

# **STATE V. AGUILAR: EXPANDING ARIZONA’S EMOTIONAL PROPENSITY EXCEPTION TO THE PROHIBITION AGAINST OTHER ACTS EVIDENCE IN SEXUAL ASSAULT CASES**

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## **I. FACTS**

David Heran Aguilar was tried for sexually assaulting three women between November 9, 1999 and May 10, 2001.<sup>1</sup> A Maricopa County grand jury indicted Aguilar in a single indictment for sexual assaults against four women; the charges relating to one victim were dropped before trial.<sup>2</sup> The trial court permitted joinder of the charged offenses under Arizona Rule of Criminal Procedure 13.3(a)(1) and Arizona Rule of Evidence 404(c).<sup>3</sup> After a single trial, a jury convicted him on three counts of kidnapping, four counts of sexual assault, and two counts of sexual abuse.<sup>4</sup> Aguilar appealed the convictions and the Arizona Court of Appeals reversed, holding that, because 404(c) was applied incorrectly in Aguilar’s case, the trial court had improperly joined the charged offenses. The State then appealed to the Arizona Supreme Court where the court, sitting en banc, vacated the decision of the court of appeals in part, reversed Aguilar’s convictions and sentences, and remanded the matter to the trial court for further proceedings.<sup>5</sup>

## **II. BEFORE STATE V. AGUILAR—MCFARLIN AND TREADAWAY**

Arizona Rule of Evidence 404(b) renders “evidence of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith” inadmissible, unless the evidence falls within the exception provided in 404(c).<sup>6</sup> Rule 404(c) was added to the Arizona Rules of Evidence by

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1. State v. Aguilar, 97 P.3d 865, 866 (Ariz. 2004).
  2. *Id.*
  3. *Id.*
  4. *Id.*
  5. *Id.* at 867, 878.
  6. ARIZ. R. EVID. 404.

amendment in 1997.<sup>7</sup> In the comment to the 1997 amendment, Rule 404(c) is described as a codification of and foundation for applying the common law rules established by the Arizona Supreme Court in *State v. McFarlin*<sup>8</sup> and *State v. Treadaway*.<sup>9</sup> Despite the comment to Rule 404(c), the language of the Rule itself changed important parts of the common law rules established in *McFarlin* and *Treadaway*. However, the case law from 1997 until *State v. Aguilar* borrowed more from those common law rules than from the new rule of evidence.<sup>10</sup> Although Rule 404(c) has been in effect since 1997, *State v. Aguilar* is the first case that parses out the changes to the *McFarlin* and *Treadaway* rules.<sup>11</sup>

### III. MCFARLIN'S PROPENSITY FOR SEXUAL ABERRATION EXCEPTION

Thomas McFarlin was convicted of child molestation based, in part, on evidence admitted at trial that showed McFarlin had molested children on four other occasions between May 1970 and July 1970.<sup>12</sup> Based on the existing statutory framework and Pre-McFarlin case law, this evidence would have been inadmissible; but the Arizona Supreme Court, in *McFarlin*, recognized “that in addition to the usual exceptions there is in cases involving the charge of sexual aberration the additional exception of emotional propensity.”<sup>13</sup> After refining the limits of the “emotional propensity” exception, the court narrowly limited it to cases involving “abnormal sex acts such as sodomy, child molesting, [and] lewd and lascivious” acts.<sup>14</sup> In addition, the court included the requirement that the other acts be similar in nature and close in temporal proximity to the offense charged.<sup>15</sup> The court reasoned that because of the secretive nature of sex crimes, evidence of prior, similar, abnormal sexual acts can be relevant and not unduly prejudicial to the defendant.<sup>16</sup> Under the *McFarlin* rule, however, the emotional propensity exception was not available in cases of heterosexual sexual assault in which

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7. Adam Kargman, Note, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 and 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963, 982 (1999).

8. *State v. McFarlin*, 517 P.2d 87 (Ariz. 1973).

9. *State v. Treadaway*, 568 P.2d 1061 (Ariz. 1977).

10. *State v. Aguilar*, 97 P.3d 865 (Ariz. 2004).

11. *See Aguilar*, 97 P.3d at 872 (noting that after the adoption of 404(c), other act evidence may be admitted in offenses other than those listed in *McFarlin*, in direct conflict with the holding of the court of appeals in *Aguilar*).

