STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPREME COURT

CHRISTOPHER YOUNG

V.

No. [illegible]

LOUIS E. GELINEAU; DANIEL P. REILLY; KENNETH A. ANGELL; ROBERT E. MULVEE; THOMAS J. TOBIN; CHURCH OF THE HOLY FAMILY; THE ROMAN CATHOLIC BISHOP OF PROVIDENCE, a Corporation Sole.; JOHN PETROCELLI; and JOHN/JANE DOE 1-250, AND XYZ CORPORATIONS 1-250

MEMORANDUM OF THOMAS J. TOBIN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Introduction

"Strongly entrenched among many American traditions is the concept that man should not be judged strenuously by reference to the awesome spectre of his past life. When one faces trial for a specific crime, he should not be held to answer for the scandal that his earlier vices would most certainly produce."[1]

That tradition is the root of Rule 404(b), which provides that: "Evidence of other crimes,

[1] *State v. Mohapatra*, 880 A.2d 802, 811 (R.I. 2005) (quoting M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325, 325 (1956)).

wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Both the tradition and the rule "reflect[ ] a deep seated notion that our system of justice should not permit the trier of fact to infer that because someone was a bad guy once, he is likely to be a bad guy again."[2]

If the tradition and the rule is inhospitable to the notion that *past* crimes or *earlier* wrongs or acts be used to prove character at a *later* time, in order to show a person acted in conformity with that character at that later time, it would be at least equally inhospitable to the notion that *later* wrongs or acts be used to prove character at an *earlier* time, in order to show a person acted in conformity with that character at that earlier time. Yet the trial justice's order permits the plaintiffs to embark on a fishing expedition through 35 years of records for evidence of unrelated earlier or later bad acts for the specific purpose of using that evidence to persuade a finder of fact that because the defendants acted culpably in other circumstances - - years and sometimes a decade or more later - - they therefore must have acted culpably in their case too. That this is true is reflected by the fact that the plaintiffs specifically justified their discovery request on Rule 406, which permits evidence of other acts constituting a habit or routine practice to be used to show a party acted in conformity with that habit or routine practice. Here, the plaintiff's theory is that each of the defendants had a "habit" or "routine practice" of covering up alleged abuse when they received notice of a priest's misconduct.

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[2] *Id.* at 812 (quoting *United States v. McCourt*, 925 F.2d 1229, 1235-36 (9th Cir. 1991)).

Argument

I.) Young's search for "other bad acts" evidence, unlimited in time or scope, serves no purpose unless he first proves the defendants had adequate notice of his attacker's propensity for harm.

For either Christopher Young or Marc Banville to recover on their claims against any of the individual defendants, they must prove that the specific defendant had notice sufficient to prevent reasonably foreseeable harm from the sexual advances of the respective perpetrator priests, John Petrocelli and Roland Lepire, prior to the assaults they suffered. *See N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592, 600 (Okla. 1999) ("The critical element for recovery is the employer's prior knowledge of the servant's propensities to create the specific danger resulting in damages."); *see also Lisa P. v. Attica Central School District*, 27 A.D.2d 1080, 1081, 810 N.Y.S.2d 772, 773 (2006) (To impose liability on a school district for negligent supervision "the plaintiff generally must demonstrate the [school district's] prior knowledge or notice of the individual's propensity or likelihood to engage in such conduct, so that the individual's acts could be anticipated or were foreseeable."). Once Young and Banville prove the critical element of notice, they then have to prove that despite the notice, the defendants failed to take reasonable steps that would have protected them from foreseeable harm.

It is the second element - - the failure to take reasonable steps - - that the plaintiffs claim the discovery will help to prove. They allege that collectively the defendants had a policy of covering up abuse, and that the evidence concerning 83 non-party priests is reasonably calculated to demonstrate this policy. Presuming they prove the defendants had the requisite notice with regard to their alleged abusers, Petrocelli and Lepire, Young and Banville assert the "other bad acts" evidence would be admissible to show that *the defendants acted in conformity with that*

policy and failed to act after receiving notice. Plaintiffs asserted below that such "other bad acts" evidence would be admissible as "habit" or "routine practice" evidence under Rule 406, but the trial judge ordered discovery under the theory it would be admissible as "common plan or scheme" evidence under Rule 404(b). As a matter of law, however, neither rule would permit any of the requested evidence to be admitted at trial.

