IN THE

Supreme Court of Pennsylvania

MIDDLE DISTRICT

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127 MAP 2014

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

JUAN LUIS OLIVO,
Appellee

BRIEF FOR *AMICUS CURIAE* PENNSYLVANIA COALITION AGAINST RAPE

Interlocutory Appeal of an Order of the Court of Common Pleas, Berks County, Holding 42 Pa.C.S. § 5920 Unconstitutional

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International Association of Chiefs of Police, Police Response to Violence Against Women, http://www.theiacp.org/Police-Response-to-Violence-Against-Women 33

Jennifer G. Long, Nat'l District Attny's Assoc., Introducing Expert Testimony to Explain Victim Behavior (2007), *available at* http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf..... 32

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Michigan's Sexual Assault Benchbook—Revised Edition § 8.6 (2015), *available at* http://courts.mi.gov/education/mji/publications/documents/sexual-assault.pdf 29

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I. Statement of Interest in the Questions Involved of *Amicus Curiae* Pennsylvania Coalition Against Rape[1]

The Pennsylvania Coalition Against Rape (PCAR) is a private nonprofit organization. Founded in 1975, PCAR is the oldest anti-sexual-violence coalition in the country and is widely respected at both the state and national levels for its leadership in efforts to prevent sexual violence and to provide support and justice to survivors. Over the past 40 years, PCAR has successfully worked as an agent of change—educating the public, the courts, police, prosecutors, healthcare professionals, educational institutions, and other professionals and entities about the severe and long-lasting impact of sexual violence on victims and their communities.

At the core of PCAR's success is its statewide network of 50 rape crisis centers that provide counseling, crisis intervention, and referral services; hospital, court, and police accompaniment; prevention education; and community outreach. PCAR member centers offer confidential crisis support 24 hours a day, seven days a week. PCAR has been at the forefront of collaboration with our allied stakeholders in the healthcare and justice systems,

[1] While not formally required by the Pennsylvania Rules of Appellate Procedure, this statement is given to apprise the Court of the *Amicus Curiae's* interest in the questions involved and is recommended by G. Ronald Darlington, *et al.*, Pennsylvania Appellate Practice § 531:2 (2014-2015 Ed.).

with a particular focus on providing prosecutors with all available resources to try these complex cases.

One of the most critical partnerships for PCAR is with our affiliated organization, AEquitas: The Prosecutors' Resource on Violence Against Women. The mission of AEquitas is to improve the quality of justice in sexual violence, intimate partner violence, stalking, and human trafficking cases by developing, evaluating, and refining prosecution practices that increase victim safety and offender accountability. AEquitas is a technical assistance provider for prosecutors, law enforcement, advocates, and allied professionals who are called upon to respond to crimes of violence against women, including domestic violence, sexual violence, human trafficking, and related offenses. Funded by the United States Department of Justice Office on Violence Against Women, AEquitas provides training, research assistance, consultation services, and other resources in an effort to improve the investigation and prosecution of these offenses by incorporating best practices based upon the most current research in the disciplines of social science, medicine, forensic sciences, police science, and related fields.

AEquitas has, along with PCAR, followed closely the development of the research in the area of victim behavior following traumatic crimes of sexual and domestic violence, and the incorporation of that research in the law throughout

the United States. The judiciaries and legislatures of the overwhelming majority of states have recognized the problems posed by jurors' misjudgment of victim behavior that does not fit with their conception of how a "real" victim of sexual violence, domestic violence, or human trafficking would behave. The presentation of expert testimony in the area of victim behavior during and after these violent crimes is a practice that PCAR and AEquitas strongly support and advocate in the trainings AEquitas presents throughout the country, including their National Institutes on the Prosecution of Domestic Violence, Prosecution of Sexual Violence, Prosecution of Domestic Violence Homicide, and Prosecution of Human Trafficking. The failure to present such testimony where the victim's behavior cannot otherwise be adequately explained can lead juries erroneously to discount the victim's report of the offense because they lack the proper context for evaluation of the victim's credibility.

PCAR was a moving force behind the enactment of 42 Pa.C.S. § 5920, which allows the admission, in prosecutions of sex crimes, of expert testimony concerning common victim behaviors. In addition to laboring over the drafting of the statute, PCAR shepherded the provision through the legislative process, explaining to lawmakers the need for juries to understand the reasons for such common behaviors of victims of sexual assault as delayed reporting or failure to physically resist an assault.

PCAR and AEquitas strongly believe that 42 Pa.C.S. § 5920 properly narrows the permitted expert testimony so that it does not intrude on the jury's function to judge the victim's credibility and the offender's guilt of the charged offense, but rather simply allows the jury to place the victim's behavior in its proper context—one that is unfamiliar to the average juror. PCAR, in partnership with AEquitas, therefore offers this *Amicus* brief in support of the Commonwealth's position in the present case.

II. Statement of Jurisdiction

The jurisdiction of this Court is invoked pursuant to 42 Pa.C.S. § 722(7), which provides:

> The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases:
>
> * * *
>
> (7) Matters where the court of common pleas has held invalid as repugnant to the Constitution, treaties or laws of the United States, or to the Constitution of this Commonwealth, any treaty or law of the United States or any provision of the Constitution of, or of any statute of, this Commonwealth, or any provision of any home rule charter.

III. Standard of Review

"Analysis of the constitutionality of a statute … [is a] question[] of law; therefore, our standard of review is de novo." *Commonwealth v. Ludwig*, 874 A.2d 623, 628 n.5 (Pa. 2005).

