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IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 3314 EDA 2018

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE,
V.

WILLIAM H. COSBY, JR.,
APPELLANT.

BRIEF FOR APPELLEE

APPEAL FROM THE JUDGEMENT OF SENTENCE ISSUED ON SEPTEMBER 25, 2018, MADE FINAL BY THE DENIAL OF THE POST-SENTENCE MOTION ON OCTOBER 23, 2018, BY THE HONORABLE STEVEN T. O'NEILL, IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, CRIMINAL DIVISION, AT NO. 3932-2016.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the trial court properly admitted prior bad act evidence from five victims of drug-facilitated sexual assaults by defendant to prove a common scheme, plan, or design, and absence of mistake?

(Answered in the affirmative by the trial court).

2. Whether the trial court properly denied a recusal motion that is waived and meritless?

(Answered in the affirmative by the trial court).

3. Whether the trial court properly denied defendant's motion to dismiss charges when it found that there was no promise from the former district attorney not to prosecute?

(Answered in the affirmative by the trial court).

4. Whether the trial court properly denied defendant's motion to suppress his deposition testimony when it found that there was no promise from the former district attorney not to prosecute and that defendant voluntarily submitted himself to the deposition?

(Answered in the affirmative by the trial court).

5. Whether the trial court properly admitted evidence that defendant had access to, knowledge of, and motive and intent to use, a

central nervous system depressant to render his victim unconscious for the purpose of engaging in sex acts?

(Answered in the affirmative by the trial court).

6. Whether the trial court properly determined that defendant had waived his claim challenging the jury instructions where he did not object after the jury charge when the trial court inquired if there was anything else?

(Answered in the affirmative by the trial court).

7. Whether the trial court properly seated Juror #11 where the juror denied making an improper remark and affirmed his impartiality under oath, and all seated jurors who were present at the time of the alleged impropriety corroborated the juror's denial?

(Answered in the affirmative by the trial court).

8. Whether the trial court properly designated defendant an SVP where Act 29, Subchapter I's, SVP provisions are not punitive or unconstitutional?

(Answered in the affirmative by the trial court).

COUNTER-STATEMENT OF THE CASE

This is appellant, William H. Cosby, Jr.'s, appeal from his judgments of sentence for three counts of aggravated indecent assault. The factual and procedural background follows.

I. FACTUAL HISTORY

A. THE SEXUAL ASSAULT

In January 2004, defendant invited Andrea Constand to his home in Cheltenham, Montgomery County, under the pretense of discussing her career. At the time, Constand was the Director of Operations for the Temple University Women's Basketball Team. Defendant was a longtime trustee of the university and supporter of the basketball team (N.T. Trial by Jury, 4/13/18, pp. 17, 53, 57, 68).

When she arrived at defendant's home, Constand and defendant sat at the kitchen table and began talking; she explained that she had been feeling stressed. She then went to use the bathroom, and defendant went upstairs. They both returned to the kitchen (*id.* at 57-59). Defendant opened his hand and produced three blue pills and told her to "[p]ut them down" (*id.* at 59-60). He said, "[t]hese are your friends[;] [t]hey'll help take the edge off . . . [t]hey'll help you relax" (*id.*). She thought they were

natural or herbal pills because she and defendant had once discussed how she did not take medication, but would take herbal and natural supplements. She trusted defendant, so she took the three pills, along with some water that defendant provided. Defendant also encouraged her to drink some wine from a glass on the table, telling her it was from an old bottle that she needed to try. She took a sip of the wine (*id.* at 58-59).

Shortly after ingesting the wine, water, and the three blue pills, Ms. Constand began to feel ill; she was slurring her words, her mouth felt dry and "cottony," and she had double vision. She told defendant that she was seeing two of him. Eventually, she was unable to speak. Defendant told her she needed to relax. She stood up, but could not stand on her own. Her legs were "shaky" and "felt really rubbery" (*id.* at 61-63). Defendant took her arm and helped her to a couch. He laid her down on her left side, telling her to relax (*id.* at 62).

Constand was soon unconscious as a result of the intoxicants defendant administered. She later recalled, during a brief bout of semi-consciousness, defendant lying on the couch behind her, penetrating her vagina with his fingers and fondling her breasts. He also took her hand, placed it on his penis and masturbated himself with it. Throughout the

assault, she was trying to move, but could not. She wanted to speak to tell him to stop, but she could not. She was completely incapacitated (*id.* at 62-64). As she explained to the jury:

> I wanted it to stop. I couldn't say a thing. I was trying to get my hands to move, my legs to move, and the message just wasn't getting there. I was weak. I was limp. And I could not fight him off

(*id.* at 64).

The next thing she remembered was waking up on the couch around 4:00 or 5:00 in the morning, disheveled, with her bra around her neck and her pants partially unzipped. After getting herself together, she stood up and walked toward the kitchen door. Defendant was standing in the doorway, wearing only a robe and slippers. He told her that there was a muffin and a cup of tea for her on the table. She took two sips of the tea, put the muffin top in a napkin, and then left (*id.* at 65-66).

A couple of months after the assault, defendant invited Constand to a group dinner at a Chinese restaurant in Philadelphia. She went to the dinner so she could confront defendant about the sexual assault. She wanted to know what pills he had given her that night. She was unable to speak with him at the dinner, so she approached him afterward and asked

to speak with him. He said she should come back to his house, and they could speak there. She went to his house and questioned him about the night of the assault. He was evasive, however; he simply said, "I thought you had an orgasm" (*id.* at 67-68). Realizing that she would not be getting any answers from defendant, she lost her courage and left (*id.* at 68).

Constand remained in her position as Director of Basketball Operations at Temple University for a couple of months after the assault. Because of her position and defendant's standing and affiliation with the university, she continued to have contact with him following the assault on basketball-related issues. She left the university in March 2004 (*id.* at 69-70).

B. THE RELATIONSHIP PRIOR TO THE ASSAULT

Before the assault, defendant and Ms. Constand developed a friendship and a mentorship. They first met at a basketball game on Temple's campus, through her job. A university donor introduced her to defendant, who himself was a donor to the school's basketball program and was on the university's Board of Trustees. During their initial meeting, defendant toured the new women's locker room and had some questions about the facility. Constand could not answer the questions at that time;

defendant later called her at her office to follow-up on the questions. He called her on other occasions, too, to discuss the women's basketball program. During these discussions, defendant also asked about her and her career goals (*id.* at 23-24, 25, 28).

Defendant later invited Constand to dinner at his Cheltenham home. When she arrived, the chef brought her dinner; she ate dinner alone. Defendant came and sat with her as she finished eating her dinner. They had a general discussion centered on defendant getting to know her better. Defendant sat close to her and briefly put his hand on her thigh as an affectionate gesture. She did not infer anything romantic from this fleeting contact (*id.* at 28-32).

After this initial dinner at his Cheltenham home, over the course of the next several months, defendant invited Constand to two more dinners at his home, both with groups of people. The first dinner was with local restauranteurs. Defendant invited her to the dinner because she was new to the city and he wanted her to make more contacts. Under the same pretense, he invited her to another group dinner at his home; this one was with representatives from local colleges and universities. Constand was never alone with defendant at either dinner. Nothing inappropriate

occurred (*id.* at 33-36).

Constand and defendant continued to maintain contact. Defendant invited her to a dinner in New York with a business associate, who he wanted her to meet because he worked in broadcasting, and defendant had previously discussed a career in broadcasting with her. She accepted his offer; she believed that the dinner was another way that defendant was trying to mentor her and help her in her career. Constand took the train to New York City, and she took the train back to Philadelphia immediately following the dinner. Defendant invited Constand to New York City on another occasion, for a blues concert. She went to the concert and sat with other females guests of defendant, but she had no interaction with defendant; she simply saw him when he appeared on stage during the concert (*id.* at 37-41).

Several months after the blues concert, defendant again invited Constand to dinner at his Cheltenham home to discuss her career. This time, she was the only guest. The two ate dinner and discussed her work at Temple and her future career aspirations. After they finished eating, defendant sat next to her. He tried to unbutton her pants; she could feel his hand at the top of her zipper, trying to pull the zipper down. She leaned

forward, stopping his hand and that she was not interested. Defendant removed his hand, and she left his home. Constand believed "[h]e got the picture" (*id.* at 41-44).

Throughout all of her interactions with defendant up until the time of the assault, Ms. Constand never felt threatened. Defendant had instilled his trust in her. He was a trustee at her place of employment; he developed what she thought was a legitimate friendship with her; he acted as a mentor to her; and she believed he was showing a genuine interest in her career (*id.* at 53-54).

C. ANDREA CONSTAND'S DISCLOSURE

In January 2005, Constand woke up crying from a bad dream, which had been happening frequently since her return to her parents' home in Canada. Unable to suppress the assault any longer, the dream and her emotional reaction prompted her to tell her mother, Gianna Constand, about the assault. She told her mother that defendant gave her three blue pills and then sexually violated her without her consent (*id.* at 76-78).

Once Constand disclosed the assault to her mother, and after she filed a police report, her mother telephoned defendant and he called her

back the next day.[1] Both Gianna Constand and her daughter were on the phone call. During the call, defendant confirmed that he had drugged and sexually assaulted Constand; he apologized to her. Her mother tried to get him to tell them what drug he had given her daughter. He said he had to go find the prescription bottle; he left the phone call for several minutes. When he returned to the phone call, he told them that he could not read the name on the prescription bottle. He said he would write it down and mail it to them. He never did (*id.* at 83-85; N.T. Trial by Jury, 4/16/18, at 188-189).

Gianna Constand had a later phone conversation with defendant. During the call, defendant asked her if her daughter was still interested in a career in sportscasting or television. She was not sure what defendant was referring to or why he was asking the question. She told defendant her daughter was currently in massage therapy school. Defendant then offered

[1] Defendant had previously sought to ingratiate himself with Ms. Constand's family. On an occasion after the assault, defendant was performing in Toronto and invited the Constand family to the show. Constand had already left Temple and was living in Toronto with her parents; her family did not know about the assault at the time. Her parents had been talking about going to the show; they were excited to go. Constand did not want to let them down, so she attended the show with her parents and her sister. Her mother even brought defendant a Canadian t-shirt as a thank you (*id.* at 74-75). Defendant had invited members of Ms. Constand's family to a show prior to the assault as well.

to pay for graduate school for her. Gianna Constand did not know where this was coming from; she had never spoken to defendant about this before. Defendant also broached the subject of arranging for the Constands to travel to Miami to meet with him. Once again, Gianna Constand did not know where this was coming from, as she never made such a request. The only things she asked for from defendant were an apology and the name of the drug he had given her daughter. She got the apology, but he never gave her the name of the drug, even when she asked him again during this phone call (*id.* at 198-199, 203-206). Defendant admitted at the end of the conversation that he was "a sick man" and that he felt like he was "a dirty old perverted man" (*id.* at 207).

Within a day or two of filing a police report, one of defendant's representatives left a voicemail for Constand. When she returned his call, the representative sought to obtain information so he could make travel arrangements for a trip for her to meet with defendant. Another one of defendant's representatives called her to set up an educational trust for her from defendant. She accepted neither (N.T. Trial by Jury, 4/13/18, at 87, 89, 92, 93).

D. DEFENDANT'S STATEMENT TO POLICE

On January 26, 2005, defendant gave a statement to detectives from the Montgomery County Detective Bureau and the Cheltenham Police Department. The interview took place at defendant's lawyer's office in New York, New York. During the interview, defendant claimed to detectives that the medication he gave to Constand was Benadryl. He admitted that he never—either then or any time after—told Constand what those pills were. He stated that he routinely used Benadryl and had been doing so for the past five years; he used the pills when he was traveling and "if the time is turned around" (N.T. Trial by Jury, 4/17/18, at 113, 126-127). He also stated that he gave Constand one-and-a-half tablets, and he felt comfortable doing so. He also stated, however, that he takes two Benadryl tablets, but they make him so drowsy that he would never go perform after taking them. He then told the detectives that he carries the pills with him, and he had his driver bring pills up from his car. The pills that defendant showed the detectives were in a plastic bag; the pills defendant claimed were Benadryl were pink, not blue (*id.* at 127, 150, 158-159, 161).

When asked by the detectives if he ever had sexual intercourse with

Constand, defendant responded, "[n]ever asleep or awake" (*id.* at 130). He thus suggested that, in his mind, either could be a reasonable answer.

Defendant also admitted to offering to pay for graduate school for Constand, provided she maintained a 3.0 grade point average, but the Constands did not accept his offer. Defendant said he offered the graduate school payment and a trip to Miami because he felt threatened. He did not like his first conversation with Gianna Constand; she was upset and confrontational (*id.* at 141, 147-148). He stated, "so from my conversation talking about grad school and being a therapist . . . I thought there was something I could do to put them [the Constands] back with me" (*id.* at 147).

E. DEFENDANT'S CIVIL DEPOSITION TESTIMONY

The Commonwealth initially declined to prosecute defendant. Constand, instead, sought justice civilly by suing defendant. She reached a settlement with him. As a part of the confidential settlement agreement, defendant paid Constand $3,380,000. In return, she had to sign an agreement that stated that she "agrees that she will not initiate any criminal complaint against Cosby arising from the underlying facts of this case" (N.T. Trial by Jury, 4/13/18, at 104, 108, 110).

In 2005 and 2006, defendant gave sworn testimony during a civil deposition in the matter of *Constand v. Cosby*. In 2015, a federal judge released this testimony for the first time and the Montgomery County Detective Bureau obtained a copy (N.T. Excerpted Testimony of James Reape, 4/17/18, at 8).

1. Defendant's Romantic Interest in Constand

In this deposition, defendant stated that he developed a romantic interest in Constand the first time he saw her, though he did not tell her that he had that romantic interest (*id.* at 20-21). By romantic interest, he meant "romance in terms of steps that will lead to some kind of permission or no permission or how you go about getting to wherever you're going to wind up" (*id.* at 24-25).

2. Defendant's Knowledge of Central Nervous System Depressants

Defendant talked about the pills that he had shown the detectives during his formal interview. He said that the green blood pressure pill was homeopathic; he did not know the name of it, but he used it to sleep and relax. He stated that the white pill was called Arnica Montana; it was a homeopathic pill also. He admitted to discussing herbal medicines with

Constand (*id.* at 33-36).

Defendant also stated that he gave Constand one-and-a-half blue Benadryl pills on the night of the incident, and told her to take them (*id.* at 46, 48, 54). He said to her, "[y]our friends, I have three friends for you to make you relax" (*id.* at 48-49). Like he told the detectives, he testified that he takes two Benadryl pills at a time. He stated that he uses two types of Benadryl pills—"straight Benadryl" pills, which are white, and Benadryl pills with an added decongestant, which are white and blue. He again stated that he uses Benadryl when he travels so that he can adjust his sleep pattern for the time zone changes (*id.* at 46-48). He further stated that because of his own use of Benadryl, he gave Constand one-and-a-half pills "because Andrea is about the same size I am, not weight, former athlete. I take two" (*id.* at 55). Defendant stated that it helps him relax and sleep when he takes two pills. He then immediately claimed, however, that if he does not want to go to sleep, the Benadryl will not make him go to sleep (*id.* at 55-56).

Defendant also admitted to having access to, and knowledge of, prescription drugs that induce unconsciousness. He specifically discussed Quaaludes, another central nervous system depressant, and stated that he

obtained multiple prescriptions for them (N.T. Trial by Jury, 4/18/18, at 40-41). He admitted that he obtained the prescriptions without intending to use the pills himself, but instead "for young women [he] wanted to have sex with" (*id.* at 35, 40-41, 47, 49-50). He explained, "[w]hat was happening at that time was that . . . Quaaludes happen to be the drug that kids, young people, were using to party with and there were times when I wanted to have them just in case" (*id.* at 44).

He talked about how the Quaaludes affected one particular woman; he said "[s]he became, in those days, what was called high" (*id.* at 36). When asked to clarify, defendant said she was unsteady and "[w]alking like [she] had too much to drink" (*id.* at 37).

He stated that a doctor prescribed him the Quaaludes for back pain, but he never took them because they made him sleepy. When asked how he would know the drug made him sleepy, defendant responded, "Quaaludes happen to be a depressant. I have had surgery and while being given pills that block the nervous system, in particular the areas of muscle, the back, I found that I get sleepy and I want to stay awake" (*id.* at 41-43).

Finally, defendant stated that he believed at the time that it was

illegal for him to dispense the drugs to other people (*id.* at 42).

3. Defendant's Actions After Constand's Disclosure

Defendant, in recalling the initial conversation with Gianna Constand following her daughter's disclosure, said he was "thinking and praying that nobody's recording me" (*id.* at 62). He admitted that he told Gianna Constand that he digitally penetrated her daughter, and he apologized, twice, "because I'm thinking this is a dirty old man with a young girl" (*id.* at 66). He admitted, however, that he did not tell her that the pills her gave her daughter were Benadryl (*id.* at 61-62).

Defendant continued during his deposition that after this phone call, he called the Constands back with the offer to pay for Constand to go to graduate school. He stated that he did so because of his concerns that they may try to embarrass or extort him. Even though he said that he had an educational foundation, he said that the money for Constand would not come from that, but rather would come from his family writing a check. He made clear that it would be a secret (*id.* at 79-83). He stated, "my wife would not know it was because Andrea and I had sex and that Andrea was now very, very upset and that she decided that she would like to go to

school or whatever it is" (*id.* at 83). Defendant said he had never set up this type of "educational trust" outside his educational foundation before offering it to Ms. Constand (*id.* at 83-84).

Defendant maintained that he did not think the Constands were looking for money from him in exchange for not reporting the assault; nonetheless, he still offered to pay for Constand's education after she disclosed to her mother that he assaulted her. Defendant also made it clear that he knew that there would be a financial consequence to him if any of this became public (*id.* at 73-74, 77).

II. PROCEDURAL HISTORY

After a first trial ended with a deadlocked jury and mistrial, a second jury trial was held on April 9, 2018, through April 26, 2018. The jury convicted defendant of three counts of aggravated indecent assault in connection with the drug-induced sexual assault he committed on Andrea Constand: 18 Pa. C.S. § 3125(a)(1) (without consent); 18 Pa. C.S. § 3125(a)(4) (victim unconscious); and 18 Pa. C.S. § 3125(a)(5) (administering an intoxicant). At trial, five additional women—Heidi Thomas, Chelan Lasha, Janice Dickinson, Janice Baker-Kinney, and Maud Lise-Lotte Lublin—testified regarding defendant's conduct with them that was strikingly

similar to his conduct with Andrea Constand.[2]

The trial court deferred sentencing pending the completion of a presentence investigation ("PSI"), a probation and parole intervention ("PPI"), and a sexually violent predator ("SVP") assessment.

The trial court conducted an SVP hearing and a sentencing hearing on September 24 and 25, 2018. After hearing evidence—including testimony from Kristen F. Dudley, Psy.D., a member of the Sexual Offenders Assessment Board who performed an assessment of defendant and concluded to a reasonable degree of professional and scientific certainty that he met the criteria of a sexually violent predator—the trial court designated defendant an SVP. The Commonwealth conducted an extensive colloquy with defendant regarding his understanding of his rights and obligations under Pennsylvania's sexual offender registration statute, Act 2018, June 12, P.L. 140, No. 29; HB 1952 of 2018 ("Act 29"), codified in Subchapter I, 42 Pa. C.S. § 9799.51 *et seq*. Throughout the colloquy, defendant repeatedly asserted that he understood his sex offender rights and obligations (N.T. 9/24/18, SVP Hearing/Sentencing Hearing, 33, 40, 68; N.T. 9/25/18, SVP Hearing/Sentencing Hearing, 67,

[2] Kelley Johnson testified similarly at defendant's first trial.

70-80).

The trial court then, with the benefit of the presentence investigation, sentenced defendant to a standard-guideline-range sentence of three to ten years' incarceration on his aggravated indecent assault conviction under § 3125(a)(1).[3] It also ordered defendant to pay a $25,000 fine and the costs of prosecution.

After the trial court denied defendant's post-sentence motion, he filed this appeal.

[3] The Court did not impose sentence on the remaining two aggravated indecent assault convictions. They merged for sentencing purposes.

SUMMARY OF THE ARGUMENT

The trial court properly admitted evidence of prior drug-facilitated sexual assaults defendant committed against five different women in a strikingly similar fashion to his sexual assault of Andrea Constand. The evidence was relevant to prove a common scheme, plan, or design, and absence of mistake. It showed that where, over the course of decades, defendant intentionally intoxicated women in a signature fashion, then sexually assaulted them while they were incapacitated, he could not have been mistaken about whether or not Constand was conscious enough to consent to the sexual contact. Relatedly, the evidence was also admissible under the "doctrine of chances" to demonstrate the objective improbability that defendant mistakenly assessed each victim's level of consciousness when engaging in sexual contact with her in light of the heightened number of victims reporting similar drug-induced sexual assaults.

The trial court properly denied defendant's recusal motion based on its alleged bad relationship with a pretrial defense witness. Defendant waived it by failing to raise it until at least five months after the tabloid article he relies on was published. He also waived it by intertwining it with a non-record affidavit, thus impairing meaningful appellate review.

Finally, defendant cannot cite one case to support his outrageous claim that recusal was mandated, and the trial court conscientiously determined that it was capable of being fair and impartial throughout the proceedings below.

The trial court properly denied defendant's attempt to have the charges dismissed, and evidence suppressed, based on a supposed "non-prosecution agreement." The trial court made a credibility determination based on the evidence offered that no such promise ever existed, and that determination should remain undisturbed. For support, defendant can only cite decisional authority in which there was no dispute that an agreement—supported by appropriate consideration—was reached between the Commonwealth and a criminal defendant, and so those cases are distinguishable.

Defendant's challenge to the introduction of his admissions regarding Quaaludes is equally unavailing. These statements, coming from defendant's own mouth, demonstrate that he had access to, knowledge of, and a motive and intent to knowingly use a central nervous system depressant, a substance he knew could render a female unconscious, for the purpose of engaging in sex acts. His own words make

clear that he knew the effects this type of drug could have on a woman. The evidence was also admissible to demonstrate the strength of its already-ruled-admissible Pa. R.E. 404(b) evidence relating to defendant's signature of administering intoxicants to women and then sexually assaulting them, and to rebut any purportedly mistaken belief in Constand's ability to consent

Defendant's next claim is waived. He challenges the trial court's instruction on consciousness of guilt. But even though he objected prior to the charging conference, he did not renew his objection at the conclusion of the jury charge. The trial court even inquired if there was anything else, and defense counsel responded in the negative.

Defendant's claim that the trial court abused its discretion in denying his motion to remove Juror #11 for allegedly making an improper comment is meritless. Defendant made his motion based on the accusation of a discharged prospective juror who reached out to defense counsel, but not to the court. She signed an affidavit that the defense team prepared, believing that she would not have to stand by her accusation in court. The court properly exercised its discretion by holding a hearing on the motion, taking testimony from the prospective juror, the accused juror, and all

three of the remaining jurors who were present when the improper comment was allegedly made. The accused juror denied the accusation and the three remaining jurors corroborated his testimony. Thus, the court properly exercised its discretion in discrediting the discharged potential juror, crediting the testimony of the remaining jurors, and avoiding the unnecessary delays of re-summoning other discharged prospective jurors.

Defendant's claim that the trial court abused its discretion in applying the SVP provisions of Subchapter I to him, because doing so supposedly unconstitutionally increased his "punishment," is waived and meritless. It is waived because he failed to present any pertinent discussion to explain why the statute is supposedly punitive. It is meritless because the SVP provisions of Subchapter I are nearly identical to this in Megan's Law II, which the Pennsylvania Supreme Court found non-punitive. An analysis of the seven factors outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), which establishes the test for whether a law is punitive, further demonstrates that Subchapter I is ***not*** punitive. Because the SVP provisions of Subchapter I are not punishment at all, defendant was not subject to increased punishment. Defendant has failed to meet his heavy burden to prove the statute is unconstitutional.

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED PRIOR BAD ACT EVIDENCE PERTAINING TO DEFENDANT'S DRUG-INDUCED SEXUAL ASSAULTS OF FIVE WOMEN.

Defendant first claims that the trial court erred in admitting prior bad act evidence from five women who, like Andrea Constand, were victims of drug-facilitated sexual assaults by defendant.[4] *Id.* at 34, 41. He argues this evidence was used to "strip [him] of his presumption of innocence and to try to establish that [he] had the propensity to sexually assault women." *Id.* at 36. He is wrong. As the trial court instructed the jury several times, the evidence was not offered to show propensity, but rather to show that defendant engaged in a common scheme, plan, or design, and to demonstrate an absence of mistake. The evidence was relevant to establish that defendant who, for decades, intentionally isolated and intoxicated young women in a signature fashion, then sexually assaulted them while

[4] Defendant also claims that the court erred in allowing prior bad act evidence about "a *de facto* sixth woman," *Defendant's Brief,* at 34, pertaining to admissions he made about Quaaludes in his civil deposition, portions of which were admitted into evidence at trial. In his Pa. R.A.P. 1925(b) concise statement, defendant raised the Quaaludes evidence as a separate issue. In his appellate brief, however, he includes it in his claim related to the five prior bad act witnesses and as a stand-alone claim. For ease of reference, the Commonwealth will address the Quaaludes evidence under issue number V, *infra.*

they were incapacitated, could not have been mistaken about whether Andrea Constand was conscious enough to consent to the sexual contact. Relatedly, the evidence was also admissible under the "doctrine of chances" to demonstrate the objective improbability that defendant somehow mistakenly assessed each victim's level of consciousness during his numerous other drug-induced sexual assaults. Because the probative value of the prior bad act evidence outweighed any potential for unfair prejudice, the trial court properly admitted it.

A. BACKGROUND

During its investigation into defendant's assault of Andrea Constand, the Commonwealth learned that more than 50 other women suffered nearly identical trauma at his hands. The women's accounts revealed a distinct pattern: defendant picked young female victims, isolated them in a place within his control, provided them with an intoxicant, then sexually assaulted them once they were incapacitated. The Commonwealth sought to introduce a mere sampling of this other act evidence at defendant's first trial, moving to admit evidence of 13 of these incidents to demonstrate an absence of mistake and common scheme, plan, or design. *Commonwealth's Motion to Introduce Evidence of Prior Bad Acts of Defendant*. The trial court

granted the Commonwealth's motion in part; it allowed the Commonwealth to introduce evidence pertaining to one woman, Kelley Johnson, who testified at defendant's first trial. *Order,* dated Feb. 24, 2017 (O'Neill, J.).

Prior to defendant's second trial, the Commonwealth again moved to admit evidence of 19 prior bad acts to show a common scheme, plan, or design, and to demonstrate an absence of mistake or accident. *Commonwealth's Motion to Introduce Evidence of 19 Prior Bad Acts of Defendant,* at 2. It also proffered the evidence under the additional, related theory of the "doctrine of chances," to negate any non-criminal intent and to establish an absence of mistake. *Id.* at 3.

Following extensive briefing and oral argument, the trial court granted the Commonwealth's motion in part, permitting it to present evidence related to five of the eight prior bad acts that occurred closest in time to defendant's sexual assault of Constand.[5] *Order,* dated Mar. 15, 2018 (O'Neill, J.). Five women, the victims of those assaults—Janice Baker-Kinney, Janice Dickinson, Heidi Thomas, Chelan Lasha, and Maud Lise-

[5] These prior bad acts ranged from 1982 through 1996. *See Commonwealth's Memorandum of Law in Support of its Motion to Introduce Evidence of 19 Prior Bad Acts of Defendant,* at 28-40.

Lotte Lublin — testified at defendant's second trial.[6]

1. <u>The Prior Bad Act Victims</u>

a. <u>Janice Baker-Kinney</u>

Janice Baker-Kinney met the married defendant in 1982, when she was a bartender at Harrah's Casino in Reno, Nevada. A co-worker invited her to a "party" defendant was supposedly hosting at the home where he was staying—owned by Mr. Harrah—while in town performing at Harrah's Casino. Baker-Kinney was 24 years old; defendant was 45 (N.T. Trial by Jury, 4/11/18, at 164-167).

When Baker-Kinney and her co-worker arrived at the "party," no other guests were there. They were alone with defendant. He gave her a beer, then offered her a pill. He said it was a Quaalude. He then gave her a second pill and told her it would be okay to take the two pills. She trusted defendant, thinking, "[w]ell, if Bill Cosby says it's okay, it must be

[6] Additionally, the Commonwealth presented corroborative witnesses for two of the prior bad act victims, after defendant attacked their credibility on cross-examination (*see* N.T. Trial by Jury, 4/12/18, at 57-58 (Mary Chokran testifying that Baker-Kinney called her in 1982, feeling "distraught," "mortified," and "ashamed," and told her that defendant had given her what she thought was a mood-enhancing drug—possibly Quaaludes—not something that would leave her unconscious); N.T. Trial by Jury, 4/18/18 (starting at 10:31 a.m.), at 4-8 (Judith Reagan, the publisher of Dickinson's 2002 memoir, testifying that Dickinson told her that defendant had drugged and raped her, and that she wanted to include the incident in her book, but the legal department would not allow her to do so)).

all right to take these" (*id.* at 167-172). She swallowed both pills (*id.* at 172-173).

After taking the pills, Baker-Kinney began playing backgammon. She quickly began feeling dizzy. Her vision became blurry, and her head was spinning. She eventually "face-planted" into the game board and passed out (*id.* at 173-174).

Baker-Kinney's next memory is being on a couch in another room and hearing her co-worker say goodbye to defendant. When she opened her eyes and propped herself up on her elbow, she realized that her shirt was unbuttoned and her pants were unzipped, but she had no recollection of how her clothing became undone. Defendant then came over to the couch and sat behind her. He propped her up by leaning her back onto his chest. He put his hand underneath her shirt and fondled her breasts, then moved his hand down towards her vagina. She was unable to move, and still extremely woozy (*id.* at 175-176, 179). As she explained at trial, everything "was still swirling and blurry" (*id.* at 176). Defendant then led her to an upstairs bedroom; she could not walk without assistance (*id.*).

She had no memory of what happened in the bedroom until the following morning, when she woke up naked in bed with defendant, who

was also naked. She felt a sticky wetness between her legs. While she had no memory of it, she felt like she had sex the night before. She quickly got dressed and left, but not before defendant looked at her seriously and said, "Now, this is just between you and me" (*id.* at 177-180).

b. Janice Dickinson

Janice Dickinson met defendant in 1982 when she was a 27-year-old model working in New York City. The then-45-year old defendant contacted her modeling agency to arrange a meeting at his townhome in New York City, supposedly for the purpose of a potential mentorship. Her business manager accompanied her to the meeting, where they discussed her singing and acting career (N.T. Testimony of Janice Dickinson, 4/12/18, at 8-10).

Dickinson next heard from defendant when she was on a modeling assignment in Bali, Indonesia. He telephoned her and offered her a plane ticket to Lake Tahoe to meet him to discuss her career. She accepted his invitation. Upon her arrival in Lake Tahoe, defendant's musical director took her to a sound stage to practice her vocal range. Defendant joined them, and the three later ate dinner together at their hotel (*id.* at 11-16).

While at dinner, Dickinson drank some red wine. She began getting

menstrual cramps. When she mentioned the cramps, defendant gave her a small, round, blue pill. She took it and began feeling dizzy and woozy. When they finished eating, the musical director left and defendant invited Dickinson to his room supposedly to continue discussing her career. She accepted his invitation and they went upstairs to his room (*id.* at 17-18).

