

**IN THE SUPERIOR COURT OF PENNSYLVANIA**  
**FOR THE EASTERN DISTRICT**

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

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

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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 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.

End Violence Against Women International (EVAWI) is a non-profit organization based in Colville, WA, with offices in Washington, DC. They are a professional training organization committed to inspiring and educating those who respond to gender-based violence, equipping them with the knowledge and tools they need to support victims and hold perpetrators accountable. They promote victim-centered, multidisciplinary collaboration, which strengthens the response of

the criminal justice system, other professionals, allies, and the general public -- making communities safer.

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 education and training; promoting the National Alliance of Victims' Rights Attorneys and Advocates; researching and analyzing developments in crime victim law; and litigating as amicus curiae issues of national importance regarding crime victims' rights in cases nationwide. NCVLI also provides information to crime victims and crime victims' attorneys through its website, [www.ncvli.org](http://www.ncvli.org).

The National Center for Victims of Crime ("National Center"), a non-profit organization headquartered in Washington, DC, is one of the nation's leading resource and advocacy organizations for all victims of crime. The National Center's mission is to forge a national commitment to help victims of crime rebuild their lives. The National Center is dedicated to serving individuals, families and communities harmed by crime. Among other things, the National Center advocates laws and policies that create resources and secure rights and protections

for crime victims. The National Center has a particular interest in this brief due to its work and dedication to the interests of victims of sexual assault.

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 violence. PCAR has successfully worked as an agent of change--educating society about the severe and long-lasting impact of sexual violence, confronting victim-blaming attitudes, challenging injustice, and advocating for policies for victims of sexual violence to provide them with the compassion, privacy and dignity they deserve.

## **I. SUMMARY OF THE ARGUMENT**

The amici submit that the trial court properly allowed evidence of the five additional victim witnesses who testified Bill Cosby sexually assaulted them in a strikingly similar manner to Andrea Constand. In challenging his conviction, Mr. Cosby asserts that the trial court “abused its discretion, erred, and infringed on [his] constitutional rights” by permitting these witnesses to testify.<sup>1</sup> Cosby is wrong. The testimony of the five additional victims was admissible not only under Pa. R.C.P. No. 404(b)’s exceptions for evidence demonstrating a “common plan or

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<sup>1</sup>Statement of Matters Complaint on Appeal at para 6.

scheme,” or an “absence of mistake,” but also proper under the “Doctrine of Chances.”

## II. BACKGROUND

This is not Cosby’s first trial for the sexual assault of Ms. Constand. During Cosby’s first trial, Judge O’Neill permitted testimony from one additional victim witness. The first prosecution ended in a mistrial in 2017, after the jury remained deadlocked after 52 hours of deliberation.<sup>2</sup>

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. In his May 14, 2019 opinion, Judge O’Neill explained that, while Rule 404(b) permits such testimony, the Doctrine of Chances could also be used as a “compelling” justification for admissibility, particularly in light of Chief Justice Saylor’s concurrence in *Commonwealth v. Hicks*, endorsing the adoption of the Doctrine of Chances in Pennsylvania.<sup>3</sup>

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<sup>2</sup>Maria Puente, *Bill Cosby Trial: How Did a Mistrial Happen? And What Comes Next?*, USA Today (June 17, 2017, 4:04 PM), <https://www.usatoday.com/story/life/people/2017/06/17/bill-cosby-trial-how-did-mistrial-happen-and-what-comes-next/102812764/>.

<sup>3</sup>Opinion at 43; *Commonwealth v. Hicks*, 156 A.3d 1114 (Pa. Super. Ct. 2017).

### **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:

**Andrea Constand** described<sup>4</sup> meeting Cosby in 2002 while working at Temple University. Over the next 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. Constant to take three small blue pills to "take the edge off" and help her relax.<sup>5</sup> Because they had previously discussed homeopathic treatments, she thought they were a natural anxiety remedy. Ms. Constand said she took the pills because she trusted Cosby. Soon after taking them, 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 at this time.<sup>6</sup> She lost consciousness again, awaking on the sofa with her bra around her neck and her pants unzipped.

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<sup>4</sup> See, Direct Testimony of Andrea Constand, <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4554> (last visited July 19, 2019).

<sup>5</sup> *Id.* at 59-60.

<sup>6</sup> *Id.* at 63-64.

**Ms. Chelan Lasha** testified<sup>7</sup> 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 suite at the Las Vegas Hilton, purportedly to have photos taken for the Ford Modeling Agency and discuss an acting opportunity on “The Cosby Show.” When Ms. Lasha arrived, she complained of cold or allergy symptoms. Cosby offered her a pill, which he claimed 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 and laid her in the bed where she was unable to move. She was aware<sup>8</sup> 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<sup>9</sup> that as an aspiring actress in 1984, Cosby identified her through her modeling agency to offer his 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.” After sipping the wine, 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

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<sup>7</sup> See, Direct Testimony of Chelan Lasha, <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4557> (last visited July 19, 2019).

<sup>8</sup> *Id.* at 67.

<sup>9</sup> See, Transcript Direct Examination of Heidi Thomas, <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4546> (last visited July 19, 2019).

bed and hearing Cosby state, “your friend is going to come again.” She awoke the next day feeling nauseated.

