

No.

IN THE
SUPREME COURT OF THE UNITED STATES

BRETT DEWAYNE COLE,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI (CORRECTED)

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June 15, 2026

QUESTION PRESENTED

Whether acts of juvenile delinquency, which are defined not to be crimes by 18 U.S.C. § 5031, are “crimes” within the definition of “child molestation” in Federal Rule of Evidence 414(d)(2).

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Brett Dewayne Cole and Respondent the United States of America.

There are no stock ticker symbols for these parties, and no corporate disclosure statement is required under Rule 29.6.

LIST OF RELATED PROCEEDINGS

There are no related proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brett Dewane Cole¹ respectfully petitions for a writ of certiorari to review the December 24, 2025 published Opinion of the Tenth Circuit affirming his conviction.

OPINIONS BELOW

The December 24, 2025 published Tenth Circuit decision is *United States v. Cole*, No. 24-7077, 162 F.4th 1070 (10th Cir. 2025), Attachment A in the Appendix (slip opinion version). The Tenth Circuit's Order denying the petition for rehearing en banc (February 9, 2026) is Attachment B in the Appendix.

JURISDICTION

The United States District Court for the Eastern District of Oklahoma had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. It issued a published opinion affirming Cole's conviction on December 24, 2025. App. 3-23. On December 29, 2025, the Tenth Circuit granted Cole's timely motion for extension of time to file a petition for rehearing, extending the deadline to January 28, 2026. Cole filed his Petition for Rehearing En Banc in the Tenth Circuit on January 28, 2026. The Tenth Circuit denied rehearing on February 9, 2026. App. 25. On April 3, 2026, Cole filed an application for an extension of time to file this petition for writ of certiorari (25A1100), which Justice Gorsuch granted on April 10, 2026, extending the petition deadline to June 9, 2026. This court has jurisdiction under 28 U.S.C. § 1254(1).

¹ Petitioner's middle name is spelled without a "y", but the case caption in both the district court and Tenth Circuit misspelled it throughout the proceedings.

PERTINENT STATUTORY AND RULE PROVISIONS

The pertinent statutory and rule provisions are the following, which are included in the Appendix:

1. **18 U.S.C. § 5031**

For the purposes of this chapter, a “juvenile” is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and “juvenile delinquency” is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult or a violation by such a person of section 922(x).

2. **Federal Rule of Evidence 414**

3. **Military Rule of Evidence 414**

STATEMENT OF THE CASE

This case involves an interpretation of Federal Rule of Evidence 414 by the Tenth Circuit that cannot be squared with the plain language of that rule or 18 U.S.C. § 5031. Under the plain language of § 5031, acts of juvenile delinquency are not crimes and therefore are not admissible under Rule 414. The Tenth Circuit’s contrary interpretation opens the door to the government using prior acts of juvenile adjudications in child molestation prosecutions contrary to the plain language of Rule 414 and § 5031.

Cole was charged by indictment with Aggravated Sexual Abuse in Indian Country, Aggravated Abuse in Indian Country, and Abusive Sexual Contact in

Indian Country. The government sought to admit evidence under Fed. R. Evid. 414 and 404(b) that Cole had allegedly sexually molested two other girls when they were under the age of twelve. Cole was a juvenile when those prior acts allegedly occurred.

The district court ruled the evidence admissible under Fed. R. Evid. 414, and the evidence was admitted at trial through the testimony of the alleged victims. The court alternatively ruled that the evidence was admissible under Rule 404(b). In admitting the evidence under Rule 414, the district court rejected Cole's argument that the prior acts were not admissible under Rule 414 because they did not meet the definition of "child molestation" set forth in Rule 414(d)(2). Specifically, Cole contended that the prior acts were acts of juvenile delinquency and therefore were not "crime[s] under federal law or under state law" as required to satisfy Rule 414(d)(2). The district court rejected the argument and allowed the admission of the prior acts evidence at trial. Cole's first trial ended in a mistrial, but he was convicted at his second trial and later sentenced to life in prison.

On appeal, Cole challenged the district court's ruling under Rule 414. But the Tenth Circuit affirmed, concluding that though "juvenile delinquency proceedings differ from criminal proceedings, the underlying acts remain criminal." App. 8. The Tenth Circuit rejected Cole's argument that the Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. §§ 5031-5043, defines acts of "juvenile delinquency" to not be crimes, App. 9-10, and the court therefore affirmed Cole's

convictions. The Tenth Circuit denied Cole’s petition for rehearing en banc. App.

