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CRIMINAL TRIAL APPLICATION OF RULES 404b & 609 OF THE RULES OF EVIDENCE

Rule 404(b) of the Alabama Rules of Evidence has tripped up even the most seasoned attorneys practicing criminal law. The seemingly straightforward rule is one of the largest points of contention at both pre-trial stage and during trial. This seeks to clarify common pitfalls and provide a general background of 404(b) and the caselaw interpretation.

A. 404(b) and its general application

Alabama Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action 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 or accident, 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.

Ala. R. Evid. 404(b). The rule can essentially be broken into three parts; (1) the general exclusionary rule, (2) exceptions to the exclusionary rule, and (3) the notice requirement. The general exclusionary section "provides specifically that evidence of collateral crimes, wrongs, [and] other acts is not admissible to character as a basis for implying that conduct on a particular occasion was in conformity with it." Official Commentary to Ala. R. Evid. 404(b). The rule

seeks to protect the accused from being tried and possibly convicted based on past bad acts instead of the conduct for which he or she is charged.

The Alabama Appellate Courts have repeatedly held that the rule "'prevents the introduction of prior criminal acts for the sole purpose of suggesting that the accused is more likely to be guilty of the crime in question.'" *Frye v. State*, 185 So.3d 1156, 1162 (Ala. Crim. App. 2015) (quoting *Pope v. State*, 365 So.2d 369, 371 (Ala. Crim. App. 1978)). The Supreme Court has held that the basis for the protections offered by the general exclusionary rule of 404(b) are found in Rule 403 of the Alabama Rules of Evidence. *Id*. (quoting *Ex parte Arthur*, 472 So.2d 665, 668 (Ala. 1985) (holding that "[t]he basis for the rule lies in the belief that the prejudicial effect of prior crimes will far outweigh any probative value that might be gained from them." *Arthur*, 472 So.2d at 668)). Indeed, the *Arthur* Court held that prior crimes evidence "has an almost irreversible impact upon the minds of the jurors." *Id*. The general application of 404(b) excludes the admission of prior bad acts and makes the admission of such acts presumptively prejudicial, unless the acts sought to be admitted fit within a recognized exception.

B. Exceptions to the general exclusionary rule

Rule 404(b) lists eight exceptions to the general exclusionary rule. Those exceptions are motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The commentary to the rule states that "section (b) does not propose to provide an exhaustive listing of proper purposes. . . ." but states that the rule "does not bar evidence of specific acts when that evidence is offered for some purpose other than the impermissible one of proving action in conformity with a particular character." Official Commentary to Ala. R. Evid. 404(b). The *Frye* Court held that there are nine "well-established exceptions to the exclusionary rule. . . ." *Frye*, 185 So.3d at 1162. Those exceptions are: "(1) relevancy to prove identity; (2)

relevancy to prove res gestae; (3) relevancy to prove scienter; (4) relevancy to prove intent; (5) relevancy to show motive; (6) relevancy to prove system; (7) relevancy to prove malice; (8) relevancy to rebut special defenses; and (9) relevancy in various particular crimes." *Id*. at 1162-1163 (quoting *Willis v. State*, 449 So.2d 1258, 1260 (Ala. Crim. App. 1984; *Scott v. State*, 353 So.2d 36 (ala. Crim. App. 1977)).

However, because the proposed prior acts fit within one of the exceptions does not necessarily mean automatic admission. The court must conduct a balancing test akin to the Rule 403 balancing test. In *Ex parte Jackson*, the Supreme Court held the following:

> It does not suffice to simply see if the evidence is capable of being fitted within an exception to the rule. Rather, a balancing test must be applied. The evidence of another similar crime must not only be relevant, it must also be reasonably necessary to the government's case, and it must be plain, clear, and conclusive, before its probative value will be held to outweigh its potential prejudicial effects.

Ex parte Jackson, 33 So.3d 1279, 1284-85 (Ala. 2009) (quoting *Robinson v. State*, 528 So.2d 343, 347 (Ala. Crim. App. 1986)). Evidence cannot be admitted by simply alleging that the prior act fits within a recognized exception. The Court must be satisfied that the proposed prior act fits within an exception and passes the prejudicial/probative balancing test from Rule 403 before the evidence may be properly admitted.

