IN THE SUPERIOR COURT OF PENNSYLVANIA
FOR THE EASTERN DISTRICT

NO. 3314 EDA 2018

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

WILLIAM H. COSBY, JR.,
Appellant

BRIEF FOR APPELLANT

Appeal of William H. Cosby, Jr., from the denial of Post-Sentence Motions on October 23, 2018, by the Honorable Steven T. O'Neill, Judge, Court of Common Pleas, Montgomery County

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I.

STATEMENT OF JURISDICTION

Jurisdiction over this matter is conferred upon This Honorable Court by §742 of the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, §2, (42 Pa.C.S.A. §742).

II.

ORDER OR OTHER DETERMINATION IN QUESTION

A. Order dated February 4, 2016

> **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 of Habeas Corpus and, therefore, the Habeas Corpus Petition seeking dismissal of the charges is here by **DENIED**.
>
> BY THE COURT

[R. 1048a].

B. Order dated December 5, 2016

> * * *
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> 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

[R. 1192-1197a].

C. Order dated March 15, 2018

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. . . .

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BY THE COURT

[R. 1672-1673a].

D. Order dated April 17, 2018

> **AND NOW**, this 17th day of April, 2018, upon consideration of the Commonwealth's "Motion to Introduce Admissions of the Defendant," the Defendant's response thereto, argument on March 30, 2018, the Commonwealth's Supplemental Memorandum of Law, and the Defendant's Response to the Supplemental Memorandum of Law, and supplemental argument on April 17, 2018, is hereby **ORDERED** and **DECREED** that the Commonwealth's Motion is **GRANTED**.
>
> BY THE COURT

[R. 6224a].

E. Order dated September 19, 2018

> 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

[R. 5894a].

F. Order dated April 9, 2018

* * *

> So at this stage I'm going to deny the defense motion. I have considered, again, all of the testimony that was taken here today. I will admit again as Court-1 the entire e-mail that just sets forth the process. I'm not interested in any other and I will not admit into evidence any letters that came from counsel or the e-mail exchanges between Mr. Mesereau and Mr. Steele. And I most likely will not engage in this again. I'm just trying to assist the process that we'll do everything by motions and record.
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> * * *
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> So based thereon, I'm going to deny the motion as brought and based upon all testimony that was taken here in this in-camera hearing.
>
> BY THE COURT

[R. 2713-2714a].

G. Order dated September 27, 2018

> **AND NOW**, this 27th day of September, 2018, upon consideration of the Defendant's "Motion for Declaration of Unconstitutionality," filed on July 25, 2018, the Commonwealth's Response thereto, filed on August 1, 2018, the Defendant's Memorandum of Law in Support of his Motion, filed August 9, 2018 and following argument thereon on September 24, 2018, it is hereby **ORDERED** and **DECREED** that the

Motion is **DENIED** for the reasons placed on the record on September 24, 2018.

BY THE COURT

[R. 6214a].

III.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Issues A and E pertain to the lower court's decision to admit certain evidence. The lower court's decision "...to admit evidence is subject to review for an abuse of discretion." ***Commonwealth v. Hairston,*** 84 A.3d 657, 664 (Pa. 2014). "'An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, *or such lack of support so as to be clearly erroneous.*'" ***Id***. at 664-665, (quoting ***Commonwealth v. Dillon***, 925 A.2d 131, 136 (Pa. 2007)(emphasis added)). Where the lower court provides its reasons for the decision rendered, the scope of review "...is limited to an examination of the stated reason." ***Commonwealth v. Minerd,*** 753 A.2d 225, 229 (Pa. 2000)(citing ***Morrison v. Dep't of Pub. Welfare,*** 646 A.2d 565, 570 (Pa. 1994)).

Issue B challenges the lower court's failure to recuse itself, which is reviewed for an abuse of discretion. It is presumed that all judges are "'honorable, fair and competent'" and "[t]he

party who asserts a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal, and the 'decision by a judge against whom a plea of prejudice is made will not be disturbed except for an abuse of discretion.'" ***Commonwealth v. Kearney***, 92 A.3d 51, 60 (Pa.Super. 2014)(citations omitted).

Issue C pertains to the Petition for Writ of Habeas Corpus and the lower court's failure to dismiss the criminal complaint due to a non-prosecution agreement. This decision "is within the sound discretion of the trial judge and will be reversed on appeal only where there has been a clear abuse of discretion." ***Commonwealth v. Niemetz***, 422 A.2d 1369, 1373 (Pa.Super. 1980).

Issue D challenges the trial court's denial of a motion to suppress evidence. The standard of review is whether "the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. . . [W]e must consider only the evidence of the prosecution and so much of the evidence of the defense as remains uncontradicted when read in the context of the record as a whole. Those properly supported facts

are binding upon us and we may reverse only if the legal conclusions drawn therefrom are in error." ***Commonwealth v. Janda***, 14 A.3d 147, 157 (Pa.Super. 2011)(citations omitted).

Issue F challenges the lower court's decision to provide an inapplicable and misleading jury instruction. This Court reviews "...a challenge to a jury instruction for an abuse of discretion or an error of law." ***Commonwealth v. Rush,*** 162 A.3d 530, 540 (Pa.Super. 2017). The Court "...must consider the charge as a whole, rather than isolated fragments." ***Id***. Furthermore, the entire instruction must be examined "'...against the background of all evidence presented, to determine whether error was committed.'" ***Id.***, (quoting ***Commonwealth v. Grimes***, 982 A.2d 559, 564 (Pa.Super. 2009)).

A determination of whether a jury instruction is legally accurate or legally required is a question of law, and the Court's review is plenary. ***See*** *e.g.*, ***Quinby v. Plumsteadville Family Practice,*** 907 A.2d 1061, 1070 (Pa. 2006)(citation omitted); ***Naylor v. Township of Hellam,*** 773 A.2d 770, 773 (Pa. 2001).

Issue G pertains to the lower court's denial of a motion to excuse a juror. When a juror demonstrates a likelihood of prejudice by conduct or answer to questions, "much depends upon the answers and demeanor of the potential juror as observed by the trial judge and[,] therefore[,] reversal is appropriate only in the case of palpable error." ***McHugh v. P&G Paper Prods. Co.***, 776 A.2d 266, 270 (Pa.Super. 2001); ***see Commonwealth v. Johnson***, 445 A.2d 509, 512 (Pa.Super. 1982).

Issue H pertains to the lower court's application of the sexually violent predator designation ("SVP") under the Sexual Offender Registration and Notification Act ("SORNA"). Whether the application of that designation to a defendant being sentenced in 2018 for an offense committed in 2004 violates the *Ex Post Facto* laws of the state and federal Constitutions presents a question of law; therefore, the "standard of review is de novo and [the] scope of review is plenary." ***Commonwealth v. Lee***, 935 A.2d 865, 876 (Pa. 2007).

IV.

STATEMENT OF QUESTIONS PRESENTED

A. WHERE THE LOWER COURT PERMITTED TESTIMONY FROM FIVE WOMEN (AND A DE FACTO SIXTH VIA DEPOSITION), AS WELL AS PURPORTED ADMISSIONS FROM COSBY'S CIVIL DEPOSITION, CONCERNING ALLEGED UNCHARGED MISCONDUCT BY COSBY THAT WAS: (A) MORE THAN FIFTEEN YEARS OLD; (B) LACKING ANY STRIKING SIMILARITIES OR CLOSE FACTUAL NEXUS TO THE CONDUCT FOR WHICH HE WAS ON TRIAL; AND (C) UNDULY PREJUDICIAL, WAS THE LOWER COURT'S DECISION CLEARLY ERRONEOUS AND AN ABUSE OF DISCRETION, THUS REQUIRING THAT A NEW TRIAL BE GRANTED?[1]

Answered in the negative by the lower court.

B. DID THE LOWER COURT ABUSE ITS DISCRETION IN FAILING TO DISCLOSE HIS ACRIMONIOUS RELATIONSHIP WITH AN IMPERATIVE DEFENSE WITNESS WHICH NOT ONLY CREATED THE APPEARANCE OF IMPROPRIETY BUT WAS EVIDENCED BY ACTUAL BIAS?[2]

Answered in the negative by the lower court.

C. DID THE LOWER COURT ERR IN DENYING THE WRIT OF HABEAS FILED ON JANUARY 11, 2016 AND FAILING TO DISMISS THE CRIMINAL COMPLAINT WHERE THE COMMONWEALTH, IN 2005 THROUGH DISTRICT ATTORNEY CASTOR, PROMISED COSBY

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[1] This issue was preserved in the lower court via Cosby's Opposition to Commonwealth's Motion to Introduce Evidence of Alleged Prior Bad Acts of Defendant [R. 6225-3270a]. It also was preserved for appeal in Cosby's 1925(b) Statement. [See Appendix B].

[2] This issue was raised in the lower court via Cosby's Motion for Disclosure, Recusal and for Reconsideration of Recusal [R. 5874a-5886a] and preserved for appeal in Cosby's 1925(b) Statement. [See Appendix B].

THAT HE WOULD NOT BE CHARGED FOR THE ALLEGATIONS MADE BY THE COMPLAINANT?[3]

Answered in the negative by the lower court.

D. DID THE LOWER COURT ERR IN DENYING THE MOTION TO SUPPRESS WHERE COSBY, RELYING ON THE COMMONWEALTH'S PROMISE NOT TO PROSECUTE HIM FOR THE ALLEGATIONS BY THE COMPLAINANT, HAD NO CHOICE BUT TO ABANDON HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT OF THE US CONSTITUTION AND TESTIFY AT A CIVIL DEPOSITION?[4]

Answered in the negative by the lower court.

E. WHERE THE EXCERPTS OF COSBY'S DEPOSITION CONCERNING HIS POSSESSION AND DISTRIBUTION OF QUAALUDES TO WOMEN IN THE 1970S HAD NO RELEVANCE TO THE ISSUE AT TRIAL, WAS THE LOWER COURT'S DECISION TO ALLOW THIS EVIDENCE TO BE PRESENTED TO THE JURY CLEARLY ERRONEOUS AND AN ABUSE OF DISCRETION, THUS REQUIRING THAT A NEW TRIAL BE GRANTED?[5]

Answered in the negative by the lower court.

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[3] This issue was raised in the lower court via Cosby's Petition for Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney's Office [R. 389a-411a] and preserved for appeal in Cosby's 1925(b) Statement. [See Appendix B].

[4] This issue was raised in the lower court via Cosby's Motion to Suppress the Contents of 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 [R. 6271a-6290a] and preserved for appeal in Cosby's 1925(b) Statement. See Appendix B.

[5] This issue was raised in the lower court via Cosby's Opposition to Commonwealth's Motion to Introduce Admissions by Defendant. [R. 6298-6308]. It was also preserved for appeal in Cosby's Rule 1925(b) Statement. [See Appendix B].

F. WHERE THE LOWER COURT'S FINAL CHARGE TO THE JURY ERRONEOUSLY INCLUDED AN INSTRUCTION ON "CONSCIOUSNESS OF GUILT," A CHARGE WHICH WAS MISLEADING AND HAD NO APPLICATION TO COSBY'S CASE, WAS THE CHARGE LEGALLY DEFICIENT, THUS REQUIRING A NEW TRIAL BE GRANTED?[6]

Answered in the negative by the lower court.

G. WHERE THE LOWER COURT ALLOWED A JUROR TO BE IMPANELED, DESPITE EVIDENCE DEMONSTRATING THAT THE JUROR HAD PREJUDGED COSBY'S GUILT, DID THE LOWER COURT ABUSE ITS DISCRETION AND DEPRIVE COSBY OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY, THUS, REQUIRING THAT A NEW TRIAL BE GRANTED?[7]

Answered in the negative by the lower court.

H. DID THE LOWER COURT ABUSE ITS DISCRETION IN APPLYING SORNA II TO THE 2004 OFFENSES FOR WHICH COSBY HAD BEEN CONVICTED, IN VIOLATION OF THE *EX POST FACTO* CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS?[8]

Answered in the negative by the lower court.

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[6] This issue was preserved for appeal by lodging an objection to the consciousness of guilty instruction at the time of the charge conference and by memorializing the objection in writing [R. 5869-5873; 6519a, 6526a]. It was also preserved for appeal in Cosby's Rule 1925(b) Statement. [See Appendix B].

[7] This issue was raised via Cosby's Motion and Incorporated Memorandum of Law in Support Thereof, to Excuse Juror for Cause and For Questioning of Jurors [R. 2541a-2548] and preserved for appeal in Cosby's Rule 1925(b) Statement. [See Appendix B].

[8] This issue was raised in the lower court via Cosby's Motion for Declaration of Unconstitutionality [R. 6291a-6297] and preserved for appeal in Cosby's Rule 1925(b) Statement. [See Appendix B].

V.

STATEMENT OF THE CASE

A. INITIAL COMPLAINT

In January 2005, Andrea Constand ("Complainant") reported to police that she had been sexually assaulted by William H. Cosby, Jr. ("Cosby") one year prior. [R. 3759a, 3758a]. The allegation was investigated by the Cheltenham Police Department and the Montgomery County Detective Bureau. [R. 3784a]. Bruce Castor ("Castor"), then District Attorney of Montgomery County, issued a press release on February 17, 2005 indicating that, after reviewing the statements of Cosby, the Complainant, witnesses, and consulting with the Cheltenham Police Department and Montgomery County Detective Bureau, "insufficient, credible and admissible evidence exists upon which any charge against Cosby could be sustained beyond a reasonable doubt." [R. 127a-128a]. Castor concluded "that a conviction under the circumstances of this case would be unattainable" and Castor declined to file charges against Cosby. [R. 127a-128a]. Castor's statement added that he would not comment on any specific party's credibility because he

understood that a civil action had a lower standard of proof, and it cautioned all parties that the decision could be reconsidered "should the need arise." [R. 127a-128a].

After issuing the press release, Castor contacted Cosby's attorney, Walter Phillips[9] ("Phillips"), and advised him that Castor intended the press release to act as a non-prosecution agreement freeing Cosby to participate openly in a civil deposition. [R. 703a]. Castor intended that, without an impending criminal charge, Cosby would be unable to assert his Fifth Amendment rights. [R. 703a].

The Complainant filed a civil suit against Cosby less than a month later on March 8, 2005. [R. 3807a]. Cosby sat for four days of deposition on September 28, 2005, September 29, 2005, March 28, 2006 and March 29, 2006. [R. 728a]. During the four days of testimony, Cosby did not assert his right to remain silent pursuant to the Fifth Amendment. [R. 750a-751a]. On November 8, 2006, the civil suit filed by the Complainant was settled for $3.38 million dollars. [R. 3809a, 3811a].

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[9] Attorney Walter Phillips passed away in 2015.

In September 2015, following the public release of Cosby's deposition testimony, the Montgomery County District Attorney's Office decided to reopen the 2005 investigation regarding Complainant's allegations against Cosby. Upon learning of the investigation, Castor sent multiple emails to then District Attorney Risa Ferman, including an email reminding her of the non-prosecution agreement he made with Cosby in 2005. [R. 384a-388a].

In November 2015 Kevin Steele ("Steele") was elected District Attorney of Montgomery County, beating Castor for the position. On December 30, 2015, District Attorney Steele charged Cosby with Aggravated Indecent Assault under 18 § 3125(a)(1), 18 § 3125(a)(4), and 18 § 3125(a)(5).

B. RELEVANT PRETRIAL HEARINGS PRECEDING FIRST TRIAL

On January 11, 2016, Cosby filed a Petition for Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney's Office ("Writ of Habeas") based upon Castor's

promise not to prosecute Cosby[10]. Hearings were held before Montgomery County Judge Steven T. O'Neill[11] ("the lower court") on February 2 and 3, 2016. Castor, Attorney John Schmitt ("Schmitt"), one of Cosby's civil attorneys, and Complainant's civil attorneys, Attorney Dolores Troiani ("Troiani") and Attorney Bebe Kivitz ("Kivitz"), testified at the hearing.

Regarding the non-prosecution agreement, Castor testified, "it was better for justice to make a determination that Mr. Cosby would never be arrested." [R. 476a]. Castor "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." [R. 475a].

Schmitt testified that he had retained Phillips as criminal counsel for Cosby during the 2005 investigation. [R. 700a-701a]. Phillips informed Schmitt that, "although the District Attorney had

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[10] Procedural history as it relates to the issues addressed in Cosby's appellate brief is included. All additional filings are listed in the criminal docket. [R. 1a-108a].

[11] Judge O'Neill presided over the case from start to finish.

determined there wasn't sufficient evidence to charge Mr. Cosby, that he did anticipate that there would be a civil litigation. And, therefore, his decision was - - it was an irrevocable commitment to us that he was not going to prosecute." [R. 703a]. Schmitt believed the criminal investigation was closed and counseled Cosby to sit for the civil deposition without hesitation because Schmitt "had the assurances given to our criminal counsel". [R. 760a-762a]. Schmitt testified he had relied on the signed press release of Castor and his conversation with Phillips when counseling Cosby to testify at the civil deposition. [R. 732a].

According to Troiani, no one from the Montgomery County District Attorney's office told her that Cosby would not be prosecuted criminally. [R. 830a-832a]. Kivitz, who was representing the Complainant in a civil suit against Castor at the time of the hearing, denied having contact with him or the Cheltenham police department regarding any agreement not to prosecute Cosby. [R. 926a-928a].

The lower court conducted its own examination of Castor. [R. 634a-649a]. The lower court questioned Castor on his use of

the word "molestation" [R. 635a]; on his decision not to prosecute Cosby in order to encourage Cosby's cooperation in the civil deposition without invoking his right against self-incrimination [R. 641a-642a]; on the concept of immunity [R. 643a]; and on American Bar Association guidelines. [R. 647a-648a].

The lower court denied the Writ of Habeas on the following day, February 4, 2016, "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." [R. 1048a].

A preliminary hearing was held on May 24, 2016, and all charges were bound over for final disposition before the Montgomery County Court of Common Pleas. A criminal information was filed on or about July 13, 2016. [R. 1a-108a].

On September 6, 2016, the Commonwealth filed Commonwealth's Motion to Introduce Evidence of Other Bad Acts of Defendant. Hearings were held on December 13 and 14, 2016. [R. 1a-108a]. On February 24, 2017, the lower court granted the Commonwealth's motion in part, allowing the testimony only of prior

alleged victim number six. [R. 1198a]. The lower court denied the motion as it related to prior alleged victims one through five and seven through thirteen. [R. 1198a].

On August 12, 2016, Cosby filed a Motion to Suppress the Contents of 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 ("Motion to Suppress"). [R. 6271a-6290a]. At a hearing held on November 1, 2016, at the request of counsel for the Commonwealth and the defense, the lower court admitted into evidence notes of testimony from the February 2 and 3, 2016 Writ of Habeas hearing, as well as several stipulations relating to the September 23 and 25, 2015 emails between Castor and Risa Ferman ("Ferman"). [R. 1056a-1058a]. No further testimony was taken.

On November 6, 2019, the lower court denied Cosby's Motion to Suppress and on December 5, 2016, the lower court issued its Findings of Fact, Conclusions of Law and Order Sur Defendants' Motion to Suppress Evidence Pursuant to Pa.R.Crim.P.

581(I), concluding, in relevant part: "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." [R. 1196a].

C. FIRST TRIAL

The first trial by jury commenced on June 5, 2017, in Montgomery County, ultimately resulting in a mistrial on June 17, 2017, because the jury was deadlocked on all three counts. The matter was scheduled for a second trial.

D. RELEVANT PRETRIAL PROCEEDINGS PRECEDING SECOND TRIAL

On January 18, 2018, the Commonwealth filed a Motion to Introduce Evidence of 19 Prior Bad Acts of Defendant. [R. 1200a-1308a]. The Commonwealth's motion included the thirteen prior alleged victims submitted at the first trial and six additional prior alleged victims. [R. 1200a-1308a]. On January 25, 2018, Cosby filed a Motion to Incorporate all Prior Pretrial Motions and Oppositions to Commonwealth's Motions.

A hearing was held on March 5 and 6, 2018 regarding the Commonwealth's Motion to Introduce Evidence of 19 Prior Bad Acts

of Defendant. [R. 1309a-1671a]. On March 15, 2018, the lower court granted the Commonwealth's motion, in part, and allowed the Commonwealth to choose five of the nineteen prior alleged victims submitted to testify at trial. [R. 1672a-1673a].

On March 28, 2018, Radar Online published an article, "*Bill Cosby Judge Steven T. O'Neill Kept Relationship Secret, Used as Grudge Against Key Witness: Sources*" detailing a hostile relationship between the presiding jurist and Bruce Castor. [R. 1674a-1982a].

E. SECOND TRIAL

The second jury trial commenced on April 2, 2018, with jury selection. On April 6, 2018, defense counsel filed a Motion, and Incorporated Memorandum of Law in Support Thereof, to Excuse Juror For Cause and For Questioning of Jurors. [R. 2541a-2548a]. A juror, identified as Prospective Juror #9, had come forward and indicated she overheard Juror #11 admit to prejudging Cosby's guilt. [R. 2541a]. After interviewing some, but notably not all, of the witnesses present at the time Juror #11 made the statement, the lower court denied Cosby's request to excuse Juror #11 or to

complete questioning regarding that juror's statement. [R. 2713-2714].

During trial on direct examination, the Complainant testified at some length about her ongoing relationship with Cosby. Specifically, the Complainant testified that she was introduced to Cosby at a basketball game in the fall of 2002. [R.3726a-3727a]. At the time, she was approximately 30 years old. [R. 3878a]. Approximately one month after being introduced to each other, Cosby spoke with the Complainant and had an "introductory conversation..." [R. 3728a]. Additional phone conversations followed where Cosby and the Complainant discussed Temple University ("Temple"), the basketball coach, and "some personal questions" about the Complainant and her background. [R. 3729a-3730a].

Cosby eventually invited the Complainant to his home for dinner. [R. 3732a-3733a]. Although Cosby did not actually eat with the Complainant, the Complainant finished eating and drank her wine, while Cosby joined her, and they talked. On this evening, Cosby put his hand on her inner thigh. [R. 3734a]. The

Complainant testified she thought that it was an "affectionate gesture," and was not threatened or offended by it. [R. 3734a].[12]

After this, the Complainant and Cosby continued to speak via phone discussing primarily Temple sports programs. [R. 3737a-3738a].

Cosby again invited the Complainant to his home to have dinner with several people from the community. [R. 3736a]. The Complainant stated that she had been in the community for less than a year and it was nice to meet people outside of basketball. [R. 3737a]. Another dinner at Cosby's home followed, during which individuals from different universities were present. [R. 3738a-3739a].

As time passed, the relationship between Cosby and the Complainant continued to evolve, and they discussed more personal issues, including why she had not pursued a career in broadcasting or television. [R. 3739a]. Cosby eventually invited the Complainant

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[12] With respect to this contact, on cross, the Complainant verified that, in a prior statement she stated that Cosby touched her pants, her inner thigh, her clothes and her waist; she indicated she thought Cosby "was being silly" and that she was "kind of a little bit" embarrassed by this contact. [R. 3847a].

to a dinner in New York to meet with someone in the entertainment field who had worked with Cosby. The Complainant took the train to New York and had dinner with six or eight people, including the referenced contact. [R. 3740a-3741a]. Cosby reimbursed the Complainant for her train fare. [R. 3741a].

Later, Cosby invited the Complainant to see a blues concert in New York and to meet other young women who shared her interests. [R. 3741a-3742a]. The Complainant indicated that she and Cosby would talk about health food, homeopathic remedies, and her life philosophy. [R. 3742a].

The Complainant indicated that several months later, Cosby again invited her to his home for dinner. [R. 3744a]. The Complainant testified that Cosby wanted to discuss getting head shots, attending acting lessons, and taking other steps that would help with the Complaint's career in broadcasting. [R. 3745a]. The Complainant accepted the invitation, and upon arriving at Cosby's home met the chef and placed her order for dinner. Cosby eventually joined her, and they sat and talked. [R. 3745a]. The Complainant drank wine with dinner and sipped on brandy after her

meal. [R. 3747a]. The Complainant stated that she and Cosby talked, and, at some point, he reached his hand over to try to unbutton her pants. [R. 3747a]. The Complainant admitted that it "was a full-on pass" at her and she leaned forward, gestured that she was not interested, and he stopped. [R. 3747a]. Nothing was ever said about it ever again by either the Complainant or Cosby. [R. 3747a-3848a].

After that evening, the Complainant continued to speak with Cosby on the phone. [R. 3748a]. At some point, Cosby invited her to the Foxwoods Casino and Resort located in Connecticut. [R. 3749a]. According to the Complainant, Cosby convinced her to come "and let [her] hair out." [R. 3749a-3750a]. The Complainant and Cosby had dinner [R. 3750a] in Cosby's hotel room. [R. 3968a]. The Complainant testified she was affectionate with Cosby; for example, when he had invited the Complainant to dinner, she gave him a hug and kissed him "cheek to cheek." [R. 3851a]. After dinner, the Complainant again gave Cosby a hug and said thank you. [R. 3851a-3852a].

At approximately 10:30-11:00 p.m. that same night, the Complainant received a call from Cosby, who asked her to come back to his room because he had baked goods for her. [R. 3751a, 3969a]. At Cosby's invitation, the Complainant entered the room and sat on the bed. [R. 3751a]. He started to talk to her about sports, broadcasting, and Temple. [R. 3751a]. At some point, he motioned her to come to the bedroom portion of his room, and she complied. [R.3970a].

The Complainant testified she sat on the edge of the bed. [R. 3751a]. Cosby came over and laid down on the bed. [R. 3751a].[13] The Complainant then laid down on the bed as well, resting on her elbow. [R. 3971a]. The Complainant testified that Cosby lay there with his eyes closed. [R. 3752a]. According to the Complainant, she sat there and watched him sleep for 10 minutes. [R. 3752a]. She then went back to her room. [R. 3752a]. The Complainant indicated that this trip was in late 2003. [R. 3752a].

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[13] On cross, the Complainant admitted that, during her deposition, she testified that she had laid in the bed with Cosby in the hotel room. [R. 3971a]. [See also, R. 6330a].

Over the course of their relationship, the Complainant gave Cosby gifts, including Temple hats, T-shirts and sweatshirts. [R. 3753a-37594]. The Complainant also gave him incense. [R. 3845a]. Cosby gave the Complainant perfume and three cashmere sweaters. [R. 3830a-3831a].

The Complainant indicated that in January 2004, she was getting ready to resign from Temple to pursue a career in massage therapy instead of broadcasting. [R. 3759a-3760a]. She was nervous about tendering her resignation to the head basketball coach. [R. 3759a]. The Complainant stated that Cosby invited her to his home to discuss her concerns. [R. 3760a].

According to the Complainant, she and Cosby were seated across from each other at the kitchen table and started to discuss her concerns. [R. 3760a]. During this conversation, the Complainant had been drinking water and she had a sip of wine. [R. 3761a-3762a]. The Complainant stated that at some point she excused herself to go to the bathroom. [R. 3762a]. Simultaneously, Cosby went upstairs. [R. 3762a]. They both arrived back into the kitchen at the same time. [R. 3762a]. According to the

Complainant, Cosby held out his hand containing three blue pills. [R. 3762a]. Cosby purportedly said, "These are your friends. They'll help take the edge off." [R. 3762a-3763a]. The Complainant took the pills with water. [R. 3763a]. They both sat down and continued to talk. [R. 3764a].

At some point, the Complainant started to have double vision; her mouth became "cottony"; and she started slurring her speech. [R. 3764a]. The Complainant indicated that her legs shook when she stood up, and Cosby had to help her. [R. 3765a]. Cosby walked her to a sofa, put a pillow under her head and told her to relax. [R. 3765a]. According to the Complainant, she was getting very weak, and, the next thing she recalled was feeling Cosby on the couch behind her and beside her. [R. 3735a-3766a]. The Complainant stated that he was penetrating her vagina with his fingers and was touching her breasts. The Complainant stated that he took her hand and placed it on his penis. [R. 3766a]. The Complainant stated that she could not tell him to stop and could not move him away. [R. 3766a-3767a].

The Complainant testified that her next memory was getting up between 4:00 and 5:00 a.m. with her bra around her neck and her pants "kind of half unzipped." [R. 3768a]. She got herself together and, as she walked towards the door, Cosby was in the doorway between the kitchen and the dining room with a muffin and tea for her. [R. 3768a-3769a]. The Complainant stated that she took a couple of sips of tea, grabbed the muffin and left. [R. 3769a].

After the incident, the Complainant and Cosby continued to have phone contact. [R. 3777a]. The Complainant stated that Cosby would call her to check in about sports and scores. [R. 3772a]. The Complainant stated that nothing personal was discussed during these conversations. [R. 3773a].

A few of months after the incident, Cosby invited the Complainant to a Chinese food diner in Philadelphia. [R. 3770a]. The Complainant indicated she accepted the invitation because she wanted to talk with him about what happened. [R. 3770a]. The Complainant stated that during dinner she told him that she wanted to talk to him. Cosby asked her to go to his house and they would

talk there. [R. 3770a]. The Complainant stated that it was a short visit. [R. 3770a]. The Complainant claims that he was evasive and would not answer her questions; so, she left. [R. 3771a].

Consistent with her plans, the Complainant left Temple and moved back to Canada at the end of March 2004. [R. 3773a]. The Complainant continued to have contact with Cosby after she moved out of the country. [R. 3776a]. Cosby invited the Complainant and her family to one of his performances in Toronto, which they accepted. [R. 3776a-3777a]. The Complainant admitted that there were "a lot" of calls between Cosby and herself after the alleged incident. [R. 4013a]. She recalled 70 calls between the two of them after the alleged incident. [R. 4013a].

According to the Complainant, in January 2005, she told her mother that she was sexually violated by Cosby. [R. 3778a].

On cross-examination, the Complainant confirmed that she is not accusing Cosby of having intercourse with her. [R. 3822a]. The Complainant also admitted that she became friends with Cosby and viewed him as "somewhat" of a mentor. [R. 3823a]. The Complainant testified that she told the police that she

exchanged "minor flirtatious comments" with Cosby on a few occasions. [R. 3830a]. The Complainant admitted that during her deposition, she testified that she and Cosby had physical contact "of an intimate nature" before the alleged incident. [R. 3860a-3861a]. In fact, during her civil deposition, the Complainant admitted that, prior to the alleged incident, "on two other occasions" there was some type of exchange" of "suggestive contact." [R. 6328a].

On April 26, 2018, the jury returned a verdict of guilty on all counts. [R. 5813a]. Sentencing was deferred for a sexual offender assessment by the Sexual Offender Assessment Board.

On July 25, 2018, defense counsel filed a Motion for Declaration of Unconstitutionality claiming the lower court could not proceed with a sexually violent predator hearing. [R. 6291a-6297a]. This motion was denied on September 27, 2018. [R. 6214a].

On September 11, 2018, defense counsel filed a Motion for Disclosure, Recusal and for Reconsideration of Recusal ("Motion for Recusal") seeking recusal of the lower court for his past tumultuous relationship with Castor. [R. 5874a-5886a]. Counsel sought disclosure from the lower court the nature of his relationship

with Castor in light of the Radar Online article which outlined a secret relationship and a long-standing grudge. [R. 5874a-5886a]. Sentencing counsel retained an investigator to investigate the allegations made in the Radar Online article. [R. 5874a-5886a].

The lower court denied the Motion for Recusal on September 19, 2018, without a hearing, ruling that Cosby's motion was untimely and facially meritless. [R. 5887a-5894a].

Sentencing occurred on September 24 and 25, 2018. [R. 5895a-6212a]. At that time, the lower court denied defense counsel's request to strike the sexually violent predator designation of the Sex Offender Registration Act ("SORNA") as unconstitutional; found Cosby to be a sexually violent predator; and sentenced him to serve three to ten years in a state correctional facility. A timely Post Sentence Motion to Reconsider and Modify Sentence and for New Trial was filed on October 5, 2018. The Post Sentence Motion was denied on October 23, 2018.

A timely Notice of Appeal was filed on November 19, 2018. A timely Concise Statements of Matters Complained of on Appeal was filed on December 11, 2018. This appeal follows.

VI.
SUMMARY OF THE ARGUMENT

Cosby's conviction was not based on any credible evidence that he actually committed the crimes for which he was on trial; instead, his conviction was based on flawed, erroneous, and prejudicial rulings of the lower court which improperly allowed the following to be admitted at trial: (1) inflammatory evidence with no probative value to the actual crimes charged, which stripped Cosby of his presumption of innocence; and (2) alleged civil deposition admissions of Cosby, which were admitted as evidence in violation of Cosby's Fifth Amendment rights and despite the Commonwealth's previous agreement that Cosby would never be prosecuted (a means to secure those admissions). Similarly, the lower court allowed the prosecution to proceed even though the Commonwealth previously agreed that Cosby would never be prosecuted for the allegations involving the Complainant--a promise on which Cosby relied, to his detriment.

The lower court's decision to allow testimony from five women other than the Complainant, and a de facto sixth woman via deposition excerpts, that Cosby had non-consensual sexual contact

with them between 1970 and approximately 1986 was clearly erroneous and an abuse of discretion. The allegations of prior, uncharged sexual misconduct were: (a) not "nearly identical" to; (b) did not have "striking and substantial similarities" to; (c) had no "link or close factual nexus" to; and (d) were extraordinarily remote in time to the 2004 allegations for which Cosby was on trial.

Undeniably, the locations of the prior alleged offenses were substantially different than that involving the Complainant; the geographical proximity of the alleged prior offenses was vastly remote to that involving the Complainant; the nature of the alleged sex acts was vastly different; and, importantly, the alleged minimal contact that Cosby had with the other women was vastly different than the nature of relationship that Cosby had with the Complainant (i.e., an eighteen month friendship with, per the Complainant, "minor flirtations" between them). The extraordinarily remote prior sexual misconduct allegations made by the other women in no way established a "true plan" or an "absence of mistake" as to the crimes for which Cosby was on trial. Instead, this evidence was used in a manner prohibited by decades of Pennsylvania

jurisprudence and ***P.R.E. 404(b)***. This evidence was used to strip Cosby of his presumption of innocence and to try to establish that Cosby had the propensity to sexually assault women. This evidence never should have been admitted at trial.

Not only was this evidence inadmissible under ***P.R.E. 404(b)***, but it was also inadmissible under ***P.R.E. 403***. There was no probative value to this evidence, other than to try to establish propensity—a legally improper basis for admitting it. Moreover, the prosecution had not only the Complainant's testimony to support the Commonwealth's claims (albeit, admittedly inconsistent and not credible), it also had testimony of others, including an expert on "victimology and sexual assault." The prosecution's "need" to present propensity evidence to prove its case does not support its admissibility.

The lower court also abused its discretion in failing to disclose its contentious relationship with a key defense witness, Castor. Although the lower court had a contentious and public dispute with Castor earlier in their legal careers, and had previously accused Castor of dishonest action, the lower court failed to disclose

this dispute and instead presided over proceedings directly concerning Castor's credibility--proceedings so important to this case that to believe Castor would have meant the dismissal of all charges. The lower court, without an evidentiary hearing, denied a subsequent request to recuse after an online publication detailed the lower court's ongoing, contentious dispute with Castor. At the very least, this created the appearance of impropriety.

In addition to the above, the lower court abused its discretion in denying the Writ of Habeas, where Cosby presented credible evidence that the Commonwealth had promised Cosby that they would never prosecute him based upon the allegations brought by the Complainant. This promise was made by Castor and then discussed with Cosby's criminal attorney. It was Castor's opinion that the Commonwealth could not prove its case against Cosby. In order to ensure that Cosby could not assert his Fifth Amendment rights in the Complainant's anticipated civil prosecution, Castor agreed that Cosby would never be prosecuted for the allegations brought by the Complainant. As a result, Cosby, relying on Castor's promise, testified at a civil deposition without asserting his Fifth

Amendment right against self-incrimination. The lower court later allowed Cosby's civil deposition testimony to be used against him at trial. Based on the Commonwealth's agreement not to prosecute, and its subsequent breach of that agreement, the lower court erred in allowing the civil deposition testimony to be admitted.

Moreover, the excerpts of Cosby's deposition bore no relevance to the Complainant's allegations, but instead concerned his possession and distribution of Quaaludes to women in the 1970s. In those excerpts, Cosby admitted to consensually giving women Quaaludes in the 1970s and he admitted that he was aware that this was illegal. This evidence was not admissible under ***P.R.E. 404(b)***. It had absolutely nothing to do with the crimes for which Cosby was on trial. In the present case, testimony established that Cosby gave the Complainant Benadryl to help her relax. The detailed deposition testimony concerning Cosby's possession and sharing of Quaaludes with women in the 1970s had no relevance to the instant case and it served no purpose other than to inflame the jury and prejudice Cosby. A new trial is warranted.

Further, the lower court's final charge to the jury included an instruction on "consciousness of guilt." This instruction was misleading, had no application to Cosby's case, and was prejudicial. The lower court instructed that statements made by Cosby to the Complainant's mother concerning his offers to pay for the Complainant's education, therapy and travel, and the fact that he did not reveal the name of the pills that he gave to the Complainant, could be considered as evidence tending to prove Cosby's consciousness of guilt. However, these statements were made *prior to* Cosby being made aware of any police investigation. The offers made by Cosby were consistent with the nature of his friendship with the Complainant, during which he paid for the Complainant to travel to see him perform; paid for the Complainant to get away to relax; tried to promote the Complainant's career; introduced her to individuals who could help promote her professionally and personally; and spent time with the Complainant during periods when she was stressed and needed to relax. To assert that the statements that Cosby made to the Complainant's mother could be evidence of his "consciousness of guilt" ignores the

actual relationship that Cosby and the Complainant had and is extraordinarily misleading. This instruction never should have been given. A new trial is warranted.

The lower court abused its discretion in failing to provide Cosby with an impartial jury and violating the most fundamental due process rights guaranteed by the federal Constitution. Because the lower court deprived Cosby of a fair trial by failing to dismiss Juror #11, who displayed a preconceived notion of Cosby's guilt, a new trial is warranted.

Finally, the lower court abused its discretion in denying Cosby's Motion for Declaration of Unconstitutionality, applying the registration provisions of the Sex Offender Registration Act, and designating Cosby as a sexually violent predator without benefit of a trial by jury for his conviction of allegations from 2004, all in violation of the *Ex Post Facto* clauses of the state and federal Constitutions.

VII.

ARGUMENT FOR APPELLANT

A. WHERE THE LOWER COURT PERMITTED TESTIMONY FROM FIVE WOMEN (AND A DE FACTO SIXTH VIA DEPOSITION), AS WELL AS PURPORTED ADMISSIONS FROM COSBY'S CIVIL DEPOSITION, CONCERNING ALLEGED UNCHARGED MISCONDUCT BY COSBY THAT WAS: (A) MORE THAN FIFTEEN YEARS OLD; (B) LACKING ANY STRIKING SIMILARITIES OR CLOSE FACTUAL NEXUS TO THE CONDUCT FOR WHICH HE WAS ON TRIAL; AND (C) UNDULY PREJUDICIAL, THE LOWER COURT'S DECISION WAS CLEARLY ERRONEOUS AND AN ABUSE OF DISCRETION, THUS REQUIRING THAT A NEW TRIAL BE GRANTED.[14]

Cosby was convicted not based on the contradictory and impeached testimony of the Complainant, but by the admission of allegations of six dissimilar acts, all having occurred approximately 15 or more years before the charged crime. Because Pennsylvania law bans other acts to prove propensity, even in cases of alleged sexual misconduct or assault; because other crimes evidence is inadmissible absent a striking similarity between those acts and the

[14] Although Cosby included in his 1925(b) Statement a challenge to the admission of the prior bad acts evidence on Due Process grounds, upon further assessment, the Due Process argument is not being raised on direct appeal. The decision to not raise this issue on direct appeal should not be construed as a waiver of the right to raise any claim for the ineffective assistance of counsel in a post-conviction proceeding.

one on trial; and because some close factual nexus must exist between the prior bad acts and the crimes charged, the lower court's decision to allow the jury to be presented with this evidence lacked such support so as to be clearly erroneous, both factually and legally, and was an abuse of discretion. A new trial is required. Nothing in the lower court opinion justifies the admission of this evidence. As set forth below, the lower court's decision lacked such support so as to be clearly erroneous and an abuse of discretion.

1. COSBY, CHARGED WITH A SEXUAL ASSAULT ALLEGED TO HAVE OCCURRED IN 2004, WAS IMPROPERLY CONVICTED WHEN EVIDENCE OF STRIKINGLY DISSIMILAR ACTS, FROM DECADES EARLIER, WAS ADMITTED AGAINST HIM AT TRIAL.

It is a fundamental principle that the prosecution "...must prove beyond a reasonable doubt that a defendant has committed the particular crime of which he is accused, and it may not strip him of the presumption of innocence by proving that he has committed other criminal acts." ***Commonwealth v. Stanley***, 398 A.2d 631, 633 (Pa. 1979). This principle has been enshrined in Pennsylvania law for almost 150 years. ***Shaffner v. Commonwealth***, 72 Pa. 60, 65 (1872).

From these seminal holdings two controlling principles have emerged: First, Pennsylvania has no propensity exception for sexual assault offenses. ***See Commonwealth v. Shively***, 424 A.2d 1257, 1259 (Pa. 1981)[15]; and second, to be admissible as shows a "common plan," the similarities must be strikingly similar, not generic, and there must be some "close factual nexus" between the prior bad acts and the crime for which the accused is on trial. ***Commonwealth v. Chalfa,*** 169 A. 564, 565 (Pa. 1933); ***Commonwealth v. Ross***, 57 A.3d 85, 103-104 (Pa.Super. 2012); ***Commonwealth v. Bidwell***, 195 A.3d 610, 618-619 (Pa.Super. 2018). Similarly, to show "absence of mistake or accident," the prior acts must be "remarkably similar" to the offense for which the accused is on trial. ***Commonwealth v. Tyson***, 119 A.3d 353, 359 (Pa.Super. 2015)(quoting ***Commonwealth v. Kinard***, 95 A.3d 279, 294-295 (Pa.Super. 2014)).

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[15] Pennsylvania has not adopted Federal Rule of Evidence 413, which permits other acts to show propensity in sexual assault and sexual misconduct prosecutions. Rather, "evidence that a person committed other crimes, wrongs, or acts is inadmissible for the purpose of showing a disposition or propensity to behave in a similar fashion." ***1 Ohlbaum on the Pennsylvania Rules of Evidence*** § 404.15 (2018).

These requirements were not met in this case. The allegations of prior sexual misconduct were used to establish precisely what ***Rule 404(b)*** prohibits, i.e., to try to show that, because Cosby allegedly provided either alcohol or pills to young women in the 1970s and 1980s and then purportedly had some type of sexual contact with them allegedly against their consent, that he had the propensity to do the same in the Complainant's case more than a decade and a half later. The effect was to strip Cosby of his presumption of innocence. A new trial is warranted.

a. THE TESTIMONY OF: (A) THE FIVE OTHER WOMEN WHO ACCUSED COSBY OF IMPROPER SEXUAL CONTACT PURPORTEDLY OCCURRING IN THE 1980s; AND (B) COSBY'S DEPOSITION TESTIMONY CONCERNING HIS CONTACT WITH "JANE DOE 1" AND "OTHER WOMEN" IN THE 1970s, WAS NOT ADMISSIBLE UNDER Pa.R.E. 404(b).

The Commonwealth sought admission of these remote other acts based on two claims: that they proved "plan" and "absence of mistake." As to the former, "'...much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or theft. The device used must be so unusual and distinctive as to be like a signature.'" ***Commonwealth***

v. Semenza, 127 A.3d 1, 8 (Pa.Super. 2015)(quoting ***Commonwealth v. Roney***, 79 A.3d 595, 606 (Pa. 2013)). Indeed, "[s]imilarities cannot be confined to insignificant details that would likely be common elements regardless of the individual committing the crime." ***Bidwell***, 195 A.3d at 618-619. ***See also, Rush***, 646 A.2d at 560-561 (quoting and approving ***McCormick, Evidence***, Sect. 190 (1972 2d ed)).

When comparing the "methods and circumstances of other crimes sought to be introduced through ***Rule 404(b)***," the court must look for particular similarities including: "...the elapsed time between the crimes, the geographical proximity of the crime scenes and the manner in which the crimes were committed." ***Commonwealth v. Rush***, 646 A.2d 557, 561 (Pa. 1994). Also assessed are the: "'... (2) weapons used; (3) ostensible purpose of the crime; (4) location; and (5) type of victims.'" ***Commonwealth v. Weakley***, 972 A.2d 1182, 1189 (Pa.Super. 2009) (internal citation omitted).

As noted, the alleged prior bad acts must establish either a *true signature* or a *true plan as to the allegations concerning*

which the accused is on trial. A leading authority commented that similar bad acts:

> ...may be probative of the defendant's status as a professional criminal; and the similarities may tend to show that when faced with similar, random opportunities for committing a crime, the defendant repeatedly chooses to use roughly the same methodology. However, if the similarities are insufficient *to establish modus [i.e., signature]* and there is no inference of a *true plan* in the defendant's mind, the proponent is offering ... forbidden ... character, disposition, or propensity evidence.

1 Imwinkelried, *Uncharged Misconduct Evidence*, § 3:24 (2005)(emphasis added).

With respect to the need to establish a "true plan" to support the "common scheme, plan or design" exception to Rule 404(b), Justice Donohue observed:

> ...Imwinkelried admonishes the use of "common scheme" as a justification to admit *unlinked acts* on the theory that a pattern or systematic course of conduct amounts to a "plan." *Id.* Neither a "spurious plan" nor a plan to commit a series of similar crimes should be

> permitted as evidence that the accused committed the crime on trial. *Id.*; *see also Shaffner*, 72 Pa. at 65–66.

Commonwealth v. Hicks, 156 A.3d 1114, 1147-1148 (Pa. 2017)(Donohue, J., dissenting)(emphasis added).

In addition to the above, "[r]emoteness in time between the crimes is also factored, although its probative value has been held inversely proportional to the degree of similarity between crimes." ***Weakley***, 972 A.2d at 1189.

With respect to absence of mistake or accident, it must be shown that the various acts are "remarkably similar." ***Tyson***, 119 A.3d at 359 (quoting ***Kinard***, 95 A.3d at 294-295).

A review of the allegations of misconduct alleged by the other women confirms that they: (a) are not similar to; (b) do not have any "close factual nexus" to; (c) do not establish a true plan with respect to; and (d) are so remote to the crimes for which Cosby was on trial that they do not fall within any exception to Rule 404(b).

