OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: VERL HADLEY, Petitioner v. UNITED STATES

CASE NO: 91-6646

PLACE: Washington, D.C.

DATE: November 4, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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VERL HADLEY :

Petitioner :

v. : No. 91-6646

UNITED STATES :

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Washington, D.C.

Wednesday, November 4, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

JOHN TREBON, ESQ., Flagstaff, Arizona; on behalf of the Petitioner.

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 91-6646, Verl Hadley v. the United States.

Mr. Trebon. Is it Trebon, or Trebon?

MR. TREBON: Trebon.

CHIEF JUSTICE REHNQUIST: Trebon. Mr. Trebon.

ORAL ARGUMENT OF JOHN TREBON

ON BEHALF OF THE PETITIONER

MR. TREBON: Thank you, Mr. Chief Justice, and may it please the Court:

The question in this case is whether or not the courts below correctly applied Rules 404(b) and 403 of the Federal Rules of Evidence in order to assure a fair trial below.

More specifically, if the issue of intent is not a disputed issue at trial, and the defense offers a genuine, judicial admission on the issue of intent, should the prosecution be allowed to admit overwhelming amounts of uncharged misconduct evidence under the ruse of proving the marginal statutory issue of intent, and secondly, should the prosecution be allowed to ambush the accused with eleventh-hour prior bad conduct evidence?

Let me highlight some of the facts in this case. Mr. Hadley was a teacher in Chilchinbeto, Arizona, a rural

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area on the Navajo Indian Reservation. He had never previously been convicted of any crimes whatsoever. This was his first trial.

During a parallel investigation in Chilchinbeto involving another teacher, it came to the attention of FBI agents that Mr. Hadley may have a tendency to be a homosexual. As a result, the FBI interviewed all sixth, seventh, and eighth graders in Chilchinbeto -- over 75 students -- and asked them specifically about Mr. Hadley. There were no identified victims, and Mr. Hadley was not known to be a suspect before any of these interviews commenced.

During the same time, during the pendency of this case, there were congressional hearings regarding what was perceived as an epidemic of child molestation on the Navajo Indian Reservation. The victims in this case, besides Cory K., who testified as a prior bad act witness, never mentioned that Mr. Hadley had touched or molested them to anyone else other than the FBI either before or after the interviews.

During the FBI interviews, many students at trial testified that the FBI told them that they knew that Mr. Hadley had touched other students and they were only interested to find out if he had touched them, too. They were told that they couldn't leave the room unless and

until they told them what Mr. Hadley had done with them.

They testified that they were afraid of the FBI. Many witnesses testified that the FBI told them that we can charge you with perjury if you don't tell us the truth. There were no adults, other than the FBI agents, present when the children were interviewed. It was a very, we think, coercive environment.

Several students during trial testified that they had been forced by the FBI to make up stories about Verl Hadley. Indeed, one of the victims in the case --

QUESTION: Mr. Trebon, how does this bear on the questions presented here, which seem to deal mostly with Rule 403?

MR. TREBON: That's true. What I'm trying to show in this case, that there were genuine disputes about what occurred in this particular case, and the problem with 404(b) evidence is that it tends to draw the attention of the jurors away from the facts in dispute in this case, and tend to paint the defendant as a bad person or show that he has a predisposition for committing these types of offenses, and in this case that's exactly what it did.

The prior bad act evidence was absolutely overwhelming. It was very prejudicial, and smeared the defendant, so that the facts in dispute in this case could

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not be fairly decided. Intent was the basis for admitting the prior bad conduct evidence, Mr. Chief Justice, and intent in this case was merely a marginal issue required by Federal statute. Federal --

QUESTION: Well, it's an issue like any other element of a crime in which the Government bears a burden of proof beyond a reasonable doubt, isn't it?

MR. TREBON: Yes, Chief Justice, that's true, but the intent required in this case was merely the statute follows the model penal code which requires that when you touch someone that you do it with the desire to harass, humiliate, to arouse or satisfy the sexual desire of any person. In other words, it was placed in the statute merely to distinguish innocent or accidental touchings from intentional or sexual touchings.

QUESTION: But it's still there, and the Government has to prove it.

MR. TREBON: That's right, Mr. Chief Justice, it is there, and the Government does have to prove it. My point here is that there's not much there to prove.

QUESTION: Well, as to count IX, I take it that there could have been a plausible defense that the actions did occur but that they were innocent.

MR. TREBON: Theoretically, Justice Kennedy, that's true, but no such defense was put forward, number

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1, and number 2, the predicate for establishing, if the Government needed a prior bad act to establish what was going on in count IX, was established by count VIII.

QUESTION: Did he deny that the count IX acts occurred at all?

MR. TREBON: Yes. He occurred that both count VIII and count IX acts occurred, and count VIII, of course, the same type of conduct allegedly went further, so there was no question about what was supposedly taking place when count IX evidence was presented. Count VIII occurs during October of '87, count IX evidence occurs during November of 1987, so again, the issue of intent was merely --

QUESTION: Do you have to -- I thought you were arguing that just as a per se rule that if -- there's a stipulation about intent, that if these acts occurred, they occurred intentionally, that that -- then no prior conduct evidence should be admitted.

MR. TREBON: Justice White, we are not saying that there's a per se rule. What we are saying is that in a case like this --

QUESTION: Well, why aren't you? The intent would never be at issue then.

MR. TREBON: Because we believe that Rule 403 is designed to give trial courts broad discretion, and we're

saying that the offer to stipulate as to the issue of intent should have been a factor considered under Rule 403, and moreover, if it had been a factor considered under Rule 403, in this case it would have tipped the balance in favor of exclusion of all this massive amount of prior misconduct evidence to prove an issue of intent that was transparent from the nature of the acts alone.

QUESTION: Mr. Trebon, the Government contends that there were other purposes for introducing it that supported its relevance in the case and not just its relevance to the intent. What do you say to that?

MR. TREBON: Well, Justice Scalia, first of all it could have never been considered for any other purpose in this case. The jury was instructed that they could only consider the evidence for motive, intent and preparation, and planning, number 1. Number 2 --

QUESTION: Wait a minute. Wait a minute. Motive -- what else?

MR. TREBON: Intent, preparation, and planning.

QUESTION: Intent, preparation, and planning.

MR. TREBON: Right.

QUESTION: Well, that's beyond intent, isn't it?

MR. TREBON: Although in this case they were also instructed -- when the jury instruction was first drafted it was drafted to be used as an intent

instruction. That language was thrown in immediately before it went to the jury.

The trial court also instructed the jury that they could only consider the evidence if they found that the acts charged in the indictment had been proven beyond a reasonable doubt. In other words, they were instructed they could only use the evidence for the mental state of Mr. Hadley. They could not use it to determine whether or not the actus reus had occurred.

