

Erie County Legal Journal

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In the Superior Court of Pennsylvania
Commonwealth v. Rhodes

Erie County Legal Journal

*Reporting Decisions of the Courts of Erie County
The Sixth Judicial District of Pennsylvania*

Managing Editor: Paula J. Gregory
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Erie County Bar Association

Calendar of Events and Seminars

TUESDAY, FEBRUARY 22, 2011

E-Discovery

ECBA Live Lunch-n-Learn Seminar

Bayfront Convention Center

12:15 p.m. - 1:15 p.m. (11:45 a.m. lunch)

\$32 (ECBA member/non-attorney staff)

\$48 (nonmember)

1 hour substantive

WEDNESDAY, MARCH 2, 2011

Litigating the Complex Disfigurement Case: Specific Loss, Hearing Loss, & Vision Claims

PBI Groupcast Seminar

Erie County Bar Association

12:30 p.m. - 3:45 p.m. (12:00 p.m. reg.)

Lunch Included

\$254 (member) \$234 (admitted after 1/1/07)

\$274 (nonmember)

Early Registration - If you register more than 2 days before this presentation you will qualify for this Early Registration Fee:

\$229 (member) \$209 (admitted after 1/1/07) \$249 (nonmember)

3 hours substantive

TUESDAY, MARCH 8, 2011

Department of Corrections 101

PBI Video Seminar

Erie County Bar Association

9:00 a.m. - 1:30 p.m. (8:30 a.m. reg.)

\$129 (member) \$109 (admitted after 1/1/07)

\$149 (nonmember)

4 hours substantive

MONDAY, MARCH 14, 2011

Dead Man's Rule

PBI Groupcast Seminar

Erie County Bar Association

12:30 p.m. - 2:30 p.m. (12:00 p.m. reg.)

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\$214 (member) \$194 (admitted after 1/1/07)

\$234 (nonmember)

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\$189 (member) \$169 (admitted after 1/1/07) \$209 (nonmember)

2 hours substantive

THURSDAY, MARCH 17, 2011

Primer on the Fair Debt Collection Practices Act

PBI Video Seminar

Erie County Bar Association

9:00 a.m. - 1:30 p.m. (8:30 a.m. reg.)

\$129 (member) \$109 (admitted after 1/1/07)

\$149 (nonmember)

4 hours substantive

FRIDAY, MARCH 18, 2011

Sophisticated Issues in Foreclosure Proceedings

PBI Groupcast Seminar

Erie County Bar Association

8:30 a.m. - 3:45 p.m. (8:00 a.m. reg.)

Lunch Included

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5 hours substantive / 1 hour ethics

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Slicing Up the Pie: Property Distribution in Pennsylvania

PBI Video Seminar

Erie County Bar Association

9:00 a.m. - 12:30 p.m. (8:30 a.m. reg.)

\$219 (member) \$199 (admitted after 1/1/07)

\$239 (nonmember)

3 hours substantive

WEDNESDAY, MARCH 23, 2011

24th Annual Civil Litigation Update

PBI Groupcast Seminar

Erie County Bar Association

9:00 a.m. - 4:30 p.m. (8:30 a.m. reg.)

Lunch Included

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5 hours substantive / 1 hour ethics

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E-Discovery

ERIE COUNTY BAR ASSOCIATION

Live Lunch-n-Learn Seminar

TUESDAY, FEBRUARY 22, 2011

Bayfront Convention Center

Lunch - 11:45 a.m.

Seminar - 12:15 p.m. - 1:30 p.m.

Cost: \$32 (ECBA member/non-attorney staff)
\$48 (nonmembers)

An introductory, yet comprehensive, presentation of e-discovery considers both the technical and legal dimensions of ESI (Electronically Stored Information). After outlining the discrete steps that comprise the E-Discovery Process (preservation, collection, filtering, processing, review and production), this format provides the context to examine the required legal functions that must be performed within each step based upon the F.R.C.P., relevant case law and emerging best practices. Special emphasis is given to recent changes in the Local Rules relative to ESI adopted by the U.S. Court, Western District of Pennsylvania and other key developments.

PRESENTER:

RICHARD N. LETTIERI, ESQ.

LETTIERI LAW FIRM, LLC
PITTSBURGH, PA



Rick Lettieri is a lawyer and a technologist. He is a graduate of Lafayette College and Duquesne University School of Law and has practiced law in Pennsylvania since 1983. At IBM and PricewaterhouseCoopers, Rick held a series of management positions in litigation and legal systems and became a recognized legal systems "thought-leader." After five years as an Electronic Evidence Legal Consultant at Kroll Ontrack, Rick formed the Lettieri Law Firm, LLC, where his practice is limited to electronic evidence and e-discovery. His complete bio, including the recent legal matters in which Rick has provided legal advice to legal teams in litigation and mediation, and his recent e-discovery articles and speaking engagements, can be reviewed at www.lettierilaw.com.

This seminar has been approved by the PA CLE Board for 1 hour substantive law credit.

COMMONWEALTH OF PENNSYLVANIA, Appellee

v.

TERI RHODES, Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 143 WDA 2009

Appeal from the Judgment of Sentence entered November 21, 2008

In the Court of Common Pleas of Erie County

Criminal Division at No. CP-25-CR-0000110-2008

BEFORE: FORD ELLIOTT, P.J., ORIE MELVIN and BENDER, JJ.

OPINION BY BENDER, J.:

Filed: December 31, 2009

*This opinion is continued from last week's issue of the
Erie County Legal Journal - Vol. 94 No. 6 - February 11, 2011*

¶ 14 In this appeal, Rhodes challenges the judgment of sentence the court imposed as well as Judge Cunningham's refusal to recuse himself from participation in the case in response to the multiple requests Rhodes's counsel made. Rhodes's Statement of the Questions Involved appears as follows:

- I. Whether the court relied upon improper considerations in the imposition of sentence.
 - A. Intentional premeditated killing
 - B. Matters not of record
 - C. Racial considerations/Chytoria Graham case
 - D. Morality
- II. Whether the lower court abused its discretion in the imposition of sentence.
 - A. Whether the sentence exceeded the Sentencing Guidelines and was unreasonable[.]
 - B. Whether the sentence imposed was manifestly excessive.
 - C. Whether the sentencing court abused its discretion by imposing sentence based exclusively upon the seriousness of the crime and giving no consideration to the Defendant's personal history, rehabilitative needs or background.
- III. Whether the Due Process clauses of the United States and Pennsylvania Constitutions are violated when a defendant enters a guilty plea to Voluntary Manslaughter but the court, after conducting an *in camera* investigation, concludes that the defendant committed first degree murder and enhances the sentence based upon the *in camera* proceedings.
- IV. Whether the lower court abused its discretion in refusing to recuse.

