

MEMORANDUM

TO: Ad Hoc Committee on the Arizona Rules of Evidence

FROM: Maricopa County Public Defender's Office

DATE: May 13, 2010

RE: Proposed Modifications to Arizona Rule of Evidence 404 and Related Provisions

INTRODUCTION

On May 11, 2010, a focus group was convened at the Maricopa County Public Defender's Office to discuss the Arizona Supreme Court's interest in modifying the Arizona Rules of Evidence to more closely mirror the Federal Rules of Evidence. Specifically, the group focused its discussion on ARE 404(c) and Arizona's rape-shield law and analyzed how replacing ARE 404(c) with FRE 412-415 would impact the defense of those accused of sexual offenses in Arizona. This memorandum summarizes the group's findings and recommendations.

SUMMARY

The focus group advised against the adoption of FRE 412-415 in Arizona. The group believed that adopting these federal rules would pose a threat to criminal defendants' constitutional rights, would needlessly prejudice victims of sexual crimes, would reduce judicial economy, would lead to highly-divergent judicial opinions, and would further complicate issues of admissibility in this area. However, the group recommended a number of changes that would improve the existing Arizona rules. These changes included: (1) adopting a rule of evidence based on A.R.S. § 13-1421 (Arizona's rape-shield law) that includes a "catch-all" provision which requires the admission of evidence needed to protect defendants' constitutional rights, a provision that modifies the rule of admissibility governing evidence of false allegations of sexual misconduct made by the victim against others, and that modifies the standard for admissibility of some types of prior victim sexual conduct, (2) expressly including the standard for admissibility of evidence in ARE 404(b) and ARE 404(c), (3) including a list of specific types of other sexual acts evidence that is admissible under 404(c) and clarifying the types of cases in which other sexual acts evidence is allowed, and (4) expressly including a hearing requirement in ARE 404(c).

DISCUSSION

THE SUPREME COURT SHOULD NOT ADOPT FRE 412-415

The focus group compared FRE 412 through 415 to the Arizona rules governing similar types of evidence and found that it would be inappropriate to adopt the federal rules in Arizona for a variety of reasons. Based on its analysis, the group agreed that, with a few exceptions, the current Arizona rules are superior to the federal rules because they better protect the interests of the parties to criminal proceedings, the public, and the courts.

First, the group was most concerned with the expansive way in which the federal rules define the types of prior sexual acts evidence permitted under FRE 413 and 414. For example, subsection (d) of FRE 413 defines the phrase “offense of sexual assault” as follows:

For the purposes of this rule and Rule 415, “offense of sexual assault” means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

- (1) any conduct proscribed by chapter 109A of title 18, United States Code;
- (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
- (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
- (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Fed. R. Evid. 413(d). Contrary to ARE 404(c), which requires that the prior act be “relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity *to commit the offense charged*,” Ariz. R. Evid. 404(c) (emphasis added), the federal rules do not require that the prior act be similar to the charged offense.¹ This result is not surprising because in passing the Violent Crime Control and Law Enforcement Act of 1994, which added FRE 413 and 414, Congress expressed its intent to create an expansive framework that would allow for the liberal admission of prior sexual acts evidence at the trials of defendants charged with sexual offenses. *See* 140 Cong. Rec. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Susan Molinari). Recognizing the expansive reach of FRE 413 and 414, the Judicial Conference of the United States sought to add a number of provisions to limit the scope of these rules, including a list of factors² that trial courts would be required to consider on the record before admitting other sexual acts evidence under FRE 413 or 414. JUDICIAL CONFERENCE OF THE U.S., REPORT TO CONGRESS ON RECOMMENDATIONS CONCERNING PUBLIC LAW 103-322 (Feb. 9, 1995). While the conference’s recommendations were not adopted by Congress, some of them were adopted by the Arizona Supreme Court. *See* Ariz. R. Evid. 404(c)(1)(C). By including the relevance factors suggested by the judicial

