#2017-011

Carolyn Koegler, Secretary
Advisory Committee on Rules
New Hampshire Supreme Court
One Charles Doe Drive
Concord, N.H. 03301

November 6, 2017

Re: Proposed Change to Rule of Evidence 404(b)

Dear Secretary Koegler:

I write in my capacity as a Deputy Director of the New Hampshire Public Defender and an Appellate Defender attorney, in response to the proposed amendment to Rule of Evidence 404(b). In addition, Charles Keefe, President of the New Hampshire Association for Criminal Defense Lawyers, has reviewed this letter and has co-signed it on behalf of the Association.

An email dated October 23, 2017 described the proposed amendment to Rule 404(b) as follows:

> IX. 2017-011. New Hampshire Rule of Evidence 404(b).
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> This proposed amendment would codify the three-part test adopted by the New Hampshire Supreme Court for admitting evidence under Rule 404(b), but would change the second prong of the test. The second prong currently requires "clear proof" that the person committed the other crime, wrong or act. This proposed amendment would change the second prong to adopt the federal standard.[1]

After reviewing the email, I looked at the Committee materials on the Rule 404(b) proposal. I saw a memorandum dated June 26, 2017, written by Attorney David Peck, and an email dated September 14, 2017, written by Judge Delker.

Attorney Peck states that the FRE do not require the trial court to make a threshold determination with respect to Rule 404(b) evidence, and concludes that the New Hampshire rule should be modified accordingly. Judge Delker concurs, though he notes that "[Superior Court Chief] Judge Nadeau expressed some reservations [with respect to Attorney Peck's proposal]." While the rule change notice does not set forth the language of the new rule, Attorney Peck's memo suggests that the bad acts evidence be admitted "if there is sufficient

[1] Federal Rule of Evidence (FRE) 404(b) sets forth no standard of proof. As discussed below, the standard derives from a United States Supreme Court case.

evidence to support a finding by the jury that the defendant committed the similar act."

The "clear proof" prong predates the adoption of the Rules of Evidence. It was incorporated into the test for admissibility under Rule 404(b) by the New Hampshire Supreme Court. The test has not proven unworkable or burdensome. It is part of the protection afforded criminal defendants before prior bad acts evidence is admitted at trial. A survey of state law reveals a split of authority as to the requisite standard of proof, with many states employing a "clear proof" test like New Hampshire's. Moreover, while the Committee recently amended many rules of evidence to accord with the federal rules, it determined that Rule 404(b) should not be modified.

For these reasons, the Public Defender respectfully disagrees with the proposal to eliminate the "clear proof prong" of the Rule 404(b) admissibility test and replace it with a "sufficient evidence" standard.

New Hampshire Law

As Judge Delker's email states, the first reference to a clear proof standard as applicable to the admission of bad acts evidence was in State v. Barker, 117 N.H. 543 (1977), which predates adoption of the rules of evidence. In Barker, the Court stated that before admitting bad acts evidence, "[t]he judge must determine that the evidence is relevant for a purpose other than showing the character or disposition of the defendant, that the proof that the acts in question were committed by the defendant is clear, and that the probative value of the evidence outweighs the danger of prejudice to the defendant." Id. at 546.

In State v. Hickey, 129 N.H. 53 (1986), the Court incorporated the Barker test into the rule. "Barker was decided under common law, but the determinations required therein are also required under Rule 404(b)." Hickey, 129 N.H. at 60. Thus, the "clear proof" prong has been part of the Rule 404(b) test for over thirty years.

The Court has held that "[t]he 'clear proof' requirement 'is satisfied when the State presents evidence firmly establishing that the defendant, and not some other person, committed the prior act.'" State v. Howe, 159 N.H. 366, 377 (2009) (quoting State v. Ayer, 154 N.H. 500, 512-13 (2006)). It has held that due process does not require the trial court to hold an evidentiary hearing on the issue of whether the State has presented "clear proof." State v. Haley, 141 N.H. 541, 543-45 (1997). In one published case, the Court reversed a conviction because the trial court erred in its "clear proof" determination. State v. Michaud, 135 N.H. 723, 728 (1992). In other cases, the Court upheld the trial court's ruling that the "clear proof" prong was satisfied. See, e.g., State v. Ericson, 159 N.H. 379, 388-89 (2009) (State's offer of proof was sufficient);

State v. Berry, 148 N.H. 88, 92 (2002) (Court found "clear proof" based on the appellate record); State v. Lesnick, 141 N.H. 121, 127 (1996) (upholding finding based on statements of deceased victim and testimony of witnesses); Michaud, 135 N.H. at 728 (citing six cases in which the Court found "clear proof").