Brief for Appellant at 4-5.¹⁷

¶ 15 As a preliminary matter, we note that Rhodes's questions I, II, and III challenge discretionary aspects of the process of sentencing as applied by the trial court. Accordingly, Rhodes is not entitled to review of those questions as of right, *see Commonwealth v. Fiascki*, 886 A.2d 261, 263 (Pa. Super. 2005); we consider them in the first instance only as requests for allowance of appeal subject to the requirements of Pa.R.A.P. 2119(f) and the body of case law that interprets and applies it. *See Commonwealth v. Hoch*, 936 A.2d 515, 518 (Pa. Super. 2007). Rule 2119(f) requires that Rhodes, as the appellant, include in

¹⁷ The Commonwealth did not submit an advocate's brief in this case but instead incorporated by reference the trial court's opinions of January 26, 2009 and March 31, 2009.

her brief a Concise Statement of Reasons Relied Upon for Allowance of Appeal which, in turn, must raise a “substantial question” as to whether the trial judge, in imposing sentence, violated a provision of the Sentencing Code or contravened a “fundamental norm” of the sentencing process. *See Fiascki*, 886 A.2d at 263; *Commonwealth v. Ousley*, 573 A.2d 599, 601 (Pa. Super. 1990). The determination of whether a particular issue poses a substantial question is to be made on a case-by-case basis. *See Fiascki*, 886 A.2d at 263.

¶ 16 In this case, Rhodes has satisfied the threshold requirements for review of the discretionary aspects of the sentence imposed, having included a thorough Rule 2119(f) Statement. That statement poses substantial questions concerning Judge Cunningham’s imposition of sentence based solely on the seriousness of the offense without considering all relevant factors, *see Commonwealth v. Macias*, 968 A.2d 773, 776 (Pa. Super. 2009); his reliance upon impermissible considerations, *see id.*, *see also Commonwealth v. Crork*, 966 A.2d 585, 590 (Pa. Super. 2009), including unsubstantiated hearsay, *see Commonwealth v. Cruz*, 402 A.2d 536 (1979); his imposition of an excessive sentence beyond the ranges of the Sentencing Guidelines based on impermissible considerations, *see id.*, *see also Commonwealth v. Kraft*, 737 A.2d 755, 757 (Pa. Super. 1999), *Commonwealth v. Guth*, 735 A.2d 709, 711 (Pa. Super. 1999); his reliance on crimes and conduct not charged, *see Commonwealth v. Chase*, 530 A.2d 458, 462 (Pa. Super. 1987), *Commonwealth v. Stufflet*, 469 A.2d 240, 243 (Pa. Super. 1983), and his reliance on matters outside the record such as police reports, *see Commonwealth v. Schwartz*, 418 A.2d 637, 638, 640-41 (Pa. Super. 1980).

¶ 17 Following careful scrutiny of the record as well as the trial court’s written submissions, we find ample ground for vacating the judgment of sentence based on Rhodes’s challenges to the court’s reliance on impermissible considerations. *See id.* (“[I]t is not necessary that an appellate court be convinced that the trial judge in fact relied upon an erroneous consideration; it is sufficient to render a sentence invalid if it reasonably appears from the record that the trial court relied in whole or in part upon such a factor.”). The court’s reliance on police reports it obtained *ex parte* is of particular concern, as Judge Cunningham failed to afford Rhodes the opportunity to cross-examine the witnesses whose hearsay statements comprised the bulk of the reports’ contents. He then drew factual inferences directly from those reports on the basis of which he imposed a sentence almost five times that recommended by the Commonwealth and only one to two years shy of the statutory maximum for Voluntary Manslaughter. The court then sought to buttress the sentence with the repeated assertion that its duration reflected Rhodes’s commission of a “calculated, premeditated killing,” reflecting a finding of elements that define an offense with which Rhodes was not charged and to which she did not plead. Every such occurrence contravened accepted sentencing “norms” in this Commonwealth. *See id.* (“Other jurisdictions have similarly recognized the impropriety of a judge sentencing on out-of-court information, communication and investigation . . . and this [C]ourt has previously noted that reliance on unverified hearsay outside the record is impermissible.”); *Commonwealth v. Sypin*, 491 A.2d 1371, 1372 (Pa. Super. 1985) (reaffirming holdings of *Commonwealth v. Karash*, 452 A.2d 528, 528 (Pa. Super. 1982), and *Stufflet*, *supra*, that trial court may not impose sentence on the basis of offense or conduct not charged or pled).

¶ 18 In so stating, we acknowledge that prior to imposing sentence “[a] sentencing judge ‘may appropriately conduct an inquiry broad in scope, largely unlimited either as to the

kind of information he may consider, or the source from which it may come.” *Schwartz*, 418 A.2d 637, 640-641 (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)).

Nevertheless, the discretion of a sentencing judge is not unfettered; a defendant has the right to minimal safeguards to ensure that the sentencing court does not rely on factually erroneous information, and any sentence predicated on such false assumptions is inimicable [sic] to the concept of due process. *United States v. Tucker*, *supra*; *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948). Obviously, the probability of receiving accurate pre-sentence information is considerably enhanced when the defendant has an opportunity to review and dispute the facts and allegations available to the sentencing judge.

