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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)
) Arizona Supreme Court No. R-20-____
)
ARIZONA RULE OF)
EVIDENCE 404)
) PETITION TO AMEND ARIZONA
) RULE OF EVIDENCE 404(b)
)
)
_____)

**PETITION TO AMEND RULE 404(b) OF THE ARIZONA RULES OF
EVIDENCE**

Pursuant to Rule 28, Rules of the Supreme Court, the Advisory Committee on Rules of Evidence, by and through its Co-Chairs, the Honorable Sara Agne and the

Honorable Maria Elena Cruz, petitions the Court to amend Arizona Rule of Evidence 404(b), as reflected in the attachment hereto, effective January 1, 2021.

I. INTRODUCTION AND BACKGROUND

The Arizona Rules of Evidence were first adopted by this Court in September 1977, and were based on the Federal Rules of Evidence, which had been adopted in 1975. In the more than forty years since the adoption of the Arizona Rules of Evidence, the Federal Rules of Evidence have been amended on several occasions, but not all of these amendments have become part of the Arizona Rules of Evidence.

In June 2012, the Arizona Supreme Court established the Advisory Committee on Rules of Evidence with the following purpose:

The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012.

At its regular meeting on September 6, 2019, the Advisory Committee unanimously recommended that Arizona Rule of Evidence 404(b) be amended to be consistent with proposed amendments to Federal Rule of Evidence 404(b), which are expected to become effective December 1, 2020.

II. SUMMARY OF THE PROPOSED AMENDMENTS TO ARIZONA RULE OF EVIDENCE 404(b)

The proposed amendments are intended to conform Arizona Rule of Evidence 404(b) (the use of other crimes, wrongs, or acts to prove something other than character or propensity) to proposed Federal Rule of Evidence 404(b), while maintaining consistency between Arizona Rule of Evidence 404(b) and (c). Several Circuit courts had noted the expansive use of other acts evidence, which is sometimes—contrary to the Rule—admitted for purposes that seem to be little other than character or propensity. *See, e.g., United States v. Banks*, 884 F.3d 998, 1025-26 (10th Cir. 2018) (acknowledging the trend in other circuits to more carefully analyze other acts evidence, but rejecting the effort and admitting other drug crimes to prove “knowledge”); *see also United States v. Mehrmanesh*, 689 F.2d 822, 831-32 (9th Cir. 1982) (lamenting the lack of record made by the proffering party showing that the evidence was not admitted for propensity, but noting that precedent compelled affirmance of the admission of some because there was “at least some logical connection, however weak” and finding harmless the Rule 404(b) error in the admission of other).

The Federal Advisory Committee determined that Federal Rule of Evidence 404(b) could better protect criminal defendants’ rights by expanding prosecutors’ notice obligations and requiring prosecutors to “articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that

supports that purpose.” Federal rules bodies debated, but declined to impose, a definite time limit on the notice, and instead, the proposed federal rule requires the prosecutor to provide this notice “in writing sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence.” In addition, the federal amendments clarify certain portions of the text and headings.

After their September 2019 approval by the Judicial Conference of the United States, the proposed federal amendments are to be considered by the United States Supreme Court and eventually, Congress. If the proposed amendments proceed in due course, it is expected that the amendments to the federal rule would become effective December 1, 2020. The Advisory Committee recommends that Arizona Rule of Evidence 404(b) be amended to keep it in conformity with Federal Rule of Evidence 404(b).

The Advisory Committee has identified other areas of Rule 404(b) that may be ripe for amendment, including whether any enhanced notice requirements should be imposed in civil cases and/or expanded to require notice by defendants in criminal cases and whether the rule should be amended to clarify whose other crimes, wrongs, and acts are covered (*i.e.*, just the defendant’s or other witnesses’ as well). These issues go beyond the federal amendment, are still percolating, and are not part of this Petition.

III. SPECIFICS OF THE PROPOSED AMENDMENTS TO ARIZONA RULE OF EVIDENCE 404(b)

The primary purpose of the amendments to Federal Rule of Evidence 404(b) is to ensure fairness to criminal defendants by imposing a heightened notice requirement when prosecutors seek to admit evidence of other crimes, wrongs, or acts in criminal prosecutions. The proposed amendments to the Arizona rule serve these same laudatory goals, but also seek to align the time for disclosing the use of this other acts evidence under Arizona Rule of Evidence 404(b) with the time for disclosing character evidence under Arizona Rule of Evidence 404(c) (character evidence in sexual misconduct cases); that is, unlike the amended federal rule, the proposed Arizona rule does contain a definite time limit on the notice, and it is recommended that Arizona Rule of Evidence 404(b) remain consistent with Arizona Rule of Evidence 404(c). *See* ARIZ. R. EVID. 404(c)(3) (for criminal cases, cross-referencing Rule 15.1 of the Arizona Rules of Criminal Procedure and requiring the state to make disclosure “no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause”); *see also State v. Vitasek*, No. 1 CA-CR 12-0050, 2017 WL 525963, at *6 ¶32 (App. Feb. 9, 2017) (mem.) (highlighting one reason for proper and timely disclosure—the need for adequate jury instruction on the proper purpose(s) of such evidence) (cited for persuasive value only pursuant to Ariz. R. Supreme Ct. 111(c)(1)(C)). In addition, the Advisory

Committee proposes minor clarifications to the text and headings, both for readability and to better conform the Arizona rule to its federal counterpart.

The notice requirements of the proposed Arizona rule largely mirror those of the amended federal Rule. Now numbered like the federal rule, proposed Arizona Rule of Evidence 404(b)(3)(B) requires the state to “articulate in the disclosure the permitted purpose for which the state intends to offer the evidence and the reasoning that supports the purpose.” The differences between this proposal and the amended federal rule are twofold: the Arizona rule uses the word “disclosure” rather than “notice” and the word “state” rather than “prosecutor” to maintain conformity with the remainder of Arizona Rule of Evidence 404. Neither difference is substantive. In addition, proposed Arizona Rule of Evidence 404(b) repeats the phrase “other crimes, wrongs, or acts,” while the amended federal rule shortens the phrase to “such evidence.” That difference is not substantive, either, and the proposed Arizona language is in conformity with both the proposed revision to the Rule’s title and to the language used throughout the Rule.

Thus, under both the federal rule and the Arizona rule, the prosecution must identify the evidence that it intends to offer pursuant to the rule and must also articulate a permitted non-character purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. This

amendment requires the prosecutor to clearly set forth a relevant purpose for the evidence other than propensity or character.

Although the federal Advisory Committee declined to set forth a specific timeframe for the prosecutor's notice in Federal Rule of Evidence 404(b) cases, Arizona Rule of Evidence 404(c) already contains a specific time for the prosecutor's notice of use of character evidence in sexual misconduct cases. Proposed Arizona Rule of Evidence 404(b) imports this familiar timeframe from Rule 404(c) into 404(b). Newly renumbered, proposed Arizona Rule of Evidence 404(b)(3)(A) requires the state to:

make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause;

As noted, this language is absent from the federal rule, but maintains conformity with Arizona Rule of Evidence 404(c). To continue that conformity, the defendant's right of rebuttal from Arizona Rule of Evidence 404(c) is then noted in proposed Arizona Rule of Evidence 404(b)(3)(B), after the requirement that the state "articulate in the disclosure the permitted purpose for which the state intends to offer the evidence and the reasoning that supports the purpose."

Proposed Arizona Rule of Evidence 404(b) includes some other minor edits, clarifications, and renumbering. The heading for Arizona Rule of Evidence 404 heading capitalizes the word "not" in "Character Evidence Not Admissible to Prove

Conduct” to highlight the importance of the word. In addition, the heading, which currently contains the phrase “Other Crimes,” is amended to include the entire phrase—“Other Crimes, Wrongs, or Acts”—both to comport with the federal rule and to align the title of the Rule with the subheading of Arizona Rule of Evidence 404(b) (“Other crimes, wrongs, or acts”) and the substance of the Rule, which uses the phrase “other crimes, wrongs, or acts,” not merely “other crimes.”

Current Arizona Rule of Evidence 404(b) contains a single paragraph, while proposed Rule 404(b) contains three main subheadings, all retitled to conform to the federal rule, which contains subparts (b)(1)-(b)(3). Proposed Arizona Rule of Evidence 404(b)(1) is titled “*Prohibited uses*”; proposed Arizona Rule of Evidence 404(b)(2) is titled “*Permitted uses*”; and proposed Arizona Rule of Evidence 404(b)(3) is titled “*Notice in a criminal case.*” These are the same headings found in the federal rule. Additionally, for clarification, in proposed Arizona Rule of Evidence 404(b)(2), the word “[i]t” is replaced with “[t]his evidence.” The federal rule already uses the phrase “[t]his evidence.”

Finally, the Advisory Committee recommends a single comment to the 2021 amendment: “Rule 404(b) was amended effective January 1, 2021, to conform to the changes made to Federal Rule of Evidence 404(b) that took effect on December 1, 2020.”

ATTACHMENT¹

ARIZONA RULE OF EVIDENCE 404

Rule 404. Character Evidence ~~n~~Not Admissible to Prove Conduct; Exceptions; Other Crimes, Wrongs, or Acts

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused or civil defendant.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or evidence of the aberrant sexual propensity of the accused or a civil defendant pursuant to Rule 404(c);

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts.

(1) *Prohibited uses.* Except as provided in Rule 404(c) 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.

(2) *Permitted uses.* ~~It~~ This 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.

¹ Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

(3) Notice in a criminal case. In all criminal cases in which the state intends to offer evidence of other crimes, wrongs, or acts pursuant to this subdivision of Rule 404, the state shall:

(A) make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause; and

(B) articulate in the disclosure the permitted purpose for which the state intends to offer the evidence and the reasoning that supports the purpose. The defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause.

(c) Character evidence in sexual misconduct cases. In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of 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. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

- (i) remoteness of the other act;
- (ii) similarity or dissimilarity of the other act;

- (iii) the strength of the evidence that defendant committed the other act;
- (iv) frequency of the other acts;
- (v) surrounding circumstances;
- (vi) relevant intervening events;
- (vii) other similarities or differences;
- (viii) other relevant factors.

(D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).

(2) In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence.

(3) In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause. The defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause. In all civil cases in which a party intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the parties shall make disclosure as required by Rule 26.1, Rules of Civil Procedure, no later than 60 days prior to trial, or at such later time as the court may allow for good cause shown.

(4) As used in this subsection of Rule 404, the term "sexual offense" is as defined in A.R.S. Sec. 13-1420(C) and, in addition, includes any offense of first-degree murder pursuant to A.R.S. Sec. 13-1105(A)(2) of which the predicate felony is sexual conduct with a minor under Sec. 13-1405, sexual assault under Sec. 13-1406, or molestation of a child under Sec. 13-1410.

Comment to 2021 Amendment

Rule 404(b) was amended effective January 1, 2021, to conform to the changes made to Federal Rule of Evidence 404(b) that took effect on December 1, 2020.