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A FAIR TRIAL FOR THE WORST OF CRIMES
by
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In the past twenty years, crimes of sexual abuse and sexual assault have been widely reported and discussed in both the American media and society. Instances such as the sexual abuse scandal in the Catholic Church and the rise in inappropriate relationships between teachers and their students have changed the way American's view individuals charged with sexual offenses and the ways in which society interacts with sexual predators. As a result of these changes, society began to view individuals who have committed sexual offenses as predators deserving special attention and monitoring from society. This has resulted in the creation of sex offender registries that enable citizens to easily identify neighbors who have been convicted of sexual offenses as well as parents being reminded to more closely monitor who their children are left alone with or speak to on the internet. With so much attention being turned to the monitoring of individuals convicted of sexual abuse and preventing sexual abuse, the courts of the United States reexamined the manner in which defendants charged with sexual crimes are tried. The federal courts have opened the door to the greater admissibility of prior incidences of sexual misconduct in reaction to the greater attention paid to sexual offenders. In contrast, Michigan has refused to handle the admission of prior bad acts of sexual misconduct in a manner different from the admission of prior bad acts in any other case. By resisting the urge to single out sexual crimes, Michigan has preserved the rights of criminal defendants while recognizing that prior acts of sexual misconduct can and should be admitted but only under certain circumstances where it can be assured that the defendant may still receive a fair trial.

In order to ensure that every defendant is afforded a fair trial, the prior bad acts of a defendant have been inadmissible to show that the defendant has the character to commit similar bad acts.¹ This type of propensity evidence has traditionally been kept out of the courtroom so that it can be ensured that the jury is only basing its decision on the facts of the crime for which

the defendant is charged. This protection has been enshrined in Federal Rule of Evidence (FRE) 404(b). FRE 404(b) states, “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 In essence, this rule prevents the admission of evidence that the defendant has committed acts or crimes similar to the crime for which the defendant has been charged at the current trial. The fear is that the jury will look past the evidence presented in the current trial and base any finding of guilt on evidence that the defendant has committed a similar bad act or crime in the past and therefore most likely committed that crime again.

The traditional approach to propensity evidence

FRE 404(b) however allows evidence of prior bad acts to be admitted if those acts are admitted for a narrow purpose.³ Specifically, evidence of prior bad acts may be admitted to show, “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”⁴ In order for evidence to be admissible under one of these exceptions, the proponent of the evidence must first provide opposing counsel with notice that evidence of a prior bad act will be offered.⁵ This notice requirement reflects the value of evidence regarding a prior bad act. The drafters of 404(b) sought to ensure that a defendant would have ample opportunity to object to any evidence regarding a prior bad act. These narrow exceptions to the general prohibition against the admission of prior bad acts work in tandem with FRE 401 and FRE 403. Namely, the admission of prior bad acts for a permissible 404(b) purpose must first be relevant to a material issue at trial.⁶ Second, the admission of the prior bad act must be more probative than prejudicial.⁷ The interaction between these three federal rules ensured that any evidence of a defendant’s prior bad acts received a careful vetting by the court prior to the admission of any evidence. First, the evidence must be offered for a permissible purpose.⁸

Second, the evidence must be relevant to a material issue at trial.⁹ Finally, the admission of the evidence must be more probative than prejudicial.¹⁰

The introduction of FRE 413, 414 and 415

However, this interaction between FRE 401, 403, and 404(b) changed on July 9, 1995. On that day, FRE 413, 414 and 415 became effective and radically changed the manner in which prior bad acts are admitted in federal court with regards specifically to sexual crimes.¹¹ First, FRE 413 governs the admission of prior bad acts or similar crimes with regards to sexual assault cases.¹² FRE 414 governs the admission of prior bad acts in child molestation cases.¹³ Finally, FRE 415 governs the admission of prior bad acts of sexual assault or child molestation in civil cases.¹⁴ These three rules changed the admission of prior bad acts significantly with regards to only one type of prior bad act, those involving sexual misconduct. This was the first time that any specific criminal act had been singled out for special evidentiary treatment by the Federal Rules of Evidence.

The most significant change can be seen in the plain language of the newly enacted rules. Commentators have taken note of the danger that the language used in FRE 413-415 posed to the other rules of evidence.¹⁵ The plain language of the rules serves as the most accurate indicator when determining the types of evidence that Congress sought to make admissible. First, FRE 413 states, “evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.”¹⁶ This language is also echoed by FRE 414 and 415.¹⁷ This language is a dramatic change from the language used in FRE 404(b). Specifically, FRE 404(b) states, “It (evidence of prior bad acts) may, however, be admissible for other purposes.”¹⁸ This language indicates the importance of ensuring that any evidence of prior bad acts is considered for relevancy and the

prejudicial impact on the defendant. However FRE 413 states that any evidence of a prior sexual bad act “is admissible” as long as the evidence is relevant.¹⁹ This language seemingly strips away the presumption that propensity evidence will not be admissible unless there is a clear non-propensity purpose for the evidence.²⁰ Based on the plain language of the FRE 413, 414 and 415, defendants charged with sexual assault or abuse in a criminal federal proceeding seem to have a harder challenge to face in order to keep evidence of prior bad acts out of evidence because there seems to be a presumption in the plain language that the evidence “is admissible.”²¹

In order to understand the changes made to the Federal Rules of Evidence, it is instructive to consider how the new rules were passed.²² Congress alone has the power to create and enact new rules regarding the admittance of evidence in federal court and the general running of the federal court system.²³ Congress affirmed this right when FRE 413, 414 and 415 were passed as part of the Violent Crime Control and Law Enforcement Act of 1994.²⁴ In addition to the new federal rules of evidence, the Act also included measures such as a ban on assault weapons and grants for local and state law enforcement agencies.²⁵ The new rules were not the main focus of the legislation even though they radically changed the admission of prior bad acts in the federal courts.

