

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 v. : No. CR 1200-2018  
 :  
 LEWIS A. GREGG, :  
 Defendant :  
 :

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Timothy M. Doherty, Esq. Counsel for Commonwealth  
Senior Deputy Attorney General  
  
Robert A. Sauerman, Esq. Counsel for Defendant

MEMORANDUM OPINION AND ORDER

Matika, J. - March 15, 2021

I. INTRODUCTION.

This Memorandum Opinion addresses the September 24, 2020 "Omnibus Pretrial Motions" ("Defendant's Omnibus Pretrial Motions") filed by Defendant Lewis A. Gregg ("Mr. Gregg" or "Defendant").

As shall be delineated in detail herein, Defendant has presented six motions in connection with this matter for the Court's consideration. In accordance with the Order that follows this Memorandum Opinion, three of these motions shall be **DENIED** and three of these motions shall be **GRANTED**.

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PENNSYLVANIA

**II. FACTUAL AND PROCEDURAL BACKGROUND.**

**A. The Underlying Charges.**

Defendant has been charged with:

- Possession with Intent to Deliver a Controlled Substance [Count I] [Felony]  
(35 Pa.C.S.A. §780-113(a)(30));
- Aggravated Assault [Count II] [Felony - 2]  
(18 Pa.C.S.A. §2702(a)(6))
- Unlawful Possession of Drug Paraphernalia [Count III] [Misdemeanor]  
(35 Pa.C.S.A. §780-113(a)(32))
- Dealing in Proceeds of Unlawful Activities [Count IV] [Felony - 1]  
(18 Pa.C.S.A. §5111(a)(1))
- Harassment [Count V] [Misdemeanor - 1]  
(18 Pa.C.S.A. §908(a))

**B. Factual Background.<sup>1</sup>**

**1. The Sealed Search Warrant.**

On August 30, 2018, Narcotics Agent Crystal Adames ("Narcotics Agent Adames"), then known as Crystal Bodden, prepared an Affidavit of Probable Cause and Application for Search Warrant and Authorization (sometimes hereinafter the "Search Warrant") with respect to the search for and seizure of prescription

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<sup>1</sup> The Court gleans the factual background herein set forth from the testimony given at the November 17, 2020 hearing held in this matter before this Court (the "November 17, 2020 Hearing.").

medications, controlled substances, drug paraphernalia, and items related thereto and pertaining to the person of Defendant and the premises located at 311 West Patterson Street, Lansford, Pennsylvania.

Also on August 30, 2018, the Honorable Steven R. Serfass, reviewed and signed the Application for Search Warrant and Authorization. Additionally, Judge Serfass ordered that the Affidavit of Probable Cause be sealed for sixty days based upon Narcotics Agent Adames' representation that the protection of both the identity and safety of a confidential informant and the integrity of other parallel criminal investigations so required.

The Application for Search Warrant and Authorization identified the 311 West Patterson Street address and Defendant as the "premises and/or person to be searched" and further identified Defendant as the "owner, occupant or possessor of said premises to be searched."

## 2. The Search at 311 West Patterson Street.

Agents from the Pennsylvania Office of Attorney General and the Carbon County Drug Task Force (sometimes hereinafter the "Agents") executed the Search Warrant on August 31, 2018 at the 311 West Patterson Street premises. The Agents took Defendant into custody at these premises.

Subsequent to the execution of the Search Warrant, on August

31, 2018, Narcotics Agent Adames handed Defendant a copy of the Application for Search Warrant and Authorization, a copy of an inventory sheet delineating items found during the search and seizure, but not a copy of the sealed Affidavit of Probable Cause. She did so after conducting an interview of Defendant at the Lansford Police Department, in a Lansford Police Department patrol unit, and as authorities transported Defendant to be arraigned.<sup>2</sup> At an unspecified time "earlier in the day," the Agents advised Defendant that they possessed a signed and approved search warrant.

