APAAC SEX CRIMES SEMINAR 2014: Other act evidence

I. How to successfully satisfy the prerequisites for Rule 404(c).

The text of Arizona Rule of Evidence 404(c):

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

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

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

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

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others: (i) remoteness of the other act; (ii) similarity or dissimilarity of the other act; (iii) the strength of the evidence that defendant committed the other act; (iv) frequency of the other acts; (v) surrounding circumstances; (vi) relevant intervening acts; (vii) other similarities or differences; (viii) other relevant factors.

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

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

(3) In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause. The defendant

> shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause. …
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> (4) As used in this subsection of Rule 404, the term "sexual offense" is as defined in A.R.S. Sec. 13-1420(c) and, in addition, includes any offense of first-degree murder pursuant to A.R.S. Sec. 13-1105(A)(2) of which the predicate felony is sexual conduct with a minor under Sec. 13-1405, sexual assault under Sec. 13-1406, or molestation of a child under Sec. 13-1410.

Ariz.R.Evid.404(c).

2. The pertinent passage of A.R.S. § 13-1420(C) reads as follows:

> For the purposes of this section, "sexual offense" means any of the following:
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> 1. Sexual abuse in violation of § 13-1404.
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> 2. Sexual conduct with a minor in violation of § 13-1405.
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> 3. Sexual assault in violation of § 13-1406.
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> 4. Sexual assault of a spouse if the offense was committed before the effective date of this amendment to this section.
>
> 5. Molestation of a child in violation of § 13-1410.
>
> 6. Continuous sexual abuse of a child in violation of § 13-1417.
>
> 7. Sexual misconduct by a behavioral health professional in violation of § 13-1418.
>
> 8. Commercial sexual exploitation of a minor in violation of § 13-3552.
>
> 9. Sexual exploitation of a minor in violation of § 13-3553.

3. The comment that accompanied the 1997 amendment to Rule 404 that promulgated Rule 404(c) reads as follows:

> Subsection (c) of Rule 404 is intended to codify and supply an analytical framework for the application of the rule created by case law in *State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977), and *State v. McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973). The rule announced in *Treadaway* and *McFarlin*

> and here codified is an exception to the common-law rule forbidding the use of evidence of other acts for the purpose of showing character or propensity.
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> Subsection (1)(B) of Rule 404(c) is intended to modify the *Treadaway* le by permitting the court to admit evidence of remote or dissimilar other acts providing there is a "reasonable" basis, by way of expert testimony or otherwise, to support relevancy, i.e., that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged. The *Treadaway* requirement that there be expert testimony in all cases of remote or dissimilar acts is hereby eliminated.
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> The present codification of the rule permits admission of evidence of the other act either on the basis of similarity or closeness in time, supporting expert testimony, or other reasonable basis that will support such an inference. To be admissible in a criminal case, the relevant prior bad act must be shown to have been committed by the defendant by clear and convincing evidence. *State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997).
>
> Notwithstanding the language in *Treadaway*, the rule does not contemplate any bright line test of remoteness or similarity, which are solely factors to be considered under subsection (1)(c) of Rule 404(c). A medical or other expert who is testifying pursuant to Rule 404(c) is not required to state a diagnostic conclusion concerning any aberrant sexual propensity of the defendant so long as his or her testimony assists the trier of fact and there is other evidence which satisfies the requirements of subsection (1)(B).
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> Subsection (1)(c) of the rule requires the court to make a Rule 403 analysis in all cases. The rule also requires the court in all cases to instruct the jury on the proper use of any other act evidence that is admitted. At a minimum, the court should instruct the jury that the admission of other acts does not lessen the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt, and that the jury may not convict the defendant simply because it finds that he committed the other act or had a character trait that predisposed him to commit the crime charged.

Comment to 1997 Amendment, Rule 404(c), Ariz.R.Evid.

1. Rule 404(c)(1)(A) issues:

A. Definition. The "clear and convincing evidence" standard is "more exacting than the standard of preponderance of the evidence, but less exacting than the standard of proof beyond a reasonable doubt," *State v. Renford*, 155 Ariz. 385, 388, 746 P.2d 1315, 1318 (App.1987), and is deemed satisfied with proof rendering "the truth of the contention … 'highly probable.'" *State v. Roque*, 213 Ariz. 193, 215, ¶ 75, 141 P.3d 368, 390 (2006) (quoting *In re Neville*, 147 Ariz. 106, 111, 708 P.2d 1297, 1302 (1985)).

B. The State satisfies the clear and convincing evidence standard when it offers evidence that would be sufficient proof for the other-act to survive a Rule 20 motion for a directed verdict of acquittal, had it been a charged offense.

> Before evidence of a prior crime may be admitted for purposes of Rule 404(b), there must be sufficient proof of that crime that it could be presented to a jury if the crime was charged. *State v. Hughes*, 102 Ariz. 118, 426 P.2d 386 (1967). This means that there must be substantial evidence of each element of the crime charged.

State v. McGann, 132 Ariz. 296, 298, 645 P.2d 811, 813 (1982). *Accord State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997) ("We find that the jury reasonably could have concluded that defendant committed the alleged acts."); *State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995) ("Second, this evidence was factually relevant because the state presented sufficient evidence from which the jury could determine that the defendant did the other act in question."); *State v. Williams (Aryon)*, 183 Ariz. 368, 378, 904 P.2d 437, 447 (1995) ("The jury here could reasonably have concluded that defendant committed the prior acts."); *State v. Schurz*, 176 Ariz. 46, 51-52, 859 P.2d 156, 161-62 (1993) ("Allison's testimony was more than sufficient for the jury to find that a robbery took place and that defendant committed it."); *State v. Fierro*, 166 Ariz. 539, 547, 804 P.2d 72, 80 (1990) ("Before evidence of a prior act can be admitted, there must be proof sufficient to take the case to a jury."); *State v. Valles*, 162 Ariz. 1, 5, 780 P.2d 1049, 1053 (1989) ("The evidence of the December robbery was sufficient to take that case to the jury and was admissible to prove defendant's identity."); *State v. Woods*, 121 Ariz. 187, 190, 589 P.2d 430, 433 (1979) ("It is clear from a reading of the record that the evidence concerning the iron was not sufficient evidence of a crime to take the case to the jury."); *State v. Williams (Jason)*, 182 Ariz. 548, 553, 898 P.2d 497, 502 (App. 1995) (citing Ariz. R. Crim. P. 20 in support of the proposition that "there must be proof that the defendant committed the prior act sufficient to take that case to the jury"). *Cf. State v. Terrazas*, 189 Ariz. 580, 583, 944 P.2d 1194, 1197 (1997) (citing *Valles*, *McGann*, and *Woods* to show that *Hughes'* standard survived the promulgation of the Arizona Rules of Evidence).

C. One important implication of conflating the Rule 20 "substantial evidence" standard for directed verdicts of acquittal with the clear-and-convincing-evidence standard for the admission of other-act evidence is that the judge may not preclude evidence offered under Rules 404(b) and 404(c) on the ground that he/she finds the prosecution's witness unbelievable. This conclusion flows from the following principles:

> **(1) In the Rule 20 context, "[i]f reasonable minds can differ on the inferences to be drawn from the evidence, a trial court has no discretion to enter a judgment of acquittal and *must* allow the case to proceed."** *State v. Cifelli*, 214 Ariz. 524, 527, ¶ 11, 155 P.3d 363, 366 (App.2007) (emphasis added). *Accord State v. West*, 226 Ariz. 559, 563, ¶ 18, 250 P.3d 1188, 1192

(2011); *State v. Alvarez*, 210 Ariz. 24, 27, ¶ 10, 107 P.3d 351, 353 (App.2005); *State v. Sullivan (Michael)*, 205 Ariz. 285, 287, ¶ 6, 69 P.3d 1006, 1008 (App.2003).

(2) The sufficiency of the State's evidence and the credibility of its witnesses raise distinctly separate questions for judges ruling on motions for directed verdicts of acquittal. *See State v. Fimbres*, 222 Ariz. 293, 297, ¶ 8, 213 P.3d 1020, 124 (App.2009) (defendant's denial of wrongdoing went to witness credibility, not sufficiency of the evidence); *State v. Williams (Roy)*, 209 Ariz. 228, 231, 99 P.3d 43, 46 (App.2004) ("Appellant's arguments regarding the sufficiency of the evidence go merely to weight and credibility."); *State v. Lee*, 151 Ariz. 428, 429, 728 P.2d 298, 299 (App.1986) ("The issue was not the sufficiency of the evidence, but rather the credibility of the appellant and the victim. That was a matter for the jury to resolve, and we will not disturb its conclusions.").

(3) Courts improperly invade the jury's province by granting motions for directed verdict, based upon their own personal disbelief of the victim's testimony trial. *See State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) ("This court is not empowered to impose its own determination as to the credibility of Woods and Ray in deciding a Rule 20 motion."). *Accord State v. Hall*, 204 Ariz. 442, 455, ¶ 55, 65 P.3d 90, 1003 (2004) (upholding denial of Rule 20 motion, despite defendant's argument that prosecution "witnesses were not credible and their testimony must be discounted because the witnesses were either jailhouse informants, felons, drug abusers, or a combination of the three," because "[t]he credibility of witnesses, however, is a matter for the jury."); *State v. Paoletto*, 133 Ariz. 412, 416, 652 P.2d 151, 155 (App.1982) ("Accordingly, we find that the trial court erred in invading the province of the jury by granting the defendant's motion for acquittal based on his belief that the victim's testimony was not credible."). *Cf. State v. Cox*, 217 Ariz. 353, 357, ¶ 27 174 P.3d at 269 (2007) ("No rule is better established than that the credibility of the witnesses and the weight and value to be given their testimony are questions exclusively for the jury.") (quoting *State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974)). **If judges harboring personal doubts about the victim's credibility cannot keep charges supported by substantial evidence from the jury, they accordingly lack the authority to deny the jury other-act testimony by witnesses whom they personally disbelieve.** *See Logerquist v. McVey*, 196 Ariz. 470, 487, ¶ 51, 1 P.3d 113, 130 (2000) ("It would be strange that a judge forbidden to comment on the reliability or credibility of testimony would be empowered to preclude the jury from hearing it at all because the judge believes it to be unreliable or not worthy of belief.").

(4) A conviction may rest on the uncorroborated testimony of one witness. *See United States v. Kirkie*, 261 F.3d 761, 768 (8th Cir. 2001); *People of the Territory of Guam v. McGravey*, 14 F.3d 1344, 1346-47 (9th Cir. 1994);

State v. Jerousek, 121 Ariz. 420, 427, 590 P.2d 1366, 1373 (1978); *State v. McFarlin*, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1974); *State v. Verdugo*, 109 Ariz. 391, 393, 510 P.2d 37, 39 (1973); *State v. Vega*, 228 Ariz. 24, 29, ¶ 19 & n.4, 262 P.3d 628, 633 & n.4 (App.2011); *State v. Hollenback*, 212 Ariz. 12, 15, ¶ 8, 126 P.3d 159, 162 (App.2005). **This maxim holds true even when the sole prosecution witness gave inconsistent statements or suffered impeachment of his credibility in other ways.** *See State v. Hensley*, 142 Ariz. 598, 603, 691 P.2d 689, 694 (1984) (conflict between eyewitness' testimony and stipulated facts regarding robbery "does not render the testimony irrelevant … but rather goes to the weight to be given the testimony by the trial judge."); *State v. Ortega*, 220 Ariz. 320, 330, ¶ 34, 206 P.3d 769, 779 (App.2009) ("To the extent Ortega is arguing that F.Q.'s testimony was unreliable because it was inconsistent, this was an issue of credibility for the jury to resolve."); *State v. Sullivan (John)*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App.1996) (upholding convictions based on uncorroborated testimony of child victim, despite several inconsistent statements regarding the cause of his injuries)

(5) The State's evidence is not rendered insufficient to support a conviction by the fact the defendant presented contradicting evidence. *See State v. Garfield*, 208 Ariz. 275, 277-78, ¶ 9, 92 P.3d 905, 907-08 (App.2004) ("That he presented evidence to support that defense does not render the contrary evidence insufficient to support his conviction."). *Accord State v. Kreps*, 146 Ariz. 446, 449, 706 P.2d 1213, 1216 (1985); *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1308 (1983).

(6) The mere fact the defense witnesses outnumber the prosecution witnesses does not render the evidence insufficient. *See State v. Manzenado*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App.2005) ("That other witnesses testified they had not seen Manzanedo damage any property does not render Officer Glass's testimony insubstantial, as Manzanedo suggests. The jury was entitled to believe whichever witnesses it found credible."). *Accord State v. Montano*, 121 Ariz. 147, 149, 589 P.2d 21, 23 (App.1978) ("Appellant attacks the sufficiency of the evidence to support his conviction because the arresting officer was the only witness for the state who identified appellant as the driver of the fleeing vehicle, whereas seven witnesses, relatives and friends of appellant, testified otherwise. Also, these seven witnesses testified that neither the siren nor the emergency lights of the police vehicle were on at the crucial time, contrary to the officer's testimony that they were. It is not the function of an appellate court to retry a conflict in the evidence, but only to decide whether there is evidence to support the verdict.").

(7) The defendant's testimony, even if not contradicted by the State, does not render the prosecution's evidence insufficient because "[t]he jury is not compelled to accept the story or believe the testimony of an interested party." *State v. Pieck*, 111 Ariz. 318, 320, 529 P.2d 217, 219 (1974). *Accord State v. Lacy*, 187 Ariz. 340, 350, 929 P.2d 1288, 1298 (1996); *State v. Clemons*,

110 Ariz. 555, 557, 521 P.2d 987, 989 (1974); *State v. Dugan*, 36 Ariz. 36, 42, 282 P.2d 481, 483 (1929); *State v. Cid*, 181 Ariz. 496, 501, 892 P.2d 216, 221 (App.1995); *State v. Carrillo*, 128 Ariz. 468, 470, 626 P.2d 1100, 1102 (App.1980).

D. Rule 404(c)(1)(A) contains no text conditioning the admission of propensity evidence upon the *judge's* personal satisfaction that the proponent's witnesses are credible, but instead allows admission when "[t]he evidence is *sufficient to permit the trier of fact* to find that the defendant committed the other act." (Emphasis added.) Had the drafters intended to allow judicial credibility determinations to usurp the jury's truth-detector role, Rule 404(c)(1)(A) would have included language explicitly conditioning admission upon the presentation of evidence sufficient to convince *the judge* that the defendant committed the other act. The absence of such language is conclusive proof that a judge may not preclude other-act evidence based upon her own credibility determination. *See State v. Sepahi*, 206 Ariz. 321, 324, ¶ 16, 78 P.3d 732, 735 (2003); *State v. Thompson*, 200 Ariz. 439, 440, ¶ 6, 27 P.3d 796, 797 (2001); *State v. Hollenback*, 212 Ariz. 12, 14, ¶ 5, 126 P.3d 159, 161 (App.2005); *State v. Arbolida*, 206 Ariz. 306, 308, ¶ 8, 78 P.3d 275, 277 (App.2003).

Instead, Rule 404(c)(1)(A) contains language textually analogous to the "evidence sufficient to support a finding" phraseology of Arizona Rules of Evidence 104(b) and 901(a), the jurisprudence of which manifests the Arizona Supreme Court's intent to sanction the admission of other-act evidence that *a jury* could find true by the governing standard. *See State v. Plew*, 155 Ariz. 44, 49-50, 745 P.2d 102, 107-08 (1987) ("We recently held on a similar issue that such 'veracity-reliability-credibility' issues 'traditionally fall within the province of the jury rather than the judge. We do not believe that a judge should be able to bootstrap himself into the jury box via evidentiary rules.'") (quoting *State v. LaGrand*, 153 Ariz. 21, 28, 734 P.2d 563, 570 (1987)); *State v. King*, 213 Ariz. 632, 636, ¶ 11, 146 P.3d 1274, 1278 (App. 2007) ("The judge does not determine whether the document is authentic, only whether there is some evidence from which the trier of fact could reasonably conclude that it is authentic."); *State v. Alvarez*, 210 Ariz. 24 28-29, ¶¶ 16-17, 107 P.3d 350, 354-55 (App.2005) (upholding admission of excited utterance, despite alleged unreliability of declarant based upon authority holding that "credibility remains a question for submission to the jury"); *State ex rel. McDougall v. Superior Court*, 172 Ariz. 153, 156, 835 P.2d 485, 488 (App.1992) ("The jury occupies the unique province of weighing the credibility, veracity, and reliability of evidence and of resolving the conflicting inferences drawn from the evidence."); *State v. Meijas*, 163 Ariz. 531, 532, 789 P.2d 398, 399 (App.1990) ("In making a determination about trustworthiness of the statement, *LaGrand* makes it clear that the trial judge is not to determine whether he believed the statement but only whether a reasonable juror 'could' find it true.").

The rule that evidence is "admissible when a jury could reasonably believe from the evidence that the condition was fulfilled" applies with equal force to other-act evidence. *State v. Williams (Aryon)*, 183 Ariz. 368, 377-78, 904 P.2d 437, 446-47 (1995). *Accord State v. Roscoe*, 184 Ariz. 484, 493, 910 P.2d 635, 644 (1995) ("The incidents are

also factually or conditionally relevant because the trial judge could determine that 'the evidence in the record ... would permit a reasonable person to believe' that the other acts occurred and that Roscoe was the actor.") (quoting *Plew*, 155 Ariz. at 50, 745 P.2d at 108); *State v. Romero*, 178 Ariz. 45, 52, 870 P.2d 1141, 1148 (App.1993) (recognizing that Rule 104(b) permits the trial court to admit other-act evidence without weighing credibility, based upon its determination that "the jury could reasonably find the conditional fact" by the governing standard of proof).

E. The final nail in the coffin of the notion that a judge may preclude testimony she/he personally finds incredible is that the Arizona constitution has enshrined the jury's exclusive right to determine witness credibility: "Our constitution preserves the 'right to have the jury pass upon questions of fact by determining the credibility of witnesses and the weight of conflicting evidence.'" *McVey v. Logerquist*, 196 Ariz. 470, 487, ¶ 51, 1 P.3d 113, 130 (2000) (quoting *Burton v. Valentine*, 60 Ariz. 518, 529, 141 P.2d 847, 851 (1943)).

F. Do not be deterred from presenting other-act evidence on the ground that your witness suffered repeated abuse by the defendant over a lengthy period of time, but cannot recall specific details about each discrete event. Such testimony will nonetheless satisfy the clear-and-convincing-evidence standard, for the following reasons:

> **(1) A trial witness' inability to recall matters formerly within his or her personal knowledge goes to the weight, but not the admissibility, of his or her testimony.** *See State v. McCray*, 218 Ariz. 252, 257, ¶ 15, 183 P.3d 503, 508 (2008) ("To the extent his recollection of the events was incomplete or conflicted with testimony by other witnesses, these concerns go to the weight rather than the admissibility of the evidence."); *State v. Romanosky*, 162 Ariz. 217, 224, 782 P.2d 693, 700 (1989) ("The fact that Mrs. Smith said the T-shirts were 'similar' to the ones she purchased in Florida, instead of claiming to be able to positively identify them as hers, clearly goes only to the weight of the evidence, not to its admissibility."); *State v. Bowie*, 119 Ariz. 336, 339, 580 P.2d 1190, 1196 (1978) ("Contradictions or a hazy recollection of events goes to the weight of the evidence, not its admissibility."); *State v. Herrera*, 232 Ariz. 536, 546-47, ¶ 26, 307 P.3d 103, 113-14 (App.2013) (finding clear and convincing evidence based solely on the victim's testimony regarding the uncharged acts, despite her inability to recall the dates of these events, and relying upon the trial judge's credibility assessment).
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> **(2) "Rather than exclude a witness' testimony when the witness is unable to precisely recall events, the modern trend is to allow the witness to testify, allowing the fact finder to consider the witness' memory as one factor affecting the weight to be given the testimony."** *State v. McSwine*, 438 N.W.2d 778, 782-83 (Neb.1989) (citing cases). *Accord Tucker v. State*, 721 P.2d 639, 642 (Alaska App. 1986); *State v. Gorman*, 854 A.2d 1164, 1170-71

(Me.2004). This principle applies with equal force when the witness cannot recall important details, such as:

> **(a) the date of an event significant to the litigation**, *see Sheek v. Asia Badger, Inc.*, 235 F.3d 687, 696 (1st Cir. 2000); *United States v. Powers*, 75 F.3d 335, 340 (7th Cir. 1996); *Alexander v. State*, 370 So.2d 330, 331 (Ala.Crim.App.1979); *State v. Herrera*, 232 Ariz. 536, 546-47, ¶ 26, 307 P.3d 103, 113-14 (App.2013); *State v. Rippinger*, 409 N.W.2d 693, 695 (Iowa 1987); *Commonwealth v. Capone*, 659 N.E.2d 1196, 1199 n.1 (Mass.App.1996); *State v. Wood*, 319 S.E.2d 247, 249 (N.C.1984); *Heyward v. State*, 208 P.3d 71, 73, ¶ 8 (Wyo.2009); or
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> **(b) the specific words used by parties to an important conversation,** *see Buehler v. Oregon-Washington Plywood Corp.*, 551 P.2d 1226, 1231-32 (Cal.1976); *State v. Hicks*, 363 A.2d 1081, 1085 (Conn.1975); *Williams v. State*, 586 S.E.2d 751, 753 (Ga.App.2003); *State v. Moses*, 517 S.E.2d 853, 869 (N.C.1999); *Gruber v. State*, 812 S.W.2d 368, 371 (Tex.App.1991).

(3) Furthermore, many courts throughout the country have held that the prosecution may secure *convictions* for sex crimes occurring repeatedly over a protracted period of time, even if the witness cannot recall details about each specific episode, provided that the victim described the sexual activity (i.e., vaginal intercourse, oral sex, etc.), estimated how often the defendant victimized her (i.e., "more than 50 times," "once a month," and "every weekend"), and the general time frame of these sexual encounters (i.e., the 4-year period between the victim's ninth and fourteenth birthdays or her summer vacation in 2007). In a leading case, the California Supreme Court elaborated upon the evidence that will be sufficient to prove a defendant's guilt in so-called "resident molester" cases:

> Does the victim's failure to specify precise date, time, place or circumstance render generic testimony insufficient? Clearly not. As many of the cases make clear, the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction. [Citations omitted.]
>
> The victim, of course, must describe the kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (*e.g.* lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged in the information or indictment (*e.g.*, "twice a month" or "every time we went camping"). Finally, the victim must be able to describe the general time period in which these acts

> occurred (*e.g.*, "the summer before my fourth grade," or "during each Sunday morning after he came to live with us") to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction.

People v. Jones, 792 P.2d 643, 655-56 (Cal.1990). *Accord U.S. v. Hawpetoss*, 388 F.Supp.2d 952, 960-63 (E.D.Wis.2005); *State v. Davis*, 820 A.2d 1122, 1130-31 (Conn.App.2003) *Taylor v. State*, 982 A.2d 279, 284-85 (Del.2008); *People v. Letcher*, 899 N.E.2d 315, 320-24 (Ill.App.2008); *McNeely v. State*, 529 N.E.2d 1317, 1326-27 (Ind.1988); *State v. Rippinger*, 409 N.W.2d 693, 693-94 (Iowa 1987); *Commonwealth v. Kirkpatrick*, 668 N.E.2d 790, 794-95 (Mass.App.1996); *Rose v. State*, 163 P.3d 408, 414-15 (Nev.2007); *State v. Gipson*, 207 P.3d 1179, 1181-83, ¶¶ 6-17 (N.M.App.2009); *State v. Register*, 698 S.E.2d 464, 475-76 (N.C.App.2010); *State v. Vance*, 537 N.W.2d 545, 549-50 (N.D.1995); *State v. Swan*, 753 N.W.2d 418, 420-23, ¶¶ 10-21 (S.D.2008); *State v. Hayes*, 914 P.2d 788, 795-97 (Wash.App.1995); *Brown v. State*, 817 P.2d 429, 437-38 (Wyo.1987).

G. The defendant's admissions may also constitute clear and convincing evidence that he committed the other-act evidence you seek to admit under Rule 404's exceptions.

(1) The defendant's prior conviction after a trial, for the obvious reasons that the prosecution proved his guilt beyond a reasonable doubt. *See United States v. Benally*, 500 F.3d 1085, 1091 (10th Cir. 2007) ("As to the first three incidents, the court concluded the fact of Benally's rape and assault and battery convictions satisfied the first Enjady factor for the incidents involving Virginia, Sarah, and Betty, respectively."); *United States v. LeMay*, 260 F.3d 1018, 1029 (9th Cir. 2001) ("Additionally, the evidence of LeMay's prior abuse of his cousins was also highly reliable. LeMay had been convicted of at least one of the rape charges arising from the incidents in Oregon."); *State v. Dixon*, 226 Ariz. 545, 550, ¶ 14, 250 P.3d 1174, 1179 (2011) (defendant's sexual-assault conviction satisfied Rule 404(c)(1)(A)).

(2) The defendant was convicted of a sex offense by plea agreement. *See United States v. Chesney*, 86 F.3d 564, 572 (6th Cir. 1996) (guilty plea entered before trial rendered that crime admissible as other-act evidence); *United States v. Anderson*, 879 F.2d 369, 377-78 & n.3 (8th Cir. 1989) (guilty plea under oath satisfied clear-and-convincing-evidence standard); *State v. Spencer*, 683 So.2d 1326, 1330 (La.App.2006) (guilty plea satisfies clear-and-convincing-evidence standard, notwithstanding defendant's subsequent

profession of innocence); *State v. Moorman*, 505 N.W.2d 593, 602 (Minn.1993) (same).

The defendant cannot avoid admission of his plea agreement by contending that he was innocent, but pled only because he wanted to avoid incarceration or some other negative consequence. Courts in Arizona and elsewhere have upheld the admission of other-act evidence when the contesting party argues that there are possible innocuous alternative explanations for the evidence, reasoning that these competing views go to the weight the jury will accord the challenged evidence. *See, e.g., State v. Johnson*, 212 Ariz. 425, 430 n.4, 133 P.3d 735, 740 n.4 (2006); *State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995); *State v. Bible*, 175 Ariz. 549, 593, 858 P.2d 1152, 1196 (1993); *State v. Spoon*, 137 Ariz. 105, 111, 669 P.2d 105, 111 (1983); *State v. Jeffers*, 135 Ariz. 404, 415, 661 P.2d 1105, 1116 (1983); *State v. Phelps*, 125 Ariz. 114, 118, 608 P.2d 51, 55 (App.1979). *Accord United States v. Strong*, 485 F.3d 985, 990 (7th Cir. 2007); *Bronshtein v. Horn*, 404 F.3d 700, 731 (3rd Cir. 2005); *Sakeagak v. State*, 952 P.2d 278, 283 (Alaska App. 1995); *State v. Smith*, 927 P.2d 649, 653 (Utah App. 1996).

(3) The defendant's admission to having committed the uncharged acts at issue also satisfies the clear-and-convincing-evidence standard. *See Arizona v. Fulminante*, 499 U.S. 279, 292 (1991) ("A defendant's confession is probably the most probative and damaging evidence that can be admitted against him."); *Johnson v. State*, 983 A.2d 904, 934 (Del.2009) ("Johnson's own written words describing the unadjudicated misconduct also qualify as plain, clear and convincing evidence."); *State v. Lykes*, 933 A.2d 1274, 1285 (N.J.2007) (finding clear-and-convincing-evidence standard satisfied, based upon defendant's concession during cross-examination at trial "to having seen and held cocaine vials previously"). The *corpus delicti* rule does not require the State to offer independent evidence corroborating the defendant's incriminating statements regarding uncharged acts. *See State v. Alatorre*, 191 Ariz. 208, 212, ¶ 15 n.5, 953 P.2d 1261, 1265 n.5 (App.1998) ("The *corpus delicti* rule has not been extended to the admission of prior-acts evidence under Rule 404(b)."); *State v. Armstrong*, 176 Ariz. 470, 474, 862 P.2d 230, 234 (App.1993) ("We therefore hold that an admission by defendant to an uncharged offense may, if relevant and otherwise admissible, be admitted at trial absent independent proof of that offense."); *State v. Sanchez*, 130 Ariz. 295, 300, 862 P.2d 1217, 1222 (App.1981) ("It was not necessary to show that appellant had actually committed any prior bad act since he boasted that he had.").

H. When does Rule 404(c) require an evidentiary hearing with live testimony?

(1) Unfortunately, the Arizona Supreme Court ignored the principles outlined above and has (wrongly) held that the trial judge must resolve the conflict between a victim's allegations and the defendant's denials by

conducting an evidentiary hearing at which he/she can assess the relative credibility of these witnesses:

> ¶ 33 In this case, the trial court, in determining whether the State met its burden under Rule 404(c), limited its review to the transcript of the grand jury proceedings, the pleadings, and the arguments of counsel at oral argument. None of these materials contained testimony from the victims; the ****875 *50** grand jury transcript contained only a police officer's descriptions of the victims' statements to the police. Based on these materials, the court found that each sexual assault incident was cross-admissible as to the others under Rule 404(c). However, the court's findings plainly did not satisfy the specificity requirement of Rule 404(c) (1)(D), specifically as to the factor set forth in Rule 404(c)(1)(A).
>
> ¶ 34 In making its finding under Rule 404(c)(1)(A), the court stated that clear and convincing evidence established that Aguilar committed the other acts because Aguilar admitted to the police that he had sexual contact with the three victims. But that misses the point. The question here is not simply whether Aguilar had sexual contact with the victims, but also whether that sexual contact was without the victims' consent. ***Thus, the court's focus should have been on whether clear and convincing evidence established that Aguilar committed the other sexual assaults, not on Aguilar's admission that he had consensual sexual contact with the victims*.**
>
> ¶ 35 ***The resolution of this issue—whether the victims consented to the sexual contact—turns largely on the credibility of the witnesses. Consequently, the trial court had to make a credibility determination that the victims' accounts of the assaults were more credible than Aguilar's for the court to make the necessary finding that clear and convincing evidence established that the sexual contact in each incident was non-consensual. That could not have occurred here, when the court neither heard from the victims nor was presented with any prior testimony from them.*** The court's findings on this element of Rule 404(c)(1) were insufficient to support the cross-admission of the three allegations of sexual assault.

