IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
CRIMINAL TRIAL DIVISION

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COMMONWEALTH OF PENNSYLVANIA	:	CP-46-MD-3156-2015
	:	
vs.	:	
	:	
WILLIAM H. COSBY, JR.	:	

OPPOSITION TO THE COMMONWEALTH'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO DISQUALIFY THE MONTGOMERY COUNTY DISTRICT ATTORNEY'S OFFICE

Defendant William H. Cosby Jr., by and through his attorneys, hereby submits this Opposition to the Commonwealth's Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney's Office.

I. INTRODUCTION

Mr. Cosby is not asking for "special treatment" (Mot. at 1), he is asking for what any citizen should expect from the government—that the District Attorney's Office will not play "gotcha" with its citizens' constitutional rights and breach its agreements with them. He is asking that his due process rights not be violated by prosecutors waiting until critical evidence is lost—such as evidence here of the non-prosecution agreement that was lost when Mr. Phillips passed away—before pursuing 12-year-old allegations it had agreed not to pursue. And he is asking that prosecutors not be permitted to pursue that prosecution after violating ethical rules by inciting public opinion against a defendant for political gain.

When prosecutors breach agreements with defendants, Pennsylvania courts recognize the "concern that a defendant might be coerced into a bargain or fraudulently induced to give up [his] very valued constitutional guarantees" and enforce such agreements against the

Commonwealth.[1] When prosecutors unreasonably delay and prejudice a defendant, the "criminal charges should be dismissed."[2] And when prosecutors wrongfully use their power and pulpit to foment public opinion against an accused and pursue charges for political gain, they are rightly disqualified.[3]

Here, Mr. Cosby entered into and relied on a clear non-prosecution agreement with the then-sitting District Attorney, Bruce Castor. In the decade since, critical evidence of that agreement has been lost. Moreover, the new District Attorney has irreparably prejudiced Mr. Cosby through a barrage of politically-motivated, improper public condemnations, even before bringing charges.

For all these reasons, the Petition should be granted, the Commonwealth's Motion to Dismiss denied, and the charges against Mr. Cosby dismissed or in the alternative, the Montgomery County District Attorney's Office disqualified.

II. ARGUMENT

A. Formal Arraignment Is Not Required Before Seeking Habeas Relief

The Commonwealth argues the Court cannot rule on the Petition until after formal arraignment (Mot. at 5-11), but that is incorrect. Habeas relief is available to a wrongfully-detained individual at *any time*, including as early as before preliminary arraignment. *See* Pa. Const. art. I, § 14; 42 Pa. C.S. § 6502 ("Any judge of a court of record may issue the writ of habeas corpus to inquire into the cause of detention of any person or for any other lawful purpose"); *Commonwealth ex rel. Fitzpatrick v. Mirarchi*, 392 A.2d 1346, 1348 n.4 (Pa. 1978)

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[1] *Commonwealth v. Ginn*, 587 A.2d 314, 316-17 (Pa. Super. Ct. 1991) (quoting *Commonwealth v. Zuber*, 353 A.2d 441, 444 (Pa. 1976)).

[2] *Commonwealth v. Snyder*, 713 A.2d 596, 599-600 (Pa. 1998).

[3] *See, e.g.*, *Commonwealth v. Brooks*, 1 Phila. Co. Rptr. 440, 442 (Pa. Com. Pl. 1978) (disqualifying District Attorney from further involvement in cases due to news release and public statements criticizing defendants' sentence).

("Because of defense counsel's use of a writ of habeas corpus to test probable cause to arrest before the preliminary arraignment, the Commonwealth had the option of appealing Judge Mirarchi's grant of habeas corpus to the Superior Court."); *Commonwealth v. Carbo*, 822 A.2d 60, 69 n.4 (Pa. 2003) (same).

The Commonwealth cites no authority to the contrary, and mischaracterizes the only case on which it relies. *See* Mot. at 6-8 (citing *Commonwealth v. Cosgrove*, 680 A.2d 823 (Pa. 1996)). The defendant in *Cosgrove* did not seek habeas relief or disqualification of the Office of the District Attorney. Rather, the defendant sought a pre-trial hearing to compel the Office of the Attorney General to produce evidence demonstrating its statutory ability to prosecute.[4] Relying on well-settled precedent, the Court held "that a criminal defendant may not challenge the jurisdiction of the Attorney General to prosecute until after the formal arraignment proceeding." *Id.* at 825.[5] Because *Cosgrove* involved no request for habeas relief nor disqualification of the Office of the District Attorney, it is inapposite. The Commonwealth has cited no authority suggesting that the Pennsylvania Rules of Criminal Procedure applicable to pretrial motions somehow limit the absolute constitutional right to petition for writ of habeas corpus provided by the Constitution itself.