Therefore, planning, which would normally go -- planning -- of course, the planning exception clearly doesn't apply here anyway. A plan is a two-stage sequential state of events that takes place where both are in the minds of the actor at the time that one crime was committed. The actor has in mind to commit another crime as well. For example, when you burglarize a gun shop so that you can get a gun to rob a bank. That's a plan.

In no sense of the plan, with the meaning of plan within 403 was there plan in this case, but nevertheless, they were specifically instructed they couldn't use the evidence except for the mental state.

QUESTION: Well, I mean, plan could cover such things as, you know, why he invited children to his home. You know, it's charged that that's one of the ways that one of the charged touchings occurred, but -- and evidence

was introduced that he had done that with other children before. I mean, all of that would go to whether he had planned the enterprise --

MR. TREBON: Justice Scalia --

QUESTION: But I must say that if the instruction was you must first establish from other evidence beyond a reasonable doubt that the acts occurred, then it would have been irrelevant to the planning, wouldn't it.

MR. TREBON: It would have, Your Honor. That's in the Joint Appendix at page 75.

QUESTION: Of course, maybe that instruction was wrong.

MR. TREBON: Well, there's -- one thing's for sure, though, I'm sure you'd agree, Justice Scalia, you certainly couldn't use the evidence now for some basis that the jury couldn't use it for. It would be impossible for this Court to affirm the conviction on some other allowable basis for this evidence when the jury in this case couldn't consider it for that purpose. That would simply be impossible, we submit --

QUESTION: I don't --

MR. TREBON: And no one is arguing --

QUESTION: Is that right? You mean, whenever there's a mistake in the instruction, all evidence that is

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rendered irrelevant by that mistake was therefore improperly admitted?

MR. TREBON: In other words, we don't know how much calculus the jury added to the weight of this evidence at trial, and it would be impossible to redetermine that if we submit it to the jury for another purpose when we know they didn't consider it for that purpose.

In this particular case, we know that we couldn't do that. I don't know that -- if you have another case involving the judge as a trier of fact, it might be a different situation.

QUESTION: Are the instructions in the appendix that you refer to?

MR. TREBON: Yes, Your Honor, they are. This particular instruction I believe appears in the Joint Appendix twice, and it's on page 75, as I recall. the instruction was given both before the -- or, after the testimony of Kyle Hartman and before the testimony of Cory K. It was given in both instances, the identical instruction.

QUESTION: Is it correct that plan was neither an element of any offense charged nor an issue in the case as it was tried?

MR. TREBON: Yes, Justice Souter, that is true,

because plan does have to involve some chain of events, something that's in the mind of the actor. It's not a substitute as a weak modus operandi exception, and it was never part of this case, no.

The prior bad acts, unfortunately, that were admitted in this case, occurred 13 to 17 years earlier in the case of Kyle Hartman and several years earlier in the case of Cory K., and of course the reason that they were so prejudicial, if anyone has any question about that, is because they were unspecified.

When the Government filed a motion in limine several months before trial, they said we want to introduce particular prior bad acts relating to three people. Well, two of those people recanted, so two of those people never testified, and Cory K. was one of them, but when he got on the stand he testified about numerous unspecified prior bad acts.

In the Government's brief, they concede 10 to 20 prior bad acts between he and Mr. Hadley that we had no prior notice of, that I had to deal with on cross-examination for the first time and, of course, in Kyle Hartman's case --

QUESTION: This, too, doesn't really bear on the question presented, does it, the fact that one witness may have surprised you?

MR. TREBON: Well, Mr. Chief Justice, I think it does to the extent when we weigh the amount of evidence necessary to establish intent in this case and we weigh the heavy amount of effect that the prior misconduct evidence had, we can see, I hope it crystallizes the notion, that a stipulation would have taken care of the matter or significantly changed --

QUESTION: Yes, I understand that point, but I don't understand how that point is aided by your contention that you had no notice of what this witness was going to testify to, that you were surprised.

MR. TREBON: Well, actually, in Rule 403, unfair surprise was kept out of the rule itself but it's in the comment, and it says that's also a factor for the trial judge to consider. If there hasn't been prior notice and they're surprised, then obviously the trial court should naturally weigh against the introduction of such evidence.

In this case, it's another factor to attach to our stipulation or proposed judicial admission which would have changed --

QUESTION: Well, supposing you have a crime defined as consisting of four elements, do you think a defendant can come into court and say, I'll stipulate to three of these elements and therefore the Government should not be allowed to introduce any evidence on those

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three and we'll just try one element?

MR. TREBON: I think in the usual case that would not be allowed.

QUESTION: Why not?

MR. TREBON: Because the Government is allowed to put forth its full evidence, the moral force of its evidence on the elements at stake. In other words, if they're intrinsic acts, Mr. Chief Justice, if the acts that you're trying to stipulate out of the case are intrinsic to the case itself --

QUESTION: Well, I'm talking about elements of the crime to stipulate out of a case, and not acts.

MR. TREBON: Well, I think -- then I would make another distinction. If you intend to prove one of those elements with the use of prior misconduct evidence under 404(b), then, of course, you have to consider the parallel provisions of Rule 403, and then a stipulation must be a factor to be weighed by the trial court, so in that situation I'd say you'd at least have to weigh it out.

QUESTION: You say anytime, then, that a defendant offers to stipulate to an element of a crime charged, and the Government wishes to use some sort of prior bad acts evidence, the stipulation is a factor regardless of anything else.

MR. TREBON: Sure. Mr. Chief Justice, it's at

least a factor the trial court should consider in determining whether or not the incremental probative value of the evidence is outweighed by the danger of unfair prejudice, and in this case, of course, the stipulation would have easily taken care of the problem.

We had an issue of intent that was necessarily inferred from the nature of the act alone. I mean, there was no question that if someone touched someone the way that Mr. Hadley was accused of doing, that he was guilty of a crime, that he was touching these children improperly. It was indefensible to argue otherwise, and no one did and no one could. No one could think of a theoretical case within the facts of this case where that would have been possible.

Second of all, there's a whole line of cases undisputed by the Government here. They stay away from all these lines of cases. But when a defendant denies participation in the act, then he or she does not usually raise intent as an issue.

Here, our sole defense at trial, put forward in a memorandum filed well before trial itself, was that Mr. Hadley did not commit the acts in question. We never raised any kind of defense that he could have done these acts but he couldn't have been guilty of the mental state required by the statute.

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QUESTION: But of course, the fact you don't raise a defense doesn't mean that the Government doesn't have to prove that element. I mean, it's not like a civil action where the defendant comes in and pleads defenses. You're not guilty plea raises every question of the element.