Id. See also *Karash*, 452 A.2d at 528 (citations omitted) (“[T]he court violates the defendant’s right to due process if, in deciding upon the sentence, it considers unreliable information or information affecting the court’s impartiality, or information that it is otherwise unfair to hold against the defendant.”).¹⁸

¶ 19 Despite the trial court’s assertions here that defense counsel had equal access to the police reports on which the court relied at sentencing, the fact remains that the court made use of those reports without advance disclosure and in place of the pre-sentence report on which the defense quite reasonably relied.¹⁹ We find the court’s undisclosed use of these documents a source of substantial prejudice. Our Sentencing Code sanctions the use of pre-sentence reports based upon the investigation of a probation officer who, unlike the Commonwealth and the prosecuting police officers who compile police reports, is a “professional neutral.” See *Schwartz*, 418 A.2d at 642. As a prophylactic measure, the resulting pre-sentence investigation report must then be disclosed to allow the defendant and her counsel the opportunity to challenge the information it contains. See *id.* (“The prophylactic measure of pre-sentence report disclosure would be seriously compromised if the sentencing judge was permitted to surreptitiously gather information outside the report without affording the defendant the opportunity to verify its accuracy.”). If a pre-sentence report prepared by a “professional neutral” must be disclosed, “then *a fortiori* the information proffered by the prosecuting officials need be disclosed and examined.” *Id.*

¶ 20 Regrettably, the trial court’s reliance on the undisclosed and unchallenged hearsay of the police reports allowed it to reach the tendentious characterization of Rhodes’s conduct on

¹⁸ The court’s several opinions attempt to buttress its consideration of matters outside the record by reference to our en banc decision in *Commonwealth v. Goggins*. See, e.g., Rule 1925(a) Opinion, 3/31/09, at 13 (quoting *Goggins*, 748 A.2d 721, 728 (Pa. Super. 2000) (noting that it is “part of the responsibility of a sentencing judge to ‘conduct sufficient presentence inquiry such that, at a minimum, the court is apprised of the particular circumstances of the offense, not limited to those of record, as well as the defendant’s personal history and background.’”)) (emphasis in trial court opinion). The court’s reliance is misplaced. We reached our decision in *Goggins* on the basis of a trial judge’s decision to confine a defendant to prison without ordering a pre-sentence investigation, questioning the defendant concerning his personal background, or otherwise informing himself of the sentencing factors the Rules of Court require a sentencing judge to consider. See *Goggins*, 748 A.2d at 728. To that end, our decision recognizes our current pre-sentence investigation process as the preferred method by which a trial judge should apprise himself of the appropriate information at sentencing. See *id.* (quoting *Commonwealth v. Martin*, 351 A.2d 650, 657 (Pa. 1976) (quoting ABA PROJECT ON MINIMUM STANDARDS OF JUSTICE, STANDARDS RELATING TO PROBATION § 2.3 (Approved Draft, 1970)). In no way did our decision license the manner of *ex parte* investigation the court conducted in this case where, we note, a pre-sentence report had been compiled. Nor did it abrogate the disclosure requirement in *Schwartz*, *supra*.

¹⁹ As we have discussed, *supra*, disclosure of the trial court’s *ex parte* contact was ultimately made by the District Attorney after the court had already composed and disseminated its Statement of Sentencing Rationale.

which it based its rejection of the FBI neonaticide profile and the Commonwealth's sentence recommendation. Although a court is never compelled to accept the Commonwealth's recommendation of sentence on an open plea, the bases upon which Judge Cunningham did so cannot be sustained on the record before us. Rhodes was not charged with premeditated killing, *i.e.*, murder in the first degree, and did not accept premeditation as part of the factual basis of her plea. Nevertheless, the court consciously relied on that element at sentencing, emphasizing repeatedly that Rhodes's crime was a "premeditated, calculated and intentional killing." N.T., Sentencing, 11/21/08, at 38, 39, 50, 63. In so doing, the court effectively convicted and sentenced the defendant for conduct and intent she had not admitted and could not prepare to address. Rhodes's crime was Voluntary Manslaughter as defined by 18 Pa.C.S. § 2503(a); she was presumptively innocent of first degree murder.²⁰ Of course, we cannot know whether the court was motivated in its determination merely by its view of the facts, or by other factors such as its personal philosophy on sentencing or its disapproval of the Commonwealth's exercise of prosecutorial discretion. Regardless, the court's own exercise of discretion in the imposition of sentence was inappropriate, unjustified, and prejudicial.

¶ 21 In response to the process the court employed at sentencing, Rhodes's counsel made multiple requests for Judge Cunningham's recusal from further consideration of this case. The court having denied each one of them, Rhodes asserts in her fourth question on appeal that the court conducted the proceedings before, during, and after sentencing in a manner suggesting at least the appearance of bias. Brief for Appellant at 46. Accordingly, Rhodes requests that we vacate the judgment of sentence and remand the matter for re-sentencing before another judge. *See id.* In its Rule 1925(a) Opinion, the trial court responds to Rhodes's assertion of the need for recusal only to the extent that Rhodes asserted the impropriety of the court's contact with a reporter the Erie Times News and the court's efforts to publish its Statement of Sentencing Rationale through various media outlets, on Erie County's website and in the Erie County Legal Journal. The Opinion does not indicate the extent of Judge Cunningham's reflection on his ability to proceed impartially; nor does it analyze whether the court's conduct at sentencing might give rise to the appearance of bias. We find the potential for such an appearance significant and therefore dispositive of this appeal.