II.) The Court-ordered discovery is unnecessary and unduly burdensome at this point of the litigation.

As an initial matter, Courts have the obligation to limit discovery to "that which is proper and warranted in the circumstances of the case." *Wyoming v. United States Department of Agriculture*, 208 F.R.D. 449, 452 (D.D.C. 2002) (quoting *Katz v. Bataria Marine & Sporting Supplies*, 984 F.2d 422, 424 (Fed. Cir. 1993)). In meeting that obligation Courts balance the need for discovery against the burden imposed on the person ordered to produce the document. *Id.* Unduly burdensome requests may be prohibited, and an "undue burden is identified by looking at factors the court uses in weighing the burden of imposing discovery." *Id.* The factors include:

- relevance;
- the need for the documents;
- the breadth of the document request;
- the time period covered by the request;
- the particularity with which the documents are described;
- and the burden imposed.

Id. (citing *Flatow v. Islamic Republic of Iran*, 196 F.R.D. 203, 206-07 (D.D.C. 2000)).

Here the request encompasses large quantities of documents of extremely marginal significance; created and collected over a 35 year period. The request does not describe the documents with any particularity, and the amount will be expensive to reproduce ($30,000 to $60,000). Moreover, the plaintiffs have not yet shown a need for the information by addressing the threshold issues of the statute of limitations or notice. For that reason alone, requiring the defendants to provide the requested discovery was an abuse of discretion in light of the unduly burdensome standard.

Beyond the burdensomeness of the request, however, any "other bad act" evidence uncovered and disclosed after review of 35 years' worth of records encompassing 83 or so non-party priests would not be admissible under Rule 406, as advocated by the plaintiffs, or under Rule 404(b) as advocated by the trial judge.

III.) Making a decision to act or not act, and what action to take after receiving an allegation of misconduct, requires judgment and decision-making and is not the type of non-volitional, reflexive conduct that can constitute "habit" or "routine practice" under Rule 406.

Rule 406 renders "[e]vidence of the habit of a person or the routine practice of an organization" admissible "to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." R.I. R. of Evidence 406. While "habit" refers to the behavior of an individual, "routine practice" is behavior on the part of a group that is the equivalent of habit. *Fed. R. of Evid. 406*, advisory committee note. The specific purpose of habit or routine practice evidence is to *prove that the party acted in conformity with the habit or routine practice in the absence of evidence as to how they did in fact act. See Babcock v. General Motors Corporation*, 299 F.3d 60, 66 (1st Cir. 2002) (plaintiff seeking to use

habit or custom evidence to prove decedent always wore a seatbelt when he drove a motor vehicle in the absence of evidence that he was on the day in question) (emphasis added).

Even before meeting their burden to demonstrate whether any of the Hierarchy defendants had notice Petrocelli or Lepire posed a danger, or determining whether there was evidence of how the defendants responded if notice was established, plaintiffs have asserted Bishop Tobin must turn over reams of non-party evidence, regardless of cost or privacy issues, in the *hope that it might demonstrate "habit" or "routine practice"* that could be used to prove how they acted *in the event there is no evidence of how they actually acted.* Setting aside the propriety of the timing and scope of such a request, the material they seek to discover would not constitute habit or routine practice evidence under Rule 406 as a matter of law.

An accumulation of decisions, by the defendants or others, as to whether to take action or not based on the nature of the particular notice, and what action to take if the decision is to act, is not the type of evidence that can establish a "habit" or "routine practice" under Rule 406.

