Bail in Sexual Assault Cases

Judicial Bench Card

For relevant cases and resources, see the accompanying flash drive.

Pennsylvania law does not contain specific provisions for those accused of sexual violence offenses. The court should tailor conditions to the specific details of each case.

Key Statutes

Pa. Const. Art. I §14 – Prisoners to be bailable; habeas corpus: All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion, the public safety may require it.

1. The bail authority may deny bail if it is determined that no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community.

42 Pa. Cons. Stat. Ann. §5701 – Right to Bail: All prisoners shall be bailable by sufficient sureties, unless: No condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great.

Pa.R.Crim.P. 520 – Bail Before Verdict: Bail before verdict shall be set in all cases as permitted by law. Whenever bail is refused, the bail authority shall state in writing or on the record the reasons for that determination. A defendant may be admitted to bail on any day and at any time.

Types of Bail

Pa.R.Crim.P. Rule 524(c)(1),(2),(3),(4),(5)

1. ROR-Release on Recognizance
2. Release on Nonmonetary Conditions
3. Release on Unsecured Bail Bond
4. Release on Nominal Bail
5. Release on a Monetary Condition

Any bail condition may include electronic monitoring including ankle bracelet and GPS monitoring.

Practical Tips

- ☑ Know the factual background of the case and ask questions to ensure the bail conditions provide protection to the alleged victims and the community in general.
- ☑ Tailor the conditions to the particulars of the sexual violence case before the court.

Factors for Bail Consideration - Pa.R.Crim.P. 523

The fundamental purpose of bail is to assure appearance, the Rules of Criminal Procedure allow the court to consider all available and relevant information to the defendant's appearance and compliance with a bail bond or conditions of bail including:

- the nature of offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty;
- the defendant's employment status and history, and financial condition;
- the length and nature of defendant's residence in the community, and any past residences;
- the defendant's age, character, reputation, mental condition, and whether addicted to alcohol or drugs;
- if the defendant has previously been released on bail, whether he appeared as required, and complied with any bail conditions;
- whether the defendant has any record of flight to avoid arrest or prosecution, or of escape or attempted escape;
- the defendant's prior criminal record;
- whether the defendant has any history of use of false identification; and
- any other factors relevant to whether the defendant will appear as required and comply with the conditions of the bail bond.

Monetary bail may be supplemented with non-monetary conditions including electronic monitoring. Pa.R.Crim.P.527 Comment.

The bail authority should consider what the specific circumstances are that relate to the likelihood that the defendant will appear and comply and should tailor the conditions of release for the defendant's specific circumstances. In addition, the bail authority must determine whether the conditions being considered are reasonably capable of being enforced.

A combination of conditions may include the following:

Conditions to ensure safety of the alleged victim and others;

- Refrain from contact with specified person(s) including the victim;
- Cannot be in the presence of minor children;
- Drug and/or alcohol testing and follow-up treatment;
- Refrain from excessive use of alcoholic beverages;
- Refrain from any use of illegal drugs;
- Undergo a mental health evaluation and follow-up treatment and/or counseling;
- If compelling reasons exist, for the defendant to commit himself to a private or public mental health facility.
- Undergo urinalysis on a specified schedule.

Restrictive conditions on the defendant's travel and whereabouts to ensure their presence at future court proceedings;

Specific reporting conditions for the defendant to ensure their presence at future court proceedings;

Supervisory conditions to ensure the defendants presence at future court proceedings.

(See Benchbook, 6:12-13)

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Child Witnesses: Competency & Taint

Judicial Bench Card

For relevant cases and resources, see the accompanying flash drive.

Competency

Competency of a trial witness less than 14 years old must be determined at a pre-trial hearing held out of the presence of the jury. It is a threshold issue for the trial judge and will not be reversed absent a clear abuse of discretion.

Note: Competency is different issue/hearing than admission of statements pursuant to Tender Years Hearsay Act. Competency of child to testify at trial is not a consideration for evaluation of TYHA evidence. *(See Benchbook 5:46, 7:13, 7:90)*

Suggested competency questions that may be tailored to age of child:

This examination may be done by the proponent of the witness or the judge. Child may be cross examined regarding competency. Consider doing immediately prior to trial to save the child an additional court appearance.

- ☑ Ask nine or 10 general questions about name, age, school, grade or favorite activity
- ☑ Ask three or four questions about family such as siblings, ages, pets
- ☑ Is it good or bad to tell a lie?
- ☑ Do you know what color _____ is?
- ☑ If I told you it was _____ *(different color)* would that be the truth or a lie?
- ☑ What happens if you tell a lie?
- ☑ We are also only going to talk about things that are real. Do you know who (Ex. Winnie the Pooh) is? Is he real? Today we are only talking about things that are real and true. Do you understand?
- ☑ Do you promise to tell the truth?

Key Rules

Pa. R. E. 601 – Competency

601(a) every person is competent to be a witness except as otherwise provided.

601(b) Person is incompetent to testify if Court finds that because of mental defect or immaturity the person:

1. Is, or was, at any relevant time, incapable of perceiving accurately;
2. Is unable to express themselves to be understood;
3. Has an impaired memory;
4. Does not sufficiently understand the duty to tell the truth.

Pa. R. E. 104 and Com v. Washington, 722 A.2d 643 (Pa. 1998) require a pre-trial determination of competency to be made by the judge outside of the presence of the jury.

Taint

This issue is only relevant relating to the trial testimony of an allegedly sexually abused child victim. *(Com. v. Page)* It should be addressed at the competency hearing. The defense must have some basis to allege taint. Defendant bears burden of proving taint by clear and convincing evidence.

There is no statute or rule. Pa. R. E. 601 comments: PA law recognizes a child's "tainted" testimony as grounds for finding incompetency.

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Children and Youth Records and Testimony

Judicial Bench Card

For relevant cases and resources, see the accompanying flash drive.