The Commonwealth's attempt to distinguish *Commonwealth ex rel Levine v. Fair* fails. Mot. at 9-11 (citing *Fair*, 146 A.2d 834 (Pa. 1958)). In *Fair*, the Court granted a petition for

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[4] This type of "*Goodman* hearing" originates from *Commonwealth v. Goodman*, 500 A.2d 1117 (Pa. Super. Ct. 1985), and has been sanctioned by the Pennsylvania Supreme Court. *See, e.g.*, *Cosgrove*, 680 A.2d at 824 n.1.

[5] *See, e.g.*, *Cosgrove*, 680 A.2d at 824 ("The Superior Court held that the trial court correctly determined that the proper time for Appellant to challenge the Attorney General's jurisdiction to bring charges against him was after a preliminary hearing."); *id.* at 826 ("We find that the Rules of Criminal Procedure are dispositive in answering the question of when may a criminal defendant request that a court of common pleas compel the Attorney General to demonstrate that a sufficient nexus exists between the defendant and a corrupt organization.").

habeas relief that was filed and ruled upon before any preliminary hearing took place. Although the Commonwealth had delayed the preliminary hearing, the Court specifically *rejected* the Commonwealth's argument that a hearing on the writ petition should be postponed until after the preliminary hearing, holding that "every aggrieved person has the right to be heard, especially if he claims he is being illegally deprived of his freedom." *Id.* at 838. *Fair* is fully consistent with what this Court has already recognized—a petition for habeas relief can be heard and ruled on at any time, including before the preliminary hearing.

B. The Commonwealth Cannot Repudiate An Agreement Made By A Sitting District Attorney

The Commonwealth's opposition does not dispute that Bruce Castor, while sitting as District Attorney, agreed on behalf of the State "that there would be no state prosecution of Cosby in order to remove from him the ability to claim his Fifth Amendment protection against self-incrimination . . ." (Mot. at 12, quoting Ex. B at 1.) Instead, the Commonwealth argues it is free to make agreements with a criminal defendant to induce him to waive his constitutional rights, and then break the agreement with impunity and capitalize on the waiver. The Commonwealth's arguments are meritless.

1. Section 5947 Does Not Permit District Attorneys To Breach Agreements With Defendants

The Commonwealth argues that even if it entered into a non-prosecution agreement, Mr. Cosby has no means to enforce the agreement because the statutory requirements for immunity orders under 42 Pa.C.S.§ 5947 were not met. (Mot. at 15-18.) This argument fails for three reasons.

First, Section 5947 plainly does not apply here. Section 5947 does not govern *every* type of non-prosecution agreement. Rather, it establishes a particular type of "immunity order" which

"direct[s] a witness to testify or produce other information over a claim of privilege against self-incrimination," thereby providing a mechanism to *compel* a witness to testify over a Fifth Amendment assertion, under the threat of being held in contempt. *See* 42 Pa. C.S. § 5947(d), (f). The cases the Commonwealth cites in support simply confirm the unremarkable proposition that prosecutors cannot issue orders compelling witnesses to testify—only courts can. *See Commonwealth v. Parker*, 611 A.2d 199, 200, n.1 (Pa. 1992) ("Pursuant to 42 Pa.C.S.A. § 5947, the district attorney must request from the court an order granting immunity."); *Commonwealth v. Bernstein*, 515 A.2d 54, 58 (Pa. Super. Ct. 1986) ("[O]nly the court can issue the order.").