The Judicial Conference of the United States strongly responded to the amendments to the Federal Rules of Evidence when the Violent Crime Control and Law Enforcement Act of 1994 were passed.²⁶ The report of the Judicial Conference stated, “After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules.”²⁷ The conference first stated its belief that amendments were not necessary because the admission of prior bad acts was already contemplated and allowed in certain

circumstances by FRE 404(b).²⁸ The report also addressed the substance of the amendments that had been proposed:

“Furthermore, the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.”²⁹

The report also pointed out the difficulty in offering evidence of prior bad acts from a procedural perspective.³⁰ “In addition, the advisory committee concluded that, because prior bad acts would be admissible even though not the subject of a conviction, mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence.”³¹

The report itself of the Judicial Conference was very unique. “It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice.”³² This aspect of the report, namely the near unanimity of dissent except for the representative of the Department of Justice, reflects the political nature of the amendments. The only supporter of the amendments was acting on behalf of the administration that had sought the amendment and signed the Violent Crime Control and Law Enforcement Act of 1994. The other members of the conference were able to respond and evaluate the amendments to the Federal Rules of Evidence without having to take into consideration politics or any other consideration that would have influenced the Department of Justice. Even though the amendments were opposed on both procedural and substantive grounds by the Judicial Conference of the United States, the amendments were enacted as passed.

The practical application of FRE 413, 414 and 415

The federal courts have not interpreted the amendments to the federal rules entirely consistent with the plain language of the amendments. Although FRE 413 states that evidence of prior sexual bad acts “is admissible”, the courts have not held that this language completely overrides the other evidentiary protections created by the Federal Rules of Evidence.³³ The Sixth Circuit, which controls the federal courts in the state of Michigan, recently laid out the procedures by which evidence of prior sexual bad acts should be admitted at trial. In *United States v. Seymour*, the defendant was charged with sexually abusing his niece.³⁴ The federal prosecutor sought to introduce evidence that the defendant had sexually assaulted three other women previously.³⁵ At trial, the evidence was admitted, and the judge refused to provide the jury with any sort of limiting instruction regarding the evidence of prior bad acts.³⁶ In analyzing the admission of the evidence, the court first discussed the relationship between FRE 413 and 414. The court held that FRE 413, under which the evidence was admitted at trial, is broad enough to cover both instances of sexual misconduct against adults as well as children.³⁷ Furthermore, both rules indicate that neither rule should be used to limit the admission of evidence under any other rule.³⁸ The court then discussed the relationship between FRE 413 and 403. The court held that the trial court appropriately applied the 403 balancing test to the admissibility of the evidence.³⁹ “Rule 413 was enacted as an exception to the default position set forth in Rule 404(b) that propensity evidence is presumptively more prejudicial than probative.”⁴⁰ The court held that this is the only other hurdle that evidence of past sexual misconduct must overcome in order to be admitted in federal court.⁴¹ Yet, outside of examining whether the evidence was unduly prejudicial, the court did not look to determine if the evidence met any of the non-propensity purposes listed in FRE 404(b). The court also did not even

discuss whether the court erred when it failed to provide any limiting instruction to the jury regarding the proper non-propensity use of the evidence once it was admitted.

The state of Michigan uses rules of evidence that echo the Federal Rules of Evidence in order to create consistency and uniformity between the Michigan Rules of Evidence (MRE) and the Federal Rules of Evidence.⁴² However, the state of Michigan has not adopted Federal Rules of Evidence 413, 414 and 415. The Michigan Supreme Court has consistently objected to the addition of any amendments to the Michigan Rules of Evidence if those rules apply only to one specific type of crime. Recently in October of 2004, the Michigan Supreme Court rejected an amendment to include prior bad acts of domestic abuse to the exceptions listed in MRE 404(b).⁴³ Justice Taylor in concurrence took notice of the danger that can take place when the desire to prosecute a particular crime is the motivation for amending evidentiary rules. “As is customary at a time of such zeal, reformers want the courts to gut traditional evidentiary protections so as to facilitate prosecutions. While I am as horrified by the specter of domestic abuse as any, I do not feel it, *or any other imaginable domestic peril*, justifies the wholesale dumping of our traditional defendant protection rules.”(emphasis added)⁴⁴ Justice Young went further in concurrence to directly address the crime specific amendments that had previously been passed by Congress. “While the Congress has recently adopted crime specific exceptions to the general prohibition against propensity evidence, see FRE 413 and FRE 414, I am unconvinced that the principles under girding MRE 404 ought to be undercut by specific classes of criminality.”⁴⁵ Justice Young pointed out the utility of MRE 404 in refusing to add crime specific evidentiary exceptions. “Consequently, until we conclude that a defendant’s guilt should be decided as much on past conduct as on current charged conduct, I believe that MRE 404 serves a vital purpose protecting the interests of all concerned in the pursuit of justice.”⁴⁶ As the Michigan Supreme Court has

pointed out, crime specific exceptions to the traditional rules of evidence create the danger of eroding a defendant's right to a fair trial by allowing propensity evidence to inappropriately taint the evidentiary pool. The Supreme Court of Michigan has correctly refused to add any crime specific exception, particularly an exception for sexual assault or molestation, to the Michigan Rules of Evidence. Michigan courts should continue to resist amendments to the Michigan Rules of Evidence and judge the admissibility of all propensity evidence under the rubric of MRE 404(b).

Admission of prior bad acts in Michigan

Following the passage of the Michigan Rules of Evidence, MRE 404(b) was enforced by the courts by looking at a four prong test set forth in *People v. Golochowicz*.⁴⁷ This test required:

“First, there must be substantial proof that the defendant committed the other act sought to be introduced. Second, there must be some ‘special quality or circumstance’ of the other act which tends to prove some issue or fact other than the defendant’s bad character. Third, the other acts evidence must be material to the case, in the sense that the issue or fact proved by the proffered evidence must be in issue, or probative of some matter in issue. Finally, the probative value of the evidence sought to be introduced must not be outweighed by the potential for unfair prejudice to the defendant.”⁴⁸

In *People v. Engelman*, the Michigan Supreme Court applied this test.⁴⁹ The defendant was charged with third degree sexual conduct for taking sexually explicit photographs of the victim.⁵⁰ The prosecutor argued that evidence of prior misconduct involving explicit photographs should be admitted to show a common modus operandi of the defendant.⁵¹ The court held that the photographs alone did not establish a common plan or modus operandi because the photographs of past misconduct did not by themselves establish that the defendant had a common plan by which to carry out sexual misconduct.⁵² In addition to holding that the prior bad acts had no proper purpose under MRE 404(b), the court also stressed the danger posed by the admission of

prior bad acts. “We conclude, however, by acknowledging that the proper and improper purposes of other acts evidence are so variable, the state of proofs regarding materiality so infinite, and the precedents and commentators so inconsistent, that a rule of minimalism is the best rule of thumb in this area.”⁵³ The court took note of the particular dangers associated with evidence of prior bad acts. The recognition of the dangers associated with evidence of prior bad acts has been instrumental in helping craft a careful jurisprudence in Michigan when considering the admittance of prior bad acts.

