

Motion To Recuse (Second Request), ¶5, February 17, 2009. These allegations are unfortunate and baseless.

As defense counsel knows, this case gained widespread attention even before Appellant was arrested. The public scrutiny of this case was based on the nature of what Appellant did. It was not this Court that created the public's interest; it was Appellant's conduct. There was no need for this Court to take any action to further sensationalize this case.

Against this backdrop, let's examine the allegations made by Appellant. The first accusation is: "Prior to the sentencing hearing the court communicated by e-mail with a reporter from the Erie Times News in which the court indicated that it would 'have a lot to say about these cases including prosecutorial discretion in the appropriate legal forum.' At the time of the sentencing hearing the court made good on its promise to the Erie Times News." *Motion To Recuse (Second Request)*, *Id.*

In this accusation, Appellant is trying to create the false impression this Court, in an effort "to generate publicity," *Id.*, initiated contact with a news reporter before Appellant's sentencing to draw attention to what this Court will say at sentencing, then this Court "made good on its promise." *Id.* This allegation is more than a distortion of the truth by defense counsel.

To clear the record for this matter, the e-mail exchange with the Erie Times News reporter, namely Ed Palattella, was chronologically as follows:

-----Original Message-----

From: Palattella, Ed [mailto:Ed.Palattella@TimesNews.com]

Sent: Wednesday, August 06, 2008 2:47 PM

To: Cunningham, Judge William R.

Subject: Question

Hello Judge:

I stopped by your office this afternoon and left a message, but am sending the e-mail to give you an idea what I would like to talk to you about.

I'm unclear on how the Teri Rhodes plea fits the definition of voluntary manslaughter, based on the language of the statute.

I came across some questions while reviewing the case of Erie resident Rodger O. Henry, who killed a 4-month-old baby in 2001 and wanted to plead voluntary manslaughter. Judge DiSantis rejected the plea, saying that an infant could not provide the level of provocation the voluntary manslaughter statute requires.

Henry pleaded guilty to third-degree murder and was sentenced to 15 to 35 years.

If you could please get back to me, I'd appreciate being able to talk to you for a story.

Thanks.

Ed

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-----Original Message-----

From: Cunningham, Judge William R. [mailto:Wcunningham@eriecountygov.org]
Sent: Friday, August 08, 2008 12:30 PM
To: Palattella, Ed
Subject: RE: Question

Ed, Sorry about the delay in responding but I have been in court non-stop, including Treatment Court yesterday and I am on duty with OCY this month. As you know from your years of experience at the courthouse, a judge cannot comment about a pending case thus I cannot respond to your questions about the Rhodes case. I will have a lot to say about these cases, including prosecutorial discretion, in the appropriate legal forum. Thanks.

This exchange speaks for itself. The reporter initiated the contact. The reporter wanted to do a story about Appellant's plea prior to contacting this Court. This Court's answer was the customary "no comment" because this was a pending case. There was nothing in this Court's

response or conduct that was publicity-seeking or self-promoting; nor did it generate unnecessary attention for this case.

The dates of this email exchange are noteworthy. The inquiry by the reporter was on August 6, 2008. This Court's reply was on August 8, 2008. Appellant's sentence was on November 21, 2008. For Appellant to contend this Court's response to a reporter's inquiry in August about her plea was intended to showcase this Court's performance at sentencing is ludicrous.

The timing of Appellant's accusation must be noted. In the months between the time the "no comment" response was published and Appellant's sentencing, defense counsel did not take issue with this comment. At the sentencing, including the objections presented thereafter, defense counsel did not mention this comment. It was not until December 1, 2008, in Appellant's Post-Sentence Motion, that this comment was first referenced. If this comment demonstrated such a display of judicial self-promotion that recusal was warranted, there was no need to wait until after Appellant's sentencing to use it as a basis for a recusal request. In any event, the "no comment" response by this Court on August 8, 2008 to a reporter's inquiry is not a basis for recusal.

Next, defense counsel argues the distribution of copies of the Statement of Sentencing Rationale at Appellant's sentencing demonstrates such judicial self-promotion that recusal was required. Further, the publication of the Statement of Sentencing Rationale in the Erie County Legal Journal and on the Erie County website establishes this Court was more interested in generating publicity than in justice.

These allegations are devoid of any basis for recusal. At Appellant's sentencing, double-sided copies of the Sentencing Rationale were distributed to interested persons, the exact number

of which is uncertain because the demand immediately exceeded the supply. In response to the continuing demand by members of the public for copies of the Sentencing Rationale, a decision was made to post it on the county's website since it is a public document available to any interested citizen. As a practical matter, this posting also reduced the number of phone calls to the courthouse, including to this Court's office. For similar reasons, the January 26, 2009 Opinion was posted on the county's website.

If the posting of these two documents on a website is a basis for judicial recusal then all judges from the United States Supreme Court through the trial courts of Pennsylvania would have to recuse themselves. In this electronic age, it is standard practice for judicial opinions to be published online.

The United States Supreme Court has been publishing opinions online since the year 2000. Any member of the public can access a U.S. Supreme Court opinion by simply going to www.supremecourtus.gov/opinions.

The Pennsylvania Supreme Court has been publishing opinions online since 1996. The Superior and Commonwealth Courts followed suit a year later. These opinions can be accessed online through the website for the Unified Judicial System of Pennsylvania at www.pacourts.us.

Trial Courts in Pennsylvania have opinions published through the District and County Reporters which are accessible online through Westlaw, InCite or LEXIS websites. Notably, this Court did not forward a copy of any opinions in this case for publication in the District and County Reporters.

A copy of the Sentencing Rationale was forwarded to the Erie County Bar Association who publishes the Erie County Legal Journal. All nine judges in Erie County routinely forward opinions to the Erie County Bar Association. It is up to the Erie County Bar Association Legal

Journal editor to decide which local opinions to publish. The fact the Sentencing Rationale was chosen by the Bar Association editor for publication in the Erie County Legal Journal is not a basis for this Court's recusal. If it were, any judge who has an opinion published in the Legal Journal must be recused.

Defense counsel's post-sentence campaign to caricature this Court as a self-promoting media hound is misguided. The timing and content of defense counsel's requests for recusal suggest the real motive: a readily transparent attempt to judge-shop. Defense counsel does not like Appellant's sentence and appears to strategize that if he continually attacks the sentencing judge, the judge will be forced to grant his recusal requests and another judge will be assigned to the case. It would be less surprising if these attacks came from an unschooled defendant. It is surprising these attacks come from a lawyer charged with ethical responsibilities under the Rules of Professional Conduct and our Code of Civility.¹

Defense counsel is also engaging in a common defense tactic of diverting attention from the client's conduct by attacking someone else. Most often these types of attacks are leveled against the police or the prosecutor.

