**STATE’S MEMORANDUM ON ADMISSIBILITY OF OTHER ACTS EVIDENCE IN A SEXUAL ABUSE CASE**

 **State Of Arizona**

 **MEMORANDUM OF POINTS AND AUTHORITIES**

**I. PROCEDURAL HISTORY**

On October 20, 2000, pursuant to Rule 404(B) and (C), the State, in this matter, filed a Notice of Intent to Introduce Other Acts Pursuant to Rule 404(B) and (C), Ariz. R. Evid. Specifically, the State gave notice of its intent to introduce evidence that the defendant committed and has been convicted of a sexual assault with numerous similarities to the crime charged. That sexual assault occurred on June 6, 1997, approximately eight and a half months after the current offense.

In an informal conference, this Court expressed concerns as to whether one other sexual assault would be sufficient for the Court to find that the defendant has a “character trait.” This memorandum addresses this issue, as well as the remoteness and similarity factors discussed during the informal conference.

**II. LAW**

Rule 404, Ariz. R. Evid., states, in part, as follows:

(C) Character evidence in sexual misconduct cases:

In a criminal case in which the defendant is charged with having committed a sexual offense . . . evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403 . . . .

Subsection C then lists various factors to be considered by the Court.

Further, the Comment to Rule 404(C) states that

Subsection (c) of Rule 404 is intended to codify and supply an analytical framework for the application of the rule created by case law in State v. Treadaway, 116 Ariz. 163, 568 P.2d 1061 (1977), and State v. McFarlin, 110 Ariz. 225, 517 P.2d 87 (1973). The rule announced in Treadaway and McFarlin and here codified is an exception to the common-law rule forbidding the use of evidence of other acts for the purpose of showing character or propensity . . . .

Thus, a review of the Treadaway/McFarlin line of cases also is instructive.

**A. Character Trait**

As stated above, this Court has expressed concern over whether it can find that the defendant has a character trait based on one other sexual assault.

**1. The Law Does Not Require Multiple Other Acts.**

As a threshold matter, Rule 404(C) does not require any particular number of other acts. In fact, there is no Arizona case law that mandates the finding of more than one other act. To the contrary, Arizona cases have upheld the admission of evidence of a single uncharged act. See, e.g., State v. Gates, 25 Ariz. App. 241, 542 P.2d 822, (App. 1975)(upholding admission of evidence of one prior incident of indecent exposure).

In State v. Dale, 113 Ariz. 212, 550 P.2d 83 (1976), charges of rape relating to two women were found to be properly joined. In discussing the Dale opinion, the Arizona Court of Appeals noted that evidence of one rape would have been admissible in the trial concerning the other rape “under the sexual propensities rationale of Taylor v. State.” State v. Henderson, 116 Ariz. 310, 316-17, 569 P.2d 252, 258-29 (App. 1977)(Citation omitted).

In State v. Arner, a child molestation trial, the Arizona Court of Appeals upheld the trial court’s admission of a single prior act that occurred three years earlier. 195 Ariz. 394, 397, 988 P.2d 1120, 1123 (App. 1999). Further, the Court noted that “[t]he State was not required to support the evidence of Defendant’s emotional propensity to commit aberrant sexual acts with expert testimony at trial.” Id.

Rule 404(C) does list as a factor to be considered “frequency of other acts.” Although no Arizona case law exists concerning this factor, case law does discuss ongoing behavior. However, this is in the context of a child molestation case in which the defendant has regular access to the child victim. See, e.g., State v. Rojas, 177 Ariz. 454, 460, 868 P.2d 1037, 1043 (App. 1993), (finding that “remoteness is not an issue . . . when similar molestations occur incessantly over a long period of time against the same victim”) *rev’d on other grounds*. Certainly, the same analysis cannot be applied to sexual assault cases due to the typical absence of a relationship between the perpetrator and the victim.

1. **The Court Does Not Have to Determine Whether the Defendant Possesses a Character Trait.**

Rule 404(C) states:

In a criminal case in which a defendant is charged with having committed a sexual offense . . . evidence of other crimes, wrongs, or acts may be admitted by the court *if relevant to show that the defendant had a character trait* giving rise to an aberrant sexual propensity to commit the offense charged.”

(Italics added). Subsection (1)(b) states that the court shall admit evidence of the other act only if it first finds that “[t]he commission of the other act *provides a reasonable basis to infer that the defendant had a character trait* giving rise to an aberrant sexual propensity to commit the crime charged.” (Italics added). Thus, the Court must determine whether the act is relevant[[1]](#footnote-1) to prove that the defendant had a character trait and whether the act provides a reasonable basis to *infer* that the defendant had a character trait. The jury then may consider the evidence, deciding what weight to give it. “Credibility determinations, the weighing of the evidence, and *the drawing of legitimate inferences* from the facts are jury functions, not those of a judge.” McClennen and Gottsfield, Rule 404(B) and 404(C): New Definitions; New Tests; and New Rules at 7 (citing Thompson v. Better-Bilt Aluminum Products, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992), (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986))). McClennen and Gottsfield also note that *the judge must find “a ‘reasonable basis’ for believing that the other act may permit an inference of propensity* to commit the crime charged.” Id. at 9-10 (italics added).

