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IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

39 MAP 2020

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

WILLIAM HENRY COSBY,

Appellant

Brief of *Amicus Curiae* the Pennsylvania Association of Criminal Defense Lawyers in Support of Appellant William Henry Cosby

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

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a professional association of more than 900 private criminal defense attorneys and public defenders admitted to practice before the Pennsylvania Supreme Court, and who are actively engaged in providing criminal defense representation. As such, PACDL represents the perspective of experienced criminal defense attorneys who seek to protect and ensure, by rule of law, those individual rights guaranteed in Pennsylvania, and to work to achieve justice and dignity for defendants.

Pursuant to Pa.R.A.P. 531(b), PACDL represents that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

STATEMENT OF THE QUESTION PRESENTED

On June 23, 2020, this Honorable Court granted, in part, the petition for allowance of appeal filed by William Henry Cosby, Jr. ("Mr. Cosby") at 9 MAL 2020. This *amicus* brief is limited to the first question:

> Where allegations of uncharged misconduct involving sexual contact with five women (and a *de facto* sixth) and the use of Quaaludes were admitted at trial through the women's live testimony and Petitioner's civil deposition testimony despite: (a) being unduly remote in time in that the allegations were more than fifteen years old and, in some instances, dated back to the 1970s; (b) lacking any striking similarities or close factual nexus to the conduct for which Petitioner was on trial; (c) being unduly prejudicial; (d) being not actually probative of the crimes for which Petitioner was on trial; and (e) constituting nothing but improper propensity evidence, did the Panel err in affirming the admission of this evidence?

Commonwealth v. Cosby, --- A.3d ---, 2020 WL 3425277, 9 MAL 2020 (Pa. June 23, 2020).

STATEMENT OF THE CASE

For purposes of this *amicus* brief, the relevant facts and procedural history of Mr. Cosby's case, as gleaned from his petition for allowance of appeal, are as follows.

In 2015, Mr. Cosby was charged with three counts of Aggravated Indecent Assault based on allegations made by Andrea Constand ("Ms. Constand") that he had unwanted sexual contact with her in 2004. According to Constand, she and Mr. Cosby often had dinner together at his home during their 18-month friendship. On the night of the incident, she accepted a glass of water, a glass of wine, and three blue pills from Mr. Cosby upon arriving at his house. At some point, Constand became weak and sat down on the couch. Mr. Cosby sat down next to her, digitally penetrated her, and placed her hand on his genitals. Mr. Cosby claimed that all sexual contact was consensual.

Prior to trial, the Commonwealth filed a motion to introduce the testimony of 13 women claiming that Mr. Cosby had unwanted sexual contact with them as well. The trial court granted the Commonwealth's motion in part, allowing prior bad act testimony from one witness. Following trial, the jury deadlocked and a mistrial was declared.

Prior to Mr. Cosby's second trial, the Commonwealth renewed its motion to present prior bad act evidence. This time, however, the Commonwealth sought testimony from 19 prior bad act witnesses. The trial court granted the Commonwealth's motion in part. Although finding the testimony of all 19 witnesses to be relevant and admissible, the trial court allowed prior bad act testimony from only five witnesses of the prosecution's choice. The Commonwealth selected Janice Baker-Kinney ("Ms. Baker-Kinney"), Janice Dickinson ("Ms. Dickinson"), Heidi Thomas ("Ms. Thomas"), Chelan Lasha ("Ms. Lasha"), and Maud Lise-Lotte Lubin ("Ms. Lubin").

Ms. Baker-Kinney testified that at a hotel party in Las Vegas in 1982, Mr. Cosby touched her breasts after giving her a beer and a Quaalude. Ms. Dickinson testified that at a Lake Tahoe hotel in 1982, she had vaginal and anal intercourse with Mr. Cosby in his room after he gave her a blue pill at dinner. Ms. Thomas testified that at a third party's home in Reno in 1984, Mr. Cosby forced her to perform oral sex after giving her a glass of wine. Ms. Lasha testified that at a Las Vegas hotel in 1986, Mr. Cosby pinched her nipple and humped her leg in his room after she accepted an antihistamine and a shot of Amaretto from

him. Ms. Lubin testified that at a Las Vegas hotel around 1989, Mr. Cosby stroked her hair after giving her a few drinks, but there was no sexual contact between them.

