No. 21-3484

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ERIC KINDLEY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Defendant-appellant Eric Kindley, a former prisoner-transport officer, sexually assaulted two women, A.M. and E.S., while transporting them across state lines. A jury convicted Kindley under 18 U.S.C. 242 of depriving A.M. and E.S. of their right to bodily integrity while acting under color of law, and under 18 U.S.C. 924(c)(1)(A) of possessing a firearm in furtherance of a crime of violence.

On appeal, Kindley argues that the district court erred in admitting testimony under Rules 404(b) and 413 of the Federal Rules of Evidence from four other women—besides A.M. and E.S.—whom Kindley subjected to sexual assault or misconduct during transports. Kindley also argues that the court erred in instructing the jury on its consideration of the Rule 413 evidence. Finally, he argues that Rule 413 violates the Fifth Amendment.

Kindley's arguments lack merit. The district court carefully applied Rule 403, balancing the highly probative value of the Rule 404(b) and Rule 413 evidence against the risk of unfair prejudice. In addition, the court properly instructed the jury concerning its consideration of Rule 413 evidence. Finally, binding Eighth Circuit precedent forecloses Kindley's constitutional challenge to Rule 413. Accordingly, this Court should affirm.

Because the issues presented on appeal are straightforward, oral argument is unnecessary.

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STATEMENT OF JURISDICTION

This appeal is from the entry of final judgment in a criminal case in the Eastern District of Arkansas. The district court had jurisdiction under 18 U.S.C. 3231 and entered final judgment against defendant-appellant Eric Kindley on October 26, 2021. Add. 7.[1] Kindley timely appealed on November 4, 2021. R. Doc. 179. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

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[1] "Add. __" refers to page numbers in the addendum filed with Kindley's opening brief. "Br. __" refers to page numbers in Kindley's opening brief. "R. Doc. __, at __" refers to records on the district court docket by docket number

(continued…)

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether the district court erred in admitting "other-acts" evidence under Rules 404(b) and 413 of the Federal Rules of Evidence.

United States v. *Weber*, 987 F.3d 789 (8th Cir. 2021)

United States v. *Luger*, 837 F.3d 870 (8th Cir. 2016)

United States v. *Strong*, 826 F.3d 1109 (8th Cir. 2016), cert. denied, 137 S. Ct. 1578 (2017)

United States v. *Ali*, 616 F.3d 745 (8th Cir. 2010)

2. Whether the district court erred in instructing the jury on its consideration of Rule 413 evidence.

United States v. *Oldrock*, 867 F.3d 934 (8th Cir. 2017)

3. Whether Rule 413 is unconstitutional under the Fifth Amendment's Due Process Clause.

United States v. *Rodriguez*, 581 F.3d 775 (8th Cir. 2009), cert. denied, 562 U.S. 981 (2010)

United States v. *Mound*, 149 F.3d 799 (8th Cir. 1998), cert. denied, 525 U.S. 1089 (1999)

(…continued)
and internal pagination. "Tr., Vol. __, __" refers to the trial transcript by volume and page number. "GX __, __" refers to the government's exhibit labels attached in the district court proceedings and page number.

STATEMENT OF THE CASE

This case arises from a pair of sexual assaults that defendant-appellant Eric Kindley committed while working as a prisoner-transport officer. Following a five-day trial, a jury convicted Kindley of two counts under 18 U.S.C. 242 for depriving two women in his custody, E.S. and A.M., of their fundamental right to bodily integrity while acting under color of law. Add. 7. The jury also convicted Kindley of one count under 18 U.S.C. 924(c)(1)(A) for possessing a firearm in furtherance of a crime of violence, specifically his sexual assault of E.S. Add. 8.

1. Factual Background

Kindley operated a private prisoner-transport company from 2003 until his arrest in 2017. See Tr., Vol. III, 444-445. Local jails contracted with Kindley to transport individuals arrested on out-of-state warrants to jurisdictions where they faced criminal charges. Tr., Vol. II, 125, 154, 173. On these trips, Kindley was generally not subject to oversight; he operated on the "honor system." Tr., Vol. II, 172. Although it is typical within the prisoner-transport industry for incarcerated women to be transported by multiple officers—so as to guard against sexual misconduct by transport officers—Kindley worked alone. Tr., Vol. II, 154-156, 168, 172, 183, 187, 201; Tr., Vol. III, 266, 340, 394, 410. He transported incarcerated people in an unmarked, white minivan with no designated compartment physically separating him from incarcerated passengers. Tr., Vol. II,

70-71, 201-202; Tr., Vol. III, 263, 395, 413. Rather, people being transported by Kindley rode in the van's passenger cabin. Tr., Vol. II, 72-73, 202; Tr., Vol. III, 263, 396, 420-421.

a. E.S.'s Transport

In January 2017, Kindley transported E.S. from the Shelby County Jail in Alabama to the Apache County Jail in Arizona. Tr., Vol. III, 450-452. When Kindley took custody of E.S., he told her that "whatever's talked about on the truck stays on the truck," a reference to the van that he used to transport E.S. and other incarcerated individuals. GX 1, 10:06:15-10:06:19; see also Tr., Vol. II, 67, 124. Kindley then shackled E.S.'s feet and handcuffed her wrists in front of her body with a chain around her waist. Tr., Vol. II, 69-70, 73. He initially told E.S. that he would pick up another incarcerated person in Kansas, before proceeding to Arizona. Tr., Vol. II, 67. Upon reaching Memphis, Tennessee, however, Kindley informed E.S. that it would "just be [E.S.] and him the whole way" to Arizona. Tr., Vol. II, 82.

Kindley's interactions with E.S. changed markedly after he determined that the transport would include no additional passengers. Shortly after crossing the bridge from Memphis into Arkansas, Kindley asked E.S. if she was "lonely" and how long she had been in jail. Tr., Vol. II, 83, 85. Kindley then offered E.S. some lip balm and lotion, which she accepted because her skin was dry from being in

jail. Tr., Vol. II, 83. As E.S. used the products, Kindley said that other women that he had transported had rubbed lotion on their breasts. Tr., Vol. II, 84. He then asked about and guessed the size of E.S.'s breasts. Tr., Vol. II, 85. Using graphic language, Kindley recounted numerous stories about passengers purportedly performing sex acts on themselves, with each other, and on him during transports. Tr., Vol. II, 84, 86-87. He also claimed that a female passenger once "begged" him to pull over and have intercourse with her, a request that he "felt privileged" to oblige. Tr., Vol. II, 84. Harkening back to his remarks at the Shelby County Jail, Kindley said that he permitted all of this sexual activity during transports because "[w]hat happens in his van stays in his van." Tr., Vol. II, 86-87. Kindley's comments terrified E.S. because she felt that Kindley was "expecting something out of" her that she did not want to do. Tr., Vol. II, 85, 87.

