Received 9/14/2020 9:31:52 PM Supreme Court Middle District

Filed 9/14/2020 9:31:00 PM Supreme Court Middle District
39 MAP 2020

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

39 MAP 2020

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

WILLIAM HENRY COSBY

Appellant

BRIEF OF THE RAPE, ABUSE & INCEST NATIONAL NETWORK AS AMICI CURIAE IN SUPPORT OF THE COMMONWEALTH OF PENNSYLVANIA'S BRIEF FOR APPELLEE

Appeal from the order of the Superior Court entered on December 10, 2019 at 3314 EDA 2018, affirming judgment of sentence dated September 25, 2018 of Montgomery County Court of Common Pleas, Criminal Division, at CP-46-CR-3932-2016

Scott Berkowitz
RAINN
1220 L St NW, Suite 500
Washington D.C. 20005
Phone: 828-318-6382

Lynn Hecht Schafran
Legal Momentum
32 Broadway
Suite 1801
New York, NY. 10004
Phone: 212-413-7518

Virginia A. Gibson (Pa. Bar No. 32520)
Counsel of Record
Kendyl E. Gilmore (Pa. Bar No. 324263)
Hogan Lovells US LLP
1735 Market Street, 23rd Floor
Philadelphia, PA 19103
Counsel for the Rape, Abuse, and Incest National Network

Meg Garvin, MA, JD
National Crime Victim Law Institute
at Lewis & Clark Law School
1130 SW Morrison St., Suite 200,
Portland, OR 97205
Phone: 503-768-6953

Jennifer R. Storm
Office of Victim Advocate
1101 S. Front Street, Suite 5200 |
Harrisburg PA 17104
Phone: 717-214-2256

Karen Baker
Pennsylvania Coalition Against Rape
2101 N Front Street
Governor's Plaza North, Bldg #2
Harrisburg, PA 17110
Phone: 717-728-9740 x161

Shea M. Rhodes, Esquire
Villanova Law Institute to Address
Commercial Sexual Exploitation
299 N. Spring Mill Road
Villanova, PA 19087
Phone: 610-519-7183

Courtney Toomath-West
Women Lawyers On Guard Inc.
P.O. Box 100551
Arlington VA 22210
Phone: 301-215-0354

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Testimonies

The Rape, Abuse & Incest National Network (RAINN) and additional amici curiae[1] respectfully submit this *amicus* brief in support of the Commonwealth of Pennsylvania's Brief of Appellee. The amici curiae represent a wide variety of sexual violence and victim advocacy organizations with collective decades of experience studying sexual violence and the law.

I. SUMMARY OF THE ARGUMENT

The amici submit that the trial court properly allowed evidence of the five additional witnesses who testified Bill Cosby sexually assaulted them in a strikingly similar manner to Andrea Constand. In challenging his conviction, Cosby claims the Superior Court "erred when it abandoned the time—honored test that [prior bad act] evidence be 'nearly identical' to the charged offense, finding instead that its admission was justified because it followed a rough 'playbook of criminal tactics.'"[2] Cosby is wrong. The testimony of the five additional victims was admissible under Pa. R.C.P. No. 404(b)'s exceptions for evidence demonstrating a "common plan or scheme," or an "absence of mistake," and under the Doctrine of Chances.

[1] *See* Statement of Interest for each *amicus* at Appendix A.
[2] Brief for Appellant, *Commonwealth of Pennsylvania v. William Henry Cosby, Jr.*, No. 30 MAP 2020 (Pa. April 11, 2020) at 28 ("Appellant Br.").

II. BACKGROUND

Cosby was convicted of aggravated indecent assault arising from an assault he committed against Andrea Constand in 2004. Cosby's first trial, in which one additional victim witness testified, ended in a mistrial in 2017, after the jury remained deadlocked after 52 hours of deliberation.[3]

At Cosby's retrial, the Commonwealth sought to introduce 19 additional victim witnesses, under Rule 404(b) and the Doctrine of Chances; the Court permitted five to testify. Judge O'Neill permitted the testimony under Rule 404(5), but noted that the Doctrine of Chances was a "compelling" justification for admissibility, particularly in light of Chief Justice Saylor's concurrence in *Commonwealth v. Hicks*.[4]

The Superior Court subsequently heard Cosby's case on appeal, holding that the Trial Court properly admitted testimony from the additional victim witnesses under Rule 404(b). The Superior Court did not address the Doctrine of Chances.

A. Victim and Prior Bad Acts Witness Testimonies Presented at Trial

At Cosby's re-trial, Ms. Constand and five additional victim witnesses testified regarding the assaults perpetrated by Mr. Cosby:

---

[3]Maria Puente, *Bill Cosby Trial: How Did a Mistrial Happen? And What Comes Next?*, USA Today (June 17, 2017), https://www.usatoday.com/story/life/people/2017/06/17/bill-cosby-trial-how-did-mistrial-happen-and-what-comes-next/102812764/.

[4] Opinion at 43; *Commonwealth v. Hicks*, 156 A.3d 1114 (Pa. 2017).

Andrea Constand described[5] meeting Cosby in 2002 while working at Temple University. For 18 months, Constand regularly interacted with Cosby, considering him a mentor. In 2004, Cosby invited her to his home to discuss her career. During this visit, Cosby urged Ms. Constand to take three small blue pills to "take the edge off."[6] Because they had previously discussed homeopathic treatments, she thought they were a natural anxiety remedy. Trusting Cosby, she took the pills. Soon afterwards, she experienced double vision, a "cottony" feeling in her mouth, and slurred speech. She testified Cosby walked her over to the sofa in the living room, laid her down on her side, and she lost consciousness. She awoke to Cosby laying behind her, penetrating her vagina with his fingers and groping her breasts. She testified Cosby masturbated himself with her hand. Ms. Constand testified she was unable to resist or move. [7] She lost consciousness again, awaking on the sofa with her bra around her neck and her pants unzipped.[8]

Ms. Chelan Lasha testified[9] that in 1986, Cosby identified her through a family member and offered his mentorship. Cosby visited Ms. Lasha and her grandparents, and invited her to his hotel suite, purportedly to have photos taken for the Ford Modeling Agency and discuss an acting opportunity on "The Cosby Show." When Ms. Lasha

---

[5] *See*, Direct Testimony of Andrea Constand (April 13, 2018), https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4554.
[6] *Id.* at 59-60; Appellant Br. at 15.
[7] *Id.* at 63-64.
[8] *Id*. at 65.
[9] *See*, Direct Testimony of Chelan Lasha (April 11, 2018), https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4557.

arrived, she complained of cold or allergy symptoms. Cosby offered her a pill, claiming it was an antihistamine, and two shots of amaretto. Ms. Lasha began to feel "woozy." She testified Cosby brought her to the back of the suite, laying her in the bed where she was unable to move. She was aware[10] that Cosby laid next to her, humped her leg and pinched her breasts until she felt something warm on her leg. She lost consciousness, awaking in a Hilton bathrobe to Cosby clapping his hands in her face.