The four-part Vandervliet test

The modern framework for considering the admission of prior bad acts in Michigan was set forth by the Michigan Supreme Court in *People v. Vandervliet*.⁵⁴ In that case, the defendant was employed as a case manager assigned to assisting developmentally disabled young men.⁵⁵ The defendant was charged with second-degree criminal sexual conduct with regards to three separate victims.⁵⁶ The prosecutor sought to admit testimony in each proceeding regarding the defendant’s conduct with the other two victims pursuant to MRE 404(b).⁵⁷ The trial court refused to allow the testimony, and the trial court’s decision was affirmed by the Michigan Court of Appeals.⁵⁸ In addressing the issue, the Michigan Supreme Court looked to the decision of the United States Supreme Court in *Huddleston v. United States*.⁵⁹ The US Supreme Court in *Huddleston* considered the admission of prior bad acts under the rubric of FRE 404(b) prior to the amendment to the Federal Rules of Evidence that added FRE 413, 414 and 415.⁶⁰ In *Huddleston*, the court pointed out the purpose behind 404(b). The rule “generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor’s character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge.”⁶¹

The Michigan Supreme Court interpreted the admission of evidence pursuant to MRE 404(b) in a manner that would be consistent to FRE 404(b) prior to the passage of FRE 413-415.⁶² Although the admittance of prior bad acts involving sexual misconduct are no longer governed by FRE 404(b), the state of Michigan evaluates prior bad acts of sexual misconduct in a manner consistent with FRE 404(b). The Michigan Supreme Court set forth a four part test to determine whether prior bad acts could be admitted pursuant to 404(b). First, “the prosecutor must offer the other acts evidence under something other than a character to conduct theory.”⁶³ “Second, as previously noted, the evidence must be relevant under Rule 402, as enforced through Rule 104(b), to an issue or fact of consequence at trial.”⁶⁴ “Third, the trial judge should employ the balancing process under Rule 403.”⁶⁵ “Finally, the trial court, upon request, may provide a limiting instruction under Rule 105.”⁶⁶ This four part test recognized the importance and weight of testimony regarding prior bad acts. The Michigan Supreme Court realized that MRE 404(b), alone, was not intended to govern the admission of prior bad acts. Rather, the plain language of 404(b) was just a first step to determining whether prior bad acts should be offered.

In the case of the defendant in Vandervliet, the court first considered whether the evidence of prior bad acts could be offered for a non-propensity purpose.⁶⁷ The court held that evidence of other instances of molestation could be offered to show that the defendant’s conduct did not have an innocent intent.⁶⁸ The evidence was also found to be relevant to the issue of intent because the defendant had entered a plea of not guilty which acted as a general denial to all charges.⁶⁹ Therefore, the prosecution had to prove every element of the crimes charged including the intent of the defendant to commit the crime.⁷⁰ The Supreme Court then remanded the case to the trial court to determine whether the testimony was admissible under Rule 403.⁷¹ The court stated that “Rule 403 determinations are best left to a contemporaneous assessment of

the presentation, credibility, and effect of testimony, we remand this case to the trial court for further proceedings.”⁷² The Supreme Court emphasized the importance of the MRE 403 determination when determining the admission of prior bad acts by remanding the case for the trial court to determine whether or not the evidence was unduly prejudicial. This test, for determining the admissibility of prior bad acts pursuant to MRE 404(b), was set forth by the Michigan Supreme Court a year before FRE 413, 414, and 415 were added to the Federal Rules of Evidence. Following the introduction of FRE 413, 414, and 415, the Michigan Supreme Court would have an opportunity to reconsider the process for determining the admissibility of prior bad acts.

The importance of MRE 403 to MRE 404(b)

In *People v. Crawford*, the defendant was charged and convicted of possession with intent to deliver 50 to 225 grams of cocaine.⁷³ At trial, evidence regarding the defendant’s prior conviction for a drug crime was admitted over the defendant’s objection.⁷⁴ The judge, however, agreed to and did in fact provide a limiting instruction to the jury regarding the defendant’s prior conviction.⁷⁵ When considering whether the evidence was admitted properly, the Supreme Court first looked back to its decision in *Vandervliet*.⁷⁶ “In that case (*Vandervliet*), we rejected a rigid, bright-line approach to other acts evidence and directed the bench and bar to employ the evidentiary safeguards already present in the Rules of Evidence, as identified by the United States Supreme Court in *Huddleston*.”⁷⁷ The court held in this case that the prosecutor had not shown that the evidence of the prior conviction could be admitted under any appropriate exception to MRE 404(b).⁷⁸ The court based this ruling on the lack of factual similarity between the prior conviction and the case at trial.⁷⁹ Previously, the defendant had been convicted when he had sold cocaine to an undercover police officer.⁸⁰ In this case, the defendant was discovered

to be in possession of cocaine following a routine traffic stop.⁸¹ This lack of a factual connection between the charged crime and prior bad act is essential to determining whether the prior bad act is relevant to the current trial.

Although the prior conviction at issue failed to meet the first element of the test set forth in *Vandervliet*, the court went on to discuss the importance of MRE 403 when determining the admissibility of prior bad acts. The court pointed out that even if there was a proper purpose for the evidence under MRE 404(b), the evidence should not be admitted because it failed under MRE 403.⁸² “Rule 403 does not prohibit prejudicial evidence; only evidence that is unfairly so. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. In the context of prior bad acts, that danger is prevalent.”⁸³ The Supreme Court rightly recognized the importance of keeping away from the jury evidence that is unduly prejudicial no matter how probative the evidence is.

