IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA – CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	NO. CP-46-CR-0003932-2016
	:	
WILLIAM H. COSBY, JR.	:	

MOTION IN LIMINE TO EXCLUDE THE COMMONWEALTH'S 14 PROPOSED RULE 404(b) ANCILLARY WITNESSES OR, ALTERNATIVELY, FOR TRIAL CONTINUANCE

INTRODUCTION

The introduction of up to five accusers testifying to allegations that have no connection to the charged conduct already creates an unconstitutionally defective and unfair trial. But on top of that, the Commonwealth has indicated its intention to call up to 14 additional witnesses (a total of 19 witnesses) to prove up the supposed prior acts. On a phone conference with counsel, the Court indicated its concern over this case devolving into mini-trials. That is precisely what will happen if the Commonwealth is permitted to introduce evidence from these ancillary witnesses to bolster the testimony of the Rule 404(b) witnesses on issues entirely collateral to the charged conduct in this case. These witnesses' testimony will provide no probative value to any of the charged conduct in this case, instead merely vouching for the five "other act" witnesses. Given the undue distraction and confusion of the issues that this onslaught of irrelevant testimony will cause the jury, the Court should exclude any and all "supporting" witnesses to the Rule 404(b) testimony.

Moreover, the disclosure two weeks before trial of the Commonwealth's intent to call these numerous additional witnesses without providing any discovery as to who many of these individuals are, what their relationship is, if any, to the alleged prior bad act, or what their

anticipated testimony will be violates Mr. Cosby's due process and Sixth Amendment rights.[1] As Mr. Cosby previously argued to this Court, even the disclosure of 19 witnesses approximately two and a half months before trial deprived him of an adequate opportunity to prepare for trial. When the Court permitted testimony from five such witnesses on March 15, 2018, Mr. Cosby immediately moved for a continuance, which this Court denied. Subsequently, however, on March 19, 2018, the Commonwealth indicated its intent to admit 14 additional witnesses. In light of the late disclosure of these additional Rule 404(b) witnesses, the Court should either exclude the witnesses, or in the alternative grant a trial continuance, to protect Mr. Cosby's rights to a fair trial.[2]

[1] Contrary to the Commonwealth's representation to this Court and to defense counsel on March 19, 2018 that "the names of supporting witnesses, along with other information related to supporting witnesses, has been previously disclosed to the defense through the ongoing discovery process[,]" the Commonwealth has failed to provide any discovery with respect to several ancillary witnesses it seeks to introduce purportedly as Rule 404(b) evidence:

- **Accuser #12:**
  - Marilyn Dana
  - Mary Chokran
- **Accuser #15:**
  - Dr. Thomas Davidson
- **Accuser #18:**
  - Christina Izzard
  - Cathy Woodard

(*See* Commw. Ltr., Mar. 19, 2018, attached hereto as Exhibit 1.)

[2] Since the Commonwealth's March 19, 2018 disclosure, the parties have met and conferred regarding, among other things, the Commonwealth's intentions regarding these 14 additional witnesses. District Attorney Steele has indicated that the Commonwealth would only intend to call these additional witnesses if the defense "opens the door." However, this limitation does not assist the defense because any cross-examination of the accusers could be interpreted by the Commonwealth as "opening the door."

ARGUMENT

I. This Testimony Is Not Admissible as Substantive Evidence Under Rule 404(b) Because It Is Not Evidence of a "Crime, Wrong, Or Other Act"