25. Cole timely petitions this Court for review of the Tenth Circuit’s decision.

REASONS FOR GRANTING THE PETITION

1. **The Tenth Circuit’s decision conflicts with the plain language of Rule 414 and 18 U.S.C. § 5031. The decision treats acts of juvenile delinquency as “crimes” for purposes of Rule 414 despite § 5031 defining such acts to not be crimes when committed by juveniles.**

The Tenth Circuit’s decision conflicts with the plain language of Rule 414 and 18 U.S.C. § 5031. The court’s decision treats the rule’s language defining child molestation to be a “crime under federal law or under state law” as using the term “crime” in the general sense. The decision thereby fails to apply the plain language of the rule and § 5031. This court should grant review to clarify the meaning of “child molestation” in the rule, particularly since Rule 414 (and its companion rule, Fed. R. Evid. 413) were enacted directly by Congress instead of going through the ordinary rulemaking process. *See United States v. Meacham*, 115 F.3d 1488, 1492 (10th Cir. 1997) (noting that Rule 414 was not developed through the Judicial Conference rulemaking process but instead was created by Congress itself). Under the plain language of Rule 414 and § 5031, acts of juvenile delinquency are not “crimes under federal law” and therefore cannot constitute acts of child molestation under Rule 414(d)(2). Because the Federal Rules of Evidence are a legislative enactment, courts employ traditional tools of statutory construction to interpret the rules. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988).

To be admissible under Rule 414, the proffered prior acts must be acts of “child molestation” as that term is defined in the rule. Contrary to the district

court's and Tenth Circuit's conclusion, the uncharged other acts here are not "crimes" as that term is used in Rule 414 because Cole was a juvenile at the time the other acts allegedly occurred.

Rule 414(d)(2) defines "child molestation" as "a crime under federal law or under state law" that involves one of six types of conduct proscribed in Rule 414(d)(2)(A)-(F). As a threshold matter, other acts evidence can be admitted under Rule 414 only if the other act is a "**crime** under federal law or under state law." (Emphasis added.)

But an act of juvenile delinquency is not a crime for purposes of Rule 414, and therefore the other acts here did not satisfy the "crime" element of Rule 414(d)(2). Under 18 U.S.C. § 5031, a "juvenile" is a person "who has not attained his eighteenth birthday." "Juvenile delinquency" is defined as "the violation of a law of the United States committed by a person prior to his eighteenth birthday *which would have been a crime if committed by an adult* or a violation by such a person of section 922(x)." 18 U.S.C. § 5031 (emphasis added). Under the plain language of this section, acts that *would* constitute a crime *if* committed by someone 18 years or older—an adult—are not "crimes" if committed by someone "who has not attained his eighteenth birthday." 18 U.S.C. § 5031. Section 5031 thus distinguishes between crimes, which only adults can commit, and acts of "juvenile delinquency," which only those under the age of 18 can commit. Cole's alleged prior acts were acts of juvenile delinquency, not crimes.

The definition of “juvenile delinquency” uses the conditional perfect tense “would have been” when referring to the term “crime.” The condition for the phrase “would have been a crime” is “if committed by an adult.” Thus, a “crime” under § 5031 can be committed only by an adult, that is, someone 18 years or older. Any act that “would have been a crime if committed by an adult” is instead defined to be an act of “juvenile delinquency” if committed by one under 18. In other words, unless the condition set forth in § 5031—being at least 18 years old—is satisfied, the act is not a crime. Therefore, as a matter of federal criminal law, the alleged other acts by Cole would be acts of juvenile delinquency under § 5031, not crimes. Since they would not be crimes under federal law, they do not satisfy the “crime” requirement set forth in Rule 414(d)(2).

The Tenth Circuit and the district court both ignored the statute’s and rule’s plain language in concluding that the term “crime under federal law or under state law” means “crime” in the general sense, despite the rule’s specific references to federal and state law to further modify “crime.” But the plain language of the term “crime” in the rule requires that federal law or state law define the conduct to be a crime (and also involve at least one of the actions listed in Rule 414(d)(2)(A)-(F)).