Whether defense counsel has crossed an ethical boundary is a determination this Court leaves to others. For purposes of this case, this Court can wholly separate the histrionic chicanery of defense counsel's accusations from the information to be considered in making decisions affecting Appellant. For example, on February 23, 2009, this Court granted Appellant's request for bond pending appeal such that she is now living with her family in Michigan while her appeal is decided.

¹ See, e.g., Rules of Professional Conduct 3.5(a); 8.2(a); 8.4(c)(d) and Code of Civility II (1)-(6), (8) and (18).

In *Com. v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998), our Supreme Court held, in part, that the “obstreperous” conduct of defense counsel did not warrant the recusal of the trial judge. *Id. at 89*. Similarly, defense counsel’s post-sentence conduct does not form the basis for this Court’s recusal.

It is worth noting that the Commonwealth has not joined in Appellant’s request for recusal. *See, Commonwealth’s Response to Appellant’s Post Sentence Motion*, ¶24, December 8, 2008. As the record reflects, the Commonwealth has never requested judicial recusal in this case.

This Court did not ask to be assigned to this case. It was assigned according to the normal rotation of homicide cases among the judges in Erie County. *See, Assignment Order by Judge Ernest DiSantis, September 18, 2007*. There was no conflict of interest requiring recusal on a basis defined by the Canons of the Code of Judicial Conduct.

On a personal level, this Court does not belong to any organization that espouses a position that would compromise the ability to preside in this case. This Court does not bring to this case any fixed opinions or an agenda that would warrant recusal.

The only time this Court has spoken substantively about this case was during the legal proceedings and in the judicial documents filed as part of this case. If a court cannot do so without a demand for recusal then there is no means for a court to act; the role of the sentencing court would be eviscerated.

To grant Appellant’s demands for recusal under the circumstances of this case would create an unbridgeable divide in the ethical field of our profession. It would mean a lawyer who disagrees with a client’s sentence, or any decision of a judge, can go on a rampage against the judge until the judge is forced to recuse. There is no need to set such a precedent in this case.

APPELLANT'S FALSE PREMISE

Throughout the SECA Appellant's repeated description of her sentence as "enhanced" demonstrates Appellant's mistaken belief she was entitled to a specific sentence. Appellant was not entitled to any particular sentence; the only certainty for Appellant was that her sentence could not exceed the statutory maximum for voluntary manslaughter.

Appellant entered an open plea acknowledging she faced a possible maximum sentence of twenty years. *Defendant's Statement of Understanding of Rights Prior to Guilty/No Contest Plea, August 5, 2008*. She also knew that the sentencing guidelines and the sentencing positions of the parties were not binding on the sentencing court. *Id.* Appellant was not promised any type of sentence. *Id.* For Appellant to now posture that she was entitled to a certain sentence and that her sentence was illegally "enhanced" is contrary to Pennsylvania law as explained by the Pennsylvania Supreme Court:

It is well established that the Sentencing Guidelines are purely advisory in nature. As this Court explained in Commonwealth v. Sessoms, 516 Pa. 365, 532 A.2d 775, 780-81 (Pa. 1987), the Guidelines do not alter the legal rights or duties of the defendant, the prosecutor or the sentencing court. The guidelines are merely one factor among many that the court must consider in imposing a sentence. *Sessoms*, 532 A.2d at 781. Consequently, this Court explained:

The defendant has no "right" to have other factors take pre-eminence or be exclusive; therefore, to have the guidelines considered, whatever they may provide does not change his rights. Likewise, the prosecutor has no "right" to have a particular sentence imposed. Most important, the court has no "duty" to impose a sentence considered appropriate by the Commission. The guidelines must only be "considered" and, to ensure that such consideration is more than mere fluff, the court must explain its reasons for departure from them.

Id. Likewise, we explained in Commonwealth v. Mouzon, 571 Pa. 419, 812 A.2d 617, 621 (Pa. 2000)(plurality), that despite the recommendation of the Sentencing Guidelines, the "the trial courts retain broad discretion in sentencing matters, and therefore, may sentence defendants outside the Guidelines." The only line that a sentence may not cross is the statutory maximum sentence. *See*

Mouzon, 812 A.2d at 621 n.4., Commonwealth v. Saranchak, 544 Pa. 158, 675 A.2d 268, 277 n.17.

Com. v. Yuhasz, 592 Pa. 120, 923 A.2d. 1111, 1118-1119 (2007).

Because the sentencing issues in this appeal are premised upon the false assumption Appellant was entitled to a sentence within or below the sentencing guidelines, which are not binding, this appeal must fail.

WAIVER

In Paragraph 2 of the SECA, Appellant generally avers a due process violation for the alleged conduct of an *in camera* trial that purportedly resulted in a harsher sentence for Appellant. However, Appellant does not set forth a constitutional argument that allows any meaningful judicial review.

Appellant does not allege a theory for relief. Appellant does not reference what constitutional provisions she relies upon and whether the claim is pursuant to federal or state law. Appellant does not cite any statutory or procedural support for her sweeping claims. Appellant fails to even identify whether she is asserting a procedural or a substantive due process claim.

As the Superior Court has stated: ‘ “When the Trial Court has to guess what issues an Appellant is appealing, that is not enough for a meaningful review.” ’ *Com. v. Lemmon*, 804 A.2d. 34, 37 (Pa.Super. 2002) quoting *Com. v. Dowling*, 778 A.2d 683, 686 (Pa.Super. 2001). The Superior Court has also held: “When an Appellant fails to adequately identify in a concise manner the issues sought to be pursued on appeal, the Trial Court is impeded in its preparation of its legal analysis which is pertinent to those issues.” *In re Estate of Daubert*, 757 A.2d 962, 963 (Pa.Super. 2000).

