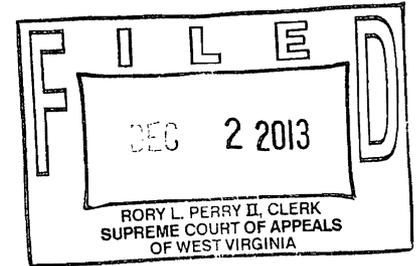


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0574



STATE OF WEST VIRGINIA,

*Plaintiff below, Respondent,*

v.

CARLOS ANGLE,

*Defendant below, Petitioner.*

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**BRIEF OF RESPONDENT**

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No. 13-0574

STATE OF WEST VIRGINIA,

*Plaintiff below, Respondent,*

v.

CARLOS ANGLE,

*Defendant below, Petitioner.*

**RESPONDENT'S BRIEF**

**I.**

**ASSIGNMENTS OF ERROR**

- I. The Circuit Court erred in admitting Rule 404(b) evidence because that evidence was not admitted for a proper purpose.
  - A. Evidence offered to show “lustful disposition” is only admissible in cases involving sex crimes against children.
  - B. The State set forth multiple general reasons for using the evidence without explaining with specificity how the evidence was related to those reasons.
- II. The Circuit Court’s factual determination that there was sufficient evidence that the other acts occurred was clearly erroneous.
- III. The Circuit Court erred with regard to the analysis of the relevance of the evidence under Rules 401 and 402.
  - A. The Circuit Court failed to conduct the balancing test on the record as required.
  - B. The proposed evidence was more prejudicial than probative.
- IV. The improper inclusion of 404(b) evidence was not harmless error.

## II.

### STATEMENT OF THE CASE

On October 30, 2008, the victim and her boyfriend, Larry Broadwater, were living together in an apartment on 215 Walnut Avenue in Fairmont. App. 127-28, 191. In the early morning on that day, the Petitioner (who previously lived in the victim's neighborhood and who the victim knew by friendly acquaintance, app. 129-30, as did Mr. Broadwater, app. 193-94) and two other men, began to beat on the apartment door. App. 130. The victim rose from bed to let the trio in so as to not allow their beating on the door to disturb the neighborhood. App. 130-31, 195.

The Petitioner and his two cohorts went into the living room and Mr. Broadwater got up from bed and joined them in the living room. App. 131. The trio, which had brought their own beer, app. 132, 196, were "very intoxicated," app. 196, and "belligerently drunk." App. 131. Mr. Broadwater told them they could only stay for a few minutes, app. 198, because he had to go to work early in the morning. App. 131. Subsequently, a friend of the victim, Josh Dieffenbauch (known as "Duck") showed up. App. 132, 197, 231.

Somewhat later, the two men who had arrived with the Petitioner left the apartment, but despite their urging, the Petitioner did not leave with them. App. 139. A bit after the two left, Mr. Broadwater finally told the Petitioner that the Petitioner had to leave and he and Mr. Dieffenbauch walked the Petitioner out of the apartment. App. 140, 201, 233.

After the Petitioner and Mr. Dieffenbauch left the apartment, the victim and Mr. Broadwater returned to bed. App. 141, 203. Mr. Dieffenbauch testified that before he parted ways from the Petitioner, the Petitioner told him that he (the Petitioner) was going to go to the victim's apartment to sleep on her couch. App. 234. Mr. Dieffenbauch texted the victim, "'Don't answer the door. It's Carlos.'" App. 235.

Because she is such a heavy sleeper, app. 141, 204, the victim did not hear Mr. Broadwater leave for work. App. 141. *See also* app. 204 -05 (Mr. Broadwater testified that he did not wake the victim up when he left for work, that this was not unusual, and the victim would usually sleep though his alarm). She testified that her next conscious thought was of someone in her room. App. 142. The victim felt a penis between her legs and looked around to see it was the Petitioner. App. 142. The Petitioner had his shirt off and his pants around his knees. App. 165-66. The victim testified the Petitioner had pulled her panties down around her knees. App. 166. The victim leapt up from bed and ran into the bathroom saying, ““Hey, man, what are you going [sic]?”” and ““Get the fu\*k out of my house.”” App. 142. She locked herself in the bathroom and did not exit it until she heard the Petitioner leave the apartment. App. 142.

When she left the bathroom, she called Mr. Broadwater from the telephone she had left on the night stand beside the bed, app. 147, and then called 911. App 147. It was only after calling 911 that the victim observed Mr. Dieffenbach had earlier sent her the text message about the Petitioner coming back to her apartment. App. 147-48. The victim and Mr. Broadwater denied being intoxicated or having had used drugs that evening. App. 157.

