

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

COMMONWEALTH OF PENNSYLVANIA : CP-46-CR-3932-2016

v.

WILLIAM H. COSBY, JR.

**COMMONWEALTH’S MOTION TO INTRODUCE EVIDENCE OF PRIOR
BAD ACTS OF DEFENDANT**

The District Attorney of Montgomery County, Kevin R. Steele, hereby moves the Court to admit prior bad acts of defendant, William H. Cosby, Jr. (“defendant”), pursuant to Pennsylvania Rule of Evidence 404(b).

I. INTRODUCTION

A. On December 30, 2015, defendant was arrested and charged with aggravated indecent assault. These charges stem from defendant sexually assaulting Andrea Constand (“the victim”) in his Cheltenham home during the winter of 2004, after rendering her legally incapable of consent. Since the victim disclosed this drug-facilitated sexual assault to the police, other women, suffering nearly identical trauma at the hands of defendant, came forward. During the course of this case, the Commonwealth investigated nearly fifty women allegedly victimized by defendant. What became clear was that defendant has engaged, over the course of his lifetime, in a pattern of serial sexual abuse. The legal significance of defendant’s serial

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sexual abuse in light of Pennsylvania Rule of Evidence 404(b) is two-fold. First, defendant's behaviors took on the form of a common plan, scheme, or design. Second, defendant's actions demonstrate an absence of mistake. That is to say, an individual who, over the course of decades, intentionally intoxicates women in a signature fashion with the intention of sexually assaulting them cannot also be mistaken about whether or not those women are consenting to the sexual abuse. And that is so because the answer is clear: they are not.

B. The Commonwealth is cognizant of the extraordinary nature of this pattern. The Commonwealth is equally cognizant of the herculean task that this Court would have to undertake to evaluate each and every allegation of past sexual assault and misconduct. Rather than asking this Court to evaluate the same number of victims as were investigated for the purpose of Pennsylvania Rule of Evidence 404(b), and with an eye toward judicial economy, the Commonwealth respectfully submits the following motion, containing the accounts of thirteen women, prior victims of defendant, for consideration. The following factual accounts represent admissible prior bad acts pursuant to Pennsylvania Rule of Evidence 404(b) under both the common plan, scheme, or design exception and the absence of mistake exception and the Commonwealth respectfully requests

this Honorable Court admit evidence from the following thirteen victims and supporting witnesses.

II. DEFENDANT INTOXICATED AND SEXUALLY ASSAULTED THE VICTIM AND NUMEROUS OTHER WOMEN

A. Victim

1. The victim met defendant during the winter of 2002, through her employment.
2. At the time of their meeting, and throughout the duration of their social and professional relationship and even thereafter, defendant maintained a position of authority in the industry within which the victim worked.
3. Victim was employed as the Director of Operations for Temple University's Women's Basketball Team, while Defendant had a long-standing professional role in Temple University's athletics, academics, and social affairs. Defendant often used his fame and substantial earnings to donate to and promote Temple University's interests. Additionally, he often used his fame and substantial earnings to donate to and promote the career and educational interests of younger actresses, models, and other individuals looking to enter the entertainment industry nationwide. Indeed, he had a long-standing reputation for

using his contacts and experiences to mentor and advise younger individuals in their career paths.

4. Defendant was older than the victim. At the time of the crime against the victim, she was 30 years old; defendant was about 66 years old.
5. Moreover, defendant was a married man, having married his wife in 1964.
6. Over the course of the relationship, never once did defendant make any successful sexual advances toward the victim, but instead used his fame, notoriety, and public status to instill trust in her.
 - a. In the days and weeks following her initial introduction to defendant, the victim formed what she believed to be a sincere friendship, and believed him to be mentoring her with career guidance and advice. In welcoming his friendship, the victim accepted dinner and event invitations from him when they would talk about career options or he would introduce her to various people under the guise of helping her advance her career.
 - b. Although the victim considered defendant a friend, there were two incidents prior to the beginning of 2004 when he made sexual advances toward her.

Each time, however, the victim immediately stopped defendant's advances and did not draw any more attention to the incidents. The victim continued to have contact with him, as she still considered the elder man her friend and mentor. Moreover, she believed her resistance to his advances was sufficient to thwart any future advances.

- 7.** Defendant, however, violated that perceived trust when he invited her to his home, under the guise of discussing her future career goals, and gave her an intoxicant.
 - a.** When the victim arrived at defendant's residence, no one else was present. Once inside the residence and settled, defendant offered her wine. She told him she did not really want to drink that night, but he persisted. The victim ended up taking a couple of sips of the wine.
 - b.** The victim told defendant that she was exhausted and stressed. Defendant gave her three blue pills, telling her they were herbal supplements, and encouraged her to swallow them, telling her that the pills would make her feel good and "take the edge off." The victim took the pills with water that he provided.

8. The intoxicants defendant administered were so powerful that they disabled the victim's ability to sustain and maintain consciousness and rendered her completely unable to consent to, let alone resist, defendant's unwanted sexual advances.

a. About fifteen to thirty minutes after ingesting the pills, water, and wine, the victim began experiencing blurred vision and had difficulty speaking. She told defendant how she was feeling, and he told her to lie down on the couch.

b. At this time, the victim had no strength in her legs and everything was "blurry" and "dizzy." The victim had trouble keeping her eyes open and she felt "nauseous."

c. The victim laid down on a couch while she continued to feel these physical symptoms.

9. Once the victim was incapacitated, defendant sexually assaulted her.

a. At some point while she was lying down, defendant positioned himself behind her and began fondling her breasts, putting his hand inside her pants, and penetrating her vagina with his fingers.

b. Defendant also took her hand and placed it on his erect penis.

10. During this sexual assault, the victim was incapacitated—unable to maintain consciousness, incapable of moving or speaking, and feeling “frozen” and “paralyzed.”

11. The victim did not consent to this sexual contact with defendant.

B. Prior Victim Number One

1. Prior Victim Number One met defendant around the early 1970s, through her employment.
2. At the time of their meeting, and throughout the duration of their professional and social relationship and even thereafter, defendant maintained a position of authority.
3. Prior Victim Number One worked at the Playboy Club in New York, New York, and was an aspiring actress. Defendant was a popular comedian and actor, who had gained substantial fame in the comedic, cinematic, and entertainment industry.
4. Defendant was also older than Prior Victim Number One. She was in her early 20s; he was 32 years old.
5. Moreover, defendant was a married man at the time.
6. Over the course of the relationship, never once did defendant make any successful sexual advances toward

Prior Victim Number One, but instead used his fame, notoriety, and public status to instill trust in her.

- 7.** In the days, weeks, and months following her initial introduction to defendant, Prior Victim Number One formed what she believed to be a sincere friendship. In welcoming his friendship, the two went to dinner on occasion.
- 8.** Defendant, however, violated that perceived trust when he invited her to dinner, under the guise of fun and entertainment, and gave her an intoxicant.

 - a.** When defendant arrived in his limousine to pick up Prior Victim Number One, no one else was present.
 - b.** There, he offered her pills, which he said were “ludes,” slang for Quaaludes, and insisted she take them to relax. Feeling already relaxed, she declined.
 - c.** After much insistence, defendant shifted focus and offered her champagne, which he poured for her.
 - d.** Prior Victim Number One ingested about three or four glasses of the champagne that defendant personally poured for her while in that limousine.
 - e.** The drinks contained an intoxicant. After ingesting the drinks, she became incapacitated—unable to maintain consciousness.

- f.** The intoxicant was so powerful, it disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant’s unwanted sexual advances.
- 9.** Once Prior Victim Number One was incapacitated, defendant sexually assaulted her.

