APPENDIX TABLE OF CONTENTS

**OPINION OF THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
(JUNE 30, 2021)**

---

252 A.3d 1092

[J-100-2020]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

WILLIAM HENRY COSBY JR.,

Appellant.

No. 39 MAP 2020

Appeal from the Order of Superior Court at
No. 3314 EDA 2018 dated December 10, 2019
Affirming the Judgment of Sentence dated
September 25, 2018 of the Montgomery Court of
Common Pleas, Criminal Division, at
No. CP-46-CR-3932-2016

Argued: December 1, 2020

Before: BAER, C.J., SAYLOR, TODD, DONOHUE,
DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE WECHT

DECIDED: June 30, 2021

In 2005, Montgomery County District Attorney Bruce Castor learned that Andrea Constand had reported that William Cosby had sexually assaulted her in 2004 at his Cheltenham residence. Along with his top deputy prosecutor and experienced detectives, District Attorney Castor thoroughly investigated Constand's claim. In evaluating the likelihood of a successful prosecution of Cosby, the district attorney foresaw difficulties with Constand's credibility as a witness based, in part, upon her decision not to file a complaint promptly. D.A. Castor further determined that a prosecution would be frustrated because there was no corroborating forensic evidence and because testimony from other potential claimants against Cosby likely was inadmissible under governing laws of evidence. The collective weight of these considerations led D.A. Castor to conclude that, unless Cosby confessed, "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."[1]

Seeking "some measure of justice" for Constand, D.A. Castor decided that the Commonwealth would decline to prosecute Cosby for the incident involving Constand, thereby allowing Cosby to be forced to testify in a subsequent civil action, under penalty of perjury, without the benefit of his Fifth Amendment

---

[1] Notes of Testimony ("N.T."), *Habeas Corpus* Hearing, 2/2/2016, at 60.

privilege against self-incrimination.[2] Unable to invoke any right not to testify in the civil proceedings, Cosby relied upon the district attorney's declination and proceeded to provide four sworn depositions. During those depositions, Cosby made several incriminating statements.

D.A. Castor's successors did not feel bound by his decision, and decided to prosecute Cosby notwithstanding that prior undertaking. The fruits of Cosby's reliance upon D.A. Castor's decision—Cosby's sworn inculpatory testimony—were then used by D.A. Castor's successors against Cosby at Cosby's criminal trial. We granted allowance of appeal to determine whether D.A. Castor's decision not to prosecute Cosby in exchange for his testimony must be enforced against the Commonwealth.[3]

I. Factual and Procedural History

In the fall of 2002, Constand, a Canadian-born former professional basketball player, was employed as the Director of Basketball Operations at Temple University. It was in this capacity that Constand first met Cosby, who had close ties to, and was heavily involved with, the university. That fall, she, along with a few other Temple administrators, showed Cosby

---

[2] *Id.* at 63.

[3] As we discuss in more detail below, at Cosby's trial, the trial court permitted the Commonwealth to call five witnesses who testified that Cosby had engaged in similar sexually abusive patterns with each of them. We granted allowance of appeal here as well to consider the admissibility of that prior bad act evidence pursuant to Pa.R.E. 404(b). However, because our decision on the Castor declination issue disposes of this appeal, we do not address the Rule 404(b) claim.

around the university's then-recently renovated basketball facilities. Over the course of several telephone conversations concerning the renovations, Cosby and Constand developed a personal relationship.

Soon after this relationship began, Cosby invited Constand to his Cheltenham residence. When Constand arrived, Cosby greeted her, escorted her to a room, and left her alone to eat dinner and drink wine. Cosby later returned, sat next to Constand on a couch, and placed his hand on her thigh. Constand was not bothered by Cosby's advance, even though it was the first time that any physical contact had occurred between the two. Shortly thereafter, Constand left the residence.

As the personal nature of the relationship progressed, Cosby eventually met Constand's mother and sister, both of whom attended one of Cosby's comedy performances. Soon thereafter, Cosby invited Constand to return to his home for dinner. Constand arrived at the residence and again ate alone, in the same room in which she had eaten during her first visit. When Constand finished eating, Cosby approached and sat next to her on the couch. At first, the two discussed Constand's desire to work as a sports broadcaster, but Cosby soon attempted physical contact. Cosby reached over to Constand and attempted to unbutton her pants. When she leaned forward to prevent him from doing so, Cosby immediately ceased his efforts. Constand believed that her actions had communicated to Cosby clearly that she did not want to engage in a physical relationship with him. She expected that no further incidents like this one would occur.

Toward the end of 2003, Cosby invited Constand to meet at the Foxwoods Casino in Connecticut. Con-

stand accepted the invitation and, once at the casino, dined with Cosby and a casino employee, Tom Cantone. After dinner, Cantone walked Constand to her hotel room. Cosby called Constand and asked her to meet him for dessert in his room. Constand agreed. When she arrived, she sat on the edge of Cosby's bed as the two discussed their customary topics: Temple athletics and sports broadcasting. Cosby then reclined on the bed next to Constand. Eventually, he drifted off to sleep. After remaining in Cosby's room for a few minutes, Constand left and returned to her own room. Constand interpreted Cosby's actions as another sexual overture. Notwithstanding these unwelcome advances, Constand still regarded Cosby as a mentor, remained grateful for his career advice and assistance, and did not feel physically threatened or intimidated.[4]

Eventually, Constand decided to leave her job at Temple and return to Canada to work as a masseuse. In January 2004, Constand went to Cosby's Cheltenham residence to discuss that decision. As on her previous visits to Cosby's home, Constand entered through the kitchen door. On this occasion, however, Constand noticed that Cosby already had placed a glass of water and a glass of wine on the kitchen table. While she sat at the table with Cosby and discussed her future, Constand initially chose not to sample the wine because she had not yet eaten and did not want to consume alcohol on an empty stomach. At Cosby's insistence, however, Constand began to drink.

At one point, Constand rose to use the restroom. When she returned, Cosby was standing next to the kitchen table with three blue pills in his hand. He

---

[4] N.T., Trial, 4/13/2018, at 53, 55.

reached out and offered the pills to Constand, telling her that the pills were her "friends," and that they would "help take the edge off."[5] Constand took the pills from Cosby and swallowed them. The two then sat back down and resumed their discussion of Constand's planned departure from Temple.

Constand soon began experiencing double vision. Her mouth became dry and she slurred her speech. Although Constand could not immediately identify the source of her sudden difficulties, she knew that something was wrong. Cosby tried to reassure her. He told her that she had to relax. When Constand attempted to stand up, she needed Cosby's assistance to steady herself. Cosby guided her to a sofa in another room so that she could lie down. Constand felt weak and was unable to talk. She started slipping out of consciousness.

Moments later, Constand came to suddenly, finding Cosby sitting behind her on the sofa. She remained unable to move or speak. With Constand physically incapable of stopping Cosby or of telling him to stop, Cosby began fondling her breasts and penetrating her vagina with his fingers. Cosby then took Constand's hand and used it to masturbate himself. At some point, Constand lost consciousness.

When Constand eventually awakened on Cosby's couch in the early morning hours, she discovered that her pants were unzipped and that her bra was raised and out of place. Constand got up, adjusted her clothing, and prepared to leave the residence. She found Cosby standing in a doorway, wearing a robe

---

[5] N.T., Trial, 4/13/2018, at 59-60.

and slippers. Cosby told Constand that there was a muffin and a cup of tea on a table for her. She took a sip of the tea, broke off a piece of the muffin, and left.

After the January 2004 incident, Constand and Cosby continued to talk over the telephone about issues involving Temple University athletics. In March of that year, Cosby invited Constand to dinner at a Philadelphia restaurant. She accepted the invitation in hopes of confronting Cosby about the January episode, but the two did not discuss that matter during dinner. Afterward, Cosby invited Constand to his residence. She agreed. Once there, Constand attempted to broach the subject by asking Cosby to identify the pills that he had provided to her. She then tried to ask him why he took advantage of her when she was under the influence of those pills. Cosby was evasive and would not respond directly. Realizing that Cosby was not going to answer her questions, Constand got up and left. She did not report to the authorities what Cosby had done to her.

A few months later, Constand moved back to her native Canada. She spoke with Cosby over the telephone, mostly about an upcoming Toronto performance that he had scheduled. Cosby invited Constand and her family to the show, which especially excited Constand's mother, who had attended two of Cosby's other performances and who brought a gift for Cosby to the show.

Constand kept the January 2004 incident to herself for nearly a year, until one night in January 2005, when she bolted awake crying and decided to call her mother for advice. Initially, Constand's mother could not talk because she was en route to work, but she returned Constand's call immediately upon arrival.

During the call, Constand told her mother that Cosby had sexually assaulted her approximately one year earlier. Together, the two decided that the best course of action was to contact the Durham Regional Police Department in Ontario, Canada, and to attempt to retain legal counsel in the United States.

That night, Constand filed a police report with the Durham Regional Police Department. Shortly thereafter, Constand called Cosby, but he did not answer his phone. When Cosby returned the call the next day, both Constand and her mother were on the line. Constand brought up the January 2004 incident and asked Cosby to identify the three blue pills that he had given to her that night. Cosby apologized vaguely. As to the pills, Cosby feigned ignorance, promising Constand that he would check the label on the prescription bottle from which they came and relay that information to her.

Frustrated, Constand left the call, but her mother remained on the line and continued to speak with Cosby. Cosby assured Constand's mother that he did not have sexual intercourse with Constand while she was incapacitated. Neither Constand nor her mother informed Cosby that Constand had filed a police report accusing him of sexual assault.

Constand later telephoned Cosby again and, unbeknownst to Cosby, recorded the conversation with a tape recorder that she had purchased. During this conversation, Cosby offered to continue assisting Constand if she still desired to work in sports broadcasting. He also indicated that he would pay for Constand to continue her education. Cosby asked Constand to meet him in person to discuss these matters further, and told her that he would have someone

contact her to set up the meeting. As with the previous call, Cosby again refused to identify the pills that he had provided to Constand on the night of the alleged assault.

Within days of filing the police report, Constand received two telephone messages from people associated with Cosby. The first message was from one of Cosby's assistants, calling on Cosby's behalf to invite Constand and her mother to Cosby's upcoming performance in Miami, Florida. Constand called the representative back and recorded the call. The representative asked for certain details about Constand and her mother so that he could book flights and hotel rooms for them. Constand declined the offer and did not provide the requested information. Constand then received a message from one of Cosby's attorneys, who stated that he was calling to discuss the creation of a trust that Cosby wanted to set up in order to provide financial assistance for Constand's education. Constand never returned the attorney's call.

In the meantime, the Durham Regional Police Department referred Constand's police report to the Philadelphia Police Department, which, in turn, referred it to the Cheltenham Police Department in Montgomery County, where Cosby's residence was located. The case was assigned to Sergeant Richard Schaeffer, who worked in tandem with the Montgomery County Detective Bureau and the Montgomery County District Attorney's Office to investigate Constand's allegation.

Sergeant Schaeffer first spoke with Constand by telephone on January 19, 2005. According to Sergeant Schaeffer, Constand seemed nervous throughout this brief initial interview. Thereafter, Constand traveled

from Canada to Cheltenham to meet with the investigating team in person. Because this was Constand's first time meeting with law enforcement personnel, she felt nervous and uncomfortable while discussing with them the intimate nature of her allegations.

On January 24, 2005, then-Montgomery County District Attorney Bruce Castor issued a press release informing the public that Cosby was under investigation for sexual assault. Sergeant Schaeffer and other law enforcement officials interviewed Cosby in New York City, utilizing a written question and answer format. Cosby was accompanied by his attorneys, Walter M. Phillips, Esquire, and John P. Schmitt, Esquire. Cosby reported that Constand had come to his home at least three times during their social and romantic relationship. Cosby claimed that, on the night in question, Constand came to his house complaining of an inability to sleep. Cosby stated that he told Constand that, when he travels, he takes Benadryl, an antihistamine, which immediately makes him drowsy. According to Cosby, he then handed Constand one-and-a-half Benadryl pills, but did not tell her what they were.

Cosby recalled that, once Constand ingested the pills, they kissed and touched each other on the couch. Cosby admitted that he touched Constand's breasts and vagina, but he insisted that she neither resisted nor told him to stop. Additionally, Cosby told the investigators that he never removed his clothing and that Constand did not touch any part of his body under his clothes. Cosby denied having sexual intercourse with Constand and disclaimed any intent to do so that night. In fact, Cosby claimed that the two never had sexual intercourse on any occasion.

Cosby admitted that he told Constand and her mother that he would write down the name of the pills and provide them that information, but he acknowledged that he never actually did so. After the interview—and without being asked to do so—Cosby provided the police with pills, which laboratory testing confirmed to be Benadryl.

In February 2005, then-District Attorney Castor reviewed Constand's interviews and Cosby's written answers in order to assess the viability of a prosecution of Cosby. The fact that Constand had failed to promptly file a complaint against Cosby troubled the district attorney. In D.A. Castor's view, such a delay diminished the reliability of any recollections and undermined the investigators' efforts to collect forensic evidence. Moreover, D.A. Castor identified a number of inconsistences in Constand's various statements to investigators. After Cosby provided his written answers, police officers searched his Cheltenham residence and found no evidence that, in their view, could be used to confirm or corroborate Constand's allegations. Following the search of Cosby's home, Constand was interviewed by police again. D.A. Castor noted that there were inconsistences in that interview, which further impaired Constand's credibility in his eyes. He also learned that, before she contacted the police in Canada, Constand had contacted civil attorneys in Philadelphia, likely for the purpose of pursuing financial compensation in a lawsuit against Cosby.

Additionally, according to D.A. Castor, Constand's behavior in the year since the alleged assault complicated any effort to secure a conviction against Cosby. As evidenced by the number of telephone calls that she recorded, Constand continued to talk with

Cosby on the phone, and she also continued to meet with him in person after the incident. D.A. Castor found these recurring interactions between a complainant and an alleged perpetrator to be atypical. D.A. Castor also reasoned that the recordings likely were illegal and included discussions that could be interpreted as attempts by Constand and her mother to get Cosby to pay Constand so that she would not contact the authorities. The totality of these circumstances ultimately led D.A. Castor to conclude that "there was insufficient credible and admissible evidence upon which any charge against [ ] Cosby related to the Constand incident could be proven beyond a reasonable doubt." N.T., 2/2/2016, at 60.

Having determined that a criminal trial likely could not be won, D.A. Castor contemplated an alternative course of action that could place Constand on a path to some form of justice. He decided that a civil lawsuit for money damages was her best option. To aid Constand in that pursuit, "as the sovereign," the district attorney "decided that [his office] would not prosecute [ ] Cosby," believing that his decision ultimately "would then set off the chain of events that [he] thought as a Minister of Justice would gain some justice for Andrea Constand." *Id.* at 63-64. By removing the threat of a criminal prosecution, D.A. Castor reasoned, Cosby would no longer be able in a civil lawsuit to invoke his Fifth Amendment privilege against self-incrimination for fear that his statements could later be used against him by the Commonwealth. Mr. Castor would later testify that this was his intent:

> The Fifth Amendment to the United States Constitution states that a person may not

be compelled to give evidence against themselves. So you can't subpoena somebody and make them testify that they did something illegal—or evidence that would lead someone to conclude they did something illegal—on the threat of if you don't answer, you'll be subject to sanctions because you're under subpoena.

So the way you remove that from a witness is—if you want to, and what I did in this case—is I made the decision as the sovereign that Mr. Cosby would not be prosecuted no matter what. As a matter of law, that then made it so that he could not take the Fifth Amendment ever as a matter of law.

So I have heard banter in the courtroom and in the press the term "agreement," but everybody has used the wrong word. I told [Cosby's attorney at the time, Walter] Phillips that I had decided that, because of defects in 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 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.

[Attorney] 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 one to the other. 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.
>
> [Attorney] Phillips, a lawyer of vastly more experience even than me—and I had 20 years on the job by that point—agreed with my legal assessment. And he said that he would communicate that to the lawyers who were representing Mr. Cosby in the pending civil suit.

Id. at 64-66. Recalling his thought process at the time, the former district attorney further emphasized that it was "absolutely" his intent to remove "for all time" the possibility of prosecution, because "the ability to take the Fifth Amendment is also for all time removed." *Id.* at 67.

Consistent with his discussion with Attorney Phillips, D.A. Castor issued another press release, this time informing the public that he had decided not to prosecute Cosby. The press release stated, in full:

> 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. Cosby maintains a residence in Cheltenham Township, Montgomery County.

A 31 year old female, a former employee of the Athletic Department of Temple University complained to detectives that Cosby touched her inappropriately during a visit to his home in January of 2004. The woman reported the allegation to police in her native Canada on January 13, 2005.

Canadian authorities, in turn, referred the complaint to Philadelphia Police. Philadelphia forwarded the complaint to Cheltenham Police. The District Attorney's Office became involved at the request of the Cheltenham Chief of Police John Norris.

Everyone involved in this matter cooperated with investigators including the complainant and Mr. Cosby. The level of cooperation has helped the investigation proceed smoothly and efficiently. The District Attorney commends all parties for their assistance.

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 including family, friends and co-workers of the complainant, and professional acquaintances and employees of Mr. Cosby. 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 Mr. Cosby possessed the requisite criminal intent. In addition, District Attorney Castor applied the Rules of Evidence governing whether or not evidence is admissible. Evidence may be inadmissible if it is too remote in time 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 for proof is possible, the District Attorney renders no opinion concerning the credibility of any party involved so as to not 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. 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. The District Attorney encourages the parties to resolve their dispute from this point forward with a minimum of rhetoric.

Press Release, 2/17/2005; N.T., 2/2/2016, Exh. D-4.

D.A. Castor did not communicate to Constand or her counsel his decision to permanently forego prosecuting Cosby. In fact, Constand did not learn of the decision until a reporter appeared at one of her civil attorney's offices later that evening. With the resolution of her allegations removed from the criminal courts, Constand turned to the civil realm. On March 8, 2015, less than one month after the district attorney's press release, Constand filed a lawsuit against Cosby in the United States District Court for the Eastern District of Pennsylvania.[6]

---

6 *See Constand v. Cosby*, Docket No. 2:05-cv-01099-ER.

During discovery in that lawsuit, Cosby sat for four depositions. Cosby's attorney for the civil proceedings, John Schmitt, had learned about the non-prosecution decision from Cosby's criminal counsel, Walter Phillips. From the perspective of Cosby's attorneys, the district attorney's decision legally deprived Cosby of any right or ability to invoke the Fifth Amendment. Accordingly, not once during the four depositions did Cosby invoke the Fifth Amendment or even mention it. During one deposition, Attorney Schmitt advised Cosby not to answer certain questions pertaining to Constand, but he did not specifically invoke the Fifth Amendment.[7] Nor did Cosby claim the protections of the Fifth Amendment when asked about other alleged victims of his sexual abuse, presumably because he believed that he no longer retained that privilege. In fact, no one involved with either side of the civil suit indicated on the record a belief that Cosby could be prosecuted in the future. D.A. Castor's decision was not included in any written stipulations, nor was it reduced to writing.

