ARTICLE: ROLAND B. MOLINEUX AND HIS ILLEGITIMATE OFFSPRING: THE HISTORY AND MYSTERY OF 404(B)

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Author: BY Rauch Wise

C. Rauch Wise is a former member of the NACDL Board of Directors.

Text

[*28] For over a half-century, the rule concerning the admission of "other bad acts" has betrayed the promise of *People v. Molineux*. The origins of the rule against admitting evidence of other crimes are as old as the common law. What originated as a rule to protect the fairness of a trial against the accused has evolved into a rule that admits propensity evidence against a defendant. Criminal defense attorneys must know how to properly argue against the admissibility of other bad acts when the other bad acts do not fit within any of the exceptions. To understand the original rule, this article will discuss in detail the premier case in this field.

The Roland B. Molineux Case

In 1871, some of the wealthiest and most prestigious men in New York City founded the Knickerbocker Club. J. Herbert Ballentine, who made his fortune in the beer industry, purchased the club building. Among the original founders was wealthy paint manufacturer Gen. Edward Molineux, a hero of the Civil War. By the end of the 19th century, the Knickerbocker Club was embroiled in what many newspapers called the "trial of the century" -- a tale of jilted love and alleged hatred of a fellow club member that gave rise to two murders. [1] The case resulted in a 1901 appellate decision that, over a century later, is still known throughout the country for the issue of when other bad acts are admissible as evidence in a trial. [2] The case has been cited with approval in almost every state and almost every federal circuit. Unfortunately, many of the cases citing the opinion have not been true to the principles it established.

Roland Burnham Molineux was the privileged middle son of Gen. Edward Molineux. As his father was one of the original founders of the Knickerbocker Club, Roland Molineux became a member of the club. While a member, the younger Molineux had serious differences with club manager Henry Cornish and Henry C. Barnet, another club member who resided at the club.

His differences with Cornish arose over the management of the club. In a standoff, Roland Molineux threatened to resign if the board of directors did not fire Cornish. The board refused and Molineux, true to his word, resigned on Dec. 20, 1887.

On Dec. 24, 1898, Cornish received in the mail a bottle purporting to contain Bromo Seltzer. The return address was that of a local facility that rented out mail boxes to individuals. Cornish did not take the medicine, but unfortunately his secretary, Katharine Adams, the woman from whom he was renting a room, did take it. She complained about its bitter taste. Cornish tasted a small amount of the alleged medicine and also noticed that it did not taste like Bromo Seltzer. Adams died from the poison a day later and Cornish became seriously ill. The poison was determined to be cyanide of mercury.

[*29] The investigation that followed pitted the New York police department against two major newspapers as to who could uncover the most evidence. The *New York* Journal, founded by William Randolph Hearst, and the *New York World*,

[1] The story of the investigation and trial of Roland B. Molineux is chronicled in HAROLD SCHECHYER, THE DEVIL'S GENTLEMAN (2007). Many of the background facts for this article are taken from that book.

[2] *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286(1901).

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founded by Joseph Pulitzer, were rivals in reporting the story. The investigation was sensationalized. The newspapers and the police immediately focused on Roland Molineux. Both newspapers sent investigative reporters out to look into the evidence.

While the police conducted an investigation into the death of Katharine Adams, suspicion arose concerning the death of Henry Barnet, who had died on Nov. 10, 1898. Authorities exhumed his body and conducted a second autopsy. Contrary to the first autopsy, the findings from the second autopsy determined that he also died from taking the poison cyanide of mercury. Barnet received his poison through the mail in a medicine called Kutnow Powder. Like Cornish, he had a disagreement with Roland Molineux. But this disagreement was over a woman.

Roland Molineux and Henry Barnet had long been rivals for the affections of Blanche Cheeseborough. Molineux had met her years before on a yacht in Portland, Me. When she later moved to New York, Molineux introduced her to Barnet. Over the next several years, Molineux and Barnet vied for her affections. On Nov. 19, 1898, less than 10 days after the death of Barnet, Blanche Cheeseborough became Mrs. Roland B. Molineux.

The coroner's inquest set the tone for the later trial. James Osborne, the prosecuting attorney, treated Roland Molineux with great deference at the beginning of the proceedings. During the presentation of the evidence of the death of Katharine Adams, he made few accusations against Molineux and appeared to focus on Henry Cornish as being the guilty party. All that changed when he presented evidence of the murder of Henry Barnet. The connection of Roland Molineux to both cases clearly demonstrated that Osborne was blaming Roland Molineux for both murders. The coroner's inquest resulted in a decision that Katharine Adams was murdered by the hand of Roland Molineux. The strategy of the coroner's inquest became the strategy of the trial. The person who sent the poison to Henry Cornish that killed Katharine Adams was the same person who sent the poison to Henry Barnet, and that person was Roland Molineux, the middle son of the wealthy and highly respected Gen. Edward Molineux.

