IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, Plaintiff, vs. [redacted] Defendant.	)	CASE NO. [redacted] JUDGE [redacted] **MOTION TO SEVER OFFENSES FOR TRIAL** **(Oral Hearing Requested)**

Now comes the Defendant, [redacted], by and through undersigned counsel, Friedman & Nemecek, L.L.C., and pursuant to Rules 8 and 14 of the Ohio Rules of Criminal Procedure, hereby moves this Honorable Court to sever counts 1, 2-3, 4-6, 7-9, 10, 11, 12-14, 15-17, and 18 of the indictment for purposes of trial in the above-captioned matter. Reasons for this Motion are set forth more fully in the Memorandum in Support attached hereto and incorporated herein by reference.

Respectfully submitted,

/s/Ian N. Friedman

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion was served, this 6th day of April, 2021, to [redacted], Assistant Cuyahoga County Prosecutor, at her office, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.

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MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE

On or about September 29, 2020, the Cuyahoga County Grand Jury returned an eighteen (18) count Indictment against the Defendant, [redacted]. The Indictment alleges: one (1) count of Gross Sexual Imposition in violation of Ohio Revised Code §2907.05(A)(4), a felony of the third degree, sixteen (16) counts of Gross Sexual Imposition in violation of Ohio Revised Code §2907.05(A)(1), felonies of the fourth degree, and one (1) count of Sexual Imposition in violation of Ohio Revised Code §2907.06(A)(4), a misdemeanor of the third degree.

The counts set forth in the Indictment pertain to nine (9) accusers, to wit: (Count 1) Jane Doe 1, (Counts 2-3) Jane Doe 2, (Counts 4-6) Jane Doe 3, (Counts 7-9) Jane Doe 4, (Count 10) Jane Doe 5, (Count 11) Jane Doe 6, (Counts 12-14) Jane Doe 7, (Counts 15-17) Jane Doe 8, (Count 18) Jane Doe 9. The allegations made by the accusers span over five (5) distinct years. The allegations were also brought to the attention of authorities at different times. Some were made at the time of or close to the time of the alleged conduct, and others weren't made until years later. Further, many of the allegations weren't made until other accusers came forward and voiced their stories both publicly on Facebook as well as in a private Facebook group for alleged victims. None of the allegations involve more than one (1) accuser for any given accusation and therefore none of these accusers are connected to one another but for their allegations against the Defendant.

There is a significant danger that [redacted] will be irreparably prejudiced if the State is permitted to proceed with the allegations of nine (9) distinct women in one (1) trial. Any argument that these instances are relevant to one another would be introduced pursuant to Evid R. 404 (B), however, any probative value is far outweighed by the extreme prejudice that would result if these cases are tried together. Ohio Evid. R. 404(B). Based on the facts and law contained herein, [redacted] respectfully moves this Honorable Court to sever the counts as they relate to each alleged victim and grant [redacted] separate trials. At the hearing on this respectful request, undersigned will bear out all supporting evidence for the instant Motion.

II. LAW AND ARGUMENT

If trial were to proceed on all eighteen (18) counts at once, [redacted] right to a fair trial, as guaranteed by the Ohio and United States Constitutions, would be severely prejudiced. As such, the eighteen (18) counts the State alleges should be severed per alleged victim into the following cases:

- Case 1: Jane Doe #1 – Count 1;
- Case 2: Jane Doe #2 – Counts 2 and 3;
- Case 3: Jane Doe #3 – Counts 4, 5, and 6;
- Case 4: Jane Doe #4 – Counts 7, 8, and 9;
- Case 5: Jane Doe #5 – Count 10;
- Case 6: Jane Doe #6 – Count 11;
- Case 7: Jane Doe #7 – Counts 12, 13, and 14;
- Case 8: Jane Doe #8 – Counts 15, 16, and 17; and
- Case 9: Jane Doe #9 – Count 18.

While Ohio law and the Ohio Rules of Criminal Procedure allow for joinder under certain circumstances, severance is permissible and favorable where

prejudice as a result of the joinder would result. "Ohio law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged 'are of the same or similar character.'" *State v. Kuck*, 79 N.E.3d 1164, 1179 (Ohio Ct. App. 2016), quoting *State v. Lott*, 51 Ohio St. 3d 160, 163 (Ohio 1990), quoting Crim. R. 8(A). The Ohio Rules of Criminal Procedure govern joinder of offenses.

