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IN THE SUPREME COURT OF PENNSYLVANIA

NO. _____

COMMONWEALTH OF PENNSYLVANIA,
Respondent

VS.

WILLIAM HENRY COSBY, JR.,
Petitioner

PETITION FOR ALLOWANCE OF APPEAL

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

Brian W. Perry, Esquire
ID# 75647
Barbara A. Zemlock, Esquire
ID# 58891
Perry Shore Weisenberger & Zemlock
Attorneys for the Petitioner
2411 North Front Street
Harrisburg, PA 17110

Sarah Kelly-Kilgore, Esquire
Pro Hac Vice Motion to Be Filed
Matthew S. Ingles, Esquire
Pro Hac Vice Motion to Be Filed
Greenberg Gross LLP
601 South Figueroa Street
30th Floor
Los Angeles, CA 90017
(213) 334-7000

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OPINIONS IN THE COURTS BELOW

On December 10, 2019, a panel of the Superior Court (the "Panel") issued a published Opinion at 2019 PA Super 354, 2019 WL 6711477, docketed at 3314 EDA 2018, affirming Petitioner's judgment of sentence. A copy of the Panel's Opinion is attached as Appendix "A." A copy of the trial court's Rule 1925(a) Opinion is attached as Appendix "B."

ORDER IN QUESTION

The Order in Question states:

Judgment of sentence ***affirmed***.

Judgment Entered.

/s/ *Joseph D. Seletyn*
Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/10/19

[App'x "A," pp. 93-94].

QUESTIONS PRESENTED FOR REVIEW

I. Where allegations of uncharged misconduct involving sexual contact with five women (and a *de facto* sixth) and the use of Quaaludes were admitted at trial through the women's live testimony and Petitioner's civil deposition testimony despite: (a) being unduly remote in time in that the allegations were more than fifteen years old and, in some instances, dated back to the 1970s; (b) lacking any striking similarities or close factual nexus to the conduct for which Petitioner was on trial; (c) being unduly prejudicial; (d) being not actually probative of the crimes for which Petitioner was on trial; and (e) constituting nothing but improper propensity evidence, did the Panel err in affirming the admission of this evidence?

II. Where: (a) the Montgomery County District Attorney ("MCDA") agreed that Petitioner would not be prosecuted in order to force Petitioner's testimony at a deposition in Complainant's civil action; (b) the MCDA's Office issued a formal public statement reflecting that agreement; and (c) Petitioner reasonably relied upon those oral and written statements by providing deposition testimony in the civil action, thus forfeiting his constitutional right against self-incrimination, did the Panel err in affirming the trial court's decision to allow not only the prosecution of Petitioner but the admission of Petitioner's civil deposition testimony?

III. Where a seated juror allegedly made statements evincing his prejudgment of Petitioner's guilt, did the Panel err by affirming the trial court's denial of Petitioner's request for a full hearing that included examination of all potential witnesses?

IV. Where Petitioner was charged and convicted prior to the enactment of the 2018 Sex Offender Registration Act ("SORNA II"), a statute which has been found unconstitutional and is currently under review by this Court, did the Panel err in affirming Petitioner's sentencing under that Act?

STATEMENT OF THE CASE

While the proceedings below attracted significant media attention, the Panel's precedential Opinion has far-reaching consequences for all future criminal proceedings, including those that proceed outside the national spotlight. The Panel's Opinion effectively changed the controlling law and guiding principles that have existed within the Commonwealth for well over a century. This Honorable Court should grant review to provide much-needed guidance on these issues, the relevant background of which is set forth below.

A. Procedural History.

On December 30, 2015, Petitioner William H. Cosby, Jr. ("Petitioner") was charged with three counts of aggravated indecent assault based on allegations made by Andrea Constand ("Complainant"). [App'x "B," p. 33].

On January 11, 2016, Petitioner filed a Petition for Writ of Habeas Corpus, arguing for dismissal of the charges on the grounds that such charges are precluded by a non-prosecution agreement ("NPA") between him and the MCDA. [R. 389a-411a]. That motion was denied on February 4, 2016. [R. 1048a].

Prior to his first trial, which ended in a deadlocked jury and a mistrial [R. 1a-108a], Petitioner filed numerous pretrial motions, including a motion to suppress the deposition testimony he provided in Complainant's civil action against him on the grounds that such testimony was given in reliance on the NPA. [R. 6271a-6290a]. That

motion was denied on December 5, 2016. [R. 1192a-1197a]. The prosecution filed a motion to introduce testimony from thirteen women concerning alleged prior bad acts ("PBA(s)") involving Petitioner; that motion was granted in part and denied in part, with the trial court allowing testimony from one specified PBA witness. [R. 1198a].

Prior to his second trial, Petitioner renewed all of his pretrial motions. [App'x "B," pp. 37-38]. The prosecution also filed a pretrial motion seeking, again, to introduce testimony regarding alleged PBAs—this time from nineteen PBA witnesses. [R. 1200a-1308a]. On March 15, 2018, the trial court granted that motion, allowing the introduction of testimony from any five PBA witnesses of the prosecution's choice. [R. 1672a-1673a].

Jury selection began April 2, 2018, with nearly every prospective juror expressing familiarity with the case and more than half harboring some prejudgment of guilt. [R. 1829a-1839a; 2110a-2113a; 2370a-2380a]. On April 6, 2018, before the jury had been sworn, Petitioner filed a motion seeking to excuse Juror 11 for cause based upon statements the juror had reportedly made prejudging guilt. [R. 2541a-2548a]. After establishing a process to determine whether the juror had prejudged the case that involved examining all ten individuals in the jury room, the trial court abandoned that process prematurely and denied the motion. [R. 2714a].

On April 26, 2018, the jury returned a verdict of guilty on all counts. [R. 5822a-5823a]. Despite Petitioner's constitutional challenges to SORNA II, enacted on June 12, 2018, Petitioner was

subsequently found to be a sexually violent predator under that statute and sentenced to 3 to 10 years' incarceration. [R. 6145a; 6198a].

Petitioner filed a post-sentence motion, which was denied on October 23, 2018. [App'x "B," p. 40]. He then filed a notice of appeal on November 19, 2018, and a court-ordered Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b) (the "1925(b) Statement") on December 11, 2018. [App'x "C"]. The trial court issued its Rule 1925(a) Opinion on May 14, 2019. [App'x "B"]. On December 10, 2019, the Panel affirmed the trial court's ruling. [App'x "A"].

B. Factual History.

1. Complainant's Accusations.

By 2004, Petitioner and Complainant had been friends for approximately eighteen months, with Complainant repeatedly joining Petitioner at his home for dinner. [R. 3732a; 3736a; 3744a].

On the night of the alleged assault, Complainant went to Petitioner's home seeking career advice. [R. 3759a-3760a]. When she arrived, Petitioner offered, and Complainant accepted, both a glass of water and a glass of wine, as well as three blue pills [R. 3761a-3762a], which Petitioner testified were Benadryl. [R. 228a].

According to Complainant, at some point that evening, she began feeling weak and slurring her speech. [R. 3764a-3765a]. Complainant testified that Petitioner then joined her on the couch, and digitally penetrated her while also placing her hand on his genitals.

[R. 3735a-3766a]. Petitioner has maintained that all sexual contact was consensual. [R. 294a].

2. Investigation & NPA.

In January 2005, Complainant contacted the Durham Regional Police and accused Petitioner of sexual assault. [R. 3779a-3782a; 3791a]. A comprehensive police investigation ensued. [R. 4309a]. At the conclusion of a joint investigation between Durham and Montgomery County officials, the MCDA's Office issued a press release on February 17, 2005, stating that "insufficient, credible and admissible evidence exists upon which any charge against Petitioner could be sustained beyond a reasonable doubt" and "that a conviction under the circumstances of this case would be unattainable." [R. 382a-383a]. The statement also confirmed that the MCDA would not file charges against Petitioner. [*Id.*].

During this same period, the MCDA was in contact with Petitioner's attorney, Walter Phillips, and told Attorney Phillips that Petitioner would not be prosecuted.[1] [R. 703a]. The MCDA explained that: (a) he intended to remove any threat of criminal prosecution in order to force Petitioner's testimony in Complainant's civil action, (b) "his decision was...an irrevocable commitment...that he was not going to prosecute," and (c) he intended the press release to reflect the NPA. [R. 703a; 732a]. Attorney Phillips communicated the MCDA's statements to others, including Petitioner's general counsel, John Schmitt. [*Id.*].

[1] Phillips died in February 2015. [App'x "A," p. 7].

Relying on the MCDA's press release and his conversations with Attorney Phillips [R. 732a], Attorney Schmitt advised Petitioner to testify at his civil deposition without asserting his Fifth Amendment rights [R. 760a-762a]. Accordingly, Petitioner gave civil deposition testimony over the course of four days (which was ultimately used against him in his criminal trial). [R. 750a-751a; 4791a].

Ten years later, in the midst of intense media scrutiny and vilification of Petitioner, the MCDA's Office reopened an investigation into Complainant's accusations. [R. 1194a]. Former MCDA Bruce Castor, knowing of the NPA made during his tenure, reminded the MCDA's Office of that agreement. [R. 384a-388a]. Nonetheless, acting amidst a surge of national attention and the "Me Too" movement, newly elected MCDA Kevin Steele charged Petitioner under 18 Pa.C.S.A. § 3125(a)(1), 18 Pa.C.S.A. § 3125(a)(4), and 18 Pa.C.S.A. § 3125(a)(5). [R.1195a].

3. Accusations Regarding Other PBAs.

At the second trial, over Petitioner's objections, the trial court allowed the prosecution to introduce allegations from five PBA witnesses (and a *de facto* sixth, through Petitioner's deposition testimony), purportedly pursuant to Pa.R.E. 404(b) ("Rule 404(b)"), despite the objective differences between each one's claims:

(a) Heidi Thomas

In 1984, Thomas, an aspiring twenty-four-year-old actress and model, was sent to Reno, Nevada by her talent agency to meet Petitioner. [R. 2941a-2942a; 5851a-5852a]. Petitioner met Thomas at a house (not owned by Petitioner), where they rehearsed various

scenes and Petitioner encouraged Thomas to sip wine as a prop. [R. 2956a; 5852a]. After drinking a glass of wine, Thomas purportedly was "in a fog" and could only remember "snapshots" of the evening. [R. 2956a-2957a; 5852a-5853a]. Thomas claims that she recalls waking up in a bed while Petitioner was forcing her to perform oral sex, and that she later stood and shut the door to that room. [R. 2958a-2959a; 5853a].

(b) Chelan Lasha

In 1986, Lasha was a seventeen-year-old aspiring model, and claims that she met Petitioner at a hotel in Las Vegas, Nevada, where he allegedly gave her an antihistamine and a double-shot of Amaretto. [R. 3247a-3248a; 3251a; 5859a; 5862a-5863a]. Petitioner allegedly pinched her nipple and began "humping" her leg after she lay down in the hotel room bed; she says she remembers nothing thereafter except Petitioner clapping his hands to wake her and asking her to leave. [R. 3252a; 5863a].

(c) Janice Baker-Kinney

In 1982, Baker-Kinney was a twenty-four-year-old employee of Harrah's Casino in Reno, Nevada. [R. 3349a-3350a; 5836a]. Baker-Kinney's friend heard of a party near the casino and invited her to attend. [R. 3352a; 5836a].

At the party, Petitioner allegedly offered Baker-Kinney a beer and a Quaalude [R. 3355a; 5837a], which Baker-Kinney had previously taken recreationally and voluntarily accepted. [R. 3355a-3356a; 5835a]. After this, Baker-Kinney allegedly became dizzy and "blacked out." [R. 3360a; 5837a]. Petitioner allegedly touched her breasts and the top of her pants before guiding her towards a bedroom.

[R. 3361a; 5838a]. She woke the following morning and believed they had been intimate because she was "wet down there." [R. 3363a; 5839a].

(d) Janice Dickinson

In 1982, Dickinson was a twenty-seven-year-old model looking to develop her singing and acting career. [R. 3611a; 5844a]. Following an initial meeting in New York, Dickinson flew to Lake Tahoe to meet Petitioner, where they had dinner with a third guest. [R. 3614a-3619a; 5844a]. Dickinson claims to remember very little of the evening, but recalls Petitioner giving her a blue pill at dinner to alleviate her menstrual pains. [R. 3620a; 5845a]. After dinner, Dickinson now says she visited Petitioner in his hotel room, where she recalls feeling immobilized and losing consciousness after feeling a sharp pain. [R. 3621a; 3626a; 5845a].[2] When she awoke the next day, Dickinson noticed indicators that she and Petitioner had engaged in vaginal and anal intercourse. [R. 3627a; 5845a].

(e) Maud Lise-Lotte Lublin

In 1989, Lublin, a twenty-three-year-old aspiring model, met Petitioner. [R. 5865a]. After their initial meeting, Lublin and Petitioner were in contact for two years. [*Id.*]. Lublin met Petitioner for the second time at a hotel in Las Vegas. [R. 3513a-3514a; 5866a]. Petitioner allegedly gave Lublin a few drinks and began to stroke her hair. [R. 5866a]. Lublin has never stated that she had any sexual contact with Petitioner. [*Id.*].

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[2] Dickinson later wrote a book discussing this meeting, stating that she had rejected Petitioner's advances and the encounter ended immediately after dinner. [R. 3646a].

(f) Jane Doe 1 ("Doe")[3]

While providing deposition testimony in Complainant's civil suit, Petitioner was questioned regarding his interactions with Doe. [R. 4784a]. Petitioner remarked that he met Doe in Las Vegas in the 1970s, where she voluntarily engaged in the recreational use of Quaaludes. [*Id.*]. Petitioner stated in his deposition that it looked like Doe 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]. No testimony was presented indicating that Petitioner engaged in sexual relations with Doe, although the prosecution characterized her as a woman who "came forward." [R. 4784a].

[3] The Panel asserted that Petitioner made no challenge to this sixth *de facto* witness in his 1925(b) Statement. [App'x "A," p. 41, fn. 1.] Not so. [App'x "C," p. 4; *see* App'x "B," p. 96].

REASONS FOR ALLOWANCE OF APPEAL

> Societies appear to be subject, every now and then, to periods of moral panic. ... [I]ts nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) res[ort]ed to; ... sometimes the panic passes over and is forgotten...at other times it has more serious and long-lasting repercussions and might produce such as those in legal and social policy or even in the way society conceives itself.[4]

Cases exist in which the outcomes were deeply influenced by public panic fueled by the nature of the allegations lodged, the media, and other special interest groups. The criminal justice system teeters on a dangerous precipice in such cases; as commentators have observed, "[w]e must react to serious crimes in meaningful and substantive ways, *but there is no crime that warrants the destruction of prized values such as fairness or constitutional principles involving the presumption of innocence, due process*, and the notion that a punishment should fit the crime." *Grossman*, *supra*, at 77 (emphasis added).

The instant case is one that has pushed the criminal justice system of this Commonwealth, and the bedrock principles upon which it rests, to that precipice. Here, the Panel, in a published, and hence

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[4] Steven Grossman, *Hot Crimes: A Study in Excess*, 45 Creighton L. Rev. 33 (December, 2011), quoting Stanley Cohen, *Folk Devils and Moral Panics: The Creation of Mods and Rockers* 9 (MacGibbon & Kee eds. 1972).

precedential, decision: (a) interpreted and applied Rule 404(b)(2) so expansively as to strip an accused of the presumption of innocence and relieve the prosecution of its burden of proof by permitting a jury to hear, and base its verdict on, dissimilar and inflammatory, decades-old propensity evidence concerning *allegations* of prior sexual assaults from multiple accusers; (b) ignored the inherent authority of a sitting district attorney to make an agreement not to prosecute an accused, with such decision being binding on subsequent district attorneys; (c) disregarded the constitutional import of an accused's reliance on a promise not to prosecute where the accused, in reliance on that promise, relinquishes his Fifth Amendment rights in a civil deposition; (d) undermined the integrity of the jury by refusing to conduct an inquiry sufficient to determine whether a juror prejudged guilt; and (e) disregarded constitutional prohibitions on *ex post facto* laws by allowing a sentencing statute enacted after conviction to be applied.

These issues present the "special and important reasons" required for further appeal. Pa.R.A.P. 1114. The Panel's precedential decision: (a) involves questions of such substantial public importance as to require prompt and definitive resolution by this Court; (b) was such a departure from accepted judicial practices, and was such an abuse of discretion, as to call for the exercise of this Court's supervisory authority; (c) was inconsistent with decisions of this Court and the Superior Court on the same legal issue; and (d) implicates an issue of first impression. Review of each Question Presented for Review is warranted.

I. THE PANEL'S INTERPRETATION AND APPLICATION OF RULE 404(b): (1) RAISES QUESTIONS OF SUCH SUBSTANTIAL PUBLIC IMPORTANCE AS TO REQUIRE PROMPT AND DEFINITIVE RESOLUTION BY THIS COURT; (2) IS INCONSISTENT WITH DECISIONS OF BOTH THIS COURT AND THE SUPERIOR COURT; AND (3) INVOLVES SUCH AN ABUSE OF DISCRETION BY THE LOWER COURTS THAT REVIEW IS WARRANTED.

Review of the Panel's decision regarding the admissibility of PBA evidence in this case, including both the testimony given by five PBA witnesses (and a *de facto* sixth) concerning alleged, unwanted sexual contact by Petitioner back in the 1980s, and the civil deposition testimony given by Petitioner concerning providing Quaaludes to women in the 1970s, is imperative. The Panel's published decision effectively abolishes the bedrock principle of law that propensity evidence may not be used to prove that an accused acted in conformity with alleged PBAs, and allows allegations of prior sexual assaults to be admitted in a trial regardless of: (a) whether there are striking similarities between the alleged PBAs and the crime for which the accused is on trial; (b) the remoteness in time of those alleged PBAs; (c) the probative value of the alleged PBAs, if any, to the charged crime; and (d) the extreme prejudice of the PBA allegations. Indeed, the Panel:

- Stripped the factual details and discounted the significant differences between the alleged PBAs and Complainant's claims, instead premising its decision on "simplified likenesses" that purportedly supported a "predictable pattern" of sexual assaults [App'x "A," pp. 35-37];

- Concluded that the substantially remote nature of the alleged PBAs was of no import because there were "multiple prior sexual assaults, not merely one," and that they all had the same "pattern" of misconduct [*Id.* at pp. 41-42]; and
- Abandoned any analysis of whether the prejudicial impact outweighed any probative value of the alleged PBAs, finding that any prejudice was removed merely by the trial court's decision to allow five—as opposed to nineteen—PBA witnesses to testify [*Id.* at pp. 42-43].

Each is addressed below.

A. The Panel's Decision Abolishes the Bedrock Principle That Propensity Evidence May Not Be Used to Prove That an Accused Acted in Conformity with Prior Alleged Misconduct, Thus Stripping an Accused of the Presumption of Innocence.

1. The Testimony of the PBA Witnesses.

It is an inalienable right 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*, 484 Pa. 2, 7, 398 A.2d 631, 633 (1979)(emphasis added). Although Rule 404(b)(1) seeks to preserve this right (*see Commonwealth v. Sherwood*, 603 Pa. 92, 114, 982 A.2d 483, 497 (2009)), Rule 404(b)(2) permits evidence of prior "wrongs" or "other acts" to be admitted for "non-propensity" purposes relating to the charged crime, such as establishing, in

relevant part, "common plan" or "absence of mistake." For alleged PBAs to be admissible under these exceptions, the prosecution must demonstrate that the similarities between the PBA(s) and the allegations for which an accused is on trial are *strikingly similar, not generic*, and there must be some close factual nexus between the PBA(s) and the crime for which the accused is on trial. *See, e.g.*, *Commonwealth v. Chalfa*, 313 Pa. 175, 178, 169 A. 564, 565 (1933).

The Panel's decision does not comply with these rules. Instead, it permits allegations of prior alleged sexual assault to be admitted not to establish "identity," a "true plan," an "absence of mistake," or any other recognized exception but, rather, to establish that the accused acted in conformity with a "pattern" of crimes of a very general class, to wit: sexual assault. According to the Panel: "It is the pattern itself, and not the mere presence of some inconsistencies between the various assaults, that determines admissibility under these exceptions." [*See* App'x "A," p. 36]. But, as this Court has instructed, "'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. Roney*, 622 Pa. 1, 20, 79 A.3d 595, 606 (2013)(quoting *Commonwealth v. Bryant*, 515 Pa. 473, 478, 530 A.2d 83, 85 (1987)).

Indeed, "[s]imilarities cannot be confined to insignificant details that would likely be common elements regardless of the individual committing the crime." *Commonwealth v. Bidwell*, 195 A.3d 610, 618-619 (Pa.Super. 2018); *see Commonwealth v. Rush*, 538 Pa. 104, 112-113, 646 A.2d 557, 560-561 (1994). 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." *Rush*, 538 Pa. at 113, 646 A.2d at 561. 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). Importantly, the PBAs must establish either a *true signature* or a *true plan as to the allegations concerning which the accused is on trial*. *See Chalfa*, 313 Pa. at 178, 169 A. at 565 ("[t]o make the evidence competent, it must show that a connection existed in the mind of the actor between the criminal acts, linking them for some purpose he intended to accomplish").[5] The Panel concedes as much. [App'x "A," p. 33].

Nevertheless, while focusing on what the trial court perceived as seven similarities between the PBAs and the events for which

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[5] Although the Panel acknowledged some of these principles, it proceeded to ignore them or to substantially and impermissibly override them. For example, the Panel stated that PBA evidence is permitted under "the common plan/scheme/design exception," as well as the absence of mistake exception, "'to counter [an] anticipated defense of consent.'" [App'x "A," p. 29, 32]. As the Panel acknowledged, this exception "aids in identifying a perpetrator based on his or her commission of extraordinarily similar criminal acts on other occasions." [*Id.* at p. 28]. But such exception has no application to this case, as "identity" was not at issue. Moreover, no "true plan or scheme" connecting the alleged PBAs and Complainant's claims was ever established; indeed, such did not exist.

Petitioner was on trial [*see* App'x "A," pp. 34, 36],[6] the Panel ignored many significant differences, finding that it is the general "pattern" of sexual misconduct, and not "the mere presence of some inconsistencies between the various assaults, that determines admissibility under these exceptions." [*Id.* at p. 36]. This is in direct conflict with the Pennsylvania jurisprudence cited above and the admonition of this Court more than a century ago that "[i]t is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely that he would commit another...." *Shaffner v. Commonwealth,* 72 Pa. 60, 65 (1872).

