Experienced criminal defense attorneys know the deep frustration of defending against one charge only to be confronted with evidence introduced under Rule 404(b) that the defendant engaged in other, often unrelated bad conduct for which he or she is not on trial. As of this writing, there are well over 600 published North Carolina opinions and over 300 more unpublished decisions citing Rule 404(b). The rule is not only the most litigated of the rules of evidence but one of the most difficult to apply correctly.

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. . . .

N.C. R. Evid. 404(b). Although the rule seems relatively straightforward, its application in practice has proved otherwise. Courts and litigants alike are confused about how it should operate. The analysis of the issue in appellate opinions is often incomplete, inconsistent with other opinions, manifestly incorrect, or lacking altogether.

At common law, evidence of extrinsic misconduct was considered dangerously prejudicial, warranting close scrutiny. Since adoption of the rules of evidence, our courts have said repeatedly that Rule 404(b) is consistent with the common law. Despite that assertion, they have not remained true to the historic roots of the rule. On the whole, the courts have become increasingly uninterested, if not hostile, when criminal defendants challenge admission of “other crimes or wrongs” evidence under Rule 404. The resulting sloppy analysis and lack of consistency makes it difficult for counsel to know what the law is or should be.
The challenge for defense counsel is to cut through the confusion and help refocus the courts on these basic principles: 1) Character evidence is generally inadmissible under Rule 404. 2) Evidence of other crimes or wrongs is the most damaging character evidence imaginable. Therefore, evidence of other crimes or wrongs must be closely scrutinized. 3) The evidence must be offered for a proper purpose, that is, to prove a material fact in issue and not to prove bad character or propensity. 4) The test for admissibility under Rule 404(b) is whether the evidence is logically relevant under Rule 401 to the purpose for which it is offered, not whether the extrinsic bad conduct is “similar” to the crime being tried. 6) Even if the evidence is relevant and admissible under rules 401 and 404, strong policy reasons exist in every case for keeping it out under the Rule 403 balancing test. The weight on the prejudice side of the scale is greater than with other kinds of evidence. 7) In close cases, the defendant wins.

The purpose of this paper is to identify specific problems facing defense counsel in these cases, and to offer some practice tips for resisting admission of evidence of other crimes, bad acts, or wrongs for which the defendant is not on trial. Hopefully, if we are persistent, we can eventually reeducate the courts, coax them closer to the origins of the rule, and obtain fairer results for our clients.

I. THE GOOD OLD DAYS

Since early common law, the general rule was that the state could not introduce evidence showing the accused in a criminal case committed another crime that was separate and distinct from the crime for which he was being prosecuted, even if the separate offense was of the same nature as the crime for which the accused was on trial. E.g., State v. McClain, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954) (citing cases going back as far as 1869); State v. Williams, 303 N.C. 507, 513, 279 S.E.2d 592, 596 (1981). This general rule excluding evidence of other crimes was subject to certain “well-recognized exceptions.” Id. at 174, 81 S.E.2d at 365.
McClain, the leading pre-Rules case on evidence of other crimes, explained that the rationale behind the rule is that evidence of another crime has a dangerous, natural, and inevitable tendency to divert the attention of the jury from the charge before it; it predisposes the jury to believe the defendant is guilty; and it forces the accused to defend against charges for which he is not on trial. *Id.* The general rule against admitting other crimes or wrongs was a special application of the broader rule barring the state from attacking the character of the defendant or from proving character with evidence of specific conduct. *Id.* As a policy matter, early courts believed that a criminal defendant should not be convicted of a current charge because of the kind of person he was or because of conduct unrelated to the crime on trial.

The defendant in *McClain* was convicted of prostitution and occupying a building for the purpose of prostitution. Three hours after the john returned to his hotel room in a groggy condition, Ms. McClain entered and stole $135. On appeal, our supreme court concluded evidence of the larceny did not fall within any exception to the general rule excluding evidence of other offenses, and it prejudiced the defendant's fundamental right to a fair trial. Its admission required a new trial. *McClain* is noteworthy less for its holding than for its extensive explanation of the dangers of extrinsic misconduct evidence and the policy reasons for excluding it. Although it is a pre-Rules case, every criminal trial attorney should be familiar with *McClain*, as it is the foundation for most of the helpful law on bad conduct evidence.

Even at common law, the courts struggled with how to apply the exceptions to the general rule of inadmissibility. *McClain* acknowledged, “Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine.” *McClain*, 240 N.C. at 176, 81 S.E.2d at 368. However, the following principles were clear, and they should be the guiding star for defense counsel:
The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected."

McClain, 240 N.C. at 176, 81 S.E.2d at 368 (emphasis added).

II. RULE 404(B) – THE EARLY YEARS

The North Carolina Rules of Evidence took effect in July 1984. In subsequent years, the court continued to quote with approval from McClain and to rely on pre-Rules cases when interpreting Rule 404(b). See, e.g., State v. Cotton, 318 N.C. 663, 351 S.E.2d 277 (1987); State v. McKoy, 317 N.C. 519, 347 S.E.2d 374 (1986). The Supreme Court of North Carolina presumed that the rule did not change the existing law and that Rule 404(b) was simply a codification of the McClain rule. Therefore, like McClain, Rule 404(b) required exclusion of evidence of other crimes or wrongs, subject to a non-exhaustive list of exceptions included in the rule. As late as 1989, the court said:

While evidence of other crimes or acts committed by a criminal defendant is generally inadmissible in a prosecution for an independent offense, evidence of a prior act may be introduced “when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission.” State v. McClain, 240
This rule was later codified in Rule 404(b). . . .

State v. Shamsid-deen, 324 N.C. 437, 444, 379 S.E.2d 842, 846-47 (1989) (emphasis added). See also State v. Boyd, 321 N.C. 574, 579 n.1, 364 S.E.2d 118 (1988) (“The trial judge also based his decision to admit the evidence on this Court's holding in State v. McClain. . . which established the "other crimes" exception now codified in N.C.G.S. 8C-1, Rule 404 (b”); State v. Green, 321 N.C. 594, 603, 365 S.E.2d 587 (1988) (“The law in North Carolina on admissibility of evidence of other crimes was set forth in State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954), and codified in N.C.G.S. 8C-1, Rule 404. Rule 404 (b) lists identity, motive, intent, and knowledge . . . as among the exceptions which may permit evidence of other crimes to be admitted”); State v. McKnight, 87 N.C. App. 458, 460, 361 S.E.2d 429 (1987) (“general rule” in McClain prohibiting evidence of other crimes “is subject, however, to the exceptions stated in Rule 404(b) which codifies the general rule”); State v. Gordon, 316 N.C. 497, 504, 342 S.E.2d 509 (1986) (“Both the general prohibition against the use of other crimes and misconduct and certain exceptions to the rule . . . . have been codified in Rule 404(b) of the North Carolina Rules of Evidence. As noted in State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986), this provision is consistent with prior North Carolina practice.”)

The court also recognized that fundamental due process rights are at stake when the effect of such evidence is to “predispose the mind of the juror to believe that the prisoner is guilty, and thus effectually to strip him of the presumption of innocence.” State v. Jones, 322 N.C. 585, 589, 369 S.E.2d 822, 824 (1988) (citation omitted) (new trial required where “other crimes” evidence prejudiced defendant’s “fundamental right to a fair trial).

1 “Common plan or scheme” was one of the exceptions to the general rule of exclusion recognized at common law.
III. CHANGE OF FOCUS – A “RULE OF INCLUSION” AND A RULE OF “SIMILARITY”

In 1989, our supreme court decided State v. Shamsid-deen, 324 N.C. 437, 379 S.E.2d 842 (1989). In that case, which was tried in May of 1984 and therefore was decided under McClain rather than Rule 404, the defendant was convicted of first-degree rape of his 20-year-old daughter. The court upheld the admission of evidence that the defendant had sexual intercourse with the victim and with two other daughters for a number of years. The court reasoned the evidence tended to prove a pattern or systematic plan to force his daughters to have sexual intercourse with him over a number of years. The court said it was applying the “plan or scheme” exception set out in McClain. 324 N.C. at 444-45, 379 S.E.2d at 847.2

Justice Mitchell (then an associate justice) wrote a concurring opinion for the sole purpose of stating his view that the law under Rule 404(b) was fundamentally different from the law under McClain.