Also, subsequent to the execution of this Search Warrant, Narcotics Agent Adames interviewed Defendant at the Lansford Police Department with Narcotics Agent Thomas Sodor ("Narcotics Agent Sodor") also present. Prior to commencing the interview, Narcotics Agent Adames verbally read Defendant his Miranda rights from a written document containing a statement of those rights. Narcotics Agent Adames, Narcotics Agent Sodor, and Defendant each executed the written copy of the Miranda rights from which Narcotics Agent Adames had read which also contained a statement indicating his willingness to speak with narcotics Agent Adames and Narcotics Agent Sodor.

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<sup>2</sup> Defendant contended at the November 17, 2020 Hearing that he did not receive a copy of the Application for Search Warrant and Authorization on August 31, 2018. This Court finds Narcotics Agent Adames' testimony on this point to be more credible.

Defendant subsequently admitted to selling his prescribed medication, selling controlled substances, and purchasing heroin from a supplier. Defendant executed a handwritten document prepared by Narcotics Agent Adames containing both questions proffered to him during this interview and the aforementioned admissions.<sup>3</sup>

Throughout the interview process, Defendant presented as sober, understanding of the proceedings, capable of reading and writing the English language, understanding of both the written Miranda rights, and under no threats, coercion, or promises. Defendant willingly provided his admissions.

C. Procedural Background: The Charges Filed and the Instant Motions.

Defendant, represented by counsel, waived his preliminary hearing.

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<sup>3</sup> Defendant contended at the November 17, 2020 Hearing that since he did not have his glasses with him, he could not read the questions proffered to him during this interview and the aforementioned admissions. The Court does not find this testimony to be credible and notes that, even if true, Narcotics Agent Adames' unrefuted testimony indicates that she reads all of her documents word for word so that putative defendants can hear the contents thereof in case that they cannot see the contents thereof.

Based upon the foregoing, on November 9, 2018, the Commonwealth charged Defendant by Information with the above-delineated offenses.

Defendant's Omnibus Pretrial Motions present six motions for this Court's consideration:

"Count One - Motion to Suppress - Search Warrant

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Count Two - Motion to Suppress [Alleged Written Confession]

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Count Three - Motion to Compel - Cell Phones

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Count Four - Motion to Compel - Audio/Video Recordings

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Count Five - Motion to Compel - Photographic Images

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Count Six - Motion for Habeas Corpus Relief[.]"

*See, generally* Defendant's Omnibus Pretrial Motions.

At the November 17, 2020 Hearing, the Commonwealth and Defendant agreed to have this Court grant the motions set forth at "Count Three - Motion to Compel - Cell Phones," "Count Four -

Motion to Compel - Audio/Video Recordings," and "Count Five - Motion to Compel - Photographic Images."

The Commonwealth and Defendant agreed that this Court should order that the materials therein referenced, to the extent such materials exist, to be turned over from the Commonwealth to Defendant and barred from use at trial by the Commonwealth if not turned over. The Court shall do so in the accompanying Order.<sup>4</sup>

Defendant's Omnibus Pretrial Motions characterize the relief sought in the three remaining motions thusly:

[Count One - Motion to Suppress - Search Warrant] Suppression of the subject search warrant and all evidence derived therefrom because "it was never shown to Gregg, nor provided to him until it was eventually turned over to his counsel in discovery" and "[t]he warrant was based on incomplete hearsay from a confidential informant rather than the type of reliable evidence necessary to secure such a warrant."

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[Count Two - Motion to Suppress [Alleged Written Confession]] Suppression of the contents of Defendant's "alleged written confession made on August 31, 2018 at 9:33 a.m." because "he never made these statements," "his signature on the paper was made while he did not have his glasses to review the contents of the statement," "he was not informed of the true content of the statement or that he was admitt[ing] to selling controlled substances by

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<sup>4</sup> Given the foregoing, the Court need not further discuss herein "Count Three - Motion to Compel - Cell Phones," "Count Four - Motion to Compel - Audio/Video Recordings," or "Count Five - Motion to Compel Photographic Images."

signing it," and "[t]he statement was made under duress and without the understanding of Gregg as to its contents."