When they got there, defendant changed into a bathrobe and made a telephone call, while Dickinson sat on the edge of the bed taking photographs. They were alone in the room. When she finished taking pictures, she felt lightheaded and she could not speak. Defendant finished his phone call, then got on top of Dickinson and, with his robe opened, penetrated her vagina with his penis. She could not move; she just laid there. She felt pain in her vaginal area. She passed out soon after defendant penetrated her (*id.* at 19-23).

The next morning, she woke up in her own hotel room—not knowing how she got there—with no pajama bottoms on, semen between her legs, and feeling anal pain. She returned to work in Indonesia the next day (*id.* at 24).

c. Heidi Thomas

Heidi Thomas, an aspiring actress and model, met defendant in April

1984, after her agent informed her that an icon in the entertainment industry wanted to mentor promising young talent. She was 24 years old; defendant was 46.

Thomas' agent told her to call "Mr. C" to set up a meeting; he would then call her back to set up one-on-one acting coaching. She soon learned that "Mr. C" was defendant. When he called her back, he spoke not only with her, but also with her parents. He invited her to Reno, Nevada, for acting lessons; he told her that her agent highly recommended her, and he was looking forward to giving back to the industry that had given him so much (N.T. Testimony of Heidi Thomas, 4/10/18, at 5-7, 18-21).

Thomas took defendant up on his offer, and her agency made travel arrangements. She was supposed to stay at Harrah's Hotel and Casino in Reno, where defendant would be performing. When she arrived at the Reno airport, a car arranged by defendant was waiting for her. The driver did not take her to Harrah's, however; instead, he took her to a ranch house outside Reno and told her that the acting coaching would take place there (*id.* at 21-25, 28).

Defendant greeted Thomas at the door. The driver brought her bags inside, and defendant told him to show her to her room. He told her to

change into something more comfortable before returning to do a monologue. At this point, Thomas learned for the first time that she would not be staying at Harrah's Hotel, but instead the ranch house (*id.* at 28-29).

When Thomas returned from her room, the driver was gone and she was alone with defendant. She read her monologue for defendant, but he wanted her to read a different script, in which she was to play an intoxicated person. When she finished the script, defendant did not appear impressed by her performance. He asked if she had ever been drunk. When she told him she had not, he asked her how she expected to play the part of an intoxicated person if she had never been drunk herself. Defendant then got her a glass of white wine and told her to use it as a prop and sip on it, and try to relax (*id.* at 30-33).

Thomas took just one sip of the wine and immediately became incapacitated. She explained that things were "not even fuzzy" they were "just not there." She had little recollection, aside from periodic "snapshots," of anything that happened over the next several days after taking the sip of wine. She later explained, "There's just nothing. There's this blank until there's a picture. And then there's just blank, and then there's another picture" (*id.* at 33-34).

In one of those snapshots, Thomas woke up on a bed, feeling sick and wondering how she got there. Defendant was forcing himself in her mouth. In another snapshot, she was in bed with defendant, her head at the foot of the bed and his head at the top of the bed, and defendant was saying, "your friend is going to come again" (*id.* at 35-36). She then remembers waking up—she assumed it was the next morning—shaking and feeling sick (*id.* at 36-37).

d. Chelan Lasha

Chelan Lasha met defendant in 1986, through her employment as a model and actress. She was 17 years old; defendant was 48.[7] Defendant called Lasha's residence; he spoke first to her grandmother and then to her. On another occasion, he visited her home and her grandmother cooked for him. After this first meeting, Lasha sent modeling shots to defendant through his production company, and spoke with him several times on the telephone (N.T. Trial by Jury, 4/11/18, at 54-60).

Defendant asked her to meet him in the Elvis Presley Suite at the Las Vegas Hilton to discuss her modeling career; he told her that someone from

[7] A family member who worked at a production company affiliated with defendant arranged for him to call Lasha to assist her in pursuing her modeling and acting career.

the Ford Modeling Agency would be there to take pictures of her. He also told her a new character would be appearing on *The Cosby Show*, and implied that this might be an opportunity for her (*id.* at 63-64, 81-82).

As requested, Lasha went to the Elvis Presley Suite to meet defendant. She had a head cold and was repeatedly blowing her nose. When she arrived at the room, someone came and took photographs of her; another person came in and provided stress and relaxation therapy. Both people eventually left the room (*id.* at 64-65).

When they were alone, defendant gave Lasha a little blue pill. He told her it was an antihistamine that would help her cold. He encouraged her to take the pill, along with a shot of amaretto he provided. She took the pill and the shot because she trusted him. Defendant then gave her another shot of amaretto (*id.* at 65-66).

Soon after, defendant sat behind Lasha on the couch and began rubbing her shoulder. She began to feel woozy; when she got up, she could barely move. Defendant helped her to the bedroom, where he laid her down on the bed. She could no longer move at this point. Defendant lay next to her, pinching her breasts and humping her leg. She felt something warm on her leg. The next thing she remembered was waking

up, in only a robe, to defendant clapping his hands and saying, "Daddy says wake up" (*id.* at 66-67).

e. Maud Lise-Lotte Lublin

Maud Lise-Lotte Lublin, a 23-year-old aspiring actress and model working in Las Vegas, Nevada, first met the then-52-year-old defendant through her modeling agency. Her booking agent called her and said defendant wanted to meet her. She thought he was interested in helping her with her modeling career. Lublin expected other models to be at her first meeting with defendant, but she was the only model present. Defendant told her that he would send her photos to a modeling agency in New York (N.T. Trial by Jury, 4/12/18, at 76-77).

After their initial meeting, defendant called Lublin's home frequently, often speaking to her mother. He ingratiated himself with her family, he arranged for her sister and brother-in-law to meet him in his dressing room at one of his performances, and he took Lublin and her mother to a local college to run on the track. She considered defendant to be a mentor and father figure (*id.* at 77-81).

Lublin's perception of defendant changed drastically the second time she met with him to discuss her career. He invited her to his suite at the

Hilton Hotel, supposedly to talk. When she arrived, they began discussing acting and improvisation. Defendant poured her a shot of alcohol and told her to drink it; that it would help her relax. Lublin told him that she did not drink alcohol, but defendant insisted that it would help relax her for the improvisation. Lublin trusted defendant and took the drink (*id.* at 81-83).

Defendant then made her a second drink and told her to drink it. Once again, she accepted the drink because she trusted defendant. A few minutes later, she began feeling dizzy and woozy, and she was having trouble hearing and standing (*id.* at 83-84).

Defendant asked Lubin to come and sit with him on the couch. As requested, she sat between his legs with her back to him. She knew this was not appropriate, but did not know what to do because she could not hold herself up. Defendant started to stroke her hair. She could hear him talking but could not make out anything that he was saying. She did not know why he was touching her—she thought it was odd and she felt uncomfortable—but she could not do anything about it because she "didn't have the power to move or to get up" (*id.* at 86, 139). The next thing she remembered was walking down a hallway, but she had no recollection of

how she got there. After that, she remembered nothing until she woke up at home two days later. She did not know how she got home (*id.* at 83-88, 139).

B. DISCUSSION

"The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion." *Commonwealth v. Antidormi*, 84 A.3d 736, 749 (Pa. Super. 2014). "When a court comes to a conclusion through the exercise of its discretion, there is a heavy burden to show that this discretion has been abused." *Commonwealth v. Norton,* 201 A.3d 112, 120 (Pa. 2019) (quoting *Commonwealth v. Eichinger*, 915 A.2d 1122, 1140 (Pa. 2007)). "It is not sufficient to persuade the appellate court that it might have reached a different conclusion, it is necessary to show an actual abuse of the discretionary power." *Id.* An abuse of discretion does not involve a mere error of judgment; rather, it is "the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." *Antidormi*, 84 A.3d at 749-50 (citations omitted).

Prior bad act evidence is generally not admissible to prove bad character or criminal propensity; it is, however, admissible for other relevant purposes, so long as the probative value outweighs the likelihood of unfair prejudice. *Commonwealth v. Hicks,* 156 A.3d 1114, 1125 (Pa. 2017); Pa. R.E. 404(b)(1),(2). Evidence is relevant if "it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact." *Commonwealth v. Tyson,* 119 A.3d 353, 358 (Pa. Super. 2015). Prior bad act evidence is relevant to prove, among other things, intent, knowledge, absence of mistake or accident and a "common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the other." *Commonwealth v. O'Brien,* 836 A.2d 966, 969 (Pa. Super. 2003); Pa. R.E. 404(b)(2). This list is not exclusive. *Commonwealth v. Lark,* 543 A.2d 491, 497 (Pa. 1988). A determination of whether prior bad act evidence is admissible is made by the trial court "on a case by case basis in accordance with the unique facts and circumstances of each case." *Commonwealth v. Frank,* 577 A.2d 609, 614 (Pa. Super. 1990).

1. Defendant's Prior Bad Acts are Relevant to Show a Common Scheme, Plan, or Design.

To be admissible under the common scheme, plan, or design exception, the other act must be "distinctive and so nearly identical as to become the signature of the same perpetrator." *Tyson*, 119 A.3d at 359; *see Frank,* 577 A.2d at 612 (other acts "must embrace distinctive elements and be so nearly identical as to bear the signature or be the handiwork of the same person") (citations omitted). Relevant considerations include, among other things, "habits or patterns of action or conduct undertaken by the perpetrator to commit the crime[s]," types of victims typically chosen by the perpetrator ("commonality of roles"), place, and time. *Tyson,* 119 A.3d at 359; *see Commonwealth v. Newman*, 598 A.2d 275, 279 (Pa. 1991) (noting that in assessing the shared similarities, the court is to consider the commonality of the relationship between the defendant and the victims and the location of the acts). Thus, a signature is not based solely on a perpetrator's actions, but also considers the factual similarities of the crime ***in their entirety***. *See id.* at 278 (court must examine shared similarities in the details of the crimes and not focus solely on acts of the perpetrator).

Importantly, the common scheme, plan, or design exception "does not require that two scenarios be identical in ***every*** respect." *Tyson*, 119 A.3d at 360 n.3 (emphasis in original); *see Hicks,* 156 A.3d at 1128 n.8 (noting that "a perfect match is not required"); *Newman,* 598 A.2d at 278 (requiring the court to examine the shared similarities in the details of each incident and not just focus on the acts performed by the perpetrator). Rather, there need only be "such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other." *Hicks,* 156 A.3d at 1125 (quoting *Commonwealth v. Wable,* 114 A.2d 334, 336-337 (Pa. 1955)). In the context of prior bad acts involving sexual assaults, the fact that the sexual contact was not the same in each instance does not automatically render evidence inadmissible under the common plan or scheme exception. *See Frank*, 577 A.2d at 425-426 (evidence that defendant sexually assaulted six other boys prior to raping the victim admissible to prove common scheme, plan or design even though sexual contact was not identical in each instance). Even in homicide cases, moreover, courts routinely allow evidence of prior assaults that did not lead to death. *See, e.g., Hicks,* 156 A.3d at 1120-1122, 1128 (permitting other act evidence about three women defendant strangled but

did not kill in a homicide prosecution where defendant strangled and beheaded his current victim); *Commonwealth v. Arrington,* 83 A.3d 831 (Pa. 2014) (evidence that defendant assaulted, but did not kill, three other girlfriends and a male acquaintance admissible in homicide by shooting). "Sufficient commonality of factors" between the prior bad acts and the underlying crime "dispels the notion that they are merely coincidental and permits the contrary conclusion that they are so logically connected they share a perpetrator." *Hicks,* 156 A.2d at 1125 (quoting *Commonwealth v. Weakley,* 972 A.2d 1182, 1189 (Pa. Super. 2009)).

There was no coincidence here. To the contrary, defendant's drug-facilitated sexual assault of Constand was the culmination of a decades-long pattern of behavior evidenced by his prior bad acts towards the five witnesses sufficiently "distinctive and so nearly identical as to become the signature of the same perpetrator." *Tyson,* 119 A.3d at 359. In each instance, defendant, a world-renowned entertainer, administered an intoxicant to a much younger woman in whom he had instilled trust and over whom he yielded power and influence. The unique nature of defendant's scheme is evidenced by the following similarities between Constand and each of the five women who testified as victims of his prior

bad acts: each woman was substantially younger than the married defendant;[8] each woman met defendant through her employment or career; most of the women believed he truly wanted to mentor them; defendant 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 defendant, where he would be without interruption and undiscovered by a third party; defendant 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; defendant 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[9]—while she was not fully conscious and, thus, unable to resist his

[8] The average age difference between defendant and his victims is 26 years.

[9] Maud Lise-Lotte Lublin has no recollection of being sexually assaulted because she blacked out shortly after defendant gave her an intoxicant. Certainly, however, a

unwelcomed sexual contact; and, none of the victims consented to any sexual contact with defendant.

These overwhelming similarities establish not only a logical connection between defendant's prior drug-facilitated sexual assaults and his assault of Ms. Constand, but they also demonstrate a distinctive pattern: defendant "engaged in a pattern of non-consensual sexual [contact] with [young women] who were in an unconscious or diminished state." *Tyson,* 119 A.3d at 357. The similarities between assaults are "not confined to insignificant details that would likely be common elements regardless of who committed the crimes." *Aikens,* 990 A.2d at 1185. Rather, they are quite distinct from a typical sexual abuse pattern; so distinct, in fact, that they are all recognizable as the handiwork of the same perpetrator—defendant.[10]

Tyson, supra, is particularly instructive. Tyson, like defendant here, engaged in a pattern of non-consensual sexual intercourse with women

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reasonable inference to draw from what she did remember, *see supra,* is that defendant did, in fact, sexually assault her while she was unconscious.

[10] Indeed, defendant's *modus operandi* is so distinctive as to be unparalleled. A survey of the relevant authority has failed to uncover ***any*** case where a defendant engaged in this type of recurring pattern of drug-facilitated sexual assaults on young women over the course of decades. The unmatched nature of the sexual script demonstrates nothing less than a signature.

with whom he was acquainted who were in an unconscious or diminished state, and he deliberately took advantage of each victim's diminished state and inability to consent.

Tyson was charged with rape and related offenses. The victim reported that she called Tyson, a friend to drive her home after she become ill at work. Once inside her apartment, she fell asleep and later awoke to the defendant having sexual intercourse with her. *Id.* at 356.

Before trial, the Commonwealth sought to introduce evidence of the defendant's prior rape conviction from 10 years earlier to show, among other things, a common plan or scheme.[11] In the earlier case, the victim drank alcohol at a party in her home, hosted by her brother. She woke up in her bed to Tyson, an acquaintance who attended the party, having sexual intercourse with her. *Id.* at n.1. The trial court precluded evidence of the prior rape. *Id.* at 356.

This Court reversed. It found that the evidence was admissible under, *inter alia,* the common scheme or plan exception, noting the following similarities between the two cases: each victim was a black

[11] As discussed *infra,* the Commonwealth also sought to introduce the prior rape to show that defendant did not mistakenly conclude the victim consented to sexual intercourse with him. *Id*

female in her twenties; Tyson was acquainted with each victim; Tyson was invited into her home; each victim ultimately lost consciousness and the defendant was aware each victim was in a weakened or compromised state; and each victim awoke in her bedroom in the early morning hours to find Tyson having vaginal intercourse with her. *Id.* at 360-361.

Based on these similarities, the Court found that the prior bad act evidence did not merely demonstrate that Tyson sexually assaulted two women or that his actions were "generically common to many sexual assault cases." *Id.* Rather, the incidents reflected a "clear pattern" where Tyson was legitimately in his victim's home; was cognizant of each victim's compromised state; and sexually assaulted each victim in her bedroom in the middle of the night while she was unconscious. *Id.* These factors, the Court concluded, revealed conduct that was "sufficiently distinctive" to establish that Tyson engaged in a "common scheme [or plan] of nonconsensual intercourse with unconscious victims." *Id.* at 360-61.

Aikens, supra, is also instructive. Aikens was prosecuted for involuntary deviate sexual intercourse with his 14-year-old daughter. This Court ruled that evidence that he raped another daughter 15 years earlier was properly admitted because it showed a common scheme, plan, or

design. *Id.* at 1183-1185. The Court reached this conclusion based on the similar fact patterns: the victims were of like ages (14 and 15 years old); both were the Aikens' daughters; he initiated both incidents during an overnight visit to his apartment; he showed the victims pornography; and the assaults occurred in bed at night. *Id*. at 1185-1186. These similar characteristics made the incidents "unique" and "distinguish[able]" from a typical or routine child-abuse factual pattern. *Id*. at 1186. The court also noted that the similarities at issue "were not confined to insignificant details that would likely be common elements regardless of who committed the crimes." *Id*.

Commonwealth v. Elliott, too, warrants a conclusion that the prior bad act evidence here was properly admitted under the common scheme or plan exception. Elliot was prosecuted for the rape and murder of a woman. The Pennsylvania Supreme Court held that his three prior assaults on women were admissible to show a common plan, scheme, or design because they were sufficiently similar to the current attack. 700 A.2d 1243, 1250 (Pa. 1997). In doing so, it noted the following similarities: the victims were all white women in their twenties; they were all attacked in the early morning hours after finding themselves alone with Elliot; each assault had

sexual overtones; and each victim was choked, beaten, or both. *Id.* at 1249-1250. The Court rejected the Elliot's claim that the prejudicial value of the evidence outweighed its probative value, partly because the prior assault evidence rebutted Elliot's claim that the victim's injuries resulted from rough sex. *Id.* at 1250.

O'Brien, supra, further supports the admission of the prior bad act evidence in this case. In *O'Brien,* this Court held that evidence of O'Brien's prior sexual assaults of two minor boys in a prosecution where the defendant had sexually assaulted a third minor boy about 10 years later was admissible to prove common plan, scheme, or design, and to bolster the victim's credibility. *Id.* at 970-972. In reaching this conclusion, the Court held that the facts of each incident were sufficiently similar because the victims in each case were of similar age and race; O'Brien knew each victim because he was friends with the victim's parents; he assaulted his victims while alone with them in his home; and he engaged in deviate sexual intercourse with each victim after showing them pornography. *Id.*

Like the prior bad act evidence in *Tyson, Aikens, Elliott,* and *O'Brien*—all of which was admitted under the common scheme, plan, or design exception—the similarities among the prior bad acts and Constand's

assault are "not confined to insignificant details that would likely be common elements regardless of who committed the crimes." *Aikens,* 990 A.2d at 1185. Rather, these distinctive similarities demonstrate that the incidents are so related that proof of one tends to establish proof of another. This evidence thus is relevant under the common scheme, plan, or design exception. *See Commonwealth v. Luktisch*, 680 A.2d 877, 878-879 (Pa. Super. 1996) (common scheme exception justified admission of defendant's previous sexual assaults despite six-year lapse between periods of abuse, where three victims were nearly the same age, were either his daughter or stepdaughter, lived with him when acts occurred, and pattern of molestation—from improper touching to oral sex to sexual intercourse—was highly similar).

Defendant, though, maintains that circumstances surrounding the five prior bad acts and those surrounding his conduct toward Constand are "significantly different from one another" in terms of location, type of victim, conduct, and circumstances." *Defendant's Brief,* at 59. He also claims that the prior bad acts—which occurred in 1982, 1984, 1986, and 1989—are too remote to be relevant. *Id.* at 66. His claims fail.

First, he relies on inconsequential distinctions. For instance, he takes issue with the fact that the assaults did not all take place at the same location. Whether the assaults took place in defendant's home, in his hotel room, or in a house where he was temporarily residing, is of no moment. The fact of the matter is that in each instance, defendant isolated each victim. assaulted her in a setting he exclusively controlled so that he could execute his plan without interruption or unexpected discovery. In any event, location is just one of many factors to consider. *See Commonwealth v. Gordon,* 652 A.2d 317, 325 (Pa. Super. 1994) (finding that the trial court placed undue emphasis on the location of the offenses and failed to consider the similarities of the offenses in their entirety).

Next, he claims he had different relationships with each victim. *Defendant's Brief,* at 59-60. That's not true. In almost each instance, there was some type of professional mentoring relationship. In any event, even if there were differences in the relationships, *Tyson* made clear that this was an insignificant distinction; the court found sufficient similarities between the crimes even though the current victim was a friend but the prior victim was a mere acquaintance.

Defendant also argues that the nature of the sexual contact was not sufficiently similar to be relevant. As noted, however, "[t]he common scheme exception does not require that the two scenarios be identical in ***every*** respect," *see Tyson, supra* (emphasis in original). A "signature" is not based solely on the perpetrator's actions, but rather on the totality of factual similarities. *See Newman,* 598 A.2d at 278 (requiring the court to examine the shared similarities in the details of each incident and not just focus on the acts performed by the perpetrator). Indeed, the *Tyson* Court found that the prior bad act evidence constituted a "signature" despite the fact that the circumstances surrounding the incidents were not identical in all respects. *Cf. O'Brien,* 836 A.2d at 971 (finding that the trial court erred in failing to find a "signature" where it incorrectly based its finding solely on O'Brien's actions and not on the factual similarities of the incidents in their entirety).

Frank, *supra,* is particularly instructive. It demonstrates that the prior bad act evidence was admissible to prove common plan or scheme, despite the fact that the six scenarios are not identical in ***every*** respect. Frank was in a counselor-patient relationship with his teenage victim who he sexually assaulted. The Commonwealth proffered evidence from six other teenage

boys that Frank sexually assaulted them. The Court deemed the evidence admissible as a common scheme or plan, even though the assaults were not the same in every case, because there were sufficient "shared similarities." *Id.* at 614, 618. It found it sufficient that defendant initiated "some type of sexual contact" with them in light of the shared similarities, such as, commonality of roles. *Id.* at 612. Here, as in *Frank,* defendant initiated "some type of sexual contact" with each of his victims. Moreover, as with the present case, all of the victims in *Frank* viewed him as a professional and person of authority, respected in the community and among their families, who was supposed to help them. *Id.* at 617.

Defendant also places undue emphasis on the remoteness of the prior bad acts. Remoteness is just one factor to consider in determining the probative value of other prior crimes evidence. *Luktisch*, 680 A.2d at 879. Moreover, the importance of any time gap is "inversely proportional" to the similarities between the acts. *Tyson,* 119 A.3d at 359. The more similar the acts, the less the remoteness of time between the acts matters. *See Aikens*, 990 A.2d at 1186 (finding that although defendant's abuse of prior victim occurred remotely to that in the current case before it, because the

parallels between the two cases were "striking," remoteness did not preclude admission).

Notably, courts in this Commonwealth have, on numerous occasions, found prior acts to be admissible despite long delays where there were substantial similarities between the incidents. *See, e.g., Smith*, 635 A.2d at 1089 (incidents were 10 to 20 years apart but so strikingly similar that the significance of the lapse in time was "non-existent, or minimal at best"); *Aikens*, *supra* (admission of prior 15-year-old sex assault); *Odum*, *supra* (admission of 10-year-old sex assault); *Luktisch*, *supra* (admission of 14-year-old sex assault); *Commonwealth v. Patskin*, 93 A.2d 704 (Pa. 1953) (admission of 17-year-old prior assault).

Furthermore, in conducting a remoteness analysis, the court is not to consider each act in isolation but rather must consider the sequential nature of the prior bad acts. *See Smith,* 635 A.2d at 1089 (Pa. Super. 1993) (noting that the issue for remoteness under a prior bad act analysis "is determined by analyzing the time involved ***between each of the criminal incidents***") (emphasis added); *Commonwealth v. Odum*, 584 A.2d 953, 955 (Pa. Super. 1990) (stating that "[w]e refuse to consider the evidence entirely out of its sequential context, as appellant would require us to do").

Conducting such an inquiry necessarily entails an analysis of whether the evidence "indicated a recurring sequence of acts by this [defendant] over a continuous span of time, as opposed to random and remote acts." *Smith,* 635 A.2d at 1090 (citing *Frank,* 577 A.2d at 617). Not surprisingly, defendant fails to even acknowledge this well-settled maxim. Instead, he references each prior bad act in isolation and in relation to the Andrea Constand assault, as opposed to in relation to its sequential context.

While there was a several-year gap between a few incidents, most of the assaults occurred within a two-year period of another assault, and several incidents even occurred within the same year of each other.[12] *See id.* at 13-40. Viewing the prior bad act evidence proffered in sequence—as the trial court properly did – reveals that defendant repeatedly perpetrated drug-induced sexual assaults over a continual span almost 40 years.

Even putting aside the sequential nature of the prior bad acts, a lengthy gap between assaults does not mechanically render the prior bad

[12]While the Commonwealth proffered 19 prior bad act victims, as pointed out in its *Memorandum of Law in Support of its Motion to Introduce Evidence of 19 Prior Bad Act of Defendant,* dozens of other women—who were not proffered as part of its Rule 404(b) motion—came forward reporting similar drug-induced sexual assaults at the hands of defendant. When viewed in their sequential context, these added incidents further diminish the time periods between the incidents. *See Odum*, 584 A.2d at 955 (noting that "there were additional incidents which were not submitted to the jury … [that] would further act to reduce the time periods between incidents").

acts too remote. To the contrary, as noted, this Court has expressly cautioned that "[f]ocusing solely upon th[e] time lapse . . . is improper." *Luktisch*, 680 A.2d at 878.

Furthermore, the substantial similarities, discussed above, between the prior bad acts and the instant assault render the time gap between them insignificant.[13] *See Aikens*, 990 A.2d at 1186; *see also Tyson*, 119 A.3d at 359 (noting that the importance of any time gap is "inversely proportional" to

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[13] Defendant attempts to downplay some of these similarities by claiming either that they find no support in the record or they are not relevant. For instance, he claims that the age difference between him and his victims "is of no relevance." *Defendant's Brief*, at 70. He is wrong. Even a cursory review of the applicable law makes clear that age is indeed a relevant factor. *See. e.g., Tyson*, 119 A.3d at 360 (finding relevant for purposes of both the common scheme or plan exception and the absence of mistake exception that both victims were women in their twenties); *Aikens*, 990 A.2d at 185-1186 (finding a similar fact pattern for purposes of the common scheme or plan exception based, in part, on the fact that the victims were of like ages); *Elliott*, 700 A.2d at 1249-1250 (finding prior assaults sufficiently similar for purposes of common scheme or plan exception where, among other similarities, the victims were all women in their twenties). Defendant also takes issue with the trial court's statement that the prior bad act witnesses were "physically fit"; he maintains that the record does not support this conclusion. Once again, he is wrong. The record makes clear that Thomas, Lasha, Dickinson, and Lublin were all young, aspiring models and actresses at the time of their interaction with defendant. Baker-Kinney, while not an aspiring actress or model, lived an extremely healthy and active lifestyle at the time of her assault. Among other activities, she skied, bowled, water-skied, and aerobicized. Lublin was a runner, and Constand was a former professional basketball player (N.T. Testimony of Heidi Thomas, 4/10/18, at 5-9, Exhibit C-3; N.T. Trial by Jury, 4/11/18, at 54-57, 195; N.T. Testimony of Janice Dickinson, 4/12/18, at 8-11; N.T. Trial by Jury, 4/12/18, at 76-77, Exhibit C-16). Thus, contrary to defendant's contention, the trial court's characterization of defendant's victims as being "physically fit" is indeed supported by the record.

the similarities between the acts); *Frank,* 577 A.2d at 617 ("[g]iven the degree of similarity in the details of each of the six experiences of these witnesses and the testimony of the victim . . . the relevancy of this evidence indicated a recurring sequence of acts by this [defendant] over a continuous span of time, as opposed to random and remote acts"); *Odum*, 584 A.2d at 953 (prior bad act evidence admitted even though the gap exceeded 10 years; "refus[ing] to consider the evidence entirely out of its sequential context" and noting that the fact that additional incidents were not submitted would "further act to reduce the time periods between incidents"). Accordingly, contrary to defendant's contention, the trial court properly found the lapse of time "unimportant." *Opinion,* dated May 14, 2019, at 109 (O'Neill, J.).

Finally, defendant repeatedly highlights the fact that the prior bad act evidence involves ***uncharged*** conduct, as if this somehow renders it less relevant for Rule 404(b) purposes. *See, e.g., Defendant's Brief,* at 84. But, "Pa. R. Evid. 404(b) is not limited to evidence of crimes that have been proven beyond a reasonable doubt in court. Rather, it encompasses both prior crimes ***and prior wrongs and acts,*** the latter of which, by their nature, often lack 'definite proof.'" *Ardinger,* 839 A.2d at 1145 (Pa. Super. 2003)

(citing *Commonwealth v. Lockcuff,* 813 A.2d 857, 861 (Pa. Super. 2002)) (emphasis added); *see, e.g., Commonwealth v. Donahue,* 549 A.2d 121, 125 (Pa. 1988) (prior child abuse incident admitted in prosecution for murder of another baby even though no charges in prior incident); *Elliot,* 700 A.2d at 1243 (Pa. 1997) (three prior assaults on women (only one of which led to a conviction) admissible in prosecution for rape and murder); *Ardinger,* 839 A.2d at 1145-1146 (finding that the trial court erred in not allowing prior bad act comprising of charged, but not yet resolved, conduct). Indeed, as the title of the rule makes clear—"Character Evidence; Crimes or ***Other Acts***"—a defendant need not have been charged or convicted of other crimes in order for those crimes to be admissible under the rule. Pa. R.E. 404 (emphasis added). Nor does the Commonwealth need to prove the prior bad acts beyond a reasonable doubt. *Donahue*, 549 A.2d at 126.

2. Defendant's Prior Bad Acts are Relevant to Show an Absence of Mistake or Accident.

Prior bad act evidence is admissible to show a defendant's actions were not the result of a mistake or accident where the manner and circumstances of the prior and current acts are "remarkably similar." *Tyson*, 119 A.3d at 359 (citing *Commonwealth v. Kinard,* 95 A.3d 279, 294-295

(Pa. Super. 2014). Thus, the logical relevance of evidence tending to establish a lack of mistake or accident "does not depend on as great a degree of similarity, as between the charged and uncharged misconduct, as is the case under the *modus operandi* [or common scheme or plan] theory." *Hicks,* 156 A.3d at 1132 (Saylor, C.J., concurring); *see Commonwealth v. Sitler*, 144 A.3d 156, 164 (Pa. Super. 2016) (quoting *Commonwealth v. Ross*, 57 A.3d 85, 98-99 (Pa. Super. 2012)) (stating that to be admissible under the absence of mistake exception there need not be a "unique signature," but rather a "close factual nexus sufficient to demonstrate the connective relevance of the prior bad acts to the crime in question"). "[C]ertain differences between the . . . incidents are not essential to the question of whether [defendant] mistakenly believed [the victim] consented to sexual [contact]." *Tyson* 119 A.3d at 363.

The basic premise of the absence of mistake or accident exception is that "as the number of . . . incidents grows, the likelihood that [the defendant's] conduct was unintentional decreases. It is merely a matter of probabilities." *Donahue*, 549 A.2d at 127 (opinion announcing judgment of the court).

Along with being admissible to establish a common scheme or plan, evidence of the five prior drug-facilitated sexual assaults defendant committed upon his young female victims was also properly admitted under the absence of mistake or accident exception to rebut a defense of consent to the sexual assault charges. In other words, the evidence tends to prove that defendant did not mistakenly believe that Constand was awake or gave consent to his sexual assault; he could not have reasonably believed that Constand was conscious enough to give her consent. Indeed, Constand, like his five prior victims, was incapacitated because ***he*** drugged her. He knew the debilitating effect of the intoxicants he used from his past experiences—specifically, his experience drugging and assaulting the five prior bad act victims. In fact, as will be discussed more fully under issue number V, *infra,* defendant had previously admitted that although he received prescriptions for Quaaludes—a substance he knew to be a central nervous system depressant, like Benadryl—he did not take them himself because he gets "sleepy" and "want[s] to stay awake"; instead, he used them on women with whom he wanted to have sex. Defendant even acknowledged that at least one such woman became "high" and was

"[w]alking like [she] had too much to drink" (N.T. Trial by Jury, 4/18/18 (starting at 10:31 a.m.), at 35-36, 41-43, 47-49).

