

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

COMMONWEALTH OF PENNSYLVANIA : CP-46-CR-0003932-2016

v. :

WILLIAM H. COSBY, JR. :

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION *IN LIMINE*
TO ADMIT TESTIMONY REGARDING ANDREA CONSTAND'S PRIOR
ALLEGED STATEMENT

TO THE HONORABLE STEVEN T. O'NEILL, J.:

I. INTRODUCTION

The Commonwealth is prosecuting defendant for drugging and sexual assaulting Andrea Constand in his Cheltenham home in 2004. Prior to trial, defendant provided the Commonwealth with a statement executed by Marguerite Jackson in 2016. Defendant has now submitted a second, slightly-tweaked version of Ms. Jackson statement—this time an affidavit—executed in January 2018. According to her both her statement and affidavit, Ms. Jackson is a graduate of Temple University and has been employed by the school for more than 30 years. Importantly, during her tenure at Temple University, defendant sat as a prominent member of its Board of Trustees. He also played an active role in its athletic program, where Ms. Jackson spent multiple years working. In both documents, Ms. Jackson alleges that after viewing a news story on the television with Ms. Constand about an unnamed, yet “prominent” and “high profile individual” who was accused of drugging and sexually assaulting women in a “highly publicized matter,” Ms. Constand alleged that a similar thing happened to her. Conveniently, though Ms. Jackson is unable to

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recall this “prominent” individual’s name, she remembers the exact words that Ms. Constand allegedly used to describe what she theoretically could do. Ms. Jackson alleges that after questioning Ms. Constand further, Ms. Constand denied that she was sexually assaulted, but then allegedly said she “could say it happened” and “get money.” *See* Exhibit A (2016 statement); *see also* Exhibit B (2018 affidavit).¹

Initially, it should be noted that the circumstances by which this absurd, incredible assertion came to light—over a decade **after** Ms. Constand reported this crime to the police—should call into question the motives, intentions, and veracity behind Ms. Jackson’s proffered testimony. This desperate move to introduce this highly-suspect, hearsay testimony reflects defendant’s continuing strategy of inserting red herrings to distract from the relevant issues in this case.²

¹ Notably, in Ms. Jackson’s 2016 statement, she is only able to paraphrase the contents of her alleged conversation with Ms. Constand, which would have occurred approximately 13 years earlier. *See* Exhibit A. In her 2018 affidavit, however, she is miraculously able to quote the exact contents of her alleged conversation with Ms. Constand, now 15 years earlier. *See* Exhibit B. Moreover, while Ms. Jackson’s 2016 statement indicates that she had this supposed conversation with Ms. Constand “about a year [before] ... Andrea left Temple”—which would be **before** defendant sexually assaulted her—any reference to when this conversation occurred is strikingly absent from Ms. Jackson’s 2018 affidavit. Notably, this Court found the timing of the supposed conversation relevant and, indeed, based exclusion thereupon. This deliberate omission, in addition to several other important factors, evidences the lack of reliability inherent in Ms. Jackson’s statement.

² Of course, defendant undertakes this strategy at his own peril to the extent that he is permitted to present an unreliable witness who fabricates on the witness stand.

Notwithstanding the rather suspicious circumstances surrounding the revelation of Ms. Jackson's proffered testimony, defendant is requesting the Court to disregard the law and admit statements that are nothing more than inadmissible hearsay. Moreover, these broad, speculative statements about what Ms. Constand allegedly said she **could** do (not what she was going to do or what she intended to do) at an unnamed time, to an unknown person, made at an unnamed time, are precisely the type of evidence those promulgating the Pennsylvania Rules of Evidence, and other rules governing criminal trials generally, intended to preclude. Ms. Jackson's testimony is nothing more than a tenuous set of allegations that lack the requisite probative value necessary to survive the test of relevancy. Moreover, alternatively, admission of Ms. Constand's very general alleged statement, which requires complete speculation in order for a person to imply that it demonstrated her intention to set up defendant, makes the statement nothing more than an unduly prejudicial piece of evidence intended to mislead and confuse the jury. Finally, notwithstanding the lack of relevancy, the statements constitutes inadmissible hearsay, permitted under none of the exceptions to the Pennsylvania Rules of Evidence. Thus, Ms. Jackson's testimony regarding Ms. Constand's alleged statements should be precluded.

II. LEGAL ARGUMENT

A. MS. JACKSON'S TESTIMONY REGARDING AN ALLEGED ASSERTION LACKING ANY SPECIFICITY SHOULD BE PRECLUDED AS IRRELEVANT.

In order for Ms. Jackson's statement to be admissible, defendant must establish that it is material and relevant. *Commonwealth v. Laich*, 777 A.2d

1057, 1060–61 (Pa. 2001). Evidence is relevant if it (1) logically tends to establish a material fact in the case, (2) tends to make a fact at issue more or less probable, or (3) supports a reasonable inference or presumption regarding a material fact. *See* Pa. R.E. 401, 402. Since Ms. Jackson’s testimony regarding Ms. Constand’s alleged statement about what she **could** do lacks any degree of specificity, it has no tendency to prove, disprove, or even support a reasonable inference regarding a material fact in the instant case—let alone a set-up of defendant, as his arguments would suggest. Thus, for the following reasons, her testimony should be prohibited as lacking the requisite level of detail needed to establish its probative value, and should be precluded.

