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Robert F. Thompson III

CHARACTER EVIDENCE AND SEX CRIMES IN THE FEDERAL COURTS: RECENT DEVELOPMENTS

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I. INTRODUCTION

As part of the Violent Crime Control and Law Enforcement Act of 1994, Congress amended the Federal Rules of Evidence to add Federal Rules 413, 414, and 415.[1] In cases in which a defendant is charged with a sex crime such as rape or child molestation, these new rules allow federal prosecutors to introduce evidence of the defendant's bad character in order to prove that the defendant committed the sex crime. The new rules are unusual in that they permit a prosecutor to prove the government's case through the use of propensity evidence, or evidence of prior misconduct on the part of the defendant.

A quick rundown on the new rules:

• *Federal Rule 413.* Under Rule 413(a), in a case in which a criminal defendant is accused of a sexual assault crime, "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.*"[2] In other words, in a case in which a defendant is charged with raping a victim, the prosecutor can introduce evidence that the defendant has previously raped someone, in order to prove that the defendant raped the victim in the instant case. Note that it does not matter whether the defendant was convicted or even formally charged with the first sex crime.

• *Federal Rule 414.* Under Rule 414(a), if a defendant is accused of child molestation, "evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."[3] This rule allows prosecutors accusing a defendant of child molestation to prove the defendant's criminal liability by introducing evidence that the defendant molested children in the past. Again, actual conviction for this past misconduct is not necessary.

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* B.A., Hendrix College (1993); J.D., University of Arkansas School of Law (1997). Associate, Williams & Anderson LLP, Little Rock, Arkansas. Opinions expressed in this article are those of the author alone.

1. *See* Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2135-37 (1994).
2. *See* FED. R. EVID. 413 (emphasis added).
3. *See* FED. R. EVID. 414.

• *Federal Rule 415.* Under Rule 415(a), if a plaintiff in a civil action sues a defendant for damages stemming from alleged commission of conduct which would constitute an offense of sexual assault or child molestation, evidence of the defendant's "commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules."[4] Thus, if a plaintiff sues a defendant for civil damages stemming from a sex crime, evidence that the defendant has engaged in activity amounting to a sex crime in the past may be used to prove the defendant's civil liability. Once again, actual conviction of a sex crime is not required under this rule.[5]

II. THE BACKGROUND OF THE NEW FEDERAL RULES

Before the adoption of Rules 413 and 414, prosecutors tried to introduce evidence of a criminal defendant's past sex crimes through Federal Rule 404(b), which allows introduction of evidence of "other crimes, wrongs, or acts" to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Arkansas Rule of Evidence 404(b) is the rule under which prosecutors in Arkansas currently attempt to introduce evidence of a defendant's prior bad acts or uncharged criminal activity.[6] The scope of Arkansas Rule 404(b) is potentially very broad, considering that the government theoretically has to prove "intent," "knowledge," or another culpable mental state in most criminal prosecutions. Many courts have in fact liberally used Rule 404(b) to introduce evidence of a defendant's prior uncharged criminal activity.[7] But Rule 404(b) has its limits, and some federal courts, including the Eighth Circuit Court of Appeals, have limited the use to which the government can introduce character evidence under the guise of proving "intent" or "motive."[8] Rules 413 and 414 will therefore broaden the amount of character evidence that the federal government can introduce in sex-crime cases, both in theory and in fact.

The principal sponsors of the bill implementing these new rules were Senator Bob Dole of Kansas and Representative Susan Molinari of New York. In their statements to the Congress on August 21 and September 20, 1994, Senator Dole and Representative Molinari offered two principal justifications

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4. *See* FED. R. EVID. 415.

5. Because of a lack of case law interpreting Federal Rule 415 as of the publication of this article, I will confine my discussion to Rules 413 and 414, the two new federal rules which are applicable to criminal cases.

6. *See* ARK. R. EVID. 404(b).

7. *See* Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 61-64 (1995).