**Ms. Janice Dickinson** testified<sup>10</sup> 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 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<sup>11</sup> 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

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<sup>10</sup> See, Transcript of Direct Examination of Janice Dickinson, <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4548> (last visited July 19, 2019).

<sup>11</sup> See, Testimony on Cross-Examination of Janice Baker-Kinney, <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4553> (last visited July 24, 2019). See also, Statement of Janice Baker Kinney referred to in Cross-Examination, Gloria Allred, <https://www.gloriaallred.com/Gloria-s-Videos-and-Statements/4-23-15-Janice-Baker-Kinney-Statement.pdf> (last visited July 24, 2019).



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 unbuttoned and her pants unzipped. 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 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<sup>12</sup> 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.<sup>13</sup> Cosby told her to sit between his legs; she complied because she had difficulty standing. She testified that Cosby pet her hair and spoke to her. However, she testified she

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<sup>12</sup> See, Testimony Maude Lise-Lotte Lublin, <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/4553> (last visited July 19, 2019).

<sup>13</sup> Lublin *supra* note 12 at 84.

couldn't get up or hear his words clearly. She recalled walking past bedrooms in Cosby's suite, then regaining consciousness two days later in her own bed. After the incident, she refused to be alone with Mr. Cosby again.

### III. ARGUMENT

Trial courts enjoy broad discretion regarding the admissibility of evidence.<sup>14</sup> A trial court's determination should only be overturned where its "judgment is manifestly unreasonable or where the law is not applied, or where the record shows that the action is a result of partiality, prejudice, bias or ill-will."<sup>15</sup> 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). However, this evidence may be used to demonstrate, *inter alia*, "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* Such evidence is admissible where the probative value of the evidence substantially outweighs its potential for unfair prejudice.<sup>16</sup>

Here, the trial court was within its discretion to permit five additional victims to testify at trial. In particular, the trial court properly exercised its discretion in permitting the Commonwealth to offer this evidence to establish (1)

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<sup>14</sup> *Commonwealth v. Parker*, 882 A.2d 488, 492 (Pa. Super. Ct. 2005).

<sup>15</sup> *Commonwealth v. Clay*, 64 A.3d 1049, 1055 (Pa. Super. Ct. 2013).

<sup>16</sup> Pa.R.E. 404(b)(2).

Cosby was not mistaken about Ms. Constand's lack of consent, and (2) the improbability of Cosby's contention that he is a hapless victim of a series of false accusations.

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

Judge O'Neill properly admitted the additional victim 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.<sup>17</sup> The offenses need not be identical; "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."<sup>18</sup> Likewise, establishing a common plan or scheme does not require identical facts, only the existence of a "logical connection" between the crimes.<sup>19</sup> 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."<sup>20</sup> Here, there is a sufficient factual nexus between the charged assault and the testimony offered by the five additional victims.

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<sup>17</sup> *Commonwealth v. Tyson*, 119 A.3d 353, 359 (Pa. Super. Ct. 2015).

<sup>18</sup> *Id.* at 363.

<sup>19</sup> *Commonwealth v. Ivy*, 146 A.3d 241, 253 (Pa. Super. Ct. 2016).

<sup>20</sup> *Commonwealth v. Judd*, 897 A.2d 1224, 1231-32 (Pa. Super. Ct. 2006).

The additional victim witness testimony established a pattern of behavior Cosby followed for years, with little deviation. That scheme, outlined by the victims, can be summarized as follows:

- 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:** Cosby invited each victim to meet 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 victim.
- 5) Provide incapacitating drug:** Cosby offered either a drink, or he provided a pill to his victim, 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 victim accounts from Constand and the five admitted witnesses. 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 sexual consent.<sup>21</sup> The assaults can be summarized as follows:

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<sup>21</sup> Notes of Testimony, Jury Trial, June 8, 2017 at 207.

**5 PRIOR BAD ACTS VICTIM WITNESSES ADMITTED TO TESTIFY IN BILL COSBY'S RETRIAL<sup>22</sup>**

| <b>Victim</b>                 | <b>Year</b> | <b>Developed Trust/ Implicit Trust</b>  | <b>Offered Pretext to Meet</b>         | <b>Isolated Victim in Controlled Location</b> | <b>Cosby Drugged Victim</b>                        | <b>Intoxicant Induced Reaction</b>   | <b>Incapacitation of Victim</b> | <b>Cosby Sexually Assaulted Victim</b>  |
|-------------------------------|-------------|---|--|---|--|--|---------------------------------|---|
| <b>Andrea Constand</b>        | 2004        | Met through employment; Considered mentor   | Invited to discuss career              | Home in Elkins Park, Pennsylvania             | Took three pills he offered                        | Vision changed, "cottony" feeling in mouth, speech slurred; Incapable of controlling limbs | Rendered unconscious            | Testified: Cosby digitally penetrated her vagina, used her hand to masturbate   |
| <b>Maud Lise-Lotte Lublin</b> | 1989        | Identified through modeling agency; Developed relationship with her family            | Invited to discuss modeling career     | Hotel room at Las Vegas Hilton                | Drank two drinks he offered                        | "Dizzy," "woozy," hearing impaired   | Rendered unconscious            | Testified: Cosby sat behind her, placed her head between his legs. Was walked down a hall to the bedrooms. Refused to be alone with him after incident. |
| <b>Chelan Lasha</b>           | 1986        | Identified through a family member; Developed relationship with victim and her family | Invited to discuss career/ photo shoot | Hotel room at Las Vegas Hilton                | Drank two shots he offered. Took a pill he offered | "Woozy," "could barely breathe," felt immobile   | Rendered unconscious            | Testified: Cosby humped her leg and pinched her breasts until he orgasmed on her leg  |
| <b>Heidi Thomas</b>           | 1984        | Identified through modeling agency; Considered mentor                                 | Invited for acting coaching            | Ranch house in Reno, NV                       | Drank a drink he offered                           | "Feels like there's just nothing,"   | Rendered unconscious            | Testified: Cosby forced his penis in her mouth  |
| <b>Janice Dickinson</b>       | 1982        | Identified through modeling agency; Considered mentor                                 | Invited to discuss career              | Hotel room in Lake Tahoe                      | Took a pill he offered                             | Felt "Woozy," dizzy, "out of it," motionless, immobile                                     | Rendered unconscious            | Testified: felt vaginal pain, awoke with semen between her legs and vaginal and anal pain.  |
| <b>Janice Baker-Kinney</b>    | 1982        | Met through employment; Trusted due to reputation                                     | Invited to a party                     | Harrah's Mansion in Reno, NV                  | Took two pills he offered                          | Felt "Fuzzy," "woozy"  | Rendered unconscious            | Testified: felt "a sticky wetness" between her legs, and felt like she had sex  |