1. Permitting Ms. Jackson’s testimony would require the jury to make a speculative leap that is precluded by law.

If the proffered evidence requires jurors to make large speculative leaps to make it probative, or fails to support a reasonable inference without the need to speculate, it should be precluded. *See Commonwealth v. Williams*, 720 A.2d 679, 686 (Pa. 1998) (holding that the trial court properly excluded multiple witnesses’ testimony that they had heard that unnamed individuals had been beaten, shot, and robbed by the three victims, which defendant intended to offer “to show that these unnamed individuals **would** have had a motive to kill the three victims,” because the testimony was “rank hearsay” and “highly speculative”); *see also Commonwealth v. Cook*, 676 A.2d 639, 647 (Pa. 1996) (holding that the trial court properly excluded four witnesses’ testimony that they heard the victim state that he was indebted to “someone” and that he was in the process of repaying this “someone” or “someones,” which defendant

argued demonstrated why “someone” would have a motive to kill the victim, was so speculative that it had little or no probative value). Indeed, courts in this Commonwealth have consistently precluded evidence lacking a logical nexus between the proffered evidence and the matters at hand, as it cannot survive the test of relevancy. *See, e.g., Commonwealth v. Bishop*, 936 A.2d 1136, 1144 (Pa. Super. 2007) (holding, in a sex abuse prosecution, that the trial court erred by admitting evidence that nine pornographic magazines ***which were not linked to any of the crimes*** were taken from the defendant’s truck, finding the evidence irrelevant and unfairly prejudicial).

Ms. Jackson’s testimony is irrelevant and should be precluded. Contrary to defendant’s assertions, Ms. Jackson’s testimony regarding what Ms. Constand ***could*** do to ***someone*** is so vague and lacks the requisite evidentiary nexus to reasonably infer that it establishes Ms. Constand’s actual intent to set up defendant. Thus, the evidence should be precluded.

2. Ms. Jackson’s testimony is contrary to the facts at issue, as asserted by both Ms. Constand and defendant, and thus has no tendency to establish any material fact at issue in this case.

The specific details surrounding the assault are important because defendant’s own admissions undermine his current claim that Ms. Constand allegedly devised a plan to fabricate being drugged and sexually assaulted by him approximately a year prior to its execution. *See Cook, supra* (holding that the trial court properly excluded four witnesses’ testimony where the victim’s own statements—that he was in debt and paying off “someone” that he was in debt to—failed to demonstrate defendant’s defense that “someone” had a

motive to kill the victim, finding that such speculative evidence has little or no probative value especially since “the victim’s own statements that he was repaying this debt fails to demonstrate why “someone” who was being paid back money owed would have a motive to kill the victim”).

In January 2004, defendant invited Ms. Constand to his Cheltenham home to discuss her career path (N.T. Trial by Jury, 6/6/17, pp. 169-170). Importantly, by defendant’s own admission, Ms. Constand never asked to come over, never showed up unannounced, and came only upon an invitation offered by defendant. *See Exhibit C, Civil Deposition of William H. Cosby, 9/28/05 (159:8-15)*. Notably, while she never had any romantic interest in defendant, who is more than 30 years her senior, it was defendant who had a romantic interest in her from the time he first met her; though he never let her know. *See Exhibit D, Civil Deposition of William H. Cosby, 9/28/05 (106:18-21)*. Significantly, on the night in question, defendant admits that without being prompted to or requested to, and without any deliberate act on the part of Ms. Constand, he went upstairs to his bathroom, grabbed multiple pills of Benadryl, told her that he had “three friends” for her to take to make her relax, and provided them to her. *See Exhibit E, Civil Deposition of William H. Cosby, 9/29/05 (233:11-235:9)*. He then engaged in unsolicited and unwanted sexual conduct with her, while she was incapacitated.

Had, as defendant now alleges, the acts of that night been an elaborate plan orchestrated by Ms. Constand a year prior—that she had happened to tell an alleged colleague, whom she never knew or, at best, was so insignificant to

her that she cannot remember her—a reasonable person would expect some intentional deliberate act on the part of Ms. Constand to facilitate putting this intricate plan in motion. The absence thereof not only evidences the utter lack of reliability and truthfulness contained within Ms. Jackson’s statement and follow-up affidavit, but also the lack of probative value Ms. Constand’s alleged statement has to the instant facts.

Importantly, moreover, the idea of this set-up to get money for school is also belied by defendant’s admissions that Ms. Constand refused to accept his invitation for a flight, hotel stay, and educational trust, and his admission that when confronted by Ms. Constand and her mother about drugging and sexually assaulting Ms. Constand, they requested no money, just an apology. *See* Exhibit F, Civil Deposition of William H. Cosby, 9/29/05 (187:2-6, 213:9-215:5). Thus, Ms. Constand’s alleged statements to Ms. Jackson—especially in light of defendant’s admissions and the facts existing in this case—fail to demonstrate that on the day of the alleged conversation, she had a motive to fabricate allegations against defendant to get money. Hence, Ms. Jackson’s testimony should be precluded.

B. ALTERNATIVELY, MS. JACKSON’S CONTRADICTED AND SPECULATIVE TESTIMONY SHOULD BE PRECLUDED AS UNFAIRLY PREJUDICIAL.

Relevant evidence may be excluded “if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Pa. R.E. 403. Unfair prejudice exists when

there is “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.” *Commonwealth v. Tyson*, 119 A.3d 353, 360 (Pa. Super. 2015) (citing *Commonwealth v. Dillon*, 925 A.2d 131, 141 (Pa. 2005)).

In order for any juror to assume that Ms. Constand’s alleged statement established a clear intention to set up defendant, they would need to speculate, overcome the contradictions established by defendant’s own admissions, and infer that on the night she conversed with Ms. Jackson, she intended to set up defendant. Such a specifically stated elaborate plan, which is wholly unsupported by the facts, at best decreases the probative value, if any, associated with Ms. Jackson’s testimony; causing it to be substantially outweighed by the danger of unfair prejudice. Thus, even if the Court finds Ms. Jackson’s testimony relevant, it should still be precluded as unfairly prejudicial.