Relevancy as to Motive

In order for the motive exception to apply, the state must show that the prior act is proof of motive for the current crime charged. Motive goes beyond reasoning for committing a crime, "'[m]otive is an inducement, or that which leads or tempts the mind to do or commit the crime charged' *Spicer v. State*, 65 So. 972, 977 (1914). Motive is 'that state of mind which works to "supply the reason that nudges the will and prods the mind to indulge the criminal intent."'"

Bowden v. State, 538 So.2d 1226, 1235 (Ala. 1988) (quoting Charles Gamble, *Character Evidence: A Comprehensive Approach* 42 (1987)). Testimony that is being offered to show a particular motive is always admissible. *Id*. "It is permissible in *every criminal case* to show that there was an influence, an inducement, operating on the accused, which may have led or tempted him to commit the offense." *Id*. (emphasis original).

Relevancy as to Intent

In order for intent to be successfully asserted as an exception, the State must prove that "intent is material or of consequence to the case. This normally means that it must be an element of the crime with which the accused is charged." *Frye*, 185 So.3d at 1164 (quoting Charles W. Gamble and Robert J. Goodwin, *McElroy's Alabama Evidence* § 69.01(5) (6th ed. 2009)) (hereinafter "*McElroy's*"). Furthermore, "[w]henever the prerequisite intent may be inferred from the nature of the criminal act itself, evidence of other crimes is inadmissible if offered to prove such intent." *Id*. Therefore, unless the current charge has a specific intent element, the court should not admit prior acts under the guise of intent evidence.

Relevancy as to Identity

Similar to the requirement for intent, in order for the State to successfully assert the identity exception, the identity of the accused must actually be in question. The State must go beyond mere likeness of the crime in order for prior act evidence to be admitted; the crime needs to be "committed in a novel and peculiar manner." *Towles v. State*, 168 So.3d 124, 131-132 (Ala. Crim. App. 2013) (quoting *McElroy's*, §69.01(8)). The likeness of the offense must have such close similarities "that it marks the offense as the handiwork of the accused." *Ex parte Baker*, 780 So.2d 677, 680 (Ala. 2000). In fact, the Court of Criminal Appeals described the type of

prior act required be like that of a signature. *Hurley v. State*, 971 So.2d 78, 83 (Ala. Crim. App. 2006).

Relevancy as to common plan

The exception on the basis of common plan is perhaps the broadest of the exceptions because it encompasses elements that are similar to the other exceptions. In fact, the Supreme Court has held that the common plan exception is "essentially coextensive with the identity exception." *Ex parte Darby*, 516 So.2d 786, 789 (Ala. 1987). Furthermore, common plan is only an applicable exception when identity is also at issue. *Campbell v. State*, 718 So.2d 123, 128-129 (Ala. Crim. App. 1997). The common plan exception, however, does differ from the other exceptions. The *Frye* Court held:

> First, the plan, design, scheme or pattern is not an element of the crime charged and, consequently, is always material or of consequence in the case. Such ever-present materiality causes the application of the exception to focus upon whether the other acts do indeed have a tendency to show a plan or scheme. A second difference lies in the fact that a single collateral crime or act could be more sufficient to show knowledge or intent but, in contrast, it generally takes more than a single act to form a plan or scheme. Last a greater degree of similarity between the charged crime and the collateral act is required when the latter is offered to prove plan or scheme rather than intent.

Frye, 185 So.3d at 1165 (quoting *McElroy's* § 69.01(6)).

Relevancy as to knowledge

In order for the court to admit evidence of knowledge or scienter based on prior bad acts, scienter must be an element of the crime charged. See *Averette v. State*, 469 So.2d 1371 (Ala. Crim. App. 1985). Additionally, the fact that the accused has committed a similar type of crime in the past does not mean that the accused has the necessary knowledge or scienter to commit a completely different crime. *Id*. The Supreme Court has held that in order for the knowledge exception to 404(b) to apply, the accused must have learned something from his previous crime

