COMMONWEALTH OF PENNSYLVANIA	**:**	**IN THE COURT OF COMMON PLEAS**
	:	**OF ERIE COUNTY, PENNSYLVANIA**
v.	**:**	**CRIMINAL DIVISION**
	:	
TERI RHODES	**:**	**NO. 110 OF 2008**

OPINION

On August 12, 2007, the Defendant intentionally killed her newborn daughter by suffocating her in a plastic bag.

On August 8, 2008, the Defendant entered a negotiated plea. On a general charge of Criminal Homicide, the Defendant entered a plea of guilty to Voluntary Manslaughter. Four other charges were withdrawn by the Commonwealth, to-wit, Concealing Death of a Child, Endangering Welfare of a Child, Recklessly Endangering Another Person and Abuse of a Corpse.

On November 21, 2008, the Defendant was sentenced. On December 1, 2008, the Defendant filed a Post Sentence Motion seeking to vacate and/or modify the sentence. This Opinion is entered to explain the reasons for denial of the Defendant's Motion. [1]

I. THE DEFENDANT'S CRIMINAL CONDUCT

The primary focus of the Defendant's sentencing position was on the Defendant's personal characteristics. For the circumstances surrounding the crime, Defense Counsel presented a Potemkin Village in terms of a façade that the Defendant was a young college student who did not know she was pregnant and panicked irrationally when the childbirth process began. The Defendant wanted

[1] At the time of the Defendant's sentencing, this Court was required by law to provide a written statement of the reasons for the sentence which was done in a document titled Statement of Sentencing Rationale. This document is referenced in this Opinion as "Sentencing Rationale."

Any cites to the plea proceeding held on August 8, 2008 are noted as *"P.T."*. Any cites to the sentencing of November 21, 2008 are noted as *"S.T."*. Any cites to the police reports of the Erie Police Department shall be *"P.R."*.

this Court to focus only on a narrow window of time around the childbirth and then only on selective facts.

However, the circumstances leading to the crime began in the preceding nine months. While the Defendant wants to airbrush out of the picture any incriminating conduct, the sentencing decision has to be based on all of the Defendant's conduct.

Five days prior to sentencing, Defense Counsel submitted a seven-page Sentencing Memorandum that discussed the facts of the crime in these two limited paragraphs:

> Teri returned to Mercyhurst College in August, 2007 for volleyball camp. On August 10, 2007, she underwent a pre-participation physical evaluation with Dr. Cherinor Sillah. Dr. Sillah noted that she had a protuberant abdomen and suspected that she might be pregnant. He, however, cleared her to play volleyball and ordered a sonogram for the subsequent week. Teri underwent physical testing on August 10 and went to two practices on August 11. Those practices involved diving, serving and passing and were very physical in nature. Teri finished practice at approximately 9:00 p.m. and had severe cramps. She took Advil and Midol tablets and attempted to sleep.
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> On the following morning, August 12, she awoke and went to morning practice. She told the coaches that she was too ill to practice and returned to her apartment. She went through labor in her apartment bathroom alone and after hours of labor delivered the child in a breech delivery. She lost a great deal of blood and placed the baby into a plastic bag that she left in the bathroom. Her assistant coach came to her apartment and took her to St. Vincent Health Center for treatment in the emergency department.

Sentencing Memorandum, p. 2.

This recitation of facts was not elaborated on at sentencing. When these two paragraphs are dissected, it is obvious Defense Counsel overstates some facts, understates others and omits a host of significant facts. A breakdown of these two paragraphs is in order to explain why the Defendant's sentencing position was unsupportable.

Notably, Defense Counsel immediately fast-forwarded the picture to August 10, 2007. Because she was cleared to play volleyball after a physical on August 10th, Defense Counsel suggests the Defendant had little or no reason to believe she was pregnant and was thus surprised two days later to be giving birth.[2]

By starting the chronology of events on August 10th, Defense Counsel bypassed a number of important circumstances in the prior months that establish the Defendant was well aware of her pregnancy by the time of her physical.

The Defendant knew she was sexually active during the preceding winter. The Defendant knew she had consensual sex with her college boyfriend "a couple of times." *Defense Exhibit "C," Report of Dr. Sadoff p. 5* (hereafter "*Sadoff Report*"). The Defendant acknowledged she had consensual sex twice during the likely month of conception; she insisted her boyfriend used a condom each time. *Id. pp. 5, 7*. The Defendant said she never used birth control pills. *Id. p. 5*. She confirmed with Lt. Spizarny that she was sexually active with two partners, albeit during different time frames. *P.R. p. 21*.[3]

When the Defendant returned home from college in the spring of 2007, her parents noticed her weight gain. To their credit, during the summer months each parent separately asked the

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[2] A medical doctor may not have been the one to clear the Defendant to play volleyball as averred by Defense Counsel. According to the Commonwealth, it is unclear who conducted the physical examination of the Defendant on August 10, 2007. The examiner was not a medical doctor according to the District Attorney, but perhaps was a medical student or intern. *S.T. p. 46*. This may be a collateral point but it could also be Defense Counsel inflating the status of the person who allegedly cleared the Defendant to play volleyball.

[3] The Defendant also told at least three different people about an incident at a party during the possible time of conception. She first mentioned this subject to the E.R. nurse, Kathy Pruchniewski, whom she told she was at a party over the winter, got drunk and had sex. *P.R. pp. 8, 10*. The next day, the Defendant told Lt. Spizarny (on videotape) a slightly different version. The Defendant said she was at party at a house on Pine Avenue in December, 2006 with some volleyball players, had one drink, got tired, fell asleep in a back room and woke in the morning. *P.R. p. 17*. She felt sick, but she was still dressed and did not suspect anything had happened. *Id.* She did not elaborate any further. *Id.* In the sole interview the Defendant had with Dr. Sadoff over five weeks later, on September 24, 2007, the Defendant said she had a drink, passed out and awoke to find her pants unbuttoned. She was nauseated and "didn't feel right in her vagina" although there was no bleeding or physical evidence of trauma. *Sadoff Report, p. 5*. There is no evidence the Defendant sought medical attention after this incident or reported it to anyone, e.g. her roommate, friends, family, coaches, counselor or the police.

Defendant if she was pregnant. *Sadoff Report pp. 2, 3.* The Defendant's mother asked her on two different occasions if she was pregnant. In every response to her parents the Defendant said she was not pregnant. *Id.* The Defendant's mother also asked her about her menstrual cycle and the Defendant replied that she was having regular periods. *Id.* The fact her parents were asking these questions certainly raised the prospect of her pregnancy to the Defendant.

There are discrepancies in what the Defendant told people after the crime about her menstrual history while pregnant. The Defendant told the emergency room ("E.R.") nurse Kathy Pruchniewski that from January, 2007 on she was spotting monthly. *P.R. pp. 8, 10.* The next day, on videotape, the Defendant told Lt. Spizarny she missed her menstrual period in January, 2007, but thought it was a fluke. *P.R. p. 20.* She also said in the following months she had either a little or a short period. *Id.* By contrast, the Defendant told her mother and Dr. Sadoff her menstrual periods were regular during her pregnancy. *Sadoff Report pp. 3, 5, 7.*

There were other physiological changes occurring with the Defendant that put her on notice of her pregnancy. The Defendant gained 20-25 pounds since her physical for volleyball in the prior year. *P.R. p. 20.* Her weight gain was immediately apparent to her roommate, coaches and the trainer who saw her on August 10th. *Id. pp. 6, 12, 15, 23, 29.* The autopsy report stated the Defendant's baby weighed approximately 6 ¼ pounds. *P.R. p. 29.* This means the Defendant was carrying in her abdomen a child weighing around 6 pounds at the time of her physical on August 10th. [4]

The assistant coach for the Defendant's volleyball team, Sarah King, noticed during exercises on August 10th, the Defendant's belly button was protruding consistent with a pregnant woman. *Id. p. 15.* The Defendant acknowledged that her breasts were getting bigger. *Sadoff Report p. 3.* All of

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[4] The Defendant told Lt. Spizarny on videotape that when she was questioned about the mass in her abdomen during the physical, she just thought she had "a tight ab." *P.R. p. 20.*

these physical changes to her body were objective medical evidence the Defendant cannot dispute as reasons to know she was pregnant.

The most overt evidence of the Defendant's knowledge of her pregnancy comes from her computer. The Defendant's computer records show she expended a considerable amount of time doing extensive research on the Internet over the summer of 2007 about pregnancy and ways to kill a fetus. She researched topics such as "what can kill a fetus", "alternative methods of ending pregnancy", "dilate the cervix", "dilation and evacuation", "herbal abortion techniques", "pregnancy termination" and "terminating pregnancy." *See p. 3* of the Probable Cause Affidavit of the Defendant's arrest warrant.

When asked why she was doing this research, the Defendant told Lt. Spizarny on videotape that she was nervous because people were telling her stuff. *P.R. p. 21*. She wanted to know "what to expect." *Id.* She became concerned so she did research on what could harm her or the baby. *Id.* She looked up pregnancy and pregnancy tests. *Id. p. 22.* The Defendant thought about having an abortion and researched abortion on the Internet. *Id.* She also thought that she could not have a baby. *Id.* She ruled out abortion stating she was brought up better than that. *Id.* These thoughts and this research confirmed the Defendant's knowledge of her pregnancy. Moreover, the Defendant's Internet research is consistent with someone looking for ways to terminate a pregnancy.

Also, the Defendant altered her dressing habits. She told Dr. Sadoff "she wore loose fitting clothes to hide the fact that she was gaining weight." *Sadoff Report p. 3.* Julia Butler, her college roommate, noticed during the weekend of August 10th the Defendant was wearing extra large shirts and was more private in her dressing habits. *P.R. p. 12.* Unlike the prior year when the Defendant would take showers after practice with her teammates at the athletic center, the Defendant went back to her apartment after practice to shower in private. *Id.* Bryan Bentz, one of the trainers for the

volleyball team, observed the Defendant was frequently pulling her shirt down over her stomach making sure her stomach did not show. *P.R. p. 6.*

During the Defendant's physical on August 10th, a mass was noted in her abdomen. The examiner directly asked the Defendant numerous times (fifteen times, according to Bryan Bentz), if she was pregnant. *P.R. p. 29.* In response to each of these inquiries, the Defendant said she was not pregnant. *Id.* The examiner also recommended the Defendant take a pregnancy test. *P.R. p. 20.* Concerned, the examiner ordered an ultrasound test for the following week. *Id.*

The constellation of these circumstances established the Defendant's knowledge of her pregnancy. The Defendant was aware of her consensual sexual activities with her college boyfriend, the party incident and her recent menstrual history. She had been asked directly several times by her parents whether she was pregnant. She researched pregnancy, abortion and related issues on the Internet. She was concerned about what harm could occur to her or her baby and wanted to know "what to expect." She thought about an abortion and ruled it out. The physiological changes to the Defendant's body were undeniable. Her dressing habits were more private and she was making a concerted effort not to expose her stomach to others. She was asked repeatedly during a physical on August 10, 2007 whether she was pregnant because there was a mass in her abdomen. She was carrying a six pound baby. An ultrasound test was ordered.

The Defendant's lack of candor about her pregnancy on August 10 during her physical was not consistent with all of the circumstances known by her. Despite the fact the Defendant was cleared to play volleyball after the physical, this circumstance alone did not mean the Defendant was unaware of or had little reason to suspect her pregnancy.

Next, Defense Counsel avers in the Sentencing Memorandum the Defendant underwent physical testing on August 10, 2007 and two volleyball practices on August 11, 2007 that "involved

diving, surveying, passing and were very physical in nature." *Sentencing Memorandum p. 2.* The Defendant wanted this Court to believe because she underwent physical testing and could participate in "very physical" activities, including diving for a volleyball, she must not have realized that she was pregnant. Unfortunately, Defense Counsel has underreported what occurred.