Ms. Heidi Thomas testified[11] that as an aspiring actress in 1984, Cosby identified her through her modeling agency to offer mentorship. Cosby invited her to Reno, Nevada, for a one-on-one acting coaching session. During the session, Cosby encouraged Ms. Thomas to sip wine as a "prop." Afterwards, Ms. Thomas experienced intermittent memory loss. She recalled lying on a bed clothed with a naked Cosby forcing his penis in her mouth, lying at the foot of the bed and hearing Cosby state, "your friend is going to come again." She awoke the next day feeling nauseated.

Ms. Janice Dickinson testified[12] she was a model, and aspiring singer and actress in 1982 when Mr. Cosby identified her through her modeling agency to offer his mentorship. Cosby invited her to Lake Tahoe to attend his performance and discuss her career. Ms. Dickinson said that she had menstrual cramping, and Mr. Cosby offered her a

[10] *Id*. at 67.
[11] *See*, Transcript Direct Examination of Heidi Thomas (April 10, 2018) https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4546.
[12] *See*, Transcript of Direct Examination of Janice Dickinson (April 12, 2018) https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4548.

pill for the pain. After taking the pill, Ms. Dickinson said she felt "woozy," "dizzy," and "slightly out of it." Cosby took Ms. Dickinson to his hotel room, where she experienced lightheadedness and difficulty speaking. She described being immobile when Cosby got on top of her and kissed her. Before losing consciousness, Dickinson recalled feeling vaginal pain. The next morning, Dickinson awoke, partially disrobed, in her own hotel room. She testified to noticing semen between her legs and feeling vaginal and anal pain.

Ms. Janice Baker-Kinney testified[13] she was a cocktail waitress at the Harrah's Casino in Reno, Nevada in 1982. A co-worker named Judy invited Ms. Baker-Kinney to a pizza party with Bill Cosby. When Ms. Baker-Kinney arrived at the Harrah Mansion, the only people present were Judy, Cosby, and Ms. Baker-Kinney. Ms. Baker-Kinney accepted a beer and a pill from Cosby. Cosby then urged her to take a second pill, which she did. Shortly afterwards, her vision became blurry, and she lost consciousness. She awoke on a couch with her shirt and pants undone. She heard Judy leaving, at which time Cosby sat behind Ms. Baker-Kinney on the couch. Cosby leaned Baker-Kinney's back against him on the couch, put his arm around her shoulder, and groped her breast. Then, Cosby guided her upstairs to a bedroom; her next memory was waking up naked in bed

[13] *See*, Testimony on Cross-Examination of Janice Baker-Kinney (April 11, 2018), https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4557. *See also*, Statement of Janice Baker-Kinney referred to in Cross-Examination, Gloria Allred (April 23, 2015). https://www.gloriaallred.com/Gloria-s-Videos-and-Statements/4-23-15-Janice-Baker-Kinney-Statement.pdf.

with a naked Cosby, and "a sticky wetness" between her legs, feeling as though she had sex the previous night.

Ms. Maud Lise-Lotte Lublin testified[14] that in 1989 Cosby identified her through a modeling agency, and developed a relationship with her and her family over two years. Cosby invited Ms. Lublin to meet him at his suite in the Las Vegas Hilton, where he gave her a shot of alcohol, insisting she drink it to help her improvisation skills. She complied. He then provided a second shot of alcohol. She subsequently felt "woozy" and "dizzy" and had difficulty hearing. [15] Cosby told her to sit between his legs; although she felt this was inappropriate, she complied because she had difficulty standing. She testified that Cosby pet her hair and spoke to her. However, she testified she couldn't get up or hear his words clearly. She recalled walking past bedrooms in Cosby's suite, but lost consciousness shortly afterwards, awaking two days later.

III. ARGUMENT

Trial courts enjoy broad discretion regarding the admissibility of evidence, and judgments as to admissibility are only reversible when the trial court abused its discretion.[16] "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest

[14] *See*, Testimony of Maude Lise-Lotte Lublin (April 12, 2018), https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4553.
[15] *Id.* at 84.
[16] *Commonwealth v. Sherwood*, 982 A.2d 483, 495 (Pa. 2009).

unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous."[17] Under Pennsylvania's Rules of Evidence, "evidence of a crime, wrong, or other act is not admissible…to show that on a particular occasion the person acted in accordance with their character." (Pa. R.E. 404). Importantly, Rule 404 is a rule of *inclusion*, not a rule of exclusion. In other words, while prior bad act evidence may be used to demonstrate "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident," it may also be used in other ways so long as the proposed use does not require a propensity inference. *Id*. Such evidence is admissible where the probative value of the evidence substantially outweighs its potential for unfair prejudice.[18]

Here, the trial court was within its discretion to permit five additional victims to testify at trial. In particular, the trial court properly allowed the Commonwealth to offer this evidence to establish (1) that these assaults were part of a common plan or scheme, (2) Cosby was not mistaken about whether Ms. Constand consented, and (3) the improbability that Cosby is merely a hapless victim of a series of false accusations made in the "fervor of the #MeToo movement." Appellant Br. at 28, 59.

[17] *Id.*
[18] Pa. R.E. 404(b)(2).

A. The Testimony of the Five Prior Bad Acts Witnesses Is Admissible Under Rule 404

Judge O'Neill properly admitted, and the Superior Court properly upheld, the additional witnesses' testimony under the Rule 404(b) exceptions for common plan or scheme and lack of mistake. Prior bad acts are admissible to show absence of mistake where the "manner and circumstances" of the prior act and the charged offense are similar.[19] Although the Defendant argues otherwise, prior bad acts need not be identical to the charged conduct, and "certain differences between the two incidents—such as the exact reason the victim was in a compromised state – are not essential to the question of whether [the defendant] mistakenly believed [the victim] consented to sexual intercourse."[20] Likewise, establishing a common plan or scheme does not require *identical* facts, only the existence of a "logical connection" between the crimes.[21] Such a logical connection exists where "there are shared similarities in the details of each crime" such that "proof of one tends to prove the others."[22]

The additional victims in this case paint a near-identical picture of their assaults by Cosby. The additional victim testimony established a pattern of behavior Cosby followed for years, with little deviation. That scheme, outlined by the victims, is as follows:

---

[19] *Commonwealth v. Tyson*, 119 A.3d 353, 359 (Pa. Super. Ct. 2015).
[20] *Id.* at 363.
[21] *Commonwealth v. Ivy*, 146 A.3d 241, 253 (Pa. Super. Ct. 2016).
[22] *Commonwealth v. Judd*, 897 A.2d 1224, 1231-32 (Pa. Super. Ct. 2006).