MR. TREBON: That's true, Mr. Chief Justice, and that's how criminal cases are different than civil cases. A civil case you could plead such an issue out, but in this case we did more than that, of course. The Ninth Circuit is wrong when it says that we simply focused our attention on some other defense. We did not. We came forward and affirmatively stipulated that this issue could be taken out of the case.

QUESTION: Well, you affirmatively offered to stipulate.

MR. TREBON: Yes.

QUESTION: The Government did not join in your stipulation.

MR. TREBON: We believe that's the error below, certainly one of them. We offered to stipulate, and the response from the Government was, we won't stipulate, and the response from the trial court was, well, I'm not going to make the Government stipulate.

QUESTION: You think the Government should have

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been required to stipulate? I thought a moment ago you said no.

MR. TREBON: I think the Government should have been required to stipulate in this case. In other words, once you considered the fact under Rule 403, yes, Mr. Chief Justice, in this case it was appropriate to accept that stipulation in lieu of the evidence.

QUESTION: Well --

QUESTION: You said that a moment ago that for -- if the Government's going to use bad acts evidence and refuses to stipulate, that should be a factor, an admission of bad acts. Now you say the Government couldn't refuse to stipulate. I thought -- that isn't quite the same as what you said a moment ago.

MR. TREBON: I'm sorry, let me try to clarify it. I'm saying that if you offer to stipulate to an essential element of the statute when the Government is trying to admit prior bad act evidence to prove that point, that the offer to stipulate in lieu of the prior bad act evidence is a factor that the trial court should weigh within the balancing processes of Rule 403.

QUESTION: I take it another way of saying that is the Government can be required to stipulate as a precondition to the admission of the prior bad acts.

MR. TREBON: Justice Kennedy, I would say that

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the Government could be required to stipulate instead of allowing the prior bad acts. Rule 403 comments say exactly that.

QUESTION: Yes. All right. All right.

MR. TREBON: Yes.

QUESTION: Of course, you're not even arguing -- you're not even going that far here. All you really have to establish, I guess, is that at least it should have been taken into account. What you're arguing here is not that it necessarily should have been excluded because there was no stipulation, but at least you should have considered the refusal to stipulate in deciding whether it should have been admitted or not.

MR. TREBON: Well, Justice Scalia, you're correct, although I suppose my position now would be that now that the Government's conceded in their brief that everyone, according to the Government, agrees that it should be a factor considered under Rule 403, I'd like to go on and convince you that in this case you can see by looking at the relevant factors it would have changed the equation, that if the stipulation would have been accepted, then the need for this evidence is obviously trivial and the prejudice from it is overwhelming. In other words, it stopped Mr. Hadley from getting a fair trial.

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And I think you do one other important thing. Speaking as a trial lawyer before this honorable Court, the practice now at trial is for the prosecutor to come in at the trial level and spotlight one of the other purposes under Rule 404(b) as a facade for getting masses of amounts of prior misconduct evidence before the jury, because we all know -- I think the comments to the rules support it, all the scholars support it, and a milieu of case law supports it --

QUESTION: Well --

MR. TREBON: That once that evidence comes in, it's misused.

QUESTION: It seems to me that you are just asking us to disagree with the two courts below that this evidence was admissible and that it wasn't too prejudicial, and you say it shouldn't have been admitted because the equation was such that it shouldn't have been admitted, which means that this is just sort of a fact-bound argument about the application of the rules.

MR. TREBON: Well, I think that both -- Justice White, you and Justice Scalia are correct when you say that if -- there's -- a possible remedy in this case is to send it back. In other words, that's right, the trial court applied the rule wrongly when it didn't offer to consider the stipulation.

QUESTION: I don't know where I got the idea -- I must have misread your brief -- that you were asking for a rule that if you offer to stipulate, the prior crimes evidence is automatically excluded.

MR. TREBON: Only if it's allowed by the trial court when it weighs all the factors under Rule 403.

QUESTION: Well then, so it's -- you weren't urging -- aren't urging a per se rule.

MR. TREBON: I am not urging a per se rule.

QUESTION: So then it's just an argument over the application of these two rules, that's all.

MR. TREBON: Justice White, you're exactly right, I am not urging a per se rule.

QUESTION: Based on the facts --

QUESTION: You abandon, then, your question 3?

MR. TREBON: I hope not.

QUESTION: Well, is it appropriate for Federal courts to adopt a per se rule of admissibility in favor of -- oh, I see, this -- you're opposing that sort of a per se --

MR. TREBON: Exactly.

QUESTION: Okay.

MR. TREBON: Exactly, Mr. Chief Justice. The Ninth Circuit and the Seventh Circuit have adopted per se rules.

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Mr. Hadley's advocating a balancing test under Rule 403 in which the stipulation would simply be considered as a relevant factor. The comments to Rule 401 say exactly that, that the offer to concede a point may result in the exclusion of evidence.

That's what the comments to Rule 401 expressly says. That's what we asked that the Court do in this case. It unequivocally refused to do so because the Government refused to enter into the stipulation.

We submit to you that had 403 been correctly applied in this case, and the stipulation considered in good faith, it would have changed the calculus or the equation --

QUESTION: All right. So you are, then, asking that always if there's an offer to stipulate, that the Court should entertain it.

MR. TREBON: At least consider it under the --

QUESTION: Yes.

MR. TREBON: With other factors.

QUESTION: Entertain it.

MR. TREBON: Yes, Justice White, that's right, at least consider it with other factors.

QUESTION: So this is a question of law, I suppose.

MR. TREBON: It is. In fact, the circuits are

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split in varying forms, in varying complex forms, about exactly what you do with an offer to concede. The Second Circuit has the most elaborate test. Other circuits have employed other tests. Only the Seventh Circuits and Ninth Circuits say that they have a per se rule against them whenever a specific intent crime has been charged. Both of the circuit courts --

QUESTION: The trial judge in his comments seemed to say that an important factor was -- in admitting the evidence was the difficulty of proof in crimes like this, the fact that there was a child whose English was either a second language or he was not as proficient in English as some children are.

Does this go really further than his express rationale of admitting it just for intent? Does it show that he's admitting it just for propensity?

MR. TREBON: I think that that's what the trial court in many ways, quite honestly, Justice Kennedy, wanted to do, but it gave him a jury instruction that said they couldn't do it. There's no sexual propensity exception under the Federal Rules of Evidence.

QUESTION: Do you read the Government's brief as advocating such a rule?

MR. TREBON: Absolutely. I don't see much of a distinction between what the Government's arguing and a

pure propensity argument.

Even in Huddleston, the Chief Justice speaking for a unanimous Court started the opinion off by saying no one questioned in that case whether or not the goods were stolen. The only question was whether or not the person in possession of the goods knew that they were stolen.

