**IN THE SUPERIOR COURT OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_ COUNTY**

**STATE OF GEORGIA**

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**STATE OF GEORGIA**

**INDICTMENT NO.**

**vs.**

**[DEFENDANT]**

**Defendant**

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# **BRIEF IN SUPPORT OF STATE’S NOTICE OF INTENT TO INTRODUCE**

# **OTHER ACTS EVIDENCE PURSUANT TO O.C.G.A. § 24-4-413**

# **COMES NOW** the State of Georgia, by and through the undersigned Assistant District Attorney, and submits this brief in support of its “Notice of Intent to Introduce Other Acts Evidence Pursuant To O.C.G.A. § 24-4-413.” Under the Georgia Rules of Evidence codified at O.C.G.A. §§ 24-4-413 and 24-4-403, which became effective January 1, 2013, in a criminal proceeding in which the accused is accused of an offense of sexual assault, the State is entitled to introduce evidence of the accused’s commission of another offense of sexual assault, and such evidence shall be admissible and may be considered for its bearing on any matter to which it is relevant, including propensity. In support of its notice, the State shows as follows:

1. **Purpose and Rationale of O.C.G.A. § 24-4-413**

In 2011, the General Assembly enacted House Bill 24, which was designed and intended to “to revise, modernize, and reenact the general laws of [Georgia] relating to evidence while adopting, in large measure, the Federal Rules of Evidence.” The Bill specifically provided that “there are many issues regarding evidence that are not covered by the Federal Rules of Evidence . . . Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012, be retained.” 2011 Ga. Laws 52 at 1.[[1]](#footnote-1)

Prior to the enactment of O.C.G.A. § 24-4-413, the admission of other sexual offenses was governed by the Georgia common law pertaining to similar transactions. While the rules of admissibility regarding sexual crimes were relatively relaxed compared to other crimes, there was no outright presumption of admissibility like the federal rules, and the permissible use of such evidence was not as broad as O.C.G.A. § 24-4-413.

O.C.G.A. § 24-4-413 ushered in a tidal wave of change when considering the permissible uses of other sexual crimes. “Federal Rules of Evidence 413 to 415 are exceptions to the general rule that evidence of past crimes may not be used to prove the character of a person in order to show action in conformity therewith. *United States v. Bentley*, 561 F.3d 803 (8th Cir. 2009); *Johnson v. Elk Lake Sch. Dist*., 283 F.3d 138 (3d Cir. 2002). **The rules create presumptions in favor of admission of the defendant’s other sexual offenses in sex crimes prosecutions**. *United States v. Stamper*, 106 Fed. Appx. 833 (4th Cir. 2004); *United States v. Bentley*, 475 F. Supp. 2d 852 (N.D. Iowa 2007). *See also United States v. Enjady*, 134 F.3d 1427 (10th Cir. 1998) (rejecting Constitutional challenge to Rule 413’s presumption of admission).” Carlson, M., *Carlson on Evidence, 2nd Edition*, 158 (2014). “Rules 413 and 414 operate under a presumption that evidence of prior sexual assault or child molestation is admissible” *United States v. Martinez*, 2009 U.S. Dist. LEXIS 114193 (D.N.M. 2009).

1. **Application of O.C.G.A. § 24-4-413**

Section 413 is significantly more permissive than Section 404(b). Section 404(b) "identifies the propensity inference as improper in all circumstances" while Section 413 "makes an exception to that rule when past sexual offenses are introduced in sexual assault cases." *United States v. Rogers*, 587 F.3d 816, 822 (7th Cir. 2009). Through Section 413, the Legislature has effectively stated that "in a criminal trial for an offense of sexual assault, it is *not* improper to draw the inference that the defendant committed this sexual offense because he has a propensity to do so." *Id.* (emphasis added). As stated in *United States v. Levinson*, 504 Fed. Appx. 824 (11th Cir. 2013):

Evidence that a defendant engaged in child molestation in the past is admissible to prove that the defendant has a disposition of character that makes it more likely that he did commit the act of child molestation charged in the instant case.

*See also, State v. Prine*, 303 P.3d 662 (Kan. 2013).

