

IN THE SUPERIOR COURT OF PENNSYLVANIA

WILLIAM H. COSBY, JR.,
Petitioner

:
:
: DOCKET NO.: _____

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

:
:
:

PETITION FOR REVIEW PURSUANT TO Pa.R.A.P. 1762(b)(2)

The Petitioner, William H. Cosby, Jr. (the “Petitioner” or “Mr. Cosby”),
by and through his attorneys, Brian W. Perry and Kristen L. Weisenberger,
of Perry Shore Weisenberger & Zemlock, files this Petition for Review
Pursuant to Pennsylvania Rule of Appellate Procedure 1762(b), from the
determination and order of the trial court entered on September 27, 2018,
denying Mr. Cosby’s request for bail post-sentencing and, in support
hereof, states as follows:

JURISDICTIONAL STATEMENT

1. This Court has authority to hear this Petition pursuant to
Pa.R.A.P 1762(b).

2. Procedurally, after a one-and-a-half day hearing, on September 25, 2018, Mr. Cosby was sentenced to a term of incarceration of not less than three (3) years nor more than ten (10) years. See Notes of SVP/Sentencing Hearing dated September 25, 2018, p. 120. Relevant portions of the Notes of Sentencing Hearing are attached hereto at Exhibit "1." An oral motion for bail was made to the lower court immediately following sentencing. Id., p. 120. The lower court denied the motion and Mr. Cosby was immediately incarcerated. Id., pp. 124-127; 131-133. The Order denying bail was entered on September 27, 2018. A true and correct copy of the Order denying bail is attached as Appendix "A." On October 2, 2018, pursuant to Pa. R. Crim. P. 720(B) and 720(C), a timely Post-Sentence Motion to Reconsider and Modify Sentence and for a New Trial in the Interest of Justice (the "Post-Sentence Motion") was filed with the lower court. Insofar as the Post-Sentence Motion is pending and an appeal has not yet been filed, as it is not ripe, this Court has authority to hear this Petition pursuant to Pa.R.A.P. 1762(b).

PARTIES

3. The Petitioner is William H. Cosby, Jr., who is currently incarcerated at the State Correctional Institution at Phoenix.

4. The Respondent is the Commonwealth of Pennsylvania acting by and through the District Attorney of Montgomery County.

DETERMINATION SOUGHT TO BE REVIEWED

5. Mr. Cosby seeks review of the determination and Order of Judge Steven T. O'Neill of the Court of Common Pleas of Montgomery County denying the motion for bail that Mr. Cosby's counsel presented to the lower court immediately subsequent to sentencing. The lower court placed his reasons for denying bail on the record during the sentencing hearing on September 25, 2018. The Order denying bail, which was entered and docketed on September 27, 2018, reflects that bail was denied "for the reasons set forth on the record on September 25, 2018." See Appx. "A."

6. In addressing Mr. Cosby's request for bail, the lower court stated that his reasons for denying bail were the same as those that he relied upon in imposing sentence. See Ex. 1, p. 132. In short, the lower court stated that Mr. Cosby was convicted of a serious crime and that "[t]he nature of the crime and what this Court has before me indicates that he could quite possibly be a danger to the community." Id.

7. As set forth more fully below, the lower court failed to disclose his contentious relationship with a material witness on the critical issue of whether the prosecution against Mr. Cosby could even proceed, the circumstances of which should have compelled Judge O'Neill's recusal from the case. Accordingly, the lower court's denial of bail on the purported basis that Mr. Cosby was convicted of a crime for which he never should have been prosecuted was a clear abuse of discretion.

8. Additionally, there are other significant appellate issues that should result in a reversal of the conviction. Specifically, the lower court wrongly admitted deposition testimony Mr. Cosby gave pursuant to District Attorney Castor's promise not to prosecute, allowed the prosecution to proceed despite a prejudicial twelve-year delay in filing charges, and allowed five women offered by the prosecution to testify regarding uncharged conduct. These errors denied Mr. Cosby his constitutional rights and warrant reversal of the conviction.

9. Moreover, there is absolutely nothing in the record that would support any conclusion that Mr. Cosby, who is 81 years old and legally blind, is a danger to the community.

**GENERAL STATEMENT OF THE OBJECTIONS TO THE ORDER OR
OTHER DETERMINATION UNDER REVIEW**

I. PROCEDURAL BACKGROUND

10. On December 30, 2015, Montgomery County District Attorney Kevin Steele charged Mr. Cosby with three counts of aggravated indecent assault. As set forth in the criminal complaint, each count was based upon purported conduct alleged to have occurred “on or about mid-January to mid-February 2004” at a residence Mr. Cosby owns in Cheltenham, Pennsylvania. The complainant had lodged the allegations against Mr. Cosby more than a decade earlier, in January 2005. At the time that the allegations were lodged, the Montgomery County District Attorney was Bruce Castor, who, as more fully set forth below, thoroughly investigated the allegations and thereafter determined and promised, on behalf of the Commonwealth, that Mr. Cosby would never be prosecuted for them. District Attorney Castor’s promise not to prosecute was made for the purpose of compelling Mr. Cosby to testify in an anticipated deposition in civil litigation against the complainant without invoking his Fifth Amendment privilege against self-incrimination.

11. On December 30, 2015, bail was set in the amount of \$1,000,000.00, ten percent (10%) acceptable. Mr. Cosby posted bail and

was released. On January 11, 2016, Mr. Cosby filed a Petition for Writ of Habeas Corpus through which Mr. Cosby sought dismissal of the charges based on the binding promise not to prosecute made by District Attorney Castor.

12. According to a sworn and notarized affidavit of Mr. Castor, Judge O'Neill chose to assign this particular criminal case to himself. Attached hereto as Exhibit "4" is the Affidavit of Bruce Castor, dated October 20, 2018. The lower court should have known that by assigning the matter to himself he would preside over a hearing in which Mr. Castor would be called as the primary witness on the key issue of whether this prosecution could proceed. As set forth more fully below, during the subsequent hearing at which Mr. Castor testified, the lower court took questioned Mr. Castor and, in Mr. Castor's words, proceeded to treat Mr. Castor with "tremendous animosity" before determining that Mr. Castor lacked credibility. See Ex. 4 ¶17. At no time, either before or after the hearing, did the lower court disclose his contentious relationship with Mr. Castor.

13. Subsequently, on May 24, 2016, a preliminary hearing was held before Magisterial District Judge Elizabeth McHugh and all charges were held for court.

14. On July 13, 2016, a three-count Criminal Information was filed charging Mr. Cosby with aggravated indecent assault pursuant to 18 Pa.C.S. §3125(a)(1)(Count 1); aggravated indecent assault pursuant to 18 Pa.C.S. §3125(a)(4)(Count 2); and aggravated indecent assault pursuant to 18 Pa.C.S. §3125(a)(5)(Count 3).

15. Shortly before trial, the prosecution filed a motion to admit the testimony of more than a dozen accusers about misconduct they claim occurred decades ago. On February 24, 2017, the lower court entered an order allowing the testimony of only one “404(b) witness,” whose accusations were most recent in time, yet still more than two decades old. On May 22, 2017, a jury was selected, and trial commenced on June 5, 2017. On June 17, 2017, however, the lower court declared a mistrial as the jury could not reach a verdict after six days of deliberations.

16. Shortly before start of the second trial, the prosecution again filed a motion seeking to admit the testimony of more than a dozen “404(b) witnesses.” This time, the lower court, without explanation and in stark

contrast to his ruling in the first trial, entered an order allowing five such witnesses to testify. A jury was subsequently selected, and trial commenced on April 9, 2018. Following testimony from not only the five “404(b) witnesses,” but also additional witnesses called by the prosecution to bolster their credibility, the jury returned a verdict of guilty on the charges on April 26, 2018.

17. Subsequent to the return of the verdict, Mr. Cosby’s bail was continued, but modified to provide that he be confined to his Pennsylvania home pending sentencing.

18. As noted above, the lower court, on September 25, 2018, sentenced Mr. Cosby on Count One of the Criminal Information to, *inter alia*, a term of incarceration of not less than three (3) nor more than ten (10) years imprisonment. See Ex. “1,” p. 120. The lower court determined that the verdicts on Counts Two and Three merged with Count One. Id., pp. 106-107, 120. The lower court also declared, immediately prior to imposing sentence, that Mr. Cosby was a “sexually violent predator” within the meaning of 42 Pa.C.S. §9799.58(e)(3).

19. As reflected above, the oral motion for bail was denied, and the Order concerning the same was entered on September 27, 2018.

**OBJECTIONS TO THE DETERMINATION AND THE REASONS WHY
POST-SENTENCING BAIL SHOULD BE GRANTED**

20. The Pennsylvania Rules of Criminal Procedure address the provision of bail after a finding of guilt. In relevant part, Pa.R.Crim.P. 521(B)(2) provides:

...when the sentence imposed includes imprisonment of 2 years or more, the defendant shall not have the same right to bail as before verdict, but bail may be allowed in the discretion of the judge.

21. It is beyond dispute that Pa.R.Crim.P. 521(B)(2) provides the lower court with the discretion to impose bail post-sentencing. Moreover, this Court has recognized that an abuse of discretion will occur where the record discloses that “...the trial court exercised manifestly unreasonable judgment or based its decision on ill will, bias or prejudice...” *Commw. v. Heckman*, 66 A.3d 765, 768 (Pa. Super. 2013), quoting *Commw. v. Ruby*, 838 A.2d 786, 788 (Pa. Super. 2003).

22. The record in this case reflects that the lower court’s decision to deny Mr. Cosby bail post-sentencing was a clear abuse of discretion.

23. Prior to sentencing, Mr. Cosby’s counsel filed a motion for recusal based on the lower court’s undisclosed contentious relationship

with Mr. Castor, and sought a hearing regarding the same in which the testimony of percipient witnesses, including Mr. Castor, would be introduced. The lower court denied the motion without a hearing in a Memorandum Opinion and Order dated September 19, 2018.

24. In support of the request for bail, Mr. Cosby's counsel advised the lower court that an appeal was imminent and that there were substantial legal issues, including recusal, to be raised on appeal. See Ex. 1, pp. 120-121, 124, 127-128. The lower court summarily dismissed this fact.

25. Moreover, the record reflects that, at age 81 and legally blind, Mr. Cosby is a threat to no one. He was out on bail prior to sentencing, complied with his conditions of bail, and appeared for all required court proceedings.

26. The record demonstrates both that bail pending the determination of Mr. Cosby's Post-Sentence Motion and, if necessary, pending appeal is warranted, and that the judge abused his discretion by not granting the same. The above issues will be addressed below, seriatim.

II. NUMEROUS ERRORS BY THE LOWER COURT VIOLATED MR. COSBY'S CONSTITUTIONAL RIGHTS AND COMPEL THE CONCLUSION THAT THE CONVICTION SHOULD BE REVERSED AND THE CASE DISMISSED OR, AT A MINIMUM, THAT A NEW TRIAL IS WARRANTED. THE LOWER COURT SUMMARILY DISMISSED THIS ARGUMENT, EFFECTIVELY EXERCISING NO DISCRETION ON BAIL.

27. The issues that are anticipated to be raised on appeal are so strong as to warrant the provision of post-sentencing bail. These issues include, but are not limited to, the following:

a. The lower court failed to disclose his contentious relationship with a material witness on a critical issue concerning whether the prosecution against Mr. Cosby could even proceed, the circumstances of which compelled his recusal from this case.

i. A legitimate and significant issue exists concerning the failure of the lower court to disclose a contentious relationship that he had with a material witness in this case. That personal history created a bias, or at the very least, a perception of bias, so significant as to call into question the impartiality of the lower court and its ability to fairly decide dispositive issues in this case. That bias, whether real or perceived, also mandated the lower court's recusal from, at a minimum, deciding any motions predicated, even in part, upon

the testimony of this critical witness. Specifically, and as referenced above, a Petition for Writ of Habeas Corpus was filed seeking the dismissal of the charges based on District Attorney Castor's 2005 promise that he would not prosecute Mr. Cosby. At a hearing on the Petition, Mr. Castor testified that it was his intent to bind the Commonwealth to never prosecute Mr. Cosby. See Notes of Testimony, dated February 2, 2016, at p. 63, lines 20-25; p. 63, attached hereto as Exhibit "2." Mr. Castor made the promise not to prosecute in order to place Mr. Cosby in the position of being precluded from invoking his Fifth Amendment rights in a deposition in the complainant's civil suit. Id., pp. 63-65. Indeed, Mr. Castor testified that "...I made the decision as the sovereign that Mr. Cosby would not be prosecuted no matter what. As a matter of law, that then made it so that he could not take the Fifth Amendment ever as a matter of law." Id., p. 64, lines 17-20.

ii. Then District Attorney Castor advised Mr. Cosby's counsel, Walter Phillips, of his promise not to prosecute

Mr. Cosby. Id. at pp. 64-67.¹ In reliance on that promise, Mr. Cosby's counsel allowed Mr. Cosby to be deposed in the civil suit. See Notes of Testimony dated February 3, 2016, pp 10-11; 13-14 (Testimony of John Patrick Schmitt, counsel to Mr. Cosby). Relevant portions of Attorney Schmitt's testimony are attached hereto as Exhibit "3." Indeed, Attorney Schmitt, an experienced 36-year practitioner, testified, "Mr. Cosby sat for a deposition. We did that knowing that the criminal litigation—that the criminal matter had been concluded and could not be reopened." Id., p. 13, lines 18-21. Because of District Attorney Castor's binding promise not to prosecute, Mr. Cosby could not, and did not, invoke his rights under the Fifth Amendment to the United States Constitution. Consistent with District Attorney Castor's promise, and all parties' understanding of that promise, Mr. Cosby was not prosecuted over the next decade, including the two terms Risa Ferman served as District Attorney from 2008 through 2016.

¹ Mr. Phillips died in February 2015.

iii. Indeed, Mr. Cosby was not prosecuted until First Assistant District Attorney Kevin Steele decided to make the matter an issue in his 2015 campaign for election against Mr. Castor, who had decided to again run for District Attorney. Campaigning on a promise to prosecute Mr. Cosby, Mr. Steele ultimately won the election and charged Mr. Cosby for the very conduct for which he had been promised he would never be prosecuted, a promise on which Mr. Cosby had expressly relied, to his detriment.

iv. Although the lower court was well aware that Mr. Castor was a critical and material witness to the existence of this promise not to prosecute, the lower court did not disclose the contentious relationship that he had with Mr. Castor. With respect to that relationship, see Ex. "4", which chronicles the strained relationship between him and the lower court. In short, Mr. Castor and Judge O'Neill were political rivals in 1999, over the Office of the District Attorney. Id., ¶1. During the campaign for the party endorsement, Judge O'Neill accused Mr. Castor of engaging in conduct during a political debate that sought to

exploit a personal and private family issue. Id., ¶¶2-8.

Specifically, Mr. Castor and Judge O’Neill debated each other at an event where a female Assistant District Attorney with whom Judge O’Neill had an extramarital affair was present in the front row. Id., ¶¶2-3. According to Mr. Castor’s sworn affidavit, Judge O’Neill seemed “distracted, unfocused, and nervous” during that event. Id., ¶2. The next morning, Judge O’Neill’s campaign manager called Montgomery County’s Republican Party Chairman to complain that placing the female prosecutor in the front of the debate to distract Judge O’Neill was “playing dirty politics.” Id., ¶3. Later, while leaving a subsequent political event, Mr. Castor encountered Judge O’Neill and his wife. Id., ¶5. Judge O’Neill, in front of several witnesses, angrily accused Mr. Castor and his supporters of “running a smear campaign and trying to ruin his marriage and life.” Id., ¶¶5, 8. Mr. Castor won the Republican Party endorsement for DA, causing Judge O’Neill to withdraw his name from consideration for the election. Id., ¶6. Mr. Castor believes that Judge O’Neill has never forgiven him or his

political supporters for using Judge O'Neill's marital infidelity as a "smear campaign," and that Judge O'Neill's subsequent conduct confirms that belief. Id., ¶¶8-9. Mr. Castor describes his relationship with Judge O'Neill over the next sixteen years as "strained and tense." Id., ¶9. Judge O'Neill was appointed to the bench in 2002. Id., ¶10. From 2002 until 2008, while Mr. Castor served as DA, he does not recall ever personally appearing before Judge O'Neill, and would have assigned another prosecutor to appear before Judge O'Neill "so as to avoid being put in a position where Judge O'Neill could embarrass or humiliate me and potentially damage the prosecution." Id., ¶11. It was after Mr. Castor secured the endorsement of the party and was thereafter elected as the District Attorney in 1999 that he investigated the allegations lodged by the complainant. Had then Attorney O'Neill won the endorsement and been elected, he would have been the District Attorney that would have investigated these allegations.

v. Additionally, while serving as District Attorney and, thereafter, Montgomery County Commissioner from 2008 to

2016, Mr. Castor was placed in the position where he initially opposed certain court-related programs supported and proffered by Judge O’Neill. Id., ¶¶13-14. As the attached Affidavit reflects, Mr. Castor felt and believed that Judge O’Neill harbored ill will toward him. See e.g. Id., ¶¶8-9, 17.

vi. Despite this adverse relationship, which was so strained as to warrant recusal from the case, the lower court never disclosed the same to Mr. Cosby or his counsel. Ironically, according to Mr. Castor’s sworn affidavit, the lower court chose to assign the case to himself, thereby putting himself in a position to make a decision regarding Mr. Castor’s credibility. Id., ¶15.

vii. A review of the transcript of the hearing on the Petition for Writ of Habeas Corpus reflects that despite thorough cross-examination from a seasoned prosecutor, the lower court, *sua sponte*, repeatedly questioned Mr. Castor on his promise not to prosecute Mr. Cosby. See e.g., Ex. 2 at pp. 223-238. Mr. Castor felt “tremendous animosity” from Judge O’Neill just from the tone of his questions. See Ex. 4

¶17. A review of the transcript of that hearing demonstrates that the lower court was never going to find Mr. Castor credible, specifically stating, in response to arguments on the Petition by Mr. Cosby's counsel:

THE COURT: Agreed, but, again, your whole argument is premised that this Court believes everything that Mr. Castor said because he's the only one testifying as to a promise. He's the only one. It's not - - Mr. Phillips isn't here. Mr. Cosby wasn't in the room. You weren't in the room. Mr. McMonagle. There's no other witness to the promise.

So what' I'm trying to say is you've kind of - - you know, the rabbit is in the hat. And you want me at this stage to assume that, hey, the promise was made, Judge. Just accept that. And now everything else doesn't really - - and I just wanted to make sure that if there's cases in which there's - - like this where one person said they made the promise or a potential defendant claims a prosecutor made the promise, that might help, too, you know. But I just wanted to make sure that by the fact you're arguing it doesn't make the promise enforceable.

See Ex., 3, Notes of Testimony dated February 3, 2016, p. 269-270.

viii. On February 4, 2016, immediately after two days of testimony, the lower court issued an Order denying the Petition. See Ex. “5.” The lower court’s Order states that “...based upon review of all the pleadings and filings, the exhibits admitted at the hearing, and all testimony of witnesses, with a credibility determination being an inherent part of this Court’s ruling, the Court find that there is no basis to grant the relief requested...” and that the Petition is denied. *Id.* (emphasis added). In other words, the lower court did not believe the testimony of former District Attorney Castor. According to Mr. Castor, Judge O’Neill intentionally publicly embarrassed him because he believed Mr. Castor had flaunted an affair in order to win the party’s endorsement years earlier.

ix. With respect to this disclosure and recusal issue, on September 11, 2018, Mr. Cosby filed a “Motion for Disclosure, Recusal and for Reconsideration of Recusal” and a Memorandum of Law in support thereof. A copy of that Motion is attached as Exhibit “6.” Through that Motion, Mr. Cosby asked the Court to make a disclosure related to Mr. Castor;

vacate the February 4, 2016 Order denying his Petition for Writ of Habeas Corpus; recuse itself from further proceedings; and reconsider the denial of a prior motion for recusal, the basis for which was independent of the instant issue. The lower court denied the Motion without a hearing.

x. On September 19, 2018, the lower court issued a Memorandum Opinion and Order Sur Recusal. A copy of the lower court's Memorandum Opinion and Order Sur Recusal is attached hereto as Exhibit "7." In that Opinion, the lower court, in addition to asserting that the Motion was untimely, goes on to characterize the claim as "unsubstantiated" and "facially meritless." According to the lower court, a hearing was "neither required nor necessary." *Id.*, p. 5. Ironically, the lower court, in its Opinion, recounts and relies on facts not of record concerning his personal history on the bench and his interactions with Mr. Castor—precisely the type of facts that should have been disclosed and explored at a hearing, and, where applicable, rebutted. See e.g., Ex. 7, pp. 5-6 (the lower court discussing his tenure on the bench, and his interaction

with Mr. Castor over that period of time). Had a hearing been granted, Mr. Castor would have testified inconsistently with the trial judge's conclusions. See, Ex. 4.

xi. Given: (a) the adverse nature of the relationship between Mr. Castor and the lower court; (b) that Mr. Castor was the key witness concerning the promise that Mr. Cosby would not be prosecuted; (c) that the lower court did not disclose that adverse relationship; (d) that the lower court ostensibly made a finding that Mr. Castor was not credible; and (e) that Mr. Cosby, upon learning of the relationship, filed a motion questioning the foregoing, the lower court should have, at a minimum, held a hearing on this motion.

xii. The integrity of Mr. Cosby's criminal conviction is marred by the lower court's failure to disclose, at any time before or after denying the Petition for Writ of Habeas Corpus, the nature of his contentious relationship with Mr. Castor. Mr. Cosby had a right to have his Petition reviewed and decided by a judge who could make a decision free of bias, or even the perception of bias, where the ability to prosecute

Mr. Cosby hinged on the testimony of the 2005 District Attorney. This is a fundamental issue in the case implicating Mr. Cosby's right to Due Process of Law under the Constitution of the United States, as well as the Constitution of the Commonwealth of Pennsylvania. Further, this issue is meritorious such that Mr. Cosby should have been granted post-sentencing bail.

b. The lower court's decision to deny Mr. Cosby's "Motion to Suppress the Contents of his Deposition Testimony and any Evidence Derived Therefrom on the Basis that the District Attorney's Promise Not to Prosecute him Induced him to Waive his Fifth Amendment Right Against Self-Incrimination" (the "Motion to Suppress Deposition Testimony") was not only legally flawed, but also suffered from the same biases as set forth above.

i. Related to the above issue, the lower court also denied Mr. Cosby's Motion to Suppress Deposition Testimony. Through this Motion, Mr. Cosby sought to suppress his civil deposition testimony because it was provided in reliance on the promise by the Commonwealth, through District Attorney Castor, that Mr. Cosby would never be prosecuted for complainant's allegations. Mr. Cosby's reliance on DA Castor's

promise is evidenced by the following exchange with

Mr. Cosby's civil counsel, Attorney Schmitt:

Q: If you had known that the criminal investigation in Montgomery County could be reopened, how would it have affected your representation if at all?

A: We certainly wouldn't have let him sit for a deposition.

Ex. 3, p. 14, lines 6-10. Accordingly, and as set forth in Mr. Cosby's motion, the Commonwealth was estopped from using the deposition and any evidence obtained therefrom at trial. The lower court's ruling, in allowing the Commonwealth to use that deposition, violated Mr. Cosby's right to Due Process of Law and his right against self-incrimination as guaranteed by the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania.

ii. The two-day hearing that was held on the Petition for Writ of Habeas Corpus was offered in support of the Motion to Suppress Deposition Testimony. No further evidence was provided by either party. As noted, the lower court ultimately denied that Motion. A copy of the lower court's Findings of

Fact, Conclusions of Law and Order are attached hereto as Exhibit "8." The Findings of Fact reflect that the lower court challenged Mr. Castor's testimony and found, among other things, that "...there were numerous inconsistencies in the testimony and writings of Mr. Castor and [that the lower court] has previously ruled that credibility determinations were an inherent part of this Court's denial of the Defendants' initial 'Petition for Writ of Habeas Corpus.'" Ex. 8, Finding 40. The lower court concluded that "...there was neither an agreement nor a promise not to prosecute...." *Id.*, Conclusion 1.

Noteworthy, however, is the fact that Mr. Castor was not the only witness to testify as to the existence of the promise not to prosecute Mr. Cosby; as referenced above, Mr. Cosby's counsel, John Schmitt, also testified as to the same. See e.g., Ex. 3, pp. 10-11 (In response to a question concerning whether he had an understanding "as to whether the criminal investigation could be continued, could be re-opened," Attorney Schmitt responded, "I had an understanding that it could not be. I spoke to Mr. Phillips who indicated that, although the District

Attorney had determined there wasn't sufficient evidence to charge Mr. Cosby, that he did anticipate that there would be civil litigation. And he wanted to ensure that Mr. Cosby could be compelled to testify in a civil litigation. And, therefore, his decision was—it was an irrevocable commitment to us that he was not going to prosecute.”). See also Id. at p. 40, lines 12-16 (Mr. Schmitt testifying, “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.”). Although the lower court acknowledged that Mr. Phillips had told Mr. Schmitt of Mr. Castor's promise not to prosecute (See Ex. 8, Finding 21), the lower court failed to reconcile this support with his conclusion that this promise did not exist. The import of Mr. Schmitt's testimony is simply ignored by the lower court.

iii. This issue has significant merit. Not only did the lower court err in denying the Motion, he compounded his error by considering, ruling on, and ultimately denying the Motion without disclosing the strained and tense relationship he had

with Mr. Castor. The nature of that relationship mandated that the lower court disclose his bias, or perceived bias, against Mr. Castor and recuse himself from the case. The lower court's failure to do so, and his more recent refusal to conduct a hearing, warrants bail pending appeal in and of itself.

c. If the Commonwealth had the ability to prosecute Mr. Cosby, which it did not, then the inexplicable twelve-year delay in filing charges prejudiced Mr. Cosby and violated his right to Due Process of Law.

i. In addition to the issues set forth above, Mr. Cosby's Motion to Dismiss Charges Based on Deprivation of Defendant's Due Process Rights should have been granted. This is yet another meritorious issue. The complainant lodged her allegations against Mr. Cosby in January 2005. As set forth above, the Commonwealth promised not to prosecute Mr. Cosby. If no non-prosecution agreement existed, as the current District Attorney argues, then the failure to file criminal charges against Mr. Cosby over the past twelve (12) years has been inexcusable and without valid reason. Over that twelve-year period, Mr. Cosby has been substantially prejudiced insofar as: (a) a critical witness to the non-prosecution

agreement has died; (b) memories have faded; and (c) Mr. Cosby's health has deteriorated in that he is now legally blind. For example, during an argument on the Motion to Suppress Deposition Testimony held on September 6, 2016, the lower court repeatedly pushed Mr. Cosby's counsel to identify evidence besides Mr. Castor's testimony to support the existence of the promise to not prosecute Mr. Cosby. See e.g. Notes of Testimony dated September 6, 2016, at pp. 34-40. A true and correct copy of the relevant portions of these Notes of Testimony is attached hereto as Exhibit "9." Although Mr. Cosby's counsel reminded the lower court that Walter Phillips, the criminal defense attorney who represented Mr. Cosby in 2005 when the promise was made, had died in February 2015 (prior to the criminal charges filed later that year and the new DA's position that there was no agreement to prosecute), the lower court expressed skepticism that the promise existed expressly because Mr. Castor was the only percipient witness who testified and "Mr. Phillips isn't here."

Ex. 3, p. 269. Mr. Phillips's unavailability clearly had a negative impact on the lower court.

d. The lower court infringed on Mr. Cosby's Due Process rights, violated law, and abused his discretion by allowing five women to testify that Mr. Cosby sexually assaulted them at various times during the 1980's, conduct with which Mr. Cosby was not charged, that was remote in time, and that served no purpose other than to smear Mr. Cosby.

i. Mr. Cosby also intends to challenge on appeal the lower court's decision, without any explanation, to permit five women to testify at Mr. Cosby's second trial that he engaged in inappropriate sexual contact with them. The lower court's admission of this extremely prejudicial testimony was wholly inappropriate under both the Pennsylvania Rules of Evidence and the Constitutions of the United States and the Commonwealth of Pennsylvania. That Mr. Cosby suffered severe prejudice as a result of this decision by the lower court is evidenced by the fact that, at Mr. Cosby's first trial, where only one "404(b) witness" was permitted to testify, the jury could not reach a verdict and a mistrial was declared. Subsequent thereto, and prior to the second trial, the Commonwealth filed a Motion to Introduce Evidence of 19 Prior Bad Acts from 19

different women. Other than the fact that the prosecution could not prove its case during the first trial, the prosecution offered no legitimate reason as to why the judge should increase the number of accusers permitted to testify. On March 15, 2018, the lower court issued an Order permitting five accusers beside the complainant to testify. A copy of the lower court's Order is attached hereto as Exhibit "10." That Order improperly tipped the scales in favor of conviction, and the lower court's failure to provide any justification for the change in his ruling is telling. This additional meritorious appellate issue constitutes further reason to grant bail pending appeal.

28. The issues set forth above are but some of the issues that will be raised on appeal. By identifying the above in this Petition, Mr. Cosby is not in any way waiving any other issue that is properly preserved and that he may raise on appeal. Instead, the above are illustrative of the significant and meritorious issues that exist in this case. If successful on appeal, Mr. Cosby's conviction will be reversed and vacated.

29. Given the meritorious nature of the issues to be raised on appeal, and their significance, bail is warranted. The lower court abused its

discretion by concluding otherwise. Moreover, the lower court abused its discretion by refusing to even assess whether Mr. Cosby had meritorious issues on appeal as a basis for his decision on bail.

III. GIVEN MR. COSBY'S AGE AND THE FACT THAT HE IS LEGALLY BLIND, THE LOWER COURT'S ASSERTION THAT MR. COSBY IS A RISK TO REOFFEND AND THAT IMMEDIATE INCARCERATION IN LIEU OF BAIL IS NEEDED TO PROTECT THE PUBLIC IS WITHOUT SUPPORT IN FACT.

30. As set forth above, the lower court advised that his "...reasons for the sentence is [sic] the reasons that I am relying on in denying this defendant bail." Ex. "1," p. 132, lines 14-16. The lower court noted that the crime is a sexual assault crime, and that "...what this Court has before me indicates that he could quite possibly be a danger to the community." *Id.* at p. 132, lines 19-23. That assertion is meritless and there was nothing before the lower court to support its claim.

31. Mr. Cosby, who is 81 and legally blind, is clearly not a danger to the community. Mr. Cosby was out on bail prior to trial without incident. After the verdict, Mr. Cosby was confined to his home as a condition to continuing bail, again, without incident, and complied with all bail conditions.

32. Dr. Timothy Foley, PH.D., a licensed psychologist, evaluated Mr. Cosby in relation to his risk for recidivism. Citing Mr. Cosby's age and poor health, Dr. Foley testified in his expert opinion that Mr. Cosby's risk of recidivism is "extraordinarily low." See Notes of Testimony from SVP Hearing/Sentencing Hearing dated September 25, 2018 p. 25, at Ex. 1.

33. Moreover, prior to the instant conviction, Mr. Cosby had no prior criminal record.

34. The lower court's denial of bail on the purported basis that Mr. Cosby is a danger to the community was a clear abuse of discretion, particularly in light of the meritorious issues on appeal.

A SHORT STATEMENT OF RELIEF SOUGHT

35. As referenced above, Mr. Cosby was initially released on bail on December 30, 2015, the date of his arrest. Mr. Cosby did not violate any conditions of bail and appeared for all required Court proceedings.

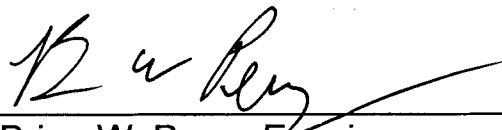
36. Subsequent to the jury returning its verdict, as a condition of bail, Mr. Cosby was confined to in-house arrest. Again, Mr. Cosby appeared for all court proceedings.

37. Mr. Cosby seeks the reinstatement of bail as it existed prior to sentencing.

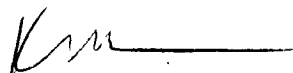
WHEREFORE, the Petitioner respectfully requests that this Honorable Court reverse the Order of the lower court denying Mr. Cosby bail; grant to Mr. Cosby bail in the amount previously set, which was \$1,000,000.00, ten percent acceptable; and enter such other relief as this Court deems just and reasonable. Alternatively, to the extent that this Honorable Court believes that it cannot grant this Petition on its face, or has questions concerning the same, it is requested that this Honorable Court grant a hearing on this Petition.

Respectfully submitted,

**PERRY SHORE WEISENBERGER &
ZEMLOCK**



Brian W. Perry, Esquire
Supreme Court ID 75647
2411 North Front Street
Harrisburg, PA 17110
(717) 232-9900



Kristen L. Weisenberger, Esquire
Supreme Court ID 84757
2411 North Front Street
Harrisburg, PA 17110
(717) 232-9900

Date: October 23, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 127(a) of the Pennsylvania Rules of Appellate Procedure, I hereby certified that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Date: 10 - 23 - 18



Brian W. Perry, Esquire



Kristen L. Weisenberger, Esquire


VERIFICATION

I do hereby swear and affirm that the facts and matters set forth in the within Petition for Review are true and correct to the best of my knowledge, information and belief. The undersigned understands that the statements made therein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

Date: 10-23-18



Brian W. Perry, Esquire



Kristen L. Weisenberger, Esquire

APPENDIX A

**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA : No. 3932-16
v. :
WILLIAM H. COSBY, JR. :

ORDER

AND NOW, this 27th day of September, 2018, the Defendant's request for bail pending appeal pursuant to Pa. R. Crim. P. 521 (B)(2), is hereby **DENIED**, for the reasons set forth on the record on September 25, 2018.

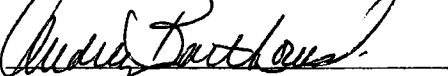
BY THE COURT:



STEVEN T. O'NEILL, J.

Copies of this Order mailed on 9/27/18 to the following:

Joseph P. Green, Esq.
Kevin R. Steele, Esq.
M. Stewart Ryan, Esq.
Kristen Gibbons Feden, Esq.
Michael R. Kehs, Esq. (Court Administrator)


Secretary

2018 SEP 27 PM 2:20
CLERK OF COURTS
OFFICE
MONTGOMERY COUNTY
PENNA.

EXHIBIT 1

IN THE COURT OF COMMON PLEAS
IN AND FOR THE COUNTY OF MONTGOMERY, PENNSYLVANIA
CRIMINAL DIVISION

- - -

COMMONWEALTH OF PENNSYLVANIA:

vs.

:
:
:
:

NO. 3932-16

WILLIAM H. COSBY, JR.

- - -

SVP HEARING/SENTENCING HEARING

- - -

Courtroom A
Tuesday, September 25, 2018
Commencing at 9:27 a.m.

- - -

Virginia M. Womelsdorf, RPR
Official Court Reporter
Montgomery County Courthouse
Norristown, Pennsylvania

- - -

BEFORE: THE HONORABLE STEVEN T. O'NEILL, JUDGE

- - -

COUNSEL APPEARED AS FOLLOWS:

KEVIN R. STEELE, ESQUIRE
District Attorney
M. STEWART RYAN, ESQUIRE
KRISTEN GIBBONS-FEDEN, ESQUIRE
TRACY S. PIATKOWSKI, ESQUIRE
Assistant District Attorneys
for the Commonwealth

JOSEPH P. GREEN, JR., ESQUIRE
ELIZABETH A. REDMOND, ESQUIRE
PETER GOLDBERGER, ESQUIRE
for the Defendant

- - -

I N D E X

COMMONWEALTH'S EVIDENCE

| <u>Witness</u> | <u>VDire</u> | <u>Direct</u> | <u>Cross</u> | <u>Redir</u> | <u>Recr</u> |
|---------------------------|--------------|---------------|--------------|--------------|-------------|
| KRISTEN F. DUDLEY, Psy.D. | | | | 11 | 5 12 |

DEFENDANT'S EVIDENCE

| <u>Witness</u> | <u>VDire</u> | <u>Direct</u> | <u>Cross</u> | <u>Redir</u> | <u>Recr</u> |
|----------------------------|--------------|---------------|--------------|--------------|-------------|
| TIMOTHY P. FOLEY, Ph.D. | 6 | 21 | 26 | 53 | 54 |

- - -

E X H I B I T S

DEFENDANT'S

| <u>Number</u> | <u>Description</u> | <u>Marked</u> | <u>Rec'd</u> |
|---------------|---|---------------|--------------|
| D-SVP-1 | Report of Timothy P. Foley, Ph.D. dated 9-11-18 | -- | 24 |
| D-SVP-2 | Special Section - DSM-5 and paraphilic Disorders | 7 | 22 |
| D-SVP-3 | Curriculum Vitae of Timothy P. Foley, Ph.D. | 18 | 19 |

- - -

| | <u>Page</u> |
|-----------------------|-------------|
| Sentence of the Court | 119 |

(The following proceedings were commenced with the Court, Mr. Steele, Mr. Ryan, Ms. Feden, Ms. Piatkowski, Mr. Green, Ms. Redmond, Mr. Goldberger, and the defendant being present:)

- - -

THE COURT: All right. Mr. Green, you may call your witness.

MR. GREEN: Your Honor, I'm going to start by recalling Dr. Dudley for a moment.

THE COURT: Recalling?

MR. GREEN: Dr. Dudley.

THE COURT: For the record, at this stage we are returning to the Sexually Violent Predator Hearing. And then you would be calling -- Mr. Green, you'll be calling a witness for the Sexually Violent Predator Hearing. If you are calling your witness for other purposes, please let me know that that is occurring.

MR. GREEN: Yes, I will.

THE COURT: Thank you.

- - -

KRISTEN F. DUDLEY, PSY.D., having been duly sworn, was examined and testified

as follows:

FURTHER RECROSS-EXAMINATION

BY MR. GREEN:

Q Doctor, you testified yesterday and were asked some questions about the definition of paraphilic disorder that you identified.

Do you remember those questions, definitional questions?

A I do.

Q Do you recall testifying that you didn't remember what the definition was of paraphilic disorder you were describing?

A I do, yes.

MR. GREEN: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. RYAN: Just so the record is clear, Your Honor, I believe counsel is approaching with a document he's just provided to me for the first time. It appears to be 10 pages in length. I haven't seen it. I don't know if the witness has seen it, so I'd ask --

THE COURT: Well, then the witness will be permitted time to review the document. If she needs

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it, she'll let us know.

THE WITNESS: I would like a minute to review this.

THE COURT: Thank you.

MR. GREEN: And I will give the Court and counsel and the witness a heads-up that I intend to focus on the definitional portion on Page -- on the third page of D-SVP-3.

- - -

(Discussion off the record.)

- - -

MR. GREEN: Judge, I have a bench copy. Would you like it?

THE COURT: If you have one, it would help.

MR. GREEN: Judge, after consultation with people who know the exhibits better than I, I'd ask permission to add the article marked as D-SVP-2.

THE COURT: Okay. So we're removing D-3 and it's D-SVP-2.

MR. GREEN: D-SVP-1 is the Foley letter previously marked.

THE COURT: Foley letter or Foley report. It's a letter. I see it.

(Special Section - DSM-5 and paraphilic Disorders marked Defendant's Exhibit D-SVP-2 for identification.)

MR. GREEN: If the witness is ready, Your Honor, may I proceed?

THE COURT: Yes, please.

BY MR. GREEN:

Q Doctor, do you recognize the table and the information contained in the table on Page 193 of the reprint that's marked as Defendant's SVP-2?

A Yes.

Q You recognize that as the DSM-5 diagnostic criteria for paraphilic disorder regarding non-consenting victims?

A I do.

Q You recognize that in Subparagraph A of that diagnostic criteria, there has to be a finding for one of the underlying predicate disorders; is that correct?

A Yes.

Q And we talked about the underlying predicate disorders yesterday and you didn't identify any of them here; is that correct?

A I believe that I did.

Q What underlying predicate disorder is identified

1
2 in your report?

3 A The diagnosis that I came up with is the
4 paraphilic disorder. And in order to meet criteria,
5 the "over a period of at least six months, recurrent
6 and intense sexual arousal", that is assumed based on
7 behavior.

8 Q Okay. That's your opinion. I'm not trying to
9 fight with you about what your opinion is.

10 A Okay.

11 Q I'm trying to ask you whether you agree what the
12 diagnostic criteria are in the table.

13 A This is the diagnostic criteria, yes.

14 Q And you haven't identified any of those four
15 predicates as being applicable here at all?

16 A Again --

17 Q A simple yes or no would be helpful.

18 A Yes, I have.

19 Q Which one have you identified as being applicable?

20 A Okay, I see what you're asking. If you're asking
21 whether Mr. Cosby meets the criteria for voyeuristic
22 disorder --

23 Q For any one of those four underlying predicate
24 disorders.

25 A No.

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2 Q And the next is -- I'd like to invite your
3 attention down to the remission criteria. Do you see
4 that? If you go down about two-thirds of the way, it
5 says in full remission. Do you see that?

6 A I do.

7 Q And the diagnostic criteria for what is called
8 full remission is not acting on any urges with a
9 non-consenting person for at least five years in an
10 uncontrolled environment; is that correct?

11 A That is correct.

12 Q And that clearly applies here; correct?

13 A It appears to.

14 Q Well, Doctor, it doesn't appear to. In the last
15 five years, have there been -- has there been any
16 credible report of acting out?

17 A There has not been.

18 Q In the last 14 years, has there been, to your
19 knowledge, any credible report of acting out?

20 A There has not been.

21 Q Okay. So do you think that that would qualify as
22 full remission under the diagnostic criteria identified
23 by the DSM-5?

24 A Potentially.

25 Q Potentially?

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A Potentially.

Q Okay.

A We know that victims don't always come forward.

Q Excuse me?

A We know that victims don't always come forward.

Q Yeah, anything is possible; right?

A So, yes, anything is possible.

Q And that's really the basis of your opinion, isn't it, that anything is possible? It's possible that something might happen in the future; is that fair?

A That is fair.

Q Doctor, is it still your testimony that the defendant is properly classified as suffering from paraphilic disorder involving non-consenting victim given your admission that he doesn't meet any of the diagnostic criteria for any of the underlying four predicates?

MR. RYAN: Objection. Leading.

MR. GREEN: It's cross-examination.

THE COURT: Overruled. She's as of cross.

THE WITNESS: I'm sorry. Could you repeat your question?

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BY MR. GREEN:

Q Do you continue to express the opinion that the defendant meets the criteria for paraphilic disorder involving non-consenting victims given your admission that he doesn't meet the diagnostic criteria for any of the four underlying disorders?

A There's another chapter or another section of paraphilic disorder. Not all the -- in DSM-4-TR language, it was "not otherwise specified". In DSM-5 language it is "other specified".

MR. GREEN: Thank you. That's all I have. Thank you.

THE COURT: Re-redirect now.

FURTHER REDIRECT EXAMINATION

BY MR. RYAN:

Q Doctor, looking at the DSM criteria, you would agree with me that in the overall context of your report, there was a demonstration of behavior over at least a six-month period where there was touching and rubbing against non-consensual persons?

THE COURT: What page are you on?

MR. RYAN: Same page that we've been on --

THE COURT: Remind me.

1
2 MR. RYAN: -- in this document that I
3 just got.

4 MS. FEDEN: Page 193.

5 THE WITNESS: Okay.

6 BY MR. RYAN:

7 Q You'd agree that in the overall context of your
8 report, part of your opinion was formed based on that
9 over a period of six months involving Andrea Constand
10 and others that testified at trial that defendant
11 engaged in a behavior of touching or rubbing against
12 non-consenting persons?

13 A Yes.

14 Q Okay. And that would be one of the diagnostic
15 criteria that we see on Page 193 here?

16 A That's correct.

17 MR. RYAN: Those are all the questions I
18 have.

19 FURTHER RECROSS-EXAMINATION

20 BY MR. GREEN:

21 Q Which part of that event qualifies as recurrent?

22 A Which --

23 Q Which part of what you just described qualifies as
24 recurrent required in the first sentence of
25 Subparagraph A, the diagnostic criteria that counsel

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just selected and read from?

MR. RYAN: I would object to that. I got a document he literally just handed me. I didn't selectively quote from anything. The document speaks for itself. So if we can leave that to the side --

THE COURT: So you're objecting to what he said --

MR. RYAN: To the form of the question.

THE COURT: -- which is a question which is not any evidence in the case. You don't like what he said. So maybe you can rephrase it so that we can all understand it.

MR. GREEN: All right.

THE COURT: Do you need more time to review the document?

MR. RYAN: No. As of right now, he's referring to one section only.

MR. GREEN: That's all I've been referring to.

BY MR. GREEN:

Q Do you see the beginning paragraph or the beginning line of the diagnostic criteria A in the DSM-5 for paraphilic disorder involving non-consenting?

A I see that.

1
2 Q Does it require in Paragraph A over a period of at
3 least six months, recurrent behavior that falls into
4 one of the four predicate disorders? Does the word
5 "recurrent" appear in the first --

6 A The word "recurrent" does appear, and Mr. Cosby's
7 behavior was recurrent over time, over the course of
8 many years.

9 MR. GREEN: Thank you.

10 THE COURT: Let me just ask one other
11 question. Again, when you do these reports and you
12 utilize the statutory definition of mental
13 abnormality --

14 THE WITNESS: Yes.

15 THE COURT: -- is there anything in the
16 actual statutory definition of a mental abnormality
17 that tells you to consult a DSM?

18 THE WITNESS: No.

19 THE COURT: Okay. And as to the
20 sexually violent predator definition, there it states
21 "due to a mental abnormality or personality disorder".
22 And again, you referenced yesterday to the personality
23 disorder?

24 THE WITNESS: I did.

25 THE COURT: Okay. So you are going

1 from -- the mental abnormality has a definition, but
2 you're utilizing the sexually violent predator -- due
3 to a mental abnormality, you're utilizing the
4 personality disorder section?
5

6 THE WITNESS: No, not in this case. So
7 a mental abnormality -- it's a mental abnormality such
8 as the paraphilia or a personality disorder such as
9 antisocial personality disorder.

10 THE COURT: Okay. So that's important.
11 So, again, you're utilizing a mental abnormality
12 paraphilia --

13 THE WITNESS: I am, yes.

14 THE COURT: -- in a definition of mental
15 abnormality that does not require a consultation or
16 usage of the DSM. I mean, I don't know what
17 professionally -- and I'm going to allow them both to
18 ask you questions. I'm just asking in this statute
19 does it say in order to do so --

20 THE WITNESS: The statute does not say
21 that the DSM needs to be utilized.

22 THE COURT: And that would be the only
23 reference in the definition sections as to definitions
24 of mental abnormality? Do you know of anything else in
25 Section 9799 that says look somewhere else for a

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definition of mental abnormality?

THE WITNESS: I could have also used the ICD-10, the International Classification diagnosis.

THE COURT: Did you?

THE WITNESS: I did not.

THE COURT: Okay. So you used DSM-5?

THE WITNESS: I used DSM.

THE COURT: All right. Now, that may open up for questions.

MR. RYAN: No.

MR. GREEN: No, thank you.

THE COURT: Thank you very much, ma'am. You may step down.

THE WITNESS: Thank you.

(Witness excused.)

- - -

MR. GREEN: I'd call Dr. Timothy Foley.

- - -

TIMOTHY P. FOLEY, PH.D., having been duly sworn, was examined and testified as follows:

EXAMINATION ON VOIR DIRE

BY MR. GREEN:

Q Please state your name and spell your last name.

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A Timothy P. Foley, F-O-L-E-Y.

Q What is your vocation?

A I'm a licensed psychologist.

Q What is your highest educational attainment?

A I have a Ph.D. in psychology.

Q How long have you been a Ph.D. in psychology?

A For approximately 30 years.

Q Do you have any state or governmental licensure in connection with your vocation?

A Yes. I'm licensed in Pennsylvania and New Jersey.

Q Do you have any experience in the practice of psychology and forensic psychology in the courts?

A Yes, I do.

Q How long have you been practicing forensic psychology in the courts in Pennsylvania and New Jersey?

A In Pennsylvania, since 1990 approximately. And in Jersey, since 2000, 2001.

Q Do you hold any positions with the federal courts in New Jersey and Pennsylvania regarding the assessments and treatment of sex offenders?

A Yes. I have a purchasing agreement with Federal Parole and Probation that I've had for many years.

Q What do you do in brief for the federal courts and

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probation departments in New Jersey and Pennsylvania?

A I primarily do risk assessments, psychological evaluations primarily for child pornography offenses.

Q Do you have any history of practice in the assessment and treatment of sex offenders?

A Yes.

Q And where did that begin? What has that entailed?

A Over approximately the last 25 years I've done evaluations in federal and state courts in New Jersey, Pennsylvania, Virginia, Delaware.

Q Do you have any experience with the legislation and litigation of sexually violent predator cases?

A Yes. I've done many cases in Pennsylvania and New Jersey.

Q Have you had occasion to participate in the legislative side on the development of SVP legislation by presentations to --

A Yes. I've testified in Harrisburg to the legislature in the late '90s; '97, '98.

Q Have you participated in international forums regarding these issues?

A Yes.

Q For instance, when most recently?

A I believe the last time was in Stockholm probably

1
2 about 13, 14 years ago.

3 (Curriculum Vitae of Timothy P. Foley,
4 Ph.D. marked Defendant's Exhibit D-SVP-3
5 for identification.)

6 MR. GREEN: May I approach the witness,
7 Your Honor?

8 THE COURT: Yes.

9 BY MR. GREEN:

10 Q Sir, I'm going to show you what's been marked
11 D-SVP-3. Is that a copy of your most recent Curriculum
12 Vitae?

13 A I believe so, yes.

14 MR. GREEN: Move the admission of D-3.

15 THE COURT: Any objection?

16 MR. RYAN: No.

17 THE COURT: It is admitted.

18 (Defendant's Exhibit D-SVP-3 received in
19 evidence.)

20 MR. GREEN: Your Honor, the defendant
21 offers Dr. Timothy Foley as an expert in forensic
22 psychology and specifically in the assessment of
23 persons charged with sex offenses.

24 MR. RYAN: I would object to that based
25 on the report. It's my understanding it is a risk

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2 assessment. So certainly if he's going to testify as
3 to risk assessments, even specifically with regard to
4 sex offenders --

5 THE COURT: What type of risk assessment
6 did he do?

7 MR. GREEN: What type of risk assessment
8 did he do in this case?

9 THE COURT: Yes.

10 MR. GREEN: I think the best answer to
11 that is I'll ask him, if you'd like.

12 THE COURT: Well, they're raising an
13 objection to his qualifications as an expert. And what
14 you're saying -- and I was just asking -- you said it's
15 based on his report. Now you're calling him as a
16 defense witness regarding an SVP, you know, opinion
17 held by a member of the board; correct?

18 MR. GREEN: I am not. I'm limiting what
19 I'm calling him for. I'm going to ask him -- the only
20 SVP questions I'll ask him have to do with the
21 authenticity of the exhibit I just used, and it's
22 limited to the definitions. I'm not asking him to
23 express SVP opinions.

24 THE COURT: All right.

25 MR. GREEN: Separately he'll address the

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2 sentencing issues. And what I'll do is when I'm
3 finished the questions on the first issue, I'll tell
4 you when I'm moving on to the second issue.

5 THE COURT: Do you have any objection to
6 him being called as a forensic psychologist and break
7 it down?

8 MR. RYAN: So that he can say what the
9 definition on Page 193 is?

10 THE COURT: I don't care what he's going
11 to say. Based on his qualifications, do you have any
12 objection to calling him as a forensic psychologist
13 based on his experience and his testimony in previous
14 cases?

15 MR. RYAN: No.

16 THE COURT: All right. So, so far we
17 have one down. What is the further -- the finding of
18 that that you want to utilize it for? So he's a -- I'm
19 going to admit him as an expert in forensic psychology
20 which is broad. Anything else?

21 MR. GREEN: I think that covers it.

22 THE COURT: All right.

23 DIRECT EXAMINATION

24 BY MR. GREEN:

25 Q Doctor, have you had occasion to review what's

1
2 been marked as D-SVP-2, an article reprint written by
3 Michael B. First, M.D., titled *DSM-5 and Paraphilic*
4 *Disorders* published in the Journal of the American
5 Academy of Psychiatry and Law, Volume 42, Pages 192 to
6 201, in 2014?

7 A Yes.

8 Q Based on your experience, your review of that
9 article and other information in the field, do you have
10 an opinion as to whether that's an authoritative work?

11 A Yes.

12 Q And what is your opinion in that regard?

13 A It is. It's been incorporated into the DSM-5.

14 MR. GREEN: Move the admission of
15 D-SVP-2.

16 THE COURT: Admitted.

17 (Defendant's Exhibit D-SVP-2 received in
18 evidence.)

19 BY MR. GREEN:

20 Q Doctor, at my request did you conduct an
21 assessment designed to study and express opinions on
22 the likelihood of recidivism expressed or presented by
23 Mr. Cosby?

24 A Yes.

25 Q How did you go about conducting that assessment?

1
2 A I reviewed the records listed on Page 1 and 2 of
3 my report, and I met with Mr. Cosby on July 18th for
4 approximately three hours.

5 MR. GREEN: Your Honor, I believe that
6 the report's been marked as D-SVP-1, and I'd move its
7 admission.

8 MR. RYAN: I don't have an objection
9 with it. I just want to make sure I understand in
10 terms of expert testimony, because there are questions
11 about opinions, if he's being offered for something in
12 addition to just general forensic psychology and the
13 definition of --

14 THE COURT: Forensic psychology is a
15 broad, broad category. I'll hear his testimony. He
16 examined the defendant about to be sentenced in a
17 criminal case. That's a very broad category, so I'll
18 hear him in regards to his evaluation.

19 MR. GREEN: I think I moved the
20 admission of D-SVP-1.

21 THE COURT: You did.

22 MR. GREEN: Is it admitted?

23 THE COURT: Yes.

24 MR. GREEN: I have a bench copy if you'd
25 like one.

(Defendant's Exhibit D-SVP-1 received in evidence.)

BY MR. GREEN:

Q Dr. Foley, are you familiar with the literature in the field on the likelihood of re-offending or recidivism?

A Yes.

Q And did you express your views in that regard on Page 4 of your report?

A I did.

Q Did notice any disabilities that Mr. Cosby presents?

A The records I have indicate blindness, and he demonstrated blindness during my meeting with him.

Q Did you notice anything about his age and his physical condition other than his blindness?

A He ambulates with a cane, needed assistance.

Q Did he seem to you in the interactions you had with him to be self-sufficient?

A No.

Q Did you draw any conclusions regarding the risk for sexual offense recidivism in the future? Yes or no?

A Yes.

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2 MR. GREEN: Your Honor, this portion is
3 offered for sentencing. May I proceed?

4 THE COURT: Yes.

5 BY MR. GREEN:

6 Q What opinions did you reach regarding his risk for
7 recidivism in the future?

8 A Extraordinarily low.

9 Q Can you explain to the judge why?

10 A Because he's 81 years old. He's been convicted of
11 a sex offense. Sex offense recidivism declines as a
12 function of aging. After 70, it becomes virtually
13 negligible. He has no known sexual misconduct for the
14 last 15 years. For all of those reasons, I found him
15 to be at extraordinarily low risk for sex offense
16 recidivism.

17 Q Did you identify in your report any particular
18 pieces of literature that you think are particularly
19 relevant in that regard?

20 A Yes, I quoted Barbaree and Blanchard.

21 Q What is Barbaree and Blanchard?

22 A Barbaree and Blanchard is a study that was done on
23 an analysis looking at aging and recidivism, and they
24 found extremely low rates. And I'm basically
25 paraphrasing Barbaree and Blanchard saying that over

70, sex offense recidivism becomes negligible.

Q Is Barbaree and Blanchard the work that's identified in Footnote 1 of your report at Page 4?

A Yes.

Q And is that published in 2009 in a text?

A Yes.

Q Is that text generally accepted in the field?

A Yes.

Q And is the Barbaree and Blanchard article generally accepted as authoritative, in fact the gold standard on age-related recidivism?

A Yes.

MR. GREEN: That's all I have, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. RYAN:

Q Good morning, Doctor.

A Good morning, sir.

Q So I have a few questions just so that I make sure I understand what it is that you did with regard to this report and your testimony is going to be.

Before we get there, have you ever testified as an expert for the government in any

1 capacity?

2 A Not in Pennsylvania. Not that I can recall, no.

3 Q Okay. And when I say "government", I mean someone
4 prosecuting a criminal offense.
5

6 A Correct.

7 Q Have you ever done an SVP assessment before?

8 A Yes.

9 Q Have you ever found that a person that you're
10 evaluating meets the statutory definition of an SVP?

11 A Yes.

12 Q And how many times have you done that?

13 A Approximately -- in Pennsylvania, approximately --
14 and New Jersey, approximately 50 percent of the
15 referrals that I get.

16 Q So 50 percent of the time you find someone to be
17 an SVP?

18 A So when a defense attorney retains me, I deliver a
19 contrary opinion. And I don't testify.

20 Q In terms of the records that you reviewed in order
21 to compile your report, you'd agree with me that you
22 list five different records that you reviewed?

23 A Yes.

24 Q And one of them was Dr. Dudley's SVP assessment?

25 A Correct.

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Q And you'd agree with me that Dr. Dudley listed, I think, over 340 different sources of information?

A It was an extremely long discovery list.

Q And prior to coming here to court and as you sit here today, you've never read a single page of the trial transcript in this case; is that correct?

A Correct.

Q And you've never read a single page of the defendant's deposition in this case?

A Correct.

Q You've never read a single page of Andrea Constand's deposition in this case?

A Correct.

Q Were you aware before you met with the defendant that he admitted in his deposition to obtaining seven prescriptions for Quaaludes?

A I believe so, yes.

Q And where did you learn that information?

A I'm not sure. It might have been from the press. I don't know.

Q Okay. Is there information that you learned from the press that you used in preparing your report?

A No.

Q Is there information that you learned from the

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press that you used in your interview of the defendant?

A No. Not that I can think of, no.

Q Okay. So fair to say you didn't use the information that the defendant obtained seven prescriptions for Quaaludes in any way in your interview with him or in your report?

A I don't believe so, no.

Q Were you aware that the defendant admitted in that same deposition with regard to Quaaludes that he obtained those prescriptions in order to give them to young women he wanted to have sex with?

A Could you repeat that? I'm sorry.

Q Sure. Are you aware that the defendant in his deposition admitted that he obtained seven prescriptions for Quaaludes in order to give them to young women he wanted to have sex with?

A I didn't read the deposition.

Q Can you answer my question?

MR. GREEN: He just did.

THE WITNESS: No.

MR. GREEN: Objection, Your Honor. He just did.

THE COURT: Well, he said he didn't read the deposition. That's an answer, probably the one

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you're looking for.

BY MR. RYAN:

Q If I can refer to your report starting on Page 2 under background information.

A Correct.

Q Are you with me?

A Yes.

Q You indicate in your report that the records you reviewed indicated that he, being the defendant, sexually assaulted an adult female acquaintance on separate occasions in 2004; is that right?

A Correct.

Q And you also indicated in your report that on each of these separate occasions when the defendant, according to the records you reviewed, sexually assaulted Andrea Constand, that the defendant provided medications to facilitate the sexual assaults?

A That was in the Affidavit of Probable Cause.

Q Okay. So it's your testimony that the information that is represented here came from the Affidavit of Probable Cause?

A Yes.

Q And so, going through your report and preparing your report, it was your understanding that there were

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multiple occasions of sexual assault in this case?

A Yes.

Q In meeting with the defendant, you'd agree with me that he was oriented to time and place?

A Yes.

Q That his speech was clear and comprehensible?

A Correct.

Q That there were no indications of deficits in his ability to attend verbal stimuli?

A Correct.

Q That his short- and long-term memory were intact?

A Yes.

Q That his verbal intelligence was above average?

A Correct.

Q That he had no problems sleeping or maintaining sleep?

A That was his report.

Q Okay. And you reported that there was no sign of a neurological disorder; correct?

A No gross symptoms. I'm not a neurologist.

Q Okay. And you did indicate that you reviewed records and it was your perception that the defendant was legally blind?

A Yes.

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Q You did not do any sort of independent medical examination in order to confirm that, did you?

A I'm not a physician.

Q Right. And so I just wanted to make sure I understand some of the opinions that you appear to offer with regard to likelihood of re-offending.

You've cited blindness. You have no independent -- you did no independent medical examination to confirm that fact?

A No. I relied on the records that I had.

Q And where did you get the records?

A Mr. Green.

Q The fact that the defendant needs to ambulate with a cane, as you said, you did no independent medical examination in order to confirm whether that was true or not?

A No.

Q And you testified earlier that the defendant was "not self-sufficient". That's not an opinion that you can hold to any reasonable degree of scientific certainty; is that true?

A I asked him his adjustments for daily living. He said he needed assistance. And I knew and I had corroboration that he was blind.

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2 Q Is it your testimony that you're offering an
3 expert opinion based on your expertise in forensic
4 psychology that the defendant is not self-sufficient?

5 A Yes, because of his blindness that I had
6 corroboration on. I didn't determine his blindness.
7 But he had difficulties finding his way outside of the
8 room. He had difficulties getting from the house that
9 we -- where I saw him which was like a house adjacent
10 to but not connected to his house. And I had to assist
11 him to get back to the door to get in.

12 Q And I understand those are the observations that
13 you're telling us here today.

14 A Yes.

15 Q My question is: In terms of your expertise as a
16 forensic psychologist, is it your opinion that you're
17 able to offer, expert opinion, about whether or not the
18 defendant is self-sufficient?

19 A You're correct, I have no expertise in that.

20 Q And you'd agree with me that separate and apart
21 from your expertise as a forensic psychologist, you do
22 have familiarity with various institutions where a
23 criminal defendant may be incarcerated?

24 A Yes.

25 Q And you're aware that there is specifically in

1
2 Pennsylvania a State Correctional Institution designed
3 to deal with older inmates?

4 A I'll take your word for it.

5 Q Okay. So you're not independently --

6 A I've never been to one.

7 Q Okay. And I'm not asking whether you've been to
8 one or not, but are you independently aware that --

9 THE COURT: Can you hold one second?

10 MR. RYAN: Sure.

11 (Pause.)

12 THE COURT: I apologize. Thank you very
13 much.

14 BY MR. RYAN:

15 Q My question was whether or not you're
16 independently aware that there's a place called SCI
17 Laurel Highlands that's specifically designed for older
18 inmates?

19 A I'm not.

20 Q Okay. I want to speak to you again about the risk
21 assessment that you conducted and just also risk
22 assessments in general.

23 A Okay.

24 Q You'd agree with me that case law such as Dengler
25 and the statute itself indicate that the factors

1
2 contained in the SVP statute are not to be used as a
3 risk assessment tool?

4 MR. GREEN: Objection to the legal
5 conclusions. I don't have any objection to it being
6 questioned about whether the defendant meets the SVP
7 criteria if he was offering that. He was not.

8 THE COURT: Well, he was offered to
9 defeat a component of Ms. Dudley's evaluation. So I'm
10 agreeing he's not opining, but you did call him
11 specifically to be the one that brought in what you're
12 saying you're using. You probably could have sought to
13 bring the actual DSM in.

14 MR. GREEN: I have the actual DSM, but
15 my point is that I made an effort to be precise and
16 direct in this. And what counsel is now doing is
17 opening the questioning that's the entire SVP
18 assessment.

19 THE COURT: Why don't you define for me
20 what I should be hearing from his limited testimony
21 regarding the SVP?

22 MR. GREEN: The proper diagnostic
23 criteria as set forth in the authoritative report.

24 THE COURT: Right. So he's saying the
25 proper diagnostic report wasn't used. Then he's now

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saying, Well -- and he's going --

MR. GREEN: No, he did not.

THE COURT: He did not?

MR. GREEN: He didn't say that the proper criteria wasn't used. If we want to get off into that tangent of whether Dr. Dudley properly supported an opinion, we can go there.

THE COURT: You said that. You brought him on to say here are the factors and, you know, obviously you're going to argue that they were not used. Your cross-examination -- he's now seeking to cross-examine this doctor who brought in a scholarly article. He didn't bring in just the DSM. He brought in a scholarly article that was admitted into evidence, and he stands for that scholarly article.

MR. GREEN: And that's fine so long as counsel recognizes that if he wants to go down this road, then the redirect is an entire SVP assessment based on the evidence that's in front of me. I haven't tried to do that.

THE COURT: All right. Let me hear it that way.

MR. GREEN: Okay.

THE COURT: If you're limiting simply

1
2 that he was a vehicle to bring in something that talked
3 about the actual underlying criteria, DSM-5, the
4 paraphilia --

5 MR. GREEN: Correct.

6 THE COURT: -- and that you felt the
7 need to use an expert for that, and he did it by also
8 bringing in a scholarly article -- I could have just
9 looked at the DSM, seen the same things that you're
10 pointing out, and I ignore the rest of the scholarly
11 article because the scholarly article is what brings
12 him into this sphere. The scholarly article is *DSM-5*
13 *and Paraphilic Disorders*. As long as you're saying
14 you're not utilizing him for SVP, then limit your
15 cross-examination.

16 MR. GREEN: I didn't say for SVP. I
17 said for an SVP assessment. His likely to reoffend
18 evidence is relevant to that and that's different than
19 that one.

20 THE COURT: As a piece of contrary, in
21 your opinion, to Dr. Dudley.

22 MR. GREEN: Yes, sir.

23 THE COURT: I think I understand. Limit
24 your cross-examination. You don't need to go into the
25 rest of the SVP.

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MR. RYAN: And I'm not.

THE COURT: Good. Then you have nothing to worry about.

MR. RYAN: What I am trying to make sure that we understand is risk assessment versus SVP.

THE COURT: That's important, if he knows.

MR. RYAN: Right.

BY MR. RYAN:

Q So, as I understand it, you did not conduct an SVP assessment in this case?

A Correct.

Q Your -- what I understand your letter to be is a risk assessment.

A Correct.

Q Okay. Now, you'd agree with me that with regard to Dengler and the SVP statute, that does, in fact, distinguish risk assessments and it says that those factors are not to be used as a risk assessment?

A The 14 factors are not to be used as a risk assessment.

Q Right. And like we just said, you didn't do an SVP assessment?

A Correct.

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2 Q Was the risk assessment you conducted specific to
3 the defendant's history of sex offending?

4 A Yes. That was the -- that was the indexed
5 offense. That was the reason that prompted the
6 assessment.

7 Q Okay. And what risk assessment tool did you use
8 in compiling this letter?

9 A There was none available that was appropriate.
10 Static-99 or other actuarial tools really don't fit
11 with an individual who's 81 years old. And the reason
12 for that is that the pool of individuals who recidivate
13 after the age of 70 is so low that you can't match it.
14 And that's the job of an actuarial tool.

15 So what I looked at basically was his
16 age. And that was the primary factor. And I know the
17 recidivism rate for individuals over the age of 70,
18 which is extraordinarily low, and I referenced that
19 through the Barbaree and Blanchard report.

20 Q And the information that you've just offered is
21 based on that report, that Barbaree --

22 A Barbaree and Blanchard, yes.

23 Q Okay. So you, as you indicated, did not use a
24 Static-99 or any other sort of actuarial --

25 A All of them would have been inappropriate.

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2 Q You did not use a structured clinical interview in
3 this case?

4 A No.

5 Q You'd agree with me that dating all the way back
6 to 1954 and Meal, that it's generally accepted that
7 clinical judgments on their own without some sort of
8 tool are insufficient to calculate risk?

9 A It's no better than chance, but what I'm doing is
10 matching Mr. Cosby with a group of individuals with a
11 known behavior; in other words, sex offenders over the
12 age of 70, by gauging their recidivism, not time of the
13 first offense.

14 Q Would you agree with me that the principle I just
15 stated is generally accepted in your field?

16 A The '54 Meal, yes.

17 Q You, in your report, cataloged the defendant's
18 sexual history?

19 A Yes.

20 Q And I believe it's on Page 3?

21 A Yes.

22 Q You indicated that there was "no report of"
23 paraphilic disorders such as voyeurism, bestiality,
24 frotteurism or fetishism; is that correct?

25 A Correct.

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Q And that was based on the defendant's self-report?

A Correct.

Q And you didn't review any materials with regard to either of the two trials that occurred in this case?

A Correct.

Q Or any investigative materials other than the Affidavit of Probable Cause?

A Correct.

Q The defendant, in your conversation with him, denied any unreported history of contact sex offenses?

A Correct.

Q What question did you ask him to elicit that information?

A Are there any unreported victims of sexual misconduct that you want to share with me?

Q Did you take that to mean that all of his victims have reported?

A I didn't assume that there were prior victims. Those are allegations. I assume and what I know is that he's been convicted of three counts of aggravated indecent assault involving AC.

Q And did you know that there were six other individuals that testified under oath that the defendant sexually assaulted them?

1 A I didn't have that information.

2 Q As you sit here today, do you have that
3 information?
4

5 A Well, you just told me.

6 Q Right. Take aside what I said. Do you know that
7 independently of me telling you right now?

8 A No.

9 Q Did you ask him any questions about the facts of
10 the offense for which he was convicted?

11 A He decided on the advice of his attorney not to
12 discuss that.

13 Q All right. And did you include that in your
14 report?

15 A I don't think so, no.

16 Q Who asked you to do the report?

17 A Mr. Green.

18 Q Did you ask him any questions surrounding other
19 women that might have accused him of sexual assault,
20 abuse or harassment?

21 A I didn't go into that, no.

22 Q Why?

23 A I asked him unreported victims and I left it at
24 that.

25 Q Why did you do that?

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A Because it's a standard question that I ask when I do an evaluation, Is there something I don't know about that you want to tell me?

Q And you base it strictly off of the signal answer that that individual gives and explore no further?

A I didn't go farther than his self-report when I don't have any other information to counter it.

Q You had the Affidavit of Probable Cause; right?

A I had the Affidavit of Probable Cause.