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[Count Six - Motion for Habeas Corpus Relief] Dismissal of all charges against Defendant because "[o]nce [the requested] pieces of evidence are suppressed the Commonwealth no longer has the necessary prima facie evidence to take this matter forward," and "[n]ew case law in Pennsylvania (Commonwealth v. McClelland) requires that the Commonwealth produce fact witnesses at preliminary hearings, a procedural right that Gregg must be allowed to take advantage of in defense of the charges against him,"

See Defendant's Omnibus Pretrial Motions at ¶¶6-19, 44-56. At the November 17, 2020 Hearing, the Court indicated that it would limit any presentation and briefing with respect to habeas corpus relief to the issue of Defendant's entitlement to a habeas corpus hearing.<sup>5</sup>

Defendant filed his "Brief in Support of Defendant's Omnibus Pretrial Motions" ("Defendant's Supporting Brief") on November 30, 2020.

The Commonwealth filed its "Commonwealth's Response to Defendant Lewis Gregg's Omnibus Pretrial Motions" ("Commonwealth's

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<sup>5</sup> For judicial expediency purposes, this ruling allowed counsel to address the *McClelland* issue with the understanding that, depending upon this Court's ruling thereupon, a potential habeas corpus hearing might be held on the issue of *prima facie*.



Response Brief") on November 12, 2020 and its "Commonwealth's Supplemental Brief in Opposition to Defendant Lewis Gregg's Omnibus Pretrial Motion" ("Commonwealth's Supplemental Brief") on November 23, 2020.

### III. DISCUSSION.

#### A. "Count One - Motion to Suppress - Search Warrant".

##### 1. The Commonwealth's Burden Regarding Suppression of Evidence in a Search Warrant Matter.

Rule 581(H) of the Pennsylvania Rules of Criminal Procedure ["Suppression of Evidence"] delineates the Commonwealth's burden with respect to the suppression of evidence and states:

"(H) The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of defendant's rights. The defendant may testify at such hearing, and if the defendant does testify, the defendant does not thereby waive the right to remain silent during trial.

See Pa.R.Crim.P. 581(H). See, generally, *Commonwealth v. Dixon*, 997 A.2d 368 (Pa.Super. 2010).

In a search warrant matter, the Commonwealth must introduce the warrant, the accompanying affidavit, and must also produce the affiant for cross-examination purposes. See *Commonwealth v. Ryan*, 407 A.2d 1345 (Pa.Super. 1979). Where the Court finds the testimony of the relevant police officer(s) to be credible, it may

find that the Commonwealth has satisfied its burden. See *Commonwealth v. Valenuzza*, 597 a.2D 93 (Pa.Super. 1991).

2. The Propriety of the Sealed Search Warrant in this Matter.

a. Standards Governing a Finding of Probable Cause and Sealing when Issuing a Search Warrant.

Defendant contends without explanation that, in this matter, “[t]he warrant was based on incomplete hearsay from a confidential informant rather than the type of reliable evidence necessary to secure such warrant” and that accordingly all of the evidence seized from 311 West Patterson Street must be suppressed. See Defendant’s Omnibus Pretrial Motions at ¶¶9-10. This Court, which authorized the Search Warrant in this matter, per Judge Serfass, disagrees with Defendant’s contention.<sup>6</sup>

The Fourth Amendment to the United States Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

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<sup>6</sup> Defendant, despite having the opportunity to do so, did not address his search warrant contentions in Defendant’s Supporting Brief, confining his discussion of the search warrant to the assertion that “Gregg believes that the law pursuant to the search warrant is relatively settlement (sic) and therefore will rely on the Court’s understanding of such law.” See Defendant’s Supporting Brief at 1-2.

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. See U.S. Const., Amdt. 4.

When analyzing the Fourth Amendment's probable cause sufficiency of a search warrant request "...the task of the issuing [authority], is simply to make a practical, common-sense decision whether, **given all the circumstances** set forth in the affidavit before her/him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, **there is a fair probability that contraband or evidence of a crime will be found in a particular place.**" See *Illinois v. Gates*, 462 U.S., 213, 238 (1983) (emphasis added). Conclusory statements will not suffice. See *Id.* at 238.<sup>7</sup>

The Pennsylvania Supreme Court has explained that:

"This Court subsequently held that a determination of probable cause based upon information received from a confidential informant depends upon the informant's reliability and basis of knowledge viewed in a common sense, non-technical manner. *Commonwealth v. Luv*, 557 Pa. 570, 735 A.2d 87, 90 (1999). Thus, an informant's tip may constitute probable cause where police independently corroborate the tip, or where the informant has provided