(1) Statements Regarding The Other Allegations Of Misconduct.[16]

(i) Heidi Thomas

Thomas, who was an aspiring actress and model, stated that she met Cosby in April 1984. [R. 5851a-5852a; 2941a]. She was twenty-four years old. [R. 5847a]. She was told by her agency that Cosby wanted to mentor promising young talent. [R. 5851a; 2941a-2942a]. Thomas was flown by her agency to Reno, Nevada and was driven to a ranch house where Cosby was staying. [R. 5852a; 2945a-2951a]. Thomas met Cosby and they immediately began to work. [R. 5852a; 2952a-2953a]. At some point, Cosby suggested that she perform a "cold read[,]" playing the part of a person who was intoxicated. [R. 5852a; 2955a]. After initially reading the part, Cosby suggested that she sip wine as a prop. [R.

[16] At the hearing in support of its motion to admit the "prior bad acts" evidence, the Commonwealth submitted to the lower court as exhibits the statements of the nineteen women who the Commonwealth wanted to call to testify at trial. [R. 5834a-5868a]. Although the lower court heard argument on the issue on March 5 and 6, 2018 [R. 1309a-1524a], no live testimony was presented from any of the nineteen women at issue. Hence, the only actual factual information presented to the lower court upon which it could base its decision to allow the prior acts evidence was the statements of those women. Accordingly, the summary above is based primarily on those statements. Relevant portions of their trial testimony are also cited.

5852a; 2956a]. According to Thomas, she agreed, and a glass of wine "appeared" in front of her. [R. 5852a; 2956a]. Thomas claims that she took a sip. [R. 5852; 2956a].

Thomas indicated that she was, "in a fog," but remembers his voice and, "snapshots" in her head. [R. 5852a-5853a; 2956a-2957a]. Thomas stated that she remembers waking up in a bed; Cosby was naked and was forcing her to perform oral sex. [R. 5853a; 2958a]. Then she remembers Cosby stating, "Your friend is going to come again." [R. 5853a; 2559a]. The next thing that she remembers was standing and shutting the door to that room. [R. 5853a; 2959a]. Thomas indicated that she remained in Reno for the scheduled remainder of her trip, but only recalls "snapshots" of it. [R. 5853a].

(ii) Chelan Lasha

Lasha was seventeen when she met Cosby in 1986. [R. 5857a; 5859a]. Her father's ex-wife worked for a production company with which Cosby was affiliated, and her family sent her information to Cosby "hoping to jump start a career in modeling and acting." [R. 5862a; 3241a-3242a].

In October, Lasha learned that Cosby was in Las Vegas and was staying at the Hilton. [R. 5859a; 5862a; 3247a-3248a; 3287a]. Lasha stated that she was invited to meet him, and he was going to introduce her to a representative of a modeling agency. [R. 5862a]. When she arrived at the hotel, she was greeted by Cosby. [R. 5863a; 3248a-3249a]. Lasha stated that Cosby gave her a blue pill, telling her it was an antihistamine and it would help her with a cold that she had. [R. 5863a; 3251a][17]. Lasha stated that he also gave her a double shot of Amaretto, which she drank. [R. 5863a; 3251a]. According to Lasha's statement, Cosby began to rub her neck and indicated that he would have someone come give her stress therapy. [R. 5863a; 3250a]. He told her to change into a robe and wet her hair and that someone was on the way to take pictures. [R. 5863a; 3250a]. A representative came to the room, took some pictures, told her to lose ten pounds and left. [R. 5863a; 3250a].

[17] Lasha's statements to the police and her trial testimony are inconsistent as to the sequence of events. [See e.g. R. 3247a; 3252].

According to Lasha, Cosby walked her to the bedroom and told her to lie down and that this would help her with her cold. [R. 5863a; 3251a]. Thereafter, Cosby allegedly pinched her nipple really hard and was "humping" her leg. [R. 5863a; 3252a]. Lasha indicated that she felt "something warm" on her leg." [R. 5863; 3252]. Lasha stated that she remembers Cosby waking her by clapping his hands. [R. 5863a]. Cosby was rushing her and telling her that she had to leave. [R. 5859a; 3252a].

(iii) Janice Baker-Kinney

Baker-Kinney was working at Harrah's casino in Reno, Nevada in 1982; she was twenty-four years old. [R. 5834a; 5836a; 3349a-3350a]. While working, a friend told her that Cosby was having a pizza party at Mr. Harrah's house and asked whether she wanted to go. [R. 5836a; 3352a]. Baker-Kinney accepted and met her friend at Mr. Harrah's home. [R. 5836a; 3352a].

When they arrived, Baker-Kinney indicated that only she, her friend and Cosby were there. [R. 5836a; 3354a]. At some point, Cosby offered her a beer; he also had a pill in his hand and offered it to her. [R. 5837a; 3355a]. She thought that he told her

that it was a Quaalude. [R. 5837a; 3355a]. Baker-Kinney indicated that she had taken a Quaalude once before, and voluntarily took the pill from him.[18] [R. 3355a-3356a].

According to Baker-Kinney, she sat down to play backgammon and while playing, she became dizzy; everything went blurry; her head was spinning; and she ultimately blacked out. [R. 5837a; 3358a-3359a]. She recalls lying on a couch and hearing her friend say goodbye and leave. [R. 5837a; 3360a]. Baker-Kinney stated her shirt was unbuttoned and her pants were unzipped. [R. 5837a; 3360a]. Baker-Kinney indicated that Cosby propped her up onto him, placed his arm on her breast and then moved toward to the top of her pants. [R. 5838a]. Baker-Kinney indicated that Cosby then took her to a bedroom. [R. 5838a; 3361a].

Baker-Kinney stated that she woke the following morning in bed with Cosby. According to Baker-Kinney, she and Cosby were both naked. [R. 5838a; 3362a]. Baker-Kinney indicated that she

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[18] There was conflicting trial testimony as to whether Baker-Kinney voluntarily took one pill or two pills. According to Baker-Kinney, she took two pills based on Cosby's statement that it would be "ok" to take two pills. [R. 3357a]. A witness who was called to corroborate Baker-Kinney's testimony testified that Baker-Kinney told her that she voluntarily took one pill. [R. 3491a].

could tell that they had sex because she "was wet down there." [R. 5839a; 3363a].

(iv) Janice Dickinson

Dickinson was a twenty-seven-year-old model who, while with her business manager, met Cosby at his townhouse in New York in 1982. [R. 5841a; 5844a; 3611a]. While there, they discussed her singing and acting career. [R. 5844a; 3613a].

That same year Dickinson was in Bali for a photo shoot when, Cosby called her and invited her to Lake Tahoe. [R. 5844a; 3614a-3615a]. Dickinson agreed and flew from Bali to Lake Tahoe. [R. 5845a; 3615a-3616a].

The evening she arrived, Dickinson went to Cosby's show with his music director and they had dinner with Cosby after the show. [R. 5845a; 3619a]. Dickinson stated that while at dinner she started to get menstrual cramps. [R. 5845a; 3620a]. Dickinson mentioned it to the gentlemen at the table and, according to Dickinson, Cosby gave her a blue pill for it. [R. 5845a; 3620a].

Dickinson stated that after dinner she alone went up to Cosby's room. [R. 5845a; 3621a]. According to Dickinson, she went there "to continue our discussion about my career." [R. 5845a].

Dickinson stated that she was sitting by the edge of his bed and took photos of Cosby while he was on the phone. [R. 5845a; 3622a]. According to Dickinson, "[a]fter that I don't remember much." [R. 5845a]. Dickinson did not remember how long after taking the pill that it took her to begin to feel its effects. [R. 5845a][19]. Dickinson stated that she could "barely move" and that her "arms or legs felt immobilized." [R. 5845a; 3625a]. Dickinson stated that she "went to sleep fast after feeling the pain." [R. 5845a; 3626a]. When asked to describe the pain, she indicated that she felt sharp pain "in my butt area. Then I blacked out." [R. 5845a]. According to Dickinson, she woke up to semen between her legs; Dickinson stated that it "felt like he had penetrated me

[19] This statement of Dickinson is inconsistent with her trial testimony, during which she indicated that, shortly after taking the pill, she felt "dizzy and woozy...slightly out of it." [R. 3621a]. According to Dickinson's trial testimony, after dinner, despite purportedly feeling "woozy and dizzy," Dickinson elected to go with Cosby to his hotel room. [R. 3621a].

anally as well." [R. 5845a, 3627a]. "My butt hurt." [R. 5846a; 3627a][20].

(v) Maud Lise-Lotte Lublin

Lublin met Cosby in 1989 when she was twenty-three years old. [R. 5865a]. Lublin was a model and her booking agent notified her that Cosby wanted to meet her. [R. 5865a]. According to Lublin, she had contact with Cosby over a two-year period of time. [R. 5865a]. The second time that she met with Cosby was at his suite at the Hilton Hotel in Las Vegas. [R. 5866a; 3513a-3514a]. Lublin indicated that he wanted to talk to her about improvisation. [R. 5866a]. Lublin indicated that he gave her a drink that was "dark brown in color." [R. 5866a]. Cosby told her that it would help her relax. [R. 5866a]. Lublin indicated that he then gave her a second drink, and that she drank it. [R. 5866a]. Lublin stated that, after the second drink, "Cosby sat next to me and was stroking my hair." [R. 5866a]. Lublin indicated that she then remembers walking down a hallway. [R. 5866a]. According to Lublin, she woke up in

[20] Dickinson later wrote a book and discussed her trip to Lake Tahoe with Cosby; nothing in the book indicates that she was raped by Cosby, or that she even had consensual sex with Cosby. [R. 3646a].

her own bed at her own home. [R. 5866a]. Lublin indicated that she thought that she had a bad reaction to the alcohol. [R. 5867a]. Lublin makes no claim that there was any sexual contact between she and Cosby, or that she was sexually assaulted by Cosby. [R. 5867a][21].

(vi) "Jane Doe 1" and the "other women" in the 1970s

Through the submission of excerpts of testimony that was provided by Cosby in a civil deposition, the lower court allowed innuendo that Cosby engaged in inappropriate sexual contact with women in the 1970s, including a "Jane Doe 1" "who came forward." [R. 4784a]. In that deposition, Cosby admitted that, in the 1970s, he gave Quaaludes to women with whom he was interested in

[21] Lublin testified at trial that she called the police in 2014 after seeing an interview of Dickinson, who claimed that she received "items" from Cosby, passed out and was assaulted. [R. 3546a-3547a]. After seeing that interview, Lublin stated that she thought that "something happened." [R. 3547a]. When asked on cross, "you have absolutely no idea whether you were sexually assaulted," Lublin responded, "I don't know what happened after I blacked out." [R. 3571a]. Lublin is not disputing that she is not aware of having non-consensual sex with Cosby. [R. 3572a].

having sex. [R. 4781a-4799a].[22] During that deposition, Cosby was questioned concerning a woman identified as "Jane Doe 1." [R. 4784a]. Cosby met her at the Hilton Hotel in Las Vegas. [R. 4784a]. Cosby admitted that he shared Quaaludes with her. [R. 4784a]. The effects that the Quaaludes had on her were discussed. [R. 4785a-4786a]. Cosby indicated it looked like she had "too much to drink; she was unsteady; he does not think that her speech was slurred; he thinks she was relaxed; and she was able to move her arms and legs." [R. 4785a-4786a].

The entire discussion concerning Quaaludes involved Cosby's possession of Quaaludes in the 1970s. [R. 4788a-4789a]. As of November 2002, Cosby did not have Quaaludes in his possession or in any of his residences. [R. 4788a].

Cosby's deposition testimony concerning Quaaludes and sex with "other women" in the 1970s also was presented to the jury. Introducing this testimony, the prosecutor stated to Detective

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[22] As set forth below, this deposition testimony should never have been presented not only because of the reasons set forth in the instant argument, but also for the reasons set forth in Argument D, infa.

Reape, "I'm going to follow-up with some questions in the deposition regarding giving Quaaludes *to other women*. Did the defendant describe why he obtained these Quaaludes?" [R. 4795a (emphasis added)]. Detective Reape indicated "yes" and read deposition excerpts where Cosby admitted that in the seventies, he intended to take Quaaludes with young women he wanted to have sex with. [R. 4796a-4797a]. However, Cosby testified at the depositions that the women took the Quaaludes voluntarily, and knowing that they were Quaaludes. [R. 4797a]. Nothing presented reflects whether Cosby actually had sex with those other women and, if so, whether they are claiming that the sexual contact was not consensual. Moreover, if Cosby actually had sex with the women "from the 1970s," including Jane Doe 1, nothing reflects the nature of the sexual contact between them.

b. THE ALLEGED CIRCUMSTANCES AND PURPORTED CONTACT INVOLVING COSBY AND THE OTHER WOMEN: (i) WERE NOT "NEARLY IDENTICAL" TO, DID NOT HAVE STRIKING AND SUBSTANTIAL SIMILARITIES TO, AND HAVE NO LINK OR NEXUS TO, THE ALLEGED CONTACT AND CIRCUMSTANCES FOR WHICH HE WAS ON TRIAL; AND (ii) WERE SO REMOTE IN TIME, THAT THE EXCEPTIONS TO RULE 404(b)(1) HAVE NO APPLICATION TO THIS CASE.

(1) The Circumstances And Purported Contact Involving Cosby And The Other Women Were Not Nearly Identical To, Did Not Have Striking And Substantial Similarities To, And Have No Close Factual Nexus To, The Contact And Circumstances Involving Complainant.

The accusations lodged by Thomas, Lasha, Baker-Kinney, Dickinson and Lublin, and the facts of Record pertaining to "Jane Doe 1" and the other women from the 1970s, are significantly different from one another in terms of time, place, type of alleged victim, conduct and circumstances, as is demonstrated above. As different as those instances are from one another, they also diverge significantly from those that existed between Cosby and the Complainant. With the exception of Lublin who claims to have communicated with Cosby over two years (but does not actually accuse him of sexually assaulting her)[23], unlike the other women, over the eighteen months that she knew him, Complainant developed an actual friendship with Cosby. [R. 3755a]. Unlike the other women, Complainant was invited to Cosby's home for dinner

[23] Although Lublin claims to have had contact with Cosby over a two-year time period and that he introduced her as his "daughter" [R. 3510a], the alleged "incident" with Cosby purportedly occurred just the second time that she met him. [R. 3513a-3514a].

on at least three different occasions prior to the alleged incident [R. 3732a; 3736a; 3744a]; and personal gifts were exchanged between the two. [R. 3753a-3754a]. Unlike the other women, Complainant admitted that, over this eighteen-month relationship, there were "minor flirtations" between Cosby and her. [R. 3830a]. Unlike the other women, Complainant admitted that on two occasions prior to the alleged incident, Cosby made intimate, suggestive physical contact with her. [R. 3860a-3861a; 6328a]. For example, in one instance, he made an overt "pass" at her with intimate contact, trying to unbutton her pants. [R. 3747a]. Complainant stated that she told him to "stop" and he complied. [R. 3747a]. Their relationship, however, continued. [R. 3748].

The nature of the sexual contact between Complainant and Cosby, and that described by the other women, was also significantly different. The allegations of sexual contact ranged from none [Lublin] to oral sex to vaginal and anal intercourse. As to "Jane Doe 1" and the other women from the 1970s, the Record is silent as to the nature of the sexual contact, if any, that Cosby purportedly had with them.

With respect to the contact between Cosby and the Complainant, one must keep in mind that Cosby does not dispute that sexual contact occurred, but rather, contends it was consensual. Cosby invited the Complainant to his home in Cheltenham, as he had done on prior occasions. [R. 3760a]. With respect to the sexual contact, Cosby and the Complainant were on the couch. [R. 3766a]. Cosby unbuttoned the Complainant's pants (as he tried to do on one prior occasion) and, ultimately, touched her. [R. 3766a]. He also touched her breasts, and she touched his penis. [R. 3766a]. Unlike the allegations lodged by some of the other women, there was no testimony that Cosby ejaculated; in fact, in a statement provided to police, Cosby indicated that he did not. [R. 116a]. Moreover, the Complainant does not accuse Cosby of having vaginal sex, anal sex or oral sex with her. Her testimony reflects that he did not.

Not only is the nature of the alleged physical contact significantly different than that involving the Complainant, but also, the locations of the alleged other incidents of contact are significantly different than that involving the Complainant. With

respect to the five testifying women, the alleged contact purportedly occurred in a hotel room or in some third person's house. The Record does not reflect where Cosby had physical contact, if any, with "Jane Doe 1" and the other women from the 1970s. The contact between Cosby and the Complainant, however, occurred in his home. This difference is significant.

The lack of detailed similarity, and the absence of any close factual nexus or link, between and among the other acts evidence and the case at hand, confirms that admission of the non-charged claims was in error. This Court's recent ruling in ***Bidwell, supra***, confirms this. In ***Bidwell***, the victim was found dead and hanging from an electrical wire. An autopsy revealed no medical evidence to support the conclusion that the victim died from hanging. The defendant ultimately was arrested and charged with the victim's death.

The prosecution sought the admission of testimony from four women, including the defendant's ex-wife and current wife, that they had a sexual relationship with the defendant and that he had tried to choke or otherwise physically harm them during the

course of that relationship. The prosecution argued that this testimony was admissible to prove motive, intent and method, and to rebut the defense that the victim committed suicide.

This Court affirmed the determination that the testimony of these four women was not admissible under Rule 404(b). The Court stated that "...the women's testimony establishes, at most, the commission of crimes or conduct in the past 'of the same general class,' namely physical and/or sexual assaults." ***Bidwell***, 195 A.3d at 626. Addressing the prosecution's argument concerning its need for this evidence in order to prove "common scheme, plan or design," the Court stated, "under Pennsylvania law, evidence of prior bad acts is admissible to prove 'a common scheme, plan or design where the crimes are so related that proof of one tends to prove the others.'" ***Id.*** (quoting ***Commonwealth v. Elliott***, 700 A.2d 1243, 1249 (Pa. 1997)). The ***Bidwell*** Court found that "...the proposed testimony of [the four women] does not establish a pattern of conduct on the part of Appellee so distinctive that proof of one tends to prove the others." ***Bidwell,*** 195 A.3d at 627 (citing ***Ross***, 57 A.3d at 104).

In reaching this conclusion, the ***Bidwell*** Court relied extensively on its decision in ***Ross, supra***. In ***Ross***, this Court reversed the lower court's determination that the testimony of three of Ross' former romantic partners who testified as to acts of violence committed against them by Ross during that relationship was admissible under ***Rule 404(b)***. Discussing the "common plan, scheme or design" exception, this Court stated that the prior bad acts evidence "did not establish a pattern of conduct on Ross' part so distinctive that 'proof of one tends to prove the others.'" ***Ross***, 57 A.3d at 104 (citation omitted). The Court stated, "Instead, the prior bad acts testimony demonstrated that Ross was a domestic abuser of women with whom he was involved in on-going romantic relationships, and did not show a unique 'signature' *modus operandi* relevant to Miller's murder." ***Id***. The ***Ross*** Court emphasized:

> The purpose of Rule 404(b)(1) is to prohibit the admission of evidence of prior bad acts to prove "the character of a person in order to show action in conformity therewith." Pa.R.E. 404(b)(1). While Rule 404(b)(1) gives way to recognized exceptions, the exceptions cannot be stretched in ways that effectively eradicate the rule. With a modicum of effort, in most cases it is

> possible to note some similarities between the accused's prior bad conduct and that alleged in a current case. To preserve the purpose of Rule 404(b)(1), more must be required to establish an exception to the rule—*namely a close factual nexus sufficient to demonstrate the connective relevance of the prior bad acts to the crime in question*. No such close factual nexus exists in this case, and this Court has warned that prior bad acts may not be admitted for the purpose of inviting the jury to conclude that the defendant is a person "of unsavory character" and thus inclined to have committed the crimes with which he/she is charged. *See, e.g., Commonwealth v. Kjersgaard,* 276 Pa.Super. 368, 419 A.2d 502, 505 (1980).

Ross, 57 A.3d at 104 (emphasis added).

In the present case, the alleged prior sexual misconduct of Cosby matches the alleged act on trial only in its general nature. There is no close factual nexus or link, whatsoever, between the alleged prior bad acts and the allegations for which Cosby was on trial. No "true plan" exists. The alleged prior bad acts admitted in this case do not establish a "common scheme, plan or design" so as to be admissible under ***Rule 404(b)***.

Similarly, the other acts also do not satisfy the threshold for "absence of mistake" evidence. As noted above, this exception requires "remarkabl[e] similar[ity]." ***Tyson***, *supra*. The dissimilarities detailed above preclude such a finding.

(2) The Period Of Time Between The Contact That Cosby Had With The Complainant And The Alleged Contact With The Other Women Is Remote And Unduly Excessive.

Beyond the lack of similarities necessary for "plan" or "absence of mistake or accident," the remoteness of the prior allegations – none less than fifteen years before the act on trial - makes the allegations of prior misconduct inadmissible.

Baker-Kinney and Dickinson claim that Cosby's alleged inappropriate contact with them occurred in 1982 [R. 5834a; 5836a; 5841a;5844a; 3349a-3350a; 3611a], more than two decades before the alleged incident with the Complainant. Thomas claims that Cosby forced her to perform oral sex on him in 1984 [R. 5851a-5852a; 2941a]; Lasha claims that her contact with Cosby was in 1986 [R. 5857a-5859a]; and Lublin claimed that she became intoxicated with Cosby in 1989 [R. 5865a] (but admits that she is not aware of having non-consensual sex with Cosby). As to "Jane

Doe 1," Cosby gave her a Quaalude, which she took knowing that it was a Quaalude, in the 70s. [R. 4781a-4797a].

The Pennsylvania Supreme Court has held that even if evidence of prior criminal activity is substantially similar to the crime for which the defendant is on trial, "'...said evidence will be rendered inadmissible if it is too remote.'" ***Shively***, 424 A.2d at 1259 (citing ***Commonwealth v. Brown***, 393 A.2d 414 (Pa. 1978)). Although "the importance of the time period is inversely proportional to the similarity to the crimes in question" (***see*** *e.g.*, ***Tyson***, 119 A.3d at 367), here, the significant differences in the alleged circumstances surrounding the purported contact, the nature of the alleged contact, and the location of the alleged contact, coupled with the significant lapse of time between the alleged prior acts and the accusation lodged by the Complainant, negate the theory that the testimony of the other women was admissible to prove some type of common plan, scheme or design, or to negate absence of mistake or accident. ***See also***, ***Commonwealth v. Strong***, 825 A.2d 658, 667 (Pa. 2003)("Here the differences in the crimes coupled with the lapse of time negates

the Commonwealth's theory that all four incidents were part of a common plan, scheme or design."). The testimony of the other women was not properly admitted under ***Rule 404(b)***.

(3) The Lower Court's 1925(a) Opinion Confirms That Its Decision To Allow The Alleged Prior Bad Acts Testimony Lacked Such Support So As To Be Clearly Erroneous And An Abuse Of Discretion.

In his 1925(a) Opinion, the lower court asserts that the testimony of the five "404(b) witnesses" "was admissible under both the common plan, scheme or design exception and the lack of accident or mistake exception, with the admissibility further supported by the doctrine of chances." [See Appendix A, p. 102]. This conclusion is not supported by either the facts of Record or the law.

At the outset, it must be recognized that the lower court glosses over the fact that the allegations of prior misconduct involve alleged conduct that is extraordinarily remote in time to the incident for which Cosby was on trial. In fact, the lower court's 1925(a) opinion characterizes this more than fifteen-year time span as "unimportant." [Appendix A, p. 109]. Calling an at least fifteen-year time span between the alleged prior bad acts and the incident for

which Cosby was on trial as "unimportant" is patently at odds with the law set forth above. Indeed, the Pennsylvania Supreme Court made it clear that, even if the evidence of prior activity is "substantially similar to" the crime for which the accused is on trial, the evidence "'...will be rendered inadmissible if it is too remote.'" ***Shively***, 424 A.2d at 1259 (citation omitted). "Remoteness" is never unimportant, and the lower court's analysis, or lack thereof, of this issue is contrary to law.

Moreover, the lower court's assertion that the allegations of the five women who testified at trial and that of the Complainant have "chilling similarities" so as to support the admissibility of this evidence under both the "common plan, scheme or design" exception and the "lack of accident or mistake" exception, "with the admissibility further supported by the doctrine of chances," has no support in the Record or law. The lower court's 1925(a) Opinion states that: "1) each woman was substantially younger than the married Defendant and physically fit; 2) the Defendant initiated the contact with each woman, primarily through her employment; 3) over the course of their time together, she came to trust him and

often developed what the woman believed to be a genuine friendship or mentorship; 4) each woman accepted an invitation from the Defendant to a place in his control, where she was ultimately alone with him; 5) each woman accepted the offer of a drink or a pill, often after insistence on the part of the Defendant; 6) after ingesting the pill or drink, each woman was rendered incapacitated and unable to consent to sexual contact; 7) the Defendant sexually assaulted her while she was under the influence of the intoxicant he administered." [Appendix A, pp. 103-104].

These characterizations are either not supported by the Record or involve "insignificant details that would likely be common elements regardless of the individual committing the crime." ***Bidwell***, 195 A.3d at 618-619. Frankly, the lower court's first point underscores its strained effort to justify its decision. The age difference between the 404(b) witnesses and Cosby is of no relevance. There is nothing "signature like" or unique about an older man (even a married one) having an interest in a younger woman. This fact has no import to the analysis.

As to the statement that the 404(b) witnesses were "physically fit," the Record does not support this conclusion. Although the Complainant was a professional basketball player [R. 3717a], nothing in the Record reflects whether these other women were "physically fit" when they had supposed contact with Cosby.

The lower court's second purported similarity, i.e., Cosby "initiated the contact with each woman, primarily through her employment," again, is not supported by the Record. First, Cosby's initial contact with the Complainant was not planned and he did not seek her out; he met her, by chance, while taking a tour of the women's locker room at Temple. [R. 3726a-3727a]. Cosby did not contact Temple to initiate contact with the Complainant and did not contact Temple for the purpose of "mentoring" the Complainant.

With respect to the 404(b) witnesses, Cosby did not contact either Baker-Kinney or Lasha. Baker-Kinney appeared at the ranch house where Cosby was staying at the invitation of her co-worker, not Cosby. [R. 5836a; 3352a]. As to Lasha, it was her family that reached out to Cosby; Cosby did not reach out to her. [R. 5857; 5859]. With respect to Thomas, the Record is not clear

whether the allegation is that Cosby contacted her agency and specifically asked to meet with her, or whether Cosby reached out to the agency and advised that he was willing to mentor someone, with the agency then selecting Thomas. [R. 2941a-2942a]. In either circumstance, however, it was not Cosby who initiated the contact. Although the Record does reflect that Cosby indicated a willingness to mentor Dickinson and Lublin (who did not make any claim that she was actually sexually assaulted), this is vastly different than the circumstances under which he met the Complainant.

Similarly, the lower court's statement that, "over the course of their time together," the 404(b) witnesses "came to trust him and often developed what the women believed to be a genuine friendship or mentorship" is also not supported by the Record. The significant differences between the nature of the relationship that Cosby had with the Complainant, and the purported nature of the relationship (or lack thereof) between Cosby and the 404(b) witnesses is set forth at length above at pages 60-61. As this demonstrates, there are no similarities between the eighteen-

month, actual friendship that Cosby had with the Complainant, and the supposed contact that he had with the other women.

As to the lower court's assertion that each of the women accepted an invitation from Cosby "to a place in his control" where she was ultimately alone with him, this assertion ignores the unrefuted evidence that Cosby never invited Baker-Kinney anywhere; she went to the house where he was staying at the invitation of her co-worker. [R. 5836a; 3352a]. Moreover, if Baker-Kinney's statement is believed, then her co-worker was present when Cosby purportedly had initial, intimate contact with Baker-Kinney. [See R. 5837a; 3360a (stating that she woke up on the couch and heard her friend leaving and saying goodbye to her, Baker-Kinney noted that her blouse was unbuttoned and her pants were unbuttoned and unzipped)]. Regardless, this purported "similarity" is one of those "insignificant details that would likely be common elements regardless of the individual committing the crime." ***Bidwell***, 195 A.3d at 618-619.

With respect to the fifth basis offered by the lower court, i.e., "each woman accepted the offer of a drink or a pill, often after

insistence on the part of the Defendant," this assertion is, again, contradicted by the Record. As to Dickinson, Baker-Kinney, Lasha and Lublin, nothing in their statements reflects that Cosby insisted that they take the pills or drink at issue; all voluntarily accepted Cosby's offer of a drink or pill. [R. 5852a, 5863a, 5837a, 5845a, 5866a; 2956a, 3251a, 3355a, 3620a]. Thomas's statement reflects that Cosby suggested that she sip wine as a "prop" [R. 5852a; 2956a]; nothing reflects, however, that he forced her to drink it.

The statements (and testimony) of the 404(b) witnesses reflect that the witnesses knew that they were drinking alcohol, taking a Quaalude, or taking a pill that was a relaxant, such as, something for menstrual cramps. According to the Complainant, however, she thought that Cosby was giving her some type of herbal medication. [R. 3763a]. This difference is significant. The Record belies that there was a "substantial similarity" between the acceptance of a drink or pill by the 404(b) witness, a typical social occurrence, and the conduct alleged by the Complainant.

Turning to the lower court's last two supposed factual similarities, these are nothing more than allegations which simply characterize the offenses at issue.

The lower court's analysis also ignores the significant differences associated with the allegations concerning the alleged sexual assault lodged by the other women and that alleged by the Complainant. These differences are set forth above at pages 62-63. The conduct alleged by the 404(b) witnesses was not substantially or even remarkably similar to the conduct for which Cosby was on trial.

With respect to "Jane Doe 1," the lower court's 1925(a) Opinion notes that she did not testify at trial; that Cosby's deposition testimony detailed his version of a "consensual sexual encounter" with her; and that "[n]o evidence regarding that woman's allegations that the Defendant sexually assaulted her was admitted at trial;" and concludes that the claim that the admission of this deposition testimony was improper 404(b) testimony is

therefore without merit. [Appendix A, p. 114].[24] This conclusion, however, ignores the fact that "Jane Doe 1" was characterized as a woman "who came forward." [R. 4784a]. Through the deposition testimony, the jury was advised that "Jane Doe 1" came forward and that Cosby admitted to giving her a Quaalude. [R. 4784a]. The jury was left to infer that some type of sexual contact occurred between the two of them. It is disingenuous to suggest that the deposition testimony concerning "Jane Doe 1" and the other women from the 1970s to whom Cosby gave Quaaludes was not testimony concerning prior acts; it certainly was. *Cf.* ***Commonwealth v. Towles***, 106 A.3d 591, 602 (Pa. 2014)(emphasizing that non-criminal conduct also falls within Rule 404). The lower court's opinion, however, does not include any analysis of the testimony concerning "Jane Doe 1" and the other women from the 1970s

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[24] In the 1925(b) Statement, it is observed that the lower court allowed the Commonwealth to "backdoor" the admission of a sixth prior bad act witness, "Jane Doe 1," by allowing the Commonwealth to use excerpts of Cosby's civil deposition testimony concerning, among other things, "Jane Doe 1." The lower court takes issue with the use of the term "backdoored," stating that it is "unable to determine the legal significance of 'backdoored,' and has found no appellate authority using such a term." [Appendix A, pp. 113-114]. The term "backdoored" was used in its lay meaning, which is defined as "indirect, devious." ***See e.g. www.merriam-webster.com/dictionary/backdoor.***

within the context of ***Rule 404(b)*** and its exceptions. As set forth above, the admission of these deposition excerpts was improper under ***Rule 404(b)***.

Additionally, the lower court failed to address what "factual nexus" or "link" between the other acts evidence and the crimes for which Cosby was on trial exists; and, similarly, the lower court failed to address how the "other acts evidence" actually relates to the events involving the Complainant so as to establish a "true plan."[25] A nexus and a "true plan" between the other acts evidence and the events for which Cosby was on trial does not exist. Each were wholly separate, and distinct.

Not only is the lower court's analysis of, and conclusions concerning, the application of the "common plan, scheme, and design" exception factually and legally erroneous, but his analysis of the "lack of mistake or accident exception" is also fatally flawed. According to the lower court, the other acts evidence was "...also

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[25] Sadly, as the #MeToo movement has demonstrated, there is nothing "signature like" with an established, older man in a position of authority being accused of exploiting that authority by engaging in some type of inappropriate, sexual contact with a woman over whom he has some type of control over the professional future of that woman.

admissible under the lack of mistake or accident exception and the related doctrine of chances, both of which require a lesser degree of similarity." [*See* Appendix A, p. 108].

"Absence of mistake or accident" is inapplicable in this case, as there was no defense of mistake or accident to which to respond. It is generally accepted that absence of mistake or accident is a responsive form of 404(b) evidence. ***See* e.g., 2 Moore's Federal Rules Pamphlet § 404.9** (2018) (Federal Rule of Evidence 404(b) "also includes some matters that are consequential facts only in **rebuttal** to defensive evidence, such as **absence** of **mistake** or accident.") [26] Cosby posited, however, that the sexual contact was consensual, the lack of which was an element of the offense, making the issue of mistake inapt. Indeed, in response to a question from the jury in which it asked for the definition of the term "consent," the lower court observed that

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[26] In Pennsylvania, the only explicit exception to that principle to be approved by our Supreme Court is in cases of First-Degree Murder. ***Commonwealth v. Boczkowski***, 846 A.2d 75, 88 (Pa. 2004) ("At least for purposes of a homicide prosecution, where the victim, of course, is unavailable, we reject the notion that proof of an absence of accident is admissible only for responsive purposes.").

consent, or the lack thereof, is "simply an element of the crime. It's inappropriate to read consent as a defense to a burden that is on the Commonwealth to prove." [R. 5775a; in general, R. 5772a-5777a]. It is disingenuous to characterize this element of the offense as a "mistake" or "accident" in an ostensible effort to pigeonhole the old allegations of misconduct into a recognized exception to ***Rule 404(b)***. The "absence of mistake or accident exception" has no application to the instant case.

Even if absence of mistake had been an issue, as demonstrated above, the other acts do not satisfy the threshold for responsive evidence. This exception requires "remarkabl[e] similar[ity]." ***Tyson***, ***supra***. The dissimilarities detailed above at length preclude such a finding.

The lower court's 1925(a) Opinion also, and erroneously, relies on the "doctrine of chances" to justify the fifteen year old and older other act evidence. In the absence of a claim of accident or mistake, that doctrine has no relevance. As well, although the "doctrine of chances" was referenced and ostensibly applied in ***Commonwealth v. Donohue***, 549 A.2d 121, 126 (Pa. 1988), this

reference was in an Opinion Announcing the Judgment of the Court; such, however, is not binding precedent. ***See Commonwealth v. Sepulveda***, 855 A.2d 783, 790, fn. 12 (Pa. 2004) (citing ***C&M Developers v. Westminster Twp. ZHB***, 820 A.2d 143, 152 (Pa. 2002)("opinion announcing judgment of court is not binding precedent")).

In ***Hicks, supra***, Chief Justice Saylor did discuss the doctrine of chances at length. ***See e.g. Hicks***, 156 A.3d at 1131-1137. That discussion, however, was presented in a concurring opinion; it was not employed or adopted by the majority. Moreover, at least one Justice, in a dissenting opinion, questioned the propriety of the application of the doctrine of chances, opining, "[a]s a practical matter, the doctrine is, in my view, merely an excuse for admitting otherwise inadmissible propensity testimony." ***Id***. at 1149 (Donohue, J., dissenting). Justice Donohue elaborated:

> Especially as applied to the facts of the case before us, its application threatens to swallow the rule. I oppose the notion that we should apply a less stringent ("roughly similar") standard for admitting evidence when the purported purpose is to prove the actus reus.

> Even if I were to concede that the doctrine of chances rests upon a non-character rationale, which I do not, I would limit its application to a narrow set of circumstances, consistent with its theoretical underpinnings.

Id.

The doctrine of chances has no application to the case before this Court. As noted above, the "absence of mistake or accident exception" is not applicable to this case.

The lower court's 1925(a) Opinion observed, "...the fact that numerous other women recounted the same or similar story further supports the admissibility of this evidence under the doctrine of chances." [Appendix A, p. 108]. Such rationale certainly reflects that this evidence was nothing but improper propensity evidence.

In short, the factual foundation upon which the lower court based its conclusion that the prior bad acts evidence was admitted pursuant to the "common plan, scheme and design" and the "absence of mistake or accident" exceptions to Rule 404(b) is not supported by either the Record or the law. The Record overwhelmingly demonstrates that the allegations that were lodged by the other women were not nearly identical or substantially

similar to those lodged by the Complainant; that there was no close factual nexus between the alleged prior bad acts and the incident for which Cosby was on trial; and that no "true plan" involving the prior acts and the offense on trial existed. Moreover, the lower court misapplied the law, and even relied, in part, on a doctrine that is not established in Pennsylvania law, in support of its decision. The lower court's decision to admit this evidence lacked such support so as to be clearly erroneous and an abuse of discretion.

2. ANY PROBATIVE VALUE OF THE PRIOR BAD ACTS EVIDENCE IS SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL IMPACT.

The lower court asserted that it balanced whether the probative value of the prior acts evidence outweighed the prejudice to Cosby. [Appendix A, p. 109]. According to the lower court, the "striking similarities" between the proffered evidence and the Complainant's assault weighed in favor of admission of the evidence. [Appendix A, p. 109]. The lower court also indicated that the Commonwealth had a "substantial need" for the prior acts evidence, asserting, "[w]here the parties agreed that the digital penetration occurred, the evidence of other acts was necessary to

rebut the Defendant's characterization of the assault as a consensual encounter." [Appendix A, p. 109]. The lower court also noted that the Complainant failed to timely report the alleged assault. [Appendix A, p. 110.].

Glaringly absent from the lower court's 1925(a) Opinion is any assessment of the highly prejudicial nature of the prior bad acts evidence. The fact that "prior bad acts" evidence is extraordinarily prejudicial cannot be disputed: "The presumed effect of such evidence is to predispose the minds of the jurors to believe the accused guilty, and thus effectually strip him of the presumption of innocence..." ***Commonwealth v. Spruill***, 391 A.2d 1048, 1050 (Pa. 1978). More than eight decades ago, the Pennsylvania Supreme Court, in ***Chalfa, supra***. recognized that such evidence distorts judgment:

> The effect... upon a mind receiving such information is not necessarily slight, for there is an emotional reaction against him who is shown to be guilty of another crime; in other the words, the mind of the jury is prejudiced.

Id., at 565. ***See also, Hicks***, 156 A.3d at 1157 (Wecht, J., dissenting)("Basic human nature and rational thought tend to

default toward the very logic that the rule prohibits. It is natural and well-nigh inevitable that a juror considers a person to be a drug dealer when told that the same person has dealt drugs multiple times in the past, or that a juror will conclude that, if a person has assaulted women before, he likely will do so again.").

Here, given the current political and social climate, one cannot imagine more prejudicial testimony to incite an emotional reaction by a jury than to parade a stream of other women accusing Cosby of having inappropriate sexual contact with them, contact for which he was never charged, in a case involving allegations of sexual misconduct. This also left him in the position of having six trials in one. The highly prejudicial nature of this evidence was ignored by the lower court.

In terms of the assertion that there were "striking similarities" between the alleged prior bad acts and the allegations lodged by the Complainant, the lack of Record support for this conclusion has already been addressed at length above. Regardless, Rule 403 requires an examination of the prejudicial impact of such evidence against the degree of whatever similarities

have been established. ***See Tyson***, 119 A.3d at 359 (citation omitted). As noted, nothing reflects that the lower court actually engaged in that balancing test.

Turning to the Commonwealth's supposed "substantial need for the evidence," it is acknowledged that, when assessing whether any probative value of "prior bad acts" evidence is outweighed by its prejudicial impact, courts have stated that "prior bad acts" evidence is "highly probative when the Commonwealth's case is otherwise based largely on circumstantial evidence." ***Hicks***, 156 A.3d at 1128. To the extent that this consideration is predicated on the Commonwealth's "need" for the evidence, as the prosecution and the lower court argued herein, such consideration must be denounced as being inapposite and in direct conflict with those fundamental principles discussed above, to wit: that the prosecution must prove, beyond a reasonable doubt, that the accused actually committed the crime charged, and that it "...may not strip him of the presumption of innocence by proving that he has committed other criminal acts." ***Stanley, infra***, at 633. It is

patent that, in this case, the prosecution used the prior allegations of sexual misconduct to strip Cosby of his presumption of innocence.

Nevertheless, the prosecution did not have a "substantial need" for the prior bad acts evidence; it had evidence beyond that of the Complainant. For example, the Complainant's mother testified to conversations that she had with Cosby, [R. 4139a-4141a], and the lower court allowed Dr. Barbara Ziv ("Ziv") to testify as an expert, pursuant to ***42 Pa.C.S. §4920*** [R. 3049a], in "victimology and sexual assault" and "...in understanding the dynamics of sexual violence, victim responses to sexual violence, and the impact of sexual violence on victims during and after being assaulted." [R. 3037a]. Ziv testified, at length, as to, among other things, the reasons for "delayed reporting" of a sexual assault [See e.g., R. 3066a-3770a; 3086a-3087a]; seemingly "spotty" recollections of a sexual assault [R. 3088a-3095a]; and behaviors of sexual assault victims. [R. 3076a-3086a]. In other words, the prosecution had evidence beyond the inconsistent testimony of the Complainant available to it.

Exacerbating the prejudicial nature of this propensity testimony is the fact that some of these other women testified that they were involved in efforts in their respective home states to abolish the statute of limitations applicable to crimes involving sexual assault. [See e.g., R. 3745; 3586-3588]. Clearly, the jury was left to infer that, but for the statute of limitations, Cosby would have been charged with crimes based on the allegations of these women but, because of a "legal technicality," he will never be tried and held accountable for his actions. One cannot imagine testimony that is more prejudicial; patently unfair; and more targeted to securing a conviction not necessarily for the crime charged, but for allegations for which Cosby cannot be tried.

In its 1925(a) Opinion, lower court states that it attempted to mitigate any prejudicial effect of the prior bad act testimony by limiting the number of witnesses from nineteen to five. [Appendix A, p. 110]. This was not mitigation at all. That the testimony of the other five women was unduly prejudicial is evidenced by, among other things, the actual conviction. As already noted above, Cosby's first trial, where only one other woman was

permitted to testify concerning her accusation that Cosby had some type of non-consensual sexual contact with her, resulted in a mistrial due to a hung jury. [R. 1a-108a]. In the face of that mistrial, the lower court allowed the prosecution to divert the jury's attention from the evidence that pertained to the allegations lodged by the Complainant and, instead, focus it on remote, unsubstantiated allegations of prior sexual misconduct for which he was not on trial[27].

The lower court did provide what he called a "limiting instruction" either after or before the testimony of the other women. [Appendix A, p. 110-111; see also R. 3235a; 3230a-3231a; 3235a; 3599a; 3497a-3499a; 3501a-3502a]. These instructions, however, were significantly flawed; they were factually and legally erroneous and failed to fully instruct the jury as to the nature and use of this inflammatory evidence. In fact, in some instances, the instruction

[27] It must be recognized that the prosecution first presented the testimony of Ziv and then paraded the five other women before the jury *prior* to presenting the testimony of the Complainant. After the Complainant testified, the prosecution then presented deposition "admissions" of Cosby that, in the 1970s he shared Quaaludes with women. This added an additional component to the unfair prejudice calculus – the jury's focus was drawn away from the credibility of the Complainant and instead turned repeatedly to propensity claims.

indicated that Cosby was guilty of the prior alleged misconduct. For example, the first 404(b) witness to testify was Thomas. At the conclusion of her testimony, the lower court instructed the jury as follows:

> So now, again, you have heard evidence *tending to prove that the defendant was guilty of some sort of improper conduct of which he is not charged in this case*. And to be clear, you were asked about that in voir dire, about whether - - not allowing something that might be not charged in this case to affect your ability to be fair and impartial.
> So, again, *this is evidence tending to prove that defendant was guilty of some improper conduct for which he is not on trial*. And again, that is the testimony of what you just heard. This defendant is not on trial for the testimony that you just heard. This evidence is before you for a limited purpose. That is for the purpose of tending to show - - and again, this is what is going to be called, and you'll hear them argue, something called common plan, scheme, design, absence of mistake. And it is for that limited purpose only.
> This evidence must not be considered by you in anyway other than for the purpose that I just stated. You must not regard this evidence as showing that the defendant is a person of bad character or of criminal tendencies from

> which you might be inclined to infer guilt. Again, the defendant is not on trial for this conduct and you are not to use this for any purpose of showing that the defendant is a person of bad character or has criminal tendencies from which he - - from which you might infer - - be inclined to infer guilt. So that's a very important instruction. For the limited purpose to either show course of conduct, plan, *whatever it is*, that you determined what you find from the testimony, it is not to be used to infer guilt or anything about the defendant's character.

[R. 3230a-3231a (emphasis added)].[28]

Instructing jurors that such testimony "tended to prove" that Cosby was guilty of another sexual assault, removed any credibility determination of that claim from the jury. Moreover, although the lower court adverted to "common plan, scheme, design, absence of mistake" in this instruction, no explanation was provided to the jury as to what that means, and how the jury was to consider the allegations of the other women for that purpose. Simply advising the jury that the purpose of the evidence is to

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[28] Similarly, flawed instructions were given both for the other women and in the final charge. [*See e.g.* R. 5734a-5735a].

"show an absence of mistake" or a "common plan, a scheme, or design" for the crime explains absolutely nothing. In fact, the instruction involving Thomas essentially states that her testimony showed "common plan, scheme, design, absence of mistake," and that the jury was to accept it for the same. This is erroneous.

As a whole, the lower court's limiting instructions and final charge on this point failed to mitigate any undue or unfair prejudice flowing from the presentation of the other acts testimony, and they actually exacerbate that prejudice. Regardless, the other acts evidence was so inflammatory and prejudicial that the prejudice could not be cured by a limiting instruction, not even a proper one.

In sum, for a crime alleged to have occurred in 2004, Cosby was forced to confront claims from the 1970s until 1989, claims that differed significantly from the charged offense, and had no link or close factual nexus to the crimes for which he was on trial. Whether under the limitations of ***Pa.R.E. 404(b)***, or because of the protection against unfair prejudice required by that Rule and by ***Pa.R.E. 403***, a new trial is warranted.

B. THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO DISCLOSE HIS ACRIMONIOUS RELATIONSHIP WITH AN IMPERATIVE DEFENSE WITNESS, WHICH CREATED NOT ONLY THE APPEARANCE OF IMPROPRIETY BUT WAS EVIDENCED BY ACTUAL BIAS.

Two years after the criminal proceedings were initiated, an online article revealed a contentious and acrimonious encounter between the lower court and a defense witness, whose testimony, if credited, would have caused Cosby's charges to be dismissed. Shockingly, however, the lower court has never disclosed the encounter, denied the encounter, or held an evidentiary hearing regarding the events whirling around the reported encounter. The lower court had a duty to disclose the encounter which created, at a minimum, an appearance of impropriety, by the lower court's attacks on, criticism of, and demeaning comments to the witness during the critical hearing on the Writ of Habeas.