The Chief Justice characterized that second question as the only material issue in the case, and the only material issue in this case, of course, has to be his intent and not propensity. You can't use evidence --

QUESTION: If there is a propensity rule for sexual molestation crimes --

MR. TREBON: There are in some of the States.

QUESTION: If there is in a State, is the -- may a district court refer to that rule in trying a case under the -- in the Federal court under the Rules of Evidence?

MR. TREBON: Absolutely not, and in fact in this case I thought that was some of the cause for confusion below, because the Government in its original motion in limine filed, I think, in November of '87 cited some Arizona cases, and even the Arizona exception -- in Arizona, you can allow sexual propensity evidence as an exception to 404, but only if you approve it or offer it along with expert testimony showing that there really is a mental predisposition on the part of this person to act in

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a certain way.

The Government didn't even offer that predicate evidence in order to get it in, and quite clearly, no, all the commenters, Justice Kennedy, conclude that you cannot offer sexual propensity evidence under the Federal Rules. There's no such exception.

If there are no other questions pending from the Court at this moment, I will reserve my final time for rebuttal.

QUESTION: Very well, Mr. Trebon.

Mr. Bryson, we'll hear from you.

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE RESPONDENT

MR. BRYSON: Mr. Chief Justice and may it please the Court:

The position we take in this case is parallel to the position taken by petitioner in several respects. The issue as we see it is actually quite narrow.

Number 1, we do agree that -- with what I understand the petitioner's submission to be, that the offer to stipulate is a factor which a court may and should take into account in the course of the 403 -- Rule 403 balancing that has to be done during the course of a decision to decide whether to admit extrinsic act evidence under Rule 404(b).

As we say it -- as we see it, and if I may back up for just a moment, we think there is essentially a three step process here. This case focuses on the third of those three steps. The first step is, is this evidence relevant?

We think it's clear that the evidence is relevant, and I don't understand petitioner to be arguing to the contrary. This is a case in which petitioner, his whole defense was that this entire case was essentially the product of an overly aggressive FBI investigation, and in which essentially the children were led into and deceived into and pressured into making false accusations against Mr. Hadley. The evidence that we --

QUESTION: Mr. Bryson, before you leave the relevance --

MR. BRYSON: Certainly.

QUESTION: Part of your three steps, you argue three grounds of relevance in your brief as I read it. At pages 20-21, is it relevant to whether the petitioner had physical contact with the boy, secondly, to state of mind, and thirdly to motive.

Now, with respect to the first of the three relevancies that you identify, do you think that was consistent with the judge's instruction that your opponent described to us?

MR. BRYSON: Your Honor, the judge I think gave -- the answer is, I think it is consistent, although the instruction I think was unduly narrow. It was consistent in this sense, in that the -- several of the contacts were contacts in which the defendant admitted that there was a contact but contended that there was actually no crime because the contact was not accompanied by a desire for sexual gratification.

In other words, he was saying, I -- basically, he's making a defense of no intent, even though he's attacking the --

QUESTION: No, but your first point is the question whether petitioner had physical contact.

MR. BRYSON: Yes.

QUESTION: You say it was relevant to that, and it seemed to me that's flatly inconsistent with the judge's instruction that you may not consider the evidence without first finding beyond a reasonable doubt that the facts occurred --

MR. BRYSON: Well, first of all --

QUESTION: And he did say that unambiguously.

MR. BRYSON: Well, Your Honor, I think first of all that there is -- I don't think it's really inconsistent with the judge's notion that -- the judge I think had a very broad notion of what preparation and plan

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was, and he understood that to mean that evidence going to whether there was a sequence of events leading to a particular --

QUESTION: Well, he says you can't consider it unless you first find that the other evidence in the case standing alone establishes beyond a reasonable doubt that Mr. Hadley did the particular acts charged in the indictment --

MR. BRYSON: Well, that's right.

QUESTION: Which would include that the -- whether they had physical contact.

MR. BRYSON: That's right, so that -- but that doesn't mean that this evidence didn't in some respect bear on that question, even though they would have, under the instruction, already had to have decided that they were satisfied that there was physical contact.

The -- what I think -- and where I think I can perhaps explain what I think the judge had in mind by the combination of the basis for admission and the instruction was that the judge was focusing on the fact that these witnesses corroborated one another.

The two witnesses in question, Amadee R. and Cory K., gave testimony which was so similar that doubts that one may have had about the accuracy of Amadee R.'s whole explanation of the events were much relieved when

you heard Cory K. testify to a very, very similar sequence of events.

Now, that goes to the credibility of Amadee R., who was attacked by petitioner on cross-examination as having fabricated this story.

QUESTION: You say it would remove any doubts, but he says you can't even use it unless you don't have any doubts.

MR. BRYSON: Well, except --

QUESTION: He says you have to have been satisfied beyond a reasonable doubt.

MR. BRYSON: Except that there are two questions that Amadee R.'s testimony bears on: 1) the question of whether the event occurred, but 2) and significantly for purposes of the instruction, the question of whether his testimony reflects intent on the part of the defendant, so if you believe that that event occurred as Amadee R. described it, then you conclude that there must have been intent on the part of the defendant, or at least you conclude that there's a very -- a much more powerful case to be made for intent.

QUESTION: Okay, but you're back --

QUESTION: You're back --

QUESTION: To the intent issue again.

QUESTION: Yes.

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MR. BRYSON: That's right, and that's --

QUESTION: We're trying to find out if there's some other purpose, other than intent, for which it was properly --

MR. BRYSON: Well, corroboration.

QUESTION: Let me ask you another question.

MR. BRYSON: Corroboration.

QUESTION: Suppose I just don't agree with you. Suppose I think that this instruction just excludes any other purpose except intent --

MR. BRYSON: Okay, fine. We're prepared to litigate the case on that basis.

QUESTION: Is it possible that it was properly admitted but improperly excluded from the jury's consideration --

MR. BRYSON: Certainly.

QUESTION: At the instruction stage.

MR. BRYSON: That is certainly true. I think this instruction was unduly restrictive. The fact that the instruction may have been too narrow doesn't retroactively render the evidence inadmissible. The evidence was admissible as relevant on the basis that it went among other things to the question of whether the acts occurred.

The fact that there was a subsequent instruction

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that was restrictive may have been unfortunate. It may have unduly restricted what the jury could do with that evidence, but it didn't affect the question of relevance.

QUESTION: But your point, and if I understand you, is that even if the Government had stipulated to intent, the evidence still would have been admissible because it corroborated the physical fact -- physical act evidence.