1) Identify and develop a relationship with victim: Cosby met his victims in business settings or through modeling agencies.

2) Gain trust or rely on trusted reputation as "America's Dad": All victims testified to either viewing Cosby as a professional mentor, or trusting him based on his beloved public reputation.

3) Invite the victim for pretextual meeting: Each victim was invited to meet Cosby under the guise of providing professional guidance or mentorship.

4) Isolate victim in a controlled location: Cosby chose locations within his control for these pretextual meetings, including a home or hotel room, where he was alone with the victims.

5) Provide incapacitating drug: Cosby offered either a drink, or he provided pill(s) to his victims, sometimes offering both.

6) Wait for drugs to incapacitate victim: The victims testified to losing or struggling to maintain consciousness, inability to move, and difficulty speaking and other indicators of incapacitation, including losing consciousness.

7) Sexually assault victim - Some victim witnesses testified to losing consciousness immediately following penetration or sexual activity, others recalled awaking to find semen on their body, vaginal and/or anal pain, disheveled or missing clothing, or sensing that they had had sex.

Cosby cannot meaningfully challenge the similarities between the six victims' accounts. Taken as a whole, the testimony adduced at trial paints a compelling portrait of Cosby's decades-long scheme to build trust, isolate, incapacitate, and sexually assault women. Although he contends that his encounter with Constand was consensual, Cosby cannot earnestly argue that he was unaware of the incapacitating effects of the drugs he offered; he witnessed their effects regularly for years, and admitted they created a grey

area "between permission and rejection" in terms of consent.[23] In fact, Cosby confessed that, although the Quaaludes were his, *he refused to take them himself because of their effects*. *See* N.T. Trial by Jury, 4/18/18 at 40-41.

Cosby and the amici quibble with trivial distinctions between victims' accounts, going so far as to make the assertion that remoteness in time should preclude admissibility of this testimony. Cosby identifies immaterial differences between the victim accounts, including the timing of the assaults or their locations.[24] He emphasizes that five of these additional assaults occurred between 1982-1989, arguing that the passage of time between assaults warrants their exclusion. However, remoteness in time is but a single factor courts may weigh at their discretion in determining the admissibility of prior bad acts evidence. *Commonwealth v. Luktisch*, 680 A.2d 877, 878 (Pa. Super. Ct. 1996) ("Focusing solely upon this time lapse, however, is improper.") Further, remoteness of prior acts should be considered in relation to *each other*, rather than solely in relation to the charged offense. *Id.* at 878.

Importantly, the apparent remoteness in time of these assaults is *a function of the Court's exercise in discretion and Cosby's success with the Trial Court*. Having succeeded in limiting the number of witnesses permitted to testify at his re-trial, Cosby now seeks to use the limitations that the Court imposed as a basis for excluding this

[23] Notes of Testimony at 207, Jury Trial, (June 8, 2017), https://www.montcopa.org/2312/Commonwealth-v-William-Henry-Cosby-Jr.
[24] Appellant Br. at 59-62.

evidence entirely. Had the Court permitted the Commonwealth to introduce 19 victim witnesses, whose assaults occurred at close intervals over a span of decades, the remoteness in time from each other would have been virtually nonexistent. Cosby's attempt to overturn his conviction on the basis that these victims' assaults were too remote in time is pure gamesmanship. Moreover, Pennsylvania courts have held that prior acts are admissible, even when they occur more remotely than those of the additional victim witnesses in this case. *See, e.g., Commonwealth v. Patskin*, 93 A.2d 704, 710 (Pa. 1953) (upholding admission of seventeen-year-old assault); *Commonwealth v. Aikens*, 990 A.2d 1181, 1186 (Pa. Super. Ct. 2010) (upholding admission of fifteen-year old assault). The overwhelming similarities between these accounts were sufficient to justify Judge O'Neill's discretion in admitting testimony from these witnesses, and did not constitute an abuse of discretion simply because they occurred outside of Cosby's arbitrary timeline.

B. The Testimony of the Five Prior Bad Acts Witnesses is Admissible Under the Doctrine of Chances

In addition to the purposes enumerated under Rule 404, the Court may also uphold admissibility of this testimony under the Doctrine of Chances. Since its introduction in *Rex v. Smith* in 1915, the Doctrine of Chances has provided means [25] to admit prior bad acts evidence where an individual finds himself embroiled in uncommon and suspicious

[25] *See, People v. Spector*, 128 Cal. Rptr. 3d 31 (Cal. Ct. App. 2011); *U.S. v. Woods*, 484 F.2d 127 (4th Cir. 1973).

circumstances more frequently than expected.[26] Rather than admitting evidence to show propensity, the Doctrine of Chances permits the admission of evidence to demonstrate a defendant accused of sexually assaulting multiple victims is not the *unlucky victim of false accusations*; instead, he is *culpable*.

> The reasoning starts with the low baseline probability…that an innocent person would be falsely accused of sexual assault … the second step in the analysis considers the effect on these already low probabilities of additional, similar occurrences… An innocent person may be falsely accused or suffer an unfortunate accident, but when several independent accusations arise or multiple similar 'accidents' occur, the objective probability that the accused innocently suffered such unfortunate coincidences decreases. At some point, the fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual or objectively improbable to be believed.[27]

As Chief Justice Saylor noted, the doctrine does not rely on "any inferences as to the defendant's personal, subjective character." *Commonwealth v. Hicks*, 156 A.3d 1114, 1133 (Pa. 2017) (J. Saylor, concurring). Instead, the doctrine asks, "What are the chances that an innocent man is involved in such suspicious circumstances so frequently?"[28] One Texas court characterized the doctrine as follows: "As Auric Goldfinger, the infamous James Bond villain, said, 'Once is happenstance. Twice is coincidence. The third time it's

---

[26] Edward J. Imwinkelreid, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 423 (2006); *see also, Rex v. Smith*, 11 Crim. App. Rep. 229 (1915). (introducing the doctrine in 1915).

[27] R. Collin Mangrum & Dee Benson, *Mangrum & Benson On Utah Evidence Rule* 404 (2019) (emphasis added) (citations omitted).

[28] *See Doctrine of Chances*, 3 Jones on Evidence § 17:62 (7th ed. 2019).

enemy action.'" *Valadez v. Texas*, No. 10-17-00161-CR, 2019 WL 2147625, at *8 n.3 (Tex. App. May 15, 2019).

The Commonwealth bears no burden to prove *exactly* how unlikely it is that Cosby has been falsely accused of sexual assault on at least five occasions. "Just as we do not need to determine the proportion of cyanosis deaths that result from intentional suffocation and natural causes to conclude that accidental deaths are rare, we do not need empirical information about the frequency of false as compared to true child abuse [or sexual assault] charges to conclude that the likelihood of a randomly chosen innocent person being accused of the crime is remote." [29] Instead, Courts applying the Doctrine of Chances should exercise sound discretion.