1. EVIDENCE CREATING THE APPEARANCE OF IMPROPRIETY

On January 11, 2016, Cosby filed a Writ of Habeas in which he advised the lower court not only that Castor would be a witness, but that he would be the key witness in determining

whether a non-prosecution agreement existed[29]. [R. 389a-411a]. At no time before, during, or after the hearing on the Writ of Habeas did the lower court disclose to counsel its prior relationship with Castor.

In March 2018, more than two years later, Radar Online published an article first revealing the existence of a hostile relationship and political rivalry between the lower court and Castor. *See "Bill Cosby Judge Steven T. O'Neill Kept Relationship Secret, Used As Grudge Against Key Witness: Sources."* [R. 1674a-1682a]. Trial counsel was initially unaware of the article. [R. 5874a-5886a]. Once sentencing counsel was made aware of the article, he hired an investigator to research the contents of the article and interview local Montgomery County attorneys. After gathering all the evidence, sentencing counsel filed a Motion for Recusal on September 11, 2018. [R. 5874a-5886a]. Appellate counsel followed with an affidavit, not yet entered in as evidence, of Castor[30]. The

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[29] As will be more fully addressed below, the lower court denied the Petition for Writ of Habeas Corpus, castigating Castor in the process. See Argument C, infra.

[30] The October 19, 2018, Affidavit of Castor was attached to Cosby's Petition for Review Pursuant to Pa.R.A.P. 1762(b)(2) filed with this Honorable Court on October 23, 2018.

lower court has never held an evidentiary hearing or commented factually on his history with Castor.

Specifically, and by way of background, in 1999, Castor and the then-Candidate O'Neill were both seeking the republican nomination for District Attorney in Montgomery County. [R. 5874a-5886a]. A nomination from the republican party was important because, in 1999, the majority of the nominees backed with the endorsement of the republican party had successful elections. [R. 5874a-5886a]. It was alleged that in 1998, then-Candidate O'Neill, who was married, had a romantic relationship with an employee of the Montgomery District Attorney's Office, where Castor was serving as first-assistant at the time. Later in 1999, after this affair had ended, both Castor and then-Candidate O'Neill appeared before the Republican Committee to seek the republican endorsement for District Attorney. It is alleged that Castor ordered the employee who had been in a relationship with then-Candidate O'Neill to attend the debate. Radar Online reported that Castor directed the woman to sit in the front row wearing a "Castor for DA" button. [R. 1674a-1682a]. Flustered by this, then-Candidate O'Neill was "nervous,

sweating, stammering" and "bombed" his speech. [R. 1674a-1682a]. Castor went on to secure the Republican Committee nomination and was elected District Attorney of Montgomery County in the 1999 general election. Then-Candidate O'Neill's campaign manager contacted the Republican party chair to determine who put the woman in the front row at the debate. [R. 1674a-1682a].

Upon learning that Castor had ordered the employee to attend the debate, then-Candidate O'Neill confronted Castor publicly, expressing his disgust with Castor. [R. 5874a-5886a]. According to Castor, he was at a political event with family and colleagues when then-Candidate O'Neill confronted Castor, and publicly accused Castor of running a smear campaign and of trying to ruin his marriage. Castor expressed that then-Candidate O'Neill was clearly angry, and overly dramatic. [R. 6215a-6223a].

2. THE LOWER COURT HAD A DUTY TO DISCLOSE HIS PRIOR ANTAGONISTIC RELATIONSHIP WITH A KEY DEFENSE WITNESS WHICH CREATED, AT MINIMUM, THE APPEARANCE OF IMPROPRIETY.

Article V, Section 10 of the Pennsylvania Constitution gives the Supreme Court authority over all courts: "[t]he Supreme Court shall have the power to prescribe general rules governing

practice, procedure and the conduct of all courts . . . ." ***PA CONST Article V, Section 10(c)***. The Supreme Court established the Code of Judicial Conduct to regulate the activity of the judges.

Code of Judicial Conduct Rule 2.2 reads that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of facts that are in dispute in the proceeding." ***Code of Judicial Conduct Rule 2.11***.

The fact that the lower court and Castor had a previous relationship and disagreement is not a valid reason, alone, for the lower court to have recused himself. However, the issue is not their prior relationship, or a mere confrontation. Rather, then-Candidate O'Neill engaged Castor, in a contentious and very public confrontation over two highly sensitive topics: love and politics. Despite knowing Castor would be a crucial witness in deciding

whether the high-profile, nationally publicized trial of Cosby would be allowed to go forward, the lower court made the decision not to disclose his history with Castor. [R. 5874a-5886a; 1674a-1682a].

The ***First Canon in the Code of Judicial Conduct*** provides, "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Withholding the fact of an angry confrontation over an illicit affair and politics with a critical defense witness contravenes judicial impartiality. The lower court, as a member of the judiciary, had a duty to disclose his prior relationship with Castor, and under ***Judicial Code of Conduct 2.11*** should have disqualified himself from presiding over Cosby's trial.

In his 1925(a) Opinion, the lower court argues he "cannot disclose that which does not exist." [Appendix A, p. 125]. Yet, the lower court has never denied the existence of his bitter relationship with Castor. Instead, the trial court has denied only that his relationship with Castor gives rise to bias, thus leaving a number of highly significant questions left open: Is the Radar Online article accurate? Was there a political feud between Castor and then-

Candidate O'Neill which resulted in Castor flaunting the latter's mistress in front of him at an important debate which resulted in him losing the Republican nomination? Did then-Candidate O'Neill publicly attack Castor and attack his character? If the answer to any of these questions is yes, the lower court had a duty to disclose and recuse himself from these criminal proceedings.

Further, the lower court's display of actual derogation towards Castor would cause a significant majority of the lay community to reasonably question the court's impartiality.

A judge is not permitted to simply deny bias without further contemplation. "A jurist's impartiality is called into question whenever he has doubts as to his ability to preside objectively and fairly in the proceeding or where there exists factors or circumstances that may reasonably question the jurist's impartiality in the matter." ***Commonwealth v. Boyle***, 447 A.2d 250 (Pa. 1982)(citations omitted). Indeed, ***Comment to Rule 2.11*** of the Code of Judicial Conduct reads, "[u]nder this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of

paragraphs (A)(1) through (6) apply." ***Comment (2) to Rule 2.7*** states, "a judge may recuse himself or herself from presiding over a matter even in the absence of a disqualifying fact or circumstance where--in the exercise of discretion, in good faith, and with due consideration for the general duty to hear and decide matters-the judge concludes that prevailing facts and circumstances could engender a substantial question in reasonable minds as to whether disqualification nonetheless should be required."

At a minimum, as part of its contemplation of the issue, the lower court had a responsibility to "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." ***Comment (5) to Judicial Code of Conduct Rule 2.11***. The lower court was aware by January 11, 2016, when counsel filed the Writ of Habeas, that Castor would be called upon to testify that he had bound the Commonwealth from ever prosecuting Cosby for the Complainant's allegations. The lower court was also aware that he would need to make a credibility determination of

Castor, whom the lower court had accused of trying to destroy his marriage. This information is clearly relevant and warrants disclosure under pertinent legal authority, regardless of whether it provides an actual basis for recusal. ***See Comment (3) to Judicial Code of Conduct Rule 2.7*** ("A judge should disclose on the record information that the judge believes the parties or their lawyer 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.").

All of the facts alleged in the Radar Online article, and, specifically, then-Candidate O'Neill's public shaming of Castor for "dirty politics," are facts all attorneys in this action would consider relevant in a motion for disqualification or recusal. Nonetheless, the lower court dismissed Cosby's Motion for Recusal without an evidentiary hearing. The September 19, 2018 opinion suggested the Motion for Recusal was untimely filed and did not address the basis for his disqualification. [R. 5887a-5894a]. The lower court wrote, "[t]he 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 a credibility determinations at a hearing in this case 31 months ago." [R. 5891a]. A defendant and the public are entitled to trust that the judiciary will remain unbiased and uncorrupted by personal interest in rendering an opinion. Although a motion for recusal should never be used as an attempt to transfer a case to a more favorable forum (i.e., "judge shop"), a court should never deny a motion for personal reasons. The lower court, at a minimum, had a duty to disclose the events of 1999, prior to holding a hearing on the Writ of Habeas, to enable counsel to investigate whether those events, at the very least, created the appearance of impropriety. He failed to do so. At a minimum a hearing on the issues should have been granted.

3. THE LOWER COURT ABUSED HIS DISCRETION IN FAILING TO RECUSE HIMSELF WHERE THERE WAS A CLEAR APPEARANCE OF IMPROPRIETY WHEN HE HAD ACCUSED COSBY'S STAR WITNESS OF BEING LESS THAN CREDIBLE.

The political rivalry and resulting turmoil between then-Candidate O'Neill and Castor created, at the minimum, an appearance of judicial impropriety. The lower court abused his discretion in failing to recuse himself.

"A trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes *his impartiality can be reasonably questioned.*" ***Commonwealth v. Kearney***, 92 A.3d 51, 60 (Pa.Super. 2014) (citations omitted)(emphasis added). An appellant need not prove actual prejudice; a judge should recuse himself where there is merely an appearance of impropriety. ***See In re Lokuta***, 11 A.3d 427 (Pa. 2011). "[A]n 'appearance of impropriety is sufficient justification for the grant of new proceedings before another judge. . . . A jurist's impartiality is called into question whenever there are factors or circumstances that may reasonably question the jurist's impartiality in the matter.'" ***Id.*** at 435 (citations omitted). In fact, "The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements." ***Commonwealth v. McFall***, 617 A.2d 707, 710 (Pa. 1992)(citations omitted).

The evidence, which has never been contradicted by the lower court, is that Castor believed then-Candidate O'Neill had an

affair and used then-Candidate O'Neill's mistress to embarrass him at an important political event. [R. 5874a-5886a]. Witnesses reported then-Candidate O'Neill was physically shaken, to the point he was unable to effectively give a brief speech. [R. 1674a-1682a]. Although both the Commonwealth and the lower court have attempted to downplay this adverse relationship as having occurred in the past, the stigma of an affair and a scandalous political rivalry is too intense to ignore.

As set forth above, the lower court's impartiality can be reasonably called into question based upon the preceding argument. The renewed investigation into Cosby was highlighted in the press. Radar Online then published an article discussing the lower court's prior contentious relationship with Castor. Public confidence in the legal system is compromised when the judiciary engages in politics and personal vendettas. This is why the appearance of impropriety alone is sufficient grounds for recusal. The lower court was not the only jurist seated on the Montgomery County bench in 2016. Any other judge could have handled this trial, or at the very, least the hearing regarding Cosby's Writ of Habeas.

The lower court should have recused itself to avoid any appearance of impropriety.

4. THE LOWER COURT ABUSED HIS DISCRETION IN FAILING TO RECUSE HIMSELF WHERE HE MAINTAINED AN ACTUAL BIAS AGAINST CASTOR, A KEY DEFENSE WITNESS, THUS DENYING COSBY A FAIR TRIAL.

There was not only an appearance of impropriety, but the lower court's actual bias infringed upon his ability to adjudicate fairly and impartially. The Pennsylvania Supreme Court has ruled "that a judge must recuse himself when his behavior departs 'from the clear line of duty through questions, expressions or conduct which contravenes the orderly administration of justice.'" ***In the Interest of Morrow***, 583 A.2d 816, 818 (Pa. 1990) (citations omitted)

The lower court could not hide his bias against Castor at the February 2, 2016, hearing on Cosby's Writ of Habeas. Upon completion of a thorough and contentious cross-examination by the Commonwealth, the lower court tenaciously questioned Castor extensively for over sixteen pages of transcribed testimony. [R. 634a-649a]. The lower court corrected Castor's use of the word

"molested," and, pointing out that this is not a legal charge under the crimes code:

> 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?"

[R. 635a].

The lower court further interrogated Castor on his decision to bind the Commonwealth from prosecuting Cosby based on the Complainant's allegation, which deprived Cosby of his Fifth Amendment privilege, thus requiring Cosby to testify in a civil proceeding that had not yet been filed, even though Complainant had secured civil counsel[31]. [R. 639a-640a]. The lower court took

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[31] THE COURT: . . . There was no civil case at that time; is that right? THE WITNESS: Yet. THE COURT: There was no civil case filed by the plaintiffs at this stage. You made your press release on February 7th. There was no filed civil case in the Eastern District of Pennsylvania at that time; is that correct? THE WITNESS: Yes. THE COURT: It is correct there was not. . . . 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.
[R. 639a-640a].

every opportunity to let Castor know that Castor was now without power:

> THE COURT: But assuming that you didn't prosecute. There had not been a civil case filed. It wasn't filed until almost a month after you made your press release. And in a deposition in September, if he just chose on advice of then counsel to say I stand on my Fifth Amendment rights, there is nothing that you could do about that because you're the District Attorney of Montgomery County. You're not counsel in the case. There's just nothing you could do about it.
>
> THE WITNESS: That's not true, Your Honor. What would happen in that circumstance, and has happened, is the plaintiff's lawyers go and complain to the judge that the exercise of the Fifth Amendment is improper. The judge then would ascertain the questions that were objected to under the Fifth Amendment and then would ascertain from - - if they were involved in the Constand case, ascertain from me that there would be no prosecution and order Mr. Cosby to testify on those issues.
>
> THE COURT: The question was, you could do nothing about it. You couldn't order him to testify. You couldn't do anything other than be a witness in some case in which some judge in the Federal Court would have to make a

> decision as to whether he was granted immunity from that testimony, but there's nothing you could do about it. You would be a witness, much the way you are here.

[R. 641a-642a].

The lower court engaged the witness solely to embarrass and humiliate him and provided no helpful line of questioning. In fact, the last statement from the court was not even a question, just a statement telling Castor he had no power.

In its 1925(a) Opinion, the lower court concludes that there was no agreement not to prosecute, in part claiming Castor was just attempting to side-step the Court and grant transactional immunity on his own, when he had no power to do so. [Appendix A, p. 62]. But this assertion fails to take into consideration the actual power given to the elected District Attorney to bring forward or reject prosecution, and to make non-prosecution agreements. ***See Commonwealth v. Stipetich***, 652 A.2d 1294 (Pa. 1995).

Without trying to determine whether a non-prosecution agreement was reached, the lower court challenged Castor on the concept of immunity:

> THE COURT: Yeah. You're familiar with the immunity statute, which is 5947 of Purdon's?
>
> THE WITNESS: Your Honor, on the issue of immunity, that is for use and derivative use immunity only. At common law, the sovereign has both the power of transactional immunity and use and derivative use immunity.
>
> THE COURT: I'm familiar with it. I'm just trying to get to your point. Let me ask you - - look, it wasn't utilized in this case because you never even charged Mr. Cosby, and you didn't charge him because you made independent reasons.
> Let me get to this. If you felt there was an agreement, why did you not make that agreement in writing with the plaintiff's attorney, with Mr. Phillips, yourself, create a miscellaneous docket number and simply file it away?
> Why did you not do that, because your intention was to bar prosecution at all times? I mean, do you know why you didn't do that?

[R. 643a].

As evidence that the lower court was merely engaging Castor to embarrass him, the lower court admitted he was asking a question that had already been answered:

THE COURT: And then I assume that you utilized - - there are certain disciplinary rules regarding roles of prosecutor and decisions to prosecute; is that correct?

THE WITNESS: Yes.

THE COURT: You've reviewed them. There's certain ABA standards that I assume you're familiar with. You have said once you made the decision not to prosecute, which was your sole discretion to do so, why did you feel compelled to do anything else? ***I'm just - - you've explained it, but I'm just saying if you could answer it one other time.*** Why were you compelled to do anything else in this case?

THE WITNESS: Well, I have to tell the public what the decision is.

THE COURT: Where is that in your Rules of Conduct that you have to tell the public what your decision is?

[R. 647a-648a (emphasis added)].

The above exchange evidences the lower court's actual bias as it was intended only to criticize Castor and elicited no additional relevant information to the issue at hand.

The court obviously may ask questions of a witness; however, he may not embarrass or shame a witness. For example before a jury, "the court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment". ***Pa.R.E. 611(a)***. A judge's questions "should not show bias or feeling or be unduly protracted." ***Commonwealth v. Purcell***, 589 A.2d 217, 223 (Pa.Super. 1991)(citations omitted). Furthermore ***Comment 1 to Code of Judicial Conduct 2.6 Ensuring the Right to Be Heard*** states, "[t]he right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed."

The trial court's cross-examination of Castor did not comport with these clear rules. Instead, that contentious cross-examination suggests that the trial court harbored resentment towards Castor for bringing his affair to light, embarrassing him at the Republican

nomination meeting, and winning the election for District Attorney years earlier.

In ***Commonwealth v. Darush***, 459 A.2d 727 (Pa. 1983), the appellant made several arguments seeking recusal of the trial judge, based upon similar antagonism to that which exists here. Appellant argued that the trial judge, when he was district attorney, made derogatory remarks about Appellant, which was supported by nothing more than a hearsay accusation. The Supreme Court found, "considering all the circumstances, especially the lower court's inability to affirmatively admit or deny making remarks from which a significant minority of the lay community could reasonably question the court's impartiality, we feel the largely unfettered sentencing discretion afforded a judge is better exercised by one without hint of animosity toward appellant." ***Id***. at 732. The Court believed the trial court "acted with complete integrity in assuring appellant it harbored no prejudice against him" and did not find the hearsay statements actually affected Appellant's sentence. ***Id***. However, the Court ruled that "a defendant is entitled to sentencing by a judge whose impartiality cannot reasonably be questioned." ***Id***.

As ***Darush*** instructs, the lower court had a duty to uphold public confidence in the judicial system and to recuse himself at the mere suggestion of impropriety. Considering all of the circumstances, the lower court clearly abused his discretion in failing to recuse himself, and the prejudice to Cosby is evident.

The Writ of Habeas and the Motion to Suppress all hinged on the credibility of Castor. The lower court denied Cosby's Writ of Habeas, finding, "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. . . ." [R. 1048a (emphasis added)]. Similarly, the lower court denied the Motion to Suppress, ruling "The Defendant principally relies on the testimony and writings of Mr. Castor to support his motion. 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*". [R. 1192a-1197a (emphasis

added)]. The lower court denied both motions determining, that a man with whom he had previously accused of trying to destroy his marriage and using deceptive tactics to steal a political nomination, was not credible. The lower court's failure to recuse in these circumstances was an abuse of discretion.

5. TRIAL COUNSEL DID NOT DELAY IN FILING A PETITION FOR RECUSAL

A motion to recuse should first be presented to the trial judge who must "make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome." ***Kearney supra*** at 60 (citations omitted). In its 1925(a) Opinion, the lower court relies upon ***Lomas v. Kravitz*** to argue that Cosby was late in filing his Motion for Recusal. 170 A.3d 380 (Pa. 2016). In ***Lomas***, the Pennsylvania Supreme Court noted "[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." ***Id***. at 390. In ***Lomas***, a civil case was brought before a Montgomery Court of Common Pleas Judge for a bench trial on attorney's fees and punitive damages. A member of the bench was

once an attorney for the plaintiff and was called to testify at the hearing. At this hearing, defendant's counsel learned for the first time that the judge had a financial interest in the outcome of the bench trial. The Pennsylvania Supreme Court stated that once counsel was made aware, after the judge testified at a hearing, that the judge had a conflict of interest, counsel was required to file a Motion for Recusal at the earliest possible moment, and not wait over 30 days to file. ***Id.***

The Radar Online article was not published until March 2018. [R. 1674a-1682a]. Trial counsel did not know the article was published on March 28, 2018. [R. 5874a-5886a]. On June 14, 2018, sentencing counsel entered their appearance. After the article was discovered, sentencing counsel promptly researched the allegations. [R. 5874a-5886a]. On September 11, 2018, based upon the investigation and the Radar Online article, sentencing counsel filed a Motion for Recusal seeking recusal of the lower court for his past tumultuous relationship with Castor. [R. 5874a-5886a].

The Commonwealth argued and the lower court concluded that since the Motion for Recusal was not filed until September

2018, the issue has been waived. This assertion is without any proof that counsel was aware of the article at the time it was published. Because of the lower court's failure to disclose his relationship with Castor, the Radar Online article was the only source of this information that could have been available to trial counsel, and there is no indication that trial counsel did, in fact, learn of the Radar Online article on the date it was published.

The lower court's analysis assumes that Castor's involvement in the Radar Online article meant that Castor must have told defense counsel of the same information in 2016 when he testified at the Writ of Habeas hearing. [Appendix A, p. 126]. There is no evidence that Castor told trial counsel of the lower court's bias. Initial trial counsel McMonagle and second trial counsel Mesereau filed numerous requests to file interlocutory appeals to the Superior Court. Over 30 motions were filed with the lower court. Had trial counsel been aware of a conflict between the lower court and Castor, a prompt recusal motion would have been filed.

The lower court had a duty to disclose his acrimonious relationship with Castor, but failed to do so, thereby abusing his

discretion. Cosby cannot possibly waive an issue the lower court intentionally failed to disclose. Further, based upon the trial court's tone, demeanor and line of questioning towards Castor, the lower court had a duty to recuse himself from presiding over Cosby's proceedings due to actual prejudice. The lower court abused his discretion in denying the Motion for Recusal and in denying even an evidentiary hearing on this issue.

C. THE LOWER COURT ERRED IN DENYING THE WRIT OF HABEAS FILED ON JANUARY 11, 2016 AND IN FAILING TO DISMISS THE CRIMINAL COMPLAINT WHERE THE DISTRICT ATTORNEY IN 2005 PROMISED COSBY HE WOULD NOT BE CHARGED FOR THE ALLEGATIONS BROUGHT BY COMPLAINANT.

"A District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case." ***Commonwealth v. Stipetich***, 652 A.2d 1294, 1295 (Pa. 1995)(citations omitted). A District Attorney "has the power to decide whether to initiate formal criminal proceedings, to select those criminal charges which will be filed against the accused, to negotiate plea bargains, to withdraw charges where appropriate,

and, ultimately, to prosecute or dismiss charges at trial." ***Commonwealth v. Clancy***, 192 A.3d 44, 53 (Pa. 2018).

In 2005, the Complainant contacted authorities reporting she was sexually assaulted by Cosby. [R. 3759a; 3758a]. The Commonwealth, through Castor, after reviewing the merits of the complaint, promised Cosby that the Office of the District Attorney would not prosecute him for the allegations brought by the Complainant. In exchange, Cosby would be testifying in the civil case brought against him by the Complainant. [R. 760a-761a]. Castor determined, after reviewing the Complainant's statement, Cosby's statement, phone records and all the evidence gathered by the Cheltenham and Montgomery County detectives, that there was "insufficient, credible and admissible evidence . . . upon which any charge against Mr. Cosby could be sustained beyond a reasonable doubt.[32]" [R. 127a-128a]. With the belief he would not succeed in a

[32] "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 Cosby could be sustained beyond a reasonable doubt. In making this finding, the District Attorney has analyzed the facts in relation to the elements of any applicable offenses, including whether Cosby possessed the requisite criminal intent. In addition, District Attorney Castor applied the Rules of Evidence governing whether or not evidence is admissible. Evidence may be inadmissible if it is too remote in time

criminal prosecution, Castor wrote the press release as a promise not to prosecute and with the intent to induce Cosby to testify during a civil deposition and prevent Cosby from asserting his Constitutional rights under the Fifth Amendment. [R. 585a]. Pursuant to the foregoing agreement, Cosby did testify at the civil deposition, and in reliance on the Commonwealth's agreement, never asserted his Constitutional rights under the Fifth Amendment of the United States Constitution. [R. 750a-751a]. When the Commonwealth filed charges in 2015, the non-prosecution agreement was breached.

On March 8, 2005, the Complainant filed a civil complaint against Cosby. [R. 3807a]. Consistent with his understanding that he could not invoke his Fifth Amendment rights because of the Commonwealth's agreement not to prosecute him as a result of the Complainant's allegations, Cosby sat for multiple days of testimony

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to be considered legally relevant or if it was illegally obtained pursuant to Pennsylvania law. After this analysis, the District Attorney concludes that a conviction under the circumstances of this case would be unattainable. As such, District Attorney Castor declines to authorize the filing of criminal charges in connection with this matter." [R. 127a-128a].

at a civil deposition and never asserted his Fifth Amendment privilege against self-incrimination. [R. 750a-751a].

In 2015, the Montgomery County election for District Attorney again took center stage. Steele, an assistant in the Montgomery District Attorney's Office, ran for District Attorney against Castor. Castor became aware of the fact that the District Attorney's Office reexamined the Complainant's allegations against Cosby and alerted the Montgomery County District Attorney's Office that they were violating the non-prosecution agreement[33].

In an email to then District Attorney Risa Ferman ("Ferman") on September 23, 2015, Castor unequivocally outlined the terms of the promise made to Cosby not to prosecute him for the allegations made by Complainant. Castor wrote, in part:

> Again, with the agreement of the defense lawyer and Andrea's lawyers, I intentionally and specifically bound the Commonwealth that there would be no state prosecution of Mr. Cosby in order to remove from him the ability to claim

[33] "I knew that I had bound the Commonwealth as the representative of the sovereign not to arrest Mr. Cosby. And at the time District Attorney Ferman was running for judge of the Court of Common Pleas, and I wanted to make sure that she didn't make a mistake and go ahead and move against Cosby and it turn out that she should not have done so and affect her election." [R. 506a].

> his Fifth Amendment protection against self-incrimination, thus forcing him to sit for a deposition under oath.

[R. 384a]. Castor concluded, in part "Because I knew Montgomery County could not prosecute Cosby for a sexual offense, if the deposition was needed to do so." [R. 384a].

In a follow-up email to Ferman on September 25, 2015, Castor stated: "The attached Press Release is the written determination that we would not prosecute Cosby." [R. 386a]. Furthermore, "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 could 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". [R. 386a].

Steele was elected Montgomery County District Attorney and proceeded to charge Cosby, in violation of the non-prosecution agreement.

A District Attorney's job is "to serve the public interest and to 'seek justice within the bounds of the law, not merely to convict.'" ***Clancy supra***, at 52. Within this job is the duty "both to respect the rights of the defendant and to enforce the interests of the public . . . ." ***Id.*** A District Attorney has "broad discretion over whether charges should be brought in any given case." ***Stipetich supra***, at 1295.

The use of plea agreements is favored by the courts, and there is "an affirmative duty on the part of the prosecutor to honor any and all promises made in exchange for a defendant's plea." ***Commonwealth v. Kroh***, 654 A.2d 1168, 1172 (Pa.Super. 1995)(citations omitted).

On the other hand, "non-prosecution agreements are binding contracts and their interpretation is guided by general principles of contract law, 'such agreements are unique and are to be construed in light of special due process concerns.'" ***United States v. Stolt-Neilsen S.A.***, 524 F.Supp.2d 609, 615 (E.D. Pa. 1995)(citing ***United States v. Baird***, 218 F.3d 221, 229 (3rd Cir. 2000)). When reviewing the breach of a non-prosecution

agreement, the court should consider "whether the non-breaching party received the benefit of the bargain, as well as the incriminating nature of the information provided by the defendant." ***Id***. at 616 (citations omitted).

Castor reviewed the evidence and concluded the Commonwealth could not reach a conviction against Cosby. Castor still sought to hold Cosby accountable for the allegations, so he agreed not to prosecute Cosby. The non-prosecution agreement forced Cosby to sit for deposition in the civil suit and not assert his Fifth Amendment rights. After procuring four days of testimony from Cosby, the suit was settled with the Complainant for $3.38 million dollars. [R. 3809a-3811a].

At the February 2, 2016 hearing on the Writ of Habeas, Castor testified "it was better for justice to make a determination that Mr. Cosby would never be arrested." [R. 676a]. Castor added, "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." [R. 475a]. According to Castor, "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 legal theory, and he agreed to that." [R. 585a].

Likewise, Schmitt, Cosby's civil attorney also testified that once he had learned of the criminal investigation in 2015, he retained Phillips as criminal counsel for Cosby. [R. 700a-701a]. Schmitt testified he learned from Phillips that "although the District Attorney had determined there wasn't sufficient evidence to charge Mr. Cosby, that he did anticipate that there would be a civil litigation. And, therefore, his decision was - - it was an irrevocable commitment to us that he was not going to prosecute." [R. 703a]. In preparation of the obvious impending civil suit, Schmitt hired additional civil counsel, Attorney Patrick O'Connor, upon conclusion of the criminal case and prior to the civil suit being filed. [R. 704a]. Schmitt testified that he knew that Cosby would not be charged criminally, and this is why he allowed Cosby to sit through four days of deposition questioning. [R. 706a]. Schmitt relied on the

conversation Castor had with Phillips and the press release Castor signed and released. [R. 732a]. Schmitt indicated he had no pause in moving forward with the deposition because he "had the assurances given to our criminal counsel" that charges would not be brought. [R. 760a-761a]. Schmitt believed that the criminal matter was closed, and he was not thinking of the criminal investigation while Cosby was answering questions during the civil deposition. [R. 762a]. With years of experience, and the assistance of Phillips, Schmitt would have never allowed Cosby to testify at a civil deposition had he not had the assurance from the Commonwealth that no criminal charges would be filed. Schmitt's testimony was not refuted by the Commonwealth or the lower court.

The lower court denied the Writ of Habeas "based upon review of all the pleading 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." [R. 1048a]. There is no evidence, however, to cast doubt on the testimony of Schmitt. The lower court took issue with the fact that the non-prosecution agreement was not in writing, yet contracts are

still binding and enforceable even if not reduced to writing. ***Woodbridge v. Hall***, 76 A.2d 205 (Pa. 1950). Regardless, Castor believed the agreement was in writing. At the February 2, 2016 Writ of Habeas hearing, Castor testified to the significance of signing the press release: "And I used my title because I intended that this was the decision of the sovereign, the District Attorney being the Commonwealth of Pennsylvania, and therefore the representative of the sovereign." [R. 500a].

The Commonwealth argued that Castor did not intend the press release to act as a non-prosecution agreement because of one sentence in the September 25, 2015, email Castor sent to Ferman: "I never agreed we would not prosecute Cosby." [R. 388a]. However, this statement is taken out of context; the entire email reads:

> One other thing. I don't know if this is important or not, but when I served on the Judicial Reform Commission with Wally Phillips, he told me that in the civil settlement agreement in the Constand/Cosby case it was "baked in" that there would be no prosecution for that incident. "Baked in" was his term. I don't know what he meant by that which is what led me to try to call him

> on Wednesday only to find out he had died.
> Anyway, there might be a writing someplace that alludes to the parties intent at the time of the settlement. I was not privy to that and it could be nonsense. I never agreed we would not prosecute Cosby. I only agreed along with the plaintiff's lawyers and Phillips that anything he said would not be used to advance a prosecution in order to force his testimony in the civil proceeding.
> Like I said, might be nothing, but I thought I'd better mention it.
> Bruce

[R. 388a].

As the full email reflects, Castor's intention was not to prosecute Cosby for Complainant's allegations and not to use anything he said in the civil deposition as evidence in a criminal proceeding. Castor left open the possibility, should new independent evidence arise, that a prosecution may be considered: "If there was perjury, I thought we could prosecute that. And with all of the 50 or so women coming forward saying that they have been molested by Cosby, I thought that it was possible - - he lived in Montgomery County - - that maybe some of them happened in Montgomery County. And I saw no reason why we couldn't

prosecute him for that. We just wouldn't be able to use the deposition or anything derived therefrom" [R. 632a-633a]. Castor also left open the possibility that Cosby could be prosecuted for other acts where the Complainant was not the victim. Specifically, at the February 16, 2016 hearing Castor stated, "but I was and have maintained all along that if Cosby could be prosecuted for criminal violations that occurred in Montgomery County other than against Ms. Constand, that I thought that we should do that." [R. 631a].

The lower court and the Commonwealth have attacked Castor on his use of the word "agreement." While there was mention made of an agreement, Castor testified at the February 2, 2016 hearing that he acted as the sovereign; specifically, "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." [R. 585a]. Whether it was an agreement, contract, arrangement, or promise, Castor made it clear

in the signed press release that the Commonwealth would not prosecute Cosby for the allegations made by the Complainant. Cosby relied on the promise to his detriment.

1. PROMISSORY ESTOPPEL

Regardless of whether some form of an agreement existed, the Commonwealth was estopped from proceeding with prosecution. Promissory estoppel involves "the promise to do something in the future . . . ." ***Commonwealth v. Dep't of Pub. Welfare v. Sch. District of Phila.***, 410 A.2d 1311, 1314 (Pa.Commw 1980). "Pennsylvania has long recognized promissory estoppel as a vehicle by which a promise may be enforced in order to remedy an injustice." ***Peluso v. Kistner***, 970 A.2d 530, 533 (Pa.Commw 2009)(citations omitted).

To succeed on a claim of promissory estoppel one must establish: "(1) the promisor made a promise that would reasonably be expected to 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." ***Peluso v. Kistner***, 970 A.2d 530, 533 (Pa.Commw 2009)(citations omitted).

The lower court rejected promissory estoppel in the present case, concluding that a promise did not exist. [See R. 1192a-1197a]. The lower court did not find a promise because he did not believe Castor's testimony, the key witness against with whom he holds a personal grudge.

Castor made a promise not to prosecute. It does not matter if that promise is in writing; however, Castor did execute and sign a press release stating his promise. Knowing the media and public would read the press release, he was intentionally vague as to certain matters[34]. Castor's promise was tailored to force Cosby to relinquish his Fifth Amendment right and sit for a civil deposition. As Castor predicted, Cosby did subject himself to four days and over 20 hours of deposition testimony which resulted in Cosby ultimately

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[34] "On that last point, the entire Eastern District of Pennsylvania Federal Court is within the Philadelphia media market. In 2005 my words would have been heard by virtually every prospective juror in the civil case. What I did not want those prospective jurors to hear, since I had already decided that I wanted Mr. Cosby punished in the civil court, I did not want them to hear that District Attorney Castor had serious doubts concerning the credibility of Ms. Constand because I did not want to mess up the carefully laid plan that Mr. Cosby would be punished by having to pay money for what he had done." [R. 485a].

settling the civil suit. Cosby's testimony from the civil depositions was then used against him in his criminal trial.

The Commonwealth through Castor made a promise not to prosecute. In reliance on that promise, Cosby testified in a civil deposition without asserting his Fifth Amendment rights. Justice can only be served by holding the Commonwealth to their promise and upholding the non-prosecution agreement.

The lower court erred in denying the Writ of Habeas. The judgment of sentence should be reversed and vacated.

D. THE LOWER COURT ERRED IN DENYING THE MOTION TO SUPPRESS WHERE COSBY, RELYING ON THE COMMONWEALTH'S PROMISE NOT TO PROSECUTE HIM FOR THE ALLEGATIONS BY COMPLAINANT, HAD NO CHOICE BUT TO ABANDON HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION AND TESTIFY IN A CIVIL DEPOSITION.

When a plea bargain is made with the Commonwealth and then broken by the Commonwealth, "the defendant is entitled, at least, to the benefit of the bargain." ***Kroh supra***, at 1172 (citations omitted). A District Attorney "serves as an 'officer of the court,' as an 'administrator of justice,' and as an 'advocate.'" ***Clancy supra at 52 supra***. A district attorney is an officer of the court, and she

should not only be held to a higher standard by the court, but when she makes a promise, a defendant should be able to believe in and rely on that promise.

For example, if the Commonwealth secures a confession by a false promise of immunity, the defendant's waiver of Miranda rights is not considered voluntary. ***See e.g., Commonwealth v. Eiland***, 301 A.2d 651 (Pa. 1973). If the Commonwealth makes a promise to a defendant, who acts in detriment to their protected rights as a result of that promise, the District Attorney, as an "administrator of justice," cannot then renege on the promise and seek to benefit from the deceit.

The lower court determined that there was no non-prosecution agreement, and, thus Cosby's rights were not violated. The lower court's Finding of Fact reflects that he discredited Castor: "(39) The Defendant principally relies on the testimony and writings of Mr. Castor to support his motion" and "(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 inherent part of this Court's denial of

the Defendant's initial Writ of Habeas." [R. 1195a]. The lower court credited the testimony of Kivitz and Troiani, the Complainant's civil attorneys (44) and seemingly ignored the testimony of Schmitt, using it as a finding of fact but not rendering an opinion as to his credibility. [R. 1195a-1196a]. Indeed, Schmitt's credibility was not, and could not, be impugned. [R. 699a-765a].

The lower court concluded that during Cosby's statement to the police, "(5) At no time during the statement to police did the Defendant invoke his Fifth Amendment privilege." [R. 1196a]. The lower court relied upon the fact that Cosby made a statement in a criminal investigation as proof that he did not need to assert his Fifth Amendment privilege in a civil deposition, and therefore there was no consideration for an agreement not to prosecute. This is in error. Cosby, in his criminal statement to police, indicated that he met with the Complainant, gave her Benadryl, and that on certain occasions he and the Complainant engaged in consensual sexual activity. [R. 109a, 111a-114a]. A civil deposition and a statement to police in a criminal investigation are not similar. The civil deposition at issue consisted of four separate days of testimony:

September 28, 2005 from 1:00pm until 5:30pm; September 29, 2005 from 9:20am until 3:30pm; March 28, 2006 from 9:00am until 2:30pm; March 29, 2006 from 9:10am until 2:45pm. [R. 129a-383a]. Further the burden of proof is different in a civil proceeding; and as a matter of common practice, the Rules of Evidence are relaxed in a civil deposition, with all objections except as to the form of the question generally being preserved and reserved for trial. See ***Pa.R.Civ.P. 4020(a)***; ***Fed.R.Civ.P. 32(b)***. It is impossible to conclude a witness's behavior during a criminal investigation will mirror his testimony during a civil deposition.

Cosby's decision not to invoke his Fifth Amendment privilege while voluntarily giving a statement to the police does not suggest he would have never invoked his Fifth Amendment privilege in the civil depositions, had there not been a non-prosecution agreement with the Commonwealth. Rather, the fact Cosby agreed to be deposed and questioned *ad nauseum* on his sexual habits, clearly suggests his reliance on the non-prosecution agreement.

In ***United States v. Hayes***, 946 F.2d 230 (3rd Cir. 1991) the government reached an agreement with the defendant that, in

exchange for his guilty plea the government would make no recommendation at the time of sentencing. At sentencing, however, the government requested a lengthy term of incarceration. The Circuit Court of Appeals ruled the government breached the plea agreement: "[T]he government must honor its bargain with the defendant." ***Id***. at 233.

In ***Stipetich***, police officers made a promise not to prosecute if the defendant cooperated and answered all questions. The Pennsylvania Supreme Court found the police officer could not make such a promise because the decision to prosecute rests solely with the District Attorney. However, the Court held that because the defendant did answer the questions, fulfilling his side of the bargain, his statement should be suppressed because "[t]his places the Stipetiches in the same position as if the unauthorized promise not to prosecute had never been made by the police." ***Stipetich supra*** at 1296.

Similarly, in ***Commonwealth v. Peters***, 373 A.2d 1055, 1062 (Pa. 1977), the Pennsylvania Supreme Court found that a statement made by appellant should have been suppressed where it

was "induced by a promise of immunity from a person in apparent authority to perform the promise . . . . "

Again, in ***Commonwealth v. Bryan***, 818 A.2d 537 (Pa. Super. 2003), this Honorable Court suggested that the defendant made incriminating statements in reliance on a later unenforced plea agreement with the Commonwealth, the defendant's statement would have been suppressed.

The Commonwealth uses one line in the press release where Castor said, "District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise" [R. 127a-128a], to argue that this was not a non-prosecution agreement. However, this attempted distinction is taken out of context. In the last paragraph of the press release[35], Castor spoke

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[35] "Because a civil action with a much lower standard of proof is possible, the District Attorney renders no opinion concerning the credibility of any party involved so as not to contribute to the publicity, and taint of prospective jurors. The District Attorney does not intend to expound publicly on the details of his decision for fear that his opinions and analysis might be given undue weight by jurors in any contemplated civil action. District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise. Much exists in this investigation that could be used (by others) to portray persons on both sides of this issue in a less than flattering light. The District Attorney encourages the parties to resolve their dispute from this point forward with a minimum of rhetoric." [R. 127a-128a].

of the civil suit and stressed the importance of all parties' cooperation.

In fact, at the Writ of Habeas hearing, Castor explained the precise meaning of that language, testifying that he put that specific language in the press release as warning to all parties, "that if they went out in the media and criticized the D.A.'s office for our decision, I was then going to call the press back and explain what I have explained here in court, that Andrea Constand's own actions during that year ruined her credibility as a viable witness to win the case." [R. 496a].

In exchange for Castor's promise not to prosecute, Cosby testified at a civil deposition. During his deposition testimony, Cosby waived his Fifth Amendment rights against self-incrimination, believing that no criminal charge would ever ensue from these accusations. The Commonwealth and Cosby entered into a non-prosecution contract, which the Commonwealth later violated.

Further, regardless of whether or not the press release constitutes a written non-prosecution agreement, it is clear from the testimony of Schmitt that Cosby believed there was a written

agreement and that, with that belief, he testified in the civil deposition. Schmitt testified that he believed the prosecution's promise that Cosby would not be charged criminally and that is why he allowed Cosby to sit through four days of testimony for the civil deposition. [R. 706a]. Schmitt relied on the conversation Castor had with Phillips and then the press release Castor signed and released. [R. 732a]. Schmitt indicated that he had no pause in moving forward with the deposition because he "had the assurances given to our criminal counsel" that charges would not be brought. [R. 760a-761a]. Notably, the lower court never discredited Schmitt. Taking Schmitt at his word, Cosby only testified at the civil deposition because of the non-prosecution agreement. Even in the absence of a binding agreement, it cannot be disputed Cosby only testified at the civil deposition because he believed there was a non-prosecution agreement.

The Commonwealth was precluded from using Cosby's civil deposition testimony as evidence in the criminal trial. The deposition testimony should have been suppressed. The lower court erred and abused its discretion by failing to do so.

E. WHERE THE EXCERPTS OF COSBY'S DEPOSITION CONCERNING HIS POSSESSION AND DISTRIBUTION OF QUAALUDES TO WOMEN IN THE 1970s HAD NO RELEVANCE TO THE ISSUE AT TRIAL, THE LOWER COURT'S DECISION TO ALLOW THIS EVIDENCE TO BE PRESENTED TO THE JURY WAS CLEARLY ERRONEOUS AND AN ABUSE OF DISCRETION, THUS REQUIRING A NEW TRIAL.

Cosby's deposition excerpts included improper 404(b) evidence and bore no relevance to the Complainant's allegations. Specifically, the prosecution presented excerpts from Cosby's civil deposition concerning his possession of Quaaludes in the 1970s, and his sharing of those Quaaludes with women with whom he wanted to have sex. The excerpts referenced, *inter alia*, the circumstances under which Cosby was prescribed the Quaaludes [R. 4789a-4790a]; the number of scripts obtained [R. 4790a]; and his decision to share the Quaaludes, noting that, at that time (i.e., the 1970s), "Quaaludes happen to be the drug that kids, young people, were using to party with and there were times when I wanted to have them just in case." [R. 4793a][36].

[36] The issues and arguments involving "Jane Doe 1" are set forth above and will not be reiterated here.

The following excerpt, however, was also presented to the jury:

> Q. "Did you believe at that time that it was illegal for you to dispense those drugs?"
>
> A. "Yes."
>
> Q. "And you did it anyway; is that correct? You have to answer yes or no."
>
> A. "Why do I have to answer that? It's obvious. I just finished telling you I gave them."

[R. 4791a].

The lower court allowed the prosecution to present Cosby's admission that he committed yet another "prior bad act," to wit: that he unlawfully delivered a controlled substance[37]. The law concerning the scope of ***Rule 404(b)*** is set forth above at length. With respect to the above "admission" of Cosby that he committed a

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[37] The lower court's 1925(a) Opinion asserts that the challenge to the admissibility of this portion of the deposition testimony was waived, "...as it was not raised before the trial court." [Appendix A, p. 112]. Trial counsel objected to the admission of Cosby's deposition excerpts concerning providing Quaaludes in the 1970s on both relevance and 404(b) grounds. See e.g., [R. 6572a-6573a, 6575a-6577a; 1709a-1729a]. The testimony concerning the illegality of dispensing the Quaaludes was part of the deposition designation offered by the Commonwealth and to which trial counsel objected. [R. 6612a-6613a]. This issue was properly preserved for appeal.

crime, it does not fall within any of the exceptions to Rule 404(b). The admission of this testimony, alone, warrants a new trial.

Moreover, the testimony of Cosby's possession and sharing of Quaaludes in the 1970s, in general, had no relevance to *any* issue at trial. It is axiomatic that "[e]vidence is admissible if it is relevant – that is, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact ... and its probative value outweighs the likelihood of unfair prejudice." ***Commonwealth v. Boczkowski***, 846 A.2d 75, 88 (Pa. 2004)(internal citations omitted). Pursuant to the Rules of Evidence, "[e]vidence that is not relevant is not admissible" (***Pa.R.E. 402***) and inadmissible evidence is not to be suggested "to the jury by any means." ***Pa.R.E. 103(d)***.

According to the lower court, Cosby's "own words about his use and knowledge of drugs with a depressant effect was relevant to show his intent and motive in giving a depressant to Ms. Constand." [Appendix A, p. 115]. This rationale ignores the fact that Cosby's deposition testimony focused specifically on the use of Quaaludes in the *1970*s as a party drug. Quaaludes, however, were

never at issue in this case. On the night in question, Cosby gave the Complainant "three blue pills." [R. 3762a-3763a]. In a statement provided to police on January 26, 2005, Cosby advised that the pills were Benadryl and he provided the pills to the police. [R. 111a]. In his deposition, Cosby confirmed that the pills were Benadryl. [R. 4528a]. Cosby's deposition also reflects that, as of November 2002, he did not have Quaaludes in his possession. [R. 4788a]. When asked during his deposition, "who are the other people that you gave Quaaludes to in the past five years," Cosby responded, "none." [R. 4794a]. Criminal detectives searched Cosby's home and, consistent with his deposition testimony, no Quaaludes were found. [R. 4319a].

The fact that the pills that the Complainant took were Benadryl is supported by the prosecution's expert, Timothy Rohrig ("Rohrig"), who was offered as an expert in toxicology. [R. 4905a]. Rohrig testified that he tested the pills produced by Cosby in 2005 and determined they were Diphenhydramine; Benadryl is the trade name. [R. 4910a]. Rohrig testified that Benadryl came in a blue pill form up until, approximately, 2010-2011. [R. 4911a]. Rohrig also

testified as to the effects of Benadryl and indicated that it has an impact on the central nervous system. [R. 4927a]. In fact, Rohrig was permitted to testify that Benadryl is a substance that has been used in cases of drug facilitated sexual assaults. [R. 4929a]. Rohrig ultimately opined that the symptoms that the Complainant described on the night in question were consistent with her ingestion of Benadryl. [R. 4927a].