IV. Order in Question

AND NOW, this 27th day of August, 2013, after hearing and argument held herein, it is hereby **ORDERED** and **DECREED** that The Defendant's MOTION IN LIMINE is **GRANTED** and the testimony of Dr. Valliere is hereby excluded. Title 42 Pa.C.S. § 5920 is hereby **SUSPENDED**.

BY THE COURT**:**

/s/ Scott D. Keller

Scott D. Keller, Judge

V. Statement of the Question Involved

Did the trial court err as a matter of law in holding that 42 Pa.C.S. § 5920, which permits a qualified expert to "testify to facts and opinions regarding specific types of victim responses and victim behaviors" in trials involving crimes of sexual violence, is unconstitutional because it violates the separation of powers doctrine by impermissibly intruding upon this Court's rulemaking authority under Article V, § 10 of the Pennsylvania Constitution?

(Answered in the negative by the court below.)

Suggested answer: Yes.

VI. Statement of the Case

Appellee Juan Luis Olivo was charged in Berks County, Court of Common Pleas, with two counts of rape under 18 Pa.C.S. § 3121; two counts involuntary deviate sexual intercourse under 18 Pa.C.S. § 3123; one count of indecent assault under 18 Pa.C.S. § 3126; one count of endangering the welfare of a child under 18 Pa.C.S. § 4304; one count of indecent exposure under 18 Pa.C.S. § 3127; and one count of corruption of minors under 18 Pa.C.S. § 6301 between January 2009 and February 17, 2012. The alleged victim was a child who was between the ages of four and seven years old at the time of the charged offenses. (R. 13a - 22a).

On July 26, 2013, Olivo filed a motion *in limine* challenging, in part, admission of expert testimony pursuant to 42 Pa.C.S. § 5920, which permits a qualified expert to "testify to facts and opinions regarding specific types of victim responses and victim behaviors" in trials involving crimes of sexual violence. On August 16, 2013, the Honorable Scott D. Keller held a hearing and heard arguments on the motion. At the hearing, the Commonwealth made an offer of proof of the expert's proposed trial testimony under § 5920. (R. 76a – 77a). By Opinion and Order dated August 27, 2013, the court recognized the relevance of the Commonwealth's proffered expert testimony (R. 78a), but held

that the testimony was inadmissible because § 5920 was enacted by the legislature in violation of the Supreme Court's rulemaking authority. The court, in its Order, "suspended" the statute.

The Commonwealth filed a timely appeal to the Superior Court. After the parties had filed briefs in that court, the Commonwealth recognized that proper jurisdiction for the appeal under 42 Pa.C.S. § 722(7) (positing exclusive jurisdiction in the Supreme Court for appeals where the Court of Common Pleas has declared a statute unconstitutional under the Pennsylvania Constitution) was with the Supreme Court. On October 6, 2014, the Commonwealth filed a motion to transfer jurisdiction to this Court, which was granted on October 21, 2014.

After this Court had assumed jurisdiction, on March 25, 2015, the Pennsylvania Coalition Against Rape (PCAR) filed a motion for leave to file an out-of-time *Amicus Curiae* brief supporting the Commonwealth. On April 6, 2015, the Commonwealth filed a motion for leave to file its own supplemental brief to incorporate argument concerning certain recent opinions of this Court and the Superior Court. By Order dated April 21, 2015, this Court granted PCAR's request to file an *Amicus* brief by April 27, 2015 (as well as permitting briefs to be filed by any other interested *amici*). The Court denied the Commonwealth's motion to file a supplemental brief, although both the

Commonwealth and the Appellee were granted the opportunity to file a response to any *Amicus* briefs by April 29, 2015.

This is the timely brief of *Amicus Curiae*, the Pennsylvania Coalition Against Rape, supporting the Commonwealth's position that the legislature's enactment of 42 Pa.C.S. § 5920 did not violate the separation of powers doctrine by impermissibly intruding upon this Court's rulemaking authority under Article V, § 10 of the Pennsylvania Constitution.

VII. Summary of Argument

This Court's 1992 decision in *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992), which has prohibited the introduction of expert testimony to explain common experiences and behaviors of victims of crimes of sexual violence, has become outdated as a result of advances in research and knowledge on the subject of the effects of rape myths on juror evaluations of credibility in these cases. By enacting 42 Pa.C.S. § 5920, the Pennsylvania Legislature sought to bring the Commonwealth into line with the rest of the country because, as of the date of its enactment, Pennsylvania was the only jurisdiction remaining in the nation to categorically prohibit such testimony. The legislature's determination and implementation of public policy on this issue is based upon overwhelming evidence that such expert testimony is helpful—indeed, essential—to the jury's accurate evaluation of the facts in these difficult cases.

In enacting § 5920 the legislature did not improperly intrude upon this Court's constitutional rulemaking authority. This statute represents only one of many such statutes in Pennsylvania that govern the admissibility of various types of evidence, none of which has caused this Court any concern in terms of the legislature's authority to act.

Argument[2]

I: The legislature properly enacted 42 Pa.C.S. § 5920, permitting expert testimony to explain victim behavior in response to crimes of sexual violence, to implement important public policy recognizing that such testimony is necessary to counter pervasive societal myths that would otherwise influence jurors to reach erroneous conclusions about the credibility of victim testimony.

Research on common myths about sexual violence victim behavior, and how these myths and misconceptions influence public perception, has advanced considerably in the 23 years since this Court's decision in *Commonwealth v. Dunkle,* 602 A.2d 830 (Pa. 1992).[3] These misconceptions continue to influence jury perception of the credibility of victims, which, in turn, influences the way

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[2] The *Amicus* agrees with, and joins in, the well-stated arguments set forth in the Commonwealth's brief.