When Officer Pigot responded to 417 Walnut to investigate the victim’s call, he saw she was “obviously emotional, upset, she’d been crying[;]” Officer Pigot documented in his report that she “had make-up running down her face . . . .” App. 273. Officer Pigot characterized her demeanor as an “[a]ppropriate emotional response to a person reporting a sexual assault.” App. 274. Officer Pigot further testified the victim “was much like a lot of the victims of physical assault of any nature that [he had] dealt with.” App. 274.

Officer Pigot then interviewed the Petitioner. (The Petitioner did not testify at trial.) Although the Petitioner had a breath alcohol level of .141 by Preliminary Breath Test, app. 296, Officer Pigot stated the Petitioner did not otherwise exhibit signs of intoxication. App. 294-95. The Petitioner confirmed that he was at the victim's apartment on the evening in question, but stated that the victim and Mr. Broadwater sought drugs from him. App. 303. The Petitioner denied using or having drugs. App. 303. The Petitioner stated that the victim had offered his compatriots sex in exchange for drugs, and then offered sex to the Petitioner if the Petitioner would get drugs for the victim. App. 304. In his statement, the Petitioner admitted to leaving and then returning to the victim's apartment, apparently returning because he did not do or sell drugs, the offer for sex for drugs was simply an offer to have sex with the Petitioner. App. 306.

The Petitioner was indicted for one count of burglary and one count of sexual assault in the second degree. App. 5-6.

Prior to trial, the State filed a "Notice of Intent to Use 404(b) Evidence." App. 7.

Specifically, the State asserted:

1. That the Defendant had been indicted for the offenses of SEXUAL ASSAULT IN THE SECOND DEGREE, SEXUAL ABUSE IN THE FIRST DEGREE and CONSPIRACY TO COMMIT A FELONY.
2. Said offenses were alleged to have occurred after the allegation contained in the above referenced matter.

This evidence will be used by the State to show motive, intent and absence of mistake as allowed by the West Virginia Rules of Evidence, Rule 404(b) and West Virginia Supreme Court of Appeals in *State v. McIntosh* (2000), 207 W. Va. 561, 569, 534 S.E.2d 757, 765.

App. 7.

The Petitioner objected to the use of the Rule 404(b) evidence. The Petitioner argued that *State v. McIntosh* applied only to child victim cases and the victim in the instant case was an adult. App. 11. The Petitioner also asserted that the evidence was inadmissible under Rule 403. App. 12.

At the Rule 404(b) hearing, the State introduced evidence from Officer Pigot. App. 16. Officer Pigot investigated the Petitioner for the alleged crimes referenced in the State's 404(b) notice. App. 17. Officer Pigot testified that in June, 2009, there was an allegation of sexual abuse and sexual assault against an adult, Ms. H.C. (who was in her early 20's),<sup>1</sup> and a child, C.S.,<sup>2</sup> who was 15 or 16, App. 17, at 425 Walnut Avenue. App. 17, 22. Upon investigation, he determined that Ms. C. and C.S., were, at the time of the crimes, under the influence of alcohol. App. 18.

According to Officer Pigot, Ms. C. told him that the Petitioner and a Nathaniel Terry were engaging in sexual acts with Ms. C. against her will and that she was trying to prevent the acts from occurring. App. 19. When Officer Pigot first talked to the Petitioner, the Petitioner denied any sexual acts ever occurred. App. 20. After Officer Pigot confronted the Petitioner with the fact he had witness statements that contradicted the Petitioner's claim, the Petitioner changed his story to assert that Mr. Terry was trying to have oral sex with Ms. C., and Ms. C. was indicating she did not want to. App. 20.

Officer Pigot then told the Petitioner that witness accounts said he had his penis out and was standing between Ms. C.'s legs. App. 20. The Petitioner confirmed that his penis was out, but that he believed Ms. C. didn't have any objections to intercourse, she was only objecting to oral sex. App. 21. According to Officer Pigot, the Petitioner's "specific line was just - - is documented in the

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<sup>1</sup>The victim in this sex crime is referred to by her initials. W. Va. Rev. R. App. P. 40(e)(1).

<sup>2</sup>See *supra* fn.1.

quotations there. He - - he didn't have consent. He just didn't think there was a problem." App. 21. Officer Pigot testified at the 404(b) hearing that the Petitioner stated he had stopped at the 422 Walnut Street apartment because he observed Mr. Terry drinking. App. 22. Officer Pigot testified that the Petitioner, at least at some point, had removed his shirt. App. 24.