The trial court gave several cautionary instructions during the course of trial, and again in its final instructions. The jury ultimately convicted Mr. Cosby on all counts. He was sentenced to 3-10 years' incarceration and declared a sexually violent predator.

On appeal, Mr. Cosby contended that the trial court committed reversible error in admitting the testimony of the prior bad act witnesses in violation of Pa.R.E. 404(b). The Superior Court rejected his argument, holding that the evidence satisfied, *inter alia*, the "common plan" exception. Mr. Cosby's judgment of sentence was affirmed.

SUMMARY OF THE ARGUMENT

At common law, both federal and state, prior bad acts evidence was inadmissible because its inherently prejudicial effect misled, confused, and overpersuaded juries. Pennsylvania Rule of Evidence 404 codified the common law. In contrast to the Federal Rules of Evidence, the Pennsylvania Rules of Evidence do not contain provisions to routinely allow the admission of prior bad act evidence in sex cases. Simply put, our history shows a deep aversion to propensity evidence in all cases.

This Honorable Court has made clear that prior bad act evidence should be admitted only under exceptionally narrow circumstances, specifically where there is a link between/among the acts. This Honorable Court has also made clear that, in determining admissibility, sex cases and non-sex cases must be treated alike. Despite this explicit directive and our history, propensity evidence has often been erroneously allowed, as in Mr. Cosby's case, under the "common plan" exception.

To be admissible under the "common plan" exception, evidence of plan must be highly specific and situational, genuinely illustrating a

deliberate, specific, and focused approach. The prior bad act evidence also must not be too remote. This "true link" test honors Pennsylvania's well-entrenched distaste for prior bad act evidence, and concern that such evidence will overpersuade juries. Any other interpretation will continue to result in the admission of improper propensity evidence.

In Mr. Cosby's case, the Commonwealth introduced the testimony of five prior bad act witnesses. However, there was no logical connection between this evidence and the accusations made by Ms. Constand. The prior bad act evidence also predated Ms. Constand's accusations by 15-22 years. Mr. Cosby's prior uncharged conduct did not satisfy the "true link" test, and constituted nothing more than improper propensity evidence. Admission of the prior conduct was reversible error.

ARGUMENT

I. Pennsylvania is, and always has been, committed to preventing propensity evidence from improperly influencing the outcome of trials. This is true even in sex cases. Consequently, where the "common plan" exception is at issue, prior bad act evidence can be admitted only where it is highly specific and situational, and it must not be too remote. In other words, plan means a true link to the crimes charged, period.

A. Under federal and state common law, prior bad acts evidence was inadmissible because its inherently prejudicial effect misled, confused, and overpowered juries.

Because Pennsylvania's Rules of Evidence, as promulgated by this Honorable Court in 1998 and re-enacted in restyled form in 2013, were intended to codify—not to reform—the common law, *Commonwealth v. Brown*, 52 A.3d 1139, 1179-1180 (Pa. 2020), *amici* begin our discussion with the common law background.

"A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977). Over a hundred years ago in *Boyd v. United States*, 142 U.S. 450 (1892), the United States Supreme Court reversed the defendants' convictions for murder following a robbery attempt because the trial court erred in permitting

the prosecution to introduce evidence of the defendants' prior robberies, reasoning that "[t]hey were collateral to the issue to be tried. .... Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law[.]" 142 U.S. at 450. As Justice Oliver Wendell Holmes later put it in *Greer v. United States*, 245 U.S. 559 (1918), "character is not an issue in the case unless the prisoner chooses to make it one[.]" 245 U.S. at 560. "Although 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)). Indeed, admission of prior bad act evidence can impermissibly result in a "trial within a trial." *United States v. Yu Qin*, 688 F.3d 257, 264 (6th Cir. 2012). *See Commonwealth v. Kjersgaard*, 419 A.2d 502, 508 (Pa.Super. 1980) (Gates, J., dissenting) ("the injection of the [prior bad acts] in this

case created a trial within a trial requiring the appellant to meet a charge...which...[was]...impossible to refute").

In *Commonwealth v. Williams*, 160 A. 602 (Pa. 1932), this Honorable Court echoed these same sentiments, explaining that, under state common law, "there can be little doubt that the admission of a prior conviction [or bad act] trenches very strongly on the fundamental rule of evidence that a distinct crime unconnected with that on trial cannot be given in evidence against a prisoner as proof of the crime on trial; it shows a moral disposition to commit crime." 106 A. at 608.

