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458 EDA 2018

IN THE SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

No. 458 EDA 2018

COMMONWEALTH OF PENNSYLVANIA,

Appellee

-v-

PI DELTA PSI. INC.

Appellant

BRIEF FOR APPELLANT

Appeal from the Order of Sentence entered in this matter on January 8, 2018, per the Hon. Margherita P. Worthington, P.J.

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TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

CASES:

STATUTES:

CONSTITUTIONAL PROVISIONS:

TEXTBOOKS:

TREATISES:

ARTICLES:

I. STATEMENT OF JURISDICTION

This is an appeal from a final order entered in the Court of Common Pleas of Monroe County in a criminal case. This appeal is filed in the Superior Court under Section 742 of the Judicial Code, 42 Pa. C.S.A.

The Superior Court has exclusive appellate jurisdiction of all appeals from final orders of the Courts of Common Pleas, except in such classes of appeal as are within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court. This appeal is not within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court.

II. STATEMENT OF THE SCOPE OF REVIEW AND STANDARD OF REVIEW

This is an appeal raising questions of constitutional law with respect to the right of an accused to present a defense, freedom of association and the unconstitutionality of the Hazing Statute *as applied* by the trial court.

The Superior Court's scope of review in cases of constitution and statutory interpretation is plenary and the standard of review is *de novo. Com. v. Atkinson*, 987 A.2d 743 (Pa.Super. 2009.) *See also Spahn v. Zoning Bd. of Adjustment,* 602 Pa. 83, 977 A.2d 1132, 1142 (Pa. 2009); *Castellani v. Scranton Times, L.P.*, 598 Pa. 283, 956 A.2d 937, 943 (Pa. 2008).

The balance of the issues which are non constitutional are subject to an abuse of discretion standard.

III. ORDERS OR DETERMINATIONS IN QUESTION

(Defendants omnibus pretrial motion)

Order

And now, this **24th day of March, 2017**, upon review of defendants on the bus pretrial motions, and in consideration of the evidence presented at the hearing in the briefs and you're going to counsel, it is hereby ordered that said motions are denied. By the court, Margherita Patti Worthington, P. J.

(Defendant's and Commonwealth's pretrial motions in limine)

Order

And now this **eighth day of November, 2017**, upon review of the defendants and commonwealths pretrial motions in limine, the order the following:

One. Defendant's request to limit photographs is held in abeyance until the time of trial;

Two. Defendant's request to limit "lumping" is denied;

Three. Defendant's objections to the Commonwealth 's 404 (B) notice and supplemental notice are denied.

Four. Commonwealth's motion in limine is granted in accordance with this courts attached opinion. [Denying right defendant's expert, David Westol, to opine with respect to satisfaction of the standard of care.]

By the court, Margherita Patti – Worthington, P. J.

(Trial Rulings appear in the trial transcripts, and are not presented here for brevity.)

(The sentencing order is not presented here for brevity because the sentence itself is not challenged.)

IV. STATEMENT OF QUESTIONS INVOLVED

A. IS THE ACCUSED DEPRIVED OF UNITED STATES AND PENNSYLVANIA CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE WHERE THE TRIAL COURT DENIES TO THE DEFENSE RELEVANT EXPERT OPINION, PRECLUDES RELEVANT DEFENSE EXHIBITS, CURTAILS FULL DEFENSE CROSS-EXAMINATION OF A KEY PROSECUTION WITNESS, ALLOWS THE PROSECUTION TO MANIPULATE THE FIFTH AMENDMENT PRIVILEGE OF WITNESSES TO MAKE THEM UNAVAILABLE TO THE DEFENSE, AND PREJUDICIALLY IMPAIRS DEFENSE CLOSING ARGUMENT?

Suggested answer: YES (negative below)

B. IS THE ACCUSED PREJUDICED BY THE TRIAL COURT'S ALLOWING THE PROSECUTION BY IMPRECISE TERMINOLOGY TO CONFLATE IN THE MINDS OF THE JURY MULTIPLE SEPARATE LEGAL ENTITIES INTO A SINGLE UMBRELLA TERM "THE FRATERNITY" FOSTERING THE ESTABLISHMENT OF GUILT OF THE ACCUSED BY ASSOCIATION, PARTICULARLY WHERE THE COURT ALLOWS THE PROSECUTION TO USE PURPORTED 404 (B) EVIDENCE?

Suggested answer: YES (negative below)

C. DOES A JURY VERDICT SLIP IN A CRIMINAL CASE SHIFT THE BURDEN OF PROOF TO DEFENDANT WITH THE *"GUILTY" COLUMN* FIRST DEFYING THE PRESUMPTION OF INNOCENCE FOR THE ACCUSED BECAUSE IT IGNORES THE WELL-KNOWN PRINCIPLES OF PRIMACY AND ORDER EFFECT IN DECISION MAKING, IN VIOLATION OF DUE PROCESS UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS?

Suggested answer: yes (negative below)

D. DOES THE TRIAL COURT'S REFUSAL UPON DEFENSE REQUEST TO USE THE MORE SPECIFIC AND ACCURATE TERM " THE ACCUSED," DURING JURY INSTRUCTIONS, RATHER THAN THE MORE PEJORATIVE TERM, "THE DEFENDANT," MATERIALLY UNDERMINE THE INTENDED EFFECT OF THE PRESUMPTION OF INNOCENCE IN VIOLATION OF DUE PROCESS UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS?