***State v. Aguilar*, 209 Ariz. 40, 49-50, ¶¶ 33-35, 97 P.3d 865, 874-75 (2004) (emphasis added). To recapitulate, *Aguilar* deems prosecutorial avowals and/or hearsay from police officers incompetent evidence and therefore requires the State to present the first-hand accounts of its victims and other so that the judge can make the credibility assessment the Arizona Supreme Court mistakenly believes Rule 404(c)(1)(A) requires. Bound by *Aguilar*, the court of appeals will follow suit and allow the question of clear and convincing evidence to turn upon witness credibility.** *See also State v. Herrera*, 232 Ariz. 536, 546, ¶ 26, 307 P.3d 103, 113 (App.2013) ("The trial court found that A.M.'s testimony 'was clear and it was convincing evidence that ... the Yuma Acts[ ] occurred.' We defer to the court's credibility determination. *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 10, 18 P.3d 85, 89 (App.2000) (trial court, not appellate court, assesses credibility). We therefore conclude the court did not abuse

its discretion in ruling the evidence was sufficient to allow the jury to find Herrera had committed the Yuma Acts.”).

(2) Thankfully, *Aguilar* has been somewhat limited by *State v. LeBrun*, 222 Ariz. 183, 213 P.3d 332 (App.2009), which allows the State an avenue for satisfying Rule 404(c)(1)(A)’s requirement without calling its other-act witnesses at a live evidentiary hearing and having them subjected to cross-examination.

(A) Because the court of appeals is an inferior court lacking authority to overrule, modify, or disregard the Arizona Supreme Court’s decision in *Aguilar*, the *LeBrun* panel was bound by the high court’s incorrect statement that “the trial court had to make a credibility determination that the victims’ accounts of the assaults were more credible than Aguilar’s for the court to make the necessary finding that clear and convincing evidence.”

(B) The *LeBrun* panel, however, seized upon the opening afforded by a phrase in *Aguilar’s* very next sentence (“That could not have occurred here, *when the court neither heard from the victims* nor was presented with any prior testimony from them.”) by holding that Judge McClennan “heard from the victims” because the State had submitted videotapes or audio cassettes of police interviews during which the witnesses related their firsthand accounts of the uncharged acts.

(c) Thus, *LeBrun* held that trial judges may determine the admissibility of other-act evidence under Rule 404(c), based upon *video or audio* recordings of the victim’s pretrial interview statements, particularly when, as here, “the trial court gave defendant the opportunity to present evidence disputing the victims’ statements, but offered nothing.” *See LeBrun*, 222 Ariz. at 185-88, ¶¶ 8, 13, 15-16, 213 P.3d at 334-37. The court of appeals articulated the following reasoning for its holding that the “taped statements by the Indiana [other-act] victims … were sufficient to permit a finding that there was clear and convincing evidence establishing that the defendant committed the other acts of sexual misconduct without an evidentiary hearing to evaluate credibility,” *id.* at 188, ¶ 16, 213 P.3d at 337:

> (1) Neither Rule 404(b) nor Rule 404(c) explicitly requires an evidentiary hearing with live testimony. *Id*. at 186, ¶ 10, 213 P.3d at 335.
>
> (2) The Court’s “review of *Aguilar* and the Rules of Evidence, including Rule 404(c), reveals nothing that categorically restricts the types of evidence the trial court may consider in determining the admissibility of evidence under Rule 404(c).” *Id.* at 187, ¶ 13, 213 P.3d at 336 (citing Ariz.R.Evid.104(a) and *State v. Hutchinson*, 141 Ariz. 583, 588, 688 P.2d 209, 214 (App.1984)).

(3) As a result of the State submitting recordings of their pretrial interview statements about the uncharged acts, "the trial court heard the victims' own statements and first-person accounts of what they observed or perceived regarding the defendant's conduct." *Id.* at 187, ¶ 15, 213 P.3d at 336.

(3) Applying mathematical terminology to which court's reasoning is more correct, the following principles of law demonstrate that "*LeBrun* > *Aguilar*":

- A trial judge may not exclude evidence based upon personal disbelief of the State's witnesses, given the Arizona Supreme Court's declaration: "Our constitution preserves the 'right to have the jury pass upon questions of fact by determining the credibility of witnesses and the weight of conflicting evidence.'" *McVey v. Logerquist*, 196 Ariz. 470, 487, ¶ 51, 1 P.3d 113, 130 (2000) (quoting *Burton v. Valentine*, 60 Ariz. 518, 529, 141 P.2d 847, 851 (1943)).

- This constitutional principle is reflected by the Arizona Supreme Court's jurisprudence construing the rules of evidence and motions for directed verdicts of acquittal. *See Logerquist v. McVey*, 196 Ariz. 470, 487, ¶ 51, 1 P.3d 113, 130 (2000) ("It would be strange that a judge forbidden to comment on the reliability or credibility of testimony would be empowered to preclude the jury from hearing it at all because the judge believes it to be unreliable or not worthy of belief."); *State v. Cox*, 217 Ariz. 353, 357, ¶ 27 174 P.3d at 269 (2007) ("No rule is better established than that the credibility of the witnesses and the weight and value to be given their testimony are questions exclusively for the jury."); *State v. Plew*, 155 Ariz. 44, 49-50, 745 P.2d 102, 107-08 (1987) ("[S]uch 'veracity-reliability-credibility' issues 'traditionally fall within the province of the jury rather than the judge. We do not believe that a judge should be able to bootstrap himself into the jury box via evidentiary rules." (quoting *State v. LaGrand*, 153 Ariz. 21, 28, 734 P.2d 563, 570 (1987)).

- The text of Rule 404(c)(1)(A) mirrors the "evidence sufficient to support a finding" phraseology of Rules 104(b) and 901(a), the jurisprudence of which manifests the Arizona Supreme Court's intent to sanction the admission of other-act evidence that *a jury* could find true by the governing standard, regardless of whether the judge personally finds the evidence credible.

- ***Aguilar* incorrectly conflates the sufficiency of the evidence with the credibility of the witnesses who relate the other-act evidence. Credibility and sufficiency-of-the-evidence inquiries are distinct, and the latter is the sole criterion by which our courts have assessed the admissibility of other-act evidence under Rules 404(b), expert testimony under Rule 702, statements falling within an exception to Rule 801's prohibition against hearsay, and determinations of authenticity under Rule 901.**

- ***Aguilar* ignores the fact that Rule 404(c) contains no language rendering Rules 104(a) and 104(b) inapplicable to other-act evidence offered to prove the defendant's aberrant sexual propensity to commit the charged offense. This is significant because:**

(1) Rule 104(a) allows the State to submit a proffer—such as the avowals of the prosecutor, police reports, and other forms of hearsay—that would not be admissible under the rules of evidence at trial. *See State v. Hutchinson*, 141 Ariz. 583, 588, 688 P.2d 209, 214 (App.1984);

(2) Rule 104(b) allows the judge to issue a ruling conditionally admitting the other-act evidence and to revisit, upon defense motion *during trial*, the sufficiency of the evidence the prosecution subsequently presented to the jury. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988) ("Often the trial judge may decide to allow the proponent to introduce evidence concerning the prior act, and *at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding*.") (emphasis added); *id.* at 691 ("[I]n assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider *all evidence presented to the jury*.") (emphasis added).

(3) Rule 104(b) does not allow the judge to assess credibility when determining the admissibility of other-act evidence. *See Huddleston*, 485 U.S. at 690 ("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 [the requisite quantum of proof]"); *State v. Romero*, 178 Ariz. 45, 52, 870 P.2d 1141, 1148 (App.1993) (recognizing that Rule 104(b) permits the trial court to admit other-act evidence without weighing credibility, based upon its determination that "the jury could reasonably find the conditional fact" by the governing standard of proof).

(4) *LeBrun* is aligned with the overwhelming number of other jurisdictions that likewise construe Rule 104(b) as granting trial courts authority to determine the admissibility of other-act evidence, based solely upon non-testimonial offers of proof—including prosecutorial avowals, tape-recorded interviews, and police reports—to avoid mini-trials and calling witnesses twice. *See United States v. Matthews*, 440 F.3d 818, 828-29 (6th Cir. 2006); *United States v. Aleskerova*, 300 F.3d 286, 294-95 (2nd Cir. 2002); *United States v. Carter*, 760 F.2d 1568, 1579 (11th Cir. 1985); *State v. Cutler*, 977 A.2d 209, 214-16 (Conn.2009); *People v. Davis*, 218 P.3d 718, 727-28 (Colo.App.2008); *Anderson v. U.S.*, 857 A.2d 451, 456-58 (D.C.2004); *Harvey v. State*, 660 S.E.2d 528, 532 (Ga.2008); *Cooke v. State*, 233 P.3d 164, 170 (Idaho App. 2010); *State v. Williams*, 830 So.2d 984, 987 & nn.5, 7 (La.2002); *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn.1998); *State v. Steffes*, 887 P.2d 1196, 1204 (Mont.1994); *Salgado v. State*, 968 P.2d 324, 326-27 (Nev.1998); *State v. Ericson*, 986 A.2d 488, 496 (N.H.2009); *State v. Hernandez*, 784 A.2d 1225, 1238-40 (N.J.2001); *People v. Holmes*, 690 N.Y.S.2d 292, 294 (1999); *State v. Mobley*, 684 S.E.2d

508, 512-13 (N.C.App.2009); *Palomo v. State*, 352 S.W.3d 87, 94 (Tex.Crim.App.2008) (citing *Arzaga v. State*, 86 S.W.3d 767, 781-82 (Tex.Crim.App.2002)); *State v. Mee*, 275 P.3d 1192, 1197, ¶¶ 20-21 (Wash.App.2012) (citing *State v. Kilgore*, 53 P.3d 974, 977-78 (Wash.2002)); *State v. McGinnis*, 455 S.E.2d 516, 527 n.16 (W.Va.1994).

- ***Aguilar's*** **declaration that the trial judge needed to determine the credibility of the defendant and the victims with testimony ignores the fact that neither Rule 404(b) nor Rule 404(c) contains any text requiring that the judge hold an evidentiary hearing.**

- **In the Rule 404(b) context, the Arizona Supreme Court examines the evidence the State ultimately offered *at trial* to determine whether the prosecution proved the defendant's commission of the uncharged act by clear and convincing evidence—not the information and argument the prosecutor presented to the trial judge when the preliminary ruling of admissibility was made.** *See State v. Garcia*, 224 Ariz. 1, 11-12, ¶¶ 32-39, 226 P.3d 370, 380-81 (2010) (focusing on evidence admitted during aggravation phase of capital defendant's sentencing); *State v. Anthony*, 218 Ariz. 439, 443-45, ¶¶ 27-37 (2008) (noting that the trial court ruled on the admissibility of other-act evidence based upon "briefing ... and extensive oral argument," but examining the trial evidence to determine sufficiency of proof); *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 57, 25 P.3d 717, 736 (2001) (discussing only trial testimony of a prosecution witness while upholding other-act evidence); *State v. Lee*, 189 Ariz. 590, 596-99, 944 P.2d 1204, 1210-13 (1997) (relating murder defendant's post-arrest statements and subsequent trial testimony); *State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995) (relying on "the testimony of two witnesses who saw the previous assault"); *State v. Schurz*, 176 Ariz. 46, 51-52, 869 P.2d 156, 161-62 (1993) ("Allison's testimony was more than sufficient for the jury to find that a robbery took place and the defendant committed it."). *Accord State v. Lykes*, 933 A.2d 1274, 1285 (N.J.2007) (finding clear-and-convincing-evidence standard satisfied, based upon defendant's concession during cross-examination at trial "to having seen and held cocaine vials previously").

- **Sometimes defense attorneys will attempt to avoid *LeBrun* by arguing that the submission of the victim's recorded out-of-court interview statements violates his Sixth Amendment right to confrontation. Should this argument be made, remind your judge that confrontation is a trial right satisfied when the defendant has an opportunity to cross-examine the State's witnesses at trial. This argument from my Petruzzi ABR should drive that point home:**

> The Supreme Court has repeatedly affirmed that a defendant has no cognizable right to confrontation during proceedings other than *trial* itself, and that the Sixth Amendment's demands are satisfied when the defendant is afforded the opportunity to cross-examine prosecution witnesses at trial. *See Kentucky v. Stincer*, 482 U.S. 730, 740-42 (1987)

(no right to confront child witnesses during competency hearing); *Pennsylvania v. Ritchie*, 480 U.S. 38, 53-54 & n.10 (1987) ("The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. … Moreover, this Court normally has refused to find a Sixth Amendment violation when the asserted interference with cross-examination did not occur at trial.") (emphasis in original); *California v. Green*, 399 U.S. 149, 159 (1970) ("[T]he inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial."); *Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right."); *McCray v. Illinois*, 386 U.S. 300, 313-14 (1967) (no Confrontation Clause violation where defendant was denied the chance to discover an informant's name at pretrial hearing).

Neither *Crawford v. Washington*, 541 U.S. 36 (2004), nor its progeny have overruled this precedent. *See Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2713 (2011) ("As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused *at trial* unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.") (emphasis added); *Crawford*, 541 U.S. at 42-43 (explaining that the resolution of the case depended on whether the Court determined that the right to confrontation solely applied to witnesses who testify at trial or whether it also applied to witnesses whose "statements are offered at trial"). Consequently, lower courts continue to follow the overwhelming majority rule "declining to apply the confrontation right to various pre- and post-trial proceedings." *United States v. Mitchell-Hunter*, 663 F.3d 45, 51-52 (1st Cir. 2011) (collecting federal cases). *Accord Oakes v. Commonwealth*, 320 S.W.3d 50, 55-56 (Ky.2010) (noting that "every other state ruling on this issue rejects claims that the Confrontation Clause applies to pre-trial hearings") (collecting cases); *Graves v. State*, 307 S.W.3d 483, 489 (Tex.Crim.App.2010) (same); *State v. Fortun-Cebada*, 241 P.3d 800, 806-07, ¶¶ 39-43 (Wash.App.2010) (same). Accordingly, numerous jurisdictions, including Arizona, permit trial courts to determine the admissibility of other-act evidence, based solely upon non-testimonial offers of proof—including prosecutorial avowals, tape-recorded interviews, and police reports—to avoid mini-trials and calling witnesses twice.[1] Thus, the defendant will suffer no violation of his right to

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[1] *See United States v. Mitchell*, 440 F.3d 818, 828-29 (6th Cir. 2006); *LeBrun*, 222 Ariz. at 187-88, ¶¶ 13-16, 213 P.3d at 336-37; *People v. Davis*, 218 P.3d 718, 727-28 (Colo.App.2008); *Anderson v. U.S.*, 857 A.2d 451, 456-58 (D.C.2004); *Harvey v. State*,

confrontation because: (1) he will have an opportunity to cross-examine the other-act witness at trial; and (2) he may move to strike the State's other-act evidence at the close of the evidence, based on alleged deficiencies in the witness' trial testimony.

I. Some recommendations on how to avoid reversal under *Aguilar.*

A. *ALWAYS* present the trial court with recordings of the interview statements of your victims or other witnesses to the uncharged acts.

(1) If your officers did not record their interview, one means of recourse is to have the agents conduct a videotaped or audio-taped interview and submit the recording to the trial judge.

(2) Note that the Victims' Bill of Rights does not allow witnesses who are not victims of the charged offenses to refuse a defense interview. *See State v. Stauffer*, 203 Ariz. 551, 553-56, ¶¶ 6-15, 58 P.3d 33, 35-38 (App.2002). You should present the judge with recordings of the witness' defense pretrial interview if you have no other tape-recordings of his/her firsthand accounts. This rationale obviously applies to victims of the charged offenses who waive their right to refuse pretrial defense interview.

(3) If the defendant made pretrial interview admissions, also present the judge with a recording of his interview statements. In the event the defendant made no statements denying his other-acts (i.e., he invoked his *Miranda* rights and consequently refused to be interviewed), make sure that the record reflects that the absence of any evidence contradicting the victims, as this point was important to the *LeBrun* panel.

(4) If the defendant was prosecuted for the other-act evidence you wish to admit at trial, it might prove beneficial to obtain transcripts from that proceeding—whether it be a change of plea hearing, the trial, or the sentencing hearing. You could then provide the trial judge with the victim's testimony at the prior trial and/or the aggravation/mitigation hearing. If the victim made unsworn statements to the sentencing judge, such firsthand accounts of the prior acts arguably pass muster under *LeBrun.* Likewise, the defendant's admissions about the prior acts during a change of plea proceeding,

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660 S.E.2d 528, 532 (Ga.2008); *Cooke v. State*, 233 P.3d 164, 170 (Idaho App. 2010); *State v. Williams*, 830 So.2d 984, 987 & nn.5, 7 (La.2002); *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn.1998); *State v. Steffes*, 887 P.2d 1196, 1204 (Mont.1994); *Salgado v. State*, 968 P.2d 324, 326-27 (Nev.1998); *State v. Ericson*, 986 A.2d 488, 496 (N.H.2009); *People v. Rhodes*, 936 N.Y.S.2d 775, 777 (2012); *People v. Holmes*, 690 N.Y.S.2d 292, 294 (1999); *State v. Mobley*, 684 S.E.2d 508, 512-13 (N.C.App.2009); *Palomo v. State*, 352 S.W.3d 87, 94 (Tex.Crim.App.2011); *State v. Mee*, 275 P.3d 1192, 1197 (Wash.App.2012); *State v. McGinnis*, 455 S.E.2d 516, 527 n.16 (W.Va.1994).

his trial testimony, and his allocution to the trial judge at sentencing make transcripts of these proceedings useful. *But see State v. Williams*, 209 Ariz. 228, 238, ¶ 43, 99 P.3d 43, 52 (App.2004) (Appellant's statements to [the presentence report writer] should not have been admitted. 'Neither a pre-sentence report nor any statement made in connection with its preparation shall be admissible as evidence in any proceeding bearing on the issue of guilt.' Ariz.R.Crim.P.26.6(d)(2). Such statements are inadmissible even if offered in a subsequent proceeding that involves an unrelated incident.").

Do not be deterred from presenting other-act evidence based upon charges for which the defendant was acquitted because the beyond-a-reasonable-doubt standard is much more difficult to meet than Rule 404's clear-and-convincing-evidence standard, and the Fifth Amendment's double-jeopardy prohibition and collateral-estoppel doctrine do not apply. *See United States v. Felix*, 503 U.S. 378, 386-87 (1992) (explaining that the "collateral-estoppel component of the Double Jeopardy Clause offered Dowling no protection despite his earlier acquittal, because the relevance of evidence offered under Rule 404(b) was governed by a lower standard of proof than that required for conviction") (citing *Dowling v. United States*, 493 U.S. 342, 347-52 (1990)); *State v. Yonkman*, 229 Ariz. 291, 296-98, ¶¶ 16-26, 274 P.3d 1225, 1230-32 (App.2012) (relying upon *Dowling* to uphold the admission of other-act evidence involving other young girls under Rules 404(b) and 404(c), despite the defendant's acquittal at an earlier trial, and requiring the trial judge on remand to conduct a fact-specific inquiry regarding the admissibility of evidence of the not-guilty verdicts), *vacated on other grounds*, 231 Ariz. 496, 297 P.3d 302 (2013), *ruling reaffirmed on remand*, 233 Ariz. 369, 373-76, ¶¶ 10-25, 312 P.3d 1135, 1139-42 (App.2013) (but note that the fact of the prior acquittals may be admissible); *State v. Harris*, 83 So.3d 269, 278 (La.App.2011) (holding that "the constitutional protections of double jeopardy, which included the collateral estoppels doctrine, did not preclude the admission of 404(b) evidence relating to prior sexual offenses of which a defendant had been acquitted, because the state's burden of proof to show the defendant's prior bad acts was lower than the state's burden of proof to show the defendant's guilt beyond a reasonable doubt").

(5) If your judge insists on a live hearing, consider filing a special action to dispute an adverse ruling. If that course produces no relief, your sole option for presenting evidence under Rule 404(c) is to call your witness to testify at the evidentiary hearing—the best way to avoid reversal under *Aguilar* years down the road, when your victim might no longer cooperate or recall the events as well. If this happens, you must file a notice of cross-appeal after sentencing to give the court of appeals jurisdiction to entertain your post-conviction challenge to this adverse ruling on direct appeal.

B. Another alternative is to consider offering the other-act evidence under some exception to Rule 404(b) because: (1) a trial court may conditionally admit

Rule 404(b) evidence, based solely on arguments, police reports, and prosecutorial offers of proof; (2) Arizona Supreme Court precedent in the Rule 404(b) context—unlike *Aguilar*—does not require trial judges to assess witness credibility; and (3) Arizona Supreme Court precedent does not confine the reviewing court to the materials/information presented to the trial judge at the time of his/her ruling, but instead allows the reviewing court to consider the evidence the prosecution ultimately offered at trial evidence—a distinction that will give you better chances of having your conviction affirmed on appeal.

C. Another alternative is to consider offering your other-act evidence under the intrinsic-evidence doctrine, which will be discussed in greater detail in another part of these materials. Please note that this doctrine has been extremely narrowed, and the old standard is now defunct:

> "Evidence is intrinsic in Arizona if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." [*State v. Ferrero*, 229 Ariz. 239, 243, ¶ 20, 274 P.3d 509, 513 (2011)]. "[E]vidence of acts that are so interrelated with the charged act that they are part of the charged act itself" is not evidence of another crime; thus, it is not analyzed under Rule 404(b)." [*Id*.]

State v. Butler, 230 Ariz. 465, 472-73, ¶ 29, 286 P.3d 1074, 1081-82 (App.2012).

The intrinsic-evidence doctrine will be applicable, even under the narrow standard, if the State charges the defendant with a violation of the continuous sexual abuse of a child statute, A.R.S. § 13-1417, because every sexual act the defendant committed against the victim during the indictment's time frame will directly prove the offense and meet the "performed contemporaneously" element. This statute provides as follows:

> A. A person who over a period of three months or more in duration engages in three or more acts in violation of § 13-1405, 13-1406 or 13-1410 with a child who is under fourteen years of age is guilty of continuous sexual abuse of a child.
>
> B. Continuous sexual abuse of a child is a class 2 felony and is punishable pursuant to § 13-705.
>
> C. To convict a person of continuous sexual abuse of a child, the trier of fact shall unanimously agree that the requisite number of acts occurred. The trier of fact does not need to agree on which acts constitute the requisite number.
>
> D. Any other felony sexual offense involving the victim shall not be charged in the same proceeding with a charge under this section unless the other charged felony sexual offense occurred outside the time period charged under

> this section or the other felony sexual offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved. If more than one victim is involved, a separate count may be charged for each victim.

2. Rule 404(c)(1)(B) issues.

A. This provision of Rule 404(c) requires the trial court to find that "[t]he commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged."

B. Before the Arizona Supreme Court promulgated Rule 404(c) in 1997, prevailing precedent required the State to present expert testimony establishing that the defendant had an aberrant sexual propensity to commit the charged offenses when the charged and uncharged acts were either dissimilar or temporally remote (more than 2 years apart). *Compare State v. Treadaway*, 116 Ariz. 163, 167, 568 P.2d 1061, 1065 (1977) ("Although we are reluctant to overturn the trial court, in light of the foregoing discussion we must hold the admission of this prior bad act in a trial involving this crime constitutes reversible error unless and until there is reliable expert medical testimony that such a prior act three years earlier tends to show a continuing emotional propensity to commit the act charged. Because there was no such expert testimony here, reversal is required."); *with State ex rel. LaSota v. Corcoran*, 119 Ariz. 573, 577. 583 P.2d 229, 233 (1978) ("*Treadaway* ... only controls if the prior act is either not similar to the crime charged or not near in time.") (no expert testimony required because only 3 months separated defendant's sexual attacks against two young boys).

C. However, "under Rule 404(c) of the Arizona Rules of Evidence, expert testimony is no longer required to establish relevancy in all cases of dissimilar or remote acts. Rather, as long as there is a 'reasonable basis,' by way of expert testimony or otherwise, to conclude that the commission of the other act permits an inference that a defendant's aberrant sexual propensity is probative, the evidence is admissible." ***State v. Arner*****, 195 Ariz. 394, 396, ¶ 5, 988 P.2d 1120, 1122 (App.1999).** *Accord* Comment, to 1997 Amendment to Rule 404, Ariz. R. Evid. ("Subsection (1)(B) of Rule 404(c) is intended to modify the *Treadaway* rule by permitting the court to admit evidence of remote or dissimilar other acts providing there is a "reasonable" basis, by way of expert testimony or otherwise, to support relevancy, i.e., that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged. The *Treadaway* requirement that there be expert testimony in all cases of remote or dissimilar acts is hereby eliminated.").

I would strongly recommend that an expert be called to testify in extreme cases, such as (1) those involving non-preferential child molesters (both genders and varying ages); and (2) when the uncharged and charged incidents concern victims whose ages significantly vary (i.e., an infant or prepubescent girl versus post-

pubescent teenagers or adults) and/or who were abused in totally different ways (i.e., non-violent molestation of a child versus forcible rape).

D. Furthermore, Rule 404(c)(1)(B) does not impose any requirement that the State's expert give trial testimony about the defendant's aberrant sexual propensities; testimony at a pretrial evidentiary hearing is sufficient. *See State v. Arner,* 195 Ariz. 394, 396, ¶ 4, 988 P.2d 1120, 1122 (App.1999) ("Other decisions have not required expert testimony at trial to explain propensity evidence.") (collecting cases).

E. After Rule 404(c)'s enactment, defendants argued that this rule was categorically inapplicable whenever the defendant was charged with sexual assault, based on the curious rationale that non-consensual heterosexual intercourse between adults of the opposite sex—unlike child molestation—is not sexually aberrant. The Arizona Supreme Court explicitly rejected this argument:

> Under the plain language of Rule 404(c), when a defendant is charged with one of the sexual offenses listed in A.R.S. § 13–1420(c), the state may introduce "evidence of other crimes, wrongs, or acts," if the court finds that such evidence "provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged." Ariz. R. Evid. 404(c)(1)(B). As a result, with the adoption of Rule 404(c), the types of sex offenses for which other act evidence may be admitted are no longer restricted to those offenses listed in *McFarlin*. Instead, the offenses for which other act evidence may be admitted are those listed in A.R.S. § 13–1420(C), which includes sexual assault. Thus, the court of appeals erred in concluding that when a defendant is charged with sexual assault of an adult and the sexual contact involves heterosexual acts, evidence of other acts is not admissible under Rule 404(c).

State v. Aguilar, 209 Ariz. 40, 48, ¶ 26, 97 P.3d 865, 873 (2004). *Accord id.* at 48-49, ¶ 28, 97 P.3d at 873-74 ("Consequently, we hold that the sexual propensity exception of Rule 404(c) is not restricted to cases in which the charges involve sodomy, child molestation, or lewd and lascivious conduct. Instead, the exception applies to the sexual offenses listed in A.R.S. § 13–1420(c), which includes charges involving nonconsensual heterosexual contact between adults."); *State v. Williams*, 209 Ariz. 228, 237, ¶ 36, 99 P.3d 43, 52 (App.2004) ("Our supreme court has never stated that its goal was to narrow or eliminate the long-recognized common-law propensity exceptions to the exclusion of evidence of prior bad acts in cases involving charges of sexual misconduct. In fact, the clear intent of our supreme court in promulgating subsection (c) of Rule 404 was to 'broaden[ ] the types of sexual offense cases in which other act evidence might be admissible.'") (quoting *Aguilar*, 209 Ariz. at 48, ¶ 26, 97 P.3d at 873); *id.* at 238, ¶ 39, 99 P.3d at 53 ("We therefore conclude that the aberrant sexual propensity exception to the prohibition against character evidence, codified in Rule 404(c), encompasses the crimes of public sexual indecency and public sexual indecency to a minor. Accordingly, the trial

court did not err in admitting the prior act evidence pursuant to Rule 404(c) and in instructing the jury pursuant to Rule 404(c)(2).")

F. "Sexual conduct with a minor qualifies as 'sexual aberration.'" *Keeney v. State*, 850 P.2d 311, 317 (Nev.1993). Although it is not always possible, your research should be geared towards finding cases that involve sexual conduct of the same or similar type as the charged offense (i.e., oral, genital, or anal intercourse, fondling, digital penetration, etc.) and children of the same gender and approximate ages as the charged victim(s). Here are some cases to jumpstart your research:

- *State v. Herrera*, 232 Ariz. 536, 542, 547, ¶¶ 6, 28, 307 P.3d 103, 109, 114 (App.2013) (upholding trial court's post-remand determination that defendant demonstrated his sexual aberrance by having his 11-13 year old step-daughter masturbate him, by videotaping her jumping up and down with her breasts exposed, filming her vagina, and commanding her to make lewd remarks on tape).

- *State v. Vega*, 228 Ariz. 24, 29, ¶¶ 19-20, 262 P.3d 628, 633 (aberrant sexual propensity established by one instance of touching 12-year-old girl's vagina over her bathing suit).

- *State v. Grainge*, 186 Ariz. 55, 57-58, 918 P.2d 1073, 1075-76 (App.1996) (propensity established by 13-year-old boy performing oral sex on defendant).

- *State v. McAnulty*, 184 Ariz. 399, 402, 909 P.2d 466, 469 (App.1995) (defendant's fondling of the genitalia and breasts of 12 and 14-year-old girls established his aberrant sexual propensity).

- *State v. Varela*, 178 Ariz. 319, 323, 873 P.2d 657, 661 (App.1993) (noting similarity in the ages of the 9-year-old victim of charged offense and the victims of the prior acts, which ranged between 7 and 13 years old).

- *State v. Pierce*, 170 Ariz. 527, 530, 826 P.2d 1153, 1156 (App.1991) (recognizing that the sexual abuse of a 12-year-old girl by a 46-year-old male defendant is sexually aberrant behavior).

- *State v. Lopez*, 170 Ariz. 112, 117, 822 P.2d 465, 470 (App.1990) (engaging in fellatio with boys between 14 and 16 years old reflects an abnormal sexual interest).

- *State v. Weatherbee*, 158 Ariz. 303, 304-05, 762 P.2d 590, 591-92 (App.1988) (fondling of daughters who were 8 to 10 and 13 years old in the family home).

- *State v. Bailey*, 125 Ariz. 263, 265-66, 609 P.2d 78, 80-81 (App.1980) (sexual aberration shown by 54-year-old defendant's acts of "French-kissing" a fifth-grade girl and kissing young girls on their lips).

- *State v. McDaniel*, 119 Ariz. 373, 376, 580 P.2d 1227, 1230 (App.1978) (sexual aberration shown by defendant placing his hand halfway under 7-year-old girl's dress and touching the area of a 6-year-old boy's genitals over his clothing).

G. Rule 404(c)(1)(B) should pose no difficulty in showing that a defendant's possession of child pornography constitutes an uncharged act manifesting his aberrant propensity to commit hands-on sexual offenses against children, for two reasons:

(1) Many legislatures, courts, and law enforcement studies have found the same correlation between child pornography possession and the commission of sexual offenses against children. *See Osborne v. Ohio*, 495 U.S. 103, 111 & n.7 (1990); *United States v. Brand*, 467 F.3d 179, 197-98 (2nd Cir. 2006); *United States v. Lebovitz*, 401 F.3d 1263, 1271 (11th Cir. 2005); *United States v. Mento*, 231 F.3d 912, 920 (4th Cir. 2000); *United States v. Byrd*, 31 F.3d 1329, 1336 n.9 (5th Cir. 1994); *State v. Berger*, 212 Ariz. 473, 478, ¶ 20, 134 P.3d 378, 383 (2006); *People v. Russo*, 487 N.W.2d 698, 704 (Mich.1992); *State v. Rodriguez*, 254 S.W.3d 361, 376 & n.34 (Tenn.2008).

