prosecution may have dispensed with Dr. Boal and Dr. Choudhary's testimony because the testimony was inferior to that of witnesses who were called. *See* Commonwealth v. Benson, 280 Pa.Super 20, 421 A.2d 383, 392 (1980) (court held that denying a missing adverse inference jury instruction is proper if the witness that was not called would have given inferior testimony to the witness called). Furthermore, the proposed instruction would have been improper and confusing for the jury because it should not have been the responsibility of the jury to determine if the witnesses were available to only one party or if their testimony was cumulative as there was no information made available to them to draw any such conclusions.

X. Sentencing

A. Aggregate sentence of ten to twenty years confinement

Defendant contends the Sentencing Court abused its discretion when it sentenced Defendant to an aggregate sentence of ten to twenty years. Defendant contends the Sentencing Court "failed to take proper consideration of Defendant's lack of a prior record, character, family support and rehabilitation potential; and/ or recuse itself from sentencing." Defendant's Statement of Matters Complained of on Appeal, 2/9/15, ¶ 10.

This Court considered the factors 42 Pa.C.S.A. § 9721(b) including the rehabilitative needs, community safety, and gravity of the offense as stated on the record at the time of sentencing. Tr. 10/31/14 at 19-20. The Court also reviewed the Presentence Investigation and the

letters that were submitted on Defendant's behalf. Tr. 10/31/14 at 20. With regard to sentencing Defendant outside of the guidelines, this Court considered the victim, Piper Breon, and the Defendant's actions following the incident. Piper Breon was an infant at the time of this offense, helpless and unable to speak. Id. at 20-21. Piper Breon suffered very serious injuries to the extent that her parents were told the injuries could end her life.

This Court also considered the Defendant's actions, and lack thereof, following the incident. Defendant did not call for medical assistance and the infant did not have immediate, or even relatively fast medical attention. Instead, she lingered until her unsuspecting mother arrived to pick her up after work. Not even then did Defendant advise Mrs. Breon that her daughter was injured; she had Piper packed in her car seat, like any other day. When Mrs. Breon inquired about her daughter's condition, Defendant told Mrs. Breon that she was acting like a first-time mother. Because the baby seemed to be losing consciousness and was still vomiting during the trip home, Mrs. Breon drove her directly to the Mount Nittany Emergency Room. The doctors instructed Mr. and Mrs. Breon to telephone Defendant to get any information about what might have happened to the baby. Not even then did Defendant provide any useful information that could have helped the doctors treat the baby; she denied that anything occurred while Piper was in her care. The baby was lifeflighted to Geisinger, Danville and the parents again reached out to Defendant and she failed to provide any information. At this time, because abuse was suspected, the parents were suspects and were treated as such and denied access to Piper and their older daughter without supervision. It was not until days later that Defendant advised Detective Moore that she had tripped and fell while carrying Piper but did not feel the baby was injured. Defendant essentially covered up the incident and, in doing so, the Piper suffered without

medical care, her doctors had to treat her without benefit of the facts surrounding the causation of the injury, and her parents were blamed and denied normal access to their very sick infant.

Furthermore, the injury to Piper Breon was dreadful as she sustained a substantial fracture to her skull. This Court found Defendant's actions and lack of any concern for the welfare of the infant whom she was being trusted to care for to be cruel and reflected a cold heart. For these reasons, as expressed at sentencing, this Court sentenced Defendant outside of the guidelines to an aggregate sentence of ten to twenty years imprisonment. Tr. 10/31/14 at 19-26.

"[F]acts regarding the nature and circumstances of the offense, which are not necessary elements of the offense for which appellant has been convicted, are also proper factors to consider in deciding whether to sentence in the mitigated minimum range, the aggravated minimum range, or outside the guidelines.") Commonwealth v. Darden, 366 Pa.Super. 597, 607, 531 A.2d 1144, 1149 (1987).

> [W]hile the sentencing court is required to 'consider' the applicable guidelines, and while the reasons for any deviation from the applicable standard range of the guidelines must be explained in writing, the determination of whether the sentence is 'not appropriate,' 'clearly unreasonable,' or 'unreasonable' must be made with reference to the Sentencing Code *as a whole,* not solely with reference to the provisions of the sentencing guidelines. 531 A.2d at 1150. (Emphasis in original). Our analysis in Darden is supported by our Supreme Court's explanation in Commonwealth v. Sessoms, 516 Pa. 365, 532 A.2d 775 (1987), that:
> 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. Viewed in this manner, the guidelines are essentially a sophisticated compilation and distillation of a vast range of factors affecting the sentencing process in the abstract, accomplished by persons of expertise representing a broad spectrum of interests. The legislature with the governor's approval has deemed it proper that the findings of such a body, assembled to assist it in

> developing and overseeing a sound sentencing system, be given practical application in individual cases as well. We may say that in directing courts to consider these guidelines, just as they must consider a number of listed though non-exclusive factors in imposing probation, the legislature has done no more than direct that the courts take notice of the Commission's work.