Throughout his sexually explicit monologue, Kindley repeatedly put his hand over the gun that he kept holstered on his right hip, which E.S. found intimidating. Tr., Vol. II, 87-88. Kindley also asked E.S. if she was on social media. Tr., Vol. II, 88. E.S. gave him a username for a secondary Facebook account that she did not use to communicate with her family and friends, which Kindley immediately looked up using his cellphone. Tr., Vol. II, 89. After perusing some of the content on E.S.'s account, Kindley remarked that E.S. looked "nice" in pictures. Tr., Vol. II, 89.

E.S. notified Kindley somewhere around Little Rock, Arkansas, that she required a restroom. Tr., Vol. II, 90. Until that point, Kindley had taken E.S. to government facilities or county jails for bathroom breaks. Tr., Vol. II, 91. This time, however, Kindley got off the interstate (I-40) and drove to a dirt road in "the middle of nowhere," eventually stopping next to a "plain field" with "dead trees." Tr., Vol. II, 91-93, 129-130.

Kindley stepped out of the van and urinated on the side of the road. Tr., Vol. II, 93. Outside, it was "pitch dark, pitch quiet." Tr., Vol. II, 93. Kindley then let E.S. out of the van and told her that she could "[p]op a squat." Tr., Vol. II, 94. Kindley "hover[ed] over" E.S. while she relieved herself. Tr., Vol. II, 94. As E.S. struggled to pull up her pants with her hands still cuffed, Kindley slammed her against the side of the van, banging her head. Tr., Vol. II, 94-95. Kindley then put his right arm across E.S.'s chest "holding her down * * * against the van" while "grabbing" and "squeezing" her left breast with his left hand, leaving fingermarks on her breast. Tr., Vol. II, 95, 97. E.S.'s "mind" and "body" were "frozen." Tr., Vol. II, 96. Taking advantage of her immobility, Kindley put his "hands * * * inside [her] vagina," "digging in [her]," tearing her underwear, and causing her pain that would last "[a] couple of days." Tr., Vol. II, 96-97, 121. Kindley pressed his erect penis against E.S.'s abdomen as he digitally penetrated her. Tr., Vol. II, 116-117.

Kindley then looked E.S. "dead in the eye" and said, "It's your word against my word, and you're just an inmate in transit. And all it takes is one bullet to the head. They're gonna believe me. I'm law enforcement. Now, get on your * * * knees and suck my dick." Tr., Vol. II, 95. E.S. refused, prompting Kindley to aggressively "slam[]" her against the van again while "putting his hand over his gun." Tr., Vol. II, 98-99. E.S. "freaked out" and shouted, fearing that if she did not do something to defend herself that "for sure that would be [her] last living moment" and that Kindley would leave her "dead in that field." Tr., Vol. II, 99. After E.S. shouted, a coyote howled, and the porch lights on a nearby house turned on. Tr., Vol. II, 99. Spooked, Kindley ordered E.S. to "[g]et in the fucking van." Tr., Vol. II, 99. Kindley drove away and warned E.S., "Remember, what happens in my van stays in my van." Tr., Vol. II, 100.

Later that evening, Kindley made calls to jails in Oklahoma, looking for a place for E.S. to spend the night. Tr., Vol. II, 102. Although several jails had room for E.S., Kindley was insistent that E.S. shower, and the only jail that would allow her to do so was the McIntosh County Jail. Tr., Vol. II, 103. Just before arriving at the McIntosh jail, Kindley reiterated, "What happens in the van stays in the van," and warned, "Oh, and by the way, I know a lot of people, a lot of people. Sheriffs, you name it. I know a lot of people, E[.S.]." Tr., Vol. II, 104. E.S. understood Kindley's remarks as "trying to intimidate [her] not to say anything."

Tr., Vol. II, 104. At the McIntosh jail, E.S. showered in a curtained area near the jail's booking section. Tr., Vol. II, 105, 185-186. Kindley stood "right around the corner" chatting gregariously with the jail staff. Tr., Vol. II, 105. E.S. wanted to report what Kindley had done to her, but she did not do so because Kindley seemed so friendly with the jail staff. Tr., Vol. II, 107, 186.

Kindley took custody of E.S. the next morning to begin the final leg of the transport. As they set out, Kindley said that he "kn[e]w a lot of people in law enforcement" in Apache County, some of whom he identified by name. Tr., Vol. II, 108. He warned that if E.S. "were to say anything, he knew a prosecutor that would give [her] the max sentence" for her charged offense. Tr., Vol. II, 108. Kindley also resumed sharing sexually explicit stories and repeated the what-happens-in-the-van refrain numerous times, placing his hand over his gun each time he made those remarks. Tr., Vol. II, 108-109. When they reached Apache County, Kindley did not drive directly to the jail; instead he "kept * * * looping around" for 30 to 45 minutes. Tr., Vol. II, 109-110. Then, Kindley stopped the van and renewed his threats one last time. Tr., Vol. II, 110.

Inside the Apache jail, Kindley lingered, talking with the jail staff for more than an hour while they booked E.S. into the jail. Tr., Vol. II, 112, 158, 160. Kindley's delayed departure contrasted with other prisoner-transport officers, who typically left after spending roughly twenty minutes filling out paperwork. Tr.,

Vol. II, 158. E.S. again wanted to tell someone about what Kindley had done to her, but she could not because Kindley was "hovering" and because she was scared by all of the threats that he had made. Tr., Vol. II, 113, 117. But later, E.S. told another inmate at the Apache jail that something had happened to her during her transport, leading a jail official to take a statement from E.S. Tr., Vol. II, 117-118, 140.

b. A.M.'s Transport

In February 2014, Kindley transported A.M. from Victoria County, Texas, to the Jackson County Jail in Oklahoma. Tr., Vol. III, 432, 461, 466. Kindley put a chain around A.M.'s waist and shackled her hands and feet, which he connected with a chain. Tr., Vol. III, 412. He then placed A.M. in his van, where there were no other passengers or transport officers. Tr., Vol. III, 413.