C. Ms. JACKSON’S TESTIMONY SHOULD BE PRECLUDED AS INADMISSIBLE HEARSAY.

1. Ms. Jackson’s testimony is inadmissible hearsay.

As noted, in order for Ms. Jackson’s statement to be admissible, defendant must establish that it is material and relevant. *Laich*, 777 A.2d at 1060–61. An out of court statement offered to prove the truth of the matter asserted in the statement is hearsay and inadmissible in a court of law. Pa. R.E. 801(c). The purpose of the hearsay rule is premised on the theory that out-of-court statements are subject to hazards that are difficult to guard against and generally unreliable. Thus, unless an enumerated exception is

applicable, hearsay evidence should be excluded. *See* Pa. R.E. 802. Simply stated, Ms. Jackson’s proffered testimony about what Ms. Constand supposedly said to her is an out-of-court statement offered to prove the truth of the matter asserted; to wit, that she was never drugged and sexually assaulted by a “prominent” and “high profile” person, but that she could say that she was in order to make some money. Since Ms. Jackson’s testimony does not meet any of the exclusions provided by law, her statement is inadmissible hearsay and should be excluded.

2. Ms. Jackson’s testimony does not meet the state of mind exception under Pa. R.E. 803(3).

“Pursuant to the state of mind hearsay exception, where a declarant’s out-of-court statements demonstrate her state of mind, are made in a natural manner, and are material and relevant, they are admissible pursuant to the exception.” *Laich*, 777 A.2d at 1060–61 (citations omitted). Importantly, the statement must describe the declarant’s then-existing state of mind. *See* Pa. R.E. 803(3) (providing that “[a] statement of the declarant’s then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition” is an exception to the rule against hearsay). Moreover, out-of-court declarations that fall within the state of mind hearsay exception are still subject to general evidentiary rules governing competency and relevancy.” *Laich*, 777 A.2d at 1060–61 (citations omitted).

Notwithstanding the lack of relevancy, as discussed *supra*, defendant’s arguments that Ms. Jackson’s testimony is admissible pursuant to the state of mind hearsay exception because it demonstrates her future intent to set him

up is lacking in factual support. First, Ms. Constand's alleged statement about what she **could** do (not what she was going to do or what she intended to do) at an unnamed time, to an unknown person, made at an unknown time, is too tenuous to assert that it was a deliberate intention of Ms. Constand's future conduct. Moreover, defendant's admissions directly contradicting any deliberate or intentional acts on behalf of Ms. Constand to carry out a plan to put herself in a position to be drugged and sexually assaulted, make clear that Ms. Constand's alleged broad and unsupported statement about what she **could** do falls far short of demonstrating any intention to set defendant up. Simply put, defendant has failed to demonstrate that Ms. Constand's purported statements demonstrate a then-existing state of mind. Ms. Jackson's testimony, accordingly, should be precluded as inadmissible hearsay.

3. Ms. Jackson's testimony should be precluded pursuant to Pa. R.E. 607(b).

In accordance with Pennsylvania Rule of Evidence 607(b), "the credibility of a witness may be impeached by any evidence **relevant to that issue**, except as otherwise provided by these [evidentiary] rules." Pa. R.E. 607(b). As previously discussed, the proffered evidence is not relevant; accordingly, its admission pursuant to Rule 607(b) should be precluded.

Notwithstanding defendant's failure to demonstrate how Ms. Jackson's statement survives the relevancy test, defendant's pleadings unsurprisingly make multiple assertions that are less than accurate. Defendant argues that Ms. Jackson's testimony is relevant because it shows that Ms. Constand lied about having been sexually assaulted. However, as the Court is well aware, this

argument holds no weight, as even a sexual assault victim's alleged prior false accusations of sexual abuse is inadmissible. *See Commonwealth v. Gaddis*, 639 A.2d 462, 466 (Pa. Super. 1994) (sexual assault victim's alleged prior false accusations of sexual abuse inadmissible), *overruled on other grounds by Commonwealth v. Allhouse*, 924 A.2d 1215 (Pa. Super. 2007), *Commonwealth v. Boyles*, 595 A.2d 1180, 1186 (Pa. Super. 1991) (holding that, pursuant to the Rape Shield Law, testimony regarding the victim's claims of past sexual attacks is inadmissible).

Defendant also alleges that, at the very least, the Court should permit Ms. Jackson to testify in order to expose Ms. Constand's alleged "lie" that she did not know Ms. Jackson. Again, it is important to remind the Court that whether Ms. Constand knew or did not know Ms. Jackson has no tendency to prove or disprove whether or not defendant's sexual contact was consensual; thus, such evidence is irrelevant. Instead, what **is** important is trying this case within the confines of the law. The law requires the evidence by which a witness may be impeached be relevant to the issue at hand. Since defendant cannot and will not be able to establish this, Ms. Jackson's testimony should be precluded as irrelevant inadmissible hearsay.

4. Ms. Jackson's testimony fails to qualify as a prior inconsistent statement pursuant to Pa. R.E. 613(a).

Pursuant to Pennsylvania Rule of Evidence 613(a), a witness can be examined concerning a prior inconsistent statement made by the witness. Pa. R.E. 613(a), (b). However, the two statements must be plainly inconsistent or

contradictory, not just different. *Commonwealth v. Johnson*, 758 A.2d 166, 170 (Pa. Super. 2000).

Contrary to defendant's assertions, Ms. Jackson's statements regarding what Ms. Constand allegedly said she could do (not what she was going to do or what she intended to do) at an unnamed time, to an unnamed person, made at an unknown time, is not inconsistent with Ms. Constand testimony, or defendant's admission that he provided Ms. Constand with pills and engaged in sexual contact with her. Nor is it inconsistent with Ms. Constand's testimony that the pills defendant gave her incapacitated her to an extent that she was unable to consent. Finally, and perhaps most significantly, if Ms. Constand's alleged statement was made a year prior to being sexually assaulted—as Ms. Jackson averred in her 2016 statement—then obviously any statement that she was not sexually assaulted is neither inconsistent nor contradictory to her expected trial testimony. This critical factor—the timing of when this alleged statement was made—is what the Court highlighted as the basis for exclusion of the evidence at defendant's first trial. Interestingly, as discussed *supra* at n.1, it is this crucial factor that is the main distinction between Ms. Jackson's 2016 statement and her 2018 affidavit: Ms. Jackson's 2018 affidavit does not indicate when Ms. Constand allegedly made these incredulous statements to her, yet her 2016 statement avers that they were made a year before Ms. Constand left Temple University, which would be early 2003—a year before

defendant sexually assaulted her.³ Thus, Ms. Jackson's testimony does not survive the test of Rule 613(b) and should not be admitted as a prior inconsistent statement.

