

Evidence: Overcoming Problems with Proof at Trial

Prof. William A. Woodruff

Felony Defender Program

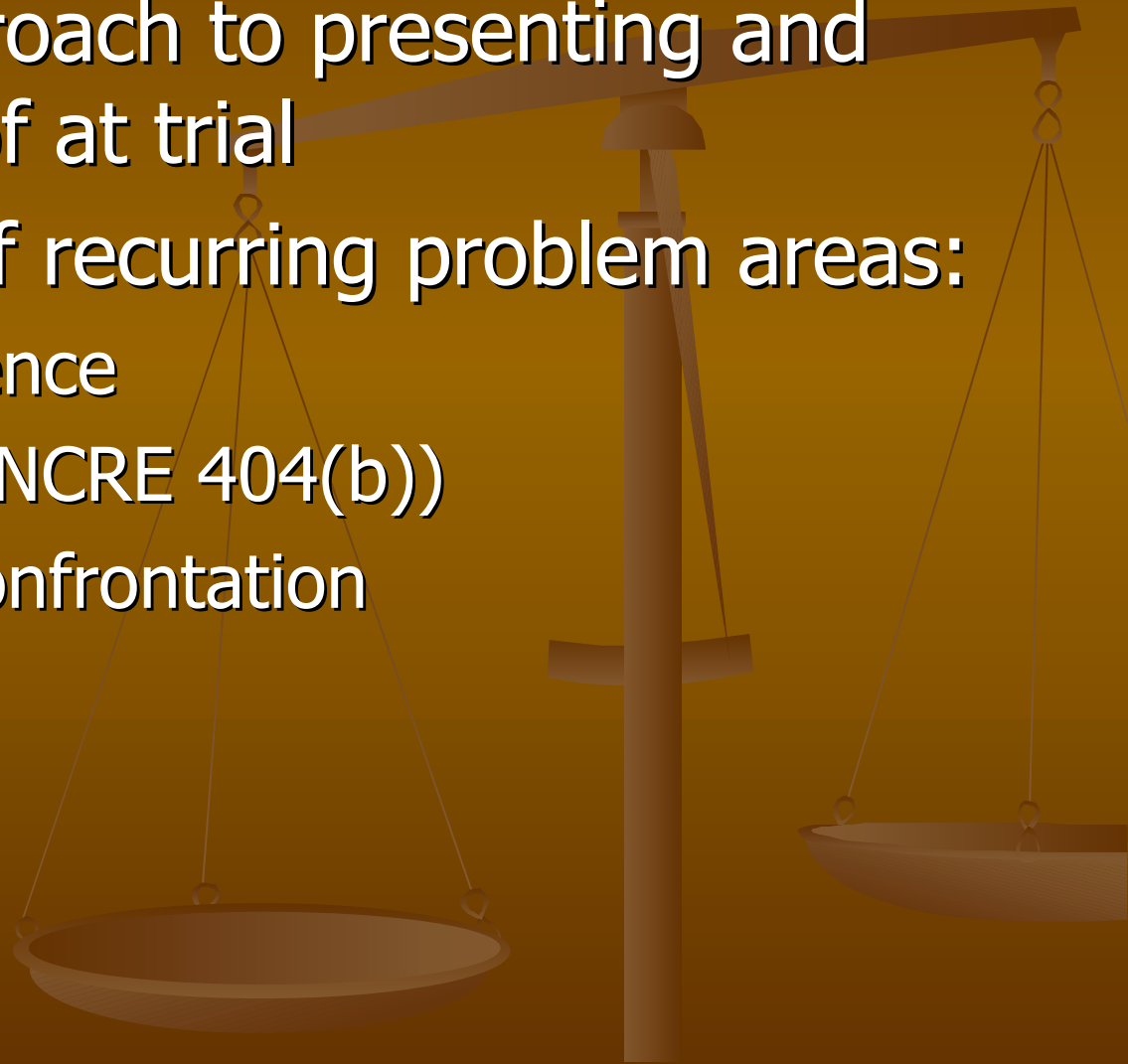
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Raleigh, NC

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Overview

- Systematic approach to presenting and preventing proof at trial
- Consideration of recurring problem areas:
 - Character evidence
 - Prior bad acts (NCRE 404(b))
 - Hearsay and Confrontation



Systematic Approach



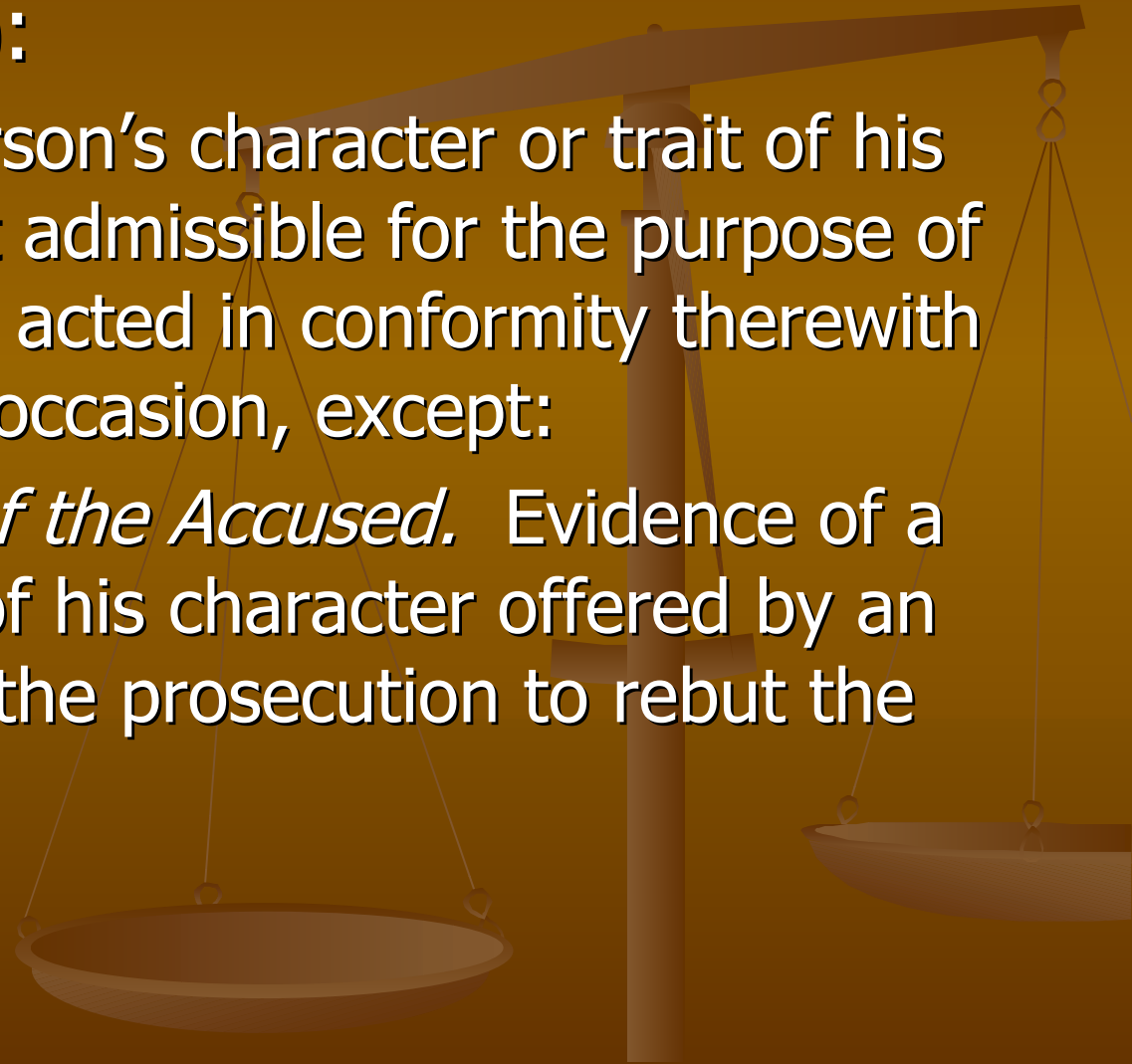
- **R**elevance: NCRE 401-412; 607-610
- **A**uthentication: NCRE 901-903; 601-602; NCGS §§ 8-1 -- 8-45
- **H**earsay: NCRE 801-806
- **O**riginal document: NCRE 1001-1008; NCGS §§ 8-1-- 8-45
- **O**pinion: NCRE 701-706; NCGS §§ 8-50.1-- 50.3
- **P**rivilege: NCRE 501; NCGS §§ 8-53 -- 58.1; 8-110

