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## **A SIX STEP ANALYSIS OF “OTHER PURPOSES” EVIDENCE PURSUANT TO RULE 404(b) OF THE NORTH CAROLINA RULES OF EVIDENCE**

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### I. INTRODUCTION

The accused is on trial for the murder of Z. The prosecution offers evidence that on two prior occasions, the accused murdered X and Y. Defense counsel objects. How should the trial judge rule on the objection to the introduction of the extrinsic acts of murder?

The answer to this question depends upon a systematic examination of a series of interrelated factual, evidentiary and substantive law considerations. The primary focus of this analysis is Rule 404(b) of the North Carolina Rules of Evidence which reads as follows:

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.<sup>1</sup>

If the sole purpose for introducing evidence that the accused previously murdered X and Y is to prove his predisposition to commit murder, then the offers of proof of the collateral murders would be excluded by Rule 404(a), the so-called “propensity rule.”<sup>2</sup> If, on the other hand, evidence of the prior murders is being offered for some other material purpose in dispute, such as intent or motive, then evidence of the prior murders might be admissible pursuant to Rule 404(b), known as the “other purposes” clause.

Although Rule 404(b) does not lend itself to a simple or mechanical application, this article discusses a six-step process that courts in North Carolina should follow in determining the admissibility of “other purposes” evidence. First, the proponent of the “other pur-

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1. N.C. R. EVID. 404(b).

2. N.C. R. EVID. 404(a).

poses” evidence should identify the specific purpose for which the collateral wrong, crime or act is being offered pursuant to Rule 404(b). Second, the trial court should determine if the offer of proof is logically relevant and if it supports a material proposition pursuant to Rule 401 of the North Carolina Rules of Evidence. Third, the trial court should determine whether the proponent of the collateral wrong, crime or act has produced sufficient evidence to prove that the extrinsic act was committed by the defendant or the party in question. Fourth, if the defendant or party has been previously acquitted of having committed the collateral crime, then the trial court should determine if evidence of that crime would be precluded by the Double Jeopardy Clause of the Constitution or by the doctrine of collateral estoppel. Fifth, the trial court should, pursuant to Rule 403 of the North Carolina Rules of Evidence, weigh the probative value of the extrinsic evidence against the danger of unfair prejudice that might arise from the introduction of that evidence. Sixth, the court should decide whether to provide a limiting instruction to the jury pursuant to Rule 105 of the North Carolina Rules of Evidence to guard against confusion of the issues and misuse of the collateral evidence by the jury.

In discussing this six-step process, this analysis of Rule 404(b) will examine three recent North Carolina Supreme Court decisions that have addressed the admissibility of “other purposes” evidence pursuant to Rule 404(b). In *State v. Agee*,<sup>3</sup> the court upheld the admission of evidence relating to a prior offense even though the defendant had been acquitted of that offense. The court relied upon the “chain of circumstances” or *res gestae* doctrine to support the admission of the prior offense evidence.<sup>4</sup>

In *State v. Stager*,<sup>5</sup> the court upheld the murder conviction of the defendant-wife for the murder by firearm of her second husband. During the trial of that case, the prosecution was allowed to offer evidence surrounding the death by firearm of defendant-wife’s first husband. The court upheld the admission of this “other purposes” evidence even though the defendant-wife was never charged with or tried for the murder of her first husband and even though the death of the first husband occurred approximately ten years prior to the death of defendant’s second husband.<sup>6</sup>

The third and most intriguing of the recent North Carolina Supreme Court cases addressing the admissibility of Rule 404(b) evidence is

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3. 391 S.E.2d 171 (N.C. 1990).

4. *Id.*

5. 406 S.E.2d 876 (N.C. 1991).

6. *Id.*

*State v. Scott*.<sup>7</sup> In that decision, the court reversed the kidnapping and rape convictions of the defendant on the basis that the trial court had improperly admitted testimony concerning a prior rape for which the defendant had been acquitted. The court held in essence that the prejudicial effect of admitting a prior offense for which the defendant had been acquitted would clearly outweigh the probative value of that evidence pursuant to Rule 403 of the North Carolina Rules of Evidence.<sup>8</sup>

This series of recent North Carolina Supreme Court decisions raises numerous issues relating to the proper interpretation and application of Rule 404(b). In *Agee* and *Stager*, the court followed a traditional approach in admitting "other purposes" evidence pursuant to Rules 404(b), 401 and 403. The *Scott* decision, however, represents a significant departure from established precedent and suggests an apparent change in the court's analytical approach and judicial attitude regarding the admissibility of collateral wrongs, crimes or acts. The *Scott* decision is particularly significant since it implicitly rejects the double jeopardy and collateral estoppel line of analysis enunciated by the United States Supreme Court in *Dowling v. United States*.<sup>9</sup> In fact, the majority opinion in *Scott*, by Chief Justice Exum, cites the dissenting opinion of Justice Brennan in *Dowling*, rather than the majority opinion of Justice White, in holding that evidence of a prior alleged offense for which the defendant had been acquitted was not admissible.<sup>10</sup>

The recent North Carolina Supreme Court decisions appear to adopt, from the federal court system, the burden of production standard first applied by the United States Supreme Court in *Huddleston v. United States*.<sup>11</sup> In determining the quantum of proof required to connect the defendant in a criminal case to the commission of a collateral offense, the United States Supreme Court adopted the conditional relevancy standard of Rule 104(b) in holding that the prosecution must introduce sufficient evidence to support the jury's finding of fact that the defendant committed the extrinsic act.<sup>12</sup> In *Stager*, the North Carolina Supreme Court cited *Huddleston* favorably and the court purportedly adopted the burden of production standard applied by the United States Supreme Court in *Huddleston*.<sup>13</sup> In both *Stager* and *Agee*, however, the court applied a "substantial evidence" standard which, on first impression, appears to establish a higher bur-

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7. 413 S.E.2d 787 (N.C. 1992).