[3] While the present appeal, which involves the constitutional validity of 42 Pa.C.S. § 5920, does not require this Court to consider whether its decision in *Dunkle* should be overruled, the *Amicus* notes that this Court has recently re-examined its longstanding prohibition on the admissibility of expert testimony concerning the reliability of eyewitness identifications. *See Commonwealth v. Walker*, 92 A.3d 766 (2014). In *Walker*, this Court overruled *Commonwealth v. Simmons*, 662 A.2d 621 (1995), which had absolutely prohibited introduction of such testimony in criminal cases because it improperly invaded the province of the jury to determine the credibility of eyewitness testimony. The *Walker* Court's decision to permit such testimony in appropriate circumstances, subject to the discretion of the trial court, was based upon the development of the scientific research in the time since its prior consideration of the issue in *Simmons*, as well as the desire to "join the vast majority of jurisdictions which leave the admissibility of such expert testimony to the discretion of the trial court." *Walker*, 92 A.3d at 769. As this brief will explain, similar considerations are present in the instant case.

victims and their cases are viewed by police and prosecutors who must make decisions whether to conduct a thorough investigation, to refer (or accept) a case for prosecution, or to take a case to trial. Police and prosecutors may view a particular case as "unwinnable" because of their concern that a jury will disbelieve a victim because he or she failed to physically resist the attacker, did not sustain significant injury, failed to report the assault immediately, continued to associate with the offender, recanted an initial report, or provided a statement or testimony in support of the offender. When a victim's behavior may appear to a jury as "counterintuitive,"[4] and the reasons for the behavior are not adequately explained, our system of justice is compromised and supplanted by the court of popular (and uninformed) opinion.[5]

The* Dunkle *decision

In 1992, this Court was asked to determine whether the Commonwealth could present expert testimony to explain the behavior of a teenaged victim of

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[4] "Counterintuitive" refers to the fact that the actual experiences and behaviors of victims of sexual violence often clash with the expectations of jurors, whose notions about rape and sexual assault have been unconsciously influenced by widespread societal myths concerning how someone becomes a victim of sexual violence, how victims respond during the assault itself, the resulting physical injury (or lack of injury) as a result of the assault, the victim's behavior following the assault, and the ability of the victim later to recall and recount details of the assault.

[5] Even victims themselves are not immune to the effects of rape myths—victims may blame themselves for the assault or—realizing that police, prosecutors, and jurors may be influenced by those erroneous beliefs—become convinced that they will never receive justice for the violence and indignity they have suffered.

sexual abuse so that the jury would not draw improper inferences from such behavior. In *Dunkle,* the Court held that "it was error to permit an expert to explain why sexually abused children may not recall certain details of the assault, why they may not give complete details, and why they may delay reporting the incident." 602 A.2d at 831. The expert witness in *Dunkle* did not relate her testimony to the victim in that case, nor did she offer an opinion as to whether the victim had been abused or was truthful in her report of the assault; rather, the expert's testimony was limited to a description of certain "behavioral patterns" exhibited by many children who have been sexually abused and general explanation of reasons why victims of such crimes might behave in certain ways. After noting that many of the "behavior patterns" described by the expert were often present in children who had not been sexually abused but rather had been affected by other emotionally upsetting experiences (such as parental divorce), the Court concluded that testimony about such behavioral patterns was of no real probative value. *Id.* at 832-836. As to the testimony about reasons why a victim of sexual abuse might delay reporting, have difficulty recalling details, or omit certain details from their initial account of what happened, the Court found that the reasons for such conduct were "easily understood by lay people and do not require expert analysis." *Id.* at 836. "We believe that the evidence presented through the fact witnesses, coupled with an

instruction to the jury that they should consider the reasons why the child did not come forward, including the age and the circumstances of the child in each case, are sufficient to provide the jury with enough guidance to make a determination of the importance of prompt complaint in each case." *Id.* at 837. Moreover, the Court said, "Not only is there no *need* for testimony about the reasons children may not come forward, but permitting it would infringe upon the jury's right to determine credibility." *Id.* (emphasis in original). Although the Court explicitly assumed that a jury would naturally take into account the fact that child witnesses are different from adults, however, the Court simultaneously acknowledged that "a jury *may judge an adult harshly* who omits details of a disturbing incident." *Id.* at 838 (emphasis added).

At the time of the *Dunkle* decision in 1992, many jurisdictions were already permitting expert testimony of the kind that was rejected in that case. A 1992 University of Miami Law Review article, the majority of which was apparently written just before this Court's decision in *Dunkle,*[6] referred to Pennsylvania's case law concerning the admissibility of expert testimony in child sexual abuse prosecutions as "the most restrictive position on

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[6] Discussion of the Supreme Court's decision in *Dunkle* was relegated to footnotes in the article, with the main text focused on a series of decisions by the Superior Court, including *Commonwealth v. Dunkle*, 561 A.2d 5 (Pa. Super. 1989), *aff'd in part, rev'd in part,* 602 A.2d 830 (Pa. 1992).

admissibility in the nation."[7] The overwhelming majority of jurisdictions at that time were permitting such testimony, at least where limited to an explanation of reasons for seemingly incongruent victim behavior for the purpose of rebutting erroneous inferences of falsity based on that behavior.[8]

The Obeta *decision in Minnesota*

One of the states that allowed such testimony in 1992—if only in cases of sexual abuse involving child victims—was Minnesota.[9] However, it was not until 2011 that the Minnesota Supreme Court became the penultimate jurisdiction in the nation to allow expert testimony to explain the behavior of

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[7] Lisa R. Askowitz, *Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecution: Pennsylvania Takes it to the Extreme*, 47 U. Miami L. Rev. 201 (1992).