Although *Crawford* did not involve prior bad acts that would have fallen under FRE 413, 414, or 415, the importance placed by the Michigan Supreme Court in applying MRE 403 highlights the superior approach Michigan takes to evaluating the admissibility of prior bad acts. As discussed previously, FRE 413 states that evidence or prior bad acts that are relevant are admissible.⁸⁴ The only other barrier to the admission of the evidence is whether the evidence is unduly prejudicial against the defendant. This requirement however is not included in FRE 413. This requirement comes from the language of FRE 403 as discussed previously. It is possible that a court could one day hold that the plain language of FRE 413 controls and FRE 403 is not implicated by the admission of evidence pursuant to FRE 413. In contrast MRE 404(b), which governs the admission of prior sexual bad acts in Michigan, only states that evidence “may” be admissible if offered for a permissible purpose.⁸⁵ This language, as interpreted by the Michigan Supreme

Court, requires the evidence not only to be relevant but also to be not unduly prejudicial to the defendant.⁸⁶

Refinement of Vandervliet by Sabin

The Michigan Supreme Court has clarified and refined the test set forth in Vandervliet through subsequent case law. In *People v. Sabin*, the Michigan Supreme Court clarified both the differences between the Michigan approach to the admittance of prior bad acts involving sexual misconduct and the federal approach as well as the importance of determining the relevancy of the prior bad act.⁸⁷ The defendant in Sabin had been charged with first-degree criminal sexual conduct.⁸⁸ During the trial, the prosecution attempted to introduce testimony from the defendant's stepdaughter that the defendant had previously sexually abused her for a period of eight years.⁸⁹ The stepdaughter also testified regarding another incident where she alleged the defendant molested his daughter's from a previous marriage.⁹⁰ The trial court allowed the testimony to be entered into evidence under the theory that the testimony showed the defendant had a scheme or plan to sexually molest young women who are members of his household.⁹¹ On appeal, the defendant challenged the testimony on the basis that it was not offered for an appropriate purpose pursuant to MRE 404(b) and even if the purpose of the evidence was proper, the evidence was unduly prejudicial pursuant to MRE 403.⁹²

First, the Michigan Supreme Court instructed courts to continue using the test set forth in Vandervliet to evaluate evidence offered pursuant to MRE 404(b).⁹³ The court then discussed the relevancy of the testimony offered and how the rules in Michigan differed from those of other jurisdictions.⁹⁴ The court took note of the "lustful disposition" exception that many states had added to the listed exceptions found in FRE 404(b) in order to allow greater admissibility of evidence involving prior bad acts of sexual misconduct.⁹⁵ The court then pointed out that

Michigan does not have any rule of evidence that is analogous to FRE 414 which deals specifically with sexual misconduct cases involving children.⁹⁶ The Michigan Supreme Court also noted, in passing, reluctance to adopt rules in Michigan similar to FRE 413, 414, and 415.⁹⁷ “Only after a *thorough* debate over the underlying policy questions, using our notice and public comment procedure, would we *consider* adopting evidentiary rules that would allow the use of other acts for propensity purposes in sexual assault and child molestation cases.”⁹⁸ (emphasis added)

The court then went on to clarify the exact circumstances under which prior bad acts are relevant pursuant to MRE 404(b). “Today, we clarify that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.”⁹⁹ This clarification requires trial courts to undergo an intensive factual comparison between the crime charged and the prior bad act. The court went on to point out that similarity between the acts, by itself, is not sufficient to establish relevancy. “To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.”¹⁰⁰ This requirement draws a clear line between relevant evidence and propensity evidence by separating out similar spontaneous acts. Evidence of similar spontaneous acts is nothing more than evidence that the defendant has a propensity for a certain type of conduct. This clarification offers a defendant far more protection than FRE 414 by requiring the trial court to undergo an intensive factual investigation as the Supreme Court conducted in *Sabin* when determining the relevancy of the stepdaughter’s testimony.

The Supreme Court held that the trial court did not abuse its discretion when the stepdaughter was allowed to testify about past instances molestation.¹⁰¹ The court based this holding on factual similarities between the charged conduct and the past conduct that reached beyond mere similarity and established a common plan or scheme.¹⁰² The court pointed to the fact that: the defendant acted as a father to the victims, the victims were of a similar age at the time of the misconduct, and the defendant threatened the victims by telling them that their family would be broken up if they told anyone about the misconduct.¹⁰³ “One could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse.”¹⁰⁴ By demonstrating to trial courts the type of intensive factual inquiry that should be undertaken, the Supreme Court of Michigan set a heightened threshold for determining the relevancy of prior acts of sexual misconduct.

This heightened threshold is far more consistent with traditional notions of fairness in the criminal justice system than the threshold set forth in the plain language of FRE 414 which only requires similarity to the charged conduct without any showing of a common plan or scheme.¹⁰⁵ The test applied by the federal courts fails to provide a defendant with important safeguards regarding the admissibility of prior sexual misconduct. As shown in *United States v. Seymour*, the federal courts do not undertake an intensive factual investigation regarding the exact circumstances involved in the prior misconduct and their similarity to the crime or crimes that have been charged. Also, Michigan requires a limiting instruction when one is requested. Yet, in federal court, the defendant is not entitled to a jury instruction even when an instruction has been requested. The lack of these two protections makes it far more likely that evidence of prior sexual misconduct will be used for a propensity purpose in federal court because the evidence

may show nothing more than the fact that the defendant has previously been guilty of sexual misconduct.

Current application of MRE 404(b)

This heightened requirement of relevancy to show plan or scheme has subsequently been applied by the Michigan Supreme Court both to allow and exclude evidence from trial. In *People v. Hine*, the defendant was charged with child abuse and felony murder for beating a two and a half year old girl to death.¹⁰⁶ Evidence was offered at trial by the defendant's previous girlfriends that the defendant had previously beaten them by placing his fingers in their mouth and forcefully pulled their lips.¹⁰⁷ At trial, the forensic pathologist testified that the victim suffered injuries similar to the injuries described by the defendant's girlfriends.¹⁰⁸ The Supreme Court held that the evidence of these similar injuries met the heightened threshold set by *Sabin* because the evidence allowed for the inference that the defendant used a common scheme or plan when assaulting the victim and his prior girlfriends.¹⁰⁹

In *People v. Knox*, the Michigan Supreme Court was confronted once again with a case of child abuse that led to death.¹¹⁰ The defendant was charged with felony murder and child abuse for shaking the victim causing severe injuries and death.¹¹¹ At trial, testimony was offered that the defendant had previously been angry and while angry damaged walls and doors, and pushed his girlfriend.¹¹² The Supreme Court held that this evidence did not meet the heightened threshold set forth in *Sabin*.¹¹³ "Under these circumstances, the evidence of defendant's past anger could only serve the improper purpose of demonstrating that he had the bad character or propensity to harm his son."¹¹⁴ The court found that none of the prior acts of violence had any similarity to the acts of violence that had caused the victim's death.¹¹⁵ Also, no evidence was offered to show that the defendant was ever angry at the victim or re-directed anger to another

individual when he was angry with his girlfriend.¹¹⁶ The only purpose for the evidence would be to show that the defendant has a propensity for anger and violence.