Tyson, once again, is instructive. There, as noted, this Court reversed the trial court order refusing to admit the defendant's prior rape conviction. Besides finding that the evidence was relevant and admissible to establish a common scheme or plan, the Court also found that it was necessary to prove that the defendant made no mistake or accident when he evaluated the victim's purported consent. Specifically, it found that the evidence "tend[ed] to increase the probability that Tyson knowingly had non-consensual sex with [the victim] in the present case." *Id.* at 360. It explained, "given the relevant similarities between the . . . incidents," the evidence of defendant's prior rape was relevant to show he did not "mistakenly believe" that the current rape victim was awake or gave consent, where he knew each victim was in a compromised state. *Id.* at 362. The Court went one step further, and noted that the prior bad act evidence was "highly probative" of the fact that the defendant

> could not have reasonably believed [the current victim] was conscious enough to give her consent. Rather, the evidence of the prior conviction tends to prove [defendant] intentionally exploited another opportunity to take advantage of a woman sexually,

> when he knew the woman was in a diminished state.

Id. at 363.

In reaching this conclusion, the Court looked at the relevant similarities: (1) the defendant was invited into the victim's home; (2) the defendant knew the victim was in a compromised state; and (3) the victim awoke to the defendant sexually assaulting her. The Court deemed these three facts relevant similarities because the defendant'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. . . . Thus, the evidence would tend to show [defendant] recognized or should have recognized that, as with [the prior victim], [the current victim's] physical condition rendered her unable to consent." *Id.* at 362-63. While the Court acknowledged that there were some differences between the incidents, it ultimately concluded that the differences were inconsequential, noting that "certain differences between the two incidents . . . are not essential to the question of whether [the defendant] mistakenly believed [the victim] consented to sexual intercourse." *Id.* at 363. The Court further noted that if

evidence of the defendant's prior conviction was excluded, "the Commonwealth must rely solely on the uncorroborated testimony of [the victim] to counter [the defendant's] defense of consent to vaginal intercourse." *Id.* at 362. It thus found that the Commonwealth had a "significant need" for the prior crime evidence to prove [the defendant] had non-consensual sex with the victim. *Id.*

Here, as in *Tyson,* the prior bad act evidence is highly probative of the issue of consent. More specifically, the fact that defendant, on at least five previous occasions, gave an intoxicant to a woman that incapacitated her and then had indecent contact with her while she was in the incapacitated state, is probative of the fact that defendant could not have reasonably believed that Constand was conscious enough to give her consent. Rather, the evidence regarding the prior victims tends to establish that he "intentionally exploited [yet] another opportunity to take advantage of a woman sexually, when he knew [she] was in a diminished state." *Id.* The prior bad act evidence, therefore, was properly deemed relevant under the absence of mistake exception. *See id.; see also Boczkowski,* 846 A.2d at 89 (finding in a homicide prosecution for the bathtub drowning death of defendant's wife that evidence of the similar death of defendant's previous

wife was relevant and admissible under the absence of mistake or accident exception where the incidents were "remarkably similar"); *Donahue,* 549 A.2d at 127 (finding in a homicide prosecution stemming from child abuse that the trial court properly allowed the Commonwealth to admit evidence of a prior, uncharged child abuse allegation involving another child to prove an absence of mistake or accident).[14]

Defendant, however, contends that the absence of mistake or accident does not apply because "there was no defense of mistake or accident to which to respond." *Defendant's Brief,* at 78. He cites a "federal rules pamphlet" for the proposition that absence of mistake or accident is only admissible "in rebuttal to defense evidence." *Id.* ***Pennsylvania*** law however, makes clear that a defendant does not have to actually forward a formal defense of accident or mistake—or even present arguments along those lines—before the Commonwealth may introduce evidence to exclude the theory of accident or mistake. *See Boczkowski*, 846 A.2d at 88 (rejecting the notion that proof of accident or mistake is only admissible for responsive purposes).

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[14] Incidentally, the defendant's conviction was ultimately reversed in *Donahue* because the Court found that the defendant should have been allowed to present evidence to defend himself against the prior child abuse allegation at trial. *Id.* at 128.

In any event, mistake or accident was indeed at issue at trial. As expressly acknowledged by defendant, his defense was that the "sexual contact was consensual." *Defendant's Brief,* at 78; *id.* at 61 (noting that defendant "does not dispute that sexual contact occurred, but rather, contends it was consensual"). Implicit in this defense is that if Ms. Constand was, in fact, too incapacitated to consent to the sexual assault, then defendant was mistaken in his belief that the sexual contact was consensual. Absence of mistake, therefore, was clearly at issue here.

3. Defendant's Prior Bad Acts are Relevant Under the "Doctrine of Chances."

The prior bad act evidence is also relevant under the "doctrine of chances," an alternative, non-character-based theory of logical relevance, with a reduced similarity threshold "that does not depend on an impermissible inference of bad character." *Hicks,* 156 A.3d at 1132 (Saylor, C.J., concurring). The doctrine allows for evidence to be admitted to establish "the objective improbability of so many accidents befalling the defendant ***or the defendant becoming innocently enmeshed in suspicious circumstances so frequently***." *Id.* (citation omitted) (emphasis in original). In other words, the more often a defendant commits the *actus reus,* the less

likely it is that the defendant acted innocently or accidentally. JONES ON EVIDENCE § 17:62 (7th ed.) (citation omitted).

Importantly, there are safeguards in place to ensure that the doctrine of chances theory does not swallow the general proscription against prior bad act evidence. First, the other act evidence must be "roughly similar" to the charged crime. *Id.* at 1136 (Saylor, C.J., concurring) (citing *People v. Everett,* 250 P.3d 649, 656-657 (Colo. App. 2010) (additional citations omitted). Second, "the number of unusual occurrences in which the defendant has been involved exceed[s] the frequency rate for the general population." *Id.* Third, there must be a real dispute between the defense and the prosecution over whether the *actus reus* occurred. *Id.*

Chief Justice Saylor applied the doctrine of chances in his concurring opinion in *Hicks,* a homicide case. He concluded that the trial court properly exercised its discretion in admitting prior bad act evidence about three women with whom defendant previously had a sexual and illegal-narcotics-using relationship and with whom he was often violent, to establish, *inter alia,* an absence of mistake or accident.[15] *Id.* at 1133-1137

[15] *Hicks* was decided after the trial court issued its order granting in part the Commonwealth's original prior bad act motion.

(Saylor, C.J., concurring); *see id.* at 1148 (Donohue, J., dissenting) (noting that Chief Justice Saylor would admit the evidence to show an absence of accident "on a 'doctrine of chances' rationale to prove a defendant committed the *actus reus*"). In applying the doctrine, he found that the defendant's "history of violent attacks upon women certainly reduced the probability that, having been found to be closely associated with a badly bruised body of a woman whom the Commonwealth contended had been strangled, there is an innocent explanation for his involvement prior to his admitted dismemberment of the body." *Id.* at 1137 (Saylor, C.J., concurring). He, therefore, concluded that this evidence satisfied the "logical non-character-based relevance criterion and . . . maintain[ed] the essential guard against inquisitorial-style determinations of guilt by character." *Id.*

The Pennsylvania Supreme Court had previously applied the doctrine of chances in *Donahue, supra.* In that case, a homicide prosecution stemming from child abuse, the trial court permitted the Commonwealth to introduce evidence of a prior, uncharged child abuse allegation involving another child. In analyzing whether the evidence was properly admitted to negate the defendant's claim that the child's injuries were sustained in an

accidental fall, then-Justice Flaherty, in an opinion announcing the judgment of the Court, relied on the doctrine in finding that the evidence was relevant and admissible. *Id.* at 126-127 (opinion announcing the judgment of the court).

Citing Wigmore, the Court explained the doctrine as follows:

> To prove intent, [and, therefore, the absence of accident], as a generic notion of criminal volition or willfulness, including the various noninnocent mental states accompanying different criminal acts, an entirely different process of thought is employed. ***The argument here is purely from the point of view of the doctrine of chances*** -- the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but that ***the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.***
>
> . . . ***In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to***

> ***establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act;*** and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.
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> * * *
>
> ***It is not here necessary to look for a general scheme or to discover a united system in all the acts;*** the attempt is merely to discover the intent accompanying the act in question; and the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent. The argument is based ***purely on the doctrine of chances, and it is the mere repetition of instances, and not their system or scheme, that satisfies our logical demand.***
>
> Yet, in order to satisfy this demand, it is at least necessary that prior acts should be ***similar.*** Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance . . . .

Id. (quoting II Wigmore, *On Evidence,* § 302, pp. 241, 245, 246 (Chadbourn Rev. 1979)) (emphasis in original).

After carefully reviewing the authority on the doctrine of chances, the *Donohue* Court found that the doctrine did, in fact, apply to render the prior bad act evidence admissible. It found that the previous child abuse

incident was similar to the incident in question and, further, that a similar result was obtained in both cases. To this end, both the current victim and the prior victim were being toilet trained by the defendant when he was caring for them; the defendant was out of work and cared for both children while his significant other worked; both children were seriously injured or killed while in his care; and both children had a pattern of bruises on their bodies. *Donahue,* 549 A.2d at 127. The Court then noted that "although two different children may, at different times, be seriously injured or killed while in a person's care, and that this may happen without his intentional conduct, ***as the number of such incidents grows, the likelihood that his conduct was unintentional decreases. It is merely a matter of probabilities***." *Id.* (emphasis added). Thus, the Court concluded that "[b]ecause the former case tends to decrease the likelihood that the same man would be involved in two such similar accidents, the former incident is admissible as probative evidence of whether the injuries in the second case were accidental." *Id.* In other words, the prior conduct was relevant to negating the defendant's claim that the child's injuries were sustained in an accidental fall. *Id.* at 126-127.[16]

[16] Defendant asserts that the doctrine of chances was merely "referenced and ***ostensibly***

If the Court in *Donahue* considered the evidence admissible under the doctrine of chances theory despite the fact that only a single prior bad act was proffered, then the doctrine unmistakably applies here, where the frequency requirement typically underpinning the doctrine of chances is unquestionably present. Indeed, the number of prior incidents proffered reached well into the double digits, with the ultimate number of prior incidents ruled admissible being five. Because of the number of prior incidents in this case, the likelihood that defendant's conduct was unintentional has plummeted. It is simply a matter of probabilities.

Indeed, it would defy logic to maintain that defendant mistakenly assessed Andrea Constand's ability to consent to the sexual acts he committed on her after providing her with an intoxicant when he had engaged in strikingly similar acts with many other women regularly over the course of decades. To the contrary, much like the conclusion reached by Chief Justice Saylor in *Hicks,* defendant's repeated history of providing intoxicants to women and then sexually assaulting them once they were

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applied" in *Donahue. Defendant's Brief,* at 79 (emphasis added). Even a cursory reading of *Donahue* makes clear that the Court did not simply reference the doctrine of chances, but instead comprehensively analyzed the doctrine and unequivocally—as opposed to "ostensibly"—applied it in finding that the prior bad act evidence was relevant and admissible.

incapacitated "reduced the probability that . . . there is an innocent explanation" for his conduct with Ms. Constand. *Id.* at 1137 (Saylor, C.J., concurring).

Furthermore, the Commonwealth has easily satisfied each of the safeguards for applying the doctrine of chances. To this end, as discussed above, the prior bad act evidence is so distinctive and similar to the current crime involving Ms. Constand so as to be a signature. Necessarily, then, these similarities satisfy the obviously lesser "roughly similar" standard required under a doctrine of chances analysis. *Hicks,* 156 A.3d at 1136 (Saylor, C.J., concurring). Moreover, certainly, the prior "unusual occurrences"—*i.e.*, defendant administering intoxicants to young women who become incapacitated only to have defendant sexually assault them while they were too incapacitated to either consent or ward off his unwanted advances—"exceeds the frequency rate for the general population." *Id.* The frequency and number of defendant's prior bad acts is seemingly unparalleled. Finally, at the time the Commonwealth proffered its prior bad act evidence—and still today—there was, in fact, a dispute between the Commonwealth and the defense about whether the *actus reus* occurred. The Commonwealth, of course, claims that a crime

occurred; defendant on the other hand, claims that any sexual contact between him and Ms. Constand was consensual (N.T. Trial by Jury, 6/12/17, at 68-69; N.T. Trial by Jury, 4/17/18, at 29-32, 124-128; N.T. Trial by Jury/Closings, 4/24/18, at 81-82).

A survey of the case law outside this jurisdiction provides even more support for applying the doctrine of chances to this case.[17] To this end, appellate courts in various jurisdictions have applied the doctrine of chances when faced with a unique set of circumstances such as those presented here, to uphold admission of prior bad act evidence to show, *inter alia,* a defendant's intent or other mental state. *See, e.g., People v.*

[17] The Commonwealth is, of course, mindful that authority from other jurisdictions is not binding on this Court. Yet these cases provide persuasive authority for applying the doctrine of chances to this case. *See Verdini v. First Nat. Bank of Penn.*, 135 A.3d 616, 619 n.5 (Pa. Super. 2016) (stating that "[t]he decisions of the lower federal courts and other states' courts may provide persuasive, although not binding, authority"). This extra-jurisdictional authority is especially persuasive here in light of the absence of ***controlling*** authority in Pennsylvania recognizing the doctrine of chances as a basis for the admission of prior bad act evidence. *Compare Branham v. Rohm & Haas Co.,* 19 A.3d 1094, 1107 (Pa. Super. 2011) ("[w]here there is controlling authority in Pennsylvania law, we need not consult the decisions of sister jurisdictions to reach a disposition"). As noted, while the Pennsylvania Supreme Court applied the doctrine of chances in *Donahue*, that decision is a non-binding opinion announcing the judgment of the Court. *See Cimaszewski v. Bd. of Prob. & Parole,* 868 A.2d 416, 424 (Pa. 2005) (citation omitted) (stating that "an [o]pinion [a]nnouncing the [j]udgment of [c]ourt is not binding precedent). Similarly, while Chief Justice Saylor applied the doctrine of chances in *Hicks,* as noted, he did so in a concurring opinion; as such, that opinion, too, is non-binding. *See Commonwealth v. Thompson,* 985 A.2d 928, 937 (Pa. 2009) (stating that concurring opinions are not binding authority).

Robbins, 755 P.2d 355, 362 (Cal. 1988) (citing the doctrine of chances in holding, in a prosecution for raping and intentionally killing a young boy where defendant acknowledged the homicide but contested the rape and intent to kill, that the trial court properly admitted, as proof of intent to kill, defendant's confession that he previously sodomized and killed another young boy); *United States v. Woods,* 484 F.2d 127 (4th Cir. 1973) (finding that the trial court properly permitted the prosecution, in a case involving the murder of defendant's seven-month-old foster son due to cyanosis, to admit evidence of 20 prior instances of cyanosis to nine children in defendant's care over a 25-year period, to establish, pursuant to the doctrine of chances, that the death was not accidental); *Martin v. State,* 173 S.W.3d 463, 465-68 (Tex.Crim.App. 2005) (evidence of another sexual assault was admissible under the doctrine of chances to prove victim did not consent); *compare State v. Lowther,* 398 P.3d 1032 (Utah 2017) (finding evidence of other uncharged sexual assaults relevant under the doctrine of chances to show victim's lack of consent and defendant's intent to have sex with her while she was sleeping, but concluding that the lower court improperly ruled the evidence admissible because it applied improper standards in balancing the probative value versus prejudicial impact).

In *People v. Kelly,* 895 N.W.2d 230 (Mich. Ct. App. 2016) (*per curiam*), cited with approval by Chief Justice Saylor in *Hicks,* the state appellate court found that the trial court abused its discretion in excluding testimony in a sexual assault case. The defendant claimed consent, yet he had seven prior assaults over the course of 25 years. The court explained, "employing the doctrine of chances, it strikes us as extraordinarily improbable that eight unrelated women in four different states would fabricate reports of sexual assaults after engaging in consensual sex with defendant." *Hicks,* 156 A.3d at 1136 (Saylor, C.J., concurring) (citing *People v. Kelly,* 895 N.W.2d at 235).

Similarly, in *People v. Everett, supra,* a sexual assault prosecution where the defendant claimed that the victim consented, or that there was an absence of evidence of a lack of consent, the court held that evidence that the defendant committed other sexual offenses may be admissible under the doctrine of chances because

> [w]hen one person claims rape, the unusual and abnormal element of lying by the complaining witness may be present. But, when two (or more) persons tell similar stories, the chances are reduced that both are lying or that one is telling the truth and the other is coincidentally telling a similar false story.

Id., 250 P.3d at 656-657 (citation omitted).

As in *Kelly,* it should strike this Court as "extraordinarily improbable" that numerous unrelated women in states throughout the country would "fabricate reports of [drug-facilitated] sexual assaults" committed by defendant. *Id.*, 895 N.W.2d at 235. Moreover, as in *Everett,* when two or more persons tell similar stories, "the chances are reduced that [all] are lying or that one is telling the truth and the other[s are] coincidentally telling a similar false story." *Everett,* 250 P.3d at 657.

For these reasons, the trial court properly concluded that the doctrine of chances offered a "related, compelling basis for admission." *Opinion,* at 99. To be sure, the repeated nature of defendant's conduct negates any non-criminal intent; the sheer number of times defendant had sexual contact with a young woman to whom he provided an intoxicant renders implausible any claim that defendant was mistaken when he assessed his victims' ability to consent to the sexual contact. Indeed, there is an objective improbability of so many accidental, inadvertent occurrences. *see Hicks,* 156 A.3d at 1132 (Saylor, C.J., concurring) (noting that under the "doctrine of chances" or the "doctrine of objective improbabilities," the

evidence is offered "to establish the objective improbability of so many accidents befalling the defendant or the defendant becoming innocently enmeshed in suspicious circumstances so frequently").

Defendant nevertheless contends that the trial court erred in relying—at least in part—on the doctrine of chances.[18] He first contends that the doctrine does not apply because there is no allegation of an accident or mistake. In the absence of a lack of accident or mistake exception, defendant maintains, the doctrine of chances is inapplicable. This argument is flawed on several levels.

First, as already discussed at length, the absence of mistake or accident exception is, in fact, applicable to this case. The prior bad act evidence was relevant to showing that defendant did not mistakenly believe that Ms. Constand was awake or gave consent to his sexual contact. In any event, the doctrine of chances does not only become relevant when there is a claim of accident or mistake. *See Boczkowski*, 846 A.2d at 89 (Pa.

[18] Curiously, in his discussion of the doctrine of chances, defendant appears to adopt a "clearly erroneous" standard of review, *see Defendant's Brief*, at 82, ostensibly because it would warrant *de novo* review by this Court. The correct standard of review, however, an abuse of discretion. *See Commonwealth v. Rosen*, 42 A.3d 988, 993 (Pa. 2012) (when reviewing a denial of a motion *in limine*, an appellate court applies an evidentiary abuse of discretion standard); *see Commonwealth v. Lomax*, 8 A.3d 1264 (Pa. Super. 2010) (an appellate court may reverse regarding the admissibility of evidence only upon a showing that the trial court abused of discretion).

2004) (stating that "the defendant does not have to actually forward a formal defense of accident, or even present an argument along those lines, before the Commonwealth may have a practical need to exclude the theory of accident[]…"). What's more, the list of Pa. R.E. 404(b) exceptions set forth in the rule is not exclusive. *See Lark,* 543 A.2d at 497 (stating that the "list of 'special circumstances' is not exclusive"). Finally, even if the court erred in admitting the prior bad act evidence under the doctrine of chances (it did not), any supposed error was harmless because the evidence was, in any event, properly admitted under the absence of mistake and the common plan or scheme exceptions. *See Commonwealth v. Johnson,* 941 A.2d 1286, 1290 (Pa. 2008) ("As an appellate court, we may uphold a decision of the trial court if there is ***any*** proper basis for the result reached; thus we are not constrained to affirm on the grounds relied upon by the trial court.") (citation omitted); *Commonwealth v. Fuller,* 940 A.2d 476, 482 (Pa. Super. 2007) (stating that the Court "[m]ay affirm a decision is any grounds for affirmance exists").

4. The Probative Value of the Prior Bad Act Evidence Outweighed any Potential for Unfair Prejudice.

Prior bad act evidence is not prohibited simply because it is harmful or prejudicial. *Commonwealth v. Dillon,* 925 A.2d 131, 141 (Pa. 2007). Indeed, prior bad act evidence is ***designed*** to be prejudicial. *Commonwealth v. Gordon,* 673 A.2d 866, 870 (Pa. 1996). Rather, where, as here, prior bad act evidence is relevant for a legitimate purpose under Rule 404(b), it is admissible unless its probative value is outweighed by its potential for ***unfair*** prejudice. *Commonwealth v. Hairston,* 84 A.3d 657, 664 (Pa. 2014); *see* Pa. R.E. 404(b)(2) ("[i]n a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice"). Unfair prejudice means "a tendency to suggest [a] decision on an improper basis or to divert the jury's attention away from its duty to weigh the evidence impartially." *Tyson,* 119 A.3d at 360. Importantly, the court "is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is charged." *Dillon,* 925 A.2d at 141 (quoting *Lark,* 543 A.2d at 501).

In conducting its weighing inquiry, the court must balance the potential for unfair prejudice with the degree of similarity between the incidents, the Commonwealth's need to present the evidence, and the ability of the court to caution the jury. *Tyson,* 119 A.3d at 359; *see, e.g., Gordon,* 673 A.2d at 870 (noting that "[w]hether relevant evidence is unduly prejudicial is a function in part of the degree which it is necessary to prove the case of the opposing party"); *Commonwealth v. Ardinger*, 839 A.2d 1143, 1146 (Pa. Super. 2003) (holding that the court is to balance the Commonwealth's need for the prior bad act evidence against the potential for prejudice); *Tyson,* 119 A.3d at 359 (holding that the court must balance the potential for unfair prejudice with, among other things, the Commonwealth's need to present the evidence and the ability of the court to caution the jury). Indeed, "[w]hen examining the potential for undue prejudice, a cautionary instruction may ameliorate the prejudicial effect of the proffered evidence." *Tyson,* 119 A.3d at 360 (citation omitted); *see Hairston,* 84 A.3d at 666 (finding other act evidence admissible where the trial court's instruction on how the other act evidence should be considered minimized the likelihood that the evidence would inflame the jury or cause it to convict defendant on an improper basis); *see also Arrington,* 86 A.3d at

845 (holding that the probative value of the prior bad act evidence outweighed its prejudicial value where the court provided the jury with a comprehensive instruction informing it of the limited and narrow purpose for which the evidence was admitted); *Boczkowski,* 846 A.2d at 89 (limiting instruction weighing in favor of upholding admission of prior bad act evidence). This is so because the law presumes that the jury follows the court's cautionary instructions. *Commonwealth v. Jones,* 668 A.2d 491, 504 (Pa. 1995).

Here, the trial court properly weighed the probative value of the prior bad act evidence against its potential for unfair prejudice—considering all relevant factors—and properly concluded that the probative value of this evidence outweighed any prejudicial impact.

a. <u>There is a High Degree of Similarity Between Current Offense and Prior Bad Acts.</u>

As discussed more fully, *supra,* there is a high degree of similarity between defendant's prior bad acts and defendant's drug-induced sexual assault of Constand. In each instance, the much-older-defendant initiated contact with his victim, isolated her in an area in which he controlled, gave her an intoxicant that rendered her incapacitated, and then sexually

assaulted her when she was unconscious or otherwise unable to consent to the sexual contact. These substantial similarities between the incidents give the prior incidents "considerable probative value." *Tyson,* 119 A.3d at 361; *see Frank,* 577 A.2d at 616-618 (holding that trial court admission of seven of defendant's prior sexual assaults of children under the common plan or scheme exception was proper where the assaults possessed a high degree of similarities and the court issued cautionary instructions).

b. The Commonwealth had a Substantial Need for the Evidence.

Moreover, the Commonwealth had a substantial need for the evidence. Defendant was charged with three counts of aggravated indecent assault. To convict defendant of this offense, in each instance, the Commonwealth must prove, *among other things,* that defendant intentionally engaged in non-consensual penetration of the victim's vagina. *See* 18 Pa. C.S. § 3125(a). In his deposition, defendant admitted to digitally penetrating the victim, though he claimed that it was consensual (N.T. Excerpted Testimony of James Reape from Trial by Jury, 4/17/18, at 29-32). Thus, at trial, the issue was one of consent. *See Defendant's Brief,* at 78 (noting that "Cosby posited . . . that the sexual contact was consensual").

The prior bad act evidence was, therefore, needed to establish that Constand did not consent to the sexual contact by defendant. Without this evidence, the Commonwealth would have had to rely on uncorroborated testimony of the victim about the lack of consent. In *Tyson,* the court made clear that this exact scenario created a heightened need for the evidence when it stated,

> If evidence of [a]ppellee's prior conviction is excluded, the Commonwealth must rely solely on the uncorroborated testimony of [the victim] to counter [a]ppellee's defense of consent to vaginal intercourse. Thus, the Commonwealth has a significant need for the prior crime evidence to prove [a]ppellee had non-consensual sex with [the victim].

Tyson, 119 A.3d at 362.

The Commonwealth's need for the evidence was heightened even more by the fact that the victim did not report the assault to the authorities until about a year afterward. *See Smith,* 635 A.2d at 1090 (finding that the Commonwealth "demonstrate[d] a need to present testimony of [defendant's] sexual abuse of [his other daughter] because the victim . . . failed to reveal promptly that she had been molested"); *see also Frank, supra* (finding that the Commonwealth presented a need to present evidence of

defendant's prior bad acts involving six additional sexual assault victims where the victim in the current case failed to promptly report the sexual assault). This is so especially in light of Pennsylvania's standard suggested jury instruction that advises the jury that it may consider the victim's failure to make a prompt complaint when assessing her credibility. Pa. SSJI (Crim) 4.13A. The court gave the jury the prompt complaint instruction at both of defendant's trial (N.T. Trial by Jury, 6/12/17, at 198-199; N.T. Trial by Jury, 4/25/18, at 37).

Furthermore, the prior bad act evidence was necessary for another purpose: to counter the defense's inevitable attacks on the victim's credibility, which were rampant during defendant's first trial and even more widespread during his second trial.

During the first trial, not only did defendant repeatedly seek to undermine Constand's credibility during cross-examination, but in his quest to convince the jury that any sexual contact was consensual, defense counsel tried to paint Constand as a liar during his closing argument (*see, e.g.,* N.T. Trial by Jury, 6/12/17, at 85 [referencing Constand's purportedly inconsistent statements and noting that "[s]he doesn't want to tell the truth

about what happened. She's gotten caught lying to law enforcement officers"]).

Defendant's attacks on Constand's credibility continued leading up to his second trial. *See, e.g., Motion in Limine to Admit Testimony Regarding Andrea Constand's Prior Statement Admitting She Intended to Fabricate a Claim of Sexual Assault.* And, once the trial began, his attacks on her credibility were instantaneous and relentless. They started at the outset of the defense opening when counsel told the jury that Constand supposedly talked to Marguerite Jackson about fabricating a sexual assault claim where she could "set up a celebrity and get a lot of money for my education and my business" (N.T. Excerpt from Trial by Jury, 4/10/18, 25). The attacks continued for the duration of the argument (*see, e.g., id.* at 28 [implying that Constand concocted the charges because she wanted "[m]oney, money and lots more money"]; *id.* at 32 [stating that "[h]er story keeps changing and evolving in ways that were going to help her in her civil suit"]; *id.* at 35 [stating that Constand "lied" and "kept changing her story"]; *id.* at 36 [highlighting Constand's "inconsistent statements"]; *id.* at 39 [calling Constand a "con artist"]).

The attacks continued throughout the trial testimony. To this end, defendant called several witnesses in an attempt to undermine Constand's account of the assault; most notably, Marguerite Jackson, who testified that Constand supposedly told her that she could make up a story about being sexually assaulted by a high profile celebrity so that she could make some money (N.T. Excerpted Testimony of Marguerite Jackson from Trial by Jury, 4/18/18, at 10-11). In addition, defense counsel repeatedly questioned law enforcement about purported inconsistencies in Constand's statements to the police (*see, e.g.,* Trial by Jury, 4/17/18, at 168 [attempting to elicit confirmation that Constand "gave very inconsistent statements" about the date of the assault]; *id.* at 169 ([attempting to elicit testimony that the prosecution was declined by the former district attorney because of Constand's supposed inconsistencies]; *id*. at 169-175 [pointing out purported inconsistencies in Constand's prior statement].

And defense counsel unyieldingly attacked Constand's credibility during cross-examination (*see, e.g.,* 4/13/18, at 118-131 [highlighting numerous purported inaccuracies and/or inconsistencies in her statement to the Durham police]; *id.* at 133-136 [pointing out supposed inaccuracies and/or inconsistencies in her statement to the Cheltenham Township

Police Department]; *id.* at 136 [pointing out that she contacted a civil attorney before contacting the Durham police]; *id.* at 149-150, 155-158, 160-162, 166-167 [pointing out a numerous purported discrepancies between her deposition testimony and her trial testimony]; *id.* at 150-153 [highlighting her mistaken recollection about the date of the assault]).

The attacks on Constand's credibility continued through the defense closing argument and, in fact, did not culminate until the very end of the argument (*see, e.g.,* N.T. Trial by Jury/Closings, 4/24/18, at 15 [telling the jury that it has "a lot of inconsistent statements by one person, and that's Ms. Constand"]; *id.* at 18 [describing Constand as "someone who gives inconsistent statements one after the other, after the other, after the other"); *id.* at 34 (stating that Constand "lied"]; *id.* at 39-55 [setting forth a supposed list of a dozen lies of Constand]; *id.* at 67 [calling her a "pathological liar"]; *id.* at 70 [stating that Constand "lies," has "credibility issues," and engages in "pathological manipulation"]; *id.* at 81 [stating that she has "given four statements at this point that are all conflicting"].

Because of the rampant attacks on Constand's credibility, among other reasons, the Commonwealth amply demonstrated a significant need for the prior bad act evidence. *See O'Brien,* 836 A.2d at 970 (evidence of

prior sexual assaults needed to counter the attacks on victim's testimony especially given five-year span between assault and reporting of assault); *see also Luktisch* 680 A.2d at 879 (when the credibility of the current victim and one of the prior bad act victims became "crippled," the Commonwealth's need to present another prior bad acts witness became "inflated"); *Gordon,* 652 A.2d at 324 (reversing the trial court's preclusion of prior bad act evidence because "the Commonwealth has demonstrated a need for the evidence, since appellee will undoubtedly assail the victim's credibility through . . . her failure to make a prompt complaint regarding the conduct or her apparent acquiescence in the acts by failing to resist at the time they occurred. Appellee might further attempt to show that the victim was mistaken regarding the nature of the acts.")