The Defendant's performance in volleyball practices was limited and unimpressive. She finished last in every physical test on Friday, August 10, 2007, according to her head coach, Ryan Patton. *P.R. p. 23.* To the observation of Sarah King during the last practice on August 11, the Defendant was not diving on her stomach during drills that called for her to do so. *Id. p. 15.* While there may be several reasons for her reluctance to dive on her stomach, among them would include the Defendant's knowledge she was pregnant.

Likewise, there may be several reasons the Defendant finished last in all of the physical tests on Friday. However, it is hard to reconcile the Defendant's poor performance with the fact she had the physical skills to play college volleyball as a freshman on a partial scholarship. *Sadoff Report p. 2.* In any event, the inference sought by Defense Counsel, that the Defendant's participation in physical tests and drills meant she was not aware of her pregnancy is unsustainable under these circumstances.

Also, there were a number of significant events on Saturday, August 11th which establish the Defendant was confronted with the fact of her pregnancy. There were several people who were suspicious the Defendant was pregnant and tried to help her.

Defense Counsel did not mention Coach Patton was so concerned about the Defendant's physical condition and possible pregnancy that after Saturday morning's practice he tactfully asked her "if there was anything he should know." *P.R. p. 24.* The Defendant's consistent response was to say she had not worked out enough over the summer. *Id.*

Glaringly absent from the Defendant's recitation is a discussion she had with Sarah King in the privacy of King's office after practice on Saturday afternoon. During their Saturday discussion, Sarah King directly asked the Defendant if she was pregnant and she denied it. *P.R. p. 15.* King was not swayed and pleaded with the Defendant to consider the risk to her and the baby associated with her participation in volleyball. *Id.* The Defendant continued her denial. *Id.*

Sarah King begged the Defendant to take a pregnancy test. *Id.* King was so concerned she offered to reimburse the Defendant the cost of a pregnancy test. Eventually the Defendant agreed to go to a nearby CVS pharmacy, buy a pregnancy test and tell King the results. *Id*. Within forty-five minutes of agreeing to do so, the Defendant electronically sent King an instant message saying the pregnancy test was negative. *Id.*

The Defendant directly lied to Sarah King and to Lt. Spizarny several times about the pregnancy test she purportedly took on that Saturday.

When the Defendant was interviewed by Lt. Spizarny on videotape beginning at 7:20 p.m. on August 13, 2007, the Defendant acknowledged that Sarah King met with her after Saturday's practice and that King asked her to take a pregnancy test. *P.R. p. 20.* The Defendant told Lt. Spizarny she went to the CVS pharmacy store at 38th and Pine Avenue after practice on Saturday afternoon and bought a pregnancy test. *Id.* She described the test kit as "First Response" in a purple box. *Id.* She took the pregnancy test at her apartment and it was negative. *Id.* She threw the tester away in the garbage in the kitchen. *Id.* She then sent an instant message to Sarah King saying the pregnancy test results were negative. *Id. p. 27.*

Subsequently, she was confronted by Lt. Spizarny with the fact a pregnancy test kit was not found in the trash in her apartment. *P.R. p. 21.* The Defendant's response was that Julia Butler had taken out the trash after she had placed the test kit in it. *Id.*

Later during this discussion, Lt. Spizarny asked the Defendant what she was wearing when she went to the pharmacy to buy the pregnancy test, but she could not remember. *Id. p. 22.* She said she did not purchase anything other than the pregnancy test. *Id.* This demonstrates that twice during this conversation with Lt. Spizarny the Defendant confirmed she bought a pregnancy test on Saturday at the CVS store.

If the Defendant had gone to CVS, it would have been around 4:00 p.m. The store records from CVS reflect that no pregnancy tests kits were sold on Saturday, August 11 between 3:00 p.m. and the store's closing that evening. Hence, the Defendant lied to Sarah King on Saturday and twice two days later to Lt. Spizarny about buying a pregnancy test kit at CVS.

It appears the Defendant told another lie to cover up these lies to Spizarny. Her explanation to Lt. Spizarny why no pregnancy test kit was found in her apartment was because her roommate took out the garbage after she put the test kit in it. This story is not corroborated. According to Julia Butler, she took out the garbage on the way to breakfast on Saturday morning. *P.R. p. 24.* This would mean that Butler took out the garbage before the Defendant purportedly purchased the pregnancy test late in the afternoon. However, given the fact that no pregnancy tests were purchased at the time and place the Defendant claimed, it is immaterial when the garbage was taken out other than it reflects on the Defendant's willingness to tell one lie to cover up a prior lie. Thus, the Defendant's intent to deceive continued through the day after the crime.

Separately, the discussion about pregnancy in Sarah King's office on Saturday on the heels of the Defendant's questioning by the medical examiner on Friday, the pending ultrasound test, the inquiry by her head coach on Saturday, her admitted weight gain, her protruding belly button, her swelling breasts, the weight of the baby and her last place finishes in physical tests all establish the

Defendant was repeatedly confronted with the prospect of her pregnancy well before the childbirth process started and in time to avoid suffocating her child.

In the Sentencing Memorandum, Defense Counsel described the remaining events of Saturday evening as follows, "Teri finished practice at approximately 9:00 p.m. and had severe cramps. She took Advil and Midol tablets and attempted to sleep." *Id. p. 2.* These statements are accurate but only give a glimpse of what occurred.

After practice, the Defendant spent the remainder of Saturday evening at her apartment with her roommate, Julia Butler. The two were alone in the apartment. Julia Butler was someone the Defendant trusted and requested to room with her. *P.R. p. 21.* At any time, the Defendant could have confided in her roommate and asked for help without anyone else knowing. She consciously chose to ignore this opportunity for help for herself and her baby.

Next, Defense Counsel attempted to minimize the events of Sunday, August 12, 2007 by omitting several important circumstances. According to Defense Counsel, all that happened was Teri Rhodes "awoke and went to morning practice. She told the coaches that she was too unwell to practice and returned to her apartment. She went through labor in her apartment bathroom alone and after hours of labor delivered the child in a breeched delivery. She lost a great deal of blood and placed the baby into a plastic bag which she left in the bathroom. Her assistant coach came to her apartment and took her to St. Vincent's Health Center for treatment in the emergency room." *Sentencing Memorandum p. 2.*

Defense Counsel sidestepped the Defendant's discussions with people who were trying to help her that day as well as the Defendant's course of deception that prevented people from knowing what she was actually doing.

The Defendant had a conversation about her condition with Julia Butler on Sunday morning at their apartment and on the way to volleyball practice. She told Butler she was having menstrual cramps. *P.R. p. 12.* She never went beyond this point to ask for help from or confide in Butler. *Id.*

When the Defendant arrived at the athletic center, she had another discussion with Sarah King in the privacy of King's office. She was asked pointblank by Sarah King whether she was in labor. *Id. p. 16.* This was a confidential setting in which the Defendant could have easily confided in her concerned coach who was a female. Yet she stuck to her story that she was just having menstrual cramps. *Id.* The Defendant was excused from practice by Coach King, who, despite the Defendant's denial, still thought she was in labor and mentioned it to the trainer. *Id.*

It was the Defendant's decision to return to her apartment late in the morning knowing that her roommate would still be at volleyball practice and then possibly at lunch. The Defendant put herself in a position of being alone without medical assistance. It was another conscious choice by the Defendant to forfeit an opportunity for help. She could have gone straight to the campus health center. She could have accessed an abundance of national, state and local organizations. She could have gone to one of several local hospitals. She could have called her parents or a sibling. Possibly, she could have called the biological father of the child. The Defendant could have contacted a Catholic priest or nun. She could have utilized the services of the Campus Ministry available at her Catholic college. The Defendant chose none of these accessible and confidential options.

Next, Defense Counsel represented the Defendant went through "hours" of labor "alone" in the apartment before the actual birthing. *Sentencing Memorandum p. 2.* This point was emphasized at sentencing in the these words of Defense Counsel: "I ask the Court to consider who she is and what happened here, all the factors of a young woman alone in an apartment delivering a breach baby with no family, no medical support, nothing." *S.T. p. 8.*

There were two points Defense Counsel was trying to make in these written and oral representations. First, Defense Counsel wanted this Court to believe the Defendant was alone in her apartment when she gave birth. Secondly, that the Defendant was alone for hours during labor in her apartment. Both representations are clearly false as reflected in the following chronology.

On two occasions, the Defendant told Lt. Spizarny she returned to her apartment between 11:30 a.m. and noon on August 12, 2007. *P.R. pp. 11, 18.* At first, the Defendant said the child delivery began about 12:30 p.m. but later changed that to closer to 1:00 p.m. *Id. pp. 11, 19.*

Prior to the actual delivery of the Defendant's child, Julia Butler returned to the apartment. Defense Counsel had the benefit of the videotaped statement of Julia Butler as well as his client's two statements to Lt. Spizarny. Within the statements of the Defendant and Julia Butler, it is very clear that Julia Butler returned to the apartment before the onset of the delivery. The Defendant places herself in the bathroom when Butler arrived home. *P.R. pp. 11, 19.* The Defendant said she had not yet begun delivery of the child when Butler arrived. *Id. pp. 11, 13.* Butler inquired how she was doing and the Defendant replied she was okay, that she was constipated. *Id.*

To the Defendant's knowledge, Julia Butler was present and in a position to help. Instead of asking for and receiving the help of Julia Butler, whose help could have saved the life of this child, the Defendant consciously chose to remain hidden behind the bathroom door and proceed with the birth and the killing.

What is revealing is the Defendant's calculating behavior during this crucial time when Defense Counsel wants to portray her as panicked and in a dissociative state. This contention by Defense Counsel was undermined when the Defendant decided to get Julia Butler out of the apartment by asking her to go to the CVS store to get Midol. At that point in time, by the

Defendant's own admission, she was giving birth to the victim. *P.R. pp. 11, 19.* She made the request for Midol while hidden behind the bathroom door. *Id.*

The Defendant did not come out from the bathroom to talk to Julia Butler. She did not ask Butler to come into the bathroom. The Defendant told Butler to get the money for the Midol from her bedroom. *Id. p. 13*.

All of this conduct was consistent with someone who knew what was occurring and did not want to expose herself or her child to Butler. Alternatively, the Defendant could have communicated to Butler the truth of what was occurring in the bathroom or said nothing at all.

The register receipt from the CVS store indicates the time of purchase for the Midol by Julia Butler was 12:38 p.m. on August 12, 2007. *Id. p. 23*. The time on this receipt means Butler had returned to their apartment from lunch roughly some time before or around 12:30 p.m. This also means the Defendant was not alone for hours in her apartment while in labor as represented by Defense Counsel.

The Defendant had a second reason for getting Julia Butler out of the apartment. The Defendant needed to get scissors from her bedroom so she could cut the umbilical cord. By her admission, while Butler was on the Midol errand, the Defendant left the bathroom and retrieved the scissors from the desk in her room so that she could cut the umbilical cord. *P.R. p. 11.* The Defendant could have asked Butler before she left for the store to hand in scissors from her desk. However, to do so may have exposed a baby attached to the Defendant.

When Julia Butler returned from CVS in about ten minutes, the Defendant was back secreted behind the bathroom door. *P.R. pp. 11, 19.* Julia Butler offered to hand in the Midol that she had just bought for the Defendant. *Id. p. 13.* The Defendant had the presence of mind to not allow Julia Butler into the bathroom, instead directing her to put the Midol in her bedroom. *Id.* The Defendant's

behavior was not consistent with someone in a state of panic or dissociated from reality as Defense Counsel avers. Moreover, it is not consistent with someone whose purported menstrual cramps were so severe she sent her roommate on an urgent errand to the store for Midol. Rather, it is consistent with someone cunning enough to hide from her roommate what she was actually doing in the bathroom.

Next, Defense Counsel downplays the circumstances of the Defendant's trip to the hospital. Defense Counsel simply said, "Her assistant coach came to her apartment and took her to St. Vincent Health Center for treatment in the emergency department." *Sentencing Memorandum p. 2.* Defense Counsel omitted a host of conduct that further demonstrated the Defendant's ability to be focused and manipulative during a time when she was allegedly in a dissociated state of mind.