When looking at both Hine and Knox, it is clear that the heightened requirement of relevancy when evaluating the admissibility of prior bad acts pursuant to MRE 404(b) is not an insurmountable barrier to the admission of the evidence. Rather, the requirements of Sabin adopt an intermediate approach. “Hine neither announced new law nor did it signify a retreat from the Vandervliet principles; rather, it simply rejected an interpretation of Sabin that would have required an impermissibly high level of similarity between the proffered other acts evidence and the charged acts.”¹¹⁷ The formulation by the Michigan Supreme Court strikes the correct balance between allowing evidence that is similar and probative and evidence that only shows a propensity. These safeguards have been abandoned in the Federal Rules of Evidence with regards to prior sexual misconduct.

The Michigan Court of Appeals has used the guidance of the Supreme Court and the test set forth in Vandervliet to evaluate prior bad acts of sexual misconduct. In *People v. Knapp*, the defendant was charged with molesting a fourteen year old boy during a mystical therapy session.¹¹⁸ At trial, the prosecutor sought to admit evidence showing that the defendant had molested another student in 1976.¹¹⁹ The prosecutor argued that this evidence was relevant for two purposes; first, to show a common scheme or plan of the defendant, second, to show that the contact between the defendant and the victim was sexual in nature which the defendant denied.¹²⁰ The Michigan Court of Appeals held that the evidence was admissible for both purposes in this case.¹²¹ The evidence was relevant to the defendant’s plan because in both cases the victim and the defendant had a teacher-student relationship, the defendant sought to isolate the victims from their parents prior to the assault, and the manner of the assaults were similar

between the two cases.¹²² The evidence was also relevant to negate the defense of the defendant. The defendant claimed that the contact between himself and the victim was non-sexual and only for the purpose of spiritual training.¹²³ The existence of the prior conduct made the defendant's defense less likely and less credible. When considering whether the evidence violated MRE 403, the court held that even though the prior conduct occurred 25 years prior to the trial in which it was sought to be admitted, the evidence was not unduly prejudicial.¹²⁴ This case demonstrates why the amendment to the federal rules should not be adopted in Michigan. The courts in Michigan are still able to admit evidence of prior sexual misconduct even when the misconduct is decades old. The requirement that the evidence pass through several layers of review simply ensures that the evidence is not offered for a propensity purpose.

In *People v. Vernon*, the Michigan Court of Appeals was faced with an incident to prior misconduct that was not similar to the conduct charged. The defendant was charged with molesting the eight year old daughter of a neighbor while the families were together celebrating Thanksgiving.¹²⁵ The prosecution sought to introduce evidence showing that the defendant was charged with third degree criminal sexual conduct of a fifteen year old girl.¹²⁶ The prosecution wanted to establish the intent of the defendant when he inappropriately touched both girls.¹²⁷ On appeal, the Michigan Court of Appeals held that the evidence was not admissible.¹²⁸ First, the circumstances of the two incidents were quite dissimilar. At the time of the prior incident, the victim was much older, the defendant and the victim had been drinking, and the defendant and the victim were alone in a building at the time of the assault.¹²⁹ "It is a stretch to conclude that the 1989 incident sheds light on defendant's state of mind during the charged incident through an inference based on the doctrine of chances, rather than an inference based on character."¹³⁰ The court also concluded that even if the evidence was relevant, it would be unduly prejudicial.¹³¹

The issue of whether the conduct was a mistake was only a minor issue at trial because the defendant denied the entire incident without admitting to any touching between himself and the victim.¹³² This case demonstrates the importance of the limits placed on the admission of prior acts evidence in Michigan. The prior incident in Vernon was similar to the charged incident only in that it was related to sexual conduct. Other than that, the incidences were dissimilar in almost every way including the age of the victim. The admission of this evidence, as the Michigan Court of Appeals pointed out, could only conceivably be used as propensity evidence.

In *People v. Fields*, the Michigan Court of Appeals was faced with a prior incident that was relevant to a specific issue at the trial that was central to the trial.¹³³ At trial, a young man who lived with the defendant and the victim testified to previous misconduct between himself and the defendant.¹³⁴ This testimony was particularly relevant because at closing defendant's counsel stated that it would have been impossible for the defendant to commit the crimes alleged because the defendant suffered from erectile dysfunction.¹³⁵ The testimony then of any prior sexual misconduct was very probative to counter the defense of the defendant. The testimony of prior misconduct was also relevant because the prior incidents and the incident for which the defendant was charged occurred under similar circumstances.¹³⁶

This case demonstrates the importance of the requirement that the evidence must be relevant to an issue at trial in order to overcome MRE 403. If the evidence is highly prejudicial to the defendant but only relevant to a minor issue, then the evidence will most likely fail the 403 balancing test as occurred in *Vernon*. Yet, when the evidence is highly probative to a central issue, as was the case in *Fields*, even incredibly prejudicial evidence will be admitted because it is so probative to determining a central issue at trial such as when the defendant makes a claim of impossibility. This level of nuance is essential to the admission of prior acts of sexual

misconduct in Michigan. The courts have operated a sliding scale to determine the admissibility of evidence under MRE 404(b). This level of nuance is not present in the plain language of the Federal Rules of Evidence. Michigan allows evidence of prior bad acts to be admitted in select circumstances when they are required to decide a central issue.

In *People v. Dobek*, the defendant was charged with molesting his twelve year old step daughter of a period of years.¹³⁷ At trial, the prosecution offered evidence of prior conduct by the defendant regarding a babysitter and his sister-in-law.¹³⁸ Both women were not minors as his stepdaughter was at the time of the molestation.¹³⁹ However, the court held that the evidence was relevant to establishing a scheme by the defendant to take advantage of any opportunity he had to sexually touch a woman.¹⁴⁰ The prior acts of misconduct in this case are not as similar to some of the previous cases. However, the prior conduct in this case was relevant to showing that the defendant had a plan to assault women under almost any circumstance. The conduct for which the defendant had been charged occurred in the family home while other people were present in the home.¹⁴¹ Therefore, prior conduct was relevant to show that the defendant had acted inappropriately at other times when other individuals were present. In this case, the court found the evidence to be relevant in a case that seems to be much closer than the previous cases.