To avoid this grave risk, courts that followed the common law approach "almost unanimously" disallowed evidence of the defendant's prior misdeeds, "[n]ot because the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief." *Michelson v. United States*, 335 U.S. 469, 475 (1948) (internal citations omitted). "[I]t is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defendant against a particular charge." *Id.* at 476. Despite its admitted probative value, rational logic, common

sense, and practical experience dictated that disallowing prior bad act evidence "tends to prevent confusion of issues, unfair surprise and undue prejudice." *Id.* (external footnote omitted).

The common law recognized exceptions to the general prohibition if evidence of the defendant's prior bad acts was offered for alternative, non-propensity purposes. *Id.* "Prior convictions [and other bad acts] can be admitted in evidence to show intent, scienter, motive, identity, plan, or the accused to be one of an organization banded together to commit crimes of the sort charged, or that such prior conviction or criminal act formed a part of a chain, or was one of a sequence of acts, or became part of the history of the event or trial, or was part of the natural developments of the case; also to prove the mental condition when the defense was insanity, or to rebut the inference of mistake, or to show a guilty knowledge." *Williams*, 160 A. at 607 (citations omitted).

Nevertheless, as this Honorable Court made clear in *Shaffner v. Commonwealth*, 72 Pa. 60 (1872),

> [t]he most guilty criminal may be innocent of other offences charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of [prior bad act] evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends,

> by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of jurors to be prejudiced by an independent act, carrying with it no proper evidence of the particular guilt.

72 Pa. at 65. "Although we have determined that evidence of prior criminal acts which the defendant himself makes relevant to prove the crimes with which he is charged admissible, we are still mindful of the potential for misunderstanding on the part of the jury when this type of evidence is admitted." *Commonwealth v. Claypool*, 495 A.2d 176, 179 (Pa. 1985).

Simply put, the common law rule, both federal and state, was broadly one of exclusion. As the common law was very much against allowing evidence of the defendant's previous misdeeds to invade trials and mislead, confuse, and overpersuade juries, the admission of such evidence was strictly limited to cases that truly presented exceptional or "special circumstances[.]" *Commonwealth v. Billa*, 555 A.2d 835, 840 (Pa. 1989) (citations omitted).

B. Pennsylvania does not follow the modified federal approach to prior bad act evidence.

More than 20 years following the 1975 adoption of Federal Rule 404, Pennsylvania enacted Pa.R.E. 404 (Character Evidence; Crimes or Other Acts)[1] codifying the common law approach of generally prohibiting admission of prior bad act evidence. *Commonwealth v. Hicks*, 156 A.3d 1114, 1142-1143 (Pa. 2017) (Donahue, J., joined in part by Wecht, J., dissenting) (citations and internal punctuation omitted). Importantly, with respect to permitted uses of prior bad act evidence, Pennsylvania Rule 404 differs from Federal Rule 404 "in several respects. [For instance], Pa.R.E. 404(b)(2) requires that the probative value of the evidence must outweigh its potential for prejudice." Pa.R.E. 404, *Comment*. This is in contrast with the Federal Rule, which allows prior bad act evidence to be used unless the value is ***substantially*** outweighed by the risk of ***unfair*** prejudice.

At least as importantly, in 1995 Congress enacted F.R.E. 413 (Similar Crimes in Sexual-Assault Cases) and F.R.E. 414 (Similar

[1] *See* Appendix A.

Crimes in Child-Molestation Cases).[2] In light of these rules, "courts have ***routinely*** allowed propensity evidence in sex-offense cases, even while disallowing it in other criminal prosecutions." *United States v. LeMay*, 260 F.3d 1018, 1025 (9th Cir. 2001) (emphasis added).

Pennsylvania adopted its own evidentiary rules with respect to prior bad act evidence in 1998, three years ***after*** the enactment of Federal Rules 413 and 414. But the Pennsylvania Rules of Evidence have no provisions equivalent to Federal Rules 413 and 414. Pennsylvania, in other words, made the informed decision to reject federal law and, thus, not allow prior bad act evidence to be "routinely" admitted in sex cases. *Id.*

C. This Honorable Court has made clear that prior bad act evidence, as a matter of policy, should be admitted only under exceptionally narrow circumstances.