Ohio Crim. R. 8(A) provides:

> Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan or are part of a course of criminal conduct.

Ohio Crim. R. 14 provides in pertinent part:

> If it appears that the defendant or the state is prejudiced by a joinder of offenses . . . the court shall order an election or separate trial of counts.. . Crim. R. 14.

Pursuant to Crim. R. 14, a defendant may move to sever offenses that have been properly joined under Crim. R. 8(A), where it appears joinder would be prejudicial. Crim. R. 14. A defendant requesting severance has the burden of providing the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial. *State v. McKnight*, 107 Ohio St.3d 101 (Ohio 2005), citing *State v. Torres*, 66 Ohio St.2d 340, 343 (Ohio 1981).

To determine whether an accused has been prejudiced by the joinder of multiple offenses, a court must first determine: (1) whether evidence of the other crimes would be admissible under Ohio Evid. R. 404(B) even if the counts were severed, and (2) if not,

whether the evidence of each crime is simple and direct. *State v. Diar*, 120 Ohio St.3d 460 (Ohio 2008); *State v. Lott*, 51 Ohio St.3d 160 (Ohio 1990).

A. EVIDENCE OF OTHER ALLEGED CRIMES WOULD NOT BE ADMISSIBLE IF THE COUNTS WERE SEVERED.

Evidence of other alleged victims would not be admissible under Ohio Evid. R. 404(B) if the charges were tried separately. The Ohio Rules of Evidence categorically prohibits other-acts evidence when the only value is to show that the defendant had the character or propensity to commit a crime. Ohio Evid. R. 404(B). Ohio Evid. R 404(B) embodies the common law principle that the accused should not be confronted with propensity evidence because the court understands that the "the typical juror is prone to 'much more readily believe that a person is guilty of the crime charged if it is proved to his satisfaction that the defendant has committed a similar crime.'" *State v. Hartman*, Slip Opinion No. 2020-Ohio-4440 at ¶20 quoting *State v. Hector*, 19 Ohio St.2d 167, 174-175 (Ohio 1969). The exception to this rule allows for evidence of other crimes, wrongs, or acts to come in if the evidence shows "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ohio Evid. R. 404(B). "Courts have long struggled with differentiating between the two types of evidence." *Hartman* at ¶23. "Because other-acts evidence 'almost always carries some risk that the jury will draw the forbidden propensity inference,' it will often present the dangers that Evid. R. 403(A) seeks to protect against." *Id.* at ¶33 citing to *United States v. Gomez*, 763 F.3d 845, 855 (7th Cir. 2014)(en banc).

The Ohio Supreme Court recently provided guidance to trial courts on whether 404(B) evidence is admissible. *State v. Hartman,* Slip Opinion No. 2020-Ohio-4440; *State v. Smith,* Slip Opinion No. 2020-Ohio-444. First, the court must determine whether the proposed evidence is relevant to the alleged crime. *Hartman* at ¶25; *Smith* at ¶37. Secondly, if the proposed evidence is relevant to the particular purpose for which it is offered, the trial court then must determine whether the proposed evidence is more prejudicial than probative. *Hartman* at ¶29

i. The Charges Should be Severed Because Evidence of the Other Charges Would be Inadmissible in Separate Trials as They are not Relevant to Each Other for a Particular Purpose.

First, the court must determine whether the proposed evidence is relevant to the alleged crime. *Hartman* at ¶25; *Smith* at ¶37. The question is not whether the other-acts evidence is relevant to the offense at hand, "[r]ather, the court must evaluate whether the evidence is relevant *to the particular purpose* for which it is offered." *Hartman.* at ¶26 (citing to *State v. Curry*, 43 Ohio St.2d 66, 73 (Ohio 1975))(emphasis in original); *Smith* at ¶37. If the evidence is not relevant to the particular purpose for which it is offered, it is not admissible. Such particular purposes include modus operandi, common scheme or plan, motive, intent, and absence of mistake. Ohio Evid. R. 404(B). Here, the evidence is not admissible because it is not relevant to any of the particular purposes Ohio Evid. R. 404(B) enumerates.

a. Evidence of Other Charges Would not be Admissible to Show Modus Operandi.