8. *See, e.g.*, United States v. Sumner, 119 F.3d 658, 660-61 (8th Cir. 1997); United States v. LeCompte, 99 F.3d 274, 277-78 (8th Cir. 1996).

for these changes in the Federal Rules of Evidence.[9] First, they argued that in child molestation cases, often the only evidence is the testimony of the child-victim, whose credibility can be easily questioned without corroboration. Dole and Molinari stated that "there is a compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense."[10] Second, they noted that in rape cases, the defense is often one of consent by the victim: "Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over his wallet as a gift—but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him." Knowledge by the jury that the defendant had committed rapes in the past would be useful in assessing the plausibility of the consent defense and prevent "unresolvable swearing matches" between the victim and the defendant.[11]

Most judges, lawyers, law professors, and legal organizations who reviewed the proposed changes to the Federal Rules adamantly opposed them. Opponents of the new rules feared that unfairly prejudicial evidence would become common in criminal trials, and they believed the new rules were poorly drafted and might create unforeseen problems. The federal Judicial Conference, made up of federal judges around the country, also opposed the new rules. Fearful that the new rules would allow a criminal defendant to be convicted for past (rather than charged) crimes or for being a "bad person," the Judicial Conference suggested that the policy concerns raised by Representative Molinari and others might be better addressed by amendments to Federal Rules 404 and 405. Despite the opposition by lawyers and federal judges, the Violent Crime Control and Law Enforcement Act, and the changes it made to the Federal Rules of Evidence, passed both houses of Congress overwhelmingly and became effective on July 9, 1995.[12]

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9. *See* 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (remarks of Sen. Dole); 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (remarks of Rep. Molinari).

10. *Id.*

11. *See* 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (remarks of Sen. Dole); 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (remarks of Rep. Molinari). The "consent" justification for the new character-evidence rules seems to be the weaker of the two. In sex-crime cases in which consent is the defense, evidence of the defendant's prior sex crimes would presumably be admitted under Rule 404(b), as proof of intent or absence of mistake.

12. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES, 159 F.R.D. 51, 52 (1995).

III. THE RELATIONSHIP OF FEDERAL RULE 403 TO THE NEW FEDERAL RULES OF EVIDENCE

One issue presented by the adoption of the new Federal Rules is their effect on Federal Rule of Evidence 403. Federal Rule 403 allows a federal district judge broad discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[13] Shortly after Congress implemented the new rules admitting character evidence in sex-crime cases, commentators began considering whether the new rules effectively trumped Rule 403 and permitted character evidence to come into sex-crime cases regardless of other considerations like prejudice to the defendant, or whether Rule 403 might still keep out propensity evidence that would otherwise come into the case under Rules 413 or 414. A strict textual analysis of the new rules indicates that they might *not* be subject to Rule 403. Rule 413(a), for instance, reads simply that character evidence in sexual assault cases "is admissible, and may be considered for its bearing on any matter to which it is relevant."[14] By its own terms, Rule 413 is not subject to Rule 403 or any other federal rule of evidence.[15]

However, examination of the legislative history of the new federal rules leads to a different conclusion. In their statements to Congress, Senator Dole and Representative Molinari said that even with the passage of these new evidentiary rules, "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect."[16] Under Representative Molinari and Senator Dole's view of impact of the new rules, propensity evidence in cases involving sex crimes is presumed admissible, but district judges would still retain some discretion under Federal Rule 403 to keep out such evidence if it is unduly prejudicial.[17]

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13. *See* FED. R. EVID. 403.

14. *See* FED. R. EVID. 413(a).

15. *See* Sheft, *supra* note 7, at 68-69. Sheft concludes that "the structure of the Federal Rules of Evidence, and the text and purpose of Rule 413, militate against Rule 403's application in sexual assault cases prosecuted in federal court." Sheft, *supra* note 7, at 68-69.

16. *See* 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (remarks of Sen. Dole); 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (remarks of Rep. Molinari).