that aides or supplies the accused with the guilty knowledge that the act they are doing is criminal, or potentially criminal. *Id*. A good example is an accused standing trial for receiving stolen property. The State intends to put on evidence of prior acts where the accused purchased stolen property from the same thief as now charged. This hypothetical has been held to be sufficient for the knowledge exception. However, because an accused has committed the crime of receiving stolen property in the past does not mean that every time he is charged with receiving stolen property, his prior acts can be used against him. See generally, *McElroy's* § 69.01(3) (using case law and common example of receiving stolen property as example). The knowledge, intent, and identity exceptions are closely intertwined and all look facially similar. Each covers a distinct element of the crime charged, and attorneys should be careful to not allow overlapping facts confuse them on the arguments. The same facts that tend to show intent might not prove scienter. This is critically important when the State has declared limited purposes for 404(b) evidence. If the State gives notice of 404(b) evidence for the purpose of showing knowledge, but actually shows intent, the State has then improperly notified the defense of 404(b) evidence and should be excluded.

Relevancy as to opportunity

The opportunity exception requires proof of prior acts relevant to show that the accused "was in a position, by either location or capacity, to have committed the now-charged crime." *McElroy's* § 69.01(12) (citing *Ward v. State*, 814 So.2d 899 (Ala. Crim. App. 2000)). This exception has also been characterized as stating the accused has the capacity or skill to achieve the currently charged crime. *Id*. Commonly, this exception is used not to enter prior crimes into evidence, but prior acts which prove that the defendant had the requisite ability and capacity

opportunity) to accomplish the criminal activity. *Id*. (using testimony of observing a gun similar to the one used in commission of the crime as an example).

Absence of mistake or accident

The absence of mistake exception is similar to the exception for intent. However, the exception can stand alone when the defense makes mistake or accident an issue in the case. *McElroy's* § 69.01(15). When an accident or mistake becomes the focus of the defense, the State is allowed to admit prior acts showing that the alleged offense was indeed not an accident. *Id*. Anecdotally, absence of mistake is illustrated by the doctrine of chances and the famous "Brides of the Bath" case.[1] In the "Brides of the Bath" a husband was charged with murdering three wives, all presumably drowning in shallow bathtubs shortly after making a will or taking out a life insurance policy. The doctrine of chances holds that by the third time there is an absence of mistake. This is similar (albeit not exact) to the absence of mistake or accident exception to Rule 404(b).

Preparation for the now-charged crime

This exception is rarely used on its own and is virtually synonymous with the "plan" exception mentioned *supra*. However, the exception does include prior acts "which are committed preparatory to the now-charged crime." *McElroy's* §69.01(14) (citing *State v. Reutter*, 374 N.W.2d 617, 625 (S.D. 1985); *State v. Coca*, 341 N.W.2d 606 (Neb. 1983); *United States v. Himelwright*, 42 F.3d 777, 784-85 (3rd Cir. 1994)).

C. The notice requirement

There are two primary points of contention between the prosecution and defense when dealing with the notice requirement of Rule 404(b). The first is what constitutes sufficient time to

[1] For more information on the "Brides in the Bath Murders", visit http://content.met.police.uk/Article/Brides-in-the-Bath-Murders/1400015481775/1400015481775

adequately notify defense counsel of the State's intention to use 404(b) evidence. The second is what constitutes sufficient notice regarding facts, prior acts, and evidence. In Madison County, the 23rd Judicial Circuit of Alabama standing order dictates that reasonable notice is seven (7) prior to the initial trial setting.[2] The case law surrounding the topic of what constitutes notice of facts, acts, or evidence does not offer much clarity to the issue. The law is clear in one regard, if the State intends to use 404(b) evidence for any purpose, they must provide adequate notice of that intention. In *Ex parte Lawrence*, the Alabama Supreme Court adopted the Federal 404(b) Advisory Committee Note interpretation of the rule when it held:

> The amendment requires the prosecution to provide notice, *regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal*. . . . Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court concludes that the notice requirement has not been met.

Ex parte Lawrence, 776 So.2d 50, 53 (Ala. 2000) (emphasis original) (noting that the Federal and Alabama's Rule 404(b) are identical and the Federal Advisory Committee's Notes are persuasive on the Alabama Courts).