Applying the plain language of the rule here required the lower courts to interpret the term “crime under federal law or under state law” not simply the unmodified noun “crime.” The Tenth Circuit and district court essentially wrote the rule’s modifying phrase out of the rule. Congress, however, chose to modify “crime” with the phrase “under federal law or under state law.” To give meaning to the

modifying phrase “under federal law or under state law” and not render it superfluous requires courts to apply the plain language faithfully. Thus, the term “crime under federal law or under state law” means a crime that is defined under federal law or state law. To qualify as an act of “child molestation” under Rule 414, the act must be a crime under a federal or state criminal statute. If the prior act is not a “crime” under a federal or state criminal statute, the act does not satisfy the definition of “child molestation” in Rule 414(d)(2), even if the act could constitute a “crime” under a dictionary definition of the unmodified noun.

Under 18 U.S.C. § 5031, “juvenile delinquency” is defined as “the violation of a law of the United States committed by a person prior to his eighteenth birthday *which would have been a crime if committed by an adult* or a violation by such a person of section 922(x).” 18 U.S.C. § 5031 (emphasis added). The use of the conditional perfect “would have been a crime if committed by an adult” demonstrates that the act of the juvenile is not a crime because the necessary condition—the act being committed by an adult—is not met. This matters because Rule 414(d)(2) defines child molestation as a crime under federal law or state law. If federal law defines something to not be a crime—as is the case with acts of juvenile delinquency—then it cannot be a “crime under federal law” for purposes of Rule 414.

Cole’s other acts are also not “crimes” under Oklahoma state law. Under Oklahoma law, a person 15-17 years old who is charged with rape by instrumentation, forcible sodomy, or lewd acts to a child under 16, “shall be held

accountable as a youthful offender,” though the statute provides that such person “may be certified as a juvenile or as an adult as provided by the provisions of the Youthful Offender Act.” *See* 10A Okla. Stat. § 2-5-205(C); *see also* 10A Okla. Stat. § 2-5-205(D). Given that the government did not sufficiently prove that Cole was at least 15 years old at the time of the alleged other acts, the acts also cannot be considered “crimes” under Oklahoma state law as that term is used in Rule 414(d)(2). Oklahoma state law thus does not provide a reason to forego review by this Court of the federal issue of the interpretation of Rule 414 and § 5031.

Accordingly, this Court should grant review to restore fidelity to the plain language of Rule 414 and § 5031 that the Tenth Circuit’s decision improperly ignored.

2. The Tenth Circuit’s decision conflicts with other case law, including (1) the Tenth Circuit’s own decision in *In re Sweeney*, 492 F.3d 1189 (10th Cir. 2007); (2) *United States v. Fetrow*, 76 M.J. 181 (C.A.A.F. 2017), which interpreted Mil. R. Evid. 414—the military analog of Fed. R. Evid. 414—as requiring that prior acts be classified as crimes before they could be admitted under that rule; and (3) *United States v. Goodin*, No. 20-CR-181-GKF (N.D. Okla. April 6, 2021), which agreed with the position Cole took in this case.

Review should also be granted because the Tenth Circuit’s decision conflicts with other case law that correctly interpreted the statute or rule.

First, the Tenth Circuit’s decision created a conflict with its own prior precedent on the interpretation of 18 U.S.C. § 5031. The court attempted to distinguish that earlier case, *In re Sweeney*, 492 F.3d 1189, 1191 (10th Cir. 2007), *see* App. 12, but its attempt was unconvincing. Instead, *Sweeney* supports Cole’s

position and interpretation of § 5031 and thereby supports his position that the prior acts were not admissible under Rule 414.

Sweeney was a bankruptcy case where the Colorado Judicial Department sought reversal of a Bankruptcy Appellate Panel decision that held that restitution ordered in a juvenile delinquency proceeding was dischargeable under 11 U.S.C. § 1328(a)(3). *Sweeney*, 492 F.3d at 1190. The bankruptcy debtor had been adjudicated delinquent at age twelve for committing second degree arson and was ordered to pay nearly \$90,000 in restitution. More than a decade later, he filed for Chapter 13 bankruptcy and listed the ~\$85,000 outstanding restitution balance as a potentially dischargeable debt.