This doctrine is distinct from the enumerated 404(b) exceptions in a number of respects. First, where the 404(b) exceptions permit admissibility of this evidence to prove lack of mistake or common plan or scheme, the Doctrine of Chances permits this, but also allows for admissibility of this evidence to prove *actus reus* — that a non-consensual sexual assault occurred. Second, courts need not impose temporal restrictions on evidence admitted under the Doctrine of Chances; because the evidence becomes more probative with the admission of each witness, temporal restrictions on admissibility run contrary to the doctrine's purpose. Finally, in applying the Doctrine of

---

[31] Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Reconsidered*, 29 U.C. Davis L. Rev. 355, 396–97 (1996)(emphasis added).

Chances, the Court need not "look for a general scheme or to discover a united system in all the [prior bad] acts…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." *Commonwealth v. Donahue*, 549 A.2d 121, 126 (Pa. 1988) (emphasis added).

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") urges this court in its brief to regress by decades, adopting an antiquated and narrow view regarding the relatedness of prior bad acts. Such a precedent would needlessly narrow the scope of Rule 404(b), exclude evidence clearly admissible under the Pennsylvania Rules of Evidence, and restrict access to justice for individuals already facing systematic disadvantage within the judicial process. Citing *Commonwealth v. Bidwell*, 195 A.3d 610, 626 (Pa. Super. Ct. 2018), PACDL advocates for narrow admission of prior bad acts evidence. *Bidwell* is inapposite. There, the Court recognized that the doctrine of chances is recognized in most jurisdictions, but held that prior bad act evidence was inadmissible because prior victim witnesses' testimony "[did] not evidence any particular distinctive pattern of behavior by [the Defendant]… For instance, it is alleged that [Defendant] assaulted his wives during the course of their marriages, but he spontaneously attacked Ms. Sickle whom he had just met while she interviewed for a job." *Id*. Courts considering the admissibility of evidence under the Doctrine of Chances have admitted testimony from

two,[30] three[31], six[32], and eight[33] unrelated victims, finding the defendants' claims of victim fabrication strained credulity in light of so many reports of assault. In light of the five witnesses who testified, Cosby's defense of fabrication strains credulity as well.

The additional victim testimony was properly admitted to prove the *actus reus*[34]—that the assault occurred as Ms. Constand alleged. In his appeal, Cosby explains "[he] did not dispute the events of the charged offense; he disputed the issue of consent."[35] In short, he disputes the *actus reus* of the crime.[36]

> Considered in isolation, the charged [sexual assault] ... may be easily explicable as an accident. However, when all similar incidents are considered collectively or in the aggregate, they amount to an extraordinary coincidence; and the doctrine of chances can create an inference of human design. The recurrence of similar incidents incrementally reduces the possibility of accident. The improbability of a coincidence of acts creates an objective probability of an actus reus.

Michigan v. Mardlin, 790 N.W.2d 607, 619 (Mich. 2010) (*citing* Imwinkelried, *Uncharged Misconduct Evidence* (rev. ed., March 2008 supp.) § 4:3 at 4-42 and 4-43). Because Cosby has disputed the consent component of the charged offense, the Doctrine

---

[30] *See, Washington v. DeVincentis*. 74 P.3d 119 (Wash. 2003).
[31] *See, Commonwealth v. Elliott*, 700 A.2d 1243, 1250 (Pa. 1997).
[32] Mem. Decision, *Utah v. Green*, Nos. 16100933, 161100934, 161100936, 161100938, 161100939, 161101097, 161101098 (Utah Dist. Ct. 2017).
[33] *Michigan v. Kelly*, 895 N.W.2d 230, 235 n.4 (Mich. Ct. App. 2016).
[34] *Utah v. Lowther*, 398 P.3d 1032, 1040 (Utah 2017) (holding that the doctrine of chances allows the admission of prior bad acts because "[i]n this case, the issues of consent, a component of *actus reus* in a rape charge . . . [is] in *bona fide dispute*"); *Hicks*, 156 A.3d at 1136-37 (explaining that the doctrine of chances can be used in response to a defendant's claim that he did not commit the *actus reus* of a crime); *Colorado v. Everett*, 250 P.3d 649, 656 (Colo. App. 2010) (holding that "[t]he doctrine of chances can be used to prove the *actus reus* of a crime").
[35] Appellant Br. at 63.
[36] For further discussion of consent and actus reus, *see id.*, at 61.

of Chances provides an appropriate rationale for admitting the testimony of the additional victim witnesses. The Commonwealth properly introduced this evidence to demonstrate the massive improbability of Cosby's defense; it would be an "extraordinary coincidence" indeed for Cosby to have engaged in consensual sex with six women, all of whom subsequently fabricated a sexual assault claim. Instead, the court admitted this testimony because it permitted the inference of "human design"—that Cosby targeted, isolated, drugged, incapacitated, and sexually assaulted Ms. Constand.

IV. PRIOR BAD ACTS EVIDENCE IS SOUND PUBLIC POLICY AND IMPROVES VICTIM'S ACCESS TO JUSTICE

Twenty states have already adopted evidentiary rules to permit prior bad acts evidence in sex crime prosecutions. Misconceptions about these crimes and victim behavior influence jury deliberations,[37] and the jurors who carry these misconceptions about victims of sexual trauma are "less likely to believe a victim, more likely to hold the victim responsible, less likely to hold the perpetrator responsible, and less likely to convict a defendant."[38] It can be difficult for a survivor of sexual assault to speak if they face

[37] For additional legal analysis of juror misconception and its legal impact, *see, State v. Obeta*, 796 N.W.2d 282, 285 (Minn. 2011) (admitting expert testimony to counteract jury's mistaken "beliefs about what rape is and what rape victims are," and "beliefs about how rape victims should be or should act").

[38] Tara Kalar, et al., *A Crisis of Complacency: Minnesota's Untested Rape Kit Backlog*, 74 BENCH & B. MINN. 22, 24 (2017); *see also,* Kerri Pickel & Rachel Gentry, *Mock Jurors' Expectations Regarding The Psychological Harm Experienced by Rape Victims as a Function of Rape Prototypicality*, 23 PSYCH. CRIM. & L. 254, 271 (2017) (study concluding that mock jurors are less likely to convict a defendant accused of acquaintance rape than one accused of stranger rape). However, federal crime research data

public criticism and fear retribution.[39] Cosby's own mistrial demonstrates that, if even one juror retains these misconceptions despite their duty to fairly evaluate the evidence, it can be sufficient to destroy jury unanimity required to render a conviction. This testimony provided the jurors with an essential opportunity to fairly weigh the evidence and reach a verdict.