Suggested answer: YES (negative below)

E. DID THE TRIAL COURT MATERIALLY PREJUDICE THE DEFENSE BY REFUSING JURY INSTRUCTIONS DRAWN FROM THE EVIDENCE AND SUPPORTING THE DEFENSE CASE WHERE IT: DECLINED TO GIVE MISSING WITNESS INSTRUCTIONS FOR WITNESSES WHOLLY UNDER THE CONTROL OF THE PROSECUTION, DECLINED TO GIVE A RES GESTAE INSTRUCTION REGARDING THE VICTIMS EXPRESSIONS TO HIS MOTHER OF FEAR OF DEFENDANT SHELDON WONG, DECLINED TO GIVE A ROGUE AGENT JURY INSTRUCTION IN REFERENCE TO A CORPORATE OFFICER UNDER IMPEACHMENT BY THE CORPORATION, AND DECLINED TO GIVE A FREEDOM OF ASSOCIATION INSTRUCTION IDENTIFYING CONSTITUTIONAL FREEDOM OF ASSOCIATION AND FREEDOM OF SPEECH INTERESTS (SPOKEN AND EXPRESSIVE) WHICH WOULD APPROPRIATELY LIMIT THE REACH OF THE HAZING STATUTE SO AS NOT TO UNCONSTITUTIONALLY IMPAIR THOSE PROTECTED CONSTITUTIONAL INTERESTS OF THE ACCUSED?

Suggested answer: YES (negative below)

F. DID THE TRIAL COURT FAIL TO CORRECT THE PROSECUTOR'S APPEAL TO PASSION DURING ITS CLOSING ARGUMENT BY DECLINING TO GIVE A CORRECTIVE INSTRUCTION?

Suggested answer: YES (negative below)

V. STATEMENT OF THE CASE

Form of Action and Brief Procedural History.

Pi Delta Psi is a nonprofit fraternal organization formed as a corporation under the laws of the state of New York, organized on or about April 19, 1995, with its address at 70 Mill St., Binghamton, Broome County, NY 13903, for the principal purposes:

> to promote fellowship and extend acquaintanceship by means of social gatherings; to promote social intercourse among the members by means of dances, dinners, musicals, and other forms of entertainment; to engage generally in any causes or objects similar to the above mentioned in order to promote the social and mental welfare of the members; to engage generally in the community through community service such as the hunger child walk and collecting food cans for C. H. O. W.

(Defendant's Certificate of Incorporation, Exhibit A to Omnibus Motion).

Defendant is a national Asian interest fraternal organization which charters affiliated local chapters at universities and colleges in the United States in accordance with the following arrangement:

> A *chapter* is the highest designation for an affiliate of Pi Delta Psi. A chapter has fully earned its right to be affiliated with the fraternity. (Constitution of Pi Delta Psi fraternity, Article 13, Section 4.)
>
> An *associate chapter* has earned the rights of a chapter was placed on a temporary probationary status to ensure that they can flourish as a chapter.. (Constitution of Pi Delta Psi fraternity, Article 13, Section 3.)
>
> A *colony* is a newly chartered subsidiary of Pi Delta Psi and is in the process of progressing towards chapter recognition. (Constitution of Pi Delta Psi fraternity, Article 13, Section 2.)

(Article 13 of the Constitution of Pi Delta Psi Fraternity, Inc. Exhibit C to Omnibus Motion.)

On or about December 7-9, 2013, in the County of Monroe, in Tunkhannock Township, Pennsylvania, the *colony* from Baruch College in New York City held a function at home rented by the Baruch *colony*. Some members of the St. John's and Stony Brook *chapters* were in attendance. Michael Deng, one of Baruch colony's aspiring members was injured as a result of particularly vicious tackling by three individuals, Deng later died. (Cross examination testimony of Sheldon Wong, supra).

As a result of the death of the Baruch *colony's* aspiring member, Michael Deng, , on or about December 8, 2015, the Pi Delta National Fraternity was charged in Monroe County with a number of criminal offenses from Murder to Hazing. The Baruch *colony* was not charged as an organization. The St. John's and Stony Brook *chapters* were also not charged. In all, 34 individuals were charged with criminal offenses.

The case was tried in November 2017. Defendant was acquitted of murder involuntary manslaughter convicted of involuntary manslaughter and lower offenses.defendant was sentenced on January 8, 2018 and thereafter filed an appeal bringing the case before this court.

Prior Determinations by Trial Court Reported Elsewhere.

There are no prior determinations by the trial court beyond those presented in this case which are unreported elsewhere.

Judge Whose Determinations Are to Be Reviewed.

The Hon. Margherita Patti Worthington, P. J.

Brief Statement of the Order or Other Determination under Review.

The orders and determinations under review are the trial court's denial of defendant's pretrial motions, the allowance to the Commonwealth of the use of 404 be evidence, and trial rulings.

Statement of Place of Raising or Preservation Issues and Related Facts to Be Known.