While the Panel endorsed the generic, amorphous "similarities" between the PBA witnesses and their alleged encounters, it failed to properly weigh the overwhelming differences involved, including, but not limited to:

- While the prosecution claimed Petitioner took advantage of his friendships with Complainant and the PBA witnesses,

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[6] A review of these purported "similarities" demonstrates that they are neither unique nor strikingly similar to the charges being tried. Even if the facts surrounding the "similarities" had been indisputable (they were not), the Panel's conclusion requires one to accept that it is "unique" for accusers to be younger than their accused, to be physically "fit," to take virtually any form of intoxicant given by the accused, and/or to be alone with the accused. [App'x "A," p. 34]. There is nothing unique about such factors. Indeed, should the Panel's decision be left undisturbed, the exception under Pa. R.E. 404(b)(2) would undoubtedly swallow Pa. R.E. 404(b)(1)'s general prohibition on PBA evidence in sexual assault cases, as many such cases fit not one, but all four, of these non-distinctive categories.

only Complainant and Lublin had any such relationship with Petitioner prior to the alleged incidents [R. 3755a][7];

- While Complainant accused Petitioner of digital penetration [R. 3766a], the nature of the alleged sexual contact among the PBA witnesses varied widely, from none (Lublin), to oral sex (Thomas), to vaginal and/or anal intercourse (Baker-Kinney and Dickinson) [R. 2958a; 3252a; 3363a; 3627a; 5839a; 5845a 5853a; 5863a; 5867a];
- While the contact with Complainant occurred in Petitioner's Montgomery County home [R. 3732a-3733a], the alleged contacts with the PBA witnesses occurred in a hotel room or some third person's house outside the Commonwealth [R. 2951a; 3249a; 3352a; 3514a; 3621a; 5836a; 5845a; 5852a; 5862a; 5866a];
- While Complainant and one PBA witness claimed to take over-the-counter medications [R. 228a; 3251a; 3762a; 4528a; 5863a], the others allegedly accepted various types of alcohol and/or prescription drugs [R. 2956a; 3355a-3356a; 3620a; 4784a; 5845a; 5852a; 5866a];
- Unlike the PBA witnesses, Complainant joined Petitioner at his home for dinner on at least three occasions prior to the alleged incident [R. 3732a-3738a; 3744a] and personal gifts were exchanged between the two [R. 3753a-3754a]; and

[7] Critically, Lublin has not accused Petitioner of sexual assault. [R. 3572a; 5867a].

- Unlike the PBA witnesses, Complainant's alleged assault was preceded by "minor flirtations" between Petitioner and Complainant over the span of their eighteen-month relationship [R. 3830a].

The Panel ignored the significance of these differences, concluding merely that "[i]t is impossible for two incidents of sexual assault involving different victims to be identical in all respects" and that it is the "pattern itself" that determines admissibility. [App'x "A," pp. 35-36]. But a "pattern" lacking the requisite "striking similarities" is not converted into an admissible signature-like PBA merely by virtue of the number of accusers. Moreover, the trial court's decision to permit *any five* of the potential PBA witnesses to testify highlights that court's elevation of numbers over similarities. [R. 1672a-1673a]. The binding decision of the Panel sanctifies the notion that "where there is smoke, there is fire"—in direct conflict with decisions of this Court—and, if permitted to stand, opens the door to the admission of propensity evidence in sexual assault cases, thereby eviscerating the presumption of innocence.

The Panel added that the PBA evidence was admissible as "it simultaneously tended to undermine any claim that Appellant was un[a]ware of or mistaken about Victim's failure to consent to the sexual contact that formed the basis of the aggravated indecent assault charges...." [*Id.* at pp. 36-37 (citing *Commonwealth v. Tyson*, 119 A.3d 353, 361 (Pa.Super. 2015))]. No explanation is provided, however, as to how unproven allegations from the 1980s could have been probative of whether Petitioner knew that contact with Complainant in 2004 was not consensual.

Unlike *Tyson*, on which the Panel relied, the PBA evidence here did not involve any prior conviction, or even a criminal charge. Such is significant because:

> The prior conviction would tend to prove Appellee was previously in a very similar situation *and suffered legal consequences* from his decision to have what proved to be nonconsensual vaginal intercourse with an unconscious victim. Thus, the evidence would tend to show Appellee recognized or should have recognized that, as with T.B., *G.B.'s physical condition rendered her unable to consent*. The jury must have a chance to decide if Appellee, in light of his past legal experience and conviction for a substantially similar criminal episode, could have reasonably concluded G.B.'s consent was possible under comparable circumstances.

Tyson, 119 A.3d at 363 (emphasis added). Here, Petitioner had no "past legal experience and conviction for a substantially similar criminal episode" that could be probative of his knowledge of legal consent. Indeed, there is no evidence that Petitioner knew of the PBA allegations prior to the 2004 incident with Complainant.

The admission of PBA evidence thus had no legitimate purpose; instead, it was used only to suggest that, based on the number of *other accusers* alone, the contact with Complainant must also have been unwanted. At its core, dissimilar PBA evidence was used to establish the propensity of Petitioner—a purpose precluded by Pennsylvania law—which has stripped Petitioner of his presumption of innocence.

2. Petitioner's Deposition Testimony Concerning Sharing of Quaaludes in the 1970s.[8]

The Panel concluded that Petitioner's testimony "regarding his knowledge of the effects of other central nervous system depressants, such as Quaaludes, was highly probative of 'the circumstances known to him' for purposes of determining whether he acted with the requisite *mens rea* for the offense of aggravated indecent assault—recklessness." [App'x "A," p. 71]. According to the Panel, Petitioner's "knowledge of the use of central nervous system depressants, coupled with his likely past use of the same with the PBA witnesses, were essential to resolving the otherwise he-said-she-said nature of [Complainant]'s allegations. Thus, this evidence was highly probative of [Petitioner's] *mens rea*." [*Id.*].

The Record does not reflect that Petitioner understood that Quaaludes were a "central nervous system depressant" that could render a person incapable of consenting to sexual contact or that Quaaludes were chemically similar to Benadryl. Rather, Petitioner testified that he shared Quaaludes back in the 1970s because "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]. While Petitioner testified that Quaaludes appeared to cause at least one woman, Doe, to become intoxicated [R. 4785a-4786a], the Record does not provide that Doe lacked the capacity to consent. Indeed, because there is nothing in the Record evidencing

[8] As discussed in Part II, Petitioner's deposition testimony should not have been admitted, as it was given in reliance upon the NPA between Petitioner and the MCDA.

that Petitioner had any sexual relations with Doe, any reliance on Petitioner's interactions with her as being probative of consent is misplaced. The Panel's resulting presumption that Petitioner understood the effects of Quaaludes on one's ability to consent is unfounded, as is the Panel's further inference that an understanding of the relationship between Quaaludes and the capacity to consent necessarily gave Petitioner an understanding of the effect of Benadryl on Complainant's capacity to consent.

The Panel also ignored that nothing in the Record reflects that the women with whom Petitioner shared Quaaludes in the 1970s: (a) were forced to take Quaaludes; (b) did not know that they were taking Quaaludes; (c) were, in fact, incapacitated by Quaaludes; or (d) had *any* sexual contact, much less nonconsensual contact, with Petitioner. Absent such facts, the Panel took an unsupported analytical leap in concluding that Petitioner's use of Quaaludes in the 1970s was probative of his providing Complainant Benadryl in 2004.

Finally, the Panel did not address the fact that the trial court allowed the prosecution to present Petitioner's highly prejudicial admission that, by sharing Quaaludes with women, he committed a crime, *i.e.*, the unlawful delivery of a controlled substance. [*See* R. 4791a]. This admission does not fall within any of the exceptions to Rule 404(b).

Like the Panel's decision concerning the testimony of the PBA witnesses, its decision affirming the admissibility of Petitioner's deposition testimony was so inconsistent with decisions of this Court and such an abuse of discretion as to call for review.

B. The Panel's Decision Overrides Existing Law from This Court by Effectively Concluding That the Fact That Allegations of PBAs May Be Extraordinarily Remote in Time Is of No Moment if There Are Multiple Accusers That Allege That the Accused Committed a Crime Against Them of the Same General Nature.

Even if PBA evidence is substantially similar to the crime for which the defendant is on trial, "'said evidence will be rendered inadmissible if it is too remote.'" *Commonwealth v. Shively*, 492 Pa. 411, 416, 424 A.2d 1257, 1259 (1981)(citing *Commonwealth v. Brown*, 482 Pa. 130, 393 A.2d 414 (1978)). Here, it cannot be disputed in good faith that the PBA evidence was extraordinarily remote in time. The allegations for which Petitioner was on trial occurred in 2004. [R. 3759a-3770a]. The alleged PBAs presented at trial purportedly occurred between the 1970s (providing Quaaludes) and 1989 (the closest-in-time alleged encounter, *i.e.*, Lublin's) [R. 2941a-2942a; 3352a; 3611a; 4784a; 5834a; 5836a; 5841a; 5844a; 5857a; 5859a; 5865a]. The Panel acknowledged that "the time period in question is substantial, especially in relation to existing case law." [App'x "A," p. 41]. Nevertheless, it opined that "distinctive similarities" between the alleged PBAs involving non-consensual contact and Complainant's claims rendered the PBA evidence admissible[9]:

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[9] Although the remote nature of PBA evidence is critical in analyzing admissibility, *see, e.g.*, *Shively*, *supra*; *Rush*, *supra*, the Panel's decision is devoid of any discussion of the three-decade lapse between the provision of Quaaludes and Complainant's claims.

> Furthermore, there were multiple prior sexual assaults, not merely one, and all of those prior assaults evidenced the same, *signature pattern of misconduct*. Had there only been a single prior bad act, it would be easier to write off the similarities as coincidental, especially given the passage of time. However, because the pattern here was well-established in this case, both in terms of frequency and similarity, the at-issue time game is relatively inconsequential.

[*Id.* at p. 42 (emphasis added)].

In other words, despite the remote nature of the allegations, because so many PBA witnesses accused Petitioner of sexually assaulting them, such must have happened to Complainant—the very definition of remote propensity evidence.

The Panel's binding decision has opened the door to the admissibility of decades-old allegations (not even convictions) of sexual misconduct and other purportedly related acts in order to establish the propensity of an accused to commit the crime charged. This result cannot stand.

C. The Panel's Decision Overrides the Law and Rewrites Rule 404(b)(2) by Abandoning Any Assessment of the Prejudicial Impact of the Old Allegations of Misconduct.

PBA evidence "is admissible *only if* the probative value of the evidence outweighs its potential for unfair prejudice." Pa.R.E. 404(b)(2)(emphasis added). The Panel's decision effectively abolishes this requirement. In response to Petitioner's arguments about unfair prejudice, the Panel merely concluded that the PBA evidence was admissible because, while the prosecution sought to

admit testimony from nineteen PBA witnesses, the lower court limited that number to five and issued a cautionary instruction. [App'x "A," p. 42]. This is no analysis at all.

Absent from the Panel's decision is any assessment of the highly prejudicial nature of the PBA evidence: "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[,]" thus relieving the prosecution of its burden of proof. *Commonwealth v. Spruill*, 480 Pa. 601, 604-605, 391 A.2d 1048, 1050 (1978); *see also Commonwealth v. Hicks*, 639 Pa. 444, 517, 156 A.3d 1114, 1157 (2017)(Wecht, J., dissenting)("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.").

Given the current political and social climate, one cannot imagine more prejudicial evidence than to present testimony from several women accusing Petitioner of having inappropriate sexual contact with them, contact for which he was never charged, in a case involving allegations of sexual misconduct. Exacerbating the prejudicial nature of this propensity testimony was the fact that some of the PBA witnesses 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. 3586a-3588a]. Clearly, the jury was left to infer that, but for the statute of limitations, Petitioner would have been charged with crimes based on the allegations of these PBA witnesses but, because of a "legal

technicality," he will never be tried and held accountable for his actions. The highly prejudicial nature of this evidence was not even acknowledged by the Panel's decision.

In the wake of the "Me Too" Movement, it is anticipated that courts will be called upon more so than before to assess whether PBA evidence should be presented to the jury—particularly in cases involving alleged sexual assault. Allowing multiple accusers to give evidence regarding alleged PBAs in a criminal trial flips constitutional jurisprudence on its head, and the "presumption of guilt," as opposed to the presumption of innocence, becomes the premise. The Panel's decision underscores that point.

Rule 404(b)(2) was never intended to be the vehicle through which individuals who, for whatever reason, never timely pressed their claims could lodge allegations of decades-old misconduct and testify before a jury in order to have "their day in court." Yet, through the Panel's decision, that is precisely what 404(b)(2) has become. Review is warranted on this issue.

II. THE EFFECT OF A DISTRICT ATTORNEY'S NON-PROSECUTION AGREEMENT ON HIS OR HER OFFICE WARRANTS THIS COURT'S REVIEW AS AN ISSUE OF FIRST IMPRESSION, AS DOES THE EFFECT OF A DEFENDANT'S WAIVER OF CONSTITUTIONAL RIGHTS MADE IN RELIANCE UPON THE DISTRICT ATTORNEY'S WORD.

As members of this Court have observed, the "impact of an agreement between the DA and a defendant remains an open question in Pennsylvania." *Commonwealth v. Roby-Spencer*, 594 Pa. 14, 17,

934 A.2d 693, 695 (2007)(Baer, J., dissenting). This remains true, despite the passing of ten years and the significant import of the issue.

In denying Petitioner relief based on the MCDA's NPA,[10] the Panel looked to the immunity statute, 42 Pa.C.S.A. § 5947, and determined that statutory immunity is the *only* means by which a defendant may obtain lasting peace. [App'x "A," pp. 53-54]. This has never been the law in Pennsylvania. Indeed, multiple decisions across the Commonwealth have recognized both the district attorney's authority to enter an NPA and the importance of granting relief where the defendant acted in reliance on such agreement. *See, e.g.*, *Commonwealth v. Stipetich*, 539 Pa. 428, 431, 652 A.2d 1294, 1296 (1995)(suggesting that district attorney's consent creates a valid NPA (citing *Santobello v. New York*, 404 U.S. 257 (1971)(validity of agreements between prosecutor and defendant)); *Commonwealth v. Ginn*, 587 A.2d 314, 316-317 (Pa.Super. 1991)(where defendant acts upon prosecutor's offer, "the courts of this Commonwealth must seek to hold the Commonwealth to terms of the agreement and dismiss the charges"). In resolving whether the MCDA's agreement bound successors to that office—an issue of first impression—the Panel rejected these general principles in a way that fundamentally alters the independence and authority of district attorneys. That decision should be reviewed by this Court.

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[10] The Panel acknowledged Attorney Schmitt's uncontroverted testimony as to the MCDA's statements (themselves corroborated by the press release), which have been construed as an NPA. [App'x "A," p. 56]. Although the Panel criticized Attorney Schmitt's conclusion regarding the *legal effect* of those statements as lacking credibility, there is no dispute that the statements were made.

A. The Panel's Decision Diminishes the Well-Established Independence and Authority of District Attorneys.

The district attorney is a constitutional officer with ultimate discretion "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*, --- Pa. ---, 192 A.3d 44, 53 (2018)(citing 16 P.S. § 1402); *Commonwealth ex rel. Specter v. Martin*, 426 Pa. 102, 110, 232 A.2d 729, 734 (1967). As this Court has noted, the district attorney "is permitted to exercise sound discretion to refrain from proceeding in a criminal case whenever he, in good faith, thinks that the prosecution would not serve the best interests of the state." *Commonwealth v. Brown*, 550 Pa. 580, 586-587, 708 A.2d 81, 84 (1998); *see Clancy*, --- Pa. ---, 192 A.3d at 53 (district attorney exercises "tremendous" discretion). In sum, district attorneys enjoy wide latitude in enforcing criminal laws, including choosing whom to prosecute and whom to immunize, "without hindrance or interference from any source." *Commonwealth ex rel. Spector v. Bauer*, 437 Pa. 37, 43, 261 A.2d 573, 576 (1970).

Historically, this discretion has empowered district attorneys, like their federal counterparts, to grant immunity either formally, pursuant to statute,[11] or informally, pursuant to an NPA. *See Stipetich*, 539 Pa. at 431, 652 A.2d at 1298 (approving federal cases

[11] *Compare* 42 Pa.C.S.A. § 5947, *with* 18 U.S.C. §§ 6002 & 6003.

recognizing validity of informal immunity granted with district attorney's consent); *United States v. Skalsky*, 857 F.2d 172, 175 (3d Cir. 1988)(acknowledging validity of both formal and informal grants of immunity); 22 C.J.S. *Crim. L.: Substantive Principles* § 107 (2019 update)("immunity pursuant to statute [is] not the only method of acquiring immunity, but courts also recognize informal agreements...the government and a person can enter into a contract providing for whatever scope of immunity they agree to"). Significantly, the matter of immunity is "entirely within the judgment of the Attorney General or District Attorney." *Commonwealth v. Johnson*, 507 Pa. 27, 31, 487 A.2d 1320, 1322 (1985). Although formal immunity requires court approval, the court "has no discretion as to whether immunity should or should not be granted," but instead *shall* grant immunity whenever requested by the district attorney. *Id.*[12] While the district attorney's consent to a NPA has traditionally been all that is required to render the agreement enforceable, this Court has yet to determine whether such agreement binds the district attorney's successor(s). *Stipetich*, 539 Pa. at 431, 652 A.2d at 1298; *see Commonwealth v. Koehler*, 614 Pa. 159, 159, 36 A.3d 121, 137 (2012)(acknowledging validity of district attorney's NPA and questioning legality of his successor's repudiation thereof). That question is of critical importance in this case, as a determination that

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[12] The Panel erred in suggesting that the MCDA's decision here was somehow non-binding because formal immunity, if sought, might not have received court approval. [App'x "A," p. 54, fn. 14]; *see Brown*, 550 Pa. at 586, 708 A.2d at 84 (district attorney's policy-driven decisions are not subject to review).

the MCDA's NPA is binding would require that the conviction be vacated.

The Panel, however, refused to grant relief, and, in doing so, departed from the above principles, determining that the district attorney lacks authority, as a matter of law, to enter a binding NPA. [App'x "A," p. 56].[13] This determination should not go unchecked, as it significantly changes the scope of a district attorney's authority. This Court should grant review to consider the important issue of whether a district attorney has authority to enter an NPA that would bind his or her successor(s).

B. The Panel's Conclusion That Petitioner Unreasonably Relied on the Word of the MCDA Undermines Public Confidence in the Judicial System.

Regardless of whether the MCDA's statements created a binding NPA or merely a revocable promise [App'x "A," p. 50-51], Petitioner forfeited his constitutional right against self-incrimination by giving civil deposition testimony in reliance upon those statements, the impact of which itself warrants this Court's review.[14]

"It is...well established that the Government must adhere strictly to the terms of agreements made with defendants—including

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[13] In doing so, the Panel rejected *Stipetich* as dicta, despite prior rulings from the panelists recognizing that case as controlling. *See, e.g.*, *Commonwealth v. Bryan*, 818 A.2d 537, 539 (Pa.Super. 2003); *Commonwealth v. Zydney*, 2017 WL 1901342, at *2 (Pa.Super. Apr. 27, 2017).

[14] The prejudicial effect of Petitioner's civil deposition testimony is discussed in Part I.A.2 of this Petition and is incorporated by reference herein.

plea, cooperation, and immunity agreements—to the extent the agreements require defendants to sacrifice constitutional rights." *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 183-184 (3d Cir. 2006); *see Ginn*, 587 A.2d at 316 ("there is an affirmative duty on the part of the prosecutor to honor any and all the promises made to a defendant...the integrity of the judicial system demands that the Commonwealth live up to its obligation"). These principles require that the defendant be granted relief, either in the form of specific performance or suppression, even where the prosecution's agreement was unauthorized or was in some way defective. *See Stipetich*, 539 Pa. at 432, 652 A.2d at 1296 (requiring that defendant be placed "in the same position as if [an] unauthorized promise not to prosecute had never been made"). As the United States Supreme Court has explained, estoppel in such circumstances may be required in order to preserve the public's significant interest in "some minimum standard of decency, honor, and reliability in their dealings with their Government." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 59-62 (1984); 22 C.J.S. *Crim. L.: Substantive Principles* § 110 (2019 update)("fairness or equity may require the enforcement of an immunity agreement, even though it is procedurally flawed").

Ignoring the above authorities, the Panel wrongly concluded that: (1) there is no law that would support the application of promissory estoppel in criminal cases, and (2) Petitioner's reliance was unreasonable. [App'x "A," pp. 55-56]. As to the first point: "In no obvious scenario would a party be permitted to enter into a binding written agreement, induce actions in reliance on the agreement, reap the benefits of the agreement, and thereafter renege on the agreement

where there is no change in circumstances." *Roby-Spencer*, 594 Pa. at 17, 934 A.2d at 695 (Baer, J., dissenting). As to the second, the public must be able to trust in the promises of their government, particularly where constitutional rights are at stake. That trust is diminished by the Panel's decision, which puts the onus on criminal defendants to prove, potentially decades later, that it was reasonable to rely on the district attorney's promise—something this Court has never required defendants to do. *See Stipetich*, 539 Pa. 428, 652 A.2d 1294. Review is warranted to address this important issue.

III. REVIEW IS WARRANTED BECAUSE THE PANEL'S BINDING DECISION CONFLICTS WITH PRECEDENT OF THE UNITED STATES SUPREME COURT AND THIS COURT THAT REQUIRED THE TRIAL COURT TO CONDUCT A FULL INQUIRY INTO WHETHER JUROR 11 HAD PREJUDGED THE CASE.

As Justice Black stated in *In re Michael*, 326 U.S. 224, 228 (1945): "[I]t is difficult to conceive of a more effective obstruction to the judicial process than a juror who has prejudged the case." That is because "Due Process means a jury capable and willing to decide the case solely on the evidence before it, and a trial court ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrence when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *see Commonwealth v. Horton*, 485 Pa. 115, 401 A.2d 320 (1979)(holding that it was error not to examine all jurors regarding defendant's inadvertent guilty plea even though there was no proof that, apart from one excused juror, any jurors heard defendant's "guilty plea").

Naturally, the trial court's duty to ensure that each and every juror is fair and impartial is heightened where, as here, pre-trial publicity has greatly increased the odds that a potential juror has preconceived views of the accused's guilt. *See Waldorf v. Shuta*, 3 F.3d 705, 710 (3d Cir. 1993)(in a case of substantial pretrial publicity, jurors' subjective assessments of their own impartiality may not adequately screen for the possibility of prejudice).

Here, nearly every prospective juror expressed familiarity with the case and more than half confessed their prejudgment of Petitioner's guilt. [R. 1829a-1833a; 2110a-2113a; 2370a-2375a]. The risk of empaneling a jury that included one or more impartial jurors was substantial, and the trial court had a heightened obligation to protect Petitioner's constitutional guarantee of a fair trial and an impartial jury. The trial court abdicated that responsibility by refusing to conduct a scrupulous inquiry into whether seated Juror 11 had openly expressed his belief that Petitioner was guilty prior to hearing any evidence in the case. The Panel's affirmance of the trial court's superficial inquiry into this most serious allegation conflicts with *Smith* and *Horton*.

Although Juror 11 stated during *voir dire* that he had not formed an opinion as to Petitioner's guilt, Prospective Juror 9 subsequently disclosed that while waiting in a small jury room, approximately 10 feet by 15 feet, with ten other prospective jurors, she heard Juror 11 state: "I'm just ready to say he's guilty, so we can all just get out of here." [R. 2609a]. Upon receiving Petitioner's motion, the trial court initially and appropriately recognized that the inquiry would require questioning *all* ten potential jurors who may

have heard the statement. [R. 2688a-2691a]. However, the trial court subsequently abandoned that position, instead conducting a limited inquiry of only the three other seated-but-unsworn jurors, who denied *hearing* any discussion about Petitioner's guilt or innocence.[15] [R. 2625a, 2630a, 2637a; 2681a-2684a]. Even after Juror 11 equivocated when questioned about whether he uttered the statements,[16] claiming that he "didn't recall" and "didn't think he would have" made the statement [R. 2617a-2618a], the trial court refused to question all the prospective jurors who were in the room when the statement was heard by Prospective Juror 9, and instead empaneled Juror 11 despite the availability of alternate jurors.[17] [2677a-2679a].

The trial court's refusal to conduct a thorough evidentiary hearing when it was tasked with making a credibility determination about the truthfulness of Prospective Juror 9's allegation infringed

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[15] The trial court's opinion re-characterizes these three juror-witnesses' testimony as stating conclusively that the statement had not been made. [App'x "B," p. 87-88].

[16] Juror 11 ultimately denied making the statement [R. 2618]; however, the inconsistencies in his testimony and the inability of the three juror-witnesses to conclusively establish whether the statement had been made should have prompted the trial court to conduct further inquiry, as it initially set out to do.