<sup>22</sup> See, Testimony of Andrea Constand, *supra* notes 4-6, *passim*; Testimony of Maud Lise-Lotte Lublin, *supra* note 12, *passim*; Testimony of Chelan Lasha, *supra* note 7, *passim*; Testimony of Heidi Thomas, *supra* note 9, *passim*; Testimony of Janice Dickinson, *supra* note 10, *passim*; Testimony of Janice Baker-Kinney, *supra* note 11, *passim*.

Cosby identifies immaterial differences between the victim accounts, including the period of time he met and then assaulted them, or that the assaults occurred in different locations.<sup>23</sup> 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. *Luktisch*, 680 A.2d at 878.

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 evidence entirely. The Commonwealth sought to introduce 19 victim witnesses, whose assaults occurred at closely packed intervals over a span of decades; the Court, exercising its discretion, limited the number of witnesses permitted to testify. Cosby should not be permitted to use Judge O’Neill’s exercise of discretion in limiting the number of victim witnesses as both a sword and a shield; had the Commonwealth introduced all 19 witnesses, the

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<sup>23</sup> Appeal at 59-62.

remoteness in time would be virtually nonexistent.<sup>24</sup> Further, Pennsylvania courts have held that prior acts are admissible, even when they occur more remotely. *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 arbitrarily defined timeline.

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

In addition to the valid 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 been employed in criminal prosecutions<sup>25</sup> to admit prior bad acts evidence where an individual finds himself embroiled in uncommon and suspicious circumstances more frequently than expected.<sup>26</sup> Rather than admitting evidence to show propensity, the

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<sup>24</sup> *See*, Addendum A for a chronological list of victims proposed by the Commonwealth.

<sup>25</sup> *See*, *People v. Spector*, 194 Cal. App. 4th 1335, 128 Cal. Rptr. 3d 31 (Cal. Ct. App. 2011); *U.S. v. Woods*, 484 F.2d 127 (4th Cir. 1973).

<sup>26</sup> Edward J. Imwinkelreid, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of*



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.**<sup>27</sup>

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. Super. Ct. 2017) (J. Saylor, concurring). Instead, the doctrine asks, “what are the chances that an innocent man is involved in such suspicious circumstances so frequently?”<sup>28</sup>

Notably, 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

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*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).

<sup>27</sup> Robert Mangrum and Dee Benson, *1 Utah Prac., Mangrum & Benson On Utah Evidence Rule 404*, (2019).

<sup>28</sup> 3 *Jones on Evidence* § 17:62 (7th ed. 2019).

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.”<sup>29</sup> Instead, Courts applying the Doctrine of Chances should rely on their discretion and analyze the facts before them on individually.

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.

Importantly, Courts considering the admissibility of evidence under the Doctrine of Chances have admitted testimony from two,<sup>30</sup> three<sup>31</sup>, six<sup>32</sup>, and eight<sup>33</sup> unrelated victims, finding the defendants’ claims of fabrication strained credulity

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<sup>30</sup> See, *State v. DeVincentis*, 74 P.3d 119 (Wash. 2003).

<sup>31</sup> See, *Commonwelath v. Elliott*, 700 A.2d 1243, 1250 (Pa. 1997).

<sup>32</sup> Mem. Decision, *Utah v. Green*, Nos. 161100933, 161100934, 161100936, 161100938, 161100939, 161101097, 161101098 (Utah Dist. Ct. 2017).

<sup>33</sup> *People v. Kelly*, 895 N.W.2d 230, 235 n.4 (Mich. Ct. App. 2016).

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 that *actus reus*<sup>34</sup>—that the assault occurred as Ms. Constand alleged. In his appeal, “Cosby does not dispute that sexual contact occurred, but rather, contends it was consensual.”<sup>35</sup> In short, he disputes the *actus reus* of the crime.

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*.