(2) Courts have found child-pornography possession and hands-on sexual offenses against children sufficiently similar to warrant admission as other-act evidence or consolidation of charges at trial. *See United States v. Bentley*, 561 F.3d 803, 814-15 (8th Cir. 2009); *United States v. Brand*, 467 F.3d 179, 195-99 (2nd Cir. 2006); *United States v. Hersh*, 297 F.3d 1233, 1242 (11th Cir. 2002); *Touchton v. State*, 437 S.E.2d 370, 372 (Ga.App.1993).

H. WARNING: *State v. Rhodes*, 219 Ariz. 476, 479-80, ¶¶ 14-16, 200 P.3d 973, 976-77 (App.2008), held or otherwise indicated that: (1) Rules 404(a)(1) and 404(c) *always* allow defendants charged with sexual offenses to present reputation and opinion evidence regarding their sexual normalcy, even if the State never offered uncharged act evidence pursuant to Rule 404(c); (2) ordinarily, defense specific-act evidence, pursuant to Arizona Rule of Evidence 405(b), is not admissible in A.R.S. § 13-1405 cases because "sexual deviancy is not an element of the crime of, and sexual normalcy is not an element of the defense to, sexual conduct with a minor"; (3) however, if the State offers propensity other act evidence under Rule 404(c), defendants charged with sexual conduct with a minor may offer specific-act evidence in rebuttal; and (4) defendants charged with sexual abuse of child molestation would be permitted to offer specific-act evidence of their sexual normalcy under the theory that it constitutes an element of A.R.S. § 13-1407(E)'s defense that the defendant lacked sexual motivation for these two offenses. The boldface text below highlights these points:

¶ 14 Rule 404(a)(1) provides an exception to the preclusion of propensity evidence in the case of "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, ***or* evidence of the aberrant sexual propensity of the accused or a civil**

defendant pursuant to Rule 404(c)." Ariz.R.Evid.404(a)(1) ([italicized] emphasis added). **By its terms, the rule allows Defendant to introduce evidence of a "pertinent trait of character" pursuant to this section, or, alternatively, pursuant to Rule 404(c), to rebut the State's evidence of specific instances of conduct showing that he had a character trait giving rise to an aberrant sexual propensity.** *See* Ariz.R.Evid.404(a)(1). In short, Rule 404(c) supplements Evidence Rule 404(a)(1) in sexual misconduct cases, but does not supersede it.

¶ 15 The trial court, in ruling on the motion *in limine*, erroneously precluded the witnesses' opinions on Defendant's character trait for sexual normalcy, relying on Rule 405(b), which permits proof of specific instances of conduct only when the character or trait of character is an "essential element" of a charge, claim or defense. In his motion, Defendant had sought only to offer opinion and reputation testimony as to his sexual normalcy pursuant to Rule 405(a), albeit based on the witnesses' observations of his conduct around children. **A defendant is allowed to offer opinion and reputation testimony, as long as the character trait is "pertinent" to the charge, as it is in this case. Ariz. R. Evid. 404(a)(1), 405(a). The pre-trial ruling was, therefore, incorrect as a matter of law to the extent it summarily excluded the proffered opinion and reputation testimony.** The trial judge, as a result, did not abuse her discretion when she granted a new trial on the basis that the pre-trial ruling was erroneous on a matter of law. See Ariz. R.Crim. P. 24.1(c)(4).

¶ 16 To the extent that the trial judge characterized sexual deviancy as an "element of the crime" in granting the new trial, however, she erred. **Although sexual normalcy is pertinent to the charged offense, sexual deviancy is not an element of the crime of, and sexual normalcy is not an element of the defense to, sexual conduct with a minor. *See* A.R.S. § 13–1405 ("A person commits sexual conduct with a minor by intentionally or knowingly engaging in ... oral sexual contact with any person who is under eighteen years of age."); A.R.S. § 13–1407(E) (Supp.2007) (identifying lack of sexual interest as a defense only to charges of sexual abuse (§ 13–1404) and molestation (§ 13–1410)). Moreover, it is only if the character trait were an "essential element" of the crime or defense, which it clearly is not in this case, cf. id., or to rebut Rule 404(c) evidence, that Defendant would be able to offer evidence of specific instances of conduct pursuant to Rule 405(b).** See Ariz. R. Evid. 405(b) ("In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or pursuant to Rule 404(c), proof may also be made of specific instances of that person's conduct."). Accordingly, although Defendant's witnesses may testify that their opinions as to his sexual normalcy were based on their observations of his appropriate behavior with children, they may not

> testify as to specific acts or instances of Defendant's conduct pursuant to Rule 405(b).

State v. Rhodes, 219 Ariz. 476, 479-80, ¶¶ 14-16, 200 P.3d 973, 976-77 (App.2008). *See also State v. Speers*, 209 Ariz. 125, 130, ¶ 16, 98 P.3d 560, 565 (App.2004) ("Nevertheless, the law is clear that to the extent the evidence satisfies the requirements of Rule 404(c), it is admissible. If it is admissible, then the defendant has the right, as a matter of due process, to present relevant evidence challenging its validity and reliability.") (reversing convictions because the court precluded defense expert testimony regarding flaws in forensic interviews of other-act child victims).

I. Note that Rule 404(c)(1)(B) may also be satisfied with uncharged act evidence against the same person, which shows the defendant's "lewd disposition" toward the victim. *See State v. Garner*, 116 Ariz. 443, 447, 569 P.2d 1341, 1345 (1977); *State v. Herrera*, 232 Ariz. 536, 542, 547, ¶¶ 6, 28, 307 P.3d 103, 109, 114 (App.2013); *State v. Marshall*, 197 Ariz. 496, 499, ¶ 4, 4 P.3d 1039, 1042 (App.2000); *State v. Alatorre*, 191 Ariz. 208, 212-13, ¶¶ 15-16, 953 P.2d 1261, 1265-66 (App.1998); *State v. Jones*, 188 Ariz. 534, 539, 937 P.2d 1182, 1187 (App.1996); *State v. Rojas*, 177 Ariz. 454, 460, 868 P.2d 1037, 1043 (App.1993); *State v. Spence*, 146 Ariz. 142, 144, 704 P.2d 272, 274 (App.1985).

Although this topic will be addressed in the intrinsic evidence section of your materials, it is important at this point to clarify whether Rule 404(c) governs the admission of other-acts involving the same victim.

Whereas *McFarlin* and *Treadaway* concerned the use of other-act evidence involving multiple victims to prove that the defendant had an aberrant sexual propensity, the Arizona Supreme Court promulgated a different rule when the defendant sexually abused the same victim repeatedly: "In 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." *State v. Garner*, 116 Ariz. 443, 447, 569 P.2d 1341, 1345 (1977).

Prosecutors took the position that Rule 404(c) was meant to codify *McFarlin/Treadaway*, but not *Garner*, because the 1997 comment to Rule 404 reads:

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

As even the Arizona Supreme Court later acknowledged, "This reading is supported by the comments to Rule 404(c), which do not mention *Garner* and

affirmatively state that Rule 404(c) is intended to substantially codify the *McFarlin*/*Treadaway* rule." *State v. Ferrero*, 229 Ariz. 239, 241, n.2, 274 P.3d 509, 511 n.2 (2012).

Four years after Rule 404's amendment, the Arizona Court of Appeals held that Rule 404(c) governs the admission of other acts involving the same victim, notwithstanding the absence of any reference to *Garner* in the comments and several prior cases that seemingly supported the position that such other acts were not governed by Rule 404 at all:

> In the years since *Garner*, our courts have continued to recognize evidence of a defendant's lewd disposition toward a particular victim as a distinct exception to the general rule excluding character evidence. *See State v. Rojas*, 177 Ariz. 454, 460, 868 P.2d 1037, 1043 (App.1993); *State v. Jones*, 188 Ariz. 534, 539, 937 P.2d 1182, 1187 (App.1996); *State v. Alatorre*, 191 Ariz. 208, 213, ¶ 16, 953 P.2d 1261, 1266 (App.1998).
>
> We do not believe, however, that this avenue of admission obviates the need to screen such evidence pursuant to the framework established in Rule 404(c). In *Garner* cases as in other cases of sexual misconduct, the prosecution undertakes to prove a defendant's uncharged acts in order to establish "an aberrant sexual propensity to commit the crime charged," the general element listed in Rule 404(c)(1)(B); in a *Garner* case, this element is simply manifest more pointedly as a lewd disposition toward a particular victim. As for the evidentiary safeguards codified in Rule 404(c)(1)(A)—assurance that the other act indeed occurred—and 404(c)(1)(C)—assurance that probative need over-balances the potential for unfair prejudice—these concerns are no less pressing in *Garner* cases than in others.

State v. Garcia, 200 Ariz. 471, 476, ¶¶ 30-31, 28 P.3d 327, 332 (App.2001). Prosecutors (myself included) argued that *Garcia* was incorrectly decided and took the position that sexual acts against the same victim, pursuant to *Garner*, necessarily constituted intrinsic evidence not subject to Rule 404(c)'s requirements. The Arizona Supreme Court, however, rejected our broad position that *Garner* evidence is necessarily intrinsic and therefore need not be screened under Rule 404(c), reaffirmed *Garcia's* holding that the rule applied to other-act evidence against the same victim, but acknowledged that Rule 404(c) was *not* the sole evidentiary vehicle for admitting such evidence:

> Twenty years after *Garner*, however, this Court promulgated Rule 404(c). *See* Ariz. R. Evid. 404(c), cmt. To 1997 amd. The court of appeals subsequently recognized that automatic admission of *Garner* evidence in cases involving sexual offenses conflicts with 404(c), which permits use of evidence of other acts to show the defendant's "aberrant sexual propensity to commit the crime charged" only if certain criteria are met. *State v. Garcia*, 200 Ariz. 471, 476 ¶ 31, 28 P.3d 327, 332 (App.2001).

> Thus, *Garcia* held that *Garner* evidence, which it viewed as necessarily offered to prove the defendant's propensity to act in a certain way, is subject to Rule 404(c) screening. Id. The decision below followed *Garcia*. *See Ferrero*, 2011 WL 1326208, at *4 ¶ 15.
>
> We agree with *Garcia* and the court of appeals in this case that when the prosecution offers *Garner* evidence to prove the defendant's propensity to commit the charged sexual offense, the evidence must be screened under Rule 404(c). That rule supplants *Garner's* potential exception to the propensity rule. We therefore relegate the term "*Garner* evidence" to shorthand for the type of evidence at issue in that case—"evidence of a prior similar sex offense committed against the same child." *Garner*, 116 Ariz. at 447, 569 P.2d at 1345.
>
> But we disagree with the court of appeals that "*Garner* evidence" is always subject to Rule 404(c) screening. Rule 404(b) and (c) create a framework for admitting evidence of other crimes, wrongs, or acts that depends in part upon the purpose for which the evidence is offered. As in *Garner*, the State offered other-act evidence here to prove Ferrero's propensity (and the jury was so instructed), but that will not always be the case. *Garner* evidence might also be relevant for non-propensity purposes, such as showing motive, intent, identity, or opportunity. If the evidence is offered for a non-propensity purpose, it may be admissible under Rule 404(b), subject to Rule 402's general relevance test, Rule 403's balancing test, and Rule 105's requirement for limiting instructions in appropriate circumstances. But if evidence of other sex acts is offered in a sexual misconduct case to show a defendant's "aberrant propensity" to commit the charged act, as it was here, Rule 404(c) applies.

State v. Ferrero, 229 Ariz. 239, 241-42, ¶¶ 10-12, 274 P.3d 509, 511-12 (2012). *See id.* at 240, ¶ 1, 274 P.3d at 510 ("We conclude that Rule 404(c) does not apply to truly intrinsic evidence, but that *Garner* evidence is not inherently intrinsic."); *State v. Herrera*, 232 Ariz. 536, 542-45, ¶¶ 6-21, 307 P.3d 103, 109-12 (App.2013) (post-*Ferrero* remand: holding that defendant's uncharged acts against charged victim in Yuma years before the crimes he committed against her in Tucson were not intrinsic evidence under *Ferrero's* new standard).

J. Also note that the prior conduct need not even be a chargeable offense to manifest the defendant's sexual aberrance. *See State v. Roscoe*, 184 Ariz. 484, 492, 910 P.2d 635, 643 (1996) (questioning 8-year-old girls about the color of their panties); *State v. Varela*, 178 Ariz. 319, 324, 873 P.2d 657, 662 (App.1993) (upholding the admission of defendant's letter to molestation victim on the ground that "*Treadaway* does not require an actual sexual contact to be a prior act which indicates an emotional propensity," but that the "act reflect the propensity of the accused to commit such perverted acts")

3. Rule 404(c)(1)(c) issues.

A. This part of Rule 404(c) requires the trial court to make the following finding:

> (c) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others: (i) remoteness of the other act; (ii) similarity or dissimilarity of the other act; (iii) the strength of the evidence that defendant committed the other act; (iv) frequency of the other acts; (v) surrounding circumstances; (vi) relevant intervening acts; (vii) other similarities or differences; (viii) other relevant factors.

B. Rule 404(c)(1)(c)(i): Temporal remoteness. Obviously, the shorter the interval, the more this factor favors admission. The following lines of authority will help you dispatch arguments that too much time has passed for the other act to demonstrate that the defendant has an aberrant sexual propensity.

(1) In the Rule 404(b) and Rule 404(c) contexts, Arizona courts have followed the rule that "an assertion that a prior act is ... too remote in time from the charged offense goes to the weight to be given the testimony by the jury, and not to relevance or admissibility." *State v. Van Adams*, 194 Ariz. 407, 416, ¶ 24, 984 P.2d 16, 25 (1999) (quoting *State v. Fernane*, 185 Ariz. 222, 225, 914 P.2d 1314, 1317 (App. 1995) (citing *State v. Hinchey*, 165 Ariz. 432, 435-36, 799 P.2d 352, 355-56 (1990)). *Accord United States v. Arnold*, 467 F.3d 880, 885 (5th Cir. 2006) (noting that "the amount of time that has passed since the previous conviction is not determinative" for purposes of Rule 404(b)); U*nited States v. Macedo*, 406 F.3d 778, 793 (7th Cir. 2005) (recognizing that "the temporal proximity of the prior acts to the current charge is alone not determinative of admissibility"); *United States v. McCollum*, 732 F.2d 1419, 1424 n.3 (9th Cir. 1984) ("No authority supports the proposition that a bad act loses all probative value after a given period of time."); *State v. Jeffers*, 135 Ariz. 404, 418, 661 P.2d 1105, 1119 (1983) ("The admissibility of such testimony is not measured by remoteness in time. Rather, the length of time is a factor to be considered by the jury in determining the weight of the evidence."); *State v. Williams*, 209 Ariz. 228, 233, ¶ 17, 99 P.3d 43, 48 (App.2004) ("Although remoteness between incidents affects the weight to be given testimony by the jury, it generally does not determine its admissibility."); *Adrian v. People*, 770 P.2d 1243, 1246 (Colo.1987) ("Other jurisdictions have held that remoteness does not prevent the admission of evidence of prior sexual assaults when such evidence is otherwise relevant.") (collecting cases); *Bhutto v. State*, 114 P.3d 1252, 1263, ¶ 25 (Wyo.2005) ("[R]emoteness affects weight rather than admissibility.").

(2) Consequently, courts in Arizona have upheld the admission of uncharged acts that exceed 20 years. *United States v. Kelly*, 510 F.3d 433, 437 (4th Cir. 2007) (22 years); *United States v. Benally*, 500 F.3d 1085, 1088-93 (10th Cir. 2007) (21-40 years); *United States v. Gabe*, 237 F.3d 954, 959-61 (8th Cir. 2001) (20 years); *United States v. Meacham*, 115 F.3d 1488, 1495 (10th Cir. 1997) (25-30 years); *United States v. v. Larson*, 112 F.3d 600, 605 (2nd Cir. 1997) (16-20 years); *United States v. Hadley*, 918 F.2d 848, 850-51 (9th Cir. 1990) (15 years); *State v. Weatherbee*, 158 Ariz. 303, 304-05, 762 P.2d 590, 590-91 (App.1988) (19-22 years); *People v. Soto*, 75 Cal.Rptr.2d 605, 620-21 (Cal.App.1998) (21-22 years); *Pareja v. State*, 673 S.E.2d 343, 346-47 (Ga.App.2009) (26 years); *Hart v. State*, 57 P.3d 348, 355-58, ¶¶ 19-30 (Wyo.2002) (28-29 years).

(3) The lengthy interlude between an uncharged act and a particular charged offense is ameliorated by the defendant's commission of other sexual misconduct during the intervening years. *See State v. Williams (Todd)*, 209 Ariz. 228, 233, ¶ 17, 99 P.3d 43, 48 (App.2004) ("Finally, as we have recognized, three subsequent similar incidents were committed between the time of the Julie C. incident and the offenses at issue, which makes the 1993 Julie C. incident seem even less remote. Appellant continued to commit offenses during that time period, indicating a continuum of conduct.").

(4) Lengthy intervals will not have detrimental effect in cases wherein the defendant was imprisoned and therefore had no opportunity to molest children or commit other sexual offenses. *See United States v. Eagle*, 137 F.3d 1011, 1016 (8th Cir. 1998) (rejecting argument that 10-year-old prior act was too remote where defendant was incarcerated for 6 years during that interval); *State v. Dixon*, 226 Ariz. 545, 550, ¶ 16, 250 P.3d 1174, 1179 (2011) ("In finding the other act not unduly remote, the judge noted that Dixon was out of custody for only about a year between the incidents."); *State v. Williams (Todd)*, 209 Ariz. 228, 233, ¶ 17, 99 P.3d 43, 48 (App.2004) ("Further, the trial court could properly determine that the intervening periods of imprisonment tolled time.") (citing *State v. Bible*, 175 Ariz. 549, 575, 858 P.2d 1152, 1178 (1993)); *State v. Superior Court*, 129 Ariz. 360, 362, 631 P.2d 142, 144 (App. 1981) ("We agree with the state that the defendant should not be allowed to rely on the fact that from 1977 when he was incarcerated for a sex offense until 1981, no aberrant sexual acts were shown to have occurred. For a time of more than 2 years, defendant was isolated from contact with children."); *State v. Casady*, 491 N.W.2d 782, 786 (Iowa 1992) ("[A]ny issue as to remoteness of the prior incident is almost completely defused by the fact that during the time gap between the prior incident and the [present offense], defendant was in confinement in a correctional institution."). *Cf. United States v. Walker*, 470 F.3d 1271, 1275 (8th Cir. 2006) ("Although approximately 18 years elapsed between Walker's robbery offense in December 1985 and the instant offense conduct in January 2004, it is '[a]n important circumstance' that Walker was incarcerated from 1986 through February 1996."); *People v. Gilliam*, 827 N.Y.S.2d 368, 370 (2007) ("We do not agree with defendant's contention that the

passage of time since that 1983 conviction (or his age [16] at the time of that crime) eliminated its probativeness because, as the court noted, defendant was incarcerated until 1999.”).

(5) Courts have applied the same rationale when the defendant is on parole and therefore subject to supervision that makes sexual misconduct more difficult. *See State v. Whitlow*, 949 P.2d 239, 245 (Mont.1997) (discounting the year that the defendant spent on parole, as well as his 4 years in prison, from the remoteness assessment); *State v. Brooks*, 857 P.2d 734, 736-37 (Mont.1993) (“Similarly, in the case at bar, the defendant did not have the opportunity to be in contact with young or adolescent boys for over a year because he was incarcerated or under the supervision of the Washington State Department of Corrections. Defendants’ abstention from sexual abuse because of a lack of opportunity will not prevent this Court from taking into account a prior crime because of remoteness in time from the present crime.”).

(6) Temporal remoteness is also not a concern when the defendant continuously abuses the same victim. *See State v. Jones*, 188 Ariz. 534, 539, 937 P.2d 1182, 1187 (App.1996) (“[R]emoteness is not an issue ... when similar molestations occur incessantly over a long period of time against the same victim.”) (quoting *State v. Rojas*, 177 Ariz. 454, 460, 868 P.2d 1037, 1043 (App.1993)); *State v. Spence*, 146 Ariz. 142, 144, 704 P.2d 272, 274 (App.1985) (“Although the original act of molestation against the victim occurred when she was four years old, there never was a break in appellant’s conduct. It continued incessantly until the instant crimes were committed. Under such circumstances there is no remoteness problem and no medical testimony is required.”); *State v. Thompson*, 533 S.E.2d 834, 839 (N.C.App.2000) (“When there is a period of time during which there is no evidence of sexual abuse, the lapse does not require exclusion of the evidence if the defendant did not have access to the victim [ ] during the lapse.”).

(7) Similarities between the charged and uncharged sexual acts enhance the probative value of temporally remote acts. *See United States v. Kelly*, 510 F.3d 433, 437 & n.4 (4th Cir. 2007) (upholding the admission of defendant’s 22-year-old prior conviction for raping a 12-year-old child because this prior act was “strikingly similar” to the charged offense of traveling in interstate commerce for the purpose of engaging in illicit sexual conduct, once again with a 12-year-old child) (collecting cases); *United States v. Benally*, 500 F.3d 1085, 1093 (10th Cir. 2007) (“Sufficient factual similarity can rehabilitate evidence that might otherwise be inadmissible due to staleness.”); *United States v. Vo*, 413 F.3d 1010, 1019 (9th Cir. 2005) (“Thus, if the prior act evidence in this case is sufficiently similar to the charged conduct, it may render it probative despite the passage of time.”) (internal quotation marks and citation omitted); *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (similarities included forced oral copulation of defendant’s young relatives while he babysat them); *United States v. Larson*, 112 F.3d 600, 605 (2nd Cir. 1997) (noting that defendant engaged in similar behavior with his victims, used the same enticements, and abused them in the same geographical

places);*United States v. Rodriguez*, 215 F.3d 110, 121 (1st Cir. 2000) (upholding the admission of a 15-year-old prior act because of the "striking similarity between the acts alleged in the indictment and the prior incident"); *State v. Varela*, 178 Ariz. 319, 323, 873 P.2d 657, 661 (App.1993) (noting similarity in the ages of the 9-year-old victim of charged offense and the victims of the prior acts, which ranged between 7 and 13 years old); *People v. Adrian*, 770 P.2d at 1246 ("Here, any difficulties caused by the remoteness of defendant's assault on D.B. is outweighed by the similarity of the three incidents."); *State v. Jacobson*, 930 A.2d 628, 638 (Conn.2007) ("Even a relatively long hiatus between the charged and uncharged misconduct, however, is not, by itself, determinative of the admissibility of common plan or scheme evidence … especially when there are distinct parallels between the prior misconduct and the charged misconduct").

(8) A prior act is not rendered temporally remote on the basis that it occurred *after* the charged offense. *See United States v. Sioux*, 362 F.3d 1241, 1245-46 (9th Cir. 2004) (subsequent misconduct may establish propensity under Federal Rules of Evidence 413 through 415); *State v. Munz*, 355 N.W.2d 576, 581-82 (Iowa 1984) (prior and subsequent sexual acts are equally probative); *State v. DeLong*, 505 A.2d 803, 806 (Me.1986) ("Thus, evidence of defendant's continued sexual activity, including a specific prior or subsequent act similar to that charged, is admissible for several other purposes that are probative of some element of the crime for which the defendant is being tried."); *State v. DeClue*, 805 S.W.2d 253, 259 (Mo.App.1991) ("Other states support the view that in a prosecution for a sexual offense committed on a child, evidence of subsequent sexual misconduct involving the defendant and the victim is admissible.") (collecting cases); *State v. Baptista*, 894 A.2d 911, 915-16 (R.I. 2006) ("Later or intermittent sexual assaults, as exist here, prove a lewd disposition or intent toward April in the same manner as prior sexual assaults."). The fact both Rule 404(b) and Rule 404(c) refer to "other crimes, wrongs, or acts" without this temporal restriction is significant because Arizona courts have held that evidence of *subsequent* uncharged acts is admissible for the exceptions set forth in Rule 404(b). *See State v. Hargrave*, 225 Ariz. 1, 8, ¶ 10, 234 P.3d 569, 576 (2010); *State v. Ashelman*, 137 Ariz. 460, 464, 671 P.2d 901, 905 (1983); *State v. Moreno*, 153 Ariz. 67, 68, 734 P.2d 609, 610 (App.1986).

(9) Sometimes a defendant will attempt to argue that temporal remoteness is not a problem in only two circumstances: (1) the interlude was attributable to the defendant having to wait for a new generation of children in his family to reach the age at which he could resume his illicit sexual contacts, *see State v. Weatherbee*, 158 Ariz. 303, 304-05, 762 P.2d 590, 591-92 (App.1988) (collecting cases); **and (2) the defendant committed intervening acts of sexual abuse between the remote act and the charged offense**, *see State v. Williams*, 209 Ariz. 228, 233, ¶ 17, 99 P.3d 43, 48 (App.2004). You can dispatch that argument with these passages:

> These two circumstances are *not* alternative *sine qua non* prerequisites, either of which must exist in order to admit temporally

remote sexual offenses. In fact, numerous courts have upheld the admission of temporally remote prior-act evidence in sex-offense trials without relying upon the presence of either of these two circumstances. *See United States v. Kelly*, 510 F.3d 433, 436-38 (4th Cir. 2007) (upholding admission of 22-year-old conviction for raping a 12-year-old child where the defendant asked prostitute to find him a 12-year-old girl for sex, and where the appellate court made no reference to the sentence imposed for the prior conviction); *United States v. Drewry*, 365 F.3d 957, 960 (10th Cir. 2004) (upholding admission of testimony of a woman whom defendant had molested 25 years earlier without reference to the defendant's family or intervening criminal activity); *United States v. Johnson*, 132 F.3d 1279, 1281-84 (9th Cir. 1997) (upholding the admission of 13-year-old prior acts in prosecution for oral copulation and sodomy of exchange student, where none of the victims were related to the defendant, and where the defendant did not commit intervening sexual offenses); *United States v. Larson*, 112 F.3d 600, 602-05 (2nd Cir. 1997) (upholding the admission of testimony regarding prior molestations occurring 16-20 years before charged offenses, where neither circumstance was present); *United States v. Hadley*, 918 F.2d 848, 850-51 (9th Cir. 1990) (upholding testimony regarding prior acts occurring as many as 15 years earlier without mention of either family relationships or intervening sexual misconduct).

Moreover, the fact that courts have upheld the admission of temporally remote prior-act evidence in prosecutions for crimes *not* involving the sexual exploitation of children further demonstrates that the defendant's familial relationship to his victims is *not* a necessary prerequisite to the admission of other-act evidence in child-molestation victims. *See United States v. Hernandez-Guevara*, 162 F.3d 863, 872-73 (5th Cir. 1998) (evidence of 15-year-old prior act properly admitted in alien-smuggling prosecution); *United States v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989) (upholding admission of 13-year-old prior-act of defendant previously using his wife's social security number improperly in fraud prosecution); *United States v. Terry*, 702 F.2d 299, 316 (2nd Cir. 1983) (upholding admission of 20-year-old narcotics conviction in drug-trafficking prosecution).

C. Rule 404(c)(1)(c)(ii): Similarity or dissimilarity.

(1) General rule: "An exact replication between the charged acts and the uncharged acts is not required [because] the [emotional-propensity] exception requires only that the uncharged acts be similar to the charged acts." *State v. Lopez*, 170 Ariz. 112, 117, 822 P.2d 465, 470 (App.1991). *See also State v. Lehr*, 227 Ariz. 140, 147, ¶¶ 20-21, 254 P.3d 379, 386 (2011) ("The trial court further found that the evidence of previous crimes could be admitted to show 'modus operandi and identity' because the 'attacks were strikingly similar in the way the Defendant

lured the victims and transported them to the area where they were assaulted, how he assaulted them, where he assaulted them, and how he left them.' In arguing that the trial court erred in admitting the other acts evidence [under Rules 404(b) and 404(c)], Lehr notes that the attacks occurred at different times and on different days of the week, the victims varied in age, and other differences. The trial court, however, identified extensive similarities among Lehr's crimes. Acts need not be perfectly similar in order for evidence of them to be admitted under Rule 404."); *State v. Herrera*, 232 Ariz. 536, 547, ¶ 30, 307 P.3d 103, 114 (App.2013) (rejecting argument that uncharged acts of filming the victim jumping up and down while topless and uttering lewd remarks were dissimilar to charged acts of oral and vaginal sex and masturbating the defendant: "The acts depicted involved nudity and sexually explicit statements and portrayed the same victim as the charged acts."); *State v. Rojas*, 177 Ariz. 454, 460, 868 P.2d 1037, 1043 (App.1993) ("Although these prior bad acts are not replicas of the acts for which defendant is charged, they are similar enough, and occurred frequently enough against the same victims, to be admissible to show a propensity for such bad behavior.") (finding sufficient similarity between charged offenses of attempted child molestation and sexual conduct with a minor and the defendant's uncharged acts against the same victims, which included pulling down their underpants or using a scissor to cut their undergarments while they were asleep and taking one victim to a shed to fondle her chest); *State v. Weatherbee*, 158 Ariz. 303, 304, 762 P.2d 590, 591 (App.1988) ("Exact similarity between acts is not required."). *Cf. State v. Roscoe*, 145 Ariz. 212, 217, 700 P.2d 1312, 1317 (1984) (stating, in the context of Rule 404(b)'s identity exception, that "[a]bsolute identity in every detail cannot be expected. Where an overwhelming number of significant similarities exist, the evidence of the prior act may be admitted; the major dissimilarity, and others here present, go to the weight of the evidence").

Nonetheless, you should make every endeavor to highlight the similarities in age, gender, grooming techniques, the progression of sexual acts culminating in the charged conduct, the victim's appearance and family characteristics, and the types of activities involved. *See United States v. Bentley*, 475 F.Supp.2d 852, 858 (N.D. Iowa 2007) (collecting cases citing gender, age, and activities as grounds of similarity); *State v. Dixon*, 226 Ariz. 545, 550, ¶¶ 15-16, 250 P.3d 1174, 1179 (2011) ("A psychologist and expert on sex offenders testified at the pre-trial hearing about important similarities between the 1985 rape and this case. Both victims were 21–year–old college students with brown hair, brown eyes, and similar height and weight. In each case, a knife was used, the victim was restrained, and homicide was either threatened or occurred. Both victims had apparently been re-dressed after the rape. … His 1985 sexual assault of another victim of the same age under strikingly similar circumstances had significant probative value in refuting that claim and establishing that a rape occurred in this case.").