Indeed, the Commonwealth's need for this evidence at the time of defendant's second trial was far greater than it was before the first trial. This is so because prior to the first trial, the Commonwealth could only speculate about the extent of the need for the evidence. After having the benefit of proceeding with a full trial, however, the initially proffered claims of inevitable attacks on the victim's credibility had become a reality. To be sure, defense counsel geared their entire cross-examination of the

victim during the first trial toward an attack on her credibility—from the outset of Constand's testimony when counsel tried to establish that her testimony was "coached" to counsel's repeated inquiries about her purported quest to find an attorney "specializing in sexual assault lawsuits" (N.T. Trial by Jury, 6/6/17, 212-214, 254-260). In fact, during defense counsel's cross-examination of the victim, she expressly informed the jury that the victim's prior sworn testimony was inconsistent (*id.* at 241).

Despite the heightened need for the evidence, defendant claims there was no need because the Commonwealth had evidence "beyond that of the [c]omplainant"; to wit, testimony from Ms. Constand's mother as to conversations she had with defendant, and testimony from Dr. Barbara Ziv, who testified as to behaviors of sexual assault victims. *Defendant's Brief,* at 86. Not surprisingly, defendant offers no authority for his unfounded assertion. That a victim behavior expert testified about, *inter alia,* the reasons why sexual assault victims delay reporting, and the fact that Gianna Constand told the jury that defendant told her he gave her daughter prescription medication in no way obviates the need for the prior

bad act evidence—especially in light of the lack of forensic evidence in this case and the relentless attacks on Ms. Constand's credibility.

c. Cautionary Instructions Alleviated any Unfair Prejudice.

During defendant's trial, the court cautioned the jury – ***no less than 6 times*** – about the limited purpose for which it could consider the prior bad act evidence. Specifically, immediately after the testimony of Ms. Thomas, the first prior bad act witness, the court gave the jury that following limiting instruction:

> So this is one of those instructions that with certain of the witnesses that may be testifying, I will give you either before or after, but it is an important instruction regarding this witnesses.
>
> So now, again, you have heard evidence tending to prove that the defedant was guilty of some sort of improper conduct of which he is not charged in this case. And to be clear, you were asked about that in *voir dire*, about whether – not allowing something that might be not charged in this case to affect your ability to be fair and impartial.
>
> So, again, this is evidence tending to prove the defendant was guilty of some improper conduct from which he is not on trial. And again, that's the testimony of what you just heard. ***This defendant is not on trial for the testimony you just heard. This evidence is before you for a limited purpose. That is for the purpose of tending to show – and again, this***

> ***is what is going to be called, and you'll hear them argue, something called common plan, scheme, design, absence of mistake. And it is for that limited purpose only.***
>
> ***This evidence must not be considered by you in any way other than for the purpose that I've just stated. You must not regard this evidence as showing that the defedant is a person of bad character or of criminal tendencies from which you might be inclined to infer guilt.***
>
> Again, the defendant is not on trial for this conduct and you are not to use this for any purpose of showing that the defendant is a person of bad character or has criminal tendencies from which he – from which you might infer – be inclined to infer guilt.
>
> So that's a very important instruction. For the limited purpose to either show course of conduct, common plan, whatever it is, that you determine what you find from the testimony, it is not to be used to infer guilt or anything about the defendant's character

(N.T. Trial by Jury, 4/11/18, at 44-46). The court gave a similar limiting instruction before Baker-Kinney's testimony (N.T. Trial by Jury, 4/11/18, at 50-51); before Dickinson's tesimony (N.T. Trial by Jury, 4/12/18, at 65-67); before Lublin's testimony (*id.* at 69-70); and at the end of the prior bad act witnesses (*id.* at 166-168). Each time, the court told the jury, in no uncertain terms, that defendant was not on trial for the prior conduct, and

that it could not consider the evidence to show defendant is a person of bad character or criminal tendencies from which they could infer guilty. Instead, it explicitly told that jury that it may only consider the evidence for the limited purpose of establishing a common scheme or plan or demonstrating an absence of mistake or accident.

The court reiterated this instruction during its closing charge to the jury, reading almost verbatim from the suggested standard jury instruction for evidence of other offenses, Pa. SSJI 3.08 (Crim). It advised the jury:

> All right. Now we talk about other types of evidence and how the law views it. I reminded you a number of times when the witnesses were testifying of this. You did hear evidence tending, as the Commonwealth contends, to prove that the defendant is guilty of improper conduct for which he is not on trial.
>
> I am speaking of the testimony of Heidi Thomas, Janice Baker-Kinney, Chelan Lasha, Janice Dickinson, and Maud Lise-Lotte Lublin, and the disposition designations of the defendant regarding the Quaaludes. So that was five witnesses and depositions designations of the defendant regarding Quaaludes.
>
> That evidence was before you for a limited purpose. This is for the purpose of tending to show the defendant's alleged common plan, scheme or design and/or the absence of mistake. The evidence must not be considered by you in any other way than for the purpose I just stated. You must not regard this evidence as showing that the defendant

> is a person of bad character or of criminal tendencies from which might be inclined to infer guilt

(N.T. Trial by Jury, 4/25/18, at 35-36).[19]

Defendant, therefore, has failed to establish unfair prejudice because of the presumption that attaches to jury instructions. *See Hairston*, 84 A.3d at 666 (finding other act evidence admissible where the trial court's instruction on how the other act evidence should be considered minimized the likelihood that the evidence would inflame the jury or cause it to convict defendant on an improper basis); *see also Arrington*, 86 A.3d at 845 (holding that the probative value of the prior bad act evidence outweighed

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[19] The suggested standard jury charge reads as follows:

> EVIDENCE OF OTHER OFFENSES AS SUBSTANTIVE PROOF OF GUILT
>
> 1. You have heard evidence tending to prove that the defendant was guilty of [an offense] [improper conduct] for which [he] [she] is not on trial. I am speaking of the testimony to the effect that *[explain testimony].*
>
> 2. This evidence is before you for a limited purpose, that is, for the purpose of tending to [show *[give specifics]*] [contradict *[give specifics]*] [rebut *[give specifics]*] *[give specifics].* This evidence must not be considered by you in any way other than for the purpose I just stated. You must not regard this evidence as showing that the defendant is a person of bad character or criminal tendencies from which you might be inclined to infer guilt.

Pa. SSJI 3.08 (Crim).

its prejudicial value where the court provided the jury with a comprehensive instruction informing it of the limited and narrow purpose for which the evidence was admitted); *Boczkowski,* 846 A.2d at 89 (limiting instruction weighing in favor of upholding admission of prior bad act evidence); *Frank,* 577 A.2d at 616-618 (holding that trial court admission of evidence of defendant's prior sexual assault of children under the common plan or scheme exception was proper where the assaults possessed a high degree of similarities and the court issued cautionary instructions).[20]

Despite the careful balancing analysis employed by the trial court, defendant maintains that the prior bad act evidence was "highly prejudicial" because of the "current political and social climate." *Defendant's Brief,* at 84. This argument fails. To begin with, each of the

[20] Defendant takes issue with the limiting instructions provided by the court; he contends that they were "significantly flawed." *Defendant's Brief,* at 88. He has waived this claim, however, because he did not object to the instructions at the time they were given—or any time thereafter—and he did not object to the closing instructions when they were given—or any time before the jury retired to deliberate. The Pennsylvania Rules of Criminal Procedure expressly provide that "[n]o portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate." Pa. R.Crim.P. 647(C); *see Commonwealth v. Baker,* 963A.2d 495, 506 (Pa. Super. 2008) (providing that "the mere submission and subsequent denial of proposed points for charge that are inconsistent with omitted from the instructions actually given will not suffice to preserve an issue, absent of specific objection or exception to the charge or the trial court's ruling respecting the points"). In any event, the instructions were, in all respects proper. As noted, they tracked the language set forth in the suggested standard jury instruction.

seated jurors made clear during *voir dire* that they could put aside anything they heard or knew about the #*MeToo* movement, and that any knowledge they had of the movement would not affect his or her ability to be a fair and impartial juror (N.T. Jury Selection/Day 1, 4/2/18, at 104-105; N.T. Jury Selection/Day 2, 4/3/18, at 15, 29-30, 90, 107-108, 110-111, 119-120; N.T. Jury Selection/Day 3, 4/4/18, at 31-32, 90-91, 112, 132-134, 167-168). And the trial court explicitly cautioned the jury, on more than one occasion, that it was only to consider information ***presented at trial*** (*See* N.T. Trial by Jury, 4/9/18, at 197-198 [advising the jury of its "affirmative obligation to avoid anything that might result or appear to result in you being exposed to outside information or influence[,]" but rather only consider "evidence, arguments, and legal instruction that are presented during the course of the trial"]; *id.* at 198 [cautioning that "[a]llowing outside information to affect your judgment is unfair and prejudicial to the parties"]). As noted, the jury is presumed to have followed the court's cautionary instruction. *Jones,* 668 A.2d at 504.

Defendant also claims that he suffered prejudice because some of the prior bad act victims testified that they were involved in efforts to abolish the statute of limitations for crimes involving sexual assault. *Defendant's*

Brief, at 87. What defendant fails to mention, however, is that when the statute of limitations was brought up at trial, it was either on cross-examination ***by the defense***, or on re-direct examination by the prosecutor ***after defendant opened the door*** to that testimony on cross-examination (*see, e.g*, N.T. 4/12/18, at 8-9, 42-43, 118-126, 138; N.T. Testimony of Heidi Thomas, 4/11/18, at 32-35). In any event, defendant has failed to establish any unfair prejudice as a result of this testimony.

Defendant also claims he was prejudiced because the Commonwealth "paraded" the five prior bad acts victims before the jury. *Defendant's Brief*, at 88. Defendant's characterization is false. The Commonwealth did not "parade" any of its prior bad act victims before the jury. In fact, how each of these witnesses took the stand was no different than any other witness—both Commonwealth and defense. At the time of each witness's respective testimony, she entered the courtroom alone, through the side door near the front of the courtroom, quietly walked the short distance to the witness stand to tell her story, and then immediately left the courtroom after her testimony. There was no "parading" of witnesses, or any other shenanigans taking place, either before, during, or after each witness's testimony. To state otherwise is an inaccurate portrayal of what occurred.

Defendant also claims that the fact that the jury actually convicted him at his second trial—where five prior bad act victims testified—but hung at his first trial—where only one prior bad act victim testified—confirms that he was, in fact, unfairly prejudiced by the admission of the five prior bad acts. *Defendant's Brief,* at 87-88. This assertion is no more than sheer speculation. Only the jury knows the factors taken into consideration in it decision-making process. Any number of factors could have contributed to the different verdicts in his two trials. For starters, defendant had a new jury for his second trial. In addition, he had an entirely new legal defense team, who implemented new strategies and presented new witnesses. The Commonwealth, too, presented additional evidence in the second trial including, but not limited to, Dr. Ziv, who testified as to various rape myths and other victim behaviors. Defendant's assertion that the jury's finding of guilt, in and of itself, demonstrates unfair prejudice is unfounded and, indeed, improper. *See Commonwealth v. Miller*, 35 A.3d 1206, 1213 (Pa. 2012) (stating, in context of seemingly inconsistent verdicts, "[W]e refuse to inquire into or to speculate upon the nature of the jury's deliberations or the rationale behind the jury's decision. Whether the jury's verdict was the result of mistake,

compromise, lenity, or any other factor is not a question for this Court to review"); *Commonwealth v. Hitcho*, 123 A.3d 731, 754-55 (Pa. 2015) (defendant claiming his death sentence was due to the jury's passion, prejudice, or arbitrariness, and the Court holding, "We cannot set aside the jury's verdict based upon speculation that the jury did not do its duty.").

Finally, the Commonwealth would be remiss if it failed to point out that the trial court found that the testimony of ***all*** of the 19 prior bad acts victims proffered by the Commonwealth was relevant. That said, it sought to mitigate any prejudicial effect by limiting the number of prior bad act victims who testified at trial to five. *Opinion*, at 110; *see Commonwealth v Hicks*, 91 A.3d 47, 53 (Pa. 2014) (stating that the trial court "would have the authority to dictate how many cumulative witnesses may testify, but it cannot dictate which of those witnesses the Commonwealth may call to prove its case"). This continues to demonstrate that the trial court properly exercised its discretion in balancing the probative vale of the evidence versus its potential for unfair prejudice.

Stated simply, defendant has failed to meet his heavy burden to show that the trial court abused his discretion in permitting the Commonwealth to introduce the prior bad evidence. Judge O'Neill did not override or

misapply the law; his exercise of judgment was not manifestly unreasonable; and he did he demonstrate any prejudice, ill-will or partiality. Instead, he properly exercised his discretion in permitting the Commonwealth to introduce highly relevant prior bad act evidence. The court's ruling, therefore, should not disturbed.

II. DEFENDANT'S RECUSAL CLAIM IS WAIVED AND MERITLESS.

Defendant's recusal claim, shorn of its gratuitous allegation about a supposed extramarital affair, is essentially this: he insists that the law required recusal because the trial court and Castor, 20 years ago, competed for a political endorsement and Castor did something during the competition that the trial court supposedly did not like. According to defendant, this rendered the trial court unable to preside at the February 2016 *habeas* hearings at which Castor was a defense witness. Defendant's claim, however, is waived and meritless.

A. DEFENDANT'S CLAIM IS WAIVED.

Defendant's claim is waived. "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); *see also Commonwealth v. Luketic*, 162 A.3d 1149, 1157-1158 (Pa. Super. 2017) (same). If a recusal motion is based on after discovered evidence, "there must be a showing that . . . the evidence could not have been brought [earlier] to the attention of the . . . court in the exercise of due diligence." *League of Women Voters of Pennsylvania v. Commonwealth*, 179 A.3d 1080, 1087 (Pa. 2018) (quoting *Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority,* 489 A.2d 1291, 1301 (Pa. 1985)).

The alleged facts comprising the Castor claim were well-known prior to September 11, 2018, when defendant raised it for the first time. The claim is based on an article from a tabloid (Radar Online) published on March 28, 2018, the day before the first recusal hearing, which focused on whether the trial court's wife, who worked with sexual assault victims, mandated recusal. The article quotes defendant's spokesperson, Andrew Wyatt, as saying in response to the allegations, "It's very interesting—it's my first time hearing about it." In another article, also published the day before the hearing, Wyatt called the allegations about Castor "very disturbing." Montero, Doug, "Cosby Camp Reacts to Radar Report: 'Very

Disturbing' Details Could Dismiss Case," *Radar Online*, Mar. 28, 2018, radaronline.com/exclusives/2018/03/ bill-cosby-reaction-judge-steven-t-oneill-relationship-secret-witness-case-could-dismissed/ (last visited Jul. 25, 2019). Wyatt walked side-by-side with defendant every day into the courthouse, observed the court proceedings, and often spoke on behalf of defendant outside the courthouse. The notion that the release of this story on the eve of the recusal hearing was purely coincidental is hard to believe, especially because Wyatt is quoted. Because these facts were known to the defense team, or at least ***should*** have been known, more than five months before they raised it, this claim is waived.

Defendant also waived the claim by basing it on facts that were never presented to the trial court. He included in the reproduced record an affidavit from Castor. This was improper. Not only is it not part of the certified record, it is not part of the record at all—defendant failed to present the affidavit to the trial court. The affidavit, therefore, cannot be considered on appeal. And because defendant bases his appellate claim so heavily on the affidavit, he was waived the entire claim.

This deficiency is not simply a meaningless error. To the contrary, this affidavit is not part of the certified record on appeal; as such, despite

the fact defendant heavily relies on it throughout his brief, it may not be considered by this Court. *See Commonwealth v. Preston,* 904 A.2d 1, 6 (Pa. Super. 2006) (noting that "[t]he law of Pennsylvania is well settled that matters which are not of record cannot be considered on appeal").

Indeed, "[i]t is black letter law in this jurisdiction that an appellate court cannot consider anything which is not part of the record in the case." *Commonwealth v. Martz,* 926 A.2d 514, 524-525 (Pa. Super. 2007). Thus, materials that have only been included in briefs or reproduced record, but are not part of the record cannot be considered. *See Commonwealth v. Stanton,* 440 A.2d 585, 588 (Pa. Super. 1982) ("[i]t is of course fundamental that matters attached to or contained in briefs are not evidence and cannot be considered part of the record ... on appeal"). To this end, this Court has repeatedly stated that copying material and attaching them to a brief does not make it a part of the certified record. *See, e.g., Lundy v. Manchel,* 865 A.2d 850, 855 (Pa. Super. 2004); *First Union Nat. Bank v. F.A. Realty Investors Corp.,* 812 A.2d 719, 724 n. 3 (Pa. Super. 2002); *Commonwealth v. Holley,* 945 A.2d 241 (Pa. Super. 2008). "For purposes of appellate review, what is not of record does not exist." *Rosselli v. Rosselli,* 750 A.2d 355, 359 (Pa. Super. 2000).

This violation is particularly egregious—and significantly hampers meaningful appellate review—because many of the facts relied on, and argument made by, defendant in his appellate brief revolve around the affidavit that cannot be considered by the Court. For example, in the section of his brief titled "Evidence Creating the Appearance of Impropriety," he has ten cites to the record. *Defendant's Brief* at 92-95. Half of them cite to the affidavit. He continues throughout the brief to base his arguments on allegations made in the affidavit. Sifting through his brief and extracting the facts and argument that are not part of the certified record would be a difficult—if not insurmountable—task and prevents meaningful review. Undertaking the sifting task would have the inevitable effect of forcing this Court to develop defendant's argument for him. Of course, as this Court has expressly stated, "[i]t is not for this Court to develop an appellant's arguments." *Commonwealth v. Rush,* 959 A.2d 945, 950 (Pa. Super. 2008). "Rather, it is the appellant's obligation to present developed arguments and, in doing so, apply the relevant law to the facts of the case, persuade us that there were errors, and convince us relief is due because of those errors." *Rush, supra* at 950-951. If an appellant fails to do

so, the appellate court may find the argument waived. *Id.* at 951. Defendant's claim, accordingly, is waived on this ground as well.

B. DEFENDANT'S CLAIM IS MERITLESS.

In any event, defendant's claim that the trial court should have disclosed the purported facts in the article and *sua sponte* recused itself prior to the *habeas* hearing lacks merit. It is a tabloid claim based on a tabloid article.

The law governing recusal requests in Pennsylvania is well-settled. *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 89 (Pa. 1998). A party seeking recusal "bears the burden of producing evidence to establish bias, prejudice, or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially." *Commonwealth v. Watkins,* 108 A.3d 692, 734 (Pa. 2014) (citations omitted).

A trial judge facing a recusal request must consider (1) whether he can "assess the case in an impartial manner, free of personal bias or interest in the outcome," and (2) whether presiding over the case would "create an appearance of impropriety and/or would tend to undermine public confidence in the judiciary." *Commonwealth v. Kearney*, 92 A.3d 51, 62 (Pa. Super. 2014). Thus, a judge shall recuse himself from a "proceeding in

which the judge's impartiality might reasonably be questioned." PA. STAT. CODE OF JUDICIAL CONDUCT Rule 2.11; *see Commonwealth v. Blakeney,* 946 A.2d 645, 662 (Pa. 2008) (noting that "a trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can be reasonably questioned"), *quoting Commonwealth v. Goodman,* 311 A.2d 652, 654 (Pa. 1973).

Notably, "[t]here is a presumption that judges of this Commonwealth are 'honorable, fair and competent[.]'" *Lomas,* 130 A.3d at 122 (citing *In re Lokuta,* 11 A.3d 427, 427 (Pa. 2011)). Similarly, it is presumed that when faced with a recusal demand, the trial court is able to determine whether it can rule "in an impartial manner, free of personal bias or interest in the outcome." *Lomas*, 130 A.3d at 122 (citing *Arnold v. Arnold,* 847 A.2d 674, 680 (Pa. Super. 2004)). The decision whether a judge's continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary "is a personal and unreviewable decision that only the jurist can make." *Lomas,* 130 A.3d at 122 (citing *Arnold,* 847 A.2d at 680-681).

"Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overruled on appeal but for an abuse of discretion." *Kearney,* 92 A.3d at 62 (quoting *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 89 (Pa. 1998). Abuse of discretion is a very high standard. A ruling is not an abuse of discretion merely because the reviewing court might reach a different conclusion. *Commonwealth v. McClure*, 144 A.3d 970, 975 (Pa. Super. 2016). It is beyond an error in judgment. *Commonwealth v. Rodda*, 723 A.2d 212, 214 (Pa. Super. 1999) (*en banc*). It exists only where the judge's decision was manifestly unreasonable, or where the court ignored or misapplied the law, or exercised its discretion out of bias, partiality, prejudice, or ill will. *Commonwealth v. King*, 932 A.2d 948, 951 (Pa. Super. 2007).

Not surprisingly, defendant fails to cite a single case to support the proposition that a judge must *sua sponte* recuse himself because he and that witness competed for an endorsement from a political committee 20 years ago and he had a disagreement with that person 20 years ago. Indeed, such an allegation is unfair and calls to mind the following passage from *Lomas*:

> It would be an unworkable rule which demanded that a trial judge recuse whenever an acquaintance was a party to or had an interest in the controversy. Such a rule ignores that judges throughout the Commonwealth know and are known by many people, ... and assumes that no judge can remain impartial when presiding in such a case.
>
> ****
>
> If the judge feels that he can hear and dispose of the case fairly and without prejudice, his decision will be final unless there is an abuse of discretion. This must be so for the security of the bench and the successful administration of justice. ***Otherwise, unfounded and ofttimes malicious charges made during the trial by bold and unscrupulous advocates might be fatal to a cause, or litigation might be unfairly and improperly held up awaiting the decision of such a question or the assignment of another judge to try the case.*** If lightly countenanced, such practice might be resorted to, thereby tending to discredit the judicial system.

Id., 130 A.3d at 123 (quoting *Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority*, 489 A.2d 973, 1299 (Pa. Super. 1989) (emphasis added)).

Defendant's "unfounded and … malicious charges" do not withstand scrutiny. *Id.* This is made clear by the fact that the trial court presided over more than 2,000 criminal cases during Castor's tenure as District Attorney. If the trial court really had an axe to grind against the former District

Attorney, it is remarkable that this is the first time it has ever surfaced in the nearly 20 years since the trial court took the bench.

To be sure, defendant's core premise is fatally flawed. He believes that the trial court found Castor's testimony unreliable because of its supposed animus toward him. But defendant ignores the many glaring weaknesses in Castor's testimony. It is hard to believe ***anyone*** who gives four different versions of the same facts, which Castor did, as the prosecution highlighted during its lengthy cross-examination. The trial court found Castor's testimony less reliable than others based on legitimate credibility assessments, ***not*** from a personal bias against him. This was obvious to anyone in the courtroom those two days; after the hearing, *The Washington Post*[21] observed that Castor "has been shredded on the witness stand before the world." Moyer, Justin Wm., "The Prosecutor Undone By A 'Secret Agreement' With Bill Cosby," *The Washington Post*, Feb. 4, 2016, washingtonpost.com/news/morning-mix/wp/2016/02/04/the-prosecutor-undone-by-a-secret-agreement-with-bill-cosby/?utm_term=.682ae7696fc1/ (last visited July 25, 2019).

[21] Castor, a seasoned politician who has run for statewide office in the past, claimed during cross-examination he was not familiar with *The Washington Post*.

Yet the trial court still "undertook a conscientious reflection on claims raised in the [m]otion":

> Even if this unsubstantiated claim, raised on the eve of sentencing, is not waived, it is facially meritless. Accordingly, a hearing is neither required nor necessary. "The party who asserts that a trial judge must be disqualified must produce evidence establishing bias, prejudice, or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially." The Motion and supporting memorandum of law do nothing more than assert that this Court should have a bias, based on the campaign tactics of a witness twenty years ago, that somehow precluded the Court from making credibility determinations at a hearing in this case 31 months ago. This claim is wholly without merit.
>
> The undersigned has served on the Montgomery County Court of Common Pleas since July, 2002. For the first six years of this Court's tenure, 2002-2008, Mr. Castor served as the District Attorney of Montgomery County. Not once during his tenure as District Attorney was Mr. Castor, or anyone else, heard to ascribe some sort of "grudge" or prejudice against Mr. Castor in any criminal matter that came before this Court. Likewise, since 2009, Mr. Castor has, on occasion, appeared before this Court as a criminal defense attorney and has never sought disclosure or disqualification of the Court because of some perceived bias or "grudge" against him. No "grudge" animus, bias or prejudice can be claimed because it simply does not exist.
>
> Defense counsel's conclusory statement that any credibility determinations made by the Court as

to [all] witnesses who testified "was an express finding that the testimony of the former District Attorney, Mr. Castor, was not credible" is simply false, with no basis in fact. The Court carefully weighed the testimony of each of the witnesses4 at the February 2 and 3, 2016 hearing on the Petition for a Writ of Habeas Corpus, and applied the applicable law, in denying the portion of the Petition seeking dismissal of the charges. This Court's ruling on the Petition, as stated on the record and memorialized in the order of February 4, 2016, and its subsequent "Findings of Fact, Conclusions of Law and Order Sur: Defendant's Motion to Suppress Evidence Pursuant to Pa. R. Crim. P. 581 (I)," docketed December 5, 2016, were not based solely on the Court's credibility assessment of any individual witness, but rather on the testimony of all witnesses and ultimately rested on the legal insufficiency of the evidence presented by the defendant in support of his motions.

****

Finally, even though this Court believes the claim to be waived, the Court nevertheless undertook conscientious reflection on claims raised in the Motion. Throughout the pendency of this matter, and in every matter over which this Court presides, this Court is sensitive to its obligations under the Code of Judicial Conduct, and takes these obligations very seriously. This Court is confident that it has and can continue to assess this case in an impartial manner, free of personal bias or interest in the outcome. This Court simply has no bias against any witness called by the defense or the Defendant himself…

Memorandum Opinion and Order Sur Recusal, Dated Sept. 19, 2018, at pg. 5-7 (O'Neill, J.) (citations omitted). This waived and meritless claim does not warrant review or relief. *See Lomas,* 130 A.3d at 122 (explaining that whether a judge's continued involvement in the case "is a personal and unreviewable decision that only the jurist can make").

Lastly, the tactics of defendant in this case cannot be ignored. His pretrial hopes were set on the alleged non-prosecution agreement. When he lost that based on factual findings, he needed some way to win on appeal, and he could not do that through facts. He therefore decided to attack the factfinder. This tactic offered him the possibility of a do-over on the non-prosecution claim and also perhaps help him leverage favorable rulings. This attempted leveraging began with the recusal motion based on the judge's wife, who worked with sexual assault victims, and the conveniently released article—the day before the recusal hearing—about the alleged affair from decades ago. It continued with the improperly filed recusal motion of the eve of sentencing. Defendant filed the written motion under Pa. R.Crim.P. 704. The plain language of the rule does not allow written motions. Pa. R.Crim.P. 704(B)(1). Defendant's written motion was thus improper. There was also no need for him to raise it then

because he was not seeking the trial court's recusal from sentencing. Instead, he appears to have filed it as a "shot across the bow" to send a message to the trial court right before it was to impose sentence.

Relying on gossip about a judge's distant past because of unfavorable but fair rulings must be stopped. It risks becoming tantamount to blackmail, where a defendant threatens the court with outrageous and scandalous allegations, seeking to exert pressure on it to bend to his will. This is what *Lomas* feared. This sort of intimidation is beyond the pale. A line must be drawn or else this slash and burn approach will become more commonplace. *See Lomas*, 130 A.3d at 123 ("If lightly countenanced, such practice might be resorted to, thereby tending to discredit the judicial system.").[22]

[22] Defendant points to four instances from the *habeas* hearing that he contends shows the trial court's bias against Castor. He did not raise those issues in the trial court, however, and so they are waived. *See* Pa. R.A.P. 302 ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal"). Regardless, when viewed in context, there was nothing remotely improper about the judge's questioning. He was the factfinder and entitled to question the witness.

III. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S ATTEMPT TO HAVE THE CHARGES DISMISSED WHERE THERE WAS NO CREDIBLE EVIDENCE THAT THE DISTRICT ATTORNEY IN 2005 PROMISED NEVER TO PROSECUTE HIM.

The trial court properly denied defendant's attempt to have the charges dismissed based on a supposed "non-prosecution agreement." Defendant's claim otherwise fails for several reasons. First, no agreement existed. Second, even if the agreement existed, it was not a binding contract. The former District Attorney had no authority to grant non-statutory immunity, and defendant provided no consideration to the Commonwealth. Third, defendant cannot prevail on an estoppel theory. He did not actually or reasonably rely on the purported agreement when he decided not to invoke his Fifth Amendment rights at the deposition. Finally, even if the agreement existed, and even if it is entitled to some binding effect—either through contract or estoppel principles—the remedy would not permit the dismissal of charges, but instead would be restricted to the suppression of evidence.

A. THE STANDARD OF REVIEW.

This claim revolves around credibility determinations and factual findings. The standard of review is onerous for a party seeking to

challenge such rulings on appeal and very deferential to the conclusions of the lower 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 and must affirm, thereby paying the proper deference due to the factfinder who heard the witnesses testify and was in the sole position to observe the demeanor of the witnesses and assess their credibility.

Commonwealth of Pennsylvania, Dep't of Transp., Bureau of Driver Licensing v. O'Connell, 555 A.2d 873, 875 (Pa. 1989).

The Pennsylvania Supreme Court has properly left assessments of credibility to the factfinder, be that a jury or jurist. It is the factfinder that is in the best position to assess the truth of a statement relayed from the witness stand, not just by stacking it up against the evidence offered to corroborate or contradict, but also by observing the demeanor and physical presentation of a witness.

B. THE RECORD SUPPORTS THE TRIAL COURT'S CREDIBILITY AND FACTUAL FINDINGS AGAINST DEFENDANT.

In December 2015, a criminal complaint was filed against defendant, charging him with offenses stemming from sexual assault that occurred in

2004.[23] A preliminary hearing was scheduled, but before the preliminary hearing could take place defendant filed a self-styled *habeas corpus* petition. In it, he argued that he was allegedly immune from prosecution because former District Attorney Bruce L. Castor, Jr., entered into a "non-prosecution agreement" with him in 2005. As a remedy, he sought dismissal of charges. The trial court scheduled a hearing for February 2, 2016.

1. Day 1 of the *habeas corpus* hearings.

The hearing took two days. The first day, Castor testified for the defense. He specifically denied that there was an agreement, explaining that there was no "*quid pro quo*" (N.T. 2/2/16, 99).[24] Instead, he testified that he decided that he did not want to go forward with what he believed would be a difficult criminal prosecution, even though he believed the

[23] Andrea Constand had previously reported the assault to the authorities in 2005, but the District Attorney at the time, Castor declined prosecution. He announced his decision in a press release, dated February 17, 2005.

[24] In his brief, defendant refers, seemingly interchangeably, to the concept Castor espoused on the stand as, *inter alia*, a "promise," "agreement," and "judgment." This is no doubt because Castor himself offered many different characterizations of exactly what he claimed to do in 2005 before finally settling on the version he testified to on February 2, 2016.

victim (*id.* at 63, 113, 115).[25] He said he still "wanted some measure of justice," however (*id.* at 63). He thus made what he called "a final determination as the sovereign" not to prosecute defendant (*id.*). He testified that he told defendant's criminal defense attorney at the time, Walter Phillips, Esquire,[26] that he believed that his decision and press release announcing that no charges would be filed would strip defendant of his Fifth Amendment rights in any future civil lawsuit (*id.* at 64-65). Castor testified that Phillips agreed with this "legal assessment" (*id.* at 65). Castor insisted that he did this to benefit the victim in her then-unfiled civil action against defendant and that he did so with the agreement of the victim's civil attorneys (*id.* at 98).