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<sup>7</sup> The Pennsylvania Supreme Court has adopted this "totality of circumstances" analysis with respect to Article I, Section 8 of the Pennsylvania Constitution, which Defendant has not invoked in this case. See *Commonwealth v. Gray*, 503 A.2d 921 (Pa. 1985). See also Pa.Const. Art. I, §8 ("The people shall be secure in their persons, houses, papers and possessions from the unreasonable searches and seizures, and no warrant to search any place or to seize any persons or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed by the affiant.").

accurate information of criminal activity in the past, or where the informant himself participated in the criminal activity. *Id.* The corroboration by police of significant details disclosed by the informant in the affidavit of probable cause meets the Gates threshold. *Commonwealth v. Sanchez*, 589 Pa. 43, 907 A.2d 477, 488 (2006) (quoting *United States v. Tuttle*, 200 F.3d 892, 894 (6th Cir.2000)) (“[I]nformation received from an informant whose reliability is not established may be sufficient to create probable cause where there is some independent corroboration by police of the informant's information.”) ***This Court has recently expressed the standard broadly: “The linch-pin that has been developed to determine whether it is appropriate to issue a search warrant is the test of probable cause. Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted.”*** *Commonwealth v. Jones*, 605 Pa. 188, 988 A.2d 649, 655 (2010) (citations omitted).”

See *Commonwealth v. Clark*, 28 A.3d 1284, 1288 (Pa. 2011) (emphasis added).<sup>8</sup>

b. Application in this Matter of Standards Governing a Finding of Probable Cause and Sealing when Issuing a Search Warrant.

This Court finds, as it stated plainly in the Search Warrant, and applying the standard delineated above, that probable cause existed to issue the search warrant in this matter. The Court

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<sup>8</sup> Defendant does not take issue with this Court having ordered that the Affidavit of Probable Cause be sealed. See, generally, Defendant's Omnibus Pretrial Motion. See also, generally, Pa.R.Crim.P. 211 ["Sealing Search Warrant Affidavits"].

further finds Defendant's claim that "[t]he warrant was based on incomplete hearsay from a confidential informant rather than the type of reliable evidence to secure such warrant" to be meritless. See Defendant's Omnibus Pretrial Motion at ¶9. In particular, the Court notes that:

- Both affiants, Narcotics Agent Adames and Officer Jarrod Bulger had extensive investigation experience;
- Narcotics Agent Adames and Officer Jarrod had learned that Defendant possessed an extensive criminal history;
- Narcotics Agent Adames and Officer Jarrod had received independently verified information from a reliable confidential informant that Defendant had distributed prescription medication and controlled substances; and
- The confidential informant, working with law enforcement, had made multiple purchases of Percocet and heroin from Defendant inside the 311 West Patterson Street premises.

### **3. Timing of Presentation of a Search Warrant.**

Defendant contends that "[n]ot presenting Gregg with a warrant was violative of his rights under the Fourth Amendment to the United States Constitution and makes such search invalid." See Defendant's Omnibus Pretrial Brief at ¶8.

This Court also finds this contention proffered by Defendant to be meritless. The United States Supreme Court has stated explicitly in *dicta* that the Fourth Amendment does not require an executing officer to present a copy of a warrant before conducting

a search. See *United States v. Grubb*, 547 U.S. 90, 98-99, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006).<sup>9</sup>

The Pennsylvania Rules of Criminal Procedure, moreover, do not require that a warrant be shown to a premises occupant prior to the conduct of a search. Rather, the Pennsylvania Rules of Criminal Procedure provide only that "[a] law enforcement officer, upon taking property pursuant to a search warrant, shall leave with the person from whom or from whose premises the property was taken a copy of the warrant and affidavit(s) in support thereof, and a receipt for the property seized[]" and that "[a] copy of the warrant and affidavit(s) must be left whether or not any property is seized." See Pa.R.Crim.P. 208(A) ["Copy of Warrant; Receipt for Seized Property"]. The Pennsylvania Rules of Criminal Procedure further provide that "...the officer shall not leave a copy of an affidavit that has been sealed pursuant to Rule 211." See Pa.R.Crim.P. 208(C) ["Copy of Warrant; Receipt for Seized