Once they were on the road, Kindley told A.M. that she had a "nice mouth" and that she was "pretty." Tr., Vol. III, 413. These comments "didn't feel right" to A.M., so she went to sleep to avoid further interaction with Kindley. Tr., Vol. III, 413. She awoke in Houston, Texas, and repeatedly caught Kindley looking at her through the rearview mirror in a way that gave her a "weird," "creepy feeling." Tr., Vol. III, 414. Kindley then began to make sexually explicit remarks similar to those he made to E.S., saying that he had a fantasy of "fuck[ing]" a hitchhiker, telling A.M. that he had a large penis, and asking her

about the size of her "titties." Tr., Vol. III, 415-416. When Kindley found out that A.M. had been incarcerated for a month, he said, "I bet your pussy is wet and hot." Tr., Vol. III, 416. A.M. did not respond and could not believe that Kindley was talking to her that way. Tr., Vol. III, 415-416.

After they crossed the state line from Texas into Arkansas, Kindley got off the interstate, drove to a campsite, and parked by a hiking trail with no other vehicles around. Tr., Vol. III, 418. He then got out of the van and walked around. Tr., Vol. III, 418. Kindley returned to the vehicle, slammed his door, yelled, "Fuck," and drove off. Tr., Vol. III, 418-419. A.M. asked Kindley if he was lost, and he seemed "annoyed." Tr., Vol. III, 419. As it was getting dark outside, Kindley stopped for a second time in a wooded, muddy area not near the interstate without any people, houses, or lights. Tr., Vol. III, 419-420.

Kindley again got out of the van, opened driver's side door to the passenger cabin and ordered A.M., who was seated on the bench immediately behind the front seats, to "suck his dick." Tr., Vol. III, 421-422. A.M. refused and tried to move away from Kindley by pushing herself to the side of the passenger bench further away from him. Tr., Vol. III, 423-424. Kindley then said, "Get in line, inmate," and reminded A.M. that he had bought her food earlier in the day. Tr., Vol. III, 424. He then reached into the van and grabbed the right side of A.M.'s hair, pulled her towards him, and "smashed [her] face" onto his exposed penis.

Tr., Vol. III, 424-426. Kindley pushed on A.M.'s head, causing her to choke, until he ejaculated in her mouth. Tr., Vol. III, 425-427. During this assault, A.M. did not scream because the shackles on her feet and wrists rendered her unable to defend herself. Tr., Vol. III, 428.

A.M. spit out Kindley's semen and wiped it on the underside of the van's passenger bench, hoping that doing so would leave DNA evidence of the assault. Tr., Vol. III, 427. Kindley gave A.M. sanitizer, which she put in her mouth and swallowed. Tr., Vol. III, 427-428. He also announced that A.M. ranked in the "top three" women—presumably among those with whom he had had sexual contact, consensual or otherwise. Tr., Vol. III, 428. Similar to the remarks that Kindley made to E.S. after he had sexually assaulted her, he told A.M. that "if [she] said anything, nobody would believe" her and warned that he had "a lot of friends" and "kn[e]w[] a lot of people." Tr., Vol. III, 429.

Kindley then drove A.M. to a jail, where she slept overnight. Tr., Vol. III, 429. After picking up another incarcerated person in Missouri the following day, Kindley dropped off A.M. in Altus, Oklahoma, where she served a two-year sentence. Tr., Vol. III, 431-432. A.M. did not tell anyone at the jail what Kindley had done to her because she was embarrassed and thought "nobody would believe" her. Tr., Vol. III, 432. After she was released, A.M. began using drugs to feel "numb" and to stop having dreams about Kindley assaulting her. Tr., Vol. III, 433.

When A.M.'s sister, R.M., confronted her about her drug abuse, A.M. told R.M. about what had happened to her during her transport. Tr., Vol. III, 433; Tr., Vol. IV, 508-510.

c. FBI Investigation

The FBI opened an investigation into Kindley after the Apache County Sheriff's Office referred E.S.'s allegations to the agency. Tr., Vol. III, 444. As part of that investigation, the FBI identified several other women, including A.M., whom Kindley had sexually assaulted or subjected to other sexual misconduct during transports. Tr., Vol. III, 445-446, 458, 461-462; Tr., Vol. IV, 491. The investigation also revealed other evidence to corroborate E.S. and A.M.'s testimony.

Records from Kindley's Facebook account, for instance, showed that E.S. blocked him and that Kindley searched for A.M. almost two years after he had transported her. Tr., Vol. III, 468-471; GX 11-A; GX 11-B. Historical cell-site data showed that while Kindley had been transporting E.S., his "phone was not travelling at highway speeds" during a 43-minute gap that occurred in a remote area near Atkins, Arkansas. Tr., Vol. III, 326. Kindley's cellphone records also corroborated E.S.'s testimony that Kindley called nine Oklahoma jails before E.S. was booked into the McIntosh County Jail. Tr., Vol. IV, 490-491. In addition, the FBI searched the van in which Kindley transported E.S. DNA analysis confirmed

that Kindley's semen was on a pillow found in the back of the van. Tr., Vol. IV, 518-521, 523.

2. Procedural History

a. A federal grand jury in the Eastern District of Arkansas returned a three-count superseding indictment against Kindley on January 8, 2019. R. Doc. 31. Counts 1 and 2 charged Kindley with violating 18 U.S.C. 242 by depriving A.M. and E.S. of their fundamental right to bodily integrity while Kindley was acting under color of law. R. Doc. 31, at 3-4. Count 3 charged Kindley with violating 18 U.S.C. 924(c)(1)(A) by possessing a firearm in furtherance of a crime of violence, specifically his sexual assault of E.S. R. Doc. 31, at 5.

b. Prior to trial, the government filed a notice of intent to offer evidence under both Rule 413 of the Federal Rules of Evidence, which permits introduction of similar crimes in sexual assault cases, and Rule 404(b), which permits introduction of prior bad acts to show a defendant's state of mind or motive, or to rebut a defense of consent or mistake. R. Doc. 35. Specifically, the government identified as potential Rule 413 witnesses six women besides A.M. and E.S. whom Kindley had transported, as well as his ex-wife, all of whom would have testified that Kindley had sexually assaulted them. R. Doc. 35, at 13-15. The government also identified eight other potential witnesses who would have offered Rule 404(b) testimony that Kindley subjected them to a pattern of conduct similar to what A.M.

and E.S. experienced even though he ultimately did not sexually assault them. R. Doc. 35, at 30-32.[2]

Kindley opposed introduction of the proffered evidence. R. Doc. 67. In addition to arguing that Rule 413 violates the Fifth Amendment, Kindley argued that Rule 403 barred the admission of the proffered evidence because its sheer volume would confuse the jury, unduly lengthen the trial, and unfairly prejudice him. R. Doc. 67, at 2-3, 17-21.