But Section 5947 was never implicated here at all, because the Commonwealth did not seek to compel Mr. Cosby to testify as a witness in 2005. The Commonwealth provides no authority remotely suggesting that a prosecutor can agree not to prosecute a defendant *only* by a court order pursuant to Section 5947.[6] Although the Commonwealth relies on *Commonwealth v. Parker* to argue that a court order is required to enforce an oral promise of immunity (Mot. at 17), but *Parker* establishes no such restriction on prosecutorial discretion. In *Parker*, the Court explicitly declined to determine whether "a defective grant of immunity would estop the Commonwealth from prosecuting" because the Commonwealth sought to prosecute the defendant "with evidence wholly independent of his compelled testimony." 611 A.2d at 201. a defendant based on his compelled testimony. *Parker*, 611 A.2d at 201. Here, unlike in *Parker*,

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[6] *See Commonwealth v. Parker*, 611 A.2d 199 (Pa. Super. Ct. 1992) (immunity order sought and granted to compel witness to testify against his brother in criminal proceeding); *Commonwealth v. Bernstein*, 515 A.2d 54, 58 (Pa. Super. Ct. 1986) (immunity order sought and granted to compel witness to testify truthfully in criminal proceeding as to why he had recanted his earlier testimony); *see also Commonwealth v. Johnson*, 487 A.2d 1320, 1322 (Pa. 1985) (finding the statute does not allow courts to grant immunity orders for defense witnesses absent a request from the prosecution for an immunity order). Notably, prosecutors may request immunity orders only when the witness has testimony that "may be necessary to the public interest." 42 Pa.C.S.§ 5947(b)(1).

the Commonwealth relies expressly on testimony offered in reliance on the agreement.[7] Indeed, the Commonwealth does not even *argue* that its criminal complaint could be sustained without reliance on Mr. Cosby's deposition testimony. Without that testimony, the Commonwealth would be required to show "by the heightened standard of clear and convincing evidence, that the evidence upon which [its] subsequent prosecution is brought arose *wholly* from independent sources." *Commonwealth v. Swinehart*, 664 A.2d 957, 969 (Pa. 1995).

Second, even if Section 5947 applied, the Commonwealth argues prosecutors are free to induce a defendant to waive his constitutional rights by promising not to prosecute, but then may breach the agreement with impunity, relying on their own failure to request a court order as an excuse for the breach. Several courts have expressly rejected this cynical argument. *See, e.g.*, *People v. Brunner*, 108 Cal. Rptr. 501, 506 (Ct. App. 1973) ("It would be anomalous to permit the People, represented by the district attorney, to argue that an earlier agreement entered into by the district attorney was void for lack of compliance with a statute of whose existence the district attorney must have been aware."); *State v. Reed*, 253 A.2d 227, 232 (Vt. 1969) ("[I]f a prosecutor, in the furtherance of justice, makes an agreement to withhold prosecution, the court may, upon proper showing, even in the absence of statute authority, honor the undertaking."); *see also United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir. 1976) (immunity agreement where "government admittedly did not seek court approval pursuant to the statutory immunity provisions" was not unlawful simply because prosecutor failed "to seek court approval").

Third, even where such an agreement has technical omissions, it is nonetheless enforceable on both due process and estoppel grounds "where the defendant's detrimental reliance on the promise has constitutional consequence, for example, where the defendant

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[7] The affidavit submitted to support probable cause relies extensively on the deposition for support. McMonagle Decl., Ex. B.

forgoes the right to counsel or the right against self-incrimination." *People v. C.S.A.*, 104 Cal. Rptr. 3d 832, 841 (Ct. App. 2010); *Chester Extended Care Center v. Commonwealth, Dep't of Public Welfare*, 586 A.2d 379, 382 (Pa. 1991) ("estoppel . . . may be asserted against the government in this jurisdiction" where there have been "1) misleading words, conduct, or silence by the party against whom the estoppel is asserted; 2) unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting the estoppel; and 3) the lack of a duty to inquire on the party asserting the estoppel."); *People v. Stapinski*, 40 N.E.3d 15, 26-27 (Ill. 2015) (Remanding "with instructions that the charge against defendant be dismissed" because, "[w]hether or not the cooperation agreement was 'valid' in the sense that it was approved by the State's Attorney, is not important. An unauthorized promise may be enforced on due process grounds if a defendant's reliance on the promise has constitutional consequences."); *United States v. Rodman* 519 F.2d 1058, 1059 (1st Cir. 1975) (based on SEC's promise to "strongly recommend" no prosecution, defendant provided incriminating statements); *State v. Sturgill*, 469 S.E.2d 557, 559 (N.C. Ct. App. 1996) based on police officer's promise defendant would not be charged as a "habitual felon," defendant admitted involvement in charged break-ins); *see also Commonwealth v. Bryan*, 818 A.2d 537, 541-42 (Pa. Super. Ct. 2003) (noting that "due process and notions of fundamental fairness are implicated only when a promise made to a defendant induces his detrimental reliance in derogation of a constitutional right" and that, "[h]ad incriminating information been obtained against [the defendant] as a result of the unauthorized agreement, he would be entitled to have that evidence suppressed").