Under our new Rule 404(b), it is not the case -- as we sometimes stated under McClain -- that evidence of other offenses falls under a "general rule of exclusion" subject to certain "exceptions." . . .

. . . .

These recent cases decided under Rule 404(b) and others relying upon them state a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. . . . I think it will be helpful to the Bar and only proper for this Court to continue along one clear course in stating the general rule to be applied

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2 The result in this case was driven in part by trial counsel’s failure to sufficiently preserve the issues for appeal. The case also followed the court’s historically liberal approach to the admission of other sexual misconduct in rape and other sex offense cases. In sex cases, the “plan or scheme” exception generally is only a thinly-veiled way of saying the defendant has unnatural sexual proclivities (bad character), as shown by his other conduct, and therefore the alleged victim probably is telling the truth.
under our new Rule 404(b), rather than adopting an erratic course as was the case under McClain. I believe that our recent cases support such a clear course under Rule 404(b) in the form of the general rule of inclusion I have set forth, and I hope we will not deviate from that course in future cases.


The following year, the court decided *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), a capital case in which the court found no error in the defendant’s conviction for murdering a ten-year-old female, but ordered a new capital sentencing hearing. The court upheld the admission of evidence the defendant had previously masturbated in front of a three-year-old female, who had reported the incident. The evidence was received to show defendant’s felonious intent for purposes of the felony murder (the underlying felony was kidnapping for the purpose of committing a sex offense) and to show motive. That fateful decision was authored by Justice Mitchell, who penned into law the “rule of inclusion” which he had advocated in *Shamsid-deen*:

“Recent cases decided by this Court under Rule 404(b) state a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” 326 N.C. at 278-79, 389 S.E.2d at 54. The opinion also noted that the court had been “markedly liberal” in allowing evidence of prior sexual offenses. *Id.*

The only arguably redeeming feature of *Coffey* was that the court went to some effort to analyze the 404(b) issue thoroughly and to explain explicitly how the challenged evidence was logically relevant to prove motive and intent on the particular facts of that case. However, *Coffey*’s “rule of inclusion” language was a powerful and terrible legacy.
Coffey, in effect, turned the law on its head. Instead of presumptively inadmissible, evidence of other crimes or wrongs was viewed as presumptively admissible after Coffey. North Carolina 404(b) cases since Coffey routinely have quoted with approval the “rule of inclusion” language, and the courts often use it to justify the admission of extrinsic misconduct evidence of highly questionable relevance without giving much thought to what it means. Moreover, the “rule of inclusion” notion has been received by the courts as an invitation to avoid the “rigid scrutiny” necessary to avoid misuse of extrinsic misconduct evidence. If other crimes evidence is presumptively admissible, it also is logical to place on the defense the burden of demonstrating that there is no possible proper purpose for which the evidence could be admitted. See, e.g., State v. Moseley, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994).

A. Arguments against a “Rule of Inclusion”

The opinion of most defense attorneys who have thought much about the matter, including this writer, is that Rule 404(b) was never intended to be a “rule of inclusion” and that the adoption of this approach has had terrible and far-reaching consequences, perhaps beyond what the Coffey court intended. When read in light of other rules of evidence and the common law roots from which the rule sprang, Rule 404(b) should not logically be viewed as a rule of “inclusion.”

a. Relation to Rule 404(a)

Under Rule 404(a), as at common law, evidence of character is presumptively inadmissible to prove conduct. The rule begins, “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.” Subsection (b) is part of the same rule and flows directly from the same policy considerations. It is consistent with McClain, which explained that allowing evidence of unrelated crimes violates the rule against attacking the character of the defendant and the rule
against proving bad character by particular acts. *McClain*, 240 N.C. at 174, 81 S.E.2d at 365-66. The illogical effect of *Coffey* was to carve out a rule of “inclusion” within what is actually a rule of exclusion.

**b. Legislative intent**

The second sentence of 404(b) states that evidence of other crimes or wrongs “may” be admissible for other purposes. The rule does not say that it “is” admissible. The distinction is important. Had the legislature intended to adopt a clear rule abrogating the common law and making such evidence presumptively admissible, it could have done so easily. Instead, the Advisory Committee’s Note, published as part of the commentary to the Rule, states:

“Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. . . . Subdivision (b) is consistent with North Carolina practice.”

From this commentary, it is clear the framers of the law did not intend to change the common-law general rule of exclusion but intended subsection (b) to be consistent with subsection (a).

**c. Common sense**

*Coffey* says that Rule 404(b) is a rule of inclusion of *relevant* evidence. However, Rule 402 states, “All relevant evidence is admissible. . . . Evidence which is not relevant is not admissible.” So, do we really need another rule to tell us that relevant evidence is admissible? There is no reason for a separate rule about evidence of other crimes unless there is something special about that kind of evidence requiring us to treat it differently. Historically, evidence of bad character, including evidence of other crimes, has been subject to special rules for policy reasons. Rule 404(b) was intended by the drafters as a specialized application of the rule that evidence must be relevant to be admissible. A special rule was needed to exclude otherwise relevant evidence because the peculiar dangers inherent in its use are unique and require extra
safety precautions. By codifying the common law in Rule 404(b), the drafters acknowledged that, as a policy matter and as a matter of law, bad character is not a fact “of consequence” in the determination of whether a person is guilty of a particular crime, and that evidence of other crimes or wrongs is so dangerously prejudicial that it demands special treatment and is deserving of its own rule.

B. Similarity and Temporal Proximity – A New Rule?

In addition to the “rule of inclusion” approach adopted in Coffey, Rule 404(b) jurisprudence has taken another wrong turn by over-emphasizing the significance of similarities and temporal proximity between the crime charged and the extrinsic misconduct, at the expense of rational inquiry into relevance. To be sure, those factors often can be a legitimate, useful tool for assessing the logical relevance of some evidence. While examining similarities and the lapse of time between the crimes may be of some use in determining whether evidence is relevant, however, the ultimate answer is not controlled by those guidelines, but by the logical relationship, if any, between the evidence and the fact to be proved. State v. Jeter, 326 N.C. 457, 461, 389 S.E.2d 805, 808 (1990). Similarity and temporal proximity do not automatically make evidence of extrinsic misconduct relevant. The “acid test” for admissibility is the logical relevance of the evidence under Rule 401. “The rule is, at bottom, one of relevance.” Jeter, 326 N.C. at 461, 389 S.E.2d at 808.

Relevant evidence is evidence making “the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. R. Evid. 401.

Rule 401 relevancy analysis requires two steps:

First, is the fact to be proved “of consequence to the determination of the action”? In other words, is the evidence offered for a proper purpose? Does the fact to be proved matter in the particular case?
Second, is the fact to be proved made more or less probable than it would be without the evidence?

The 404(b) prohibition against evidence of other crimes or bad acts, which is simply a special application of the basic requirement of Rules 401 and 402 that evidence be relevant in order to be admissible, establishes that, as a matter of law, an accused's bad character or propensity for bad conduct is not a fact “of consequence.” Therefore, the key task for counsel is to determine first, whether the evidence is offered for a proper purpose, and second, whether the evidence actually tends to prove what the state says it proves,

Sometimes consideration of the similarity and temporal proximity of the other crime or wrong simply is not helpful to determining whether the evidence is relevant in a particular case. Their weight or importance depends on the particular facts of each case and the purpose for which the evidence is offered. Similarities may be more significant when the other crimes evidence is offered to prove intent, identity, lack of mistake, or a common plan or scheme than when it is offered for some other purpose. “[R]emoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident.” E.g., State v. Stager, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991). However, the appellate courts often fail to recognize that these two factors do not serve the same purpose or have the same importance in every case. Instead, they have made broad, sweeping statements suggesting admissibility depends entirely on similarity and closeness in time, without regard to whether the evidence actually tends to prove any fact at issue. See, e.g., State v. Smith, 175 N.C. App. 796, 796, 468 S.E.2d 320 (2006) (“When the evidence is offered for a proper purpose, the ultimate test of admissibility is whether the incidents are sufficiently similar to those in the case at bar and not so remote in time as to be more prejudicial than probative under the Rule 403 test”); State v. Howell, 343 N.C. 229, 236, 479 S.E.2d 38 (1996) (“The test for determining whether evidence of crimes, wrongs, or acts other than those specifically at issue is admissible is whether the
incidents are sufficiently similar and not so remote in time that they are more probative than prejudicial under the Rule 403 balancing test”).