The district court rejected Kindley's constitutional challenge to Rule 413. Add. 1. With respect to proposed witnesses who would have testified about being assaulted during a prisoner transport, the court recognized that such testimony was "admissible under the Rules" because "[e]ach alleged incident bears striking similarities to the charged assaults and is therefore probative of propensity." Add. 3-4. Thus, the court permitted the government to present testimony from three of the proposed Rule 413 witnesses, but it ruled that testimony from any more such witnesses "would compromise Kindley's due process rights." Add. 4-5. (The court also decided that one of the government's proposed witnesses should be excluded because her "unconsciousness or the trauma of the event" left her unable

[2] The government also argued that one of the eight potential Rule 404(b) witnesses, T.W., could testify under Rule 801(d)(2) of the Federal Rules of Evidence, which permits introduction of opposing-party statements. R. Doc. 35, at 45 n.14. Kindley does not raise any arguments under Rule 801(d)(2) in this appeal.

to testify in sufficient detail. Add. 3.) Finally, the court precluded Kindley's ex-wife from testifying because Kindley did not sexually assault her during a transport and the "fit between that act and the crimes charged here [was] imprecise." Add. 3. With respect to the government's proposed Rule 404(b) witnesses, the court again decided that the volume concerns should lead it to restrict the government to presenting testimony from two women. Add. 5-6.

c. At trial, the government called two Rule 413 witnesses (K.G. and M.P.) and two Rule 404(b) witnesses (K.K. and T.W).[3] The district court gave a limiting instruction before each of these witnesses' testimony. Tr., Vol. II, 194-196; Tr., Vol. III, 257-259, 334-335, 390-391.

The four women provided similar accounts of Kindley's conduct. K.G. testified that Kindley seized upon her request to use the bathroom to drive her to a remote area while it was dark outside, where he forced her to perform oral sex on him. Tr., Vol. II, 207-214. M.P. similarly testified that Kindley seized upon her request to use the bathroom to drive her to a hiking area, where he followed her into a restroom, stood in front of her while she urinated, and then forcibly kissed

[3] Although the district court held that the testimony of K.K. (identified as K.K.1 pretrial) was admissible under Rule 413 (see Add. 3), the government requested at trial, without objection from Kindley, that she be treated as a Rule 404(b) witness because her testimony would focus on an attempted sexual assault, not a completed one. Tr., Vol. III, 333. Notwithstanding the government's caution, testimony concerning an attempted sexual assault is admissible under Rule 413. *United States* v. *Blue Bird*, 372 F.3d 989, 993-994 (8th Cir. 2004).

her and forced her to perform oral sex on him. Tr., Vol. III, 269-274. K.K. testified that during her transport Kindley repeatedly attempted to reach into the passenger cabin and touch her "crotch area." Tr., Vol. III, 344-346. She also testified that Kindley drove her during a blizzard to an isolated storage unit where he abandoned an attempt to sexually assault her after she asserted herself. Tr., Vol. III, 347-350. T.W. testified that during her transport, which occurred one week after E.S.'s transport, Kindley admitted to having digitally penetrated one of his female passengers. Tr., Vol. III, 398, 459. Among other similarities to the victims' accounts, the four women also testified that Kindley subjected them to unsolicited sexually explicit commentary and warned them against reporting him by issuing threats. Tr., Vol. II, 204-206, 215 (K.G.); Tr., Vol. III, 264-265, 268-269, 275 (M.P.); Tr., Vol. III, 341-343, 350-351 (K.K.); Tr., Vol. III, 397-400, 429-431 (T.W.).

d. Before closing arguments, the district court again instructed the jury regarding the Rule 404(b) and Rule 413 witnesses, using instructions patterned on Eighth Circuit model instructions 2.08A and 2.08. *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* (2020), https://perma.cc/5A27-23BH. The court explained that the jury could consider the evidence in question in "decid[ing] any issue to which it is relevant" if it unanimously determined that the evidence was "more likely true than not true."

Tr., Vol. V, 628-629. With respect to the Rule 404(b) evidence, however, the court stressed that it could be considered only as to whether: (1) "Kindley had the state of mind or intent necessary to commit the crimes charged"; (2) "Kindley had a motive or opportunity to commit" the charged crimes; or (3) to "rebut[] any defense of consent, accident, or mistake." Tr., Vol. V, 629. The court further reminded the jury that Kindley was "on trial only for the crimes charged in the superseding indictment" and that it could "not convict Kindley simply because [it] believe[d] that he may have committed a similar act in the past." Tr., Vol. V, 629-630. Defense counsel did not object to either of those instructions. See Tr., Vol. IV, 590-591; R. Doc. 109-3, at 25-28.

e. After hearing closing arguments and deliberating, the jury returned a verdict against Kindley on all counts. Add. 7. Following several delays associated with the COVID-19 pandemic and Kindley's unsuccessful efforts to obtain a new trial, the district court sentenced Kindley to concurrent terms of life in prison on the Section 242 counts and a term of five years in prison on the Section 924(c)(1)(A) count to run consecutively to his life sentences. Add. 9. In addition, the court imposed a five-year term of supervised release and a $300 special assessment and required Kindley to pay $20,275 in restitution to the victims. Add. 11, 14. The court entered judgment on October 26, 2021. Add. 7. Kindley timely appealed. R. Doc. 179.

SUMMARY OF ARGUMENT

1. Kindley argues that the district court abused its discretion by failing to exclude under Rule 403 the four "other acts" witnesses that testified at trial. But the court did not err—much less commit a clear abuse of discretion—by permitting this testimony. Applying the balancing test required by Rule 403, the district court carefully reviewed proffered testimony from 15 other-acts witnesses and excluded 10 of them, largely to avoid a risk of prejudice from sheer volume. Especially in light of Kindley's defense strategy focused on attacking the victims' credibility, the other-act witnesses' testimony was highly probative because it corroborated the victims' testimony by underscoring the similarities and consistency in Kindley's behavior. Only a modest portion of the trial was devoted to hearing testimony from the other-acts witnesses.

2. Next, Kindley argues that the district court erred by failing to instruct the jury to consider the Rule 413 witnesses' testimony only if it found that the government had proved beyond a reasonable doubt that the sexual assaults in question had occurred. The court did not err in instructing the jury on its consideration of the Rule 413 evidence. Its instruction properly outlined the purposes for which the jury could consider the other-acts testimony. And the instructions were consistent with this Court's case law holding that a

preponderance-of-evidence standard applies to the jury's consideration of such evidence.