The Child Protective Services Law, 23 Pa Con. Stat. Ann. §§ 6301, et seq. was enacted to involve law enforcement agencies in responding to child abuse and investigate allegations of child abuse and to provide protection for children from further abuse and provide rehabilitative services.

Key Statutes

23 Pa. Cons. Stat. Ann. § 6368 – Investigation by Children & Youth: Upon receipt of a report, Children & Youth initiates an investigation to determine the risk of harm to the child if they continue to remain in the home environment and the nature, extent, and cause of any abuse and to take any action necessary to provide for the safety of the child.

23 Pa. Cons. Stat. Ann. §§ 6339 – Confidentiality of Reports: Specifically denotes that reports made pursuant to this chapter concerning alleged instances of child abuse in the possession of the county agency are confidential.

23 Pa. Cons. Stat. Ann. §§ 6303 – Subject of the Report: Identifies any child, parent, guardian or other person responsible for the welfare of a child or any alleged or actual perpetrator named in the report.

23 Pa. Cons. Stat. Ann. §§ 6336(a) – Information in the Statewide Registry: Details the information that must be maintained in the statewide central register and must be disclosed when requested by a defendant/subject of the report.

23 Pa. Cons. Stat. Ann. §§ 6340 – Release of Information in Confidential Reports: Lists specifics as to who and what reports can be released and specifically addresses criminal investigations. The subject of a report may receive a copy of all information except what is prohibited in section (c) relating to reporting procedures.

23 Pa. Cons. Stat. Ann. §§ 6340(a)(5) – Child abuse records must be made available to a trial court by court order or subpoena.

See Benchbook, Chapter 6 for detailed analysis.

Disclosure to Defendant Classified as a "Subject of a Report"

- *Commonwealth v. Kennedy, 604 A.2d 1036, 1040 (Pa. Super. 1992):* The Pennsylvania Superior Court held that a defendant who is the subject of a child abuse investigation must be granted access to "all" of the victim's child protective service records.
- To be in compliance with *Kennedy, supra* and 23 Pa Cons. Stat. Ann. §§ 6340(b), a defendant who is the subject of a report is entitled to a copy of all information contained in the statewide central register or in any report filed pursuant to 6313.

Disclosure to Defendant Not Classified as a "Subject of a Report"

If a defendant, who is not named as a subject of a report, requests CPS records, the criminal charges likely do not stem from the child's CPS records or the defendant would have been the subject of the report. Such request would be made to discover evidence of motive or bias.

The Use of Children and Youth Records in Trial

Children & Youth report was not admissible under the Business Records Exception to the Hearsay Rule.

Commonwealth v. Savage, 157 A.3d 519 (Pa. Super. 2017): The court held that if the business record that would otherwise be admissible contains hearsay, it is double hearsay, and the underlying hearsay must also qualify as a hearsay exception in order to be admitted as a business record.

In the *Savage* case, the records originated from a source outside of CYS therefore, the court held that they are not covered by the business records exception to the hearsay rule just because the statements were contained in a report that CYS prepared. The court stated that those statements must independently fall within an exception to the hearsay rule. The information must fall within another exception to the hearsay rule to be admissible.

Children & Youth report was not admissible under the Complete Story Exception to the Hearsay Rule.

In *Commonwealth v. Savage, supra.*, the court did not allow the CYS report as substantive evidence under the "Complete Story" exception because that exception relates to res gestae, and is allowed as one piece of a puzzle when necessary to complete the story of the crime, establishing the motive or the existence of a plan, etc.

The Superior Court agreed that the statements in the CYS records are exculpatory, but there was no legal basis to permit double hearsay evidence simply because the statements are exculpatory.

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Other Crimes, Wrongs, or Acts
404(b) Evidence

Judicial Bench Card

For relevant cases and resources, see the accompanying flash drive.

Evidence of other crimes, wrongs or acts is not admissible to prove a defendant's propensity or character for such conduct. However, this type of evidence may be admissible against a defendant for other purposes, such as proof of motive, intent, identification, etc.

Key Rules of Evidence

Pa.R.E. 404(b)(1) - Evidence of other crimes, wrongs, or acts are not admissible to prove character to show that on particular occasion a person acted in conformity therewith.

Pa.R.E. 404(b)(2) - This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice. *(See Benchbook 7:40-51)*.

Rule does not distinguish between prior or subsequent acts. *Commonwealth v. Wattley, 880 A.2d 682 (Pa. Super. Ct. 2005).*

Pa.R.E. 404(b)(3) - In a criminal case the prosecutor must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial. (*See Benchbook 7:47).*

Practical Tips

Limiting Instruction - Caution jury regarding the limitations of such evidence at time of admission as well as during the charge. A cautionary instruction lessens a claim of prejudice. *Commonwealth v. Watkins, 577 Pa. 194, 843 A. 2d 1203 ((2003).*

- Commonwealth v. Hicks, 156 A. 3d 1114 (Pa. 2017) - trial court instructed jury that testimony from prior victims could only be considered as it relates to common scheme, lack of accident (as defense had suggested) and identity of perpetrator.