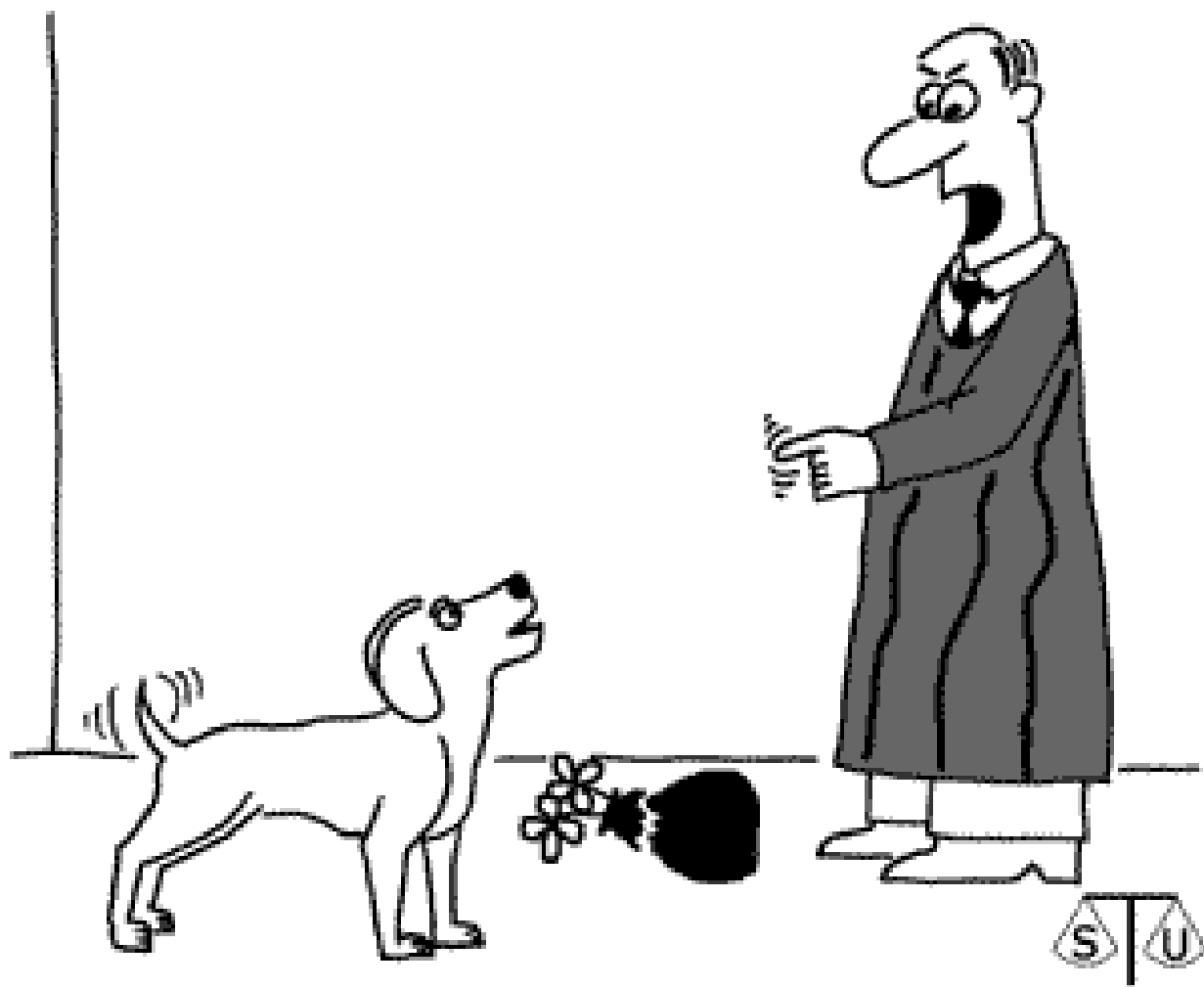
Recurring Problems: Character Evidence

- NCRE 404(a)(1):

Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of the Accused*. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;





Alleged BAD dog! Alleged BAD dog!

Character Evidence Issues



- “Character evidence” is the propensity of a person to act in conformity with a particular character trait.
 - State v. Squire, 321 N.C. 541 (1988)
- Defendant opens the door to character evidence
 - State v. Dennison, 594 S.E.2d 82, 2004 N.C. App. LEXIS 398 (2004)
 - State v. McCann, 2003 N.C. App. LEXIS 1445 (Mar. 11, 2003)



Friends call me "Fat Tony." Others call me "please, please God, don't shoot."

Character Evidence Issues

- When admissible, character evidence is limited to reputation or opinion. Evidence of specific acts to prove character is limited to the rare instances where character is an essential element of a charge, claim, or defense.
 - NCRE 405
 - State v. Baymon, 336 NC 748 (1994)

Character Evidence Issues



- A “character witness” may be cross-examined about specific instances of conduct.
 - State v. Hargett, 157 N.C. App. 90; 577 S.E.2d 703 (2003)
- The defendant may offer evidence of a pertinent trait of the victim’s character
 - State v. Wall, 2003 N.C. App. LEXIS 392

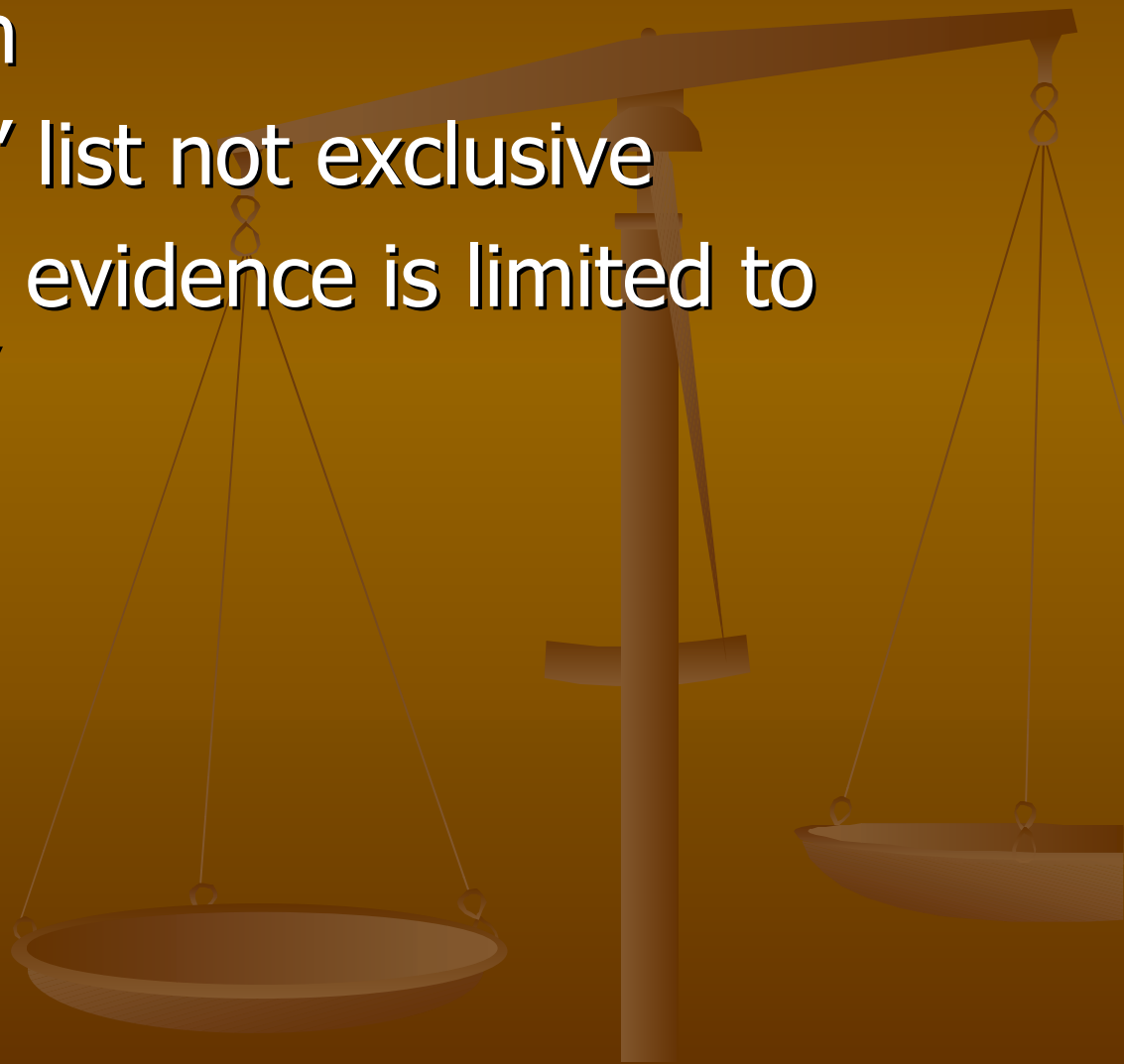
Prior Bad Acts

- NCRE 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony committed by an adult.