¹ While the federal appellate courts have widely recognized that Federal Rule of Evidence 403 applies to evidence sought to be admitted under FRE 413 and 414, *e.g.*, *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998), that rule does not necessarily require that the trial court find any significant similarity between the act charged and the prior bad act evidence sought to be admitted. *See* Fed. R. Evid. 403. Thus, many federal courts will admit evidence of any crime that qualifies as a sexual offense in any case where a defendant is charged with a sexual offense regardless of their similarity. *See, e.g.*, *United States v. Blue Bird*, 372 F.3d 989, 991-94 (8th Cir. 2004) (holding, in a case where the defendant was charged with having consensual sex with an underage girl, that evidence that the defendant had once tried to take his pants off and passed out on a thirteen-year-old girl while he was intoxicated, was properly admitted at trial under FRE 413).

² It should be noted that this list of factors is identical to that adopted by the Arizona Supreme Court in ARE 404(c)(1)(C).

conference and language requiring that the prior sexual act evidence be relevant to show a sexual propensity to commit *the act charged*, ARE 404(c) does a much better job of protecting criminal defendants' right to a fair trial under the Due Process Clause of the Fourteenth Amendment by limiting the admission of prior sexual acts evidence to the most relevant and similar past conduct.

In addition to the risk posed to criminal defendants' due process rights, the focus group also preferred ARE 404(c) to FRE 413 and 414 because ARE 404(c) does a much better job of fostering judicial efficiency, limiting appeals, and ensuring consistency among the trial courts' decisions. First, ARE 404(c) promotes judicial efficiency by including very strict pretrial discovery rules which help to avoid pretrial delay and to ensure that both parties have an opportunity to properly prepare to litigate any prior sexual act evidence at trial. Ariz. R. Evid. 404(c)(3). Second, because issues regarding evidence sought to be admitted under ARE 404(c) are generally dealt with in evidentiary hearings, judicial economy is improved as resolving these issues prior to trial improves trial efficiency. Third, even though Arizona has largely adopted the Federal Rules of Evidence and has repeatedly stated that Arizona is not bound by federal cases interpreting the Federal Rules of Evidence, *e.g.*, *State v. Terrazas*, 189 Ariz. 580, 582 (1997), the group was concerned that by adopting FRE 413 and 414 Arizona attorneys and courts would more frequently look to federal caselaw for guidance on this subject, which would only serve to further confuse Arizona's evidentiary rules. Fourth, because ARE 404(c) places more limitations on the types of prior acts evidence that may be admitted and expressly lists factors that must be considered by the trial court in admitting such evidence, there is less risk that the trial courts will error by admitting improper other sexual acts evidence, decreasing the number of criminal appeals and new trials required. Finally, by requiring that trial courts consider a list of factors on the record in admitting evidence under ARE 404(c), a better record is preserved for appeal and appellate courts considering such appeals are able to provide better guidance to the trial courts on how prior sexual acts evidence should be considered as the appellate courts may discuss and provide guidance on each enumerated factor.

A third major concern of the focus group was the standard of admissibility used by ARE 404(c) as opposed to FRE 413 and 414. ARE 404(c) demands that the State prove that the prior sexual act occurred and that the defendant committed it by clear and convincing evidence. *E.g.*, *State v. Aguilar*, 209 Ariz. 40, 47, ¶ 30 (2004). The standard to admitting such evidence in federal court is significantly lower. In such cases, the federal rules treat the issue of admitting other sexual acts as one of conditional relevance under FRE 104(b). *E.g.*, *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 154-55 (3d Cir. 2002). Under FRE 104(b), "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Fed. R. Evid. 104(b).

In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence.

United States v. Huddleston, 485 U.S. 681, 690 (1998). The problem with the approach taken by the federal courts is that while it allows the factfinder to primarily consider the question of whether the prior bad act occurred and the defendant committed it, it does little to protect the defendant from undue prejudice. As it is well settled that propensity evidence tends to be highly prejudicial to the defendant, *see, e.g., United States v. Turquitt*, 557 F.2d 464, 468 (5th Cir. 1977), the Arizona rule does a far better job of protecting the defendant from such prejudice by ensuring that significant evidence proves the prior act occurred before the jury hears it.