In *People v. Causey*, the defendant had been charged with first degree criminal sexual conduct with an individual under the age of thirteen.¹⁴² The prosecution offered evidence that the defendant had previously molested other young men who he had previously babysat.¹⁴³ The circumstances of the prior bad acts as well as the circumstances for which the defendant was charged were very similar. In both cases, the defendant had assaulted the victims while the defendant and the victims were playing hide and seek.¹⁴⁴ The court held that the evidence was relevant on the basis that the circumstances of the incidents were almost identical and as such

demonstrated a plan or scheme of the defendant.¹⁴⁵ Also, the defendant took advantage of his relationship with the victims as they all looked up to him as an older brother.¹⁴⁶ Under these circumstances, it is clear that the evidence was offered for a non-propensity purpose which was to show the defendant's common plan or scheme.

The particular danger of propensity evidence in sexual assault cases

While it is important to ensure that propensity evidence is not offered in any criminal case due to the improper inferences that may be drawn by the jury, there is a particular importance to keep propensity evidence away from the jury because of the high likelihood that the jury will use evidence of prior bad acts for an impermissible purpose regardless of any jury instruction. Society today has placed sexual crimes into a special category that is far different from any other criminal offense. Sexual crimes are seen more as symptoms of a disease as opposed to one time events. This thinking is clearly reflected in the Federal Rules of Evidence. FRE 413 allows the introduction of any prior bad act of sexual misconduct when the defendant is charged with sexual misconduct.¹⁴⁷ Congress clearly took the view, as evidenced by the amendment to the federal rules, that once a sex offender always a sex offender. If that is the case, then any evidence of any prior sexual misconduct is relevant because if the defendant did it once, then he probably did it again. This kind of inference is exactly the kind of inference that the federal courts tried to prevent through FRE 404(b). Michigan continues to try and prevent this inference through MRE 404(b). However, the view that sex offenders will act in accordance with a propensity to commit sexual crimes is expressed in other ways as well.

The American Jury

In 1966, Harry Kalven and Hans Zeisel published the results of their study of juries in the United States in The American Jury.¹⁴⁸ Kalven and Zeisel sought to understand and create a

theory with regards to why juries act the way that they do. One interesting observation studied was what the authors termed the “cross-over phenomenon”. This occurred whenever the judge and the jury would have come to opposite results based on the same evidence.¹⁴⁹ This can occur in two different ways. First, the judge can choose to convict while the jury may choose to acquit. “In studying the disagreements in which the jury is more lenient than the judge, we have come to understand what we have called the jury’s sense of equity, or its modest war with the law. It is understandable that the jury should at times acquit a defendant in defiance of the law.”¹⁵⁰ However, there were times that judge would choose to acquit yet the jury would choose to convict. These occasions were more difficult to explain. “But it is not so apparent what the reverse of this means, the situation in which the jury finds guilty a man whom the judge and the letter of the law would acquit.”¹⁵¹ These observations caused Kalven and Zeisel to view the jury, as an institution, differently. “[W]e shall come to think of the jury not so much as an institution with a built-in protection for the defendant, but rather as an institution which is stubbornly non-rule minded.”¹⁵²

To study this effect, when the jury convicts and a judge would acquit, the authors gave a jury four cases involving sex crimes where the defendant was technically innocent of the crime charged.¹⁵³ “But, in each of the cases the jury is so outraged by the defendant’s conduct that it overrides distinctions of the law and finds him guilty as charged.”¹⁵⁴ In one of the cases in particular, the defendant was charged with the statutory rape of his thirteen year old daughter.¹⁵⁵ The judge chose to acquit on the charge of statutory rape because there was a question as to whether the crime was technically committed because there was dispute as to whether the alleged act was ever completed.¹⁵⁶ The judge decided that reasonable doubt existed and would have convicted the defendant of a lesser crime.¹⁵⁷ However, the jury convicted the defendant of the

crime of statutory rape. The judge then pointed out the reason for the jury's verdict. "The crime is so reprehensible that it may have had something to do with the verdict."¹⁵⁸ This study identified a very real phenomenon in courtrooms throughout the country. The conviction of an individual who is technically innocent but found to be guilty because of conduct that does not technically meet the elements of the crime for which the defendant was charged.

This study sheds light on the inherent problems associated with the federal approach to the admission of prior sexual misconduct. Juries have shown that they are often unable to focus on delivering a truly fair verdict when faced with a defendant who has committed acts that are considered truly heinous by the jury. Such occasions often occur in cases of sexual misconduct. Evidence of prior sexual misconduct, which is admitted for any purpose other than those listed in FRE 404(b) and admitted without a cautionary instruction, places before the jury evidence of a defendant's acts that can prejudice a jury against the defendant. It is understandable for a jury to be repulsed at the facts of criminal sexual conduct. Yet, to place a defendant's prior conduct before a jury when it is irrelevant to the charged crime repulses a jury for no reason. For this reason, the Michigan Rules of Evidence at the very least ensures that the evidence is offered for a purpose relevant to the determination of whether or not the defendant committed the charged crime. Also, the requirement that a limiting instruction be given if requested at least attempts to mitigate any improper reaction that a jury may have to the evidence of a defendant's prior sexual misconduct.

The message sent by singling out sex offenders for special treatment

In 1994, Michigan passed the Sex Offenders Registration Act.¹⁵⁹ This act required individuals who had been convicted of a sex offense to register their name and address with local law enforcement.¹⁶⁰ Originally, the act only allowed law enforcement to access the information

that was provided by the convicted sex offenders. The act was later amended to include a general notification provision that allowed private citizens to access a host of information.¹⁶¹ This amendment was required by a bill signed by President Clinton which added a mandatory notification provision to the existing federal registration requirements for sex offenders.¹⁶² Originally, Congress had enacted in 1994 the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act which required states to create sex offender registries in order to receive federal crime prevention funds.¹⁶³ Individuals living in the same zip code as the convicted sex offender were able to obtain the registered sex offender's name, address, the offense involved and a physical description of the individual.¹⁶⁴ The provisions of Michigan's sex offender registry were challenged in *Lanni v. Engler*.¹⁶⁵

In *Lanni*, the plaintiff challenged the sex offender registry on a variety of basis including violation of the Equal Protection Clause, deprivation of due process, and deprivation of the constitutional right to privacy in addition to other claims.¹⁶⁶ The court held that the intent of the registration act is simply regulatory even though the act itself has no statement of legislative intent.¹⁶⁷ The court found that the act "does nothing more than create a method for easier public access to compiled information that is otherwise available to the public through tedious research in criminal court files."¹⁶⁸ "[T]he Michigan Act also seeks to provide the local citizenry with information concerning persons residing near them who have been convicted of sexually predatory conduct and who, by virtue of relatively high recidivism rates among such offenders and the devastating impact that sex crimes have on society, pose a serious threat to society."¹⁶⁹ This case clearly sets out the purposes behind the Michigan sex offender registry. The court held that since the information compiled by the registry is publicly available and the registry simply compiles the information and makes the information easily searchable.¹⁷⁰ The sex offender

registry provides a valuable service to private citizens. Yet, the fact that information regarding sex offenders is available outside of court actually argues against the admissibility of prior sex offenses at trial. The existence of a sex offender registry sends the message to the public and potential jurors that information regarding prior sexual offenses is highly probative and that sex offenders have a high rate of recidivism. While this information is useful outside of the courtroom, it is simply too dangerous inside the courtroom because the jury has been pre-conditioned by society to misuse the information. Information regarding prior convictions is always available outside of the courtroom to the public at large, yet has traditionally been kept away from jurors inside the courtroom because of the risks of improper use.