It is well-established that evidence of prior bad acts is inadmissible to prove character of a person in order to show conduct in conformity therewith. Such evidence must, therefore, only come in to show some other relevant fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. *Commonwealth v. Busanet*, 54 A.3d 35, 43 (Pa. 2012);Pa. R. Evid. 404(b). Here, not a single one of the 14 "supporting" witnesses will provide testimony that constitutes Rule 404(b) evidence because their testimony is not evidence of Mr. Cosby's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. Indeed, none of these 14 witnesses has any personal knowledge of any of the prior bad acts the Accusers allege. None of the accusers alleges that any of the ancillary witnesses listed were present during their respective, alleged assaults, and therefore none of them can have personal knowledge of the prior bad acts that the Commonwealth seeks to introduce. To the contrary, Prior Bad Acts Witness #12 only told her ancillary witnesses after the alleged incident in 1982. Indeed, of the five ancillary witnesses, Prior Bad Acts Witness #12 only told three of those witnesses (Pablo Fenjves, Dr. Drew Pinsky, and Judith Regan) about the alleged incident in 2000s. Prior Bad Acts Witness #15 only appears to have told an ancillary witness who appears to be her husband about the alleged incident "about 10 years afterward." (003015.) Because it does not appear that any of the ancillary witnesses have personal knowledge of any alleged prior bad acts of Mr. Cosby showing either his common scheme or plan, or his absence of mistake, their testimony does not fall within and cannot be proffered pursuant to any Rule 404(b) exceptions.

To the extent that the Commonwealth argues that it is entitled to offer any evidence it pleases such as 14 "supporting" witnesses to demonstrate the strength of the common scheme or absence of mistake exceptions under Rule 404(b), the law does not support such a proposition. As a threshold matter, the text of Rule 404(b) does not provide that the proponent of Rule 404(b) evidence may offer any evidence – no matter how tangentially related to the alleged prior bad act – into evidence. Moreover, cases like *Commonwealth v. Paddy* and *Commonwealth v. Flamer,* upon which the Commonwealth has relied, do not support the Commonwealth's position.

In *Commonwealth v. Paddy,* for example, the Pennsylvania Supreme Court held that defense counsel was not ineffective for failing to object to the introduction of two earlier murders that defendant had allegedly committed under the motive exception to Rule 404(b). 800 A.2d 294, 307-312 (Pa. 2002). Specifically, the defendant was on trial for murder of a woman who was to be a prosecution witness for defendant's trial for two earlier murders. *Id*. at 300-02. The Commonwealth sought to introduce evidence relating to two prior murders allegedly committed by the defendant to show his motive for committing the crime charged – namely to prevent the victim from testifying. *Id.*

Commonwealth v. Flamer is factually similar insofar as it also involved the murder of a person to prevent him from testifying for the Commonwealth in a different crime. 53 A.3d 82, 86-7 (Pa. Super. 2012). There, the Superior Court found that the trial court erred in allowing the Commonwealth to introduce some, but not all evidence it had showing defendants' conspiracy to murder a witness to the underlying crime to cause his unavailability to testify at trial. *Id*. at 87-88. Relying on *Paddy,* the Superior Court found dispositive that evidence relating to the

consciousness of guilt exception to Rule 404(b), like the motive exception, were "highly relevant in the determination of guilt." *Id*. at 88.

Here, unlike in *Paddy* and *Flamer*, where the charged murders grew directly out of the prior bad acts at issue, no such relevance exists here. Whether Mr. Cosby operated pursuant to a common scheme or plan, or was not mistaken, over twenty years ago does not bear in any way on Mr. Cosby's guilt for the alleged sexual assault of Ms. Constand. Neither *Flamer* nor *Paddy* involved the same type of evidence that the Commonwealth seeks to introduce here through its supporting witnesses: rank hearsay statements being offered to bolster the testimony of the Accusers.

Because the Commonwealth cannot show that these ancillary witnesses will offer testimony falling within any of the Rule 404(b) exceptions, the Court should exclude such evidence.

II. The Ancillary Witnesses' Testimony Should Be Excluded as Inadmissible Hearsay

The testimony of these ancillary witnesses constitutes rank hearsay that is inadmissible under Pennsylvania Rule of Evidence 802 because it appears that the only testimony these witnesses could possibly provide are out-of-court statements from the five "prior bad act" accusers offered to prove that the alleged assaults took place.[3] Nowhere does the text of Rule 404(b) provide that the proponent of Rule 404(b) evidence may offer *any* evidence into evidence. To the contrary, extrajudicial statements relating to specific "crimes, wrongs or acts" are admissible only so long as they do not constitute impermissible hearsay. *Commonwealth v. Johnson*, 160 A.3d 127, 145 (Pa. 2017) (finding that hearsay statements relating to specific

[3] It is not even clear what some of these witnesses would testify to. While some witnesses are named in the discovery as persons to whom the accusers made statements, others are not named in the discovery at all.