[8] *See, e.g.*, *Bostic v. State*, 722 P.2d 1089 (Alaska Ct. App. 1989); *State v. Moran*, 728 P.2d 248 (Ariz. 1986); *People v. Leon*, 263 Cal. Rptr. 77 (Cal. Ct. App. 1989); *State v. Spigarolo*, 556 A.2d 112 (Conn. 1989); *Wheat v. State*, 527 A.2d 269 (Del. 1987); *Allison v. State*, 353 S.E.2d 805 (Ga. 1987); *People v. Server*, 499 N.E.2d 1019 (Ill. App. Cir. 1986); *State v. Tonn*, 441 N.W.2d 403 (Iowa Ct. App. 1989); *State v. Black*, 537 A.2d 1154 (Me. 1988); *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990); *State v. Garden*, 404 N.W.2d 912 (Minn. Ct. App. 1987); *Smith v. State*, 688 P.2d 326 (Nev. 1984); *State v. Bailey*, 365 S.E.2d 651 (N.C. Ct. App. 1988); *People v. Benjamin R.*, 481 N.Y.S.2d 827 (N.Y. 1984); *State v. Middleton*, 657 P.2d 1215 (Or. 1983); *Duckett v. State*, 797 S.W.2d 906 (Tex. Crim. App. 1990); *State v. Hicks*, 535 A.2d 776 (Vt. 1987); *State v. Madison*, 770 P.2d 662 (Wash. Ct. App. 1989); *State v. Jensen*, 415 N.W.2d 519 (Wis. Ct. App. 1987); *Griego v. State*, 761 P.2d 973 (Wyo. 1988). For a further list of cases, *see State v. J.Q.*, 599 A.2d 172, 1983 (N.J. Super. Ct. App. Div. 1991). *But* see *Brown v. Commonwealth*, 812 S.W.2d 502 (Ky. 1991); *Dunnington v. State*, 740 S.W.2d 896 (Tex. Ct. App. 1987).

[9] Similar expert testimony regarding the experiences and behavior of adult victims of sexual assault had been barred in Minnesota pursuant to the Minnesota Supreme Court's decision in *State v. Saldana*, 324 N.W.2d 227, 230-31 (Minn. 1982); however, expert testimony regarding victim behavior in other types of crimes was permitted by subsequent rulings in *State v. Myers*, 359 N.W.2d 604 (Minn. 1984) (child victims of sexual abuse); *State v. Grecinger*, 569 N.W.2d 189 (Minn. 1997) (victims of domestic violence); *State v. MacLennan*, 702 N.W.2d 219 (Minn. 2005) (victims of child battering).

adult victims of sexual assault. *See State v. Obeta*, 796 N.W.2d 282 (Minn. 2011). With the *Obeta* decision, Pennsylvania became the *only* remaining jurisdiction to bar expert testimony to explain the behavior of victims of sexual violence, regardless of their age.[10] *See* Christopher Mallios, *And Then There Was One: A Recent Minnesota Supreme Court Decision Has Left Pennsylvania as the Only State That Disallows Expert Testimony to Explain Victim Behavior*, 1 Strategies in Brief (August 2011), http://www.aequitasresource.org/And_Then_There_Was_One_Issue_1.pdf.

In *Obeta*, the victim had been sexually assaulted by a new acquaintance she had met the day before. Her assailant had offered her a ride home, but instead raped her in his car. The victim went to a nearby gas station to clean up and asked to use the phone, telling the attendant that she was stranded. When she could not find a ride home, she went to a nearby fast-food restaurant and sat inside for a couple of hours before flagging down a police car and reporting the rape. *Obeta*, 796 N.W.2d at 284. Prior to the second trial,[11] the State presented

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[10] In *Commonwealth v. Balodis*, 747 A.2d 341 (Pa. 2000), this Court expressed its stance on the admissibility of expert testimony to explain any and all types of victim behavior thus: "This court has consistently maintained that expert testimony as to the veracity of a particular class of people, of which the victim is a member, is inadmissible." *Id.* at 345 (citations omitted).

[11] At the original trial, the State presented the testimony of the Sexual Assault Nurse Examiner (SANE), who had examined and treated the victim, to testify that delayed disclosure was not unusual, nor was submissive behavior during the rape and a resulting lack

the testimony of two expert witnesses, the director of a local victim services program and a professor of psychology from the University of Minnesota, and also offered into evidence two journal articles by British researchers who had studied the effects of expert testimony on mock juror deliberations in sexual violence cases. *Id.* at 284-285. The experts testified that delayed reporting was not unusual, that most victims do not physically resist their attackers, that vaginal injury was relatively uncommon, and that the more common type of injury would be bruising to the arms or thighs as a result of the victim's being restrained during the assault. *Id.* The psychologist testified about "rape myths," which she defined as "beliefs about what rape is and what rape victims are" and "beliefs about how rape victims should be or should act." *Id.* at 285. She testified that "studies that look at rape myths show that they are common" and that "people who endorse more rape myths are less likely to believe a victim, more likely to hold the victim responsible, less likely to hold the perpetrator responsible, and less likely to convict a defendant." *Id.* The psychologist went on to opine that delayed reporting, lack of resistance, lack of injury, and the victim's calm affect would be likely to impact the jury's deliberation, and that