The Michigan Supreme Court shed light on Michigan's own interpretation of the Michigan sex offender registry in *People v. Childers*.¹⁷¹ In that case, the defendant plead guilty to sexual offenses in a court martial for assaulting his daughter in Michigan.¹⁷² The defendant was subsequently tried in Michigan state court for the same acts.¹⁷³ The court held that the conviction in Michigan state court did not violate double jeopardy because the Michigan prosecution subjected the defendant to a unique set of penalties.¹⁷⁴ Specifically, "the Michigan prosecution subjects defendant to registration as a sex offender and mandatory HIV testing."¹⁷⁵ The court held that the state of Michigan had a "social interest" in requiring individuals convicted of sexual offenses to become members of the sex offender registry.¹⁷⁶ While it is clear that the state and its citizens have an interest in keeping track of sex offenders outside of court, in court the interest of the defendant is paramount and should lead to the inadmissibility of prior convictions that can only be used for propensity purposes.

Individuals convicted of sexual offenses have also been singled out by society and the courts once they have been convicted and incarcerated. In *Kansas v. Hendricks*, the United

States Supreme Court upheld the indefinite commitment of an inmate following the completion of his sentence.¹⁷⁷ The inmate had served a ten year sentence for sexually molesting two thirteen year old boys.¹⁷⁸ The state moved to have Hendricks committed as a sexual predator shortly before his release from prison.¹⁷⁹ A trial was held in which a jury heard of Hendricks' history of sexual molestation of children and found that he was a sexual predator beyond a reasonable doubt.¹⁸⁰ The court held that the commitment of sexual offenders found to be sexual predators following their sentence does not act as punishment.¹⁸¹ "Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior."¹⁸² The Kansas Act and the Supreme Court singled out sexual offenders as potential predators that are unable to resist the urge to commit further crimes. As of March 2007, Mr. Hendricks has been committed in a treatment program for thirteen years past the end of his sentence.¹⁸³ As of March, 2007, over 2,700 sexual offenders have been committed indefinitely past the end date of their sentence through civil commitment laws.¹⁸⁴ Programs that allow for sexual offenders to be held indefinitely following the completion of their sentence exist in nineteen states.¹⁸⁵ Laws such as the one in Kansas and other states once more send the message to society and potential jurors that sexual offenders are incapable of changing their behavior. Now, that is not to say an individual that has been adjudicated to be mentally abnormal or suffering from a personality disorder should not be committed. Rather, evidence that an individual has been committed or convicted for sexual misconduct should only be allowed into a courtroom under the most limited and regulated circumstances. The federal rules simply set too low of a standard for the admission of prior sexual misconduct without requiring so much as a limiting instruction to be read to the jury. Michigan, however, requires a thorough vetting of the evidence in order to ensure that the

evidence is used for a permissible purpose other than to show that the defendant has a propensity for committing similar acts.

The federal courts as required by the Federal Rules of Evidence now approach prior bad acts of sexual misconduct in a manner that is all but unrecognizable from their approach prior to 1994. However, states such as Michigan have preserved the traditional approach to propensity evidence that does not single out sexual misconduct for special treatment. When comparing the two approaches, it is clear that Michigan should continue to resist amending the Michigan Rules of Evidence to include provisions similar to FRE 413-415. Society has rightly focused its attention on the prevention of sexual assault and molestation over the past twenty years. However, this focus on sexual crimes and the sometimes predatory nature of the offenders has created a great danger in the courtroom. The danger is that any evidence of prior misconduct or conviction will lead the jury to convict the defendant for a past act and not for the crime charged. The passage of FRE 413-415 in 1994 has exasperated this danger by setting a lower bar in the federal courts regarding the admissibility of prior sexual misconduct. In contrast, the approach that Michigan has continued to employ serves the interest equally of defendants, victims, and society as a whole. The Supreme Court of Michigan should continue to resist any attempts to add rules similar to FRE 413-415 to the Michigan Rules of Evidence or interpret MRE 404(b) in a manner to allow the greater admissibility of prior sexual misconduct.

¹ See FED. R. EVID. 404.

² FED. R. EVID. 404(b).

³ See FED. R. EVID. 404(b).

⁴ FED. R. EVID. 404(b).

⁵ *Id.*

⁶ FED. R. EVID. 401.

⁷ FED. R. EVID. 403.

⁸ FED. R. EVID. 404(b).

⁹ FED. R. EVID. 401.

¹⁰ FED. R. EVID. 403.

¹¹ *See* FED. R. EVID. 413, 414, 415.

¹² FED. R. EVID. 413.

¹³ FED. R. EVID. 414.

¹⁴ FED. R. EVID. 415.

¹⁵ Adam Kargman, Note, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963, 975 (1999).

¹⁶ FED. R. EVID. 413.

¹⁷ FED. R. EVID. 414 and 415.

¹⁸ FED. R. EVID. 404(b).

¹⁹ FED. R. EVID. 413.

²⁰ FED. R. EVID. 404(b). *See*, Adam Kargman, Note, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963, 966 (1999).

²¹ FED. R. EVID. 413.

²² *See*, Adam Kargman, Note, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963, 966 (1999).

²³ *See* 28 USC § 2071 (2007), Congress has previously allowed the Supreme Court to promulgate rules yet has at times reserved this right for itself as Congress did with regards to the initial enactment of the Federal Rules of Evidence. *See*, Adam Kargman, Note, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963, 966 (1999).

²⁴ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 320935(a), 108 Stat. 1796, 2136 (1994).