At deposition, Cosby testified that he developed a romantic interest in Constand as soon as he met her, but did not reveal his feelings. He acknowledged that he always initiated the in-person meetings and visits to his home. He also stated that he engaged in consensual sexual activity with Constand on three occasions, including the January 2004 incident.

Throughout the depositions, Cosby identified the pills that he provided to Constand in 2004 as Benadryl. Cosby claimed to know the effects of Benadryl well,

---

[7] Constand's attorneys subsequently filed a motion to compel Cosby to answer.

as he frequently took two of the pills to help himself fall asleep. Thus, when Constand arrived at his house on the night in question stressed, tense, and having difficulty sleeping, Cosby decided to give her three half-pills of Benadryl to help her relax. According to Cosby, Constand took the pills without asking what they were, and he did not volunteer that information to her.

Cosby explained that, after fifteen or twenty minutes, he suggested that they move from the kitchen to the living room, where Constand met him after going to the restroom. Cosby testified that Constand sat next to him on the couch and they began kissing and touching each other. According to Cosby, they laid together on the couch while he touched her breasts and inserted his fingers into her vagina. Afterwards, Cosby told her to try to get some sleep, and then he went upstairs to his bedroom. He came back downstairs two hours later to find Constand awake. He then escorted her to the kitchen where they had a muffin and tea.

Cosby was questioned about his telephone conversations with Constand's mother. Cosby admitted that he told Constand and her mother that he would write down the name of the pills that he gave her and then send it to them, but that he failed to do so. He further explained that he would not admit what the pills were over the phone with Constand and her mother because he did not want Constand's mother to think that he was a perverted old man who had drugged her daughter. He also noted that he had suspected that the phone calls were being recorded. Although he did not believe that Constand was making these allegations in an attempt to get money

from him, Cosby explained that, after Constand and her mother confronted him, he offered to pay for her education and asked his attorney to commence discussions regarding setting up a trust for that purpose. Cosby admitted that it would be in his best interests if the public believed that Constand had consented to the encounter, and that he believed he would suffer financial consequences if the public believed that he had drugged and assaulted her.

Notably, during his depositions, Cosby confessed that, in the past, he had provided Quaaludes[8]—not Benadryl—to other women with whom he wanted to have sexual intercourse.

Eventually, Constand settled her civil suit with Cosby for $3.38 million.[9] Initially, the terms of the settlement and the records of the case, including Cosby's depositions, were sealed. However, following a media request, the federal judge who presided over the civil suit unsealed the records in 2015.

By that point, then-D.A. Castor had moved on from the district attorney's office and was serving as a Montgomery County Commissioner. He was succeeded as district attorney by his former first assistant, Risa

---

[8] "Quaalude" is a brand name for methaqualone, a central nervous system depressant that was a popular recreational drug from the 1960s through the 1980s, until the federal government classified methaqualone as a controlled substance.

[9] Constand also received $20,000 from American Media, Inc., which was a party to the lawsuit as a result of an interview that Cosby gave to the National Enquirer about Constand's allegations.

Vetri Ferman, Esquire.[10] Despite her predecessor's decision not to prosecute Cosby, upon release of the civil records, District Attorney Ferman reopened the criminal investigation of Constand's allegations. Then-First Assistant District Attorney Kevin R. Steele[11] was present during the initial stages of the newly-revived investigation and participated in early discussions with Cosby's new lawyers, Brian J. McMonagle, Esquire, and Patrick J. O'Conner, Esquire.

On September 23, 2015, upon learning that D.A. Ferman had reopened the case, former D.A. Castor sent her an email, to which he attached his February 17, 2005 press release, stating the following:

> Dear Risa,
>
> I certainly know better than to believe what I read in the newspaper, and I have witnessed first hand your legal acumen. So you almost certainly know this already. I'm writing to you just in case you might have forgotten what we did with Cosby back in 2005. Attached is my opinion from then.
>
> 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 [Constand] would have the best chance of prevailing in a civil suit against Cosby. With the agreement of [Attorney]

---

[10] D.A Ferman, now Judge Ferman, was subsequently elected to a seat on the Court of Common Pleas of Montgomery County.

[11] Mr. Steele has since been elected District Attorney of Montgomery County.

Phillips and [Constand's] lawyers, I wrote the attached as the ONLY comment I would make while the civil case was pending. Again, with the agreement of the defense lawyer and [Constand'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. [Attorney Phillips] was speaking for Cosby's side at the time, but he was in contact with Cosby's civil lawyers who did not deal with me directly that I recall. I only discovered today that [Attorney Phillips] had died. But those lawyers representing [Constand] civilly, whose names I did not remember until I saw them in recent media accounts, 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.

Knowing the above, I can see no possibility that Cosby's deposition could be used in a state criminal case, because I would have to testify as to what happened, and the deposition would be subject to suppression. I cannot

believe any state judge would allow that deposition into evidence, nor anything derived therefrom. In fact, that was the specific intent of all parties involved including the Commonwealth and the plaintiff's lawyers. Knowing this, unless you can make out a case without that deposition and without anything the deposition led you to, I think Cosby would have an action against the County and maybe even against you personally. That is why I have publically suggested looking for lies in the deposition as an alternative now that we have learned of all these other victims we did not know about at the time we had made the go, no-go decision on arresting Cosby. I publically suggested that the DA in California might try a common plan scheme or design case using [Constand's] case as part of the *res gestae* in their case. Because I knew Montgomery County could not prosecute Cosby for a sexual offense, if the deposition was needed to do so. But I thought the DA in California might have a shot because I would not have the power to bind another state's prosecutor.

Some of this, of course, is my opinion and using Cosby's deposition in the CA case, might be a stretch, but one thing is fact: the Commonwealth, defense, and civil plaintiff's lawyers were all in the agreement that the attached decision from me stripped Cosby of this Fifth Amendment privilege against self-incrimination, forcing him to be deposed.

> That led to Cosby paying [Constand] a lot of money, a large percentage of which went to her lawyers on a contingent fee basis. In my opinion, those facts will render Cosby's deposition inadmissible in any prosecution in Montgomery County for the incident that occurred in January 2004 in Cheltenham Township.
>
> Bruce

N.T., 2/2/2016, Exh. D-5.

Replying by letter, D.A. Ferman asserted that, despite the public press release, this was the first she had learned about a binding understanding between the Commonwealth and Cosby. She requested a copy of any written agreement not to prosecute Cosby. D.A. Castor replied with the following email:

> The attached Press Release is the written determination that we would not prosecute Cosby. That was what the lawyers for [Constand] wanted and I agreed. The reason I agreed and the plaintiff's lawyers wanted it in writing is so that Cosby could not take the 5th Amendment to avoid being deposed or testifying. A sound strategy to employ. That meant to all involved, including 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 [Constand's] counsel, and with the acquiescence of Cosby's counsel, with full and

> complete intent to bind the Commonwealth that anything Cosby said in the civil case could not be used against him, thereby forcing him to be deposed and perhaps testify in a civil trial without him having the ability to "take the 5th." I decided to create the best possible environment for [Constand] 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 this incident based upon then-available evidence in order to help [Constand] prevail in her civil action. Evidently, that strategy worked.
>
> The attached, which was on letterhead and signed by me as District Attorney, the concept approved by [Constand's] lawyers was a "written declaration" from the Attorney for the Commonwealth there would be no prosecution based on anything Cosby *said* in the civil action. Naturally, if a prosecution could be made out without using what Cosby said, or anything derived from what Cosby said, I believed then and continue to believe that a prosecution is not precluded.

Id., Exh. D-7.

Despite her predecessor's concerns, D.A. Ferman and the investigators pressed forward, reopening the criminal case against Cosby. Members of the prosecutorial team traveled to Canada and met with Con-

stand, asking her to cooperate with their efforts to prosecute Cosby, even though she had specifically agreed not to do so as part of the civil settlement. Investigators also began to identify, locate, and interview other women that had claimed to have been assaulted by Cosby.

Nearly a decade after D.A. Castor's public decision not to prosecute Cosby, the Commonwealth charged Cosby with three counts of aggravated indecent assault[12] stemming from the January 2004 incident with Constand in Cosby's Cheltenham residence. On January 11, 2016, Cosby filed a petition for a writ of *habeas corpus*[13] seeking, *inter alia*, dismissal of the charges based upon the former D.A. Castor's purported promise—made in his representative capacity on behalf of the Commonwealth—that Cosby would not be prosecuted. The Commonwealth filed a response to the motion, to which Cosby replied.

From February 2-3, 2016, the trial court conducted hearings on Cosby's *habeas* petition, which it ultimately denied. Later, in its Pa.R.A.P. 1925(a) opinion, the trial court explained that "the only conclusion that was apparent" from the record "was that no agreement or promise not to prosecute ever existed, only the

---

[12] By this time, Mr. Steele had replaced Judge Ferman as District Attorney. *See* 18 Pa.C.S. § 3125(a)(1), (a)(4), and (a)(5).

[13] Cosby styled the petition as a "Petition for Writ of *Habeas Corpus* and Motion to Disqualify the Montgomery County District Attorney's Office." The trial court treated the omnibus motion as three separate motions: (1) a motion to dismiss the charges based upon the alleged non-prosecution agreement; (2) a motion to dismiss the charges based upon pre-arrest delay; and (3) a motion to disqualify the Montgomery County District Attorney's Office.

exercise of prosecutorial discretion." Tr. Ct. Op. ("T.C.O."), 5/14/2019, at 62. In support of this conclusion, the trial court provided a lengthy summary of what it found to be the pertinent facts developed at the *habeas corpus* hearing. Because our analysis in this case focuses upon the trial court's interpretation of those testimonies, we reproduce that court's synopsis here:

> On January 24, 2005, then District Attorney Bruce L. Castor, Jr., issued a signed press release announcing an investigation into Ms. Constand's allegations. Mr. Castor testified that as the District Attorney in 2005, he oversaw the investigation into Ms. Constand's allegations. Ms. Ferman supervised the investigation along with County Detective Richard Peffall and Detective Richard Schaffer of Cheltenham. 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."
>
> Mr. Castor testified that Ms. Constand went to the Canadian police almost exactly one year after the alleged assault and that the case was ultimately referred to Montgomery County. 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. 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. He also reviewed Ms. Constand's statements to police. Mr. Castor felt that there were inconsistences in her statements. Mr. Castor did not recall press quotes attributed to him calling the case "weak" at a 2005 press conference.

Likewise, he did not recall the specific statement, "[i]n Pennsylvania we charged 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.

As part of the 2005 investigation, [Cosby] gave a full statement to law enforcement and his Pennsylvania and New York homes were searched. [Cosby] was accompanied by counsel and did not invoke the Fifth Amendment at any time during the statement. After [Cosby's] interview, Ms. Constand was interviewed a second time. Mr. Castor never personally met with Ms. Constand. Following that interview of Ms. Constand, Mr. Castor spoke to [Cosby's] attorney Walter M. Phillips, Jr. Mr. Phillips told Mr. Castor that during the year between the assault and the report, Ms. Constand had multiple phone contacts with [Cosby]. Mr. Phillips was also concerned that Ms. Constand had recorded phone calls with [Cosby]. 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 was to get money from [Cosby] so they would not go to the police. While he did not necessarily agree with the conclusions Mr. Phillips thought would be drawn from the records, Mr. Castor directed the police to obtain the records. Mr. Castor's recollection was that there was an "inordinate number of [phone] contacts" between [Cosby] and Ms. Constand after the assault. He also confirmed the existence of at least two "wire interceptions," which he did not believe would be admissible.

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

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

* * *

Mr. Castor further indicated, "Mr. Phillips never agreed to anything in exchange for Mr. Cosby not being prosecuted." 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. 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." He testified that she did not come back to him with any objection from Ms. Constand's attorneys and that any objection from Ms. Constand's attorneys would not have mattered anyway. 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.

Mr. Castor testified that he could not recall any other case where he made this type of binding legal analysis in Montgomery County. He testified that in a half dozen cases during his tenure in the District Attorney's office, someone would attempt to assert the Fifth Amendment in a preexisting civil case. The judge in that case would then call Mr. Castor to determine if he intended to prosecute the person asserting the privilege. He could confirm that he did not and the claim of privilege would be denied. Mr. Castor was

unable to name a case in which this happened.

After making his decision not to prosecute, Mr. Castor personally issued a second, signed press release on February 17, 2005. 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." 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." Mr. Castor testified that this language made it absolute that [Cosby] 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 [Cosby] could be sustained. And the use of 'exists' and 'could' I meant to be absolute."

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." He testified that inclusion of this sentence, warning that the decision could be revisited, in the para-

graph about a civil case and the use of the word "this," was intended to make clear that it applied to the civil case and not to the prosecution. 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. 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." 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. 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." 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.

He testified that the press release was intended for three audiences, the media, the greater legal community, and the litigants. He testified about what meaning he hoped

that each audience would glean from the press release. He did not intend for any of the three groups to understand the entirety of what he meant. The media was to understand only that [Cosby] would not be arrested. Lawyers would parse every word and understand that he was saying there was enough evidence to arrest [Cosby] but that Mr. Castor thought the evidence was not credible or admissible. The third audience was the litigants, and they were to understand that they did not want to damage the civil case. 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.

Mr. Castor testified that in November of 2014 he was contacted by the media as a result of a joke a comedian made about [Cosby]. Again, in the summer of 2015 after the civil depositions were released, media approached Mr. Castor. 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. He testified that he did not learn the investigation had been reopened until he read in the paper that [Cosby] was arrested in December 2015, but there was media speculation in September 2015 that an arrest might be imminent.

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. 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 [Constand] would have the best chance of prevailing in a civil suit against Cosby. With the agreement of [Attorney Phillips] and [Constand'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 [Constand'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 [Constand] 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 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.

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

Ms. Ferman responded to Mr. Castor's email by letter of September 25, 2015, requesting a copy of the "written declaration" indicating that [Cosby] would not be prosecuted. In her letter, Ms. Ferman indicated that "[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 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."

Mr. Castor responded by email. His email indicated,

The attached Press Release is the written determination that we would not prosecute Cosby. That was what the lawyers for the plaintiffs wanted and I agreed. The reason I agreed and the plaintiff's wanted it in writing was so Cosby could not take the 5th Amendment to avoid being deposed or testifying.. . . That meant to all involved, including 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.

Mr. Castor testified that he intended to confer transactional immunity upon [Cosby] and that his power to do so as the sovereign was derived from common law not from the statutes of Pennsylvania. In his final email to Ms. Ferman, Mr. Castor stated, "I never agreed we would not prosecute Cosby."

As noted, 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. Bebe Kivitz, Esq. testified that during the 2005 investigation she had limited contact with then-First Assistant District Attorney Ferman. The possibility of a civil suit was never discussed with anyone from the Commonwealth or anyone representing [Cosby] during the criminal investigation. At no time did anyone from Cheltenham Police, or the District Attorney's Office, convey to Ms. Troiani, or Ms. Kivitz, that [Cosby] would never be prosecuted. 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. The reporter informed her that Mr. Castor had issued a press release in which he declined prosecution. Ms. Troiani had not receive any prior notification of the decision not to prosecute.

Ms. Constand and her attorneys did not request a declaration from Mr. Castor that [Cosby] would not be prosecuted. Ms. Troiani testified that if [Cosby] 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. If he was permitted to assert a Fifth Amendment privilege, they would have been entitled to an adverse inference jury instruction. Additionally, if [Cosby] asserted the Fifth Amendment, Ms. Constand's version of the story would have been the only version for the jury to consider. Ms. Constand and her counsel had no reason to request immunity. At no time during the civil suit did Ms. Troiani receive any information in discovery or from [Cosby's] attorneys indicating that [Cosby] could never be prosecuted.

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. She did not take the language, "District Attorney Castor cautions all parties to this matter that he will reconsider this deci-

sion should the need arise," to be a threat not to speak publicly. She continued to speak to the press; Mr. Castor did not retaliate.

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

Ms. Troiani testified that one of the initial provisions [Cosby] wanted in the civil settlement was a release from criminal liability. [Cosby's civil attorney Patrick] O'Conner's letter to Ms. Ferman does not dispute this fact. [Cosby] and his attorneys also requested that Ms. Troiani agree to destroy her file, she refused. Eventually, the parties agreed on the language that Ms. Constand would not initiate any criminal complaint. The first Ms. Troiani heard of a promise not to prosecute was in 2015. The first Ms. Kivitz learned of the purported promise was in a 2014 newspaper article.

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

On March 8, 2005, Ms. Constand filed her civil suit and Mr. Schmitt retained Patrick O'Conner, Esq., as civil counsel. Mr. Schmitt participated in the civil case. [Cosby] sat for four days of depositions. Mr. Schmitt testified that [Cosby] did not invoke the Fifth Amendment in those depositions and that he would not have let him sit for the deposi-

> tions if he knew the criminal case could be reopened.
>
> He testified that generally he does try to get agreements on [Cosby's] behalf in writing. During this time period, Mr. Schmitt was involved in written negotiations with the National Enquirer. He testified that he relied on the press release, Mr. Castor's word and Mr. Phillips' assurances that what Mr. Castor did was sufficient. Mr. Schmitt did not personally speak to Mr. Castor or get the assurance in writing. During the depositions, Mr. O'Conner objected to numerous questions. 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 [Cosby]. [Cosby] did not assert a Fifth Amendment privilege when asked about these other women. Mr. Schmitt testified that he had not formed an opinion as to whether Mr. Castor's press release would cover that testimony.
>
> Mr. Schmitt testified that during negotiations of the settlement agreement there were references to a criminal case. The settlement agreement indicated that Ms. Constand would not initiate a criminal case against Mr. Cosby. Mr. Schmitt did not come forward when he learned the District Attorney's office re-opened the case in 2015.

T.C.O. at 47-61 (cleaned up).