The ultimate responsibility of deciding who may be shielded from prosecution is solely the province of the prosecutor's office, not the courts. *Commonwealth v. Johnson*, 487 A.2d 1320, 1322 (Pa. 1985) ("It is up to the executive branch of government to decide when and to whom immunity will be granted."); *Commonwealth v. Bernstein*, 515 A.2d 54, 57-58 (Pa. Super.

Ct. 1986) ("A prosecutor's decision not to prosecute an individual, and his ability to make such a promise to an individual, is an essential and vital part of our criminal justice system."). The District Attorney's Office cannot abdicate this responsibility by claiming that, so long as it never requested an immunity order under 42 Pa.C.S.§ 5947, its promises are meaningless. *See United States v. Liburd*, 607 F.3d 339, 343 (3d Cir. 2010) ("Prosecutors routinely enter into agreements with defendants that exceed their minimum obligations under the law. Whether they do so strategically or for reasons of convenience is of no moment. Once prosecutors undertake such commitments, they are bound to honor them.").

The inapplicable requirements of Section 5947 do not permit the Commonwealth to breach its non-prosecution agreement with Mr. Cosby to Mr. Cosby's obvious detriment.

C. The Commonwealth's Factual Arguments Are Meritless And Will Be Proven So At The Hearing

Finally, the Commonwealth makes several factual arguments, which Mr. Cosby will address fully at the hearing on this matter. Briefly, the Commonwealth's argument that Mr. Castor's press release fails to confer immunity (Mot. at 18-20) is a straw man. Mr. Cosby is not arguing the press release itself is the agreement, but rather that the agreement was entered into *independent* of the press release. (*See* Pet. at 7 ("In advance of issuing this press release, District Attorney Castor reached an agreement . . . .")) Mr. Castor's emails confirm this, stating that "with the agreement of the defense lawyer . . . I intentionally and specifically bound the Commonwealth that there would be not state prosecution of Cosby… ." (Mot., Ex. F at 2.) The Commonwealth also argues that any agreement should be interpreted to mean only that Mr. Cosby's deposition testimony would not be used against him (Mot. at 14), but to the extent there is any ambiguity in the agreement, such ambiguities "*will be construed against the [Commonwealth]*." *Commonwealth v. Hainesworth*, 82 A.3d 444, 447 (Pa. Super. 2013)

(quoting *Commonwealth v. Kroh*, 654 A.2d 1168, 1172) (Pa. Super. Ct. 1995) (emphasis added). Regardless, the Commonwealth expressly bases the charges on that very testimony, breaching even its own narrower interpretation of the agreement. At a minimum, even under the Commonwealth's interpretation, the evidence should be suppressed and the charges based thereon dismissed. *See Swinehart*, 541 Pa. at 526 (Commonwealth must show "by the heightened standard of clear and convincing evidence, that the evidence upon which [its] subsequent prosecution is brought arose *wholly* from independent sources.").

The Commonwealth also cryptically asserts it is not "aware" of any contemporaneous documents reflecting the agreement, but that is no defense to breach of any agreement, as the District Attorney well knows. *Dunn v. Colleran*, 247 F.3d 450, 461 (3d Cir. 2001) (recognizing that oral agreements must be enforced because "a defendant voluntarily and knowingly surrenders a plethora of constitutional rights in exchange for a commitment by the prosecutor to do or not do certain things" and "[w]hen the prosecutor breaches that agreement, he or she violates the defendant's due process rights").