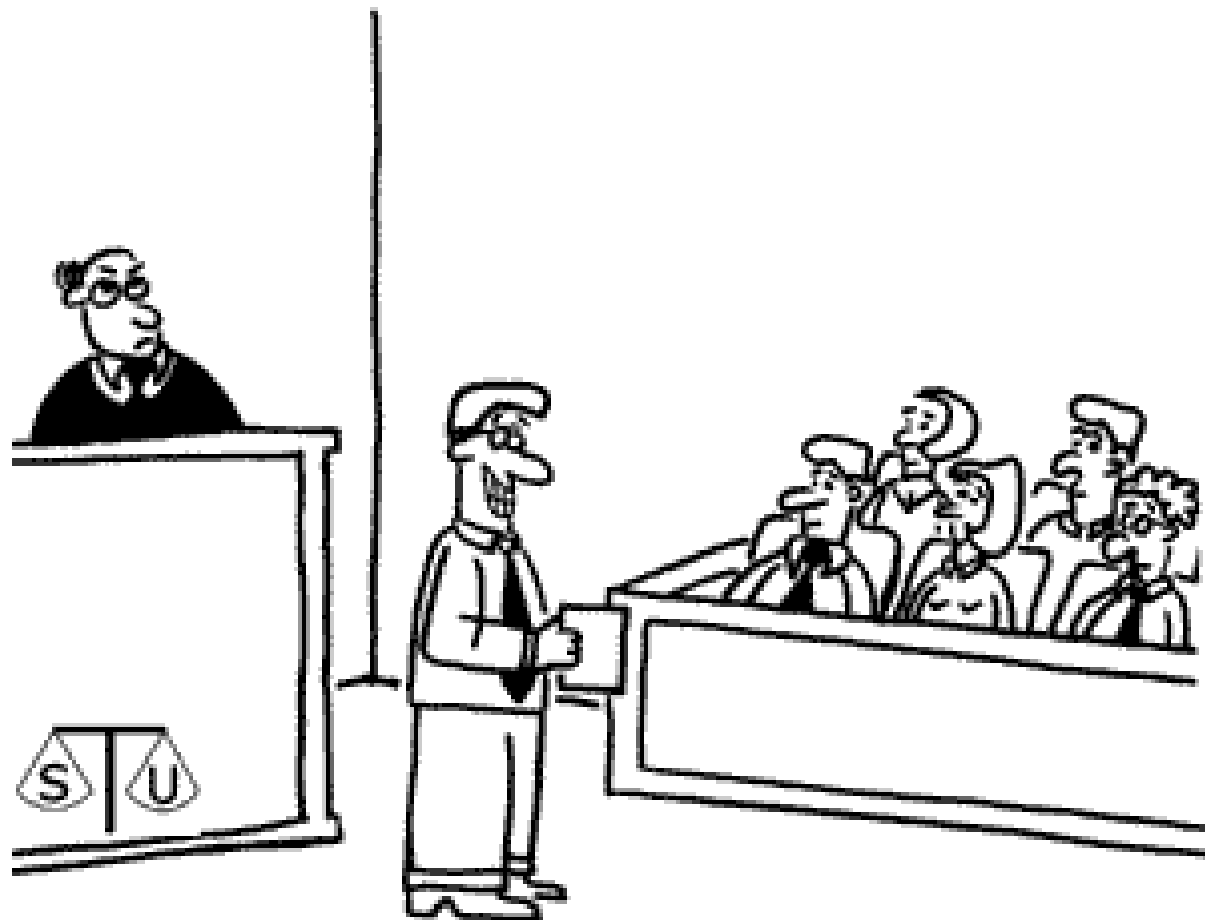
404(b)

- Rule of inclusion
- “Other purpose” list not exclusive
- Use of admitted evidence is limited to “other purpose”



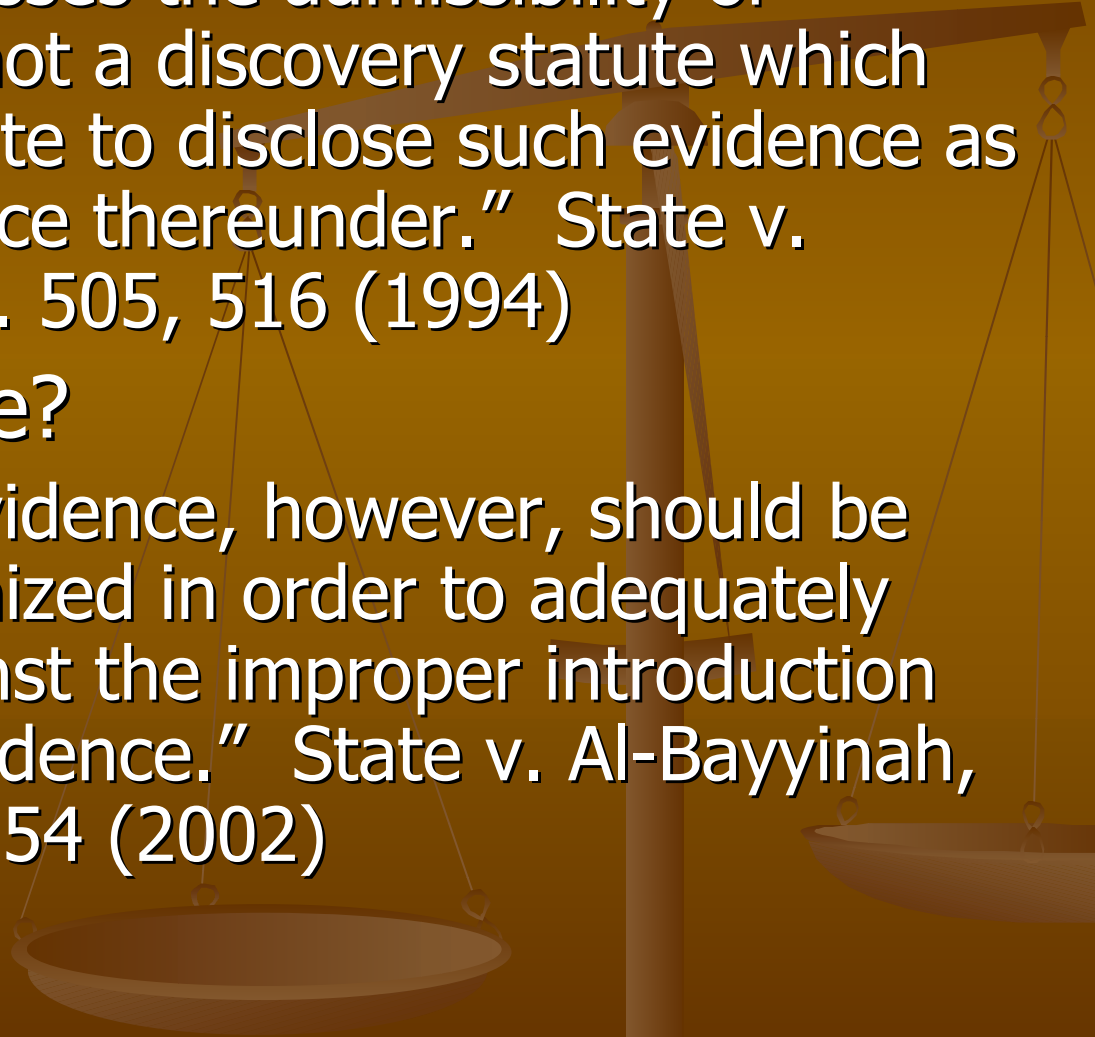
NCRE 404(b) in Practice

- Liberal construction:
 - “general rule of *inclusion*...subject to but *one exception* requiring its exclusion if its *only* probative value is to show ... propensity ... to commit ... the crime charged.” State v. Lloyd, 354 N.C. 76, 88 (2001)
- Similarity and temporal proximity talisman
 - “the admissibility of evidence under [Rule 404(b)] is guided by two further constraints – similarity and temporal proximity.” State v. Lynch, 334 N.C. 402, 412 (1993)