Notwithstanding the lack of probative value Ms. Jackson's testimony would have in this manner, her testimony is inadmissible hearsay, and is not otherwise admissible or a prior inconsistent statement. Excluding Ms. Jackson's irrelevant inadmissible hearsay testimony violates none of defendant's constitutional rights. *See Commonwealth v. Jermyn*, 533 A.2d 74 (Pa. 1987) (defendant not permitted to present irrelevant evidence held not to violate the Compulsory Process Clause). Accordingly, Ms. Jackson's testimony should be precluded.

D. MS. JACKSON'S TESTIMONY WOULD OPEN THE DOOR TO EVIDENCE OF THE SETTLEMENT OF THE CIVIL SUIT.

If the Court permits Ms. Jackson's testimony, it should permit the Commonwealth to revisit the admissibility of the circumstances surrounding the settlement of the civil suit. As the Court may recall, on March 8, 2005, Ms. Constand filed a civil lawsuit against defendant in the United States District Court for the Eastern District of Pennsylvania. Her complaint asserted claims of battery, sexual assault, and other related claims, based upon the same facts that make up this criminal case.

³ Ostensibly, this was an intentional omission which should give the Court a clear picture of what can be expected should this witness be permitted to take the witness stand and further perpetuate this fabricated tale.

In October of 2006, after over three months of intense negotiations, the case concluded by way of a settlement agreement (N.T. Pretrial Hearing, 2/3/16, pp. 191, C-21 and C-22). One significant point of contention during these settlement negotiations was defendant's requests pertaining to how Ms. Constand should handle law enforcement should they approach her regarding information and cooperation stemming from the January 2004 sexual assault (*id.*).

Initially, defendant requested that Ms. Constand release him from any criminal liability. For obvious reasons, and in line with moral and ethical obligations, defendant's offer was rejected (*id.*). Following Ms. Constand's rejection, defendant took additional steps to obstruct the criminal investigation and any potential prosecution (*id.* at 187-198). Specifically, he requested that Ms. Constand "not voluntarily cooperate with the District Attorney" and "not cooperate in any law enforcement requests" in exchange for settlement (*id.* at 191-192). Like defendant's request to absolve him of criminal liability, these requests were rejected by Ms. Constand and her attorneys (*id.*). Defendant also requested that Ms. Constand destroy all of the contents of the civil case; contents that included a deposition wherein defendant admitted to, among other things, obtaining seven prescriptions for Quaaludes which he intended to, and indeed did, give to women to engage in sexual contact with them (*id.* at 193). After three months of intense negotiations, Ms. Constand agreed that she would not initiate a criminal complaint against defendant for sexually assaulting her in January 2004 (*id.* at 193, C-22). This language was

specifically requested by defendant and led to the settlement (*id.* at 193). It was also agreed that should law enforcement request the contents of the civil file, notification would be made to defendant's attorneys, unless law enforcement requested that no notification be given (*id.* at 196).

While evidence of compromise offers and negotiations will not be admissible "to prove or disprove the validity or amount of a disputed claim... [t]he court may admit this evidence for another purpose." Pa. R.E. 408. One purpose could be to "prov[e] an effort to obstruct a criminal investigation or prosecution." Pa. R.E. 408(b). *Commonwealth v. Pettinato* is instructive. There, the Superior Court affirmed the trial court's decision to permit evidence that defendant offered to pay the victim if she refused to testify against him in the pending criminal case. *Id.*, 520 A.2d 437, 438 (Pa. Super. 1987). In rejecting defendant's argument that offers of settlement made during negotiations are inadmissible, the Court made clear that it "**refuse[d]** to exclude this type of evidence when the offer of money to a witness in an attempt to prevent her testimony at trial is a [crime]." *Id.* at 439 (emphasis added). Thus, finding that defendant's "unlawful" efforts to "'settle' the prosecution" by requesting that the victim refuse to testify against him in exchange for money was a "mode of stopping or obstructing the prosecution," the Court permitted evidence of the offer of settlement. *Id.* at 438.

Another relevant reason to permit this type of evidence is to show defendant's guilty mind. In *Commonwealth v. Melnyczenko*, the Superior Court affirmed the lower court's decision to permit testimony of the defendant's offer

to make restitution. *Id.*, 358 A.2d 98, 99-100 (Pa. Super. 1976). There, the defendant was arrested for stealing money and jewelry from the victim's home. *Id.* at 100. After the defendant's arrest, he offered to pay the victim for the missing items, but the victim rejected his offer and the matter proceeded to trial. *Id.* The Court found that "[w]hen a person commits a crime, knows that he is wanted therefore, and... conceals himself, such conduct is evidence of consciousness of guilt, and may form the basis in connection with other proof from which guilt may be inferred." *Melnyczenko, supra* (citing *Commonwealth v. Osborne*, 249 A.2d 330 (Pa. 1969)). Though Pa. R.E. was not analyzed in the decision, the Court found defendant's offer of restitution fell square within conduct evidencing his consciousness of guilt and affirmed the trial court's decision to admit the evidence. *Melnyczenko, supra*.