In *Commonwealth v. Dillon*, 925 A.2d 131 (Pa. 2007), this Honorable Court held that prior bad act evidence "***has long been deemed inadmissible*** as character evidence against a criminal defendant ***in this Commonwealth*** as a matter not of relevance, but of policy; i.e., because of a fear that such evidence is so powerful that the

[2] *See* Appendix A.

jury might misuse the evidence and convict based solely upon criminal propensity." 925 A.2d at 137 (citations omitted; emphasis added). To be admissible, there must be a logical connection between the proffered prior bad acts and the underlying charged crime. *Commonwealth v. Hicks*, 156 A.3d 1114, 1125 (Pa. 2017). "[M]uch more is demanded than the mere repeated commission of crimes of the same general class[.]" *Commonwealth v. Rush*, 646 A.2d 557, 560-561 (Pa. 1994) (quoting *Commonwealth v. Warble*, 114 A.2d 334, 336 (Pa. 1955)) (original emphasis omitted).[3] In addition to having a non-propensity purpose, the probative value of the prior bad act evidence must outweigh its prejudicial impact. *Commonwealth v. Crispell*, 193 A.3d 919, 936 (Pa. 2018) (citations omitted).

Under Pennsylvania law, these principles apply even in sex cases. In *Commonwealth v. Shively*, 424 A.2d 1257 (Pa. 1981), this Honorable Court explicitly overruled *Commonwealth v. Kline*, 65 A.2d 348 (Pa. 1949) (where sex crimes are at issue, the law is more liberal in allowing

[3] Indeed, the Superior Court itself has recognized that "the exceptions cannot be stretched in ways that effectively eradicate the rule. With a modicum of effort, in most cases it is possible to note some similarities between the accused's prior bad acts and that alleged in a current case." *Commonwealth v. Bidwell*, 195 A.3d 610, 627 (Pa.Super. 2018) (quoting *Commonwealth v. Ross*, 57 A.3d 85, 105 (Pa.Super. 2012)).

the admission of prior bad acts) and held, in no uncertain terms, that "sexual and non-sexual crimes ***must be treated alike*** in deciding whether evidence of prior criminal activity should be admitted." 424 A.2d at 1260-1261 (citations omitted; emphasis added).

The Superior Court has ignored this Honorable Court's explicit directive and the long standing common law that underlies the Pennsylvania Rules of Evidence, particularly where, as in Mr. Cosby's case, the "common plan" exception is at issue.[4] A collection of cases showing the repeated errors of the Superior Court is set forth in Appendix B, *infra*. *Amici* illustrate this problem here with two examples.

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[4] As one scholarly author has explained with respect to the Superior Court's disparate treatment of sex cases, unlike virtually all other cases in which the "common plan" exception was invoked, neither identification nor any other relevant purpose was at issue in the sex cases. Consequently, the prior bad act evidence appeared probative only of criminal propensity. The Honorable Daniel J. Anders, *Ohlbaum on the Pennsylvania Rules of Evidence*, § 404.22[4] (2020 edition). Additionally, Pennsylvania Rule 404(b) omits "common plan" as an independent issue to be proven (as opposed to a mean to prove identity or another enumerated reason), the Superior Court continues to use the phrase as an independent relevant area of proof, but it struggles to develop a theoretical framework for admitting the evidence consistent with Pennsylvania Rule 404(b)'s prohibition against propensity evidence. *Id.*

In *Commonwealth v. O'Brien*, 836 A.2d 966 (Pa.Super. 2003), the trial court excluded evidence that the defendant had previously sexually assaulted two other victims. 836 A.2d at 969-970. The Superior Court reversed, finding that the prior bad act evidence was admissible under the common plan exception. *Id.* However, not only was the defendant's identity as the perpetrator not an issue at trial, but the Superior Court erroneously relied on case law that examined the common plan exception as a means of proving identity, not as an independent aspect of Pennsylvania Rule 404(b). *Id.*

In *Commonwealth v. Aikens*, 990 A.2d 1181 (Pa.Super. 2010), the defendant was accused of indecently assaulting his biological daughter, T.S. 990 A.2d at 1182. During trial, the Commonwealth presented the testimony of V.B., the defendant's biological daughter to another woman who did not know T.S., who testified that the defendant had raped her. *Id.* at 1183. The Superior Court found the defendant's prior bad acts admissible under the common plan exception. *Id.* at 1186. However, there was not a striking similarity or logical connection between the incidents, and the Superior Court acknowledged that the 10-to-11 year gap between the allegations was "lengthy." *Id.* at 1186.