 - a.** When she regained consciousness, she awoke naked in a hotel bed, with great soreness and irritation in her vaginal area.
 - b.** Defendant was nowhere to be found; however, he left her a note indicating that the limousine was downstairs waiting for her to leave.
- 10.** During this sexual assault, Prior Victim Number One was incapacitated—unable to maintain consciousness, and overcome with a feeling of “fuzz[iness].”
- 11.** She did not consent to this sexual contact with defendant.

C. Prior Victim Number Two

- 1.** Prior Victim Number Two first met defendant in 1984, through her employment.
- 2.** At the time of their meeting, and throughout the duration of their professional and social relationship and even thereafter, defendant maintained a position of authority.

- 3.** Prior Victim Number Two was aspiring to be an actress. Defendant was a popular comedian and actor, who had gained substantial fame in the comedic, cinematic, and entertainment industry.
- 4.** Defendant was also older than Prior Victim Number Two. She was 24 years old; he was 45 years old.
- 5.** Moreover, the defendant was a married man at the time.
- 6.** Due to defendant's fame, notoriety, and public status, Prior Victim Number Two had an implicit level of trust in him.
- 7.** As such, during her whole interaction with him, albeit a single day, she had no reason to believe he would sexually assault her.
- 8.** Therefore, when her agent informed her that defendant had requested to see her because he was looking for young talent that he could mentor, she accepted his invitation to Harrah's. Moreover, prior to her trip, defendant called and spoke to Prior Victim Number Two's parents and assured them that he wanted to give back to the industry that had been so good to him.
- 9.** Defendant, however, violated that perceived trust, when he sent for her, under the guise of mentoring and coaching her within a very difficult industry, and gave her an intoxicant.

- a. When Prior Victim Number Two arrived in Reno, Nevada, at defendant's request, she was picked up by a driver and taken to a house right outside of Reno.
 - b. When Prior Victim Number Two asked the driver why they were not going to Harrah's, the driver said defendant changed the location to avoid paparazzi.
 - c. Upon arriving at the house, defendant greeted her.
 - d. He soon instructed her to perform various acting roles, which she did.
 - e. At a certain point, defendant handed her a script of an intoxicated individual and gave her an alcoholic beverage, telling her to "sip on it."
 - f. The drink contained an intoxicant. After ingesting it, she became incapacitated—unable to maintain consciousness.
 - g. The intoxicant was so powerful, it disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant's unwanted sexual advances.
10. Once Prior Victim Number Two was incapacitated, defendant sexually assaulted her.

- a. During her bouts of consciousness, she recalls being naked, and defendant forcing his penis into her mouth.
11. During this sexual assault, Prior Victim Number Two was incapacitated—unable to maintain consciousness.
12. She did not consent to this sexual contact with defendant.

D. Prior Victim Number Three

1. Prior Victim Number Three first met defendant in 1982, at a party they were both attending.
2. At the time of their meeting and throughout the duration of their daylong social relationship and even thereafter, defendant maintained a position of authority.
3. Prior Victim Number Three worked as a cocktail waitress. Defendant was a popular comedian and actor, who had gained substantial fame in the comedic, cinematic, and entertainment industry.
4. Defendant was also older than Prior Victim Number Three. She was approximately 23-24 years old; he was 31 years old.
5. Moreover, the defendant was a married man at the time.
6. Due to defendant's fame, notoriety, and public status, Prior Victim Number Three had an implicit level of trust in him.

7. As such, during her whole interaction with him, albeit a single day, she had no reason to believe he would give her an intoxicant and sexually assault her.
8. Therefore, when he gave her a pill and insisted that she take two of them, she never suspected that if she were rendered incapacitated, he would sexually assault her.
9. Defendant, however, violated that perceived trust, when he gave her an intoxicant and sexually assaulted her.
10. The intoxicant was so powerful, it disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant's unwanted sexual advances.
11. Once she was incapacitated, defendant sexually assaulted her.
 - a. During her intermittent bouts of consciousness, she recalls seeing that her blouse was unbuttoned and her pants were unbuttoned and unzipped. She recalls defendant approaching her and positioning himself behind her on the couch, propping her onto him, and groping her breast with his hand and moving his hands down toward her vagina.

b. She then lost consciousness and when she regained consciousness the next morning, she was completely naked, and her vagina contained secreted liquids.

12. During this sexual assault, Prior Victim Number Three was incapacitated—unable to maintain consciousness, feeling “woozy,” “fuzzy,” and disoriented, and having blurred vision.

13. She did not consent to this sexual contact with defendant.

E. Prior Victim Number Four

1. Prior Victim Number Four first met defendant between 1975 and 1976, while she was shopping at the gift shop in the Hilton, in Las Vegas, Nevada.
2. At the time of their meeting, and throughout the duration of their social and professional relationship and even thereafter, defendant maintained a position of authority.
3. Prior Victim Number Four was a teenager and aspiring model. Defendant was a popular comedian and actor, who had gained substantial fame in the comedic, cinematic, and entertainment industry.
4. Defendant was also older than Prior Victim Number Four. She was 18 or 19 years old; he was 38 or 39 years old.
5. Moreover, defendant was a married man at the time.

6. Due to defendant's fame, notoriety, and public status, Prior Victim Number Four had an implicit level of trust in him.
7. As such, during her interaction with him, she had no reason to believe he would give her an intoxicant and sexually assault her.
8. Defendant, however, violated that perceived trust, when he invited her to his show, under the guise of fun and entertainment, and gave her an intoxicant.
 - a. After the show, defendant invited her to a room backstage or the green room at the Hilton, Las Vegas, Nevada.
 - b. When she arrived, others were present.
 - c. Soon the others left, and defendant and Prior Victim Number Four were alone.
 - d. There, he offered her two pills, which she took.
 - e. The intoxicant was so powerful, it disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant's unwanted sexual advances.
9. Once Prior Victim Number Four was incapacitated, defendant sexually assaulted her.
 - a. In her intermittent levels of consciousness, she recalls being naked in the vanity room with the

defendant, who was also naked, positioned behind her, raping her—penetrating her vagina with his penis.

10. During this sexual assault, Prior Victim Number Four was incapacitated—unable to maintain consciousness.

11. She did not consent to this sexual contact with defendant.

12. During defendant’s deposition on September, 29, 2005, he admits to meeting Prior Victim Number Four in Las Vegas, meeting her backstage, giving her Quaaludes, and engaging in sexual intercourse with her.

13. Moreover, when asked about when he got the Quaaludes and whether it was in his mind to use these Quaaludes for young women who he wanted to have sex with, he answered in the affirmative. After his attorney objected, however, he changed his answer to “no” and said “Woman, meaning [Prior Victim Number Four], and not women.”

14. In that same deposition, defendant acknowledges that he never personally took Quaaludes and had never given them to men, but would give them to women.

F. Prior Victim Number Five

1. Prior Victim Number Five first met defendant in 1981, at a tennis tournament where she and her tennis partner were scheduled to play against defendant and his tennis partner.
2. At the time of their meeting, and throughout the duration of the relationship and thereafter, defendant maintained a position of authority.
3. Defendant was a popular comedian and actor, who had gained substantial fame in the comedic, cinematic, and entertainment industry.
4. Defendant was also older than Prior Victim Number Five. She was 25 years old; he was 43 years old.
5. Moreover, defendant was a married man at the time.
6. Due to defendant's fame, notoriety, and public status, Prior Victim Number Five had an implicit level of trust in him.
7. As such, during her whole interaction with him, albeit a single day, she had no reason to believe he would sexually assault her.
8. Defendant, however, violated that perceived trust, when he invited her to a show, under the guise of getting her a gift for winning the tennis tournament, and gave her an intoxicant.
 - a. When Prior Victim Number Five arrived at defendant's show at the Las Vegas Hilton, she, as defendant's guest, was escorted to the dressing room.

