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"Other Acts" Evidence: Recent Decisions by the Court of Appeals Undermine the Efficacy of Maryland Rule 5-404(b)

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"OTHER ACTS" EVIDENCE: RECENT DECISIONS BY THE COURT OF APPEALS UNDERMINE THE EFFICACY OF MARYLAND RULE 5-404(b)

by Lynn McLain*

I. INTRODUCTION

Next to the hearsay doctrine, the darling of evidence afficionados is "character evidence." Its intricate turnings intrigue,[1] much as those in a maze. It is easy to make a wrong turn and find one's passage blocked by an impenetrable hedge; the challenge then is to backtrack and refine one's analysis so as to reach the through path. Unfortunately, in a few recent decisions, the Court of Appeals of Maryland has taken a couple of wrong turns and trapped our trial judges in the maze. This article is written to challenge the court of appeals to turn around and lead the way out.

This article will discuss the rationale for the rules of evidence, both in general and with regard to those common law character evidence rules codified in Maryland Rule 5-404(b): the "propensity rule" and the admissibility of evidence of "other crimes, wrongs, or acts." The article will provide an overview of the pre-1998 Maryland case law on "other acts" evidence. It then will critique the court of appeals' decisions in *Wynn v. State* in 1998, *Streater v. State* and *Klauenberg v. State* in 1999, and *Sessoms v. State* in 2000. These four cases have unnecessarily complicated what was already a challenging area of the law. The added complexities are out of step both with prior case law and with the text of Title 5 of the Maryland Rules, and bring no concomitant benefit to the ascertainment of the truth or the achievement of fairness and justice.

II. PURPOSES OF THE RULES OF EVIDENCE IN GENERAL, THE "PROPENSITY RULE," AND MARYLAND RULE 5-404(b)

Our trial system is intended to provide a forum where we can peacefully resolve disputes and redress wrongs. In recognition of the fact that the unrestricted admission of evidence would so overwhelm the courts as to make them ineffective, the rules of evidence are intended to help achieve maximum fairness with a minimum expenditure of time and judicial resources. Rule 5-102 articulates the purposes of Maryland's evidentiary rules as follows: "The rules in this Title shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[2]

One way in which the rules attempt to further these goals is by minimizing appeals on evidentiary issues. Rule 5-103 requires generally that a timely objection to evidence must be made at trial in the hope that the question can be properly resolved there. Absent such an objection, a party may not complain on appeal that the admission of the evidence was erroneous.

The most basic and most time-saving rule of evidence, which is codified in Rule 5-402, excludes evidence that is irrelevant to the matter at hand. The other, more specific rules restrict the admission of relevant evidence. For example, Rule 5-407 limits the admissibility of evidence of subsequent remedial measures, and Rule 5-404 circumscribes the admissibility of character evidence.

The considerations that led to the development of

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[1] *See, e.g.*, PAUL W. GRIMM & MATTHEW G. HJORSTBERG, FUNDAMENTALS OF TRIAL EVIDENCE: STATE AND FEDERAL § 4.3 (1997); LYNN MCLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL §§ 404.1-405.5 (2d. ed. 2001) (and sources cited therein); JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK §§ 509-510(E)(6) (3d ed. 1999).

[2] MD. RULE 5-102. In the text of this Article, a Maryland Rule will be referred to as "Rule," and a Federal Rule of Evidence will be referred to as "FRE."

these and other specific rules are summarized explicitly in Rule 5-403, the "clean-up batter" of Title 5. Even if no other rule excludes particular evidence, the trial judge nonetheless has the discretion to exclude it under Rule 5-403, which provides: "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."[3]

These general considerations enumerated in Rule 5-403 are also reflected in the specific common law rules codified in Rule 5-404(b). The first sentence of Rule 5-404(b) sets forth the general "propensity rule" of exclusion of evidence of other acts when offered merely to show that the actor has acted similarly, or "in character," this time. The second sentence sets forth the permissibility of admission of such evidence for other, more specific purposes. Rule 5-404(b) provides: "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, common scheme or plan, knowledge, identity, or absence of mistake or accident."[4]

