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

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

**MOTION IN LIMINE TO ADMIT TESTIMONY REGARDING ANDREA
CONSTAND'S PRIOR STATEMENT ADMITTING SHE INTENDED TO FABRICATE
A CLAIM OF SEXUAL ASSAULT**

TO THE HONORABLE STEVEN T. O'NEILL, COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY:

Defendant William H. Cosby, Jr., by and through his attorneys, submits the following
Motion in Limine to Admit Testimony Regarding Andrea Constand's Prior Statement Admitting
She Intended to Fabricate a Claim of Sexual Assault. In support of his motion, Mr. Cosby avers
as follows:

1. The charges in this case arise from Ms. Constand's allegations that Mr. Cosby sexually assaulted her in his home. Yet, before she made her claim of sexual assault, Ms. Constand made a statement to her friend and colleague at Temple University, Marguerite ("Margo") Jackson, that she had not been sexually assaulted, but that she "could say it happened, file charges and get money to go to school and open a business." Ms. Constand's statement to Ms. Jackson is critical evidence for the defense, as it demonstrates Ms. Constand's intent to set up Mr. Cosby and her motive to do so, and completely undermines Ms. Constand's credibility as a witness.
2. Ms. Jackson's testimony was excluded from the first trial. Unfortunately, the issue arose mid-trial under circumstances that did not make clear the bases for admitting Ms. Jackson's testimony regarding Ms. Constand's statement to her. Mr. Cosby now asks the

- Court to allow Ms. Jackson to testify as her anticipated testimony is substantive evidence that goes to Ms. Constand's state of mind, admissible pursuant to Pa. R. Evid. 803(3), and is also admissible to impeach her credibility pursuant to Pa. R. Evid. 607 and 613.
3. Under Rule 803(3), an out-of-court statement is admissible if it is a statement of the declarant's motive, intent, or plan. "Where the 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." *Commonwealth v. Begley*, 780 A.2d 605, 623 (Pa. 2001). "[S]tatements of the declarant's then existing state of mind are considered reliable based on their spontaneity." *Schmalz v. Manufacturers & Traders Trust Co.*, 67 A.3d 800, 804 (Pa. Super. 2013). Among other circumstances, the state-of-mind exception "can apply to demonstrate that a declarant did a particular act that was in conformity with his or her statement after having made the statement." *Id.*
 4. Here, Ms. Constand's statement that she could fabricate a story about being sexually assaulted is a statement of her then-existing state of mind regarding her intent or plan to set someone up for a sexual assault charge. Moreover, her statement establishes her motive to fabricate such a story, specifically that it could enable her to get money to pay for school and to open a business. As the court explained in *Schmalz*, such a statement is admissible as an exception to the rule against hearsay under Rule 803(3).
 5. Ms. Jackson's testimony should also be admitted under the alternative theory of impeaching Ms. Constand's credibility. Pennsylvania's Rule of Evidence 607 provides, "The credibility of a witness may be impeached by any evidence relevant to that issue...." Pa. R. Evid. 607(b). Under Rule 607(b) a defendant must be given "wide latitude" to challenge a witness's credibility. *Commonwealth v. Reed*, 644 A.2d 1223,

1228 (Pa. Super. 1994). As the Supreme Court of Pennsylvania has explained, “evidence of interest or bias on the part of a witness is admissible and constitutes a proper subject for cross-examination.” *Commonwealth v. Birch*, 616 A.2d 977, 978 (Pa. 1992). “It is particularly important that, where the determination of a defendant’s guilt or innocence is dependent upon the credibility of a prosecution witness, an adequate opportunity be afforded to demonstrate through cross-examination that the witness is biased.” *Id.* Here, Ms. Constand’s statement to Ms. Jackson is directly relevant to impeach Ms. Constand’s credibility and should be admitted under Rule 607(b).

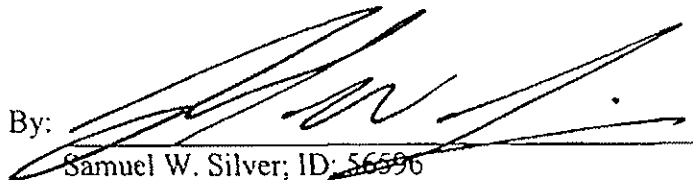
6. In addition to being admissible under Rule 803(3) and Rule 607(b), Ms. Jackson’s testimony also is admissible to impeach Ms. Constand’s testimony that she did not fabricate her allegations of sexual assault against Mr. Cosby under Rule 613(a), which provides, “a witness may be examined concerning a prior inconsistent statement made by the witness to impeach the witness’s credibility.”
7. The Supreme Court of the United States has held that the Constitution precludes state courts from limiting a defendant’s cross-examination on relevant issues such as a witness’s potential bias or credibility. *See, e.g., Davis v. Alaska*, 415 U.S. 308, 318 (1974). As the Court noted in *Davis*, a defendant must be permitted “to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of [a] witness.” *Id.* The Supreme Court of Pennsylvania has reiterated this important principle on numerous occasions, noting that “[c]ross-examination may be employed to test a witness’ story, to impeach credibility, and to establish a witness’ motive for testifying.” *Commonwealth v. Chmiel*, 889 A.2d 501, 527 (Pa. 2005). Mr. Cosby is entitled to fully cross-examine Ms. Constand and to

impeach her credibility as part of the right to present a defense in accord with principles of fundamental fairness and due process.

WHEREFORE, based upon the foregoing, in addition to those arguments, points, and authorities set forth in Mr. Cosby's Memorandum of Law in Support of Motion in Limine to Admit Testimony Regarding Andrea Constand's Prior Statement Admitting She Intended to Fabricate a Claim of Sexual Assault, submitted herewith, William H. Cosby, Jr., requests the Court enter an order that Andrea Constand may be cross-examined and Marguerite Jackson may testify regarding Ms. Constand's statement to Ms. Jackson.

Dated: January 25, 2018

Respectfully Submitted,

By: 

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