Although it arises in a criminal context, the agreement between the prosecutor and the accused is "contractual in nature and is to be analyzed under contract law standards." *Hainesworth*, 82 A.3d at 449 (quoting *Kroh*, 654 A.2d at 1172 (affirming specific enforcement of plea agreement)). Oral promises made by prosecutors in exchange for a plea or other consideration from a defendant are routinely enforced like any other oral contractual promise. *See, e.g., United States v. Sanchez*, 562 F.3d 275, 280 (3d Cir. 2009) ("Just as contracts are not invalid simply because they are made orally, the same is true of plea agreements."), *overruled on unrelated grounds United States v. Weatherspoon*, 696 F.3d 416 (3d Cir. 2012); *Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003) ("The terms of oral plea agreements are enforceable, as are those of any other contracts, even though oral plea agreements are not encouraged by reviewing

courts."); *United States v. Stein*, 2005 WL 1377851, at *17 (E.D. Pa. June 8, 2005) (enforcing prosecutor's oral agreement "restricting the subjects on which [defendant] could be questioned outside the presence of counsel").

Just as the District Attorney's Office cannot rely on its failure to obtain a court order as an excuse to breach its agreement, it cannot rely on the fact that the agreement was not reduced to writing as a basis for shirking its obligation.

D. The Commonwealth's Unreasonable Delay Violates Due Process as to Both the Merits and the Non-Prosecution Agreement

Despite Mr. Castor's explicit statements to the contrary, the Commonwealth argues there is insufficient evidence to prove the existence and scope of a non-prosecution agreement. Mot. at 11-14. Apart from the merits (which will be addressed at the hearing), these arguments only underscore the prejudice Mr. Cosby has suffered from the Commonwealth's eleven-year delay in bringing charges. Mr. Cosby's criminal lawyer who entered into the non-prosecution agreement on his behalf is now deceased. Documents that might have existed to corroborate the agreement have been lost. Mr. Cosby should be given an adequate opportunity to challenge the many factual representations made by the Commonwealth in its papers at an evidentiary hearing, but ultimately, dismissal is required because much of the evidence related to this agreement has been lost due to the Commonwealth's inexcusable delay.

Clear prejudice exists, and a reasonable basis for the Commonwealth's 11-year delay does not. For those reasons alone, the charges must be dismissed. *See, e.g.*, *United States v. Morrison*, 518 F. Supp. 917, 918 (S.D.N.Y. 1981) (dismissing based on delay of six months); *United States v. Sabath*, 990 F. Supp. 1007, 1008 (N.D. Ill. 1998) (four year delay); *United States v. Santiago*, 987 F. Supp. 2d 465, 484 (S.D.N.Y. 2013) (five years); *State v. Whitlow*, 326 P.3d 607, 612 (Or. Ct. App. 2014) (less than five years); *United States v. Barket*, 530 F.2d 189,

193 (8th Cir. 1976) (less than four years); *United States v. Sample*, 565 F. Supp. 1166, 1185-86 (E.D. Va. 1983) (less than six years); *United States v. Alderman*, 423 F. Supp. 847, 855 (D. Md. 1976) (less than three years).

E. The Montgomery County District Attorney's Office and Mr. Steele Should Be Disqualified Now, Not Later

Unless Mr. Steele and the Office are disqualified, their involvement will prejudice every proceeding that takes place—including the hearing on this Petition. The Commonwealth argues disqualification is not required here (Mot. at 29-35), but mischaracterizes Mr. Steele's inflammatory statements and the complicity of the Montgomery County District Attorney's Office in those statements. Mr. Steele did not, as the Commonwealth argues, "merely question[] the opponent's decision-making…." (Mot. at 34). Mr. Steele's TV commercial plainly labels Mr. Cosby a "sexual predator" and asserts that any failure to prosecute Mr. Cosby was tantamount to "not looking out for the victims." McMonagle Decl., Ex. D. Indeed, days before the election, Mr. Steele himself publicized on Twitter a link to an article titled, "Bill Cosby's Fate Could Hinge on a Small-Town Election,"[8] thus focusing not on Mr. Castor's judgment, but on whether charges against Mr. Cosby would be brought.

Recognizing that Mr. Steele's campaign statements went far beyond "questioning" his opponent's decision-making, the Commonwealth argues a campaigning prosecutor can say *anything at all*, short of an express "promise of a conviction." Mot. at 32. That is wrong. The Rules of Professional Conduct are clear: it is improper and unethical for a prosecutor to make statements "that have a substantial likelihood of heightening public condemnation of the accused." Pa. RPC 3.8.

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[8] https://twitter.com/Steele4DA/status/661368156724830208.