"crime, wrong or act" do not "implicate" Rule 404(b). The purpose of the testimony of these ancillary witnesses, therefore, would only be to bolster or "support" the 404(b) witnesses.

Nor could any of these witnesses' testimony be admissible as evidence of prior consistent statements pursuant to Pa. R. Evid. 613(c). That rule provides:

> (c) *Witness's Prior Consistent Statement to Rehabilitate.* Evidence of a witness's prior consistent statement is admissible to rehabilitate the witness's credibility if the opposing party is given an opportunity to cross-examine the witness about the statement and the statement is offered to rebut an express or implied charge of:
>
> (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or
>
> (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness's denial or explanation.

Pa. R. Evid. 613(c). The Commonwealth cannot establish the necessary predicates to admit these witnesses' testimony under Rule 613(c). Even assuming the Commonwealth could establish that any of the accusers made prior statements that were consistent with their testimony, the Commonwealth cannot establish that the accusers made any such statements before the "fabrication, bias, improper influence or motive, or faulty memory" arose.

While it is not been confirmed who David Thomas is in relation to Prior Bad Act Witness #15, it appears that Mr. Thomas is Prior Bad Acts Witness #15's husband. PBA Witness #15 states that she told her husband about the alleged incident "about 10 years afterward." (003015.) Any statement that Prior Bad Acts Witness #15 told her husband could not be admissible under the hearsay exception for a prior consistent statement because Prior Bad Acts Witness #15 has elsewhere acknowledged that "she could not possibly tell anyone of my terrible mistake" because her "parents would be horrified and devastated," and because "her agency would probably drop [her] for [her] complete lack of professionalism and attempting to 'sleep [her] way

to the top.'" (003018.) Thus, at the time of her alleged statement, she already had a motive to lie about the actual circumstances of the incident to place herself in a less blameworthy light.

The case may be the same with respect to statements made by the "prior bad acts" accusers to the proposed ancillary witnesses, although it is, at this juncture, impossible to tell without the benefit of discovery from many of these ancillary witnesses.

III. Testimony from the Proposed Ancillary Witnesses Should Be Excluded Pursuant to Rules 403 and 404(b) Because It Is Unfairly Prejudicial, Unnecessarily Cumulative, and Exceedingly Misleading to the Jury

Rule 404(b) provides, "In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice." Further, to make a Rule 403 determination regarding accusations of prior criminal conduct, "the court must balance the potential prejudicial impact of the evidence with such factors as the degree of similarity established between the incidents of criminal conduct, the Commonwealth's need to present evidence under the common plan exception, and the ability of the trial court to caution the jury concerning the proper use of such evidence by them in their deliberations. *Commonwealth v. G.D.M., Sr.*, 926 A.2d 984, 987 (Pa. Super. 2007). When, as here, the Court must balance the potential for prejudice, not of the accusations themselves but of witnesses bolstering these accusations, against the attenuated value of this testimony under Rule 404(b), the balance must weigh in favor of exclusion.

The Court in *Commonwealth v. Hicks*, 91 A.3d 47, 53-54 (Pa. 2014) ("*Hicks I*") specifically stated that a "court may properly exclude – pre-trial – evidence … that … carries an unusually high likelihood of causing unfair prejudice and minimal probative value regardless of the evidence ultimately presented at trial." Here, the court should exclude – pre-trial – the testimony of these ancillary witnesses on collateral issues because no evidence ultimately presented at trial will change its unduly distracting and prejudicial effect. Introduction of any of

these "supporting" witnesses is contrary to Rule 403 because it improperly bolsters these accusations, impermissibly suggests a propensity to commit sexual assault, and diverts the jury's attention away from the charged allegation. Further, the evidence is unduly prejudicial as this copious amount of testimony regarding "other act" evidence will dominate the trial.