In fact, the Comment to Rule 404(C) suggests an outline for a jury instruction concerning such evidence:

At a minimum, the court should instruct the jury that the admission of other acts does not lessen the prosecution’s burden to prove the defendant’s guilt beyond a reasonable doubt, and that *the jury may not convict the defendant simply because it finds that he committed the other act or had a character trait* that predisposed him to commit the rime charged. (Italics and emphasis added).

Character trait evidence is not unique to Rule 404(C). Character trait evidence also is allowed, under certain circumstances, under Rule 404(a), Ariz. R. Evid. Under that Rule, the parties may offer evidence that the accused or the victim has a relevant character trait.

For example, in an assault trial, the defendant, under certain circumstances, may offer evidence to show that the victim has a character trait for violence. When such evidence is offered, the Court considers, among other factors, the relevancy of the evidence, whether the accused knew of the information at the time of the assault, and so forth. The Court does *not* make a finding that the victim has a character trait of being violent. Upon finding the evidence to be relevant and in compliance with other evidence rules, the Court admits the evidence to be considered by the jury. The jury then determines whether the evidence shows that the victim had the character trait.

This principle is evident in case law concerning the admission of other act evidence pursuant to Rule 404(C) and the Treadaway/McFarlin line of cases:

[A]s long as there is a “reasonable basis,” by way of expert testimony or otherwise, to conclude that the commission of the other act permits an inference that a defendant’s aberrant sexual propensity is probative, the evidence is admissible.

State v. Arner, 195 Ariz. 394, 396, 988 P.2d 1120, 1122 (App. 1999). In Arner, the trial court instructed the jury that it was *not* to “consider this evidence to prove the Defendant’s character or that the Defendant acted in conformity with that character.” The Arizona Court of Appeals found such an instruction improper:

[I]nstructing this jury not to consider other acts as evidence of character or that the evidence acted in conformity with that character was illogical. Id.

When evidence of other crimes or wrongful acts is admitted to prove sexually aberrant propensity, however, *it is admitted to prove character* and to show action in conformity therewith. Id. at 397, 988 P.2d at 1123, (italics added)(quoting State v. Salazar, 181 Ariz. 87, 90, 887 P.2d 617, 620 (App. 1994)).

In State v. Varela, the Arizona Court of Appeals stated that

When a prior sexual act is near in time and reasonably similar, the act speaks for itself and *provides the basis for the exercise of a judge’s discretion in determining relevancy.* 178 Ariz. 319, 323, 873 P.2d 657, 661 (App. 1993)(italics added). In those instances in which the offense charged involves the element of abnormal sex acts . . . there is sufficient basis to accept proof of similar acts near in time to the offense charged as evidence of the accused’s propensity to commit such perverted acts. State v. McDaniel, 119 Ariz. 373, 376, 580 P.2d 1227, 1230 (App. 1978), cert. denied, McDaniel v. Arizona, 439 U.S. 1119, 99 S. Ct. 1028, 59 L.Ed.2d 79 (1979).

**B. Remoteness**

In amending the rules of evidence to include Rule 404(C), the Arizona Supreme Court included a comment, which states, “[Rule 404(C)] does not contemplate any bright line test of remoteness or similarity . . ..”

The Arizona Court of Appeals has considered the remoteness issue in two cases since the addition of subsection C to Rule 404: In State v. Marshall, the Arizona Court of Appeals upheld the admission of acts which occurred 19 months apart. 197 Ariz. 496, 499, 4 P.3d 1039, 1042 (App. 2000)(no expert testified at a propensity hearing in this matter).

In State v. Arner, the Arizona Court of Appeals upheld the trial court’s admission of evidence that the defendant, who was accused of molesting a boy, had molested another boy

three years earlier. 195 Ariz. 394, 988 P.2d 1120 (App. 1999)(In Arner, the State called an expert to testify that the other act was recent enough to have predictive value and that the defendant “had a continuing propensity to commit similar acts.”).[[2]](#footnote-2)

Thus, under Rule 404(C), the Arizona Court of Appeals has upheld the admission of acts which occurred 3 years and also 19 months before the charged acts.

As stated above, the Comment to Rule 404(C) states that Rule 404(C) is

[I]ntended to codify and supply an analytical framework for the application of the rule created by case law in State v. Treadaway, 116 Ariz. 163, 568 P.2d 1061 (1977), and State v. McFarlin, 110 Ariz. 225, 517 P.2d 87 (1973). The rule announced in Treadaway and McFarlin and here codified is an exception to the common-law rule forbidding the use of evidence of other acts for the purpose of showing character or propensity . . . .