MR. BRYSON: Yes, I think so. Now, let me --

QUESTION: Would --

QUESTION: And --

QUESTION: In which case you're using the prior specific bad acts in effect to prove propensity, aren't you?

MR. BRYSON: No, I don't think so. We're using the prior bad acts to show that the testimony given by Amadee R. was in fact credible and to show that that event occurred without going through the intermediate inference of character.

QUESTION: Well --

QUESTION: Well, you don't -- oh, excuse me. Go ahead, sir.

QUESTION: Go ahead.

QUESTION: I was going to say you don't need the intermediate inference on your theory.

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MR. BRYSON: Well, if we don't need it --

QUESTION: We're never going to have a propensity case if your theory is correct, because nobody is ever going to want to waste time relying on the intermediate step. They'll follow your theory of probability. He'd do it once, he probably did it twice.

MR. BRYSON: Well, Your Honor, we're not saying that he did it once, he probably did it twice. We're saying when witnesses testify as in this case to very similar events, and I would like to emphasize just how similar these two accounts are, then the doctrine of chances that Wigmore articulated comes very much into play.

QUESTION: Okay, I'll accept that, but it ends up, it seems to me, subject to the same objection.

If your doctrine of chances theory is correct, nobody is ever going to waste time on the intermediate premise of propensity because they're not going to need it.

MR. BRYSON: Well, if this evidence is relevant to -- under the doctrine of chances to the conclusion that the -- that either the event occurred or that the defendant had intent, then it would be admissible under the rule, or at least it wouldn't be foreclosed --

QUESTION: If it is, it seems to me you've

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swallowed the propensity rule just about whole. I don't know how you can get out of it.

MR. BRYSON: I don't think so, Your Honor, because the -- we certainly concede that where you don't have similarity and where the doctrine of chances would not have a powerful impact as it would in this case, that you could --

QUESTION: In that case, you wouldn't have a relevant propensity.

MR. BRYSON: Well, you could have a relevant propensity of the sort that if a person has committed one criminal act, he's more likely to commit another like criminal act, but that is what the rule is addressed to.

QUESTION: Well, or even at a narrower level of generality, you were not trying to get in merely evidence that this person had abused children before.

MR. BRYSON: That's correct.

QUESTION: What you're asserting is that the nature in which he went about conducting the abuse was the same as had been testified to by these children, used the same guile, the same ruses, and so forth, not merely --

MR. BRYSON: That's correct.

QUESTION: That he was a person who liked to abuse children.

MR. BRYSON: That's correct, Your Honor.

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QUESTION: Mr. Bryson, we did grant certiorari on the intent issue.

MR. BRYSON: The --

QUESTION: That's the major thrust of the case.

MR. BRYSON: The stipulation issue as I understand it, Your Honor, yes.

QUESTION: Yes, and you said you were prepared to argue the case on that basis.

MR. BRYSON: Certainly, yes, and let me proceed --

QUESTION: And I thought you began by saying that you would agree that the willingness to stipulate or not should be a factor in the 403 balancing.

MR. BRYSON: It should be, and it was in this case, Your Honor.

The district judge in this case said on several occasions that this particular stipulation on this record simply doesn't give the Government the equivalent of that evidence, that 404(b) evidence.

The judge was very careful in his 403 balancing in this case, and he looked time and again at the stipulation, even suggested an alternative form of the stipulation that counsel could propose that might well displace the need for the 404(b) evidence.

QUESTION: You got -- you said that there's a

three step -- you started out to give us three steps of what your position is and you were talking about relevance.

MR. BRYSON: Yes, and then the second step is is, is there anything about the relevant evidence that -- is there anything in Rule 404(b) that forces the Court to exclude that relevant evidence, and there is not in this case, and then you get to the 40 -- excuse me, the 403 question, which is the balancing test under the rule that provides that if the evidence is more prejudicial than probative then --

QUESTION: So the Government didn't agree to stipulate, did it?

MR. BRYSON: No. The Government --

QUESTION: It refused, but nevertheless the judge, you say, considered the offer as a factor in the balance.

MR. BRYSON: Yes, Your Honor, the judge considered the offer in this following sense. The judge looked at the offer to --

QUESTION: Whereabouts is it, Mr. -- are you referring to something that's in the transcript?

MR. BRYSON: Yes, Your Honor.

QUESTION: Page --

MR. BRYSON: There are several places that -- if

you have the Joint Appendix, at Joint Appendix 35, and at Joint Appendix -- well, it's at transcript 878. That -- this -- one portion of it is not in the Joint Appendix, the other is.

The court explains the -- it's describing this whole purpose of admitting the 404(b) evidence and says that simply to have a sterile stipulation that Mr. Hadley did these things and that was his intention takes away from the jury the opportunity to judge that intention and act on it, and adds that -- the court then adds that this evidence goes to motive intent as well as to whether there were any particular plans or preparations having to do with his conduct of these kinds of activities. This is the plan and preparation motion that the court --

QUESTION: How were they in issue in this case?

MR. BRYSON: Well, the court's concept was that if you look at the similarity in the Cory K. testimony and the Amadee R. testimony it establishes a modus operandi, essentially, is what he was talking about with plan and preparation, which reflects on both intent and the commission of the act.

He uses modus operandi from time to time, but usually he talks about plan and preparation.

QUESTION: So that whenever there's a modus operandi that could be inferred prior bad acts are

automatically admissible.

MR. BRYSON: If the prior bad acts are very probative of modus operandi which in turn reflects one of the ultimate elements of the crime, yes, Your Honor, certainly, and that bears -- that turns on whether there's great similarity in the prior bad acts.

QUESTION: Why was the stipulation inadequate?

MR. BRYSON: Well, let me turn to that.

QUESTION: You said that the trial judge found that merely telling the jury, look it's conceded he had the intent if he did the acts. Why wasn't that enough?

MR. BRYSON: Well, here are the reasons, and let me just go down the reasons that I think the stipulation was inadequate.

First of all there -- the attack, as I've mentioned, on the witnesses was the suggestion that they had simply fabricated this evidence. It was necessary for the Government to corroborate those witnesses in some way in order for the jury to believe the witnesses. Whether the jury believed the witnesses or not obviously went to the issues not only of intent but also whether the crime was committed. It certainly went to --

QUESTION: But -- but I thought the instruction did not cover use of the evidence for corroboration.

MR. BRYSON: Your Honor, it certainly did not

exclude corroboration, and the judge said explicitly --

QUESTION: Well, I mean, it did not allow its use for corroboration, did it?

MR. BRYSON: It spoke only of ultimate issues, Your Honor. I mean, it didn't say explicitly you may use this for corroboration, but in saying that you may use this for intent of preparation or plan, what the judge clearly contemplated was that the jury could use this to corroborate witnesses whose testimony in turn would bear on intent.