"The sentencing decision is of paramount importance in our criminal justice system," and must be adjudicated by a fair and unbiased judge. *Commonwealth v. Knighton*, 490 Pa. 16, 415 A.2d 9, 21 (1980). This means, a jurist who "assess[es] the case in an impartial manner, free of personal bias or interest in the outcome." *Commonwealth v. Abu-Jamal*, 553 Pa. 485, 720 A.2d 79, 89 (1998). Because of the tremendous discretion a judge has when sentencing, "a defendant is entitled

²⁰ Judge Cunningham's Supplement to Rule 1925(a) Opinion, filed on May 4, 2009, would appear to substantiate our concern that the court deemed it appropriate to impose sentence on the basis of conduct and intent neither charged nor pled. In that supplemental opinion, Judge Cunningham directs our attention to the case of Lauren Elizabeth Jones who killed her newborn infant under circumstances similar to those at issue here. The opinion notes that Jones, who was prosecuted in Butler County, pled *nolo contendere* to Murder in the Third Degree, Concealing Death of a Child Born Out of Wedlock, and Abuse of a Corpse, and observes that the trial court imposed an aggregate sentence of eight years to twenty years imprisonment. The Jones case is, of course, distinguishable. Regardless of any similarity of the facts in the two cases, the determining factor remains the level of culpability imposed by the plea the respective defendants accepted. Unlike Jones, Rhodes did not enter a plea to murder of any degree. Any determination to sentence her as if she had is a clear violation of due process and an abuse of the trial court's sentencing discretion. *See Karash*, 452 A.2d at 529; *Schwartz*, 418 A.2d at 638-39 (citing *Commonwealth v. Bethea*, 379 A.2d 102, 106-07 (Pa. 1977)).

to sentencing by a judge whose impartiality cannot reasonably be questioned.” *Commonwealth v. Darush*, 501 Pa. 15, 459 A.2d 727, 732 (1983). “A tribunal is either fair or unfair. There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings.” *In Interest of McFall*, 617 A.2d 707, 714 (Pa. 1992)

Commonwealth v. Druce, 848 A.2d 104, 108 (Pa. 2004).

¶ 22 Our Supreme Court presumes that judges of this Commonwealth are “honorable, fair and competent[,]” and vests in each jurist the duty to determine, in the first instance, whether he or she can preside impartially. *Id.* (citing *Commonwealth v. White*, 734 A.2d 374, 384 (Pa. 1999)). In the context of criminal sentencing, however, this standard requires that the judge recuse himself not only when he doubts his own ability to preside impartially, but whenever he “believes his impartiality can be reasonably questioned.” *Commonwealth v. Lemanski*, 529 A.2d 1085, 1088-1089 (Pa. Super. 1987) (quoting *Commonwealth v. Goodman*, 311 A.2d 652, 654 (Pa. 1973)). *See also Abu-Jamal*, 720 A.2d at 89; *Commonwealth v. Benchoff*, 700 A.2d 1289, 1294-1295 (Pa. Super. 1997) (citing *In the Interest of McFall*, 617 A.2d at 712 (“Because the integrity of the judiciary is compromised by the appearance of impropriety, recusal is necessary where the judge’s behavior appears to be biased or prejudicial.”). Consequently, “a party arguing for recusal need not prove that the judge’s rulings actually prejudiced him; it is enough to prove that the reasonable observer might question the judge’s impartiality.” *Reilly by Reilly v. Southeastern Pennsylvania Transp. Auth.*, 479 A.2d 973, 991-993 (Pa. Super. 1984). *See also Lemanski*, 529 A.2d at 1088 (“We share in the Supreme Court’s awareness that the appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of these elements.”) (internal citations omitted). Similarly, a party’s call for recusal need not be based only upon discreet incidents, but may also assert the cumulative effect of a judge’s remarks and conduct even though no single act creates an appearance of bias or impropriety. *See Benchoff*, 700 A.2d at 1295.

¶ 23 Our review of a trial court’s decision denying a motion to recuse is limited to abuse of discretion. *See id.* Where the claim at issue arises from imposition of a criminal sentence, we may find such an abuse when objective scrutiny of the record casts doubt on the judge’s impartiality, *see Darush*, 459 A.2d at 732, or “where the judge’s behavior *appears* to be biased or prejudicial[,]” *see Benchoff*, 700 A.2d at 1294-1295 (citing *In the Interest of McFall*, 617 A.2d at 712)). Indeed, our Supreme Court has recognized that even upon confirmation that a sentencing judge did not give effect to his personal bias, the extraordinary discretion he is empowered to exercise may compel his removal from the case if his impartiality can be reasonably questioned. *See also Darush*, 459 A.2d at 732 (“[C]onsidering all the circumstances, especially the trial court’s inability to affirmatively admit or deny making remarks from which a significant minority of the lay community could reasonably question the court’s impartiality, we feel the largely unfettered sentencing discretion afforded a judge is better exercised by one without hint of animosity toward appellant.”). Thus, the determinative factor in sentencing cases remains the integrity of the process and the necessity that the judge’s impartiality “cannot reasonably be questioned.” *Id.*

¶ 24 To that end, a judge’s removal may be compelled where his remarks reflect prejudgment of the case as one of a particular class of cases or where his reliance at sentencing on

conduct or offenses not charged raises a reasonable question about his impartiality. *See Lemanski*, 529 A.2d at 1088 (“A party is not limited to his own case in establishing personal bias, and may show temperamental prejudice on the particular class of litigation involved to support his allegations.”) (citation omitted); *Commonwealth v. Sypin*, 491 A.2d 1371, 1374 (Pa. Super. 1985) (vacating judgment of sentence and remanding for resentencing before another judge on the basis of perceived bias where judge, when imposing sentence, referenced disappearance and death of children although defendant had not been charged with kidnapping or killing children); *Commonwealth v. Bryant*, 476 A.2d 422 (Pa. Super. 1984) (remanding case for resentencing before a different judge where sentencing judge’s in camera remarks in a prior case showed his predetermination to impose maximum sentence and defendant filed a motion for recusal).²¹

¶ 25 In this case, the record offers ample basis upon which to question the trial court’s impartiality. Notably, the court responded to Rhodes’s allegations of bias without a discussion of the subjective reflection our law requires of every judge whose impartiality is questioned. *See Druce*, 848 A.2d at 108 (“If a party questions the impartiality of a judge, the proper recourse is a motion for recusal, requesting that the judge make an independent, self-analysis of the ability to be impartial. If content with that inner examination, the judge must then decide ‘whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary.’”) (citation omitted). Instead, the court sought to justify its decision not to recuse by denying any external affiliation or relationship that would demonstrate bias and then castigated defense counsel for seeking the court’s recusal. *See* Rule 1925(a) Opinion, 3/31/09, at 7; Trial Court Opinion and Order, 1/26/09, at 61. Such an examination is not sufficient to satisfy the direction of applicable case law and may, in its tone and apparent insufficiency, reinforce doubts otherwise raised by the record concerning the appearance of bias. *See Darush*, 459 A.2d at 732.