Q You know that that talks about other victims?

A I don't recall, to tell you the truth.

Q You had Dr. Dudley's report and assessment; right?

A Yes.

Q Do you remember mention of other victims in that?

A I didn't go into it with him during my evaluation of him.

Q And I understand that you didn't go into it. My question is not that. It's based on your earlier response which said that you didn't have the information.

So is your answer now that you didn't have the information or that you made a conscious decision not to go into it?

A I made a conscious decision not to go into it

1 because, on the advice of his attorney, he didn't want
2 to discuss it. It's under appeal, any other number of
3 legal reasons.
4

5 Q So I understand this correctly, his attorney
6 engaged you on his behalf to do a risk assessment;
7 correct?

8 A Correct.

9 Q And this risk assessment is intended to be used
10 for sentencing; correct?

11 A Correct.

12 Q And you were specifically instructed and made the
13 decision not to ask any questions about the underlying
14 offense; correct?

15 A Correct.

16 Q And you made the conscious decision under the
17 advice of Mr. Green not to ask any questions about any
18 other accusations?

19 A Correct.

20 Q And is it also true that with regard to this no
21 report of paraphilic disorder such as voyeurism,
22 bestiality, frotteurism, or fetishism, you took the
23 defendant's word at that; correct?

24 A I did. I had nothing else to counter it, no.

25 Q Because you didn't ask?

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2 A I didn't ask what?

3 Q You didn't explore further whether there were any
4 reports of these paraphilic disorders?

5 A I described them and asked him if he had ever
6 engaged in them. Some of them might be legal. Some of
7 them might be illegal. And he responded no.

8 Q And again, unreported history of contact sex
9 offenses, did you make a decision not to push him
10 further on that and accept his word?

11 A I made a decision not to press him further on it.

12 Q So he did not admit to you that he had given
13 Quaaludes to young women in order to have sex with
14 them?

15 A No.

16 Q You indicate, again in sexual history on Page 3,
17 that the defendant denied viewing internet pornography?

18 A Correct.

19 Q Did you ask him questions about other forms of
20 pornography?

21 A No, just internet pornography which is the most
22 common. If he had answered positively, then I would
23 have gone back and gotten the history of pornography,
24 but he told me that he had no affinity for pornography
25 at any point in his life.

1
2 Q And you took him at his word for that?

3 A Yes.

4 Q Okay. So, just so I understand, your statement in
5 here about internet pornography, it's your testimony
6 that the defendant told you he had no affinity
7 whatsoever for any form of pornography?

8 A I believe so, yes. But what's in my report is
9 specific to internet pornography.

10 Q With regard to drugs and alcohol, the defendant
11 denied any sort of compulsive use of alcohol or drugs?

12 A Correct.

13 Q Does he indicate to you that he does not use drugs
14 or alcohol in any form?

15 A He told me that he had never abused them.

16 Q Okay. And did you explore that any further?

17 A I left it at that.

18 Q Are you aware that the defendant has in the past
19 claimed that he does not drink or use drugs?

20 A I don't think I'm aware of that, no.

21 Q I believe it's under the summary section on
22 Page 4, that top paragraph. The last sentence, you
23 said: "There is no known record of community
24 supervision difficulties since his conviction in April
25 of 2018"?

1 A Correct.

2 Q Was that self-reported?

3 A Yes. I asked him if he had any problems, and I
4 was unaware of any.

5 Q So you're not aware that the police were called to
6 his house while he was confined to his home on house
7 arrest?

8 MR. GREEN: Objection.

9 THE COURT: Sustained.

10 BY MR. RYAN:

11 Q Did he tell you that information?

12 A No.

13 Q I believe you indicated that there was no known
14 offending in the last 15 years?

15 A Correct.

16 Q And that was what he reported to you?

17 A Yes, and from the records that -- I know that
18 there's no new charges. And since 2004 there's no new
19 charges or convictions.

20 Q And you know that from the records you reviewed or
21 from other information?

22 A Probably other information.

23 Q So that you chose to explore further?

24 A No, I didn't go into it with him.

1
2 Q But you knew that personally?

3 A Yes.

4 Q Before the interview or after?

5 A I'm not sure. I'm not sure. I can't tell you one
6 way or the other.

7 Q So the conclusion with regard to that information
8 that you put in your report, you're willing to rely on
9 his words and other information?

10 A I guess so, yes.

11 Q Including information that you didn't detail and
12 the sources of information in your report?

13 A Correct.

14 Q Did Mr. Green tell you to do that?

15 A No.

16 Q That was a conscious decision on your part?

17 A Yes.

18 Q Did you make the conscious decision to rely on
19 information outside of what you list as sources for any
20 other conclusions you reached in your report?

21 A Not that I know of. I mean, I was there to answer
22 the primary referral question which was his risk. So a
23 lot of those things, given that he was 81 years old and
24 without sight, didn't become that important to me.

25 Q His risk without regard to any other prior

1 allegations, even those offered by women other than --

2
3 A Given the fact that he's 81, blind, and has been
4 convicted and will be supervised, no.

5 Q And in the summary section, you quote from the
6 Barbaree and Blanchard text?

7 A Right.

8 Q Now, you'd agree with me that that study was based
9 on offenders when released from custody?

10 A Correct.

11 Q And offenders who have been released from custody
12 have undergone treatment; correct?

13 A Some have, some haven't.

14 Q You'd agree with me that most offenders released
15 from custody undergo treatment?

16 A I don't know. I can't say most.

17 Q Okay. Are you aware of what percentage of
18 offenders released from custody undergo treatment?

19 A I'm not.

20 Q In this study, did the population that was studied
21 of individuals released from custody include anyone
22 that was legally blind?

23 A Not that I know of.

24 Q Did it include anyone who had been alleged by
25 approximately 60 women that he sexually assaulted them?

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MR. GREEN: Objection.

THE COURT: Sustained.

THE WITNESS: Not that I know of.

BY MR. RYAN:

Q Did the population of the study include anyone who had a criminal trial where seven women testified under oath that they were sexually assaulted by the defendant?

MR. GREEN: Same objection, Your Honor.

THE COURT: Let's move on, Mr. Ryan.

You're asking leading questions which you're permitted to do so, but I'm not sure they're advancing the sexually violent predator --

MR. RYAN: That's not what he's testifying.

THE COURT: Excuse me, advancing testimony that is being offered.

BY MR. RYAN:

Q Did the population include anyone who was convicted of a drug-facilitated sexual assault?

A I assume that it did, but I don't know. I can't give you a percentage, no.

Q Did it or did it not?

A I assume it did.

1 Q Why do you make that assumption?

2 A Because out of a large group of sex offenders,
3 some of them are going to have drug-facilitated
4 offenses.
5

6 Q And your evaluations focus primarily on child
7 pornography offenses?

8 A No.

9 Q I thought I heard you say that during voir dire as
10 to expertise.

11 A Primarily for cases that are in federal court.

12 Q Okay. But you base the assumption based on your
13 understanding of statistics with regard to
14 drug-facilitated sexual assault --

15 A And --

16 Q Let me finish my question.

17 A I'm sorry.

18 Q You made that assumption based on statistics that
19 you understand with regard to drug-facilitated sexual
20 assault offenders that are old?

21 A And my experience of doing SVP evaluations for
22 more than 20 years.

23 Q Did the study consider the use of medications such
24 as Viagra?

25 A I doubt it, no.

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Q Now, the study itself discusses the age, function, and analogizes it to, as I see, three different things, including blood levels of testosterone?

A I'm sorry. Say again?

Q It analogizes age function to three different things, one of them being blood levels of testosterone?

A Right.

Q Okay. Did you test the defendant for that?

A No.

Q Did you test the defendant for what would be the sexual arousal of him personally?

A No.

Q What about with regard to him as a sex offender?

A No.

Q You'd agree with me that your report does not -- you were not tasked with giving any sort of an opinion with regard to a diagnosis of other specified paraphilic disorder, non-consenting women?

A Correct.

Q You'd agree with me that with regard to the DSM-IV-TR compared to the DSM-5, that the DSM-IV-TR had a diagnosis of paraphilia not otherwise specified?

A Yes.

Q And that that category was essentially broken

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apart in the DSM-5 to paraphilia, other specified disorder versus paraphilic -- I'm sorry, unspecified paraphilic disorder?

A And other specified. Those are the two.

Q You'd agree with me that's what occurred in the DSM-5?

A Yes.

MR. RYAN: Those are all the questions I have, Your Honor.

MR. GREEN: May I please follow up?

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. GREEN:

Q Doctor, I'll tell you that in the Presentence Investigation Report at Page 11 there is reference to a letter dated November 24th, 2015, from Robert Ritch, M.D., an ophthalmologist that summarized the defendant's blindness.

Is that a source of factual information on which you would rely in the practice of your profession?

A Yes.

Q I'll tell you also, Doctor, that in the Presentence Investigation Report at Page 12, the

1
2 Probation Department which has been monitoring his
3 house arrest since conviction writes that he "has been
4 compliant with his bail conditions" throughout that
5 period.

6 Is that a fact on which you would rely
7 in the practice of your profession?

8 A Yes.

9 MR. GREEN: That's all I have. Thank
10 you.

11 RECROSS-EXAMINATION

12 BY MR. RYAN:

13 Q Have you seen the PSI?

14 A No, I haven't.

15 THE COURT: Final recross examination.

16 MR. RYAN: That's all I have.

17 THE COURT: Let me get it out before you
18 ask a question. I missed your question.

19 MR. RYAN: I asked him if he ever saw
20 the PSI.

21 BY MR. RYAN:

22 Q Doctor?

23 A No.

24 THE COURT: Thank you very much, sir.
25 You may step down.

(Witness excused.)

- - -

MR. GREEN: That's the conclusion of the defendant's evidence for sentencing subject to discussion about allocution. I understood from the Court yesterday --

THE COURT: I need to hear your argument on SVP and then we'll get to what's next.

MR. GREEN: I understand.

THE COURT: I've got to make the SVP decision before we move on to anything else.

MR. GREEN: So that was going to be my question. Is that how you want to proceed?

THE COURT: Yes. I'm going to hear your arguments, review my notes, and make an SVP decision. And then we'll move to other stages of the sentencing.

MR. GREEN: The only part of that was to offer the Commonwealth an opportunity for rebuttal. I closed my case. Are we done? Shall we stand and argue?

THE COURT: Do you have any rebuttal?

MR. RYAN: No.

MR. GREEN: Judge, the section requires clear and convincing evidence that there is a

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2 qualifying condition that makes the defendant likely to
3 re-offend. And the likely to re-offend is a matter of
4 fact and of science.

5 And the fact set forth in the
6 Presentence Report and not contested by the
7 Commonwealth other than through cross-examination is
8 that the defendant is blind.

9 The fact set forth in the Presentence
10 Report and not contested by the Commonwealth is that
11 the defendant is 81 years old.

12 The fact set forth by Dr. Foley and not
13 seriously contested by anyone is that after 70, the
14 risk of recidivism is practically zero. As you get to
15 81, if it could be less than zero.

16 When you combine those facts, no
17 reasonable fact finder could conclude by clear and
18 convincing evidence that any identifiable condition
19 makes him likely to re-offend.

20 He is, according to the DSM-5, in full
21 remission. If you accept the diagnosis of paraphilic
22 disorders involving non-consenting victims, he's in
23 full remission. Not just five years of remission as
24 required by the diagnostic criteria, but approaching
25 15.

1
2 What I suggest is that you should not
3 accept the suggestion that Mr. Cosby suffers from or is
4 properly classified -- and that's, I think, the better
5 verb. He's not classified as exhibiting paraphilic
6 disorder involving a non-consenting victim because the
7 definition means something. In a court of law, the
8 rules matter. And the rules are set forth. And the
9 Commonwealth's witness, the Commonwealth's expert
10 concedes that he doesn't meet those criteria.

11 Now, I suppose that there could be a
12 case in which a person didn't have a diagnoseable
13 condition that would meet the condition prong of the
14 definition. I can't imagine what it is, but I don't
15 imagine that I have an infinite analogy. So I guess
16 it's possible.

17 But even in the cases where non-forensic
18 psychologists do SVP assessments, SOAB assessments in
19 the middle of the state where they don't have the
20 roster of experts that we have in this part of the
21 state, even there nobody purports to identify an SVP
22 without finding a diagnostic classification that fits.

23 Is it required by the statute? No,
24 there's no express requirement of the statute that it
25 be DSM-5 or DSM-IV-TR or some other criteria. But what

1
2 I ask you to notice is that Dr. Dudley tried to put it
3 in this box, and she did that because she knows she's
4 got to find a box. And it clearly doesn't fit. And if
5 the rule of law is what matters, that's the rule of law
6 we have to apply.

7 I'd be happy to address any questions
8 that anybody might have, but for those reasons it's the
9 defense contention that the evidence is insufficient
10 for any reasonable fact finder to find by clear and
11 convincing evidence the factors required.

12 THE COURT: Mr. Ryan.

13 MR. RYAN: Thank you, Your Honor.

14 I think it's important to -- and I'll
15 try to be brief in my remarks -- outline the
16 requirements under SVP which is, first and foremost,
17 that as it relates to 14 factors, it is not a balance.
18 It is the finding of factors by the Court that is
19 necessary. And the absence of factors is not a
20 conclusion that a defendant is not an SVP.

21 Because the defense, I would suggest, is
22 focused so much on the risk of re-offending, that's
23 what I'll focus my argument on, first bringing the
24 Court's attention to the fact that it is one of four
25 factors under mental abnormality which, as the Court

1 pointed out earlier, is not required by legal construct
2 to fit within the DSM.
3

4 Ultimately I do disagree with Mr. Green
5 in his suggestion that Dr. Dudley testified that it
6 didn't fit within the DSM. I would suggest that
7 ultimately that's exactly what she did do.

8 And in addition to that, there has been
9 no evidence proffered by the defense whatsoever to
10 rebut that claim. I would suggest the testimony with
11 regard to that that Dr. Dudley provided is more than
12 sufficient to overcome the clear and convincing
13 standard that we have.

14 Because at the end of the day, this risk
15 of re-offending, I would suggest, under the legal
16 construct that is the SVP is very specific and
17 technical. And the defense has focused their argument
18 primarily on whether or not the defendant in this
19 particular case has a risk of re-offending.

20 I would suggest to you that a close
21 reading of the statute tells you that your inquiry is
22 just a little bit different. Of course it requires an
23 analysis of the individual defendant. That's what the
24 assessment is about and that's how the conclusion in
25 overall context of SVP is reached.

1
2 But if the Court were to look at the
3 definition of mental abnormality under the legal
4 construct that we have with SVP, what that definition
5 talks about is a diagnoseable lifetime condition. Of
6 course, it doesn't require compliance with the DSM or
7 any other diagnostic tool. It requires an expert to
8 testify in the context of that statute there is a
9 lifetime condition that would make a person likely to
10 re-offend.

11 And so I would suggest that's where the
12 departure from the defense's focus on this individual
13 defendant really comes because you look at the overall
14 context, of course the 14 factors, mental abnormality
15 and predatory behavior.

16 But when you talk about that likelihood
17 of re-offending in the context of the statute, it is
18 not a specific inquiry as to this defendant, but rather
19 can he be diagnosed with a mental abnormality under the
20 statute that is a lifetime condition that would lead a
21 person to re-offend. That's what the statute requires.
22 Clearly that's what the evidence has suggested.

23 I would also say, in the alternative,
24 that there has been evidence beyond the clear and
25 convincing standard that would say and suggest this

1 individual who is not one that's been released from
2 custody, who is not one that has had any history of
3 treatment, is one who a defense expert has specifically
4 avoided talking about any sort of legitimate and true
5 sex offending history, and no other individual expert
6 or otherwise has had the opportunity to evaluate that
7 exact aspect of the defendant's history.

9 And I'm not saying that it is
10 necessarily improper under the law for him to assert
11 his right to silence, but I think it is something
12 that's important to consider, especially when you're
13 dealing with the technical legal definition in this
14 case of what exactly a mental abnormality is.

15 With regard to the specific factors that
16 Dr. Dudley relied upon, I think that there were
17 ultimately four that were very significant to her: The
18 nature of the sexual contact with the victim, the
19 relationship of the defendant to the victim, the mental
20 capacity in the moment of the sexual assault of the
21 victim, and ultimately the behavioral characteristics
22 that she utilized using the record in this case. Not
23 self-reporting, but the record in this case under the
24 statute as she's required to do.

25 Certainly she testified as to how the

1
2 defendant meets the classification as engaging in
3 predatory behavior. And ultimately, like I said, with
4 this mental abnormality, she's characterized it as
5 other specified personality disorder, non-consenting
6 women. And again, that's where I know the Court
7 inquired as to what weight, if any, other individuals
8 who testified at trial had. That's where those
9 individuals come in.

10 And I would suggest as a result of the
11 overall context of her report and her testimony, the
12 fact that it has not been attacked in any meaningful
13 way by the defendant certainly meets our burden under
14 the SVP statute.

15 MR. GREEN: May I respond?

16 THE COURT: Yes.

17 MR. GREEN: I want to respond to two
18 technical questions.

19 As far as I can tell from my notes,
20 that's the fourth time in the SVP discussion that
21 counsel has referred back to things that are not part
22 of this record; the prior history that Dr. Dudley
23 relied on and, more importantly, the defendant's
24 decision not to talk about other uncharged criminal
25 conduct.

1
2 It's one thing to say I'm not suggesting
3 that that's wrong. It's another thing to say you
4 should consider it, which is what he's now said three
5 different times. And that's just not right. In the
6 court of law that are rules, and there's a rule that
7 says you don't.

8 That's the one thing.

9 THE COURT: That's Mr. Ryan's argument.
10 The Court specifically instructed her to, when she was
11 on the stand, to not consider it and her testimony
12 should not consider it. So she either heard me or
13 didn't. And what Mr. Ryan says that she had to, I
14 didn't hear it and I've got to take the testimony that
15 she did not include it.

16 Again, I don't remember her testimony
17 anywhere around about the defendant not offering
18 himself for an assessment by the board.

19 Mr. Ryan is doing it in some oratorical
20 flare to say he didn't present it. I know the law
21 cannot take that into account. So I know the law here.
22 And the fact that Mr. Ryan has said it is just, again,
23 a statement of counsel.

24 MR. GREEN: Then I'll rely on you to
25 apply the law.

1
2 THE COURT: All right. The Court is
3 going to take a brief recess. I have to consider the
4 arguments and the evidence that was presented, and I
5 will issue my decision regarding the designation of SVP
6 status.

7 Now, I do remind the parties before
8 everybody runs out the door that, again, the conviction
9 in this case and the Court's ruling yesterday to not
10 declare the current statute unconstitutional
11 automatically designates him as a lifetime registrant
12 and all other applicabilities under the sexual offender
13 registration scheme that is currently in this
14 Commonwealth.

15 So, in that regard, I'd ask the parties
16 to, one way or the other, you know, have some kind of
17 colloquy, some kind of notice that would either be the
18 lifetime registration without the SVP component or a
19 lifetime registration with an SVP component.

20 If you have them, make sure you get them
21 together so that we can move right directly, whatever
22 the Court decides, to colloquy him and provide him the
23 appropriate notice because the Court does intend to
24 issue the sentence today.

25 Okay?

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MR. RYAN: Yes.

THE COURT: Thank you.

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(Recess.)

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(Proceedings were reconvened with the Court, Mr. Steele, Mr. Ryan, Ms. Feden, Ms. Piatkowski, Mr. Green, Ms. Redmond, Mr. Goldberger, and the defendant being present:)

THE COURT: All right. The Court has previously ruled on the constitutionality of the current form of Section I. That was law effective July 13th, 2018. I apologize, I'm losing my voice. Accordingly, this is a statutory law. Therefore, I will follow the statutes in issuing my order.

The burden that the Commonwealth must meet is a clear and convincing standard. A clear and convincing standard is one that specifically, when applied to assessments and designations under sexual offender laws, has been defined as evidence that's so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction without hesitancy of the truth of the precise facts at issue.

1
2 . Since it is a statutory vehicle, I will
3 go to the statute regarding the definitions that are to
4 be applied.

5 I find the definition of mental
6 abnormality as a congenital or acquired condition of a
7 person that affects an emotional or volitional capacity
8 of the person in a manner that predisposes that person
9 to the commission of criminal sexual acts to a degree
10 that makes a person a menace to the health and safety
11 of other persons.

12 Predatory is defined as an act directed
13 at a stranger or at a person with whom a relationship
14 has been initiated, established, maintained, or
15 promoted, in whole or in part, in order to facilitate
16 or support victimization.

17 A sexually violent offense is -- again,
18 I remind all that this is an offense that occurred
19 between April 22nd, 1996, but before December 30th,
20 2012, which are -- the Act covers that period of time.
21 He was convicted of a sexually violent offense from
22 January 2004.

23 Sexually violent predator is a person
24 who has been convicted of a sexually violent offense,
25 which this defendant was for an offense in 2004, who is

1
2 determined to be a sexually violent predator pursuant
3 to the statute relating to assessments due to a mental
4 abnormality or personality disorder that makes the
5 person likely to engage in predatory sexually violent
6 offenses or has ever been determined by a Court to have
7 such a mental abnormality or personality disorder.

8 So, based upon those statutory
9 definitions, the testimony of Dr. Dudley, the
10 cross-examination of Dr. Dudley, and consideration of
11 the arguments of counsel, I find the Commonwealth has
12 met a clear and convincing and, therefore, this
13 defendant is designated a sexually violent predator
14 under the Act based upon the date of the offense and
15 the Act in its current form.

16 All right. Now we're going to move on
17 with the remainder of sentencing. We had had closing
18 arguments, and at that stage I did say that if there
19 were any other comments regarding the closing arguments
20 or summation versus sentencing, that it should focus
21 itself on Dr. Foley and his report for that is why he
22 was presented by the defense.

23 So do you have anything further you wish
24 to say on that, Mr. Green?

25 MR. GREEN: I don't have anything that

1
2 is specific to Dr. Foley, but there are things that
3 were said by the Commonwealth in their argument to
4 which I would like to respond. And I understood that
5 this would be an opportunity to do that as well.

6 THE COURT: Yeah, I do want to give
7 everybody an opportunity to respond. Perhaps they will
8 accept an invitation.

9 Why don't we do this? I have not yet
10 offered the option that I offer in every case, and that
11 revolves around a defendant's allocution. So before
12 there are any final wrap-up summations, we need to get
13 to that.

14 So does your client intend to allocute
15 and, if he so chooses to do so, can he do it before
16 your closing summation or does he want the final word
17 before this Court imposes sentence?

18 MR. GREEN: I'll ask.

19 THE COURT: Okay.

20 (Discussion off the record between
21 Mr. Green and the defendant.)

22 MR. GREEN: No.

23 THE COURT: All right. Now, Mr. Cosby,
24 I am required, as I have throughout this case -- again,
25 I will treat you as under oath, as I have throughout

1 the case, only as to decisions being made and announced
2 by counsel in this case.

3
4 So that the record is clear, you have an
5 absolute right to allocute; that is, to have the final
6 word in this case. Any decision made in that regard,
7 of course, will be made with counsel as to your
8 decision of whether to allocute. If you do not
9 allocute, it cannot be held against you by this Court,
10 nor may any inferences be made by your failure to
11 allocute.

12 I assume you have reviewed all of that
13 with Mr. Green; is that correct?

14 THE DEFENDANT: Yes.

15 THE COURT: And has anybody forced you,
16 threatened you, or made any promises to you to get you
17 not to allocute or, again, waive allocution in this
18 case?

19 THE DEFENDANT: No.

20 THE COURT: And today are you under the
21 influence of any drugs, alcohol or emotional illness
22 that would prevent you from making such a decision?

23 THE DEFENDANT: No.

24 THE COURT: Do you have anything else
25 that you wish to review with Mr. Green in that -- to

1
2 make that decision? Is there anything you wish to
3 review? Is there any questions that he has not
4 answered for you that you need to talk to him about
5 before I conclude this colloquy?

6 THE DEFENDANT: I would like to talk to
7 him for a moment.

8 THE COURT: Okay. This is about the
9 decision whether to allocute.

10 THE DEFENDANT: I don't need any more
11 discussion on that.

12 THE COURT: Okay. Thank you very much.

13 THE DEFENDANT: Thank you.

14 THE COURT: Now we are at the place to
15 where, he having been designated both as lifetime
16 registrant under the current sexual offender
17 registration law in Pennsylvania and a concurrent
18 designation by this Court of a sexually violent
19 predator, I'm going to ask that the Commonwealth engage
20 in the colloquy as to the understanding of his rights.

21 Again, I am doing both because the Court
22 is cognizant that the status of Pennsylvania's sexual
23 offender registration acts in this Commonwealth are
24 tenuous in that there are many, many cases before our
25 appellate courts. Our legislature has labored over the

1
2 last year to pass statutes that will meet the purpose
3 of registering sex offenders and also being able to
4 know where those offenders are by the reporting
5 requirements of that Act.

6 So, with that said, Mr. Ryan, you will,
7 as an agent for the Commonwealth, give him his rights.
8 He can respond. He just has to be given his
9 requirements.

10 - - -

11 WILLIAM HENRY COSBY, JR., having been
12 previously duly sworn, was examined and
13 testified as follows:

14 BY MR. RYAN:

15 Q Mr. Cosby, my name is Stewart Ryan. Can you hear
16 the words that I'm saying to you right now?

17 A Could you speak up?

18 Q Sure. So my name is Stewart Ryan. I'm going to
19 ask you some questions. Okay?

20 A Is it all right?

21 THE COURT: Mr. Cosby, just so you know,
22 one way or the other -- I wish we had a written form,
23 but we don't.

24 MR. GREEN: The written form wouldn't
25 help him because he can't read.

1
2 THE COURT: Well, you would read to him
3 from the form and he would at that stage then say I
4 understand there and he could make his mark or sign.

5 THE DEFENDANT: All I was --

6 THE COURT: Mr. Cosby, I'd ask you not
7 to speak. I've done it with people that have sight
8 issues. I just say we don't have one. I've used them
9 before.

10 So, Mr. Cosby, this is the only way in
11 which we can give you the advice as to what your
12 requirements are. So if you can't hear Mr. Ryan,
13 please let us know.

14 THE DEFENDANT: I can hear him. He said
15 he had some questions.

16 THE COURT: Okay. Here he goes.

17 BY MR. RYAN:

18 Q Sir, if you can't hear anything I'm saying --

19 A I can hear you.

20 Q I understand that. If you can't at any point
21 during the course of my questions to you, please let me
22 know because it's important that you hear and
23 understand what I'm saying. Okay?

24 A Yes.

25 Q Sir, do you understand that you have been

1 convicted of a sexually violent offense listed under
2 Pennsylvania law at Title 42, Chapter 9799.55?

3
4 A Yes.

5 Q Do you also understand that after today's
6 proceedings, the judge has determined that you qualify
7 as a sexual violent predator under Pennsylvania law?

8 A Yes.

9 Q Do you understand that because you have been
10 convicted of a sexually violent offense, in this case
11 aggravated indecent assault, as well as a result of the
12 judge determining you are a sexually violent predator,
13 that you will be required to register with the
14 Pennsylvania State Police for the remainder of your
15 lifetime?

16 A Yes.

17 Q Do you understand that upon your release from
18 incarceration, upon parole from a state or county
19 correctional institution, or upon the beginning of a
20 sentence of intermediate punishment or probation, you
21 must provide the Pennsylvania State Police with the
22 following information:

23 Your current or intended residences.
24 All information concerning your current or intended
25 employment. All information concerning your current or

1
2 intended enrollment as a student or any other
3 information required by the statute?

4 Do you understand that?

5 A One question.

6 Q Sure.

7 A If I went from a city to another city, do I have
8 to -- even if it's just overnight, I have to get in
9 touch with the State Police?

10 Q I would advise, first and foremost, that you
11 discuss that with your counsel. I can tell you it's my
12 understanding that with regard to employment, if you
13 maintain a different employment for more than 14 days,
14 you must register that change with the Pennsylvania
15 State Police.

16 With regard to your residence, if you
17 maintain a residence for 30 days or more, you must
18 register that new residence with the State Police.
19 However, like I said at the beginning, I would suggest
20 that that specific question be posed to your counsel.

21 Okay?

22 A Thank you.

23 Q You're welcome. Do you understand that, unless
24 otherwise provided by law, if you fail to comply with
25 the registration requirements, you will not be released

1 should you be incarcerated from a state or county
2 correctional facility or released from a sentence of
3 probation or intermediate punishment?
4

5 Do you understand that?

6 A Yes.

7 Q Do you understand that if you change your
8 residence, establish an additional residence, or change
9 other information listed above that I described before,
10 that you must do the following:

11 Notify the Pennsylvania State Police of
12 the change of your residence or other information
13 required by law within three business days of the date
14 you change your residence or other information and
15 register with a new law enforcement agency no later
16 than three business days after establishing your
17 residence in whatever jurisdiction that may be.

18 Do you understand that?

19 A Yes.

20 Q Do you understand that if you fail to establish a
21 residence, you must inform the Pennsylvania State
22 Police of the following information:

23 The location of all temporary habitats
24 or other temporary dwellings, the places where you eat,
25 frequent or engage in leisure activities, and any

1
2 planned destination, including those located outside of
3 Pennsylvania, and the place where you receive mail,
4 including a post office box.

5 Do you understand that?

6 A No.

7 Q Okay. Again, I'll refer you to counsel, but for
8 my purposes, what this is telling you is that if you
9 become transient or homeless, you must register that
10 information with the Pennsylvania State Police.

11 Do you understand that?

12 A Yes.

13 Q Okay. Do you understand you must register with
14 the appropriate authorities in any state that requires
15 such registration if you are employed, carry on a
16 vocation, or are a student in that state?

17 Do you understand that?

18 A Yes.

19 Q Do you understand the period of registration shall
20 be tolled, meaning paused, if you are recommitted for a
21 parole or probation violation, or sentenced to any
22 additional prison term?

23 A Would you read that again?

24 Q Sure. Do you understand the period of
25 registration shall be tolled, or paused, if you are

1
2 recommitted for a parole or probation violation or
3 sentenced to an additional prison term?

4 MR. GREEN: That doesn't really apply to
5 him.

6 MR. RYAN: I would agree with you, but
7 it's required by the statute.

8 BY MR. RYAN:

9 Q Do you understand that, even though it may not
10 apply technically in this case, Mr. Cosby?

11 A Yes.

12 Q Do you understand that periodically an address
13 verification form will be sent to your registered
14 address and that you must report to any Pennsylvania
15 State Police station to complete the verification form
16 and to be photographed within 10 days of the
17 verification date given to you by the Pennsylvania
18 State Police?

19 Do you understand that?

20 A Yes.

21 Q Do you understand that, as you are required to
22 register with the Pennsylvania State Police for the
23 remainder of your lifetime, that if you fail to comply
24 with the lifetime registration requirement, you will be
25 committing a felony of the second degree or a felony of

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the first degree?

Do you understand that?

A Yes.

Q Do you understand that your name, address, the offense to which you have pled guilty, and other identifying factors and information will be provided to law enforcement agencies and made available to the public on an internet website?

Do you understand that?

A Could you read that again, please?

Q Sure. Do you understand that your name, address, the offense to which you have been convicted, and other identifying factors and information will be provided to law enforcement agencies and made available to the public on an internet website?

A Yes.

Q And I realize I may have said pled guilty earlier.

A You did.

Q So I appreciate you catching that.

A And I appreciate you correcting it.

Q No problem.

Do you understand that the victim shall be notified in accordance with the Crime Victims Act found at Chapter 18, Section 11.201 which is also

1 called the Crime Victims Bill of Rights?

2 Do you understand that?

3 A No, sir.

4 Q What that means --

5 A I'd just like to hear it again.

6 Q Sure. Do you understand that the victim shall be
7 notified in accordance with the Crime Victims Act which
8 is found in Title 18, Section 11.201, also known as the
9 Crime Victims Bill of Rights?
10

11 A When you say "crime victim" --

12 Q Yes.

13 A -- or "victims", what victims?

14 Q Statutorily, the victim in this case will be
15 notified of your registration under this law.

16 Do you understand that?

17 A I have to notify?

18 Q No. She will be notified by the individuals that
19 conduct the registration.

20 A Good.

21 Q Okay. Is that all set?

22 A Yes.

23 Q Good.

24 MR. RYAN: Your Honor, those are the
25 questions that I'm required to colloquy him on by

1 statute.

2
3 At this stage, it's my understanding
4 based on a conversation with Mr. Green yesterday that
5 pursuant to the same statute because, as we've
6 elaborated, this individual physically may not be able
7 to complete a form that I would ask the Court to
8 certify that this defendant has been advised of his
9 rights pursuant to the statute.

10 THE COURT: All right. The Court will
11 so certify.

12 MR. GREEN: I would not oppose.

13 THE COURT: He's been advised of his
14 rights.

15 All right. We've now given him the SVP
16 designation registration and reporting requirements.
17 He has waived his right to allocution after colloquy.
18 So, again, I would like to limit any closing arguments
19 to brief rebuttal or sur rebuttal or including in that
20 Dr. Foley and any of his testimony regarding rights
21 to -- likelihood to re-offend. But I did hear a long
22 closing argument from counsel yesterday.

23 Following that, then the Court would
24 retire to prepare its reasons for sentencing. And at
25 that time I would ask that there be a written colloquy,

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2 if you can do it this way, understanding -- meaning you
3 would take the colloquy which is in written form,
4 explain each question.

5 If he has an ability to make a mark or
6 sign his name where appropriate, you can assist him in
7 that. Or I will just do it orally as well. And if you
8 feel that you do not want to do it that way, I fully
9 understand and I will just give him his oral.

10 MR. GREEN: I have completed it and
11 initialed it for him in each of the places where his
12 initials might be required.

13 THE COURT: Thank you very much.

14 All right. Is there anything else that
15 anybody believes that we have missed here in terms of
16 his sentencing or the checklist?

17 (No response.)

18 THE COURT: All right. I will hear you,
19 Mr. Green, and/or Mr. Steele if there's any sur
20 rebuttal.

21 MR. GREEN: Judge, I'd like first to
22 respond to a legal contention and then briefly to
23 factual contentions.

24 The Commonwealth yesterday at some point
25 during their closing argument produced a memorandum

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2 regarding the application of the intermediate
3 punishment statute. I've had an opportunity to look at
4 that last night. I'd like to address that first.

5 The guidelines prepared by the Probation
6 Department incorporated into the PSI indicate that this
7 offense is eligible for intermediate punishment.
8 There's been no objection to that from the
9 Commonwealth. And there's a good reason why the PSI
10 indicates that. The current statute does not exclude
11 from the definition of eligible offenses any pre-2012
12 conviction.

13 THE COURT: Let me ask you in this
14 regard before you get started so you can address it.

15 The different iterations of the
16 Sentencing Guidelines which sets these forward clearly
17 indicate that the Level 5 offense for which he was
18 convicted, that between 1996 and 2004 -- these were
19 amended in June of 2005 -- there's just no county
20 punishment there.

21 The Probation Department did the correct
22 numeric guidelines because they haven't changed. The
23 guidelines in regards to Level 5 have changed. They
24 simply don't include a county intermediate punishment.

25 So you're saying you'll follow the

1
2 guidelines that were in place in 2004; however, I
3 should utilize the guidelines in place today because
4 I'm sentencing him today.

5 So there is a dichotomy as to am I using
6 the guidelines in place in 2004 or am I using the ones
7 in place today because the code clearly says for crimes
8 committed back between 1996 and 2005.

9 So as I put that out there, please
10 address it because I have gone over -- I went to the
11 Sentencing Commission website. I looked at every
12 iteration of the Sentencing Guidelines since their
13 implementation since 1992 and tracked the history, and
14 it just simply wasn't there. I intend to note this in
15 my sentencing remarks, but it may help you.

16 All right.

17 MR. GREEN: The general principle that
18 should be applied when construing sentencing statutes
19 and secondary guidelines is that changes that
20 disadvantage the defendant may not be applied because
21 that would constitute ex post facto application of a
22 punitive degree. But the provisions that expand
23 opportunities, availabilities, benefits to a defendant,
24 if intended to be prospectively applied, are available
25 for the benefit of the defendant.

1
2 And the best example of that is that
3 legislative determination to make county intermediate
4 punishment available. It was effective 60 days after
5 signing. And it was the legislative intention to make
6 intermediate punishment available to people who are
7 sentenced beginning 60 days after the statute was
8 effective.

9 THE COURT: And I don't have a problem
10 with it. I just bring that to your attention so
11 whatever argument that both sides may have in this
12 regard would be regarding any current statutory
13 exclusions for county intermediate punishment as
14 opposed to simply in 2004 it did not exist and it was
15 not included.

16 So why don't we move on and the
17 Commonwealth remark. They have filed, I believe, a
18 memo on this.

19 MR. GREEN: So, with regard to the
20 exclusion, what we're really focused on is the
21 definition of eligible offender. And the definition of
22 eligible offender excludes any conviction subject to
23 Subchapter H of Chapter 97. It's the sexual offense
24 sentencing provisions.

25 And by definition then, the only

1
2 eligible offender exclusions are offenses committed on
3 or after December 2012 because that's the only offenses
4 that are subject to Subchapter 8 by their terms.
5 Subchapters H and I are time-defined pursuant to the
6 amendments of this.

7 So Subchapter H counsel points to and
8 says this is an exclusion. Subchapter H doesn't apply
9 because this is an offense that doesn't meet the state
10 triggers for Subchapter H. So it's not excluded from
11 the definition.

12 The other issue that counsel raises in
13 the memorandum is this history of violence suggestion.
14 And this is a crystallized view of the application of
15 uncharged misconduct. As to which you instructed a
16 jury, you're not here to decide what happened, whether
17 this is proved or not. It's offered for some other
18 reason. That was what 404(b) was used for at trial.
19 And now it's being used as substantive evidence proved
20 to the satisfaction of someone under some legal rubric
21 that nobody has identified.

22 THE COURT: What application are you
23 talking about? To the guidelines?

24 MR. GREEN: When counsel says that
25 you're not eligible for intermediate punishment because

1
2 of this history of violence contention, they point to
3 the uncharged misconduct.

4 THE COURT: So when they say history of
5 violence, does the statute say that this conviction is
6 a history of violence?

7 MR. GREEN: The statute doesn't define.

8 THE COURT: So it is saying -- so I can
9 only tell you that you can save any more words. I have
10 no intention -- if I was to read the statute, I think I
11 could fairly read it to say this conviction, but I will
12 not read it as to any prior uncharged conduct or
13 applications of the Sentencing Guidelines which, as
14 you'll hear in my sentencing reasons, is a very strong
15 consideration for this Court in imposing sentence.

16 So I will not. But I'm not sure -- and
17 I want to hear the Commonwealth talk about presently
18 charged conduct as is clearly defined as a violent
19 offense. So the history of violence, agreed, but does
20 the offense charged and convicted, is that a violent
21 offense that would exclude him? And maybe people have
22 cases. I couldn't find any.

23 MR. GREEN: I don't think there's any
24 case that tells us whether the instant offense can be
25 the history of violence offenses. I would suggest not

1 because it's duplicative. And to interpret the statute
2 as duplicative, to interpret language as having no
3 effect is why the rules of the statute were
4 constructed.
5

6 THE COURT: I understand.

7 MR. GREEN: With regard to the facts,
8 those are the legal issues to which I wanted to apply
9 with regard to the facts.

10 Mr. Steele says life without delay, that
11 there's plenty of old blind guys in jail. There are.
12 They're lifers. They went there when they were young
13 men. Now they've gotten old and blind and soon they
14 will die. That's not the sentencing question presented
15 here.

16 Your Honor has much more sentencing
17 experience than I, but I don't remember anyone ever
18 sentencing a blind octogenarian who was a first
19 offender to state prison. Laurel Highlands is a nice
20 place if it's the kind of place you have to go, but
21 please recognize that to get to Laurel Highlands, one
22 would have to go spend some weeks at Montgomery County
23 Correctional Facility, some weeks or months at SCI
24 Phoenix, then some weeks or months at SCI Camp Hill for
25 designation before one would get to Laurel Highlands.

1 Four to six months in transit sounds generous to me.

2 Mr. Steele, for some reason, keeps
3 finding it important to say that the defendant hired a
4 band while he was on supervision.
5

6 THE COURT: I will not consider it, so
7 you may move on.

8 MR. GREEN: Thank you.

9 THE COURT: It was reported in a
10 newspaper. I will not consider it.

11 MR. GREEN: I'm asking you to --

12 THE COURT: If they want to put evidence
13 on, but, again, I heard you loud and clear regarding
14 court of public opinion, court of law. If they had
15 evidence, they would have put it on.

16 MR. GREEN: Finally, I want to finish
17 with this. Mr. Steele suggests that there's a lack of
18 remorse because the defendant went to trial in a case
19 that was a slam dunk. I think he said that three
20 times.

21 THE COURT: I'll stop you now.

22 MR. GREEN: Excuse me?

23 THE COURT: The fact that he has not
24 testified, the fact that he did not allocute will not
25 be considered by this Court. If the Commonwealth

1
2 believes they have case law that says that if I did
3 consider it and that's not reversible error, I want to
4 hear that, but I have reviewed this very carefully.

5 He stood on his right to remain silent.
6 That doesn't say that they're not allowed to use
7 evidence that came in at trial. And that would be the
8 deposition testimony. And that's the uniqueness of
9 this case.

10 But if you want to move on so that you
11 don't have to argue and wonder why I did it or not, I
12 have prepared for this extensively. And, again, if he
13 chooses not to allocute, there's a number of things
14 that I cannot do with my sentencing.

15 So the Commonwealth will have a right to
16 respond, but I'm just telling you right now I don't
17 intend to in any way hold that against him under
18 sentencing.

19 MR. GREEN: So let me then compress what
20 I was going to say about that to this. The first jury
21 didn't think it was a slam dunk. And only when the
22 number of 404(b) witnesses quintupled did the jury
23 reach a verdict. I think it's extraordinarily unfair
24 of the Commonwealth to make that contention here in
25 this courtroom. I'd ask Your Honor to apply the rule

1
2 of law.

3 THE COURT: All right. Response?

4 MR. STEELE: Your Honor, I guess I'll
5 start with the legal aspect and follow along those
6 lines.

7 In this case we prepared a Memorandum of
8 Law in regard to the defense's request for house
9 arrest. I think that's the thing that they're bringing
10 forward on this case.

11 I would suggest to the Court that based
12 upon the rules at the time of the offense where there's
13 no eligibility for house arrest based upon the fact
14 that it is one of the ineligible offenses, based
15 upon -- and I'd suggest to the Court that we looked at
16 a history of offenses.

17 And I think where defense counsel was
18 going on this, when you consider a violent offense, you
19 can consider the fact -- and there's no requirement
20 that that defendant be convicted of the offense. And
21 so when you're considering the history of violent
22 offenses and you look at the testimony from the prior
23 bad act witnesses, again, I would suggest under that
24 review of it, ineligible.

25 And then, lastly, we turn to the part

1 where he's asking for the benefit of changes in the
2 law. And I would suggest to the Court that even under
3 that, he is not because under that you look at lifetime
4 registration. And we've just gone through that and we
5 just colloquied him on it. He has lifetime
6 registration as a sexually violent predator as a
7 Megan's Law aspect of it and, therefore, ineligible for
8 house arrest.
9

10 And then I'll move to the factual
11 grounds on this that I suggest to the Court, based
12 upon, you know, Dr. Foley's testimony and the arguments
13 that defense is trying to make is that this should
14 somehow be available to him. I suggest to the Court
15 that they're asking for special treatment. They're
16 asking for a pass on this that should not be given.

17 And, you know, an ability to commit
18 further offenses in this line is not exclusive to his
19 sexual tendencies, but it goes beyond that and to the
20 power role that he had and exhibited over time and
21 directly in this case with Andrea Constand where -- to
22 say that that wouldn't be a possibility some time down
23 the line, I suggest, is just wrong.

24 And to say just because somebody is aged
25 and somebody has sight issues, that that somehow, you

1 know, takes him out of this, we forget or they would
2 ask you to forget the resources, the wealth, the homes,
3 the things that have been done. And to suggest that
4 somebody couldn't be drugged and somebody couldn't be
5 sexually assaulted in some fashion, whether that's
6 because of his sexual proclivities or because it's
7 power to him over these people.

8
9 So to put forth a risk assessment to
10 present to you in sentencing where there has been no
11 testing, no testing that was done, no assessment of
12 other factors, only things that would benefit the
13 defendant -- and I get it. I mean, they've hired him.
14 They're paying him. They only want certain things
15 considered. They don't want the big picture looked at
16 in this case. And, Your Honor, based upon those
17 reasons, this risk assessment by Dr. Foley, I think,
18 should be put to the side.

19 And defense counsel brings up Laurel
20 Highlands. Okay? There's a procedure, there's a
21 place, there is accommodations that are best. Not at a
22 county facility. At a state facility. And Your Honor,
23 we've requested and hope that you will consider that.

24 We've asked for an aggravated range
25 sentence on this. And I think that's supported by the

1
2 case law that we spoke about on why this should be an
3 aggravated range. We talked about the Smith case and
4 Miller case where an abuse of confidant is a proper
5 factor to be considered, a person in a position of
6 trust is a proper factor to be considered.

7 And there's a number of other cases that
8 go down and look at things to sentence somebody outside
9 of the aggravated range or in the aggravated range that
10 looks at the victim and what they suffer, looks at the
11 emotional scars, looks at the attempts to intimidate
12 the victim, looking at the defendant showing no remorse
13 for what he has done.

14 In the Fuetct case, the Court found in
15 that case above the aggravated range of the guidelines
16 where the defendant's indecent assault conviction was
17 proper, though the defendant in that case actually
18 expressed remorse, actually accepted responsibility,
19 actually had no prior record. The Court properly
20 considered the suffering endured by the victim in that
21 case to sentence the defendant in an aggravated range
22 or above the aggravated range.

23 So I'll sum up, Your Honor. There's
24 been a request, I think, by the defense based upon
25 infirmities in terms of age, that this should somehow

1
2 equate to mercy on this Court. And I would just ask
3 the Court to consider in this ask for a pass that he
4 was good at hiding this for a long time, good at
5 suppressing this for a long time.

6 And so it's taken a long time to get
7 there, but in the considerations that he asks for based
8 upon him, I would ask the Court to weigh the
9 considerations in what was done to Andrea Constand and
10 her family -- and I know Your Honor has the victim
11 impact statement that says it all -- and what he has
12 done to others.

13 And I suggest to the Court that, based
14 upon that, this should be a state prison sentence.
15 This should be a sentence that happens today because
16 he's earned it. Because he's earned it.

17 THE COURT: All right. Thank you all
18 very much. Is there anything else anybody can think of
19 regarding procedures? Again, when I return -- I will
20 issue the sentence of this Court at 1:30. That will
21 mean you already have the time built in that at 10
22 after 1:00, assume that Mr. Kehs is giving you the
23 10-minute warning. It won't be 1:30. I intend to come
24 in and issue the sentence of the Court at that time.

25 MR. STEELE: Can Mr. Green and I see you

1
2 about one thing?

3 THE COURT: Why?

4 MR. STEELE: I can't submit something to
5 Clerk of Courts until I get a judge's signature on it,
6 and I don't think I should take it to Miscellaneous
7 Court.

8 THE COURT: Is it on this case?

9 MR. STEELE: It is.

10 THE COURT: It can't wait?

11 MR. STEELE: It can, and I think that
12 was suggested earlier, but I also --

13 MR. RYAN: It's the costs.

14 THE COURT: Okay. It's the costs. Is
15 it something that needs to be done in open court?

16 MR. STEELE: No, it does not.

17 THE COURT: Stay here because what I'll
18 do is I'll give him all his post-sentence rights and
19 just come in and put a reason for sentence and impose
20 sentence. Does that work as well? Do you have his --

21 MR. GREEN: I've explained the
22 post-sentence rights. I've put it on the record. I've
23 already signed the form.

24 THE COURT: I'm a big believer in belts
25 and suspenders. Just hang in there. I will see the

1
2 two of you. So we will go for a little bit. We're
3 still going to issue the sentence at 1:30.

4 - - -

5 (Whereupon, a conference was held at
6 sidebar, not reported.)

7 - - -

8 THE COURT: All right. Mr. Cosby, in
9 regards -- I do intend to issue sentence; therefore,
10 you will have certain post-sentence rights.

11 Mr. Green has informed the Court that he
12 has taken time to orally go over the form that I am
13 looking at right now with you and that Mr. Green
14 initialed it indicating the understanding that he had
15 that you did understand the rights.

16 I will suffice it to say by the nature
17 of this case, its length for 34 months, that everything
18 that has been filed of record in this case -- that
19 means motions, that means Motions in Limine, Motions to
20 Suppress, any pretrial motions, any motions filed
21 during court, any objections made during trial -- they
22 are all preserved.

23 THE DEFENDANT: Say the last word again.

24 THE COURT: They are all preserved for
25 appellate review.

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THE DEFENDANT: Thank you.

THE COURT: Now, again, that is the overview. So you have two ways of addressing it to either this Court or the Superior Court of Pennsylvania, meaning you have an optional post-sentence motion to this Court. And it is not necessary to do so in order to be able to appeal to a higher court. However, you do have that right. It is within the Rules of Criminal Procedure.

If you do file it, it simply has to be in writing, it must be within 10 days of sentencing, and it has to state with some specificity and particularity of the relief requested. And again, it can be any kind of Motion for Judgment of Acquittal, Motion for Arrest of Judgment, a Motion for New Trial, Motion to Modify Sentence.

Those are the recognized post-sentence motions that you can address to this Court for the reasons that you would set forward. And, again, the relief requested may be based on issues which were preserved by motion or objection before trial, during trial, or at the Sentencing Hearing.

Again, it is not necessary to include all of the issues that you may want to appeal to a

1 higher court. You may put whatever motion -- whatever
2 issues you wish in a post-sentence motion if you choose
3 to file it. If you financially qualify, it can be
4 without the payment of costs. That does not appear
5 applicable.
6

7 And again, if you do file it, I must
8 render a decision within 120 days. I guarantee that I
9 would, if you did file it, render a decision within
10 that time period.

11 And then if the maximum sentence is two
12 years or longer, the filing of a post-sentence motion
13 will not ordinarily delay the commencement of the
14 sentence, again although the judge does have discretion
15 to allow bail pending any appeal to a higher court.

16 THE DEFENDANT: Would you run over that
17 last sentence?

18 THE COURT: If the maximum sentence,
19 which in this case it is -- again, the maximum sentence
20 in this case is two years or longer. Again, I'm not
21 issuing what it is, but potential is there for a
22 maximum sentence of two years or longer. The filing of
23 a post-sentence motion will ordinarily not delay the
24 commencement of sentence, although the judge does have
25 discretion to allow bail pending an appeal to a higher

1 court. It is fully discretionary within the Court.

2
3 Again, if the maximum sentence was less
4 than two years, you would have the same right to bail
5 as before sentencing pending the outcome of any
6 post-sentence motion or appeal to a higher court.

7 Now, if you elect not to file a
8 post-sentence motion, you may appeal directly to the
9 Superior Court of Pennsylvania and it would have to be
10 within 30 days of today's date.

11 Again, if no post-sentence motion was
12 filed, the Notice of Appeal again can contain whatever
13 you consider that was properly preserved by motion,
14 pleading, objection at trial. Essentially everything
15 that you raised and preserved on the record of this
16 case is available for review upon appeal. Again, if
17 you were to financially qualify, you may be able to
18 file it without paying the costs.

19 And again, I remind you issues that are
20 raised on appeal don't have to be raised in the
21 post-sentence motion. Any issue can be raised on
22 appeal which has been preserved by motion or objection
23 before trial, during trial, or at this Sentencing
24 Hearing.

25 Also, you may raise issues whether the

1 sentence constitutes an abuse of discretion, whether
2 the sentence is illegal, or whether the Court lacks any
3 jurisdiction in this case.
4

5 Again, the bail is -- if the maximum
6 sentence is two years or longer, the filing of an
7 appeal to the higher court will not ordinarily delay
8 the commencement of a sentence, although the Court does
9 have discretion to allow bail pending appeal to a
10 higher court.

11 If the maximum sentence imposed is less
12 than two years, the defendant will have the same right
13 to bail as before the verdict pending the outcome of
14 appeal to a higher court.

15 Do you feel you understand those as
16 explained by Mr. Green and now reiterated by me?

17 THE DEFENDANT: Clearly, sir.

18 THE COURT: Thank you very much. We
19 will return at 1:30 for the sentence of this Court.

20 - - -

21 (At 12:17 p.m., a recess was taken until
22 1:39 p.m. of the same day.)

23 - - -

24 (Proceedings were reconvened with the
25 Court, Mr. Steele, Mr. Ryan, Ms. Feden,

Ms. Piatkowski, Mr. Green, Ms. Redmond,
Mr. Goldberger, and the defendant being
present:)

THE COURT: We're about to proceed with
sentencing of the Court. Again, the Court reviewed at
the beginning of the sentencing exactly what it is
relying on. And again, I referenced the materials that
I had considered in preparation for this Sentencing
Hearing, and I incorporate them into the reasons for
sentencing.

Therefore, it would be all of the
contents of the Presentence Investigation. It would be
the guidelines that were attached and agreed to by the
parties.

It would be the victim impact
statements; that is, both testimonial of three of the
victim impact statements and the writings of Andrea
Constand.

It would be the defendant's Sentencing
Memorandum with the attached letters with the
additional letter that he entered during sentencing.

It would be the testimony and the
psychological examination report by Dr. Foley.

I would incorporate any witnesses that

1 testified on behalf of the defense and/or the
2 Commonwealth or any additional documents that may have
3 been admitted here at trial.
4

5 I heard the arguments of counsel. The
6 defendant has been given his post-sentence rights.

7 So I have to put certain reasons on for
8 sentencing, but it is important that we understand the
9 sentencing considerations that are imposed upon a
10 Court. And I start off with the most important
11 doctrine, that the imposition of a proper sentence is a
12 matter that is vested in the sound discretion of the
13 Trial Court. But I do feel I have a duty to the
14 public, to the defendant, to the Commonwealth to
15 explain the certain statutory considerations and
16 constraints that are imposed upon that discretion.

17 Section 9721 of our Sentencing Code is
18 instructive in determining the sentence to be imposed
19 by the Court. As aptly noted by counsel here, I have
20 to consider or select one or more of the following
21 alternatives to impose as a sentence.

22 I may consider an order of probation. I
23 have, and I will not sentence this defendant to an
24 order of probation as previously set before it. I can
25 make a determination of guilt without further penalty.

1 This case does not warrant such a penalty. Partial
2 confinement. I have read it and will issue the
3 statement -- the Court's reasons of why I am not
4 issuing a sentence of partial confinement. Total
5 confinement, which is what the Court will issue in this
6 case. I find, which the Court will issue in this case,
7 county intermediate punishment, which the Court for the
8 reasons to be set forth later in the reasons for
9 sentencing I do not find appropriate. And, finally,
10 state intermediate punishment for which this defendant
11 does not qualify.
12

13 The general standards that I must apply
14 in selecting from these alternatives is that any
15 sentence of total confinement has to be consistent with
16 the protection of the public.

17 I must take into account the gravity of
18 offense as it relates to the impact of the life of the
19 victim and the community, and the rehabilitative needs
20 of the defendant.

21 Most importantly, I am instructed that
22 the Court must consider any guidelines for sentencing
23 adopted by the Pennsylvania Commission for Sentencing
24 which is a wing of the legislature. So that is a
25 legislative pronouncement.

1
2 Again, I have concluded that probation,
3 partial confinement, county intermediate confinement
4 simply is not appropriate.

5 But in making any other determination as
6 the proper sentence, I must have the sufficient and
7 accurate information.

8 I must afford the defendant the
9 opportunity to make a statement on his own behalf which
10 he has waived. I cannot hold that against him under
11 the law.

12 The Commonwealth and the defense have
13 both had the opportunity to present argument and
14 information relative to sentencing.

15 I must consider the defendant's
16 individual characteristics and circumstances of the
17 particular offense and, as previously noted, I am
18 compelled to consider the guidelines.

19 When imposing a sentence, again the
20 Court must consider the protection of the public, the
21 gravity of the offense in relation to the impact upon
22 the victim, the community, and the rehabilitative needs
23 of the defendant. It must be within the statutory
24 limits, and I assure you that it will be.

25 Again, if I impose total confinement,

1
2 which I intend to do, it must be consistent with the
3 protection of the public, the gravity of the offense,
4 the rehabilitative needs, and all other considerations
5 for a Court in issuing a sentence.

6 At sentencing, the Court must seek to
7 vindicate society's interest in imposing appropriate
8 sanctions against those individuals determined to be
9 criminally culpable, but at the same time I must give
10 fair and full consideration to the particular
11 circumstances of the individual defendant and the
12 adherence to proper sentencing procedure that will
13 provide the greatest assurance that the interest of all
14 concerned will be protected.

15 Again, I have said I've considered the
16 defendant's background, his individual characteristics,
17 and the relative culpability of the prospects and will
18 comment on that.

19 Again, I would note this is a serious
20 crime, but it would be error for the Court to base its
21 sentence solely on the seriousness of the crime.

22 Again, the crime's victim and the impact
23 on a victim continues to be a significant element of a
24 sentencing judge's consideration, and I have given that
25 due consideration and weight as I will comment on.

1
2 So that's the background from which I
3 have to begin to proceed. The reasons for the Court's
4 sentencing are as follows.

5 Mr. Cosby, your guilt has been
6 determined by a jury. You were convicted of a very
7 serious crime, that you penetrated Andrea Constand's
8 genitals with your hand without her consent.

9 In exercising discretion, I must not
10 overlook these pertinent facts. I shall not disregard
11 the force of the evidence that the jury considered in
12 finding you guilty. You were convicted by a jury of
13 three counts of aggravated indecent assault.

14 Merger is a legal concept that is
15 applied at sentencing. The parties agreed here that
16 Counts 3 and 2 merge into Count 1. I am allowed to
17 consider the jury's verdict; however, I am not allowed
18 to sentence you on it. But the jury doesn't know about
19 merger. However, the facts considered by this jury led
20 them to be convinced beyond a reasonable doubt that an
21 aggravated indecent assault was really three different
22 types of crimes.

23 They found that you started the assault
24 by substantially impairing Andrea Constand's power to
25 appraise or control her conduct. You did so by

1 administering, employing without her knowledge a
2 certain drug for the purpose of preventing resistance
3 to the assault. That's the crime that they convicted
4 you of. It merges. I can't sentence you on it, but
5 the jury's verdict must be heard loud and clear.
6

7 That at the time of the assault, Andrea
8 Constand was unconscious or that you knew that she was
9 unaware that the penetration was occurring. Again,
10 that is 3125(a)(4).

11 And then what you will be sentenced on,
12 which is what all this culminated on, which is what
13 indecent sexual assault is about, that in the end and
14 what you'll be sentenced on is the penetration was done
15 without her consent.

16 That evidence is overwhelming that it
17 was planned predation, a planned assault, the giving of
18 the pills, the unconsciousness or the unawareness, the
19 lack of consent. Your own words in your deposition
20 testimony made it clear to the fact finder that in your
21 own mind you had no verbal consent. You heard no
22 verbal consent. You claimed her silence was consent.

23 That is not the law. The jury found
24 that she was silent because she was unaware or
25 unconscious because of the intoxicant you gave her.

1
2 Your version of consent was implicitly rejected by the
3 jury. That is what underscores just how serious this
4 crime is.

5 I agree with Mr. Green. This is a court
6 of law. And I intend to sentence you under the law.

7 First and foremost, I again am aware in
8 imposing this sentence I do have to consider the
9 protection of the public, the gravity of the offense
10 and its relation on the impact of the victim, and your
11 rehabilitative needs.

12 As I will state later, again the
13 rehabilitative needs I can glean from the PSI. I've
14 reviewed it. There does not appear to be
15 rehabilitative needs. You have neither sought them out
16 nor requested them, nor are you currently in any
17 treatment.

18 In fashioning a sentence, I will apply
19 the principle of equal justice under the law.
20 Sentencing Guidelines are the legislative pronouncement
21 of that principle. No one is above the law and no one
22 should be treated differently or disproportionately
23 because of where they live or who they are, in terms of
24 wealth, fame, celebrity, or even philanthropy.

25 Sentencing Guidelines were promulgated

1 so that the length of the sentence would be more
2 standardized across the state and between judges. That
3 was both to increase sentences that were too low and
4 reduce sentences that were too high. They were meant
5 to be a guiding force, one that is to be considered in
6 the discretionary aspects of sentencing by a judge.
7

8 This Court is not free to reject the
9 assessment of just punishment contained in the
10 Sentencing Guidelines and interpose its own sense of
11 just punishment, so I will embark on the Sentencing
12 Guidelines standards. They are set forth. They are
13 the law of this Commonwealth and this court of law
14 under which you are being sentenced.

15 I shall consider the Sentencing
16 Guidelines in determining the appropriate sentences for
17 offenders convicted of felonies. The guidelines apply
18 to all offenses committed while they were in effect.

19 Again, the guidelines that were in
20 effect in your case were those that were promulgated
21 originally in -- amended June 13th of 1997, and they
22 were in effect up until June 3rd of 2005. I will
23 utilize the guidelines in effect in 2004.

24 In every case in which the Court of
25 record imposes a sentence on a felony, I must make part

1 of the record and disclose in open court at the time of
2 the sentencing the statement of the reasons or the
3 reasons for the sentence imposed. I am doing so at
4 this time. That is a requirement of the guidelines.
5

6 I am instructed under the guidelines
7 after you are convicted, you are assigned an offense
8 gravity score. That's how it works.

9 The purpose of sentencing that is set
10 forth in the guidelines, which is the legislative
11 pronouncement of what this Court is to do, will provide
12 a benchmark for all judges of this Commonwealth. The
13 sentencing guidelines provide sanctions proportionate
14 to the severity of the crime. And this establishes a
15 sentencing system with a primary focus on retribution,
16 but one in which the recommendations allow for the
17 fulfillment of other sentencing purposes, including,
18 and I quote, "rehabilitation, deterrents and
19 incapacitation".

20 To facilitate consideration of
21 sentencing options consistent with the intent of the
22 Sentencing Guidelines, the Commission established five
23 levels of sentencing. It has been determined by the
24 Presentence Investigation that indecent assault, which
25 you were convicted of, is an offense gravity level of

10, a Level 5 offense.

Going further in the guidelines, Level 5 provides a sentencing recommendation, and I quote, "for the most violent offenders such that the conviction has an offense gravity score of nine or greater or at the standard range requires state incarceration".

Such a standard range, it goes on to say, that "the primary purpose of the sentencing options at this highest level are punishment commensurate with the seriousness of the criminal behavior and incapacitation to protect the public".

So under the guidelines, this Level 5 calls for the following:

Total confinement in a state facility. Again, it calls for total confinement in a state facility with participation in a state motivational boot camp. You are not eligible in that you are greater than 40 years of age.

State intermediate punishment pursuant to Code 303.12. You are simply not -- it is not applicable for you at this stage.

There is no substance use disorder defined.

Total confinement in a county facility.

1
2 Again, pursuant to 42 Purdon's 9762, the Court simply
3 finds that that is not applicable nor appropriate.

4 Partial confinement in a county facility
5 pursuant to 42 Purdon's 9762. Again, I find it not
6 appropriate nor applicable.

7 And then, finally, the arguments towards
8 county intermediate punishment put forth by Mr. Green.
9 Again, he took an approach as to a current analysis of
10 a recently-enacted Sexually Violent Predator Assessment
11 or the sexual offender code as to whether it would or
12 not. I am not sure I agree with him, but, in any
13 event, I do not find a sentence of county intermediate
14 punishment to be appropriate nor applicable to this
15 case.

16 Again, I have made it clear that this
17 Court does not consider that probation, partial
18 confinement, or county intermediate punishment is
19 appropriate.

20 So I have to consider all the statutory
21 considerations, but I intend to apply significant
22 weight to the Sentencing Guidelines because those are a
23 legislative pronouncement. They are a pronouncement of
24 our elected officials that are applied by this Court on
25 what are appropriate sentences for serious sexual

1 assaults that you are convicted of committing.

2 I do have other statutory
3 considerations. Again, I have reviewed them. I have
4 to follow the general principle that sentence imposed
5 should only call for confinement that is consistent
6 with protection of the public. And again, I harken
7 back to the deterrents set forth in the guidelines and
8 protection of the public as it would be the victims in
9 this case and in the future.

10 Again, I have weighed any risk of
11 re-offense. I have discounted them to a certain
12 degree. But this is a sentence that is consistent with
13 the protection of the overall public.

14 The gravity of the offense as it relates
15 to the impact of the life of the victim and on the
16 community. I will speak to that shortly.

17 And, again, the rehabilitative needs of
18 the defendant. I have again reviewed them from the
19 Presentence Investigation and everything contained in
20 there. And again, the defendant has neither requested
21 rehabilitative, nor do I see any indicated from the
22 record as it stands now.

23 Again, I am reminded by Section 9725 if
24 I'm going to impose a sentence of total confinement,
25

1 again with due regard to the nature and circumstances
2 of the crime, again a serious crime, the history,
3 character and condition of the defendant.
4

5 It would be the opinion of the Court
6 that total confinement of the defendant is necessary
7 because there's an undue risk that during the period of
8 probation or partial confinement which this Court has
9 already rejected because not appropriate under the
10 guidelines nor the seriousness of this crime of whether
11 the defendant will commit another crime.

12 I heard the testimony of Dr. Foley. I
13 recognize the defendant's age. I recognize the
14 defendant's blindness. However, again, that is not the
15 factor that I am putting the most weight on. The
16 defendant is in need of correctional treatment that can
17 be provided most effectively by his commitment to an
18 institution.

19 I find, based upon the seriousness of
20 the charge and the Sentencing Guidelines, that
21 correctional treatment can be provided effectively by
22 his commitment to an institution.

23 And the final is a lesser sentence would
24 depreciate the seriousness of the crime of this
25 defendant. I do put weight on it. It is not the sole

1
2 reason, but this is a serious sexual assault and I put
3 weight on the seriousness of the crime as it came to
4 light in the testimony of this case. So the Court
5 incorporates all of the evidence in this case, as I'm
6 required to do so, when I conclude that this was a
7 serious crime.

8 So, as I said, the nature and
9 circumstance of the defendant comes from the PSI. And
10 I don't have any evidence to base any finding about the
11 defendant's rehabilitative needs, no testimony except
12 for the evaluation regarding his risk factors which I
13 have taken into account. So, therefore, that must be
14 discounted in that there is just no obvious
15 rehabilitative needs.

16 The Court is aware in a state
17 confinement there is programming for those who are
18 designated to be sex offenders, and he will be required
19 to undertake that programming in a State Correctional
20 Institution.

21 I have looked at the history, the
22 character, the condition of the defendant in light of
23 the fact that equal justice under the law requires that
24 I'm not permitted to treat him any differently because
25 of who he is or who he was.

1
2 I'm reminded of Judge McEwen, Superior
3 Court, late. His words were quoted directly from
4 Commonwealth versus Lee. It references the Old
5 Testament. It tells us that fallen angels suffered
6 most from the torture of their fall from glory and
7 plummet from grace, beset with the constant and
8 unyielding knowledge of abandoned magnificence, and
9 consumed with the certainty that what was once can no
10 longer be. And, of course, the higher the ascent, the
11 sharper the fall. The more precious the gift, the more
12 shameful its loss. I recognize that impact upon you,
13 Mr. Cosby. And I am sorry for that.

14 So statutorily total confinement is
15 warranted. The nature and circumstance of this crime
16 and the history, character and condition of the
17 defendant, again, is in need of correctional treatment.
18 That is what is recommended by the guidelines. Any
19 lesser sentence would seriously depreciate the
20 seriousness of the crime. Those factors have been
21 considered.

22 When I consider the seriousness of the
23 crime, the impact on the victim, the likelihood to
24 re-offend, I do have to be cognizant of the 404(b)
25 testimony and to assure that I am not taking that into

1
2 account that any of those witnesses were victims
3 because the conduct was uncharged.

4 But I recognize, from the evidentiary
5 value that there was, the jury heard that evidence.
6 And now the Court, not as victim impact testimony as I
7 read that testimony once again, but to hear voices from
8 the past, your past, Mr. Cosby, saying this happened to
9 me at the defendant's hands six times over.

10 My ruling regarding the evidentiary
11 value of that was based on law, the Doctrine of
12 Implausibility, that those voices said over and over
13 and over again over time, making them plausible, that
14 it would not be a valuable evidentiary piece to be able
15 to use by the jury in determining your guilt.

16 I have reread the testimony, as the
17 Court is required to do, in fashioning this sentence.
18 I heard their voices loud and clear. I hear your
19 attorney's arguments that simply nothing has happened
20 in the last four years and you are old. Some might say
21 you were old back then at the time you committed the
22 assault on Ms. Constand, but some might also say that
23 it ended because a powerfully bright light was focused
24 on your behavior.

25 I have given great weight to the victim

1
2 impact testimony in this case, and it was nothing short
3 of powerful. Ms. Constand merely took the stand and
4 said You have read it, and I did, and now do justice.

5 Her victim impact testimony puts meaning
6 behind the true gravity of the offense of indecent
7 sexual assault as it does relate upon the impact of the
8 life of Andrea Constand and her community -- and by
9 that I mean her family -- as to the night of the
10 assault; the description of the paralysis, unable to
11 speak yet screaming in her own head, unable to move her
12 lips, no, no, no, because you were drugged. The
13 defendant never heard those words of anguish. He made
14 sure of that because of the administration of an
15 intoxicant. The jury heard those words. I have heard
16 those words.

17 Other passages from her victim impact
18 testimony have impact upon this Court, of the person
19 she was before, confident in the life ahead of her, the
20 nightmare of the assault, the traumatic aftermath, the
21 shame, the self-doubt, the confusion, the alienation
22 from family and friends, feeling alone, unable to
23 trust, pain, anguish, nightmares, consumption of guilt.