12. *McFarlin*, 517 P.2d at 88.

13. *Id.* at 90.

14. *Id.* at 90.

15. *Id.* at 90–91. For example, in the *McFarlin* case the other acts evidence consisted of four other incidences of child molestation, which occurred between May 1970 and July 1970. The Arizona Supreme Court found that these acts occurred close enough in time to the charged offense of July 26, 1970 and were similar enough in nature to qualify for the emotional propensity exception. *Id.* at 88, 90.

16. *Id.* at 90.

consent was the only issue because “the fact that one woman was raped is not substantial evidence that another did not consent.”<sup>17</sup>

#### IV. TREADAWAY’S MANDATE OF EXPERT TESTIMONY WHERE TEMPORAL PROXIMITY OR SIMILAR NATURE OF ACTS IS IN QUESTION

John Treadaway was tried and convicted of the sodomy and first-degree murder of a six-year-old boy.<sup>18</sup> The “other act” evidence introduced at Treadaway’s trial fell within the *McFarlin* definition of an abnormal or aberrant act, but was dissimilar from the incident charged and took place three years earlier.<sup>19</sup> In response to the dissimilarity, the Arizona Supreme Court held that expert testimony can preserve the emotional propensity exception for abnormal sexual acts even where the other act is either dissimilar or remote in time.<sup>20</sup>

During Treadaway’s retrial, an additional incident, referred to as the “Brown Incident,”<sup>21</sup> was introduced by the prosecution, and its admissibility was a subject of an appeal during the proceedings.<sup>22</sup> This incident, because it was similar to the incident charged and very close in time, was not subject to the requirement of expert medical testimony.<sup>23</sup> (*Treadaway*, despite adding one requirement to *McFarlin*’s rule, ultimately left it intact.) After *Treadaway*, the rule remained that where “the offense charged involves the element of abnormal sex acts . . . there is sufficient basis to accept proof of similar acts near in time to the offense charged as evidence of the accused’s propensity to commit such perverted acts.”<sup>24</sup>

Although “Arizona Rule 404(c) displaces state common law,”<sup>25</sup> courts continued to use the *McFarlin* and *Treadaway* rules without expanding to the full limits of what 404(c) would allow.<sup>26</sup> Before 404(c) was adopted, the emotional propensity exception for prior bad acts “was usually limited to prosecutions for

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17. *Id.* (referring to a decision by the Fourth Circuit Court of Appeals in *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948)), which refused to admit evidence of previous heterosexual sexual assaults in a rape case where consent is the only issue).

18. *State v. Treadaway*, 568 P.2d 1061, 1061 (Ariz. 1977).

19. *Id.* at 1063, 1065.

20. *Id.* at 1065.

21. *State v. Corcoran*, 583 P.2d 229, 231 (Ariz. 1978). The “Brown Incident” occurred on May 31, 1974, only three months prior to the incident for which Treadaway was convicted. On the morning of May 31, Mrs. Brown discovered a nude male strangling her son in his bedroom. The attacker fled out the open window when discovered. *Id.* at 231.

22. *Id.*

23. *Id.* at 233.

24. *Treadaway*, 568 P.2d at 1064.

25. Kargman, *supra* note 7, at 985.

26. *See, e.g., Feld v. Gerst*, 66 P.3d 1268 (Ariz. App. 2003), *depublished mem.*, 75 P.3d 1075 (Ariz. 2003) (adopting an interpretation of 404(c) as a codification of *McFarlin* and *Treadaway* and refusing to expand the definition of “aberrant sexual propensity” beyond the *McFarlin* definition in the case of a man accused of the sexual abuse, assault, and kidnapping of an adult woman). *Feld v. Gerst* is the case upon which the Court of Appeals relied when it overturned Aguilar’s conviction. *State v. Aguilar*, 97 P.3d 865, 867 (Ariz. 2004).

sexual activity with children.”<sup>27</sup> *State v. Day* was the only case that seemed to blur the line before 1997.<sup>28</sup>