The unfortunate result is that litigants, as well as judges, often miss the point and short-cut the analysis of the admissibility of “other crimes” evidence by focusing on questions of similarity and temporal proximity, as if those were the only factors that determine if evidence is relevant. See, e.g., State v. Badgett, 361 N.C. 234, 644 S.E.2d 206 (2007) (defendant did not argue that other crimes evidence was not relevant to purposes for which it was admitted, but only that it was too dissimilar and remote in time to be admissible). Published opinions often contain no discussion at all of how the challenged evidence actually might prove a fact “of consequence.” They uphold admission of other crimes evidence based entirely upon superficial similarities between the crime on trial and the extrinsic misconduct, while barely paying lip service to the requirement of logical relevance. See, e.g., State v. Locklear, 363 N.C. 438, 681 S.E.2d 293 (2009) (court upheld admission of detailed evidence of a second, unrelated murder based solely on alleged similarities between two murders, without discussing the purpose for which the evidence was introduced or how the challenged evidence was relevant). Considering the courts’ direction, it is certainly understandable that defense lawyers and prosecutors are taking the same simplistic approach. But doing so does a terrible disservice to our clients.

Rule 404(b) does not mention “similarity” or “proximity in time.” In fact, those words do not appear anywhere in any of the rules governing relevancy and its limits, and their absence is of fundamental importance. Indeed, rather than a definitive test for whether evidence is relevant for a proper purpose under Rule 404(b), those factors serve as “constraints,” or limitations, on admitting otherwise relevant evidence. E.g., State v. Carpenter 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007); Lynch, 334 N.C. at 412, 432 S.E.2d at 354. At best, they are merely two guidelines among others that a court may examine to determine whether evidence of
another crime is relevant, and if so, whether it is sufficiently relevant to be admissible. The “acid test” for admissibility of evidence under Rule 404(b) remains “its logical relevancy to the particular . . . purpose . . . for which it is sought to be introduced” -- *not* whether the other crime is similar or close in time to the crime on trial. *Jeter*, 326 N.C. at 461, 389 S.E.2d at 808 (*quoting McClain*, 240 N.C. at 177, 81 S.E.2d at 368). Accordingly, while correct 404(b) analysis may properly include consideration of similarity and temporal proximity, it should never begin or end there.

**IV. McClain Revisited: State v. Carpenter**

In 2007, our state supreme court published a quite remarkable decision appearing to signal that the court had realized its Rule 404(b) jurisprudence had strayed too far from its beginnings. In *State v. Carpenter*, 361 N.C. 382, 646 S.E.2d 105 (2007), the court found reversible error in the admission of 404(b) evidence. Mr. Carpenter was convicted of possession with intent to sell or deliver cocaine. Following a traffic stop of a vehicle in which Mr. Carpenter was a passenger, an officer found on his person twelve rocks of crack cocaine weighing a total of 1.6 grams. At trial, the state offered evidence under Rule 404(b) that, eight years earlier, Carpenter sold six rocks of crack cocaine weighing .82 grams to an informant during a controlled buy. The 404(b) evidence was offered for the limited purpose of proving Carpenter intended to sell or deliver cocaine on the day of the crime charged. The supreme court found reversible error and ordered a new trial.

What made *Carpenter* remarkable was not merely that the court found a 404(b) violation, but what the court said in arriving at that decision. Reading the opinion is almost like reading *McClain*. Although the court briefly mentioned “rule of inclusion” in passing, it moved quickly past that idea to state that Rule 404(b) is consistent with North Carolina practice before the rule’s enactment. The court then restated the “general rule” that the state may not introduce evidence
of other crimes. The court also quoted with approval and at length from McClain, including these “cogent reasons” supporting the general rule against admitting evidence of other crimes:

(1) Logically, the commission of an independent offense is not proof in itself of the commission of another crime. (2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose. (3) Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence. (4) Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial.

Id. at 387, 646 S.E.2d at 109 (quoting McClain, 240 N.C. at 173-74, 81 S.E.2d at 365-66) (citations and internal quotation marks omitted). The court stressed the dangers of unfair prejudice and misleading the jury, and it repeatedly emphasized the need for close scrutiny of evidence of other crimes. Id.

Unfortunately, by the end of the opinion, the court’s momentum died somewhat as it avoided a thorough analysis of relevancy by simply concluding that the prior crime was not sufficiently similar to the crime charged to be admissible. However, the chief importance of Carpenter is its sweeping language about the dangers of extrinsic misconduct evidence, indicating that McClain is still good law and that Coffey (perhaps) has lost some of its force. Unfortunately, although the court did not follow Coffey, it also did not overrule Coffey’s “rule of inclusion.” Nevertheless, Carpenter is a potentially powerful weapon for opposing admission of
evidence under 404(b). Since Carpenter is a recent case, it gives new force to old arguments, and it should carry more weight with the lower courts than McClain. Armed with Carpenter, defense counsel can argue without any hesitation that lower courts must always scrutinize evidence of unrelated bad conduct and that there are strong, systemic policy reasons for excluding it beyond the facts of a particular case.

V. CONTINUED PROBLEMS FACING DEFENSE COUNSEL

Four years after Carpenter, the promise of that decision remains to be fulfilled. In its five more recent cases in which our supreme court has addressed 404(b), our supreme court seems to have returned to business as usual. See State v. Ray, 364 N.C. 272, 697 S.E.2d 319 (2010) (the court did not address whether evidence was properly admitted under 404(b) but held the issue was not properly preserved for appeal and if there was error, it was harmless); State v. Jacobs, 363 N.C. 815, 689 S.E.2d 859 (2010) (holding defendant was not prejudiced by exclusion of evidence of violent acts by the victim because the jury convicted defendant of second-degree murder instead of first-degree murder); State v. Locklear, 363 N.C 438, 681 S.E.2d 293 (2009) (the court upheld admission of evidence of an unrelated murder for purposes for which it patently was not relevant); State v. Maready, 362 N.C. 641, 669 S.E.2d 564 (2008); State v. Peterson, 361 N.C. 587, 652 S.E.2d 216 (2008). In all these cases, the court cited Coffey’s “rule of inclusion” and upheld the challenged evidence on the basis that the “other crimes or bad conduct” was sufficiently similar to, and not too remote in time from, the crime being tried. Likewise, the Court of Appeals has continued its inconsistent application of the law, and the court’s recent opinions continue to lack meaningful analysis of relevancy. See, e.g., State v. Mobley, 684 S.E.2d 508 (2009) (other similar crime was not too remote in time to be relevant;
evidence was admitted to prove identity and motive even though the state had DNA evidence proving defendant was the perpetrator of the crime charged); *State v. Rainey*, ___ N.C. App. ___, 680 S.E.2d 760 (2009) (evidence of assault on a person during a fight was introduced in a trial for armed robbery committed with accomplices to show defendant’s “method of operation,” *i.e.*, he tended to fight alongside other people; Court of Appeals held the two events were sufficiently similar for the unrelated assault to be relevant). As defense counsel, we still face these difficult problems:

1) **Continued reference to 404(b) as a “rule of inclusion”**

   We may be stuck with this language for decades to come, but we need not roll over and stop fighting it. We have strong arguments for why the rule still is -- as it was at common law --- a general rule of exclusion of evidence of other crimes or wrongs, subject to certain exceptions. The decision in *Carpenter* shows that our current supreme court is capable of seeing the problems that arise when 404(b) evidence is admitted too liberally.

2) **Interpreting “rule of inclusion” to mean that other crimes evidence is presumptively admissible.**

   The “acid test” for admissibility is the logical relevance of the evidence to the purpose for which it is offered. There is no category of evidence that is presumptively relevant in all cases. Despite its constant repetition of the “rule of inclusion” language, the court said in *Carpenter* that Rule 404(b) practice is consistent with the common law. We should hold the court to this assertion.