3. Finally, Kindley argues that Rule 413 violates the Fifth Amendment's Due Process Clause. This Court rejected that argument in *United States* v. *Mound*, 149 F.3d 799 (8th Cir. 1998), cert. denied, 525 U.S. 1089 (1999). That decision, which was correctly decided and remains good law, squarely forecloses Kindley's constitutional argument.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN ADMITTING OTHER-ACTS EVIDENCE

Kindley argues that the district court abused its discretion by failing to exclude under Rule 403 testimony from four "other-acts" witnesses who testified about his past sexual assaults and misconduct during other prisoner transports. That argument, however, disregards the careful steps that the district court took to ensure that the highly probative other-acts testimony did not cause Kindley any unfair prejudice. And, to the extent that it did, any such prejudice was harmless.

A. Standard Of Review

In a criminal case where a defendant is charged with committing a sexual assault, Rule 413 permits the admission of evidence that the defendant has committed other sexual assaults to show that the defendant has a propensity to

commit such offenses. Rule 404(b) of the Federal Rules of Evidence also allows the admission of evidence that the defendant has committed another "crime, wrong, or act" for purposes other than showing that the defendant has a propensity to commit those bad acts. "Evidence admissible under both the exceptions in Rule 404(b) and under Rule 413 remains subject to Rule 403, which requires weighing the probative value of the evidence against the danger of unfair prejudice that its admission might create." *United States* v. *Blue Bird*, 372 F.3d 989, 992 (8th Cir. 2004).

This Court "accord[s] great deference to the district court's application of the Rule 403 balancing test and will reverse only for a clear abuse of discretion." *United States* v. *Medrano*, 925 F.3d 993, 996 (8th Cir. 2019) (citation omitted).

B. The District Court Acted Within Its Discretion In Admitting Other-Acts Evidence

Besides the victims, four women—K.G., M.P., K.K., and T.W.—testified at trial that Kindley sexually assaulted them or subjected them to other sexual misconduct during prisoner transports. Kindley does not dispute the admissibility of those women's testimony under Rules 404(b) or 413; rather, he argues that their testimony should have been excluded under Rule 403 because it was "more prejudicial than probative." Br. 13. Under Rule 403, evidence is excluded only when the probative value of the challenged evidence is "substantially outweighed by its potential for unfair prejudice." *United States* v. *Withorn*, 204 F.3d 790, 794

(8th Cir. 2000). In conducting Rule 403 balancing, however, courts must still give force to Rule 413, which reflects Congress's "strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible." *United States* v. *LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997). Any balancing analysis under Rule 403 therefore must allow Rule 413 to have its "intended effect, namely, to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse * * * for the purpose of showing propensity." *United States* v. *Benais*, 460 F.3d 1059, 1063 (8th Cir. 2006).

1. The Other-Acts Witnesses' Testimony Was Highly Probative

Here, the other-acts witnesses' testimony was highly probative because it lent credence to E.S. and A.M.'s testimony about Kindley's unlawful conduct—testimony that Kindley sought to undermine throughout trial. In his opening statement, Kindley's counsel told the jury that the trial was "all about" one key question: "Do you believe that these acts happened as described, or is this just blown out of proportion?" Tr., Vol. II, 63. Picking up that thread during his closing argument, defense counsel told the jury that E.S.'s testimony "sounded scripted" and emphasized the lack of photographs or a medical examination corroborating her account. Tr., Vol. V, 664-665, 676. And he further argued that trivial differences between A.M.'s testimony and her sister's corroborating testimony showed that A.M.'s "story ha[d] been exaggerated." Tr., Vol. V, 675.

Given Kindley's trial strategy, the testimony of the other-acts witnesses held tremendous probative value. This Court recently recognized in *United States* v. *Weber*, 987 F.3d 789 (8th Cir. 2021), that the Rule 413 testimony there "had substantial probative value" because of its similarity to victims' testimony and "was perhaps even more substantial" because the defendant, similar to Kindley, "advanced a theory of defense that he had been the victim of a conspiracy among some witnesses." *Id.* at 793; see also *United States* v. *Nordwall*, 998 F.3d 344, 348 (8th Cir. 2021) (holding that evidence showing that the defendant had searched for internet images of minor girls was admissible under Rule 404(b) because those acts were "similar in kind" to the charged offense of child sex-trafficking); *United States* v. *Rodriguez*, 581 F.3d 775, 796 (8th Cir. 2009) (holding that a relevant sexual assault under Rule 413 is "one committed in a manner similar to the charged offense"), cert. denied, 562 U.S. 981 (2010).

Each of the other-acts witnesses were, like E.S. and A.M., in Kindley's custody, being transported across state lines, when Kindley sexually assaulted them or subjected them to other sexual misconduct. Kindley's interactions with the four other-acts witnesses also followed a pattern remarkably similar to what happened to A.M. and E.S. In each instance, Kindley's sexually inappropriate conduct began by making comments about the women's appearance or sharing unsolicited stories with them about his sexual encounters with other passengers.

Tr., Vol. II, 84-87 (E.S.); Tr., Vol. II, 204-206 (K.G.); Tr., Vol. III, 264-265, 268-269 (M.P.); Tr., Vol. III, 341-343 (K.K.); Tr., Vol. III, 397-400 (T.W.); Tr., Vol. III, 413-416 (A.M.). As M.P. testified, these comments were designed to "feel * * * out" the women to see how they would react if he tried to sexually assault them. Tr., Vol. III, 264. Kindley also leered at K.G. and T.W. through the van's rearview mirror much like he did to A.M. Tr., Vol. II, 221 (K.G.); Tr., Vol. III, 396-397 (T.W.); Tr., Vol. III, 414 (A.M.).

Most importantly, with the exception of T.W., Kindley's conduct escalated to either completed or attempted sexual assault. Kindley drove the women to remote, isolated areas with few people around, usually while it was dark outside. Tr., Vol. II, 91-93 (E.S.); Tr., Vol. II, 207 (K.G.); Tr., Vol. III, 269 (M.P.); Tr., Vol. III, 347-348 (K.K.); Tr., Vol. III, 418-420 (A.M.). As with E.S., Kindley seized upon K.G. and M.P.'s requests to use the bathroom as an opening to drive them to those remote areas. Tr., Vol. II, 90-91 (E.S.); Tr., Vol. II, 207-214 (K.G.); Tr., Vol. III, 269-274 (M.P.). Kindley also forced K.G., and M.P. to perform oral sex on him just as he did to A.M. and as he ordered E.S. to do. Tr., Vol. II, 95 (E.S.); Tr., Vol. II, 213-214 (K.G.); Tr., Vol. III, 273-274 (M.P.); Tr., Vol. III, 424-427 (A.M.).

After sexually assaulting or subjecting the women to other sexual misconduct, Kindley threatened them and warned them not to report him. Tr., Vol.

