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IN THE SUPREME COURT OF PENNSYLVANIA
FOR THE MIDDLE DISTRICT

NO. 39 MAP 2020

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

WILLIAM H. COSBY, JR.,
Appellant

AMENDED REPLY BRIEF OF APPELLANT

Appeal from the Order of the Superior Court entered on December 10, 2019 at Docket No. 3314 EDA 2018, affirming the Judgment of Sentence entered on September 25, 2018, as made final by the denial of post-sentence motions on October 23, 2018, by the Honorable Steven T. O'Neill, Judge, Court of Common Pleas, Montgomery County at CP-46-CR-3932-2016

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MISCELLANEOUS:

REPLY

A. TESTIMONY FROM FIVE WOMEN REGARDING UNCHARGED SEXUAL MISCONDUCT ALLEGEDLY COMMITTED BY COSBY IN THE 1980S CONSTITUTED RANK PROPENSITY EVIDENCE.

1. The PBA Evidence Was Not Admissible Under the Logical Connection or Linked-Act Theory.[1]

The prosecution denies that the lower courts diluted the standard for admitting character evidence but follows suit, arguing that to demonstrate a signature-crime there need only be a "logical connection" between the PBA evidence and the charged offense. [Prosecution Br. 24-25]. The prosecution fails to appreciate that "logical connection" is a distinct legal standard that finds its roots in Pennsylvania jurisprudence dating back 150 years. *Shaffner v. Commonwealth,* 72 Pa. 60 (1872). The prosecution invokes the "logical connection" language throughout its brief but without any critical analysis that reflects an understanding of the precise theory of relevance for which it stands. This is a recurring dilemma in 404(b) jurisprudence in the courts of this Commonwealth and other states.

The prosecution accuses Cosby of trying to "upend decades worth of controlling authority on prior bad act law." [Prosecution Br. at 36]. To the contrary, Cosby urges this Court to recommit to the holding of *Shaffner* and

[1] Cosby refers to the "logical connection" theory of relevance as articulated in *Shaffner, infra.,* but agrees with the prosecution that the theory is also referred to as the "linked-act" theory. [Prosecution. Br. at 36, n.9].

demand that courts precisely identify the theory of relevance and avoid conflating theories in a way that renders the admission of PBA evidence the rule rather than the exception.

As discussed in Cosby's principal brief, to satisfy the "logical connection" exception, a connection between the PBAs must have existed in the mind of the actor, linking them together for some intended purpose. It must be possible to conclude that the PBAs and the charged crime were "both contemplated by the prisoner as parts of one plan in his mind."[2] *Shaffner,* 72 Pa. at 65-66. The prosecution concedes that Cosby did not contemplate his alleged assault of Complainant at the time he purportedly abused the PBA witnesses decades earlier [Prosecution Br. 40] but insists that *Shaffner* is no longer good law to the extent it requires an over-arching plan. The prosecution presses for a "shared similarities" test or, as the Panel put it, a "playbook of criminal tactics" test. [Prosecution Br. at 38]. This Court must detangle the "logical connection" theory from the signature-crime theory and unequivocally reject the prosecution's similar criminal tactics

[2] The prosecution contends that this argument is waived. [Prosecution Br. at 37] Not so. Citing *Shaffner* and Justice Donahue's dissenting opinion in *Hicks,* Cosby argued below that the PBA evidence was inadmissible under the true plan exception, contending in part that "unlinked acts" do not constitute a "true plan" and that "no close factual nexus or link" exists to justify admission of the PBA evidence. [Cosby Super. Br. at 46-47; 65]. While Cosby focused his "logical connection" argument before this Court in response to the Superior Court Panel's (the "Panel") holding that a plan need not be a "greater master plan" but merely a "playbook of criminal tactics" *Commonwealth v. Cosby,* 224 A.3d 372, 402 (Pa. Super. 2019), fleshing-out an argument is not equivalent to raising it for the first time. The prosecution's waiver argument is meritless.

approach. Such an approach effectively abolishes the general prohibition on the admission of character evidence, along with the presumption of innocence and the burden of proof.

In support of its position that *Shaffner* no longer holds up, the prosecution cites *Commonwealth v. Ivy,* 146 A.3d 241 (Pa. 2016), *Commonwealth v. Arrington,* 86 A.3d 831 (Pa. 2014), and *Commonwealth v. Hughes,* 555 A.2d 1264 (Pa. 1989) – none of which overruled *Shaffner* or intentionally modified the logical connection theory of admissibility. In *Ivy,* this Court permitted the admission of PBA evidence appropriately under the logical connection theory, demonstrating that the teachings of *Shaffner* are alive and well. There, this Court held that the prosecution's PBA evidence was admitted "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *Id.* at 253. Thus, the PBA evidence was directly linked or "logically connected" to the charged offense. The *Ivy* Court employed the "logical connection" theory of relevance as it was intended by *Shaffner*. The *Ivy* Court also found the PBA evidence admissible under the distinct signature-crime theory of relevance without expressly acknowledging so. *Ivy* underscores the importance of detangling theories of admissibility so that buzzwords do not replace critical analysis.

Similarly, neither *Hughes* nor *Arrington* overruled *Shaffner* or suggested that the "logical connection" theory of admissibility is satisfied simply by showing that

"similar methods" were employed by the defendant. Rather, the *Hughes* and *Arrington* Courts applied the signature-crime theory for the purpose of establishing *identity*, notwithstanding perfunctory references to the phrase "logical connection." The *Hughes* Court found that the PBA evidence "truly represent[ed] Appellant's signature." *Hughes,* 555 A.2d at 1283.

As Chief Justice Saylor and Justice Donohue previously observed, "various majority opinions of this Court, like the decisions of a number of other courts, have incorrectly blended various distinct grounds for relevance associated with proffered, uncharged misconduct," *Commonwealth v. Hicks,* 156 A.3d 1114, 1130 (Pa. 2017) (Saylor, CJ, concurring), and that either as a consequence of or in conjunction with, the effect of that misunderstanding is that the "putatively stringent standard" for the admission of PBA evidence has been diminished. *Id.* This Court should re-affirm the holding in *Shaffner* and reiterate that PBA evidence is admissible under the "logical connection" or "linked-act" theories of relevance only when it is part of the purpose in committing the charged crime, i.e., when it is part of an over-arching plan. *Shaffner, supra. See also, Commonwealth v. Weiss,* 130 A. 403, 404 (Pa. 1925); *Commonwealth v. Chalfa,* 169 A. 564, 565 (Pa. 1933).

2. The PBA Evidence Was Inadmissible Under the "Signature Crime" Approach Where Identity Was Not At Issue and The PBA Evidence Was Not "Nearly Identical" to the Charged Offense.

The prosecution tacitly concedes that the details and surrounding circumstances of the PBA evidence are not "nearly identical" to the charged offense. To save their doomed common plan theory of admissibility, the prosecution urges a watered-down signature-crime standard wherein PBA evidence is admissible if "shared similarities" or "sufficient common factors" exist between the PBA evidence and the charged offense. [Prosecution Br. at 24-25]. Notwithstanding the prosecution's attempt to cobble together authority for a reduced signature-crime standard, the law is well-settled. PBA evidence is admissible under the "signature crime" exception when the details and surrounding circumstances of each criminal incident reveal criminal conduct that is distinctive and "so nearly identical that it represents the signature of the same perpetrator." *Commonwealth v. Roney,* 79 A.3d 595, 606 (Pa. 2013); *Hicks,* 156 A.3d at 1125-1126; *Commonwealth v. Tyson,* 119 A.3d 353, 358-59 (Pa. Super 2015).