There is no on-point case law that explicitly states what level of specificity must be provided to constitute notice of intent to use prior acts pursuant to 404(b), however, the Eleventh Circuit, interpreting the identical Federal Rule 404(b) lends some guidance in *U.S. v. Carrasco*, holding that "the policy behind the Rule 404(b) notice requirement is 'to reduce surprise and promote early resolution on the issue of admissibility.'" 381 F.3d 1237, 1241 (11th Cir. 2004) (quoting Fed. R. Evid. 404(b) advisory committee's note to 1991 amendments) (the same quote was used by the Alabama Supreme Court in *Ex parte Lawrence*, 776 So.2d at 53 while interpreting Alabama's notice requirement). The *Carrasco* Court also held that even though the

[2] Available at http://23judicialcircuit.org/wp/wp-content/uploads/2016/10/Standing-Order-Rules-of-Evidence-404B.pdf

notice requirement spelled out in 404(b) is generalized, "the prosecution still must 'apprise the defense of the general nature of the evidence of extrinsic acts.'" *Id*. Therefore, while not an exact statement of what is required, the Eleventh Circuit has held more than generalized statements are required as it must provide enough information to apprise the defense of the nature of the evidence in order to be considered sufficient notice.

D. Objections to the admittance of prior acts

A motion in limine to preclude 404(b) evidence should be made upon receiving notice of the State's intent to introduce prior act evidence. The notice provided by the State should be more than a vague, generalized statement of their intention to introduce prior act evidence. The best objection at the pre-trial stage of a criminal trial in the 404(b) context is to argue that the evidence noticed by the State does not meet a recognized exception to 404(b) and the evidence is only being offered to prove character in conformity with the currently charged crime. A successful objection on these grounds comes from a firm understanding of what the potential evidence is being used to achieve, and how the exceptions apply to the accused's history and prior acts.

A second pre-trial objection that can be made is a motion to exclude for insufficient notice. In the 23rd Judicial Circuit, the timing aspect of notice should theoretically be taken care of due to the Standing Order's requirement of at least seven days' notice before the initial trial setting. Issues can arise when the State provides boilerplate language and/or not enough facts to apprise defense counsel of what the State is attempting to offer. Prosecutors should remember that the intent behind the notice requirements of 404(b) is to "prevent surprise and promote early resolution on the issue of admissibility." *Carrasco*, 381 F.3d at 1241. This is a case specific standard.

While the pre-trial objections and motions in limine are obviously important, the objections made in trial are critical, if for no other reason to preserve the issues on appeal. A motion in limine to suppress 404(b) evidence will not preserve the issue for appeal unless the trial court explicitly states that the objection will be noted as made on the record. *McElroy's* § 69.02 (11) (citing *United States v. Hall*, 312 F.3d 1250, 1255 (11th Cir. 2002)). Due to the importance of preserving the issue for appeal, sample objections from *Gamble's Alabama Rules of Evidence* have been provided at the end of this section.

The limiting instruction

When an objection to prior act evidence is overruled, or if evidence on prior acts is stipulated as admissible, defense counsel should request that a limiting instruction be immediately given. In *United States v. Gonzalez,* 975 F.2d 1514 (11th Circ. 1992), the trial court committed reversible error by failing to give a limiting instruction to the jury relating to evidence under Fed. R. Evid. 404(b). Substantial evidence was introduced of events that occurred prior to the conspiracy charged in the indictment and the Eleventh Circuit found that the defendant was prejudiced by trial courts failure to charge a limiting instruction that the evidence may be considered on issues of knowledge and intent.

If 404(b) evidence entered against one defendant, it is error for the trial court to fail to instruct the jury to limit its consideration of the evidence. *See United States v. Pearson,* 746 F.2d 787 (11th Cir. 1984). When the limiting instruction is given contemporaneasly with the introduction of the evidence, the trial court has discretion whether to repeat at the end of trial. *United States v. Butler,* 102 F.3d 1191 (11th Cir. 1997).

The limiting instruction alerts the jurors that the evidence they have just heard or are about to hear is not to be considered as substantive evidence. That is, the limiting instruction

should achieve what its named for, limiting the scope of the evidence considered by the jurors when determining guilt.