24 She came forward. No charges were
25 filed. A civil suit, depositions, the serious

1 re-traumatization of a victim in depositions. As she
2 said, Mr. Cosby, you took her beautiful, healthy, young
3 spirit and crushed it. I don't know whether the
4 defendant read your statement. I did. I heard the
5 very clear impact on your life.
6

7 I also heard from your family of the
8 victim traumatization because traumatization of this
9 sort is a family experience. And it is especially
10 devastating when such an extraordinary family like the
11 Constands were put through this devastating trauma. So
12 I put a high degree of weight on the impact of the
13 crime and the victim and her family.

14 So I have said the reasons why the Court
15 and the importance it is putting on the different
16 sentencing factors.

17 Thirty-four months. Thirty-four long
18 months since this Criminal Complaint was brought. It
19 is time for justice in a court of law. Mr. Cosby, this
20 is all circled back to you. The day has come, the time
21 has come.

22 SENTENCE OF THE COURT

23 THE COURT: Accordingly, you have been
24 given your post-sentence rights. There's nothing
25 further to come before this Court. It is the sentence

1 of this Court based upon the reasons set forth that you
2 be sentenced to not less than three years nor more than
3 10 years in such State Correctional Institution as
4 shall be designated by the Deputy Commissioner for
5 Programs, Department of Corrections, and sent to the
6 State Correctional Institution at Phoenix forthwith for
7 this purpose. You are not RRRRI eligible. You shall
8 pay the costs of prosecution and a fine of \$25,000
9 within the first 12 months.
10

11 Count 2 and Count 3 of the Bills merge
12 for the purpose of sentencing. You are to have no
13 contact with Andrea Constand or any family members.
14 And you shall be subject, if so appropriate, by the
15 Department of Corrections for sex offender programming.

16 All right. The sentence of the Court
17 has been imposed.

18 MR. GREEN: We'd move for bail pending
19 appeal.

20 THE COURT: All right. You have no
21 right to it. At this stage I'm not sure you have
22 reasons. Why would I give you bail pending appeal?

23 MR. GREEN: I do, Your Honor. There
24 are, as you know, substantial legal issues to be
25 asserted on. And there's one of which you are not

1 aware that I would like to bring to your attention.

2 I have a -- and this has been provided
3 to Mr. Steele last week. There was a news report that
4 the tape recording of Mr. Cosby made by Mrs. Constand
5 was inauthentic. And as a result of that news report,
6 we've had the tape recording assessed by an expert. A
7 preliminary expert review is available. I've provided
8 a copy to counsel. I've marked the copy as D-Bail-1
9 and move its admission and ask you to consider it.

10 MR. STEELE: But I ask that the Court
11 not consider it.

12 THE COURT: I'm not considering it.
13 This Court is going to lose all jurisdiction. I have
14 sentenced this defendant. So I'm not sure what you're
15 bringing up with this Court.

16 MR. STEELE: He's bringing up --

17 THE COURT: And why at this stage you're
18 bringing it when this defendant has been sentenced to
19 three to 10 years.

20 MR. GREEN: Because it's going to be the
21 subject of a Motion for a New Trial as well as, if that
22 motion is denied, part of his appeal.

23 MR. STEELE: It's PCRA.

24 THE COURT: Well, you'll file a motion,
25

1 won't you? You're going to file a motion, I am
2 assuming. And if you file a motion, then this Court
3 will consider bail pending appeal. Or a Superior Court
4 will.

5
6 Right now at this stage that I've
7 imposed sentence -- I don't understand just saying that
8 you're going to -- you read something in a newspaper
9 and that you're going to file some sort of a motion by
10 it. You'll file the motion, and then it will be
11 appropriate. So I can't take on newspaper accounts as
12 to what I do for bail.

13 MR. GREEN: I didn't ask you to take a
14 newspaper account, sir.

15 THE COURT: You said you read in the
16 newspaper.

17 MR. GREEN: No, I said I read it in the
18 newspaper and so we hired experts, and we had an expert
19 evaluate the original tape which we got from Mr.
20 Steele.

21 THE COURT: And you'll make that part of
22 the motion.

23 MR. STEELE: And the expert's about as
24 good as all the other experts they have gotten in the
25 case, so I don't know where we're going with this.

1
2 THE COURT: Let it be part of your
3 motion. I don't know why I didn't hear a Motion for
4 Extraordinary Relief. Nobody prevented you from doing
5 that today. I don't know why you waited until the end
6 to do it. I've sentenced this defendant.

7 MR. GREEN: Because it requires a
8 record --

9 THE COURT: It requires a record?

10 MR. GREEN: -- which would require a
11 postponement of sentence. And I pay attention to the
12 rules. That's why I didn't make it an oral motion.

13 THE COURT: I don't know if it required
14 a record or not or what the position is, but at this
15 stage, look, I've imposed sentence. So simply the fact
16 that you're going to file a post-sentence motion is not
17 one of the discretionary aspects for bail.

18 I mean, look, this case has been 34
19 months. This defendant, you know, again, I'm not
20 permitted to treat him any differently than anybody
21 else. He's been convicted of a very serious crime and
22 I've just sentenced him to three to 10 years in a state
23 correctional facility.

24 Now, so far that is not -- if that's
25 your reason, you know -- again, equal justice under the

1
2 law is a reason. I just have to -- at this stage do
3 you have any other reasons?

4 MR. GREEN: Only his constitutional
5 right to appeal and the issues of substantial legal
6 question that you've already reviewed over that, as you
7 said, 34 months.

8 THE COURT: Well, do you have cases that
9 say simply that somebody has a constitutional right to
10 appeal when it comes to discretionary bail?

11 MR. GREEN: I don't have to have a case
12 that says that there's an express right to a -- there's
13 an express constitutional right to appeal.

14 THE COURT: Yes, there is. I agree a
15 hundred percent. Does that come with a concurrent
16 right to bail?

17 MR. GREEN: No.

18 THE COURT: Okay. Well, then, again,
19 the fact that you have it, I know that you're going to
20 appeal. You've told us. And well you should. But
21 I've just not seen its connection to the discretion of
22 this Court on his right to bail. He has been sentenced
23 to a maximum sentence of 10 and a minimum sentence of
24 three years. I'm just not seeing it. I don't know --
25 do you have anything else?

1 MR. GREEN: No. Thank you.

2 THE COURT: All right. I have imposed
3 sentence. At this stage if you want to take it up with
4 another court, you can. That is just insufficient.

5 The Court's, again, reason for not
6 granting bail pending an appeal which I'm expecting is,
7 one, I haven't seen it, and two, that -- you know,
8 again in applying the guidelines in this case, this
9 case was called for a sentence of three years. Again,
10 that's a serious offense.

11 I have put the reasons for the sentence
12 on the record. Those reasons also support this Court's
13 discretionary aspects regarding bail, you know, that
14 whether because of his public persona, whether that
15 shines light on him such that he is not a risk to
16 re-offend, certainly the findings that I've made
17 indicating that he was a risk.

18 And at this stage I'm just not going to
19 treat him differently than anybody else that comes
20 through this courtroom. I don't know why I would.
21 There are people that are in jails now who believe that
22 they also have rights to appeal, but this is a
23 statutory pronouncement that, again, the discretionary
24 right just hasn't been proven to this Court.
25

1
2 If you wish to try to bring it back
3 before this Court as an application before you file a
4 motion, you can do so.

5 MR. GREEN: Would the Court rely on the
6 statements made here on the record as its reasons for
7 denying bail?

8 THE COURT: Would I rely on it?

9 MR. GREEN: Yes. I have to ask for a
10 statement of reasons, and I'll ask the court reporter
11 to prepare it. I'm trying to give you the courtesy of
12 asking you if you'd like to say anything else.

13 THE COURT: Here's what I will do. I am
14 going to retire and I'm going to look up and I will
15 come up with exactly what my reasons for denying bail
16 at this stage are. And I'll hear both sides on it
17 because this is an application to the Court. This is
18 an application to the Court under the rules, and you
19 may apply to the discretionary aspects of the Court.

20 So, again, if you're going to rely upon
21 what you said, I will take that as your application.
22 I'll give Mr. Steele an opportunity then to respond,
23 unless you have something else.

24 MR. GREEN: No. I'm just trying to be
25 courteous.

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THE COURT: Huh?

MR. GREEN: I'm just trying to be courteous and professional about this.

THE COURT: You have been nothing but courteous and professional.

MR. GREEN: I wasn't able to tell that that was your view.

THE COURT: I am simply at this stage -- you know, you brought a motion and I have to decide it. And it's a Motion for Bail Pending Appeal; correct? And your reasons are, so that Mr. Steele can respond, that you have filed an expert report with the District Attorney saying that there's something wrong with the tape and that you do intend to make it part of a post-sentence motion. That's your reason.

MR. GREEN: No, sir.

THE COURT: And you intend to file an appeal.

MR. GREEN: That's one of the reasons about which you hadn't heard before today. The other reasons you all heard about before today. They are the issues being tendered on appeal. Like, for instance, the 404(b) rule. Regardless of its rightness or un-rightness, it's certainly worthy of review.

1 THE COURT: Help me understand that.

2 MR. GREEN: All of those reasons are
3 going to be raised on appeal.

4 THE COURT: Agreed. So I understand it,
5 but is there any one particular in that -- this comes
6 up in every case where somebody is sentenced to more
7 than two years, to a maximum, you know, two years. The
8 fact that you say we're going to appeal, I understand
9 that. And I welcome it. And you should. You should.

10 But I'm just not sure where -- if that
11 is a fact, I just need a case that says the fact that
12 you're going to file an appeal somehow obviates this
13 Court's or somehow mitigates or somehow vacates this
14 Court's discretion regarding bail pending appeal.

15 MR. GREEN: The fact that there are
16 meritorious issues should affect your exercise of
17 discretion. That's all I was saying.

18 MR. STEELE: I would submit that that is
19 not a factor and there is not support for that in the
20 law.

21 Number two, in terms of this new Hail
22 Mary, to talk about a tape that is -- and I don't know
23 the exact term that he used there -- on a collateral
24 matter in this is not new to this case. And, you know,
25

1
2 it was something that, if you look at the deposition,
3 was recognized by Mr. O'Connor during the deposition as
4 not being a full transcript of the recording because it
5 was turned on after the recording started.

6 And for this to now have gone through
7 that proceeding, the first trial and the second trial,
8 and then all of a sudden this is some issue, well, then
9 that's going to be an ineffective claim on those
10 attorneys. And if they're willing to waive all their
11 appeals and go to a PCRA, well, that's the time period
12 that this would come up.

13 So for this to be inserted right now, I
14 suggest, is more of just the nonsense and show that
15 we've had to deal with for too long. And I'd submit to
16 the Court that this and this issue on bail, they're
17 asking you to treat him differently than others in this
18 circumstance. And that's not appropriate. And I think
19 the Court recognizes this.

20 And I ask: What state prisoner or
21 proven sexually violent predator gets bail? The
22 defendant has gone through a process of due process.
23 And if you look at the process here, he was allowed out
24 on bail, \$100,000. Okay. It's 10 percent of a
25 million. Then after his conviction, he was put on

1 house arrest.

2
3 And now we've gone through a sentencing.
4 He's been sentenced to state prison. He has been
5 proven to be a sexually violent predator. And if you
6 look as this process goes through, your individual
7 rights to remain free on bail diminish as the right to
8 incarceration comes up. And as the Court noted when
9 you were going through this, primary purpose of Level 5
10 offenders, a primary purpose is an incapacitation to
11 protect the public.

12 And I would suggest to the Court that no
13 amount of bail -- I mean, this is -- he should just be
14 remanded. No amount of bail to a man that's
15 purportedly worth \$400 million supports that he will be
16 here to serve a sentence and/or to do this.

17 So no amount of bail can assure a
18 sentence or protect the public. Again, I'd submit that
19 this is asking for special treatment for him in a
20 circumstance that I believe they're asking for him to
21 be able to stay home and enjoy the comforts of his home
22 and enjoy that wealth.

23 And that's just not the place where, you
24 know, somebody who's been convicted of a state sentence
25 and -- or sentenced to a state sentence as well as

1 found to be a sexually violent predator works in
2 materials of protection of the public.

3
4 I have a Memorandum of Law that we
5 prepared in anticipation of this that I'll give to the
6 Court.

7 THE COURT: You have a memorandum?

8 MR. STEELE: I do.

9 THE COURT: Well, I have to review it.
10 The Court will recess for ten minutes to review the
11 arguments of counsel, the Rules of Criminal Procedure
12 and the memorandum of the Commonwealth.

13 - - -

14 (Recess.)

15 - - -

16 (Proceedings were reconvened with the
17 Court, Mr. Steele, Mr. Ryan, Ms. Feden,
18 Ms. Piatkowski, Mr. Green, Ms. Redmond,
19 Mr. Goldberger, and the defendant being
20 present:)

21 - - -

22 THE COURT: All right. The Court has to
23 make the decision based upon, again, the Court revoked
24 the defendant's bail. And cognizant to Rule 521(b)(3),
25 when the defendant is released on bail -- when a

1 sentence imposed includes imprisonment of more than two
2 years, the defendant shall not have the same right to
3 bail as before verdict. Bail may only be allowed in
4 the discretion of the judge. So there is no automatic
5 requirement under the law.
6

7 Now, in this case I've heard the
8 arguments of counsel forwarded by the defense. The
9 argument was he has legitimate issues on appeal and he
10 has a matter that he is going to incorporate in a
11 post-sentence motion that he will bring before this
12 Court.

13 I am incorporating all of the record of
14 the sentencing. In that record of the sentencing,
15 again, my reasons for the sentence is the reasons that
16 I am relying on in denying this defendant bail. This
17 is a serious crime for which he was convicted. This is
18 a sexual assault crime.

19 I know the testimony dealt with whether
20 he would be likely to recidivate or could be a danger
21 to the community. The nature of the crime and what
22 this Court has before me indicates that he could quite
23 possibly be a danger to the community.

24 I recognize that we're relying upon his
25 age and I incorporated that into my sentence as well as

1
2 his blindness, but, again, I harken back to all the
3 reasons that I made for his sentence and incorporate
4 them as to the reasons as to why he would be denied
5 bail pending appeal.

6 I will revisit that if you file a
7 post-sentence motion with this Court because you may
8 have different reasons. And you would then be able to
9 incorporate what you just brought to this Court's
10 attention as a basis for this sentence.

11 So the Court has heard your arguments of
12 counsel and, again, the defendant is remanded to comply
13 with the order of this Court.

14 MR. GREEN: Your Honor, one other
15 matter, minor matter, on the record. I've been asked
16 to hand in my copy of the PSI.

17 THE COURT: I'm going to order that both
18 parties keep their PSI. There's going to be an appeal.
19 You're not to release it to the public, but both
20 parties can keep it. I do routinely when there's an
21 appeal.

22 MR. GREEN: Thank you.

23 MR. STEELE: Thank you.

24 (At 2:42 p.m., proceedings were
25 concluded.)

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C E R T I F I C A T E

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that this is a correct transcript of the same.

VIRGINIA M. WOMELSDORF, RPR
Official Court Reporter

- - -

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118/6 trust [2] 93/6 118/23 truth [2] 43/12 65/25 Tuesday [1] 1/13 turned [1] 129/5 two-thirds [1] 9/4 type [2] 20/5 20/7 types [1] 106/22</p> <p>U</p> <p>ultimately [5] 59/4 59/7 61/17 61/21 62/3</p> |
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| <p>V</p> <p>vacates [1] 128/14 valuable [1] 117/14 value [2] 117/5 117/11 various [1] 33/22 VDire [2] 3/4 3/7 vehicle [2] 37/2 66/2 verb [1] 57/5 verbal [4] 31/10 31/14 107/21 107/22 verdict [5] 89/23 100/13 106/17 107/6 132/4 verification [3] 77/13 77/15 77/17 version [1] 108/2 versus [4] 38/6 53/3 67/20 116/4 vested [1] 102/12 Viagra [1] 51/24 victim [29] 10/15 57/6 61/18 61/19 61/21 78/23 79/7 79/11 79/14 93/10 93/12 93/20 94/10 101/16 101/18 103/19 104/22 105/22 105/23 108/10 113/16 116/23 117/6 117/25 118/5 118/17 119/2 119/8 119/13 victimization [1] 66/16 victims [19] 7/15 10/4 10/6 11/5 41/15 41/17 41/19 42/23 43/11 43/15 56/22 78/24 79/2 79/8 79/10 79/13 79/13 113/9 117/2 view [2] 85/14 127/8 viewing [1] 45/17 views [1] 24/9 vindicate [1] 105/7 violation [2] 76/21 77/2 violence [6] 85/13 86/2 86/5 86/6 86/19 86/25 violent [28] 4/15 4/17 14/20 15/3 18/13</p> | <p>W</p> <p>wait [1] 95/10 waited [1] 123/5 waive [2] 69/17 129/10 waived [2] 80/17 104/10 warning [1] 94/23 warrant [1] 103/2 warranted [1] 116/15 wealth [3] 92/3 108/24 130/22 website [3] 78/9 78/16 83/11 week [1] 121/4 weeks [3] 87/22 87/23 87/24 weigh [1] 94/8 weighed [1] 113/11 weight [8] 62/7 105/25 112/22 114/15 114/25 115/3 117/25 119/12 weighty [1] 65/23 welcome [2] 74/23 128/10 whatsoever [2] 46/7 59/9 Whereupon [1] 96/5 while [3] 47/7 88/5 109/18 whole [1] 66/15 whom [1] 66/13 WILLIAM [2] 1/8 71/11 willing [2] 48/8 129/10 wing [1] 103/24 wish [6] 67/23 69/25 70/2 71/22 98/3 126/2 Womelsdorf [2] 1/15 134/10 women [9] 29/12 29/17 42/19 45/13 49/2 49/25 50/7 52/19 62/6 won't [2] 94/23 122/2 wonder [1] 89/11 works [2] 110/8 131/2 worry [1] 38/4 worth [1] 130/15 worthy [1] 127/25 wrap [1] 68/12 wrap-up [1] 68/12 writes [1] 54/3 writing [1] 97/12 writings [1] 101/18 written [5] 22/2 71/22 71/24 80/25 81/3 wrong [3] 63/3 91/23 127/14</p> |
| | <p>Y</p> <p>yesterday [8] 5/5 7/22 14/22 55/7 64/9 80/4 80/22 81/24 young [5] 29/12 29/17 45/13 87/12 119/3</p> |
| | <p>Z</p> <p>zero [2] 56/14 56/15</p> |

EXHIBIT 2

IN THE COURT OF COMMON PLEAS
IN AND FOR THE COUNTY OF MONTGOMERY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA:

vs.

NO. MD-3156-15

WILLIAM H. COSBY, JR.

PETITION FOR WRIT OF HABEAS CORPUS/MOTION TO
DISQUALIFY MONTGOMERY COUNTY DISTRICT ATTORNEY'S
OFFICE

Courtroom A
Tuesday, February 2, 2016
Commencing at 9:45 a.m.

Virginia M. Womelsdorf, RPR
Official Court Reporter
Montgomery County Courthouse
Norristown, Pennsylvania

BEFORE: THE HONORABLE STEVEN T. O'NEILL, JUDGE

COUNSEL APPEARED AS FOLLOWS:

KEVIN R. STEELE, ESQUIRE
District Attorney
M. STEWART RYAN, ESQUIRE
KRISTEN M. GIBBONS-FEDEN, ESQUIRE
Assistant District Attorneys
for the Commonwealth

BRIAN J. MCMONAGLE, ESQUIRE
CHRISTOPHER TAYBACK, ESQUIRE
MONIQUE PRESSLEY, ESQUIRE
JOSEPH SARLES, ESQUIRE
for the Defendant

I N D E XDEFENDANT'S EVIDENCE

| <u>Witness</u> | <u>VDire</u> | <u>Direct</u> | <u>Cross</u> | <u>Redir</u> | <u>Recr</u> |
|----------------------|--------------|---------------|--------------|--------------|-------------|
| BRUCE L. CASTOR, JR. | | 12 | 111 | 239 | |

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E X H I B I T SCOMMONWEALTH'S

| <u>Number</u> | <u>Description</u> | <u>Marked</u> | <u>Rec'd</u> |
|---------------|--|---------------|--------------|
| C-1 | ABC News "New Developments in Cosby Fondling Investigation" | 130 | |
| C-2 | Pottstown Mercury article "Cosby meets with authorities over sex assault allegations" | 138 | |
| C-3 | Bloomberg.com article dated November 26th, 2014 "Why Did Bruce Castor Pass on a Chance to Lock Up Bill Cosby?" | 147 | |
| C-4 | Southeast Missourian article dated January 27, 2005 "Prosecutor calls case against Bill Cosby weak" | 152 | |
| C-5 | Daily Mail article published November 18, 2014, "I wanted to arrest Bill Cosby" | 158 | |
| C-6 | Washington Post article dated November 19, 2014 "Prosecutor who declined to charge Bill Cosby in 2005: 'I didn't say that he didn't commit the crime'" | 165 | |
| C-7 | CNN video | 169 | |
| C-8 | WNPV audio | 173 | |

E X H I B I T SCOMMONWEALTH'S

| <u>Number</u> | <u>Description</u> | <u>Marked</u> | <u>Rec'd</u> |
|---------------|---|---------------|--------------|
| C-9 | Philly.com article dated September 14, 2015 "Time hasn't run out on possible charges against Cosby in Pa." | 176 | |
| C-10 | People.com article dated 10-22-15 "Pennsylvania District Attorney Candidates Battle it Out Over the 2005 Bill Cosby Sexual Assault Allegations" | 179 | |
| C-11 | The Intelligencer article dated September 24, 2015 "Montgomery DA candidate Castor urges delay n Cosby case until after elections" | 197 | |
| C-12 | Philly.com article dated 1-31-16 "Castor could be key witness at Cosby hearing" | 218 | |

DEFENDANT'S

| <u>Number</u> | <u>Description</u> | <u>Marked</u> | <u>Rec'd</u> |
|---------------|--|---------------|--------------|
| D-1 | Castor's biography from 2016 campaign website | 19 | 19 |
| D-2 | Castor's biography from law firm website | 19 | |
| D-3 | Canadian Incident Report | 35 | |
| D-4 | Press Release dated 2-17-05 | 70 | |
| D-5 | E-mail dated September 23, 2015 to Risa Ferman from Bruce Castor | 96 | |
| D-6 | Letter dated September 25, 2015 to Bruce Castor from Risa Vetri Ferman | 104 | |

E X H I B I T SDEFENDANT'S

| <u>Number</u> | <u>Description</u> | <u>Marked</u> | <u>Rec'd</u> |
|---------------|--|---------------|--------------|
| D-7 | E-mail dated September 25, 2015 to Risa Ferman from Bruce Castor | 106 | |
| D-8 | E-mail dated September 25, 2015 to Risa Ferman from Bruce Castor | 108 | |

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1
2 (The following proceedings were
3 commenced with the Court, Mr. Steele, Mr. Ryan, Ms.
4 Gibbons-Feden, Mr. McMonagle, Mr. Tayback, Ms.
5 Pressley, Mr. Sarles, and the defendant being
6 present:)

7 - - -

8 THE COURT: Good morning.
9 Again, I want to thank the members of the press,
10 journalists, media. There is a Decorum Order that has
11 been in place, and my understanding is everybody has
12 respected it, followed it. Again, that was
13 promulgated by our president judge and through our
14 court administrator, so I thank all the members of the
15 press that have followed that to keep this in an
16 orderly process and to the members of the public that
17 have been able to abide by that.

18 Let the record reflect that we
19 did have a brief prehearing conference with counsel
20 just to try to get an idea of how we will proceed this
21 morning. The Court had previously issued an order
22 that was limiting the nature of today's proceeding to
23 the claim raised in the Habeas Corpus Petition of the
24 defense that there was a valid existing
25 non-prosecution agreement and that that would affect

1
2 whether this case could, in fact, proceed or should it
3 be dismissed based upon such an agreement.

4 By my order, I indicated that
5 that was the only issue I was going to consider today.
6 All other issues raised in the defense Habeas Corpus
7 Motion would be preserved for more appropriate times
8 according to the Rules of Criminal Procedure.

9 So, again, read nothing into
10 that other than what we did discuss in our conference
11 as to the motion regarding the removal of the District
12 Attorney's Office in prosecuting this case as to how
13 that would be handled in the future, but it is not
14 envisioned that it would be handled today.

15 Now, with that said, the
16 District Attorney's Office filed the last pleading in
17 this matter which was in opposition of this Court's
18 power under habeas corpus to hold this hearing.

19 As I've indicated informally,
20 there's very little case law about this, the nature of
21 this proceeding. But under general principles of the
22 jurisdiction of the Court and habeas corpus, I felt it
23 best, based on what was at least alleged by the
24 defense, to hold it in the form of a Habeas Corpus
25 Hearing, to have this hearing.

1
2 But, Mr. Steele, I wanted you to
3 have the opportunity to have the record as to say why
4 you believe under the rules or the existing case law
5 in the Commonwealth of Pennsylvania that there just
6 does not envision such a hearing.

7 MR. STEELE: Thank you, Your
8 Honor.

9 THE COURT: And anybody who
10 wants to use the podium can. If you want to sit down,
11 I'm okay with it. I respect that, you know, every
12 member of the Bar here would follow the Rules of
13 Civility, but I also want you to be comfortable. So
14 if you don't feel like standing, you don't have to and
15 the Court will take no offense or use the podium or
16 whatever.

17 MR. STEELE: Thank you, Your
18 Honor. As indicated, we are of the position that this
19 motion is premature. And we rely on the case of
20 Commonwealth versus Cosgrove which is, I believe,
21 680 A.2d 823, a 1996 case, holding that a criminal
22 defendant may not challenge the authority of the
23 Commonwealth to prosecute him until after a formal
24 arraignment. We outline that in our brief.

25 THE COURT: Let me ask you. The

1
2 one thing that I know that a couple members of the
3 press asked me was please remind the attorneys to use
4 the microphone. You're talking at me. Apparently
5 there's a whole other courtroom. The closer you can
6 get it to you, please use it so that they're able to
7 hear. Sorry to interrupt, but that was a specific
8 request.

9 MR. STEELE: I was done, but I
10 can repeat myself, Your Honor.

11 THE COURT: I heard you. That's
12 important. Let's hope --

13 MR. STEELE: We're relying on
14 Commonwealth versus Cosgrove. And our position with
15 this is premature because we have not gone through a
16 Preliminary Hearing. The Rules of Criminal Procedure
17 outline a method for contesting the evidence in the
18 case, and it's our position that it's premature.

19 THE COURT: And that was an
20 Attorney General case in regards to making an election
21 to prosecute a case and the defendant was challenging
22 whether they have the authority to prosecute. I
23 understand. That's from 1996. I've reviewed it.

24 Do you want to respond?

25 MR. McMONAGLE: Judge, all I can

1
2 say is obviously it's our position that the right to
3 habeas corpus is one that needs to be protected, that
4 this United States citizen's liberty is at issue.

5 With respect to where we are
6 now, we have submitted to the Court the idea that this
7 prosecution must be barred because of a decision that
8 was made, the intent which was to bind the
9 Commonwealth of Pennsylvania to prevent a prosecution
10 ever in this case for the defendant, Mr. Cosby.

11 And we believe based on the case
12 law we have submitted, Levine versus Fair,
13 Commonwealth versus Owen and all of its progeny that
14 the time to do that is now. It does go to the heart
15 of the jurisdiction of this Court. It goes to the
16 idea of whether or not this individual citizen has the
17 ability now to say this must end.

18 We would ask the Court to give
19 us an evidentiary hearing on the subject so that we
20 can request this Court to do what we submit should
21 have been decided and remain final for the last 12
22 years.

23 THE COURT: All right. As the
24 Court indicated by my order to schedule the hearing,
25 again, the right to habeas corpus is one guaranteed to

1
2 its citizens of this Commonwealth and this country.

3 And I don't see any prejudice at
4 this stage to this important issue that is raised by
5 the defense to having a hearing on it, so we will
6 proceed with the hearing today.

7 And the Commonwealth's motion
8 to, at this stage, postpone it or not hold the
9 hearing -- it wasn't for any other relief than just
10 not holding it today and allow a Preliminary Hearing
11 under the Rules of Criminal Procedure. I would deny,
12 in effect, that request.

13 So, therefore, I have read the
14 initial motion, the Commonwealth's lengthy response to
15 it -- they are of record -- the Commonwealth's sur
16 motion, so I'm ready to hear evidence and then
17 argument as to what you believe was proven or not
18 proven, what exists, what doesn't exist.

19 So with that said, if you feel
20 the need to give an opening remark as to how you're
21 going to do it, you can. If not, you may call your
22 first witness.

23 MR. McMONAGLE: Thank you, Your
24 Honor. The defense, on behalf of William Cosby, calls
25 Bruce Castor.

DEFENDANT'S EVIDENCE

- - -

BRUCE L. CASTOR, JR., having been duly sworn, was examined and testified as follows:

MR. McMONAGLE: Your Honor, with your permission, may I ask that this exhibit be brought up to Mr. Castor so that, when we get to them, we can have him go through them?

THE COURT: Has the Commonwealth seen it?

MR. RYAN: We have not. We would love a copy.

MR. McMONAGLE: Judge, I have all the exhibits. I'm going to mark them, and they'll be demonstrated on the screen one-by-one so that the Commonwealth has them.

MR. RYAN: Before the witness sees an exhibit, I'd like to see it.

THE COURT: I understand. He can have the book up here. Don't you have them all on the screen? You were setting up in here last night until the wee hours.

MR. McMONAGLE: Yes. We're all

1
2 ready to go.

3 THE COURT: You can flash them
4 up. Please do not flash anything up there -- there's
5 obviously not a jury here, but I do want to keep to
6 the Rules of Procedure so that the Commonwealth knows
7 what you're about to bring up.

8 MR. McMONAGLE: Yes, Your Honor.
9 May I proceed, Your Honor?

10 THE COURT: Please do.

11 DIRECT EXAMINATION

12 BY MR. McMONAGLE:

13 Q Mr. Castor, good morning.

14 A Good morning.

15 THE COURT: I'm going to hold
16 you up. If that's -- that's perfectly -- just move
17 that over to an area. You can actually drop it on the
18 bar in front of you there so that -- right here. Put
19 it there and it's going to pick your voice up.

20 Can the members of the audience
21 hear? Give them a little test.

22 MR. McMONAGLE: Testing.

23 THE COURT: No? I think you
24 have to push the red button. Can you hear me?

25 AUDIENCE: Yes.

THE COURT: Okay.

BY MR. McMONAGLE:

Q Mr. Castor, good morning.

A Good morning.

Q Mr. Castor, how long have you been a member of the Bar?

A Just about 30 years.

Q I'd like to take you back and ask you when it was that you joined the Montgomery County District Attorney's Office?

A Well, I think I joined on June the 1st, 1985. The county seems to think it was June the 3rd, 1985. And so much time has passed, I didn't think it was necessary to argue with them over two days worth of pension.

Q Okay. I think that was a wise decision. Take me through, as best you can, your starting point in the District Attorney's Office and how you worked your way through the office and where you ended up.

A Well, when I was hired, I was appointed to the -- to a position as an intern in the Sex Crimes Unit and as a person that wrote briefs in the Appellate Division. After I was interviewed by then First Assistant District Attorney William Carpenter in

1
2 December of 1984, I assumed the position. I believe
3 it was the first day after Labor Day, which is why I
4 think it's the first of June, in 1985.

5 So I was in my third year of law
6 school and I -- concurrent with going to law school
7 and in the summers and vacations, I worked in the Sex
8 Crimes Unit and in the Appellate Division.

9 Upon graduation from law school
10 in May of 1986, I was appointed as an Assistant
11 District Attorney. I worked as an -- in an intern
12 capacity until I had taken the Bar exam.

13 Then District Attorney Thomas E.
14 Waters, Jr. let me have August off, and I started
15 on -- as a full-time sworn Assistant District Attorney
16 on September 2nd, 1986. I was assigned to the
17 Appellate Division because that was the only opening
18 that was available.

19 In short order, within weeks, a
20 member of the office had -- an Assistant District
21 Attorney had left, and I was moved from the Appellate
22 Division to the Pretrials Division so I would be on
23 track to be in the Trials Division ultimately trying
24 jury cases.

25 Q And did that, in fact, happen? Did you get to a

1
2 point after joining the office where you began
3 actually being involved in major crimes cases and
4 sexual assault cases?

5 A Yes. I -- either at the end of 1986 or early
6 1987, I was promoted to the Trials Division on account
7 of an emergency pregnancy leave. It was a temporary
8 promotion to the Trials Division. And when the lady
9 came back from pregnancy leave, I was allowed to
10 remain. I was assigned to the Major Crimes Unit.

11 There was a change in the
12 administration, and District Attorney Michael D.
13 Marino assumed charge of the office in 1988. I was
14 the first person that he promoted when he became
15 District Attorney.

16 I had served on the Major Crimes
17 Unit and the Sex Crimes Unit while I was in the Trials
18 Division in '87 and the latter part of '86. I was
19 promoted to captain of the Major Crimes Unit effective
20 July of 1988.

21 I served in that capacity,
22 captain of the Major Crimes Unit, from July of 1988
23 until September the 6th of 1991, whereupon I was
24 promoted to chief of the Trials Division. And I was
25 put in charge of the county Investigating Grand Jury

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2 which is ordinarily two positions, or was then, but
3 there were budget cuts in the county and I was
4 required to do both jobs.

5 Then in the Spring of 1993, then
6 First Assistant District Attorney William Carpenter
7 was nominated to be a judge of the Court of Common
8 Pleas. Back in those days, that meant that he was
9 going to, absent something very strange, going to be
10 elected in November, whereupon District Attorney
11 Marino had instructed Mr. Carpenter that he was not to
12 take on any more investigations and cases by virtue of
13 the fact that it was contemplated that he would
14 shortly become a member of the bench. And I was put
15 in the position of acting First Assistant District
16 Attorney.

17 After the election in November,
18 the governor appointed Mr. Carpenter a judge having --
19 while he was judge elect. There were vacancies that
20 the Court needed filled. The governor appointed Mr.
21 Carpenter to a judge.

22 And as of that date, as of the
23 confirmation by the senate, I became First Assistant
24 District Attorney, which had no significance
25 concerning the work I was doing apart from it was a

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substantial increase in pay.

Q Well, that never hurts.

A It did not hurt. I learned while I was at the F.B.I. academy, in fact, in the Fall of 1993.

Q Okay. So you become First Assistant District Attorney of Montgomery County in 1993. And how long do you serve as First Assistant District Attorney?

A From 1993 until I was sworn in as District Attorney in the first week in January of 2000.

Q So now we're in January of 2000. You become the District Attorney of Montgomery County. And how long did you serve the people of Montgomery County as District Attorney?

A Eight years, two terms.

Q And upon your completion in your service as District Attorney, what then did you do?

A I was -- in 1987 I decided not to run for reelection as District Attorney and instead ran for election as a County Commissioner of Montgomery County.

Q What year was that?

A 2007.

Q 2007, okay.

A The election was in 2007. I took office in the

1 first week in January of 2008.

2 Q And with respect to that position, did that
3 involve any type of particular safety concerns, et
4 cetera?
5

6 A In my first term, no. I actually didn't have
7 much of a portfolio in my first term as County
8 Commissioner. My second term as County Commissioner I
9 held the portfolio that was for supervision of the
10 Public Safety Departments, which would be the
11 Emergency Operations Center, dispatching ambulances,
12 fire, police, coordinating for major events, you know,
13 like the Pope's visit and things like that.

14 I was sort of the -- I was
15 the -- the commissioner that was in charge of all
16 those things, but of course the people that were under
17 me were very capable in and of themselves and hardly
18 needed my input. But that was what I did.

19 And then I acted as a liaison to
20 Public Safety Department row officers in the county
21 and provided the County Commissioners' perspective on
22 all public safety issues.

23 Q I want to go back to when you were District
24 Attorney of Montgomery County and Assistant District
25 Attorney of Montgomery County. Did you receive any

1
2 awards for your service as an Assistant District
3 Attorney and as the District Attorney of Montgomery
4 County?

5 A Your Honor, there would be so many, I don't know
6 that I would -- am able to do it without seeing my
7 C.V.

8 MR. McMONAGLE: Well, maybe for
9 the sake of expediency, if we could -- if we could
10 publish Exhibit 1?

11 MR. RYAN: We have no objection
12 to that, Your Honor.

13 (Castor's biography from 2016
14 campaign website marked Defendant's Exhibit D-1 for
15 identification.)

16 THE COURT: Okay. It's admitted
17 into evidence.

18 (Defendant's Exhibit D-1
19 received in evidence.)

20 BY MR. McMONAGLE:

21 Q Mr. Castor, is this, in fact, a document that you
22 recognize?

23 A No. It must have been written by somebody in the
24 campaign.

25 (Castor's biography from law

1
2 firm website marked Defendant's Exhibit D-2 for
3 identification.)

4 BY MR. McMONAGLE:

5 Q All right. Let's go to Exhibit 2.

6 THE COURT: Everybody's watching
7 T.V. but me here, and my eyes ain't good.

8 BY MR. McMONAGLE:

9 Q Mr. Castor, you've asked for a paper copy. I'll
10 give you a paper copy of this exhibit.

11 MR. McMONAGLE: Your Honor, may
12 I approach?

13 THE COURT: Yes. Feel free to
14 approach.

15 MR. McMONAGLE: Thank you.

16 THE WITNESS: Okay.

17 BY MR. McMONAGLE:

18 Q Mr. Castor, for expediency purposes, I just want
19 to take a few things down, and I think it will help us
20 move along, but I want to be clear on some of these
21 items that I've referred to.

22 In 1990, did you receive the
23 Chamber of Congress Law Enforcement Man of the Year
24 award?

25 A That's true, yes.

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2 Q In 2007, were you inducted into the Pennsylvania
3 Police Hall of Fame?

4 A I was. To my knowledge, I'm the only prosecutor
5 that has achieved that honor.

6 Q In 1995, did the Attorney General of the United
7 States issue an award to you?

8 A Yes. The Attorney General of the United States
9 acting at the recommendation of the National
10 Association of Government Attorneys in Capital
11 Litigation recognized me as first place in the country
12 for investigating and prosecuting homicide cases.

13 Q And while you were District Attorney of this
14 county and Assistant District Attorney of this county,
15 First Assistant District Attorney of this county, did
16 you, in fact, prosecute significant homicide cases?

17 A Well, they certainly were significant to the
18 people who were dead, so...

19 Q Capital cases as well?

20 A Yes.

21 Q Do you have any idea how many homicide cases you
22 prosecuted while Assistant District Attorney of
23 Montgomery County?

24 A If you include the cases that pled guilty,
25 probably 50.

1
2 Q Okay. And did you receive any awards or
3 citations from any victims' groups that you remember?

4 A All of the major victims' groups in Montgomery
5 County gave me their highest awards. Laurel House.

6 Q What is Laurel House?

7 A It's a support group for -- primarily for women
8 victims of violent crime and sexual abuse. Victim
9 Services Center which does the same thing. And I
10 think that there's another one, but I can't remember
11 what it is.

12 In fact, they -- I think in 2007
13 Laurel House granted me the highest distinction that
14 they were able to at a grand ball they had that was
15 covered by Philadelphia Magazine, which I thought was
16 a little over the top myself.

17 Q And with respect to peer reviews, have you, in
18 fact, received various citations and awards with
19 respect to those?

20 A By "peer review," you mean other lawyers granting
21 me honors?

22 Q Yes.

23 A Yes. I am a fellow of the Litigation Counsel of
24 America, a distinction that I have had for, I think,
25 about nine years. I was designated a Pennsylvania

1
2 Super Lawyer 10 or 11 times, four of those times while
3 I was District Attorney.

4 I am rated by Martindale-Hubbell
5 as AV, which is the highest rating, five out of five,
6 a perfect rating. The AV letters, I don't know
7 exactly what they stand for, but one of them has to do
8 with legal ability and the other has to do with
9 integrity and ethics.

10 That group is further delineated
11 in the Martindale-Hubbell Bar Register of Preeminent
12 Lawyers in America, and my peers have seen fit to
13 grant me that distinction as well.

14 Q Lastly, with respect to background, you've
15 indicated to us that when you left the District
16 Attorney's Office, you became a County Commissioner.
17 Are you still, in any capacity as we speak today,
18 involved in prosecuting cases?

19 A Yes. Tomorrow I'll be arguing a case in the
20 capitol as an Assistant District Attorney of Centre
21 County. On the peer review things, I think I also
22 have been four times selected as a Top 100 Trial
23 Lawyer in America.

24 Q Okay. With respect to what you just said prior
25 to that about prosecuting a case tomorrow, how is it

1
2 that you're still involved in prosecuting cases in the
3 State of Pennsylvania?

4 A In April of last year, a -- well, in January of
5 last year, a scandal broke in Centre County that
6 caused the District Attorney there to have to defend
7 herself and her office against attacks that they were
8 too friendly with members of the bench.

9 As a result thereof, the
10 District Attorney asked me to prosecute cases for that
11 office where her office was under attack for too close
12 a relationship with the bench because, of course, I
13 didn't know any of the bench up there. And I did
14 quite a number of them.

15 The trial level prosecution
16 seemed to be over because the defense lost them all,
17 and now I am dealing with the appeals, and one of them
18 is tomorrow.

19 Q All right. I want to take you back now to what
20 brings us here. In 2005, you were District Attorney
21 of Montgomery County. And did you oversee the
22 investigation of allegations made by Ms. Andrea
23 Constand against my client, Mr. Cosby?

24 A I did.

25 Q As District Attorney of Montgomery County in

1
2 2005, did you delegate others to investigate that
3 allegation?

4 A Yes. The procedure then was the same procedure
5 that had been in place when I was First Assistant D.A.
6 Field operations were directed by the First Assistant
7 District Attorney and such members of the County
8 Detective Bureau as that official decided he or she
9 needed. Then the information was gathered and was
10 presented to the District Attorney.

11 That is the procedure I utilized
12 in this case. I appointed First Assistant District
13 Attorney Risa Ferman to supervise the investigation
14 along with Detective Richard Peffall and a Cheltenham
15 detective, Detective Schaffer.

16 Q Okay. I know we're going back in time, 2005, but
17 to the best of your recollection, are you able to tell
18 us where it was? And by "where," I mean what country
19 it was this complaint originated from?

20 A Yes. The chain of events was that the
21 complainant complained to law enforcement officers in
22 Canada where she lived. The Canadian authorities, I
23 want to say it was Toronto police or -- I don't know
24 if they're called police there, but Toronto law
25 enforcement officials, believing that Temple

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2 University was in Philadelphia as it, in fact, mostly
3 is, referred the complaint to Philadelphia police
4 authorities who ascertained that the event complained
5 of actually occurred on our side of the border in
6 Montgomery County.

7 And Philadelphia Police,
8 pursuant to protocols, long-standing protocols,
9 referred that to the Cheltenham Township Police
10 Department. Cheltenham Police Department referred it
11 to our office to assist them in the investigation.

12 Q And when it got referred to your office, were you
13 able to determine preliminarily whether or not
14 Ms. Constand had made what we know in the law as a
15 prompt complaint of an assault?

16 MR. RYAN: Objection, Your
17 Honor.

18 THE COURT: Nature?

19 MR. RYAN: Relevance. I don't
20 see how the substance of the underlying allegations
21 have any play into the narrow issue we're here for
22 which is non-prosecution agreements.

23 THE COURT: Well, at this stage,
24 obviously, it's going to be in the whole narrative as
25 to relevance as to what reason the case was not

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2 prosecuted, whether it was an agreement, whether it
3 was prosecutorial discretion, whether it followed the
4 ABA standards. So it's relevant in that regard as to
5 any decisions that he made, so I'll overrule the
6 objection.

7 BY MR. McMONAGLE:

8 Q Do you remember my question?

9 A I do. There was no what we referred to as a
10 prompt complaint in this case made by this
11 complainant.

12 Q Do you have an independent recollection of how
13 long it took, meaning how long it took from the
14 so-called event until the complaint was made?

15 A It was almost exactly a year.

16 Q Was that of significance to you as a former sex
17 crimes prosecutor and the District Attorney of
18 Montgomery County?

19 A Well, it was of enormous significance.

20 Q Why?

21 A Pennsylvania law grants prosecutors the license
22 to argue that the credibility of witnesses is enhanced
23 if they complain promptly to law enforcement
24 officials, especially if -- primarily if they're
25 adults. Children is -- have a special set of

1
2 circumstances, but we're dealing with an adult. And
3 in this case it wasn't even a young adult. I believe
4 she was in her 30s.

5 So it was of enormous
6 significance from a legal standpoint because when
7 something bad happens to a person and the person
8 considers themselves to be victimized, the law
9 recognizes that if it is very scary or hurts that
10 person, that if they go to the police and tell them
11 about it or go to a relative who then goes to the
12 police and tells them about it, that you can utilize
13 that to say that, when you're arguing, that no one
14 would go to the police and put themselves in the
15 position of having to explain what happened unless it
16 really did happen.

17 So it's a way of bolstering the
18 credibility of a complaining witness, and it is of
19 extreme importance in cases where you have no forensic
20 evidence and you're going to have an oath against oath
21 case.

22 Q So you've got, as I understand it, an issue in
23 terms of the duration it took, how long it took to
24 make the complaint for credibility issues, and you've
25 also referenced forensics; is that fair?

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2 A Right. There's a secondary component. The first
3 component is the legal component that the prosecutor
4 can use to enhance the credibility of the complainant.

5 But the second component which
6 is of investigatory value as opposed to courtroom
7 tactical value is the passage of time tends to make it
8 so that the ability to collect forensic evidence,
9 trace evidence, if you will, hairs, fibers, DNA,
10 anything of that nature -- the longer time goes by,
11 the less likely those things are going to be found.

12 You're talking about a sex
13 crime. It's particularly of significance because
14 trace evidence on the person's body who was victimized
15 is going to disappear when the person takes a shower.
16 So that's a big problem.

17 But a lot of people don't know
18 we can sometimes get some forensic value even weeks
19 later, if we had hair samples for example, because if
20 somebody's taking drugs and -- or was drugged, as we
21 thought might be the case here, if we can test their
22 hair, if we can find it somewhere from the root out --
23 we know hair grows at a roughly constant rate.

24 As a result, if we find some
25 indication of the drug in the hair, we might be able

1
2 to back it up to where it had been ingested. Same
3 with fingernails. But after a year, you've cut your
4 fingernails and you've cut your hair.

5 Q Did you learn -- when you first got involved in
6 looking at this matter, did you ascertain whether or
7 not Miss Constand had contacted civil attorneys before
8 making a complaint to the police?

9 MR. RYAN: Objection.

10 Relevance. Again, we're getting into the substance of
11 the underlying claims which has no bearing on the
12 non-prosecution agreement.

13 THE COURT: Well, Mr. Ryan, the
14 question is if the -- you know, it seems it's relevant
15 if the District Attorney at the time made just an
16 independent decision he wasn't going to prosecute.
17 It's very relevant as to why bother doing anything
18 else. I mean, that's their claim.

19 He made a determination.

20 Reviewing the American Bar Association Standards,
21 whatever standards he had professionally, he's telling
22 you why he didn't prosecute.

23 Now, if he's going to go on as
24 to other reasons, I mean, it's relevant to their
25 claim. I mean, it -- it's not relevant to anything

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2 else, but the claim that we're here for today, I'm
3 afraid that it is.

4 MR. RYAN: My suggestion to you,
5 Your Honor, is that it's relevant to the extent --
6 what's relevant for this hearing is whether or not
7 there was an agreement -- I'm sorry -- a decision to
8 charge.

9 I certainly agree that that may
10 be relevant and have bearing on this hearing. As to
11 the underlying substance, this hearing is not a forum
12 to litigate the underlying substantive claims of this
13 case. I'm suggesting to you that that's where we are
14 going.

15 THE COURT: Well, I would hope
16 we're not. At this stage, you know, you've given a
17 basis to -- a simple basis that you're stating -- the
18 witness is stating he felt he did not have a case that
19 he was going to prosecute.

20 Now you're moving on, so we
21 don't need to get into anything more about it. I
22 mean, you're now about to move on to, I assume, the
23 agreement.

24 MR. RYAN: I would hope so.

25 MR. McMONAGLE: Judge, there's

1
2 an enormous amount of investigation that he did
3 step-by-step-by-step that brought him to the
4 conclusion that there was going to be an agreement.

5 And they have challenged, quite
6 frankly, in their moving papers, the credibility of
7 this witness. They've challenged his ability to make
8 the decision. They've examined his reasons for making
9 the decision.

10 And I think it's completely
11 relevant to where we're going, which is he spent a
12 significant amount of time, as did his staff and his
13 team, in investigating this matter and why it was that
14 he came to the conclusion that he had to make this
15 agreement. And so I think I have to develop this
16 record, and I'm going to do it as quickly as I can.

17 And I'm certainly not at this
18 point in time trying to try the case. But what he was
19 thinking in realtime in 2005 and why he made these
20 decisions is of paramount importance to our issue here
21 because I know, unless I'm wrong, they're not going to
22 agree with me when I'm all done.

23 And so they're going to say,
24 well, either he didn't do it or he didn't do it the
25 right way. And I want to establish, A, he did it the

1
2 right way, why he did it and what he did.

3 So I'll move it as quickly as
4 possible, sir. I'm not trying to --

5 THE COURT: I didn't know
6 whether that was it because you just asked about an
7 agreement.

8 If he's saying he's not
9 finished, you're going to have to wait for each
10 question or make a broad relevancy objection.

11 I mean, at this stage it's
12 relevant to get to the place to where they're claiming
13 that there is a non-prosecution agreement that was in
14 existence and enforceable. And if it is related to
15 the fact of whether he thought he could prosecute this
16 case, then it's relevant.

17 So that's my overall, you know,
18 general ruling as to each time he asks a question.
19 I'll note that -- if you feel the need to, continue to
20 object to it, but I think at this stage we're going to
21 have to hear it.

22 MR. RYAN: I will object where
23 necessary. I do appreciate Your Honor and the
24 perspective that you have that this is not a forum to
25 re-litigate this case, and so I'll object when I feel

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it's necessary.

THE COURT: Not a forum to re-litigate that case --

MR. RYAN: Or litigate it in the first place.

THE COURT: Re-litigate the investigation. We'll leave it at that.

MR. RYAN: Yes.

THE COURT: It's not. If he thinks it's a forum for some sort of a basis for a decision that he's made, I'm afraid it's relevant.

BY MR. McMONAGLE:

Q And, Mr. Castor, let me be real clear. Obviously, when you received this allegation, I take it you wanted to give it as much care as you could?

A Well, certainly. I mean, the case was referred by Philadelphia Police from an international source. I wanted the international referring agency to think that we took it seriously. I assigned who I thought were our best people to the case. And I took an active role as District Attorney because I thought we owed it to Canada to show that, in America, we will investigate allegations even against celebrities.

Q And obviously we were dealing with a celebrity

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here.

A Yes. Actually, it was the first I learned that he lived in our county, but yes.

Q By "he" you're referring to Mr. Cosby?

A Yes.

Q I'm going to try to move as quickly as I can through this, although important, mindful of the Court's view of this.

With respect to --

THE COURT: Well, Mr. McMonagle, my view is I overruled the relevance objection. Ask questions. Develop the case that you want to. Right now you've indicated why it's relevant.

(Canadian Incident Report marked Defendant's Exhibit D-3 for identification.)

BY MR. McMONAGLE:

Q I want to go to Exhibit 3.

A I didn't answer the question that you asked. Do you want me to or not?

THE COURT: Why don't you leave it to Mr. McMonagle?

BY MR. McMONAGLE:

Q Let's go to Exhibit 3.

MR. RYAN: Your Honor, if I

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2 could just ask that before we publish documents, if
3 the witness could be shown to lay the proper
4 foundation.

5 THE COURT: To the electronic
6 operators there, the Rules of Evidence are still
7 working even if we're using T.V. cameras -- I mean,
8 even if we're using electronic publishing. They've
9 got to see it.

10 Now, if you have --

11 MR. McMONAGLE: They do.

12 THE COURT: Before they see it,
13 before the witness sees it, if you have the ability to
14 publish it on his screen alone -- I thought that's
15 what the book was for. You say we're going to Number
16 3. You look at the book. He may not want it
17 published. He may not want -- may have an objection
18 to it. Just publish it on that screen.

19 MR. McMONAGLE: They have the
20 book. I say we're going to Exhibit 3, publish it on
21 his screen.

22 MR. RYAN: If I may ask the
23 Court if Mr. McMonagle can come show me the exhibit.
24 I believe he has Exhibit 3 labeled as "8" in my book.
25 I don't know if that's going to be a persistent

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problem. Or if he just wants to come show me, that's fine.

MR. McMONAGLE: Tab 7 in your book.

THE COURT: Let me ask. Do you have the ability to publish a, you know, document to, at this stage, the prosecutor and the Court without publishing it to the public? I mean --

THE TECHNICIAN: No.

THE COURT: It's all going to be through the paper version, and that's going to leave you in charge of that to say, this is what's coming up. Then you'll turn to your people and say, you know, publish it after I've made a ruling. Or if you need him to look at it in terms before I make a ruling, then you may be able to do that as well.

THE WITNESS: Your Honor, if I may? I have trouble reading it on the screen, too.

MR. McMONAGLE: What's that?

THE COURT: Right now there's nothing up there, so let's see what happens.

THE WITNESS: Do you have a paper book for me?

MR. McMONAGLE: May I approach,

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Your Honor?

THE COURT: Yes.

MR. McMONAGLE: Can we publish this on the screen?

THE COURT: That's the problem. Ask him questions about it. This happens all the time. You know, he has the document. You ask him questions, establish a foundation.

MR. McMONAGLE: All right.

THE COURT: There's got to be a preliminary test of relevance.

BY MR. McMONAGLE:

Q Mr. Castor, please take a look at what is before you. And it will be, for our purposes, Exhibit 3.

Will you please tell me what it is that you're looking for -- what you're looking at which is Exhibit 3?

A I believe that this is the initial report that was taken by the police in Canada.

Q Okay. And I take it you reviewed that document as part of your investigation in this case, what she, in fact, informed Canadian authorities of and what she told them?

A Yes.

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Q And did you rely on it in making a determination in this case?

A Partially, yes.

Q Okay.

MR. McMONAGLE: Judge, at this time I'd like to publish the document.

MR. RYAN: And I would object. As I've indicated or as Your Honor has indicated -- and I have no issue with this witness explaining at this stage the underlying rationale of his decision.

We're now getting to a point where we're admitting investigative documents, and I would renew my objection that this is becoming a forum to re-litigate the underlying case.

And if the witness wishes to make statements about what his rationale was with regard to a charging decision, I understand Your Honor's ruling as it relates to that, but this, I would suggest to you, is different.

THE COURT: Let's start with this. How did you get it?

MR. McMONAGLE: The District Attorney's Office provided it in discovery in the civil litigation. And it was given by the District

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2 Attorney's Office years ago in the civil litigation.

3 THE COURT: So this is discovery
4 in a civil litigation to which you're now utilizing it
5 in whether Mr. Castor believed that he had sufficient
6 reason to prosecute this case. This is what he knew.
7 This was a statement.

8 Now, can it be used in a
9 fashion -- and, again, I'm just throwing this out
10 there. Can it be used in a fashion for him to look at
11 it, because the case that's going on here isn't
12 whether I think. It's not whether you think.

13 MR. McMONAGLE: Yes, sir.

14 THE COURT: Whether he had --
15 it's in time. So if he looks at something and says,
16 yeah, I remember this, this was that statement. In
17 order to try to at least protect this record should,
18 you know, I rule against you, and if, in fact, a prima
19 facie case is established, and should this case
20 survive the motions or whatever and end up with a jury
21 pool, that is really what I'm looking at here as to
22 beginning to have discovery not be published to the
23 public domain here via an exhibit.

24 I mean, I don't want to seal
25 records and documents. I mean, it's something that

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2 he's familiar with. He can look at it. He raises a
3 very important concern, so, I mean, I don't know what
4 else you're going to say about it.

5 MR. RYAN: Well, I have a
6 secondary concern which is that the document itself is
7 hearsay. I mean, it appears to be a police report.
8 So I certainly would have no objection if counsel were
9 to refresh the witness's recollection with such a
10 document.

11 I would suggest that could be a
12 proper purpose for a subsequent question, but, again,
13 even at the stage of admissibility, it's also a
14 hearsay document that, for the purpose that Mr.
15 McMonagle is intending to use it, I don't think is
16 appropriate.

17 THE COURT: I mean, at this
18 stage I just don't know. If you're showing it to him
19 and you're saying that this is part of the, you know,
20 documents and the evidence and the interviews and
21 forensic evidence that he may have had in 2005, I
22 mean, he can make reference to it. But the
23 particulars of it -- we're not trying this case, I can
24 tell you that. That's not what we're here for today.

25 And I really believe that I can

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2 make this decision based upon his testimony. If you
3 have an agreement that cites all this -- it's filed of
4 record -- I'm sure you would have displayed it
5 earlier. But if it's what he knew at the time, it's
6 just not -- I don't believe it is relevant to be
7 published or the Court to rely on whether he, in fact,
8 had enough with all the documents you're going to
9 give.

10 So if you want to show him the
11 documents, reference the documents, ask him what they
12 are, ask him what his reliance was, I think you can
13 accomplish the same thing without publishing the
14 documents to the record to where then they potentially
15 could effect the case.

16 MR. McMONAGLE: I understand the
17 Court's ruling.

18 THE COURT: So that's going to
19 be the ruling here. So he can look at what you have
20 to utilize to refresh his recollection and the like as
21 to why he made decisions.

22 BY MR. McMONAGLE:

23 Q Mr. Castor, let me follow up on something I asked
24 previously before we get to the exhibit. One of the
25 questions that was objected to as it was overruled was

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whether --

THE COURT: Again, that objection, Mr. Ryan, was sustained as to the actual publishing of the document and any admission thereof. It may be used for his testimony.

MR. McMONAGLE: Yes. I'm going back to something previously, Judge.

BY MR. McMONAGLE:

Q I had asked the question, and I don't believe I had gotten an answer from you, on whether or not your investigation confirmed whether or not Miss Constand had spoken to or tried to contact civil attorneys before making a complaint.

Do you remember that question?

A I remember that question, yes.

Q What's the answer?

A The answer is that she reported to Ontario police that she had spoken -- had contacted a lawyer in Philadelphia prior to speaking to them.

Q And was that significant to your ultimate determination?

A Yes, that -- like with the exhibit when you asked did I rely on that in making my decisions, all of these were pieces of the things I relied on. So the

1
2 lack of prompt complaint and the inability to gather
3 forensic evidence from the home or from the person is
4 one piece. The contacting of a civil lawyer before
5 going to the police department is another piece.

6 Q Let me stop you there. Did Ms. Constand give
7 interviews to Cheltenham Police and also the
8 Montgomery County Detectives in this case?

9 A Yes.

10 Q Was there more than one?

11 A Yes.

12 Q Were the statements that she made in each of
13 those interviews and what she said in those
14 interviews -- I'm not going to show them on the
15 screen, but is what she said at different times, was
16 that part of your decision making in this case?

17 A Yes.

18 Q And what is your memory, as you at the time were
19 looking at these various statements, of what your
20 conclusions were about what she said?

21 A Your Honor, I've been doing this a long time.
22 I'm wondering if you should hear that answer in camera
23 first.

24 THE COURT: First time a witness
25 has ever asked me for something in camera. I don't

1
2 know the answer to what you're about to do. He's
3 interjecting something. Do you need to speak to your
4 counsel -- counsel that called you in this case? Is
5 that your counsel there?

6 THE WITNESS: No.

7 THE COURT: You said you had
8 counsel here?

9 THE WITNESS: No.

10 BY MR. McMONAGLE:

11 Q Let me ask the question about your request. I
12 take it this has nothing to do with you needing
13 counsel?

14 A No, it doesn't have to do with me needing
15 counsel.

16 THE COURT: But he's a witness
17 and he's asked the Court to hear some testimony in
18 camera.

19 THE WITNESS: Mr. McMonagle, if
20 I answer that question accurately --

21 THE COURT: Do me a favor.
22 Don't answer the question. Go talk to Mr. McMonagle.
23 Tell him why you surprised him with that answer.

24 MR. McMONAGLE: I don't think he
25 did.

1
2 THE COURT: He didn't surprise
3 you?

4 MR. McMONAGLE: No.

5 THE COURT: Well, I would have
6 liked to have known back there somebody was going to
7 ask for an in-camera hearing. At this stage I'm going
8 to go back to conference if people are going to answer
9 a question that they say they don't want to answer.
10 But you stay here, Mr. Castor, because it sounds like
11 you know what he's talking about.

12 MR. McMONAGLE: I think he's
13 trying --

14 THE COURT: No, no, don't. Go
15 talk to him, find out what he's saying before I go and
16 talk to you. Take a brief recess.

17 - - -

18 (Recess.)

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20 (A conference was held in
21 chambers, not reported.)

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23 (The following proceedings were
24 reconvened with the Court, Mr. Steele, Mr. Ryan, Ms.
25 Gibbons-Feden, Mr. McMonagle, Mr. Tayback, Ms.

1 Pressley, Mr. Sarles, and the defendant being present:)

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4 THE COURT: Let the record
5 reflect that we had a conference regarding a statement
6 made by the witness that he requested something to be
7 in camera which is highly unusual. I directed the
8 attorney who called this witness to find out what it
9 was and how it can be handled in a different way.

10 So we don't have any formal
11 objections because the question was never answered --
12 because an answer was offered up. So let's rewind a
13 little bit and start over.

14 MR. McMONAGLE: Yes, sir.

15 BY MR. McMONAGLE:

16 Q Mr. Castor, obviously as part of your
17 responsibilities, it was to, in fact, examine the
18 various interviews that were given by Ms. Constand; is
19 that correct?

20 A That's correct, yes.

21 Q And I know we're here now, but going back in 2005
22 and 2006, did you actually do that?

23 A Not in 2006. In 2005.

24 Q 2005 you did that. And did you draw -- at that
25 point in time as District Attorney in this case and

1
2 prosecutor in this case, did you draw any conclusions
3 about those statements, those various statements?

4 A I did.

5 Q And was there at that point in time, in realtime,
6 any difficulties with those statements that you saw as
7 you were making a decision as to whether or not to
8 bring a prosecution?

9 A Difficulties for a prosecutor who has those
10 statements already memorialized? Yes. I mean, the
11 statements -- there were, as I recall, at least three
12 statements: The one given to the police in Canada,
13 one given to the Cheltenham Police who were screening
14 the case to determine whether it needed to be brought
15 to the attention of the District Attorney, and a
16 statement -- and maybe even a second statement, I
17 can't recall -- with County Detectives and Cheltenham
18 Police.

19 There were a number of
20 inconsistencies among the statements that Ms. Constand
21 had given that caused me concern because I knew that
22 inconsistencies on material points would be things
23 that would affect her credibility at trial.

24 Q Were there inconsistencies about, for instance,
25 when the event happened?

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2 A Well, that was --

3 MR. RYAN: Objection, Your
4 Honor. And pardon me, Mr. Castor. It's the same
5 objection I've had.

6 THE COURT: At this stage, look,
7 I am not here and nobody else is here to determine
8 what was in the witness's prosecutorial discretion in
9 bringing it. Okay? I am not going to take a chance
10 here that now he sits here as a witness, former
11 District Attorney making a decision.

12 So he has said inconsistencies.
13 He is allowed to make in his discretion any decisions
14 that he wants to under certain standards, and he made
15 them. So he said inconsistencies.

16 I don't think at this stage it's
17 relevant to continue to point them out. If we
18 continue, then we're going to go down a road here that
19 is just not at all the focus of this hearing. It is
20 whether there was an agreement not to prosecute.

21 MR. McMONAGLE: Judge, at least
22 so as I understand it based on your ruling, I will not
23 delve further into what the inconsistencies were?

24 THE COURT: That's correct. He
25 can make statements, in his position as a prosecutor,

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2 with discretion as to why he didn't.

3 MR. McMONAGLE: Yes, sir.

4 THE COURT: I don't need the
5 specifics because they aren't relevant because I'm not
6 making the determination of whether he had basis.
7 They're not making the determination. And I assure
8 you the public is not going to make a determination.
9 And I don't want to risk it being out there.

10 So he's allowed to make these
11 decisions. So let's try to keep it and then move
12 forward to how it connects up with an alleged
13 agreement not to prosecute.

14 MR. McMONAGLE: Yes, sir.

15 BY MR. McMONAGLE:

16 Q In addition to looking at the interviews of
17 Ms. Constand, was there, in fact, an interview
18 conducted of Mr. Cosby?

19 A Yes.

20 Q And did you evaluate that interview in coming to
21 a conclusion as to whether or not to bring a
22 prosecution ever in this case?

23 A I did.

24 Q Was there any searches conducted in this case at
25 your direction?

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A Yes. We searched his home, Mr. Cosby's home, in Cheltenham. And I believe he had a home in New York, and I sent detectives there to search that home.

Q And did you in making your own decision factor in the results of those specific searches?

A I did, yes.

Q After interviewing Mr. Cosby, was Ms. Constand re-interviewed to your knowledge?

A Yes.

Q And after interviewing Ms. Constand again, did you rely on what you learned in that interview in making your decision in this case?

A In part, yes.

Q Again, without getting into specifics, were there things said in that final interview that you determined were inconsistent with previous interviews?

A Yes, there were.

Q All right. So we're at a point now where you've interviewed or -- you've interviewed, Canadian police have interviewed -- and when I say "you," it's the royal you. It's members of the police department, members of the County Detectives. Mr. Cosby's interviewed. Searches have been conducted.

Did there come a point in time

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where you then spoke with Mr. Cosby's counsel?

A Yes.

Q And tell the Court who his counsel was.

A Mr. Cosby's counsel at that time was Walter M. Phillips, Jr., a very renowned criminal defense attorney in Southeast Pennsylvania, a man for whom I had great respect then and do now.

Q Obviously, Mr. Phillips has passed away?

A Yes, that's true.

Q But at that time you obviously spoke with Mr. Phillips. And did he provide you with information that was important to your ultimate determination in this case?

A Mr. -- yes. Mr. Phillips made an appointment to see me, and he asked me to review certain possible evidence in the case or asked the detectives to review certain possible evidence in the case.

Q What was that evidence?

MR. RYAN: I would object, Your Honor.

THE COURT: Do they know about it?

MR. McMONAGLE: Of course. I only know about it because they know about it.

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2 MR. RYAN: Perhaps I can speak
3 with Mr. McMonagle.

4 THE COURT: Why don't you tell
5 them what they already know that they don't know.

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7 (Discussion off the record
8 between counsel.)

9 - - -

10 MR. McMONAGLE: See, I was
11 right.

12 MR. RYAN: Turns out I did know
13 about it, Your Honor.

14 THE COURT: All right.

15 BY MR. McMONAGLE:

16 Q Tell us what that is.

17 A Mr. Phillips told me that during that year period
18 between the alleged incident and the reporting to the
19 police that Mr. Cosby and Ms. Constand had had
20 multiple contacts, some in person and quite a number
21 over the telephone that would be supported by
22 telephone records if we would be able to obtain them.

23 He also told me that he
24 suspected that there had been wiretaps conducted by
25 non-law enforcement personnel during that period of

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2 time that he believed were efforts to obtain
3 incriminating recordings of Mr. Cosby.

4 He told me that there were two
5 types of telephone records. And the explanation for
6 the first set of records were a series of continuing
7 banter back and forth between two people that he said
8 were friends.

9 And that -- later he said that
10 if we investigated and recovered phone records and
11 possibly wiretaps that were conducted by non-law
12 enforcement personnel, that we would conclude from
13 that that Ms. Constand and, I believe, her mother were
14 involved in a -- an effort to convince Mr. Cosby to
15 pay them money in order that he would not go to the
16 police or that she would not go to the police and
17 report him for the incident that allegedly occurred in
18 Cheltenham in January of 2004.

19 Q All right. So let me take them kind of one at a
20 time. With respect to -- did you actually go about
21 trying to confirm whether what Mr. Phillips told you
22 was true?

23 A Yes. Mr. Phillips is -- there was -- in my mind,
24 there was no chance at all that Mr. Phillips was lying
25 to me about the existence of records. I had known the

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2 man for 20 years. He was a former prosecutor of a
3 generation before me, a man that did high level
4 corruption cases and important government work. He's
5 not going to lie to the District Attorney.

6 So I was pretty well convinced
7 that if I directed the detectives to go look for those
8 records, that they would be found. What I would
9 conclude from that -- I did not necessarily agree that
10 Mr. Phillips would know the conclusions I would draw,
11 but I did think the records must have existed and I
12 did tell the police to go find them.

13 Q And did they?

14 A They did, yes.

15 Q And so were you able to confirm with respect to
16 what Mr. Phillips told you that, in fact, there was
17 evidence of extensive phone conversations that
18 occurred between Ms. Constand and Mr. Cosby after a
19 time period in which he said she was sexually
20 assaulted?

21 A Yes. And I remember it was in -- I remember
22 thinking it was an inordinate number of contacts. And
23 sometimes, in sex crimes prosecutions especially, we
24 will -- we'll generate the contact using a wiretap to
25 try to gather evidence. But there was no police

1 involvement in that, so this was not a
2 police-initiated investigation over the telephone.
3

4 I also believe that we were able
5 to confirm face-to-face meetings between the two after
6 the alleged incident.

7 And I believe that I was made
8 aware from the detectives of at least two wire
9 interceptions, what we would call here in Pennsylvania
10 hard wires where the people on the telephone are --
11 hard wires that would require approval of the Superior
12 Court upon application of the District Attorney or the
13 Attorney General, and that the information contained
14 in those wiretaps could be construed as incriminating
15 if I wanted to try to make them parts of evidence.