Given the foregoing testimony, Cosby's possession and sharing of Quaaludes in the 1970s had no relevance to the instant case. The Record is barren of any evidence which reflects that Cosby had Quaaludes in his possession in 2004 and that the pills the Complainant was given were Quaaludes. In fact, the Record reflects otherwise. Moreover, the fact that Cosby may have shared *Quaaludes* with women in the *1970s* is not probative of his motive or intent concerning providing *Benadryl* to the Complainant in *2004*.

Quaaludes were legal in the 1970s and were a "party drug" widely used in the 1970s and early 1980s. [R. 4969a-4970a]. The fact that Cosby possessed but unlawfully shared Quaaludes in the 1970s while partying with other individuals may be salacious,

but it does not establish any material fact in this case, nor does it make a fact at issue (i.e., whether Cosby had nonconsensual sexual contact with the Complainant) more or less probable. Further, it does not raise any reasonable inference supporting a material fact. It had no probative value and was not relevant but was extraordinarily prejudicial.

The prosecution offered this evidence to raise the innuendo that Cosby supplied women with Quaaludes *back in the 1970s* and then had sex with them. No facts were presented, however, to support the conclusion that the women: (a) were forced to take the Quaaludes; (b) did not know that they were taking Quaaludes; (c) actually had sex with Cosby; and (d) if they had sex with Cosby, had nonconsensual sex with Cosby. The fact is, a person can be impaired by voluntarily taking a controlled or non-controlled substance, or by consuming alcohol, and still engage in consensual sexual contact. That such may have happened between Cosby and some women in the 1970s in no way establishes whether, on some night in 2004, Cosby had nonconsensual contact with the Complainant. This prejudicial evidence was offered for no

reason other than to smear Cosby, a reason which certainly does not support the admissibility of the evidence. A new trial is warranted.

F. WHERE THE LOWER COURT'S FINAL CHARGE TO THE JURY ERRONEOUSLY INCLUDED AN INSTRUCTION ON "CONSCIOUSNESS OF GUILT," A CHARGE WHICH WAS MISLEADING AND HAD NO APPLICATION TO COSBY'S CASE, THE CHARGE WAS LEGALLY DEFICIENT AND A NEW TRIAL IS WARRANTED.[38]

When assessing a lower court's charge to the jury, the Superior Court has stated:

> "...[a] jury charge will be deemed erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. A charge is considered adequate *unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error*. Consequently, the trial court has wide discretion in fashioning jury instructions. The trial court is not required to give every charge that is requested by the

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[38] Although Cosby included in his 1925(b) Statement a challenge to certain instructions beyond that pertaining to "consciousness of guilt" and to the failure to include certain special interrogatories on the verdict slip, after further assessment, only the issue pertaining to the instruction on "consciousness of guilt" is being raised on direct appeal. The decision to not raise the other issues on direct appeal should not be construed as a waiver of the right to raise any claim for the ineffective assistance of counsel in a post-conviction proceeding on issues related to those other claims.

> parties and its refusal to give a requested charge does not require reversal unless the [defendant] was prejudiced by that refusal."

Commonwealth v. Becker, 192 A.3d 106, 118 (Pa. Super. 2018)(emphasis added)(quoting ***Commonwealth v. Sandusky***, 77 A.3d 663, 667 (Pa. Super. 2013)).

Here, the lower court instructed the jury as follows:

> The Commonwealth contends there was evidence tending to show that the defendant made offers to pay for education, therapy and travel, and that he concealed the name of the pills that he gave to Andrea Constand. The defendant contends this is not evidence of the consciousness of guilt.
>
> If you believe this evidence, you may consider it as tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider and weigh this evidence along with all other evidence in the case.

[R. 5735a][39].

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[39] The lower court's 1925(a) Opinion argues that a challenge to this instruction was not preserved for appeal. [Appendix A, p. 118]. This argument is made despite the lower court's acknowledgment that counsel did lodge an objection at the charging conference. [Appendix A., p. 118; see also R. 6519a, 6526a]. Moreover, counsel memorialized that objection in filed, written objections. [R. 5869a-5873a]. This issue was sufficiently preserved for appeal.

Courts have approved a "consciousness of guilt" instruction under certain specific factual circumstances, such as: (1) "...where evidence exists that a defendant committed a crime, knew he was wanted, and fled or concealed himself..." ***Commonwealth v. Johnson***, 838, A.2d 663, 681 (Pa. 2003) (citing ***Commonwealth v. Tinsley***, 35 A.2d 791, 792-93 (Pa. 1976)); and (2) "...where the prosecution establishes, by direct or circumstantial evidence, that an alteration in appearance has been made by a defendant who knew he was wanted for a crime and the jury finds as a fact that the change was effected with the intention of avoiding subsequent identification, an inference of consciousness of guilt may thereby arise, which *in connection with other proof*, may form a basis upon which guilt may be inferred." ***Commonwealth v. Horwat***, 515 A.2d 514, 516 (Pa. 1986)(emphasis in original) (citing ***Commonwealth v. Holland***, 389 A.2d 1026, 1033 (Pa. 1978)). Additionally, an effort to interfere with a witness's testimony may be admitted to establish the accused's "consciousness of guilt." ***See e.g., Commonwealth v. Johnson***, 179 A.3d 1105, 1120 (Pa. Super. 2018)("Any attempt by a defendant to interfere with a

witness' testimony is admissible to show a defendant's consciousness of guilt."); ***Commonwealth v. Goldblum***, 447 A.2d 234, 243 (Pa. 1982).[40]

Cosby's offer to pay for the Complainant's education, therapy and travel, and the assertion that he "concealed the name of the pills" given to the Complainant, refers to testimony that was presented by the Complainant and her mother regarding two phone conversations with Cosby in January 2005. In short, the Complainant's mother testified that she confronted Cosby about the alleged incident. [R. 4142a]. The Complainant's mother stated that, during one of the phone conversations, Cosby asked whether or not the Complainant was still interested in sports broadcasting. A discussion ensued about whether the Complainant wanted to attend graduate school and Cosby indicated that he was willing to pay for it. [R. 4159a]. The Complainant's mother also advised Cosby that the Complainant was emotionally distraught. In response, Cosby

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[40] ***Johnson*** and ***Goldblum*** did not involve a challenge to a jury instruction; instead, the issue was whether the testimony was admissible to establish "consciousness of guilt." It is not clear from these decisions whether the jury actually was instructed on "consciousness of guilt."

purportedly offered to pay for counseling. [R. 4160a]. Cosby also offered to fly the Complainant and her mother to Florida, where he was then performing. [R. 4161a]. Finally, the Complainant's mother testified that, when she asked Cosby what pills he gave to the Complainant, he said that he did not remember and that he would send the name to her. [R. 4144a]. He never did. [R. 4144a].

When assessing whether the above testimony supports a "consciousness of guilt" instruction, important undisputed facts must be taken into consideration. First, Cosby had an eighteen-month friendship with the Complainant, over the course of which they discussed the Complainant's career goals, which included sports broadcasting and becoming a broadcaster at the Olympics, and Cosby took steps to help her achieve her goals. [See e.g. R. 3896a-3898a].

Second, Cosby was aware that the Complainant was struggling with career issues and that it was weighing on her. [R. 3759a-3760a]. In an effort to assist her with her stress, Cosby paid for the Complainant to take a trip to New York to meet other young women with similar interests [R. 3740a-3741a], and also paid for

the Complainant to take a trip to the Foxwood Casino in Connecticut so that she could "let her hair out" for a night. [R. 3749a-3750a].

Third, over the course of this eighteen-month friendship, Cosby purchased gifts for the Complainant, took her to dinner at a Philadelphia restaurant with other friends, and invited her to dinner at his home, both alone and with others. [R. 3830a-3831a]. That Cosby would offer to: pay for the Complainant and her mother to travel to Florida; help provide for her emotional concerns; and try to assist her professionally, are wholly consistent with the nature of the relationship that they had. It is misleading to suggest that such reflects a "consciousness of guilt."

Turning to Cosby's decision not to advise the Complainant's mother that he gave the Complainant Benadryl, Cosby addressed the same in the statement that he gave to police on January 26, 2005. Cosby said he was startled by her questioning and began to feel that he was being attacked. [R. 4357a; 4365a]. Importantly, however, once Cosby learned that the Complainant actually went to the police with her allegations, Cosby spoke to the police and gave a formal statement within ten days of the

conversation with the Complainant's mother. [R. 4357a]. At that time, not only did Cosby tell the police that he gave the Complainant Benadryl, but he provided to them samples of the product that he gave to her. [R. 4400a-4403a].

In other words, when Cosby spoke with the Complainant's mother on the phone, Cosby was not aware Complainant's mom had contacted the police. When Cosby learned that a criminal investigation had been opened and the police wanted to speak with him, Cosby presented himself to law enforcement, gave a statement and provided a sample of the Benadryl that he provided to the Complainant. [R. 4400a-4403a].

Unlike those cases in which the courts have upheld the submission of a "consciousness of guilt" instruction to the jury, Cosby is not accused of fleeing; of concealing himself in some way; of altering his appearance; of threatening any witness; or of intimidating any witness. The conduct which ostensibly served as the basis for the lower court's "consciousness of guilt" instruction was consistent with wholly innocent conduct that occurred between Cosby and the Complainant over the period of their friendship and

does not constitute the type of conduct which is reflective of one's "consciousness of guilt." Yet, the lower court advised the jury that this innocent conduct could be considered for some sinister purpose. Although the lower court attempts to justify the instruction by asserting that he did not "direct the jury that such acts, in fact, constituted consciousness of guilt and instructed the jury that it was not required to consider the evidence as tending to prove consciousness of guilt" [Appendix A, p. 119], such does not change the fact that the lower court erroneously advised the jury that it *could* consider such to be evidence of Cosby's "consciousness of guilt." The lower court's instruction to the jury was misleading and never should have been given.

This factually and legally inapplicable instruction was extraordinarily and unduly prejudicial. The jury was instructed to consider evidence, which was emblematic of a long-standing friendship, as indicative of Cosby's guilt. The evidence presented in this case did not support a jury instruction on "consciousness of guilt." Because of this defective and misleading jury instruction, a new trial is warranted.

G. WHERE THE LOWER COURT ALLOWED A JUROR TO BE IMPANELED, DESPITE EVIDENCE DEMONSTRATING THAT THE JUROR HAD PREJUDGED COSBY'S GUILT, THE LOWER COURT ABUSED ITS DISCRETION AND DEPRIVED COSBY OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY, THUS REQUIRING THAT A NEW TRIAL BE GRANTED.

The constitutional right to an impartial jury is one of the most fundamental rights guaranteed to criminal defendants. ***Commonwealth v. Cornitcher***, 291 A.2d 521, 527 (Pa. 1972) (citing ***USCA CONST amends. VI & XIV***; ***PA CONST Art. I, § 9***.) Because the failure to provide an impartial jury "violates even the minimal standards of due process," lower courts "must be zealous to protect the rights of an accused" and must exercise their discretion over jury selection "subject to the essential demands of fairness." ***Dennis v. United States***, 339 U.S. 162, 168 (1950); ***Morgan v. Illinois***, 504 U.S. 719, 730 (1992). The lower court's failure to protect Cosby's rights, where testimony was introduced evidencing that Juror #11 had prejudged Cosby's guilt in the face of intense media coverage, requires that a new trial be granted.

1. COSBY'S CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY IS PROPERLY BEFORE THIS COURT.

In the court below, Cosby asserted his constitutional right to an impartial jury by promptly and repeatedly objecting to Juror #11's impaneling after that juror's disqualifying prejudgment of guilt was discovered. [R. 2541a-2543a; 2551a; 2554a-2559a; 2622a, 2643a, 2651a, 2667a, 2710a]. Cosby also objected to the lower court's decision to prematurely terminate the in-camera hearing regarding Juror #11's expressed bias. [R. 2663a]. After the lower court denied Cosby's prayers for relief and impaneled the jury, Cosby immediately moved for a mistrial based upon the evidence showing that Juror #11 "had an opinion about believing Cosby was guilty and let's get it over with and go home essentially." [R. 2663a-2666a, 2678a-2680a, 2719a-2721a, 2729a-2730a]. Again, the lower court denied Cosby's motion. [R. 2730a].

Notwithstanding the multiple opportunities it had to consider Cosby's constitutional right to a fair and impartial jury, the lower court now posits in his 1925(a) Opinion that Cosby somehow waived any constitutional argument by invoking the right to a fair and impartial jury without specifically identifying that right, in each

instance, as being a "constitutional" one.[41] [Appendix A, p. 80]. This suggestion has no merit. ***See Commonwealth v. Ellison***, 902 A.2d 419, 423 (Pa. 2006) ("The *sole* purpose of examination of jurors" like that at issue here "is to secure a competent, fair, impartial and unprejudiced jury" thereby preserving the right "explicitly granted by Article 1, Section 9 of the Pennsylvania Constitution and the Sixth Amendment of the United States Constitution" (emphasis added)).

It is well established that courts must "not presume acquiescence in the loss of fundamental rights," but must instead "'indulge every reasonable presumption against waiver' of fundamental constitutional rights" like that at issue here. ***Cornitcher***, 291 A.2d at 528 (quoting ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938)). This presumption against waiver is consistent with the Court's instruction that "issues will not be deemed waived if they have been presented to the lower court in

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[41] As the lower court acknowledges, the briefing Cosby submitted prior to the hearing on this issue expressly invoked "Article 1, Section 9 of the Pennsylvania Constitution and the Sixth Amendment of the United States Constitution." [R. 2558a].

some form and have been addressed by the trial judge." ***Commonwealth v. Montalvo***, 641 A.2d 1176, 1181 (Pa. Super. 1994), ***cited with approval by Commonwealth v. McGriff***, 160 A.3d 863 (Pa. Super. 2017). Thus, contrary to the lower court's suggestion, "magic words"[42] are not required to preserve a party's rights. ***See Commonwealth v. Turner***, 405 A.2d 9, 11 (Pa. Super. 1972) (rejecting assertion that defendant had waived objections by failing to "utter the magic words, 'I object'" where counsel had argued for exclusion based on prejudicial effect).

Given Cosby's repeated invocation of his right to a fair and impartial jury, including express reference to the constitutional provisions guaranteeing that right [R. 2558a], there is no basis for a finding of waiver here. Accordingly, Cosby's constitutional right to an impartial jury is properly before this Court.

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[42] The lower court's suggestion that the term "constitutional" should have been repeated *ad nauseam* is at odds with its demand that defense counsel cease raising Cosby's specific right to a "fair and impartial" trial: "I'm going to ask, Ms. Bliss, when you do speak, you don't keep -- we are all trying to get a fair and impartial. We are all doing it." [R. 2651a].

2. COSBY WAS IMPROPERLY CONVICTED BY A JURY THAT INCLUDED A BIASED JUROR.

The charges against Cosby in this action generated international press coverage and public protests, particularly in the wake of the "Me Too" movement popularized in October 2017. The attention surrounding Cosby's second trial was so intense that nearly every prospective juror affirmed that he or she was familiar with the facts at issue. [R. 1829a-1831a; 2110a-2112a; 2370a-2371a]. More than one-half of the prospective jurors stated that they had already prejudged guilt in this action, with an alarming number affirming the opinions formed outside the courtroom to be immutable. [R. 1829a-1839a; 2110a-2100a; 2370a-2380a].

On the third day of jury selection, after hundreds of prospective jurors had been dismissed for cause, Juror #11 (then the second panel's Prospective Juror #93), was individually questioned. During his examination, Juror #11 affirmed that he was familiar with the action against Cosby due to items he saw in the press but indicated that he had not formed an opinion as to

Cosby's guilt. [R. 2271a].[43] Based on Juror #11's answers, Cosby and the Commonwealth accepted him as a juror. [R. 2272a].

Later that evening, however, another prospective juror contacted Cosby's counsel to report that, while seated in one of the side rooms during jury selection, Juror #11 had stated "he is guilty" in reference to Cosby. [R. 2529a]. Upon receiving that message from the prospective juror (identified as Prospective Juror #9) the following day, Cosby's counsel contacted her to verify her allegations. [R. 2529a]. Prospective Juror #9 repeated the statement Juror #11 had made to her, providing several details

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[43] During his individual voir dire, Juror #11 also volunteered the fact that he knows Kayleen Longstreet, a woman whom the lower court identified as "a compliance officer or something over there regarding technical information" for the courthouse. [R. 2275a]. Contrary to the lower court's assertions, the Commonwealth's bill of costs in this action identified Kayleen Longstreet as an investigator who worked with several of the testifying witnesses. The Commonwealth's failure to identify Investigator Longstreet as a participant in this action when notified of her connection to a prospective juror, and the lower court's erroneous identification of Investigator Longstreet as a compliance officer in the courthouse, deprived Cosby of his ability to fully examine Juror #11 as to his partiality. ***See Shinal v. Toms***, 162 A.3d 429, 443-44 (Pa. 2017) ("Jurors should be above suspicion. . . . The weight of authority excludes venirepersons who could be suspected of bias due to their business, professional, familial, or social relationships with a participant to the litigation."); ***Cordes v. Assocs. of Internal Med.***, 87 A.3d 829, 846 (Pa. Super. 2014) (requiring examination of relationships to participants in litigation in order to ensure "not only a jury that is impartial in fact, but one that appears to be free of the taint of partiality").

about their conversation, which were subsequently memorialized in a declaration. [R. 2529a-2532a]. Immediately after obtaining Prospective Juror #9's signed declaration on Friday, April 6, 2018, Cosby's counsel filed a motion to excuse Juror #11 for cause and to conduct a hearing into that juror's bias and the effect it may have had on other prospective jurors. [R. 2529a]. Cosby's counsel supplemented that motion on Sunday, April 8, 2018, before proceedings resumed. [R. 2529a].[44]

When proceedings resumed on April 9, 2018, the lower court began by conducting an in-camera hearing regarding Juror #11's prejudgment of guilt. During that hearing, Prospective Juror #9 twice reiterated that Juror #11 had stated "he's guilty, so we can just get out of here" about Cosby, this time testifying to the statement under oath. [R. 2607a-2609a]. When confronted, Juror #11 equivocated about his prejudgment of guilt, stating that he "d[id]n't recall it" and "d[id]n't think [he] would have" made the

[44] Because Juror #11 had already been seated by the time his prejudgment of guilt was discovered, Cosby was unable to exercise a peremptory challenge, as he would have done had the prejudgment of guilt been discovered during voir dire. ***Pa.R.Crim.P. 631(F)(1)(b)***.

statement. [R. 2617a-2618a]. Other seated (but unsworn) jurors in the room at the time of Juror #11's statement were similarly equivocal, with Juror #9 stating that he maybe "wasn't paying attention" and didn't remember the conversation in the room, and Jurors #10 and 12 stating that they could not recall whether any statements were made regarding a prejudgment of Cosby's guilt. [R. 2625a, 2630a, 2637a].

Although the lower court had previously recognized that testimony from other prospective jurors in the room "would be important," and even outlined the process by which those prospective jurors' testimony would be obtained, the court refused to complete a full hearing into Juror #11's expressed bias. [R. 2681a-2684a]. Instead, the lower court allowed Juror #11 to be impaneled without completing the process of assessing Juror #11's bias—over Cosby's objections—despite the fact that an alternate juror could have been selected and seated. [R. 2552a].[45]

[45] Cosby offered to proceed to trial with just five alternates to minimize delay in jury selection. [R. 2559a].

3. THE LOWER COURT'S VIOLATION OF COSBY'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY REQUIRES THAT A NEW TRIAL BE GRANTED.

In exercising its discretion over jury selection, the lower court committed two palpable errors that violated Cosby's constitutional guarantees of due process and a fair trial. "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." ***Smith v. Phillips***, 455 U.S. 209, 217 (1982). Specifically, the lower court's deprivation of Cosby's right to a full hearing regarding Juror #11's bias, and Juror #11's subsequent impaneling, each constitute an abuse of discretion[46] invalidating Cosby's conviction.

First, the lower court palpably abused its discretion in refusing to provide Cosby with a complete evidentiary hearing into

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[46] The lower court's 1925(a) Opinion suggests that the lower court's decisions are shielded from reversal by virtue of the discretion afforded to it. [Appendix A, p. 81]. But "'discretion' and 'deference' cannot be elevated to talismanic status such that they become 'magic words,' the invocation of which forces a reviewing court to close its eyes to arbitrary or vindictive decisions. Nor can such words insulate those decisions from judicial scrutiny, 'render[ing] appellate review a mere empty formality." ***Brown v. Wetzel***, 177 A.3d 200, 207 (Pa. 2018).

Juror #11's expressed bias. As the United States Supreme Court has explained, "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." ***Smith v. Phillips***, 455 U.S. 209, 215 (1982); *cf.* ***Williams v. Taylor***, 529 U.S. 420, 441-42 (2000) (holding on collateral review that due process requires an evidentiary hearing into the likelihood of prejudice where a prospective juror is connected to one or more trial participants).

Here, the lower court initially stated that it would provide a multi-step hearing during which evidence would first be taken from Prospective Juror #9; then Juror #11; followed by seated Jurors #9, 10, and 12; and, if there existed conflicting testimony from those initial five persons, from six other prospective jurors, all of whom "would have been in the same room when #11 made the alleged [statement] and [whose] testimony would be important." [R. 2525a-2528a]. Such conflicting testimony was produced exactly as the lower court predicted, with Prospective Juror #9 reiterating that Juror #11 expressed a prejudgment of guilt, Juror #11 denying (albeit reservedly) that he had done so, and seated Jurors #9, 10,

and 12 stating that they had not heard or could not recall any such statement. [R. 2525a-2528a]. Nonetheless, the lower court refused to proceed with the final step of the hearing. [R. 2662a-2665a]. The court's refusal to complete the hearing was in error, particularly given the fact that the lower court did not establish—and did not allow Cosby to determine—whether any of the unseated jurors was better situated to hear Juror #11's statements, and, thus, better able to corroborate Prospective Juror #9's testimony. As the Pennsylvania Supreme Court has explained, even where there is no concrete proof "that such conversations actually occurred, we are dealing with 'potentialities[.]' . . . It would have cost little of the court's time, and would have traveled a long way towards assuring that appellant would be tried by a fair and impartial jury, if the court had granted appellant's request that the jurors be questioned regarding the incident." ***Commonwealth v. Horton***, 401 A.2d 320, 323 (Pa. 1979).

Second, the lower court committed a palpable abuse of discretion in refusing to strike Juror #11 based on the evidence that was adduced at hearing. ***See Commonwealth v. Ingber***, 531 A.2d

1101, 1102-03 (Pa. 1987) ("A challenge for cause to service by a prospective juror should be sustained and that juror excused where that juror demonstrates through his conduct and answers a likelihood of prejudice."). In the lower court's own words, Juror #11's denials only became "clear in the end," following the court's repeated questioning. [R. 2617a-2620a, 2641a-2644a]. Such denials simply cannot be credited over all other evidence as the lower court suggests, particularly given Juror #11's connection to the prosecution and the general antipathy towards Cosby within the community. ***See Commonwealth v. Penn***, 132 A.3d 498, 504-05 (Pa. Super. 2016) (acknowledging that prospective juror's "candid admissions" should be afforded great weight in determining his or her likelihood of prejudice and recognizing the need to be skeptical of "juror's assurances [where] they appeared to be the product of suggestive questioning by the court aimed at eliciting a judicially desired response"); ***see also Murphy v. Florida***, 421 U.S. 794, 800-02 (1975) ("[T]he juror's assurances that he is equal to this task cannot be dispositive of the accused's rights . . . . In a community where most veniremen will admit to a disqualifying

prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.").

Further, the lower court's evaluation of Prospective Juror #9's credibility rests, almost entirely, on the assertion that Prospective Juror #9 had some sort of "history with the District Attorney's Office." [Appendix A., p. 88]. As the lower court himself recognized, however, no evidence was introduced to support the existence of this alleged history. [R. 2655a, 2658a-2659a]. The lower court's decision to credit that alleged history now, having deprived Cosby of any ability to verify the allegations or, if necessary, rehabilitate Prospective Juror #9's credibility, is manifestly unjust.

Similarly flawed is the lower court's reliance on some purported discrepancy between the testimony of Prospective Juror #9 and the defense team's investigator as to communications between the two regarding whether Prospective Juror #9 would need to attend the hearing if she signed a written statement.

[Appendix A, p. 85]. That testimony demonstrates simply that Prospective Juror #9 was told that Cosby's counsel intended to use only her written statement rather than her testimony at a hearing. [R. 2660a-2661a, 2706a-2707a]. To the extent that there could be any discrepancy between the testimony, the fact that Prospective Juror #9 voluntarily appeared for the hearing indicates that any such discrepancy is the result only of a misunderstanding between her and the defense team's investigator, not that she provided any false statement.

Moreover, the lower court fails to give any consideration to those facts supporting Prospective Juror #9's credibility, which include her statements that she had no interest in the case, wanted no public recognition for her efforts, and appeared for the in camera hearing at her own expense because "she just felt that it was the right thing to do."[47] [R. 2661a, 2666a-2667a, 2706a-2707a]. Those facts also include the similarity between Prospective Juror #9's

[47] To the extent that any "history" between Prospective Juror #9 and the District Attorney's Office does exist, the fact that Prospective Juror #9 nonetheless appeared without the prospect of any personal gain strongly supports her credibility.

testimony that Juror #11 had said of this case, "I really did think this mess was over," and Juror #11's own statements during individual voir dire that "I thought it was over." [R. 2608a-2609a; 2271a]. They also include the testimony from Jurors #10 and 12, who corroborated Prospective Juror #9's testimony that there were other discussions about YouTube in the room. [R. 2633a, 2637a-2638a].[48] Contrary to the lower court's findings, the evidence demonstrates a reasonable likelihood that Juror #11 was prejudiced against Cosby.

The Supreme Court of Missouri recently came to a similar conclusion in ***State v. Ess***, 453 S.W.3d 196 (Mo. 2015) (en banc). In that case, the defendant sought a new trial based upon "Juror No. 3's" statement during a recess before the end of jury selection that "this is an open and shut case." ***Id.*** at 199-200. The defendant initially provided an affidavit from a prospective juror who had heard Juror No. 3's prejudgment of guilt, and later introduced

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[48] Although the lower court cites these jurors' statements that they did not recall any discussion of a comedy show as discrediting Prospective Juror #9's testimony, only Prospective Juror #9 and Juror #11 were asked about such a comedy show. [R. 2609a-2610a, 2614a, 58a].

testimony from that prospective juror during an evidentiary hearing. ***Id.*** at 200.[49] The lower court nonetheless denied the request for relief based, in part, on another juror's testimony that he had not heard Juror No.'s 3 statement and did not "gather or perceive" that Juror No. 3 held any preconceived bias or notion about the case. ***Id.*** at 202, 211 (Wilson, J., concurring in part and dissenting in part). The Missouri Supreme Court reversed, holding that the record "amply supports a finding that Juror No. 3 formed and expressed an opinion concerning the facts at issue during voir dire" and that Juror No. 3's impaneling "serve[d] an injustice to our criminal justice system that guarantees both the state and the defendant an impartial, indifferent jury." ***Id.*** at 206.

This decision is consistent with controlling law in the Commonwealth, which recognizes the need to address even "the potentialities of harm for the sake of absolute fairness." ***Commonwealth v. Stewart***, 295 A.2d 303, 305 (Pa. 1972).[50]

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[49] As in the present case, the prosecution in ***Ess*** "presented no evidence whatsoever and did not impeach [any] witness's credibility in any meaningful way." 453 S.W.3d at 202.

[50] Other jurisdictions have similarly concluded that doubts about a juror's partiality must result in the juror's dismissal. ***See, e.g., United States v. Mitchell***, 690 F.3d 137, 143 (3d Cir. 2012) ("Because the right to an impartial

Under such a rubric, the court cannot blindly credit a juror's statement that he or she can be impartial, but must instead "endeavor[] to prevent even the probability of unfairness" by striking any juror whose impartiality may reasonably be doubted. ***Id.*** at 306-07. Because the impaneling of "even a single juror" whose impartiality may be so doubted requires a new trial, ***Cornitcher***, 291 A.2d at 527, Juror #11's impaneling requires such relief here.

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jury is constitutive of the right to a fair trial, doubts regarding bias must be resolved against the juror." (internal brackets and quotation marks omitted)); ***State v. Freshment***, 43 P.3d 968, 973 (Mont. 2002) ("[D]ismissal for cause is favored when a serious question arises about the juror's ability to be impartial."); ***People v. Russell***, 13 A.D.3d 655, 656 (N.Y. App. Div. 2004) ("If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another."); ***Sizemore v. Commonwealth***, 397 S.E.2d 408, 410 (Va. Ct. App. 1990) ("[A]ny reasonable doubt whether a juror is unbiased or will be able to follow the court's instructions and the law must be resolved in the accused's favor."); *see also* ***ABA Principles for Juries & Jury Trials***, Jury Principle 11(C)(3) ("If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial.").

H. THE LOWER COURT ABUSED ITS DISCRETION IN APPLYING SORNA II TO THE 2004 OFFENSES FOR WHICH COSBY HAD BEEN CONVICTED, IN VIOLATION OF THE *EX POST FACTO* CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

The Sex Offender Registration Act ***42 Pa.C.S.A. § 9799.51*** (Subchapter I) ("SORNA II"), enacted as an effort to cure the Constitutional deficiencies in SORNA I as set out in ***Commonwealth v. Muniz***, 164 A.3d 1189 (Pa. 2017) and ***Commonwealth v. Butler***, 173 A.3d 1212 (Pa.Super. 2017), is itself, unconstitutional. This issue is currently before the Pennsylvania Supreme Court in ***Commonwealth v. Lacombe***, 35 MAP 2018.

The *Ex Post Facto* Clause of the United States Constitution provides that "no States shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . ." ***USCA CONST Art. I § 10, cl.1***. Similarly, Article 1 §17 of the Pennsylvania Constitution provides that: "no *ex post facto* law nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." ***PA CONST Art. I, § 17***. Essentially, the *Ex Post Facto* Clause is "the

lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." ***Muniz***, at 1195 (citations omitted). For a statute to be "deemed *Ex Post Facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." ***Id.*** 1195-1196 (citations omitted). Both factors are met here.

Cosby was convicted of ***18 Pa.C.S.A. § 3125(a)(1), (4)&(5)***, Aggravated Indecent Assault for offenses occurring in 2004. In 2004, Megan's Law II was in effect[51]. Cosby was charged in 2016 when SORNA I[52] was in effect. However, Cosby was sentenced under SORNA II (Subchapter I) enacted in June 12, 2018. The lower court held a hearing, outside the presence of a

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[51] The SVP provisions of Megan's Law I were found unconstitutional by ***Commonwealth v. Williams***, 733 A.2d 593 (Pa 1999), because Megan's Law I required the defendant to rebut a presumption that she was a SVP. Parts of Megan's Law II, dealing with the penalty provision which applied to an SVP, were declared unconstitutional in ***Commonwealth v. Williams***, 833 A.2d 962 (Pa. 2003); however, it remained in effect until SORNA went into effect on December 20, 2012. Megan's Law III was passed in November 2004 to correct the constitutional infirmities of Megan's Law II; however, this too failed to pass Constitutional scrutiny. ***See Commonwealth v. Neiman***, 84 A.3d 603 (Pa. 2013).

[52] SORNA went into effect from December 20, 2012.

jury, and determined there was clear and convincing evidence that Cosby met the requirements of an SVP. [R. 5895a-6212a].

In 2017, the Pennsylvania Supreme Court in ***Muniz*** found SORNA I unconstitutional as it violated state and federal *Ex Post Facto* clauses. ***Muniz supra***. ***Muniz*** found that the registration requirements of SORNA I constituted criminal punishment and the statute could not be applied retroactively. ***Id.*** This Honorable Court decided ***Butler*** a few months later, holding specifically that SORNA I's provisions for designation of a sexually violent predator (SVP) violated state and federal constitutions. Because the ***Muniz*** Court determined the registration requirements of SORNA I were punitive, then the SVP provisions in SORNA I, must be so as well. ***Butler*** concluded that "since our Supreme Court has held that SORNA registration requirements are punitive or a criminal penalty to which individuals are exposed, then under ***Apprendi*** and ***Alleyne***, a factual finding, such as whether a defendant has a 'mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses,' 42 Pa.C.S.A. §9799.12, that increases the length of registration must be found

beyond a reasonable doubt by the chosen fact-finder." ***Id.*** at 1217-1218. Furthermore, "trial courts cannot designate convicted defendants SVPs (nor may they hold SVP hearings) until our General Assembly enacts a constitutional designation mechanism." ***Id.*** at 1218.

Our General Assembly enacted SORNA II, Subchapter I in June 2018, and the lower court wrongly applied this provision at the time of sentencing by holding a hearing, outside the presence of a jury, to designate Cosby a sexually violent predator. SORNA II still violates ***Apprendi***[53] and ***Alleyne.***[54] A sexually violent predator determination still punishes a defendant with automatic lifetime registration and counseling. Specifically, with the Aggravated Assault conviction for which Cosby has been convicted, the registration period was extended from ten years to lifetime; thereby drastically increasing his punishment without the benefit of trial, and without a jury finding beyond a reasonable doubt. ***42 Pa.C.S.A. §***

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[53] ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000)

[54] ***Alleyne v. United States***, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)

9799.55. The law as set out in ***Alleyene*** requires any element which increases a defendant's sentence to be determined by a jury, beyond a reasonable doubt. ***Alleyene supra***. SORNA II only requires a judge, not a jury, to determine a defendant's sexually violent predator status only by clear and convincing evidence. ***42 Pa.C.S.A. § 9799.58(e)(3)***. SORNA II remains unconstitutional.

Additionally, SORNA II is still punitive. In ***42 Pa.C.S.A. § 9799.51(b)(2)*** the General Assembly included six words, "and shall not be construed as punitive," as an attempt to comply with the constitutional flaws outlined in ***Muniz*** and ***Butler***. However, the statute increases punishment for offenses. ***42 Pa.C.S.A. § 9799.55***. The Community will be notified and can access information on sexually violent predators and prisoners being paroled: "necessary and relevant information" will be released to the community through "the publicly accessible Internet website of the Pennsylvania State Police . . . ." ***42 Pa.C.S.A. § 9799.51(b)(2)***. An offender must be photographed, must report and update their address, employer, and place of education. ***42 Pa.C.S.A. § 9799.56(a)(i)***. A sexually violent predator must

attend and pay for monthly counseling. ***42 Pa.C.S.A. § 9799.70(a)***. A sexually violent predator must verify their residence every 90 days and appear at the Pennsylvania State Police Station quarterly. ***42 Pa.C.S.A. § 9799.60(a)***. SORNA II is still punitive.

Muniz examined the factors laid out in ***Kennedy v. Mendoza-Martinez***, such as:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment - - retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

372 U.S. 144, at 168, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). The ***Muniz*** Court found the factors "weigh in favor of finding SORNA to be punitive in effect despite its expressed civil remedial purposes." ***Muniz*** at 1218.

Megan's Law II required a defendant to update their information with the Pennsylvania state police within 10 days while SORNA II mandates the update must be done within 3 days. ***42 Pa.C.S.A. § 9799.56(a)(2)***. SORNA II also increases the information shared with the public that was not found in Megan's Law II, such as "identifying marks, including scars, birthmarks and tattoos," ***42 Pa.C.S.A. § 9799.63(c)(1)(viii)*** along with "the license plate number and description of vehicle owned or registered to the offender". ***42 Pa.C.S.A. § 9799.63(c)(1)(ix)***.

SORNA II requires a sexually violent predator to attend, and pay for, monthly counseling sessions. ***42 Pa.C.S.A. § 9799.70***. SORNA II requires law enforcement to notify neighbors of a sexually violent predator's name, address and photograph. ***42 Pa.C.S.A. § 9799.62***. SORNA II, subchapter I requires quarterly in person reporting for sexually violent predators. ***42 Pa.C.S.A. § 9799.60***. ***Muniz*** declared the "in-person reporting requirements, for both verification and changes to an offender's registration, to be a direct restraint . . . and hold this facto weighs in favor of finding SORNA's effect to be punitive." ***Muniz*** at 1211.

SORNA II humiliates and demeans anyone a judge finds to be a sexually violent predator. SORNA II increases the punishment of anyone a judge finds to be a sexually violent predator. SORNA II restricts the rights and freedoms of anyone a judge finds to be a sexually violent predator. SORNA II is punitive and permits retroactive punishment. SORNA II is unconstitutional and the lower court's finding that Cosby is a sexually violent predator should be overturned.

VIII.

CONCLUSION

For the reasons set forth above, Appellant, William H. Cosby, Jr., requests this Honorable Court reverse and arrest judgment. Alternatively, it is requested that this Court reverse and award Cosby a new trial.

Respectfully submitted,

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CERTIFICATION

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

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(*admitted Pro Hac Vice*)

CERTIFICATION

This 25th day of June, 2019, I certified that this brief contains 30710 words, as counted by the undersigned's Microsoft Word processing software, and therefore complies with the applicable word count limit.

Kristen L. Weisenberger, Esquire

For B.W.P.

Brian W. Perry, Esquire

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APPENDIX A

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	MONTGOMERY COUNTY, PENNSYLVANIA
	:	
vs.	:	NO: CP-46-CR-3932-2016
	:	
WILLIAM HENRY COSBY, JR.	:	CHARGE(S): AGGRAVATED
	:	INDECENT ASSAULT

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

TO THE HONORABLE STEVEN T. O'NEILL, JUDGE OF SAID COURT:

AND NOW, this 10th day of December, 2018, comes Brian W. Perry, Esquire, and Kristen L. Weisenberger, Esquire, on behalf of William Henry Cosby, Jr., who files the following Statement of Matters Complained of on Appeal:

1. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights by failing to excuse juror 11 where evidence was introduced of the juror's inability to be fair and impartial. Specifically, a prospective juror testified juror 11 prejudged guilty prior to the commencement of trial. Moreover, the trial judge abused its discretion, erred and infringed on Mr. Cosby's constitutional rights by refusing to interview all jurors who were in the room with juror 11 to ascertain whether they heard the comment and, if so, the impact that the comment had on them.

2. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights in allowing Dr. Barbara Ziv to testify as an expert witness pursuant to 42 Pa.C.S.A §5920 regarding an offense that occurred 12 years prior to the conception of that statute, and in violation of Mr. Cosby's rights under the fifth and sixth amendments of the Constitution of the United States, and under Article I, §§1, 9 and 17

of the Constitution of the Commonwealth of Pennsylvania where the statute is unconstitutional and not retroactive in application.

3. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights to Due Process of Law under the Constitution of the United States and under the Constitution of the Commonwealth of Pennsylvania by failing to disclose his biased relationship with Bruce Castor, and by failing to recuse himself as the presiding judge as a result of this biased relationship. Judge Steven T. O'Neill confronted Mr. Castor for, in his opinion, exploiting an affair in order to gain a political advantage in their 1999 political race for Montgomery County District Attorney. Mr. Castor's conduct as District Attorney in 2005, however, was a material and dispositive issue in this case; specifically, a significant question arose as to whether Mr. Castor agreed in 2005 that the Commonwealth would never prosecute Mr. Cosby for the allegations involving Andrea Constand and whether he relayed that promise to Mr. Cosby's attorneys. The defense alleged that the Commonwealth was precluded from prosecuting Mr. Cosby due to former District Attorney Bruce Castor's agreement to never prosecute Mr. Cosby for the Constand allegations. The trial court erred in failing to disclose his bias against District Attorney Castor, and in failing to recuse himself, prior to determining the credibility of former District Attorney Castor and whether he made said agreement. The trial court similarly erred in failing to disclose his bias or recuse himself prior to ruling upon the admissibility of the defendant's civil deposition, where the trial court was again determining the credibility of former District Attorney Castor.

4. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights to Due Process of Law under the Constitution of the United States and of the Commonwealth of Pennsylvania in denying the Petition for Writ of Habeas Corpus filed January 11, 2016, and failing to dismiss the criminal information where the Commonwealth, in 2005, promised to never prosecute Mr. Cosby for the Constand allegations. Moreover, given the agreement that was made by the Commonwealth in 2005 to never prosecute Mr. Cosby and Mr. Cosby's reliance thereon, the Commonwealth was also estopped from prosecuting Mr. Cosby.

5. The trial court erred in permitting the admission of Mr. Cosby's civil deposition as evidence at trial in violation of the Due Process Clause of the State and Federal Constitutions and in violation of Mr. Cosby's right against self-incrimination pursuant to the Fifth Amendment of the Federal Constitutions and Article I, §9 of the Constitution of the Commonwealth of Pennsylvania. Moreover, the prosecution was estopped from arguing the admission of the civil deposition at trial, as Mr. Cosby gave this deposition testimony in reliance on the promise by former District Attorney Castor that Mr. Cosby would never be prosecuted for the Constand allegations.

6. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights to Due Process of Law under the Constitution of the United States and of the Commonwealth of Pennsylvania in admitting five prior "bad act witnesses" pursuant to Pa.R.Evid. §404(b). The witness' allegations were too remote in time and too dissimilar to the Constand allegations to fall within the proper scope of Pa.R.Evid 404(b). Furthermore, during the first trial the trial court allowed one 404(b) witness;

however, after that trial resulted in a mistrial, the trial court allowed the Commonwealth, without explanation or justification, to call five 404(b) witnesses in violation of Mr. Cosby's Due Process rights under the State and Federal Constitutions.

7. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights under the Constitution of the United States and of the Commonwealth of Pennsylvania in allowing the Commonwealth to proceed with the prosecution of Mr. Cosby where the offense did not occur within the twelve year statute of limitations pursuant to 42 Pa.S.C.A. 5552 and the Commonwealth made no showing of due diligence. Moreover, the jury's verdict was against the weight of the evidence concerning whether the offense occurred within the twelve year statute of limitations. Furthermore, even if the alleged offense occurred within the twelve year statute of limitations, the delay in prosecuting Mr. Cosby caused him substantial prejudice and infringed on his Due Process rights under the Constitutions of the Commonwealth of Pennsylvania and of the United States, as a material witness to the non-prosecution agreement died within that twelve year period.

8. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights under the Due Process Clause of the Constitution of the United States and of the Commonwealth of Pennsylvania by permitting the Commonwealth to introduce Mr. Cosby's civil deposition testimony regarding Quaaludes. This testimony was not relevant to the Constand allegations; was remote in time; "backdoored" the admission of a sixth 404(b) witness; and constituted "bad act" evidence that was not

admissible. Furthermore, this testimony was highly prejudicial in that it included statements regarding the illegal act of giving a narcotic to another person.

9. The trial court abused its discretion, erred and violated Mr. Cosby's rights to Due Process of Law under the Constitution of the United States and of the Commonwealth of Pennsylvania by denying Mr. Cosby's objections to the trial court's charge and including or refusing to provide certain instruction. Specifically, the trial court abused its discretion, erred and violated Mr. Cosby's rights to Due Process of Law by: 1) providing to the jury an instruction on the "consciousness of guilt" where this charge was not appropriate to the facts before the jury; 2) refusing to provide an instruction, consistent with *Kyles v. Whitley*, 514 U.S. 419 (1995), that the jury may consider the circumstances under which the case was investigated; and 3) by failing to provide the jury the instruction on 404(b) witnesses as suggested by the defense; indeed, the trial court's charge effectively instructed the jury that Mr. Cosby was guilty of the uncharged alleged crimes and failed to properly explain how this uncharged, alleged misconduct should be considered. Moreover, the trial court abused its discretion, erred and violated Mr. Cosby's rights to Due Process of Law under the Constitution of the United States and of the Commonwealth of Pennsylvania by refusing to provide to the jury a special interrogatory on whether the offense occurred within the statute of limitations.

10. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights in finding that Mr. Cosby was a sexually violent predator pursuant to SORNA where the Commonwealth expert relied upon unsubstantiated, uncorroborated

evidence not admitted at trial; specifically relying on hearsay evidence that there were approximately 50 more women making allegations Mr. Cosby.

11. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights in applying the sexually violent predator provisions of SORNA (Act 2018-29) for a 2004 offense in violation of the *Ex Post Facto* Clauses of the State and Federal Constitutions.

Respectfully submitted,

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CERTIFICATION

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

Brian W. Perry, Esquire

Kristen L. Weisenberger, Esquire

CERTIFICATE OF SERVICE

AND NOW, this 10th day of December, 2018, I hereby certify that I have served the foregoing STATEMENT OF MATTERS COMPLAINED OF ON APPEAL on the following via Federal Express:

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APPENDIX B

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

COMMONWEALTH OF PENNSYLVANIA	:	No. 3932-16
	:	
	:	3314 EDA 2018
v.	:	
	:	
WILLIAM H. COSBY, JR.	:	

OPINION

O'NEILL, J. **May 14, 2019**

I. Introduction

The Defendant, William H. Cosby, Jr. appeals from the judgment of sentence entered on September 25, 2018, as made final by the denial of his post-sentence motion on October 23, 2018. For the reasons set forth below, the judgment of sentence should be affirmed.

II. Facts

In January 2004[1], the Defendant sexually assaulted then thirty year old Andrea Constand at his home in Elkins Park, Cheltenham, Montgomery County. Notes of Testimony (N.T), Trial by Jury, April 13, 2018 at 56. On the evening of the assault, Ms. Constand was invited to the then sixty-six year old Defendant's home to discuss her upcoming career change. Id. at 56. She had

[1] In each of her statements to police, and in prior testimony, Ms. Constand indicated that the assault took place in 2004. N. T. Apr. 16, 2018 at 111-113; N.T. Apr. 17, 2018, Trial by Jury, at 217. She indicated to police that the assault happened prior to her cousin visiting from Canada; border crossing records indicate that he entered the United States on January 22, 2004. N.T., Apr. 18, 2018, Excerpted Testimony of James Reape From Trial by Jury at 19. There was no evidence to indicate that the assault happened prior to December 30, 2003. Id. at 26.

decided to leave her position as the Director of Basketball Operations for the Temple women's basketball team, and to return to her native Canada to pursue a career in massage therapy. Id. When she arrived at the home, she entered through the kitchen door, as she had on prior visits. Id. at 57. She and the Defendant sat at the kitchen table and began talking. Id. at 58. There was a glass of water and a glass of wine on the table when she arrived. Id. Initially, she drank only the water because she had not eaten a lot and did not want to drink on an empty stomach. Id. Eventually, the Defendant convinced her to taste the wine. Id. at 59. They discussed the stress she was feeling at the prospect of telling Coach Staley that she was leaving Temple. Id. Ms. Constand left the table to use the restroom. Id. When she returned, the Defendant was standing by the table, having gone upstairs himself while she was in the bathroom. Id. at 59. He reached out his hand and offered her three blue pills. Id. He told her, "These are your friends. They'll help take the edge off." Id. at 60. She asked him if she should put the pills under her tongue. Id. He told her to put them down with water, and she did. Id.