Relevant Factors to Consider

- **Common Scheme, plan, design** - Similarity of victims (age, race, weight, height, physical features, education or lack thereof, etc.), relationship between victims and accused, similarity in crime locations, progression in type of crime or crimes committed, time of day, season of year, anything showing similar pattern.
- **Identity** - Consider how crimes were committed, weapons used, probable purpose of crime, location, victim similarities. *See Commonwealth v. Weakly, 972 A. 2d 1182 (Pa. Super. 2009).*

Sexual Assault Case Considerations

Probative Value vs. Prejudicial Impact - Under Pa.R.E. 403, evidence "may be excluded if its probative value is outweighed by the danger of unfair prejudice. (*See Benchbook 7:48).*

- Evidence should not be prohibited merely because it is harmful to the defendant and may be unpleasant to hear so long as it is relevant to the issues at hand and forms a history and natural development of the events and offenses involved in the case. *Commonwealth v. Lark, 518 Pa. 290, 543 A. 2d 491 (1988).*

- Probative value of prior sexual assaults of children outweighed prejudicial impact because it tended to show common scheme, plan, design since all charges stemmed from sexual assaults on young boys and all victims shared similar personal characteristics. *Commonwealth v. O'Brien, 836 A. 2d 966, 972 (Pa. Super. 2003), appeal denied, 577 Pa. 695, 845 A. 2d 817 (2004).*

- In balancing the need for other crimes evidence against possible prejudice, the court is to look to the actual need for the evidence of prior bad acts in light of the issues in the case, the other evidence available to the prosecution and the strength or weakness of the prior bad acts evidence in supporting the issue. *Commonwealth v. Schwartz, 419 Pa. Super 251, 615 A. 2d 350 (Pa. Super. Ct. 1992).*

Remoteness - Remoteness is a factor in weighing probative value versus prejudicial impact regarding the admission of other crimes evidence. (*See Benchbook 7:50).*

- Prior incident of sexual assault was admissible under common scheme, plan, design theory despite ten-year lapse where victims were of similar age and both were daughters of the defendant. *Comm. v. Aikens, 990 A. 2d 1181 (Pa. Super. 2010).*

- Also, *Comm. v. Luktisch, 680 A. 2d 877 (Pa. Super. Ct. 1996)* held that a 14-year gap between the rape of his daughter and alleged rape of step-daughter was not too remote for common scheme, plan, or design admission since the acts were similar.

Other Factors - The list of possible other crimes evidence is not exhaustive. It may include evidence of motive, opportunity, intent, preparation, plan, knowledge identity, absence of mistake, lack of accident, and impeachment of the defendant who testifies at trial. (*See Benchbook 7:40).*

- Other crimes, wrongs, acts may be introduced when the defendant has used prior bad acts to threaten victim. *Comm. v. Reid, 811 A. 2d 530 (Pa. 2002).* See also, *Commonwealth v. Corley, 638 A. 2d 985 (Pa. Super. Ct. 1994).*

- Prior sexual assault against same rape victim. *Comm. v. Richter, 711 A. 2d 464 (Pa. 1998).*

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Expert Testimony in Sexual Assault Cases

Judicial Bench Card

For relevant cases and resources, see the accompanying flash drive.

Properly qualified experts may testify to facts and opinions regarding specific types of victim responses and behaviors in crimes of sexual violence. Opinions as to the credibility of any witness, including the victim are specifically prohibited.

Key Statutes

42 Pa. Cons. Stat. Ann. §5920 - Expert Testimony in Certain Criminal Proceedings

(a) Scope - The sections applies to all of the following:

1. A criminal proceeding for an offense for which registration is required under Subchapter H of Chapter 97 (relating to registration of sexual offenders).
2. A criminal proceeding for an offense under 18 Pa. Cons. Stat. Ch. 31 (relating to sexual offenses).

Qualifications and use of experts

1. In a criminal proceeding subject to this section, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness's experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence, 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.
2. If qualified as an expert, the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors.
3. The witness's opinion regarding the credibility of any other witness, including the victim, shall not be admissible.
4. A witness qualified by the court as an expert under this section may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony.

42 Pa. Cons. Stat. Ann. §5920 - Scope Defined

This section applies to prosecutions that fall under one or two classifications as listed.

1. **Offense for which registration with PSP is mandated. Includes all Tier I, II and III sexual offenses.**
2. **Criminal Proceedings under Chapter 31, §3121-3129.** Rape, Statutory Sexual Assault, Involuntary Deviate Sexual Intercourse, Sexual Assault, Institutional Sexual Assault, Aggravated Indecent Assault, Indecent Assault, Indecent Exposure, Sexual Intercourse With Animals, Sexual Assault by Sports Official, Volunteer or Employee.

Qualification of Experts Defined

42 Pa. Cons. Stat. Ann. §5920

The Court may qualify an expert if the witness:

- Has specialized knowledge beyond that of the average lay person;
- The specialized knowledge is based upon the witnesses' experience with or specialized training or education in sexual violence in criminal justice, behavioral science or victim services issues;
- Court must determine the testimony will assist the jury in understanding and the following:
  - Dynamics of sexual violence,
  - Victim response to sexual violence, and
  - Impact of sexual violence on victims during and after being assaulted.
- Expert may testify to facts and opinions regarding specific types of victim responses to sexual assault and victim behaviors following sexual assault.

Forensic Sexual Assault Evidence

Sexual Assault Nurse Examiner (SANE)

- Sexual Assault Nurse Examiners ("SANES") are registered nurses who receive specialized education and fulfill clinical requirements in order to perform rape examinations.
- Terms sexual assault forensic examiner (SAFE) and sexual assault examiner (SAE) describe health care provider i.e. physician, physician's assistant, nurse or nurse practitioner; specifically trained and educated to perform sexual assault examinations.
- A competent and properly qualified SANE could provide expert testimony regarding medical causation in sexual assault cases.

Forensic Sexual Assault Evidence Collection

- Sexual Assault forensic medical examination performed by a SANE/SAE/SAFE includes:
  - Examination; Documentation of physical and biological findings; Collection of evidence; Information, treatment and referrals for sexually transmitted diseases, pregnancy, suicidal ideations, drug and alcohol abuse & other non-acute medical concerns; Follow-up as needed for additional healing, treatment or evidence collection.
- Rape Kit, Sexual Assault Evidence Collection Kit, Rape Evidence Kit
  - A forensic examination tool used to collect blood, hair, semen, saliva, fibers and other substances from the sexual assault victim's body and clothing that is retained for further forensic evaluation.
- Other scientific and expert evidence admissible and subject to analysis of admission of expert testimony by the court include:
  - DNA; bite mark evidence; Comm. v. Henry, 524 Pa. 135; 509 A.2d 929 (1990); hair sample analysis; blood typing evidence to verify the defendant's presence at scene.