It is true that under the signature-crime exception, two scenarios need not be identical in every respect; however, they *must* be "nearly identical" to "earmark them as the handiwork of the accused." *Id.* The prosecution attempts to satisfy this high burden but ultimately reverts to arguing, albeit indirectly, that the standard is not as rigorous as this Court has repeatedly held. This Court must resist the

prosecution's attempt to dilute the rigorous standard for admitting PBA evidence under the signature-crime theory.

On the question of whether the prosecution satisfied the high signature-crime standard, Cosby will not rehash arguments advanced in his principal brief, since the prosecution offers little beyond its contention that drug-facilitated sexual misconduct constitutes a signature-crime.[3] Where fully 50% of acquaintance rape involves the use of an intoxicant, Cosby's alleged provision of unknown intoxicants ranging from alcohol to Quaaludes to Benadryl is simply not a distinctive enough fact to demonstrate the "handiwork of the same perpetrator."

More problematic for the prosecution is that the question of whether Cosby was the "perpetrator" of the charged offense is not in dispute. Although the prosecution advanced the signature-crime theory of admissibility in the trial court, and the lower courts relied heavily on that theory, the question remains whether the signature-crime theory of admissibility is even applicable where identity is not at issue. A fundamental flaw in the prosecution's argument is that it fails to pinpoint the disputed factual issue that the PBA evidence tends to make more or less probable. *See United States v. Caldwell,* 760 F.3d 267, 276 (3rd Cir. 2014)(holding

[3] Desperate to prove uncanny similarities between the PBA evidence and the charged offense, the prosecution shamelessly urges this Court to assume that Cosby assaulted PBA witness, Maud Lise-Lotte Lublin, even though she admitted that she could not say that she was assaulted and pointed to no physical evidence that supported such an inference. [R.3571a; 5867a] ("Q: Do you have any recollection of being sexually assaulted? A: I do not.")

that in seeking the admission of PBA evidence the proponent of the evidence must identify a proper purpose that is "at issue" in the case and explain how the evidence is relevant to that purpose). The prosecution argues that *because* the PBA evidence is sufficiently similar to the charged offense, it may be introduced to show that Cosby more likely than not assaulted Complainant. This is nothing more than propensity evidence. The prosecution's authority underscores its faulty reasoning.

For example, in *Commonwealth v. Elliott,* 700 A.2d 1243 (Pa. 1997), the defendant was convicted of murdering a female bartender (Griffith) who he and his friend (Nardone) met at a nightclub. Griffith accompanied defendant and Nardone back to Nardone's apartment where they ingested drugs and Griffith eventually passed out. The following afternoon, Nardone awoke to find Griffith's naked and battered body on the couch; she died from strangulation. Griffith also suffered injuries to her vagina and anus, indicating forced penetration. Forensic analysis excluded Nardone as the source of sperm found in Griffith's body but did not exclude defendant. *Id.* at 1247. Defendant admitted that he had consensual sex with Griffith but claimed she was alive when he left Nardone's apartment.

Because the identity of the perpetrator responsible for murdering Griffith was "at issue," as was defendant's claim that some of the victim's injuries were a result of consensual "rough sex," the prosecution sought to introduce testimony

from three other women who provided nearly-identical accounts of sexual and physical assaults inflicted upon them after encountering the defendant at the same nightclub. This Court found the admission of the nearly-identical PBA evidence proper as it made it more probable that defendant was responsible for killing Griffith rather than some unknown party.

In contrast, neither identity nor the underlying physical acts of the encounter between Cosby and Complainant are "at issue." Unlike *Elliott,* the prosecution had no legitimate need to place PBA evidence before the jury, signature-like or otherwise, to show that Cosby committed the acts alleged by Complainant.

Similarly, in *Commonwealth v. Frank,* 577 A.2d 609 (Pa. 1990), the defendant, a therapist, was convicted of raping T.Y., a troubled 11-year-old boy who defendant counseled in his home office. T.Y. described how the defendant initiated the abuse and how it escalated. Defendant argued on appeal that the trial court erred by admitting the testimony of six other witnesses, all adolescent boys who like T.Y. were counseled by defendant and were experiencing emotional/behavioral problems. The witnesses "uniformly" testified that they were abused by defendant in his home office and gave virtually identical accounts of how the abuse began and escalated. The Court found that the "similarities are striking and represent the unique signature of this appellant." *Id.*

Importantly, in *Frank,* the contested factual issue was whether the appellant engaged in sexual contact with T.Y., since the appellant did not admit to having sex with a child. The prosecution sought to persuade the jury that appellant committed the charged acts, a fact made more probable by the testimony of six other adolescent boys who gave virtually identical accounts of their abuse. *See also, Commonwealth v. Aikens,* 990 A.2d 1181 (Pa. Super. 2010); *Commonwealth v. O'Brien,* 836 A.2d 966 (Pa. 2003) (both child sex-abuse cases where PBA evidence was permitted to show that defendant was the perpetrator of the offenses).

In *all* of the aforementioned cases, the question of whether the accused was the perpetrator of the crime was "at issue." In contrast, the only question in dispute here is whether Complainant consented to the sexual contact. Simply because one person claims that she did not consent to sexual contact with Cosby does not mean that another woman did not consent to sex with Cosby. Because the prosecution cannot identify what disputed fact becomes more probable if the PBA evidence is "nearly identical" to the charged offense (which it was not), the only purpose it serves is the forbidden one, namely that because he engaged in alleged non-consensual sex acts previously, he probably engaged in non-consensual sex acts in the charged case. The PBA evidence was not admissible for a non-propensity purpose under any common plan theory of admissibility.

3. The PBA Evidence Was Inadmissible Under the Absence of Mistake/Accident Exception.

The prosecution accuses Cosby of misstating the law on the absence of mistake exception while pushing for a reduced standard of admissibility based on disjointed phrases awkwardly culled from a variety of cases. It is difficult to ascertain the standard that the prosecution believes should be applied when invoking the absence of mistake/accident exception.

The prosecution ignores that the Panel in this case expressly held that the standard for admission of PBA evidence under the common plan and the absence of mistake/accidents exceptions is identical, i.e., the PBA evidence "must be distinctive and so nearly identical as to become the signature of the same perpetrator." *Cosby,* 224 A.3d at 401. The prosecution further challenges Cosby's reliance on *Boczkowski* for the same legal principle. In *Boczkowksi,* this Court applied the absence of accident exception upon finding a "remarkable similarity between the manner in which both the appellant's wives were killed." *Commonwealth v. Boczkowski,* 846 A.2d 75, 89 (Pa. 2004). *See also, Tyson,* 119 A.3d at 359 (holding that evidence of a prior crime may also be admitted to show a defendant's actions were not the result of a mistake or accident "where the manner and circumstances of two crimes are remarkably similar.").

The prosecution seems to agree that the "remarkably similar" standard articulated in *Boczkowski* and *Tyson* dictates the admissibility of PBA evidence

under the absence of mistake/accident exception but suggests, without authority, that the "remarkably similar" standard is a lesser standard than "signature-like" similarities. Notably absent from the prosecution's brief is any authority supporting this position.[4]

The prosecution's contention that the PBA evidence was admissible under the absence of mistake/accident exception hinges almost entirely on the Superior Court's decision in *Tyson, supra.* Apart from *Tyson,* the prosecution cites no other authority for the proposition that the absence of mistake/accident exception has ever been used in an acquaintance-assault scenario where the only issue in dispute is consent. The cases cited by the prosecution, *Boczkowski, Donahue, Bill, and Travaglia,* merely prove Cosby's point, as the defendants in those cases all claimed that the victims' injuries or death occurred accidentally.