Notably, when District Attorney Castor decided not to prosecute Cosby, he "absolutely" intended to remove "for all time" the possibility of prosecution, because "the ability to take the Fifth Amendment is also for all time removed." N.T., 2/2/2016, at 67. The trial court sought clarification from Mr. Castor about his statement in his second email to D.A. Ferman that he still believed that a prosecution was permissible as long as Cosby's depositions were not used in such proceedings. Former D.A. Castor explained to the court that he meant that a prosecution may be available only if other victims were discovered, with charges related only to those victims, and without the use of Cosby's depositions in the Constand matter. Specifically, former D.A. Castor stated that what he was "trying to convey to Mrs. Ferman [was that his] binding of the Commonwealth not to prosecute Cosby was not for any crime in Montgomery County for all time. It was only for the sexual assault crime in the Constand case." N.T., 2/2/2016, at 224-25. He continued, "[s]o if they had evidence that some of these other women had been sexually assaulted at Cosby's home in Cheltenham, then I thought they could go ahead with the prosecution of that other case with some other victim, so long as they realized they could not use the Constand deposition and anything derived therefrom." *Id.*

As noted, the trial court denied the motion, finding that then-D.A. Castor never, in fact, reached an agreement with Cosby, or even promised Cosby that the Commonwealth would not prosecute him for assaulting Constand. T.C.O. at 62. Instead, the trial court considered the interaction between the former district attorney and Cosby to be an incomplete and

unauthorized contemplation of transactional immunity. The trial court found no authority for the "proposition that a prosecutor may unilaterally confer transactional immunity through a declaration as the sovereign." *Id.* Rather, the court noted, such immunity can be conferred only upon strict compliance with Pennsylvania's immunity statute, which is codified at 42 Pa.C.S. § 5947.[14] Per the terms of the statute, permission from

---

[14] The immunity statute provides, in relevant part:

> (a) General rule.–Immunity orders shall be available under this section in all proceedings before:
>
> (1) Courts.
>
> * * *
>
> (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.
>
> (c) Order to testify.–Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding specified in subsection (a), and the person presiding at such proceeding communicates to the witness an immunity order, that witness may not refuse to testify based on 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 court is a prerequisite to any offer of transactional immunity. *See id.* § 5947(b) ("The Attorney General or a district attorney may request an immunity order from any judge of a designated court."). Because D.A. Castor did not seek such permission, and instead acted of his own volition, the trial court concluded that any purported immunity offer was defective, and thus invalid. Consequently, according to the trial court, the "press release, signed or not, was legally insufficient to form the basis of an enforceable promise not to prosecute." T.C.O. at 62.

The trial court also found that "Mr. Castor's testimony about what he did and how he did it was equivocal at best." *Id.* at 63. The court deemed the former district attorney's characterization of his decision-making and intent to be inconsistent, inasmuch as he testified at times that he intended transactional immunity, while asserting at other times that he intended use and derivative-use immunity. The trial court specifically credited Attorney Troiani's statements that she never requested that Cosby be

---

> 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.

42 Pa.C.S. § 5947(a)-(d).

provided with immunity and that she did not specifically agree to any such offer.

As further support for the view that no agreement was reached, nor any promise extended, the trial court noted that, in his initial statement to police, which was voluntarily provided and not under oath, Cosby did not invoke his Fifth Amendment rights. Instead, Cosby presented a narrative of a consensual sexual encounter with Constand, which he asserted again later in his depositions. "Thus," the trial court explained, "there was nothing to indicate that [Cosby's] cooperation would cease if a civil case were filed." *Id.* at 65. Since Cosby previously had discussed the incident without invoking his right to remain silent, the court found no reason to believe that Cosby subsequently would do so in a civil case so as to necessitate the remedy that the former district attorney purported to provide in anticipation of that litigation.

The trial court further held that, even if there was a purported grant of immunity, Cosby could not insist upon its enforcement based upon the contractual theory of promissory estoppel, because "any reliance on a press release as a grant of immunity was unreasonable." *Id.* Specifically, the court noted that Cosby was represented at all times by a competent team of attorneys, but none of them "obtained [D.A.] Castor's promise in writing or memorialized it in any way." *Id.* at 65-66. The failure to demand written documentation was evidence that no promise not to prosecute was ever extended. For these reasons, the trial court found no legal basis to estop the Commonwealth from prosecuting Cosby.

Cosby filed a notice of appeal and a petition for review with the Superior Court. In response to the

filings, the Superior Court temporarily stayed the proceedings below. However, upon a motion by the Commonwealth, the Superior Court quashed the appeal and lifted the stay. This Court likewise rejected Cosby's pre-trial efforts to appeal the adverse rulings, denying his petition for allowance of appeal, his petition for review, and his emergency petition for a stay of the proceedings.

On May 24, 2016, following a preliminary hearing, all of Cosby's charges were held for trial. Thereafter, Cosby filed a number of pretrial motions, including a petition for a writ of *habeas corpus*, a motion to dismiss the charges on due process grounds, and, most pertinent here, 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 Him to Waive his Fifth Amendment Right Against Self-Incrimination." After holding a hearing on the suppression motion, at which no new testimony was taken, the trial court again concluded that former District Attorney Castor's testimony was equivocal, credited the testimony of Constand's attorneys, and found that no promise or agreement not to prosecute existed. Having so determined, the court discerned "no [c]onstitutional barrier to the use of [Cosby's] civil deposition testimony" against him at trial, and it denied the suppression motion.[15] Later, the Commonwealth would introduce portions of Cosby's deposition testimony against Cosby, including his admissions to using

---

[15] T.C.O. at 72 (quoting Findings of Fact, Conclusions of Law and Order Sur Defendant's Motion to Suppress Evidence Pursuant to Pa.R.Crim.P. 581(I), 12/5/2016, at 5).

Quaaludes during sexual encounters with women in the past.

On September 6, 2016, the Commonwealth filed a "Motion to Introduce Evidence of Other Bad Acts of the Defendant," which Cosby opposed by written response. The Commonwealth sought to introduce evidence and testimony from other women who alleged that Cosby had sexually assaulted them, instances that could not be prosecuted due to the lapse of applicable statutes of limitations. On February 24, 2017, the trial court granted the Commonwealth's motion, but permitted only one of these alleged past victims to testify at Cosby's trial.

On December 30, 2016, Cosby filed a motion seeking a change in venue or venire. The trial court kept the case in Montgomery County, but agreed that the jury should be selected from a different county. Thus, Cosby's jury was selected from residents of Allegheny County, and trial commenced. On June 17, 2017, after seven days of deliberation, the jury announced that it could not reach a unanimous verdict. The trial court dismissed the jury and declared a mistrial.

Ahead of the second trial, the Commonwealth filed a motion seeking to introduce the testimony of a number of additional women who offered to testify about Cosby's prior acts of sexual abuse. Generally, the women averred that, in the 1980s, each had an encounter with Cosby that involved either alcohol, drugs, or both, that each became intoxicated or incapacitated after consuming those substances, and that Cosby engaged in some type of unwanted sexual contact with each of them while they were unable to resist. The dates of the conduct that formed the basis of these allegations ranged from 1982 to 1989,

approximately fifteen to twenty-two years before the incident involving Constand. Again, Cosby opposed the motion. Following oral argument, and despite there being no change in circumstances other than the first jury's inability to reach a unanimous verdict, the trial court granted the Commonwealth's motion in part, increasing the number of prior bad acts witnesses allowed at trial from one to five. The selection of the five witnesses from a pool of at least nineteen women was left entirely to the Commonwealth.

The Commonwealth selected, and introduced testimony at Cosby's second trial from, the following women:

Janice Baker-Kinney. In 1982, Baker-Kinney worked at a Harrah's Casino in Reno, Nevada. During that year, a friend invited her to a party that, unbeknownst to her, was being held at a temporary residence used by Cosby in Reno. At the time, Baker-Kinney was twenty-four years old; Cosby was forty-five. When Baker-Kinney arrived at the residence, she realized that there actually was no party, at least as she understood the term. Besides Cosby, Baker-Kinney and her friend were the only people there. Cosby gave Baker-Kinney a beer and a pill, which she believed may have been a Quaalude. A short time later, Cosby gave her a second pill. She took both voluntarily, after which she became dizzy and passed out. When she awakened, she was on a couch in another room. Her shirt was unbuttoned and her pants were unzipped. Cosby approached and sat next to her. Cosby then leaned her against his chest. He fondled her breasts and her vagina. Still intoxicated, Baker-Kinney followed Cosby to an upstairs bedroom. She had no memory of what happened after

entering the bedroom until the following morning, when she woke up naked next to Cosby, who also was naked. Although she could not remember for sure, Baker-Kinney believed that they had had sex. She dressed and left.

Janice Dickinson. Also in 1982, Janice Dickinson met Cosby. She was twenty-seven years old. Dickinson was an aspiring model, and Cosby contacted her modeling agency to arrange a meeting. Supposedly, Cosby wanted to mentor Dickinson. Along with her agent, Dickinson met with Cosby. Sometime later, while she was on a modeling job, Cosby called her and offered to fly her to Lake Tahoe. There, Dickinson met with Cosby's musical director and practiced her vocal skills. At dinner that night, Cosby arrived and met with Dickinson, who was drinking wine. Dickinson mentioned that she was suffering from menstrual cramps. Cosby provided her with a pill to help relieve the discomfort. The musical director eventually left, and Cosby offered to discuss Dickinson's career in his hotel room. She agreed and accompanied him there. When they got to the room, Cosby put on a robe and made a phone call. Dickinson felt lightheaded and had trouble speaking. Cosby got off the phone, climbed on top of Dickinson, and had sexual intercourse with her. Dickinson stated that she was unable to move and that she passed out soon after Cosby had finished. When she woke up the next morning, she did not recall how she had arrived at Cosby's room. She was naked from the waist down, had semen on her legs, and felt pain in her anus.

Heidi Thomas: In 1984, Heidi Thomas was twenty-seven years old, and Cosby was forty-six. Thomas wanted to be an actress and a model. Her agent told

her that Cosby was looking to mentor a promising young talent. Eventually, Cosby invited Thomas to Reno for some personal acting lessons. Thomas believed that she would be staying at a hotel, but, when she got to Reno, a car took her to a ranch house where Cosby was staying. Cosby arranged a room in the house for her. When they were the only two people left in the house, Cosby asked Thomas to audition for him by pretending to be an intoxicated person, which she explained to Cosby would be a challenge for her because she had never been intoxicated. Cosby asked how she could play such a role without ever having had that experience. So, he gave her some wine. Thomas drank only a little of the wine before becoming extremely intoxicated. She faded in and out of consciousness. At one point she came to on a bed only to find Cosby forcing his penis into her mouth. She passed out and awoke later feeling sick.

Chelan Lasha. Lasha met Cosby in 1986, while she was working as an actress and model. She was only seventeen years old. Cosby was forty-eight. Cosby called her at her home, and later visited her there. Lasha then sent him modeling shots and spoke with him a number of times on the phone about her career. Cosby invited her to meet him in Las Vegas, where, he told her, someone would take better pictures of her. He implied that she could get a role on "The Cosby Show." Enticed by the prospect, Lasha went to Las Vegas. As promised, once there, someone took pictures of her. Someone else gave her a massage. Eventually, Lasha was alone with Cosby. He gave her a blue pill, which he said was an antihistamine that would help with a cold from which she was suffering. Cosby also provided her with a shot of

liquor. Because Lasha trusted Cosby, she voluntarily consumed both the alcohol and the pill. Cosby then gave her a second shot and led her to a couch. Lasha began to feel intoxicated. Lasha was unable to move on her own, and Cosby helped her to the bed. Cosby laid next to her, pinched her breasts, and rubbed his genitals against her leg until she felt something warm on her leg. Lasha woke up the next day wearing only a robe.

Maud Lise-Lotte Lublin. When Cosby met Lublin in 1989, he was fifty-two years old, and she was twenty-three. Lublin also was an aspiring model and actress. Lublin's agent informed her that Cosby wanted to meet her. Soon after, Lublin met with Cosby, who told her that he would refer her to a modeling agency in New York City. Cosby then started to call her regularly. Lublin considered Cosby to be a mentor and a father figure. Once, Cosby invited her to his hotel, where they talked about improvisation. Cosby poured her a shot of liquor and told her to drink it. Not normally a drinker, Lublin initially declined the shot. When Cosby insisted, she drank it. He poured her another shot, and again strongly encouraged her to drink it. Because she trusted him, Lublin drank the second shot as well. She quickly felt dizzy and unstable, and was unable to stand on her own. Cosby asked her to sit between his legs and lean against his chest. He stroked her hair and talked, but she could not hear his words. She could not move or get up. She awoke two days later at her home, with no idea how she got there.

The trial court rejected Cosby's arguments that the introduction of testimonies from the five prior bad acts witnesses violated his due process rights,

and that the incidents were too remote in time and too dissimilar to have probative value, let alone probative value sufficient to overcome the unduly prejudicial impact of such evidence. The court noted that prior bad acts evidence generally cannot be used to establish a criminal propensity or to prove that the defendant acted in conformity with the past acts, but that such evidence can be used to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, so long as the probative value of the evidence outweighs its prejudicial effect.[16] The court then determined that the

---

[16] T.C.O. 96-97 (citing Pa.R.E. 404(b)). Rule 404 provides, in relevant part:

> (a) Character Evidence.
>
> (1) *Prohibited Uses*. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
>
> * * *
>
> (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.

Pa.R.E. 404(b)(1)-(2).

testimony of the five prior bad act witnesses—and the deposition testimony pertaining to the prior use of Quaaludes—was admissible to demonstrate Cosby's common plan, scheme, or design. The trial court reasoned that the similarity and distinctiveness of the crimes bore a logical connection to Constand's allegations, and amounted to a "signature of the same perpetrator."[17] Comparing the past and present allegations, the court noted that each woman was substantially younger than Cosby and physically fit; that Cosby initiated the contact with each woman, primarily though her employment; that each woman came to trust Cosby and view him as a friend or mentor; that each woman accepted an invitation to a place that Cosby controlled; that each woman consumed a drink or a pill, often at Cosby's insistence; that each woman became incapacitated and unable to consent to sexual contact; and that Cosby sexually assaulted each woman while each was under the influence of the intoxicant. *Id.* at 103-04. These "chilling similarities," the court explained, rendered Cosby's actions "so distinctive as to become a signature," and therefore the evidence was admissible to demonstrate a common plan, scheme, or design. *Id.* at 104.

The court further determined that the prior bad acts evidence was admissible to demonstrate that Cosby's actions were not the result of mistake or accident. The court relied in large part upon then-Chief Justice Saylor's concurrence in *Commonwealth v. Hicks*, 156 A.3d 1114 (Pa. 2017), which suggested the "doctrine of chances" as another "theory of logical

---

[17] *Id.* at 97 (quoting *Commonwealth v. Tyson*, 119 A.3d 353, 358-59 (Pa. Super. 2015) (*en banc*)).

relevance 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 1131 (Saylor, C.J., concurring). The trial court reasoned that the purpose of the evidence was not to demonstrate that Cosby behaved in conformity with a criminal propensity, but rather to "establish the objective improbability of so many accidents befalling the defendant *or the defendant becoming innocently enmeshed in suspicious circumstances so frequently*." *Id.* at 1133 (Saylor, C.J., concurring). The court noted that there was no dispute that a sexual encounter between Cosby and Constand had occurred; the contested issue was Constand's consent. The prior bad acts evidence, therefore, was "relevant to show a lack of mistake, namely, that [Cosby] could not have possibly believed that [ ] Constand consented to the digital penetration as well as his intent in administering an intoxicant." T.C.O at 108. Similarly, with regard to the "doctrine of chances," the court opined that the fact that nineteen women were proffered as Rule 404(b) witnesses "lends [*sic*] to the conclusion that [Cosby] found himself in this situation more frequently than the general population." *Id.* Accordingly, "the fact that numerous other women recounted the same or similar story, further supports the admissibility of this evidence under the doctrine of chances." *Id.*

The trial court recognized that the alleged assaults upon the prior bad acts witnesses were remote in time, but it explained that remoteness "is but one factor that the court should consider." *Id.* at 97. The court reasoned that the distance in time between the prior acts and the incident involving Constand was

"inversely proportional to the similarity of the other crimes or acts." *Id.* (citing *Tyson*, 119 A.3d at 359). Stated more simply, the "more similar the crimes, the less significant the length of time that has passed." *Id.*at 98 (citing *Commonwealth v. Luktisch*, 680 A.2d 877 (Pa. Super. 1996)). The court noted that, while there was a significant temporal gap between the prior incidents and Constand's case, the alleged assaults involving the prior bad acts witnesses occurred relatively close in time to each other. Thus, "[w]hen taken together," the court explained, "the sequential nature of the acts coupled with their nearly identical similarities renders the lapse of time unimportant." *Id.* at 109.

To be unfairly prejudicial, the trial court emphasized, the proffered evidence must be "unfair," and must have 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." *Id.* at 100 (quoting Pa.R.E. 403 cmt). Evidence "will not be prohibited merely because it is harmful to the defendant," and a court "is not required to sanitize the trial to eliminate all unpleasant facts." *Id.* at 100-01 (quoting *Commonwealth v. Conte*, 198 A.3d 1169, 1180-81 (Pa. Super. 2018)). For the trial court, the aforementioned similarities between Constand's claim and that of the other alleged victims weighed in favor of admissibility, particularly because the court believed that the Commonwealth had a "substantial need" for the evidence. *Id.* at 109. "Where the parties agreed that the digital penetration occurred, the evidence of other acts was necessary to rebut [Cosby's] characterization of the assault as a consensual encounter." *Id.* "Furthermore," the court opined, "Ms. Constand

did not report the assault until approximately one year later, further supporting the Commonwealth's need for the evidence." *Id.* at 110. With regard to the prejudicial impact of the evidence, the court suggested that it had sufficiently mitigated any potential prejudice when it limited the number of witnesses who could testify (at the second trial) to just five of the nineteen witnesses that the Commonwealth requested. *Id.* The court noted that it found all nineteen witness' testimony to be relevant and admissible, but limited the number to five so as to mitigate the prejudice to Cosby. The court added that it gave cautionary instructions on the permissible use of this evidence, designed so as to limit its prejudicial impact. *Id.* at 110-11.

Finally, the trial court rejected Cosby's challenge to the admissibility of the contents of his deposition testimony to the extent that it concerned his use of Quaaludes in decades past. The court opined that Cosby's "own words about his use and knowledge of drugs with a depressant effect was relevant to show his intent and motive in giving a depressant to [ ] Constand." *Id.* at 115. Because the evidence demonstrated Cosby's knowledge of the effects of drugs such as Quaaludes, the court reasoned, Cosby "either knew [Constand] was unconscious, or recklessly disregarded the risk that she could be." *Id.* As with the Rule 404(b) witnesses, the court found that any prejudicial effect of this evidence was mitigated by the court's cautionary instructions. *Id.* Accordingly, the court trial opined that all of the Rule 404(b) evidence was admissible.