**"Drug dealer, or just an addict?
There's no way to know how my client
intended to use the 500 kilos of cocaine."**

NCRE 404(b) in Practice



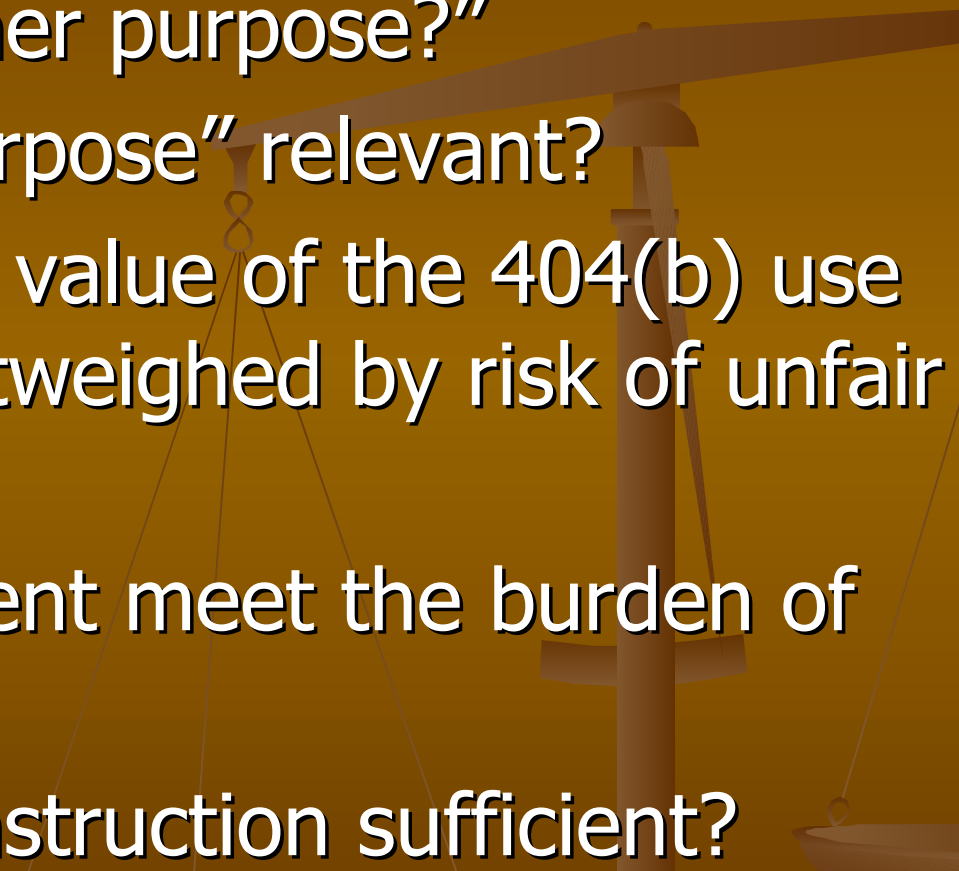
- Notice of intent to use 404(b) not required
 - “this rule addresses the admissibility of evidence; it is not a discovery statute which requires the state to disclose such evidence as it might introduce thereunder.” *State v. Payne*, 337 N.C. 505, 516 (1994)
- Glimmer of hope?
 - “Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence.” *State v. Al-Bayyinah*, 356 N.C. 150, 154 (2002)



DOUG SPENDER...

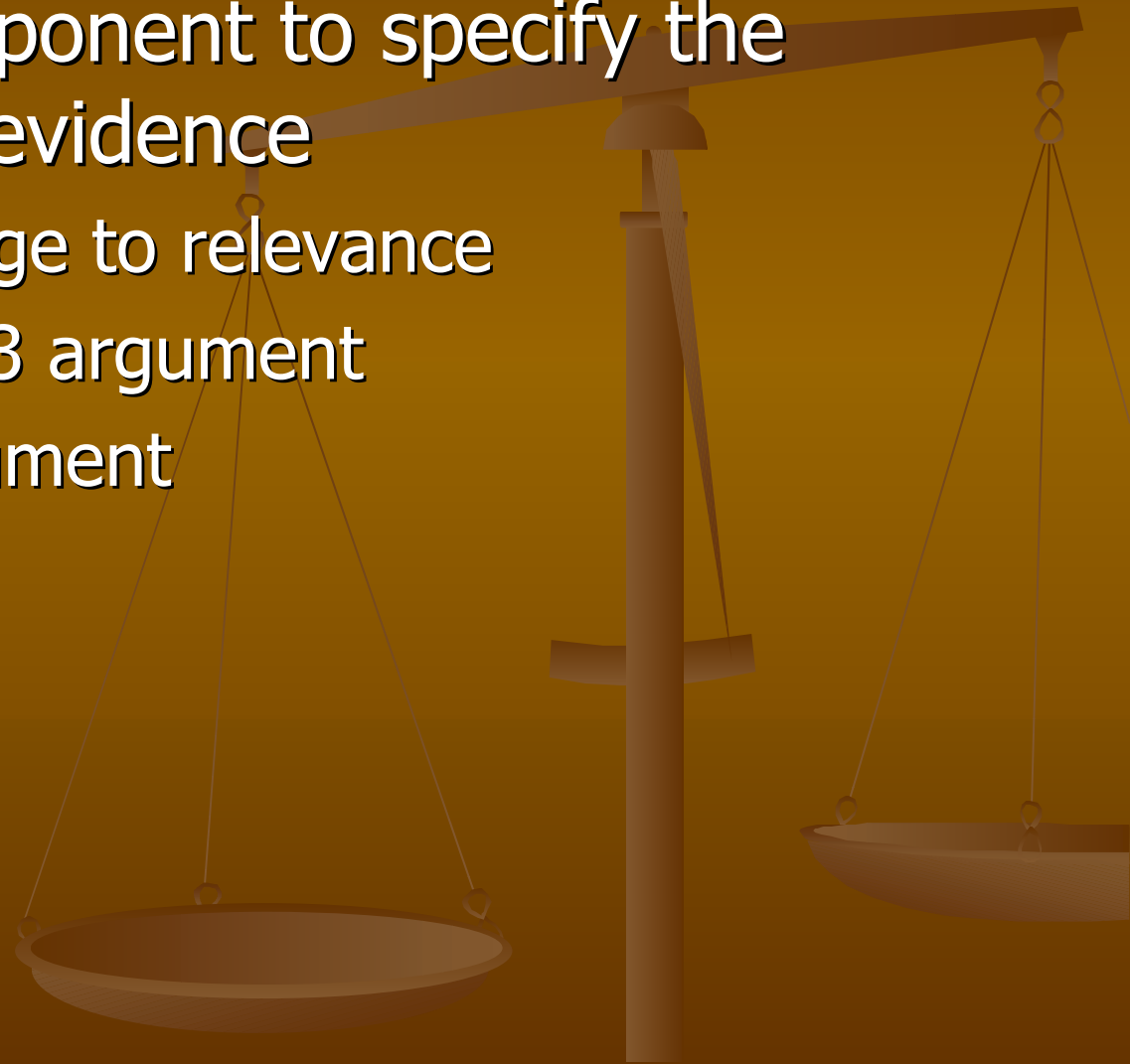
"YOU'RE BECOMING A REGULAR ON 'COURT TV.'"

Dealing with 404(b) Evidence

- What is the “other purpose?”
 - Is the “other purpose” relevant?
 - Is the probative value of the 404(b) use substantially outweighed by risk of unfair prejudice?
 - Can the proponent meet the burden of proof?
 - Is the limiting instruction sufficient?
- 