Castor testified, and defendant adopts in his brief, that this decision was rendered with a review of the evidence in the case. *See Defendant's Brief,* at 117. And in his 2005 press release declining charges Castor also suggested he reviewed the evidence in full ***and*** consulted with Montgomery County and Cheltenham Township detectives (N.T. 2/2/16

[25] Castor, who never met the victim during the 2005 criminal investigation (*id.* at 115), would later go on to say that the victim had "compromised her credibility" (*id.* at 93).

[26] Phillips is now deceased. Defendant was also represented, however, by a civil attorney, Patrick J. O'Connor. He is alive, but defendant chose not to call him as a witness.

at 82); *Defendant's Brief,* at 117 n.32. Castor did not, in fact, consult with Cheltenham Township Detectives. Indeed Sergeant Richard Schaeffer, the lead investigator from the Cheltenham Township Police Department, testified during both trials that the day Castor issued his press release declining charges, investigators from Cheltenham had been meeting to discuss the next steps for gathering further evidence to bolster a potential prosecution (N.T. 4/17/18 at 82-83). There would, of course, be no reason for a meeting to discuss additional investigative steps if Castor had in fact "consulted with . . . Cheltenham detectives" in reaching his conclusion as he testified to under oath and represented to the public in his 2005 press release.

The Commonwealth extensively cross-examined Castor. His testimony was inconsistent with, among other things, the 2005 press release that stated his decision was open to reconsideration, his statements to journalists over the years that the case could be reopened, and his September 2015, emails to then-District Attorney Ferman,[27] in which he described the purported arrangement in detail. He wrote those emails in

[27] Former District Attorney Ferman is now a judge of the Court of Common Pleas, Montgomery County, Pennsylvania.

the midst of a political campaign for district attorney, after he had learned of a renewed investigation into defendant's case. In particular, the challenges to Castor on cross-examination largely centered on: (1) his new and novel characterization of his non-prosecution agreement, (2) inconsistencies between his testimony and past public statements about the case, (3) inconsistencies related to past public comments that the case could be re-opened, and (4) inconsistencies with his testimony and the 2015 emails written to then-District Attorney Ferman.

a. Castor's strange characterization of the 2005 press release.

One of the first issues addressed on cross-examination was Castor's fashioning of the 2005 press release that he, for the first time during direct testimony, claimed he, as "sovereign," forever bound the Commonwealth not to prosecute. Castor went to great lengths to parse and explain the language of this now-sovereign pronouncement in a nearly sentence-by-sentence explanation of its meaning on direct examination (N.T. 2/2/16 at 75-87).[28] On cross-examination, he explained that when he wrote the press

[28] This explanation of the press release dealt directly with the words Castor used. He had not yet explained that the different grammar and tenses he used were significant. That would only come near the end of his cross-examination, when he elucidated the significance of his using present, versus past, tense in the press release (*id.* at 203-204).

release, he did so with the intention that none of the three target audiences—the media, other attorneys, and the "litigants" as he described them—would understand his edict in its entirety. He then changed course, explaining that he did expect the "litigants" to understand the entirety of the press release, but that he simply did not care if the victim and her attorneys understood it, as the only person who mattered in this context was defendant (*id.* at 120, 122, 125-126). One thing Castor did not want, as he explained through testimony, was for this to become "a matter of public debate" (*id.* at 126).

Castor unveiled this version of events for the first time at the hearing. It was not only different from what he had repeatedly said in the past, but also legally confused and baseless. Though a district attorney may enter into a contractual agreement not to prosecute a defendant, he may not ***unilaterally*** confer what amounts to transactional immunity. "Our Supreme Court has determined that under Pennsylvania law only use immunity is available to a witness." *Commonwealth v. Swinehart*, 642 A.2d 504, 506 (Pa. Super. 1994). Use immunity is available only through a court order. *Commonwealth v. Parker*, 611 A.2d 199, 200 n.1 (Pa. 1992). Of course, there was no court order here. Further, a defective attempt to confer

immunity does not strip an individual of his or her Fifth Amendment rights. *See United States v. Doe*, 465 U.S. 605, 616-617 (1984) (holding that a government promise of immunity without court order does not strip an individual of his Fifth Amendment rights).

b. Castor's testimony was inconsistent with his past public statements.

Next addressed on cross-examination was Castor's claim that, in 2005, he wanted to create the "best possible environment" for the victim to prevail in a civil lawsuit. To demonstrate the inconsistency of this claim with reality, the Commonwealth highlighted a variety of past public statements Castor had made. In this respect, Castor demonstrated, at times, an uncertain memory.[29] He was confronted with the following past public statements:

When asked about the victim's credibility at a press conference in January 2005, Castor was quoted as calling "inaccurate" a report that he had determined her account credible. Castor testified he did not recall the press conference; he also testified he did not recall making this statement

[29] Castor's failures of memory were highly suspect especially in light of what the trial court aptly described as "pinpoint accuracy as to a lot of things that occurred in 2005" when Castor was being asked questions by defendant's counsel on direct examination (*id*. at 161).

even when shown a direct quote from a news account (*id.* at 129-137). This 2005 statement—declining to endorse the victim's credibility—was inconsistent with his testimony during the February 2016 *habeas* hearing that he believed the victim (*id.* at 113), with his stated purpose of creating an atmosphere of success for the victim (*id.* at 77), and his 2015 email to then-District Attorney Ferman.

On the same day in January 2005, Castor was quoted as stating that defendant was cooperative "and he appeared to be not withholding anything" (*id.* at 141-142). Once again, Castor testified that he did not remember making the statement. His statement to the press that it was inaccurate that he found the victim's account to be credible, while also claiming defendant was cooperative and did not withhold anything, was inconsistent with both his February 2016 testimony and the 2015 email he sent to then-District Attorney Ferman. It was also inconsistent with his claim that he sought to create a positive environment for the victim.

On the same day in January 2005, Castor was quoted as stating that the victim's case was "weak" (*id.* at 148-149). He testified that he did not remember making this statement either. Nonetheless, such a statement was

inconsistent with his testimony and the 2015 email to then-District Attorney Ferman.

On the same day in January 2005, Castor was quoted as stating the following about the allegations: "In Pennsylvania, we charge people for criminal conduct. We don't charge people with making a mistake or doing something foolish" (*id.* at 154). Once more, Castor failed to recall having made this statement (*id.*). Nonetheless, such a statement was inconsistent with his testimony and the 2015 email to then-District Attorney Ferman.

Castor's past statements, made at a time when he was purportedly trying to create a positive atmosphere for the victim to succeed civilly, contrasted greatly with his more recent statements about the case. These new statements represented not only inconsistencies, but also an apparent change of heart about certain elements of the criminal case. They also came at a time when public sentiment had turned against defendant.

First, in November 2014, when recalling the criminal investigation, Castor was quoted as now saying that the victim "didn't tell us anything that was actually criminal." Castor testified he could not recall making this statement.

Second, again in November 2014, Castor was quoted in an article in *The Washington Post,* explaining that his statements about insufficient reliable evidence was "'prosecutor's speak' for 'I think he did it but there's just not enough here to prosecute.'" (*id.* at 167). Once more, Castor testified he could not recall this statement (*id.*). The statement to the *Washington Post* was inconsistent with his *habeas* testimony, specifically his repeated attempts during his time under oath to attack the credibility of the victim and the case in an effort to justify his decision.

Third, again in November 2014, Castor appeared in an interview on CNN. Despite this being a television interview in 2014, as opposed to a newspaper interview in 2014 or press conference in 2005, Castor testified that he still could not remember what he said. The Commonwealth then played the interview—during which Castor stated, in reference to his recollection of the law enforcement interview of defendant, "I thought he was lying"—for Castor to see with his own eyes. After seeing himself on video making this statement, Castor begrudgingly testified that he recalled making the statement (*id.* at 170). Castor's improved recollection aside, this statement is, of course, inconsistent with statements he made in 2005 about defendant being cooperative and not withholding anything. Castor was

not asked to explain how an individual can withhold nothing while, at the same time, also be lying.

Beyond the inconsistencies in his past statements compared to his present testimony, Castor also noted, on direct and on cross-examination, that he intended part of the 2005 press release as a "threat" issued to the victim and her attorneys (*id.* at 156-157). He made this threat to ensure that the victim and her attorneys did not "attack," in Castor's words, his decision in the case (*id.*).

c. Castor's 2015 correspondence with then-District Attorney Ferman cast further doubt on his credibility.

Cross-examination then addressed the 2005 press release and the emails Castor wrote to then-District Attorney Ferman in 2015. In the first email, dated September 23, 2015, Castor wrote in multiple different instances that he reached "an agreement" between himself, in the form of the "Sovereign of the Commonwealth of Pennsylvania," defendant's attorney, and the victim's attorneys. While cautious to maintain that there was no promise or agreement, but rather a "judgment as the [S]overeign" (*id.* at 174), Castor tried to elaborate on who agreed to what. To this end, he was questioned about the following excerpts from his 2015 email:

- "With the agreement of . . . Andrea's lawyers, I wrote the attached [press release] as the only comment I would make" (*id.* at 188).

- "With the agreement of . . . Andrea's lawyers, I intentionally and specifically bound the Commonwealth" (*id.* at 190).

- "In fact, that was the specific intent of all parties involved, including the Commonwealth and the Plaintiff's lawyers" (*id.* at 191).

- "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" (*id.* at 195).

Though these statements imply Castor discussed the matter with the involved parties, he sought to distance himself from that conclusion during his testimony. Instead, he testified that he remembered delegating contact with the victim's attorneys to then-First Assistant Ferman and instructing her on what to do (*id.* at 187-188; 209).

Castor's recollections took the following forms. First, Castor did not remember if then-First Assistant Ferman reported back to him about what the victim's attorneys said about Castor's "sovereign edict" (*id.* at 188). Then, he testified that then-First Assistant Ferman did not report any objection from the victim's attorneys so that is why he repeatedly wrote

about their "agreement" with the "sovereign edict" (*id.* at 189). Castor then modified his recollection again, testifying that he assumed then-First Assistant Ferman reported something back to him but he could not remember what it was (*id.* at 193). Next, Castor testified that, while he did not remember what then-First Assistant Ferman reported, it actually did not matter what the victim's attorneys thought of his sovereign pronouncement (*id.* at 193-194). Finally, Castor settled on not remembering if then-First Assistant Ferman reported anything to him about what the victim's attorneys said (*id.* at 195).

Castor was then questioned about a letter he received from then-District Attorney Ferman that stated, "the first I heard of such a binding agreement was your email sent this past Wednesday [September 23, 2015]." When asked whether he was shocked or surprised that then-District Attorney Ferman had no recollection of his edict, Castor replied, "I believe she tells the truth as she recalls it" (*id.* at 207-208).

Next, Castor was questioned about an email he wrote to then-District Attorney Ferman on September 25, 2015, in reply to her letter cited above. In this email, Castor returned to the idea that the victim's attorneys somehow agreed with his edict. Referring to the written press release, he

wrote in the email, "That is what the lawyers for the plaintiff wanted and I agreed" (*id.* at 211). He also wrote, "I signed the press release for precisely this reason, at the request of plaintiff's counsel" (*id.* at 212). Finally, he wrote, "The attached [press release] which was on letterhead and signed by me as District Attorney, the concept approved by the plaintiff's lawyers was a 'written declaration' from the attorney for the Commonwealth" (*id.* at 214).

When asked where this information, the specific requests, and instructions from the victim's attorneys came from, Castor could only say that it came from then-First Assistant Ferman (*id.* at 211). When pressed, he testified that he could only "assume" it was then-First Assistant Ferman who told him that (*id.* at 213). He then testified that he was 90 percent sure it was then-First Assistant Ferman, but it could have been an investigator (*id.* at 213). Regardless, that contrasted with his earlier testimony that was ambiguous at best on whether he remembered then-First Assistant Ferman reporting back to him, or whether he wrote about the "agreement" by the

victim's attorneys because of the omission of a report back from then-First Assistant Ferman.[30]

d. Castor's attempts to explain what his 2005 press release meant when it said the case could be reopened made no sense.

Castor also testified about which specific portion of the 2005 press release made his pronouncement absolute. He testified that the phrase, "the District Attorney finds insufficient, credible, and admissible evidence exists upon which any charge against Mr. Cosby could be sustained beyond a reasonable doubt," was that absolute language (*id.* at 203-204). He testified that because (1) he used the present tense, (2) the word "exists," and (3) the word "could," he meant the press release to be an "absolute" (*id.*).

Castor was questioned about the ambiguity his written pronouncement left about the case being re-opened; he was questioned about a specific sentence in the 2005 press release reading, "District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise" (*id.* at 217). Castor testified on direct examination, and initially reiterated on cross-examination, that this

[30] Like O'Connor, defendant chose not to call Judge Ferman as a witness.

modified his earlier statement in the press release about his not intending any further comment (*id.* at 217).

Castor was then confronted with an article from *The Philadelphia Inquirer* published on January 31, 2016, and containing statements he made in either 2014 or 2015 (*id.* at 219). In that article, Castor was quoted as saying, "I put in there that if any evidence surfaced that was admissible then I would revisit the issue. And that evidently is what the D.A. is doing" (*id.* at 220). This quote appeared in the article as a reference by Castor to the press release and his suggestion that he had left the door open to defendant being charged.

When questioned about the article and the quotes, Castor denied knowing what he was referring to when he said, "I put it in there" (*id.* at 220). He then suggested that he might have been referring to a perjury case or one of the "50 or so" other allegations that had surfaced since 2005 (*id.* at 221), none of which, of course, occurred in Montgomery County.

The quote in the article was not the only statement that contradicted Castor's testimony about his press release not leaving open the possibility of charges in the instant case. To be sure, Castor was questioned again about his September 25, 2015, email to then-District Attorney Risa Vetri

Ferman, where he wrote: "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.* at 222). When asked how this could be, given his pronouncement, Castor testified that by using the term "***a*** prosecution" he was referring to other potential allegations involving victims other than Constand (none of which have jurisdiction in Montgomery County), and had he intended to refer to the instant case he would have used the term "***the*** prosecution" (*id.* at 223) (emphasis added).

2. Day 2 of the *habeas corpus* hearings.

On the second day of the hearing, the defense concluded its case by presenting John Schmitt, Esquire, a civil attorney who had represented defendant in various matters since 1983 (N.T. 2/3/16, at 7). He testified that he never spoke with Castor, but Phillips had told him that Castor had made "an irrevocable commitment" not to prosecute defendant (*id.* at 11). Schmitt testified that, but for this alleged commitment, he would not have allowed defendant to sit for the civil deposition (*id.* at 14).

Schmitt's testimony about the alleged "irrevocable commitment" was dubious. His failure to obtain such an important agreement in writing—or

even to make it a part of the record at any time during the civil lawsuit—is remarkable given his experience and past practice (*id.* at 16-17, 25-26, 33-34). If there had really been any such agreement, surely he would have taken such basic steps to protect his client's interests. Further, as part of the settlement of the civil suit, he had attempted to negotiate a confidentiality agreement that precluded the victim from ever cooperating with the police—something that would have been unnecessary if there really were an "irrevocable commitment" (*id.* at 47-48).

Schmitt's testimony that he would have advised defendant to invoke his Fifth Amendment rights at the depositions but for the "irrevocable commitment" was equally dubious. Indeed, defendant frequently spoke about the incident without invoking his right to remain silent. Schmitt had permitted defendant to be interviewed by detectives during the criminal investigation, and at no time did he invoke his Fifth Amendment rights (*id.* at 18). That worked out well for him, since no charges were filed at that time. During the criminal investigation, Schmitt also negotiated an agreement for defendant to give an interview about the case to the *National Enquirer*, and defendant did so after the investigation was concluded (*id.* at 33, 176). Finally, at the civil depositions, defendant maintained his

innocence, as he did in the police interview. Significantly, he did not invoke his Fifth Amendment rights when questioned about ***other*** potential victims, who clearly would not have been covered by any supposed arrangement with Castor (*id.* at 58-59).

The Commonwealth presented Dolores Troiani, Esquire, and Bebe Kivitz, Esquire, the civil attorneys who represented Constand in 2005. They testified that Castor never mentioned any understanding he had with Phillips that defendant could not invoke his Fifth Amendment rights in a civil lawsuit and, further, that neither defendant nor his several civil attorneys ever mentioned this supposed arrangement at any time throughout the civil litigation (*id.* at 184, 236-237).

Troiani, an experienced civil practitioner, testified that should such an agreement exist, it would be customary to note it for the record prior to the start of the deposition. While some stipulations and agreements were placed on the record at the outset of defendant's deposition, there was no mention whatsoever of this supposed agreement (*id.* at 178-79). Troiani also testified that if defendant had invoked his Fifth Amendment rights at the deposition, it would have ***benefited*** their civil case (*id.* at 176). *See Harmon v. Mifflin County School Dist.*, 713 A.2d 620, 623-624 (Pa. 1998)

(noting that "a party's failure to testify can support an inference that whatever testimony he could have given would have been unfavorable to him"). Specifically, it could have led to an adverse-inference instruction at trial and, thus, "the only testimony in our case would have been [Constand's] version of the facts" (N.T. 2/3/16, at 176).

Troiani also described the atmosphere during defendant's 2005-2006 depositions. Far from a man unburdened from the threat of criminal prosecution being forced to answer questions put to him, defendant—sometimes at the behest of counsel—either refused to answer many questions or was intentionally non-responsive. Defendant became more and more contentious as the deposition went on. It came to the point that Troiani was forced to file motions to compel with the court, most of which were granted, in order to force defendant to answer questions (*id.* at 181-84).

At the conclusion of testimony, the trial court denied defendant's motion based on his "non-prosecution agreement" claim. In its order, the trial court explained that "a credibility determination" was "an inherent part" of its ruling (*id.* at 307; *Order*, dated Feb. 4, 2016 (O'Neill, J.)); *see also*

Findings of Fact, Conclusions of Law, and Order Sur Defendant's Motion to Suppress Evidence Pursuant to Pa. R.Crim.P. 581(I) (Filed Dec. 5, 2016).

C. THERE WAS NO PROMISE AND NO RELIANCE.

As to the alleged promise that never was, defendant limits his argument on appeal to promissory estoppel. He argues that he detrimentally relied on Castor's supposed promise not to prosecute him when he decided not to invoke his Fifth Amendment rights during his deposition testimony in the matter of *Constand v. Cosby,* months after Castor closed the initial criminal investigation. The evidence offered by defendant was not credible when compared to the evidence offered by the Commonwealth. In any event, even if the alleged promise existed and defendant actually relied on it, he would not be entitled to relief of any sort—in particular, the dismissal of charges. Defendant could not have reasonably relied on it when he decided not to invoke his Fifth Amendment rights at the deposition. Finally, the cases defendant relies on are easily distinguishable.

As an initial matter, a trial court's decision to grant or deny a motion to dismiss criminal charges is vested in the sound discretion of that court

and may only be overturned upon a showing of abuse of discretion. *Commonwealth v. Doolin*, 24 A.3d 998, 1003 (Pa. Super. 2011).

Importantly, the trial court made a factual finding that these allegations—be they a promise, agreement, judgment, edict or whatever term Castor settled on—were incredible. "Questions of credibility and conflicts in the evidence presented are for the trial court to resolve, not our appellate courts." *O'Connell,* 555 A.2d at 875. As the Pennsylvania Supreme court explained,

> [a]s 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 and must affirm, thereby paying the proper deference due to the factfinder who heard the witnesses testify and was in the sole position to observe the demeanor of the witnesses and assess their credibility.

Id. at 875. Thus, when an appellate court is reviewing a court's findings of fact and credibility determinations, those findings are ***binding*** if they find any support in the record. *Commonwealth v. Myers*, 722 A.2d 649, 652 (Pa. 1998).

While it is understandable that defendant clings to the revisionist narrative crafted by Castor and presented by his counsel, it lacks any

credible factual basis. To the contrary, as demonstrated above, Castor's testimony is facially incredible, and he contradicted himself at multiple turns. Without belaboring what is clearly identified above, Castor repeatedly contradicted emails he wrote to then-District Attorney Ferman about what the victim's attorneys knew about and/or requested, and ultimately even contradicted his own testimony on these points; he contradicted what he directed then-First Assistant Ferman to do and what she reported back; he repeatedly undercut his claim that he was trying to create an environment through which the victim could succeed with a civil lawsuit when confronted with statements he made at the time of the 2005 investigation and subsequent to it; he admitted that he intended to threaten the victim and her attorneys with the contents of his press release; he utterly failed to explain how a press release could constitute or represent the sort of binding judgment he made it out to be; and he contradicted the entire premise of his revisionist history by writing to then-District Attorney Ferman that he believed a prosecution could be had, but just not with any evidence garnered from the civil case and, in particular, defendant's deposition.

Defendant, much like Castor, also seemingly has a selective memory. He suggests that the Commonwealth did not challenge Schmitt's credibility—and even says that the trial court did not address his testimony—while being careful to limit his claim to only the trial court's findings of fact and conclusions of law regarding suppression. In fact, however, the Commonwealth challenged Schmitt at every turn and elicited answers that plainly contradicted his belief—that was based entirely on hearsay and "understandings"—that there was any judgment or agreement not to prosecute (*see, e.g.*, N.T. 2/3/16, at 22-27, 31-33).

Schmitt was forced to admit on cross-examination that he permitted defendant to be questioned by police and, during an interview in advance of that questioning, did not believe that defendant could incriminate himself (*id.* at 22-24). He also admitted to negotiating with the *National Enquirer* on the details of a published interview with defendant regarding the criminal investigation while the criminal investigation was ongoing, and also trying to negotiate the settlement agreement to prohibit Constand 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 the Schmitt's testimony, as it is patently obvious that his testimony belies his

claim that there was some "promise" from Castor not to prosecute (*id.* at 25-27, 39-41). Further, by crediting the testimony of Troiani and Kivitz the trial court necessarily discredited Schmitt just as it did Castor.

While defendant 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(b) opinion, which makes it abundantly clear that Schmitt's conduct in representing defendant was totally and completely inconsistent with the existence of any promise or agreement not to prosecute from Castor.

The trial court had a choice after listening to the evidence and observing the witnesses. It chose to credit the evidence offered by the Commonwealth and reject that offered by the defense. That choice should remain undisturbed, given the ample evidence supporting it in the record. *See Myers,* 722 A.2d at 652 (holding that a trial court's findings of fact and credibility determinations are binding if there is any support in the record).

As it relates to promissory estoppel, assuming this Court declines to accept the otherwise binding credibility assessments of the trial court, defendant's claim still fails. The party who seeks the benefit of promissory

estoppel must show the following: "(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." *Shoemaker v. Commonwealth Bank*, 700 A.2d 1003, 1006 (Pa. Super. 1997). Satisfaction of the third requirement depends, in part, on the reasonableness of the promisee's reliance. *Thatcher's Drug Store v. Consolidated Supermarkets*, 636 A.2d 156, 160 (Pa. 1994) (quoting *Restatement (Second) of Contracts* § 90, cmt. b).

Here, as a factual matter, there was no promise and no actual reliance. The trial court denied defendant's claim based on credibility, and that should remain undisturbed. If there was no promise (there was not), then there can be no reliance on same.

In any event, even if there were a promise, defendant's reliance on it—an informal, unwritten promise of non-prosecution—was unreasonable, as he was then represented by a competent team of lawyers. Those attorneys had the professional responsibility to ensure that they accurately advised him about any adverse consequences of his deposition testimony. They should have known that Castor's alleged attempt to unilaterally

confer transactional immunity—never even put down in writing—was defective. *See Commonwealth v. Swinehart*, 642 A.2d 504, 506 (Pa. Super. 1994), ("Our Supreme Court has determined that under Pennsylvania law only use immunity is available to a witness."). They also should have known that a defective attempt to confer immunity did not strip their client of his Fifth Amendment rights. *See United States v. Doe*, 465 U.S. 605, 616-617 (1984) (holding that a government promise of immunity without court order does not strip an individual of his Fifth Amendment rights). No reasonable attorney would have failed to recognize this clear law. But even if defendant's counsel failed in their duty and advised him to rely on Castor's mistaken representation (if he even made it in the first place), such a failure would have no bearing on the criminal case against defendant. The alleged reliance was unreasonable; and, therefore, defendant's estoppel claim fails.

What few cases defendant cites—some of which are extrajurisdictional[31]— involve actual non-prosecution agreements. *See, e.g., Stipetich,* 652 A.2d at 1296 (noting that "[n]one of the parties contest the fact

[31] Of course, the extrajurisdictional cases he relies on are not binding on this Court. *See Verdini*, 135 A.3d at 619 n.5 (noting that the decisions of the lower federal courts and other states' courts are not binding in Pennsylvania).

that an agreement was entered into") (Cappy, J., dissenting). There was no such agreement here. Even Castor admitted that there was no "*quid pro quo*" (N.T. 2/2/16, 99). Those cases are therefore distinguishable.

Defendant also attempts to draw parallels to contract principles. *See Defendant's Brief,* at 121-122. He overlooks a basic fact, however: in Pennsylvania cases where the courts enforce an agreement under a contract theory, consideration supported the agreement.

In *Commonwealth v. Ginn*, 587 A.2d 314 (Pa. 1991), for example, the parties agreed that a mutually acceptable accountant would review a company's record. If that accountant opined that the defendant had diverted funds, she agreed to plead guilty. If the accountant opined that she had not diverted funds, the Commonwealth agreed to *nol pros* the case. Both parties agreed to forgo the exercise of their legal rights: the prosecutor agreed to restrain his discretion to prosecute the case, and the defendant agreed to forfeit her right to dispute the charges. Thus, consideration supported the parties' agreement. *Commonwealth v. Hainesworth*, 82 A.2d 444 (Pa. Super. 2013), and *Dunn v. Colleran*, 247 F.3d 450 (3d Cir. 2001), also involved enforceable contracts due to consideration. In both instances, the respective defendants entered guilty pleas in exchange for the

Commonwealth's promised conduct—to require a shorter sex-offender registration period or recommend a certain range of sentences, respectively. The defendants in those cases surrendered their right to challenge the Commonwealth's case.

Defendant's reliance on contract principles is, therefore, misplaced. He gave up no right in his criminal case: he did not agree to plead guilty if an agreed-upon condition were met, *Ginn*, *supra,* or to plead guilty based on a negotiated sentence, *Hainesworth*, *supra*. Rather, he alleges that he gave up his right to invoke his Fifth Amendment rights in a civil case in federal court that the victim had not yet even filed. Even assuming for the sake of argument that such an assertion were true, defendant has cited no authority for the proposition that such attenuated "consideration" may bind the Commonwealth.

Further, it seems inherently troublesome for prosecutors to allow multi-millionaire defendants to essentially buy their way out of criminal charges by agreeing to concessions during a one-party "negotiation" in a private party's civil suit—an option that is off-the-table for ordinary defendants. If a prosecutor believes a complainant deserves justice, he or she should seek it in a court of criminal law. A secret agreement that

allows a wealthy suspect to avoid criminal charges like this should not be enforced. *See generally Bowman v. Sunoco, Inc.*, 986 A.2d 883, 886 (Pa. Super. 2009) (contracts that violate public policy are invalid and unenforceable).

Defendant also misstates the remedy for estoppel claims in the criminal context. The proper remedy for such claims, ***if proven to be true***, is not dismissal of charges, but rather the suppression of evidence obtained as a result of the defendant's reliance. As the Pennsylvania Supreme Court explained in *Commonwealth v. Parker*:

> Appellant contends that the immunity promised him, albeit defective, should estop the Commonwealth from prosecuting his parole violation. However, 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.***

Id., 611 A.2d 199, 201 (Pa. 1992) (emphasis added); *see also Stipetich*, 652 A.2d at 1296 (Pa. 1995) (same).

IV. THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS WHERE THERE WAS NO PROMISE BY THE COMMONWEALTH FOR THE DEFENDANT TO RELY UPON AND WHERE HE FREELY CHOSE TO TESTIFY AT HIS CIVIL DEPOSITION.

Defendant next advances arguments that are similar to those presented in the preceding section and premised on the exact same facts. As such, the Commonwealth incorporates by reference the factual summary of the preceding section. For the same reasons set forth above, at least with respect to the trial court's factual and credibility determinations, the court's decision should remain undisturbed. At the absolute best, defendant was able to demonstrate that Castor exercised non-binding prosecutorial discretion in 2005 when he declined to authorize charges. There was, therefore, nothing for defendant to rely upon when sitting for his civil deposition, and certainly no constitutional impediment to the Commonwealth using the contents of his deposition at trial.

"In reviewing a suppression court's ruling, an appellate court is bound by factual findings supported by the record." *Commonwealth v. Slaton*, 680 A.2d 5, 5 (Pa. 1992); *see Commonwealth v. James*, 486 A.2d 376, 379 (Pa. 1985) (noting that a reviewing court is "bound by the findings of a suppression court if those findings are supported by the record"). If the

factual findings are supported by the record, then the only remaining determination is whether those legal conclusions drawn from those facts are correct. *Commonwealth v. McClellan*, 178 A.3d 874, 880-81 (Pa. Super. 2018). Moreover, when "the Commonwealth prevailed before the suppression court, [an appellate court] may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole." *Id.*

Defendant claims that a civil deposition and a statement to law enforcement are different. While the Commonwealth does not disagree with that premise, defendant misses the mark when it comes to the interplay between a statement to law enforcement and a deposition. In this particular case, the fact that defendant voluntarily submitted to an interview with police demonstrates that he did not have any concern that he may incriminate himself. Schmitt, his attorney, even interviewed him prior to his police statement and also did not believe that there was any concern that he would incriminate himself. While it is unclear why defendant was not concerned about incriminating himself when facing multiple seasoned detectives, but purportedly was when facing plaintiff's

lawyers, that is of no moment. Rather, the fact that defendant was not concerned about incriminating himself with the police belies his new claim that he was concerned with incriminating himself during a deposition on the same subject matter.

Related to this credibility issue is the fact that had defendant invoked the Fifth Amendment during his deposition in the civil matter, he would have, in fact, harmed his chances of success. This is so because in such a situation, Constand—the plaintiff in the civil matter—would have been permitted to receive an instruction informing the jury that it could infer the answer to any questions where defendant invoked the Fifth Amendment would have been adverse to his position. *See Harmon,* 713 A.2d at 623-424. Said another way, defendant would have been inviting a future civil jury to infer the accusations brought by the victim were true by invoking the Fifth Amendment.

In addition, defendant's negotiations with the *National Enquirer* for an interview (which he ultimately agreed to), and the negotiation with respect to the settlement agreement clause requiring that the victim refuse to cooperate with future law enforcement investigations, also demonstrate that he had no concern with incriminating himself such that he would

deem it necessary to invoke the Fifth Amendment (N.T. 2/3/16, 33, 47-48, 176).

All of the above, however, presumes that defendant had any rights against self-incrimination to invoke in the first place. While he would like to note that a statement to police and a deposition are different in temporal scope—which is no doubt accurate in most cases—he fails to acknowledge that in this case the substance of the two exercises were the same. Indeed, the very facts underlying each exercise, whether a statement to police or a sworn deposition, were the same in this case. In this instance, the fact that defendant had voluntarily submitted to an interview with law enforcement, and voluntarily disclosed the facts underlying this case, operated as a waiver of his Fifth Amendment rights such that he could not have invoked same during his civil deposition. *See Rogers* v. *United States*, 340 U.S. 367 (1951) ("courts have uniformly held that, where [in]criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details."); *Prep v. Pennsylvania Turnpike Commission*, 29 Pa. D. & C. 2d 665, 678 (1962) (finding witness in a civil lawsuit could not invoke Fifth Amendment when he had previously testified before an investigating grand jury without invoking privilege).