The general "propensity rule" of exclusion of evidence to prove that a person has a "good" or "bad" character and therefore is somewhat more likely to have acted in a "good" or "bad" way is not premised on a total lack of relevance.[5] If the evidence were irrelevant, Rule 5-402 would exclude it; the first clause of Rule 5-404(a)(1)[6] and the first sentence of Rule 5-404(b) would be unnecessary. As the United States Supreme Court has stated:

> The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend 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.[7]

Rule 5-404(b) recognizes that "other acts" evidence has relevance, but that the strength of its probative value will vary. The lower the probative value, the higher the risk of unfair prejudice. For example, the fact that an accused once stole $20 from his sick grandmother's pocketbook to buy beer is not strongly probative that he is thus more likely to have assaulted and raped a stranger six years later. Any slight probative value the earlier theft may have concerning his disregard for the law is substantially outweighed by its potential to unfairly prejudice the jury against him, for reasons of "bad character" entirely unrelated to the issues at hand.

The second sentence of Rule 5-404(b) codifies the common law rule that evolved in recognition that the higher the probative value of the evidence -- that is, the stronger and more logically persuasive the evidence is of the point it is offered to help prove -- the lesser the risk of *unfair* prejudice.[8] When the issue is sharpened, and the "other acts" evidence is probative not just of general character but is relevant to the narrower issue, "such as,"[9] but not limited to, those listed in the second sentence of Rule 5-404(b), the probative value is likely to be higher. When there is no other available, equally probative evidence on

[3] MD. RULE 5-403.

[4] MD. RULE 5-404(b).

[5] *E.g.*, Harris v. State, 324 Md. 490, 495-96, 597 A.2d 956, 959-60 (1991).

[6] Rule 5-404(a)(1) provides: "(1) *In General.* Evidence of a person's character or a trait or character is not admissible for the purpose of proving action in conformity therewith on a particular occasion...."

[7] Michelson v. United States, 335 U.S. 469, 475-76 (1948) (footnotes omitted).

[8] *See, e.g.*, Duckworth v. State, 323 Md. 532, 594 A.2d 109 (1991).

[9] MD. RULE 5-404(b).

an important issue in dispute, the "other acts" evidence may be helpful, rather than confusing or distracting, to the fact-finder.[10] Nor will its admission under those circumstances unduly waste time.

III. TRADITIONAL APPLICATION OF RULE 5-404(b) AND THE COMMON LAW RULES THAT IT CODIFIED

Rule 5-404(b)'s use of the phrase "such as" imports that the permissible purposes listed in the rule are merely examples of "well-established categories"[11] of admissibility and are not exclusive. Any relevant purpose other than proving only "character of a person in order to show action in conformity therewith"[12] is proper. The court of appeals has repeatedly referred to this principle as one that the proffered evidence of other crimes, wrongs, or acts must have "special relevance."[13]

Under the court of appeals' 1989 decision in *State v. Faulkner*,[14] if "other acts" evidence has "special relevance," it may be admitted by the trial court and heard by the jury, if the judge is satisfied that there is "clear and convincing evidence" of the other acts and who performed them, and if the judge finds that the evidence has sufficient probative value that it should not be excluded by virtue of the considerations now codified in Rule 5-403.

The case law interpreting Rule 5-404(b) and the common law rules that it codified traditionally has looked not only at the elements of the claim or charge being tried, but also at the defense presented, to determine on which issue or issues it may be fair and appropriate to provide the fact-finder with the "other acts" evidence.