8. *Id.*

9. 493 U.S. 342 (1990).

10. 413 S.E.2d at 787.

11. 485 U.S. 681 (1988).

12. *Id.*

13. *State v. Stager*, 406 S.E.2d 876, 890 (N.C. 1991).

den of production standard than the "sufficiency of evidence" standard enunciated by the United States Supreme Court in *Huddleston*.<sup>14</sup>

This article is divided into a discussion of preliminary considerations, followed by an examination of a proposed six-step analysis that trial courts in North Carolina should apply in admitting or excluding evidence of collateral wrongs, crimes or acts pursuant to Rule 404(b). Finally, this article concludes that far too often, North Carolina courts have failed to carefully analyze all of the relevant considerations before ruling on the admissibility of "other purposes" evidence. Hopefully, *Scott*<sup>15</sup> signals a transition from a perfunctory application of Rule 404(b) to a higher standard of scrutiny and analysis in determining the admissibility of collateral offenses pursuant to Rule 404(b).

## II. PRELIMINARY CONSIDERATIONS

A clear understanding of Rule 404(b) requires an initial examination of related rules that address the admissibility of character evidence. According to *Brandeis on North Carolina Evidence*, "[c]haracter comprises the actual qualities and characteristics of an individual, the peculiar qualities impressed by nature and habit on the person, which distinguish him from others."<sup>16</sup> The admissibility of character evidence depends upon the nature of the evidence and the purpose for which it is being offered. If character is an ultimate issue in a case, Rule 405(b) provides that proof of the particular character trait may be made by introducing specific instances of the person's character or by reputation or opinion evidence of the person's relevant character traits.<sup>17</sup> Instances in which character is an ultimate issue include defamation cases, claims of negligent entrustment or negligent employment, criminal prosecutions involving carnal knowledge of a virtuous female, and child custody cases.

Circumstantial character evidence, on the other hand, is generally inadmissible to prove that at the time in question the individual acted in conformity with his predisposed character traits. Circumstantial character evidence is excluded by the so-called "propensity rule," which is codified as Rule 404(a) of the North Carolina Rules of Evidence.<sup>18</sup> Thus the propensity rule would normally exclude evidence that a defendant in a murder case possesses a violent temperament or that a defendant in a fraud case has engaged in other acts of dishon-

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14. Stager, 406 S.E.2d at 890; *State v. Agee*, 391 S.E.2d 171 (N.C. 1991).

15. *State v. Scott*, 413 S.E.2d 787 (N.C. 1992).

16. 1 HENRY BRANDEIS JR., *BRANDEIS ON NORTH CAROLINA EVIDENCE* § 102 at 454 (3d ed. 1988).

17. N.C. R. EVID. 405(b).

18. N.C. R. EVID. 404(a).

esty. In civil cases, evidence that a defendant in a negligence case is careless by nature would generally be excluded by the propensity rule. Rule 404(a), however, contains three exceptions to the exclusion of circumstantial character evidence. First, an accused in a criminal case may "open the door" to his pertinent character traits and the prosecution may "rebut the same" pursuant to Rule 404(a)(1).<sup>19</sup> Second, the defendant in a criminal case may "open the door" to the pertinent character traits of the victim of the crime and the prosecution may "rebut the same" pursuant to Rule 404(a)(2).<sup>20</sup> Third, the credibility — truthfulness or untruthfulness — of every witness in either a civil case or a criminal prosecution may be impeached<sup>21</sup> by reference to prior bad acts of the witness pursuant to Rule 608 or to prior convictions of the witness pursuant to Rule 609. As a general rule, then, character evidence is not admissible in either criminal cases or civil cases unless character is an ultimate issue in the case, or unless the defendant in a case "opens the door" to his character or to the character of the victim of the alleged crime, or unless credibility evidence is involved in impeaching a witness in either a criminal prosecution or a civil action.

The first sentence of Rule 404(b) restates the essence of the propensity rule found in Rule 404(a).<sup>22</sup> The second sentence of Rule 404(b) is known as the "other purposes" clause and provides that other wrongs, crimes or acts of an individual may be admitted for any relevant purpose except to prove that the individual acted in conformity with his character at the time in question.<sup>23</sup> Thus, Rule 404(b) is not an exception to the propensity rule since evidence of an individual's wrongs, crimes or acts offered pursuant to Rule 404(b) is not admitted as character evidence per se. Rather, evidence of an individual's wrongs, crimes or acts offered pursuant to Rule 404(b) is admitted for some purpose other than to prove the character traits of the individual.

At least one North Carolina appellate court decision has stated that Rule 404(b) is applicable to parties in civil cases and usually to defendants in criminal cases.<sup>24</sup> The language of the rule, however, does not limit its application to the admission of collateral wrongs of parties. If in the unusual circumstance, the collateral wrongs, crimes or acts of non-parties are material and relevant under Rule 404(b), there is no reason to automatically exclude evidence of those events. The

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19. N.C. R. EVID. 404(a)(1).

20. N.C. R. EVID. 404(a)(2).

21. N.C. R. EVID. 404(a)(3).

22. N.C. R. EVID. 404(a) & 404(b).

23. N.C. R. EVID. 404(b).

24. *State v. Morgan*, 340 S.E.2d 84 (N.C. 1986).