At the conclusion of a second jury trial, Cosby was convicted on all three counts of aggravated

indecent assault. Following the denial of a number of post-trial motions, the trial court deemed Cosby to be a "sexually violent predator" pursuant to the then-applicable version of the Sex Offender Registration and Notification Act ("SORNA"), 42 Pa.C.S. §§ 9799.10-9799.41. The trial court then sentenced Cosby to three to ten years in prison. Cosby was denied bail pending an appeal. He filed post-sentence motions seeking a new trial and a modification of his sentence, which were denied.

Cosby timely filed a notice of appeal, prompting the trial court to order him to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Cosby complied. On May 14, 2019, the trial court responded to Cosby's concise statement with its opinion, issued pursuant to Pa.R.A.P. 1925(a).

A unanimous panel of the Superior Court affirmed the judgment of sentence in all respects. *Commonwealth v. Cosby*, 224 A.3d 372 (Pa. Super. 2019). The Superior Court began by assessing Cosby's challenge to the admissibility of the prior bad acts evidence under Rule 404(b). The panel observed that a reviewing court must evaluate the admission of evidence pursuant to the abuse-of-discretion standard. *Id.* at 397. Addressing the trial court's rationale regarding the admissibility of prior bad acts evidence demonstrating a common plan, scheme, or design, the panel noted that the exception aims to establish a perpetrator's identity based upon "his or her commission of extraordinarily similar criminal acts on other occasions. The exception is demanding in it[s] 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." *Id.* at 398 (citing *Commonwealth v. Miller*, 664 A.2d 1310, 1318 (Pa. 1995)). Although the common plan, scheme, or design rationale typically is used to establish the identity of a perpetrator of a particular crime, the Superior Court pointed out that courts previously have also used the exception "to counter [an] anticipated defense of consent." *Id.* (quoting *Tyson*, 119 A.3d at 361).

In *Tyson*, Jermeel Omar Tyson brought food to his victim, who was feeling ill. *Tyson*, 119 A.3d at 356. While Tyson remained in the residence, the victim fell asleep. When she awoke some time later, Tyson was having vaginal intercourse with her. She told Tyson to stop, and he complied. But, when she fell asleep a second time, he resumed the uninvited sexual contact. Tyson was arrested and charged with sex-related offenses. *Id.*

Before trial, the Commonwealth sought to introduce evidence of a rape for which Tyson had been convicted in Delaware twelve years earlier. *Id.* The Delaware offense involved a victim of the same race and of a similar age as the victim in *Tyson*. *Id.* The Delaware victim similarly was casually acquainted with Tyson, invited Tyson into her home, was in a compromised state, and awoke to find Tyson engaged in vaginal intercourse with her. *Id.* at 357. The trial court declined to admit the Rule 404(b) evidence against Tyson. *Id.* at 356. On interlocutory appeal, the Superior Court reversed the trial court's decision, finding that the proffered evidence was admissible. *Id.* at 363. The court reasoned 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.[18] Notably, the *Tyson Court* found the twelve-year gap between Tyson's Delaware conviction and the offense at issue to be "less important" when compared to the strength of the similarities between the crimes. *Id.* at 361.

With *Tyson* in mind, the Superior Court turned its attention to the case *sub judice*. Based upon the similarities between Constand's allegations and those of Cosby's other accusers identified by the trial court, the Superior Court agreed that the accounts of the five prior bad acts witnesses established a "predictable pattern" that reflected Cosby's "unique sexual assault playbook." *Cosby*, 224 A.3d at 402. Accordingly, the panel concluded that the witnesses' testimony was admissible to show Cosby's common plan, scheme, or design.

The Superior Court further agreed with the trial court that the prior bad acts evidence was admissible to demonstrate the absence of mistake on Cosby's part as to Constand's consent. The court concluded

---

[18] The *en banc* majority opinion in *Tyson* was authored by then-President Judge Gantman and joined by then-Judge Mundy, President Judge Emeritus Ford Elliott, and Judges Panella, Shogan, and Olson. Then-Judge Donohue dissented, joined by President Judge Emeritus Bender and Judge Ott, opining that the majority "overemphasize[d] the few similarities that exist between Tyson's prior rape conviction and the present matter while completely dismissing the several important differences between the two incidents." *Tyson*, 119 A.3d at 363 (Donohue, J., dissenting). The dissent further disputed the *en banc* majority's reliance upon the need for the prior bad acts evidence "to bolster the credibility of the Commonwealth's only witness where there is no indication that the witness is otherwise impeachable." *Id.* at 364.

that *Tyson*'s rationale was applicable to the instant case. The court rejected Cosby's efforts to distinguish Constand's allegations from those dating to the 1980s. Cosby emphasized the fact that the relationship between Cosby and Constand lasted longer than his relationship with any of the prior bad acts witnesses, that Constand was a guest at Cosby's home on multiple occasions, that Cosby and Constand had exchanged gifts, that Cosby had made prior sexual advances toward Constand, that the nature of the sexual contact differed among the alleged victims, and that the alleged prior assaults occurred in hotel rooms or at the home of a third party, while the incident with Constand occurred in Cosby's home. *Id.* at 401-02. The Superior Court dismissed these apparent dissimilarities as unimportant, opining that "[i]t is impossible for two incidents of sexual assault involving different victims to be identical in all respects." *Id.* at 402. The court added that it would be "simply unreasonable" to require two incidents to be absolutely identical in order to be admissible under Rule 404(b), and concluded that "[i]t is the pattern itself, and not the mere presence of some inconsistencies between the various assaults, that determines admissibility under these exceptions." *Id.*

As to the temporal gap between the prior bad acts and the incident involving Constand, the Superior Court acknowledged that, even if the evidence were otherwise admissible under Rule 404(b), it "will be rendered inadmissible if it is too remote." *Id.* at 405 (quoting *Commonwealth v. Shively*, 424 A.2d 1257, 1259 (Pa. 1981)). The panel agreed with the trial court's statement that the significance of the age of a prior bad act is "inversely proportional" to the similarity

between the prior bad act and the facts underlying the charged offense. *Id.* (quoting *Commonwealth v. Aikens*, 990 A.2d 1181, 1185 (Pa. Super. 2010)). Although the panel recognized the significant lag in time between the events in question, it relied upon the similarities as found by the trial court to conclude that "the at-issue time gap is relatively inconsequential." *Id.* "Moreover," the panel opined, "because [Cosby's] identity in this case was not in dispute (as he claimed he only engaged in consensual sexual contact with [Constand]), there was no risk of misidentification" through the admission of the prior bad acts evidence, "despite the gap in time." *Id.*

Additionally, the Superior Court rejected Cosby's contention that the trial court had failed to weigh adequately the prejudicial impact of the prior bad acts evidence. The panel highlighted the fact that the trial court provided the jury with cautionary instructions on the use of the evidence, as well as that court's decision to limit the number of prior bad acts witnesses to five. These steps, in the Superior Court's view, were sufficient to mitigate the prejudicial impact of the evidence. *Id.*

The Superior Court dealt separately with Cosby's Rule 404(b) challenge to the use of his deposition testimony regarding his provision of Quaaludes to women in the past. The court rejected Cosby's "attempts to draw a hard distinction between Quaaludes and Benadryl," and noted that "the jury was free to disbelieve [Cosby's] assertion that he only provided [Constand] with Benadryl." *Id.* at 420. The court credited the Commonwealth's argument that Cosby's familiarity with Quaaludes was suggestive of his *mens rea*, inasmuch as it 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." *Id.* (quoting Pa.R.E. 404(b)(2)). Moreover, Cosby's "knowledge of the use of central nervous system depressants, coupled with his likely past use of the same with the [prior bad acts] witnesses, were essential to resolving the otherwise he-said-she-said nature of [Constand's] allegations." *Id.* The Superior Court added that the trial court did not err in determining that the probative value of this evidence outweighed its potential for unfair prejudice, inasmuch as, "in a vacuum, Cosby's use and distribution of a then-legal 'party drug' nearly half a century ago did not appear highly prejudicial," and "only becomes significantly prejudicial, *and fairly so*, when, in the context of other evidence, it establishes Cosby's knowledge of and familiarity with central nervous system depressants for purposes of demonstrating that he was at least reckless" in giving Constand such a drug before having sexual contact with her. *Id.* at 420-21 (emphasis in original) (cleaned up). The court added that any potential for unfair prejudice was mitigated substantially by the court's cautionary instructions, and that, accordingly, there was no error in the admission of this evidence. *Id.* at 421.

Turning to Cosby's claims relating to the enforceability of the non-prosecution or immunity decision rendered by then-District Attorney Castor, the Superior Court viewed this as a challenge to the denial of a motion to quash a criminal complaint, which would be evaluated under an abuse-of-discretion standard. *Id.* at 410. Like the trial court, the panel found no

"authority suggesting that a district attorney 'may unilaterally confer transactional immunity through a declaration as the sovereign.'" *Id.* at 411 (quoting T.C.O. at 62). Therefore, the court opined, "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." *Id.* The court added: "Even assuming Mr. Castor promised not to prosecute [Cosby], only a court order can convey such immunity. Such promises exist only as exercises of prosecutorial discretion, and may be revoked at any time." *Id.* The court discussed the immunity statute and observed that it provides that "a district attorney may request an immunity order from any judge of a designated court. . . . " *Id.* (quoting 42 Pa.C.S. § 5947(b)). Because no such order existed here, the Superior Court concluded that it could "ascertain no abuse of discretion in the trial court's determination that [Cosby] was not immune from prosecution, because Mr. Castor failed to seek or obtain an immunity order pursuant to Section 5947." *Id.* at 412. "Only a court order conveying such immunity is legally binding in this Commonwealth." *Id.*

The Superior Court further rejected Cosby's invocation of promissory estoppel asserting reliance upon D.A. Castor's assurances, as demonstrated by Cosby's cooperation with Constand's civil suit and his decision not to invoke the Fifth Amendment during his deposition testimony. The panel opined that Cosby failed to cite sufficient authority to establish that a prosecution may be barred under a promissory estoppel theory. The panel further agreed with the trial court that, in any event, "it was not reasonable

for [Cosby] to rely on Mr. Castor's promise, even if the trial court had found credible the testimony provided by Mr. Castor and [Cosby's] civil attorney," Attorney Schmitt. *Id.* The panel stated: "We cannot deem reasonable [Cosby'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." *Id.* at 413.

The Superior Court further opined that there was "virtually no evidence in the record that [Cosby] actually declined to assert his Fifth Amendment rights at the civil deposition based on Mr. Castor's purported promise not to prosecute." *Id.* Although the court noted that Attorney Schmitt was the only witness who could testify that Cosby indeed relied upon Castor's purported promise during his deposition (Attorney Schmitt did so testify), it emphasized the Commonwealth's argument that Attorney Schmitt allowed Cosby to give a statement to the police during the initial investigation, that Cosby did not incriminate himself at that point, that Attorney Schmitt further negotiated with the National Enquirer on the details of its published interview with Cosby, and that Attorney Schmitt negotiated a term of the settlement agreement with Constand that required her assurance that she would not cooperate with any future criminal investigation. Thus, the Commonwealth argued, and the Superior Court agreed, that "[i]t 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.* (quoting Commonwealth's Superior Court Brief at

136-37). The Superior Court agreed that "the evidence was entirely inconsistent with [Cosby's] alleged reliance on Mr. Castor's promise in choosing not to assert his Fifth Amendment privilege in the civil suit." *Id.* at 413-14.

For the same reasons, the Superior Court rejected Cosby's claim that the trial court erred in failing to suppress his deposition testimony due to the immunity that he purportedly should have enjoyed. The court opined that Cosby's suppression argument was "contingent upon his claim that Mr. Castor unilaterally immunized [Cosby] from criminal prosecution, which we have already rejected." *Id.* at 414. The panel distinguished all of the precedents upon which Cosby relied, including this Court's decision in *Commonwealth v. Stipetich*, 652 A.2d 1294 (Pa. 1995).

In *Stipetich*, Pittsburgh police personnel had promised George and Heidi Stipetich that, if they answered questions about the source of the drugs found in their home, no charges would be filed against them. After the Stipetiches fulfilled their part of the agreement, prosecutors charged them anyway. *Id.* at 1294-95. The trial court granted the Stipetiches' motion to dismiss the charges on the basis of the police promise. *Id.* at 1295. This Court ultimately held that the Pittsburgh police department had no authority to bind the Allegheny County District Attorney's Office to a non-prosecution agreement. *Id.* However, this Court opined:

> 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. Although the Superior Court dismissed this passage from *Stipetich* as *dicta*, it found the situation distinguishable in any event inasmuch as former D.A. Castor testified that there was no "agreement" or "quid pro quo" with Cosby, and, therefore, any reliance that Cosby placed upon the district attorney's promise was unreasonable. *Cosby*, 224 A.3d at 416-17.

The Superior Court concluded that it was bound by the trial court's factual findings and by its credibility determinations. The trial court had "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." *Id.* at 417. The panel added that the trial court had "found that the weight of the evidence supported its finding that no agreement or grant of immunity was made, and that [Cosby] did not reasonably rely on any overtures by Mr. Castor to that effect when he sat for his civil deposition." *Id.* Thus, the Superior Court discerned no error in the trial

court's decision to allow the use of Cosby's deposition testimony against him at trial.[19]

II. Issues:

On June 23, 2020, this Court granted Cosby's petition for allowance of appeal, limited to the following two issues:

> (1) 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 [Cosby'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 [Cosby] was on trial; (c) being unduly prejudicial; (d) being not actually probative of the crimes for which [Cosby] was on trial; and (e) constituting nothing but improper propensity evidence, did the Panel err in affirming the admission of this evidence?
>
> (2) Where: (a) [District Attorney Castor] agreed that [Cosby] would not be prosecuted in order to force [Cosby's] testimony at a depo-

---

[19] In addition to the Rule 404(b) and non-prosecutions claims, the Superior Court rejected a number of other issues raised by Cosby, including an assertion of improper juror bias, a challenge to an allegedly misleading jury instruction, and a contention that SORNA was unconstitutional. *Cosby*, 224 A.3d at 396, 421-431. Because those issues are not relevant to the matters before us, we need not discuss them herein.

> sition in [Constand's] civil action; (b) [the district attorney] issued a formal public statement reflecting that agreement; and (c) [Cosby] 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 [Cosby] but the admission of [Cosby's] civil deposition testimony?

Commonwealth v. Cosby, 236 A.3d 1045 (Pa. 2020) (*per curiam*).[20]

III. Analysis

We begin with Cosby's second listed issue, because, if he is correct that the Commonwealth was precluded from prosecuting him, then the question of whether the prior bad act testimony satisfied Rule 404(b) will become moot.

On February 17, 2005, then-District Attorney Castor announced to the public, on behalf of the Commonwealth of Pennsylvania, that he would not prosecute Cosby for any offense related to the 2004 sexual abuse that Constand alleged. Constand's potential credibility issues, and the absence of direct or corroborative proof by which to substantiate her claim, led the district attorney to believe that the case presented "insufficient, credible, and admissible

---

[20] In his petition, Cosby also sought this Court's review of his claim of improper juror bias and his challenge to the constitutionality of SORNA. We denied *allocatur* as to those two claims.

evidence upon which any charge could be sustained beyond a reasonable doubt." Press Release, 2/17/2005 (cleaned up). Given his "conclu[sion] that a conviction under the circumstances of this case would be unattainable," D.A. Castor "decline[d] to authorize the filing of criminal charges in connection with this matter." *Id.* In light of the non-prosecution decision, Cosby no longer was exposed to criminal liability relating to the Constand allegations and thus could no longer invoke his Fifth Amendment privilege against compulsory self-incrimination in that regard. With no legal mechanism available to avoid testifying in Constand's civil suit, Cosby sat for depositions and, therein, made a number of statements incriminating himself.

D.A. Castor's declination decision stood fast throughout his tenure in office. When he moved on, however, his successor decided to revive the investigation and to prosecute Cosby. Ruling upon Cosby's challenge to this belated prosecution, the trial court concluded that the former district attorney's promise did not constitute a binding, enforceable agreement. To determine whether Cosby permanently was shielded from prosecution by D.A. Castor's 2005 declination decision, we first must ascertain the legal relationship between D.A. Castor and Cosby. We begin with the trial court's findings.

It is hornbook law that reviewing courts are not fact-finding bodies. *O'Rourke v. Commonwealth*, 778 A.2d 1194, 1199 (Pa. 2001). Appellate courts are limited to determining "whether there is evidence in the record to justify the trial court's findings." *Id.* at 1199 n.6. "If so, this Court is bound by them." *Id.* However, while "we accord deference to a trial court

with regard to factual findings, our review of legal conclusions is de novo." *Id.* at n.7 (citation omitted). Indeed, it is a long-standing appellate principle that, "[w]ith respect to [ ] inferences and deductions from facts and [ ] conclusions of law, . . . appellate courts have the power to draw their own inferences and make their own deductions and conclusions." *In re Pruner's Est.*, 162 A.2d 626, 631 (Pa. 1960) (citations omitted).

Here, the trial court presided over the *habeas corpus* hearing, viewing and hearing the witnesses and their testimonies first-hand. From that vantage point, the trial court determined that, as a matter of fact, D.A. Castor had not extended a formal promise to Cosby never to prosecute him, let alone consummated a formal non-prosecution agreement with Cosby. The factual basis for the court's findings was two-fold. First, the court characterized the interaction between the district attorney and Cosby as a failed attempt to reach a statutorily prescribed transactional immunity agreement. Second, the court concluded that the former district attorney's testimony regarding the legal relationship between him and Cosby was inconsistent and "equivocal at best." T.C.O. at 63. Both findings are supported adequately by the record.

Pursuant to 42 Pa.C.S. § 5947, when a prosecutor wishes to formalize an immunity agreement, he or she "may request an immunity order from any judge of a designated court." *Id.* § 5947(b). Presented with such a request, the petitioned court "shall issue such an order," *id.*, upon which a witness "may not refuse to testify based on his privilege against self-incrimination." *Id.* § 5947(c). At the *habeas* hearing, former District Attorney Castor testified that he

intended to provide Cosby with transactional immunity. He explained that this conferral was predicated upon the state's common-law authority as a sovereign rather than any statutory provisions or protocols. T.C.O. at 57 (citing N.T., 2/2/2016, at 232, 234, 236). The record does not contradict his testimony. There is no evidence, nor any real contention, that the parties even contemplated a grant of immunity under Section 5947. The trial court's finding that the interaction between D.A. Castor and Cosby was not a formal attempt to bestow transactional immunity upon Cosby is supported by the record.