A. The Testimony of the Five Additional Witnesses Is Not Unduly Prejudicial

Cosby has complained that additional victim witness testimony unfairly prejudiced him in the eyes of the jury. He is actually complaining of losing his unfair advantage, one that has long allowed serial offenders[40] to escape unscathed in the American criminal justice system due to perceived weaknesses in evidence. The testimony of the five victim witnesses presented the opportunity to confront misconceptions about sexual violence, which often come into play in criminal prosecutions.[41] Such misconceptions include that victims who delay reporting their assault are less credible; that a substantial number of

---

shows that 8 out of 10 rapes are committed by someone known to the victim, and that 39% of all sexual assaults are perpetrated by an acquaintance.

[39] *See*, Michael Planty et al., *Female Victims of Sexual Violence, 1994-2010* at 7, Bureau of Justice Statistics, U.S. Department of Justice (Mar. 2013), https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf. (last visited Sept. 10, 2020) (twenty percent (20%) of victims cited they feared retaliation as a top reason to delay reporting).

[40] One study of untested sexual assault kits found that 35.7% of the perpetrators in the sample had two or more sexual assaults linked via DNA, reflecting systematic difficulty in locating and successfully prosecuting offenders. *See* Rebecca Campbell et al., *Connecting the Dots: Identifying Suspected Serial Sexual Offenders Through Forensic DNA Evidence*, 10 PSYCH. OF VIOLENCE 255 (2020).

[41] Hubert S. Feild, *Attitudes Toward Rape: A Comparative Analysis of Police, Rapists, Crisis Counselors, and Citizens*, 36 J. PERSONALITY & SOC. PSYCHOL. 156, 162-64 (1978) (discussing prevalence of rape myth acceptance in public).

rape accusations are fabricated; and that rape victims share responsibility for the assault when it is by an acquaintance or when drugs or alcohol[42] are involved.[43] The additional victim testimony confronts these ill-informed ideas that may lead juries to discredit victims.

Prior victim witness testimony may also confront misconceptions about victim response to trauma. For instance, individuals often misunderstand reasons for reporting delays.[44] Indeed, Cosby has repeatedly attempted to exploit these misconceptions about sexual violence, claiming witness delay in reporting is an indicator of fabrication. Nonsense. Research demonstrates that victims, facing the intimidating process of speaking to law enforcement, may delay or entirely avoid filing a complaint because of

---

[42] Destin N. Stewart & Kristine M. Jacquin, *Juror Perceptions in a Rape Trial: Examining the Complainant's Ingestion of Chemical Substances Prior to Sexual Assault*, 19 J. AGGRESSION MALTREATMENT & TRAUMA 853, 869-70 (2010) (finding that victims who had ingested alcohol were less credible to jurors).

[43] *See e.g.*, Jan Jordan, *Beyond Belief? Police, Rape and Women's Credibility*, 4 CRIM. JUST. 29-59 (2004), https://pdfs.semanticscholar.org/770e/145794425fce693439439e5c95c872cae7fc.pdf?_ga=2.164312959.1397883990.1564018177-1766473934.1564018177 (citing Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013-71 (1991)); Simon Bronitt, *The Rules of Recent Complaint: Rape Myths and the Legal Construction of the "Reasonable" Rape Victim*, Balancing the Scales: Rape, Law Reform & Australian Culture 41-58 (Patricia Easteal ed., 1998); Liz Kelly, *Routes to (In)Justice: A Research Review on the Reporting, Investigation, and Prosecution of Rape Cases*, Univ. of N. London (Oct. 2001), https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2014/04/Rapelitrev.pdf.

[44] *See*, Jordan, *supra* note 43. *See also*, Pennsylvania Coalition Against Rape, *Speak Out From Within: Speaking Publicly About Sexual Assault*, https://www.pcar.org/sites/default/files/resource-pdfs/speaking_out_from_within-_speaking_publicly_about_sexual_assault.pdf (last visited Sept. 10, 2020) (a supportive guide for victims who are considering disclosing their assault).

the fear of not being believed.[45] Fearing disbelief,[46] or that the seriousness of their assault may be minimized,[47] victims often disclose to a trusted individual first. In the United States, only 230 out of every 1,000 sexual assaults are reported to law enforcement, and only a fraction result in conviction.[48] The testimony of these witnesses illustrated that reporting delays are common and understandable responses to sexual violence.

Further, there is a pervasive misunderstanding that many rape and sexual assault claims are false.[49] For example, 47.7% of male students aged 18–24 years, as well as 33.6% of females, agreed with the statement that a significant proportion of police-

[45] *See,* Debra Patterson et al., *Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems*, 34 HEALTH & SOCIAL WORK 127 (2009), http://responsesystemspanel.whs.mil/public/docs/meetings/20131107/Background_Materials/Rebecca_Campbell/Understanding_Rape_Survivors_Dec_Not_Seek_Help_Frml_Social_Sys_2009.pdf.; *see, Female Victims of Sexual Violence*, *supra* note 39. Of the sexual violence crimes not reported to police between 2005-2010, 13% of victims cited fear that the police would not do anything to help as the reason they did not report.

[46] *See,* Patterson, *supra* note 45 at 130-31.

[47] *See*, Courtney Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 A.M. J. OF CMTY. PSYCH. 263 (2006), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1705531/ (citing Rebecca Campbell, *The Community Response To Rape: Victims' Experiences With The Legal, Medical, And Mental Health Systems*, 26 A.M. J. of Comty. Psych., 355 (1998)).

[48] Federal research data indicates that 3 out of 4 rapes go unreported. *See,* RAINN, *Statistics,* https://www.rainn.org/statistics (last visited Sept. 10, 2020). Only 230 out of every 1,000 sexual assaults are reported to police. That means about 3 out of 4 go unreported. S*ee*, RAINN, *Statistics: The Criminal Justice System*, https://www.rainn.org/statistics/criminal-justice-system, (last visited Sept. 10, 2020) (citing i. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016 (2017); ii. Federal Bureau of Investigation, National Incident-Based Reporting System, 2012-2016 (2017); iii. Federal Bureau of Investigation, National Incident-Based Reporting System, 2012-2016 (2017); iv. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2009 (2013)).

[49] *See,* Emma Sleath & Ray Bull, *A Brief Report on Rape Myth Acceptance: Differences Between Police Officers, Law Students, and Psychology Students in the United Kingdom*, 30 VIOLENCE & VICTIMS 136 (2015),https://curve.coventry.ac.uk/open/file/69ef1fe6-0e15-4066-b7e6-5d14a8ce4935/1/brief%20report.pdf.

reported rapes were false allegations.[50] Law enforcement officers likewise "[believe] that only 36% of rapes reflected 'true' rapes."[51] Despite research indicating that only 2%[52] to 8%[53] of sexual assault reports are false, misconceptions persist in the public at large about victims of sexual violence that tend to discredit a victim's account.[54] Some of these myths were directly implicated in Cosby's prosecution.