For example, assume that a defendant is charged with having fractured a child's skull. To make a prima facie case, the State offers evidence that the child was in the care of the defendant at the time the injury was suffered, as well as medical evidence regarding the injury and the type of force that could cause it. Under Rule 5-404(b) and the case law it codified, if the defendant or another defense witness testifies that the child's injuries resulted from the child's accidentally slipping in the bathtub and hitting his head, the trial judge will have the power to admit, to prove "absence of ... accident,"[15] evidence that the defendant previously had custody of five other young children who received head fractures while in her care. The evidence of these other acts would have the requisite "special relevance" and would be helpful to the jury in determining whether the injury occurred as the defense portrays it. The *Faulkner* gloss on Rule 5-404(b) also requires, for admissibility, both that there be clear and convincing proof[16] that the defendant caused the other fractures and, second, that the judge does not find that the evidence should be excluded for the reasons codified in Rule 5-403.[17]

This three-step *Faulkner* process is itself, then, rather complicated. But, over the past two years, a majority of the court of appeals has rendered four decisions that

[10] *E.g.*, Streater v. State, 352 Md. 800, 807, 724 A.2d 111 (1999).

[11] Tichnell v. State, 287 Md. 695, 711-12, 415 A.2d 830, 839 (1980) ("Some of the well-established categories of evidence outside the ambit of the narrow rule of exclusion include evidence of other crimes which tends to establish (1) motive, (2) intent, (3) absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and (5) the identity of the person charged with the commission of a crime on trial. Other exceptions have been recognized as well."), *cert. denied*, 466 U.S. 993 (1984).

[12] MD. RULE 5-404(b); *see, e.g.*, Wynn v. State, 351 Md. 307, 311, 718 A.2d 588, 590 (1998) ("In Maryland, it is a rule of exclusion that recognizes the general exclusion of other crimes evidence with a group of stated, but not exhaustive, exceptions."); State v. Faulkner, 314 Md. 630, 633-35, 552 A.2d 896, 897-98 (1989).

[13] *E.g.*, Streater, 352 Md. at 808-09, 724 A.2d at 114-15.

[14] 314 Md. at 633-35, 552 A.2d at 897-98.

[15] *See* Duckworth v. State, 323 Md. 532, 544-45, 594 A.2d 109, 114-15 (1991).

[16] *E.g.*, Skrivanek v. State, 356 Md. 270, 291-92, 739 A.2d 12, 24 (1999).

[17] *E.g.*, Williams v. State, 342 Md. 724, 736-39, 679 A.2d 1106, 1112-14 (1996); Ayers v. State, 335 Md. 602, 634-36, 645 A.2d 22, 37-38 (1994).

combine to further burden the trial judges and impede the efficient administration of justice.

IV. *WYNN* AND *STREATER* FURTHER COMPLICATE THE TRIAL JUDGES' TASK

In 1998 and 1999 the court of appeals announced two decisions that have unduly complicated the trial judges' job with regard to the application of Rule 5-404(b): *Wynn v. State*[18] and *Streater v. State*.[19]

In *Wynn*, the majority reversed the trial court when it disagreed with the ground stated by the trial judge for admission of Rule 5-404(b) evidence. The majority refused to look at whether the admission of the evidence was proper under another label. Yet, if the admission was proper, no harm resulted. The court of appeals' approach in *Wynn* strays from the basic, "no harm, no foul" premise of appellate review. *Wynn* burdens the system with unnecessary, costly, time-consuming new trials.

In *Streater*, the majority reversed the trial judge, even though it found that she had ruled correctly on the objection that had been made. Deviating from two well-established principles, first, that a trial judge need only rule on the objections raised by counsel at trial, and, second, that only those will be reviewed on appeal, the majority faulted the trial court for not proceeding to perform the three-step *Faulkner*-5-404(b) analysis sua sponte.

The *Streater* majority also urged trial judges to conduct the *Faulkner*-5-404(b) analysis on the record. If this directive means that the appellate court will find the lack of such a record to be reversible error, even if the appellate court, in its own analysis of Rule 5-404(b), would have reached the same result as did the trial court, reversible error again will be unnecessarily created.

A. *Wynn*

In *Wynn*, a majority of the court of appeals found that the trial court erroneously had concluded that proffered evidence had special relevance to the accused's "absence of mistake," which is a permissible purpose for "other acts" evidence specifically stated in Rule 5-404(b). The defendant was tried on ten counts of burglary, housebreaking, and theft, but the trials were severed into three.