Once again, in support of defendant's proposition that he was promised he would not be prosecuted to induce him to testify at a civil deposition, he cites to cases in which there was actually a promise or agreement not to prosecute and consideration on the parts of both parties. In doing so, he fails to acknowledge that there was no credible evidence of such a promise or agreement—or sovereign edict—ever being made in this case. Each case is therefore distinguishable. *See, e.g., United States v. Hayes*, 946 F.2d 230 (government breached its plea bargain promise that it would not make specific sentencing recommendation and therefore defendant was entitled to new sentencing hearing or withdrawal of plea); *Stipetich,* 652 A.2d at 1296 (when there is no dispute that police entered into non-prosecution agreement with suspect, police could not bind Commonwealth but Commonwealth not permitted to use any incriminating evidence derivative of the agreement); *Commonwealth v. Peters*, 373 A.2d 1055 (Pa. 1977) (when statement to police is product of promise of immunity from police, even if immunity is defective, statement must be suppressed); *Commonwealth v. Bryan*, 818 A.2d 537 (Pa. Super. 2003) (defendant not entitled to dismissal of charges based on non-binding non-prosecution agreement entered into with police).

Therefore, despite defendant's fast and loose use of the term "promise"—when his own witness, Castor, flatly denied there was any such *quid pro quo*—and his attempts to explain away clear reasons he had to ***not*** invoke the Fifth Amendment (assuming he could in the first place), he cannot escape the reality of the evidence and the factual findings made by the trial court that are directly in line with that evidence. For all these reasons, the trial court's appropriate decision to deny suppression should remain undisturbed.

V. THE TRIAL COURT PROPERLY ALLOWED THE COMMONWEALTH TO INTRODUCE DEFENDANT'S ADMISSIONS REGARDING QUAALUDES.

Defendant next claims the trial court erred in permitting the Commonwealth to introduce admissions he made during his civil deposition regarding Quaaludes. His claim fails. The evidence at issue was admissible to prove he had access to, knowledge of, and a motive and intent to use, a central nervous system depressant that would render his victims unconscious so he could engage in sex acts with them. In addition, the evidence was admissible to demonstrate the strength of the prior bad act evidence already deemed admissible by the trial court.

Prior to defendant's second trial, the Commonwealth moved to introduce defendant's admissions from his civil deposition regarding Quaaludes. Following extensive briefing and argument, the trial court took the motion under advisement. During trial, after the Commonwealth's prior bad act witnesses testified, the court ruled that defendant's admissions from the deposition were admissible (N.T. 4/17/18 Trial by Jury, at 29-30).[32] Defendant was permitted to cross-designate for admission additional portions of his deposition testimony—that would otherwise have been inadmissible hearsay—on the basis of the "Rule of Completeness," Pa. R.E. 106.[33]

A. THE EVIDENCE WAS PROPERLY ADMITTED AS AN ADMISSION BY A PARTY-OPPONENT.

The Pennsylvania Supreme Court "has consistently held that a defendant's out-of-court statements are party admissions and are exceptions to the hearsay rule" and can be used against a defendant at trial. *Commonwealth v. Edwards,* 903 A.2d 1139, 1157–1158 (Pa. 2006) (citing

[32] The court had previously granted a similar motion at defendant's first trial.

[33] Rule 106 provides that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time." Pa. R.E. 106.

Commonwealth v. Chmiel, 738 A.2d 406, 420 (Pa. 1999)); *see* Pa. R.E. 803(25) (providing that an admission by a party-opponent is admissible as an exception to the rule against hearsay). Indeed, as the Supreme Court noted, "a party can hardly complain of his inability to cross-examine himself. A party can put himself on the stand and explain or contradict his former statements." *Edwards,* 903 A.2d at 1157. To qualify as an admission by a party-opponent, the statement must be offered against the party and, as is relevant here, must be "the party's own statement in either an individual or a representative capacity." Pa. R.E. 803(25).

Defendant's deposition testimony plainly constitutes an admission by a party opponent. He made the statements and the Commonwealth offered them against him at trial. Pa. R.E. 803(25). Defendant makes no argument to the contrary.

The fact that defendant's deposition testimony included references to prior bad acts did not render it inadmissible. *See, e.g., Commonwealth v. Brohshtein,* 691 A.2d 907 (Pa. 1997) (Brohshtein's statement admitting to another murder admitted to prove identity and intent pursuant to a common scheme or plan); *Commonwealth v. Einhorn,* 911 A.2d 960 (Pa.

Super. 2006) (Einhorn's diary excerpts detailing previous assaults relevant and admissible to prove a common scheme or plan and identity).

B. THE DEPOSITION TESTIMONY WAS PROPERLY ADMITTED UNDER RULE 404(B).

As discussed *supra*, prior bad act evidence is generally not admissible to show propensity, but is admissible for other relevant purposes, so long as the probative value outweighs the likelihood of unfair prejudice. *Hicks,* 156 A.3d at 1125; Pa. R.E. 404(b)(1),(2). Here, the testimony was admissible to show knowledge, motive, and intent. In addition, it was admissible to demonstrate the strength of the Rule 404(b) evidence already deemed admissible.

1. The Evidence was Relevant to Establish Knowledge, Motive, and Intent.

Defendant's admissions 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. To be sure, he expressly admitted to having access to, and knowledge of, Quaaludes, a prescription drug that he knew acted as a depressant of the central nervous system. Defendant 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. Trial by Jury, 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).

These admissions were critical to the Commonwealth's case. Defendant was charged with three counts of aggravated indecent assault, 18 Pa. C.S. §§ 3125(a)(1) (without consent), (a)(4) (victim unconscious), and (a)(5) (administering an intoxicant). In order to meet its burden of proof pursuant to subsection (a)(4), the Commonwealth was required to prove that defendant administered an intoxicant to Constand and did so at least recklessly. Specifically, it was required to prove that,

> the defendant knew of or recklessly disregarded [Constand's] unconsciousness … A defendant "recklessly" disregards another person's unconsciousness . . . if he . . . consciously disregards a substantial and unjustifiable risk that the other

> person is unconscious . . . The risk disregarded must be the sort of risk that is grossly unreasonable for the defendant to disregard.

Pa. SSJI (Crim) 3125B. Similarly, to sustain a conviction under subsections (a)(1) and (a)(5), the Commonwealth was required to prove, respectively, that defendant knew or, at the very least, recklessly disregarded Constand's non-consent, and that he knew or recklessly disregarded Constand's substantial impairment. Pa. SSJI (Crim) 3125A; *Id.* at 3125B. Evidence that defendant had extensive familiarity with Quaaludes was critical to proving knowledge and/or recklessness.

Defendant's deposition testimony demonstrated he was very familiar with Quaaludes. As Dr. Timothy Rohrig, the Commonwealth's expert forensic toxicologist, explained at the first trial, Quaaludes are in the same class of drugs as Benadryl, which is what defendant said he gave Andrea Constand on the night of the assault.[34] Dr. Rohrig testified that diphenhydramine, the active ingredient in Benadryl, and methaqualone, the active ingredient in Quaaludes, are central nervous system depressants that slow the brain down and aid the user in falling asleep. He further

[34] As will be discussed in more detail, *infra*, the Commonwealth does not now—nor has it ever—concede that the intoxicant defendant provided to Constand was, in fact, Benadryl.

stated that the effects described by Constand—among other things, a dry, "cottony" mouth; blurred vision; poor muscle coordination; and significant sedation—were consistent with a central nervous system depressant. Importantly, he opined that while the effects suffered by Constand could be consistent with diphenhydramine, a variety of other central nervous system depressants could have caused similar effects (N.T. Trial by Jury, 6/9/17, at 199-200, 204-205, 210-213).[35]

Therefore, defendant'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 Constand would render her unconscious, or nearly unconscious, and thus unable to consent to sex with him—at the very least, he disregarded this risk. Indeed, defendant'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

[35] Dr. Rohrig testified consistently with these opinions at defendant's second trial (*see* N.T. Trial by Jury, 4/19/18, at 70-72, 83-88 (stating that the effects of the drug administered by defendant described by Constand are consistent with, but not exclusive to, diphenhydramine; the effects are also consistent with other central nervous system depressants, such as methaqualone, the active ingredient in Quaaludes).

Constand on the night of the assault. The Commonwealth therefore needed this evidence to help prove his knowledge and recklessness.

Because a jury is free to believe all, part, or none of the evidence presented, "the Commonwealth can never be certain which, if any, of its evidence will be believed by the jury and regarded as proving a particular fact beyond a reasonable doubt." *Commonwealth v. Claypool*, 495 A.2d 176, 180 (Pa. 1985). Courts should "not hamper the Commonwealth's ability to present all of its relevant evidence to the jury to prove each and every element of the crimes charged." *Id.*

This same evidence was also probative of defendant's motive and intent in executing his signature pattern of providing an intoxicant to a young woman for the purpose of engaging in sex acts. Indeed, evidence of intent and motive is always relevant and admissible in a criminal case. *Commonwealth v. Tedford,* 960 A.2d 1, 41-42 (Pa. 2008) (stating that "[e]vidence to prove motive [and] intent . . . is always relevant in criminal cases") (citing *Commonwealth v. Gwaltney,* 442 A.2d 236, 241 (Pa. 1982); *see Commonwealth v. Ward,* 605 A.2d 796, 797 (Pa. 1992) (stating that "although motive is not an essential element of the crime, it is always relevant and admissible").

Defendant told law enforcement that he gave Constand Benadryl. He then acknowledged that the same medication—which he has been taking for five years (thus building up a tolerance)—made him "sleepy." In fact, when asked if he went to sleep "[r]ight away" after taking two tablets, he responded, "Yes. I am drowsy. I would not take this and go out and perform" (N.T. Trial by Jury, 4/17/18, at 127, 150). He admitted in his deposition that Quaaludes would make him "sleepy," too, because "they happen to be a depressant" (N.T. Trial by Jury, 4/18/18, at 42). As Dr. Rohrig opined, moreover, both Benadryl and Quaaludes are central nervous system depressants that slow the brain down and aid the user in falling asleep and, further, that Constand's reaction to the intoxicants could be consistent with Benadryl or another central nervous system depressant (N.T. Trial by Jury, 6/9/17, at 199-200, 204-205, 210-213).

Defendant's familiarity with one drug and its effects in an overall class of drugs is highly probative where he claimed, in this prosecution, to have used a different drug in the same class with effects he knows to be similar. That is, his own words about his use and knowledge of a central nervous system depressant drug, when coupled with the admissions he made claiming to have provided Constand Benadryl, and the expert

testimony indicating that the effects experienced by Constand are consistent with being given a central nervous system depressant, were relevant to demonstrate defendant's intent and motive in giving Constand a central nervous system depressant; to wit, to render her unconscious so that he could facilitate a sexual assault.

2. <u>The Evidence was Relevant to Demonstrate the Strength of the Rule 404(b) Evidence Already Ruled Admissible</u>.

When the Commonwealth filed its motion to introduce defendant's admission, the trial court had already determined that the testimony of five prior bad act witnesses was relevant and admissible under Pa. R.E. 404(b). The deposition testimony, therefore, was admissible to demonstrate the strength of the Commonwealth's Rule 404(b) evidence. *Compare Commonwealth v. Flamer,* 53 A.3d 82, 87-88 (Pa. Super. 2012) (finding that the trial court erred in prohibiting the Commonwealth from presenting all the evidence it wanted to present in support of the Rule 404(b) exception the court had previously deemed applicable).

Once a Pa. R.E. 404(b) exception has been established, the Commonwealth "must be given the opportunity to demonstrate the strength" of the exception "through all available evidence." *Flamer,* 53

A.3d at 88; *see Commonwealth v. Paddy*, 800 A.2d 294, 308 (Pa. 2002) (noting that "[t]he Commonwealth must be given the opportunity to demonstrate the strength of the proffered motive"). Indeed, "[i]t is a fundamental precept of our criminal jurisprudence that the Commonwealth is entitled to prove its case by relevant evidence ***of its choosing***." *Commonwealth v. Hicks*, 91 A.3d 47, 55 (Pa. 2014) (emphasis added).

Flamer, supra, is particularly instructive. In that case, two brothers were on trial for murder. While the case was pending, a trial witness was murdered by an associate of the brothers; the associate was arrested and convicted of the murder. *Id*. at 84. Prior to the brothers' trial, the Commonwealth sought to introduce evidence of the murder of the witness to show that the brothers conspired with the associate to kill the witness, demonstrating their consciousness of guilt. The trial court admitted only two of 15 pieces of evidence proffered by the Commonwealth. *Id.* at 85. The Commonwealth appealed, seeking admission of eight additional pieces of evidence. *Id*.

At the outset, this Court noted that the trial court was correct to admit evidence of the witness' killing to show the history of the case and the defendants' guilty conscience. *Id*. at 87. It then noted that while the

trial court allowed the Commonwealth to present evidence of the conspiracy between the two brothers and the associate, it excluded most of the evidence that established the conspiracy. *Id.* It criticized the trial court for handicapping the Commonwealth, noting that the other act evidence was "highly relevant to the determination of guilt . . . the Commonwealth must be given the opportunity to show the strength of the defendant's consciousness of guilt through all admissible evidence." *Id*. at 87-88.

Paddy, supra, is equally instructive. There, Paddy was on trial for murdering a witness to a prior murder he committed. *Id.* at 301. At trial, the Commonwealth was permitted to introduce extensive evidence of the earlier murder to establish, *inter alia,* motive pursuant to Pa. R.E. 404(b). *Paddy,* 800 A.2d at 307. The Commonwealth presented evidence that the murder victim identified Paddy as one of the two men who committed the earlier murder, that she failed to testify as promised when Paddy's trial for the earlier murder was listed, that his friends had taken her to an out-of-state motel at the time of the initially-scheduled trial and promised her $5000, and that she was afraid Paddy would harm her or her family if she testified against him. *Id.* at 300-302.

On appeal, Paddy claimed that it was error to allow such extensive evidence of motive at trial. *Id.* at 307. The Pennsylvania Supreme Court rejected his argument, holding that the Commonwealth was required to be given an opportunity to demonstrate the strength of its Rule 404(b) evidence of motive. *Id.* at 307-308. It explained,

> [m]erely informing the jury that [his murder victim] had intended to testify that [he] had committed the earlier murders, without, for example, offering evidence as to her failure to testify as promised and her trip to Maryland with [the defendant's] friends, would not have conveyed to the jury the intensity with which [the defendant] pursued his goal of silencing [his murder victim].

Id. at 308.

Here, as in *Flamer*, the trial court had already authorized the admission of prior bad act evidence to establish (1) defendant's signature of administering intoxicants to women and then sexually assaulting them, and (2) his absence of a mistaken belief in Constand's ability to consent. Both of these have critical bearing on motive and intent in administering these intoxicants. The ability of the Commonwealth to establish defendant's motive and intent through the absence of mistake was particularly critical here, where consent was a defense. The court properly

refused to limit that evidence. Just as in *Flamer* and *Paddy,* the Commonwealth "must be given the opportunity to show the strength" of its Rule 404(b) evidence—in this case, common scheme or design and absence of mistake—"through all available evidence," including defendant's admissions regarding Quaaludes. *See Flamer,* 53 A.2d at 87-88; *Paddy,* 800 A.2d at 308. There is no stronger, or more critical, evidence of defendant's signature of getting his prey to a place he controlled and administering an intoxicant for the purpose of facilitating a sexual assault, or of the clear absence of any mistaken belief on defendant's part as to his victim's consent, than these admissions, coming directly from his own mouth.

Defendant, however, maintains that the evidence was irrelevant because Quaaludes were never at issue in this case. According to him, the evidence unequivocally established that the pills he gave to Constand were Benadryl. *Defendant's Brief,* at 140-141. He is wrong.

In support of his claim, defendant cites his own self-serving statement to the police, and his equally self-serving deposition testimony, wherein he stated, on both occasions, that the pills he gave Constand were Benadryl. He also points to the fact that the pills he provided to the

authorities a year after the assault proved to be diphendhydramine, the active ingredient in Benadryl. That he conveniently and unsolicited, however, gave detectives Benadryl pills a year after the assault in no way establishes that the pills he gave Constand a year earlier were, in fact, Benadryl. His self-serving statements are no more convincing. Just because defendant stated that he gave Constand Benadryl does not make it so.

Indeed, as noted, the Commonwealth has never conceded that Benadryl was, in fact, the intoxicant defendant provided to Constand (N.T. Trial by Jury, 4/9/18, at 241 [District Attorney Steele stating during opening argument that "we're not conceding that this is Benadryl"]; N.T. Trial by Jury/Closings, 4/24/18, at 131-132, 205 [Assistant District Attorney Feden stating during closing argument that "[w]e're not saying that the defendant administered Benadryl like he admitted to . . . we don't know what he gave her"]). To the contrary, at the time of defendant's trial—and still today—there is an open question as to what particular substance or substances defendant administered to Constand.[36] What is

[36] Constand believed defendant was giving her an herbal supplement and defendant implied to her mother that he gave her a prescription medication. Importantly,

clear from the evidence is that the victim was drugged. Only defendant knows what specific intoxicant or intoxicants he gave her. Therefore, his previous admissions that he was aware of substances that would render a female victim unconscious, that he sought them out and possessed them, and that he did in fact administer them to women with whom he wanted to have sex, is significant to establishing his signature and absence of mistake, as well as his knowledge, motive and intent.[37]

C. THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHED ANY POTENTIAL FOR UNFAIR PREJUDICE.

Defendant claims that the Commonwealth introduced his admissions regarding Quaaludes for no reason other than "to raise innuendo that [he] supplied women with Quaaludes back in the 1970s and then had sex with them." *Defendant's Brief,* at 143 (emphasis omitted). He baldly asserts—without any supporting analysis—that his admissions were

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moreover, Constand consumed wine and water on the night in question, the full and actual contents of which remain unknown.

[37] Moreover, far from Quaaludes being "never at issue" in this case—aside from the above-mentioned relevance under Pa. R.E. 404(b)—Janice Baker-Kinney testified that she believes that defendant told her the drugs he was giving her were Quaaludes (N.T. Trial by Jury, 4/11/18, at 170-171).

"extraordinarily prejudicial." *Defendant's Brief,* at 143.[38] His contentions are meritless.

A trial court must weigh the probative value of prior bad act evidence against its potential for unfair prejudice. Pa. R.E. 404(b)(3). In doing so, it must balance the potential for unfair prejudice with, among other things, the Commonwealth's need to present the evidence and its ability to caution the jury. *Tyson,* 119 A.3d at 359; *see Gordon,* 673 A.2d at 870 (noting that "[w]hether relevant evidence is unduly prejudicial is a function in part of the degree to which it is necessary to prove the case of the opposing party"). Need can arise through anticipated defenses.

Here, there is no question that defendant's admissions about Quaaludes and his familiarity with this central nervous system depressant go toward intent and proving beyond a reasonable doubt his, at a minimum, reckless disregard and absence of mistake.

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[38] "It is not for this Court to develop an appellant's arguments." *Commonwealth v. Rush,* 959 A.2d 945, 950 (Pa. Super. 2008) (citing *Commonwealth v. Hardy,* 918 A.2d 766, 771 (Pa. Super. 2007)). Rather, it is an appellant's "responsibility to provide an adequately developed argument by identifying the factual bases of his claim and ***providing citation to and discussion of relevant authority*** in relation to those facts." *Commonwealth v. Thomas,* 783 A.2d 328, 336 (Pa. Super. 2001) (emphasis added); *see Rush,* 959 A.2d at 950-951 (noting that "it is the appellant's obligation to present developed arguments and, in doing so, apply the relevant law to the facts of the case, persuade us that there were errors, and convince us relief is due because of those errors"). Where, as here, an appellant fails to sufficiently develop a particular argument, the appellate court may find the argument waived. *Rush,* 959 A.2d at 951.

Claypool, *supra*, is illustrative. Claypool was convicted of rape and related offenses. *Id*. at 177. During the rape, defendant told his victim that he had been jailed for a previous rape, he was not going back to jail, and he would hurt her if she resisted. *Id*. at 177-178. The Supreme Court held that Claypool's statement to the victim referencing his prior rape was admissible under Pa. R.E. 404(b) because it helped establish the forcible compulsion element of rape. *Claypool,* 495 A.2d at 179. Finding that a cautionary instruction would protect against the potential for misunderstanding by the jury, the Court, importantly, noted that its conclusion was "not altered by the fact that there was other evidence of force against the victim." *Id*. at 179 – 80. The Court explained:

> The Commonwealth was not required to omit portions of its case to accommodate [the defendant]. A jury is free to believe all, part or none of the evidence presented. For this reason, the Commonwealth can never be certain which, if any, of its evidence will be believed by the jury and regarded as proving a particular fact beyond a reasonable doubt. We will not hamper the Commonwealth's ability to present all of its relevant evidence to the jury to prove each and every element of the crimes charged.

Id. at 180.

Here, as in *Claypool,* defendant's admissions go directly toward an element of the offense. Specifically, his prior admissions relate to his knowledge and use of drugs of the same kind as what he purportedly gave to the victim and, therefore, go directly to the recklessness element of the crimes charged.

Claypool also underscores why the trial court's ruling permitting the Commonwealth to present five prior victims does not lessen the necessity of the deposition testimony. Beyond the impact defendant's admissions had on an element of the offenses charged, they were also relevant to directly rebut defendant's consent defense—defendant knew the drugs he gave Constand would render her semi- or unconscious and therefore unable to consent—and thus critical to the Commonwealth's case. *See Smith,* 635 A.2d at 1090 (finding that the Commonwealth "demonstrate[d] a need to present testimony of [defendant's] sexual abuse of [his other daughter] because the victim . . . failed to reveal promptly that she had been molested"). Indeed, it is because of the consent defense that evidence of defendant's familiarity with central nervous system depressant drugs is so critical, especially in light of the burden the Commonwealth bears with respect to knowledge and intent. Defendant admitted to digital

penetration after administering an intoxicant which, by his own admission, puts him to sleep. Under this scenario, the fact that defendant had experience, separate and apart from this incident, in administering a specific drug to women with whom he wanted to have sex, knowing that the same drug would make him sleepy and, in fact, had made at least one woman seem like she had too much to drink, renders his admissions necessary.

Since the admissions regarding Quaaludes came straight from defendant's mouth, the trial court did not have to be concerned with whether there was a "sufficient quantum of proof," linking him to the acts, as it would be with the non-admission-based prior bad acts. *Compare Commonwealth v. Matthews*, 609 A.2d 204, 207 (Pa. Super. 1992) (finding, in a possession with intent to deliver case, that the trial court should have allowed the admission of a prior controlled buy of cocaine where there was a "sufficient quantum of proof" linking the defendant to the alleged prior bad act because law enforcement saw a confidential informant enter the defendant's residence, saw a car registered to defendant in front of the residence, the drugs purchased were nearly identical to the drugs seized

during the warrant and the confidential informant identified the defendant as the dealer).

The highly relevant—and indeed, critical—nature of this evidence outweighed any potential for unfair prejudice. The evidence did not have "a tendency to suggest [a] decision on an improper basis or to divert the jury's attention away from its duty to weigh the evidence impartially." *Tyson,* 119 A.3d at 360. To the contrary, as with the prior bad act evidence, the court cautioned the jury as to the limited purpose for which it could consider the Quaalude evidence (N.T. Trial by Jury, 4/25/18, at 35). Thus, any prejudicial effect of this evidence was allayed in light of the presumption that jurors follow the court's instructions. *See Jones,* 668 A.2d at 504; *see Commonwealth v, Means,* 773 A.2d 143, 157 (Pa. 2001) (stating that the presumption that jurors follow such instructions is "[a] pillar of our system of trial by jury").

Far from being unfairly prejudiced from the admission of his deposition testimony regarding Quaaludes, defendant actually ***benefitted***, to a certain extent, from the court's ruling. This is so because he was permitted to introduce other portions of his testimony that were favorable to him based on the "Rule of Completeness," Pa. R.E. 106 (*see* N.T. Pretrial

Motions, 3/30/18, at 93 [defense counsel noting that if the Commonwealth's motion was granted, the defense would be presenting counter-designations regarding Quaaludes for admission]).

Defendant's complaint that his testimony regarding "Jane Doe Number 1" enabled the Commonwealth to "back-door" a sixth prior bad act witness, causing him unfair prejudice, fails. As defendant acknowledges in his brief, no facts were presented in the deposition to support a conclusion that "Jane Doe Number 1" was forced to take the Quaaludes; that she did not know she was taking Quaaludes; or that she actually had sex, consensual or otherwise, with defendant. *Defendant's Brief,* at 143. To the contrary, defendant expressly stated in his deposition that this woman voluntarily took the Quaaludes (N.T. Trial by Jury, 4/18/18, at 36). Defendant, therefore, has not demonstrated "unfair prejudice."[39]

[39] Defendant also takes issue with the introduction of his admission acknowledging that he knew it was illegal for him to dispense Quaaludes. He argues that this improperly shows he "committed yet another 'prior bad act.'" *Defendant's Brief,* at 139 (citing N.T. Trial by Jury 4/18/18, at 42). Defendant has waived this claim, however, because he did not present this particular theory in the trial court. *See Commonwealth v. Cline,* 177 A.3d 922, 927 (Pa. Super. 2017) (stating that "issues . . . are waived if not raised in the trial court. A new and different theory of relief may not be successfully advanced for the first time on appeal."); *Commonwealth v. Phillips*, 141 A.3d 512, 522 (Pa. Super. 2016) (stating that an appellant is barred "from raising a new and different

For the foregoing reasons, the trial court properly admitted the deposition testimony regarding Quaaludes.

VI. DEFENDANT'S CLAIM CHALLENGING THE JURY INSTRUCTIONS IS WAIVED.

Defendant asserts that the trial court erred by giving a standard "consciousness of guilt" instruction to the jury. This claim is waived. Although he 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 (N.T. Trial by Jury, 4/25/18, 61). Consequently, his challenge to the jury instruction is waived. *See* Pa. R.Crim.P. 647(B) ("No portions of the charge nor omissions therefrom may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate"); *Commonwealth v. Parker*, 104 A.3d 17, 29 (Pa. Super. 2014) (challenge to instruction waived where appellant objected at charging conference but did not renew objection when asked at the end of the charge if he needed to see the trial court); *Commonwealth v. Smallhoover*, 567 A.2d 1055, 1059 (Pa. Super. 1989) (challenge to instruction waived where appellant previously had objected to charge, but failed to renew his

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theory of relief for the first time on appeal); *see generally* Pa. R.A.P. 302(a) ("[i]ssues not raised in the [trial] court are waived and cannot be raised for the first time on appeal").

objection and responded negatively when trial court inquired at end of charge whether he had any additions or corrections).[40]

VII. DEFENDANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION TO REMOVE JUROR #11 IS MERITLESS.

Next, defendant argues that he is entitled to a new trial because the trial court supposedly abused its discretion by denying his motion to remove Juror #11. Defendant alleged that Juror #11 made a remark before trial about his guilt. Defendant also complains that the trial court only took testimony from four jurors and one potential juror about this alleged remark. Defendant's argument fails. Juror #11 denied making the remark and three other jurors corroborated his testimony.

A. BACKGROUND

On Tuesday, April 3, 2018, the trial judge conducted *voir dire* of a panel of prospective jurors that included Juror #11 (then identified as Prospective Juror #93) (N.T. Jury Selection/Day 2, 4/3/18 at 187). Each prospective juror had a card with their designated juror number, and the judge instructed them to raise their cards if he asked a question that

[40] Defendant argues that he preserved the claim in written objections to the instructions. Because he has new counsel, who were not present at trial, they may be unfamiliar with the fact that the defense filed the motion ***after*** the jury began deliberating, and so the objections did not preserve the claim.

pertained to them, or if there was any doubt. *Id*. at 191. The court then placed the panel under oath (*id*. at 193) and specifically asked them, *inter alia*, whether any: (1) had formed an opinion about defendant's guilt (*id*. at 214-215), (2) would refuse to accept or apply defendant's presumption of innocence (*id*. at 198-199), (3) had any preconceived notions that would prevent them from deciding the case fairly and impartially (*id*. at 218-219), or (4) felt that the nature of the charge would prevent them from being fair and impartial (*id*. at 219). Juror #11 answered in the negative in response to each of these questions by declining to raise his card.

The next day, Wednesday, the court called in Juror #11 and Prospective Juror #9 (and many others) for individual *voir dire* (N.T. Jury Selection/Day 3, 4/4/18 at 35; 129). For his part, Juror #11 repeatedly affirmed that he did not have a fixed opinion about defendant's guilt (*id*. at 131). He also repeatedly affirmed his ability to be impartial, notwithstanding the fact that he knows someone who works for the Montgomery County Detective Bureau (*id*. at 132-135). Based on these

assurances, the Commonwealth and defendant accepted him as Juror #11 (*id*. at 135).[41]

Prospective Juror #9's *voir dire*, on the other hand, yielded a much different result. She was not selected as a juror because the Commonwealth legitimately decided to use its third peremptory strike to exclude her. As soon as the Commonwealth did so, and without requesting a sidebar or offer of proof, defendant made a baseless *Batson* objection in open court, falsely accusing the Commonwealth of racial discrimination before a courtroom packed with representatives of the media, even though the Commonwealth had already agreed in the selection of both of the black jurors who were previously available to be selected (*id*. at 45, 49, 66). When the defense team made its baseless *Batson* challenge, the Commonwealth noted: "It's being done for the media behind us. . . . There's not a race component to this case and should not be" (i*d*. at

[41] As an aside, defendant complains in a footnote that the Commonwealth deprived him of his opportunity to examine Juror #11 by failing to identify the fact that the individual with whom Juror #11 was familiar worked for the County Detective Bureau. In stating that the court identified her as a courthouse compliance officer, however, defendant mischaracterizes the record by missing the context of the court's inquiry. The court specifically asked, "The fact that you know somebody ***that works in the County Detectives*** -- do you talk to her about cases[?]" (N.T. 4/4/18 at 134) (emphasis added). Thus, defendant did not need the Commonwealth to confirm that she worked for County Detectives. In any event, defendant failed to raise this issue in his 1925(a) statement.

66-67). Also, the Commonwealth objected to the airing of Prospective Juror #9's "dirty laundry," some of which was the basis for the use of the Commonwealth's peremptory strike (*id*. at 65-66). The judge asked that defendant make his record *in camera*, and recessed to excuse the other potential jurors (*id*. at 73, 75).

Thereafter, the Commonwealth informed the defense team of its legitimate race-neutral basis for striking Prospective Juror #9; specifically, her criminal history, suspected ongoing criminal activity (which was under investigation at that time), and corresponding potential bias against the Commonwealth (N.T. Trial by Jury, 4/9/18 at 96-97; N.T. Jury Selection/Day 3, 4/4/18 at 76). Defendant then abandoned his *Batson* challenge, but the media did not, rushing to publish several stories, without the benefit of knowing the basis of the Commonwealth's decision (*id*.). *See, e.g., Bill Cosby Defense Attorney Accuses Prosecutors of Racial Discrimination,* GOOD MORNING AMERICA (Chris Francescani), April 4, 2018.[42]

[42] Available at https://www.goodmorningamerica.com/culture/story/bill-cosby-defense-attorney-accuses-prosecutors-racial-discrimination-54234664 (last visited July 15, 2019).