[17] In its 1925(a) Opinion, the trial court wrote that he found Prospective Juror 9 not credible based on her "history with the District Attorney's office." [App'x "B," p. 88]. While hearing Petitioner's challenge to Juror 11, however, the trial court expressly stated that he was "not going to get into that [history]" [R. 2658a-2659a], and Petitioner was never permitted the opportunity to explore or challenge the "history" that contributed to the trial court's credibility determination.

upon Petitioner's constitutional guarantees under the Sixth and Fourteenth Amendments to the United States Constitution and Pa. Const. art. I, §9. *See Commonwealth v. Stewart*, 449 Pa. 50, 52, 295 A.2d 303, 304 (1972)(stressing the "potentialities" of harm for the sake of absolute fairness even when there was no proof that other jurors heard potentially prejudicial statements (citing *Turner v. Louisiana*, 379 U.S. 466 (1965))). Consistent with *Smith*, the trial court had a duty to conduct a full inquiry into: (1) whether Juror 11 had uttered the statements attributed to him by Prospective Juror 9; *and* (2) what effect those prejudicial statements may have had on other potential jurors. By failing to question all prospective jurors in the room and by denying the parties an opportunity to explore *both* Prospective Juror 9's and Juror 11's bias and motives, the process *itself* was unfair and did not effectively ensure Juror's 11's impartiality or that other jurors were untainted by any prejudicial statements. As this Court observed in *Horton*, we are dealing with "potentialities" of harm: "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 juror be questioned regarding the incident." *Horton*, 485 Pa. at 121, 401 A.2d at 323.

In *Irwin v. Dowd*, 366 U.S. 717, 722 (1961), the United States Supreme Court observed, "the right to jury trial guarantees to the criminal accused a fair trial by a panel of impartial and 'indifferent' jurors. ... This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies...a juror who has formed an opinion cannot be impartial."

(internal citations omitted). Here, the Panel simply could not confirm that Petitioner was tried by a panel of "indifferent" jurors where the trial court refused to conduct the constitutionally necessary inquiry for determining whether, in fact, Juror 11 had expressed any prejudgment of Petitioner's guilt. The Panel's affirmance of the trial court's constitutionally unsound procedure is inconsistent with *Smith* and *Horton*; review of this issue by this Court is warranted.

IV. REVIEW IS WARRANTED BECAUSE ONLY THIS COURT CAN RESOLVE THE IMPORTANT QUESTION OF SORNA II'S CONSTITUTIONALITY.

SORNA II, 42 Pa.C.S.A. § 9799.51 (Subchapter I), enacted as an effort to cure the constitutional defects in SORNA I, is, itself, unconstitutional. The facial constitutionality of SORNA II is currently before this Court in *Commonwealth v. Lacombe*, 35 MAP 2018 (Pa. 2018) and *Commonwealth v. Witmayer*, 64 MAP 2018 (Pa. 2018). Should this Court strike down SORNA II in either of those cases, Petitioner is entitled to the benefit of such a decision.

Further, if for any reason this Court does not reach the constitutionality of the relevant SORNA II provisions in *Lacombe* or *Witmayer*, it should do so in this case, as the constitutionality of that statute is of immediate concern to numerous cases and parties across the Commonwealth.

Finally, in the event that SORNA II is deemed facially constitutional, the Court should exercise review here to determine whether the statute may yet be unconstitutional as applied to Petitioner. SORNA II was enacted fourteen years after the acts

complained of, two-and-a-half years after Petitioner was charged, and nearly two months after Petitioner was convicted. Petitioner therefore had no notice of the penalties provided for by SORNA II, and that sentencing statute was unconstitutionally applied to Petitioner, as set forth in his Rule 1925(b) statement and his brief on appeal. [App'x "C," p. 44].

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court grant allowance of appeal of the Questions Presented for Review.

DATED: January 9, 2020 Respectfully submitted,

By: _____

Brian W. Perry, Esquire
ID# 75647
Barbara A. Zemlock, Esquire
ID# 58891
Perry Shore Weisenberger & Zemlock
Attorneys for the Petitioner
2411 North Front Street
Harrisburg, PA 17110
(717) 232-9900

Sarah Kelly-Kilgore, Esquire
Pro Hac Vice Motion to Be Filed
Matthew S. Ingles, Esquire
Pro Hac Vice Motion to Be Filed
Greenberg Gross LLP
601 South Figueroa Street
30th Floor
Los Angeles, CA 90017
(213) 334-7000

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I certify, pursuant to Pa.R.A.P., 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 that non-confidential information and documents.

Brian W. Perry, Esquire
Barbara A. Zemlock, Esquire

Sarah Kelly-Kilgore, Esquire
(*Pro Hac Vice* Motion to Be Filed)
Matthew S. Ingles, Esquire
(*Pro Hac Vice* Motion to Be Filed)

CERTIFICATE OF WORD COUNT

This 9th day of January, 2020, I certified that this petition contains 8,977 words, as counted by the undersigned's Microsoft Word processing software, and therefore complies with the applicable word count limit.

Brian W. Perry, Esquire
Barbara A. Zemlock, Esquire

Sarah Kelly-Kilgore, Esquire
(*Pro Hac Vice* Motion to Be Filed)
Matthew S. Ingles, Esquire
(*Pro Hac Vice* Motion to Be Filed)

APPENDICES

APPENDIX A

2019 PA Super 354

COMMONWEALTH OF PENNSYLVANIA, Appellee v. WILLIAM HENRY COSBY, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3314 EDA 2018

Appeal from the Judgment of Sentence Entered September 25, 2018
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-3932-2016

BEFORE: BENDER, P.J.E., GANTMAN, P.J.E., and NICHOLS, J.

OPINION BY BENDER, P.J.E.: **FILED DECEMBER 10, 2019**

Appellant, William Henry Cosby, Jr., appeals from the judgment of sentence of 3-10 years' incarceration, imposed following his conviction for three counts of aggravated indecent assault, pursuant to 18 Pa.C.S. § 3125(a)(1), (4), and (5). After careful review, we affirm.

The trial court summarized the facts adduced at trial as follows:

> In January 2004[,][1][] [Appellant] sexually assaulted [the] then thirty[-]year[-]old [Victim] at his home in Elkins Park, Cheltenham, Montgomery County. On the evening of the assault, [Victim] was invited to the then sixty-six[-]year[-]old [Appellant]'s home to discuss her upcoming career change. She had 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. When she arrived at the home, she entered through the kitchen door, as she had on prior visits. She and [Appellant] sat at the kitchen table and began talking. There was a glass of water and a glass of wine on the table when she arrived. Initially, she drank only the water because she had not eaten a lot and did not want

to drink on an empty stomach. Eventually, [Appellant] convinced her to taste the wine. They discussed the stress she was feeling at the prospect of telling [the basketball coach] that she was leaving Temple. [Victim] left the table to use the restroom. When she returned, [Appellant] was standing by the table, having gone upstairs himself while she was in the bathroom. He reached out his hand and offered her three blue pills. He told her, "These are your friends. They'll help take the edge off." She asked him if she should put the pills under her tongue. He told her to put them down with water, and she did.

[1] In each of her statements to police, and in prior testimony, [Victim] indicated that the assault took place in 2004. She indicated to police that the assault happened prior to her cousin['s] visiting from Canada; border crossing records indicate that he entered the United States on January 22, 2004. There was no evidence to indicate that the assault happened prior to December 30, 2003.

After she took the pills, [Victim] and [Appellant] sat back down at the kitchen table and continued their conversation. She began to have double vision and told [Appellant] that she could see two of him. Her mouth became cottony and she began to slur her words. [Appellant] told her that he thought she needed to relax. [Victim] did not know what was happening to her, but felt that something was wrong. They stood up from the table and [Appellant] took her arm to help steady her. Her legs felt rubbery as he walked her through the dining room to a sofa in another room. He placed her on the sofa on her left side and told her to relax there. She began to panic and did not know what was happening to her body. She felt weak and was unable to speak. She was unable to maintain consciousness. She was jolted awake by [Appellant] forcefully penetrating her vagina with his fingers. [Appellant] had positioned himself behind her on the couch, penetrated her vagina with his fingers, and fondled her breasts. He took her hand[,] placed it on his penis[,] and masturbated himself with her hand. [Victim] was unable to tell him to stop or to physically stop the assault.

She awoke sometime between four and five a.m. to find her pants unzipped and her bra up around her neck. She fixed her clothing and began to head towards the front door. As she walked towards the door, she saw [Appellant] standing in the doorway between the kitchen and the dining room. He was wearing a robe and slippers and told her there was a muffin and tea for her on

the table. She sipped the tea[,] took a piece of the muffin with her[,] and drove herself home.

At the time of assault, [Victim] had known [Appellant] since the fall of 2002 when she met him in her capacity as the Director of Basketball Operations. She was introduced to [Appellant] by Joan Ballast at a basketball game at the Liacouras Center. [Victim] accompanied Ms. Ballast and several others [who were] giving [Appellant] a tour of the newly renovated facilities. Several days after the initial introduction, [Appellant] called Temple with some questions about the renovations and spoke to [Victim] on the phone. Several weeks later, she again spoke to him on the phone at her office. They discussed having met at the game at Temple. They began having more regular conversations, mostly pertaining to Temple sports. The conversations also included personal information about [Victim]'s history as a professional basketball player, her educational background and her career goals.

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

Subsequently, [Appellant] 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. She did not see [Appellant] in person on that trip.

Sometime later, she was again invited to dine at [Appellant]'s home alone. The chef called her about the meal and again she ate in the same room as she had on the first occasion. For a second time, when she was finished [with] her meal, [Appellant] sat beside her on the couch. The conversation again revolved around things [Victim] could do to ... break into sports broadcasting. On this occasion, [Appellant] reached over and attempted to unbutton and to unzip her pants. She leaned forward to prevent him from undoing her pants. He stopped. She believed that she had made it clear she was not interested in any

of that. She did not feel threatened by him and did not expect him to make a romantic or sexual advance towards her again.

[Victim] continued to have contact with [Appellant], primarily by phone and related to Temple sports. [Appellant] also had contact with [Victim]'s family. [Victim]'s mother ... and ... sister ... attended one of [Appellant]'s performances in Ontario, and afterward, met him backstage.

In late 2003, [Appellant] invited [Victim] to meet him at the Foxwoods Casino in Connecticut. He put her in touch with Tom Cantone, who worked at the casino. When she arrived at the casino, she had dinner with [Appellant] and Mr. Cantone. After dinner, Mr. Cantone escorted [Victim] to her room. 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. [Appellant] called her and asked her to come back upstairs to his room for some baked goods. When she arrived at the room, he invited her in and continued to unpack his luggage cart. She believed that the baked goods were on the cart. During this time, they discussed their usual topics of conversation, Temple and sports broadcasting. [Victim] was seated on the edge of the bed. [Appellant] laid down on the bed. He fell asleep. [Victim] remained in the room for several minutes, and then she went back to her own room.

[Victim] testified that during this time, she came to view [Appellant] as a mentor and a friend.[2] He was well respected at Temple as a trustee and alumni, and [Victim] was grateful for the help that he tried to give her in her career. 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 [Appellant].

[2] In his statement to police, [Appellant] agreed and indicated that [Victim] saw him as a mentor and that he encouraged that relationship as a mentor.

Following the assault, between January[] 2004 and March[] 2004, [Victim] and [Appellant] continued to have telephone contact, solely regarding Temple sports. In March 2004[, Appellant] invited [Victim] to a dinner at a restaurant in Philadelphia. [Victim] attended the dinner, hoping to speak to [Appellant] about the assault. After the dinner, [Appellant] invited her to his home to talk. Once at the home, she attempted to confront him to find out what he gave her and why he assaulted

her. She testified that he was evasive and told her that he thought she had an orgasm. Unable to get an answer, she lost her courage and left the home.

At the end of March 2004, [Victim] moved back to Canada. [Victim]'s mother ... testified that when her daughter returned home, she seemed to be depressed and was not herself. She would hear her daughter screaming in her sleep, but [Victim] denied that anything was wrong.

After returning to Canada, [Victim] had some phone contact with [Appellant] related to his performance in the Toronto area. [Appellant] invited [Victim] and her family to attend that show. Her parents were excited to attend the show, and her mother had previously spoken with [Appellant] on the phone and attended two of his shows prior to the assault. [Victim's] mother brought [Appellant] a gift to the show.

In January 2005, [Victim] disclosed the assault to her mother. She woke up crying and called her mother. [Victim's mother] was on her way to work and called [Victim] back once she arrived at work. They decided to contact the Durham Regional Police in Ontario, Canada[,] when [Victim's mother] returned home from work. Unsure of how the American criminal justice system worked, and afraid that [Appellant] could retaliate against her or her family, [Victim] attempted to reach two attorneys in the Philadelphia area during the day.

Ultimately, that evening, [Victim] and her mother contacted the Durham Regional Police and filed a police report. Following the report, [Victim's mother] asked for [Appellant]'s phone number and called him. [Appellant] returned [Victim's mother]'s call the next day. During this call, both [Victim] and her mother spoke to [Appellant] on separate phone extensions. [Victim] confronted him about what happened and the three blue pills that he gave her. [Appellant] apologized, but would not tell her what he had given her. He indicated that he would have to check the prescription bottle and that he would write the name down and send it to them. [Victim] hung up the phone and her mother continued to speak to [Appellant]. He told [Victim's mother] that there was no penile penetration. [Victim] did not tell [Appellant] that she had filed a police report.

After this initial phone conversation with [Appellant], [Victim's mother] purchased a tape recorder and called him again. In the call, [Appellant] indicated that he wanted to talk about a "mutual

feeling or friendship," and "to see if [Victim] is still interested in sports [broad]casting or something in T.V." [Appellant] also discussed paying for [Victim] to continue her education. He continued to refuse to give [Victim's mother] the name of the medication he had given [Victim]. Additionally, he invited her and [Victim] 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.

Subsequently, [Victim] received a phone message from Peter Weiderlight, one of [Appellant]'s representatives. Mr. Weiderlight indicated in his message that he was calling on behalf of [Appellant] to offer [Victim] a trip to see [Appellant]'s upcoming performance in Florida.

When [Victim] returned Mr. Weiderlight's call, she recorded the conversation. During this conversation, Mr. Weiderlight discussed [Appellant]'s offer for [Victim] and her mother to attend a performance ... in Miami and sought to obtain her information so that he could book flights and make reservations. [Victim] did not give him that information or call him back to provide the same. [Victim] also received a message from [Appellant]'s attorney, Marty Singer, Esq., wherein he indicated that [Appellant] wished to set up an educational trust for [Victim]. [Victim] did not return Mr. Singer's call. Both of these calls were received within days of [Victim]'s report to police.

The Durham Regional Police referred the report to the Philadelphia Police, who ultimately referred it to the Cheltenham Police Department in Montgomery County, Pennsylvania. Sergeant Richard Schaeffer, of the Cheltenham Township Police Department, was assigned to the case in 2005. Cheltenham police investigated jointly with the Montgomery County Detective Bureau. On January 19, 2005, Sgt. Schaeffer spoke to [Victim] by phone to obtain a brief description of her allegations. He testified that [Victim] was nervous and anxious during this call. She then drove from Canada to meet with law enforcement in person in Montgomery County. She testified that in each of her meetings with law enforcement she was very nervous. She had never had any previous contact with law enforcement, and discussing the nature of the assault made her uncomfortable. She testified that she cooperated with the police and signed releases for her mental health, banking and phone records.

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 [Victim]'s January 13, 2005[] report to authorities in Canada. As part of the investigation, law enforcement, including Sgt. Schaeffer, took a written[] question and answer statement from [Appellant] in New York City on January 26, 2005. [Appellant] was accompanied by counsel, both his criminal defense attorney Walter M. Phillips[, Esq.,][3][] and his longtime general counsel John P. Schmitt, Esq., when he provided his statement to police.

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

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

He stated that after he gave her the pills, they began to touch and kiss on the couch with clothes on. He stated that she never told him to stop and that he touched her bare breasts and genitalia. He stated that he did not remove his clothing and [Victim] did not touch him under his clothes. He told police, "I never intended to have sexual intercourse, like naked bodies with [Victim]. 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."

He stated that there were at least three other occasions where they engaged in similar petting in his home. When asked if they had ever had intercourse, he stated, "[n]ever asleep or awake." He stated that on each occasion, he initiated the petting. 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.

He stated that, just prior to the date of his statement, he spoke to [Victim's mother] on the phone and she asked him what he had given her daughter. He told her that he gave [Victim] some pills and that he would send her the name of them. He further stated that [he] told [Victim's mother] there was no penile penetration, just petting and touching of private parts. He also stated that he did not recall using the word 'consensual' when describing the encounter to [Victim's mother]. He also answered "no," when asked if he ever knew [Victim] to be untruthful. Following that interview, [Appellant], unprompted, provided law enforcement with pills that were later identified as Benadryl.

On February 17, 2005, law enforcement had a strategy meeting where they created a plan for the next steps in the investigation. 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 [Appellant]. The press release cautioned that the decision could be reconsidered. Mr. Castor never personally met with [Victim].

[Victim]'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. The reporter informed her that Mr. Castor had issued a press release in which he declined prosecution. Ms. Troiani had not received any prior notification of the decision not to prosecute.

At a pretrial hearing held on February 2 and 3, 2016, Mr. Castor testified that it was his intention in 2005 to strip [Appellant] 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, [Appellant]'s criminal attorney, agreed with his legal assessment. Mr. Castor also testified that he relayed this intention to then First Assistant District Attorney Risa V. Ferman.[4]

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

Disappointed with the declination of the charges, [Victim] sought justice civilly. On March 8, 2005, she filed a civil suit against [Appellant] in federal court. As part of the lawsuit, both parties were deposed. On four dates, September 28 and 29, 2005[,] and March 28 and 29, 2006, [Appellant] sat for depositions in the civil matter. He was accompanied by counsel, including Mr. Schmitt. Mr. Schmitt testified that Mr. Phillips had informed him of Mr. Castor's promise not to prosecute.

[Appellant] did not invoke the Fifth Amendment during the depositions; however, counsel did advise him not to answer questions pertaining to [Victim] and her attorneys filed motions to compel his testimony. [Appellant] did not invoke the Fifth Amendment when asked about other alleged victims. At no time during the civil litigation did any of the attorneys for [Appellant] indicate on the record that [Appellant] could not be prosecuted. 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.

In his depositions, [Appellant] testified that he met [Victim] at the Liacouras Center and developed a romantic interest in her right away. He did not tell her of his interest. 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 [Victim]. 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." After their first meeting, they spoke on the phone on more than one occasion. He testified that every time [Victim] came to his Elkins Park home it was at his invitation; she did not initiate any of the visits.

He testified that there were three instances of consensual sexual contact with [Victim], including the night he gave her the pills. [During] 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. He also testified about the pills he gave law enforcement at the January 26, 2005 interview. Additionally, he testified that he believed the incident during which he gave [Victim] 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 [Victim]."

He testified that he and [Victim] had discussed herbal medicines and that he gave [Victim] pills on one occasion, that he identified to police as Benadryl[]. He testified about his knowledge of the types of Benadryl and their effects. He indicated that he would take two pills to help him go to sleep.

[Appellant] testified that on the night of the assault, [Victim] accepted his invitation to come to his home. They sat at a table in the kitchen and talked about [Victim]'s position at Temple as

well as her trouble concentrating, tension and relaxation. By his own admission, he gave [Victim] one and one[-]half Benadryl and told her to take it, indicating, "I have three friends to make you relax." He did not tell her the pills were Benadryl. He testified that he gave her the three half pills because he takes two and she was about his height. He testified that she looked at the pills, but did not ask him what they were.

[Appellant] 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. He testified that [Victim] went to the bathroom and returned to the living room where he asked her to sit down on the sofa. 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. 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 ... 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.

He testified that after the encounter he told her to try to go to sleep and then he went upstairs. He set an alarm and returned downstairs about two hours later when it was still dark out. [Victim] 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.

During his depositions, [Appellant] also discussed his phone calls with [Victim's mother]. He testified that he told [Victim] and her mother that he would write the name of the pills he gave

[Victim] on a piece of paper and send it to her. 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.

He testified that after his first, unrecorded phone call with [Victim], he had "Peter" from William Morris contact [Victim] to see if she would be willing to meet him in Miami. He also testified that he apologized to [Victim's mother] "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." He later offered to pay for [Victim] to attend graduate school. [Appellant] contacted his attorney Marty Singer and asked him to contact [Victim] regarding an educational trust.

He also testified that he did not believe that [Victim] was after money. When asked if he believed it was in his best interest that the public believe [Victim] consented, he replied "yes." He believed there would be financial consequences if the public believed that he drugged [Victim] and gave her something other than Benadryl.

In his deposition testimony, [Appellant] also testified about his use of Quaaludes with women with whom he wanted to have sex.

On November 8, 2006, the civil case settled and [Victim] entered into a confidential settlement agreement with [Appellant], Marty Singer and American Media.[5] [Appellant] agreed to pay [Victim] $3.38 million[,] and American Media agreed to pay her $20,000. As part of the settlement agreement, [Victim] agreed that she would not initiate a criminal complaint arising from the instant assault.

> [5] American Media was a party to the lawsuit as a result of [Appellant's] giving an interview about [Victim]'s allegations to the National Enquirer.

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.

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 [Appellant], who was represented by Mr. McMonagle and Mr. O'Connor. 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]

[6] This email was marked and admitted as Defendant's Exhibit 5 at the February 2016 *Habeas Corpus* hearing held in this matter.

In this September 23, 2015 email, Mr. Castor indicated "[a]gain with the agreement of the defense lawyer and [Victim]'s [lawyers,] I intentionally and specifically bound the Commonwealth that there would be no state prosecution of [Appellant] 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." The correspondence further stated,

> I signed the press release for precisely this reason, at the request of [Victim]'s counsel, and with the acquiescence of [Appellant]'s counsel, with full and complete intent to bind the Commonwealth that anything [Appellant] 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 [Victim]'s lawyers were all in agreement that the attached decision [February 17, 2005 press release] from me stripped [Appellant] of his Fifth Amendment privilege, forcing him to be deposed.[]

However, in his testimony at the hearing on [Appellant]'s Petition for *Habeas Corpus*, Mr. Castor indicated that there was no agreement and no *quid pro quo*. On September 23, 2015, at 1:47 pm, Mr. Castor forwarded this email identified above as Defendant's *Habeas* Exhibit 5 to Mr. McMonagle.

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." 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 [Appellant] said, or anything derived from what [Appellant] said, I believed then and continue to believe that a prosecution is not precluded."

[7] This letter was marked and admitted as 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.

[8] This email was marked and admitted as Defendant's Exhibit 7 at the February 2016 *Habeas Corpus* hearing in this matter.

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. 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." In his final email to Ms. Ferman on the subject, Mr. Castor stated, "I never said we would not prosecute [Appellant]."

In 2015, prosecutors and [d]etectives from Montgomery County visited [Victim] in Canada and asked her if she would cooperate in the instant case. As a part of the reopened investigation in 2015, the Commonwealth interviewed numerous women who claimed that [Appellant] had sexually assaulted them. The Commonwealth proffered nineteen women for this [c]ourt'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 [I]mages. JF Images was owned by Jo Farrell.[9] In April of 1984, her agent told her that a prominent figure in the entertainment world was interested in mentoring young talent. She learned that [Appellant] was going to call her to arrange for one-on-one acting sessions. [Appellant] called Ms. Thomas at her home and spoke to both of her parents. Ms. Thomas' agency paid

for her to travel to Reno, Nevada[,] to meet with [Appellant] and booked her a room at Harrah's. Her family took a photo of her with her father and boyfriend when she was leaving for the airport; she testified that she dressed professionally because she wanted [Appellant] to know she took this opportunity very seriously. Ms. Thomas purchased a postcard of Harrah's when she arrived in Reno to commemorate her trip and kept several other mementos. When she arrived in Reno, Ms. Thomas was met by a driver. She eventually realized that they were driving out of Reno. 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.