Practical Guidance

- Court must qualify any purported expert witness.
- Medical experts may testify to personal observation and treatment not credibility.

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Impeachment of Character Witness

Judicial Bench Card

For relevant cases and resources, see the accompanying flash drive.

During a criminal trial, evidence of a defendant's character may be presented by witnesses who testify to defendant's reputation in the relevant community. Limited questioning on direct examination is generally used to elicit reputation regarding a pertinent character trait.[1] However, the scope of cross-examination of character (reputation) witnesses can be a more vexing issue.

Key Rules

Pa. R.E. 404 (a)(2)(A) allows a defendant in criminal case to present evidence of pertinent character trait to show action in conformance.

- Evidence of good character is substantive; an independent factor which may raise a reasonable doubt.

Pa. R.E. 405(a) allows character testimony to be presented as reputation evidence. Commonwealth may cross-examine and/or rebut.

- Nexus between offered character testimony and cross-examination. Generally, direct and cross should be limited to offered character trait and relate to period at or about the time of the crime. *Comm. v. Luther, 463 A.2d 1073 (Pa. Super. Ct. 2006)*.
- Opinion testimony as to character not admissible.
- Inquiry into allegations of criminal conduct of defendant not resulting in conviction not permissible.
- Cross-examination may address credibility, details of discussion of reputation with others, nature of relationship with defendant, non-criminal conduct that may tend to rebut character trait.

Commonwealth may call witnesses to rebut the character evidence presented by accused; generally limited to reputation in community as to same character trait.

Pa. R.E. 405(b) says specific instances of conduct are generally not admissible to prove character/ trait of character.

- Defendant not permitted to use evidence of child victim telling lies in school about unrelated matters since it's not a pertinent trait of character with respect to the alleged sexual offense. *Comm. v. Minich, 4 A. 3d 1063 (Pa. Super. 2010)*.
- Violent propensity of victim can be explored in some instances

Recommendations

- At sidebar: Determine the exact character trait to be offered, discuss limitations of direct exam questions, andreview any scope of cross-examination issues.
- Caution jury on the purpose and limits of character (reputation) testimony;

- ☑ The defendant is entitled to jury charge that character evidence may, in and of itself, create a reasonable doubt of guilt. *Comm. v. Neely, 561 A.2d. 1, (Pa. 1989).*

[1]Examples of direct examination questions asked of character (reputation) witness: Do you know the defendant? How do you know him/her (friend, neighbor, etc.)? How long have you known defendant? Do you know other people in the community who know the defendant? Among those people, what is the defendant's reputation for (specific character trait such as peacefulness, honesty, good moral character, etc.)? (Witness can answer that the reputation is good, bad, or respond "I don't know.")

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Mental Health Records of Service Providers (Documents or Testimony)

For relevant cases and resources, see the accompanying flash drive.

Judicial Bench Card

Mental health records of a victim may not be subpoenaed or ordered to be disclosed by the court. The court may not order the victim to consent to the release of records. *(See "Privilege" - Benchbook 6:51)*

Key Statutes and Regulations

50 Pa. Cons. Stat. Ann. § 7111, the Mental Health Procedures Act ("MHPA"), prohibits subpoena of patients' records.

42 Pa. Cons. Stat. Ann. § 5944 - § 5945.1 relates to privileged communications between complainant and mental health providers, schools, and sexual assault counselors. Case law has expanded privilege to treatment team members and psychotherapists and to case files.

55 Pa. Code Ch. 5100.31 – 5100.39 relates to the obligation of mental health providers and the confidentiality of mental health records.

Exceptions

Waiver: If the Commonwealth has possession of records, privilege has been waived, see *Com. v. Weiss, 81 A.3d 767 (Pa. 2013)*. If agreement has been entered regarding disclosure, privilege has been waived, see *Com. v. T.J.W., 114 A.3d 1098 (Pa. Super. 2015)*.

Communications from the patient to provider are confidential. Diagnoses, opinions, treatment plans, and observations of the provider are not. See *Com. v. Simmons, 719 A.2d 336 (Pa. Super. 1998)* purpose of communications ie. treatment vs. determination of appropriate placement. *Com v. G.P., 765 A.2d 363 (Pa. Super. 2000)*

Recommendations

- ☑ A hearing should be held if criminal defendant wishes to subpoena records from a 3rd party mental health provider of the complainant or witness.
- ☑ Any order to disclose records or to quash subpoenas may be subject to interlocutory review.

While privilege may be challenged as to entire record since only communications by patient are protected, the MHPA and code may provide protection of the entire record.

Older cases referred to §5944 privilege as "absolute." That view has been eroded in more recent cases.

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Pennsylvania Rape Shield Law

Judicial Bench Card

For relevant cases and resources, see the accompanying flash drive.

Pennsylvania's Rape Shield Law prevents evidence of specific instances of the alleged victims past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct from being admitted into evidence, subject to limited exceptions[1].