Commonwealth v. Felix, 372 Pa.Super. 145, 539 A.2d 371, 375 (1988). This Court asserts that the sentencing guidelines were thoroughly considered. For the many reasons reflected above and on the record at the time of sentencing, concerning the specific facts of this case, the sentence issued was wholly fitting the crime committed against an infant victim.

B. Recusal of Sentencing Judge

Defendant also raises the recusal issue in the context of sentencing. She does not indicate specifically on what basis; however, this Court assumes she will argue that the undersigned Judge should have recused on the same bases as those raised in her first issue raised on appeal at "I." above. Defendant alleged that the undersigned Judge should have recused himself "based upon the appearance of bias and bias as reflected in text messages between the court and the District Attorney's office during trial; ex parte communications of the court; pictures of social media events posted online; and the court and district attorney's statements on record which were patently false and perpetrated a fraud upon the court." Defendant's Concise Statement of Matters Complained of on Appeal, 2/9/15, ¶ 1.

A judge shall disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned. Disqualification: Pa. C.J.C 2.11(A). This Court did not find that the undersigned Judge's impartiality may reasonably have been questioned and did not recuse. It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice, or unfairness which raises substantial doubt as to the judge's ability to preside impartially. Arnold v. Arnold, 2004 Pa.Super 57, 847 A.2d 674, 680 (2004) *citing* Commonwealth v. Abu-Jamal,

553 Pa. 485, 720 A.2d 79 (1998). "It is incumbent upon the proponent of a disqualification motion to allege facts tending to show bias, interest or other disqualifying events, and it is the duty of the judge to decide whether he feels he can hear and dispose of the case fairly and without prejudice because we recognize that our judges are honorable, fair and competent," Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority, 507 Pa. 204, 489 A.2d 1291 (1985).

Text Messages

Defendant alleged that there was a creation of bias or the appearance of bias because of text messages exchanged between Judge Lunsford and members of the District Attorney's office during trial and with the prosecutors on the case after jury selection and before trial and after trial but before sentencing. *See* Defendant's Statement of Matters Complained of on Appeal, 2/9/15 ¶1. The Pennsylvania Code of Judicial Conduct 2.3, Bias, Prejudice and Harassment, advises that a Judge shall not manifest bias or prejudice or engage in harassment including but not limited to sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socio-economic status, or political affiliations. Bias and Prejudice: Pa. C.J.C. 2.3(B). While this list is not exhaustive, Rule 2.3 was enacted primarily to prevent discriminatory bias or prejudice by the Court. *See* Pa. C.J.C. 2.3 Comment 2. (Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime). Defendant had not provided any evidence to show that the text messages between the Judge and attorneys in the District Attorney's office had created any sort of discriminatory bias or prejudice. There has been nothing even suggested that Judge Lunsford is biased in this way.

Defendant did not raise impartiality or fairness in his Concise Statement of Matters Complained of on Appeal; however, to the extent she raises it on appeal, this Court did not find there to be any violation of Pennsylvania Code of Judicial Conduct 2.2, Impartiality and Fairness. This rule advises that a judge shall uphold and apply the law and shall perform all duties of the judicial office fairly and impartially. Impartiality and Fairness: Pa. C.J.C. 2.2. This Court contends that these text messages did not make the undersigned Judge partial to the Prosecution. Defendant placed much emphasis on text messages being the mode of communication which happens to be the undersigned Judge's preferred method of communication when face-to-face communication is not practical. This Court does not believe this issue would not have been raised if a spoken conversation between the Judge and the DA or an ADA had occurred. It is common for Judges to have contact with the other attorneys in the court house. While Defendant may argue the text messages were voluminous, generally, the content of many text messages is perfunctory and amounts to no more than a few words. A text message is nothing more than a transcription of a conversation between two parties.