- b. There, she saw defendant and many others.
 - c. After greeting defendant, he offered her a drink in a champagne glass. She drank it.
 - d. The drink contained an intoxicant. After ingesting the champagne that defendant personally gave to her, she became incapacitated—unable to maintain consciousness.
 - e. The intoxicant was so powerful, it disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant's unwanted sexual advances.
- 9. Once Prior Victim Number Five was incapacitated, defendant sexually assaulted her.
 - a. During her intermittent bouts of consciousness, she recalls defendant mounting himself on top of her, kissing her forcefully, and rubbing his erect penis on her.
- 10. During this sexual assault, Prior Victim Number Five was incapacitated—unable to maintain consciousness.
- 11. She did not consent to this sexual contact with defendant.

G. Prior Victim Number Six

1. Prior Victim Number Six first met defendant around 1990, through her employment.
2. At the time of their meeting, and throughout the duration of their professional and social relationship and even thereafter, defendant maintained a position of authority.
3. Prior Victim Number Six worked for an assistant to defendant's personal appearance agent. Defendant was a popular comedian and actor, who had gained substantial fame in the comedic, cinematic, and entertainment industry.
4. Defendant was also older than Prior Victim Number Six. She was 29 years old; he was 58 years old.
5. Moreover, the defendant was a married man at the time.
6. In the days and weeks following her initial introduction to defendant, she formed what she believed to be a sincere friendship and believed him to be very friendly and fatherly toward her. He even mentored her on future career plans. In welcoming his friendship, she accepted dinner invitations from defendant, wherein, on occasion, she would bring her children. She also accepted invitations to defendant's hotel, where they would discuss future career plans. Defendant would also call her at her home and speak to her family members.

7. Over the course of the relationship, never once did defendant make any successful sexual advances toward Prior Victim Number Six, but instead used his fame, notoriety, and public status to instill trust in her. However, on one occasion, defendant invited her to his home to read a script for a possible role on a popular show airing on NBC. This was an uncomfortable experience for her because the script ended with her giving a passionate kiss to defendant. She expressed and showed her discomfort, and defendant made no sexual advances toward her during that time.
8. In 1996, still trusting defendant, she accepted his invitation to join him for lunch to discuss career goals. Instead, he would administer an intoxicant and sexually assault her.
- a. When she arrived at his bungalow for lunch, to her surprise, defendant was in his robe and slippers. At the door, he invited her in and informed her that they were ordering lunch to the room.
 - b. No one else was present in defendant's bungalow at that time.
 - c. Defendant then offered her some red wine, which she declined to drink. He then offered her a white pill so that she could relax. He repeatedly insisted that she

take the pill with the red wine, convincing her by saying, “would I give you anything to hurt you?”

- d.** After refusing more than once, Prior Victim Number Six put the pill into her mouth.
 - e.** Defendant took great efforts to ensure that she ingested the pill—demanding that she open her mouth and lift her tongue. At that request, Prior Victim Number Six swallowed the pill.
 - f.** After ingesting the pill, she became incapacitated—unable to maintain consciousness.
 - g.** The intoxicant was so powerful, it disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant’s unwanted sexual advances.
- 9.** Once Prior Victim Number Six was incapacitated, defendant sexually assaulted her.
- a.** During her intermittent consciousness, she recalls being placed in defendant’s bed, next to him, as he lay naked beneath his open robe. She also recalls being face down and her dress and underwear being in such a state that her breasts and vagina were exposed. She also recalls defendant using her hand

to masturbate his penis and him making grunting noises.

10. During this sexual assault, Prior Victim Number Six was incapacitated—unable to maintain consciousness and unable to speak.

11. She did not consent to this sexual contact with defendant.

H. Prior Victim Number Seven

- 1.** Prior Victim Number Seven met defendant in 1975, through her employment.
- 2.** At the time of their meeting, and throughout the duration of the relationship and thereafter, defendant maintained a position of authority.
- 3.** Prior Victim Number Seven worked at Castle Donuts in Santa Monica, California. Defendant, a customer at Castle Donuts, was a popular comedian and actor, who had gained substantial fame in the comedic, cinematic, and entertainment industry.
- 4.** Defendant was also older than Prior Victim Number Seven. She was 19 years old; he was 37 years old.
- 5.** Moreover, defendant was a married man that the time.
- 6.** Due to defendant's fame, notoriety, and public status, prior victim number seven had an implicit level of trust in him.

7. As such, during her whole interaction with him—which included conversation at her place of employment and an invitation to watch a movie filming and thereafter go to a gathering—she had no reason to believe he would sexually assault her. Moreover, defendant spoke to her mother and her roommate prior to.
8. Defendant, however, violated that perceived trust, when he invited her out, under the guise of fun and entertainment, and gave her an intoxicant.
- a. After the filming, Prior Victim Number Seven and defendant were supposed to go to the gathering, however, when defendant cancelled those plans and invited her to the Playboy Mansion, she accepted his invitation.
 - b. While there, the two played pinball.
 - c. During the game, defendant told her that whoever lost would have to take a pill, which she believed was a Quaalude.
 - d. Prior Victim Number Seven lost the pinball game. Defendant then gave her the pill, which she ingested.
 - e. The intoxicant was so powerful, it disabled her ability to sustain and maintain consciousness, and

rendered her completely unable to consent to, let alone resist, defendant's unwanted sexual advances.

9. Once Prior Victim Number Seven was incapacitated, defendant sexually assaulted her.

a. Throughout her intermittent consciousness, she recalls being completely undressed and with defendant. She recalls defendant touching her naked body, and raping her—penetrating her vagina with his penis.

10. During this sexual assault, Prior Victim Number Seven seven was incapacitated—unable to maintain consciousness.

11. She did not consent to this sexual contact with defendant.

I. Prior Victim Number Eight

1. Prior Victim Number Eight met defendant through her employment.

2. At the time of their meeting around 1964, and throughout the duration of their professional and social relationship and even thereafter, defendant maintained a position of authority in the industry within which prior victim number eight worked.

3. At the time of their meeting, Prior Victim Number Eight was a flight attendant on a flight that defendant was

on with a friend, who encouraged Prior Victim Number Eight to pursue modeling and acting. This was at a time when defendant had gained substantial fame in the comedic, cinematic, and entertainment industry.

4. Defendant was also older than Prior Victim Number Eight. She was 21 or 22 years old; he was 30 years old.
5. Moreover, defendant was a married man at this time.
6. Over the course of the relationship, never once did defendant make any successful sexual advances toward Prior Victim Number Eight, but instead used his fame, notoriety, and public status to instill trust in her.
7. In the days, weeks and months following her initial introduction to defendant, Prior Victim Number Eight formed what she believed to be a sincere professional and mentoring friendship with him. In welcoming his friendship, she accepted his invitation to a taping of his show, wherein she was used as an extra, as well as dinner.
8. Defendant, however, violated that perceived trust, when he invited her to a party, under the guise of fun and entertainment, and gave her an intoxicant.
 - a. When Prior Victim Number Eight arrived at dinner, defendant and a few people were present.
 - b. There, she was given a room key by defendant.

- c. Thereafter, she excused herself to the bathroom, and when she returned, to her surprise, defendant and the others had all left.
 - d. A man told her that a limousine was waiting for her, and the limousine took her to the Drake Hotel, where defendant was staying.
 - e. There, he provided her champagne as well as a sweatshirt, and insisted that she try it on.
 - f. The drink contained an intoxicant. After ingesting the drink, she began to lose control of her body.
9. The intoxicant was so powerful that it disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant's unwanted sexual advances.
10. Once Prior Victim Number Eight was incapacitated, defendant assaulted her—pulling her close to him, kissing her, and pushing her to the bed. She then loses consciousness.
11. During this assault, Prior Victim Number Eight was incapacitated—unable to maintain consciousness.
12. She did not consent to this contact with defendant.