[9] In his deposition testimony, [Appellant] testified that Jo Farrell would send her clients to see him perform in Denver, C[olorado].

She rang the doorbell and [Appellant] answered the door. The driver showed her to her room. [Appellant] instructed her to change into something more comfortable and to come back out with her prepared monologue. She returned to a kitchen area and performed her monologue for [Appellant]. Unimpressed with her monologue, [Appellant] suggested that she try a cold read. In the script he gave her, her character was supposed to be intoxicated. She performed the scene. Again, unimpressed, [Appellant] questioned whether she had ever been drunk. She told him that she did not really drink, but that she had seen her share of drunk people in college. He asked her what she would drink if she were to have a drink and she indicated perhaps a glass of white wine. He got up and returned with a glass of white wine. He told her it was a prop and to sip on it to see if she could get more into character. She took a sip and then remembers only "snap shots" of what happened next. She remember[ed] [Appellant's] asking her if she was relaxing into the part. She remember[ed] waking up in a bed, fully clothed with [Appellant] forcing his penis into her mouth. In her next memory, she awoke with her head at the foot of the bed, and hear[d] [Appellant] say[,] "your friend is going to come again." Her next memory [wa]s slamming the door and then apologizing to [Appellant].

She awoke, presumably the next morning, feeling unwell. She decided to get some fresh air. She went to the kitchen, where she saw someone other than the driver for the first time. The woman in the kitchen offered her breakfast, but she declined. She went outside with her camera that she always carried with her, and took pictures of the estate. She took a number of photos of both the

interior and exterior of the house where she was staying. She also remembers going to a show and being introduced to the Temptations and being in [Appellant]'s dressing room. She testified that it did not occur to her to report the assault to her agent, and that she felt she must have given [Appellant] some signal to think it was okay to do that to her.

Two months later, in June 1984, [Ms.] Thomas called [Appellant], 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. She made arrangements to see him in St. Louis, using her own money. When she arrived in St. Louis, she purchased a postcard. On this trip, she photographed her hotel room and the driver who picked her up. Ms. Thomas attended the show, but was not allowed backstage. After [Appellant]'s performance, she accompanied him and others to a dinner. There were a number of people at the dinner and Ms. Thomas was unable to confront [Appellant] about what happened in Reno. 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 [Appellant]. She had no further contact with [Appellant]. At some time later, she told both a psychologist and her husband what happened.

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 [Appellant]. At that time, Ms. Lasha lived with her grandparents[.] [Appellant] called her home and spoke to her and to her grandmother. [Appellant] 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. The first time she met [Appellant] in person, he came to her grandparents' home for a meal. They remained in phone contact and she sent headshots to his agency in New York.

After she graduated from high school that same year, she worked at the Las Vegas Hilton. [Appellant] returned to Las Vegas and invited Ms. Lasha to meet him at the Las Vegas Hilton. When she arrived at the hotel, she called [Appellant] and a bellman took her to the Elvis [Presley] Suite. 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. Ms. Lasha testified that she had a cold on the day of the meeting. [Appellant]

directed her to wet her hair to see what it looked like, and someone took some photographs of her. The photographer left. A second person came into the suite, who [Appellant] said was a therapist related to stress and relaxation; this person also left the suit[e].

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

When she stood up[,] she could barely move and [Appellant] guided her to the back bedroom. He laid her on the bed, at which point she could no longer move. He laid down next to her and began pinching her breasts and rubbing his genitals on her leg. She felt something warm on her leg. Her next memory is [Appellant] clapping to wake her up. When she awoke, she had a Hilton robe and her shorts on, but her top had been removed. Her top was folded neatly on a table with money on top. [Appellant] told her to hurry up and get dressed and to use the money to buy something nice for herself and her grandmother. During her incapacitation, she was aware of what was happening but was powerless to stop it. When she left the hotel, she drove to her guidance counselor's house and told her what happened. She also told her sister.

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

Janice Baker-Kinney testified that she lived in Reno, Nevada[,] and worked at Harrah's Casino from 1981-1983. In 1982, Ms. Baker-Kinney was a twenty-four[-]year[-]old bartender at Harrah's. During the course of her employment, she met several celebrities who performed in one of Harrah's two showrooms. Performers could stay either in the hotel, or in a home owned by

Mr. Harrah, just outside of town. Ms. Baker[-]Kinney attended a party at that home hosted by Wayne Newton.

On one particular evening, one of the cocktail waitresses invited her to go to a pizza party being hosted by [Appellant]. [Appellant] was staying at Mr. Harrah's home outside of town. Ms. Baker-Kinney agreed to attend the party and met her friend at the front door of the home. [Appellant] answered the door. Ms. Baker-Kinney was surprised to find that there was no one else in the home for a party. She began to think that her friend was romantically interested in [Appellant] and asked her to come along so she would not be alone. She decided to stay for a little while and have a slice of pizza and a beer.

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

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

Her next memory is of [Appellant] helping her into a bed and then being awoken the next day by the phone ringing. She heard [Appellant] speaking on the phone and realized that they were in bed together and both naked. When [Appellant] 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. She had a sticky wetness between her legs that she knew indicated they had sex at some point, which she could not remember.

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. [Appellant] walked her to the front door and told her that it was just between them and that she should not tell anyone. She made a joke that she would not alert the media and left, feeling mortified.

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

Mary Chokran testified that in 1982, Ms. Baker-Kinney called her and was very distraught. Ms. Baker[-]Kinney told Ms. Chokran that she had taken what she thought was a Quaalude and that [Appellant] had given it to her. 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.

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

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

When she arrived at the airport in Reno, Nevada, she was met by Stu Gardner, [Appellant]'s musical director. He took Ms. Dickinson to the hotel where she checked in to her room and put on the clothes ... provided for her by the hotel boutique. She arranged to meet [Mr.] Gardner on a sound stage to go over her vocal range. [Appellant] arrived in the room. She attended [Appellant]'s performance and had dinner afterwards with [Appellant] and [Mr.] Gardner.

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

Ms. Dickinson traveled with a camera and took photographs of [Appellant], including one of him making a phone call, inside of his hotel room. She testified that after taking the photos, she felt very lightheaded and like she could not get her words to come out. When [Appellant] finished his phone call, he got on top of her and his robe opened. Before she passed out, she felt vaginal pain as he penetrated her vagina. She awoke the next morning in her room with semen between her legs and she felt anal pain.

Later that day, she saw [Appellant] and they went to Bill Harrah's house. At the house, she confronted [Appellant] and asked him to explain what happened the previous evening. He did not answer her. She left Lake Tahoe the next day on a flight to Los Angeles with [Appellant] and Mr. Gardner. From Los Angeles, she returned to Bali to complete her photo shoot. Ms. Dickinson did not report the assault; she was having commercial success as a model and feared that it would impact her career.

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. Judith Regan testified that she was the publisher of Ms. Dickinson's 2002 memoir. She testified that Ms. Dickinson told her that [Appellant] had raped her and that she wanted to include that in her book. Ms. Regan told Ms. Dickinson that the legal department would not allow her to include the story without corroboration. Ms. Dickinson was angry and upset when she learned she could not include her account in the book.

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. That conversation was never broadcast. She testified that she also disclosed [it] to a hairdresser and makeup artist.

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. She met [Appellant] in 1989,

when she was twenty-three years old. Her modeling agency told her that [Appellant] wanted to meet her. 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.

She had subsequent contact with [Appellant]. [Appellant] also developed a relationship with her family. On one occasion, she and her mother went to the [University of Nevada, Las Vegas] track with [Appellant] where he introduced her to people as his daughter. She and her sister spent time with [Appellant] on more than one occasion. 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. She felt that [Appellant] was a father figure or mentor. Eventually, that relationship changed.

[Appellant] called her and invited her to the Hilton in Las Vegas. 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. 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. She told him that she did not drink alcohol. He insisted that it would help her work on improvisation and help the lines flow. She trusted his advice and took the drink. He went back to the bar and prepared her a second drink, which she accepted.

Within a few minutes, she started to feel dizzy and woozy and her hearing became muffled. [Appellant] asked her to come sit with him. He was seated on the couch; Ms. Lise-Lotte Lublin was standing. He asked her to come sit between his knees. She sat down; he began stroking her hair. [Appellant] was speaking to her, but the sound was muffled. She felt very relaxed and also confused about what this had to do with learning improvisation. She testified that she remembers walking towards a hallway and being surprised at how many rooms were in the suite. She has no further memory of the night. When she woke up, she was at home. She thought she had a bad reaction to the alcohol and told her family about the meeting. 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. She continued to have contact with [Appellant].

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

Trial Court Opinion (TCO), 5/14/19, at 1-33 (citations to the record omitted).

It is unnecessary to recount fully the tortured procedural history of this case, but for the following summary of the pertinent procedural events. On December 30, 2015, the Commonwealth charged Appellant by criminal complaint with three counts of aggravated indecent assault, 18 Pa.C.S. § 3125(a)(1), (4), and (5), for the incident involving Victim that occurred in Appellant's home in January of 2004.[1] Appellant filed a Petition for Writ of *Habeas Corpus* ("*Habeas* Motion I") on January 11, 2016, arguing for, *inter alia*, the dismissal of the charges based on Former District Attorney Castor's alleged promise not to prosecute Appellant.[2] ***See*** Reproduced Record ("RR") at 389a.[3] The trial court heard testimony and argument at a hearing held on

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[1] The Commonwealth later filed a criminal information setting forth the same charges on July 13, 2016.

[2] Appellant has not raised the other issues preserved in *Habeas* Motion I in the instant appeal.

[3] Due to the massive size of the certified record in this case, we will primarily cite to the reproduced record for ease of disposition. We note that the Commonwealth has not issued any objections to the contents of the reproduced record.

February 2 and 3, 2016. ***Id.*** at 412a-1047a. On February 4, 2016, the trial court denied *Habeas* Motion I.[4] ***Id.*** at 1048a.

Following a preliminary hearing held on May 24, 2016, the magistrate held the aforementioned charges over for trial. Subsequently, Appellant and the Commonwealth filed numerous pretrial motions.[5] On August 12, 2016, Appellant filed a motion to suppress the contents of his civil deposition testimony. ***Id.*** at 6271a-6290a. On September 6, 2016, the Commonwealth filed a motion to introduce evidence of Appellant's prior bad acts ("First PBA Motion"). Both matters were addressed at hearings held on November 1 and 2, 2016. ***Id.*** at 1049a-1191a. Appellant's suppression motion was denied on December 5, 2016. ***Id.*** at 1197a. The trial court granted in part and denied in part the First PBA Motion on February 24, 2017. ***Id.*** at 1198a (granting the motion with respect to a single prior-bad-acts witness, but denying the motion with respect to twelve other proffered witnesses).

Appellant's first jury trial began on June 5, 2017, and concluded on June 17, 2017, when the jury deadlocked on all three counts, leading the trial court to issue an order declaring a mistrial based upon "manifest necessity." Order,

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[4] Appellant filed an interlocutory appeal from the denial of *Habeas* Motion I. After initially granting a temporary stay, this Court granted the Commonwealth's motion to quash that appeal on April 25, 2016. Our Supreme Court denied further review on June 20, 2016. Indeed, Appellant filed numerous, unsuccessful interlocutory appeals from the decisions of the trial court. The remainder have been omitted as none impact our decision today.

[5] We will discuss only the pretrial motions that have at least some relevance to the issues raised in the current appeal.

6/17/17, at 1 (single page). On July 6, 2017, the trial court ordered a new trial. Order, 7/6/17, at 1 (single page).

On January 18, 2018, the Commonwealth filed a second motion *in limine,* seeking to introduce Appellant's prior bad acts ("Second PBA Motion"). RR at 1200a-1206a; ***Id.*** at 1208a-1308a (memorandum in support thereof). On January 25, 2018, Appellant filed a motion seeking to incorporate all of his previous pretrial motions from his first trial. On March 15, 2018, the trial court granted the Commonwealth's Second PBA Motion in part, and denied it in part. ***Id.*** at 1672a-1673a (permitting five of the nineteen proffered prior-bad-acts witnesses to testify).

Appellant's second trial commenced on April 2, 2018. On April 6, 2018, Appellant filed a motion seeking to excuse Juror 11 for cause. ***Id.*** at 2541a-2548a. The trial court denied the motion. ***Id.*** at 2714a (N.T., 4/9/18, at 153). On April 26, 2018, the jury returned a verdict of guilty on all counts. ***Id.*** at 5813a (N.T., 4/26/18, at 10). Sentencing was deferred pending an assessment by the Sexual Offender Assessment Board.

On July 25, 2018, Appellant filed a post-trial motion challenging the constitutionality of the trial court's retroactively applying to him the current version of Pennsylvania's Sex Offender Registration and Notification Act ("SORNA II"), 42 Pa.C.S. § 9799.10 *et seq.* ***Id.*** at 6291a-6297a. Appellant also filed a post-trial motion seeking recusal of the trial court judge on September 11, 2018, alleging newly-discovered evidence that the judge harbored a bias toward one of Appellant's pretrial hearing witnesses, Mr.

Castor. ***Id.*** at 5874a-5886a. The trial court denied the recusal motion on September 19, 2018. ***Id.*** at 5887a-5894a.

The trial court conducted a combined Sexually Violent Predator (SVP) and sentencing hearing on September 24 and 25, 2018. The trial court deemed Appellant to be an SVP under a clear-and-convincing-evidence standard. ***Id.*** at 6213a. The trial court also denied Appellant's constitutional challenge to SORNA II, which was later memorialized in an order dated September 27, 2018. ***Id.*** at 6214a. The trial court then sentenced Appellant to 3-10 years' incarceration. ***Id.*** at 6198a (N.T., 9/25/18, at 120).

Appellant filed a timely post-sentence motion, which the trial court denied on October 23, 2018. He then filed a timely notice of appeal on November 19, 2018, and a timely, court-ordered Pa.R.A.P. 1925(b) statement on December 11, 2018. The trial court issued its Rule 1925(a) opinion on May 14, 2019.

Appellant now presents the following questions for our review:

> A. Where the lower court permitted testimony from five women (and a de facto sixth via deposition), as well as purported admissions from [Appellant]'s civil deposition, concerning alleged uncharged misconduct by [Appellant] 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?
>
> 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?

C. Did the lower court err in denying the writ of *habeas* [*corpus*] filed on January 11, 2016[,] and failing to dismiss the criminal complaint where the Commonwealth, in 2005 through District Attorney Castor, promised [Appellant] that he would not be charged for the allegations made by [Victim]?

D. Did the lower court err in denying the motion to suppress where [Appellant], relying on the Commonwealth's promise not to prosecute him for the allegations by [Victim], had no choice but to abandon his constitutional rights under the Fifth Amendment of the U[.]S[.] Constitution and testify at a civil deposition?

E. Where the excerpts of [Appellant]'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?

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 [Appellant]'s case, was the charge legally deficient, thus requiring a new trial [to] be granted?

G. Where the lower court allowed a juror to be impaneled, despite evidence demonstrating that the juror had prejudged [Appellant]'s guilt, did the lower court abuse its discretion and deprive [Appellant] of his constitutional right to a fair and impartial jury, thus, requiring that a new trial be granted?

H. Did the lower court abuse its discretion in applying SORNA II to the 2004 offenses for which [Appellant] had been convicted, in violation of the *ex post facto* clauses of the state and federal constitutions?

Appellant's Brief at 11-13.

A. Prior Bad Acts Evidence

Appellant's first claim concerns the trial court's admission of prior bad acts ("PBA") evidence. The court admitted the testimony of five witnesses

who essentially testified that Appellant had drugged and then sexually assaulted them in circumstances similar to that recounted by Victim. The PBA evidence was admitted under the 'common plan/scheme/design' and 'absence of mistake' exceptions to the general evidentiary ban on PBA evidence. ***See*** Pa.R.E. 404(b). Appellant asserts that this PBA evidence was not admissible because it did not satisfy any exception.

The at-issue PBA evidence was the subject of the Commonwealth's January 18, 2018 Second PBA Motion. RR at 1200a-1206a. Pursuant to that motion, the Commonwealth sought to admit the testimony of 19 prior victims of Appellant's alleged sexual misconduct. Following a hearing held on March 5 and 6, 2018, the trial court granted the Second PBA Motion in part, and denied it in part. ***Id.*** at 1672a-1673a (Order, 3/15/18, at 1-2). The Commonwealth was thereby permitted to present the PBA testimony of five witnesses: Heidi Thomas, Chelan Lasha, Janice Baker-Kinney, Janice Dickinson, and Maud Lise-Lotte Lublin. The trial court did not permit the Commonwealth to introduce the testimony of the remaining 14 PBA witnesses proffered by the Commonwealth.

"The admission of evidence is committed to the sound discretion of the trial court, and a trial court's ruling regarding the admission of evidence will not be disturbed on appeal unless that ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous." ***Commonwealth v. Minich***, 4 A.3d 1063, 1068 (Pa. Super. 2010) (citations and quotation marks omitted).

Pennsylvania Rule of Evidence 404(b)(1) prohibits "[e]vidence of a crime, wrong, or other act ... to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Pa.R.E. 404(b)(1). This is because "[t]he Commonwealth 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. Ross***, 57 A.3d 85, 98-99 (Pa. Super. 2012) (citations omitted). However, PBA "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident[,]" if "the probative value of the evidence outweighs its potential for unfair prejudice." Pa.R.E. 404(b)(2).

Here, the trial court admitted the testimony of Heidi Thomas, Chelan Lasha, Janice Baker-Kinney, Janice Dickinson, and Maud Lise-Lotte Lublin under two PBA exceptions: the common plan/scheme/design exception, and the absence-of-mistake exception. Both exceptions were invoked to serve similar evidentiary goals for the Commonwealth. The Commonwealth sought to demonstrate that Appellant engaged in a pattern of non-consensual sex acts with his victims that were "quite distinct from a typical sexual abuse pattern; so distinct, in fact, that they are all recognizable as the handiwork of the same perpetrator—[Appellant]." Commonwealth's Brief at 44.

A determination of admissibility under the common plan/scheme/design exception

> must be made on a case by case basis in accordance with the unique facts and circumstances of each case. However, we recognize that in each case, the trial court is bound to follow the same controlling, albeit general, principles of law. When ruling upon the admissibility of evidence under the common plan exception, the 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. Given this initial determination, the court is bound to engage in a careful balancing test to assure that the common plan evidence is not too remote in time to be probative. 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.

Commonwealth v. Frank, 577 A.2d 609, 614 (Pa. Super. 1990).

Thus, the common plan/scheme/design exception aids in identifying a perpetrator based on his or her commission of extraordinarily similar criminal acts on other occasions. The exception is demanding in it constraints, requiring nearly unique factual circumstances in the commission of a crime, so as to effectively eliminate the possibility that it could have been committed by anyone other than the accused. ***See Commonwealth v. Miller***, 664 A.2d 1310, 1318 (Pa. 1995) (holding admissible, to prove a common scheme, plan, or design, evidence that the defendant lured other victims of similar race and weight into his car, took them to remote areas to force sex upon them, beat them in a similar manner, and killed or attempted to kill them), *abrogation on other grounds recognized by* ***Commonwealth v. Hicks***, 156 A.3d 1114 (Pa. 2017); ***Commonwealth v. Clayton***, 483 A.2d 1345, 1349–50 (Pa. 1984)

(holding admissible, to prove a common scheme, plan, or design, evidence of a subsequent crime for which the defendant had already been acquitted, because it was strikingly similar in geographic location, motive and method of execution); ***but see Commonwealth v. Fortune***, 346 A.2d 783, 787 (Pa. 1975) (holding inadmissible in a trial for felony murder, under the common scheme, plan, or design exception, evidence of defendant's commission of six prior robberies where "too many details ... [were] unexplained or incongruous to say that one crime naturally tend[ed] to show that the accused [was] the person who committed the other").

This Court has also permitted PBA evidence under the common plan/scheme/design exception "to counter [an] anticipated defense of consent." ***Commonwealth v. Tyson***, 119 A.3d 353, 361 (Pa. Super. 2015). In ***Tyson***, the defendant was accused of rape and related offenses based on the following course of conduct:

> On July 31, 2010, [the victim,] G.B.[,] left work because she felt ill after donating plasma. G.B. asked [Tyson], whom she knew casually, to bring her some food. [Tyson] arrived at G.B.'s apartment and stayed as she fell asleep. During the early morning hours of August 1, 2010, G.B. claims she awoke to find [Tyson] having vaginal intercourse with her. [Tyson] told G.B. she had taken her pants off for him. G.B. claims she told [Tyson] to stop, and he complied. After falling back asleep, G.B. woke again later that night and went into her kitchen, where she allegedly found [Tyson] naked. G.B. claims she told [Tyson] she did not want to have sex with him and returned to bed. Shortly thereafter, G.B. claims, she woke up[,] and [Tyson] was again having vaginal intercourse with her. G.B. told [Tyson] to stop and asked him what he was doing. [Tyson] told G.B. her eyes were open the whole time.

Id. at 356.

The Commonwealth filed a motion *in limine* seeking to introduce evidence of Tyson's then 12-year-old rape conviction in Delaware, which the trial court denied. On appeal, the Commonwealth argued that the PBA evidence regarding the prior rape was admissible under both the common plan/scheme/design and absence-of-mistake exceptions, because Tyson "engaged in a pattern of non-consensual sexual intercourse with acquaintances who were in an unconscious or diminished state." ***Id.*** at 357. This Court noted

> numerous similarities between the two incidents: (1) the victims were the same race and similar in age; (2) both victims were casually acquainted with [Tyson]; (3) [Tyson]'s initial interaction with each victim was legitimate, where [Tyson] was invited into the victim's home; (4) [Tyson] had vaginal intercourse with each victim in her bedroom; (5) both incidents involved vaginal intercourse with an alleged unconscious victim who woke up in the middle of the act; and (6) in each case, [Tyson] knew the victim was in a compromised state.

Id.

This Court reversed the trial court's determination that the PBA evidence was not admissible, reasoning that the "relevant details and surrounding circumstances of each incident further reveal criminal conduct that is sufficiently distinctive to establish [that Tyson] engaged in a common plan or scheme." ***Id.*** at 360. The ***Tyson*** Court further stated:

> The factual overlap between the two incidents goes beyond the commission of crimes or conduct 'of the same general class.' The evidence does not merely show [Tyson] sexually assaulted two different women or that [his] actions are generically common to

> many sexual assault cases. To the contrary, the incidents reflect a clear pattern where [Tyson] was legitimately in each victim's home; [he] was cognizant of each victim's compromised state; and [he] had vaginal intercourse with each victim in her bedroom in the middle of the night while the victim was unconscious.

Id. The ***Tyson*** Court also opined that the lapse in time between the rapes did not undermine its probative value, both because Tyson was incarcerated for a majority of that time, and because the "similarities [between] the two incidents render[ed] the five-year time gap even less important." ***Id.*** at 361.

The absence-of-mistake exception typically applies in circumstances where the identity of the accused is not at issue, such as where the evidence serves to prove that the cause of an injury was not accidental. A quintessential example of the absence-of-mistake exception to the ban on PBA evidence occurred in ***Commonwealth v. Boczkowski***, 846 A.2d 75 (Pa. 2004), where the defendant's wife, Maryann, was found unconscious in the couple's hot tub. She later died. Maryann had alcohol in her blood, and paramedics observed the defendant trying to revive her when they arrived on the scene, suggesting that her death may have been accidental. However, other injuries to the victim's body suggested that she had been the target of foul play.