The trial, which started on Nov. 14, 1899, was to become the most widely covered and longest trial in New York at that time. Gen. Molineux spared no expense in defending his son. When the accusations against Roland Molineux first arose, Gen. Molineux retained well-respected lawyers Bartow Weeks and George Gordan Battle. [3] The attorneys represented Molineux before the coroner's inquest. They were well aware of the strategy of the state. Over the objection of the defense lawyers, the state was permitted to introduce evidence of the poisoning of Henry Barnet. The similarity of the two crimes was indeed quite astounding. Both murders occurred within two months of each other. In both cases the poisons were sent through the mail from a rented private mailbox. The same poison was used in both cases, the rare cyanide of mercury. In both cases the poison was contained in a medication. The victim and intended victim were both connected with the Knickerbocker Club. And, of course, in both cases the intended recipient of the poison was a person with whom Roland Burham Molineux had had a disagreement.

Molineux was convicted and sentenced to death. He was transferred to Sing Sing prison in Ossining, N.Y., to await execution. Gen. Molineux rented a house near the prison so that Blanche Molineux could be near her husband. Gen. Molineux was willing to spend his entire fortune to exonerate his son. In the end, the money was well spent.

For the appeal, Gen. Molineux retained the services of John G. Milburn, the most prominent lawyer in Buffalo, N.Y., and probably the most prominent citizen in Buffalo. He was the head of the Pan-American Exposition, which was being held in Buffalo at the time of the appeal. [4] While the appeal involved several issues, the major issue was whether the evidence of the murder of Henry Barnet was admissible. On Oct. 15, 1901, the court answered that question and reversed the conviction and death sentence of Roland B. Molineux.

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[3] After the Molineux trial, George Gordan Battle hired a law clerk named Jonathan Liddy. He was so impressed by his law clerk that he later paid for Mr. Liddy to go to law school. In appreciation Mr. Liddy named his firstborn George Gordan Battle Liddy, known to us today as G. Gordan Liddy. His other lawyer, Bartow Weeks, later became a judge on the New York Court of Appeals. *See* HAROLD SCHECHYER, THE DEVIL'S GENTLEMAN (2007).

[4] The fact that President William McKinley, after being shot while attending the Pan-American Exposition, died at the home of John G. Milburn attests to his prominence. President McKinley's death on Sept. 13, 1901, occurred while the parties were awaiting a decision from the New York Court of Appeals.

People v. Molineux [5] discusses all the exceptions to the general rule that evidence of prior crimes is not admissible, and the court holds the evidence as to Molineux's alleged involvement in the Barnet murder was not admissible under any of the exceptions. As to the exception for common scheme or plan, the court said, "To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced." [6] The New York case gives many illustrations to show the exact meaning of "common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others." The court said that "common scheme or plan" did not mean just two very similar crimes. The court stated: "Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received." [7]

Two years later, the principles establish in *Molineux* were reaffirmed in *People v. Romano*. [8] In Romano, the state accused the defendant of robbery. The method used to accomplish the robbery was to throw snuff in the face of the victim and then rob him. The sole defense was an alibi. The state sought to introduce evidence that the defendant committed another robbery at the same location upon another person by the use of the same means. The trial court admitted the evidence "as showing a similar offense, done in a similar manner, within a reasonable time." [9] The New York court held the evidence was not admissible. In reversing the court said, "There is always more or less of similarity between the commission of independent crimes of this class, and in many instances features that are common to one are found in the other; and yet it has never been supposed that, where there was separation as to time and no connection established beyond that of place and similarity, the first crime was admissible to establish any of the elements which constituted the other." [10]

The Principle Established In *Molineux*

The principles established in *Molineux* have been set forth in Rule 404(b) of the Federal Rules of Evidence and in similar rules in almost every state in the country. The federal rule lists as exceptions "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ..." [11] Some states list the exception as "a common scheme or plan." [12] The full exception set forth in *Molineux* is "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others." As will be discussed later, the abbreviation of this exception to "plan" or "common scheme or plan" has led to confusion in various courts, and as a result many courts that claim to follow the *Molineux* decision actually pay it only lip service.

The *Molineux* decision acknowledges [*30] that its list of exceptions is not intended to be exhaustive. [13] Some courts have limited the exceptions to those listed in the decision. What other exceptions may exist are not the subject of this article. The exception involving a "common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others" has created the most problems. It will be discussed in greater detail than the other exceptions.

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5 168 N.Y. 264, 61 N.E. 286 (1901).

6 *Id.* at 305, 61 N.E. at 299.

7 *Id.* at 306, 61 N.E. at 299.

8 84 App. Div. 318, 82 N.Y.S. 749 (1903).

9 *Id.* at 319,82 N.Y.S. at 749.

10 *Id.* at 320, 82 N.Y.S. at 750.

11 FED. R. EVID. 404(b).

12 S.C. R. EVID. 404(b).

13 "The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial." *People v. Molineux*, 168 N.Y. at 293, 61 N.E. at 294.

Virtually all the rules in state and federal courts concerning the admissibility of other bad acts begin with this sentence or one substantially similar: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." [14] Thus, the default position is evidence of other crimes is not admissible. The government, therefore, has the burden of proving that the evidence is admissible. The defendant, who generally is not the proponent of the evidence, does not have the burden of proving the evidence is inadmissible.