Here, if the Court permits Ms. Jackson's testimony, then admitting evidence that he settled the lawsuit and the circumstances leading up to that settlement are proper for three main reasons. First, the details of the intense negotiations that ultimately led to the settlement of the civil suit clearly show defendant's efforts to both intimidate Ms. Constand from cooperating with the authorities—which she refused to do—and obstruct the criminal investigation into the sexually violative conduct he perpetrated against Ms. Constand, and impede any prosecution therefrom. Like the defendant in *Pettinato*, the defendant offered to settle the pending civil suit Ms. Constand filed against him if she refused to testify against him. *Pettinato*, 580 A.2d at 438. Unlike the defendant in *Pettinato*, however, defendant's efforts to stop and obstruct any

potential prosecution against him did not stop there. *Id.* Rather, he also requested Ms. Constand to release him from criminal liability, refuse to cooperate with the police should they reopen the investigation, thwart the prosecution by failing to voluntarily cooperate with the district attorney's office, and destroy the contents of the civil file, which, incidentally contained defendant's admissions to giving Quaaludes to women for the purpose of engaging in sexual contact with them. Ultimately, defendant agreed to settle with Ms. Constand in exchange for her agreement to refuse to initiate contact with law enforcement and to automatically notify defendant's attorneys if law enforcement made a blanket request for the civil file—an agreement evidencing defendant's clear efforts to obstruct a criminal investigation and hamper any efforts to prosecute this crime. Accordingly, consistent with Pa. R.E. 408(b), and using the Superior Court's guidance as set forth in *Pettinato*, if this Court permits evidence of the civil suit, this Court should also permit evidence of defendant's efforts to obstruct this criminal investigation or prosecution.

Second, the details of the intense negotiations that ultimately led to the settlement of the civil suit clearly show defendant's guilty mind. Should the Court permit Ms. Jackson's testimony, then the Court should also permit the fact of settlement and the circumstances leading up to it as evidence of defendant's consciousness of guilt, as defendant's efforts to conceal himself of criminal liability far exceed those steps taken by the defendant in *Melnyczenko*. All of the efforts defendant took to absolve himself of criminal liability and conceal any evidence connecting him to this crime—including silencing the

victim, requesting that she not cooperate with law enforcement, and requesting that the civil file be destroyed—are evidence from which defendant’s guilty conscience may be inferred. Thus, in line with Rule 408(b), as broadly construed, and using the Superior Court’s guidance as set forth in *Melnyczenko*, if this Court permits Ms. Jackson’s testimony, then this Court should also permit evidence of settlement and the circumstances leading up to it as proof of defendant’s consciousness of guilt.

Lastly, should the Court permit Ms. Jackson’s testimony, evidence of the settlement and the circumstances leading up to it is critical to rebut any charge or claim of Ms. Constand’s bias. Therefore, if Ms. Jackson’s testimony is deemed admissible, so, too, should evidence of, and the circumstances leading up to, the settlement.

For the foregoing reasons, the Commonwealth respectfully requests that this Court deny Defendant's motion *in limine*.

RESPECTFULLY SUBMITTED:

A handwritten signature in blue ink, appearing to read "K. R. Steele", is written over a horizontal line.

KEVIN R. STEELE
DISTRICT ATTORNEY

VERIFICATION

I, Kevin R. Steele, District Attorney of Montgomery County, declare under penalty of perjury that the statements herein are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

A handwritten signature in blue ink, appearing to read "K. R. Steele", is written over a horizontal line.

KEVIN R. STEELE
DISTRICT ATTORNEY

PUBLIC ACCESS POLICY CERTIFICATION

I, Kevin R. Steele, District Attorney of Montgomery County, certify that this filing complies with the provisions of the *Public Access Policy of the Uniform Judicial Systems of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.



KEVIN R. STEELE
DISTRICT ATTORNEY

CERTIFICATE OF SERVICE

I, Kevin R. Steele, District Attorney of Montgomery County, being duly sworn according to law, depose and say that a true and correct copy of the *Commonwealth's Response to Defendant's Motion In Limine To Admit Testimony Regarding Andrea Constand's Prior Statement Admitting She Intended To Fabricate a Claim of Sexual Assault* will be delivered to the following:

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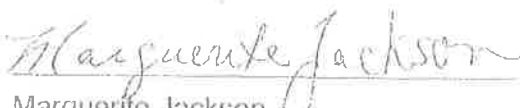
Date: 2.5.2018

Exhibit

A

Statement of Marguerite Jackson

I, Marguerite Jackson state that I reside at 7556 Woodcrest Avenue in Philadelphia, PA. I am employed by Temple University and have been for the past thirty years. I am a student advisor. In this role I have supported various departments to include the Fox School of Business, Athletics and Music and Dance. From approximately 2002 until 2006 I was assigned to Academic Advising for Student Athletics. My role as advisor to the departments is to ensure the students are on track academically. As a result I worked closely with Andrea Constand, who at that time was the Operations Manager of the women's basketball team. Andrea and I had regular contact and as a result became friends. As a function of my position, I would travel with the team occasionally. As I recall, I traveled with the team approximately six times. On each occasion, Andrea and I shared a hotel room. Although I cannot recall the specific year, there was an occasion I traveled with the team to Rhode Island. During our stay Andrea and I shared a room. I recall the television was on. We were watching the news. There was a news story of a high profile individual who was accused of drugging women and sexually assaulting them. It was a well publicized case. The news story peaked Andrea's interest. She told me that something similar had happened to her. I was shocked. I asked her if she had filed charges. She said she hadn't. I asked her why and she said, that like the story on the news, the person who had drugged and done something to her sexually was a high profile person. I responded telling Andrea that it didn't matter who the person is, she should have reported it. I then asked Andrea if what she was saying really happened. Her response was that it had not happened but she could say it happened and file charges, file a civil suit, get the money, go to school and open a business. Andrea and I never discussed the matter again. It was about a year later that Andrea left Temple and then I learned she went to the authorities and claimed that Bill Cosby had drugged and sexually assaulted her. I wasn't shocked since this was exactly what Andrea said she could do, and so she did. I, Marguerite Jackson state that the foregoing statement of one page is true and correct. I am giving this statement freely and voluntarily. No one has threatened or intimidated me to provide this statement nor have I been offered a reward.