II, 95, 100, 102, 104, 108, 110 (E.S.); Tr., Vol. II, 215 (K.G.); Tr., Vol. III, 275 (M.P.); Tr., Vol. III, 350-351 (K.K.); Tr., Vol. III, 402 (T.W.); Tr., Vol. III, 429-431 (A.M.). At various points throughout the transports, he also threatened the women nonverbally by gesturing toward his gun. Tr., Vol. II, 87-88, 98-99, 108-109 (E.S.); Tr., Vol. II, 212 (K.G.); Tr., Vol. III, 349-350 (K.K.). Kindley also intimidated the women by "linger[ing]" at the jails to which he took them and by gregariously interacting with the jail staff. Tr., Vol. III, 352 (K.K); see also Tr., Vol. II, 112, 158, 160 (E.S.).

Beyond the uncanny similarities among the witnesses' testimony, the probative value of the other-acts witnesses' testimony is further enhanced because each testified that she had never heard of the victims or any of the other women who had testified before them. Tr., Vol. II, 227; Tr., Vol. III, 281, 356, 404; see also *Weber*, 987 F.3d at 793 (noting that the probative value of Rule 413 witnesses' testimony was enhanced because "the[] witnesses came from an entirely different community many miles removed" from where the victims lived). And the FBI agent interviewing the other-act witnesses took precautions to ensure that they did not know the nature of the investigation until after they had described what Kindley had done to them. Tr., Vol. II, 225-226; Tr., Vol. III, 280, 355, 403-404; Tr., Vol. IV, 491. Accordingly, none of the other-acts witnesses could have conspired to fabricate such consistent accounts.

2. The Other-Acts Testimony Was Not Unfairly Prejudicial

Despite the high probative value of the other-acts evidence, the district court carefully conducted Rule 403 balancing. That is why it ultimately decided to limit the number of other-acts witnesses to avoid "compromis[ing] Kindley's due process rights" and "prolong[ing] the trial with cumulative evidence." Add. 4-5. The court recognized that although "individually, no account is so unfairly prejudicial or problematic that it requires exclusion under Rule 403 * * * there's an issue of diminishing evidentiary return—each additional account carries a bit less probative value, but a bit more prejudice to Kindley." Add. 4. Moreover, the court was careful to preclude testimony from two proffered witnesses whose accounts were either dissimilar from the charged conduct or too lacking in detail. Add. 2-3.[4]

The district court's careful approach to conducting Rule 403 balancing shows that it took seriously its obligation to exclude unfairly prejudicial other-acts evidence. See *United States* v. *Luger*, 837 F.3d 870, 874 (8th Cir. 2016) (holding

[4] The district's court's ruling thus resembled the Tenth Circuit's cautious approach to Rule 403 balancing for cases in which "the government seeks to introduce a large number" of other-acts witnesses, requiring district courts to "consider the diminishing marginal return on each additional witness's testimony." *United States* v. *Perrault*, 995 F.3d 748, 769 (10th Cir.) (affirming a district court's admission of seven witnesses under Rule 414 of the Federal Rules of Evidence, the companion to Rule 413 applicable in child-molestation cases), cert. denied, 142 S. Ct. 472 (2021).

that the district court did not abuse its discretion by admitting Rule 413 evidence based on the court's "commendably thorough" Rule 403 analysis that resulted in the exclusion of some witnesses and the admission of others); *United States* v. *Crow Eagle*, 705 F.3d 325, 328 (8th Cir. 2013) (concluding that the district court "properly balanced the probative value of the evidence with the risk of unfair prejudice," in part based on the court's exclusion of some proffered witnesses); *United States* v. *Carter*, 410 F.3d 1017, 1022 (8th Cir. 2005) (same).

Kindley improperly urges this Court to second guess the district court's delicate Rule 403 balancing. Relying on *United States* v. *Never Misses a Shot*, 781 F.3d 1017 (8th Cir. 2015), he argues that the other-acts evidence was unfairly prejudicial because the four other-acts witnesses who testified outnumbered the victims by a two-to-one margin. Br. 13-14. In *Never Misses a Shot*, the district court admitted—without exception—all six of the Rule 413 witnesses proffered by the government. 781 F.3d at 1021, 1027. This Court was "troubled" by the district court's failure to exclude any of the proffered Rule 413 witnesses. *Id.* at 1028. Nevertheless, this Court declined to order a new trial. Instead, it held that any error was harmless and stressed that it was "stat[ing] no inflexible rule that provides a maximum limit of Rule 413 * * * witnesses that can testify but

encourage[d] district courts to continually balance all 403 factors." *Id.* at 1028 n.6. That is precisely what the district court did here.[5]

Reflecting the delicate balance that the district court struck in conducting Rule 403 analysis, the other-acts evidence amounted to only a modest portion of the testimony presented at trial. Other-acts testimony (or testimony corroborating the other-acts evidence) comprised 125 pages of a 694-page trial transcript. The other-acts testimony therefore was not an "unfettered" aspect of the trial. *United States* v. *Strong*, 826 F.3d 1109, 1113 (8th Cir. 2016) (holding that other-acts testimony that comprised 21 pages of a 318-page trial transcript was not an unfairly prejudicial quantity), cert. denied, 137 S. Ct. 1578 (2017); cf. *United States* v. *Forcelle*, 86 F.3d 838, 843 (8th Cir. 1996) (holding that improper admission of Rule 404(b) evidence was not harmless error where it comprised 620 of 809 pages of transcripts from the first four days of trial). In addition, the modest portion of trial testimony devoted to other-acts evidence also demonstrates that admission of the evidence did not result in distracting "mini-trials" or "side trials," as Kindley suggests. Br. 14.

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[5] Nor has this Court ever suggested that there is something inherently improper about admitting more than three other-acts witnesses. See, *e.g.*, *United States* v. *Ali*, 616 F.3d 745, 752 (8th Cir. 2010) (affirming admission of four Rule 404(b) witnesses); *United States* v. *Fool Bull*, 32 F. App'x 778, 779 (8th Cir. 2002) (five Rule 413 witnesses).

The district court further guarded against the risk of unfair prejudice by giving the jury limiting instructions both before it heard testimony from each of the other-acts witnesses and before closing arguments. Tr., Vol. II, 194-196; Tr., Vol. III, 257-259, 334-335, 390-391; Tr., Vol. V, 628-630. Kindley questions the capacity of limiting instructions to protect against unfair prejudice. Br. 18-20. As he acknowledges, however, this Court has repeatedly rejected that view. *United States* v. *Crawford*, 413 F.3d 874, 876 (8th Cir. 2005) ("Limiting instructions decrease the danger of unfair prejudice."); *United States* v. *Mound*, 149 F.3d 799, 802 (8th Cir. 1998) ("The Court's cautionary instruction to the jury further guarded against unfair prejudice."), cert. denied, 525 U.S. 1089 (1999). Contrary to what Kindley suggests, Rule 403 does not require courts to "cure[]" any and all prejudice that might result from the admission of evidence. Br. 18-19. It requires only that "danger of * * * *unfair* prejudice" not outweigh the "probative value" of the other-acts evidence. Fed. R. Evid. 403 (emphasis added). The limiting instructions given by the district court ensured that the balance tipped even more decisively in favor of admission of the other-acts evidence.