J. Prior Victim Number Nine

1. Prior Victim Number Nine first met defendant in 1989, through her employment.
2. At the time of their meeting, and throughout the duration of their professional and social relationship and even thereafter, defendant maintained a position of authority.
3. Prior Victim Number Nine was a model and aspiring actress. Defendant, who requested to meet her under the pretense of looking for young acting talent, was a popular comedian and actor, who had gained substantial fame in the comedic, cinematic, and entertainment industry.
4. Defendant was also older than Prior Victim Number Nine. She was 23 years old; he was 50 years old.
5. Moreover, the defendant was a married man at the time.
6. Over the course of the relationship, never once did defendant make any successful sexual advances toward Prior Victim Number Nine, but instead used his fame, notoriety, and public status to instill trust in her.
7. Over the next two years, following her initial introduction to defendant, Prior Victim Number Nine formed what she believed to be a sincere friendship and believed him to be mentoring her with career guidance and advice. Defendant even attempted to ingratiate himself with her family. In welcoming his friendship, she and her mother accepted an

invitation to run with defendant, and a gift of dinner and tickets to his show for her mother's birthday.

8. She also accepted his invitation when he asked her to see him at the Hilton to perform improvisation exercises for him.

9. Defendant, however, violated that perceived trust, when he invited her to the Hilton, under the guise of discussing her future career goals, and gave her an intoxicant.

- a.** When Prior Victim Number Nine arrived at the Hilton, no one else was present at that time.
- b.** Defendant gave her a drink and told her it would help her relax. He repeatedly insisted that she drink it, saying that it would help her.
- c.** After ingesting the drink, defendant offered her another drink, which she refused. After much insistence, she eventually consumed the second drink.
- d.** The drinks contained an intoxicant, because after ingesting it, she became incapacitated.
- e.** The intoxicant was so powerful, it disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant's unwanted contact.

10. Once Prior Victim Number Nine was incapacitated, defendant assaulted her.

a. During her bouts of intermittent consciousness, she recalls defendant sitting next to her and stroking her hair; walking down a hallway with several doors; and waking up at her home two days later.

11. During this assault, Prior Victim Number Nine was incapacitated—unable to maintain consciousness, unable to focus, and feeling dizzy and “woozy.”

12. She did not consent to any physical contact with defendant.

K. Prior Victim Number Ten

- 1.** Prior Victim Number Ten first met defendant around 1967 or 1968, through her employment.
- 2.** At the time of their meeting, and throughout the duration of their social and professional relationship and even thereafter, defendant maintained a position of authority.
- 3.** Prior Victim Number Ten was employed at the Trident Restaurant located in Sausalito, California, where defendant was a frequent patron. At this time, defendant had gained substantial fame in the comedic, cinematic, and entertainment industry.

4. Defendant was also older than Prior Victim Number Ten.
She was 26 years old; he was 33 years old.
5. Moreover, defendant was a married man at this time.
6. Over the course of the relationship, never once did defendant make any successful sexual advances toward Prior Victim Number Ten, but instead used his fame, notoriety, and public status to instill trust in her.
7. In fact, at the time of the initial introduction at the Trident Restaurant, defendant was especially friendly to her 9-year-old son who occasionally came into the restaurant and remained while his mother worked.
8. On one occasion, when the child was not at work with his mother, defendant came into the Trident Restaurant and requested to call him. Defendant called the child and gave him advice about the negative effects of drugs, the significance of not giving in to peer pressure, and the importance of studying hard and listening to his mother.
9. In the days and weeks following her initial introduction to defendant, Prior Victim Number Ten formed what she believed to be a sincere friendship with him and believed him to be mentoring her son. In welcoming his friendship, she accepted his invitation to one of his performances at the Circle Star Theater.

- 10.** Defendant, however, violated that perceived trust, when he picked her up in a limousine to take her to the performance, under the guise of fun and entertainment, and gave her an intoxicant.
- a.** Shortly after Prior Victim Number Ten entered the limousine, defendant pulled out a bottle of wine and offered her a drink. She drank the wine.
 - b.** Once they arrived at the performance, she and defendant went to the dressing room, where other individuals were present.
 - c.** Feeling ill, she complained to defendant that she had a headache, to which he responded by obtaining a pill from another individual and handing it directly to her, which she then ingested.
 - d.** The intoxicants were so powerful, they disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant's unwanted sexual advances.
 - e.** After ingesting the pill and wine, Prior Victim Number Ten lost control of her body and was unable to maintain consciousness.
- 11.** Once she was incapacitated, defendant sexually assaulted her.

- a. While she was incapacitated, defendant grabbed her arms and, with the assistance of another person, placed her on the back seat of the limousine.
 - b. While Prior Victim Number Ten was in and out of consciousness, defendant positioned himself near her and began to touch her all over her body, over and under her clothing.
 - c. During this time, she was unable to resist defendant's unwanted sexual advances.
 - d. She soon passed out and, when she awoke the next morning, she was home in her bed, naked except for only her underpants.
12. During this sexual assault, Prior Victim Number Ten was incapacitated—unable to maintain consciousness.
13. She did not consent to this sexual contact with defendant.

L. Prior Victim Number Eleven

- 1. Prior Victim Number Eleven first met defendant between 1982 and 1984, through her employment.
- 2. At the time of their meeting, and throughout the duration of their professional and social relationship and even thereafter, defendant maintained a position of authority.

3. Prior Victim Number Eleven worked as a masseuse at a health club in Las Vegas, Nevada. Defendant, a popular comedian and actor, who had gained substantial fame in the comedic, cinematic, and entertainment industry, frequented the club to play tennis.
4. Defendant was also older than Prior Victim Number Eleven. She was between 27 and 29 years old; he was 48 years old.
5. Moreover, the defendant was a married man at the time.
6. Over the course of the relationship, never once did defendant make any successful sexual advances toward Prior Victim Number Eleven, but instead used his fame, notoriety, and public status to instill trust in her.
7. In the days and weeks following her initial introduction to defendant, Prior Victim Number Eleven formed what she believed to be a sincere friendship, and believed him to be genuinely seeking her masseuse expertise and advice regarding his sore muscles. Defendant even tried to ingratiate himself with her family—he had friendly conversations with her mother and aunt. Prior victim number eleven welcomed defendant's friendship, and accepted his invitation to his show at the Las Vegas Hilton and dinner afterward.

- 8.** Defendant, however, violated that perceived trust when he invited her to his show and dinner, under the guise of fun and entertainment, and gave her an intoxicant.
- a.** Prior Victim Number Eleven attended the show at defendant's invitation. After the show, the two went to a restaurant.
 - b.** As soon as they took their seats, Prior Victim Number Eleven was served an alcoholic beverage, without making an order, and defendant was served food.
 - c.** Defendant told her to drink the beverage, which she refused. Defendant, however, insisted that she drink the beverage.
 - d.** During that time, defendant ate. She did not eat; in fact, she was refused food by defendant when she attempted to take food from his plate.
 - e.** The drink was an intoxicant. After she ingested it, she became incapacitated.
 - f.** The intoxicant was so powerful, it disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant's unwanted sexual advances.

9. Once Prior Victim Number Eleven was incapacitated, defendant sexually assaulted her.
 - a. While incapacitated, defendant took her to his room, and raped her—penetrating her vagina with his penis.
10. During this sexual assault, Prior Victim Number Eleven was incapacitated—unable to maintain consciousness, and feeling dazed, “disoriented,” “confused,” and “disabled.”
11. She did not consent to this sexual contact with defendant.

M. Prior Victim Number Twelve

1. Prior Victim Number Twelve met defendant in 1969, through her employment.
2. At the time of their meeting, and even thereafter, defendant maintained a position of authority.
3. Prior Victim Number Twelve was an aspiring model and met defendant through a meeting set up by her agent, wherein she was to go to defendant’s show and thereafter accompany him to dinner. Defendant was a popular comedian and actor, who had gained substantial fame in the comedic, cinematic, and entertainment industry.