Sarah King came to the apartment at the distressed request of Butler, who was upset by the Defendant's behavior. *P.R. pp. 13, 16.* King then talked to the Defendant. King immediately noticed the Defendant's stomach looked thinner. *P.R. p. 16.* King asked the Defendant what was the problem and the Defendant replied that she was having a heavy bleed. *Id.* She did not disclose she had just given birth and the baby was in the bathroom.

This was another crucial time when the Defendant could have made a different decision that may have saved the life of her child. At this point in time, the Defendant was in the privacy of her apartment with two women with whom she enjoyed a comfortable relationship. Through that time Butler and King had gone out of their way to help the Defendant. The autopsy report shows the Defendant had given birth to a live, breathing baby that lived for an undetermined period of time. Rather than be forthright with her roommate and coach, the Defendant chose a continued path of deception that possibly snuffed out the last chance this newborn had to live.

Like what she did with Julia Butler, the Defendant had the presence of mind to find a reason to get Sarah King to do something for her. The Defendant asked King to get her some clothes and towels from her bedroom. *Id.* King retrieved these items from the bedroom and handed them into the Defendant in the bathroom. *Id.*

According to Julia Butler, it took the Defendant "forever to finish" in the bathroom before leaving with King for the hospital. *Id. p. 13.* The Defendant was alone in the bathroom during this time. *Id. pp. 13, 16.*

When she did emerge, the Defendant did not bring out the baby she had just birthed. She did not tell Butler or King there was a newborn baby in the bathroom. Instead, she intentionally hid the victim in a plastic bag. She placed the dead child on the floor of the bathtub. The shower curtain was pulled closed in such a fashion that the victim was not openly or easily visible to a person in the bathroom.

Before leaving with the Defendant, Sarah King stepped into the bathroom to look around. *Id. p. 16.* She checked in the trash can and saw some bloody paper. *Id.* She did not see the victim hidden behind the shower curtain. *Id.*

Julia Butler was also suspicious about what happened in the bathroom. After the Defendant left with King, Butler went in the bathroom. She saw some bloody toilet paper in the trash can. *Id. p. 13.* The shower curtain was half closed. Butler did not look behind the shower curtain. Upset by the sight of the blood, Butler left the apartment. *Id.*

In their quick inspections of the bathroom, Butler and King were not able to see the victim hidden behind the shower curtain. As far as the Defendant knew when she left the apartment for the hospital, no one was aware of the crime that occurred in the bathroom or the hidden baby.

The Defendant's presence of mind to conceal the baby in this way reflected her criminal intent and consciousness of guilt. The Defendant had sufficient time and several opportunities to disclose to her accommodating roommate and coach the truth of what just occurred in the bathroom. She consciously chose to create a ruse. This was the genesis of the Defendant's cover-up. It further demonstrates the Defendant's ability to coolly manipulate her circumstances during a time when she was alleged to have been in a dissociative state.

En route to the hospital with King, the Defendant never admitted to King she had just given birth to a child. *Id. p. 16.* While in King's car on the way to the hospital, the Defendant had a cell phone conversation with her father. It sounded to King as though the Defendant's father was repeatedly asking her what was occurring and whether she was okay. *Id.* King was upset the Defendant was not forthcoming in responding to her father's multiple inquiries. *Id.*

Upon arrival at the hospital, the Defendant told admissions personnel her presenting symptom was heavy menstrual cramps. *Id. pp. 7, 8, 10, 20.* This blatant lie was contrary to what the Defendant knew occurred within the preceding hour.

This lie at the hospital demonstrated not only the Defendant's consciousness of guilt but also her intent to complete the cover up of her crime. The Defendant's criminal intent was further manifested while she was waiting for medical attention at the hospital. The Defendant left a message for Julia Butler at 3:07 p.m. on August 12, 2007, instructing Butler to not go into the bathroom because it was a mess. *P.R. p. 14.* This message made no mention of the childbirth or the victim in a plastic bag behind the shower curtain in the bathtub.

At this point in time, the Defendant still had not told anyone about killing her child. To her knowledge, the victim remained undiscovered in her hiding place. There was still a chance the

Defendant could return to the apartment and dispose of the body before anyone could find out. This explains why the Defendant continued to lie to people at the hospital.

When the Defendant was subsequently treated in the Emergency Room, she maintained her ruse when she told the emergency room nurse and doctor her presenting symptom was menstrual cramps. When asked directly if she had recently given birth, the Defendant flatly denied it. *P.R pp. 8, 10.* It was only when confronted by the objective medical evidence of a tear found by the E.R. doctor that the Defendant eventually relented and separately disclosed the childbirth to a nurse. *Id. p. 10.*

The Defendant's reluctant confession to the E.R. nurse did not mean her criminal intent had ended. Instead, she persisted with several lies designed to allow her to dispose of the baby before authorities could find the evidence of the crime.

Thus, the Defendant baldly lied to the E.R. nurse by telling her the baby was in a dumpster on Briggs Avenue. *P.R. p. 10.* The Defendant knew this information was false. The Defendant told the same lie a short time later at the hospital to Lt. Spizarny. *Id. p. 10.* This lie was despite the advice by Spizarny at the outset of the conversation emphasizing the need for the Defendant to be truthful and that he was aware she had already made statements to hospital personnel that were false. *Id.* There was no purpose to be served by these lies by the Defendant other than furthering her criminal design.

Toward the end of their second conversation at the hospital, the Defendant told Spizarny the baby was in her apartment on Briggs Avenue. On this point a correction needs to be made to the reasons for the sentence stated by this Court at sentencing. This Court's original impression was the Defendant did not disclose to Spizarny near the end of their conversations at the hospital the location of the baby in her apartment. However, the probable cause affidavit for the arrest warrant indicates

that after she first said the baby was in a dumpster, the Defendant later admitted the baby was in her apartment.

In fairness to the Defendant, what this means is that she was eventually forthright with Spizarny on this point. It also means there is one less reason to question her motive in hiring a cab and leaving the hospital bound for Tinseltown. She may not have been trying to quickly get back to her apartment to dispose of the baby if she knew the police were now aware of the baby's location.

Nonetheless, Sarah King was still at the hospital when the Defendant was released. It remains questionable why the Defendant did not get a ride home from the hospital with Sarah King. It was King who cared enough for the Defendant that she immediately came to the Defendant's apartment to help, drove the Defendant to the hospital and waited for hours on a Sunday afternoon in August for the Defendant to receive medical treatment. *P.R. p. 16.* Rather than locate King upon her release from the hospital, the Defendant made the necessary arrangements to leave in a cab. It is hard to reconcile this conduct with the Defendant being in a state of panic or detached from reality.

In review, the Defendant's deceptive behavior with Butler, King, the hospital personnel and Lt. Spizarny all demonstrate the Defendant was acutely aware of what had occurred and what she had done. The Defendant had a fully formed intent to commit the crime and then cover it up. The killing of the baby and the lies the Defendant told to cover up what she was doing were the product of a cool, calculating mind. These lies were not produced by someone in a state of panic or a dissociated mental state.

When all of the circumstances are considered, the Defendant was not a naïve college student who panicked on August 12th when she first discovered she was pregnant as she began to give birth. The Defendant knew of her circumstances for a significant time and consciously chose to forego many opportunities to resolve her situation other than by suffocation of the child.

The Defendant was not disconnected from reality; to the contrary, the Defendant was devious and deliberate in the months, days and hours leading up to the killing. As part of her deliberation, the Defendant did extensive research on the Internet about pregnancy and ways to kill a fetus.

The Defendant consciously created a set of circumstances designed to keep her pregnancy a secret and continue her lifestyle. In so doing, the Defendant deceived or attempted to deceive her family, friends, coaches, medical personnel and the police.

Importantly, the Defendant was not alone nor did she need to be alone at the time she killed this child. This killing was unnecessary and easily avoidable.

A sentencing judge is not bound to accept the factual representations of a party. This is especially true in this case because the factual presentation by the Defendant was selective, self-serving and inaccurately portrayed what occurred. In the end, the Defendant's sentencing position was unsupportable.

II. WHETHER THE SENTENCE WAS TOO HARSH, EXCESSIVE AND UNREASONABLE

The Defendant seeks a sentence reduction by arguing her sentence is too harsh, excessive and unreasonable. Further, the Defendant contends there were insufficient reasons stated for the sentence. These allegations are without merit.

There are a host of circumstances distinguishing this case from other manslaughter cases. These factors are summarized hereafter.

A. The Nature and Age of the Victim

The Defendant killed her newborn daughter. This infant was completely defenseless. Her survival primarily depended on the care provided by her mother. This child could not talk. She could not feed or clothe herself. It is uncontroverted the victim was a living, breathing human being. Absent other maladies or misfortunes, she would be nearly eighteen months old now with the prospect of a fulfilling life. That prospect was eliminated when she was intentionally suffocated by her own mother.

The first distinction in this case is the nature of the victim. Her age alone is a salient fact. In *Commonwealth v. Walls*, the age of the victim, a seven-year old girl who was sexually molested by her grandfather, was deemed an aggravating factor by the Pennsylvania Supreme Court. *Commonwealth v. Walls,* 926 A.2d. 957, 967 (Pa. 2007). On remand, the Pennsylvania Superior Court affirmed the sentence for Walls of twenty-one to fifty years, which included consecutive sentences of ten to twenty years each for rape and involuntary deviate sexual intercourse. *Walls,* 938 Ad.1122 (Pa. Super. 2007)(Table). Notably, Walls had sexual intercourse with and fondled his seven-year old granddaughter, but he did not kill her.

Unlike most manslaughter cases, this infant presented no ability to harm her killer. This victim was no threat to her mother's physical health or well-being. This was not a case where the Defendant had to choose between her own death or her newborn's death. The Defendant's survival was not affected by the birth of this child. Also, since the Defendant had no other children, this was not a situation where the continued life of this victim would have adversely affected the health and well-being of other children.

The Defendant could have lived a comfortable and full life had this victim been allowed to live. Indeed, her pregnancy was a life-altering event for the Defendant, but it was not a life-

threatening matter for her or her child. To permit the Defendant to kill her child under these circumstances and then return to her comfortable lifestyle as suggested by Defense Counsel is unacceptable.

B. Parental Relationship of Trust and Responsibility

Another salient factor is the unique relationship of the Defendant to the victim, who had only one birth mother to protect her. As the victim's mother, the Defendant was obligated to ensure the health and safety of her daughter. Unlike most manslaughter cases, the Defendant was in a position of trust and responsibility regarding the victim.

In many areas of our law, parents are charged with a myriad of legal duties intended to ensure the well-being and development of offspring. The parental relationship is so important that our civil laws provide for the highest burden of evidentiary proof to terminate a parental relationship. This most important position of trust and responsibility was severed permanently when the Defendant intentionally suffocated her defenseless daughter.

C. Ample Time to Consider Options Other Than Killing the Victim

Another distinguishing factor is the length of time the Defendant had to ponder her options. This case differs from other manslaughter cases where the circumstances suddenly arise or erupt as a result of cumulative events. The Defendant had possibly eight to nine months to decide what to do. She had hours, days and months before the killing to contemplate her options. This was ample time for the Defendant to address her situation other than by suffocating her baby.

D. Available Resources to Help the Defendant Resolve Her Dilemma Without Killing Her Child

Unlike almost every other form of manslaughter, the Defendant had a plethora of resources to assist her and avoid killing another human being. In the months leading up to August 12, 2007, the Defendant had access to national, state and local organizations whose raison d'etre is to help women in the Defendant's situation. This help was available in the Defendant's home state of Michigan and her collegiate state of Pennsylvania. Confidential assistance was available on her college campus. All of these options could have preserved the secrecy of her pregnancy, her lifestyle and saved the life of this child.