Marguerite Jackson
Date: 11/29/16

Exhibit

B

AFFIDAVIT OF MARGUERITE JACKSON

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF ~~MONTGOMERY~~ PHILADELPHIA RJB

MARGUERITE JACKSON states as follows:

1) I have been an employee of Temple University, 1801 No. Broad Street, Philadelphia, PA 19122, for the past 31 years and am a resident of Philadelphia County.

2) I have a Masters of Education, Counseling Psychology, awarded in 2001 by Temple University. I work as an academic counselor for students, and I also provide independent psychological counseling through various community organizations. As part of my work, I frequently counsel victims of sexual assault and abuse.

3) I was assigned to the women's basketball team between 2002 and 2006, and was present and worked with Andrea Constand. Ms. Constand and I became friends and had regular work-related contact. I periodically traveled with the team and on approximately six (6) occasions was assigned to room with Andrea Constand.

4) I recall that when the Temple University Women's Basketball team was in Rhode Island, I was rooming with Andrea Constand. While in the hotel room, a news story was on television about a prominent person who had been accused of drugging and sexually assaulting women. I believe this case was a highly publicized matter but do not recall the location or the individual's name.

5) While we were watching the story, Ms. Constand said that something like that had happened to her. I asked Ms. Constand if she had reported the incident to the police. Ms. Constand said she had not because this was a very powerful man and Ms. Constand said she knew she could not prove it. I responded to Ms. Constand by telling her that it did not matter who it was, she needed to report it.

6) I was surprised by Ms. Constand's demeanor, which caused me to question Ms. Constand, specifically asking Ms. Constand if that had really happened to her, meaning whether she had been taken advantage of in that way. Ms. Constand asked why


these women would make these allegations. I responded that money is a great motivator. When I asked Ms. Constand again if that had happened to her, Ms. Constand said, "No, it didn't but I could say it did." Ms. Constand then said, "I could say it happened, file charges and get money to go to school and open a business."

7) While on a cruise I heard about the current criminal allegations of Ms. Constand against Mr. Cosby. I was not surprised based on my previous conversation with Ms. Constand. I felt Ms. Constand was setting up a celebrity, just as she told me she was going to do.

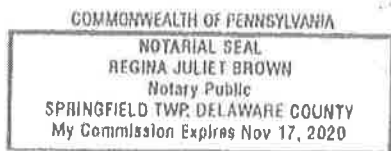

Marguerite Jackson

Sworn to and subscribed before me

This 22 day of JANUARY, 2018

Notary Public: 

My commission expires: 11/17/20



Exhibit

C

William Cosby, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREA CONSTAND : CIVIL ACTION
- VS -
WILLIAM H. COSBY, JR.: NO. 05-CV-1099

Oral deposition of WILLIAM H. COSBY,
JR., taken pursuant to notice, held at the
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1 like this.

2 Q. One leads to the other. How
3 do those gates open?

4 A. One opens -- they used to
5 both open electrically but the back
6 one is cranky.

7 Q. Do you have to open them or
8 the person who's in the house has to
9 open them?

10 A. The front gate opens
11 electrically, the back one is cranky,
12 we walk to it.

13 Q. My question is, for the
14 front gate, the one that you said
15 opens electrically, is there an
16 electric eye so the gate automatically
17 opens when a car gets there?

18 A. No.

19 Q. You have to open the gate
20 from the house?

21 A. From the house.

22 Q. And the other one you need
23 to open by somebody going out and
24 opening the gate?

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1 A. Yes.

2 Q. And every time that Andrea
3 came, were those gates closed?

4 A. Might have been.

5 Q. Do you normally keep them
6 closed?

7 A. Yes.

8 Q. So, for Andrea to get into
9 the house somebody had to -- or bring
10 her car into the house, somebody had
11 to open the gate; is that correct?

12 A. Yes.

13 Q. Is there an access for an
14 individual pedestrian, or do they
15 still have to go through this gate?
16 You're looking at me like you don't
17 understand.

18 A. You're right.

19 Q. If I were walking up to your
20 house, in order to get to the house
21 itself, one of the doors, does
22 somebody still have to open the gate,
23 or is there an area where a person
24 could walk in as opposed to a car?

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1 A. Is there a gate for a human
2 being or a dog or something?

3 Q. Right.

4 A. No.

5 Q. Andrea never dropped in on
6 you then?

7 A. No.

8 Q. Every time she came to your
9 house, it was at your initiation?

10 A. Exactly.

11 Q. Now, let's go to --

12 A. And I don't think Andrea
13 ever called me and said, can I come up
14 to your house. I'm not sure. But I'm
15 just adding to it.

16 Q. Now, you told the police
17 that you believe that there were three
18 sexual contacts that you had with her.

19 MR. O'CONNOR: Can you give
20 me the page reference?

21 MS. TROIANI: I certainly
22 would.

23 MS. KIVITZ: Bottom of page
24 5.

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1 BY MS. TROIANI:

2 Q. I don't want to get into the
3 confusion that we had yesterday.

4 What do you believe were the
5 three contacts of a sexual nature that
6 you had with Andrea?

7 MR. O'CONNOR: In fairness,
8 this states there were three other
9 times in my house. And he referred to
10 a previous time. I don't know whether
11 it's four or three. I think the
12 question is, when did the petting stop
13 and he goes on. And this is the
14 Benadryl night. Then had you had any
15 petting or romantic relationship prior
16 to that night. And I think the
17 Benadryl night he said yes. How many
18 times, at least three other times in
19 my house in the other living room.

20 BY MS. TROIANI:

21 Q. Can you tell me how many
22 times?

23 A. I may be mistaken in that
24 count. I've given you all I remember

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D

William Cosby, Jr.