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of vaginal trauma. An investigating police officer also testified that delayed reports were not uncommon in rape cases. The defendant's conviction was reversed on appeal, in part due to admission of that testimony, which the Minnesota Court of Appeals found to have been admitted in violation of the rule established in *Saldana, supra*. *Obeta*, 796 N.W.2d at 284.

the general public lacked information about the range of victim behaviors that could be manifested as a result of sexual assault. *Id.* The two journal articles offered by the State[12] described the study undertaken by British researchers, which involved presentation of mock testimony in a sexual assault trial in which the victim had delayed her report of the assault, displayed a flat emotional affect on the witness stand, and suffered no physical injury beyond the act of penetration. The researchers observed jurors' deliberations when they received no expert instruction, as well as when they received education in the form of either expert testimony or a detailed jury instruction. *Id.* The *Obeta* court described in its opinion the findings of the study as follows:

> Drs. Ellison and Munro examined the deliberations of the groups that did not receive any educational information to determine whether the mock jurors subscribed to rape myths. Ellison & Munro, *Reacting to Rape*, *supra*, at 206. They found that mock jurors' "commitment to the belief that a 'normal' response to sexual attack would be to struggle physically was, in many cases, unshakeable." *Id.* Additionally, jurors harbored "strong, but unfounded, convictions that vaginal tissues are easily torn, that pelvic muscles can be rigidified at will and that intercourse without trauma only occurs where a woman is aroused, which, in the jurors' minds, was wholly inconsistent with rape." *Id.* at 207. The study also yielded support for the proposition that jurors view delayed reporting as indicative of a fabricated report, although the jurors were receptive to the idea that a victim may delay reporting for other reasons. *Id.* at 209–10. [*Obeta*, 796 N.W.2d at 285.]

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[12] Louise Ellison & Vanessa E. Munro, *Turning Mirrors into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials*, 49 Brit. J. Criminology 363 (2009); Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 Brit. J. Criminology 202 (2009).

In its opinion in *Obeta*, the Minnesota Supreme Court concluded that the social science research since its 1982 decision in *Saldana* shed light on the need for expert testimony that dispelled erroneous beliefs about sexual assault and about victims of such crimes, including their reactions during the crime and their post-assault responses. *Id.* at 290-92. Noting that the expert testimony in *Saldana* had been characterized as describing "Rape Trauma Syndrome," the *Obeta* Court observed that current social science distinguishes between the notion of a "syndrome" affecting rape survivors and "typical post-rape symptoms and behavior of rape victims." *Id.* at 290. The Court explained:

> Rape myths and counterintuitive rape-victim behaviors, on the other hand, are not counseling tools used in the recovery or healing process. Instead, they involve behaviors and beliefs that social scientists have observed. Rape myths are "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists." Amy M. Buddie & Arthur G. Miller, *Beyond Rape Myths: A More Complex View of Perceptions of Rape Victims*, 45 Sex Roles 139–40 (2001) (citation omitted). Typical rape-victim behaviors are common behaviors and mental reactions social scientists repeatedly observe in rape victims, such as delayed reporting, lack of physical injuries, or the failure to fight aggressively against the attacker, that are contrary to society's expectations of how a person who was sexually assaulted would behave. *See* [Jane Campbell] Moriarty, [*Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials*, 26 Vt. L.Rev. 43, 98 (2001)]. [*Obeta*, 276 N.W.2d at 290]

In addition to this compelling evidence of the pervasive effects of rape myths on jurors, the *Obeta* Court was persuaded by the virtually universal acceptance

of this kind of expert testimony in other jurisdictions. The Court painstakingly enumerated all of the courts that recognized the helpfulness of this kind of testimony in sexual assault trials, observing that only Minnesota and Pennsylvania had theretofore categorically rejected the admissibility of such testimony. *Id.* at 292 & n.7; 292-93 & n.8. With its decision to permit such testimony, subject to the trial court's determination of relevance, helpfulness, and foundational reliability, *id.* at 294, the *Obeta* Court left the Commonwealth of Pennsylvania as the sole jurisdiction in the nation that precluded expert testimony to explain victim behavior in response to an act of sexual violence.

The Commonwealth of Pennsylvania catches up: §5920

On April 1, 2011, a mere eight days after *Obeta* was decided, 2011 H.B. 1264, an amended version of which was ultimately enacted June 29, 2012, and codified at 42 Pa.C.S. § 5920, was introduced in the General Assembly of Pennsylvania.

It is clear that the legislature, in enacting this statute, was responding to the need for juries in cases involving crimes of sexual violence to make informed, rational decisions based upon the realities experienced by victims of these crimes, rather than upon misguided and erroneous rape myths. To that end, the legislature authorized trial courts to admit carefully circumscribed expert testimony to explain "specific types of victim responses and victim

behaviors." 42 Pa.C.S. § 5920(b)(2). The expert must be qualified by virtue of his or her "experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues" and the testimony must be of the type that will "assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted." 42 Pa.C.S. § 5920(b)(1). To ensure fairness, the expert testimony must not infringe on jury's province to judge the credibility of the victim or any other witness and may be introduced by either the prosecution or the defense. 42 Pa.C.S. § 5920(b)(3), (4).