Similarly, research shows that a victim's use of drugs or alcohol can influence jury deliberations, where victims are viewed "as contributing to [their] sexual violation, rather than condemning the way in which the perpetrator exploited [their] vulnerability and diminished capacity."[55] Thus, jurors attribute greater responsibility to victims who consumed drugs or alcohol, as in Ms. Constand's assault.[56] Jurors may view alcohol consumption as a "discrediting factor—but only for the victim."[57]

---

[50] *Id.*

[51] *See*, Rachel M. Venema, *Police Officers' Rape Myth Acceptance: Examining the Role of Officer Characteristics, Estimate of False Reporting, and Social Desirability Bias*, 33 VIOLENCE & VICTIMS 176 (2018).

[52] *See*, Liz Kelly et al., *A Gap or a Chasm? Attrition in Reported Rape Cases*, Home Research, Development and Statistics Directorate (2005), https://webarchive.nationalarchives.gov.uk/20110218141141/http://rds.homeoffice.gov.uk/rds/pdfs05/hors293.pdf.

[53] *See*, David Lisak, et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010), https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2016/03/12193336/Lisak-False-Allegations-16-VAW-1318-2010.pdf.

[54] *See*, Amy Grubb & Emily Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity And Substance Use on Victim Blaming*, 17 AGGRESSION & VIOLENT BEHAVIOR 443 (2012), https://www.sciencedirect.com/science/article/pii/S135917891200064X.

[55] *See*, Jordan, *supra* note 43; Louise Ellison & Vanessa E. Munro, *A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of A Mock Jury Study*, 13 NEW CRIM. L. REV. 781 (2010).

[56] *See*, Claire Gravelin, et al., *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, Frontiers in Psychology (Jan. 2019),

Cosby's defense capitalized on misunderstandings about acquaintance rape. He emphasized that he knew the victims for a short time, making it more likely that they fabricated their claims, and alleges his victims are only interested in financial gain.[58] Victims often face disbelief or criticism in cases where the perpetrator and victim know each other,[59] even though 8-out-of-10 rapes are committed by someone known to the victim.[60] Cosby manipulated his victims, by not just being an acquaintance, but maintaining his trusted public persona as "America's Dad," who "does not fit society's image of a rapist."[61] In fact, Cosby derived substantial benefit from this facade as many of his victims testified to feeling self-blame during the assaults that in turn contributed to

---

https://www.researchgate.net/publication/330523078_Blaming_the_Victim_of_Acquaintance_Rape_Individual_Situational_and_Sociocultural_Factors/fulltext/5c45ff97a6fdccd6b5be2017/330523078_Blaming_the_Victim_of_Acquaintance_Rape_Individual_Situational_and_Sociocultural_Factors.pdf?origin=publication_detail ("…[D]runk victims were judged more *responsible* for assault than sober victims.") *See also*, e.g., Ellison & Munro, *supra* note 54; Tara Kalar, et al., *A Crisis of Complacency: Minnesota's Untested Rape Kit Backlog*, 74 BENCH & B. MINN. 22, 24 (2017).

[57] *See*, Jordan, *supra* at 43.

[58] Appellant Br. at 39.

[59] *See*, Pickel & Gentry, *supra* note 37 at 271 (study concluding that mock jurors are less likely to convict a defendant accused of acquaintance rape than one accused of stranger rape). However, federal crime research data shows that 8 out of 10 rapes are committed by someone known to the victim, and that 39% of all sexual assaults are perpetrated by an acquaintance.

[60] *See*, RAINN, *Perpetrators of Sexual Violence: Statistics*, https://www.rainn.org/statistics/perpetrators-sexual-violence (last visited Sept. 10, 2020) (citing Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016 (2017)).

[61] Veronique Vallere, *Understanding the Non-Stranger Rapist*, 1 The Voice 4 (2007), http://www.ncdsv.org/images/NDAA_UnderstandingNonstrangerRapist_TheVoice_vol_1_no_11_2007.pdf ("Another powerful tool [sex offenders] use to groom and manipulate their audience is to be nice. A 'nice' offender does not fit society's image of a rapist. . . Most non-stranger rapists use their social skills to gain control of and cooperation from the victim with little effort.").

their delay in disclosure - another common response from victims assaulted by a known offender.[62]

Cosby's tactics worked during his first trial. Indeed, Bobby Dugan, a juror during the first mistrial, stated that "…if [Cosby] was a regular average joe, [deliberations] wouldn't have taken that long."[63] It was not only Cosby's fame that worked to his advantage, but also the jury's acceptance of the myths that he exploited. One juror at Cosby's first trial, when interviewed, indicated that he voted to acquit Cosby because he believed these myths. This juror criticized Ms. Constand's clothing choice, and implied sexual overtones to gifts that Andrea Constand delivered to Cosby as part of her job.[64] He also stated, "Let's face it: She went up to his house with a bare midriff and incense and bath salts. What the heck?"

Further, the juror said Constand should have gone to Cosby's home only if she was "dressed properly,"[65] and he did not believe Andrea's testimony because it was "well-coached."[66] He questioned why Ms. Constand did not immediately report the incident to police, stating it was hard for him to believe despite expert testimony confirming that reporting delays are commonplace. Finally, he claimed that he believed "more than half

---

[62] *See,* Patterson, *supra* note 45 at 128.
[63] Sarah Bloomquist, *Cosby Juror Describes Regret, Others Crying*, ABC News (June 26, 2017), https://6abc.com/pennsylvania-news-cosby-trial-bill-juror-speaks/2150739/.
[64] Laura McCrystal & Jeremy Roebuck. *Cosby Juror Says He Didn't Believe 'Well-Coached' Constand,* Philadelphia Inquirer (June 22, 2017), https://www.inquirer.com/philly/news/cosby/bill-cosby-juror-constand-deliberations-pittsburgh-20170623.html.
[65] *Id.*
[66] *Id.*

jumped on the bandwagon."[67] His commentary is a running litany of rape myths– all of which influenced his deliberations. It is these myths that Cosby now seeks to exploit again.

B. The Doctrine of Chances is an Established Legal Doctrine

Recognizing that sexual crimes are persistent and evasive, more than half of U.S. states have affirmed either by case law or by statute that similar prior crimes or bad acts are admissible evidence at trial for sexual crimes.