As the cases addressing remoteness show, you should endeavor to highlight as many similarities as possible when lengthy interludes separate the

charged and uncharged offenses, and you cannot attribute the delay to the defendant's incarceration or other obstacles to his access to children generally.

(2) A defendant should not prevail on the basis that his sexual misconduct with one victim was less intrusive than his activities with another, because such differences could be attributable to the victim's level of resistance or prompt disclosure, the proximity of others who could detect the abuse, or the defendant's differing levels of access to the victims. *See United States v. Benally*, 500 F.3d 1085, 1092 (10th Cir. 2007) ("It is inconsequential that the prior incidents involved an actual rape, whereas [defendant's] purported assault on N.W. involved only genital touching."); *United States v. Johnson*, 132 F.3d 1279, 1281-83 (9th Cir. 1997) (rejecting claim that prior acts and charged offense were dissimilar on the grounds that "the progression of sexual activity between [defendant] and the first [prior-act] witness occurred over the course of a single afternoon, as opposed to a period of several weeks with the [charged] minor, and that [defendant's] sexual contact with the second [prior-act] witness never became physical," but the defendant engaged in sodomy and oral copulation with the charged minor); *State v. Jacobson*, 930 A.2d 628, 638-40 (Conn.2007) (upholding admission of prior-act evidence showing that the defendant followed the same plan or scheme while committing his prior acts and charged offenses, even though the defendant achieved greater sexual contact with his prior-act victims than the charged victim, because the defendant had engaged in the same preliminary acts with both sets of victims) (collecting cases).

(**3) In cases involving child pornography, the depiction of conduct similar to the defendant's hands-on charged acts helps establish similarity.** *See Touchton v. State*, 437 S.E.2d 370 372 (Ga.App.1993) (upholding admission of defendant's prior possession of child pornography that depicted behavior "strikingly similar to the acts for which he was on trial").

D. Rule 404(c)(1)(c)(iii): Strength of evidence. Obviously, convictions, multiple witnesses, and confessions are far easier to admit than other acts supported solely by the uncorroborated testimony of the victim.

(1) As noted above, the fact that a conviction may rest upon the uncorroborated testimony of one witness is useful in the context of Rule 404(c)(1)(A) and Rule 404(c)(1)(C)(iii). A conviction may rest on the uncorroborated testimony of one witness. *See State v. Herrera*, 232 Ariz. 536, 546-47, ¶ 26, 307 P.3d 103, 113-14 (App.2013) (finding clear and convincing evidence based solely on the victim's testimony regarding the uncharged acts, despite her inability to recall the dates of these events, and relying upon the trial judge's credibility assessment); *State v. Vega*, 228 Ariz. 24, 29, ¶ 19 & n.4, 262 P.3d 628, 633 & n.4 (App.2011) ("The testimony of the victim is a sufficient basis on which to conclude by clear and convincing evidence that the incident occurred.") (citing two old Arizona cases for the proposition that the uncorroborated testimony of the victim is sufficient to support a conviction). These cases finding one witness

sufficient to sustain a conviction will help fend off arguments that the testimony of one witness lacks sufficient strength to survive Rule 403 balancing. *United States v. Kirkie*, 261 F.3d 761, 768 (8th Cir. 2001); *People of the Territory of Guam v. McGravey*, 14 F.3d 1344, 1346-47 (9th Cir. 1994); *State v. Jerousek*, 121 Ariz. 420, 427, 590 P.2d 1366, 1373 (1978); *State v. McFarlin*, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1974); *State v. Verdugo*, 109 Ariz. 391, 393, 510 P.2d 37, 39 (1973); *State v. Merryman*, 79 Ariz. 73, 75, 283 P.2d 239, 241 (1955); *State v. Hollenback*, 212 Ariz. 12, 15, ¶ 8, 126 P.3d 159, 162 (App.2005).

(2) Once again, a conviction for prior offense satisfies the lesser standard of clear and convincing evidence. *See State v. Dixon*, 226 Ariz. 545, 550, ¶ 14, 250 P.3d 1174, 1179 (2011); *State v. Bible*, 175 Ariz. 549, 575, 858 P.2d 1152, 1178 (1993). *Accord United States v. Benally*, 500 F.3d 1085, 1091 (10th Cir. 2007); *United States v. LeMay*, 260 F.3d 1018, 1029 (9th Cir. 2001); *United States v. Chesney*, 86 F.3d 564, 572 (6th Cir. 1996).

Also, the defendant cannot prevail by contending that his conviction was the product of a no-contest plea because "[a]n *Alford* plea, by its nature [is] a grudging concession that the state ha[s] a case to present which might result in appellant's conviction." *State v. Draper*, 162 Ariz. 433, 437, 784 P.2d 259, 263 (1989) (quoting *State v. King*, 116 Ariz. 353, 355, 569 P.2d 295, 297 (App.1977)).

(4) The defendant's confession makes this factor weigh in our favor. See *Arizona v. Fulminante*, 499 U.S. 279, 292 (1991) ("A defendant's confession is probably the most probative and damaging evidence that can be admitted against him.").

(5) Even without a confession, the State is not completely at loss because a defendant's inconsistent and false statements constitute very probative circumstantial evidence of his guilt. *See Jackson v. Virginia*, 443 U.S. 307, 325 (1979) ("It is evident from the record that the trial judge found this story, including the petitioner's belated contention that he had been so intoxicated as to be incapable of premeditation, incredible."); *United States v. Henderson*, 409 F.3d 1293, 1301 (11th Cir. 2005) (recognizing that "a defendant's implausible explanation may constitute positive evidence in support of a jury verdict.") (quoting *United States v. Bennett*, 848 F.2d 1134, 1139 (11th Cir. 1988)); *United States v. Burgos*, 94 F.3d 849, 868 (4th Cir. 1996) ("Observing that juries take account of incredible tales, [the] *Bennett* [court] explained that '[a] reasonable jury might well disbelieve the explanation and conclude that the [defendants] were lying in an attempt to cover up illegal activities.'"); *State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27, 975 P.2d 75, 84 (1999) (finding sufficient evidence supporting murder conviction, based partly on evidence that "Defendant made several false, misleading, and inconsistent statements to police, other witnesses, and his wife—showing consciousness of guilt"); *People v. Unger*, 749 N.W.2d 272, 288 (Mich.App.2008) ("A jury may infer consciousness of guilt from evidence of [the defendant's] lying or deception."); *State v. Page*, 609 S.E.2d 432, 438

(N.C.App.2005) ("Additionally, defendant's inconsistent statements regarding his location during the shooting is circumstantial evidence of defendant's guilt."); *State v. Williams*, 919 A.2d 90, 98 (N.J.2007) (collecting cases); *State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt."); *Emmett v. Commonwealth*, 569 S.E.2d 39, 45 (Va.2002) ("A defendant's false statements are probative to show he is trying to conceal his guilt, and thus is evidence of his guilt").

E. Rule 404(c)(1)(c)(iv): frequency. Obviously, you will fare better if the other acts you seek to offer in evidence were committed frequently, as the repetitive nature strongly reinforces the inference that the defendant possesses an aberrant propensity to commit the charged offense(s). You can offset the relative lack of frequency by, *inter alia*, highlighting the similarities and temporal proximity between the charged and uncharged acts, noting that the defendant had been incarcerated and therefore had no opportunity to continue his sexual predations against children, observing that the prior act involved the same victim, and arguing the strength of the evidence supporting the sole uncharged act. In the joinder/severance context, the State should argue that the frequency factor supports a consolidated trial whenever the defendant has been charged with sexually abusing three or more victims, or with sexually abusing the same child repeatedly.

(1) Cases upholding the admission of other-act evidence when the uncharged conduct involves just one incident. *See State v. Dixon*, 226 Ariz. 545, 550, ¶¶ 14-16, 250 P.3d 1174, 1179 (2011) (a sexual assault the defendant committed in 1985, which led to his conviction and was similar to the charged offense); *State v. Vega*, 228 Ariz. 24, 29, ¶¶ 19-20, 262 P.3d 628, 633 (aberrant sexual propensity established by one instance of touching 12-year-old victim's vagina over her bathing suit in a prosecution for based upon molesting the victim and her sister).

(2) Cases involving the commission of multiple acts during the relevant time period. *See State v. Jones*, 188 Ariz. 534, 539, 937 P.2d 1182, 1187 (App.1996) ("Here, defendant's assaults followed the same pattern over a course of several years, and CJ was his only victim."); *State v. McAnulty*, 184 Ariz. 399, 402, 909 P.2d 466, 469 (App.1995) (defendant's fondling of the genitalia and breasts of 12 and 14-year-old girls established his aberrant sexual propensity); *State v. Varela*, 178 Ariz. 319, 323, 873 P.2d 657, 661 (App.1993) (noting similarity in the ages of the 9-year-old victim of charged offense and the victims of the prior acts, which ranged between 7 and 13 years old); *State v. Lopez*, 170 Ariz. 112, 117, 822 P.2d 465, 470 (App.1990) (engaging in fellatio with boys between 14 and 16 years old reflects an abnormal sexual interest); *State v. Weatherbee*, 158 Ariz. 303, 304-05, 762 P.2d 590, 591-92 (App.1988) (fondling of daughters who were 8 to 10 and 13 years old in the family home). *State v. Bailey*, 125 Ariz. 263, 265-66, 609 P.2d 78, 80-81 (App.1980) (sexual aberration shown by 54-year-old defendant's acts of "French-kissing" a fifth-grade girl and

kissing young girls on their lips); *State v. McDaniel*, 119 Ariz. 373, 376, 580 P.2d 1227, 1230 (App.1978) (sexual aberration shown by defendant placing his hand halfway under 7-year-old girl's dress and touching the area of a 6-year-old boy's genitals over his clothing).

F. Rule 404(c)(1)(c)(v-viii): Surrounding circumstances, relevant intervening acts, other similarities or differences, and other relevant factors. Given the overlap with the factors listed above (remoteness, similarity, strength of evidence, and frequency), these four have drawn scant, if any, independent treatment by the judiciary. While litigating these factors, prosecutors could pigeonhole the following common facts into one of these four subcategories;

- The defendant's close relationship—familial, pastoral, professional, sports, friendship—with the victim or his/her parents.

- The dynamics of the victim's domestic life, including those that would make him/her vulnerable to abuse or less likely to disclose the abuse promptly—abusive or absent parents, which provided a void the defendant purported to fill, or which deterred the victim from disclosing the abuse; the mother's close relationship with the defendant; familial pressure to prevent the victim's cooperation.

- The defendant's lack of access to children, whether due to military service, imprisonment, work-related travel, the proximity of others during contacts with children, etc. *See Smith v. State*, 745 So.2d 284 (Ala.Crim.App.1998) (holding that evidence of similar acts of sexual abuse committed twenty years prior to the charged offenses was admissible because the lapse in abuse was mainly attributable to a substantial time span where no children resided with the defendant); *State v. Thompson*, 533 S.E.2d 834, 839 (N.C.App.2000) ("When there is a period of time during which there is no evidence of sexual abuse, the lapse does not require exclusion of the evidence if the defendant did not have access to the victim [ ] during the lapse.").

4. Rule 404(c)(1)(D): Findings.

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

B. The rationale underlying this requirement:

> In making the determination under Rule 403, the court also must consider the factors listed in Rule 404(c)(1)(c)(i)-(viii). Finally, the rule requires the trial judge to make *specific* findings with respect to each of the prerequisites for admission under the rule. Ariz.R.404(c)(1)(D). [Footnote omitted.]

The rationale for this latter requirement is twofold. First,

> the danger of undue prejudice [of evidence of other sexual conduct] is particularly great [because] the prosecution's evidence of other instances of sexual conduct will often involve sexual behavior that is legally as well as socially abhorrent and thus is more likely to lead the trier of fact to punish the defendant because, in sexual matters, he is a bad man, not because it has decided he has committed the sexual wrong charged in the case at hand.
>
> 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 62.3 (1983). Thus, the requirement that the judge make specific findings as to each of Rule 404(c)'s prerequisites for admissibility helps focus the trial court's discretion so that only truly relevant other acts are admitted. Second, the rule's requirement of specific findings enables an appellate court to effectively examine the basis for the trial judge's decision to admit other act evidence under Rule 404(c).

State v. Aguilar, 209 Ariz. 40, 49, ¶¶ 31-32, 97 P.3d 865, 874 (2004) (emphasis in original).

C. The Arizona Supreme Court has shown little reluctance to reverse a conviction in those cases in which the trial court never made any Rule 404(c)(1)(D) findings at all or did so in a defective manner. *See State v. Ferrero*, 229 Ariz. 239, 245, ¶ 28 & n.5, 274 P.3d 509, 515 & n.5 (2012) ("Because the evidence was offered to prove the defendant's propensity to commit the charged act, the trial court erred in admitting evidence of that act without screening it under Rule 404(c).") (trial court incorrectly concluded that the uncharged acts against the same victim was not subject to Rule 404(c)'s requirements and therefore made no findings under Rule 404(c)(1)(D); the Arizona Supreme Court noted in a footnote that it denied review on the State's alternative argument that this omission constituted harmless error); *State v. Aguilar*, 209 Ariz. 40, 49-51, ¶¶ 33-38, 97 P.3d 865, 874-76 (2004) (reversing convictions of consolidated counts involving different rape victims because the trial court's findings with respect to Rule 404(c)(1)(A) did not resolve the disputed issue of consent and were therefore flawed, and the error was not harmless because the materials before the court at the time of the ruling—arguments by counsel and the case agent's grand jury testimony—were deemed insufficient to resolve the conflict and assess the relative credibility of the defendant and his accusers); *State v. Prion*, 203 Ariz. 157, 164, ¶ 43, 52 P.3d 189, 196 (2002) ("sexual propensity evidence under Evidence Rule 404(c) ... cannot be admitted, much less argued, without specific findings").

D. The court of appeals, however, does subject the trial court's failure to make the appropriate findings to harmless-error review, and several cases have deviated from *Aguilar* by considering the evidence the State actually offered *at trial*, but these cases are lower-court decisions that either distinguished *Aguilar* or predated it. *See State v. Vega*, 228 Ariz. 24, 28-30, ¶¶ 17-24, 262 P.3d 628, 632-34 (App.2011) (considering the entire trial record while determining whether the improper

admission of an uncharged act without Rule 404(c) screening constituted harmless error because: (1) the erroneous ruling did not concern the joinder/severance of counts and therefore did not determine entire course of trial; (2) "it was plain that regardless of whether the beach evidence was admitted, the jury would hear both victims testify about the charged acts"; and (3) unlike *Aguilar*, the trial court properly instructed jury that it "may" consider the evidence "only if" the state proved by clear and convincing evidence that defendant committed the act and the act showed predisposition to commit abnormal or unnatural sexual acts); *State v. Marshall*, 197 Ariz. 496, 499-500, ¶ 7, 4 P.3d 1039, 1042-43 (App.2000) (pre-*Aguilar* case holding that the superior court's failure to make the specific findings required by Rule 404(c) while ruling on a motion to sever counts "was at most harmless error," because the videotape footage of the sexual offenses conclusively satisfied the rule's conditions for admissibility). *Cf. Marshall*, 197 Ariz. at 500-01, ¶¶ 8-14, 4 P.3d at 1043-44 (upholding denial of mistrial motion based upon victim's unexpected testimony that the defendant subjected her to digital and penile penetration during charged episode involving oral sex by both parties, partly because this evidence would have been admissible under Rule 404(c) or as intrinsic evidence).

N.B. Division Two of the Arizona Court of Appeals likewise found the trial court's failure to make findings, pursuant to Rule 404(c)(1)(D), to constitute harmless error, partly based upon its determination that *the evidence introduced at trial* demonstrated satisfaction of Rule 404(c)'s prerequisites for admissibility, but the Arizona Supreme Court granted review and remanded the case for reconsideration in light of *State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012), because the court of appeals also held that the defendant's uncharged acts against the victim constituted intrinsic evidence under *Garner*. *See State v. Herrera*, 226 Ariz. 59, 243 P.3d 1041 (App.2010), *vacated and remanded*, 230 Ariz. 387, 285 P.3d 308 (2012). After a remand for further findings, the court of appeals found the evidence offered at trial admissible under Rule 404(c). *State v. Herrera*, 232 Ariz. 536, 542-49, ¶¶ 6-34, 307 P.3d 103, 109-16 (App.2013).

E. In another case, the court of appeals did not attempt to cure the lack of Rule 404(c) screening by reviewing the evidence adduced at trial, but instead engaged in traditional harmless-error analysis to determine whether the jury would have still convicted the defendant, even without exposure to the other-act evidence at issue. *See State v. Garcia*, 200 Ariz. 471, 478-79, ¶¶ 41-45, 28 P.3d 327, 334-35 (App.2001) (finding harmless error only for those verdicts supported by physical injuries that corroborated the victim's testimony, and noting that the jury demonstrated lack of prejudice by acquitting the accused on other counts).

F. Recommendations on how to avoid reversal on Rule 404(c)(1)(D) grounds.

- **Keep a good record.** If your opponent concedes the admissibility of the evidence under Rule 404(c) during a bench conference, please remember to make sure that the court acknowledges this concession on the record. Unfortunately, the reason the trial court did not make any findings in *Ferrero* is that the defense attorney made them moot by asking to approach the bench when the judge began the hearing and conceded during an unrecorded discussion that the State's evidence

was admissible under Rule 404(c). Unless the court reporter or clerk memorializes the concession made during an *unrecorded* bench conference, the concession is a nullity on appeal because it is not part of the appellate record. Likewise, if you submit materials to the trial court (such as recordings of police interviews of other-act witnesses, transcripts of prior testimony, or other documents), make sure that these exhibits are made part of the record by the clerk.

- **Submit with your motion a written draft of proposed findings of fact and law, which is the practice some federal courts employ after evidentiary hearings.** This vehicle will encourage the judge to make all the findings outlined in subsections A, B, and C of Rule 404(c)(1), especially after you've done the work for him/her. At the very worst, the judge will incorporate by reference some or all of your proposed findings of fact and law.

- **Another sound tactic is not to rely exclusively upon Rule 404(c) to justify the admission of your other-act evidence. If the evidence is admissible for a non-character purpose under Rule 404(b), you should explicitly argue for admission and a limiting instruction under those theories as well.** Pursuing this course will be beneficial on appeal because it will allow the Attorney General's Office to defend your convictions under the "right result, wrong reasoning" doctrine and the appellate court's duty to affirm a conviction on any basis supported by the record. *See State v. Adriano*, 215 Ariz. 497, 503, ¶ 23, 161 P.3d 540, 546 (2007) ("Because the evidence was admissible under Rule 404(b), the trial court did not abuse its discretion in admitting the evidence, even if it might have admitted the evidence for the wrong reason.") (trial court's improper reliance upon the "intrinsic evidence" doctrine to admit other-act evidence was not reversible because the Arizona Supreme Court alternatively found it admissible under Rule 404(b)'s exceptions for plan, knowledge, and intent); *State v. Roscoe* 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996) ("Although the court admitted the Cheryl and Kristi incidents to establish both modus operandi and emotional propensity, we will affirm the court's admission if it is sustainable on either ground."); *State v. Varela*, 178 Ariz. 319, 323, 873 P.2d 657, 661 (App.1993) ("This court will affirm the trial court's admission of prior act evidence if it is sustainable on any ground.").

- **Move for clarification if the judge grants the State's motion without making the requisite findings, fails to address all three prongs of Rule 404(c)(1), or omits discussion about certain sub-factors in Rule 404(c)(1)(c).** Hopefully, the judge will cure any omissions or deficiencies after being reminded that Rule 404(c)(1)(D)'s use of the word "shall" imposes a mandatory obligation to "make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1)." *See State v. Rogers*, 227 Ariz. 55, 57, ¶ 6, 251 P.3d 1042, 1044 (App.2010) ("A general principle of statutory construction is that ... the use of the word 'shall' typically indicates a mandatory provision."); *Arizona Libertarian Party v. Schmeral*, 200 Ariz. 486, 490, ¶ 10, 28 P.3d 948, 952 (App.2001) ("Ordinarily, the use of the word 'shall' indicates a mandatory directive from the legislature.").

N.B. If the defendant objects to the State's motion for clarification, the happy consequence is that the invited-error and judicial-estoppel doctrines will bar reversal of his convictions on appeal based on deficient findings. *See Johnson v. United States*, 318 U.S. 189, 201 (1943) ("We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him."); *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996) ("Judicial estoppel prevents a party from taking an inconsistent position in successive or separate actions. … The doctrine's application to criminal cases usually involves a defendant who asserts one position at trial and another on appeal."); *State v. Islas*, 132 Ariz. 590, 592, 647 P.2d 1188, 1190 (App.1982) ("Generally, a party who participates in or contributes to an error cannot complain of it.").

If the judge refuses to clarify or elaborate on your ruling, you have two options under the law. The most dramatic is filing a petition for a writ of mandamus, pursuant to Article V, Sections 5.1 and 5.4 of the Arizona Constitution, with the Arizona Supreme Court which has exclusive original jurisdiction. *See Goodrich v. Industrial Commission*, 11 Ariz. 244, 245, 463 P.2d 550, 551 (1970) (court of appeals has no jurisdiction to issue writs of mandamus). The following principles apply:

> A writ of mandamus is a proper remedy to compel public officers, including judges of the inferior courts, to perform an act which the law specifically enjoins as a duty arising out of the office. *State v. Phelps*, 67 Ariz. 215, 193 P.2d 921 [(1948)]. It is an extraordinary remedy designed to expedite matters where the applicant has an immediate and complete right to the thing demanded. *Emery v. Superior Court*, 89 Ariz. 246, 360 P.2d 1025. It is issued to compel the performance of an act which the law especially enjoins as a duty arising out of the office. *Graham v. Moore*, 56 Ariz. 106, 105 P.2d 962.

Burns v. Superior Court of Pima County, 97 Ariz. 112, 113, 397 P.2d 448, 449 (1964). The radical nature of this remedial action is manifested by the lack of any opinion or decision memorializing the issuance of a writ of mandamus in the Rule 404(c) context since 1997. This nuclear option should be used only as a last resort, such as when the county has just one superior court judge who systematically refuses to make the findings that Rule 404(c)(1)(D) mandates and thereby jeopardizes every sex-crime case in which the State needs to offer other-act evidence under Rule 404(c). This option might also be necessary in larger counties where certain judges are particularly notorious in their flouting of Rule 404(c)(1)(D).

Because A.R.S. § 13-4032 does not confer the State with the right to appeal from a deficient evidentiary ruling, filing a special action with the court of appeals afford you a much less drastic plausible alternative than seeking a writ of mandamus by the Arizona Supreme Court. *See State ex rel. Thomas v. Blakey*, 211 Ariz. 124, 126, ¶¶ 8-9, 118 P.3d 639, 641 (App.2005) ("Special action jurisdiction is appropriate where there is no equally plain, speedy, and adequate remedy by appeal. Ariz.R.P.Spec.Act.1(a). … [T]his case involves an interlocutory order from which the State has no right of appeal. It is therefore appropriately challenged by special action.") (prosecution sought relief from trial judge's refusal to try in absentia an illegal alien whom INS voluntarily deported); *State v. Dawley*, 201 Ariz. 285, 286, ¶ 2, 34 P.3d 394, 395 (App.2001) (granting State's special action to challenge the trial judge's impending use of a defective jury instruction).

5. Rule 404(c)(2): Limiting instruction.

A. Rule 404(c)(2) provides: "In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence."

B. The comment to Rule 404(c) provides additional guidance and specifies what must be conveyed to the jury:

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

Comment to 1997 Amendment, Rule 404(c), Ariz.R.Evid.

C. Please note that Rule 404(c)(2) provides that the judge "*shall* instruct the jury" "[i]n *all* cases in which evidence of another act is admitted pursuant to this subsection." (Emphasis added.) *See also State v. Aguilar*, 209 Ariz. 40, 49 n.11, 97 P.3d 865, 874 n.11 (2004) ("If the superior court should admit evidence of other acts under Rule 404(c), it *must* "instruct the jury as to the proper use of such evidence.") (emphasis added).

(1) Please note that we cannot rely upon Rule 404(b)'s jurisprudence, which does *not* mandate any limiting instruction, but instead holds that the trial court is obligated to give a limiting instruction *only upon the request of the defendant*. Consequently, reviewing courts will not find error, let alone prejudicial fundamental error, when the defendant never asked the judge to give one to the jury when other-act evidence is offered under Rule 404(b). *See State v. Nordstrom*, 200 Ariz. 229, 247, ¶ 51, 25 P.3d 717, 735 (2001) ("A limiting instruction would have been appropriate under Rule 105, which provides that when evidence is admissible for a limited purpose, the court should so instruct the jury.

However, the trial court does not err in failing to give a limiting instruction if trial counsel does not properly request an instruction.") (collecting cases); *State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996) ("Roscoe did not request a limiting instruction, and the trial court's failure to *sua sponte* give a limiting instruction is not fundamental error."); *State v. Miles*, 211 Ariz. 475, 483, ¶ 31, 123 P.3d 669, 677 (App.2005) ("Although evidence of other acts is not allowed to show that a defendant acted in conformity with them, Rule 404(b), Ariz.R.Evid., a trial court is not required, *sua sponte*, to give a limiting instruction on such evidence.") (collecting cases). **I have twice been successful in fending off claims of fundamental error by citing *Roscoe*, but that case predated Rule 404(c) and involved the admission of evidence offered under *McFarlin/Treadaway*, but sustained under the identity exception under Rule 404(b)).**

(2) In the event the judge fails to give the Rule 404(c) instruction, you can cure any prejudice during your closing arguments by telling the jury how to properly use this evidence: (a) the evidence is being offered only to prove that the defendant has an aberrant propensity to commit the charged offenses; (b) the jury needs to find that he committed the other acts by clear and convincing evidence, and that these acts demonstrate that he has an aberrant sexual propensity; and (c) even if the jury finds that he committed the other acts and has the character trait of sexual aberrance, the jurors must still unanimously find beyond a reasonable doubt that he committed the charged acts. *See State v. Lehr*, 227 Ariz. 140, 148, ¶ 24, 254 P.3d 379, 387 (2011) ("Here, the purposes for which the evidence was admitted were apparent from the record. In closing arguments, the State urged the jury to consider the evidence only for the original purposes for which it had been offered: to show modus operandi, identity, and an aberrant sexual propensity."); *State v. Valverde*, 220 Ariz. 582, 586, ¶ 16, 208 P.3d 233, 237 (2009) ("In assessing the impact of an erroneous instruction, we also consider the attorneys' statements to the jury."); *State v. Fierro*, 220 Ariz. 337, 340, ¶ 14, 206 P.3d 786, 789 (App.2008) ("Furthermore, even assuming any ambiguity in the instruction, it was mitigated during closing arguments."); *State v. Morales*, 198 Ariz. 372, 374, ¶ 5, 10 P.3d 630, 632 (App.2000) ("In addition, any alleged ambiguity in the instruction was alleviated by the prosecutor's closing argument, which made clear that the jury had to find that Morales was 'impaired to the slightest degree by alcohol.'") (citing *State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App.1989)); *State v. Cruz*, 189 Ariz. 29, 35, 938 P.2d 78, 84 (App. 1996) (alternatively holding that closing arguments remedied the omission of any standard for determining when the trial evidence raises the issue of self-defense). **Keep these cases on hand just in case a defendant waits until after conviction to move for a new trial on this basis.**

D. You should pay close attention to the accuracy of the limiting instruction. If the judge's instruction is wrong, the appellate court will take that error into account while determining the harmlessness of any other deficiency in the Rule 404(c) screening process. *See State v. Aguilar*, 209 Ariz. 40, 50 n.12, 97 P.3d 865, 875 n.12 (2004) ("Nor can we rely on the jury verdicts in this case. Although the trial court

instructed the jury to consider the evidence supporting each count separately, it also instructed the jury that '[e]vidence of abnormal sexual acts ha[d] been presented' to them and that they '***must*** consider this evidence in determining whether [Aguilar] had a character trait that predisposed him to commit the crimes charged.' (Emphasis added). In light of the latter instruction, we cannot say that a jury would have reached the same verdict on each sexual assault if the charges had not been tried together."). **Conversely, a correct limiting instruction will contribute to the reviewing court finding errors in the screening process to be non-prejudicial or harmless.** *See State v. Nordstrom*, 200 Ariz. 229, 254, ¶ 84, 25 P.3d 717, 742 (2001) ("Courts do not presume that jurors betray the court's trust and ignore their instructions."); *State v. Vega*, 228 Ariz. 24, 29, ¶ 18, 262 P.3d 628, 633 (App.2011) ("Moreover, the court in this case instructed the jury pursuant to Rule 404(c) that it "may" consider the other-act evidence 'only if' the State proved by clear and convincing evidence that Vega committed the act and the act showed that his 'character predisposed him to commit abnormal or unnatural sexual acts.' *See* Ariz.R.Evid.404(c)(2). For these reasons, we conclude we may consider the entire trial record in determining whether it was harmless error for the court to admit testimony about the beach incident without first screening the evidence and making the findings Rule 404(c) requires."). **The fact that the jury received a correct limiting instruction regarding the use of other-act evidence is helpful because courts presume that jurors follow their instructions, and acquittals or verdicts on lesser-included offenses demonstrates proof that the jury did so.**

6. Rule 404(c)(3): Discovery obligations.

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

B. **Be specific about the acts you intend to offer and ask for a pretrial determination on the admissibility of such evidence. Specificity and obtaining a pretrial ruling will help you avoid several problems besides defense claims of inadequate pretrial disclosure:**

(1) Lack of specificity in the disclosure notice and/or motion *in limine* creates the possibility that some of the defendant's other acts evidence will escape the court's attention and be admitted without Rule 404(c) screening.

(2) Besides risking convictions on Rule 404(c)-related grounds, the failure to enumerate the defendant's uncharged acts creates the possibility that the jury will be presented with a duplicitous charge, especially in cases where the charged and uncharged acts involve the same conduct, and the defendant has

been charged with fewer counts than the number of crimes he committed (i.e., the defendant possessed thousands of images of child pornography, but is charged with 20 representative files, or the defendant molested the same victim numerous times, but only the three are charged). A "duplicitous charge" exists "when the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Paredes–Solano*, 223 Ariz. 284, 287, ¶ 4, 222 P.3d 900, 903 (App.2009) (citation omitted). Although a duplicitous charge implicates a defendant's right to a unanimous verdict and constitutes fundamental error, *see State v. Davis*, 206 Ariz. 377, 390, ¶¶ 63-64, 79 P.3d 64, 77 (2003), this error may be cured by having the jury base their verdict on the same exact act "through a special verdict form or jury instruction." *State v. Butler*, 230 Ariz. 465, 470 n.5, 286 P.3d 1074, 1079 n.4 (App.2012). The failure to take these remedial measures, however, poses a risk of reversal on appeal.

