

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

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. CR 972-2019
	:	
DANIEL JOB,	:	
Defendant	:	

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Brian B. Gazo, Esq.

Counsel for Commonwealth  
Assistant District Attorney

Leonard Gryskewicz, Jr., Esq.

Counsel for Defendant

MEMORANDUM OPINION AND ORDER

Matika, J. - October 19, 2020

**I. INTRODUCTION.**

This Memorandum Opinion addresses the October 10, 2019 "Omnibus Pre-Trial Motions" ("Defendant's Omnibus Pre-Trial Motions") filed by Defendant Daniel Job ("Mr. Job" or "Defendant").

As shall be delineated in detail herein, Defendant has presented nine motions in connection with this matter - six of which remain for the Court's consideration herein. In accordance with the Order that follows this Memorandum Opinion, each of the remaining six motions shall be **DENIED**.<sup>1</sup>

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<sup>1</sup> This Court will summarily grant the "Motion in Limine to Preclude any Testimony that Defendant called D.D.'s Sister Fat" as agreed to at the February 20, 2020 hearing in this matter.

## II. FACTUAL AND PROCEDURAL BACKGROUND.

### A. The Underlying Charges.

Defendant has been charged with:

- Corruption of Minors [Count 1] [Misdemeanor]  
(18 Pa.C.S.A. §6301(a)(1)(i));
- Harassment [Count 2] [Misdemeanor]  
(18 Pa.C.S.A. §2709(a)(4)) ("...communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures...;" and
- Harassment [Count 3] [Summary]  
(18 Pa.C.S.A. §2709(a)(3)) ("...engages in a course of conduct or repeatedly commits acts which swerve no legitimate purpose...").

See Defendant's Omnibus Pre-Trial Motions at ¶¶14, 34-35.

### B. Factual Background.<sup>2</sup>

In the latter part of the 2018-2019 school year, Defendant, a seventy-five year old man, drove a school van for the school attended by D.D., the victim in this matter ("D.D." or the "Victim"). At the time of the incidents herein described D.D., a ten-year old female, had special needs described by her mother as

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<sup>2</sup> The Court gleans the factual background herein set forth from the testimony given at the August 14, 2019 preliminary hearing held before Magisterial District Judge Joseph D. Homanko, Sr. (the "August 14, 2019 Preliminary Hearing") in this matter. The parties agreed at the February 20, 2020 hearing with respect to Defendant's Omnibus Pre-Trial Motions that the testimony given at the August 14, 2019 Preliminary Hearing, as reflected in the transcript thereof, would constitute the factual record for purposes of the resolution of the motions herein considered.

"ADHD combined" and "ODD, oppositional defiance disorder."

On three separate occasions in the late winter - early spring time period in 2019, Defendant made the following comments to D.D. while alone with her on the school van:

- "...If you eat too much pretzels your boobs will grow big." (the "Pretzel Comment");
- "Sometime when people are having sex they always put mirrors up above them or on the side." (the "Mirror Comment");
- "...I can't wait for you to grow up so I can see your body." (the "Body Comment");

D.D. variously testified that she told her mother about the Body Comment on the same day that it occurred, that she told her mother about all three of the comments, and that she told her mother about two of the comments.

On the morning following the Body Comment, D.D.'s mother notified a counselor in the Weatherly Area School District. On May 16, 2019, Officer Edward Kubert ("Officer Kubert") received a Childline report regarding D.D. whereupon he subsequently arranged to have D.D. taken to the Children's Advocacy Center for an interview.

On May 31, 2019, Defendant voluntarily appeared at the Weatherly Police Department and gave a statement to Officer Kubert in which he denied making any sexual comments to D.D.

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

Based upon the foregoing, on August 29, 2019, the Commonwealth charged Defendant with the above-delineated charges.

Defendant's Omnibus Pre-Trial Motions presents nine motions for this Court's consideration:

"III. Motion for Writ of Habeas Corpus on Count 1 of the Information

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IV. Motion for Writ of Habeas Corpus on Harassment Charges

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V. Motion to Dismiss Charges based Upon Protected First Amendment Speech

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VI. Motion to Declare D.D. Incompetent to Testify

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VII. Motion to have D.D. Submit to Psychiatric Evaluation to Aid in the Competency Determination

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VIII. Motion to Preclude D.D. from Testifying Because she does not Understand what an Oath is or the Purpose of the Oath to Testify Truthfully

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IX. Motion in Limine to Preclude Video of CAC Interview from being Introduced into Evidence at Trial

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X. Motion in Limine to Preclude Christelle Patrice from Testifying at Trial

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XI. Motion in Limine to Preclude any Testimony that Defendant called D.D.'s Sister Fat[.]"