The reason for the exclusion of other crimes is to prevent undue prejudice against the defendant. As the *Molineux* court and numerous other courts have recognized, "The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence." [15] The Maryland Court of Appeals said, "The primary concern underlying the rule is a 'fear that jurors will conclude from evidence of other bad acts that the defendant is a bad person and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking.'" [16] The courts have long recognized the inherit prejudice associated with the introduction of evidence of other crimes against a defendant. Cases supporting the proposition are too numerous to cite. Over the years, unfortunately, the courts have retreated from this protection of a citizen accused of a crime and have improperly admitted evidence of other crimes. What follows is a discussion of the exceptions to the general rule and how to put the courts back on the right track.

Motive

The motive exception is too often confused with the intent exception. The two words have very separate and distinct meanings. [17] As one court said, motive is "the impulse which moves a man to commit the criminal act. This impulse may arise from various causes, hatred, jealousy, avarice, etc." [18] Motive can also be used to introduce proof of another crime. Consider, for example, a defendant accused of murdering a witness to prevent the witness from testifying about another crime of which the defendant is accused. In a trial for murder of the witness, the state would be permitted to show that the defendant is accused in another crime for the purpose of establishing the motive to kill the person.

The fact that a person robbed a store years earlier to obtain money does not establish a motive to commit the recent robbery for which he is on trial even though the motive in both cases, to obtain money, was the same. Having the same motive can never be the basis for introducing evidence of another similar crime. If a person commits a sex crime for the purpose of satisfying his lustful desire, that fact does not mean another sex crime is admissible to establish that the defendant committed the sex crime for which he is on trial. In few, if any, cases will the motive of the defendant be relevant if the defendant is clearly identified as the person who committed the act. [19]

Regarding motive, the court in *Molineux* said the following:

> But, assuming for present purposes that the prosecution did in fact prove all that it sought to prove, it is impossible to perceive any legal connection between the two cases. Barnet was said to have been poisoned because he had

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[14] FED. R. EVID. 404(b).

[15] 168 N.Y. at 292, 61 N.E. at 294. *See also United States v. Castillo*, 140 F.3d 874, 881 (10th Cir. 1998) ("The ban on propensity evidence dates back to English cases of the seventeenth century."); Harrison's Trial, 12 How. St. Tr. 834 (Old Bailey 1692); *Boyd v. United States*, 142 U.S. 450, 458 (1892) ("Proof of [prior robberies admitted at trial] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law.").

[16] *Hurst v. State*, 400 Md. 397, 929 A.2d 157 (Ct. App. 2007).

[17] For a case that illustrates the confusion between the two words, see *State v. Martin*, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001) ("In the instant case, we find evidence of Martin's marijuana use was logically relevant and admissible, not to impugn his character, but rather to establish his motive, as well as his intent for possession marijuana.").

[18] *State v. Hyde*, 234 Mo. 200, 136 S.W. 316 (1911).

[19] "When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance." *People v. Molineux*, 168 N.Y. at 296,61 N.E. at 296.

> interfered in the defendant's love affair. Cornish was to be poisoned because he had incurred the hatred of the defendant as the result of quarrels between them over club matters. [20]

The *Molineux* court did not permit the introduction of another strikingly similar case to prove motive. Similarity was not the criteria.

Nevada has, unfortunately, confused the legal definition of "motive" with motivation. In *Ledbetter v. State*, [21] the state admitted a prior sexual act under the motive exception to the rule that other crimes are not admissible. The court explained:

> The mental aberration that leads a person to commit a sexual assault upon a minor child, while not providing a legal excuse to criminal liability, does explain why the event was perpetrated. It therefore remains the law in Nevada that whatever might "motivate" one to commit a criminal act is legally admissible to prove "motive." ... [22]

Under such a broad interpretation of the motive exception, anything that motivates one to commit a crime would be admissible under virtually any circumstance. *Molineux* does not support such an interpretation. As one treatise writer has said, "The motive theory should not apply, however, when the 'motive' is so common that the reasoning that establishes relevance verges on ordinary propensity reasoning." [23]

Intent

Intent is what can make the act a crime. In most states, simply entering a building without permission to get out of the weather is not burglary. To prove burglary, the state is required to prove the entering of the building was with an intent to commit a crime. When a defendant is charged with possession of drugs with intent to distribute, the state may be permitted to introduce evidence of a previous drug sale to prove the intent with which the drugs are possessed. [24] Obviously, if the prior sale of drugs was too remote in time, then the other drug sale should not be admissible as its prejudice would exceed its probative value. Most parents will touch their children in their private areas. But this is not a crime. The crime occurs when a touching in a **[*31]** private area is done for the purpose of satisfying a person's lustful desire.

The government is required in most cases to prove intent and may on occasion be required to prove a specific intent. If other bad acts exist that would be probative on the issue of intent, then the government should be able to introduce that evidence. If a defendant testifies that he touched a child inappropriately, but the touching was accidental or done with no intent to satisfy any lustful desire, then the government would be entitled to introduce evidence to refute that defense. Under circumstances when another crime is admissible to refute that defense, it is not admissible until the defendant raises that defense.