General Rule: Generally, evidence of an alleged victim's prior sexual conduct, whether it is consensual or not, is inadmissible *unless it has probative value which is exculpatory to the defendant.* If it does, the trial court will conduct an in-camera hearing and will carefully weigh the evidence, and in its discretion, make a determination as to admissibility. *Example: Commonwealth v. Fink, 791 A.2d. 1235, 1241-42.*

Key Statutes

18 Pa. Cons. Stat. Ann. §3104(b) - Evidentiary Proceedings A defendant who proposes to offer evidence of the alleged victim's past sexual conduct shall file a written motion and offer of proof at the time of trial. If the court determines it is sufficient on its face, it shall order an in-camera hearing and make findings on the record as to relevance and admissibility of the proposed evidence pursuant to subsection (a). *(See Benchbook, 6:45, 6:47)*

Commonwealth v. Kunkle, 623 A.2d 336, 339 (Pa. Super. 1993), appeal denied 637 A.2d 281 (Pa.1993) (quoting Commonwealth v. Wall, supra.) - Specific Proffer – includes exactly what evidence counsel seeks to admit and precisely why it is relevant to the defense. Where the proffer is vague and conjectural, evidence of the victim's past sexual conduct will be excluded and no further inquiry needs be entertained. *(See Benchbook, 6:48)*

Commonwealth v. Weber, 701 A.2d 531 (Pa. 1997) - In-Camera Hearing - held on the record to weigh probative value against prejudicial effect. The proponent of the evidence has the burden of establishing admissibility and relevance under the Rape Shield Law.

Trial Court must determine:

1. The proposed evidence is relevant to show bias or motive or attack credibility;
2. Whether the probative value outweighs the prejudicial effect, and;
3. Whether there is an alternative means of proving bias or motive or to challenge credibility.

Commonwealth v. Black, 487 A.2d 396 (Pa. Super. 1985); Commonwealth v. Fink, supra; 18 Pa. Cons. Stat. Ann. § 3104(b). *(See Benchbook, 2:5)*

[1]Reference is made to Hon. Jack A. Panella, Pennsylvania Benchbook on Crimes of Sexual violence, (Administrative Office of Pennsylvania Courts, 3rd ed. 2015). (Abbreviated for brevity as "Benchbook")

Exceptions to General Rule

There are four recognized exceptions to the general rule:

1. Evidence of the victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and the evidence is otherwise admissible. *18 Pa. Cons. Stat. Ann. § 3104(a).*
2. Evidence that negates directly the act of intercourse with which a defendant is charged; *Commonwealth v. Mjorana, 470 A.2d 80 (1983).*
3. Evidence demonstrating a witness' bias or evidence that attacks credibility;
4. Evidence tending to directly exculpate the accused by showing that the alleged victim is biased and thus has the motive to lie, fabricate, or seek retribution via prosecution.

Commonwealth v. Burns, 988 A.2d 648 (Pa. Super. 2009)(en banc), appeal denied 8 A.3d 341 (2010); (See Benchbook, 2:5).

Common Issues

Confrontation Clause: Weighing the rights of an alleged victim to avoid fishing expeditions and violations of their privacy against the defendant's Sixth Amendment Confrontation Clause to cross-examine an accuser and ability to present a complete defense. *(Benchbook, 5:21-23; 7:18)*

Nonconsensual Sexual Conduct: Because evidence of prior sexual assaults is not considered conduct of the victim and thus does not impugn the victim's reputation for chastity, this type of evidence is not covered by the Rape Shield Law and is admissible if relevant and conforming to the traditional rules of Evidence. *Commonwealth v. Johnson, 638 A.2d. 940 (1994).* Such evidence is evaluated under the general evidentiary rules. *Commonwealth v. Fink, 791 A.2d 1235m 1242 (Pa.Super.2002). (See Benchbook, 2:6; 5:60)*

Consent: Evidence regarding consent is evaluated differently depending whether or not it is raised as a defense to the alleged conduct.

- Where consent is used as a defense to the alleged conduct, the exception set forth in the statute would apply and the victim's past sexual history with the defendant would not be precluded by the Rape Shield Law. It would be allowed in so long as it is otherwise admissible under the rules of evidence.
- Where consent is not raised as a defense to the alleged conduct, the evidence of past sexual history is generally inadmissible unless it is highly probative to show bias against the defendant or to attack the credibility of the victim. *Commonwealth v. Fink, Supra. (See Benchbook, 6:46).*
    - Evidence of the alleged victim's prior sexual solicitation cannot be used to bolster consent defense when the admitted purpose of the evidence is to prove the victim acted in conformity with past behavior. *Commonwealth v. Guy, A.2d 397 (Pa.Super.1996), reargument denied, appeal denied 695 A.2d 784 (Pa.1996). (See Benchbook, 6:47).*

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Prompt Complaint/ Prompt Reporting/ Failure to Report

For relevant cases and resources, see the accompanying flash drive.

Judicial Bench Card

Evidence of whether a complainant promptly reported a sexual assault is admissible at trial, unless the complainant was unable to comprehend the offensiveness of the contact at the time.

Key Cases & Statutes

**Prompt complaint evidence will only be permitted if it is otherwise admissible under the Pennsylvania rules.*

Rule: Pennsylvania allows introduction of complainant's prompt complaint at trial.*

Commonwealth v. Barger, 743 A.2d 477, 480-481 (Pa. Super. 1999): Commonwealth can introduce evidence of prompt complaint in its case in chief.

18 Pa. Cons. Stat. Ann. § 3105: Although a prompt complaint to a public authority is not required for conviction, evidence of the absence of a prompt complaint may be introduced for impeachment.

Commonwealth v. Bryson, 860 A.2d 1101, 1104 (Pa. Super. 2004): Evidence of a prompt complaint is limited to evidence that the complaint was actually made.

Commonwealth v. Lane, 521 Pa. 390, 555 A.2d 1246 (Pa. 1989): "[I]t is important to note that evidence of a prompt complaint should also be considered when the victim is a child."

Exception: Where a complainant was unable to comprehend offensiveness of the sexual contact at the time it occurred, the absence of prompt reporting may not be used to question whether the conduct occurred. *See, Commonwealth v. Snoke, 525 Pa. 295, 302, 580 A.2d 295, 298 (1989)*

Jury Instructions

Pennsylvania Standard Criminal Jury Instruction 4.13A: Failure to Make Prompt Complaint in Certain Sexual Offenses.

1. Before you may find the defendant guilty of the crime charged in this case, you must be convinced beyond a reasonable doubt that the act charged did in fact occur and that it occurred without [name of victim]'s consent.