Issues raised pretrial by defense motion in limine – The issues were conflation of multiple parties and individuals under the umbrella term "the fraternity;" defense expert opinion with respect to standard of care, and opposition to Commonwealth 404 (b) evidence. They were decided by the trial court and defendant,s requested relief was denied. (Defense motion in limine.Trial court opinion and order - motion in limine & 404 (b), Appendix)

Jury instruction issues – The issues were freedom of association instruction, a corporate agency/ rogue agent instruction, missing witness instructions, a "lumping" instruction (hand written), and res gestae instruction were raised at the charging conference and the request for instructions was renewed before the jury was allowed to retire for deliberation. The issues were decided by the trial court and defendant's requested relief was denied. (defense request for jury instructions with specimens supplied, and renewal of request before jury allowed to retire. Trial court 1925(a) opinion and order, and supplemental opinion and order. Appendix)

Other trial rulings – The cut off of the cross-examination of key witness Sheldon Wong, the exhibit preclusion for the "beyond the normal rituals" letter and the prosecution's "additions and subtractions" proffer instructions , argument demonstrative aid preclusion arose during trial by Commonwealth objection. Defense objection to the appeal to

passion/sympathy by prosecutor during closing argument.(Objection timely made directly after prosecutors closing).These were decided by the trial court during the course of trial. Defendant's requested relief was denied. (Trial proceedings outlined in reproduced record. Trial court 1925 opinion and order, and supplemental opinion and order.)

1925 (b) Statement. The list of issues complained of on appeal were listed in a timely 1925 (b) statement which is attached in the Appendix to the brief.

VI. SUMMARY OF THE ARGUMENT

Cascading destructive effect is the theme of this case. The background for that theme is set by the Constitution of the Commonwealth of Pennsylvania and of the United States. This case is an example of due process denied under the guise of "judicial discretion."

Defendant was firstly deprived of evidence on a pivotal issue at the outset by the trial court's pretrial preclusion of expert testimony on the standard of care for policy and policing by a wholly volunteer fraternity organization. The trial court held that defense standard of care evidence was "irrelevant" even though the criminal statutes at issue have a standard of care as a necessary element.

Defendant was later deprived of the opportunity to fully confront Sheldon Wong, the key prosecution witness, to demonstrate Wong's plea deal induced amnesia, masking the vicious conduct of the last of four lethal tacklers, over whom Sheldon Wong was to exercise control. Defendant was also deprived of the opportunity to show prosecution inducements for its witnesses to make "additions and subtractions" to their accounts of what happened. Defendant was even deprived of the opportunity to compel a witness to authenticate national fraternity policy e-mails received by the Baruch *colony,* already in the hands of the prosecution, because the prosecution manipulated the availability of witnesses for the defense.

Cascading destructive effect. Evidentiary deprivation precludes effective closing argument. Evidentiary deprivation results in distorted, one-sided, prosecution oriented jury instructions, and hence such juries. Even the verdict slip brazenly defies due process by reversing the presumption of innocence. A new trial should be granted.

VII. ARGUMENT

A. THE ACCUSED IS DEPRIVED OF UNITED STATES AND PENNSYLVANIA CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE WHERE THE TRIAL COURT DENIES TO THE DEFENSE RELEVANT EXPERT OPINION, PRECLUDES RELEVANT DEFENSE EXHIBITS, CURTAILS FULL DEFENSE CROSS-EXAMINATION OF A KEY PROSECUTION WITNESS, ALLOWS THE PROSECUTION TO MANIPULATE THE FIFTH AMENDMENT PRIVILEGE OF WITNESSES TO MAKE THEM UNAVAILABLE TO THE DEFENSE, AND PREJUDICIALLY IMPAIRS DEFENSE CLOSING ARGUMENT.

The United States Supreme Court has found the right to effectively present a defense to be constitutionally required. *Chambers v. Mississippi*, 410 U.S. 284 (1972). The Court said," The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Id. at 294. A criminal defendant may not be denied the right to a fair opportunity to defend against the state's accusations.

That fair opportunity includes the right to rebut prosecution evidence; the right to be heard; to call witnesses on your behalf (and compel them if necessary); and to effectively present evidence central to your defense. *Ake v. Oklahoma,* 470 U.S. 68, 83 (1985) Davis v. Alaska, 415 U.S. 308 (1974); *Gardner v. Florida*, 430 U.S. 349 (1977); *Olden v. Kentucky*, 488 U.S. 227 (1988) United States v. Cronic, 466 U.S. 648, 656 (1984): Strickland v. Washington, 466 U.S. 668,684-685 (1984); California v. Trombetta, 467 U.S. 479, 485 (1984); Rock v. Arkansas, 483 U.S. 44, 51 (1987). Green v. Georgia, 442 U.S. 95, 97 (1979) ; See also *Gilmore v. Henderson*, 825 F.2d 663, 665-667 (2d Cir. 1987).

The Fourteenth Amendment to the United States Constitution states, in relevant part,

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. The Due Process Clause in the amendment guarantees the fundamental elements of fairness in a criminal trial. *See also* Spencer v. State of Texas, 385 U.S. 554, 563-64 (1967) (citations omitted).