The group was also concerned about the Arizona Supreme Court adopting FRE 412, which limits the admissibility of evidence regarding alleged victims' past sexual conduct. Specifically, the group found that the Arizona version of the rule (A.R.S. § 13-1421) better protected the constitutional rights of criminal defendants because it provides a wider variety of evidence that may be admitted at trial. *Compare* A.R.S. § 13-1421, *with* Fed. R. Evid. 412. The focus group recognized that many of the acts listed in the Arizona statute would be allowed under the "catch-all" provision of FRE 412; however, it opined that by listing as many types of victim sexual conduct evidence in a rule as possible, more predictability is added to the trial process and trial courts are reminded that defendants' constitutional rights always trump evidentiary rules and statutes. The group also agreed that overtly listing the types of evidence that is admissible at trial fosters plea bargains and limits appeals by creating more consistent trial-court rulings. However, concerns were raised about the "clear and convincing" standard for admissibility, which some argued may violate defendants' constitutional rights, especially where defendants seeks to admit evidence of prior false allegations of sexual misconduct made by the victim against others. In such cases, the defendant is essentially forced to prove a negative—that a sexual act *did not* occur—by clear and convincing evidence, which is often an insurmountable burden.

Based on the foregoing points of concern, the focus group determined that adopting FRE 412 through 415 in Arizona would not be advisable. However, the following list of recommendations were offered to improve the current Arizona Rules of Evidence insofar as they relate to the admission of evidence of criminal defendants' prior sexual misconduct and of alleged victims' sexual conduct.

RECOMMENDATION #1: ADOPT AN ARIZONA RULE OF EVIDENCE BASED ON A.R.S. § 13-1421

Unlike the Federal Rules of Evidence, the Arizona Supreme Court has not included a rule of evidence governing rape-shield issues. Thus, the only legal provision governing the admission of such evidence is A.R.S. § 13-1421. However, the current framework could be improved in a number of ways by adopting an Arizona Rule of Evidence based on the statute.³ While it is recommended that the Supreme Court

³ Under article six, section five of the Arizona Constitution, the Arizona Supreme Court has "[p]ower to make rules relative to all procedural matters in any court." Ariz. Const. art. VI, § 5. While statutory provisions may create procedural rules, it is well-settled law in Arizona that statutory rules of procedure may be superseded by rules of the Arizona Supreme Court. *E.g., State v. Garza*, 128 Ariz. 8, 10 (Ct. App. 1981) ("In addition, we recognize that even though the power to make procedural rules is now vested in the supreme court pursuant to Ariz. Const., art. VI, § 5, statutory rules are deemed to be rules of court and remain in effect *until modified or suspended by rules promulgated by the supreme court.*" (emphasis added)). Thus, the supreme court could modify A.R.S. § 13-1421 insofar as procedural, and not substantive, provisions of that statute are concerned by promulgating a new rule of evidence. *See State v. Gilfillan*, 196 Ariz. 396, 403-04 (Ct. App. 2000) (holding that subsection (a) of A.R.S. §

largely adopt the language of A.R.S. § 13-1421 in drafting a new rule of evidence, three modifications were recommended by the focus group.

First, the focus group recommended that a “catch-all” provision, similar to that in FRE 412 be included in the Arizona rule. FRE 412’s “catch-all” provision states: “In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: . . . (C) evidence the exclusion of which would violate the constitutional rights of the defendant.” Fed. R. Evid. 412(b)(1)(C). Certainly it is true (and was recognized by the focus group) that to the extent an Arizona criminal defendant’s constitutional rights would be violated by a court’s refusal to admit evidence at trial under A.R.S. § 13-1421, the constitution will trump the statute and will require that the applicable evidence be admitted at trial. *See State v. Gilfillan*, 196 Ariz. 396, 403, ¶¶ 22-23 (Ct. App. 2000) (holding that the Arizona rape-shield law is constitutional, but suggesting that when A.R.S. § 13-1421 bars the admission of evidence that must be allowed to protect a defendant’s constitutional rights, an as-applied constitutional challenge to A.R.S. § 13-1421 will allow the defendant to offer the evidence at trial). However, the focus group posited that while not necessary, such a catch-all section would serve as a good reminder to judges that evidence facially barred by A.R.S. § 13-1421 may at times be required by the constitution. The group also noted that there is no downside to adding this language as it merely restates the rule of law on this issue.