*People v. Mardlin*, 790 N.W.2d 607, 614 (Mich. 2010) (citing Imwinkelried, *Uncharged Misconduct Evidence* (rev. ed., March 2008 supp.), § 4:3, pp. 4-42 and 4-43). Because Cosby has disputed the consent component of the charged offense, the Doctrine 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

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<sup>34</sup> *State 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*”) (quotations omitted); *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); *People 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”).

<sup>35</sup> Appeal at 61.

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 jury was permitted to hear this testimony because it permitted the inference of “human design”—that Cosby targeted, isolated, drugged, incapacitated, and sexually assaulted Ms. Constand.

### **C. The Doctrine of Chances is an Established Legal Doctrine**

Either by statute or case law, more than half of U.S. States have affirmed that similar prior crimes or bad acts are permissible evidence at trial for sexual crimes. The majority of jurisdictions recognize that this evidence is probative and not unfairly prejudicial.

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 R. Evid. 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** (Ga. Code Ann. § 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** (Tenn. Code. Ann. § 40-17-124); **Utah** (Utah R. Evid. 404(c)); and **Virginia** (Va. Sup. Ct. R. 2:413).

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** (*People v. Steele*, 27 Cal. 4th 1230, 47 P.3d 225 (Cal. 2002); *People v. Balcom*, 7 Cal. 4th 414, 867 P.2d 777 (Cal. 1994); *People v. Spector*, 194 Cal. App. 4th 1335, 128 Cal. Rptr. 3d 31 (Cal. Ct. App. 2011)); **Colorado** (*People v. Jones*, 311 P.3d 274 (Colo. 2013); *People v. Everett*, 250 P.3d 649 (Colo. Ct. App. 2010)); **Illinois** (*People 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** (*State v. Monroe*, 364 So. 2d 570 (La. 1978); *State v. Vail*, 150 So. 3d 576 (La. Ct. App. 2014)); **Michigan** (*People v. Mardlin*, 790 N.W.2d 607 (Mich. 2010); *People v. Kelly*, 895 N.W.2d 230 (Mich. Ct. App. 2016)); **Nebraska** (*State v. Kuehn*, 728

N.W.2d 589 (Neb. 2007); *State v. Valverde*, 835 N.W.2d 732 (Neb. 2013)); **Nevada** (*Farmer v. State*, 405 P.3d 114 (Nev. 2017)); **New York** (*People v. Cass*, 784 N.Y.S.2d 346 (N.Y. Sup. Ct. 2004)); **North Carolina** (*State v. Lanier*, 598 S.E.2d 596 (N.C. Ct. App. 2004)); **Oregon** (*State v. Tena*, 362 Or. 514, 524 (Or. 2018); *State v. Allen*, 301 Or. 569 (Or. 1986)); **Texas** (*Martin v. State*, 173 S.W.3d 463 (Tex. Crim. App. 2002)); **Utah** (*State v. Lowther*, 398 P.3d 1032 (Utah 2017); *State 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** (*State v. Vuley*, 70 A.3d 940 (Vt. 2013)); **Washington** (*State v. Norlin*, 951 P.2d 1131 (Wash. 1998); *State v. Lough*, 853 P.2d 920 (Wash. Ct. App. 1993)); **Wisconsin** (*State v. Evers*, 4407 N.W.2d 256 (Wis. 1987)); **Wyoming** (*Swett v. State*, 431 P.3d 1135 (Wyo. 2018)).

Legislatures and judges have agreed that a prior accusation of a sexual crime is important evidence based on a subsequent accusation of a sexual crime. We urge the court to join these jurisdictions and affirm the trial court's decision.

**D. The Testimony of the Five Additional Witnesses Is Important as a Matter of Public Policy to Counter Pervasively Held Misconceptions About Sexual Violence**

The amici represent advocacy organizations that fight on behalf of victims of sexual violence. We opine that the testimony of the five victim witnesses presented

the opportunity to confront pervasive misconceptions about sexual violence in the American public, which often come into play in criminal prosecutions. Such common misconceptions include that victims who report their assault after the passage of time are less credible; that a substantial number of rape accusations are fabricated; that rape victims are more responsible for the assault when drugs or alcohol are involved, as well as in cases of acquaintance rape.<sup>36</sup> The testimonies of these witnesses confronts these ill-informed ideas that may lead juries to discredit victims and gave them an opportunity to voice what happened to them and support other victims.

There is no “right way” for a victim to respond to sexual trauma, and the reasons victims delay reporting to authorities are not always understood by members of the general public, or by jurors.<sup>37</sup> Indeed, Cosby has repeatedly attempted to undermine the victim witnesses and Ms. Constand, claiming their

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<sup>36</sup> See e.g., Jan Jordan, *Beyond Belief? Police, Rape and Women’s Credibility*, 4 Criminal Justice 29-59 (2004), [https://pdfs.semanticscholar.org/770e/145794425fce693439439e5c95c872cae7fc.pdf?\\_ga=2.164312959.1397883990.1564018177-1766473934.1564018177](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 Eastaer ed., 1998); Liz Kelly, *Routes to (In)Justice: A Research Review on the Reporting, Investigation, and Prosecution of Rape Cases* (2002), <https://www.justiceinspectors.gov.uk/cjji/wp-content/uploads/sites/2/2014/04/Rapelitrev.pdf>.