In addition, the Superior Court has concluded: "...when the appellant provides a concise statement which is too vague to allow the trial court an opportunity to identify the issues raised on appeal, he/she has provided 'the functional equivalent of no Concise Statement at all.'" *Ferris v. Harkins*, 940 A.2d. 388, 397 (Pa.Super. 2007) quoting *Com. v. Dowling*, 778 A.2d. 683, 686 (Pa.Super. 2001). Separately, the Superior Court found, "Even if the trial court correctly guessed the issues Appellant brings before this Court, the vagueness of Appellant's Concise Statement renders all issues raised therein waived." *Com. v. McCree*, 857 A.2d. 188, 192 (Pa.Super. 2004), quoting *Com. v. Heggins*, 809 A.2d 908, 912 (Pa.Super. 2002)(citation omitted); *affirmed Com. v. McCree*, 592 Pa. 238, 924 A.2d. 621 (2007).

It is also not enough to use magic words such as "due process" to allege a constitutional violation. As the Superior Court has found: "It is important to note that this Court is not persuaded by bald assertions or the invocation of special words in a concise statement of reasons." *Com. v. Kalichak*, 943 A.2d 285, 287 (Pa.Super. 2008) quoting *Com. v. Malovich*, 903 A.2d at 1250.

Because Appellant's constitutional averments in Paragraph 2 are not pled in a manner that can be addressed without pure speculation, any constitutional claim is waived.

A. SUBSTANTIVE DUE PROCESS

Assuming *arguendo* Appellant's purported due process claims are not waived, this Court will try to decipher Appellant's intended arguments.

Appellant seems to be claiming her due process rights were violated because she was sentenced based on information allegedly garnered as part of an "*in camera* trial" from which

she was precluded. *SECA*, ¶2. In this form, Appellant could be asserting a substantive due process argument, i.e., a violation of her constitutional right to a jury trial.

A similar scenario was presented to the Pennsylvania Supreme Court in *Com. v. Yuhasz*, *supra*, in which the defendant was charged with numerous counts of sexual assault upon a fourteen-year-old girl. Yuhasz entered a negotiated plea of guilty to one count of statutory sexual assault, a felony of the second degree. Yuhasz was sentenced beyond the aggravated range of the sentencing guidelines but less than the statutory maximum.

On appeal, Yuhasz argued the sentence was a violation of his Sixth Amendment right to a jury trial because the judge went beyond the sentencing guidelines based on judicially-determined facts, which facts were neither found by a jury nor admitted as true at his plea. The Supreme Court accepted allocatur to address the issue of whether the Sixth Amendment right to a jury trial was violated when the sentence exceeded the aggravated range of the sentencing guidelines but was within the statutory maximum and was based on conduct not admitted during the defendant's plea. The Supreme Court found there was no Sixth Amendment violation and affirmed the sentence.

The Supreme Court began its analysis by eliminating the same false premise that Appellant labors under, to-wit, that a judge cannot go outside the sentencing guidelines, or in Appellant's words "enhance" a sentence, without a jury trial or without an admission of fact at a plea.

The Supreme Court recognized Pennsylvania has an indeterminate sentencing scheme, meaning a sentence consists of a minimum and a maximum term as decided by the sentencing judge. Trial judges are afforded wide discretion to fashion an appropriate sentence so long as the maximum term does not exceed the statutory maximum for the offense.

Under our sentencing scheme, the Supreme Court held the important consideration in determining whether a Sixth Amendment violation exists is the statutory maximum. A sentence exceeding the maximum violates the Sixth Amendment. By comparison, because the sentencing guidelines are only advisory, it is not a Sixth Amendment violation to sentence beyond the guidelines. As more cogently explained by the Supreme Court:

Because the statutory maximum is the polestar for Sixth Amendment purposes, a judge may impose a sentence outside the Guidelines without unconstitutionally increasing the punishment for a crime based on judicially-determined facts as long as the maximum sentence imposed does not exceed the statutory limit.

...

As Appellant in this case was sentenced within the statutory maximum sentence provided by 18 Pa.C.S. §106(b)(3), the fact that the trial court considered material not admitted in Appellant's plea in departing from the sentencing guidelines is constitutionally irrelevant. Thus, the judgment of sentence is affirmed.

Yuhasz, Id. at 1122.

A sentencing court is permitted to consider evidence beyond the scope of what was admitted at the time of the plea. After an open plea, a sentencing court is not obligated to accept the factual representations or the sentencing position of any party. The fact Appellant's sentencing position was not accepted does not mean she was denied substantive due process. In the words of our Supreme Court, Appellant's arguments are "constitutionally irrelevant." *Id.*

B. PROCEDURAL DUE PROCESS

The procedural due process requirements for a sentencing in Pennsylvania are embodied in Pa.R.Crim.P. 704, which provides for notice and an opportunity for a Defendant to be heard at a sentencing. All of the procedural due process requirements of Pa.R.Crim.P. 704 were satisfied in Appellant's case (see pages 34 - 51 of the January 26, 2009 Opinion).

Appellant had an unlimited opportunity to present written and oral evidence in support of her sentencing position. All of Appellant's evidence, including the hearsay, was considered. Appellant tried to present a picture of a naïve college student who did not realize she was pregnant and became dissociated from reality during the birthing process. In support of this contention, Appellant set forth a "Statement of Facts" in her Sentencing Memorandum, p. 2, November 14, 2008.

This Court sought to verify the information in Appellant's Sentencing Memorandum by reading the police reports. This task was undertaken as part of the responsibility of a sentencing judge to "conduct sufficient pre-sentence inquiry such that, at a minimum, the court is apprised of the particular circumstances of the offense, *not limited to those of record*, as well as the defendant's personal history and background." *Com. v. Goggins*, 748 A.2d 721, 728 (Pa.Super. 2000)(Emphasis added.)

This Court disclosed to Appellant all of the documents reviewed for sentencing purposes, including the police reports. *Statement of Sentencing Rationale*, pp. 3-4, November 21, 2008. During the sentencing, the District Attorney noted he had provided this Court with the police reports. *Sentencing Transcript (hereafter "S.T.")*, pp. 23- 24, November 21, 2008. This Court acknowledged reading the police reports. *Id. at 26*.

Appellant has never objected to this Court reading the police reports. The fact the police reports were read does not mean an *in camera* trial was held. In this Court's Opinion of January 26, 2009, all of the circumstances that were derived from the police reports were specifically referenced by page number in the police reports to allay any concern about the source or accuracy of the information. The circumstances described by this Court were not whimsical or pulled out of thin air. Instead, all were attributable to Appellant.

Solely because Appellant's evidence was not accorded the weight Appellant wanted does not mean an in camera trial was held or that she was denied procedural due process.