The group’s second recommendation is that A.R.S. § 13-1421(A)(5) *not* be included in any version of the statute adopted as an Arizona Rule of Evidence. A.R.S. § 13-1421(A)(5) states that “[e]vidence of false allegations of sexual misconduct made by the victim against others” may be admitted at trial only if the judge finds the evidence relevant and material, if the possible prejudice does not outweigh the probative value of the evidence, and if the evidence sought to be admitted under this section is proved by clear and convincing evidence. A.R.S. § 13-1421(A)(5). The group argued that subsection (A)(5) should be withdrawn from the rule because that section does not limit “evidence of specific instances of the victim’s prior sexual conduct,” which is the aim of A.R.S. § 13-1421. *Id.* § 13-1421(A). Rather, subsection (A)(5) limits evidence of a victim’s prior *false allegations* about sexual conduct *that never actually occurred*. *Id.* When this fact is combined with the high standard of admissibility required by § 13-1421(B) (clear and convincing evidence), subsection (A)(5) often works to jeopardize defendants’ right to present a full and complete defense and to cross-examine the witnesses against them by placing an unfair evidentiary burden on defendants who seek to admit crucial evidence needed for the jury to weigh the credibility of the victim. *See, e.g., United States v. Stamper*, 766 F. Supp. 1396, 1400 (W.D.N.C. 1991) (holding that the jury was entitled to present evidence of the victim’s prior false allegations of sexual misconduct in order to protect the defendant’s constitutional right to present a defense where the victim’s credibility as a witness was a key part of the government’s case). The problem with subsection

13-1421, which lists the types of victim sexual act evidence allowed is constitutional because it currently does not conflict any current rules of evidence; however, the court also held that because the standard of proof of clear and convincing evidence set by subsection (b) is a substantive rule, not a procedural one, the supreme court has no authority to alter it); *cf. Barsema v. Susong*, 156 Ariz. 309, 314 (1988) (holding that a statutory provision that prohibited proof that a witness was covered by a particular professional liability insurance policy, which conflicted with the Arizona Rules of Evidence forbidding evidence of liability insurance and dealing with issues of relevancy violated Article III (separation of powers) and Article VI, section 5 of the Arizona Constitution, and was, therefore, invalid).

(A)(5) is that it effectively requires that the defense *prove a negative by clear and convincing evidence*—that sexual misconduct a victim alleged took place *never actually occurred*. Depending on the age of the false allegation, where it occurred, and who it involved, reaching this evidentiary burden may be impossible. Further, removing this provision from the rule would not prevent the court from precluding this type of evidence where the defense fails to offer evidence establishing that the prior false allegation occurred and was in fact false. See Ariz. R. Evid. 104(b) (requiring that when the “relevancy of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon . . . the introduction of evidence sufficient to support a finding of the fulfillment of the condition); see also *State v. Williams*, 183 Ariz. 368, 378 (1995) (“Evidence whose relevancy depends on the fulfillment of a condition of fact is admissible when a jury could reasonably believe from the evidence that the condition was fulfilled.”). Accordingly, the group deemed the removal of subsection (A)(5) to be appropriate.