"Habit refers to the type of nonvolitional activity that occurs with invariable regularity." *DeLeon v. KMart Corp.*, 735 So.2d 1214, 1218 (Ala. Ct. Civ. App. 1998) (quoting *Weil v. Seltzer*, 873 F.2d 1453, 1460 (D.C. Cir. 1989)); *accord, Wanke v. Lynn's Transportation Co.*, 836 F.Supp. 587, 594 (N.D. Ind. 1993); *Hooker v. State*, 716 So.2d 1104, 1118 (Miss. 1998). It is the "regular practice of meeting a particular kind of situation with a specific type of conduct[.]" *Weil*, 873 F.2d at 1460 (quoting C. McCormick, *Handbook of Law of Evidence*, 340 (1954)). The same is true for the "routine practice" of a group. *See Fed. R. Evid. 406*, advisory committee note. It is the "nonvolitional" and "semi-automatic" character of the evidence that distinguishes it from inadmissible character or bad acts evidence establishing a mere tendency or propensity to act in a given manner. *See Weil*, 873 F.2d at 1460; *Simplex, Inc. v. Diversified*

Energy Systems, Inc., 847 F.2d 1290, 1293 (7th Cir. 1988); *United States v. Troutman*, 814 F.2d 1428, 1455 (10th Cir. 1987); *Reyes v. Missouri Pacific Railroad Company*, 589 F.2d 791, 794 (5th Cir. 1979); *DeLeon*, 735 So.2d at 1218; *Brett v. Berkowitz*, 706 A.2d 509, 517 (Del. 1998).

To fall within Rule 406, the evidence must have "a reflexive, almost instinctive quality." *Weil*, 873 F.2d at 1460. If the conduct "entails some amount of judgment and decision-making, [it] is too complex and is susceptible to too much variation to qualify as habit evidence." *DeLeon*, 735 So.2d at 1218 (quoting *Brett v. Berkowitz*, 706 A.2d at 516). True "habitual conduct is largely free from the complicating and confusing element of volition[.]" *Levin v. United States*, 338 F.2d 265, 272 (D.C. Cir. 1964) (quoting Chamberlayne, *Modern Law of Evidence*, 3204, p. 4433); *see, e.g., Weil*, 873 F.2d at 1460 (medical treatment does not constitute habit or regular practice evidence); *Troutman*, 814 F.2d at 1455 (extortion or refraining from extortion is not a semi-automatic act and does not constitute habit evidence); *Levin*, 338 F.2d at 272 (observance of the Sabbath in a particular manner involves a volitional assent, however guided or instructively urged); *Hoskins v. Kaufman Independent School District*, 2004 WL 1283958 (N.D. Tex.) (cover-up of abuse allegations is not nonvolitional, habitual activity); *DeLeon*, 735 So.2d at 1218 (telephoning police is necessarily volitional and purposeful, rather than "semi-automatic and instinctive").

Determining what action to take or not take, after receiving notice of alleged misconduct, cannot plausibly be characterized as nonvolitional. Judgment and decision-making is involved in assessing the nature of the notice, the nature of the alleged misconduct, and such things as the source of the notice, whether it is corroborated or substantiated, and the response, if any, of the priest. Even if the plaintiffs' claims of a deliberate cover-up were taken at face value, a cover-up is a volitional decision, not a reflexive, semi-automatic, instinctive response like going down the

stairs two steps at a time. Plaintiffs may not use an alleged cover-up on an unrelated occasion or number of occasions to prove that the defendants had the propensity to cover-up and therefore must have covered up in the cases at bar. They could only use unrelated "cover-ups" to prove that is what occurred in these cases if a cover-up was an unthinking, semi-automatic, and nonvolitional act. It plainly is not such an act and therefore would not fall within Rule 406.[3]

IV.) Only prior bad acts can prove a Rule 404(b) plan and 90% of the evidence to be produced occurred after the assaults on Young and Banville.