In the end, to allow a re-sentencing on the basis of this record is to reward Appellant for attempted deception. It would mean a sentencing decision is circumscribed by the circumstances that a defendant presents regardless of the veracity of those circumstances. For example, it would mean Appellant has the benefit of the distortion that she was unaware of her pregnancy until the actual onset of the childbirth process; or that Appellant was alone for hours in labor in her apartment without the benefit of any available help during the childbirth process. It would mean Appellant's misrepresentations on these points would have to be accepted at face value. The result would be a sentencing decision based only on selective and skewed information approved by the defendant and spoon-fed to the judge. Such a precedent renders the sentencing process a mockery.

OTHER SENTENCING CODE CLAIMS

Appellant alleges a violation of the Sentencing Code because a written statement of the reasons for the sentence was prepared ahead of time and distributed during the sentencing.

SECA, ¶3. Appellant argues the sentence was "predetermined." *SECA*, ¶8. These claims are specious.

For the most part, these contentions have been addressed in the Opinion of January 26, 2009. Appellant still does not cite any legal authority or establish a factual basis for any relief.

Appellant's sentence was not set forth in the Sentencing Rationale. Appellant's sentence was not decided until all of the evidence was presented by the parties at sentencing. Notably,

there were no new revelations or surprises presented at sentencing by Appellant that were not set forth in Appellant's Sentencing Memorandum and its accompanying exhibits.

The testimony of Appellant's witnesses at sentencing was consistent with the letters each had submitted before sentencing, all of which were read by this Court. This Court listened to each of Appellant's witnesses at sentencing. *See, S.T. at pp. 9, 11, 13, 14, 16, 18, 20, 21, 22.* In considering Appellant's evidence, she was informed: "I respect the fact that all the folks that have come here today to speak on her behalf and to be here in support of her, that took time and came here from Michigan and set aside what they were doing in their lives to speak on her behalf. I have no reason to dispute or not believe what they say, and I accept what they say as accurate. I accept their characterizations." *S.T. at 36.*

This Court even concurred with the observations of one of Appellant's witnesses, Father Michael Savickas, about the four steps of recovery from a wrongdoing. *S.T. at 35, 65.* Hence, defense counsel's attempt to argue this Court predetermined a sentence and did not listen to or consider any defense evidence presented at sentencing is inaccurate.

Next, Appellant alleges a violation of the Sentencing Code because counsel was not provided a copy of the Statement of Sentencing Rationale until the completion of the presentations by the parties and Appellant's request to review the document prior to the completion of the proceeding was denied. *SECA, ¶3.*

Appellant fails to cite any authority in support of these contentions. Further, Appellant's latter contention is belied by the record as defense counsel placed his objections on the record after an opportunity to review the Sentencing Rationale. Accordingly, this claim must fail.

Appellant is fortunate she was not subjected to an alternative presentation of the statement of reasons for the sentence imposed. At Appellant's sentencing, after hearing from the

parties, this Court could have read verbatim all thirty-six pages of the Sentencing Rationale into the record without an interruption or objection from the parties. The sentence could have then been pronounced, copies of the Sentencing Rationale given to the parties and the sentencing hearing recessed, with the Sentencing Rationale filed contemporaneously.² This scenario would have met the statutory requirements for a sentence outside of the sentencing guidelines, 42 Pa.C.S.A. §9721(b), as well as the due process requirements of Pa.R.Crim.P. 704.

In this case, Appellant was spared the lengthy reading of the Sentencing Rationale but was still given in writing the reasons for the sentence imposed. Importantly, Appellant was given a timely opportunity at sentencing to object to the oral and written reasons stated for the sentence.

Appellant has not suffered any actual or legal prejudice nor does she aver any such prejudice. Notably, none of the post sentence claims by Appellant have been declared waived for failure to object at sentencing.

Appellant has yet to present any substantive challenge to the Sentencing Rationale. Likewise, Appellant has not identified any substantive evidence she would have otherwise presented at sentencing. Appellant has not proffered any evidence she would present at a re-sentencing. There is no basis to grant post sentence relief for Appellant on procedural grounds.

Appellant next alleges a violation of the Sentencing Code “and Pennsylvania law” by not allowing defense counsel to present objections until the courtroom had been cleared. *SECA*, ¶4.

Appellant fails to cite any Pennsylvania law in support of this argument and, therefore, it is waived.

² It is arguable that a more abrupt procedure could have been utilized at Appellant’s sentencing. After the presentation by the parties, this Court could have stated the reasons for the sentence were in the Sentencing Rationale and incorporated it into the record without reading it verbatim, provided copies to the parties, pronounced the sentence, recessed and filed the Sentencing Rationale contemporaneously.

Defense counsel's allegation is also inaccurate. Defense counsel was given an opportunity during the sentencing hearing to object to the Sentencing Rationale and he responded, "I'll wait." *S.T. at 35.*

The second part of Appellant's allegation is likewise without merit. There is no legal authority mandating that defense counsel was entitled to an audience for his objections to the Sentencing Rationale.

The reality is that a recess was needed after the lengthy sentence proceeding that began at 9:15 a.m. and concluded at 11:05 a.m. When Appellant's sentence was pronounced, there were emotional reactions from a number of people in the courtroom which were disruptive to courtroom decorum. The courtroom was cleared, in part, to restore a calm atmosphere for Appellant's sentencing objections. *See, Canon 3A(2), Code of Judicial Conduct.*

When court reconvened at 11:13 a.m., Appellant was given the opportunity to place on the record any objections to the sentence. The record of this proceeding was not sealed and is open to any member of the public who wants to know what occurred. Further, Appellant has preserved her challenges to the sentence and thereby suffered no prejudice. Thus, Appellant's claim does not afford her any relief.

**WHETHER THE SENTENCE WAS MANIFESTLY EXCESSIVE
AND/OR UNREASONABLE**

Appellant alleges error because her sentence was "manifestly excessive" and/or "unreasonable." *SECA, ¶¶4, 5.*

As Appellant knows, she received a lesser sentence than if she raped or had deviate sexual intercourse with or committed aggravated indecent assault on a child. Even with her

evidence of mitigation, Appellant would have received a sentence mandated by the citizens of Pennsylvania of ten to twenty years for any of those three sexual offenses. *See*, 42 Pa.C.S.A. §9718.

Appellant did not rape or otherwise sexually assault her victim. She killed her. Hence, to claim Appellant's sentence is excessive or unreasonable is illogical in light of the mandated sentences for sexual assaults on a child.