In order to keep such evidence out, a simple solution for defense counsel is to stipulate the required intent. Counsel can stipulate that if anyone touched a child in such a manner, that person did so with the intent to satisfy lustful desire. Counsel can stipulate that whoever possessed the drugs did so with the intent to distribute. In *Stare v. Lyle*, [25] the defendant was accused of issuing fraudulent checks. The state introduced evidence that the defendant had allegedly passed other fraudulent checks under similar circumstances. The defendant offered to stipulate that whoever passed the fraudulent check

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[20] 168 N.Y. at 311, 61 N.E. at 301.

[21] 122 Nev. 252, 129 P.3d 671 (2006).

[22] *Id.* at 262, 129 P.3d at 678.

[23] BROWN, MCCORMICK ON EVIDENCE, *Character and Habit* § 190 at 1043 (2013).

[24] *Store v. Gore*, 299 S.C. 368, 384 S.E.2d 750 (1989); *see also United States v. Bell*, 516 F.3d 432 (6th Cir. 2008).This case contains an excellent discussion of the Rule 404(b) issues.

[25] 118 S.E. 803, 125 S.C 406 (S.C. 1923). This case contains an excellent discussion of the principles set forth in the Molineux case. While it has never been overruled, many of the subsequent cases in South Carolina have not followed it, even in cases in which the court claims to be following it. *See, e.g., State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

for which he was on trial did so with the required intent to defraud the recipient of the check. In holding the other alleged criminal acts were not admissible, the court noted the defendant had stipulated to the intent required for the check to be fraudulent.

Whether to stipulate or not is a decision that trial counsel will have to make considering the defense used, the proof the state has offered, and the nature of any other crime the government will seek to introduce. The important thing to know is that the option may be available. Also, the fact that other alleged bad acts of the defendant may be similar is not a basis for admitting the evidence to prove intent. Similarity does not prove intent. Otherwise a similar robbery could be used to prove an intent element of a robbery. In most robbery cases, intent is not a contested fact.

Accident, Mistake or Lack of Knowledge

On occasion a defendant may use as a defense that the act he performed was done by accident, mistake, or he did not have the knowledge that the act was illegal. To refute this argument, the government will be permitted to introduce evidence [*32] of other crimes. But the government is not entitled to use this other crime evidence unless the defense actually uses an accident or a mistake as a defense. In *State v. Johnston*, [26] the state was permitted to introduce evidence that the defendant had previously passed counterfeit currency to refute his defense that he did not know the currency was counterfeit.

The Sixth Circuit in *United States v. Bel* [27] discusses this exception. In holding that the prior drug conviction was not admissible under the accident or mistake exception, the court said that "for other acts evidence to be admissible for the purpose of showing absence of mistake or accident, the defendant must assert a defense based on some type of mistake or accident." [28]

Identity

Identity can be proven by two separate and distinct methods. Sometimes a defendant will commit a "signature crime," i.e., a person has committed a crime in such a unique and unusual manner that only one person could have done it. Admission of this type of evidence is rare. Identity can also be proven when a defendant commits a second crime with items stolen in a previous crime. The identity of the person who committed the first crime is relevant to identifying the person who perpetrated the crime for which the defendant is charged. Again, the probative value of this type of evidence is diminished over time. This type of evidence is discussed at length in *Molineux*. Except in the case of a signature crime, similarity of crime is not what makes the evidence of the other crime admissible to prove identity. The logical connection between the two crimes is what makes it admissible.

Brasher v. State, an early Alabama case, illustrates the limit upon the use of other crimes to prove identity. Fayette Brasher was convicted of having carnal knowledge of a 13-year-old girl. The court of appeals held that the trial court correctly permitted the prosecutor to show that, four months prior to the alleged relations with the 13-year-old, Brasher had committed alleged acts of perversion upon a five-year-old girl. The Supreme Court of Alabama disagreed, however, and ruled that none of the testimony related to the five-year-old girl should have been admitted. Commenting on the holding of the court of appeals, the Alabama Supreme Court said: "The effect of such holding is that the evidence as to defendant's relations with the little five-year-old girl was admissible for the purpose of identification because it showed he was a man with a disposition, propensity, or inclination to commit such offenses with little girls." [29]

A Common Scheme or Plan

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[26] 49 S.C. 195, 146 S.E. 663 (1929).

[27] 516 F.3d 432 (6th Cir. 2008).

[28] *Id.* at 442.

[29] *Brasher v. Alabama*, 249 Ala. 96,98,30 So. 2d 31,33 (1947) (This case contains a collection of cases from around the country generally holding that evidence of sex acts by a defendant with one other than the accuser in the case on trial is not admissible.).

The exception that has led to the most confusion among courts is "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others." [30] Too many courts have failed to recognize that the *Molineux* case held inadmissible evidence involving the Henry Barnet murder even though the similarities between the two crimes were striking. As the court said in *Molineux*, "Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received." [31] The connection must be more than to commit two similar crimes.