In ruling the evidence admissible, the circuit court said on the record,

"The Court will allow the admission of the evidence. I think it's proper 404b evidence. I would ask [sic] the State to prepare for The Court the limiting instructions to which they've made reference so that The Court could give that at the time of the evidence and later in the charge, if necessary." App. 32.<sup>3</sup>

After the victim and Mr. Broadwater testified at trial the Petitioner's trial, counsel argued to the trial court that "[d]uring th[e Rule 404(b)] hearing, it was represented that [the Petitioner] mode of operation was to go in, get the victims drunk, drink with them, and then take advantage of them," and that because the victim and Mr. Broadwater testified the victim was not drunk or intoxicated, the Rule 404(b) evidence was not admissible since it was not sufficiently similar to the instant case. App. 222. The circuit court refused to reconsider its ruling. App. 224.

The circuit court gave a limiting instruction to the jury during trial and again during its charge. App. 335, 392, that the Petitioner was

"not on trial for any events related to th[e 404(b)] conduct. I am instructing you that if you believe such conduct occurred, such evidence is not admitted as truth of the defendant's guilt in the charge against him in the indictment in this case. In other words, if you believe the conduct occurred, you cannot conclude from such conduct that the defendant is guilty of the charge against him in the indictment in this case."

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<sup>3</sup>The State was to prepare a written order, App. 23, but no written order was ever entered.

The circuit court denied the Petitioner's motion for judgment of acquittal on the burglary count, but partially granted it in regard to the second degree sexual assault count, allowing the jury only to consider the lesser included offense of first degree sexual abuse. App. 374. The jury acquitted the Petitioner of burglary and second degree sexual abuse. App. 444.

### **III.**

#### **SUMMARY OF ARGUMENT**

This Court should expand the lustful disposition exception to adults. This would be consistent with federal law, would advance the ability of the jury to render a fair verdict, protect women from chauvinistic attitudes of society, and advance the protection of society from sexual predators. The Court should also remand this case for an on the record consideration of the Rule 403 factors that would apply under such a rule.

In the event the Court does not wish to expand the lustful disposition exception, any error in the case is harmless. The jury here heard the testimony of the victim and was able to compare it to the statements made by the Petitioner wherein he said that he claimed the victim's request to buy drugs was a request for sex and to view the behaviors and demeanor at trial even though he did not testify. The jury also heard the testimony of Officer Pigot that the victim exhibited behavior consistent with having been sexually assaulted.

### **IV.**

#### **ORAL ARGUMENT**

Because the State seeks to extend a rule of law, Rule 20 argument is appropriate.

V.

ARGUMENT

This Court has explained:

[t]he standard of review for a trial court’s admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court’s factual determination that there is sufficient evidence to show the other acts occurred. Second, we review de novo whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third we review for an abuse of discretion the trial court’s conclusion that the “other acts” evidence is more probative than prejudicial under Rule 403.

*State v. LaRock*, 196 W. Va. 294, 310–11, 470 S.E.2d 613, 629–30 (1996). It has further said it:

is limited to the inquiry as to whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion. In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect.

*State v. Willett*, 223 W. Va. 394, 397, 674 S.E.2d 602, 605 (2009) (per curiam).

**A. The lustful disposition exception should be extended to adults.**

The Petitioner correctly argues this Court has apparently limited the lustful disposition basis for the admission of other sex misconduct to those cases involving children. *See, e.g., State v. Parsons*, 214 W. Va. 342, 350, 589 S.E.2d 226, 234 (2003) (per curiam) (“Ordinarily, our law does not permit the introduction of evidence concerning a defendant’s other sexual offenses to show that the defendant was more likely to have committed the crime in question. ‘It is impermissible for collateral sexual offenses to be admitted into evidence solely to show a defendant’s improper or lustful disposition toward his victim.’” (quoting Syl. pt. 7, *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986))).

What *Dolin* and its progeny failed to appreciate is (1) sexual offenses—be they directed against children or adults—are unique, *see, e.g., United States v. Julian*, 427 F.3d 471, 487 (7th Cir.