4. Defendant was also older than Prior Victim Number Twelve. She was 21 years old; he was 31 years old.
5. Moreover, defendant was a married man at the time.
6. Due to defendant's fame, notoriety, and public status, prior victim number twelve had an implicit level of trust in him.
7. As such, during her whole interaction with him, albeit a single day, she had no reason to believe he would sexually assault her.
8. Defendant, however, violated that perceived trust, when he invited her to his room, under the guise of getting her a gift, and gave her an intoxicant.
 - a. When Prior Victim Number Twelve walked with defendant into his hotel room, no one else was present.
 - b. There, he offered her a soda, which she accepted.
 - c. The drink contained an intoxicant, because after ingestion, she lost control of her body—unable to maintain consciousness.
 - d. The intoxicant was so powerful, it Prior Victim Number Twelve's ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant's unwanted sexual advances.

- e. After ingesting the drink, Prior Victim Number Twelve “blacked out.”
- 9. Once she was incapacitated, defendant sexually assaulted her.
 - a. In her intermittent stages of consciousness, she recalls being naked beside a naked defendant, him reaching over and penetrating her vagina with his finger, being flipped over, and defendant “yank[ing] [her] hips up toward him,” and raping her—penetrating her vagina with his penis—and fondling her breast.
- 10. During this sexual assault, Prior Victim Number Twelve was incapacitated—unable to maintain consciousness, feeling “paralyzed” and “lifeless” and “unable to respond in any way.”
- 11. She did not consent to this sexual contact with defendant.

N. Prior Victim Number Thirteen

- 1. Prior Victim Number Thirteen first met defendant around 1969, through her employment.
- 2. At the time of their meeting, and throughout the duration of their professional and social relationship and even thereafter, defendant maintained a position of authority.

- 3.** Prior Victim Number Thirteen was a model at the time, who worked for a popular producer. Defendant was a popular comedian and actor who had gained substantial fame in the comedic, cinematic, and entertainment industry.
- 4.** Defendant was also older than Prior Victim Number Thirteen. She was 21 years old; he was 31 years old.
- 5.** Moreover, defendant was a married man at this time.
- 6.** Over the course of his relationship with Prior Victim Number Thirteen, never once did defendant make any successful sexual advances toward her, but instead used his fame, notoriety, and public status to instill trust in her.
- 7.** In the days and weeks following her initial introduction to defendant, Prior Victim Number Thirteen formed what she believed to be a sincere friendship and believed him to be mentoring her with career guidance and advice. In welcoming his friendship, the two went to the movies and to the park together.
- 8.** Defendant, however, violated that perceived trust, when he invited her to a movie, under the guise of fun and entertainment, and gave her an intoxicant.

 - a.** When Prior Victim Number Thirteen arrived at defendant's friend's house, the place where they were

to meet, she was feeling ill and complained to defendant of having a headache.

- b.** Defendant responded by handing her a pill he claimed was “a miracle cure from the doctors.”
 - c.** After she inquired into the identity of the pill, defendant avoided the question, saying it was from his doctor and would really “fix you up.”
 - d.** She continued to inquire, and defendant continued to insist that she take the pill, telling her, “Just take it,” and asking her, “Don’t you trust me?” She took the pill.
 - e.** The intoxicant was so powerful, it disabled her ability to sustain and maintain consciousness, and rendered her completely unable to consent to, let alone resist, defendant’s unwanted sexual advances.
 - f.** After ingesting the pill, Prior Victim Number Thirteen became incapacitated—unable to maintain consciousness.
- 9.** Once she was incapacitated, defendant sexually assaulted her by raping her—penetrating her vagina with his penis.
- a.** When she regained consciousness, she was naked, and defendant was seated nearby in his robe. Despite having been rendered unconscious after defendant

administered the intoxicant, Prior Victim Number Thirteen “could feel [that] the [defendant and I] had sex.”

10. During this sexual assault, Prior Victim Number Thirteen was incapacitated—unable to maintain consciousness, and feeling like she was “floating.”

11. She did not consent to this sexual contact with defendant.

III. LEGAL ARGUMENT

A. LEGAL AUTHORITY

1. Prior bad act evidence is not admissible solely to demonstrate a defendant’s general propensity to commit crimes. Pa. R.E. 404(b)(1). However, prior bad act evidence may be admissible where the evidence is relevant for some other legitimate purpose, and not merely to prejudice the defendant by showing him to be a person of bad character. *Commonwealth v. O’Brien*, 836 A.2d 966, 969 (Pa. Super. 2003).
2. Specifically, Rule 404(b)(2) allows for the admission of prior bad act evidence where it is relevant to establish a defendant’s “motive, opportunity, intent, preparation, plan, knowledge, identity, *absence of mistake*, or lack of accident.” Pa. R.E. 404(b)(2).

3. In addition, evidence of a defendant's prior bad acts may be admissible to show a "common scheme, plan, or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the other." *O'Brien*, 836 A.2d at 969.
4. To be admissible to show that a defendant's actions were not the result of a mistake, the Commonwealth must establish that the manner and circumstances of the crimes are "remarkably similar." *Commonwealth v. Tyson*, 119 A.3d 353, 359 (Pa. 2015) (citing *Commonwealth v. Kinard*, 95 A.3d 279, 294-295 (Pa. Super. 2014)). Indeed, "as the number of such incidents grows, the likelihood that [the defendant's] conduct was unintentional decreases. It is merely a matter of probabilities." *Commonwealth v. Donahue*, 549 A.2d 121 (Pa. 1987).
5. A defendant, moreover, "does not have to actually forward a formal defense of accident, or even present an argument along those lines, before the Commonwealth may have a practical need to exclude the theory of accident[. ...]" *Commonwealth v. Boczkowski*, 846 A.2d 75, 89 (Pa. 2004).
6. To be admissible under the common plan or scheme exception, the other act evidence must be "distinctive and so nearly identical as to become the signature of the same

perpetrator.” See *Tyson*, 119 A.3d at 359. Relevant considerations include the “habits or patterns of action or conduct undertaken by the perpetrator to commit crime, as well as the time, place, and types of victims typically chosen by the perpetrator.” *Id.* Importantly, the common plan or scheme exception does not require that the two scenarios be identical in *every* respect. *Id.* at n.3.

7. Remoteness, moreover, is only a single factor to be considered in determining admissibility of the other act evidence; the importance in the time gap is “inversely proportional” to the similarities between the crimes. See *Commonwealth v. Luktisch*, 680 A.2d 877, 879 (Pa. Super. 1996) (“while remoteness in time is a factor to be considered in determining the probative value of other crimes evidence under the theory of common scheme, plan or design, the importance of the time period is inversely proportional to the similarity of the crimes in question”); see also *Commonwealth v. Aikens*, 990 A.2d 1181, 1185 (Pa. Super. 2010) (noting that the more similar the commission of the crimes, the less the remoteness of time between the commissions of the crime matters). Indeed, the courts in this Commonwealth have allowed the admission of prior bad acts spanning decades, so long as prior acts are similar to the

current acts. *See, e.g., Commonwealth v. Smith*, 635 A.2d 1086, 1090 (Pa. Super. 1993) (allowing the admission of sexual crimes that occurred ten to twenty years prior to the sexual crimes being prosecuted where the incidents were strikingly similar, rendering the significance of the lapse in time “non-existent, or minimal at best”); *Commonwealth v. Odum*, 584 A.2d 953, 954-955 (Pa. Super. 1990) (finding that the probative value of a prior attempted homicide and other assaults against the victim to demonstrate intent, malice, or absence of mistake outweighed the prejudicial effect in defendant’s prosecution for murder and aggravated assault, even though the time frame of the prior acts exceeded ten years); *Aikens*, 990 A.2d at 1186 (permitting the introduction of a rape at trial that occurred fifteen years prior to the assault at issue); *Commonwealth v. Patskin*, 93 A.2d 704, 710 (Pa. 1953) (permitting evidence of defendant’s bad act from seventeen years prior).