See March 20, 2019 Brief in Support of Omnibus Pre-Trial Motions ("Defendant's Supporting Brief") at ¶¶13, 33, 56, 75, 96, 108, 112, 116, 121.

On February 20, 2020, in connection with the hearing in this matter, the Court permitted Defendant to withdraw without prejudice the "[IX.] Motion Limine to Preclude Video of CAC Interview from being Introduced into Evidence at Trial" and the "[X.] Motion in Limine to Preclude Christelle Patrice from Testifying at Trial." Additionally, the Commonwealth indicated that it had no intent to elicit testimony in this matter with respect to any physical characteristics of D.D.'s sister. As such, the Commonwealth indicated that it consented to the "[XI.] Motion in Limine to Preclude any Testimony that Defendant called D.D.'s Sister Fat." Accordingly, the Court indicated that it would grant Defendant's "[XI.] Motion in Limine to Preclude any Testimony that

Defendant called D.D.'s Sister Fat" and shall do so in the accompanying Order.<sup>3</sup>

Defendant's Supporting Brief characterized the remaining issues raised thusly:

"1. Whether the Defendant is entitled to a Writ of *Habeas Corpus* on Count 1 of the Information since there was no act that tended to corrupt the morals of a minor?

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2. Whether the Defendant is entitled to a Writ of *Habeas Corpus* on Counts 2 and 3 of the information [lower case in original] since the Commonwealth cannot prove a *prima facie* case that Mr. Job had the intent to annoy, harass or alarm when the comments were allegedly uttered?

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3. Whether the Defendant is entitled to a Writ of *Habeas Corpus* on Count 2 of the Information because the Commonwealth cannot prove that the alleged comments were lewd, lascivious, threatening, or obscene?

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4. Whether the Court should dismiss all charges against Defendant on the basis that, even if believed, the alleged statements constitute protected free speech under the First Amendment of the United States Constitution and under the Pennsylvania Constitution?

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<sup>3</sup> Given the foregoing, the Court need not further discuss herein the "[IX.] Motion Limine to Preclude Video of CAC Interview from being Introduced into Evidence at Trial," the "[X.] Motion in Limine to Preclude Christelle Patrice from Testifying at Trial," or the "[XI.] Motion in Limine to Preclude any Testimony that Defendant called D.D.'s Sister Fat."

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5. Whether the Court should hold that D.D. is incompetent to testify at a trial in this case?

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6. Whether the Court should order a psychiatric evaluation of D.D. to aid the Court in determining whether D.D. is competent to testify?

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7. Whether the Court should preclude D.D. from testifying because she does not understand what an oath is or the purpose of the oath to testify truthfully and therefore, the Commonwealth cannot comply with Pennsylvania Rule of Evidence 603 when presenting D.D.'s testimony?"

See Defendant's Supporting Brief at 9-10. The Commonwealth filed its responsive "Commonwealth's Brief in Response to Defendant's Omnibus Pre-Trial Motions" ("Commonwealth's Response Brief") on March 10, 2020.

### III. DISCUSSION.

- A. "VI. Motion to Declare D.D. Incompetent to Testify"  
and "VIII. Motion to Preclude D.D. from testifying  
Because she does not Understand what an Oath is or the  
Purpose of the Oath to Testify Truthfully."

#### 1. D.D.'s Competence to Testify.

Pennsylvania Rule of Evidence 601 ["Competency"] sets forth the disqualification standards pertaining to witness competency.

Pennsylvania Rule of Evidence 601 states:

**"(a) General Rule.** Every person is competent to be a witness except as otherwise provided by statute or in these Rules.

**(b) Disqualification for Specific Defects.** A person is incompetent to testify if the Court finds that because of a mental condition or immaturity the person:

- (1) is, or was, at any relevant time, incapable of perceiving accurately;
- (2) is unable to express himself or herself so as to be understood either directly or through an interpreter;
- (3) has an impaired memory; or
- (4) does not sufficiently understand the duty to tell the truth."

See Pa.R.E. 601.

"The application of the standards in Pa.R.E. 601(b) is a factual question to be resolved by the court as a preliminary question under Rule 104 [of the Pennsylvania Rules of Evidence]." See Pa.R.E. 601, Comment. "In *Commonwealth v. Washington*, 554 Pa. 559, 722 A.2d 643 (1988), a case involving



child witnesses, the Supreme Court announced a *per se* rule requiring competency hearings outside the presence of the jury." See Pa.R.E. 601, Comment. "A child's competency to testify is a threshold issue that the trial court must decide..." *Commonwealth v. Washington*, 722 A.2d at 646.

