

[CAPTION]

**DEFENDANT’S OBJECTION TO STATE’S 404(B) NOTICE REQUEST**

Defendant, by counsel, respectfully objects to the State’s Motion for Written Notification of any Evidence Intended to be Offered by Defendant Pursuant to Evidence Rule 404(b). In support of this objection, the Defendant states the following:

1. Defendant is charged with [insert offense].
2. On [insert date], the State filed a Motion for Written Notification of Any Evidence Intended to be Offered by Defendant Pursuant to Evidence Rule 404(b) requesting that the Defendant disclose 404(b) evidence he intends to offer regarding State witnesses. Moreover, the Motion requests that the defense provide “specific details” about the allegations and evidence underlying such 404(b) evidence.
3. The State’s request contravenes Indiana Evidence Rule 404(b) in two respects. First, the pretrial notice provision of the rule is limited to the “prosecution” giving pretrial notice to the “the accused.” The rule does not require a criminal defendant to provide such notice. This difference is significant as demonstrated in Garland v. State, 788 N.E.2d 425 (Ind. 2003). The Garland Court noted it self-evident that this rule intends to delineate “subsets of persons” and that the terms “accused” and “person” have different meanings. Id. at 429. Application of the pretrial notice provisions to a defendant would erase Rule 404(b)’s distinction in pretrial notice responsibility which is placed solely upon the “prosecution.” The Garland decision does not change this provision of the rule.
4. There is no requirement of pretrial disclosure notice by the accused under Garland or any other precedent. Garland was concerned with the interpretation the word “person” in the first sentence of Evidence Rule 404(b). The Court did not interpret the pretrial notice provision of the rule. Likewise, there is nothing in Garland to suggest that the pretrial disclosure provision applies to any party other than the “prosecution.”

5. Trial courts may establish local rules. However, when those rules are inconsistent with rules promulgated by the Indiana Supreme Court, they are “deemed to be without force and effect.” Snell v. State, 866 N.E.2d 392, 400 (Ind.App. 2007). Here, enforcement of a pretrial disclosure notice upon the defense is inconsistent with the clear language of Evid.R. 404(b), which only provides for such pretrial disclosure by the “prosecution.”
6. Likewise, requiring Defendant to provide “specific details” of the allegation and specification of all supporting “documentation” and “witnesses” conflicts with the express language of Evidence Rule 404(b). The rule provides for pretrial disclosure of the “general nature of any such evidence.” Ind. Evidence Rule 404(b).
7. Requiring specificity in such pretrial disclosure violates the work-product privilege of the defense and thereby infringes upon the Defendant’s right to effective assistance of counsel. Essentially, the State’s request requires disclosure of counsel’s legal theories. Work product privilege precludes pretrial discovery of attorney’s “mental impressions, conclusions, opinions, or legal theories.” Hick v. State, 544 N.E.2d 500, 504 (Ind. 1989).
8. In addition, discovery rules which are not reciprocal violate due process. Wardius v. Oregon, 412 U.S. 470 (1973). The prosecution is only obligated to provide pretrial disclosure of the “general nature of any such evidence.” The State’s request requires specifics from Defendant. As such, the request violates the due process principles of Wardius.
9. Defendant submits that the prosecution is seeking that to which it is not entitled. Defendant’s due process rights and his right to effective assistance of counsel will be violated if his attorneys are required to make pretrial disclosure as requested. U.S. Const. Amends. V, VI, & XIV; Ind. Const. Art. I, §13.

WHEREFORE, Defendant respectfully objects to the State’s Motion for Written Notification of any Evidence Intended to be Offered by Defendant Pursuant to Evidence Rule 404(b), requests this Court to deny such Motion, and for all other relief proper in these premises.

(Signature)

## **CASE LAW**

Garland v. State, 788 N.E.2d 425 (Ind. 2003) (Indiana Rule of Evidence 404(b) applies to all witnesses, and not just the Defendant).

Sloan v. State, 654 N.E.2d 797 (Ind.Ct.App. 1995) (the State must give notice of the specific exception upon which they are relying for 404(b)).

Hatcher v. State, 735 N.E.2d 1155 (Ind. 2007) (purpose of notice provision in Rule 404(b) is to reduce surprise and to promote the early resolution of questions of admissibility).

Alvarez v. State, 983 N.E.2d 626, 628 (Ind.Ct.App. 2013) (in general, evidence of Defendant's prior criminal history is highly prejudicial and is not admissible).