The only way that these text messages could be considered to implicate a Judge's impartiality is if there were ex parte communications occurring via text message or if the Judge permitted his rapport with the District Attorney or Assistant District Attorneys to influence his judicial conduct or compromise his judgment which did not occur. Pa. C.J.C. 2.4(B). There has been no evidence introduced about the content of the text messages. The information contained in the text messages would have to pertain to the pending matter and the undersigned Judge would have had to unreasonably believe that the Prosecution would not gain a procedural, substantive, or tactical advantage. The mere fact that the Judge had text messaged with members of the District Attorney's office does not automatically mean his judgment was compromised. A

judge is permitted to have contact with other attorneys as long as his impartiality is not compromised. *See* In Re Metropolitan Metals, Inc., 206 B.R. 89 (M.D. 1996); Wagner v. Anzon Inc., 1988 WL 679817 (Pa. Ct. Com. Pl. 1988); (courts held that judge's previous relationship with counsel did not impact his impartiality to the point of recusal being necessary).

Defendant filed a Motion for Recusal on October 13, 2014. At the hearing regarding the motion, on October 30, 2014, Defendant's attorney stated that he believed there to be text messaging with Assistant District Attorney Nathan Boob during Defendant's jury trial. He did not have any phone records at that time but wished to call his partner who would provide hearsay. When counsel for Defendant later obtained phone records, the records confirmed there was no texting between the Judge and ADA Boob during trial. *After the trial*, the undersigned Judge was teaching a class on the Penn State campus and received a text from ADA Boob that the jury had a verdict and the undersigned responded acknowledging that he would return to the courthouse. There was one message from the Court to the District Attorney over a lunch break regarding returning to the courtroom prior to the jury being seated to discuss the attorneys' conduct. The District Attorney did not respond to the text. The undersigned Judge did not recall having sent this one text, two months later, as it was unremarkable and was administrative in nature. After thoughtful consideration of the Motion for Recusal, the required self-analysis, and after the hearing on October 30, 2014, the fact that this Court had text communications with members of the District Attorney's office, after jury selection but before sentencing, had absolutely no bearing on his ability to sentence Defendant fairly. This Court determined that his impartiality could not reasonably be questioned based on the evidence Defendant presented in the Motion for Recusal and at the hearing concerning text messages.

Although there were text messages with Assistant District Attorney, Lindsay Foster, on the days of the trial, ADA Foster was not involved in Defendant's trial and those communications did not concern this matter. This Court does not believe the mere existence of communications between the Judge and an ADA not working on the case is enough to raise substantial doubt to the judge's ability to preside impartially. The ADA who the undersigned Judge exchanged texts with was not involved in the subject case. Having communications with someone in the District Attorney's office does not automatically make a judge impartial.

Alleged Ex Parte Communication

Defendant also alleged that that Judge Lunsford should have recused himself from the case based on ex parte communications. A judge shall not initiate, permit, or consider ex parte communications made to the judge outside the presence of lawyers, concerning pending or impending matters unless the judge reasonably believes the party will not gain a procedural, substantive, or tactical advantage. Ex Parte Communications: Pa. C.J.C. 2.9. The 'ex parte communication' which Defendant complains of was a conversation between Judge Lunsford and Defendant's counsel that took place after the trial but before sentencing. In that conversation, the undersigned Judge expressed his concern over Defendant's counsel supposedly making statements to other members of the bar that 'the fix was in' for the trial against Defendant. The undersigned Judge stated that if Defendant's counsel was making similar statements, he believed that it was inappropriate conduct for an attorney. This conversation was not an impermissible form of ex parte communication. The conversation with Defendant's counsel would not give Defendant any procedural, substantive, or tactical advantage. The communications did not give Defendant any advantage or give the Commonwealth any advantage for that matter. Therefore, this Court did not find that the undersigned Judge actually participated in an ex parte

communication that violated the Code of Judicial Conduct or that his impartiality may reasonably have been questioned when he engaged in this conversation with Defendant's counsel.

Pictures of Social Media Events

Defendant alleges that Judge Lunsford should have recused himself because of pictures of social media events posted online. In the Motion for Recusal, Defendant included a photo of the undersigned Judge with court staff and ADA Boob. This photo was taken following a public concert. The other photo which Defendant complained of was taken at Champs Sports Grill after the Color Run. Defendant did not attach the photo taken at Champs Sports Grill to the Motion for Recusal but stated that he was advised that such a picture existed.