17. *See* 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (remarks of Sen. Dole); 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (remarks of Rep. Molinari). Rules 413 and 414 include one built-in protection for criminal defendants: to prevent unfair surprise, they require federal prosecutors to disclose to the defendant any evidence that will be offered under these rules fifteen days before trial. *See* FED. R. EVID. 413(b), 414(b). Rule 415 provides similar protection for character evidence offered in civil cases. *See* FED. R. EVID. 415(b).

That is the general interpretation that federal courts have given the new federal rules. Relying on the legislative history of Rules 413 and 414, the federal appellate courts who have considered the matter have thus far held that Federal Rule 403's balancing test should still be applied when the district judge determines whether to admit evidence under Rules 413 or 414. In *United States v. Larson*,[18] the Second Circuit considered the case of David Larson, a criminal defendant who was convicted of transporting a thirteen-year-old boy from Connecticut across state lines to a cabin in rural Massachusetts and sexually molesting him. On appeal, Larson challenged a ruling by the district judge allowing the government to introduce evidence that Larson had victimized a twelve-year-old boy under similar circumstances sixteen to twenty years earlier. The district court had allowed the testimony in under both Rule 404(b) and Rule 414, and had also applied a Rule 403 analysis to the evidence. Citing statements of Senator Dole and Representative Molinari, the Second Circuit approved the district judge's use of Rule 403 and found no abuse of discretion in allowing the evidence in the case.[19]

The Eighth Circuit Court of Appeals has also applied Rule 403 to evidence offered under Rules 413 and 414. In *United States v. Sumner*,[20] the Eighth Circuit reviewed the conviction of Stuart Lee Sumner for sexually abusing his live-in girlfriend's minor daughter. Sumner argued on appeal that the district court erred in admitting evidence that on two prior occasions he had assaulted fourteen-year-old girls, one occasion which involved uncharged conduct and another for which Sumner was convicted. The government responded that Sumner's conviction should be affirmed because the evidence was admissible under both Rule 404(b)—because it was relevant to Sumner's "intent"—and under Rule 414. The Eighth Circuit rejected the government's argument that the evidence of prior bad acts was admissible under Rule 404(b), because under Eighth Circuit precedent, intent is not at issue in a criminal case when the defendant denies only the criminal behavior, rather than the criminal intent.[21] The court also rejected the government's argument that the evidence was admissible under Rule 414, the rule which allows propensity evidence in to prove a child molestation charge, because the district court had not performed a Rule 403 analysis to see if the evidence of the two previous incidents of sexual misconduct was unduly prejudicial. Citing both the legislative history and the Tenth Circuit's decision in *United States v. Larson*, the Eighth Circuit held that the 403 balancing test can limit evidence which

18. 112 F.3d 600 (2d Cir. 1997).
19. *See id.* at 604-05.
20. 119 F.3d 658 (8th Cir. 1997).
21. *See id.* at 660. *See also* United States v. Thomas, 58 F.3d 1318, 1321-22 (8th Cir. 1995).

would otherwise come in the case under Rules 413 or 414. Accordingly, the Eighth Circuit reversed and remanded for a new trial.[22]

In another recent Eighth Circuit case, *United States v. LeCompte*,[23] the court of appeals reversed a holding by the district judge under Rule 403 that evidence of a previous incident of child molestation was inadmissable. Leo LeCompte was charged with sexual abuse of his wife's eleven-year-old niece, "T.T.," in violation of federal law. The government sought to introduce evidence under Rule 414 that eight to ten years previously, LeCompte had sexually abused "C.D.," the niece of LeCompte's previous wife. Citing Rule 403, the district court in South Dakota refused to admit this bad character evidence. The district judge focused on some differences in the alleged episodes of sexual abuse of the girls: LeCompte had allegedly played games with T.T. before molesting her, but had not played games with C.D.; he had purportedly molested C.D. while her siblings were present but had molested T.T. in isolation; and the two alleged offenses occurred several years apart. The District Court also noted that this character evidence would be extremely prejudicial to LeCompte's case given the fact that "sexual abuse deservedly carries a unique stigma in our society . . . ."[24]