16 The reason I remember this so
17 clearly is I had a great deal of experience with the
18 Wiretap Act here in Pennsylvania because I held the
19 position in the office that approved and applied for
20 the wiretaps and I was one of the people who helped
21 revise the act when it needed to be updated, so I had
22 a great knowledge of that.

23 And what concerned me was if we
24 were going to be able to use anything from these
25 wiretaps, what law was going to be applied because my

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2 recollection was the wiretaps were over the telephone.
3 They were not conducted by police officers and they
4 were not -- neither party was in Pennsylvania at the
5 time the interceptions occurred.

6 Some states allow only -- allow
7 one-party consent. Some require two-party consent.
8 Pennsylvania is a two-party consent state, and I was
9 trying to figure what law a court here would apply.

10 And I ultimately determined that
11 there were cases in Pennsylvania that said that the
12 wiretap law is to be construed strictly against the
13 Commonwealth because of its inherent importance and
14 reliability.

15 And I thought that the Court in
16 Pennsylvania would use Pennsylvania law and,
17 therefore, if no law enforcement was involved in
18 intercepting those calls, that meant that the Wiretap
19 Act was not complied with and the people that had
20 committed the -- had done those would potentially have
21 engaged in felonious behavior under Pennsylvania law.

22 And certainly if we used them,
23 we would be violating the statute that says that you
24 can't use illegally intercepted wire communications
25 when you -- and make them public without yourself

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2 committing a felony.

3 Q So just to summarize then, as I understand it,
4 Mr. Phillips gave you the information, you followed up
5 on it and you confirmed the fact that the complainant
6 in the case had extensive phone contact with the
7 defendant after a time period in which there was an
8 alleged assault. And you were concerned about the
9 fact that maybe either she or her mother had committed
10 a felony?

11 A That was what I was concerned about.

12 Q Okay.

13 A Yes.

14 Q All right. As a result of all that, did you also
15 take steps at that point in time to look at other
16 allegations as it related to Mr. Cosby?

17 A Yes. The publicity then, as now, was worldwide,
18 and anyone who had access to television or newspapers
19 or radio media would hear about it. And some people
20 came forward and said to -- contacted us and said that
21 Mr. Cosby had done similar things to them that he is
22 alleged to have done to Ms. Constand.

23 Q And as the District Attorney of Montgomery
24 County, did you endeavor to investigate those
25 allegations?

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2 A I delegated that to First Assistant D.A. Ferman,
3 yes.

4 Q And did you reach certain conclusions about those
5 allegations at that time?

6 A Yes. The -- all of the allegations that we had
7 as of that date in February of 2005, as I remember,
8 were decades old and they were never reported to the
9 police. This is an area of particular interest to me.

10 At the time we had had -- here
11 in Montgomery County we had had a major death penalty
12 case reversed on this when the Supreme Court ruled
13 that a prior murder used to show a common scheme, plan
14 or design for the murder we prosecuted -- I prosecuted
15 it personally -- was -- the Supreme Court of
16 Pennsylvania reversed that in the case of Commonwealth
17 versus Thomas Hawkins.

18 And in this case, while there
19 was a span of years -- I believe it was 16 years
20 between the murders -- most of that time the killer
21 was in prison, so he wasn't available to go and commit
22 other murders. In that case the two murders lined up
23 almost perfectly. And the Court here allowed it, but
24 the Supreme Court of Pennsylvania reversed it.

25 Q Being aware of what the state of the law was and

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2 your conclusions regarding these other allegations,
3 did you ultimately factor that determination into what
4 you ultimately decided in this case?

5 A Yes. I determined that the other crime's
6 evidence would not be admissible by use of the
7 probative value versus prejudicial test because they
8 were too remote in time to be reliable. And I thought
9 a Court here would not allow it.

10 Q All right. We've gone over many things that you
11 examined in 2005 concerning this allegation. Do you
12 come to a point in time after examining all these
13 things, and I'm sure many others, where you reach a
14 conclusion?

15 A Yes.

16 Q And what was that conclusion?

17 A I decided that there was insufficient credible
18 and admissible evidence upon which any charge against
19 Mr. Cosby related to the Constand incident could be
20 proven beyond a reasonable doubt.

21 Q And as a result of reaching that conclusion, what
22 did you decide to do?

23 A I -- my choices were to leave the case open and
24 hope it got better or definitively close the case and
25 allow the civil court to provide redress to

1 Ms. Constand.

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3 On the issue of leaving the case
4 open, for example, if somebody's house is burglarized
5 and the police find fingerprints and they can't match
6 those fingerprints up, they leave the case open in the
7 hopes that someone will ultimately be arrested, their
8 fingerprints taken and they'll match the fingerprints
9 at the burglary. So the case remains open because
10 there's the possibility that the case could get
11 better.

12 In this instance, I did not
13 think there was any possibility that the case could
14 ever get better. The passage of time from the date of
15 the incident until when Ms. Constand came to the
16 police made forensic collection of evidence
17 impossible, and it would also be impossible and could
18 never be resurrected.

19 The fact that Ms. Constand had
20 given multiple statements that had inconsistencies
21 within them and also behavior detailed within them
22 that I thought was inconsistent with the behavior of a
23 person who had been sexually assaulted, I knew that
24 that end of the case, what Ms. Constand said, would
25 never get any better.

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2 And in fact, her actions on her
3 own, including going to a lawyer before going to the
4 police, had created a credibility issue for her that
5 could never be improved upon.

6 So whoever was sitting at the
7 table here in front of me would never be able to
8 repair that credibility damage. I concluded that
9 those elements -- oh, and I -- I concluded that
10 because of the international publicity, and all we got
11 from that was very old statements from people who I
12 could possibly have used as common scheme, plan or
13 design evidence, none of them had gone to the police.
14 And I didn't think that that end of the case would
15 ever get any better because the prejudicial effect
16 would always -- the probative value would always fail
17 to be -- to overcome the prejudicial effect.

18 Not reporting it to the police
19 was a -- the other people who came to us, by not
20 reporting those instances to the police ever until
21 they heard about this and decades going by, led me to
22 conclude that that possibility of using common scheme,
23 plan or design was never going to get any better.

24 So I came to the conclusion
25 that, unlike the example I gave about the fingerprint

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2 when your house is broken into, that there was no way
3 that the case could ever improve and get better with
4 time absent Mr. Cosby confessing.

5 At that point I concluded it was
6 better for justice to make a determination that Mr.
7 Cosby would never be arrested. I did that because of
8 the rules that -- there's special rules that
9 prosecutors have to operate under.

10 And while defense counsel are
11 supposed to do everything that is within their ability
12 legally and ethically to represent their client
13 vigorously and try to avoid a conviction, the
14 prosecutor, according to the Pennsylvania Rules of
15 Disciplinary -- Pennsylvania Disciplinary Rules for
16 Lawyers, says that the prosecutor is a Minister of
17 Justice.

18 And I did not believe it was
19 just to go forward with a criminal prosecution, but I
20 wanted there to be some measure of justice. So I made
21 the final determination as the sovereign. You
22 understand I am not Bruce Castor, the District
23 Attorney. I am the sovereign Commonwealth of
24 Pennsylvania when I am making these decisions.

25 And as the sovereign, I decided

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that we would not prosecute Mr. Cosby and that would then set off the chain of events that I thought as a Minister of Justice would gain some justice for Andrea Constand.

Q How so?

A The Fifth Amendment to the United States Constitution states that a person may not be compelled to give evidence against themselves. So you can't subpoena somebody and make them testify that they did something illegal -- or evidence that would lead someone to conclude they did something illegal -- on the threat of if you don't answer, you'll be subject to sanctions because you're under subpoena.

So the way you remove that from a witness is -- if you want to, and what I did in this case -- is I made the decision as the sovereign that Mr. Cosby would not be prosecuted no matter what. As a matter of law, that then made it so that he could not take the Fifth Amendment ever as a matter of law.

So I have heard banter in the courtroom and in the press the term "agreement," but everybody has used the word wrong. I told Mr. Phillips that I had decided that, because of defects in the case, that the case could not be won

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2 and that I was going to make a public statement that
3 we were not going to charge Mr. Cosby.

4 I told him that I was making it
5 as the sovereign Commonwealth of Pennsylvania and, in
6 my legal opinion, that meant that Mr. Cosby would not
7 be allowed to take the Fifth Amendment in the
8 subsequent civil suit that Andrea Constand's lawyers
9 had told us they wanted to bring.

10 Mr. Phillips agreed with me that
11 that is, in fact, the law of Pennsylvania and of the
12 United States and agreed that if Cosby was subpoenaed,
13 he would be required to testify.

14 But those two things were not
15 connected one to the other. Mr. Cosby was not getting
16 prosecuted at all ever as far as I was concerned. And
17 my belief was that, as the Commonwealth and the
18 representative of the sovereign, that I had the power
19 to make such a statement and that, by doing so, as a
20 matter of law Mr. Cosby then would be unable to assert
21 the Fifth Amendment in a civil deposition.

22 Mr. Phillips, a lawyer of vastly
23 more experience even than me -- and I had 20 years on
24 the job by that point -- agreed with my legal
25 assessment. And he said that he would communicate

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2 that to the lawyers who were representing Mr. Cosby in
3 the pending civil suit.

4 Q Okay. So then, to summarize, you've indicated
5 that considering the fact that you were a Minister of
6 Justice and based on your evaluation of the case and
7 what you had hoped to accomplish, you informed
8 Mr. Phillips that Mr. Cosby would never be prosecuted
9 for the allegations made by Ms. Constand; correct?

10 A Correct.

11 Q And you did so for the specific purpose of making
12 sure that Mr. Cosby could not assert the Fifth
13 Amendment in any subsequent civil proceedings as they
14 related to Ms. Constand?

15 A For all time, yes.

16 Q And both of those decisions were for all time,
17 you acting as sovereign; is that fair?

18 A That is -- that's the truth.

19 Q After Mr. Phillips told you that he would honor
20 your decision and what you had informed me that you
21 were going to do in never prosecuting Mr. Cosby for
22 the Constand crime, did you then take steps to provide
23 some type of formal document that would tell the
24 public and would tell the parties what you had
25 decided?

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2 A The premise of your question contains an error.
3 Mr. Phillips never agreed to do anything in exchange
4 for Mr. Cosby not being prosecuted. What he agreed to
5 was my legal analysis was accurate and that he would
6 tell the lawyers representing Mr. Cosby that Bruce has
7 the legal knowledge correct and that he would affirm
8 that he also agreed with that.

9 And, frankly, neither one of us
10 thought it was that hard a concept to understand
11 because once the Fifth -- once the possibility for all
12 time of being prosecuted is removed, the ability to
13 take the Fifth Amendment is also for all time removed.

14 Q And that was your intent?

15 A That was absolutely my intent.

16 Q And you communicated that intent to Mr. Phillips?

17 A I did.

18 Q Okay. Moving on now to, I guess, the next step,
19 did you inform all of the parties of your decision in
20 this case not to prosecute Mr. Cosby? And when I say
21 "you," I mean you or your office.

22 A I told Mr. Phillips, I told First Assistant D.A.
23 Ferman, and I directed her to contact Constand's
24 lawyers. She had -- earlier in this whole process,
25 she had told me -- the First Assistant had told me

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2 that she knew one of the lawyers from school. And I
3 assigned her the duty to liaise between the victim and
4 her lawyers and the D.A.'s office.

5 So I asked First Assistant D.A.
6 Ferman to communicate the decision to Constand's
7 lawyers that Cosby was not going to be prosecuted and
8 that the purpose for that was that I wanted to create
9 the atmosphere or the legal conditions such that Mr.
10 Cosby would never be allowed to assert the Fifth
11 Amendment in the civil case because I thought at the
12 time -- I still think -- that making Mr. Cosby pay
13 money to Ms. Constand was the best I was going to be
14 able to set the stage for because a criminal
15 prosecution, in my professional judgment, was not
16 viable and never would be.

17 Q At some point did you take steps to issue a press
18 release in this case?

19 A Yes. Yes, I did.

20 Q All right. If we could go --

21 THE COURT: You want to take a
22 break here?

23 MR. McMONAGLE: Sure, Judge.

24 THE COURT: I intend to go until
25 12:30, so I will give at this stage a 10-minute break

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2 so that we're back and witnesses will testify until
3 about 12:30, and then we'll take our luncheon break
4 which will be about an hour.

5 So please, members of the public
6 and to the press, you've been extraordinary in your
7 cooperation and I know that you'll continue to do so.
8 So you'll continue to abide by the Decorum Order.

9 This is a scheduled break,
10 again, but we will be picking back up at -- by that
11 clock on the wall there at 11:40. So you better be in
12 your seats because the Decorum Order will take over.
13 So we are subject to the call of the crier, but we
14 intend to start at 11:40.

15 - - -

16 (Recess.)

17 - - -

18 (A conference was held in
19 chambers, not reported.)

20 - - -

21 (The following proceedings were
22 reconvened with the Court, Mr. Steele, Mr. Ryan, Ms.
23 Gibbons-Feden, Mr. McMonagle, Mr. Tayback, Ms.
24 Pressley, Mr. Sarles, and the defendant being present:)

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2 THE COURT: All right. You may
3 resume the questioning.

4 BY MR. McMONAGLE:

5 Q Mr. Castor, I believe before we broke I was
6 asking you about whether you issued a press release.

7 A I did, yes.

8 MR. McMONAGLE: If I may
9 approach, Your Honor?

10 THE COURT: Yes. Again, if I
11 don't respond, you may keep moving.

12 MR. McMONAGLE: I'm going to ask
13 this be marked as D-4, Judge.

14 (Press Release dated 2-17-05
15 marked Defendant's Exhibit D-4 for identification.)

16 BY MR. McMONAGLE:

17 Q Mr. Castor, please take a look at what's been
18 marked for identification as D-4 and tell me if you
19 recognize that document.

20 A Yes.

21 THE COURT: Do you have a book
22 for me?

23 MR. McMONAGLE: It's going to be
24 on the screen in two seconds.

25 THE COURT: Not until I say it

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is. This I'm aware of.

MR. McMONAGLE: We've got an agreement coming forward with the rest of these, Judge, with your permission. We tried to work that out during the break so we can move.

MR. RYAN: Your Honor, if you want this book, I have it right here.

THE COURT: If you have an agreement.

BY MR. McMONAGLE:

Q Mr. Castor, taking a look at Defense-4, do you recognize that document?

A I do.

Q And what is it?

A It is a photocopy of the original press release that I issued -- actually, I personally issued on February 17th, 2005.

Q What do you mean "personally issued"?

A Well, it was kind of a weird situation because ordinarily I would not author a press release personally. And ordinarily I would give it to the First Assistant to see that it was released.

First Assistant D.A. Ferman at that time had, I believe, three children and left

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2 before the time I was going to be able to release it,
3 so I had to figure out how to do it myself, which
4 everybody will laugh today, but in 2005 I did not know
5 how to use -- attach a document to e-mail, so it was
6 all going to be faxed.

7 And so I typed it myself. It
8 took quite a long time to get it worded just the way I
9 wanted it. And I signed it. And then I was
10 responsible for sending out the faxes because I was --
11 actually, you had to put the paper in the machine so
12 it would come out on the letterhead. Now we don't do
13 it that way.

14 Q You're right, we're laughing. All right. Let me
15 ask you a question. How long did it take you to put
16 this press release together? I don't mean faxing it
17 and figuring out how you were going to transmit it,
18 but preparing it.

19 A It took me several hours.

20 Q And would you say that you exercised great care
21 in the preparation of this document?

22 A That would be an understatement.

23 Q And why would it be an understatement?

24 A I was writing this for three audiences. I was
25 writing it for the general consumption of the media

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2 who would then transmit my decision to the world. I
3 knew that the media would read it through the lens of
4 wanting to inform the public of what the outcome was,
5 but they would not parse the words because that's not
6 a reporter's job. A reporter's job is to inform in
7 the big picture.

8 So I wrote it in such a way that
9 I knew what the reporters would take from it, but I
10 knew they also wouldn't read it as a lawyer would read
11 it. I wrote it for the greater legal community who I
12 assumed would be analyzing my decision and would read
13 it as a lawyer would read it, attaching meaning to
14 every word and every sentence in context.

15 Then I was writing it for the
16 litigants to let them know that I did not want the
17 case tried in the press anymore and I wanted them to
18 go into the civil court and resolve their differences
19 without so much rhetoric.

20 And it was a warning to the
21 litigants that if they did not heed my advice to stop
22 making public pronouncements and speeches and press
23 events, that I would recall the national media to my
24 office and explain my reasoning for why I didn't
25 approve a prosecution of Mr. Cosby.

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2 On that last point, the entire
3 Eastern District of Pennsylvania Federal Court is
4 within the Philadelphia media market. In 2005 my
5 words would have been heard by virtually every
6 prospective juror in the civil case.

7 What I did not want those
8 prospective jurors to hear, since I had already
9 decided that I wanted Mr. Cosby punished in the civil
10 court, I did not want them to hear that District
11 Attorney Castor had serious doubts concerning the
12 credibility of Ms. Constand because I did not want to
13 mess up the carefully laid plan that Mr. Cosby would
14 be punished by having to pay money for what he had
15 done.

16 Q And to that end, did you fashion this press
17 release?

18 A I did.

19 MR. McMONAGLE: Could I, Your
20 Honor, have this published at this time?

21 THE COURT: Yes.

22 MR. McMONAGLE: Thank you, sir.

23 (Defendant's Exhibit D-4
24 published.)

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BY MR. McMONAGLE:

Q Mr. Castor, taking a look at this press release, it is two pages; correct?

A There is another page that's not here where I am telling the media that if they didn't get the fax, to go to the website.

Q Okay.

A That's not here.

Q But in terms of the actual substance which precedes your signature, is it on here?

A It is. The significance of the last page is it has the time where I completed it --

Q I understand. I understand.

A -- which I believe was 5:45 or something.

Q If we could get the first page up, I want to go through this. I know the document speaks for itself, but I just want to go through it paragraph-by-paragraph. You've told us you took a great deal of time to prepare this document.

Paragraph 1 of this document, it just basically references the fact that there was a joint investigation that went on into allegations against actor and comic Bill Cosby and that it was concluded; is that fair?

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A Yes.

Q The second paragraph relates to Ms. Constand;
correct?

A Yes.

Q And in it you describe her, that she was a former
employee of the Athletic Department of Temple
University and that she had complained to detectives
that Cosby touched her inappropriately during a visit
to his home in January of 2004; is that correct?

A Yes.

Q You document in that second paragraph that she
reported the allegation to her native Canada
January 13th of 2005?

A Yes.

Q I take it it was important, at least for your
consideration at that point in time, to show the time
lapse that had actually lapsed between the so-called
event and the complaint; correct?

A Precisely, to demonstrate the lack of prompt
complaint.

Q And then you also there indicated that Canadian
authorities had turned it over to Philadelphia Police
which, of course, we know is true; correct?

A Yes.

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Q You then put in Paragraph 3 that everyone involved in this matter cooperated with investigators, including the complainant and Mr. Cosby, and this level of cooperation has helped the investigation proceed smoothly and efficiently. The District Attorney commends all parties for their assistance.

Why did you put that paragraph in there?

A I put that in there because, in the civil case, I wanted the jurors in that case -- potential jurors in that case to think that everybody did what they were supposed to do in dealing with the police and draw no adverse inference between either side.

Q And that was important to you?

A It was very important to me, yes.

Q Your goal being, I take it, that Ms. Constand be able to obtain some success in her civil case?

A Right. And the idea, of course, is, as I was weighing the scales from the criminal perspective, the scale tumbled way down in favor of Mr. Cosby and against Ms. Constand.

I thought by including that paragraph, I would be telling jurors that everybody talked to the police and cooperated with the police,

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2 so nobody should draw a negative conclusion against
3 Mr. Cosby or against Ms. Constand just because I
4 decided not to arrest Mr. Cosby.

5 Q So am I to understand then that it was your goal
6 not to adversely affect Ms. Constand in the civil case
7 by not bringing this criminal prosecution?

8 A Yes.

9 Q In Paragraph 4, the District Attorney has
10 reviewed the statements of the parties involved, those
11 of all witnesses who might have firsthand knowledge of
12 the alleged incident including family, friends, and
13 co-workers of the complainant, and professional
14 acquaintances, and employees of Mr. Cosby.

15 You put that in there?

16 A I did.

17 Q And was that, in fact, accurate?

18 A It was.

19 Q Detectives searched Mr. Cosby's Cheltenham home
20 for potential evidence. Investigators further
21 provided District Attorney Castor with phone records
22 and other items that might have evidentiary value.

23 You referenced that. You
24 thought that important to this press release?

25 A Yes. In the first sentence, I -- the code word,

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2 if you will, that I expected lawyers and the litigants
3 to pick up on was "firsthand knowledge" because
4 whisper-down-the-lane hearsay I did not consider.

5 And I wanted people to know that
6 inadmissible hearsay was not part of anything that I
7 considered, but I did consider firsthand knowledge.

8 Q You also referenced phone records in this same
9 press release; am I correct?

10 A In the next -- in the third sentence -- I'm
11 sorry. The reason I used the phone records is I knew
12 that the litigants were aware of the significance of
13 the multiple phone contacts between the complainant
14 and Mr. Cosby, but that the press would read over that
15 and not highlight it.

16 And I don't think that they ever
17 did, but I thought lawyers examining this would
18 conclude that those phone records might be detrimental
19 to the successful prosecution.

20 And then I used the nebulous
21 term "and other items that might have evidentiary
22 value" because I did not want to say that I had
23 concluded that there were illegally obtained wiretaps
24 in the case because I did not want anybody to think
25 that Ms. Constand, her mother, or anyone else involved

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2 in those -- in the production of those wiretaps had
3 done something illegal because I, again, didn't want
4 prospective jurors to conclude that Ms. Constand was a
5 bad person and therefore hold it against her in the
6 civil case we all knew was coming.

7 Q The last sentence in that paragraph reads:

8 Lastly, the District Attorney reviewed statements from
9 other persons claiming that Mr. Cosby behaved
10 inappropriately with them on prior occasions.

11 Why include that in the press
12 release?

13 A Because with the publicity, we had some people
14 that had contacted us saying that they had been
15 molested by Mr. Cosby. And First Assistant D.A.
16 Ferman reviewed those statements and then forwarded
17 them to me.

18 And I wanted the public -- I
19 wanted the public to know that we didn't ignore the
20 fact that we had that information. We, in fact, did
21 look at them and consider whether they were of
22 evidentiary value.

23 Q And then to the next paragraph, which actually
24 speaks to that: However, the detectives could find no
25 instance in Mr. Cosby's past where anyone complained

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2 to law enforcement of conduct which would constitute a
3 criminal offense.

4 You wrote that and you thought
5 that was of significance to write?

6 A Yes. I wanted, again, the -- anybody who thought
7 that these other reports were of value, evidentiary
8 value to the Commonwealth, to realize that we tried to
9 discern whether there was any way to enhance their
10 probative value. And the best way to enhance their
11 probative value is if they went to the police and had
12 given statements.

13 And I asked the detectives to
14 look for them, and there were no statements that I
15 recall that they were able to find where the event
16 occurred that the other complaining witnesses were
17 saying with Cosby and then that other complaining
18 witness went to the police.

19 So to the masses who were going
20 to read the media accounts, it was simply to be read
21 on its face, that yeah, those guys looked at this
22 issue, but they decided it wasn't of value because
23 they hadn't been reported to police.

24 I thought the greater legal
25 community would say that I was applying the Rules of

1 Evidence knowing that a judge would not admit that.
2
3 And I was communicating to the litigants that if they
4 went down that road, it was my opinion that they would
5 not be able to get that information in.

6 Q Okay. And for that end then, that last -- I
7 shouldn't say the last paragraph. The second to last
8 paragraph -- and it's a lengthy one -- if you're okay
9 with it, I'm going to paraphrase it.

10 You do, in fact, in that
11 paragraph discuss your consultations with other
12 members of your team. You discussed your findings,
13 that there was insufficient, credible and admissible
14 evidence that exists upon which to bring any charge
15 against Mr. Cosby which could be sustained beyond a
16 reasonable doubt.

17 And then you in a rather general
18 fashion discuss facts and elements of the offenses,
19 criminal intent, the Rules of Evidence, the
20 admissibility of evidence, and then, finally, conclude
21 with: After this analysis, the District Attorney
22 concludes that a conviction under the circumstances of
23 this case would be unattainable. As such, District
24 Attorney Castor declines to authorize the filing of
25 criminal charges in connection with this matter.

2 I've summarized that correctly?

3 A Yes. There are a lot of things in that paragraph
4 that are to be read on different levels.

5 Q I understand. I want to get to the last
6 paragraph. The last paragraph you actually begin
7 with: Because a civil action with a much lower
8 standard of proof is possible, the District Attorney
9 renders no opinion concerning the credibility of any
10 party involved so as not to contribute to the
11 publicity and taint prospective jurors.

12 Did I read that correctly?

13 A You did.

14 Q You saw fit at that time, recognizing your goal I
15 take it, of making sure that there was a, at least in
16 some measure, successful resolution for Ms. Constand.
17 You made sure that the public, the potential jurors in
18 that case would not be affected by the fact that you
19 didn't bring a prosecution.

20 Is that a fair way to summarize
21 that?

22 A It is, but there's an addition. At that point I
23 don't want to tell the public that I thought Andrea
24 Constand had compromised her credibility because I
25 didn't want her to be vilified publicly because, A, I

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2 thought that was unfair to her.

3 But there's a broader reason,
4 and that was that I wanted -- I wanted to encourage
5 people to come forward if they're sexually assaulted
6 or assaulted in any way. And what I didn't want to
7 have happen is this high publicity case act as a
8 deterrent for people who are molested going to the
9 police.

10 And if I had written in there
11 the reason why I didn't think the case should go
12 forward in explicit terms that were easy to
13 understand, I was afraid that other victims would say
14 look what happened in that case, if they're abused,
15 I'm not going to the police because now this woman is
16 being vilified by the very people who are supposed to
17 be protecting her.

18 Q Okay. And then it goes on: The District
19 Attorney does not intend to expound publicly on the
20 details of his decision for fear that his opinions and
21 analysis might be given undue weight by jurors in any
22 contemplated civil action.

23 And you've obviously spoken to
24 that previously. And then it says: District Attorney
25 Castor cautions all parties to this matter that he

1 will reconsider this decision should the need arise.

2 Did I read that correctly?

3 A You did.

4 Q And what was your intent in writing that?

5 A That was telling primarily Andrea Constand's
6 lawyers, but also Wally Phillips, that if they went
7 out in the media and criticized the D.A.'s office for
8 our decision, I was then going to call the press back
9 and explain what I have explained here in court, that
10 Andrea Constand's own actions during that year ruined
11 her credibility as a viable witness to win the case.

12 If I had said that, the civil
13 case would have been severely hampered because, back
14 in 2005, what I said on the matter of law enforcement
15 in the Philadelphia media market was generally
16 accepted by the public as accurate and true based on
17 lengthy years of service and successful prosecutions
18 that I had brought. That's a warning.

19 Q So as I understand it, you're warning both sides
20 don't take advantage of this decision one way or the
21 other and go about your business in the civil realm
22 and do it the right way?

23 A Correct.

24 Q Contextually the next sentence reads: Much

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2 exists in this investigation that could be used (by
3 others) to portray persons on both sides of the issue
4 in a less than flattering light.

5 A I don't know how I could have been any clearer.
6 I'm not speaking to the general public there or even
7 to the greater legal community. I'm speaking directly
8 to the litigants, the complainant and Mr. Cosby.

9 And I'm saying that we have put
10 together and documented things that would make the
11 married Mr. Cosby look bad to the world, a man whose
12 reputation at that time, I'm sure, and probably still,
13 does mean something to him. And I am telling Andrea
14 Constand and her lawyers that we documented a number
15 of things that would make her not look good in public.

16 So I was saying that everybody
17 better keep their mouths shut because you don't want
18 those things out there because that would put a monkey
19 wrench into the success or failure of the civil case.

20 Q Which, in fact, you speak to in the last sentence
21 of this paragraph: The District Attorney encourages
22 the parties to resolve their dispute from this point
23 forward with a minimum of rhetoric.

24 A Earlier in my testimony I said that I detailed
25 First Assistant D.A. Ferman to act as liaison with the

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2 Constand side. That was because one of the lawyers on
3 the Constand side, I believed, was trying to influence
4 me by extrajudicial statements in the media, and I
5 didn't like that.

6 And I was in this paragraph
7 telling those lawyers and Mr. Cosby and his lawyers
8 that that as far as the criminal matter is concerned,
9 it's over. We have other methods in America to
10 redress grievances.

11 In the civil court, I have
12 created a scenario where you'll get a statement from
13 Mr. Cosby under oath with all the extra discovery that
14 is allowed in civil cases that you don't have in
15 criminal cases, and that was all I was going to do.

16 Q And you did that, as I understand your testimony,
17 by making a decision and informing Mr. Phillips of a
18 decision that Mr. Cosby would never be prosecuted?

19 A That's correct.

20 Q Did you find out that your hope, your goal of a
21 civil suit being brought was, in fact, realized, heck,
22 three weeks after the press release?

23 A Yes. It was reported in the newspaper and in the
24 legal publications that I read, so I saw that the
25 civil suit had been brought. I had no doubt that it

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would be brought.

And once I had decided that there could not be a prosecution that would be viable, I operated under the certainty that a civil suit was coming and set up the dominoes to fall in such a way that Mr. Cosby would be required to testify.

Q And ultimately do you learn that, in fact, not only does that not happen, that there's a civil suit here that Mr. Cosby does testify, and that ultimately that lawsuit is settled?

A I read the -- I read the Complaint. Somebody had sent me the Complaint. I think maybe a reporter. And I -- now, of course, the civil Complaint is written in the light most favorable to the plaintiff, and it contains in it the things the plaintiff hopes the plaintiff is going to be able to prove at a civil trial.

But I remember smiling to myself thinking that if I could have proven all of those things, Mr. Cosby would have handcuffs on him right now. But I later learned that the case was settled, but I don't know how.

Q While it's up on the screen -- and I'll have it taken off the screen -- the press release that we

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2 referred to, you actually signed it; is that correct?
3 That's your signature?

4 A That is, yes.

5 Q Was that typical for you to do? And if it was or
6 wasn't, why did you sign it in this case?

7 A I don't recollect that I generally signed them.
8 This was so unusual for me to actually be the one who
9 wrote it that I don't remember whether we signed them
10 routinely or not.

11 But I remember in this case I
12 absolutely signed it. And I used my title because I
13 intended that this was the decision of the sovereign,
14 the District Attorney being the Commonwealth of
15 Pennsylvania, and therefore the representative of the
16 sovereign.

17 Q You talked about the Complaint, and I want to
18 kind of move forward. At some point in time you come
19 to the realization that that lawsuit that you had
20 hoped would occur is settled; is that fair?

21 A Yes.

22 Q All right. Now, let me ask you this. At any
23 point in time from the time you signed that press
24 release until you left as District Attorney, did you
25 ever take any steps, any efforts to investigate the

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2 civil case, obtain documents from the civil case,
3 obtain depositions from the civil case or anything of
4 the like?

5 A No. I directed that the office cooperate with
6 Ms. Constand in providing discovery materials without
7 any hassle, but I did not do anything, nor direct
8 anyone, to continue the criminal investigation because
9 the criminal investigation was dead by virtue of the
10 decision I made as the representative of the sovereign
11 that Mr. Cosby would never be prosecuted.

12 Q And to that point, that decision that he would
13 never be prosecuted -- to your knowledge, after you
14 left, Miss Ferman became District Attorney; is that
15 correct?

16 A Yes.

17 Q And she becomes District Attorney in 2008;
18 correct?

19 A Yes.

20 Q 2008, 2009, 2010, 2011, 2012, 2013, 2014, to your
21 knowledge, did District Attorney Ferman do anything to
22 conduct an additional investigation of a case that you
23 had already determined and promised would never be
24 prosecuted?

25 A Not to my knowledge, no.

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2 Q Okay. The finalization of that civil case, did
3 it allow you to conclude, based on what you knew about
4 it and what you read about it, that, in fact, after
5 you had informed Mr. Phillips that you were never
6 going to prosecute Mr. Cosby so that he could and
7 would have to give up any opportunity under the Fifth
8 Amendment to not be imposed, that he, in fact,
9 followed through with that and that Mr. Cosby was
10 deposed as you had hoped?

11 A Ms. Constand followed through with it as I had
12 hoped and filed a civil suit, put a subpoena on Mr.
13 Cosby to testify, and he did so.

14 Q Okay.

15 A The matter was resolved and I was hopeful that I
16 had made Ms. Constand a millionaire.

17 Q Okay. And so time moves forward. You obviously
18 leave the office. You've discussed with us your
19 career subsequent to that.

20 Does something happen in the
21 Summer of 2015 that allows you or causes you to become
22 aware of, again, something involving the Cosby case?

23 A Yeah. It was the second time though. But the --
24 the second -- I recall three times having the national
25 media descend upon me on Cosby without warning,

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2 because obviously we're giving it a great deal of
3 attention now and the Court is hearing a motion.

4 But other than -- other than
5 when some comedian makes some joke about Cosby being a
6 sexual predator or a rapist or something, I never gave
7 the case another thought.

8 And I don't recall giving any
9 interviews until that time or thinking anything other
10 than, as a Minister of Justice, I had done the best
11 that I could.

12 So in, I think it was, November
13 of -- you said '15, but I think it was November of
14 '14, the joke comes out and three days of my life are
15 spent explaining to the media what the situation was
16 from back in 2005.

17 I felt that since I was still a
18 public official and I was still part of the same
19 government here that I had to respond.

20 Q Okay. Let me interrupt you because I want to try
21 and hustle along here in terms of getting us to some
22 of the issues that we're raising.

23 THE COURT: Do me a favor
24 because he corrected a question that presumed a date.
25 The question, I read it as Summer of 2015.

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MR. McMONAGLE: Okay.

THE COURT: He's now talking about November of '14.

MR. McMONAGLE: Yeah.

THE COURT: So did --

BY MR. McMONAGLE:

Q I had asked you a question about learning of something in the Summer of 2015. You're offering something in the Summer of 2014, which is why I was moving him along, but I don't want to interrupt your answer.

THE COURT: I just want to be clear. Is it you learned something in Summer of 2014 and then, in November of 2014, three days of something? I'm just trying to be clear on the dates here.

THE WITNESS: No. In November of 2014 the case -- the case exploded onto the national media scene and I addressed questions as they came in.

There was then a second time when information was released in the Summer of 2015 where I was, again unexpectedly, drawn into the maelstrom of the Cosby case.

1
2 BY MR. McMONAGLE:

3 Q And what was that?

4 A I never did completely understand the procedural
5 aspects of what happened, but evidently, according to
6 what I read and what reporters told me, a judge, a
7 Federal District Court judge released or unsealed
8 portions of the -- of some of the deposition testimony
9 that Mr. Cosby had given in the original 2005 civil
10 suit.

11 And contained within the portion
12 that was released were statements that could be used
13 as incriminating statements in a criminal prosecution
14 had we had those back in 2005.

15 Q Got you. And at some point do you find it
16 necessary to contact the Montgomery County District
17 Attorney's Office in any way about that particular
18 subject?

19 A Yes. I think it's important to point out that
20 the District Attorney's Office did not consult with me
21 on anything that went on in the Cosby case. They were
22 doing their job as the law enforcement arm, and I was
23 doing my job as the legislative and executive arm for
24 the county. So it's not like they're asking my
25 advice. They're doing their own thing.

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2 So I don't know what they're
3 doing, but it gets reported in the newspapers that
4 the -- as a result of the Cosby -- the unsealing of
5 the Cosby deposition, that the case has been -- the
6 criminal case as it relates to Andrea Constand had
7 been re-opened.

8 And I read numerous reports that
9 said that I had learned that it had been re-opened,
10 but I never actually did learn that until he was
11 arrested. What I learned was that there was
12 speculation in the newspapers in September of 2015
13 that Mr. Cosby might be arrested imminently.

14 Q What did you do as a result of that?

15 A I knew that I had bound the Commonwealth as the
16 representative of the sovereign not to arrest Mr.
17 Cosby. And at the time District Attorney Ferman was
18 running for judge of the Court of Common Pleas, and I
19 wanted to make sure that she didn't make a mistake and
20 go ahead and move against Cosby and it turn out that
21 she should not have done so and affect her election.

22 Q And with that in mind, what did you do?

23 A I wrote her an e-mail explaining the situation
24 from 2005 to tell her to tread carefully here because,
25 in my opinion, she was exposing the county and herself

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2 to civil liability because the decision on whether to
3 go forward in Cosby was put to rest by my decision in
4 2005. And I went in some detail about that so that
5 she would have it on record.

6 (E-mail dated September 23, 2015
7 to Risa Ferman from Bruce Castor marked Defendant's
8 Exhibit D-5 for identification.)

9 MR. McMONAGLE: Judge, with your
10 permission, I'd like to approach.

11 BY MR. McMONAGLE:

12 Q I'm going to show you, Mr. Castor, what's been
13 marked for identification as Defense-5 and ask you,
14 first and foremost, if you recognize that document?

15 A I do.

16 Q And what is it?

17 A This is an e-mail that I sent from home because I
18 was off -- that was my wedding anniversary that day --
19 to District Attorney Ferman at her Montgomery County
20 D.A.'s Office address.

21 And I signed it intentionally or
22 I typed intentionally my name and my title as
23 Commissioner because this was an official
24 communication from a fellow member of the government
25 to the District Attorney to let her know that if the

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2 speculations in the newspaper are true, there are big
3 problems with this case if you decide to go ahead.

4 MR. McMONAGLE: Your Honor, if I
5 may publish this?

6 THE COURT: Any objection?

7 MR. RYAN: No, Your Honor.

8 THE COURT: You may publish it.

9 (Defendant's Exhibit D-5
10 published.)

11 BY MR. McMONAGLE:

12 Q Mr. Castor, what's being published, this is the
13 e-mail that you sent to District Attorney -- then
14 District Attorney Ferman; is that correct?

15 A It is. There's a caveat. I didn't realize that
16 that was a holiday, a Jewish holiday, so I had it
17 hand-delivered the next day. So I don't know whether
18 this is the one I actually sent or the hand-delivered
19 copy. I figured the District Attorney gets a lot of
20 e-mails and might have missed it, so I made sure to
21 have it delivered.

22 Q Obviously, the document speaks for itself in
23 terms of what's said. I'd like to explore some things
24 that you did say.

25 Obviously in the first paragraph

1
2 you reference that you had read something in the
3 newspaper. And after you compliment Ms. -- then
4 District Attorney Ferman, you then say: So you almost
5 certainly know this already. I'm writing to you just
6 in case you might have forgotten what we did with
7 Cosby back in 2005. Attached is my opinion from then.

8 Is that correct?

9 A That's correct.

10 Q You then in the next paragraph say: Once we
11 decided that the chances of prevailing in a criminal
12 case were too remote to make an arrest, I concluded
13 that the best way to achieve justice was to create an
14 atmosphere where Andrea would have the best chance of
15 prevailing in a civil suit again Cosby.

16 And that obviously you testified
17 to much of the morning; is that correct?

18 A That's correct.

19 Q With the agreement of Wally Phillips and Andrea's
20 lawyers, I wrote the attached as the only comment I
21 would make while the civil case was pending. Again,
22 with the agreement of the defense lawyer and Andrea's
23 lawyers, I intentionally and specifically bound the
24 Commonwealth that there would be no state prosecution
25 of Cosby in order to remove from him the ability to

1
2 claim his Fifth Amendment protection against
3 self-incrimination, thus forcing him to sit for a
4 deposition under oath.

5 Did I read that correctly?

6 A You did.

7 Q And that's what you did?

8 A Correct. That was not an agreement. That was a
9 statement from me that Mr. Cosby would not be
10 prosecuted by the Commonwealth of Pennsylvania and
11 that, as a matter of law, removed from him the ability
12 to claim his Fifth Amendment protection against
13 self-incrimination.

14 So I am telling District
15 Attorney Ferman that there wasn't any quid pro quo
16 here. This was a definitive statement by the
17 Commonwealth and, as a result thereof, Mr. Cosby would
18 be required by law to testify without Fifth Amendment
19 protection.

20 Q Right. A decision by you to never prosecute
21 Cosby articulated to his lawyer that was then
22 obviously relied upon in submitting in the deposition;
23 correct?

24 A I would assume, yeah.

25 Q Yeah.

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A Cosby would have had to have been nuts to say those things if he thought there was any chance of being prosecuted.

Q Well, more importantly, after you communicate to Mr. Phillips that he's never going to be prosecuted and removing his Fifth Amendment right, then in fact it's clear that it was relied upon and that he testified; correct?

A I think he testified even more than once.

Q Let me move on: Wally was speaking for Cosby's side at the time, but he was in contact with Cosby's civil lawyers who did not deal with me directly that I recall. I only discovered today that Wally had died.

A Well, yeah, that was sort of embarrassing because I wanted to get ahold of Wally when I saw in the newspaper that there was the possibility that Cosby's arrest could be imminent. I wanted to call Wally up and say to him, you know, do I have something wrong here, because I was absolutely positive of what I did.

And I put in Google, and the first thing that came up was his obituary. I discovered that he had died in February. I felt badly that I didn't know that because he and I had served on the Judicial Reform Commission in Philadelphia and I

1
2 liked him.

3 THE COURT: Ready to take a
4 break?

5 MR. McMONAGLE: Yes, sir.

6 THE COURT: All right. It's
7 12:30 and I want to keep to a schedule here. And
8 we've been going -- many of you have been sitting here
9 for a long time.

10 Now, this is a luncheon break.
11 This is not a situation where there's a jury, so I
12 don't have to give any kind of cautionary instructions
13 to a jury, but the only cautionary instructions that I
14 have for the members of the public and press is follow
15 the Decorum Order. Again, that was put together with
16 a great deal of thought and it is an Order of Court.

17 As to the parties, Mr. Castor,
18 you are a witness under oath. You are not to speak
19 with anyone while you are waiting to return to
20 continue with direct examination and subsequent
21 cross-examination.

22 Essentially use this time to go
23 get lunch, stretch your legs, file reports if that's
24 what you need to do, and we will start as close to
25 1:30 as we can.

1
2 There's a very good likelihood
3 that we go through until tomorrow -- this is moving at
4 a slower pace than I thought, so I'm going to address
5 that with counsel -- even if I was to consider all of
6 the evidence today and then take the overnight to make
7 a decision, so you might want to plan accordingly.

8 So with that said, you know,
9 counsel, try to be back maybe five minutes early. If
10 something comes up, you can address me.

11 - - -

12 (At 12:30 p.m., a recess was
13 taken until 1:40 p.m. of the same day.)

14 - - -

15 (A conference was held in
16 chambers, not reported.)

17 - - -

18 (The following proceedings were
19 reconvened with the Court, Mr. Steele, Mr. Ryan, Ms.
20 Gibbons-Feden, Mr. McMonagle, Mr. Tayback, Ms.
21 Pressley, Mr. Sarles, and the defendant being present:)

22 - - -

23 THE COURT: We're ready to
24 resume the questioning of the witness.

25 MR. McMONAGLE: Thank you, Your

1
2 Honor. If we could just resume with the last
3 exhibits?

4 THE COURT: And just for the
5 record, we did have a brief conference with just the
6 lead counsel on both. It was to try to figure out
7 whether we will be going over until tomorrow or not.

8 Again, I'm not limiting anybody.
9 I'm clearing my schedule if we had to. Right now it
10 doesn't appear it, but that was all we had gone over.

11 MR. McMONAGLE: Yes, sir.

12 BY MR. McMONAGLE:

13 Q Mr. Castor, I just want to ask you with respect
14 to this document -- and if I'm rereading over what I
15 did, I'll do it quickly -- that this was a document
16 that you sent to Miss Ferman after dealing with being
17 made aware that there was activity in this case; is
18 that fair?

19 A No, that's not fair. I read in the newspaper
20 that there was speculation that something was going to
21 be happening in the Cosby case, so I didn't learn
22 anything.

23 Q Okay.

24 A That's why I started off by saying "I certainly
25 know better than to believe what I read in the

1 newspaper."

2 Q Okay. But you sent this to Ms. Ferman; correct?

3 A I did.

4 Q And thereafter did Ms. Ferman respond?

5 A (No response.)

6 Q Thereafter did Ms. Ferman respond and how?

7 A Well, she sent me a letter. I didn't immediately
8 consider it a response. I considered it a request.

9 Q Okay.

10
11 (Letter dated September 25, 2015
12 to Bruce Castor from Risa Vetri Ferman marked
13 Defendant's Exhibit D-6 for identification.)

14 MR. McMONAGLE: And if I could
15 approach, Your Honor?

16 THE COURT: Yes.

17 BY MR. McMONAGLE:

18 Q Mr. Castor, I want to show you -- we're now up to
19 D-6 -- what's been marked for identification as D-6.

20 Do you recognize that item?

21 A I do.

22 Q And is that, in fact, the request or at least a
23 responsive e-mail that you received from then D.A.
24 Ferman?

25 A Yes. It was not an e-mail. It was a letter.

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Q I'm sorry, letter.

MR. McMONAGLE: And if we could demonstrate that without objection, I believe?

MR. RYAN: I do not have an objection.

(Defendant's Exhibit D-6 published.)

BY MR. McMONAGLE:

Q This is a letter from D.A. Ferman. And in it she is referencing the -- really referencing the e-mail that you sent to her; is that correct? When I say "referencing," she's clearly responding to your e-mail; is that fair?

A No, I don't think so, Mr. McMonagle.

Q Tell me what she was doing.

A In the intervening day between the 23rd and the 25th, a newspaper article appeared that seemed to suggest that there was another writing in addition to the writing that I had sent to the D.A. which -- I don't know what you've marked it, but what was my opinion in the case that was issued as the press release.

As a result of that, it created the impression that there was another writing. I

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actually asked the reporter to clarify that, and I don't know whether it ever happened. And that generated -- when I read this letter, I thought that that was a request from Mrs. Ferman to me for any other documents that I might have had.

And then later on, further down in the letter, she says -- she makes a reference to my e-mail.

Q Okay. And as a result of receiving this from then D.A. Ferman, do you respond to her?

A Yes.

(E-mail dated September 25, 2015 to Risa Ferman from Bruce Castor marked Defendant's Exhibit D-7 for identification.)

MR. McMONAGLE: Your Honor, if I may approach with D-7?

THE COURT: Yes.

BY MR. McMONAGLE:

Q Please take a look at what's been marked for identification as D-7 and tell me what that is.

A This is an e-mail from me to District Attorney Ferman on September the 25th.

Q And this is you responding to the letter that she sent you, Mr. Castor?

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A I think so. I haven't read it in a long time.

Q Take a second. And I don't mean to rush you through it. Please take a second and, when you're comfortable, I'll ask the next question.

A The reason why I'm not sure is because this was that holiday that I referenced when I thought maybe she had not received it.

(Witness reading document.)

Yes. Yes, this is in response because it references what I said was an error in the newspaper story.

MR. McMONAGLE: Okay. If we could publish this then without objection, Your Honor?

THE COURT: Yes.

(Defendant's Exhibit D-7 published.)

BY MR. McMONAGLE:

Q Just to summarize, Mr. Castor, in Ms. Ferman's letter to you, she had requested, as I understand it and as I read it, any type of written agreements, declarations, et cetera; correct?

A No. She was referring to a specific statement in a newspaper article that there was a written declaration that I signed off on, and she wanted to

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2 know what that was. And the newspaper reporter had
3 become confused because the written declaration was,
4 in fact, the press release that I had signed.

5 Q I see. And in this particular e-mail, you do
6 indicate that the attached press release is a written
7 determination that we would not prosecute Cosby; is
8 that correct?

9 A Yes.

10 Q All right. Thank you. And then if we can go to
11 the next exhibit.

12 (E-mail dated September 25, 2015
13 to Risa Ferman from Bruce Castor marked Defendant's
14 Exhibit D-8 for identification.)

15 MR. McMONAGLE: Your Honor,
16 again, if I may approach?

17 THE COURT: Yes.

18 BY MR. McMONAGLE:

19 Q D-8, would you please take a look at that and
20 tell me if you remember what that was?

21 A I do.

22 Q And what is it, sir?

23 A Also on September 25th -- it was a couple of
24 hours -- it was a couple of minutes after I sent the
25 previous one. I recollected a conference that I had

1
2 had with Wally Phillips when he and I served on the
3 Judicial Reform Commission together.

4 Q Okay.

5 A And I didn't know whether it was important, but I
6 sent it along anyway because I deduced from
7 Mrs. Ferman's communication to me that she was looking
8 for writings that might be helpful in her
9 determination of what to do based on my September 23rd
10 e-mail.

11 Q And in this e-mail, you do reference obviously
12 that you had served on the Reform Commission with
13 Mr. Phillips and that, during a meeting with him, he
14 had told you that the civil Settlement Agreement in
15 the Constand/Cosby case was baked in, that there would
16 be no prosecution for that incident.

17 Am I correct that you wrote that
18 in this e-mail?

19 A Well, it wasn't a meeting. We were at -- well,
20 we were at a Judicial Reform Commission meeting, and
21 he happened to sort of out of the blue say to me that
22 there -- that the decision that Cosby would not be
23 prosecuted was baked in, was his words, into the
24 Settlement Agreement.

25 Now, I had nothing to do with

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2 the Settlement Agreement and I have never seen it, and
3 I don't know what the words "baked in" meant.

4 Q Okay.

5 A But I thought maybe District Attorney Ferman
6 might be able to get that Settlement Agreement and it
7 might be -- might assist her in her analysis.

8 Q Okay. After writing the e-mails that we have
9 seen and which you sent to Ms. Ferman, did either
10 Ms. Ferman or anybody at the District Attorney's
11 Office ask you to come in to be interviewed about the
12 decision that you made in 2005?

13 A No. Much to my surprise, actually, I thought
14 that when it became common knowledge that I would be
15 testifying here today that the County Detectives would
16 want to take a statement from me or interview me to
17 find out what I was going to testify to, and I was
18 actually kind of disappointed that they didn't.

19 Q Going back to the date in which you sent the
20 e-mails, that time period, did you receive any phone
21 calls from Ms. Ferman or, again, anybody in the
22 District Attorney's Office asking you what exactly you
23 had decided in 2005, what you had told Mr. Phillips or
24 anything of the like?

25 A No, not that I recall, no.

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Q And on the flip side of that, have I called you and spoken to you on numerous occasions about what you've testified here today?

A Yeah. You call me on numerous occasions on all sorts of things, but this -- this is among them.

Q Well, specifically I want to talk -- that's probably true. But with respect to this, you and I have spoken numerous times about what you told Mr. Phillips and obviously relevant to what you've testified here today?

A Yes.

Q Would you have in any way said no to any overture or request by the District Attorney's Office to speak to them?

A Let's be clear, Mr. McMonagle. I'm not on your team here. I want them to win.

Q We're crystal clear.

MR. McMONAGLE: I have no further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. RYAN:

Q Good afternoon, Mr. Castor.

A Good afternoon.

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Q We met earlier just now, you'll recall, right over here?

A Yeah. You were nice to introduce yourself.

Q It's my pleasure. So I have some questions for you. And what I want to start with are some statements that you made on your direct examination.

Do you need a moment to get comfortable?

A Yeah, it's -- I have to turn the chair so I don't have to turn my back. Go ahead.

Q Ready? On cross-examination -- I'm sorry. On direct examination you said that it was your position that the victim in this case, Andrea Constand, had "compromised her credibility."

Do you recall saying that?

A Yes.

Q And that when you were talking about the scales of justice as you were looking at them in evaluating this case, those scales had "tumbled way down" in the favor of Mr. Cosby.

Do you recall saying that?

A Yes.

Q Is it your testimony here today that you did not believe Ms. Constand's account?

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2 A No.

3 Q No, it's not your testimony or it is your
4 testimony and no, you did not believe Ms. Constand's
5 account of what occurred?

6 A I believed Ms. Constand's account of what
7 occurred.

8 Q Okay. And that, I guess, is despite all these
9 various issues that you said she created for herself
10 with regard to her credibility?

11 A Well, what I think and what is proveable in a
12 courtroom are two different things.

13 Q And I understand that. What I'm asking you here
14 right now is what you think.

15 MR. McMONAGLE: I don't mind,
16 but if he could just be permitted to fully answer the
17 question.

18 MR. RYAN: I apologize.

19 THE COURT: This is
20 cross-examination and you can't hear. You know what?
21 Now that you're back and he's going to -- let's get
22 the microphones. Give him the microphone.

23 MR. RYAN: I have one.

24 THE COURT: You can use the
25 podium if you'd like. Make sure you use the

1 microphone and you use your microphone.

2 BY MR. RYAN:

3 Q And I apologize, Mr. Castor. You paused and I
4 took that as the conclusion of your answer.

5 So go ahead and finish.

6 A What I think is Andrea Constand was
7 inappropriately touched by Mr. Cosby. I am not
8 analyzing it back in 2005 as to what I think. I am
9 analyzing it back in 2005 as to what I can prove. I
10 can probably rattle off a half a dozen people I think
11 committed murder in Montgomery County, but that
12 doesn't mean that I can prove it. And that's why they
13 didn't get arrested.

14 And the problem with the
15 Constand case is, setting aside whether I believed her
16 or not, we have to follow the Rules of Evidence and we
17 have to produce sufficient evidence to convict
18 somebody beyond a reasonable doubt.

19 By virtue of Ms. Constand's
20 behavior in the year between when the incident
21 occurred and when she went to the police and the
22 multiple inconsistencies after she went to the police
23 and gave statements and the behavior that she
24 exhibited with Cosby after she claimed that she was
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2 of that. That is why I asked the Court to consider
3 this privately, because I can go through that very
4 extensively and demonstrate to all assembled here how
5 Ms. Constand would be easily discredited in a
6 courtroom.

7 Q And now I want to talk about -- a little bit
8 about your experience because, as you've said, you
9 were experienced certainly as a prosecutor generally,
10 but also as a prosecutor of sex crimes; right?

11 A That's true.

12 Q And frequently, it's fair to say, in sex crimes
13 cases you find the prosecutor finds themselves making
14 the decision about whether or not to file charges in
15 those sorts of cases?

16 A When I was on the Sex Crimes Unit, somebody above
17 me decided that.

18 Q A prosecutor?

19 A Yes.

20 Q And you were involved, it's fair to say, at least
21 in decisions with regards to declining charges or
22 approving charges in all types of cases, not just sex
23 crimes cases, during your career as a prosecutor?

24 A I was involved in the decision-making process on
25 whether to prosecute or not prosecute frequently from

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2 about 1988 until January of 2008, but certainly not in
3 every case. And in fact, it would be only a small
4 percentage of cases.

5 Q But still a good number of cases, you'd agree
6 with me?

7 A I don't know what you mean by "a good number." I
8 would imagine that it would be in the thousands of
9 times.

10 Q I'd say that's a good number. So in those cases
11 where you're deciding whether to file charges or not
12 file charges, can you ever recall another instance
13 where you declined charges and made the same sort of
14 binding legal analysis you did in this one for the
15 purpose of stripping someone of their Fifth Amendment
16 rights for a civil lawsuit?

17 A I cannot recall doing it in that way in
18 Montgomery County. The way it -- I had done it in the
19 past was -- and the way this comes up a couple of
20 times a year, someone already has a civil case going
21 and a witness is refusing to testify because of the
22 Fifth Amendment. The lawyers and the judge adjourn to
23 the judge's chambers.

24 And if I was D.A. or First
25 Assistant D.A., they would call me and say are you

1
2 ever going to prosecute this person for this offense?

3 I would say no. The assertion of the Fifth Amendment
4 would be denied and it would go forward.

5 Q And how many times did that happen while you were
6 in the District Attorney's Office here in Montgomery
7 County?

8 A I don't know how many times it happened because I
9 wouldn't have been the only one in power to do that.

10 Q Did it ever happen?

11 A It -- I did it on a half a dozen occasions
12 perhaps over 14 years where I was First Assistant or
13 D.A., but they were always cases where I had never
14 heard of the case and it was somebody saying they were
15 going to take the Fifth Amendment and the judge
16 wanting an assurance that we were not going to
17 prosecute the person so that they could get on with
18 the civil case. Most of the time I didn't even know
19 the names.

20 Q So if I ask you what those half a dozen cases
21 were over the 14 years where you received these sorts
22 of phone calls, you would be totally unable to tell me
23 what those cases were?

24 A That's true.

25 Q Now, in this particular case, the defendant now,

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Mr. Cosby, he gave a statement to the police in 2005; correct?

A Yes.

Q And he did so with his attorneys present?

A I don't know.

Q Okay. Certainly you remember him giving a statement?

A Yes.

Q And it was fairly -- let me rephrase that. He gave a statement in which he did not invoke his right to silence, he did not invoke his rights against self-incrimination during that statement; correct?

A Correct.

Q Now, you spent some time on direct examination going through the press release that you issued with regard to this case in 2005, and of course you recall that?

A I do.

Q Just a short time ago. And you spent, as you indicated, in 2005 a good deal of time and, in your words, great care in crafting that statement?

A I did.

Q And you then took the time here in court to describe almost on a sentence-by-sentence basis what

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2 each of those statements were intended to impart;
3 correct?

4 A Correct.

5 Q And so is it your testimony here today that all
6 the explanation that you provided about the various
7 statements in that press release, you expected those
8 three audiences, the public, other attorneys or the
9 litigants, as you described them, to understand what
10 you were -- what you had explained here in court?

11 A No. Exactly the opposite. I wrote it so that
12 the three distinct groups would not know the entirety
13 of what I meant because I knew that the media who
14 would then report it to the public, they wanted to
15 know the answer was Cosby getting arrested or not,
16 which is why you'll find 1,000 articles where it is
17 stated that I said there was insufficient evidence to
18 prosecute Cosby.

19 I, in fact, did not say that. I
20 said there was insufficient credible and admissible
21 evidence upon which any conviction could be sustained
22 beyond a reasonable doubt. But I knew the press was
23 shorthanded into Castor said there's not enough
24 evidence to prosecute Cosby.

25 I knew that lawyers, who are

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2 trained to parse out words and look at each word for
3 what it means and take those words in context, would
4 read it and would recognize that what I was actually
5 saying was that there was enough evidence to arrest
6 Cosby, that I thought the evidence was not credible
7 and I thought that the evidence would be inadmissible
8 so that we were at a situation where, because the
9 representations of the Commonwealth must be taken as
10 true by the issuing authority, and right up until the
11 matter goes to a jury, there was enough evidence to
12 arrest Cosby because credibility of witnesses is not
13 an issue until you reach the jury. I then concluded
14 that when credibility became an issue, there was no
15 way that I could see that a jury would ever believe
16 Ms. Constand.

17 Furthermore, at a Preliminary
18 Hearing or in pretrial hearings, the wiretaps which
19 may have been gathered illegally could have been used
20 to get the case to a trial, to a pretrial stage where
21 a Common Pleas judge would decide on its
22 admissibility. I thought that those wiretaps would be
23 suppressed.

24 So I wrote it so that the larger
25 legal community would come to those conclusions which

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2 are quite different than the way I wrote it for the
3 press.

4 And then the third audience was
5 the litigants, and I wrote it to them telling them
6 that you don't really want me explaining all of this
7 or it will be detrimental to the civil case that I was
8 hoping the plaintiff would prevail in.

9 Q So you wrote the press release -- just so I
10 understand that answer that you just provided, you
11 wrote the press release understanding it was directed
12 at three different audiences, but that those three
13 audiences wouldn't necessarily understand all of the
14 press release?

15 A I thought that the litigants would understand all
16 of the press release. I thought that the larger legal
17 community would understand most of it. And I thought
18 that the press would understand little of it.

19 Q And so -- I hope you're not offended. So as it
20 relates to this broader legal community, is it your
21 testimony here today that you anticipated the broader
22 legal community to understand this press release to be
23 you stripping Mr. Cosby of his Fifth Amendment rights
24 and, therefore, engaging in a legal analysis by which
25 the prosecutor's office in Montgomery County could

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never prosecute Mr. Cosby?

A I don't think that I cared what the greater legal community thought about that. What I --

Q Which parts did you care --

MR. McMONAGLE: If he could just finish.

THE COURT: Let him finish.

THE WITNESS: What I cared about was the greater legal community seeing the analysis that I had gone through because I wanted to be able to discuss with other lawyers, should the need arise, the legal analysis that I went through because, unfortunately, then, as now, almost all of my friends are lawyers or cops.

BY MR. RYAN:

Q So the press is not supposed to understand it. The broader legal community is supposed to understand all of it except for the portion where you strip Mr. Cosby of his Fifth Amendment rights and promise, therefore, by implication not to prosecute.

So necessarily then the litigants in this matter should have understood the press release to represent you stripping the defendant of his Fifth Amendment rights and binding the

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2 Commonwealth into perpetuity forever to never
3 prosecute Mr. Cosby?

4 A Is that a question?

5 Q It is a question. Shall I repeat it?

6 A If you can.

7 Q Sure. So bear with me because you gave me a lot
8 of information. The press is not supposed to
9 understand the press release; correct?

10 A No, that's not correct. I expected that they
11 would not.

12 Q Okay. So the broader legal community, you
13 expected them to understand the press release in all
14 the ways you described before with the exception of it
15 being a document that strips Mr. Cosby of his Fifth
16 Amendment rights and binds the Commonwealth never to
17 prosecute him?

18 A That also is incorrect. I didn't care about
19 that -- the broader legal community knowing that.
20 What I wanted them to know was the process. I figured
21 that any lawyer who knows the practice of criminal law
22 knows that when someone is not going to be prosecuted,
23 they cannot then assert the Fifth Amendment. But it
24 made no difference to me whether the broader legal
25 community understood that, no.

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2 Q And my question, sir, was not did you care
3 whether they understood that. My question was did you
4 anticipate them or expect them to understand this
5 concept that you're describing?

6 A And my answer is I didn't care, so therefore I
7 did not consider it.

8 Q Did you expect the litigants in this case to
9 understand that aspect of the press release, it
10 stripping the defendant of his Fifth Amendment rights
11 and binding the Commonwealth never to prosecute?

12 A Again, it makes no difference to me whether --
13 first of all, the litigants, there were no litigants.

14 Q That's a word you used. That's why I was trying
15 to familiarize. But please, by all means.

16 A All that mattered was that Cosby understood that.
17 That was the only thing that mattered because what
18 the -- what the complainant believes and what the
19 complainant wants is not an issue that was before me
20 at the time.

21 The issue that was before me at
22 the time was is there sufficient evidence upon
23 which -- admissible evidence and reliable evidence
24 upon which a conviction could be achieved beyond a
25 reasonable doubt? And if the answer to that question

1
2 was no, was there a way to achieve a measure of
3 justice.

4 And I wanted to make sure that
5 Mr. Cosby understood that, but I did not want it to be
6 a matter of public debate because I wanted the tamping
7 down of the enormous media coverage to begin so that a
8 jury could be selected to decide the case.

9 So the only person who I had any
10 interest in understanding what was happening was Wally
11 Phillips and Bill Cosby.

12 Q So during the course of direct examination, you
13 made several different statements about various things
14 that you recalled and what formed the basis of your
15 ultimate charging decision or, in this case, no
16 charging decision.

17 You recall those portions of
18 direct testimony?

19 A Well, I do. I did not give a complete account
20 because I understood the judge to rule that he did not
21 want a complete account because he did not want to try
22 the ultimate issue in today's hearing.

23 Q And it appeared to me as though you more or less
24 were recalling these things from your memory.

25 Is that fair to say?

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A Some I recalled from my memory. Some I recalled from reports that Mr. McMonagle gave me to read from back then.

Q And that was my next question. Which items did you review in preparation for testimony?

A I reviewed the report from Canada, the report from the -- the initial report from Cheltenham or, I guess, a statement from Cheltenham, a subsequent, more thorough report after Cheltenham had decided that the case should be given to the D.A.'s office. I think I reviewed Cosby's statement, but I can't remember. And then I reviewed the e-mails and the letters that have been put in or marked. I don't know if they've been admitted, but marked.

Q And these items were provided by Mr. McMonagle?

A Yes.

Q Now, as it relates to that 2005 investigation, you have said that at the point in time you decided charges would not be warranted or successful, you wanted to create the best atmosphere, as you described it, for civil recovery.

Is that a fair statement?

A Yes.

Q Now, I want to draw you back to 2005. And I want

1
2 to draw you to this wiretap issue that you discussed
3 during your direct testimony.

4 Now, you described a meeting
5 between you and Mr. Phillips in which he discussed the
6 existence, potential existence of some wiretap
7 evidence.

8 Do you recall that?

9 A Yes. He suspected it.

10 Q And the way it occurred in Mr. McMonagle's
11 questioning, it was after you discussed the victim's
12 statement on February the 9th of 2005.

13 So did this meeting with
14 Mr. Phillips occur after that last statement taken
15 from the victim in this matter?

16 A I can't remember.

17 Q Do you remember in any sort of time frame when
18 that meeting would have occurred?

19 A I thought that Mr. Phillips brought me
20 information that he wanted -- that he thought we
21 should review earlier in the investigation. I thought
22 it was right in the first few days, but, Your Honor, I
23 can't remember well enough to state that with any
24 certainty.

25 Q And what I took from your direct testimony was

1
2 that up until that point in time, you had no knowledge
3 of any sort of wiretap evidence that existed in this
4 case?

5 A I can't remember if I did or not. I recall that
6 I was told by someone -- I can't remember if it was
7 Mr. Phillips or investigators -- that they thought
8 that Andrea Constand's mother was involved in these
9 wiretaps. And I could very well have been told by
10 both investigators and Mr. Phillips. I don't
11 remember.

12 Q Do you recall in January of 2005, and in
13 particular January 26th of 2005, giving a press
14 conference related to this case, the Cosby
15 investigation?

16 A No.

17 Q You do not remember that. Do you remember being
18 at a press conference that you were offering and
19 making statements, any statements about the Cosby
20 investigation in January of 2005?

21 A No.

22 Q So if I were to read you a quote which is "I did
23 hear a report that said I had determined her
24 testimony, her statement was credible. That is
25 inaccurate. I haven't made any such determination one

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way or the other."

That quotation, if I told you it was attributed to you, you would have no recollection of that?

A I do not recall.

(ABC News "New Developments in Cosby Fondling Investigation" marked Commonwealth's Exhibit C-1 for identification.)

BY MR. RYAN:

Q So, Mr. Castor, I'm going to approach you with --

MR. McMONAGLE: Judge, I just want to inform the Court I just received some documents. It may take some time for me --

MR. RYAN: I handed him the item that I'm going to be referring to.

THE COURT: He said you handed him a bunch of documents.

MR. RYAN: I did both.

THE COURT: Are you intending to use the bunch of documents?

MR. RYAN: I'm intending on using some of them.

THE COURT: Well, let's start with the one you are going to use. He has to have a

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chance to look at it.

MR. RYAN: Yes. And this is the issue we had raised with Your Honor in conference about potentially having a recess. And obviously Mr. Castor's testimony went past lunch.

THE COURT: So the time is here.

MR. RYAN: I'm sorry.

THE COURT: This would be the time so we don't have to continually interrupt. He has the right to review.

MR. RYAN: I have no doubt.

THE COURT: He hasn't had these documents before.

MR. RYAN: So if he would like the time --

THE COURT: I'm going to take an early midafternoon break because I generally like to go at least an hour and 15 minutes.

MR. McMONAGLE: Okay.

THE COURT: But it allows you to review the documents that potentially are going to be used in cross-examination.

So, again, this wasn't a scheduled break, but it's going to have to do. So

1
2 we'll pick back up at 2:30. Does it look like
3 something you can handle within that time frame,
4 Mr. McMonagle?

5 MR. McMONAGLE: Yes, sir.

6 THE COURT: All right. We will
7 reconvene at exactly 2:30, so be back in your seats.
8 Again, the witness is under oath. He's not to
9 converse with the parties calling him while under
10 cross-examination.

11 - - -

12 (Recess.)

13 - - -

14 (The following proceedings were
15 reconvened with the Court, Mr. Steele, Mr. Ryan, Ms.
16 Gibbons-Feden, Mr. McMonagle, Mr. Tayback, Ms.
17 Pressley, Mr. Sarles, and the defendant being present:)

18 - - -

19 THE COURT: Mr. McMonagle, have
20 you had an opportunity to review the documents?

21 MR. McMONAGLE: Thank you, Your
22 Honor. I have.

23 THE COURT: Okay.

24 BY MR. RYAN:

25 Q So, Mr. Castor, I'm approaching you with a

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document that I have marked as C-1. And you're now holding that document in your hand. And the document is, in fact, a newspaper article from ABC News with the headline "New Developments in Cosby Fondling Investigation."

Is that what I just handed you?

A That's what it says.

Q January 27th, 2005?

A That is what it says.

Q Okay.

MR. RYAN: And, Your Honor, at this time I'm going to publish.

THE COURT: Any objection?

MR. McMONAGLE: No, sir.

(Commonwealth's Exhibit C-1 published.)

BY MR. RYAN:

Q So, Mr. Castor, I know that you've suggested that you have some difficulty seeing the screen, but you're able to see fine with that document right in front of you?

A Yes.

Q Now, I'm going to point you towards the portion of the article where there's a small bolded phrase

1 "Prosecutors Could Make Decision in Two Weeks."

2 Do you see that portion right
3 towards the middle of the document?
4

5 A Yes.

6 Q And this is on Page 1 of what I've marked as C-1.

7 And it says: At a news conference Wednesday,
8 Montgomery County District Attorney Bruce L. Castor
9 said Cosby is fully cooperating.

10 A It actually says: Bruce L. Castor, Jr. said.

11 Q I apologize to you and your father.

12 A I don't think he's going to hear this.

13 Q So does this help you recall at all holding a
14 press conference where you made statements about the
15 Cosby investigation?

16 A No.

17 Q So the quote down there in the next paragraph:
18 "I did hear a report that said that I determined her
19 testimony, her statement was credible. That is
20 inaccurate. I haven't made any such determination one
21 way or the other," Castor said.