<sup>37</sup> See, Jordan supra. See also, Pennsylvania Coalition Against Rape, *Speak Out From Within*, [https://www.pcar.org/sites/default/files/resource-pdfs/speaking\\_out\\_from\\_within-speaking\\_publicly\\_about\\_sexual\\_assault.pdf](https://www.pcar.org/sites/default/files/resource-pdfs/speaking_out_from_within-speaking_publicly_about_sexual_assault.pdf). (A supportive guide for victims who are considering disclosing their assault).

delay in reporting is an indicator of fabrication. However, experience and research demonstrates that victims, facing the intimidating process of speaking to law enforcement, may delay or entirely avoid filing a complaint because of the fear of not being believed.<sup>38</sup> Victims fearing disbelief,<sup>39</sup> or that the seriousness of their assault may be minimized,<sup>40</sup> instead often disclosing to a trusted individual first.<sup>41</sup>

In the United States, only 230 out of every 1,000 sexual assaults are reported to law enforcement, and only a fraction of which result in conviction.<sup>42</sup> Thus, the

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<sup>38</sup> See, Debra Patterson et al., *Understanding Rape Survivors' Decisions Not to Seek Help from Formal Social Systems*, 34(2) *Health Social Work*, 127-36 (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](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, Michael Planty et al., *Female Victims of Sexual Violence, 1994-2010*, Bureau of Justice Statistics, U.S. Department of Justice, (2013), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>. (last visited July 21, 2019). 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.

<sup>39</sup> See, Patterson, *supra*. at 130-131.

<sup>40</sup> See, Courtney Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 *A.M. J. of Community Psychol.* 263-74 (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(3) *A.M. J. of Community Psychol.*, 355-79 (1998).

<sup>41</sup> In the period of June 2018 to June 2019, 34% of callers to the National Sexual Assault Hotline who self-identified as victims of sexual assault reported that their call to the Hotline was the first time that they had disclosed their sexual assault to anyone.

<sup>42</sup> Federal research data indicates that 3 out of 4 rapes go unreported. See, RAINN, *Statistics*, <https://www.rainn.org/statistics> (last visited July 24, 2019). Only 230 out of every 1,000 sexual assaults are reported to police. That means about 3 out of 4 go unreported. See, RAINN, *Statistics: The Criminal Justice System*, <https://www.rainn.org/statistics/criminal-justice-system>, (last visited July 24, 2019) (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)).



testimony of these witnesses illustrated that reporting delays, even for years, are a common and understandable response to sexual violence.

Further, there is a pervasive misunderstanding that a substantial number of rape and sexual assault claims are false.<sup>43</sup> For example, recent findings have documented that 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 rapes reported to the police were false allegations.<sup>44</sup> However, despite the most rigorous research indicating that only 2%<sup>45</sup> to 8%<sup>46</sup> of sexual assault reports are false, extensive and varied misconceptions persist in the public at large about victims of sexual violence that tend to discredit or diminish a victim’s account of their sexual assault.<sup>47</sup> Some of these were directly implicated in Cosby’s criminal prosecution.

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<sup>43</sup> See, Emma Sleath and Ray Bull, *A Brief Report on Rape Myth Acceptance: Differences Between Police Officers, Law Students, and Psychology Students in the United Kingdom*, 30(1) *Violence and Victims*, 136-47 (2015), <https://curve.coventry.ac.uk/open/file/69ef1fe6-0e15-4066-b7e6-5d14a8ce4935/1/brief%20report.pdf>. “Ideas around the elevated nature of false rape allegations remain despite evidence that levels of false rape reporting are no different to (Rumney, 2006).”

<sup>44</sup> Id.

<sup>45</sup> See, Liz Kelly et al., *A Gap or a Chasm? Attrition in Reported Rape Cases*, Home Research, Development and Statistics Directorate (2005).

<sup>46</sup> See, David Lisak, et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) *Violence Against Women*, 1318-34. (2010), <https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2016/03/12193336/Lisak-False-Allegations-16-VAW-1318-2010.pdf>.

<sup>47</sup> 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* 443-52 (2012), <https://www.sciencedirect.com/science/article/pii/S135917891200064X>.

For example, research shows that a victim’s use of drugs or alcohol can influence juror deliberations, particularly 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.”<sup>48</sup> Thus, jurors may attribute greater responsibility to victims where drugs or alcohol were a factor in the assault.<sup>49</sup> During trial, some victims have been poorly received by jurors, who view alcohol consumption as: a “discrediting factor—but only for the victim.”<sup>50</sup>

Repeatedly, Cosby defended himself by capitalizing on misunderstandings about acquaintance rape. He emphasizes that he knew the victims for a short time, making it more likely that their claims are fabricated, and alleges his victims are only interested in financial gain.<sup>51</sup> It is known that victims often face disbelief or

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<sup>48</sup> See, Jordan, *supra*. 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. 781-801 (2010).

<sup>49</sup> See, Claire Gravelin, et al., *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, *Frontier in Psychol.* (2019), [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](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). “...Drunk victims were judged more *responsible* for assault than sober victims.” See also, e.g., 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(4) New Crim. L. Rev. 781-801 (2010); Tara Kalar, et al., *A Crisis of Complacency: Minnesota's Untested Rape Kit Backlog*, 74 BENCH & B. MINN. 22, 24 (2017), available at: <http://mnbenchbar.com/2017/03/untested-rape-kit-backlog/>

<sup>50</sup> See, Jordan, *supra* at 38.