The legislature enacted § 5920 recognizing it was time for the Commonwealth of Pennsylvania to acknowledge that the premise of *Dunkle*—that jurors would *naturally* and "universally" understand that child victims of sexual abuse might delay reporting the crimes or have difficulty recalling and recounting dates, times and details of disturbing events—is outdated and flawed, and that *Dunkle's* acknowledgement that jurors might judge adult victims of such crimes "harshly" for the same omissions is, unfortunately, accurate but equally damaging to the cause of truth and justice in these cases. In enacting this carefully drafted piece of legislation, lawmakers sought to bring the Commonwealth into line with the rest of the country with an enlightened view of the very real, and thoroughly studied and documented, phenomena

around the experiences of victims of sexual violence and the uninformed beliefs of jurors who fail to understand these experiences and reactions without neutral and professional guidance by experts who are intimately familiar with them.

In addition to the mountain of case law throughout the United States approving the use of this kind of testimony in cases involving sexual violence, there is a compelling body of research supporting it. Much of that research is compiled in Kaarin Long, et al., *A Distinction Without a Difference: Why the Minnesota Supreme Court Should Overrule its Precedent Precluding the Admission of Helpful Expert Testimony in Adult Victim Sexual Assault Cases*, 31 Hamline J. Pub. L. & Pol'y 569 (2010). On the widespread public acceptance of rape myths, see Kimberly A. Lonsway & Louise F. Fitzgerald*, Rape Myths in Review,* 18 Psychol. Women Q. 133, 134-35 (1994*)*; Renae Franiuk, *The Impact of Rape Myths in Print Journalism*, 12 Sexual Assault Report 33, 36 (Jan./Feb. 2009); H. Colleen Sinclair & Lyle E. Bourne, Jr., *Cycle of Blame or Just World: Effects of Legal Verdicts on Gender Patterns in Rape-Myth Acceptance and Victim Empathy*, 22 Psychol. Women Q. 575-88 (1998); Kara M. DelTufo, *Resisting "Utmost Resistance": Using Rape Trauma Syndrome to Combat Underlying Rape Myths Influencing Acquaintance Rape Trials*, 22 B.C. Third World L.J. 419, 431 (2002) (citing Cassia Spohn & Julie Horney, Rape Law Reform: A Grassroots Revolution and Its Impact at104, 159

(1992)); Colleen A. Ward, ATTITUDES TOWARDS RAPE: FEMINIST AND SOCIAL PSYCHOLOGICAL PERSPECTIVES (1995); Lynn Hecht Schafran, Legal Momentum, *Barriers to Credibility: Understanding and Countering Rape Myths*, http://www.nationalguard.mil/Portals/31/Documents/J1/SAPR/SARCVATraining/Barriers_to_Credibility.pdf (last visited April 26, 2015).

Many jurisdictions stress the importance of understanding victim behavior in crimes of sexual violence, including the need for expert testimony on the subject, in their benchbooks on crimes of sexual violence: see, *e.g.*, Michigan's Sexual Assault Benchbook—Revised Edition § 8.6 (2015), *available at* http://courts.mi.gov/education/mji/publications/documents/sexual-assault.pdf; the Tribal Law and Policy Institute's Tribal Court Judges Sexual Assault Bench Book at 9-12, 41-42 (2011) *available at* http://www.tribal-institute.org/download/TribalJudgeSABenchbook6-9-11.pdf; The United Kingdom's Crown Court Bench Book (2010) *available at* https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf. Pennsylvania's own Benchbook[13] has devoted many pages to the contrast between rape myths and reality as borne out by studies and statistics. Pennsylvania Coalition Against Rape & Administrative

[13] The *Amicus*, Pennsylvania Coalition Against Rape, was Project Manager for the Pennsylvania Benchbook, and contributed substantially to its content. Pennsylvania Crimes of Sexual Violence Benchbook at i-iv.

Office of Pennsylvania Courts, Pennsylvania Crimes of Sexual Violence Benchbook at 1-9 to 17 (2015) *available at* http://www.pacourts.us/assets/files/setting-3008/file-723.pdf?cb=01a225. The Benchbook also discusses the physical, emotional, and psychological effects of sexual assault on victims and their behavior during and after the assault, including the traumatic effects of testifying in court, *id.* at 1-17 to 26, as well as the procedures for admitting testimony to explain victim behavior, including testimony pursuant to 42 Pa.C.S. § 5920, *id.* at 8-1 to 15.

Authorities and experts responsible for training law enforcement officers investigating these cases, prosecutors who must try them, and medical personnel responsible for treating victims of sexual violence also emphasize the need to understand the traumatic effects of violence on the ability of victims to recount what has happened to them, as essential knowledge required for these professionals to properly perform their duties. See, *e.g.*, with respect to sexual assault forensic nurse examiners, U.S. Department of Justice, Office on Violence Against Women, A National Protocol for Sexual Assault Medical Forensic Examinations: Adults/Adolescents, Second Edition at 30-42 (on effects of trauma and other considerations affecting victims), 50-54 (on reports to law enforcement), 121-123 (on courtroom testimony as experts) (Apr. 2013), *available at* http://c.ymcdn.com/sites/www.forensicnurses.org/resource/resmgr/

Education/National_Protocol_2013.pdf?hhSearchTerms=%22victim+and+behavior%22; with respect to prosecutors, Jennifer G. Long, Nat'l District Attny's Assoc., Introducing Expert Testimony to Explain Victim Behavior (2007), *available at* http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf; with respect to law enforcement, International Association of Chiefs of Police, Police Response to Violence Against Women, http://www.theiacp.org/Police-Response-to-Violence-Against-Women (last visited Apr. 26, 2015) (see section on investigation of sexual assault).