QUESTION: You say he should have let him use it for that, even if he didn't.

MR. BRYSON: Yes, that's right.

QUESTION: Yes, but their testimony would also bear on whether or not the acts occurred, and it seems to me that in this case 90 percent of the thrust of the testimony is whether or not the acts occurred, and 90 percent of the corroboration that you obtained by introducing these prior acts is that the acts occurred, and that intent is not fictional, but it is de minimis or insignificant.

MR. BRYSON: Well --

QUESTION: I have to submit that.

MR. BRYSON: Well, Your Honor, let me explain why I think intent was in this case despite the offer to

stipulate, and this is -- really goes to the second ground, I think, on which the district court properly refused to take the stipulation, and that is, this is really not a case in which there was a concession as to intent, but the theory of the defense case, again, was that I -- and this was his testimony:

I had -- sure, I had a lot of contact with these children. I dealt with them on a regular basis, but it was because of a benevolent interest in their welfare.

He was saying, I have not gotten -- he said this explicitly. I have no intent of sexual gratification when I deal with these children. I am attempting simply to help them along. I am -- as he put it with respect to Amadee R., I am a clan brother of his, and that's why I'm having contact with him, that's why I'm having him sit on my lap --

QUESTION: Well, but that was all done to try and convince the trier of fact that the particular acts in dispute didn't happen because I'm not that kind of person.

MR. BRYSON: Well, that's right, and that was -- what he was doing is saying, the reason those acts didn't happen is because I don't have the intent to have sexual gratification, and then he says, but -- and here's the stipulation -- if they occurred, then I had the intent.

He can't concede -- he can't come in and say

well, you can't introduce the facts that will undercut my intent argument at the front side if I concede and stipulate intent at the back side. It's a two-step process --

QUESTION: Well, of course, your intent -- would make everything relevant.

MR. BRYSON: Well, Your Honor, this -- in this case, if you look at this objectively, that is what his defense was. His defense was that I do not have the intent to commit these crimes and therefore probably didn't commit them.

QUESTION: Mr. Bryson, on the basis of that stipulation, had it been accepted, wouldn't it have been proper for the trial judge to instruct the jury that they -- that if they found that the acts charged occurred, they could take that as sufficient proof of the intent required, i.e., sexual gratification. That would have been a proper instruction, wouldn't it?

MR. BRYSON: They -- the court could have given such an instruction, yes. Under the stipulation, that presumably would have been an instruction. If -- of course, they would have had to conclude first that the acts occurred, which would have depended on the evidence with respect to the lack of intent.

Now, of course --

QUESTION: Mr. Bryson, as I understand it, there was no stipulation.

MR. BRYSON: No, there wasn't.

QUESTION: There was an offer to stipulate.

MR. BRYSON: That's correct, there was no stipulation. The stipulation --

QUESTION: Well, do you think the trial court could have charged the jury with respect to an offer to stipulate which was never accepted?

MR. BRYSON: No. I'm saying if the Government had been required to stipulate --

QUESTION: Oh, are you -- you're talking about a hypothetical case.

MR. BRYSON: Exactly. Exactly. That's what I --

QUESTION: But it's also the case, isn't it, Mr. Bryson, even though there was not in fact a final stipulation, that the trial judge could have considered -- in determining whether to keep out the prior acts, he could have considered an offer on the defendant's part that if you keep them out you may instruct the jury in the manner I just suggested.

That would have been perfectly proper, and there would have been no error in the judge's doing so, would there -- no error that could have been --

MR. BRYSON: No error --

QUESTION: Raised by the defendant?

MR. BRYSON: No error against the defendant --

QUESTION: Yes.

MR. BRYSON: That's right. That's right.

I think a final ground on which the 404(b) evidence -- I keep calling it 404(b) evidence. It really isn't. Extrinsic act evidence, let me call it -- would have been admissible is to impeach, and the denials of the defendant in his own testimony as opposed to the contradiction of the theory of the defense case, but specifically to impeach the denials in his testimony of having had sexual contact with particular minors and minors in general.

QUESTION: I thought you were limited to his answers on cross-examination under the Evidence Code, or am I missing something? I thought to impeach by prior bad acts you simply ask on cross-examination, you don't introduce extrinsic evidence --

MR. BRYSON: Your Honor, if it's --

QUESTION: Or --

MR. BRYSON: If it's by contradiction on a fact that goes to the elements of the crime, it's certainly perfectly permissible to impeach by contradiction, and you can do that by introducing evidence.

That evidence has in effect -- it's admissible evidence which has become relevant by virtue of the denials that are made, in this case denials of contacts with minors.

If -- in other words, his testimony that he did not have sexual contacts with minors made relevant evidence that in fact he did, because if he is telling the truth that he didn't have contact -- sexual contact with minors, then he is surely not guilty, and our impeachment by contradiction goes to the heart of the case, so we --

QUESTION: And that's different than impeachment under 608.

MR. BRYSON: Under 608, that's right, because those --

QUESTION: Well, don't you --

MR. BRYSON: Those go only to credibility.

QUESTION: But then you simply supplant the 608 balancing test with no balancing test at all.

MR. BRYSON: If there's -- if it's an issue which is at the heart of the case, Your Honor, that goes to one of the elements of the crime or whether the crimes occurred at all, then we are certainly entitled to impeach by contradiction.

If the defense comes in --

QUESTION: Does a case occur to you that I could

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read to --

MR. BRYSON: Well, there's a discussion in Weinstein of impeachment by contradiction, and it's at -- well, I don't recall the section number, but there is a good discussion on that doctrine.

QUESTION: You're not talking just about impeachment without any other relevance, you're talking about evidence that is relevant to some --

MR. BRYSON: Yes.

QUESTION: Some issue in the trial as -- and it kind of happens to impeach.

MR. BRYSON: Yes, exactly, and it's become particularly relevant by virtue of the denial. In other words, the district judge is perfectly within his rights to say that now you have specifically denied, given a broad denial -- and this is what the district judge said -- of any commission of any of these crimes, the Government is entitled to come back and say well, that's not true, because it goes to the heart of the case.

QUESTION: So that 608 is simply for collateral matters.

MR. BRYSON: Well, it's for -- credibility, it goes to credibility on matters that aren't part of the corpus on the Government's case. In other words, part of elements the Government has to prove in order to establish

its case.

The defendant contends that we smuggled into the defense testimony the broad denial of having -- as having ever had sexual contact with minors by asking that question during cross-examination, but there can be no question -- and this, the district judge ruled on this -- that given the nature of his denials, the nature of his defense, including a statement that the FBI had said that his students had given him a clean bill of health, all the suggestions in the testimony were that he was denying any involvement in any of these events, and denying that he had ever had involvement with minor children.