After she took the pills, Ms. Constand and the Defendant sat back down at the kitchen table and continued their conversation. Id. at 61. She began to have double vision and told the Defendant that she could see two of him. Id. Her mouth became cottony and she began to slur her words. Id. The Defendant told her that he thought she needed to relax. Id. Ms. Constand did not know what was happening to her, but felt that something was wrong. Id. They stood up from the table and the Defendant took her arm to help steady

her. Id. at 62. Her legs felt rubbery as he walked her through the dining room to a sofa in another room. Id. He placed her on the sofa on her left side and told her to relax there. Id. She began to panic and did not know what was happening to her body. Id. She felt weak and was unable to speak. Id. She was unable to maintain consciousness. Id. She was jolted awake by the Defendant forcefully penetrating her vagina with his fingers. Id. at 63. The Defendant had positioned himself behind her on the couch, penetrated her vagina with his fingers, and fondled her breasts. Id. He took her hand and placed it on his penis and masturbated himself with her hand. Id. Ms. Constand was unable to tell him to stop or to physically stop the assault. Id.

She awoke sometime between four and five a.m. to find her pants unzipped and her bra up around her neck. Id. at 65. She fixed her clothing and began to head towards the front door. Id. As she walked towards the door, she saw the Defendant standing in the doorway between the kitchen and the dining room. Id. at 66. He was wearing a robe and slippers and told her there was a muffin and tea for her on the table. Id. She sipped the tea and took a piece of the muffin with her and drove herself home. Id.

At the time of assault, Ms. Constand had known the Defendant since the fall of 2002 when she met him in her capacity as the Director of Basketball Operations. Id. at 23. She was introduced to the Defendant by Joan Ballast at a basketball game at the Liacouras Center. Id. Ms. Constand accompanied Ms. Ballast and several others giving the Defendant a tour of the newly renovated facilities. Id. at 24. Several days after the initial introduction, the

Defendant called Temple with some questions about the renovations and spoke to Ms. Constand on the phone. Id. at 25. Several weeks later, she again spoke to him on the phone at her office. Id. They discussed having met at the game at Temple. Id. They began having more regular conversations, mostly pertaining to Temple sports. Id. The conversations also included personal information about Ms. Constand's history as a professional basketball player, her educational background and her career goals. Id. at 26-27.

After several phone conversations, the Defendant invited Ms. Constand to his home for dinner. Id. at 28. When she arrived at the home, the Defendant greeted her and took her to the room where she ate her dinner. Id. at 29. The chef served her meal and a glass of wine and she ate alone. Id. As she was finishing her meal, the Defendant came in to the room and sat next to her on the couch. Id. at 30. At this point, he placed his hand on her thigh. Id. She was aware that this was the first time the Defendant touched her, but thought nothing of it and left shortly after as she had been preparing to do. Id. at 31-32.

Subsequently, the Defendant invited her to attend a blues concert in New York City with other young women who shared similar interests, particularly related to health and homeopathic remedies. Id. at 39. She did not see the Defendant in person on that trip. Id. at 41.

Sometime later, she was again invited to dine at the Defendant's home alone. Id. at 42. The chef called her about the meal and again she ate in the same room as she had on the first occasion. Id. For a second time, when she

was finished her meal, the Defendant sat beside her on the couch. Id. at 44. The conversation again revolved around things Ms. Constand could do to potentially break into sports broadcasting. Id. On this occasion, the Defendant reached over and attempted to unbutton and to unzip her pants. Id. She leaned forward to prevent him from undoing her pants. Id. He stopped. Id. She believed that she had made it clear she was not interested in any of that. Id. She did not feel threatened by him and did not expect him to make a romantic or sexual advance towards her again. Id. at 45.

Ms. Constand continued to have contact with the Defendant, primarily by phone and related to Temple sports. Id. at 45-46. The Defendant also had contact with Ms. Constand's family. N.T. Apr. 16, 2018 at 175. Ms. Constand's mother, Gianna Constand, and her sister, Diana, attended one of the Defendant's performances in Ontario, and afterward, met him backstage. Id. at 176.

In late 2003, the Defendant invited Ms. Constand to meet him at the Foxwoods Casino in Connecticut. N.T. Apr. 13, 2018 at 46, 49. He put her in touch with Tom Cantone, who worked at the casino. Id. at 46. When she arrived at the casino, she had dinner with the Defendant and Mr. Cantone. Id. at 47. After dinner, Mr. Cantone escorted Ms. Constand to her room. Id. She thanked him and told him that she would have to leave early in the morning and would not have time to tour the Indian reservation that was on the property. Id. at 48. The Defendant called her and asked her to come back upstairs to his room for some baked goods. Id. When she arrived at the room,

he invited her in and continued to unpack his luggage cart. Id. She believed that the baked goods were on the cart. Id. During this time, they discussed their usual topics of conversation, Temple and sports broadcasting. Id. Ms. Constand was seated on the edge of the bed. Id. The Defendant laid down on the bed. Id. He fell asleep. Id. at 49. Ms. Constand remained in the room for several minutes, and then she went back to her own room. Id.

Ms. Constand testified that during this time, she came to view the Defendant as a mentor and a friend.[2] Id. at 52. He was well respected at Temple as a trustee and alumni, and Ms. Constand was grateful for the help that he tried to give her in her career. Id. at 53. She continued her friendship with him, despite what she felt were two sexual advances; she was a young, fit woman who did not feel physically threatened by the Defendant. Id. at 53, 55.

Following the assault, between January, 2004 and March, 2004, Ms. Constand and the Defendant continued to have telephone contact, solely regarding Temple sports. Id. at 69. In March 2004 the Defendant invited Ms. Constand to a dinner at a restaurant in Philadelphia. Id. at 67. Ms. Constand attended the dinner, hoping to speak to the Defendant about the assault. Id. After the dinner, the Defendant invited her to his home to talk. Id. Once at the home, she attempted to confront him to find out what he gave her and why he assaulted her. Id. at 68. She testified that he was evasive and told her that he

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[2] In his statement to police, the Defendant agreed and indicated that Ms. Constand saw him as a mentor and that he encouraged that relationship as a mentor. N.T. Apr. 17, 2018 at 142.

thought she had an orgasm. Id. Unable to get an answer, she lost her courage and left the home. Id.

At the end of March 2004, Ms. Constand moved back to Canada. Id. Ms. Constand's mother, Gianna Constand, testified that when her daughter returned home, she seemed to be depressed and was not herself. N.T. Apr. 16, 2018 at 178. She would hear her daughter screaming in her sleep, but Ms. Constand denied that anything was wrong. Id.

After returning to Canada, Ms. Constand had some phone contact with the Defendant related to his performance in the Toronto area. N.T. Apr. 13, 2018 at 73. The Defendant invited Ms. Constand and her family to attend that show. Id. Her parents were excited to attend the show, and her mother had previously spoken with the Defendant on the phone and attended two of his shows prior to the assault. Id. at 74. Her mother brought the Defendant a gift to the show. N.T. Apr. 13, 2018 at 75; N.T. Apr. 16, 2018 at 180.

In January 2005, Ms. Constand disclosed the assault to her mother. N.T. Apr. 13, 2018 at 76; N.T. Apr. 16, 2018 at 182. She woke up crying and called her mother. N.T. Apr. 13, 2018 at 76. Mrs. Constand was on her way to work and called Andrea back once she arrived at work. Id. at 78. They decided to contact the Durham Regional Police in Ontario, Canada when Mrs. Constand returned home from work. Id. Unsure of how the American criminal justice system worked, and afraid that the Defendant could retaliate against her or her family, Ms. Constand attempted to reach two attorneys in the Philadelphia area during the day. Id. at 81.

Ultimately, that evening, Ms. Constand and her mother contacted the Durham Regional Police and filed a police report. Id. at 82. Following the report, Mrs. Constand asked for the Defendant's phone number and called him. Id. at 83. The Defendant returned Mrs. Constand's call the next day. Id. During this call, both Ms. Constand and her mother spoke to the Defendant on separate phone extensions. Id. at 84. Ms. Constand confronted him about what happened and the three blue pills that he gave her. Id. The Defendant apologized, but would not tell her what he had given her. Id. at 85. He indicated that he would have to check the prescription bottle and that he would write the name down and send it to them. Id. Ms. Constand hung up the phone and her mother continued to speak to the Defendant. Id. He told Mrs. Constand that there was no penile penetration. N.T. Apr. 17, 2018 at 124. Ms. Constand did not tell the Defendant that she had filed a police report. N.T. Apr. 13, 2018 at 85-86.

After this initial phone conversation with the Defendant, Mrs. Constand purchased a tape recorder and called him again. N.T. Apr. 16, 2018 at 195. In the call, the Defendant indicated that he wanted to talk about a "mutual feeling or friendship," and "to see if Andrea is still interested in sportscasting or something in T.V." Id. at 203; Exhibit C-39, Exhibit C-40. The Defendant also discussed paying for Ms. Constand to continue her education. N.T. Apr. 16, 2018 at 204. He continued to refuse to give Mrs. Constand the name of the medication he had given Ms. Constand. Id. at 206. Additionally, he invited her and Ms. Constand to meet him in another city to meet with him to discuss

these offers in person and told her that someone would call them to arrange the trip. Id.

Subsequently, Ms. Constand received a phone message from Peter Weiderlight, one of the Defendant's representatives. N.T. Apr. 13, 2018 at 86; Exhibit C-20, Exhibit C-21. Mr. Weiderlight indicated in his message that he was calling on behalf of the Defendant to offer Ms. Constand a trip to see the Defendant's upcoming performance in Florida. N.T. Apr. 13, 2018 at 86. When Ms. Constand returned Mr. Weiderlight's call, she recorded the conversation. Id. at 90; Exhibit C-22, Exhibit C-23. During this conversation, Mr. Weiderlight discussed the Defendant's offer for Ms. Constand and her mother to attend a performance to come in Miami and sought to obtain her information so that he could book flights and make reservations. Exhibit C-23. Ms. Constand did not give him that information or call him back to provide the same. N.T., Apr. 13, 2018 at 93. Ms. Constand also received a message from the Defendant's attorney, Marty Singer, Esq., wherein he indicated that the Defendant wished to set up an educational trust for Ms. Constand. Exhibit C-24 (disc), Exhibit C-25. Ms. Constand did not return Mr. Singer's call. N.T., Apr. 13, 2018 at 93. Both of these calls were received within days of Ms. Constand's report to police. Id. at 88.

The Durham Regional Police referred the report to the Philadelphia Police, who ultimately referred it to the Cheltenham Police Department in Montgomery County, Pennsylvania. Id. at 97. Sergeant Richard Schaeffer, of the Cheltenham Township Police Department, was assigned to the case in

2005. N.T. Apr. 17, 2018 at 67-68. Cheltenham police investigated jointly with the Montgomery County Detective Bureau. Id. at 81. On January 19, 2005, Sgt. Schaeffer spoke to Ms. Constand by phone to obtain a brief description of her allegations. Id. at 71. He testified that Ms. Constand was nervous and anxious during this call. Id. at 73. She then drove from Canada to meet with law enforcement in person in Montgomery County. N.T. Apr. 13, 2018 at 98-99. She testified that in each of her meetings with law enforcement she was very nervous. Id. at 99. She had never had any previous contact with law enforcement, and discussing the nature of the assault made her uncomfortable. Id. She testified that she cooperated with the police and signed releases for her mental health, banking and phone records. Id. at 100-101.

On January 24, 2005, then Montgomery County District Attorney Bruce L. Castor, Jr., issued a signed press release indicating that an investigation had commenced following the victim's January 13, 2005, report to authorities in Canada. N.T. Feb. 3, 2016 at 65; Habeas Exhibit C-17. As part of the investigation, law enforcement, including Sgt. Schaeffer, took a written, question and answer statement from the Defendant in New York City on January 26, 2005. N.T Apr. 17, 2018 at 113-155; Exhibit C-60. The Defendant was accompanied by counsel, both his criminal defense attorney Walter M. Phillips[3], Esq., and his longtime general counsel John P. Schmitt, Esq., when he provided his statement to police. N.T. Feb. 3, 2016 at 19, 52-53.

[3] Mr. Phillips passed away in early 2015.

In his statement to police, the Defendant stated that he met Ms. Constand in 2002 at the Liacouras Center. N.T. Apr. 17, 2018 at 121. He stated they had a social and romantic relationship that began on her second visit to his home. Id. He stated that she was alone with him in the home on three occasions. Id. As to the night of the assault, he stated that Ms. Constand had come to his home and they were talking in the kitchen about her inability to sleep. Id. He told police that he gave her Benadryl that he uses to help him sleep when he travels. Id. at 126. He stated that he would take two Benadryl and would become sleepy right away. Id. at 150. He gave Ms. Constand one and half pills. Id. He did not tell Ms. Constand what the pills were. Id. at 126. He stated that he was comfortable giving her pills to relax her. Id. He stated that she did not appear to be under the influence when she arrived at his home that night. Id. at 135.

He stated that after he gave her the pills, they began to touch and kiss on the couch with clothes on. Id. at 127. He stated that she never told him to stop and that he touched her bare breasts and genitalia. Id. at 128. He stated that he did not remove his clothing and Ms. Constand did not touch him under his clothes. Id. at 129. He told police, "I never intended to have sexual intercourse, like naked bodies with Andrea. We were fully clothed. We are petting. I enjoyed it. And then I stopped and went up to bed. We stopped and then we talked." Id.

He stated that there were at least three other occasions where they engaged in similar petting in his home. Id. When asked if they had ever had

intercourse, he stated, "[n]ever asleep or awake." Id. at 130. He stated that on each occasion, he initiated the petting. Id. at 132. He stated that on her second visit to his home, they were kissing in the hallway and he lifted her bra to kiss her breasts and she told him to stop. Id. at 133.

He stated that, just prior to the date of his statement, he spoke to Mrs. Constand on the phone and she asked him what he had given her daughter. Id. at 122-123. He told her that he gave Ms. Constand some pills and that he would send her the name of them. Id. at 123. He further stated that told Mrs. Constand there was no penile penetration, just petting and touching of private parts. Id. at 124. He also stated that he did not recall using the word 'consensual' when describing the encounter to Mrs. Constand. Id. at 125. He also answered "no," when asked if he ever knew Ms. Constand to be untruthful. Id. at 152. Following that interview, the Defendant, unprompted, provided law enforcement with pills that were later identified as Benadryl. N.T. Apr. 17, 2018 at 159; Exhibit C-93.

On February 17, 2005, law enforcement had a strategy meeting where they created a plan for the next steps in the investigation. N.T. Apr. 17, 2018 at 82. Later that same day, then District Attorney, Bruce L. Castor, Jr., issued a second, signed press release, this time stating that he had decided not to prosecute the Defendant. N.T., Feb. 2, 2016 at 71-72, 89; Habeas Exhibit D-4; N.T. Apr. 17, 2018 at 84. The press release cautioned that the decision could be reconsidered. N.T. Feb. 2, 2016 at 215; Habeas Exhibit D-4. Mr. Castor never personally met with Ms. Constand. Id. at 115.

Ms. Constand's attorneys, Dolores Troiani, Esq., and Bebe Kivitz, Esq., first learned of Mr. Castor's decision not to prosecute when a reporter arrived at Ms. Troiani's office on the evening of February 17, 2005 seeking comment about what Bruce Castor had done. N.T. Feb. 3, 2016 at 141. The reporter informed her that Mr. Castor had issued a press release in which he declined prosecution. Id. at 141-142. Ms. Troiani had not received any prior notification of the decision not to prosecute. Id. at 142.

At a pretrial hearing held on February 2 and 3, 2016, Mr. Castor testified that it was his intention in 2005 to strip the Defendant of his Fifth Amendment right to force him to sit for a deposition in a yet to be filed civil case, and that Mr. Phillips, the Defendant's criminal attorney, agreed with his legal assessment. N.T. Feb. 2, 2016 at 63-68. Mr. Castor also testified that he relayed this intention to then First Assistant District Attorney Risa V. Ferman.[4] Id. at 67.

Disappointed with the declination of the charges, Ms. Constand sought justice civilly. N.T. Apr. 13, 2018 at 104. On March 8, 2005, she filed a civil suit against the Defendant in federal court. Id. As part of the lawsuit, both parties were deposed. Id. at 105-106. On four dates, September 28 and 29, 2005 and March 28 and 29, 2006, the Defendant sat for depositions in the civil matter. N.T. Feb. 3, 2016 at 36. He was accompanied by counsel, including Mr. Schmitt. Id. at 13, 36. Mr. Schmitt testified that Mr. Phillips had informed him of Mr. Castor's promise not to prosecute. Id. at 11. The

[4] Ms. Ferman is now a Judge on the Court of Common Pleas.

Defendant did not invoke the Fifth Amendment during the depositions; however, counsel did advise him not to answer questions pertaining to Ms. Constand and her attorneys filed motions to compel his testimony. N.T. Feb. 3, 2016 at 41-42, 181-184, 248-24. The Defendant did not invoke the Fifth Amendment when asked about other alleged victims. Id. at 58-59. 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. Feb. 3, 2016 at 177, 184, 247-248. There was no attempt by defense attorneys 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. Id. at 71, 178-179, 247-248.

In his depositions, the Defendant testified that he met Ms. Constand at the Liacouras Center and developed a romantic interest in her right away. N.T., Apr. 17, 2018, Excerpt, at 20-21, 22, 24-25. He did not tell her of his interest. Id. at 21. He testified that he was open to "sort of whatever happens" and that he did not want his wife to know about any relationship with Ms. Constand. Id. at 22. When asked what he meant by a romantic interest, he testified "[r]omance in terms of steps that will lead to some kind of permission or no permission or how you go about getting to wherever you're going to wind up." Id. at 24-25. After their first meeting, they spoke on the phone on more than one occasion. Id. at 24. He testified that every time Ms. Constand came to his Elkins Park home it was at his invitation; she did not initiate any of the visits. Id. at 26.

He testified that there were three instances of consensual sexual contact with Ms. Constand, including the night he gave her the pills. Id. at 26-33. On one of the encounters, he testified that he tried to suck her breasts and she told him "no, stop," but she permitted him to put his hand inside of her vagina. Id. at 31-33. He also testified about the pills he gave law enforcement at the January 26, 2005 interview. Id. at 33-36. Additionally, he testified that he believed the incident during which he gave Ms. Constand the pills was in the year 2004, "[b]ecause it's not more than a year away. That's a time period that I knew—it's a ballpark of when I knew Andrea." Id. at 43.

He testified that he and Ms. Constand had discussed herbal medicines and that he gave Ms. Constand pills on one occasion, that he identified to police as Benadryl,. Id. at 36, 45-46. He testified about his knowledge of the types of Benadryl and their effects. Id. at 46, 55. He indicated that he would take two pills to help him go to sleep. Id. at 55.

The Defendant testified that on the night of the assault, Ms. Constand accepted his invitation to come to his home. Id. at 48. They sat at a table in the kitchen and talked about Ms. Constand's position at Temple as well as her trouble concentrating, tension and relaxation. Id. at 48, 50. By his own admission, he gave Ms. Constand one and one half Benadryl and told her to take it, indicating, "I have three friends to make you relax." Id. at 48-49. He did not tell her the pills were Benadryl. Id. at 54. He testified that he gave her the three half pills because he takes two and she was about his height. Id. at

55. He testified that she looked at the pills, but did not ask him what they were. Id. at 57.

The Defendant testified that, after he gave her the pills, they continued to talk for 15-20 minutes before he suggested they move into the living room. Id. at 50. He testified that Ms. Constand went to the bathroom and returned to the living room where he asked her to sit down on the sofa. Id.

He testified that they began to "neck and we began to touch and feel and kiss, and kiss back," and that he opened his shirt. Id. He then described the encounter,

> [t]hen I lifted her bra up and our skin—so our skin could touch. We rubbed. We kissed. We stopped. I moved back to the sofa, coming back in a position. She's on top of me. I place my knee between her legs. She's up. We kiss. I hold her. She hugs. I move her to the position of down. She goes with me down. I'm behind her. I have [my left arm behind] her neck . . . Her neck is there and her head. There's a pillow, which is a pillow that goes with the decoration of the sofa. It's not a bedroom pillow. I am behind her. We are in what would be called in a spooning position. My face is right on the back of her head, around her ear. I go inside her pants. She touches me. It's awkward. It's uncomfortable for her. She pulls her hand—I don't know if she got tired or what. She then took her hand and put it on top of my hand to push it in further. I move my fingers. I do not talk, she does not talk but she makes a sound, which I feel was an orgasm, and she was wet. She was wet when I went in.
>
> Id. at 51.

He testified that after the encounter he told her to try to go to sleep and then he went upstairs. Id. at 52. He set an alarm and returned downstairs about two hours later when it was still dark out. Id. at 52, 55. Ms. Constand was awake and they went to the kitchen where he gave her some tea and a

blueberry muffin that she took a bite of and wrapped up before she left. Id. at 52-53.

During his depositions, the Defendant also discussed his phone calls with Gianna Constand. Id. at 59. He testified that he told Ms. Constand and her mother that he would write the name of the pills he gave Ms. Constand on a piece of paper and send it to her. Id. at 61. He testified that he did not tell them it was Benadryl because,

> I'm on the phone. I'm listening to two people. And at first I'm thinking the mother is coming at me for being a dirty old man, which is also bad—which is bad also, but then, what did you give my daughter? And [if] I put these things in the mail and these people are in Canada, what are they going to do if they receive it? What are they going to say if I tell them about it? And also, to be perfectly frank, I'm thinking and praying no one is recording me.

Id. at 62.

He testified that after his first, unrecorded phone call with Mrs. Constand, he had "Peter" from William Morris contact Ms. Constand to see if she would be willing to meet him in Miami. Id. at 60-61. He also testified that he apologized to Mrs. Constand "because I'm thinking this is a dirty old man with a young girl. I apologized. I said to the mother it was digital penetration." Id. at 66. He later offered to pay for Ms. Constand to attend graduate school. Id. at 79. The Defendant contacted his attorney Marty Singer and asked him to contact Ms. Constand regarding an educational trust. Id. at 85.

He also testified that he did not believe that Ms. Constand was after money. Id. at 73. When asked if he believed it was in his best interest that the public believe Ms. Constand consented, he replied "yes." Id. at 77. He believed

there would be financial consequences if the public believed that he drugged Ms. Constand and gave her something other than Benadryl. Id. at 77.

In his deposition testimony, the Defendant also testified about his use of Quaaludes with women with whom he wanted to have sex. N.T., Apr. 18, 2018, commencing at 10:31 a.m. at 35-50.

On November 8, 2006, the civil case settled and Ms. Constand entered into a confidential settlement agreement with the Defendant, Marty Singer and American Media.[5] Apr. 13 at 106; Exhibit C-27. The Defendant agreed to pay Ms. Constand $3.38 million and American Media agreed to pay her $20,000. Id. at 108-109. As part of the settlement agreement, Ms. Constand agreed that she would not initiate a criminal complaint arising from the instant assault. Id. at 110.

The 2005-2006 civil depositions remained under temporary seal until 2015 when the federal judge who presided over the civil case unsealed the records in response to a media request. As a result, in July 2015, the Montgomery County District Attorney's Office, led by then District Attorney Ferman, reopened the investigation. N.T. Apr. 17, 2018, Excerpt, at 8.

On September 22, 2015, at 10:30 am, Brian McMonagle, Esq. and Patrick O'Connor, Esq., met with then District Attorney Ferman and then First Assistant District Attorney Kevin Steele at the Montgomery County District Attorney's Office for a discussion regarding the Defendant, who was

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[5] American Media was a party to the lawsuit as a result of the Defendant giving an interview about Ms. Constand's allegations to the National Enquirer. Id. at 109-110.

represented by Mr. McMonagle and Mr. O'Connor. Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #1. On September 23, 2015, at 1:30 pm, Bruce L. Castor, Jr., Esq., now a County Commissioner, sent an unsolicited email to then District Attorney Ferman.[6]

In this September 23, 2015 email, Mr. Castor indicated "[a]gain with the agreement of the defense lawyer and Andrea's lawyer's I intentionally and specifically bound the Commonwealth that there would be no state prosecution of Cosby in order to remove from him the ability to claim his Fifth Amendment protection against self-incrimination, thus forcing him to sit for a deposition under oath." Habeas Exhibit D-5. The correspondence further stated,

> 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. . . [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. Feb. 3, 2016 at 195; Habeas Exhibit D-5.

However, in his testimony at the hearing on Defendant's Petition for Habeas Corpus, Mr. Castor indicated that there was no agreement and no quid pro quo. N.T. Feb. 2, 2016 at 99, 227. On September 23, 2015, at 1:47 pm, Mr. Castor forwarded this email identified above as Defendant's Habeas Exhibit 5

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[6] 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).

to Mr. McMonagle. Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #3.

On September 25, 2015, then District Attorney Ferman sent a letter to Mr. Castor by way of hand delivery.[7] In her letter Ms. Ferman stated, "[t]he first I heard of such a binding agreement was your email sent this past Wednesday." Habeas Exhibit D-6. On September 25, 2015, at 3:41 pm, Mr. Castor sent an email to District Attorney Ferman.[8] In this email, he wrote Ms. Ferman, "[n]aturally, 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." Habeas Exhibit D-7.

On September 25, 2015, at 3:59 pm, Mr. Castor forwarded the letter from Ms. Ferman, identified above as Defendant's Habeas Exhibit 6, to Mr. McMonagle. Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #5. On September 25, 2015, at 4:19 pm, Mr. Castor forwarded the email identified above as Defendant's Habeas Exhibit 7 to Mr. McMonagle along with the message "Latest." Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #7. In his final email to Ms. Ferman on the

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[7] 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.

[8] 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.

subject, Mr. Castor stated, "I never said we would not prosecute Cosby." Habeas Exhibit D-8.

In 2015, prosecutors and Detectives from Montgomery County visited Ms. Constand in Canada and asked her if she would cooperate in the instant case. N.T., April 13 at 111. As a part of the reopened investigation in 2015, the Commonwealth interviewed numerous women who claimed that the Defendant had sexually assaulted them. N.T., Apr. 17, 2018, Excerpted Testimony of James Reape from Trial by Jury, at 13. The Commonwealth proffered nineteen women for this Court's consideration, ultimately, five such women were permitted to testify at trial.

Heidi Thomas testified that in 1984, she was a twenty-two year old aspiring actress working as a model, represented by JF images. N.T. Apr. 10, 2018, Testimony of Heidi Thomas, at 7. JF Images was owned by Jo Farrell.[9] Id. In April of 1984, her agent told her that a prominent figure in the entertainment world was interested in mentoring young talent. Id. at 18. She learned that the Defendant was going to call her to arrange for one-on-one acting sessions. Id. at 19, 21. The Defendant called Ms. Thomas at her home and spoke to both of her parents. Id. at 21. Ms. Thomas' agency paid for her to travel to Reno, Nevada to meet with the Defendant and booked her a room at Harrah's. Id. at 22, 25. Her family took a photo of her with her father and boyfriend when she was leaving for the airport; she testified that she dressed

[9] In his deposition testimony, the Defendant testified that Jo Farrell would send her clients to see him perform in Denver, Co. N.T., Apr. 18, 2018, Excerpt at 86-87.

professionally because she wanted the Defendant to know she took this opportunity very seriously. Id. at 27; Exhibit C-3W. Ms. Thomas purchased a postcard of Harrah's when she arrived in Reno to commemorate her trip and kept several other mementos. Id. at 26. When she arrived in Reno, Ms. Thomas was met by a driver. Id. at 28. She eventually realized that they were driving out of Reno. Id. They pulled up to a house, the driver told her that this is where the coaching would take place and that she should go in. Id.

She rang the doorbell and the Defendant answered the door. Id. at 29. The driver showed her to her room. Id. The Defendant instructed her to change into something more comfortable and to come back out with her prepared monologue. Id. She returned to a kitchen area and performed her monologue for the Defendant. Id. at 31. Unimpressed with her monologue, the Defendant suggested that she try a cold read. Id. at 32. In the script he gave her, her character was supposed to be intoxicated. Id. She performed the scene. Id. Again, unimpressed, the Defendant questioned whether she had ever been drunk. Id. at 33. She told him that she did not really drink, but that she had seen her share of drunk people in college. Id. He asked her what she would drink if she were to have a drink and she indicated perhaps a glass of white wine. Id. He got up and returned with a glass of white wine. Id. He told her it was a prop and to sip on it to see if she could get more into character. Id. She took a sip and then remembers only "snap shots" of what happened next. Id. at 34. She remembers the Defendant asking her if she was relaxing into the part. Id. She remembers waking up in a bed, fully clothed with the

Defendant forcing his penis into her mouth. Id. at 35. In her next memory, she awoke with her head at the foot of the bed, and hearing the Defendant say "your friend is going to come again." Id. at 36. Her next memory is slamming the door and then apologizing to the Defendant. Id.

She awoke, presumably the next morning, feeling unwell. Id. She decided to get some fresh air. Id. at 37. She went to the kitchen, where she saw someone other than the driver for the first time. Id. The woman in the kitchen offered her breakfast, but she declined. Id. She went outside with her camera that she always carried with her, and took pictures of the estate. Id. She took a number of photos of both the interior and exterior of the house where she was staying. Id. at 37-41; Exhibits C-3W-Y. She also remembers going to a show and being introduced to the Temptations and being in the Defendant's dressing room. Id. at 41. She testified that it did not occur to her to report the assault to her agent, and that she felt she must have given the Defendant some signal to think it was okay to do that to her. Id. at 42.

Two months later, in June 1984, Thomas called the Defendant, as he told her she could, in an attempt to meet with him to find out what had happened; she was told by his representative that she would be able to see him. Id. at 43-44, 45-46. She made arrangements to see him in St. Louis, using her own money. Id. at 44. When she arrived in St. Louis, she purchased a postcard. Id. at 46. On this trip, she photographed her hotel room and the driver who picked her up. Id. at 48-49; Exhibit C-3nn. Ms. Thomas attended the show, but was not allowed backstage. N.T. Apr. 11, 2018, Trial By Jury, at

13. After the Defendant's performance, she accompanied him and others to a dinner. N.T. Apr. 10, 2018, Testimony of Heidi Thomas, at 49-50. There were a number of people at the dinner and Ms. Thomas was unable to confront the Defendant about what happened in Reno. Id. As the evening came to a close and it became clear she would not be able to speak to him, she asked the driver or valet to take her picture with the Defendant. Id. at 51; Exhibit C-3pp. She had no further contact with the Defendant. Id. at 52. At some time later, she told both a psychologist and her husband what happened. Id. at 54.

Chelan Lasha testified that in 1986 when she was a seventeen-year-old senior in high school, in Las Vegas, Nevada, a connection of her father's ex-wife put her in touch with the Defendant. N.T. Apr. 11, 2018, Trial By Jury, at 56. At that time, Ms. Lasha lived with her grandparents, the Defendant called her home and spoke to her and to her grandmother. Id. at 57. The Defendant told her that he was looking forward to meeting her and to helping her with her education and pursuit of a career in acting and modeling. Id. at 58. The first time she met the Defendant in person, he came to her grandparents' home for a meal. Id. at 59. They remained in phone contact and she sent headshots to his agency in New York. Id. at 60.

After she graduated from high school that same year, she worked at the Las Vegas Hilton. Id. at 63. The Defendant returned to Las Vegas and invited Ms. Lasha to meet him at the Las Vegas Hilton. Id. When she arrived at the hotel, she called the Defendant and a bellman took her to the Elvis Pressley Suite. Id. Ms. Lasha understood the purpose of their meeting was to help her

break into modeling and that someone from the Ford Modeling Agency would be meeting her and taking her picture. Id. at 64. Ms. Lasha testified that she had a cold on the day of the meeting. Id. The Defendant directed her to wet her hair to see what it looked like, and someone took some photographs of her. Id. at 65. The photographer left. Id. A second person came into the suite, who the Defendant said was a therapist related to stress and relaxation; this person also left the suit. Id.

Ms. Lasha was congested and blowing her nose, the Defendant offered her a decongestant. Id. at 65-66. He gave her a shot of amaretto and a little blue pill. Id. at 66. She took the pill. Id. He gave her a second shot of amaretto. Id. He sat behind her and began to rub her shoulders. Id. She began to feel woozy and he told her that she needed to lay down. Id. The Defendant took her to the back bedroom; prior to that time, they had been in the living area of the suite. Id.

When she stood up she could barely move and the Defendant guided her to the back bedroom. Id. at 67. He laid her on the bed, at which point she could no longer move. Id. He laid down next to her and began pinching her breasts and rubbing his genitals on her leg. Id. She felt something warm on her leg. Id. Her next memory is the Defendant clapping to wake her up. Id. When she awoke, she had a Hilton robe and her shorts on, but her top had been removed. Id. Her top was folded neatly on a table with money on top. Id. The Defendant told her to hurry up and get dressed and to use the money to buy something nice for herself and her grandmother. Id. During her

incapacitation, she was aware of what was happening but was powerless to stop it. Id. at 68. When she left the hotel, she drove to her guidance counselor's house and told her what happened. Id. She also told her sister. Id.

The day after the assault, Ms. Lasha's mother and grandmother attended a performance at the Hilton where the Defendant was a participant. Id. at 69. The Defendant called her and asked her why she did not attend, she told him she was sick and hung up the phone. Id. A couple days later, Ms. Lasha attended a performance at the Hilton with her grandmother, where she heckled the Defendant. Id. at 69-70. Afterwards, she told her grandmother what happened. Id. at 70. She was ultimately fired from her position at the Hilton. Id. at 79. She reported the assault to the police in 2014. Id. at 80.

Janice Baker-Kinney testified that she lived in Reno, Nevada and worked at Harrah's Casino from 1981-1983. Id. at 164. In 1982, Ms. Baker-Kinney was a twenty-four year old bartender at Harrah's. Id. at 165. During the course of her employment, she met several celebrities who performed in one of Harrah's two showrooms. Id. at 166. Performers could stay either in the hotel, or in a home owned by Mr. Harrah, just outside of town. Id. Ms. Baker-Kinney attended a party at that home hosted by Wayne Newton. Id.

On one particular evening, one of the cocktail waitresses invited her to go to a pizza party being hosted by the Defendant. Id. at 167. The Defendant was staying at Mr. Harrah's home outside of town. Id. at 167. Ms. Baker-Kinney agreed to attend the party and met her friend at the front door of the home. Id.

The Defendant answered the door. Id. at 168. Ms. Baker-Kinney was surprised to find that there was no one else in the home for a party. Id. at 169. She began to think that her friend was romantically interested in the Defendant and asked her to come along so she would not be alone. Id. She decided to stay for a little while and have a slice of pizza and a beer. Id.

The Defendant offered Ms. Baker-Kinney a pill, which she believes he said were Quaaludes. Id. at 170. She accepted the pill and then he gave her a second pill, which she also accepted. Id. at 170-171. Having no reason not to trust the Defendant, she ingested the pills. Id. at 173. After taking the pill, she sat down to play backgammon with the Defendant. Id. Shortly after starting the game, she became dizzy and her vision blurred. Id. at 174. She told the Defendant that the game was not fair anymore because she could not see the board and fell forward and passed out onto the game. Id.

Ms. Baker-Kinney next remembers hearing voices behind her and finding herself on a couch. Id. at 175. She realized it was her friend leaving the house. Id. She looked down at her clothing and realized that her shirt was unbuttoned and her pants were unzipped. Id. The Defendant sat down on the couch behind her and propped her up against his chest. Id. at 175-176. She remembers him speaking, but could not recall not the words he said. Id. at 176. His arm was around her, inside her shirt, fondling her. Id. He then moved his hand toward her pants. Id. She was unable to move. Id.

Her next memory is of the Defendant helping her into a bed and then being awoken the next day by the phone ringing. Id. at 176-177. She heard

the Defendant speaking on the phone and realized that they were in bed together and both naked. Id. at 177. When the Defendant got off of the phone, Ms. Baker-Kinney apologized for passing out and tried to explain that dieting must have affected her ability to handle the pills. Id. She had a sticky wetness between her legs that she knew indicated they had sex at some point, which she could not remember. Id. at 178.

Afraid that someone she worked with would be coming to clean the home, Ms. Baker-Kinney rushed to get herself dressed and get out of the home. Id. at 179-180. The Defendant walked her to the front door and told her that it was just between them and that she should not tell anyone. Id. at 180. She made a joke that she would not alert the media and left, feeling mortified. Id. at 180-181.

The day after the assault, she worked a shift at Harrah's. Id. at 185. At the end of her shift, she was leaving with a friend and heard the Defendant calling her name across the room. Id. She gave a slight wave and asked her friend to get her out of there and they left. Id. Within days of the assault, she told her roommate, one of her sisters, and a friend what had happened. Id. at 185.

Mary Chokran testified that in 1982, Ms. Baker-Kinney called her and was very distraught. N.T. Apr. 12 2018, Trial By Jury, at 57. Ms. Baker-Kinney told Ms. Chokran that she had taken what she thought was a Quaalude and that the Defendant had given it to her. Id. at 58. Ms. Baker-Kinney told

her that she thought it was a mood-enhancing party drug, not something that would render her unconscious as it did. Id.

Janice Dickinson testified that in 1982, when she was a twenty-seven year old, established model represented by Elite Modeling Agency, the Defendant contacted the agency seeking to meet with her. N.T., Apr. 12, 2018, Testimony of Janice Dickinson, at 8. She first met the Defendant at his townhouse in New York City. Id. She went to the home with her business manager. Id. at 9. She was excited about the meeting; she had been told that the Defendant mentored people and had taken an interest in her. Id. During the meeting they discussed her potential singing career as well as acting. Id. at 10. The Defendant gave her a book about acting. Id. After the meeting she and her manager left the home. Id.

Sometime later, Ms. Dickinson was working on a calendar shoot in Bali, Indonesia when the Defendant contacted her. Id. at 11. The Defendant offered her a plane ticket and a wardrobe to come meet him in Lake Tahoe to further discuss her desire to become an actress. Id. at 12. She accepted the invitation and left her boyfriend in Bali to go meet the Defendant to discuss the next steps to further her career. Id. at 13.

When she arrived at the airport in Reno, Nevada, she was met by Stu Gardner, the Defendant's musical director. Id. at 14. He took Ms. Dickinson to the hotel where she checked in to her room and put on the clothes the provided for her by the hotel boutique. Id. She arranged to meet Gardner on a sound stage to go over her vocal range. Id. The Defendant arrived in the room.

Id. at 15. She attended the Defendant's performance and had dinner afterwards with the Defendant and Gardner. Id. at 16.

During the dinner, Ms. Dickinson drank some red wine. Id. at 17. She began to experience menstrual cramps, which she expressed to the table. Id. The Defendant said he had something for that and gave her a little, round blue pill. Id. She ingested the pill. Id. Shortly after taking the pill, she began to feel woozy and dizzy. Id. at 18. When they finished in the restaurant, Mr. Gardner left and the Defendant invited her to his room to finish their conversation. Id. at 18.

Ms. Dickinson traveled with a camera and took photographs of the Defendant, including one of him making a phone call, inside of his hotel room. Id. at 19; Exhibit C-11-C-13. She testified that after taking the photos, she felt very lightheaded and like she could not get her words to come out. Id. at 21. When the Defendant finished his phone call, he got on top of her and his robe opened. Id. at 22. Before she passed out, she felt vaginal pain as he penetrated her vagina. Id. at 23. She awoke the next morning in her room with semen between her legs and she felt anal pain. Id. at 24.

Later that day, she saw the Defendant and they went to Bill Harrah's house. Id. At the house, she confronted the Defendant and asked him to explain what happened the previous evening. Id. at 25. He did not answer her. Id. She left Lake Tahoe the next day on a flight to Los Angeles with the Defendant and Mr. Gardner. Id. at 26. From Los Angeles, she returned to Bali to complete her photo shoot. Id. Ms. Dickinson did not report the assault;

she was having commercial success as a model and feared that it would impact her career. Id. at 27.

In 2002, Ms. Dickinson sought to include the rape in her memoir, *No Lifeguard on Duty*, but the publishing house's legal team would not allow her to include it. Id. at 33-34. Judith Regan testified that she was the publisher of Ms. Dickinson's 2002 memoir. N.T. Apr. 18, 2018 at 4. She testified that Ms. Dickinson told her that the Defendant had raped her and that she wanted to include that in her book. Id. at 5. Ms. Regan told Ms. Dickinson that the legal department would not allow her to include the story without corroboration. Id. at 6. Ms. Dickinson was angry and upset when she learned she could not include her account in the book. Id. at 7.

In 2010, Ms. Dickinson disclosed what happened to her to Dr. Drew Pinsky in the course of her participation in the reality show Celebrity Rehab. N.T., Apr. 12, 2018, Testimony of Janice Dickinson at 31. That conversation was never broadcast. Id. at 32. She testified that she also disclosed to a hairdresser and makeup artist. Id. at 33.

Maud Lise-Lotte Lublin testified that when she was in her early twenties and living in Las Vegas, she modeled as a way to make money to finance her education. N.T. Apr. 11, 2018, Trial by Jury, at 73-75. She met the Defendant in 1989, when she was twenty-three years old. Id. at 76. Her modeling agency told her that the Defendant wanted to meet her. Id. The first time she met with him in person, he was reviewing other headshots from her agency; he told

her that he would send her photos to a New York agency to see if runway or commercial modeling was the best fit for her. Id. at 77.

She had subsequent contact with the Defendant. Id. The Defendant also developed a relationship with her family. Id. at 78. On one occasion, she and her mother went to the UNLV track with the Defendant where he introduced her to people as his daughter. Id. She and her sister spent time with the Defendant on more than one occasion. Id. at 81. He was aware that her goal was to obtain an education and thought that modeling or acting would help her earn enough money to reach her educational goals. Id. She felt that the Defendant was a father figure or mentor. Id. Eventually, that relationship changed. Id.

The Defendant called her and invited her to the Hilton in Las Vegas. Id. at 82. She arrived at the suite and he began talking to her about improvisation and acting, as she had not done any acting at this point. Id. During the conversation, he went over to a bar and poured her a shot, told her to drink it and that it would relax her. Id. at 82-83. She told him that she did not drink alcohol. Id. at 83. He insisted that it would help her work on improvisation and help the lines flow. Id. She trusted his advice and took the drink. Id. He went back to the bar and prepared her a second drink, which she accepted. Id. at 83-84.

Within a few minutes, she started to feel dizzy and woozy and her hearing became muffled. Id. at 84. The Defendant asked her to come sit with him. Id. He was seated on the couch; Ms. Lise-Lotte Lublin was standing. Id.

He asked her to come sit between his knees. Id. at 85. She sat down; he began stroking her hair. Id. at 86. The Defendant was speaking to her, but the sound was muffled. Id. She felt very relaxed and also confused about what this had to do with learning improvisation. Id. She testified that she remembers walking towards a hallway and being surprised at how many rooms were in the suite. Id. She has no further memory of the night. Id. at 87. When she woke up, she was at home. Id. She thought she had a bad reaction to the alcohol and told her family about the meeting. Id. at 88. In the days that followed, she told additional friends that she thought she had accidentally had too much to drink and gotten sick and embarrassed herself. Id. at 89. She continued to have contact with the Defendant. Id.

On one occasion she traveled to see the Defendant at Universal Studios in California. Id. at 90. She invited a friend to go with her as she felt uncomfortable seeing him alone after what happened. Id. at 92. On the drive to Universal Studios, she told her friend that she was uncomfortable because the Defendant had her sit down and he stroked her hair and she could not remember what happened. Id. She came forward in 2014. Id. at 93.

III. Procedural History

On December 30, 2015, the Defendant was charged with three counts of Aggravated Indecent Assault.[10] On January 11, 2016, the Defendant filed a document styled as "Petition for Writ of Habeas Corpus and Motion to

[10] 18 Pa. C.S.A. § 3125 (a)(1), (a)(4), and (a)(5).

Disqualify the Montgomery County District Attorney's Office."[11] While artfully misnomered as a "Petition for Writ of Habeas Corpus," this Court treated the filing as containing three distinct motions (1) a motion to dismiss based on an alleged non-prosecution agreement;[12] (2) a motion to dismiss based on pre-arrest delay;[13] and (3) a motion to disqualify the District Attorney's Office.[14]

The Commonwealth filed a Response/Motion to Dismiss the Motion on January 20, 2016. On January 28, 2016, the Defendant filed his "Opposition to the Commonwealth's Motion to Dismiss and Motion to Disqualify the Montgomery County District Attorney's Office." A hearing/argument on the matter was scheduled for February 2, 2016. By order of January 22, 2016, the February 2, 2016 hearing was limited to the issue of an alleged non-prosecution agreement and this Court noted that all other issues raised by the Defendant would be preserved. However, following a conference and by agreement of the parties, the Court agreed to hear argument on the Defendant's Motion to Disqualify the District Attorney's Office as well.

Following two days of testimony and argument on February 2 and 3, 2016, this Court denied the Defendant's Motion to Dismiss based on the alleged non-prosecution agreement and the Defendant's Motion to Disqualify the District Attorney's Office. The Defendant filed a Notice of Appeal on

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[11] This document was docketed as a miscellaneous matter indexed at MD-3156-2015. All filings under that docket number have been migrated to the instant docket.
[12] Defendant's "Memorandum of Law in Support of Petition for Writ of Habeas Corpus and Motion to Disqualify," para. III(B).
[13] Memorandum of Law, para. III(C).
[14] Memorandum of Law, para. III(D).

February 12, 2016.[15] The Commonwealth filed a Motion to Quash the Appeal with the Superior Court, indexed at 488 EDA 2016. By Order of March 1, 2016, the Superior Court stayed further trial court proceedings pending the disposition of the Commonwealth's Motion to Quash the Appeal. On March 4, 2016, the Defendant filed a Petition for Review with the Superior Court, indexed at 23 EDM 2016. On April 25, 2016, the Superior Court denied the Petition for Review, granted the Commonwealth's Motion to Quash the February 12, 2016 appeal and lifted the stay.[16]

A preliminary hearing was held before District Justice Elizabeth McHugh on May 24, 2016 and the charges were held for court. On June 8, 2016, the Defendant filed a "Petition for Writ of Habeas Corpus" and accompanying memorandum of law. The Commonwealth filed a response, the Defendant filed a reply, and a hearing was held on July 7, 2016. This Court denied the Petition by order of July 7, 2016. On July 20, 2016, the Defendant again sought appellate review of this Order.[17]

On August 12, 2016, the Defendant filed a "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

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[15] This Court denied the Motion to Amend the February 4, 2016 order to certify it for appeal pursuant to 42 Pa. C.S. § 702 (b).