When the need to educate judges, police officers, prosecutors, and medical professionals about victim behavior and the effects of traumatic victimization is so widely and universally recognized, it is clear that jurors must not be the only ones kept in the dark about the realities of sexual victimization—jurors are the ones whose judgment about the truth of what occurred has the final, lasting impact on a criminal case.

The *Amicus* submits that 42 Pa.C.S. § 5920 represents an urgently-needed advance to ensure that prosecutions of crimes involving sexual violence will be determined based upon the informed deliberations of juries guided by facts and reality, not inaccurate myths and misconceptions. The legislature performed its proper role in determining and implementing the policy of the Commonwealth in this respect.

II: The legislature's enactment of 42 Pa.C.S. § 5920 did not violate the separation of powers doctrine by impermissibly intruding upon this Court's rulemaking authority under Article V, § 10 of the Pennsylvania Constitution.

The authority of the Pennsylvania legislature to enact laws governing the admissibility of evidence is beyond cavil. Numerous examples of such substantive evidentiary statutes have been enacted over the years, governing a wide variety of subjects:

- Competency of witnesses. *See, e.g.*, 42 Pa.C.S. § 5921 (interest not to disqualify); 42 Pa.C.S. § 5922 (perjury disqualification); 42 Pa.C.S. § 5930 (Dead Man's Act).

- Scientific evidence. *See, e.g.*, 23 Pa.C.S. § 5104 (blood test to determine paternity); 75 Pa.C.S. § 1547 (chemical tests for driving under the influence); 75 Pa. C.S § 3368 (speed timing device).

- Relevancy. *See, e.g.*, 18 Pa.C.S. 3104 (Rape Shield Statute).

- Expert testimony. *See, e.g.*, 42 Pa.C.S. § 6111 (handwriting comparisons).

- Impeachment. *See, e.g.*, 42 Pa.C.S. § 5918 (character evidence).

- Privileges. *See, e.g.*, 42 Pa.C.S. § 5916 (attorney-client); 42 Pa.C.S. § 5914 (spousal communications); 42 Pa.C.S. §5929 (physician-patient); 42 Pa.C.S. § 5942 (news reporter); 42 Pa.C.S. § 5943 (clergyman); 42 Pa.C.S. § 5944 (psychiatrist and licensed psychologist); 42 Pa.C.S. § 5945 (school personnel); 42 Pa.C.S. § 5945.1 (sexual assault counselor); 42 Pa.C.S. § 5945.2 (crime stoppers); 42 Pa.C.S. § 5945.3 (human trafficking caseworker); 42 Pa.C.S. § 5948 (marriage counselor).

- Hearsay. *See, e.g.,* 35 Pa.C.S. § 450.810 (records of vital statistics); 42 Pa.C.S. § 5328 (foreign records); 42 Pa.C.S. § 5985.1 (tender years

exception); 42 Pa.C.S. § 6103 (official records); 42 Pa.C.S. § 6108 (business records).

- Best evidence rule. *See, e.g.*, 42 Pa.C.S. § 6106 (certified exemplifications of records).

It is well-nigh impossible to distinguish the legislative enactment here, 42 Pa.C.S. § 5920(b)(1) ("a witness may be qualified by the court as an expert if the witness has specialized knowledge…that will assist the trial of fact in understanding the dynamics of sexual violence"), from the long-standing statute permitting expert testimony on handwriting analysis, 42 Pa.C.S. § 6111(c) (allowing such opinion testimony where "the results are important to the point at issue"). Both statutes address the admissibility of expert testimony. Both have as their purpose the need to assist the trier of fact on matters that are not common knowledge. *Cf.* Pa.R.E. 702 (stating that expert knowledge is "beyond that possessed by the average layperson" and "will help the trier of fact to understand the evidence or to determine a fact in issue"). Both statutes are, without question, proper enactments of the legislature.

The Pennsylvania Rape Shield Statute provides a useful analogy where the legislature has deemed that certain evidence is *inadmissible*. Under the Rape Shield provision, evidence of a victim's past sexual conduct—whether by opinion, reputation, or specific instances of conduct—is inadmissible. 18 Pa.C.S. § 3104(a). Likewise, the present statute provides that expert opinion on

the credibility of a witness is inadmissible. 42 Pa.C.S. § 5920(b)(3). It is clear that under long-standing practice, the legislature may, through statutory enactments, validly circumscribe the admissibility of certain types of evidence, including expert opinion evidence.

There is a long history of the Pennsylvania legislature's sharing the development of evidence law with the judiciary. Until October 1, 1998, when the Pennsylvania Rules of Evidence took effect, evidence law in the Commonwealth comprised a combination of statutory provisions, relatively few rules of court, and numerous rules that had evolved through the development of the common law. With the Supreme Court's codification of the Rules of Evidence under its rulemaking authority pursuant to Article V, § 10 of the Pennsylvania Constitution, this history of shared development was continued. Statutory evidence provisions co-exist along with Court-promulgated rules, and the rules themselves reflect, for the most part, long-standing Pennsylvania case law. No one has ever suggested—nor could they suggest—that the Pennsylvania Rules of Evidence preempted, through the separation of powers doctrine, any future legislative action on the subject of evidence law. To find otherwise would be to upend centuries of jurisprudence. As this Court has stated, "Subject only to constitutional limitations, the legislature is always free

to change the rules governing competency of witnesses and admissibility of evidence." *Commonwealth v. Newman*, 633 A.2d 1069, 1071 (Pa. 1993).