8. Moreover, Rule 404(b) “is not limited to evidence of crimes that have been proven beyond a reasonable doubt in court. It encompasses both prior crimes and prior wrongs and acts, the latter of which, by their nature, often lack ‘definitive proof.’” *Commonwealth v. Ardinger*, 839 A.2d 1143, 1145 (Pa. Super. 2003); *see Edward D. Ohlbaum on the*

Pennsylvania Rules of Evidence § 404.16 (2004-2005 ed.)

(“[e]vidence of other crimes, wrongs, or acts includes specific instance of conduct, whether or not they led to conviction, arrest, or any consequences”); see *Commonwealth v. Booth*, 435 A.2d 1220, 1226 (Pa. Super. 1981).

9. Prior bad act evidence is not to be prohibited simply because it is harmful. See *Commonwealth v. May*, 656 A.2d 1335, 1341 (Pa. 1995) (properly admitting defendant’s prior acts of rape and assault against two other victims that were “undoubtedly of a prejudicial and potentially emotional nature” where the common scheme employed by defendant “outweighed its potential for prejudice”). Indeed, the Pennsylvania Supreme Court has “upheld the admission of other crimes evidence, when relevant, even where the details of the other crime were extremely grotesque and highly prejudicial.” *Commonwealth v. Dillon*, 924 A.2d 131,141 (Pa. 2007). Rather, when offered for one of the aforementioned legitimate purposes, prior bad act evidence is admissible unless its’ probative value is outweighed by its potential for “unfair prejudice.” *Commonwealth v. Hairston*, 84 A.3d 657, 664 (Pa. 2014) (emphasis added); Pa. R.E. 404(b)(2). Unfair prejudice means “a tendency to suggest [a] decision on an improper basis or to divert the jury’s attention away from its

duty of weighing the evidence impartially.” *Tyson*, 119 A.3d at 360 (citing *Dillon*, 924 A.2d at 141).

10. Furthermore, in weighing the impact of prior bad act evidence, the court must balance the potential prejudicial impact with such factors as the degree of similarity established between the incidents of criminal conduct, the Commonwealth’s need to present the evidence, and the capability of the trial court to caution the jury about the proper use of such evidence. *Tyson*, 119 A.3d at 359. Such cautionary instructions would “advise the jury of the limited purpose of the evidence and to clarify that the jury cannot treat the prior crime as proof of Appellee’s bad character or criminal tendencies.” *Id.* at 362. Of course, juries are presumed to follow the court’s instructions. *Hairston*, 84 A.3d at 666.

11. Here, the evidence of the other sexual assaults defendant perpetrated on unconscious and incapacitated victims is admissible under both the common plan or scheme exception and the absence of mistake exception to the general proscription against other act evidence. The relevant authority in this jurisdiction warrants this conclusion.

12. *Commonwealth v. Tyson, supra*, is instructive.

- a.** In *Tyson*, the Commonwealth charged the defendant with rape and related offenses after the victim reported waking up in her apartment to the defendant penetrating her vagina with his penis. She reported that she became ill at work after donating plasma, so she called the defendant, with whom she was acquainted, to drive her home. Once inside her apartment, she fell asleep and later awoke to the defendant raping her. *Id.* at 356.
- b.** Prior to trial, the Commonwealth filed a motion *in limine* seeking to introduce evidence of the defendant's prior rape conviction from ten years earlier on two theories: (1) that the prior conviction was admissible as part of a common plan or scheme; and (2) that the conviction was admissible to show the defendant did not "mistakenly" conclude the victim consented to sexual intercourse with him. *Id.*
- c.** In the earlier case, too, the victim woke up in her home to the defendant raping her. Earlier that night, she had gone to bed after drinking alcohol at a party that her brother was having at their home in which defendant attended. *Id.* at n.1. The trial court denied

the Commonwealth's motion and the Commonwealth appealed. *Id.* at 356.

- d. The Pennsylvania Superior Court held that the trial court abused its discretion in denying the Commonwealth's motion *in limine*, finding that the evidence of the prior rape was admissible under both the common scheme exception and the absence of mistake or accident exception. *Id.* at 362-363.
- e. In finding that the prior act evidence was admissible under the common plan or scheme exception, the court noted the similarities between the two cases: (1) that each victim was a black female in her twenties; (2) that the defendant was acquainted with each victim and he was invited into her home; (3) that each victim ultimately lost consciousness and the defendant was aware each victim was in a weakened or compromised state; and (4) that each victim awoke in her bedroom in the early morning hours to find the defendant penetrating their vaginas with his penis. *Id.* at 360. Based on these similarities, the court found that the prior act evidence did not merely demonstrate that the defendant sexually assaulted two different women or that the defendant's actions were "generically common

to many sexual assault cases.” *Id.* Rather, the incidents reflected a “clear pattern” where the defendant was legitimately in his victim’s home; he was cognizant of each victim’s compromised state; and he had sexual intercourse with each victim in her bedroom in the middle of the night while the victim was unconscious. *Id.* at 360. Thus, in light of the similarities, the court found that the earlier rape “tend[ed] to increase the probability that [the defendant] knowingly had non-consensual sex with [the victim] in the present case.” *Id.* It, therefore, concluded that the defendant “engaged in a common scheme of nonconsensual intercourse with unconscious victim.” *Id.* at 361.

- f.** Similarly, with respect to the absence of mistake or accident exception, the court found that “given the relevant similarities between the two incidents, evidence of [the defendant’s] prior rape would tend to prove that he did not “mistakenly believe” [the victim in the current case] was awake or gave her consent. *Id.* at 363. Thus, the court concluded that evidence of the defendant’s prior crime was “highly probative of the fact that [the defendant] could not have reasonably

believed [the victim] was conscious enough to give her consent. Rather, the evidence of the prior conviction tends to prove [the defendant] intentionally exploited another opportunity to take advantage of a woman sexually, when he knew the woman was in a diminished state.” *Id*

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

13. *Commonwealth v. O’Brien, supra*, lends further support to the admissibility of defendant’s prior bad acts.

- a.** In *O’Brien*, as in *Tyson*, the Superior Court held that the trial court abused its discretion in prohibiting the Commonwealth from introducing evidence of the defendant’s prior sexual assaults of two minor boys in a prosecution where the defendant had sexually assaulted a third minor boy approximately ten years

later. *Id.* at 970-71. In reaching this conclusion, the court held that the facts of each incident were sufficiently similar such that the evidence was admissible to establish a common plan or scheme. *Id.* at 972.

- b.** It noted the following facts in support of its conclusion: (1) the victims in each case were of similar age and race; (2) the defendant knew each victim because he was friends with their parents; (3) he assaulted his victims while alone with them in his home; (4) and he engaged in deviate sexual intercourse with each victim after showing them pornography. *Id.* The court determined that the evidence was admissible and “relevant to establish a common scheme, plan or design and, thus bolster the victim’s credibility.” *Id.* at 970.

14. *Commonwealth v. Aikens, supra*, also supports the Commonwealth’s position.

- a.** In *Aikens*, defendant was convicted of having involuntary deviate sexual intercourse with his 14-year-old daughter.
- b.** The Superior Court ruled that evidence that he raped another daughter fifteen years earlier was properly

admissible under the common plan, scheme, or design exception. *Id.* at 1183-1185. The court reached this conclusion based on the similar fact patterns: (1) the victims were of like ages (14 and 15 years old); (2) both victims were the defendant's daughters; (3) the defendant initiated both incidents during an overnight visit to his apartment; (4) he showed the victims pornography; and (5) the assaults occurred in bed at night. *Id.* at 1185-1186. According to the court, "[t]hese matching characteristics elevate the incidents into a unique pattern that distinguishes them from a typical or routine child-abuse factual pattern." *Id.* at 1186. The court further noted that the similarities at issue "were not confined to insignificant details that would likely be common elements regardless of who committed the crimes." *Id.*

c. Finally, in noting the lengthy time lapse between the two incidents, the court reiterated that the importance of any time gap is "inversely proportional to the similarity between the crimes"; it then found that the parallels in the two cases were "striking." *Id.*

15. *Commonwealth v. Hughes*, 555 A.2d 1264 (Pa. 1989) is also instructive.