¶ 26 Regrettably, the record, which we have examined in exhaustive detail, raises significant concerns that the trial court may have prejudged this case or reached its decision at sentencing on the basis of improper considerations. Although a judge is never constrained to accept a plea, Judge Cunningham accepted Rhodes’s plea to Voluntary Manslaughter and, correctly, directed compilation of a presentence report. Having received the report, he then declined to use it and relied instead on police reports he ordered from the Commonwealth, *ex parte*. His use of those reports remained undisclosed to Rhodes’s counsel until the sentencing hearing was in progress and the court had already completed and distributed its Statement of Sentencing Rationale to all present in the courtroom, except counsel. Accordingly, Rhodes was deprived of any meaningful opportunity to challenge the layered hearsay of the reports, which examination of the Statement of Sentencing Rationale verifies served as the primary source of information on which the court made its determination to impose a sentence close to the statutory maximum. In that Statement, as well as its remarks at sentencing, the court stated, repeatedly and unequivocally, that it reached its determination based on Rhodes’s commission of a premeditated killing, notwithstanding the fact that

²¹ Contrary to the trial court’s assertion, *see* Rule 1925(a) Opinion, 3/31/09, at 34, this Court does, under limited circumstances, retain the authority to direct resentencing before another judge. Although our Supreme Court limited our authority to replace a trial judge *sua sponte*, *see Commonwealth v. Whitmore*, 912 A.2d 827, 834 (Pa. 2006), it did not purport to do so where the aggrieved party filed a motion to recuse and the record establishes that the trial judge abused his discretion in denying it.

premeditation is not an element of the crime to which Rhodes offered her plea. Consistent with its determination concerning premeditation, the court's Statement then repudiated the Commonwealth's sentencing recommendation on the basis of an unrelated case (Chytoria Graham) before it offered the District Attorney any opportunity to respond or explain. To all appearances, the court then made *de facto* findings of fact, seemingly ascribing conduct to Rhodes, *e.g.*, inducing her own labor, that appears nowhere in the charges against her.

¶ 27 Viewed from a third party perspective, these occurrences render an appearance that the court adjudged this case based not on the conduct charged, but on conduct intimated - which, because it involved a child victim, according to Judge Cunningham, must merit an aggravated sentence regardless of the plea the defendant tendered or the factual basis for that plea. *See Lemanski*, 529 A.2d at 1088 (indicating that the appearance of partiality may be shown by evidence that the court harbored a bias concerning a particular class of cases). This approach is documented throughout the record, most particularly in the court's repudiation of D.A. Foulk's explanation of the exercise of the Commonwealth's prosecutorial discretion and in the court's declaration that any other approach "creates an open season on all infant children in our community." *See* n.14, *supra* (quoting Statement of Sentence Rationale, 11/21/08, at 30). These occurrences, coupled with the court's responsiveness to the apparent suggestion of the Erie Times News that Rhodes's conduct was not consistent with a charge of Voluntary Manslaughter and that other defendants who killed children had received long term sentences, *see supra*, n.15, are sufficient to cause us significant reservation at the extent to which the court imposed sentence without prejudging the case, giving voice to the judge's personal sentencing philosophy, or complying with the demands of external opinion.

¶ 28 The court's explanation does little to allay our concern. In point of fact, its attacks on defense counsel's integrity and its cursory denial of Rhodes's motion for bail on the basis of an obvious typographical error lend additional substance to our reservations. Although we approach this determination with regret, we must assure that no hint of improper motive undermines the just resolution of criminal charges in our courts and that no defendant's sentence be subject to a reasoned perception of bias. *See Darush*, 459 A.2d at 732. *See also Benchoff*, 700 A.2d at 1294-1295. "We, as jurists, are committed to impartiality. But if we allow our personal opinions and goals to cause us to manipulate the law, our commitment is no longer credible, no matter how righteous our purpose." *Lemanski*, 529 A.2d at 1089. Under the circumstances of this case, given the cumulative effect of Judge Cunningham's conduct and remarks, *see Benchoff*, 700 A.2d 16 1295, it is clear that the trial court's impartiality could be reasonably questioned. We conclude accordingly that Judge Cunningham abused his discretion in refusing to recuse himself in response to the multiple motions filed by Rhodes's counsel. In view of the taint that follows such a determination, we vacate the judgment of sentence and remand this case for re-sentencing before another judge. *See Whitmore*, 912 A.2d at 834.

¶ 29 Judgment of sentence **VACATED**. Case **REMANDED** for resentencing before another judge. Jurisdiction **RELINQUISHED**.

COMMONWEALTH OF PENNSYLVANIA, Petitioner

v.

TERI RHODES, Respondent

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT
No. 45 WAL 2010

Petition for Allowance of Appeal from the Order of the Supreme Court

ORDER

PER CURIAM:

AND NOW, this 15th day of December, 2010, the Petition for Allowance of Appeal is DENIED.

Madame Justice Orie Melvin did not participate in the consideration or decision of this matter.

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FICTITIOUS NAME NOTICE

Pursuant to Act 295 of December 16, 1982 notice is hereby given of the intention to file with the Secretary of the Commonwealth of Pennsylvania a "Certificate of Carrying On or Conducting Business under an Assumed or Fictitious Name." Said Certificate contains the following information:

FICTITIOUS NAME NOTICE

1. Fictitious Name: Home Solutions
By Stephen Jones Building and Remodeling
2. Address of principal place of business, including street and number: 10722 West Main Road, North East, PA 16428
3. The real names and addresses, including street and number, of the persons who are parties to the registration: Great Lakes Home Solutions, LLC, 10722 West Main Road, North East, PA 16428
4. An application for registration of a fictitious name was filed on February 9, 2011.