The third trial was for the fifth and sixth counts, the housebreaking and theft charges related to one dwelling (the Quigley home). In the State's case-in-chief at that trial, evidence was admitted as to the ninth and tenth counts, housebreaking of and theft from another residence (the Garrison home) in the same neighborhood on the same weekend. The State was making an anticipatory strike, with the expectation that the defendant would rely on the same defense he had employed in the preceding trials on the other counts. That defense was that he had bought from a flea market the items that were later found in his possession and matched the description of the stolen goods.[20]

The defendant never took the stand at the third trial. But he offered a defense that, if believed, supported this alternative explanation for his possession of the Quigley goods. A defense witness testified that she saw the defendant at a flea market, carrying several bags of merchandise. Defense counsel in closing argued that the defendant had innocently purchased, at the flea market, the items that were found at his house.[21]

The court of special appeals affirmed the defendant's conviction, on the ground that, "[b]ecause appellant argued a defense of mistake or accident evidence of prior similar acts was admissible to show lack of mistake or accident."[22] The court of appeals reversed.

The majority, in an opinion authored by Judge Cathell, stressed that the defendant had not yet presented a defense at the time the other crimes evidence was admitted,[23] but

[18] 351 Md. 307, 718 A.2d 588 (1998).

[19] 352 Md. 800, 724 A.2d 111 (1999).

[20] Wynn, 351 Md. at 319 & n.7, 718 A.2d at 594 & n.7.

[21] *Id.* at 315, 718 A.2d at 592.

[22] Wynn v. State, 117 Md. App. 133, 150, 699 A.2d 512, 520 (1997), *rev'd*, 351 Md. 307, 718 A.2d 588 (1998).

[23] 351 Md. at 314 & nn.2-3, 333, 718 A.2d at 591-92 & nn.2-3.

it did not rest its finding of error on that basis.[24] It thus suggested that this was a risky undertaking on the part of the State, which was gambling that the accused would offer a defense of mistake or accident. The crux of the majority opinion is that the accused did not assert a defense that the majority felt fit into the Rule 5-404(b) pigeonhole of "absence of mistake."

This decision is ill-considered for two reasons. First, the majority read the "absence of mistake" category too narrowly. Second, even if the majority disagreed with the trial court's reading of "absence of mistake," the appellate court should have affirmed the trial court's ruling, if the appellate court found that the evidence would have been properly admitted under some other rubric. The majority declined to undertake that inquiry.

1. The Evidence Should Have Been Held to Have Been Properly Admitted to Prove "Absence of Mistake"

The *Wynn* majority limited the reach of the "absence of mistake" category to situations where the accused's defense was either that he had entered the Quigley house, but by mistake, or that he had stolen the Quigley property, but in the mistaken belief that he had a right to it.[25] It stressed that the defendant was not charged with possession of stolen property, and reasoned that, therefore, his "mistake" in possessing those particular goods was not in issue.[26]

But the majority overlooked the Maryland case law under which it is well established that, absent a reasonable explanation, the defendant's possession of recently stolen goods will support a factual inference that he is the thief."[27] Once the defendant puts forward a "reasonable" explanation of his innocent possession of the goods, as a practical matter he puts the ball back in the State's court to prove, with additional evidence, that his possession was not innocent.

The *Wynn* majority mistakenly opined that, if the challenged "other acts" Garrison evidence were proper in *Wynn*, similar evidence would be admissible in "virtually any" theft case when the defendant "pleads not guilty."[28] This is not so. The evidence would not have been admissible in *Wynn* had the defendant merely put the State's proof to its test, or had he denied either that he had been at the Quigley home or that he had the goods in his possession. It was his argument that he had obtained the Quigley goods, but innocently, at a flea market, that gave the Garrison evidence "special relevance."