2. The evidence of [name of victim]'s [failure to complain][delay in making a complaint] does not necessarily make [his] [her] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore, the [failure to complain] [delay in making a complaint] should be considered in evaluating [his] [her] testimony and in deciding whether the act occurred [at all] with or without [his] [her] consent].

3. You must not consider [name of victim]'s [failure to make] [delay in making] a complaint as conclusive evidence that the act did not

occur or that it did occur but with [his] [her] consent, [name of victim]'s failure to complain [at all] [promptly] [and the nature of any explanation for that failure] are factors bearing on the believability of [his] [her] testimony and must be considered by you in light of all the evidence in this case.

Recommendations

- "[W]here the actual occurrence of the assault is at issue in the case, the trial judge is required to charge the jury as to the relevance of a delay in disclosure and the significance of a prompt complaint," however, "the witness'[s] understanding of the nature of the conduct is critical" to the determination. *Commonwealth v. Snoke, 525 Pa. 295, 303, 580 A.2d 295, 298 (Pa. 1990).*

- Use of prompt complaint jury instruction should be determined on a case-by-case basis using a subjective standard, considering the age and condition of the complainant. *See, Commonwealth v. Thomas, 904 A.2d 964. 970 (Pa. Super. 2006).*

- Factors to be considered in determining whether a jury instruction on prompt complaint should be given where there exists "no conclusive evidence" of the minor complainant's understanding of the offensiveness of the alleged act include:

    1. The age of the complainant;
    2. The mental and physical condition of the complainant;
    3. The atmosphere and physical setting in which the incidents were alleged to have taken place;
    4. The extent to which the accused may have been in a position of authority, domination or custodial control over the complainant;
    5. Whether the complainant was under duress.

    Commonwealth v. Ables, 404 Pa. Super. 169, 182-183, 590 A.2d 334, 340 (2006) (Where there was no evidence that a 13-year old victim did not understand the offensiveness of the sexual acts perpetrated by her uncle over the course of a year, the trial court was not in error for refusing a prompt complaint instruction because the complainant was under duress as the minor was emotionally exploited by the perpetrator telling the victim not to inform anyone about the acts or the perpetrator would be in trouble.)

- A trial court must evaluate the appropriateness of a requested prompt complaint instruction with respect to the comprehension of the offensiveness to each alleged victim. Commonwealth v. Sandusky, 2013 Pa. Super 264, 77 A.3d 663 (2013).

Practice Tip

Consider whether the risk of reversible error is decreased if instruction is given.

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Sex Offender **Registration & Notification Act** (SORNA)

Judges **Bench Card**

42 Pa. Cons. Stat. Ann. §§ 9799.10-9799.41, the Sex Offender Registration and Notification Act requires sex offenders to register with the Pennsylvania State Police.

Tier System Registration Categories & Requirements

Tier I	Offenders[1] must appear annually.[2]
Tier II	Offenders[3] must appear semiannually.[4]
Tier III	Offenders[5] must appear quarterly.[6]
Tiers I, II and III	Offenders must appear at an approved registration site and provide or verify registration information and be photographed.
Sexually Violent Predators ("SVP")[7]	Must appear at an approved registration site and provide or verify registration information, be photographed quarterly and attend monthly counseling.[8]
Sexually Violent Delinquent Children ("SVDC")[9]	Must appear quarterly.[10]
Transient Offenders[11]	Must appear monthly.[12]

Sexually violent predator status is determined by a trial court after an assessment process conducted by the state Sexual Offenders Assessment Board (SOAB).

[1] For Tier I offenses see ***42 Pa. Cons. Stat. Ann. § 9799.14(b).***

[2] ***42 Pa. Cons. Stat. Ann. § 9799.15(e)(1).***

[3] For Tier II offenses see ***42 Pa. Cons. Stat. Ann. § 9799.14(c).***

[4] ***42 Pa. Cons. Stat. Ann. § 9799.15(e)(2).***

[5] For Tier III offenses see ***42 Pa. Cons. Stat. Ann. § 9799.(14)(d).***

[6] ***42 Pa. Cons. Stat. Ann. § 9799.15(e)(3).***

[7] For SVP category see ***42 Pa. Cons. Stat. Ann. § 9799.15(f) and § 9799.36.***

[8] ***42 Pa. Cons. Stat. Ann. § 9799.15(f).***

[9] Sexually Violent Delinquent Children are defined in ***42 Pa. Cons. Stat. Ann. § 9799.12.***

[10] ***42 Pa. Cons. Stat. Ann. § 9799.15(h)(3).***

[11] Transient offenders are defined in ***42 Pa. Cons. Stat. Ann. § 9799.12.***

[12] ***42 Pa. Cons. Stat. Ann. § 9799.15(h)(1).***

Period of Registration

15 — **15 Year Registration:** If a defendant is convicted of a **Tier I** sexual offense. ***42 Pa. Cons. Stat. Ann. § 9799.15(a)(1).***

25 — **25 Year Registration:** If a defendant is convicted of a **Tier II** sexual offense. ***42 Pa. Cons. Stat. Ann. § 9799.15(a)(2).***

LIFETIME — **Lifetime Registration:** If a defendant is a SVP and convicted of a Tier I, II, or III sexual offense, ***42 Pa. Cons. Stat. Ann. §§ 9799.15(a)(6)&(d),*** or if defendant is convicted of a **Tier III** sexual offense, ***42 Pa. Cons. Stat. Ann. § 9799.15(a)(3).*** This currently includes any "two or more convictions" of Tier I or Tier II offenses, ***42 Pa. Cons. Stat. Ann. §§ 9799.14(d)(23).***

LIFETIME — **Lifetime Registration:** If a defendant is a SVDC as defined in ***42 Pa. Cons. Stat. Ann. § 9799.12.***