3) **Assuming that all the “exceptions” or permissible purposes listed in 404(b) are applicable in every case.**

   Prosecutors like to toss out a laundry list of permissible purposes for which the proposed evidence is said to be relevant. Perhaps they do not know any better. Or perhaps they believe
this tactic makes it less likely the trial court will scrutinize the evidence. It certainly is much easier for the trial court to make a generalized ruling that the evidence is admissible for a variety of purposes than to analyze each purpose individually to determine if and how it applies to the facts of the case. The limiting instructions that follow are usually confusing and ineffective for preventing misuse of the evidence by the jury. Moreover, it is easy, and therefore commonplace, for overworked appellate judges to uphold the trial court’s rulings without any close scrutiny. Our responsibility as advocates is to pressure the courts to examine carefully how the evidence is being used or likely to be used by the jury. We must be quick to call the prosecutor on alleged purposes that are no more than veiled propensity arguments.

4) Focusing on similarity and temporal proximity instead of relevancy

As previously discussed, we have judges and prosecutors who seem to believe that evidence is always admissible under 404(b) as long as the other crime or bad act is sufficiently similar and not too remote in time from the offense charged. As zealous advocates, is it our responsibility to remind them (again and again, if necessary) that, “[t]he rule is, at bottom, one of relevance.” Jeter at 459, 389 S.E.2d at 807. Thus, to be admissible, the evidence must first satisfy the definition of relevant evidence in Rule 401. If relevant under Rule 401, the evidence must still be excluded under Rule 404 if it is relevant only to prove bad character or propensity to commit a particular crime. Temporal proximity and similarity, when they matter at all, are “constraints” on using the evidence. State v. Lynch, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993).

If, in a particular case, arguing that the acts in question are too dissimilar or too temporally remote from one another helps to keep out extrinsic misconduct evidence, we certainly must make the argument as part of our defense. But we must think very hard about
how those factors make a difference. Court must always remember that “similarity and temporal proximity” do not substitute for proper application of Rule 401, and counsel should never concede that evidence satisfies Rules 401 or 404 just because it is similar and not too remote in time.

VI. PERMISSIBLE PURPOSES AND HOW THEY WORK

In State v. McClain, our supreme court set out eight “recognized exceptions” to the general rule excluding evidence of other crimes at common law. That list includes: 1) evidence of another crime that is part of the same transaction as the crime charged and so closely connected that one cannot be fully shown without proving the other; 2) evidence that tends to establish intent or other mental state, where a specific mental intent or state is an essential element of the crime charged; 3) evidence tending to prove guilty knowledge, where guilty knowledge is an element of the crime charged; 4) evidence the accused committed another crime offered to prove identity, where the accused is not definitely identified as the perpetrator of the crime charge and circumstances tend to show the same person committed both crimes; 5) evidence tending to prove motive to commit the crime charged; 6) evidence tending to show a common plan or scheme embracing a series of related crimes, such that proof of one or more tends to prove the crime charged or connect the defendant with its commission; 7) evidence of illicit, consensual sexual acts as corroboration or explanation showing mutual disposition of the participants to engage in the act; and 8) evidence of other acts offered to corroborate or explain the evidence proving the act charged. 240 N.C. at 174-76, 81 S.E.2d at 366-68.

Rule 404(b) adds some other permissible purposes to the McClain list. The rule provides that, although evidence of other crimes or wrongs is not admissible to prove character in order to show action in conformity therewith, the evidence “may” be admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of
mistake, entrapment, or accident.” The list is not exclusive or exhaustive. *E.g.*, *State v. Young*, 317 N.C. 396, 412 n.2, 346 S.E.2d 626, 635 (1986).

*McClain* provides a good starting point for understanding some of the most commonly seen permissible purposes of other crimes evidence, such as identity or “common plan or scheme.” In addition, several useful treatises explain the various permissible uses of this kind of evidence and include lists of illustrative cases. *See, e.g.*, Brandis & Broun on North Carolina Evidence, § 95 (6th ed. 2004 & Supp. 2009); 1 McCormick on Evidence § 190 (6th ed. 2006 & Supp. 2009); 1 Wharton’s Criminal Evidence (15th ed. 1997 & Supp. 2008). It is beyond the scope of this paper to discuss each of these possible purposes individually, or to explain how they have been applied in practice or how they *should* apply. In fact, because the numerous published decisions are all over the map with respect to how each purpose applies, and the decisions are generally fact-specific, drawing useful general rules from them is difficult. Furthermore, some of the published decisions are just wrongly decided, and some are clearly the result of unusual facts or of the court’s desire to reach a particular result.

The following general principles bear consideration, however.

1) **Fine line between mens rea and propensity.** When the stated purpose for the other crimes evidence is proof of intent, motive, plan or scheme, or another specific mental state, there often is a very fine line between proving that mental state and merely showing bad character or propensity to commit the crime charged. When the state seeks to introduce evidence for any of these purposes, defense counsel should be particularly wary and diligent in examining the evidence and taking steps to avoid its misuse.
2) **Propensity as intermediate step in relevancy analysis.** Establishing the relevancy of other misconduct to the crime charged always involves more than one step, and may involve a chain of inferences.

In general effect, the cases and the Rule agree that the commission of a certain act is never directly evidential of the commission of a similar act at some other time. There is always some intermediate step in the reasoning. If there is no other connection between the two acts, it is argued that the doing of the first act shows a disposition to indulge in that kind of conduct, and from this disposition the probability of the second act is inferred. But to reason thus from one crime to another is a clear violation of the character rule.

*Brandis & Broun on North Carolina Evidence* § 95, accord State v. Cotton, 318 N.C. 663, 666, 351 S.E.2d 277, 278 (1987). Often when a prosecutor says that evidence is admissible for one or more purposes, a closer inspection reveals that the state is really arguing propensity. For example, if the argument is that commission of a prior crime shows motive or intent to commit the crime charged, the real argument may be that, because the defendant had a certain motive or intent at an earlier time, he must have had the same state of mind when he committed a second crime. This is just another way of saying the defendant has the propensity to respond the same way to similar situations. If the logical relevance of the evidence depends, as the intermediate step in the chain of inferences, on an inference that the defendant has a propensity to act or think a certain way, the evidence should be excluded even if the stated purpose for the evidence is a proper one.

3) **Beware of “laundry lists.”** Because of the so-called “rule of inclusion,” prosecutors tend to argue the state’s evidence of other crimes or bad acts is admissible for multiple purposes under 404(b), many of which are not genuinely applicable to the facts of the case. The courts, in turn, tend to rule the evidence is admissible for multiple purposes without analyzing how the evidence is relevant for each purpose. The general judicial climate seems to be that, if the
prosecutor can articulate reasons that are specifically listed in the rule, the evidence comes in for all of them. Also, when the court admits the evidence for multiple reasons, the limiting instructions given to the jury tend to be very confusing.

It may be that, in a particular case, the other crimes evidence is legitimately relevant to more than more issue in the case. However, it should go without saying that the mere fact that the rule lists a certain purpose does not make it applicable in all cases. If counsel can not persuade the court to exclude the evidence altogether, counsel should try to limit the purposes for which it is admitted and on which the jury is instructed. In short, rather than making a generalized argument that evidence is not relevant or is too prejudicial, defense counsel must examine the evidence closely and tailor arguments to the specific purposes for which the evidence is offered.

4) **Unnecessary details about other crimes.** Another problem often arises when evidence of other crimes is logically relevant and offered for a proper purpose under Rule 404(b), but the fact of consequence it tends to prove can be shown without the jury hearing all the gory or heart-wrenching and inflammatory details of the other offense. The courts usually admit all the evidence. Nevertheless, defense counsel should always ask the court to limit the details about the extrinsic misconduct to those that are necessary to make the point for which it is offered. The argument is two-fold. First, counsel should argue that the details of the other bad act are unrelated to the limited purpose for which the evidence is offered. *See, e.g., State v. Emery, 91 N.C. App. 24, 370 S.E.2d 456, disc. rev. denied, 323 N.C. 627, 374 S.E.2d 594 (1988).* Second, counsel should argue that proof of unnecessary details wastes court time and judicial resources, misleads the jury, and is more prejudicial than probative, such that it must be excluded under Rule 403.
VII. THE ROLE OF RULE 403

Even when evidence satisfies the threshold relevancy requirements under Rule 404(b), the trial judge still must determine "whether the danger of unfair prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." Official Commentary to Rule 404. The court must conduct a balancing test to determine whether the probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *E.g.*, *State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987).