North Carolina Supreme Court, however, recently rejected a defendant's contention that Rule 404(b) could be used to prove the collateral acts of a non-party as circumstantial evidence that the non-party, and not the defendant, committed the crime in question.<sup>25</sup> In a similar case, the North Carolina Court of Appeals recently held that a defendant, who was arrested after a bag of cocaine was found under the seat of the truck that he was driving, was not entitled to offer evidence that the owner of the truck had been previously convicted of cocaine possession for the purpose of showing that the owner of the truck had probably placed the bag of cocaine under the seat.<sup>26</sup> The court held that the offer of proof was too speculative.<sup>27</sup> This limitation on the use of Rule 404(b) thus creates the anomalous result that the prosecution may introduce "other purposes" evidence to convict the defendant but the defendant may not introduce "other purposes" evidence for exculpatory purposes.

Therefore, in practice, Rule 404(b) is a prosecutor's rule that permits the State to circumvent the propensity rule by introducing past wrongs, crimes and acts of the defendant disguised as "other purposes" evidence.

Many of the reported North Carolina cases that apply Rule 404(b) involve offers of proof by the prosecution of "other purposes" evidence relating to the collateral wrongs, crimes or acts of defendants in criminal cases. This article is limited to a discussion of the application of Rule 404(b) in criminal cases even though the rule also applies in the trial of civil cases.

North Carolina Evidence Rule 404(b) is modeled after and tracks the language of Federal Rule of Evidence 404(b),<sup>28</sup> with two exceptions. First, the second sentence of North Carolina Rule 404(b) lists "absence of entrapment" as a categorical other purpose, but Federal Rule of Evidence 404(b) does not list "absence of entrapment" as one of the explicit other purposes.<sup>29</sup> The second difference between the North Carolina rule and the Federal rule arises from a 1991 amendment to Federal Rule of Evidence 404(b) which was revised by adding the following notice provision: "provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."<sup>30</sup>

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25. *State v. Richardson*, 402 S.E.2d 401 (N.C. 1991).

26. *State v. Chandler*, 398 S.E.2d 337 (N.C. 1990).

27. *Id.*

28. FED. R. EVID. 404(b).

29. N.C. R. EVID. 404(b), FED. R. EVID. 404(b).

30. FED. R. EVID. 404(b).

### III. IDENTIFY THE SPECIFIC "OTHER PURPOSES" WHICH THE EVIDENCE OF OTHER WRONGS, CRIMES OR ACTS MAY PROVE

In determining the admissibility of "other purposes" evidence, the threshold consideration is to identify the specific purpose(s) for which a collateral wrong, crime or act would be admissible. The second sentence of Rule 404(b) of the North Carolina Rules of Evidence lists ten "other purposes" which prior or subsequent offenses may prove: "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."<sup>31</sup> In addition to the ten categorical purposes stated in Rule 404(b), "there are numerous other uses to which evidence of criminal acts may be put, and those enumerated are neither mutually exclusive nor collectively exhaustive."<sup>32</sup> Stated below are examples of the manner in which the courts have applied Rule 404(b):

A. *Motive* - In the prosecution of a defendant for murder of a state trooper, extrinsic evidence that the defendant had recently escaped from prison was held to be admissible to prove his motive for killing the state trooper.<sup>33</sup> On the other hand, in an attempted robbery prosecution, extrinsic evidence that the defendant was addicted to cocaine was held not to be admissible to prove the defendant's motive for the attempted robbery.<sup>34</sup>

B. *Opportunity* - Extrinsic evidence is admissible to prove opportunity "in the sense of access to or presence at the scene of the crime or in the sense of possessing distinctive or unusual skills or abilities employed in the commission of the crime charged."<sup>35</sup>

C. *Intent* - When a specific mental intent or state of mind is an essential element of a crime, extrinsic evidence of similar acts is admissible to prove the defendant's state of mind in the case being adjudicated.<sup>36</sup>

D. *Knowledge and Plan* - In a prosecution for filing a false insurance claim, extrinsic evidence that defendant had previously filed similar false claims was admissible to prove intent, knowledge, plan or scheme.<sup>37</sup>

E. *Identity* - Extrinsic evidence that defendant was involved in another robbery, perpetrated in the same manner as the robbery in question, is admissible as evidence of identity.<sup>38</sup>

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31. N.C. R. EVID. 404(b).

32. 1 JOHN W. STRONG ET. AL., MCCORMICK ON EVIDENCE § 190 (4th ed. 1992) [hereinafter McCormick].

33. State v. Bray, 365 S.E.2d 571 (N.C. App. 1988).

34. State v. Rowland, 366 S.E.2d 550 (N.C. App. 1988).

35. State v. Rowland, 366 S.E.2d 550 (N.C. App. 1988).

36. State v. Hall, 355 S.E.2d 250 (N.C. App. 1987).

37. State v. Melvin, 392 S.E.2d 740 (N.C. App. 1990).

38. State v. McDowell, 378 S.E.2d 48 (N.C. App. 1989).



F. *Absence of Mistake or Accident* - Collateral acts or incidents are admissible to prove that the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge.<sup>39</sup>

G. *Absence Of Entrapment* - Extrinsic evidence of the defendant's drug use and possession on other other occasions is admissible to prove absence of entrapment on drug charges in the case before the court.<sup>40</sup>