A. This Testimony Has Minimal Probative Value

The Commonwealth bears the burden of demonstrating the probative value of these "supporting" witnesses. While the volume of this evidence may be substantial, its probative value certainly is not. It only serves to bolster the testimony of other act witnesses and, as discussed above, does not provide any additional evidence to demonstrate Mr. Cosby's knowledge or common plan under Rule 404(b). Thus, the value of this testimony to vouch for already attenuated Rule 404(b) evidence is minimally probative at best.

B. This Testimony is Unduly Prejudicial

Even if this "supporting" witness testimony tenuously provides the bare minimum degree of probative value to meet the "mistake" or "common plan" exception to the Rule 404(b) prohibition, the unduly prejudicial effect of this testimony weighs in favor of exclusion. This testimony will be highly prejudicial as it has a "tendency to suggest decision on an improper basis [and] to divert the jury's attention away from its duty of weighing the evidence impartially." Pa. R. Evid. 403, cmt.; *Commonwealth v. Wright*, 961 A.2d 119, 151 (Pa. 2008). As this excessive amount of testimony addresses other act evidence rather than any evidence of the charged conduct, it serves to confuse the jury by diverting attention away from the inquiry into the charged conduct and to the collateral issues of the credibility of prior bad act accusers. *See, e.g.*, *Commonwealth v. Baez*, 720 A.2d 711, 724 (Pa. 1998) (evidence of a witness's drug habit prior to witnessing a murder was properly excluded even though it impeached his claim that he began using drugs after the murder because it has limited relevance to the main issue of

the defendant's liability for the crime); *Commonwealth v. Akrie*, 159 A.3d 982, 987 (Pa. Super. 2017) (evidence was properly excluded where the jury would have spent more time assessing a claim of an officer's excessive use of force than whether the defendant committed the alleged offenses).

The record from the previous trial demonstrates why this distracting and unfairly prejudicial testimony must be excluded pretrial. The testimony of the two witnesses bolstering Kelley Johnson's testimony occupied nearly one-third of the entire trial. This not only wasted the Court's and the jury's time, but distracted the jury from weighing the evidence concerning Ms. Constand's alleged assault objectively and impartially because their testimony invited the jury to spend undue time and attention exploring a collateral issue. The Court has now admitted up to 5 prior bad act witnesses which alone will consume the jury's attention. If the Commonwealth is permitted to present any additional testimony on top of that, the jury would spend an inordinate amount of time assessing these Rule 404(b) claims instead of assessing whether Mr. Cosby committed the alleged offense.

Even if the Court allows just one bolstering witness for each of these Rule 404(b) witnesses, the trial will devolve into mini-trials on each of the allegations and would result in a multitude of witnesses testifying to events having nothing to do with the charged conduct. This would be exceedingly distracting and prejudicial. Additionally, if the Court begins making a one by one determination to allow bolstering witnesses for some the five accusers, it may become arbitrary, unprincipled, and ultimately unmanageable to shut down this parade of bolstering witnesses. Such an approach will similarly devolve into a series of distracting mini-trials on each of these wholly separate allegations.

"Whenever a jury improperly receives evidence of other crimes, the impact is

significant." *Commonwealth v. Fortune*, 346 A.2d 783, 787 (1975). When the jury receives testimony from other witnesses with no connection to the charged conduct, that impact is compounded. As Justice Wecht wrote in his dissent in *Hicks II*, "[a]lthough we presume that jurors follow a trial judge's instructions,… it is difficult to set aside opinions that arise naturally and to confine evidence of an inflammatory nature to a purpose whose limitations conflict with intuitive thought processes. I have no doubt that jurors across this Commonwealth are capable of rising to this challenge, and that they do so on a daily basis in our courtrooms. This does not, however, obviate the fact that putting aside such innate reactions is a daunting task for any person." *Commonwealth v. Hicks*, 156 A.3d 1114, 1157-1158 (Pa. 2017) (*Hicks II*) (internal citation omitted). Where, as here, the 404(b) evidence, inflated by testimony by "supporting witnesses, is highly prejudicial and questionably probative, a limiting instruction is not adequate to remove the prejudice. *See Fortune*, 346 A.2d at 787. In the exceptional circumstances of this case, given the variety and age of these five accusations, addition of witnesses concerning these other accusations creates further undue prejudice and distraction that a limiting instruction cannot overcome.