Setting aside the plaintiffs' proferred legal basis for the potential admissibility, and thus discoverability, of the discovery designed to unearth "other bad acts" evidence, the trial judge relied on Rule 404(b)'s common plan exception. She reasoned the evidence might reveal a "pattern of conduct or a plan or design" to deal with alleged perpetrators in a certain way. (App. at 100). She repeatedly referred to "a set pattern of responding" or "pattern of conduct" in

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[3] Courts are cautious in permitting the admission of other bad act evidence as habit or pattern of conduct evidence under Rule 406 for two reasons. First it necessarily "engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character, thereby thwarting Rule 404's prohibition against the use of character evidence except for narrowly prescribed circumstances." *Simplex*, 847 F.2d at 1293. *Mathes v. The Clipper Fleet*, 774 F.2d 980, 984 (9th Cir. 1985) ("[H]abit or pattern of conduct is never to be lightly established, and evidence of examples, for the purpose of establishing such habit, is to be carefully scrutinized before admission[.]"); *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 511 (4th Cir. 1977) (same).

Second, collateral inquiries into the other instances of alleged bad conduct threaten the orderly conduct of the trial, "potentially coloring the central inquiry and unfairly prejudicing the party against whom they are admitted." *Simplex*, 847 F.2d at 1293. The circumstances around each alleged other bad act would present issues to be tried involving direct and cross-examination, and many collateral issues would be litigated consuming much time and distracting the jury from the main issue to be decided. *Levin*, 338 F.2d at 271. Here, other instances of alleged cover-up would likely be litigated just as vigorously as any allegation of a cover-up in the cases at bar, completely distorting the focus of the trial to the great prejudice of the defendants.

handling allegations against priests and declared those circumstances to be "sort of a 404(b) exemption." (App. at 100).

Rule 404(b) provides that evidence of other crimes, wrongs, or acts may be admissible as proof of "plan." The trial judge reasoned that discovery of the information related to 83 non-party priests might show a pattern of conduct, plan or design to deal with allegations of sexual molestation in a certain way.

As an initial matter, for both the uncharged acts and the charged acts to be part of a common plan or scheme within the contemplation of Rule 404(b), they must both be part of "a continuing or connected scheme,"[4] "a single series of events,"[5] or "a singular plan or design."[6] Each act, charged or uncharged, must be of "an integral part of an overarching plan."[7] In a true 404(b) plan case the theory is that the charged conduct "is said to be caused by a conscious committment to a course of conduct of which the charged [act] is only a part." 207 F.3d at 196 (citing 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure*, §5244, at 494-500 (West 1978)). The proponent of Rule 404(b) plan evidence must show that "the defendant in fact and mind formed a plan including the [prior act] and the [ ] charged [act] as stages in the plan's execution." *Id.* (citing 1 Edward J. Inwinkelriad, *Unchanged Misconduct Evidence*, §3:22 at 117 (West 1999)). The proponent must show that the defendant's plan "included the specific crime the defendant is now charged with." *Id.*

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[4] *United States v. Varoudakis*, 233 F.3d 113, 119 (1st Cir. 2000).

[5] *J &R Ice Cream Corporation v. Baugher*, 31 F.3d 1259, 1268 (3rd Cir. 1994).

[6] *Becker v. Arco Chemical Company*, 207 F.3d 176, 196 (3rd Cir. 2000) (quoting II Wigmore, *Evidence* §300, at 238 (Chadbourne rev. 1979)).

[7] *Id.* (quoting 1 John William Strong, ed. *McCormick* on Evidence §190, at 800-01 (4th ed. 1992).

For a plan to include the specific wrongful act or conduct at issue in the lawsuit, the plan necessarily had to exist prior to the conduct at issue. If the existence of the plan is to be proved by other bad acts or uncharged conduct, they must necessarily be *prior* bad acts - - only then can they prove the existence of a plan that includes the charged conduct. Later bad acts can only demonstrate a later plan coming into existence after the charged misconduct, which cannot give rise to an inference that they shared the same motivation or impulse - - which is the rationale for common plan exception. Since over 90% of the "notice" evidence concerning the 83 non-party the priests occurred *after* the assaults on Young and Banville, they are not at all probative of proving a common plan or scheme under Rule 404(b) in relation to the claims by Young or Banville.