2005) (“sexual assault cases . . . often raise unique questions regarding the credibility of the victims which render a defendant’s prior conduct especially probative”); Tamara Larsen, Comment, *Sexual Violence Is Unique: Why Evidence of Other Crimes Should Be Admissible in Sexual Assault and Child Molestation Cases*, 29 Hamline L. Rev. 177, 182 (2006) (“Sexual assault crimes are unique . . . .”); Jessica D. Khan, Note, *He Said, She Said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence 413 and 414*, 52 Vill. L. Rev. 641, 647 (2007) (“Sex crimes are different from other types of crimes.”); and, (2) prohibiting the introduction of other sex crime evidence creates a “perverse approach directly benefit[ing] those least deserving of protection: criminals who commit repeated acts of sexual violence, including predatory pedophiles and serial rapists.” Paul G. Cassell & Evan S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 Utah L. Rev. 145, 171 (1998). Consistent with Justices Davis and McHugh’s dissenting opinion in *State v. McFarland*, 228 W. Va. 492, 509 n.6, 721 S.E.2d 62, 79 n.6 (2011) (per curiam), this Court should in this case adopt the approach followed by the Federal Courts under Federal Rules of Evidence 413.<sup>4</sup> The State, therefore, asks this Court to adopt and apply Federal Rule 413 as part of West Virginia law, that is, subject to Rule 403, evidence of a defendant’s act(s) of sexual misconduct that are criminal under West Virginia law, federal law, or the law of any other State or equivalent political entity of the United States; or contact, without consent, between any part of the defendant’s body—or an object—and another person’s genitals or anus; or, contact, without consent, between the defendant’s genitals or anus and any part of another person’s body; or, deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or an attempt or conspiracy

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<sup>4</sup>This Court is considering adopting Rule 413 as part of the codified Rules of Evidence. The Court should nevertheless address the issue here. *See State ex rel. Richey v. Hill*, 216 W. Va. 155, 166-67 n.14, 603 S.E.2d 177, 188-89 n.14 (2004).

to engage in conduct described is admissible for any relevant reason.<sup>5</sup> There are numerous reasons supporting adoption of this Rule.

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<sup>5</sup>Federal Rule of Evidence 413 provides:

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;

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

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

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

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

[B]oth child-victim and adult-victim sex crime prosecutions have “distinctive characteristics” which make conviction inherently more difficult given traditional evidentiary maxims . . . [R]ecurring issues in these prosecutions, [include] credibility problems, unusual and specific dispositions of defendants toward sexual violence, the tendency of victims in both rape and child molestation cases to be too traumatized or intimidated to come forward, and the inherent he-said-she-said credibility wars.

Kelly, *He Said, She Said*, 86 St. John’s L. Rev. at 662 (footnotes omitted).

Witness credibility is a central problem in sexual offense cases. Many sex crimes, such as that at issue here, boil down to a “she said/he said” swearing contest between the defendant and the victim. “The nature of sexual assault typically dictates that it takes place secretly and privately, only involving the victim and the perpetrator and leaving no neutral witnesses.” Jennifer Kelly, Note, *He Said, She Said: Sex Crime Prosecutions and Spousal Privileges under the Federal Rules of Evidence*, 86 St. John’s L. Rev. 637, 662 (2012).

Indeed, in many cases there will not be physical evidence of sexual assault such as DNA because ejaculation is not a required element of any sex crime in West Virginia, *see, e.g.*, W. Va. Code § 61-8B-1(6) & (7);<sup>6</sup> *Elam v Commonwealth*, 326 S.E.2d 685, 686 (Va. 1985) (“Penetration by a penis of a vagina is an essential element of the crime of rape; proof of penetration, however slight the entry may be, is sufficient; evidence of ejaculation is not required”), or because the assailant used a condom or gloves. *See, e.g., Barclay v. Spitzer*, 371 F. Supp.2d 273, 283 (E.D.N.Y. 2005) (“No physical evidence of the alleged rape was introduced. There was no DNA evidence from

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<sup>6</sup>West Virginia Code § 61-8B-1(6) provides “‘Sexual contact’ means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person’s body by the actor’s sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.” West Virginia Code § 61-8B-1(7) provides, “‘Sexual intercourse’ means any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.”

semen; the complainant testified that a condom was used on the two separate alleged coital contacts.”); Mark Hansen, *The Great Detective*, 87-APR A.B.A. J. 37, 40 (2001) (observing some criminals “have donned condoms and gloves”).

There may also be a lack of DNA because rape victims may be forced to shower by their assailants, Mark Hansen, *The Great Detective*, 87-APR A.B.A. J. at 40 (noting that some criminals have “forced rape victims to shower or bathe”), or “victims may have showered or washed their clothes in an effort to feel clean after the trauma of a rape.” Larsen, *Sexual Violence Is Unique*, 29 Hamline L. Rev. at 197.

Moreover, there may be an absence of physical injury, because the victim is unable to fully fight back for fear of further injury due to a disparity of size between the victim and the attacker, the attackers use of a weapon to facilitate the attack, the remote location of the attack, or the trauma of the attack itself. “Today the law does not expect a woman, as part of her proof of opposition or lack of consent, to engage in heroics when such behavior could be useless, fruitless, or foolhardy. Fighting to protect one’s virtue can be a risky business.” *State v. Carvalho*, 409 A.2d 132, 135–36 (R.I. 1979). *See also* Larsen, *Sexual Violence Is Unique*, 29 Hamline L. Rev. at 199 (“Adult victims may not have physical injuries, particularly given that many women are not able to fight back for fear of being further harmed or due to emotional trauma.”); *People v. Bolton*, 566 N.E.2d 348, 351 (Ill. Ct. App. 1990) (“If circumstances show resistance to be futile or life endangering or if the victim is overcome by superior strength or fear, useless or foolhardy acts of resistance are not required.”); *State v. Campbell*, 206 N.W.2d 53, 56 (Neb. 1973) (“Where resistance would obviously be useless, futile, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the female’s opposition and lack of consent.”).