Several additional purposes often arise even though they are not specifically listed in Rule 404(b). They include the "chain of circumstances" or *res gestae* purpose;<sup>41</sup> act of ill-will to prove malice;<sup>42</sup> unique *modus operandi*<sup>43</sup> and to show a passion for unusual or abnormal sexual relations.<sup>44</sup>

The proponent of "other purposes" evidence (typically, the prosecuting attorney) bears the burden of identifying the specific purpose that the other wrong, crime or act would tend to prove. In appropriate cases, the opponent to the admission of the "other purposes" evidence (typically, the defendant's attorney in a criminal case) should specifically object to the evidence on the ground that it does not fall within the "other purposes" clause of Rule 404(b) and, if the court overrules the objection, the opponent should force the proponent's attorney to state for the record the specific purpose for which the collateral wrong, crime or act is being offered. There are at least two advantages that the opponent gains by compelling the proponent to state the purpose for which the collateral evidence is being tendered. First, the proponent might not be able to promptly identify the applicable 404(b) purpose. Second, the statement of a particular 404(b) purpose has the effect of limiting the use of the evidence to the purpose stated. During closing arguments or on appeal the proponent may not rely upon a 404(b) purpose that he did not previously identify.

The party objecting to Rule 404(b) evidence at trial should make a specific objection by stating that the offer of proof is not admissible pursuant to Rule 404(b). If the party objecting to the evidence merely states a general or nonspecific objection ("I object"), the likely consequence on appeal is that the appellate court will uphold the admission of the evidence by the trial court as long as there is any purpose for which the collateral wrong, crime or act is admissible.<sup>45</sup> Moreover, by

39. 1 McCORMICK, *supra* note 32, at § 190.

40. *State v. Goldman*, 389 S.E.2d 281 (N.C. App. 1990).

41. *See State v. Agee*, 391 S.E.2d 171 (N.C. 1990).

42. *See State v. Spruill*, 360 S.E.2d 667 (N.C. 1987).

43. *See State v. Wortham*, 341 S.E.2d 76 (N.C. App. 1986) *rev'd*, 351 S.E.2d 294 (N.C. 1987).

44. *State v. Artis*, 384 S.E.2d 470 (N.C. 1989), *vacated*, 494 U.S. 1023 (1990).

45. 1 McCORMICK, *supra* note 32, at § 52.

forcing the proponent of the evidence to explicitly state the purpose for which the collateral evidence is being offered, the opponent is laying the foundation for a possible appeal in the event that the proponent failed to state a proper purpose in support of the admission of the collateral evidence.

#### IV. DETERMINE THE LOGICAL RELEVANCY AND MATERIALITY OF THE "OTHER PURPOSES" EVIDENCE PURSUANT TO RULE 401

The second consideration in analyzing the admissibility of "other purposes" evidence is to determine whether the collateral wrong, crime, or act is relevant pursuant to Rule 401 of the North Carolina Rules of Evidence. Although evidence of a collateral event may fall within one or more of the other purposes listed in Rule 404(b), evidence of that event is not admissible unless the offer of proof is logically relevant as defined in Rule 401 of the North Carolina Rules of Evidence: "Relevant evidence means evidence having any tendency to make 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."<sup>46</sup> This definition embraces two important evidentiary concepts — relevancy and materiality. Relevancy means that an offer of proof has some tendency to prove a factual issue. Materiality means that a factual issue is pertinent to the claims, charges or defenses raised in a particular case. Thus, to satisfy the two-fold requirements of Rule 401, an offer of proof made pursuant to Rule 404(b) must first have a tendency to prove either a listed or unlisted purpose pursuant to Rule 404(b) and, second, the purpose must fall within the range of allowable proof as determined by the claims, charges or defenses in the particular case.

In *State v. Rowland*, the North Carolina Court of Appeals stated: "Before extrinsic conduct evidence is admissible pursuant to Rule 404(b), the trial court is required to first determine whether conduct is being offered pursuant to Rule 404(b); second, the trial court is required to make a determination of the evidence's relevancy."<sup>47</sup> The North Carolina Supreme Court has described logical relevancy as "the touchstone" in deciding whether extrinsic evidence is admissible.<sup>48</sup> The court has also stated that the "acid test" for determining whether evidence of collateral events falls within Rule 404(b) is "its logical rel-

46. N.C. R. EVID. 401.

47. 366 S.E.2d 556 (N.C. App. 1980).

48. *State v. Fowler*, 53 S.E.2d 853, 855 (N.C. 1949).

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evancy to the particular purpose for which it is sought to be introduced."<sup>49</sup>

*McCormick on Evidence* points out that the "other purposes" which the extrinsic evidence purports to prove must be in dispute:

[T]he connection between the evidence and the permissible purpose should be clear, and the issue on which the other crimes evidence is said to bear should be the subject of a genuine controversy. For example, if the prosecution maintains that the other crime reveals defendant's guilty state of mind, then his intent must be disputed. Thus, if the defendant does not deny that the acts were deliberate, then the prosecution may not introduce the evidence merely to show that the acts were not accidental. Likewise, if the accused does not deny performing the acts charged, the exceptions pertaining to identification are unavailing.<sup>50</sup>

In determining the probative value of an extrinsic act, the remoteness in time of the prior event diminishes its probative value. The North Carolina Supreme Court has held that evidence of similar prior sexual assaults by the defendant which happened seven years before the sexual assault in question was prejudicial to defendant's fundamental right to a fair trial because the prior acts were too remote in time.<sup>51</sup> In *State v. Stager*,<sup>52</sup> on the other hand, the Court held that evidence of the ten year old murder of defendant's first husband was admissible in defendant's trial for the murder of her second husband. The courts do not apply a fixed time limit in determining whether a prior act is too remote. Instead, the remoteness of a prior act affects the weight and not the admissibility of the prior act.<sup>53</sup>