The Colorado Judicial Department challenged dischargeability, arguing that “an adjudication of guilt resulting from juvenile delinquency laws is equivalent to a conviction of crime, and, therefore, that restitution—whether ordered against a juvenile or an adult—is nondischargeable because it is ‘included in a sentence on the debtor's conviction of a crime’ under § 1328(a)(3).” *Sweeney*, 492 F.3d at 1190. The Tenth Circuit in *Sweeney* rejected that argument and affirmed the decision finding the restitution debt dischargeable.

In doing so, the Tenth Circuit rejected the Colorado Judicial Department’s argument that “dictionary definitions of the word ‘conviction’ illustrate a uniform understanding of ‘crime’ such that Mr. Sweeney ‘was found guilty of’ and ‘was sentenced for committing the crime of second degree arson.’” *Sweeney*, 492 F.3d at 1191. The Tenth Circuit said that argument “fundamentally mischaracterizes

juvenile delinquency law. As noted above, an adjudication of juvenile delinquency is not equivalent to a conviction precisely because § 5031 punishes ‘violation[s]’ of the law that ‘*would have been a crime* if committed by an adult,’ 18 U.S.C. § 5031 (emphasis added), with a classification of ‘status’ as opposed to ‘criminal conviction.’” *Id.*, quoting *United States v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990) (emphasis in original). Restitution for Sweeney’s “delinquent acts is not imposed pursuant to the State’s criminal code” *Id.* Thus, the Tenth Circuit did not treat Sweeney’s act of juvenile delinquency as a “crime” under Colorado state law, and therefore the restitution order was dischargeable.

Sweeney supports Cole’s proposition that an act of juvenile delinquency is not a crime under federal law. *Sweeney* emphasized the same part of 18 U.S.C. § 5031 as Cole emphasized in the Tenth Circuit—the conditional phrase “would have been a crime if committed by an adult.” Because Cole’s alleged acts were *not* committed by an adult, they were not “crimes under federal law.” Thus, *Sweeney* and the Tenth Circuit’s decision below conflict on the interpretation of § 5031.

The FJDA provides in plain language that an act of juvenile delinquency is not a crime; instead, it is a “violation of a law of the United States” that “*would have been a crime if* committed by an adult” 18 U.S.C. § 5031 (emphasis added). The conditional perfect construction “would have been if” has only one reasonable reading—that a violation of the law by a juvenile is not a crime. It would have been a crime if the person had been an adult. Thus, an act of juvenile delinquency cannot be a crime under federal law for purposes of Rule 414. This

Court should grant review to address the conflict between *Sweeney* and this case and restore the proper plain language interpretation of § 5031 to exclude acts of juvenile delinquency from the scope of Rule 414(d)(2).

Second, the Tenth Circuit's decision below conflicts with a decision of the Court of Appeals for Armed Forces that interpreted the military analog of Rule 414, Mil. R. Evid. 414. In *United States v. Fetrow*, 76 M.J. 181 (C.A.A.F. 2017), the Court of Appeals for the Armed Forces addressed the application of Mil. R. Evid. 414 to admit prior acts in a general court-martial.

In *Fetrow*, the servicemember was tried and convicted of sexual offenses with child victims. He appealed to the Air Force Court of Criminal Appeals, challenging the admission of testimony of his biological daughter about three prior incidents that had been admitted under Mil. R. Evid. 414. The lower appellate court concluded that the military judge had erred in admitting two of three incidents and that Fetrow had been prejudiced. 76 M.J. at 183. The Judge Advocate General of the Air Force appealed, but the Court of Appeals for the Armed Forces affirmed.

Analyzing the admission of the other acts under Mil. R. Evid. 414, the court set forth three admissibility requirements: (1) the accused is charged with an act of child molestation as defined by Mil. R. Evid. 414(a); (2) the proffered evidence is evidence of his commission of another offense of child molestation as defined by the rule; and (3) the evidence is relevant under Mil. R. Evid. 401 and 402. 76 M.J. at 185.

The Court of Appeals noted that Mil. R. Evid. 414(d)(2)(A)-(G) “provides an exclusive list of conduct and *the similar crimes evidence must fall within those categories.*” 76 M.J. at 186 (emphasis added). (Mil. R. Evid. 414(d)(2)(B)-(G) correspond to virtually identical provisions in Fed. R. Evid. 414(d)(2)(A)-(F).) The court noted that to “the extent those categories incorporate specific criminal statutes, the prior conduct at issue *must constitute a crime under those statutes* in effect on the day of trial.” 76 M.J. at 186 (emphasis added). The Court of Appeals upheld the lower appellate court’s conclusion that two of the acts—acts of indecent exposure to a child—were not admissible under Mil. R. Evid. 414 “because neither incident involved a sexual act or sexual contact as defined by the rule.” *Id.* at 187. Applying *Fetrow*’s reasoning here, the prior acts are not crimes under Fed. R. Evid. 414 because § 5031 defines them specifically to be acts of juvenile delinquency and therefore not crimes. Accordingly, *Fetrow* supports Cole’s position here and conflicts with the Tenth Circuit’s contrary ruling and interpretation of Rule 414. Review should be granted to address this conflict.