And even if DNA does exist, it “is irrelevant when the issue in the case involves non-identity issues such as consent or intent.” *State ex rel. Richey v. Hill*, 216 W. Va. 155, 165, 603 S.E.2d 177, 187 (2004).

In such circumstances the victim (usually female, Larsen, *Sexual Violence Is Unique*, 29 Hamline L. Rev. at 199), is at a distinct disadvantage. *Barclay v. Spitzer*, 371 F. Supp.2d 273, 283 (E.D.N.Y. 2005) (“Jurors tend to rely on such scientific evidence in rape cases and will tend to discount the probability of guilt in a close case where it is absent.”).

For example, it is not uncommon for rape victims to delay reporting the crime because of the stigma society places on the rape victim, the difficulty talking about the details of what happened and embarrassment of the circumstances, an internalized blaming of themselves for the rape such as believing she deserved what happened, or a belief that the incident did not constitute rape at all. Larsen, *Sexual Violence Is Unique*, 29 Hamline L. Rev. at 182; *Elam v Commonwealth*, 326 S.E.2d at 686 (“To the lay person, rape is generally construed to mean total consummation of an act of sexual intercourse, committed forcibly and with complete penetration. But the law does not define the crime in the vernacular.”).

Moreover, “[s]ocial science research establishes that women are generally perceived as less credible than men (and occasionally, as no more credible than children).” Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 Yale J.L. & Feminism 75, 116 (2008).

Further, many people want to avoid discussing or believing rape occurs, which, “[i]n many ways . . . is even truer for women than men since women must be aware of their ongoing safety in a way that most men do not experience. Thus, many women avoid thinking about the possibility that

they could be assaulted, and many women tend to see an alleged assault as false, or as unworthy of prosecution.” Larsen, *Sexual Violence Is Unique*, 29 Hamline L. Rev. at 198.

Additionally, societal norms tend to elevate the male who has sex, yet denigrate the female with whom the male was in flagrante delicto. “The male offender can admit that he engaged in intercourse with his accuser and assert consent, all without fear of social stigmatization. The female victim, however, must prove that while intercourse occurred, it occurred without her consent, and she must do so while trying to overcome the preconceived notions established by rape mythology.” Scott A. McDonald, Note, *When a Victim’s a Victim: Making Reference to Victims and Sex-Crime Prosecution*, 6 Nev. L.J. 248, 254 (2005) (footnotes omitted).

And even where the case shifts from the victim to the defendant, a sexual offender is often difficult to identify because the offender’s outward demeanor may suggest an upstanding citizen. A defendant is usually presented in court in civilian cloths, such as a suit and tie, and many frequently have families and can be “model citizens[.]” Scott, *Fairness to the Victim*, 35 Hous. L. Rev. at 744.

In short, in rape cases the State is at a decided disadvantage because of the tremendous victimization of the rape victim and the archaic and chauvinistic attitudes which society has not shed. See David P. Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology 1194, 1382 (1997) (“We found that the prosecution [in rape cases] is at a disadvantage in pure swearing contests.”).

As noted by the Sponsor of the legislation creating Federal Rule of Evidence 413:

[S]exual assault cases, where adults are the victims, often turn on difficult credibility determinations. Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over his wallet as a gift—but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him. Knowledge that

the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches.

140 Cong. Rec. S129901–01, at \*S12990 (Sept. 20, 1994) (Statement of Sen. Dole).

An additional justification for Rule 413, and what sets it apart, is that “[s]ex offenders are a serious threat in this Nation[,]” *McKune v. Lile*, 536 U.S. 24, 32(2002) (plurality opinion), because they are dangerously recidivistic. Jessica D. Khan, Note, *He Said, She Said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence 413 and 414*, 52 Vill. L. Rev. 641, 653 (2007). “When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.” *McKune v. Lile*, 536 U.S. 24, 33 (2002). Indeed, the Legislature, as has every other State in the Union, has recognized that sexual misconduct behavior is dangerously recidivistic and that certain requirements must be imposed on sex offenders because sex offenders are dangerously recidivistic. *See, e.g.*, W. Va. Sex Offender Registration Act, W. Va. Code §§ 15-12-1 to -10; *Hensler v. Cross*, 210 W. Va. 530, 533 n.4, 558 S.E.2d 330, 333 n.4 (2001) (“Our research shows that all fifty states have registration laws”); *United States v. Kebodeaux*, 133 S. Ct. 2496, 2513 n.2 (2013) (Roberts, C.J., dissenting in part) (“All 50 States have used their general police powers to enact sex offender registration laws.”).