"Expert testimony has been used when competency under these standards has been an issue." See Pa.R.E. 601, Comment. "The party challenging competency bears the burden of proving grounds of competency by clear and convincing evidence." See Pa.R.E. 601, Comment citing *Commonwealth v. Delbridge*, 855 A.2d 27, 40 (Pa. 2003).

A Court must ascertain that the subject child possesses "(1) such capacity to communicate, including as it does both an ability to understand questions and to frame intelligent answers, (2) mental capacity to observe the occurrence itself and the capacity of remembering what it is that [the child] is called to testify about and (3) consciousness of the duty to speak the truth." See *Commonwealth v. Washington*, 722 A.2d at 646 quoting *Rosche v. McCoy*, 156 A.2d 307, 310 (Pa. 1959) (bracketed material in original).

The parties agreed at the February 20, 2020 hearing that the testimony given at the August 14, 2019 Preliminary Hearing, as reflected in the transcript thereof, would constitute the factual

record for purposes of the resolution of the motions herein considered. This Court has reviewed such transcript as well as the arguments proffered by the parties pertaining thereto.

Consistent with Rule 321 of the Pennsylvania Rules of Civil Procedure Governing Actions and Proceedings Before Magisterial District Judges, Magisterial District Judge Homanko ("Judge Homanko"), at the August 14, 2019 Preliminary Hearing, considered Defendant's "objection to the witness's competency." See Pa.R.C.P.M.D.J. No. 321 ["Hearings and Evidence"] ("The magisterial district judge shall be bound by the rules of evidence...").

In considering this objection, Judge Homanko permitted questioning by counsel for both the Commonwealth and Defendant, preliminarily questioned D.D. himself, satisfied himself as to D.D.'s competency to testify, and reserved the right to "excuse the witness" in the event that her testimony became "complicated." D.D. testified to completion at the August 14, 2019 Preliminary Hearing without being excused.

Specifically, upon inquiry by Judge Homanko, D.D. spoke freely to him, identified him as a judge, recalled that she attended school at Jim Thorpe the previous year, and stated that she knew the difference between the truth and a lie.

Similarly, the Commonwealth's competency questioning of D.D.

elicited that she knew when her birthday is, understood what the truth is, and that she knew that she had to tell the truth. D.D. also told Commonwealth's counsel that she does not know what an "oath" means.

Defense counsel's competency questioning of D.D. consisted solely of asking her if she understood what an "oath" is and what the purpose of an oath is. D.D., under this questioning, confirmed her unfamiliarity with the meaning and purpose of the term "oath."

Based upon the foregoing, this Court concludes that D.D. satisfied the required elements for a determination of witness competency - the capacity to communicate, the mental capacity to observe an occurrence, the capacity to remember, and a consciousness of the duty to speak the truth - and that she testified competently at the August 14, 2019 Preliminary Hearing. This Court further concludes, at this stage of the proceedings, and based upon the factual record upon which the parties elected to rely upon with respect to the disposition of the within motions, that D.D. is competent to testify.

In so determining, the Court has considered Defendant's motion and briefing arguments that D.D.'s testimony at the August 14, 2019 Preliminary Hearing contained instances wherein D.D. could not remember particular facts or events and that Defendant has characterized D.D.'s testimony as inconsistent. The Court

will not expand Pennsylvania's judicial requirements with respect to witness competency so as to declare a witness who testifies to the effect that "I don't recall" or fails to give entirely consistent testimony to be "incompetent."

2. Unfamiliarity with the Term "Oath" does not Preclude a Determination that D.D. is Competent.

Defendant contends that D.D.'s unfamiliarity with the term "oath" and failure to understand the purpose of an oath constitutes a sufficient stand-alone reason for the Court to find D.D. incompetent to testify. In considering this contention the Court concludes that D.D.'s unfamiliarity with legal terms of art (1) falls outside of the matters to be considered when making a witness competency determination and (2) does not merit a finding of witness incompetency.

For the reasons set forth in this section, the Court **DENIES** Defendant's "Motion to Declare D.D. Incompetent to Testify" and Defendant's "Motion to Preclude D.D. from Testifying Because she does not Understand what an Oath is or the Purpose of the Oath to Testify Truthfully."