Modus operandi "is evidence of signature, fingerprint-like characteristics unique enough 'to show that the crimes were committed by the same person.'" *Hartman* at ¶37 quoting Weissenberger, *Federal Evidence,* Section 404.17 (7th Ed. 2019). Evidence of modus operandi is relevant to prove identity. *Id*. The Ohio Supreme Court has held that when a defendant is accused of multiple sexual offenses, it is not enough to string them together because the defendant allegedly assaulted women in the same general scheme. *Id.* at ¶38 (where the Ohio Supreme Court held that Hartman's prior assault on a child in her bed did not share a modus operandi with the offense of raping a woman in a bed explaining "[t]hat both crimes were committed against a female sleeping in a bed is hardly unique to Hartman as a perpetrator.").

Here, the alleged offenses do not show a fingerprint-like characteristic and are markedly different from one another. The alleged assaults involved women ranging from under 13 years old to 18 years old. The alleged assaults were not all alleged to have taken place at the same place. While some were alleged to have taken place on public school grounds, within those allegations are differing locations including the band room, [redacted] office, and the copy room. Beyond that, some of the alleged assaults took place off school grounds while at band camp. Amongst the different locations are also completely different environments in which these alleged assaults took place. For instance, the alleged assaults that occurred off school grounds while at band camp allegedly took place on a scissor lift outside in front of the entire band. In

contrast, some of the alleged assaults took place in a copy room behind a closed door where only the accuser and [redacted] were present.

Further, the specific details of the alleged assaults differ significantly amongst the accusers. Some of the accusers allege that [redacted] rubbed his groin against their clothing from behind, while others assert that he touched them on their bare skin under the butt. One accuser asserts that she manually stimulated [redacted] in a theater tech room. While all of the accusers do assert that [redacted] was their music teacher and that he crossed a sexual line, there are distinct differences in the actual alleged conduct amongst the accusers. Thus, the offenses would not be admissible in separate cases to show modus operandi.

Additionally, and importantly, the issue of identity is not up for debate in this case. [redacted] has not asserted another perpetrator committed these crimes nor has there been any discrepancy amongst the accusers in terms of who they are alleging committed these crimes. The Ohio Supreme Court explained that even if the other-acts evidence shared a modus operandi they would not be admissible if the defense did not raise identity as an issue. *Smith* at ¶42. Thus, here, modus operandi evidence would not be admissible.

b. Evidence of Other Charges Would not be Admissible to Show a Common Scheme or Plan.

"Evidence of a plan or common design 'refers to a larger criminal scheme of which the crime charged is only a portion.'" *Hartman* at ¶40 citing to *People v. Barbour*, 106 Ill. App. 3d 993, 436 N.E.2d 667 (1982). The Ohio Supreme Court has given district

courts an example of a common scheme: at a trial for murdering an heir, evidence showing that the defendant killed the other heir would be admissible to show the defendant was committing a broader scheme to inherit a fortune. *Id* at ¶42.

Common scheme or plan evidence must refer to a larger design by the defendant, "[o]therwise, proof that the accused has committed similar crimes is no different than proof that the accused has a propensity for committing that type of crime." *Id* at ¶46.

There is no evidence that [redacted] was engaged in some larger nefarious plan that involved the alleged assaults. Thus, alleging that [redacted] other charges are admissible to show a common scheme or plan would be no different than offering the other charges for proof of propensity, which is inadmissible. The separate charges would not be admissible if severed for the purpose of showing a common scheme or plan.

c. Evidence of Other Charges Would not be Admissible to Show Motive.

"Motive evidence establishes that the accused had a specific reason to commit a crime." *Hartman* at ¶48 citing to Weissenberger at Section 404.16. A sexual offense offered to prove the defendant has a sexual motivation is not admissible. *Hartman* at ¶49 ("Hartman's molestation of his former stepdaughter does not reveal a specific reason for raping E.W. and thus does not provide evidence of any motive to commit rape beyond that which can be inferred from the commission of any rape"), citing to *State v. Curry*, 43 Ohio St.2d 66, 71 (Ohio 1975)("A person commits or attempts to commit statutory rape for the obvious motive of sexual gratification. Since motive

cannot be deemed to have been a material issue at appellee's trial, 'other acts' testimony was not admissible to prove this matter.").

Here, motive is not an issue at trial. The State has not alleged that they would introduce evidence of a motive other than general sexual gratification. The alleged crimes would not be admissible in each other's trials if severed for the purpose of showing motive.

d. Evidence of Other Charges Would not be Admissible to Show Intent or Absence of Mistake.