- a. In *Hughes*, the Pennsylvania Supreme Court found the trial court properly permitted evidence of a prior rape in a prosecution for rape and murder. The Court found that the common plan exception applied, placing significant weight on the “strikingly similar” implementation of the assault. *Id.* at 1283.
- b. Specifically, the Court noted the following similarities: (1) both crimes involved young females; (2) both victims were non-Caucasian; (3) both crimes occurred during the daytime; (4) both crimes took place within a four-block radius; (5) both crimes took place within a five-minute walk from the defendant’s home; (6) both crimes involved circumstances in which the victim was lured or strong-armed off the street; (7) both victims were taken to upstairs bedrooms of vacant buildings; (8) in both crimes the assailant ordered the victims to undress; (9) both crimes involved rape, other sex acts and manual strangulation; and (10) both crimes involved circumstances in which the accused and the victims were previously acquainted. *Id.* The Court noted that “[t]he similarities are not confined to insignificant details that would likely be common elements regardless of who had committed the crimes,

but rather [those elements that] truly represent [defendant's] signature . . . Both rapes were strikingly similar in the implementation of the assault." *Id.* (citations omitted).

- 16.** In *Commonwealth v. Luktisch, supra*, moreover, the court reached a similar ruling, which is equally applicable here.
- a.** In that case, the court found that the defendant's progressive course of conduct of sexual abuse against his victims was "so distinct" that admission of the prior bad acts was proper. *Id.* at 879.
 - b.** Specifically, the court found the following facts strikingly similar: (1) the three victims were near the same age when defendant molested them; (2) they all had the relationship of daughter or step-daughter to defendant; (3) all three were living with him when the acts occurred; (4) the nature of the acts were almost identical; and (5) "the progression of the acts performed on each victim was similar; improper touching first, then oral sex, then sexual intercourse." *Id.*
- 17.** *Commonwealth v. Newman*, 598 A.2d 275 (Pa. 1991) is equally instructive.

- a.** In *Newman*, defendant was an x-ray technician in a facility where his victims were seeking medical assistance for head injuries. *Id.* The first victim was a 28-year-old woman. *Id.* at 279. The defendant, while alone with the first victim, instructed her to lie down on the examination table and then disrobe. He then fondled and sucked her breasts, digitally penetrated her, and then climbed on the examination table and raped her. He then threatened to kill her should she disclose the incident. *Id.* at 269-279.
- b.** More than a year later, the defendant engaged in similar conduct with another patient, who had also come into his place of employment seeking x-rays for a head injury. While alone with this second victim, the defendant hugged her, kissed her on the mouth, picked her up, laid her on the examination table, lifted her shirt, kissed her chest, and then pulled down her underwear and raped her. *Id.* at 277. The following day, she went to the police. *Id.*
- c.** Upon seeing the facts regarding this sexual assault on the news, the first victim then went to the police. *Id.* at 276.

- d.** Though the issue on appeal was one involving the consolidation of the case involving the first victim with that of the second victim, a prior bad act analysis—specifically, an inquiry into whether the incidents were part of a common plan or scheme—was a necessary component of the consolidation issue.
- e.** The Supreme Court found sufficient similarities in the two cases to support consolidation. In doing so, it emphasized that the common scheme analysis should not just focus on the acts performed by the defendant, but also on the shared similarities in the details of the crimes. *Id.* at 279.
- f.** It found the following similarities: (1) both rapes occurred in the x-ray department, late at night when the x-ray department was otherwise deserted and the defendant was the only technician on duty; (2) the victim in each instance was a female, suffering from a head injury, who was approximately half the size of the defendant; and (3) in each case, the defendant began kissing and hugging the victims and fondling their breasts, he then climbed up onto the examination table and raped them. *Id.* at 278.

- 18.** Finally, *Commonwealth v. Elliott*, 700 A.2d 1243 (Pa. 1997), *abrogated on other grounds by Commonwealth v. Freeman* 827 A.2d 385 (Pa. 2003), is also instructive.
- a.** *Elliott* involved the prosecution of the defendant for the rape and murder of a woman.
 - b.** The Pennsylvania Supreme Court held that the defendant's three prior assaults on women were admissible to show a common plan, scheme, or design. *Id.* at 1250. Specifically, the court found that the prior assaults were sufficiently similar to the current attack because the victims were all white women in their twenties; the victims were all attacked in the early morning hours after finding themselves alone with the defendant; each assault had sexual overtones; and each victim was choked or beaten, or both. *Id.* at 1249-1250.
 - c.** In reaching this conclusion, the court rejected the defendant's claim that prejudicial value outweighed its probative value. In doing so, it noted that at trial, the defendant suggested the victim's injuries were the result of rough sex; thus, the Commonwealth needed to introduce prior assaults, in part, to rebut this claim. *Id.* at 1250.

B. ARGUMENT FOR ADMISSION OF EVIDENCE OF DEFENDANT'S PRIOR SEXUAL ASSAULTS OF VICTIMS STATED ABOVE

1. This Court should find the aforementioned prior bad act evidence admissible under the common plan, scheme, or design exception to the general proscription against other act evidence.
2. Similar to the facts in *Tyson*, the victim in this case and all of defendant's prior victims were legitimately with defendant as a result of an initiated invitation; defendant was clearly cognizant of the victim's and all of his prior victims' incapacitated and compromised state, as all of the women described a feeling of passing out and being rendered incapacitated; and defendant engaged in sexual contact with the women in their compromised state. Like in *Tyson*, this evidence shows a clear pattern that proves that defendant knowingly had nonconsensual sexual contact with an unconscious victim; a scheme not generically common to other sexual assault cases.
3. Adding more of a pattern than was seen in *Tyson* are the facts, similar to those in *O'Brien*, *Aikens*, *Hughes*, and *Luktisch*, that the instant victim and all of the prior victims were young women of similar age, ranging in age from 18 or 19 to 30 years of age; like in *Aikens* and, to an extent, *Hughes*, all of the victims were younger than defendant.

4. Moreover, like in *Newman*, where the defendant held a position of trust, in the instant case, due to defendant's fame, marital status, notoriety, and public status, defendant was able to gain all of his victims' trust, and lure all of them, under false pretenses, to a location where he was alone with them.
5. As in *O'Brien*, where the assaults always happened after showing the victims pornography, and in *Hughes*, *Luktisch*, and *Elliott*, where the implementation and progression of each assault was strikingly similar, here, defendant sexually assaulted the women after giving them an intoxicant. In many of the cases involving the principal victim and prior victims, defendant persistently encouraged the women to take the intoxicant—whether they knew it or not—rendering them incapacitated. All of these matching characteristics elevate the incidents into a unique pattern that distinguishes them from a typical or routine sexual assault factual pattern and shows the true signature of defendant; the similarities are not details that would be found in common sexual assault cases. See *Aikens*, *supra* at 1186.
6. The Courts in *Aikens*, *Hughes*, *Newman*, and *Elliott* make clear that the type of sexual assault perpetrated against the principal victim and those perpetrated against the prior

victims do not need to be identical in every regard. To be sure, the courts in this Commonwealth have consistently held that all that is required is that the similarities, when taken together, are enough to separate the instant and prior crimes from one which would ordinarily occur. *See, e.g., Commonwealth v. Robinson*, 864 A.2d 460, 472-474 (Pa. 2004) (prior sexual crime admitted where the type of weapon used varied and the age range of the victims varied from fifteen to forty-seven; noting that the dissimilarity does not preclude admission when the other similarities are so great). The fact that defendant sexually assaulted the same type of victim by luring them in the same way and facilitated the assaults in the same manner—by giving his victims intoxicants—demonstrate ample similarities to show defendant’s pattern. Moreover, all of the assaults were sexual in nature, whether they were sexual assault, or an unknown assault with sexual overtones.