In her Sentencing Memorandum and at sentencing, the Defendant presented with a close-knit family consisting of two loving parents and three sisters. The Defendant had many opportunities to confide in them right up until the time of the killing. With their assistance, this killing need not have occurred.

If the Defendant was not comfortable discussing this matter with her immediate family, she was blessed with a deep pool of relatives, neighbors and friends with whom she could have sought refuge. She also had available her trusted roommate, Julia Butler, who was with her right through the time of the killing. The Defendant was fortunate to have a very caring assistant coach, Sarah King, who bent over backwards to help her in the days before the killing.

The Defendant's head coach, Ryan Patton, expressed concern for her in plenty of time to avert this killing. The Defendant's volleyball teammates were in proximity and could have helped her, as was a team trainer, Bryan Bentz. She could have sought advice from the medical examiner during her physical on August 10, 2007. It is possible the biological father could have helped her. The Defendant could have gone to her Catholic priest back in Michigan or consulted with a priest or

nun in Pennsylvania. She could have sought refuge through the Campus Ministry at the Catholic college she was attending. She could have called a Hotline advisory service.

The Defendant had more resources readily available to her for months than many women in her situation. She consciously spurned all of these options.

E. Evidence of Premeditation

Another prominent factor that distinguishes this case from other manslaughter cases is the Defendant's premeditation. This was not a spontaneous killing done in a state of panic by a person who did not know she was pregnant until she began to give birth. The Defendant had plenty of time and reasons to know she was pregnant. While she may have been in denial and wished away her pregnancy, she was not detached from reality. To the contrary, she was deliberate and devious in her behavior.

Perhaps the most damaging evidence of premeditation is the Defendant's extensive research on the Internet about pregnancy and ways to kill a fetus. There would be little reason to do this type of research if you were not aware of your pregnancy and were not plotting ways to kill your fetus/child.

There were many forks in the road for the Defendant during the course of her pregnancy. There were many pivotal points when she had to make a decision what to do about her pregnancy. There were many chances the Defendant had to make decisions that would not have sent her down the road to suffocation of her child.

These decisions included the Defendant's responses to the inquiries from her parents about the appearance of her pregnancy. At that point the Defendant had choices. She was aware of her

sexual and menstrual history in the preceding months. She could have taken a pregnancy test to answer the questions posed to her.

During the summer of 2007, the Defendant was experiencing physical changes to her body that would have required some thought and response on her part. She had to decide whether to seek a medical opinion about what was occurring to her. She chose to forego a medical opinion.

The Defendant was obviously contemplating her options when she went on the Internet. Her research may have answered some questions for her. However, the nature of the topics she was researching reflect the Defendant's thoughts that helped form her remaining decisions.

When she was confronted about her pregnancy during her volleyball physical on August 10th, the Defendant had a decision to make. She could have confided in the medical examiner, a person with some expertise she needed. The Defendant could have accepted the examiner's suggestion she take a pregnancy test. She decided against any of these options. Her decision was to repeatedly deny her pregnancy to the examiner despite all of the information known to her at that time.

She had a decision to make whether to confide in her trusted roommate, Julia Butler. Despite many opportunities to do so over the summer and during the week-end of August 10th, 2007, the Defendant went to great lengths to keep her secret from Butler. Perhaps the most egregious decisions the Defendant made were the calculated deceptions she used to prevent Butler from helping her during the week-end of August 10th. The decisions the Defendant made on Sunday, August 12th intentionally prevented Julia Butler from becoming aware of the Defendant's pregnancy and from helping her. Had the Defendant made a different decision at any point over the week-end, this baby would not have been suffocated.

The Defendant had many decisions to make whether to confide in Sarah King and to accept King's direct offers of help. The Defendant could have talked about her situation with King at any

time over the August 10th week-end. The Defendant had two golden opportunities to confide in King in the confidential setting of King's office. On Saturday afternoon, the Defendant was alone with King in the privacy of King's office. The Defendant was pointedly asked by King whether she was pregnant. King pleaded with the Defendant to consider the risks to her and her baby. During this discussion, the Defendant had a series of decisions to make about confiding in King, buying a pregnancy test and taking a pregnancy test. We know the dishonest decisions the Defendant made with King on that Saturday.

Likewise on Sunday morning, the Defendant was alone with King. The Defendant was asked if she was in labor. The Defendant decided not to confide in King or accept the opportunity for help for her or her baby. We also know the Defendant's decision to lie to King later that day when King first arrived at the Defendant's apartment.

During the same week-end, the Defendant had decisions to make about her interactions with Coach Patton. After practice on Saturday morning, the Defendant had a direct opportunity to talk to Coach Patton about her situation. She decided not to confide in him or accept that opportunity for help.

The Defendant had decisions to make with all of the other people who were available to help her over the August 10th week-end. Bryan Bentz, the trainer, was trying to help the Defendant at various times throughout the week-end. The Defendant's teammates were accessible for help. The Defendant could have sought refuge with her family, friends and many other people and organizations. Instead, she chose a criminal course.

At all of these pivotal moments of decision, the Defendant chose secrecy and not to access the resources that could have helped her and her baby. Almost all were conscious decisions the Defendant made at a time when she was not undergoing the stress of the childbirth process.

During the child delivery process, the Defendant displayed a remarkable ability to stay focused despite all of the physical and emotional trauma she was enduring. While in the bathroom in the early afternoon of August 12th, the Defendant coolly made calculated decisions that enabled her to prevent others from knowing what she was doing.

The thread that runs through all of the decisions the Defendant made to deceive others forms the fabric of her premeditation. The Defendant intentionally told a series of lies to her roommate, coaches, medical personnel and the police to conceal her intent and her crime. She made choices that ultimately lead her to kill her child. These choices by the Defendant constitute her premeditation.

F. No Need for Killing

This was a killing that was unnecessary and avoidable. Unlike most manslaughter cases, the victim was not involved in a bar fight or a domestic dispute with the killer. The victim was not armed. The victim did not engage in a series of abusive behaviors over time toward her killer. The victim did nothing to provoke her death.

G. Summary

The totality of the Defendant's conduct was different from most manslaughter cases. The Defendant's sentence holds her accountable for what she did. The sentence was individualized and dictated by the conscious decisions the Defendant made over an extended period of time that enabled her to intentionally suffocate her helpless daughter.

III. CONSIDERATION OF MITIGATING FACTORS

The Defendant contends the sentence did not include any consideration of her mitigating evidence. This contention is belied by the record as a whole.

From the beginning, Defense Counsel has taken the position that neonaticide should be treated differently from any other form of killing. Also, in part because the Defendant purportedly fits an FBI profile of neonaticide perpetrators, she should be given preferential treatment. Neither of these positions is supportable under the facts of this case.

Our state legislature is free to hold public hearings and receive evidence from the finest minds in the medical, psychiatric and psychological fields about the state of mind of a woman who commits neonaticide. The legislature can consider the plight of women situated similarly to the Defendant. The legislature can then decide whether the people of this Commonwealth want to take a different approach to neonaticide cases. To date, our legislature has chosen not to do so.

To the contrary, our state legislature has created serious sanctions for crimes committed against children. As noted at the Defendant's sentencing, the people of Pennsylvania have expressed genuine concern about the protection of children by enacting laws mandating lengthy minimum sentences for defendants who commit heinous crimes against children.

Specifically, a law in our Sentencing Code titled "Sentences for Offenses Against Infant Persons" provides a mandatory minimum sentence of ten to twenty years in jail for the rape of a child.[5]

Likewise, having involuntary deviate sexual intercourse (meaning sexual acts orally or anally) with a child less than thirteen years old results in a mandatory minimum sentence of ten to twenty years in jail.[6]

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[5] See 42 Pa.C.S.A. §9718 (1),(3). It should be noted that at page 31 of the Sentencing Rationale, this section of the statute was incorrectly cited as §9721.

Similarly, a mandatory minimum sentence of ten to twenty years is required for Aggravated Indecent Assault against a child under age thirteen.[7]

Meanwhile, certain forms of Aggravated Assault against a child under thirteen require a mandatory minimum sentence of five to ten years in jail.[8] Likewise, a different form of Aggravated Indecent Assault against a child under thirteen warrants a mandatory minimum sentence of five to ten years.[9]

For all of these mandatory sentences, parole shall not be granted until the minimum term of imprisonment has been served.[10]

Enactment of these mandatory laws means there are severe consequences for a defendant who commits a serious crime against a child. By contrast to most other crimes, where advisory, non-binding sentences are suggested by way of the sentencing guidelines, these mandatory laws foreclose judicial discretion and require a minimum period of lengthy incarceration.

In other words, the citizens of Pennsylvania have not suggested a sentence by way of the sentencing guidelines; instead a minimum period of incarceration is mandated. These mandatory sentences reflect the collective judgment of the citizens of Pennsylvania about how criminals should be treated for certain crimes against children.

Notably, these mandatory minimum sentences are applicable regardless of the mitigating circumstances in the defendant's life. Accordingly, a person who is situated similarly to the Defendant, to-wit, no prior criminal record, age 18 at the time of the crime, middle to upper class economically, stable nuclear family, an established religious base, high school graduate, two years of college with success at every academic level, athletic achievements, volunteer work in the

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[6] 42 Pa. C.S.A. §9718 (1). These provisions were applicable in the *Walls, supra* case.
[7] *Id.* §9718 (3).
[8] *Id.* §9718 (2)
[9] *Id.* §9718 (3)
[10] *Id.* §9718 (b)

community and favorable references from relatives and friends in her hometown, would still be going to jail for at least ten to twenty years if she were convicted of Rape, Involuntary Deviate Sexual Intercourse or Aggravated Indecent Assault of a child. The perpetrator would be going to jail for at least five to ten years for Aggravated Assault or other forms of Aggravated Indecent Assault. The offender also would not be eligible for parole until the mandatory minimum has been served. These sentences are mandated by the people of Pennsylvania regardless of the defendant's mitigating circumstances.

In this case, the Defendant is not facing any of the described mandatory sentences. Nor is the Defendant facing the possibility she is not eligible for parole prior to the expiration of her minimum sentence. By contrast, the Defendant is eligible for release from a state prison into a pre-release program eighteen months prior to the expiration of her minimum sentence, with participation in a pre-release program beginning twelve months before the expiration of her minimum sentence.

Contrary to the Defendant's Post Sentence Motion, the Defendant's case was mitigated. She was permitted to enter a plea to Voluntary Manslaughter thereby avoiding exposure to a life sentence for first degree murder or a possible maximum sentence of forty years for third degree murder. The Defendant overlooks the fact there are a host of women who committed neonaticide in Pennsylvania under similar circumstances as this case and who are serving more severe sentences than the Defendant, including life in prison for first degree murder.

On March 11, 2008, a jury in Washington County convicted Jessica Rizor of first degree murder and other charges for giving birth to a newborn baby in the bathroom of the home she shared with her husband and mother, killing the newborn child and then placing the baby in a trash bag.[11] Rizor told her husband the trash bag contained Thanksgiving leftovers. At trial, Rizor contended she

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[11] See *Commonwealth v. Rizor, Washington County Docket Number 2637 of 2004*.

suffered from a "depersonalization disorder" in which she did not appreciate what she was doing. The jury did not agree. Rizor was sentenced on June 5, 2008 to life in prison.

A jury in Northumberland County convicted Tracy Dupre of first degree murder and related charges for giving birth in her bathtub, drowning the baby and then placing the child in a garbage bag.[12] The victim was subsequently found in a dumpster. Dupre was sentenced on December 10, 2002 to life imprisonment without parole and an aggregate consecutive sentence of 6 months to 19 years for the related charges. The Superior Court affirmed by Opinion and Order dated January 11, 2005.[13]

The Defendant holds out her age as a mitigating factor. Yet two women who were younger than the Defendant at the time of killing a newborn child are doing life sentences without parole for first degree murder.