The trial court's description of former D.A. Castor's testimony as inconsistent and equivocal finds support in the record as well. At times, the former district attorney was emphatic that he intended his decision not to prosecute Cosby to bind the Commonwealth permanently, provided no substantive changes occurred in the case, such as Cosby confessing to the alleged crimes or proof appearing that Cosby had lied to, or attempted to deceive, the investigators. In addition to the unconditional nature of the press release, former D.A. Castor told then-District Attorney Ferman in his first email to her that he "intentionally and specifically bound the Commonwealth that there would be no state prosecution." N.T., 2/2/2016, Exh. D-5. In his second email to D.A. Ferman, Mr. Castor asserted that, by "signing off" on the press release, he was "stating that the Commonwealth will not bring a case against Cosby for this incident based upon then-available evidence." *Id.*, Exh. D-7.

Further indicative of his intent to forever preclude prosecution of Cosby for the 2004 incident, former D.A. Castor testified that the signed press release

was meant to serve as proof for a future civil judge that Cosby would not be prosecuted, thus stripping Cosby of his Fifth Amendment right not to testify. Mr. Castor emphasized that his decision was "absolute that [Cosby] never would be prosecuted." T.C.O. at 52. The former district attorney stressed that his intent was to "absolutely" remove "for all time" the prospect of a prosecution, because, in his view, only a steadfast guarantee would permanently strip Cosby of his right to invoke the Fifth Amendment. N.T., 2/2/2016, at 67. Mr. Castor also expounded upon the purpose of his emails to D.A. Ferman, which he claimed were an attempt to inform her that, while he bound the Commonwealth with regard to the 2004 incident, she was free to prosecute Cosby for any other crimes that she might uncover.

Although former D.A. Castor stated that he intended permanently to bar prosecution of Cosby, he also testified that he sought to confer some form of transactional immunity. In his second email to D.A. Ferman, former district attorney Castor suggested that his intent in "signing off" on the press release was to assure Cosby that nothing that he said in a civil deposition could or would be used against him in a criminal prosecution. N.T., 2/2/2016, Exh. D-7. In the same email, he simultaneously expressed his belief that "a prosecution is not precluded." *Id.* As such, the evidence suggests that D.A. Castor was motivated by conflicting aims when he decided not to prosecute Cosby. On one hand, the record demonstrates that D.A. Castor endeavored to forever preclude the Commonwealth from prosecuting Cosby if Cosby testified in the civil case. On the other hand, the record indicates that he sought to foreclose only the use in a

subsequent criminal case of any testimony that Cosby gave in a civil suit.

The trial court was left to resolve these seeming inconsistencies. The court concluded that Cosby and D.A. Castor did not enter into a formal immunity agreement. Because the record supports the trial court's findings in this regard, we are bound by those conclusions. Pertinently, we are bound by the trial court's determination that D.A. Castor's actions amounted only to a unilateral exercise of prosecutorial discretion. This characterization is consistent with the former district attorney's insistence at the *habeas* hearing that what occurred between him and Cosby was not an agreement, a contract, or any kind of *quid pro quo* exchange.

We are not, however, bound by the lower courts' legal determinations that derive from those factual findings. Thus, the question becomes whether, and under what circumstances, a prosecutor's exercise of his or her charging discretion binds future prosecutors' exercise of the same discretion. This is a question of law.

For the reasons detailed below, we hold that, when a prosecutor makes an unconditional promise of non-prosecution, and when the defendant relies upon that guarantee to the detriment of his constitutional right not to testify, the principle of fundamental fairness that undergirds due process of law in our criminal justice system demands that the promise be enforced.

Prosecutors are more than mere participants in our criminal justice system. As we explained in *Commonwealth v. Clancy*, 192 A.3d 44 (Pa. 2018), prosecutors inhabit three distinct and equally critical

roles: they are officers of the court, advocates for victims, and administrators of justice. *Id.* at 52. As the Commonwealth's representatives, prosecutors are duty-bound to pursue "equal and impartial justice," *Appeal of Nicely*, 18 A. 737, 738 (Pa. 1889), and "to serve the public interest." *Clancy*, 192 A.3d 52. Their obligation is "not merely to convict," but rather to "seek justice within the bounds of the law." *Commonwealth v. Starks*, 387 A.2d 829, 831 (Pa. 1978).

> As an "administrator of justice," the prosecutor has the power to decide whether to initiate formal criminal proceedings, to select those criminal charges which will be filed against the accused, to negotiate plea bargains, to withdraw charges where appropriate, and, ultimately, to prosecute or dismiss charges at trial. *See, e.g.*, 16 P.S. § 1402(a) ("The district attorney shall sign all bills of indictment and conduct in court all criminal and other prosecutions. . . . "); Pa.R.Crim.P. 507 (establishing the prosecutor's power to require that police officers seek approval from the district attorney prior to filing criminal complaints); Pa.R.Crim.P. 585 (power to move for *nolle prosequi*); *see also* ABA Standards §§ 3-4.2, 3-4.4. The extent of the powers enjoyed by the prosecutor was discussed most eloquently by United States Attorney General (and later Supreme Court Justice) Robert H. Jackson. In his historic address to the nation's United States Attorneys, gathered in 1940 at the Department of Justice in Washington, D.C., Jackson observed that "[t]he prosecutor has more control over

> life, liberty, and reputation than any other person in America. His discretion is tremendous." Robert H. Jackson, The Federal Prosecutor, 31 Am. Inst. Crim. L. & Criminology 3, 3 (1940). In fact, the prosecutor is afforded such great deference that this Court and the Supreme Court of the United States seldom interfere with a prosecutor's charging decision. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 693 (1974) (noting that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *Stipetich*, 652 A.2d at 1295 (noting that "the ultimate discretion to file criminal charges lies in the district attorney").

Clancy, 192 A.3d at 53 (cleaned up).

As prosecutors are vested with such "tremendous" discretion and authority, our law has long recognized the special weight that must be accorded to their assurances. For instance, in the context of statements made during guilty plea negotiations, the Supreme Court of the United States has held that, as a matter of constitutional due process and as compelled by the principle of fundamental fairness, a defendant generally is entitled to the benefit of assurances made by the prosecutor. *See Santobello v. New York*, 404 U.S. 257 (1971).[21] *Santobello* holds that, "when a plea rests in

---

[21] In *Santobello*, the Supreme Court of the United States did not state explicitly that it was premising its holding on due process guarantees. Nevertheless, it is only sensible to read *Santobello*'s holding as resting upon due process principles because—as Justice Douglas noted in his concurring opinion—without a constitutional basis the Court would have lacked

any significant degree on a promise or agreement by the prosecutor, so that it can be said to be part of the *inducement or consideration*, such promise must be fulfilled." *Id.* at 262 (emphasis added).

This Court has followed suit with regard to prosecutorial inducements made during the guilty plea process, insisting that such inducements comport with the due process guarantee of fundamental fairness. In *Commonwealth v. Zuber*, 353 A.2d 441 (Pa. 1976), during plea negotiations in a murder case, the prosecutor agreed to recommend to the sentencing court that Rickey Zuber receive a sentence of seven to fourteen years in prison if he pleaded guilty. *Id.* at 442-43. The prosecutor also agreed to consent to a request that Zuber's sentence be served concurrently with "back time" that Zuber was required to serve for a parole violation. *Id.* at 443. The prosecutor stated the terms of the agreement on the record, and the trial court accepted the terms of Zuber's guilty plea and sentenced Zuber accordingly. However, because the law requires that "back time" sentences and new sentences be served consecutively, Zuber was legally obligated to begin serving his sentences one after the other, instead of simultaneously. *Id.*

Zuber sought post-conviction relief, arguing that the plea as stated in open court had to be enforced, statutory law notwithstanding. On appeal to this Court, Zuber argued that he was "induced by the specific promise made by the Commonwealth," which ultimately turned out to be a "false and empty one." *Id.* We noted that plea bargaining is looked upon

---

jurisdiction over what was otherwise a state law matter. *See Santobello*, 404 U.S., at 266-67 (Douglas, J. concurring).

favorably and that "the integrity of our judicial process demands that certain safeguards be stringently adhered to so that the resultant plea as entered by a defendant and accepted by the trial court will always be one made voluntarily and knowingly, with a full understanding of the consequences to follow." *Id.*

> [T]here is an affirmative duty on the part of the prosecutor to honor any and all promises made in exchange for a defendant's plea. Our courts have demanded strict compliance with that duty in order to avoid any possible perversion of the plea bargaining system, evidencing the concern that a defendant might be coerced into a bargain or fraudulently induced to give up the very valued constitutional guarantees attendant the right to trial by jury.
>
> Therefore, in Pennsylvania, it is well settled that where a plea bargain has been entered into and is violated by the Commonwealth, the defendant is entitled, at the least, to the benefit of the bargain.

Id. at 444 (cleaned up).

We then turned to the remedy to which Zuber was entitled, which was problematic because enforcement of the plea necessarily meant compelling an outcome that was prohibited by statute. Nonetheless, because, *inter alia*, Zuber had "reasonably relied upon the advice of his counsel and the expression of that specific promise stated in open court by the assistant district attorney," *id.* at 445, he was entitled to the benefit of the bargain. Thus, we modified Zuber's sentence by lowering the minimum range to reflect

the point at which Zuber would have been eligible for parole had the original bargain been enforceable by law. *Id.* at 446.

Interactions between a prosecutor and a criminal defendant, including circumstances where the latter seeks enforcement of some promise or assurance made by the former, are not immune from the dictates of due process and fundamental fairness. The contours and attendant obligations of such interactions also can involve basic precepts of contract law, which inform the due process inquiry. The applicability of contract law to aspects of the criminal law has been recognized by the Supreme Court of the United States, *see Puckett v. United States*, 556 U.S. 129, 137 (2009), by the United States Court of Appeals for the Third Circuit, *see McKeever v. Warden SCI-Graterford*, 486 F.3d 81, 86 (3d Cir. 2007), and by this Court. *See Commonwealth v. Martinez*, 147 A.3d 517, 531 (Pa. 2016). In order to succeed on a claim of promissory estoppel, the aggrieved party must prove that: (1) the promisor acted in a manner that he or she should have reasonably expected to induce the other party into taking (or not taking) certain action; (2) the aggrieved party actually took such action; and (3) an injustice would result if the assurance that induced the action was not enforced. *See Crouse v. Cyclops Indus.*, 745 A.2d 606, 610 (Pa. 2000).

In *Martinez*, we reexamined the enforceability of terms of plea agreements made by prosecutors pertaining to the applicability of sexual offender registration obligations. There, three defendants entered into plea bargains with the Commonwealth, each of which was formulated in a way that either limited or eliminated the defendants' obligations under

the then-applicable sexual offender registration statute. *Martinez*, 147 A.3d at 521 22. However, after some time, our General Assembly enacted the first version of SORNA, which fundamentally altered the registration and reporting obligations of sexual offenders, including those of the three offenders in *Martinez*. Each defendant was notified by the Pennsylvania State Police that he or she was subject to the intervening statute and thus had to comply with the new obligations under SORNA, even though those obligations contradicted the terms of each of their plea deals. *Id.* at 522-523.

Each of the three offenders filed an action seeking the enforcement of the terms of his guilty plea, notwithstanding the fact that those terms conflicted with the newly-enacted statute. *Id.* at 523-24. Citing *Santobello*, *Zuber*, *Commonwealth v. Hainesworth*, 82 A.3d 444 (Pa. Super. 2013) (*en banc*), and other decisions, this Court held that the offenders were entitled to specific performance of the terms of the plea bargains to which the prosecutors had agreed. *Martinez*, 147 A.3d at 531-32. We held that, once a bargained term is enveloped within a plea agreement, a defendant "is entitled to the benefit of his bargain through specific performance of terms of the plea agreement." *Id.* at 533.

The applicability of contract law principles to criminal negotiations is not limited to the plea bargaining process. *See United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983) (holding that fundamental fairness requires a prosecutor to uphold his or her end of a non-prosecution agreement). For instance, the United States Court of Appeals for the Third Circuit has explained that, like plea agreements,

non-prosecution agreements are binding contracts that must be interpreted according to general principles of contract law, guided by "special due process concerns." *United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000) (citation omitted). And, in *Commonwealth v. Ginn*, 587 A.2d 314 (Pa. Super. 1991), our Superior Court similarly held that non-prosecution agreements are akin to plea agreements, necessitating the application of contract law principles to prevent prosecutors from violating the Commonwealth's promises or assurances. *Id.* at 316-17.

Under some circumstances, assurances given by prosecutors during plea negotiations, even unconsummated ones, may be enforceable on equitable grounds rather than on contract law principles. *Government of Virgin Islands v. Scotland*, 614 F.2d 360 (3d Cir. 1980), is instructive. In that case, the parties had reached a tentative, preliminary plea agreement. But before the defendant could formally enter the plea, the prosecutor attempted to add another term to the deal. *Id.* at 361-62. The defendant rejected the new term and sought specific performance of the original, unconsummated agreement. *Id.* The district court denied his request. The Circuit Court of Appeals affirmed, holding that, because the agreement was not formalized and accepted by the court, the defendant was not entitled to specific performance under a contract law theory. *Id.* at 362. The appellate court noted that, absent detrimental reliance upon the prosecutor's offer, a defendant's due process rights were sufficiently safeguarded by his right to a jury trial. *Id.* at 365. The court cautioned, however, that, by contrast, when a "defendant detrimentally relies on the government's promise, the resulting harm from this

induced reliance implicates due process guarantees." *Id.*[22]

Considered together, these authorities obligate courts to hold prosecutors to their word, to enforce promises, to ensure that defendants' decisions are made with a full understanding of the circumstances, and to prevent fraudulent inducements of waivers of one or more constitutional rights. Prosecutors can be bound by their assurances or decisions under principles of contract law or by application of the fundamental fairness considerations that inform and undergird the due process of law. The law is clear that, based upon their unique role in the criminal justice system, prosecutors generally are bound by their assurances, particularly when defendants rely to their detriment upon those guarantees.

There is no doubt that promises made during plea negotiations or as part of fully consummated plea agreements differ in kind from the unilateral discretion exercised when a prosecutor declines to pursue criminal charges against a defendant. As suggested by the trial court in the present case, such an exercise of discretion is not *per se* enforceable in the same way that a bargained-for exchange is under contract law. The prosecutor enjoys "tremendous" discretion to wield "the power to decide whether to initiate formal criminal proceedings, to select those criminal charges which will be filed against the accused, to negotiate plea bargains, to withdraw charges where appropriate, and, ultimately, to

---

[22] Ultimately, the court did not grant the defendant relief under a theory of detrimental reliance because there was "no claim in this case of such reliance." *Scotland*, 614 F.2d at 365.

prosecute or dismiss charges at trial." *Clancy*, 192 A.3d at 53. Unless patently abused, this vast discretion is exercised generally beyond the reach of judicial interference. *See Stipetich*, 652 A.2d at 1295 (noting that "the ultimate discretion to file criminal charges lies in the district attorney").

While the prosecutor's discretion in charging decisions is undoubtedly vast, it is not exempt from basic principles of fundamental fairness, nor can it be wielded in a manner that violates a defendant's rights. The foregoing precedents make clear that, at a minimum, when a defendant relies to his or her detriment upon the acts of a prosecutor, his or her due process rights are implicated. *See, e.g.*, *Santobello, Baird,* and *Scotland*, *supra.*

The Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution mandate that all interactions between the government and the individual are conducted in accordance with the protections of due process. *See Commonwealth v. Sims*, 919 A.2d 931, 941 n.6 (Pa. 2007) (noting that federal and state due process principles generally are understood as operating co-extensively). We have explained that review of a due process claim "entails an assessment as to whether the challenged proceeding or conduct offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental and that defines the community's sense of fair play and decency." *Commonwealth v. Kratsas*, 764 A.2d 20, 27 (Pa. 2001) (cleaned up). Due process is a universal concept, permeating all aspects of the criminal justice system. Like other state actors, prosecutors must act within the boundaries set by our

foundational charters. Thus, we discern no cause or reason, let alone any compelling one, to waive the prosecution's duty to comply with due process simply because the act at issue is an exercise of discretion, *e.g.*, whether or not to charge a particular suspect with a crime.

That is not to say that each and every exercise of prosecutorial discretion with regard to charging decisions invites a due process challenge. Charging decisions inhere within the vast discretion afforded to prosecutors and are generally subject to review only for arbitrary abuses. A prosecutor can choose to prosecute, or not. A prosecutor can select the charges to pursue, and omit from a complaint or bill of information those charges that he or she does not believe are warranted or viable on the facts of the case. A prosecutor can also condition his or her decision not to prosecute a defendant. For instance, a prosecutor can decide initially not to prosecute, subject to possible receipt or discovery of new inculpatory evidence. Or, a prosecutor can choose not to prosecute the defendant at the present time, but may inform the defendant that the decision is not final and that the prosecutor may change his or her mind within the period prescribed by the applicable statute of limitations. Similarly, there may be barriers to a prosecution, such as the unavailability of a witness or evidence, which subsequently may be removed, thus enabling a prosecution to proceed. Generally, no due process violation arises from these species of discretionary decision-making, and a defendant is without recourse to seek the enforcement of any assurances under such circumstances.

An entirely different situation arises when the decision not to prosecute is unconditional, is presented as absolute and final, or is announced in such a way that it induces the defendant to act in reliance thereupon. When a non-prosecution decision is conveyed in such a way, and when a defendant, having no indication to the contrary, detrimentally relies upon that decision, due process may warrant preclusion of the prosecution. Numerous state and federal courts have found that a defendant's detrimental reliance upon the government's assurances during the plea bargaining phase both implicates his due process rights and entitles him to enforcement even of unconsummated agreements. The cases are legion.[23]

---

[23] *See, e.g., State v. Francis*, 424 P.3d 156, 160 (Utah 2017) (holding that, "[w]hen a defendant has reasonably and detrimentally relied on a plea agreement, the State should not be able to withdraw a plea agreement just because it has not yet been presented to the district court"); *State v. Johnson*, 360 S.W.3d 104, 115 (Ark. 2010) (holding that, "when the State has entered into an agreement not to prosecute with a prospective defendant and the defendant has performed and acted to his detriment or prejudice in reliance upon that agreement, the government must be required to honor such an agreement."); *People v. Rhoden*, 89 Cal. Rptr.2d 819, 824 (Cal. App. 4th Dist. 1999) (explaining "unexecuted plea bargains generally do not involve constitutional rights absent detrimental reliance on the bargain"); *United States v. Streebing*, 987 F.2d 368, 372-73 (6th Cir. 1993) (holding that the defendant had to demonstrate, *inter alia*, that he had relied upon the government's promise to his detriment before the promise would be enforceable); *United States v. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992) (explaining that a defendant's detrimental reliance is an exception to the general rule that defendants are not entitled to enforcement of unconsummated plea agreements); *State v. Parkey,* 471 N.W.2d 896, 898 (Iowa App. 1991) (finding that, in the absence of a showing that the defendant detrimentally relied upon an agreement

That is what happened in this case. There has been considerable debate over the legal significance of District Attorney Castor's publicly announced decision not to prosecute Cosby in 2005. Before the trial court, the Superior Court, and now this Court, the parties have vigorously disputed whether D.A. Castor and Cosby reached a binding agreement, whether D.A. Castor extended an enforceable promise, or whether any act of legal significance occurred at all. There is testimony in the record that could support any of these conclusions. The trial court—the entity charged with sorting through those facts—found that D.A. Castor made no agreement or overt promise.