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<sup>9</sup> The Fourth Amendment **does** require that an executing officer present to a premises occupant a warrant **upon request** of an occupant, barring the existence of articulated safety or tactical concerns. See *Camara v. Mun. Ct.*, 387 U.S. 523, 530-533, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (Noting that "...when the inspector demands entry, the occupant has... no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under the proper authorization" and "[t]hat purpose cannot be served if executing officers arbitrarily decide to withhold the presentation of the warrant until the conclusion of the search despite an occupant's repeated requests to view the warrant."). No evidence exists that Defendant made such a request in this matter.

Property"]. Such is the case here.

For the reasons set forth in this section, the Court **DENIES** Defendant's "Count One - Motion to Suppress - Search Warrant."

**B. "Count Two - Motion to Suppress [Alleged Written Confession]."**

Defendant seeks, in his "Count Two - Motion to Suppress [Alleged Written Confession]," suppression of the contents of Defendant's "alleged written confession made on August 31, 2018 at 9:33 a.m." because "he never made these statements," "his signature on the paper was made while he did not have his glasses to review the contents of the statement," "he was not informed of the true content of the statement or that he was admitt[ing] to selling controlled substances by signing it," and "[t]he statement was made under duress and without the understanding of Gregg as to its contents." See Defendant's Omnibus Pretrial Motions at ¶¶11-19.

The United States Supreme Court has held that, before police may conduct a custodial interrogation of an individual, such individual must be informed in clear and unequivocal terms of the right to remain silent, that anything said can and will be used against the speaker in court, that the speaker has the right to consult with counsel, and that, if indigent, counsel will be appointed for the speaker. See *Miranda v. Arizona*, 384 U.S. 467-469 (1966).

An accused may waive these rights if done so knowingly. See *Edwards v. Arizona*, 451 U.S. 477, 484 (1981) (internal citations omitted) (Recognizing that "after initially being advised of his *Miranda* rights, the accused may validly waive his rights and respond to interrogation" and "that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'").

In Pennsylvania, the Commonwealth must establish a knowing, intelligent, and voluntary waiver of *Miranda* rights by a preponderance of the evidence. See *Commonwealth v. Fletcher*, 750 A.2d 261 (Pa. 2000).

In the instant matter, the Court finds that Defendant made a knowing, voluntary, and intelligent waiver of his *Miranda* rights and finds not credible Defendant's contentions that "he never made these statements," "his signature on the paper was made while he did not have his glasses to review the contents of the statement," "he was not informed of the true content of the statement or that he was admitt[ing] to selling controlled substances by signing it," and "[t]he statement was made under duress and without the understanding of Gregg as to its contents."



See Defendant's Omnibus Pretrial Motions at ¶¶11-19.

In particular, the Court notes that:

- Narcotics Agent Adames read Defendant his *Miranda* rights in the presence of Narcotics Agent Sodor;
- Defendant signed along with Narcotics Agent Adames and Narcotics Agent Sodor, an acknowledgement that delineated his *Miranda* rights and his willingness nonetheless to speak with law enforcement;
- Defendant thereafter made voluntary post-*Miranda* admissions that he sold his prescribed medication, sold controlled substances, and purchased heroin from a supplier; and
- Defendant executed a handwritten document prepared by Narcotics Agent Adames containing both questions proffered to him during the post-*Miranda* interview and the aforementioned admissions.

For the reasons set forth in this section, the Court **DENIES** Defendant's "Count Two - Motion to Suppress [Alleged Written Confession]."