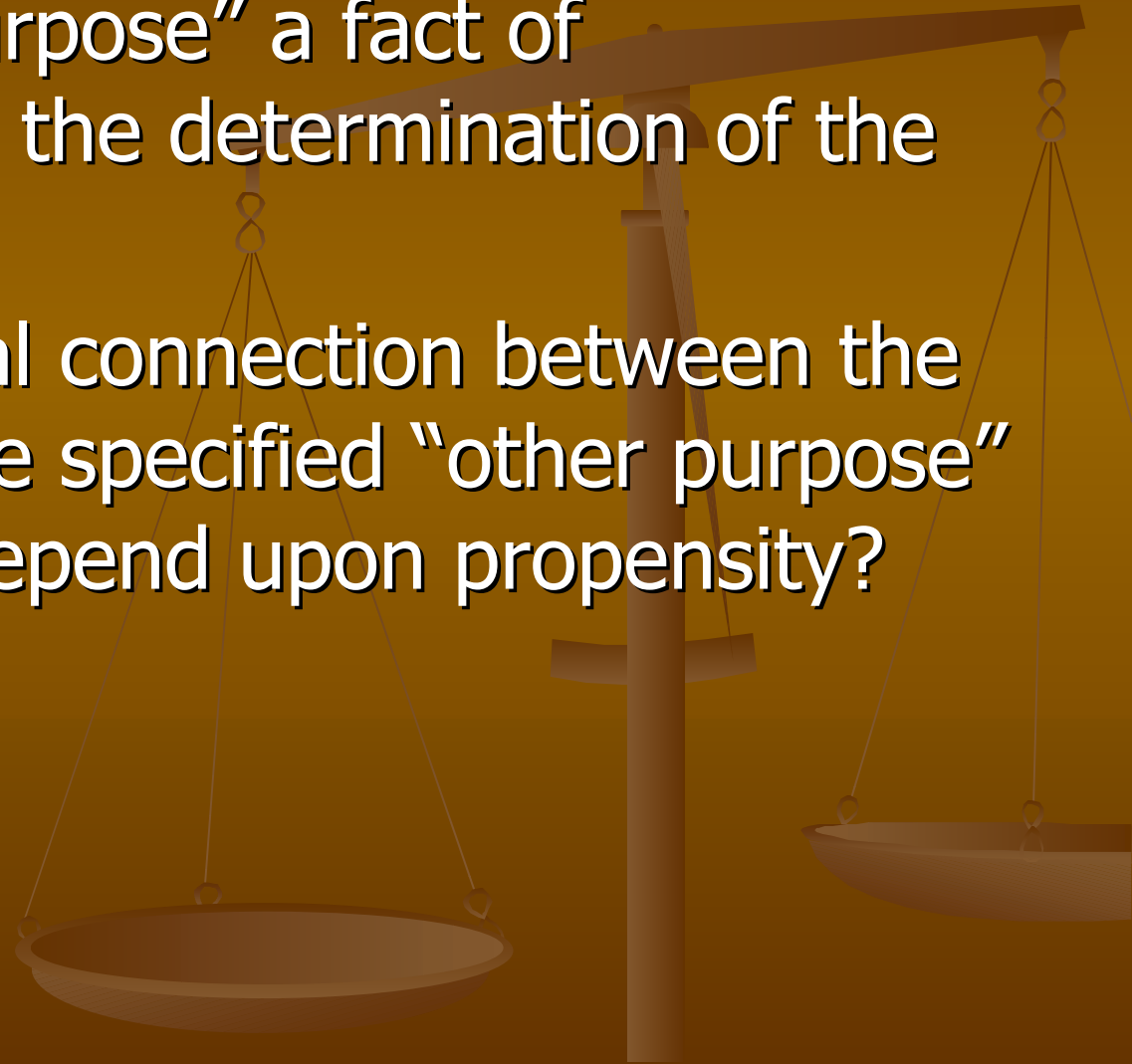
What is the “other purpose?”

- Require the proponent to specify the purpose of the evidence
 - Sets up challenge to relevance
 - Focuses the 403 argument
 - Limits jury argument

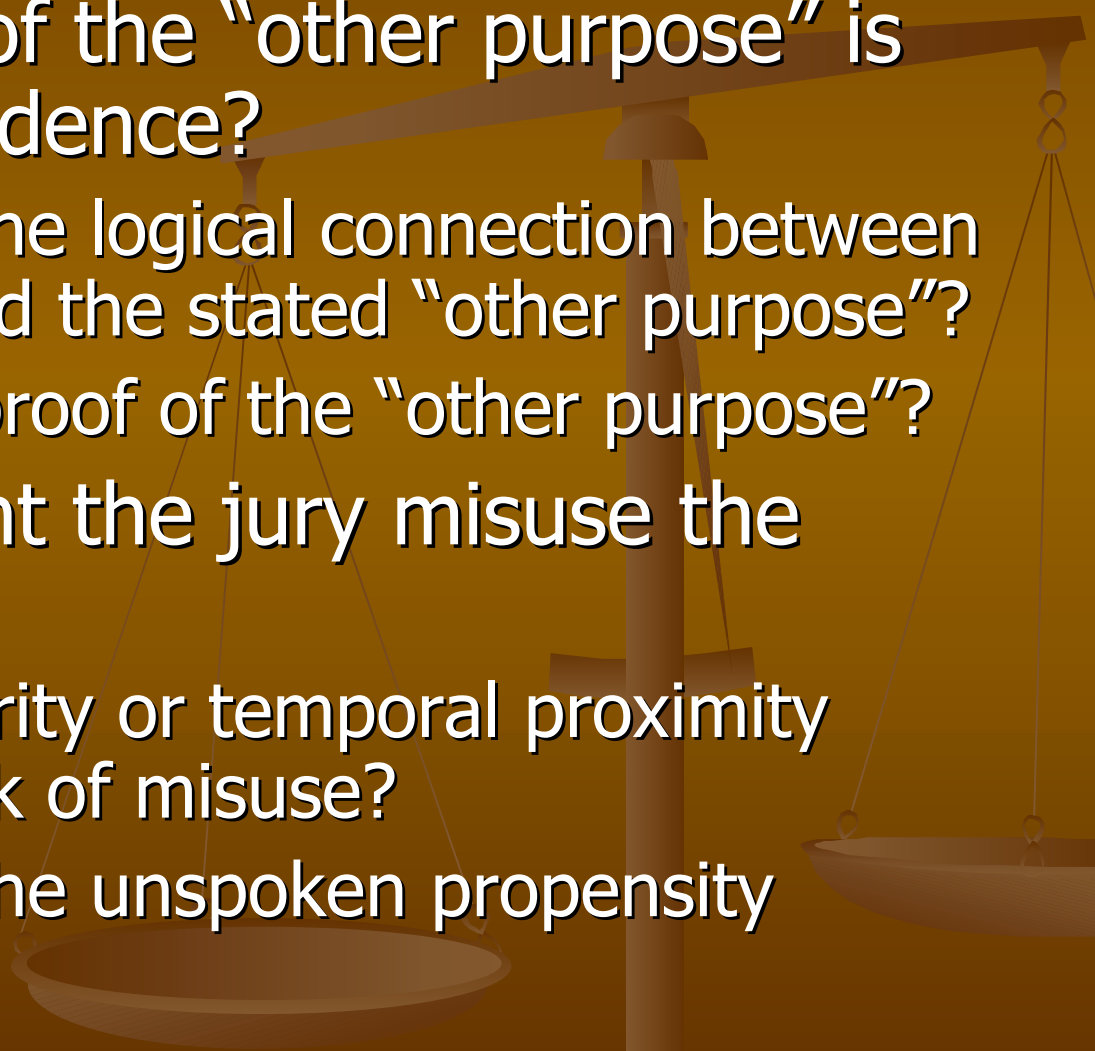


Is the “other purpose” relevant?

- Is the “other purpose” a fact of consequence to the determination of the action?
- Is there a logical connection between the prior act and the specified “other purpose” that does not depend upon propensity?