Rule 403 represents a legislative acknowledgment that even evidence of unquestioned relevance may possess attendant disadvantages of such significance that its exclusion is required in the interests of justice and judicial economy. The 403 weighing process takes on even greater significance in the context of 404(b) evidence -- as opposed to run-of-the-mill relevance questions -- because evidence of other crimes always is dangerously prejudicial. *See, e.g.*, *Carpenter*, 361 N.C. at 387, 646 S.E.2d at 109.

Evidence is unfairly prejudicial if it has an undue tendency to suggest decision on an improper basis, such as an emotional one. *See, e.g.*, *Frazier*, 319 N.C. at 390, 354 S.E.2d at 477; *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986).

Evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action may cause a jury to base its decision on something other than the established propositions in the case.

1 J. Weinstein and M. Berger, Weinstein's Evidence §403(03) at 403-33 (1991). “The dangerous tendency of [evidence of other crimes or bad acts] to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the

Although admissibility under Rule 403 is ultimately within the trial judge's discretion, e.g., State v. Mason, 315 N.C. 724, 340 S.E.2d 430 (1986), that discretion is far from boundless. See State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989) (holding that trial court misapplied Rule 403). Rather, "it must affirmatively appear that the probative force of [the challenged evidence] outweighs the specter of undue prejudice to the defendant and, in close cases, fundamental fairness requires giving defendant the benefit of the doubt and excluding the evidence." Riddick at 135-36, 340 S.E.2d at 428 (citation omitted) (emphasis added).

Among the factors that Rule 403 requires to be weighed against probative value is whether use of the challenged evidence will result in "needless presentation of cumulative evidence." The Commentary to Rule 404 explains the evidence must be considered “in view of the availability of other means of proof.”

When the government has ample evidence to establish an element of the crime, the probative value of the prior crime evidence is greatly reduced, and the risk of prejudice which accompanies the admission of such evidence will not be justified.


At the Rule 403 balancing stage, defense counsel is not limited to arguing unfair prejudice. To be sure, evidence of other crimes is inherently more prejudicial than any other evidence the jury may hear and the court should always be reminded of that fact. However, iff the state has other means of proving the same issue, the 404(b) evidence also may be needlessly
cumulative and, if the trial is long, the evidence may take up too much of the court’s time. And the more detailed the evidence, the more likely it will mislead or confuse the jurors about the issues. Any one of these arguments may make all the difference in a particular case.
CONCLUSION

Evidence of other crimes or bad conduct for which the defendant is not on trial is arguably the most damaging and unfairly prejudicial evidence that a jury may hear in a criminal trial. A consistent effort by the defense bar to exclude this type of evidence whenever possible and to educate the courts about its proper use is essential to effective advocacy. The unfortunate reality is that Rule 404(b) jurisprudence is complicated and messy, and the Rule creates a minefield for criminal defense lawyers in North Carolina. On the whole, our trial courts seem increasingly opposed to excluding evidence of extrinsic misconduct, and our appellate courts are extremely reluctant to reverse a conviction on 404(b) grounds. The job of defense counsel has been made far more difficult by the “rule of inclusion” notion introduced in Coffey, and by the increasing focus of the courts on questions of similarity and temporal proximity to the exclusion of careful analysis of logical relevance under Rule 401 or proper balancing under Rule 403. Sometimes defense attorneys seem to have given up the fight, as trial transcripts reflect only perfunctory, half-hearted arguments for keeping out the evidence, thereby limiting the arguments appellate counsel can make on appeal. Some seem to have accepted the premise that the evidence comes in if it is sufficiently similar and not too remote in time to the crime charged, even if the logical relevance of the evidence is not entirely clear. A wholesale assault is needed on the current state of 404(b) jurisprudence in order to restore fairness to criminal trials.

The task of moving the courts in the right direction is certainly daunting. The good news, however, is that proper application of Rule 404(b) turns on the facts of each case, so each case is a fresh opportunity to try again. Counsel should never feel that a particular case is controlled by any published appellate court decision in another case. Moreover, the recent decisions in Carpenter and Al-Bayyinah have breathed new life into age-old truths about the many serious dangers of introducing “bad acts” evidence in a criminal trial. Those decisions provide
significant new ammunition with which to confront the increasingly liberal admission of other crimes evidence and to educate the lower courts about the strong policy reasons for excluding it. Armed with those cases and a better understanding of the fundamental principles underlying 404(b), we must be willing to mount a tireless assault on the deteriorating state of the law if we are to make a difference for our individual clients and for the criminal jurisprudence of the state.

There are still cases to be won if defense attorneys refuse to accept that Rule 404(b) must be viewed as a rule of inclusion or that the only test for admissibility is whether the bad conduct is similar or close in time to the crime charged. The key to success is careful preparation in every case, coupled with a willingness to lead the trial judge through all the steps necessary to a proper determination of whether the evidence is offered for a proper purpose and is logically relevant to the purpose for which it is offered. We must not stop reminding the court that Rule 404(b) is, at bottom, one of relevance and that, in close cases, the tie goes to the defendant.
APPENDIX

How to argue inadmissibility under Rule 404(b)

Rule 404(b) practice tips

Some helpful cases

Some helpful language

Sample proposed jury instructions
HOW TO ARGUE INADMISSIBILITY UNDER RULE 404(B):

(1) What’s the purpose? Determine what fact (or facts) the proponent of the evidence claims it tends to prove (when in doubt, have the court ask the DA)

(2) Decide if that fact is “of consequence to the determination of the action.” See Rule 401. To be “of consequence,” the fact the evidence is offered to prove must be something other than the defendant’s bad character or propensity to commit a crime and must be material.

The "issue on which the evidence of other crimes is said to bear should be the subject of genuine controversy." State v. McDonald, 130 N.C. App. 263, 502 S.E.2d 409 (1998) (citation omitted). See, e.g., Stager, 329 N.C. at 302, 406 S.E.2d at 890 (evidence must relate to “disputed fact”); State v. McKoy, 317 N.C. at 527, 347 S.E.2d at 379 (purpose for which evidence was admitted was not “material fact in issue”); State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986) (evidence lacked relevance to any contested issue).

(3) Assess whether the fact to be proved is actually made more or less probable by the evidence, apart from the improper inference of propensity, i.e., does the evidence prove what the state says it proves? Rule 401.

The “the acid test” for admissibility of evidence under Rule 404(b) remains “its logical relevancy to the particular . . . purpose . . . for which it is sought to be introduced.” State v. Jeter, 326 N.C. 457, 461, 389 S.E.2d 805, 808 (1990) (quoting McClain, 240 N.C. at 177, 81 S.E.2d at 368).

(4) Even if the evidence meets the 401 test for relevance, admission is further "constrained by" by two other requirements: similarity and temporal proximity.

A determination of whether evidence of another crime is relevant to prove a material fact other than character or propensity “is guided by two further constraints – similarity and temporal proximity.” State v. Lynch, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993) (emphasis added). Rather than a definitive test for whether evidence is relevant under Rule 404(b), those questions serve as “constraints,” or limitations, on admitting otherwise relevant evidence. E.g., Carpenter at 388, 646 S.E.2d at 110; Lynch, 334 N.C. at 412, 432 S.E.2d at 354.
The similarity/dissimilarity or remoteness of the other bad act may increase or decrease the relevance of the evidence, depending on the purpose for which it is offered.

Be aware -- in some circumstances, similarity and remoteness in time logically have absolutely nothing to do with whether the evidence proves a fact "of consequence." However, until we get the courts to understand this, we might be able to keep out damaging evidence by arguing it is too dissimilar or too remote, if all else fails.

(5) Rule 403 balancing

Start with the **scale tipped toward keeping it out** because of all the dangers spelled out in *McClain/Carpenter*.