On appeal, "[i]n light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible," the Eighth Circuit reversed. The appellate court found the differences in the alleged sexual abuse of C.D. and T.T. (i.e., game-playing, presence of siblings) to be minimal, while the similarities (the victims were both nieces of LeCompte's wives, LeCompte had exposed himself to both of them) were great. The lapse of time between the incidents did not trouble the Court, because LeCompte was in prison for most of the time between the alleged incidents and could not have molested children. Finally, the Court was not concerned that the prejudice in this case was too high, because "[t]his danger is one that all propensity evidence . . . presents."[25] *LeCompte* apparently stands for the proposition that under Federal Rules 413 and 414, character evidence will usually come into a case in which a criminal defendant is charged with a sex crime, and that the prejudice to the defendant must be strong to keep such evidence out under Rule 403.

IV. ARE THE NEW RULES OF EVIDENCE UNCONSTITUTIONAL?

Shortly after Congress approved the Violent Crime Control and Law Enforcement Act of 1994, commentators began questioning the constitutional validity of Rules 413, 414, and 415.[26] The most persuasive arguments were

22. *See Sumner*, 119 F.3d at 662.
23. 131 F.3d 767 (8th Cir. 1997).
24. *See id.* at 769.
25. *See id.* at 770.
26. For an argument that Rules 413 and 414 violate a criminal defendant's due process

based on the Due Process Clauses of the Fifth and Fourteenth Amendments, and the common-law tradition of refusing to allow propensity evidence in a trial to prove criminal liability.[27] Historically, courts in the United States have excluded evidence of bad character to prove that the defendant acted in conformity with that character, not because such evidence is not relevant, but because it is *too* relevant. Bad character evidence tends to obscure other evidence in the trial and influence the jury to convict the defendant not for committing the crime with which he is charged, but for being a bad person.[28] The United States Supreme Court has written that "[t]he overriding policy of excluding [character] evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of the issues, unfair surprise and undue prejudice."[29] The historical aversion to character evidence by American courts, and the guarantee of "fundamental fairness" in the criminal justice system by the due process clauses,[30] have encouraged academics and criminal defense lawyers to argue that the new federal rules allowing character evidence in cases involving sexual assault and child molestation are unconstitutional.[31]

Federal courts have rejected the argument that Rules 413 and 414 violate criminal defendants' due process rights. In *United States v. Enjady*,[32] the Tenth Circuit upheld the constitutionality of Rule 413, with one notable qualification: that the new rule be subject to the safeguards of Rule 403. Kerry Neil Enjady was charged with raping a woman, referred to by the court as "A," while she was unconscious. The government sought to introduce evidence that Enjady had raped "B," another woman, two years earlier. The district court in New Mexico admitted the evidence, and Enjady was convicted. On appeal, he argued that Rule 413 violates fundamental fairness for three reasons: it prevents a fair trial because of the history of refusing to admit bad character evidence in

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rights, *see* Sheft, *supra* note 7, at 77-82.

27. The argument has also been made that Rules 413 and 414 violate the equal protection guarantees of the Fifth and Fourteenth Amendments. The gist of this argument is that Rules 413 and 414 deny a particular class of defendants (rape and child molestation defendants) the right to a fair trail, and that therefore courts must examine the new evidentiary rules with "strict scrutiny." *See* Sheft, *supra* note 7, at 82-86. The Eighth and Tenth Circuits have rejected this argument. *See* United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998), *cert. denied*, No. 98-5121, 1998 WL 396582 (Oct. 5, 1998); *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998).

28. *See* IA JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2 (1983).

29. *See* Michelson v. United States, 335 U.S. 469, 476 (1948).

30. See Rochin v. California, 342 U.S. 165, 172 (1952).

31. In 1967, Chief Justice Earl Warren wrote that decisions from state and federal courts "suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." Spencer v. Texas, 385 U.S. 554, 573-74 (1967) (Warren, C.J., concurring and dissenting).