Evidence of other crimes may be admissible to show intent or absence of mistake. Ohio Evid. R. 404(B). Such evidence may be used to show that the act in question was not performed accidentally or without guilty knowledge. *Hartman* at ¶52 citing to [redacted], *Evidence,* Section 190 at 804 (4th Ed. 1994). In a criminal trial, the defendant may raise the question of accident in two ways: that no criminal act occurred at all or that the defendant did not intend to do the alleged criminal act. *Id* at ¶52-53. "There is a thin line between the permissible use of other-acts evidence to show intent and the impermissible use to show propensity. Allowing other-acts evidence to prove the defendant's state of mind 'flirt[s] dangerously with eviscerating the character evidence prohibition' altogether." *Hartman* at ¶57 quoting Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events,* Section 4.10 (2d Ed. 2019). In determining whether other-acts evidence is probative of intent rather than propensity, the question for the trial court is whether "*under the circumstances, the detailed facts* of the charged and

uncharged offenses strongly suggest that an innocent explanation is implausible." Leonard at Section 7.5.2(emphasis in original).

The Ohio Supreme Court in *Hartman* determined that other-acts evidence was not admissible where the prosecution argued that because Hartman sexually assaulted a prior victim, he intended to assault the victim at hand. *Hartman* at ¶59. The Ohio Supreme Court noted that there was no relationship between the two victims beyond the fact that they had both been allegedly assaulted by Hartman. *Id* at ¶62 ("Without more, the fact that all the acts occurred at night in the victims' sleeping quarters does not provide the degree of similarity necessary to infer intent.").

Here, as noted *supra*, there are distinct distinguishing facts between the alleged assaults. Additionally, like in *Hartman*, the accusers in [redacted] case are not of the same class. Some were purportedly under 13 years of age and in middle school, while others were volunteers over the age of 18, no longer students, and assisting in teaching summer band camp. Similar to *Hartman*, there is no relationship between the victims other than the backdrop of the alleged incidents – that all were at one point students at the same school where [redacted] taught. However, even in the sole context of location, some of the accusers alleged that the conduct took place at [redacted] School, some allege that it took place at [redacted] School, and some even say both. Therefore, all of the accusers don't even necessarily share the connection of being students at the same school when the alleged conduct took place. However, even if this similarity amongst the accusers is a factor in favor of joinder, it is simply not enough in light of the distinctions amongst their allegations when it comes to the where, when, and how. Like

Hartman, there is insufficient marked similarity necessary to admit the other-acts evidence for intent. Accordingly, the charges would not be admissible in each other's cases for the purpose of intent or absence of mistake.

ii. If Separate Trials, the Other Offenses Would be Inadmissible Because They Would be More Prejudicial Than Probative Even if the State Proposed Them for a Purpose Other Than Propensity.

Even if the proposed evidence is relevant to the particular purpose for which it is offered at trial, the court then must determine whether the proposed evidence is more prejudicial than probative. *Id* at ¶29. If the probative nature of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, the evidence is inadmissible. Ohio Evid. R. 403(A); *See State v. Hunt*, 2007 WL 1847660 (Ohio App. 10th Dist. 2007). In determining whether the probative value is outweighed, there are some important considerations. *Hartman* at ¶31:

> The first is the extent to which the other-acts evidence is directed to an issue that is actually in dispute. "[S]ensitivity to the real factual disputes in the case is critical to meaningful Rule 403 balancing." *Gomez*, 763 F.3d at 860. The probative value of the evidence, as well as whether any prejudice is unfair, will generally depend on the degree to which the fact is actually contested. If the fact that the proponent seeks to prove by way of other acts is not genuinely disputed or material to the case, then it has little probative value and the risk of prejudice is high. *See* Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St.L.J. 593, 598 (1990); *Curry*, 43 Ohio St.2d at 70-71, 330 N.E.2d 720.

Additionally, the trial court should consider whether the prosecution would be able to prove the same fact through alternate means. *Id* at ¶32.

In *State v. Schaim*, 65 Ohio St.3d 51 (Ohio 1992), the Ohio Supreme Court discussed the dangers of admitting other acts evidence in a case where the offenses included rape, gross sexual imposition, and sexual imposition against three different victims. The Court stated that the admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. *Id*; See *State v. Curry* (1975), 43 Ohio St.2d 66, 68, 72 O.O.2d 37, 38, 330 N.E.2d 720, 723. The Ohio Supreme Court went on to say that this danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, as is certainly true in this case. *Schaim* at ¶59.