Furthermore, the Superior Court declined to meaningfully address the defendant's legitimate concern that it was "pigeonholing sexual abuse cases to such an extent that any prior instance of child abuse would be admissible in a subsequent child abuse prosecution." *Id.*

D. The "common plan" exception requires a true link to the crimes charged, period.

Prior bad act evidence, by definition, is confusing, misleading, and unduly prejudicial. It undercuts the basic constitutional principle that a criminal defendant is presumed innocent of the crimes for which he or she is on trial. Consequently, where the Commonwealth seeks to inform the jury of the defendant's prior bad acts through the "common plan" exception, the "true link" test must be employed. That is, to be admissible, the evidence of plan must be highly specific and situational, and it must not be too remote.

"Evidence that an individual prepared or planned to commit a crime or act is admissible as proof that the person accomplished what he or she set out to do." Anders, *Ohlbaum on the Pennsylvania Rules of Evidence*, § 404.20. In other words, the evidence of earlier wrongdoing is admissible under this theory only if commission of one crime was a step toward an overarching goal, as where the defendant developed a

plan to gain control of a business and, over time, committed various offenses—stealing the business records; burglarizing the homes of the owners; and then killing some of the owners—to achieve the ultimate end, the unlawful taking control of a business even though the only crime charged is the ultimate one. This interpretation of the "common plan" exception is the only one that is consistent with Pennsylvania's well-entrenched distaste for prior bad act evidence, and concern that such evidence will overpersuade juries and jeopardize the presumption of innocence. Any other rule is unworkable and will perpetuate improper admission of propensity evidence.[5]

---

[5] Purportedly curative jury instructions, by themselves, cannot overcome the inherently undue prejudice created by prior bad act evidence. Prior bad act evidence is not just "any" proffered evidence. As Chief Justice Saylor recently observed, "I maintain concerns about the power of potentially inevitable character inferences associated with other-acts evidence, with requiring defendants to effectively defend mini-trials concerning collateral matters, and about the efficacy of jury instructions in this context. .... It may well be that the interests of justice would be well served were this Court to consider revamping the present approach." *Hicks*, 156 A.3d at 1138 (Saylor, C.J., concurring) (unnecessary paragraphing omitted). "[W]hen evidence suggesting 'a propensity or disposition to commit crime ... reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk.'" *Breakiron v. Horn*, 642 F.3d 126, 144 (3d Cir. 2011) (quoting *Government of the Virgin Islands v. Toto*, 529 F.2d

"The prejudicial effect of a prior conviction is not assessed in a vacuum; an appellate court should not only consider the purpose for which the evidence is introduced, but the actual use made of the evidence and also the jury instructions that accompany the admission of evidence." *Commonwealth v. Hoover*, 107 A.3d 723, 731 (Pa. 2014).

In Mr. Cosby's case, the Commonwealth introduced the testimony of five prior bad act witnesses. As counsel for Mr. Cosby aptly demonstrated, there was no logical connection between this evidence and the accusations made by Ms. Constand, the crimes for which Mr. Cosby was actually on trial. Moreover, the prior bad act evidence predated Constand's accusations by 15-22 years. Simply put, evidence of Mr. Cosby's prior uncharged conduct did not satisfy the "true link" test for the "common plan" exception under Pa.R.E. 404(b)(2), but constituted nothing more than improper propensity evidence. As such, Mr. Cosby's judgment of sentence must be reversed, and he must be afforded a new trial.

278, 283 (3d Cir. 1976)). This is all the more reason to adopt *amici*'s "true link" interpretation of the "common plan" exception.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court affirming Mr. Cosby's convictions should be reversed.