Potential Registration Requirement Crimes

- Failure to register, ***18 Pa. Cons. Stat. Ann. § 4915.1(a)(1).***
- Failure to verify information, ***18 Pa. Cons. Stat. Ann. § 4915.1(a)(2).***
- Failure to provide accurate information, ***18 Pa. Cons. Stat. Ann. § 4915.1(a)(3).***

Duties and Responsibilities of the Court

Prior to sentencing

- Within 10 days of the date of conviction, **order an assessment for the defendant** by the Sexual Offenders Assessment Board. ***42 Pa. Cons. Stat. Ann. § 9799.24(a).***
- **Prosecutor should provide you with an order requiring an assessment** by the Sexual Offender Assessment Board. The prosecutor should forward the signed order to the Board.
- If the SOAB expert opines that defendant is a sexually violent Predator, **set a date for an evidentiary hearing.** ***42 Pa. Cons. Stat. Ann. § 9799.24(e).***

At the time of sentencing

- **Order the fingerprints, palm prints, DNA sample and photograph** of the defendant be provided to the PA State Police. ***42 Pa. Cons. Stat. Ann. § 9799.23(4).***
- **Assign a Tier classification to the defendant,** and make sure the classification appears on the sentencing order. ***42 Pa. Cons. Stat. Ann. § 9799.23(6).***
- **Inform the defendant** of the duty to register, attend counseling (if applicable), and register changes. ***42 Pa. Cons. Stat. Ann. §§ 9799.23.(2)(3).***
- Order the defendant to **read and sign an acknowledgment form** indicating that all duties have been explained. ***42 Pa. Cons. Stat. Ann. § 9799.23(5).***

Evidentiary hearing

- Commonwealth must **file a praecipe and send a copy to the Defendant's counsel** along with a copy of the assessment report. ***42 Pa. Cons. Stat. Ann. § 9799.24(e).***
- Commonwealth will likely **present the SOAB expert as a witness**.
- **Defense may present an expert witness** and any assessment by that expert must be provided to the District Attorney prior to the hearing.
- **Defendant has a right to counsel and to have counsel appointed** if defendant cannot afford counsel.
- Commonwealth must **prove with clear and convincing evidence** that the defendant is a sexually violent predator. ***42 Pa. Cons. Stat. Ann. § 9799.24(e)(3).***
- Evidence must establish that defendant **has a mental abnormality or personality disorder** that makes it likely for the defendant to engage in predatory sexually violent offenses. ***42 Pa. Cons. Stat. Ann. § 9799.12.***

Practical Guide

If defendant is convicted of a SORNA crime, you must defer sentencing 90 days. SORNA crimes are listed in ***42 Pa. Cons. Stat. Ann. § 9799.14.***

If the SOAB expert opines that defendant is not a Sexually Violent Predator, the Court may proceed with sentencing.

Have defendant, counsel and Court sign the Advisory Form and make sure the Advisory Form goes into the Court file.

A detailed overview of the act is available in the Pennsylvania Bench Book on Crimes of Sexual Violence, Third Addition 2015, by Honorable Jack A. Panella, Superior Court of Pennsylvania.

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Tender Years Hearsay Act (TYHA)

Decision Tree

Pre-trial motion filed by proponent of hearsay statement of child **12 years old or younger**

→ If not enough notice to the opposing party, statement is precluded

↓

If adequate notice is given, in-camera pre-trial hearing is held - Burden is Prepoderance of Evidence

→ Statements to law enforcement done in anticipation of prosecution/testimonial - **Is child available for cross-examination?**

↙ **YES** Statement not precluded

↘ **NO** Statement not admissible under TYHA

↓ But child must testify at trial prior to admission of statement

↓ But maybe as prior consistent statement

← Statements to lay witnesses **Court considers indicia of reliability**

↓

Factors: spontaneity, consistency, mental state of declarant, use of unexpected terms for age, lack of motive to fabricate

↙ If sufficient indicia of reliability, statement is admissible

↘ If not sufficient indicia of reliability, statement is not admissible under TYHA and probably not as prior consistent statement

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Tender Years Hearsay Act (TYHA)

Judicial Bench Card

For relevant cases and resources, see the accompanying flash drive.

The Tender Years Hearsay Act allows admissibility of an out-of-court statement made by a child witness, who **at the time the statement was made was 12 years of age or younger** describing assault, homicide, kidnapping, sex offenses, burglary, or robbery offenses not otherwise admissible by statute or rule of evidence in any criminal or civil matter. *(See Benchbook, 7:78).*

Key Statutes

42 § 5985.1(a)(1) - If the court finds after an in camera hearing that the evidence is relevant and that the time, content, and circumstances of the statement provide sufficient indicia of reliability **and**

§ 5985.1(a)(2) - The child either (i) testifies at the proceeding or (ii) is unavailable as a witness

(a.1) Emotional distress - In order to make a finding under subsection (a)(2)(ii) that the child is unavailable as a witness, the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate. In making this determination, the court may do all of the following:

1. Observe and question the child, either inside or outside the courtroom.
2. Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting. Proponent of hearsay statement bears the burden of proof by preponderance of the evidence and must provide notice of intention to use the statement to the adverse party sufficiently in advance of trial.

Exception

Consider whether out-of-court statement is **testimonial** or **non-testimonial.**

Com. v. Hanawalt, 615 A2d 432 (PaSuper. 1992) 42 Pa.C.S.A § 5985.1: Out-of-court statement does not violate the Confrontation Clause of the U.S. or PA Constitutions.