The legislature has recognized the problems raised by the admission of other acts evidence in prosecutions for sexual offenses and has carefully limited the circumstances in which evidence of the defendant's other sexual activity is admissible. *Id* at 59. The Ohio Supreme Court concluded that the defendant's rights were prejudiced by the trial court's failure to sever the charges based on a number of factors, including the inflammatory nature of the offenses, the similarities between portions of the victims' testimony and "the fact that joinder allowed the state to circumvent the prohibition on other acts testimony." *Id* at 63.

In *State v. Frazier*, 2004 WL 443650 (Ohio App. 8th District 2004), the Eighth District Court of Appeals noted the guidance set forth in *Schaim* in holding that the trial court's joinder of offenses involving two different victims prejudiced the defendant. In

Frazier, the defendant was charged with multiple counts of kidnapping, rape, attempted rape, and gross sexual imposition against two young relatives. *Id* at *1. In a second case involving one of the victims, the defendant was also charged with gross sexual imposition, attempted gross sexual imposition and kidnapping. *Id*. The prosecution moved to join the offenses for trial arguing that the offenses involved conduct of a similar character, indicated a course of criminal conduct and constituted a common scheme or plan. *Id*. The defendant opposed, arguing that joinder of offenses would be prejudicial because each of the victims' testimony would be used to bolster the other's. *Id* at *5. The trial court refused to hold a hearing on the issue and the cases were consolidated for trial. *Id* at *1.

The Eighth District Court of Appeals reversed the defendant's convictions and remanded the case, ordering separate trials with respect to each victim. *Id* at *5. The Court found that evidence of the defendant's other sexually-related acts would not have been admissible had the offenses been tried separately. *Id* at *4. Specifically, one victim's testimony regarding the defendant's sexual conduct toward her would not have been admissible to prove that the defendant raped the other victim. Identity was not at issue and none of the other exceptions contained in Evid. R. 404(B) applied to make evidence of the defendant's other acts admissible. *Id*. The Court noted that evidence that the defendant exhibited a pattern of isolating young relatives for the purpose of sexual gratification may be admissible if appropriately limited. However, even with such limitations, any testimony regarding the rape of one victim in the trial of the defendant regarding the other victim would be inadmissible because the prejudice

to the defendant would outweigh its probative value. *Id*.

Here, should these nine (9) accusers proceed in one (1) trial, [redacted] will certainly be faced with the same issues that were addressed and ultimately decided in *Frazier*. The Court cannot permit testimony of one accuser to bolster and/or exaggerate the testimony of another accuser where the substance of their allegations differ to an improper degree. However, even if the State were to argue that the allegations taken together create a common scheme or plan, as in *Frazier*, any evidence of other alleged sexual assaults committed by [redacted] would not be admissible if tried separately. As in *Frazier*, there is no issue of identity or motive here and none of the other exceptions outlined in Evid. R. 404(B) apply. Furthermore, any alleged pattern of behavior that the State would present at trial would be inadmissible to support the accusations made by one single accuser and any probative value of said testimony would be outweighed by the prejudice that would result.

While it might be convenient for the State to try all of the charges against [redacted] in a single trial, expedience should not overcome [redacted] right to a fair trial. Certainly, defense counsel has a similar interest in seeking resolution short of proceeding with nine (9) trials, but [redacted] life hangs in the balance and the severity of these allegations requires that any and all potential violations of his right to a fair trial be decided with an abundance of caution. All parties undoubtedly must strive to afford [redacted] a fair trial. In this case, that can only be accomplished by trying the charges relevant to each alleged victim separately. The improper injection of other acts evidence in the form of multiple victims testifying against [redacted] in a single trial

would absolutely violate the propensity rule contained in Ohio Evid. R. 404(B). Further, if all of the charges are tried together, there is an extreme risk that the jurors will overlook the relatively weak evidence with respect to each alleged victim and attach greater weight to all allegations upon hearing testimony from nine (9) different accusers.

While the State of Ohio may argue nine (9) separate trials is a burden on judicial resources, it is not only fair and equitable given [redacted] right to a fair trial, but it also would not be the first time Cuyahoga County has severed a case in this fashion. In 2009, in *State of Ohio v.* [redacted], Judge [redacted] granted a Motion to Sever Counts where the indictment alleged forty-nine (49) violations of the Ohio Revised Code and involved nine (9) distinct accusers. That case also dealt with allegations of sexual assault including gross sexual imposition and rape. After severance, the matter proceeded with four (4) jury trials and one (1) bench trial. The remaining counts were dismissed and the case was ultimately sealed.