Feb. 18

INCORPORATION NOTICE

Harrington Farm Association has been incorporated under the provisions of the Business Corporation Law of 1988.
Knox McLaughlin Gornall
& Sennett, P.C.
120 West 10th Street
Erie, PA 16501

Feb. 18

INCORPORATION NOTICE

Notice is hereby given that Sterling Healthcare Associates, Inc. has been incorporated under the provisions of the Business Corporation Law of 1988.
Craig A. Zonna, Esq.
Elderkin, Martin, Kelly & Messina
150 E. 8th St.
Erie, PA 16501

Feb. 18

LEGAL NOTICE

MARSHALS SALE: By virtue of a Writ of Execution issued on August 24, 2010, out of the United States Court for the Western District of Pennsylvania and to

me directed, I shall expose the following real property to public sale **AT THE ERIE COUNTY COURTHOUSE, located at 140 WEST SIXTH STREET, ERIE, PENNSYLVANIA 16501, on March 4, 2011, at 9:00 a.m., local time.** Said hereinafter described property is located at 9816 Bateman Avenue, Cranesville, PA 16410, being more fully described as follows:

All those certain tracts of land, together with the buildings, and improvements erected thereon, described in Deed Book Volume 1095, Page 2109, recorded in the Recorder's Office of Erie County, Pennsylvania, seized and taken in execution as the property of Kelly L. Lascak, at the suit of *The United States of America v. Kelly L. Lascak*, to be sold on Writ of Execution at Case No. 1:10-cv-00021, filed in the United States District Court for the Western District of Pennsylvania.

TERMS OF SALE: Successful bidder will pay ten percent (10%) by certified check to be tendered immediately at the sale and the remainder of the bid within thirty (30) days from the date of the sale and in the event bidder cannot pay the remainder, the property will be resold and all monies paid in at the original sale will be applied to any deficiency in the price at which the property is resold. Notice is hereby given that a Schedule of Distribution will be filed by me on the thirtieth day after the date of sale, and that distribution will be made in accordance with the Schedule unless exemptions are filed thereto within ten (10) days thereafter. Purchaser must furnish State Realty Transfer Tax Stamps and stamps required by the local taxing authority. Marshals' costs, fees and commissions will be the responsibility of the seller. On behalf of the U.S. Marshals Service, we are allowing the highest bidder to secure, by official bank check or money order, ten percent (10%) of the highest bid amount within one hour of the conclusion of the sale.

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Feb. 4, 11, 18, 25

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Notice is hereby given that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same and all persons indebted to said estates are requested to make payment without delay to the executors or their attorneys named below.

FIRST PUBLICATION

**ANDRUS, WILLIAM R.,
deceased**

Late of the Township of Summit, County of Erie and Commonwealth of Pennsylvania
Executor: James F. Andrus
Attorney: Thomas J. Minarcik, Esq., Elderkin, Martin, Kelly & Messina, 150 East 8th Street, Erie, PA 16501

**COSTELLO, PATRICK A.,
deceased**

Late of the City of Corry, County of Erie and Commonwealth of Pennsylvania
Executor: James Bryant, c/o 210 ½ Maple Ave., Corry, PA 16407
Attorney: None

**GUSTAFSON, EVELYN,
deceased**

Late of Edinboro, County of Erie, Pennsylvania
Executor: James Gustafson, 1419 East 29th Street, Erie, PA 16504
Attorney: None

**KAUS, ELIZABETH P.,
deceased**

Late of Summit Township, County of Erie and Commonwealth of Pennsylvania
Executor: Myrna E. Calabrese, c/o Kevin M. Monahan, Esq., Suite 300, 300 State Street, Erie, PA 16507
Attorneys: Marsh, Spaeder, Baur, Spaeder & Schaaf, LLP, Attorneys-at-Law, Suite 300, 300 State Street, Erie, PA 16507

**LOEFFLER, ANN B.,
deceased**

Late of Erie, PA
Executor: Robert J. Loeffler, 8141 Grubb Rd., McKean, PA 16426
Attorney: None

**MOORE, DOROTHY A.,
deceased**

Late of the City of Erie, County of Erie
Administrator: Lynne S. Parker Poyer, 327 Connecticut Drive, Erie, PA 16505
Attorney: Donald J. Rogala, Esq., 246 West Tenth Street, Erie, PA 16501

SECOND PUBLICATION

**CATHERMAN, SUSAN K.,
deceased**

Late of the City of Erie, County of Erie
Executor: Duane C. Catherman, c/o Thomas A. Testi, Esq., P.O. Box 413, Fairview, PA 16415
Attorney: Thomas A. Testi, Esq., 3952 Avonia Road, P.O. Box 413, Fairview, PA 16415

**CAUFMAN, JAMES A.,
deceased**

Late of the City of Erie, County of Erie, Commonwealth of Pennsylvania
Executrix: Mary M. Hilliard, c/o Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506
Attorney: Scott L. Wallen, Esq., Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506

**DAUGHERTY, DELBERT C.,
deceased**

Late of the Township of Harborcreek, County of Erie, Pennsylvania
Executor: Carl J. Daugherty, c/o 246 West 10th Street, Erie, PA 16501
Attorney: Scott E. Miller, Esquire, 246 West Tenth Street, Erie, PA 16501

**GADOMSKI, WILLIAM L.,
deceased**

Late of the Township of Harborcreek, County of Erie, Commonwealth of Pennsylvania
Executor: Sandra Delaney, c/o Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506
Attorney: Scott L. Wallen, Esq., Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506

**GLASS, WILLIAM B.,
deceased**

Late of the City of Erie, County of Erie
Executrix: Filomena M. Glass, c/o Thomas A. Testi, Esq., P.O. Box 413, Fairview, PA 16415
Attorney: Thomas A. Testi, Esq., 3952 Avonia Road, P.O. Box 413, Fairview, PA 16415

**GORDON, GEORGE S.,
deceased**

Late of the Township of Millcreek, County of Erie, Commonwealth of Pennsylvania
Executrix: Sandy G. Rounds, c/o Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506
Attorneys: I. John Dunn, Esq., Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., 2222 West Grandview Blvd., Erie, PA 16506