7. Additionally, the strikingly similar implementation of the assault perpetrated against the victim as compared to the prior victims shows a high correlation of detail that tends to prove that defendant perpetrated this crime against the victim and, indeed, that it is unlikely that anyone else but defendant perpetrated these acts against the victim. *See*

Commonwealth v Morris, 425 A.2d 715, 720 (Pa. 1981)
(noting that “there must be such a high correlation in the details of the crime that proof that the defendant committed one makes it very unlikely that anyone else but the defendant committed the others). Thus, given the variety of circumstances in which rape and drug-facilitated rape is committed, the similarities in the instant case—where defendant uses his position to gain the trust of the victim; lures her into a false sense of security; ingratiates himself into her life, family, and career; and then drugs her and sexually assaults her—make it very unlikely that the sexual assault of the victim and the prior victims were committed by different people.

8. As the Court held in *O'Brien*, all of the evidence is necessary and “relevant to establish a common scheme, plan or design and thus bolster the victim’s credibility.” *Id.*, 836 A.2d at 970; see *Elliott*, 700 A.2d at 1250 (permitting evidence of prior bad acts to allow the Commonwealth to overcome claims of rough sex). This is especially true in this case where by virtue of defendant’s fame, notoriety, wealth, and public status, his image alone is self-bolstering.
9. Geographical proximity is a factor that this court may consider in admitting these prior bad acts. In the instant

case, however, the apparent lack of geographic proximity in fact weighs in favor of admission. Whereas a typical defendant may be restricted in his ability to travel and thus be unable to victimize numerous people all over the nation, this defendant is a wealthy, national figure, who has the luxury of traveling to various destinations, for professional or social purposes. His status—as opposed to the status of the those of lesser economic means who are unable to regularly travel and thus, to the extent they engage in criminal or unsavory conduct, they would do so in a more confined locale—does not enable him to escape the consequences of his actions. *See Commonwealth v. Davis*, 737 A.2d 792 (Pa. Super. 1999) (“acts which occur in one jurisdiction may be used by any other jurisdiction to demonstrate a continuing pattern of conduct or course of conduct”).

10. This Court should also find the aforementioned prior bad act evidence admissible under the absence of mistake or accident exception. First, it should be noted that the relevant similarities in this case are more numerous and establish more of a pattern than those seen in many of the cases cited above where admission of the other act evidence was permitted. Beyond that, however, in the instant case, just as in *Tyson*, evidence of the past, premeditated conduct that

defendant used to lure other young aspiring women into a false sense of security, then drug and sexually assault them in the exact same way he did to lure, drug, and sexually assault the victim in this case, proves that he did not mistakenly believe the victim was awake or in any physical or mental state to consent to any sexual contact. As the court mentioned in *Tyson*, this evidence is “highly probative of the fact that [defendant] could not have reasonably believed [the victim] was conscious enough to give consent. Rather, the evidence of the prior [acts] tends to prove [defendant] intentionally exploited another opportunity to take advantage of a woman sexually, when he knew the woman was in a diminished state.” *Id.* at 363.

11. Moreover, the probative value of the prior victims’ testimony substantially outweighs any potential for unfair prejudice. More specifically, the Commonwealth’s need for the evidence far outweighs any potential for undue prejudice. To be sure, if this relevant prior bad act evidence were excluded in this case, the Commonwealth would be required to “rely solely on the uncorroborated testimony of [the victim] to counter [defendant’s] defense of consent,” which is something the *Tyson* and *O’Brien* Court made clear would be an abuse of the trial court’s discretion. *Tyson*, 119 A.3d at

362. This is so because the need for such evidence is seen as a “significant” to the Commonwealth in order to prove that defendant engaged in nonconsensual sexual contact with the unconscious victim. *See id.*; *see also Commonwealth v. Gordon*, 673 A.2d 866 (Pa. 1996) (holding that evidence of defendant’s similar prior sexual assaults was not unduly prejudicial where the Commonwealth was required to prove non-consensual touching occurred; evidence was necessary for the prosecution of the case where uncorroborated testimony of victim might lead jury to determine there was reasonable doubt as to whether or not defendant committed the crime). Indeed, testimony about defendant’s acts toward the prior victims is critical in establishing that defendant’s actions in this case were not consensual, especially in light of his public image. *See Commonwealth v. Kinard*, 95 A.3d 279 (Pa. Super. 2014) (“[c]learly, the introduction of the phone calls in this case, which were highly prejudicial, established that appellant was a drug dealer. However, when balancing the probative versus the prejudicial nature of this evidence, it was clearly supportive of the other evidence in this case and was critical in establishing the absence of mistake or accident and a common scheme, plan or design”).

12. Finally, the fact that the Commonwealth is respecting judicial economy should not be held against it. Indeed, just because the Commonwealth is seeking admission of only thirteen prior victims in this case does not detract from the serial nature of defendant's decades-long pattern of sexual assault. *See, e.g., Commonwealth v. Odum*, 584 A.2d 953 (Pa. Super. 1990) (finding that the probative value of prior bad acts to show intent, malice, or absence of accident outweighed the prejudicial effect even though the time frame of the prior acts exceeded ten years; "refus[ing] to consider the evidence entirely out of its sequential context" and noting that the fact that additional incidents were not submitted would "further act to reduce the time periods between incidents"); *U.S. v. Woods*, 484 F. 2d 127 (4th Cir. 1973) (utilizing prior bad act standards identical to those in Pennsylvania and permitting evidence that nine children within defendant's custody suffered incidents of cyanosis, and seven died as a result, despite the fact that the first bad act was committed 24 years prior; finding that when "the incidents [are] considered collectively . . . an unmistakable pattern emerges").

13. Accordingly, for the reasons stated above, this Court should permit the Commonwealth to admit the prior bad act

evidence pertaining to the aforementioned victims, as this evidence is relevant to establish a common plan, scheme, or design, and to demonstrate an absence of mistake. See *Tyson*, 119 A.3d at 362-363 (holding that evidence of a prior rape of an incapacitated person should have been admissible in a rape prosecution to establish an absence of mistake and a common plan, scheme or design, where the evidence was necessary to demonstrate that defendant did not mistakenly believe his victim was conscious enough to give her consent); compare *Commonwealth v. Hicks*, 91 A.3d 47 (Pa. 2014) (noting that the trial court acted in error when it limited the Commonwealth from calling a certain number of witnesses, labeling them repetitive, and, more significantly, precluded specific witnesses). Indeed, “[i]t is a fundamental precept of our criminal jurisprudence that the Commonwealth is entitled to prove its case by relevant evidence of its choosing.” *Id.* at 54.

WHEREFORE, the above-mentioned prior bad acts of defendant should be admissible at trial.

RESPECTFULLY SUBMITTED,



KEVIN R. STEELE
DISTRICT ATTORNEY

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

COMMONWEALTH OF PENNSYLVANIA

CP-46-CR-3932-2016

v.

WILLIAM H. COSBY, JR.

VERIFICATION

I verify that the statements made in the foregoing response are true and correct to the best of my knowledge, information, and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities.



KEVIN R. STEELE
DISTRICT ATTORNEY

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

COMMONWEALTH OF PENNSYLVANIA	:	CP-46-CR-3932-2016
	:	
v.	:	
	:	
WILLIAM H. COSBY, JR.	:	

CERTIFICATE OF SERVICE

I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities. I, Kevin R. Steele, District Attorney, being duly sworn according to law, depose and say that a true and correct copy of the Commonwealth's Motion to Introduce Evidence of Prior Bad Acts of Defendant will be delivered to the following:

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