Alabama Pattern Limiting Instruction

Alabama Pattern Jury Instruction 15.08 states:

> Some of the evidence in this case is admitted for a limited purpose. The evidence (described the evidence) is admitted only for (describe the purpose). You cannot consider it (describe what it cannot be used for). You will consider this evidence with the rest of the evidence, but only for the purpose it was admitted.

APJI 15.08.

Eleventh Circuit Pattern Limiting Instructions

The pattern instruction when similar acts evidence is introduced in the Eleventh Circuit states:

> During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant is currently charged. You must not consider any of this evidence to decide whether the Defendant engaged in the activity alleged in the indictment. This evidence is admitted and may be considered by you for the limited purpose of assisting you in determining whether [the Defendant had the state of mind or intent necessary to commit the crime charged in the indictment] [the Defendant had a motive or the opportunity to commit the crime charged in the indictment] [the Defendant acted according to a plan or in preparation to commit a crime] [the Defendant committed the acts charged in the indictment by accident or mistake].

Pattern Jury Instructions, Eleventh Circuit (2016 Revision) § S4.1.

The Eleventh Circuit has a special instruction for the Identity exception and states:

> During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant is currently charged. If you find the Defendant committed the allegedly similar acts, you may use this evidence to help you decide whether the similarity between those acts and the one[s] charged in this case suggests the same person committed all of them. The Defendant is currently on trial only for the crime[s] charged in the indictment. You may not convict a person simply because you believe that person may have committed an act in the past that is not charged in the indictment.

Pattern Jury Instructions, Eleventh Circuit (2016 Revision) § S4.2.

Form of the objection (in trial)

1. Such evidence of my client's collateral acts is inadmissible by virtue of the general exclusionary rule of character.
2. We are here, your honor, to determine whether my client did or did not commit the act in question and my client's character is not relevant to that issue.
3. Such acts are a form of character evidence and generally excluded.
4. The prosecution may not offer such evidence of my client's alleged collateral misconduct in order to show that my client was of a bad character and, therefore, committed the crime being prosecuted.

Form of the Response

1. This evidence, your honor, is not offered to prove bad character, consequently, it does not violate the exclusionary rule.
2. This evidence is offered to prove (stated purpose), rather than bad character, and therefore, is admissible.
3. The prosecution may, your honor, offer evidence of the accused prior criminal acts when, as here, they are offered for a purpose other than to prove bad character and conformity therewith.[3]

E. The interplay between 404(b) and 609 impeachment evidence

Rules 404(b) and 609 are similar in their scope and in what they allow into evidence, with a few critical distinctions. Rule 609 allows for the impeachment of a witness (whether the accused or not) through evidence of prior convictions. The first big distinction is 609 allows for impeachment only by convictions for felonies and crimes of dishonesty, while 404(b) covers

[3] Charles W. Gamble, *Gamble's Alabama Rules of Evidence: A Trial Manual for Making and Answering Objections*, p. 102 (2d ed. 2002).

other wrongs, acts, and crimes, not solely convictions. The second major distinction is the time limitation of ten years for convictions found in Rule 609. The last major distinction is the limited scope of the inquiry.

Rule 609 allows evidence of previous convictions for impeachment purposes if (1) the conviction was punishable by death or in excess of one year in prison; (2) the conviction involved a crime of dishonesty or false statement, regardless of punishment; (3) the impeachment evidence passes the Rule 403 balancing test; (4) the impeachment evidence meets the time limitation requirement of ten years and was not a juvenile or youthful offender adjudication. The Rules of Evidence allow for such evidence because "whenever a witness takes the stand and offers testimony, evidence of the witness's character for untruthfulness may be admitted as a basis from which to infer that the witness is not telling the truth." Official Commentary to Ala. R. Evid. 609. For this reason, crimes of dishonesty and false statements are virtually always admissible. William A. Schroeder, *Evidentiary use in Criminal Cases of Collateral Crimes and Acts: A Comparison of the Federal Rules and Alabama Law*, 35 Ala. L. Rev. 241, 275 (1984) (hereinafter *Collateral Crimes and Acts*).

Rule 609 is not a free-for-all workaround of 404(b) for the State to use, however. Whenever the accused is on the stand, and impeachment testimony is sought from the accused through Rule 609, the trial court should conduct a Rule 403 balancing test. Official Commentary to Ala. R. Evid. 609. This analysis will balance the impeachment value versus the prejudice to the accused. If the potential prejudice outweighs the impeachment value, then the proffered testimony should always be excluded. Schroeder, *Collateral Crimes and Acts*, at 275.