The prosecution gets distracted, debating whether consent forms the *actus reus* of a sexual assault. This argument is a red herring. What matters is that the prosecution admits (and the Panel found) that the PBA evidence was offered to show that Cosby *knew* that Complainant did not consent to the sexual activity, not to prove that the sexual contact happened as Complainant described and as Cosby

[4] If Cosby has misstated the holding of *Boczkowski* as the prosecution accuses, then so has Justice Donahue in her dissenting opinion in *Hicks* wherein the Justice cited *Boczkowski* for the principle that "signature-like similarities are as essential for proving absence of accident as they are for proving identity." *Hicks,* 156 A.3d at 1147 (Donohue, J. dissenting).

described in his deposition testimony.[5] Whether the absence of consent is considered an element of the offense or part of the *actus reus* of the crime is of no moment.

Despite a lengthy discussion, the prosecution never explains how nearly-identical PBA evidence sheds any light on the question of whether Complainant consented and whether Cosby should have known that she did not consent. As Imwinkelried points out, "even if the accused entertained a certain intent during a similar, uncharged incident, the accused may not have formed that intent on the charged occasion." Inwinkelried, Edward J., *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 584 (Summer 90).

As addressed in Cosby's principal brief, *Tyson* stands alone as the sole authority in this Commonwealth for the proposition that a uniquely similar prior assault can be admitted to show that the defendant in the charged offense knew or should have known that the victim did not consent to the sexual contact. Cosby maintains that consistent with Imwinkelried's view, *supra,* one woman's lack of

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[5] The prosecution pretends that the *actus reus* of the crime was in dispute, because Cosby did not concede "penetration," and it was the prosecution that introduced Cosby's deposistion testimony to prove penetration. It is true that Cosby did not testify, but Cosby did not put the "penetration" issue into dispute and his counsel advanced no argument challenging Complainant's account of the physical touching. No reasonable jurist could review this Record and conclude that Cosby lodged a defense that denied the *actus reus* of the crime.

consent says nothing about whether another woman is capable of consenting – even when drugs or alcohol are involved. To the extent *Tyson* holds otherwise, Cosby contends *Tyson* was wrongly decided.

But even *if Tyson* is correctly decided, it is distinguishable because the Record here fails to show that Cosby was aware of the accusations of the PBA witnesses at the time he allegedly assaulted Complainant. If at the time of the charged offense Cosby had no knowledge that PBA witnesses viewed their interactions with him as non-consensual, those prior incidents tell us nothing about whether Cosby knew or *should* have known that Complainant did not consent to the sexual contact. The prosecution minimizes this distinction by arguing that because Cosby "drugged" each of the victims he "knew his victims were incapacitated." The prosecution overstates or outright misstates the actual evidence. As a reminder, the PBA witness testimony constitutes allegations that were never charged or proven. Furthermore, the PBA witnesses had different accounts about how drugs or alcohol played a role in their sexual contact with Cosby. For example, Baker-Kinney did not claim to be unknowingly "drugged," Dickinson admitted to voluntarily taking some type of relaxant for her "menstrual cramps," and Lublin did not even allege a non-consensual sex act after consuming alcohol. But more importantly, *none* of the PBA witnesses came forward to allege

assault until well after the charged incident.[6] This distinction is extraordinarily important as the prosecution cannot show that Cosby was on any type of notice (or had knowledge) that the PBA witnesses viewed their encounters with Cosby as non-consenual until well after the charged offense. Thus, unlike the defendant in *Tyson*, it cannot be said that these prior incidents informed Cosby's knowledge that Complainant was unable to consent. Assuming *Tyson* was correctly decided, it is distinguishable from the case at bar.

4. **Even If the Prosecution Found a Theory of Relevance that Permitted the Admission of the PBA Evidence, It Should Have Been Barred As Excessively Remote.**

The prosecution reiterates that the remoteness of PBAs matters less when the PBAs are highly similar to the charged offense. While accurate, the PBA evidence in this case was not "nearly identical" to the charged offense; in some cases, it was markedly different (Baker-Kinney; Lublin). Therefore, the remoteness of the PBA evidence should have been given significant consideration.

The prosecution argues that this Court must consider the "sequential nature" of the PBAs, noting that remoteness is determined by analyzing the time involved between each of the criminal incidents. Cosby agrees but fails to see how this principle advances the prosecution's position where there was a tremendous gap of

[6] Even Dickinson admits that she did not accuse Cosby of assaulting her but instead asked him, "[d]o you want to explain what happened last night because that wasn't cool." [R.3628a] And that in response he said nothing and "looked at [her] like she was crazy." *Id.*

15 years between the charged offense and the nearest PBA (which did not involve a claim of sexual contact). Notably, in *Frank, supra,* the Superior Court approved the admission of numerous PBAs that preceded the charged offense by three and four years "because the trial court viewed these events as a continuous, uninterrupted pattern or scheme of conduct on the part of the appellant in his role as a therapist." *Frank,* 577 A.2d at 617. In contrast, the PBA evidence here was not part of a "continuous, uninterrupted pattern of conduct" where there was an excessive 15 year gap between the charged crime and the nearest PBA.

The prosecution fails to point this Court to any case that condoned the admission of PBA evidence that was 15 and 20 years old. The prosecution provides a long string-cite at pages 33-34 of its brief implying that courts routinely allow the admission of significantly-aged PBA evidence in circumstances like the instant case. Upon further scrutiny, the prosecution misleads this Court. For example, *Odum* and *Patskin* did not involve the admissibility of unrelated PBA evidence but rather addressed the admissibility of prior acts of violence by the defendant against the victim of the charged crime that spanned an extended-period of time with no significant gap between incidents. Similarly, *Smith, Aikens, and Luktisch* involved child sexual abuse cases where the defendant engaged in prolonged, recurring abuse against more than one child in the house over a continuous span of time.

These cases are highly distinguishable from Cosby's case. Here, the PBA evidence consisted of singular events, the latest of which occurred 15 years before the charged offense. Had Complainant alleged that Cosby abused her continually over the course of 15 years, the prosecution's argument (and authority) would be well-taken. But where there is a defined, clear and unequivocal gap of time between the charged offense and nearest PBA, remoteness becomes an important consideration. If remoteness does not demand the exclusion of the PBA evidence in this case, it is difficult to imagine a scenario where remoteness *would* bar the admission of PBAs.

5. The Doctrine of Chances Should Be Rejected As Its Application Will Invariably Swallow the Rule Prohibiting Character Evidence, But Even If It Is a Viable Theory of Admissibility, It Does Not Support Admission of the PBA Evidence Here.

Notwithstanding this Court's plurality decision in *Commonwealth v. Donahue,* 549 A.2d 121 (Pa. 1987), the doctrine of chances ("the doctrine") is a controversial doctrine that should be rejected since its application runs the risk of eradicating the deeply-cherished principle prohibiting the introduction of bad character evidence. As Justice Donahue observed in *Hicks,* admission of "roughly similar" bad acts to show that an accused has committed a charged act or, as in this case, to show the defendant *knew* that Complainant did not consent is simply an excuse for admitting otherwise inadmissible propensity evidence. *Hicks*, 156 A.3d at 1149 (Donahue, J. dissenting). The doctrine clashes with the presumption of

innocence and operates as a presumption of guilt for anyone charged with a crime who has been previously accused (regardless of conviction) of the same type of misconduct. The examples of how this doctrine would swallow the general rule prohibiting propensity evidence and override the presumption of innocence are endless.[7]

Even if this Court concludes that there is some room for application of the doctrine, this case is not a fit for a number of reasons. Initially, the prosecution has failed to identify the foundational elements necessary to show the doctrine is applicable under the unique circumstances of *this* case. Indeed, the prosecution cannot settle on what disputed fact it seeks to prove under this theory (*i.e. actus reus, mens rea,* identity). It is all over the map on this important starting point for any doctrine-of-chances analysis.