By the year 2011, when the Minnesota Supreme Court decided, in its landmark *Obeta* decision, to allow expert testimony on victim behavior, the passage of time and further research on the subject had already persuaded every other jurisdiction in the nation that the underpinnings of this Court's *Dunkle* decision were flawed. The time had come for that holding to be cast aside, and the Pennsylvania legislature took the initiative to do so by enacting 42 Pa.C.S. § 5920. The separation of powers doctrine must not serve as the vehicle to return us to a dark time when these harmful societal myths were held as truth.

Finally, the constitutionally authorized Rules of Evidence themselves provide further support in upholding the statutory provision at issue against a constitutional challenge. In promulgating these rules, this Court emphasized the overarching principle that the "rules should be construed so as to … promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." Pa.R.E. 102. To strike down 42 Pa.C.S. § 5920 would impede, rather than promote, the development of evidence law in Pennsylvania by ignoring three decades of court decisions throughout the nation, as well as well-grounded sociological research. It would obfuscate the search for the truth by allowing jurors to rely upon their erroneous beliefs,

uncorrected by qualified experts who could educate them in matters beyond their own experience and knowledge. And it would pervert justice by preserving, undisturbed, the discredited societal myths that the legislature sought to eradicate.

While the present case has been pending on appeal, a panel of the Superior Court considered, and rejected, precisely the same separation of powers argument in a challenge to the constitutionality of this very same statute. In *Commonwealth v. Carter*, __ A.3d __, 2015 WL 1249556 (Pa. Super. Mar. 19, 2015), the court unanimously upheld the constitutionality of 42 Pa.C.S. §5920. The reasoning in the opinion of the distinguished President Judge Emeritus Kate Ford Elliott in *Carter* is persuasive and unassailable.

First, the court found that 42 Pa.C.S. §5920 is "really a rule regarding the admissibility of evidence, not a procedural rule." *Carter*, 2015 WL 1249556 at *3. As noted in the discussion in this *Amicus* brief, § 5920 is only one of many, many such statutory provisions governing the admissibility of evidence. Second, the *Carter* court noted that § 5920 is not in direct conflict with any existing court rule. In particular, it does not conflict with Pa.R.E. 702, which requires any expert testimony "help the trier of fact to understand the evidence or to determine a fact in issue." *Carter*, 2015 WL 1249556 at *3. The provision at issue does precisely that. Finally, the court correctly observed that *Dunkle*,

which predated § 5920 by twenty years, "was not based on constitutional grounds but on existing case law and rules of evidence." *Carter*, 2015 WL 1249556 at *3. In *Dunkle,* after concluding that this type of expert testimony did not satisfy the requirements for admission under Pa.R.Evid. 702, this Court went on to comment that it would not "befit[] this Court to simply disregard the long-standing principles of the presumption of innocence and the proper admission of evidence[.]" *Dunkle,* 602 A.2d at 839. Apart from that passing comment in *dicta*,[14] there is no suggestion whatsoever that exclusion of this type of expert testimony was constitutionally based. *Dunkle* was strictly, and simply, an evidentiary decision. In this, too, Judge Ford Elliott's reasoning in *Carter* hits the mark.

For these reasons, the *Amicus* urges that this Court need trouble itself but little in rejecting Olivo's separation of powers argument; the Court should adopt the sound reasoning of the Superior Court panel decision in *Carter*. The issue is not a close one. Section 5920 was enacted by the legislature as a substantive, not procedural, evidentiary provision to assist the trier of fact on a matter that the legislature has determined to be outside the ken of the average juror. Such a

[14] The *Amicus* suggests that the *Dunkle* Court's reference to "the presumption of innocence and the proper admission of evidence" was merely a passing allusion to the fact that these are the bedrock principles to keep in mind when deciding what evidence should be admissible in criminal cases—not a determination that expert testimony of this type poses any special threat to those principles.

statute is not only constitutional under the Pennsylvania Constitution but is wholly rational in light of the overwhelming weight of both judicial authority across the nation and compelling sociological research dedicated to the study of victim behaviors and responses to sexual violence.

Conclusion

The Pennsylvania Legislature properly enacted 42 Pa.C.S. § 5920 to ensure that juries in crimes involving sexual violence will be able to evaluate all of the evidence in its proper context. In doing so, the legislature admirably performed its role in determining, and then implementing, this important public policy. The statute ensures that jurors will be able to fulfill their role as the sole judges of witness credibility, unhindered by misguided myths and outdated beliefs. The statute brings the Commonwealth into line with the rest of the country—including the professional communities of judges, prosecutors, law enforcement, and medical professionals—where the this kind of juror education is viewed as not only appropriate, but *essential* to an accurate determination of the facts. In enacting the statute, the legislature performed its proper function within the Commonwealth's constitutional system, determining what evidence is relevant and admissible, just as it has in countless other evidentiary contexts. The Amicus respectfully urges this Honorable Court to reverse the Order of the Court of Common Pleas and to allow the Commonwealth to introduce the expert testimony that the court below has already determined to be relevant and helpful to the jury.

Respectfully submitted,

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Certificate of Compliance With Pennsylvania Rule of Appellate Procedure 2135(a)(1)

I certify that this brief complies with the word count limits of Pa. R. App. P. 2135(a)(1) because, according to the word processing software used to prepare this brief, it contains less than 14,000 words.

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Proof of Service

I hereby certify that I am, on April 27, 2015, serving the foregoing *Amicus Curiae* Brief upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R. A. P. 121 and 3309(a):

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