22 Continuing the quote: "He
23 (Cosby) is presumably innocent and can come and go as
24 he pleases," you do not recall making that statement
25 at any time in your entire life?

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2 A I do not recall making that statement on that
3 day. I assume that at some time in my life I have
4 uttered the words that people are presumed innocent
5 and can come and go as they please.

6 Q How about the part that it's inaccurate that you
7 made a determination about the victim in the Cosby
8 case being incredible?

9 A Sir -- your name is Mr. Reilly?

10 Q No, it's Mr. Ryan.

11 A Mr. Ryan, I do not remember having a press
12 conference on this case. It would not have been
13 unusual for me to do so. But I was in public life for
14 30 years and I have given so many press interviews and
15 conferences, I cannot recall.

16 Q Hard to remember, as I can understand. So would
17 you have any reason to believe that the quote that's
18 provided there is inaccurate based on something that
19 you said at a press conference as of January 27th,
20 2005?

21 A Well, in the first sentence it says "I did hear a
22 report that I had determined her testimony, her
23 statement was credible." I can't answer your
24 question.

25 The second is -- I can say that

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if the first was true, the statement that I said it was inaccurate would follow from the first because I wouldn't make a final determination on anyone's credibility until I was making the final decision on the case.

Q And I want to get to that point, but I just want to get that question I had answered.

So my question to you was:

Would you have any reason to believe that the quote that I've pointed you to that's attributed to you is inaccurate?

MR. McMONAGLE: That's been asked and answered.

MR. RYAN: Respectfully, it hasn't.

THE COURT: I don't know if it's been answered, but it has been asked.

MR. McMONAGLE: He doesn't remember.

THE COURT: If the answer now is going to be I see it, but I don't remember, then you can move on. So if there's anything more you want to ask outside of that --

MR. RYAN: There was, Your

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Honor. I asked the question is there any reason you would have to believe that this is inaccurate, and I am not sure what the answer was, but it was not responsive to my question.

THE COURT: That is a different question and I'll allow him to answer that.

BY MR. RYAN:

Q So, Mr. Castor, my question was: Do you have any reason to believe that the quote provided here is inaccurate?

A I have seen myself misquoted hundreds of times, so I would have to say that I have every reason to believe that it is inaccurate because I have seen myself misquoted so many times.

Q This particular quote you don't remember making, but other than the fact that you've apparently been misquoted so many times, no other reason to believe it's inaccurate?

A I assume the reporters try to do the best they can. I assume they record these things. I assume they transcribe them from recordings. So based on that, I don't -- I can't say that I have any reason to disbelieve the accuracy of it. I just flat out don't remember giving a press conference in this case.

(Pottstown Mercury article
"Cosby meets with authorities over sex assault
allegations" marked Commonwealth's Exhibit C-2 for
identification.)

BY MR. RYAN:

Q So I'm going to now hand you another document.
Before I do that, you had said that with regard to
this quote, it would make sense for you to say
something like this because, as a prosecutor, you
wouldn't want to make credibility determinations prior
to a final charging decision.

Is that a fair description of
what you said in one of your last answers?

A No, I wouldn't make them public.

Q Okay, fair enough. You wouldn't go out in the
press and talk about credibility determinations?

A Right.

Q So now I'm going to hand you what I've marked as
Commonwealth's Exhibit C-2. And this one has a bit
smaller print, but that is a newspaper article that is
entitled "Cosby meets with authorities over sexual
assault allegations."

Is that accurate? That's what
the title is?

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A I mean these are internet searched printouts off of the computer, so I assume that it's a newspaper article. But it says: "Cosby meets with authorities over sex assault allegations."

Q Now, do you see at the bottom of this document there appears to be a web address? Is that right?

A It does appear to be a web address. We started with pencils and typewriters, so I'm not that savvy.

Q I'll try not to push your knowledge on technology, but this web address is www.pottsmmerc.com.

Are you at all familiar with that web address?

A Yeah.

Q And that's for the Pottstown Mercury newspaper; correct?

A Yes. And Carl Hessler is still here today. I think I saw him.

Q He's right there in the front row.

A He looks a little older.

Q You certainly wouldn't catch me saying that.

So you weren't sure, Mr. Castor, whether or not this was a newspaper article, but is it fair to say that you and I can now agree seeing that there is headlines and that this document is written

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2 by Mr. Hessler, who is sitting right there, and that
3 there's a web address, pottsmmerc, which is the
4 Pottstown Mercury website, we can officially now agree
5 that this is a newspaper article; right?

6 A What we can agree upon is that this is an
7 internet search, from the Pottstown Mercury website,
8 printout. Many times I have seen printouts from
9 websites of newspapers that are not the same as the
10 print paper. And when I see the print paper, I
11 consider that a newspaper article. And when I see the
12 internet, I consider that to be an internet article.

13 So if we're going to broaden the
14 term of "newspaper article" to be internet articles,
15 then I --

16 Q I'm sorry? Then you what?

17 A Then I agree.

18 Q Okay. Thank you. So this has a date written on
19 there and it says: Posted. I'm going to point it out
20 for you. It says: Posted 1-27-05; correct?

21 THE COURT: That's --

22 MR. RYAN: I'm going to put it
23 up right now.

24 THE COURT: You got something
25 different up there. You have the ABC News one up

1
2 there.

3 MR. RYAN: I wanted to lay a
4 foundation before I projected it.

5 THE COURT: This one?

6 MR. RYAN: Correct, C-2, which
7 I've identified.

8 THE COURT: Turn that off then
9 until they're ready to go. You're on to another
10 document. Don't publish it.

11 MR. RYAN: With Mr. McMonagle's
12 permission --

13 THE COURT: The problem is they
14 had one up while he's showing him another one. When
15 you're done with a document, shut that one down and
16 then come up with the next one.

17 MR. McMONAGLE: Yes, sir.

18 BY MR. RYAN:

19 Q So, Mr. Castor, I'm going to direct you towards
20 the top of this document, C-2, that I have handed you.
21 And when I say "top," I mean top of the portion that
22 begins with this article.

23 There's a quotation there. It
24 says: "Cosby and his lawyers have been fully
25 cooperative with us without delay or hesitation,"

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2 District Attorney Bruce L. Castor Jr. confirmed
3 Wednesday, adding that the interview occurred
4 "recently."

5 "I am not going to get into what
6 he told us. He was cooperative and he appeared to be
7 not withholding anything," Castor said.

8 Is that what is reflected on
9 C-2?

10 A Yes.

11 Q Do you recall making that statement?

12 A No.

13 Q Would you have any reason to believe that
14 Mr. Hessler there in the front row would have
15 misquoted you about that?

16 A He usually gets it right.

17 Q I think so, too.

18 A Am I done looking at this one?

19 Q For now. So is it fair to say that when you talk
20 about -- well, strike that. When you said that -- or
21 specifically, rather, when you declined to comment
22 publicly on January 26th, '05, about the victim's
23 credibility saying that any such reports were
24 inaccurate, was that in an effort to create the best
25 possible atmosphere, as you described it, for Andrea

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2 to succeed civilly?

3 Is that what you were attempting
4 to do by making that statement?

5 A Mr. Ryan, I haven't testified that I made that
6 statement because I don't recall.

7 Q Had you made that statement, do you think that
8 that would have been in an effort for you to create
9 the best atmosphere, as you described you were
10 attempting to do, for Miss Constand to succeed
11 civilly?

12 A You want me to speculate on what I might have
13 thought of something I don't recall?

14 Q That's what I'm asking.

15 A I -- now, you understand, Your Honor, this is
16 simply a guess, but my best guess is --

17 MR. McMONAGLE: Judge, I
18 don't -- I don't like to object, but I object to
19 guessing, speculation, things like that.

20 THE COURT: He's your witness
21 and they are doing cross-examination. He's got an
22 statement that he doesn't recall making. He has said
23 that the author of the article generally gets it
24 right, so he's now -- much of what we're doing here is
25 going back in time.

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2 Memories may fade, but I think
3 it's a permissible question to probe what he could
4 have been thinking. He clearly did a lot of that with
5 that press release. We dissected it. So if this is a
6 statement that he attributes that he thinks that he
7 gets it right, he can certainly comment on it.

8 Overrule the objection.

9 THE WITNESS: Mr. Ryan, you're
10 referring to C-1 which is the article that was not
11 authored by Mr. Hessler; right?

12 BY MR. RYAN:

13 Q What I'm referring to is C-1. And my question to
14 you, sir --

15 THE COURT: I apologize. I
16 thought we were on the Hessler article. We're back to
17 the ABC article?

18 MR. RYAN: Yes.

19 THE COURT: It applies either
20 way, although he didn't say that ABC oftentimes gets
21 it right. But at this stage it is a recounting of
22 something that occurred 10 years ago that he doesn't
23 remember giving. But that's a lot of what we are
24 doing here today, so I'm going to permit it in that
25 context.

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2 THE WITNESS: Okay. My best
3 guess is that I was stopping speculation in the public
4 that we were going to come to a rapid conclusion, and
5 I did not reach the point in my thinking by the 27th
6 of January 2005 that the case was impossible to win.

7 So I did not come up with the
8 idea of trying to create the best possible atmosphere
9 to win a civil case because I had not given up on the
10 hope, the hope that we could create a criminal case
11 out of what we learned and what we would subsequently
12 discover.

13 BY MR. RYAN:

14 Q Now, look at C-2. That's where the quotation is
15 "he was cooperative and he appeared to be not
16 withholding anything." And that's in reference to Mr.
17 Cosby.

18 When you made that statement,
19 were you attempting to create the best atmosphere for
20 Andrea to recover?

21 A My best guess, again, as these are dated the same
22 day, 12:01 a.m. on that day, is that I had not reached
23 the point in my thinking that the case could not be
24 won, so I was -- I was trying to let the public know
25 that we are working on -- working toward building a

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prosecution.

It was only after I determined that the case could not be won that I began to think of other options to obtain some measure of justice in the case.

Q So on the same day where you're confronted with reports that you found the victim's statement credible and you deny those reports, on the same day that you say Mr. Cosby appeared to not be withholding anything, that's your attempt to inform the public that you haven't given up on the case yet?

MR. McMONAGLE: Objection.

Asked and answered.

THE COURT: Overruled.

THE WITNESS: I -- Mr. Ryan, I do not remember making these statements.

BY MR. RYAN:

Q That wasn't my question, sir.

MR. McMONAGLE: Judge, I would just ask if he's going to be permitted to ask the question, that he be permitted to answer it.

THE COURT: Please let him answer the question.

THE WITNESS: I don't recall

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2 making these statements. You asked me to speculate if
3 I had done them, was I doing so to try to create the
4 best possible atmosphere for Andrea Constand to
5 recover civilly.

6 If you want me to assume that I
7 made those statements, the answer to your question is
8 I was not at all concerned with the best possible
9 atmosphere for a civil recovery. I was concerned with
10 the best possible atmosphere for a criminal
11 prosecution and I am trying to tell the public
12 essentially we're working on it.

13 (Bloomberg.com article dated
14 November 26th, 2014 "Why Did Bruce Castor Pass on a
15 Chance to Lock Up Bill Cosby?" marked Commonwealth's
16 Exhibit C-3 for identification.)

17 BY MR. RYAN:

18 Q I'm going to hand you a document I've marked as
19 C-3. This is a Bloomberg news article written by Lisa
20 DePaulo on November 26th, 2014. The headline is "Why
21 Did Bruce Castor Pass on a Chance to Lock Up Bill
22 Cosby?"

23 Do you recall this article?

24 A No.

25 Q Do you recall being -- well, let me ask you this.

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This is dated November 26th of 2014; correct?

A Yes.

Q You're saying you have no recollection of speaking to this Lisa DePaulo for the purpose of writing this article?

A I don't know who Lisa DePaulo is, so no, I don't recall speaking to her. When I was inundated with media every time something popped up in this case, it was always national media. And I don't know any of them, so I -- their names go in one ear and out the other.

Q So I'm going to turn you to Page 2 of this document. I'm going to point you to the second full paragraph, the first sentence of that: At the time of Constand's complaint, he, being Bruce Castor, said at a press conference that her case was "weak."

Do you recall saying that at a press conference in 2005?

A No. I don't recall giving a press conference in 2005. That doesn't mean I didn't. I just don't recall it.

Q Do you recall ever saying that the case was "weak" at any point prior to declining charges?

A In public, you mean?

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Q Yes.

A I don't remember.

Q Now, I'm going to go back towards -- I'm sorry, back to C-1 in the area of that same quote. Tell me when you have C-1. Do you have C-1 in your hands?

A I do.

Q This is on Page 1 again towards the middle of that page. Continuing on in that quote that we had read earlier, you were further quoted as saying: I think the factors such as failure to disclose in a timely manner and contacts with the alleged perpetrator after the event are factors that weigh toward Mr. Cosby.

Do you remember saying that?

A No.

Q When you said that the case -- I'm sorry. Let's speculate again. If you were quoted as saying that the case was weak in 2005, would that be in an effort to explain to the public that you guys were still giving it a go and making a criminal case out of it?

A Could you repeat your question?

Q I sure can. Let's again assume that the quote is accurate in the newspaper article I provided at C-3 which is not, in fact, being displayed, but so that we

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2 can all be on the same page --

3 MR. McMONAGLE: Judge, just so
4 you know, we're not in control of this.

5 MR. RYAN: Right. I was just
6 about to pull up C-3 because I realize it's not.

7 THE COURT: You're using the
8 other side's expert in electronic transmission of
9 documents.

10 BY MR. RYAN:

11 Q So, again, you have to assume, because you don't
12 remember, that you said that this case was "weak." In
13 2005, would that again have been in an effort for you
14 to explain to the public that you were attempting to
15 build a criminal case?

16 A Yes, of course. I'm telling the public what the
17 hurdles are that we're trying to get over. That's --
18 if I said that, that's exactly what I'm doing.

19 Q And referring back now to C-1, when you said or
20 when you were describing factors that weighed in the
21 favor of Mr. Cosby as early as January 26th of 2005,
22 was that again you attempting to tell the public that
23 you were doing your best to build a case?

24 A Oh, I thought I was answering that question on
25 the last one.

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Q We've moved on to the next one. That would be back to C-1.

A What was I doing on the question before that because I was looking at C-1?

Q You're going to have to tell me. I don't know what you're looking at.

THE COURT: Okay. We need to coordinate those who are publishing documents with what Mr. Castor has. So what is important is note the document by its exhibit number.

BY MR. RYAN:

Q Let's try to get, Mr. Castor -- let's talk about C-1 --

A Okay.

Q -- which is the document that's being projected right here.

When you made the statement describing different factors that weigh toward Mr. Cosby on January 26th, 2005, were you making that public statement in an attempt to inform the public that you were still trying to build a criminal case?

A I don't recall this press conference, but if I said what you quoted, that I think the factors such as failure to disclose in a timely manner and contacts

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2 with the alleged perpetrator after the event are
3 factors that weigh toward Mr. Cosby, I am informing
4 the public of the hurdles that we are trying to get
5 over on the case.

6 (Southeast Missourian article
7 dated January 27, 2005 "Prosecutor calls case against
8 Bill Cosby weak" marked Commonwealth's Exhibit C-4 for
9 identification.)

10 BY MR. RYAN:

11 Q And now I'm going to hand you another document
12 which is marked as C-4. And this is an Associated
13 Press wire article dated January 25th, 2005,
14 "Prosecutor calls case against Bill Cosby weak."

15 Is that what the headline reads?

16 A The headline is Southeast Missourian, which is
17 not a paper that I am familiar with. And then
18 underneath it it says: Prosecutor calls case against
19 Bill Cosby weak.

20 Q And it says it comes from The Associated Press;
21 correct?

22 A It does.

23 Q Is that something you're familiar with?

24 A I'm familiar with The Associated Press.

25 Q And now looking --

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2 MR. McMONAGLE: Judge, I just
3 want the record to reflect that's not a quote. That's
4 a conclusion in an article. So I don't know why he's
5 being asked about it.

6 MR. RYAN: I --

7 MR. McMONAGLE: Hold on. I'm
8 almost done. I have no objection to
9 cross-examination, healthy cross-examination on what's
10 being attributed to him by quote. But now we're
11 having some reporter's conclusion attributed to him,
12 and it's unfair.

13 THE COURT: And I wouldn't at
14 all use a headline from the newspaper in any purpose
15 in that regard. I mean, it says what it says. I
16 assume, Mr. Ryan, you're moving towards a quote in
17 that article?

18 MR. RYAN: I am.

19 THE COURT: So let's not get
20 caught up in what a headline says.

21 BY MR. RYAN:

22 Q So, Mr. Castor, I want to point you towards the
23 bottom of that article. Do you have C-4 in front of
24 you?

25 A Yes.

1
2 Q I'm going to point towards that quote right
3 there: "In Pennsylvania, we charge people for
4 criminal conduct. We don't charge people with making
5 a mistake or doing something foolish," Castor said.

6 Did you say that in January of
7 2005?

8 A I don't remember saying that, but that is a true
9 statement.

10 Q It is a true statement. But, again, you don't
11 recall saying it in the context of a press conference
12 because you don't recall the press conference?

13 A Right. Mr. Ryan, it would be fair to say that I
14 have probably done a thousand press conferences in my
15 career. I don't remember all of them. And I don't
16 remember doing one in this case because the media
17 attention was so much that I was trying to tamp down
18 the flow of information out into the public because I
19 was hoping that we were going to be able to pick a
20 jury and run a prosecution.

21 Now, it would not have been
22 unusual when the case came in the door for me to have
23 given a press conference, but I simply don't remember.

24 Q So I want to move to the press release that you
25 issued in this case at least for a portion of time.

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And so this would be Exhibit D-4.

Do you have that in front of you, Mr. Castor?

A I do.

Q And I want to point you to the second page of Defense Exhibit 4.

You would agree with me that if your intention at the time you determined charges would not be successful against Mr. Cosby, at that time if -- you agree now that your intention going forward from there was to create an atmosphere by which Ms. Constand could successfully sue civilly; right?

We've agreed on that?

A Well, more precise than that. I wanted Cosby to have to testify under oath which I thought would lead to an improved likelihood of recovery civilly.

Q So are you now denying that one intention of yours was to create a "atmosphere in which Ms. Constand could succeed civilly"?

A I'm not denying that at all. I'm saying that the way I wanted to go about that was to force Mr. Cosby to testify under oath.

Q But you'd agree with me that you've said in the

1
2 past your intention at the time you decided charges
3 wouldn't be successful was to create an atmosphere by
4 which Ms. Constand could succeed civilly?

5 And while that may entail Mr.
6 Cosby testifying, you agree you said in the past that
7 that was your intention at that stage?

8 A Yes, that was -- yes, that was the balloon under
9 which I hoped we would get to by making Cosby have to
10 testify under oath.

11 Q And so certainly at the time you wrote your press
12 release, that would have been something in the back of
13 your mind, that you wanted to create an atmosphere
14 through which she could succeed civilly?

15 A It was not in the back of my mind. It was in the
16 front of my mind.

17 Q Front and center. So when you wrote in the press
18 release "much exists in this investigation that could
19 be used (by others) to portray persons on both sides
20 of the issue in a less than flattering light," was
21 that written with the intention of creating an
22 atmosphere, the best atmosphere by which Ms. Constand
23 could succeed civilly?

24 A Yes.

25 Q And in fact, on your direct examination, you

1 identified that line as a threat to her and her
2 lawyers; correct?

3 A Yes.

4 Q And that threat was actually intentioned to
5 create such as atmosphere that she could succeed
6 civilly?
7

8 A Yes, because if she -- if the office was attacked
9 for its decision, I would have responded by saying
10 that Andrea Constand had created an atmosphere on her
11 own where she made her credibility so suspect that a
12 criminal prosecution could not go forward, and I would
13 be telling all potential jurors in the civil case
14 essentially that District Attorney Castor didn't
15 believe her testimony would support conviction and
16 might not therefore support a civil recovery.

17 So, yes, by making that threat
18 in that line, I was telling her don't attack the
19 office for this because, if you do, your ability to
20 recover civilly will suffer.

21 Q What you were saying was I want you to succeed,
22 but you better not question my authority or my
23 decision making in this case?

24 A No. What I was saying was that I want you to
25 succeed, but if the office comes under attack based on

1
2 our decision making, I will explain to the public why
3 it is we decided the way we did. If I was required to
4 do that, it would dramatically damage, in my view, her
5 ability to prevail civilly.

6 (Daily Mail article published
7 November 18, 2014, "I wanted to arrest Bill Cosby"
8 marked Commonwealth's Exhibit C-5 for identification.)

9 BY MR. RYAN:

10 Q Mr. Castor, I'm handing you now a document that I
11 have marked as Commonwealth's Exhibit C-5. And that's
12 an article that appeared in the Daily Mail which is a
13 British newspaper; correct?

14 A I don't know.

15 Q And it was published on November 18th of 2014.
16 Is that what that indicates?

17 A November 18th.

18 Q Yes. I'm sorry if I didn't say that.
19 November 18th, 2014?

20 A Yes.

21 Q And looking at the fourth paragraph, this is an
22 interview, or at least the article indicates that you
23 made statements directly to MailOnline. This is
24 M-A-I-L, MailOnline.

25 Is that what that says?

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A I think -- yes.

Q You think yes or yes?

A I never heard -- I never heard of MailOnline, but that's what it says.

Q So you don't recall making statements that ultimately were included in this article?

A I don't recall this interview. I'm much more likely to recall interviews from the local press corps than national or international press corps because I know the reporters.

Q Well, you failed to remember that one from Carl Hessler earlier. We can agree about that; right?

A I said I was much more likely. And I also said that he's likely to get it right.

Q So I want to turn you to Page 3 of this article, and I'm going to project it.

(Commonwealth's Exhibit C-5

published.)

BY MR. RYAN:

Q Are you turned to Page 3 of the article, Mr. Castor?

A I am.

THE COURT: My clerk has returned. What's the number of this?

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MR. RYAN: This is C-5.

THE COURT: C-5 you called Daily Mail?

MR. RYAN: Correct.

BY MR. RYAN:

Q Do you see a quotation at the top, underneath the picture at the top of the page?

MR. McMONAGLE: Your Honor, if I may just for the record purposes? And again, I understand the rulings and you know I'll respect them.

On direct examination I tried carefully to, when I referred to stuff that was prepared in the past, that it would be the actual preparer that I asked the questions of.

The press release, as you referred to it, was something that Mr. Castor prepared. I had to ask him if he wrote it first before I asked him before about it. And we went over it in detail.

He's not being asked questions about the Daily Mail's articles from the internet and all over the world that he may or may not have either been interviewed for and he doesn't remember in some instances, quotes that are attributable to him, which

1 is a whole different element. They don't come in
2 under admissions unless they can be in some way by
3 evidence, by competent evidence, established.
4

5 When the witness indicates he
6 doesn't remember, unlike the press release which he
7 authored, I would submit to the Court that the Court
8 should exclude it completely. And that's my argument.

9 THE COURT: Mr. McMonagle, I
10 believe this falls under the category of
11 cross-examination. He's impugning his credibility
12 which is what he is attempting to do, and I think
13 that's a classic cross-examination. That's what he's
14 doing.

15 Now, clearly on direct
16 examination he had pinpoint accuracy as to a lot of
17 things that occurred in 2005. If he doesn't remember,
18 he can answer that he doesn't remember. And then
19 he'll try to either refresh his recollection -- but
20 it's not an attempt to get a fact into evidence, I
21 believe.

22 Correct me if I'm wrong. It is
23 an attempt to impugn his credibility in terms of his
24 direct testimony?

25 MR. RYAN: I have no need to

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correct it, Your Honor.

THE COURT: But that is cross-examination of what he believes to be his prior statements. If they're not, he can deny them or he can answer I don't remember.

MR. McMONAGLE: Okay.

BY MR. RYAN:

Q So, Mr. Castor, I'm pointing you towards a quotation that's at the top of the text on that page. And I have it highlighted on the screen. It begins, "there was almost."

Can you find that quotation or do you see it in front of you? If you would like, I'm happy to come up and point it out.

A I see it.

Q This reads quote: There was almost no evidence on which to base a criminal case. The lady could not remember what happened with any detail, and she didn't report it for a year. All this made the case very difficult.

Do you recall making that statement?

A No. I just don't recall this interview. I don't -- I don't recall the Daily Mail, but --

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Q Do you ever recall making that statement in November of 2014?

A I don't. I don't remember doing that. I may have, but I can't recall.

Q Now I'm going to go to Page 4 of eight in this same document which is in front of you marked as C-5. And I'm going to be in that same section of text I described before which is to say the text at the top portion of the page, but the fourth paragraph down.

Do you see where I am? It begins, "Commissioner Castor said."

A I see.

Q The quote reads: Commissioner Castor said "All she could say is that she was there (at Cosby's house) and then something might have happened due to how she was when she next remembered something."

Do you remember giving that quote in November of 2014?

A No, I don't.

Q Now I'm going to refer back to C-3. Do you have C-3 in front of you?

A I do.

Q And I am going to go to Page 4 of that document. Are you on Page 4 of that document?

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A They're not numbered, but I think so.

Q You can count it out okay?

A I can count to four, but sometimes it's difficult.

Q And at this late hour, I understand. So I think it would be easier for me to point out for you this paragraph.

Do you see that paragraph?

A Yes.

Q And it has a quote attributed to you. "Well, believe what? I mean, she didn't tell us anything that was actually criminal," Castor chuckles a bit nervously.

Do you remember giving that quote in November of 2014?

A I can't recall ever chuckling nervously in my life, so therefore I think that that quote is wrong.

Q So this one you're saying it's not that you don't remember, it's that this is definitely wrong?

A I don't remember and I don't believe I ever chuckled a bit nervously ever in my life.

THE COURT: Well, let me be clear. You don't remember giving the quote? You have never chuckled nervously? I just want to make sure,

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is that the answer?

MR. RYAN: That's what I took
the answer to be.

THE WITNESS: I don't recall
ever chuckling nervously.

THE COURT: No, no, I know. But
there's two questions there. It seems to be I
wouldn't have made the quote because I never chuckled
nervously, therefore the whole quote is wrong. But
you've said I never chuckled nervously, but you don't
remember making the quote.

THE WITNESS: It's the second of
those two.

BY MR. RYAN:

Q Later on down in that page, do you remember
making or giving this quote? "Well, I don't remember
what she said all these years later."

Do you remember giving that
quote in November of 2014?

A No. Mr. Ryan, I've never seen these before nor
read any of these stories before, so no, I don't.

Q So now I want to give you another one.

(Washington Post article dated
November 19, 2014 "Prosecutor who declined to charge

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Bill Cosby in 2005: 'I didn't say that he didn't commit the crime'" marked Commonwealth's Exhibit C-6 for identification.)

BY MR. RYAN:

Q I'm approaching you with what I've marked as Commonwealth's Exhibit C-6, Mr. Castor. This is an article from The Washington Post.

Are you familiar with The Washington Post?

A No.

Q You're not familiar with The Washington Post?

A Well, if you're asking me if I've ever read The Washington Post, the answer is no.

Q Okay.

A If you're asking if I've ever heard of it, yeah. I follow Bloomberg/Bernstein, too, like everyone else.

Q So this article has a headline: Prosecutor who declined to charge Bill Cosby in 2005: 'I didn't say that he didn't commit the crime.'

And I'm asking you for foundational purposes, that's what C-6 says; correct?

A That's what it says.

Q And it's written by an individual or it's attributed to an individual Justin Moyer from

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November 19th of 2014?

A It is.

Q So this is, as I said, dated November 19th, 2014. The quote is: "I didn't say that he didn't commit the crime," Castor said. "What I said was there was insufficient, admissible, and reliable evidence upon which to base a conviction beyond a reasonable doubt. That's 'prosecutor's speak' for 'I think he did it but there's just not enough here to prosecute.'"

Do you remember saying that?

A No, but that's true.

Q Now, what I next want to ask you about is actually related back to C-2. You want to pick C-2 back up for me?

A (Witness complied.)

Q We already said there's a quotation in here you don't remember, but the quotation I'm referring to is "he was cooperative and he appeared to not be withholding anything."

That's the quotation in that article we discussed, correct, on Page 1 right at the top there? Do you remember us discussing that quotation?

A Yes.

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Q But you don't remember giving it?

A I don't -- I don't remember giving the press conference on that day.

Q But this quotation, do you remember ever giving this quotation or stating the words contained in that quotation in January of 2005?

A No.

Q Right, you don't. But we had said that it was written by Mr. Hessler and he usually gets things right. That's the article we were talking about.

Do you remember talking about that?

A Yes.

Q Do you remember giving an interview on CNN, for a T.V. appearance on CNN November 19th of 2014 related to this case?

A I don't remember specifically CNN. I remember being inundated by national media, so I would imagine CNN was one of them.

Q So you don't remember appearing on CNN in November of 2014?

A No.

Q Let's see if we can refresh your recollection. I'd like you to watch this and tell me if you remember

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this appearance on CNN.

MR. McMONAGLE: Is this an exhibit?

MR. RYAN: I apologize. I'm going to mark this as C-7. If I can just have a moment, Your Honor.

THE COURT: Sure.

(CNN video marked Commonwealth's Exhibit C-7 for identification.)

MR. RYAN: Your Honor, there's apparently a technical issue with the computer. If I can have a few moments. I don't know if you want to take a break or you want to wait. The detective here is telling me it might take a minute.

THE COURT: What's the issue?

MR. RYAN: That's what we're attempting to figure out.

THE COURT: Sound?

BY MR. RYAN:

Q All right. Mr. Castor, I apologize for that delay, but where we just were was that 2005 article where you were -- you said you don't remember it -- quoted as saying in reference to Mr. Cosby: "He was cooperative and he appeared not to be withholding

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anything."

And I was asking about a November 2014 CNN interview and seeing if I could help refresh your recollection.

(Commonwealth's Exhibit C-7 published.)

BY MR. RYAN:

Q Do you remember giving that interview on CNN?

A I remember Chris Cuomo. I didn't know that he was with CNN.

Q So you do remember that interview?

A I do.

Q So now I want to move -- and hopefully this will improve your memory a little bit -- to January of 2015.

At that stage, in January of 2015, you had announced that you'd be running again for District Attorney of Montgomery County?

A I don't remember when I did that. I think it was early in January. The 8th maybe, something like that.

Q Okay. So January 8th, in and around that time you decided, or announced, rather?

A Well, it would be -- whatever day then District Attorney Ferman said she was not running, it would

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have been the next day.

Q Regardless, January of 2015?

A That sounds right.

Q Well, you certainly sound more sure than in my initial question. You're thinking either January 8th or January 7th?

A For some reason I think January 8th, but I can't be certain.

Q Okay. So when I say January 2015 at the very least, it doesn't not sound right; that is, in fact, right?

A What?

Q In reply to my question about January 2015, you said that sounds right, but we can both agree that was definitely January of 2015?

A The only reason that I think that I have January 8th in my head is because when Andrea Constand sued me, she said that I was -- I had announced I was running for District Attorney in 2014. And we checked and it wasn't until 2015. And I think we responded in an answer it was January 8th. That would have been only a few weeks ago. That's why I think it's that date.

Q So when you decided to run again for Montgomery

1
2 County District Attorney, it's true that you sat down
3 with individuals related to your campaign and
4 attempted to determine what issues may be used by
5 opponents, so to speak, against you for that campaign.

6 Is that fair to say?

7 A No. I just decided I was going to run and that
8 was that.

9 Q And at no time during the campaign did you sit
10 down with anybody and discuss past cases, for example,
11 that an opponent may use to make you appear in a
12 negative light?

13 A I don't recall that. Usually -- this was my
14 sixth campaign -- you hire people and they do research
15 and they come up with things that they think might
16 hurt you, and then they tell you what they think you
17 might need to be prepared to defend against.

18 I don't remember any such
19 meeting, but it certainly was not before I decided I
20 was going to run.

21 Q Right. I'm saying after you decided you were
22 going to run, did you have such a meeting?

23 A I just told you I don't recall having such a
24 meeting. You hire people to run these campaigns. You
25 put somebody in charge. They figure out what the

1
2 problems are. They figure out how to defend against
3 the problems. And then if the problem develops, the
4 candidate is the last to know.

5 Q Now, do you recall giving a radio interview in
6 October of 2015 to WNPV? It's a local -- I think it's
7 a Lansdale radio station; is that right?

8 A It is a Lansdale radio station. And I -- October
9 of 2015 would have been near the election, so I
10 probably would have accepted an invitation, but I
11 don't specifically recall.

12 Q And you don't recall -- well, let me see. And
13 I'm going to mark this as C-8, this audio file. I'm
14 going to mark this as C-8. I want you to listen to it
15 and see if that refreshes your recollection about a
16 radio interview that you gave in October of 2015.

17 (WNPV audio marked

18 Commonwealth's Exhibit C-8 for identification.)

19 (Commonwealth's Exhibit C-8
20 published.)

21 BY MR. RYAN:

22 Q Do you recall giving that or making those
23 statements during a radio interview at WNPV in October
24 of 2015?

25 A Yes.

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Q So when you said in that radio interview, "We sat down and figured out what might be used against me," were you talking about a meeting that you had where you and individuals involved in your campaign determined what could be used against you?

A No. It's "we" being the campaign, not "we" meaning me personally.

Q Okay. So now -- if I can have a moment. Now I'm going to talk about sort of where you ended with your direct examination, which would be this agreement that was made not to prosecute the defendant.

A There was no agreement.

Q Yes, analysis; right? You made a legal analysis that stripped the defendant of his Fifth Amendment rights and bound the District Attorney's Office never to prosecute him; correct?

A I made a judgment as the sovereign, the representative of the Commonwealth, not to prosecute Cosby. And that, by operation of law, made it so that he would not be permitted to take the Fifth Amendment. I went to Wally Phillips and told him that was my legal theory, and he agreed to that.

Q So one of the areas I want to start -- one of the dates I want to start with is September 23rd, which is

1 the first e-mail that you sent to then District
2 Attorney Ferman -- and I see that you're searching for
3 it -- which is Defense Exhibit 5, if that assists you
4 in finding it.
5

6 A It doesn't, because they're not in order.

7 Q Take your time.

8 A I have it.

9 Q Now, one of the things you indicated on direct
10 examination or stated on direct examination was that
11 even up until the date of Mr. Cosby's arrest, you
12 never had confirmed that the case was actually
13 re-opened by the District Attorney's Office; correct?

14 A No one in law enforcement told me that. I read
15 in the newspaper speculation about it.

16 Q What about Mr. McMonagle? Did he ever tell you
17 prior to the defendant's arrest that the case had been
18 re-opened by the District Attorney's Office?

19 A I think Mr. McMonagle called me and asked if I
20 had heard that the case had been re-opened. I don't
21 think he told me that it had. As a matter of fact,
22 I'm quite sure about that because I never knew as a
23 fact from anybody on the inside.

24 I recall reading in the
25 newspaper speculation and I recall Mr. McMonagle

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calling me and saying, "What do you know about this?"
And the truth of the matter is I didn't know anything
other than what was in the paper.

Q And what you read in the paper was an article
that appeared in the Inquirer on September 12th, I
believe; is that accurate?

A I can't remember.

Q Well, it's fair to say that -- well, do you
recall making a post on social media, on your
Facebook, after an Inquirer article where you were
quoted as saying "Inky: Cosby victim told police much
different than she told the Court in her lawsuit.
First I saw that in a story. Troublesome for the good
guys."

Do you remember making that
media post?

A I do.

Q And that was in a November 12th Inquirer article?

A I don't know the date, but I do remember whether
that happened.

(Philly.com article dated
September 14, 2015 "Time hasn't run out on possible
charges against Cosby in Pa." marked Commonwealth's
Exhibit C-9 for identification.)

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BY MR. RYAN:

Q Mr. Castor, I'm handing you what I've marked as Commonwealth's Exhibit 9. Do you recognize that article?

A The print is very small and it will take me a longer time to read it, but I don't immediately recognize it.

Q So that's not the article, at least as you recall it, that informed you at least speculation -- at least in terms of speculation that the Cosby case was being re-opened?

A I thought you said it was September 12th and this is September 14th.

Q And I realize looking at that that it is September 14th and I made an error in that regard.

But that article, does that look familiar as the article you read where you learned that this speculation was the case was being re-opened?

A I don't know.

Q Okay.

A But it was around this time. I remember it was around the middle of September that I first began to think that law enforcement was reconsidering whether

1
2 to prosecute Cosby. I don't know if it was this
3 article or another one. And the print is just so
4 small, I can't read it.

5 Q I understand the difficulty. You're being sued
6 about an issue that arose in the press about you
7 making commentary about Ms. Constand allegedly in the
8 press. You know that; right?

9 A I thought that I was being sued because I
10 commented on a social media post that the Inquirer had
11 mentioned that the allegations in the civil complaint
12 were more detailed than the -- than what Andrea
13 Constand had told detectives.

14 A Right. And that social media posting was made --
15 appended to an article entitled from the Philadelphia
16 Inquirer "Time hasn't run out on possible charges
17 against Cosby in Pa." Is that correct?

18 A I don't know. If you had shown it to me in the
19 reverse, I could have said yeah, but I can't remember
20 by looking at it in a vacuum. And I can't believe
21 anyone could read print that small.

22 THE COURT: Do you have it
23 electronic then? You don't have it?

24 MR. McMONAGLE: They have it.

25 THE COURT: Some things you

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have. Do you have this one?

MR. McMONAGLE: No. A lot of these things that were turned over, Judge, I do not have. I would publish it gladly.

MR. RYAN: I have it.

THE COURT: I know. He has it. He can't read it.

MR. RYAN: We'll get there.

(People.com article dated 10-22-15 "Pennsylvania District Attorney Candidates Battle it Out Over the 2005 Bill Cosby Sexual Assault Allegations" marked Commonwealth's Exhibit C-10 for identification.)

BY MR. RYAN:

Q If I can turn this back over, this is what I've marked as Commonwealth's Exhibit C-10. I'm not anticipating you being a reader of People Magazine.

Is that fair to say?

A That's fair to say.

Q But, nonetheless, I'm going to direct you towards the last page of this document.

Do you see that?

A Yes.

(Commonwealth's Exhibit C-10

1 published.)

2 BY MR. RYAN:

3 Q Okay. Now, I don't know if you're able to see it
4 or not, but I'm going to use the screen, understanding
5 that you may have some trouble with the screen as
6 well, but is that the Facebook posting that you were
7 referencing earlier?
8

9 A Yes, but this says September 12th and you were
10 showing me a September 14th article.

11 Q Right. And so let's just look at that. So
12 September 12th is the date that you make the reference
13 at issue in the lawsuit. And that article was the one
14 where you learned this speculation that the Cosby case
15 was being re-opened, or do you not remember?

16 A I thought that I was commenting on the Inquirer's
17 figuring out that the allegations in the civil suit
18 are wildly more precise and more concise than Andrea
19 Constand's statements to police. I did not think of
20 that article that the case had been re-opened.

21 The point that I was making was
22 if the speculation was that the case was going to be
23 re-opened, the discovery by the Inquirer that the
24 averments in the civil suit were much more precise and
25 cogent than what Andrea Constand told the police, and

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2 they -- and law enforcement wanted to be able to bring
3 a prosecution, that would be detrimental to law
4 enforcement's interests. So hence the statement that
5 I wrote "troublesome for the good guys."

6 Q But you don't remember the substance underlying
7 that article that you were posting about on Facebook
8 is my question?

9 A I thought the substance was that the Inquirer was
10 pointing out the differences between what Andrea
11 Constand had told the police and what she alleged or
12 her lawyers alleged in her lawsuit. That's what my
13 recollection is for why I tweeted that.

14 Q So going back to, like I said, the conclusion of
15 your direct testimony, what you said as an initial
16 matter was that you had a meeting with Mr. Phillips,
17 and that was really the first place that the decision,
18 the written decision not to prosecute would act to
19 officially strip the defendant of his Fifth Amendment
20 rights.

21 It's fair to say that that's
22 where that was first discussed?

23 A No.

24 Q Where was it first discussed?

25 A I had multiple meetings with Mr. Phillips before

1 that issue came up. Once I reached the point where I
2 did not think the prosecution -- a conviction was
3 attainable, I made the decision that we were not going
4 to prosecute Cosby as the representative of the
5 Commonwealth, then I told Phillips of my decision.
6 And I told him that I thought that that meant, as a
7 matter of law, Cosby could not take the Fifth
8 Amendment in any deposition. And he agreed with that.
9 And it was thereafter his job to communicate that to
10 Cosby or whoever was representing Cosby civilly.
11

12 Now, whether that was the first
13 time I had ever discussed that idea with anyone, I
14 doubt it. I probably discussed it with my wife.

15 Q And, again, when you say "that idea," you mean as
16 it specifically applies to the Cosby case?

17 A Right. I mean the general concept is black
18 letter law. I wouldn't need to discuss that with
19 anybody.

20 Q Black letter law coming from a case?

21 A Probably. Well, I just finished a case that's a
22 reported decision, *Veloric v. Doe*, from last summer
23 that says that if there is no chance of a prosecution,
24 a witness in a civil case may not assert the Fifth
25 Amendment.

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2 When I briefed and argued that
3 case in the Superior Court and allocatur was
4 refused -- re-argument was refused and allocatur was
5 refused, so that is the law of Pennsylvania. There is
6 many cases I cited for that proposition. If the
7 testimony is incapable of incriminating a person, then
8 the Fifth Amendment right against self-incrimination
9 no longer exists. So I would consider that to be
10 black letter law.

11 Q And being a civil practitioner, you know that as
12 a litigator in an instance where an individual such as
13 a suspect or a criminal defendant even has given a
14 statement to law enforcement, to authorities during
15 the course of an investigation, that would be a basis
16 by which a civil practitioner could argue they no
17 longer have Fifth Amendment rights.

18 You'd agree with me about that
19 proposition?

20 A No.

21 Q So I want to briefly go back. You said that you
22 received a phone call, was it, from Mr. McMonagle
23 asking you whether or not you knew anything about the
24 case being re-opened by the District Attorney's
25 Office?

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2 Was that your earlier testimony?

3 A I believe he did, and I believe it was right
4 around mid-September, because that was when rumors
5 were in the newspapers about it.

6 Q Would it have been September 22nd?

7 A Could have been. I don't recall.

8 Q Were you aware that Mr. McMonagle and Mr. Patrick
9 O'Connor, who was a civil attorney for Mr. Cosby, had
10 a meeting on September 22nd with then District
11 Attorney Ferman and then First Assistant District
12 Attorney Kevin Steele about the Cosby case and
13 reopening the investigation?

14 A If he told me, I don't recall.

15 Q So let me ask you about the procedure behind this
16 2005 decision that you made. So you indicated that
17 perhaps you first spoke with your wife about this;
18 correct?

19 A I probably spoke with her about it because, like
20 every other person in the country, she was interested
21 in what was going on. And I probably told her before
22 I told Mr. Phillips that this was what I thought I was
23 going to do.

24 Q And then you told Mr. Phillips by telephone?

25 A I think it was in person.

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2 Q At the District Attorney's Office?

3 A Yes.

4 Q And he agreed with the legal analysis portion of
5 that conversation you were having?

6 A Yes.

7 Q And then when did you discuss this legal analysis
8 with your First Assistant District Attorney, Risa
9 Ferman?

10 A I don't remember. I don't remember whether I
11 discussed it at length with her or not. I probably
12 just told her that that was what we were going to do.
13 And she was -- I told her that she was to contact
14 lawyers for Constand and let them know. And I don't
15 recall Mrs. Ferman coming back to me with any --

16 THE COURT: She was then First
17 Assistant D.A.; correct?

18 MR. RYAN: That's correct, Your
19 Honor.

20 THE WITNESS: I don't recall
21 Mrs. Ferman coming back to me and saying that there
22 was any objection raised. It wouldn't have mattered
23 anyhow, but I went ahead and told Mr. Phillips that
24 that's what we were going to do, and that's what we
25 did.

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BY MR. RYAN:

Q So when you say you just -- or directed at the time First Assistant Ferman to inform the victim and her attorneys of the decision, when you say "decision," you mean decision not to prosecute and, along with that, your legal analysis that such a decision would strip the defendant of his Fifth Amendment rights?

A That is what I recall telling Mrs. Ferman to do, yes.

Q Now I want to turn to D-5. Do you have D-5 in front of you?

A I do.

THE COURT: You want to take a short break here?

MR. RYAN: That's fine.

THE COURT: We've been going for about an hour and a half. I'm committed to go until about 5:00. I know that people -- we generally don't take court much past 4:30 here, but in an effort, I recognize that -- I'm assuming that Mr. Castor told you something about not being able to come back. I'd like to complete his testimony.

MR. McMONAGLE: Yes, sir.

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2 THE COURT: I would like to take
3 a short break here and then plow on for a little bit
4 and see where we are. So, again, I'm going to
5 recommence at 4:00, so be back in your seats at 4:00.

6 - - -

7 (Recess.)

8 - - -

9 (The following proceedings were
10 reconvened with the Court, Mr. Steele, Mr. Ryan, Ms.
11 Gibbons-Feden, Mr. McMonagle, Mr. Tayback, Ms.
12 Pressley, Mr. Sarles, and the defendant being present:)

13 - - -

14 THE COURT: Mr. Ryan.

15 (Defendant's Exhibit D-5
16 published.)

17 BY MR. RYAN:

18 Q Mr. Castor, I was about to ask you questions
19 related to D-5, which was the e-mail you sent to then
20 District Attorney Risa Vetri Ferman on September 23rd.

21 A I have it.

22 Q Now, what you're laying out in this e-mail was
23 your recollection of what occurred in 2005. And what
24 I want to ask you initially was, in 2005 it was your
25 testimony on direct that you assigned Mrs. Ferman to

1
2 discuss your decision which included this
3 non-prosecution analysis with the plaintiff's lawyers;
4 correct?

5 A I instructed her to tell them what we were doing,
6 so yes.

7 Q And in this 9-23 e-mail, you indicate in the
8 third line of the second paragraph: "With the
9 agreement of Wally Phillips and Andrea's lawyers, I
10 wrote the attached as the only comment I would make."

11 So when you say in that e-mail
12 "With the agreement of Wally Phillips and Andrea's
13 lawyers," did you speak with Andrea's lawyers about
14 this being your only comment?

15 A No.

16 Q Did Mrs. Ferman report back to you that Andrea's
17 lawyers were in agreement with this being your only
18 public comment?

19 A I don't remember.

20 Q So when you say in this e-mail that was written
21 on September 23rd of 2015, "With the agreement of
22 Wally Phillips and Andrea's lawyers," what agreement
23 are you referencing?

24 A The agreement that my decision not to prosecute
25 Cosby would set the dominoes falling to make him

1
2 testify in a civil case.

3 Q And so when you say, "With the agreement of
4 Andrea's lawyers," which conference are you
5 referencing that you had with her lawyers that's now
6 contained in this e-mail?

7 A I am using the term "with the agreement of Wally
8 Phillips and Andrea's lawyers, I wrote the attached"
9 as my immediate subordinate did not report to me any
10 objection.

11 Q So you telling Mrs. Ferman to do something and
12 the omission of her returning to you with any
13 information as the plaintiff's lawyers agree with this
14 being my only comment?

15 A Yes. Mrs. Ferman followed orders. Also,
16 Andrea's lawyers were not necessary to be part of the
17 discussion. It was a courtesy that I delegated to now
18 Judge Ferman.

19 Q Because, like you said, the only person you cared
20 about knowing about this analysis was the defendant;
21 correct?

22 A No. I thought I said that I -- I needed Wally
23 Phillips to agree that my legal analysis was correct
24 so that when he told that to Cosby, Cosby would
25 believe him.

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2 Q And you, frankly, didn't care what the
3 plaintiff's lawyers opinion of it was?

4 Is that a fair statement?

5 A I didn't -- from a legal perspective, I didn't
6 care because I had already concluded the case could
7 not get any better and that this was the best way to
8 get some measure of justice for Andrea.

9 Q So in this next line you say again: "With the
10 agreement of the defense lawyer and Andrea's lawyers,
11 I intentionally and specifically bound the
12 Commonwealth."

13 Are you again referring to
14 Mrs. Ferman not returning to you with any sort of
15 objection from the plaintiff's lawyers when you talk
16 about this agreement?

17 A Correct.

18 Q And, of course, you didn't lay out in this e-mail
19 Well, hey, Risa, you remember I sent you to the
20 plaintiff's lawyers and you didn't say anything about
21 them objecting?

22 You didn't put that in the
23 e-mail, did you?

24 A I put in the e-mail what's written on the paper.

25 Q So you didn't put in, Hey, Risa, you remember how

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intent of the plaintiff's lawyers, are you again talking about when Mrs. Ferman just never returned to you with any sort of objection from the plaintiff's lawyers?

A Which sentence are you looking at?

Q Can you see it on the screen right in front of you there? It's highlighted.

A Not exactly. The specific intent was that the non-prosecution of Cosby would make him have to testify. And that was the intent of me, Wally Phillips, and those were the only parties.

Q So right here when you talk about the specific intent of all parties including the plaintiff's lawyers, you're now saying that what you really meant was just you and Wally Phillips?

A Well, anything that I'm referencing the plaintiff's lawyers was what I deduced from whatever it is that Mrs. Ferman, now Judge Ferman, told me.

Q Or didn't tell you?

A Or didn't tell me, right.

Q Incidentally, did Mrs. Ferman report anything back to you when you directed her to go inform the plaintiff's lawyers and the victim about your analysis?

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2 A I assume that she did, but I just don't remember.

3 Q Because certainly if there were something to
4 report, your First Assistant District Attorney would
5 have done so?

6 A Well, she's a very capable lawyer and judge, and
7 knows that what the -- what the victim and her lawyers
8 want has no bearing on the decision that there was no
9 evidence upon which a prosecution could succeed and
10 that, therefore, removing the Fifth Amendment barrier
11 would enhance the case.

12 So if the answer that she got
13 from Andrea's lawyers was we don't like it, but if
14 that's the best we're going to do, then that's the
15 best we're going to do, she might not consider it
16 necessary to tell me.

17 Q But certainly Mrs. Ferman didn't report the
18 information you just described?

19 A No. What I told you was I don't recall whether
20 she did or not. At that point was an insignificant
21 matter. Once I was convinced that the victim had
22 compromised her credibility to the point where the
23 case could not be won, added to the delay in the case,
24 it no longer mattered what the victim's lawyer and the
25 victim wanted.

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2 All that mattered was the
3 decision of do we leave the case open and he doesn't
4 get arrested, or do we do something to try to get the
5 victim some compensation.

6 And the analysis was, if I
7 thought the case could have gotten any better, I might
8 have decided to leave it open. But because I thought
9 it could never get any better, I decided the best
10 possible course for the victim, regardless of what her
11 lawyer said, was to engage in the legal analysis I did
12 with Mr. Phillips, state the Commonwealth would not
13 prosecute Cosby, and make him testify under oath.

14 Q And as you just said, when -- as soon as you
15 determined that you weren't going to be able to
16 prosecute Bill Cosby, the opinion of the victim, the
17 opinion of her attorneys, became insignificant; right?

18 A It became irrelevant.

19 Q The word you used was insignificant.

20 A Okay. Insignificant, I'll agree. Irrelevant,
21 insignificant.

22 Q So let's move down to the final paragraph, and it
23 may carry over onto Page 2 of the document you have in
24 your hand. I cannot be sure without it in front of
25 me.

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2 You state: "But one thing is
3 fact. The Commonwealth, defense and civil plaintiff's
4 lawyers were all in agreement that the attached
5 decision from me stripped Cosby of his Fifth Amendment
6 privilege."

7 Again, what you're saying in
8 this e-mail is that the agreement coming from the
9 plaintiff's lawyers would have been the fact that
10 Risa -- I'm sorry, then First Assistant District
11 Attorney Ferman never reported anything back to you
12 that you recall?

13 A Correct. I don't recall that she told me of
14 anything coming from the civil plaintiff's lawyers'
15 side that would have been of value in the
16 decision-making process because, as you well know, you
17 represent the Commonwealth. You do not represent the
18 victim.

19 Q Now, let's turn to what I believe is marked as
20 D-6, which is a letter from then District Attorney
21 Ferman on September 25th, 2015, to you.

22 Do you have that in front of
23 you, sir?

24 A I do.

25 Q And as you can see by the dates on the letters,

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this is coming September 25th which is, of course, after your September 23rd e-mail; correct?

A Yes, but I was not in the office, so it was not hand-delivered to me. It was ultimately scanned and faxed or scanned to me, so I don't know if I got it that day or the next day.

Q But what the then District Attorney is stating in this letter is that she's attempting to determine an appropriate course of action, but that she read a newspaper article that you were quoted in talking about a "written declaration" that you signed in 2005 indicating the Montgomery County District Attorney's Office would not prosecute Bill Cosby on information coming out of the civil litigation with Andrea Constand. And that's what this letter is initially regarding?

A I am not 100 percent sure that I was quoted in that article. I remember there was an erroneous article in the Intelligencer that led me and any reasonable person who would read it to think that I had said that there was more than the press release written to memorialize what happened. I immediately contacted the reporter and asked for a retraction and a correction. I don't know whether that ever

1
2 happened.

3 I deduced from this letter that
4 Mrs. Ferman had the same reaction that I did and is
5 now looking around for something else and asked me
6 about it, and asked me to send it to her if there was
7 anything.

8 The last sentence which states:
9 "Since I know you keep copies of important documents,
10 I am writing to request that you provide a copy to us
11 now, so that we may properly resolve this important
12 matter" is simply untrue.

13 I happen to have the press
14 release on my computer because it was one of the few,
15 if not the only, I actually wrote myself. So when I
16 brought my -- when I moved across the street and took
17 my personal files with me, it was there.

18 So I don't know why Mrs. Ferman
19 would make such a statement, but that is, in fact, not
20 true.

21 (The Intelligencer article dated
22 September 24, 2015 "Montgomery DA candidate Castor
23 urges delay in Cosby case until after elections"
24 marked Commonwealth's Exhibit C-11 for
25 identification.)

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BY MR. RYAN:

Q I'm going to hand you what I've marked as Commonwealth's Exhibit C-11. Take a look at that and tell me if you're familiar with it.

A Yes, I remember this newspaper article.

Q And this is the newspaper article that you were just talking about that was written by Peggy Gibbons that you felt was inaccurate?

A I don't know that. I'd have to look at it again.

Q Take your time.

A The date is cut off on mine. Can you tell me the date?

Q The print date is 9-25, but I believe it was actually on September 24th, 2015.

A Okay. Yeah, that would have been the day in between.

Q Exactly.

A And you just let me know if you have come to the conclusion that you're familiar with it.

A I am familiar with it, but I'm not familiar with it enough, unless you point me to specific parts.

Q But this is the article you were just referencing that made first mention of this written declaration;

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is that accurate?

A Yes.

Q Okay. So now I am going to point you to a particular page. And if you look at the top, it has Page 1 of 5. You see that? I'm going to turn you to Page 3 of 5.

A Okay.

Q Are you on that page?

A Yep.

(Commonwealth's Exhibit C-11

published.)

BY MR. RYAN:

Q And we see it blown up on the screen in front of us. And I believe the quote you're talking about says, At the -- the statement in the article: At the same time he decided not to pursue criminal charges against Cosby, Castor said he signed off on a written declaration saying his office would not prosecute Cosby.

That's the misstatement that you're referring to?

A Right. And you'll notice that that is not a quotation.

Q Right. And I'm not suggesting that it is, but

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that was what you sought a retraction for?

A Right, because the written declaration that I was referring to was the signed press release. And I could see how anybody reading that would think there was something else, and that's what I asked for a retraction of.

Q Now, do you see above that the sentence that starts: Castor, who would have normally made."

Do you see that sentence?

A Yes.

Q Castor, who would have normally made the announcement at a press conference, said he opted for a "more carefully worded" press release than his "off the cuff remarks" at a press conference so as no to "pollute jurors" in a potential civil litigation.

Do you recall saying that?

A Yes, I do.

Q And nowhere in that do you mention, well, I actually didn't hold a press conference because I wanted to issue a press release because it would be a writing signed by the District Attorney as sovereign and, therefore, stripping the defendant of his Fifth Amendment rights?

You didn't state that or it

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testified to?

A My recollection is I always said that because
I --

Q It's interesting because --

THE COURT: Hold on.

MR. RYAN: I apologize.

THE WITNESS: Because when I
wrote in the press release on February 17th, I wrote
that --

BY MR. RYAN:

Q Are you finished, Mr. Castor?

A No. I'm trying to find it. I made it absolute
in the press release --

Q Please, tell me in the press release where you
made it absolute.

A I will if you'll quiet down and let me look at
it.

When I said that the -- After
reviewing the above and consulting with County and
Cheltenham detectives, the District Attorney finds
insufficient, credible and admissible evidence exists
upon which any charge against Mr. Cosby could be
sustained beyond a reasonable doubt.

So I used the present tense that

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2 the -- that there is no -- there's -- "insufficient,
3 credible, and admissible evidence exists," exists in
4 the whole world, exists, "upon which any charge
5 against Mr. Cosby could be sustained beyond a
6 reasonable doubt."

7 So I'm making it an absolute. I
8 said I found that there was no evidence -- there was
9 insufficient, credible, and admissible evidence in
10 existence upon which any charge against Mr. Cosby
11 could be sustained. And the use of the word "exists"
12 and "could" I meant to be absolute.

13 Q And you told that to news reporters when you
14 talked to them?

15 A Well, I didn't parse it out the way I did there,
16 because I figured lawyers could figure that out. but
17 I told newspaper reporters that he was not going to be
18 prosecuted in order to make it so that he would be
19 required to give a deposition under oath.

20 If there was any wiggle room at
21 all, then he would not be able -- if there's any
22 wiggle room at all, he could take the Fifth Amendment
23 and the judge would sustain his Fifth Amendment
24 assertion by virtue of the fact that there was wiggle
25 room.

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2 So it was my specific intent to
3 create no wiggle room so that the judge would say
4 sorry, Mr. Cosby, you can't take the Fifth Amendment
5 because the D.A. has said that you will not be
6 prosecuted for this case.

7 Q And you told that in whatever form you told it to
8 them, to newspaper reporters, every time you talked
9 about this case?

10 That was your statement I'm
11 trying to clarify, Mr. Castor.

12 A I told newspaper reporters -- if I didn't tell
13 them every time, it was darn near every time, because
14 eventually you get tired giving 20 and 30 interviews a
15 day.

16 But the -- I have been
17 consistent from the first time this case came back
18 into the media that it was designed so that for all
19 time Cosby would not be prosecuted for the Constand
20 event in order that he could never claim the Fifth
21 Amendment and there would be no wiggle room that he
22 could say in some remote way that he could ultimately
23 be prosecuted 10 years later, because if that was the
24 case and the judge overseeing the civil suit agreed,
25 then I would have failed in the endeavor that I was

1
2 trying to achieve in making him testify and enhancing
3 what I thought would be the chance for a large
4 recovery civilly.

5 Q I just find it interesting that you have such a
6 specific recollection of telling newspaper reporters
7 this, when I showed you perhaps half a dozen newspaper
8 articles that you had no recollection of making any
9 quotations contained in those newspaper articles.

10 A I am very pleased to know what you find to be
11 interesting, but the portion that I have just
12 testified to was the actual kernel of the case, the
13 most important thing in the case.

14 Specific statements at a press
15 conference on the 27th of January I don't remember
16 having. And I'm not going to sit here and lie to you
17 and tell you that I do have an independent
18 recollection when I don't.

19 But on this single-most
20 important aspect of the case, I am absolutely certain
21 that I have explained that to every reporter who has
22 ever asked me, because they always ask me why did you
23 do that? So I told them.

24 Q The most important aspect of the case, and you
25 wrote in your September 23rd e-mail that you never

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2 made an important decision without discussing it with
3 your First Assistant, Mrs. Ferman; is that accurate?

4 A I did. And I wrote that -- I wrote it
5 ambiguously because I could not remember specifically
6 talking with her, so I am -- I am assuming that I did
7 because I had faith in her judgment and I would have
8 discussed it with her.

9 But I was absolutely certain as
10 of the 16th of February 2005 that that was the right
11 move, and there was -- no one was going to change my
12 mind on that. So I would be surprised if I did not
13 speak to her about it, but I did not -- I don't have
14 any specific recollection of it.

15 Q So you must have been very surprised when she
16 wrote in a letter to you on September 25th: "The
17 first I heard of such a binding agreement was your
18 e-mail sent this past Wednesday. The first I heard of
19 a written declaration documenting the agreement not to
20 prosecute was an article authored on 9-24-15 and
21 published today by Margaret Gibbons of The
22 Intelligencer."

23 That must have come as quite a
24 shock to you, seeing as how such an important decision
25 you most assuredly would have discussed with your

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First Assistant at the time.

A It did not come as a shock to me that then First Assistant D.A. Ferman did not know of any other written agreement, because that was an error in the paper.

Q What about the binding agreement that she references?

A The binding agreement, it doesn't come as a shock to me because I trusted her. And she remembers things or she doesn't remember things. And I believe that she tells the truth as she recalls it, as I am telling the truth as I recall it.

But on that day, the 17th of February 2005, I was the only person in Pennsylvania that had the power of the people to make that decision, and I made it. And whether she was present at that time or not, I don't know.

But I have a great deal of faith in Mrs. Ferman, Judge Ferman's legal acumen and her prosecutorial skills, and I simply don't recall whether I discussed it with her in as stark a terms as I am doing now.

Q So earlier when you testified that you directed her to explain your decision to the plaintiff's

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2 lawyers, you're now unsure as to exactly what terms
3 you discussed with her?

4 A No, I'm not unsure at all. I told her what we
5 were going to do, and I assumed that she would carry
6 out my order to communicate that to the victim's
7 lawyer or lawyers.

8 When you're the District
9 Attorney, you expect to be obeyed without question,
10 and she always did that.

11 (Defendant's Exhibit D-6
12 published.)

13 BY MR. RYAN:

14 Q I am going to refer you to D-6. I'm sorry, D-7.
15 Tell me when you have it in front of you.

16 A I have it.

17 Q You have it. All right. So let's look at -- and
18 so this is Mrs. -- I'm sorry, then District Attorney
19 Ferman has written you a letter asking for any sort of
20 written determination or any evidence of a binding
21 agreement with regard to the Cosby case.

22 And you write: The attached
23 press release is the written determination that we
24 would not prosecute Cosby. And of course you go on in
25 this e-mail to explain that you think perhaps the

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2 article was misconstrued, there was a
3 misunderstanding.

4 But what I want to talk about is
5 the next sentence which states: That was what the
6 lawyers for the plaintiff wanted and I agreed.

7 Is it your testimony here today
8 that, again, when you say that's something the
9 plaintiffs wanted and I agreed, that that statement is
10 based off of Mrs. Ferman simply not returning to you
11 with any objection from the plaintiff's attorneys?

12 A Which line are you looking at?

13 Q Let me point it out for you.

14 THE COURT: They have it up in
15 yellow.

16 THE WITNESS: Okay. Well, this
17 is -- you want me to look at a different yellow part?

18 BY MR. RYAN:

19 Q I'm sorry. I apologize.

20 THE COURT: Are you controlling
21 that or are you controlling that?

22 MR. McMONAGLE: Judge, we've
23 been out of control for a couple hours.

24 THE COURT: They set it up and
25 suddenly I saw a new yellow appear, and I'm like where

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was that coming from?

MR. RYAN: That was my fault.

THE COURT: Not a fault. It's
okay.

BY MR. RYAN:

Q Mr. Castor, I apologize for that. Let's first go
back to the first highlighted portion where it said:
The reason I agreed and the plaintiff's lawyers --

A Wanted it in writing.

Q I'm sorry, the first sentence: That was what the
lawyers for the plaintiff wanted and I agreed.

When you say "that is what the
lawyers for the plaintiff wanted and I agreed," what
are you talking about?

A The plaintiff's lawyers, knowing that Cosby was
not going to be arrested, wanted to make a lot of
money for their client and a contingent fee for
themselves.

Q Where did that information come from?

A It must have come to me from Mrs. Ferman. I
don't recall, but it certainly makes sense, because
once the decision is made that Cosby is not going to
be prosecuted, if I leave the case open, then the
civil case is infinitely more more difficult and would

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2 move more slowly.

3 So I thought that was
4 corroborated by the fact that they would want as much
5 money for the plaintiff as possible and as much money
6 for themselves as possible.

7 And putting in writing that we
8 would not prosecute Cosby, which is what I did in the
9 press release, would be evidence that they could show
10 to a civil judge that Cosby is not getting prosecuted.

11 Q If, of course, they could parse the language as
12 you've done here today?

13 A It's not difficult to say to a judge --

14 Q And I'm not going to ask you to explain it again.

15 What I'd like you to do is look
16 at the next highlighted portion of this e-mail where
17 you wrote: I signed the press release for precisely
18 this reason, at the request of plaintiff's counsel.

19 Is that because Mrs. Ferman told
20 you that plaintiff's counsel wanted you to sign the
21 press release?

22 A Somebody told me they wanted it signed so that it
23 had my actual signature on it binding the
24 Commonwealth.

25 Q But you don't remember at this date who that was?

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2 A I assume it was Judge Ferman, but I am not 100
3 percent sure. But what I recall is that once the
4 hurdle was over that Cosby was not going to be
5 arrested, the plaintiff's side -- the future
6 plaintiff's side wanted it to be signed and I signed
7 it.

8 Q What percent sure are you that it was
9 Mrs. Ferman?

10 A What percent? I am 90 percent sure. Part of the
11 problem is that the detectives had a relationship with
12 the victim and her lawyers as well, so it could have
13 come from there.

14 Q That's only 10 percent possible?

15 A The reason I can't be sure is there were other
16 people apart from me who were in contact with the
17 future plaintiff's side.

18 Q Right. You said that was Mrs. Ferman on direct
19 testimony. You said she had a relationship with, I
20 believe it was, Bebe Kivitz out of a case which was
21 the Nevison (ph) case. And as a result of that, you
22 assigned Mrs. Ferman to deal with the plaintiff's
23 lawyers?

24 A I did not say that, no. What I said was
25 Mrs. Ferman had a relationship with one of the

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lawyers, because I thought she said that she had gone to school with one of them.

Q Right, that was your testimony.

A I don't know the name of the lawyer and I don't know about that lawyer's involvement in the Nevison case.

Q I apologize. That was my fault.

So going down to the final paragraph in this e-mail, the first sentence, it reads: The attached which was on letterhead and signed by me as District Attorney, the concept approved by the plaintiff's lawyers was a "written declaration" from the attorney for the Commonwealth.

When you say "the concept approved by the plaintiff's lawyers," where is that information coming from?

A They wanted -- they wanted the government to be bound by something in -- signed, saying that Cosby is not going to be prosecuted, so that's what I did.

Q Who told you that?

A Well, it was either Mrs. Ferman or one of the detectives who was involved in the case who had developed a relationship with the future plaintiff's side. Also, it makes logical sense.

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Q All right. So I want to ask you now -- and we'll return to this e-mail, but I want to talk to you about the press release. Let's go back there. And that's D-4. Tell me when you have it.

A I have it.

(Defendant's Exhibit D-4

published.)

BY MR. RYAN:

Q So in D-4, I believe it's the final paragraph -- and I pulled it up here on the screen in the event you can't see it, but you wrote: District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise.

That's what that reads; correct?

A Yes.

Q Now, what you testified to on direct was that that sentence modifies the one before it, meaning that that sentence is actually a comment on whether or not you would make any further public statements about the case; is that right?

A Partially. That sentence modifies the entire paragraph because the entire paragraph deals with the civil action and how I wanted the parties to conduct themselves in the pursuit of the civil action.

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2 So what I was saying was I
3 recognize the civil action, with a much lower standard
4 of proof, is possible. I could have written
5 "probable" or even "certain."

6 I said that I didn't want to
7 express any opinion on the credibility of the parties,
8 because the publicity then, as it is now, was
9 overwhelming and the Philadelphia media market would
10 cover it all and taint prospective jurors.

11 So I then went on to say, again
12 referring to the civil case, that I would not expound
13 on the details of my decision for fear that my
14 opinions and analysis might be given undue weight by
15 jurors in any contemplated civil action.

16 And then I said that I cautioned
17 all parties to this matter that I will reconsider this
18 decision should the need arise.

19 So all of that has to do with
20 the civil aspect of the case. I have seen that, taken
21 out of context, there is a suggestion that I was
22 referring to the entire decision of whether to
23 prosecute Cosby or not. Had I meant for that, I
24 wouldn't have put it in the paragraph dealing with the
25 civil action.

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2 But I also would have said that
3 District Attorney Castor cautions all parties to this
4 matter that he will reconsider "the" decision should
5 the need arise, not "this" decision, because "this" is
6 referring to the decision not to comment publicly and
7 taint prospective jurors

8 Q That's what I wanted to ask you. You've said on
9 direct, and you're still maintaining now, that that
10 sentence was not intended to mean that you will
11 re-open the decision as to whether or not to prosecute
12 Mr. Cosby, because what you said during direct was
13 that your legal analysis bound the Commonwealth and he
14 could never be prosecuted for the sexual assault
15 allegations that arose in January of 2004; correct?

16 A No. I said that once I had made the decision
17 that Cosby would not be prosecuted ever, then the
18 legal analysis, as a matter of law, made it so that he
19 could no longer take the Fifth Amendment.

20 But if I felt that the office
21 needed to defend itself further than what I wrote
22 here, I would expound on my reasons for not
23 prosecuting Cosby. He still would not have been
24 prosecuted, but now the entire Eastern District of
25 Pennsylvania would know that I did not think Andrea

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Constand's testimony would be found credible by jurors.

(Philly.com article dated 1-31-16 "Castor could be key witness at Cosby hearing" marked Commonwealth's Exhibit C-12 for identification.)

BY MR. RYAN:

Q Did you read the Inquirer this Sunday?

A No.

Q Okay. I'm going to hand you a document that I'm marking as Commonwealth's Exhibit C-12 and I want you to take a look at that.