By Section 413's own language, "evidence of the accused's commission of another offense of sexual assault *shall be admissible* and may be considered for its bearing *on any matter* to which it is relevant." O.C.G.A. § 24-4-413(a) (emphasis added). *United States v. Meacham*, 115 F.3d 1488 (10th Cir. 1997). Therefore, evidence admitted under Section 413 is not limited to the specific reasons listed in Section 404(b).

There is no requirement that a defendant be charged or convicted of another sexual offense in order for it to be admissible. *United States v.* Dillon, 532 F.3d 379 (5th Cir. 2008); *United States v. Guidry*, 456 F.3d 493 (5th Cir. 2006). Courts have approved the admission of uncharged sex offenses as well as those that resulted in a charge. *United States v. Mann*, 193 F.3d 1172 (10th Cir. 1999). Courts have also held that there is no requirement that the other sexual misconduct occur prior to the alleged incident. *United States v. James*, 60 M.J. 870 (A.F.C.C.A 2005). “The legislative history of Rules 413-15 indicates that Congress intended to allow admission not only of prior convictions for sexual offenses, but also of uncharged conduct.” *United States v. Julian*, 427 F.3d 471 (7th Cir. 2005).

**III. Application of O.C.G.A. §§ 24-4-403 and 24-4-413**

As with any evidence, evidence sought to be introduced under O.C.G.A. § 24-4-413 must satisfy balancing test set forth in O.C.G.A. § 24-4-403; that is, its probative value must not be substantially outweighed by the risk of "unfair prejudice, confusion of the issues, or misleading the jury." O.C.G.A. § 24-4-403; *see United States v. Enjady ,* 134 F.3d 1427, 1431 (10th Cir. 1998). Evidence of a defendant's other sexual assaults will unquestionably be prejudicial to the defendant. However, the test is whether that prejudice will be unfair and whether it will substantially outweigh the probative value of the evidence.

Exclusion under Rule 403 is an "extraordinary remedy," which courts should employ "only sparingly since it permits the trial court to exclude concededly probative evidence." *United States* v. *Smith,* 459 F.3d 1276, 1295 (11th Cir. 2006); *United States* v. *Church,* 955 F.2d 688, 700 (11th Cir. 1992). Thus, while "[Section] 403 balancing is still applicable under [Section 413] the courts are to 'liberally' admit evidence of prior uncharged sex offenses." *United States* v. *Meacham,* 115 F.3d 1488, 1492(l0th Cir. 1997).

Courts have specifically addressed whether admission of Rule 413 and Rule 414 evidence is fundamentally unfair. “We conclude that there is nothing fundamentally unfair about the allowance of propensity evidence under Rule [413 and] 414. As long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded.” *United States v. LeMay*, 260 F.3d 1018 (9th Cir. 2001). In the instant case, the probative value of the evidence sought to be introduced is extremely high.

Sexual propensity evidence is generally considered to be highly probative. *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997). “With respect to the Rule 403 balancing, however, the sponsors of Rule 414 stated that the presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice.” *Id.*; *See also*, *United States v. Dewrell*, 52 M.J. 601 (A.F.C.C.A. 1999); *United States v. Guardia*, 135 F.3d 1326 (10th Cir. 1998).

The State has complied with all notice requirements contained in O.C.G.A. § 24-4-413 and Uniform Superior Court Rules 31.1 and 31.3 by attaching to and incorporating by reference in its “Notice of Intent to Introduce Other Acts Evidence Pursuant to O.C.G.A. §§ 24-4-413,” either a statement of, or documentation including the nature, date, and county of occurrence of the other act as well as a list of the witnesses the State expects to call at trial in regard to the other act evidence. In addition, the State will provide a copy of any police reports, if not already attached to this notice, and supplement as necessary.

**WHEREFORE**, the State prays that this Honorable Court set a date for the hearing required by Uniform Superior Court Rule 31.3 at which the State is prepared to present evidence in support of its request to present other act evidence at trial. Once the requirements of the Uniform Superior Court Rules and O.C.G.A. §§ 24-4-413 and 24-4-403 are met, the State asks this Court issue a written order specifically permitting the admission of the enumerated other acts evidence at the trial of this case.

Respectfully submitted this \_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_.

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Assistant District Attorney

1. The Preamble to the law enacting the revised evidence code states that "[i]t is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal.... Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the 11th Circuit Court of Appeals." 2011 Ga. Law, Act 52, Section 1. [↑](#footnote-ref-1)