Respectfully Submitted:

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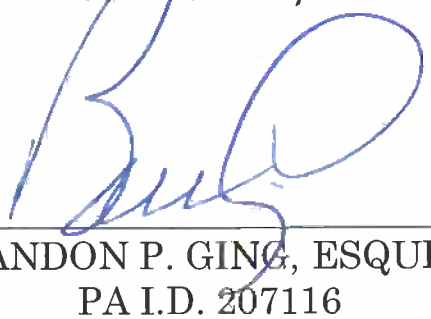

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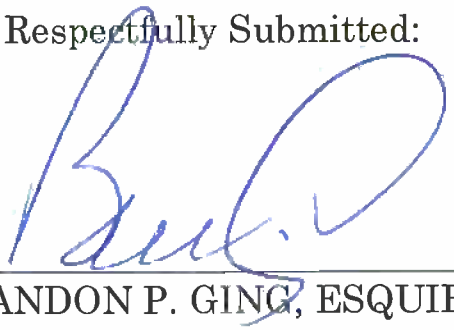
CERTIFICATE OF COMPLIANCE PURSUANT TO Pa.R.A.P. 531(b)(3)

I, Brandon P. Ging, Esquire, hereby certify that this *amicus* brief complies with the word count requirement pursuant to Pa.R.A.P. 531(b)(3), as it does not exceed 7,000 words.

Respectfully Submitted:



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CERTIFICATE OF COMPLIANCE PURSUANT TO Pa.R.A.P. 127

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

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APPENDIX A

Pennsylvania Rules of Evidence

In relevant part, Pennsylvania Rule 404 reads as follows:

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

...

(b) Crimes, Wrongs or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

(3) Notice in a Criminal Case. In a criminal case the prosecutor must provide reasonable notice in

advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial.

Pa.R.E. 404(a)(1)-(b).

Federal Rules of Evidence

In relevant part, Federal Rule 404 reads as follows:

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

...

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a

> defendant in a criminal case, the prosecutor must:
>
> (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
>
> (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

F.R.E. 404(a)(1)-(b). Effective December 20, 2020, absent contrary Congressional action, the government's notice requirements pursuant to subsection (b)(2) will be separately restyled as subsection (b)(3).

In relevant part, Federal Rule 413 states that, "[i]n a criminal case in which a defendant is accused of sexual assault, this court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant." F.R.E. 413(a).

In relevant part, Federal Rule 414 states that, "[i]n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant." F.R.E. 414(a).

APPENDIX B

Collection of Superior Court cases

- *Commonwealth v. Lauro*, 819 A.2d 100 (Pa.Super. 2003) (finding the defendant's prior misdeeds to be admissible to prove a common plan, but without discussing (or even citing to) Pennsylvania Rule 404(b)).

- *Commonwealth v. Judd*, 897 A.2d 1224 (Pa.Super. 2006) (erroneously relying on case law that considered evidence of a common plan in the context of proving identity, even though identity was not at issue in the case).

- *Commonwealth v. G.D.M., Sr.*, 926 A.2d 984 (Pa.Super. 2007) (providing no meaningful discussion of how the prior bad act evidence, admitted under the "common plan" exception, was probative of anything other than the defendant's criminal propensity to commit crimes of a general class).

- *Commonwealth v. Hacker*, 959 A.2d 380 (Pa.Super. 2008), *reversed on other grounds*, *Commonwealth v. Hacker*, 15 A.2d 333 (Pa. 2001) (holding that evidence of a common plan was admissible to bolster the victim's credibility, but without explaining how this did not merely inform the jury that the defendant had a criminal propensity to commit a certain type of crimes).

- *Commonwealth v. Tyson*, 119 A.3d 353 (Pa.Super. 2015) (*en banc*) (finding the defendant's prior bad acts admissible under the "common" plan exception, even though identity was not at issue, and without explaining how the evidence did not inflame the jury's sensibilities with references to the defendant's propensity to commit particular crimes).

- *Commonwealth v. Ivy*, 146 A.3d 241 (Pa.Super. 2016) (erroneously concluding that the trial court abused its discretion in excluding

some evidence of the defendant's prior misdeeds based on undue prejudice because the Superior Court found, in its own estimation, that it qualified under the "common plan" exception).

- *Commonwealth v. Conte*, 198 A.3d 1169 (Pa.Super. 2018) (finding evidence of the defendant's prior bad acts, introduced by the Commonwealth in rebuttal, admissible under the "common plan" exception, even though the other assault had no logical connection to the assault at issue and was demonstrative only of the defendant's criminal propensity).