While the list is by no means exhaustive, many states have decisions that properly follow the principles of *Molineux*. [32] Also, numerous decisions exist that give a totally illegitimate interpretation of the principles established in *Molineux*, with some decisions being in the states that claim to follow the principles in *Molineux*. [33] The most common problem with the courts that incorrectly interpret the rule against admitting other crimes is their willingness to accept mere similarity as an exception to the rule. Astoundingly, courts that claim to apply *Molineux* admit other crimes, especially other sex crimes, based solely on similarity. Even a casual reading of *Molineux* shows this is not correct.

This example gives insight into what the exception truly means: As part of a plan to rob a bank, a person steals an explosive to blow up the safe at the bank. The common scheme or plan was to rob the bank with the stolen explosives. The evidence of stealing the explosives would be admissible to show the common plan or scheme. If a person steals an automobile to rob a bank, the same principle would apply. The automobile theft would be part of the common scheme or plan to rob the bank. The exception means more than the fact that a defendant committed two similar or very similar crimes. [34] The government must prove a clear connection between the two or more crimes.

As noted previously, another strikingly similar murder was excluded in *Molineux* because similarity was not a basis for admitting the evidence of the other murder under any exception. The *Molineux* court said:

> To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. [35]

One of the problems in using similarity as a basis for admitting other crimes can be illustrated by examining language in two South Carolina cases. In *State v. Blanton* [36] the South Carolina Court of Appeals said, "This evidence is admissible if it tends to show common scheme or plan and its close similarity to the charged offense enhances its probative value so as to outweigh its prejudicial effect." [37] Then, in an opinion just over six months later, without making reference to the

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[30] Some states refer to this as the "transaction rule." *State v. Stout*, 356 Mont. 468, 237 P.3d 37 (2010). The *Stout* case contains an excellent discussion and collection of citations on this issue. However, one must read the footnotes.

[31] 168 N.Y.at 306, 61 N.E. at 299.

[32] *See, e.g., State v. Cox*, 781 N.W.2d 757 (Iowa 2010); *Hurst v. State*, 400 Md. 379, 929 A.2d 157 (2007); *James v. State*, 152 P.3d 255 (Ok. Ct. App. 2007); *State v. Sweeney*, 299 Mont. 111, 999 P.2d 296 (2000); *Brasher v. State*, 249 Ala. 96, 30 So. 2d 31 (1947); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923); *State v. Hyde*, 234 Mo. 200, 136 S.W. 316 (1911).

[33] *See, e.g., State v. Merriam*, 264 Conn. 617, 835 A.2d 895 (2003) (correctly holding the other criminal acts were not admissible to prove identity but erroneously holding evidence admissible to prove common scheme or plan); *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009); *State v. Friedrich*, 135 Wis.2d 1, 398 N.W.2d 763 (1987) (but see excellent dissent); *State v. Frazier*, 121 N.C. App. 1,464 S.E.2d 490(1995).

[34] *See, e.g., Reidnauer v. State*, 133 Md. 311, 755 A.2d 553 (2000); *State v. Wright*, 191 N.W.2d 638 (Iowa 1971); *Goodman v. State*, 184 Ga. 315,191 S.E. 117 (1937).

[35] 168 N.Y. at 305, 61 N.E. at 299.

[36] 316 S.C. 31, 446 S.E.2d 438 (S.C. Ct. App. 1994).

[37] 316 S.C. at 32, 446 S.E.2d at 439.

Blanton case, the same [*34] court in *State v. Campbell* [38] said, "When the prior bad acts are strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced." [39] Did the South Carolina Court of Appeals truly mean for attorneys to argue to the trial judge the subtle difference between "close similarity" and "strikingly similar" in making a determination of whether evidence of other crimes is admissible? [40] The fact that the *Blanton* case involved a lewd act on a minor child and the *Campbell* case involved a drug crime should be of no consequence if cases are to be decided based upon legal principles and not human emotion. [41]

Treatise writers who have addressed this issue also generally agree that the common scheme or plan exception does not mean two or more crimes are similar. [42] The problem with introducing similar crimes is not that they are probative of any issue the state is required to prove, but that the impact of the evidence is clearly more prejudicial than probative. If another criminal act is admitted to prove "intent, lack of mistake or knowledge," then a trial judge can truly weigh the probative versus the prejudice factors required under Rule 403. But when the only basis for admitting the other criminal act is to prove that the acts are similar, then that which makes the evidence prejudicial also makes it probative. No trial judge can then weigh the prejudicial effect versus probative value, especially when the mere similarity proves no element of the crime.

The U.S. Court of Appeals for the Fourth Circuit has recognized the inherit prejudice of introducing evidence of another similar crime for impeachment. In *United States v. Sanders*, [43] the court reversed a conviction for assault with a dangerous weapon with intent to do bodily harm. The charges arose out of a fight between inmates. At the trial the prosecutor introduced evidence of a similar conviction involving another inmate. The Fourth Circuit held the evidence was not admissible as either impeachment evidence under Rule 609 of the Federal Rules of Evidence or under Rule 404(b). In excluding the evidence, the court said that "[e]ven if the district court had explicitly conducted a balancing inquiry before admitting this evidence, we would find the evidence inadmissible under Rule 609(a) because of the high likelihood of prejudice that accompanies the admission of such similar prior convictions." [44] The court also held the same evidence was not admissible as Rule 404(b) evidence. If similar evidence is not admissible for impeachment purposes, it should not be admitted when it serves no probative value.