A judge shall not participate in activities that will interfere with proper performance of the judge's judicial role. Extrajudicial Activities: Pa. C.J.C. 3.1(A). Additionally, a judge shall not participate in activities that would reasonably appear to undermine the judge's independence, integrity, or impartiality. Extrajudicial Activities: Pa. C.J.C. 3.1(C). This court did not find that these extrajudicial activities in violated the Pennsylvania Code of Judicial Conduct 3.1: Extrajudicial Activities. Defendant alleged there were two instances when Judge Lunsford participated in activities that would reasonably appear to undermine his independence. Two pictures appeared on social media of Judge Lunsford and ADA Boob. However, both of these pictures were taken following two separate public events, which occurred after Defendant's trial. The Pennsylvania Judicial Code of Conduct does not require judges to have no contact with other attorney's outside of the court room. The undersigned Judge has a friendly and cordial relationship with many attorneys in the local bar although he does not have a close personal relationship with ADA Boob. Social activity between Judges and attorneys is not strictly

forbidden or automatic grounds for recusal. While not controlling, a quote from United States v. Murphy is illustrative:

> In today's legal culture friendships among judges and lawyers are common ... judge need not cut himself off from the rest of the legal community ... Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend -- even a close friend -- appears as a lawyer.

768 F.2d 1518, 1537-38 (7th. 1985).

Defendant introduced no other evidence to establish that these extrajudicial activities undermined Judge Lunsford's independence, integrity, or impartiality. This court did not find that the pictures alone reasonably establish that Judge Lunsford's independence, integrity, or impartiality has been undermined. Therefore, this Court did not find that Judge Lunsford's impartiality could reasonably be questioned because he had his picture taken twice, after trial, with an ADA following public events and at public locations.

Alleged False Statements

Defendant alleges that the Court and the District Attorney made statements on record that were false and perpetrated a fraud upon the court. This Court assumes that Defendant is referring to Judge Lunsford's statements that he did not text with either District Attorney Stacy Parks Miller or Assistant District Attorney Nathan Boob during the trial. As discussed above, the undersigned Judge sent one text message to District Attorney Stacy Parks Miller during a lunch break regarding returning to the courtroom before the jury was seated. Also, the undersigned Judge did not receive or send any text messages during trial to the ADA Nathan Boob. He received one text from ADA Nathan Boob *after* the trial indicating the jury had returned with a verdict and sent one text acknowledging that he would return to the courthouse. These were

perfunctory, administrative matters of no consequence and certainly not ex parte communications as they could not give the Prosecution any advantage. Judge Lunsford did not intend to perpetrate a fraud, he was just mistaken and did not recall right then that he sent the one text message to the District Attorney over lunch.

This Court assumes Defendant will also raise the statement that there was no picture with ADA Boob after the Color Run as false. Defendant's counsel stated that there was a posting on social media "clearly from the Color Run that I was advised that both individuals, you and Mr. Boob, looked like you had participated in the Color Run." Tr. 10/31/14 at 12-13. The undersigned Judge knew that he did not participate in the Color Run with ADA Boob and did not see ADA Boob before or after the run at the course. Therefore, no photos could have been taken at the Color Run or after the Color Run with ADA Boob. That was what was on the undersigned Judge's mind when he made the statement. There was a photo taken later that afternoon (or evening) at Champs Sports Grill with ADA Boob. This Court did not recall the photo having been taken at the time of the oral argument concerning the Motion to Recuse. The undersigned Judge stated clearly on the record that he saw ADA Boob at Champs Sports Grille that evening. Tr. 10/30/14 at 26. Also, the Defendant did not provide the photo he was referring to at the time he filed or argued the Motion for Recusal. The undersigned Judge was relying on his recollection which was clearly mistaken. It was not the intent of the Judge to perpetrate any fraud on the Court. This is reflected in the undersigned Judge's statement that he was at Champ's Sports Grill that evening, as was ADA Boob.

Therefore, this Court maintains that there was no abuse in discretion in denying the Motion for Recuse from sentencing for the above stated reasons.

XI. Motion to Suppress filed on December 20, 2012

In the Supplemental Statement of Matters Complained of on Appeal filed on April 17, 2015, Defendant averred the Court erred in denying the motion to suppress evidence. On December 20, 2012, Defendant filed an Omnibus Pretrial Motion to Suppress the statements Defendant made after August 19, 2010, when she invoked her right to remain silent and have an attorney present. Defendant contended that on August 19, 2010, when speaking to a Children and Youth Services representative and Detective Moore, she exercised her right to an attorney and provided the name of Attorney Bernard Cantorna. The Motion to Suppress was denied in an Opinion and Order entered on April 26, 2013 by the Honorable Jonathan Grine which thoroughly addressed the suppression issue.