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1 THE WITNESS: That may very
2 well be.
3 MS. TROIANI: It is, sir.
4 THE WITNESS: But the
5 question -- the questions that happen
6 to be coming between the two of you
7 happen to be about my answers also.
8 And I'm asking her and I have asked
9 for her to go back as far as Andrea so
10 that I can understand. And it hasn't
11 happened. I'm not a lawyer. I don't
12 have the power to tell you what to do,
13 but I did ask.
14 And in fairness, I think I
15 did tell you earlier that this is a
16 situation for me that has some sort of
17 tension and I want to respect
18 everything here. So, if we can, I
19 would like to go back so that we can
20 hear what it is so I can understand
21 when you get to, do you think it's
22 appropriate.
23 BY MS. TROIANI:
24 Q. I'll tell you what I'll do
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1 for you. I will rephrase the
2 question.
3 Do you believe it is
4 appropriate for you, you as a married
5 man, to invite an unmarried woman who
6 is not related to you to have dinner
7 with you alone in your house?
8 A. Yes.
9 Q. Why is it appropriate?
10 A. Because it depends on what
11 business I would have with said
12 unmarried woman.
13 Q. Why would it be
14 inappropriate for you to invite Andrea
15 to your house?
16 A. Because Andrea was a
17 romantic issue.
18 Q. When did you first develop a
19 romantic interest in Andrea?
20 A. Probably the first time I
21 saw her.
22 Q. Where was that?
23 A. Liacouras Center.
24 Q. When was it?
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1 A. I have no idea.
2 Q. How were you introduced?
3 A. Joan Ballast I believe who
4 is a friend of mine at the university.
5 Q. Did you ask her to introduce
6 you to Andrea?
7 A. I don't remember.
8 Q. Did you develop this
9 romantic interest just from seeing
10 her?
11 A. Yes.
12 Q. And did you tell her that
13 you had a romantic interest in her?
14 A. No.
15 Q. Why not?
16 A. Can't do it right away.
17 Q. Why?
18 A. I don't know her. She
19 doesn't know me.
20 Q. Everybody knows you, Mr.
21 Cosby.
22 A. Not really.
23 Q. What was the plan when you
24 first saw her?
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1 A. To meet her.
2 Q. And then what?
3 A. And then perhaps to have
4 some moments with her that would have
5 to do with some sort of friendship.
6 Q. In other words, you had to
7 build her trust up first?
8 A. I think you're trying to put
9 words in my mouth.
10 Q. Oh, no. You can say no.
11 A. If you're married, and I'm
12 sure you are, I'm sure you didn't, the
13 man you met, want to build up his
14 trust in you.
15 Q. I didn't? I did not want
16 to?
17 A. To build up his trust in
18 you, that doesn't go. You want to
19 meet someone to get to know them.
20 Q. Well, you're married,
21 correct?
22 A. 41 years.
23 Q. You certainly didn't want
24 your wife to know about this
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Exhibit

E

William Cosby, Jr.

1

IN THE UNITED STATES DISTRICT COURT
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- VS - : NO. 05-CV-1099
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William Cosby, Jr.

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- 1 BY MS. TROIANI:
2 Q. Why don't we go back to the
3 heart of this allegation. Let's talk
4 about the incident which brings us
5 here today.
6 MR. O'CONNOR: I need the
7 document you're referring to.
8 MS. TROIANI: I'm just
9 looking at the police report.
10 BY MS. TROIANI:
11 Q. Tell me in your own records
12 what happened on the night that you
13 gave Andrea the Benadryl.
14 A. She came to the house, the
15 back door, she knocked on the door or
16 I saw her coming and opened the door.
17 Q. Did you know she was coming?
18 A. Yes.
19 Q. How did you know that?
20 A. Andrea comes, she accepts my
21 invitation.
22 Q. And what happened when you
23 went to the back door and let her in?
24 A. She came in.

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William Cosby, Jr.

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- 1 have one half and one whole one,
2 that's two.
3 Are you saying you broke the
4 whole one so you had three halves?
5 A. Yes.
6 Q. Why would you break the
7 whole pill in half and give her both
8 halves?
9 A. Because they're long.
10 MR. O'CONNOR: Let me read
11 what he said.
12 MS. TROIANI: Please do not.
13 I'm not discussing that statement.
14 I'm talking to him about the incident.
15 MR. O'CONNOR: I'm not going
16 to allow you. This is the statement
17 he gave.
18 MS. TROIANI: You may not
19 do this.
20 MR. O'CONNOR: Of course I
21 can.
22 MS. TROIANI: You may not.
23 MS. KIVITZ: We're going to
24 have to call the judge.

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- 1 Q. And then what happened?
2 A. She sat with her back to the
3 kitchen wall, which is the door, the
4 door wall, the entry door wall. Our
5 conversation at that time was about
6 concentration, was about -- I don't
7 remember that clearly now what it was
8 fully about, but we talked. And there
9 was talk of tension, yes, about
10 relaxation and Andrea trying to learn
11 to relax the shoulders, the head, et
12 cetera. And I went upstairs and I
13 went into my pack and I broke one,
14 whole one and brought a half down and
15 told her to take it. Your friends, I
16 have three friends for you to make you
17 relax.
18 Q. So, you brought down two and
19 a half pills?
20 A. Broke one in half and
21 another one, half, which would be one
22 and a half, would be three pills.
23 Q. So, you broke one pill in
24 half. Where are the three? If you

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- 1 MR. O'CONNOR: Call the
2 judge.
3 MS. TROIANI: If his
4 statement today is inconsistent --
5 MR. O'CONNOR: This is
6 unfair because he can't read his
7 statement.
8 MS. TROIANI: If his
9 statement is inconsistent to the
10 police, like you asked our client --
11 MR. O'CONNOR: She was
12 reading it.
13 MS. TROIANI: She was not
14 reading it.
15 MR. O'CONNOR: Incorrect.
16 It's an unfair examination. He's
17 entitled to know what he said to the
18 police. I'm not going to allow this
19 travesty to occur.
20 MS. TROIANI: That's why he
21 should have been prepped for more than
22 three hours, if we believe he was
23 prepped for three hours.
24 MR. O'CONNOR: Are you

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Exhibit

F

William Cosby, Jr.