The defendant's former wife, Elaine, had died under similar circumstances just 4 years earlier.

> Elaine died in her bathtub, Maryann in a hot tub. Both women were in their thirties and in good health. [The defendant] reported to the North Carolina police that Elaine had been drinking alcoholic beverages before entering the bathtub; he told Ross Township police that Maryann had been drinking prior to entering the hot

> tub. [The defendant] told police in both jurisdictions that he and his wife had a minor argument on the evening before the death. In each case, police noticed that [the defendant] had fresh scratch marks on his arms, hands and torso shortly after his wife's death. The autopsies of both women revealed that they had died from asphyxiation, not drowning.

Id. at 82. The Commonwealth presented evidence of Elaine's death in Boczkowski's trial pursuant to Rule 404(b)(2) in order to demonstrate that Maryann's death was not an accident. Our Supreme Court determined that such evidence was admissible even if the defendant does not "actually forward a formal defense of accident, or even present an argument along those lines," because "the Commonwealth may have a practical need to exclude the theory of accidental death." ***Id.*** at 89.

The absence-of-mistake exception has also been used to defeat an anticipated defense of consent in a case of sexual misconduct. The ***Tyson*** Court permitted the PBA evidence at issue in that case under the absence-of-mistake exception, reasoning that:

> [Tyson] disputes G.B.'s account that she was asleep when [he] initiated sexual intercourse with her—[Tyson] maintains he thought G.B. consented to the act. Given the relevant similarities between the two incidents, evidence of [Tyson]'s prior rape would tend to prove he did not "mistakenly believe" G.B. was awake or gave her consent. [Tyson] was invited into G.B.'s home for another reason, [he] knew G.B. was in a compromised state, and G.B. awoke to find [him] having vaginal intercourse with her. [Tyson]'s prior conviction would likewise show he had been invited into the home of an acquaintance, knew the victim was in a compromised state, and had non-consensual sex with the victim while the victim was unconscious. The prior conviction would tend to prove [Tyson] was previously in a very similar situation and suffered legal consequences from his decision to have what proved to be non[-]consensual vaginal intercourse with an unconscious victim. Thus, the evidence would tend to show

> [Tyson] recognized or should have recognized that, as with T.B., G.B.'s physical condition rendered her unable to consent.

Tyson, 119 A.3d at 362–63.

Instantly, Appellant contends that the PBA evidence—the testimony of Heidi Thomas, Chelan Lasha, Janice Baker-Kinney, Janice Dickinson, and Maud Lise-Lotte Lublin—should not have been permitted under either exception. Appellant argues that their testimony involved "strikingly dissimilar acts" and were too distant in time to outweigh the potential for undue prejudice. Appellant's Brief at 42. Thus, he asserts that the trial court abused its discretion by admitting the PBA evidence. Notably, under both exceptions, the standard for admission is virtually the same. The PBA evidence must be "distinctive and so nearly identical as to become the signature of the same perpetrator," and its probative value must not be undermined by the lapse in time between incidents. ***Frank***, 577 A.2d at 614; ***see also Tyson***, 119 A.3d at 359-60. Appellant first contends that the acts in question were too dissimilar to be admitted under either exception, and second, that the lapse in time between the conduct at issue in this case and the PBA evidence undermined its probative value.

The trial court justified its admission of the PBA evidence as follows:

> 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 admissibility further supported by the doctrine of chances. Therefore, this claim must fail.
>
> First, [Appellant] asserts that testimony of the permitted witnesses was too dissimilar to [Victim]'s allegations. This claim is belied by the record. Victim's testimony can be summarized as

> follows: 1) [Victim] was substantially younger than the married [Appellant] 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 [Appellant] 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; 6) once she took the pills, she became incapacitated and was unable to verbally or physically stop the assault[; s]he did not consent to sexual contact with [Appellant]; [and] 7) during intermittent bouts of consciousness, she was aware of [Appellant's] 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 [Appellant] and physically fit; 2) [Appellant] 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 [Appellant] 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 [Appellant]; 6) after ingesting the pill or drink, each woman was rendered incapacitated and unable to consent to sexual contact; [and] 7) [Appellant] 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.

TCO at 102-04 (footnotes omitted).

Appellant points to various dissimilarities between the PBA incidents and the instant matter. Appellant's Brief at 59-62. For instance, Appellant's relationship with Victim lasted longer than his relationship with any of the PBA witnesses. ***Id.*** at 59. Prior to the at-issue assault, Victim was a guest at Appellant's home for dinner on multiple occasions, and Appellant and Victim

had exchanged gifts. ***Id.*** at 59-60. Appellant had made prior attempts at sexual contact with Victim, unlike with the other victims. ***Id.*** at 60. Additionally, the nature of the sexual contact between Appellant and his victims varied in each incident. ***Id.*** at 60-61. Finally, Appellant's assault of Victim was the only reported assault to occur in Appellant's home, whereas the PBA evidence only involved incidents "in a hotel room or in some third person's house." ***Id.*** at 62.

We disagree that these differences render the PBA evidence inadmissible under the common plan/scheme/design or absence of mistake exceptions. It is impossible for two incidents of sexual assault involving different victims to be identical in all respects. Indeed, we instead subscribe to the statement offered by Amicus Curiae, the Office of the Attorney General of Pennsylvania, when it states:

> A distinct pattern does not require outlandish or bizarre criminal conduct, nor does it demand proof that the conduct was part of a greater master plan. Rather, what is essential is that the similarities "are not confined to insignificant details that would likely be common elements regardless of who had committed the crimes." ***Commonwealth v. Hughes***, 555 A.2d 1264, 1283 (Pa. 1989). A criminal "plan" may be analogized to a script or playbook of criminal tactics that worked for the offender when committing past crimes.

Brief of Amicus Curiae, the Office of the Attorney General of Pennsylvania, at 18. We further observe that no two events will ever be identical, and it is simply unreasonable to hold the admission of PBA evidence to such a standard. The question for the trial court was whether the pattern of misconduct demonstrated by the PBA evidence was sufficiently distinctive to

warrant application of the Rule 404(b)(2) exceptions. It is the pattern itself, and not the mere presence of some inconsistencies between the various assaults, that determines admissibility under these exceptions.

Here, the PBA evidence established Appellant's unique sexual assault playbook. His assault of Victim followed a predictable pattern based on the PBA evidence:

> [E]ach woman was substantially younger than the married [Appellant]; each woman met [Appellant] through her employment or career; most of the women believed he truly wanted to mentor them; [Appellant] was legitimately in each victim's presence because each had accepted an invitation to get together with him socially; each incident occurred in a setting controlled by [Appellant], where he would be without interruption and undiscovered by a third party; [Appellant] had the opportunity to perpetrate each crime because he instilled trust in his victims due to his position of authority, his status in the entertainment industry, and his social and communication skills; he administered intoxicants to each victim; the intoxicant incapacitated each victim; [Appellant] was aware of each victim's compromised state because he was the one who put each victim into that compromised state; he had access to sedating drugs and knew their effects on his victims; he sexually assaulted each victim—or in the case of one of his victims, engaged in, at minimum, untoward sexual conduct—while she was not fully conscious and, thus, unable to resist his unwelcomed sexual contact; and, none of the victims consented to any sexual contact with [Appellant].

Commonwealth Brief's at 42-44 (footnotes omitted). Indeed, not only did the PBA evidence tend to establish a predictable pattern of criminal sexual behavior unique to Appellant, it simultaneously tended to undermine any claim that Appellant was unware of or mistaken about Victim's failure to consent to

the sexual contact that formed the basis of the aggravated indecent assault charges. Thus, both exceptions applied to the circumstances of this case.

Appellant argues that the trial court's admission of the PBA evidence conflicts with this Court's recent ruling in ***Commonwealth v. Bidwell***, 195 A.3d 610 (Pa. Super. 2018), *reargument denied* (Nov. 13, 2018), *appeal denied*, 208 A.3d 459 (Pa. 2019). In ***Bidwell***, the victim was discovered "hanging from an electrical heating wire tied to a refrigeration unit that was located in a trailer" in the appellee's scrap yard. ***Id.*** at 612. However, the victim's "face was not swollen or discolored, as is commonly seen in victims of hanging or ligature strangulation." ***Id.*** Nevertheless, "the original investigators and the coroner concluded that the [v]ictim committed suicide by hanging." ***Id.***

Other evidence emerged linking Bidwell to the death, including a witness who claimed that he had admitted to killing the victim and to having arranged it to look like a suicide. It was also revealed that Bidwell had been involved in an extra-marital affair with the victim. ***Id.*** Bidwell also "made several contradictory statements regarding the circumstances of the [v]ictim's death and his whereabouts at that time." ***Id.*** at 613. The Commonwealth charged Bidwell with criminal homicide.

The Commonwealth subsequently filed a motion *in limine*, seeking to introduce PBA evidence, including evidence of Bidwell's prior violent conduct toward other women. The trial court granted admission of some PBA evidence (such as evidence concerning Bidwell's infidelity), but denied, *inter alia*,

evidence of his prior violent behavior toward *other* women.[6] The Commonwealth sought to use such evidence to demonstrate that the victim's death was not a suicide, and to show Bidwell's motive. The trial court excluded the evidence because "it was 'improper propensity evidence of [Bidwell]'s prior, ***dissimilar*** assaults on other women.'" ***Id.*** at 618 (emphasis added). The Commonwealth filed an interlocutory appeal from that order.

On appeal, this Court affirmed, ruling that the trial court had not abused its discretion in excluding the proffered PBA evidence regarding Bidwell's prior violent conduct. The ***Bidwell*** Court reasoned that:

> The Commonwealth's evidence failed to show that each woman was assaulted in the same manner or had been involved in a sexual relationship with [Bidwell] or that [he] was under the influence of alcohol or drugs at the time of the encounters with the women. To the contrary, 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. Their testimony does not evidence any particular distinctive pattern of behavior by [Bidwell] in that [Bidwell]'s allegedly abusive behavior appears to have been triggered in each incident by different causes. For instance, it is alleged that [Bidwell] assaulted his wives during the course of their marriages, but he spontaneously attacked Ms. Sickle whom he had just met while she interviewed for a job. Ms. Benek indicated [Bidwell] did not physically accost her.
>
> In addition, the trial court found that the [PBA] testimony was not admissible to prove a "common scheme, plan or design." 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." ***Commonwealth v. Elliott***, ... 700 A.2d 1243, 1249 ([Pa.] 1997).

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[6] The trial court in ***Bidwell*** did not prohibit PBA evidence concerning Bidwell's prior violent conduct toward the deceased victim. ***Id.*** at 618.

> In ***Elliott***, the appellant had been accused of sexually assaulting and killing a young woman whom he had approached outside a nightclub at 4:30 a.m. The Pennsylvania Supreme Court affirmed the trial court's decision to permit three other young women to testify that the appellant also had preyed upon and physically and/or sexually assaulted each of them as they left the same club in the early morning hours. ***Id.*** at ... 1250–51. Our Supreme Court held that evidence of the similarities among the assaults was admissible to establish a common scheme, plan or design. ***Id.***
>
> As the trial court found herein, the proposed testimony of Denise Bidwell, Jennifer Bidwell, Alyssa Benek and Danielle Sickle does not establish a pattern of conduct on the part of [Bidwell] so distinctive that proof of one tends to prove the others. Instead, the prior bad acts testimony demonstrates that [Bidwell] was a domestic abuser of women, some of whom he was involved in on-going romantic relationships in the past, but it does not show a unique "signature" *modus operandi* relevant to the [v]ictim's murder.

Bidwell, 195 A.3d at 626–27.

We find ***Bidwell*** easily distinguishable from the instant case. First, the procedural posture here is not the same as this Court confronted in ***Bidwell***. In ***Bidwell***, the Commonwealth appealed from the denial of a motion *in limine* concerning the admissibility of evidence. The burden was on the Commonwealth in that case to demonstrate that the trial court abused its discretion in deeming the PBA evidence inadmissible. Here, Appellant bears the burden on appeal of demonstrating that the trial court abused its discretion by deeming admissible the at-issue PBA evidence. Given the deference we pay to trial courts under the abuse of discretion standard, it would not necessarily follow that the holding in ***Bidwell*** dictates the same result in the instant case.

Second, the evidence in this case is not comparable to the facts in ***Bidwell***, as the circumstances here present a far more compelling argument for admission of the PBA evidence under Rule 404(b)(2). Here, the PBA evidence established a distinct, signature pattern: Appellant presented himself as a mentor or potential mentor to much younger women in order to establish trust, and then he abused that trust by drugging those women in order to sexually assault them. This constitutes far more distinctive behavior than the PBA evidence of prior domestic abuse considered by the ***Bidwell*** Court. The PBA evidence does not, as Appellant claims, merely "match[] the alleged act on trial only in its general nature." Appellant's Brief at 65. Accordingly, we reject his contention that ***Bidwell*** supports his claim.

Appellant also alleges that his assault on Victim and the assaults detailed in the PBA evidence are too remote in time to be probative. He argues:

> Baker-Kinney and Dickinson claim that [Appellant]'s alleged inappropriate contact with them occurred in 1982, more than two decades before the alleged incident with [Victim]. Thomas claims that [Appellant] forced her to perform oral sex on him in 1984; Lasha claims that her contact with [Appellant] was in 1986; and Lublin claimed that she became intoxicated with [Appellant] in 1989.... As to "Jane Doe 1," [Appellant] gave her a Quaalude, which she took knowing that it was a Quaalude, in the 70s.

Id. at 66-67 (citations omitted). The allegation of sexual assault in this case concerned conduct that occurred in 2004. Thus, the PBA evidence spanned between 15-22 years prior to the conduct in this case for the testifying

witnesses, and at least a few years prior to that for the incident involving Jane Doe 1, about whom Appellant testified in his civil deposition.[7]

As our Supreme Court has stated, "even if evidence of prior criminal activity is [otherwise] admissible under [Rule 404(b)(2)], said evidence will be rendered inadmissible if it is too remote." ***Commonwealth v. Shively***, 424 A.2d 1257, 1259 (Pa. 1981). However, this Court has also held that "while remoteness in time is a factor to be considered in determining the probative value of other crimes evidence under the theory of common scheme, plan or design, the importance of the time period is inversely proportional to the similarity of the crimes in question." ***Commonwealth v. Aikens***, 990 A.2d 1181, 1185 (Pa. Super. 2010) (citation omitted).

Here, the time period in question is substantial, especially in relation to existing case law. Nevertheless, several factors tend to demonstrate that the probative value of the PBA evidence remains strong, despite that substantial time gap. There are distinctive similarities between the PBA evidence and Appellant's sexual assault of Victim. Furthermore, there were multiple prior sexual assaults, not merely one, and all of those prior assaults evidenced the same, signature pattern of misconduct. Had there only been a single prior bad act, it would be easier to write off the similarities as coincidental,

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[7] We will not separately address Appellant's contention that Jane Doe 1 was effectively a sixth PBA witness, as Appellant only challenged the admission of the testimony of the five PBA witnesses in his Rule 1925(b) statement. ***See*** Appellant's 1925(b) Statement, 12/11/18, at ¶ 6; ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998) (holding that any issues not raised in a 1925(b) statement are waived).

especially given the passage of time. However, because the pattern here was well-established in this case, both in terms of frequency and similarity, the at-issue time gap is relatively inconsequential. Moreover, because Appellant's identity in this case was not in dispute (as he claimed he only engaged in consensual sexual contact with Victim), there was no risk of misidentification by use of the PBA evidence despite the gap in time. Accordingly, we conclude that the remoteness of the PBA evidence was so substantial as to undermine its probative value.

Appellant also contends that the trial court failed to make "any assessment of the highly prejudicial nature" of the PBA evidence. Appellant's Brief at 83. The record belies this claim. The Commonwealth sought the admission of 19 witnesses, and the trial court "found that the testimony of all 19 witnesses was relevant and admissible" under Rule 404(b)(2). TCO at 110. Nevertheless, "the [c]ourt sought to mitigate any prejudicial effect of such evidence by limiting the number of witnesses" to five. ***Id.*** Moreover, the trial 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.[, 4/11/18,] at 45-46, 50-51; N.T.[, 4/12/18,] at 69, 167. Jurors are presumed to follow the court's instructions. ***Commonwealth v. La Cava***, 666 A.2d 221, 228 (Pa. 1995). Limiting instructions weigh in favor of upholding admission of other bad acts evidence. ... ***Boczkowski***, 846 A.2d [at] 89....

Id. at 110-11. By limiting the number of relevant and admissible witnesses, as well as by issuing multiple cautionary instructions, the trial court

necessarily recognized the potential for unfair prejudice presented by the PBA evidence. Thus, Appellant's argument to the contrary is baseless.

Finally, we deem it unnecessary to address Appellant's claim that the trial court abused its discretion by relying on the 'Doctrine of Chances'[8] in admitting the PBA evidence,[9] as we agree with the trial court that the PBA evidence was admissible under both the common plan/scheme/design and the absence-of-mistake exceptions to Rule 404(b)(1)'s prohibition on PBA evidence. For all the aforementioned reasons, we conclude that the trial court did not abuse its discretion by admitting the PBA evidence and, therefore, Appellant's first claim lacks merit.

B. Trial Judge's Failure to Disclose Prior Relationship with Former District Attorney Castor

Next, Appellant asserts that he is entitled to a new trial because the trial judge in this case, the Honorable Steven T. O'Neill ("Judge O'Neill"), failed to disclose his prior and allegedly "acrimonious" relationship with former District Attorney Castor ("Mr. Castor"). Appellant's Brief at 92. As discussed in more detail *infra*, Mr. Castor purportedly promised not to prosecute Appellant while he was serving as Montgomery County's District Attorney during the initial

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[8] In his concurring opinion in ***Commonwealth v. Hicks***, 156 A.3d 1114 (Pa. 2017), Chief Justice Saylor endorsed the 'Doctrine of Chances' theory, which holds, generally, that PBA evidence may be admissible where a logical inference can be drawn "that does not depend on an impermissible inference of bad character, and which is most greatly suited to disproof of accident or mistake." ***Id.*** at 1132 (Saylor, J., concurring).

[9] ***See*** Appellant's Brief at 79-82; TCO at 99-100.

investigation into Victim's accusations against Appellant. Judge O'Neill received testimony from Mr. Castor regarding that issue at a pretrial hearing, and Mr. Castor was essentially a witness for the defense. Appellant contends that Judge O'Neill was biased against Mr. Castor due to interactions between the two that are alleged to have occurred in 1999. The Commonwealth contends that Appellant waived this claim by failing to raise it at the earliest possible opportunity.

It is undisputed that, in 1999, Judge O'Neill and Mr. Castor were both "seeking the [R]epublican nomination for District Attorney in Montgomery County." ***Id.*** at 94. Mr. Castor won the nomination, and ultimately was elected as District Attorney. However, Appellant alleges that Mr. Castor's use of smear tactics during that campaign (allegedly prompting a confrontation with Judge O'Neill at a campaign event) produced a long-held bias in Judge O'Neill toward Mr. Castor. Appellant asserts that this purported bias calls into question the propriety of Judge O'Neill's making credibility determinations regarding Mr. Castor's purported promise not to prosecute Appellant, which occurred at a hearing held on February 2, 2016. Appellant essentially claims that Judge O'Neill should have recused himself from hearing testimony from Mr. Castor as a result of this bias. Appellant argues:

> The fact that the lower court and [Mr.] 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 [Mr.] Castor, in a contentious and very public confrontation over two highly sensitive topics: love and politics. Despite knowing [Mr.] 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 [Mr.] Castor.

Id. at 96-97.

In his Rule 1925(a) opinion, Judge O'Neill flatly denies that he harbors any bias against Mr. Castor, and states that he had nothing to disclose to the defense, and no reason to recuse. TCO at 125 ("This [c]ourt cannot disclose that which does not exist. This [c]ourt simply has no bias against Mr. Castor, thus no disclosure was necessary."). In any event, the trial court agrees with the Commonwealth that Appellant waived this claim. ***Id.*** at 126 (finding that Appellant "failed to raise the alleged issue at th[e] earliest possible moment").

"The standards for recusal are well established. It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially." ***Commonwealth v. Abu-Jamal***, 720 A.2d 79, 89 (Pa. 1998) (citations omitted). Until evidence establishes a jurist's bias, "[t]his Court presumes judges of this Commonwealth are 'honorable, fair and competent,' and, when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice." ***Commonwealth v. Luketic***, 162 A.3d 1149, 1157 (Pa. Super. 2017) (quoting ***Commonwealth v. Druce***, 848 A.2d 104, 108 (Pa. 2004)).

Before we address the merits of this claim, we must address the Commonwealth's contention that Appellant waived our consideration of this issue, as

> the law is clear. In 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).

The Commonwealth contends that Appellant waived his recusal issue by waiting 167 days to raise it after discovering the factual basis for the claim. We agree. Although Mr. Castor testified before Judge O'Neill on February 2, 2016, prior to Appellant's first trial, Appellant did not raise the instant claim until after his second trial, and just prior to sentencing, on September 11, 2018. Appellant initially asserted this after-discovered-evidence-recusal claim based on a Radar Online article published on March 28, 2018. ***See*** Motion for Disclosure, Recusal, and for Reconsideration of Recusal, 9/11/18, at 3 ¶¶ 7-8 (asserting that neither Appellant nor his attorneys had any knowledge of the 1999 incident until the article was published). In the article, Appellant's spokesperson, Andrew Wyatt, was quoted as having just learned of the purported 1999 confrontation between Mr. Castor and Judge O'Neill. RR at 1679a ("A spokesman for Cosby, Andrew Wyatt, told Radar: 'It's very interesting—it's my first time hearing about it.'").

Appellant provided virtually no argument in his September 11, 2018 motion, nor does he provide any argument in his brief, indicating why he waited 167 days to seek Judge O'Neill's recusal based on the factual

allegations contained in the Radar Online article.[10] Appellant has not denied that his spokesperson, Mr. Wyatt, made the quoted statement, nor has he asserted that Mr. Wyatt withheld that information from him or his attorneys. In any event, even if we were inclined to disregard the obvious—that Mr. Wyatt would have no rational reason for withholding such information from Appellant or Appellant's counsel—Appellant has not offered any explanation as to why he was unable to discover the Radar Online article at an earlier time. Accordingly, we agree with the trial court and the Commonwealth that Appellant waived this claim, as he failed to raise it at the earliest possible opportunity.[11] ***See Reilly by Reilly v. S.E. Pennsylvania Transp. Auth.***,

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[10] Appellant attempts to claim that his *sentencing counsel* had no knowledge of the Radar Online article until after June 14, 2018, when *sentencing counsel* entered his appearance. Appellant's Brief at 114. This excuse borders on frivolity. It is undisputed that Appellant was represented by counsel at every stage of the proceedings below. Yet, he has thus far failed to argue why he or his prior attorneys were unable to ascertain the contents of the Radar Online article at an earlier time.

In any event, even if we were to countenance the notion that only sentencing counsel's oversight of Appellant's defense was relevant to our analysis, Appellant has still not justified the delay of 89 days from when sentencing counsel entered his appearance until the recusal motion was filed. Furthermore, nowhere in Appellant's numerous filings has he ever stated a specific date, or even a general range of dates, establishing when he or his attorneys actually learned of the contents of the Radar Online article. This alone demonstrates that Appellant has failed to satisfy his burden of demonstrating why he did not raise the matter at the earliest possible time.