#### V. DETERMINE IF THE "OTHER PURPOSES" EVIDENCE IS SUFFICIENT TO PROVE THAT THE DEFENDANT COMMITTED THE COLLATERAL ACT

The third step in analyzing the admissibility of other wrongs, crimes or acts evidence is to determine whether the evidence is sufficient to prove that the party (usually the defendant in a criminal case) actually committed the collateral act. For a number of years following the enactment of the Federal Rules of Evidence, the federal courts were divided in assessing the quantum of proof needed to link the defendant to a collateral act before that collateral act would be admissible under Federal Rule of Evidence 404(b).<sup>54</sup> In 1988, the United States

49. *State v. Jeter*, 389 S.E.2d 805 (N.C. 1990).

50. 1 MCCORMICK, *supra* note 32, at § 190.

51. *State v. Jones*, 369 S.E.2d 622 (N.C. 1988).

52. 406 S.E.2d 876 (N.C. 1991).

53. 1 MCCORMICK, *supra* note 32, at § 190.

54. *Huddleston v. U.S.*, 485 U.S. 681, 686 n.2 (1988).

Supreme Court addressed this burden of production issue in *Huddleston v. United States*.<sup>55</sup> The Court held:

We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a). . . . In the Rule 404(b) context, similar act evidence is relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor.<sup>56</sup>

The Court in *Huddleston* proceeded to adopt the conditional relevancy standard provided in Rule 104(b) of the Federal Rules of Evidence:

In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence. . . . Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding.<sup>57</sup>

Although the *Huddleston* standard has become known as the "sufficiency of evidence" standard, a careful reading of the case reveals that the Court actually adopted the Rule 104(b) conditional relevance standard: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."<sup>58</sup>

The North Carolina Supreme Court has purportedly adopted the *Huddleston* burden of production standard. In *State v. Stager*,<sup>59</sup> the court, per Justice Mitchell, stated:

In *Huddleston*, the Supreme Court of the United States held that evidence may be admitted under Rule 404(b) of the Federal Rules of Evidence if there is sufficient evidence to support a jury finding that the defendant committed the similar act; no preliminary finding by the trial court that the defendant actually committed such an act is required. We find the reasoning of *Huddleston* compelling and conclude that evidence is admissible under Rule 404(b) of the North Carolina Rules of Evidence if it is substantial evidence tending to support a reasonable finding *by the jury* that the defendant committed a similar act or crime and its probative value is not limited *solely* to tending to

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55. 485 U.S. 681 (1988).

56. *Id.* at 689.

57. *Id.* at 690.

58. *Id.* (quoting FED. R. EVID. 104 (b)).

59. 406 S.E.2d 876 (N.C. 1991).

establish the defendant's propensity to commit a crime such as the crime charged.<sup>60</sup>

A collateral wrong, crime or act is therefore admissible under Rule 404(b) of the North Carolina Rules of Evidence if the proponent of the evidence is able to produce "substantial evidence tending to support a reasonable finding by the jury that the defendant committed a similar act or crime."<sup>61</sup> The "substantial evidence" standard is a relatively low threshold requirement. The proponent of the collateral wrong, crime or act must produce sufficient credible and competent evidence connecting the defendant to the collateral event so that the jury's decision on this issue will not be overturned. Although the term "substantial evidence" gives the impression that an enormous amount of evidence is required to link the defendant to the collateral event, in reality, the standard is a low quantum of proof requirement that demands only the production of "some evidence" connecting the defendant to the commission of the collateral event.

It is interesting to note that even though the North Carolina Supreme Court ostensibly adopted the *Huddleston* standard in *Stager*, the court neither discussed nor invoked the terminology of conditional relevancy in conjunction with its application of Rule 404(b) to the facts in *Stager*.<sup>62</sup> Instead, the court coined its own phrase, "substantial evidence,"<sup>63</sup> as the standard to be applied in determining whether the proponent of "other purposes" evidence has produced sufficient evidence to connect the defendant to the collateral event. It should also be noted that North Carolina Rule 104(b), the conditional relevancy rule, is identical to its federal counterpart.<sup>64</sup> It appears, though, that contrary to the rationale of *Huddleston*, the "substantial evidence" standard adopted by the North Carolina Supreme Court in *Stager*, *Agee* and *Scott* is treated as part of a preliminary question analysis pursuant to Rule 104(a) rather than as a question of conditional relevancy pursuant to Rule 104(b). These two rules operate quite differently. The trial judge determines the preliminary question of admissibility under Rule 104(a).<sup>65</sup> "In making its determination [the trial court] is not bound by the rules of evidence except those with respect to privileges."<sup>66</sup> Conditional relevancy, on the other hand, authorizes the trial court to admit before the jury evidence of the collateral act before sufficient evidence has been introduced establishing

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60. *Id.* at 890 (citations omitted).

61. *Id.*

62. *Id.*

63. *Id.*

64. See N.C. R. EVID. 104(b); FED. R. EVID. 104(b).

65. N.C. R. EVID. 104(a).

66. *Id.*

the fact that the defendant actually committed the collateral act.<sup>67</sup> If the proponent does not subsequently offer "sufficient evidence" to prove that the defendant committed the collateral act, then the condition has not been fulfilled and the judge should withdraw evidence of the collateral fact from the jury.<sup>68</sup> The burden is on the opponent, however, to make a motion to strike evidence of the collateral act if the proponent does not offer "sufficient evidence" to fulfill the condition.<sup>69</sup> Thus, it appears that North Carolina has adopted the Rule 104(a) approach in determining whether sufficient evidence of the collateral act is available to justify its admission even though the North Carolina Supreme Court purportedly adopted the Rule 104(b) approach applied in *Huddleston*.