That night, according to defendant's subsequent motion to remove Juror #11 and its attachments, with the stories of the Commonwealth allegedly discriminating against her still 'hot off the presses,' Prospective Juror #9 telephoned the defense team's offices in Nevada and California to offer "information."[43] According to the declaration by the administrative assistant to one of defendant's lawyers, Prospective Juror #9 left a voice message, ***which was later destroyed***, stating that one of the jurors pronounced defendant guilty during jury selection. Also, according to the declaration by one of defendant's investigators, Prospective Juror #9 expressed concern that defendant receive a fair trial. Yet despite this stated concern, assuming everything in defendant's motion is true, Prospective Juror #9 contacted the defense offices in Nevada and California, rather than the trial court. The defense team then failed to immediately notify the trial court. In fact, the following day, Thursday, April 5, 2018, the parties completed the jury selection process in the ordinary course of proceedings. The remaining prospective jurors were discharged to resume their everyday lives, with no indication from the defense that there was an

[43] *See Defendant's Motion, and Incorporated Memorandum of Law in Support Thereof, to Excuse Juror for Cause and for Questioning of Jurors* at 6-8 (attached declarations) (collectively, "*Motion to Remove Juror #11*").

outstanding issue concerning any of the selected jurors (N.T. Jury Selection/Day 4, 4/5/18 at 190-191; N.T. Trial by Jury, 4/9/18 at 150).

On that date, rather than notifying the court about the potential issue of a juror having a fixed bias, as is the appropriate protocol, the defense team contacted Prospective Juror #9, and *the defense team* prepared a declaration for her to sign (*id*. at 22, 39, 136-137). *Motion to Remove Juror #11*. The next day, Friday, Prospective Juror #9 met one of defendant's investigators and signed the prepared statement, declaring that while she was in a waiting room with Juror #11 and ten other potential jurors, Juror #11 stated: "I just think he's guilty, so we can all be done and get out of here." *Motion to Remove Juror #11* at 8 (Declaration of Prospective Juror #9). Defendant then filed his motion on Friday afternoon requesting removal of Juror #11, and asking "to question *seated* jurors." *Id*. at 1 (emphasis added).

On Monday, April 9, 2018, the court held proceedings on the motion. The court took testimony from Prospective Juror #9, accepted the remaining declarations in defendant's motion as a part of the record, and received testimony from Juror #11.

Prospective Juror #9 testified under oath that she had been sitting across from Juror #11, in the waiting room where the twelve prospective

jurors had been waiting for hours (N.T. Trial by Jury, 4/9/18 at 44). She claimed that the prospective jurors were joking about trying to escape by jumping out of the windows, and that one of them said, "Oh, you can go for it. You'll break a couple bones, but you won't die" (*id*. at 47). She first claimed that Juror #11 said: "I'm just ready to say he's guilty so we can just all get out of here[,]" and that she did not know whether he was joking (*id*. at 46). Thereafter, however, when asked to repeat his alleged statement, she adjusted her testimony so that it aligned more closely with the declaration that the defense team prepared, stating: "Oh, he just said, *I just think that* he's – you know, *he's guilty*, so we can just get out of here" (*id*. at 48) (emphasis added).

She also claimed that one of defendant's private investigators promised her that if she signed the declaration that her name would not come up, and that she would not have to return to court (*id*. at 40; 99-100) ("He said that he cleared it with . . ." defense counsel Becky James). In contrast, however, defense counsel Becky James stated that she spoke directly to Prospective Juror #9 before she signed the declaration that the defense team prepared, and that she told Prospective Juror #9 twice that she could not guarantee Prospective Juror #9 would not have to appear

and give testimony (*id* at 115, 137-138). With that statement, the Commonwealth noted: "So you've just impeached her credibility" (*id*. at 116). After Attorney James offered a more detailed statement of all that occurred, the judge responded: "I understand that, but that's not what she testified" (*id*. at 138). Then, investigator Scott Ross testified that he also told Prospective Juror #9 he could not guarantee she would not have to appear (*id*. at 145-146; 151 [Commonwealth arguing, "Now you have an investigator and an officer of the court, Ms. James, saying that she lied"]).

The judge also called Juror #11 to address the accusation, asking him repeated questions about the very same thing. Each time, Juror #11 denied saying anything about defendant's guilt:

> Q 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 all can be done and get out of here, or something similar to that? And we're not inquiring about any --
>
> A No.
>
> Q You never made such a statement?
>
> A No.
>
> Q Okay. So if you were standing at the window there, you don't recall just making a statement, for

whatever reason, it could have been just to break the ice?

A I do not recall that.

Q You don't recall it. Could you have made a statement like that?

A I don't think I would have.

Q You don't think you would have?

A No.

Q And it is -- I want to make it 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 that you do tell us.

A (Nods.)

Q And I'm going to let you reflect on it because it's just part of the process that we do have to check these things out.

A Okay.

Q So did you make that statement? If you did, it's perfectly okay.

A No.

Q You did not?

A No

(*id*. at 56-57). Then, after Juror #11 was once again placed under oath, he reiterated his unequivocal denial of Prospective Juror #9's accusation.

> Q Okay. So this is like the continued oath that we did on the *voir dire*. So I'll put it to you one last time. Did you make a comment similar to or the exact comment of something, I just think he's guilty, so we can all be done and get out of here?
>
> A No

(*id*. at 58; *see also id*. at 92 [transcribing Juror #11's repeated unequivocal denials after the judge informed him that he was accused of making the alleged statement]).

Given that Prospective Juror #9 and Juror #11 were fully contradicting one another under oath, the judge decided to question seated Jurors 9, 10, and 12, the only seated jurors aside from Juror #11 who were in the room at the time of the alleged statement. Seated Juror #9 gave an unequivocal "no" and "Absolutely not" when asked if he remembered hearing a prospective juror make the alleged statement in question (*id*. at 63-64 ["Q. But you clearly didn't hear anybody make any comment about the guilt or innocence of Mr. Cosby? A. Absolutely not."]). Likewise, Juror #10 gave an unequivocal "No" to the same question, and affirmed

that he had, in fact, been listening carefully (*id*. at 69; 73). Consistently, Juror #12 also repeatedly gave an unequivocal "no," when asked whether he heard any statements about defendant's guilt and whether he heard anyone make the alleged statement in question, and testified that he was clear on the matter (*id*. at 76-77). After taking this testimony, the trial judge commented:

> I don't know what your positions are, but right now I have four people in that room. If you're -- if one of them had indicated maybe, then I would have dealt with these other jurors. But I have three sworn jurors in the room that simply said they didn't hear it

(*id*. at 78; *see also id*. at 80 ["Now we're just delaying proceedings"]).

The court heard argument on the motion, including defendant's now substantially broader request of questioning "seated jurors" (*Motion to Remove Juror #11* at 1) to bring back discharged potential jurors for questioning. Ultimately, the court denied the motion.

The Commonwealth also made argument addressing some of Prospective Juror #9's credibility issues, including a prior fraud arrest (N.T. Trial by Jury, 4/9/18 at 96-97). The Commonwealth explained that Prospective Juror #9 was believed to have been operating under an alias

with the Department of Human Services, and that the Commonwealth had a witness present "to identify her in a crime that she has committed" (*id*. at 97). The court declined to hear from the Commonwealth's witness, stating the Commonwealth had given more than enough race-neutral reasons in support of its peremptory challenge, and that the court was not going to get into the prior fraud case or active criminal investigation.

Similarly, the court declined to bring back additional discharged prospective jurors for questioning. The court reasoned:

> [T]his Court has assessed the credibility of this witness together with everything that she said . . . .
>
> But the weight of this evidence here in this case was three jurors that were in a room that can't be anything more than 10 to 15 feet large all denied [Juror #11] saying it.
>
> And, most importantly, and under oath, twice at the request of the defense I asked him point blank, Did you say it? Now, if he denies saying it, there's no basis whatsoever under any record that indicates that he said it and that he is lying to this Court now, that he's not being credible.
>
> So I had to make this call. I deny your motion to remove Juror Number 11

(i*d*. at 117).

> [B]ased on the record that you have put forward, I just don't think you've carried your burden. . . . No other of those jurors volunteered to come [with] what your proponent said. Not one of them [has] contacted this Court. You have never said that they've contacted you or anyone else . . . .

(*id*. at 122-123).

The court further noted the "unfair burden" that would be imposed upon "the summoned jurors who were dismissed and have now gone about their lives" (*id*. at 150). It stated:

> The delay very much could take two or three days. . . . If they say, I'm at work – they were discharged from any duty. They were discharged from having to come back. There's nothing in the history of any case law I've ever seen that would indicate that you would resummon potential jurors who were discharged from service.
>
> So I just want to make sure when [defense counsel says] that it's no burden, it is a burden upon us and, most importantly, the prospective jurors that have been told that they're discharged from their service

(*id*. at 150).

Thus, the court concluded:

> I have made a determination that to [bring back the discharged prospective jurors] would be burdensome upon the potential jurors that believe that they were discharged.

> And there is just nothing even to raise a level of a prima facie [basis] that at this stage I should continue to inquire of people that were in the same room; that the alleged person who made the remark denies making the remark; and three other people who were in the room, one of which was in a very close distance, just simply claim they never heard the remark.
>
> So at this stage I'm going to deny the defense motion

(*id*. at 153).

Defendant now claims that the trial court abused its discretion in not removing Juror #11 and declining to burden discharged potential jurors.

B. RELEVANT LEGAL STANDARDS

Pennsylvania law is straightforward concerning these issues. Once a prospective juror has been accepted by all parties, a trial judge "may allow a challenge for cause at any time before the jury begins to deliberate . . . ." Pa. R.Crim.P. 631. In the event that that the judge allows a selected juror to be challenged for cause, the standard for dismissing that juror is "well settled." *Commonwealth v. Blasioli*, 685 A.2d 151, 158 (Pa. Super. 1996), aff'd, 713 A.2d 1117 (Pa. 1998). A challenge to a juror should be sustained where "the juror indicates by **his answers** that he will not be an impartial juror[,]"

or where the juror has such a close relationship with a participant in the case that a likelihood of prejudice will be presumed irrespective of the juror's answers. *Id*. (emphasis added).

> 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 . . . demonstrates a likelihood of prejudice by his or her conduct or answers to questions.

Commonwealth v. Briggs, 12 A.3d 291, 333 (Pa. 2011).

Moreover, it is certain that the burden of proving a juror should be removed for cause is on the challenger, and that the challenger must prove the juror "possesses a fixed, unalterable opinion that would prevent him or her from rendering a verdict based solely on the evidence and the law." *Blasioli*, 685 A.2d at 159. Otherwise, prospective jurors are presumed impartial, even where there exists some "preconceived notion as to the guilt or innocence of an accused," so long as "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Commonwealth v. Tressler*, 584 A.2d 930, 933 (Pa. 1990).

Accordingly, even if a prospective juror demonstrates a "desire to conclude [a] matter with all due haste and [an] initial belief that the [accused is] perhaps guilty," the existence of such factors does not, *per se*, establish the denial of a fair trial by an impartial jury. *Id*. The defendant must prove "that the jurors who served were incapable of laying aside any preconceived impressions or opinions that they might have held prior to hearing the evidence presented and being sworn." *Id*.

"In reviewing a trial court's action regarding jury selection, great deference is afforded to the trial judge, who is in the best position to assess the credibility of the jurors and their ability to be impartial." *Id*. Thus, it is within the province of the trial judge, as the factfinder, "to resolve all issues of credibility, resolve conflicts in evidence, make reasonable inferences from the evidence, and believe all, none, or some of the evidence presented." *Commonwealth v. Bishop*, 742 A.2d 178, 189 (Pa. Super. 1999). So where a trial judge finds, after examining witnesses, that a juror accused of improper statements did not make those statements, that finding should be upheld absent an abuse of discretion. *Commonwealth v. Posavek*, 420 A.2d 532, 537 (Pa. Super. 1980) ("We see no reason to disturb this finding

because the credibility of these witnesses was for the trier of fact, the trial judge, to determine.").

The trial judge is "vested [with] the power and authority to maintain the order and integrity of the judicial process, and it is "universally accepted" that the judge is responsible for maintaining "the appropriate atmosphere for the fair and orderly disposition of the issues presented." *Commonwealth v. Patterson*, 464, 308 A.2d 90, 94 (Pa. 1973). While the Pennsylvania Supreme Court recognizes that the Commonwealth has an "interest in the swift and efficient administration of criminal justice[,]" it holds that defendants "should not be permitted to unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice." *Commonwealth v. Lucarelli*, 971 A.2d 1173, 1178-1179 (Pa. 2009). To that end, "[i]t is axiomatic that a trial judge has broad powers concerning the conduct of a trial and, particularly, with regard to the admission or exclusion of evidence." *Commonwealth v. Niemetz*, 422 A.2d 1369, 1376 (Pa. Super. 1980). Indeed, our law vests the trial judge with the discretion to exclude even relevant evidence where its probative value is outweighed by a danger of "undue delay, wasting time, or needlessly presenting cumulative evidence." Pa. R.E. 403.

"Accordingly, reversal by an appellate court is inappropriate unless the judge's ruling on such matters amounts to an abuse of discretion." *Niemetz*, 422 A.2d at 1376; *see also Briggs*, 12 A.3d 291, 332–33 (holding, "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."). Where a trial record "simply reflects defense counsel's failure to convince the trial judge of the merits of his argument . . . and does not support a finding that the trial judge misapplied the law, acted out of ill-will, or in any other manner abused his discretion[,]" the defendant is not entitled to any relief. *Niemetz*, 422 A.2d at 1376.

C. APPLICATION

Defendant is not entitled to relief because the judge acted within his discretion when he determined that (1) Prospective Juror #9 was not credible, (2) no further testimony was necessary to resolve the issue (particularly testimony requiring retrieval of prospective jurors who had already been discharged), and (3) Juror #11's *voir dire* answers and credited testimony concerning the accusation were enough to satisfy the court that he held no fixed opinion that would prevent him from rendering a verdict

solely on the evidence and law. Defendant's claim that Juror #11's denials only became clear in the end after repeated questioning is belied by the record. *See Defendant's Brief* at 163; *but cf.* N.T. Trial by Jury, 4/9/18 at 56-59; 92. Thus, defendant cannot demonstrate an abuse of discretion.

As for Prospective Juror #9's credibility, not only did the court have the discretion to find her not credible, but it had ample reason to do so. As the court noted, her testimony concerning what allegedly took place in the waiting room contradicted four other people who were in the same room, including Juror #11, who repeatedly denied making the alleged statement. His testimony is corroborated by all the eventually seated jurors in the room at the time—not one of them heard anyone make the alleged comment. Prospective Juror #9's testimony is unsupported by any evidence. The fact that her account was also at odds with one of defendant's own lawyers and one of his investigators also tended to discredit her testimony. And while her criminal activity is not a matter of record beyond the Commonwealth's proffer (because the court did not think the evidence was necessary), the fact that she approached the defense and not the court with her allegations, at minimum, suggested her bias. The court properly exercised its discretion in finding her not credible.

The court also properly exercised its discretion in making the decision not to burden the discharged prospective jurors after hearing from four witnesses who flatly contradicted Prospective Juror #9's discredited account. In avoiding any waste of time and unnecessary delay, the trial judge was doing his job. Again, Pa. R.E. 403 authorizes excluding potentially relevant evidence to avoid undue delay and wasting time. There was nothing in the record to justify any expectation that the discharged jurors would testify any differently than the four seated jurors who addressed the matter under oath. Furthermore, the fact that the judge declined to hear the Commonwealth witness who was present and ready to testify, as well as the discharged prospective jurors who were not present, speaks to the fairness that the judge afforded defendant throughout his trial. Defendant has yet to cite any case that requires a trial judge to re-summon discharged prospective jurors to question them about the potential bias of an individual juror, let alone a case that presents circumstances like these. Thus, he cannot demonstrate an abuse of discretion.

While defendant suggests that a "full hearing" on whether a juror can be fair and impartial requires the testimony of multiple people, the caselaw

he relies on says otherwise. He cites *Smith v. Phillips*, 455 U.S. 209 (1982), for the proposition that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215. In that case, however, the Supreme Court rejected the argument that defendant is making now: "that a court cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question." *Id*. It held that judges may properly make such determinations at a hearing like the one that took place in that case, where the only juror to testify about his impartiality was the juror in question. *Id*. at 217. The Court also commented:

> Respondent correctly notes that determinations made in [these] hearings will frequently turn upon testimony of the juror in question, but errs in contending that such evidence is inherently suspect. As we said in *Dennis v. United States*, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950), "[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter."

Smith, 455 U.S. at 217. Here, Juror #11 affirmed his ability to be impartial and flatly denied making the statement ascribed to him. Although his

testimony did not need to be supported by any evidence beyond his own word, three disinterested jurors corroborated his account.

Defendant's reliance on *Commonwealth v. Horton*, 401 A.2d 320 (Pa. 1979), is also misplaced. There the Pennsylvania Supreme Court granted a new trial where a prospective juror heard the defendant say he was guilty, and told the court that he was unable to be impartial as a result. The court then refused a defense request to examine other jurors regarding the same. In this case, in contrast, all seated jurors who were present for the alleged comment denied hearing it and denied making it. So while it was possible that seated jurors in *Horton* heard a prejudicial statement, the trial judge made sure that did not take place in this case. Likewise, the comment that it would have cost little of the court's time to examine the seated jurors in *Horton* has no application to the discharged jurors in this case, where the court assessed that such an inquiry could delay proceedings for days, and where any bias they may have held became irrelevant the moment they were discharged.

As clear as Pennsylvania law is on the standards that govern this analysis, defendant takes partial quotes from inapposite cases out of context to support his ultimate, and erroneous, proposition that the

impaneling of a single juror whose impartiality may be reasonably doubted requires a new trial. *Defendant's Brief* at 168. That proposed standard strays far from the law governing appeals in this Commonwealth as set forth above.

Defendant begins the analysis in support of his proposed standard with an accused child molester in Missouri, where the Missouri Supreme Court held that the lower court abused its discretion in not granting a new trial. In that case, the record "amply" supported finding that a seated juror both formed and expressed an opinion about the case, and intentionally concealed that information during *voir dire*. *State v. Ess*, 453 S.W.3d 196, 206 (Mo. 2015). The trial court held a hearing on the allegation at which one juror testified that he heard the statement in question, and a second juror testified that he admonished the accused juror to be quiet upon hearing some statement about the case at the same time. Much different from the present case, the Missouri court heard no testimony at all from the juror accused of making the statement, so "it was never established Juror No. 3 could set aside his prior opinions regarding Ess's guilt and give him a fair trial." *Id*. at 200. All that was presented at the hearing in that case was the "unimpeached testimony" of the two jurors establishing the impropriety at

issue, and unlike here, "the . . . court did not find the [accusing] witnesses not credible." *Id*. (noting that "[g]enerally speaking, the circuit court is free to believe all, part, or none of the testimony presented by the witnesses at the evidentiary hearing.").

In this case, the accused juror spoke for himself, affirming his willingness and ability to be impartial, the testimony of the single accuser was discredited, and the testimony of the other jurors in the room at the time of the alleged statement corroborated Juror #11's denial, rather than the discredited accusation. Thus defendant's *Missouri* child molestation case is easily distinguished on its facts.

Likewise, the Pennsylvania cases he relies on are easily distinguished. In *Commonwealth v. Stewart*, 295 A.2d 303, 304 (Pa. 1972), where the defendant was charged with assaulting his wife with a beer bottle and bar stool, and ultimately killing her with a butcher knife, her father was on the panel from which the jury had been selected, and had been in the room with selected jurors for two and a half days. *Id*. at 303-304. The court ordered a new trial, noting the "extreme prejudice" inherent in a "continuous and intimate association" that gives individuals opportunity to make "acquaintances among the members of the jury." *Id*.

at 305. The court noted that during the time the victim's father was with the jury, "the subtle emotions of hate for the appellant, or pity for the father of the deceased could clearly develop, even assuming the father said nothing about the case." *Id*. at 305-306. In that context, the court mentioned that our legal system endeavors to prevent the "probability of unfairness." *Id*. at 306. Here, there is no allegation that defendant's victim (or any of his prior victims) had family members on the panel, and the record does not otherwise demonstrate a "probability of unfairness." *Id*. In fact, the record demonstrates quite the opposite.

Finally, in *Commonwealth v. Cornitcher*, 291 A.2d 521 (Pa. 1972), the Pennsylvania Supreme Court vacated and remanded a post-conviction case so that the petitioner could amend his petition and be heard on the merits of a prejudiced juror claim that had been deemed waived. Supposedly, the petitioner once had a fistfight with one of the jurors but did not recognize him because the petitioner was intoxicated during the fight. Ultimately, the court held that a hearing was needed to vet the issue as "the due process guarantee of an impartial jury invalidates criminal trials where even a single juror is discovered to have been partial or prejudiced against the defendant." *Id*. at 527. Here, in contrast, the trial court held a hearing

to vet the issue raised in defendant's motion and discovered that the single juror at issue was not partial or prejudiced.

For these reasons, none of these cases hold that a new trial is required where a juror is impaneled whose impartiality is later questioned because of an unfounded accusation. Rather, these cases collectively hold that when the impartiality of any juror is reasonably disputed, the trial court should hold a hearing at which the judge, as factfinder, assesses the facts, determines credibility, and ultimately determines whether there is, in fact, a *probability* that the juror is partial or prejudiced.

The ultimate question raised by defendant's motion was whether Juror #11 could be impartial. That juror repeatedly assured the court that he could, initially by declining to raise his card when the court asked the relevant questions. N.T. Jury Selection/Day 2, 4/3/18 at 198-199, 214-215, 218-219. (Of course, the jury is presumed to follow the judge's instructions. *Commonwealth v. Spotz*, 896 A.2d 1191, 1224 (Pa. 2006)). Juror #11 further assured the court that he could be impartial in response to his questions on individual *voir dire*. N.T. Jury Selection/Day 3, 4/4/18 at 131-134. The court responded to defendant's motion by holding the requisite hearing, finding Prospective Juror #9 not credible, and crediting the testimony of

Juror #11 that he would, in fact, be fair and impartial. The law does not require anything more, and the court properly relied on Juror #11's repeated assurances. *Blasioli*, 685 A.2d at 158; *Briggs*, 12 A.3d at 333. Because the trial court assessed that it was not probable that Juror #11 was partial or prejudiced, the court properly exercised its discretion in denying defendant's motion. Defendant's argument fails because he cannot demonstrate any misapplication of law, bias, prejudice or ill-will on the part of the trial judge.

VIII. THE SVP PROVISIONS OF ACT 29, SUBCHAPTER I, ARE NOT PUNITIVE; DEFENDANT'S DESIGNATION AS AN SVP IS CONSTITUTIONAL.

Defendant claims the trial court erred and abused its discretion in applying the SVP provisions of Act 29, Subchapter I ("Subchapter I"), to him because, in his opinion, doing so unconstitutionally increased his "punishment" in violation of *Alleyne*[44] and *Apprendi*,[45] and the *Ex Post Facto*

[44] *Alleyne v. United States,* 570 U.S. 99 (2013) (holding that any fact that increases the mandatory minimum sentence must be submitted to a jury and proved beyond a reasonable doubt).

[45] *Apprendi v. New Jersey,* 530 U.S. 466 (2000) (any fact other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

clauses of the federal and state constitutions. *Defendant's Brief*, at 169. His claim is waived and meritless.[46]

As an initial matter, if defendant now attempts to challenge the imposition of his ***non***-SVP registration requirements under Act 29, that claim is waived, as he did not raise it in his 1925(b) statement. *See Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998) (any issues not raised in a 1925(b) statement are waived on appeal). In that statement, defendant stated only that "[t]he trial court abused its discretion, erred, and infringed on [defendant's] constitutional rights in applying the sexually violent predator provisions of [Act 29] for a 2004 offense in violation of the *Ex Post Facto* Clauses of the State and Federal Constitutions." *Defendant's Statement of Matters Complained of On Appeal*, at ¶ 11. Accordingly, he has only preserved a challenge to the SVP provisions of Subchapter I.

But that claim is also waived. The Pennsylvania Rules of Appellate Procedure provide that "[t]he argument shall . . . have . . . the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent." Pa. R.A.P. 2119(a). Failure by an

[46] The trial court aptly summarized the relevant history of Pennsylvania's sex offender registration laws in its opinion. The Commonwealth will not repeat that history here but respectfully directs this Court to that opinion at pp. 131-139.

appellant to discuss pertinent facts or cite legal authority will lead to waiver. *Commonwealth v. Rhodes,* 54 A.3d 908, 915 (Pa. Super. 2012).

Defendant has presented no pertinent discussion here. His claim rests on the premise that Subchapter I constitutes criminal punishment. Although he notes the ***existence*** of the seven-factor *Mendoza-Martinez*[47] test for determining whether a statute is punitive, *Defendant's Brief*, at 173-174, he never ***applies*** the test to the statute. Instead, he identifies three random provisions of Subchapter I and asserts that "[Act 29] 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. Pa. R.A.P. 2119(a), *supra*; *see*, *e.g.*, *Commonwealth v. Delvalle*, 74 A.3d 1081, 1086-1087 (Pa. Super. 2013) (undeveloped claim waived on appeal).

Defendant's claim likewise fails because he has not met his burden to prove that the statute is unconstitutional. The party challenging a statute bears the burden to prove that it is unconstitutional. *West Mifflin Area School District v. Zahorchak,* 4 A.3d 1042, 1048 (Pa. 2010). The challenger's

[47] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963) (identifying factors to be weighed when considering a challenge to the constitutionality of a statute).

burden is heavy. "[D]uly enacted legislation carries with it a strong presumption of constitutionality," which "will not be overcome unless the legislation is clearly, palpably, and plainly in violation of the constitution." *Commonwealth v. Turner*, 80 A.3d 754, 759 (Pa. 2013) (internal citations omitted); *see Commonwealth v. McMullen*, 961 A.2d 842, 846 (Pa. 2008) ("[t]he presumption that legislative enactments are constitutional is strong."); *see also* 1 Pa. C.S. § 1922(3) (presumption exists that General Assembly did not intend to violate federal and state constitutions). Because of the "respect due to the legislature as a co-equal branch of government," *Commonwealth v. Nicely*, 638 A.2d 213, 216 (Pa. 1995) (citation omitted), "all doubts are to be resolved in favor of a finding of constitutionality." *Commonwealth v. Mayfield*, 832 A.2d 418, 421 (Pa. 2003) (citations omitted).

As noted, defendant's claim hinges on the premise that Subchapter I's SVP provisions constitute criminal punishment. Because he has not explained ***how*** this is supposedly so —he just asserts that it is—he has not met his burden to show that the statute "clearly, palpably, and plainly" violates the Constitution. His claim fails for this reason also.

Even if defendant had developed some meaningful discussion in his brief (he has not), his claim would still fail. The SVP provisions of Subchapter I are ***not*** punitive. To the contrary, as discussed extensively below, they are substantially similar to those in Megan's Law II, which the Pennsylvania Supreme Court found non-punitive. *Commonwealth v. Williams* ("*Williams II*") 832 A.2d 962, 986 (Pa. 2003); *see Commonwealth v. Lee*, 935 A.2d 865, 886 (Pa. 2007) ("the [registration, notification, and counseling] provisions that attach to sex offenders assessed to be SVPs [under Megan's Law II] are not constitutionally punitive"). Because they are not punitive, defendant has not been subject to punishment at all, much less *ex post facto* punishment, and his SVP designation does not violate *Alleyne* and *Apprendi*.

A. SVPs are Subject to a Different Statutory Scheme and Analysis Than Non-SVPs.

SVPs are subject to a different statutory scheme and analysis than non-SVPs because of the heightened public safety threat they pose. In *Kansas v. Hendricks*, 521 U.S. 346, 368-369 (1997), the United States Supreme Court upheld a statute that provided for indefinite civil commitment of SVPs (defined as "any person who has been convicted of or charged with a

sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence" under Kansas' Sexually Violent Predator Act). The Court found the statute non-punitive for *ex post facto* and double jeopardy purposes in part because, under the *Mendoza-Martinez* analysis, it furthered the legitimate purpose of protecting the public from the dangerously mentally ill. *Id*. at 357, 363.

In *Seling v. Young*, 531 U.S. 250 (2001), the Court examined a Washington statute "nearly identical" to that in *Hendricks*, finding that with respect to "those individuals with untreatable conditions . . . there was no federal constitutional bar to their civil confinement, because the State had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions." *Id.* at 257-258 (citing *Hendricks*, 521 U.S. at 366).[48]

Since *Hendricks*, at least nineteen states have enacted civil commitment statutes allowing for the confinement of sexually violent

[48] The United States Supreme Court upheld the constitutionality of civil commitment statutes again in *Kansas v. Crane*, 534 U.S. 407 (2002).

predators.[49] Courts in all of these states have determined that the statutes are civil, not criminal.[50] [51]

Pennsylvania's approach is less extreme. Rather than indefinite civil commitment, the legislature has addressed the public danger posed by SVPs through registration, notification, and counseling requirements. Pennsylvania's statute providing for those requirements is likewise civil, not criminal. Indeed, the Pennsylvania Supreme Court analyzed the

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[49] *See* Ariz. Rev. Stat. Ann. §§ 36–3701 to 3717; Cal. Welf. & Inst. Code §§ 6600–6609.3; Fla. Stat. Ann. §§ 394.910–.931; 725 Ill. Comp. Stat. 207/1–99; Iowa Code §§ 229A.1–.16; Kan. Stat. Ann. §§ 59–29a01 to 29a21; M.G.L.A. 123A §§ 1, 2, 6, 9, 12-16; M.S.A. §§ 253d.01-253d.36; Mo. Ann. Stat. §§ 632.480–.513; Neb. Rev. St. §§ 71-1201 to 71-1226; N.J.S.A. §§ 30:4-27.24 to 27.38: N.H. Rev. Stat Ann. §§ 135-E:1 to 135-E:24; NY Mental Hygiene Law §§ 10.01 to 10.17; N.D. Cent. Code §§ 25–03.3–01 to 03.3–23; S.C. Code Ann. §§ 44–48–10 to 170; Tex. Health & Safety Code §§ 841.001 to 841.153; Va. Code Ann. §§ 37.2-900 to 37.2-921; Wash. Rev. Code §§ 71.09.010 to 71.09.800; Wis. Stat. Ann. §§ 980.01 to 980.14.

[50] *In re Leon G.,* 59 P.3d 779, 782 (Ariz. 2002); *Hubbart v. Superior Court,* 969 P.2d 584, 606-611 (Cal. 1999); *Westerheide v. State,* 831 So.2d 93, 103 (Fla. 2002); *In re Det. of Samuelson,* 727 N.E.2d 228, 234-235 (Ill. 2000); *In re Det. of Garren,* 620 N.W.2d 275, 279-283 (Iowa 2000); *Commonwealth v. Bruno,* 735 N.E.2d 1222, 1230-1232 (Mass. 2000); *In re Hay,* 953 P.2d 666, 673 (Kan. 1998); *In re Linehan,* 594 N.W.2d 867, 870, 878 (Minn. 1999); *In re Gibson,* 168 S.W.3d 72 (Mo. Ct. App. 2004); *In re S.C.*, 810 N.W.2d 699, 704 (Neb. 2012); *State v. Ploof*, 34 A.3d 563 (N.H. 2011); *In re Civil Commitment of J.H.M.,* 845 A.2d 139, 144 (N.J. Ct. App. Div. 2003); *In re M.D.*, 598 N.W.2d 799, 805-06 (N.D. 1999); *State v. Nelson*, 89 A.D.3d 441 (N.Y. App. Div. 2011); *In re Matthews,* 550 S.E.2d 311, 316-317 (S.C. 2001); *In re Commitment of Fisher*, 164 S.W.3d 637, 646 (Tex. 2005); *Shivaee v. Commonwealth*, 613 S.E.2d 570 (Va. 2005); *In re Det. of Turay*, 986 P.2d 790, 812-813 (Wash. 1999) (*en banc*); *In re Commitment of Rachel*, 647 N.W.2d 762, 777-778 (Wis. 2002).