Much of that debate, and the attendant factual conclusions, were based upon the apparent absence of a formal agreement and former D.A. Castor's various efforts to defend and explain his actions ten years after the fact. As a reviewing court, we accept the trial court's conclusion that the district attorney's decision was merely an exercise of his charging discretion.[24] As we assess whether that decision, and

---

with the prosecutor, dismissal was not warranted); *Rowe v. Griffin*, 676 F.2d 524, 528 (11th Cir. 1982) (stating that, when a promise induces a defendant to waive his Fifth Amendment rights by testifying or otherwise cooperating with the government to his detriment, due process requires that the prosecutor's promise be fulfilled); *People v. Reagan*, 235 N.W.2d 581, 587 (Mich. 1975) (noting that, where the defendant was prejudiced by submitting to a polygraph in exchange for an agreement that his prosecution would be dismissed, trial court erred in refusing to enforce the agreement).

[24] The dissent agrees—as do we —with the trial court's conclusion that D.A. Castor's decision not to prosecute was, at its core, an exercise of the inherent charging discretion vested in district attorneys. *See* D.O. at 1. But the dissent would simply end the analysis there. In the dissent's view, once a decision is deemed

the surrounding circumstances, implicated Cosby's due process rights, former D.A. Castor's *post-hoc* attempts to explain or characterize his actions are largely immaterial. The answer to our query lies instead in the objectively indisputable evidence of record demonstrating D.A. Castor's patent intent to induce Cosby's reliance upon the non-prosecution decision.

In January and February of 2005, then-D.A. Castor led an investigation into Constand's allegations. When that investigation concluded, Mr. Castor decided

---

to fall within a prosecutor's discretion, that decision "in no way" can bind the actions of future elected prosecutors. Respectfully, this perspective overlooks the verity that not all decisions are the same. As to routine discretionary decisions, the dissent may be correct. But as we explain throughout this opinion, what occurred here was anything but routine. Here, D.A. Castor's exercise of discretion was made deliberately to induce the deprivation of a fundamental right. The typical decision to prosecute, or not to prosecute, is not made for the purpose of extracting incriminating information from a suspect when there exists no other mechanism to do so.

The dissent would amalgamate and confine all "present exercise[s] of prosecutorial discretion" within a single, non-binding, unenforceable, and unreviewable category. *Id.* We decline to endorse this blanket approach, as such decisions merit, and indeed require, individualized evaluation. To rule otherwise would authorize, if not encourage, prosecutors to choose temporarily not to prosecute, obtain incriminating evidence from the suspect, and then reverse course with impunity. Due process necessarily requires that court officials, particularly prosecutors, be held to a higher standard. This is particularly so in circumstances where the prosecutor's decision is crafted specifically to induce a defendant to forfeit a constitutional right, and where the defendant has relied upon that decision to his detriment. The dissent's approach would turn a blind eye to the reality of such inducements. Due process does not.

that the case was saddled with deficiencies such that proving Cosby's guilt beyond a reasonable doubt was unlikely, if not impossible. For those reasons, D.A. Castor decided not to prosecute Cosby. To announce his decision, the district attorney elected to issue a signed press release—an uncommon tactic in the typical case, but not necessarily so in cases of high public profile or interest.

In that press statement, D.A. Castor explained the extent and nature of the investigation and the legal rules and principles that he considered. He then announced that he was declining to prosecute Cosby. The decision was not conditioned in any way, shape, or form. D.A. Castor did not say that he would re-evaluate this decision at a future date, that the investigation would continue, or that his decision was subject to being overturned by any future district attorney.

There is nothing from a reasonable observer's perspective to suggest that the decision was anything but permanent. The trial court found contrary indicia in the latter portion of the press release, where Mr. Castor "cautioned all parties to this matter that [District Attorney Castor] will reconsider this decision should the need arise," Press Release, 2/17/2005; N.T., 2/2/2016, Exh. D-4. The trial court's narrow interpretation of "this decision" is possible only when this sentence is read in isolation.[25] The court ignored

---

[25] There is no doubt that there are two decisions at issue: the decision not to prosecute and the decision not to discuss that choice in public. The dissent would endorse the trial court's selective interpretation of D.A. Castor's language in the press release, finding at a minimum that D.A. Castor's assertion that he would reconsider the "decision" is ambiguous. But a plain

what came before and after, omitting all relevant and necessary context. The entire passage reads as follows:

> Because a civil action with a much lower standard for proof is possible, the District Attorney renders no opinion concerning the credibility of any party involved so as to not contribute to the publicity and taint potential

---

reading of the release belies such a construction. Like the trial court's interpretation of the relevant paragraph of the press release, the dissent's finding of ambiguity can result only when one overlooks the context and surrounding statements quite entirely. D.A. Castor stated that he did not intend to discuss the details of his decision not to prosecute. In the very next sentence, D.A. Castor stated that he would reconsider "this decision" if the need arose. In context, "this decision" must naturally refer to the decision not to discuss the matter with the public. This is so because announcing that particular decision was the very purpose of the immediately preceding statement, and the subject sentence naturally modifies that prior statement. D.A. Castor already had stated earlier in the press release that he had decided not to prosecute Cosby. Thus, when D.A. Castor referred to "this decision" in the particular paragraph under examination, he was referring not to a decision addressed much earlier in the press release but rather to the decision that he had stated for the first time in the immediately preceding sentence. Even more compelling is the fact that the entirety of the paragraph relates to D.A. Castor's concern about the potential effect that any public statements that he would make might have on jurors empaneled in a civil case. Nothing at all in that paragraph pertains to the decision not to prosecute Cosby. As noted, D.A. Castor already had addressed the non-prosecution decision. There is no support for the notion that D.A. Castor was referring to his decision not to prosecute Cosby in the middle of a paragraph directed exclusively to: (1) the potential impact that any public explication by D.A. Castor might have upon the fairness of a civil case; and (2) D.A. Castor's derivative decision not to discuss the matter publicly in order to avoid that potential impact.

> jurors. The District Attorney does not intend to expound publicly on the details of his decision for fear that his opinions and analysis might be given undue weight by jurors in any contemplated civil action. District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise. Much exists in this investigation that could be used (by others) to portray persons on both sides of the issue in a less than flattering light. The District Attorney encourages the parties to resolve their dispute from this point forward with a minimum of rhetoric.

Id. (emphasis added).

When we review the statement in its full context, it is clear that, when D.A. Castor announced that he "will reconsider *this decision* should the need arise," the decision to which he was referring was his decision not to comment publicly "on the details of his [charging] decision for fear that his opinions and analysis might be given undue weight by jurors in any contemplated civil action." The entire paragraph addresses the district attorney's concern that he might inadvertently taint a potential civil jury pool by making public remarks about the credibility of the likely parties in that highly anticipated case. Then-D.A. Castor expressly stated that he could change his mind on *that* decision only. Nothing in this paragraph pertains to his decision not to prosecute Cosby. The trial court's conclusion is belied by a plain reading of the entire passage.

Our inquiry does not end there. D.A. Castor's press release, without more, does not necessarily

create a due process entitlement. Rather, the due process implications arise because Cosby detrimentally relied upon the Commonwealth's decision, which was the district attorney's ultimate intent in issuing the press release. There was no evidence of record indicating that D.A. Castor intended anything other than to induce Cosby's reliance. Indeed, the most patent and obvious evidence of Cosby's reliance was his counseled decision to testify in four depositions in Constand's civil case without ever invoking his Fifth Amendment rights.

The Fifth Amendment to the United States Constitution, which is applicable to the States via incorporation though the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The right to refuse to incriminate oneself is an "essential mainstay" of our constitutional system of criminal justice. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964). The privilege constitutes an essential restraint upon the power of the government, and stands as an indispensable rampart between that government and the governed. The Fifth Amendment's self-incrimination clause "is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well." *Ullmann v. United States*, 350 U.S. 422, 445 (1956) (Douglas, J., dissenting).

We recently discussed the centrality of the privilege against compulsory self-incrimination in the American concept of ordered liberty in *Commonwealth v. Taylor*, 230 A.3d 1050 (Pa. 2020). There, we noted that certain rights, such as those enshrined in the Fifth Amendment, are among those privileges "whose

exercise a State may not condition by the exaction of a price." *Id.* at 1064 (quoting *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967)). To ensure that these fundamental freedoms are "scrupulously observed," we emphasized that "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," *id.* at 1063-64 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)), and that "the Fifth Amendment is to be "broad[ly] constru[ed] in favor of the right which it was intended to secure." *Id.* at 1064 (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), *Boyd*, 116 U.S. at 635, and *Quinn v. United States*, 349 U.S. 155, 162 (1955)). We stressed that "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Id.* at 1064 (quoting *Grunewald v. United States*, 353 U.S. 391, 425 (1957) (Black, J., concurring).[26]

The right against compulsory self-incrimination accompanies a person wherever he goes, no matter the legal proceeding in which he participates, unless and until "the potential exposure to criminal punishment no longer exists." *Taylor*, 230 A.3d at 1065. It is indisputable that, in Constand's civil case, Cosby was entitled to invoke the Fifth Amendment. No court could have forced Cosby to testify in a depo-

---

[26] To that end, the application of the privilege against self-incrimination is not limited to criminal matters. Its availability "does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Id.* (quoting *Application of Gault*, 387 U.S. 1, 49 (1967)). "The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory." *Gault*, 387 U.S. at 49.

sition or at a trial so long as the potential for criminal charges remained. Here, however, when called for deposition, Cosby no longer faced criminal charges. When compelled to testify, Cosby no longer had a right to invoke his right to remain silent.

Cosby was forced to sit for four depositions. That he did not—and could not choose to remain silent is apparent from the record. When Cosby attempted to decline to answer certain questions about Constand, Constand's attorneys obtained a ruling from the civil trial judge forcing Cosby to answer. Most significantly, Cosby, having maintained his innocence in all matters and having been advised by a number of attorneys, provided critical evidence of his recurring history of supplying women with central nervous system depressants before engaging in (allegedly unwanted) sexual activity with them—the very assertion that undergirded Constand's criminal complaint.

The trial court questioned whether Cosby believed that he no longer had a Fifth Amendment right to invoke during the civil proceedings, or whether he would have invoked that right had he still possessed it. The court noted that Cosby voluntarily had submitted to a police interview and had provided the police with a consent-based defense. Cosby repeated this narrative in his depositions. The court found no reason to believe that Cosby would not continue to cooperate as he had, and, thus, discerned no reason for him to invoke the Fifth Amendment. In other words, it was not that the trial court surmised that Cosby had no privilege against compulsory self-incrimination to invoke, but rather that Cosby simply chose not to invoke it.

The trial court's conjecture was legally erroneous. The trial court surmised that, although Cosby repeatedly told an exculpatory, consent-based version of the January 2004 incident, he naturally would have been willing to offer inculpatory information about himself as well. Assuming that a person validly possesses the right to refrain from giving evidence against himself, he may invoke that right "at any time." *See Miranda v. Arizona*, 384 U.S. 436, 473 (1966); *Commonwealth v. Dulaney*, 295 A.2d 328, 330 (Pa. 1972). The fact that Cosby did not assert any right to remain silent to the police or while sitting for the depositions is of no moment. Had his right to remain silent not been removed by D.A. Castor's decision, Cosby would have been at liberty to invoke that right at will. That Cosby did not do so at other junctures is not proof that he held the right but elected not to invoke it, as the trial court evidently reasoned. To assume an implicit waiver of the right violates a court's "duty . . . to be watchful for the constitutional rights of the citizen," and to construe the existence of such rights broadly. *Taylor*, 230 A.3d at 1064 (quoting *Boyd*, *supra*).

These legal commandments compel only one conclusion. Cosby did not invoke the Fifth Amendment before he incriminated himself because he was operating under the reasonable belief that D.A. Castor's decision not to prosecute him meant that "the potential exposure to criminal punishment no longer exist[ed]." *Id.* at 1065. Cosby could not invoke that which he no longer possessed, given the Commonwealth's assurances that he faced no risk of prosecution. Not only did D.A. Castor's unconditional decision not to prosecute Cosby strip Cosby of a fundamental consti-

tutional right, but, because he was forced to testify, Cosby provided Constand's civil attorneys with evidence of Cosby's past use of drugs to facilitate his sexual exploits. Undoubtedly, this information hindered Cosby's ability to defend against the civil action, and led to a settlement for a significant amount of money. We are left with no doubt that Cosby relied to his detriment upon the district attorney's decision not to prosecute him. The question then becomes whether that reliance was reasonable. Unreasonable reliance warrants no legal remedy.

We already have determined that Cosby in fact relied upon D.A. Castor's decision. We now conclude that Cosby's reliance was reasonable, and that it also was reasonable for D.A. Castor to expect Cosby to so rely. The record establishes without contradiction that depriving Cosby of his Fifth Amendment right was D.A. Castor's intended result.[27] His actions were

---

[27] The dissent asserts that we have predicated our decision upon the existence of an "unwritten promise," which was rejected by the trial court's credibility findings. D.O. at 3. To the contrary. As we explained earlier, we have accepted the trial court's findings in this regard, and those findings, which are supported by the record, are binding on this Court. *See*, *supra*, page 48 (citing *O'Rourke*, 778 A.2d at 1199 (Pa. 2001)). However, our deference is limited to the factual findings only; we may draw our own inferences therefrom and reach our own legal conclusions. *See In re Pruner's Est.*, 162 A.2d at 631. Thus, the trial court's factual finding that no formal bargained-for-exchange, written or unwritten, occurred does not constrain our legal analysis, nor does it in any way serve to immunize D.A. Castor's actions from constitutional scrutiny. That there was no formal promise does not mean that Cosby no longer had due process rights.

The trial court's credibility finding regarding the existence *vel non* of a particular promise does not allow us to ignore the remainder of the overwhelming evidence of record. The record

specifically designed to that end. The former district attorney may have equivocated or contradicted himself years later with regard to *how* he endeavored to achieve that result, but there has never been any question as to what he intended to achieve. There can be no doubt that, by choosing not to prosecute Cosby and then announcing it publicly, D.A. Castor reasonably expected Cosby to act in reliance upon his charging decision.

We cannot deem it unreasonable to rely upon the advice of one's attorneys. The constitutional guarantee of the effective assistance of counsel is premised, in part, upon the complexities that inhere in our criminal justice system. A criminal defendant confronts a number of important decisions that may result in severe consequences to that defendant if, and when, they are made without a full understanding

---

firmly establishes that D.A. Castor's desired result was to strip Cosby of his Fifth Amendment rights. This patent and developed fact stands separate and apart from the trial court's finding that D.A. Castor never extended a formal promise.

The dissent would ignore the undeniable reality that Cosby relied to his detriment upon D.A. Castor's decision. The dissent does so by shifting the perspective from D.A. Castor's actions to Cosby's, focusing in particular upon the fact that Cosby did not record the purported agreement or reduce it to writing. As we note in this opinion, in this context, neither a promise, nor an agreement, nor a contract, nor evidence of reliance derives legal validity only upon being recorded or upon written materialization. The law knows no such prerequisite, and Cosby cannot be punished for failing to comply with a legal requirement that does not exist. The proof of Cosby's reliance is plain on the face of the record. It is the fact that, upon the advice and assistance of counsel, Cosby sat for four depositions and incriminated himself, obviously a decision made after and in direct reliance upon D.A. Castor's decision.

of the intricacies and nuances of the ever-changing criminal law. As Justice Black explained in *Johnson v. Zerbst*, 304 U.S. 458 (1938):

> [The right to counsel] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer to the untrained layman may appear intricate, complex, and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to the humane policy of modern criminal law, which now provides that a defendant, if he be poor, may have counsel furnished [to] him by the state, not infrequently more able than the attorney for the state.'
>
> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant

> to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Id. at 462-63 (cleaned up). Not only was Cosby's reliance upon the conclusions and advice of his attorneys reasonable, it was consistent with a core purpose of the right to counsel.

To hold otherwise would recast our understanding of reasonableness into something unrecognizable and unsustainable under our law. If Cosby's reliance was unreasonable, as found by the lower courts and as suggested by the Commonwealth, then reasonableness would require a defendant in a similar position to disbelieve an elected district attorney's public statement and to discount the experience and wisdom of his own counsel. This notion of reasonableness would be manifestly unjust in this context. Defendants, judges, and the public would be forced to assume fraud or deceit by the prosecutor. The attorney-client relationship would be predicated upon mistrust, and the defendant would be forced to navigate the criminal justice process on his own, despite the substantial deficit in the critical knowledge that is necessary in order to do so, as so compellingly explained by Justice Black.

Such an understanding of reasonableness is untenable. Instead of facilitating the right to counsel, it undermines that right. We reject this interpretation. We find nothing unreasonable about Cosby's reliance upon his attorneys and upon D.A. Castor's public

announcement of the Commonwealth's charging decision.

The trial court alternatively suggested that Cosby's belief that he would never be prosecuted, thus stripping him of his Fifth Amendment rights, based upon little more than a press release, was unreasonable because neither Cosby nor his attorneys demanded that the terms of any offers or assurances by D.A. Castor be reduced to writing. This reasoning is unpersuasive. Neither the trial court, nor the Commonwealth for that matter, cites any legal principle that requires a prosecutor's assurances to be memorialized in writing in order to warrant reasonable reliance. We decline to construe as unreasonable the failure to do that which the law does not require.

It also has been suggested that the level of the defendant's sophistication is a relevant factor in assessing whether his reliance upon a prosecutor's decision was reasonable. Such a consideration is both impractical and unfair. There is no equitable method of assessing a particular defendant's degree of sophistication. Any attempt would be an arbitrary line-drawing exercise that unjustifiably would deem some sophisticated and some not. Nor are there any objective criteria that could be used to make that assessment accurately. Would sophistication for such purposes be established based upon one's ability to hire one or more attorneys? By the level of education attained by the defendant? Or perhaps by the number of times the defendant has participated in the criminal justice system? There is no measure that could justify assessing reasonableness based upon the so-called sophistication of the defendant.