(3) The defendant could argue that the lack of adequate pretrial disclosure prevented him from offering rebuttal evidence at trial. The court of appeals made this very point last year:

> The lengthy title of the State's disclosure pursuant to Arizona Rule of Criminal Procedure 15.1 included the phrase, "Notice of Intent to Use Other Crimes, Wrongs or Acts Pursuant to Rule 404(B), 404(C)," and the State represented in that disclosure that it would "seek to introduce all prior or subsequent acts of the Defendant that are contained in or incorporated into the police reports to prove sexual propensity, motive, intent, or knowledge otherwise use[d] at trial." FN5 Pursuant to Rule 404(c)(3), once the State has disclosed evidence of a prior act, "[t]he defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause."
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> > FN5. Beyond its initial disclosure, the State should have asked the court pursuant to Rules 16.1 and 16.3 of the Arizona Rules of Criminal Procedure prior to trial to determine the admissibility of any evidence it sought to offer pursuant to Rule 404(c). *Cf. State v. LeBrun*, 222 Ariz. 183, 187, ¶ 15, 213 P.3d 332, 336 (App.2009) (although circumstances may not require court to hold evidentiary hearing before making Rule 404(c) findings, court allowed defense to offer evidence to dispute the act). In this case, if the State had asked the court to consider the admissibility of the other-act evidence prior to trial, Vega presumably would have been in a better position to offer his daughter's testimony to impeach the account of the beach incident.

State v. Vega, 228 Ariz. 24, 30, ¶ 28 & n.5, 262 P.3d 628, 634 & n.5 (App.2011).

II. The intrinsic-evidence doctrine.

1. The intrinsic evidence doctrine is best understood as application of the concept of relevance embodied in Arizona Rules of Evidence 401 and 402 and subject only to Rule 403's provision excluding evidence whose probative value is substantially outweighed by the risk of unfair prejudice. "Its premise is that certain acts are so closely related to the charged act that they cannot fairly be considered 'other' acts, but rather are part of the charged act itself." *State v. Ferrero*, 229 Ariz. 239, 242, ¶ 14, 274 P.3d 509, 512 (2012) (citing *United States v. Green*, 617 F.3d 233, 245 (3rd Cir. 2010)). "The doctrine recognizes that excluding evidence of these acts may prevent a witness from explaining the charged act, making the witness's testimony confusing or incoherent." *Id.* (citing *Burke v. State*, 624 P.2d 1240, 1250 (Alaska 1980); *People v. Dobek*, 732 N.W.2d 546, 568 (Mich.App.2007).

2. This doctrine is very alluring to prosecutors because intrinsic evidence is not subject to the requirements of Rule 404(b) or Rule 404(c). *See State v. Ferrero*, 229 Ariz. 239, 240, ¶ 1, 274 P.3d 509, 510 (2012) ("We conclude that *Rule 404(c) does not apply to truly intrinsic evidence*, but that *Garner* evidence is not inherently intrinsic."); *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 56, 25 P.3d 717, 736 (2001) ("We agree that intrinsic evidence is admissible absent Rule 404(b) analysis."); *State v. Baldenegro*, 188 Ariz. 10, 15–16, 932 P.2d 275, 280–81 (App.1996) (same).

3. Until 2012, the Arizona Supreme Court adhered to the following formulation of this doctrine: "'Other act' evidence is 'intrinsic' when evidence of the other act and evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." *State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (quoting *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996) (quoting *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990)). *Accord State v. Andriano*, 215 Ariz. 497, 502 ¶ 18, 161 P.3d 540, 545 (2007); *State v. Herrera*, 226 Ariz. 59, 64, ¶ 12, 243 P.3d 1041, 1046 (App.2011).

4. The tripartite formulation and the cases citing them are no longer good law, however, because the Arizona Supreme Court explicitly overruled them and imposed a new and much narrower standard for intrinsic evidence, based upon the following concerns:

> Despite our efforts [in *Adriano* and *Nordstrom*] to narrowly constrain the intrinsic evidence doctrine, some decisions have cited it to justify the admission of evidence that is not truly intrinsic to the charged act. *See, e.g.*, *State v. Herrera*, 226 Ariz. 59, 64 ¶ 15, 243 P.3d 1041, 1046 (App.2011). It has proved difficult for courts to determine when an "other act" is necessarily preliminary to the charged act or when evidence crosses

> the line from being admissible as "part of a single criminal episode" as the charged act, to being inadmissible as merely arising "out of the same series of transactions as the charged offense." *See, e.g., United States v. Siegel*, 536 F.3d 306, 316 (4th Cir. 2008) (applying "same series of transactions" test); *United States v. McLee*, 436 F.3d 751, 760 (7th Cir. 2006) (same).
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> The Third Circuit noted similar problems in identifying whether evidence is sufficiently "inextricably intertwined" to make it intrinsic, remarking that "the [inextricably intertwined] test creates confusion because, quite simply, no one knows what it means." *Green*, 617 F.3d at 246. In *Green*, the defendant was convicted of attempted possession of cocaine. *Id*. at 237-38. At trial, the court admitted evidence of a bomb plot under the theory that the defendant sought to purchase dynamite and cocaine in the same transaction, so the bomb plot helped explain how the defendant attempted to procure the drugs. *Id*. at 237. The Third Circuit found the evidence admissible for non-propensity purposes under Rule 404(b), *id.* at 252, but it disagreed with the trial court's analysis and held that the evidence relating to the bomb plot was not intrinsic to the attempted cocaine possession, *id.* at 249. After extensively analyzing the pitfalls of the intrinsic evidence doctrine generally, and the "inextricably intertwined" category in particular, the court decided to "reserve the 'intrinsic' label for two narrow categories of evidence." *Id*. at 248. According to the court, an "other act" is intrinsic only if it (1) "directly proves the charged offense," or (2) is "performed contemporaneously with" and "facilitate[s] the commission of the charged crime." *Id*. at 248-49 (internal citations and quotation marks omitted).
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> Given the difficulty Arizona courts have experienced in applying the intrinsic evidence definition we espoused in *Andriano* and *Nordstrom*, we adopt *Green's* definition. It desirably allows evidence of acts that are so interrelated with the charged act that they are part of the charged act itself without improperly admitting evidence that, although possibly helpful to explain the charged act, is more appropriately analyzed under Rule 404(b) or (c).

State v. Ferrero, 229 Ariz. 239, 242-43, ¶¶ 18-20 1, 274 P.3d 509, 512-13 (2012).

5. The Arizona Supreme Court then adopted *Green's* two-part test for intrinsic evidence:

> Henceforth, evidence is intrinsic in Arizona if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act. (Footnote 3 and citation omitted.) The intrinsic evidence doctrine thus may not be invoked merely to "complete the story" or because evidence "arises out of the same

> transaction or course of events" as the charged act. [FN4: Evidence that "completes the story," "arises out of the same transaction" as the charged act, or is "part and parcel" of the charged act may well qualify as intrinsic evidence, but those tests are broader than our formulation and should not be invoked to analyze whether evidence is intrinsic to the charged act.]

State v. Ferrero, 229 Ariz. 239, 242-43, ¶¶ 18-20, 274 P.3d 509, 512-13 (2012) (citing *United States v. Green*, 617 F.3d 233, 248-49 (3rd Cir. 2010)). *Accord State v. Butler*, 230 Ariz. 465, 472-73, ¶ 29, 286 P.3d 1074, 1081-82 (App.2012).

6. Prosecutors should take note that the Arizona Supreme Court has telegraphed to the defense bar its willingness to entertain abandoning the intrinsic-evidence doctrine altogether by dropping the following footnote to the passage quoted above:

> Other jurisdictions have entirely abandoned the intrinsic evidence doctrine. *See, e.g., State v. Fetelee*, 117 Hawai'i 53, 175 P.3d 709, 737 (2008); *State v. Rose*, 206 N.J. 141, 19 A.3d 985, 1010–11 (2011). Although the need for the doctrine may be questioned, *the parties have not asked that we abandon it, so we do not decide that issue today*.

State v. Ferrero, 229 Ariz. 239, 243, ¶ 20 n.3, 274 P.3d 509, 513 n.3 (2012) (emphasis added). **Given the fact that the State petitioned for review in *Ferrero* to advance the argument that "*Garner* evidence" is intrinsic and therefore not subject to Rule 404(c) screening, it is remarkable that the Court commented that "the *parties* have not asked that we abandon it."**

7. The Arizona Supreme Court's application of its new standard demonstrates that *very few uncharged acts* will qualify as conduct that either "directly proves the charged act" or "is performed contemporaneously with and directly facilitates commission of the charged act":

> For example, the trial court, presumably relying on *Garner*, permitted the prosecutor to introduce evidence that on the ride to Ferrero's house on the night of the first charged offense, Ferrero told the victim to pull down the victim's pants and underwear and expose himself. The victim acceded to Ferrero's demands because Ferrero threatened to leave him on the side of the road if he did not comply. When they arrived at Ferrero's house, the victim talked with Ferrero's mother and played computer games for at least thirty minutes while Ferrero showered. The victim then joined Ferrero in bed, at which time Ferrero completed the first charged act.
>
> The State offered the exposure evidence to show "that Defendant had the emotional propensity to engage in sexual misconduct" with the victim, and the jury was instructed that the evidence could be used for that

> purpose. The evidence is facially governed by Rule 404(c) because it involves an uncharged sex act offered "to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." The evidence is therefore exempt from Rule 404(c) screening only if the uncharged act was truly intrinsic to the charged act and thus not an "other act."
>
> The evidence of this uncharged act does not fit within our narrow definition of intrinsic evidence. The two acts were qualitatively different and constituted two separate instances of sexual abuse. Thus, under the first prong of our definition, forcing the victim to expose himself does not directly prove that Ferrero later committed the charged sexual offense. The second prong—which requires that the act occur contemporaneously with and directly facilitate the charged act—is equally unavailing. **Although forcing the victim to pull down his pants in the vehicle may have facilitated the charged act by weakening the victim's defenses, it did not occur contemporaneously with the charged act. The acts were separated by at least thirty minutes, during which time the victim talked to Ferrero's mother and played computer games**.
>
> The forced exposure is therefore not intrinsic to the charged act. Because the evidence was offered to prove the defendant's propensity to commit the charged act, the trial court erred in admitting evidence of that act without screening it under Rule 404(c).

State v. Ferrero, 229 Ariz. 239, 245, ¶¶ 25-28, 274 P.3d 509, 514 (2012).

8. The Arizona Supreme Court defends the narrow scope of its new standard by observing that virtually all of the evidence the prosecution might seek to admit as intrinsic evidence is admissible for a non-character purpose under Rule 404(b), and that channeling such other-act evidence will prevent the State from evading its disclosure obligations and the defendant's entitlement to a limiting instruction upon request:

> Our narrow definition of intrinsic evidence will not unduly preclude relevant evidence of a defendant's other acts. Non-intrinsic evidence will often be admissible for non-propensity purposes under Rule 404(b). *See Andriano*, 215 Ariz. at 502-03, ¶¶ 22-23, 26-27, 161 P.3d at 545-46 (finding evidence of attempts to procure insurance and extramarital affairs not intrinsic, but nonetheless admissible under Rule 404(b) to show plan, knowledge, motive, and intent to kill). As the court observed in *Green*,
>
>> [I]t is unlikely that our holding will exclude much, if any, evidence that is currently admissible as background or "completes the story" evidence under the inextricably intertwined test. We

> reiterate that the purpose of Rule 404(b) is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person, implying that the jury needn't worry overmuch about the strength of the government's evidence. No other use of prior crimes or other bad acts is forbidden by the rule, and one proper use of such evidence is the need to avoid confusing the jury. Thus, most, if not all, other crimes evidence currently admitted outside the framework of Rule 404(b) as "background" evidence will remain admissible under the approach we adopt today. The only difference is that the proponent will have to provide notice of his intention to use the evidence, and identify the specific, non-propensity purpose for which he seeks to introduce it (*i.e.*, allowing the jury to hear the full story of the crime). Additionally, the trial court will be required to give a limiting instruction upon request.
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> 617 F.3d at 249 (citations and internal quotation marks omitted); see Ariz.R.Evid.105 (jury instruction); Ariz.R.Crim.P.15.1(b)(7) (pretrial notice); *see also* [*United States v.*] *Bowie*, 232 F.3d [923,] 927 [(D.C.Cir.2000)] ("So far as we can tell, the only consequence[ ] of labeling evidence 'intrinsic' [is] to relieve ... the court of its obligation to give an appropriate limiting instruction upon defense counsel's request.").

State v. Ferrero, 229 Ariz. 239, 244, ¶ 23, 274 P.3d 509, 514 (2012).

9. Under the prevailing standard, prosecutors could rely upon the intrinsic-evidence standard in the following circumstances:

A. When the defendant commits the uncharged acts in the same place as and during the commission of the charged offense. The court of appeals illustrated a scenario that would satisfy the "performed contemporaneously with and directly facilitates commission of the charged act" prong of the new intrinsic-evidence standard that the *Ferrero* court found unsatisfied by proof that the defendant made the victim pull down his pants and expose himself during a car ride to the defendant's house, where the defendant molested the victim just 30 minutes later:

> ¶ 8 Marshall claims that the trial court erred in failing to declare a mistrial with respect to Counts 17 and 18 after the victim testified as to other uncharged bad acts committed by him. Count 17 charged Marshall with performing oral sex on the victim. Count 18 alleged that Marshall had the victim perform oral sex during the same occasion. **During her trial testimony, the victim first described the act alleged in Count 18. The prosecutor, in an attempt to elicit testimony supporting Count 17, asked whether Marshall did anything to any part of the victim's body. She responded that Marshall had penetrated her vagina with his penis and his fingers. She then described the act alleged in Count 17.**

> Surprised by the allegations of uncharged acts of digital and penile penetration, defense counsel objected under Arizona Rule of Evidence 404(b) and Arizona Rule of Criminal Procedure 15.1.
>
> …
>
> ¶ 13 Furthermore, a mistrial based upon a claim of evidentiary error is warranted only when the jury has been exposed to improper evidence and the error might have affected the verdict. [Citation omitted.] Had the other acts been disclosed prior to trial, they would have undoubtedly been admissible either as evidence of Marshall's propensity to commit aberrant sex offenses upon the victim or **because they were so much part and parcel of the criminal episode involving Counts 17 and 18 so as to be "intrinsic" to the charged offenses.** *See State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996) (intrinsic evidence includes that which is inextricably intertwined with charged crime **or part of same criminal episode** so as to be admissible absent a Rule 404(b) analysis).

State v. Marshall, 197 Ariz. 496, 500-01, ¶¶ 8, 13, 4 P.3d 1039, 1043-44 (2000). *See also State v. Salamanca*, 233 Ariz. 292, 295, ¶ 12, 311 P.3d 1105, 1108 (App.2013) (upholding the admission of an angry text message that the intoxicated vehicular manslaughter defendant sent to his girlfriend just 59 seconds before a 911 call under *Ferrero's* new intrinsic-evidence doctrine, but avoiding the "close question" of whether an earlier text message sent 2 minutes and 15 seconds before the 911 call constituted intrinsic evidence because such evidence was admissible under Rule 404(b) to prove the defendant's distracted and angry state of mind: "The superior court did not abuse its discretion by concluding that the second text was close enough in time to the collision that it was intrinsic to the charged offense. The jury could have concluded the second text in fact caused the collision—that the act of sending the text, or the act of handling his cell phone directly after having sent the text, caused Salamanca to lose control of his vehicle. Viewing the evidence in that fashion, the superior court did not abuse its discretion in finding that the second text was 'performed contemporaneously with and directly facilitates commission of the charged act.'") (quoting *Ferrero*, 230 Ariz. at 243, ¶ 20, 274 P.3d at 513).

Presumably, this prong would permit the State to offer uncharged act evidence showing that: (1) the defendant committed hands-on offenses, like sexual abuse, child molestation, or sexual conduct with a minor, while he had the victim sit on his lap to view child pornography on his computer or while he was reading incestuous literature to the victim (the facts I encountered in two cases: *State v. Darrin Wiles* and *State v. Joel Kenton Barr*); (2) the defendant abused the charged victim at the same time as another child whom he had a prior sexual relationship in order to "educate" and lower the resistance of the charged victim to his sexual advances (the facts I encountered in *State v. David*

***Garcia*, where the defendant brought two sisters to his bedroom and used the older child to show the younger how to perform oral sex on him).**

B. The intrinsic-evidence standard's "directly proves the charged act" prong may be satisfied when the defendant's uncharged act establishes an element of the crime. *See United States v. Gibbs*, 190 F.3d 188, 218 (3rd Cir. 1999) (uncharged acts of violence directly proved the existence of the charged conspiracy); *United States v. Diaz*, 176 F.3d 52, 79 (2nd Cir. 1999) ("An act that is alleged to have been done in furtherance of the alleged conspiracy ... is not an 'other' act within the meaning of Rule 404(b); rather, it is part of the very act charged. … Where, as in this case, the indictment contains a conspiracy charge, uncharged acts may be admissible as direct evidence of the conspiracy itself.") (internal citations and quotation marks omitted); *United States v. Daly*, 974 F.2d 1215, 1217 (9th Cir. 1992) (defendant's possession of a firearm as a felon was established by his uncharged shootout with the police); *State v. Baldenegro*, 188 Ariz. 10, 15-16, 932 P.2d 275, 279-80 (App.1996) (upholding admission of crimes committed by defendant's fellow gang members as "intrinsic" to the charged offenses of assisting and participating in a criminal syndicate because such criminal acts proved the element that the gang to which defendant belonged was a criminal street gang).

The reasoning in the cases detailed above would apply with equal force if the State charged the defendant with a violation of A.R.S. § 13-1417, because every violation of the sexual-abuse, child-molestation, and sexual-conduct-with-a-minor statutes would be direct proof of an element of the crime:

> A. A person who over a period of three months or more in duration engages in *three or more acts in violation of § 13-1405, 13-1406 or 13-1410 with a child who is under fourteen years of age* is guilty of continuous sexual abuse of a child.
>
> B. Continuous sexual abuse of a child is a class 2 felony and is punishable pursuant to § 13-705.
>
> C. To convict a person of continuous sexual abuse of a child, *the trier of fact shall unanimously agree that the requisite number of acts occurred. The trier of fact does not need to agree on which acts constitute the requisite number*.

A.R.S. § 13-1417 (emphasis added).

10. We can turn *Ferrero* to our advantage by resorting to Rule 404(b) and noting the Arizona Supreme Court's observation that "most, if not all, other crimes evidence currently admitted outside the framework of Rule 404(b) as 'background' evidence will remain admissible under the approach we adopt today." 229 Ariz. at 244, ¶ 23, 274 P.3d at 514. Thus, the balance of this outline

sets forth the non-character purposes for admitting uncharged-act evidence under Rule 404(b).

III. Rule 404(b).

A. General Principles

1. Text of Arizona Rule of Evidence 404(b):

> Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"This list of permissible purposes is merely illustrative, not exclusive." *State v. Wood*, 180 Ariz. 53, 62, 881 P.2d 1158, 1167 (1994) (citing *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983)). *Accord State v. Via*, 146 Ariz. 108, 122, 704 P.2d 238, 252 (1985).

2. A**lthough courts frequently refer to uncharged acts as "prior acts," Rule 404(b) applies with equal force to a defendant's conduct *subsequent* to the charged offense.** *See State v. Hargrave*, 225 Ariz. 1, 8, ¶ 10, 234 P.3d 569, 576 (2010); *State v. Ashelman*, 137 Ariz. 460, 464, 671 P.2d 901, 905 (1983); *State v. Moreno*, 153 Ariz. 67, 68, 734 P.2d 609, 610 (App.1986).

3. "The purpose of Rule 404(b) is 'to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person.'" *State v. Hardy*, 230 Ariz. 281, 289, ¶ 34, 283 P.3d 12, 20 (2012) (quoting *State v. Ferrero*, 229 Ariz. 239, 244 ¶ 23, 274 P.3d 509, 514 (2012) (quoting *United States v. Green*, 617 F.3d 233, 249 (3rd Cir. 2010)). **However, the prosecution may offer other-act evidence for any reason other than proving that the defendant acted in conformity with his past conduct and/or bad character when he committed the charged acts:**

> The question under Rule 404(b) is not whether evidence tends to establish guilt but how it tends to establish it. If it tends to show a disposition toward criminality from which guilt on this occasion is to be inferred, it is inadmissible. If it establishes guilt in some other way, it is admissible.

***State v. Ramirez-Enriquez*, 153 Ariz. 431, 432, 737 P.2d 407, 408 (App.1987).** Thus, "if evidence is relevant for any purpose other than that of showing the defendant's criminal propensities, it is admissible even though it refers to his prior bad acts." *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983). *Accord State v. Connor*, 215 Ariz. 553, 563, ¶ 32, 161 P.3d 596, 606 (App.2007) ("Rule 404(b) only precludes evidence that is offered to show the character of a defendant to prove disposition to acts of a particular

type. … Evidence relevant for any purpose other than showing propensities to act in a certain way remains admissible.”).

4. The Arizona Supreme Court recapitulated the conditions for admitting uncharged act evidence pursuant to Rule 404(b) as follows:

> The proponent must establish by clear and convincing evidence that the defendant committed the act, *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997), and the court must then “(1) find that the act is offered for a proper purpose under Rule 404(b); (2) find that the prior act is relevant to prove that purpose; (3) find that any probative value is not substantially outweighed by unfair prejudice; and (4) give upon request an appropriate limiting instruction,” *State v. Anthony*, 218 Ariz. 439, 444 ¶ 33, 189 P.3d 366, 371 (2008).

State v. Hargrave, 225 Ariz. 1, 8, ¶ 10, 234 P.3d 569, 576 (2010). *Accord State v. Hausner*, 230 Ariz. 60, 78, ¶ 69, 280 P.3d 604, 622 (2012); *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 54, 25 P.3d 717, 736 (2001).

5. Defendants sometimes attempt to preclude other-act on the evidence on the ground that the uncharged incident is alone insufficient to prove that he committed the charged offense. That argument improperly equates the standard of relevance with the evidence necessary to survive a directed verdict. *See State v. Greenawalt*, 128 Ariz. 388, 395, 626 P.2d 118, 125 (1981); *State v. Neese*, 126 Ariz. 499, 508, 616 P.2d 959, 968 (App. 1980). To be relevant under Rule 401, “evidence need only alter the probability, not prove or disprove the existence, of a consequential fact.” *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496, 733 P.2d 1073, 1079 (1987). “It is not necessary that such evidence be sufficient to support a finding of an ultimate fact; it is enough if the evidence, if admitted, would render the desired inference more probable.” *State v. Paxson*, 203 Ariz. 38, 41-42, ¶ 17, 49 P.3d 313-14 (App. 2002)) (quoting *Reader v. General Motors Corp.*, 107 Ariz. 149, 155 (1971)). *Accord United States v. Boulware*, 384 F.3d 794, 805 n.3 (9th Cir. 2004) (“For evidence to be relevant, and thus admissible, Rule 401 does not require that it ‘prove’ anything. Rule 401’s only requirement is that the proffered evidence have *a tendency* to prove a fact in issue.”) (emphasis in original); *United States v. Leftenant*, 341 F.3d 338, 346 (4th Cir. 2003) (“Indeed, to be admissible, evidence need only be ‘worth consideration by the jury,’ or have a ‘plus value.’”); *United States v. Shultz*, 333 F.3d 393, 416 (2nd Cir. 2003) (“Evidence need not be conclusive in order to be relevant.”). This principle applies equally to evidence admitted pursuant to Rule 404(b). *See United States v. Brand*, 467 F.3d 179, 197-99 (2nd Cir. 2006); *United States v. Latney*, 108 F.3d 1446, 1449 (D.C. Cir. 1997); *State v. Taylor*, 169 Ariz. 121, 124 n.3, 817 P.2d 488, 491 n.3 (1991). “[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.” *Huddleston v. United States*, 485 U.S. 681, 691 (1988) (quoting *Bourjaily v. United States*, 483 U.S. 171, 179-180 (1987)).

6. An important caveat when you are litigating uncharged act evidence: you should do more than merely parrot the language of Rule 404(b) and broadly claim that the other-act evidence is admissible to prove the defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Instead, be specific and explain how the other-act evidence will help you prove a contested element of the crime or rebut the defendant's noticed trial defenses.

You need to crystallize your theories as they apply to the case at hand because the Arizona Supreme Court rejected the Seventh Circuit's rule allowing the State to offer other-act evidence to prove uncontested elements of the charged offenses in favor of the Second Circuit's narrower rule restricting the use of uncharged-act evidence to prove disputed elements of the case (*i.e.*, Rule 404(b)'s exceptions for intent, knowledge, and absence of accident or mistake are inapplicable when the defendant's defense is that he never had sexual contact with the molestation victim):

> The state also contends the acts were admissible "to show intent and lack of mistake or accident." As noted above, defendant denied ever having touched any of the girls in a sexual manner. See supra at 105, 927 P.2d at 765. The only touching to which defendant admitted was steadying L.M. in order for her to get plates down and drying off T.J. at the request of her parents.
>
> Courts are split on the issue of whether a defendant may remove intent as an issue by a blanket denial of participation in a criminal act. **The Seventh Circuit Court of Appeals, for example, has held that "[i]n cases involving specific intent crimes, intent is automatically an issue, regardless of whether the defendant has made intent an issue in the case."** *United States v. Mazzanti*, 888 F.2d 1165, 1171 (7th Cir. 1989) (quoting *United States v. Monzon*, 869 F.2d 338, 344 (7th Cir.), *cert. denied*, 490 U.S. 1075, 109 S.Ct. 2087, 104 L.Ed.2d 650 (1989)), *cert. denied*, 495 U.S. 930, 110 S.Ct. 2167, 109 L.Ed.2d 497 (1990). In *Mazzanti*, the court concluded that the defendant's "blanket denial of any wrongdoing ... was meant to negate any evidence of intent," and therefore that introduction of other act evidence was permissible. 888 F.2d at 1171.
>
> The Second Circuit has taken a different approach. In *United States v. Colon*, the court noted that:
>
> > **Our cases have thus recognized a distinction between defense theories that claim that the defendant did not do the charged act at all, and those that claim that the defendant did the act innocently or mistakenly, with only the latter truly raising a disputed issue of intent.**

880 F.2d 650, 657 (2nd Cir.1989). In *Colon*, defendant shifted his theory of defense before trial, from one which raised the issue of intent to one that did not. *Id*. at 658. The court held that "to take [the intent issue] out of a case, a defendant must make some statement to the court of sufficient clarity to indicate that the issue will not be disputed." ****770 *110** *Id*. at 659. However, the court determined that although defendant did not explicitly alert the trial court that his second theory removed intent as an issue from the case, the circumstances were sufficient to show that the second theory was "an offer to stipulate intent out of the case." *Id*.

We prefer the approach in *Colon* to that in *Mazzanti*. Otherwise, the general rule prohibiting introduction of prior bad acts to show character would never apply to specific intent crimes because intent would always be at issue. This, we believe, cuts too deeply into the rule against character evidence. Moreover, it does so based on a nearly meaningless distinction. As the instant case amply demonstrates, sometimes even specific intent crimes do not put intent at issue. Even a cursory reading of the record below indicates that the issue in this case was whether the defendant committed the acts at all, not what his state of mind was when he committed them.

We do not believe that in a case such as this, absent another legitimate 404(b) purpose, prior bad acts demonstrate anything beyond an improper character inference**. If intent is not at issue, and no other valid 404(b) grounds exist, we fail to see why propensity evidence is permissible in specific intent cases but not those involving general intent crimes. Instead, we adopt the *Colon* approach.** This approach best avoids the danger of an impermissible character inference, such as the one addressed by the Ninth Circuit Court of Appeals in *United States v. Powell*:

> The issue is whether [defendant] was the person who trafficked in this particular marihuana, and the only logical connection between the two marihuana incidents was that a person who has shown a willingness to deal in large quantities of marihuana in one circumstance may be willing to deal in large quantities of marihuana in another. In short, this is the same forbidden use of the prior conviction.

587 F.2d 443, 449 (9th Cir.1978); *see also United States v. Mundi*, 892 F.2d 817, 820 (9th Cir. 1989) (allowing proof of prior bad acts to demonstrate intent where defendant's case "largely concerned his lack of criminal intent"), *cert. denied*, 498 U.S. 1119, 111 S.Ct. 1072, 112 L.Ed.2d 1178 (1991). *But see U.S. v. Hadley*, 918 F.2d 848, 851–52 (9th Cir. 1990) (holding *Powell's* reference to the issue of intent is "nonbinding dicta"). **Unless there is some discernible issue as to defendant's intent**

> **(beyond the fact that the crime charged requires specific intent), the state may not introduce evidence of prior bad acts as part of some generalized need to prove intent in every case.**

State v. Ives, 187 Ariz. 102, 109-10, 927 P.2d 762, 769-70 (1996). *See also State v. Hughes*, 189 Ariz. 62, 69, 938 P.2d 457, 464 (1997) ("Where, as here, the accused denies any involvement in the charged offense, the 'intent' exception of 404(b) is not a proper basis for injecting prior misconduct into a proceeding.").

Articulating your theories for admitting evidence under Rule 404(b) will serve these functions: (1) the State's appellate attorneys will have the benefit of defending Rule 404(b) rationales that you actually did advance and thus will not have to resort to the doctrine requiring the court of appeals to affirm the conviction on any basis supported by the record, including theories you did not cite to justify the admission of the challenged other-act evidence; (2) if defense counsel has not done so already, he will have to identify the defenses he intends to present at trial in order to oppose your evidence—a development that will avoid the unhappy scenario in which the State offered other-act evidence on an undisputed issue; and (3) if defense counsel proceeds beyond the defenses he articulated, you may have the court revisit the issue and argue that he opened the door to evidence that was preliminarily ruled inadmissible for not concerning any disputed fact or element. *See State v. Kemp*, 185 Ariz. 52, 60-61, 912 P.2d 1281, 1289-90 (1996) (holding that defense counsel's assertion that no evidence connecting this client to the murder invited any error in the court allowing the State to rebut this misleading claim with contrary proof, notwithstanding a prior ruling excluding the evidence); *State v. Martinez*, 127 Ariz. 444, 447, 622 P.2d 3, 6 (1980) ("When the defendant, as here, 'opens the door' by denying certain facts which the evidence, previously excluded, would contradict, he may not rely on the previous ruling that such evidence will remain excluded.").