This Court has said, “[c]itizens who are the victims of crime are entitled to have the State, through its prosecuting attorneys, vindicate their constitutional level claims to protection from criminal invaders.” *Moore v. Starcher*, 167 W. Va. 848, 853, 280 S.E.2d 693, 696 (1981). As Justice Cardozo said in *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), “justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament.” Evidence of other sexual misconduct corroborates the victim’s testimony

and leads to a more reliable verdict. Sherry L. Scott, Comment, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 Hous. L. Rev. 1729, 1744 (1999).

**B. This Court should set forth guidance to guide circuit courts in making a Rule 403 analysis and remand this case for such a review to be made in the first instance by the circuit court.**

Almost all evidence is subject to Rule 403, which provides, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Sex crimes propensity evidence should be subject to Rule 403.

As part of its Rule 403 analysis, the trial court “should consider factors that affect the probative value of the proffered evidence, including the similarity of the prior acts to the act charged, the closeness in time of the prior acts to the charged conduct, the frequency of the prior acts, the presence or absence of intervening events, and the need for additional testimony to explain the prior acts.” *United States v. Stamper*, 106 Fed. Appx. 833, 835 (4th Cir. 2004). Applying these factors (and any other pertinent factors that might apply in any given case) requires the trial court to remember that “Rule 403 is a rule of inclusion, ‘generally favor[ing] admissibility[.]’” *United States v. Udeozor* 515 F.3d 260, 264-65 (4th Cir. 2008) (quoting *United States v. Wells*, 163 F.3d 889, 896 (4th Cir.1998)), and that “Rule 403 exclusion should be invoked rarely[.]” *United States v. Cooper*, 482 F.3d 658, 663 (4th Cir. 2007). And such should especially be the rule here since Rule 403 should not be read to eviscerate the rule permitting lustful disposition. *Stamper*, 106 Fed. Appx. at 835. “It is not expected, however, that evidence admissible pursuant to proposed Rules 413-15 would often

be excluded on the basis of Rule 403.” David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 Chi.-Kent L. Rev. 15, 19 (1994). In other words, “[t]he presumption is in favor of admission. The underlying legislative judgment is that the sort of evidence that is admissible pursuant to proposed Rules 413-15 is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse considerations.” *Id.* See *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (“the exclusion of relevant evidence under Rule 403 should be used infrequently, reflecting Congress’s legislative judgment that the evidence ‘normally’ should be admitted”); *United States v. LeCompte*, 131 F.3d 767, 768 (8th Cir. 1997) (applying Rule 403 to Rule 413 to “loosen to a substantial degree the restrictions of prior law on the admissibility of such evidence”); *United States v. Meacham*, 115 F. 3d 1488, 1492 (10th Cir. 1997) (noting “the courts are to ‘liberally’ admit evidence of prior uncharged sex offenses”).

Here, rather than remanding for a new trial, this Court should remand for a hearing to address the 403 issue.

“If upon remand the trial court determines the probative value of the prior . . . is substantially outweighed by the danger of unfair prejudice . . . , the court should order a new trial. If the trial court determines the probative value of the . . . testimony is not substantially outweighed by the danger of unfair prejudice . . . the conviction sh[ould] be affirmed subject to the right of appellate review.” *State v. Spears*, 742 S.E.2d 878, 884 (S.C. Ct. App. 2013). See also *Seeley v. Chase*, 443 F.3d 1290, 1295-96 (10th Cir. 2006) (similar); *United States v. Robinson*, 700 F.2d 205, 214 (5th Cir.1983) (similar).<sup>7</sup>

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<sup>7</sup>In *State v. McFarland*, 228 W. Va. 492, 503, 721 S.E.2d 62, 73 (2011) (per curiam), this Court concluded that a circuit court did not perform an adequate Rule 403 balancing test on the record. This, along with other errors relating to the 404(b) evidence introduced in that case resulted in this Court reversing that verdict. However, the State in that case never sought a remand to conduct a sufficient Rule 403 balancing test. See [www.courtswv.gov/supreme-court/calendar/2011/briefs/sept11/101413respondent.pdf](http://www.courtswv.gov/supreme-court/calendar/2011/briefs/sept11/101413respondent.pdf); [www.courtswv.gov/supreme-court/calendar/2011/briefs/sept11/101413appellee.pdf](http://www.courtswv.gov/supreme-court/calendar/2011/briefs/sept11/101413appellee.pdf). Because the State never sought a simple remand for the court to make findings of facts and conclusions of law in *McFarland*, *McFarland* does not stand as an impediment to using