#### VI. DETERMINE WHETHER THE ADMISSION OF THE PRIOR OFFENSE WOULD BE BARRED BY THE DOUBLE JEOPARDY CLAUSE OR BY THE DOCTRINE OF COLLATERAL ESTOPPEL

The issues of collateral estoppel and double jeopardy must be analyzed when the collateral crime offered into evidence at the present trial was the subject of a previous adjudication which resulted in an acquittal. The Double Jeopardy Clause of the United States Constitution and the principles of *res judicata* and collateral estoppel normally preclude the re-litigation of the issue of guilt once a judgment on a case or issue has been entered. The preclusive effect of prior adjudications on the admission of "other purposes" evidence has been the subject of numerous appellate decisions in both the federal courts and the courts of North Carolina.

*Dowling v. United States*<sup>70</sup> is a landmark decision of the United States Supreme Court that addressed the admissibility of collateral offenses against a defendant even though the defendant had been previously acquitted of those offenses.<sup>71</sup> The Court in *Dowling* provided a historical frame of reference in addressing this issue:

In *Ashe v. Swenson*, we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. In that case, a group of masked men had robbed six men playing poker in the basement of a home. The State unsuccessfully prosecuted Ashe for robbing one of the men. Six weeks later, however, the defendant was convicted for the robbery of one of the other players. Applying the doctrine of collateral estoppel which we found implicit in the Double Jeopardy

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67. N.C. R. EVID. 104(b).

68. *Id.*

69. 1 McCORMICK, *supra* note 32, at § 190.

70. 493 U.S. 342 (1990).

71. *Id.* at 347-348.

Clause, we reversed Ashe's conviction, holding that his acquittal in the first trial precluded the State from charging him for the second offense. We defined the collateral estoppel doctrine as providing that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe's acquittal in the first trial foreclosed the second trial because, in the circumstances of that case, the acquittal verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits. A second prosecution was impermissible because, to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion.<sup>72</sup>

In *Dowling*, the defendant was charged with armed robbery, which he committed while wearing a mask.<sup>73</sup> As proof of his identity, the prosecution offered into evidence the testimony of a witness that she had been robbed in her home by a masked robber approximately two weeks after the armed robbery in question and that the defendant was the person who had robbed her.<sup>74</sup> The defendant, however, had been previously acquitted of committing the prior robbery of the female witness.<sup>75</sup> In the *Dowling* decision, the Court distinguished the facts in *Dowling* from the facts in *Ashe v. Swenson*:

[U]nlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case. . . . and we decline to extend *Ashe v. Swenson* and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances, . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.<sup>76</sup>

Thus the critical test under *Dowling* is whether the prior acquittal determined an "ultimate issue in the present case."<sup>77</sup> If so, then evidence of the prior offense would be excluded. If not, then evidence of the prior offense would not be precluded by the Double Jeopardy Clause or by the doctrine of collateral estoppel even though the defendant was acquitted of committing the alleged prior offense.

The North Carolina Supreme Court was confronted with the preclusive effect of a prior acquittal in *State v. Agee*.<sup>78</sup> The North Carolina Supreme Court held, per Justice Whichard, that in defendant's criminal trial for felonious possession of LSD, it was not reversible error

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72. *Id.* (citations omitted).

73. *Id.* at 344.

74. *Id.* at 344-345.

75. *Id.* at 345.

76. *Id.* at 348 (referring to *Ashe v. Swenson*, 397 U.S. 436 (1970)).

77. *Id.*

78. 391 S.E.2d 171 (N.C. 1990).

for the trial court to admit evidence of defendant's possession of marijuana to show a chain of circumstances related to the LSD possession charge despite the fact that the defendant had been previously acquitted of the possession of marijuana charge.<sup>79</sup> According to Justice Whichard, the previous acquittal on the marijuana charge would not be precluded by "the doctrine of collateral estoppel, as encompassed by the fifth amendment guarantee against double jeopardy"<sup>80</sup> because "the prior acquittal did not determine an ultimate issue in the present case."<sup>81</sup> Thus, North Carolina case law is consistent with the decisions of the United States Supreme Court in holding that a defendant's acquittal of a prior criminal act does not automatically preclude the admission of that evidence in a subsequent adjudication of the same defendant. Whether evidence of the prior act is admissible, however, is subject to the "balancing test" found in Rule 403.<sup>82</sup>

VII. DETERMINE WHETHER THE PROBATIVE VALUE OF THE  
"OTHER PURPOSES" EVIDENCE IS SUBSTANTIALLY  
OUTWEIGHED BY ITS PREJUDICIAL EFFECT  
PURSUANT TO RULE 403

Fifth, the trial court must determine whether, pursuant to Rule 403 of the North Carolina Rules of Evidence,<sup>83</sup> the probative value of the "other purposes" evidence is substantially outweighed by considerations of unfair prejudice. The balancing test stated in Rule 403 is referred to as the "legal relevancy" test and should be distinguished from the "logical relevancy" test stated in Rule 401.<sup>84</sup> Rule 403 provides as follows: "Although relevant, evidence may be excluded if its 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."<sup>85</sup>

The underlying rationale of Rule 403 is that evidence should be excluded if there is a substantial risk that the admission of the evidence might lead to an unfair result. The inherent nature of "other purposes" evidence creates the danger that the introduction of collateral wrongs, crimes or acts of a defendant in a criminal case might lead the jury to reach a verdict on an improper basis. Once the jury hears that the defendant has committed other wrongs, crimes or acts, the danger

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79. *Id.* at 175-176.