Similarity and temporal proximity may be factors at this step as well -- the greater the similarity, the more prejudicial; the more remote, the less relevant, etc.

Argue not only the "danger of unfair prejudice" but also "confusion of the issues, or misleading the jury, or . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *E.g., State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987).

(6) In close cases, the defendant wins.

"It must affirmatively appear that the probative force of [the challenged evidence] outweighs the specter of undue prejudice to the defendant and, in close cases, fundamental fairness requires giving defendant the benefit of the doubt and excluding the evidence." *State v. Riddick*, 316 N.C. 127, 135-36, 340 S.E.2d 422, 428 (1986) (citation omitted).


**Argue the Constitution.** When the effect of such evidence is to “predispose the mind of the juror to believe that the prisoner is guilty, and thus effectually to strip him of the presumption of innocence,” its admission violates the defendant’s constitutional right to due process. *State v. Jones*, 322 N.C. 585, 589, 369 S.E.2d 822, 824 (1988) (citation omitted) (new trial required where “other crimes” evidence prejudiced defendant’s “fundamental right to a fair trial).
RULE 404(B) PRACTICE TIPS

I. BEFORE TRIAL

1) Litigate the issue pretrial. File a motion in limine, citing cases and constitutional provisions.

2) Ask for complete recordation of all pretrial and trial proceedings, including jury selection, opening and closing statements, and discussions on admissibility of the evidence. N.C. Gen. Stat. § 15A-1241.

   Don’t worry about annoying the court reporter.

   If your case goes up on appeal, it is crucial to have a record of every time the 404(b) evidence was mentioned. Closing arguments may be particularly helpful to demonstrate prejudice.

3) Prepare, prepare, and prepare some more.

   Do not let yourself be blind-sided.

   You have a right to discovery of other crimes evidence in the state’s possession, and the prosecutor has a continuing duty to disclose new information. N.C. Gen. Stat. §§ 15A-904, -907.

   Do not rely on the state to educate you about your own client. Investigate your client’s past bad conduct. Do not limit your investigation to prior crimes or convictions.

   Brainstorm ways the state might try to use extraneous bad conduct in your case. Research and prepare arguments for exclusion for each bad act.

   Consider drafting a bench brief addressing each bad act.

   Make copies of helpful cases for the judge and ask to put copies in the record.

4) Ask, “What’s the purpose?” At pretrial hearing, ask the court to pin down the state as to the purpose(s), i.e., facts “of consequence” for which the evidence will be offered. Look out for laundry lists.

   “The better practice is for the proponent of the evidence, out of the presence of the jury, to inform the court of the rule under which he is proceeding and to obtain a ruling on its admissibility prior to offering it.” State v. Morgan, 315 N.C. 626, 630, 340 S.E.2d 84(1986)
5) **Argue all the steps for inadmissibility.**

Meet broad arguments about “similarity” and “rule of inclusion” by taking the court through each step of the analysis; do this separately for each purpose for which the state claims the evidence is offered.

What’s the purpose?
Is the fact “of consequence”?
Is there a genuine controversy about the issue?
Is the evidence really relevant to the particular purpose for which it is offered?

If relevant, apply the “constraints” – similarity and temporal proximity.

Is the prior act similar? Does it matter on these facts?
Is the prior act close in time? Does it matter on these facts?

If it passes all these tests, argue 403 requires exclusion:

Prejudice outweighs probative value
Confusion of the issues
Waste of time
Forces defendant to defendant against crimes not charged
The state doesn’t need the evidence to make its case

7) **Remind the court of its obligation to scrutinize the evidence closely at each step.**

8) **Talk about the inherent dangers in evidence of other crimes/bad acts.**

Quote liberally from *Carpenter, Al-Bayinna*, and *McClain*.

9) If the court reaches Rule 403 balancing, **remind the judge there is a heavier weight on prejudice side of scale** at the outset than with other types of evidence because of the inherent dangers of other crimes evidence.

10) **Argue that, if it’s a close case, defendant wins.**

11) **Constitutionalize the issue.**

12) If court rules against you, object again.

13) Try to limit details of other crimes evidence.

   If the trial court rules that the other crime comes in, argue that all the sordid details of the
   prior offense are unnecessary to accomplish the state’s purpose. They also make the
   prejudice greater than the probative value under 403.

14) Request your own carefully crafted limiting instruction.

   Any limiting instruction should stress that the law prohibits the jury from convicting of
   present charge because of something the defendant did in the past.

   Make it clear on the record your position is that no limiting instruction can sufficiently
   remove the prejudice as a matter of law. But if the court will not reconsider, you at least want
   a limiting instruction the jury has a prayer of understanding.

   If judge refuses to give your instruction, ask to see the instruction he intends to give in
   advance. Object to the instruction as inadequate to cure the prejudice from admission of
   the evidence.

   “The admission of evidence which is relevant and competent for a limited purpose will not be
   held for error in the absence of a request by the defendant for a limiting instruction . . . . ‘Such an
   instruction is not required unless specifically requested by counsel.’” State v. Stager, 329 N.C.

II. AT TRIAL

1) Object to the evidence when the state begins to present it.

   Ask to be heard out of the present of the jury and tell the judge you are expressly
   renewing all your previous arguments. Be sure to mention the state and federal
   constitutional right to due process again. Otherwise the issue is waived for appeal. State

2) Continue objecting on all the bases previously argued.

3) If there is a question as to the commission of the prior act or your client’s identity as the
   perpetrator, defend against the 404(b) evidence by vigorous cross-examination of the state’s
   404(b) witnesses vigorously or by calling your own witnesses. I.e., be prepared to litigate a trial
   within a trial.

   Renew your objection. If you present evidence to rebut the 404(b) evidence, put on the
   record that you that you are presenting evidence to explain or rebut the state’s 404(b)
evidence and you would not be doing it but for the court’s admission of the evidence over your objection.

4) **Do not open the door** to otherwise inadmissible evidence by putting on evidence of good character.

Weigh the pros and cons of presenting evidence of a pertinent trait of character. Is it crucial to your defense? How damaging is the evidence to which you are opening the door?

“Whenever a defendant "opens the door" to character evidence by introducing evidence of his own pertinent character trait--in this case his peacefulness--the prosecution may rebut that evidence with contrary character evidence. . . . Defendant cannot complain when the whole story is revealed, part of which he elicited through his own questioning.” *State v. Duke*, 360 N.C. 110, 121, 623 S.E.2d 11, 19 (2007) (citations omitted) (no error in trial court’s admission of “bad acts” evidence where defendant opened the door by introducing evidence of his good character).

5) **Listen attentively to the state’s closing arguments.**

**Object** to any argument about the other crimes evidence. Be prepared to argue that the DA’s argument encourages the jury to misuse the evidence for purposes other than those for which it was admitted.

If the trial court admits “other crimes” evidence for a limited purpose under Rule 404(b), the prosecutor cannot rely on the evidence during closing argument to show that the defendant acted in conformity with his alleged character trait. *See State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986).

6) **At the charge conference, renew your request for your own limiting instruction**

7) **Consider whether to talk about the other crimes evidence in your own closing argument.**

**Pro:** Allows you to remind the jury of the extremely narrow purpose for which it is offered. You can read the jury instruction and explain it to the jury

**Con:** May draw too much attention to the evidence

Factors to consider:

Do you have the last argument?

Did the DA argue the other crimes evidence?

How much time was spent presenting the other crimes evidence?

How badly does the other crimes evidence hurt your case?
### SOME HELPFUL CASES

#### I. NEW TRIAL FOR 404(B) VIOLATIONS:

**State v. Carpenter**, 361 N.C. 382, 646 S.E.2d 105 (2007). The defendant was convicted of possession with intent to sell or deliver cocaine based on evidence that an officer, after stopping a vehicle in which defendant was a passenger, searched defendant’s person and found twelve rocks of crack cocaine totaling 1.6 grams. The trial court admitted evidence that defendant sold an informant six rocks of crack cocaine weighing .82 grams during a controlled buy eight years earlier, and evidence of the defendant’s resulting conviction. The evidence was offered and received to show the defendant’s specific intent to sell or deliver cocaine. On appeal, the court focused solely on the similarities and dissimilarities between the two offenses and held the prior offense was not sufficiently similar to the crime being tried and was inadmissible under Rule 404(b). **Pro:** The courted quotes liberally from McClain and downplayed the notion of “rule of inclusion.” The court reached the correct result. **Con:** The court based its ruling on dissimilarities and did not discuss how the evidence might or might not be relevant to prove intent, so the analysis is flawed.