**GUNTHER, EDWARD JAMES,
a/k/a EDWARD J. GUNTHER,
deceased**

Late of the Township of Millcreek, County of Erie, Pennsylvania
Executrix: Shyla O. Gunther, c/o 246 West 10th Street, Erie, PA 16501
Attorney: Scott E. Miller, Esquire, 246 West Tenth Street, Erie, PA 16501

**HURLEY, SHIRLEY M., a/k/a
SHIRLEY MELISSA HURLEY,
deceased**

Late of Millcreek Township,
County of Erie, and
Commonwealth of Pennsylvania
Executor: Patricia A. Hurley, c/o
The McDonald Group, L.L.P.,
Thomas J. Buseck, P.O. Box
1757, Erie, PA 16507-1757
Attorney: Thomas J. Buseck,
Esq., The McDonald Group,
L.L.P., P.O. Box 1757, Erie, PA
16507-1757

**KEITH, MARIAN V.,
deceased**

Late of the City of Erie, County
of Erie, Pennsylvania
Co-Executrices: Marilyn Hunt
and Diane Keith, c/o 150 West
Fifth St., Erie, PA 16507
Attorney: Colleen C. McCarthy,
Esq., McCarthy, Martone &
Peasley, 150 West Fifth St., Erie,
PA 16507

**KOPER, BETTY F., a/k/a
BETTY KOPER, a/k/a
ELIZABETH F. KOPER,
deceased**

Late of the Township of
Girard, County of Erie, State of
Pennsylvania
Executrix: Karen A. Koper,
4211 Elk Park Road, Lake City,
Pennsylvania 16423
Attorney: James R. Steadman,
Esq., 24 Main St. E., Girard,
Pennsylvania 16417

**McHENRY, ALICE M.,
deceased**

Late of Lawrence Park Township,
Erie County, Erie, Pennsylvania
Executor: Clinton S. McHenry,
c/o Robert J. Jeffery, Esq., 33
East Main Street, North East,
Pennsylvania 16428
Attorney: Robert J. Jeffery,
Esq., Orton & Jeffery, P.C., 33
East Main Street, North East,
Pennsylvania 16428

**MONSCHEIN, JACOB H.,
deceased**

Late of the City of Erie, County
of Erie and Commonwealth of
Pennsylvania
Executrix: Karen Zimmerman,
c/o 3305 Pittsburgh Avenue, Erie,
Pennsylvania 16508
Attorney: Darlene M. Vlahos,
Esquire, 3305 Pittsburgh Avenue,
Erie, Pennsylvania 16508

**NELSON, JEAN L., a/k/a
JEAN NELSON, a/k/a
JEAN LOUISE NELSON,
deceased**

Late of the Township of Millcreek
Administrator: Carol Seib
Attorney: Michael G. Nelson,
Esq., Marsh, Spaeder, Baur,
Spaeder & Schaaf, LLP, 300
State Street, Suite 300, Erie,
Pennsylvania 16507

**SHAFFER, JOYCE M., a/k/a
JOYCE MARIE SHAFFER,
deceased**

Late of the City of Erie, Erie
County, Pennsylvania
Administrator: Rodney N.
Shaffer, 1034 West 36th Street,
Erie, PA 16508
Attorney: None

**SOTO, HERON DE LEON, a/k/a
ERON DE LEON SOTO, a/k/a
ERON DELEON SOTO, a/k/a
ERON D. SOTO,
deceased**

Late of the City of Erie, County
of Erie, and Commonwealth of
Pennsylvania
Executor: Andrew De Leon Soto,
c/o The McDonald Group, L.L.P.,
Thomas J. Buseck, P.O. Box
1757, Erie, PA 16507-1757
Attorney: Thomas J. Buseck,
Esq., The McDonald Group,
L.L.P., P.O. Box 1757, Erie, PA
16507-1757

**TUROWSKI, PETER WALTER,
deceased**

Late of the City of Erie
Administrator: Janet Martinez
Attorney: Catherine A. Allgeier,
Esq., 504 State St., Suite 203,
Erie, PA 16501

**ULLAND, JOHN L.,
deceased**

Late of Erie City, Erie County,
Pennsylvania
Executrix: Marlene D. Ulland,
1020 West 36th Street, Erie,
Pennsylvania 16508
Attorney: John R. Falcone, Esq.,
The Gideon Ball House, 135 East
6th Street, Erie, Pennsylvania
16501

**WEAVER, EDWARD J.,
deceased**

Late of the City of Erie
Administrator: Timothy Deckert,
c/o Attorney Terrence P.
Cavanaugh, 3336 Buffalo Road,
Wesleyville, PA 16510
Attorney: Terrence P. Cavanaugh,
Esq., 3336 Buffalo Road,
Wesleyville, PA 16510

**WILCZEWSKI, JEAN,
deceased**

Late of Millcreek Township, Erie
County, Pennsylvania
Administrator: Richard L.
Wilczewski, 4611 Basin Circle,
Erie, Pennsylvania 16509
Attorney: John R. Falcone, Esq.,
The Gideon Ball House, 135 East
6th Street, Erie, Pennsylvania
16501

**WOLFE, GERALD MARK, a/k/a
GERALD M. WOLFF,
deceased**

Late of the Township of
Harborcreek, County of Erie, and
Commonwealth of Pennsylvania
Administratrix: Deborah A.
Wolff, 3304 Rose Avenue, Apt.
#14, Erie, Pennsylvania 16510
Attorney: Robert E. McBride,
Esquire, 32 West Eighth Street,
Suite 600, Erie, Pennsylvania
16501

THIRD PUBLICATION

**BARGIELSKI, FRANCES V.,
deceased**

Late of the City of Erie, County of Erie and Commonwealth of Pennsylvania

Executrix: Patricia Marie Bargielski, c/o 504 State Street, 3rd Floor, Erie, PA 16501

