



IN THE SUPREME COURT OF ALABAMA

March 3, 2023

ORDER

IT IS ORDERED that Rule 404(b), Alabama Rules of Evidence, be amended to read in accordance with Appendix A to this order;

IT IS FURTHER ORDERED that the Advisory Committee's Notes to Amendment to Rule 404(b) Effective May 1, 2023, be adopted to read in accordance with Appendix B to this order;

IT IS FURTHER ORDERED that the amendment to Rule 404(b) and the adoption of the Advisory Committee's Notes thereto are effective May 1, 2023; and

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 404:

"Note from the reporter of decisions: The order amending Rule 404(b), Alabama Rules of Evidence, and adopting the Advisory Committee's Notes thereto, effective May 1, 2023, is published in that volume of *Alabama Reporter* that contains Alabama cases from __ So. 3d."

Parker, C.J., and Shaw, Wise, Bryan, Sellers, Stewart, and Cook, JJ., concur.

Mendheim and Mitchell, JJ., dissent.

Witness my hand and seal this 3rd day of March, 2023.

Megan B. Rhodeseuk

**Clerk of Court,
Supreme Court of Alabama**

**FILED
March 3, 2023
Clerk of Court
Supreme Court of Alabama**



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APPENDIX A

Rule 404(b), Ala. R. Evid.

(b) Other Crimes, Wrongs, or Acts.

(1) *Prohibited Uses.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) *Permitted Uses.* This evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(3) *Notice in a Criminal Case.* In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial -- or in any form during trial if the court, for good cause, excuses lack of pretrial notice.



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APPENDIX B

Advisory Committee's Notes to Amendment to Rule 404(b) Effective May 1, 2023

Rule 404(b) has been amended to keep this rule consistent with the corresponding federal rule, which was amended in 2020. The rule as amended imposes additional notice requirements on the prosecution in a criminal case when Rule 404(b) evidence is offered.

The notice provision of Rule 404(b) has been changed in several ways: First, subpart (3)(A) requires the prosecution to provide reasonable notice of Rule 404(b) evidence that the prosecution intends to offer at trial so that the defendant has a fair opportunity to meet it. Before this amendment, prosecutors were required to disclose only the "general nature" of Rule 404(b) evidence, which was not a tough burden to meet. Because prosecutors were not required to disclose the specific details of the Rule 404(b) evidence, the notice often provided very little benefit to defendants. Under the amended rule, prosecutors should describe the specific Rule 404(b) evidence intended to be offered with sufficient detail so the defendant can adequately prepare to respond to such evidence.

Second, subpart (3)(B) requires the prosecution to identify the "nonconformity" purpose for which the Rule 404(b) evidence is being offered and to explain how the evidence is relevant to prove that purpose. Notice that simply provides a "laundry list" of the permitted purposes listed in Rule 404(b)(2) with no explanation as to how the evidence is relevant for each of those purposes is not sufficient.

Third, part (3)(C) requires that pretrial notice of a prosecutor's intent to use Rule 404(b) evidence be in writing. As stated by the Advisory Committee that recommended the 2020 amendments to the corresponding federal rule, "[r]equiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided." Advisory Committee Notes to 2020 Amendments to Rule 404(b), Fed. R. Evid.



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Fourth, subpart (3)(C) also requires notice to be provided before trial in sufficient time to allow the defendant a fair opportunity to meet the evidence. Similar notice provisions are found in other rules. See, e.g., Ala. R. Evid. 609(b) (containing notice requirement for offering evidence of convictions that are more than 10 years old for impeachment purposes); Ala. R. Evid. 902(11) (containing notice requirement when using affidavit or sworn testimony to authenticate domestic records of regularly conducted activity). The Advisory Committee that recommended the 2020 amendments to the corresponding federal rule stressed the importance of advance notice as follows, which applies equally to the amendment to Ala. R. Evid. 404(b):

"Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied -- even in cases in which a final determination as to the admissibility of the evidence must await trial. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. See, e.g., *United States v. Lopez-Gutierrez*, 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez Tosta*, 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

"The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a [nonconformity] purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial."



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Advisory Committee Notes to 2020 Amendments to Rule 404(b), Fed. R. Evid.

Fifth, "the amendment eliminates the requirement that the defendant must make a request before notice is provided." *Id.* Thus, the prosecution now has an affirmative obligation to provide the Rule 404(b)(3) notice.

Finally, Alabama law has long provided that "[t]he pretrial notice requirement remains obligatory upon the prosecution even when it intends to offer the collateral crimes, wrongs, or acts under theories other than Rule 404(b), such as for impeachment or rebuttal." 1 C. Gamble et al., *McElroy's Alabama Evidence* § 69.02(9) (7th ed. 2020). See *Ex parte Lawrence*, 776 So. 2d 50, 53 (Ala. 2000). Nothing in this amendment is intended to affect this interpretation of the prosecution's notice requirements.