The notice requirement for Rule 609 is only required when a party seeks to have evidence admitted of a conviction that is more than ten years old. Ala. R. Evid. 609(b). The commentary

to the rule states that "[s]ufficiency of such notice is measured by whether it provides the adverse party a fair opportunity to contest the use of the conviction." Official Commentary to Ala. R. Evid. 609. The Rule 609 notice requirement has no time limitation, just that the adverse party has provided the opportunity to contest the use of the conviction. This could very well be the day of trial, so long as opposing counsel gives written notice. Defense counsel should be careful to ensure that there is not Rule 404(b) evidence that is being brought in during cross without proper 404(b) notice when the accused takes the stand. Despite the fact that prior act convictions can be introduced under the guise of 609, if the actual purpose of the evidence is to show character in conformity with the charged crime, the evidence shall be dismissed under rule 404(b).

F. Defense Use of 404(b)

Nothing in the Rule states that prior act evidence can only be introduced by the prosecution. The Defense can introduce prior act evidence that fits within a recognized exception when examining a third-party witness, such as an informant. In *United States v. Stephens*, the Eleventh Circuit held that the defense was entitled to use evidence of an informant's act subsequent to becoming an informant to show that the informant was a drug dealer. The Court held that the defense could use the evidence to show that the informant had access to drugs and was not necessarily buying the drugs from the defendant. See *United States v. Stephens*, 365 F.3d 967, 974-975 (11th Cir. 2004) (holding that exclusion of informant's other drug transactions should not have been excluded as they were not entered in order to show character in conformity with the currently charged crime); *United States v. Cohen*, 888 F.2d 770 (11th Cir. 1989). Defense counsel should be aware that when attempting to use 404(b) evidence on a third party, the "motive" exception applies only to the motive to commit the currently charged crime, not a

motive to falsely accuse the defendant. *United States v. Farmer*, 923 F.2d 1557 (11th Cir. 1991) (holding that motive to falsely accuse is brought in under Rule 608).

G. Specific Instances (Evidence Held Inadmissible and Particular Types of Evidence)

Mugshots and Processing Paraphernalia

A mugshot is highly prejudicial to the accused and is generally inadmissible. *Adams v. State*, 955 So.2d 1037, 1071 (Ala. Crim. App. 2003) (reversed on other grounds) (quoting *Guthrie v. State*, 616 So.2d 914, 926-27 (Ala. Crim. App. 1993)). There are three prerequisites for the mugshot to meet in order for it to be admissible and not afoul of 404(b):

> 1. The Government must have a demonstrable need to introduce the photographs; and (2) The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal records; and (3) the manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

Id. Rap sheets, fingerprint cards, and other police processing materials are generally inadmissible. *McElroy's* § 69.02(2) (citing *Woodson v. State*, 405 So.2d 967 (Ala. Crim. App. 1981)).

Entrapment

Defense attorneys should be careful when using the defense of entrapment as this defense allows the prosecution to bring in 404(b) evidence that would normally be inadmissible. There are two theories on how 404(b) evidence is admitted when the entrapment defense is asserted. The first is that the evidence is admissible as opening the door because by pleading to entrapment the defense is contending that the accused had no predisposition to commit the currently charged crime. *Graham v. State*, 593 So.2d 162 (Ala. Crim. App. 1991). The second theory is that the entrapment defense puts the accused's state of mind and intent at issue. *Brown v. State*, 392 So.2d 1248 (Ala. Crim. App. 1980).