In its Superior Court brief, the prosecution opined that the PBA evidence was admissible under the doctrine to establish the *actus reus* of the crime. [Prosecution Super. Ct. Br. at 71]. The prosecution also argued that the evidence was admissible because it showed the objective improbability that Cosby would mistakenly assess Complainant's ability to consent – a *mens rea* purpose.

[7] Consider a defendant charged with drug possession who denies possessing drugs. Under the doctrine, nothing would stop the prosecution from placing before the jury the defendant's prior drug arrests to show the "objective improbability" that he did not possess the drugs on the charged crime. This would result in a presumption of guilt based entirely on PBAs.

[R.1448a; 1496a]; [Prosecution Super. Ct. Br. at 70]; [Prosecution Br. at 55]. On other occasions, the prosecution suggested that the PBA evidence is admissible to show the objective improbability that numerous unrelated women would fabricate claims of assault. [R.1498a; 1502a]; [Prosecution Br. at 58-59]. The trial court's 1925 Opinion neither identified the precise purpose for which the PBA evidence was being introduced nor examined whether the prosecution had satisfied the foundational elements for admission of the evidence under that specific doctrine theory. Instead, the trial court engaged in a general discussion of Chief Justice Saylor's concurring opinion in *Hicks*, a case wherein the defendant contested the *actus reus* of the crime. [Appx. "B" to Principal Br. at 99-100].

Because the foundational elements vary depending on the *purpose* for which the PBA evidence is offered under the doctrine, it was imperative that the prosecution *identify* the non-character purpose that it sought to prove through the PBA evidence. Edward J. Imwinkelried, *The Evidentiary Issue Crystalized by the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony About an Accused's Uncharged Misconduct Under the Doctrine of Chances to Prove Identity*, 48 Sw. L. Rev. 1, 7 (2019) (observing that different foundational elements and proof are required depending on the theory; confusing two theories can lead to miscarriages of justice). The prosecution failed to do so, and now simply pieces together general concepts underlying the rationale of the

doctrine, avoiding the fundamental question of what purpose the evidence serves and under what rubric it should be examined. The prosecution's lack of critical analysis demonstrates that its true purpose in invoking the doctrine for the admission of the PBA evidence was for a prohibited character purpose.

The prosecution urges application of the test articulated by Chief Justice Saylor's concurring decision in *Hicks* which examined how the doctrine applies in a case where the *actus reus* was in dispute. As previously discussed, the test articulated by Chief Justice Saylor in *Hicks* by its own terms would not apply where the *actus reus* is uncontested.

The prosecution embraces Imwinkelried's "*The Evidentiary Issue Crystalized . . .*" but fails to appreciate that Imwinkelried's analysis proves that the doctrine fails *on this Record.* Imwinkelried explores the more "traditional uses" of the doctrine, such as to prove an occurrence of an *actus reus* or to defeat a claim that an accused had a criminal intent rather than committed an act accidentally. *Id.* at 13-17. But Imwinkelried notes that those purposes are *not* at issue in the Cosby case and that the prosecution in the Cosby case relied on the doctrine for the more controversial purpose of showing "the improbability that multiple victims would independently fabricate similar stories," which he characterizes as an "identity" purpose. *Id.* at 7; 17-33.

Imwinkelried clearly did not read the Superior Court briefs in this case wherein the prosecution never defended the introduction of the PBA evidence on "identity" grounds but instead argued that the evidence showed the objective improbability that Cosby would have miscalculated Complainant's ability to consent. That said, Imwinkelried underscores an important point, namely that if the prosecution seeks to admit PBA evidence under the doctrine to show the "objective improbability" that an accused would be the subject of so many false allegations – an argument the prosecution did not make or preserve – a court *must* scrupulously apply the correct foundational elements for admission. Imwinkelried warns that if the courts extend the doctrine for this purpose, "even the most ardent advocates of this use of the doctrine counsel that the courts apply the doctrine with 'great caution.'" *Id.* at 23. Imwinkelried emphasizes that courts should clearly specify the foundational requirements to minimize the risk of confusing the doctrine with the "verboten character reasoning." *Id.*

Here, the lower court failed to specify the foundational requirements necessary to introduce the PBA evidence under the doctrine. Neither the prosecution nor the trial court pinpointed the precise purpose of the PBA evidence (*e.g. actus reus, mens rea,* identity) which was the necessary starting point for a doctrine-of-chances analysis, indeed for any PBA analysis. In fact, it is still unclear what disputed fact the prosecution sought to prove through the PBA

evidence, but to the extent it now contends that the evidence showed the unlikelihood that Cosby would be the subject of so many false allegations of non-consensual sex acts, the argument is waived having not been raised in the courts below. It is worth noting, however, that the Record would not support admission under this theory.

Pointing to a Utah Supreme Court case, *State v. Lopez,* 417 P.3d 116, 128 (2016), Imwinkelried urges courts to consider the following factors in analyzing whether the doctrine would apply in the Cosby scenario: (1) the independence of the accusations; (2) the similarity and relative frequency of the accusations; and (3) estimating the relative frequency of similar accusations against "similarly situated persons." "*The Evidentiary Issue Crystalized . .* " at 23.

These inquiries are highly fact-based and implicate such matters as the excessive media attention that Cosby's case generated. Furthermore, Cosby must be compared to "similarly situation persons," namely high-profile celebrities, in order for a court to assess the relative frequency of similar accusations. None of that fact-finding was conducted in the trial court and this Record fails to address these foundational criteria for admission.

By way of example, the independence of the PBA accusations was not explored during any evidentiary hearing despite the fact that taint was a legitimate concern given the extraordinary press coverage coupled with the fact that the PBA

witnesses did not make prompt outcries and many were represented by the same high-profile lawyer. As Imwinkelried observes:

> It will sometimes be extremely difficult to determine the probability of multiple complaints or accusations against the accused. However, the risk of collaboration between the complainants compounds the difficulty. If the accusations are not independent, it is improper to apply the multiplication or product rule. If there is a taint such as the risk posed by widespread publicity for one of the accusations, the probabilities are conditional rather than independent. In that event, it will be even harder to estimate the probability of multiple accusations. Suppose that a woman interacted with Mr. Cosby a decade ago. Realistically how can one quantify the risk that the massive publicity for the Cosby scandal will subconsciously influence her, prompt her to misrecollect the nature of the interaction, and therefore lodge a false complaint against him? In this situation, it can be frightfully difficult, if not impossible, for a judge or juror to intelligently resolve the bottom line question. They will be unable to determine with any degree of confidence whether the number of complaints against the accused exceeds the number of accusations that could be expected against a similarly situated, innocent person.

Id. at 25.[8]

The prosecution again relies on *Donahue, supra,* a case in which the defendant denied the *actus reus* of the crime, stating that "if the Court in *Donahue* considered the evidence under the doctrine of chances theory despite the fact that

[8] This risk is illustrated by the testimony of Maud Lise-Lotte Lublin who in 1989 told family and friends that she auditioned for Cosby and "she had too much to drink" and "made a fool of herself." [R.3521a] Lublin's perspective changed 15 years later when she heard other women's stories in the media, watched an interview with Janice Dickinson, and was contacted by the Dr. Phil show where she met her eventual attorney, Gloria Allred. [R.3545a-3548a]. She even communicated with Complainant prior to her in-court testimony. [R.3570a]. The Lublin case raises concerns regarding the "independence" of her allegations, a factor that was never probed by the trial court.

only a ***single*** prior bad act was proffered, the doctrine unmistakably applies here, "where the frequency requirement typically underpinning the doctrine is undeniably present." [Prosecution Br. at 54]. The prosecution evinces a fundamental misapprehension of how the doctrine applies. Imwinkelried explains:

> [u]nder the doctrine, the point of the bottom line is to determine whether there have been more complaints against the accused than would be expected to be lodged against a *similarly situated* person in the same time period. The question is not the absolute number of complaints or accusations; rather the key is the relative frequency.