Melisa McManus was sixteen years old on April 1, 1993 when her newborn child was suffocated in a trash bag. Like the Defendant, McManus concealed her pregnancy, tried to hide the victim's body and lied to authorities afterwards about the crime. She was tried as an adult in Lancaster County and convicted of first degree murder on May 6, 1994.[14]

Melisa McManus was sentenced to life in prison without parole. This result was affirmed by the Superior Court on May 1, 1995.[15] The Pennsylvania Supreme Court denied allocatur on November 14, 1995.[16]

A similar case occurred in Dauphin County. Tina Marie Brosius was almost five months younger than Teri Rhodes when she drowned her newborn infant in a portable toilet in a public park

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[12] *Commonwealth v. Dupre, Northumberland County Docket Number 01-914.*
[13] *Commonwealth v. Dupre,* 866 A.2d 1089 (Pa. Super. 2005)
[14] *Commonwealth v. McManus, Lancaster County Docket Number 2039 of 1993.*
[15] *Commonwealth v. McManus, 445 Pa. Super. 628, 664 A.2d1057 (1995) (Table, No. 1930 PHL 94).*
[16] 543 Pa. 692, 670 A.2d 141 (1995) (Table, No. 376 M.D. Alloc. 1995).

on May 8, 1994.[17] Tina Brosius was convicted of first degree murder and is serving a sentence of life in prison without parole.

A separate case of neonaticide in Dauphin County resulted in a conviction for Third Degree Murder and Endangering the Welfare of a Child. Lori Pinkerton suffocated her son within an hour of giving birth and then gave bogus stories to authorities about the circumstances surrounding the birth and the whereabouts of the dead body.[18] She was sentenced to the maximum sentence existing then for Third Degree Murder of ten to twenty years of incarceration. [19] The Pinkerton case was affirmed by the Superior Court by Opinion and Order dated April 8, 1997.[20]

There are many factual similarities between these cases and the Defendant's case. There was an attempt to conceal the pregnancy. The killing took place shortly after giving birth. There are instances of suffocation in a plastic bag. There are attempts to hide the victim afterwards. Fabricated stories about what happened or where the body was located are told by the defendant to medical and legal authorities afterward.

All of these defendants are serving sentences longer than the Defendant. In fact, all but Pinkerton serving life sentences without parole.

By comparison, the Defendant had the benefit of a plea bargain accepted in which her homicide charge was reduced to Voluntary Manslaughter. The Defendant's exposure to a life sentence for First Degree Murder or a forty year maximum sentence for Third Degree Murder was eliminated.

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[17] *Commonwealth v. Tina Brosius, Dauphin County Docket Number 1540 of 1994.*
[18] *Commonwealth v. Pinkerton, Dauphin County Docket No. 1736 CD 1995.*
[19] The maximum sentence for Third Degree Murder was increased to forty years effective April, 1998. *See* 18 Pa.C.S.A. §1102(d). The forty year maximum for Third Degree Murder was in effect on August 12, 2007 when the Defendant's crime occurred.
[20] *Superior Court Docket Number 0100 Harrisburg 1996, April 8, 1999.*

Four additional charges against the Defendant were withdrawn. Two of the withdrawn charges, Concealing the Death of a Child and Endangering Welfare of a Child, were first degree misdemeanors each carrying a five year maximum sentence. The charges of Recklessly Endangering Another Person and Abuse of a Corpse were second degree misdemeanors each carrying a maximum sentence of two years in jail.

Added together, the dismissal of these four charges eliminated a possible fourteen years of additional sentencing exposure for the Defendant. Remember, Tracy Dupre received six months to nineteen years of incarceration for the crimes committed in addition to the life in prison for murder.

The Defendant received a fair resolution of her case by a plea to one reduced charge and the dismissal of four related charges.

Her sentence was also mitigated by the circumstances over which she had control. All of the mitigating circumstances as cited in Paragraphs 22 A and B of the Defendant's Post Sentence Motion were reviewed in the first two pages of the Sentencing Rationale. This Court accepted as true all of the representations about the personal characteristics of the Defendant as reflected in these comments:

> I want to begin with what has been proffered as the mitigation in this case. And I certainly empathize deeply with the family of Teri Rhodes, with Teri Rhodes herself. I know it has to be devastating. 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. I think Teri is a very kind-hearted and loving person. And you've lived your life, for the most part, to earn what has been said here today.
>
> I take into account all your circumstances that have been described here, all your character traits, and it's pretty obvious what they are.
>
> I do note I may have made one mathematical mistake, which is my mistake. I had it written as you were 19, you may have been 18 at the time you were pregnant.

> I do accept the representations that you're remorseful for what occurred in this case and I note you've accepted responsibility by way of your plea to voluntary manslaughter, and I take that into account.

S.T. pp. 36-37.

The Defendant was also informed: "This Court is empathetic to the situation Teri Rhodes found herself in January, 2007. This Court fully appreciates the reasons for compassion for Teri Rhodes and her family." *Sentencing Rationale pp. 28-29.* Further, "The parties are correct that Teri Rhodes has lived an exemplary life until the events leading up to the killing of this child." *Id. p. 29.*

The sentence imposed by this Court took into consideration all of the evidence of mitigation presented by the Defendant. These circumstances were then balanced with the nature and extent of her criminal conduct. As the Defendant was informed, the mitigation in the form of her good character existed at the time she got pregnant and throughout her pregnancy. The Defendant's character should have deterred her from committing this crime.

The Defendant abandoned her integrity and honesty and engaged in a course of intentionally deceptive behavior that enabled her to lie to her family, peers, coaches, medical personnel and the police. She chose not to use her intelligence, talents and resources to resolve the challenge she faced with her pregnancy. Ultimately, the Defendant chose the worse possible option.

None of the Defendant's character witnesses were there in the days leading up to the Defendant's crime and may not be aware of all of her conduct or the circumstances she created. While their opinions of the Defendant's character are solidly based on years of contact with her, the undeniable fact remains the Defendant has proven capable of committing a heinous crime against an infant who was totally dependent upon her for survival.

By contrast, none of the people who were with the Defendant in the days leading up to her crime attested to her character. Julia Butler, Sarah King, Ryan Patton and Bryan Bentz did not

submit letters or speak on the Defendant's behalf at sentencing. Nor did any members of the Defendant's college volleyball team. In the broader view, there were no letters or appearances at sentencing by any of the Defendant's friends, classmates, teachers or administrators from Mercyhurst College.[21]

In the end, the Defendant received a lesser sentence than if she raped a child, had involuntary deviate sexual intercourse with a child or committed an aggravated indecent assault of a child. It was also less than the statutory maximum of ten to twenty years for Voluntary Manslaughter. To say evidence of mitigation for the Defendant was not considered is inaccurate.

In *Commonwealth v. Devers,* 546 A.2d 12 (Pa. 1988), the Pennsylvania Supreme Court held:

> "(w)here pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of the relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors."

Devers, 546 A.2d at 18.

In this case, the Pre-Sentence Report was read in its entirety. There were no objections to it by either party. This Court also had the benefit of the mitigating evidence submitted by the Defendant prior to and at sentencing that was duly weighed. The fact the Defendant does not like the sentence does not mean that her evidence of mitigation was not utilized.

IV. WHETHER THE SENTENCING WAS A "SHAM" PROCEEDING

Defense Counsel alleges the Defendant's sentencing was a "sham" proceeding. *Post Sentence Motion Paragraph 28.* The law and the record expose this characterization as hollow.

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[21] Interestingly, the parents of the Defendant's roommate her freshman year wrote but their daughter did not. Specifically, Edward and Jean Ross, who live a short distance from the Defendant's parents in Michigan, wrote letters on behalf of the Defendant, but their daughter, Amanda Ross, the Defendant's roommate freshman year, did not write on the Defendant's behalf for sentencing purposes.

By law, the following is required at a sentencing:

> (1) At the time of sentencing, the Judge shall afford the Defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing.
> (2) The Judge shall state on the record the reasons for the sentence imposed.
> (3) The Judge shall determine on the record that the Defendant has been advised of all post sentencing rights.
> (4) The Judge shall require that a record of the sentencing proceedings be made and preserved so that it can be transcribed as needed…

Pa.R.Crim.P. 704 (C)(1)-(4).

Consistent with these requirements, the Defendant had a full opportunity to present any and all information for sentencing purposes. In fact, ten witnesses testified in addition to the Defendant.

Further, Defense Counsel provided to this Court a Sentencing Memorandum on Monday, November 17, 2008 setting forth the Defendant's background, a very brief statement of the facts and other sentencing considerations to support the Defendant's requested sentence.

Attached to the Sentencing Memorandum was a report dated May 31, 2008 from Dr. Neil S. Kaye, who holds himself as an expert on neonaticide. *See Defendant's Exhibit "A."* Also attached was a report dated October 30, 2008 from Dr. Cathy Pietrofesa, a therapist who has worked with the Defendant. *See Defendant's Exhibit "B."* A third report was attached from Dr. Robert Sadoff dated September 4, 2008 which has been identified as the "Sadoff Report." *See Defendant's Exhibit "C."*

Also provided with the Sentencing Memorandum were a compilation of letters from relatives and friends in support of the Defendant. *See Defendant's Exhibits "D1-D68."* [22] The ten witnesses who were called to testify at the time of sentencing each had submitted a letter within Exhibit "D." *See Exhibits "D5, 6, 8, 21, 36, 45, 54, 58, 59 and 66."*

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[22] Defense Counsel said there were 68 letters. Actually there were 66. There were duplicate letters from Kristina Hutson and Gerald Anderson.

The Defendant's Sentencing Memorandum, three reports and the letters of support were all read prior to sentencing. Defense Counsel was so informed at the outset of the sentencing proceeding. *S.T. p. 5.*

The Defendant was given an unlimited opportunity to exercise her right of allocution. The Defendant did speak on her own behalf. *S.T. pp. 22-23.*

Defense Counsel was given an unlimited opportunity to present any and all argument he deemed appropriate on the Defendant's behalf. *S.T. pp. 5-23.*

The District Attorney stated his position and was given as much time as he desired to make his presentation. *S.T. pp. 23-34.*

Once all the parties were done, this Court set forth on the record the reasons for the sentence imposed. The entire proceeding was preserved on the record by a court stenographer. The Defendant was duly informed of all of her post-sentencing rights.

Accordingly, the Defendant fully had her day in court at the time of sentencing as required under the law. For the Defense Counsel to characterize this proceeding as a sham is unfortunate.

Next, Defense Counsel objects to the preparation by the Court of a written statement of the reasons for the sentence imposed. Defense Counsel contends the Sentencing Rationale demonstrates a bias and that the sentence was predetermined. *Post Sentence Motion Paragraph 17*. As a matter of law and fact, these objections are baseless.

By law, if a sentence is going to be imposed outside of the sentencing guidelines, "the Court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. Failure to comply shall be grounds for vacating the sentence and re-sentencing the Defendant." 42 Pa.C.S.A. §9721(b). In this case, the sentence was outside of the sentencing guidelines, thus §9721(b) mandated a contemporaneous written statement of the reasons for the

sentence. In accord therewith, the Sentencing Rationale was presented to the parties at the time of sentencing and filed that morning.

Obviously the statutory requirement of a written statement contemplates that a judge think about an appropriate sentence ahead of time and be prepared to provide a written statement at the time of sentencing. Prior to most cases, the judge is provided a pre-sentence report to read before sentencing.

As Defense Counsel knows, he provided a lengthy Sentencing Memorandum, three reports and voluminous letters to be read ahead of time. Defense Counsel wanted the Court to consider the Defendant's evidence and position prior to sentencing. There is nothing wrong with this procedure; in fact, it is common. As a practical matter, if this information is not reviewed ahead of time, what is left is a situation where all of the parties have to wait as a judge sits there and reads a stack of documents, hears from the parties and then decides a sentence on the spot. This latter scenario is not an efficient or effective method to arrive at a sentencing decision.