Moreover, even if the requested discovery could establish a Rule 404(b) plan, where bad acts evidence is offered to establish the defendants' plan, scheme, practice or pattern, and proof of a plan or design is not a required element of the charged offense or claim, "evidence that shows a plan must be relevant to proving some ultimate issue in the case[ ]" beyond existence of the plan itself. *Becker*, 207 F.3d at 195. And that issue or purpose cannot be propensity. *Id.* at 191.

Here the trial judge did not articulate a purpose to be served by the plan evidence other than proving the existence of a "pattern of conduct." If the only issue the plan evidence is relevant to is whether one of the defendant bishops mishandled any notice with respect to Young or Banville, it cannot be relevant absent the inference the defendant bishop had a propensity to act in a certain way, and that in handling the notice he acted in conformity with his prior or later conduct - - an impermissible purpose. *See Becker*, 207 F.3d at 191.

In sum, the Rule 404(b) "plan" exception is unavailable because: 1) a 404(b) plan cannot be established by later bad acts subsequent to the assaults on Young and Banville; and 2) neither the trial judge nor the plaintiffs have identified any issue the plan evidence would prove other than propensity.

V.) If the discovery is permitted notwithstanding the above contentions, Bishop Tobin should be permitted to comply by making the documents available for inspection, and to permit the plaintiffs to copy the relevant documents at their own expense.

Even if it is determined that plaintiffs are entitled to discover the evidence concerning the 83 other priests, this Court should grant certiorari to quash the lower court order with respect to the trial justice's determination that Bishop Tobin must provide the plaintiffs with copies of the documents at the expense of the Roman Catholic Bishop of Providence.

Rule 34 permits a party to request another party to produce documents and permit the requesting party "to *inspect and copy*, any designated documents . . . which constitute or contain matters within the scope of Rule 26(b)[.]" Plainly, the rule only requires that the defendants provide an opportunity for the plaintiffs to inspect, and copy at their own expense, any documents requested. *See Anderson v. A.C.&S., Inc.*, 83 Ohio App.3d 581, 588, 615 N.E.2d 346, 348 (1992). *See also Allstate Insurance Company v. Hodges*, 855 So.2d 636, 642 (Fla. App. 2d Dist. 2003) (appropriate for court to require posting of "bond to indemnify the producing party against the costs of discovery when the cost is unreasonable and unduly burdensome."); *Rinber Material Corporation v. Navistar International Transportation Corp.*, 654 So.2d 279 (Fla. App. 4th Dist. 1995) ("This court has frequently mandated that expensive or burdensome production be conditioned upon advance payment of the expenses to be incurred."); *Etzion v. Etzion*, 7 Misc.2d 940, 945, 796 N.Y.S.2d 844, 847 (2005) ("[T]he party seeking discovery should incur the costs

in the production of discovery material."); *Rubin v. Alamo Rent-A-Car*, 190 A.D. 661, 663, 593 N.Y.S.2d 284, 286 (1993) ("Each party should shoulder the initial burden of financing his own suit, and based upon such a principle, it is the party seeking discovery of documents who should pay the cost of their production."). Bishop Tobin, as the Roman Catholic Bishop of Providence should not have to finance the plaintiffs' broad-brush attempt to discover the existence of some evidence that may or may not be admissible, or even necessary.

Conclusion

For the above-stated reasons, and those set forth in the Petition for Writ of Certiorari, petitioner Thomas J. Tobin asks this Court to grant the petition and issue a writ of certiorari to review the discovery order at issue.

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PROOF OF SERVICE

I hereby certify that on this 9 day of January, 2007, I mailed a true and exact copy of the within to **Timothy Conlon, Esq.**, 76 Westminster St., Turks Head Bldg., Suite 420, Providence, RI 02903; and **Carl DeLuca, Esq.**, DELUCA & DELUCA LAW OFFICES, INC., 631 Jefferson Boulevard, Warwick, RI 02886.

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