B. EVIDENCE OF EACH OFFENSE IS NOT SIMPLE AND DIRECT.

In *State v. Mills*, 62 Ohio St.3d 357 (Ohio 1992), the Supreme Court of Ohio explained that the joinder test requires that the evidence of the joined offenses be simple and direct, so that a jury is capable of segregating the proof required for each offense. The Court explained that the rule seeks to prevent juries from combining the evidence to convict of both crimes, instead of carefully considering the proof offered for each separate offense. *Id*. *See* also *Lott*, 51 Ohio St.3d 160.

In *Frazier*, discussed *supra*, the Eighth District Court of Appeals found that the

evidence of each offense was not simple and distinct. The Court explained that the highly inflammatory nature of the offenses, combined with the fact that the offenses against each victim varied in degree and that the testimony by each victim was similar, would make it very difficult for the fact finder to view the evidence supporting each offense as simple and direct because "the temptation would be too great to respond to the evidence emotionally rather than rationally." *Frazier*, 2004 WL 443650 at *4.

The case of *State v. Quinones*, 2005 WL 3366965 (Ohio App. 11th Dist. 2005) provides pertinent guidance in the case at bar as well. In *Quinones*, the defendant was charged with two counts of gross sexual imposition against one victim and, one count of gross sexual imposition and one count of rape against a second victim. *Id*. at *2. The defendant filed a motion requesting that the charges be severed into two separate trials. After conducting a hearing, the trial court denied the motion. *Id*.

After determining that the evidence presented for each offense would not be admissible if the offenses were tried separately, the Eleventh District Court of Appeals addressed whether the evidence itself is simple and direct. *Id*. at *6. The court concluded that the evidence of each offense was not so simple and direct as to prevent the jury from considering evidence of each victim's accusation as corroborative of the other. *Id*. The court explained that once the jury is presented with testimony regarding the alleged abuse of one victim, "the jury is then asked to, in essence, 'disregard' all that testimony and start fresh with new allegations of abuse" regarding another victim. *Id*. at *6.

Importantly, the court noted that the allegations of each victim in the case were

similar in nature. *Id*. at *7. The court stated, "[w]hile the evidence is not so similar as to be admissible under Evid. R. 404(B) for proof of motive, plan, or intent, it is not 'simple and direct.'" *Id*. The court set forth a number of reasons why the jury could easily confuse and/or combine the evidence regarding one victim's allegations with the evidence relating to another victim's allegations. Specifically, the court noted that both victims were young females, both alleged that the defendant inappropriately touched them, and both victims described an incident that occurred when they were watching a movie on a couch. *Id*. Due to the similarity of the allegations, the court found that the evidence tended to blur together and prevented the jury from being able to reach a separate conclusion regarding each offense. *Id*.

In the instant matter, the evidence of each offense is not simple and direct. As in *Frazier* and *Quinones*, the offenses in this case are highly inflammatory in nature. Based on the number of victims, there is a significant danger that the jury will give undue weight to the cumulative testimony of all of the accusers rather than closely scrutinizing the testimony of each accuser. The proverbial idea that "where there is smoke there is fire" will undoubtedly be a theme presented by the State and contemplated in the jury room. The risk of inferences being drawn from the smoke and fire scenario is heightened as the 'me too' movement only grows. The average juror will likely not only be aware of the movement but also well-educated on the many stories that have been in the news regarding groups of accusers that have come forward with allegations of sexual assault against celebrities or well-known individuals. The 'me too' movement, albeit notable, has certainly created an environment in which society is told to take accusers allegations

at their word, especially when there are large numbers of them making accusations against one individual. This only further perpetuates the smoke and fire scenario *Frazier* and *Quinones* set out to avoid. This movement only intensifies the need for severance in trials such as this dealing with allegations of sexual assault by several accusers, where their allegations involve one alleged perpetrator but markedly varied allegations.

In addition, the allegations of most of the accusers have overlapping facts. While not all, some of the allegations amongst the nine (9) accusers can be grouped into smaller categories of somewhat similar allegations which could lead to confusion for the jurors as to which accuser testified as to each allegation and how the allegations differ amongst them. Any confusion for the jury may lead to overlap of testimony and one accusers' testimony being used to corroborate or compound that of another where the substance of their testimony is different and distinct.

For instance, some of the accusers allege that while students, [redacted] asked them to copy papers while he pressed his groin up against them. Other accusers allege being touched on their butt or leg while in his office with the door closed. In comparison, another student alleges that she was forced to touch his penis and perform manual stimulation in his office after she was no longer a student.

Perhaps more confusing to the jury will be any electronic evidence of the accuser's correspondence with [redacted] as well as their communications with one another since reporting to law enforcement. The State has provided a great deal of electronic evidence pertaining to communications between the accusers, between the accusers and [redacted], and Facebook records relating to the history of "friendship"

between several of the accusers and [redacted]

Many of the accusers corresponded with one another leading up to the charges against [redacted] to share their stories. Multiple accusers shared posts on Facebook recalling their version of events. Other accusers have commented on said posts in support, but without stating that they too believe they were assaulted. For instance, Jane Doe #1 posted on Facebook on June 4, 2020, that she was a victim of an alleged assault by [redacted]. Jane Doe #8 commented on said post the following day. It was not until June 16, 2020, that Jane Doe #8 came forward with her allegations to police.

In addition, the accusers as well as other former Solon students disclosed various examples of their interactions with [redacted]. The discovery shows former students exchanging messages claiming that [redacted] picked them to be his "special helper" and forced them to change clothing in his office. The sender of some of the messages alleges that she knew other people who allegedly were forced into the same situation. Based on the similarities and volume of repetitive evidence that could be related to and used to corroborate the testimony of some of the accusers, it is virtually certain that a jury will be confused and/or unfairly persuaded while trying to decipher and analyze the electronic evidence.

The timing of these posts and the way in which they feed off of one another is in it of itself problematic for the credibility of the accusers who came forward later in the timeline. However, and more importantly, the nature of the messages and how the posts and responses all blend together could, and likely would, cause the jury to be overwhelmed with the sheer number of accusers and weigh the quantity alone in favor

of guilt. Quantity can never overshadow quality when justice is being sought. As such, [redacted] will be deprived of the right to a fair trial unless the charges are severed, and [redacted] is granted separate trials.

C. ORAL HEARING REQUESTED

Before issuing a ruling, Defendant respectfully requests that this Court hold a hearing on Defendant's Motion to Sever. Ohio Crim.R. 12 explains that a "court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means." Although Ohio Crim.R. 12 provides for hearings to adjudicate a pretrial motion, appellate courts have identified circumstances where a hearing is not required. Trial courts are not required to hold a hearing on pretrial motions where a hearing is not requested. *State v. Miller*, 105 Ohio App.3d 679, 692, 664 N.E.2d 1309, 1318 (4th Dist.1995) citing *State v. Haddix*, 92 Ohio App.3d 221, 223, 634 N.E.2d 690, 691 (1994). Trial courts are also not required to hold a hearing when a pretrial motion is in boilerplate form and fails to provide factual allegations to support its claim. *State v. Boone*, 108 Ohio App.3d 233, 670 N.E.2d 527 (1st Dist.1995). Neither are applicable here. Defendant, through undersigned counsel, has requested a hearing and its motion identifies specific facts that support its Motion to Sever.

Furthermore, both O.R.C. §§ 2907.05(F) and 2907.02(E) require a hearing when resolving the admissibility of proposed evidence of sexual activity. Specifically, O.R.C. §§ 2907.05(F) and 2907.02(E) provides:

> Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the

> court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.
> (O.R.C. § 2907.05)
>
> Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial. (O.R.C. § 2907.02)

As outlined previously, to fully understand how [redacted] will be prejudiced by the joinder of multiple offenses, this court must first determine: (1) whether evidence of the other crimes would be admissible under Ohio Evid. R. 404(B) even if the counts were severed, and (2) if not, whether the evidence of each crime is simple and direct. *State v. Diar*, *supra*, *State v. Lott*, *supra*. Since this court is required to determine whether evidence of these sexual allegations against [redacted] is admissible under Ohio Evid. R. 404(B), to ultimately determine whether severance is appropriate, a hearing is mandated in accordance with O.R.C. § 2907.02 and O.R.C. § 2907.05.

WHEREFORE the Defendant, [redacted], respectfully moves this Honorable Court to sever counts 1, 2-3, 4-6, 7-9, 10, 11, 12-14, 15-17, and 18. Severance is necessary to preserve [redacted] right to a fair trial as guaranteed under the Ohio and United States Constitution.

Respectfully submitted,

/s/Ian N. Friedman

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