Appellant's sentence was not unreasonable as that term is viewed by the Pennsylvania Supreme Court. In *Com. v. Walls*, 926 A.2d 957 (Pa. 2007), our Supreme Court opined: "It is clear that the General Assembly intended the concept of unreasonableness to be inherently a circumstance-dependent concept that is flexible in understanding and lacking precise definition." *Walls, Id.* at 963. In other words, the unreasonableness of a sentence depends on the circumstances of the case.³

This Court has set forth at length and in detail Appellant's circumstances that warrant the sentence imposed. As stated in writing and orally, this Court considered the relevant factors under the Sentencing Code. *See*, 42 Pa.C.S.A. §9721(b).

The factors that distinguish this case from other manslaughter cases have been identified. *See, Opinion, pp. 19-26, January 26, 2009.*

The standard of review on appeal is whether the sentencing court committed a manifest abuse of discretion. According to the Supreme Court, "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of

³ In *Walls*, after a plea of guilty to rape, involuntary deviate sexual intercourse and incest with a seven- year-old granddaughter, the defendant received sentences on the rape and IDSI counts of the statutory maximum of ten (10) to twenty (20) years of incarceration to run consecutively. These sentences exceeded the aggravated range of sixty-six (66) to seventy-eight (78) months. These sentences were not unreasonable. *Com.v. Walls*, 938 A.2d 1122 (Pa.Super. Sep 14, 2007)(Table, NO. 747 MDA 2003).

support so as to be clearly erroneous.” *Walls, supra* at 961, quoting *Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 839 A.2d 1038, 1046 (2003).

Historically, the Supreme Court has given “broad discretion” to the sentencing court, who “is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it.” *Walls, supra*, quoting *Com. v. Ward*, 524 Pa. 48, 568 A.2d 1242, 1243 (1990). As the Supreme Court observed, “the sentencing court sentences flesh-and-blood Appellants and the nuances of sentencing decisions are difficult to gauge from the cold transcript used upon appellate review.” *Walls, supra*.

The Supreme Court has also concluded “[e]ven though the unreasonableness inquiry lacks precise boundaries, we are confident that rejection of a sentencing court’s imposition of sentence on unreasonableness grounds would occur infrequently, whether the sentence is above or below the guideline ranges, especially when the unreasonableness inquiry is conducted using the proper standard of review.” *Walls, supra* at 964.

The case at bar is not one of the infrequent cases where a sentence is unreasonable or excessive. Given all of the factors stated by this Court orally and in writing, the cited reasons were not “mere fluff.” *Com. v. Sessoms*, 516 Pa. 365, 532 A.2d 775, 781 (Pa. 1987).

Also, Appellant’s sentence was less than what was imposed in other reported cases of neonaticide. As discussed in pages 29 –31 of the January, 26, 2009 Opinion, appellate courts in neonaticide cases have affirmed life sentences for first degree murder.

Appellant’s sentence was based on a series of articulated, reasonable factors drawn from all of Appellant’s circumstances as she created them. Appellant’s sentence was not a manifest abuse of discretion.

FAILURE TO STATE A BASIS FOR REVIEW OF THE DISCRETIONARY ASPECTS OF THE SENTENCE

In Paragraph 8 of the SECA, Appellant continues to argue her sentence was unreasonable by claiming "...the court refused to take into account anything other than the nature of the offense in imposing sentence... ." What Appellant is actually arguing is that her evidence of mitigation was not given the weight desired by Appellant. Such a challenge does not preserve appellate review of the discretionary aspects of Appellant's sentence.

It has long been the law that there is not an absolute right to appellate review of the discretionary aspects of a sentence. *See*, 42 Pa.C.S.A. §9781(b). One of the requirements to preserve such review is to establish a substantial question the sentence was inappropriate under the Sentencing Code. *Id.*

The allegation as couched by Appellant in Paragraph 8 does not raise a substantial question under the Sentencing Code. As stated by the Superior Court: "...[t]his Court has held on numerous occasions that a claim of inadequate consideration of mitigating factors does not raise a substantial question for our review." *Com. v. Matroni*, 923 A.2d 444, 455 (Pa.Super. 2007).

Assuming *arguendo* appellate review of this claim has been preserved, it is nonetheless without merit. This Court had the benefit of a Pre-Sentence Report which was read in its entirety, including the sentencing guidelines. In *Com. v. Devers*, 546 A.2d 12 (Pa. 1988), the Supreme Court created a presumption that a sentencing judge who read the pre-sentence report was aware of all relevant information regarding the defendant's character and "weighed those circumstances along with the mitigating statutory factors." *Id. at 18*. The record in this case supports this presumption.

The record does not support the contention this Court “refused to take into account anything other than the nature of the offense... .” *SECA*, ¶8. Appellant wants to present the false impression this Court did not listen to or read any of the evidence presented by her.

As Appellant was informed orally and in writing at sentencing, all of her evidence of mitigation was reviewed. *See, Statement of Sentencing Rationale, pp. 2, 28, 29; see also, Sentencing Transcript, pp. 36-37.* In fact, evidence of Appellant’s good character was accepted by this Court. *Id.*

As Appellant was also informed, the mitigation in the form of her good character existed at the time she became pregnant. Appellant’s character should have allowed her in the ensuing period of gestation to make decisions far different from her conscious course of deceptive conduct and the lies she told her family, friends, coaches and medical personnel that culminated in Appellant’s intentional suffocation of a living, breathing human being.

The fact that Appellant’s evidence of mitigation was not accorded the weight she desired does not mean this Court did not listen to her witnesses or consider her evidence. As the record reflects, this Court did not have blinders on in evaluating the total circumstances of this case.

WHETHER THE SEPARATION OF POWERS DOCTRINE WAS VIOLATED

Appellant alleges this Court usurped the role of the District Attorney and thereby violated the Separation of Powers doctrine. *SECA*, ¶7. Appellant does not develop this argument in any meaningful fashion other than the bald assertion. Therefore, this claim is waived.

Appellant also fails to establish any standing to raise this claim.

At Appellant’s sentencing, the District Attorney did not object to any alleged usurpation of his role.

The District Attorney filed a written response to Appellant's Post Sentence Motion and did not claim or object to any purported usurpation of his role. To the contrary, the District Attorney stated: "...[t]he Commonwealth asserts that much of what was contained in the police reports, previously supplied to the Court on November 19, 2008, was quoted in its remarks at the time of sentencing, as well as in its "Statement of Rationale." *Commonwealth's Response to Appellant's Post Sentence Motion*, ¶14, December 8, 2008.