In her strong dissent, Judge Raker argued that the trial judge had properly admitted the evidence to prove absence of the accused's mistakenly or accidentally having the stolen goods.[29] Her analysis focused on the "doctrine of chances" as proof of lack of accident or coincidence:

> [T]he doctrine of chances rests on the trial court's assessment of the improbability that someone would be innocently involved in similar activity....The unlikely coincidence that Wynn purchased the items at a flea market triggered the court's appropriate, albeit unspecified, application of the doctrine of chances. Moreover, the clear and immediate limiting

[24] *See id.* at 334 n.1, 718 A.2d at 602 n.1 ("Notwithstanding the majority's reference to the fact that the State introduced this evidence before the defense presented its case, that is clearly not the *ratio decidendi* of the majority opinion nor was it the basis of any objection below.") (Raker, J., dissenting).

[25] 351 Md.at 332, 718 A.2d at 600. These are, of course, two situations where the "absence of mistake" category clearly would apply.

[26] *Id.* at 331-32, 718 A.2d at 600.

[27] *E.g.*, Simms v. State, 83 Md.App. 204, 210-12, 574 A.2d 12, 15-17 (in a trial for daytime house breaking and misdemeanor theft of a credit card, no error in admitting evidence that defendant "used the credit card a mere five hours after breaking and entering was discovered and his flight upon being discovered [as it was] relevant to proving appellant's guilt without simply showing propensity."), *cert. denied*, 321 Md. 68, 580 A.2d 1077 (1990). *See* Wynn v. State, 351 Md. at 340-43, 718 A.2d at 604-06 (Raker, J., dissenting).

[28] 351 Md. at 333, 718 A.2d at 601.

[29] *Id.* at 355, 718 A.2d at 612.

> instruction given by the trial judge further supports the conclusion that the trial court did not abuse its discretion in admitting evidence of Wynn's prior criminal acts.[30]

Judge Raker had the better reasoned argument.

2. The Majority's Approach Unnecessarily Creates Reversible Error Even When the Trial Court Has Ruled Correctly, but has Stated the Wrong Reason for Its Ruling

Unfortunately, the majority refused to go on to consider whether the evidence was properly admitted, under Rule 5-404(b), on any ground other than "absence of mistake or accident."[31] This approach, which the majority ascribes to "the limitation of our certiorari jurisdiction" and to allowing the defense an opportunity to respond to each ground relied on,[32] "misses the forest for the trees."

The *logic* of the trial court's ruling was clear to the defense at trial. The defense had ample opportunity to refute that logic at trial. The court of appeals' requirement of what it perceives to be the correct "labeling" under Rule 5-404(b) places a formalistic and unduly heavy burden on the trial judge, and reaps no concomitant benefit in fairness or justice.

More importantly, under the common sense approach of "no harm, no foul,"[33] the routine handling of evidentiary rulings is that the trial judge will be affirmed, if he or she reached an appropriate ruling as to admission or exclusion, even if the judge gave an incorrect reason for that ruling.[34] To require trial judges not only to reach the right decisions but also to state the correct reasons for each of the multitude of evidentiary rulings they make -- and to reverse their *correct* decisions, if they do not -- is to exalt "form over substance."[35]

The *Wynn* court's approach of refusing to perform the analysis as to whether the trial judge was "right for the wrong reason" will result in requiring a new trial when no unfairness resulted from the "incorrect" grounds having been given at the first trial, for a ruling which, as to the bottom line, was correct. This would be an extravagant use of judicial resources under any circumstances. But to impose this unnecessary cost of time and judicial resources,

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[30] *Id.* at 355, 718 A.2d at 612. *See id.* at 334-35, 718 A.2d at 601-02 ("Wynn's possession of the goods stolen from the Quigley home, explained throughout his trial defense as the result of an innocent and unknowing purchase, might otherwise be characterized as 'unintentional,' 'mistaken' or even 'accidental.' It was for the purpose of dispelling Wynn's express claim, and its various possible characterizations, that the trial court rightfully permitted the prosecution to present evidence of Wynn's possession of goods stolen from the other residences. His possession was no mistake or accident"). (Raker, J., dissenting).