"The Evidentiary Issue Crystalized . . ." at 27-28 (emphasis added).

To assess the "relative frequency" in this case, the trial court cannot merely look to the frequency with which an average person would be accused of the conduct lodged against Cosby. Cosby must be evaluated relative to similarly-situated persons over the same period of time. For example, Cosby would have to be compared against similar, wealthy, well-known celebrity figures during the relevant time period. As Imwinkelried notes, one factor to consider in this analysis is the attractiveness of the accused as a target. *Id.* at 33. "For obvious reasons, wealthy, 'deep-pocket' persons are more attractive targets than destitute individuals. Similarly, by virtue of their profession or line of work certain individuals are more attractive targets because they are more vulnerable to accusations." *Id.* Any number of bases might be considered in order for a judge to develop a trustworthy estimate of frequency. *Id.*

The trial court did not engage in any type of *relative* frequency analysis, instead looking only at the "brute numbers." Frankly, it is questionable whether a court could say with any degree of confidence in the #MeToo era that the number of complaints against Cosby (19 as proffered by the prosecution) exceeds the number of accusations that could be expected against other wealthy, high-profile figures with similar name-recognition over the course of four decades.[9] Regardless, the analysis was never conducted; the prosecution did not identify the appropriate foundational requirements; and Cosby was never given an opportunity to challenge the specific foundational elements for the admission of the PBA evidence under the doctrine. Contrary to the proseuction's suggestion, Imwinkelried did not comment on whether the prosecution met the foundational elements for the introduction of the PBA evidence under the doctrine.

Lastly, the prosecution relies on out-of-jurisdiction authority that is either wholly inapplicable or suffers from the same problematic analysis identified by Imwinkelried. Most importantly, the prosecution cannot point to any case involving a world-famous and wealthy defendant who was the subject of relentless

[9] To conduct an appropriate relative frequency analysis, Cosby would have to be compared against such high-profile figures as Harvey Weinstein, Bill Clinton, Alan Dershowitz, Prince Andrew, Donald Trump, Joe Biden, Brett Kavanaugh, R. Kelly, Mario Batali, Matt Lauer, Kevin Spacy, Charlie Rose - the list goes on. According to Vox, 262 celebrities, politicians, and influential CEOs have been accused of sexual misconduct since April 2017. https://www.vox.com/a/sexual-harassment-assault-allegations-list.

media coverage – both important factors in determining the independence of the PBA allegations and for assessing the relative frequency of the allegations.

Cosby urges this Court to reject the doctrine whole-cloth given the risk that its application (and inevitable misapplication) will lead to a scenario where the admission of propensity evidence becomes the rule rather than the exception. But even if this Court finds some merit to the doctrine, it cannot be relied on here to justify the admission of the PBA evidence where the prosecution has *never* clearly identified the purpose of the PBA evidence or the foundational criteria for its admission.

6. Any Probative Value of PBA Evidence Was Outweighed By Its Prejudicial Effect.

The prosecution contends that PBA evidence was highly probative because it was "incredibly similar." [Prosecution Br. at 62]. The prosecution further contends that it "needed" the evidence to prove its case and that any potential for prejudice was ameliorated by the trial court's cautionary instructions. *Id.* at 62-63.

As discussed in Cosby's principal brief, even *if* the PBA evidence had a high-degree of similarity to the charged offense (it did not), because the PBAs were uncharged and excessively remote, it was *not* particularly probative. When considering the PBA evidence *cumulatively*, its probative value diminished exponentially as compared to its prejudicial effect. The prosecution dismisses this

argument but must concede that Cosby's prejudice claim would be significantly weaker if the trial court had permitted only a single PBA witness.

The prosecution had no need for the PBA evidence, let alone a substantial need. Complainant's testimony was corroborated in a number of different ways, including via testimony from her mother and through expert testimony. Simply because Cosby enjoyed a Sixth Amendment right to confront and cross-examine his accuser does not mean that the prosecution *needed* the PBA evidence.

Additionally, the prosecution's need for the PBA evidence in the age of #MeToo is greatly overstated. It is now common knowledge that a defining tenet of the #MeToo movement is to *believe* women without question or scrutiny. Questioning a woman's allegation of abuse is verboten in the era of #MeToo. Without engaging in any judgment of this general view, the point must be made that the prosecution was not unfairly hampered by relying on its non-PBA evidence to prove its case where at the time of Cosby's trial, women who alleged assault were *presumed* to be telling the truth.

The trial court's cautionary instructions could not have cured the prejudice suffered by Cosby, no matter how many times they were repeated. In fact, the trial judge's instruction made matters worse as he told the jury that the PBA evidence tended to show that Cosby was *guilty* of the crimes alleged by the

Witnesses.[10] Although the court told the jury that the evidence could be considered for the limited purpose of "something called common plan, scheme, design, absence of mistake" [R. 3230a], those concepts were not explained to the jury – concepts that seasoned attorneys and judges sometimes misconstrue. Importantly, the jury was not expressly told that it could not assume that Cosby was guilty of the charged offense because he had purportedly committed prior similar misconduct.

Courts and commentators generally agree that uncharged misconduct evidence can have a decisive impact on criminal trials because of its influence on a jury's factfinding process. McCandless, Jason L., *Note: Prior Bad Acts and Two Bad Rules: The fundamental Unfairness of Federal Rules of Evidence 413 and 414,* 5 Wm. & Mary Bill of Rts. J. 689, 712-713 (Summer 1997). The risk of jury misdecision seems particularly acute when a court admits PBA evidence of sexual misconduct. *Id.* It has the capacity to impact the jury in the following ways: surprise, misestimation, confusion of the issues, arousal of punitive instincts and interference with the guilt determination standard. *Id. See also, Boyd v. United States,* 142 U.S. 450 (1892).

Lastly, the prosecution takes issue with Cosby's contention that given the

[10] "So now, again, you have heard evidence tending to prove that the defendant was guilty of some sort of improper conduct of which he is not charged in this case." [R. 3230a]

media circus that overwhelmed his trial (including #MeToo protests on the courtroom steps and regular press conferences by some of the accusers' lawyer), the trial court had a special obligation to carefully weigh the probative value of the uncharged PBA evidence against its prejudicial impact. The prosecution declares that Cosby "deserved no special treatment." [Prosecution Br. at 67]. Cosby has never sought "special treatment," he merely demands that his constitutional guarantees be protected with the same vigor as any other person. The Record reflects that the trial court abdicated its responsibility in this regard when it failed to give due consideration to the overwhelming potential for undue prejudice.

B. COSBY'S DEPOSITION TESTIMONY REGARDING HIS USE OF QUAALUDES AND HIS SEXUAL BEHAVIOR WITH "JANE DOE" AND "OTHER WOMEN" IN THE 1970S WAS IRRELEVANT AND SERVED NO PROPER NON-PROPENSITY PURPOSE.