A Do you want me to sit here and read it?

Q Are you familiar with it? Have you ever read it before?

A No.

Q You've never seen it before?

A No.

Q Okay. So I want to direct you to Page 3 of 6. Can you find Page 3 of 6?

A Yes.

Q All right. And at the very bottom of that page there's a quote: "I have said repeatedly and for months that if I ever get the opportunity where I get

1
2 the power to review the investigation into Cosby, I
3 would do so," he said before the election, referring
4 to you.

5 Do you remember making that
6 statement?

7 A Yes.

8 Q Before the election, so sometime during 2015?

9 A Yes. Well, it could have been 2014.

10 Q Either way. You'd agree with me that you made
11 that statement in either 2015 or 2014?

12 A Yes.

13 Q Okay. Let's go up above towards the sixth
14 paragraph. And it's actually a quotation on that same
15 page. It begins: "I put in there."

16 Do you see that?

17 A You say it's the same page?

18 Q Yes. Let me know when you've found it.

19 A I found it, yes.

20 Q "I put in there that if any evidence surfaced
21 that was admissible then I would revisit the issue,"
22 he told The Inquirer in September. "He" is you. And
23 evidently that is what the D.A. is doing.

24 Do you remember making that
25 quote?

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2 A Yes.

3 Q Now, the paragraph above it, that paragraph is
4 referencing the press release, meaning, as we've
5 learned from what you're testifying to here today,
6 that quote is modifying the statement ahead of it;
7 correct?

8 A No, that's not. The article that -- the
9 paragraph that's in quotes, I put it in there. The
10 paragraph above that is not my words.

11 Q So when you're saying: "I put in there that if
12 any evidence surfaced that was admissible then I would
13 revisit the issue, and that evidently is what the D.A.
14 is doing" -- you give that quote in September of 2015
15 in reference to this Cosby investigation -- what were
16 you talking about, Mr. Castor?

17 A I don't know what the -- what the "put in there"
18 is, but I was and have maintained all along that if
19 Cosby could be prosecuted for criminal violations that
20 occurred in Montgomery County other than against
21 Ms. Constand, that I thought that we should do that.

22 I first thought that the thing
23 we should do was try to make a perjury case out, but
24 the statement that we could prosecute him for Constand
25 is not true.

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2 Q Because what you said was that you bound the
3 Commonwealth such that we could never prosecute him
4 for any charges related to Andrea Constand or the
5 incident that you were investigating in 2005; correct?

6 A This one am I supposed to be looking at?

7 Q I'm asking you a question. The reason that you
8 don't -- that you're saying that that article is not
9 referring to anything in the press release or not
10 referring to your comment about the possibility that
11 the Cosby case could be re-opened is because you have
12 maintained that in 2005 you specifically and
13 permanently bound the Commonwealth that we could never
14 prosecute the charges related to that investigation in
15 2005; correct?

16 A The sexual assault cases, yes.

17 Q Right?

18 A If there was perjury, I thought we could
19 investigate that. And with all of the 50 or so women
20 coming forward saying that they have been molested by
21 Cosby, I thought that it was possible -- he lived in
22 Montgomery County -- that maybe some of them happened
23 in Montgomery County. And I saw no reason why we
24 couldn't prosecute him for that. We just wouldn't be
25 able to use the deposition or anything derived

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therefrom.

Q Let's turn back to D-7. That's this e-mail that you wrote to then District Attorney Risa Ferman on September 25th.

Do you have it?

A Yes.

Q And in this e-mail, again you're talking about agreements that were made in 2005 that, exactly what you just said, you wouldn't use anything from the deposition.

Now, you've testified here today that you would never prosecute Mr. Cosby, but I want to direct you to the bottom paragraph of this e-mail.

Do you see that?

A Yes.

Q You write: Naturally, if a prosecution could be made out without using what Cosby said, or anything derived from what Cosby said, I believed then and continue to believe that a prosecution is not precluded.

Is that what you wrote to the District Attorney of Montgomery County on September 25th, 2015, in reference to this case?

A That's what I wrote. That's what I meant. And

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that is what I still think today.

But you are missing the point. If I was referring to the Constand case, I would have written: Naturally, if the prosecution could be made out without using what Cosby said or anything derived therefrom, I believe then and I believe now is not precluded.

"A prosecution" refers to other victims, not Constand, that occurred in Montgomery County. And I thought that with the enormous publicity of the 50 or so potential victims that maybe they had one in Montgomery County and then they could prosecute that one, but they simply couldn't use the deposition or the -- anything derived therefrom.

MR. RYAN: I don't have any further questions, Your Honor.

THE COURT: I have a couple questions and then I'll open it back up for redirect.

MR. McMONAGLE: Yes, sir.

THE COURT: Let me start with that. You believe that that statement was that there could be other cases in 2015 of other potential victims that may have arisen that you knew nothing about that Mr. Cosby may have disclosed in his

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deposition testimony?

THE WITNESS: No. I was reading, like everyone else, all of these women coming forward saying that they had been molested. I thought that if any of them had been molested in Montgomery County --

THE COURT: You mean sexual assault. Molest is not a charge; correct? I want to make sure. It's not an indecent assault, sexual assault. I just want to make sure that we're talking about -- molestation is not a charge under the Crimes Code, is it, because the words are important here?

If you'd made an agreement regarding a charge that didn't exist -- you mean sexual assault of some sort?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: So what I'm -- in that last paragraph, what I'm trying to convey to Mrs. Ferman is my binding of the Commonwealth not to prosecute Cosby was not for any crime in Montgomery County for all time. It was for only the sexual assault crime in the Constand case.

So if they had evidence that

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2 some of these other women had been sexually assaulted
3 at Cosby's house in Cheltenham, then I thought they
4 could go ahead with the prosecution of that other case
5 with some other victim, as long as they realized they
6 could not use the Constand deposition and anything
7 derived therefrom.

8 THE COURT: But she wasn't
9 soliciting your opinion about prosecution of unrelated
10 cases. We agree with that? I'm just trying to --
11 you've said it and that's obvious. If it has nothing
12 to do with the Constand case and has nothing to do
13 with the Cosby deposition, then the District Attorney
14 is free to prosecute any case it wants.

15 Is my understanding of that
16 correct? You don't have to tell her, hey, prosecute
17 any case you want, just not the Constand case. That's
18 what you mean by that?

19 THE WITNESS: No, not exactly,
20 because if -- you've got to -- if the D.A.'s Office
21 had gotten to this other victim or gathered evidence
22 on this other victim by using what Cosby had said in
23 the Constand deposition or anything derived therefrom,
24 she had to be cautious and separate that out before
25 moving on that other victim.

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2 THE COURT: You also mentioned
3 possibly that if she would have an independent basis
4 for a perjury charge. You mentioned that?

5 THE WITNESS: I did.

6 THE COURT: Now, where -- my
7 understanding from everything that I've read is that
8 there was never any statement that was taken under
9 oath by Mr. Cosby, is that correct, in your
10 investigation of the Constand case?

11 THE WITNESS: No.

12 THE COURT: Let me just make
13 sure. There was no statement under oath in the
14 original investigation? They were statements to the
15 police?

16 THE WITNESS: Right.

17 THE COURT: And if there had
18 been a statement under oath by Mr. Cosby, that would
19 be different than his statement to the police, that
20 might be a basis for a perjury; would it not?

21 THE WITNESS: Correct.

22 THE COURT: Now, if he gave a
23 statement in his September depositions, in his
24 depositions while he was under oath, that was
25 different from his statement that he gave the

1 officers.

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3 Are you saying that's the
4 perjury?

5 THE WITNESS: Yes.

6 THE COURT: But that's derived
7 from the very statements that you were encouraging him
8 to give in a deposition, is it not? It's derived.
9 It's a crime. He's saying that I didn't do it.

10 You meant to bar his prosecution
11 for this case so as to encourage him to give a
12 deposition. If he then gave the deposition and it
13 differed with the statements that you had in your
14 file, are you saying you'd turn around and she should
15 as well prosecute him for perjury?

16 THE WITNESS: Yes.

17 THE COURT: Okay. Let me make
18 sure that I'm clear. Are you now saying that there
19 was no agreement not to prosecute? I've heard you say
20 that a number of times, there was no agreement not to
21 prosecute.

22 THE WITNESS: Correct.

23 THE COURT: There was a decision
24 by you not to prosecute.

25 THE WITNESS: Correct.

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2 THE COURT: And you gave all
3 your reasons for doing that. And so at that stage you
4 did that because you wanted to strip Mr. Cosby of all
5 his Fifth Amendment rights; is that correct?

6 THE WITNESS: For all time in
7 that case.

8 THE COURT: In that case. Now,
9 for instance, if he had gone and -- one other thing.
10 There was no civil case at that time; is that right?

11 THE WITNESS: Yet.

12 THE COURT: There was no civil
13 case filed by the plaintiffs at this stage. You made
14 your press release on February 7th. There was no
15 filed civil case in the Eastern District of
16 Pennsylvania at that time; is that correct?

17 THE WITNESS: Yes.

18 THE COURT: It is correct there
19 was not. And you had learned from whom that there was
20 a possibility of a case?

21 THE WITNESS: I believe it was
22 from Andrea's lawyer's comments in the newspaper and
23 Mrs. Ferman, and the deduction that I concluded that
24 Andrea and her mother were trying to extort money from
25 Cosby to keep from going to the police.

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THE COURT: So there was no case. And the depositions, in fact, didn't occur until September, is that right, when there eventually was filed a case?

THE WITNESS: I think the case was filed in March.

THE COURT: That's correct. And then the depositions that you wanted to strip him of any claim of the Fifth Amendment had not even been scheduled? This wasn't imminent or pending or people were coming to you saying, well, we want to move forward? There's nothing there? You were looking to the future?

THE WITNESS: Correct.

THE COURT: And in doing so, if at that stage other cases had come out, because there were cases that were out there, you had made a statement that they didn't go to the police, so therefore they may not be, but there were other at least allegations out there; is that correct?

THE WITNESS: Yes.

THE COURT: And if they occurred in some other state, California, that somebody made a statement, but maybe they didn't go to the police, and

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2 the plaintiff's lawyers began to ask him questions
3 under a deposition about criminal conduct, you would
4 not believe that that would be any basis for your
5 statement that you wanted to strip him of his Fifth
6 Amendment rights to raise the Fifth Amendment; is that
7 correct? He can raise the Fifth Amendment any time he
8 wants, couldn't he?

9 THE WITNESS: For any
10 incriminating evidence in any other case apart from
11 Constand.

12 THE COURT: But assuming that
13 you didn't prosecute. There had not been a civil case
14 filed. It wasn't filed until almost a month after you
15 made your press release. And in a deposition in
16 September, if he just chose on advice of then counsel
17 to say I stand on my Fifth Amendment rights, there is
18 nothing that you could do about that because you're
19 the District Attorney of Montgomery County. You're
20 not counsel in the case. There's just nothing you
21 could do about it.

22 THE WITNESS: That's not true,
23 Your Honor. What would happen in that circumstance,
24 and has happened, is the plaintiff's lawyers go and
25 complain to the judge that the exercise of the Fifth

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2 Amendment is improper.

3 The judge then would ascertain
4 the questions that were objected to under the Fifth
5 Amendment and then would ascertain from -- if they
6 were involved in the Constand case, ascertain from me
7 that there would be no prosecution and order Cosby to
8 testify on those issues.

9 THE COURT: The question was,
10 you could do nothing about it. You couldn't order him
11 to testify. You couldn't do anything other than be a
12 witness in some case in which some judge in the
13 Federal Court would have to make a decision as to
14 whether he was granted immunity from that testimony,
15 but there's nothing you could do about it. You would
16 be a witness, much the way you are here.

17 THE WITNESS: In my experience,
18 it has not worked that way. In my experience, the
19 judge has called and said, "Are you going to
20 prosecute?" I would tell him no and he orders them to
21 go ahead.

22 THE COURT: I'm not sure -- I've
23 never experienced that, but in Pennsylvania we have an
24 immunity statute, don't we? You're familiar with it?

25 THE WITNESS: Is that a question

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2 for me, Your Honor?

3 THE COURT: Yeah. You're
4 familiar with the immunity statute, which is 5947 of
5 Purdon's?

6 THE WITNESS: Your Honor, on the
7 issue of immunity, that is for use and derivative use
8 immunity only. At common law, the sovereign has both
9 the power of transactional immunity and use and
10 derivative use immunity.

11 THE COURT: I'm familiar with
12 it. I'm just trying to get to your point. Let me ask
13 you -- look, it wasn't utilized in this case because
14 you never even charged Mr. Cosby, and you didn't
15 charge him because you made independent reasons.

16 Let me get to this. If you felt
17 there was an agreement, why did you not make that
18 agreement in writing with the plaintiff's attorney,
19 with Mr. Phillips, yourself, create a miscellaneous
20 docket number and simply file it away?

21 Why did you not do that, because
22 your intention was to bar prosecution at all times? I
23 mean, do you know why you didn't do that?

24 THE WITNESS: The -- it was
25 unnecessary because I concluded there was no way that

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2 the case could ever get any better. And if
3 Mr. Phillips and Mr. Cosby's lawyers wanted more than
4 that to protect themselves, it was up to them to
5 provide it. But the plaintiff's are not party to any
6 of that because the litigants are the Commonwealth and
7 the suspect.

8 The utilization of the statute
9 requires permission of the Court, and I did not want
10 to -- first of all, there was no judge to file it in
11 front of.

12 THE COURT: Well, in this
13 county, you know, there's miscellaneous dockets for
14 all kinds of seizures of property where a person never
15 gets prosecuted, but somebody makes a deal that we'll
16 give you back \$5,000, we'll keep him, and we want a
17 judge's signature on them.

18 I mean, you can create
19 miscellaneous dockets and do whatever you want.
20 That's your experience at least with forfeitures,
21 isn't it?

22 THE WITNESS: It is. And I
23 don't want to argue with the Court.

24 THE COURT: It's not an
25 argument. I'm not -- really, I'm just trying to

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2 wonder that if this agreement existed and we
3 definitely have, you know, this -- I recognize your
4 common law immunity of witnesses, but we have a
5 statute that talks about how to do it.

6 THE WITNESS: No. I disagree,
7 Your Honor. There are two types of immunity in
8 Pennsylvania. There's transactional immunity and use
9 and derivative use immunity. At common law, the
10 sovereign has both.

11 The legislature has taken that
12 power -- has taken the use and derivative use immunity
13 power away from the sovereign so that you -- if you're
14 going to grant use and derivative use immunity, the
15 sovereign has to go and ask permission of the Court
16 and explain why.

17 THE COURT: Exactly. You
18 just -- at this stage you felt you didn't have to do
19 it. I understand it. I'm not -- I'm trying to find
20 out if there were mechanisms that were at least in
21 existence, something to memorialize what we're doing
22 10 years later in trying to put together whether there
23 was an express agreement not to prosecute. Really, I
24 mean, I understand it.

25 If you wanted to create it, I'm

1 asking were you aware of -- obviously there's a
2 statute that does deal with use immunity in
3 Pennsylvania; not specific to this case, but it was a
4 way to at least get a judicial sanction on it or
5 judicial approval of it. You file it away and you
6 bring it out should something like this ever occur.

7
8 You just felt it was not
9 available to you?

10 THE WITNESS: I felt it was
11 not -- I felt it was not appropriate for several
12 reasons. The first is the civil case hadn't been
13 filed. And in order to go and seek use and derivative
14 use immunity in a civil court, you'd have to go to the
15 federal judge. You'd have to ask him to grant use and
16 derivative use immunity. Not a Montgomery County
17 judge. So he's utilizing a Pennsylvania statute.
18 That's number one.

19 Number two, from Cosby's point
20 of view, the request for immunity would be a
21 suggestion in the Court of Public Opinion that he had
22 done something wrong and he, therefore, needs
23 immunity.

24 And number three, I didn't want
25 there to be use and derivative use immunity. I wanted

1
2 there to be the equivalent of transactional immunity,
3 which by default lays solely with the sovereign and
4 does not lay with the Court, because the legislature
5 took the power of use and derivative use immunity
6 granting away from the sovereign and requires
7 application to the Court and approval of the Court.

8 In order to achieve approval of
9 the Court, I would have had to tell the Court in
10 public filings that the victim in this case had
11 engaged in conduct that drastically damaged her
12 credibility. That would have been publicized and it
13 would have acted as a deterrent for other victims
14 coming forward.

15 THE COURT: All right. I
16 believe you had testified you had said, to your
17 knowledge, Mr. Phillips did nothing in exchange for
18 your decision not to prosecute; is that true?

19 THE WITNESS: Yes.

20 THE COURT: And then I assume
21 that you utilized -- there are certain disciplinary
22 rules regarding roles of prosecutor and decisions to
23 prosecute; is that correct?

24 THE WITNESS: Yes.

25 THE COURT: You've reviewed

1 them. There's certain ABA standards that I assume
2 you're familiar with. You have said once you made the
3 decision not to prosecute, which was your sole
4 discretion to do so, why did you feel compelled to do
5 anything else?
6

7 I'm just -- you've explained it,
8 but I'm just saying if you could answer it one other
9 time. Why were you compelled to do anything else in
10 this case?

11 THE WITNESS: Well, I have to
12 tell the public what the decision is.

13 THE COURT: Where is that in
14 your Rules of Conduct that you have to tell the public
15 what your decision is?

16 THE WITNESS: In the special
17 rules of a prosecutor, it says that the prosecutor
18 shall not make extrajudicial statements beyond what is
19 necessary to inform the public of what he or she is
20 doing and the outcome of a prosecution or an
21 investigation.

22 So I had to tell the public what
23 we did. And other than that, the only thing I wanted
24 to confirm was Wally Phillips' agreement with my legal
25 analysis that if Cosby could never be prosecuted, he

1
2 therefore could never take the Fifth. And those were
3 the only things I did.

4 THE COURT: Right. But you've
5 testified here today you wanted him to be punished,
6 and they got a lot of money from the civil case. I
7 mean, you've stated that that was clearly -- once you
8 cleared the hurdle of his Fifth Amendment rights, that
9 they'd be free to bring a civil case. And you were
10 convinced at that stage they would be able to
11 capitalize on it, that they would get money and in
12 some form he would be punished.

13 But there's nothing that
14 requires you to do something like that to ensure if
15 you're not going to prosecute that something else will
16 happen to a defendant?

17 THE WITNESS: I took the word in
18 the -- the words in the disciplinary rule that says
19 the prosecutor is a Minister of Justice to mean that I
20 should find a way of achieving justice, and that's
21 what I did.

22 THE COURT: Okay. That was the
23 Court's questions. So I don't know what he -- whether
24 you have some redirect.

25 MR. McMONAGLE: Very brief.

1
2 THE COURT: We're going to
3 recommence, after this witness completes, tomorrow
4 morning, if we just have to do argument or any other
5 witnesses at that time.

6 MR. McMONAGLE: Yes, sir.

7 THE COURT: Because we have now
8 pushed the bounds.

9 MR. McMONAGLE: May I, Your
10 Honor?

11 THE COURT: Yes.

12 REDIRECT EXAMINATION

13 BY MR. McMONAGLE:

14 Q Mr. Castor, I want to follow up on some of the
15 questions that His Honor just asked and maybe a couple
16 questions by the Assistant District Attorney.

17 You just indicated that, as a
18 Minister of Justice in this case, you wanted to see
19 that justice was served; is that fair?

20 A Yes. Mr. McMonagle, those are the actual words
21 in the comment to the rule. And it's capitalized.
22 The prosecutor is a Minister of Justice. And I
23 thought that meant I was supposed to seek justice to
24 the best of my ability.

25 Q: And seek justice to the best of your ability in

1
2 this case led you to a conclusion that you should in
3 this case make a decision that Mr. Cosby would never
4 be prosecuted for the allegations involving
5 Ms. Constand; am I right?

6 A You are right.

7 Q And being a Minister of Justice in this case, you
8 also came to the conclusion that you wanted to make it
9 clear to Mr. Phillips as his counsel that that's
10 exactly what you were doing?

11 A Yes.

12 Q And you did? You actually gave your word --
13 strike that. You gave the word of the Commonwealth of
14 Pennsylvania in this case to Mr. Phillips that you
15 would not prosecute his client for the allegations
16 involved in the Constand matter; am I correct?

17 A I was not acting as Bruce Castor. I was acting
18 as the Commonwealth. And on behalf of the
19 Commonwealth, I promised that we would not -- that the
20 Commonwealth, the sovereign, would not prosecute Cosby
21 for the Constand matter in order to forever strip his
22 Fifth Amendment privilege from him in the Constand
23 sexual assault allegation case.

24 Q Ever?

25 A Ever, yes.

1
2 Q: And you told that to Mr. Phillips; correct?

3 A: I told it to him in no uncertain terms, and he
4 understood it explicitly.

5 Q: And relied on your word?

6 A: It was not my word. It was the word of the
7 Commonwealth of Pennsylvania. And the people of
8 Montgomery County granted me the power to bound the
9 Commonwealth of Pennsylvania.

10 MR. McMONAGLE: Your Honor,
11 thank you.

12 THE COURT: Is that it?

13 MR. McMONAGLE: Yes, sir.

14 THE COURT: Any final recross
15 examination?

16 MR. RYAN: No, Your Honor.

17 THE COURT: All right. Thank
18 you very much. You may step down.

19 THE WITNESS: Thank you, Your
20 Honor. May I be excused?

21 THE COURT: Yes. At this stage
22 I'm releasing him as a witness in this case. And
23 whoever subpoenaed him holding the power of that
24 subpoena, hearing nothing, I will release it and he's
25 free to go.

1
2 MR. McMONAGLE: I subpoenaed
3 him, judge, and I have no objection to him being
4 released.

5 (Witness excused.)

6 - - -

7 THE COURT: We will reconvene
8 tomorrow morning at 9:30. The Decorum Order remains
9 in effect. Again, however many witnesses you intend
10 to call, you will call.

11 I do want to make a decision in
12 this case tomorrow, so if there are briefs that are
13 accompanying any of your arguments with some of the
14 testimony that occurred today, I guess you'll work
15 late.

16 And I intend to revisit the
17 issue regarding removal of the prosecutor and hear you
18 on it at best. I hope -- again, I don't believe
19 there's any testimonial evidence necessary there, but
20 I would like to make the decisions in this case one
21 way or the other so we can move forward.

22 All right?

23 MR. McMONAGLE: Yes, sir.

24 THE COURT: Thank you.

25 MR. RYAN: Thank you, Your

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COMMONWEALTH vs. WILLIAM H. COSBY, JR.

Honor.

(At 5:20 p.m., proceedings were
concluded.)

- - -

C E R T I F I C A T E

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that this is a correct transcript of the same.

VIRGINIA M. WOMELSDORF, RPR
Official Court Reporter

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EXHIBIT 3

IN THE COURT OF COMMON PLEAS
IN AND FOR THE COUNTY OF MONTGOMERY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA:

vs.

WILLIAM H. COSBY, JR.

:
:
:
:

NO. MD-3156-15

PETITION FOR WRIT OF HABEAS CORPUS/MOTION TO
DISQUALIFY MONTGOMERY COUNTY DISTRICT ATTORNEY'S
OFFICE

Courtroom A
Wednesday, February 3, 2016
Commencing at 9:33 a.m.

Virginia M. Womelsdorf, RPR
Official Court Reporter
Montgomery County Courthouse
Norristown, Pennsylvania

BEFORE: THE HONORABLE STEVEN T. O'NEILL, JUDGE

COUNSEL APPEARED AS FOLLOWS:

KEVIN R. STEELE, ESQUIRE
District Attorney
M. STEWART RYAN, ESQUIRE
KRISTEN M. GIBBONS-FEDEN, ESQUIRE
Assistant District Attorneys
for the Commonwealth

BRIAN J. MCMONAGLE, ESQUIRE
CHRISTOPHER TAYBACK, ESQUIRE
MONIQUE PRESSLEY, ESQUIRE
JOSEPH SARLES, ESQUIRE
for the Defendant

I N D E X

DEFENDANT'S EVIDENCE

| <u>Witness</u> | <u>VDire</u> | <u>Direct</u> | <u>Cross</u> | <u>Redir</u> | <u>Recr</u> |
|----------------------|--------------|---------------|--------------|--------------|-------------|
| JOHN PATRICK SCHMITT | | 7 | 15 | 59 | 65 |

COMMONWEALTH'S EVIDENCE

| | | | |
|-----------------|--|-----|-----|
| DOLORES TROIANI | | 135 | 198 |
| BEBE KIVITZ | | 233 | 238 |

E X H I B I T S

COMMONWEALTH'S

| <u>Number</u> | <u>Description</u> | <u>Marked</u> | <u>Rec'd</u> |
|---------------|--|---------------|--------------|
| C-1 | ABC News "New Developments in Cosby Fondling Investigation" | | 254 |
| C-2 | Pottstown Mercury article "Cosby meets with authorities over sex assault allegations" | | 254 |
| C-3 | Bloomberg.com article dated November 26th, 2014 "Why Did Bruce Castor Pass on a Chance to Lock Up Bill Cosby?" | | 254 |
| C-4 | Southeast Missourian article dated January 27, 2005 "Prosecutor calls case against Bill Cosby weak" | | 254 |
| C-5 | Daily Mail article published November 18, 2014, "I wanted to arrest Bill Cosby" | | 254 |
| C-6 | Washington Post article dated November 19, 2014 "Prosecutor who declined to charge Bill Cosby in 2005: 'I didn't say that he didn't commit the crime'" | | 254 |

E X H I B I T S

COMMONWEALTH'S

| <u>Number</u> | <u>Description</u> | <u>Marked</u> | <u>Rec'd</u> |
|---------------|---|---------------|--------------|
| C-7 | CNN video | | 254 |
| C-8 | WNPV audio | | 254 |
| C-9 | Philly.com article dated September 14, 2015 "Time hasn't run out on possible charges against Cosby in Pa." | | 254 |
| C-10 | People.com article dated 10-22-15 "Pennsylvania District Attorney Candidates Battle it Out Over the 2005 Bill Cosby Sexual Assault Allegations" | | 254 |
| C-11 | The Intelligencer article dated September 24, 2015 "Montgomery DA candidate Castor urges delay n Cosby case until after elections" | | 254 |
| C-12 | Philly.com article dated 1-31-16 "Castor could be key witness at Cosby hearing" | | 254 |
| C-13 | Cheltenham Township Police Department Investigation Interview Report of William H. Cosby | 19 | |
| C-14 | Packet titled Responsive, Non-Privileged Documents Withheld from Production Pending Agreement on Confidentiality | 28 | |
| C-15 | Philadelphia Daily News article dated 2-2-06 | 42 | 257 |
| C-16 | Settlement Agreement | 47 | |

E X H I B I T S

COMMONWEALTH'S

| <u>Number</u> | <u>Description</u> | <u>Marked</u> | <u>Rec'd</u> |
|---------------|--|---------------|--------------|
| C-17 | Office of the District Attorney Press Release dated January 24, 2005 | 64 | 259 |
| C-18 | Daily News dated February 18, 2005 | 142 | |
| C-19 | Letter dated July 10, 2015 to Dolores Troiani from Risa Vetri Ferman | 185 | 188 |
| C-20 | Letter dated September 22, 2015 to Dolores Troiani and Patrick O'Connor from Risa Vetri Ferman | 185 | 188 |
| C-21 | Letter dated September 23, 2015 to Risa Vetri Ferman from Dolores M. Troiani | 187 | 188 |
| C-22 | Letter dated September 24, 2015 to Risa Vetri Ferman from Patrick J. O'Connor | 187 | 188 |

- - -

DEFENDANT'S

| <u>Number</u> | <u>Description</u> | <u>Marked</u> | <u>Rec'd</u> |
|---------------|--|---------------|--------------|
| D-1 | Castor's biography from 2016 campaign website | | 77 |
| D-2 | Castor's biography from law firm website | | 77 |
| D-3 | Canadian Incident Report | | |
| D-4 | Press Release dated 2-17-05 | | 76 |
| D-5 | E-mail dated September 23, 2015 to Risa Ferman from Bruce Castor | | 77 |

E X H I B I T S

DEFENDANT'S

| <u>Number</u> | <u>Description</u> | <u>Marked</u> | <u>Rec'd</u> |
|---------------|--|---------------|--------------|
| D-6 | Letter dated September 25, 2015 to Bruce Castor from Risa Vetri Ferman | | 77 |
| D-7 | E-mail dated September 25, 2015 to Risa Ferman from Bruce Castor | | 77 |
| D-8 | E-mail dated September 25, 2015 to Risa Ferman from Bruce Castor | | 77 |
| | - - - | | |
| Stipulation-1 | Stipulation | 75 | 259 |
| | - - - | | |
| | | | <u>Page</u> |
| | RULING OF COURT | | 306 |
| | RULING OF COURT | | 320 |
| | - - - | | |

(The following proceedings were commenced with the Court, Mr. Steele, Mr. Ryan, Ms. Gibbons-Feden, Mr. McMonagle, Mr. Tayback, Ms. Pressley, Mr. Sarles, and the defendant being present:)

- - -

THE COURT: All right. We had a brief prehearing conference again for the sole purpose of trying to understand how we will proceed this morning regarding witnesses, any motions, arguments thereon, but we don't have any firm plan on how that's going to work out. So we will take it one step at a time here.

We are still in the defendant's case since it is the defendant's motion on habeas corpus that the Court is hearing evidence on. So at this stage you may call your next witness.

MR. TAYBACK: Thank you, Your Honor. The defense calls John P. Schmitt.

- - -

JOHN PATRICK SCHMITT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TAYBACK:

Q Mr. Schmitt, you go by the first name Jack?

A I do.

Q What do you do for a living?

A I'm a lawyer.

Q Where are you a lawyer? Where do you practice?

A Patterson, Belknap, Webb & Tyler in New York City.

Q How long have you been at the Patterson Belknap firm?

A Since 1983.

Q What are the positions that you've held while you've been at Patterson Belknap?

A I was an associate from 1983 through 1988, a partner from 1989 through December 2015, became of counsel January 1 of this year. At various times I also held the position of chair of the Corporate Department, chair of our commercial group and vice chair for them.

Q Do you have a specialty within your own practice?

A I'm a corporate lawyer.

Q Have you represented Bill Cosby in the past?

A Since 1983.

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Q In what capacity or capacities have you represented Mr. Cosby?

A When I first came to the firm as a junior associate, I was assigned discreet matters for him. Over time I became more involved in his legal affairs. And starting in the early 1990's I became his general counsel.

Q Describe for me what the role of general counsel is.

A Any legal matters that affect Mr. Cosby would come to me. I would either perform the legal services or I would coordinate the legal services of others.

Q At some point did you become aware -- in approximately 2005 did you become aware of a criminal investigation of Mr. Cosby in Montgomery County?

A I did, in January of 2005.

Q And that was an investigation regarding Andrea Constand?

A That's correct.

Q When you became aware of that criminal investigation, what did you do on behalf of Mr. Cosby?

A I retained criminal counsel. I spoke to the chair of our firm who is also our senior litigator and had been an Assistant U.S. Attorney to ask for

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recommendations. He reached out to a number of his former colleagues, and every single one recommended Walter Phillips who was a preeminent criminal lawyer in the Philadelphia area.

Q And does Walter also sometimes go by Wally? Did he?

A He did go by Wally, yes.

Q And did you meet Mr. Phillips?

A I did.

Q And did you ultimately retain him?

A I did.

Q On behalf of Mr. Cosby?

A I retained him on behalf of Mr. Cosby.

Q What role did you serve for Mr. Cosby in connection with the criminal investigation where Mr. Phillips was Mr. Cosby's criminal defense lawyer?

A Well, Mr. Phillips dealt directly with the prosecutor's office. He would report to me and discuss all those matters. I would also discuss those with Mr. Cosby to determine how we would proceed.

Q Was the D.A. at the time in Montgomery County Bruce Castor?

A It was.

Q Did Mr. Cosby -- with your advice, did Mr.

1
2 Cosby -- withdraw that.

3 Did Mr. Cosby cooperate with the
4 investigation?

5 A He did.

6 Q Did he participate in an interview?

7 A He did. He was interviewed in a conference room
8 at my firm by -- I believe it was by detectives from
9 the Cheltenham Police Department and the District
10 Attorney's Office. Mr. Cosby was there, I was there,

11 Mr. Phillips was there, and the detectives were there.

12 Q At some point in time was the criminal
13 investigation resolved?

14 A It was.

15 Q Approximately when?

16 A Within a matter of weeks. I think it was
17 mid-February.

18 Q And how was it resolved?

19 A The District Attorney determined that there was
20 insufficient evidence to charge Mr. Cosby with a
21 crime.

22 Q And did -- at the time that decision was made,
23 did you have an understanding as to whether the
24 criminal investigation could be continued, could be
25 re-opened?

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2 A I had an understanding it could not be. I spoke
3 to Mr. Phillips who indicated that, although the
4 District Attorney had determined there wasn't
5 sufficient evidence to charge Mr. Cosby, that he did
6 anticipate that there would be a civil litigation.
7 And he wanted to ensure that Mr. Cosby could be
8 compelled to testify in a civil litigation. And,
9 therefore, his decision was -- it was an irrevocable
10 commitment to us that he was not going to prosecute.

11 Q Is that how you understood the determination of
12 the District Attorney's Office?

13 A Absolutely.

14 (Defendant's Exhibit D-4

15 published.)

16 BY MR. TAYBACK:

17 Q I'm going to show you a document that was marked
18 yesterday as Exhibit D-4. Mr. Schmitt, you have the
19 option of a paper in front of you and the video
20 screen. It's a two-page document.

21 Do you recognize that?

22 A It's a press release released by the Office of
23 the District Attorney on February 17th, 2005.

24 Q And do you remember receiving that -- a copy of
25 that press release at or around the time it was

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issued?

A I do.

Q Now, you said that it was anticipated that a civil suit would be filed. Did you understand that a civil suit would likely be filed by Ms. Constand against Mr. Cosby even before it was filed?

A That was my expectation, yeah.

Q And in connection with that civil suit, once the criminal investigation was, as you said, irrevocably concluded, what did you do to assist Mr. Cosby in defending the civil suit that you anticipated would come?

A We retained civil counsel in Philadelphia. We retained Patrick O'Connor, a partner of Cozen O'Connor to be the lead counsel along with our firm, but he was the lead counsel on the litigation.

Q And was Mr. O'Connor retained after the conclusion of the criminal case?

A He was.

Q After -- at some point after the criminal case was concluded, was, in fact, a civil suit filed?

A It was.

Q Approximately when was that?

A I think it was in March of 2005.

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Q And did you, in fact, participate in the defense of that lawsuit on behalf of Mr. Cosby with Mr. O'Connor?

A I did.

Q Did you rely upon the irrevocable commitment of the District Attorney's Office not to reopen the criminal investigation in defending Mr. Cosby?

MR. STEELE: Objection to leading.

THE COURT: Sure is. Don't lead the witness.

MR. STEELE: And it's irrelevant.

BY MR. TAYBACK:

Q What did you do in defending the civil litigation brought by Miss Constand?

A We participated in the discovery. Mr. Cosby sat for a deposition. We did that knowing that the criminal litigation -- that the criminal matter had been concluded and could not be reopened.

Q And how many days of deposition did Mr. Cosby sit for?

A He sat for four days.

Q Did he invoke the Fifth?

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A No.

Q Did you participate in other aspects of discovery?

A Yes.

Q If you had known that the criminal investigation in Montgomery County could be re-opened, how would it have affected your representation, if at all?

A We certainly wouldn't have let him sit for a deposition.

Q Did that civil case eventually resolve?

A It did.

Q Approximately when?

A About a year after it was initiated.

Q Was it a settlement?

A It was a settlement, yeah.

Q Are the terms confidential?

A They are.

Q Did you ever, after February of 2015 (sic), receive any requests from the Montgomery County District Attorney's Office on behalf of Mr. Cosby?

A 2005?

Q I'm sorry, 2005.

A No.

Q Did you receive any requests for the deposition

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transcripts or any portion of them?

A No.

Q Did you ever receive any inquires about how the matter had been resolved?

A No.

Q Did you receive any inquires regarding how the matter was litigated?

A No.

Q Was that true from the date of that press release until --

A Until fall or winter of last year, of 2015.

Q Do you know whether Mr. Phillips is alive?

A He died last year.

Q Do you know when?

A I think almost exactly a year ago, I believe. I'm not certain.

MR. TAYBACK: No further questions.

THE COURT: Cross-examine.

MR. STEELE: Thank you.

CROSS-EXAMINATION

BY MR. STEELE:

Q Mr. Schmitt, we went through some of your background in this -- in your direct testimony. And,

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you know, how many years have you been practicing law at this point?

A Thirty-six years.

Q Thirty-six. And in your practice, it's pretty wide specialties; correct? Like transactional and deals and all kinds of stuff like that; right?

A Transactional, yeah. I don't know what "all kinds of stuff like" -- yes.

Q Agreements that you make on different things and you work through those?

A That's right.

Q Right?

A That's right.

Q And you're integrally involved in as general counsel to the defendant? You've been active in agreements that he's been involved with; correct?

A Correct.

Q Okay. Now, would you agree with me that it is a good practice in any of your work to get things in writing?

A As a general matter we try to get it in writing, I do agree.

Q All right. And again, dealing with, you know, Mr. Cosby, you try to get matters in writing when

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you're making agreements; correct?

A Correct.

Q So I want to go through, you know, kind of a timeline here with you. You are familiar that an investigation is going on regarding your client, Mr. Cosby; correct?

A Yes.

Q And, you know, in January, former District Attorney, Mr. Castor, had put out a press release, you know, in that regard, that there was an investigation going on. He talked about asking you or asking Mr. Cosby's legal team to meet with detectives, which you ended up doing; correct?

A I'm sorry? Are you -- you're talking about January of 2005; correct?

Q Yes.

A Yes.

Q Okay. And you follow through and you do that, that request with your client to meet with detectives; right?

A Yes.

Q Okay. And when that meeting goes on in your offices in New York --

A Uh-huh.

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Q -- you have Mr. Cosby there? You have Mr. Phillips there?

A Uh-huh.

Q There's detectives there, and they're doing a written statement or lead into a written statement with the defendant?

A They're taking notes as they go along.

Q Okay. But then, you know, eventually it's signed off on; right?

A Correct.

Q And at no time during that, that statement where he's being investigated, do you tell your client to take the Fifth or not answer questions?

A That's correct. He answered all the questions.

Q And with counsel there, you and he, you and Mr. Phillips there and maybe other lawyers; correct?

A As I said, yes.

Q Okay. And while that statement is going on -- and I can --

THE COURT: What statement are you referring to?

MR. STEELE: Mr. Cosby's statement.

THE COURT: Of the date of?

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MR. STEELE: One-26-05.

THE COURT: Okay.

(Cheltenham Township Police
Department Investigation Interview Report of William
H. Cosby dated 1-26-05 marked Commonwealth's Exhibit
C-13 for identification.)

THE COURT: Just to clarify
while they're doing that -- I had missed it -- this
statement is of 1-26-2005. You and Mr. Phillips were
present in whatever room or where this statement was
being taken?

THE WITNESS: That's correct.

THE COURT: Okay. Thank you.

BY MR. STEELE:

Q I just stuck it next to you there,
Commonwealth's-13. And I'd just ask you if you
recognize a question and answer statement that was
given by Mr. Cosby?

A Yes, I do.

Q Okay. And I think there's a number of signatures
on the last page as witnesses and counsel and things
like that.

Do you recognize any of those
signatures?

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A I do.

Q Which ones?

A Well, there's Mr. Cosby's signature.

Q Uh-huh.

A Signature of -- I think it was -- I think that's John Norris.

Q Correct, the chief.

A Yep. And then there's my signature as counsel.

Q Okay.

A On the right, I think that's Peffall. I think he was one of the detectives.

Q And Schaffer, I believe, another detective?

A I don't remember him. I don't know him.

Q Okay. But the counsel signature is yours?

A Yes, that's my signature.

Q Okay. All right. Now, it's -- let's see, an 18-page statement that is given; correct?

A That's correct.

Q And during that statement, I'll refer you to a couple different points here.

MR. TAYBACK: Your Honor, may I pose an objection to reading from a document on a couple different grounds? One, it's hearsay. But two, it's irrelevant for the same reasons Your Honor

1
2 did not allow the reports into evidence or recitation
3 of the various points regarding Ms. Constand's
4 different statements.

5 THE COURT: Well, my ruling
6 regarding Mr. Castor was that he was aware of the
7 statements and whether they're -- very relevant to his
8 decision that he made. So my ruling was limited
9 there. And also balancing putting out material that
10 is not yet out into the public. But at that stage it
11 was very relevant to what Mr. Castor decided.

12 I don't know why he's asking
13 these questions. If you would like to have, you know,
14 a side bar so I can at least understand where these
15 questions are going --

16 MR. TAYBACK: I would.

17 THE COURT: -- because the
18 concerns of having all -- everything out in the
19 public, I don't want to do that.

20 - - -

21 (A conference was held at side
22 bar, not reported.)

23 - - -

24 THE COURT: Okay. Now, there is
25 an objection. I did not have the court reporter

1
2 because at this stage I didn't feel the necessity to
3 have the court reporter to rule on an objection.

4 I'm going to hold the objection
5 open and see if we can go about the purpose of the
6 questioning. And if we don't, we'll come back to it.

7 BY MR. STEELE:

8 Q Sir, you have the statement before you; correct?

9 A I do have the statement before me.

10 Q And we're in agreement that you sat through that
11 statement, you signed off as a witness to that
12 statement?

13 A That's correct.

14 Q Okay. Can you assume from that that you were
15 there through the entirety of the statement?

16 A I was -- I was.

17 Q Okay. During that time, a number of questions
18 were asked that could lead to criminal charges on your
19 client; correct?

20 A Depending on the answer, not the question.

21 Q Okay, conceded. Okay. That depending upon his
22 answer, it could be the basis for a criminal charge?

23 A Right.

24 Q Okay. And at no time while he's giving those
25 answers -- and I want to get into the specifics of it,

1
2 but things that could potentially lead to him being
3 criminally charged, you never stopped that interview
4 and said we're taking the Fifth; correct?

5 A Correct. He gave answers that did not lead to
6 criminal charges.

7 Q That's not my question.

8 A I'm sorry. Then I misunderstood your question.

9 Q They could have led to criminal charges and you
10 were concerned about them leading to criminal charges;
11 correct?

12 A I -- I had interviewed Mr. Cosby previously. I
13 was not concerned that his answers --

14 MR. TAYBACK: I would just
15 admonish the witness not to -- remind the witness --
16 I'd ask the Court to remind the witness not to
17 disclose privileged communications inadvertently in
18 his accounting of --

19 THE COURT: You think a man with
20 36 years of experience needs you to remind him of
21 that?

22 THE WITNESS: We could all use a
23 little help.

24 THE COURT: I'm not going to
25 tell anybody what to testify. If this is what he's

1
2 going to testify to, that's up to him. He's under
3 oath, and I'd ask you not to give him cues as to what
4 he should or shouldn't do.

5 Answer the question.

6 BY MR. STEELE:

7 Q So let's follow up on this. So you had talked to
8 him and you were confident at that point that you
9 wanted him to talk because it's not going to lead to
10 criminal charges?

11 A That is correct.

12 Q And you cooperated with this, you know,
13 investigation. You allowed police to search his
14 residence; correct?

15 A That is correct.

16 Q And then there was a deposition that goes on, you
17 know, in this case. And you're confident in your
18 position at that point, too; weren't you?

19 A The deposition was not in this case. It was in
20 the civil matter.

21 Q In the civil matter. You were confident that
22 he's going to be fine. You had talked to him. You
23 knew what was going on in the case; right?

24 A Yes, I did.

25 Q Let's go to the writing aspects of things for a

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moment, sir. You would agree with me that you never obtained a written agreement from the Commonwealth, from Mr. Castor, that your client, the defendant, would not be prosecuted?

A I have a signed statement from him, from the prosecutor.

Q You have a press release in that regard; right?

A That he signed.

Q That he signed?

A Right.

Q And that also says that that decision can be reopened?

A No, it doesn't.

Q Let me see it.

A You want this?

Q Yes. I'd like you to look at a line here. I don't have my glasses, so you're going to have to help me here. That indicates -- and I'm pointing to the line there, "District Attorney Castor." Just read that for me.

A It says: "District Attorney Castor cautions all parties of this matter that he will reconsider this decision should the need arise."

Q Okay. All right. So your testimony is that that

1
2 release was the written agreement that you got from
3 the Commonwealth that they wouldn't proceed on
4 charges? Yes or no?

5 A Yes, it is.

6 Q Okay. And you obtained no other document
7 regarding this written agreement?

8 A That is correct.

9 Q Okay. Now, I know most of your work is civil
10 work. I ran across a blog talking about Thomas J.
11 Farrell's excellent criminal defense, tools and
12 techniques.

13 Let me read something to you.

14 "If a judge or a prosecutor makes any assurance,
15 either make sure that they are memorialized in a
16 writing that becomes an exhibit at a plea or repeat
17 them for the record at a time of the plea. Courts
18 will not enforce unarticulated agreements or side
19 agreements not found in a written agreement."

20 Does that make sense to you?

21 A I'm not a criminal lawyer. I'm not familiar.

22 Q Well, let me see here. When you get this
23 assurance in writing in this press release, do you
24 memorialize that in any other way, in any document to
25 plaintiff's counsel or anybody else? Is this brought

1
2 up any time in something in writing?

3 A Well, there was no plaintiff's counsel there.
4 The -- this is the writing I got. We also got oral
5 assurances. Mr. Phillips got oral assurances from Mr.
6 Castor that this was an irrevocable decision that he
7 had made.

8 Q So let's move then to -- to what's going on kind
9 of midstream with this. All right. You're general
10 counsel to Mr. Cosby; right?

11 A Right.

12 Q So you have to worry about his other matters that
13 are going on and public matters that he's dealing with
14 over this issue?

15 A That's correct.

16 Q So one of those issues was a matter with the
17 National Enquirer; correct?

18 A Correct.

19 Q Okay. And you were involved in negotiations with
20 the National Inquirer?

21 A That is correct.

22 Q Okay. And when I'm talking about -- when I asked
23 you before about, like, agreements and things like
24 that, you know, in an agreement that you're making,
25 typically one side is giving something up and getting

1 something in return for that. And that's contract
2 principles; correct?

3 A Okay.

4 Q And with this agreement with the National
5 Enquirer, you were giving up things, they were getting
6 things. You know, it's back and forth; right?

7 A Correct.

8 Q And that is all articulated in writings that are
9 going back and forth between, you know, counsel and
10 you before he's ever going to do this interview with
11 the National Enquirer?

12 A I don't recall how much back and forth. It's a
13 long time ago.

14
15 (Packet titled Responsive,
16 Non-Privileged Documents Withheld from Production
17 Pending Agreement on Confidentiality marked
18 Commonwealth's Exhibit C-14 for identification.)

19 BY MR. STEELE:

20 Q I'm going to approach you and I'm going to show
21 you what I'll mark as C-14 and if you could take a
22 look at that packet of documents and see if that
23 refreshes your recollection as to some of the back and
24 forth that goes on in regard to this negotiation and
25 this written negotiation.

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A Well, the first page, all it has is Wally Phillips' name, and then it has the name of somebody from the Enquirer and a telephone number.

Q Yeah. If you want me to point you to --

A Well, I'm just --

Q Okay.

A The second page has nothing to do with it. It just notes Wally Phillips' name again.

The third page looks like it's the beginning of my notes on the -- I don't know. No, it's some -- it mentions Barry Levine. He's with the Enquirer. I don't know who this other name is.

MR. TAYBACK: Your Honor, it's a narrative at this point. There's not a question pending. I believe it's just a narrative.

THE WITNESS: I'm sorry. I thought he asked me --

THE COURT: I don't think the question's -- we really intend to let him answer. I think what he really wants you to do is stop reading.

MR. TAYBACK: He was reading.

THE COURT: Tell him to stop reading.

MR. TAYBACK: Nonresponsive.

1
2 THE COURT: Just wait for a
3 question to be pending.

4 BY MR. STEELE:

5 Q All right. So have you had a chance to look at
6 those documents?

7 A Yeah. Yes, I have.

8 Q All right. So it appears from somebody who was
9 not involved in this negotiation that this goes --
10 this goes back and forth somewhat, you know, with
11 different -- different letters and changes in the
12 letter.

13 If you look about, I guess,
14 halfway through the documents, it looks like there's
15 an e-mail with your byline on the top, John Schmitt,
16 John P. Schmitt.

17 A I see it. Is that your question?

18 Q Yeah. So if you go through, you know -- then
19 there's another document that is -- that is numbered,
20 you know, kind of breaks up the paragraphs in that
21 same letter form. I think the date on the top of it
22 is February 11th. I'll show it to you if you want.

23 A I mean, there are a number of documents dated
24 February 11th.

25 Q I'll show you. I'm just trying to get the one

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that starts with the numbers. I think you have it there.

A Okay.

Q The numbers.

A I've got it.

Q Okay. So it appears from these documents that you guys go back and forth a little bit and you have a negotiation in writing in regard to what your client's going to do and then what -- and then what you're going to do.

If you want me to go through the paragraphs, I can do that along those lines. If you go to that --

A Okay.

Q If you go to that letter that we were just talking about, you know, Mr. Cosby is going to do an exclusive interview with the Enquirer, the National Enquirer; correct?

A Yes.

Q And in it you define what he's going to do. He's going to apologize to his wife if he's done anything to hurt her?

MR. TAYBACK: Objection. The document is not in evidence. It's hearsay.

1
2 THE COURT: Well, you know,
3 again, we're trying to use these extrajudicial
4 documents for purposes of decisions and how decisions
5 were reached. Now, can you refer to something, ask
6 him to read it, ask him if he's read it without you
7 reading it --

8 MR. STEELE: I can.

9 THE COURT: -- to see if that
10 can help your question? Again, the Court has to deal
11 head on with this information at a most preliminary
12 stage from there's been a Preliminary Hearing or
13 there's been any fact finding, any jury decisions on
14 anything. I just don't want this stuff out there.
15 See what we can do.

16 MR. STEELE: Okay. And I'm
17 not --

18 THE COURT: If you can't, then
19 I'll have to rule.

20 MR. STEELE: And I'm not
21 offering it for the truth of the matter asserted. I'm
22 simply asking it to show that there were definitive
23 terms that he went through when he's negotiating this
24 because this is what he does.

25 THE COURT: Ask him those

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questions in that regard then.

MR. STEELE: Okay.

BY MR. STEELE:

Q Look at five, six, seven, eight, nine and 10.
You did?

A I've read them.

Q So can you agree for me based upon the reading of those provisions that are being lined up here that, you know, while the criminal investigation is going on, you are working through this -- the confines of Mr. Cosby, the defendant, doing an interview with the National Enquirer?

A Yes.

Q Okay. And during that period of time, you are allowed -- if criminal charges are filed, we're not going to do this or we'll work something else out. If they aren't filed, then we're going to proceed in this fashion and do this interview, this exclusive interview; right?

A That's what the document says, yes.

Q Okay. And then with that you are negotiating all of the terms of that?

A Uh-huh.

Q Correct?

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A Correct.

Q And they're very specific; right?

A Yes. Yes. Excuse me.

Q And then you end up doing the interview afterwards; correct? And you go to Houston with him and do this interview with the National Enquirer?

A That's correct.

Q Okay. Under the confines of all of these written terms; right?

A Right.

Q And would you agree with me that in your business, those written terms are very important to how you operate?

A It was important in this case to have these written terms. Is that the question?

Q It is.

A Okay.

Q Okay. So let's fast forward a little bit here to the time period of the civil suit being filed and depositions being taken. Correct?

A Correct what?

Q That was done, sir, wasn't it? There was a civil suit filed? Didn't you go and sit at depositions?

MR. McMONAGLE: Objection.

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Compound.

THE COURT: Okay. There's

the --

THE WITNESS: You're saying fast

forward to a time when depositions are being taken and you didn't ask me a question. I didn't mean to offend you.

BY MR. STEELE:

Q I'm not offended.

A Okay.

Q Can you agree with me that a civil suit was filed and that you were the defendant's counsel at those depositions along with other people?

A That is correct.

Q Okay. And you had Mr. O'Connor and, you know, a number of other attorneys with you on that?

A That's correct.

Q Okay. So -- and in those depositions -- and you'll have to help me with this because I haven't done civil work, but in those depositions, is there a procedure that's followed before a deposition is taken, meaning do you go over the rules of the -- of what's going to happen?

A No. You set a time.

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Q Okay.

A You set a place.

Q Uh-huh.

A And you agree to sit for the deposition.

Q Okay. Then -- and you have a court reporter there, somebody to type down what's said in the deposition; right?

A Sure.

Q Okay. And in this case there were four times that you sat for a deposition with Andrea Constand's lawyers; correct?

A Mr. Cosby sat on four occasions, yes.

Q On 9-28-05, 9-29-05, 3-28-06 and 3-29-06?

THE COURT: Can you give them to me again?

MR. STEELE: On 9-28-05, 9-29-05, 3-28-06 and 3-29-06.

BY MR. STEELE:

Q Do we agree on those dates?

A That sounds around the time. I don't know the specific dates.

Q And you were there for all four; correct?

A I was there for all four.

Q Now, I want to direct you to the one on Thursday,

1
2 March 28th, '06. At the beginning of that, it talks
3 about stipulations and agreements on sealing, filing
4 of certifications, and then it goes into agreements
5 that are being made regarding that National Enquirer
6 interview and what happened with that.

7 Would I be correct in saying,
8 like, at the beginning of a deposition you put the
9 rules on on where you can go on certain things and
10 where you can't go on certain things?

11 MR. TAYBACK: Object to the form
12 of the question. Vague and confusing.

13 THE COURT: If you don't
14 understand, you can ask him to define it for you, but
15 I understood it.

16 Do you understand it?

17 THE WITNESS: Well, I think I
18 understand it. Let me say I am a corporate lawyer.

19 BY MR. STEELE:

20 Q Okay.

21 A I bring in civil litigators for civil litigation.
22 At the beginning of depositions, there are phrases
23 thrown out like, "We'll use the usual stipulations,"
24 for example.

25 Q Uh-huh.

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A I have no idea what that means.

Q Okay.

A I relied on Patrick O'Connor of Cozen O'Connor. I felt quite comfortable that whatever stipulations he thought were appropriate would be appropriate, but I can't tell you what those are or what they mean.

Q Okay, fair. But can we agree that that's at least done at the beginning of a deposition?

A Whatever that is is done at the beginning of the deposition, yes.

Q Okay. Kind of the rules of the road, for whatever it's worth?

MR. TAYBACK: Objection. Vague and relevance.

THE COURT: Rules of the road. He said the usual stipulations. Again, they do appear in most depositions, those words. And a corporate lawyer and a criminal lawyer don't know what they are, so let's move to another question.

MR. STEELE: Okay.

BY MR. STEELE:

Q So in this you knew what the Fifth was; right?

A I know what the Fifth is, yes.

Q You know what it was?

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A Yes.

Q And I think you said before you would never let him sit for a deposition, you know, if you hadn't gotten this agreement; right?

A That's correct.

Q Because, you know, it wouldn't look good for you, you know, on that; right? I mean, is that like malpractice if you do something along those lines?

A I don't make decisions because of whether it makes me look good or not.

Q Okay. Well, can you tell me if, you know, if this was so important, having this agreement, why there's no place in any of those stipulations beforehand or anything during any of those depositions that refers to the Fifth, this agreement?

A The agreement was with the prosecutor's office in a matter --

Q On whose behalf?

A I'm sorry.

THE COURT: Let him answer the question.

THE WITNESS: And I can hear you. You don't have to yell at me.

THE COURT: Don't tell him what

1 he can and can't do.

2 THE WITNESS: I apologize, Your
3 Honor.

4 THE COURT: He's -- answer the
5 question and then he can ask another one.

6 THE WITNESS: The agreement that
7 was made was made with Mr. Castor, the District
8 Attorney. That matter was concluded. We had our
9 agreement with him. We had his assurances. The civil
10 case is filed subsequent to that.

11 I don't need to worry about the
12 Fifth Amendment because there is no risk of jeopardy
13 to Mr. Cosby because the District Attorney has agreed
14 irrevocably that there would be no criminal
15 prosecution.

16 BY MR. STEELE:

17 Q And you relied on that press release as that
18 irrevocable agreement?

19 A No. I relied on the combination of the press
20 release signed by Mr. Castor and the assurances that
21 were given to Wally Phillips, the criminal lawyer who
22 I retained, who assured me that it was sufficient to
23 the purpose.

24 Q All right. So you never spoke to Mr. Castor?
25

1 A I never spoke to Mr. Castor.

2 Q And you never, again -- and I'm repeating myself,
3 but you never got a written agreement other than the
4 release?
5

6 A There is no other written agreement.

7 Q Okay. So with this -- is it the civil attorneys
8 that are for Ms. Constand that are benefiting from
9 your client taking a deposition?

10 A I'm not sure how -- what that means, an attorney
11 is benefiting from a deposition. I mean, they want
12 discovery. They're getting the discovery they want.

13 Q And doing that -- and throughout the deposition,
14 there were times where you didn't want, or Mr.
15 O'Connor, I guess, because he's lead in it, doesn't
16 want, you know, the defendant to answer certain
17 questions?

18 A He made objections to what he thought -- when he
19 thought questions were inappropriate.

20 Q Okay. And questions about Andrea Constand were
21 objected to during the deposition?

22 A I don't have the transcript in front of me.
23 There were numerous objections, objections as to the
24 form of the question, objections as to whatever other
25 evidentiary objections there were.

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Q And didn't you have to go and do -- weren't those, I guess, objections involving Miss Constand, didn't you have to go to the Court and have the Court decide what can be answered and what couldn't and set rules up?

A Well, I -- I -- I know that during the deposition there were a number of times where Constand's lawyer said, We'll take that to the Court. I don't recall what the motion practice that came out of that was. They may have filed motions. I don't recall.

(Philadelphia Daily News article dated 2-2-06 marked Commonwealth's Exhibit C-15 for identification.)

BY MR. STEELE:

Q Sir, I'm going to show you what I'll mark as Commonwealth's-15 for identification. And it's really just to refresh your recollection. That's an article that was written in the Philadelphia Daily News.

A Okay.

Q And then it goes through -- and I think it's more -- on the second half it talks about those confines. I don't want you to read it out loud. I just want to see if that refreshes your recollection to the point I was trying to make.

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A I don't have an independent recollection of this. I see that there's the report of it, but I don't recall the motion practice.

Q Okay. So when you -- let me back up then. If you recall, as we spoke before, about objections to certain things being put on the record and how the questions were being asked.

A I do recall that.

Q And at least according to that, there was some time that was spent with a judge to figure out, you know, which -- well, I won't use rules of the road again, but to figure out what's going to be able to be asked.

A It appears he overruled some of the objections, yes.

Q And then Mr. Cosby had to go forward and answer things about the incident or about Ms. Constand instead of just reading the police statement in?

A That's what it says. Again, I don't recall that independently.

Q Okay. So you work through. And I hope we agree that from your statement before that you say we didn't need the Fifth, so it was never brought up in the depositions.

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A Correct.

Q Okay. You then move to what was referred to earlier as a settlement of that matter, the civil matter?

A The matter settled, yes.

Q Okay. And with that, similar to, I guess, some of the other things that we've looked at, the documents with the National Enquirer back and forth, you have a very specific Settlement Agreement; correct?

A There was a Settlement Agreement, yes.

Q And you go through and there's provisions that get negotiated with that?

A That is correct.

Q Do you recall in those settlement agreements that you requested a release of criminal liability?

MR. TAYBACK: I'm going to object to the terms of the Settlement Agreement being discussed. I believe they were protected by a separate Confidentiality Order.

THE COURT: What's it have to do with this case? I mean, if he --

MR. TAYBACK: And I would also say it's hearsay.

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2 THE COURT: It's
3 cross-examination. We're well down the road about
4 this document. It's an intent in this proceeding, you
5 know, to define hearsay now trying to shut the door
6 versus well down the road, but the confidentiality
7 part -- what's the basis of a confidentiality
8 agreement between plaintiff and the defendant in a
9 civil case?

10 He's now asking about that term.
11 Not about the terms of it, but the term of
12 confidentiality. I'm assuming along the lines of how
13 that was negotiated vis-a-vis an agreement.

14 I mean, if that's the limitation
15 of where you're going, then we're within a context
16 without going into the details of the agreement.
17 That's what you're trying to prevent.

18 MR. TAYBACK: If he's only
19 asking about the fact that it was negotiated and that
20 it was confidential, then I wouldn't have an objection
21 to that.

22 THE COURT: Can I see counsel
23 before I call in the court reporter? This may be
24 another one I can answer the question. It's still a
25 little early for a morning break, so we're coming

1 back.

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3 - - -

4 (A conference was held in
5 chambers, not reported.)

6 - - -

7 THE COURT: Please, when we walk
8 back in the room, that means we're ready to start. I
9 would ask that you all cease your communications.

10 All right. There was an
11 objection based upon a question of which the Court
12 does not have that document there. And apparently
13 there's a paragraph in the Settlement Agreement
14 regarding criminal charges.

15 And I don't know what it is, but
16 the Court has determined that its present purpose is
17 being used for cross-examination, not the truth of the
18 matter asserted. And I make no other rulings in that
19 regard, but I'm going to overrule the objection,
20 permit him to ask the question, and the witness can
21 answer it.

22 MR. STEELE: So I'm going to try
23 to pick up where I was.

24 BY MR. STEELE:

25 Q So -- and I'm getting into the negotiations a

1
2 little bit here on this. So originally there's a
3 request to basically absolve him from criminal
4 liability, and then there's a push back on that that
5 ends up in the Settlement Agreement along the language
6 of that Andrea Constand cannot initiate a criminal
7 action.

8 Do you recall that?

9 A I recall that the Settlement Agreement makes
10 reference to criminal matters. I don't recall the
11 specifics of it.

12 Q All right.

13 (Settlement Agreement marked
14 Commonwealth's Exhibit C-16 for identification.)

15 BY MR. STEELE:

16 Q Sir, I just want you to take a look at
17 Commonwealth's-16 to see if that refreshes your
18 recollection. And I just point you towards the "C"
19 paragraph and then what's on -- excuse me -- and then
20 on the next page, just the top few lines of that and
21 see if that refreshes your recollection.

22 A Okay.

23 Q So does that help refresh your recollection in
24 terms of those portions of the Settlement Agreement?

25 A It -- it -- I now recall what the Settlement

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Agreement says, yes.

Q Okay, great. Now, with that, I'm really just focused on those portions of it, you know. It indicates that she will not initiate a criminal complaint against Cosby; correct?

A Correct.

Q Okay. And it also goes on to indicate if an agency, law enforcement, is subpoenaing or making, you know, a document request, that they have to comply with that.

A It says they may comply with it.

Q Okay.

A Unless there's a valid and timely objection filed in court.

Q And there's also a no notice provision in there if requested by the law enforcement agency?

A Yeah. Yeah.

Q Okay. Now, sir, you had more about a civil background on things as opposed to the criminal background.

Are you familiar with the principle that if your client -- not necessarily Mr. Cosby, but any client -- would take the Fifth during a deposition, potentially there would be an adverse

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inference that could be drawn on him?

A In a civil matter, yes.

Q In a civil matter.

A I am familiar with that.

Q Okay.

MR. STEELE: No other questions,

Your Honor.

THE COURT: The Court has a couple of questions and I will permit both sides any redirect and recross examination.

So that I'm clear, you are the personal/corporate counsel for Mr. Cosby; is that right?

THE WITNESS: I am, Your Honor.

THE COURT: And that has been at least for 21 years prior to the January 2005 events that we are here for today?

THE WITNESS: Yes.

THE COURT: You said you started in 1983?

THE WITNESS: '83 as a junior lawyer. I became his principal lawyer in the early '90s.

THE COURT: So let me first

1
2 start with when did you first hear that Cheltenham
3 Police Department or Montgomery County Detectives
4 wanted to talk to Mr. Cosby? When did you first learn
5 of that?

6 THE WITNESS: I believe it was
7 just several days before he actually met with them.

8 THE COURT: So assuming that the
9 date that he met with them was January 26th, is
10 that -- so you would think a few days would be four or
11 five days before that?

12 THE WITNESS: I believe that's
13 so, yes.

14 THE COURT: At any time prior to
15 that date, four or five, had you consulted with
16 Mr. Phillips?

17 THE WITNESS: No. I had never
18 met Mr. Phillips.

19 THE COURT: So the reason to
20 consult Mr. Phillips was the contact that you had
21 about the criminal case?

22 THE WITNESS: That is correct.

23 THE COURT: How long before the
24 deposition did you -- well, let me ask you first, did
25 you retain Walter Phillips?

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2 THE WITNESS: We did. We
3 retained Walter Phillips, yes.

4 THE COURT: And you had an
5 agreement with Mr. Phillips that he would act as
6 Pennsylvania counsel in regards to any criminal
7 matters for Mr. Cosby?

8 THE WITNESS: He was retained
9 for that purpose. I don't think there was a written
10 retainer agreement.

11 THE COURT: There was not. You
12 simply communicated what you needed to communicate so
13 that he would be able to represent Mr. Cosby for
14 anything regarding this criminal investigation?

15 THE WITNESS: Yes, he was
16 retained for that purpose.

17 THE COURT: And who was
18 contacted about the statement on January 26th? Who?
19 You or Mr. Phillips? How was the contact made about
20 wanting to come have the Cheltenham Police Department
21 and Montgomery County Detectives take a statement?

22 Who was told that?

23 THE WITNESS: It must have been
24 Mr. Phillips. He certainly -- I know that he called
25 and said yes. Exactly how that conversation was

1 initiated, I don't recall.

2 THE COURT: In any event --

3 THE WITNESS: It wasn't me.

4 THE COURT: -- it was not you?

5 THE WITNESS: No.

6 THE COURT: So did you come to
7 learn that the purpose of the statement was criminal
8 investigators taking a statement about an alleged
9 criminal incident?
10

11 THE WITNESS: I understood that,
12 yes.

13 THE COURT: You understood that?

14 THE WITNESS: Absolutely.

15 THE COURT: And if you
16 understood that, would it be fair to assume that
17 Mr. Phillips understood that?

18 THE WITNESS: Yes, he did.

19 THE COURT: And when the
20 statement was taken, you were present there?

21 THE WITNESS: I was.

22 THE COURT: And Mr. Phillips was
23 present there?

24 THE WITNESS: He was.

25 THE COURT: And were there any

1
2 other attorneys representing Mr. Cosby present at that
3 stage?

4 THE WITNESS: I think that my
5 partner, my then partner Andrew Shaw who was a
6 litigator, I believe he was present. I'm not entirely
7 sure. He became very involved in the civil matter.
8 He may have been present there, but I'm not entirely
9 sure.

10 THE COURT: All right. And then
11 for the -- the investigators, there was the Cheltenham
12 Police Department. You remember that?

13 THE WITNESS: Chief Norris,
14 yeah.

15 THE COURT: And there was a
16 detective for the Montgomery County Detectives?

17 THE WITNESS: Mr. Peffall was
18 with Montgomery County.

19 THE COURT: Do you recall
20 anybody else that was there?

21 THE WITNESS: I saw there was a
22 Mr. Schaffer. I don't recall him specifically. I
23 recall Peffall and Norris.

24 THE COURT: All right. Now, at
25 this stage it was clear that there was a statement

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being taken and there were questions being answered by your client about alleged criminal involvement. Is that fair to assume? Did you know that was why he was there?

THE WITNESS: Yes, I did.

THE COURT: And following that statement, people signed that statement, did they not?

THE WITNESS: That is correct.

THE COURT: And you had indicated you think that Chief Norris signed it.

THE WITNESS: That appeared to be his signature on it, yes.

THE COURT: Do you give him the document? The document is not to be admitted, but there were questions I just needed clarification on.

MR. STEELE: I think it still may be up there.

THE COURT: Since it's not being admitted into evidence, I don't want to see it because I don't want to at this stage put it out, but it was used for cross-examination.

THE WITNESS: Yes, it is signed by Mr. Cosby. It is signed -- I believe that signature is John Norris who I understood to be the

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2 chief of police. It is signed by me as counsel. It's
3 signed by Detective Peffall. And it's signed by
4 Richard Schaffer CTPD, so I guess that was Cheltenham
5 as well.

6 THE COURT: Let me see it. At
7 this point I just want to make sure that what you're
8 saying --

9 (Handing document.)

10 THE COURT: So it was
11 Schaffer -- I want to make sure from you that you're
12 reading. So it's Schaffer --

13 THE WITNESS: That's Peffall.

14 THE COURT: Peffall.

15 THE WITNESS: That's me.

16 THE COURT: That's you.

17 THE WITNESS: That's Norris.

18 THE COURT: That's Norris.

19 THE WITNESS: That's Mr. Cosby.

20 THE COURT: And that's Mr.
21 Cosby. Can you explain to me why his retained
22 criminal counsel didn't sign that agreement?

23 THE WITNESS: Meaning the
24 transcript --

25 THE COURT: Excuse me, that

1
2 statement.

3 THE WITNESS: It was produced
4 obviously after the conclusion. It came to me -- I
5 don't recall why Wally didn't sign it, but it -- I
6 don't recall why his signature is not on it.

7 THE COURT: Let me see it one
8 more time.

9 THE WITNESS: Sure.

10 (Handing document.)

11 THE COURT: And did Mr. Cosby
12 give any other statements to law enforcement
13 authorities?

14 THE WITNESS: No.

15 THE COURT: At that statement or
16 before that statement, do you recall any law
17 enforcement authorities saying that Mr. Cosby would
18 not be prosecuted?

19 THE WITNESS: No.

20 THE COURT: Mr. Steele asked you
21 questions regarding what will or -- I'll refer to it
22 as the National Enquirer document. Was that document
23 being negotiated during the period of January 22nd up
24 through and including February 17th?