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1 A. I never used the word hush
2 money.
3 Q. Did you believe that she was
4 after money so that she would not
5 report this?
6 MR. O'CONNOR: Separate and
7 apart from this article?
8 MS. TROIANI: Yes.
9 THE WITNESS: No.
10 BY MS. TROIANI:
11 Q. Did you at any time lead
12 Barry Levine to believe that Andrea's
13 mother had asked you for money?
14 A. No.
15 Q. You did not believe when
16 Andrea's mother called you that she
17 wanted money from you?
18 A. No.
19 Q. At any time did you come to
20 believe that Andrea's mother wanted
21 money from you?
22 A. Yes.
23 Q. When was that?
24 A. When the suit was filed,
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1 after the police.
2 Q. The next quotation here
3 says, and I'm under his photograph
4 that says, my problem, sometimes you
5 try to help people and it backfires on
6 you and then they try to take
7 advantage of you. People can soil you
8 by taking advantage.
9 Who are you referring to in
10 that?
11 MR. O'CONNOR: Give me a
12 reference here, where is that?
13 MS. TROIANI: Under the
14 picture that says, my problem is how.
15 MR. O'CONNOR: Okay. That's
16 in quotes.
17 THE WITNESS: And you want
18 to know who?
19 BY MS. TROIANI:
20 Q. To whom were you referring
21 when you made that statement?
22 A. People.
23 Q. Did you include Andrea in
24 that?
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1 A. Not yet.
2 Q. So, you did not believe that
3 Andrea or her mother wanted money from
4 you at the time they made the phone
5 calls to you?
6 A. No.
7 Q. Then why did you offer them
8 money?
9 MR. O'CONNOR: I object to
10 the form of that question. I don't
11 believe there's anything in the
12 record. If you have something, give
13 it to him.
14 BY MS. TROIANI:
15 Q. Can you answer that
16 question?
17 A. I can only answer it with a
18 question, where does it show that I
19 offered them money?
20 Q. Didn't you offer to pay for
21 her education?
22 A. I offered, yes. But what's
23 left out is I offered a face-to-face
24 meeting with Andrea's mother and
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1 Andrea. There was no offer of money.
2 Q. And what was your purpose in
3 offering them the face-to-face
4 meeting?
5 A. Well, very, very important.
6 I want to find out what the problem is
7 face-to-face. I told Andrea's mother
8 that. I asked Andrea's mother on the
9 telephone, do you think that we will
10 ever be able to get together to talk
11 this over? And her mother said, I
12 would hope so. I don't know, her
13 mother said. And I said to her, do
14 you think we could have some kind of
15 meeting? And she said, I don't know.
16 But I had the gentleman from
17 the Morris office to try to set up. I
18 don't know who Peter talked to,
19 however, it wasn't Andrea. I believe
20 it was Andrea's mother and her mother
21 said, let me think about it and I'll
22 talk to. And I guess she was going to
23 talk to Andrea, I'm not sure. And the
24 word came back that they're sorry but
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- 1 A. Yes.
2 Q. And who would that be?
3 A. Shawn Thomson.
4 Q. Anyone else?
5 A. Not that I can remember.
6 Q. That's the woman who's now
7 Shawn Upshall?
8 A. Yes.
9 Q. Now, in your statement again
10 on page 12, after the question
11 about -- and I'll start I guess the
12 fifth question again. At any time
13 because of who you are, did you feel
14 that there was the potential that
15 either Andrea or her mother was going
16 to use this information to either
17 embarrass you or extort you? Did you
18 have any of these concerns? And
19 you've answered, yes.

20 However, earlier you say,
21 the top of the page, that you asked
22 her twice, meaning Andrea's mother
23 what she wanted and both times she
24 said that an apology was enough. Is

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- 1 said, I got to go. And there was no
2 connect. And I felt that this is the
3 first time I've ever felt an anger or
4 been able to project an anger from
5 her.
6 Q. From Andrea?
7 A. Yes.
8 Q. Because she said I have to
9 go?
10 A. It was the way she said it.
11 Also, she had not given me any help
12 when I asked for it.
13 Q. What do you mean?
14 A. Well, I said, look, Andrea,
15 explain, tell your mother, in other
16 words, talking about -- I don't
17 remember specifically, but it was
18 about her eyes and the movement,
19 talking to the mother about Andrea's
20 eye movement, she was asking about the
21 pills. And the way she was asking
22 about the pills was in a very up, high
23 frequency, of I want to know the
24 truth, what you did to my daughter.

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- 1 that correct?
2 A. Yes.
3 Q. So, what was it that caused
4 you to believe that an apology was not
5 enough?
6 A. The mother said it twice,
7 but the mother also went on to say --
8 what I remember is her life, something
9 to the effect that she wanted to live
10 her life, and I hesitate to say in a
11 comfortable way, but it was to live
12 her life in a way without worries, so
13 to speak. I don't think she was
14 talking about a huge amount of money,
15 but it could be interpreted by me and
16 I was thinking, what does that mean
17 when she says okay, you apologized,
18 all right. That's -- you know, that's
19 all I wanted, Bill.

20 Now, what do you want me to
21 do? Nothing. That's all I wanted. I
22 still upon hanging up the phone --
23 also, Andrea spoke twice, three times
24 she spoke. And the third time she

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- 1 And I was trying to explain
2 and I gave her the Benadryl so that
3 she would relax because she had talked
4 to me about not being able to sleep
5 and that she said her eyeballs move.
6 I tried to get her to say that to her
7 mother. And Andrea said, I, my
8 mother, and it was cut off. And the
9 mother said, what does that have to do
10 with what we're talking about, about
11 what you did to my daughter? Then the
12 second time I thought, all right,
13 Andrea, tell your mother what
14 happened. And Andrea said, I, I, I
15 couldn't move. And then the mother
16 jumped in and we had that
17 conversation.

18 Even though the mother said,
19 okay, Bill, that's good enough for me,
20 even though she said it twice, it
21 still didn't register. I was
22 frightened.

23 Q. Now, you didn't tell either
24 Andrea or her mother during the first

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