<sup>51</sup> Brief for Appellant at 39.

criticism in cases where the perpetrator and victim know each other,<sup>52</sup> regardless of the fact that 8-out-of-10 rapes are committed by someone known to the victim.<sup>53</sup> Insidiously, 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.”<sup>54</sup> In fact, Cosby derived substantial benefit from this facade as many of his victims testified to deep confusion and self-blame during the assaults that in turn contributed to their delay in disclosure or seeking help - another common response from victims assaulted by a known offender.<sup>55</sup>

#### **E. Prior Bad Acts Evidence is Sound Public Policy and Improves Victim’s Access to Justice**

As highlighted above, twenty states have already adopted evidentiary rules to permit prior bad acts evidence in sex crime prosecutions. Misconceptions about

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<sup>52</sup> See, Kerri Pickel & Rachel Gentry, *Mock Jurors’ Expectations Regarding The Psychological Harm Experienced by Rape Victims as a Function of Rape Prototypicality*, 23 *Psychol. 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 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.

<sup>53</sup> See, RAINN, *Perpetrators of Sexual Violence: Statistics*, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited July 24, 2019) (citing Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016 (2017)).

<sup>54</sup> Veronique Vallere, *Understanding the Non-Stranger Rapist*, 1 *The Voice* 4 (2007), [http://www.ncdsv.org/images/NDAA\\_UnderstandingNonstrangerRapist\\_TheVoice\\_vol\\_1\\_no\\_1\\_2007.pdf](http://www.ncdsv.org/images/NDAA_UnderstandingNonstrangerRapist_TheVoice_vol_1_no_1_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.”).

<sup>55</sup> See, Patterson, *supra* note 39 at 128.

these crimes and victim behavior have been shown to influence jury deliberations,<sup>56</sup> 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.”<sup>57</sup> It can be difficult for a survivor of sexual assault to speak if they face public criticism and fear retribution.<sup>58</sup> We know from the Cosby’s own mistrial<sup>59</sup> that, if even one juror retains these misconceptions despite their duty to only evaluate the evidence before them, it can be sufficient to destroy jury unanimity required to render a conviction.

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<sup>56</sup> 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.”).

<sup>57</sup> Tara Kalar, et al., *A Crisis of Complacency: Minnesota's Untested Rape Kit Backlog*, 74 *Bench & B. Minn.* 22, 24 (2017), <http://mnbenchbar.com/2017/03/untested-rape-kit-backlog/>; *See also*, Kerri Pickel & Rachel Gentry, *Mock Jurors' Expectations Regarding The Psychological Harm Experienced by Rape Victims as a Function of Rape Prototypicality*, 23 *Psychol. 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).

<sup>58</sup> *See, Female Victims of Sexual Violence, 1994-2010, supra* at 3. Twenty percent (20%) of victims cited they feared retaliation as a top reason to delay reporting.

<sup>59</sup> Laura McCrystal and 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>. The juror called the allegations by all 60 victims who disclosed their sexual assaults by Bill Cosby “ridiculous [and] unbelievable,” and said, “I think more than half jumped on the bandwagon.” He indicated that Andrea Constand was culpable for her assault due to her clothing choice and stated: “... Let’s face it: She went up to his house with a bare midriff and incense and bath salts. What the heck?”

Allowing witnesses of prior bad acts to testify in court can empower a victim while supporting other victims as corroborative witnesses, and in the process hold their perpetrator accountable. Prosecution of serial sexual perpetrators who regularly rely on the fact that their victims face great hurdles to accessing the criminal justice system is a public safety issue. As illustrated in Cosby's case, holding a serial perpetrator accountable for even one act of sexual violence can validate all of that perpetrator's victims, and improve access to justice.

#### IV. CONCLUSION

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

Dated: July 25, 2019

Respectfully Submitted ,

/s/Virginia A. Gibson

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**CERTIFICATE OF COMPLIANCE WITH RULE 531**