Com. v. Allshouse, 36 A.3d 163 (Pa. 2012): If the court determines that the statement constitutes "testimonial evidence" rather than "non-testimonial evidence," the defendant has a constitutional right to confront the witness and statement may not come in through TYHA if child does not testify at trial, but may come in under another exception to hearsay if witness is unavailable and defendant has had an opportunity to cross-examine. *See also Crawford v. Washington, 541 U.S. 36 (2004), In the Interest of N.C., 105 A.3d 1199 (Pa. 2014).*

In determining whether evidence is testimonial or non-testimonial, one of the most important factors to consider is the primary purpose of the interview that elicited the statement. Was the statement made to police as they were trying to address an on-going emergency or was it given in anticipation of a criminal prosecution? Also evaluate the circumstances surrounding the interrogation such as the formality and location as well as the statements and actions of both the interrogator and the declarant. *Allshouse.*

Practical Applications

Admission of statements made by children 12 years of age or younger (at the time the statement was made) under the Tender Years Hearsay Act, should be addressed in camera, pre-trial and does not require that the child be found competent to testify at trial. The child is not present at these hearings.

Even statements not admissible as exception to hearsay rule under TYHA, (because testimonial) may be admissible as prior consistent statements as corroborating evidence in trial court's discretion. Right to cross-examine witness regarding prior consistent statement pursuant to **Pa.R.E. 613** does not necessarily apply in child abuse cases. See Hunzer.

If testimonial hearsay statement, child must be found competent, testify, and be subject to cross-examination before testimonial hearsay statement is admitted.

42 Pa.C.S.A. § 5985 allows for testimony by contemporaneous alternative method. Court must determine after pre-trial hearing that testifying in open forum in the presence of the finder of fact or in the defendant's presence will result in child witness suffering serious emotional distress. Child will then be allowed to testify in a location outside of the courtroom and a contemporaneous video feed will be shown in the courtroom. See *Pa. SSJI (Crim.) 4.18* for instruction to be given prior to testimony.

Pa.SSJI (Crim) 4.18 Advisory committee note indicates no special instruction on consideration of child testimony is required but court retains discretion to assess need for one in a particular case. See *Com. v. Barnosky, 400 A.2d 168 (Pa. Super. 1979)*

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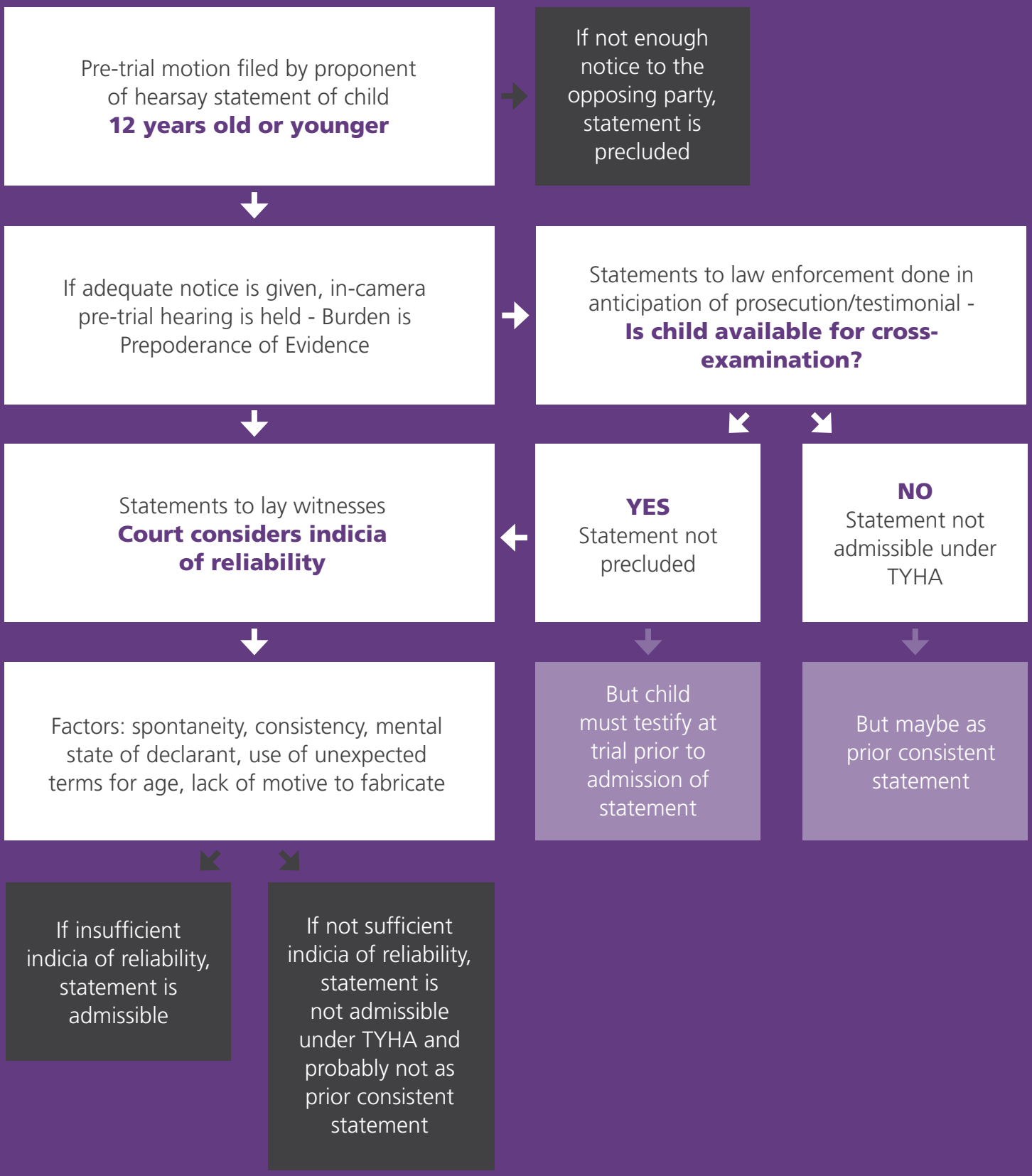
Tender Years Hearsay Act (TYHA)

Decision Tree