### V. RULE 404(C)’S EFFECT ON THE EMOTIONAL PROPENSITY EXCEPTION

Under Rule 404(c), the emotional propensity exception is first broadened for use in all sexual offense cases as defined by Arizona Revised Statute Section 13-1420(C).<sup>29</sup> In addition, there are three specific findings that a court must make before prior bad acts evidence is admitted under 404(c).<sup>30</sup> The three requirements are the evidence of the prior bad act must be “sufficient to permit the trier of fact to find that the defendant committed the act;”<sup>31</sup> the “commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged;”<sup>32</sup> and the court undertakes a Rule 403 balancing test to determine whether the value of the other act will be outweighed by “danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403.”<sup>33</sup> In addition, the Rule lists a number of factors which are to be taken into account in the Rule 403 analysis, but which are no longer necessary prerequisites to application of the exception as they were under *McFarlin*.<sup>34</sup>

### VI. ANALYSIS OF *STATE V. AGUILAR*

David Aguilar was indicted for sexually assaulting four women between November 9, 1999 and May 10, 2001; charges brought by one of the women were dropped before trial.<sup>35</sup> Because Aguilar admitted to having sexual contact with the three victims whose charges were brought to trial, the only issue left at trial was consent.<sup>36</sup> After a single trial, Aguilar was convicted on three counts of

27. Kargman, *supra* note 7, at 985. See, e.g., *State v. Roscoe*, 910 P.2d 635 (Ariz. 1996) (applying emotional propensity exception to prosecution for molestation, kidnapping, and murder of seven-year-old); *State v. Salazar*, 887 P.2d 617 (Ariz. App. 1994) (applying exception for attempted molestation of defendant’s thirteen-year-old niece); *State v. Varela*, 873 P.2d 657 (Ariz. App. 1993) (applying exception in prosecution for sexual exploitation of a minor and solicitation of child molestation).

28. 715 P.2d 743 (Ariz. 1986). In *State v. Day* other acts evidence in the case of a man who sexually assaulted adult women was held to fall within the *McFarlin* rule. This is the only case in which *McFarlin* was successfully applied to a heterosexual sexual assault where the sole issue was consent. See *Id.* at 747.

29. ARIZ. R. EVID. 404(c)(4).

30. *Aguilar*, 97 P.3d at 871.

31. ARIZ. R. EVID. 404(c)(1)(A).

32. *Id.* 404(c)(1)(B).

33. *Id.* 404(c)(1)(C).

34. *Id.* 404(c)(1)(C)(i)–(viii). Under the *Treadaway* analysis “remoteness of the other act” and “similarity or dissimilarity of the other act” had to be present in order to admit the evidence without expert testimony. *State v. Treadaway*, 568 P.2d 1061, 1066 (1977).

35. *Id.* at 866.

36. *Id.*

kidnapping, four counts of sexual assault, and two counts of sexual abuse.<sup>37</sup> Aguilar appealed his convictions and the Arizona Court of Appeals reversed and remanded.<sup>38</sup> The appellate court reasoned that because the sexual conduct charged was not “abnormal or remarkable,” the evidence of each incident was not cross-admissible as other acts evidence under 404(c); therefore, the trial court should have granted Aguilar’s motion to sever the charges with respect to each victim.<sup>39</sup> The State appealed the reversal on the basis that 404(c) should not limit the “sexual propensity exception . . . to child molestation cases or those involving ‘highly unusual sex acts.’”<sup>40</sup> The Arizona Supreme Court granted review to clarify what other acts and sexual offenses are covered under Rule 404(c).<sup>41</sup>

In its decision, the Arizona Supreme Court examined the previous common law rules from *McFarlin* and *Treadaway*, but distinguished them from the new Rule 404(c). The court noted that “courts generally interpreted the emotional propensity exception as applying only to crimes of child molestation, sodomy, and lewd and lascivious conduct.”<sup>42</sup> However, the comment to Rule 404(c) made clear that the Rule—which was adopted as a compromise<sup>43</sup> after the controversial amendment to the Federal Rules of Evidence in 1994 that added Rules 413 and 415<sup>44</sup>—was intended to replace the common law rules and provide an analytical framework for the sexual propensity exception.<sup>45</sup> In *Aguilar*, the Arizona Supreme Court stated that under the plain language of 404(c), “the types of sex offenses for which other act evidence may be admitted are no longer restricted to those offenses listed in *McFarlin*.”<sup>46</sup> Rule 404(c) directly states that it applies to sex offenses listed under Arizona Revised Statute Section 13-1420(C), which includes child molestation but also includes sexual assault on adults.<sup>47</sup>