The "clear proof" prong is neither unworkable nor unduly burdensome. As described further below, many states employ a similar standard. Trial judges have discretion with respect to how to administer the "clear proof" prong, including the ability to order a pretrial evidentiary hearing if it is appropriate, or to proceed by offers of proof. There is no cause to promulgate a rule amendment that eliminates the "clear proof" test.

Attorney Peck and Judge Delker suggest that the "clear proof" prong wrongly places the trial judge in the position of deciding whether evidence is sufficiently credible. However, the Court has held that it is, at times, appropriate for the trial court to render a credibility determination before admitting evidence. See State v. Addison, 165 N.H. 381, 493 (2013) ("The court reasoned that [i]f evidence is not relevant and reliable, it is not probative. . . . To determine the probative value or risk of unfair prejudice associated with any information, th[e] court must consider its reliability.'") (Citation and quotation omitted); State v. White, 145 N.H. 544, 549 (2000), vacated and remanded by White v. Coplan, 399 F.3d 18 (1st Cir. 2005) ("The trial court . . . must make an initial determination of credibility or else risk admitting evidence of prior allegations without a showing that they are demonstrably false, resulting in a 'trial within a trial' and confusing the jury."). If needed, the trial court thus may consider credibility in making a "clear proof" determination.

Finally, Attorney Peck and Judge Delker did not address the difference between federal and New Hampshire law. In adopting FRE 404(b), "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." Huddleston v. United States, 485 U.S. 681, 688-89 (1988); see also United States v. Record, 873 F.2d 1363, 1375 (10th Cir. 1989) (Congress adopted inclusive approach to admission of bad acts evidence). In New Hampshire, however, "Rule 404(b) is a prime example of an internal procedural rule designed to effectuate a constitutional right." Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562, 574 (1997); see also id. at 577 ("Due process is a substantive right grounded in the constitution, and Rule 404(b) is a method by which the right is enforced."); State v. Melcher, 140 N.H. 823, 827 (1996) (holding that Rule 404(b) reflects "long-established notions of fair play and due process, which forbid judging a person on the basis of innuendos arising from conduct which is irrelevant to the charges for which he or she is presently standing trial.") (Quotation omitted). To the extent that the proposed rule change makes it easier to admit Rule 404(b) evidence, the change is inconsistent with long-standing New Hampshire law.

Federal Law

In Huddleston, the Court held that due process does not require a trial judge to determine by a preponderance of the evidence that a prior bad act occurred before admitting it. Id. at 689.[2] Nonetheless, the court must perform an analytically similar exercise: to examine all the evidence, and determine whether a jury could, by a preponderance of the evidence, find that the bad act occurred. Id. at 690. This resembles the test that courts apply when assessing a motion to dismiss based on sufficiency of the evidence, except the court determines whether a rational jury could make the requisite finding by a preponderance of the evidence, rather than beyond a reasonable doubt.

Attorney Peck suggests that Rule 404(b) be amended to provide that the court admit bad acts evidence "if there is sufficient evidence to support a finding by the jury that the defendant committed the act." There are three problems with this language. First, Huddleston contemplates that the court ensure the jury could make the finding by a preponderance of the evidence that the defendant committed the act. Attorney Peck's proposal incorporates no burden of proof. Second, whether the defendant committed the act necessarily encompasses both his identity as the actor, and the facts comprising the act. The proposal ignores the second part of the inquiry. Third, as discussed above, the proposal fails to account for the difference between the federal and state rules, a difference that weighs against grafting a federal standard onto established state law.