IV. Admissions of this Testimony Is So Prejudicial As To Deprive Mr. Cosby of His Constitutional Right to Fair Trial

When "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Fourteenth Amendment's Due Process Clause provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 809 (1991); *see also Dowling v. United States*, 493 U.S. 342, 352 (1990) (evidence that "is so extremely unfair that its admission violates fundamental conceptions of justice" may violate due process). The impermissibly distracting nature of this deluge of irrelevant evidence would violate Mr. Cosby's rights to due process and fair trial. Convictions adduced on evidence at trial must be based on evidence relevant to the

charged conduct, not a pile-on of accusations of other bad acts, bolstered by individuals with no personal knowledge of the prior bad acts at issue. The Commonwealth must not be relieved of its obligation to prove every element of the charged offense beyond a reasonable doubt, through reliance on a series of distracting and irrelevant mini-trials involving issues entirely separate from the charged conduct in this case. *See Old Chief v. United States*, 519 U.S. 172, 200 (1997); *In re Winship*, 397 U.S. 358 (1970).

Further, the late and inadequate disclosure of information about these additional 14 witnesses makes it impossible for Mr. Cosby to adequately prepare for trial. The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const. Amend. VI; *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Commonwealth v. Laird*, 988 A.2d 618, 630 (Pa. 2010). The "primary interest secured by [the Confrontation Clause] is the right of cross-examination." *Davis*, 415 U.S. at 315. Cross-examination has long been recognized as the principal means by which the believability of a witness and the truth of his testimony are tested. *Id*. at 316. As such, defense counsel must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id*. at 319; *Brookhart v. Janis*, 384 U.S. 1, 3 (1966); *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

Here, Mr. Cosby's defense team learned of many of the ancillary witnesses for the first time only two weeks before trial. As to others, the information provided is so vague, skeletal, and remote as to preclude any meaningful preparation. Without adequate notice and time to investigate and prepare, and without limitation on the number of these witnesses allowed at trial, it would be an impossible burden for Mr. Cosby to prepare to effectively cross-examine, not only the "prior bad act" Accusers as well as the collateral witnesses that the Commonwealth chooses to call. Permitting testimony from 14 ancillary witnesses to bolster and vouch for the five accusers

would likewise be unprecedented as the defense has found no case permitting this type of vouching evidence into evidence. The Court should not take these extraordinary steps to help the Commonwealth bolster its case, and certainly should not do so without adequate time and notice provided to the defense.

In the event that this Court does not outright preclude these ancillary witnesses from testifying, Mr. Cosby renews his Motion for a Continuance, which this Court clarified was denied without prejudice at hearings held on pre-trial motions on March 29, 2018. (*See* N.T., 3/29/2017.) While "[t]he matter of [a] continuance is traditionally within the discretion of the trial judge," the denial of a justifiable request violates due process. *Ungar v. Sarafite*, 376 U.S. 575, 589-90 (1964). "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Id.* (citing *Chandler v. Fretag*, 348 U.S. 3 (1954)). Here, in light of the late and inadequate disclosure of information about these 14 ancillary witnesses, Mr. Cosby asks this Court to continue trial to allow the defense to investigate these proposed ancillary witnesses and to prepare a defense.

CONCLUSION

For the reasons set forth above, Mr. Cosby respectfully requests that the Court exclude the 14 ancillary Rule 404(b) witnesses identified by the Commonwealth, or in the alternative, order a continuance of the trial date.