I certify that this amicus 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

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Date: July 25, 2019



# **ADDENDUM A**

**19 PRIOR BAD ACTS VICTIM WITNESSES WILLING TO TESTIFY IN BILL COSBY’S RETRIAL**

| <b>Victim</b>                               | <b>Year</b> | <b>Developed Trust or Implicit Trust</b>                                   | <b>Offered Pretext to Meet</b>                          | <b>Isolated Victim in Controlled Location</b> | <b>Cosby Drugged Victim</b>  | <b>Intoxicant Induced Reaction</b>   | <b>Incapacitation of Victim</b> | <b>Cosby Sexually Assaulted Victim</b>  |
|---|-------------|--|---|---|--|--|---------------------------------|---|
| <b>Andrea Constand</b> <sup>60</sup>        | 2004        | Met through employment; Considered mentor;                                 | Invited to discuss career                               | Home in Elkins Park, Pennsylvania             | Took three blue pills he offered                                     | Vision changed, “cottony” feeling in mouth, speech slurred; Incapable of controlling her limbs; could not walk | Rendered unconscious            | Testified: Cosby digitally penetrated her vagina, used her hand to masturbate   |
| Victim Number 19 <sup>61</sup>              | 1990        | Considered mentor; formed friendship                                       | Invited to lunch at Bel Air Hotel to discuss her career | Bungalow at the Bel Air Hotel in Los Angeles  | Took a white pill he offered   | Felt like she was “underwater”   | Rendered unconscious            | Recalls lying in Cosby’s bed, without underwear and with her breasts and vagina exposed; Recalls seeing a naked Cosby; Recalls Cosby using her hand to masturbate himself |
| <b>Maud Lise-Lotte Lublin</b> <sup>62</sup> | 1989        | Identified through modeling agency; Developed relationship with her family | Invited to discuss modeling career                      | Hotel room at Las Vegas Hilton                | Drank two drinks he offered  | “Dizzy” and “woozy,” impaired her hearing  | Rendered unconscious            | Testified: Cosby by sat behind her, placed her head between his legs. Was walked down a hall to the bedrooms. Refused to be alone with him after incident.                |
| <b>Chelan Lasha</b> <sup>63</sup>           | 1986        | Considered mentor; Developed relationship with her family                  | Invited to discuss career and a photo shoot             | Hotel room at Las Vegas Hilton                | Offered her two shots of an alcoholic drink. Took a pill he offered. | “Woozy,” “could barely breathe,” felt immobile   | Rendered unconscious            | Testified Cosby humped her leg and pinched her breasts before losing consciousness  |
| Victim Number 16 <sup>64</sup>              | 1986        | Considered mentor; friendly relationship                                   | Invited to taping of show                               | Hotel room at Drake Hotel, Chicago            | Drank an alcoholic drink he offered                                  | “Light-headed,” about to faint   | Rendered unconscious            | Recalls Cosby kissing her and then pushing her down on the bed and raping her   |

<sup>60</sup> *Commonwealth v. Cosby*, No. 3932-16, slip op. at 3-6 (Pa. Ct. Com. Pl. May 14, 2019).

|  |           |   |                                     |   |                           |   |                      |   |
|--|-----------|---|-------------------------------------|---|---------------------------|---|----------------------|---|
| <b>Heidi Thomas</b> <sup>65</sup>        | 1984      | Identified through modeling agency; Considered mentor           | Invited to Reno for acting coaching | Ranch house outside of Reno, NV               | Drank a drink he offered  | “Feels like there’s just nothing.”                                | Rendered unconscious | Testified that Cosby forced his penis in her mouth before losing unconscious  |
| Victim Number 14 <sup>66</sup>           | 1982-1984 | Considered mentor; formed friendship                            | Invited to show at Las Vegas Hilton | Dressing room                                 | Drank a drink he offered  | “So high and confused”<br>“disoriented”<br>“hypnotic dream state” | Rendered unconscious | Recalls that upon returning to Cosby’s dressing room, he pulled down her pants and penetrated her vagina with his penis   |
| <b>Janice Dickinson</b> <sup>67</sup>    | 1982      | Identified through modeling agency; Considered mentor           | Invited to discuss career           | Hotel room in Lake Tahoe                      | Took a pill he offered    | Felt “Woozy,” “dizzy,” “out of it,” then she felt “immobile”      | Rendered unconscious | Testified that she felt vaginal pain before losing consciousness Awoke with semen between her legs.                       |
| <b>Janice Baker-Kinney</b> <sup>68</sup> | 1982      | Met through employment; Trusted due to Cosby’s reputation       | Invited to a party                  | Empty Harrah Mansion, where Cosby was staying | Took two pills he offered | “Fuzzy,” “woozy”  | Rendered unconscious | Testified she felt “a sticky wetness” between her legs and she felt like she had had sex the previous night.              |
| Victim Number 11 <sup>69</sup>           | 1981      | Formed friendly relationship                                    | Invited to dinner                   | Private dressing room at Las Vegas Hilton     | Drank a drink he offered  | Could not maintain consciousness                                  | Rendered unconscious | Recalls Cosby laying on top of her and forcing himself on her   |
| Victim Number 10 <sup>70</sup>           | 1981      | Considered mentor; Implicitly trusted due to Cosby’s reputation | Invited to dinner                   | Hotel room in Denver                          | Drank a drink he offered  | Could not maintain consciousness                                  | Rendered unconscious | Recalls waking up to Cosby standing over her, naked, with his robe open; Believed Cosby sexually assaulted her because of |

<sup>61</sup> Comm’s Mem. of Law in Supp. of its Mot. to Introduce Evid. of 19 Prior Bad Acts of Def. at 38-40, *Commonwealth v. Cosby*, CP-46-CR-0003932-2016 (Pa. Ct. Com. Pl. Jan. 18, 2018).

<sup>62</sup> *Commonwealth v. Cosby*, No. 3932-16, slip op. at 21-23.

<sup>63</sup> *Id.* at 24-26.

<sup>64</sup> Comm’s Mem. of Law in Supp. of its Mot. to Introduce Evid. of 19 Prior Bad Acts of Def. at 34-35, *Commonwealth v. Cosby*, CP-46-CR-0003932-2016 (Pa. Ct. Com. Pl.).

<sup>65</sup> *Commonwealth v. Cosby*, No. 3932-16, slip op. at 26-28.

<sup>66</sup> Comm’s Mem. of Law in Supp. of its Mot. to Introduce Evid. of 19 Prior Bad Acts of Def. at 31-32, *Commonwealth v. Cosby*, CP-46-CR-0003932-2016 (Pa. Ct. Com. Pl.).