**State v. al-Bayyinah**, 356 N.C. 150, 567 S.E.2d 120 (2002). The defendant was convicted of an attempted robbery and murder of the owner of a grocery store. Identity of the perpetrator was at issue in the case. The state introduced evidence that another store owner had been robbed twice about six weeks earlier. The victim of these robberies identified defendant as his assailant from a single photograph. On appeal, the court held the only similarities between the three robberies were generic likenesses inherent in all robberies. **Pro:** The court reached the correct result. **Con:** The court based its ruling on dissimilarities. A key factor in the court’s decision was that the proof defendant committed the other robberies depended on a questionable identification procedure.

**State v. Lynch**, 334 N.C. 402, 432 S.E.2d 349 (1993). The defendant was convicted of two counts of first-degree murder. The supreme court ordered a new trial, holding the trial court erred by allowing the prosecutor to elicit, on cross-examination of the defendant, the underlying facts supporting prior convictions for crimes that had no logical connection to the crimes for which he was being tried. The cross-examination violated both Rule 404(b) and Rule 609.

**State v. White**, 331 N.C. 604, 419 S.E.2d 557 (1992) (admission of 404(b) evidence was proper, but trial court erred in its limiting instructions regarding the permissible use of the evidence).

**State v. Morgan**, 315 N.C. 626, 340 S.E.2d 84 (1986) (evidence defendant had pointed a gun three months earlier at someone other than the alleged murder victim was not admissible to negate defendant’s claim of self defense).

**State v. Irby**, 113 N.C. App. 427, 439 S.E.2d 226 (1994) Defendant was convicted of two counts of second-degree murder. The appellate court rules that evidence of two prior shooting incidents by defendant and his father that did not involve the alleged murder victims was not properly admitted to show intent where the prior incidents had no connection to the crimes charged other than to show propensity for violence and negate defendant’s claim of self defense and defense of another.
State v. Emery, 91 N.C. App. 24, 370 S.E.2d 456, disc. rev. denied, 323 N.C. 627, 374 S.E.2d 594 (1988). The defendant was convicted of second-degree murder. The state introduced evidence the defendant sold marijuana to the victim and other people, including high school students, and evidence of a breaking and entering committed by defendant the night before the victim was shot. The Court of Appeals held some of the evidence related to the victim was relevant. However, evidence that defendant sold drugs to high school students, evidence of how he packaged and sold marijuana, and evidence that he once traded drugs for a car “had no tendency to make any fact of consequence more or less probable.” The breaking and entering was unrelated to the alleged murder and was not admissible to prove “the defendant’s willingness to use the gun in a felonious manner.” Moreover, by introducing details of other crimes, the prosecutor exceeded the limited purpose for which the evidence was introduced.

State v. Willis, 136 N.C. 820, 526 S.E.2d 191 (2000). Defendant was convicted of committing armed robbery in Forsyth County. At trial, the state introduced certified court documents showing defendant was convicted in Guilford County of a common-law robbery that was committed only eight days after the Forsyth robbery. The trial court admitted the evidence to show identity, modus operandi, motive, and common scheme or plan. The Court of Appeals held that, because there was no evidence of the manner in which the Guilford County robbery was carried out, there was insufficient showing of similarities between the two robberies to make the evidence relevant to identity or motive. A new trial was required because the only relevance of the evidence was to show the character of the defendant to commit armed robbery, which is forbidden by Rule 404(b).

II. SEX CASES

State v. Jones, 322 N.C. 585, 590, 369 S.E.2d 822, 825 (1988) A seven year lapse of time between prior sexual assaults and those for which the defendant was on trial caused any probative impact to become so attenuated by time that it was “little more than character evidence illustrating the predisposition of the accused.”

State v. Scott, 318 N.C. 237; 347 S.E.2d 414 (1986) Defendant was convicted of first-degree sex offense for acts of cunnilingus involving his 3-year-old and 4-year-old nieces. The prosecutor cross-examined defendant and his sister about sexual acts with the sister occurring nine years before trial. The state argued the evidence was relevant to prove identity. The court held the prior conduct was inadmissible because 1) it was too remote in time to be relevant, 2) the conduct was too dissimilar from the crimes on trial, and 3) it was clear that identification of the perpetrator was not the purpose for which the evidence was admitted.

State v. Gray, COA10-307 (N.C. Ct. App. April 5, 2011) Defendant was convicted of first-degree sex offense and indecent liberties with five-year-old girl. Quoting liberally from State v. Carpenter, the court held the trial judge committed prejudicial error by admitting evidence defendant had sexually assaulted a four-year-old boy eighteen years earlier. The court concluded 1) remoteness of the prior offense did not merely go to the weight of the evidence but was a factor to be considered in determining admissibility of the evidence, 2) the prior offense was too dissimilar and too remote in time to be admissible. The evidence was not relevant to the prove
identity, intent, or common scheme or plan. Even if arguably relevant, it was more prejudicial than probative under Rule 403.

**State v. Beckelheimer**, COA10-203 (N.C. Ct. App. April 19, 2011) Defendant was convicted of three counts of first-degree sexual offense and three counts of indecent liberties based on evidence he, at age 27, touched and “kissed” the penis of an eleven-year-old boy in the summer of 2007. Noting the danger of 404(b) evidence to “mislead and raise a legally spurious presumption of guilt,” the Court of Appeals ordered a new trial for improper admission of evidence the defendant had reciprocal, consensual sexual contact with the victim’s half-brother years earlier, when both the half-brother and the defendant were minors and were only 3 or 4 years apart in age. The court did not discuss whether the evidence was relevant, but held it was inadmissible because the prior conduct was not sufficiently similar to the crime charged.

**State v. Webb**, 197 N.C. App. 619, 682 S.E.2d 393 (2009) The defendant was convicted of one count of indecent liberties with a minor. The trial court improperly admitted testimony of two witnesses who said that defendant had sexually abused them 21 years and 32 years earlier. The Court of Appeals said the events were too remote and too dissimilar to be admissible.

**State v. White**, 135 N.C. App. 349, 520 S.E.2d 70 (1999). The thirteen-year-old defendant was convicted of first-degree rape for raping a nine-year-old girl while threatening her with a knife. The Court of Appeals ordered a new trial because the trial court erred by admitted evidence the defendant performed cunnilingus on a four-year-old girl four months later. The court held the incidents were not sufficiently similar and tended only to show the propensity of the defendant to perform sexual acts with young female children. (The court did not discuss the purpose for which the evidence was offered).

**State v. Smith**, 152 N.C. App. 514, 521, 568 S.E.2d 289, 294, *disc. rev. denied*, 356 N.C. 623, 575 S.E.2d 757 (2002) (evidence the defendant possessed pornographic magazines and videos was not relevant in a prosecution for sexual offenses with a minor, where the defendant never showed the materials to the victim).


**State v. Moore**, 620 S.E.2d 1, 8 (N.C. App. 2005) (error to admit irrelevant testimony regarding pornographic magazines and criminal citation found in defendant’s motel room)

II. NEW TRIAL FOR RULE 403 VIOLATIONS:

State v. Ward, COA08-978 (N.C. Ct. App. Aug. 18, 2009) Defendant convicted of numerous drug offenses, including trafficking in opium, possession with intent to sell or deliver several prescription drugs, and others. The court ruled that evidence of very similar crimes committed one and one-half years earlier was relevant under 404(b) to show intent, knowledge, identity and the existence of a common plan or scheme to engage in the unlawful sale of controlled substances in New Hanover County. However, because some of the prior charges arising from possession of prescription drugs had been dismissed for insufficient evidence, admission of evidence of those offenses violated Rule 403 and required a new trial. Dismissal for insufficient evidence was tantamount to an acquittal which, under State v. Scott, 331 N.C. 39, 413 S.E.2d 787 (1992), rendered the evidence more prejudicial than probative as a matter of law.