Third, district courts have come out on both sides on this Rule 414 issue. The district court and the Tenth Circuit below both rejected Cole’s argument that acts of juvenile delinquency are not crimes for purposes of Rule 414. But another district court in the Tenth Circuit agreed with the position Cole takes here. In *United States v. Goodin*, No. 20-CR-181-GKF (N.D. Okla. April 6, 2021), the district court sustained the defendant’s objection to the government’s Rule 414 notice. *See App.*

35-45 (April 6, 2021 Order in *Goodin*).² The district court in *Goodin* concluded that acts of juvenile delinquency are not crimes for purposes of Rule 414 under either federal or Oklahoma state law (the same state law applicable to Cole).

The court in *Goodin* noted that Rule 414

permits “evidence that the defendant committed any other child molestation” and further defines “child molestation” to mean “a *crime* under federal law or under state law.” (emphasis added). The plaintiff offers no examples—under federal or state law—in which an eleven-year-old has been charged with a *crime* of child molestation. See 18 U.S.C. § 5032 (Under certain circumstances, a juvenile thirteen years and older alleged to have committed an act after his thirteenth birthday may be tried as an adult.); see also 10A Okla. Stat. § 2-5-204(A) (similar). Rather, a “violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult” is an act of “juvenile delinquency.” 18 U.S.C. § 5031; see also 10A Okla. Stat. § 2-2-402(F). ***The plain meaning of “crime” under both federal and Oklahoma law is distinct from, and does not include, an act of juvenile delinquency.***

Moreover, “[p]roper interpretation of a word ‘depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedent or authorities that inform the analysis.’” *Ko*, 739 F.3d at 560 (quoting *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006)). The whole statutory text supports the plain reading of the term “crime.” Congress amended the Federal Rules of Evidence to include Rules 412, 413, and 414 via the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (Sept. 13, 1994) (hereinafter, the “Act”). In the Act, Congress demonstrated its knowledge of the distinction between crimes and acts of juvenile delinquency. See *id.* at §§ 140001-140003 (amending 18 U.S.C. § 5032 to allow the prosecution of thirteen-year-olds as adults for certain offenses); see also *id.* at § 150001 (amending 18 U.S.C. § 521 to clarify that “conviction” for purposes of the Criminal Street Gangs Statute “includes a finding, under State or Federal law, that a person has committed an act of juvenile delinquency involving a violent or controlled substances felony.”).

² The *Goodin* order is included in the Appendix because it does not seem to be available except through PACER.

Accordingly, the court holds that the term “crime,” as used in Federal Rule of Evidence 414(d)(2), does not encompass acts of juvenile delinquency. Therefore, the second requirement for admissibility under Rule 414 is not satisfied.

App. 39-40 (bold emphasis added). *Goodin* conflicts with the Tenth Circuit’s decision here. *Goodin* is faithful to the plain language of Rule 414 and § 5031, while the decision below is not. This Court should grant review to right the ship and harmonize the proper interpretation of Rule 414 and § 5031, namely, that acts of juvenile delinquency are not “crimes under federal or under state law” as that phrase is used in the definition of “child molestation” in Rule 414(d)(2).

In sum, the Tenth Circuit’s decision below conflicts with the plain language of Rule 414 and § 5031, and with the decisions in *Sweeney*, *Fetrow*, and *Goodin*. This Court should grant review to address the correct interpretation of the rule and statute and hold that acts of juvenile delinquency are not “crimes” for purposes of Rule 414. Review is particularly necessary given the government’s ubiquitous reliance on Rule 414 in child molestation prosecutions and the lengthy sentences usually imposed for convictions in such cases.

CONCLUSION

The Court should grant this petition, address this case on its merits, and reverse Cole’s conviction.

Respectfully submitted,

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