The contours of the right to counsel do not vary based upon the characteristics of the individual seeking to invoke it. Our Constitutions safeguard fundamental rights equally for all. The right to counsel applies with equal force to the sophisticated and the unsophisticated alike. The most experienced defendant, the wealthiest suspect, and even the most-seasoned defense attorney are each entitled to rely upon the advice of their counsel. Notwithstanding Cosby's wealth, age, number of attorneys, and media savvy, he, too, was entitled to rely upon the advice of his counsel. No level of sophistication can alter that fundamental constitutional guarantee.

In accordance with the advice his attorneys, Cosby relied upon D.A. Castor's public announcement that he would not be prosecuted. His reliance was reasonable, and it resulted in the deprivation of a fundamental constitutional right when he was compelled to furnished self-incriminating testimony. Cosby reasonably relied upon the Commonwealth's decision for approximately ten years. When he announced his declination decision on behalf of the Commonwealth, District Attorney Castor knew that Cosby would be forced to testify based upon the Commonwealth's assurances. Knowing that he induced Cosby's reliance, and that his decision not to prosecute was designed to do just that, D.A. Castor made no attempt in 2005 or in any of the ten years that followed to remedy any misperception or to stop Cosby from openly and detrimentally relying upon that decision. In light of these circumstances, the subsequent decision by successor D.A.s to prosecute Cosby violated Cosby's due process rights. No other conclusion comports with the principles of due process and fundamental fairness to

which all aspects of our criminal justice system must adhere.[28]

Having identified a due process violation here, we must ascertain the remedy to which Cosby is entitled. We note at the outset that specific performance does not automatically apply in these circumstances. As a general rule, specific performance is reserved for remedying an injured party to a fully consummated agreement, such as an agreed-upon and executed plea bargain. *Commonwealth v. Spence*, 627 A.2d 1176, 1184 (Pa. 1993). "'Specific performance' is a traditional contract remedy that is available when monetary damages are inadequate." *Martinez*, 147 A.3d at 532 (citing Black's Law Dictionary 1425 (8th ed. 2004) (defining "specific performance" as, inter alia, "a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate")).

This does not mean that specific performance is unavailable entirely. It only means that the remedy does not naturally flow to someone under these circumstances as an automatic consequence of contract law. Specific performance is awarded only when equity and fundamental fairness command it. *See Scotland*, at 614 F.2d at 365 (stating that, if "the defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process guarantees"); *see also Commonwealth v. Mebane*, 58 A.3d 1243 (Pa. Super. 2012) (upholding

---

[28] *See Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 946 (Pa. 2004) ("Substantive due process is the esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice. . . . ") (cleaned up).

trial court ruling that fundamental fairness required enforcement of the prosecution's plea offer that was later withdrawn, where the defendant detrimentally relied upon the offer); *Commonwealth v. McSorley*, 485 A.2d 15, 20 (Pa. Super. 1984), *aff'd,* 506 A.2d 895 (Pa. 1986) (*per curiam*) (enforcing an incomplete agreement based upon detrimental reliance). As noted earlier, the principle of fundamental fairness, as embodied in our Constitutions, requires courts to examine whether the challenged "conduct offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental and that defines the community's sense of fair play and decency." *Kratsas*, 764 A.2d at 27.

In our view, specific performance of D.A. Castor's decision, in the form of barring Cosby's prosecution for the incident involving Constand, is the only remedy that comports with society's reasonable expectations of its elected prosecutors and our criminal justice system. It bears repeating that D.A. Castor intended his charging decision to induce the waiver of Cosby's fundamental constitutional right, which is why the prosecutor rendered his decision in a very public manner. Cosby reasonably relied to his detriment upon that decade-old decision when he declined to attempt to avail himself of his privilege against compulsory self-incrimination and when he provided Constand's civil attorneys with inculpatory statements. Under these circumstances, neither our principles of justice, nor society's expectations, nor our sense of fair play and decency, can tolerate anything short of compelling the Montgomery County District Attorney's Office to stand by the decision of its former elected head.

In *Stipetich,* we briefly contemplated a remedy for the breach of a defective non-prosecution agreement. In that case, Stipetich agreed with the police that, if he revealed his source for obtaining drugs, no charges would be filed against him or his wife. *Stipetich*, 652 A.2d at 1294-95. Even though Stipetich fulfilled his end of the bargain, charges still were filed against him and his wife. *Id.* at 1295. The Stipetiches sought enforcement of the non-prosecution agreement with the police. This Court found that the non-prosecution agreement was invalid, because the police did not have the authority to make it. Only a prosecutor holds that power. *Id.*

We recognized that what befell the Stipetiches may have been "fundamentally unfair," particularly if their discussions with the police produced additional evidence of criminality, including possibly self-incriminating statements. *Id.* at 1296. In *dicta*, we suggested that the remedy might be to suppress the evidence or statements that were obtained after the police purported to bind the Commonwealth in a non-prosecution agreement. *Id.*

This remedy is insufficient here, for a number of reasons. First, as noted, the remedy statement was *dicta*, and is not the law in Pennsylvania. Second, the circumstances that led to the suggestion of that remedy are markedly different than those that occurred in the present case. In *Stipetich*, the agreement was formulated with arresting officers, who lacked the authority to make the promise not to prosecute. Here, conversely, the non-prosecution decision was made by the elected District Attorney of Montgomery County, whose public announcement of that decision was fully within his authority, and was objectively

worthy of reasonable reliance. Finally, a one-size-fits-all remedy does not comport with the individualized due process inquiry that must be undertaken. As outlined above, a court must ascertain, contemplating the individual circumstances of each case, the remedy that accords with the due process of law. In some instances, suppression of evidence may be an adequate remedy; in others, only specific enforcement will suffice.

Here, only full enforcement of the decision not to prosecute can satisfy the fundamental demands of due process. *See Rowe*, 676 F.2d at 528 (explaining that, when a promise induces a defendant to waive his Fifth Amendment rights by testifying or otherwise cooperating with the government to his detriment, due process requires that the prosecutor's promise be fulfilled). In light of the extent and duration of Cosby's reliance, induced as intended by then-District Attorney Castor, no other remedy will do. Anything less under these circumstances would permit the Commonwealth to extract incriminating evidence from a defendant who relies upon the elected prosecutor's words, actions, and intent, and then use that evidence against that defendant with impunity.

The circumstances before us here are rare, if not entirely unique. While this controversy shares some features of earlier cases that contemplate the constitutional role of prosecutors, that import contract principles into the criminal law, and that address the binding nature of prosecutorial promises in plea agreements and in other situations—as well as breaches of those promises—there are no precedents directly on point that would make the remedy question an easy one. As the concurring and dissenting opinion ("CDO") observes, the circumstances of this case

present a "constellation of . . . unusual conditions."[29] It is not at all surprising, then, that a reasonable disagreement arises regarding the remedy that must be afforded for what we and the CDO agree was a violation of Cosby's due process rights.

In our respectful judgment, the CDO's proposed remedy, a third criminal trial of Cosby—albeit one without his deposition testimony—falls short of the relief necessary to remedy the constitutional violation. Specific performance is rarely warranted, and should be imposed only when fairness and equity demand it. As the CDO notes, such a remedy generally should be afforded only under "drastic circumstances where the defendant detrimentally relies on an inducement and cannot be returned to the status quo *ante*."[30] Our disagreement with the CDO arises concerning its view that mere suppression of Cosby's deposition testimony will remedy his constitutional harm and "fully" restore him to where he stood before he detrimentally relied upon D.A. Castor's inducement.[31] This perspective understates the gravity of Cosby's harm in this case, and suppression alone is insufficient to provide a full remedy of the consequences of the due process violation.

The CDO would limit our assessment of the harm suffered by Cosby to the Commonwealth's use of the deposition testimony at his two trials. But the harm is far greater than that, and it began long before even the first trial. It must be remembered

---

[29] *See* CDO at 4.

[30] *Id.* at 9.

[31] *Id.* at 5.

that D.A. Castor's decision not to prosecute Cosby, and to announce that decision orally and in a written press release, was not designed to facilitate the use of testimony against Cosby in a future criminal trial. Instead, D.A. Castor induced Cosby's forfeiture of his Fifth Amendment rights as a mechanism and a lever to aid Constand's civil action and to improve the chances that she would receive at least a monetary benefit for the abuse that she suffered, given that D.A. Castor had determined that Constand would not, and could not, get relief in a criminal trial. Through his deliberate efforts, D.A. Castor effectively forced Cosby to participate against himself in a civil case in a way that Cosby would not have been required to do had he retained his constitutional privilege against self-incrimination. To say the least, this development significantly weakened Cosby's legal position. Cosby was compelled to give inculpatory evidence that led ultimately to a multimillion dollar settlement. The end result was exactly what D.A. Castor intended: Cosby gave up his rights, and Constand received significant financial relief.

Under these circumstances, where our equitable objective in remedying a due process violation is to restore an aggrieved party to the status he held prior to that violation, exclusion of the deposition testimony from a third criminal trial, and nothing more, falls short of what our law demands. Though this appeal emanates from Cosby's criminal convictions, we cannot ignore the true breadth of the due process violation. The deprivation includes the fact that D.A. Castor's actions handicapped Cosby in the derivative civil suit. Nor can we ignore the fact that weakening Cosby's position in that civil case was precisely why

D.A. Castor proceeded as he did. Suppression of evidence in a third criminal trial can never restore Cosby to the position he held before he forfeited his Fifth Amendment rights. The consequences of D.A. Castor's actions include the civil matter, and no exclusion of deposition testimony can restore Cosby's injuries in that regard.

It was not only the deposition testimony that harmed Cosby. As a practical matter, the moment that Cosby was charged criminally, he was harmed: all that he had forfeited earlier, and the consequences of that forfeiture in the civil case, were for naught. This was, as the CDO itself characterizes it, an unconstitutional "coercive bait-and-switch."[32] It is the true and full breadth of the consequences of the due process violation that separates this case from the cases relied upon by the CDO, including *Stipetich*.[33] Each of those prosecutions involved defective or unenforceable promises that resulted in suppression remedies. Critically, none of them featured the additional harm inflicted in this case. In none of those cases did the effects of the constitutional violation extend to matters beyond the criminal trial, as was the circumstance here. Accordingly, none of those cases support, much less compel, the limited remedy that the CDO proffers.

The impact of the due process violation here is vast. The remedy must match that impact. Starting

---

[32] *Id.* at 1.

[33] *See* CDO at 6-8 (citing *Stipetich*, *Commonwealth v. Peters*, 373 A.2d 1055 (Pa. 1977); *Commonwealth v. Parker*, 611 A.2d 199 (Pa. 1922); *People v. Gallego*, 424 N.W.2d 470 (Mich. 1988); and *United States v. Blue*, 384 U.S. 251 (1966)).

with D.A. Castor's inducement, Cosby gave up a fundamental constitutional right, was compelled to participate in a civil case after losing that right, testified against his own interests, weakened his position there and ultimately settled the case for a large sum of money, was tried twice in criminal court, was convicted, and has served several years in prison. All of this started with D.A. Castor's compulsion of Cosby's reliance upon a public proclamation that Cosby would not be prosecuted. The CDO's remedy for all of this would include subjecting Cosby to a third criminal trial. That is no remedy at all. Rather, it is an approach that would place Cosby nowhere near where he was before the due process violation took root.

There is only one remedy that can completely restore Cosby to the status quo *ante*. He must be discharged, and any future prosecution on these particular charges must be barred. We do not dispute that this remedy is both severe and rare. But it is warranted here, indeed compelled. The CDO would shun this remedy because (at least in part) it might thwart the "public interest in having the guilty brought to book."[34] It cannot be gainsaid that society holds a strong interest in the prosecution of crimes. It is also true that no such interest, however important, ever can eclipse society's interest in ensuring that the constitutional rights of the people are vindicated. Society's interest in prosecution does not displace the remedy due to constitutionally aggrieved persons.

---

34 *See* CDO (quoting *Blue*, 384 U.S. at 255).

IV. Conclusion

We do not question the discretion that is vested in prosecutors "over whether charges should be brought in any given case." *Stipetich*, 652 A.2d at 1295. We will not undermine a prosecutor's "general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case." *Id.* (quoting *Commonwealth v. DiPasquale*, 246 A.2d 430, 432 (Pa. 1968)). The decision to charge, or not to charge, a defendant can be conditioned, modified, or revoked at the discretion of the prosecutor.

However, the discretion vested in our Commonwealth's prosecutors, however vast, does not mean that its exercise is free of the constraints of due process. When an unconditional charging decision is made publicly and with the intent to induce action and reliance by the defendant, and when the defendant does so to his detriment (and in some instances upon the advice of counsel), denying the defendant the benefit of that decision is an affront to fundamental fairness, particularly when it results in a criminal prosecution that was foregone for more than a decade. No mere changing of the guard strips that circumstance of its inequity. *See, e.g., State v. Myers*, 513 S.E.2d 676, 682 n.1 (W.Va. 1998) (explaining that "any change in the duly elected prosecutor does not affect the standard of responsibility for the office"). A contrary result would be patently untenable. It would violate long-cherished principles of fundamental fairness. It would be antithetical to, and corrosive of, the integrity and functionality of the criminal justice system that we strive to maintain.

For these reasons, Cosby's convictions and judgment of sentence are vacated, and he is discharged.[35]

Justices Todd, Donohue and Mundy join the opinion.

Justice Dougherty files a concurring and dissenting opinion in which

Chief Justice Baer joins.

Justice Saylor files a dissenting opinion.

---

[35] Accordingly, we do not address Cosby's other issue.

CONCURRING AND DISSENTING OPINION OF JUSTICE DOUGHERTY (JUNE 30, 2021)

[J-100-2020] [MO: Wecht, J.]

CONCURRING AND DISSENTING OPINION

JUSTICE DOUGHERTY

DECIDED: June 30, 2021

By publicly announcing that appellant William Cosby would not be charged with any crimes related to Andrea Constand—a decision apparently made, in part, to force Cosby to testify in Constand's future anticipated civil suit—former Montgomery County District Attorney Bruce Castor intended to, and in fact did, force Cosby to give up his Fifth Amendment right against self-incrimination. Then, years later, Castor's successor used the damaging evidence Cosby turned over in the civil case to convict him of the same criminal offenses he had previously been induced to believe were off the table. I am constrained to agree with the majority that due process does not permit the government to engage in this type of coercive bait-and-switch. However, while I share in that conclusion, and agree with much of the majority's well-reasoned analysis, I part ways from it in several material respects—most notably the remedy.

A.

I begin by addressing an underlying issue that the majority says little about but which I believe

looms large: Castor's apparent belief that, as an elected district attorney, he could forever preclude his successors from prosecuting Cosby. *See, e.g.*, N.T. *Habeas Corpus* Hearing, 2/2/2016 at 64-66 ("I made the decision as the sovereign that Mr. Cosby would not be prosecuted no matter what."); *id.* at 66-67 (emphasizing it was "absolutely" his intent to remove "for all time" the possibility of prosecution); *id.* at Exh. D-5 (alleging in an email to his successor that he "intentionally and specifically bound the Commonwealth that there would be no state prosecution"). The majority does not directly address whether it considers Castor's belief to be an accurate statement of the law. *Cf.* Majority Opinion at 51 ("the question becomes whether, and under what circumstances, a prosecutor's exercise of his or her charging discretion binds future prosecutors' exercise of the same discretion"). Nevertheless, to the extent the majority's opinion could arguably be interpreted as signaling even a tacit approval of Castor's view, I respectfully distance myself from it.

District attorneys in this Commonwealth are constitutionally elected officers. *See* PA. CONST. art. IX, § 4. However, the Constitution "is altogether silent on the question of the district attorney's powers and duties." *Commonwealth v. Schab*, 383 A.2d 819, 830 (Pa. 1978) (Pomeroy, J.). Instead these duties and powers are set by statute. *See* 16 P.S. § 1402(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 . . . , and perform all the duties which, prior to May 3, 1850, were performed by deputy attorneys general."). Significantly, none of this authority or our case law interpreting it

remotely purports to grant to district attorneys the power to impose on their successors—in perpetuity, no less—the kind of general non-prosecution agreement that Castor sought to convey to Cosby. It's not difficult to imagine why: If district attorneys had the power to dole out irrevocable get-out-of-jail-free cards at will and without any judicial oversight, it would invite a host of abuses.[1] And it would "effectively assign pardon power to District Attorneys, something this Court has already rejected as unconstitutional." Attorney General's Brief at 30, *citing Commonwealth v. Brown*, 196 A.3d 130, 144 n.5 (Pa. 2018) (pardon "can be granted only by the authority in which the pardoning power resides[,]" *i.e.*, the Governor).[2] So, not only is it plain that Castor's view is wrong as a matter of law; it's also dangerous to even implicitly suggest otherwise. For that reason, unlike the majority, I would expressly reject it here and now.[3]

---

[1] One might reasonably wonder if such abuses were at work in this case, particularly given Castor's odd and ever-shifting explanations for his actions.

[2] Indeed, where a prosecutor seeks an immunity order for a witness, Pennsylvania's immunity statute contemplates judicial approval. *See* 42 Pa.C.S. § 5947. But contrary to what the courts below concluded, this statute is irrelevant in this case because it pertains to witnesses whose assistance is sought to testify against other defendants, not for procuring testimony from defendants themselves. *See id.* at § 5947(b)(1) (permitting prosecutors to seek immunity where "the testimony or other information from a witness may be necessary to the public interest") (emphasis added).

[3] Failure to directly condemn Castor's inappropriate behavior in this regard only invites more abuses of prosecutorial power and increases the likelihood that other defendants will detrimentally rely on similar improper inducements. In my

B.

Beyond this point, I am largely in accord with the majority's thoughtful analysis, and I join its conclusions that Cosby's non-prosecution claim implicates due process and that contract law precepts generally—but more specifically, principles of promissory estoppel—are the most natural fit for analyzing it. I also agree that Cosby has proven his entitlement to relief, because: "Castor reasonably expected Cosby to act in reliance upon his charging decision"; "Cosby relied to his detriment upon [Castor]'s decision not to prosecute him"; and "Cosby's reliance was reasonable[.]" Majority Opinion at 67-69. With respect to reasonableness, I find particularly apt the majority's explanation that "[i]f Cosby's reliance was unreasonable . . . , then reasonableness would require a defendant in a similar position to disbelieve an elected district attorney's public statement and to discount the experience and wisdom of his own counsel." *Id.* at 70. The constellation of these unusual conditions requires the conclusion that Cosby's reliance—particularly in the absence of any prior authority from this Court addressing whether it is lawful for a district attorney to unilaterally extend a binding, permanent non-prosecution agreement—was reasonable under the circumstances.