While many lawyers may claim that their states have the worst "other bad acts" law, Georgia has to be truly the worst. Prior to the 2013 adoption of the new evidence rules, [45] Georgia [46] had an exception to character evidence that admitted such evidence to prove "bent of mind." In *McCullough v. State*, a routine driving while intoxicated case, the Georgia Court of Appeals admitted as showing "bent of mind" another routine driving while intoxicated case. Since the adoption of the new

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[38] 317 S.C. 449, 454 S.E.2d 899 (S.C. Ct. App. 1994).

[39] 317 S.C. at 451,454 S.E. at 901.

[40] To its credit, the South Carolina Court of Appeals did clarify this inconsistency in *State v. Wallace*, 364 S.C. 130, 611 S.E.2d 332 (2005). Unfortunately, the South Carolina Supreme Court reversed that decision in *State v. Wallace*, 683 S.E.2d 275 (2009). Reading the two cases can be educational in understanding the law in this area.

[41] Interestingly, when the *Blanton* case was originally decided on March 7, 1994, it contained this sentence: "However, where a sexual offense is charged, evidence of similar prior sexual acts of sexual misconduct are admissible to establish the identity of the defendant and to show a lewd disposition on his part." Upon a request for rehearing, this sentence was withdrawn, but the conviction was still affirmed.

[42] *See* BROWN, MCCORMICK ON EVIDENCE, *Character and Habit* § 190 (2013); IMWINKELRIED, *Uncharged Misconduct Evidence*, § 3:25,137; WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5244, 499-500; DAVID P. LEONARD, THE NEW WIGMORE: *Evidence of Other Misconduct and Similar Events* § 4.4, 231-32 (2009); MUELLER & KIRKPATRICK, EVIDENCE, *Character Evidence* § 4.15 (3d ed. 2003); *but see* FISHMAN, JONES ON EVIDENCE CIVIL AND CRIMINAL, Common Scheme or Plan § 17:44 (7th ed. 1998).

[43] 964 F.2d 295(1992).

[44] *Id.* at 298.

[45] GA. CODE ANN. § 24-4-404.

[46] 230 Ga. App. 98, 495 S.E.2d 338 (1998).

rules of evidence, the Georgia courts have given some indication they may now reject the "bent of mind" exception. [47] The exception was not included in the new statute.

Sex Crime Exception

Is there a sex crime exception to the rule that "other criminal acts" are not admissible? Congress has basically said there is no such exception. To ensure that such evidence is admissible in a sex crime case, Congress passed Rules 413 and 414 of the Federal Rules of Evidence. Rule 413(a) provides: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." Rule 414(a) similarly provides: "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant." In passing these rules, Congress found "Rule 413 is based on the premise that evidence of other sexual assaults is highly relevant to prove propensity to commit like crimes, and often justifies the risk of unfair prejudice. Congress thus intended that rules excluding this relevant evidence be removed." [48] Some states have also enacted rules specifically admitting other sex crimes for no probative value other than to prove propensity. [49]

Other states, while claiming to adhere to the basic principle that other crimes are not admissible, have admitted other sex crimes on very weak or nonexistent legal grounds. [50] The basis for admitting the evidence of other sex crimes is indeed strange. After stating that the evidence of the other sex crimes did not meet the common scheme or plan exception, the court in *Dejesus* said: "Accordingly, we conclude that evidence of uncharged misconduct properly may be admitted in sex crime cases under the liberal standard, provided its probative value outweighs its prejudicial effect, to establish that the defendant had a tendency or a propensity to engage in certain aberrant and compulsive sexual behavior." [51] Under that standard, how could the prejudice ever outweigh the probative value? To remove any doubt as to how often such evidence would be admitted, the court added the following:

> In balancing the probative value of such evidence against its prejudicial effect, however, trial courts must be mindful of the purpose for which the evidence is to be admitted, namely, "to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity." [52]

As mentioned above, other courts have admitted the evidence of other sex crimes under the "plan" or "common scheme or plan" exception. [53] No court has ever adequately explained how proving a defendant committed a similar sex act is relevant to an element the state has to prove in the case being tried. When weighed against the traditional reason for admitting evidence of other crimes, the prejudice clearly outweighs the probative value in a sex crime case. Proving a defendant committed a similar sex crime is virtually never a fact the state has to prove. "[T]he sex crime exception flouts the general prohibition of evidence whose only purpose is to invite the inference that a defendant who committed a previous crime is disposed toward committing crimes. ..." [54]

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[47] *See Jones v. State*, 757 S.E.2d 261 (Ga. Ct. App. 2014).

[48] 140 Cong. Rec. H8968-01, H8992 (S. Molinari, Aug. 21, 1994).

[49] *See, e.g.*, ALASKA R. EVID. 404; CAL. EVID. CODE § 1108; 725 ILCS 5/115-7.3 (IL); LSA-C.E. Art. 412.2 (La); NEB. REV. STAT. § 27-414.