State v. Scott, 331 N.C. 39, 413 S.E.2d 787 (1992) Admission of evidence of crime of which the defendant had been acquitted violated Rule 403. “[W]here the probative value of such evidence depends upon defendant’s having in fact committed the prior alleged offense, his acquittal of the offense in an earlier trial so divests the evidence of probative value that, as a matter of law, it cannot outweigh the tendency of such evidence unfairly to prejudice the defendant. Such evidence is thus barred by N.C. R. Evid. 403. Id., 331 N.C. at 41, 413 S.E.2d at 788. This holding rested “on the proposition that the presumption of innocence continues with the defendant after his acquittal and so erodes the probative value of the evidence of the previous crime that it is more prejudicial than probative, making it inadmissible under N.C.G.S. § 8C-1, Rule 403.” State v. Lynch, 337 N.C. 415,419, 445 S.E.2d 581, 582 (1994).

The principle enunciated in Scott does not bar the admission of testimony relating to other bad acts for which the defendant was acquitted if the other bad acts and the crime charged were “part of a single continu[ous] transaction.” State v. Bell, 164 N.C. App. 83, 87-88, 594 S.E.2d 824, 826-27 (2004).

State v. Jones, 322 N.C. 585, 590, 369 S.E.2d 822, 825 (1988) (finding an abuse of discretion where the “probative impact has been so attenuated by time that it has become little more than character evidence illustrating the predisposition of the accused”)
SOME HELPFUL LANGUAGE

I. SIMILARITY AND TEMPORAL PROXIMITY OPERATE AS “CONSTRAINTS” ON OTHERWISE RELEVANT EVIDENCE

State v. al-Bayyinah, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (“To effectuate these important evidentiary safeguards, the rule of inclusion described in Coffey is constrained by the requirements of similarity and temporal proximity.”)


II. COURTS MUST SCRUTINIZE 404(B) EVIDENCE CLOSELY BECAUSE OF ITS DANGEROUS TENDENCY TO RAISE AN INFRINGEMENT OF GUILT

State v. Jones, 322 N.C. 585, 588, 369 S.E.2d 822, 824 (1988) (“[T]he admissibility of evidence of a prior crime must be closely scrutinized since this type of evidence may put before the jury crimes or bad acts allegedly committed by the defendant for which he has neither been indicted nor convicted.”)


State v. al-Bayyinah, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (“As we stated in State v. Johnson, 317 N.C. 417, 347 S.E.2d 7 (1986), "the dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts." Id. at 430, 347 S.E.2d at 15.)

State v. al-Bayyinah, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (“Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused.”)
III. FACT TO BE PROVED SHOULD BE IN ISSUE

*State v. McDonald*, 130 N.C. App. 263, 502 S.E.2d 409 (1998) (citation omitted) (the connection between the evidence and its permissible purpose should be clear, and the issue on which the evidence of other crimes is said to bear should be the subject of genuine controversy)


*State v. McKoy*, 317 N.C. at 519, 527, 347 S.E.2d 374, 379 (1986) (admission of unrelated breaking or entering was error where the purpose for which the evidence was admitted was not a “material fact in issue”)


*State v. Fair*, 354 N.C. 131, 149, 557 S.E.2d 500, 514 (2001). This is not a 404(b) case but contains a useful discussion of relevance. The holding rests on the proposition that, to be relevant, evidence must tend to prove a fact “at issue.” The court held there was no error in admitting evidence offered by the defendant to corroborate defendant’s account of meeting the victim at a certain place and time because “where and at what time defendant met the victim was not a disputed fact at trial.”

IV. 404(B) IS A RULE OF EXCLUSION, WITH CERTAIN RECOGNIZED EXCEPTIONS.

*State v. Carpenter*, 361 N.C. 382, 386, 646 S.E.2d 105, 109 (2007) (repeated references to “general rule” that state cannot offer evidence of other crimes, as set out in *McClain*)


*State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419 (1986) (“Generally, character evidence is inadmissible to prove action in conformity therewith under *McClain*, and Rule 404(a) of the North Carolina Rules of Evidence. . . . Rule 404(b) provides an exception if the evidence provides proof of motive, opportunity, intent, plan, etc.”)

V. POLICY REASONS REQUIRING EXCLUSION OF THE EVIDENCE

State v. Al-Bayinnah, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (“The inquiry [into character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the [jurors] and to overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defendant against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.” (quoting Michelson v. United States, 335 U.S. 469, 175-76, 93 L.Ed.2d 168, 174 (1948).

State v. Al-Bayinnah, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (“[Character evidence] is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal – whether the judge or jury – is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused’s guilt of the present charge.”) (citations omitted)

VI. THE “ACID TEST” FOR ADMISSIBILITY IS THE LOGICAL RELEVANCE OF THE EVIDENCE TO THE PURPOSE FOR WHICH IT IS OFFERED.

State v. McKoy, 317 N.C. 519, 527, 347 S.E.2d 374, 379 (1986) (“The acid test is its logical relevancy to the particular purpose or purposes for which it is sought to be introduced,” quoting McClain, 240 N.C. at 177, 81 S.E.2d at 368).

VII. IN CLOSE CASES, THE EVIDENCE MUST BE EXCLUDED

State v. McKoy, 317 N.C. 519, 527, 347 S.E.2d 374, 379 (1986) (“if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected,” quoting McClain, 240 N.C. at 177, 81 S.E.2d at 368).

State v. Riddick, 316 N.C. 127, 135, 340 S.E.2d 422, 427 (1986) (When weighing probative value against prejudicial effect, "it must affirmatively appear that the probative force of such evidence outweighs the specter of undue prejudice to the defendant, and, in close cases, fundamental fairness requires giving defendant the benefit of the doubt and excluding the evidence") (citation omitted) (pre-Rules case).
SAMPLE PROPOSED JURY INSTRUCTIONS

I. TO PROVE INTENT IN PROSECUTION FOR POSSESSION WITH INTENT TO SELL OR DELIVER CONTROLLED SUBSTANCE

Evidence has been received tending to show that Mr. X sold cocaine to a confidential informant on July 5, 1999. This evidence was offered by the state and admitted for the sole purpose of showing that Mr. X had the specific intent to sell cocaine on May 5, 2009, the date of the offense for which he is on trial. The state contends, and the Mr. X denies, that this evidence tends to show Mr. X’s intent on May 5, 2009. If you believe this evidence, and if you believe it bears on the issue of Mr. X’s intent on May 5, 2009, you may consider it, along with all the other facts and circumstances surrounding the charged crime, in deciding whether Mr. X had the specific intent to sell cocaine on May 5, 2009. You may not consider this evidence for any other purpose. You may not use this evidence as proof that Mr. X is a bad person and therefore probably committed the crime charged. You may not convict Mr. X of the present charge because of something he may have done in the past.

II. TO PROVE MOTIVE IN A FIRST-DEGREE MURDER CASE.

Proof of motive for the crime is permissible and often valuable but never essential for conviction. If you are convinced beyond a reasonable doubt that Mr. Y committed the crime, the presence or absence of motive is immaterial. Motive may be shown by facts surround the crime if they support a reasonable inference of motive. When thus proved, motive is a circumstance to be considered by you. The absence of motive is equally a circumstance to be considered on the side of innocence.

Evidence has been received that that Mr. Y broke into the home of Jane Doe on December 18, 2006 and took away a flat screen TV. This evidence was offered by the state and admitted for the sole purpose of showing that Mr. Y had a motive to commit murder in this case on January 10, 2009. The state contends, and the defendant denies, that this evidence tends to show he had a motive to kill the victim. What the evidence does show, if anything, is for you to decide. If you believe this evidence, and if you believe it bears on the existence of a motive to commit the crime charged, you may consider it, along with all the other facts and circumstances surrounding the charged crime, in deciding whether Mr. Y had a motive to kill Jane Doe on January 10, 2009. You may not consider this evidence for any other purpose. You may not use this evidence as proof that Mr. Y is a bad person and therefore probably committed the crime charged. You may not convict Mr. Y of the present charge because of something he may have done in the past.