Dated: March 30, 2018

Respectfully Submitted,

By: /s/ *Lane L. Vines*

Lane L. Vines (Pa. Bar No. 80854)
BERGER & MONTAGUE, P.C.
1622 Locust St.
Philadelphia, PA 19103
Tel.: 215-875-4658

Thomas Mesereau, Jr. (*pro hac vice*)
MESEREAU LAW GROUP
10100 Santa Monica Blvd., Suite 300
Los Angeles, CA 90067
Tel.: 310-651-9960

Kathleen Bliss (*pro hac vice*)
Jason Hicks (*pro hac vice*)
KATHLEEN BLISS LAW PLLC
1070 W. Horizon Ridge Pkwy., Suite 202
Henderson, NV 89012
Tel.: 702-463-9074

Becky S. James (*pro hac vice*)
Jaya C. Gupta (*pro hac vice*)
Rachael A. Robinson (*pro hac vice*)
GREENBERG GROSS LLP
601 S. Figueroa St., 30th Floor
Los Angeles, CA 90017
Tel.: 213-334-7060

Attorneys for Defendant William H. Cosby, Jr.

PUBLIC ACCESS POLICY CERTIFICATION

I, Lane L. Vines, certify that this filing complies with the provisions of the *Public Access Policy of the Uniform Judicial Systems of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: March 30, 2018

/s/ *Lane L. Vines*
Lane L. Vines

EXHIBIT 1

OFFICE OF THE DISTRICT ATTORNEY

KEVIN R. STEELE
DISTRICT ATTORNEY

EDWARD F. McCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY

COUNTY OF MONTGOMERY
COURTHOUSE
P.O. BOX 311
NORRISTOWN, PENNSYLVANIA
19404-0311

SAMUEL J. GALLEN
CHIEF COUNTY DETECTIVE

JESSE S. KING
CHIEF OF STAFF

DISTRICT ATTORNEY'S OFFICE (610) 278-3090
DISTRICT ATTORNEY'S FAX (610) 278-3095
COUNTY DETECTIVE BUREAU (610) 278-3368

March 19, 2018

Honorable Steven T. O'Neill
Chambers
Montgomery County Courthouse
Norristown, PA 19404

Re: *Commonwealth v. William Cosby*, 3932-16

Judge O'Neill:

I am writing today with respect to your March 15, 2018, order granting in part the *Commonwealth's Motion to Introduce Evidence of 19 Prior Bad Acts of the Defendant.* As Your Honor is aware, you are permitting the Commonwealth to present evidence regarding five prior bad acts of our choosing from witnesses identified as CPBA 2-12 through CPBA 2-19. Your order further directed the Commonwealth to identify by today's date which witnesses we intend to call.

Below, please find a list of the five prior victims by their number that the Commonwealth intends to call. Listed below each number are supporting witnesses the Commonwealth may call, pursuant to the request made by the defense and granted by the Court during our phone conference on Friday, March 16, 2018. In this regard please note that we would anticipate any such supporting witness to be brief and that we do not necessarily intend to call any or all supporting witnesses identified; rather we wish to make the decision regarding supporting witnesses based on the evidence and cross examination that develops during trial with respect to each prior victim. Finally, please note that the names of supporting witnesses, along with other information related to supporting witnesses, has been previously disclosed to the defense through the ongoing discovery process.

- Prior Victim Number 12
  - Marilyn Dana
  - Mary Chokran
- Prior Victim Number 13
  - Pablo Fenjves
  - Sandy Linter
  - Dr. Drew Pinsky
  - Judith Regan
  - Edward Tricomi
- Prior Victim Number 15
  - David Thomas
  - Dr. Thomas Davidson
- Prior Victim Number 17
  - Patricia Green
  - Yanni Lasha
- Prior Victim Number 18
  - Maria Diaz
  - Christina Izzard
  - Cathy Woodard

Respectfully,

Kevin Steele

cc: Lane Vines, Esq. *(via email)*
Kathleen Bliss, Esq. *(via email)*
Thomas Mesereau, Esq. *(via email)*
Becky James, Esq. *(via email)*