**C. If the Court declines to adopt a general sexual offender propensity rule, it should nevertheless affirm the conviction here because any error is harmless.**

This Court has observed that “[t]he doctrine of harmless error is firmly established by statute, court rule and decisions as a salutary aspect of the criminal law of this State.” *State v. Reed*, 218 W. Va. 586, 590, 625 S.E.2d 348, 352 (2005) (per curiam) (quoting *State v. Blair*, 158 W. Va. 647, 659, 214 S.E.2d 330, 337 (1975)). Because erroneous admission of 404(b) evidence is non-constitutional error, *State v. Blevins*, No. 12-0438, 2013 WL 3185064, at\*5 (W. Va. June 24, 2013) (Memorandum Decision), *see also United States v. Starr*, 276 Fed. Appx. 761, 765 (10th Cir. 2008) (“the admission of extrinsic evidence in violation of Rule 404(b) is a non-constitutional error”), *United States v. Hill*, 898 F.2d 72, 75-76 (7th Cir. 1990) (“even if the fact of possession of the quantity of marijuana should not have been admitted under Rule 404(b), we conclude the error was harmless under the lower threshold applicable to non-constitutional error”), the test for non-constitutional harmless applies. Under the non-constitutional harmless error test, the Court asks if there is sufficient evidence remaining after the impermissible evidence is removed from the case to sustain the conviction and, if so, it then determines whether the error had any prejudicial effect on the jury. Syl. Pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979). Because “[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it[.]” *Neder v. United States*, 527 U.S. 1, 18 (1999) (quoting R.

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that procedure here. “[C]ases cannot be read as foreclosing an argument that they never dealt with.” *Waters v. Churchill*, 511 U.S. 661, 679 (1994). “It is a venerable principle that a court isn’t bound by a prior decision that failed to consider an argument or issue the later court finds persuasive.” *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 541 (9th Cir. 1993).

Traynor, *The Riddle of Harmless Error* 50 (1970), this Court has said, a non-constitutional error is “harmless unless the reviewing court has grave doubt as to whether the erroneously admitted evidence substantially swayed the verdict.” *State v. Potter*, 197 W. Va. 734, 748, 478 S.E.2d 742, 756 (1996). *But see State v. Baker*, 738 S.E.2d 909, 919 (W. Va. 2013) (citing Atkins non-constitutional harmless error test, but then finding “we simply cannot say with any degree of confidence that the improperly admitted Rule 404(b) evidence was harmless beyond a reasonable doubt.”). Application of the non-constitutional harmless error test shows any error here is harmless.

Here, removing the 404(b) evidence, the State otherwise adduced sufficient evidence to sustain the conviction. One is guilty of First Degree Sexual Abuse when, inter alia, one “subjects another person to sexual contact who is physically helpless[.]” West Virginia Code § 61-8B-1(6) provides

“Sexual contact” means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person’s body by the actor’s sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.

“Physically helpless” means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.” *Id.* § 61-8B-1(4).

The victim testified she awoke from a sound sleep on her stomach with her panties pulled down around her knees, she felt a penis between her legs and looked around to see it was the Petitioner on top of her, app. 142, whose shirt was off and whose pants were around his knees. App. 165-66. The victim leapt up from bed and ran into the bathroom saying, ““Hey, man, what are you going [sic]?”” and ““Get the fu\*k out of my house.”” App. 142. And indeed, the victim’s testimony was corroborated in certain details.

For example, Mr. Dieffenbach also texted the victim, “Don’t answer the door. It’s Carlos.” App. 235. And when Officer Pigot responded to investigate the victim’s call, he saw she was “obviously emotional, upset, she’d been crying[;]” Officer Pigot documented in his report that she “had make-up running down her face . . . .” App. 273. Officer Pigot characterized her demeanor as an “[a]ppropriate emotional response to a person reporting a sexual assault.” App. 274. Officer Pigot further testified the victim “was much like a lot of the victims of physical assault of any nature that [he had] dealt with.” App. 274. Absent the 404(b) evidence there was more than sufficient evidence to sustain the conviction.

Further, admission of the June 2009 incident does not create grave doubt as to whether it substantially swayed the verdict.

