# NOTICE OF INTENT TO INTRODUCE EVIDENCE PURSUANT TO FEDERAL RULE OF EVIDENCE 414 AND MOTION FOR PRETRIAL RULING

##### United State of America

Plaintiff, United States of America, by and through its attorneys, J.N., United States Attorney for the District of Arizona, and S.R.V., Assistant U.S. Attorney, hereby gives notice pursuant to Fed. R. Evid. 414(b) of its intention to introduce evidence of offenses of child molestation in addition to those charged in the indictment. Pursuant to Fed. R. Crim. P. 12(b) and (e), the government requests this court rule on the admissibility of this evidence prior to trial.

**SUMMARY OF FACTS**

The evidence will consist of testimony from an Indian woman (Witness #1) who is now 21 years old. Witness #1 will testify that one incident occurred in July or August of 1987, when she was 12 years old. The defendant put her into his car, then took her for a ride and got her drunk. Upon returning the witness to her grandmother’s home, the defendant began to touch her breasts and buttocks over her clothing. The defendant tried to take off the witness’ clothing, but she was able to push him away.

Witness #1 will also testify that the defendant would repeatedly fondle her breasts, buttocks and genital area underneath her clothing while the witness was sleeping over at her grandmother’s house. She will testify that this went on for approximately two years, when witness #1 was 11 to 12 years old.

Another woman, witness #2, will also testify that the defendant molested her. Witness #2 is an Indian woman who is now 22 years old. She will testify that when she was 8 years old, during wintertime, the defendant came into her bedroom while she was asleep, and touched her vagina with his hand, under her clothes. Witness #2 will also testify that her uncle’s girlfriend came in the front door and the defendant stopped touching her at that time.

The victim in Count I of the indictment is an 8-year-old Indian female. She will testify that the defendant touched her buttocks once, and that the defendant also touched her between her legs on still another occasion. These two incidents are in addition to the offense described in Count I of the indictment. This victim will testify that all three incidents took place at her grandmother’s house on the \_\_\_\_\_\_\_ Indian reservation.

Defense Counsel has previously been provided copies of reports, which detail these three witnesses’ statements, and which identify the witnesses, their relationship to the defendant, and where the offenses took place.

**LAW**

The government believes that the evidence described above, not charged in the present indictment, is admissible under Fed. R. Evid. 414, and may be “considered for its bearing on any matter to which it is relevant,” including the defendant’s propensity to commit an act of aggravated sexual abuse of a child.

In *United States v. Roberts*, 88 F.3d 872, 876 (10th Cir. 1996), the Tenth Circuit considered the analogous new Rule 413, which applies to other acts of sexual assault involving adults, and noted that this new Rule “was designed to create a ‘general rule of admissibility in sexual... cases for evidence that the defendant has committed offenses of the same type on other occasions’,” (citing legislative history).[[1]](#footnote-1)

Courts have traditionally favored a broad approach to the admission of other crimes evidence in sex offense cases, and many jurisdictions have adopted special rules that allow evidence of other crimes to show the defendant’s propensity to commit sex offenses. *See*, Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 Am. J. Crim. L. 127, 188 (1993) (29 states allow propensity evidence in some category or categories of sex offenses); IA Wigmore’s *Evidence* § 62.2, at 1334-35 (Tiller’s rev. 1983) (rule against propensity evidence not honored in sex offense cases). Until recently, however, the federal courts maintained a categorical prohibition against admission of evidence of character or propensity in all cases, including sex offenses, pursuant to Fed. R. Evid. 404.

First introduced in Congress in 1991, Rules 413 and 414 were eventually enacted as part of the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103-332, 108 Stat. 1796, 2135-37).

These Rules, together with new Rule 315 for civil cases, reflect a deliberate policy judgment by Congress that sex offenses present distinctive difficulties and issues of proof, and that special rules of evidence regarding uncharged sexual misconduct are required in response to these problems. With regard to child molestation cases in particular, the principal House sponsor of the new Rules stated:

The proposed reform is critical to the protection of the public from rapists and child molesters, and is justified by the distinctive characteristics of the cases it will affect. In child molestation cases... a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense. 140 Cong. Rec. H8991 (daily ed., Aug. 21, 1994) (statement of principal House sponsor, Rep. Susan Molinari).

Against this background, there is no basis for excluding propensity evidence in this type of case. Rules of this type are not unusual or novel, but are instead the norm. *See*, *e.g.*, Cal. Evid. Code § 1108; Mo. Rev. Stat. § 566.025; *State v. Charles L.*, 398 S.E.2d 123, 133 (W. Va. 1990); *State v. Mankiller*, 722 P.2d 1183, 1191 (N.M. Ct. App. 1986); *State v. McFarlin*, 517 P.2d 87, 90 (Ariz. 1973); *Burke v. State*, 624 P.2d 1240, 1249 (Alaska 1980).