The prosecution insists that Cosby's admissions regarding his familiarity with Quaaludes was necessary evidence to prove that he recklessly administered an intoxicant (other than a Quaalude) to Complainant. The prosecution's closing argument tells a different story. It is difficult to accept the prosecution's stated-purpose for the evidence when it repeatedly argued during closing arguments that Cosby routinely gave Quaaludes to "unknown numbers of women" with whom he wanted to have sex, including "Jane Doe Number 1" and others, "many of whom have not yet come forward." [R.5573a; R.5611a].

The prosecution's defense for the admission of this PBA evidence is

disingenuous because its *best* evidence regarding Cosby's knowledge of how Benadryl works were his own statements about how Benadryl affected him, detailed at page 73 of the prosecution's brief and highlighted in closing argument. [R.5523a; 5542a]. The prosecution did not need nor intend to introduce the Quaalude evidence to show Cosby's knowledge of how Benadryl operated. The prosecution had a more nefarious purpose for the Quaalude evidence, which was to suggest, without proof, that Cosby used Quaaludes in the 1970s to incapacitate countless women and assault them.

The prosecution eventually concedes its true intent in introducing the Quaalude statements, arguing that Cosby's deposition testimony regarding his provision of Quaaludes to women demonstrated his motive and intent in executing his signature pattern and plan of "administering an intoxicant to facilitate a sexual assault." [Prosecution Br. at 74; 76]. The prosecution admits that it introduced Cosby's deposition testimony to persuade the jury that he had a pattern dating back to the 1970s in which he drugged women to assault them despite the fact that Cosby made *no such admissions* during his deposition. This extraordinarily prejudicial evidence would have been inadmissible 404(b) evidence if Cosby had actually made such statements (which he did not). The prosecution's gross distortion of Cosby's statements are nothing short of reversible error.

The prosecution doubles-down on its use of the deposition testimony,

claiming that Cosby's prior testimony that he sometimes provided Quaaludes to women (with their knowledge) was "relevant to show the strength of the admissible [PBA] evidence." [Prosecution Br. at 74]. It is worth reiterating that Cosby did *not* admit to drugging women with Quaaludes. The truth matters on this point. Cosby testified that in the 1970s, Quaaludes were the party-drug of choice; he had access to Quaaludes and sometimes offered the drugs to sexually-appealing women *who voluntarily accepted them.* [R.4785a; 4797a].

The prosecution used this prior deposition testimony, not on face value, but as an admission of countless drug-facilitated sexual assaults. This was a less than subtle effort to back-door improper bad-character evidence which was not rooted in any factual basis and not subject to any proper 404(b) analysis.

The prosecution claims that Cosby failed to demonstrate prejudice for the introduction of the Quaalude evidence, going so far as to suggest that Cosby *benefitted* from the evidence because the Rule of Completeness allowed him to introduce portions of the deposition testimony to place the admitted excerpts in context. The Rule of Completeness, however, did not stop the prosecution from unfairly contorting Cosby's generally exculpatory statements into admissions of drug-induced rape. The prejudice of allowing minimally probative evidence that the prosecution then encouraged the jury to misuse cannot be overstated.

In sum, the prosecution smuggled in highly inflammatory evidence that it

disingenuously claims was necessary to show Cosby's knowledge of central nervous system drugs. The introduction of the evidence and the manner in which it was used violated Cosby's constitutional guarantees and demands a new trial.

C. THE PROSECUTION'S ARGUMENT CONCERNING THE DECISION NOT TO PROSECUTE COSBY IGNORES A SIMPLE TRUTH—THE MCDA DECLINED TO PROSECUTE COSBY; DID SO IN ORDER TO COMPEL COSBY'S DEPOSITION TESTIMONY; AND COSBY RELIED ON THAT DECISION TO HIS DETRIMENT.

1. The Prosecution's Efforts to Bury Those Dispositive Facts Which Reflect that the MCDA Forever Declined to Prosecute Cosby and That Cosby Detrimentally Relied on That Promise Must Be Rejected.

Turning its attention to the issues pertaining to the non-prosecution decision that its own office made in 2005, the prosecution attempts to bury the merits of Cosby's claim by peppering the Court with 16 pages of cherry-picked excerpts from the Habeas hearing and certain exhibits. The facts and law, however, lead to the conclusion that, *at a minimum*, Cosby's deposition testimony should have been suppressed.

Initially, the prosecution criticizes Cosby for purportedly ignoring the facts and "scarcely" mentioning "pivotal rulings." [Prosecution Br., p. 81]. This disregards that much of Cosby's principal brief concerning the MCDA's non-prosecution promise focused on facts directly challenging the Trial Court's findings and conclusions regarding the scope of that promise and Cosby's reliance on it. *See e.g.* Cosby Principal Brief ("Principal Brief"), pp. 74-77; 87-88; 90-92.

Simply because Cosby did not assault the Trial Court with vitriolic rhetoric does not mean that he disregarded those findings and conclusions. The legal arguments in Cosby's principal brief are premised on facts in the Record that demonstrate the fatal flaws with the decisions of both lower courts.

The prosecution would have this Court rubber stamp these decisions, asserting that when a trial judge finds facts against a litigant, "...there's not much the litigant can do on appeal." [Prosecution Br., p. 80]. To the contrary, although this Court's standard of review of a trial court's factual findings is deferential, those findings are not unassailable. Indeed, "...this Court is bound by the trial court's findings of fact, *unless* those findings are not based on competent evidence." *Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc.*, 636 A.2d 156, 160 (Pa. 1994)(emphasis added). Furthermore, "...absent an abuse of discretion, this Court is bound by the trial court's assessment of the credibility of the parties." *Id.* (citations omitted). "'An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or *partiality, prejudice, bias*, or *ill-will, or such lack of support so as to be clearly erroneous.*'" *Commonwealth v. Hairston,* 84 A.3d 657, 664-665 (Pa. 2014)(citation

omitted; emphasis added).[11] As Cosby's principal brief demonstrates, the Trial Court's findings concerning the scope of the MCDA's non-prosecution decision are not supported by competent evidence. [*See e.g.* Principal Brief, pp. 74-77; 81]. Equally important are those facts which demonstrate that Cosby's civil counsel relied on that promise. *Id.*, p. 86-91.

Despite its factual dissertation (much of which was nothing but a vituperative attack on Castor), the prosecution ignores certain dispositive facts supporting Cosby that cannot be dispelled in good faith.[12] It cannot be disputed that Castor made a decision not to prosecute Cosby; the Trial Court actually credited the MCDA's February 17, 2005 signed press release, acknowledging that it indicated that the MCDA "decided not to prosecute William H. Cosby, Jr." [R.1193a]. The signed press release also included a paragraph that addressed the anticipated civil action [R.494a], reflecting a nexus between the non-prosecution decision and the civil suit.

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[11] The prosecution wants this Court to accept the Trial Court's credibility findings without question. Although the standard of review is deferential, as *Hairston* reflects, it is not absolute. Importantly, one should not ignore the fact that, prior to the Habeas hearing, the Trial Court never disclosed the contentious relationship that he had with Castor; when Cosby ultimately filed a motion to recuse raising that issue, it was denied as being untimely, a determination affirmed by the Panel. *Cosby*, 224 A.3d at 406-408.

[12] Admittedly, some of Castor's testimony and emails were inconsistent or not artfully phrased. Such, however, does not change the dispositive and irrefutable facts that support the existence of a decision not to prosecute Cosby, memorialized in the written and signed press release, and the events flowing therefrom.