B. "VII. Motion to have D.D. Submit to Psychiatric Evaluation to Aid in the Competency Determination."

Having determined, at this stage of the proceedings, that D.D. is competent to testify, the Court **DENIES** Defendant's "Motion

to have D.D. Submit to Psychiatric Evaluation to Aid in the Competency Determination."<sup>4</sup>

C. "III. Motion for Writ of Habeas Corpus on Count 1 of the Information."

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

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<sup>4</sup> The Court notes Defendant's assertion that the Commonwealth did not address, and therefore waived opposition to, this argument in the Commonwealth's Response Brief. Failure to present an argument in an opposition brief may be construed to constitute waiver of an argument. See *City of Canton, Ohio v. Harris*, 489 U.S. 378, 383 (1989); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985). However, the Court in the instant matter finds opposition to the need for a psychiatric evaluation to aid in the Court's competency determination to be both implicit and inherent in the Commonwealth's contention that D.D. stands competent to testify.

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. **The Commonwealth has Eastablished a Prima Facie Case of Corruption of Minors.**

The Commonwealth, at Count 1 of the Information, charged Defendant with "Corruption of Minors," 18 Pa.C.S.A. §6301(a)(1)(i). Section 6301(a)(1)(i) of the Pennsylvania Crimes Code provides:

**(a) Offense defined.—**

**(1)(i)** Except as provided in subparagraph (ii) [not relevant hereto], whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.

See 18 Pa.C.S.A. §6301(a)(1)(i).

The Court holds that a seventy-five year old man making the Pretzel Comment, the Mirror Comment, or the Body Comment - whether considered individually or collectively - to a ten year old girl constitutes behavior that falls within the definition of Corruption of Minor as set forth at 18 Pa.C.S.A. §6301(a)(1)(i).

See *Commonwealth v. Decker*, 698 A.2d 99 (Pa.Super. 1997) (common sense of community, as well as sense of decency, propriety, and morality which most people entertain, is sufficient to apply corruption of minors statute; corruption of minor can involve conduct towards child in unlimited number of ways). The Commonwealth, having presented at the August 14, 2019 Preliminary Hearing D.D.'s testimony that Defendant made the foregoing comments, has presented a prima facie case with respect to the Corruption of Minors charge set forth at Count 1 of the Information.

For the reasons set forth in this section, the Court **DENIES** Defendant's "Motion for Writ of Habeas Corpus on Count 1 of the Information."

D. **"IV. Motion for Writ of Habeas Corpus on Harassment Charges."**

The Commonwealth, at Counts 2 and 3 of the Information respectively, charged Defendant with "Harassment" pursuant to 18 Pa.C.S.A. §2709(a)(3) and 18 Pa.C.S.A. §2709(a)(4). These sections of the Pennsylvania Crimes Code provide:

**(a) Offense defined.**— A person commits the crime of harassment when, with intent to harass, annoy, or alarm another, the person:

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**(3)** engages in a course of conduct or

repeatedly commits acts which serve no legitimate purpose;

(4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures.

See 18 Pa.C.S.A. §2709(a)(3); 18 Pa.C.S.A. §2709(a)(4).

Words "filled with or showing sexual desire" constitute lascivious words. See Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/lascivious> (Accessed September 29, 2020).

An intent to harass may be inferred from the totality of circumstances. See *Commonwealth v. Cox*, 72 A.3d 719 (Pa.Super. 2013); *Commonwealth v. Lutes*, 793 A.2d 949 (Pa.Super. 2002).

A course of conduct intended to harass, annoy, or alarm a person can be based on words alone. See, generally *Id.*

The Court holds that, as with the Corruption of Minors charge, a seventy-five year old man making the Pretzel Comment, the Mirror Comment, or the Body Comment to a ten year old girl constitutes behavior that falls within the definition of the Harassment counts brought by the Commonwealth against Defendant.

D.D.'s testimony at the August 14, 2019 Preliminary Hearing as to any one of the Pretzel Comment, the Mirror Comment, or the Body Comment - considered individually or collectively - describes the use of lascivious words toward D.D., permits the inference of



intent, and satisfies the elements of a prima facie case with respect to the Harassment charges set forth at Count 2 of the Information based upon 18 Pa.C.S.A. §2709(a)(4) ("communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures").

D.D.'s testimony at the August 14, 2019 Preliminary Hearing as to the Pretzel Comment, the Mirror Comment, and the Body Comment - considered collectively - describes a course of conduct by Defendant devoid of legitimate purpose, permits the inference of intent, and satisfies the elements of a prima facie case with respect to the Harassment charges set forth at Count 3 of the Information based upon 18 Pa.C.S.A. §2709(a)(3) ("engages in a course of conduct or repeatedly commits acts which serve no legitimate purpose").

For the reasons set forth in this section, the Court **DENIES** Defendant's "Motion for Writ of Habeas Corpus on Harassment Charges."