Thus, although the Rule does not “contemplate any bright line test of remoteness,” the time lapses allowed under the Treadaway/McFarlin line of cases also provide guidance:

In State v. McAnulty, the Arizona Court of Appeals upheld the admission of acts which occurred eight to ten years prior to the charged conduct. 184 Ariz. 399, 401, 909 P.2d 466, 468 (App. 1995).

In State v. Varela, the defendant was charged with the molestation and sexual exploitation of two nine year old girls. The trial court admitted evidence that the defendant also had molested his own daughter. The last act of molestation had occurred 18 months earlier.[[3]](#footnote-3) The Arizona Court of Appeals upheld admission of the evidence finding that the acts were “near in time to the crimes for which the defendant stands convicted.” The Court went on to note that “[t]he failure to provide reliable expert testimony on the emotional propensity issue is not fatal to the admissibility of the prior bad acts. They are sufficiently similar and near in time to provide their own relevance.” State v. Varela, 178 Ariz. 319, 324, 873 P.2d 657, 662 (App. 1993).[[4]](#footnote-4)

Therefore, under 404(C), as well as the Treadaway/McFarlin line of cases, an eight month time lapse is not considered remote in time.

**C. Similarity v. Identicalness**

As stated above, the Comment to Rule 404(C) states that “the rule does not contemplate any bright line test of remoteness or similarity.” It should be noted that the rule contemplates similarity, not identicalness. “An exact replication between the charged acts and the uncharged acts is not required to permit the admission of uncharged acts under the emotional propensity exception.” State v. Lopez, 170 Ariz. 112, 117, 822 P.2d 465, 470 (App. 1991). “Exact similarity between acts is not required.” State v. Weatherbee, 158 Ariz. 303, 304, 762 P.2d 590, 591 (App. 1988) (citing State v. Roscoe, 145 Ariz. 212, 700 P.2d 1312 (1984), cert. denied, 471 U.S. 1094, 105 S. Ct. 2169, 85 L.Ed.2d 525 (1985)). See also State v. Rojas, 177 Ariz. 454, 460, 868 P.2d 1037, 1043 (App. 1993)(upholding the admission of other acts evidence in a child molestation case that were not “replicas” but which were “similar enough”).

When a prior sexual act is near in time and *reasonably similar*, the act speaks for itself and provides the basis for the exercise of a judge’s discretion in determining relevancy.

State v. Varela, 178 Ariz. 319, 323-24, 873 P.2d 657, 661-62 (App. 1993)(upholding the trial court’s admission of “sufficiently similar” acts in child molestation case).

In State v. McDaniel, the defendant was charged with molestation of a child for performing oral sex on a seven year old *girl*. The trial court allowed a six year old *boy* to testify that the defendant had touched the boy’s genital area over the boy’s clothes. Another seven year old girl also testified that the defendant put his hand halfway under her dress but did not touch her. The Arizona Court of Appeals upheld the admission of the evidence finding that prior acts “do not have to be identical, but only similar in nature.” 119 Ariz. 373, 376, 580 P.2d 1227, 1230 (App. 1978).

State v. Grainge, “included a child other than the complaining witness and a *deviant act different than the charged offense*.” 186 Ariz. 55, 58, 918 P.2d 1073, 1076 (App. 1996) (italics added). However, the Arizona Court of Appeals found that “[t]he evidence nevertheless is probative of appellant’s emotional propensity for sexual behavior with teenage boys.” Id.

**CONCLUSION**

Submitted November \_\_\_\_\_, 2017.

BY\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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1. ”Relevancy” is defined in the Comment to Rule 404(C) as “that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged.” [↑](#footnote-ref-1)
2. In Arner, the Court of Appeals noted that Rule 404(C) was not in effect at the time of Arner’s trial. Nevertheless, the Court’s decision considered the admissibility under Rule 404(C), noting that “were we to remand this matter for a new trial, Rule 404(c) would apply.” 195 Ariz. at 397, 988 P.2d at 1123 n.1. In applying Rule 404(C) to its analysis, the Court noted that “expert testimony is no longer required to establish relevancy in all cases of dissimilar or remote acts.” Id. at 396, 988 P.2d at 1122. [↑](#footnote-ref-2)
3. The Court noted that 15 months prior to the present charges, the defendant had sent a letter to his daughter demanding that she be with him and threatening her if she refused. Varela, 178 Ariz. at 324, 873 P.2d at 662. [↑](#footnote-ref-3)
4. Although other crimes, wrongs, or acts often are referred to as “prior bad acts,” there is no requirement that the other act occur prior to the charged offense. See State v. Ashelman, 137 Ariz. 460, 464, 671 P.2d 901, 905 (1983). [↑](#footnote-ref-4)