Probative Value v. Prejudicial Effect

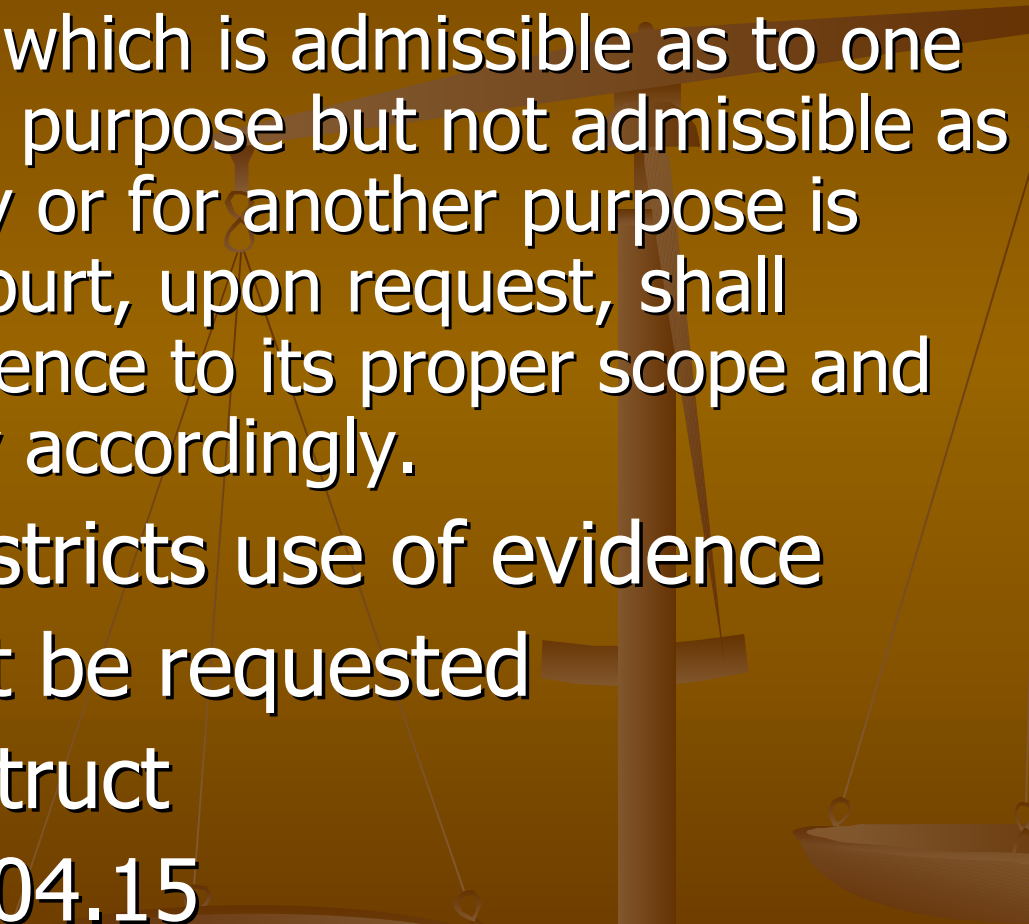


- How probative of the “other purpose” is the prior act evidence?
 - How strong is the logical connection between the prior act and the stated “other purpose”?
 - Is there other proof of the “other purpose”?
- How easily might the jury misuse the evidence?
 - Does the similarity or temporal proximity increase the risk of misuse?
 - How strong is the unspoken propensity inference?

Burden of Proof?

- “Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes “substantial evidence tending to support a reasonable finding by the jury that the defendant committed the *similar* act.” State v. Al-Bayyinah, 356 N.C. 150 (2002) citing State v. Stager, 329 N.C. 278 (1991); Huddleston v. United States, 485 U.S. 681, 99 L.Ed.2d 771, 108 S. Ct. 1496 (1988)

Sufficient Limiting Instruction?

- NCRE 105:
 - When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.
 - NCRE 404(b) restricts use of evidence
 - Instruction must be requested
 - Court “shall” instruct
 - N.C.P.I.-Crim. 104.15
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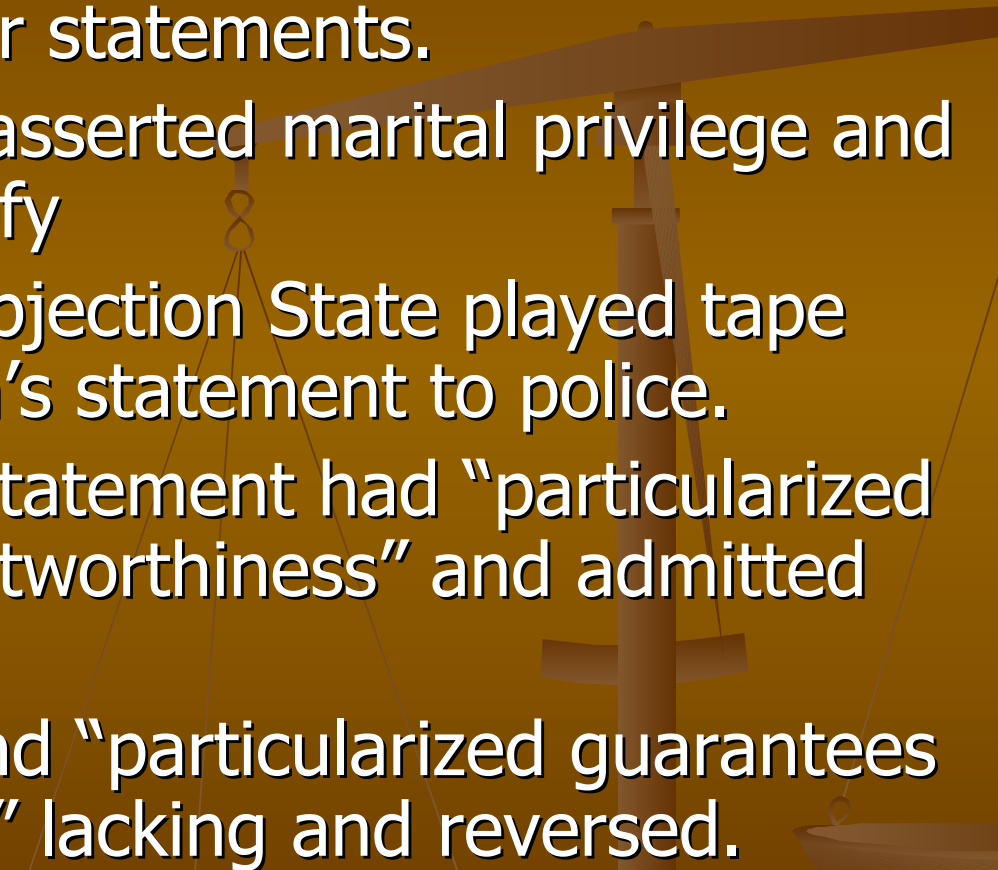


"GREAT news!! Our appeal successfully reduced your six life terms to one.

Confrontation

- *Crawford v. Washington*, 124 S. Ct. 1354, 158 L.Ed.2d 177, 2004 US LEXIS 1838, 72 U.S.L.W. 4229 (2004)
 - Crawford tried for stabbing man who allegedly tried to rape Crawford's wife, Sylvia.
 - Crawford and Sylvia went to victim's apartment to confront him over attempted rape
 - Ensuing fight resulted in stab wounds to victim

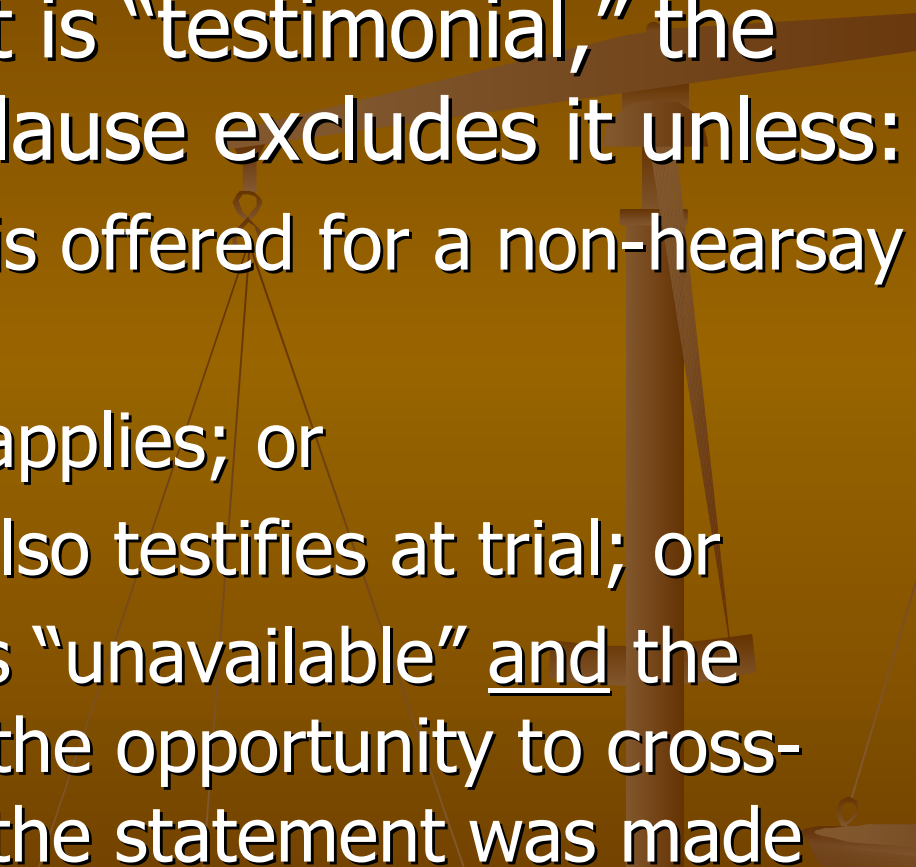
Crawford (con't)

- Police *Mirandized* both Crawford and Sylvia and tape recorded their statements.
 - At trial, Crawford asserted marital privilege and Sylvia did not testify
 - Over Crawford's objection State played tape recording of Sylvia's statement to police.
 - Trial court found statement had "particularized guarantees of trustworthiness" and admitted statement.
 - Appeals court found "particularized guarantees of trustworthiness" lacking and reversed.
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Crawford (con't)