Evidence Inadmissible (11th Circuit)

- *United States v. Young*, 39 F.3d 1561 (11th Cir. 1994)- Evidence of operating illegal still was not proper in conspiracy to manufacture and distribute marijuana charge. Held to be harmless error.
- *United States v. Phaknione*, 605 F.3d 1099 (11th Cir. 2010)- Facebook pictures showing defendant with a gun and portraying him as a gangster should not have been admitted (held harmless). Pictures did not establish a modus operandi required for the identity exception to 404(b).
- *United States v. Marshall*, 173 F.3d 1312 (11th Cir. 1999)- Evidence admitted from prior criminal investigation which no charges were filed was reversible error as improper guilt by association evidence. The evidence only showed the defendants were at a place where crack cocaine was made, not that they had any knowledge of its manufacture. In order for the evidence to be admissible, it must show intent for the current crime charged, not for bad character in the past.
- *United States v. Veltmann*, 6 F.3d 1483 (11th Cir. 1993)- Government failed to offer any evidence that the defendant perpetrated the extrinsic offense.
- *United States v. Philibert*, 947 F.2d 1467 (11th Cir. 1991)- Defendant charged with making threatening phone call. Evidence that several weeks earlier he had purchased a gun and ammunition should not have been admitted. The error was exacerbated by presenting the gun to the jury, including a Thompson machine gun.
- *United States v. Chavez*, 204 F.3d 1305 (11th Cir. 2000)- Defendant was charged with assaulting his wife. Evidence that he had engaged in prior assaults was improperly

admitted. The defendant claimed self-defense, and the fact that he had hit her previously was not probative in disputing the defense. Error ruled harmless.

Evidence Inadmissible (Alabama)

- *Boone v. State*, 2016 WL 5338717 (Ala. 2016) (Not yet released for publication, decided September 23, 2016)- Evidence of membership in a gang held inadmissible to show motive in attempted murder case. No evidence was introduced that victim had any gang involvement to suggest the attempted murder was gang related and only pointed toward an argument that escalated to violence. Evidence of association with a gang is presumptively prejudicial.
- *Yates v. State*, 2016 WL 3655298 (Ala. Crim. App. 2016) (Not yet released for publication, decided July 8, 2016)- Evidence of phone conversation between defendant and co-defendant was inadmissible and admission was not harmless error when conversation indicated that defendant said they wanted to kill who stole their clothes while in jail for the currently charged crime. Defendant was charged with being an accomplice to murder and attempted murder of two other individuals.
- *Ex Parte Jackson*, 33 So.3d 1279 (Ala. 2009)- Admission of evidence of defendant's prior murder conviction was not admissible and constituted reversible error in prosecution for capital murder.
- *Ex Parte Casey*, 889 So.2d 615 (Ala. 2004)- Evidence of defendant's prior convictions for theft and unauthorized use of a credit card constituted reversible error in prosecution for receiving stolen property.

- *Horton v. State*, 2016 WL 1084721 (Ala. Crim. App. 2016) (Not yet released for publication, decided March 18, 2016)- Reversible error to admit evidence that defendant had used cocaine and assaulted his girlfriend and mother in capital murder prosecution.
- *Frye v. State*, 185 So.3d 1156 (Ala. Crim. App. 2015)- Reversible error to admit evidence that the defendant had physically assaulted rape victim in the past because intent is not an element of first degree rape.
- *Marks v. State*, 170 So.3d 712 (Ala. Crim. App. 2014)- Evidence of defendant's sexual assaults of other women was reversible error in prosecution for first degree rape.
- *Towles v. State*, 168 So.3d 124 (Ala. Crim. App. 2013)- Evidence that defendant had assaulted his son was inadmissible and reversible error in capital murder prosecution
- *Bailey v. State*, 75 So.3d 171 (Ala. Crim. App. 2011)- Testimony regarding prior theft was unfairly prejudicial and violated 404(b) in capital murder prosecution.
- *Hurley v. State*, 971 So.2d 78 (Ala. Crim. App. 2006)- Admission of prior rape conviction was unfairly prejudicial in prosecution for first degree rape.
- *Upton v. State*, 933 So.2d 1105 (Ala. Crim. App. 2005)- Trial Court committed reversible error by admitting evidence of prior DUI's in felony DUI prosecution during the guilt phase when defendant had not opened the door.
- *McAdory v. State*, 895 So.2d 1029 (Ala. Crim. App. 2004)- Evidence of prior drug convictions was not admissible and their admission was revisable error in prosecution for possession of cocaine.
- *Draper v. State*, 886 So.2d 105 (Ala. Crim. App. 2002)- Evidence that the accused had prior conviction of possession cocaine was reversible error in prosecution for trafficking in cocaine.