Accordingly, the district court did not abuse its discretion in admitting the other-acts evidence.

3. Any Error Was Harmless

Even if the district court had abused its discretion in admitting the other-acts testimony (or some portion of that testimony), any error would be harmless because "the government's case presented sufficient evidence apart from the excess propensity evidence for the jury to convict on all counts." *Never Misses a Shot*, 781 F.3d at 1028.

"An error is harmless if * * * no substantial rights of the defendant were affected and * * * the error did not influence or had only a very slight influence on the verdict." *United States* v. *Espinosa*, 585 F.3d 418, 430 (8th Cir. 2009) (quoting *United States* v. *Eagle*, 498 F.3d 885, 888 (8th Cir. 2007)). Here, although key aspects of A.M. and E.S.'s testimony were corroborated by other evidence, that testimony—standing alone—also was credible and sufficient for a jury to find beyond a reasonable doubt that Kindley had committed the charged offenses. *United States* v. *L.B.G.*, 131 F.3d 1276, 1278 (8th Cir. 1997) ("It is well established that the uncorroborated testimony of a single witness may be sufficient to sustain a conviction." (quoting *United States* v. *Dodge*, 538 F.2d 770, 783 (8th Cir. 1976))). Given the uncanny similarity between the two charged victims' accounts—despite not knowing one another—their testimony also was mutually corroborating. Tr., Vol. III, 436.

For example, both E.S. and A.M. testified that Kindley subjected them to a barrage of sexually explicit commentary as a prelude to sexually assaulting them. Tr., Vol. II, 84-87 (E.S.); Tr., Vol. III, 413-416 (A.M.). They both also testified that Kindley deviated from his route to drive them to remote areas where he committed his sexual assault. Tr., Vol. II, 91-93 (E.S.); Tr., Vol. III, 418-420 (A.M.). E.S. and A.M. also testified that Kindley warned them not to report him using similar language. Tr., Vol. II, 95, 100, 102, 104, 108, 110 (E.S.); Tr., Vol. III, 429-431 (A.M.). They also both testified that Kindley took steps to destroy evidence of his sexual assaults, by going to lengths to make E.S. shower and by giving A.M. sanitizer. Tr., Vol. II, 102-103 (E.S.); Tr., Vol. IV, 490-491 (same); Tr., Vol. III, 427-428 (A.M.). A.M.'s account also is corroborated by her sister's testimony that A.M. told her about Kindley's crime years before the FBI began its investigation. Tr., Vol. IV, 508-510.

Other evidence collected during the FBI's investigation also corroborates the two victims' testimony. Expert analysis of historical cell-site data showed that Kindley's phone was not travelling at highway speeds for a 43-minute period while located in a remote area near Atkins, Arkansas, on the day that E.S. testified that he sexually assaulted her. Tr., Vol. III, 326. A reasonable jury could infer from that evidence that Kindley sexually assaulted E.S. during that interlude. Kindley's Facebook records also confirm that E.S. blocked him and that he searched for A.M.

almost two years after he transported her. Tr., Vol. III, 468-471. At a minimum, Kindley's interest in following women that he had transported on social media suggests that he engaged in inappropriate conduct toward them. See *Nordwall*, 998 F.3d at 348 (holding that evidence that a defendant had searched for internet images of minor girls was "very probative of [his] sexual interest in the minor females").

Because overwhelming evidence outside of the other-acts evidence supported Kindley's conviction on all counts, any error in the admission of the other-acts evidence—and there was no error—would be harmless in any event.

II

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON CONSIDERATION OF RULE 413 EVIDENCE

Kindley next argues that the district court erred by failing to properly instruct the jury on the Rule 413 witnesses' testimony. He has forfeited that argument. But even if he had not, his position cannot be squared with this Court's cases endorsing the substantive rule set forth in the instructions.

A. Standard Of Review

This Court reviews challenges to jury instructions under the abuse-of-discretion standard. *United States* v. *Poitra*, 648 F.3d 884, 887 (8th Cir. 2011). When a party fails to timely object at trial to an instruction, however, this Court reviews under the plain-error standard. *Ibid.*

B. Kindley Forfeited Any Objection To The Jury Instructions

Kindley argued in his response to the government's notice of intent to use other-acts evidence that Eighth Circuit model instruction 2.08A violates the Fifth Amendment's Due Process Clause. R. Doc. 67, at 15-16. Despite those concerns, however, Kindley did not otherwise object to the district court's instruction patterned on that model instruction. See Tr., Vol. IV, 590-591. Regardless, the district court did not err in instructing the jury on its consideration of Rule 413 evidence under any standard of review.

C. The District Court Properly Instructed The Jury On Consideration Of Rule 413 Evidence

Kindley takes issue with the district court's decision to instruct the jury on its consideration of Rule 413 evidence using an instruction patterned on Eighth Circuit model instruction 2.08A. Br. 27-29. As explained above, limiting instructions like this one "decrease the danger of unfair prejudice" to the defendant. *United States* v. *Crawford*, 413 F.3d 874, 876 (8th Cir. 2005). The district court's instruction called on the jury to consider the Rule 413 evidence only if it found the evidence "more likely true than not true" (*i.e.*, proven by preponderance of the evidence). Tr., Vol. V, 628. Kindley argues that allowing the jury to consider Rule 413 evidence proven only by a preponderance standard "violates [his] due process and * * * right to a fair trial because it lessens the

government's burden of proof as a whole to prove every element beyond a reasonable doubt." Br. 28-29.

This Court has endorsed the application of the preponderance standard to the jury's consideration of Rule 413 evidence. In *United States* v. *Oldrock*, 867 F.3d 934 (8th Cir. 2017), for instance, this Court affirmed a district court's decision to admit Rule 413 testimony after concluding that a reasonable jury could find that "a preponderance of evidence established the foundation" of the testimony. *Id.* at 939. Every other circuit that has considered the issue has reached the same conclusion. *Johnson* v. *Elk Lake Sch. Dist.*, 283 F.3d 138, 153 (3d Cir. 2002); *United States* v. *Dillon*, 532 F.3d 379, 387 (5th Cir. 2008); *United States* v. *LaVictor*, 848 F.3d 428, 449 (6th Cir.), cert. denied, 137 S. Ct. 2231 (2017); *United States* v. *Enjady*, 134 F.3d 1427, 1433 (10th Cir.), cert. denied, 525 U.S. 887 (1998).