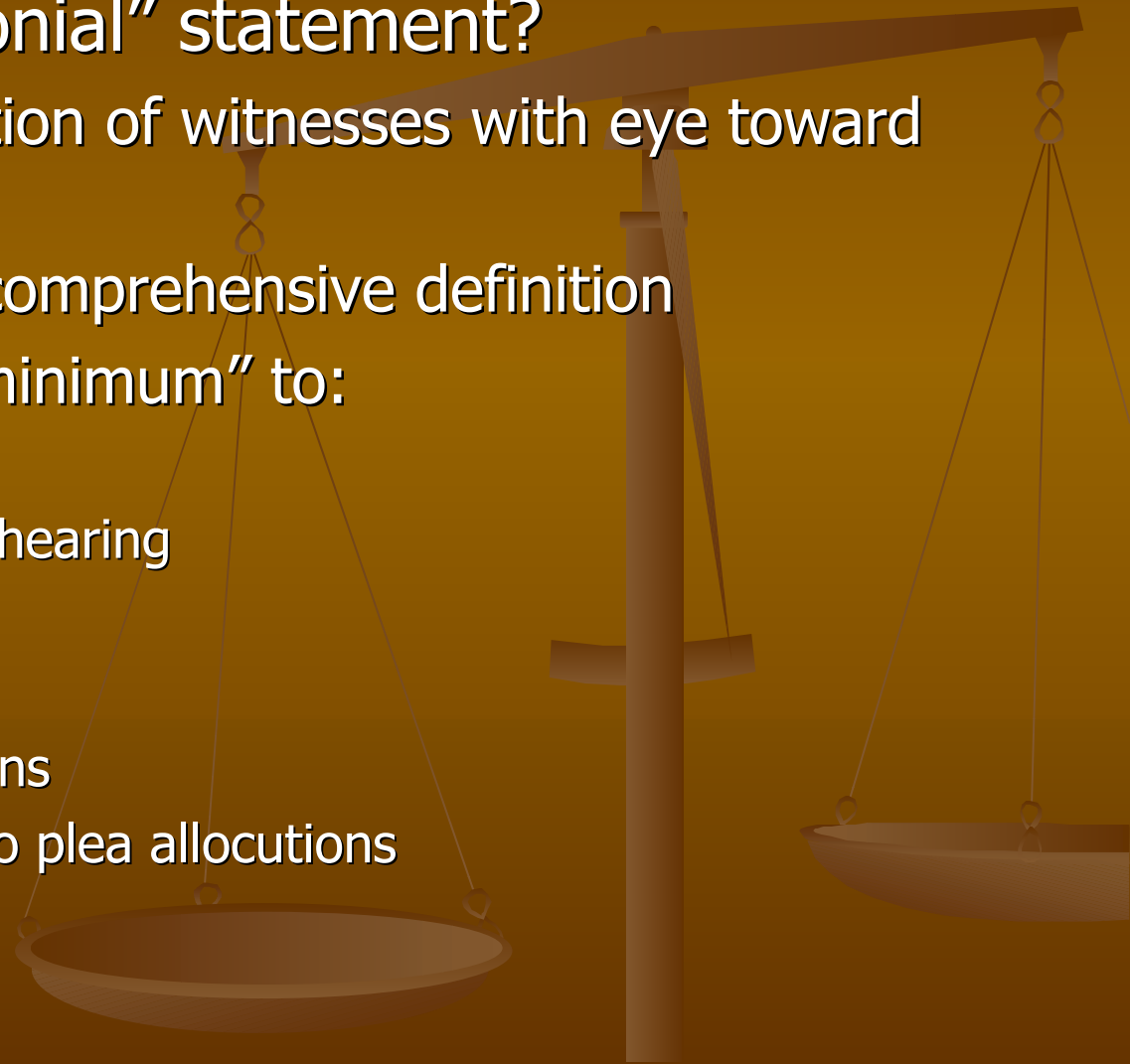
- Washington Supreme Court reinstated trial court verdict, finding that Sylvia's statement did not fall within a "firmly rooted" hearsay exception but it did have "guarantees of trustworthiness" because it "interlocked" with the defendant's own statement to police.
- US Supreme Court reversed, overruled *Ohio v. Roberts*, and held:
 - "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."

Confrontation post *Crawford*

- If the statement is “testimonial,” the Confrontation Clause excludes it unless:
 - The statement is offered for a non-hearsay purpose; or
 - FRE 804(b)(6) applies; or
 - The declarant also testifies at trial; or
 - The declarant is “unavailable” and the defendant had the opportunity to cross-examine when the statement was made
- 

Confrontation post Crawford

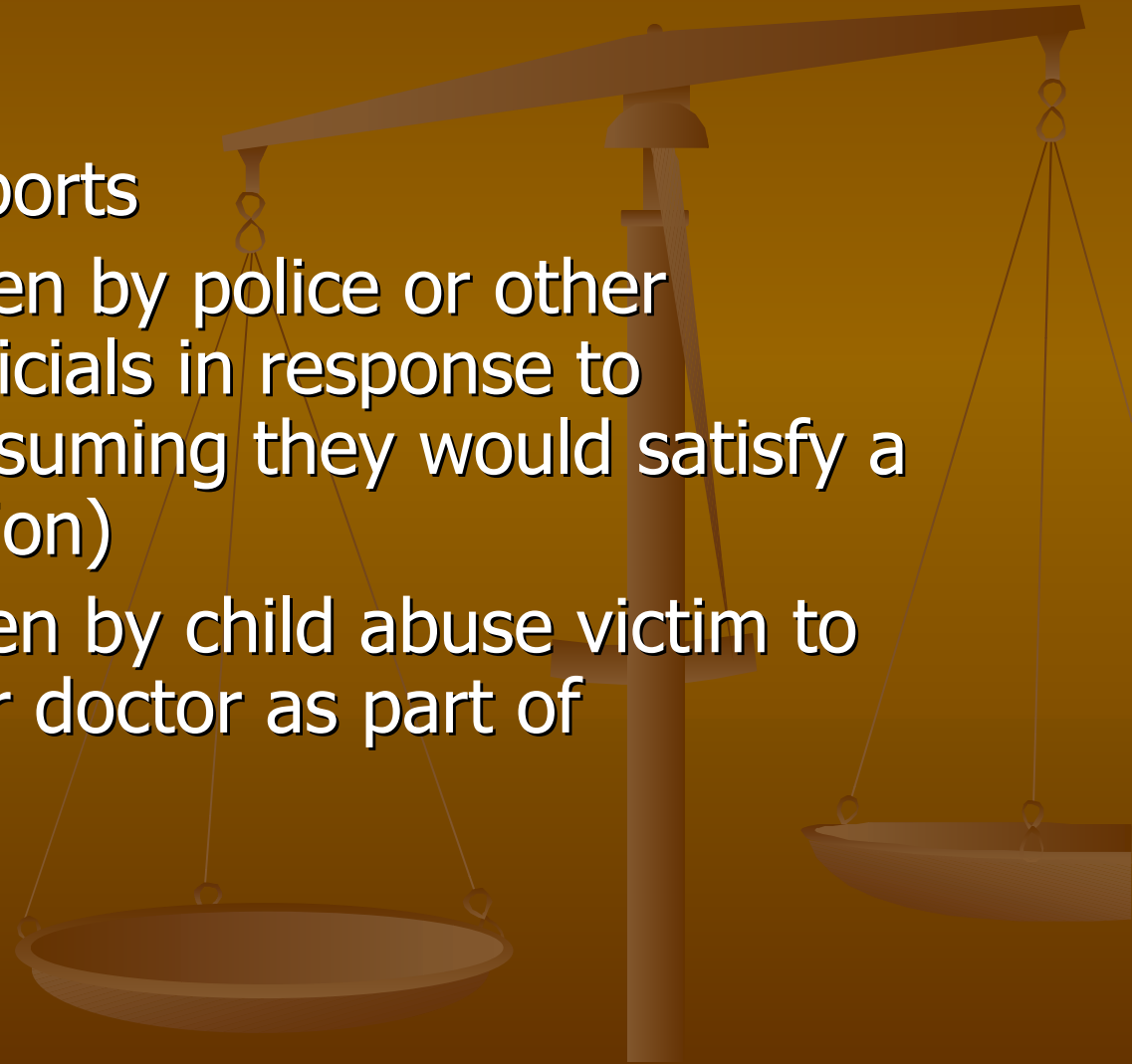
- What is a “testimonial” statement?
 - *Ex parte* examination of witnesses with eye toward prosecution
 - Court didn’t give comprehensive definition
 - “[i]t applies at a minimum” to:
 - Prior testimony at
 - A preliminary hearing
 - Grand jury
 - Former trial
 - Police interrogations
 - Probably applies to plea allocutions