²⁵ *See Id.*

²⁶ Report of Judicial Conference of United States on admission of character evidence in certain sexual misconduct cases. Notes to FED. R. EVID. 413.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ FED. R. EVID. 413.

³⁴ *United States v. Seymour*, 468 F.3d 378, 381 (6th Cir. 2006).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 385.

³⁸ *Id.* See FED. R. EVID. 413 and 414.

³⁹ *Id.*

⁴⁰ *Id.* at 386

⁴¹ *Id.* at 385.

⁴² See MICH. R. EVID.

⁴³ 83 MI Bar Jnl. 64 (2004).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *People v. Golochowicz*, 413 Mich 298 (1982).

⁴⁸ *People v. Engelman*, 434 Mich. 204, 213-14 (1990).

⁴⁹ *Id.* at 213.

⁵⁰ *Id.* at 208.

⁵¹ *Id.* at 209.

⁵² *Id.* at 221.

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- ⁵³ *Id.* at 225.
- ⁵⁴ *People v. Vandervliet*, 444 Mich. 52 (1993).
- ⁵⁵ *Id.* at 56.
- ⁵⁶ *Id.* at 58.
- ⁵⁷ *Id.* at 59.
- ⁵⁸ *Id.*
- ⁵⁹ *Id.* at 73., *Huddleston v. United States*, 485 U.S. 681 (1988).
- ⁶⁰ *Huddleston*, 485 U.S. at 691.
- ⁶¹ *Id.* at 685.
- ⁶² *Vandervliet*, 444 Mich. at 73.
- ⁶³ *Id.* at 74.
- ⁶⁴ *Id.*
- ⁶⁵ *Id.*
- ⁶⁶ *Id.* at 75.
- ⁶⁷ *Id.* at 77.
- ⁶⁸ *Id.* at 78. Intent is one of the listed exceptions in MRE 404(b).
- ⁶⁹ *Id.*
- ⁷⁰ *Id.*
- ⁷¹ *Id.* at 81.
- ⁷² *Id.*
- ⁷³ *People v. Crawford*, 458 Mich. 376, 378 (1998).
- ⁷⁴ *Id.* at 381.
- ⁷⁵ *Id.* at 382.
- ⁷⁶ *Id.* at 385.
- ⁷⁷ *Id.*
- ⁷⁸ *Id.* at 391.
- ⁷⁹ *Id.* at 395.
- ⁸⁰ *Id.* at 396.

⁸¹ *Id.*

⁸² *Id.* at 397.

⁸³ *Id.* at 398.

⁸⁴ FED. R. EVID. 413.

⁸⁵ MICH. R. EVID. 404(b).

⁸⁶ *See Vandervliet.*

⁸⁷ *People v. Sabin*, 463 Mich. 43 (2000).

⁸⁸ *Id.* at 49.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 50.

⁹² *Id.* at 52.

⁹³ *Id.* at 59.

⁹⁴ *Id.* at 60.

⁹⁵ *Id.* at 60. *See* n7.

⁹⁶ *Id.* at 61. FED. R. EVID. 414.

⁹⁷ *Id.* at 61, n7.

⁹⁸ *Id.*

⁹⁹ *Id.* at 63.

¹⁰⁰ *Id.* at 65-6.

¹⁰¹ *Id.* at 66.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ FED. R. EVID. 414.

¹⁰⁶ *People v. Hine*, 467 Mich. 242 (2002).

¹⁰⁷ *Id.* at 246-47

¹⁰⁸ *Id.* at 252.

¹⁰⁹ *Id.*

¹¹⁰ *People v. Knox*, 469 Mich. 502 (2004).

¹¹¹ *Id.* at 504-5

¹¹² *Id.* at 512.

¹¹³ *Id.*

¹¹⁴ *Id.* at 512-3.

¹¹⁵ *Id.* at 513.

¹¹⁶ *Id.*

¹¹⁷ *Knox* 469 Mich. at 511.

¹¹⁸ *People v. Knox*, 244 Mich. App. 361, 366-7 (2001).

¹¹⁹ *Id.* at 379.

¹²⁰ *Id.*

¹²¹ *Id.* at 380.

¹²² *Id.* at 379.

¹²³ *Id.* at 380.

¹²⁴ *Id.*

¹²⁵ *People v. Vernon*, No. 216176, 2001 Mich App. LEXIS 1570, at 2 (March 6, 2001).

¹²⁶ *Id.* at 5.

¹²⁷ *Id.*

¹²⁸ *Id.* at 17.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 18.

¹³² *Id.*

¹³³ *People v. Fields*, No. 249137, 2004 Mich. App. LEXIS 2524 (September 28, 2004).

¹³⁴ *Id.* at 6.

¹³⁵ *Id.* at 7.

¹³⁶ *Id.* at 8-9.

¹³⁷ *People v. Dobek*, No. 264366, 2007 Mich. App LEXIS 157 (January 30, 2007).

¹³⁸ *Id.* at 50.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 3.

¹⁴² *People v. Causey*, No. 266091, 2007 Mich. App. LEXIS 424 (February 20, 2007).

¹⁴³ *Id.* at 6

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ FED. R. EVID. 413.

¹⁴⁸ HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

¹⁴⁹ *Id.* at 375.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 396.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 397.

¹⁵⁸ *Id.*

¹⁵⁹ MICH. COMP. LAWS § 28.723 (2007).

¹⁶⁰ *Id.*

¹⁶¹ MICH. COMP. LAWS § 28.728(2) (2007).

¹⁶² 42 U.S.C. § 14071(d).

¹⁶³ *See Lanni v. Engler*, 994 F. Supp. 849, 851 (E.D. Mich. 1998).

¹⁶⁴ MICH. COMP. LAWS § 28.728(2) (2007).

¹⁶⁵ *Lanni*, 994 F. Supp. at 852.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 853.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* citing *Doe v. Pataki*, 120 F.3d 1263, 1266 (2d Cir. 1997).

¹⁷⁰ *Id.*

¹⁷¹ *People v. Childers*, 459 Mich. 216 (1998).

¹⁷² *Id.* at 217.

¹⁷³ *Id.* at 218.

¹⁷⁴ *Id.* at 220.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 223.

¹⁷⁷ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

¹⁷⁸ *Id.* at 353.

¹⁷⁹ *Id.* at 354.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 361.

¹⁸² *Id.* at 362.

¹⁸³ Monica Davey and Abby Goodbough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. Times, March 4, 2007, at A1.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*