[50] *State v. Weatherbee*, 158 Ariz. 303, 762 P.2d 590 (1988); *State v. DeJesus*, 288 Conn. 418,954 A.2d 45 (2008); *State v. Bernard*, 849 S.W.2d 10 (Mo. 1993); *State v. Lough*, 125 Wash. 2d 847,889 P.2d 487 (1995).

[51] *DeJesus*, 288 Conn.418,463,954 A.2d 45,73.

[52] *Id.* at 474,954 A.2d at 80.

[53] See *supra* note 30.

[54] BROWN, MCCORMICK ON EVIDENCE, *Character and Habit* § 190 at 1049 (2013).

Other courts have simply admitted the evidence, claiming it comes under an "emotional propensity exception." [55] Such an exception is nothing more than admitting propensity evidence against a defendant, which was prohibited by the common law. The court in *Molineux* recognized the unfairness of this approach:

> It is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most [*35] guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. [56]

The true reason for admitting such evidence in a sex crimes case is the perception that if a person has committed a sex crime in the past, that person is likely to commit one in the future. But this is propensity evidence, which the rules generally prohibit. One court has called into serious question this basic fact. [57] The courts that permit evidence of other sex acts under any theory have ignored the basic principle that the easier the law is made to convict the guilty, the easier the law is made to convict the innocent. The admission of evidence of other sex acts simply turns on its head the bedrock principle of criminal law that "it is better that a hundred guilty men go free than one innocent man suffer an unjust conviction." [58]

Are Sex Crimes Exceptions Constitutional?

If the long history of the exclusion of the evidence of other crimes because of their inherit prejudice is to be upheld, courts should declare these exceptions to be a denial of due process in violation of state constitutions and the U.S. Constitution. Courts have long known and discussed the fact that evidence of other similar crimes is prejudicial and makes the conviction for the crime charged more likely. This lowers the burden of proof placed on the state to something less than beyond a reasonable doubt.

In *State v. Cox*, [59] the Supreme Court of Iowa held the rule that permits evidence of other sex crimes to be unconstitutional: "We hold the Iowa Constitution prohibits admission of prior bad acts evidence involving a different victim when admitted solely for the purpose of demonstrating propensity. Instead, the evidence must be relevant to a 'legitimate issue.'" [60] The opinion contains a discussion of the history of admitting other sex crimes in Iowa. The court further noted that several federal circuits have upheld the constitutionality of Rules 413 and 414 of the Federal Rules of Evidence. [61] In *United States v. Enjady*, [62] the court indicates that Rule 413 is constitutional because of the balancing requirement of Rule 403 and in case of consent, the application of Rule 413 permits a trial court to conduct an adequate weighing of prejudice versus probative value. Without consent being an issue, the balancing required is virtually impossible.

In holding the rule to be unconstitutional, the Iowa Supreme Court relied upon the wording from the U.S. Supreme Court in *Old Chief v. United States*[63] and *Michelson v. United States*. [64] Both cases contain strong language about the prejudice

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[55] *Weatherbee*, 158 Ariz. at 304,762 P.2d at 591.

[56] *Molineux*, 168 N.Y. at 309, 61 N.E. at 301

[57] *State v. Treadway*, 116 Ariz. 163, 167, 568 P.2d 1061,1065 (1977) ("In addition, statistical evidence generally indicates that, in relation to other classes of criminal offenses, sexual offenses as a group have a low rate of recidivism although a few sex offenses have a somewhat higher rate of recidivism than that of sex offenses in general.") Later Arizona cases have ignored these findings. *See State v. Weatherbee*, 158 Ariz. 303,762 P.2d 590(1988).

[58] *Pruitt v. State*, 270 P.2d 351, 362 (Ok. Cr.Ct. App. 1954).

[59] 781 N.W.2d 757 (2010) The opinion contains an excellent discussion of the exceptions to the rule prohibiting the admission of other crimes, especially the common scheme or plan exception.

[60] *Id.* at 762.

[61] *United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998); *United States v. LeMay*, 260 F.3d 1018 (9th Cir. 2001).

[62] 134 F.3d 1427 (10th Cir. 1998).

[63] 519 U.S. 172 (1997).

resulting to the defendant when the government is able to introduce evidence of similar crimes. While not citing a majority opinion, the Cox court quoted former Chief Justice Earl Warren:

> While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. [*36] Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. [65]

Missouri, in declaring unconstitutional a law permitting the introduction of evidence of other sex crimes, relied upon the Missouri Constitution. One provision of the state constitution, common in most states, provides that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information. ..." [66] Another provision provides a defendant has the right "to demand the nature and cause of the accusation. ..." [67] Reading these two provisions together, the court held that "[e]vidence of other crimes, when not properly related to the cause on trial, violates defendant's right to be tried for the offense for which he is indicted. ..." [68]

The state of Washington also declared unconstitutional a rule that permits evidence of other sexual crimes to be admitted, but took a slightly different approach. In *State v. Gresham* [69] the court held the statute admitting other sex acts was unconstitutional under a separation of powers analysis. Two different cases were involved in one appeal. The court affirmed one defendant's conviction, holding the evidence was admissible as a common scheme or plan. The logic of such a ruling is not explained in the opinion. As to Gresham, the other defendant, the court reversed the conviction because the trial judge did not admit the other sex crime evidence as part of a common scheme or plan or any other exception under Rule 404(b).