In Pennsylvania, due process protection flows from Article I, Section 1 of the Pennsylvania Constitution which states that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. Art. I, § 1, § 9.

The errors falling under the ambit of the constitutional principles enunciated in these foregoing cases follow.

Denial to the Defense of Relevant Expert Opinion

The defense arranged to called David Westol, a national known expert in fraternity structure and governance to describe to the jury how fraternities operate, particularly ones which are all volunteer without any paid employees, since that is not generally known. Additionally, the defense sought to introduce his opinion as to whether or not a standard of care with respect to policy making, policy promulgation, and policy policing had been met.(defense motion in limine, Westol report). The standard of care or conduct constitute an element of the offenseses charged. Westol was prepared to testify at trial that the national fraternity's standard of care with respect to anti-hazing had been met. The core of his opinion was "Pi Delta Psi National Fraternity acted within the standard of care, custom, and practice within the community of Greek letter organizations." (Report of

Westol). The prosecution objected in a motion in limine and the trial court denied the opportunity for Mr. Westol to testify to that standard of care opinion attrial. (Trial court opinion and order - motion in limine and 404 (B), Appendix)

The Crimes Code establishes levels of culpability for criminal offenses. In relevant part, it states:

18 Pa.C.S.A. § 302. General requirements of culpability.

1. **(a) Minimum requirements of culpability.**--Except as provided in section 305 of this title (relating to limitations on scope of culpability requirements), a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(b) Kinds of culpability defined.-

. . .

(3) A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the **standard of conduct** that a reasonable person would observe in the actor's situation.

(4) A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the **standard of care** that a reasonable person would observe in the actor's situation. (Emphasis added.)

The trial court, in its motion in limine opinion (attached to the trial court's initial statement pursuant to Pa.R. A. P. 1925 (A)) misses the point entirely, stating, " From reading the report, it is not clear that he [Westol]make these assertions independent of an

opinion that defendant's conduct was consistent with the standards within Greek letter organizations. Whether defendant acted in conformity with the standards of conduct or care found in other national fraternity's is of no relevance in a criminal case." (Motion in limine opinion, P 35). This view is divorced from above statute.

In its limine opinion the court further observes that Mr. Westol did not testify [at the hearing on defendant's motion motion in limine to preclude "lumping"] using legal terms of art, "standard of care," as he did in his report. (motion in limine opinion, P 35). Standard of care was not at issue in that hearing, but rather that confusion arising in the minds of laypersons by the indiscriminate use of the umbrella term "fraternity" for multipe entities and myriad parties.

A new trial should be granted.

Curtailment of Cross-examination of Sheldon Wong.

Sheldon Wong was a key prosecution witness. He was pointing the finger at the national and sought to minimize his own involvement in the lethal tackling carried out by Raymond Lam, Charles Lai, and Kenny Kwan the cross examination was cut off by the court at precisely the time it was having its greatest effect in attacking Wong's credibility by illustratingWong's total indifference to fraternity policy, college policy, New York law, and even basic humanity in allowing the lethal tacklers Raymond lamb and Charles Lai but most importantly Kenny Kwan take 20 to 30 foot running tackles at Michael Deng.

Preclusion of Key Defense Exhibits

The letter to the District Attorney's Office received within days of the event leading to Michael Dengs death which asserted that what occurred to Michael was "beyond the normal rituals" illustrated an investigative lead that was largely ignored and

more importantly a tunnel vision or fixation by the prosecution on "nailing" the fraternity rather than the individuals involved. The exhibit was an important tool to illustrate the motive interest or bias of official prosecution witnesses in addressing the case.the defendant was deprived of this important tool.

The excerpt from Daniel Lee's proper statement transcript showing the instructions by the prosecutor to the witness (one of over 30 witnesses from home the prosecution obtained proffer statements) seeking "additions and subtractions" to the information they had offered was directed to the inducements such language would giveto opportunists who sought to shift the onus of blame. These two exhibits were powerful tools to show not only the motive interest or bias of official prosecution witnesses, but also the incentives given by those officials to lay witnesses to make "additions and subtractions," or as some put it 'not only to saying but to compose." Defendant was deprived of these tools.

Impairment to Defense Closing Argument

The denial of exhibits constitutes the denial to effectively argue. Denial of demonstrative aids does the same thing. The trial court abused its discretion in denying the defendant's use of images of metaphorical shirts during closing argument. The metaphorical shirts were specifically intended to address the rack full of shirts exhibiting to the jury every day by the prosecution to reinforce their message of guilt by association. The metaphorical shirts were intended to focus the jury on the lethal tacklers and their leader, Sheldon Wong. The court deprive the defendant of this valuable tool.

Visual aids may be used to assist the jury in understanding the evidence in appropriate cases, and permission to do so is within the sound discretion of the trial judge." Commonwealth v. Pelzer, 531 Pa. 235, 245, 612 A.2d 407, 412 (1992). Moreover,

it is well-settled that, during closing arguments, a prosecutor [and a defense attorney in an even-handed system of justice] must be given reasonable latitude to present the Commonwealth's [defense] theory of the case provided that the evidence and the inferences derived therefrom reasonably support such a scenario. See, e.g., Commonwealth v. Persichini, 444 Pa.Super. 110, 125, 663 A.2d 699, 706 (1995). A new trial should be granted.