It was perfectly legitimate and it was, in terms of the standard, reasonably suggested by the direct testimony that we ask, well, are you denying that you've ever had sexual contact with minors, and he did deny that, so impeachment was we think a perfectly legitimate ground for admitting the evidence.

I would also point out, in addition to the district judge -- I think, by the way, I stopped in reading the quote from the district judge before I got really to the main point, and that was that what the judge was saying in saying that the stipulation was not adequate here, was that it didn't -- as he put it, was not reasonable and appropriate, and then he added, under all

the relevant circumstances of this case.

It's clear that the district judge was not laying down an absolute rule that he would not require the Government to accept a stipulation and offer to stipulate in any case. The judge was simply saying that on the facts of this case, the -- there was no requirement to -- for the Government to accept the stipulation, and the court of appeals did not even discuss this issue.

There's no per se rule of the court of appeals on this. The court of appeals addressed the question of whether something is not disputed, and that's quite a different matter if an issue is not disputed whether the Government could introduce evidence going to intent, but because this issue was really put before the court of appeals only in a very tangential way in the defendant's court of appeals briefs -- two sentences, I think, on page 37 and 38 of the defendant's briefs -- it's not surprising that the court of appeals didn't address this question.

So this is not a case in which the court of appeals or the district court adopted a sweeping, per se rule of rejection of any proposed offer to stipulate.

QUESTION: Well, what if we concur in the view that both you and your opponent expressed that the offer to stipulate should be a factor taken into consideration by the district court in its balancing, but nonetheless

conclude that the district court did do this?

MR. BRYSON: Yes.

QUESTION: Ought we to send it back to the court of appeals for it to consider that, or should we consider it here? What should we do?

MR. BRYSON: Well, I -- Your Honor, I think the district court was manifestly correct in concluding that it was -- that the Government was not required on these facts to accept the stipulation, and the court of appeals affirmed the district court, so you have a judgment of the district court that's based on no error, and you have a judgment of the court of appeals --

QUESTION: Right.

MR. BRYSON: That's based on -- that's correct as well. I mean, you don't have to reverse every time a court of appeals doesn't specifically discuss a particular issue. You would have an awful lot of reversals in cases in which the court says there's no error, no merit to any of the other claims.

So you don't have to reverse in order to get the court of appeals to say something explicit on a matter on which we think there's no error whatsoever.

QUESTION: Mr. Bryson, could I just ask you a question to be sure I understand your position. Assume we had a bank robbery case before us, and the defendant had

been previously convicted of another bank robbery, could the Government begin its case by offering in evidence the prior conviction?

MR. BRYSON: Your Honor, without more --

QUESTION: That's all there is.

MR. BRYSON: It would depend, Your Honor, on, for example, whether the prior bank robbery was sufficiently similar to support an inference --

QUESTION: They were both banks in small towns in Michigan. That's a --

MR. BRYSON: I think on that basis, that's not similar enough. On the other hand, if you have banks in small towns in Michigan in which the robber used a pearl-handled revolver and used a particular expression with the teller, and the question is, say, identity, then --

QUESTION: Oh, I understand identity. We don't have an identity problem. The question here is whether the act occurred.

MR. BRYSON: Well --

QUESTION: But just -- you aren't taking the position that you can always introduce this --

MR. BRYSON: No. Our position on Rule 404(b), Your Honor, is that if it's relevant to one of these purposes, other than simply showing character for purposes of establishing --

QUESTION: Showing whether the act occurred. That's the issue for which you want to offer it.

QUESTION: No --

QUESTION: Oh, well, here it's whether the defendant performed the act with which he is charged. You say, bank robbery, it might be because you have an identity question here.

MR. BRYSON: If you have an identity question, that would certainly be so.

QUESTION: And here if he'd been convicted of a molestation of a child 10 years ago, you could start off with putting that evidence in.

MR. BRYSON: Well, I --

QUESTION: Well, that -- you'd never get -- you couldn't use that evidence, that one act to prove the -- to prove a later act.

MR. BRYSON: Well, it depends on what the act is, Your Honor. If the act is very, very specific -- I mean, for example, suppose you're offering it to prove that the defendant intended to rob a bank and what you have is --

QUESTION: Yes, but don't you have to prove that what you've indicted him for occurred?

MR. BRYSON: Well --

QUESTION: There was a bank robbery, anyway.

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You have to prove that.

MR. BRYSON: Well, let me give you this example, which would make -- in the bank robbery setting, it's a little bit difficult to answer that question, but let me --

QUESTION: Well, take it in -- here, you indict someone for child molestation.

MR. BRYSON: Well, all right, let me try this example. It seems to me to make the point.

Suppose that someone is charged with sexual abuse for rubbing up against a woman on a crowded subway car. The woman reports it and says, this is what this person did. You go to trial and, sure enough, three other women come in and say in exactly the same way, this person rubbed up against me the week before, and the defendant says, look, I never rubbed up against this woman, the complainant in the case, and --

QUESTION: Well, I suppose you're going to --

MR. BRYSON: The trial judge admits that evidence to establish --

QUESTION: I know. I suppose, though, you're going to put the woman who made the complaint on the stand and say this --

MR. BRYSON: Yes.

QUESTION: That's what you're going to start off

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with.

MR. BRYSON: That's right.

QUESTION: That's -- but you can't get away with proving this -- proving what the complainant said this man did by just -- without anything else, without even putting her on the stand.

MR. BRYSON: Oh, we'll put her on the stand, that's right --

QUESTION: Why, sure.

MR. BRYSON: But if they attack her credibility and they say --

QUESTION: Yeah, sure.

MR. BRYSON: Well, you just completely -- you either fabricated this or you didn't understand --

QUESTION: Yes, sure.

MR. BRYSON: This was accidental, this was just a brushing up against you that had no purpose to it, that might work.

QUESTION: You can use it to prove intent.

MR. BRYSON: Intent, or even the occurrence of the event, because if in fact she gets up and she says well, this person brushed up against me, and he says, look, I was there, I was nearby, but I didn't brush up against her, that tends to impeach him that exactly the same thing occurred on other occasions, and it tends to

corroborate her testimony.

QUESTION: Well --

QUESTION: Could you have made the same argument you make here if you had just count IX in the indictment, which was the business in the --

MR. BRYSON: Yes. Count IX is --

QUESTION: In the trailer.

MR. BRYSON: In the trailer. Oh, absolutely.

QUESTION: Pardon me. What if you had just counts VII and VIII --

MR. BRYSON: VII and VIII --

QUESTION: Which was automobile, and not count IX?