7. The law recognizes that a defendant may open the door to otherwise inadmissible other-act evidence both before and during trial, including through:

> **(A) The defendant's self-serving post-arrest interview statements to the police.** *See Dozier v. State*, 706 So.2d 1287, 1289 (Ala.Crim.App.1997); *State v. Stein*, 153 Ariz. 235, 239, 735 P.2d 845, 849 (App.1987); *State v. Neal*, 898 S.W.2d 440, 442-43 (Ark.1995); *Commonwealth v. Maimoni*, 670 N.E.2d 189, 192-93 (Mass.App.1996); *State v. Otto*, 157 P.3d 8, 12, ¶¶ 11-12 (N.M.2007); *State v. Fedorowicz*, 52 P.3d 1194, 1203, ¶ 30 (Utah 2002); *Commonwealth v. Ortiz*, 667 S.E.2d 751, 758 (Va.2008); *State v. Johnson*, 510 N.W.2d 811, 818 (Wis.App.1993).
>
> **(B) Assertions made by defense counsel during his opening statements to the jury.** *See State v. Hyde*, 186 Ariz. 252, 276-77, 921 P.2d 655, 679-80 (1996); *State v. Jeffers*, 135 Ariz. 404, 418-19, 661 P.2d 1105, 1119-20 (1983); *State v. Neal*, 898 S.W.2d 440, 443 (Ark.1995); *Commonwealth v. Constant*, 925 A.2d 810, 819-20 (Pa.Super.2007).

(C) Defense counsel's cross-examination of the State's witnesses. *See Biles v. State*, 715 So.2d 878, 884-85 (Ala.Crim.App.1997); *State v. Kemp*, 185 Ariz. 52, 60-61, 912 P.2d 1281, 1289-90 (1996); *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983); *Segundo v. State*, 270 S.W.3d 79, 86 (Tex.Crim.App.2008); *Isenhower v. State*, 261 S.W.3d 168, 178-79 (Tex.Crim.App.2008); *State v. Fedorowicz*, 52 P.3d 1194, 1203, ¶ 30 (Utah 2002).

(D) Evidence that the accused presented in the defense case, including his own testimony. *See State v. Lee*, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997); *State v. Dickens*, 187 Ariz. 1, 8-9, 18-19, 926 P.2d 468, 475-76, 485-86 (1996); *State v. Hines*, 130 Ariz. 68, 73, 633 P.2d 1384, 1389 (1981); *State v. Martinez*, 127 Ariz. 444, 446-47, 622 P.2d 3, 5-6 (1980); *State v. Connor*, 215 Ariz. 553, 564, ¶ 38, 161 P.3d 596, 607 (App.2007); *State v. Kiper*, 181 Ariz. 62, 64-65, 887 P.2d 592, 594-95 (App.1994).

8. The following cases upheld the admission of other-act evidence to rebut various defenses or claims that the defendant made during trial. *See United States v. Curtin*, 489 F.3d 935, 948-53 (9th Cir. 2007) (evidence of defendant's possession of incestuous stories involving children in prosecution for interstate travel to engage in sexual conduct with a minor was admissible to rebut defendant's claim he was seeking adults role-playing as children); *United States v. Verduzco*, 373 F.3d 1022, 1028 (9th Cir. 2004) (duress defense); *Collins v. State*, 669 S.W.2d 505, 507 (Ark.App.1984) (upholding admission of defendant's propositioning of child in front of her mother was admissible "to show that appellant did not crawl into the girl's bed on the night of July 16, 1982, by mistake, accident, or because he was drunk"); *State v. Villalobos*, 225 Ariz. 74, 79-80, ¶ 19, 235 P.3d 227, 232-33 (2010) (misidentification, lack of intent, and "reflex" defenses); *State v. Adriano*, 215 Ariz. 497, 503-04, ¶¶ 27-31, 161 P.3d 540, 546-47 (2007) (murder victim was an abusive spouse); *State v. Lee*, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997) (accidental-discharge defense to murders); *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997) (battered-woman syndrome); *State v. Hyde*, 186 Ariz. 252, 276-77, 921 P.2d 655, 679-80 (1996) ("In this case, the trial court determined that the evidence was admissible to show motive and to rebut defendant's implication during his opening statement that he did not need money when the murders were committed."); *State v. Maturana*, 180 Ariz. 126, 130, 882 P.2d 933, 937 (1994) (mere presence defense). *State v. Huey*, 145 Ariz. 59, 61-62, 699 P.2d 1290, 1292-93 (1985) (consent defense to sexual assault); *State v. Jeffers*, 135 Ariz. 404, 419, 661 P.2d 1105, 1120 (1983) ("Furthermore, Jeffers professed a deep abiding love for Penny which would not allow him to cause her any harm. The opening statement for the defense made several references to this love Jeffers had for Penny. Thus, evidence of this prior incident would also be admissible to rebut Jeffers' claim of inability to harm his loved one."); *State v. Gomez*, 254 P.3d 47, 56 (Idaho App. 2011) (where the defendant claimed that he could not have molested the victim at night because others were sleeping in the same bedroom, the trial court properly admitted testimony from the victim's siblings that the defendant had molested them while other children slept nearby); *State v. Kreiger*, 803 A.2d 1026, 1030, ¶ 10 (Me.2002) (prior-act evidence rebutted characterization of offensive sexual

contact as mere "tickling" done in "an innocent way"); *State v. Kerby*, 156 P.3d 704, 711, ¶ 76 (N.M. 2007) (prior-act evidence admissible to "rebut evidence that Defendant innocently touched Victim's buttocks").

B. Theories of admissibility under Rule 404(b)

This section of the outline will discuss theories of admissibility that are available to prosecutors under Rule 404(b), both under its enumerated exceptions and for other non-character purposes not listed in the rule's text.

1. <u>Preparation and Plan</u>.

A. "Grooming." Courts have defined this term as "the process of cultivating trust with a victim and gradually introducing sexual behaviors until reaching the point" that the defendant can perpetrate a sex crime against his prey. *United States v. Johnson*, 132 F.3d 1279, 1283 n.2 (9th Cir. 1997). Rule 404(b)'s enumerated exceptions for "preparation" and "plan" may be used to admit evidence of the defendant's grooming behavior and help offset the Arizona Supreme Court's abandonment of the "necessary preliminaries" component of its repudiated tripartite formulation of the intrinsic-evidence doctrine.

1. Currently, the only published Arizona decision upholding the admission of grooming evidence under Rule 404's plan exception does not involve other-acts of a sexual nature. *See State v. Grainge*, 186 Ariz. 55, 58, 918 P.2d 1073, 1076 (App.1996) (evidence that defendant gave the victim marijuana was "relevant to show … [the defendant's] plan to lower [the victim's] resistance and to develop a permissive environment conducive to his schemes") (citing *State v. Blackstead*, 878 P.2d 188, 190, 192-94 (Idaho App.1994)).

2. Several other jurisdictions, however, have admitted uncharged acts constituting "grooming" under their forum's version of Rule 404(b)'s plan and/or preparation exceptions. Here are some excellent examples:

a. *State v. Truman*, 249 P.3d 1169, 1172-78 (Idaho App.2010) (defendant's "first sexual comments towards [one victim] when she was twelve years old" and "showing her pornography" constituted grooming evidence that was admissible under Rule 404(b)'s plan exception; the court reached the same result with respect to the second victim, whom the defendant made watch and videotape him and the first victim performing oral sex on each other).

b. *Flanders v. State*, 955 N.E.2d 732, 743-44 (Ind.App.2011) ("Holding hands is not clearly sexual or illegal, but the evidence tends to show that Flanders was familiarizing H.P. with being touched by him and was creating a more physical relationship with her.").

c. *Piercefield v. State*, 877 N.E.2d 1213, 1216 (Ind.App.2007) ("The massages were either requested or demanded by Piercefield, and in the case of D.S. were employed as a tool for the child to garner a reward or be allowed to do something. In either instance, Piercefield was familiarizing the children with touching his body. These contacts were relevant evidence of preparation or plan. We find this evidence showed Piercefield's grooming of the children to familiarize them with touching and create more physical relationship with them. The evidence was probative and admissible to show Piercefield's preparation and plan and any prejudice did not outweigh this probative value.").

d. *State v. Christensen*, 561 N.W.2d 631, 633, ¶ 8 (N.D.1997) ("The State introduced the evidence to show part of the preparation, the 'grooming,' Christensen undertook before he engaged in the criminal act. The evidence showed Christensen had gained not only GBO's trust, but her parent's trust as well, and then used this trust to get closer to GBO. We believe the trial court viewed Christensen's actions in Minnesota as preparation for further activity. The trial court did not abuse its discretion in admitting evidence regarding the non-criminal acts which occurred in Minnesota.")

e. *State Ericson*, 986 A.2d 488, 495-97 (N.H.2009) (plan exception applied to evidence the defendant showed the victim pornographic movies and made her wear rubber body parts because such acts prepared the victim for and desensitized her to the subsequent sexual assaults).

f. *State v. McIntyre*, 861 A.2d 767, 769-70 (N.H.2004) (defendant's touching of victim's breast and upper thigh constituted "a calculated progression of each stage of sexual abuse" and was therefore admissible under plan exception).

g. *State v. Castine*, 681 A.2d 653, 655-56 (N.H. 1996):

> The trial court ruled that the challenged testimony was admissible under both the "plan" and "preparation" exceptions to Rule 404(b). The court found that "[t]he victim's testimony demonstrated that the defendant began to prepare her as a sexual victim ... [in] a concerted and detailed effort to groom [her] ... for what turned out to be years of sexual predation."
>
> The victim testified that when she was eight or nine years old, the defendant began showing her pornographic magazines depicting various sexual acts. Often, he would point out to her specific photographs, in particular those depicting oral sex. While at first the defendant merely displayed certain photographs, over time he began to take her hand and have her fondle his penis while showing her the magazines. Eventually, the defendant also began showing the victim pornographic videotapes. The fondling then progressed into demands for fellatio. The victim testified that the defendant used the pornographic materials as a "how-to-guide" and that the frequency of these assaults gradually escalated to approximately once per week. The court found that this testimony****656** was relevant to show that the defendant was "the person who [ ] committed the charged acts because these acts

were but a part of a much larger and very calculated plan by the defendant to subject this particular victim to years of sexual exploitation," *see generally* E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, § 3:21 (1995) (plan is relevant to show defendant was perpetrator), but was inadmissible "to show he is the kind of person who would commit the charged crimes." (Emphasis omitted.) *See McGlew*, 139 N.H. at 510, 658 A.2d at 1195 (trial court must articulate for the record the theory upon which evidence is admitted "without invoking propensity").

We have recently stated that "[t]he distinguishing characteristic of a plan is the existence of a true plan in the defendant's mind which includes the charged and uncharged crimes as stages in the plan's execution. Viewed objectively, the other bad acts must clearly tend to show that the defendant had a definite prior design or system which included the doing of the act charged as part of its consummation.... [T]he prior conduct and the charged act [must be] mutually dependent." *State v. Melcher*, 140 N.H. 823, 828, 678 A.2d 146, 149 (1996) (quotations and citations omitted).

While a series of sexual acts with the same victim may "resemble[ ] a design in retrospect[,] ... [t]here are many instances in which isolated, discrete sexual assaults may have occurred on the same victim without the defendant's having a plan in mind." *Id*. at 828–29, 678 A.2d at 149. Thus in *Melcher*, we found that the prior uncharged conduct of the defendant was comprised of a series of unrelated and disparate acts that were not "mutually dependant" and therefore did not constitute a plan.

We do not reach the same conclusion here, however, because unlike Melcher, the challenged testimony in this case described a series of interdependent acts which, along with the charged act, were part of a calculated design by the defendant to "groom" the victim. *Cf. id*. at 829, 678 A.2d at 150 (uncharged acts failed to show a plan because the charged act clearly "did not hinge" on the occurrence of the uncharged acts). Simply put, the acts were cognizable stages in the execution of a readily discernable plan. Further, the calculated progression of each stage of abuse insured that the existence of a plan could be objectively determined by looking at the prior acts themselves, thereby foreclosing reliance on the prohibited inference that because the defendant was predisposed to abusing the victim, he must have had a plan. *Cf. id*. at 828, 678 A.2d at 149 (the link between the prior conduct and the charged act must be divorced from any reliance on the defendant's character).

Under the same analysis, the evidence was admissible to show the defendant's "preparation" to commit the charged crimes. See N.H.R.Ev. 404(b); Imwinkelried, supra § 3:25. Specifically, the evidence, objectively viewed, was admissible to demonstrate that the defendant's gradually escalating abuse led to the fulfillment of his plan to commit the charged offenses by preparing the victim for the later assaults. We therefore agree with the trial court that the testimony was probative of preparation

h. *State v. Jacobson*, 930 A.2d 628, 635-42 (Conn.2007) (evidence of defendant's prior misconduct with a different boy, including sleeping in same bed whenever that child slept at defendant's house, was admissible under other-acts rule at sexual-assault trial to show a common plan or scheme, even though defendant did not sexually assault child; prior misconduct was not too remote in time to charged offenses, involved a person similar to victims of charged offenses, and was sufficiently similar to charged offenses).

i. *State v. Kirton*, 671 S.E.2d 107, 121-22 (S.C.App.2008):

> The case at bar is formed out of the same mold as Weaverling and McClellan. All of Kirton's alleged activity was directed toward the same victim. The six to seven year pattern of escalating abuse of Victim by Kirton is the essence of grooming and continuous****122** illicit activity. Kirton began by rubbing the minor victim's breasts, proceeded to make her touch his penis, began touching her vagina as she got older, and finally culminated the sexual abuse by engaging in the intercourse for which he was charged. The prior sexual acts did not take place just once or twice, six or seven years ago. Victim indicated they happened several times a month for years. While the prior sexual acts are not the same as the exact crime for which Kirton was charged, Victim detailed a clear pattern of escalating sexual abuse and not a few isolated, unrelated incidents.
>
> Kirton's prior abuse of the minor victim was clearly "part of an overall plan or scheme devised by him to perpetuate the type of misconduct that occurred." *Tutton*, 354 S.C. at 330, 580 S.E.2d at 192. The probative value of the evidence was so great that it substantially outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury. The trial court properly found the evidence was admissible to show a common scheme or plan, and Kirton's continuous illicit conduct toward Victim was extremely probative to prove the charged criminal sexual conduct occurred.

3. An important caveat: To the extent that you argue that the grooming (or other sexual other-act evidence) constitutes part of the defendant's common plan or scheme, be mindful that the Arizona Supreme Court requires a showing that these uncharged acts were part of a "particular plan of which the charged crime is a part," and that the plan exception will not be satisfied upon a "mere similarity" or "a visual connection" between the charged and uncharged acts:

> "Common scheme or plan" as used in Rule 13.3(a)(3), Arizona Rules of Criminal Procedure, and as referenced in Rule 404(b), Arizona Rules of Evidence, must be a "particular plan of which the charged crime is a part." [*State v.*] *Ives*, 187 Ariz. [102,] 108, 927 P.2d [762,] 768 [(1997)] (quoting *State v. Ramirez Enriquez*, 153 Ariz. 431, 432–33, 737 P.2d 407, 408–09 (App.1987)). In *Ives*, this court held that "the inquiry should hereafter focus on whether the acts are part of an over-arching

> criminal plan, and not on whether the acts are merely similar." *Id*. at 109, 927 P.2d at 769.

***State v. Lee*, 189 Ariz. 590, 598, 944 P.2d 1204, 1212 (1997).** *Compare State v. Hausner*, 230 Ariz. 60, 74, ¶ 47, 280 P.3d 604, 618 (2012) ("Here, in contrast to Lee, the State presented evidence showing that Hausner's crimes were part of an over-arching criminal plan. A forensic psychiatrist testified that, after reviewing information about the crimes, he concluded that this scheme was 'the seeking of thrills or excitement or relief of boredom or relief of negative feelings.' Such a scheme could include even the killing of animals because, as the psychiatrist testified, '[w]ith respect to trying to make one's self feel better through violence, I think it makes no difference whether the targeted victim is a human or some other animal.' Two detectives also testified about similarities among the various shootings. On this record, the trial court did not abuse its discretion in finding a common scheme or plan based on a general thrill-seeking scheme or by consolidating the charges in the separate indictments.").

Recommendation: To avoid any issues with the plan exception, it is important to do the following: (1) stand exclusively on the preparation exception, which avoids implicating any carryover effect from *Ives* on Rule 404(b)'s plan exception; and/or (2) show that the earlier grooming behavior was part of an overarching plan to reduce the child's resistance to the commission of the charged offense. If you intend to offer the testimony of an uncharged victim whom the defendant had groomed in similar fashion, it is important to show that the defendant used the same plan in both instances.

B. The plan exception may also be reasonably applied in cases in which the other-act is the defendant's possession of child pornography depicts strikingly unusual sexual activity that he replicated while sexually abusing the charged victim. This scenario presented itself in *State v. David Garcia,* wherein the defendant had his two minor daughters reenact an uncharged pornographic image depicting a supine young child lying upside-down with her head dangling over the foot of the bed and performing oral sex on a man who stood at the foot of the bed. The argument I presented invokes Rule 404(b)'s plan (or *modus operandi*) exception:

> The State had two non-character purposes for offering the image file, "Kiddy-Pedo-Love57.Jay.Peg," which depicted a prepubescent girl lying on her back, hanging her head over the foot of the bed, and performing oral sex on a man standing by the foot of the bed—a scene that Appellant replicated with Isabella and Gabriella during the incident giving rise to Counts 6 and 15. … Second, Appellant's possession of this particular image was admissible to prove his preparation, plan, motive, and intent with respect to the oral sexual conduct underlying Counts 6 and 15, because, as the State remarked during the settlement conference and closing argument, Appellant and his two victims reenacted the poses and conduct depicted therein. *E.g., Dressler v. McCaughtry*, 238 F.3d 908, 914 (7th Cir. 2001) (defendant's possession of videos depicting violent

homosexual acts resulting in death and mutilation was "undeniably probative of a motive, intent, or plan to commit a vicious murder"); *United States v. Lips*, 22 M.J. 679, 682 (A.F.C.M.R. 1986) ("The seized sexually-oriented material also tends to establish preparation for the charged offenses in the sense that he had photographic depictions available suggesting the activity in which he wished to participate."); *Dickerson v. State*, 697 S.E.2d 874, 876 (Ga.App.2010) (upholding joinder of charges of child-pornography and sexual-battery against a minor because "some of the photographic images depicted the same acts," which showed "a common motive, plan, scheme, or bent of mind pattern"); *Commonwealth v. Scott*, 564 N.E.2d 370, 376 n.9 (Mass.1990) (evidence defendant possessed "a magazine article about the serial killer who gagged and strangled young women" was properly admitted as "evidence of *modus operandi*" because "the way in which the serial killer murdered his victims, and the way in which the victim in the instant case died, were sufficient similar … to be admitted as evidence of sexual desire and contemplation of *modus operandi*"). Stated differently, the jury could properly draw the inference that this unique image encouraged or influenced Appellant to commit Counts 6 and 15 as the victims alleged he did. *See, e.g., Rushin v. State*, 502 S.E.2d 454, 456 (Ga.1998) (jury could find that defendant's crimes were "in some manner influenced" by repeatedly viewing "Menace II Society" movie); *Turner v. State*, 392 S.E.2d 256, 258 (Ga.App.1990) (same holding for rape defendant's renal of a "sex and violence" video which he reenacted with victim); *Commonwealth v. O'Brien*, 736 N.E.2d 841, 852 (Mass.2000) (newspaper article about "Natural Born Killers" found in defendant's possession was "probative as to the defendant's state of mind").

2. <u>Corroboration</u>.

A. **Evidence of crimes, wrongs, or other acts is admissible to "corroborate" crucial prosecution testimony, despite the fact this non-character purpose for admitting uncharged-act evidence is not an exception enumerated in Rule 404(b). Nevertheless, this rationale is deeply rooted in Arizona.** *See State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) ("'Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible,' even if it refers to a defendant's prior bad acts.") (quoting *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983)); *State v. Cook*, 150 Ariz. 470, 472, 724 P.2d 556, 558 (1986) ("In the instant case, not only is the substance of the testimony relevant to the state's theory of the case, but it also corroborates Harold Juengst's earlier testimony."); *State v. Mosley*, 119 Ariz. 393, 401, 581 P.2d 238, 246 (1978) ("Generally, any evidence that substantiates the credibility of a prosecuting witness on the question of guilt is material and relevant and may be properly admitted.").

Interestingly, the Third Circuit Court of Appeals case that promulgated the two-part intrinsic-evidence standard that the Arizona Supreme Court adopted in *Ferrero*

likewise recognizes that uncharged acts may be admitted to corroborate the testimony of a crucial prosecution witness:

> Therefore, evidence that Stahl cooperated not for the purpose of obtaining favors from the Government, but because A.G.'s life was in danger, was relevant. It provided an explanation for her cooperation that, if believed, increased her credibility relative to what it would have been if Green's attacks had gone unanswered, and thus made the facts to which she testified "more probable.... [than they would have been] without the evidence." Fed.R.Evid. 401. *See also United States v. Porter*, 881 F.2d 878, 886 (10th Cir. 1989) (because the government witness's "credibility had been placed in issue by the defense," evidence corroborating that witness's testimony was "relevant for the purpose of overcoming that attack"). Indeed, evidence concerning a witness's credibility is always relevant, because credibility is always at issue, *see United States v. Universal Rehab. Servs. (PA), Inc.*, 205 F.3d 657, 666 (3rd Cir. 2000) (en banc) (noting that "[j]urors are instructed, ... in almost all cases, that they are to determine the credibility of all witnesses who testify.... even in the absence of an affirmative challenge to witness credibility"), especially when the witness is testifying for the government in a criminal trial. *United States v. Gambino*, 926 F.2d 1355, 1363 (3rd Cir. 1991) (recognizing that, "[i]n any criminal trial, the credibility of the prosecution's witnesses is central").

United States v. Green, 617 F.3d 233, 251 (3rd Cir. 2010). *Accord United States v. Pitts*, 6 F.3d 1366, 1371 (9th Cir. 1993); *United States v. Figueroa*, 976 F.2d 1446, 1453-54 (1st Cir. 1992); *United States v. v. Blakeney*, 942 F.2d 1001, 1018-19 (6th Cir. 1991); *United States v. Porter*, 881 F.2d 878, 886 & n.8 (10th Cir. 1989); *United States v. Everett*, 825 F.2d 658, 660 (2nd Cir. 1987).

B. Courts in Arizona and many other jurisdictions have admitted other-act evidence of a sexual nature to corroborate the victim's testimony. *See State v. Ramsey*, 211 Ariz. 529, 539-40, ¶¶ 31, 34, 124 P.3d 756, 766-67 (App.2005) (incestuous pornography, lubricant, and vibrator found in defendant's possession were "probative of [his victim-daughter's] credibility and supported her testimony that [defendant] had read one of the stories to her"); *State v. Lindsey*, 149 Ariz. 493, 498, 720 P.2d 94, 99 (App.1985) (defendant's nude photographs of former wife were admissible to corroborate molestation victim's testimony defendant took nude pictures of her), *vacated in part on other grounds*, 149 Ariz. 472, 720 P.2d 73 (1986). *Accord Soper v. State*, 731 P.2d 587, 591 (Alaska App. 1987) ("Consequently, we conclude that the probative value of the testimony of N.W. and M.W. was significant. It reflected a history of prior sexual assaults against members of a limited class under circumstances highly corroborative of M.S.'s testimony."); *Bobo v. State*, 285 S.W.3d 270, 273-74 (Ark.App.2008) (eyewitness testimony that student victim "scooped" breasts of defendant teacher at school corroborated victim's testimony that they were sexually involved); *State v. Moore*, 819 P.2d 1143, 1146-47 (Idaho 1991) ("Evidence of similar acts of sexual misconduct

between a defendant and the victim or between the defendant and another witness is admissible for corroboration of the victim's testimony in sex crime cases. … In the instant case, the proposed testimony regarding acts of abuse previously inflicted by Moore upon other female children in the victim's household corroborates her testimony. Evidence of all the incidents of abuse, taken together, may provide an evidentiary plan or pattern that tends to make the alleged incidents more plausible and probable."); *State v. Howard*, 520 So.2d 1150, 1154 (La.App.1987) (other-act victim's description of similar sexual assaults corroborated victim's allegations).

The following passage from the aforementioned *Garcia* answering brief illustrates how to invoke the corroboration rationale for admitting evidence pursuant to Rule 404(b):

> The State had two non-character purposes for offering the image file, "Kiddy-Pedo-Love57.Jay.Peg," which depicted a prepubescent girl lying on her back, hanging her head over the foot of the bed, and performing oral sex on a man standing by the foot of the bed—a scene that Appellant replicated with Isabella and Gabriella during the incident giving rise to Counts 6 and 15. First, this particular image, which neither Isabella nor Gabriella had ever seen, was admissible under Rule 404(b) because: (1) as the prosecution twice reminded the jury during closing argument, this depiction corroborated both victims' testimony regarding this incident; and (2) "any evidence that substantiates the credibility of a prosecuting witness on the question of guilt is material and relevant and may be properly admitted." *State v. Mosley*, 119 Ariz. 393, 401, 581 P.2d 238, 246 (1978). *Accord State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) ("'Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible,' even if it refers to a defendant's prior bad acts.") (quoting *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983)); *State v. Cook*, 150 Ariz. 470, 472, 724 P.2d 556, 558 (1986) ("In the instant case, not only is the substance of the testimony relevant to the state's theory of the case, but it also corroborates Harold Juengst's earlier testimony."); *State v. Ramsey*, 211 Ariz. 529, 539-40, ¶¶ 31, 34, 124 P.3d 756, 766-67 (App.2005) (incestuous pornography, lubricant, and vibrator found in defendant's possession were "probative of [his victim-daughter's] credibility and supported her testimony that [defendant] had read one of the stories to her"); *State v. Lindsey*, 149 Ariz. 493, 498, 720 P.2d 94, 99 (App.1985) (defendant's nude photographs of former wife were admissible to corroborate molestation victim's testimony defendant took nude pictures of her), *vacated in part on other grounds*, 149 Ariz. 472, 720 P.2d 73 (1986).

3. <u>Relationship</u>.

A. This non-enumerated exception to Rule 404(b) sanctions the admission of other-act evidence for the non-character purpose of completing the story by

demonstrating the existence and nature of the defendant's relationship with other persons involved in the charged offenses—whether as an accomplice or the victim. *See State v. Ferrero*, 229 Ariz. 239, 244, ¶ 23, 274 P.3d 509, 514 (2012) ("Thus, most, if not all, other crimes evidence currently admitted outside the framework of Rule 404(b) as 'background' evidence will remain admissible under the approach we adopt today.") (quoting *United States v. Green*, 617 F.3d 233, 249 (3rd Cir. 2010); *State v. Cruz*, 137 Ariz. 541, 547, 672 P.2d 470, 476 (1983) (other-act evidence "helped complete the story of the crime in that it helped establish and explain the nature of the relationship between appellant and two of his co-conspirators"); *State v. Wilson*, 134 Ariz. 551, 556, 658 P.2d 204, 209 (App.1982) ("Additionally, the evidence was admissible under the "complete story" exception to explain the interrelationship of the many defendants and their business dealings, as well as their state of mind."). *Accord United States v Simmons*, 679 F.2d 1042, 1049-50 (3rd Cir. 1982) (defendant and accomplice's joint bad-check activities predating the charged offenses was admissible "to show [their] ongoing relationship" and to "help the jury understand [the accomplice's] role in the scheme"); *State v. Reynolds*, 765 N.W.2d 283, 290-91 (Iowa 2009) (murder defendant's prior threats and assaults against victim were admissible "to demonstrate the nature of [his] relationship and feelings toward a specific individual"); *State v. Pullens*, 800 N.W.2d 202, 223 (Neb.2011) ("It is commonly held that prior threats or attacks by the defendant upon the victim may be relevant not to show a general propensity toward violence, but, rather, to demonstrate the nature of the relationship between the victim and the defendant and the defendant's feelings toward the victim.").

B. Courts have applied this principle to sex-crime prosecutions in which the uncharged acts were committed against the victim alleged in the indictment, based on two interrelated rationales:

(1) "The existence of prior sexual abuse involving the same alleged perpetrator and victim … has relevance on the underlying criminal charge because it shows the nature of the relationship between the alleged perpetrator and the victim." *State v. Reyes*, 744 N.W.2d 95, 102 (Iowa 2008). *Accord Covington v. State*, 703 P.2d 436, 441 (Alaska App. 1985) ("The court accepted two closely related rationales: first, the evidence tended to establish the ongoing relationship between the accused and the victim and explained, in part, the victim's inability to specifically describe separate incidents; and, secondly, it served to explain the victim's testimony in its context, particularly indicating why she might acquiesce in the defendant's demands."); *Bobo v. State*, 285 S.W.3d 270 (Ark.App.2008) (evidence that male student victim fondled teacher defendant's breasts twice in front of other students at school demonstrated their sexual familiarity); *People v. Failor*, 649 N.E.2d 1342, 1344 (Ill.App.1995) ("In sex offense cases involving child victims, evidence of prior sexual acts between the defendant and the child victim is admissible to show intent, design, course of conduct, the intimate relationship between the parties, or to corroborate the victim's testimony regarding the charged offense. … This evidence is admissible even though an issue does not exist about whether the parties had a continuing relationship or knew each other."); *Caccavallo v. State*, 436 N.E.2d 775, 776-77

(Ind.1982) (defendant's sexually-explicit photographs of victim demonstrated "the existence of an intimate sexual relationship between the accused and the victim around the time of the charged offense"); *State v. Roman*, 622 A.2d 96, 98 (Me.1993) ("For more than a century our case law has declared that evidence of a defendant's prior or subsequent sexual relations with a victim is admissible to show the relationship between the parties or the intent of the defendant."); *Commonwealth v. Santiago*, 755 N.E.2d 795, 806 (Mass.App.2001) ("In sexual assault cases, evidence of similar illicit sexual contacts involving the same parties may be used to show a pattern of conduct, intent, and the relationship between a defendant and a complainant. Evidence of such other sexual contacts between the parties may render it not improbable that the sexual act charged may have occurred.").