Manufactured Unavailability of Material Witnesses Private Prosecution.

The prosecutor charged every individual present nomatter what their role. Even the Pledges were charged!

Government prosecutors wield the immense power. This power includes the unique ability to obtain the cooperation of witnesses by providing immunity from prosecution. *See* Peter A. Joy & Kevin C. McMunigal, *Are A Prosecutor's Responsibilities "Special"?*, 20 Crim. Just. at 58 (2005) (advocating for higher ethical duties to counter the asymmetry in resources between the prosecution and the defense); *see also* R. Cary, C. Singer and S. Latcovich, *Federal Criminal Discovery* at 5 (American Bar Association, 2011) (describing the imbalance in resources between the prosecutor and defense).

In an effort to prevent an injustice that might stem from this disparate distribution of power and resources the Due Process and Fair Trial guarantees of the Fifth and Sixth Amendments provide the defendant with the tools necessary to present a defense. *See Wardius v. Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring).. *In re Winship*, 397 U.S. 358, 364 (1970); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Crane v. Kentucky*, 476 U.S. 683, 689 - 690 (1986).

The defendant's right to compel witnesses to testify is a critical component of the fundamental right to present a defenseto put before a jury evidence that might influence the determination of guilt. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (the "right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact"). Thus, the defendant's access to evidence is necessary to ensure a just outcome. *Wardius*, 412 U.S. at 474. Excerpts from the Baruch colony email traffic of 1,658 pages was such evidence.

In *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), the court addressed whether and when a trial court could compel a defense witness facing criminaql prosecution to testify. The Court held that a defense witness may be immunized by a trial judge in two instances: first, where the government's refusal to offer immunity demonstrated a "deliberate intent to disrupt the factfinding process"; second, where the proffered testimony would be "clearly exculpatory, ... essential" and not countervailed by a "strong governmental interest." 615 F.2d at 972. Although the Smith case have been overruled on the federal level, its reasoning holds true for Pennsylvania contitutional trial rights to present a defense. The Pennsylvania Constitution has been found to have a broader reach. The record in this case shows such manipulation. (RR 159)

The Fifth Amendment Privilege is not a Blanket Protection from all Questions.

Fifth Amendment protection is not a "blanket" protection but a right invoked only upon the asking of a question that might tend to incriminate. Taking the Fifth Amendment is a case-by-case determination and defense counsel has the right to have the trial court rule on each question posed. Donovan v. Spadea, 757 F.2d 74 (3d Cir. 1989); Hoffman v. United

States, 341 U.S. 479, 486 (1951); Mason v. United States, 244 U.S. 362, 365 (1917). The grant of judicial use immunity to Jimmie Mei was necessary in order to guarantee defendant's due process trial rights under the Pennsylvania Constitutution.

A new trial should be granted.

B. THE ACCUSED IS PREJUDICED BY THE TRIAL COURT'S ALLOWING THE PROSECUTION BY IMPRECISE TERMINOLOGY TO CONFLATE IN THE MINDS OF THE JURY MULTIPLE SEPARATE LEGAL ENTITIES INTO A SINGLE UMBRELLA TERM "THE FRATERNITY" PERMITTING THE ESTABLISHMENT OF GUILT OF THE ACCUSED BY ASSOCIATION, PARTICULARLY WHERE THE COURT ALLOWS THE PROSECUTION TO USE PURPORTED 404 (B) EVIDENCE.

As requested by the defendant in its mortion in limine, the trial court should have required the prosecution to refer to the participants with reasonable precision to avoid unfair prejudice by mistaken attribution of criminal acts of others, to Pi Delta Psi [National] Fraternity. It is analgous to a case of 34 defendants each named Mr. Smith.

"The fraternity" is a blanket term used in the vernacular as an "umbrella" term. It that application it applies to individual members, their local affiliates, the local or regional chapter, or the overall national or international organization. In a legal sense however, when dealing with such multiple separate entities and myriad individuals, loose use of the umbrella term for any one of them is seriously misleading to the jury as to their individuality, and responsibility for their individual acts, paving the way for guilt by mere association to the substantial prejudice of Pi Delta Psi.

The court had authority pursuant to the Pennsylvania rules of evidence to control the mode of interrogating witnesses at trial in reference to "the fraternity ."

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence.

(a) *Control by the Court; Purposes.* The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth; . . .

Court declined to use Rule 611. The court, rather than avoid or minimize the prejudicial confusion in the first place, recommended an after the fact "self-remedy," presumably of constant objection by the defense, coloring the defense in the eyes of the jury as obstructionist. A new trial should be granted

C. A JURY VERDICT SLIP IN A CRIMINAL CASE WHICH SHIFTS THE BURDEN OF PROOF TO DEFENDANT BY PLACING THE *"GUILTY" COLUMN* FIRST IS IN VIOLATION OF DUE PROCESS UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS BECAUSE IT DEFIES THE PRESUMPTION OF INNOCENCE BY IGNORING TIIE WELL-KNOWN PRINCIPLES OF PRIMACY AND ORDER EFFECT IN DECISION MAKING.