The procedure used in this case, including by Defense Counsel, was consistent with the manner in which sentences historically have occurred in Erie County and probably throughout the Commonwealth. It allows for a more deliberative process of formulating an appropriate sentence.

There is another key fact that Defense Counsel overlooks. The Sentencing Rationale did not include the actual sentence to be imposed. This omission was intentional because a final sentencing decision was not made until all of the evidence was presented at sentencing. The Sentencing Rationale was prepared ahead of time in the event the sentence was outside of the guidelines. If the sentence were within the guidelines, the Sentencing Rationale, while not required by §9721(b), still served the purpose of stating the reasons for the sentence in this highly emotional case.

Also, Defense Counsel's sentencing position was well known prior to sentencing and did not change at sentencing. By way of his Sentencing Memorandum and the supporting documents, Defense Counsel was seeking a sentence below the mitigated range of the sentencing guidelines in the form of either community service, probation or, at most, a county-level jail sentence.

All of the evidence presented by the Defendant at the time of sentencing was consistent with this sentencing position. There were no surprises or new revelations by way of the evidence or arguments presented on behalf of the Defendant at sentencing. This was not a case where there was startling new information revealed at sentencing that enhanced the Defendant's sentencing position. Hence, the Defendant had a full opportunity to present her sentencing position.

Lastly, Defense Counsel objects because he was not given a copy of the Sentencing Rationale until after the parties had presented their case. This objection is not supported by any legal authority.

Admittedly, the Sentencing Rationale was lengthy as necessitated by what occurred in this case. By law, there is no requirement the Defendant be provided with the Court's written reasons ahead of time. There is no provision empowering Defense Counsel to cross-examine the Court on its written reasons for the sentence imposed. Hence, the request by the Defense Counsel for a recess to read the Sentencing Rationale was properly denied.

Contrary to what is pled, Defense Counsel was given an opportunity to object and state the reasons for his objections:

> MR. FRIEDMAN: Your Honor, could we have an opportunity to read this and also see the Court in chambers before - -
>
> THE COURT: No. I don't - - I don't think we need - -
>
> MR. FRIEDMAN: I am disturbed about just receiving this at this time.
>
> THE COURT: You may be.
>
> MR. FRIEDMAN: I have things I'd like to put on the record then.

THE COURT: Go ahead.

MR FRIEDMAN: I'll wait.

S.T. pp. 34-35.

As the record reflects, Defense Counsel decided to wait until after sentencing to object. In fact, after sentencing Defense Counsel placed objections on the record to the proceeding.[23] Hence, all of the Defendant's objections have been preserved for appellate purposes and the Defendant has not suffered any actual or legal prejudice. None of the claims in the Defendant's Post Sentence Motion have been declared to be waived.

The Defendant's sentencing was conducted consistent with all procedural and statutory requirements. Because the Defendant does not like the sentence does not render the proceeding a sham nor is there a basis for post-sentence relief.

V. THE FACTUAL BASIS FOR THE SENTENCE

The Defendant argues her sentence should be vacated because the proceeding was a "star chamber procedure", that the Court held an "in-camera non-jury proceeding" in which findings of fact and conclusions of law were entered without the opportunity for the Defendant to participate by way of cross-examination or presenting witnesses. *Post Sentence Motion Paragraphs 10, 24, 27.* To the contrary, the Defendant had an uninterrupted opportunity to participate in the proceeding. The Defendant's contention also ignores the long history of sentencing law in Pennsylvania.

[23] After the Defendant's sentencing, a short recess was taken from 11:05 a.m. until court was reconvened at 11:13 a.m. At that time, Defense Counsel placed his objections on the record. This latter proceeding was really a continuation of the Defendant's sentencing but was given a separate transcript by the court stenographer. Thus, the cite to when Defense Counsel placed his objections on the record is still *S.T.*, but it is at pp. 2-5 of the latter transcript which starts at 11:13 a.m.

Over the years, our appellate courts have held "The court in sentencing may receive any relevant information which will enable it to exercise its discretion in determining the proper sentence or penalty. A proceeding to determine a sentence is not a trial, and the court is not bound by the restrictive rules of evidence properly applicable to trials." *Commonwealth v. Orsino,* 178 A.2d 843, 846 (Pa.Super. 1962)*(Internal citations omitted.)*

As far back as 1940, the Pennsylvania Supreme Court held: "(I)n determining what the penalty shall be after convictions in criminal cases, courts have a wide latitude in considering facts, whether or not these facts are produced by witnesses whom the members of the court see and hear. In many jurisdictions courts in determining proper sentences consider official records and the reports of probation officers, psychiatrists and others. This court without seeing or hearing any witnesses can determine whether a sentence of death for murder in the first degree should be reduced to life imprisonment." *Commonwealth v. Petrillo,* 16 A.2d 50, 58 (Pa. 1940).

More recently, the Pennsylvania Superior Court addressed the responsibilities of a sentencing judge in ensuring there is sufficient information about the crime to impose an appropriate sentence:

> The first responsibility of the sentencing judge is to be sure that he has before him sufficient information to enable him to make a determination of the circumstances of the offense and the character of the defendant." *Commonwealth v. Carter,* 336 Pa.Super. 275, 485 A.2d 802,804 (1984). Thus, a sentencing judge must either order a PSI report or 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. *See Martin,* 466 Pa. at 134 n.26, 351 A.2d at 658 n. 26 (1976). While the extent of the pre-sentence inquiry may vary depending on the circumstances of the case, "a more extensive and careful investigation is clearly called for in felony convictions, particularly where long terms of confinement are contemplated." *Id. (Citation omitted.)*

Commonwealth v. Goggins, 748 A2d. 721,728 (Pa. Super. 2000).

In this case, a Pre-Sentence Report was reviewed by this Court prior to sentencing. *Sentencing Rationale p. 3*. However, the Pre-Sentence Report shed little light on the facts surrounding the crime. Under the heading "Description of Offense," the Pre-Sentence Report contains this two-sentence description:

> On 08/12/07, the Defendant secretly gave birth to a daughter in the bathroom of her apartment, unassisted by medical personnel. She placed the live, full-term infant in a plastic garbage bag where the baby died of asphyxia.

Pre-Sentence Report p. 2.

This meager description provided little insight into the circumstances surrounding this crime. The only other document presented prior to sentencing with any reference to the facts was the Defendant's Sentencing Memorandum. As was discussed, this document woefully described the circumstances of the crime.

The Defendant proffers as serious provocation for the killing the proposition that she was faced with a sudden, intense passion brought on by the unexpected delivery of a child. The Defendant contended the cumulative effect of a series of events leading up to the child's delivery was sufficient to constitute serious provocation.

The Defendant was seeking a mitigated sentence based on the circumstances surrounding the killing. Obviously it was important to know those circumstances to decide whether a mitigated sentence was warranted.

To determine what happened, the logical place to look was in the police reports. Historically, police reports have been part of a pre-sentence report or can be made available at the request of the sentencing judge. This is particularly true when a Defendant enters a plea. If the sentencing judge had the benefit of presiding over a trial and hearing all of the evidence, there is less need for the sentencing judge to read the police reports.

As was stated at the time of sentencing, this Court requested and received from the Commonwealth the police reports from the City of Erie Police Department and some of the reports from the County Detective's Office. *S.T. pp. 23-24.* This Court acknowledged reading the police reports at the time of the sentencing. *S.T. p. 26.*

At no time did the Defendant ever object to the fact this Court read the police reports. The police reports reviewed by this Court are the same ones known to all parties. In the Sentencing Rationale, full disclosure was made of all the documents reviewed for purposes of sentencing. *Sentencing Rationale pp. 3-4.*

In the interest of further disclosure, attached hereto is a copy of the police reports provided by the District Attorney's Office and reviewed by this Court for sentencing purposes. *Court Exhibit "A."* These are the same reports that would have been provided to Defense Counsel during discovery. *P.T. p.5.*

What also has to be noted is that the information reviewed in the police reports was reliable. This information included the evidence from the Defendant's computer. Also within the police reports were the contents of the statements the Defendant gave to Lt. Spizarny on August 12, 2007 and August 13, 2007. The Defendant's second statement was videotaped. *P.R. p. 18.* The Defendant cannot impeach her own statements or what her computer records show.

The police reports also included contemporaneous statements made by the Defendant to her roommate, coaches and other people who were with her in the days and hours leading up to the crime. These witnesses were inherently reliable given their relationships to the Defendant. These people were making extensive, personal efforts to help the Defendant and would have little or no motive to fabricate. Also, at the time these statements were given, the Defendant had not been charged with any crime.

The information coming from Sarah King, Julia Butler, Ryan Patton and Bryan Bentz is based on their videotaped statements to the police. Hence the actual words of these witnesses are preserved. There is no question about what the witnesses told the police. These videotaped statements were available to the Defendant during discovery well in advance of the Defendant's plea and sentencing.

The information from these witnesses was also reliable based in part on the Defendant's statements because she admits some of what the witnesses said. Also, there is uncontroverted physical evidence that supports these witnesses. Preserved as evidence are the contents of the Defendant's electronic message to Sarah King on Saturday stating the pregnancy test was negative and the records from the CVS pharmacy showing the Defendant did not purchase a pregnancy test on August 11th. *P.R. p. 27.* [24]

All of this information was known to the Defendant for a long time prior to sentencing. After all, she knew what was in her computer that was seized by the police. She knew what she told the police. She would be aware of her conversations with her roommate, coaches and others associated with the volleyball team. The Defendant cannot claim surprise by the use of information created by her and possessed by her for months before the entry of her plea and her sentencing.

Also, the Defendant had a lengthy opportunity to challenge any of the evidence in the police reports prior to her plea. The Defendant was arrested on September 18, 2007. The Defendant signed a Waiver of Arraignment on February 19, 2008 that was filed on February 21, 2008 thus beginning the time period for the Defendant to formally seek discovery. It also began the time period for the Defendant to file any pre-trial motions. The Defendant did not file any pre-trial motions within the thirty-day time period.

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[24] The instant messaging between King and the Defendant on Saturday includes the Defendant's inquiry whether an ultrasound had already been ordered. King responded that the ultrasound would be scheduled on Monday and hopefully be performed no later than Wednesday. *P.R. p. 27.*

On March 26, 2008, Defense Counsel filed a "Motion to Extend Time in Which to File Omnibus Pretrial Motion" averring a need for additional time to receive and review discovery from the Commonwealth and then determine whether any pretrial motion was warranted. The Defendant's request was granted by this Court by Order dated March 26, 2008. The deadline for any pretrial motions was moved to April 25, 2008.

The Defendant still did not file any pretrial motions. The Defendant has never claimed the Commonwealth withheld any discovery or made a motion seeking resolution of a discovery issue. Despite the extension of time to do so, the Defendant never filed a pretrial motion challenging any part of the police investigation or any evidence within the police reports.

The Defendant had nearly eleven months between her arrest on September 18, 2007 and her plea on August 8, 2008, to review and challenge any of the evidence against her. At her plea, the Defendant acknowledged she had sufficient time to review her case with her attorney:

> MR. FOULK: And it's my understanding that Mr. Friedman has been representing you throughout these proceedings; is that correct?
>
> THE DEFENDANT: Yes.
>
> MR. FOULK: Do you feel that you have had ample time to discuss this case with Mr. Friedman prior to coming in there this morning?
>
> THE DEFENDANT: Yes.
>
> MR. FOULK: Is it your understanding that the Commonwealth has provided all of the discovery necessary to try this case to your attorney, and have you had the opportunity to go over all of the options with him?
>
> THE DEFENDANT: Yes.

P.T. pp. 5-6.

> THE COURT: Is that why you're entering a plea is because in fact you're guilty?
>
> THE DEFENDANT: Yes.

> THE COURT: Do you feel like you're, in entering your plea, you're giving up any valid legal defense in this case?
>
> THE DEFENDANT: No.
>
> THE COURT: Or any defense at all that you would like to assert to these charges?
>
> THE DEFENDANT: No.