C. "Count Six - Motion for Habeas Corpus Relief."

1. The Habeas Corpus Standard.

Traditionally, a petition for writ of habeas corpus may be filed to correct void or illegal sentences or an illegal detention, or where the record shows that a trial, sentence, or plea to be so fundamentally unfair as to amount to a denial of due process or other constitutional rights. See *Chadwick v. Caulfield*, 834 A.2d 562 (Pa.Super. 2003). A petition for writ of habeas corpus

additionally constitutes the proper method for challenging a pre-trial finding that the Commonwealth established a prima facie case. See *Commonwealth v. Cabo*, 822 A.2d 60 (Pa.Super. 2003). In the face of a pre-trial habeas corpus petition, the Commonwealth bears the burden of establishing that a prima facie case has been established - that a crime has been committed and that the accused probably committed it. See *Commonwealth v. Prado*, 393 A.2d 8 (Pa. 1978). The Commonwealth must present evidence such that, if presented at trial, the case would be submitted to a jury. See *Commonwealth v. Wojdak*, 466 A.2d 991 (Pa. 1983).

2. Defendant Voluntarily Waived His Preliminary Hearing.

Defendant seeks, in his "Count Six - Motion for Habeas Corpus Relief," dismissal of all charges against because "[o]nce [the requested] pieces of evidence are suppressed the Commonwealth no longer has the necessary prima facie evidence to take this matter forward." Further, Defendant argues that "[n]ew case law in Pennsylvania (Commonwealth v. McClelland) requires that the Commonwealth produce fact witnesses at preliminary hearings, a procedural right that Gregg must be allowed to take advantage of in defense of the charges against him." See Defendant's Omnibus Pretrial Motions at ¶¶6-19, 44-56.

The Court takes judicial notice that Defendant in the instant matter waived his preliminary hearing while represented by counsel. See *Commonwealth of Pennsylvania v. Lewis A. Gregg*, MDJ-563093-CR-407-2018, Waiver of Preliminary Hearing, October 10, 2018. Defendant accordingly by rule may not challenge the sufficiency of the Commonwealth's *prima facie* case. See Pa. R.C.P. 541 [Waiver of Preliminary Hearing]. Defendant specifically acknowledged this consequence when waiving his preliminary hearing. See *Commonwealth of Pennsylvania v. Lewis A. Gregg*, MDJ-563093-CR-407-2018, Waiver of Preliminary Hearing, October 10, 2018 ("I understand that when I am represented by counsel and I waive the right to preliminary hearing, I am thereafter precluded from raising challenges to the sufficiency of the *prima facie* case").

3. The Pennsylvania Supreme Court's Decision in *Commonwealth v. McClelland*.

Rule 542(E) of the Pennsylvania Rules of Criminal Procedure ("Rule 542(E)") states:

**Rule 542. Preliminary Hearing; Continuances**

(E) Hearsay as provided by law shall be considered by the issuing authority in determining whether a *prima facie* case has been established. Hearsay evidence shall be sufficient to establish any element of an offense, including, but not limited to, those requiring proof of the ownership of, non-permitted use of, damage to, or value of property.

See Pa.R.Crim.P. 542(E).

As of the October 10, 2018 preliminary hearing in this matter, the Pennsylvania Superior Court's opinion in *Commonwealth v. Ricker* provided Pennsylvania's prevailing interpretive judicial pronouncement with respect to Rule 542(E). In *Commonwealth v. Ricker*, the Pennsylvania Superior Court held that a plain reading of Rule 542(E) indicates that it permits hearsay evidence to be considered at a preliminary hearing in determining any material element of a crime when the Commonwealth seeks to establish a *prima facie* case and that an accused does not have a state or federal constitutional right to confront the witnesses against him or her at the preliminary hearing. See generally, *Commonwealth v. Ricker*, 120 A.3d 349 (Pa.Super. 2015).

On July 21, 2020, the Pennsylvania Supreme Court, in *Commonwealth v. McClelland*, held that Rule 542(E) does not permit the Commonwealth to rely exclusively on hearsay evidence to establish all elements of all crimes for purposes of establishing a *prima facie* case at a preliminary hearing. See *Commonwealth v. McClelland*, 233 A.3d 717, 734 (Pa. 2020) ("We determine Rule 542(E), though not the model of clarity, does not permit hearsay evidence alone to establish all elements of all crimes for purposes of establishing a *prima facie* case at a defendant's preliminary hearing.").

4. Retroactive Application of Commonwealth v. McClelland.

"Unless they fall within an exception to the general rule [inapplicable to this matter], new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." See *Teague v. Lane*, 489 U.S. 288, 310 (1989).