---

respectful view, we should reject Castor's misguided notion outright and declare that district attorneys do not possess this effective pardon power, and thus render any similar future promises illusory and reliance thereon manifestly unreasonable. In other words, we can prospectively prevent similar deprivations of due process in the event any future district attorney might be reckless enough to act as Castor did here.

C.

Where I begin to disagree with the majority is in the final stretch of its analysis. Although the majority presents a compelling discussion of the promissory estoppel and due process principles at play in this matter, *see id.* at 53-71, it ultimately concludes that "the subsequent decision by successor [district attorneys] to prosecute Cosby violated Cosby's due process rights." *Id.* at 72. I cannot agree. It is not the mere fact that another district attorney sought to prosecute Cosby after Castor made an unauthorized (and invalid) declaration there would be no such prosecution that resulted in the due process violation. Rather, it was the prosecution's use, at the subsequent criminal trial, of the evidence obtained in the civil case concerning Cosby's "use of drugs to facilitate his sexual exploits" that violated his due process rights. *Id.* at 67. This evidence would not have been available for use in the criminal case if Castor had not induced Cosby to believe he had no choice but to forfeit his Fifth Amendment right against self-incrimination in the civil depositions. Importantly, though, it was not until this evidence was actually introduced at Cosby's criminal trial that he was harmed, and the due process violation occurred. *See, e.g.*, *Gov't of Virgin Islands v. Scotland*, 614 F.2d 360, 365 (3rd Cir. 1980) (if "the defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process") (emphasis added); *see also generally Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984) ("A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused

of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.") (footnote omitted).

The majority's misidentification of when the due process violation occurred here leads it also to supply the wrong remedy. The majority concludes: "[O]nly full enforcement of the decision not to prosecute can satisfy the fundamental demands of due process." Majority Opinion at 74; *see id.* at 73 (requiring "specific performance of D.A. Castor's decision, in the form of barring Cosby's prosecution for the incident involving Constand"); *id.* ("neither our principles of justice, nor society's expectations, nor our sense of fair play and decency can tolerate anything short of compelling the Montgomery County District Attorney's Office to stand by the decision of its former elected head"). According to the majority, "[a]nything less under these circumstances would permit the Commonwealth to extract incriminating evidence from a defendant who relies upon the elected prosecutor's words, actions, and intent, and then use that evidence against that defendant with impunity." *Id.* at 75. But the majority's own statement proves there is an obvious alternative remedy that more narrowly (but still fully) compensates Cosby for the due process violation: we can simply preclude the prosecution from "us[ing] that evidence against th[e] defendant with impunity," *i.e.* we can order it suppressed. And, in fact, this is precisely what this Court and many others have done in comparable situations.

Starting with our precedent, the majority properly identifies *Commonwealth v. Stipetich*, 652 A.2d 1294 (Pa. 1995), as most analogous to the present situation. There, Pittsburgh police officers told George Stipetich

that if he answered questions concerning the source of controlled substances and drug paraphernalia found in his residence, he and his wife would not be charged. *See id.* at 1294-95. Stipetich fulfilled his part of the purported non-prosecution agreement by answering all questions posed by police, but the district attorney's office nevertheless charged him and his wife. *See id.* at 1295. The trial court, citing the alleged agreement, granted the Stipetiches' motion to dismiss the charges, and the Superior Court affirmed. *See id.* We reversed. *See id.* at 1296. Recognizing "[t]he Pittsburgh police did not have authority to bind the [district attorney]'s office as to whether charges would be filed[,]" we held "[t]he non-prosecution agreement was, in short, invalid." *Id.* at 1295.

Even though we deemed the non-prosecution agreement invalid, we continued to consider the remedy afforded by the lower courts. We observed:

> 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. This places the Stipetiches in the same position as if the

> unauthorized promise not to prosecute had never been made by the police.

Id. at 1296 (emphasis added; internal citations omitted). Despite these strong statements, the majority discards them as mere dicta. *See* Majority Opinion at 74. Be that as it may, I still find the reasoning highly persuasive—especially because the relevant passages from *Stipetich* drew support from another one of our decisions in a similar matter. *See Stipetich*, 652 A.2d at 1296, *citing Commonwealth v. Peters*, 373 A.2d 1055, 1061-62 (Pa. 1977) (suppressing testimony rather than barring prosecution where a detective with a district attorney's office "cajoled [the defendant] by telling him 'the most that would happen to him would be that he would be picked up or held as a material witness on dollar bail' or 'without bail,'" *i.e.*, he "promised immunity to the [defendant] by implying he would not be prosecuted"); *see also Commonwealth v. Parker*, 611 A.2d 199, 201 (Pa .1992) ("we need not decide whether a defective grant of immunity would estop the Commonwealth from prosecuting a parole violation because, in this case, even a perfect grant of immunity would not preclude the Commonwealth from prosecuting appellant with evidence wholly independent of his compelled testimony") (emphasis omitted). This authority refutes the majority's position that the statements in *Stipetich* do not represent "the law in Pennsylvania." Majority Opinion at 74.[4]

---

[4] Significantly, Cosby agrees "if Castor's non-prosecution commitment was not binding on his successors or was somehow defective, then, alternatively, Cosby's deposition testimony should have been suppressed." Cosby's Brief at 94. To this end, Cosby also relies on our decisions in *Stipetich* and *Peters* as support,

Moving beyond the Commonwealth, I observe other jurisdictions have likewise found that suppression, as opposed to specific performance, is often the appropriate remedy for due process violations relative to invalid non-prosecution agreements. *See People v. Gallego*, 424 N.W.2d 470, 475 n.12 (Mich. 1988) (collecting cases in which courts have "den[ied] specific performance of an unauthorized, non-plea agreement which provides that [a] defendant not be prosecuted"); *see also generally United States v. Blue*, 384 U.S. 251, 255 (1966) ("Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth amendment . . . , [o]ur numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether.").

Gallego is particularly instructive. In that case, the Drug Enforcement Agency and the Oakland County Police entered into a written agreement with the defendant in which they promised they would not prosecute him if he returned $33,000 worth of hidden "buy" money. *See id.* at 470-71. The defendant returned the money, but several months later was charged with delivery of cocaine because the "prosecutor did not feel bound by the agreement[.]" *Id.* at 471. On appeal, the Michigan Supreme Court rejected the defendant's position that specific performance of the agreement was required. It reasoned that this remedy was inappropriate based on a number of factors, including: "the instant case involves a non-plea agreement for which specific performance amounts to preclusion of an otherwise valid prosecution"; the

---

even going so far as to assert that *Stipetich* is "on-point and controlling." *Id.* at 95.

decision not to prosecute "stemmed not from those legitimate considerations involved in plea bargaining or in authorized grants of immunity, but rather from less worthy considerations such as the embarrassment resulting from the loss of the buy money"; and there existed "an alternative remedy which essentially restores defendant to the position he enjoyed prior to making the agreement in question[.]" *Id.* at 474-75.[5] On this last score, the court explained:

> Since suppression or exclusion cures defendant's detrimental reliance, specific performance is not necessary to return defendant to the position he enjoyed prior to making the unauthorized, non-plea agreement at issue in this case. Moreover, we are not required, as a result of the "constable's blunder," to place defendant in a better position than he enjoyed prior to making the agreement with the police. As a result, we agree with the . . . decision to suppress or exclude the written agreement and the buy money.

Id. at 475-76 (footnote omitted).

I would reach a similar conclusion in this case. Specific performance is only appropriate in drastic circumstances, such as where the defendant detri-

---

[5] Of course, it was also relevant to the *Gallego* court's analysis "that the police lacked the authority to make a binding promise of immunity or not to prosecute." *Gallego*, 424 N.W.2d at 473. But the fact that the non-prosecution decision at issue here emanated from Castor rather than a police officer is of no moment. As already explained, district attorneys in this Commonwealth lack the power to convey permanent non-prosecution agreements outside of the normal plea-bargaining and immunity contexts.

mentally relies on an inducement and cannot be returned to the status quo *ante*. Here, although Cosby detrimentally relied on Castor's inducement, we can return him to the position he enjoyed prior to being forced to surrender his Fifth Amendment right against self-incrimination by simply suppressing the evidence derived from the civil depositions at which he testified. We should not use Castor's "blunder" to place Cosby in a better position than he otherwise would have been in by forever barring his prosecution. "So drastic a step" merely "increase[s] to an intolerable degree interference with the public interest in having the guilty brought to book." *Blue*, 384 U.S. at 255.[6]

Chief Justice Baer joins this concurring and dissenting opinion.

---

[6] As the majority's decision to discharge Cosby renders his remaining claim moot, I express no opinion on it.

DISSENTING OPINION OF JUSTICE SAYLOR (JUNE 30, 2021)

[J-100-2020] [Wecht, J.]

DISSENTING OPINON

JUSTICE SAYLOR

DECIDED: June 30, 2021

I respectfully disagree with the majority's determination that the press release issued by former District Attorney Bruce Castor contained an unconditional promise that the Commonwealth would not prosecute Appellant in perpetuity. *See* Majority Opinion, *slip op.* at 50-52, 60-64. Rather, I read the operative language—"District Attorney Castor declines to authorize the filing of criminal charges in connection with this matter"—as a conventional public announcement of a present exercise of prosecutorial discretion by the temporary occupant of the elected office of district attorney that would in no way be binding upon his own future decision-making processes, let alone those of his successor. *Accord United States v. Goodwin*, 457 U.S. 368, 380, 102 S. Ct. 2485, 2492 (1982) (explaining that a prosecutor may forgo legitimate charges at one time and file additional charges later); Brief for Appellee at 95 (observing that the Castor press release "says nothing about the alleged forever immunity"). From my point of view, the majority's position that such statements must be laden with qualifications, on pain of potentially undermining later prosecutions via an effective conferral of transactional immunity, is unsound. *Cf.*

Brief for *Amicus* Office of Attorney General at 30 (highlighting that crediting Appellant's position "would effectively assign pardon power to District Attorneys, something this Court has already rejected as unconstitutional.").[1]

---

[1] The language of the press release indicating that Castor might reconsider his decision is of little significance to my own analysis, since I believe the possibility of reconsideration is inherent and implicit in the exercise of prosecutorial discretion. I note only that I find this specific language to be ambiguous in terms of whether it referred to Castor's charging decision itself or his decision not to elaborate on the reasons for declining prosecution. While the majority asserts that "[n]othing in [the relevant] paragraph pertains to [Castor's] decision not to prosecute Cosby," Majority Opinion, *slip op.* at 64, in point of fact, the second sentence of that paragraph relates that: "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." Press Release dated February 17, 2005, N.T., Feb. 2, 2016, Ex. D-4 (emphasis added). As the Commonwealth observes, "his decision," in this sentence, obviously refers to the decision not to prosecute. *See* Brief for Appellee at 84 n.29.

The ambiguity arises, however, in the ensuing sentence, stating: "District Attorney Castor cautions all parties to this matter that he will reconsider *this decision* should the need arise." Press Release dated February 17, 2005, N.T., Feb. 2, 2016, Ex. D-4 (emphasis added). In response to the majority's assertion that "this decision" can only refer to Castor's decision to contemporaneously refrain from elaborating, *see* Majority Opinion, *slip op.* at 64, I note that I find the Commonwealth's countervailing rationale to be apt. As it explains: "Earlier in the release[, *i.e.*, in the preceding sentence], . . . [Castor] referred to 'his decision' not to prosecute; in the next sentence he said he might reconsider '[this] decision.' Reasonable people would read the [latter] sentence as referring to the decision not to prosecute," referenced immediately before. Brief for Appellee at 84 n.29.

I also respectfully differ, in many material regards, with the majority's treatment of the trial court's findings of fact. For example, to counter the trial court's explicit finding that Castor made no promise that the Commonwealth would never prosecute, the majority posits that "[t]he record establishes without contradiction that depriving Cosby of his Fifth Amendment right was D.A. Castor's intended result." Majority Opinion, *slip op.* at 68. The fact of an unwritten promise, however, was rejected on credibility grounds, and Castor's account of his motivations underlying his uncredited assertion of a promise need not be separately contradicted by record evidence to also fall by the wayside. In any event, there are numerous possible explanations for why Castor issued a press release reflecting his decision not to prosecute in a high-profile matter, as well as for why he subsequently claimed there was a promise not to prosecute, beginning in his ensuing correspondence with his successor.[2] From my point of view, the

---

[2] In this regard, the Commonwealth posits as follows:

> The first time [the alleged promise not to prosecute] was reflected in any written form was in Castor's 2015 emails. This alone calls its existence into question. That an experienced district attorney, a veteran criminal defense attorney, and several competent civil attorneys would fail to leave a paper trail of such a significant agreement beggars belief. And Castor wrote those emails in the midst of a political campaign for district attorney, after he had learned of a renewed investigation into the case. He would face negative publicity if criminal charges were filed before the election. He tried to discourage then-District Attorney Ferman from filing charges by rewriting history in light of the political facts on the ground in 2015. His testimony at the hearing was

majority opinion supplants the trial court's fact-finding on critical points—including the fact of a promise and the asserted reliance—in contravention of the operative principles of review set forth in the opinion. *See id.* at 48-49.[3]

> also inconsistent with his 2005 press release, his statements to journalists over the years, and irreconcilable with his September 2015 emails to District Attorney Ferman.

Brief for Appellee at 92-93.

Again, it matters little whether the Commonwealth's portrayal is wholly accurate. The determinative factor here should be the trial court's well-supported rejection of Castor's bizarre portrayal of his thought processes, in which: he found that Andrea Constand had drastically damaged her credibility through delayed reporting, pervasive contradictions, and post-assault contacts with Appellant; Castor nevertheless believed Constand's account of the sexual assault despite having never personally met or interviewed her; he decided to act as a "Minister of Justice" to orchestrate unwanted interference in the proceedings in a yet-to-be-filed civil case against Appellant; and, despite believing that Constand was attempting to extort money from Appellant, he "was hoping [she] would sue Cosby, make a lot of money and, incidentally, her lawyers make a big contingent fee." N.T., Feb. 2, 2016, at 48, 64, 114-15, 188, 202, 228 (testimony of Bruce L. Castor, Jr.). The inconsistencies and contradictions notwithstanding, the trial court was under no obligation to accept such an account. *See* Brief for Appellee at 102 (explaining why it is inappropriate for "a prosecutor to pick sides in a civil case after they have determined not to file criminal charges.").

[3] The trial court explained, at length, why Appellant likely acted in his own interest (and not in reliance on the asserted unwritten commitment never to prosecute) when he sat for depositions in the civil case. *See Commonwealth v. Cosby*, No. 3314 EDA 2018, *slip op.* at 64-66 (C.P. Montgomery May 14, 2019); *see also* Brief for Appellee at 89-91, 96-98.

For these reasons, I respectfully dissent relative to the Court's order directing a discharge. I note, however, that I have substantial reservations about the trial court's decision to permit the Commonwealth to present testimony from other asserted victims of sexual assaults by Appellant, which allegedly occurred from between fifteen and twenty-two years in the past. Since under the majority's approach the issue is moot, I merely take the opportunity to note that my present, tentative inclination would be to award a new trial grounded upon Appellant's challenge to such evidence as being unduly prejudicial. *See generally Commonwealth v. Hicks*, 638 Pa. 444, 484-85, 156 A.3d 1114, 1138 (2017) (Saylor, C.J., concurring) ("I maintain concerns about the power of potentially inevitable character inferences associated with other-acts evidence, with requiring defendants to effectively defend mini-trials concerning collateral matters, and about the efficacy of jury instructions in this context.").

Additionally, I agree with the trial court, the Commonwealth, and its *amici* that any claimed reliance would be unreasonable. *Accord* Brief for *Amicus* Office of Attorney General at 29 ("Defendant's reliance on an alleged oral promise that was unwritten, unrecorded, and vague was also unreasonable, if not reckless.").

**OPINION OF THE
SUPERIOR COURT OF PENNSYLVANIA
(DECEMBER 10, 2019)**

---

224 A.3d 372
2019 PA Super 354

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

WILLIAM HENRY COSBY, JR.,

Appellant.

J-M07001-19

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 twentyseven[-]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 February 2 and 3,

---

[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.

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, 6/17/17, at 1 (single page).

---

[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.

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 Univer-

sity; 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]

---

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

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).

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 ongoing 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.*

---

[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).

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, 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

---

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

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 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

---

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.

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*

---

[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 relationship

Reilly by Reilly v. S.E. Pennsylvania Transp. Auth., 489 A.2d 1291, 1300 (Pa. 1985) (holding that an 8-month delay in raising a recusal motion after the

---

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.

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 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. Alterna-

---

[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)).

tively, 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

---

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

> 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 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-pros-

ecution 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

---

[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

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 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

---

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.

> 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 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).

---

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

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[.*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

[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.

> 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

---

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.

> 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).

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 un-contradicted. 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 unauthor-

ized 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

---

[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.

> 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 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 discus-

sions, 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 per-

> formance [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 investiga-

> tion. 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.

/s/ Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/10/19

TRIAL COURT JUDGMENT AND DEFERRED SENTENCE, MONTGOMERY COUNTY COURT OF COMMON PLEAS (SEPTEMBER 25, 2018)

MONTGOMERY COUNTY COURT

COMMONWEALTH OF PENNSYLVANIA,

v.

WILLIAM HENRY COSBY JR.

No. CR-3932-16

Charges and Bills of Information

CT.1 Agg. Indecent Assault

CT.2 Agg. Indecent Assault

CT.3 Agg. Indecent Assault

	Jury Trial
Date	4/9/18 – 4/26/2018
Judge	Steven T. O'Neill
Courtroom	A
Commonwealth's Atty	Kevin Steele
Defendant's Atty	Thomas Mesereau
Court Reporter	Ginny Womelsdorf
Court Clerk	Barb Lewis

AND NOW, this 26th day of April 2018

☒ The Court overrules motions for judgment of acquittal as to Bill(s) of information:

CT. 1, CT. 2, & CT. 3

☒ After Trial, the Jury finds the defendant:

Guilty of the following Bills of information

CT. 1 (F2) CT. 2 (F2) CT. 3 (F2)

Jury Sworn: 4/9/18@2:26pm

Jury Returns: 4/26/18 @ 1:47pm

Trial Days: 13

☒ The Court directs that the defendant forthwith register with the Adult Probation Department for:

☒ PPI Evaluation

PPI pyscho sexual;
Bail conditions to be supervised by APO

☒ Pre-Sentence Investigation and Report

☒ Sexually Violent Predator Assessment

☒ Sentence Deferred:

Defendant released on same bail pending sentencing.

☒ Special Conditions:

Defendant not to leave his 8210 N. 2nd St., Cheltenham, PA address & Defendant's passport is in the possession of Montco Detectives.

BY THE COURT:

/s/ Steven T. O'Neill