Burden Shifting and Due Process.

A judge's "discretion" to structure a verdict slip to shift the burden of proof to a criminally accused person violates the principles of constitutional due process under the United States and Pennsylvania constitutions. Years ago, juries themselves wrote their verdict of "not guilty or "guilty" on a verdict slip that simply listed the charges against the accused. When exactly "improved" verdict slips with the *"Guilty First"* structure came into vogue is unclear. Bad ideas at odds with the Constitution often crop up, remain unrecognized, and persist for a surprising length of time to the detriment of justice.

The burden shifting format of the present verdict slip cannot be said *beyond a reasonable doubt* to have had no effect on the jury's verdict in the present case. It is a palpable error, easily correctable at virtually no cost when brought to the attention of the court, as it was in this case. The burden shifting risk of the *"Guilty First"* verdict slip is very much reflected in the verdict. The verdict slip fostered for the jury the view that defendant had to "prove" that it was not guilty. For murder and voluntary manslaughter, it did so. For the balance of the charges the defendant could not "prove" that it was not guilty. The best existing authority for the format of a verdict slip is the presumption of innocence itself. A wide range of human experience bears this out.

The Presumption of Innocence is Genuine and Not Trivial in American Law.

The United States Supreme Court has routinely held that the presumption of innocence, "although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976). In the nineteenth century, the United States Supreme Court in *Coffin v. Us.*, 156 U.S. 432 (1895) recognized the universal acceptance of the presumption of innocence in American jurisprudence, saying:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. It is stated as unquestioned in the textbooks, and has been referred to as a matter of course in the decisions of this court and in the courts of the several states. *Coffin v. Us.*, 156 U.S. 432 (1895).

In the *Coffin* case, the presumption of innocence is traced back to Deuteronomy in the Bible, to Athens and Sparta, and then Roman law, through Canon Law and through the Common Law of England and the early United States.

The Role and Scope of the Presumption of Innocence in American Law.

The role of the presumption of innocence in our system of justice is explained in relevant part by 22A *CORPUS JURIS SECUNDUM* Criminal Law § 959, as follows:

> § 959. Innocence-Effect **and** scope of presumption
>
> The presumption of innocence is a conclusion drawn by the law in favor of the accused, by virtue whereof, when brought to trial on a criminal charge, the accused must be acquitted unless he or she is proved to be guilty. The presumption is considered a basic component of a fair trial. It is axiomatic and elementary, and its enforcement lies at the foundation of the administration of criminal law. The presumption of innocence is founded on the first principles of justice, and is intended not to protect the guilty, but to prevent, so far as human agencies can, the conviction of an innocent person.
>
> *Scope of presumption.*
>
> An accused enters on the trial with the presumption of innocence in his or her favor. He or she is entitled to the benefit of the presumption before trial, during preliminary proceedings, and throughout the trial. Thus, the presumption of innocence goes into the jury room and continues until the jury arrives at its verdict and the accused is convicted.

The Principles of Primacy and Order Effect in Decision Making Are Genuine and Not Trivial in Textbooks and Legal Journals.

More than 30 years ago a common textbook on trial practice for law students, *Fundamental of Trial Techniques*, Thomas A. Mauet, Little, Brown and Company, Boston, 1980, mentioned the importance of the principles of primacy, recency, and

order effect for budding lawyers. Particular attention is given to the principles in argument and order of proof. The book highlighted these principles as a "given," not as unsubstantiated and speculative. The Mauet book is in its 8th printing.

In recent legal writing, suggestions are given on how to emphasize key trial points in a common legal journal claiming to be the oldest legal journal in the United States. aptly titled, *Lost in the Middle: Using Primacy and Recency to Emphasize Key Trial Points,* Melissa M. Gomez, PhD. *The Legal Intelligencer Blog,* (from the oldest law Journal in the United States) April 20, 2010, http://thelegalintelligencer.typepad. com/tli/20101041 lost-in-the"middle"using"primacy"and"recency"to"emphasize"key" trial-points-. html.

Primacy and Order Effect in Decision Making Are Genuine And Not Trivial in Common Experience.

Media accounts regularly identify the importance of primacy in decision making contexts, particularly election contests, ironically involving judge candidates. In Philadelphia, in the Spring of 2013, Abbe Fletman, a Penn Law graduate and lecturer, an experienced trial lawyer, named one of Pennsylvania's top female attorneys, and said to be supremely qualified to sit on Philadelphia's Court of Common Pleas dropped out of the race due to poor ballot position. *Ridiculous Rules Mar Philadelphia S Choosing of Judges,* Karen Heller, The Inquirer, Philly.com, April 4, 2013 http://articles.philly.com/2013-04-4/news/38251632 _1_ballot- position- sierra -thomas - street- sayde -ladov

In 2010, two Harris County, Texas judge candidates sued, each claiming they were entitled to first ballot position alleging they will be "irreparably harmed"

because they are not listed first in their races on the primary ballot. *Two Judicial Candidates File Suit Over Ballot Order,* Charles Kuffner, Off the Kuff, February 9, 2010, http://offthekuff.com/wp/?p=25849.