[51] In addition, the Federal Government has established its own civil commitment process for "sexually dangerous persons." 34 U.S.C. § 20971.

statute's requirements in Megan's Law II and deemed them non-punitive under *Apprendi*. *See Lee*, 935 A.2d at 886; *Williams II,* 832 A.2d at 986.

As detailed below, because there is substantial similarity between the SVP provisions of Megan's Law II and Subchapter I, the decision in *Williams II* dictates that the SVP requirements of Subchapter I are likewise non-punitive.

B. THE SVP PROVISIONS OF SUBCHAPTER I ARE SUBSTANTIALLY SIMILAR TO, BUT EVEN LESS ONEROUS THAN, MEGAN'S LAW II.

1. Registration

Under Megan's Law II, SVPs needed to register as sex offenders for life. 42 Pa. C.S. § 9795.1(b)(3), *effective July 10, 2000, through January 23, 2005*. They had to appear in person quarterly to verify with the Pennsylvania State Police ("PSP") their residence, employment, and school information, if any, and be photographed. 42 Pa. C.S. § 9796(a), *effective July 10, 2000, through January 23, 2005*.[52] SVPs were also required to update the PSP in person within ten days of any change to their registration

[52] The version of Megan's Law II considered in *Williams II* did not yet require offenders to register their employment and academic enrollment information with PSP, as these provisions were added in a 2002 amendment to the statute. *Williams II*, 832 A.2d at 967 n.8

information. 42 Pa. C.S. § 9795.2(a)(2), *effective July 10, 2000, through January 23, 2005*. Failure to comply with these obligations was a first-degree felony. 42 Pa. C.S. § 9795.2(d)(2), *effective July 10, 2000, through January 23, 2005*.[53]

As in Megan's Law II, SVPs under Subchapter I must register as sex offenders for life and report in person, quarterly, to verify compliance and be photographed. 42 Pa. C.S. §§ 9799.55, 9799.56(a)(2), 9799.60(a),(b). Failure to comply with reporting obligations is either a first- or second-degree felony, and violating counseling requirements is a first-degree misdemeanor. 42 Pa. C.S. §§ 4915.2(c), (c.1). There are some slight differences between the statutes, including, for example, under Subchapter I, SVPs have three days to report changes to their registration information, 42 Pa. C.S. § 9799.56(a)(2), whereas they had ten under Megan's Law II. 42 Pa. C.S. § 9795.2(a)(2), *effective July 10, 2000, through January 23, 2005*.

2. <u>Notification</u>

Megan's Law II required the chief law enforcement officer of the local municipality where an SVP resided to provide written notice of the SVP's

[53] The penalty provisions of Megan's Law II were struck down as punitive, but severable, in *Williams II*. 832 A.2d at 986.

name, address, offense, SVP status, and a photograph (if available) to certain individuals and institutions in the vicinity of the SVP's residence. 42 Pa. C.S. § 9798(a)(1), *effective July 10, 2000, through January 23, 2005*. The SVP's name and address were also sent to the victim within 72 hours of his initial registration and upon notice of a change in residence. 42 Pa. C.S. § 9797(a)(1), *effective July 10, 2000, through January 23, 2005*.

Subchapter I's notification requirements are nearly identical to those in Megan's Law II, except that, under Act 29, local police have five days (instead of three) to notify neighbors when an SVP moves into the neighborhood. 42 Pa. C.S. §§ 9799.61, 9799.62.

3. Monthly Counseling

The counseling requirements for SVPs under Megan's Law II and Subchapter I are the same. *See* 42 Pa. C.S. § 9799.4, *effective July 10, 2000, through January 23, 2005*; 42 Pa. C.S. § 9799.70(a).

4. Subchapter I's Removal Mechanism

Although Subchapter I and Megan's Law II are virtually identical, one critical difference renders Subchapter I even less onerous than Megan's Law II. Under Subchapter I, SVPs may petition for exemption from their lifetime requirements obligations after twenty-five years on the registry

and, if denied, file subsequent petitions every five years thereafter. 42 Pa. C.S. § 9799.59. Megan's Law II contained no mechanism for review and removal.

Given the strong similarities between the two statutes, and given that the SVP provisions of Megan's Law II were deemed non-punitive by the Pennsylvania Supreme Court ***even without the removal mechanism*** in *Williams II*, it is evident that the SVP provisions of Subchapter I are also not punitive. An application of the relevant *Mendoza-Martinez* factors further proves this point.

C. SUBCHAPTER I IS NOT PUNITIVE.

The test for determining whether a statute is punitive contains two parts. Courts must determine: (1) whether the General Assembly's intent was to impose punishment, and, if not: (2) whether the statute's purpose or effect is such that it renders the statute punitive, despite the General Assembly's intent to the contrary. *E.g.*, *Commonwealth v. Muniz*, 164 A.3d 1189, 1208 (Pa. 2017) (citing *Williams II*, 832 A.2d at 971).

Here, the intent of the legislature is clear: Subchapter I "shall not be construed as punitive." 42 Pa. C.S. §9799.51(b)(2). The analysis thus turns to the second element.

To determine the second element — whether the statute is punitive in purpose and effect —the following seven-factor test set forth in *Kennedy v. Mendoza-Martinez*, applies:

1. Whether the statute involves an affirmative disability or restraint;
2. Whether the sanction has been historically regarded as punishment;
3. Whether the statute comes into play only on a finding of scienter;
4. Whether the operation of the statute promotes the traditional aims of punishment;
5. Whether the behavior to which the statute applies is already a crime;
6. Whether there is an alternative purpose to which the statute may be rationally connected; and
7. Whether the statute is excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 372 U.S. at 168-169. In weighing these factors, courts must keep in mind that only the "clearest proof" can establish that a law is punitive where, as here, the General Assembly has specified otherwise. *Muniz*, 164 A.3d at 1208 (citing *Lee*, 935 A.2d at 876-877). Moreover, these factors are "neither exhaustive nor dispositive," *Williams II,* 832 A.2d at 972, and "[o]ne factor alone does not provide the 'clearest proof' [a statute] has a punitive purpose; each of the other factors must be evaluated."

Commonwealth v. Abraham, 62 A.3d 343, 351 (Pa. 2012) (quoting *Lehman v. Pennsylvania State Police*, 839 A.2d 265, 272 (Pa. 2003)).

A reviewing court "must examine the law's entire statutory scheme when determining whether a statute is truly civil or creates instead a punitive effect." *Smith v. Doe*, 538 U.S. 84, 92 (2003). With these principles in mind, an analysis of the *Mendoza-Martinez* factors for Subchapter I's SVP requirements follows.

1. <u>The statute does not impose an affirmative disability or restraint.</u>

Subchapter I's SVP requirements do not constitute an affirmative disability or restraint. An affirmative disability or restraint, as the term is traditionally understood, involves the loss of liberty or deprivation of a fundamental right. *Williams II*, 832 A.2d at 974 (citing *Herbert v. Billy*, 160 F.3d 1131, 1137 (6th Cir. 1998)); *see Abraham*, 62 A.2d at 351 (a sanction is an affirmative restraint where it is so onerous as to be "on the same plane as incarceration or deportation"). Imprisonment is the "paradigmatic affirmative disability or restraint" because it subjects a person to physical restraint. *See Williams II*, 832 A.2d at 974 (an affirmative disability or restraint is "some sanction that approaches the infamous punishment of

imprisonment") (citing *Herbert,* 160 F.3d at 1137). But "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 U.S. at 100.

The SVP requirements here do not come close to being on the same plane as incarceration or deportation. Like the nearly identical non-punitive SVP requirements of Megan's Law II, Subchapter I's SVP requirements "do not significantly restrain registrants, who remain 'free to live where they choose, come and go as they please, and seek whatever employment they may desire.'" *Id.* at 973 (quoting *Femedeer v. Haun*, 227 F.3d 1244, 1250 (10th Cir. 2000)); *see Smith*, 538 U.S. at 100 (Alaska Sex Offender Registration Act not punitive where it imposed no physical restraint and did not "restrain activities sex offenders may pursue but left them free to change jobs or residences").

Despite its frequency, monthly counseling is not an affirmative disability or restraint. The *Williams II* Court found the monthly counseling requirement for SVPs in Megan's Law II not comparable to "incarceration, deprivation of citizenship, or to the liberty-restricting conditions of probation," because it was designed to "assist[] the sexually violent predator, who is likely to be impulsive, irresponsible and burdened with

poor behavioral controls, from relapsing into sexually predatory behavior." *Williams II*, 832 A.2d at 975 (citation omitted).[54]

Accordingly, for all these reasons, Subchapter I's registration, notification, and counseling requirements do not constitute an affirmative disability or restraint.

2. <u>The registration, notification, and counseling requirements for SVPs have not been historically regarded as punishment</u>.

The second *Mendoza-Martinez* factor, whether the sanction has historically been regarded as punishment, also weighs in favor of finding the SVP provisions of Subchapter I non-punitive.

The *Muniz* Court found SORNA's non-SVP registration requirements punitive for two primary reasons: (1) they were comparable to traditional forms of punishment, such as probation, particularly in terms of the sheer number of required in-person appearances; and (2) the internet website functioned in a manner comparable to colonial-era shaming punishments.

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[54] Although the *Muniz* Court found the quarterly, in-person reporting requirements for Tier III offenders, combined with their obligation to report updates in person, amounted to an affirmative disability or restraint, 164 A.3d at 1210-1211, it specifically distinguished SVPs from non-SVPS in reaching that conclusion. It explained, "Under SORNA, where there has been no finding that individuals subject to the in-person registration requirements are sexually violent predators, subject to needed counseling, the in-person appearances do not constitute counseling in any event. Thus, the reasoning on this point in *Williams II* simply does not apply." *Muniz*, 164 A.3d at 1211.

Muniz, 164 A.3d at 1211-1213. These findings do not apply to the SVP provisions of Subchapter I, which are not comparable to historical forms of punishment.

a. Subchapter I's SVP requirements are not comparable to probation.

Subchapter I's SVP requirements serve a different purpose —to protect vulnerable members of the public from predation by addressing SVPs' compulsion to commit sexually violent offenses—than probation. Subchapter I operates by obtaining (and maintaining) information about sex offenders, and making the information available to the public. To be effective, the registry must be accurate and up-to-date. The statute, therefore, requires SVPs to verify in person, quarterly, and update certain personal information when it changes. 42 Pa. C.S. §§ 9799.56, 9799.60.

Public notification and information sharing are not the primary objectives of probation. Rather, probation is "devised to serve rehabilitative goals, such as recognition of wrongdoing, deterrence of future criminal conduct, and encouragement of future law-abiding conduct." *Commonwealth v. Hall*, 80 A.3d 1204, 1216 (Pa. Super. 2013) (citation omitted).

Probation is, primarily a mechanism for rehabilitation, and conditions of probation "are imposed specifically to 'insure or assist the defendant in leading a law-abiding life.'" *Williams II*, 832 A.2d at 977 (quoting 42 Pa. C.S. § 9754(b)); *see also Commonwealth v. Quinlan,* 412 A.2d 494, 496 (Pa. 1980) (stating that parole and probation "are primarily concerned with the rehabilitation and restoration to a useful life of the parolee or probationer").

Probation is also far more restrictive than sex-offender registration. With probation, officers directly supervise offenders, and may, for example, subject them to drug testing, and employment and vocational requirements. Probationers may not possess a firearm. *See* 42 Pa. C.S. § 9754 (setting forth the varied conditions which may be imposed on probationers). And unlike SVP registrants, probationers have a reduced expectation of privacy permitting warrantless searches of their homes. *Commonwealth v. Williams*, 692 A.2d 1031, 1035 (Pa. 1997). Thus, while some aspects of probation and SVP registration are similar, such as periodic reporting and potential criminal sanctions for failure to comply,[55]

[55] There are also critical procedural differences between violations of probation and non-compliance with sex offender registration. For example, when a person violates

registration and probation are different schemes, with different primary objectives, that function in different ways. Subchapter I's SVP registration, notification, and counseling requirements are not comparable to probation.

b. Subchapter I's website is not comparable to colonial-era shaming punishments.

In *Smith v. Doe*, the United States Supreme Court emphasized the essential purpose and critical need for Alaska's sex offender website: "The purpose and the principle effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." 538 U.S. at 99. The SVP

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probation or parole, a petition is filed with the court, the offender must appear before the trial judge, and that judge determines whether a violation has occurred by a preponderance of the evidence. This procedure is not triggered by any action from a law enforcement official, there are few steps involved, and the entire process can be resolved fairly quickly, often in somewhat informal proceedings. Pa. R.Crim.P. 708; *Commonwealth v. Mitchell*, 632 A.2d 934 (Pa. Super. 1993); *Commonwealth v. Griggs*, 461 A.2d 221 (Pa. Super. 1983); *Commonwealth v. Holmes*, 408 A.2d 846 (Pa. Super. 1979). In contrast, because non-compliance with registration requirements is its own offense, it comes with all the safeguards attendant to the criminal process, including obtaining an arrest warrant supported by probable cause, a preliminary hearing before a magisterial district judge, the opportunity to file pretrial motions, and the right to a jury trial where the Commonwealth must prove the defendant's guilt beyond a reasonable doubt. *See*, *e.g.*, Pa. R.Crim.P. 513(b)(2), 542(d), 578. Given the far more rigorous process for prosecuting registration violations, which are their own crimes, as compared to a probation or parole violation, the mere fact that incarceration may cause either circumstance is insufficient to conclude that the two situations are equivalent or equally "punitive."

notification provisions of Subchapter I are equally necessary for the same reasons and do not amount to shaming punishment.

In *Smith*, the Court found that Alaska's sex offender law did not resemble colonial-era shaming punishment because the information disseminated was truthful, made available for the purpose of public safety (not to humiliate offenders), and much of it was already public. 538 U.S. at 98-99. The fact that the information was available on the internet did not change the Court's analysis, particularly because Alaska's website did not provide members of the public with the means to shame offenders, such as posting comments underneath an offender's record. *Id*. at 99. The Court also noted that, while the website may have made obtaining offender information more convenient, members of the public still had to affirmatively seek out that information. *See id.* ("[T]the process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality.")

The *Muniz* Court reached a different conclusion. Relying on Judge, now Justice, Donahue's concurrence in *Commonwealth v. Perez*, it stated:

> Yesterday's face-to-face shaming punishment can now be accomplished online, and an individual's presence in cyberspace is omnipresent. The public internet website utilized by the Pennsylvania State Police broadcasts worldwide for an extended period of time, the personal identification information of individuals who have served their sentences. This exposes registrants to ostracism and harassment without any mechanism to prove rehabilitation -- even through the clearest proof.

Muniz, 164 A.3d at 1212 (citing *Perez*, 97 A.3d 747, 765-766 (Pa. Super. 2014)).

Subchapter I addresses these concerns in several ways. As for the *Muniz* Court's conclusion that online posting "exposes registrants to ostracism and harassment," the statute includes "[a] warning that the information on the [i]nternet website should not be used to unlawfully injure, harass or commit a crime against" an offender appearing on the site "and that any such action could result in criminal or civil penalties." 42 Pa. C.S. § 9799.28(2)(ii). Consistent with the statute, when a user first accesses Pennsylvania's Megan's Law website (https://www.pameganslaw.state.pa.us/), a warning in red block letters cautions: "Any person who uses the information contained herein to threaten, intimidate, or harass the registrant or their family, or who otherwise misuses this information, may be subject to criminal prosecution or civil liability." Before conducting an

offender search, a user must affirmatively accept this warning and the site's terms of use. Thus, the website expressly seeks to prevent any improper use of information on the registry, including potential harassment. There is nothing, and defendant has not identified anything, to suggest that the website is used in a manner contrary to this directive.

In terms of the potential that people may choose not to associate with an SVP or "ostracize" him, that consequence stems from the crime(s) he committed, not from the statute's notification provisions. "Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Smith*, 538 U.S. at 101.

Further, even though notification may cause an offender to feel shame or humiliation, *Defendant's Brief*, at 176, that does not render the statute punitive. "[W]hether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the sting of punishment." *Williams II,* 832 A.2d at 976. "Equally important, any punitive effect that results from being designated a sexually violent predator is not gratuitous, but rather, an inevitable consequence of

the effectuation of the law's remedial objective of protecting vulnerable members of the public." *Id*. The dissemination of accurate information about offenders to protect the community does not render the website punitive.

The dissemination of criminal information is a common and essential feature of our justice system. Pennsylvania provides the public with the means to access someone's criminal record online through its court system. *See* https://ujsportal.pacourts.us/. It also provides e-PATCH ("Pennsylvania Access to Criminal History"), which allows members of the public online access not only to someone's criminal record including convictions, as well as arrests over the last three years and charges for which a warrant has been issued. *See generally* http:epatch.state.pa.us. Pennsylvania's Megan's Law website simply assembles and facilitates the sharing of much of this same public information in an efficient manner that advances the legislature's public protection goals.

Moreover, the mere availability of sex offender information worldwide is different from proactive dissemination or broadcasting of that information. Interested persons, wherever they may be, must still affirmatively seek out the website and any information on it. While

someone in a distant geographic region might choose to do so, there is no reason to conclude that this conduct is commonplace.

And, even if it were, it would have no impact on the offender. Unlike colonial-era punishments which maximized pain, degradation, and emotional suffering by shaming someone in the most public and personal way possible, an SVP offender would not even know if his information had been accessed online. There is simply no mechanism on the website to notify him that his information has been viewed.

Nor does the website provide the public with the means to post comments about an offender. *See Smith*, 538 U.S. at 99 (website not punitive where it "d[id] not provide the public with means to shame the offender by say, posting comments underneath his record"). The online registry is strictly informative.

Thus, the website functions as designed, for the express purpose of providing members of the public with information so they may take affirmative steps to address the risk posed by sex offenders, in particular SVPs, in their area.[56] This factor favors finding the statute non-punitive.

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[56] SVP sex offender notifications are more analogous to "various forms of state warnings about threats to public safety . . . ." *E.B. v. Verniero*, 119 F.3d 1077, 1100 (3d

3. The SVP provisions of Subchapter I do not come into play only upon a finding of scienter.

The third *Mendoza-Martinez* factor is whether the statute comes into play only upon a finding of scienter. SVP requirements are imposed based on a mental abnormality or personality disorder, not criminal intent. They therefore do not come into play only upon a finding of scienter for purposes of *Mendoza-Martinez*. *Williams II*, 832 A.2d at 978 (the relevant determination of sexually violent predator status is made based on a mental abnormality, not criminal intent). This factor is, therefore, of little significance in the balance. *Smith*, 538 U.S. at 105; *Muniz*, 164 A.3d 1213-1214; *Williams II*, 832 A.2d at 977-978; *Perez*, 97 A.3d at 754-755.

Cir. 1997). "In order to provide members of the public with an opportunity to take steps to protect themselves, the government has traditionally published appropriate warnings about a range of public hazards." *Id.* at 1101. For instance, posting information about dangerous sex offenders is like law enforcement's "Most Wanted Lists," which have historically been posted in public places and are now available on the worldwide web. *See, e.g.*, FBI Most Wanted List, https://www.fbi.gov/wanted (last visited July 18, 2019); Pennsylvania State Police Most Wanted List, https://www.psp.pa.gov/Documents/Public%20Documents/psp_most_wanted_current.pdf (last visited July 18, 2019). The information for these "most wanted" suspects is disseminated even though a conviction may not have occurred yet.

4. The statute does not promote the traditional aims of punishment: deterrence and retribution.

The fourth *Mendoza-Martinez* factor examines whether the statute promotes the traditional aims of punishment: deterrence and retribution. It does not.

In criminal law, deterrence is "the prevention of criminal behavior by fear of punishment." *Black's Law Dictionary* (11th ed. 2019). Because Subchapter I applies only retroactively, it cannot possibly deter or prevent the criminal behavior that led to its application. But, the statute and, in particular, the SVP provisions, would not promote deterrence anyway. As SVPs suffer from a mental abnormality or personality disorder that prevents them from exercising adequate control over their behavior, such persons are unlikely to be deterred. *Williams II*, 832 A.2d at 978.

In any event, to the extent the statute arguably promotes deterrence at all, it does not use the threat of confinement to do so. Any "deterrence" occurs through the statute's counseling provisions, which serve to "assist[ ] the sexually violent predator, who is likely to be impulsive, irresponsible and burdened with poor behavioral controls, from relapsing into sexually predatory behavior." *Williams II*, 832 A.2d at 975.

In reaching a different conclusion, the *Muniz* Court emphasized that, unlike Megan's Law II, SORNA required long registration periods for less serious offenses, and registration for offenses that did not include a sexual component. 164 A.3d at 1215. These concerns do not apply to SVPs, who are designated as such following an assessment, and upon proof that they possess a mental abnormality or personality disorder that makes them likely to engage in predatory sexual offenses. This determinative fact is independent of the seriousness of the underlying offense(s).

As for retribution, the *Williams II* Court held that any retributive effect associated with Megan Law II's SVP scheme was "ancillary to the results achieved in terms of societal awareness and self-protection, and rehabilitation of the offender," and "d[id] not require the individual to pay his debt to society." 832 A.2d at 978 (internal citations omitted). The same holds true here, given that, as discussed, the SVP provisions of Subchapter I are essentially the same as those in Megan's Law II.

For these reasons, Subchapter I's SVP requirements do not promote the traditional aims of punishment. This factor is, therefore, non-punitive.

5. The behavior to which the statute applies is already a crime.

The fifth factor, whether the behavior to which the statute applies is already a crime, does not support a finding that the SVP provisions of Subchapter I are punitive. Even the *Muniz* Court rejected the argument that this factor supported finding SORNA's non-SVP registration provisions punitive, recognizing that "where SORNA is aimed at protecting the public against recidivism, past criminal conduct is 'a necessary starting point.'" 164 A.3d at 1216 (quoting *Smith*, 538 U.S. at 105). Because Subchapter I's SVP provisions are aimed at protecting the public from recidivist offenders, past criminal conduct remains a necessary beginning point. *Smith*, 538 U.S. at 105; *Muniz*, 164 A.3d at 1216; *Williams II*, 832 A.2d at 979.

6. The statute has a rational connection to an alternate purpose: community protection.

The sixth factor, whether the statute has an alternative purpose to which it is rationally connected, weighs in favor of finding the statute non-punitive.

The *Muniz* Court found this factor weighed ***against*** finding SORNA's registration provisions punitive because the statute had a rational alternate

purpose: community protection. 164 A.3d at 1217. The *Williams II* Court reached the same conclusion about the SVP provisions of Megan's Law II, noting that this factor was the "most significant factor in [the] determination that the statute's effects are not punitive." 832 A.2d at 979 (quoting *Smith*, 538 U.S. at 102). Because Subchapter I has essentially the same SVP provisions, and serves the same remedial purpose, as Megan's Law II, this factor weighs in favor of finding Subchapter I's SVP provisions non-punitive also.

7. <u>The statute is not excessive in relation to its purpose</u>.

Finally, Subchapter I's SVP requirements are not excessive in relation to their purpose. In making this assessment, Subchapter I's effects "must be evaluated in light of the importance of the governmental interest involved." *Williams II*, 832 A.2d at 982. "[T]he effects of a measure must be extremely onerous to constitute punishment..." *Id.* (internal citation omitted). Moreover, the excessiveness inquiry "is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy," but rather, "[t]he question is whether the regulatory means chosen are reasonable in light of the non[-]punitive objective." *Smith*, 538 U.S. at 105. Here, "[t]here is little question

that the threat to public safety and the risk of recidivism among sex offenders is sufficiently high to warrant careful record-keeping and continued supervision." *Lee*, 935 A.2d 883 (citing *Smith*, 538 U.S. at 103).

The *Williams II* Court found Megan's Law II's SVP requirements proportional to the legislature's non-punitive purpose. It reasoned that the requirements were not designed "to impose upon the sexually violent predator any gratuitous opprobrium or hardship beyond what is reasonably necessary to effectuate the Legislature's remedial and regulatory purposes." *Williams II*, 832 A.2d at 979. It further found that the SVP requirements were "reasonably designed to serve the government's legitimate goal of enhancing public awareness and ensuring that offenders do not relapse into harmful behavior." *Id.* at 981.

Even if the SVP notification requirements have some adverse effects on registrants, those effects are justified. *See id*. at 982 ("the state's interest in protecting the public against sexually violent predators is so great that it justifies the adverse effects that community notification might have upon the registrant") (citing *Verniero*, 119 F.3d at 1104).

Moreover, although the *Muniz* Court found the non-SVP registration requirements of SORNA excessive, it expressly distinguished them from

the SVP provisions at issue in *Williams II*, which were ***not*** excessive. It noted, "we do not analyze excessiveness as applied only to appellant or sexually violent predators, but instead we examine SORNA's entire statutory scheme." 164 A.3d at 1218. Given that the *Muniz* Court's discussion of this factor does not apply to SVPs, the *Williams II* Court's rationale controls.

There is, however, one significant difference between Subchapter I and Megan's Law II that further supports finding that Subchapter I is not punishment. The *Williams II* Court noted that "one of the most troubling aspects of the statute [wa]s that the period of registration, notification, and counseling lasts for the sexually violent predator's entire lifetime," and there was no means for an SVP to show he no longer posed a threat to the community. 832 A.2d at 982-983. Despite this concern, it still found the SVP requirements of Megan's Law II non-punitive. The Court reached the same conclusion in *Lee*, finding the SVP provisions of Megan's Law II not punitive, although there was no removal mechanism. 935 A.2d at 886.

But Act 29, Subchapter I, ***has*** a removal mechanism for all offenders, including SVPs, who may petition the court for exemption after twenty-five years. 42 Pa. C.S. § 9799.59(a). The petition triggers a new assessment

and designation process, which mirrors what occurred when the offender was originally assessed. *Id.* If the court finds he is no longer a threat, it must exempt him from all of Subchapter I's requirements. *Id*. If he fails to obtain relief, he can file subsequent petitions for removal every five years thereafter. *Id*. Given that the *Williams II* Court found Megan's Law II's SVP provisions non-punitive even without a removal mechanism, Subchapter I's nearly identical SVP provisions, which include a removal mechanism, certainly are not punitive.

8. Conclusion

Application of the *Mendoza-Martinez* factors demonstrates that the SVP registration, notification, and counseling requirements of Act 29, Subchapter I, are not punitive. Defendant has not shown by any proof, much less the clearest proof, otherwise.

D. DEFENDANT'S SVP DESIGNATION WAS PROPER.

Because the SVP provisions of Subchapter I are not punitive, *Apprendi* and *Alleyne* are not implicated. *See Lee*, 935 A.2d at 886 (rejecting Lee's *Apprendi*-based challenge and finding the registration, notification, and

counseling provisions of Megan's Law II were not punitive and therefore required "no more process than the statute . . . provide[d]").[57]

Neither is the *Ex Post Facto* Clause. An *ex post facto* law is one that "(1) makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) aggravates a crime, or makes it greater than it was when committed; (3) changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; or (4) alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense in order to convict the offender." *Commonwealth v. Allshouse*, 36 A.3d 163, 184 (Pa. 2012).

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[57] The Commonwealth recognizes that a panel of this Court recently reached a different conclusion in *Commonwealth v. Alston*. __ A.3d __ *2019 WL 2376209* (Pa. Super., filed June 6, 2019). That case holds that, under the rationale of *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017), *alloc. granted* No. 47 WAL 2018 (Pa. Jul. 31, 2018), an offender is entitled to fact-finding by a jury of the dates of his crimes, where those crimes straddle the operative dates of Subchapters H and I. In so holding, the Courteffectively deemed the non-SVP provisions of Act 29 punitive. This decision is problematic in several respects. First, the Court did not engage in an analysis of the *Mendoza-Martinez* factors as applied to either subchapter of Act 29. Second, there was, and is, no precedent for the Court's ruling; the issue of whether the statute is punitive is currently on review in the Pennsylvania Supreme Court in *Commonwealth v. LaCombe*, 35 MAP 2018, and *Commonwealth v. Torsilieri*, 37 MAP 2018. For these reasons, the Commonwealth has filed a petition for allowance of appeal in *Alston*, which is docketed at 399 MAL 2019. In any event, *Alston* is distinguishable from the instant matter because that case did not involve a challenge to the SVP requirements of Subchapter I which, as discussed, are subject to a different analysis than the non-SVP provisions.

"Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Lehman*, 839 A.2d at 270, (quoting *Weaver v. Graham,* 450 U.S. 24, 30 (1981)).

Here, as explained, defendant has not been subject to "punishment" at all under Subchapter I. He therefore could not have been subject to *ex post facto* punishment. *See*, *e.g.*, *Perez*, 97 A.3d at 759 (*Ex Post Facto* Clause of the Federal Constitution did not prohibit the retroactive application of sex offender registration requirement where statute was non-punitive).

But even if Subchapter I were punitive (it is not) defendant's *ex post facto* claim would fail anyway because any "punishment" he supposedly received did not increase as a result of Subchapter I's SVP provisions. Although defendant argues that his registration requirements for "aggravated assault" increased from ten years to lifetime, *Defendant's Brief*, at 172, that is wrong. He was not convicted of aggravated assault, but aggravated indecent assault, ***which was a lifetime offense under Megan's Law II***. 9795.1(b)(3), *effective January 21, 2003, through January 23, 2005*. Thus, the length of his registration has not increased from what he was on

notice he could have received at the time of his offense. He was, and is, a lifetime registrant. *Id*.; 42 Pa. C.S. § 9799.55(b)(3).

Although, as noted, defendant never actually explains how the statute is supposedly punitive, he still claims that "[b]ecause the *Muniz* Court determined the registration requirements of SORNA [ ] were punitive, then the SVP provisions in [Act 29], must be so as well." *Defendant's Brief*, at 171. This is wrong. The *Muniz* Court never found the ***SVP*** provisions of SORNA punitive; that decision is limited to its ***non***-SVP. It simply does not follow that because one set of provisions, applicable to a limited group of offenders in a different a statute (which, incidentally, never applied to defendant[58]), are punitive, another set of provisions applicable to a different group of offenders in a different statute are also punitive.

The SVP provisions of Act 29, Subchapter I, are neither punitive nor unconstitutional. They are a civil remedial measure, duly enacted by the Pennsylvania General Assembly, intended to protect citizens of the Commonwealth from dangerous sexual predators like defendant. The trial

[58] SORNA was enacted in 2011, and became effective in 2012, ***after*** defendant committed the instant crime. SORNA was replaced in 2018, before defendant's second trial.

court properly rejected defendant's constitutional challenge below, held a hearing in accordance with the statute, and found defendant to be an SVP.

Defendant's disappointment with this outcome does not provide a basis for relief.

CONCLUSION

For the foregoing reasons, and those set forth in the trial court's opinion, the Commonwealth respectfully requests this Honorable Court to affirm the judgment of sentence.

Respectfully submitted,

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IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee,	:	3314 EDA 2018
v.	:	
WILLIAM H. COSBY, JR., Appellant.	:	

Certification of Word Count

I, Adrienne D. Jappe, Montgomery County Assistant District Attorney, do hereby certify that the brief in the above-captioned matter, filed today, contains 49,391 words.

The Commonwealth has filed an Application for Leave to File Brief in Excess of Word Limit. That application is currently pending.

Respectfully submitted,

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