MR. BRYSON: I think so, Your Honor, because VII and VIII were cases in which I think demonstrate very clearly that there was no concession as to intent, because, keep in mind, he admitted that he had allowed Amadee R. to sit on his lap.

QUESTION: Well, but there was nothing similar about VII and VIII and what Cory testified to.

MR. BRYSON: Well, there were actually, Your Honor. There was testimony both that -- in Cory's case, there was anal sodomy and also that --

QUESTION: Well, but that's just an act.

MR. BRYSON: Sitting on the lap in the same

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posture.

QUESTION: Yes, but that's virtually at the same level of two bank robberies.

If your -- I mean, if that's going to be an appropriate argument, then you can say whenever he robbed one bank you can introduce evidence that he robbed a prior one.

MR. BRYSON: I think this is more -- this is more unusual conduct in that respect. It is certainly --

QUESTION: Well, it's unusual.

MR. BRYSON: It certainly bears on his intent.

The question is, when he put Cory K. -- excuse me, when he put Amadee on his lap, did he have the intent to do anything further, and I think Cory K.'s testimony reflects very significantly on that intent because it demonstrates his state of mind in a generally similar setting.

QUESTION: Well, just to get the record straight, Cory K. didn't testify to an incident sitting on a lap in an automobile, did he?

MR. BRYSON: Not in an automobile. It was in his -- in the trailer, that's correct.

Thank you.

QUESTION: Thank you, Mr. Bryson.

Mr. Trebon, you have 6 minutes remaining.

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REBUTTAL ARGUMENT OF JOHN TREBON

ON BEHALF OF THE PETITIONER

MR. TREBON: Thank you, Mr. Chief Justice.

There is no exception under Rule 404(b) for a weak modus operandi case. That does not somehow become corroboration, that does not somehow become plan. Modus operandi evidence is admitted to show identity. There was no identity issue in this case, number 1, and number 2, there was no finding by the trial court that these acts were so similar as to constitute modus operandi. There was no signature to crime in this case.

Moreover, corroboration evidence is no different than propensity evidence unless it corroborates the act on trial. You cannot call someone as a corroboration witness if they speak about a different act. They have to corroborate the specific act on trial. That's corroboration.

If corroboration is used so broadly that if crime A is on trial and you corroborate to another person that crime B was committed, that's not corroborating what's on trial, that's simply propensity evidence. There's no difference between the two. All the commenters say so.

Professor Imwenkerlied and others say that that is a false use of corroboration testimony in order to get

around 404(b) and 403. That is simply unallowable in this case.

Secondly, following up on Justice Kennedy, let me tell you that the acts in this case were not that similar anyway. Counts VII and VIII involving Amadee R. take place inside of a car. The acts that they want you to believe that it's similar to are supposedly full-blown sodomy attempts in a bedroom with lotion and all the things that they put in their brief, none of which existed in counts VII and VIII. They simply were not very similar at all.

There was no use of that evidence for purposes of corroboration in this case. When we offered to stipulate, we offered to stipulate intent out of the case unequivocally. There was no doubt about the full force and validity of our stipulation.

What the Government is telling you now is that Judge Carroll didn't like the stipulation. Judge Carroll didn't want to add anything to our stipulation relating to the element of the crime. He wanted me to stipulate that the prior bad acts had occurred.

It didn't make any sense. Why would I have to stipulate that the prior bad acts had occurred? The only thing in question was intent, and I offered a stipulation or concession, if you will, Mr. Chief Justice, that that

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was satisfied to a concession.

The comment to Rule 401 says that the trial court should consider concession on a point at trial in lieu of actual evidence in order to exclude that evidence, especially 404(b) evidence.

QUESTION: Do you deny that your client touched these students?

MR. TREBON: Yes.

QUESTION: At all.

MR. TREBON: Yes. We deny that he touched them -- the particular acts in question. Certainly we didn't deny that he may have tickled them on the playground as their teacher, and so forth, but we denied all of the acts in question.

So this was a trial about whether or not these acts occurred, or whether or not they were prompted, similarly to many other witnesses who testified at trial, prompted by the FBI to make accusations against Mr. Hadley.

It was a case that necessitated a full-blown exploration on the particular acts in question, and all we did by admitting all the prior bad act evidence is to change the focus of the trial to events that occurred 13 to 17 years earlier, and certainly was extremely prejudicial. All the commenters in all the cases say that

emotional -- that the emotional propensity of child molestation is extremely high, and limiting instructions in this area are very ineffective.

I don't believe that the Government can have it both ways with the jury instruction, too. You can't say Judge Carroll had this broad idea about plan evidence but yet instructed the jury that they couldn't consider the evidence for anything other than mental state.

You had to determine independently whether or no the acts occurred beyond a reasonable doubt, so clearly none of this evidence could have been considered at the trial level to determine the actus reus of the case. That's simply implausible under the jury instruction that was given by Judge Carroll.

QUESTION: Well, what if the instruction was in fact wrong? What we're talking about here is admissability of evidence, not its use by the jury.

MR. TREBON: Well, this was admitted for a limited purpose, as all 404(b) is. You only can admit 404(b) evidence, Mr. Chief Justice, if you identify one of the other purposes that it's allowed for under the rule, and, as this Court noted in Huddleston -- indeed, as Mr. Chief Justice wrote for a unanimous Court, under Rule 105 you have to give a limiting instruction if it's requested when 404(b) evidence is admitted.

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QUESTION: Yes, but what if the limiting instruction was unduly restrictive? How does that bear on the issues that are presented here?

MR. TREBON: Well, I think it makes -- it gives the Government a major problem if they're trying to tell you now that that evidence should have been used for some other purpose, number 1. It couldn't have been, because the trier of fact couldn't have used it in some other fashion.

Second of all, I would have cross-examined witnesses differently, Mr. Chief Justice. If I thought that this was going to be corroboration evidence rather than going to the mental intent that the judge had just given to the jury, I would have had to delve deeper in my cross-examination of some of these witnesses, especially Kyle Hartman, who I didn't cross-examine at all -- hardly at all.

So it would have changed the complexity of the trial. It's impossible to reshape that now, I would submit to you. My cross-examination would have been different, and the jury's mental processes would have been different.

Second of all, Mr. Chief Justice, I would take the issue head on.

QUESTION: Wait, those instructions were given

at the end. I mean, after you've gone through all that, right? Had he made it clear at the outset that that's the instruction he was going to give?

MR. TREBON: At my request the instructions were given to the jury simultaneously with the testimony of the prior bad act witnesses. It was given at the time that they testified.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Trebon. The case is submitted.

(Whereupon, at 1:53 p.m. the case in the above-entitled matter is submitted.)

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Verl Hadley v. United States

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BY Ann-Marie Federico

(REPORTER)