Another instance of commonplace recognition of the power of primacy and order effect on decisions made is described in, *The Role Of Bingo Balls In Upcoming Elections,* Carolyn Steiger, Choose Judges on Merit, March 17, 2011,http://www.judgesonmerit.org/tag/ballot-position/:

> Ballot positions were chosen by picking numbered bingo balls out of a coffee can, and "the drawing had the feel of a circus joined to a lottery." Although there is clearly more involved in running a campaign than ballot position, it is telling that one candidate referred to the day as "one of the most important days in the election." Another candidate, after receiving first position on the ballot, "literally danced out of the courtroom, saying in a sing-song voice 'Hallelujah, thank you Jesus. Do the right thing and vote for Bloom in the Spring.'"

It is not only judge candidates who recognize the importance of primacy and order effect on final results. In an election contest described in, *Ballot Order Picked* For Cambria Commissioner Candidates. Sandra K. Reabuck, The Tribune Democrat, Ebensburg, Pa. March 16, 2007, a candidate expressed common wisdom upon drawing first position:

> That's fantastic. In politics, there's an old saying that being No.1 helps to draw votes. I don't know if it's true," she said Thursday. [Former Cambria County Commissioner Kathy Holtzman']

Similarly, described in, *Ras Berska Among Newark Candidates To Get Top Positions On Election Ballot,* David Giambusso, The Star-Ledger, Newark, NJ, March 10, 2010:

> Ras Baraka, Peter Pantoliano and Yvonne Garrett Moore were among the lucky candidates in today's drawing, scoring top positions on the city ballot in the May election ... While the benefits of being placed high on the ballot was debated among candidates today, most political experts say a candidate with their name at the top of the ballot has a slight advantage. In some of the city's tighter races, the position on the ballot may even prove to be definitive.

The position of the *"Not Guilty'* column on a verdict slip should reflect common experience and conform to the presumption of innocence. It is easily implemented, costs nothing, and need not even involve "the feel of a circus joined to a lottery."

Primacy and Order Effect in Decision Making Are Genuine and Not Trivial as Determined in Social Science Research.

Social science research reflects what is apparent from common experience about order effect and primacy in decision making. The first modern empiricalstudy on the effect of ballot order was an analysis of the 1992 general election in Ohio by Professors Joanne Miller and Jon Krosnick. They found statistically significant ballot order effects on the final results in almost half of the races analyzed, and, among these races, nearly all of the effects were primacy effects, rather than recency effects. *The Impact of Candidate Name Order on Election Outcomes,* Joanne M. Miller & Jon A. Krosnick, 62 PUB. OPINION Q. 291, 293-94 (1998).

The authors of another study of ballot order effect on final results found what they considered a fairly shocking conclusion: Ballot order might have changed the actual winner in seven of fifty-nine of the primary races examined. *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment: The* California Alphabet Lottery. 1978-2002, Public Opinion Quarterly, Vol. 72, *No.2* (Summer) 2008.

Scholars in other countries besides the United States have also examined ballot order effects on final results. The effect of ballot order on final results has been found to be even more pronounced in nations with compulsory

voting. *Ballot Order: Donkey Voting in Australia,* Graeme Orr, 1 ELECTION L. J.

573 (2002).

Laura Miller, a J.D. Candidate, New York University School of Law, 2010;

Ph.D., Stanford University, 2007, in her monograph surveying the social science

literature on primacy and ballot order effects, *Election By Lottery: Ballot Order,*

Equal Protection, And The Irrational Voter, Laura Miller, (2010);

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p. 405., sums up the importance of primacy on final results:

> Ballot order effects are real. In close elections, whether or not you are listed first as a candidate can be the difference between winning and
>
> losing. Substantial empirical evidence points to the conclusion that ballot order effects, are both statistically significant and large enough in magnitude to alter the outcome of elections. When elections are close, as they frequently are, "the margin of error is likely to exceed the margin of victory."

The position of the *"Not Guilty'* column on a verdict slip to give effect to the

presumption of innocence should accord with modern social science. It can be

accomplished for free, with no burden on the states, and without disrupting any

currently known criminal trial process other than misguided judicial "discretion."

Primacy and Order Effect in Decision Making Are Genuine and Not Trivial in Constitutional Legal Experience Addressing Decision Making.

The New Hampshire Supreme Court in, *Ralph L. Akins, v. Secretary Of*

State, No. 2005-794, (2006), recognized the constitutional dimension of a biased

distribution of primacy effect, albeit not in a verdict slip context.

The *Akins* court, applying strict scrutiny, reversed the lower court's holding that a biased primacy effect distribution on ballots was of no consequence, noting in addition to its own reasoning under the New Hampshire Constitution, that:

> Other appellate courts have accepted findings that the first position on a ballot confers an advantage. Tsongas v. Secretary of the Commonwealth, 291 N.E.2d 149, 15152 (Mass. 1972); Gould v. Grubb, 536 P.2d 1337, 1341 (Cal. 1975) (en bane)
>
> That other states have found unconstitutional statutes and election procedures that provided for unequal or biased distribution of the primacy effect. See Gould, 536 P.2d at 1345-47; Kautenburger v. Jackson, 333 P.2d 293, 295 (Ariz. 1958) (declaring unconstitutional an Arizona statute that provided for alphabetical listing of candidates on primary election ballots that would be tallied by voting machines).