The Commonwealth attempts to distinguish *State v. Hohman*, 420 A.2d 852, 854-55 (Vt. 1980), *overruled on other grounds by Jones v. Shea*, 532 A.2d 571 (Vt. 1987), claiming the court only found "the prosecutor biased" because of a "promise to convict" (Mot. at 32), but that is clearly wrong. The court in *Hohman* squarely ruled that "it was error for the state's attorney to fail to disqualify himself, and it was error for the trial court to deny the motion to disqualify the state's attorney." 420 A.2d at 855. The holding was clear: where a campaigning prosecutor runs advertisements invoking prosecution of a defendant, it is error to deny a motion to disqualify brought on the ground that "the advertisement per se evinces such personal bias on the party of the state's attorney" as to require disqualification. *Id.* at 854.[9]

Waiting until after the hearing on this petition or after the preliminary hearing to address this issues will prejudice Mr. Cosby. Mr. Steele has already repeatedly made public statements violating the Pennsylvania Rules of Professional Conduct and infringed on Mr. Cosby's right to a fair trial, and his Office has done nothing to stop Mr. Steele's statements. Mr. Steele and the District Attorney's Office should be disqualified.

III. CONCLUSION

For the reasons set forth above, the defendant respectfully requests that the Court grant the Petition, deny the Commonwealth's Motion to Dismiss, and dismiss all charges following an evidentiary hearing on these matters. In the alternative, the defendant requests the Court disqualify Mr. Steele and the Montgomery County District Attorney's office from continued involvement in this prosecution.

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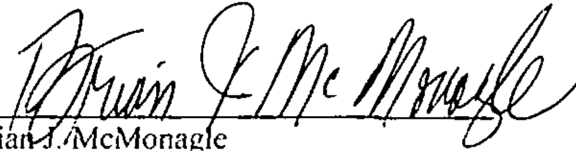
[9] Ultimately, "the jury's verdict cured the prejudice that resulted from the state's attorney's attitude by giving the defendant the best result he could have attained through plea negotiations." *Hohman*, 420 A.2d at 856.

January 28, 2015

Respectfully Submitted,



Brian J. McMonagle
MCMONAGLE, PERRI, MCHUGH, & MISCHAK P.C.
1845 Walnut Street, 19th Floor
Philadelphia, PA 19103
(215) 981-0999; Fax 215-981-0977

Christopher Tayback
Joseph Sarles
(*pro hac vice* admission pending)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
(213) 443-3000; Fax (213) 443-3100
Email: christayback@quinnemanuel.com
josephsarles@quinnemanuel.com

Monique Pressley
(*pro hac vice* admission pending)
THE PRESSLEY FIRM, PLLC
1629 K Street NW, Suite 300
Washington, DC 20036
(202) 973-0181; Fax (240)235-3388
Email: mdpressley@thepressleyfirm.com

Attorneys for Defendant

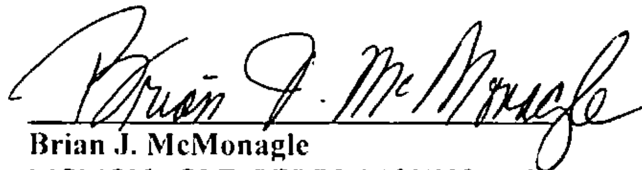
CERTIFICATE OF SERVICE

I, BRIAN J. MCMONAGLE, Esquire, hereby certify that a true and correct copy of the foregoing Motion was served via hand delivery as follows:

Honorable Steven T. O'Neil, Administrative Judge
Montgomery County Court House
Norristown, PA 19404

AND

Kevin Steel, Esquire
District Attorney
Courthouse, Fourth Floor
P.O. Box 311
Norristown, Pa 19404-0311



Brian J. McMonagle
MCMONAGLE, PERRI, MCHUGH, &
MISCHAK P.C.
1845 Walnut Street, 19th Floor
Philadelphia, PA 19103
(215) 981-0999; Fax 215-981-0977
Christopher Tayback
Joseph Sarles
(*pro hac vice* admission pending)
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
(213) 443-3000; Fax (213) 443-3100
Email: christayback@quinnemanuel.com
josephsarles@quinnemanuel.com
Monique Pressley
(*pro hac vice* admission pending)
THE PRESSLEY FIRM, PLLC
1629 K Street NW, Suite 300
Washington, DC 20036
(202) 973-0181; Fax (240)235-3388
Email: mdpressley@thepressleyfirm.com
Attorneys for Defendant

DATED: January 28, 2016