The instant matter - obviously still ongoing - had not become final as of the Pennsylvania Supreme Court's July 21, 2020 issuance of the *Commonwealth v. McClelland* opinion. Accordingly, this Court shall consider retroactive application of *Commonwealth v. McClelland*.

D. Application of Commonwealth v. McClelland to this Matter.

The Pennsylvania Supreme Court in *Commonwealth v. McClelland* held that "[w]e determine Rule 542(E), though not the model of clarity, does not permit hearsay evidence alone to establish all elements of all crimes for purposes of establishing a *prima facie* case at a defendant's preliminary hearing."). See *Commonwealth v. McClelland*, 233 A.3d at 734.

This Court holds that any retroactive application of *Commonwealth v. McClelland* does not compel the necessity of a

preliminary hearing when a defendant has waived a preliminary hearing. In the instant matter, and in the context of a preliminary hearing waiver, Defendant cannot avail himself of any procedural safeguards afforded by *Commonwealth v. McClelland*. Defendant cannot by waiving a preliminary hearing deprive the Commonwealth of the opportunity to present fact witnesses in support of its *prima facie* case only to later complain that the Commonwealth has not presented fact witnesses. Further, the Court cannot accept any argument suggesting that a Defendant waived his or her preliminary hearing on the speculative basis that the Commonwealth's *prima facie* case would have been established by the type of hearsay evidence precluded by *McClelland*.

Defendant, in essence, would have this Court expand and re-write the *Commonwealth v. McClelland* holding to eviscerate Rule 541 of the Pennsylvania Rules of Civil Procedure pertaining to preliminary hearing waivers.

This Court will not undertake to do so and accordingly **DENIES** Defendant's "Count Six - Motion for Habeas Corpus Relief."

#### **IV. CONCLUSION.**

For the foregoing reasons, this Court enters the following Order:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 v. : No. CR 1200-2018  
 :  
 LEWIS A. GREGG, :  
 Defendant :  
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Timothy M. Doherty, Esq. Counsel for Commonwealth  
Senior Deputy Attorney General

Robert A. Sauerman, Esq. Counsel for Defendant

ORDER OF COURT

AND NOW, this 15<sup>th</sup> day of March, 2021, upon consideration of

- the September 24, 2020 "Omnibus Pre-Trial Motions" filed by Defendant Lewis A. Gregg,

- the November 30, 2020 "Brief in Support of Defendant's Omnibus Pretrial Motions" filed by Defendant Lewis A. Gregg,

- the November 12, 2020 "Commonwealth's Response to Defendant Lewis Gregg's Omnibus Pretrial Motion,"

- the November 12, 2020 "Commonwealth's Brief in Opposition to Defendant, Lewis Gregg's, Omnibus Pretrial Motion,"

- the November 23, 2020 "Commonwealth's Supplemental Brief in Opposition to Defendant Lewis A. Gregg's Omnibus Pretrial Motion,"

after the November 17, 2020 hearing thereon, and upon comprehensive review of this matter, it is hereby **ORDERED and DECREED** that the:

- Motion to Suppress - Search Warrant,

FILED IN OFFICE  
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TIMOTHY M. DOHERTY  
CLERK OF COURTS  
CARBON COUNTY  
PENNSYLVANIA

- Motion to Suppress [Alleged Written Confession],  
and

- Motion for Habeas Corpus Relief,

filed by Defendant Lewis A. Gregg are **DENIED**, and the

- Motion to Compel - Cell Phones,

- Motion to Compel - Audio/Video Recordings, and

- Motion to Compel - Photographic Images

filed by Defendant Lewis A. Gregg are **GRANTED**.

The Commonwealth, to the extent it has not already done so, shall forthwith turn over to Defendant Lewis A. Gregg all cell phone data in its possession related to this matter, any audio or video recordings in its possession related to this matter, any phone intercept orders in its possession related to this matter, and any legible photographs of all evidence collected during the August 31, 2018 search in this matter and other photographs of evidentiary value in its possession. Any such existent material not turned over to Defendant in accordance with this Order shall not be used by the Commonwealth at trial.

BY THE COURT:

  
\_\_\_\_\_  
Joseph J. Matika, J.