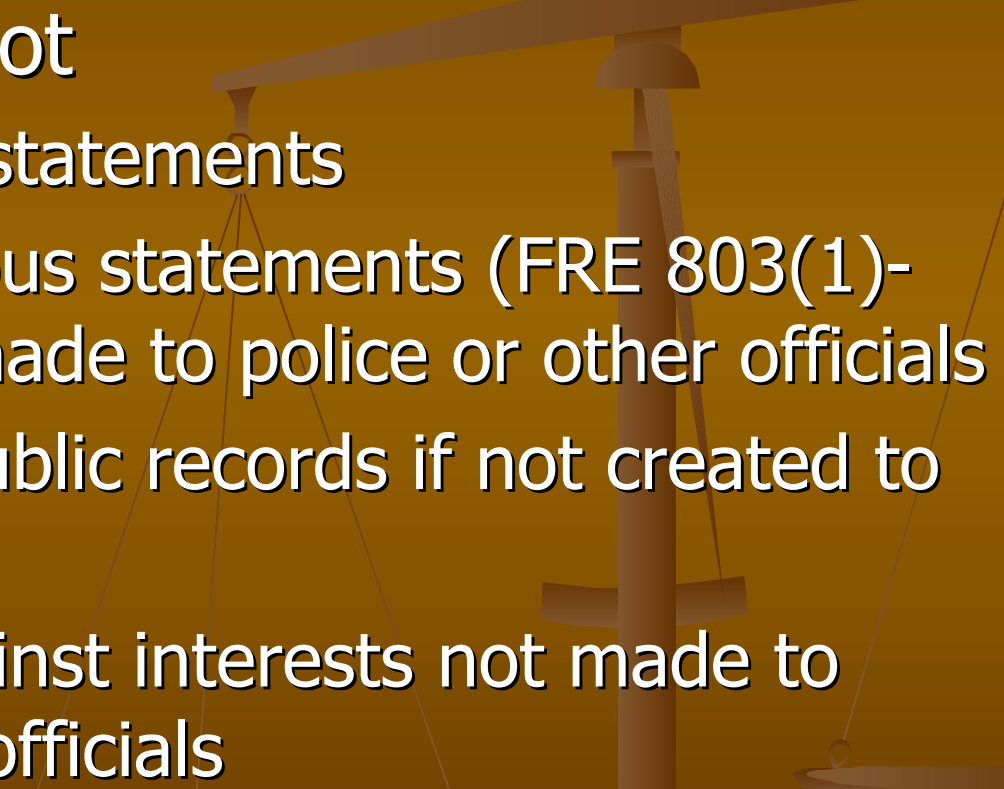
What is a “testimonial” statement? (con’t)

■ Maybe

- Forensic lab reports
- Statements taken by police or other government officials in response to questioning (assuming they would satisfy a hearsay exception)
- Statements given by child abuse victim to social worker or doctor as part of investigation



What is a “testimonial” statement? (con’t)

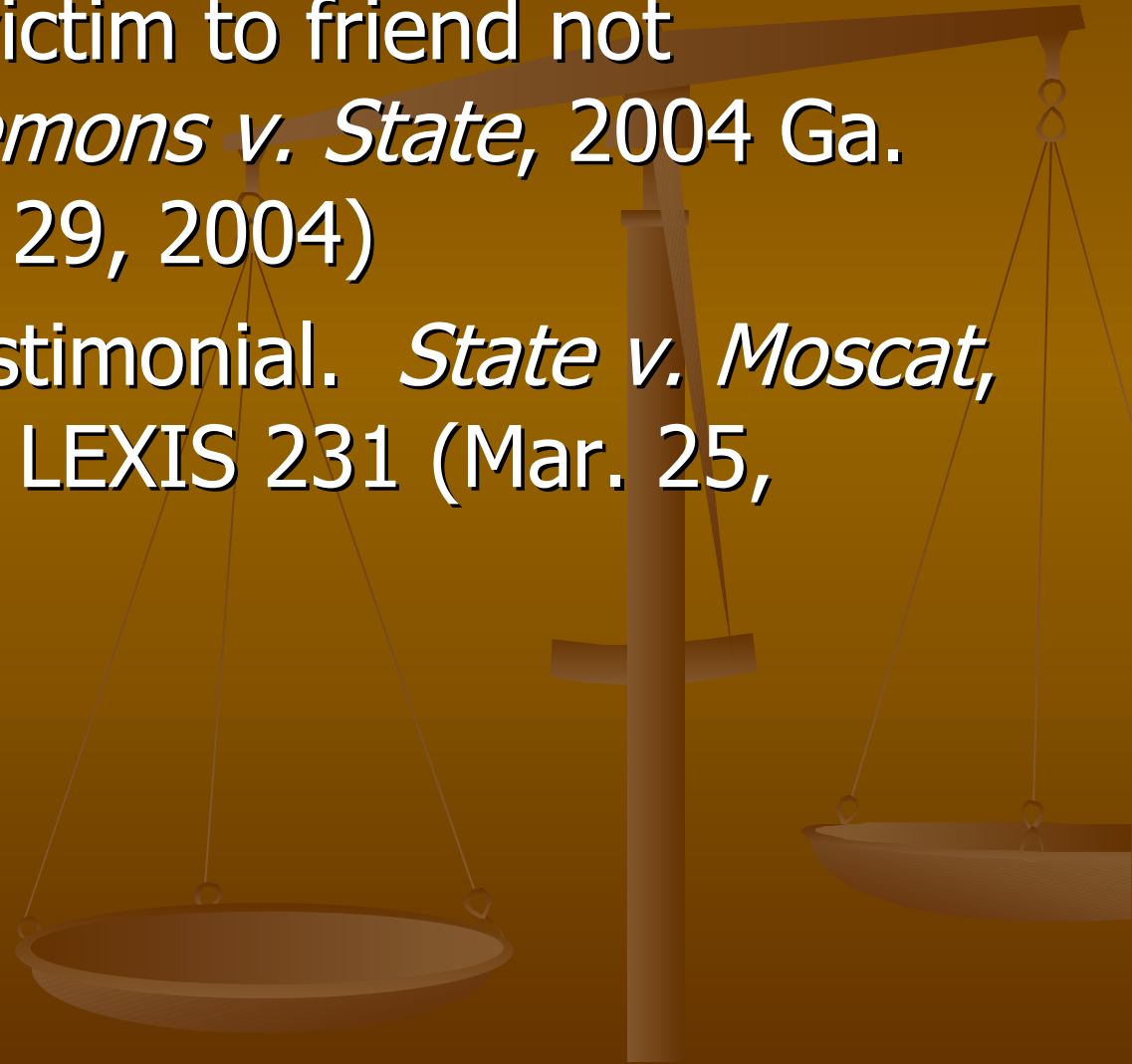
- Most probably not
 - Co-conspirator statements
 - Contemporaneous statements (FRE 803(1)-803(4)) if not made to police or other officials
 - Business and public records if not created to be “evidence”
 - Statements against interests not made to police or other officials
- 

What is a “testimonial” statement? (con’t)

- Child abuse victim’s statement to investigator? *Corona v. Florida*, 2004 US Lexis 2017, 72 U.S.L.W. 3597 (Mar. 22, 2004)
- “Adoptive admissions” in joint interview? *Shields v. California*, 2004 US Lexis 2016, 72 U.S.L.W. 3597 (Mar. 22, 2004)

Recent Post-*Crawford* Cases

- Statements of victim to friend not testimonial. *Demons v. State*, 2004 Ga. Lexis 274 (Mar. 29, 2004)
- 911 calls not testimonial. *State v. Moscat*, 2004 N.Y. Misc. LEXIS 231 (Mar. 25, 2004)



Recent Post-*Crawford* Cases

- Statement against penal interest to nephew not testimonial. *State v. Rivera*, 2004 Conn. Lexis 129 (Apr. 6, 2004)
- Co-conspirator statement not testimonial. *US v. Reyes*, 2004 U.S. App. Lexis 5833 (Mar. 30, 2004)
- Former testimony where defendant had opportunity to cross but elected not to satisfies 6th Amend. *Liggins v. Graves*, 2004 U.S. Dist. Lexis 4889 (S.D. Iowa Mar. 24, 2004)

Recent Post-*Crawford* Cases

- 6th Amend applies to parole revocation hearings. *US v. Jarvis*, 2004 U.S. App. Lexis 5813 (9th Cir. Mar. 26, 2004)
- Confrontation Clause satisfied where defendant had opportunity to cross at preliminary hearing but did not. *State v. Young*, 2004 Kan. Lexis 220 (Apr. 9, 2004)
- Child sex abuse victim's statement to social worker is testimonial. *Snowden v. State*, 2004 Md. Lexis 32 (Apr. 5, 2004)



"Money? Ha! I'm a legal aid lawyer.
The only thing in my wallet is an
overdue notice for my student loans."