[11] We note that Appellant provided this Court with an affidavit from Mr. Castor in the reproduced record (hereinafter "Castor's Affidavit"). ***See*** RR at 6215a-6223a. Castor's Affidavit is dated October 20, 2018. ***Id.*** at 6223a. Therein, Mr. Castor ostensibly provides additional details concerning his prior

489 A.2d 1291, 1300 (Pa. 1985) (holding that an 8-month delay in raising a recusal motion after the facts were known to the moving party resulted in waiver of the recusal claim); ***see also Lomas***, 170 A.3d at 391 ("[I]t is obvious that October 15, 2007, was not 'the earliest possible moment' that [the a]ppellants could have raised their objections regarding recusal, as all of

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relationship with Judge O'Neill not contained in the Radar Online article, such as his recollections concerning the 1999 campaign, as well as various opinions held by Mr. Castor regarding Judge O'Neill's purported bias against him over the ensuing years. However, it is undisputed that Castor's Affidavit was never presented in the trial court, and it does not appear in the certified record in this case.

> [A]s an appellate court, our review is limited by the contents of the certified record. Pa.R.A.P.1921; ***Commonwealth v. Young***, ... 317 A.2d 258, 264 ([Pa.] 1974) ("only the facts that appear in [the] record may be considered by a court"). ***See also Ritter v. Ritter***, ... 518 A.2d 319, 323 ([Pa. Super.] 1986) ("the appellate court can only look at the certified record on appeal when reviewing a case"). All documents in a criminal matter must be filed with the clerk of courts in order to become part of the certified record. 42 Pa.C.S. § 2756(a)(1). Additionally, [the a]ppellant has the duty to ensure that all documents essential to his case are included in the certified record. ***Fiore v. Oakwood Plaza Shopping Ctr.***, ... 585 A.2d 1012, 1019 ([Pa. Super.] 1991) ("It is the obligation of the appellant to make sure that the record forwarded to an appellate court contains those documents necessary to allow a complete and judicious assessment of the issues raised on appeal[.]"). If a document is not in the certified record then this Court cannot take it into account.

Commonwealth v. Walker, 878 A.2d 887, 888 (Pa. Super. 2005).

Thus, we cannot consider the contents of Castor's Affidavit. Nonetheless, even if we could consider it, we would still deem Appellant's recusal claim waived due to his failure to raise it at the earliest opportunity, as the basic, underlying facts were contained in the Radar Online article published on March 28, 2018.

the facts underlying the recusal issue were known to [them] ... on September 6, 2007.").

C. Mr. Castor's Alleged Promise Not to Prosecute

Appellant next argues that the trial court abused its discretion when it denied his *habeas corpus* motion seeking to quash the criminal complaint and bar his trial based on Mr. Castor's purported promise in 2005 not to prosecute him for his sexual assault of Victim. As noted in the trial court's summary of the facts, *supra*, the original investigation into Appellant's 2004 sexual assault of Victim began in January of 2005, and ended the following month when, on February 17, 2005, Mr. Castor personally issued a press release in his capacity as District Attorney, which read in pertinent part as follows:

> Montgomery County District Attorney Bruce L. Castor, Jr. has announced that a joint investigation by his office and the Cheltenham Township Police Department into allegations against actor and comic Bill Cosby is concluded.
>
> ...
>
> The District Attorney has reviewed the statements of the parties involved, those of all witnesses who might have first[-]hand knowledge of the alleged incident.... Detectives searched Mr. Cosby's Cheltenham home for potential evidence. Investigators further provided District Attorney Castor with phone records and other items that might have evidentiary value. Lastly, the District Attorney reviewed statements from other persons claiming that Mr. Cosby behaved inappropriately with them on prior occasions. However, the detectives could find no instance in Mr. Cosby's past where anyone complained to law enforcement of conduct, which would constitute a criminal offense.
>
> 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.

> In making this finding, the District Attorney has analyzed the facts in relation to the elements of any applicable offenses, including whether or not evidence is admissible. Evidence may be inadmissible if it is too remote in time 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.
>
> 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 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.

RR at 382a-383a.

After he was charged by the current District Attorney of Montgomery County on December 30, 2015, Appellant filed a *habeas corpus* petition alleging that his prosecution was barred by a non-prosecution agreement. ***Id.*** at 389a-391a (Appellant's Petition for Writ of *Habeas Corpus*, 1/11/16). However, it is undisputed that no written, formalized non-prosecution agreement exists in this case. Additionally, no order granting Appellant immunity from prosecution was previously sought by Appellant or Mr. Castor. Appellant contends that the above-stated press release, coupled with testimonial evidence regarding Mr. Castor's intent to bar Appellant's prosecution (and communication of that intent to Appellant's now deceased, former attorney in 2005), constituted a *de facto* "agreement, contract,

arrangement, or promise" not to prosecute him.[12] Appellant's Brief at 127. Alternatively, Appellant argues that the principle of promissory estoppel barred his trials, reasoning that Mr. "Castor's promise was tailored to force [Appellant] to relinquish his Fifth Amendment right and sit for a civil deposition[,]" even if the promise was formally defective in conveying immunity from prosecution.[13] ***Id.*** at 129.

The trial court rejected both claims. The court first determined that

> the only conclusion that was apparent to this [c]ourt 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 [c]ourt 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.

TCO at 62.

In rejecting Appellant's claim that the principle of promissory estoppel barred his prosecution, the trial court reasoned:

> 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. [Appellant] was represented by a competent team of attorneys who were versed in written negotiations. Yet none of

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[12] As noted by the trial court, Mr. Castor also "testified that he intended to confer transactional immunity upon [Appellant] and that his power to do so as the sovereign was derived from common law not from the statutes of Pennsylvania." TCO at 57 (citing N.T., 2/2/16, at 232-36 (RR 643a-647a)).

[13] Elements of Appellant's civil deposition were used as evidence against him at trial as discussed, *infra*.

> 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 [c]ourt did not abuse its discretion and this claim must fail.

Id. at 65-66.

We review the denial of a motion seeking to quash a criminal complaint or information under a well-settled standard of review.

> The decision to grant or deny a motion to quash 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. ***See Commonwealth v. Hackney***, ... 178 A. 417, 418 ([Pa. Super.] 1935).... A court, moreover, "should not sustain a motion to quash ... except in a clear case where it is convinced that harm has been done to the defendant by improper conduct that interfered with his substantial rights."

Commonwealth v. Niemetz, 422 A.2d 1369, 1373 (Pa. Super. 1980).

Additionally, to the extent that denying such a motion turns in some part on issues of fact, this Court is highly deferential to the findings of the trial court.

> Questions of credibility and conflicts in the evidence presented are for the trial court to resolve, not our appellate courts.
>
> As long as sufficient evidence exists in the record which is adequate to support the finding found by the trial court, as factfinder, we are precluded from overturning that finding[.]

Commonwealth of Pennsylvania, Dept. of Transp., Bureau of Traffic Safety v. O'Connell, 555 A.2d 873, 875 (Pa. 1989) (citations omitted); ***accord Commonwealth v. Doolin***, 24 A.3d 998, 1003 (Pa. Super. 2011) ("It is well settled that the decision to grant a pretrial motion to dismiss a criminal charge 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.") (internal brackets, quotation marks, and citation omitted).

We first address whether a non-prosecution agreement existed that precluded Appellant's prosecution for the instant offenses. As a matter of law and based on the uncontested facts, independent of any credibility determination by the trial court, we hold that Appellant was not immune from prosecution based on Mr. Castor's alleged promise not to prosecute.

Like the trial court, we cannot uncover any authority suggesting that a district attorney "may unilaterally confer transactional immunity through a declaration as the sovereign." TCO at 62. Appellant has yet to present any authority suggesting otherwise and, therefore, it is clear on the face of the record that the trial court did not abuse its discretion in determining that there was no enforceable non-prosecution agreement in this case; *i.e.*, there was no legal grant of immunity from criminal prosecution conferred to Appellant by Mr. Castor. Even assuming Mr. Castor promised not to prosecute Appellant, only a court order can convey such immunity. Such promises exist only as exercises of prosecutorial discretion, and may be revoked at any time.

The exclusive authority for conferring immunity from prosecution rests within the immunity statute itself, 42 Pa.C.S. § 5947. Section 5947 provides, in pertinent part, that

> 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.

42 Pa.C.S. § 5947(b) (emphasis added).

Mr. Castor indicated that he never sought such an order, and no evidence of such an order exists in this case.[14] Instead, Mr. Castor testified that he "made the decision as the sovereign that [Appellant] would not be prosecuted no matter what." RR at 475a (N.T., 2/2/16, at 64). Mr. Castor did not suggest under what statute or relevant case law he relied in exercising such authority outside the parameters of Section 5947. Indeed, Appellant makes no attempt in his brief to legally support Mr. Castor's contention at all. Thus, we ascertain no abuse of discretion in the trial court's determination that Appellant was not immune from prosecution, because Mr. Castor failed to seek or obtain an immunity order pursuant to Section 5947. At most, Mr. Castor exercised his prosecutorial discretion in promising not to prosecute Appellant. We have not discovered any case law, nor does Appellant cite to any relevant authority, holding that when a prosecutor exercises his or her

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[14] Nor does it appear that such an order would have been granted by a trial court had it been sought. Even if Mr. Castor's speculation was reasonable that a civil suit against Appellant was inevitable, and that it was equally inevitable that Appellant would have likely attempted to refuse to testify based on his 5th Amendment right against self-incrimination, there is no reason to believe that his testimony was "necessary to the public interest." 42 Pa.C.S. § 5947(b)(1). It was, at best, potentially helpful to Victim's private interest in a civil suit. However, regardless of whether Mr. Castor could have procured such an order, he did not even attempt to obtain one.

discretion not to prosecute, such action conveys immunity from future prosecution for the same accusation or offense, even if such a decision takes the form of an agreement. Only a court order conveying such immunity is legally binding in this Commonwealth.

Alternatively, Appellant argues that the trial court abused its discretion when it denied his *habeas corpus* motion seeking to bar his trial based on a promissory estoppel theory. As Appellant contends:

> The Commonwealth through [Mr.] Castor made a promise not to prosecute. In reliance on that promise, [Appellant] 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.

Appellant's Brief at 130.

Initially, we note that Appellant fails to cite any precedent for the proposition that a prosecution can be barred based on a contract theory of promissory estoppel, or anything similar. Rather, he merely provides this Court with boilerplate law concerning the theory and its application in contract law. As such, Appellant has utterly failed to convince us of the applicability of such a theory in barring a criminal prosecution. Accordingly, he is not entitled to relief on this basis alone.

In any event, even if we were to countenance Appellant's novel theory, we agree with the trial court that he cannot establish the necessary elements of a promissory estoppel claim. "Promissory estoppel enables a person to enforce a contract-like promise that would be otherwise unenforceable under

contract law principles." ***Peluso v. Kistner***, 970 A.2d 530, 532 (Pa. Cmwlth. 2009).

> To establish promissory estoppel, the plaintiff must prove that: (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. These factors are strictly enforced to guard against the "loose application" of promissory estoppel.

Id. (citation omitted).

With regard to the first element, we agree with the trial court that it was not reasonable for Appellant to rely on Mr. Castor's promise, even if the trial court had found credible the testimony provided by Mr. Castor and Appellant's civil attorney, John Patrick Schmitt, Esq.[15] As noted above, there is simply no authority for the proposition that immunity from criminal prosecution can be conveyed by a prosecutor absent a valid court order pursuant to the immunity statute, 42 Pa.C.S. § 5947. We cannot deem reasonable Appellant's reliance on such a promise when he was represented by counsel, especially when immunity can only be granted by a court order, and where no court order granting him immunity existed.

With regard to the second element, there is virtually no evidence in the record that Appellant actually declined to assert his Fifth Amendment rights at the civil deposition based on Mr. Castor's purported promise not to

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[15] The trial court did not find Mr. Castor's testimony regarding the promise not to prosecute to be credible.

prosecute. Appellant did not testify to this fact at either hearing on the at-issue *habeas* petition. Appellant's only witnesses were Mr. Castor and Attorney Schmitt. Mr. Castor testified that he had made such a promise through the press release, in part, and through conversations he had with Appellant's prior criminal defense attorney, Walter Phillips, Esq. (now deceased).

Yet, Attorney Schmitt was the only witness who could ostensibly testify as to whether Appellant relied on the alleged promise not to prosecute by sitting for a deposition in the civil case. Attorney Schmitt testified regarding his conversations with Mr. Phillips, indicating that Mr. Phillips had assured him that Mr. Castor's promise not to prosecute was binding,[16] and therefore Appellant could be compelled to testify during any subsequent civil litigation. RR at 703a (N.T., 2/3/16, at 11). However, as the Commonwealth accurately notes,

> Schmitt was forced to admit on cross-examination that he permitted [Appellant] to be questioned by police and, during an interview in advance of that questioning, did not believe that [Appellant] could incriminate himself[. N.T., 2/3/16, at 22-24]. He also admitted to negotiating with the *National Enquirer* on the details of a published interview with [Appellant] regarding the criminal investigation while the criminal investigation was ongoing, and also trying to negotiate the settlement agreement to prohibit [Victim] from ever cooperating with police in the future[.

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[16] As noted above, Mr. Phillips was clearly mistaken in that regard, as immunity from prosecution can only be obtained by a court order pursuant to 42 Pa.C.S. § 5947.

> ***Id.*** at 31-33, 44-48]. It was not necessary for the trial court to specifically state that it rejected ... Schmitt's testimony, as it is patently obvious that his testimony belies his claim that there was some "promise" from [Mr.] Castor not to prosecute[. ***Id.*** at 25-27.] Further, by crediting the testimony of Troiani and Kivitz the trial court necessarily discredited Schmitt just as it did [Mr.] Castor.[17]
>
> While [Appellant] seemingly takes issue with the trial court's treatment of Schmitt's testimony in its findings of fact and conclusions of law, he completely ignores the trial court's thorough analysis of his testimony in its 1925([a]) opinion, which makes it abundantly clear that Schmitt's conduct in representing [Appellant] was totally and completely inconsistent with the existence of any promise or agreement not to prosecute from [Mr.] Castor.

Commonwealth's Brief at 136-37.

We agree with the Commonwealth and the trial court that the evidence was entirely inconsistent with Appellant's alleged reliance on Mr. Castor's promise in choosing not to assert his Fifth Amendment privilege in the civil suit. It is axiomatic that:

> The privilege against self-incrimination can only be asserted when the witness is being asked to testify to self-incriminating facts and only when a witness is asked a question demanding an incriminating answer. The witness has the burden of demonstrating that he or she has a reasonable ground for asserting the privilege.

McDonough v. Com., Dept. of Transp., Bureau of Driver Licensing, 618 A.2d 1258, 1261 (Pa. Cmwlth. 1992) (citation omitted).

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[17] Troiani, one of Victim's attorneys in her civil case against Appellant, testified that she never received any information from Appellant's civil attorneys indicating that he could never be prosecuted. N.T., 2/3/16, at 177. She also indicated several reasons why it would not have been to Appellant's advantage to assert his Fifth Amendment rights during a civil trial in any event. ***Id.*** at 176.

Attorney Schmitt believed that Appellant could not incriminate himself based on the testimony he intended to provide. If this was the case, then there was no basis for Appellant to assert the Fifth Amendment privilege in the civil suit, which is consistent with Appellant's prior decision to sit for an interview with criminal investigators. Moreover, Attorney Schmitt's actions were entirely inconsistent with reliance on the purported promise, as he failed to mention the alleged promise to Victim's civil attorneys, and he attempted to negotiate a settlement with Victim to prevent her from cooperating with the police in the future. Thus, even if Appellant's promissory estoppel theory were cognizable (and we hold that it is not), he would not be entitled to relief.

D. Motion to Suppress the Contents of Appellant's Civil Deposition

Appellant next argues that the trial court abused its discretion when it denied his motion to suppress the contents of his civil deposition.

> [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. We are bound by the suppression court's factual findings so long as they are supported by the record; our standard of review on questions of law is *de novo*. Where, as here, the defendant is appealing the ruling of the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted. Our scope of review of suppression rulings includes only the suppression hearing record and excludes evidence elicited at trial.

Commonwealth v. Yandamuri, 159 A.3d 503, 516 (Pa. 2017) (citations omitted).

Appellant's suppression argument is contingent upon his claim that Mr. Castor unilaterally immunized Appellant from criminal prosecution, which we have already rejected. We have also rejected Appellant's promissory estoppel theory as a basis for barring his prosecution, and we agree with the trial court that suppression is not warranted for the following reasons:

> 1. Instantly, this [c]ourt 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, [Appellant] 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 [Appellant] and principles of fundamental fairness and due process have not been violated.
>
> 6. This [c]ourt finds that there is no Constitutional barrier to the use of [Appellant]'s civil deposition testimony.

TCO at 72 (quoting Findings of Fact and Conclusions of Law, 12/5/16, at 5 (RR at 1196a)).

Appellant cites several cases in support of his claim, discussed below. However, we conclude that none of these cases suggest, much less compel, a ruling that the trial court abused its discretion in denying suppression of Appellant's civil deposition testimony in this matter.

Appellant first cites ***Commonwealth v. Eiland***, 301 A.2d 651 (Pa. 1973), for the proposition that: "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." Appellant's Brief at 131.

However, ***Eiland*** did not involve circumstances comparable to the matter at hand. There, the defendant had claimed that his incriminating statement, given while in custody, was unlawfully induced through physical coercion and a substantial delay between his arrest and his arraignment. The ***Eiland*** Court ultimately granted relief, based on the following facts:

> The record evinces [u]ncontradicted evidence that [the defendant], a 20-year-old with a tenth grade education, was isolated for several periods of time; that upon his initial interrogation he refused to admit involvement in the shooting; that eleven hours later when told by the police he would get more lenient treatment if he confessed, he signed an incriminating statement; and that he was not arraigned until some twenty-five hours after arrest.

Eiland, 301 A.2d at 654. The ***Eiland*** Court concluded that the defendant had been subject to "impermissible psychological coercion." ***Id.*** at 655. Accordingly, the Court ruled that his incriminating statement should have been suppressed.

Here, Appellant was not in custody when he was deposed. The at-issue statement was given in the presence of experienced counsel at a civil deposition, and his civil deposition testimony was not compelled based on a promise that he would be shown leniency if he confessed directly to criminal conduct. Thus, ***Eiland*** is completely inapposite.

Next Appellant argues that relief is due pursuant to ***United States v. Hayes***, 946 F.2d 230 (3d Cir. 1991). In ***Hayes***, the defendant alleged that the Commonwealth had breached the terms of his plea agreement, which stated, *in writing*, that the district attorney would not recommend a specific sentence at sentencing. The Commonwealth breached that agreement by recommending a sentence in its sentencing memorandum. On that basis, the ***Hayes*** Court granted relief and vacated the defendant's sentence, reasoning that, "the government must honor its bargain with the defendant." ***Id.*** at 233.

The instant case does not involve a promise made pursuant to a plea agreement. Moreover, the agreement in ***Hayes*** was memorialized in writing and accepted by the trial court, and the specific terms of that agreement were not in dispute. Here, the purported promise by Mr. Castor was not memorialized in writing, and Appellant's alleged consideration for that promise

was nonexistent at the time; indeed, the Commonwealth in this case claims that no agreement or promise existed at all. Furthermore, there is no evidence that the purported promise not to prosecute was the product of a negotiation, rather than merely being a unilateral declaration made by Mr. Castor. Thus, ***Hayes*** does not support Appellant's claim.

Appellant also cites ***Commonwealth v. Stipetich***, 652 A.2d 1294 (Pa. 1995). In that case, Pittsburgh police searched George and Heidi Stipetich's home pursuant to a warrant and discovered a small quantity of drugs and related paraphernalia.

> Sergeant Thomas, the officer in charge of the search, was subsequently contacted by the Stipetiches' attorney, Charles Scarlata. Thomas and Scarlata reached an agreement that, if George Stipetich would answer questions concerning the source of the controlled substances and drug paraphernalia found in his residence, no charges would be filed against either of the Stipetiches. George Stipetich then fulfilled his part of the agreement by answering all questions posed by the police.
>
> Nevertheless, ... on the basis of the contraband recovered in the foregoing search, Allegheny County authorities charged the Stipetiches with possession of controlled substances. Citing the non-prosecution agreement entered with the Pittsburgh police, the Stipetiches filed a motion seeking dismissal of the charges. The motion was granted by the [C]ourt of [C]ommon [P]leas.

Id. at 1294-95. Our Supreme Court reversed that decision because the "non-prosecution agreement was, in short, invalid. The Pittsburgh police did not have authority to bind the Allegheny County District Attorney's office as to whether charges would be filed." ***Id.*** at 1295.

However, the ***Stipetich*** Court opined that:

> The decisions below, barring prosecution of the Stipetiches, embodied concern that allowing charges to be brought after George Stipetich had performed his part of the agreement by answering questions about sources of the contraband discovered in his residence would be fundamentally unfair because in answering the questions he may have disclosed information that could be used against him. The proper response to this concern is not to bar prosecution; rather, it is to suppress, at the appropriate juncture, any detrimental evidence procured through the inaccurate representation that he would not be prosecuted.

Id. at 1296.

This language from ***Stipetich***, relied upon by Appellant, is merely *dicta*. The holding in ***Stipetich*** was solely that the Stipetiches' prosecution was not barred by the invalid non-prosecution agreement. Nevertheless, ***Stipetich*** is also factually distinguishable from the instant case. Here, there was no negotiated agreement, just a unilateral declaration by Mr. Castor, which on its face did not grant Appellant immunity from prosecution. Moreover, as Mr. Castor testified, "there wasn't any *quid pro quo* here." RR at 99 (N.T., 2/2/16, at 99). Indeed, at the time of Mr. Castor's statement, Victim had not yet filed a civil claim against Appellant. Additionally, as discussed above, there was no reasonable reliance on a defective grant of immunity when the suit was filed and Appellant was ultimately deposed. Accordingly, ***Stipetich*** does not support Appellant's suppression claim.

Appellant also relies on ***Commonwealth v. Peters***, 373 A.2d 1055 (Pa. 1977), but provides practically no analysis of that case. We find that ***Peters*** is easily distinguishable from the instant matter. In ***Peters***, an uncounseled defendant waived his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966),

and gave an incriminating statement when promised by a detective with the District Attorney's Office that he would not be prosecuted. Our Supreme Court held that the Commonwealth had not "carried its burden" to demonstrate that the defendant had knowingly, intelligently, and voluntarily waived his ***Miranda*** rights, where "[n]o explanation of this promise was provided by the Commonwealth." ***Peters***, 373 A.2d at 1062. Here, Appellant was represented by multiple attorneys throughout the initial criminal investigation and civil proceedings, and gave the at-issue statement during a civil deposition, not during a custodial interrogation.

Appellant offers another cursory analysis of ***Commonwealth v. Bryan***, 818 A.2d 537 (Pa. Super. 2003), but that case also does not suggest that he is entitled to relief. In ***Bryan***, the defendant *failed to comply* with an invalid and unenforceable non-prosecution agreement with police. The trial court dismissed the subsequently filed charges due to a delay in filing the charges. We reversed, ruling, in part, that there was no demonstrable prejudice to the defendant due to the delay. ***Id.*** at 541-42. We then, in *dicta*, suggested that, "[h]ad incriminating information been obtained against [the defendant] as a result of the unauthorized agreement, he would be entitled to have that evidence suppressed." ***Id.*** at 542. In any event, in that case, the police offered not to prosecute in exchange for the defendant's assistance in unrelated criminal matters. The offer was made while the uncounseled defendant was detained for blood testing during a DUI arrest. Again, in this case, Appellant was represented by counsel, and there was no negotiation.

The Commonwealth did not receive any benefit from Mr. Castor's promise, and Appellant provided testimony while counseled at a civil deposition, not while under duress from a custodial interrogation.