Certainly, a jury verdict slip in a criminal trial deserves similar scrutiny. A verdict slip is likely the most important ballot that a criminally accused person will ever face. It should conform to constitutional due process.

D. THE TRIAL COURT'S REFUSAL UPON DEFENSE REQUEST TO USE THE MORE SPECIFIC AND ACCURATE TERM " THE ACCUSED," DURING JURY INSTRUCTIONS, RATHER THAN THE MORE PEJORATIVE TERM, "THE DEFENDANT," MATERIALLY UNDERMINES THE INTENDED EFFECT OF THE PRESUMPTION OF INNOCENCE IN VIOLATION OF DUE PROCESS UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS.

The Constitutional due process significance of the presumption of innocence and its intended effect was discussed at length in Section C, and as a consequence will not be repeated here, but adopted.

Word choice provides important nuance. The trial court relies for its analysis on the definition of "defendant" in Black's Law Dictionary. (Trial court's supplemental statement pursuant to PA are. A. P. 1925 (a), P 13.) Black's Law dictionary may be great for lawyers and judges. Lay people like jurors are more likely to be familiar with and use a different meaning and nuance shapes their understanding of terms. Someone can be an accused without being a defendant, that is, an accused can be simply be "blamed." Simply put, a defendant is always an accused, but an accused is not even constitutionally obliged to defend. Use of the more pejorative term "defendant" carries with it the implication that something criminal has already been proved about the accused, subtly but surely greasing the skids for conviction.

E. THE TRIAL COURT MATERIALLY PREJUDICED THE DEFENSE BY REFUSING JURY INSTRUCTIONS DRAWN FROM THE EVIDENCE AND SUPPORTING THE DEFENSE CASE.

The refused but crucial instructions were ;Missing Witness Instructions for Witnesses Wholly under the Control of the Prosecution. The Res Gestae Instruction Regarding the Victim's Expressions to His Mother of His Fear of Defendant Sheldon Wong, and thc Rogue Agent Jury Instruction in Reference to a Corporate Officer under Impeachment by the Corporation. Likewise, the Freedom of Association Instruction was crucial, decidedly, even more so. Without it, the statute is inconstitutional

Freedom of Association includes but is broader then just speech. The First Amendment of the U.S. Constitution protects the rights of individuals to freedom of religion, speech, press, petition, and freedom of association is constitutionally protected because it serves as a means of preserving other First Amendment activities such as free speech, petition for redress of grievances,and the exercise of religion,. *Pickup v. Brown*, 740 F.3d 1208 (Ninth circuit. 2014).

Freedom of association under the First Amendment and the Pennsylvania Constitution protects the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. *National Association for the advancement of multijurisdictional practice the Berch*, 770 3F. 3-D 1037 (Ninth Circuit 2014). While the First Amendment does not protect violence, other forms of expressive or physical activity are protected, including nude dancing and flag burning Texas v. Johnson, 491 U.S. 397 (1989). It should do no less for fraternity rituals which do not pose an unreasonable risk of harm. A jury instruction was crucial

F. THE TRIAL COURT FAILED TO CORRECT THE PROSECUTOR'S CLOSING ARGUMENT APPEAL TO JURY PASSION BY DECLINING TO GIVE A CORRECTIVE INSTRUCTION.

The prosecution clearly was appealing to passion and sympathy rather than reason during the closing argument. The trial court in its 1925 (A) supplemental statement, correctly identifies the instance citing prosecutor's following admonition to the jurors:

> October 22, 2013, important national pledge education reform official release, how is it an official release if there was a change before? Well, they've been working diligently.
>
> Isn't that nice? Should we go back to Mary Deng who lost her one and only child to hazing and tell her that the fraternity was working diligently? They hadn't gotten there yet.

NT, 11/21/17, P 84 – 85. Clearly, Mary Deng, a mother who lost her only child had nothing to do with defense closing argument . Prosecutor's comments had nothing to do with "fair response." Leaving this unaddressed simply added to the cascading destructive effectof the courts prior rulings. A new trial should be granted.

CONCLUSION

Pi Delta Psi Fraternity, the national, was deprived of the constitutional right to present a defense. The trial was riddled with other error depriving the national fraternity of a fair trial. Being deprived of evidence and the opportunity to rebut, then further deprived of exhibits, precluding effective closing argument by counsel renders the right to counsel and the trial itself a sham. Distorted jury instructions naturally result. Even the verdict slip brazenly defies due process by reversing the presumption of innocence, a fundamental underpinning of the system of justice in the United States.. The cascading destructive effect is immeasurable. A new trial should be granted.

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IN THE SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

Commonwealth of Pennsylvania, Appellee	:	Superior Court Docket No. 458 EDA 2018
v.	:	
Pi Delta Psi, Inc., Appellant	:	

PROOF OF SERVICE

I hereby certify that I am, this 30th day of July, serving a true and correct copy of the **Appellant's Brief**, Appendix, and Reproduced Record, upon the persons and in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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