25 THE WITNESS: I don't know that

1
2 it started that early. I think it -- I think that
3 negotiation started in February. I --

4 THE COURT: Was the negotiation
5 underway completed for any reason prior to
6 Mr. Castor's press release of February 17th?

7 THE WITNESS: Yes.

8 THE COURT: At the time of the
9 depositions which you stated were September 28th,
10 September 29th, March 28th and March 29th, were you or
11 anybody representing him at that deposition, if you
12 know, aware of any claims in other states? Whether
13 taken to the police or not, just aware of claims of a
14 similar nature?

15 THE WITNESS: We were made aware
16 through the deposition. The plaintiff was alleging
17 that there were other women.

18 THE COURT: That's the first you
19 learned?

20 THE WITNESS: Yes.

21 THE COURT: And were there
22 any --

23 THE WITNESS: Excuse me, Your
24 Honor. In the course of making their claims, not
25 necessarily at the deposition.

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2 THE COURT: So it could have
3 been before.

4 THE WITNESS: Well, they filed
5 papers and they indicated that they had --

6 THE COURT: They filed the civil
7 suit.

8 THE WITNESS: They had Jane Doe
9 witnesses.

10 THE COURT: Okay. The civil
11 suit I have being filed on March 8th; is that correct?

12 THE WITNESS: That's correct.

13 THE COURT: And as his corporate
14 and personal counsel, you worked with Mr. O'Connor
15 regarding that suit; is that correct? You didn't
16 directly, you know, administer it, but you clearly had
17 discussions regarding it?

18 THE WITNESS: I was involved in
19 the civil suit, yes.

20 THE COURT: And were you at the
21 deposition?

22 THE WITNESS: I was.

23 THE COURT: So you were at the
24 depositions. And, again, was the Fifth Amendment at
25 any time interposed for any questions?

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THE WITNESS: In the deposition?

THE COURT: Yes.

THE WITNESS: No.

THE COURT: So even questions regarding non-Constand matters, there was no Fifth Amendment objection?

THE WITNESS: No.

THE COURT: And did you believe that Mr. Castor's press release would cover, if they started to ask questions about other states or other people, that his press release would cover that?

THE WITNESS: I don't think we formed an opinion one way or the other.

THE COURT: All right. Thank you very much. Now, that allows each side to have another round.

REDIRECT EXAMINATION

BY MR. TAYBACK:

Q Mr. Schmitt, could you take a look at what was placed in front of you and marked as Commonwealth's-16, C-16. It's the excerpt of the Settlement Agreement.

A I have it.

Q That -- on the first page there, there's a

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Paragraph C which you were asked questions about.

Do you see that?

A I do.

Q The actual words, I believe, say that "Constand agrees she will not initiate any criminal complaint."

Do you see that?

A I do.

Q At the time -- let me ask you this. Why was that -- in your understanding, why was that inserted in this agreement in light of the understanding you had with the District Attorney?

A We were trying to have a comprehensive agreement, cover all bases.

Q And "any criminal complaint" would include any complaint in any jurisdiction where she might go?

A Yes.

Q By the way, did you know whether Miss Constand was a United States citizen or a citizen of another country?

A I believe she's a Canadian.

Q Let me ask you this. You were asked some questions about how you negotiate commercial contracts like the specific contract with the National Enquirer about a particular interview. I want to revisit that

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topic.

A Okay.

Q Why didn't you negotiate the contract like the National Enquirer agreement you were asked about with the District Attorney from Montgomery County?

A The District Attorney was not interested in doing that sort of agreement. He sort of dictated how that was going to be handled.

Q In your experience negotiating contracts, are the parties to that contract usually voluntarily in the room together; that is to say, the National Enquirer wants to do a deal and Mr. Cosby wants to do a deal, and you're talking to each other?

A Sure.

Q Mr. Cosby didn't voluntarily engage with the District Attorney with respect to the criminal investigation?

A He did not.

Q You were asked questions about the interview that Mr. Cosby gave to investigators in January of 2005.

At the time he gave that interview, was it your hope that it would result in no charges being filed?

A Sure, yes.

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Q Is it your experience as a lawyer that sometimes your adversaries don't see the facts the same way you do?

A That is my experience.

Q And so did you recognize that it was a possibility, theoretical or otherwise, that the District Attorney might disagree?

A It was a possibility. It wasn't my expectation.

Q And if it had been the other way and the District Attorney had disagreed and continued to investigate or brought charges, did you understand that you had the right or Mr. Cosby would have the right to assert the Fifth beyond that date of that interview?

A Absolutely.

Q Let me ask you about Exhibit 4 which is the press release itself. It's a two-page press release; correct?

A It is.

Q And when Mr. Steele asked you questions about this press release, you recall he asked you about one specific sentence.

Do you remember that?

A I do.

Q Now, if you look at the first page of the press

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release, there are multiple paragraphs that describe the Office of the Montgomery County District Attorney and the nature of the investigation and what investigative steps were taken.

Do you see that?

A I do.

Q Now, in the second page there's another couple longer paragraphs. The first full paragraph that starts "After reviewing the above" and you see it ends with the phrase "District Attorney Castor declines to authorize the filing of criminal charges in connection with this matter."

Do you see that?

A I do.

Q In that paragraph, was it significant to you he didn't say that he reserved his right to re-open the investigation should other evidence come forward?

A Yep. I understood this to be a final decision.

Q Now, the sentence that you were directed to -- that page, go to the next paragraph -- was a sentence in the middle of this last paragraph. Do you remember it? It was the sentence that says: "District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need

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arise."

Do you see that?

A I do.

Q What did you understand that to be referring to?

A Well, it's referring to the decision not to expound publicly further on the case.

Q So it's referring to the decision that is described in the sentences in this paragraph just above the one that Mr. Steele showed you?

A Right. He's -- yes.

Q And not to a decision to re-open the investigation at some point in the future?

A Right. I mean, he's telling us not to make public statements that could poison the juror pool, but if we were to engage in what he refers to as rhetoric, that he would revisit his decision not to speak further about the case.

MR. TAYBACK: No further questions.

THE COURT: Recross examination.
(Office of the District Attorney
Press Release dated January 24, 2005 marked
Commonwealth's Exhibit C-17 for identification.)

RECROSS-EXAMINATION

BY MR. STEELE:

Q There's one thing I wanted to clarify. I'm going to show you Commonwealth Exhibit 17 which I would ask to admit. I'll show it to you. I was referring to a press release from Mr. Castor on January 24th of '05.

And in that, there's a portion down towards the bottom that discussed, you know, his request to have Mr. Cosby meet with detectives and give a statement.

A I see that, yes.

Q Yes?

A Yes.

Q And you were aware of that request through this; right?

A I was aware of the request. I don't know that it was through the press release that I became aware of that request.

Q You learned it through Mr. Phillips?

A Yeah. I mean -- yes. This indicates that he had asked Mr. Phillips for permission to interview Mr. Cosby.

Q Okay. I just wanted to clarify that because I brought that up earlier about the press release that

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2 had been done on the 24th. I want to go back to a
3 couple things that you just said.

4 The judge asked you if you knew
5 about any other allegations at the time. And you said
6 no, you just learned that through the deposition. I
7 want to focus you --

8 A I said through the discovery.

9 Q The discovery, okay. I want to focus you back on
10 your agreement with the National Enquirer that's up
11 there.

12 Wasn't that whole thing about
13 those allegations from somebody else about things that
14 the defendant had done? And that was what the
15 negotiation was about with the National Enquirer, that
16 they weren't going to print an article about that and
17 then your client was going to testify or --

18 A You're correct. And I stand corrected. We had
19 heard through the National Enquirer that they were
20 going to publish a story about another woman, that is
21 absolutely correct. And that was about a month before
22 the discovery, two months before the discovery
23 started.

24 Q So you were asked about the press release that
25 was given to you, the one where you're indicating that

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2 that's your declaration that he's not going forward on
3 it.

4 You would agree with me that the
5 line about potentially re-opening something could be
6 somewhat a matter of interpretation?

7 MR. TAYBACK: Objection to the
8 use of the word re-opening, actually.

9 MR. STEELE: I don't have it in
10 front of me.

11 THE COURT: Well, get it in
12 front of you because if you use a word that's not
13 there, you're going to get an objection.

14 MR. STEELE: Okay.

15 BY MR. STEELE:

16 Q So I'll be specific on this. District Attorney
17 Castor cautions all parties to this matter that he
18 will reconsider this decision should the need arise.

19 A No, I don't think it's ambiguous, because in the
20 context it starts out because -- he's talking about a
21 civil action. Burden of proof is different.

22 He expects that there's going to
23 be -- he does not want to speak further because he
24 doesn't want to contribute to publicity and taint
25 prospective jurors.

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2 He doesn't intend to expound
3 publicly on the details, it appears, for fear that his
4 opinions will affect jurors, cautions us not to engage
5 in rhetoric such that we would potentially taint
6 jurors, that there is much in here that could portray
7 both sides in a less than flattering light.

8 But if, in fact, we go ahead and
9 proceed to make statements, he's going to reconsider
10 his decision not to make statements.

11 Q On cross-examination yesterday, he said something
12 different.

13 A Well, I don't know what he said, but I can tell
14 you what I understood.

15 Q Is there any interpretation --

16 THE COURT: Hold on. Statements
17 by counsel I'm not going to consider. You'll argue
18 what he did or didn't say. Just ask him a question.

19 BY MR. STEELE:

20 Q So with all of this writing that you do in
21 negotiating specific terms, that didn't cause you any
22 hesitation in going forward with depositions and other
23 things that you did in this case?

24 A I'm -- did this language --

25 Q Yeah.

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A -- give me caution going forward?

Q Yes.

A No, because I understood that we had this and I had the assurances given to our criminal counsel.

Q You've said that.

A You asked me again.

Q So you never -- and in terms of this, you know, the depositions and everything you did, you never, you know, said that, you know, as part of, you know, stipulations or getting on the record, you never took it to the judge, you never called and clarified anything with Mr. Castor; correct?

MR. TAYBACK: Objection.

Compound and, I believe, asked and answered.

THE COURT: Okay. Put that into English. Did you understand the question?

THE WITNESS: I'm not sure I understand the question.

THE COURT: Try to ask it so the witness understands.

MR. STEELE: I'll break it down here.

BY MR. STEELE:

Q So at no point in these depositions and when

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you're having your client sit for them do you clarify that in any of the preambles or anything like that?

A Clarify --

Q That language.

A This language --

Q That there's nothing that can happen to your client over this.

A This is referring to a criminal matter. That criminal matter was closed. There was no reason for me to be referring back to the criminal matter in this civil context. There's no -- I don't -- that's my answer.

Q Well, you refer to it throughout. There's a statement that's referred to in the deposition. That was part of the criminal matter; right?

A I don't know what statement you're referring to.

Q Mr. Cosby's statement, the one you sat through.

MR. TAYBACK: Objection.

Argumentative.

THE WITNESS: I mean --

THE COURT: He said statement.

He's clarifying.

THE WITNESS: I'm sorry? What's

the question now?

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BY MR. STEELE:

Q Mr. Cosby's statement that you sat through, was that involved in the criminal matter?

A In the criminal matter?

Q Yes.

A Yes, it was.

Q And then that was referred to within the deposition; right?

A Well, the civil case was making the same allegations that she had brought to --

Q Yes.

A Right.

Q That's correct; right?

A That is correct.

Q Okay. And at no point during this do you clarify Mr. Castor's press release or the things with the -- with Mr. Phillips, the things that were supposedly said to Mr. Phillips with a federal judge that was overseeing this case?

A It wasn't at issue.

Q I asked whether you did it or not.

A Well, no.

Q Okay.

A Okay.

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Q Is that simple enough? Yes or no?

THE COURT: All right. Just ask him the questions.

BY MR. STEELE:

Q All right. Now, you heard about us re-opening this case; correct?

A Yes, I did.

Q Okay. And at no point did you come forward and say anything about this agreement that was -- that you understood had occurred back in '05, did you?

A Did I come forward?

Q Yeah.

A No.

MR. STEELE: I have no other questions, Your Honor.

THE COURT: Any further -- I'm ready to cut it off. If it's important, I'll allow reredirect.

MR. TAYBACK: No, I have no questions.

THE COURT: All right. Then that would conclude the testimony of Mr. Schmitt. Thank you very much.

THE WITNESS: Thank you, Your

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as far as we can tell.

There is --

THE COURT: Let me -- if you're going to relate to it again, I mean, again, was -- your premise is here that I now am taking everything that Mr. Castor said as an absolute fact in terms of promise. What you're arguing now is this is now a promise and that's what your client took it as, a promise, and your client was never a defendant in this case.

So if you have those cases -- and, again, I am assuming the Dunn case, this was a defendant who they sought to have testify and, if he testified, they would nol-pros his case which is different than not prosecuting, but sounds the same, non-pros the case.

But so that I'm sure, was there any writing in the Dunn case? Was it subject to a writing?

MR. TAYBACK: The Dunn case was an oral agreement. It was on the record.

THE COURT: On the record in front of a judge?

MR. TAYBACK: In front of a

1
2 judge.

3 THE COURT: Again, I don't mean
4 to be showing my hand, but if you have those cases
5 that are, you know, more close to here where you don't
6 have a judge involved and it was not to a defendant
7 who was charged and, you know, there was, you know,
8 there was no recording of it, just let me know.

9 MR. TAYBACK: I will --

10 THE COURT: Other than that, I'm
11 going to assume --

12 MR. TAYBACK: I will say that
13 there is no case that we have found that turns on it
14 being a writing, that turns on it being transcribed,
15 that says if only you had had it transcribed, that
16 would be the magic of having a court reporter there or
17 have it in writing otherwise. It's not a statute of
18 frauds kind of case.

19 THE COURT: Agreed, but, again,
20 your whole argument is premised that this Court
21 believes everything that Mr. Castor said because he's
22 the only one testifying as to a promise. He's the
23 only one. It's not -- Mr. Phillips isn't here. Mr.
24 Cosby wasn't in the room. You weren't in the room.
25 Mr. McMonagle. There's no other witness to the

1
2 promise.

3 So what I'm trying to say is
4 you've kind of -- you know, the rabbit is in the hat.
5 And you want me at this stage to assume that, hey, the
6 promise was made, Judge. Just accept that. And now
7 everything else doesn't really -- and I just wanted to
8 make sure that if there's cases in which there's --
9 like this where one person said they made the promise
10 or a potential defendant claims a prosecutor made the
11 promise, that might help, too, you know. But I just
12 wanted to make sure that by the fact you're arguing it
13 doesn't make the promise enforceable.

14 MR. TAYBACK: And I understand.
15 And I'm certainly not assuming that you have to make
16 that determination. You are the finder of fact on
17 this issue and I intend to persuade you why that is
18 true.

19 THE COURT: I appreciate it.

20 MR. TAYBACK: But my point is
21 that if that is true, their arguments that have been
22 framed now by the Commonwealth that are independent of
23 that credibility determination, they're legal
24 arguments. And those legal arguments should be flatly
25 rejected based on the facts as they have come out.

EXHIBIT 4

AFFIDAVIT OF BRUCE L. CASTOR, JR., ESQUIRE

I, Bruce L. Castor, Jr., Esquire, provide this Affidavit to Attorneys Brian W. Perry and Kristen L. Weisenberger, in lieu of giving a compelled deposition, and with the knowledge that instead of my compelled deposition, this Affidavit will be attached as an Exhibit to a Petition for Review Pursuant to Pennsylvania Rule of Appellate Procedure 1762(b)(2), related to the criminal conviction of William H. Cosby, Jr., at docket CP-46-CR-3932-2016:

1. In 1998 and 1999, as Montgomery County First Assistant District Attorney, I campaigned for the Republican nomination for the position of Montgomery County District Attorney against Attorney Steven T. O'Neill, a private practitioner in Norristown, Pennsylvania.
2. In or about January or February of 1999, at the Upper Moreland Township Building in Willow Grove, Pennsylvania, I engaged in a debate against Steven T. O'Neill. At that point, I was not aware that Judge O'Neill was or had been engaged in an extramarital affair with a female Assistant District Attorney employed by the Montgomery County District Attorney. At the election debate at Upper Moreland Township Building in Willow Grove, Pennsylvania, the female Assistant District Attorney was present. Attorney O'Neill oddly seemed distracted, unfocused, and nervous in that debate, despite the fact that as a trial lawyer, he was an accomplished public speaker.
3. The next morning, I received a call from Montgomery County Republican Party Chairman Frank Bartle, who indicated that he had just received a call

from Bill Donnelly, a key supporter of Steven O'Neill's campaign for District Attorney of Montgomery County and the political leader of the Party that encompassed Upper Moreland Township. Mr. Donnelly informed Mr. Bartle who relayed it to me that he, Donnelly, thought placing the female Assistant District Attorney in the front of the debate to distract Steven O'Neill was playing dirty politics.

4. I responded to Mr. Bartle that no one on the campaign had anything to do with the female's attendance at the debate and that was the first time I learned Attorney O'Neill was having, or had, an affair with the female Assistant District Attorney who worked in my office.
5. In approximately February or March of 1999, I arrived at a political event at the Bay Pony Inn in Harleysville, Pennsylvania. Around 11:30 a.m. (I believe), I exited the political event with a number of individuals, including my wife, Frank Bartle, the Montgomery County Republican Party Chairman, his wife, and State Representative Bob Godshall. Our group encountered Steven O'Neill as he arrived to the event with a woman that I later learned was his wife. I specifically recall Bob Godshall asking Mr. O'Neill if the woman with him was his wife. This caused Mr. O'Neill to angrily accuse me, and the entire group, of running a smear campaign and trying to ruin his marriage and life. I remember Mr. O'Neill's wife saying similar things at that time. They both reacted with what I thought were overly dramatic gestures and language.

6. I eventually won the Republican Party endorsement for District Attorney of Montgomery County, causing Mr. O'Neill to withdraw his name from consideration from the election.
7. In the spring of 1999, I was nominated by the Republican Party to be its candidate for District Attorney of Montgomery County, Pennsylvania. In the fall of 1999, I was elected as District Attorney of Montgomery County.
8. There is no question in my mind that Mr. O'Neill blamed me and my political supporters for raising his marital infidelity in a "smear campaign" to defeat him in the election for Montgomery County District Attorney. It is my belief that Mr. O'Neill has never forgiven me for this.
9. I would describe my relationship with Mr. O'Neill over the next sixteen years as strained and tense. I would not describe the relationship as overtly hostile, however, since I seldom came in contact with him while serving two terms as District Attorney and two terms as Montgomery County Commissioner. Our paths rarely crossed.
10. Steven O'Neill was appointed to the Montgomery County bench in April 2002 by then Governor Mark S. Schweiker. He was later elected to a ten year term in 2004 and retained for another ten year term in 2014.
11. From 2002 until 2008, while I served as District Attorney of Montgomery County, I do not recall ever personally appearing in front of Judge O'Neill. I can say with certainty that I never handled a contested case of any significance before him because as District Attorney, I only personally

prosecuted a handful of cases each year year, and I would remember trying a contested matter of import before him. In fact, as I had the authority to assign prosecutors to cases, I would have assigned another prosecutor to any significant contested matter scheduled to occur before Judge O'Neill so as to avoid being put in a position where Judge O'Neill could embarrass or humiliate me and potentially damage a prosecution.

12. After I left the Office of the District Attorney and entered private practice, I do not recall appearing in front of Judge O'Neill as an attorney in any capacity. Again, I can say with certainty that I never represented a client in a contested matter before Judge O'Neill. But I don't think I ever handled any matter before him either as DA or in private practice. I suppose some matters are so routine that I might forget appearing before him, but I never appeared before him for anything contested that I can think of.

13. However, I do recall Judge O'Neill approaching me in my capacity as Montgomery County District Attorney seeking my support for a project known as drug court. Although I did not think at the time this program made good prosecutorial sense for the County, after repeated requests for my support, I relented. My approval was dispositive of drug court coming into being. If the DA would not agree to the institution of the program, it could not get off the ground. I believe that Judge O'Neill resented the fact that he had to ask me to support this program for it to be initiated.

14. I was elected Montgomery County Commissioner in 2007 and later reelected in 2011. In my capacity as Commissioner, I recall Judge O'Neill coming to see me in an attempt to gain my continued support for funding drug court program, which he strongly supported and had oversight of. I had made clear publicly that I thought drug court cost too much money for the limited number of people Judge O'Neill claimed as success stories. As a Commissioner coming from a prosecution background, I had serious misgivings concerning whether the continuation of drug court made prosecutorial and economical sense. Again, I relented. But, it is my belief that Judge O'Neill resented the fact that he needed to ask for my support for his drug court program.
15. Regarding the case of Commonwealth of Pennsylvania v. William H. Cosby, Jr., docket number CP-46-CR-3932-2016, I believe that Judge O'Neill assigned himself to this case in part because he knew that I made the decision not to prosecute Mr. Cosby in 2005 and I would be at the center of whether this case could proceed to trial.
16. On September 4, 2018, preceding defense counsel sent an investigator to interview me about whether Judge O'Neill has a personal animosity against me because he has never forgiven me, or my campaign, for thinking we used his extramarital affair during the campaign of 1999 for political gain when we both sought the post of District Attorney of Montgomery County. The investigator contacted me. I did not reach out to the Cosby defense team.

17. I was subpoenaed as a defense witness in a Petition for Writ of Habeas Corpus/Motion to Disqualify Montgomery County District Attorney's Office in front of Judge O'Neill on February 3, 2016. In that February 3, 2016 proceeding, it was evident to me there existed in the courtroom tremendous animosity from Judge O'Neill toward me from the moment that I took the stand. It was obvious from his tone and line of questioning that Judge O'Neill felt very negatively towards me. In fact, at one point during my testimony, I suggested that I not answer a particular question in public but instead *in camera* or at sidebar because I thought my answer would be inflammatory and affect future jurors in the case if publicly reported. In response, I perceived Judge O'Neill's facial expression towards me as one of disgust. He also made statements that he thought it was ridiculous that I would make such a statement. We went in camera and Judge O'Neill later ruled that I was to testify more vaguely than the full truth for the precise reason I stated was my reason for believing he should hear my answer *in camera* or a sidebar in the first place.

18. I believe that by finding that a non-prosecution promise did not exist, and by finding me "incredible," Judge O'Neill attempted to hurt me publicly and professionally as a political payback. At the time we ran against each other, Judge O'Neill was a heavyweight political operative from Lower Merion Township which had the most money and the largest single voting block of delegates to the nominating convention. I was a career civil servant who

entered politics only to run for DA. I believed that, and I still do, that Judge O'Neill felt he was "entitled" to the nomination for DA and that I had not "earned" my chance to run by working in the political trenches, my record of successes to that point as a prosecutor notwithstanding.

19. Regardless of innocence or guilt in this case, I believe that what happened to Mr. William Cosby should never happen to any American citizen in any American courtroom. I have been in and around government and the justice system for 37 years. In many ways I am a product of the system: completely beholden to the rule of law, the presumption of innocence, the burden of proof being on the government in criminal cases, and the Exclusionary Rule as a remedy for governmental constitutional violations. I am also absolutely a man of my word, and when I said to Cosby through his counsel the Commonwealth was not going to prosecute him, I meant just that: he could never take the Fifth Amendment because it was impossible for him to incriminate himself criminally, but he could incriminate himself civilly as occurred. As the chief law enforcement officer of Montgomery County, I intended to forever bind the Commonwealth of Pennsylvania from a future prosecution of Mr. Cosby related to the facts and circumstances of the case involving Andrea Constand. I believed at the time that the allegation was made that there was insufficient evidence to convict Mr. Cosby on the facts as presented to me, something that time has shown was an accurate assessment. My goal was to obtain some measure of justice by assisting a

civil resolution and forcing Mr. Cosby to testify and give evidence in a civil case that I knew would be filed. Because I, as the District Attorney of Montgomery County, decided that Mr. Cosby would not be prosecuted for these alleged crimes, he would not have been able to assert his Fifth Amendment protection in any civil proceeding related to the anticipated civil suit. Had he tried, I would have certified to the presiding judge that Cosby was not going to be prosecuted ever, thus ensuring that nothing Cosby said could prove incriminating and opening him up to having his testimony compelled.

20. I clearly communicated my intention to Mr. Cosby's attorney at the time, Walter Phillips who, as a former high level prosecutor himself and long time criminal defense lawyer, immediately understood the ramifications to Cosby civilly. There is no question that Mr. Cosby relied upon my representation when he submitted to depositions in the civil case related to the allegations made by Ms. Constand. Indeed, it strains credulity that given Cosby's resources and access to able counsel, there is any other reason but for my representation that Cosby would fail to invoke his Fifth Amendment protections. Indeed, Constand's civil counsel, who took Cosby's deposition and knew what he had said that was incriminating for a criminal case, never asked me to review it with an eye toward re-opening the Cosby investigation.

I swear and affirm that these facts are true and correct to the best of my knowledge.

10/20/18

Date




Bruce L. Castor, Jr.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF MONTGOMERY

Sworn to and subscribed

before me this 20th day

of October, 2018



Notary Public

My commission expires: April 2, 2022.

Commonwealth of Pennsylvania - Notary Seal
Melanie Altemus, Notary Public
Montgomery County
My commission expires April 2, 2022
Commission number 1255142
Member, Pennsylvania Association of Notaries

EXHIBIT 5

2016 FEB 16 10 58 AM

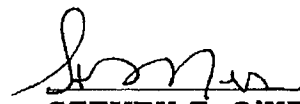
IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : No. MD-3156-15
: :
v. : :
: :
WILLIAM H. COSBY, JR. :

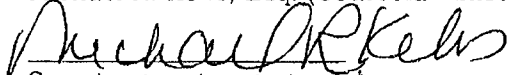
ORDER

AND NOW, this 4 day of February, 2016, it is hereby **ORDERED** as follows:
based upon review of all the pleadings and filings, the exhibits admitted at this
hearing, and all testimony of witnesses, with a credibility determination being an
inherent part of this Court's ruling, the Court finds that there is no basis to grant the
relief requested in paragraph 3b of the Defendant's Petition for a Writ Habeas Corpus
and, therefore, the Habeas Corpus Petition seeking dismissal of the charges is hereby
DENIED.

BY THE COURT:


STEVEN T. O'NEILL J.

Copies of this Order
mailed on 2/4/16
to the following:
Brian J. McMonagle, Esq.
Kevin R. Steele, Esq.
Honorable Elizabeth A. McHugh
Honorable William J. Furber, Jr., President Judge
Michael R. Kehs, Esq. (Court Administrator)


Secretary Ct. Admin.

2016 FEB -4 PM 4:00

CLERK OF COURT

EXHIBIT 6

JOSEPH P. GREEN, JR.
Atty I. D. No. 32604
138 West Gay Street
West Chester, PA 19380
Telephone: (610) 692-0500

Attorney for Defendant

COMMONWEALTH OF PENNSYLVANIA : IN THE MONTGOMERY COUNTY
: COURT OF COMMON PLEAS
vs. : CRIMINAL DIVISION
WILLIAM H. COSBY, JR. : No. CP-46-CR-0003932-2016

2016 SEP 11 AM 10:56
CLERK OF COURTS
OFFICE
MONTGOMERY COUNTY
PENNSYLVANIA

***MOTION FOR DISCLOSURE, RECUSAL
AND FOR RECONSIDERATION OF RECUSAL***

Defendant Moves this Honorable Court for Disclosure, Recusal and For Reconsideration of Recusal. In support of that Motion, defense counsel sets forth the following:

1. Defendant was charged on or about December 30, 2015, with various offenses alleged to have occurred in or around January of 2004. After a mistrial resulted from a deadlocked jury, defendant was found guilty on April 26, 2018, on 3 Counts of Aggravated Indecent Assault in violation of 18 Pa.C.S. § 3125.
2. On January 11, 2016, prior defense counsel filed a Petition for Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney (hereinafter, "the Petition"). On or about January 13, 2016, the case was assigned to the Honorable Steven T. O'Neill. Judge O'Neill entered an Order on that date directing that the District Attorney file a response to the Petition within 14 days. The District Attorney filed a response on January 20, 2016.

3. On January 22, 2016, Judge O'Neill entered an Order scheduling a hearing on the Petition for February 2, 2016. That Order provided, in relevant part, that the hearing would be "limited to the issues regarding a non-prosecution agreement."

4. At the time of the filing of the Petition, and certainly by the time the Response was filed on January 20, 2016, and the Order was entered on January 22nd, it was manifestly apparent that the credibility of Bruce L. Castor, Jr., would be a primary issue in the resolution of the Petition.

5. On February 4, 2016, after a hearing, the Court entered an Order denying the Petition, stating that "a credibility determination" was "an inherent part" of the Court's ruling. That credibility determination was an express finding that the testimony of the former District Attorney, Mr. Castor, was not credible.

I. MOTION FOR DISCLOSURE

6. The Court made no disclosures, at any time before, during or after the hearing, that the Court had long been embroiled in a personal conflict with Mr. Castor that can only be described as nasty, including conduct by Mr. Castor directed at Judge O'Neill, that would cause any reasonable person, including any reasonable Judge, and "a significant minority of the lay community," to conclude that the Court could not possibly be impartial regarding Mr. Castor's credibility.

7. On or about March 28, 2018, an article was published by Radar Online, an Internet gossip site owned by American Media, Inc., the publisher of, *inter alia*, *The National Enquirer*, with the headline "*Bill Cosby Judge Steven T. O'Neill Kept Relationship Secret, Used As Grudge Against Key Witness: Sources.*" A

copy of this article is attached hereto as Exhibit A. This article may be accessed at <https://radaronline.com/exclusives/2018/03/bill-cosby-judge-steven-t-oneill-relationship-secret-used-grudge-witness/>.

8. Neither the defendant, the defendant's original counsel, Brian J. McMonagle, nor his subsequent trial counsel, Thomas A. Mesereau, Jr., had any knowledge of these subjects at the time of the original Due Process hearing in 2016 or the trials in 2017 or 2018. This pre-sentence filing is the defendant's first opportunity to raise the issues asserted herein.

9. Facts uncovered by subsequent investigation by undersigned counsel, and others, has led undersigned counsel to the following conclusions:

A. The most-likely source of the Radar Online article was Bruce L. Castor, Jr., himself. Mr. Castor has denied to an investigator retained by undersigned counsel that he is the source of the article. The source of the article appears to have painted the circumstances in the light most favorable to Mr. Castor.

B. Mr. Castor was serving as First Assistant District Attorney in Montgomery County in 1998 and 1999 in the run-up to the 1999 election campaign for District Attorney. Mr. Castor was a candidate for the Republican nomination for that office. Steven T. O'Neill was also a candidate for that nomination. In that era, the endorsed Republican candidate was highly likely to be the eventual winner of the general election for any Montgomery County office, including the office of the District Attorney.

C. Prior to 1998, Judge O'Neill was separated from his wife and

dating a single woman who was an employee of the District Attorney's Office. That relationship ended well before the 1998-1999 campaign.

D. During the 1999 endorsement campaign, Castor and O'Neill both appeared at various County Republican Committee meetings and debates.

E. During the Spring of 1999, before the Republican Committee met to award its endorsement, Castor ordered the female member of his staff to appear at the next impending debate between he and O'Neill. The staff member was upset by this order and reported it to her supervisor at the DA's Office. Ultimately she followed Castor's order and appeared at the debate accompanied by two other attorneys from the District Attorney's staff. This order was manifestly unlawful (as a form of "macing," cf. 25 P.S. §§ 2374-2375), and served no legitimate purpose. Rather, it appeared only to be a petty attempt to rattle or distract Mr. Castor's opponent.

F. When Judge O'Neill learned that the female staffer had been ordered to appear at the debate, O'Neill was angry and confronted Castor, who O'Neill believed had unfairly and underhandedly abused his position as First Assistant District Attorney. The relationship between Castor and O'Neill became increasingly acrimonious, and has remained so to this date.

G. Ultimately Castor secured the Republican nomination. Judge O'Neill at first attempted to organize a Primary Election campaign opposing Castor for the Republican nomination to run for the Office of District Attorney, but eventually decided to abandon that effort.

H. Judge O'Neill subsequently received a Gubernatorial nomination to, and was later elected to, the office of Judge of the Court of Common Pleas. Throughout his terms on the bench, Judge O'Neill's relationship with Castor, serving as District Attorney and later as a County Commissioner, has remained hostile and acrimonious.

10. As applied to the assessment of Castor's credibility made by Judge O'Neill in resolving defendant's Due Process claims in 2016, these facts constitute information that "the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification or recusal, even if the judge believes there is no proper basis for disqualification or recusal." See, *Comment* (3), Rule 2.7, Code of Judicial Conduct. See also, *Comment* (5), Rule 2.11, Code of Judicial Conduct (A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.)

11. The Court was required, and is now required, to state on the record the true facts of his interactions with Mr. Castor beginning with the 1998 prelude to the 1999 election campaign for District Attorney.

WHEREFORE, defendant respectfully requests that this Honorable Court disclose, on the record, the true facts of his interactions with Mr. Castor beginning with the 1998 prelude to the 1999 election campaign for District Attorney.

II. MOTION FOR RECUSAL,

AND FOR NEW HEARING ON DUE PROCESS MOTION

12. At the time that the Court denied defendant's Motion To Dismiss, and

made an adverse credibility determination regarding Mr. Castor, the Court should have disqualified itself *sua sponte* because the Judge's impartiality might reasonably be questioned due to the Judge's personal knowledge of and bias against Mr. Castor. See, Rule 2.11(A)(1) (Disqualification).

13. The Comment to the Rule suggests that the Court should have exercised its discretion to recuse itself because the "prevailing facts and circumstances could engender a substantial question in reasonable minds as to whether disqualification nonetheless should be required." See, *Comment (2)*, Rule 2.11.

14. Defendant respectfully requests that the Court vacate its Order of February 4, 2016, denying the defendant's Habeas Corpus Petition, because that Order necessarily relied upon an assessment of the credibility of Mr. Castor ("with a credibility determination being an inherent part of this Court's ruling").

WHEREFORE, defendant respectfully requests that this Honorable Court Vacate its prior Order denying the defendant's Habeas Corpus Petition, and its credibility determination, and Recuse itself from further proceedings herein.

***III. MOTION FOR RECONSIDERATION
OF DENIAL OF MOTION FOR RECUSAL***

15. The Court has previously denied the defendant's Motion For Recusal on the basis that the Court would be presiding over a jury trial, and that the jury would conduct the fact finding. See, Order dated February 4, 2016, (stating that the Order denying the Petition was entered "with a credibility determination being an inherent part of this Court's ruling"); see also N.T. March 29, 2018, at 67 ("So as I

engage in this conscientious self-examination as to whether I can assess this case and preside over this jury trial where I am not the fact finder, can I do so fairly and impartially? Again, I note that actual bias is not alleged. It is the bias connected with the appearance of impropriety that counsel has advanced in its argument.”)

16. The Commonwealth has requested that the Court act at sentencing as the fact finder regarding the veracity of unidentified claims of uncharged misconduct. See, *Motion to Admit Evidence of Uncharged Criminal Acts Committed by Defendant* (filed September 4, 2018).

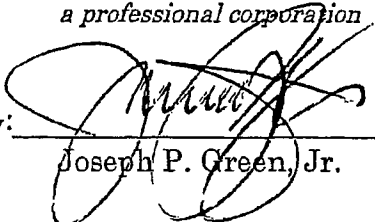
17. Under these changed circumstances, the Judge’s impartiality might reasonably be questioned because of the Judge’s personal knowledge derived from the work of his wife, who has expressed strong views regarding the believability of disputed claims of abuse. See, Rule 2.11(A)(1) (Disqualification). Defendant seeks to incorporate herein the evidence and arguments adduced on March 29, 2018, as if set out here at length.

18. The Comment to the Rule suggests that the Court should exercise its discretion to recuse itself here because the “prevailing facts and circumstances could engender a substantial question in reasonable minds as to whether disqualification nonetheless should be required.” See, *Comment (2)*, Rule 2.11.

WHEREFORE, defendant respectfully requests that this Honorable Court enter an Order granting the Motion For Recusal from further proceedings herein.

Respectfully submitted,
law offices of
JOSEPH P. GREEN, JR.
a professional corporation

Dated: 9/10/2018

By: 
Joseph P. Green, Jr.

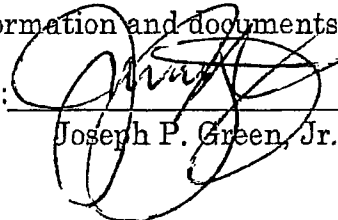
VERIFICATION

COUNSEL HEREBY CERTIFIES that the facts set forth in the foregoing Motion are true and correct to the best of counsel's knowledge, information and belief. This verification is made subject to the penalties for unsworn falsification set forth in Section 4904 of the Crimes Code, 18 Pa.C.S. § 4904 (Unsworn falsification to authorities).

CERTIFICATE OF COMPLIANCE

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.

Dated: 9/10/2018
Attorney ID No. 32604

By: 
Joseph P. Green, Jr.

100-111

rch...

Exhibit A

COSBY TRIAL CHAOS

Bill Cosby Judge Steven T. O'Neill Kept Relationship Secret, Used As Grudge Against Key Witness: Sources

Trial rocked on eve amid calls for Judge Steven T. O'Neill to be recused.

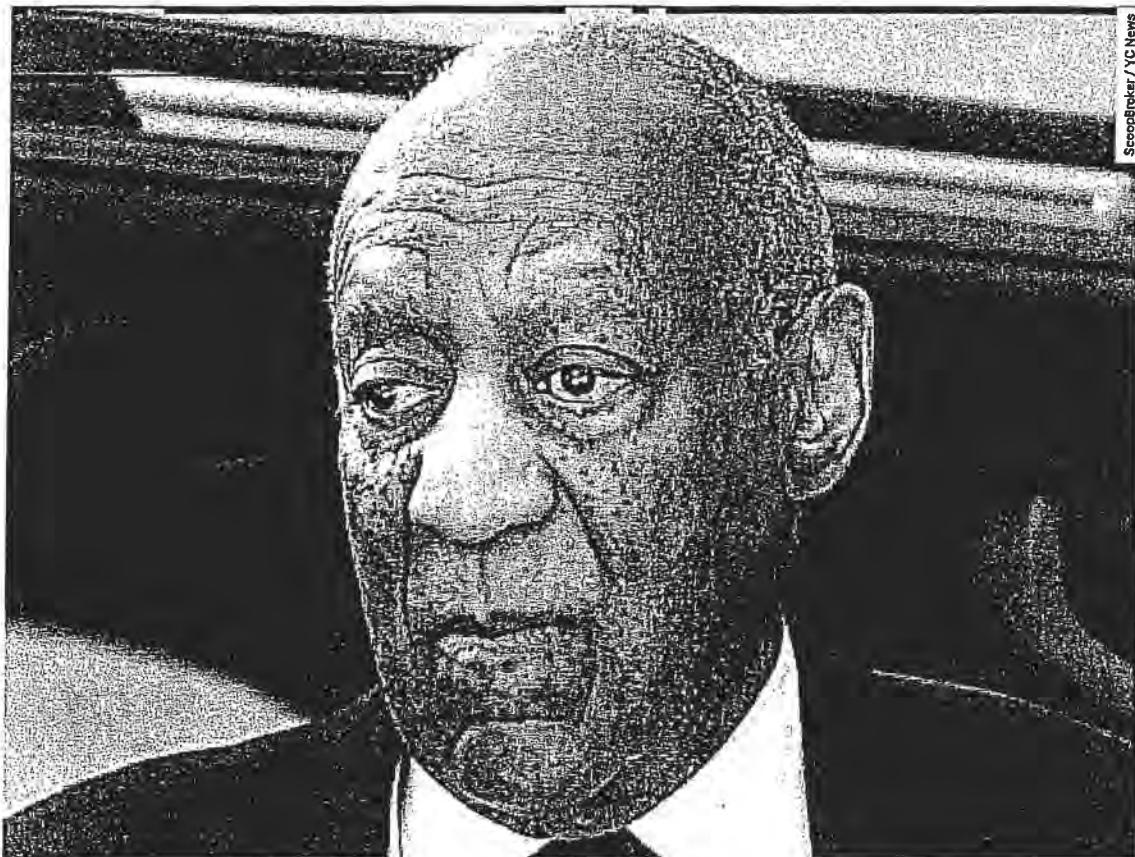


By Dylan Howard

Posted on Mar 28, 2018 @ 16:26PM

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SHARE

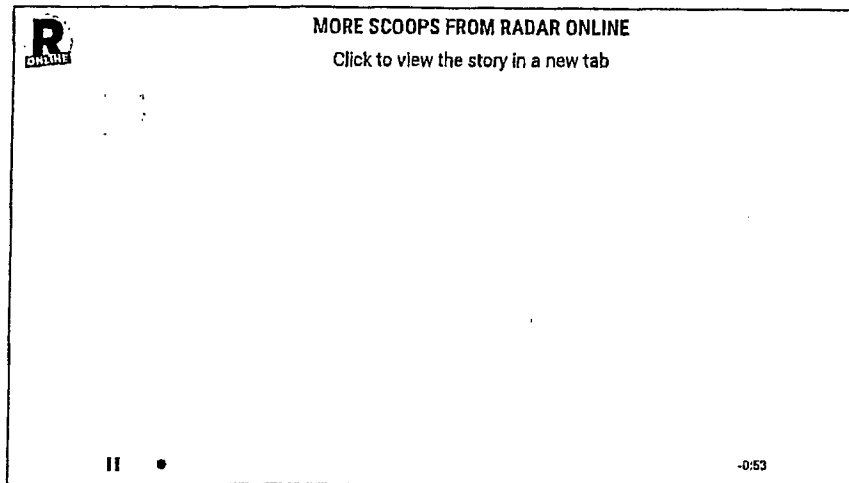



The sex assault retrial of **Bill Cosby** has been rocked on its eve with accusations the presiding judge, **Steven T. O'Neill**, had a blow out fight with a key witness arising from allegations of a close relationship he had with that witness's employee.

PRINT

Coggins, who is now also a judge for the Montgomery County Magisterial District in Pennsylvania, was an assistant district attorney working under **Bruce L. Castor Jr.**, the former district attorney who notoriously declined to press charges against Cosby in 2005.

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Why is this important? Prosecutors want Judge O'Neill to exclude Castor as a witness and from telling the jury why he declined to prosecute the actor in 2005, citing a lack of "reliable and admissible" evidence.

District Attorney, Kevin R. Steele, argued in recent court papers that the opinion of Castor is not relevant and should not be presented to a jury by the defense team.

"There is simply no legitimate, relevant purpose to presenting evidence of Castor's publicly-stated reasons for declining prosecution, which centered on his alleged opinions about the admissibility and credibility of the evidence. His opinions on those subjects are not remotely relevant," Steele wrote in court papers.

"Such evidence and argument can only be used to confuse the issues and mislead the jury, as the defense attempted to do at the first trial," Steele added.

PHOTOS: 'Cosby' Actress Secretly Told Cops About Unwanted 'Sexual Contact' With Bill — Read The Shocking Police Report

Staggeringly, the man who must make the decision on whether to keep Castor's opinion out of the trial is Judge O'Neill.

Judge O'Neill could be forced to make that call as early as tomorrow (Thursday) when the final round of pretrial hearings before jury selection begins on April 2.

But Cosby's defense team, headed by high-profile lawyer Thomas Mesereau, who won an acquittal for Michael Jackson during his 2005 child-molestation trial, are almost certain to ask Judge O'Neill to recuse himself permanently from the trial, a request that would also require a new judge to make a decision on the admissibility of Bruce Castor, sources told Radar.

PHOTOS

The scuffle behind the latest Cosby cartoon stems from a local and bitter political battle between Judge O'Neill and Castor over who would become Montgomery County District Attorney in 1999.

It was a fight Castor ultimately won – but not before bitterness was sewn.

PHOTOS: 'We Want To Seek Justice!' Philly DA Vows To Reveal 'Truth' About Cosby Sex Assault

Sources on the ground in Montgomery County told Radar that Castor deliberately sat Coggins directly in front of O'Neill at the podium, where she wore a "Castor for DA" button.

At the event, both Castor and O'Neill were scheduled to give three-to-five minute talks to their fellow county GOP members to introduce themselves and explain why they were running.

With Coggins front-and-center, O'Neill was "absolutely terrible that night," said a source who was there. "Nervous, sweating, stammering, no focus. Just really bad."

According to Radar's well-placed sources, Bill Donnelly, who was O'Neill's campaign manager during the run, later called the then GOP party chair, Frank Bartle, to ask him who had put Coggins in front of O'Neill to throw him off the game at the debate.

Castor later insisted to Bartle he hadn't — and, in fact, Coggins' arrival at candidate night was how he first learned of O'Neill and Coggins' relationship.

But the damage to O'Neill was done. He lost the election shortly thereafter.

Castor and Coggins did not respond to a request for comment when contacted by Radar.

PHOTOS: Latest Statement: Gloria Allred Deposed Bill Cosby For Seven Hours In Playboy Mansion Sexual Assault Case, Reveals Plans To Release Transcript!

"Judge O'Neill has a motive to get back at Castor for his humiliation," a source who knows Castor told Radar.

In another bizarre twist in the protracted Cosby case, it was Judge O'Neill who tossed Cosby's claim that the first trial should never have proceeded in the first place, based on Castor's non-prosecution agreement with the comedian's lawyer more than a decade ago.

On the stand, Castor defended his decision not to bring charges, citing among other things victim Andrea Constand's year-long delay in going to police, her continued contact with Cosby, and suggestions that she and her mother might have tried to extort the comic.

O'Neill did not elaborate on how he came to the ruling, but he appeared to doubt Castor's credibility regarding the existence of the oral agreement from 2005.

"There's no other witness to the promise," he said at the time. "The rabbit is in the hat and you want me at this point to assume, 'Hey, the promise was made, Judge, accept that.'"

However, Judge O'Neill failed to disclose his earlier run-in with Castor to the defense team — or put it on the record when deciding Castor's credibility.

PHOTOS: Bill Cosby Sexual Assault Case: Smiling Wife Camille Arrives For Deposition

Some legal experts told RadarOnline.com that Judge O'Neill should have disqualified himself in the first trial and

around

All court officials are obligated to disclose, not only any conflict of interest, but any potential conflict of interest, renowned New York City lawyer, **Peter Gleason**, told Radar.

What's more, Gleason added that O'Neill's failure to disclose, "gives Cosby's defense team the opportunity to use this to Cosby's advantage and enables them to say, 'how can he get a fair trial if all this inside baseball is going on?'"

"At a minimum, he should have revealed it. To err on the side of caution — he should have recused himself."

The bombshell Radar revelation is eerily similar to that of Judge Lance Ito in the 1995 **O.J. Simpson** murder trial, who failed to disclose his wife, **Margaret York**, had been detective **Mark Fuhrman's** superior officer in the past.

Fuhrman had been called to testify by the prosecution regarding his discovery of evidence in the case.

Sources connected to Castor have told Radar he would verify the grudge if questioned in the trial about it.

A spokesman for Cosby, Andrew Wyatt, told Radar: "It's very interesting — it's my first time hearing about it."

— *Additional reporting by Mike Jaccarino, Jen Heger & Doug Montero*

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Inside Shameless Bill Cosby's Reality TV Cash Grab

AROUND THE WEB

Bill Cosby Steven T. O'Neill

COMMENTS

JOSEPH P. GREEN, JR.
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138 West Gay Street
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Telephone: (610) 692-0500

Attorney for Defendant

COMMONWEALTH OF PENNSYLVANIA : IN THE MONTGOMERY COUNTY
vs. : COURT OF COMMON PLEAS
: CRIMINAL DIVISION
WILLIAM H. COSBY, JR. : No. CP-46-CR-0003932-2016

CERTIFICATE OF SERVICE

This is to certify that in this case, a true and correct copy of the within document has been served upon the following persons, by the following means and on the date stated:

| Name: | Means of Service: | Date of Service: |
|---|---|------------------|
| Kevin R. Steele, Esquire District Attorney's Office PO Box 311 Norristown, PA 19404-0311 | First Class mail & Electronic service HAND DELIVERY | 9/10/2018 |

Respectfully submitted,
law offices of
JOSEPH P. GREEN, JR.
a professional corporation

Dated: 9/10/2018

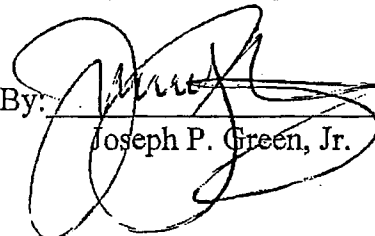
By: 
Joseph P. Green, Jr.

EXHIBIT 7

**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA : No. 3932-16
v. :
WILLIAM H. COSBY, JR. :

2018 SEP 19 PM 12:00
MONTGOMERY COUNTY
PENNA.

MEMORANDUM OPINION AND ORDER SUR RECUSAL

O'NEILL, J.

September 19, 2018

On September 11, 2018, the Defendant filed a “Motion for Disclosure, Recusal and for Reconsideration of Recusal (“Motion”) and supporting Memorandum of Law. The Commonwealth filed a “Response to the Motion for Disclosure, Recusal, and For Reconsideration of Recusal,” (“Response”), on September 13, 2018.

In his Motion, the Defendant asks the Court to: 1) make a disclosure related to a witness; 2) vacate the February 4, 2016 Order denying his Petition for a Writ of Habeas Corpus,¹ and recuse itself from further proceedings; and 3) reconsider the denial of his prior recusal motion.²

“A motion for disqualification is directed to and decided by the jurist whose impartiality is questioned.” League of Women Voters of Pennsylvania v. Commonwealth, 179 A.3d 1080 (Pa. 2018) (citing Commonwealth v. Travaglia, 661 A.2d 352, 370 (Pa. 1995)).

¹ On January 11, 2016, the Defendant filed a “Petition for a Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney’s Office,” (“Petition”) and supporting Memorandum of Law, seeking, *inter alia*, to have the charges dismissed on the basis of a non-prosecution agreement. A hearing on this issue was held on February 2 and 3, 2016.

² “Defendant’s Motion for Recusal of The Honorable Steven T. O’Neill and Request for Reassignment” was filed on March 21, 2018 and denied March 29, 2018.

It is well settled that,

[t]here is a presumption that judges of this Commonwealth are honorable, fair and competent, and, when confronted with a recusal demand, are able to determine whether they can rule in an impartial manner, free of personal bias or interest in the outcome. If the judge determines he or she can be impartial, the judge must then decide whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. A judge's decision to deny a recusal motion will not be disturbed absent an abuse of discretion.

Lomas v. Kravitz, 130 A.3d 107, 122 (Pa. Super. 2015), aff'd, 170 A.3d 380 (Pa. 2017) (citations and internal quotations omitted).

Furthermore, courts have consistently held that, “[i]n this Commonwealth, a party must seek recusal of a jurist at the earliest possible moment, *i.e.*, when the party knows of the facts that form the basis for a motion to recuse. If the party fails to present a motion to recuse at that time, then the party's recusal issue is time-barred and waived.” Lomas v. Kravitz, 170 A.3d 380, 390 (Pa. 2017). “Notably, [the Pennsylvania Supreme Court] has held that, in addition to actual knowledge of the facts underlying the application, facts that ‘should have been known’ are to be considered in determining timeliness.” League of Women Voters, 179 A.3d at 1087 (citation omitted). Courts conduct a waiver analysis because,

[l]itigants cannot be permitted to hedge against the possibility of losing a case on the merits by delaying the production of arguable grounds for disqualification, or, worse, by digging up such grounds only after learning of an adverse order. To hold otherwise would encourage judge-shopping, would undermine the interests in the finality of judicial decisions, and would countenance extensive and unnecessary expenditures of judicial resources, which are avoidable by mere timely advancement of the challenge. The courts of this Commonwealth cannot and do not approve of such gamesmanship.

Id. at 1086; Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority, 489 A.2d 1291, 1300 (Pa. 1985) (citation omitted) (stating, “[o]nce the trial is completed with the entry of a verdict, a party is deemed to have waived his right to have a judge disqualified, and if he has waived that issue, he cannot be heard to complain following an unfavorable result”). Where a recusal motion is based upon purportedly after-discovered evidence, the Pennsylvania Supreme Court has held that, “as in other cases involving after discovered evidence, there must be a showing that... the evidence could not have been brought to the attention of the ... court in the exercise of due diligence.” League of Women Voters, 179 A.3d at 1087 (quoting Reilly, 489 A.2d at 1301). Defendant’s post-verdict,³ presentence Motion is both time-barred and meritless.

First, the Motion is untimely and, thus, waived. This case commenced with the filing of a Criminal Complaint on December 30, 2015. Numerous pretrial hearings were held, beginning with the first hearings on February 2 and 3, 2016. The Defendant was represented by a total of 7 attorneys at various times, through the commencement of jury selection on May 22, 2017. The first trial ended in a mistrial on June 17, 2017. Thereafter, Defendant replaced his entire Defense team with 8 new lawyers who represented Defendant at various times through commencement of the

³ The Rules of Criminal Procedure provide for an oral Motion for Extraordinary Relief prior to sentencing seeking an arrest of judgment, judgment of acquittal, or a new trial. Pa. R. Crim. P. 704 (B). The Motion does not comport with that rule and is, therefore, procedurally improper as well. Appellate courts have repeatedly stated “this Rule was not intended to provide a substitute vehicle for convicted defendant to raise matters which could otherwise be raised via post sentence motions.” Commonwealth v. Howe, 842 A.2d 436, 441, (Pa. Super. 2004) (citations omitted). The Defendant seeks to revisit a pretrial ruling, under the guise of a motion to recuse; he may challenge that ruling via the appropriate post-sentence procedures.

second trial, and vigorously pursued many additional pre-trial motions on Defendant's behalf. As noted above, the Defendant filed a recusal motion on March 21, 2018, which was denied following a hearing on March 29, 2018.

The second trial commenced with jury selection on April 2, 2018. On April 26, 2018, the jury found the Defendant guilty of three counts of Aggravated Indecent Assault (18 Pa. C.S.A. § 3125). By Order of May 15, 2018, this Court set sentencing for September 24 and 25, 2018. Defendant's current counsel entered his appearance on June 14, 2018 and did not file the within Motion until September 11, 2018.

The sum and substance of the Motion is based on a March 28, 2018, unsourced tabloid article posted by "Radar Online," a website described by the Defendant as an "internet gossip site." (Motion ¶ 7). The article was posted the day before this Court held a hearing on the Defendant's prior recusal motion, and four days before the start of his second trial. The Defendant's spokesperson is quoted in the article. (Motion, Exhibit "A" at 4). As noted in the Commonwealth's Response, the Defendant's spokesperson accompanied the Defendant to every court appearance, observed the proceedings, and frequently spoke on the Defendant's behalf to the media. (Response at 5). Clearly, the Defendant was aware, or should have been aware, of the basis for the instant motion in March of 2018 at the latest, *prior to the commencement of his retrial*. Furthermore, the fact that this Court sought a party nomination for the Office of District Attorney nearly twenty years ago is a fact of public record that could easily be uncovered in the exercise of due diligence by no less than 15 attorneys (and their private investigators) acting in the capacity of Defendant's legal counsel. Therefore, the Motion is untimely as a matter of Pennsylvania law.

Even assuming, *arguendo*, the Court had a duty to disclose that a witness was a political opponent nearly twenty years ago, basing the Motion on the Court's duty to disclose does not overcome the failure to file the Motion at the earliest possible date. See League of Women Voters, 179 A.3d at 1088 (quoting Reilly, 489 A.2d at 1301) (“[S]imply because a judge does not raise *sua sponte* the issue of his impartiality, however, does not entitle a party to question a judge's partiality after the case has ended without substantiation in the record that the complaining party did not receive a full, fair, and impartial trial”).

Even if this unsubstantiated claim, raised on the eve of sentencing, is not waived, it is facially meritless. Accordingly, a hearing is neither required nor necessary. (See Pa. R. Crim. P. 577 and 704). “The party who asserts that a trial judge must be disqualified must produce evidence establishing bias, prejudice, or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially.” Lomas v. Kravitz, 130 A.3d 107, 122 (Pa. Super. 2015), aff'd, 170 A.3d 380 (Pa. 2017) (citations and internal quotations omitted). The Motion and supporting memorandum of law do nothing more than assert that this Court *should* have a bias, based on the campaign tactics of a witness twenty years ago, that somehow precluded the Court from making credibility determinations at a hearing in this case 31 months ago. This claim is wholly without merit.

The undersigned has served on the Montgomery County Court of Common Pleas since July, 2002. For the first six years of this Court's tenure, 2002-2008, Mr. Castor served as the District Attorney of Montgomery County. Not once during his tenure as District Attorney was Mr. Castor, or anyone else, heard to ascribe some sort of

“grudge” or prejudice against Mr. Castor in any criminal matter that came before this Court. Likewise, since 2009, Mr. Castor has, on occasion, appeared before this Court as a criminal defense attorney and has never sought disclosure or disqualification of the Court because of some perceived bias or “grudge” against him. No “grudge,” animus, bias or prejudice can be claimed because it simply does not exist.

Defense counsel’s conclusory statement that any credibility determinations made by the Court as to [all] witnesses who testified “was an express finding that the testimony of the former District Attorney, Mr. Castor, was not credible” is simply false, with no basis in fact. (Motion ¶ 5). The Court carefully weighed the testimony of each of the witnesses⁴ at the February 2 and 3, 2016 hearing on the Petition for a Writ of Habeas Corpus, and applied the applicable law, in denying the portion of the Petition seeking dismissal of the charges. This Court’s ruling on the Petition, as stated on the record and memorialized in the order of February 4, 2016, and its subsequent “Findings of Fact, Conclusions of Law and Order Sur: Defendant’s Motion to Suppress⁵ Evidence Pursuant to Pa. R. Crim. P. 581 (I),” docketed December 5, 2016, were not based solely on the Court’s credibility assessment of any individual witness, but rather

⁴ In addition to Mr. Castor, John P. Schmitt, Esq, testified on behalf of the Defendant. Dolores Troiani, Esq., and Bebe Kivitz, Esq., were called by the Commonwealth.

⁵ Defendant’s “Motion to Suppress The Contents Of His Deposition Testimony and Any Evidence Derived Therefrom on the Basis that the District Attorney’s Promise Not to Prosecute Him Induced Him to Waive His Fifth Amendment Right Against Self-Incrimination” was filed on August 12, 2016. A hearing was held on November 1, 2016. No new evidence was presented at the hearing. Rather, the Notes of Testimony from the February 2 and 3, 2016 hearing on the Defendant’s “Petition for Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney’s Office,” and a series of stipulations were admitted as evidence sufficient to dispose of the Motion to Suppress.

on the testimony of all witnesses and ultimately rested on the legal insufficiency of the evidence presented by the defendant in support of his motions.

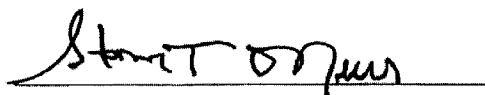
In regards to Section III of the Motion, seeking a reconsideration of this Court's ruling on the Defendant's prior Motion to Recuse filed March 21, 2018, and denied March 29, 2018, the Court's findings, statements and reasons for said denial which were placed on the record on March 29, 2018 are incorporated herein by reference. Nothing raised by the Defendant warrants reconsideration of the Court's previous denial.

Finally, even though this Court believes the claim to be waived, the Court nevertheless undertook conscientious reflection on claims raised in the Motion. Throughout the pendency of this matter, and in every matter over which this Court presides, this Court is sensitive to its obligations under the Code of Judicial Conduct, and takes these obligations very seriously. This Court is confident that it has and can continue to assess this case in an impartial manner, free of personal bias or interest in the outcome. This Court simply has no bias against any witness called by the defense or the Defendant himself. This Court finds no merit in any of the bases alleged by the Defendant and the Court will not recuse itself. Based on the foregoing, the Court issues the following:

ORDER

And now this 19th day of September, 2018, upon consideration of the Defendant's Motion for Disclosure, Recusal and For Reconsideration of Recusal, and supporting Memorandum of Law, filed September 11, 2018, and the Commonwealth's Response thereto, filed September 13, 2018, it is hereby **ORDERED** and **DECREED** that the Motion is **DENIED** in its entirety.

BY THE COURT:



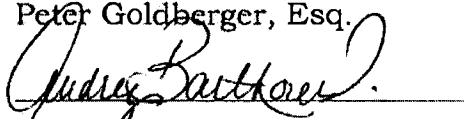
STEVEN T. O'NEILL, J.

Copies of this Order mailed on 9/19/18 to the following:

Joseph P. Green, Esq.

Kevin R. Steele, Esq.

Peter Goldberger, Esq.



Secretary

EXHIBIT 8

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

2016 DEC -5 PM 3:23

CLERK OF COURTS
OFFICE
MONTGOMERY COUNTY
PENNA.

COMMONWEALTH OF PENNSYLVANIA : No. 3932-16
: :
v. : :
: :
WILLIAM H. COSBY, JR. :

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER SUR DEFENDANTS'
MOTION TO SUPPRESS EVIDENCE PURSUANT TO PA. R. CRIM. P. 581 (I)**

I. Findings of Fact

1. The Defendant seeks to suppress the contents of his civil deposition testimony, and any evidence derived therefrom, on the basis that he expressly relied upon former District Attorney Bruce L. Castor, Jr.'s alleged promise not to prosecute him as the basis for not invoking his Fifth Amendment right against self-incrimination at his civil depositions in 2005 and 2006. (Defendant's Motion to Suppress the Contents of His Deposition Testimony and Any Evidence Derived Therefrom On the Basis that the District Attorney's Promise Not to Prosecute Him Induced Him to Waive his Fifth Amendment Right Against Self-Incrimination at 1.)
2. A hearing was held before the undersigned on November 1, 2016. No new evidence was presented at the hearing. Rather, the Notes of Testimony from the February 2 and 3, 2016 hearing on the Defendant's "Petition for Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney's Office," (Commonwealth's Suppression Exhibit 1 (CS-1))¹ and a series of stipulations (CS-2) were admitted as evidence sufficient to dispose of the instant Motion to Suppress which was filed August 12, 2016. (N.T. 11/1/16 at 7-8). This Court considered no other evidence in making its findings and conclusions.
3. On January 24, 2005, then Montgomery County District Attorney Bruce L. Castor, Jr., Esq. issued a signed press release indicating that an investigation had commenced following the victim's January 13, 2005, report to authorities in Canada that she was allegedly sexually assaulted by the Defendant at his home in Pennsylvania. Ultimately, the case was referred to Cheltenham Township Police Department. (N.T. 2/3/16 at 65; C-17).
4. On January 26, 2005, the Defendant gave a written, question and answer statement to law enforcement. The Defendant was accompanied by counsel, both his criminal defense attorney Walter M. Phillips², Esq., and his longtime

¹ All other exhibits referenced herein are cited by the exhibit number assigned at the February 2 and 3, 2016 hearing.

² Mr. Phillips passed away in early 2015.

- general counsel John P. Schmitt, Esq., when he provided his statement to police. (N.T. 2/3/16 at 19, 52-53).
5. At no time during the statement to police did the Defendant invoke his Fifth Amendment privilege. (Id. at 18).
 6. Mr. Schmitt testified that he interviewed the Defendant prior to both his statement to police and to his civil depositions and did not believe that he was going to incriminate himself. (N.T. 2/3/16 at 22-24).
 7. On February 17, 2005, then District Attorney, Bruce L. Castor, Jr., issued a signed press released stating that he had decided not to prosecute William H. Cosby, Jr. (N.T. 2/2/16 at 71-72, 89); Defendant's Exhibit 4 (D-4)).
 8. Mr. Castor testified that it was his intention to strip the Defendant of his Fifth Amendment right to force him to sit for a deposition in an unfiled civil case and that Mr. Phillips, the Defendant's criminal attorney, agreed with his legal assessment. (N.T. 2/2/16 at 63-68). He also testified that he relayed this intention to then First Assistant District Attorney Risa V. Ferman. (Id. at 67).
 9. The press release cautions that the decision could be reconsidered. (N.T. 2/2/16 at 215; D-4).
 10. There was no agreement not to prosecute and no "quid pro quo." (N.T. 2/2/16 at 99, 227).
 11. The decision not to prosecute was not the result of any agreement with, or request from, the victim's attorneys, Dolores Troiani, Esq. and Bebe Kivitz, Esq. (N.T. 2/3/16 at 175, 238, 247-248).
 12. In fact, Ms. Troiani had no contact with the District Attorney's Office during the investigation. (N.T. 2/3/16 at 139-140). Ms. Kivitz had limited contact with then-First Assistant Risa V. Ferman. (Id. at 236, 247).
 13. Further, Ms. Troiani had no discussions with anyone involved in the investigation regarding a possible civil case against the Defendant. (Id. at 140).
 14. Additionally, Ms. Troiani testified that if the Defendant had invoked the Fifth Amendment at his depositions, it would have benefitted their civil case in the event of a jury trial, because she would have requested an adverse inference jury instruction. (N.T. 2/3/16 at 176).
 15. At no time was the purported promise not to prosecute reduced to writing. (N.T. 2/3/16 at 26, 41). Likewise, there was no Court approval of any promise or agreement not to prosecute.
 16. Neither of the victim's attorneys was aware of the purported promise until 2015. (Id. at 184, 237-238).
 17. In fact, Ms. Troiani only learned of Mr. Castor's decision not to prosecute when a reporter came to her office to obtain a comment on the decision. (Id. at 141-142).
 18. During the 2005 criminal investigation, the Defendant's attorneys were negotiating, in writing, with the National Enquirer for the defendant to give an interview regarding the instant allegations, which he gave following the conclusion of the criminal investigation. (N.T. 2/3/16 at 33-34).
 19. On March 8, 2005, the victim filed a civil lawsuit against the Defendant in the Eastern District of Pennsylvania.
 20. On four dates, September 28-29, 2005 and March 28-29, 2006, the Defendant sat for depositions in the civil matter. (N.T. 2/3/16 at 36).

21. He was accompanied by counsel, including Mr. Schmitt. (N.T. 2/3/16 at 13, 36). Mr. Schmitt testified that Mr. Phillips had informed him of Mr. Castor's promise not to prosecute. (Id. at 11).
22. The Defendant did not invoke the Fifth Amendment during the depositions, however, counsel did advise him not to answer questions pertaining to the victim in the instant case and her attorneys had to file motions to compel his testimony. (N.T. 2/3/16 at 41-42, 181-184, 248-249).
23. The Defendant did not invoke the Fifth Amendment when asked about other alleged victims. (Id. at 58-59).
24. At no time during the civil litigation did any of the attorneys for the Defendant indicate on the record that the Defendant could not be prosecuted. (N.T. 2/3/16 at 177, 184, 247-248).
25. There was no attempt to confirm the purported promise before the depositions, even though Mr. Castor was still the District Attorney; it was never referenced in the stipulations at the outset of the civil depositions. (N.T. 2/3/16 at 71, 178-179, 247-248).
26. In the late summer of 2006, the victim and the Defendant settled the civil case. As part of the settlement agreement defendant's attorneys initially attempted to negotiate a provision whereby the victim would absolve the Defendant of criminal responsibility and not cooperate with law enforcement. Additionally, the defendant's attorney requested that Ms. Troiani agree to destroy her file. (N.T. 2/3/16 at 47-48, 190-193).
27. The settlement agreement contains a provision that Ms. Constand would not initiate a criminal complaint against the Defendant based on the instant allegations. (N.T. 2/3/16 at 48; C-22).
28. On July 6, 2015, in response to a request by the Associated Press, a federal judge unsealed previously sealed portions of the record in the civil case, which included portions of the defendant's 2005 depositions. (Defendant's Motion to Suppress The Contents Of His Deposition Testimony and Any Evidence Derived Therefrom on the Basis that the District Attorney's Promise Not to Prosecute Him Induced Him to Waive His Fifth Amendment Right Against Self-Incrimination at 4).
29. Around this time, the District Attorney's Office reopened the investigation. (C-19, C-20).
30. On September 22, 2015, at 10:30 am, Brian McMonagle, Esq. and Patrick O'Connor, Esq., met with then District Attorney Risa Vetri Ferman and then First Assistant District Attorney Kevin Steele at the Montgomery County District Attorney's Office for a discussion regarding William H. Cosby, Jr., who Mr. McMonagle and Mr. O'Connor represented. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #1).
31. On September 23, 2015, at 1:30 pm, Bruce L. Castor, Jr., Esq. sent an email to then District Attorney Ferman. This email was marked and admitted as Defendant's Exhibit 5 at the February 2016 *Habeas Corpus* hearing held in this matter. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #2).

32. On September 23, 2015, at 1:47 pm, Mr. Castor forwarded the email identified above as Defendant's Exhibit 5 to Mr. McMonagle. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #3).
33. On September 25, 2015, then District Attorney Ferman sent a letter to Mr. Castor by way of hand delivery. This letter was marked and admitted as the Defendant's Exhibit 6 at the February 2016 Habeas Corpus hearing held in this matter. At 3:02 pm that same day, Mr. Castor's secretary forwarded a scanned copy of the letter to him by way of email. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #4).
34. In her letter Ms. Ferman stated, "[t]he first I heard of such a binding agreement was your email sent this past Wednesday." (D-6)
35. On September 25, 2015, at 3:59 pm, Mr. Castor forwarded the letter identified above as Defendant's Exhibit 6 to Mr. McMonagle. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #5).
36. On September 25, 2015, at 3:41 pm, Mr. Castor sent an email to then District Attorney Ferman. This email was marked and admitted as Defendant's Exhibit 7 at the February 2016 Habeas Corpus hearing in this matter. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #6).
37. On September 25, 2015, at 4:19 pm, Mr. Castor forwarded the email identified above as Defendant's Exhibit 7 to Mr. McMonagle along with the message "Latest." (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #7).
38. On December 31, 2015, the instant charges were filed.
39. The Defendant principally relies on the testimony and writings of Mr. Castor to support his motion.
40. In that regard, the Court finds that there were numerous inconsistencies in the testimony and writings of Mr. Castor and has previously ruled that credibility determinations were an inherent part of this Court's denial of the Defendant's initial "Petition for Writ of Habeas Corpus." (Court Order 2/4/16).
41. There were multiple inconsistencies between Mr. Castor's communications with the District Attorney's Office in September of 2015 and with his testimony on February 2, 2016.
42. For example, in his September 23, 2015 email, he indicated that the decision not to prosecute was an attempt to force the Defendant to sit for depositions in an unfiled civil case and that the decision was made with the "agreement" of defense counsel and plaintiff's counsel. (D-5). However, in his testimony, he indicated that there was no agreement and no quid pro quo.
43. The correspondence further states, "I signed the press release for precisely this reason, at the request of the Plaintiff's counsel, and with the acquiescence of Cosby's counsel, with full and complete intent to bind the Commonwealth that anything Cosby said in the civil case would not be used against him, thereby forcing him to be deposed and perhaps testify in a civil trial without him having the ability to 'take the 5th.'" (D-5). "[B]ut one thing is fact: the Commonwealth, defense and civil plaintiff's lawyers were all in agreement that the attached decision [February 17, 2005 press release] from me stripped Cosby of his Fifth Amendment privilege, forcing him to be deposed." (N.T. 2/3/16 at 195; D-5).