First, the circuit court gave a limiting instruction to the jury which is an important factor in the harmless error analysis. *State v. McGinnis*, 193 W. Va. 147, 156-57, 455 S.E.2d 516, 525-26 (1994) (“We deem the giving of a limiting instruction and its effectiveness significant not only in deciding whether to admit evidence under Rule 404(b), but the absence of an effective limiting instruction will be considered by us on appeal in weighing the prejudice ensuing from the erroneous admission of Rule 404(b) evidence.”). The circuit court gave a limiting instruction to the jury during trial and again during its charge, App. 335, 392, that the Petitioner was “not on trial for any events related to th[e 404(b)] conduct. I am instructing you that if you believe such conduct occurred, such evidence is not admitted as truth of the defendant’s guilt in the charge against him in the indictment in this case. In other words, if you believe the conduct occurred, you cannot conclude from such conduct that the defendant is guilty of the charge against him in the indictment in this case.” A “court’s issuance of a limiting instruction ‘greatly minimize[s]’ the risk of undue prejudice posed

by an erroneous admission under Rule 404(b). . . .” *United States v. Reagan*, 725 F.3d 471, 490 (5th Cir. 2013) (citation omitted), *see also Vega v. State*, 255 S.W.3d 87, 105 (Tex. Ct. App. 2007) (even if trial court erred in admitting extraneous offense evidence, “any error was harmless because the [limiting] instruction, which we presume the jury followed, identified material issues for which the evidence could be considered under rule 404(b)”).

Second, the Petitioner’s statement to the police, that he believed the victim’s request to buy drugs for her was code for having sex with him was unbelievable and the unbelievable statements of the defendant should weigh in favor of a finding of harmlessness. *See People v. Hall*, 960 N.E.2d 399, 405 (N.Y. 2011) (considering defendant’s “ridiculous explanation” in harmless error analysis); *United States v. Ewings*, 936 F.2d 903, 908 (7th Cir. 1991) (citing *Phelps v. Duckworth*, 772 F.2d 1410, 1414 (7th Cir.1985) (en banc)) (“[A] defendant’s implausible defense supports finding of harmless error”).

Third, the circuit court instructed the jurors they could use the 404(b) evidence, “*if you believe such conduct occurred*, such evidence is not admitted as truth of the defendant’s guilt in the charge against him in the indictment in this case. In other words, *if you believe the conduct occurred*, you cannot conclude from such conduct that the defendant is guilty of the charge against him in the indictment in this case.” In *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), this Court observed that jurors do not have to accept that the 404(b) events occurred. “We believe that the decision to admit Rule 404(b) evidence is exclusively that of the trial court pursuant to Rule 104(a). Nevertheless, as part of the trial court’s charge to the jury, the jury may be instructed, if requested, that it is not required to give any consideration to the prior acts evidence unless it finds by a preponderance of the evidence that the prior acts were committed and that the defendant was

the actor. This instruction could become significant in cases where the commission of the prior act is contested.” *Id.* at 156 n.10, 455 S.E.2d at 525 n.10. And here, the Petitioner’s trial counsel did an excellent job of undermining the Rule 404(b) evidence and its applicability to this case in front of the jury.

During cross-examination, Officer Pigot testified that the sexual conduct in the June 2009 episode did not occur in the victims’ bedrooms, but in the living room. App. 341. Officer Pigot also testified that, unlike the case at hand, in June 2009, the victim was not alone the Petitioner. *Id.*

And during closing, the Petitioner’s counsel specifically observed that the June 2009 incident consisted only of allegations, not convictions. App. 428. Counsel also argued to the jury that the State was not using the June 2009 incident to prove “all this other stuff, and mode of operation, and motive, and all that,” but was instead using it “to throw as much against the wall as they can to see what sticks.” App. 429.

Any error in this case is harmless.

## VI.

### CONCLUSION

For the forgoing reasons, the case should be remanded with directions to the circuit court to perform an on the record Rule 403 balancing test or it should be affirmed on the grounds of harmless error.

Respectfully submitted,

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By counsel,

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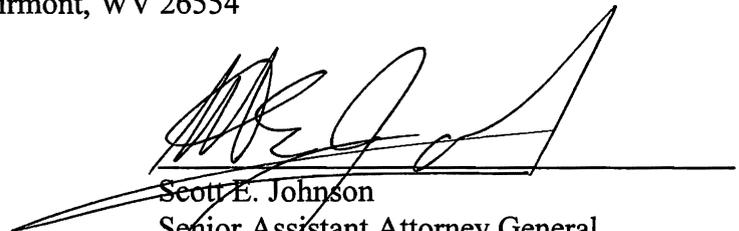
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**CERTIFICATE OF SERVICE**

I, Scott E. Johnson, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Respondent's Brief* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 2nd day of December, 2013, addressed as follows:

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A handwritten signature in black ink, appearing to read 'Scott E. Johnson', is written over a horizontal line. The signature is stylized and cursive.

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