That approach is consistent with the Supreme Court's decision in *Huddleston* v. *United States*, 485 U.S. 681 (1988), which held that district courts should admit Rule 404(b) evidence if "the jury could reasonably find the conditional fact * * * by a preponderance of the evidence." *Id.* at 690. In reaching that conclusion, the Supreme Court reasoned that the text of Rule 404(b) "contains no intimation * * * that any preliminary showing is necessary before such evidence may be introduced for a proper purpose." *Id.* at 687-688. Rule 413

likewise is "silent as to the appropriate standard for admitting evidence of past acts of sexual assault." *Johnson*, 283 F.3d at 153. Requiring a jury to apply a reasonable-doubt standard to Rule 413 evidence would therefore be contrary to the Rule's text. Based on *Huddleston*'s reasoning, this Court has even affirmed a Rule 404(b) limiting instruction that set forth no standard of proof whatsoever for the jury's consideration of the evidence. *United States* v. *Sparkman*, 500 F.3d 678, 685 (8th Cir. 2007).

Accordingly, the district court did not err by instructing the jury to consider the Rule 413 evidence if it found that it is was true by a preponderance of the evidence.

III

RULE 413 DOES NOT VIOLATE THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

Finally, Kindley argues that Rule 413 is unconstitutional under the Fifth Amendment's Due Process Clause and that the district court therefore erred by admitting evidence under that Rule. That argument is squarely foreclosed by binding precedent.

A. Standard Of Review

This Court reviews de novo constitutional challenges to rules of evidence. *United States* v. *Axsom*, 761 F.3d 895, 897 (8th Cir. 2014), cert. denied, 574 U.S. 1181 (2015).

B. Rule 413 Does Not Violate The Fifth Amendment's Due Process Clause

As Kindley acknowledges (Br. 22-23 nn.6-7), this Court—like every other court of appeals that has addressed the issue—has held that Rule 413 does not violate the Fifth Amendment's Due Process Clause. *United States* v. *Mound*, 149 F.3d 799, 801 (8th Cir. 1998), cert. denied, 525 U.S. 1089 (1999); see also *United States* v. *Schaffer*, 851 F.3d 166, 177 (2d Cir.), cert. denied, 138 S. Ct. 469 (2017); *United States* v. *Enjady*, 134 F.3d 1427, 1433 (10th Cir.), cert. denied, 525 U.S. 887 (1998). That precedent is binding on the panel in this case. *United States* v. *Rodriguez*, 581 F.3d 775, 795 (8th Cir. 2009) (holding that "*Mound* forecloses" challenges to Rule 413 under the Due Process Clause), cert. denied, 562 U.S. 981 (2010). Contrary to what Kindley suggests (Br. 22 n.6), one panel of this Court cannot overrule another panel unless "the earlier panel decision is cast into doubt by a decision of the Supreme Court." *Patterson* v. *Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997). Kindley points to no intervening Supreme Court decision that calls *Mound* into question, nor any other reason to revisit *Mound*'s longstanding holding.[6]

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[6] In *United States* v. *Guerrero*, 19 F.4th 547 (1st Cir. 2021), the First Circuit did not overturn an earlier panel's decision at its whim because "it was time" to do so. Br. 22 n.6. Rather, the court overruled a decision that "r[an] counter to the strong modern trend" of Fourth Amendment case law "started by the Supreme Court and faithfully applied by [the First Circuit] in other contexts." *Guerrero*, 19 F.4th at 557.

(continued…)

Even if this panel were at liberty to revisit *Mound*, that case persuasively explains why Rule 413 satisfies the Fifth Amendment's Due Process Clause. An evidentiary rule violates due process only if introduction of the evidence in question would be "so extremely unfair that its admission violates 'fundamental conceptions of justice.'" *Dowling* v. *United States*, 493 U.S. 342, 352 (1990) (quoting *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977)). "Beyond the specific guarantees enumerated in the Bill of Rights," this "fundamental fairness" test "has limited operation." *Ibid.* Nothing in the Bill of Rights specifically prohibits this type of evidence. And as this Court explained in *Mound*, just because the practice of excluding propensity evidence is "ancient does not mean it is embodied in the Constitution." *Mound*, 149 F.3d at 801 (quoting *Enjady*, 134 F.3d at 1432). Because "'Congress has the ultimate power over the enactment of [evidentiary] rules,' * * * it was within Congress's power to create exceptions to

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(…continued)

Kindley also cites three state-court cases that he suggests conflict with the federal authority uniformly holding that Rule 413 is valid under the Due Process Clause. Br. 23 n.7. But as this Court observed in discussing two of those cases, they "appl[ied] state constitutions, not the U.S. Constitution" to state laws that parallel Rule 413. *United States* v. *Coutentos*, 651 F.3d 809, 819 (8th Cir. 2011) (citing *State* v. *Cox*, 781 N.W.2d 757, 768 (Iowa 2010); *State* v. *Ellison*, 239 S.W.3d 603, 607-608 (Mo. 2007)); see also *State* v. *Gresham*, 269 P.3d 207, 217 (Wash. 2012) (en banc) (holding that a Washington analogue to Rule 413 violated that state's separation-of-powers doctrine). The state-court cases cited by Kindley are therefore irrelevant.

the longstanding practice of excluding prior-bad-acts evidence." *Ibid.* (quoting *Enjady*, 134 F.3d at 1432).

The applicability of Rule 403's safeguards to the admission of evidence under Rule 413 provides an additional bulwark against any fundamental unfairness that might flow from the admission of evidence of other sexual assaults. *Enjady*, 134 F.3d at 1433 ("Considering the safeguards of Rule 403, we conclude that Rule 413 is not unconstitutional on its face as a violation of the Due Process Clause."). This Court has therefore properly deferred to Congress's decision to allow other acts evidence in sexual-assault cases, and it should do so again here.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8746 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word in a proportionally spaced typeface (Times New Roman) in 14-point font.

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version1.2.3412.0) and is virus-free according to that program.

s/ Jonathan L. Backer
JONATHAN L. BACKER
Attorney

Date: February 10, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2022, I filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users.

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, the foregoing brief will be sent by Federal Express, next-day mail, to the Clerk of the Court (ten copies) and to the following counsel of record (one copy) pursuant to Local Rule 28A(d):

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