80. *Id.* at 176.

81. *Id.* (quoting *Dowling v. United States*, 493 U.S. 342, 348 (1990)).

82. N.C. R. EVID. 403.

83. *Id.*

84. N.C. R. EVID. 401, 403.

85. N.C. R. EVID. 403.



exists that the jury will intentionally or unwittingly conclude that since the defendant committed other crimes, he probably committed the crime in question. Once the jury is made aware of collateral events, it is difficult to control the manner in which the jury will consider and weigh that evidence. For this reason, 404(b) evidence should not be introduced unless it is clear that the prejudicial effect of the "other purposes" evidence will not substantially outweigh its probative value.

Rule 403 establishes a balancing test between probative value and the counterweights of unfair prejudice, confusion of the issues and other factors that might cause the jury to reach a verdict on an improper basis. Many of the appellate court decisions that have applied Rule 403 in conjunction with Rule 404(b) have upheld the introduction of the "other purposes" evidence on the ground that the probative value was not substantially outweighed by considerations of unfair prejudice or confusion of the issues. For example, in *State v. Stager*,<sup>86</sup> the defendant was on trial for the murder by firearm of her second husband. At the murder trial, the judge admitted evidence that the defendant's first husband had also been killed by a firearm approximately ten years earlier under circumstances similar to the death of her second husband.<sup>87</sup> The supreme court, per Justice Mitchell, held that the circumstances surrounding the death of the first husband were admissible in the defendant's trial for the murder of her second husband to show motive or intent pursuant to Rule 404(b).<sup>88</sup> The court stated that there was substantial evidence linking the defendant to the death of her first husband,<sup>89</sup> despite the fact that she was never charged or tried for the murder of her first husband. The court further concluded that the probative value of the collateral event was not outweighed by considerations of unfair prejudice.<sup>90</sup>

In *State v. Scott*,<sup>91</sup> the North Carolina Supreme Court reached a different result in balancing the probative value against the prejudicial effect of the collateral crimes offered into evidence. In *Scott*, the defendant was tried on several charges including rape, kidnapping and crime against nature.<sup>92</sup> At the trial, the prosecution introduced the testimony of a witness (not the prosecuting witness) that two years earlier, the defendant had raped her under circumstances similar to the alleged rape for which the defendant was then on trial.<sup>93</sup> The de-

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86. 406 S.E.2d 876 (N.C. 1991).

87. *Id.* at 891.

88. *Id.* at 892-893.

89. *Id.* at 891.

90. *Id.* at 893-894.

91. 413 S.E.2d 787 (N.C. 1992).

92. *Id.*

93. *Id.* at 788.

fendant had been tried and acquitted of the alleged prior rape.<sup>94</sup> In a carefully written opinion, Chief Justice Exum, speaking for the majority of the court, stated:

We conclude that evidence that defendant committed a prior alleged offense for which he has been tried and acquitted may not be admitted in a subsequent trial for a different offense when its probative value depends, as it did here, upon the proposition that defendant in fact committed the prior crime. To admit such evidence violates, as a matter of law, Evidence Rule 403.<sup>95</sup>

The court concluded:

The North Carolina Rules of Evidence must be interpreted and applied in light of this proposition: an acquittal and the undefeated presumption of innocence it signifies mean that, in law, defendant did not commit the crime charged. When the probative value of evidence of this other conduct depends upon the proposition that defendant committed the prior crime, his earlier acquittal of that crime so erodes the probative value of the evidence that its potential for prejudice, which is great, must perforce outweigh its probative value under Rule 403.<sup>96</sup>

The court reversed the kidnapping and rape convictions but upheld the crime against nature conviction.<sup>97</sup> The court's rationale was that evidence of the prior sexual offense (for which the defendant had been acquitted) pertained to the issue of consent in the second case.<sup>98</sup> Consent is not a defense to a crime against nature charge and the impermissible admission of the prior offense evidence did not taint the crime against nature conviction.<sup>99</sup>

The court's decision in *Scott* would appear to be in conflict with its decision in *Agee*, discussed in Section VI above. The court attempted to distinguish the two cases on both the facts and the law. In a dissenting opinion to the majority opinion in *Scott*, Justice Meyer points out that the majority opinion in *Scott* appears to be a departure from the court's traditional analysis of collateral estoppel and of the balancing test found in Rule 403.<sup>100</sup> The majority opinion in *Scott* does, indeed, represent an apparent change in the court's approach in analyzing the admissibility of "other purposes" evidence pursuant to Rules 404(b) and 403. All too often in the past, appellate courts in North Carolina have merely "rubberstamped" the admission of "other purposes" evidence without carefully weighing the probative value of the evidence against its prejudicial effect to determine if the probative

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94. *Id.*

95. *Id.*

96. *Id.* at 790.

97. *Id.* at 791.