BY THE COURT:

Date: 4/30/15

Bradley P. Lunsford, J.

AFFIDAVIT

I, Maggie Miller, being duly sworn according to law, depose and state that the facts set forth are true and correct:

1. In April 2012, I was employed by Centre County as an official court reporter with an address of 108 South Allegheny Street, Bellefonte, PA 16823.

2. In my capacity of official court reporter, I was assigned to the case of Commonwealth v. Randall Brooks, CR-1927-2010 (Criminal Attempt-Criminal Homicide; Aggravated Assault; Poss Instrument of Crime W/Int; Stalking - Repeatedly Commit Acts To Cause Fear; Recklessly Endangering Another Person).

3. The proceeding was a four day jury trial held on April 17, April 18, April 19, April 20, 2012.

4. The judge presiding over the jury trial was Judge Bradley Lunsford.

5. For the Commonwealth was Stacy Parks Miller, District Attorney and Nathan Boob, Assistant District Attorney. The Defendant was pro se with standby counsel Karen G. Muir. During the course of this trial, I had an opportunity to have discussions with Judge Lunsford during breaks and recesses.

6. During one of the recesses when I was involved in a conversation with Judge Lunsford, Judge Lunsford told me that he and the District Attorney were texting to each other during the four day trial. Then he complained that through texts, Stacy Parks Miller was "bitching to him" about the way Judge Lunsford handled some objections and how he was handling the trial.

7. Judge Lunsford's remarks disgusted me and I then went to talk to his secretary Joan Parsons, who sits immediately outside Judge Lunsford's chamber.

8. I talked to Joan Parsons and told her that I was very upset about what Judge Lunsford had just told me about texting with the District Attorney during trial. Joan Parsons told me that she would regularly tell Judge Lunsford to leave his phone in his office when he went on the bench. Joan Parsons said Judge Lunsford ignored her advise and took the phone to the bench constantly.

9. To confirm that we spent long days in court during this trial and that the DA was complaining, I saved a note. On Day II of the trial after a long day (which ended at approximately at 8:00 p.m.) DA Stacy Parks Miller said out loud "I hate myself so bad right now I want to pop a cap in my own ass."

10. I was so struck by that statement that I made a note and placed it in my records related to the trial.

11. A copy of that note is attached to this Affidavit as Exhibit 1.

12. I have made these comments available to the Judicial Conduct Board and the Disciplinary Board.

13. While I have had preliminary conversations with those offices, neither of those offices made an attempt to preserve my testimony in any way.

Maggie Miller

Maggie Miller

Sworn and Subscribe before
me this 8th day of May, 2015

Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Kimberley D. Mann, Notary Public
State College Boro, Centre County
My commission expires October 23, 2018

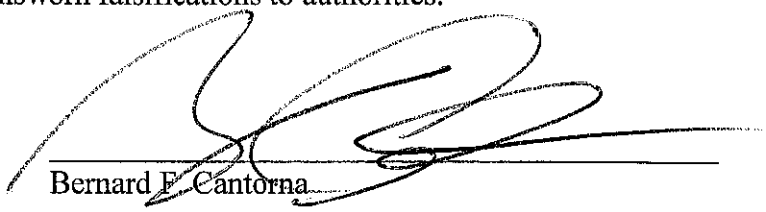
I hate myself so bad right now! I want to pop a cap in my own ass!

SPM Day 2
4/18/12
After Long day
SP

EXHIBIT A

VERIFICATION

I, Bernard F. Cantorna, Esquire, attorney for the Appellant, verify that the facts contained in the foregoing Application for Relief Pursuant to Rule 123 are true and correct to the best of my knowledge. The undersigned understands that false statements herein are made subject to the penalties 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.



Bernard F. Cantorna

IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA Appellee	:	
v.	:	No. 147 MDA 2015
JALENE R. McCLURE, Appellant	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within **APPELLANT'S APPLICATION FOR RELIEF PURSUANT TO RULE 123** was served by depositing the same with the United States Postal Service, postage prepaid, addressed to the following:

Stacy Parks Miller, Esquire
District Attorney
Centre County Courthouse
102 South Allegheny Street
Bellefonte, PA 16823

By: _____
Bernard F. Cantorna, Esq.
Attorney for Appellant

DATED: May 21, 2015