The Trial Court also acknowledged Castor's testimony that "...it was his intention to strip [Cosby] of his Fifth Amendment right to force him to sit for a deposition..." and that "Mr. Phillips, [Cosby's] criminal attorney, agreed with his legal assessment." [R.1193a]. Although the prosecution aggressively challenged Castor on cross-examination, Castor was unwavering on this point. [R.585a; 593a; 597a; 603a; 605a; 616a-617a; 639a; 648a-649a]. The Trial Court also acknowledged the testimony of Cosby's civil attorney, John P. Schmitt, that "...Mr. Phillips had informed him of Mr. Castor's promise not to prosecute." [R.1194a].

The prosecution cannot dispute either these findings or *the events* that followed the non-prosecution decision. Just 19 days after the press release was issued, Complainant filed the civil suit; the Trial Court acknowledged the same. [R.1193a]. Although the prosecution attempts to downplay the timing of this filing, as it is consistent with Castor's intent to compel Cosby to sit for a deposition by declining to prosecute him criminally, it cannot be refuted. Consistent with the press release and Castor's stated reasons for making the non-prosecution decision, Cosby sat for four days of deposition and did not invoke the Fifth Amendment. [R.1193a-1194a].

Schmitt testified that in deciding to allow Cosby to sit for the deposition and not invoke the Fifth Amendment, he relied on the non-prosecution decision,

evidenced by the signed press release, and believed it to be irrevocable based on assurances by Castor. *See e.g.* R.719a (Testifying that the signed press release was the writing that he got, and stating, "We also got oral assurances. Mr. Phillips got oral assurances from Mr. Castor that this was an irrevocable decision that he had made."). *See also* R.731a-732a. Schmitt confirmed that, without this assurance, he would not have let Cosby be deposed [R.706a; 731a].

The prosecution mischaracterizes aspects of Schmitt's testimony in order to deflect the reliance that he placed on the MCDA's decision in his counsel to Cosby to sit for the deposition and not invoke the Fifth Amendment. Referencing Schmitt's testimony concerning the decision to allow Cosby to be interviewed by the police, the prosecution argues that Schmitt did not believe that Cosby would incriminate himself in the deposition and had no concerns about Cosby testifying at the deposition. [Prosecution Br., p. 96].

Concerning the deposition, Schmitt actually testified, "I don't need to worry about the Fifth Amendment because there is no risk of jeopardy to Mr. Cosby because the District Attorney has agreed irrevocably that there would be no criminal prosecution." [R.732a]. Schmitt's testimony that he was not concerned about Cosby incriminating himself was in regard to the interrogation by the police. [R.714a-716a]. It mischaracterizes the Record to argue that Schmitt allowed Cosby

to sit for four days of testimony in a civil discovery deposition because he had no concerns that Cosby would incriminate himself in that deposition.

The prosecution is also incorrect that the Trial Court found Schmitt to be not credible; that credibility determination was reserved for Castor, not Schmitt. [R.1195a]. Instead, finding no promise or agreement not to prosecute Cosby, the Trial Court concluded that "[t]here is no basis in the record to support justifiable reliance on the part of the Defendant." [R.1196a]. Whether "reliance" on some set of facts is "justifiable" or "reasonable" is a conclusion of law, and this Court is not bound by the same; instead, the "...standard of review is *de novo* and [the] scope of review is plenary." *Commonwealth v. Livingstone*, 174 A.3d, 609, 619 (Pa. 2017).

Cosby addressed the reasonableness of his reliance on the non-prosecution decision in his principal brief. [Principal Brief, pp. 86-91]. In short, a signed statement issued by the MCDA that he was not authorizing the filing of criminal charges; the reference in that statement to an anticipated civil suit; the MCDA's representations that he made the non-prosecution decision in order to strip Cosby of his Fifth Amendment rights; the MCDA's discussion of that position with Cosby's criminal attorney, with assurances provided that Cosby would not be prosecuted; and confirmation by Cosby's civil attorney that this information was

conveyed to him by Cosby's criminal counsel, support the conclusion that Cosby's reliance on the MCDA's commitment was reasonable.

Undoubtedly, it would have been prudent to have a second writing signed by both the MCDA and Cosby memorializing the understanding of the parties. Certainly, civil counsel can be criticized for failing to note, prior to the deposition, that the Fifth Amendment was not being invoked based on the promise of the MCDA. Such does not change the fact, however, that: a decision was made not to prosecute; this decision was linked to the civil action; the MCDA intended to strip Cosby of his Fifth Amendments rights; the same was communicated to Cosby's criminal and civil counsel; and Cosby sat for the deposition without invoking the Fifth Amendment in reliance on that decision. These facts are entrenched in the Record. They establish that the MCDA, in 2005, promised not to prosecute Cosby and that Cosby relied on that promise to his detriment.

2. The Prosecution Failed to Refute the Legal Authority Supporting the Conclusion that the MCDA's Commitment Precluded the Prosecution of Cosby or, at a Minimum, Required That his Deposition Testimony be Suppressed.[13]

a. The Prosecution's Argument Disregards the Inapplicability of the Witness Immunity Statute; The Tremendous Authority that a Prosecutor Wields; and the Impact That a Non-Prosecution Decision Has on an Individual's Fifth Amendment Rights.

Turning to the legal arguments, the prosecution posits that "a prosecutor has no non-statutory authority to confer" immunity and that immunity is only available through the Witness Immunity Statute. [Prosecution Br., p. 101]. Although the prosecution cites *Commonwealth v. Swinehart*, 642 A.2d 504 (Pa. Super. 1994), *aff'd*, 664 A.2d 957 (Pa. 1995), *Commonwealth v. Parker*, 611 A.2d 199, 200, n. 1 (Pa. 1992) and *Commonwealth v. Carrera*, 227 A.2d 627, 630 (Pa. 1967), in support of its position, these cases are distinguishable. In these cases, some type of criminal proceeding was pending, and the prosecutor attempted to compel the

[13] The prosecution begins its legal argument alleging that Cosby waived some aspect of his argument, i.e., the "sovereign edict" theory, because it purportedly was abandoned in the Superior Court. [Prosecution Br., p. 100]. It is not clear as to what, exactly, the prosecution is referencing as the "sovereign edict" theory. Regardless, the issues raised in Cosby's principal brief were raised in the Superior Court. There, Cosby addressed, *inter alia*, the broad authority wielded by a prosecutor, including the authority to decide whether to prosecute. *See* Principal Superior Court Brief, pp. 116-117; 121-122; 124-125. These principles were discussed throughout his argument within the context of the MCDA's testimony and representation that he was acting as the "sovereign" and made the decision that Cosby would not be prosecuted "no matter what." *Id.* at pp. 119; 120; 122-123; 125; 127. Simply because Cosby did not cut and paste his Superior Court arguments verbatim does not mean that issues are waived. Moreover, Cosby was compelled to address the Panel's analysis. The prosecution's waiver argument is meritless.

witness to testify in that proceeding. *Swinehart* (witness subpoenaed to testify in a capital case); *Parker* (witness subpoenaed to testify at a preliminary hearing); *Carrera* (witness subpoenaed to testify before a grand jury). Here, the MCDA was not trying to compel Cosby's testimony in a pending criminal proceeding. Instead, the MCDA decided that Cosby would never be prosecuted for the allegations involving Complainant, thus directly impacting his ability to invoke the Fifth Amendment in the deposition.

The prosecution argues that Cosby's position "...would effectively assign pardon power to District Attorneys, something this Court has already rejected as unconstitutional. [*Commonwealth v. Brown*, 196 A.3d 130, 144 & n.5 (Pa. 2018) (pardon 'can be granted only by the authority in which the pardoning power resides, i.e., the Governor.')]." [Prosecution Br., p. 102, n. 35]. The premise for which *Brown* is relied on to support that proposition has no application here. *Brown* involved a capital murder prosecution where the jury returned a verdict of death. Before this Court were issues raised in post-conviction proceedings, including a joint application to, *inter alia*, vacate the death sentence. *Id.*, p. 137. Rejecting this invitation, the *Brown* Court emphasized that a jury returned a sentence of death. *Id.*, p. 144. The Court indicated that, having done so, "...neither the parties, by agreement, nor this Court, absent a finding of legal error, have the

power or ability to order that the jury's verdict be commuted to a life sentence without parole." *Id.* (footnote omitted).