States that have enacted statutes permitting evidence of prior sexual crimes or bad acts at a subsequent trial for a different sexual crime include **Alaska** (Alaska Rule of Evidence 404(b)(2)-(3)); **Arizona** (Ariz. R. Evid. 404(a)(1) and 404(c)); **California** (Cal. Evid. Code § 1108); **Colorado** (Colo. Rev. Stat. Ann. § 16-10-301); **Connecticut** (Conn. Code Evid. §4-5(b)); **Florida** (Fla. Stat. Ann. § 90.404(2)(b)-(c)); **Georgia** (O.C.G.A. § 24-4-413 and 24-4-414); **Illinois** (725 Ill. Comp. Stat. Ann. 5/115-7.3); **Iowa** (Iowa Code § 701.11); **Kansas** (Kan. Stat. Ann. § 60-455(d)); **Louisiana** (La. Code. Evid. Ann. Art. 412.2); **Maryland** (Md. Code Ann., Cts. & Jud. Proc. § 10-923); **Michigan** (Mich. Comp. Laws § 768.27a and 768.27b); **Missouri** (Mo. Rev. Stat. § 566.025); **Nebraska** (Neb. Rev. Stat. Ann. § 27-413 and 27-414); **Nevada** (Nev. Rev. Stat. Ann. § 48.045(3)); **Oklahoma** (Okla. Stat. Ann. tit. 12, § 2413); **Tennessee** (T.C.A. § 40-17-124); **Utah** (Utah R. Evid. 404(c)); and **Virginia** (Va. Sup. Ct. R. 2:413).

[67] *Id.*

These statutes recognize that because sexual offenses "usually occur under circumstances in which there are no witnesses except for the accused and the victim…evidence of other sexual acts is typically relevant and highly probative, and it is expected that normally the probative value of such evidence will outweigh any danger of unfair prejudice, even when incidents are remote from one another in time." Colo. Rev. Stat. Ann. §16-10-301.

In addition to statutory mandates to include this type of evidence at trial, more than a dozen states have endorsed the Doctrine of Chances through case law, including **California** (*California v. Steele*, 47 P.3d 225 (Cal. 2002); *California v. Balcom*, 867 P.2d 777 (Cal. 1994); *California v. Spector*, 128 Cal. Rptr. 3d 31 (Cal. Ct. App. 2011)); **Colorado** (*Colorado v. Jones*, 311 P.3d 274 (Colo. 2013); *Colorado v. Everett*, 250 P.3d 649 (Colo. Ct. App. 2010)); **Illinois** (*Illinois v. Brown*, 557 N.E.2d 611 (Ill. App. Ct. 1990); *Hatchett v. W2X, Inc.*, 993 N.E.2d 944 (Ill. App. Ct. 2013)); **Louisiana** (*Louisiana v. Monroe*, 364 So. 2d 570 (La. 1978); *Louisiana v. Vail*, 150 So. 3d 576 (La. Ct. App. 2014)); **Michigan** (*Michigan v. Mardlin*, 790 N.W.2d 607 (Mich. 2010); *Michigan v. Kelly*, 895 N.W.2d 230 (Mich. Ct. App. 2016)); **Nebraska** (*Nebraska v. Kuehn*, 728 N.W.2d 589 (Neb. 2007); *Nebraska v. Valverde*, 835 N.W.2d 732 (Neb. 2013)); **Nevada** (*Farmer v. Nevada*, 405 P.3d 114 (Nev. 2017)); **New York** (*New York v. Cass*, 784 N.Y.S.2d 346 (N.Y. Sup. Ct. 2004)); **North Carolina** (*North Carolina v. Lanier*, 598 S.E.2d 596 (N.C. Ct. App. 2004)); **Oregon** (*Oregon v. Tena*, 362 Or. 514, 524 (Or. 2018);

Oregon v. Allen, 301 Or. 569 (Or. 1986)); **Texas** (*Martin v. Texas*, 173 S.W.3d 463 (Tex. Crim. App. 2002)); **Utah** (*Utah v. Lowther*, 398 P.3d 1032 (Utah 2017); *Utah v. Verde*, 296 P.3d 673 (Utah 2012); Mem. Decision, *Utah v. Green*, Nos. 16100933, 161100934, 161100936, 161100938, 161100939, 161101097, 161101098 (Utah Dist. Ct. 2017)); **Vermont** (*Vermont v. Vuley*, 70 A.3d 940 (Vt. 2013)), *Utah v. Murphy*, 441 P.3d 787, 796 (Jan. 27, 2020); **Washington** (*Washington v. Norlin*, 951 P.2d 1131 (Wash. 1998); *Washington v. Lough*, 853 P.2d 920 (Wash. Ct. App. 1993)); **Wisconsin** (*Wisconsin v. Evers*, 4407 N.W.2d 256 (Wis. 1987)); **Wyoming** (*Swett v. Wyoming*, 431 P.3d 1135 (Wyo. 2018)).

Indeed, Pennsylvania has adopted the doctrine already. *See Donahue*, 549 A.2d at 126. Although this Court has not yet applied the doctrine to sexual assault claims, Pennsylvania Courts have adopted it generally. *Id*; *see also Commonwealth v. Boykin*, 298 A.2d 258, 263 (1972). Cosby does not provide any principled basis to distinguish sexual assault claims.

Citing no case law, Cosby claims that by disputing the issue of consent, he does not contest the *actus reus* of the crime. He does. The Doctrine of Chances allows the admission of prior bad acts to address the issue of consent because consent is a "component of actus reus in a rape charge." *Utah v. Lowther*, 398 P.3d 1032, 1040 (Utah 2017); *see also Utah v. Murphy*, 441 P.3d 787, 796, reh'g denied (Jan. 27, 2020) ("Utah appellate courts have upheld the application of the doctrine of chances for the purposes of

showing … the victim's lack of consent."). This is apparent on the face of Pennsylvania's aggravated indecent assault statute, which states "a person who engages in penetration of the genitals … for any purpose other than good faith medical, hygienic, or law enforcement procedures commits aggravated indecent assault if … the person does so without the complainant's consent." 18 Pa. C.S.A § 3125(a)(1). The *mens rea* of offense is not the victim's lack of consent- it is Cosby's lack of a "good faith medical, hygienic, or law enforcement" purpose.

Cosby does not contest that the doctrine of chances may be used to demonstrate that the *actus reus* of the offense occurred, and instead is simply mistaken about what that means. Indeed, he agrees that "one criteria for determining whether the doctrine of chances permits the admission of 'roughly similar' PBA evidence [when] 'there is a real dispute between the prosecution and the defense over whether the *actus reus* occurred.'" Appellant Br. at 63. That is precisely what is at issue here.

Legislatures and judges have agreed that prior bad acts evidence is highly probative in sexual assault cases. We urge the court to join these jurisdictions and affirm the trial court's decision.

V. CONCLUSION

For the foregoing reasons, the *amici* respectfully request the court uphold the trial court's admission of the five additional victims' testimony.