98. *Id.*

99. *Id.*

100. *Id.*

value is “substantially outweighed” by the prejudicial effect of admitting the evidence. In the *Stager* decision, for example, Justice Mitchell, in writing the majority opinion, cursorily concluded that the probative value of admitting the circumstances of the prior death by firearm of the defendant’s first husband was not outweighed by prejudice.<sup>101</sup> The opinion does not reflect a careful balancing of probity versus prejudice. In *Scott*, on the other hand, Chief Justice Exum carefully analyzed and applied the balancing test found in Rule 403 in concluding that evidence of a prior alleged crime for which the defendant had been acquitted should be excluded with respect to some of the charges, but admitted with respect to other charges.<sup>102</sup> The *Scott* decision hopefully establishes a higher standard of scrutiny in applying Rule 403 to determine the admissibility of “other purposes” evidence. The significance of *Scott* should not be limited to cases that involve prior acquittals. Rather, the lesson to be learned from *Scott* is that trial courts and appellate courts should engage in a careful and thoughtful balancing process in determining whether to admit “other purposes” evidence pursuant to Rule 403.

#### VIII. APPLY THE DOCTRINE OF LIMITED ADMISSIBILITY PURSUANT TO RULE 105

The sixth step in determining the admissibility of “other purposes” evidence arises from the application of the doctrine of limited admissibility found in Rule 105 of the North Carolina Rules of Evidence.<sup>103</sup> The rule provides as follows: “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.”<sup>104</sup>

The Advisory Committee’s Notes to Rule 105 of the North Carolina Rules of Evidence state in pertinent part:

A close relationship exists between this rule and Rule 403 which requires exclusion when “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403.<sup>105</sup>

101. *State v. Stager*, 406 S.E.2d 876, 893-94 (N.C. 1991).

102. *State v. Scott*, 413 S.E.2d 787, 790-91 (N.C. 1992).

103. N.C. R. EVID. 105.

104. *Id.*

105. N.C. R. EVID. 105 advisory committee’s note.

Evidence which is admitted pursuant to Rule 404(b) may be considered by the jury only to the extent that it proves one or more of the "other purposes" for which it was admitted. "Other purposes" evidence may not be considered by the jury as proof that the defendant may have acted at the time in question in a manner consistent with her character. As stated earlier, the propensity rule<sup>106</sup> excludes the introduction of circumstantial character evidence. Normally, the judge restricts the jury's consideration of evidence of other crimes, wrongs, or acts by giving a limiting instruction to the jury. The essence of the limiting instruction is that the jury may consider evidence of other crimes, wrongs, or acts of the defendant only for the purpose of determining whether the prosecution has established proof of specific "other purposes" pursuant to Rule 404(b). Evidence of other wrongs may not be considered by the jury for the purpose of determining whether the defendant acted in conformity with any predisposed character traits.

In *State v. Stager*,<sup>107</sup> (the murder case in which the defendant-wife was found guilty of murdering her second husband), the trial court did not give a limiting instruction to the jury concerning the purposes for which it could consider the circumstances surrounding the death of the defendant's first husband. Presumably, the jury considered the evidence surrounding the first husband's death for any and all purposes. Despite the failure of the trial court to give a limiting instruction, the supreme court held that a limiting instruction is not required "unless specifically requested by counsel."<sup>108</sup> The court's ruling in this regard is consistent with Rule 105 of the North Carolina Rules of Evidence which provides that a limiting instruction shall be given "upon request"<sup>109</sup> in an appropriate situation. The danger exists, however, that in the absence of a limiting instruction, the jury will probably consider the "other purposes" evidence as circumstantial character evidence - a result that would clearly violate the propensity rule.

## IX. CONCLUSION

The admission of "other purposes" evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence raises a substantial danger that in criminal cases in particular, jurors will misuse evidence of the defendant's past conduct as propensity evidence. Rule 404(b) is essentially a "prosecutor's rule" that enables the prosecutor to introduce character evidence before the jury disguised as "other purposes"

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106. N.C. R. EVID. 404(a).

107. 406 S.E.2d 876 (N.C. 1991).

108. *Id.* at 894.

109. N.C. R. EVID. 105.

evidence. It is incumbent on the courts and attorneys to protect against the improper use of Rule 404(b). If applied properly, the six-step process discussed in this article provides a systematic approach that courts may follow in determining the admissibility of "other purposes" evidence while at the same time safeguarding the procedural due process rights of litigants, especially defendants in criminal cases. To further ensure the rights of defendants in criminal cases, the North Carolina General Assembly should amend Rule 404(b) by adding a notice provision similar to the notice provision added to Federal Rule of Evidence 404(b)<sup>110</sup> in 1991. This provision should require the prosecution in criminal cases to give reasonable notice to the defendant, prior to trial, of the prosecution's intended use of "other purposes" evidence. The notice requirement would eliminate the element of surprise and it would expedite the hearing and resolution of pre-trial motions in limine based on Rule 404(b) and related considerations. During the course of or subsequent to pretrial hearings, the trial judge would be able to carefully consider and analyze the legal and evidentiary issues that are involved in ruling on the admissibility of "other purposes" evidence. Under North Carolina Rule of Evidence 404(b) as presently written, the prosecution is not required to provide prior notice of its intention to introduce collateral wrongs, crimes or acts of the defendant into evidence. Thus, the issue does not normally arise until the prosecution makes an offer of proof pursuant to Rule 404(b). At that time, defense counsel objects and the trial court makes an immediate ruling concerning the admissibility of the "other purposes" evidence. This approach does not lend itself to the kind of methodical evaluation of the facts and of the applicable evidentiary rules that Rule 404(b) demands. The combination of a reasonable notice provision and the application of the six-step process in determining the admissibility of Rule 404(b) evidence would militate against the improper use of "other purposes" evidence by the jury and ensure fairness to all litigants.

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110. FED. R. EVID. 404(b).