Importantly, the Court addressed the prosecution's argument that the Court could not interfere with its ability to exercise prosecutorial discretion. *Id.*, p. 145. According to the Court, the parties "misconstrue the nature of a district attorney's prosecutorial discretion":

> ...the scope of prosecutorial discretion changes as a criminal case proceeds, narrowing as the case nears completion. *At the outset, a prosecutor has almost unfettered power to charge, or not charge, as he or she sees fit.* Once charges are filed, the prosecutor may withdraw them by nolle prosequi, subject to judicial oversight... A prosecutor may also choose to enter into a plea agreement, again subject to appropriate judicial oversight.... The decision whether the Commonwealth will seek the death penalty is also left to the prosecutor, though this decision, which is made at the time of arraignment, is also potentially subject to some pre-trial judicial review. *See Commonwealth v. Buck*, 551 Pa. 184, 709 A.2d 892, 896 (1998)...

Id., 145-146 (emphasis added)(footnotes omitted).

Once a verdict is returned, however, "...a district attorney's prosecutorial discretion narrows significantly." *Id.*, p. 146. The Court stated, "[p]rosecutorial discretion provides no power to instruct a court to undo the verdict without all necessary and appropriate judicial review." *Id.*

As to the fact that the district attorney's office initially decided to seek the death penalty, the Court stated:

> ..we note that the Philadelphia District Attorney's Office, through the exercise of its prosecutorial discretion, actively sought and obtained a death sentence for Brown. It cannot now seek to implement a different result *based upon the differing views of the current office holder with respect to the prior exercise of prosecutorial discretion.* Elections alone cannot occasion efforts to reverse the result of judicial proceedings obtained by the prior office holder. Every conviction and sentence would remain constantly in flux, subject to reconsideration based upon the changing tides of the election cycles.

Id., p. 149 (emphasis added).

Here, the MCDA exercised its "almost unfettered power" and committed that Cosby would not be prosecuted, thus removing the threat of criminal exposure and effectively compelling Cosby to sit for the deposition. Although the current MCDA disagreed with that decision, he should not be permitted to "...seek to implement a different result based upon the differing views" of the former MCDA's exercise of prosecutorial discretion. *Id.*

The inapplicability of the Witness Immunity Statute, the tremendous authority that a prosecutor wields and the legal significance of a non-prosecution commitment are discussed at length in Cosby's principal brief. [Principal Brief, pp. 68-77]. The prosecution does not address these specific issues. Nor does it address whether the MCDA's decisions and actions in 2005 were binding on that office; as demonstrated in Cosby's principal brief, they were. *Id.*, pp. 74-81.

Instead, citing inapposite case law, the prosecution concludes with vitriol, asserting that that the MCDA allowed Cosby to "buy his way out of criminal charges" and suggests that some "secret arrangement" existed. [Prosecution Br., p. 102]. This is nonsense. There was nothing "secret" about the MCDA's decision; he announced to the world through a signed press release that Cosby would not be prosecuted. Moreover, the inflammatory statements regarding Cosby being a "multi-millionaire" who was allowed to "buy his way out of criminal charges" is nothing but rhetoric. Despite the extensive and aggressive cross-examination of Castor at the Habeas hearing, neither the Trial Court nor the prosecution elicited any evidence that his decision was predicated on Cosby's financial or celebrity status. The prosecution's allegations are unfounded.

Charging decisions are made every day by prosecutors. Those decisions have legal consequences. The MCDA decided that Cosby would not be prosecuted, and it is patent that this decision was made anticipating that a civil lawsuit was imminent. Against this backdrop and given the discussions with Cosby's attorney, the MCDA's decision and subsequent representations removed the potential of criminal exposure for Cosby, thus stripping him of the ability to invoke the Fifth Amendment. *See Commonwealth v. Taylor*, 230 A.3d 1050, 1065 (Pa. 2020). Not only did the MCDA have the authority to make this decision, but as Cosby

demonstrated in his principal brief (pp. 74-88), that decision was binding on his elected successor. Cosby's conviction should be vacated.

b. Reliance on the Commitment of the Elected MCDA Was Reasonable, and What Someone Else May Have Done in Hindsight Does not Undermine the Reasonableness of That Reliance.

The prosecution argues that Cosby's reliance on the non-prosecution commitment was not reasonable, focusing on what Cosby's counsel "should have known" and what they did not do. [Prosecution Br., pp. 103–04]. It is easy to critique others' actions a decade later and pontificate on how something could have been done better.

What the prosecution does not acknowledge is the significance of: (a) a signed press release that was issued and publicly advised of the elected MCDA's non-prosecution decision; (b) the acknowledgment in that press release that a civil suit was likely to be filed; and (c) the subsequent discussions that the MCDA had with an experienced criminal defense attorney concerning that decision, along with his representation that, with the threat of prosecution removed, Cosby would be compelled to sit for a deposition without the ability to invoke the Fifth Amendment. Reliance on this non-prosecution commitment was certainly reasonable. Cosby addressed this issue above and at length in his principal brief. The prosecution's argument to the contrary fails.

Finally, contrary to the prosecution's assertion (which ignores an entire section in the principal brief)[Prosecution Br., p. 104, fn 36], Cosby did argue that one of the remedies that this Court could provide is to conclude that his deposition testimony should have been suppressed. [Principal Brief, pp.92-96]. Cosby argued, alternatively, that if this Court were to find that the decision made by Castor was not binding on his successor, or was some-how defective, suppression of the deposition testimony is warranted. *Id*. As argued therein, *Commonwealth v. Stipetich,* 652 A.2d 1294 (Pa. 1995) supports that conclusion. At a minimum, a new trial is warranted.

CONCLUSION

As set forth herein and in his principal brief, Appellant William H. Cosby, Jr. respectfully requests that this Honorable Court reverse and arrest judgment. Alternatively, it is requested that this Court reverse and award Cosby a new trial.

Respectfully submitted,

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CERTIFICATION

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATION

This 19th day of October, 2020, I certify that this brief contains 10,490 words, as counted by the undersigned's Microsoft Word processing software. The numbers of words set forth herein is within the word count limit authorized by this Court via Order dated October 1, 2020, which granted Appellant's Application for Relief Seeking Permission to Exceed Page Limit on Reply Brief seeking to file a brief in excess of the word count limit set forth in Pa.R.A.P. 2135(a) and to file a reply brief not to exceed 10,500 words.

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Jennifer Bonjean, Esquire
(admitted Pro Hac Vice)

s/Barabara A. Zemlock
Barbara A. Zemlock, Esquire

s/Brian W. Perry
Brian W. Perry, Esquire

CERTIFICATION OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the person(s) via PACFile and United States Postal Service, which service satisfies the requirements of Pa. R.A.P. 121:

Kevin Steele, District Attorney
Montgomery County District Attorney's Office
Montgomery County Courthouse
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Norristown, PA 19404-0311

Robert Falin, Assistant District Attorney
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Norristown, PA 19404-0311

s/*Jennifer Bonjean*
Jennifer Bonjean, Esquire

s/*Barbara A. Zemlock*
Barbara A. Zemlock, Esquire

s/*Brian W. Perry*
Brian W. Perry, Esquire

Date: October 19, 2020