[31] *Id.* at 318 n.6, 718 A.2d at 593 n.6 (The court's footnote argues that relevance for another non-character purpose, other than absence of mistake, is of no consequence: "As we understand it, if 'other crimes' evidence is offered under the absence of mistake exception and is found to be inadmissible, the matter is over; a probative value assessment is not made").

[32] *Id.* at 324-25 & n.8, 712 A.2d at 596-97 & n.8 ("[T]he State did not, in any forum, present the 'doctrine of chances' relied upon extensively in the dissent. We considered the petition, the State's limited response, and granted the writ as presented. In the exercise of our certiorari jurisdiction, we do not perceive any extraordinary facet of this case that leads us to consider an issue not properly presented. *** It would be, in our view, equally unfair for this Court to do as the dissent suggests, *i.e.*, rely on a *Faulkner* first-prong exception never presented below and then balance its probative [value] with its prejudicial effect, without affording any opportunity to the defendant to be heard on that specific exception.") (footnotes omitted).

[33] *See* MD. RULE 5-103(a) ("Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling....").

[34] *E.g.*, Robeson v. State, 285 Md. 498, 502, 403 A.2d 1221, 1223 (1979) ("[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm. In other words, a trial court's decision may be correct although for a different reason than relied on by that court"), *cert. denied*, 444 U.S. 1021 (1980).

[35] Wynn, 351 Md. at 354, 718 A.2d at 611 (Raker, J., dissenting).

when our courts are already fighting heavy backlogs, is especially irresponsible.

B. *Streater*

This undesirable result has been compounded by the court of appeals' decision in *Streater*. *Streater* again employs too fine-toothed a comb when reviewing a trial judge's ruling on an objection.

1. *Streater* Reversed a Trial Court When It Had Ruled Properly on the Objection Made

In *Streater*, a majority of the court of appeals, in an opinion by Judge Chasanow, reversed a trial court's decision to admit other crimes evidence contained within a protective order, even though the defense had objected only to the admission of evidence of the existence of the protective order, which fact the court of appeals held was admitted properly.[36] The majority held that the trial judge was required to have performed the three-step *Faulkner* "other acts" analysis on the record, even though no objection had been made under Rule 5-404(b) and, indeed, a different objection had been made. This decision places an unprecedented onus on the trial court.

Streater was tried for stalking his estranged wife. His lawyer objected to the admission of evidence that the victim had obtained a protective order, which required the defendant to stay away from her. The majority of the court of appeals held that that fact was properly admitted, as relevant both to the defendant's course of conduct and to his having been warned to stay away.[37] This holding was correct, and the appellate court's role should have ended there.

But the majority's intimate knowledge of and exuberance for the intricacies of Rule 5-404(b) took it too far. It held that the trial court committed reversible error in admitting the entire protective order without sua sponte conducting an inquiry as to the admissibility of other crimes evidence -- including a break-in of and theft from the wife's home-- related in the order.[38] This part of the decision is contrary to two well-established principles under Maryland case law. First, a party must object to particular evidence at trial in order to preserve for appeal the question of its admission.[39] Second, if a party's objection is specific, the party is restricted to making only that same argument on appeal.[40] *Streater* holds trial judges to an unprecedented standard.

2. *Streater* Directs Trial Judges to Conduct Their *Faulkner*-5-404(b) Analysis on the Record

The *Streater* majority further burdened trial judges by directing them to conduct their three-step *Faulkner*-5-404(b) analysis, regarding (1) "special relevance," (2) clear and convincing proof, and (3) a balancing of probative value versus unfair prejudice, on the record in order to enhance appellate review. Repeated comments to this effect are sprinkled throughout the majority's opinion.[41] This instruction undermines the approach

[36] 352 Md. 800, 724 A.2d 111 (1999).

[37] *Id.* at 805, 812-13, 724 A.2d at 113,117.

[38] *Id.* at 812-23, 724 A.2d at 117-122.