Finally, in assessing the trial court's denial of Appellant's motion to suppress, we are bound by the court's factual determinations. The trial court determined that Mr. Castor's testimony and, by implication, Attorney Schmitt's testimony (which was premised upon information he indirectly received from Mr. Castor) were not credible. The court found that the weight of the evidence supported its finding that no agreement or grant of immunity was made, and that Appellant did not reasonably rely on any overtures by Mr. Castor to that effect when he sat for his civil deposition. Thus, for all of the aforementioned reasons, we do not ascertain any abuse of discretion in the trial court's denial of Appellant's motion to suppress his civil deposition.

E. Evidence from Appellant's Civil Deposition Concerning His Possession and Distribution of Quaaludes in the 1970's

Next, Appellant challenges the admission of the portion of his civil deposition testimony pertaining to his possession and distribution of Quaaludes in the 1970s. Appellant asserts that such evidence was inadmissible under Pa.R.E. 404(b), and that it did not satisfy any exception thereto as set forth in Rule 404(b)(2). Specifically, Appellant challenges the admission at trial of his civil deposition testimony pertaining to

> the circumstances under which [Appellant] was prescribed the Quaaludes[, RR at 4789a-4790a;] the number of scripts obtained[, ***id.*** at 4790;] 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." [***id.*** at 4793a].

Appellant's Brief at 138.

The trial court determined that this evidence was admissible to establish Appellant's intent and motive in giving "a depressant to [Victim]" for the purpose of impairing her ability to refuse to consent to sexual activity. TCO at 115; ***see*** Pa.R.E. 404(b)(2) (permitting the admission of PBA evidence that demonstrates "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident[,]" if "the probative value of the evidence outweighs its potential for unfair prejudice.").

Appellant contends:

> The [r]ecord is barren of any evidence which reflects that [Appellant] had Quaaludes in his possession in 2004[,] and that the pills [Victim] was given were Quaaludes. In fact, the [r]ecord reflects otherwise. Moreover, the fact that [Appellant] may have shared Quaaludes with women in the 1970s is not probative of his motive or intent concerning providing Benadryl to [Victim] in 2004.
>
> Quaaludes were legal in the 1970s and were a "party drug" widely used in the 1970s and early 1980s. [RR at 4969a-4970a]. The fact that [Appellant] 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 [Appellant] had non[-]consensual sexual contact with [Victim][)] 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 [Appellant] 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 [Appellant]; and (d) if they had sex with [Appellant], had nonconsensual sex with [him]. The fact is, a person can be impaired by voluntarily taking a controlled or noncontrolled substance, or by consuming alcohol, and still engage in consensual sexual contact. That such may have happened between [Appellant] and some women in the 1970s in no way establishes whether, on some night in 2004, [Appellant] had nonconsensual contact with [Victim]. This prejudicial evidence was offered for no reason other than to smear [Appellant], a reason which certainly does not support the admissibility of the evidence. A new trial is warranted.

Appellant's Brief at 142-44.

The Commonwealth responds, first, that Appellant's admissions regarding his distribution of Quaaludes "were relevant because they tended to establish that he had knowledge of substances—particularly, central nervous system depressants—that would induce unconsciousness and facilitate a sexual assault." Commonwealth's Brief at 151.

> [Appellant] specifically testified in his deposition that he obtained numerous prescriptions for Quaaludes, without intending to use the pills himself, but to give to "young women [he] wanted to have sex with[.]" [N.T.], 4/18/18, at 35, 40-42, 47.... He admitted that he knew the drugs caused at least one woman—"Jane Doe Number 1"—to get "high," appear "unsteady," and "walk[] like [she] had too much to drink[.]" [***Id.***] at 35-37.... He knew the drug was a central nervous system "depressant" because he had taken a similar medication following surgery. For that that reason, he did not take the drugs himself because he "get[s] sleepy" and he "want[s] to stay awake[.]" [***Id.***] at 41-43....

Id. at 151-52.

The Commonwealth argues that these admissions were critical to the prosecution in order to prove Appellant's commission of an aggravated indecent assault, where the Commonwealth was required to prove that he

engaged in "penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures" and

> (1) the person does so without the complainant's consent; ...
>
> (4) the complainant is unconscious or the person knows that the complainant is unaware that the penetration is occurring;
>
> (5) the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance....

18 Pa.C.S. § 3125(a).

The Commonwealth correctly notes, and Appellant does not dispute, that the minimum *mens rea* for these offenses is recklessness. "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." 18 Pa.C.S. § 302(b)(3). That risk "must be of such a nature and degree that, considering the nature and intent of the actor's conduct ***and the circumstances known to him***, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." ***Id.*** (emphasis added).

The Commonwealth argues that Appellant's

> admissions that he gave other women central nervous system depressants (Quaaludes), knowing their effects, helped prove that he knew that the supposed Benadryl he gave to [Victim] would render her unconscious, or nearly unconscious, and[,] thus[,

> make her] unable to consent to sex with him—at the very least, he disregarded this risk. Indeed, [Appellant]'s admission to knowing the effect of a central nervous system depressant was critically relevant to the case because it demonstrated his familiarity with a certain prescription drug that falls within the same class of drugs as that which he alleges to have given [Appellant] on the night of the assault.

Commonwealth's Brief at 154-55.[18] The Commonwealth maintains that Appellant's

> familiarity with one drug and its effects in an overall class of drugs is highly probative where he claimed, in this prosecution, to have used a different drug in the same class with effects he knows to be similar. That is, his own words about his use and knowledge of a central nervous system depressant drug, when coupled with the admissions he made claiming to have provided [Victim] Benadryl, and the expert testimony indicating that the effects experienced by [Victim] are consistent with being given a central nervous system depressant, were relevant to demonstrate [Appellant]'s intent and motive in giving [Victim] a central nervous system depressant; to wit, to render her unconscious so that he could facilitate a sexual assault.

Id. at 156-57.

Second, the Commonwealth contends that Appellant's admissions regarding his distribution of Quaaludes were relevant to strengthen evidence provided by the five PBA witnesses, discussed *supra*. The Commonwealth

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[18] The Commonwealth's expert forensic toxicologist, Dr. Timothy Rohrig, testified that both Benadryl and Quaaludes fall in the same class of central nervous system depressants. ***See*** N.T., 4/18/18, at 60, 85. Dr. Rohrig also indicated his knowledge of several cases where Benadryl (or its active ingredient, diphenhydramine) had been used to facilitate sexual assaults. ***Id.*** at 74-76. He testified that numerous other central nervous system depressants are manufactured as small, blue pills. ***Id.*** at 81-82. In any event, the Commonwealth notes that it never conceded that Appellant had given Victim Benadryl rather than another central nervous system depressant. Commonwealth's Brief at 154 n.34.

argues that, in combination, such evidence was necessary to establish Appellant's "motive and intent in administering these intoxicants. The ability of the Commonwealth to establish [Appellant]'s motive and intent through the absence of mistake was particularly critical here, where consent was a defense." ***Id.*** at 160.

We agree with the Commonwealth, and we are not convinced that Appellant's attempts to draw a hard distinction between Quaaludes and Benadryl present a meaningful argument for our consideration. First, the jury was free to disbelieve Appellant's assertion that he only provided Victim with Benadryl. Second, even accepting that Appellant gave Benadryl to Victim, his testimony regarding his knowledge of the effects of other central nervous system depressants, such as Quaaludes, was highly probative of "the circumstances known to him" for purposes of determining whether he acted with the requisite *mens rea* for the offense of aggravated indecent assault—recklessness. 18 Pa.C.S. § 302(b)(3). This was particularly relevant where Appellant's own admissions to his sexual contact with Victim left him contesting only her consent. His knowledge of the use of central nervous system depressants, coupled with his likely past use of the same with the PBA witnesses, were essential to resolving the otherwise he-said-she-said nature of Victim's allegations. Thus, this evidence was highly probative of Appellant's *mens rea*.

Furthermore, we do not ascertain any abuse of discretion in the trial court's determination that the probative value of this evidence outweighed its

"potential for unfair prejudice." Pa.R.E. 404(b)(2). In a vacuum, Appellant's use and distribution of a then-legal 'party drug' nearly half a century ago, does not appear highly prejudicial, at least not to the extent that there was a serious risk that it would overwhelm the good sense of a rational juror. It only becomes significantly prejudicial, *and fairly so*, when, in the context of other evidence, it establishes Appellant's knowledge of and familiarity with central nervous system depressants for purposes of demonstrating that he was at least reckless in providing a central nervous system depressant to Victim before engaging in sexual acts with her, as he should have been aware that it would substantially impair her ability to consent.

Moreover, whatever potential for unfair prejudice existed was substantially mitigated by the trial court's issuance of cautionary instructions regarding the admission of this evidence. It is undisputed that the jury was instructed to consider the evidence in question only for its admitted purpose. ***See Tyson***, 119 A.3d at 362 (holding that "to alleviate the potential for unfair prejudice, the court can issue a cautionary instruction to the jury, to advise the jury of the limited purpose of the evidence and to clarify that the jury cannot treat the prior crime as proof of [Tyson's] bad character or criminal tendencies"). Moreover, "[j]urors are presumed to follow the trial court's instructions." ***Id.*** Accordingly, we ascertain no abuse of discretion in the trial court's admission of Appellant's civil deposition statements regarding his use and distribution of Quaaludes in the 1970s.

F. Consciousness-of-Guilt Jury Charge

Appellant claims that the trial court abused its discretion when it issued a consciousness-of-guilt jury charge. The Commonwealth argues that this claim is waived, and the trial court agrees. ***See*** Commonwealth's Brief at 170-71; TCO at 116-18. We agree that Appellant waived this claim by failing to adequately preserve it below.

The Commonwealth contends that, "[a]lthough [Appellant] argued prior to the jury charge that the trial court should not issue a consciousness of guilt instruction, he made no objection to the actual instructions after they were given...." Commonwealth's Brief at 170. Indeed, regardless of any prior discussions, when the court concluded giving the instructions to the jury, neither the Commonwealth nor Appellant offered any objections. N.T., 4/25/18, at 61. At 11:08 a.m., the jury retired to deliberate. ***Id.*** at 66. The following day, Appellant filed written objections to the court's jury instructions. ***See*** Defendant William H. Cosby, Jr.'s Objections to Jury Instructions, 4/26/18, at 2 ¶ 5. Appellant contends that he adequately preserved his objection by 1) opposing the instruction during the charging conference; and 2) filing the written objections the day after the jury retired to deliberate. We disagree that those actions were sufficient to preserve his claim.

"Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Furthermore, a "general exception to the charge to the jury will not preserve an issue for appeal. Specific exception shall be taken to the language or omission complained of." Pa.R.A.P. 302(b). "In order to preserve a claim that a jury instruction was

erroneously given, the [a]ppellant must have objected to the charge at trial." ***Commonwealth v. Parker***, 104 A.3d 17, 29 (Pa. Super. 2014); ***see also*** Pa.R.Crim.P. 647(C) ("No 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.").

In ***Parker***, as here, the defendant contested a jury charge "at the charging conference." ***Parker***, 104 A.3d at 29. However, he failed to object immediately after the jury was charged when prompted by the court. ***Id.*** We held in that case that Parker's objection at the charging conference was not sufficient to preserve a claim challenging that instruction on appeal. ***Id.***; ***see also Commonwealth v. Smallhoover***, 567 A.2d 1055, 1059 (Pa. Super. 1989) (deeming waived a challenge to a jury instruction under similar circumstances).

Here, under ***Parker***, Appellant's objections at the charging conference were not sufficient to preserve his challenge to the consciousness-of-guilt jury charge issued by the trial court because he did not also object when the charge was given to the jury. Moreover, Appellant's attempt to preserve that challenge in the subsequently-filed written objections does not satisfy the explicit requirement in Rule 647(C) that the objection must be filed "before the jury retires to deliberate." Pa.R.Crim.P. 647(C). Thus, we agree with the trial court that Appellant waived this claim.

Nevertheless, had Appellant not waived this claim, we would deem it meritless.

> [W]hen 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) (quoting ***Commonwealth v. Trippett***, 932 A.2d 188, 200 (Pa. Super. 2007)).

Here, Appellant concedes that the Commonwealth's evidence, *if believed by the jury*, demonstrated that he offered "to pay for [Victim]'s education, therapy[,] and travel" during the phone conversations he had with Victim and Victim's mother, in which they confronted Appellant with Victim's accusation that Appellant had sexually assaulted her. Appellant's Brief at 148. However, Appellant contends that those offers did not constitute evidence of his consciousness of guilt, because:

> Unlike those cases in which the courts have upheld the submission of a "consciousness of guilt" instruction to the jury, [Appellant] 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 [Appellant] and [Victim] over the period of their friendship....

Id. at 150.

We disagree. First, Appellant cites no authority for the proposition that consciousness-of-guilt instructions are limited to the circumstances he listed. Pennsylvania courts have specifically rejected the use of certain types of

evidence as consciousness-of-guilt evidence, especially when the admission of such evidence conflicts with well-established constitutional protections. ***See Commonwealth v. Welch***, 585 A.2d 517 (Pa. Super. 1991) (holding that a defendant's refusal to consent to a search in the absence of a warrant was not admissible under a consciousness-of-guilt theory of relevancy); ***see also Commonwealth v. Chapman***, 136 A.3d 126 (Pa. 2016) (holding that a defendant's refusal to submit to a warrantless blood test for DNA purposes was inadmissible to demonstrate consciousness of guilt). Here, the admission of evidence concerning Appellant's offers to Victim does not conflict with these or similar constitutional principles. Indeed, Appellant fails to cite any case law that suggests the inadmissibility of this or similar evidence.

Second, the jury was under no obligation to view Appellant's offers to Victim as "wholly innocent conduct[.]" Appellant's Brief at 150. In the circumstances of this case, a reasonable person could interpret Appellant's actions as an attempt to entice Victim with economic incentives not to pursue a criminal prosecution. Appellant's argument goes to the weight of the evidence, not its admissibility under a consciousness-of-guilt theory, nor to the propriety of issuing an instruction on that theory.

Third, the evidence in question does not fall outside the underlying purpose of the consciousness-of-guilt theory for the admissibility of evidence. The courts of this Commonwealth have permitted a wide variety of evidence under auspices of the consciousness-of-guilt theory. ***See Commonwealth v. Homeyer***, 94 A.2d 743, 747 (Pa. 1953) (recognizing, as consciousness of

guilt, "manifestations of mental distress" and "fear at the time of our just before or just after discovery of the crime"); ***Commonwealth v. Sanchez***, 610 A.2d 1020, 1028 (Pa. Super. 1992) (holding that evidence of "suicide ideation" and "attempt to commit suicide" are admissible "to show consciousness of guilt"); ***Commonwealth v. Pestinikas***, 617 A.2d 1339, 1348 (Pa. Super. 1992) (holding "that an attempt by a criminal defendant to obtain and apply political pressure for the purpose of obtaining a dismissal of charges is a relevant circumstance tending to show consciousness of guilt"); ***id.*** (recognizing that an "attempt to influence witnesses" can constitute evidence of consciousness of guilt). Appellant's argument that he did not attempt to "conceal *himself* in some way" is purely semantical. Appellant's Brief at 150 (emphasis added). The jury could reasonably infer that by offering Victim and her mother significant economic benefits immediately after being confronted with his unlawful behavior, Appellant was attempting to influence witnesses in order to shield himself from prosecution. Accordingly, even had we not deemed this issue waived, we would ascertain no abuse of discretion by the trial court in its decision to present the jury with a consciousness-of-guilt instruction.

G. Juror Bias

Next, Appellant claims he is entitled to a new trial because the trial court deprived him of a fair and impartial jury when it failed to remove an ostensibly biased juror. The trial court explained the circumstances leading to its decision not to dismiss the juror in question as follows:

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., [4/5/18,] at 190. On April 6, 2018, the [c]ourt and counsel had a conference to address any outstanding issues in advance of the commencement of trial.... Following this conference, ... [Appellant] 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, [Appellant] alleged that during the jury selection process, Juror 11 indicated that he believed [Appellant] was guilty. In support of this Motion, [Appellant] filed declarations of Priscilla Horvath, the administrative assistant for [Appellant]'s Attorney Kathleen Bliss, the declaration of Richard Beasley, a defense private investigator, and the declaration of prospective Juror 9.

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] 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 [Appellant]. Ms. Horvath called the prospective juror back and obtained a description of the juror who purportedly made the statement. Private investigator Beasley also contacted the prospective juror; the juror relayed the same information to Beasley. 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 [c]ourt's attention at that time, or during the April 6, 2018 conference, but instead undertook an independent investigation.

On April 9, 2018, the [c]ourt 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, summoned on April 3, 2018. The jurors who were not stricken for cause returned the next day, April 4, 2018, for individual *voir dire*. Prospective [J]uror 9 and eleven other prospective jurors waited in a small jury room for individual *voir dire*. The court noted during the in chambers proceeding that the room is a small room, approximately 10 feet by 15 feet. Prospective [J]uror 9 testified that she was sitting across the room from Juror 11. She testified that she was able to hear anything that anyone said in the room unless they were having a private conversation.

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. She testified that he stated that he was ready to just say [Appellant] was guilty so they could all get out of there. She testified that she was unsure if he was joking. She indicated that no one else in the room reacted to the statement and people continued to make small talk. She indicated that Juror 11 also made a statement about a comedy show that [Appellant] performed after the first trial. There was also some discussion in the group about a shooting at YouTube.

Prospective Juror 9 contacted defense counsel and left a message regarding this information. When questioned by the [c]ourt, 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. 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. 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.

The [c]ourt questioned Juror 11 about the statement. The following exchange took place:

> The [c]ourt: 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 [c]ourt: You never made such a statement?
>
> Juror 11: No.
>
> The [c]ourt: 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 [c]ourt: You don't recall it. Could you have made a statement like that?
>
> Juror 11: I don't think I would have.
>
> The [c]ourt: You don't think you would have?
>
> Juror 11: No.

> The [c]ourt: 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 [c]ourt: 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 [c]ourt: So did you make that statement? If you did, it's perfectly okay.
>
> Juror 11: No.
>
> The [c]ourt: You did not?
>
> Juror 11: No.
>
> [...]
>
> The [c]ourt: So did you hear anyone at any time mention an[] opinion when you [were] back in this room regarding the guilt or innocence of [Appellant]?
>
> Juror 11: No.
>
> The [c]ourt: That means whether it was joking or not joking, just any comment?
>
> Juror 11: No, I don't remember anything like that.
>
> The [c]ourt: So you don't remember, but you clearly know that you did not say it; is that correct?
>
> Juror 11: Yes.

[N.T., 4/9/18, at 56-59].

Juror 11 consistently denied making any such statement, even as a joke. He also stated that he did not remark on a comedy performance of [Appellant] and indicated that people in the room discussed the shooting at YouTube.

Following Juror 11's repeated denials, the [c]ourt then interviewed the seated jurors who were in the room at the time of the alleged

> statement. First, the [c]ourt interviewed seated Juror 9. [Seated J]uror 9 indicated that they did not hear anyone make a comment to the effect that [Appellant] was guilty, any comment about his guilt or innocence, or any discussion of YouTube. The [c]ourt interviewed seated Juror 10. Juror 10, likewise, did not hear anyone make a comment regarding [Appellant]'s guilt or innocence. Juror 10 indicated that they heard people discussing the shooting at YouTube. Juror 10 did not hear anyone talk about a comedy performance [by Appellant]. The [c]ourt interviewed seated Juror 12 who did not hear anyone say that they thought [Appellant] was guilty. Juror 12 did hear people discuss the shooting at YouTube. He did not hear any discussion of a comedy performance [by Appellant] that may have been on YouTube. Juror 12 was seated next to Juror 11 at the time of the alleged statement.
>
> Following the interviews of Jurors 9, 10 and 12, the [c]ourt again questioned Juror 11. At this point, the [c]ourt 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." Again the juror denied making the statement.
>
> Based on this [c]ourt'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 [c]ourt denied the motion on credibility grounds.

TCO at 83-88 (some citations and footnotes omitted).

Appellant contends that the trial court erred in two respects. First, Appellant claims that the trial court "palpably abused its discretion in refusing to provide [Appellant] with a complete evidentiary hearing into [Juror 11]'s expressed bias." Appellant's Brief at 160-61. In this regard, Appellant believes the trial court erred by failing to call other prospective jurors to testify regarding Juror 11's alleged comment. Second, Appellant argues that the trial court "committed a palpable abuse of discretion in refusing to strike [Juror 11] based on the evidence that was adduced at [the] hearing." ***Id.*** at 162. Thus,

Appellant essentially argues that Juror 11 should have been removed for cause based on the record that was developed below and, alternatively, that even if he was not entitled to relief based upon the record as it stands, the trial court should have heard additional testimony.

> A trial court's decision regarding whether to disqualify a juror for cause is within its sound discretion and will not be reversed in the absence of a palpable abuse of discretion. ***Commonwealth v. Stevens***, [] 739 A.2d 507, 521 ([Pa.] 1999). In determining if a motion to strike a prospective juror for cause was properly denied our Court is guided by the following precepts:
>
> > The test for determining whether a prospective juror should be disqualified is whether he 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.... It must be determined whether any biases or prejudices can be put aside on proper instruction of the court.... A challenge for cause should be granted when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct or answers to questions.

Commonwealth v. Briggs, 12 A.3d 291, 332-33 (Pa. 2011) (quoting ***Commonwealth v. Cox***, 983 A.2d 666, 682 (Pa. 2009)). Additionally,

> [t]he refusal of a new trial on grounds of alleged misconduct of a juror is largely within the discretion of the trial judge. When the facts surrounding the possible misconduct are in dispute, the trial judge should examine the various witnesses on the question, and his findings of fact will be sustained unless there is an abuse of discretion.

Commonwealth v. Posavek, 420 A.2d 532, 537 (Pa. Super. 1980) (citation omitted).

Here, the trial court rejected Appellant's biased-juror claims, stating:

> Based on this [c]ourt's observations of the demeanor of all of the people questioned regarding the statement and its review of the declarations attached to the Motion [to remove the juror], the [c]ourt denied the motion on credibility grounds. Juror 11 answered the questions without hesitation. This [c]ourt did not find [p]rospective Juror 9 to be credible. Prospective Juror 9 claimed that she heard people talking about a comedy performance by [Appellant]; 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. Based on the foregoing, this court did not abuse its discretion in refusing to strike Juror 11.

TCO at 88 (citations omitted).

We ascertain no abuse of discretion in the trial court's decision not to remove Juror 11 from the jury based on the record before us. The trial court, as factfinder, determined that prospective Juror 9's accusation was not credible, and that Juror 11's testimony, which directly contradicted prospective Juror 9's testimony, was credible. Indeed, the court's credibility determination was buttressed by the testimony of three other seated jurors who were in the immediate vicinity of prospective Juror 9 and Juror 11 at the time the purported statement was made. We are bound by the trial court's credibility determination that Juror 11 did not make any statement prejudging Appellant's culpability.

We are unpersuaded by Appellant's reliance on ***State v. Ess***, 453 S.W.3d 196 (Mo. 2015). ***Ess*** is not a controlling authority in this jurisdiction. In any event, that case did not involve similar circumstances to the instant

matter. In ***Ess***, a juror had purportedly evinced prejudgment of a case during a break in *voir dire* by stating to another juror that it was a "cut-and-dry []case." ***Id.*** at 200. Ess filed a motion for a new trial based on juror misconduct, and the prosecutor objected. The trial court ultimately "sustained the prosecutor's objections, which were to a lack of foundation, speculation, and hearsay." ***Id.*** The Supreme Court of Missouri reversed, because, *inter alia*, the trial court had failed to make any credibility assessment regarding the juror's purported statement. ***Id.*** at 203. Instead, the trial court had determined that, even if the statement had been made, it was not alone sufficient to demonstrate bias against the defendant rather than the prosecution. ***Id.*** The instant case is clearly disanalogous to ***Ess***. Here, the trial court conducted a hearing, assessed the credibility of multiple witnesses, and ultimately determined that Juror 11 did not make the at-issue statement.