[16] The Pennsylvania Supreme Court also denied Defendant's emergency application for a stay, Petition for Allowance of Appeal, and Petition for Review. 58 MM 2016, 326 MAL 2016, 63 MM 2016.

[17] This Court denied the Motion to Amend the July 7, 2016 order to certify it for appeal pursuant to 42 Pa. C.S. § 702 (b). That appeal, indexed at 2330 EDA 2016, was quashed by order of October 12, 2016. The Supreme Court denied Defendant's Petition for Allowance of Appeal by Order of April 12, 2017. Commonwealth v. Cosby, 765 MAL 2016.

Him to Waive His Fifth Amendment Right Against Self-Incrimination."[18] The Commonwealth filed a response. On September 6, 2016, the Commonwealth filed a "Motion to Introduce Evidence of Other Bad Acts of the Defendant."

On October 6, 2016, the Defendant filed "Motion to Dismiss Charges Based on Deprivation of Defendant's Due Process Rights," on the basis of pre-arrest delay, and supporting memorandum of law. On October 18, 2016, the Commonwealth filed its response. On October 31, 2016, the Defendant filed his "Opposition to the Commonwealth's Motion to Introduce Evidence of Prior Bad Acts of Defendant: Remote, Vague, Unreported Allegations of Other Accusers." and a "Motion for a Hearing on the Competency of any Prior Accuser that the Court is inclined to let Testify at Trial." Hearings on pretrial motions were held on November 1 and 2, 2016.

By Orders of November 16, 2016, the Court denied Defendant's "Motion to Dismiss Charges Based on Deprivation of Defendant's Due Process Rights," "Motion for a Competency Hearing," and "Motion for In Camera Voir Dire" of 404 (b) proffered witnesses. The Court took 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" under advisement. On December 5, 2016, this Court issued written Findings of Fact and Conclusions of Law, thereby denying the

[18] On August 3, 2016, the Defendant filed his "Motion to Suppress the Recording of a Telephone Call Obtained in Violation of Pennsylvania's Wiretapping and Electronic Surveillance Act." Following a hearing on September 6, 2016, that Motion was Denied by Order of September 16, 2016.

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."

Remaining pretrial motions were argued on December 13th and 14th, 2016. On December 30, 3016, the Defendant filed a "Motion for Change of Venue/Venire." On February 24, 2017, this Court granted the Commonwealth's 404(b) Motion in part, allowing one prior alleged victim to testify. A hearing on Motion for Change of Venue/Venire was held on February 27, 2017. This Court granted the Change of Venire; a jury was selected from Allegheny County.

On June 17, 2017, following trial and several days of deliberation, the jury was unable to reach a verdict; this Court declared a mistrial. Retrial was scheduled for November 6, 2017. A pretrial conference was held on August 22, 2017; all defense counsel withdrew and a new team of trial counsel entered its appearance. The retrial was continued until April 2, 2018.

On January 18, 2018, the Commonwealth filed a "Motion to Introduce Evidence of 19 Prior Bad Acts of Defendant" and accompanying memorandum of law. The Defendant filed a response. On January 25th and 26th 2018 the Defendant filed the following relevant motions, with supporting memorandum of law: (1) "Motion to Dismiss Due to Insufficient Evidence to Prove Alleged Encounter Occurred Within the Statute of Limitations Period;" (2) "Motion to Incorporate All Prior Pretrial Motions and Oppositions to Commonwealth

Motions;" and (3) "Motion to Dismiss for Prosecutorial Misconduct."[19] Hearings on the Motions were scheduled for March 5 and 6, 2018. The Commonwealth filed responses.

On March 6, 2018, following argument, the Court denied the "Motion to Dismiss for Prosecutorial Misconduct" and the "Motion to Dismiss Due to Insufficient Evidence to Prove Alleged Encounter Occurred Within the Statute of Limitations Period." The Court took the Commonwealth's 404 (b) motion under advisement, and following review of post-argument submissions, granted the motion, in part, by order of March 15, 2018 permitting five 404 (b) witnesses to testify. This Court denied the Motion to Amend the March 15, 2018 order to certify it for appeal pursuant to 42 Pa. C.S. § 702 (b). The Defendant did not attempt an interlocutory appeal.

On March 20, 2018, the Commonwealth filed several Motions in Limine regarding evidentiary issues. On March 21, 2018, the Defendant filed a "Motion for Recusal of the Honorable Steven T. O'Neill and Request for Reassignment." On March 28, 2018, following argument, the Court denied the "Motion for Recusal." Additional pretrial motions and responses to Commonwealth Motions, not relevant to the instant appeal, were filed by the Defendant on March 28, 2018. The following day, the Commonwealth filed a "Motion to Introduce Admissions of the Defendant" and memorandum of law. The Motion pertained to the civil deposition testimony regarding Quaaludes. The Court heard argument on March 30, 2018 and deferred a ruling until trial.

[19] The Defendant filed a supplement to this Motion on February 5, 2018.

Jury selection commenced on April 2, 2018. On April 6, 2018, after the jury had been selected, but before it was sworn, the Defendant filed a "Motion and Incorporated Memorandum of Law in Support Thereof, to Excuse Juror for Cause," seeking to remove Juror 11 on the basis of a statement purportedly overheard by a prospective juror during jury selection. On April 8, 2018, the Defendant supplemented his memorandum. Prior to the swearing of the jury, on April 9, 2018, argument and questioning of the jurors took place. The Court denied the Motion to remove Juror 11 and the case proceeded to trial.

At trial, Dr. Barbara Ziv testified as an expert in understanding the dynamics of sexual violence, victim responses to sexual violence, and the impact of sexual violence on victims during and after being assaulted, pursuant to 42 Pa. C.S.A. § 5920. The Defendant presented a defense, wherein he attempted to show, *inter alia*, that Ms. Constand fabricated the assault in order to obtain money from the Defendant. N.T. Apr. 18, 2018, Excerpted Testimony of Marguerite Jackson From Trial By Jury; N.T. Apr. 18, 2018, Excerpted Testimony of Pamela Gray-Young. Additionally, he presented evidence purporting to show that he was not at his Elkins Park home during the time period in which the assault occurred. N.T. Apr. 20, 2018 at 57-83, 84-110; N.T. Apr. 23, 2018 at 46-98.

On April 26, 2018, the jury convicted the Defendant on all three counts of Aggravated Indecent Assault. The Court ordered a Sexually Violent Predator Assessment. On June 14, 2018, post-trial counsel entered his appearance and all trial counsel withdrew. On July 25, 2018, the Defendant filed a "Motion for

Declaration of Unconstitutionality" and a "Motion for Production of Information Collected, Considered or Relied on By SOAB," the latter of which was granted by Order of August 2, 2018.

On September 11, 2018, the Defendant filed a "Motion for Disclosure, Recusal, and for Reconsideration of Recusal" and supporting memorandum of law. The Commonwealth filed its response on September 13, 2018. By memorandum and order of September 19, 2018, this Court denied this motion.

On September 24, 2018, following argument, the Court denied the "Motion for Declaration of Unconstitutionality" and proceeded to a Sexually Violent Predator hearing. The Defendant was sentenced to three to ten years' incarceration in a state correctional facility and was also designated a Sexually Violent Predator, pursuant to 42 Pa. C.S.A. § 9799.58. Defendant's request to remain on bail pending appeal was denied by this Court. The Defendant filed a "Post-Sentence Motion to Reconsider and Modify sentence and For a New Trial in the Interest of Justice" on October 5, 2018. One week later, on October 12, 2018, post-trial counsel withdrew and appellate counsel entered his appearance. By Order of October 23, 2018, the Defendant's post-sentence motion was denied. This timely appeal followed. By Order of December 11, 2018, the Defendant was directed to file a concise statement of errors, pursuant to Pa. R. Crim. P. 1925 (b). He has since complied with that directive.

IV. Issues

The Defendant raises the following issues in his concise statement, reproduced verbatim:

1. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights by failing to excuse juror 11 where evidence was introduced of the juror's inability to be fair and impartial. Specifically, a prospective juror testified that juror 11 prejudged guilty prior to the commencement of trial. Moreover, the trial judge abused its discretion, erred and infringed on Mr. Cosby's constitutional rights by refusing to interview all jurors who were in the room with juror 11 to ascertain whether they heard the comment and, if so, the impact the comment had on them.

2. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights in allowing Dr. Barbara Ziv to testify as an expert witness pursuant to 42 Pa. C.S.A. § 5920 regarding an offense that occurred 12 years prior to the conception of that statute, and in violation of Mr. Cosby's rights under the fifth and sixth amendments of the Constitution of the United States, and under Article I §§1, 9 and 17 of the Constitution of the Commonwealth of Pennsylvania where the statute is unconstitutional and not retroactive in application.

3. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights to Due Process of Law under the Constitution of the United States and under the Constitution of the Commonwealth of Pennsylvania by failing to disclose his biased relationship with Bruce Castor, and by failing to recuse himself as presiding judge as a result of this biased relationship. Judge Steven T. O'Neill confronted Mr. Castor for, in his opinion, exploiting an affair in order to gain a political advantage in their 1999 political race for Montgomery County District Attorney. Mr. Castor's conduct as District Attorney in 2005, however, was a material and dispositive issue in this case; specifically, a significant question arose as to whether Mr. Castor agreed in 2005 that the Commonwealth would never prosecute Mr. Cosby

for the allegations involving Andrea Constand and whether he relayed that promise to Mr. Cosby's attorneys. The defense alleged that the Commonwealth was precluded from prosecuting Mr. Cosby due to former District Attorney Bruce Castor's agreement to never prosecute Mr. Cosby for the Constand allegations. The trial court erred in failing to disclose his bias against District Attorney Castor, and in failing to recuse himself, prior to determining the credibility of former District Attorney Castor and whether he made said agreement. The trial court similarly erred in failing to disclose his bias or recuse himself prior to ruling upon the admissibility of the defendant's civil deposition where the trial court was again determining the credibility of former District Attorney Castor.

4. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights to Due Process of Law under the Constitution of the United States and of the Commonwealth of Pennsylvania in denying the Petition for Writ of Habeas Corpus filed January 11, 2016, and failing to dismiss the criminal information where the Commonwealth, in 2005, promised to never prosecute Mr. Cosby for the Constand allegations. Moreover, given the agreement that was made by the Commonwealth in 2005 to never prosecute Mr. Cosby and Mr. Cosby's reliance thereon, the Commonwealth was also estopped from prosecuting Mr. Cosby.

5. The trial court erred in permitting the admission of Mr. Cosby's civil deposition as evidence at trial in violation of the Due Process Clause of the State and Federal Constitutions and in violation of Mr. Cosby's right against self-incrimination pursuant to the Fifth Amendment of the Federal Constitutions and Article I § 9 of the Constitution of the Commonwealth of Pennsylvania. Moreover, the prosecution was estopped from arguing the admission of the civil deposition at trial, as Mr. Cosby gave the deposition testimony in reliance on the promise by former District Attorney Castor that Mr. Cosby would never be prosecuted for the Constand allegations.

6. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights to Due Process of Law under the

Constitution of the United States and of the Commonwealth of Pennsylvania in admitting five prior "bad act witnesses" pursuant to Pa. R. Evid. § 404(b). The witness' allegations were too remote in time and too dissimilar to the Constand allegations to fall within the proper score of Pa. R. Evid. 404(b). Furthermore, during the first trial, the trial court allowed one 404(b) witness; however, after that trial resulted in a mistrial, the trial court allowed the Commonwealth, without explanation or justification, to call five 404 (b) witnesses in violation of Mr. Cosby's Due Process rights under the State and Federal Constitutions.

7. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights under the Constitution of the United States and of the Commonwealth of Pennsylvania in allowing the Commonwealth to proceed with the prosecution of Mr. Cosby where the offense did not occur within the twelve year statute of limitations pursuant to 42 Pa. C.S.A. § 5552 and the Commonwealth made no showing of due diligence. Moreover, the jury's verdict was against the weight of the evidence concerning whether the offense occurred within the twelve year statute of limitations. Furthermore, even if the alleged offense occurred within the twelve year statute of limitations, the delay in prosecuting Mr. Cosby caused him substantial prejudice and infringed on his Due Process rights under the Constitutions of the Commonwealth of Pennsylvania and of the United States, as a material witness to the non-prosecution agreement died within the twelve year period.

8. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights under the Due Process Clause of the Constitution of the United States and of the Commonwealth of Pennsylvania by permitting the Commonwealth to introduce Mr. Cosby's civil deposition testimony regarding Quaaludes. This testimony was not relevant to the Constand allegations; was remote in time; "backdoored" the admission of a sixth 404(b) witness; and constituted "bad act" evidence that was not admissible. Furthermore, the testimony was highly prejudicial in that it included statements regarding the illegal act of giving a narcotic to another person.

9. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights to Due Process of Law under the

Constitution of the United States and of the Commonwealth of Pennsylvania by denying Mr. Cosby's objections to the trial court's charge and including or refusing to provide certain instructions. Specifically, the trial court abused its discretion, erred and violated Mr. Cosby's rights to Due Process of Law by: 1) providing to the jury an instruction on the "consciousness of guilt" where this charge was not appropriate to the facts before the jury; 2) refusing to provide an instruction, consistent with *Kyles v. Whitley*, 514 U.S. 419 (1995), that the jury may consider the circumstances under which the case was investigated; and 3) by failing to provide the jury the instruction on 404 (b) witnesses suggested by the defense; indeed the trial court's charge effectively instructed the jury that Mr. Cosby was guilty of the uncharged alleged crimes and failed to properly explain how this uncharged, alleged misconduct should be considered. Moreover, the trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights to Due Process of Law under the Constitution of the United States and of the Commonwealth of Pennsylvania by refusing to provide to the jury a special interrogatory on whether the offense occurred within the statute of limitations.

10. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights in finding that Mr. Cosby was a sexually violent predator pursuant to SORNA where the Commonwealth expert relied upon unsubstantiated, uncorroborated evidence not admitted at trial; specifically relying on hearsay evidence that there were approximately 50 more women making allegations Mr. Cosby.[sic]

11. The trial court abused its discretion, erred, and infringed on Mr. Cosby's constitutional rights to Due Process of Law under the Constitution of the United States and of the Commonwealth of Pennsylvania in applying the sexually violent predator provisions of SORNA (Act 2018-29) for a 2004 offense in violation of the Ex Post Facto Clauses of the State and Federal Constitutions.

For ease of review, these issues will be reordered and divided into pretrial issues, evidentiary issues, jury instructions and post-trial issues.

V. Discussion

The Court notes preliminarily that pursuant to the Rules of Appellate Procedure, a Statement of Errors Complained of on Appeal shall,

> *concisely* identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge...The Statement should not be redundant or provide lengthy explanations as to any error. Where non-redundant, non-frivolous issues are set forth in an appropriately concise manner, the number of errors raised will not alone be grounds for finding waiver.

Pa. R.A.P. 1925 (b)(ii), (iv). The Superior Court has stated,

> a [c]oncise [s]tatement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no [c]oncise [s]tatement at all. The court's review and legal analysis can be fatally impaired when the court has to guess at the issues raised. Thus, if a concise statement is too vague, the court may find waiver.

Commonwealth v. Hansley, 24 A.3d 410, 415 (Pa. Super. 2011) (citations and internal quotations omitted). It is well-established that "'[a] party complaining, on appeal, of the admission of evidence in the court below will be confined to the specific objection there made.' If counsel states the grounds for an objection, then all other unspecified grounds are waived and cannot be raised for the first time on appeal." Commonwealth v. McGriff, 160 A.3d 863, 871–72 (Pa. Super. 2017) (citations omitted). The law is clear that "issues, even those of constitutional dimension, are waived if not raised in the trial court. A new and different theory of relief may not be successfully advanced for the first time on appeal." Commonwealth v. Cline, 177 A.3d 922, 927 (Pa. Super. 2017)(citations omitted). Likewise, "[i]ssues not raised in the lower court are

waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a). The Defendant has raised eleven issues, many of which contain multiple subparts, and many of which contain allegations of error that were not raised before this Court as will be noted below where relevant.

A. Pretrial Issues

1. The Court properly denied Defendant's January 11, 2016 Petition for a Writ of Habeas Corpus. (Concise Statement Issue 4)

The Defendant's first contention is that this Court erred in denying his Petition for Writ of Habeas Corpus ("Habeas Petition").[20] First, he alleges that in 2005 the Commonwealth promised that he could never be prosecuted. Second, he alleges that the Commonwealth made an agreement by which he would never be prosecuted, thereby estopping the Commonwealth from bringing the instant prosecution. Initially, the Court notes that the Defendant did not raise a due process argument in conjunction with his motion to dismiss based on a non-prosecution agreement, thus constituting waiver. As there was no promise or agreement, only an exercise of prosecutorial discretion, these claims must fail.

"[T]he decision to grant or deny a motion to dismiss criminal charges is vested in the sound discretion of the trial court and may be overturned only upon a showing of abuse of discretion or error of law." Commonwealth v.

[20] As outlined above, this Court treated the January 11, 2016 filing as containing three distinct motions: (1) a motion to dismiss based on an alleged non-prosecution agreement; (2) a motion to dismiss based on pre-arrest delay; and (3) a motion to disqualify the District Attorney's Office. As worded, the Defendant's concise statement appears only to challenge the denial of his motion to dismiss based on the non-prosecution agreement. Thus, the other grounds are waived.

Handfield, 34 A.3d 187, 202 (Pa. Super. 2011) (citations omitted). This Court did not abuse its discretion and this claim is without merit.

In his Habeas Petition, the Defendant contended that he, through his now deceased former attorney, Walter J. Phillips, Esq., entered into an express agreement in 2005 with the former District Attorney Bruce L. Castor, Jr., whereby Mr. Castor agreed to not to prosecute the Defendant for the purpose of inducing him to testify fully in Ms. Constand's then unfiled civil case. Petition for Writ of Habeas Corpus and to Disqualify Montgomery County District Attorney's Office, Jan. 11, 2016 at 1. Mr. Castor testified on behalf of the Defendant at the hearing on his Motion.

On January 24, 2005, then District Attorney Bruce L. Castor, Jr. issued a signed press release announcing an investigation into Ms. Constand's allegations. N.T. Feb. 3, 2016 at 65; Habeas Exhibit C-17. Mr. Castor testified that as the District Attorney in 2005, he oversaw the investigation into Ms. Constand's allegations. N.T. Feb. 2, 2016 at 24. Ms. Ferman[21] supervised the investigation along with County Detective Richard Peffall and Detective Richard Shaffer of Cheltenham. Id. at 25. Mr. Castor testified that "I assigned who I thought were our best people to the case. And I took an active role as District Attorney because I thought I owed it to Canada to show that, in America, we will investigate allegations against celebrities." Id. at 34.

Mr. Castor testified that Ms. Constand went to the Canadian police almost exactly one year after the alleged assault and that the case was

[21] Ms. Ferman is now a Judge on the Court of Common Pleas.

ultimately referred to Montgomery County. Id. at 25, 27. The lack of a prompt complaint was significant to Mr. Castor in terms of Ms. Constand's credibility and in terms of law enforcement's ability to collect physical evidence. Id. at 27, 29. He also placed significance on the fact that Ms. Constand told the Canadian authorities that she contacted a lawyer in Philadelphia prior to speaking with them. Id. at 43-44. He also reviewed Ms. Constand's statements to police. Id. at 47. Mr. Castor felt that there were inconsistencies in her statements. Id. at 48. Mr. Castor did not recall press quotes attributed to him calling the case "weak" at a 2005 press conference. Id. at 148; Habeas Exhibit C-3. Likewise, he did not recall the specific statement, "[i]n Pennsylvania we charge people for criminal conduct. We don't charge people with making a mistake or doing something foolish;" however, he indicated that it is a true statement. Id. at 154.

As part of the 2005 investigation, the Defendant gave a full statement to law enforcement and his Pennsylvania and New York homes were searched. Id. at 49-51. The Defendant was accompanied by counsel and did not invoke the Fifth Amendment at any time during his statement.[22] Id. at 119. After the Defendant's interview, Ms. Constand was interviewed a second time. Id. at 51. Mr. Castor never personally met with Ms. Constand. Id. at 115. Following that interview of Ms. Constand, Mr. Castor spoke to the Defendant's attorney Walter M. Phillips, Jr. Id. at 52. Mr. Phillips told Mr. Castor that during the year

[22]In his statement to police, the Defendant recounted giving Ms. Constand Benadryl and described what he categorized as a consensual, romantic relationship. N.T. Apr. 17, 2018 at 121-134, 137; Exhibit C-60.

between the assault and the report, Ms. Constand had multiple phone contacts with the Defendant. Id. at 53. Mr. Phillips was also concerned that Ms. Constand had recorded phone calls with the Defendant. Id. at 54. Mr. Phillips told Mr. Castor that if he obtained the phone records and the recorded calls he would conclude that Ms. Constand and her mother were attempting to get money from the Defendant so they would not go to the police. Id. While he did not necessarily agree with the conclusions Mr. Philips thought would be drawn from the records, Mr. Castor directed the police to obtain the records. Id. at 55. Mr. Castor's recollection was that there was an "inordinate number of [phone] contacts" between the Defendant and Ms. Constand after the assault. Id. at 55. He also confirmed the existence of at least two "wire interceptions," which he did not believe would be admissible. Id. at 56-57.

As part of the 2005 investigation, allegations made by other women were also investigated. Id. at 59. Mr. Castor delegated that investigation to Ms. Ferman. Id. He testified that he determined that, in his opinion, these allegations were unreliable. Id. at 60.

Following approximately one month of investigation, Mr. Castor concluded that "there was insufficient credible and admissible evidence upon which any charge against Mr. Cosby related to the Constand incident could be proven beyond a reasonable doubt." Id. He testified that he could either leave the case open at that point or definitively close the case to allow a civil case. Id. He did not believe there was a chance that the criminal case could get any

better. Id. at 61. He believed Ms. Constand's actions created a credibility issue that could not be overcome. Id. at 62. He testified:

> At that point I concluded it was better for justice to make a determination that Mr. Cosby would never be arrested. I did that because of the rules that—there's special rules that prosecutors have to operate under . . . [that say] that the prosecutor is a Minister of Justice.
>
> And I did not believe it would be just to go forward with a criminal prosecution but I wanted some measure of justice. So I made the final determination as sovereign. You understand, I am not Bruce Castor, the District Attorney. I am the sovereign Commonwealth of Pennsylvania when I am making these decisions. And as the sovereign, I decided that we would not prosecute Mr. Cosby and that would set off the chain of events that I thought as Minister of Justice would gain some justice for Andrea Constand. . . .
>
> 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 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 wrong word. I told Mr. Philips that I had decided that, because of the defects in the case, that the case, that the case could not be won and that I was going to make a public statement that we were not going to charge Mr. Cosby.
>
> I told him that I was making it as the sovereign of the Commonwealth of Pennsylvania and, in my legal opinion, that meant that Mr. Cosby would not be allowed to take the Fifth Amendment in the subsequent civil suit that Andrea Constand's lawyers had told us they wanted to bring.
>
> Mr. Phillips agreed with me that that is, in fact, the law of Pennsylvania and of the United States and agreed that if Cosby was subpoenaed he would be required to testify.
>
> But those two things were not connected to one another. Mr. Cosby was not getting prosecuted at all ever as far as I was

> concerned. And my belief was that, as the Commonwealth and the representative of the sovereign, that I had the power to make such a statement and that, by doing so, as a matter of law Mr. Cosby would be unable to assert the Fifth Amendment in a civil deposition.

Id. at 63-65.

Mr. Castor further indicated, "Mr. Philips never agreed to anything in exchange for Mr. Cosby not being prosecuted." Id. at 67. Mr. Castor testified that he told Mr. Philips of his legal assessment and then told Ms. Ferman of the analysis and directed her to contact Constand's attorneys. Id. at 67, 185-186, 188. He testified that she was to contact the attorneys to let them know "that Cosby was not going to be prosecuted and that the purpose for that was that I wanted to create the atmosphere or the legal conditions such that Mr. Cosby would never be allowed to assert the Fifth Amendment in the civil case . . ."[23] Id. at 68. He testified that she did not come back to him with any objection from Constand's attorneys and that any objection from Ms. Constand's attorneys would not have mattered anyway. Id. at 185. He later testified that he did not have any specific recollection of discussing his legal analysis with Ms. Ferman, but would be surprised if he did not. Id. at 207-208.

Mr. Castor testified that he could not recall any other case where he made this type of binding legal analysis in Montgomery County. Id. at 117. He testified that in a half dozen cases during his tenure in the District Attorney's

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[23] Ms. Constand's attorneys testified that they were never contacted regarding Mr. Castor's decision nor were the reasons for the decision ever communicated to them.

office, someone would attempt to assert the Fifth Amendment in a preexisting civil case. Id. The judge in that case would then call Mr. Castor to determine if he intended to prosecute the person asserting the privilege. Id. at 118. He would confirm that he did not and the claim of privilege would be denied. Id. Mr. Castor was unable to name a case in which this happened. Id.

After making his decision not to prosecute, Mr. Castor personally issued a second, signed press release on February 17, 2005.[24] Id. at 71; Habeas Exhibit D-4. Mr. Castor testified that he signed the press release at the request of Ms. Constand's attorneys in order to bind the Commonwealth so it "would be evidence that they could show to a civil judge that Cosby is not getting prosecuted." Id. at 212. The press release stated, "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." Habeas Exhibit D-4. Mr. Castor testified that this language made it absolute that the Defendant would never be prosecuted, "[s]o I used the present tense, [exists], . . . So I'm making it absolute. I said I found that there was no evidence—there was insufficient credible and admissible evidence in existence upon which any charge against Mr. Cosby could be sustained. And the use of "exists" and "could" I meant to be absolute." Id. at 204.

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[24]The Court notes that the January 24, 2005 press release confirming the investigation was also personally signed by Mr. Castor. Exhibit C-17. The Defendant and Mr. Castor ascribed no legal significance to the signing of that earlier press release.

The press release specifically cautioned the parties that the decision could be revisited, "District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise." Id. at 85. He testified that inclusion of this sentence, warning that the decision could be revisited, in the paragraph about a civil case and the use of the word "this," was intended to make it clear that it applied to the civil case and not to the prosecution. Id. at 217. Mr. Castor testified that this sentence was meant to advise the parties that if they criticized his decision, he would contact the media and explain that Ms. Constand's actions damaged her credibility, which would severely hamper her civil case. Id. at 85. He testified that once he was certain a prosecution was not 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." Id. at 88. He included the language "much exists in this investigation that could be used by others to portray persons on both sides of the issue in a less than flattering light," as a threat to Ms. Constand and her attorneys should they attack his office. Id. at 86, 156-157. In a 2016 Philadelphia Inquirer article, in reference to this same sentence, Castor stated, "I put in there that if any evidence surfaced that was admissible I would revisit the issue. And evidently, that is what the D.A. is doing." Id. at 219-220; Habeas Exhibit C-12. He testified that he remembered making that statement but that it referred to the possibility of a prosecution based on other victims in Montgomery County or perjury. Id. at 220-221.

He testified that the press release was intended for three audiences, the media, the greater legal community, and the litigants. Id. at 72-73. He testified about what meaning he hoped that each audience would glean from the press release. Id. at 75-87. He did not intend for any of the three groups to understand the entirety of what he meant. Id. at 120. The media was to understand only that the Defendant would not be arrested. Id. Lawyers would parse every word and understand that he was saying there was enough evidence to arrest the Defendant but that Mr. Castor thought the evidence was not credible or admissible. Id. at 121. The third audience was the litigants, and they were to understand that they did not want him to damage the civil case. Id. at 122. He then stated that the litigants would understand the entirety of the press release, the legal community most of it and the press little of it. Id.

Mr. Castor testified that in November of 2014 he was contacted by the media as a result of a joke a comedian made about the Defendant. Id. at 92. Again, in the summer of 2015 after the civil depositions were released, media approached Mr. Castor. Id. at 93. He testified that he told every reporter that he spoke to in this time frame that the reason he had declined the charges was to strip Mr. Cosby of his Fifth Amendment privilege. Id. at 201-202, 204-206. He testified that he did not learn the investigation had been reopened until he read in the paper that the Defendant was arrested in December 2015, but there was media speculation in September 2015 that an arrest might be imminent. Id. at 95.

On September 23, 2015, apparently in response to this media speculation, unprompted and unsolicited, Mr. Castor sent an email to then District Attorney Risa Vetri Ferman. Habeas Exhibit D-5. His email indicated, in pertinent part,

> I'm writing you just in case you might have forgotten what we did with Cosby back in 2005 . . . Once we decided that the chances of prevailing in a criminal case were too remote to make an arrest, I concluded that the best way to achieve justice was to create an atmosphere where Andrea would have the best chance of prevailing in a civil suit against Cosby. With the agreement of Wally Phillips and Andrea's lawyer, I wrote the attached [press release] as the ONLY comment I would make while the civil case was pending. Again, with the agreement of the defense lawyer and Andrea's lawyers, I intentionally and specifically bound the Commonwealth that there would be no state prosecution of Cosby in order to remove from him the ability to claim his Fifth Amendment protection against self-incrimination, thus forcing him to sit for a deposition under oath . . . But those lawyers representing Andrea civilly . . . were part of this agreement because they wanted to make Cosby testify. I believed at the time that they thought making him testify would solidify their civil case, but the only way to do that was for us (the Commonwealth) to promise not to prosecute him. So in effect, that is what I did. I never made an important decision without discussing it with you during your tenure as First Assistant.
>
> ***
>
> [B]ut one thing is a fact. The Commonwealth, defense and civil plaintiff's lawyers were all in agreement that the attached decision from me stripped Cosby of his Fifth Amendment privilege against self-incrimination forcing him to be deposed.

Habeas Exhibit D-5.

He indicated in his email that he learned Mr. Phillips had died on the date of his email. Id. The email also suggested that the deposition testimony might be subject to suppression. Id.

Ms. Ferman responded to Mr. Castor's email by letter of September 25, 2015, requesting a copy of the "written declaration" indicating that the Defendant would not be prosecuted. N.T. Feb. 2, 2016 at 104; Habeas Exhibit D-6. In her letter, Ms. Ferman indicated that the "[t]he first I heard of such a binding agreement was your email sent this past Wednesday. The first I heard of a written declaration documenting the agreement not to prosecute was an article authored on 9/24/15 and published today by Margaret Gibbons of the Intelligencer. . . We have been in contact with counsel for both Mr. Cosby and Ms. Constand and neither has provided us with any information about such an agreement." Habeas Exhibit D-6.

Mr. Castor responded via email. Habeas Exhibit D-7. His email indicated,

> The attached Press Release is the written determination that we would not prosecute Cosby. That was what the lawyers for the plaintiff wanted and I agreed. The reason I agreed and the plaintiff's lawyers wanted it in writing was so Cosby could not take the 5th Amendment to avoid being deposed or testifying . . . That meant to all involved, include Cosby's lawyer at the time, Mr. Phillips, that what Cosby said in the civil litigation could not be used against him in a criminal prosecution for the event we had him under investigation for in early 2005. I signed the press release for precisely this reason, at the request of 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 could not be used against him, thereby forcing him to be deposed and perhaps testify in a civil trial without the ability to "take the 5th." I decided to create the best possible environment for the Plaintiff to prevail and be

> compensated. By signing my name as District Attorney and issuing the attached, I was "signing off" on the Commonwealth not being able to use anything Cosby said in the civil case against him in a criminal prosecution, because I was stating the Commonwealth will not bring a case against Cosby for the incident based on the then-available evidence in order to help the Plaintiff prevail in her civil action . . . [n]aturally, 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.

Habeas Exhibit D-7.

Mr. Castor testified that he intended to confer transactional immunity upon the Defendant and that his power to do so as the sovereign was derived from common law not from the statutes of Pennsylvania. N.T. Feb. 2, 2016 at 232, 234, 236. In his final email to Ms. Ferman, Mr. Castor stated, "I never agreed we would not prosecute Cosby." Habeas Exhibit D-8.

As noted above, Ms. Constand's civil attorneys also testified at the hearing. Dolores Troiani, Esq. testified that during the 2005 investigation, she had no contact with the District Attorney's office and limited contact with the Cheltenham Police Department. N.T. Feb. 3, 2018 at 139. Bebe Kivitz, Esq. testified that during the 2005 investigation she had limited contact with then-First Assistant District Attorney Ferman. Id. at 236. The possibility of a civil suit was never discussed with anyone from the Commonwealth or anyone representing the Defendant during the criminal investigation. Id. at 140. At no time did anyone from Cheltenham Police, or the District Attorney's Office, convey to Ms. Troiani, or Ms. Kivitz, that the Defendant would never be prosecuted. Id. at 140, 235-237. They learned that the criminal case was

declined from a reporter who came to Ms. Troiani's office in the evening of February 17, 2005 seeking comment about what Bruce Castor had done. N.T. Feb. 3, 2016 at 141. The reporter informed her that Mr. Castor had issued a press release in which he declined prosecution. Id. at 141-142. Ms. Troiani had not received any prior notification of the decision not to prosecute. Id. at 142.

Ms. Constand and her attorneys did not request a declaration from Mr. Castor that the Defendant would not be prosecuted. Id. at 140. Ms. Troiani testified that if the Defendant attempted to invoke the Fifth Amendment during his civil depositions they would have filed a motion and he would have likely been precluded since he had given a statement to police. Id. at 176. If he was permitted to assert a Fifth Amendment privilege, they would have been entitled to an adverse inference jury instruction. Id. Additionally, if the Defendant asserted the Fifth Amendment, Ms. Constand's version of the story would have been the only version for the jury to consider. Id. Ms. Constand and her counsel had no reason to request immunity. Id. At no time during the civil suit did Ms. Troiani receive any information in discovery or from the Defendant's attorneys indicating that the Defendant could never be prosecuted. Id. at 177.

Ms. Troiani testified that she understood the press release to say that Mr. Castor was not prosecuting at that time but if additional information arose, he would change his mind. Id. at 152, 175. She did not take the language, "District Attorney Castor cautions all parties to this matter that he will

reconsider this decision should the need arise," to be a threat not to speak publicly. Id. at 175. She continued to speak to the press; Mr. Castor did not retaliate. Id.

Ms. Troiani was present for the Defendant's depositions. Id. at 178. At no point during the depositions was there any mention of an agreement or promise not to prosecute. Id. at 178-179. In her experience, such a promise would have been put on the record at the civil depositions. Id. at 179. She testified that during the four days of depositions, the Defendant was not cooperative and the depositions were extremely contentious. Id. at 181. Ms. Troiani had to file motions to compel the Defendant's answers. Id. The Defendant's refusal to answer questions related to Ms. Constand's allegations formed the basis of a motion to compel. Id. at 182, 184. When Ms. Troiani attempted to question the Defendant about the allegations, the Defendant's attorneys sought to have his statement to police read into the record in lieu of cross examination. Id.

Ms. Troiani testified that one of the initial provisions the Defendant wanted in the civil settlement was a release from criminal liability. Id. at 191. Mr. O'Connor's letter[25] to Ms. Ferman does not dispute this fact. Id. at 195; Habeas Exhibit C-22. The Defendant and his attorneys also requested that Ms. Troiani agree to destroy her file, she refused. Id. at 193. Eventually, the parties agreed on the language that Ms. Constand would not initiate any

[25] By letter of September 22, 2015, Ms. Ferman requested that Ms. Troiani and Mr. O'Connor provide her with any portions of the settlement agreement pertaining to bringing criminal charges. Habeas Exhibit C-20.

criminal complaint. Id. The first Ms. Troiani heard of a promise not to prosecute was in 2015. Id. at 184. The first Ms. Kivitz learned of the purported promise was in 2014 in a newspaper article. Id. at 237.

John P. Schmitt, Esq. testified that he has represented the Defendant since 1983. N.T. Feb. 3, 2016 at 7. In the early 1990s, he became the Defendant's general counsel. Id. at 8. In 2005, when he became aware of the instant allegations, he retained criminal counsel, Walter Phillips, Esq., on the Defendant's behalf. Id. 8-9. Mr. Phillips dealt directly with the prosecutor's office and would then discuss all matters with Mr. Schmitt. Id. at 9. The Defendant's January 2005 interview took place at Mr. Schmitt's office. Id. at 10. Both Mr. Schmitt and Mr. Phillips were present for the interview. Id. Numerous questions were asked the answers to which could lead to criminal charges. Id. at 22. At no time during his statement to police did the Defendant invoke the Fifth Amendment or refuse to answer questions. Id. at 18. Mr. Schmitt testified that he had interviewed the Defendant prior to his statement and was not concerned about his answers. Id. at 23. Within weeks of the interview, the District Attorney declined to bring a prosecution. Id. at 10. Mr. Schmitt testified that Mr. Phillips told him that the decision was an irrevocable commitment that District Attorney Castor was not going to prosecute the Defendant. Id. at 11. He received a copy of the press release. Id. at 12.

On March 8, 2005, Ms. Constand filed her civil suit and Mr. Schmitt retained Patrick O'Connor, Esq., as civil counsel. Id. Mr. Schmitt participated in the civil case. Id. at 13. The Defendant sat for four days of depositions. Id.

Mr. Schmitt testified that the Defendant did not invoke the Fifth Amendment in those depositions and that he would not have let him sit for the depositions if he knew the criminal case could be reopened. Id. at 14.

He testified that generally he does try to get agreements on the Defendant's behalf in writing. Id. at 16. During this same time period, Mr. Schmitt was involved in written negotiations with the National Enquirer. Id. at 27-28, 33-34; Habeas Exhibit C-14. He testified that he relied on the press release, Mr. Castor's word and Mr. Phillips' assurances that what Mr. Castor did was sufficient. Id. at 40. Mr. Schmitt did not personally speak to Mr. Castor or get the assurance in writing. Id. at 41. During the depositions, Mr. O'Connor objected to numerous questions. Id. At the time of the depositions, Mr. Schmitt, through his negotiations with the National Enquirer, learned that there were Jane Doe witnesses making allegations against the Defendant. Id. at 58, 66. The Defendant did not assert a Fifth Amendment privilege when asked about these other women. Id. at 59. Mr. Schmitt testified that he had not formed an opinion as to whether Mr. Castor's press release would cover that testimony. Id.

Mr. Schmitt testified that that during negotiations of the settlement agreement there were references to a criminal case. Id. at 47. The settlement agreement indicated that Ms. Constand would not initiate a criminal complaint against Mr. Cosby. Id. at 48. Mr. Schmitt did not come forward when he learned the District Attorney's office re-opened the case in 2015. Id. at 72.

Based on the testimony of Mr. Castor, Mr. Schmitt, Ms. Troiani and Ms. Kivitiz, the only conclusion that was apparent to this Court was that no agreement or promise not to prosecute ever existed, only the exercise of prosecutorial discretion. A press release, signed or not, was legally insufficient to form the basis of an enforceable promise not to prosecute. The parties did not cite, nor has this Court found any support in Pennsylvania law for the proposition that a prosecutor may unilaterally confer transactional immunity through a declaration as the sovereign. Thus, the District Attorney was required to utilize the immunity statute, which provides the only means for granting immunity in Pennsylvania.[26]

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[26] Specifically, the statute governing grants of immunity reads, in pertinent part:

> Immunity orders shall be available under this section in all proceedings before:
>
> (1) Courts;
> (2) Grand juries;
> (3) Investigating grand juries;
> (4) The minor judiciary or coroners.
>
> The Attorney General or a district attorney **may request an immunity order from any judge of a designated court**, and that judge shall issue such an order, when in the judgment of the Attorney General or district attorney:
>
> (1) the testimony or other information from a witness may be necessary to the public interest; and
>
> (2) a witness has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.
>
> No testimony or other information compelled under an immunity order, or any information directly or indirectly derived from such testimony or other information, may be used against a witness in any criminal case, except that such information may be used in a

As outlined above, Mr. Castor's testimony about what he did and how he did it was equivocal at best. His testimony was both internally inconsistent and inconsistent with his writings to then District Attorney Ferman during her reinvestigation of the case. For example, he testified that Cosby could never be prosecuted, "Mr. Cosby was not getting prosecuted at all ever as far as I was concerned." N.T. Feb. 2, 2016 at 65. However, in his emails to Ms. Ferman, he wrote that the depositions could be subject to suppression and that "I believed

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> prosecution under 18 Pa.C.S. § 4902 (relating to perjury) or under 18 Pa.C.S. § 4903 (relating to false swearing)...

42 Pa.C.S.A. § 5947 (a)-(b), (d) (emphasis added).

As defined by the statute, an immunity order is "[a]n order issued under this section by a designated court, directing a witness to testify or produce other information over a claim of privilege against self-incrimination." § 5947(g). The statute provides for only use and derivative use immunity. § 5947(d).

"'Use" immunity provides immunity only for the testimony actually given pursuant to the order compelling said testimony." Commonwealth v. Brown, 26 A.3d 485, 499–500 (Pa.Super.2011) (citing Commonwealth v. Swinehart, 541 Pa. 500, 664 A.2d 957, 960 n. 5 (1995)). Second, "'[u]se and derivative use" immunity enlarges the scope of the grant to cover any information or leads that were derived from the actual testimony given under compulsion...." Id. Finally, "'[t]ransactional" immunity is the most expansive, as it in essence provides complete amnesty to the witness for any transactions which are revealed in the course of the compelled testimony." Id.

It is well settled that,

> [t]ransactional immunity is not required in order to compel testimony over a Fifth Amendment claim of privilege against self-incrimination. "[I]mmunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader.

Commonwealth v. Webster, 470 A.2d 532, 535 (1983)(citations omitted).

then and continue to believe that a prosecution is not precluded." Habeas Exhibits D-5, D-7.

Mr. Castor was called as a witness in support of the Defendant's motion to support his claim that there was an agreement not to prosecute. Mr. Castor specifically testified that there was no such agreement. Likewise, he repeatedly indicated in his correspondence with Ms. Ferman that Ms. Constand's counsel was specifically in agreement and he testified that he signed the press release at their request. However, Ms. Troiani's testified that she did not, and would not have made such a request, and did not even learn the prosecution was declined until a reporter showed up at her office. The Court credited Ms. Troiani's testimony in this regard.

Furthermore, at the time of the 2005 press release declining to charge the Defendant, there was no civil suit filed and no one representing Ms. Constand had discussed the possibility of the same with *anyone* representing the Commonwealth. In fact, the civil suit was not filed until three weeks after the prosecution was declined. Ms. Troiani and Ms. Kivitz never spoke directly to Mr. Castor; Ms. Kivitz had limited interaction with then-First Assistant District Attorney Ferman. Mr. Castor never met with Ms. Constand. Ms. Troiani testified in no uncertain terms that she did not and would not have requested that the Defendant not be prosecuted. In fact, if the Defendant invoked the Fifth Amendment in his subsequent depositions that would have benefited their civil case. Ms. Troiani testified that the Defendant attempted to include a provision in the settlement agreement absolving him from criminal

liability in the instant case. Such a provision would be unnecessary if Mr. Castor had, in fact, promised not to prosecute him.

During the District Attorney's 2005 investigation, the Defendant voluntarily sat for a question and answer statement in the presence of two of his attorneys, never invoking the Fifth Amendment or declining to answer a question. Instead, he presented his narrative of a consensual sexual relationship with Ms. Constand, the same narrative he ultimately testified to in his deposition. Mr. Schmitt testified that he interviewed the Defendant prior to his police statement and was not concerned about his answers. Thus, there was nothing to indicate that the Defendant's cooperation would cease if a civil case were filed.

Even if Mr. Castor had been aware of the civil suit that was ultimately filed, there is no evidence of record to indicate that the Defendant intended to "take the 5th," necessitating such a grant of immunity. Mr. Castor did nothing more than decline prosecution at that time. No non-prosecution agreement or promise was ever memorialized by any writing, memorandum to investigative file, letter to counsel or filed with any court. Thus, there was nothing for the Defendant to purportedly rely upon in sitting for depositions.

Even assuming, arguendo, that there was a defective grant of immunity, as would support a theory of promissory estoppel, any reliance on a press release as a grant of immunity was unreasonable. The Defendant was represented by a competent team of attorneys who were versed in written negotiations. Yet none of these attorneys obtained Mr. Castor's promise in

writing or memorialized it in any way, further supporting the conclusion that there was no promise. Therefore, the Commonwealth was not estopped from proceeding with the prosecution following their reinvestigation. The Court did not abuse its discretion and this claim must fail.

2. The Court did not err in denying the Defendant's Motion to Suppress His Deposition Testimony. (Concise Statement Issue 5)

The Defendant's next contention is that the Court erred in allowing the admission of his civil deposition testimony, in violation of his Constitutional rights. The Court will treat this issue as a challenge to the denial of "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 on August 23, 2017. This claim is without merit and must fail.

The standard of review for the denial of a suppression motion is well settled. The Pennsylvania Supreme Court has stated:

> [o]ur standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Since the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Bomar, 826 A.2d 831, 842 (Pa. 2003) (citing Commonwealth v. Fletcher, 750 A.2d. 261 (Pa. 2007); Commonwealth v. Hall, 701 A.2d 109,

197 (Pa. 1997), cert. denied, 523 U.S. 1082 (1998)). Following the denial of his January 11, 2016 Habeas Corpus petition, the Defendant file a motion to suppress his deposition testimony on August 12, 2016. This Court made the following Findings of Fact and Conclusions of Law:

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))[27] 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

[27] All other exhibits referenced herein are cited by the exhibit number assigned at the February 2 and 3, 2016 hearing.

Walter M. Phillips[28], Esq., and his longtime 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.

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[28] Mr. Phillips passed away in early 2015.

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.

Findings of Fact, Conclusions of Law and Order Sur Defendants' Motion to Suppress Evidence Pursuant to Pa. R. Crim. P. 581 (i), Dec. 5, 2016 at 1-5.

The Defendant is limited to the Constitutional grounds raised in his motion to suppress. As this Court concluded, there was no constitutional impediment to the admission of this evidence, and this claim must fail. Likewise, as concluded in section A(1), there was no promise not to prosecute, only an exercise of prosecutorial discretion. Thus, there was nothing for the Defendant to purportedly rely on in sitting for his civil deposition and the Commonwealth was not estopped from using the same in its subsequent prosecution. Therefore, this claim must fail.

3. Statute of Limitations (Concise Statement Issue 7).

The Defendant's next allegation of error conflates three distinct issues. First, he alleges error in "allowing the Commonwealth to proceed with prosecution," which this Court will treat as an allegation relating to the denial of his "Motion to Dismiss Charges Due to Insufficient Evidence to Prove Alleged Encounter Occurred Within the Statute of Limitations." ("Motion to Dismiss-SOL"). Next, he raises a weight of the evidence claim with regard to the statute of limitations. Finally, he appears to assert a claim related to pre-arrest delay. As set forth below, these claims must fail.