<sup>67</sup> *Commonwealth v. Cosby*, No. 3932-16, slip op. at 29-30.

<sup>68</sup> *Id.* at 31-33.

<sup>69</sup> Comm’s Mem. of Law in Supp. of its Mot. to Introduce Evid. of 19 Prior Bad Acts of Def. at 27-28, *Commonwealth v. Cosby*, CP-46-CR-0003932-2016 (Pa. Ct. Com. Pl.).

<sup>70</sup> *Id.* at 25-26.

|                               |           |   |  |   |                           |   |                      |   |
|-------------------------------|-----------|---|--|---|---------------------------|---|----------------------|---|
|                               |           |   |  |   |                           |   |                      | soreness and semen in her vaginal area  |
| Victim Number 9 <sup>71</sup> | 1980/1981 | Considered mentor; Implicitly trusted due to Cosby's reputation;                  | Invited to Las Vegas for career guidance | Hotel room, Las Vegas Hilton                    | Drank a drink he offered  | Could not maintain consciousness  | Rendered unconscious | Recalls waking up in bed with Cosby the next morning, sure that Cosby sexually assaulted her because "[a] girl can tell" when she has had sex   |
| Victim Number 8 <sup>72</sup> | 1976      | Implicitly trusted due to Cosby's reputation                                      | Invited to dinner                        | Hotel room                                      | Drank a drink he offered  | Could not maintain consciousness  | Rendered unconscious | Recalls waking up in Cosby's hotel room; Cosby then forced her to perform oral sex on him   |
| Victim Number 7 <sup>73</sup> | 1976      | Implicitly trusted due to Cosby's reputation                                      | Invited to his show                      | Private dressing room at Las Vegas Hilton hotel | Took two pills he offered | Could not maintain consciousness  | Rendered unconscious | Recalls Cosby penetrating her vagina with his penis   |
| Victim Number 6 <sup>74</sup> | 1975      | Considered mentor; Implicitly trusted due to Cosby's reputation                   | Invited to film set and party            | Private residence                               | Took a pill he offered    | "Everything was black"  | Rendered unconscious | Recalls waking up to Cosby penetrating her vagina with his penis; Recalls Cosby fondling her breasts and sexually assaulting her                |
| Victim Number 5 <sup>75</sup> | 1971      | Implicitly trusted due to Cosby's reputation; formed friendship                   | Invited to dinner                        | In limousine, and hotel room in New York City   | Drank a drink he offered  | "Everything started to get fuzzy"   | Rendered unconscious | Recalls waking up naked in a hotel bed with vaginal soreness and irritation   |
| Victim Number 4 <sup>76</sup> | 1969      | Identified through modeling agency; Implicitly trusted due to Cosby's reputation; | Invited to show and dinner               | Hotel room in Toronto                           | Drank a drink he offered  | Felt "lifeless;" wanted to say stop but unable to respond; felt "paralyzed" | Rendered unconscious | Recalls being naked on bed and Cosby penetrating her vagina with his fingers; Recalls he flipped her body over and raped her while fondling her |

<sup>71</sup> *Id.* at 24-25.

<sup>72</sup> *Id.* at 23-24.

<sup>73</sup> *Id.* at 22.

<sup>74</sup> *Id.* at 20-21.

<sup>75</sup> *Id.* at 18-20.

<sup>76</sup> *Id.* at 17-18.

|                                  |      |  |                               |  |   |  |                                |   |
|----------------------------------|------|--|-------------------------------|--|---|--|--------------------------------|---|
|                                  |      |  |                               |  |   |  |                                | breasts   |
| Victim<br>Number 3 <sup>77</sup> | 1969 | Met through<br>employment;<br>Considered<br>mentor;<br>formed<br>friendship                              | Invited to<br>watch movie     | Friend's New<br>York City<br>apartment       | Took a<br>pill he<br>offered                                    | Felt like:<br>"Floating<br>around,"<br>And the night<br>became a<br>"blur" | Rendered<br>unconscious        | Recalls she<br>awoke naked<br>and could "feel<br>that [defendant<br>and I] had sex"   |
| Victim<br>Number 2 <sup>78</sup> | 1967 | Met through<br>employment;<br>Formed<br>friendship/<br>Implicit trust<br>due to<br>Cosby's<br>reputation | Invited to his<br>performance | Private<br>dressing<br>room in<br>California | Drank a<br>drink he<br>offered;<br>Took a<br>pill he<br>offered | In and out of<br>consciousness   | Rendered<br>unconscious        | Recalls Cosby<br>groping her<br>body; Awoke in<br>her bed only<br>wearing<br>underwear,<br>knowing "that I<br>had been<br>violated"                 |
| Victim<br>Number 1 <sup>79</sup> | 1965 | Met through<br>employment;<br>Implicit trust<br>due to<br>Cosby's<br>reputation                          | Invited to<br>party           | Home in Los<br>Angeles                       | Drank<br>two<br>drinks he<br>offered                            | Felt like she<br>was<br>"floating"   | In and out of<br>consciousness | Recalls being in<br>bed with a naked<br>Cosby and he<br>was fondling her<br>breasts; Cosby<br>tried to force her<br>head toward his<br>erect penis. |

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<sup>77</sup> *Id.* at 16-17.

<sup>78</sup> *Id.* at 14-16.

<sup>79</sup> *Id.* at 13-14.