The final recommendation the group offered regarding the adoption of a rule of evidence based on A.R.S. § 13-1421 is that the standard of admissibility be altered with respect to certain types of evidence sought to be admitted regarding alleged victims’ sexual history. While it was recognized that the standard of proof codified in A.R.S. § 13-1421(B) cannot be altered by a Supreme Court rule, see *Gilifillan*, 196 Ariz. at 404, ¶ 27, the group acknowledged that the Supreme Court could recommend such a change to the legislature or could effectively achieve this result by failing to include certain types of evidence barred by A.R.S. § 13-1421(A) in an adopted rule of evidence.⁴ The group recognized that the purpose of rape-shield statutes/rules is “to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.” Fed. R. Evid. 412 cmt. However, the group suggested that perhaps the Arizona statute tips the balance too far in favor of victims by establishing such a high evidentiary burden. Cf. Fed. R. Evid. 412. The focus group suggested that while a reduced standard of admissibility across the board would be ideal, lowering the standard of admissibility for evidence sought to be admitted under subsections (A)(3) through (A)(5) (assuming subsection (A)(5) was included in any adopted Arizona rule) would strike a fair balance among the competing interests at issue in such cases. Under such an approach, past sexual conduct of the victim sought to be admitted under (A)(1) and (A)(2) would still need to be proved by clear and convincing evidence, which would protect victims from the most intrusive attacks on their privacy, while evidence offered to suggest a motive to lie, to bring out previous false allegations, or to impeach evidence of the victim’s sexual conduct when the State has first raised the issue would tip the balance of protection slightly in favor of protecting defendants’ constitutional rights when the prior acts in question may be most difficult to prove, when witness credibility is of the utmost importance to a defendant’s case, and, in fairness, when the State has raised the issue first.

RECOMMENDATION #2: INCLUDING A STANDARD OF ADMISSIBILITY FOR SEXUAL OTHER ACTS EVIDENCE OFFERED UNDER ARE 404(b)-(c)

⁴ By failing to include particular types of evidence barred by A.R.S. § 13-1421(A) in a supreme court rule, the admission of such types of evidence would be controlled by ARE 104. Arguably, the supreme court could also create a standard of admissibility for other sexual acts evidence not specifically governed by any adopted supreme court rule; however, such an approach could lead to conflict with A.R.S. § 13-1421.

Currently, the standards of admissibility for evidence of other sexual acts sought to be admitted under either ARE 404(b)⁵ or 404(c) are controlled by the common law. *E.g.*, *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 30 (2004) (recognizing that “the trial court must determine that clear and convincing evidence supports a finding that the defendant committed the other act” before such evidence may be admitted under ARE 404(c)); *State v. Terrazas*, 189 Ariz. 580, 584 (1997) (holding that before evidence may be admitted under ARE 404(b), the “trial judge[] must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act”). The focus group suggested that since the standards of admissibility for evidence sought to be admitted under ARE 404(b) and (c) is well-established by Supreme Court jurisprudence, including the standard of admissibility directly in ARE 404 would add absolute clarity to the rule’s admissibility requirements, which would work to further eliminate the risk of confusion, improper trial-court rulings, and needless litigation on ARE 404(b) and (c) issues. This amendment would thus work to protect the constitutional rights of criminal defendants and would conserve judicial economy by clarifying issues for litigation at ARE 404 evidentiary hearings and reducing unnecessary appeals.

RECOMMENDATION #3: INCLUDING A LIST OF SPECIFIC TYPES OF OTHER SEXUAL ACTS EVIDENCE THAT IS ADMISSIBLE UNDER ARE 404(c) AND CLARIFYING THE TYPES OF CASES IN WHICH OTHER SEXUAL ACTS EVIDENCE IS ALLOWED

It is well settled by legal scholars that other acts evidence sought to be admitted to prove bad character or a propensity to act in a particular way tends to be minimally probative while carrying a large potential for prejudice. *See* 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE §§ 186, 190 (Kenneth S. Broun ed., 6th ed. 2006). In particular, it has been noted that the reasons for not allowing such evidence are particularly strong in the criminal context, especially in jury trials, where “the dangers of prejudice, confusion, and time-consumption outweigh the probative value.” *Id.* § 190; *see also United States v. Turquitt*, 557 F.2d 464, 468 (5th Cir. 1977) (recognizing that because of its tendency to invite the jury to render a verdict on impermissible propensity grounds, situations where the unfair prejudice caused by the prior acts evidence substantially outweighs its probative value are very likely to arise). However, contrary to the general rule that such evidence is inadmissible at trial, *e.g.*, Ariz. R. Evid. 404(a), ARE 404(c) and FRE 413 and 414 carve out exceptions to this general rule in the case of other sexual crimes evidence. Ariz. R. Evid. 404(c); Fed. R. Evid. 413-414. These exceptions are “particularly difficult to justify” because they “rest[] either on an unsubstantiated empirical claim that one rather broad category of criminals are more likely to be repeat offenders than all others or on a policy of giving the prosecution some extra ammunition in its battle against alleged sex criminals,” and thus not on any firmly rooted evidentiary ground. *Dix, supra*, § 190. In fact, Congress, in passing the Violent Crime Control and Law Enforcement Act of 1994, which added FRE 413 and 414, specifically expressed its intent to remove prior sexual acts evidence from the standard exclusionary provisions of FRE 404 in