The Defendant's first claim is that this Court erred by denying his "Motion to Dismiss Charges-SOL." At the outset, this Court notes that the Defendant erroneously attempts to ascribe a due diligence standard on the Commonwealth. This standard is applicable only in civil cases relating to the tolling of the statute of limitations. See, e.g., Pocono Intern. Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa.,1983) (holding that "the

"discovery rule" exception arises from the inability, despite the exercise of diligence, to determine the injury or its cause, not upon a retrospective view of whether the facts were *actually* ascertained within the [statute of limitations] period"). In the criminal context, a "due diligence" standard applies exclusively to the Defendant's right to a speedy trial. Pa. R. Crim. P. 600 (C) (1) (including in the speedy trial calculation "periods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to exercise due diligence"). As this is a criminal matter and no speedy trial issue was raised, the "due diligence" standard is inapplicable to the instant issue.

Likewise, as to this first allegation of error, again, no constitutional claim was raised before this Court and none is specified in his concise statement, thus constituting waiver of that ground. Cline, 177 A.3d at 927 (citations omitted) (stating "issues, even those of constitutional dimension, are waived if not raised in the trial court. A new and different theory of relief may not be successfully advanced for the first time on appeal"). This Court did not abuse its discretion by denying the "Motion to Dismiss-SOL" and sending the issue of the statute of limitations to the jury and the Defendant's first claim fails.

The statute of limitations is a waivable, affirmative defense. Commonwealth v. Rossetti, 862 A.2d 1185, 1190 (Pa. Super. 2004). In order for prosecution to be precluded, the issue must solely be a question of law, as opposed to a question of fact or a mixed question of fact and law. Commonwealth v. Groff, 548 A.2d 1237, n.8 (Pa. Super. 1988) (stating "[i]f the statute of limitations defense poses a question of law, the judge may decide the

issue pretrial or at an appropriate time during trial. If the statute of limitations defense poses a question of fact, the judge should not decide the question but should present the question for jury consideration").

The Defendant relied on Commonwealth v. Bethlehem, 570 A.2d 563, 568 (Pa. Super. 1989), abrogated on other grounds by Commonwealth v. Gerstner, 656 A.2d 108, 110 (Pa. 1995) to support his argument that this Court should decide the issue pretrial. In Bethlehem, the Commonwealth agreed that the charges were brought outside the statute of limitations; however, it believed that the statute of limitations was tolled because the victim was a minor based on an erroneous interpretation of case law. Id. at 564. On appeal, the Superior Court noted that because there was clear and uncontradicted evidence that the statute of limitations had run and there was no factual dispute that the offenses were outside the statute of limitations, "the failure to grant dismissal of the charges on statute of limitations grounds at the preliminary hearing or pretrial motions stage is inexplicable." Id. at 565.

Bethlehem is easily distinguishable from the instant case. The statute of limitations for aggravated indecent assault, 18 Pa. C.S.A. 3125, is twelve years. 42 Pa.C.S.A. § 5552 (b.1). Instantly, there was no such "clear and uncontradicted evidence" that the assault did not happen within the statute of limitations. As discussed above, Ms. Constand consistently maintained that the assault took place in 2004. While she initially reported that it took place in March of 2004, she ultimately determined that it took place in January of 2004. By his own admission, the Defendant agreed that the assault took place

in 2004 as that was the "ballpark" of when he knew her and it was "not more than a year away." N.T. Apr. 18, 2018, Excerpt, at 43. The Defendant was charged on December 30, 2015, within the twelve year statute of limitations. As presented in this case, the statute of limitations was a question of fact properly sent to the jury as both parties agreed that the encounter happened. Thus, this claim fails.

The Defendant's next claim is that the verdict was against the weight of the evidence concerning the statute of limitations. Preliminarily, the Court submits that this claim is more properly categorized as a challenge to the sufficiency of the Commonwealth's evidence that the assault took place within the twelve year limitations period.[29] Pursuant to Pennsylvania law, once the Defendant asserted the statute of limitations as a defense, the Commonwealth was required to prove that the offense happened within the limitations period. Bethlehem, 570 A.2d at 568; 18 Pa.C.S.A. § 103 (stating "an element of an offense is such conduct or such attendant circumstances or such a result of conduct as negatives a defense under the statute of limitation"). As the jury was instructed, in a sex crimes prosecution, the uncorroborated testimony of the victim alone is sufficient to sustain a conviction. Pa. SSJI (Crim) 4.13 (B). Ms. Constand testified that the assault took place in January 2004. Thus, the

[29] In reviewing the sufficiency of the evidence, we are required to view the evidence, and all permissible inferences to be drawn therefrom, in the light most favorable to the Commonwealth, as verdict winner. The test is whether, taking as true the evidence most favorable to the Commonwealth, together with all reasonable inferences therefrom, the evidence is sufficient to prove appellant's guilt beyond a reasonable doubt. Commonwealth v. Ruffin, 463 A.2d 1117, 1118-19 (Pa. Super. 1983) (citations omitted).

evidence was sufficient to support a finding that the offense happened within the statute of limitations. However, as he failed to challenge the sufficiency of that evidence, a sufficiency claim is waived.

A true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed. Commonwealth v. Morgan, 913 A.2d 906, 909 (Pa. Super. 2006) (citing Commonwealth v. Charlton, 902 A.2d 554, 561 (Pa. Super. 2006) (quoting Commonwealth v. Galindes, 786 A.2d 1004, 1013 (Pa. Super. 2001)). The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003)). Accordingly, a weight of the evidence challenge contests the weight that is accorded the testimonial evidence. Morgan, 913 A.2d at 909 (citing Armbruster v. Horowitz, 744 A.2d 285, 286 (Pa. Super. 1999)). In reviewing a weight of the evidence challenge, "[a] new trial should be granted only where the verdict is so contrary to the evidence as to shock one's sense of justice." Commonwealth v. Davidson, 860 A.2d 575, 581 (Pa.Super. 2004) (internal citation and quotation omitted).

Ms. Constand testified that the assault took place in January 2004. N.T. Apr. 13, 2018 at 56. Likewise, Detective Reape testified that there was no evidence to indicate that the assault happened prior to 2004. N.T. Apr. 18, 2018, Excerpted Testimony of James Reape from Trial by Jury, at 26. The Defendant presented evidence in his defense. In addition to testimony

purporting to show that Ms. Constand lied about the assault to obtain money, the Defendant presented records and schedules in an attempt to prove that he was not at his Elkins Park home in January of 2004 during the period of time Ms. Constand testified that the assault took place. Clearly, the jury afforded greater weight to the testimony of Ms. Constand that the assault took place in January 2004. The Court discerns no error in the jury's verdict and thus did not abuse its discretion in denying Defendant's post sentence motion for a new trial on this basis.

Finally, the defendant appears to be raising a claim of pre-arrest delay; it is unclear why such a claim has been raised in an allegation of error related to the statute of limitations. By its plain language, this allegation of error presumes that the assault happened within the statute of limitations. Preliminarily, this Court notes that this claim may be waived.[30] Prior to his first trial, the Defendant filed a "Motion to Dismiss the Charges Based on the Deprivation of the Defendant's Due Process Rights," on October 6, 2016. By Order of November 16, 2016, this Court denied the Motion *without prejudice* to the Defendant's ability to raise the claim again during trial. His first trial ended in a mistrial, constituting a nullity.

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[30]This Court submits that this claim is vague and potentially waived on that ground. While this Court assumes the issue is referring to Mr. Phillips, the Defendant does not specify the witness who died during the twelve year period. Hansley, 24 A.3d at 415; Commonwealth v. Lemon, 804 A.2d 34, 38, (Pa. Super. 2002) (stating "[w|e specifically conclude that when an appellant fails to identify in a vague Pa.R.A.P.1925(b) statement the specific issue he/she wants to raise on appeal, the issue is waived, even if the trial court guesses correctly and addresses the issue in its Pa.R.A.P.1925(a) opinion").

On January 25, 2018, the Defendant filed a "Motion to Incorporate All Prior Pretrial Motions And Oppositions to the Commonwealth's Motions." At the March 5, 2018 hearing on pretrial motions, this Court stated, "[T]here is a motion to incorporate all prior pretrial motions. . . I'm proceeding with the concept that no rulings that I made previously—this is a new trial...[s]o[,]although I have granted the motion to incorporate all pretrial motions, you have to tell me what it is you want to deal with." N.T. Mar. 5, 2018 at 9. The Defendant did not seek to relitigate this issue. The Court submits that the Motion to Incorporate Prior Pretrial Motions was insufficient to preserve this claim where the motion was denied without prejudice. Even if this claim is not waived, it is without merit and must fail.

First, to prevail on a claim of pre-arrest delay, the Defendant must show actual prejudice, not "substantial prejudice," as stated in his concise statement. Commonwealth v. Snyder, 713 A.2d 596 (Pa. 1998) ("Snyder I"). If he makes such a showing, the burden shifts to the Commonwealth to show that the delay was proper. Id. In any event, as discussed in section A(1), there was no agreement not to prosecute, thus the death of Mr. Phillips did not prejudice the Defendant. Likewise, Mr. Phillips was not the only source of evidence regarding the purported agreement. Furthermore, the delay in prosecution was not a result of the Commonwealth's actions or an attempt to gain a strategic advantage. Rather, the Defendant and his legal team managed to keep his depositions in the 2005 civil case shielded from public view until 2015. Once the Defendant's depositions were unsealed, containing, *inter alia,*

an admission that he digitally penetrated Ms. Constand, the Commonwealth reopened its investigation. As a result of the reopened investigation, which included new allegations from additional women, the Defendant was ultimately charged on December 30, 2015, within the statute of limitations. Thus, this claim must fail.

4. This Court properly denied the Defendant's Motion to Excuse Juror 11. (Concise Statement Issue 1)

The Defendant's next contention is that the Court erred by not removing Juror 11. The Defendant made no constitutional argument in his motion[31] seeking the removal of Juror 11 or at the in camera hearing on his motion and thus, this Court submits any such argument is waived. Commonwealth v. McGriff, 160 A.3d 863, 871–72 (Pa. Super. 2017) (citation omitted)(stating "[i]f counsel states the grounds for an objection, then all other unspecified grounds are waived and cannot be raised for the first time on appeal").

Likewise, to the extent that the Defendant is attempting to assign error to this Court's refusal to interview all of the *prospective* jurors that were in the room, the Court submits such a claim is waived. The Court cannot be made to guess at what issues the Defendant seeks to raise on appeal. Hansley, 24 A.3d at 415. Moreover, the Court did interview the *selected* jurors who were in the room to determine whether they heard the purported comment, thus, no allegation of error can be assigned on that basis and, again, the Defendant

[31] His supplemental memorandum of law, filed at 6:50 p.m. on Sunday, April 8, 2018 on the eve of the hearing on the motion, includes a constitutional argument based on Article 1 § 9 of the Pennsylvania Constitution and the Sixth Amendment of the United States Constitution, however, he did not pursue this argument at the in-camera hearing.

made no constitutional argument. This Court did not abuse its discretion in denying the motion on credibility grounds, thus, this claim must fail.

It is well settled that, "[t]he decision whether to disqualify a juror is committed to the sound discretion of the trial court and is reversible only in the event of a 'palpable abuse of discretion.'" Commonwealth v. Hetzel, 822 A.2d 747, 756 (Pa. Super., 2003) (citation omitted). Pursuant to the Pennsylvania Rules of Criminal Procedure "[w]ithout declaring a mistrial, a judge may allow a challenge for cause at any time before the jury begins to deliberate, provided sufficient alternates have been selected ... ." Pa. R. Crim. P. 631 (F)(1)(b). "The test for determining whether a prospective juror should be disqualified is whether [the potential juror] is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence, and this is to be determined on the basis of answers to questions and demeanor." Commonwealth v. Bridges, 757 A.2d 859, 873 (Pa. 2000) (citations omitted), abrogated on other grounds by, Commonwealth v. Freeman, 872 A.2d 385 (Pa. 2003).

During jury selection, the prospective jurors were extensively *voir dired* about, *inter alia,* their knowledge of this case and whether they had a fixed opinion regarding the Defendant's guilt or innocence. Specifically, during individual *voir dire,* the following exchange took place with the individual who ultimately became Juror 11:

> The Court: So I assume what you heard [about the case] came from the print or online or wherever you get your information, you heard something about this case. Have you formed any opinion about the case?

Juror 11:[32] Not really. I thought it was over.

The Court: Okay. So when you say, "not really, I thought it was over," let's now go back. So it could be from any time, this information [about the case]. That's what would be important. You did indicate on your under-oath question that you didn't have a fixed opinion; is that right?

Juror 11: Correct.

The Court: Okay. So let's start with do you think you've heard online, T.V., radio, or anything that you have an opinion about the case?

Juror 11: I haven't heard much. I mean, I don't have a fixed opinion. I can't say if he's guilty or innocent. I don't know. I don't know nothing.

The Court: So you don't have an opinion then?

Juror 11: Correct.

The Court: Or you don't have a fixed opinion?

Juror 11: Yeah.

The Court: Well, yeah to both of them. Well I'm going to ask my next questions and that's important. So we don't know how much you may have been exposed to, but as that information comes in, would you be able to take an oath that would say no matter what I may have heard back then, I thought it was over, maybe I heard something, maybe I didn't, would you take an oath that would say that you would not consider any of that evidence or not that—any of those things that I heard or saw, I just wouldn't consider it because I'll take an oath to say I'll only consider evidence that is coming in from a witness stand or there? Could you take such an oath?

Juror 11: Yeah.

The Court: Then, finally, the fact of whatever you've heard, whatever it has been, whenever you remember it from, would it

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[32] During his individual *voir dire*, he was referred to as prospective juror 93.

affect your ability to be a fair and impartial juror in this case?

Juror 11: No.

N.T., Jury Selection/Day 3, Apr. 4, 2018 at 131-132. Following the individual *voir dire* of this juror, both the Defense and the Commonwealth indicated that they had no additional questions and accepted him as Juror 11. Id. at 135.

Jury selection was completed on April 5, 2018 with the selection of twelve jurors and six alternates; although the jury was selected, the jury was not yet sworn. N.T. Apr. 5, 2018 at 190. On April 6, 2018, the Court and counsel had a conference to address any outstanding issues in advance of the commencement of trial on Monday, April 9, 2018. Following this conference, in the late afternoon on April 6, 2018, the Defendant filed "Defendant's Motion, and Incorporated Memorandum of Law In Support Thereof, to Excuse Juror for Cause and for Questioning of Jurors." In the Motion, the Defendant alleged that during the jury selection process, Juror 11 indicated that he believed the Defendant was guilty. In support of this Motion, the Defendant filed declarations of Priscilla Horvath, the administrative assistant for the Defendant's Attorney Kathleen Bliss, the declaration of Richard Beasley, a defense private investigator, and the declaration of prospective Juror 9.[33]

Ms. Horvath indicated that when she arrived at work on April 5, 2018, there was a message from prospective Juror 9. In the message, prospective

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[33] On April 4, 2018, the Commonwealth exercised its third peremptory strike to remove prospective Juror 9. N.T. Apr. 4, 2018 at 45. The Defendant has not challenged that strike on appeal.

Juror 9 indicated that she had been dismissed from the jury on April 4, 2018 and that there was a potential juror who stated that "he is guilty" in reference to Defendant. Horvath Declaration para. 3. Ms. Horvath called the prospective juror back and obtained a description of the juror who purportedly made the statement. Id. at para 4. Private investigator Beasley also contacted the prospective juror; the juror relayed the same information to Beasley. Beasley Declaration at para 2. Despite learning of this purported issue on April 5, 2018, at which time jury selection was still taking place, defense counsel did not bring this issue to the Court's attention at that time, or during the April 6, 2018 conference, but instead undertook an independent investigation.

On April 9, 2018, the Court held an in-camera hearing prior to the commencement of trial. At the hearing, prospective Juror 9 testified that she was on the second panel of jurors,[34] summoned on April 3, 2018. N.T., Trial by Jury, Apr. 9, 2018 at 34. The jurors who were not stricken for cause returned the next day, April 4, 2018, for individual *voir dire*. Id. at 35. Prospective juror 9 and eleven other prospective jurors waited in a small jury room for individual *voir dire*. Id. at 36. The court noted during the in chambers proceeding that the room is a small room, approximately 10 feet by15 feet. Id. at 36. Prospective juror 9 testified that she was sitting across the room from Juror 11. Id. at 37. She testified that she was able to hear anything that anyone said in the room unless they were having a private conversation. Id. at 36-37.

[34] Jurors 9, 10, 11, and 12 were ultimately secured from this panel.

She testified that when they returned to the jury room after lunch, at some point in the afternoon, Juror 11 was standing by the window, playing with the blinds. Id. at 46. She testified that he stated that he was ready to just say the Defendant was guilty so they could all get out of there. Id. She testified that she was unsure if he was joking. Id. She indicated that no one else in the room reacted to the statement and people continued to make small talk. Id. at 47. She indicated that Juror 11 also made a statement about a comedy show that the Defendant performed after the first trial. Id. at 48-49. There was also some discussion in the group about a shooting at YouTube. Id. at 49.

Prospective Juror 9 contacted defense counsel and left a message regarding this information. When questioned by the Court, she unequivocally indicated that she was told by the defense team that if she signed the declaration, she would not have to return to court. Id. at 40, 99-100. Defense counsel, Becky James, Esq., stated that she spoke to prospective Juror 9 over the phone and told her twice that she could not guarantee that she would not have to come back. Id. at 115-116. Defense investigator Scott Ross, who actually obtained the signed declaration of prospective Juror 9, also indicated that he told her he could not guarantee she would not have to return to testify. Id. at 146.

The Court questioned Juror 11 about the statement. The following exchange took place:

> The Court: Let me just ask you: At any time during the afternoon, for whatever reason, did you make the statement, I just think he's

guilty, so we can all be done and get out of here, or something similar to that? . . .

Juror 11: No.

The Court: You never made such a statement?

Juror 11: No.

The Court: So if you were standing at the window there, you don't recall making a statement, for whatever reason, it could have been just to break the ice?

Juror 11: I do not recall that.

The Court: You don't recall it. Could you have made a statement like that?

Juror 11: I don't think I would have.

The Court: You don't think you would have?

Juror 11: No.

The Court: I just want to make perfectly clear, it is okay if you did. We just—I need to track down a lot of different things and, you know, I will ask you some other questions afterwards, but it is important that if you made such a statement you do tell us.

Juror 11: (Nods).

The Court: And I'm going to let you reflect on it because it's part of the process and we do have to check these things out.

Juror 11: Okay.

The Court: So did you make that statement? If you did, it's perfectly okay.

Juror 11: No.

The Court: You did not?

Juror 11: No.

Id. at 56-57

> The Court: So did you hear anyone at any time mention and opinion when you back in this room regarding the guilt or innocence of Mr. Cosby?
>
> Juror 11: No.
>
> The Court: That means whether it was joking or not joking, just any comment?
>
> Juror 11: No, I don't remember anything like that.
>
> The Court: So you don't remember, but you clearly know that you did not say it; is that correct?
>
> Juror 11: Yes.

Id. at 59.

Juror 11 consistently denied making any such statement, even as a joke. Id. at 56-59. He also stated that he did not remark on a comedy performance of the Defendant and indicated that people in the room discussed the shooting at YouTube. Id. at 58-59.

Following Juror 11's repeated denials, the Court then interviewed the seated jurors who were in the room at the time of the alleged statement. First, the Court interviewed seated Juror 9. Id. at 62. Juror 9 indicated that they did not hear anyone make a comment to the effect that the Defendant was guilty, any comment about his guilt or innocence, or any discussion of YouTube. Id. at 63-64. The Court interviewed seated Juror 10. Id. at 66. Juror 10, likewise, did not hear anyone make a comment regarding the Defendant's guilt or innocence. Id. at 69. Juror 10 indicated that they heard people discussing the shooting at YouTube. Id. at 72. Juror 10 did not hear anyone talk about a comedy performance of the Defendant. Id. at 73. The

Court interviewed seated Juror 12 who did not hear anyone say that they thought the Defendant was guilty. Id. at 76. Juror 12 did hear people discuss the shooting at YouTube. Id. at 77. He did not hear any discussion of a comedy performance of the Defendant that may have been on YouTube. Id. Juror 12 was seated next to Juror 11 at the time of the alleged statement. Id. at 75, 111.

Following the interviews of Jurors 9, 10 and 12, the Court again questioned Juror 11. At this point, the Court told Juror 11 that a prospective juror claimed that he made a statement to the effect of "I think he's guilty, so we can all be done and get out of here." Id. at 92. Again the juror denied making the statement. Id.

Based on this Court's observations of the demeanor of all of the people questioned regarding the statement and its review of the declarations attached to the Motion, the Court denied the motion on credibility grounds. Id. at 117, 154. Juror 11 answered the questions without hesitation. This Court did not find Prospective Juror 9 to be credible. Prospective Juror 9 claimed that she heard people talking about a comedy performance by the Defendant; no other interviewed juror heard any such conversation. Additionally, prospective Juror 9 had a history with the District Attorney's Office. She had previously been required to complete community service and at the time of this allegation had been interviewed in connection with an ongoing fraud investigation. Id. at 96-97. Based on the foregoing, this court did not abuse its discretion in refusing to strike Juror 11.

B. Evidentiary Issues

The Defendant's next two issues are that this Court erred in the admission of evidence. It is well settled that, "[a]dmission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion." Commonwealth v. Drumheller, 808 A.2d 893, 904 (Pa. 2002). Likewise, when reviewing challenges to the admission of expert testimony, appellate courts leave such decisions "largely to the discretion of the trial court, and its rulings thereon will not be reversed absent an abuse of discretion." Commonwealth v. Cramer, 195 A.3d 594, 605 (Pa. Super. 2018). "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." Commonwealth v. Harris, 884 A.2d 920, 924 (Pa.Super.2005), appeal denied, 593 Pa. 726, 928 A.2d 1289 (2007). This standard also applies to rulings on a motion *in limine*. Commonwealth v. Parker, 104 A.2d 17 (Pa. Super. 2014) (citation omitted).

Pursuant to the Rules of Evidence, the threshold inquiry in determining the admissibility of evidence is relevance. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Pa.R.E. 401. All relevant evidence is admissible. Pa. R.E. 402. However, "[t]he court may exclude relevant evidence if its probative value is outweighed by a danger

of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa. R.E. 403.

1. The Court properly allowed expert testimony pursuant to 42 Pa. C.S.A. § 5920. (Concise Statement Issue 2)

The Defendant's first evidentiary claim is that this Court erred by allowing Dr. Barbara Ziv to testify as an expert witness pursuant to 42 Pa C.S.A. § 5920. This Court did not abuse its discretion in permitting Dr. Ziv's testimony and this claim must fail.

The Defendant does not appear to challenge Dr. Ziv's qualifications as an expert, but rather the statute itself, which allowed for her testimony. The grounds for that error are not entirely clear from the Defendant's concise statement. First, the Defendant alleges that Dr. Ziv's testimony violated his Fifth and Sixth Amendment rights. However, he has not specified how Dr. Ziv's testimony violated the Fifth and Sixth Amendments of the United States Constitution. Pretrial, counsel made a vague, theoretical argument on these grounds based on testimony that could potentially be elicited at trial in the form of hypotheticals or on the subject of offender profiling. N.T., Apr. 10, 2018, Excerpt from Trial by Jury, at 14-15. However, at trial, no such testimony was elicited and defense counsel made no constitutional objections to Dr. Ziv's testimony on direct or redirect examination. N.T. Apr. 10, 2018,

Testimony of Dr. Babara Ziv, M.D., at 37-78; 124-131. Thus, this Court submits such a claim is waived.[35]

Likewise, any claim related to Article I §§ 1 and 9 of the Pennsylvania Constitution was not developed and, thus, waived. The Court further notes that the Defendant has failed to assert an *ex post facto* challenge under the United States Constitution in his concise statement, thus any such challenge is waived. Even if a federal *ex post facto* claim is not waived, it is without merit. The Defendant's sole claim is that under the Pennsylvania Constitution[36], the statute, which took effect on August 28, 2012, cannot apply to the instant case because the assault took place in 2004.[37] He is mistaken.

Section 5920 provides, in pertinent part,

> In a criminal proceeding subject to this section, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness's experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence, that will assist the trier of fact in understanding the dynamics of sexual violence, victim

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[35] Pursuant to the Rules of Evidence, in order to preserve a claim of error relating to the admission or exclusion of evidence, a contemporaneous objection which states the specific ground for the objection or an offer of proof is required. Pa. R.E. 103. Likewise "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a).

[36] This Court notes that the only constitutional challenge to this law that has been litigated to date is whether the law violates the Supreme Court of Pennsylvania's authority over procedural rules under Article V § 10(c) of the Pennsylvania Constitution. The Supreme Court held that § 5920 is a substantive evidentiary rule and does not violate the Supreme Court's authority over procedural rules. Commonwealth v. Olivio, 127 A.3d 769, 780-81.

[37] The Defendant's concise statement indicates that the assault took place 12 years before the inception of the statute, which is factually incorrect.

> responses to sexual violence and the impact of sexual violence on victims during and after being assaulted. If qualified as an expert, the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors. The witness's opinion regarding the credibility of any other witness, including the victim, shall not be admissible.

42 Pa.C.S.A. § 5920 (b)(1)-(3). The statute applies to "[a]criminal proceeding for an offense under 18 Pa.C.S. Ch. 31 (relating to sexual offenses)." § 5920 (a)(2).

Furthermore, as noted in the enabling act, "[t]he addition of 42 Pa.C.S. § 5920 shall apply to actions ***initiated*** on or after the effective date of this section." 2012 Pa. Legis. Serv. Act 2012-75 (H.B. 1264) (emphasis added). The statute took effect on August 28, 2012. The instant case was initiated on December 30, 2015, well after the effective date of the statute. Thus, the statute is applicable to the instant matter. The Defendant claims that such application violates the *ex post facto* clause.

This Court's analysis under both the state and federal ex post facto clauses is substantially the same. Commonwealth v. Allshouse, 36 A.3d 163, 184 (2012) (noting "that the *ex post facto* clauses of the United States and Pennsylvania Constitutions are virtually identical in language, and the standards applied to determine *ex post facto* violations under both constitutions are comparable"). The United States Constitution provides "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts... ." USCA CONST Art. I § 10, cl. 1. Article 1 § 17 of the Pennsylvania Constitution provides "[n]o *ex post facto* law nor any law

impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." It is well settled that,

> [a] law violates the *ex post facto* clause of the United States Constitution if it (1) makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) aggravates a crime, or makes it greater than it was when committed; (3) changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; or (4) alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense in order to convict the offender.

Allshouse, 36 A.3d at 184 (citing Carmell v. Texas, 529 U.S. 513, 522, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798))) (some citations omitted).

In Carmell v. Texas, the Supreme Court of the United States analyzed a Texas statute that was amended to allow for a conviction of certain sexual offenses on the uncorroborated testimony of the victim alone. 529 U.S. 513, 516, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000). Carmell was indicted on fifteen counts of sexual abuse between 1991 and 1995 of a victim who was 12 to 16 years old during the time of the abuse.[38] Id. Until September 1, 1993, to sustain a conviction the statute at issue required "outcry or corroboration"[39] in addition to the victim's testimony, unless the victim was under 14 years old. Id. at 517. If the victim was less than 14, his or her uncorroborated testimony alone could sustain a conviction. Id. The amendment to the statute extended

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[38] The amendment to the statute affected four of Carmell's fifteen convictions. Id. at 519.

[39] The statute required independent evidence to corroborate the victim or evidence that the victim informed another person within six months of the assault. Id.

the child victim exception to allow convictions based on the uncorroborated testimony of victims under 18 years old. Id. at 518. The Court found that amended statute violated the *ex post facto* clause because it

> changed the quantum of evidence necessary to sustain a conviction; under the new law, petitioner could be (and was) convicted on the victim's testimony alone, without any corroborating evidence. Under any commonsense understanding of *Calder's* fourth category, [the amended statute] plainly fits. Requiring only the victim's testimony to convict, rather than the victim's testimony plus other corroborating evidence is surely 'less testimony required to convict' in any straightforward sense of those words.

Id. at 530.

In Allshouse, the Pennsylvania Supreme Court analyzed an amendment to the Tender Years Hearsay Act ("TYHA")[40] under the fourth prong of the *ex post facto* analysis. 36 A.3d at 185. The statement at issue in Allshouse was a four year old's statement that the Defendant was responsible for the spiral fracture of her infant brother's arm. Id. at 168. At the time of the 2004 incident of child abuse, the Act only permitted child hearsay about acts perpetrated "with or on the child by another." Id. at 184. At the time of trial, the Act had been amended and the language "with or on the child by another" was removed. Id. at 183. The trial court permitted the testimony and the

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[40] The tender years exception permits an out-of-court statement of a child victim or witness under the age of twelve to be admissible if the evidence is "relevant and the time, content and circumstances of the statement provide sufficient indicia of reliability." 42 Pa. C.S.A. § 5985.1 (a)(1). The child must either testify at trial or be unavailable as a witness for the statement to be admissible.
§ 5985.1 (a)(2).

Supreme Court held that the application of the amended Act did not violate the *ex post facto* clause. Id. at 188. The Court stated,

> the TYHA is not a sufficiency rule, as it does not address the type of evidence sufficient to support a conviction. . . the amended version of the TYHA in the instant case did not alter the evidence the Commonwealth was required to prove in order to convict Appellant. A.A.'s testimony, though potentially helpful, was not an essential element of the Commonwealth's case against Appellant.

Id.

Instantly, Section 5920 does not implicate the first three prongs of the test for an *ex post facto* violation. Therefore, it would only violate the *ex post facto* clause if it "alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense in order to convict the offender." Like the statute at issue in Allshouse, and unlike the statute in Calder, § 5920 is not a rule of sufficiency and did not alter the proof necessary to convict the Defendant.

At trial, Dr. Barbara Ziv testified as an expert in understanding the dynamics of sexual violence, victim responses to sexual violence, and the impact of sexual violence on victims during and after being assaulted, as permitted by the statute. Dr. Ziv's testimony did go to any element that the Commonwealth was required to prove in order to sustain a conviction, but simply assisted the jury in understanding victim responses to sexual violence. Therefore, this Court properly allowed expert testimony pursuant to §5920 and this claim must fail.

2. This Court did not err in admitting evidence of prior bad acts pursuant to Pa. R.E. 404 (b). (Concise Statement Issues 6 and 8)

Defendant's makes two claims related to the admission of prior bad acts evidence pursuant to Pa. R.E. 404 (b), each with multiple subparts. First, the Defendant claims that the Court violated his due process rights in allowing the Commonwealth to present evidence in the form of five prior bad act witnesses who each alleged that the Defendant sexually assaulted her. Next, he alleges that the witnesses' allegations were too remote and dissimilar from Ms. Constand's. Finally, he alleges that the Court's changed ruling, following a mistrial, violated his rights to due process.

Second, the Defendant assigns error to the admission of his civil deposition testimony regarding Quaaludes. First, he alleges that this evidence violated his due process rights under the state and federal constitutions. Next, he claims that the deposition testimony regarding Quaaludes was irrelevant and remote in time. He then claims that the deposition testimony regarding Quaaludes "backdoored" the admission of a sixth 404 (b) witness, constituting inadmissible prior bad act evidence. Finally, he alleges that the Quaalude evidence was highly prejudicial in that it included statements regarding the illegal act of giving "narcotics" to another person. These claims are without merit and must fail.

Pursuant to the Pennsylvania Rules of Evidence, evidence of prior bad acts or unrelated criminal activity generally is inadmissible to show that a defendant acted in conformity with those past acts or to show criminal

propensity. Pa. R.E. 404(b)(1). However, evidence of prior bad acts may be admissible when offered to prove some other relevant fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. Pa. R.E. 404(b)(2). Prior bad act evidence is admissible only if the probative value outweighs its potential for unfair prejudice. Pa. R.E. 404 (b)(2). Notably, Pa. R.E. 404(b) is not limited to evidence of crimes that have been proven beyond a reasonable doubt in court. It encompasses both prior *crimes* and prior *wrongs and acts,* the latter of which, by their nature, often lack "definitive proof." Commonwealth v. Lockcuff, 813 A.2d 857, 861 (Pa. Super. 2002).

> As to common plan, scheme or design, our Supreme Court has stated,
>
> [t]he trial court must first examine the details and surrounding circumstances of each criminal incident to assure that the evidence reveals criminal conduct which is distinctive and so nearly identical as to become the signature of the same perpetrator. Relevant to such a finding will be the habits or patterns of action or conduct undertaken by the perpetrator to commit crime, as well as the time, place, and types of victims typically chosen by the perpetrator.

Commonwealth v. Tyson, 119 A.3d 353 (Pa. 2015) (citations omitted). The prior acts must bear a logical connection to the crimes charged. Hicks, 156 A. 3d at 1125-1126. "Much more is demanded than the mere repetition of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual or distinctive as to be like a signature." Id. (citations omitted).

Remoteness is but one factor that the court should consider. The importance of the time period between the earlier act and the current act is inversely proportional to the similarity of the other crimes or acts. Tyson, 119

A.3d at 359. The more similar the crimes, the less significant the length of time that has passed. Commonwealth v. Luktisch, 680 A.2d 877 (Pa. Super. 1996) (holding common scheme exception justified admission of testimony regarding defendant's previous sexual assaults despite six-year lapse between periods of abuse, where three victims were nearly same age, victims were either daughter or step-daughter of defendant and lived with him when acts occurred; and pattern of molestation—from improper touching to oral sex to sexual intercourse—was highly similar with respect to two victims). "If the evidence reveals that the details of each criminal incident are nearly identical, the fact that the incidents are separated by a lapse of time will not likely prevent the offer of the evidence unless the time lapse is excessive." Tyson, 119 A.3d at 359. When conducting a remoteness analysis, the sequential nature of the acts and the time between each act is determinative. Commonwealth v. Smith, 635 A.2d 1086, 1089 (Pa. Super. 1993) (quoting Frank, 577 A.2d at 617 (stating "[i]ndeed, the relevancy of this evidence rested in large part upon the fact that the evidence indicated a recurring sequence of acts by this [defendant] over a continuous span of time, as opposed to random and remote acts")).

Evidence of a prior crime or bad act may also be admitted to show a defendant's actions were not the result of a mistake or accident, "where the manner and circumstances of two crimes are remarkably similar." Tyson, 119 A.3d at 359 (citing Commonwealth v. Kinard, 95 A.3d 279, 294–95 (Pa. Super. 2014)).

Chief Justice Saylor's concurring opinion in Commonwealth v. Hicks, offers a related, compelling basis for admission. In Hicks, Chief Justice Saylor described the "doctrine of chances," or "the doctrine of objective improbability" as another "theory of logical relevance that does not depend on an impermissible inference of bad character, and which is most greatly suited to disproof of accident or mistake." Hicks, 156 A.3d at 1131 (Saylor, C.J. concurring) (citations omitted); Commonwealth v. Donahue, 549 A.2d 121, 126 (Pa. 1988) (OAJC).

Chief Justice Saylor succinctly summarized leading commentary on the doctrine:

> To determine whether the asserted theory qualifies [as a non-character-based theory of logical relevance], the trial judge must trace the entire chain of inferences underlying the theory. The theory passes muster if the inferential path between the item of evidence and a fact of consequence in the case does not require any inferences as to the defendant's personal, subjective character.
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> * * *
>
> [T]he proponent does not offer the evidence of the uncharged misconduct to establish an intermediate inference as to the defendant's personal, subjective bad character. Rather, the proponent offers the evidence to establish the objective improbability of so many accidents befalling the defendant *or the defendant becoming innocently enmeshed in suspicious circumstances so frequently.*
>
> * * *
>
> The reasoning of the doctrine of chances theory avoids the forbidden character-based logic, and thus is permissible under current law. It is founded on a logical inference deriving not from the personal characteristics of the actor, but from the external circumstances themselves. The inference is based on informal probability reasoning—reasoning that does not require formal statistical proof, but only the jury's subjective evaluation of likelihood based on intuition and common experience. And in

> many cases, the intuitive assessment is rather compelling. Could it really be true that a person has received so many stolen vehicles without realizing—at any point—that they were stolen? It is thus possible for one's mind to travel from the evidence to the conclusion without relying on forbidden character reasoning or on the assumption that prior experience would have given the defendant notice of the stolen nature of vehicles obtained from a particular source or under similar circumstances.

Hicks, 156 A.3d at 1133 (Pa., 2017) (Saylor, C.J. concurring)(emphasis in original)(citations omitted).

The Chief Justice noted that caution must be used when applying the doctrine of chances, specifically,

> [t]o protect against the exception swallowing the rule, Professor Imwinkelried recommends that the trial court determine whether the prosecution has satisfied three criteria. First, is the evidence of other acts roughly similar to the charged crime? Second, does the number of unusual occurrences in which the defendant has been involved exceed the frequency rate for the general population? Third, is there a real dispute between the prosecution and the defense over whether the actus reus occurred?

Id. at 1136.

Upon determining that prior bad act evidence meets an exception,

> the trial court must assure that the probative value of the evidence is not outweighed by its potential prejudicial impact upon the trier of fact. To do so, the court must balance the potential prejudicial impact of the evidence with such factors as the degree of similarity established between the incidents of criminal conduct, the Commonwealth's need to present evidence under the [exception], and the ability of the trial court to caution the jury concerning the proper use of such evidence by them in their deliberations.

Tyson, 119 A.3d at 359.

"Unfair prejudice" means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." Pa. R. E. 403, cmt. "Evidence will not be prohibited merely because it is harmful to the defendant. Although at times the jury is

presented with unpleasant facts, '[t]he trial court is not required to sanitize the trial to eliminate all unpleasant facts ....'" Commonwealth v. Conte, 198 A.3d 1169, 1180–81 (Pa.Super. 2018) (citation omitted).

When ruling on the admissibility of prior act evidence, the determination is fact specific and must be made on a case by case basis. Commonwealth v. Frank, 577 A.2d 609, 614 (Pa. Super. 1990) (enumerating balancing test factors).

a. The testimony of five prior bad act witnesses was properly admitted. (Concise Statement Issue 6)

The Defendant's first allegation of error is that the Court erred in permitting five 404 (b) witnesses to testify. The Court notes at the outset, to the extent that this allegation of error relies on the difference between this Court's ruling prior to the first trial and the ruling prior to the second trial, this claim is both waived and belied by the record. At no time was this claim raised before the trial court, during the second trial, constituting waiver. In fact, Defense counsel conceded that "the Court is not bound by its prior rulings..." during argument on the 404 (b) motion. N.T. March 6, 2018 at 32.[41] Thus, any error on this ground is waived. Pa. R.A.P. 302(a)

Likewise, this Court submits that the Defendant has not preserved a Due Process Claim. In his "Opposition to the Commonwealth's Motion to Introduce Evidence of Alleged Prior Bad Acts of Defendant," ("Opposition") the Defendant raised a general due process argument regarding the admission of improper

[41] See, Commonwealth v. Paddy, 800 A.2d 294, 311 (stating "the grant of a new trial 'wipes the slate clean'").; Commonwealth v. Mulholland, 702 A.2d 1027, 1035-36 (Pa. 1997).

evidence and cited extra-jurisdictional authority for support of that argument. Opposition at 31-33. However, at the argument on the Commonwealth's Motion, defense counsel made a due process argument in the context of preparing to defend against the testimony of the 404 (b) witnesses. N.T. Mar. 6, 2018 at 112. Furthermore, in his post argument brief, the Defendant's due process argument focused on the proffered testimony of witnesses who were not ultimately called at trial. Post-Hearing Brief in Support of Defendant's Opposition to Commonwealth's Motion to Introduce Evidence of 19 Alleged Prior Bad Acts of the Defendant at 17-20 ("Post-Hearing Brief"); See, Exhibits C-PBA-2, 3, 5, 6, 14, 16. He argued that evidence pertaining to those allegations were vague as to time and place, hampering his ability to prepare his defense. Post-Hearing Brief at 17. As he has not specified how his right to due process was violated, forcing the Court to guess, this Court's analysis is hampered; thus, constituting waiver. To the extent that his due process claim implicates the balance of probative value versus unfair prejudice, it will be discussed below.

The testimony of the five[42] 404 (b) witnesses was admissible under both the common plan, scheme or design exception and the lack of accident or mistake exception, with admissibility further supported by the doctrine of chances. Therefore, this claim must fail.

First, the Defendant asserts that testimony of the permitted witnesses was too dissimilar to Ms. Constand's allegations. This claim is belied by the

[42] The Commonwealth proffered 19 prior bad act witnesses.

record. Ms. Constand's testimony can be summarized as follows: 1) Ms. Constand was substantially younger than the married Defendant and physically fit; 2) she met him through her employment at Temple University; 3) they developed what she believed to be a genuine friendship and mentorship. Over the course of that friendship, she accepted invitations to see the defendant socially, both with other people and alone; 4) after a period of time, during which he gained her trust, he invited her to his home to discuss her upcoming career change; 5) he offered her three blue pills and urged her to take them;[43] 6) once she took the pills, she became incapacitated and was unable to verbally or physically stop the assault. She did not consent to sexual contact with the Defendant; 7) during intermittent bouts of consciousness, she was aware of the Defendant digitally penetrating her vagina and using her hand to masturbate himself.

The allegations of the Commonwealth's 404 (b) witnesses may be summarized as follows: 1) each woman was substantially younger than the married Defendant and physically fit; 2) the Defendant initiated the contact with each woman, primarily through her employment; 3) over the course of their time together, she came to trust him and often developed what the woman believed to be a genuine friendship or mentorship; 4) each woman accepted an invitation from the Defendant to a place in his control, where she was ultimately alone with him; 5) each woman accepted the offer of a drink or a pill, often after insistence on the part of the Defendant; 6) after ingesting the pill or

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[43] He told her, ""These are your friends. They'll help take the edge off."

drink, each woman was rendered incapacitated and unable to consent to sexual contact; 7) the Defendant sexually assaulted her while she was under the influence of the intoxicant he administered. These chilling similarities rendered the 404 (b) testimony admissible under the common plan, scheme or design and the absence of mistake exceptions.

The Defendant's actions were so distinctive as to become a signature. The striking similarities between the assaults alleged by each woman were not confined to insignificant details. In each instance, the Defendant met a substantially younger women, gained her trust, invited her to a place where he was alone with her, provided her with a drink or drug and sexually assaulted her once she was rendered incapacitated.

Each woman was substantially younger than the married Defendant, and physically fit.

Ms. Constand was 30, the Defendant was 66. Ms. Thomas was 22, the Defendant was 46. Ms. Lasha was 17, the Defendant was 49. Ms. Baker-Kinney was 24, the Defendant was 45. Ms. Dickinson was 27, the Defendant was 45. Ms. Lublin was 23, the Defendant was 52. Each woman was physically fit. Ms. Constand was a former professional basketball player and athlete. Exhibit C-19. Ms. Thomas was an aspiring actress. Exhibit C-3A. Ms. Lasha was an aspiring model and actress. Ms. Baker-Kinney was a bartender at Harrah's Casino. Ms. Dickinson was an established professional model. Ms. Lublin was modeling to pay for her education. Exhibit C-16.

Each woman met the Defendant through her employment or career aspirations, most believing that he sincerely desired to mentor her.

Ms. Constand met the Defendant at Temple University, where she was the Director of Basketball Operations. Ms. Constand considered him a mentor. Ms. Thomas met the Defendant through her modeling agency that sent clients to the Defendant to be mentored. Ms. Lasha met the Defendant through a family connection in the hope of becoming an actress and model. Ms. Baker-Kinney met the Defendant at Harrah's Casino, where she worked and he was a regular performer. Ms. Dickinson met the Defendant when he contacted her modeling agency and asked to meet her. She believed he was interested in helping her break into an acting and singing career. Ms. Lublin met the Defendant through her modeling agency.

Each woman accepted the Defendant's invitation to a location under his control.

Ms. Constand accepted an invite to his home. Ms. Thomas travelled to Reno, Nevada for acting lessons with the Defendant. She believed she was staying at Harrah's hotel, but upon her arrival, she was taken to a home outside of Reno where no one was present except the Defendant. Ms. Lasha accepted an invitation to the Defendant's suite at the Las Vegas Hilton. Ms. Baker-Kinney accepted an invitation to a party, only to arrive with her friend to find there were no other guests. Ms. Dickinson accepted an invitation to Lake Tahoe to discuss her acting aspirations. Following dinner, she accepted an invitation to his room to continue discussing her career. Ms. Lublin accepted an invitation to the Las Vegas Hilton.

Once each woman was in a location under the Defendant's control, he gave her an intoxicant.

When Ms. Constand arrived at his home, he offered her wine. When she declined, he insisted that she try it. After she only tasted the wine, the Defendant went upstairs and returned with three blue pills, which she accepted. He told her "These are your friends. They'll help take the edge off." The Defendant asked Ms. Thomas to do a cold read of a script in which her character was intoxicated. He gave her a glass of wine to use as a prop and to help her get into character. Ms. Lasha had a cold on the day of her meeting with the Defendant. He offered her a blue pill he said was a decongestant and two shots of amaretto. Ms. Baker-Kinney accepted two pills from the Defendant which she believed he said were Quaaludes. Ms. Dickinson was suffering from menstrual cramps and the Defendant gave her a small, round blue pill that he said would help. The Defendant poured Ms. Lublin a shot to help her relax. She initially resisted as she was not a drinker. He insisted that it would help her improvisational skills and she accepted the drink. He then prepared her a second drink.

After consuming the intoxicant, each woman became incapacitated.

Ms. Constand testified that after taking the pills, she began to have double vision and to slur her words. She described her legs as rubbery and weak and she could not speak. She was unable to maintain consciousness. Ms. Thomas testified that she remembers only "snap shots" of what happened after she sipped the wine he gave her. Ms. Lasha testified that she began to feel woozy after taking the pill and shot that the Defendant provided her; he led

her to a back bedroom and she could no longer move. Ms. Baker-Kinney testified that after she took the pills, she became dizzy and her vision blurred and that she fell forward onto the game she was playing with the Defendant. Ms. Dickinson testified that after taking the pill the Defendant gave her, she felt lightheaded and like she could not get her words out. Ms. Lublin testified that she felt dizzy and woozy and her hearing became muffled after taking the shots the Defendant prepared for her.

Each woman was incapable of consent and sexually assaulted.[44]

Ms. Constand testified that she was unable to maintain consciousness and was jolted awake by the Defendant forcefully penetrating her vagina with his fingers. Ms. Thomas testified that she woke up in bed with the Defendant forcing his penis into her mouth. Ms. Lasha testified that she was aware of the Defendant rubbing his genitals on her leg and pinching her breasts, but she was unable to stop him. Ms. Baker-Kinney testified that she awoke to the sound of her friend leaving the house and looking down to see her clothes were disheveled. The Defendant positioned himself behind her on the couch and began to fondle her as she was unable to move. Ms. Dickinson testified that she began to feel woozy, dizzy, lightheaded and could not get her words to come

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[44] The Court acknowledges that the actual sexual act perpetrated against each woman was not identical. Common plan scheme or design exception "does not require that the two scenarios be identical in *every* respect." Tyson, 119 A.3d at 360 n.3 (emphasis in original); Frank, 577 A.2d at 425-426 (upholding the admission of six prior instances of sexual assault in rape case where the sexual contact was not identical in each instance).

out. The Defendant got on top of her and she felt vaginal pain before she passed out.

