

[CAPTION]

**DEFENDANT'S REQUEST FOR PRETRIAL HEARING CONCERNING
ADMISSIBILITY OF OTHER MISCONDUCT EVIDENCE**

The Defendant, by counsel, respectfully requests a pretrial hearing concerning the admissibility of other misconduct evidence. In support of the Request, the Defendant states the following:

1. Counsel for the Defendant has reason to believe that the State of Indiana may seek to admit at the trial of this cause, evidence of certain alleged other misconduct by the Defendant.

2. Ind.R.Evid. 404(b) provides in relevant part that: “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” “This rule prevents the State from punishing people for their character.” Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003).

3. Moreover, the State is required, upon request by the accused, to provide reasonable notice in advance of trial of the general nature of any prior misconduct evidence it intends to introduce at trial. Ind.R.Evid. 403. The Defendant [is requesting or has requested] notice of the prior misconduct evidence of all witnesses.

4. Ind.R.Evid. 403 provides in relevant part that: “[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.”

5. In determining the admissibility of extrinsic act evidence under Evidence Rule 404(b), the courts must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person’s propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403. Bassett v. State, 795 N.E.2d 1050 (Ind. 2003).

6. Moreover, the State must be able to prove by a preponderance of the evidence that the Defendant committed the prior misconduct. Camm v. State, 908 N.E.2d 215 (Ind. 2009).

7. In order to determine the general nature of the State's anticipated prior misconduct evidence and whether the anticipated evidence of the State fits within the requirements for its admissibility and conduct the required balancing test, a hearing prior to trial should be conducted.

8. Due to the potentially overwhelming prejudicial impact of bad character evidence on the jury that can result in a fundamentally unfair trial, it is important for both parties to understand what prior acts are inadmissible in order to instruct witnesses accordingly and avoid a mistrial. Clausen v. State, 622 N.E.2d 925 (Ind. 1993) (a motion in limine should be used as protective order against prejudicial questions and statements being asked during trial).

9. Failure to order the State to notify defense counsel in advance of trial as to specifics of the prior acts it intends to offer at trial and failure to conduct an evidentiary hearing will result in the denial of due process, the right to effective assistance of counsel, the right to present evidence, and the right to adequate appellate review, as guaranteed by the United States Constitution, Amendments Six, Eight, and Fourteen, and the Indiana Constitution, Article I, Sections 12, 13, 16, 18, 18 and Article VII, Section 6.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to set a hearing, prior to trial and at the Court's earliest convenience, to address the issues raised above and determine the admissibility of the anticipated other misconduct evidence, and for all other relief just and proper in the premises.

CASE LAW

State v. Lovett, 943 N.E.2d 409, 412 (Ind.Ct.App. 2011) (the function of a motion in limine is to protect against potential prejudicial matter coming before the jury until the trial court has an opportunity to rule upon its admissibility in the context of the trial itself).

Guffey v. State, 42 N.E.3d 152, 159-60 (Ind.Ct.App. 2015) (determining the admissibility of specific acts evidence under Rule 404(b) requires the trial court to: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the Defendant's propensity to commit the charged act; (2) determine that the proponent has sufficient proof that the person who allegedly committed the act did, in fact, commit the act; and (3) balance probative value against prejudicial effect of evidence).

Pierce v. State, 29 N.E.3d 1258, 1269 (Ind. 2015) (evidence of a prior wrongful act is not admissible if its sole apparent purpose is to show that Defendant acted in conformity with that character).