In addition, the Arizona Supreme Court took time to differentiate the *McFarlin* rule from that established in 404(c) as proof of the fact that “404(c) did not merely codify the rule announced in *McFarlin*.”<sup>48</sup> In *McFarlin*, the rule rested on the aberrant or abnormal nature of the other sexual act offered into evidence.<sup>49</sup> However, under Rule 404(c) the question becomes whether the other act evidence leads “to a reasonable inference that the defendant had a character trait that gives rise to an aberrant sexual propensity to commit the charged sexual offense.”<sup>50</sup> Although the difference here is slight, the impact is important. Under Rule 404(c), as interpreted by the Arizona Supreme Court in *Aguilar*, the other act evidence

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37. *Id.*  
38. *Id.*  
39. *Id.* at 867.  
40. *Id.*  
41. *Id.*  
42. *Aguilar*, 97 P.3d at 870.  
43. *Id.* at 871.  
44. *Id.* at 870.  
45. ARIZ. R. EVID. 404(c), cmt. to 1997 amend.  
46. *Aguilar*, 97 P.3d at 872.  
47. *Id.*  
48. *Id.* at 873.  
49. *Id.*  
50. *Id.*

does not have to be “aberrant” or “abnormal” sexual behavior as long as it leads one to believe that the defendant has an aberrant propensity to commit a certain sexual offense.<sup>51</sup>

The Arizona Supreme Court, applying Rule 404(c), concluded that the evidence of the sexual offenses met the threshold test and could be cross-admissible if the trial court found that the other requirements of Rule 404(c) were satisfied.<sup>52</sup> The court reversed Aguilar’s conviction based on the fact that the State had not met its burden of showing by clear and convincing evidence that the other sexual offenses were committed.<sup>53</sup> In order for the evidence to have been cross-admissible, the State needed to show, by clear and convincing evidence, that Aguilar committed the other sexual offenses without consent.<sup>54</sup> Because the materials relied upon by the trial court contained none of the victims’ statements, there was not enough evidence for the trial court to properly make that finding.<sup>55</sup> The Arizona Supreme Court held that “Aguilar was entitled to severance as a matter of right” and that the denial of his motion to sever was reversible error.<sup>56</sup> The court vacated the decision of the court of appeals in part, reversed the convictions and sentences of the trial court, and remanded the matter for further proceedings.<sup>57</sup>

## VII. RULE 404(C) AFTER AGUILAR

The effect that *Aguilar* will have on subsequent sexual assault cases is relatively straightforward: other acts evidence will now be more widely admissible for all types of sexual offenses as defined in Arizona Revised Statute section 13-1420(C). The *McFarlin* rule that restricted the use of other acts evidence largely to child molestation cases is now expanded with the adoption and subsequent interpretation of Arizona Rule of Evidence 404(c). However, Rule 404(c) should not be mistaken for a twin to the expansive Federal Evidence Rules 413 and 415.<sup>58</sup> Those two rules are not subject to the same judicial determinations that Rule 404(c) demands.<sup>59</sup>

As a result of the precise drafting of Rule 404(c) and the explicit test that it sets forth, the admission of other acts evidence in sexual offense cases is likely to be expanded in a way that is commensurate with the interests of justice.<sup>60</sup>

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51. *Id.* at 873.

52. *Id.* at 874.

53. *Id.* at 875.

54. *Id.*

55. *Id.* at 874–75.

56. *Id.* at 876.

57. *Id.*

58. Kargman, *supra* note 7, at 986 (detailing the differences between 404(c) and Federal Evidence Rules 413 and 415).

59. *Id.* at 985.

60. ARIZ. R. EVID. 404(c)(1)(C). For example, the Rule 403 balancing test gives more direction to the courts than the Federal Rules 413 and 415 provide. A list of important factors gives more leeway to judges to admit evidence that did not meet similarity of time requirements of *McFarlin* and *Treadaway*, as long as the evidence would not be unfairly prejudicial under Rule 403. Kargman, *supra* note 7, at 986–87.

Although Rule 404(c) has been in effect since 1997, the *McFarlin* and *Treadaway* rules appeared to still govern the threshold analysis of the emotional propensity exception. The Arizona Supreme Court has now clarified that, as long as the other requirements are met, sexual propensity “other acts” evidence is admissible in cases of sexual assault on adult victims in which consent is the only issue, a proposition clearly eschewed in *McFarlin*.<sup>61</sup>

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61. State v. McFarlin, 517 P.2d 87, 90 (Ariz. 1973).