The testimony was also admissible under the lack of mistake or accident exception and the related doctrine of chances, both of which require a lesser degree of similarity. Instantly, there was no dispute that a sexual encounter occurred, however, the Defendant maintained that it was consensual. The evidence presented by the Commonwealth was, therefore, relevant to show a lack of mistake, namely, that the Defendant could not have possibly believed that Ms. Constand consented to the digital penetration as well as his intent in administering an intoxicant.

Furthermore, the evidence was also admissible under a doctrine of chances theory. As outlined above, the evidence admitted was more than roughly similar to the charged conduct. The Defendant befriended younger women and administered an intoxicant in order to have sexual contact with them. The fact that at 19 other women were proffered as 404 (b) witnesses lends to the conclusion that the Defendant found himself in this situation more frequently than the general population.[45] Finally, both the Defendant and Ms. Constand agreed that digital penetration occurred. However, the Defendant maintained that it was consensual. Under those circumstances, the fact that numerous other women recounted the same or similar story, further supports the admissibility of this evidence under the doctrine of chances.

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[45] The Commonwealth indicated in its Motion that it had investigated approximately 50 allegations, but chose 19 for this Court's consideration.

As to remoteness, while there was a lapse of fifteen years between the presented testimony and the instant case, the incidents were all close in time to each other. Two of the assaults were in 1982, one in 1984, one in 1986 and one in 1989. When taken together, and as a whole with all 19 proffered witnesses, the sequential nature of the acts coupled with their nearly identical similarities renders the lapse of time unimportant. Thus, this Court did not abuse its discretion in permitting this evidence under the common plan, scheme or design exception.

Upon finding that the evidence falls within the common plan, scheme or design, lack of accident or mistake and related doctrine of chances exceptions, this Court engaged in a balancing of the probative value versus the prejudice to the Defendant. First, the striking similarities between the proffered evidence and Ms. Constand's assault weighed in favor of admission of this evidence. Additionally, the Commonwealth had a substantial need for the other acts evidence. Where the parties agreed that the digital penetration occurred, the evidence of other acts was necessary to rebut the Defendant's characterization of the assault as a consensual encounter. See, Commonwealth v. Gordon, 673 A.2d 866, 870 (Pa. 1996) (affirming admissibility of prior bad act evidence "where [Defendant] denies that the touching occurred, and since the uncorroborated testimony of the alleged victim in this case might reasonably lead a jury to determine that there was a reasonable doubt as to whether [Defendant] committed the crime charged, it is fair to conclude that the other crimes evidence is necessary for the prosecution of the case"); Commonwealth

v. Gordon, 652 A.2d 317, 324 (Pa. Super. 1994) (reversing trial court's exclusion of the evidence stating "the Commonwealth has demonstrated a need for the evidence, since appellee will undoubtedly assail the victim's credibility through [. . .] her failure to make a prompt complaint regarding the conduct or her apparent acquiescence in the acts by failing to resist at the time they occurred. Appellee might further attempt to show that the victim was mistaken regarding the nature of the acts"). Furthermore, Ms. Constand did not report the assault until approximately one year later, further supporting the Commonwealth's need for the evidence. Smith, 635 A.2d at 1090; Frank, 577 A.2d at 618 (stating "[t]he Commonwealth's need for the evidence was not minimal in light of the victim's failure to promptly reveal the fact that he had been sexually molested by the Appellant").

While this Court found that the testimony of all 19 witnesses was relevant and admissible, the Court sought to mitigate any prejudicial effect of such evidence by limiting the number of witnesses. 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"). The Commonwealth was permitted to call five 404 (b) witnesses whose testimony was admissible to show both a common plan, scheme or design and the absence of mistake.

Furthermore, in addition to limiting the number of 404 (b) witnesses who were permitted to testify, at trial, this Court gave a cautionary instruction no

less than four times during trial, and again in its concluding instructions, limiting the prejudicial effect of the testimony. N.T. Apr. 11, 2018 at 45-46, 50-51; N.T. Apr. 12, 2018 at 69, 167. Jurors are presumed to follow the court's instructions. Commonwealth v. LaCava, 666 A.2d 221, 228 (Pa.1995). Limiting instructions weigh in favor of upholding admission of other bad acts evidence. Commonwealth v. Boczkowski, 846 A.2d 75, 89 (Pa. 2004). Therefore, because the evidence of other acts was admissible under 404 (b) and this Court repeatedly cautioned the jury, the Court did not abuse its discretion in allowing five prior bad act witnesses and this claim must fail.

b. The Court did not err in admitting the Defendant's deposition testimony regarding Quaaludes. (Concise Statement Issue 8)

The Defendant's next allegation under Pa. R. E. 404 (b) is that this Court erred in admitting portions of his civil deposition testimony related to his use of Quaaludes. First, the Defendant alleges that the admission of this evidence violated his Due Process Rights. Next, the Defendant argues that the admission of the Quaalude testimony "backdoored" the admission of a sixth prior bad act witness, was not relevant and was remote in time and constituted inadmissible "bad act" evidence. Finally, he alleges that the deposition testimony regarding Quaaludes was highly prejudicial as it involved giving "narcotics" to another person.

Initially, this Court notes any due process argument is subsumed in this Courts analysis of the denial of the Defendant's motion to suppress his depositions as a whole, as discussed in section A (2). As to the final subpart of

this claim, regarding giving a "narcotic" to another person, the Court submits this is waived as it was not raised before the trial court. A new and different theory of relief may not be advanced for the first time on appeal. Cline, 177 A.3d at 927. As this Court did not abuse its discretion by admitting the portions of the Defendant's civil deposition testimony regarding Quaaludes, these claims must fail.

Following this Court's ruling that five 404(b) witnesses could testify, the Commonwealth sought the admission of the Defendant's civil deposition testimony regarding Quaaludes under 404(b). Specifically, the Commonwealth argued that this evidence was necessary to demonstrate the strength of its 404 (b) evidence showing common plan, scheme or design and absence of mistake and relatedly to show the Defendant's motive and intent in executing his signature plan and the absence of mistake.

In his deposition testimony, the Defendant testified about his use of Quaaludes with women he wanted to have sex with. N.T., Apr. 18, 2018, Trial by Jury, commencing at 10:31 a.m. at 35-50. He testified that he gave Quaaludes to Jane Doe Number 1, that he had never given Quaaludes to a man, and that he did not take the Quaaludes himself. Id. at 35. He described Jane Doe 1 as "walking like she had too much to drink," after knowingly taking the Quaalude he gave her. Id. at 36.

He testified that he obtained seven prescriptions for Quaaludes in the 1970s and agreed that he could have kept them for several years. Id. at 38, 40-41. He obtained the Quaaludes from his doctor, but he never personally

took them. Id. at 40. He testified that he used them "the same as a person would say 'have a drink,'" meaning he gave them to other people. Id. at 42. He testified that he did not take them because he would get sleepy and that he knew Quaaludes were a depressant. Id. at 42. He testified that, "Quaaludes happen to be a depressant. I have had surgery and while being given pills that block the nervous system, in particular areas of muscle, the back, I found that I get sleepy when I want to stay awake." Id. at 42-43. He testified that his doctor was aware that he did not intend to personally take the Quaaludes and that "[w]hat was happening at the time was that—Quaaludes happen to be the drug that kids, young people, were using to party with and there were times when I wanted to have them just in case." Id. at 44. He also indicated that when he obtained the Quaaludes he intended to use them with young women that he wanted to have sex with. Id. at 47. At this point in his deposition, Ms. Constand's counsel asked him, "Did you ever give any of those young women Quaaludes without their knowledge?" Id. at 47. The Defendant's counsel objected and the Defendant stated, "I misunderstood. Woman, meaning Jane Doe Number 1, and not women." Id. He testified that he never gave the drug to women without their knowledge. Id. at 48. He further testified that he had given Quaaludes to other women besides Jane Doe Number 1 who had not come forward. Id. at 49, 50.

First, the Defendant alleges that this evidence inappropriately "backdoored" the admission of another 404 (b) allegation of sexual assault. This Court is unable to determine the legal significance of "backdoored," and

has found no appellate authority using such a term. While the woman that the Defendant testified he gave Quaaludes to was proffered as a 404 (b) witness, she did not testify at trial. The Defendant's deposition testimony detailed only his version of a consensual sexual encounter with that woman. No evidence regarding that woman's allegations that the Defendant sexually assaulted her was admitted at trial. Thus, this claim is without merit.

Next, he alleges that the evidence was irrelevant and remote. The Commonwealth established that the Defendant engaged in a signature pattern of providing an intoxicant to a woman and sexually assaulting her. Thus, the Defendant's *own words* in describing his use of drugs with a depressant effect with women he wanted to have sex with was highly probative of his intent and motive in executing that signature pattern. The import of his own words relating to the use of Quaaludes with women he had sex with rendered the fact that the testimony was about the 1970s inconsequential.

Again, upon finding this evidence relevant and admissible this Court balanced the probative value against the risk of undue prejudice. Like the prior bad act witness testimony, the Commonwealth demonstrated a need for this evidence. The evidence was relevant to show the strength of the Commonwealth's 404 (b) evidence. Commonwealth v. Paddy, 800 A.2d 294, 308 (Pa. 2002). For example, Ms. Baker-Kinney testified that in the early 1980s, the Defendant gave her two pills that she believed were Quaaludes. In his deposition, the Defendant testified that he obtained a number of

prescriptions for Quaaludes and agreed that he could have kept them for many years.

The Defendant was charged with three counts of Aggravated Indecent Assault. 18 Pa. C.S.A. § § 3125 (a)(1), (a)(4), (a)(5). In order to sustain a conviction pursuant to § 3125 (a)(4), the Commonwealth was required to prove that,

> the defendant knew of or recklessly disregarded Andrea Constand's unconsciousness. A defendant "recklessly" disregards another person's unconsciousness if he consciously disregards a substantial and unjustifiable risk that the other person is unconscious. The risk disregarded must be the sort of risk that is grossly unreasonable for the defendant to disregard.

Pa. SSJI (Crim) 3125(B). Likewise, in order to sustain a conviction pursuant to § 3125 (a) (5), the Commonwealth was required to prove, that the Defendant knew or recklessly disregarded Ms. Constand's substantial impairment.

The Defendant's own words about his use and knowledge of drugs with a depressant effect was relevant to show his intent and motive in giving a depressant to Ms. Constand. As a result of this knowledge, he either knew she was unconscious, or recklessly disregarded the risk that she could be. Similarly, he either knew she was substantially impaired or recklessly disregarded the risk that she could be.

Additionally, any prejudicial effect of this evidence was mitigated by the Court's instructions. N.T. Apr. 25, 2018 at 35. This evidence was included in the Court's instructions to the jury outlining the limited purpose of such evidence. Thus, this claim is without merit and must fail.

C. Jury Instructions

1. This Court properly instructed the jury. (Concise Statement Issue 9)

The Defendant's next contention is that this Court erred in several of its instructions to the jury and by refusing to include a special interrogatory on the verdict sheet. Initially the Court notes that, once again, to the extent that the Defendant couches his claims as a violation of his constitutional right to Due Process, any such claim is waived as it was never raised before this Court. The law is clear that "issues, even those of constitutional dimension, are waived if not raised in the trial court. A new and different theory of relief may not be successfully advanced for the first time on appeal." Commonwealth v. Cline, 177 A.3d 922, 927 (Pa. Super. 2017)(citations omitted); Pa. R.A.P. 302(a) (stating "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal").

Likewise, pursuant to the Rules of Criminal Procedure, "[n]o portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto **before the jury retires to deliberate**. All such objections shall be made beyond the hearing of the jury." Pa. R. Crim. P. 647(C) (emphasis added). Furthermore, "'[u]nder Criminal Procedural Rules 603 and 647(B), the mere submission and subsequent denial of proposed points for charge that are inconsistent with or omitted from the instructions actually given will not suffice to preserve an issue, absent a specific objection or exception to the charge or the trial court's ruling respecting the points.'" Commonwealth. v. Baker, 963 A.2d 495, 506, (Pa. Super. 2008)(quoting

Commonwealth v. Pressley, 887 A.2d 220, 225 (2005)). "The relevant inquiry for [appellate courts] when reviewing a trial court's failure to give a jury instruction is whether such charge was warranted by the evidence in the case." Baker, 963 A.2d at 506 (citations omitted).

Instantly, both the Commonwealth and the Defendant submitted proposed points for charge. Following an informal charging conference, the Court indicated at an on-the-record conference which instructions would be read. N.T., Trial by Jury Commencing at 1:30 p.m., Apr. 23, 2018 at 57-107. There was no objection to the final form of the instructions when the Court made its final ruling on the inconsistent statement charge before closing arguments. N.T. Apr, 24, 2018 at 5-8. Likewise, there were no objections either before or after the instructions were actually given. N.T. Apr. 25, 2018 at 1-6, 61. Instead, on April 26, 2018, **the day after the jury was instructed** and retired to deliberate, the Defendant filed a document purporting to preserve objections that were not previously made on the record. Defendant William H. Cosby's Objections to Jury Instructions. Pursuant to Pa. R. Crim. P. 647(C), this Court submits that such a filing was insufficient to preserve these claims on appeal. Even if the claims are not waived, this court did not abuse its discretion in instructing the jury and this claim must fail.

It is well settled that,

> when evaluating the propriety of jury instructions, this Court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper. We further note that, it is an unquestionable maxim of law in this Commonwealth that a trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the

> law is clearly, adequately, and accurately presented to the jury for its consideration. Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error.

Commonwealth v. Antidormi, 84 A.3d 736, 754 (Pa. Super. 2014), appeal denied, 95 A.3d 275 (Pa. 2014)(citations omitted).

a. The jury was properly instructed on consciousness of guilt.

The Defendant's first claim is that the Court abused its discretion by giving a consciousness of guilt instruction. As outlined above, the Court submits that this claim is waived. Additionally, while the Defendant did object at the on the record charging conference, the objection was followed by extended discussion about the specific wording of the instruction. N.T. Apr. 23, 2018, Trial by Jury Commencing at 1:30 p.m., at 59, 60-66. At the conclusion of the conference, the following exchange took place:

> Ms. Bliss: And then we were going to email you our proposed language for that consciousness of guilt.
>
> The Court: No. I've already made a decision on that one. I've made a decision on that one.
>
> Ms. Bliss: Ok. All right.
>
> The Court: I'm going to read it as introduced by the language of the [standard] charge.

Id. at 107. The record is devoid of any objection to the Court's final consciousness of guilt instruction, thus constituting waiver. N.T. Apr. 25, 2018 at 1-6; 61. Even if this claim is not waived, the Court did not abuse its discretion by instructing the jury on consciousness of the guilt.

The Court instructed the jury as follows:

> The Commonwealth contends there was evidence tending to show

> that the Defendant made offers to pay for education, therapy and travel; and that he concealed the name of the pills that he gave to Andrea Constand. The Defendant contends this is not evidence of the consciousness of guilt. If you believe this evidence, you may consider it as tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider and weigh this evidence along with all the other evidence in the case.

N.T. Apr. 25, 2018 at 36. This instruction outlined the parties' contentions about certain acts of the Defendant after he was confronted by Ms. Constand and her mother and how the jury could consider such acts. However, it did not direct the jury that such acts, in fact, constituted consciousness of guilt and instructed the jury that it was not required to consider the evidence as tending to prove consciousness of guilt. Thus, the instruction, derived from Pa. SSJI (Crim.) 3.15, was appropriate based on the evidence in the case and the Court did not abuse its discretion.

b. The Court properly denied the Defendant's request for a "grading the investigation" charge.

The Defendant's next contention is that the Court erred in denying his request for an instruction consistent with Kyles v. Whitley,[46] which he entitled "Grading the Investigation." "Defendant's Notice of Filing Proposed Jury Instructions," Apr. 26, 2018, Exhibit 1 at 22 ("Proposed Instructions"). As outlined above, the submission of written instructions is insufficient to preserve a claim of error. Even if this claim is not waived, this Court is aware of no legal authority for such an instruction. Likewise, such an instruction

[46] In Kyles v. Whitley, 541 U.S. 419 (1995), evidence was affirmatively withheld from the defense that created the possibility that the Defendant had not committed the crime, including potentially inculpatory statements of another individual.

was not supported by the evidence. Kyles v. Whitley dealt with Brady[47] violation and suppression of evidence favorable to the defense, neither of which occurred in this case. Furthermore, the record is devoid of any objection or argument regarding this instruction, fatally impairing this Court's ability to conduct further analysis.

c. This Court's 404 (b) instruction contained an accurate statement of the law.

The Defendant's third contention is that this Court's 404(b) instruction contained an inaccurate statement of the law. As noted above, he failed to preserve this claim, thus it is waived. The Defendant did not object to the court's instruction during trial, where it was given numerous times. N.T. Apr. 11, 2018[48] at 45-46, 50-51; N.T. Apr. 12, 2018 at 65-67, 69-70, 167-168. Likewise, the Defendant did not object at the charging conference when it became apparent his proposed language would not be read or when the instruction was actually read to the jury. N.T. Apr. 23, 2018, Trial by Jury Commencing at 1:30 p.m., at 58, 67-70; N.T. Apr. 25, 2018 at 1-6, 61. However, even if it is not waived, the Defendant is mistaken.

Both during the trial and in concluding instructions, the Court read Pennsylvania Standard Criminal Jury Instruction 3.08 which instructs the jury that the evidence of prior bad acts may only be used for a limited purpose, in this case to show a common plan, scheme or design or an absence of mistake,

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[47] Commonwealth v. Brady, 507 A.2d 66 (Pa. 1986).

[48] There are two volumes of notes of testimony from this date, both indicating a commencement time of 10:37 a.m. The smaller volume contains brief argument and is only 31 pages. The cited volume is that containing testimony.

and may not be used not to infer that the Defendant is a person of bad character. The instruction, as read by this Court, contains an accurate statement of the law.

The 404 (b) instruction requested by the Defendant contained an inaccurate statement of the law and attempted to impart a duty on the jury to determine the relevance and probative value of the prior bad acts evidence. Specifically, he sought to include the following language: "[e]ach allegation of Commonwealth witnesses stands on its own merits, and you must decide beyond a reasonable doubt whether the claimed charge is relevant or probative of the charged crime in this case; that is, similar or part of a pattern." Proposed Instructions, Exhibit 1 at 7. This language misstates Pennsylvania law. The jury's duty is to apply the law to the facts as they find them. Pa. SSJI (Crim) 7.05 (2016)(stating "[i]t will be your responsibility to consider the evidence, to find the facts, and, applying the law to the facts as you find them, to decide whether the defendant has been proven guilty beyond a reasonable doubt"). Questions of relevance and probative value are threshold evidentiary inquiries to be determined by the Court. Therefore, the Court did not abuse its discretion by denying Defendant's request for an inaccurate statement of the law.

d. The Court properly denied the Defendant's request for a special interrogatory regarding the statute of limitations.

Finally, this court did not err in denying the Defendant's request for a special interrogatory on whether the offense occurred within the statute of limitations. Preliminarily, the Court submits that while the Defendant made

argument regarding the interrogatory at the charging conference, he did not object when the Court issued its ruling. N.T. Apr. 23, 2018 at 67, 71. Thus, this claim is waived or, alternatively, without merit.

The Court denied the request to avoid confusing the jury and creating the potential for an inconsistent verdict. Id. at 71. Instead, the court instructed the jury as follows:

> The information alleges that the crime was committed between January and February of 2004.
>
> You are not bound by the date alleged in the information. It is not an essential element of the crime charged. You may find the defendant guilty if you are satisfied beyond reasonable doubt that he committed the crime charged in and around the date charged in the information even though you are not satisfied that he committed it on the particular date alleged in the information.
>
> Now, very carefully follow this. The Defendant may not be convicted of aggravated indecent assault unless the Commonwealth proves beyond a reasonable doubt that the prosecution began within 12 years of the date that the offense was committed. The Defendant was arrested on December 30, 2015, which is the date the prosecution began in Commonwealth v. Williams H. Cosby, Jr. That meant that the Commonwealth must prove beyond a reasonable doubt that the offense occurred on or after December 30, 2003 to be within 12-year window. The Commonwealth does not need to prove, however, the specific date that the offense occurred.

N.T. Apr. 25, 2018 at 46-47.

Thus, the jury was instructed that before it could find the Defendant guilty, it had to find that the assault happened within the statute of limitations. As the charge to the jury was clear and accurate on the whole, this Court did not abuse its discretion, therefore, this claim must fail.

D. Post-Trial Issues

1. This Court did not abuse its discretion in denying the Defendant's motion for recusal. (Concise Statement Issue 3)

The Defendant's next issue is that this Court should have recused itself.[49] Again, the Defendant failed to preserve any constitutional challenge. His motion contains no allegation of constitutional error, thus, he may not raise such a claim for the first time on appeal. Commonwealth v. Cline, 177 A.3d 922, 927 (Pa. Super. 2017). As fully set forth in this Court's memorandum and opinion of September 19, 2018, which this Court incorporates as if set forth in its entirety in satisfaction of Pa. R.A.P. 1925 (a), this issue is both waived and without merit.

As this Court outlined in its memorandum,

> 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 A2.d 352, 370 (Pa. 1995)).
>
> 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

[49] The Defendant sought this Court's recusal twice; this issue deals with his "Motion for Disclosure, Recusal, and For Reconsideration of Recusal," filed on September 11, 2018, and only insofar as it relates to Defendant's allegations of bias related to a defense pretrial witness, Bruce L. Castor, Jr.

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).

Memorandum and Order at 1-3.

Furthermore,

> 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").

Id. at 5. This Court cannot disclose that which does not exist. This Court simply has no bias against Mr. Castor, thus no disclosure was necessary.

Instantly, the Defendant waived this issue by failing to timely raise it. The Defendant filed an unsupported motion on the eve of sentencing based on this Court's purported bias against a defense witness. The basis for the motion was a Radar Online tabloid article; Attorney Green[50] concluded that Mr. Castor was the most likely source of the article. Motion For Disclosure, Recusal and Reconsideration of Recusal para. 9A. The Motion does nothing more that assert that this Court *should* have a bias against Mr. Castor based on Mr. Castor's actions in a decades old political race. The Court has no such bias.

The source of this alleged information, Mr. Castor himself, testified before this Court in a pretrial matter on February 2 and 3, 2016, nearly *three years* before the motion was filed. At the February 2016 hearing, Mr. Castor was called as a Defense witness. During that hearing, there was an exchange between then defense counsel and Mr. Castor indicating that they had numerous conversations regarding Mr. Castor's testimony. N.T. Feb. 2, 2016

[50] Attorney Green represented the Defendant for sentencing.

at 111. Clearly, because Attorney Green concluded that Mr. Castor was the basis for the article on which he based the motion, the basis for the motion was known by a defense witness in 2016 and could have been discovered by the defense with an exercise of due diligence. The Defendant failed to raise the alleged issue at this earliest possible moment.

Even if the Defendant was not aware of the grounds asserted in his motion at the time of Mr. Castor's testimony, the article on which he relied in his Motion was published on March 28, 2018, prior to his retrial and contains quotations from his spokesperson. Thus, he knew, or should have known, the grounds for his motion in March 2018. However, he failed to file a motion until September 13, 2018, nearly seven months later. Thus, this Court submits the claim is waived.

Again, even if it is not waived, the claim is entirely devoid of merit. "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 Defendant has not asserted anything in the record to show that this Court exhibited any bias toward him, or any witness testifying on his behalf. As such, this claim must fail.

2. The Defendant was properly designated a sexually violent predator pursuant to 42 Pa. C.S.A. §9799.58. (Concise Statement Issues 10, 11)

The Defendant's final issues relate to this Court's finding the Defendant to be a sexually violent predator. First, he challenges the application of the Sexually Violent Predator provisions of Act 29[51]. Second, he challenges the information relied upon by the Sexual Offender Assessment Board ("SOAB"). The Court properly applied the SVP provisions of Act 29, and the SOAB did not rely on improper information. Thus, these claims must fail.

The Defendant contends that the application of the SVP provisions in Act 29 violate the ex post facto clauses of the State and Federal Constitutions. As discussed above,

> [a] law violates the *ex post facto* clause of the United States Constitution if it (1) makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) aggravates a crime, or makes it greater than it was when committed; (3) changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; or (4) alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense in order to convict the offender.

Allshouse, 36 A.3d at 184 (citing Carmell v. Texas, 529 U.S. 513, 522, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798))) (some citations omitted). "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when

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[51] 42 Pa. C.S.A. § 9799.58.

the legislature increases punishment beyond what was prescribed when the crime was consummated." Commonwealth v. Muniz, 164 A.3d 1189, 119 (Pa., 2017) (quoting Weaver v. Graham, 450 U.S. 24 (1981)).

It is well settled that, "[a] legislative pronouncement enjoys the presumption of constitutionality. The party challenging the constitutionality of a statute bears a heavy burden." Commonwealth v. Olivo, 127 A.3d 769, 777 (Pa. 2015) (citation omitted). Further,

> [a]ll doubts are to be resolved in favor of sustaining the constitutionality of the legislation. [N]othing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void. In other words, we are obliged to exercise every reasonable attempt to vindicate the constitutionality of a statute and uphold its provisions[.] The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases. Moreover, one of the most firmly established principles of our law is that the challenging party must prove the act "clearly, palpably and plainly" violates the constitution. Finally, we note that: The power of judicial review must not be used as a means by which the courts might substitute its judgment as to public policy for that of the legislature. The role of the judiciary is not to question the wisdom of the action of [the] legislative body, but only to see that it passes constitutional muster.

Commonwealth v. Elia, 83 A.3d 254, 266–67 (Pa.Super. 2013) (internal quotations and citations omitted).

The Rules of Statutory Construction provide, in pertinent part,

> (a)The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.

> (b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

1 Pa.C.S.A. § 1921.

When determining legislative intent, the following presumptions, among others, may be used:

> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.
> (2) That the General Assembly intends the entire statute to be effective and certain.
> (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.

1 Pa. C.S.A. § 1922.

Where legislation has a stated non-punitive purpose, courts conduct an analysis pursuant to Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), to determine if the law is punitive in effect despite its stated non-punitive purpose. The *Mendoza-Martinez* Court identified the following considerations:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Commonwealth v. Williams, 832 A.2d 962, 973, 574 Pa. 487, 505 (Pa. 2003) (Williams II) (citing Mendoza-Martinez, 372 U.S. 144). "[O]nly the "clearest

proof" may establish that a law is punitive in effect. Furthermore, in determining whether a statute is civil or punitive, we must examine the law's entire statutory scheme." Muniz, 164 A.3d at 1208. (citations omitted).

In his "Memorandum of Law in Support of Motion for Declaration of Unconstitutionality" ("Memorandum"), the Defendant contends that under the Mendoza-Martinez analysis, Act 29, Subchapter I is punitive in effect, despite the legislature's stated non-punitive intent, such that the application of Act 29 to the Defendant would violate the ex post facto clauses of the state and federal constitutions. Memorandum at 8. He made no additional arguments at oral argument on the Motion. N.T. Sept. 24, 2018 at 6-8. Specifically, he asserts that quarterly in-person verification for sexually violent predators, notification of changes in certain information, monthly counseling of sexually violent predators constitute affirmative restraints. Memorandum at 9-10. Additionally, he argues that the ability to petition for removal from the registry is meaningless, as he is 81 years old. Id. at 10. Further, he alleges that an SVP designation would interfere with his relationship with his grandchildren. Id. at 11. Next, he alleges that the active notification requirements for SVPs[52] and passive internet notifications constitute shaming which has historically been regarded as punishment. Id. at 14. Likewise, he contends that quarterly in person reporting and monthly counseling of SVPs further the traditional aims of punishment. Id. at 15. Finally, he argues that Act 29 remains excessive in relation to its stated non-punitive purpose. Id. at 17. As will be

[52] 42 Pa. C.S.A. §9799.62

discussed below, the Defendant failed to carry his burden to show by the "clearest proof" that Act 29 is punitive in effect.

In Pennsylvania, there have been several sex offender registration laws. Megan's Law I[53], the first Sex Offender Registration scheme, was enacted in 1995. Id. at 1196 (quoting Commonwealth v. Williams, 832 A.2d 962 (Pa. 2003)(Williams II). Under Megan's Law I, the procedure for adjudicating certain offenders as sexually violent predators included a pre-sentence assessment by the board, followed by a hearing. Id. At the hearing, the offender was required to rebut the presumption that he or she was a sexually violent predator by clear and convincing evidence. Id. A sexually violent predator was subjected to an enhanced maximum sentence of life imprisonment and more extensive registration and community notification requirements than non-sexually violent predators. Id. The Pennsylvania Supreme Court struck down the SVP provisions of Megan's Law I as violative of the Due Process Clause of the Fourteenth Amendment. Commonwealth v. Williams, 733 A.2d 593, 608 (Pa. 1999) (Williams I).

Megan's Law II was signed into law on May 10, 2000. Muniz, 164 A.3d at 1186 (quoting Williams II). Under Megan's Law II, "sexually violent predators [were] no longer subjected to an automatic increased maximum term of imprisonment for the predicate offense. Instead, they [were] required to undergo lifetime registration, notification and counseling procedures; failure to comply with such procedures [was] penalized by a term of probation or

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[53] 42 Pa. C.S.A. §§ 9791-9799.

imprisonment." Id. The registration, notification and counseling provisions of Megan's Law II were found to "constitute non-punitive, regulatory measures supporting a legitimate governmental purpose" that did not constitute additional criminal punishment. Williams II, 832 A.2d at 986. Megan's Law II was amended by Act 152 of 2004, becoming Megan's Law III. Muniz, 164 A.3d at 1186 (quoting Williams II). Megan's Law III made numerous substantive changes to the law:

> 1) established a two-year limitation for asbestos actions; (2) amended the Crimes Code to create various criminal offenses for individuals subject to sexual offender registration requirements who fail to comply; (3) amended the provisions of the Sentencing Code which govern "Registration of Sexual Offenders"; (4) added the offenses of luring and institutional sexual assault to the list of enumerated offenses which require a 10–year period of registration and established local police notification procedures for out-of state sexual offenders who move to Pennsylvania; (5) directed the creation of a searchable computerized database of all registered sexual offenders ("database"); (6) amended the duties of the Sexual Offenders Assessment Board ("SOAB"); (7) allowed a sentencing court to exempt a lifetime sex offender registrant, or a sexually violent predator registrant, from inclusion in the database after 20 years if certain conditions are met; (8) established mandatory registration and community notification procedures for sexually violent predators; (9) established community notification requirements for a "common interest community"—such as a condominium or cooperative—of the presence of a registered sexually violent predator; (10) conferred immunity on unit owners' associations of a common interest community for good faith distribution of information obtained from the database; (11) directed the Pennsylvania State Police to publish a list of approved registration sites to collect and transmit fingerprints and photographs of all sex offenders who register at those sites; and (12) mandated the Pennsylvania Attorney General to conduct annual performance audits of state or local agencies who

> participate in the administration of Megan's Law, and, also, required registered sex offenders to submit to fingerprinting and being photographed when registering at approved registration sites.

Id. at 1197–98 (quoting Williams II (citing 18 Pa. C.S.A. §4915; 42 Pa. C.S.A. §§ 5524.1, 9792, 9795.1 (a)(1), 9795.4, 9795.5, 9796, 9798, 9798.1, 9799, 9799.1, 9799.8)). Megan's Law III was ultimately struck down as violative of the single subject rule and replaced by the Sexual Offender Registration and Notification Act ("SORNA"). Id.

In 2012, the legislature enacted SORNA in an attempt to comply with the federal Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, 42 U.S.C. §§ 16901-16991. Muniz, 164 A.3d at 1204. SORNA created, *inter alia,* a tier based registration scheme, established a statewide registry of sexual offenders to be available on the internet, required additional in person reporting "within three business days of any changes to their registration information including a change of name, residence, employment, student status, telephone number, ownership of a motor vehicle, temporary lodging, e-mail address, and information related to professional licensing," was retroactive and applied to all offenders who were required to register under any prior version Megan's Law and had not finished their period of registration and to anyone sentenced after its effective date. Id. at 1206-1208.

Two cases prompted the legislature to make changes to SORNA. First, our Supreme Court's decision in Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017), followed by the Superior Court's holding in Commonwealth v. Butler,

173 A.3d 1212 (Pa. Super. 2017)[54]. In Muniz, the Defendant was convicted of two counts of indecent assault and scheduled to be sentenced on May 8, 2007, at which time Megan's Law III was in effect and would have required a ten year period of registration as a sex offender. Muniz, 164 A.3d at 1193. However, he absconded and was not sentenced until 2014. Id. The effective date of SORNA was December 20, 2012. Under SORNA, the defendant faced lifetime registration. Id. At sentencing, the court found that Muniz would be subject to the requirements of SORNA. Id. The Superior Court held that SORNA's registration requirement was not punishment and, therefore, as applied to Muniz, did not run afoul of the federal or state ex post facto clauses. Id. at 1194. Our Supreme Court granted review to determine if SORNA, as applied retroactively to the defendant therein, was violative of the ex post facto clauses of the United States and Pennsylvania Constitutions. Id. at 1194.

In Muniz, the Supreme Court conducted an analysis and found that the Mendoza-Martinez factors weighed in favor of a finding that SORNA's registration provisions constituted punishment. Id. at 1218. Specifically, they found the following factors weighed in favor of finding SORNA to be punitive in effect: 1) whether the statute involves an affirmative disability or restraint[55]; 2)

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[54] Our Supreme Court granted allocator in Butler on July 28, 2018. Commonwealth v. Butler, 25 WAP 2018.

[55] Under SORNA, Muniz was a Tier III offender, which required quarterly, in person appearances with additional in person appearances for changes in registration information. §§ 9799.15 (e)(3), (g). The Court found these in person reporting requirement to weigh in favor of the law being punitive. Muniz, 164 A.3d at 1211.

whether the sanction historically regarded as punishment[56]; 3) whether the statute promotes traditional aims of punishment[57]; and 4) whether the statute is excessive in relation to the alternative purpose assigned.[58] Id. at 1210-1218. The Muniz court did not give weight to "whether the statute comes into play only on a finding of scienter;" "whether the behavior to which the statute applies is already a crime;" and found that "whether there is an alternative purpose to which the statute may rationally be connected" weighed in favor of finding it non-punitive. Thus, the application of SORNA to Muniz violated the ex post facto clause of the United States Constitution, but the Court equally divided on the issue of whether the Pennsylvania Constitution provides greater protection than its federal counterpart. Notably, the Muniz court did not find SORNA facially unconstitutional.

In Butler, the Defendant pled guilty to statutory sexual assault and corruption of minors. 173 A.3d at 1213. Following a SOAB evaluation, the trial court found that the Commonwealth proved by clear and convincing evidence that Butler was an SVP and designated him as such. Id. Defendant was notified of the lifetime registration requirement pursuant to 42 Pa.C.S.A. §

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[56] The court found that SORNA's publication provisions to be comparable to shaming punishments and SORNA's mandatory conditions akin to probation. Id. at 1213.

[57] Unlike Megan's Law II, not all crimes under SORNA carried lengthy sentences of incarceration and there were numerous non-sexual registrable offenses, thus registration for those offenses clearly deterrent in effect. Id. at 1215. Increased registration, mandatory reporting requirements and dissemination of more private information made SORNA retributive. Id. at 1216.

[58] Muniz Court found the statute to be excessive and over inclusive in relation to assigned non-punitive purpose. Id. at 1218.

9799.15 (a)(6). Id. Without the designation, Butler would only have been required to register for 15 years. Id. at 1215 (referencing 42 Pa. C.S.A. §§9799.14 (b)(8), 9199.15(a)(1)). In Butler, the Superior Court found that because Muniz held SORNA to be punitive and because an SVP designation increased Butler's minimum registration requirement, a challenge to the SVP designation implicates the legality of a sentence. Id. at 1215. The Superior Court addressed the legality of Butler's sentence *sua sponte*. The court stated:

> [O]ur Supreme Court's holding that registration requirements under SORNA constitute a form of criminal punishment is dispositive of the issue presented in this case. In other words, since our Supreme Court has held that SORNA registration requirements are punitive or a criminal penalty to which individuals are exposed, then under Apprendi and Alleyne, a factual finding, such as whether a defendant has a "mental abnormality or personality disorder that makes [him or her] likely to engage in predatory sexually violent offenses [,]" 42 Pa.C.S.A. § 9799.12, that increases the length of registration must be found beyond a reasonable doubt by the chosen fact-finder. Section 9799.24(e)(3) identifies the trial court as the finder of fact in all instances and specifies clear and convincing evidence as the burden of proof required to designate a convicted defendant as an SVP. Such a statutory scheme in the criminal context cannot withstand constitutional scrutiny. Accordingly, we are constrained to hold that section 9799.24(e)(3) is unconstitutional and Appellant's judgment of sentence, to the extent it required him to register as an SVP for life, was illegal.

Id. at 1217-1218.

In response to Muniz and Butler, the legislature enacted Feb. 21 P.L. 25, No. 10; HB 631 of 2017 ("Act 10") on February 21, 2018 and reenacted by Act 2018, June 12, P.L. 140, No. 20; HB 1952 of 2018 ("Act 29") on June 12, 2018.

The Acts are substantially the same. The legislative findings and declaration of policy state:

> (a) Legislative findings--It is hereby determined and declared as a matter of legislative finding:
>
> (1) If the public is provided adequate notice and information about sexually violent predators and offenders as well as those sexually violent predators and offenders who do not have a fixed place of habitation or abode, the community can develop constructive plans to prepare itself for the release of sexually violent predators and offenders. This allows communities to meet with law enforcement to prepare and obtain information about the rights and responsibilities of the community and to provide education and counseling to their children.
>
> (2) These sexually violent predators and offenders pose a high risk of engaging in further offenses even after being released from incarceration or commitments, and protection of the public from this type of offender is a paramount governmental interest.
>
> (3) The penal and mental health components of our justice system are largely hidden from public view, and lack of information from either may result in failure of both systems to meet this paramount concern of public safety.
>
> (4) Overly restrictive confidentiality and liability laws governing the release of information about sexually violent predators and offenders have reduced the willingness to release information that could be appropriately released under the public disclosure laws and have increased risks to public safety.
>
> (5) Persons found to have committed a sexual offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.
>
> (6) Release of information about sexually violent predators and offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.

(b) Declaration of policy.--It is hereby declared to be the intention of the General Assembly to:

(1) Protect the safety and general welfare of the people of this Commonwealth by providing for registration, community notification and access to information regarding sexually violent predators and offenders who are about to be released from custody and will live in or near their neighborhood.

(2) Require the exchange of relevant information about sexually violent predators and offenders among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators and offenders to members of the general public, including information available through the publicly accessible Internet website of the Pennsylvania State Police, as a means of assuring public protection and shall not be construed as punitive.

(3) Address the Superior Court's opinion in the case of Commonwealth v. Wilgus, 975 A.2d 1183 (2009), by requiring sexually violent predators and offenders without a fixed place of habitation or abode to register under this subchapter.

(4) Address the Pennsylvania Supreme Court's decision in Commonwealth v. Muniz, No. 47 MAP 2016 (Pa. 2016), and the Pennsylvania Superior Court's decision in Commonwealth v. Butler (2017 WL 4914155).

42 Pa.C.S.A. § 9799.51.

By enacting Acts 10 and 29, the legislature specifically stated that it intended to address Muniz and Butler and to enact a non-punitive registration scheme. 42 Pa. C.S.A. §§ 9799.11; 9799.51 (b)(2),(4). Act 10 divided sexual offender registration statutes into two chapters, Subchapter H-Registration of Sexual Offenders[59] and Subchapter I-Continued Registration of Sexual Offenders[60]. Subchapter H applies to offenses committed after December 20,

[59] 42 Pa.C.S.A. §§ 9799.10-9799.42.
[60] 42 Pa.C.S.A. §§ 9799.51-9799.75.

2012. Subchapter I applies to offenses committed on or after April 1996 but before December 20, 2012. The Defendant's offenses fall under Chapter I.

As the stated purpose of this legislation is non-punitive, the analysis turns to the Mendoza-Martinez factors. The legislature made several changes to the law as a whole to remedy the balance outlined in Muniz. As to the first factor, whether the statute involves an affirmative disability or restraint, Subchapter H reduced the number of times some registrants are required to report in person by providing for telephonic verification after three years for offenders classified as Tier II and Tier III offenders. 42 Pa. C.S.A. § 9799.25 (a.1), (a.2). Subchapter I has reduced in person reporting requirements for all offenders. §§ 9799.56 (a)(2), 9799.60 (a)-(b.2). Likewise, all offenders, including SVPs, may petition for removal from the registry after 25 years. 42 Pa. C.S.A. § 9799.15 (a.2); § 9799.59. As to the second factor, whether the sanction historically regarded as punishment, reduced in person reporting requirements and the ability to petition for removal from the registry make Act 29's registration provisions less like probation. As to the third factor, whether the statute promotes traditional aims of punishment, again, reduced in person reporting requirements and fewer registrable offenses, along with the removal of tiered registration[61] under Subchapter I, render this factor non-punitive. Finally, as to the fourth factor, whether the statute is excessive in relation to the alternative purpose assigned, the removal of the majority of non-sexual offenses were removed from the statute. § 9799.14; § 9799.55, addition of the

[61] Under Subchapter I, there are no longer tiered registration requirements, only 10 year or lifetime. § 9799.55.

ability to petition for removal after 25 years and the reduced in person reporting remedied the Muniz Court's concern relating this factor.

On the whole, these changes render the statute non-punitive. As the statute is non-punitive, the retroactive application to the Defendant does not violate the ex post facto clause. Likewise, because Act 29 is non-punitive, it does not increase an offender's punishment and, therefore, does not implicate the concerns of Apprendi and Alleyne, making the Defendant's SVP designation pursuant to § 9799.58 constitutional.

Additionally, this Court notes that unlike the defendants in Butler and Muniz, the Defendant would have been subject to a lifetime registration requirement, with or without an SVP designation, and quarterly in person verification and monthly counseling as an SVP under Megan's Law II which was in effect at the time of the assault in January 2004. 42 Pa. C.S.A. §§ 9795.1 (b)(2), 9796 (a), 9799.4. Thus, this Court submits that even assuming, *arguendo*, that Act 29 is still punitive, it did not increase the period of the Defendant's registration and did not subject him to "greater punishment than the law annexed to the crime when committed." Therefore, there can be no ex post facto violation and this Court properly designated the Defendant a sexually violent predator pursuant to Act 29.

The Defendant's final issue is that this Court erred in designating him a sexually violent predator under SORNA where the SOAB evaluator relied on unsubstantiated, uncorroborated evidence in reaching her conclusion that the Defendant is a sexually violent predator. As raised, this issue is factually

inaccurate, potentially constituting waiver. First, Defendant alleges that he was found to be a sexually violent predator under SORNA, when, in fact, as discussed above, he was found to be a sexually violent predator under Act 29. While Defendant correctly challenged Act 29 in his first SVP related issue, the Court cannot be made to guess what he seeks to challenge in his final issue.

Likewise, again this Court notes, to the extent that he raises a constitutional challenge, the Defendant does not specify what constitutional provision is applicable, thus hampering this Court's review and constituting waiver of that ground. Cline, 177 A.3d at 927 (stating "issues, even those of constitutional dimension, are waived if not raised in the trial court. A new and different theory of relief may not be successfully advanced for the first time on appeal")(citations omitted). At the SVP hearing in this matter, counsel initially made a confrontation clause objection, but indicated "so, first, there's a statutory hearsay objection that probably obviates you having to reach the confrontation clause." N.T. Sept. 24, 2018 at 49. Even if this claim is not waived, the expert's testimony was limited to consideration of the witnesses who testified at trial and the claim fails on its merits.

At the SVP hearing in this matter, after defense counsel's objection, the following exchanges took place,

> The Court: [I'm] capable of reading the statute and finding out what are the factors that you're permitted to consider, but I will probably not find in there certainly the uncharged conduct and then the reports that are supplied to you by the District Attorney's Office. So if that is in your testimony—and again, . . . obviously she's an expert and she's going to consult a lot of material. If you are able to tell me that you did not consider these additional

statements other than what were at the very least the trial testimony of five witnesses, you need to do so . . . if you are able to make that distinguishment, I would request that you do so.

***

Mr. Ryan: So let me, Doctor, just make sure we all know where we are. First and foremost, what I'm going to be doing is asking you questions based upon, as I understand it, your consideration of the sworn testimony of six female individuals who testified at either trial and, of course, the sworn testimony of Andrea Constand

Dr. Dudley: Yes.

Mr. Ryan: Okay, so understanding that, based on the testimony you've provided thus far, is anything changed?

Dr. Dudley: No.

N.T. Sept. 24, 2018 at 57-59.

The Court: Did you in your reliance upon your opinion, in reliance upon this testimony form your opinions, can you excise, meaning not consider the proffered testimony [of other potential 404b witnesses] as opposed to only the trial testimony of those six individuals?

Dr. Dudley: Yes.

Id. at 97.

At the conclusion of the hearing, the Court stated, "[t]he Court specifically instructed her to, when she was on the stand, to not consider it and her testimony should not consider it. So she either heard me or she didn't . . . I didn't hear it and I've got to take the testimony that she did not include it."

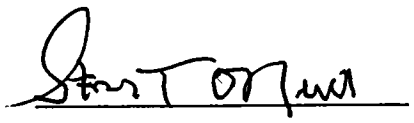
N.T. Sept. 24, 2018 at 63.

Thus, it is clear that the opinion Dr. Dudley rendered at the hearing on this matter did not include evidence that was not admitted in either of the trials in the instant matter. As such, the Court did not consider this information when determining if the Commonwealth met its burden of proving the Defendant to be a sexually violent predator. Therefore, this claim must fail.

VI. Conclusion

Based on the foregoing, the judgment of sentence should be affirmed.

BY THE COURT:



STEVEN T. O'NEILL J.

Copies mailed on 5/14/19 to the following:
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Brian W. Perry, Esq.
Kristen L. Weisenberger, Esq. ✓

Audrey Bartkowski/SP

Secretary

Certification of Service

I hereby certify that I am this day serving the foregoing document upon the person(s) and in the manner indicated below which service satisfies the requirements of Pa. R.A.P. 121:

Kevin Steele, District Attorney
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Dated: June 25, 2019

Kristen L. Weisenberger, Esquire

For BWP

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Sarah Kelly-Kilgore, Esquire
(admitted Pro Hac Vice)