**E. "V. Motion to Dismiss Charges based Upon Protected First Amendment Speech."**

Defendant contends that all of the charges in this matter should be dismissed as being based upon speech protected by the First Amendment to the United States Constitution.

The First Amendment, as applied to the states through the

Fourteenth Amendment to the United States Constitution, generally prohibits governmental interference with an individual's freedom of speech. See *Commonwealth v. Zullinger*, 676 A.2d 687 (Pa.Super. 1996) citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Exceptions exist for speech considered to be obscene, defamatory, or to constitute "fighting words." See *Id.*

In connection with visual material, the United States Supreme Court has established an obscenity test through three major cases: *Miller v. California*, 413 U.S. 15, 24-25 (1973); *Smith v. United States*, 431 U.S. 291, 300-302 (1977); and *Pope v. Illinois*, 481 U.S. 497, 500-501 (1987). The three-part *Miller* test - **applicable to adults** - considers satisfaction of the following elements to constitute obscenity:

1. Whether the average person, applying contemporary adult community standards, finds that the matter, taken as whole, appeals to **prurient interests** (erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion);
2. Whether the average person, applying **contemporary adult community standards**, finds that the matter depicts or describes sexual conduct in a **patently offensive** way (ultimate sexual acts, normal or perverted, actual or simulated, masturbation, excretory functions, lewd exhibition of the genitals, or sado-masochistic sexual abuse); and
3. Whether a reasonable person finds that the matter, taken as a whole, **lacks serious literary, artistic, political, or scientific**

**value.**

See, generally, *Miller v. California*, 413 U.S. 15, 24-25 (1973).

A less stringent standard applies to that communication considered ***harmful to minors***. With respect to minors, harmful communication consists of any communication that involves nudity, sex, or excretion that (1) appeals to the ***prurient interests of minors***, (2) is ***patently offensive to prevailing adult community standards with respect to that which is suitable for minors***, and (3) ***lacks serious literary, artistic, political, or scientific value for minors***. See, e.g., 18 U.S.C. §2252B(d) [Misleading domain names on the Internet] [Defining "material that is harmful to minors"].<sup>5</sup>

This Court finds that no First Amendment protections exist with respect to a seventy-five year old man making the Pretzel Comment, the Mirror Comment, or the Body Comment to a ten year old girl. The Court holds such comments, within the factual context herein presented, violate each of the standards set forth above, and to be obscene.

For the reasons set forth in this section, the Court **DENIES** Defendant's "Motion to Dismiss Charges based Upon Protected First

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<sup>5</sup> Pennsylvania has codified these obscenity standards. See 18 Pa.C.S.A. §5903(b)(6) [Obscene and Other Sexual Materials and Performances] [Defining "Obscene"]; 18 Pa.C.S.A. §5903(e)(6) [Defining "Harmful to Minors"].

Amendment Speech."

**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 972-2019
	:	
DANIEL JOB,	:	
Defendant	:	

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Brian B. Gazo, Esq.	Counsel for Commonwealth Assistant District Attorney
Leonard Gryskewicz, Jr., Esq.	Counsel for Defendant

ORDER OF COURT

AND NOW, this 19<sup>th</sup> day of October, 2020, upon consideration  
of

- the October 10, 2019 "Omnibus Pre-Trial Motions" filed  
by Defendant Daniel Job,
- the March 20, 2020 "Brief in Support of Omnibus Pre-  
Trial Motions" filed by Defendant Daniel Job,
- the March 10, 2020, "Commonwealth's Brief in Response  
to Defendant's Omnibus Pre-Trial Motions" filed by the  
Commonwealth,

after the February 20, 2020 hearing thereon, and upon comprehensive  
review of this matter, it is hereby **ORDERED** and **DECREED** that the:  
the:

- Motion to Declare D.D. Incompetent to Testify

FILED  
20 OCT 19 A 10:43  
CLERK OF COURTS

- Motion to Preclude D.D. from Testifying Because she does not Understand what an Oath is or the Purpose of the Oath to Testify Truthfully,
- Motion to have D.D. Submit to Psychiatric Evaluation to Aid in the Competency Determination,
- Motion for Writ of Habeas Corpus on Count 1 of the Information,
- Motion for Writ of Habeas Corpus on Harassment Charges,
- Motion to Dismiss Charges based Upon Protected First Amendment Speech,

filed by Defendant Daniel Job are **DENIED**, and the

- Motion in Limine to Preclude any Testimony that Defendant called D.D.'s Sister Fat[.]"

filed by Defendant Daniel Job is **GRANTED**.

BY THE COURT:

  
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Joseph J. Matika, J.