A detailed analysis of the arguments against the constitutionality of special rules of evidence that permit the introduction of other sex crimes can be found in an article by Drew D. Dropkin and James H. McComas. [70] The authors contend that the Alaska statute permitting the introduction of other sex crimes violates the due process clauses of the Alaska Constitution as well as the U.S. Constitution. Unfortunately, at least as to the court of appeals, the article fell on deaf ears in *Bingaman v. State*, [71] which held the rule constitutional. The Alaska Supreme Court has not addressed the issue.

Defending Against Other Bad Acts

When the legal train is on the wrong track, putting it back on the right track will be difficult. Unless one practices in one of the few states that has good law in this area, keeping out inadmissible evidence will require preparation.

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64 335 U.S. 469 (1948).

65 *Spencer v. Texas*, 385 U.S. 554,572-575 (1967) (Warren, C.J., concurring in part and dissenting in part) (internal citations omitted).

66 MO. CONST. ART. 1, § 17.

67 MO. CONST. ART. 1, § 18(a).

68 *State v. Ellison*, 239 S.W.3d 603, 607 (Mo. 2007); *see also State v. Burns*, 978 S.W.2d 759 (Mo. 1998) (holding a previous version of the statute unconstitutional).

69 173 Wash. 2d 405, 269 P.3d 207 (2012).

70 Drew D. Dropkin & James H. McComas, *On a Collision Course: Pure Propensity Evidence and Due Process in Alaska*, 18 ALASKA L. REV. 177 (2001); *see also* Louis M. Natali Jr. & R. Stephen Stigall, *Are You Going to Arraign His Whole Life?: How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY.U.CHI.L.J. 1,13 (1996).

71 76 P.3d 398 (Ak. 2003).

At trial, unless the evidence is offered under a specific "propensity exception," trial counsel must make the government state under which exception the evidence is being admitted and why the evidence is needed. "All of them" is not an acceptable answer. [72]

Next, trial counsel must ask the following questions: Why is the evidence relevant to prove that exception? Is the evidence essential to the government's case? Why? With enough understanding of the law in this area and enough pointed questions asking the state for the reason the evidence is admissible, one may receive a response like this: "This is technically a credibility case, that's what it is. It's one witness's word against potentially another witness's word. The evidence would be relevant and would be essential to the state's case because it is a piece of evidence, just like any other piece of evidence, that goes to prove or disprove the case. And this is strictly a credibility case. Therefore, this testimony is necessary to, again, prove the victim's allegations." [73] This statement was made by a prosecutor in successfully admitting evidence of a prior sex act. The prosecutor clearly did not perceive the connection between the case on trial and the other bad act. As the court said in *Molineux*, "This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence rejected." [74]

Preparation is the key. Keeping the evidence of other crimes out can often mean the difference between a conviction and an acquittal. Roland B. Molineux certainly learned that fact. At his second trial, without the evidence of the murder of Henry Barnet, he was found not guilty.

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[72] *United States v. Sampson*, 980 F.2d 883 (3d Cir. 1982); *United States v. Mehrmanesh*, 689 F.2d 822 (9th Cir. 1982).

[73] *Wallace*, 364 S.C. at 141,611 S.E.2d at 338, *rev'd State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009).

[74] 168 N.Y. at 306,61 N.E. at 299.

THE SEIBELS LAW FIRM, P.A.

38 Broad Street, Suite 200
Charleston, South Carolina 29401

843.722.6777
fax 843.722.6781

February 4, 2015

Via U.S. Mail and Email
Jenny Abbot Kitchings
Clerk of Court
P.O. Box 11629
Columbia, SC 29211
jkitchings@sccourts.org

RE: State of South Carolina v. Venancio Diaz Perez
Court of Appeals Case No.: 2013-000179
Our File No.: 79-915

Dear Ms. Kitchings:

Pursuant to Rule 208(b)(7), SCACR, please find attached the following supplemental authority: Rauch Wise, *Roland B. Molineux and his Illegitimate Offspring: The History and Mystery of 404(b)*, 38 Champion 28 (July/August 2014). This citation bears upon Issue I and Argument I in Appellant's Brief. It is provided now because it was not available at the time the Appellant's Briefs were prepared and Appellant's counsel only obtained a copy today.

Should you have any questions or require further information, please do not hesitate to contact me.

With kind personal regards I remain

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FEB 09 2015
SC Court of Appeals

Sincerely yours,

SEIBELS LAW FIRM, P.A.

Jason Scott Luck

/JSL
Enclosures

cc: Salley Elliott, counsel for Respondent (w/enc) (via U.S. Mail and email)
Robert Dudek, co-counsel for Appellant (w/enc) (via U.S. Mail and email)

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