The typically secretive nature of sex offenses, particularly those involving children, serves as a basis for providing special evidentiary treatment in cases subject to federal jurisdiction. This is not the only rule of evidence that addresses difficulties of proof. For example Fed. R. Evid. 404 (a) (2) allows the government to offer evidence of a homicide victim’s peaceful character to rebut a claim of self-defense. This is responsive to the extreme difficulty posed by such self-defense claims resulting from the unavailability of the victim to testify and present the other side of the encounter.

A second example is the “dying declaration” exception to the hearsay rule found in Fed. R. Evid. 804 (b)(2). The Advisory Committee Note states that this exception “originated as a result of the exceptional need for the evidence in homicide cases.” The House Judiciary Committee Report (H.Rep. No. 93-650) accompanying Rules 413-415 similarly noted and relied upon the “exceptional need” for evidence of this type in cases such as this.

Rape shield laws are but another example of a legislative response to the difficulties in prosecuting certain cases. Fed. R. Evid. 412 and its numerous state counterparts were enacted in large part as an appropriate response to the problems in effectively prosecuting rape cases, where victims were often deterred from testifying because of threatened exposure of their past sexual histories and the intimate details of their lives.

Section 3509 (b)(1)(B)(i) of Title 18, United States Code, reflects yet another recognition that special rules are needed in child abuse prosecutions. These provisions allow for the use of videotaped deposition testimony by children, showing an understanding of the vital necessity for such evidence and the inherent difficulties that often arise in presenting children’s testimony, and recognizing that the prejudice to the defendant in foregoing ordinary confrontation is outweighed by the critical need for the children’s evidence.

The court must, of course, determine whether this otherwise admissible evidence should be excluded as unfairly prejudicial to the defendant under Fed. R. Evid. 403. This analysis weighs heavily in favor of admissibility of this evidence.

This evidence is highly probative of the defendant’s ongoing disposition and his propensity to molest little girls. Counts I and III also require that the government prove that defendant’s touching of the two victims’ genitalia were with the specific intent to arouse or gratify his sexual desire. This uncharged act evidence is highly probative on the issue of defendant’s specific intent as well.

With regard to the victim described in count one of the indictment, the evidence is also crucial to explaining her ongoing fear of the defendant.

With respect to the two older witnesses, their testimony will not unduly complicate or prolong the proceedings, nor will such testimony tend to confuse the jury in this case.

The new Rules are clearly intended to change the old formula for consideration of such evidence under Fed. R. Evid. 404(b) and 403:

*The new rules will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b)*. In contrast to Rule 404(b)’s general prohibition of evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing ‘on any matter to which it is relevant.’ This includes the defendant’s propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.

In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court’s authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect.

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The practical effect of the new rules is to put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. *The presumption is in favor of admission. The underlying legislative judgment is that the evidence admissible pursuant to the proposed rules is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse effects*.

In line with this judgment, *the rules do not impose arbitrary or artificial restrictions on the admissibility of evidence*. Evidence of offenses, for which the defendant has not been previously prosecuted or convicted will be admissible, as well as evidence of prior convictions. No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often very probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charged offense or offenses. *See*, *e.g.*, *United States v. Hadley*, 918 F.2d 848, 850-51 (9th Cir. 1990), *cert. Dismissed*, 113 S. Ct. 486 (1992) (evidence of offenses occurring up to 15 years earlier admitted); *State v. Plymate*, 345 N.W.2d 327 (Neb. 1984) (evidence of defendant’s commission of other child molestations more than 20 years earlier admitted).

Finally, the practical efficacy of these rules will depend on faithful execution by judges of the will of Congress in adopting this critical reform. *To implement the legislative intent, the courts must liberally construe these rules to provide the basis for a fully informed decision of sexual assault and child molestation cases, including assessment of the defendant’s propensities and questions of probability in light of the defendant’s past conduct*. 140 Cong. Rec. H8991-92 (daily ed. Aug. 21, 1994).

For the foregoing reasons, the government requests that the court allow admission of the uncharged misconduct evidence at trial in this case, and that the jury be instructed as follows at the close of the evidence as follows:

You have heard evidence that the defendant has committed another offense involving the intentional touching of the genitalia or buttocks of [uncharged act victim’s name]. This involves a sexual act which is not charged in the indictment. In deciding whether the defendant is guilty of the offenses charged in the indictment, you may consider this evidence involving [uncharged act victim’s name] for its bearing on any matter to which it is relevant, including the defendant’s disposition or propensity to commit the offenses that are charged in the indictment.

No limiting instruction should be given, as that would conflict with the plain language or Rule 414 and the legislative intent of Congress.

The government further requests pursuant to Fed. R. Crim. P. 12(b) and (e) that this court rule on the admissibility of this evidence prior to trial.

Respectfully submitted this \_\_\_\_\_\_\_ day of January 1997.

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United States Attorney

District of Arizona

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Assistant U.S. Attorney

1. 1 The precise holding of *Roberts* which involved the effective date of the new Rule, was legislatively overruled by Congress’ enactment of The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, §120, which was passed by both Houses of Congress and signed by the President, becoming law on September 30, 1996. This makes Rules 413 and 414 applicable to all trials commenced on or after July 10, 1995. [↑](#footnote-ref-1)