⁵ As the focus group was concerned with other sexual acts evidence that may be admitted in general, *State v. Garner*, which held that “[i]n a case involving a sex offense committed against a child, evidence of a prior similar sex offense committed against the same child is admissible to show the defendant’s lewd disposition or unnatural attitude toward the particular victim” *under ARE 404(b)*, was also discussed. 116 Ariz. 443, 447 (1977). Based on this rule, the focus group found that it would be beneficial expressly include the clear and convincing standard of admissibility in ARE 404 in regards to both subsection (b) and subsection (c).

order to protect “the public from rapists and child molesters.” 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Susan Molinari). Congress cited that there was “a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense” because similar sexual acts show “an unusual disposition of the defendant . . . that simply does not exist in ordinary people”—a view that has been largely undercut by scholars, see DIX, *supra*, § 190—and because sexual assault cases often rely on the testimony of child victims, whose credibility is readily attacked. 140 Cong. Rec. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Susan Molinari). To this end, Congress passed FRE 413 and 414, which are incredibly broad in the types of prior sexual acts evidence they allow. See Fed. R. Evid. 413(d), 414(d). Recognizing that perhaps Congress went too far, the Judicial Conference of the United States recommended a number of modifications to the bill that would have clarified the rules and ensured that only the most relevant prior sexual acts evidence was admitted. JUDICIAL CONFERENCE OF THE U.S., REPORT TO CONGRESS ON RECOMMENDATIONS CONCERNING PUBLIC LAW 103-322 (Feb. 9, 1995). Among their recommendations was the addition of a list of factors trial courts would be required to consider in admitting other sexual acts evidence at trial. *Id.* This list is identical to that included by the Arizona Supreme Court in ARE 404(c)(1)(C). Compare *id.*, with Ariz. R. Evid. 404(c)(1)(C). While Arizona did a great deal to protect the constitutional right of criminal defendants to a fair trial by placing a number of limitations on the admission of prior sexual acts evidence in ARE 404(c) that are not contained in FRE 413 and 414, two minor changes to the rule could add much needed clarification.

First, ARE 404(c) could be improved by clarifying the definition of the term “sexual offense” in subsection (c)(4). While certainly the definition of the term in the Arizona rule is much more limited than it is in the related federal rules,⁶ recent Arizona appellate decisions have sought to expand the definition. Specifically, in *State v. Williams*, the court of appeals held that the definition of “sexual offense” in ARE 404(c) “does not necessarily preclude a definition more expansive than that provided in A.R.S. § 13-1420.” 209 Ariz. 228, 236, ¶ 32 (Ct. App. 2004). This holding poses a significant threat to the constitutional rights of criminal defendants who may not be able to prevent the admission of minimally probative but highly prejudicial other sexual acts evidence that is beyond the scope of the types of evidence the supreme court sought to include in drafting ARE 404(c)(4). As ARE 404(c), like FRE 413 and

⁶ FRE 413 defines “sexual assault” as:

a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Fed. R. Evid. 413.

414 represent exceptions to the general rule that propensity evidence should not be admitted at trial, the court, in drafting such an exception, has a duty to clearly define the cases in which such evidence is allowed. Further, *Williams* threatens to make trial court decisions on 404(c) issues far less predictable and consistent by allowing trial judges to create their own definition of phrase “sexual offense.” Accordingly, the focus group recommended that the Supreme Court add specific language to ARE 404(c)(4) stating that the term “sexual offense,” as defined in subsection (c)(4), is strictly limited to the crimes referenced in that subsection, and that to the effect that any judicial precedent, including *State v. Williams*, suggests otherwise, it is invalid.