32. 134 F.3d 1427, 1433 (10th Cir. 1998).

criminal trials; it creates a presumption of guilt which undermines the requirement that the defendant be proven guilty beyond a reasonable doubt; and it allows a jury to punish a defendant for past misconduct, "eroding the presumption of innocence that is fundamental in criminal trials."[33]

The Tenth Circuit held that the Rule 403 balancing test could prevent the defendant from being unfairly prejudiced from propensity evidence introduced by the government. The court first held that Rule 413 is subject to the balancing requirements of Rule 403.[34] Next, the court laid out specific considerations a district court should consider when using the Rule 403 balancing test in the context of sexual assault cases:

> 1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: 1) how likely is it such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct.[35]

If the district court engages in this sort of careful balancing test, the court in *Enjady* was satisfied that unfairness to the defendant could be avoided. An interesting caveat to the court's holding, however, is the language in the opinion reading, "[W]ithout the safeguards embodied in Rule 403, we would hold [Rule 413] unconstitutional."[36] Thus, combining a strict textual reading of Rule 413 (which apparently does not permit Rule 403 to keep evidence of previous sexual assaults out of evidence) and the reasoning of the *Enjady* court (which requires Rule 403 balancing to hold Rule 413 constitutional), a future court could conceivably hold that Rule 413, as written, is unconstitutional.

The Eighth Circuit has also held that Rules 413 and 414 are constitutional. In *United States v. Mound*,[37] Alvin Ralph Mound was convicted in federal court in South Dakota of sexually abusing his young daughter from 1993 to January 1997. The district judge admitted evidence under Rule 413 that Mound had sexually abused a twelve-year-old girl and a sixteen-year-old girl in 1987.[38] On appeal, Mound challenged the constitutionality of Rule 413,

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33. *Id.* at 1432.

34. *See id.* at 1431. The Tenth Circuit had already held that Rule 414 is subject to Rule 403 balancing. *See* United States v. Meacham, 115 F.3d 1488, 1492 (10th Cir. 1997).

35. *See Enjady*, 134 F.3d at 1433 (citing Sheft, *supra* note 7, at 59 n.16).

36. *Id.* at 1433.

37. 149 F.3d 799 (8th Cir. 1998).

38. In *Mound*, although the government introduced evidence of prior child molestation under Rule 413, the Eighth Circuit stated explicitly that its holding applies to both Rule 413 and to Rule 414. *See id.* at 800.

arguing that it violated his due process rights.[39] The Eighth Circuit, citing the Tenth Circuit's *Enjady* opinion, rejected the argument, holding that "it was within Congress's power to create exceptions to the longstanding practice of excluding prior-bad-acts evidence."[40] The *Mound* opinion seems somewhat broader than *Enjady*, because the court in *Mound* did not expressly condition the constitutionality of the new federal rules on the application of Rule 403. The court in *Mound* focused primarily on the power of Congress to amend the Federal Rules of Evidence, rather than the protections provided sex-crime defendants by Rule 403.

V. CONCLUSION

Because most sex crimes are prosecuted in state court, the new Federal Rules of Evidence allowing character evidence into sex-crime cases will probably have a limited impact on practicing criminal lawyers in Arkansas. However, several states are apparently following the lead of Congress and enacting their own versions of Federal Rules 413, 414, and 415.[41] If the Arkansas Supreme Court chooses to adopt rules which allow a prosecutor to introduce evidence of a defendant's bad character in order to prove that the defendant committed a crime, it should be prepared to address the same evidentiary and constitutional issues that have surfaced in the federal courts in recent years.

39. *Mound* also argued that Rule 413 denied him equal protection. The court, applying a "rational relation" standard of review, rejected this argument. *Id.* at 800-01.

40. *Id.* at 801.

41. *See* John Gibeaut, *An Evidentiary Dragnet*, A.B.A. J., June 1998, at 44-45.