In fact, the District Attorney has never claimed a separation of powers violation by this Court.

The fact this Court did not accept the sentencing position proffered by Appellant does not mean there was a constitutional violation of the separation of powers.

**WHETHER THERE WAS SENTENCING ERROR BY SUBSTITUTING
MORALITY FOR THE SENTENCING CODE**

In Paragraphs 9 and 10(a) of the SECA, Appellant alleges error because this Court purportedly substituted its view of morality in lieu of the factors outlined in the Sentencing Code.

This contention is belied by the record. The factors set forth in the Sentencing Code, including §9721, were considered and discussed extensively in writing by this Court in the Sentencing Rationale, orally on the record in Appellant's presence at sentencing and in this Court's Opinion dated January 26, 2009 (see pages 55-59 addressing this issue).

Law and morality are inseverable. A sentencing decision is not divorced from morality. To the contrary, our sentencing laws reflect a moral judgment of our citizens about the conduct that is criminalized and the parameters of the judicial response.

Voluntary Manslaughter has been deemed morally wrong by the people of Pennsylvania and punishable by up to twenty years in jail. In Appellant's case, there were no moral causes or principles that overrode all other sentencing factors or caused an "enhancement" of Appellant's sentence. Appellant was sentenced within the moral and legal parameters set by our citizens based on the circumstances she created.

WHETHER IMPERMISSIBLE FACTORS WERE CONSIDERED

Appellant sets forth a number of allegedly "impermissible" factors that were considered in fashioning Appellant's sentence. *SECA*, ¶¶10 (a)-(g).

Subparagraph (a) has been discussed. Subparagraphs (b) and (c) will be combined into one response. Each ensuing subparagraph will then be discussed.

Appellant alleges it was improper to find she committed an intentional, premeditated murder based on an *in camera* trial and despite the fact her plea was to voluntary manslaughter. *SECA*, ¶10(b). Appellant claims she was sentenced for a crime for which she was not convicted. *SECA*, ¶10(c).

Appellant keeps overlooking the fact she admitted under oath that she intentionally killed her daughter. The circumstances for premeditation in this case were consistent with the intentional killing of Appellant's daughter and cannot simply be ignored.⁴

Whether Appellant's conduct amounts to premeditation in a legal sense does not matter since premeditation is not an element of voluntary manslaughter. The fact remains Appellant had a fully formed intent to kill her child and it was this intent that was considered. Giving the conduct a label of "premeditation" does not change Appellant's conduct or render it an impermissible factor to consider.

⁴ See pages 23 to 26 of the January 26, 2009 Opinion.

Appellant's claim that she was sentenced for a crime she did not commit is the same argument that was rejected in *Com. v. Sheller*, 961 A.2d 187 (Pa.Super. 2008). In *Sheller*, the Appellant shot his wife in the back of the head as she was sleeping on their living room sofa. Sheller had no prior criminal record. He was sentenced to eight (8) to twenty (20) years of incarceration for voluntary manslaughter. This sentence was above the aggravated range of the sentencing guidelines. Sheller argued, *inter alia*, the sentence was based on an impermissible factor, namely the sentencing court's belief Sheller committed murder. Sheller's sentence was affirmed.

Appellant's argument was likewise rejected in *Com. v. Miller*, ---A.2d ---, 2009 WL 189950 (Pa. Super. 2009). Miller pled guilty to Third Degree Murder; various other charges, including arson, were withdrawn as part of a plea bargain. In imposing sentence, the sentencing judge made several references to the fire that engulfed the victim. It was noted the fire was "obviously to cover up what happened" in the homicide and it put the lives of firefighters and the police at risk. *Id.* Miller argued the abuse of sentencing discretion by the consideration of a crime for which he had not been convicted, namely arson. The Superior Court disagreed, finding the sentencing court considered many factors beyond the fire. While the arson charge was dismissed as part of Miller's plea bargain, consideration of the fire did not taint all of the factors considered by the sentencing judge.

In similar fashion, there were many circumstances that were factored into Appellant's sentence. Appellant's sentence was not based on one dominant factor. Appellant was not sentenced for first or third degree murder. She was sentenced to less than the statutory maximum for voluntary manslaughter. Her contention is without merit.

(d) Race, Intelligence, Education and Chytoria Graham.

Appellant alleges that this Court improperly used her “race, intelligence and education to enhance her sentence.” *SECA*, ¶10 (d).

This contention is waived for vagueness and failure to adequately develop the issue. *Com. v. Lambert*, 787 A.2d 327 (Pa. 2001)(failure to develop a theory for relief constitutes waiver). Also, it is not enough for Appellant to allege a constitutionally significant word like “race” without articulating any basis for relief. *Kalichak, supra*.

Appellant also fails to provide any legal authority for the constitutional protection at sentencing of a person’s intelligence and education.

To the extent Appellant premises her argument on the belief that her sentence was improperly “enhanced”, for the reasons previously discussed, this argument affords her no relief under the sentencing scheme in Pennsylvania. *Yuhasz, supra*.

This Court is not going to speculate as to the nature of Appellant’s argument. However, if Appellant is trying to contend she was discriminated against based on her race, intelligence and education, such a contention is belied by the record.

What the record actually reflects is the rejection of the elitist approach suggested by Appellant in her Sentencing Memorandum and at sentencing. This rejection does not mean Appellant’s race, intelligence and education were used to enhance her sentence.

Appellant contorts the record. What is disingenuous is that defense counsel promoted Appellant’s socioeconomic factors by arguing she is among a class of middle/upper echelon women who commit neonaticide and should not be punished with state incarceration.

The primary focus of Appellant’s Sentencing Memorandum was on Appellant’s personal circumstances. In arguing Appellant should not be sent to a state prison, defense counsel wrote

“...placing Teri Rhodes in a setting where her life is in danger serves no societal interest...” *Sentencing Memorandum*, p. 6., November 18, 2008. To further the argument that Appellant should be treated differently, the Memorandum concluded with this reference: “(i)nfanticide offenders are typically young girls with no prior criminal records. They generally come from good homes and are frequently college students.” *Id.* Hence, among other factors prior to sentencing, Appellant was tendering her “good home” and status as a college student as reasons she should not go to a state prison.

This theme was continued at sentencing. The constant focus of Appellant’s evidence was on her personal circumstances. Defense counsel urged this Court to consider, “who she is...” *S.T.*, p. 8.