While the foregoing cases relate to sex crimes against a child, the relationship rationale applies also to adult sexual-assault victims whom the defendant repeatedly abused over a long period of time. *See Commonwealth v. Morris*, 974 N.E.2d 1152, 1164-65 (Mass.App.2012) (finding no reversible error occurred when the prosecution offered evidence that the defendant "dropped out of high school and discouraged Alice from studying, had sex with Alice when he was seventeen and she was fifteen, called Alice vulgar names, was jealous when she interacted with other boys, pushed a chair over in her direction that wound up hitting her, abandoned her at a track meet and insulted her performance, threatened to kill himself, hated and threatened her parents, let her dog escape and was indifferent to its safety, threatened her if she dated anyone else, 'ke[pt] tabs' on her after their breakup, and sent her a text message reading 'U f—— him yet?'"). The Massachusetts Court of Appeals wrote, in pertinent part:

> In the context of sexual assault, "evidence of uncharged conduct may be admissible to give the jury a view of the entire relationship between the defendant and the alleged victim, and 'the probative existence of the same passion or emotion at the time in issue.'" *Commonwealth v. Dwyer*, 448 Mass. 122, 128–129, 859 N.E.2d 400 (2006), quoting from *Commonwealth v. Barrett*, 418 Mass. 788, 794, 641 N.E.2d 1302 (1994). *Cf. Commonwealth v. Young*, 382 Mass. 448, 463, 416 N.E.2d 944 (1981) (at murder trial, "[i]t was well for the jury to have a view of the entire relationship between the defendant and ... the alleged victims"). "These determinations are left to the sound discretion of the judge, ... whose decision to admit such evidence will be upheld absent clear error." *Commonwealth v. DelValle*, 443 Mass. 782, 790, 824 N.E.2d 830 (2005).

(2) Limiting the victim's testimony to the charged offense and prohibiting mention of the antecedent acts "would seriously undermine her credibility in the eyes of the jury." *People v. Dobek*, 732 N.W.2d 546, 568 (Mich.App.2007). *Accord State v. Hart*, 242 P.3d 1230, 1255 (Kan.App.2010) ("With this case turning on the credibility of C.H., N.B., and Brown, evidence of Hart's prior sexual abuse of C.H. and N.B. was relevant to show Hart's relationship with C.H. and N.B.

and probative to show the victims' actions before, during, and after the acts giving rise to the charged sexual offenses. By being presented with evidence that the sexual abuse had taken place over a number of years, beginning at an early age and in the secret manner described by N.B., the jury could more adequately assess Hart's defense, the victims' credibility, the previous denial by C.H. of any sexual abuse by Hart, the lengthy time period between the alleged incidents and the victims' reports to the police, and the difficulty that C.H. had in relating the alleged incident at trial."); *People v. DerMartzex*, 213 N.W. 97, 100 (Mich.1973) ("Common experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy."); *People v. Khan,* 931 N.Y.S.2d 393, 394 (2011) ("The evidence was properly admitted to demonstrate the defendant's pattern of escalating sexual conduct toward the victim during the period between the charged crimes, and as relevant background information to enable the jury to understand the defendant's relationship with the victim and to place the events in question in a believable context, particularly since the defendant raised the issue of the victim's delayed disclosure of the charged criminal conduct"); *Brown v. State*, 6 S.W.3d 571, 577-79 (Tex.Crim.App.1999) (defendant demonstrated his "ability to commit the offense alleged" and the victim's compulsion "to acquiesce" by making her kiss him and holding her by her waist and buttocks in public); *State v. Forbes*, 640 A.2d 13, 15-16 (Vt.1993) ("The daughter's allegations of sexual contact on one night would have seemed incredible absent the context of a continuous sexual relationship with her father. … Where the crime involves incest, the history is so interwoven with the crime, it cannot be separated without skewing the event made the subject of the charge. The case depended on the daughter's credibility in describing their incestuous relationship. The credibility of the daughter's description of that relationship depended on the whole pattern of her father's conduct toward her, and not on the integrity of any particular event.").

Last year, the Arizona Court of Appeals, albeit in the context of Rule 404(c), recognized the importance of allowing the State to offer evidence of uncharged acts when the defendant attacks the victim's credibility, based upon her failure to report sexual abuse immediately:

¶ 29 Herrera lastly contends the trial court erred in finding the other-acts evidence satisfied the third step of the screening required by Rule 404(c), arguing the evidence was "needlessly cumulative, ... confusing, and add[ed] nothing but unfair prejudice." But the court found *the Yuma Acts "provided historical context to the charged sex crimes" because "[t]he sequence of escalating sexual contact was important." FN9 It also found the evidence related to "[a] major issue at trial," which was A.M.'s delay in reporting the charged offenses that subsequently were committed in Vail.* The court noted the victim had testified that when she and Herrera were in Yuma, he had told her the acts that had occurred there were "'okay'—provided 'no one found out.' *However, without testimony about the Yuma [A]cts, the jury would not have been able to fully assess the impact the warning had on the Victim."* These findings are supported by the record and the court did

> not abuse its discretion by finding the evidence was relevant to primary issues in the case.

State v. Herrera, 232 Ariz. 536, 547, ¶ 29, 307 P.3d 103, 114 (App.2013) (emphasis added).

C. Undoubtedly, the defendant will claim that other-act evidence involving the charged victim is inadmissible under Rule 403. However, you can dispatch that contention by relying upon the following cases, which hold that a charged victim's testimony about the defendant's indicted offenses and his uncharged misconduct does not unfairly prejudice the defendant because the sole issue before the jury with respect to both types of acts is the credibility of the same witness (the victim):

> Finally, as in [*State v. Reed*, 8 P.3d 1025 (Utah 2000)], the evidence in this case satisfies the requirements of rule 403. This case depended largely on the credibility of the child's testimony, "as is frequently true of child sex abuse cases." *Id*. at ¶ 31. The child's testimony about all of Devey's actions, including those for which he was not specifically charged, allowed her to describe the "full scope of the context" of Devey's conduct over the relevant time period. *Id*. In addition, the instances of abuse that the child testified about "were essentially interchangeable, were of the same nature and character ..., and were carried out on the same victim during the same uninterrupted course of conduct." *Id*. As the *Reed* court noted,
>
> > Such evidence of multiple acts of similar or identical abuse is unlikely to prejudice a jury; jurors will either believe or disbelieve the testimony based on the witness's credibility, not whether the witness asserts an act occurred three times or six. This evidence simply does not have the prejudicial effect that may result from introduction of prior criminal acts committed against a number of unrelated victims, and therefore does not raise the kinds of due process concerns we have expressed in [prior opinions].

State v. Devey, 138 P.3d 90, 94-95, ¶ 15 (Utah App. 2006) (quoting *State v. Reed*, 8 P.3d 1025, ¶ 31 (Utah 2000)). *Accord State v. Forbes*, 640 A.2d 13, 16-17 (Vt.1993) ("In a case like this there is less danger of the jury convicting defendant simply because it thinks he acted in conformity with his past conduct. The victim of the crime charged was also the victim of the past uncharged behavior. The daughter was either a credible victim of incest or not a victim at all. The credibility in a case like this depends on which person, victim or perpetrator, is believed—not so much whether one particular incident or another is true.").

4. <u>Identity</u>.

A. This enumerated exception typically applies in those cases in which the defendant committed the charged and uncharged acts with commonalities in aspects of the crime where one would expect differences, thereby leaving a "signature" that identifies the accused as the perpetrator of *both* the charged offense(s) and those not alleged in the indictment:

> The identity exception to Ariz.R.Evid.404(b) applies if identity is in issue, "and if the behavior of the accused both on the occasion charged and on some other occasion is sufficiently distinctive, then proof that the accused was involved on the other occasion tends to prove his involvement in the crime charged." [MORRIS K. UDALL, ET AL., ARIZONA PRACTICE—LAW OF EVIDENCE § 84, 183-84 (3d ed. 1991)]. Merely showing that the crimes are of the same nature is insufficient to bring conduct within this exception. Instead, "[t]he pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." *Id*. at 185 (quoting EDWARD W. CLEARY ET. AL., MCCORMICK ON EVIDENCE § 190, at 559–60 (3d ed. 1984)); *see also* [*State v*.] *Roscoe*, 145 Ariz. [212,] 217, 700 P.2d [1312,] 1317 [(1984)]. In our analysis, therefore, we examine the differences as well as the similarities among the crimes. *State v. Jackson*, 124 Ariz. 202, 204, 603 P.2d 94, 96 (1979). "While identity in every particular is not required, there must be similarities between the offenses in those important aspects 'when normally there could be expected to be found differences.'" *Roscoe*, 145 Ariz. at 217, 700 P.2d at 1317 (quoting *Jackson*, 124 Ariz. at 204, 603 P.2d at 96). We apply this analysis to the facts of this case.

State v. Stuard, 176 Ariz. 589, 597, 863 P.2d 881, 889 (1993). *Accord State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996) ("[T]he *modus operandi* of and the circumstances surrounding the two crimes must be sufficiently similar as to be like a signature.") (citations omitted); *State v. Williams*, 209 Ariz. 228, 233 ¶ 20, 99 P.3d 43, 48 (App.2004) ("Absolute identity in every detail cannot be expected. Where an overwhelming number of significant similarities exist, the evidence of the prior act may be admitted. The term 'overwhelming' does not require a mechanical count of the similarities but, rather, a qualitative evaluation. Are the two crimes so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature?") (quoting *State v. Bible*, 175 Ariz. 549, 576, 858 P.2d 1152, 1179 (1993)).

B. Arizona has found evidence of other sex crimes (usually sexual assaults) admissible under Rule 404(b) to prove the defendant's identity by virtue of his unique *modus operandi*. *See State v. Roscoe*, 145 Ariz. 212, 217, 700 P.2d 1312, 1317 (1984) ("Thus, the *modus operandi* exception is applied to sex offenses where an adequate foundation is made showing that the prior offense was not too remote in time, was similar to the offense charged and was committed with a person similar to the prosecuting witness in the case being tried."). *Accord State v. Lehr*, 227 Ariz. 140, 146-

47, ¶¶ 16-21, 254 P.3d 379, 385-86 (2011); *State v. Roscoe*, 184 Ariz. 484, 491-92 910 P.2d 635, 642-43 (1996); *State v. Williams*, 209 Ariz. 228, 233-34, ¶¶ 19-21, 99 P.3d 43, 48-49 (App.2004).

C. On occasion, the Arizona Supreme Court has inadvertently indicated that the identity exception authorizes the admission of other-act evidence only if the State meets its burden of proving that sufficient similarities establishing a signature exist. *See State v. Prion*, 203 Ariz. 157, 163, ¶ 38, 52 P.3d 189, 195 (2003) ("The identity exception to Rule 404 is applicable *only where* 'the pattern and characteristics of the crimes ... are so unusual and distinctive as to be like a signature.'") (emphasis added) (quoting *State v. Stuard*, 176 Ariz. 589, 597, 863 P.2d 881, 889 (1993)). This language cannot be reconciled with other precedent recognizing other bases for admitting other-act evidence to prove the defendant's identity:

> Defendant argues that the evidence of the previous assault was inadmissible because it was not similar to the murder. However, the other crime proved by the proffered evidence must be similar to the offense charged only if similarity of the crimes is the basis for the relevance of the evidence. "Relevant evidence is not to be excluded because it fails to meet a similarity requirement." *United States v. Riggins*, 539 F.2d 682, 683 (9th Cir. 1976).

State v. Gulbrandson, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995). *Accord Bronshtein v. Horn*, 404 F.3d 700, 731 (3rd Cir. 2005) (defendant's confession to one murder helped establish his identity as the perpetrator of the charged homicide); *United States v. Joseph*, 310 F.3d 975, 978 (7th Cir. 2002) (rejecting this restrictive construction of the identity exception and upholding the admission of other-act evidence showing that the defendant used the same alias during the uncharged and charged drug transactions); *United States v. Tai*, 994 F.2d 1204, 1209-10 (7th Cir. 1993) (finding the "signature" line of cases "where the extrinsic act reveals the defendant's actual control over something involved in the charged act," such as "evidence of a person's prior possession of a gun found at a robbery site might be admitted to prove the person's involvement in the robbery"); *State v. Nordstrom*, 200 Ariz. 229, 249-50, ¶ 65, 25, P.3d 717, 737-38 (2001) (proof of defendant's proximity to crime scene with a handgun and his accomplice 2 hours before the murder was admissible to prove his identity); *State v. Spencer*, 176 Ariz. 36, 41, 859 P.2d 146, 151 (1993) (defendant's prior statement that he wanted to stab and burn his wife properly admitted to prove his identity as her murderer); *State v. Fierro*, 166 Ariz. 539, 547-48, 804 P.2d 72, 80-81 (1990) (identity established by defendant's possession of items obtained from uncharged burglary); *State ex rel. LaSota v. Corcoran*, 119 Ariz. 573, 576, 583 P.2d 229, 232 (1978) ("In addition to the necklace [reportedly worn by the defendant during a prior sexual assault], the clothes which were found outside of the boy's window are probative of the identification of the attacker. Head and pubic hairs found in the clothing were similar to samples taken from Treadaway. Furthermore, a police criminalist found a crab louse egg sack, which he considered to be rare, on a pubic hair taken from Treadaway and on one from the clothing."); *Rufo v. Simpson*, 103

Cal.Rptr.2d 492, 500 (2001) ("The requirement for a distinctive *modus operandi* does not apply when the prior and charged acts involve the same perpetrator and the same victim."); *State v. District Court of Eighteenth Judicial Dist. of Montana* (*Salvagni*), 246 P.3d 415, 431, ¶ 60 (Mont.2010) ("For instance, a dissimilar act showing consciousness of guilt—e.g., attempting to bribe the jurors in her trial—can be evidence that the defendant is the perpetrator of the charged act of murder."); *State v. Cheeseboro*, 552 S.E.2d 300, 311 (S.C.2001) (defendant's admissions regarding the charged and uncharged shootings in jail correspondence proved his identity).

D. Identity may also be established by proof that the defendant harbored certain feelings (like hatred, possessiveness, or sexual infatuation) towards a certain victim or class of persons, which demonstrates the defendant's relatively unique motive to commit the charged offense. *See United States v. Cunningham*, 103 F.3d 553, 556 (7th Cir.1996) ("Most people do not have a taste for sexually molesting children. As between two suspected molesters, then, only one of whom has a history of such molestation, the history establishes a motive that enables the two suspects to be distinguished."); *State v. Farnum*, 878 A.2d 1095, 1101 (Conn.2005) ("Proof of motive can be used to identify the defendant as the perpetrator of a crime."); *Jennings v. State*, 956 N.E.2d 203, 205 (Ind.App.2011) ("Further, the testimony concerning Jennings's animosity toward Pope, combined with the lack of any evidence supporting a conclusion that Terrell bore any ill will toward Pope, supports an inference that Jennings, not Terrell, was the perpetrator."); *Commonwealth v. Melton*, 763 N.E.2d 1092, 1100 (Mass.2002) ("circumstantial evidence pointing to the defendant as the likely perpetrator" of murder included a prior fight that rendered him the person with "the strongest motive to attack" the victim); *State v. Van Landingham*, 197 S.E.2d 539, 546-47 (N.C.1973) ("[E]vidence of motive is relevant as a circumstance to identify an accused as the perpetrator of an offense."); *Johnson (Otto) v. State*, 872 P.2d 93, 97 (Wyo.1994) ("[I]f a motive is unique to only one person or unique to a set of persons smaller than the general population, it is probative of identity.").

(1) The motive exception is most frequently used to establish the perpetrator's identity in murder cases, where prior difficulties between the defendant and the victim supports the inference that the defendant committed the homicide. *See State v. Mills*, 196 Ariz. 269, 274-75, ¶¶ 23-26, 995 P.2d 704, 710-11 (App.1999) (upholding evidence that defendant previously cut his ex-wife's brake lines as proof of his "motive to eliminate [her] as a source of difficulty in his dissolution proceeding" and to counter "his defense that he loved [her] and had not been involved in her murder"); *People v. Zack*, 229 Cal.Rptr. 317. 319-20 (1986) ("Evidence having a direct tendency, in view of the surrounding circumstances, to prove motive on the part of a person for a crime, and thus to solve a doubt, as to the identity of the slayer, is admissible against a defendant, however discreditably it may reflect on him, and even where it may show him guilty of other crimes.") (internal quotation marks and citations omitted); *People v. Leonard*, 872 P.2d 1325, 1328 (Colo.App.1993) ("We recognize that evidence of uncharged conduct indicative of motive is generally admitted for the purpose of establishing identity or intent."); *Void v. United States*, 631 A.2d 374, 380 (D.C.1993) ("Evidence of the

drug conspiracy and crimes at the Glassmanor apartment was admissible to show appellant's motive to kill and, inferentially, his identity as one of Carrington's killers," especially where "the motive was peculiar to the defendant" and "particularly concerned the victim of the crime charged"); *Perry v. State*, 956 N.E.2d 41, 58-59 (Ind.App.2011) ("Evidence of motive may be offered to prove that the act was committed, or to prove the identity of the actor, or to prove the requisite mental state."); *State v. Richards*, 809 N.W.2d 80, 94-95 (Iowa 2012) (upholding prior domestic violence against the murder victim because the defendant's misidentification defense "behooved the State to establish that [the defendant] had a motive for murdering [the victim]"); *Johnson (Bill) v. State*, 936 P.2d 458, 464 (Wyo.1997) ("That the defendant had a motive for that particular crime increases the inference of the defendant's identity. Many other persons presumably had no motive, and the defendant's motive raises the probability of defendant's identity.").

(2) Courts have implicitly applied this principle to admit sexual other-act evidence showing the defendant's sexual interest in the charged victim (or persons having the same physical characteristics as the charged victim) to prove the defendant's identity as the perpetrator. *See State v. Smith*, 23 P.3d 786, 795-96 (Idaho App. 2001) (upholding testimony that defendant expressed sexual attraction for "grandmotherly" women with large breasts as proof of his motive and identity as murderer of victim possessing those characteristics); *Warren v. State*, 709 So.2d 415, 419, ¶¶ 16-19 (Miss.1998) (defendant's identity at voyeurism trial established by "peeping tom" acts at victim's house on prior occasions); *Goodrich v. State*, 671 S.W.2d 920, 922 (Tex.Crim.App.1984) (evidence that defendant had "peeped" into the victim's window several times before the charged rape was probative of his identity).

(3) The identity exception to Rule 404(b) is particularly apropos when the defendant attempts to blame another person for committing hands-on offenses against sex-crime victims, or when he claims that a hacker, roommate, a robot-program, or some other agency external to himself was responsible for downloading the child pornography found in his possession. *See United States v. Kapordelis*, 569 F.3d 1291, 1313 (11th Cir. 2009) (defendant's sexual trysts with young boys in Europe admitted to rebut defenses that third party secreted child-pornography images on his computer or that his computer downloaded these images automatically); *United States v. Betchter*, 534 F.3d 820, 825 (8th Cir. 2008) (uncharged child-pornography images refuted defense that victims had photographed themselves); *United States v. Dodds*, 347 F.3d 893, 898 (11th Cir. 2003) (uncharged images rebutted defense that deceased friend was responsible for secreting child-pornography images on computer); *United States v. Becht*, 267 F.3d 767, 769-73 (8th Cir. 2001) (39 uncharged contraband images placed in file directories rebutted claim that "robot program" placed child pornography on defendant's computer); *United States v. Hay*, 221 F.3d 630, 638-39 (9th Cir. 2000) (uncharged images rebutted defense blaming a hacker); *United States v. Yellow*, 18 F.3d 1438, 1441 (8th Cir. 1994) (defendant's prior molestations

were properly admitted to rebut his defense that someone else had raped the same victim); *State v. Thomes*, 697 A.2d 1262, 1265, ¶ 10 & n.3 (Me.1997) ("Moreover, because [defendant's] defense was that he did not commit the charged offenses, evidence of his motive [a desire to seduce the young girls to whom he gave marijuana] was relevant to establish that he and not someone else [a student who sold one victim marijuana on campus] was the perpetrator."); *State v. Stephens*, 466 N.W.2d 781, 785-86 (Neb.1991) (prior sexual assaults against stepdaughter were admissible to rebut suggestion that gang-initiate entered through open back door and sexually assaulted 1-month-old granddaughter); *State v. Davis*, 916 A.2d 493, 499-503 (N.J.App.2007) (sexual relationship with 16-year-old girl admitted to rebut defendant's claim that unsolicited e-mails were source of child-pornography on his computer); *State v. Dubois*, 746 N.W.2d 197, 204-06 (S.D.2008) (allowing prosecution to introduce sexually explicit chat-room correspondence to rebut defense claim that third party placed child pornography on his computer). *Cf. State v. Maturana*, 180 Ariz. 126, 130, 882 P.2d 933, 937 (1994) (evidence that defendant stabbed person whom he suspected to have stolen his ladder established motive for revenge and rebutted claim that he was merely present when a third party murdered the actual thief).

E. Here are some cases that support the proposition that a defendant's attempt to shift blame to third parties renders his uncharged acts sufficiently probative to withstand any argument that Rule 403 precluded its admission, as the defendant's misidentification defense effectively nullifies any contention that the other-act evidence's probative value is substantially outweighed by the danger of unfair prejudice. *See State v. Johnson (Ruben)*, 212 Ariz. 425, 430, ¶ 11, 133 P.3d 735, 740 (2006) ("In addition, if testimony is probative on the crucial issue of identification, any slight prejudicial element is clearly outweighed by the probative value."); *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) ("Once the defendant attempted to shift responsibility to Allison, the evidence had enough probative value to withstand any Rule 403 weighing process."); *State v. Valles*, 162 Ariz. 1, 6, 780 P.2d 1049, 1054 (1989) ("Furthermore, considering defendant's misidentification defense, the probative value of the prior robbery evidence outweighed any prejudice to the defendant.").

5. <u>Motive.</u>

A. Specifically enumerated by Rule 404(b) as a proper non-character purpose for admitting other-act evidence, "motive" has been defined as "the moving course, the impulse, the desire that induces criminal action on the part of the accused," *State v. Bronson*, 496 N.W.2d 882, 890 (Neb.1990) (quoting BLACK'S LAW DICTIONARY (6TH ED. 1990), at 1014), and as "that which incites or stimulates a person to do an act." *State v. Ruebke*, 731 P.2d 842, 852 (Kan.1987) (citing *People v. Weiss*, 300 N.Y.S. 249, 255 (1937)). *Accord Lee v. City of Los Angeles*, 92 F.3d 842, 850 (9th Cir. 1996) ("Motive is the moving course, the impulse, the desire that induces the defendant to criminal action."); *State v. Atwood*, 171 Ariz. 576, 638, 832 P.2d 593, 655 (1992) ("motive defined as an inducement, or that which leads or tempts the mind to indulge a criminal act") (quoting *State v. Bowen*, 738 P.2d 316, 319 (Wash.App.1987));

Mitchell v. State, 865 P.2d 591, 597 (Wyo.1993) ("The motive is a cause, and the *actus reus* is the effect.").

B. This exception is applicable, even when motive is not an element of the charged offense, because "the fact that the defendant had some motive, good or bad, for committing the crime is one of the circumstances which, together with other circumstances, may lead the fact-finder to conclude that he did in fact commit the crime." *State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983) (quoting W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 29, at 208 (1972)). *Accord State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995) ("Although motive is not an element of a crime, a trial court may admit evidence of a defendant's other misconduct if the misconduct furnished or supplied the motive for the charged crime.").

C. "Although most of the published opinions involve the motive to commit a violent crime, the preexisting hostility may furnish the motive for any type of crime which injures the victim in some way." *State v. District Court of Eighteenth Judicial Dist. of Montana (Salvagni)*, 246 P.3d 415, 431, ¶ 59 n.6 (Mont.2010) (quoting EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, § 3:18, AT 101 (rev. ed., West 1998)).

D. Evidence of a prior crime may demonstrate a defendant's motive in one of two ways—the first of which comes naturally to the mind, but the second of which we tend to overlook, despite its usefulness in sex-crime prosecutions:

> For instance, an uncharged theft may supply the motive to murder an eyewitness to the theft. See [EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, VOL. 1, § 3:16, 81 (REV. ED., WEST 1998).] In this situation, the uncharged act is cause, and the charged act is effect. *Id*. at § 3:18, 101. In other cases, however, the uncharged *act evidences the existence* of a motive but does not *supply* the motive. Rather, the motive is cause, and the charged and uncharged acts are effects; that is, both acts are explainable as a result of the same motive.

State v. District Court of Eighteenth Judicial Dist. of Montana (Salvagni), 246 P.3d 415, 431, ¶ 59 (Mont.2010) (emphasis in original). *Accord People v. Spector*, 128 Cal.Rptr.3d 31, 68 (App.2011).

The Wyoming Supreme Court elaborated on the second rationale, which we need to keep in mind to avoid violating the prohibition against using evidence of a prior act for the sole purpose of proving that the defendant acted in conformity with his past conduct or bad character:

> Further explaining this second form [of motive evidence], Professor Imwinkelried states:

> The courts typically invoke this theory of relevance when the motive is in the nature of hostility, antipathy, hatred, or jealousy. When the evidence is offered to identify the defendant, the emotion must be directed at the victim or a defined class which included the victim. The prosecutor's case for admissibility is strongest when the sole object of the [emotion] is the victim. … However, the courts have also admitted evidence of acts evidencing [emotion] against a class which included the victim. … There must be some relationship between all the victims. Otherwise, the evidence would show only the defendant's general [emotional] nature and violate the prohibition in the first sentence of Rule 404(b).

Mitchell v. State, 865 P.2d 591, 596 (Wyo.1993) (quoting EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, § 3.15 at 46 (1992 & Supp.1993)).

E. Arizona recognizes both forms of motive evidence, as manifested by numerous decisions upholding other-act evidence that *either*:

(1) supplied the defendant with the motive for committing the charged offense, *see State v. Johnson (Ruben)*, 212 Ariz. 425, 430, ¶ 12, 133 P.3d 735, 740 (2006) (defendant's motive for murder was that victim witnessed armed robbery for which he had been charged); *State v. Sharp*, 193 Ariz. 414, 421-22, ¶ 23, 973 P.2d 1171, 1178-79 (1999) (three pornographic magazines recovered from defendant's hotel room reflected his sexual motivation in luring murder victim to room, where he raped her before strangling her to death); *State v. Armstrong*, 176 Ariz. 470, 472-73, 862 P.2d 230, 232-33 (App.1993) (defendant's need for drugs established his motive to traffic in stolen property); ***or***

(2) manifested the existence of a motive that induced the defendant to commit the crime for which the defendant stood trial, *see* *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997) (defendant's prior expressions of hatred for and acts of violence against her baby daughter was admissible because they "demonstrated defendant's lack of concern or actual dislike for her child, which could reasonably be construed as a motive for the charged offenses."); *State v. Jeffers*, 135 Ariz. 404, 418, 661 P.2d 1105, 1119 (1983) ("Evidence of prior trouble between the victim and the accused derives its relevance from the fact that the existence of prior ill will toward the victim not only renders the commission of the crime more probable, but tends to show the malice, motive or premeditation of the accused. … Evidence of this prior bad act, taken together with the expression in Jeffers' intercepted jail note of his desire to kill Penny by heroin overdose, shows a continuing state of mind from which the jury could properly infer that Jeffers carried out his desire.").

F. "Prior instances of sexual misconduct with a child may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the sexual exploitation of

children." *United States v. Sebolt*, 460 F.3d 910, 917 (7th Cir. 2006). *Accord United States v. Breitweiser*, 357 F.3d 1249, 1252-54 (11th Cir. 2004) (defendant's child-molestation conviction and prior act of masturbating near a child was probative of his sexual motive for touching the leg of young female passenger on airplane); *State v. Atwood*, 171 Ariz. 576, 637-38, 832 P.2d 593, 654-55 (1992) (upholding admission of defendant's letter and conversations regarding his sexual attraction toward children because they reflected his motive for kidnapping and murdering a young girl). **Note that these cases apply when the other-act evidence demonstrates the defendant's sexual attraction to children generally.**

G. Accordingly, trial courts may properly admit evidence of a defendant's possession of child pornography to prove his motive to commit the hands-on sexual offenses against minors alleged in the indictment. *See United States v. Brand*, 467 F.3d 179, 198 (2nd Cir. 2006) (child pornography on defendant's computer manifested his sexual attraction towards children, which created an urge not only to obtain child erotica, but to have sex with young girls); *State v. Ramsey*, 211 Ariz. 529, 539-40, ¶¶ 31-34, 124 P.3d 756, 766-67 (App.2005) (defendant's possession of pornographic material—incestuous stories—was probative of his motive and intent to have sex with his young daughter); *People v. Memro*, 905 P.2d 1305, 1347-48 (Cal.1995) (defendant's possession of media depicting unclothed children established motive and intent to molest young boy); *State v. Rossignol*, 215 P.3d 538, 544-45 (Idaho App. 2009) ("The incest stories were relevant … to show [defendant's] motive and plan to engage in sexual acts with his daughter."); *State v. Brown*, 710 S.E.2d 265, 269 n.3 (N.C.App.2010) (approving proof defendant possessed a "child pornographic video with an incestuous theme, other child pornographic images, and incestuous stories" as evidence "relevant to show [defendant's] intent and motive to commit sexual acts with the nine-year-old female [victim]").

You can argue that a defendant's possession of child pornography is extremely probative of his motive to commit sexual offenses involving actual children because courts and legislatures have repeatedly recognized that such visual material inflames the sexual desires of pedophiles and further induces them to molest children. *See United States v. Falco*, 544 F.3d 110, 123 n.18 (2nd Cir. 2008) ("Congress found that 'child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children.'") (quoting Pub.L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 (1996)); *United States v. Byrd*, 31 F.3d 1329, 1336 n.9 (5th Cir. 1994) ("In addition, there is evidence that child pornography may induce viewers to commit sex crimes on children."); *State v. Berger*, 209 Ariz. 386, 392, ¶ 11, 103 P.3d 298, 302 (App.2004) (recognizing that child pornography "inflames the desires of child molesters [and] pedophiles"); *State v. Blair*, 721 N.W.2d 55, 69 n.16 (S.D.2006) ("However, profiles of cases and Federal Bureau of Investigation studies of sexual offenders indicate a correlation between the viewing and collection of child pornography materials and the subsequent commission of crimes.").

H. Furthermore, trial courts properly admit evidence of a defendant's sexual attraction toward a specific victim or small class of persons as evidence of his motive to commit a sexual offense against that individual or members of that small group.

The Texas Court of Appeals illustrated the reasoning underlying this considerable precedent:

> We will also assume without deciding that the investigating officer's testimony that appellant appeared to have an erection while being questioned about the victim is not same-transaction contextual evidence, but instead is general background contextual evidence. However, evidence that appellant was sexually aroused while talking about the child could be viewed as giving rise to a logical inference that appellant had feelings of sexual attraction and desire toward him. Such evidence would, therefore, tend to show that appellant had a motive for sexually assaulting the child:
>
> > The sexual passion or desire of X for Y is relevant to show the probability that X did an act realizing that desire. On the principle set out above, this desire at the time in question may be evidenced by proof of its existence at a prior or subsequent time. Its existence at such other time may, of course, be shown by any conduct which is the natural expression of such desire.
>
> *Brown v. State*, 657 S.W.2d 117, 118 (Tex.Crim.App.1983) (quoting McCormick & Ray, Texas Law of Evidence 236–37 (3rd ed. 1980)). Thus, the challenged evidence had relevance apart from character conformity. *See* Tex.R.Crim.Evid. 404(b).