P.T. p. 19.

> THE COURT: And is your plea here today the product of a lot of thought on your part?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Have you had enough time to discuss your case with Mr. Friedman?
>
> THE DEFENDANT: Yes.

P.T. p. 24.

The Defendant stated under oath at her plea that she had received discovery and reviewed it with her attorney. Further, in entering her plea, she did not feel she was giving up any valid defense to the charge. The Defendant was satisfied she had enough information to enter an informed plea and sufficient time to consult with her attorney.

The Defendant's sentencing was held on November 21, 2008. Thus the defense had over fourteen months to prepare for sentencing, including review of the police reports. The defense cannot in good faith claim any prejudice or surprise by the information used at sentencing from the police reports.

The circumstances described by this Court for sentencing purposes were not pulled out of thin air or created from an extraneous, irrelevant source. All of the information about the crime relied upon for sentencing purposes came directly, or by logical inference, from the information contained

within the police reports. More importantly, this information was largely derived directly from the Defendant's statements, conduct and computer.

All of this information cannot be simply ignored. The Defendant cannot pretend there are no witnesses to her crime. The Defendant cannot wish away the physical evidence of her crime.

Given the averments of the Post Sentence Motion, it appears the Defendant wants the benefit of a trial within a plea. If the Defendant wanted a trial, she was free to exercise her right to do so and have a public airing of all the facts in her case. A sentencing is not a trial.

Notably, Defense Counsel asked this Court to accept evidence from three experts who did not testify at sentencing and from fifty-six people who submitted letters but did not testify at sentencing. These experts and letter-writers were not subject to cross-examination, yet the relaxed evidentiary rules for sentencing allowed consideration of hearsay.

The Defendant's report from Dr. Sadoff was considered even though it was largely double hearsay because it contained a lengthy discussion of what the Defendant told Dr. Sadoff about herself, her family and this crime. Defense Counsel received the benefit of introducing the Defendant's testimony through Dr. Sadoff's report without any cross-examination about the inconsistencies of what she said to Dr. Sadoff versus what she did or said otherwise. Further, the opinions expressed by Dr. Sadoff were considered despite the fact he was not subject to cross-examination, particularly about the basis for the opinions rendered.

The Defendant also had the benefit of her testimony considered in the form of double hearsay as set forth in the report of Dr. Pietrofesa. *See Defendant's Exhibit "B*." In this report the Defendant talked about herself, her family and this crime. The Defendant also had the benefit of the opinions expressed by Dr. Pietrofesa about an appropriate sentence for the Defendant. *Id*. The

Defendant's statements within this report were not subject to cross-examination for the inconsistencies. Dr. Pietrofesa's opinions were also not subject to cross-examination.

The Defendant had the benefit of the report of Dr. Kaye who did not testify. Dr. Kaye did report on the Defendant's childbirth on August 12, 2007. *See Kaye Report*, Defendant's Exhibit "A," *p. 3*. This information as presented in his Report was double hearsay and not subject to cross-examination. Dr. Kaye also expressed various opinions about the Defendant's situation and sentence. Hence, the Defendant had the benefit of her case being presented through Dr. Kaye.

Some of the Defendant's letter-writers who did not testify discussed the Defendant's level of criminality. The hearsay from all of these defense witnesses was considered despite the fact they were not subject to cross-examination.

The Defendant's hearsay evidence is no different from the hearsay statements of Julia Butler, Sarah King, Ryan Patton and Brian Bentz. Like the Defendant's witnesses, Butler, King, Patton, *et al.,* were conveying information based on what they saw or heard from the Defendant. Unlike the Defendant's experts, these witnesses were not going farther and expressing their opinions about the Defendant's conduct.

Stated differently, the Defendant presented two layers of hearsay. The first layer consisted of the Defendant's statements to her experts, family, friends and other supporters. Layered thereon are the opinions expressed by the defense experts regarding the statements, conduct and sentencing of the Defendant. By comparison, the hearsay from Butler, King, *et al.*, does not get beyond the first layer of hearsay and does not express any opinions about the Defendant's conduct or sentence.

Distilled, the Defendant's position is that only her hearsay can be considered at sentencing. According to Defense Counsel, this Court can consider any hearsay or double hearsay proffered by the Defendant, including what she said to her experts, about the crime. However, no other hearsay,

including anything the Defendant said to her roommate, coaches, medical personnel and Lt. Spizarny is permissible.

Further, the Defendant's witnesses are not subject to cross-examination, but all other witnesses must be subject to cross-examination at sentencing. Defense Counsel thinks he controls what information can be considered by his experts and by a sentencing court. This position is untenable and undermines the responsibility of a sentencing judge to be fully informed of the circumstances of the crime.

This Court is not bound to accept the opinions proffered by the defense experts. Had the defense experts been provided with the police reports, including the videotaped statements and the physical evidence, then subjected to cross-examination, it is possible the expert opinions would have been different.

Also, the Defendant's argument was forfeited when the Defendant entered a plea. It is noteworthy the Defendant is not now seeking to withdraw her plea. Further, in her Post Sentence Motion, the Defendant has not challenged the evidence produced from her computer, the accuracy of the statements she gave to the police or the accuracy of the statements provided by Sarah King, Julia Butler, Ryan Patton and Brian Bentz.

For months prior to the sentencing Defense Counsel had the police reports. Defense Counsel had access to the statements of his client. The defense was aware of the videotaped statements of Sarah King, Julia Butler, Ryan Patton and Bryan Bentz. None of this information was sprung on the defense by surprise at the sentencing. The Defendant was not ambushed by any new evidence not previously known by the defense.

In a cryptic objection, Defense Counsel states: "(t)he court further notes in its Statement of Sentencing Rationale that: 'however, there is no objective evidence that she was undergoing any

stress or impairment of her reasoning or judgment in the months, days and hours leading up to the child birth.' *(p.25).* The defendant was not given an opportunity to present any such evidence." *Post Sentence Motion Paragraph 12*.

This allegation is factually false. Defense Counsel was given as much time as needed to present any evidence. Defense Counsel was not limited in the presentation of any evidence. The Defendant had a full opportunity to testify at sentencing. The Defendant called ten additional witnesses and had the benefit of three expert reports.

The Defendant did present evidence on this subject in the form of her statements to Dr. Sadoff and Dr. Pietrofesa. The Defendant had the benefit of the opinions expressed by her three experts.

The Defendant's allegation is an insult to the three experts tendered by Defense Counsel. Each expert expressed an opinion about the Defendant's mens rea and the stressful circumstances the Defendant faced. Dr. Sadoff opined at length about the Defendant's circumstances during her pregnancy and her state of denial as a defense mechanism. *Sadoff Report, pp. 7, 8.*

Defense Counsel does not identify any evidence he would have otherwise presented at sentencing. It is unlikely the defense could recall the Defendant as a witness at sentencing. According to Dr. Pietrofesa, the Defendant has only a vague recollection of what occurred during the crime. *Defendant Exhibit "B," p. 1.*

The Defendant had the benefit of her testimony concerning the months of her pregnancy by virtue of all of her statements reported by Drs. Sadoff and Pietrofesa.

What the Defendant did in the months leading up to the crime is not subject to many differences. The Defendant went home at the end of the 2007 school year in a physical condition that prompted her parents to inquire whether she was pregnant. The Defendant did extensive research on

the Internet about pregnancy and ways to kill a fetus. The Defendant cannot dispute what her computer records show.

None of the 69 witnesses for the Defendant identified any problems the Defendant was having in the months leading up to August 12, 2007 that showed any evidence of a disconnect from reality. Defense Counsel proffers no objective evidence that was not available for review or presentation at sentencing.

The Defendant's sentencing started at 9:15 a.m. and concluded at 11:05 a.m. (followed by the objections placed on the record by Defense Counsel). The Defendant presented all of her available evidence. The defense fired all of the guns at their disposal at sentencing. The Defendant had a full opportunity for her story to be told in its entirety at sentencing. The Defendant's story was retold through her experts.

The fact that some of the evidence presented by the Defendant was not accorded the significance the Defendant wants does not mean she did not get her day in court. The decision by Defense Counsel to focus primarily on the Defendant's personal circumstances does not mean the Defendant gets a second bite of the apple by way of a second sentencing. The fact Defense Counsel chose not to call any of his experts as a live witness does not entitle the Defendant to a second sentencing. It is not the role of the Court to tell Defense Counsel how to present the Defendant's case.

To grant the Defendant post sentence relief on the basis of this record is to set a precedent based on deception. The defense, despite having knowledge of what was in the Defendant's computer, in the Defendant's statements to the police and what others said on videotape about the circumstances leading up to the crime, chose to present a skewed picture of what occurred. The

defense had every opportunity to be forthright. The fact this Court did not accept the Potemkin Village presented by Defense Counsel does not mean the Defendant is entitled to another sentencing.

This Court was charged with the responsibility of understanding the circumstances of the Defendant's crime. All relevant information was considered. This Court was not limited to just the evidence presented by the Defendant. When all of the circumstances were reviewed, the Defendant's sentencing position was unsupportable.

VI. A PREMEDITATED AND INTENTIONAL KILLING

The Defendant shifts gears to argue: "The court improperly in its in camera proceeding determined that the defendant had committed a 'premeditated and intentional killing.' The court did so based upon evidence that it obtained outside the record. By reaching this conclusion the court impermissibly sentenced the defendant for a crime for which she had not been convicted or had been given due process of law." *Post Sentence Motion Paragraph 27.*

In making this argument, Defense Counsel overlooks the fact the Defendant admitted under oath at her plea to intentionally killing her child. *P.T. pp.11-14.*

It is accurate that premeditation is not an element of Voluntary Manslaughter. However, that does not mean all evidence of premeditation must be ignored for sentencing purposes. Sadly, there is considerable evidence this killing was premeditated.

A long line of appellate decisions holds that premeditation can be formed in a very brief time. *See, e.g., Commonwealth v. Thornton,* 431 A.2d 248 (Pa. 1981). Further, premeditation "does not require planning or previous thought or any particular length of time. It can occur quickly. All that is necessary is that there is time enough so that the defendant can and does fully form an intent to kill and is conscious of that intention." *Pa. S.S.J.I. (Crim) 15.2502A(4), Second Edition.*

The evidence of premeditation was cited to explain in part the reasons for the Defendant's sentence. While the Defendant wants to disregard this evidence, in determining the circumstances surrounding the crime, evidence of the Defendant's intent cannot be swept under the rug.

The Defendant's argument she was sentenced for a crime she did not commit is misguided. The sophistry of this argument is that the Defendant admitted by way of her plea that she intentionally killed her child. Consistent with the description of premeditation, the circumstances show the Defendant had fully informed an intent to kill and was conscious of that intention. She was sentenced for this conduct. Apparently the Defendant thinks that she should not be sentenced for an intentional killing despite her plea to it.

The Defendant fails to identify for what crime she was sentenced but was not convicted. The Defendant was not sentenced for a premeditated murder, which would have meant a sentence of life in prison. The Defendant also was not sentenced under the guidelines and forty year maximum for Third Degree Murder. Her sentence was less than the maximum sentence for Voluntary Manslaughter.

As the Defendant was informed, the circumstances of her case are closer to murder than to manslaughter. *Sentencing Rationale p. 28.* A review of the cases of Jessica Rizor, Tracy Dupre, Melisa McManus, Tina Brosius and Lori Pinkerton reveals striking similarities with the circumstances of this case. However, this does not mean the Defendant was sentenced for a crime she did not commit. It does explain why the Defendant was sentenced closer to the maximum sentence for Voluntary Manslaughter than requested by the Defendant.