44. This Court credits the testimony of Ms. Kivitz and Ms. Troiani, whose relevant testimony regarding such agreement is outlined in paragraphs 11-17 above.
45. Mr. Castor's testimony about who was in agreement with his decision, as well as what he purportedly promised, was equivocal. (N.T. 2/2/16 at 185-195).
46. In his final email to Ms. Ferman on the subject Mr. Castor states, "I never said we would not prosecute Cosby." (D-8)
47. Additionally, there were multiple inconsistencies between Mr. Castor's accounts to the press and his testimony on February 2, 2016. (E.g., N.T. 2/2/16 at 218-220, C-12).
48. There is no basis in the record to support the contention that there was ever an agreement or a promise not to prosecute the Defendant.
49. There is no basis in the record to support justifiable reliance on the part of the Defendant.

II. Conclusions of law

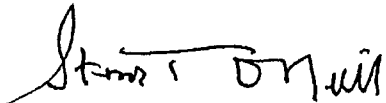
1. Instantly, this Court concludes that there was neither an agreement nor a promise not to prosecute, only an exercise of prosecutorial discretion, memorialized by the February 17, 2005 press release.
2. In the absence of an enforceable agreement, the Defendant relies on a theory of promissory estoppel and the principles of due process and fundamental fairness to support his motion to suppress.
3. Where there is no enforceable agreement between parties because the agreement lacked consideration, the agreement may still be enforceable on a theory of promissory estoppel to avoid injustice. Crouse v. Cyclops Indus., 745 A.2d 606 (Pa. 2000).
4. The party who asserts promissory estoppel must show (1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise. Id. (citing Restatement (Second) of Contracts § 90). Satisfaction of the third requirement may depend, *inter alia*, on the reasonableness of the promisee's reliance and the formality with which the promise was made. Thatcher's Drug Store of W. Goshen, Inc. v. Consol. Supermarkets, Inc., 636 A.2d 156, 160 (Pa. 1994) (citing Restatement (Second) of Contracts § 90, comment b).
5. Because there was no promise, there can be no reliance on the part of the Defendant and principles of fundamental fairness and due process have not been violated.
6. This Court finds that there is no Constitutional barrier to the use of the Defendant's civil deposition testimony.

Based on the foregoing, the Court issues the following:

ORDER

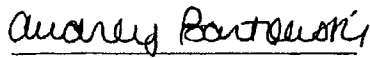
And now, this 5th day of December, 2016, upon consideration of the "Defendant's Motion to Suppress The Contents Of His Deposition Testimony and Any Evidence Derived Therefrom on the Basis that the District Attorney's Promise Not to Prosecute Him Induced Him to Waive His Fifth Amendment Right Against Self-Incrimination," filed August 12, 2016, the Commonwealth's Response thereto, filed September 2, 2016, and after hearing before the undersigned on November 1, 2016, based upon the arguments of counsel and the evidence adduced, the Defendant's Motion to Suppress is hereby **DENIED** in its entirety.

BY THE COURT:



STEVEN T. O'NEILL, J.

Copy of the above Order
mailed on 12/5/16 to the following:
Kevin R. Steele, Esq. (District Attorney's Office)
M. Stewart Ryan, Esq.
Kristen Gibbons Feden, Esq.
Brian J. McMonagle, Esq.
Angela C. Agrusa, Esq.
Court Administration



Secretary

EXHIBIT 9

IN THE COURT OF COMMON PLEAS
IN AND FOR THE COUNTY OF MONTGOMERY, PENNSYLVANIA
CRIMINAL DIVISION

- - -

COMMONWEALTH OF PENNSYLVANIA:

vs.

NO. 3932-16

WILLIAM H. COSBY, JR.

- - -

PRETRIAL CONFERENCE/MOTION TO SUPPRESS TELEPHONE
RECORDING

- - -

Courtroom A
Tuesday, September 6, 2016
Commencing at 1:00 p.m.

- - -

Virginia M. Womelsdorf, RPR
Official Court Reporter
Montgomery County Courthouse
Norristown, Pennsylvania

- - -

BEFORE: THE HONORABLE STEVEN T. O'NEILL, JUDGE

- - -

COUNSEL APPEARED AS FOLLOWS:

KEVIN R. STEELE, ESQUIRE
District Attorney
M. STEWART RYAN, ESQUIRE
KRISTEN GIBBONS-FEDEN, ESQUIRE
Assistant District Attorneys
for the Commonwealth

BRIAN J. McMONAGLE, ESQUIRE
ANGELA AGRUSA, ESQUIRE
for the Defendant

(The following proceedings were commenced with the Court, Mr. Steele, Mr. Ryan, Ms. Gibbons-Feden, Mr. McMonagle, Ms. Agrusa, and the defendant being present:)

- - -

THE COURT: We had a brief pre-conference conference, but nothing was discussed at this stage that's not going to be discussed out here. It's going to be a little unwieldy to try to begin to bring this case within a trial track that we can begin to get resolution.

Now, we are here today, Counsel, as we've discussed, for a pretrial conference that was scheduled by my order of June 14th. And my order of June 14th setting the trial -- pretrial conference under the Rules of Criminal Procedure for today envisioned that there would be another order regarding the filing of motions prior to the pretrial motion of September 6th.

It was envisioned that motions would be filed. An interlocutory appeal was taken from my habeas corpus decision, and at that stage I did not send out the order. However, it was obvious to the Court that counsel heard me and began to file

1 motions and began to undertake discovery.

2
3 I note that the District
4 Attorney in today's filing indicated that it has
5 provided -- in what it believes in its opinion
6 provided -- both mandatory and discretionary
7 discovery, at least what it believes it has to.

8 And, in fact, the defense has
9 filed two pretrial motions today. And just today the
10 District Attorney's Office filed a 404(b) motion which
11 obviously is very large in scope and size.

12 So counsel was at least
13 following the formal agreements that we had made at
14 the pretrial conference, the scheduling conference,
15 back in June. And I appreciate counsel for doing
16 that, but really today would mark now beginning to
17 formalize dates, the types of filings that we should
18 expect, deadlines for those, any further discovery,
19 and really beginning to set hearing dates for the
20 various motions that are going to be filed.

21 Now, I do know one thing, Mr.
22 McMonagle, in one of the -- it was actually a letter
23 prior to this requesting whether the defendant would
24 have to appear. And you did indicate at this stage in
25 an affirmative fashion that he was blind.

1
2 Now, if that is the case, then
3 I -- you need to know, you know, at least through your
4 client and his doctors, what ramifications that is for
5 being able to accommodate the defendant through our
6 court procedures.

7 We've endeavored through our
8 decorum orders and we do the best we can, but anything
9 that is personal and private to your client in regards
10 to his medical condition you're going to need to let
11 the Court and the decorum officer, our Court
12 Administrator, Michael Kehs, know so that we can
13 provide all accommodations that are necessary.

14 MR. McMONAGLE: Thank you, sir.

15 THE COURT: Okay. So in the
16 future, please be able to do that. He would be
17 required to be present at these hearings.

18 Now, I do note from the outset,
19 Counsel, that this case is now 252 days from the
20 filing of Criminal Complaint. And I do envision that,
21 as you've indicated, that there will be a motion from
22 the defense regarding pre-arrest delay, and that could
23 be envisioned by at least the two hearings that we've
24 already had in this, the both of them with the Court
25 having made decisions.

1
2 But clearly it raised the issue
3 of incidences that occurred in 2004, from the
4 disclosure of the Commonwealth, and 2005, and a
5 Criminal Complaint being filed in 2015. I could
6 envision that they will be there.

7 But, nonetheless, a Criminal
8 Complaint was filed and, therefore, there is a right
9 to a speedy trial. And I recognize with a trial and
10 some of the pretrial motions that have been filed just
11 to date, this is a large scope. But, nonetheless,
12 your client has speedy trial rights.

13 Now, the only delay that has
14 actually occurred in the case was when the Superior
15 Court did stay this matter, I believe just from March
16 1st through April 25th. Now, that was an actual stay
17 where this Court was divested of jurisdiction to do
18 anything.

19 Under Rule 600, each side could
20 make claims as to, well, the filing of a certain thing
21 or having a certain hearing delayed the actual trial.
22 And I'm not trying to, you know, encourage anyone. I
23 just don't know. But rights are rights, and in this
24 Commonwealth you have a right to be tried within 365
25 days from the date that the Commonwealth filed a

1
2 Criminal Complaint. So a mechanical run date, as we
3 call it in this business, would be December 29th,
4 2016.

5 Now, I don't think anyone who is
6 associated with this case believes that this case will
7 be tried before that date, but so far the only actual
8 excludable time is when the Superior Court divested
9 this Court.

10 Again, there have been two
11 appeals to the Superior Court, the first one
12 interlocutory in which they granted a stay, and the
13 second one being the current interlocutory appeal
14 which this Court denied permission for such an
15 interlocutory appeal.

16 And there's now an application
17 to the Superior Court to hear that appeal in regards
18 to this Court's ruling in regards to hearsay being
19 utilized in the form of prima facie evidence at a
20 Preliminary Hearing.

21 So that is on appeal. To my
22 knowledge, no stay has been granted. I think all are
23 in agreement that the rules permit this Court to
24 proceed with all trial procedures, all trial matters,
25 and I intend to do so.

1
2 So I just put that as a backdrop
3 so that everybody is sensitive to it, that this Court
4 will endeavor with everything within its power to give
5 this defendant his right to a speedy trial, no matter
6 how large the scope and no matter how much underlying
7 procedural matters have to be undertaken.

8 So with that said, the Court
9 notes that there was procedural anomaly that, in fact,
10 your client had waived arraignment via your entry of
11 appearance back on June 3rd and, in fact, had pled not
12 guilty. That actually came prior to Bills of
13 Information being filed.

14 So just for clarity of the
15 record, Bills of Information were, in fact, filed on
16 July 13th of 2016 charging William Henry Cosby with
17 three counts, these involving incidences alleged to
18 have occurred between January of 2004 and
19 February 2004, Count 1 being aggravated indecent
20 assault, a felony of the second degree.

21 And hearing -- again, trying to
22 extrapolate your entry of appearance of not guilty, I
23 will enter a plea of not guilty on that matter.

24 MR. McMONAGLE: Thank you, sir.

25 THE COURT: He's charged with

1
2 Count 2, aggravated indecent assault, a felony of the
3 second degree, the alleged victim being Andrea
4 Constand for all three of these.

5 Again, I will enter a not guilty
6 on that one; is that correct?

7 MR. McMONAGLE: Yes, sir.

8 THE COURT: And then, finally,
9 Count 3, aggravated indecent assault, a felony of the
10 second degree.

11 I will also enter a plea of not
12 guilty.

13 MR. McMONAGLE: Thank you, Your
14 Honor.

15 THE COURT: All right. So pleas
16 of not guilty have -- we've now kind of caught up the
17 Bills of Information and the waivers of arraignment.
18 That then triggers certain rules of -- our
19 Pennsylvania Rules of Criminal Procedure have certain
20 deadlines.

21 Now, most Courts are somewhat
22 loose. They want to make sure we guarantee the rights
23 to trial of all parties in being able to have a trial
24 where all of the pretrial issues have been heard and
25 resolved.

1
2 So although I am not a stickler
3 to the rules, we're going to have to be setting our
4 own rules, even though they may be outside of the
5 Rules of Criminal Procedure, but we will still
6 endeavor to try to follow that.

7 With that said, we are having,
8 you know, an official pretrial conference under Rule
9 570, and there are a number of things that we should
10 at least cover and make sure that we handle.

11 So far in this case the
12 following motions have been filed. They've been
13 called pretrial motions. That was of August 3rd of
14 2016 by the defense, and that was to suppress the
15 phone call that the Commonwealth claims it's going to
16 intend to use in evidence.

17 Now, we've talked about that. I
18 believe that that is one hearing that is basically a
19 great deal of legal argument or, if not, it may be
20 incorporation of prior testimony. I don't know, but I
21 don't think it would be. And we will hear that today.
22 There's no reason we couldn't hear that argument.

23 There is a second motion that
24 was filed -- again, the phone call suppression, the
25 Commonwealth filed its answer on September 1st to

1
2 that. So in all respects, that's ready to go in that
3 there has been a motion and an answer.

4 The next being a Motion to
5 Suppress Deposition Testimony of the defendant given
6 at a deposition following at least the -- I guess
7 sometime in 2005, a deposition testimony. And the
8 answer was filed by the Commonwealth in that on
9 September 2nd.

10 Now, that being the later in
11 time and also the later Commonwealth answer, I'm
12 willing to, as much as it may require just legal
13 argument, to do that. But I don't have to hear that
14 one if the parties do not feel that they are ready to
15 proceed on that one. But the Court is prepared to
16 hear those.

17 And those are the only two
18 motions that were outstanding up to about an hour ago
19 at which time the Commonwealth filed a rather weighty
20 motion under Pennsylvania Rule of Evidence 404(b)
21 which there is an indication there that you intend to
22 present the testimony of 13 alleged prior incidences
23 that you believe will meet the requirements of
24 Pennsylvania Rule of Evidence 404(b).

25 Now, that's obviously weighty

1
2 because there's a lot of information contained in that
3 motion and a hearing thereon will take some time. So,
4 as we discussed in the conference in the robing room,
5 that will need to be set out for a date certain. And
6 obviously there's certain investigation that you may
7 need to undertake.

8 Now, the only thing I would
9 comment on that, the Court has not read it except for
10 to skim it because it was just filed today, but it
11 appears to have the accounts of -- there's reference
12 to originally 50 possible, but you have chosen 13 that
13 you wish to have this Court consider as to whether
14 they would be permitted to testify under what is known
15 as the common plan, scheme or design exception. And
16 therefore, it did not appear that any names were
17 placed in there and they are not attached to it.

18 I don't know how that's going to
19 be handled in terms of the Commonwealth and the
20 defense. I would note that up until this, all 200 --
21 some days that we've had so far, that counsel in this
22 case has conducted themselves with the highest
23 integrity and allegiance to their ethical obligations
24 and rules, but we're talking about individuals here.
25 And I just don't know -- nobody's asked for anything

1 as far as disclosure of names of these individuals.

2 I'm going to leave it to counsel
3 at this stage. I would not -- I just don't --
4 nobody's asked me to do anything in that regard. I
5 would just note that there are no names attached to
6 those 13 accounts that you intend to use. Is that
7 correct?
8

9 MR. STEELE: That's correct,
10 Your Honor.

11 THE COURT: Okay. So we're
12 going to deal with that at the end of today as to how
13 we're going to schedule that out.

14 One other motion that was filed
15 was the Commonwealth's Motion for Pretrial Discovery
16 and Reciprocal Discovery that is commonly filed. It's
17 a prophylactic motion filed by the Commonwealth to
18 ensure that if the defense has any kind of discovery,
19 that they are essentially asking for it.

20 However, I note, Mr. McMonagle,
21 in that motion they make a claim that they, in their
22 own determination, have provided you with all of their
23 obligations under the discovery rules of our Rules of
24 Criminal Procedure.

25 That may or may not be the case

1
2 because, again, good lawyers and good lawyering is
3 exactly what I guess they're claiming and what
4 everybody has demonstrated so far; that you don't need
5 to involve the Court or you don't have to have filings
6 and everything else for everything, meaning they
7 recognize their obligations.

8 So you're going to have to
9 review. Obviously discovery is always going to be
10 ongoing in this courtroom. And I will be sensitive to
11 the needs of both parties, but I ask you to be
12 expeditious so that we do not have delays in this
13 trial because of discovery motions.

14 I can look at where the case is
15 now by reviewing an Affidavit of Probable Cause from
16 some of the testimony I've heard so far. With the
17 404(b) motion aside, there doesn't seem like there's
18 going to be a great deal of other discovery. There
19 doesn't appear to be a lot of scientific, a lot of DNA
20 or other kind of testimony, but I just don't know.

21 So you're going to have to let
22 me know where you think you are in regards to
23 discovery. So you haven't had a chance to look at
24 that one either?

25 MR. McMONAGLE: No, Judge. Both

1
2 those motions were filed as we walked in today.

3 THE COURT: Right. So I would
4 ask you if you believe -- because I will be a stickler
5 on the discovery motions, meaning to keep you tight on
6 that -- if there is something that you don't think you
7 got. And when was this discovery provided? Over time
8 or was it one, two discs and that's it? Does anybody
9 know?

10 MR. RYAN: Your Honor, there was
11 a large batch in the beginning. I know that we handed
12 over some related to the prior bad acts motion today,
13 but I would say it's occurred over time. And we have
14 a standing, you know, date with counsel. If he wants
15 to come look at our file, he can.

16 THE COURT: Okay. So I'm going
17 to leave that to counsel at this stage.

18 Now, there are certain
19 requirements that I should be going over with you and
20 your client here, Mr. McMonagle. And the first
21 obviously is any terms, procedures for pretrial
22 discovery and inspection. We covered that. Unless
23 this Court hears that there's any problems with it,
24 I'm going to assume that that is proceeding in
25 accordance with the rules.

1
2 Now, there's some general stuff
3 under the requirements of a pretrial conference. They
4 talk about the stipulation of factual issues,
5 admissibility of evidence and the like.

6 I don't know whether we're there
7 at that stage because a lot of it has been -- but I
8 always ask counsel to keep that in mind, that
9 everything we're doing is still ultimately in a
10 direction of trial.

11 So that if these stipulations do
12 come along and admissibility of evidence, think in
13 terms of being able to keep a list of it so it's not
14 something we have to do at the end at the last moment
15 to try and work these out. I know that good counsel
16 generally follow those kinds of rules. And they talk
17 about exhibits and evidence so as to avoid the
18 unnecessary delay.

19 Again, the number of witnesses
20 that are going to be of a cumulative nature, you're
21 not going to begin to know that until you know the
22 identities of their proposed 404(b) and whether I
23 would even permit one or all to testify. So that
24 obviously is going to be sensitive on further hearings
25 on that motion.

1
2 But there are certain things
3 that would fall into your obligations now, and that
4 would be the defenses of alibi and mental infirmity or
5 anything in that regard. The rules are pretty clear
6 on that, but that's something we should get going on
7 soon.

8 So I can set down a date. If
9 you're going to be exploring that, it's certainly
10 within 15 to 30 days if that is going to be an issue.
11 Make sure you're capturing this. That's something
12 that we have in 15 -- I'll decide when I look at that.

13 So I have not seen any motion
14 for Bill of Particulars. Now, that's something that
15 is in our discovery rules, in my opinion often
16 underutilized, but I'm not inviting it if it doesn't
17 have to be there. But it is in our rules and it is
18 out there. And I certainly am a fan of it because
19 sometimes it begins to limit issues of what we're
20 doing here at trial.

21 So, again, I don't know whether
22 this is archaic, but they talk about establishing the
23 time and place of the offense charge and the corpus
24 delicti. I don't -- it has generally been, you know,
25 pled in this case that it's between January and

1
2 February as to an exact date. Obviously, any charge
3 to a jury does not require an exact date of an
4 offense.

5 You're proceeding with the
6 qualifying and labeling of any of the discovery and
7 the exhibits and that, and I'm sure you'll all follow
8 along with it.

9 Admissions of fact we talked
10 about.

11 I doubt there's going to be any
12 pleas to a various count in there.

13 There doesn't appear to be any
14 nol pros.

15 But then we're starting to get
16 to regarding determination of the suppress and return
17 of evidence. We will spend some time on scheduling
18 that out. We will hear the first motion on that
19 today.

20 Any severance, it doesn't
21 appear.

22 Again, the number of counsel.
23 Now, today you have counsel that will be moving
24 towards a pro hac vice admission; is that correct?

25 MR. McMONAGLE: That is correct,

1
2 Your Honor.

3 THE COURT: And that is -- name?

4 MR. McMONAGLE: Judge, Angela
5 Agrusa.

6 THE COURT: And, again, I
7 permitted you, clearly, to be able to sit at counsel
8 table, but Pennsylvania is kind of a stickler on the
9 pro hac vice motions. And all counsel that were
10 involved in previous hearings have now officially
11 withdrawn, so, as of everything that's out there, you
12 are the only counsel of record, Mr. McMonagle.

13 MR. McMONAGLE: Yes, Your Honor.

14 THE COURT: So I would address
15 you and I look forward to any motions in regards to
16 Ms. Agrusa.

17 MS. AGRUSA: Thank you for
18 allowing me to stay.

19 THE COURT: Again, I am limited
20 as to what you would be able to do in terms of any
21 actual court procedure. So that involves -- I don't
22 know what -- this says the length and number of
23 addresses of counsel, whatever that means. I don't
24 know about the length.

25 But then the number of

1 challenges of jurors and procedure for voir dire and
2 the like. Now, obviously that is going to be
3 important in this case. I mean, it hangs over this
4 case, which are pretrial publicity.
5

6 And, again, the Court is
7 operating under what is called a Decorum Order and it
8 is only necessitated because this is a case of public
9 interest. And, again, it is scheduled for the same
10 day that I was calling trial and pretrial matters in
11 my regular courtroom, but by the very nature of this
12 case, what appears to be large public interest, we
13 have scheduled and I see that we will continue to
14 schedule matters via separate scheduling.

15 The defendant will be present
16 and it will be in this courtroom subject to Decorum
17 Orders, so heads up on that, both to the press or any
18 interested parties that are here and the attorneys, so
19 be mindful of that.

20 But we will eventually then have
21 to begin to address at some stage any motions as to if
22 there is a change of venue or anything having to do
23 with what procedures we would do to try to select
24 jurors in this case if and when we get to that time.

25 All right. So that's kind of

1
2 what, you know, the rules suggest. Let me make sure
3 of my checklist as to anything else. I think that's
4 pretty much at least what the rules envision.

5 Now, how about counsel? What,
6 if anything, right now do you want that the Court can
7 do or anything that you're unsure of?

8 MR. STEELE: Your Honor, in
9 terms of dates and things that you're going to be
10 picking, the Commonwealth is ready to proceed. We're
11 ready to proceed in this matter. We're ready to go to
12 trial, so at the Court's earliest convenience we are
13 prepared to do so.

14 THE COURT: All right. Now,
15 that becomes important whether they really are or not.
16 They will, under Rule 600, always be in a posture of
17 saying they're ready.

18 MR. STEELE: We're ready.

19 THE COURT: You are ready to
20 proceed, but we're not going to call this case for
21 trial. And I don't see that there is any unreasonable
22 delay of the defense in this case.

23 Again, I fully understand the
24 defense's posture in its filing of its original habeas
25 corpus. This case is of a unique nature in how it

1 arrived at this court. So I don't see that as an
2 unreasonable delay. And pursuing cases of a unique
3 legal ruling as far as they're concerned.
4

5 And whether we call it
6 interlocutory or not, that is really for the Superior
7 or Supreme Court to decide whether to accept appeals
8 like that. I'll make my judgment as to whether they
9 are, in fact, interlocutory.

10 So I don't want to get into --
11 but the Commonwealth, and I do say this, will probably
12 always maintain it's ready to proceed to trial, Mr.
13 McMonagle. And that's important because I want your
14 client to be able to feel that, you know, however much
15 delay there has been leading up to the arrest, that
16 this Court stands ready, willing and able to afford
17 both parties a speedy trial.

18 But I recognize that it is
19 within the bounds of your ethical duty to be a zealous
20 advocate and to be an advocate that is fully prepared
21 and ready to present whatever you feel in your
22 client's interests, that are in his best interests. I
23 understand that. So I will need to hear from you in
24 that regard if you are not thinking that your speedy
25 trial rights are being followed.

1
2 Now, that does present -- you're
3 going to do the argument on the one pretrial, and then
4 we might retire again to get the calendars out and
5 then look long and hard at what we have to deal with
6 in terms of existing pretrial motions and presumed
7 pretrial motions or anticipated ones which you have
8 indicated you will file. And I don't want to leave
9 here again without setting deadlines for you to file
10 them and deadlines for the Commonwealth to file them.

11 But I do note this as a
12 backdrop. But we did talk and I want you to think
13 about it as we do this. You are probably one of the
14 most preeminent trial lawyers in this region, and you
15 alerted to me that you might not be available until
16 June. That's something we have to work on. It's
17 probably a long, hard look at your calendar.

18 And I don't want to, you know,
19 manage your business for you or anything like that,
20 but by being a preeminent trial lawyer, you get a lot
21 of trials, some of which go to trial, some of which
22 don't, but we need to deal with that because I
23 wouldn't want your trial status to deny your client at
24 least the ability to get an expeditious trial as long
25 as the Commonwealth is always going to be rising and

1 saying they're ready to go.

2 So, with that said --

3 MR. McMONAGLE: I did look
4 around when you said preeminent, Judge.

5 THE COURT: I consider you that,
6 I'll put it that way, Mr. McMonagle, considering I've
7 worked with the Commonwealth team here and I consider
8 them preeminent, but they're closed in to this county
9 here. That's where they do their work.

10 But you are a regional attorney
11 and hence a very, very large inventory of cases
12 awaiting trial, and that sometimes in itself is a
13 difficult procedural matter to deal with.

14 MR. McMONAGLE: Yes, Your Honor.

15 THE COURT: All right. I think
16 my checklist -- I think I went over most of it.

17 So let's talk about -- you know,
18 I don't have to make my ruling today, but I believe
19 that the motion filed by the defense -- this was a
20 motion that was filed on August 3rd of 2016
21 supplemented on August 12th of 2016. It is entitled
22 Defendant's Motion to Suppress the Recording of a
23 Telephone Call Obtained in Violation of Pennsylvania's
24 Wiretapping and Electronic Surveillance Control Act.
25

1
2 And that was supplemented on
3 August 12th of 2016 with a Commonwealth response
4 containing the actual, I believe, transcript of the
5 alleged recording. And that was filed September 1st.

6 So let me start, first, with
7 have you heard the phone call, Mr. McMonagle?

8 MR. McMONAGLE: Have I heard it,
9 Judge?

10 THE COURT: Yes.

11 MR. McMONAGLE: No.

12 THE COURT: Okay. So I have to
13 deal first -- if I'm -- I don't think that the Court's
14 determination is going to revolve around the actual
15 wording of the phone call. That could be subject of
16 another motion.

17 But they have taken the
18 liberty -- I am assuming this is a one-sided
19 transcription of a phone call that you have disclosed
20 in discovery?

21 MR. STEELE: Correct, Your
22 Honor.

23 THE COURT: So the phone call
24 exists. It's a matter for you to listen. If you have
25 assistance or experts to make sure that it's an

1
2 accurate transcription if and when it was ever to be
3 used, that's on you. They claim they have an accurate
4 transcript.

5 MR. MCMONAGLE: I don't
6 anticipate a problem with that, Your Honor.

7 MR. STEELE: And, Your Honor,
8 with that, my understanding on this was that we are
9 going to incorporate the exhibits, Commonwealth
10 exhibits, for this hearing.

11 THE COURT: Right. That's what
12 I'm doing here. I have Exhibit A and I have Exhibit
13 B.

14 Now, Exhibit A -- Exhibit B
15 appears to be an official court reporter transcribed
16 deposition. And it was -- the purpose the
17 Commonwealth seemed to add to it was to bolster an
18 argument that they made regarding knowledge of being
19 recorded, I'm assuming.

20 But that's a little different
21 than -- I don't see how the legal argument on what
22 state's wiretapping statute applies, if it applies.
23 They have kind of a dual argument in that regard. But
24 right now we can hold that open as to whether it was
25 an accurate transcription pending you listening to it,

1 but I don't think it looks like an issue either.

2 So with that said, your motion.

3 MR. McMONAGLE: Yes, sir.

4 THE COURT: You may address it.

5 MR. McMONAGLE: Your Honor, as
6 the Court's correctly stated, Mr. Cosby comes before
7 the Court today requesting that he be entitled to the
8 protections of Pennsylvania's Wiretapping and
9 Electronic Surveillance Act laws.
10

11 This Court is well aware that in
12 the State of Pennsylvania, the State of Pennsylvania
13 criminalizes the interception and disclosure of phone
14 conversations without the consent of both parties. In
15 Pennsylvania we choose to protect our citizens from
16 such invasions. We're pretty vigilant, quite frankly,
17 in the way we protect our citizens from such an
18 invasion of privacy.

19 In 2005, a citizen of a foreign
20 country, Gianna Constand, while on foreign soil
21 recorded a phone conversation with Mr. Cosby while he
22 was in the United States. And she did so without his
23 consent.

24 Despite the fact that
25 Pennsylvania criminalizes use of such evidence, the

1
2 District Attorney's Office seeks to do just that, use
3 it. The District Attorney has argued that this Court
4 should ignore Pennsylvania law and, instead, apply the
5 law of another country, that being Canada, which
6 permits such intrusion of one's privacy.

7 We submit that to do so would
8 violate Mr. Cosby's rights. This Court is aware that
9 any time that there is a collision like we have here
10 of laws or a conflict of laws, the Court has to begin
11 as a threshold matter to decide whether or not that
12 law that is at issue is procedural or substantive.
13 And I think the Court's aware that in our legal papers
14 we have argued that this is a procedural rule.

15 If it is a procedural rule, then
16 it makes it really easy in terms of the Court's input.
17 If it's deemed procedural, then this Court must apply
18 the law of forum, and in that particular instance that
19 would be Pennsylvania.

20 We argue consistent with the
21 pronouncements of Commonwealth versus Dennis in its
22 holding. The questions that involve the admissibility
23 of evidence are procedural and must therefore be
24 analyzed under Pennsylvania law.

25 However, even if this Court were

1
2 to come to a conclusion different than Dennis and
3 determine that the question of the admissibility of an
4 oral communication like this one is, in fact,
5 substantive, the result is the same. Pennsylvania law
6 applies. And here's why.

7 If a conflict involves a
8 substantive law, the Court must analyze which forum
9 has the greater interest. And I think we're all in
10 agreement on that. The level of inquiry this Court
11 must now embrace is if it's substantive, which
12 jurisdiction, whether it be Pennsylvania or Canada,
13 has the greater interest?

14 I'd invite the Court to what
15 transpired in Commonwealth versus Rebert. There, the
16 Superior Court was charged with the task of analyzing
17 a conflict of law question in a Pennsylvania murder
18 case. In that particular instance, tragically, James
19 and Victoria Shugar were murdered here in
20 Pennsylvania.

21 In that case the defendant,
22 Mr. Rebert, tried to argue that the Pennsylvania court
23 should apply New York law in analyzing the
24 admissibility of what was a jailhouse confession. And
25 he argued that the confession occurred in New York and

1
2 that it was obtained in a New York prison and it was
3 orchestrated by New York prison guards.

4 It's the typical scenario that
5 this Court has obviously seen time and time again
6 where law enforcement officers, whether they be in a
7 prison or some other locale, decide that they're going
8 to send in somebody to the prison to try and obtain a
9 confession. Well, they did in New York and they were
10 successful.

11 And the defendant said, not so
12 fast. You got to apply New York law. And New York
13 law, he said, would require evidence suppression.

14 And then the Superior Court said
15 in deciding this, not so fast, Mr. Rebert. You hold
16 on. We're going to look hard to determine which
17 state, New York or Pennsylvania, has the greater
18 interest. And they did. And here's what they wrote.
19 And I'm coming right out of that opinion.

20 The Shugars, James and Victoria,
21 they said, were Pennsylvania residents. The
22 defendant, Mr. Rebert, was a Pennsylvania resident.
23 The crime occurred in the Commonwealth of
24 Pennsylvania. The Pennsylvania State Police
25 investigated the murder. A Pennsylvania D.A.

1
2 prosecuted the murder. And many of the witnesses, the
3 Court said, were from the State of Pennsylvania. The
4 Court then came to the inescapable conclusion that New
5 York really had no interest in the outcome of the case
6 and they so ruled.

7 I now ask you to apply that test
8 to the facts of this case step by step. In 2004, Mr.
9 Cosby was a resident of the State of Pennsylvania. In
10 2004, Miss Constand was a resident of the State of
11 Pennsylvania. It is alleged in this case that this
12 incident happened in the State of Pennsylvania at Mr.
13 Cosby's house. The case was investigated, without
14 question, by the Montgomery County District Attorney's
15 Office which is here in Pennsylvania. And the
16 Montgomery County District Attorney's Office has now
17 prosecuted the case with criminal charges.

18 Stated simply, Canada has
19 absolutely no interest on this issue as it now sits
20 here before you in Pennsylvania. And any interest, I
21 submit, that Canada might have pales in comparison to
22 the interest of our state and our jurisdiction, and
23 I'd ask you to apply the law of the Commonwealth of
24 Pennsylvania. And if I do, then there can be no
25 question that the evidence has to be suppressed.

1
2 THE COURT: But obviously the
3 Wiretap Act criminalizes the behavior.

4 MR. McMONAGLE: Yes, sir.

5 THE COURT: So there's certain,
6 you know, venue of where it occurred. This is not
7 where anybody is being charged with a crime. This is
8 an evidentiary matter whether they can use it.

9 MR. McMONAGLE: No question.

10 THE COURT: You're saying it's
11 still procedurally fact that he is a Pennsylvania
12 resident, they can't use it. But the act,
13 Pennsylvania's act is about charging someone, isn't
14 it, not about whether you're using it in evidence?

15 MR. McMONAGLE: Well, it is
16 about a prohibition of conduct that we're not going to
17 tolerate invasions of privacy here in Pennsylvania set
18 out that way without dual party consent.

19 And what we are arguing and I
20 think what is allowed under the statute is if someone
21 tries to use it in the State of Pennsylvania, it can
22 be illegal. And if someone tries to use it in a
23 criminal prosecution in Pennsylvania, it can be
24 suppressed. Well, someone's trying to do that.
25 Ironically, it's law enforcement in this particular

1 case.

2
3 The only question before you, I
4 submit to the Court, is what law you're going to
5 apply? They want you to apply Canada's law, a foreign
6 country. And let's think about that for a second. I
7 mean, it's all nice and warm and fuzzy because it's
8 Canada, but don't make it Canada for a second. Make
9 it Iraq, make it North Korea, make it some
10 jurisdiction that intends to use subterfuge or
11 trickery or a lie like in this case to get somebody on
12 the phone and record them.

13 Do we want them -- Courts like
14 Pennsylvania to apply the law of some foreign country?
15 And the answer is no.

16 THE COURT: Right. So tell me
17 whether it changes it at all that it appears that the
18 phone call that was recorded, that your client was in
19 California.

20 MR. McMONAGLE: Yes, sir.

21 THE COURT: And is that a
22 stipulation that everybody agrees to?

23 MR. McMONAGLE: I believe it is.
24 And I would say to the Court -- and it's the same
25 argument -- if for some reason this Court found that

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2 California had any interest -- and I don't believe
3 they do. Like Canada, California has absolutely no
4 interest in this, has no dog in this fight. But if
5 you applied California law, it would be the same.

6 THE COURT: If I applied
7 California law.

8 MR. McMONAGLE: Sure.

9 THE COURT: I'm trying to
10 piggyback on the reasons that you tell me that I have
11 to apply Pennsylvania law. You call him a resident of
12 Pennsylvania. Is that a factual thing that we have to
13 establish?

14 If you're going to move along
15 and claim, well, essentially this is the statute when
16 you're not prosecuting somebody under it and you're
17 really utilizing it to say that it's a prohibition,
18 therefore we want to protect Pennsylvania residents,
19 is he a resident of Pennsylvania? Is he a resident of
20 California making a phone call from California? But
21 you're arguing because he's being prosecuted for an
22 related crime in Pennsylvania, he should get the
23 procedural protection?

24 That's kind of what I'm hearing
25 you say.

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2 MR. McMONAGLE: Unfortunately,
3 because of the 12-year delay we have to go back in
4 time to the event. Normally it's a little bit more
5 timely. But at the time of incident, the time that
6 brings us here, Mr. Cosby was a resident of
7 Pennsylvania. That's not in dispute. I'm sure Mr.
8 Steele is not taking that position. He lived in
9 Cheltenham. And the house that was in question in
10 this case, his house --

11 THE COURT: But he also may have
12 lived in California.

13 MR. McMONAGLE: Well, that's
14 certainly possible, too. And people can have dual
15 residences and live in different countries.

16 THE COURT: I keep asking. If
17 the Commonwealth is not going to raise it, they're not
18 going to be -- again, this is not whether he is being
19 prosecuted for illegally wiretapping somebody else.

20 MR. McMONAGLE: Of course.

21 THE COURT: You are trying to
22 prohibit its use because it would seem wrong if we
23 have a statute that makes it illegal if it's only one
24 party consent, it certainly would seem wrong to admit
25 it into evidence in a case. That's kind of what your

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argument is.

MR. McMONAGLE: It would be illegal.

THE COURT: Right. And the argument is we protect our residents; right?

MR. McMONAGLE: Yes.

THE COURT: If you want to record, you better have two. And if you're being recorded, you better be in this state.

MR. McMONAGLE: That's correct.

THE COURT: Okay. But he wasn't in this state.

MR. McMONAGLE: No.

THE COURT: And his only connection to this state is he happened to be a resident, but he made the call from California.

MR. McMONAGLE: Well, that's not the only connection to this state. The connections to this state are enormous in terms of your analysis. I mean, what this Court is required to do under conflict of law principles in deciding whether it's Pennsylvania's law or Canada's law is look at the whole case. Look at it.

Mr. Cosby resided in

1
2 Pennsylvania. Miss Constand resided in Pennsylvania.
3 The alleged incident occurred in Pennsylvania. It's
4 the same inquiry in Rebert.

5 The Courts are going to go step
6 by step and say, wait a second. What state has the
7 greatest interest? We're trying this case in
8 Pennsylvania. He's going on trial in Pennsylvania.
9 God forbid if he's convicted, he's going to be
10 punished under Pennsylvania law. No other
11 jurisdiction in this country or anywhere in the world
12 has a greater interest in the outcome of this ruling
13 than the State of Pennsylvania.

14 And for all those reasons,
15 Judge, if you look at the analysis provided by the
16 Superior Court in other cases, you're going to have to
17 come down somewhere on this.

18 And I know that Your Honor is
19 asking about the statute itself, but time and time
20 again the case law has permitted suppression.

21 THE COURT: I am not talking
22 about -- but, again, the analysis that gets you there,
23 you're falling back -- because I get all the
24 connections that the alleged crime occurred here; that
25 at the time the alleged crime occurred, both parties

1
2 were here; whether she was a technical resident of the
3 Commonwealth with, whether he was a resident of the
4 Commonwealth, nobody's established yet. I can just
5 say maybe Mr. Cosby has residences in other states.

6 And coming back about protecting
7 our citizens, not protecting the transient, you know,
8 people that will come through our state and they get
9 our protections here, your basic claim is everybody
10 was a resident. That locks us into Pennsylvania when
11 the crime occurred.

12 And then a year later nobody's
13 in Pennsylvania when the alleged discretion, you know,
14 the alleged indiscretion under a wiretap occurred.
15 Nobody was in Pennsylvania then. One was in Canada;
16 one was in California.

17 What you're saying is pay no
18 attention to that because now we're back here again
19 for something that allegedly happened a year before
20 and a trial that's happening now in Pennsylvania with
21 a Pennsylvania prosecution.

22 I'm just not -- maybe you're
23 correct, but you see I'm getting a little attenuated
24 when they didn't commit the alleged violation at the
25 time anybody was in Pennsylvania.

1
2 Can you argue, hey, we've got to
3 protect our residents because that is one of the
4 foundations?

5 MR. McMONAGLE: Yeah. The
6 distinctions are made by distinctions. I think
7 they're distinctions without a difference. And the
8 reason that I say that is you have to look, again, at
9 the totality of the circumstances in real time. Look
10 at Rebert.

11 THE COURT: I have.

12 MR. McMONAGLE: In Rebert,
13 everything happened in New York in terms of the
14 intrusion, for lack of a better description, the
15 evidence that was being suppressed.

16 So when you look at conflict
17 purposes and conflicts laws and what's being protected
18 here, I submit to the Court that step by step by step
19 there is no other forum that has any interest in the
20 outcome of this particular issue and no other forum
21 that could even make a complaint.

22 Let me give you another example.
23 When Miss Constand went and made her complaint a year
24 after the fact, she had relocated to Canada. She
25 actually went to Canadian authorities. And you know

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2 what they said? Not our problem. Call Pennsylvania.
3 In fact, they took no steps to investigate the case.
4 They took a page interview and they called
5 Pennsylvania as fast as they could and they said, this
6 is your problem. This is your interest. We have no
7 interest. Of course, they don't.

8 Of course, California has no
9 interest. Just the fact that a nationally recognized
10 entertainer happens to be in California on business
11 and own a home in California doesn't change the fact
12 that everything that has to do with this case is right
13 here in your county in Pennsylvania.

14 THE COURT: Well, does it change
15 the fact that the alleged victim in this case didn't
16 record anybody?

17 MR. McMONAGLE: That the victim
18 didn't record anybody?

19 THE COURT: That's not the
20 claim. I haven't read any claim that the alleged
21 victim recorded anybody.

22 MR. McMONAGLE: I never
23 suggested that she did.

24 THE COURT: Okay, but you --

25 MR. McMONAGLE: Are you asking

1 me whether that matters?

2
3 THE COURT: Well, you're saying,
4 look --

5 MR. McMONAGLE: Well, her mother
6 did.

7 THE COURT: I understand who
8 they allege did it, but she's not a subject of
9 anything here. Clearly the mother couldn't be
10 prosecuted in Canada; correct?

11 MR. McMONAGLE: That's correct.

12 THE COURT: The mother undertook
13 an individual decision to record this conversation in
14 Canada where she was perfectly permitted to do so.

15 You keep talking about Miss
16 Constand being a resident of Pennsylvania at the time
17 of the crime.

18 MR. McMONAGLE: She's the
19 complainant.

20 THE COURT: I know who she is,
21 but not the person who recorded the conversation --

22 MR. McMONAGLE: Yes.

23 THE COURT: -- which is a little
24 different than some of the other cases, meaning the
25 actual case participant, she didn't record anything.

1
2 They just have -- they're claiming they have a piece
3 of evidence --

4 MR. McMONAGLE: Yeah.

5 THE COURT: -- that was
6 perfectly permitted. I mean, there was something, I
7 also believe, in one of the earlier hearings regarding
8 whether, in fact, Miss Constand would be prosecuted
9 for recording phone calls. I believe there was
10 testimony by -- was it Miss Troiani or Miss Kivitz
11 that that's why they went to their office, that there
12 were -- but nobody ever got prosecuted for recording
13 it; correct?

14 MR. McMONAGLE: Not to my
15 knowledge.

16 THE COURT: And the only
17 recording that was made was made by the victim's --
18 the alleged victim's mother.

19 MR. McMONAGLE: That's correct.

20 THE COURT: And you're saying it
21 just doesn't make a difference.

22 MR. McMONAGLE: No. The law,
23 the wiretap law doesn't say it's got to be a --

24 THE COURT: The wiretap law
25 doesn't talk about --

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MR. McMONAGLE: Right.

THE COURT: -- admitting evidence.

MR. McMONAGLE: So I don't think whoever the party is that engages in the, what I'll call, conduct that's in Pennsylvania, it doesn't matter who it is, you just can't use it in Pennsylvania. That's it. Unless you record from another jurisdiction that has greater interest.

In this case, the party who recorded it recorded it in Canada. Canada has no interest in the outcome of this issue. And for that reason, the only law you can apply is Pennsylvania. And when you apply that law, whether it be Miss Constand, her mother or the man in the moon, you can't admit the evidence.

THE COURT: Got you. All right. Who would like to argue from the Commonwealth? Come on over to the podium.

MR. STEELE: Do I need to go there?

THE COURT: Argue where you want, but there's a nice microphone here. The collective members of the audience would like to hear

1
2 you loud and clear.

3 MR. STEELE: I'm focused on you.

4 THE COURT: I hear you, but the
5 microphone will project your focus back to them.

6 MR. STEELE: All right. So I
7 think it's helpful to look at this from a fact of
8 standpoint. The original motion that was filed by the
9 defense indicated that the defendant was in
10 Pennsylvania at the time. Then there was the
11 supplemental that he was in California.

12 And I think also important to
13 this and to the assessment is he is making the call.
14 It is a phone call that he makes to Canada, a phone
15 call between the defendant and Mrs. Constand.

16 Now, looking at the
17 circumstances of the call, one of the evaluations that
18 should be looked at on this is: Is there an
19 expectation of privacy? Do you have an expectation of
20 privacy that you're not being recorded at the time?

21 And when you look at this from a
22 factual basis of the circumstances around the call,
23 similar to Your Honor calling and somebody saying that
24 this is being recorded, well, that's not a violation
25 of the Wiretap Act. That's you giving up your

1 expectation of privacy and engaging in this call.

2 So in this call there is a
3 beeping sound. And that's outlined in the factual
4 basis that we presented, but also in the transcript
5 itself. And there's back and forth on whether this
6 was a parrot or something else.
7

8 THE COURT: Well, let me ask
9 you. Obviously you have two responses to their
10 motion.

11 MR. STEELE: Uh-huh.

12 THE COURT: One is that he has
13 waived his expectation of privacy.

14 MR. STEELE: Correct.

15 THE COURT: Now, pretty much
16 most of that can be made out. The recording is the
17 recording where there was a claim that there is beeps.
18 Now, I have not heard it. I don't know whether you're
19 able to play it.

20 But is it determinative of me or
21 someone else to listen and say that's not a parrot,
22 that's beeping? So then when he says is that beeping
23 and she keeps saying, no, it's a parrot, that in order
24 for me to determine his expectation of privacy, I've
25 got to make a determination is it an electronic beep

1 or is it a really good parrot?

2 MR. STEELE: No.

3 THE COURT: I don't have to do
4 that?

5 MR. STEELE: You don't.

6 THE COURT: But you're claiming
7 that. You're saying he knew what he was doing. He
8 said, I think you're recording me. So that works for
9 your argument. He's saying, look -- so you keep
10 telling me, Judge, whatever that lady was saying on
11 there, that ain't a parrot. That's an electronic
12 recording and he knew it. And he said you can say
13 what you want, parrot, no parrot, and you move on.

14 Part of your evidence is that he
15 definitely makes a humorous remark about it to say
16 that he knew it wasn't a parrot, right, in his
17 deposition?

18 MR. STEELE: Okay. So that's
19 where you get to the second point on it, which is the
20 evaluation that we just talked about is, yes, he
21 believes that he is being recorded at the time, which
22 it is important for the analysis.

23 And we corroborate that not just
24 from what he says in the transcript on the call and
25

1 asking about this beeping noise, but what he says in
2 the deposition when he is asked about it and he said
3 yeah, I thought I was being recorded. And you have
4 the transcript on it.
5

6 THE COURT: Do we have the
7 recording? Because if your whole argument is -- well,
8 stop with the parrot. Even if that's what
9 Mrs. Constand said, you hear this recording and you
10 know somebody is recording it.

11 And then your position is he
12 just kept going, he knew what that beeping was. And
13 in fact, he let us know nine, 10 months later he knew
14 exactly what the beeping was. But maybe he says I
15 didn't say anything incriminating, I didn't do
16 anything, I just had a conversation.

17 That turns around you now want
18 to use it, but I don't know whether it was a beeping
19 or whether it sounded like a parrot and whether it was
20 plausible, and if it was plausible that it was a
21 parrot at the time and he said no harm there, there's
22 a parrot in the background, I'm going to keep saying
23 things.

24 I think that goes to my
25 determination, doesn't it?

1
2 MR. STEELE: Well, then we'll
3 get you the recording, but I don't think it does.

4 THE COURT: All right. Keep
5 going.

6 MR. STEELE: Because it is his
7 expectation of privacy, what he thinks, you know, at
8 the time. And the assessment, he's given it. He says
9 that he thought he was being recorded. So that in and
10 of itself --

11 THE COURT: He said he thought
12 he was being recorded until she kept saying, no, it's
13 a parrot. Maybe it was a really good parrot that was
14 able to mimick back beeps. I don't know that. I just
15 don't know it.

16 But that's your argument, that
17 it was ludicrous that it was a parrot. It's
18 ridiculous that it was a parrot. And he knew right in
19 there that it wasn't a parrot. Maybe he thought he
20 wasn't going to say anything that he thought anybody
21 was ever going to use against him and he just kept
22 going.

23 But I'd hate to see the
24 determination of being that -- you're arguing
25 something and I don't know whether it was a parrot or

1
2 a beep. Because people know electronic beeps of
3 recording, don't they? Have you heard it? You
4 haven't heard it either?

5 MR. McMONAGLE: No.

6 MR. STEELE: We can get it and
7 bring it down here if you'll give us a couple minutes
8 to do that.

9 THE COURT: Ask somebody to do
10 it because if he hears it -- his response right now is
11 he had no clue he was being recorded. Zero clue.
12 That's got to be his position.

13 MR. STEELE: He didn't say that.

14 MR. McMONAGLE: Judge --

15 THE COURT: Stop. He had no
16 clue because had he had a clue -- I'm going to ask him
17 to come back in rebuttal to rebut your -- your main
18 piece is before I even get to which law applies and
19 how it applies is his expectation of privacy. He
20 never addressed that once with me. He never said
21 anything. He said, Judge, his interest is in this
22 Commonwealth procedurally. You got to suppress it.

23 So now you're making the
24 argument that this man knew he was being recorded and
25 he never had a chance to respond to it. That's all

1
2 I'm saying.

3 MR. McMONAGLE: It's actually a
4 little simpler than that.

5 MR. STEELE: Here, you can have
6 the microphone.

7 MR. McMONAGLE: Judge, he's lied
8 to in that conversation. She tells him she's not
9 recording. And getting back to your first question,
10 she called him, left a phone message with him in New
11 York, and then he called her back.

12 So to both points that have been
13 raised, it doesn't matter that at some point in time
14 he may or may not have heard beeping. By the time
15 he's deposed however many months later, someone told
16 him, oh, he got wiretapped. What matters is she lied
17 to him in that conversation and didn't have his
18 consent to record it.

19 THE COURT: Their whole premise
20 is whether she said it or not, he knew he was being
21 recorded. Now, there's not many cases on this, but I
22 don't want this to go down -- his position is yes, his
23 main -- that was the first thrust of your argument,
24 Mr. Steele. He waived it.

25 Now he's arguing, well, you

1
2 can't waive it because a lie is a lie. Even though
3 everything in the background could be saying you are
4 being recorded, beep, beep, beep, that indicated --

5 MR. McMONAGLE: That's not the
6 case.

7 THE COURT: I don't know. You
8 haven't heard it. You didn't hear any background.
9 Nobody's heard this thing.

10 MR. McMONAGLE: I can tell you
11 that's not the case.

12 THE COURT: Well, I just think I
13 would need to hear it because your argument is it is
14 not a reasonable expectation of privacy. And
15 reasonable sounds like somebody has to make a
16 determination of reasonable. You've made it.

17 MR. STEELE: He made it, not me.

18 THE COURT: He argues somebody
19 told him later on it wasn't a parrot.

20 MR. McMONAGLE: She lied to him
21 in the conversation. Why are we having this
22 conversation?

23 THE COURT: My fault. I didn't
24 mean to break this down. I need to hear the
25 recording. That's all. Not very long. It sounds

1 like you'd have to hear it in terms of your position.

2 MR. STEELE: No.

3 THE COURT: I don't?

4 MR. STEELE: We'll play it for
5 you, but no, because that's the -- the point here is
6 you don't have an expectation of privacy. And just
7 because you're being recorded, you talk and you say
8 things and he decides to be somewhat cagey and not do
9 certain things on the phone because he thinks he's
10 being recorded --

11 THE COURT: Their claim is he
12 did not know he was being recorded. That's what Mr.
13 McMonagle is now saying. And he didn't know it
14 because he asked the direct question, and she said I
15 am not recording you. He relied upon it and continued
16 to speak.

17 MR. STEELE: That's not what he
18 says in the deposition.

19 THE COURT: Okay. Let's leave
20 the deposition out of it because their claim there is
21 he could have been told later on you were recording it
22 when he didn't think he's being prosecuted.

23 So, the Court -- again, if it's
24 going to be part of this, I think we need to hear the
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1
2 background of this recording, and he hasn't even heard
3 it, because it's your main argument. Your other
4 argument might be --

5 MR. STEELE: You haven't let me
6 get to the rest of the argument. Okay? I have a list
7 and I'm --

8 THE COURT: I'm going to listen
9 to all of them. Relent with that one.

10 MR. STEELE: Sure. That's how
11 we're going through it.

12 THE COURT: All right. Let's
13 go.

14 MR. STEELE: All right. So no
15 expectation of privacy, similar to what we deal with
16 in calls, you know, from the prison, from anyplace
17 elsewhere you have, hey you're being recorded and
18 people talk anyway on them. He believed he was being
19 recorded and he still talked anyway and made
20 admissions that should come in. And then that
21 deposition and that transcript of the deposition
22 support that.

23 Now, we get to the second
24 aspects.

25 THE COURT: Are you going past

1
2 the expectation of privacy?

3 MR. STEELE: I am.

4 THE COURT: Let's just finish
5 that because, whether I hear it or not, the reason
6 that you now allege that -- that you can tell from the
7 recording, both the transcript and if I listen to it
8 in real time, that right then and there he knew he was
9 being recorded. Because it's not important --

10 MR. STEELE: I don't think that
11 that's -- that is integral to the decision making.

12 THE COURT: Okay. Well, then
13 point to me what was the deposition testimony that
14 indicates to you -- the deposition appeared to be
15 taken when? Anybody know when this was taken?

16 MR. STEELE: So if you turn
17 to --

18 THE COURT: Turning to your
19 Exhibit B?

20 MR. STEELE: Right.

21 THE COURT: And there's no date
22 on my deposition.

23 MR. STEELE: Yeah. That's --
24 it's indicated in the motion. March 29th, 2006.

25 THE COURT: So what are the

1 parts in there that you're saying now, over a year
2 later, that he now says he knew he was being recorded?
3

4 MR. STEELE: All right. So if
5 you go to the top of 211.

6 THE COURT: 211, got it.

7 MR. STEELE: There's a question.
8 Part of the question: "Do you have a beeping going on
9 on your phone?"

10 THE COURT: This is Miss
11 Troiani's questions to Mr. Cosby?

12 MR. STEELE: Correct. "Why did
13 you say that? I don't trust anybody. Do you believe
14 that you were being tape-recorded in that
15 conversation? I believed there is a possibility."

16 MR. McMONAGLE: Can you read
17 that in its entirety?

18 THE COURT: "I believed there is
19 a possibility. I think she said something like, wait
20 a minute, I have to get away from phone" -- no, "from
21 some people or do something like that."

22 MR. McMONAGLE: Yes.

23 THE COURT: That's his answer.

24 MR. STEELE: Uh-huh.

25 THE COURT: Then the next is a

1
2 question. She says, "She said no, no, not at all. I
3 have a parrot."

4 MR. STEELE: Do you want me to
5 read through that to get to where we are?

6 THE COURT: That's where you're
7 talking.

8 MR. STEELE: No. We got to keep
9 going.

10 THE COURT: You take me to the
11 place. You said the first is his answer "I believed
12 there is a possibility."

13 MR. STEELE: Right.

14 THE COURT: What's the next one
15 that indicates?

16 MR. STEELE: All right. So, and
17 then the discussion here is about why, like, he's not
18 giving her certain information. And it relates to the
19 piece of paper that he said he was going to send her,
20 you know, with the drugs on it.

21 So then at the bottom of the
22 page, the question is: "Why didn't you want to tell
23 her at that point?"

24 "Answer: The parrot.

25 "Question: Because you believe

1
2 you were being taped? Is that what you are saying?

3 "Yes."

4 Unequivocal in terms of he
5 believed at the time he was being taped and that's why
6 he didn't say certain things on the phone.

7 Now, he says other things that
8 we submit are admissions that we want to use in this
9 case. But he believed he was being recorded at the
10 time and says so unequivocally, so there's no
11 expectation of privacy that he has. Therefore, it's
12 admissible.

13 THE COURT: So you're saying at
14 this stage when he said -- "Why didn't you want to
15 tell her at that point" and he said, "The parrot,"
16 that that is his recollection of the conversation?

17 So he knew he was being recorded
18 at the time, said the parrot obviously to be humorous
19 in terms of that parrot was really the recording, he
20 knew it was recording and he just wasn't going to say
21 anything that he thought could be used against him or
22 could be incriminating or something he just didn't
23 want recorded?

24 MR. STEELE: I believe that's a
25 fair assessment.

1
2 THE COURT: That I can
3 understand. I'm going to give you a chance to rebut
4 that, but they raise it as to why it's an exception to
5 your whole argument.

6 MR. McMONAGLE: Yes, sir.

7 THE COURT: Go ahead.

8 MR. STEELE: So, I mean, that
9 goes to the aspects of no reasonable expectation of
10 privacy.

11 So then you deal with the second
12 part of this under more of the wiretap laws and what
13 we're dealing with in Pennsylvania's Wiretap Act,
14 California's Wiretap Act and Canada's Wiretap Act.

15 Our suggestion on this point is
16 the defendant from California calls Canada. When you
17 do that, you are allowing yourself to fall under their
18 rules. You know, when you leave a message on
19 someone's -- on somebody's tape, when you do things
20 along those lines, you are falling under that
21 jurisdiction's rules with this.

22 So Miss Constand violated no
23 rules from Canada. It's a one-party consent. She's
24 permitted to tape record somebody who is calling in.
25 And she did that in this case.

1
2 So when you look at the laws and
3 how this is to be resolved, if you look at -- and I'll
4 spell it -- S-I-N-H-A versus Sinha which talks about
5 stating the flexible conflict of law approach in
6 Pennsylvania and then finding a similar
7 interest-oriented approach is appropriate for
8 resolution of conflicts between the law of the states
9 of the United States and the law of another country.
10 That is in cases where -- that do have an
11 international dimension.

12 So what you're looking at here
13 is, you know, Canadian law which permits this to go
14 on. And if you look at the cases in support of this,
15 like Housman, like Larrison, they, I believe, are on
16 point with this issue. Rebert is not.

17 And, as we footnoted in Rebert,
18 it did not involve a conflict analysis regarding
19 wiretap laws. It instead involved statements made by
20 a New York prisoner to a jailhouse informant about
21 Pennsylvania murders.

22 When it comes to conflicts of
23 all the wiretap statutes, Housman and Larrison are the
24 controlling cases in this regard and, under both, that
25 this is admissible based upon those circumstances.

1
2 And Pennsylvania's wiretap law does not apply, you
3 know, to this. Canada's does. And it was lawfully
4 recorded in Canada and should be used in this case.

5 THE COURT: All right. Is that
6 it?

7 MR. STEELE: And before I step
8 aside, the opinion that is being relied on for this is
9 an unpublished opinion that is not persuasive.

10 THE COURT: You wouldn't ask me
11 to rely on an unpublished opinion, would you, Mr.
12 McMonagle?

13 MR. McMONAGLE: Judge, we set
14 forth the specific nature of it in our moving papers
15 that it was unpublished and I think I even said that
16 to you.

17 THE COURT: What's our Superior
18 Court operating procedure say about that?

19 MR. McMONAGLE: We set that out
20 in our brief, too.

21 THE COURT: What did they say
22 about it? You just took up a lot of time and asked me
23 to rely upon a case that the Superior Court's
24 operating procedure say I'm not allowed to.

25 MR. McMONAGLE: Well, Judge, it

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actually --

THE COURT: It's not a holding.

MR. McMONAGLE: It's not a holding, but this Court can certainly consider the legal analysis offered by the Superior Court. I think to do otherwise would be ridiculous. And I think counsel --

THE COURT: Well, if they wanted me to, they wouldn't have made it a non-published opinion.

MR. McMONAGLE: Well, they certainly made the ruling they did in that case and it certainly affected Mr. Rebert and it should affect us. Let me just kind of address a couple points.

One of the issues that's problematic in Housman as you read Rebert is what do you do here and what do you do now when it's not Virginia and Pennsylvania where both states within the United States have made a conscious choice about how they're going to provide for expectation of privacy, both authored by the same federal Constitution, our Constitution.

What do we do now when it is another government's laws that we're trying to get

1 used and relied upon like in this case? They want us
2 now, you now to use Canada's law. Well, would
3 Canada's laws survive constitutional muster in
4 Pennsylvania or in the United States as written? We
5 have no idea. And that's a slippery slope in terms of
6 relying on Housman. Look at the analysis and you
7 never get there.
8

9 On the issue of this parrot, for
10 lack of a better description, I want you to just think
11 about what they're saying to you. What they're saying
12 to you is you can get a phone call from somebody,
13 return the call no matter where they are. They can
14 illegally, or in their country legally, record you.
15 You don't know it. You ask them if they're illegally
16 recording you. They lie to you and they tell you no.
17 And at some point in time during the conversation you
18 get a little suspicious.

19 Are you saying now that under
20 those facts this whole conversation comes in when you
21 are recorded from the beginning without being told,
22 without your consent, when you are lied to when asked
23 about whether or not you're being recorded, and at
24 some point in time you may figure it out?

25 Do you then redact what it is

1
2 you were supposed to figure out, the parrot is not a
3 parrot and you're being lied to? I submit to the
4 Court the whole thing stinks and you ought to throw it
5 out.

6 THE COURT: All right. Well,
7 what do you want to do about -- I can take it under
8 advisement. You've made the argument that he waived
9 it. And to do that, I'd have to hear the actual
10 context in which your argument would make sense, you
11 know. I'd just have to hear it because you're both
12 arguing.

13 His position is you never
14 ever --

15 MR. STEELE: Just give us a
16 couple-minute recess. We'll bring it in and present
17 it to you. Okay?

18 THE COURT: Okay. Let's deal
19 with, before we would retire, to at least try to come
20 up with some dates. How are we going to approach them
21 in terms of importance? So far I have two outstanding
22 motions that would have to have hearings. I have his
23 original one to suppress the deposition as a
24 constitutional right violation and the Commonwealth's
25 404(b) motion. I leave the discovery motion out there

1 because it doesn't require any immediate action.

2 So what else do you -- is there
3 anything that you know today that you will be filing?
4

5 MR. McMONAGLE: Yes, sir.

6 Judge, at least at this point we are working on a due
7 process/pre-arrest delay motion. One was
8 preliminarily filed pre-Preliminary Hearing which was
9 tabled. And we are supplementing that now and that
10 will be filed.

11 Additionally, it's anticipated
12 that we'll be filing a motion --

13 THE COURT: How long do you
14 think it would take to do the pre-arrest delay motion?
15 I mean, to finish it?

16 MR. McMONAGLE: I would ask for
17 60 days if possible.

18 THE COURT: Sixty days?

19 MR. McMONAGLE: The only reason
20 I'd ask is we're accumulating now a lot of evidence
21 and discovery, et cetera, that go to the heart of the
22 issue. Particularly I'm trying to locate witnesses.
23 Are there witnesses that we no longer have access to
24 for purposes of pre-arrest delay? Perhaps they're up
25 in Canada.

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2 So we're working on that now. I
3 just want to try and give myself as much time as I can
4 to make a complete argument. But I obviously defer to
5 the Court. I'll get it done as fast as you want me
6 to.

7 THE COURT: Thirty days. Next.

8 MR. McMONAGLE: We're also,
9 Judge, going to be working on a Motion for Change of
10 Venue.

11 THE COURT: Of jurors or
12 location?

13 MR. McMONAGLE: Probably both.
14 And then the Court will decide which one, if any,
15 we'll get.

16 THE COURT: Where should we go?

17 MR. McMONAGLE: You want me to
18 tell you now?

19 THE COURT: Where would you
20 find -- this is a case of national interest.

21 MR. McMONAGLE: Yes.

22 THE COURT: This isn't a
23 regional-type case. It would at least follow along
24 the cases that have addressed this issue. In
25 Pennsylvania, a Philadelphia case of public interest

1
2 generally -- where would you go? Can't go outside the
3 bounds of the Commonwealth.

4 MR. McMONAGLE: No. And I
5 certainly was never going to file a motion that
6 requested that. I think what we'd like to do, what
7 we're trying to do with expert testimony is determine
8 where there would be a big enough county where perhaps
9 the pool itself wouldn't have been saturated.

10 We're concerned, quite frankly,
11 about Montgomery County for one very important reason
12 which we've previously argued, which is, unfortunately
13 and regretfully, while Mr. Cosby was awaiting and
14 being investigated in this case, there was an
15 election.

16 And in that election Mr. Cosby
17 for a significant news period was being referred to
18 before he was ever charged with a crime as a sexual
19 predator. Unfortunately, those references were made
20 by the now District Attorney, then First Assistant
21 District Attorney's campaign.

22 We are trying to develop as much
23 as we can, and why I've asked for the time on this is
24 to see just how much went out there.

25 THE COURT: Those pools -- the

1
2 only -- you're saying a pool large enough seeing that
3 we are the third largest pool, right, this county?

4 MR. McMONAGLE: I take your word
5 for that, Judge.

6 THE COURT: The only other two
7 would be Philadelphia and Allegheny. You're saying
8 another pool, either Philadelphia, Allegheny or
9 another large county not --

10 MR. McMONAGLE: Sure. We'll
11 have a big enough --

12 THE COURT: I understand. Look,
13 I'm not putting you to the test here, but again --

14 MR. McMONAGLE: I'm happy to
15 answer your questions.

16 THE COURT: -- I want to think
17 about it. I think I understand what you're saying.

18 MR. McMONAGLE: Yes.

19 THE COURT: So how long for
20 that?

21 MR. McMONAGLE: Judge, that is
22 requiring us to do a lot of due diligence in terms of
23 looking at things like population, looking at the
24 pretrial publicity that occurred here. We're trying
25 to accumulate all that happened during that campaign

EXHIBIT 10

**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA : No. 3932-16
: :
v. : :
: :
WILLIAM H. COSBY, JR. :

2018 MAR 15 PM 2:51

CLERK OF COURT
MONTGOMERY COUNTY
PENNSYLVANIA

ORDER

AND NOW, this 15th day of March, 2018, upon consideration of the Commonwealth's "Motion to Introduce Evidence of 19 Prior Bad Acts of the Defendant," the Defendant's response thereto, the Commonwealth's offers of proof, argument of Counsel on March 5 and 6, 2018, the post hearing briefs submitted by Counsel, and this Court's comprehensive review of Pa. R. E. 404 (b), reported appellate authority, an analysis of the proposed evidence under the "common plan, scheme and design" and "absence of mistake" exceptions, and a balancing of the probative value of the other acts evidence versus the risk of unfair prejudice to the Defendant, it is hereby **ORDERED** and **DECREED** that the Commonwealth's Motion is **GRANTED** in part and **DENIED**, in part, subject to further examination and evidentiary rulings in the context of trial.

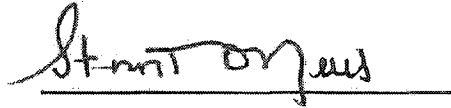
The Commonwealth shall be permitted to present evidence, pursuant to Pa. R. E. 404 (b), regarding **five** prior bad acts of its choosing from CPBA 2-12 through CPBA 2-19. See, Commonwealth v. Hicks, 91 A.3d 47, 55 (Pa. 2014) ("Hicks I") (stating that "[trial court] would have the authority to dictate how many cumulative witnesses may testify, but it cannot dictate which of those

witnesses the Commonwealth may call to prove its case"); Commonwealth v. Hicks, 156 A.3d 1114 (Pa. 2017) (plurality) ("Hicks II"); Commonwealth v. Gordon, 652 A.2d 317, 324 (Pa. Super. 1994); Commonwealth v. Frank, 577 A.2d 609 (Pa. Super. 1990) (enumerating balancing test factors); Commonwealth v. Smith, 825 A.2d 1086 (Pa. Super. 1993); Commonwealth v. Donahue, 549 A.2d 121 (Pa. 1988).

The balance of the Commonwealth's Motion is **DENIED**.

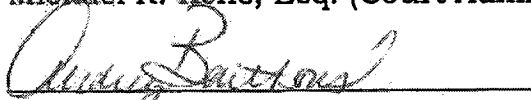
The Commonwealth shall identify to the undersigned and to Defense counsel which witnesses it intends to call by March 19, 2018.

BY THE COURT:



STEVEN T. O'NEILL J.

Copies of this Order mailed on 3/15/18 to the following:
Lane Vines, Esq.
Thomas A. Mesereau, Jr., Esq.
Kathleen Bliss, Esq.
Jason Hicks, Esq.
Becky S. James, Esq.
Kevin R. Steele, Esq.
M. Stewart Ryan, Esq.
Kristen Gibbons Feden, Esq.
Michael R. Kehs, Esq. (Court Administrator)



Secretary

PROOF OF SERVICE

I hereby certify that this 23rd day of October, 2018, I have served the attached Petition for Review, including its Exhibits, on the persons and on the dates and manners set forth below, which satisfies the requirements of Pa.R.A.P. 121.

VIA PACFILE AND UNITED STATES POSTAL SERVICE

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