Dated: September 14, 2020

Respectfully Submitted ,

/s/ Virginia A. Gibson

Virginia A. Gibson (Pa. Bar No. 32520)
Counsel of Record
Kendyl E. Gilmore (Pa. Bar No. 324263)
Hogan Lovells US LLP
1735 Market Street, 23rd Floor
Philadelphia, PA 19103
Counsel for the Rape, Abuse, and Incest National Network

CERTIFICATE OF COMPLIANCE WITH RULE 531

I certify that this brief complies with 210 Pa. Code 531(b)(3), as it contains fewer than 7,000 words.

CERTIFICATE OF COMPLIANCE WITH RULE 137

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

Submitted by: Virginia A. Gibson

Signature: */s/ Virginia A. Gibson*

Attorney No. (if applicable): 32520

Date: 9/14/2020

APPENDIX 1

STATEMENTS OF INTEREST OF AMICI CURIAE

The Rape, Abuse & Incest National Network (RAINN) respectfully submits this *amicus* brief in support of the Commonwealth of Pennsylvania's Brief of Appellee. RAINN is the nation's largest anti-sexual violence organization, whose purpose is to provide services to victims of sexual violence and advocate for improvements to the criminal justice system's response to sexual violence. RAINN founded and operates the National Sexual Assault Hotline, and in its over 25 years of operation has helped three million survivors of sexual assault and their loved ones. Under a contract with the U.S. Department of Defense, RAINN also operates the DoD Safe Helpline, providing services to the nation's worldwide military community. RAINN is a leader in public education on sexual violence, provides consulting services to various industries on best practices for prevention and response to sexual assault/harassment, and advocates on the state and federal levels to improve legislation on sexual violence.

Legal Momentum, the Women's Legal Defense and Education Fund, is a national non-profit gender justice advocacy organization. For 50 years, Legal Momentum has been advancing equal rights for women and girls through legislation, impact litigation, education and direct representation of clients. Its areas of focus include fairness in the courts, employment law and all forms of gender-based violence. In connection with its commitment to ending gender-based violence, Legal Momentum was instrumental in drafting and helping to pass the Violence Against Women Act ("VAWA") in 1994 and its subsequent reauthorizations in 2000, 2005, 2013, as well as the current re-authorization, passed by the House of Representatives in 2019. For 40 years Legal Momentum's National Judicial Education Program (NJEP) has provided judges across the country with education about all aspects of sexual violence. NJEP's two-day curriculum, *Understanding Sexual Violence: the Judicial Response to Stranger and Nonstranger*

Rape and Sexual Assault, has been presented in more than twenty-five states, including Pennsylvania. NJEP's Director, Lynn Hecht Schafran, is widely published on sexual assault issues, *e.g., Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist,* XX Fordham U. L. J. No.3 (1993) and *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Cas*e (2016). In 2010, Ms. Schafran testified before the Pennsylvania House Majority Committee on Policy regarding Expert Witness Testimony re Victim Behavior in Sexual Assault Cases and before the Pennsylvania House Judiciary Committee re Expert Witness Testimony on Victim Behavior in Sexual Assault Cases, H.B. 225.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education and resource sharing. NCVLI accomplishes its mission through training and education; providing legal technical assistance on cases nationwide; researching and analyzing developments in crime victim law; promoting the National Alliance of Victims' Rights Attorneys & Advocates; and participating as amicus curiae in select state, federal and military cases that present victims' rights issues of broad importance.

The Pennsylvania Office of Victim Advocate ("OVA") was created during the Special Session on Crime in 1998 upon the realization that the Commonwealth significantly lacked in the provision of post-sentencing rights for crime victims. The OVA was established to ensure that all crime victims whose offenders received state sentences were afforded their rights. At the same time the creation of an independent Victim Advocate was created to lead the agency; the role of the Victim Advocate was broader in its legislative mandate in that they are to advocate in general on behalf of all crime victims before the department and board. This was to ensure that all crime victims had a voice in all aspects of

the Commonwealth. The role of the Victim Advocate, was further expanded in 2012 after an Interbranch Commission was convened. That commission expanded the Victim Advocate's roles and duties to ensure the voices of all crime victims were advocated for at the state level in all matters. The Victim Advocate is the office where crime victims file complaints when they feel their rights have been violated. The Victim Advocate attempts to research these claims, determines if violations occurred, and reaches out to all parties to try to find a resolution. The mission of the OVA is dedicated to representing, protecting and advancing individual and collective rights and interests of crime victims.

Additionally, OVA works to ensure that all crime victims who request post-sentencing services receive compassionate and individualized attention and advocacy, and that no additional harm comes to crime victims through their interactions with the criminal justice system. The OVA works to ensure that all crime victims' rights are afforded to them as deemed appropriate by law, and that the services they receive at all levels of the criminal justice system are done with adherence to the Crime Victim Act and other applicable laws affecting the rights of crime victims.

The Pennsylvania Coalition Against Rape (PCAR) is a private nonprofit organization. Founded in 1975, PCAR is the oldest anti-sexual violence coalition in the country and is widely respected at both the state and national levels for its leadership to prevent sexual assault, abuse and harassment. PCAR has successfully worked as an agent of change--educating society about the severe and long-lasting impact of sexual assault, sexual abuse and sexual harassment, confronting victim-blaming attitudes, challenging injustice, and advocating for policies for victims of sexual abuse, sexual assault and sexual harassment to provide them with the compassion, privacy and dignity they deserve.

The Institute to Address Commercial Sexual Exploitation at Villanova University Charles Widger School of Law (hereinafter "CSE Institute") works across the Commonwealth of Pennsylvania and nationally against commercial sexual exploitation (hereinafter "CSE") and sex trafficking. The CSE

Institute educates and provides technical assistance to legislators, policy decision makers, and stakeholders to improve legal responses to CSE. The CSE Institute also provides direct legal services to survivors to sex trafficking seeking to vacate convictions, including convictions for prostitution, resulting from their victimization. Inspired by Villanova University Charles Widger School of Law's Catholic and Augustinian mission, the CSE Institute aims to ensure every human being is treated with dignity, compassion, and respect. Our approach is multi-disciplinary, victim-centered, and trauma-informed. The CSE Institute centers the voices of survivors to ensure their lived experience guides the policies we recommend and the changes instituted by this Commonwealth.

For the reasons outlined in the *Amicus* brief, the CSE Institute supports the RAAIN's position and urges this Court to maintain the protections of Pennsylvania's Prior Bad Acts Law.

Women Lawyers On Guard (WLG) is a national non-partisan, non-profit organization harnessing the power of lawyers and the law in coordination with other non-profit organizations to preserve, protect, and defend the democratic values of equality, justice, and opportunity for all. ELG has participated as amicus curiae in a range of cases before the United States Supreme Court and other federal courts to secure the equal treatment of women under the law and to challenge sex discrimination, sexual assault, and harassment.