State Law

In determining whether to adopt language that eliminates the "clear proof" prong, the Committee should consider other states' approaches. Several states have chosen to follow Huddleston.[3] Note: Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation, 40 Fordham Urb. L.J. 1493, 1510-11

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[2] The New Hampshire Supreme Court has never addressed this question. However, it has held that the three-pronged test, which includes the "clear proof" prong, reinforces the defendant's due process right to a fair trial. Opinion of the Justices, 141 N.H. at 577; Melcher, 140 N.H. at 827.

[3] Despite Huddleston, not all federal courts are consistent in how they administer the Rule 404(b) test. The Eighth Circuit employs a four-part test which requires proof of the act by a preponderance of the evidence. United States v. Lakosky, 462 F.3d 965, 979-80 (8th Cir. 2006). The Ninth Circuit cites the "sufficient evidence" standard suggested by Attorney Peck. United States v. Bailey, 696 F.3d 794, 799 (9th Cir. 2012). Other circuits contemplate that the court determine whether the jury could conclude by a preponderance that the other act was committed. See, e.g., United States v. Anderson, 933 F.2d 1261, 1269 (5th Cir. 1991) (judge must determine whether jurors could reasonably conclude by a preponderance that defendant committed acts).

(2013) (listing nineteen states).[4] Including New Hampshire, sixteen states require the court to make a preliminary finding with respect to the act of clear and convincing evidence. Id. at 1512-13. Texas requires the court to make a preliminary finding of beyond a reasonable doubt. Id. at 1512. Four states require a preliminary finding by a preponderance of the evidence. Id. at 1513. The fact that half the states employ a procedure similar to New Hampshire's supports the Public Defender's position that there is no need to change the test.

Prior Rules Amendments

As the Committee knows, based on an extensive study by the NHRE Update Committee, the Court has adopted dozens of changes to the rules of evidence. Many changes were stylistic and intended purely to adopt wording consistent with the FRE. The preamble to the rules makes clear that "[w]here the rule amendments are stylistic only, they are not intended to change existing case law that has developed under the rule. In interpreting the rules, New Hampshire case law has primacy over federal case law." Some changes were substantive. See, e.g., N.H. R. Ev. 103(b) (changed to mirror federal rule); N.H. R. Ev. 804(b)(6) (adopting federal rule admitting statements where defendant caused declarant's unavailability). In some instances, the Committee declined to change a rule because New Hampshire law is different from federal law. See, e.g., N.H. R. Ev. 201 (judicial notice); N.H. R. Ev. 301 (presumptions); N.H. R. Ev. 412 (prior sexual activity); N.H. R. Ev. 501-512 (privileges).

The Committee also declined to change Rule 404(b). See 2016 NHRE Update Committee Note to Rule 404(b) ("No change was made to New Hampshire Rule of Evidence 404 to mirror the federal rule."). It did not make any change "[b]ecause New Hampshire has a body of case law that has clarified and limited this rule as applied in New Hampshire. . . ." Id. The Note is accurate. Nothing has changed in the months that have passed since the Committee decided not to amend Rule 404(b).

Conclusion

The "clear proof" prong was part of the Rule 404(b) admissibility test before the Rules of Evidence were promulgated. It has not proven unworkable,

[4] The Note observes that these states either agree with Huddleston's rationale or cite a "desire for uniformity" with the FRE. Id. at 1511. The Court's Rule 404(b) precedent does not signal agreement with Huddleston. Despite the Update Committee's desire for a degree of uniformity with the FRE, as embodied in the recent stylistic and substantive changes to the rules, this Committee made no change to Rule 404(b).

and it is not inconsistent with the tests employed by many other states. Given that the Rule 404(b) test, including the "clear proof" prong, is ingrained in New Hampshire jurisprudence, the decision as to whether the test is to be altered or rejected is best left to the Court if the issue arises in an appeal.

For the reasons stated in this letter, the Public Defender recommends that the Committee decline to adopt the proposed amendment to Rule 404(b). The New Hampshire Association of Criminal Defense Lawyers joins in this request.

Respectfully Submitted,

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