Attorney: Michael J. Nies, Esquire, 504 State Street, 3rd Floor, Erie, PA 16501

**BLACK, JACK L., SR.,
deceased**

Late of the City of Corry, County of Erie and Commonwealth of Pennsylvania

Executrix: Carmen M. Black, 13567 W. Smith St. Ext., Corry, PA 16407-8915

Attorney: None

**CALAWAY, ALICE L., a/k/a
ALICE CALAWAY,
deceased**

Late of the Borough of Girard, County of Erie, State of Pennsylvania

Co-Executrices: Diana R. Fetterman, 10067 Sampson Avenue, Lake City, Pennsylvania 16423 and Elaine M. Heiden, 419 Olin Avenue, Girard, Pennsylvania 16417

Attorney: James R. Steadman, Esq., 24 Main St. E., Girard, Pennsylvania 16417

**EASTMAN, RAYMOND,
deceased**

Late of the Township of North East, Commonwealth of Pennsylvania

Executor: Sandra J. Pavlinko, 3433 West 32nd Street, Erie, Pennsylvania 16506

Attorney: Richard A. Vendetti, Esq., Vendetti & Vendetti, 3820 Liberty Street, Erie, PA 16509

**HARSH, JOHN A.,
deceased**

Late of the Borough of North East, Erie County, Pennsylvania

Executrix: JoAnn Askey, c/o James S. Bryan, Esquire, 11 Park Street, North East, PA 16428

Attorney: James S. Bryan, Esq., Knox McLaughlin Gornall & Sennett, P.C., 11 Park Street, North East, PA 16428

**KIEWICE, BERTHA STELLA,
a/k/a BERTHA S. KIEWICE,
deceased**

Late of the City of Erie, Commonwealth of Pennsylvania

Executrix: Sandra M. Goring, 4229 Alan Drive, Erie, Pennsylvania 16510

Attorney: Richard A. Vendetti, Esq., Vendetti & Vendetti, 3820 Liberty Street, Erie, PA 16509

**MCCULLOUGH, STEWART C.,
deceased**

Late of the City of Erie, Erie County, Pennsylvania

Executors: Roger Frantz and J. Ronald Kushner

Attorney: J. Ronald Kushner, Esquire, PO Box 7, 248 Seneca Street, Oil City, PA 16301

**MILLER, ANNE K., a/k/a
ANNA J. MILLER, a/k/a
ANNA K. MILLER, a/k/a
ANNA MILLER,
deceased**

Late of the Borough of Lake City, County of Erie, and Commonwealth of Pennsylvania

Administrator dncta: Richard S. Miller, c/o The McDonald Group, L.L.P., Thomas J. Buseck, P.O. Box 1757, Erie, PA 16507-1757

Attorney: Thomas J. Buseck, Esq., The McDonald Group, L.L.P., P.O. Box 1757, Erie, PA 16507-1757

**NELSON, KARIN C.,
deceased**

Late of Millcreek Township, Erie County, Pennsylvania

Executrix: Judith K. Johnson, c/o Robert G. Dwyer, Esquire, 120 West Tenth Street, Erie, PA 16501

Attorney: Robert G. Dwyer, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

**OHMAN, ROBERT E.,
deceased**

Late of the City of Erie, Erie County, Pennsylvania

Executrix: Lucia Ann DePalma, 558 West Sixth Street, Erie, Pennsylvania 16507-1129

Attorney: Raymond A. Pagliari, Esq., 558 West Sixth Street, Erie, Pennsylvania 16507-1129

**PONTORIERO, JOSEPH
DONALD, a/k/a JACK J.
PONTORIERO,
deceased**

Late of the City of Erie, County of Erie and Commonwealth of Pennsylvania

Executrix: Frances H. Pontoriero, 4204 Trask Ave., Erie, PA 16508

Attorney: None

**PRESS, IRWIN,
deceased**

Late of the City of Erie, Erie County, Pennsylvania

Executrix: Ann Ivory, c/o Jeffrey D. Scibetta, Esq., Knox, McLaughlin, Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

Attorney: Jeffrey D. Scibetta, Esq., Knox McLaughlin Gornall & Sennett, P.C., 120 West Tenth Street, Erie, PA 16501

**RESTIFO, JOSEPH D.,
deceased**

Late of the City of Erie, County of Erie and Commonwealth of Pennsylvania

Executrix: Carol Lee Restifo
Attorney: David J. Rhodes, Esquire, Elderkin, Martin, Kelly & Messina, 150 East 8th Street, Erie, PA 16501

**ROSCINSKI, KATHRYN A.,
deceased**

Late of the City of Erie
Executrix: Cynthia A.
 Strickenberger, 2432 Pepper Tree
 Drive, Erie, PA 16510
Attorney: Michael A. Fetzner,
 Esq., Knox McLaughlin Gornall
 & Sennett, P.C., 120 West Tenth
 Street, Erie, PA 16501

**SABOL, RUDOLPH R., a/k/a
RUDOLPH SABOL, a/k/a
RUDY SABOL,
deceased**

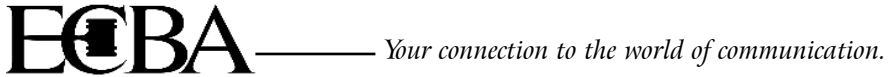
Late of the Township of
 Girard, County of Erie, State of
 Pennsylvania
Executrix: Susan L. Sabol, 1739
 Skyline Drive, Erie, Pennsylvania
 16509
Attorney: James R. Steadman,
 Esq., 24 Main St. E., Girard,
 Pennsylvania 16417

**WRIGHT, RALPH T.,
deceased**

Late of the City of Erie, Erie
 County, Pennsylvania
Executor: Mark A. Wright, c/o
 Jerome C. Wegley, Esq., Knox
 McLaughlin Gornall & Sennett,
 P.C., 120 West Tenth Street, Erie,
 PA 16501
Attorney: Jerome C. Wegley,
 Esq., Knox McLaughlin Gornall
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305 West Sixth Street
Erie, PA 16507 ----- *kjennings@shapiralaw.com*

New Name

MARISSA SAVASTANA is now MARISSA SAVASTANA WATTS ---- *mwatts@mijb.com*

New Email

JACK M. GORNALL ----- *kgornall@neo.rr.com*

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