Appellant’s request for consideration of her background, including her intelligence and education, was perfectly proper and expected. In fact, this Court recognized as mitigation Appellant’s intelligence and education. *Statement of Sentencing Rationale*, pp. 1, 2, 28, 29; *S.T.*, pp. 36-37; and *Opinion*, pp. 27-34, January 26, 2009. What this Court did not accept was Appellant’s attempt to gentrify the Sentencing Code.

At sentencing, defense counsel broached the subject of a purported FBI profile of mothers who commit neonaticide. According to defense counsel, “The FBI has done various studies on it and created what could be the typical individual who commits this particular offense, and Teri fits into that category almost precisely.” *S.T.*, p. 6.

The District Attorney concurred with defense counsel about the FBI profile and stated: “The profile for individuals that commit this type of crime are almost identical. They’re almost solely within a particular age group that this Appellant falls into. The crime is committed predominantly by middle - - upper, middle or upper class women who are highly educated or in

the process of being educated. Ninety-five percent of them, or higher, give the same scenarios, the same identical scenarios as we have in this particular case.” *S.T.*, pp. 25-26.

What was being presented was Appellant’s circumstances were “almost precisely” within and “identical” to an FBI profile. To follow Appellant’s argument, these circumstances meant Appellant should be treated leniently with a sentence in or below the mitigated range.

These arguments were anticipated by this Court given Appellant’s pre-trial submissions. Further, at Appellant’s plea, the District Attorney took the position that the Commonwealth would not object to a sentence in the mitigated range based on a favorable pre-sentence report. *See, Plea Transcript, p. 8, August 5, 2008.* (MR. FOULK: Mr. Friedman and I have discussed the presentence report; and based upon a favorable presentence report, the Commonwealth would have no objection or recommend that the Court, if they so chose, could depart from the standard range of the guidelines and sentence you different; is that your understanding?)

The position of the parties, to-wit, reliance on Appellant’s socioeconomic background and her alleged fit within an FBI profile, were not prevailing reasons for the sentence imposed.

First, the FBI study was never produced by the parties or a cite even referenced. Accepting as true its contents as represented, the purpose of an FBI profile is to describe the type of person who would commit a certain crime. It serves as an aid to law enforcement in identifying and locating a criminal. It was not intended to create a special class of women who should receive preferential treatment for committing a crime. There was no need to even discuss the FBI profile unless arguing for favorable consideration at sentencing based on Appellant’s socioeconomic background.

Unmasked, this argument was an elitist attempt to distinguish Appellant’s circumstances. It attempted to create a class of women who receive favored treatment and left open the question

of sentencing for women who commit neonaticide but do not fit into the FBI profile. The rejection of Appellant's argument does not mean that her sentence was enhanced because of her race, intelligence or education. It just means the purported FBI profile added nothing of importance to the sentencing decision in this case.⁵ It also means Appellant's race was not a determinative factor in sentencing.

This Court had a parallel concern as it relates to cases in Erie County in which women have been sentenced for child abuse to lengthy prison sentences. Based on the Commonwealth's sentencing position as stated at Appellant's plea, this Court had a concern about how the Commonwealth's view conflicted with harsher positions the Commonwealth had taken in other cases where the child victim was not killed.

To illustrate this concern, reference was made to the criminal case of Chytoria Graham. This Court was familiar with the Chytoria Graham case having presided over her trial and sentencing.⁶

Chytoria Graham's personal circumstances do not fit within the purported FBI profile discussed by the parties. As the public records reflect, Graham's highest level of formal education is the completion of ninth grade and she received assistance from the Department of Public Welfare. Also, Graham is serving a five (5) to ten (10) year sentence of incarceration based on the mandatory minimum sentence sought by the Commonwealth in the exercise of its discretion. Graham was convicted of Aggravated Assault on her four-week-old baby who, though seriously injured, survived the assault.

⁵ As it turns out, the purported FBI profile may not accurately portray the neonaticide offender in Pennsylvania. *See, e.g.*, the reported neonaticide cases cited at pp. 29-31 of this Court's Opinion of January 26, 2009.

⁶ *Commonwealth v. Chytoria Graham*, Erie County Docket No. 3344 of 2006.

Because of Graham's lengthy incarceration for the Aggravated Assault on her child, in a separate civil proceeding, all five of her children were adjudicated dependent. Graham's parental rights to all of her children were terminated on August 4, 2008.⁷

Graham's consequences were much more severe than what the Commonwealth was acquiescing to at the time of Appellant's plea. Graham did not kill her infant child. Unlike Appellant, Graham is not eligible for parole prior to the expiration of her five year minimum sentence. *See*, 42 Pa. C.S.A. §9718(b).

There was nothing inappropriate about pointing out what happened to Chytoria Graham as a reason to reject the Commonwealth's incongruent sentencing position in this case. Absent this explanation, which is not required under the Sentencing Code, Appellant would be presently alleging error for failure to state any reason(s) for not accepting the Commonwealth's sentencing position as stated at Appellant's plea.

Appellant cannot claim any form of discrimination or enhancement of her sentence because of her race, intelligence and education. The fact our sentencing laws were not gentrified in the manner suggested by Appellant does not mean she is entitled to post sentence relief.

(e) Political Considerations.

Appellant alleges this Court "improperly injected political considerations into the sentencing proceedings." *SECA*, ¶10 (e).

⁷ This Court presided in the dependency proceedings for Graham's children at Erie County Docket Numbers 1047, 1063-1066 of 2006 and the IVT proceedings at Erie County Orphans' Court Docket Numbers 95 and 95 A-D of 2008.

This allegation is waived for vagueness and a failure to develop it in any meaningful way. To the extent this contention can be deciphered, there is no factual support for it nor is there any basis for post sentence relief.⁸

(f) Whether Appellate opinions were impermissibly considered.

Appellant alleges this Court “improperly used other cases to justify the sentence when the Appellants in the other cases had been convicted of murder and not manslaughter.” *SECA*, ¶10(f).

Trial courts are bound by appellate court decisions and look to them for guidance. It is not impermissible for a sentencing court to consider appellate decisions. If Appellant wants to distinguish an appellate case for any reason, Appellant is free to do so. However, consideration of appellate case law by this Court is not an impermissible factor warranting post sentence relief for Appellant.