The Defendant entered an open plea in which she was fully advised in writing and orally that the sentencing positions of the parties were not binding, the sentencing guidelines were not binding

and that she could receive a sentence of up to twenty years in jail. The Defendant acknowledged she understood her sentencing exposure:

> THE COURT: And there will be a lot of factors going into what the appropriate sentence should be; do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And do you understand that in entering your plea at the time of sentencing you face the possibility of going to jail for up to 20 years, which would mean a sentence of 10 to 20 years?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And the maximum fine of $25,000.
>
> THE DEFENDANT: Yes.
>
> THE COURT: And Mr. Foulk has touched upon the fact that there are sentencing guidelines in your case and I believe - - correct me if I am wrong, Mr. Friedman - - but I believe in the mitigated range it's 24 months; and the standard range it's 36 to 54; and in the aggravated range, 66 months. Does that comport with your understanding?
>
> MR. FRIEDMAN: That's correct, your Honor.
>
> THE COURT: Do you understand what sentencing guidelines are:
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. Mr. Friedman's explained that to you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. Now, do you understand also that those are simply guidelines; they're not mandatory?
>
> THE DEFENDANT: Yes.
>
> THE COURT: In other words, they're not binding on a judge who is imposing sentence in this case.
>
> THE DEFENDANT: Yes.

THE COURT: And in your case, the Commonwealth, through Mr. Foulk, is making certain representations to you about the Commonwealth's position for sentencing purposes.

THE DEFENDANT: Yes.

THE COURT: But do you understand that the final determination of what your sentence will be is up to a judge?

THE DEFENDANT: Yes.

THE COURT: And it's not up to the Commonwealth.

THE DEFENDANT: Yes.

THE COURT: And the judge can disregard or reject what the Commonwealth's position is and disregard or reject what your lawyer is saying on your behalf and impose whatever sentence the Judge thinks is appropriate; do you understand that?

THE DEFENDANT: Yes.

MR. FOULK: The Court can also accept the Commonwealth's recommendations as well, your Honor.

THE COURT: Well, that's true. But do you understand that for purposes of this proceeding and this plea that if the Commonwealth's position isn't accepted per se, that's not to say that it ultimately won't be the Court's position.

THE DEFENDANT: Yes.

THE COURT: My point is, I guess I want to make sure you understand this: when you enter a plea today, the Judge isn't bound by any position of the parties.

THE DEFENDANT: I understand that, your Honor.

THE COURT: And, in fact, you could get a sentence - - legally you could get a sentence of up to 10 to 20 years; do you understand that?

THE DEFENDANT: I do.

THE COURT: Are you entering a plea expecting to receive any certain type of sentence?

> THE DEFENDANT: No.
>
> THE COURT: I'm sure that there are sentences that you would like to receive, but has anyone said, "If you enter a plea, you'll get this kind of sentence?"
>
> THE DEFENDANT: No.

P.T. pp. 20-23. See also p. 7.

The Defendant entered her plea fully knowing her sentence was up to the judge. She recognized she could go to jail for up to twenty years regardless of her requested sentence. She knew the sentencing position of the Commonwealth was not binding, neither were the sentencing guidelines. There were no promises made to the Defendant regarding her sentence.

The reasons for her sentence have been stated orally and in writing. The Defendant was sentenced within the confines of the Voluntary Manslaughter statute based on all of the circumstances of this case. There is no basis for post sentence relief.

VII. MISUSE OF MORALITY

The Defendant complains: "The court substituted its view of morality for the provisions of the Sentencing Code and the law of the Commonwealth of Pennsylvania. As the court stated: "This court is mindful of the various cases cited by Dr. Kaye about the disposition of neonaticide in other jurisdictions. To the extent that disposition of this case may differ with those cases, so be it. At some point we have to take a moral stand." *Post Sentence Motion Paragraph 33.*

There are at least three reasons why the Defendant's complaint is baseless.

First, like so much of what Defense Counsel has done in this case, there is the selective use of information. In this instance, Defense Counsel has excerpted only a portion of what was said by this Court; from there Defense Counsel extrapolates to a factual point for which there is no support.

To understand what was excerpted by Defense Counsel, it is necessary to consider the surrounding comments:

> This Court is familiar with the statistics cited by Dr. Kaye regarding how neonaticide historically has been treated. This Court recognizes that in many countries, including some in Europe, neonaticide is not considered a crime. However, the people of this country have not yet spoken through their legislative bodies to provide for the decriminalization of neonaticide. To the contrary, while laws have been created by the appellate courts and the legislature recognizing a woman's right to privacy and to an abortion, there has yet to be any law in this country making a distinction between neonaticide and the killing of a child who is more than twenty-four hours old.
>
> This Court is also mindful of the various cases cited by Dr. Kaye about the disposition of neonaticide in other jurisdictions. To the extent the disposition of this case may differ with those cases, so be it. At some point we have to take a moral stand.
>
> Notably, the moral stand here is based on the specific facts of this case. In addition, consideration also has to be given to the protection of the public in terms of the future suffocation of newborn infants.

Sentencing Rationale pp. 30-31.

Contrary to what Defense Counsel says, these comments were not the Court substituting a personal morality for the provisions of the Sentencing Code. The moral stand was "based on the specific facts of this case".

Defense Counsel also ignores the excerpted comments were stated in consideration of one of the sentencing factors under the Sentencing Code, namely the protection of the public. 42 Pa.C.S.A. §9721(b). The Defendant ignores the discussion at sentencing about the criminal sanctions imposed for crimes committed against youth. *Sentencing Rationale pp. 31-32. See also* 42 Pa.C.S.A. §9721. The Defendant ignores the fact the Sentencing Guidelines were reviewed. *Sentencing Rationale p. 3.*

Further, Defense Counsel misstates the law. The Sentencing Code and the sentencing guidelines give guidance to a sentencing judge. The guidelines are not binding. As stated by the Pennsylvania Supreme Court: "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." *Commonwealth v. Sessoms,* 532 A.2d 775, 781 (Pa. 1987).

The Supreme Court has consistently held this position, "…we reaffirm that the guidelines have no binding effect, create no presumption in sentencing, and do not predominate over sentencing factors – they are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence." *Commonwealth v. Walls,* supra, 926 A.2d at 964-965. Contrary to the Defendant's averment, the sentencing guidelines provide non-binding advice for a sentence and do not dictate the sentence to be imposed.

Lastly, this Court's comments were a rejection of the sentencing position advocated by one of the Defendant's experts, Dr. Kaye. Like Defense Counsel, Dr. Kaye's position was based on a very selective use of dispositional data. Dr. Kaye holds himself out as a national expert on neonaticide and wanted this Court to believe that most prosecutors tucked away neonaticide cases in a drawer somewhere and seldom prosecuted them. If prosecuted, the sentences infrequently involved incarceration. The most serious disposition was a plea to involuntary manslaughter.

For a national expert, Dr. Kaye did not evince familiarity with neonaticide cases in Pennsylvania. For example, even though his report was dated May 31, 2008, Dr. Kaye did not mention the Rizor case in which a Washington County jury found her guilty of first degree murder on March 11, 2008. Jessica Rizor is serving a sentence of life in prison without parole.

Dr. Kaye did not mention a case in Northumberland County where Tracy Dupre was convicted by a jury of first degree murder. Dupre is serving life sentence plus an additional 6 months to 19 years sentence. Her case was affirmed by the Superior Court in 2005.

Inexplicably, Dr. Kaye did not disclose the Pennsylvania cases in which women younger than Teri Rhodes who committed neonaticide are doing life in prison for first degree murder. Melisa McManus was 16 years old when she committed neonaticide. She was treated as an adult and remains incarcerated on a life sentence for first degree murder. Her case was affirmed by the Superior Court in 1995.

Tina Marie Brosius was almost five months younger than Teri Rhodes when her newborn drowned in a portable toilet. She continues to do a lifetime sentence without parole for first degree murder.

Dr. Kaye overlooked the conviction of Lori Pinkerton in Dauphin County for Third Degree Murder and her maximum sentence of ten to twenty years of incarceration. Her case was affirmed by the Superior Court in 1997.

All of these cases have facts in common with the Defendant's case and are a matter of public record. Yet Dr. Kaye does not mention one of these dispositions. Instead, Dr. Kaye only references two cases in Pennsylvania because those dispositions suit the position he advocates.[25] Given his slanted presentation of the data, it appears Dr. Kaye is more of an advocate than an unbiased expert.

What the cited cases mean is that jurors in various counties have not always accepted the Defendant's theory or Dr. Kaye's opinion that neonaticide is caused by a woman in a dissociative state. Jurors have found, as recently as March 11, 2008, in Washington County, that killing a newborn child can be intentional and with premeditation regardless of the physiological and psychological trauma of the childbirth process.

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[25] In the last paragraph of his report, Dr. Kaye mentions the case of Commonwealth v. Mako in Clarion County. He gave no cite for this case nor any specifics other than the defendant pled guilty to involuntary manslaughter. In the same paragraph, Dr. Kaye references a pending case in Pennsylvania involving a 22 year-old woman awaiting sentence for a "criminally negligent homicide" without any identifying information. *Kaye Report, Defendant Exhibit "A," p. 3.*

Trial Judges in Pennsylvania have imposed life sentences for neonaticide. In at least one instance, a maximum sentence of ten to twenty years for Third Degree Murder was imposed in a neonaticide case. Appellate Courts have reviewed and affirmed these dispositions. By comparison, the Defendant's sentence was not unreasonable or excessive given all of the circumstances she created.

VIII. THE DEFENDANT'S REHABILITATIVE NEEDS

The Defendant does not present with any significant rehabilitative needs. There does not appear to be any substance abuse issues. She has not been diagnosed with any mental illnesses.

There may be a need for individual counseling on a character issue relating to her honesty. Separate from the Defendant's proven ability to kill a child, this Court is concerned about the extent and depth of the Defendant's deceptive behavior that enabled her to commit this crime. The Defendant did not just tell an impulsive lie in a moment of panic on August 12, 2007. The Defendant engaged in a clear- minded pattern of deceptive behavior demonstrating she is capable of deceiving or attempting to deceive her parents, friends, coaches, medical personnel and the police. She did so over an extended period of time in a variety of settings before, during and after her crime. Her statements to Dr. Sadoff were calculated to put her in a better light and were inconsistent with what she said to others and her actual conduct.

CONCLUSION

Under the circumstances of this case, the intentional suffocation of a living, breathing human being, a defenseless child without any recourse, a person who was deprived of the pleasures of life, at the hands of a parent who bore the responsibility of protecting the child, warrants the sentence imposed. This sentence was mitigated by the personal circumstances over which the Defendant had control.

Although the Defendant wants this Court to turn a blind eye to what occurred and focus only on her personal circumstances, to do so would diminish what happened to this victim. This Court is truly empathetic to the Defendant's personal circumstances and for her family, but constrained to hold the Defendant accountable for her conduct.

Wherefore, the Motion to Vacate and/or Modify the sentence is **DENIED.**

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WILLIAM R. CUNNINGHAM, JUDGE

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: OF ERIE COUNTY, PENNSYLVANIA

v.	:	**CRIMINAL DIVISION**
	:	
TERI RHODES	:	**NO. 110 OF 2008**

ORDER

For the reasons set forth in the accompanying Opinion, the Defendant's Post Sentence Motion is DENIED.

Defense Counsel has also requested recusal pursuant to Cannon III (c) of the Code of Judicial Conduct. As Defense Counsel is aware, this Court is not related to any of the parties involved in this case. This Court does not know the Defendant and/or her family and/or any witnesses tendered in this case. Further, this Court was not a witness to any of the events nor has this Court ever served as a lawyer in any matter affecting the parties. This Court has no financial or fiduciary interest in this case.

The fact this Court entered a sentence with which a defendant disagrees has never been, nor is it now, a basis for recusal. Therefore, the Defendant's Motion to Recuse is **DENIED**.

A hearing on the Defendant's Motion for Bond Pending Appeal shall be held on the 4th day of February, 2009 at 8:45 a.m. before the undersigned.

SO ORDERED, this 26th day of January, 2009.

BY THE COURT:

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WILLIAM R. CUNNINGHAM, JUDGE