Blakeney v. State, 911 S.W.2d 508, 515 (Tex.App.1995). *Accord State v. Ramsey*, 211 Ariz. 529, 540, ¶ 34, 124 P.3d 756, 767 (App.2005) (evidence that defendant read his minor daughter incestuous pornography and bought her lubricants and adult toys was "relevant to his intent and motive to have a sexual relationship with her"); *State v. Screws*, 584 So.2d 950, 951-52 (Ala.Crim.App.1991) ("Where a defendant is charged with the first degree rape of his minor daughter, evidence establishing that he had raped and/or committed acts of sexual abuse toward her prior to or subsequent to the offense for which he is charged, is admissible to prove his motive in committing the charged offense. Such evidence tends to establish the inducement (*i.e.* unnatural sexual passion for his child) that led him to rape or molest her."); *State v. Raynor*, 854 A.2d 1133, 1140-41 (Conn.App.2004) ("That the defendant had a particular sexual interest in the victim's female friends is certainly relevant to his motivation to commit the crimes of which he was accused."); *State v. DeLong*, 505 A.2d 803, 805 (Me.1986) ("[E]vidence of prior incestuous acts was relevant and admissible to show the relationship between the parties that in turn sheds light on defendant's motive (*i.e.*, attraction toward the victim) … to commit the crimes with which he was charged."); *State v. Elston*, 735 N.W.2d 196, 199 (Iowa 2007) (upholding joint trial for child-pornography possession and molestation because both crimes "could be found to have been motivated by his desire to satisfy sexual desires through the victimization of children"); *State v. Howard*, 520 So.2d 1150, 1153-54 (La.App.1987) ("We note that in cases involving sexual assaults, such as incest, and statutory rape with family members as the victims, the courts in recent years have almost uniformly admitted such testimony … for the purpose of proving the motive of the

[defendant].") (collecting cases) (quoting *Elliott v. State*, 600 P.2d 1044, 1048 (Wyo.1979)); *State v. Gateley*, 907 S.W.2d 212, 221 (Mo.App.1995) ("Prior sexual conduct by a defendant toward the victim may be admissible as tending to establish a motive, such as satisfaction of the defendant's sexual desire for the victim."); *Ledbetter v. State*, 129 P.3d 671, 679 (Nev. 2006) ("The evidence of Ledbetter's prior acts of sexual abuse of T.B. and J.M. showed Ledbetter's sexual attraction to and obsession with the young female members of his family, which explained to the jury his motive to sexually assault L.R.").

I. Anticipate the defendant to attempt to circumvent Rule 404(b)'s motive exception by arguing that Rule 404(c)'s exception for proving the defendant's aberrant sexual propensity is the sole vehicle by which you can offer evidence of his sexual attraction toward children generally or the charged victims. If that argument is made, you can rely upon the following cases that demonstrate that evidence may be admitted under various rules and evidentiary theories, despite their overlapping fields of applicability:

> We agree with *Garcia* and the court of appeals in this case that when the prosecution offers *Garner* evidence to prove the defendant's propensity to commit the charged sexual offense, the evidence must be screened under Rule 404(c). That rule supplants *Garner's* potential exception to the propensity rule. We therefore relegate the term "*Garner* evidence" to shorthand for the type of evidence at issue in that case—"evidence of a prior similar sex offense committed against the same child." *Garner*, 116 Ariz. at 447, 569 P.2d at 1345.
>
> **But we disagree with the court of appeals that "*Garner* evidence" is always subject to Rule 404(c) screening. Rule 404(b) and (c) create a framework for admitting evidence of other crimes, wrongs, or acts that depends in part upon the purpose for which the evidence is offered. As in *Garner*, the State offered other-act evidence here to prove Ferrero's propensity (and the jury was so instructed), but that will not always be the case. *Garner* evidence might also be relevant for non-propensity purposes, such as showing motive, intent, identity, or opportunity. If the evidence is offered for a non-propensity purpose, it may be admissible under Rule 404(b), subject to Rule 402's general relevance test, Rule 403's balancing test, and Rule 105's requirement for limiting instructions in appropriate circumstances.** But if evidence of other sex acts is offered in a sexual misconduct case to show a defendant's "aberrant propensity" to commit the charged act, as it was here, Rule 404(c) applies.

State v. Ferrero, 229 Ariz. 239, 242, ¶¶ 11-12, 274 P.3d 509, 512 (2012) (emphasis added). *Accord United States v. Abel*, 469 U.S. 45, 56 (1984) ("But there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the

contrary is the case. It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar."); *State v. Robinson*, 153 Ariz. 191, 200-03, 735 P.2d 801, 810-13 (1987) (finding statements inadmissible under medical-treatment hearsay exception properly admitted under of Rules 803(24) and 804(b)(5)); *Goy v. Jones*, 205 Ariz. 421, 423, ¶ 10, 72 P.3d 351, 353 (App.2003) ("There is a clear differentiation between admitting the report as an exhibit pursuant to Rule 803(8) and allowing a witness to testify as to his recorded recollection pursuant to Rule 803(5)."); *State v. Uriarte*, 194 Ariz. 275, 280, ¶ 22, 981 P.2d 575, 580 (App.1998) ("Additionally, Rule 608(b) neither blocks an inquiry about conduct which is probative of bias nor precludes introduction of extrinsic evidence to prove such conduct.").

J. Other-act evidence may also be admissible under the motive exception to rebut the following statutory defense:

> It is a defense to a prosecution pursuant to § 13-1404 or 13-1410 that the defendant was not motivated by a sexual interest. It is a defense to a prosecution pursuant to § 13-1404 involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest.

A.R.S. § 13-1407(E). Because sexual motivation is not an element of sexual abuse or molestation of a child, Arizona courts have construed A.R.S. § 13-1407(E) as establishing an affirmative defense that the defendant must prove by a preponderance of the evidence under A.R.S. § 13-205(A). *See State v. Simpson*, 217 Ariz. 326, 328-29, ¶¶ 17-19, 173 P.3d 1027, 1029-30 (App.2007) (collecting cases recognizing that lack of sexual motivation is an affirmative defense); *State v. Farley*, 199 Ariz. 542, 544, ¶ 11, 19 P.3d 1258, 1260 (App.2001) ("Generally, an affirmative defense is a matter of avoidance of culpability even if the State proves the offense beyond a reasonable doubt."); A.R.S. § 13-103(B) (an "affirmative defense" excludes "any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification, or lack of intent").

When the defendant raises this affirmative defense, you may properly justify admitting other-act evidence to rebut his self-serving claim that he touched the victim's genitals or breasts without sexual motivation, based on the general principle that Rule 404(b) allows the prosecution to offer uncharged acts to rebut trial defenses and claims, as well as the cases that appear in the next section.

6. <u>Intent, knowledge, and absence of accident or mistake</u>.

A. "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." ***Huddleston v. United States*****, 485 U.S. 681, 685 (1988).** *Accord United States v. Curtin*, 489 F.3d 935, 952 (9th Cir. 2007) ("We routinely have held that circumstances

surrounding an alleged crime become *more* relevant when the defendant makes his intent a disputed issue.") (emphasis in original); *United States v. Verduzco*, 373 F.3d 1022, 1028 (9th Cir. 2004) ("Where the mental state to be inferred from undisputed overt acts of a defendant is the crucial issue, evidence of past criminal acts has generally been found insufficiently prejudicial to warrant exclusion.") (quoting *United States v. McCollum*, 732 F.2d 1419, 1425 (9th Cir. 1984));

B. Before considering the admission of other-act evidence to prove the defendant's mental state when he committed the charged offense, we should keep in mind the Arizona Supreme Court's admonition: "Unless there is some discernible issue as to defendant's intent (beyond the fact that the crime charged requires specific intent), the state may not introduce evidence of prior bad acts as part of some generalized need to prove intent in every case." *State v. Ives*, 187 Ariz. 102, 109-10, 927 P.2d 762, 769-70 (1996). *See also State v. Hughes*, 189 Ariz. 62, 69, 938 P.2d 457, 464 (1997) ("Where, as here, the accused denies any involvement in the charged offense, the 'intent' exception of 404(b) is not a proper basis for injecting prior misconduct into a proceeding."). **Consequently, this subsection will focus on scenarios in which the defendant admitted that he did in fact engage in the prohibited behavior (the *actus reus* element of the charged offense, but claims that he performed the charged action.**

C. Other-act evidence is admissible when a defendant charged with sexual abuse or child molestation admits that he touched the victim's sex organs, but claims that the sexual contact occurred unknowingly or accidently because the sexual contact occurred while he was asleep, suffering from an alcohol-induced blackout, or engaged in horse-play or other forms of non-sexual interpersonal contact between the defendant and the victim; (2) a defendant charged with luring a minor admits to the correspondence and travel to the rendezvous site, but claims that he thought he was going to meet an adult or intended the meeting for a non-sexual purpose. *See Collins v. State*, 669 S.W.2d 505, 507 (Ark.App.1984) (upholding admission of defendant's propositioning of child in front of her mother was admissible "to show that appellant did not crawl into the girl's bed on the night of July 16, 1982, by mistake, accident, or because he was drunk"); *State v. Parmer*, 207 P.3d 186, 194 (Idaho.App.2009) (massage-therapist defendant claimed accidental sexual contact with female clients); *State v. Kreiger*, 803 A.2d 1026, 1030, ¶ 10 (Me.2002) (offensive sexual contact characterized as mere "tickling" done in "an innocent way"); *State v. Stephens*, 466 N.W.2d 781, 785-86 (Neb.1991) (vaginal injury inadvertently occurred during diaper change); *State v. Sena*, 192 P.3d 1198, 1202-03 (N.M.2008) (application of ointment on vaginal rash); *State v. Otto*, 157 P.3d 8, 12 (N.M.2007) (defendant claimed to have had sex with victim while drunk and asleep); *State v. Kerby*, 156 P.3d 704, 711, ¶ 76 (N.M.2007) (evidence that defendant built a peephole to view children nude was admissible to "rebut evidence that Defendant innocently touched Victim's buttocks"); *State v. Borck*, 216 P.3d 915, 916-25 (Or.App.2009) (defendant's prior acts manifesting sexual motivation and grooming tactics were admissible to rebut his claims that he accidentally photographed the victims' buttocks and their breasts, and that any sexual contact occurred during horseplay); *State v. Davis*, 670 A.2d 786, 788-90 (R.I.1996)

(other-act evidence rebutted claim that touching occurred accidentally during "piggy back" horseplay); *State v. Armstrong*, 793 N.W.2d 6, 10-13, ¶¶ 9-18 (S.D.2010) (upholding admission of defendant's prior conviction for rape in the third degree in prosecution for sexual contact with a person under 16 to prove the absence of mistake or accident, where the victim of the prior crime and the victim of the current charge were similar ages when the offenses occurred); *Darby v. State*, 922 S.W.2d 614, 621 (Tex.Crim.App.1996) (defendant's "Titty Bear" magazine depicting woman portraying a young girl rebutted claim that he touched victim's genitals and breast without sexual intent).

D. Other-act evidence is also admissible when a defendant charged with luring a minor admits to the correspondence and travel to the rendezvous site, but claims that he thought he was going to meet an adult or intended the meeting for a non-sexual purpose. *United States v. Curtin*, 489 F.3d 935, 948-53 (9th Cir. 2007) (evidence of defendant's possession of incestuous stories involving children in prosecution for interstate travel to engage in sexual conduct with a minor was admissible to rebut defendant's claim he was seeking adults role-playing as children); *United States v. Brand*, 467 F.3d 179, 196-99 (2nd Cir. 2006) (child pornography rebutted defendant's claim that he arranged to meet "Julie" in New York for voice lessons, not sex); *State v. Davis*, 916 A.2d 493, 499-503 (N.J.App.2007) (child-pornographic images rebutted defendant's claim he was merely "role-playing" with a woman pretending to be an underage girl).

E. Other-act evidence is also admissible in sexual-abuse and sexual-assault prosecutions to rebut a defendant's claim that he lacked the requisite intent with respect to the victim's lack of consent.

(1) Subject to the caveat below, the State must prove that the defendant *knew* that the victim did not consent to sexual intercourse or sexual contact. *See* A.R.S. § 13-1404(A) ("A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without consent of that person or with any person who is under fifteen years of age if the sexual contact involves only the female breast."); A.R.S. § 13-1406(A) ("A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person."); A.R.S. § 13-202(A) ("If a statute defining an offense prescribes a culpable mental state that is sufficient for commission of the offense without distinguishing among the elements of such offense, the prescribed mental state shall apply to each such element unless a contrary legislative purpose plainly appears."); *State v. Kemper*, 229 Ariz. 105, 106, ¶ 5, 271 P.3d 484, 485 (App.2011) ("The final instruction correctly advised jurors that Kemper must have intentionally or knowingly engaged in sexual intercourse or oral sexual contact with the victim. It did not, however, properly instruct on the *mens rea* applicable to the consent element of the crime."); *State v. Witwer*, 175 Ariz. 305, 308, 856 P.2d 1183, 1186 (App.1993) ("We hold that in a prosecution for sexual abuse, the state must prove that the defendant intentionally and knowingly engaged in sexual contact, and that

the defendant knew that such contact was without the consent of the victim."). **The caveat referenced above is that the statutory definition of "without consent" reflects several different mental states:**

> "Without consent" includes any of the following:
>
> (a) The victim is coerced by the immediate use or threatened use of force against a person or property.
>
> (b) The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or **<u>should have reasonably been known</u>** to the defendant. For purposes of this subdivision, "mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.
>
> (c) The victim is **<u>intentionally deceived</u>** as to the nature of the act.
>
> (d) The victim is **<u>intentionally deceived</u>** to erroneously believe that the person is the victim's spouse.

A.R.S. § 13-1401.5 (emphasis added).

Thus, in cases where the lack of consent falls within the three latter scenarios, the other-act evidence would be offered to prove the intentional nature of the defendant's deception regarding his identity or his conduct, or that the defendant knew <u>or</u> should have reasonably known the victim's incapacity to consent.

As an aside, make sure in your sexual-abuse and sexual-assault cases that the trial court also gives the RAJI reciting the statutory definition of "without consent," as that instruction would have cured was the omission that triggered reversal in *Kemper*, where the jury was given a bifurcated sexual-assault instruction that improperly relieved the State of its burden of proving that the defendant *knew* of the victim's lack of consent by placing the "intentionally or knowingly" *mens rea* element in just the first clause. Thus, the *mens rea* applied only to the sexual intercourse/oral sexual contact element and did not extend to the "without consent" element. This is the defective instruction at issue in *Kemper*:

> The crime of sexual assault requires proof of the following:
>
> 1. The defendant *intentionally or knowingly* engaged in either sexual intercourse or oral sexual contact with any person; and

> 2. The sexual intercourse or oral sexual contact was without the consent of such person. **[Wrong because the jury did not need to find that the defendant knew or should have known that the victim did not consent.]**

(2) Courts have held that the prosecution may introduce evidence of a defendant's prior rapes to overcome his claim that he believed that the victim consented:

> The crucial question in determining if a sexual assault has occurred is whether the act is committed without the consent of the victim, and the intent of the accused is relevant to the issue of consent or lack thereof. In the instant case, evidence of Williams' sexual misconduct with other persons was admitted as being relevant to prove his intent to have intercourse with the victim without her consent. This evidence was introduced after Williams admitted committing the act, but claimed to have done so with the victim's consent. By acknowledging the commission of the act but asserting his innocent intent by claiming consent as a defense, Williams himself placed in issue a necessary element of the offense and it was, therefore, proper for the prosecution to present the challenged evidence, which was relevant on the issue of intent, in order to rebut Williams' testimony on a point material to the establishment of his guilt.

Honeycutt v. State, 56 P.3d 362, 370 (Nev.2002), *overruled on different grounds by Carter v. State*, 121 P.3d 592 (Nev.2005)). *Accord State v. Huey*, 145 Ariz. 59, 62, 699 P.2d 1290, 1293 (1985) ("In the instant case, defendant admitted having committed the acts charged but maintained that the victim had consented. There was no question of identity. There was, however, *the question of the defendant's intent* to kidnap and *assault the victim against her will*. The state offered the prior bad acts to demonstrate that defendant was engaging in a plan of kidnapping women against their will and then degrading and controlling them through sexual abuse."); *Webb v. State*, 995 S.W.2d 295, 298 (Tex.App.1999) ("When the defensive theory of consent is raised, a defendant necessarily disputes his intent to commit the act without the complainant's consent. … The State may then offer extraneous offenses which are relevant to that contested issue.").

F. In child-pornography cases, uncharged-act evidence may be admitted when the defendant acknowledges the presence of contraband images on his computer or otherwise in his possession (dominion and control), but raises a defense that professes ignorance.

(1) Proof of a defendant's knowledge of the child-pornographic images in his actual possession, on his computer, or in some other area under his dominion or control is necessary not only to prove the *mens rea* element of the crime of sexual exploitation of a minor, but also to establish the *mens rea* component of the *actus*

***reus* definitions of "possession" and "constructive possession."** *See* A.R.S. § 13–3553(A)(2) ("A person commits sexual exploitation of a minor by *knowingly* ... possessing ... any visual depiction in which a minor is engaged in exploitative exhibition or other sexual contact.") (emphasis added), A.R.S. § 13–105(30) ("'Possess' means *knowingly* to have physical possession or otherwise exercise dominion and control over property.") (emphasis added); A.R.S. § 13–105(31) ("'Possession' means a voluntary act if the defendant *knowingly* exercised dominion and control over property.") (emphasis added). "Dominion or control in the absence of actual physical possession has been characterized as constructive possession." *State v. Cox*, 214 Ariz. 518, 520, ¶ 10, 155 P.3d 357, 359 (App.2007), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007) (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY (UNABRIDGED) 496, 672 (1981)). "Constructive possession exists when the prohibited property 'is found in a place under the defendant's dominion or control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the property.'" *Id.* (quoting *State v. Villavicencio*, 108 Ariz. 518, 520 (1972)). A "voluntary act" is "a bodily movement performed consciously and as a result of effort and determination." A.R.S. § 13–105(37). "'Knowingly' means, with respect to conduct or to a circumstance defined by a statute defining an offense, that a person is aware or believes that his or her conduct is of that nature or that the circumstance exists." A.R.S. § 13–105(9)(b).

"It hardly can be denied that 'in cases where a defendant is charged with unlawful possession of something, evidence that he possessed the same or similar things at other times is often quite relevant to his knowledge and intent with regard to the crime charged.'" *United States v. Long*, 328 F.3d 655, 663 (D.C. Cir. 2003) (quoting *United States v. King*, 254 F.3d 1098, 1100 (D.C. Cir. 2001)). *Accord United States v. Layne*, 43 F.3d 127, 133-34 (5th Cir. 1995) (holding that defendant's possession of two child pornography magazines inside his home showed that he also "knowingly possessed child pornography in the storage facility"); *United States v, Richards*, 967 F.2d 1189, 1193-94 (8th Cir. 1992) (discovery of charged handguns in same car trunk as other-act items of evidence showed defendant's knowing possession of firearms); *United States v. Brown*, 961 F.2d 1039, 1042 (2nd Cir. 1992) (proof that defendant had other guns in his apartment and truck proved his knowledge of Uzi found in his apartment).

(**2) Courts have admitted other-act evidence to rebut a defendant's claim that he was ignorant of the contraband images on his computer, that he did not realize that the subjects of his downloaded images were minors, or that he believed that only adult pornography was available on the Internet.** *See United States v. Whorley*, 550 F.3d 326, 338 (4th Cir. 2008) ("The government introduced the evidence of Whorley's prior conviction and terms of probation to establish that Whorley received the charged images knowingly, not by accident or mistake, while surfing the Internet and that he had knowledge that the individuals depicted in Counts 41–55 were minors."); *United States v. Dodds*, 347 F.3d 893, 898-99 (11th Cir. 2003) (rebutting defendant's claim that he was unaware of child pornography on his computer with other-act evidence showing that he placed uncharged contraband images in a personalized file folder); *United States v. Becht*, 267 F.3d 767, 774 (8th Cir. 2001) (evidence that defendant sorted his uncharged

contraband images in personalized directories rebutted his defense that a robot program remotely planted the files on his computer); *People v. Garelick*, 74 Cal.Rptr.3d 815, 821 (2008) (recognizing that "the volume of material and the fact that those images were found in several different locations on Garelick's computer make them relevant to establish not only his knowledge, but also to establish the diminishing likelihood that the images' presence on his computer was inadvertent"); *People v. Shinoshara*, 872 N.E.2d 498, 525 (Ill.App.2007) (other-act evidence showed defendant's knowledge that images found on his computer depicted children).

(3) A defendant's mere-presence claim that he lived in or had access to the area where contraband was found does not remove intent as an issue of the case, because:

(a) The State cannot convict him under a "constructive possession" theory without proving circumstances from which the jury could infer his *actual knowledge* of the contraband's presence in his home, on his computer, or in other places under his dominion and control. *See United States v. DeLeon*, 170 F.3d 494, 497 (5th Cir. 1999) ("In determining what constitutes dominion and control over an illegal item, this Court considers not only the defendant's access to the dwelling where the item is found, but also whether the defendant had knowledge that the illegal item was present."); *State v. Cox*, 217 Ariz. 353, 357, ¶ 24, 174 P.3d 265, 269 (2007) (defendant's constructive possession could be proved by evidence showing his awareness of the guns found inside his car trunk); *State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972) ("Constructive possession is generally applied to those circumstances where the drug is not found on the person of the defendant nor in his presence, but is found in a place under his dominion and control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the narcotics."); *Kromer v. Commonwealth*, 613 S.E.2d 871, 874 (Va.App.2005) ("To support a conviction based upon constructive possession, the Commonwealth must point to evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the [contraband] and that it was subject to his dominion and control.");

(b) The Second Circuit, the Arizona Supreme Court, and many other jurisdictions following the *Colon/Ives* approach, have expressly identified "mere presence" as a defense that places the defendant's intent at issue and thus authorizes the admission of other-act evidence to prove the crime's *mens rea*. *See United States v. Howell*, 231 F.3d 615, 628 (9th Cir. 2000); *United States v. Maden*, 114 F.3d 155, 157 (10th Cir. 1997); *United States v. Thomas*, 58 F.3d 1318, 1322-23 (8th Cir. 1995); *United States v. Delgado*, 56 F.3d 1357, 1365 (11th Cir. 1995); *United States v. Wilwright*, 56 F.3d 586, 589 (5th Cir. 1995); *United States v. Aminy*, 15 F.3d 258, 260 (2nd Cir. 1994); *United States v. Garcia*, 983 F.2d 1160, 1174 (1st Cir. 1993); *United States v. Colon*, 880 F.2d

650, 659-60 (2nd Cir. 1989); *State v. Maturana*, 180 Ariz. 126, 130, 882 P.2d 933, 937 (1994); *Walker v. Commonwealth*, 52 S.W.3d 533, 535-36 (Ky.2001).

(c) Not surprisingly in light of "constructive possession's" requirement that the prosecution prove the defendant's *actual knowledge* of the presence of contraband and intention to exercise dominion and control over that item, these jurisdictions have upheld other-act evidence offered to counter mere-presence claims by defendants charged with possessing contraband in their domiciles, vehicles, or bedrooms, or otherwise near their possessions. *See United States v. Roberson*, 439 F.3d 934, 941 (8th Cir. 2006); *United States v. Tomberlin*, 130 F.3d 1318, 1320 (8th Cir. 1995); *United States v. Maden*, 114 F.3d 155, 156-57 (10th Cir. 1997); *United States v. Garcia*, 983 F.2d 1160, 1173 (1st Cir. 1993); *United States v. Brown*, 961 F.2d 1039, 1042 (2nd Cir. 1992); *United States v. Tussa*, 816 F.2d 58, 68 (2nd Cir. 1987); *People v. Warren*, 55 P.3d 809, 814-15 (Colo.App.2002); *State v. Steger*, 158 P.3d 280, 290-91 (Haw.App.2006).

7. Victim's lack of consent.

In the previous section, several cases were cited for the proposition that prior-act evidence is admissible to prove that the defendant entertained the requisite mental state with respect to the victim's lack of consent. Arizona and other courts have also sanctioned admitting uncharged-act evidence to rebut a broader defense—the claim that the victim actually consented and voluntarily engaged in the charged sexual activity. *See State v. Schackart*, 153 Ariz. 422, 424, 737 P.2d 398, 400 (App.1987) ("One of the defenses raised by appellant was that of consent on the part of the victim. The prior bad acts all involved the victim and were relevant to the victim's state of mind. We believe that the offering of the prior bad acts in this case comes within the 'other purpose' ambit of Rule 404(b)."); *Stevenson v. State*, 619 A.2d 155, 160-61 (Md.App.1993) ("It has often been recognized that other crimes evidence is admissible to rebut a consent defense in a rape case.") (collecting cases); *State v. Lamoureaux*, 623 A.2d 9, 13-14 (R.I.1993) ("Since defendant claims to have engaged in intercourse with the victim with her consent, it becomes part of the state's burden to negate consent in order to prove that the sexual assault was committed with force or coercion. … We are persuaded that the commission of a recent prior crime in nearly identical circumstances by the same defendant with a different victim tends to be strongly probative on the issue of lack of consent."); *Kleinschmidt v. State*, 913 P.2d 438, 440 (Wyo.1996) ("When the accused claims consent, evidence which contradicts his denials of previous use of force in sexual encounters is of assistance to the trier of fact in evaluating his … credibility.") (quoting *Carey v. State*, 715 P.2d 244, 248 (Wyo.1986)).

IV. Final Recommendations.

1. When possible, you should justify the admission of uncharged-act evidence under all applicable evidentiary theories instead of relying exclusively on Rule 404(c). This affords you with the following advantages:

A. If the court requires the State to present live witnesses at a pretrial hearing as a precondition to admitting other-act evidence under Rule 404(c), you can withdraw that rationale and rely instead on Rule 404(b), which does *not* require pretrial evidentiary hearings.

B. If the judge finds the uncharged-act evidence admissible under Rule 404(c), but does so with a minute entry ruling that fails to comport with Rule 404(c)(1)(D) and *Aguilar's* requirements, the alternative justifications will give you the luxury of abandoning Rule 404(c) at trial and proceeding solely under Rule 404(b)'s exceptions for admitting the same evidence. Even if you do *not* withdraw the Rule 404(c) rationale before final jury instructions and closing argument, the fact that the judge ruled the same evidence admissible under Rule 404(b) or the intrinsic-evidence doctrine will give the Attorney General's Office the opportunity to argue on appeal that the defendant's convictions should be affirmed because the challenged evidence was properly admitted under these alternative rationales. *See State v. Adriano*, 215 Ariz. 497, 503, ¶ 23, 161 P.3d 540, 546 (2007) ("Because the evidence was admissible under Rule 404(b), the trial court did not abuse its discretion in admitting the evidence, even if it might have admitted the evidence for the wrong reason."); *State v. Flores*, 218 Ariz. 407, 416, n.14, 188 P.3d 706, 715 n.14 (App.2008) ("The fact that trial judge comes to the proper conclusion for wrong reason is irrelevant; the appellate court is obliged to affirm the trial court's ruling if the result was legally correct for any reason."); *State v. Grainge*, 186 Ariz. 55, 57, 918 P.2d 1073, 1075 (App.1996) ("We will affirm the trial court's admission of prior act evidence if it is sustainable on any ground.").

C. If you rely solely on Rule 404(c), the State's appellate attorneys will be forced to raise other justifications for the evidence for the first time on appeal. Despite the authority cited in the preceding paragraph, the Arizona Court of Appeals has warned that the State arguably waives arguments not raised below. *See State v. Garcia*, 200 Ariz. 471, 476-77, ¶¶ 32-33, 28 P.3d 327, 332-33 (App.2001) (noting that the State did not raise intrinsic-evidence doctrine as an alternative basis for admitting other-act evidence under Rule 404(c), and stating, "We generally decline to consider an evidentiary theory that is advanced for the first time on appeal."). **The State is placed in a much weaker position when it must offer new alternative justifications on appeal.**

2. The defendant's trial strategy should play a central role in deciding which Rule 404(b) rationales justify the admission of your other-act evidence. The Arizona Supreme Court's decisions in *Ives* and *Hughes* indicate that certain defenses render mental-state exceptions (intent, knowledge, absence of mistake or accident) inapposite. Conversely, the State may offer other-act evidence to rebut trial defenses or claims. Do NOT simply recite Rule 404(b)'s entire litany of exceptions *verbatim*, but deliberately select the rationales that apply to your case.

3. If the defense attorney makes previously precluded evidence relevant through cross-examination or opening statement, revisit the court's earlier ruling and seek admission of other acts that refute the defendant's assertions.

4. During closing argument, you should remind the jury of the court's limiting instructions regarding the proper usage of the State's other-act evidence and also explain why you presented the evidence (to prove identity, rebut a defense or claim, explain the victim's failure to disclose the abuse earlier, show the defendant's aberrant sexual propensity, etc.). When the court's instructions are ambiguous or defective, your correct restatement of the law regarding the proper use of the uncharged-act evidence might well cure any prejudice. Here's an example:

> Lehr also argues that the trial court erred in instructing the jury that it could consider the evidence of other acts for all of the purposes listed in Rule 404(b). Repeatedly during trial and at the close of the guilt phase, the trial court gave limiting instructions to the jury about using evidence for 404(b) and (c) purposes. The court instructed the jury that it could consider the other acts evidence under Rule 404(b) only "to establish the Defendant's motive, opportunity, intent, preparation, plan, knowledge, and identity." On the third day of trial, Lehr asked the court to remove from the jury instructions all reasons to consider Rule 404(b) evidence except identity. The court denied Lehr's request.
>
> Although trial courts should specify in their limiting instruction the purposes for which Rule 404(b) evidence is being admitted, the failure to do so here was harmless error. *See United States v. Wilson*, 107 F.3d 774, 783 (10th Cir. 1997) (holding that trial court's failure to instruct jury on specific purpose for admitting Rule 404(b) evidence "is harmless if its purpose is apparent from the record and it was properly admitted"). Here, the purposes for which the evidence was admitted were apparent from the record. In closing arguments, the State urged the jury to consider the evidence only for the original purposes for which it had been offered: to show *modus operandi*, identity, and an aberrant sexual propensity.

State v. Lehr, 227 Ariz. 140, 147-48, ¶¶ 23-24, 254 P.3d 379, 386-87 (2011).

5. If you offer evidence under both Rule 404(b) <u>and</u> Rule 404(c), make sure that the judge gives limiting instructions on both rules. You will need to explain to the jury how these exceptions apply in the alternative or in the conjunctive.

6. Trial judges sometimes forget to include all the applicable Rule 404(b) exceptions in their final jury instructions. Make sure that the final instructions include all of your theories of admissibility. Another possible way to avoid this problem is to ask the court to give a limiting instruction just before or after the other-act testimony is presented to the jury, during trial itself.