[39] MD. RULES 2-517, 3-517, 4-323, and 5-103. *See, e.g.*, Klauenberg v. State, 355 Md. 528, 539-45, 735 A.2d 1061, 1066-70 (1999).

[40] *E.g.*, Klauenberg, 355 Md. at 541-42, 735 A.2d at 1068.

[41] *See* Streater, 352 Md. at 810, 724 A.2d at 116 ("[S]hould the trial court allow the admission of other crimes evidence, it should state its reasons for doing so in the record so as to enable a reviewing court to assess whether Md. Rule 5-404(b), as interpreted through the case law, has been applied correctly"); *id.* at 812, 724 A.2d at 116 ("Nothing in the record shows that the trial court carefully assessed the admissibility of the factual findings of other crimes contained within the protective order"); *id.* at 819, 724 A.2d at120 ("Because of the sparse record, we find it difficult to opine on the probative value and potential prejudice of the 'battery or assault and battery' finding"); *id.* at 821 n.10, 724 A.2d at 121 n.10 ("We agree with the dissent that, in weighing the probative value and prejudicial effect of other crimes evidence, trial judges "are not obliged to spell out in words *every* thought and step of logic' in weighing the competing considerations." In the instant case, the trial judge did not spell out *any* reasoning, and

followed by the drafters of Title 5, who deliberately declined to include such a directive in Rule 5-403, for example, for fear of unnecessarily creating reversible error for failure simply to state reasoning on the record.[42]

3. A Strong Dissent

Again, Judge Raker authored a strong, well-reasoned dissent, in which she was joined by Judges Rodowsky and Cathell. The dissent found first that the evidence would have been properly admitted, even if a proper objection had been made. But it also properly stressed that the majority's opinion, requiring a ruling absent a proper objection, deviates from pre-Maryland law: "The effect of the majority opinion is that absent any objection to the factual findings contained within the protective order, or articulated basis for exclusion, the trial court must nonetheless apply the three-pronged test of *Faulkner*, an approach simply inconsistent with established Maryland law."[43]

Finally, as the dissent points out, a requirement that the *Faulkner*-5-404(b) analysis be on the record disserves the justice system:

> The Majority reverses the judgment of the circuit court because the trial court failed to engage in the *Faulkner* analysis on the record. This result is unfair to trial judges and the public as well.
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> ....
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> ... While it would certainly be better if the trial court spread the reasons for the ruling on the record, neither the Maryland Rules nor the case law *require* the trial court to do so. The Majority's position is a marked change in Maryland law.[44]

C. Effect of *Wynn* and *Streater*

Wynn and *Streater* both unnecessarily increase the burden on the trial judges ruling on the admission of "other acts" evidence under Rule 5-404(b). Trial judges must dot their "i's" and cross their "t's" perfectly, even if objection on a ground other than *Faulkner*-5-404(b) is made. Yet two subsequent decisions of the court of appeals itself, in *Klauenberg* and *Sessoms*, exhibit confusion regarding such evidence. These decisions are likely to compound the consternation that trial judges might well be enjoying.

V. *KLAUENBERG* AND *SESSOMS* MISREAD RULE 5-404(b)

In *Klauenberg v. State*,[45] the majority of the court of appeals with one hand set forth a helpful clarification of the breadth of Rule 5-404(b)'s phrase "other crimes, wrongs, or acts," as including both "good" and "bad acts." But then, with the other hand, it obfuscated matters by narrowing its discussion of the scope of Rule 5-404(b) to "bad acts." Additionally, although the majority correctly defined "bad acts" (a definition that could be helpful on an issue of whether an error was reversible or harmless, as

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neither is there *any* indication that he in fact conducted a weighing of the probative value and prejudice of the other crimes evidence.") (emphasis in original; citations omitted); *id.* at 822, 724 A.2d at 121-22 ("[I]n the instant case the record reveals no determinations as to the relevancy, the sufficiency of evidence that the other crimes occurred, or the probative value and potential prejudice of admitting the evidence"). *See also* