

**Defending Against the Admission Of 404(B)**  
**Evidence: Pretrial Litigation and Crossing the 404(B) Witness at Trial**  
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**Introduction**

Imagine this scenario: John Brown gets into a fight at a bar and walks away uninjured. The other guy has a broken jaw from a single punch to the face. John is arrested and charged with felony assault, and he calls you to represent him. John is adamant that the other guy started the fight and he acted in self-defense. You speak to several witnesses who corroborate John's story, and you feel confident in your defense. Then, you receive discovery. There are over one hundred pages of police reports and witness statements related to four other fights John is accused of starting in the past, two of which resulted in criminal charges and convictions. The prosecutor's witness endorsement names several people who will be called to testify about the other fights. You object to the admission of the "prior fights" evidence, but the judge casually lets it in under Rule 404(b) on grounds that it rebuts John's claim of self-defense. You think to yourself, "what good is a good defense once the jury hears about all of John's prior bad acts!?"

If you find yourself uttering a similar sentiment in most of your criminal cases, you are not alone. Across the country, courts have grown increasingly permissive in allowing the admission of so-called other acts evidence under Rule 404(b).<sup>1</sup> Notwithstanding its origins as a rule with an exclusionary purpose<sup>2</sup>, Rule 404(b) has morphed into a rule of inclusion resulting in the liberal admission of evidence of defendants' wrongdoing that is extrinsic to the crime charged.<sup>3</sup> Treating Rule 404(b) as one of inclusion, federal and state courts routinely admit other acts evidence in cases involving fraud, drugs, guns, sexual misconduct, violent crimes, and more.<sup>4</sup> Rule 404(b) evidence may be admitted even when the relevance of the defendant's other bad acts largely depends on the his or her propensity to commit crimes,<sup>5</sup> or when the defendant has not contested elements of the charged offense that the other acts evidence would be used to prove.<sup>6</sup>

In theory, the American adversary system was designed to convict defendants based upon their charged conduct and not on their general character or past misdeeds.<sup>7</sup> Rule 404(b) creates a gigantic loophole through which the prosecution can effectively malign the character of the accused and admit evidence of the defendant's prior criminal conduct under the guise that it helps prove an issue other than the defendant's tendency to behave like a criminal. While every experienced defense attorney knows that past misdeeds cannot be admitted solely to prove a defendant's criminal disposition, the reality is that Rule 404(b) is liberally applied to admit evidence of other crimes, wrongs, and acts in criminal trials every day. In fact, Rule 404(b) is the most frequently utilized and

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<sup>1</sup> Fed. R. Evid. 404(b)(2). The phrase "other acts evidence" is intended to describe evidence covered by FRE 404(b)(2) – those bad acts included in discovery that are not part of the crime charged. Other commonly used phrases include "prior bad acts" and "uncharged misconduct." FRE 404(b) applies to prior convictions as well as acts and allegations that did not result in criminal charges or convictions.

<sup>2</sup> See e.g., *United States v. Brown*, 765 F.3d 278, 291 (3d Cir. 2014) ("Rule 404(b) is generally a rule of exclusion.")

<sup>3</sup> See, e.g., *United States v. Geddes*, 844 F.3d 983, 989 (8th Cir. 2017) (rule 404(b) is a rule of inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition).

<sup>4</sup> In federal court cases involving sexual assault, FRE 413 may apply. FRE 413 provides in relevant part: "(a) Permitted Uses. In a criminal case in which a defendant is charged with sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant." FRE 413 is still subject to FRE 403 balancing.

<sup>5</sup> See e.g., *United States v. Ferrell*, 816 F.3d 433, 447 (7th Cir. 2015) (to prevail on request to introduce 404(b), proponent of the evidence not required to negate a propensity inference that may be drawn).

<sup>6</sup> See e.g., *United States v. Harvey*, 643 F.3d 143, 151 (6th Cir. 2011) (where the crime charged is one requiring specific intent, the prosecutor may use 404(b) evidence to prove that the defendant acted with the specific intent notwithstanding any defense the defendant might raise.); but see *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017) (404(b) improperly admitted to show knowledge and intent where defendant not contesting those elements).

<sup>7</sup> 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:21, Westlaw (database updated through June 2017) ("[A] defendant should not be convicted because he is an unsavory person, nor because of past misdeeds, but only because of his guilt of the particular crime charged.").

cited rule of evidence and “has generated more published opinions than any other subsection of the rules.”<sup>8</sup> Importantly, most appeals involve prosecutorial *misuse* of 404(b) evidence against an accused.<sup>9</sup>

With that background in mind, let us return to the story of John Brown. Was John convicted? Of course, he was – because what jury could ignore his propensity to act aggressively and start bar brawls? The reality is that once a jury learns that a defendant has a history of criminal wrongdoing, the “odds of conviction skyrocket.”<sup>10</sup> That said, hope is not lost. Understanding how to contest the admission of 404(b) evidence and, if unsuccessful, how to effectively cross-examine the 404(b) witness and confront 404(b) evidence at trial is a necessary endeavor for any criminal defense attorney intent on providing effective assistance to the accused.

### What is 404(b) Evidence?

In general, federal and state rules of evidence prohibit the admission of “any other crime, wrong, or act” offered to persuade a jury that the accused is, by his propensity to behave in a certain way, the probable perpetrator of the crime of which he stands accused.<sup>11</sup> However, Rule 404(b) provides that evidence of other crimes, wrongs, or acts may be admissible for other purposes, “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>12</sup> In the seminal decision *Huddleston v. United States*, the Supreme Court noted, “[other] acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor’s state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.”<sup>13</sup>

Rule 404(b) applies solely to evidence of “other” acts, not to evidence of the very acts charged as crimes in the indictment.<sup>14</sup> As a leading treatise explains, “[o]ne of the key words in determining the scope of Rule 404(b) is ‘other’; only crimes, wrongs, or acts ‘other’ than those at issue under the pleadings are made inadmissible under the general rule.”<sup>15</sup> For instance, in a case where the defendant is charged with distribution of a controlled substance, evidence that he stole a car has no bearing upon the elements of drug distribution. If the prosecutor wanted to admit the car theft, that act would be analyzed for admission and, absent a strong tie to a permissible purpose, excluded under Rule 404(b).

Another way to think about what constitutes Rule 404(b) evidence is to consider what evidence is “intrinsic” versus “extrinsic” to the charged offense. Rule 404(b) “does not extend to evidence of acts which are ‘intrinsic’ to the charged offense.”<sup>16</sup> What constitutes “intrinsic” evidence has created a marked split amongst the circuit courts and has, as some scholars have opined, resulted in a tortured application of FRE 404(b) that persists

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<sup>8</sup> See 1 Edward J. Imwinkelried et al., *Courtroom Criminal Evidence* § 901, LexisNexis (6th ed. 2016) (Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused’s extrinsic acts is viewed as an important asset in the prosecution’s case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., *United States v. McClure*, 546 F.2d 670, 672–73 (5th Cir. 1990) (acts of informant in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.” FRE 404(b) (advisory committee’s note to 1991 amendment)).

<sup>9</sup> FRE 404(b) (advisory committee notes regarding 1991 amendment).

<sup>10</sup> See Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 Ga. L. Rev. 775, 780 (2013) (“Once the jury learns that the defendant has a criminal past, the odds of conviction skyrocket.”); see also Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L. Rev. 289, 295 & n.18 (2008) (citing empirical evidence indicating the significant negative effect on a jury of prior convictions admitted to impeach a criminal defendant).

<sup>11</sup> FRE 404(b)(1).

<sup>12</sup> FRE 404(b)(2).

<sup>13</sup> *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

<sup>14</sup> *United States v. Loftis*, 843 F.3d 1173, 1176 (9th Cir 2016).

<sup>15</sup> 22B Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5239 (1st ed. 2016)

<sup>16</sup> FRE 404(b) (advisory committee note). As apparent from the extensive case law on what constitutes “intrinsic” evidence, the concept of *res gestae* (evidence part and parcel with the charged offense) has been incorporated into the definition of “intrinsic” evidence.

in ignoring the rule's true purpose—to prevent use of evidence to show an accused's propensity to commit a charged offense.<sup>17</sup>

The majority test for determining whether evidence of crimes, wrongs, or acts, constitutes “intrinsic” versus “extrinsic” evidence requires courts to determine whether the crime, wrong, or act is “inextricably intertwined” with the charged offense.<sup>18</sup> In many jurisdictions, if the other act evidence is deemed to be “inextricably intertwined” with the charged offense, Rule 404(b) does not apply.<sup>19</sup> However, various circuits have concocted different interpretations of this test.<sup>20</sup> Therefore, whether crimes, wrongs, or acts constitute “extrinsic” evidence, and are therefore subject to a 404(b) analysis, is an important component of pretrial litigation that should be analyzed on a case-by-case basis.<sup>21</sup>

### **The Huddleston Test for Admitting Rule 404(b) Evidence**

While Rule 404(b)(1) prohibits the use of other crimes, wrongs, or acts to show a propensity to commit the instant offense, the rule allows for the evidence to be admitted for other proper purposes.<sup>22</sup> For instance, the rule provides that such evidence may be admitted to show “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>23</sup> Importantly, the proponent of 404(b) evidence must identify the “proper” purpose for which the evidence is being offered.<sup>24</sup>

In *Huddleston*, the Supreme Court outlined the proper methodology for determining the admissibility of other acts evidence under Rule 404(b).<sup>25</sup> The Court set out a four-part test, which has been largely utilized with only minor modifications across the federal circuit courts:<sup>26</sup>

First, the court must determine whether the proffered other-acts evidence has a “proper purpose” other than demonstrating a person's propensity to behave in a certain manner.<sup>27</sup> Because Rule 404(b)(2) provides for admissibility for purposes “such as” those listed in the Rule, a proper purpose may be one of those enumerated in Rule 404(b)(2) or any other proper, noncharacter purpose identified by the proponent or the court.

Second, the court must determine the relevance of the other act to such a proper purpose.<sup>28</sup> This step involves assessing the chain of inferences that leads from the other act to its purpose in proving motive or opportunity, for example, to ensure that the evidence has some tendency beyond simple propensity to demonstrate that purpose. Third, the trial court should perform a traditional Rule 403 balancing to

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<sup>17</sup> For a comprehensive article addressing the problems created by the various court-created definitions of “intrinsic” evidence, see Dora W. Klein, *The (Mis)Application of Rule 404(b) Heuristics*, 72 U. Mia. L. Rev. 706 (Spring 2018).

<sup>18</sup> *United States v. Green*, 617 F.3d 233, 245-249 (3rd Cir. 2010) (providing a detailed synopsis of the various circuits' tests for determining whether evidence is “inextricably intertwined” with the instant case).

<sup>19</sup> See *United States v. Loftis*, 843 F.3d 1173 (9th Cir. 2016) (finding limitation on admissibility of “other crimes” evidence did not preclude government, in wire fraud prosecution, from introducing evidence of uncharged transactions in order to prove existence of scheme to defraud under the “inextricably intertwined” doctrine).

<sup>20</sup> For a helpful discussion of the various interpretations of the “inextricably intertwined” standard, see *Green*, *supra*, at 245-249. (listing circuits and explaining the differences between each interpretation of the “inextricably intertwined” standard then devising an entirely new standard).

<sup>21</sup> In *The (Mis)Application of Rule 404(b) Heuristics*, cited at *supra* n.16, the author comprehensively discusses each circuit's approach to the extrinsic/intrinsic inquiry.

<sup>22</sup> See FRE 404(b)(2).

<sup>23</sup> FRE 404(b)(2).

<sup>24</sup> FRE 404(b) (advisory committed notes to 2020 amendment); see *Huddleston*, 485 U.S. at 691.

<sup>25</sup> 485 U.S. at 691–92

<sup>26</sup> For a thorough explanation of each circuits' treatment of this test, see *The (Mis)Application of Rule 404(b) Heuristics*, cited at *supra* n.16. For a discussion of the erosion of the 404(b) gatekeeping function by the circuit courts, see Daniel Capra, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 Colum. L. Rev. 769 (April, 2018).

<sup>27</sup> *Id.* at 691.

<sup>28</sup> *Id.*

determine that the probative value of the other crime, wrong, or act for the proffered proper purpose is not substantially outweighed by the risk of unfair prejudice, namely a chain of bad-character reasoning.<sup>29</sup> Finally, if the court determines that the other-acts evidence can be admitted after Rule 403 balancing, the court should offer the opponent of the evidence an appropriate limiting instruction restricting the other-acts evidence to its proper purpose.<sup>30</sup>

The Supreme Court also held that any dispute over whether a defendant actually committed the other act is a Rule 104(b) issue of conditional relevance: That condition is met if a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act.<sup>31</sup>

By way of example of what does not reasonably constitute a proper purpose, the Sixth Circuit recently held that, in a case involving defrauding a trucking company, admitting a secret tape-recording of a private conversation in which the defendant disparaged African Americans and women required reversal because the evidence did not serve to rebut a defense theory that the defendant would never do anything to jeopardize the company's reputation or success.<sup>32</sup> Instead, the circuit court held that the evidence, which was a horrendous display of "racist and chauvinistic banter," was, nonetheless, not offered for a proper purpose, and therefore, induced a verdict based on bad character and dislike of the defendant.<sup>33</sup>

As an example of evidence admitted for a proper purpose, the First Circuit recently held that evidence of prior drug smuggling by boat was admissible for the proper purpose of showing knowledge regarding the present offense.<sup>34</sup> The present offense involved smuggling drugs by boat, and therefore, the fact that the defendant had previously been involved in boat-facilitated drug trafficking tended to prove that his presence on a boat filled with drugs was not coincidental, and therefore, he had knowledge that the boat contained drugs.<sup>35</sup>

As discussed previously, FRE 404(b) is the most cited evidentiary rule in appeals and the caselaw spans any number of fact patterns. Therefore, in preparing to litigate potential 404(b) issues practitioners are encouraged to research and review cases from their jurisdiction to determine what types of evidence the courts are considering to be improper 404(b), proper 404(b), and intrinsic versus extrinsic.

#### **FRE 404(b) and the Notice Requirement**

Since 1991, FRE 404(b) has included a notice requirement.<sup>36</sup> In 2020, the notice requirement evolved to:

- Require the prosecution to identify the 404(b) evidence, articulate a non-propensity purpose for admissibility, and state the basis for concluding that the evidence is relevant for that purpose,
- Require the prosecution to give notice in writing,
- Require notice to be given "in such time as to allow the defendant a fair opportunity to meet the evidence."<sup>37</sup>

The 2020 amendment created a "good cause" exception to the timing of notice and articulation of the non-propensity purpose of offering the evidence.<sup>38</sup> However, the amendment eliminated the requirement that the defendant make a request before notice is provided.<sup>39</sup> Therefore, at the federal level, the defendant no longer has an obligation to file any motion prior to trial requesting pretrial 404(b) notice.<sup>40</sup> Notice is compulsory.

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 691-92.

<sup>31</sup> *Id.* at 690.

<sup>32</sup> *United States v. Hazelwood*, 979 F.3d 398, 405, 411 (6th Cir. 2020).

<sup>33</sup> *Id.*

<sup>34</sup> *United States v. Garcia-Sierra*, 994 F.3d 17, 31 (1st Cir. 2021).

<sup>35</sup> *Id.*

<sup>36</sup> FRE 404(b) (advisory committee note to 1991 amendment).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> State courts might still require pretrial motions requesting notice, and therefore, practitioners should be diligent to research jurisdictional evidentiary rules to determine necessary pretrial procedural requirements.

### **Practice Pointers for Litigating the Admission of Rule 404(b) Evidence<sup>41</sup>**

It goes without saying that the easiest and most effective way to combat the prejudicial value of Rule 404(b) evidence at trial is ensure it is not admitted in the first place. Under the liberal precedent for admission of Rule 404(b) evidence in most jurisdictions, this may be an uphill battle. In any case, it requires extensive investigation and proper pretrial litigation and into the other act(s).

#### Investigation

You must have a comprehensive understanding of the facts surrounding the other acts evidence and investigate the circumstances as extensively as you would the charged conduct. Even prior convictions that may be introduced as 404(b) should be investigated. For other acts involving prior convictions, you should make sure you have all available discovery and, if the case went to trial, a transcript of the proceedings. You may want to talk to trial counsel, obtain his or her investigation file, and/or (re)interview the involved witnesses to make sure you have all the information about the other act that you need. It is possible that in the course of interviewing those witnesses you learn something important about the facts or witnesses that trial counsel missed or that was not considered at trial or in the plea-bargaining process.

Particularly when the other act evidence involves a prior conviction, your investigation should focus on finding ways to distinguish the other act from the charged conduct in your case. Even if the conduct is factually distinct, think about the ways the prosecution may try to connect the dots to make it relevant – do the charged conduct and the other act require the same mental state?; do they require the same intent?; does the defendant’s conduct in the other act rebut an affirmative defense applicable to the charged conduct?; will the prosecutor claim the other act is “intrinsic” to the charged crime and therefore Rule 404(b) should not apply? The list of possibilities is long. Absent a comprehensive understanding of the facts and circumstances surrounding the other act evidence, you will be hindered in your ability to effectively object to any stated grounds of relevancy provided by the prosecution.

If the other acts evidence involves uncharged conduct, your investigation becomes even more important. Approach the other act evidence like you would any new criminal case: identify and interview possible witnesses, visit the scene, gather surveillance tapes and other tangible data, subpoena relevant records, etc. Your pretrial attack on uncharged conduct will take a two-pronged approach: (1) attack the veracity of the allegations (remember, to admit evidence under Rule 404(b) the court must find by a preponderance of evidence that the defendant committed the act); and (2) attack the relevancy of the act.

Investigating the witnesses who may testify against the defendant concerning the other act evidence is as important as investigation witnesses related to the charged offense. As discussed in greater detail below, 404(b) witnesses are subject to the same methods of impeachment, veracity challenges, and other methods of cross-examination as any other witness. To that end, make sure you have the witness’s criminal history, do a thorough social media search, talk to people who know the witness, and generally examine him or her to ensure you can effectively cross-examine the witness at trial.

#### Pretrial Litigation

In conjunction with a thorough investigation into the other act evidence comes extensive pretrial litigation asking the court to exclude it for any number of reasons.

While the federal rule no longer requires the defense to move for notice of the prosecution’s intent to admit 404(b) evidence, practitioners in state court should check the local rule to determine if an affirmative request by the defense is required. The best practice in every jurisdiction is to file a specific (non-stock) request of all of the evidence you believe *could* fall under the umbrella of 404(b). Be sure to include even those disclosed acts that might be “intrinsic” to the charged crime and ask the court for a pretrial ruling on that issue. This prevents the prosecutor from navigating around the procedural requirements of Rule 404(b) by claiming that the evidence is intrinsic (i.e., *res gestae*) and does not require a hearing.

To the contrary, your pretrial notice request should specifically request (1) a pretrial evidentiary hearing on whether the other act evidence is properly classified as Rule 404(b) evidence or *res gestae*; (2) a specific deadline by which the prosecution must provide written notice<sup>42</sup> in advance of the motions hearing of the other act

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<sup>41</sup> For an easy step-by-step approach to litigating the admission of 404(b) evidence, see the Flow Chart attached as Exhibit A.

<sup>42</sup> Written notice is required by FRE 404(b)(3)(C).

evidence it intends to tender at trial; and (3) that the prosecution's written notice clearly explain the precise evidentiary hypothesis upon which it will rely to admit the Rule 404(b) evidence independent of the impermissible inference of criminal propensity, as required by Rule 404(b)(3)(B).

Note, nothing in FRE 404(b) defines how much time ahead of trial constitutes proper notice of the prosecution's intent to introduce Rule 404(b) evidence.<sup>43</sup> It simply requires the prosecution provide "reasonable notice...so that the defendant has a fair opportunity to meet it."<sup>44</sup> Therefore, advocates should ask the court to set a deadline and ask that the deadline be well in advance of the motions hearing in order to give the defendant enough time to be prepared (think investigation, witness subpoenas, etc.) for that important hearing.

In *Huddleston*, the court proposed that trial courts should apply the four-part test for determining admissibility of 404(b) evidence during trial.<sup>45</sup> However, because *Huddleston* involved a situation where the defendant conceded that the 404(b) evidence was being offered for a proper purpose, the portion of *Huddleston* discussing the procedure trial courts should employ for determining admissibility of 404(b) evidence was mere dicta.<sup>46</sup>

From a practical standpoint, analyzing 404(b) evidence is time consuming, complicated, and requires knowledge of specific facts and evidence. Mid-trial hearings can be lengthy, and thus, inconvenience jurors. Therefore, allowing a trial court an opportunity to hear from witnesses prior to trial regarding the 404(b) evidence the witness intends to offer would facilitate more efficient trial conduct and make better use of juror time.

Make sure to subpoena all relevant 404(b) witnesses to the motions hearing. Even though it is the prosecutor's burden, more often than not the state will proceed by an offer of proof. Like any pretrial evidentiary hearing, you want the witness to take the stand in advance to make a record, preview the testimony ahead of trial, and create a baseline of testimony for impeachment purposes. Additionally, you can analyze the testimony for points requiring further clarity or investigation. As grounds for calling witnesses, you may inform the court that the testimony of the witness pertains to (1) the veracity of the allegations contained in the other acts evidence against the defendant, or (2) confronting the grounds of admissibility claimed in the notice filed by the prosecution.

### **Confronting the 404(b) Witness**

As discussed above, you must do your homework and thoroughly understand the witnesses who will be called to testify about the other acts evidence admitted under Rule 404(b). When reviewing a case to identify potential 404(b) issues, details regarding the witnesses who provided or have knowledge regarding 404(b) information should be flagged. Specifically, anyone with knowledge of the accused's putative involvement in the crime, wrong, or act should be flagged and made part of the pretrial case investigation, like any other witness related to the charged conduct. Examples of possible 404(b) witnesses include the named victim, law enforcement officers, eyewitnesses, codefendants, employers, colleagues, etc.

When preparing to cross-examine the 404(b) witness, you should:

- Ensure you have copies of any and all prior testimony the witness provided concerning the other act at issue;
- Get a copy of the witness' criminal history, including juvenile adjudications;
- Talk to your client about who the witness is, what his or her relationship with the witness is like, what motive the witness may have to lie, what the witness' role was in the other act, etc;
- Conduct a thorough social media search on the witness – how does the witness portray himself or herself on social media? Who are his or her close friends? What is his or her political affiliation? Is he or she talking about the defendant's case on Facebook or another platform? Is the witness posting pictures of himself or herself that might be relevant, such as holding weapons or making threats of violence?
- Investigate the role of the witness in the other act. Was the witness involved? If so, were they charged? Did they cut a favorable deal with the state in exchange for providing information about the defendant? If the witness was an alleged victim in the other act, did he or she have an axe to grind then or do they now?

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<sup>43</sup> See FRE 404(b)(3)(A).

<sup>44</sup> See FRE 404(b)(3)(A).

<sup>45</sup> *Huddleston*, 485 U.S at 690-91.

<sup>46</sup> See *id.* at 686 (acknowledging concession).

If the witness was uninvolved and merely provided eyewitness testimony, was his or her ability to perceive the event impacted in any way (drugs/alcohol, too far away, cross-racial identification issues, etc.).

- Has the witness made prior consistent or inconsistent statements to law enforcement, friends, or other witnesses?
- Think through other modes of impeachment and ensure you have records, transcripts or other witnesses that might be needed in order to properly impeach the 404(b) witness.

Additionally, you may need to file a motion notifying the prosecutor and the court of your intent to introduce so-called “reverse 404(b)” if you intend to introduce prior bad act evidence concerning a 404(b) witness.<sup>47</sup> Whether an anticipated 404(b) witness has a history that includes relevant 404(b) evidence should be explored during the investigation of the witness to ensure consideration of all possible cross-examination material and to prepare for any necessary reverse 404(b) litigation. Importantly, any witness might harbor bias or have a motive for testifying, which should also be explored during the investigation of the case.

Developing a theory for the cross-examination of the 404(b) witness is critical when approaching a trial in which the prosecution will rely on 404(b) to convict the accused. The cross-examination of the 404(b) witness should be closely tailored to your theory of the case and why the 404(b) information is “irrelevant” to the charged conduct. If undermining the credibility of the 404(b) witness takes the wind out of the prosecution’s sails to suggest, for instance, that the defendant committed the other act or acted with a particular intent, then the focus of your cross should be impeachment of that witness. When assessing the theory of the 404(b) witness, you should consider who the witness is in relation to the defendant, what the witness purports to know, how the witness gained that knowledge, and why the witness is choosing to share the information about the accused in a criminal trial forum. An alleged victim from a past uncharged act would probably require a different cross-examination approach than a law enforcement officer testifying to a past arrest in which the accused became physical.

For instance, while the law enforcement witness might be more susceptible to an attack on motive and bias or partiality to the prosecution, the alleged victim might be more susceptible to an attack on credibility. However, both witnesses could be used to distinguish the other crime, wrong, or act from the present offense, which would undercut the prejudicial effect of the Rule 404(b) evidence.

Additionally, some prosecutorial presentations involving 404(b) witnesses might benefit more from declining cross-examination altogether. For instance, if the witness provides information regarding an accused’s parole status at the time of the present offense, then closing argument might be a better way to refer the jury back to discussions in voir dire about how past indiscretions do not give the jury a license to presume guilt.

Generally, a properly conducted 404(b) witness investigation should reveal critical cross-examination and impeachment material. While all 404(b) witnesses should be investigated, those alleging uncharged conduct might be impeachable in different ways than those alleging gang affiliation or drug use. However, the goals of impeachment should align with the overall theory of the witness.

### **Preparing the Jury for 404(b) Evidence**

Voir dire constitutes a critical step in preparing for and desensitizing jurors to anticipated 404(b) evidence. Your first job during voir dire is to identify and establish challenges for cause for those jurors who you know, based on their answers, will not be able to follow the law. In order to do this, you must tailor part of your questioning to collect and learn jurors’ thoughts on whether the introduction of 404(b) evidence will interfere with their ability to maintain the presumption of innocence and/or lessen the burden of proof. Clearly, you want to eliminate any juror who is going to employ the “once a criminal always a criminal” mentality. Eliminating jurors who cannot constrict the use of 404(b) evidence to its limited intended purpose is essential to protecting the accused’s right to a fair trial by an impartial jury.

Questions to ask during voir dire that may start to ferret out prospective jurors who are likely to have trouble following the law on 404(b) evidence include:

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<sup>47</sup> For a thorough examination of the introduction of reverse 404(b) evidence, see Jessica Broderick, Reverse 404(b) Evidence: Exploring Standards when Defendants Want to Introduce Other Bad Acts of Third Parties, 79 U. COLO. L. REV. 587, 588 (Spring 2008).

- If you were a juror on a criminal case where you heard that the defendant had committed a similar crime in the past, would that fact alone make it more likely to you that he had committed the crime at issue in the case? Why or why not?
- What does the phrase “once a criminal always a criminal” mean to you? Do you agree with that principle 100%, 50%, or not at all? Why?
- The law says you cannot prejudge credibility. If you were a juror on a case where you heard the defendant had previously been convicted of a serious crime, would you be able to presume he was going to tell the truth if he took the stand in his own defense? Why or why not?

Of course, this is but a small sampling of some of the questions you might want to ask potential jurors in a case where 404(b) evidence was going to be introduced. Developing effective challenges for cause requires a lot of information gathering beyond these initial conversation starters. The bottom line is that you want to use voir dire to remove from the potential jury, by way of deselection and challenges for cause, any juror who even hints that hearing 404(b) evidence would sway them towards a verdict of guilt.

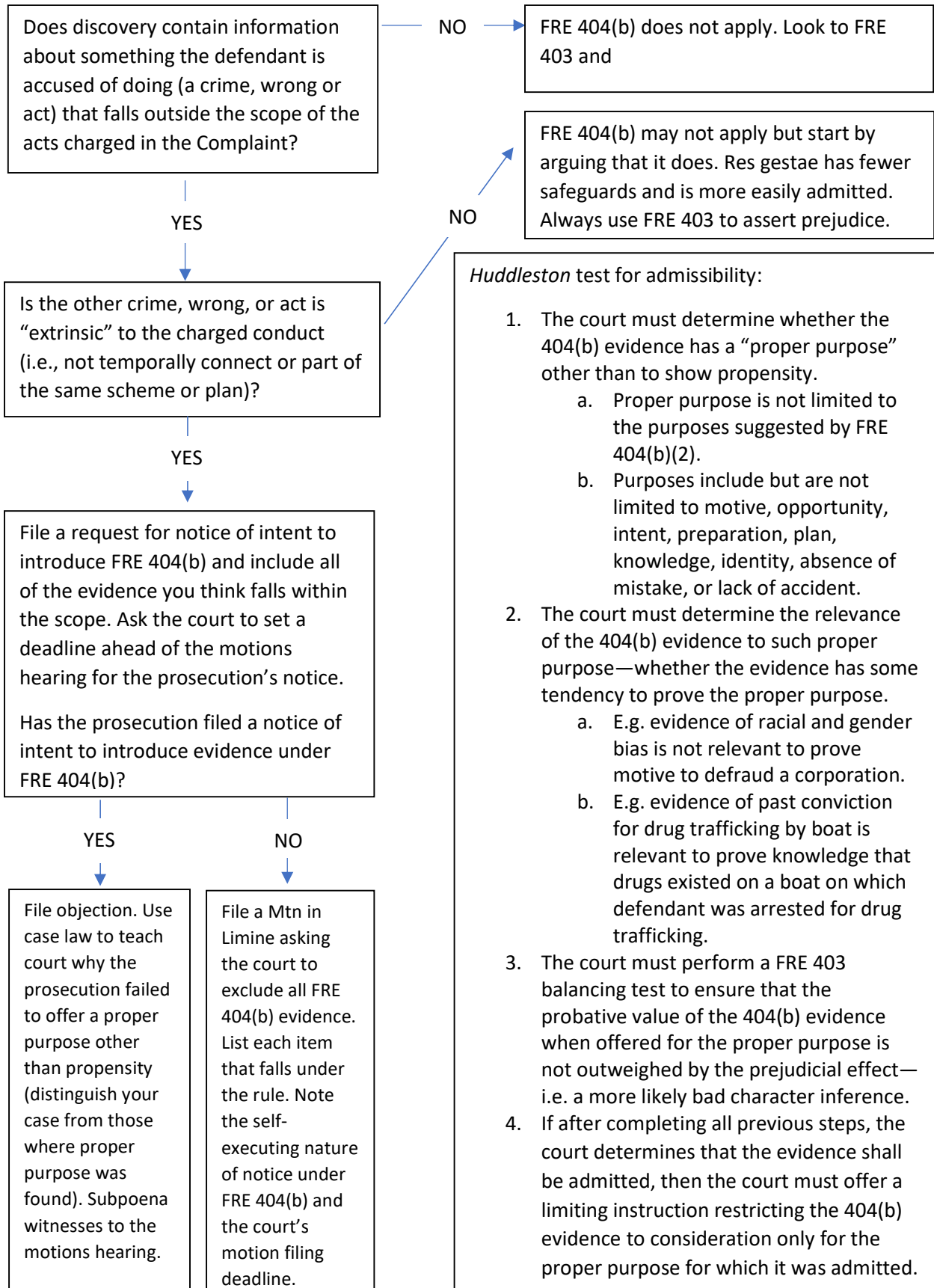
Opening statements may also be used as an opportunity to prepare the jury for the defense perspective on the 404(b) evidence. Caution: only consider discussing potential 404(b) evidence during opening if there is a pretrial ruling that it will be admitted and the prosecution raises it during its opening. Additionally, the defense can strategically object during the prosecution’s opening to any mischaracterization of the proper purpose for which 404(b) evidence is admitted.

### **Conclusion**

The admission of 404(b) into a criminal trial can be the most damning evidence against your client. The best way to avoid the prejudice that comes along with the introduction of 404(b) evidence is to avoid it through thorough, aggressive pretrial litigation. However, the likelihood that your case will involve “admissible” 404(b) evidence is high. To that end, effective investigation and cross-examination of 404(b) witnesses, voir dire, and careful presentation of the defense perspective during opening statement can be effective strategies for obtaining a Not Guilty verdict notwithstanding the prejudicial effect of 404(b).

Many Thanks and Gratitude to Denver Attorney Lindsay Brown (Richardson).

## FLOW CHART FOR LITIGATING THE ADMISSION OF FRE 404(B) EVIDENCE



### Defense Initial Questions

- Does the prior bad act fit it into one of the exceptions listed in 404(b)- motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident?
- If yes, then is the evidence relevant?
- Can the government prove by a preponderance of the evidence that the defendant committed the prior bad act?
- Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, or misleading the jury?
- Does your state have a statute that dilutes 404(b)?

### Modus Operandi- commonly relevant as a subset of identity

Trial court admitted evidence that, some 10 years previous, Rosky fondled and digitally penetrated a 12 year-old girl, JLB, in California. The district court ruled the prior bad act admissible as proof of a common scheme or plan and modus operandi. The Supreme Court of Nevada was unpersuaded finding each event independent of the other let alone the events occurred 8 years apart. The Court also rejected this evidence as modus operandi finding that type of evidence is proper in "situations where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime so clear as to establish the identity of the person on trial." *Rosky v. State*, 111 P.3d 690, 698 (Nev. 2005)

"Modus operandi evidence ordinarily is not relevant where identity is not at issue"; because "the defense theory was consent, the identity of the offender was not at issue" and "[m]odus operandi would not have been a relevant basis to admit the other crimes evidence." *People v. Boyd*, 366 Ill.App.3d 84, 303 Ill.Dec. 640, 851 N.E.2d 827, 836 (2006) See also *State v. Veikoso*, 270 P.3d 997, 1007 (Haw. 2011).

Prior bad acts evidence describing incidents in which the defendant had simply seized opportunities when no one was watching in order to molest complainant's mother and aunt did not describe acts that were significantly or specifically similar to the ones alleged in the instant case. Therefore, such evidence was not admissible, in the instant prosecution for first-degree child molestation and third-degree child rape. The fact that the defendant molested victims when no one was close enough to see what was going on was too unlike a strategy for isolating a victim, such as what allegedly occurred in the instant case. The error in admitting the prior bad acts evidence was not harmless. Therefore, reversal of the conviction and remand for a new trial was necessary. The inculpatory evidence, based mostly on the complainant's statements and testimony, was contradicted. *State v. Slocum*, 2014 WL 4373184 (Wash. Ct. App. Div. 3 2014)

When the State seeks to admit extraneous offense evidence under a theory of "system" or modus operandi, "there must be a showing that the extraneous offense which was committed by the defendant was 'so nearly identical in method [to the charged offense] as to earmark them as the handiwork of the accused.'" *Collazo v. State*, 623 S.W.2d 647, 648 (Tex.Cr.App.1981), quoting E. Cleary, McCormick's Handbook of the Law of Evidence 449 (2d ed. 1972). The State must show more than the mere repeated commission of crimes of the same type or class: " 'The device used must be so unusual and distinctive as to be like a signature,' " *Id.* "If there is no sufficiently distinctive characteristic, then the relevancy of the evidence cannot outweigh its prejudicial value." *Collazo* at 648. *Owens v. State*, 827 S.W.2d 911, 915 (Tex. Crim. App. 1992).

The State asserted at trial that evidence of the other bad acts committed by Browning was admissible to prove his identity as the perpetrator in this case. "The identity exception in Rule 404(b) was crafted primarily for crimes so nearly identical that the modus operandi is virtually a 'signature.' " *Allen v. State*, 720 N.E.2d at 711 (quoting *Thompson v. State*, 690 N.E.2d 224, 234 (Ind.1997)). The rationale underlying this exception is that the modus operandi of the instant crime and the other bad acts are so similar and unique in nature that it is highly probable that the same person committed all of them. *Allen v. State*, 720 N.E.2d 707. Crimes that are only generally similar do not qualify under this exception. *Berry v. State*, 715 N.E.2d 864 (Ind.1999).

In this case, the State contends evidence defendant engaged in and liked anal sex was relevant to prove both identity and motive. We conclude that the fact defendant engaged in and liked consensual anal sex with an adult, whom he married, is not by itself sufficiently similar to engaging in anal sex with an underage victim beyond the characteristics inherent to both, i.e., they both involve anal sex, to be admissible under Rule 404(b). We conclude this evidence was not relevant for any purpose other than to prove defendant's propensity to engage in anal sex, and thus, the trial court erred in admitting this evidence. *State v. Dunston*, 588 S.E.2d 540, 544-45 (N.C. Ct. App. 2003)

### **Absence of Mistake or Accident- this defense must first be raised**

The absence of mistake or accident may be an appropriate exception where either of these defenses are raised but are therefore inappropriate when the defense of mistake or accident has not been raised. *State v. Hooten*, 735 S.W.2d 823, 824 (Tenn. Crim. App. 1987)

### **Consent- specific to each incident**

The defendant's history of wrestling with boys and utilizing the genital hold was erroneously admitted to show lack of consent in a sex assault against a woman. Finding "evidence of Defendant's abuse of other victims is not admissible to show that Defendant acted with the requisite criminal intent based upon Victim's lack of consent." *State v. Lancaster*, 954 S.W.2d 27, 29–30 (Mo. Ct. App. E.D. 1997).

In *Malone v. State*, 441 N.E.2d 1339 (Ind. 1982), the court held that the trial court committed reversible error in admitting evidence regarding the defendant's subsequent rape of another woman. The court stated, 'We now reaffirm *Meeks* as it applies to rape cases where consent is the only issue. The fact that one woman was raped has no tendency to prove that another woman did not consent.' *Id.* at 1347.

*Hurst v. State*, 400 Md. 397, 929 A.2d 157, 164 (2007) ("The only contested issue in this case was whether Ms. P. consented to the sexual acts. The State was required to demonstrate a lack of consent on the part of Ms. P. as to the sexual activities that it alleged. Evidence that a third party did not consent to sexual intercourse with petitioner in the past has no bearing on whether Ms. P. consented to sexual activity. Ms. E.'s testimony was irrelevant as well to Ms. P.'s consent or lack of consent. It was in essence evidence that petitioner possessed a criminal propensity to engage in sex crimes and, as such, was inadmissible.")

In *Meeks v. State*, 249 Ind. 659, 234 N.E.2d 629 (1968), our supreme court held that the trial court committed reversible error in admitting evidence regarding the defendant's prior rape of another woman, where the victim's consent was the only issue at trial. See *id.* at 664, 234 N.E.2d at 632 ('Such evidence must be relevant to some point at issue, and in the case at bar, with consent being the only element at issue, the other alleged rape was irrelevant.')

The Supreme Court rejected an argument regarding motive and intent in *State v. Keys* (1993), 258 Mont. 311, 852 P.2d 621. There, the defendant was charged with sexual intercourse without consent and the trial court admitted evidence of a prior indecent exposure on the basis it tended to prove Keys' intent or motive. *Keys*, 258 Mont. at 314, 852 P.2d at 623. On appeal after his conviction, Keys contended that the evidence violated Rule 404(b), M.R.Evid., because it had no bearing on whether his victim consented. *Keys*, 258 Mont. at 314, 852 P.2d at 623. The prosecution argued that the indecent exposure was "probative of Keys' motive and intent to commit sexual acts against nonconsenting female victims." *Keys*, 258 Mont. at 314, 852 P.2d at 623. We were not persuaded, and stated that "merely reciting an allowable purpose is not sufficient if the evidence does not further that purpose or that purpose is not an issue in dispute." *Keys*, 258 Mont. at 317, 852 P.2d at 625. Since the only disputed issue in *Keys* was whether the victim consented, we observed that the prosecution's argument was, in essence, that Keys committed the crime charged because he was a person of poor character and that poor character "is precisely what prior acts evidence may not be used for." *Keys*, 258 Mont. at 317, 852 P.2d at 625. Here, the \*198 States argument boils down to one that Rogers is a sexual predator, that is, a person of bad character. While that may be true, the general rule is that character evidence is not admissible to establish that the defendant acted in conformity with such character at the time in question. See Rule 404(b), M.R.Evid. *State v. Rogers*, 992 P.2d 229, 235 (Mont. 1999)

### **Common Plan or Scheme- the prior bad acts will complete the story of the accused bad act**

Supreme Court of South Dakota analyzed the similarity in offenses presented by the government: familiar relationship with victim, opportunistic attacks, attack committed in Moeller's neighborhood, objective to obtain sex, attacks involved a knife. The Court disagreed that the facts showed relationship with victim and opportunistic attacks. The Court found the neighborhood, use of a knife, and sexual objective unpersuasive, stating specifically "any sexual assault crime involves a perpetrator who seeks sexual gratification. Permitting other acts evidence on the basis of this broad similarity invites the jury to draw the forbidden propensity inference. A more specific factual showing is required to allow admission of extrinsic evidence." *State v. Moeller*, 548 N.W.2d 465, 473 (S.D. 1996)

Other-crimes evidence is proper "to show a design or scheme on the part of the accused to commit the specific crime with which he is charged, but never to show a design or scheme to commit 'crimes of the sort with which he is charged.'" *United States v. Goodwin*, 492 F.2d 1141, 1152–53 (5th Cir.1974).

"In this case, we do not believe that the evidence of the sexual assault of the victims and evidence of the defendant's sexual assault of numerous other boys over a 20-year period justifies an inference that the defendant

had a consciously developed common design, scheme, or plan which included sexually assaulting the victims. Rather, we find it far more probable that each incident of sexual assault was a “discrete, albeit similar” act. To construe the term common design, scheme, or plan in such a manner as to allow the State to offer evidence of numerous acts of pedophilia under the guise of a common design, scheme, or plan “to gain access to young boys for sexual assaults” would be, in our opinion, to render the rule against propensity evidence meaningless.” *People v. Hansen*, 729 N.E.2d 934, 945–46 (Ill. App. Ct. 2000)

The evidence demonstrates Cox essentially committed crimes of availability against his cousins, which demonstrates nothing more than propensity. J.M., T.C., and A.L. all testified to a pattern of abuse they suffered as children and young adults, but none of the incidents of abuse against T.C. or A.L. are alleged to have occurred on the same day or connected to an incident of abuse against J.M. None of the testimony by T.C. or A.L. was necessary to “complete the story” of the crimes against J.M. or to provide the “ ‘immediate context of happenings near in time and place.’ ” *State v. Cox*, 781 N.W.2d 757, 770 (Iowa 2010).

Any alleged evidence that Berkowitz had prior relations with other clients is not admissible to prove the presence of a plan or scheme within the meaning of Rule 404(b). For prior acts to form part of a common plan, they must be so related to the present conduct as to be crucial to a full understanding of that conduct.<sup>30</sup> Mere repetition of sexual behavior is not evidence of a plan or scheme and may not be admitted under that exception. *Brett v. Berkowitz*, 706 A.2d 509, 516 (Del. 1998)

In *State v. Cox*, the government contends that the following factors are common to each assault (the one on trial for and prior bad acts): (1) defendant knew each victim; (2) defendant had nonconsensual intercourse, at each victims' home, while the victims' boyfriends or husbands were not home; (3) defendant was uninvited and began the assaults soon after entering the home; (4) defendant laid on top of the victims; (5) defendant did not completely remove his clothing or the victims' clothing, and in each instance, attempted to kiss the victim on the face and neck; and (6) defendant left the premises after completing the assault.

The Court of Appeals of Utah cannot conclude that the actions of defendant constitute a common design or modus operandi. The similarities are common to many assault or rape cases and are not peculiarly distinctive of defendant's conduct. *State v. Cox*, 787 P.2d 4, 6 (Utah Ct. App. 1990).

In addition to similar fact pattern courts should consider the events proximity in time. *State v. Hildreth*, 238 P.3d 444, 452 (Utah Ct. App. 2010)

Prior sexual abuse of daughter was inadmissible in prosecution of sexual misconduct towards co-worker. The action, context, approach, and victim characteristics were too varied. *People v. Pattison*, 276 Mich. App. 613, 741 N.W.2d 558, 560–61 (2007).

In *Velez v. State*, 762 P.2d 1297 (Alaska App.1988), the defendant was accused of “date rape”—of inviting a woman out, then using threatening words and/or behavior to coerce her into having sex with him. At trial, the State offered testimony from two other women that Velez had engaged in similarly coercive behavior when they dated him. The State's argument was that evidence of Velez's conduct toward the other women was admissible under Evidence Rule 404(b)(1) because it tended to show Velez's pattern of behavior, thus corroborating the account of the victim named in the indictment. The Alaska Court of Appeals rejected the State's argument because the purported corroborative value of the testimony implicitly rested on the inference that Velez had a propensity to sexually assault his dating partners. *Carpentino v. State*, 38 P.3d 547, 550– 51 (Alaska Ct. App. 2002).

“Since the adoption of the Rules of Evidence in 1973, New Mexico courts have continued to recognize that proof of sexual conduct involving the same victim may be admitted, see, e.g., *State v. Scott*, 113 N.M. 525, 828 P.2d 958 (Ct.App.1991), cert. quashed, 113 N.M. 524, 828 P.2d 957 (1992), but have not extended this exception to allow proof of other prior sexual conduct unless it meets the criteria for an exception within the concepts recognized under Rule 404(B). In this case, the State has failed to demonstrate any purpose for the rebuttal testimony other than its value as propensity evidence. Under Mason, the evidence is inadmissible. We therefore reject the State's assertion that occasional rejection of Defendant's request for oral sex by his girlfriend is admissible to prove he sexually assaulted the seven-year-old daughter of a friend. See *State v. Christensen*, 414 N.W.2d 843 (Iowa Ct.App.1987); *People v. Engelman*, 434 Mich. 204, 453 N.W.2d 656 (1990).” *State v. Lucero*, 840 P.2d 1255, 1259 (N.M. Ct. App. 1992)

### **Prior Convictions**

A defendant must be permitted to present his or her acquittal of a crime when the trial justice has admitted evidence of that other offense. *State v. Bernier*, 491 A.2d 1000, 1005-1006 (R.I.1985). Bernier featured a defendant charged in two indictments with multiple counts of sexual assault, assault and one count of solicitation. *Id.* at 1001–02. During the trial the state elicited testimony from the alleged victim, over a defense objection,

concerning a prior sexual assault. *Id.* at 1003. This evidence was admitted as probative of the “accused’s ‘lewd disposition or intent’ toward the victim.” *Id.* at 1004. The trial justice, however, forbade the defendant to introduce proof of his acquittal of that previous sexual assault. *Id.* at 1005. In vacating his conviction we instructed that the defendant’s “acquittal in the [previous] trial was relevant and material evidence that should have been presented to the jury.” *Id.* at 1006. We commented further as follows:

“[W]e believe that the better rule would be to allow evidence of the acquittal [to be introduced] \* \* \*. The admission of this evidence will give [a] defendant an opportunity to weaken or rebut the prosecution’s evidence of other crimes. Permitting the jurors to hear such evidence will assist them in their assessment of the significance of the evidence of other criminal activity by knowing that at another time and place, a jury, considering [the] defendant’s guilt or innocence of another crime, reached the conclusion that he or she was not guilty.” *Id.* at 1005–06.

#### **404(b) as Defense**

Third party crimes, wrongs, or other acts offered by the accused; misidentification. *State v. Scheidell*, 220 Wis. 2d 753, 584 N.W.2d 897, 902–03 (Ct. App. 1998). Just as axiomatic is the principle that a defendant does not have to prove his or her innocence. See *State v. Sawyer*, 266 Wis. 494, 506, 63 N.W.2d 749, 755 (1954).

Notwithstanding the right of the defendant to remain inactive and secure in the presumption of innocence, see *Milwaukee Alliance v. Elections Board*, 106 Wis.2d 593, 603 n. 3, 317 N.W.2d 420, 424 (1982), he or she is entitled to a reasonable opportunity to present evidence which could create a doubt as to guilt, see *People v. Bueno*, 626 P.2d 1167, 1169 (Colo.Ct.App.1981). When a defendant uses “other acts” evidence to create a doubt as to identity, prejudice to the defendant is no longer a consideration. See *State v. Garfole*, 76 N.J. 445, 388 A.2d 587, 591 (1978). When the defense uses “other acts” evidence, the fear that the jury will focus on an accused’s character and punish the defendant for being a bad person, regardless of guilt of the crime charged, disappears. See *State v. Sullivan*, 216 Wis.2d 768, 782–83, 576 N.W.2d 30, 37 (1998). § 404:5Rule 404(b)(2): crimes, wrongs or other acts, Winning Evidence Arguments § 404:5

#### **Preponderance**

Prior to admitting evidence of a defendant’s prior bad acts, the trial court must “consider the totality of all the evidence in the case ... and must apply the preponderance-of-evidence standard in deciding whether it is more likely than not that the factual conditions precedent to admitting other-crime evidence have been satisfied .... ” *People v. Garner*, 806 P.2d 366, 372-73(Colo.1991). In other words, “[b]efore admitting such evidence, the trial court, on the basis of all the evidence before it, must be satisfied by a preponderance of the evidence that the other crime occurred and that the defendant committed the crime.” *Id.* at 373.

“In this case sub judice, however, there was not sufficient evidence for the trial court to have concluded that the petitioner committed the subsequent alleged offenses. The State merely put forth evidence that the petitioner had been accused of committing additional sexual offenses, acknowledging that he denied the accusations.” *State v. Angle*, 759 S.E.2d 786, 793 (W. Va. 2014)

#### **Unfair Prejudice**

Be mindful of prior bad acts in which the “magnitude [is] far greater than the charged offense [ ]” and therefore created a grave risk that the evidence would “inspire exactly the ‘emotional’ basis for a decision” against which rules 403 and 404(b) attempt to guard. *United States v. Fortenberry*, 860 F.2d 628, 632(StHCir.1988).

The potential for prejudice from admitting prior acts is “at its highest” in sex offense cases. *State v. Saltarelli*, 98 Wash.2d 358, 363, 655 P.2d 697 (1982). Because the charges here involve sexually oriented crimes, we take this opportunity to stress our holding in *State v. Rickman*, 876 S.W.2d 824 (Tenn.1994). In *Rickman*, we expressly rejected an invitation to establish a “sex crimes exception” to the general rule that evidence of uncharged crimes is inadmissible. We concluded: “Our re-examination of the authorities convinces us that the general rule, which excludes evidence of other crimes or bad acts as irrelevant and prejudicial when the defendant is on trial for a crime or act of the same character, remains sound.” 876 S.W.2d at 829. *State v. McCary*, 119 S.W.3d 226, 244 (Tenn. Crim. App. 2003)

#### **What does the U.S. Supreme Court say on the topic? Not as much as you would think.**

FRE 404(b) cannot be used as a basis of a search. The Fourth Amendment does not permit the police to search for evidence solely because it could be admissible for impeachment, rebuttal, evidence of bad character, or

evidence of any crime that might prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident. *Messerschmidt v. Millender*, 565 U.S. 535, 566, 132 S. Ct. 1235, 1256, 182 L. Ed. 2d 47 (2012).

Admitting other crime or bad act evidence, even when an individual has been acquitted of the prior crime or bad act does not violate the collateral-estoppel component of the Double Jeopardy Clause. *Dowling v. United States*, 493 U.S. 342, 342, 110 S. Ct. 668, 669, 107 L. Ed. 2d 708 (1990).

Supreme Court relying on the legislative history of FRE 404(b) ruled that a preliminary finding that the prior act did occur is not required. "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 689, 108 S. Ct. 1496, 1501, 99 L. Ed. 2d 771 (1988).

At the homicide trial, states theory was that defendant committed a murder while in flight from the robbery to silence the victim and avoid prosecution. Therefore, evidence of the robbery was admissible to show motive and opportunity for the murder. *Morris v. Mathews*, 475 U.S. 237, 256, 106 S. Ct. 1032, 1043, 89 L. Ed. 2d 187 (1986).

I would like to thank and acknowledge all the work and research on this submitted outline by Kelly Meilstrup.

District Court, _____ County, Court address, Court Address City, State, Zip	          <input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff,  v.  <b>CLIENT CLIENT,</b> Defendant.	
Attorney for Defendant: ATTORNEY CONTACT	Case No.    Courtroom:
<b>SAMPLE STATE MOTION FOR SPECIFIC DISCOVERY</b>	

\*\*\* This motion needs to be supplemented with your specific state law\*\*\*

Mr. Client, by and through undersigned counsel, submits the following request for discovery based on due process as protected by the U.S. Const. amends V, XIV; State Const. and State statute. Defense counsel states in support:

**Relevant Factual Background**

1. Mr. Client is being prosecuted by the \_\_\_\_\_ County District Attorney’s Office based on allegations made by \_\_\_\_\_.
2. The prosecution has provided notice of their intent to present evidence of a prior bad act pursuant to State Rule of Evidence 404(b) and specific statute.
3. The alleged prior bad acts include:
  - a. On date, witness \_\_\_ states Mr. Client did x,y,z
  - b. On date, witness \_\_\_\_\_, alleges Mr. Client did x,y,z

**Legal Authority and Analysis**

4. Under Rule 404(b) of the \_\_\_\_\_ Rules of Evidence, evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Rule 404(b) evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge,

identity, or absence of mistake or accident....” Fed.R.Evid. 404(b). Upon request by the defendant, the government must “provide reasonable notice in advance of trial ... of the general nature of any [Rule 404(b) ] evidence it intends to introduce at trial.” *United States v. Swain*, 4:07–CR–62–D, 2008 U.S. Dist. LEXIS 21058, \*2, 2008 WL 717720, at \*1 (E.D.N.C. March 17, 2008). In response to this notice, the prosecution also has an obligation to disclose the 404(b) evidence that they will rely on and seek to present at trial.

### **Brady Material**

5. First, considering the constitutional requirements, due process requires the prosecution disclose “all favorable evidence” that is “material either to guilt or punishment” and that is within the government’s possession or control. *Brady v. Maryland*, 373 U.S. 83, 86, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Failure to disclose this favorable evidence violates the defendant’s due process regardless if the omission was done in good or bad faith. *Strickler v. Greene*, 527 U.S. 263, 288, 119 S.Ct. 1936, 1952, 144 L.Ed.2d 286 (1999) (inadvertent nondisclosure has same impact on fairness of the proceedings as deliberate concealment). The final element to a *Brady* violation is that the defendant did not receive a fair trial as the result of the withheld evidence. *Wearry v. Cain*, 136 S. Ct. 1002, 194 L. Ed. 2d 78 (2016).
6. The prosecution’s obligation under *Brady* extends beyond what is contained in its file, to all information, in any form, known by all law enforcement or other government agencies involved in this case, whether or not personally known to the individual prosecutor. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (The individual prosecutor has a duty to learn of any *Brady* material known to others acting on the government’s behalf, including the police); see also *Strickler v. Greene*, 527 U.S. 263, 275, n. 12 (1999) (Prosecutor is responsible for all favorable evidence known to those acting on the government’s behalf).
7. In this case, evidence that rebuts the 404(b) prior bad act evidence is now *Brady* evidence and consistent with due process must be provided.

### **Specifically Seeking**

8. Considering next the STATE requirement for discovery, Criminal Procedure Rule 16, which imposes substantially higher requirements for disclosure than does the *Brady* doctrine or Federal Rules of Criminal Procedure Rule 16 and requires the prosecution provide specifically:
  - a. All statements made by witnesses and accusers in connection with 404b prior bad acts;
  - b. All police reports and notes related to the 404b prior bad acts;

- c. All witness criminal histories related to the 404b prior bad acts;
  - d. All case related material including plea agreements, proffer statements, or agreements/decisions not to prosecute;
  - e. All photographs, examinations, tests, records, or reports related to the 404b prior bad act;
  - f. Disclosure of expert witness testimony or opinions related to the 404b prior bad act;
9. By seeking introduction of the prior bad act, the prosecution has therefore made the prior bad act relevant and all evidence related to these incidents must be disclosed to the defense in the same manner evidence of the current offense must be turned over.

### **Impeachment Discovery**

10. The prosecutor must provide evidence that might enable the defendant to impeach prosecution witnesses. *Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir.2000) (failure to disclose evidence impeaching credibility of the state's critical witness denied defendant his rights to a fair trial and to full and fair cross-examination). This includes:
- a. Any and all inconsistencies either express or implied in whatever format they may have occurred in;
  - b. Any evidence that could affect a witnesses reliability including: medical or mental conditions, substance abuse, evidence that they were under the influence at the time of the incident or suffering from a medical health condition;
  - c. Any attempts to obstruct justice or influence a witness;
  - d. Any expressed biases towards Mr. \_\_\_\_\_;
  - e. Any record of failure to appear;
  - f. Any specific acts of lying, cheating, stealing or dishonesty, deceit or fraud including: false statements, use of false name, providing false information in an affidavit or application, false information provided to corrections officer, false testimony, acts of deceit in personal affairs, false information to employees.
11. Consistent with due process, jury was entitled to know if prosecution witness made an agreement as to future prosecution. *Giglio v. United States*, 405 U.S. 150, 155, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972).
12. When the prosecution seeks to admit prior bad acts under 404(b) the witness' credibility in support of those bad acts is just as much in question as those witnesses that present evidence on the elements of the offense. Therefore, all impeachment evidence must be disclosed.

### **Conclusion**

Defense counsel does not concede that the admission of these prior bad acts is proper. In fact, defense counsel objects to the admission of the prior bad acts (see defense objection # \_\_). In

order to properly litigate the admissibility of these acts, defense counsel needs all related information in order to show distinction and irrelevancy. For the foregoing reasons and consistent with the principles of due process as guaranteed by the STATE Constitution and United States Constitution, defense counsel makes this request for the court to order proper disclosure of all the relevant discovery outlined above.

Respectfully Submitted,

Attorney for Defendant

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## Admissibility of Prior Statements and Testimony

### RULE 608

Rule 608 and its state equivalents allow a witness's character for truthfulness to be attacked or supported through the admission of testimony regarding

1. Prior conduct probative of a person's character for truthfulness or untruthfulness
2. Prior false statements tending to exonerate the defendant.

In most jurisdictions, Rule 608 aligns with the federal rule and allows the admission of prior acts of misconduct by a police officers at trial. Following is a brief discussion of the rule and its contours. It should go without saying that you must know your state and local rules and case law.

#### **I. PRIOR CONDUCT RELATING TO TRUTHFULNESS - 608(c)**

608(c) allows inquiry on cross-examination "into specific instances of conduct that are probative of the character for truthfulness or untruthfulness of"

- The testifying witness or
- "Another witness whose character the witness" has already testified about

The conduct need not have resulted in a conviction or any other form of punishment; it could include any prior lie or act of dishonesty.

#### **A. Challenging the Admission of Prior Conduct Testimony**

Admission of prior conduct testimony depends on multiple, varying requirements based on the age of the conduct, the nature of the conduct, and the person whose character is at issue.

Extrinsic evidence, however, is never admissible at trial to prove the conduct at issue.

- In other words, a party will be stuck with the witness's answer at trial
- Attorneys should therefore proceed with caution and, to the extent possible, seek to "lock in" the witness's answer at an 104(a) hearing

#### **Example**

To impeach a defense witness, the State may elicit testimony from the witness on cross-examination that they at one time lied on a job application.

- But extrinsic evidence of the act (e.g. the job application, testimony from another witness about the application, and the ramifications of the lie) is not admissible at trial
- Extrinsic evidence may, however, be used to establish, or challenge, the testimony's admissibility at an 104(a) hearing

#### ***1. Grounds for Challenges in All Cases –608(d)***

In all cases, the proponent of the prior conduct testimony must establish:

- A “reasonable factual basis” that the specific instance of conduct occurred and
- That the “conduct has probative value in assessing the witness’ character for truthfulness”

These requirements should be addressed at an 104(a) hearing, at which the defenses should consider challenging the testimony based on:

- The proffered factual basis, including through the use of extrinsic evidence
- The probative value as to the witness’s character for truthfulness, based on factors such as the recency, seriousness, and nature of the prior conduct
- The testimony’s relevance and risk of prejudice under 401 and 403
- Any resulting harassment or undue embarrassment of the witness under 611(a)

The defense, through discovery requests and pretrial arguments, should seek “reasonable notice” of the State’s intent to use 608(c) against a defense witness.

- This requirement already applies to the conduct of a defendant, 608(d), but should be applied to other witnesses as a matter of fairness and to avoid trial by ambush

The defense should also request a limiting instruction regarding the use of prior conduct.

- The model charges for prior convictions and bad-act evidence may be instructive

### ***2. Conduct Over Ten Years Old Is Presumptively Inadmissible - 608(e)***

This conduct is presumptively inadmissible and should only be admitted if the probative value of the “conduct in assessing the witness’ character for truthfulness outweighs any prejudicial effect”

- The passage of time is from the commission of the conduct to the start of trial

### ***3. Juvenile Conduct Is Generally Inadmissible - 608(f)***

Conduct of the defendant committed while the defendant was a juvenile is inadmissible.

Conduct committed by another witness when the witness was a juvenile is presumptively inadmissible and can only be admitted if the court “determines that the inquiry is necessary for a fair determination of the issues in the action.”

### ***4. Testimony About Conduct of Another Witness 608(c)(2)***

A witness may only be questioned about prior conduct of another witness:

- On cross-examination and
- If the witness has already testified about the other witness’s character for truthfulness or untruthfulness, pursuant to 608(a)

Based on the plain language of the Rule, a witness should never be allowed to discuss the conduct of a non-testifying person because that person is not a “witness.”

### **Example**

A defense witness testifies that the testifying defendant has a reputation for truthfulness. The State then cross-examines the defense witness about the defendant plagiarizing a paper in college. This questioning would not have been allowed if:

- The witness had not already testified to the defendant’s character for truthfulness
- The defendant had not testified

## ***5. Prior Conduct of the Defendant***

608(d) imposes additional protections for defendants and requires that the State:

- Provide “reasonable notice” of the intent to cross-examine on the specific conduct
- Establish the “reasonable factual basis” for the conduct and its “probative value in assessing the defendant’s character for truthfulness” at an 104 hearing

As indicated, we should work to apply these standards for non-defendant witnesses as well.

A defendant’s prior conduct may not be admitted:

- If it occurred when the defendant was a juvenile. 608(f)
- If the defendant does not testify
- Via a witness who has not testified about the defendant’s character for truthfulness

The defense should also seek to exclude prior conduct concerning the defendant as bad-act evidence under 404(b):

- 404(b) provides more protections than 608 because the State must show that: (1) the prior act is relevant to a material issue in dispute; (2) there is clear and convincing evidence that the prior conduct occurred; and (3) the probative value of the prior act is not outweighed by the apparent prejudice

Appropriate limiting instructions should also be provided both when the testimony is elicited and in the final jury charge.

### **B. Affirmative Uses of Prior Conduct Testimony**

The defense may use 608 to impeach State witnesses. To do so, the defense must only establish:

- A “reasonable factual basis” that the specific instance of conduct occurred
- That the “conduct has probative value in assessing the witness’ character for truthfulness”

There is no requirement that notice be provided or that these issues be addressed before trial.

- Nonetheless, an 104(a) hearing may allow the defense to test the strength of the accusation, and determine whether it will be denied, outside the presence of the jury
- “Locking in” a witness may also allow the defense to impeach the witness if he or she subsequently denies the accusation at trial

### **Examples – the defense may introduce testimony under 608 related to:**

- A victim or other witness who has wrongly accused others of misconduct
- A police officer with a history of falsifying police reports

### ***I. Impeaching State Witnesses***

The defense should seek information regarding prior instances of dishonesty committed by state witnesses through defense investigation and discovery.

- The State has a constitutional obligation to disclose all information that may be used to impeach a witness’s credibility, whether possessed by the prosecution or the police. Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); see also Kyles v. Whitley, 514 U.S. 419, 437 (1995) (knowledge police may have about favorable evidence is imputed to prosecution)

The defense should specifically request, by way of discovery requests, information regarding possible prior false statements and acts of dishonesty from or about:

- Police personnel records, internal affairs investigation reports, citizen complaints, and performance evaluations
- The use of aliases by state witnesses
- Prior arrests not resulting in conviction for state witnesses
- Any complaint or investigation of deceptive acts or statements for any witness
- Any other records possessed by the State

The defense should also independently seek out such information by:

- Tracking officers who have provided inaccurate information in other cases, as well as judicial or administrative findings of incredibility or unreliability
- Searching for police officer disciplinary violations related to untruthfulness disclosed pursuant to state and local attorney generals offices, prosecutor's offices, databases, and do not call lists

Be aware, however, that some jurisdictions have strictly limited Rule 608's application to instances of untruthfulness. For example, other courts have routinely barred introduction of evidence pertaining exclusively to excessive police force. This information may, however, be relevant and admissible on other grounds, depending on the nature of the case and the defense.

## **II. PRIOR FALSE EXCULPATORY STATEMENTS - 608(b)(2)**

608(b)(2) permits "a witness' character for truthfulness" to "be attacked by evidencethat the witness made a prior false statement tending to exonerate the defendant."

- The prior false statement may be established with extrinsic evidence at trial

### **A. Defending Against this Rule**

#### ***1. Protections Under 608***

The evidence may only be admitted "if the judge preliminarily determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false statement of exoneration."

- The defense should therefore seek to challenge the factual predicate for the claim, including the falsity of the statement and the witness's knowledge of its falsity

#### ***2. Challenges Based on Relevance and Prejudice Under 401 and 403***

#### ***3. Application of 404(b)***

This testimony could be bad-act evidence both because it may suggest the defendant was accused of, or committed, a prior offense and that he or she previously encouraged the witness to lie.

- If such an implication could be created, the defense should seek to apply the heightened test for admissibility under 404(b) and request appropriate limiting instructions

*The 608 analysis was prepared by Attorneys Nick Kormann and Cody Mason of the New Jersey Office of the Public Defender and is used with his permission and my thanks.*

## **S2656 Would Hold Officers Accountable When Prosecutors Won't** **Opinion by Joe Mazraani, Mazraani & Liguori, LLP**

The crash at the door came at lunch time. Celestino had just sat down to eat when a battering ram struck his front door with such force it nearly knocked it from the hinges. A stream of police – guns pointed and voices screaming – followed. It was not long before Celestino was under arrest.

The police, without question, had a warrant to search Celestino's home. What they did not have was a no-knock warrant. The warrant they had required them to knock and to announce themselves as police, an obligation that exists to protect both police and homeowners, who may otherwise believe there is a stranger breaking in.

Celestino is my client. After his arrest, I filed a motion to suppress evidence seized from his home. The sole legal issue was whether the officers knocked and announced their presence in compliance with the law.

The lead officer from the New Brunswick Police Department (NBPD) took the stand and told a story very different from the one Celestino told me. He appeared in uniform, raised his hand, and vowed to speak the truth. He looked the judge in the eye and swore that with his "big hands" he knocked loudly on the door, waited 10-to-20 seconds, knocked again, and only used a battering ram when no one answered.

What the officer did not know was that a surveillance camera caught the whole thing on video. The video, which I revealed after he testified, shows him trailing his colleagues as they rammed through the door without a moment's pause. His "big hands" never even touched it. As a Court later concluded, "the investigating officer's testimony was demonstrably and objectively shown to be untruthful. The scenes depicted in the surveillance video were diametrically opposed to the forceful and direct testimony provided by the investigating officer."

My client is lucky. The sad truth about our criminal legal system is, without the video, Celestino's word would have been no match for a cop's. The Middlesex County Prosecutors Office (MCPO) quickly dismissed the case to avoid the officer being found not credible by the motion judge.

But what of Officer Big Hands, who lied under oath in an effort to send a man to prison?

There has been much publicity lately about police transparency. The Attorney General (AG) has taken a small step by agreeing to release the names of officers who receive major discipline, but Celestino's case demonstrates why this step is not enough. Major discipline is defined as a suspension of more than five days, termination, or demotion, and it is the police themselves who decide whether misconduct has been committed and what the discipline should be. This makes disclosure dependent on decisions made by police investigating and punishing their own.

Under the AG's new policy, no attorney, judge or citizen will ever know the name of the officer who lied under oath to send Celestino to prison.

I filed an Internal Affairs (IA) complaint against Officer Big Hands. I also disseminated information about the misconduct to the local Judiciary, MCPO and fellow attorneys. I expected the police to mete out discipline and for the MCPO to realize prosecutors now had an obligation, pursuant to legal and ethical rules, to disclose information about the officer's dishonesty to attorneys in future cases.

What happened next astonished me. Despite a video that so directly contradicted the officer's sworn testimony that caused the prosecutor to dismiss the case and a judge to call the officer's testimony "objectively and demonstrably untruthful," the NBPD found the IA complaint for providing false testimony "Not Sustained" and cited the officer for only a rules violation. This case illustrates the problem with the IA system and why the AG's reforms cannot fix it. By finding only a rules violation, both the officer's name and the true nature of his conduct will remain shielded from public view.

The MCPO took one further step to ensure the officers' misconduct never saw the light of day: they sued to enjoin me from disclosing what I knew. Thankfully, the judge saw the move for what it was, "a deliberate attempt by the MCPO to quash transparency and prevent the public from learning about the investigating officer's inappropriate actions." The Court went on to say, "The actions by the MCPO in this case undermined and negated the transparency that is essential and crucial to inspire confidence and faith that the criminal justice system operates in a forthright and open manner...MCPO's attempt to block dissemination of these materials appear to have been undertaken simply to protect and insulate the NBPD investigating officer."

And that's the problem. The rules insulate bad cops. Real reform requires legislation to make all police records public. Legislation recently introduced by Senator Loretta Weinberg, S2656, would do just that. We must pass S2656 and ensure officers like Big Hands are accountable to the public even when prosecutors bend over backwards to protect them.

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