Second, the focus group recommended that the Supreme Court modify ARE 404(c) in regards to the types of prior acts that may be admitted under the rule at trial. Currently, ARE 404(c) provides that “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.” Ariz. R. Evid. 404(c) (emphasis added). In order to control the types of prior acts that are admitted, the rule lists a number of factors that the trial court must consider on the record, including the “similarity or dissimilarity of the other act.” *Id.* 404(c)(1)(C)-(D). These factors, which the Judicial Conference of the United States suggested be included in FRE 413 and 414, help to foster consistent rulings by trial judges, preserve a great record for appeal, and help to ensure that other sexual acts evidence sought to be admitted under ARE 404(c) is actually relevant to the question of whether “the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.” See Ariz. R. Evid. 404(c). However, there is concern that Arizona courts, some of which have read ARE 404(c) in an overly expansive manner, could take the rule too far and allow prior sexual acts evidence that bears little if not no relevance to the charged offense. *Cf. State v. Williams*, 209 Ariz. 228, 236, ¶ 32 (Ct. App. 2004) (holding that even though indecent exposure is not expressly defined as a sexual offense in ARE 404(c)(4), that subsection “does not necessarily preclude a definition more expansive than that provided in A.R.S. § 13-1420”). Accordingly, the focus group supported the inclusion of language that gives trial judges additional guidance as to the specific types of prior crimes, wrongs, or acts that may be admitted under ARE 404(c). Specifically, the group recommended that the Supreme Court replace that language in ARE 404(c) that “evidence of other crimes, wrongs, or acts may be admitted by the court if relevant . . .” with the following language: “evidence of other crimes, wrongs, or acts *that constitute a sexual offense as defined in subsection (4)* may be admitted by the court if relevant . . .” While this change would still provide the trial courts with some discretion to determine what prior sexual acts should be admitted in a particular case, it would better ensure consistency and predictability at the trial-court level and would more effectively protect the fair trial rights of criminal defendants by placing additional restraints on the types of evidence that may be admitted under ARE 404(c).

RECOMMENDATION #4: ADD A HEARING REQUIREMENT TO THE LANGUAGE OF ARE 404(b) AND (c)

While A.R.S. § 13-1421 has a hearing requirement before evidence of other sexual conduct by an alleged victim may be admitted, ARE 404(b) and (c) do not expressly mandate that an evidentiary hearing be held before other sexual acts evidence is permitted under either subsection. A.R.S. § 13-1421; Ariz. R. Evid. 404(b)-(c). While Rule 404(c) does not itself contain any hearing requirement, Ariz. R. Evid. 404(c), evidentiary hearings have routinely been held to admit evidence under this rule based on the Arizona

Supreme Court decision of *State v. Aguilar*, 209 Ariz. 40, 49-51, ¶ 33-38 (2004) (en banc). The argument that *Aguilar* demands an evidentiary hearing is premised on language in that case suggesting that the trial court erred in admitting evidence under ARE 404(c) because the record was insufficient for the court to find by clear and convincing evidence that the prerequisites for the admissibility of the other sexual acts evidence demanded by ARE 404(c) were met. *See id.* However, a recent court of appeals case, *State v. LeBrun*, stated that a trial court need not hold an evidentiary hearing before admitting evidence under ARE 404(b) or (c). 222 Ariz. 183, 186, ¶ 10 (Ct. App. 2009). In light of *State v. LeBrun*, the focus group suggested that a hearing requirement be expressly added to ARE 404(b) and (c). The rationale of the focus group was that because the evidence sought to be introduced under both subsections poses a significant risk to criminal defendants' due process rights and because the other acts evidence must be proved by clear and convincing evidence, a hearing requirement must be maintained if the defense is to have any meaningful opportunity to challenge the other sexual acts evidence at issue in a particular case, both by cross examining any possible witnesses and by having an opportunity to introduce conflicting evidence. Such a rule is crucially important to the defense as once other sexual acts evidence is before the jury, even if the defense may attack such evidence at trial, the danger of unfair prejudice posed by such evidence will have already been realized and will likely be uncorrectable absent a new trial, which will decrease judicial efficiency.