In further response to Appellant’s complaint, Appellant is referred to *Sheller, supra*, as an example of a sentence in a voluntary manslaughter case that exceeded the aggravated range of the sentencing guidelines. In *Sheller*, the reasons stated by the sentencing court for sentencing beyond the aggravated range were as follows:

I am going to sentence outside of the aggravated range of the guidelines. And my reasons for departure from the aggravated range are as follows: The recommendation of the prosecution in this case. The trauma imposed upon this family is unspeakable. The children are left without a mother. The shooting was close range to the head. The victim was lying down. The life of the victim being taken in such a violent fashion has caused extreme hardship to others. This offense of Voluntary Manslaughter, in this Court’s humble opinion is more onerous than usual. Anything less would depreciate the seriousness of what has happened here.

⁸ Contrary to Appellant’s insinuation, at sentencing, among the introductory comments of this Court was this observation, “I recognize that my job here is not to make people in the community happy or make a popular decision. But my job is to render, hopefully, justice based upon the facts and the law as it exists.” *S.T.*, p.35.

Sheller, supra, at 191.

In affirming Sheller's sentence of eight (8) to twenty (20) years, the Superior Court stated:

Here, the sentencing court specifically recited proper factors that it took into consideration when determining the appropriate sentence for Appellant, including the impact the crime had on relatives of the victim and that Appellant committed the crime in the family home while the victim's twelve-year-old daughter was present, causing the child to suffer the trauma of finding her mother's body.

Sheller, supra, at 192.

Like *Sheller*, Appellant's sentence was based on the circumstances she created. By comparison to the *Sheller* case, the reasons stated for the departure above the guidelines were more expansive and compelling in Appellant's case. *See, Opinion, pp. 19-26, January 26, 2009.* Similar to *Sheller*, Appellant's actions in perpetrating the crime were appropriate factors to consider in imposing a sentence outside of the guidelines.

(g) Whether Appellant's mitigation was limited to her plea bargain

Appellant contends it was improper to conclude that her negotiated plea bargain was "all of the mitigation to which she was entitled." *SECA, ¶10 (g).*

This argument does not preserve appellate review of the discretionary aspects of Appellant's sentence. *Matroni, supra.*

On the merits of this issue, Appellant seems to be laboring under the belief she is automatically entitled to a credit for mitigation beyond her plea bargain. Appellant fails to establish any legal authority for this belief. What Appellant was entitled to was judicial consideration of any evidence of mitigation she presented. As the record reflects, Appellant

received consideration of her mitigating evidence, albeit the weight given to it was not what she desired.

Appellant also misstates the record. This Court has never concluded that Appellant's plea bargain was all of the mitigation she deserved. In the interest of brevity, pages 27 – 34 of the January 26, 2009 Opinion discuss Appellant's mitigation; pages 32-34 specifically refute Appellant's mischaracterization.

(h) Law Of Impermissible Factors

The sentencing process is not a perfect science. There are variables that make each case unique. What is an important factor to a defendant may not be as important to a sentencing judge.

There may be circumstances that are unfavorable for a defendant, but those circumstances must be reviewed. Consideration of an impermissible factor is not *ipso facto* a basis for post sentence relief. As the Superior Court has stated:

Even if the sentencing court relied on factors that were subsumed into the guidelines recommendation, such as the use of a deadly weapon or the delay before the shooting, there was no abuse of discretion. Even if a sentencing court relies on a factor that should have not been considered, there is no abuse of discretion when the sentencing court has significant other support for its departure from the sentencing guidelines. *Commonwealth v. Smith*, 543 Pa. 566, 673, A.2d 893, 896-897 (1996); *Commonwealth v. P.L.S.*, 894 A.2d 120 133 (Pa.Super. 2006). Here, the sentencing court specifically recited proper factors that it took into consideration when determining the appropriate sentence for Appellant, including the impact the crime had on relatives of the victim and that Appellant committed the crime in the family home while the victim's twelve-year-old daughter was present, causing the child to suffer the trauma of finding her mother's body.

Com. v. Sheller, supra at 192. See also, Com. v. Miller, supra.

In the case at bar, there is significant support for the sentence imposed. There were no impermissible factors considered or at least any that would irreversibly taint the remaining body of relevant factors used in fashioning Appellant's sentence.

WHETHER THE CASE SHOULD BE REMANDED BEFORE AN IMPARTIAL JUDGE

Appellant alleges "the conduct of the sentencing judge mandates that the sentence be vacated and the case remanded for sentencing before an impartial judge." *SECA*, ¶11. Because there is no merit to this appeal, there is no basis for this relief.

Also, Appellant overlooks the fact this Court granted her additional time to review discovery and file any pretrial motions. This Court gave Appellant ample time to decide what to do in her case.

This Court accepted a negotiated plea bargain that enabled Appellant to avoid exposure at a jury trial to a conviction for first degree murder and a life sentence. Appellant also avoided a possible conviction for third degree murder with a maximum of forty years in jail and higher sentencing guidelines. Appellant's criminal record is for manslaughter. This Court permitted all other charges against Appellant to be withdrawn.

This Court sentenced Appellant to less time than sentences mandated for certain sex offenses against a child (regardless of the perpetrator's mitigating evidence). Appellant's sentence was less than the statutory maximum for voluntary manslaughter.

This Court granted Appellant's bond request such that she is free on bond and living with her family while this appeal proceeds.

These decisions do not demonstrate a bias or any ill-will against Appellant. These decisions do not give the appearance of partiality against Appellant.

Appellant also overlooks the fact that the Superior Court does not have authority to re-assign trial court judges. In *Com. v. Klueber*, 904 A.2d 911 (Pa. 2005), the Superior Court vacated a sentence and ordered a re-sentencing before a different trial court judge. The Pennsylvania Supreme Court vacated the Superior Court's order since the Superior Court does not have supervisory or administrative authority to order a new judge to preside at a re-sentencing.

The Supreme Court held the Superior Court "inappropriately ordered a different trial judge hear the case on remand. *See, Pa. Const. art. V, §10(a); 42 Pa.C.S.A. §502; In re Avellino*, 547 Pa. 385, 690 A.2d 1138, 1140-42 (1997) (this Court has supervisory and administrative authority over state courts, including, but not limited to, assignment of trial court judges)." *Com. v. Klueber, supra*.

There is no factual, ethical or legal basis for the relief requested by Appellant.

CONCLUSION

Appellant fully had her day in court. Appellant's sentence was not excessive or unreasonable given all of the circumstances she created. This appeal is without merit.

BY THE COURT:

WILLIAM R. CUNNINGHAM, JUDGE

Date: April 6, 2009

cc: Bradley H. Foulk, Esquire, District Attorney
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