We also disagree with Appellant's claim that he was entitled to a more extensive hearing that would have included additional witnesses. Appellant cites no authorities to support his argument. As is evident from the record, the trial court conducted a hearing, at which no less than five witnesses testified—all of whom were in the small room at the time when Juror 11 supposedly made his biased statement. Appellant fails to produce a cogent argument that more was required. Neither case cited by Appellant suggests otherwise.

For instance, Appellant suggests a more extensive hearing was required under ***Commonwealth v. Horton***, 401 A.2d 320 (Pa. 1979). We disagree.

In ***Horton***, "[i]n the presence of the judge and jury panel from which his jury was later selected, [Horton] was asked by the court clerk how he pleaded to the charges against him." ***Id.*** at 322. Horton (mistakenly) answered, "GUILTY." ***Id.*** During the subsequent *voir dire*, a juror indicated that Horton's initial response of "GUILTY" had "preconditioned" his mind against Horton. ***Id.*** When defense counsel sought to disqualify the entire jury panel, the court refused his request.

> Defense counsel then asked to be allowed to pose an appropriate question to the jurors to determine whether or not any other jurors had heard [Horton] respond "guilty" when asked how he would plead, and, if so, whether they had been predisposed by that statement to believe [Horton was] guilty. This request was also denied by the trial judge.

Id. at 323. Our Supreme Court held in ***Horton*** that the trial court had "erred when it refused to examine the jurors regarding this incident." ***Id.***

However, here, unlike what occurred in ***Horton***, where the whole jury was potentially influenced by a statement by the defendant (the content of which was not disputed), the only accusation of potential bias pertained to the alleged comment made by a single juror. In ***Horton***, the trial court refused to hold a hearing to question the jurors. Here, the trial court held a hearing and questioned more than five witnesses. The court questioned four seated jurors and prospective Juror 9, who had made the accusation, and concluded that prospective Juror 9's accusation was simply not credible. In ***Horton***, by contrast, the content of Horton's statement was not in dispute, and it was also undisputed that he made the problematic statement in front of the jury; the

only issue that remained was how many of the jurors had heard him make the statement. Thus, we conclude that ***Horton*** provides no support for Appellant's assertion that he was entitled to a more extensive hearing on Juror 11's alleged statement. Accordingly, for the aforementioned reasons, Appellant is not entitled to a new trial based on his allegation of Juror 11's bias.

H. Constitutionality of Applying SORNA II to Appellant's 2004 Offense

Finally, Appellant, challenges the constitutionality of his SVP designation, as well as his registration and reporting requirements under SORNA II. Appellant contends that the SVP provisions of SORNA II impose punitive sanctions that cannot be retroactively applied to his 2004 crime without violating the *ex post facto* clauses of the Pennsylvania and Federal Constitutions. He also argues that his SVP designation was imposed under a constitutionally insufficient standard of proof.

As background,

> [c]ourts have also referred to SORNA as the Adam Walsh Act. SORNA [I was] the General Assembly's fourth enactment of the law commonly referred to as Megan's Law. Megan's Law I, the Act of October 24, 1995, P.L. 1079 (Spec. Sess. No. 1), was enacted on October 24, 1995, and became effective 180 days thereafter. Megan's Law II was enacted on May 10, 2000[,] in response to Megan's Law I being ruled unconstitutional by our Supreme Court in ***Commonwealth v. Williams***, ... 733 A.2d 593 ([Pa.] 1999). Our Supreme Court held that some portions of Megan's Law II were unconstitutional in ***Commonwealth v. Gomer Williams***, ... 832 A.2d 962 ([Pa.] 2003), and the General Assembly responded by enacting Megan's Law III on November

> 24, 2004. The United States Congress expanded the public notification requirements of state sexual offender registries in the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901-16945, and the Pennsylvania General Assembly responded by passing SORNA [I] on December 20, 2011[,] with the stated purpose of "bring[ing] the Commonwealth into substantial compliance with the Adam Walsh Child Protection and Safety Act of 2006." 42 Pa. C.S. § 9799.10(1). SORNA [I] went into effect a year later on December 20, 2012. Megan's Law III was also struck down by our Supreme Court for violating the single subject rule of Article III, Section 3 of the Pennsylvania Constitution. [***Commonwealth***] ***v. Neiman***, ... 84 A.3d 603, 616 ([Pa.] 2013). However, by the time it was struck down, Megan's Law III had been replaced by SORNA [I].

M.S. v. Pennsylvania State Police, 212 A.3d 1142, 1143 n.1 (Pa. Cmwlth. 2019) (quoting ***Dougherty v. Pennsylvania State Police***, 138 A.3d 152, 155 n.8 (Pa. Cmwlth. 2016) (*en banc*)).

SORNA I also failed to withstand constitutional scrutiny. In ***Commonwealth v. Muniz***, 164 A.3d 1189 (Pa. 2017), *cert. denied*, ***Pennsylvania v. Muniz***, 138 S.Ct. 925 (2018), our Supreme Court held that

> 1) SORNA's registration provisions constitute punishment notwithstanding the General Assembly's identification of the provisions as nonpunitive; 2) retroactive application of SORNA's registration provisions violates the federal *ex post facto* clause; and 3) retroactive application of SORNA's registration provisions also violates the *ex post facto* clause of the Pennsylvania Constitution.

Id. at 1193. The ***Muniz*** Court deemed SORNA I's registration provisions to be punitive by applying the seven-factor test established in ***Kennedy v. Mendoza-Martinez***, 372 U.S. 144 (1963). Applying ***Muniz***, in conjunction with ***Alleyne v. United States***, 570 U.S. 99 (2013), this Court deemed unconstitutional the SVP assessment provision of SORNA I, 42 Pa.C.S. §

9799.24, because "it increases the criminal penalty to which a defendant is exposed without the chosen fact-finder making the necessary factual findings beyond a reasonable doubt." ***Commonwealth v. Butler***, 173 A.3d 1212, 1218 (Pa. Super. 2017), *reargument denied* (Jan. 3, 2018), *appeal granted*, 190 A.3d 581 (Pa. 2018).

In direct response to ***Muniz*** and ***Butler***, our General Assembly passed SORNA II, which became effective on June 12, 2018. ***See*** 42 Pa.C.S. § 9799.51(d)(4) (indicating the "intention of the General Assembly" to "[a]ddress the Pennsylvania Supreme Court's decision in ... ***Muniz***..., and the Pennsylvania Superior Court's decision in ... ***Butler***...."). This Court has already addressed a constitutional challenge to SORNA II. In ***Commonwealth v. Moore***, ---A.3d----, 2019 PA Super 320 (Pa. Super. filed Oct. 23, 2019), a panel of this Court held that the internet registration provisions of SORNA II violate the federal *ex post facto* clause. ***Id.*** at *9. However, the ***Moore*** Court also determined that "the Internet provisions of SORNA II are severable from the rest of the statutory scheme." ***Id.*** Additionally, the constitutionality of SORNA II as a whole is currently before our Supreme Court. ***See Commonwealth v. Lacombe***, 35 MAP 2018 (Pa. 2018).

Instantly, Appellant claims "SORNA II still violates ... ***Alleyne***. A sexually violent predator determination still punishes a defendant with automatic lifetime registration and counseling." Appellant's Brief at 172. He continues:

> Specifically, with the Aggravated Assault conviction for which [Appellant] 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.

Id. Appellant then goes on to present a challenge to SORNA II in its entirety. ***See id.*** at 173-75.

The Commonwealth contends that:

> As an initial matter, if [Appellant] now attempts to challenge the imposition of his non-SVP registration requirements under [SORNA II], that claim is waived, as he did not raise it in his 1925(b) statement. ***See*** ... ***Lord***, 719 A.2d [at] 309 ... (any issues not raised in a 1925(b) statement are waived on appeal). In that statement, [Appellant] stated only that "[t]he trial court abused its discretion, erred, and infringed on [Appellant's] constitutional rights in applying the [SVP] provisions of [SORNA II] for a 2004 offense in violation of the [*e*]*x* [*p*]*ost* [*f*]*acto* [c]lauses of the State and Federal Constitutions." [Appellant's 1925(b) Statement] at ¶ 11. Accordingly, he has only preserved a challenge to the SVP provisions of Subchapter I.

Commonwealth's Brief at 198.

We agree with the Commonwealth. Appellant only challenged the trial court's application of the SVP provisions of SORNA II on *ex post facto* grounds in his Rule 1925(b) statement. As such, he has waived any challenge to the general provisions of SORNA II that are unrelated to his designation as an SVP. ***Lord, supra***. He has also waived his claim that his SVP status was imposed below the beyond-a-reasonable-doubt standard of proof. Thus, the only issue raised in Appellant's Rule 1925(b) statement that was preserved for appellate review is whether the trial court's application to Appellant of the

SVP provisions of SORNA II violates the *ex post facto* clauses of the Pennsylvania and Federal Constitutions.

Before we address the merits of Appellant's constitutional claim, however, the Commonwealth presents a second waiver argument based on Appellant's ostensible failure to adequately develop the SVP claim in his brief. The failure to provide a relevant analysis that discusses pertinent facts may result in waiver under Pa.R.A.P. 2119. ***See Commonwealth v. Rhodes***, 54 A.3d 908, 915 (Pa. Super. 2012); ***see also*** Pa.R.A.P. 2119(a) ("The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part--in distinctive type or in type distinctively displayed--the particular point treated therein, ***followed by such discussion and citation of authorities as are deemed pertinent***.") (emphasis added).

As noted by the Commonwealth:

> [Appellant] has presented no pertinent discussion here. His claim rests on the premise that Subchapter I [of SORNA II] constitutes criminal punishment. Although he notes the existence of the seven-factor ***Mendoza-Martinez*** test for determining whether a statute is punitive, [Appellant]'s Brief ... at 173-[]74, he never ***applies*** the test to the statute. Instead, he identifies three random provisions of Subchapter I and asserts that "[SORNA II] is still punitive." ***Id.*** His failure to provide any meaningful analysis of how the statute is supposedly punitive in light of the ***Mendoza-Martinez*** factors renders his claim waived.

Commonwealth's Brief at 199 (footnote omitted; emphasis in original).

We agree. The portion of Appellant's argument that specifically addresses the constitutionality of his registration and reporting requirements as an SVP is poorly developed. Appellant cites—but fails to adequately apply—

the ***Mendoza-Martinez*** test to the provisions of SORNA II triggered by his SVP status. While he identifies several aspects of SORNA II that have remained virtually unchanged since SORNA I, he fails to provide any discussion, whatsoever, concerning the alterations made by the General Assembly in crafting SORNA II in response to ***Muniz*** and ***Butler***. This omission is fatal under Rule 2119, as the discussion of such changes is critical to any pertinent analysis of whether SORNA II's SVP provisions are punitive and, thus, subject to state and federal prohibitions of *ex post facto* laws.

Most importantly, Appellant fails to discuss the impact of the addition of 42 Pa.C.S. § 9799.59(a) in SORNA II. Unlike in SORNA I, or in any prior version of Megan's Law for that matter, Section 9799.59(a) provides a mechanism by which sex offender registrants, including SVPs, can be relieved of part or all of their registration, reporting, and counseling requirements under SORNA II. Specifically, an SVP may petition the sentencing court for complete relief from their obligations under SORNA II after 25 years, or after "the petitioner's release from custody following the petitioner's most recent conviction for an offense, whichever is later." 42 Pa.C.S. § 9799.59(a)(1). Upon receiving such a petition, the sentencing court must direct the Sexual Offender Assessment Board to assess whether, if the petitioner is granted relief, he or she "is likely to pose a threat to the safety of any other persons." 42 Pa.C.S. § 9799.59(a)(2). The Sexual Offender Assessment Board must respond to the sentencing court with its report within 90 days. 42 Pa.C.S. §

9799.59(a)(3). The petitioner is then entitled to a hearing within 120 days of the petition, where the

> petitioner and the district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses and the right to cross-examine witnesses. The petitioner shall have the right to counsel and to have a lawyer appointed to represent the petitioner if the petitioner cannot afford one.

42 Pa.C.S. § 9799.59(a)(4). The petitioner may then be exempted

> from application of any or all of the requirements of this subchapter, at the discretion of the court, only upon a finding of clear and convincing evidence that exempting the petitioner from a particular requirement or all of the requirements of this subchapter is not likely to pose a threat to the safety of any other person.

42 Pa.C.S. § 9799.59(a)(5). Both the Commonwealth and the petitioner are entitled to appellate review from that decision. 42 Pa.C.S. § 9799.59(a)(7). Moreover, if denied relief, the "petitioner may file an additional petition with the sentencing court no sooner than five years from the date of the final determination of a court regarding the petition and every five years thereafter." 42 Pa.C.S. § 9799.59(a)(8).

In his brief, Appellant provides no accounting for Section 9799.59 in his constitutional challenge to the SVP-triggered provisions of SORNA II. Appellant does not discuss how that provision impacts the ***Mendoza-Martinez*** test for determining whether SORNA II is punitive. Thus, Appellant does not provide a pertinent discussion of whether this Court's concerns in ***Butler*** have been adequately alleviated by the General Assembly's crafting of

SORNA II. Accordingly, we agree with the Commonwealth that Appellant has waived this claim by failing to provide a meaningful analysis for our review.

In any event, for the same reason, had we reached the merits of his claim, it would fail.

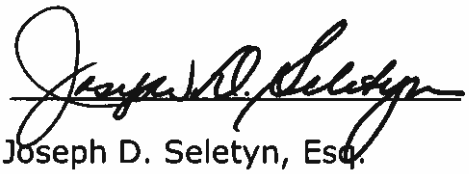
> When an appellant challenges the constitutionality of a statute, the appellant presents this Court with a question of law. ***See Commonwealth v. Atwell***, 785 A.2d 123, 125 (Pa. Super. 2001) (citation omitted). Our consideration of questions of law is plenary. ***See id.*** ... (citation omitted). A statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly, palpably, and plainly violates the constitution. ***See Commonwealth v. Etheredge***, 794 A.2d 391, 396 (Pa. Super. 2002) (citations omitted). Thus, the party challenging the constitutionality of a statute has a heavy burden of persuasion. ***See id.*** ... (citation omitted).

Commonwealth v. Howe, 842 A.2d 436, 441 (Pa. Super. 2004).

Here, Appellant's failure to address the changes between SORNA I and SORNA II, and in particular, whether the SVP provisions of SORNA II remain punitive despite the addition of Section 9799.59, demonstrates that he cannot overcome the heavy burden of persuasion to demonstrate that the SVP-triggered provisions of SORNA II clearly, palpably, and plainly violate the state and federal *ex post facto* clauses. Accordingly, had we reached the merits of his claim, Appellant would still not be entitled to relief.

Judgment of sentence ***affirmed***.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/10/19

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

[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.

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[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.

[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.
>
> * * *
>
> [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

[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,

[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."

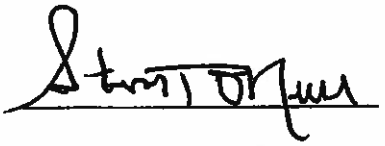
N.T. Sept. 24, 2018 at 63.

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:
Kevin R. Steele, Esq. (District Attorney's Office)
Robert Falin, Esq. (District Attorney's Office)
Brian W. Perry, Esq.
Kristen L. Weisenberger, Esq.

Audrey Bartkowski/sp
Secretary

APPENDIX C

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 11th 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,

PERRY SHORE WEISENBERGER & ZEMLOCK

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

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

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:

Judge Steven T. O'Neill
Montgomery County Court House
P.O. Box 311
Norristown, PA 19404-0311

Kevin Steele, District Attorney
Montgomery County District Attorney's Office
Montgomery County Courthouse
4th Floor
P.O. Box 311
Norristown, PA 19404-0311

Robert Falin, Assistant District Attorney
Montgomery County District Attorney's Office
Montgomery County Courthouse
4th Floor
P.O. Box 311
Norristown, PA 19404-0311

Adrienne Jappe, Assistant District Attorney
Montgomery County District Attorney's Office
Montgomery County Courthouse
4th Floor
P.O. Box 311
Norristown, PA 19404-0311

Brian W. Perry, Esquire

Kristen L. Weisenberger, Esquire

APPENDIX D

Statutes

18 U.S.C.A. § 6002

§ 6002. Immunity generally.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C.A. § 6003

§ 6003. Court and grand jury proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon

the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

18 Pa.C.S.A. §§ 3125

§ 3125. Aggravated indecent assault.

(a) Offenses defined.--Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if:

(1) the person does so without the complainant's consent;

...

(4) the complainant is unconscious or the person knows that the complainant is unaware that the penetration is occurring;

(5) the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.

16 P.S. § 1402

§ 1402. Duties of district attorney; entry of nolle prosequi.

(a) The district attorney shall sign all bills of indictment and conduct in court all criminal and other prosecutions, in the name of the Commonwealth, or, when the Commonwealth is a party, which arise in the county for which the district attorney is elected, and perform all the duties which, prior to May 3, 1850, were performed by deputy attorneys general. The duties herein conferred shall be in addition to all other duties given to the said district attorney by other statutes.

42 Pa.C.S.A. § 5947

§ 5947. Immunity of witnesses.

(a) General rule.--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.

(b) Request and issuance.--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.

...

(d) Limitation on use.--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:

(1) in a prosecution under 18 Pa.C.S. § 4902 (relating to perjury) or under 18 Pa.C.S. § 4903 (relating to false swearing);

(2) in a contempt proceeding for failure to comply with an immunity order; or

(3) as evidence, where otherwise admissible, in any proceeding where the witness is not a criminal defendant.

...

(g) Definitions.--The following words and phrases when used in this section shall have, unless the context clearly indicates otherwise, the meanings given to them in this subsection:

"Designated court."

(1) In the case of proceedings before courts, countywide grand juries, countywide investigating grand juries, the minor judiciary or coroners: the court of common pleas of the judicial district in which the proceeding is taking place.

...

"Immunity order." An 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.

42 Pa.C.S.A. § 9799.51

§ 9799.51. Legislative findings and declaration of policy.

(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).

Constitutional Provisions

U.S. Const. amend. V

Amendment V

No person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law …

U.S. Const. amend. VI

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pa. Const. art. I, §9

§ 9. Rights of accused in criminal prosecutions.

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

Other Authorities

Pa.R.A.P. 1114

Rule 1114. Standards Governing Allowance of Appeal.

(a) General Rule. Except as prescribed in Pa.R.A.P. 1101 (appeals as of right from the Commonwealth Court), review of a final order of the Superior Court or the Commonwealth Court is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.

(b) Standards. A petition for allowance of appeal may be granted for any of the following reasons:

(1) the holding of the intermediate appellate court conflicts with another intermediate appellate court opinion;

(2) the holding of the intermediate appellate court conflicts with a holding of the Pennsylvania Supreme Court or the United States Supreme Court on the same legal question;

(3) the question presented is one of first impression;

(4) the question presented is one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court;

(5) the issue involves the constitutionality of a statute of the Commonwealth;

(6) the intermediate appellate court has so far departed from accepted judicial practices or so abused its discretion as to call for the exercise of the Pennsylvania Supreme Court's supervisory authority; or

(7) the intermediate appellate court has erroneously entered an order quashing or dismissing an appeal.

Note: The petition for allowance of appeal is synonymous with a petition for allocatur. Pa.R.A.P. 1114(b)(7) supersedes the practice described in *Vaccone v. Syken*, 587 Pa. 380, 384 n.2, 899 A.2d 1103, 1106 n.2 (2006).

Pa.R.A.P. 1925

Rule 1925. Opinion in Support of Order.

(a) Opinion in support of order.

(1) *General rule.* Except as otherwise prescribed by this rule, upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall within the period set forth in Pa.R.A.P. 1931(a)(1) file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

If the case appealed involves a ruling issued by a judge who was not the judge entering the order giving rise to the notice of appeal, the judge entering the order giving rise to the notice of appeal may request that the judge who made the earlier ruling provide an opinion to be filed in accordance with the standards above to explain the reasons for that ruling.

...

(b) Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court. If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the

errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

...

(4) *Requirements; waiver.*

(i) The Statement shall set forth only those errors that the appellant intends to assert.

(ii) The Statement shall concisely identify each error that the appellant intends to assert with sufficient detail to identify the issue to be raised for the judge. The judge shall not require the citation to authorities or the record; however, appellant may choose to include pertinent authorities and record citations in the Statement.

(iii) The judge shall not require any party to file a brief, memorandum of law, or response as part of or in conjunction with the Statement.

(iv) 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.

(v) Each error identified in the Statement will be deemed to include every subsidiary issue that was raised in the trial court; this provision does not in any way limit the obligation of a criminal appellant to delineate clearly the scope of claimed constitutional errors on appeal.

(vi) If the appellant in a civil case cannot readily discern the basis for the judge's decision, the appellant shall preface the Statement with an explanation as to why the Statement has identified the errors in only general terms. In such a case, the generality of the Statement will not be grounds for finding waiver.

(vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

...

(d) Opinions in matters on petition for allowance of appeal. Upon receipt of notice of the filing of a petition for allowance of appeal under Pa.R.A.P. 1112(c)(appeals by allowance), the appellate court that entered the order sought to be reviewed, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order.

Note:

...

Paragraph (b): This paragraph permits the judge whose order gave rise to the notice of appeal ("judge") to ask for a statement of errors complained of on appeal ("Statement") if the record is inadequate and the judge needs to clarify the errors complained of. The term "errors" is meant to encourage appellants to use the Statement as an opportunity to winnow the issues, recognizing that they will ultimately need to be refined to a statement that will comply with the requirements of Pa.R.A.P. 2116. Nonetheless, the term "errors" is intended in this context to be expansive, and it encompasses all of the reasons the trial court should not have reached

its decision or judgment, including, for example, those that may not have been decisions of the judge, such as challenges to jurisdiction .

...

The paragraph explains that the Statement should be sufficiently specific to allow the judge to draft the opinion required under Pa.R.A.P. 1925(a), and it provides that the number of issues alone will not constitute waiver so long as the issues set forth are non-redundant and non-frivolous. It allows appellants to rely on the fact that subsidiary issues will be deemed included if the overarching issue is identified and if all of the issues have been properly preserved in the trial court. This provision has been taken from the United States Supreme Court rules. *See* Sup. Ct. R. 14(1).

...

This subparagraph also allows--but does not require--an appellant to state the authority upon which the appellant challenges the ruling in question and to identify the place in the record where the basis for the challenge may be found.

Neither the number of issues raised nor the length of the Statement alone is enough to find that a Statement is vague or non-concise enough to constitute waiver. *See Astorino v. New Jersey Transit Corp.*, 912 A.2d 308, 309 (Pa. Super. 2006).

...

Nothing in the rule requires an appellant to articulate the arguments within a Statement. It is enough for an appellant--except where constitutional error must be raised with greater specificity--to have identified the rulings and issues in regard to which the trial court is alleged to have erred.

...

Pa.R.E. 404

(b) Crimes, Wrongs or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

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
Montgomery County District Attorney's Office
Montgomery County Courthouse
4th Floor
P.O. Box 311
Norristown, PA 19404-0311

Brian W. Perry, Esquire
Barbara A. Zemlock, Esquire

Sarah Kelly-Kilgore, Esquire
(*Pro Hac Vice* Motion to Be Filed)
Matthew S. Ingles, Esquire
(*Pro Hac Vice* Motion to Be Filed)

Dated: January 9, 2020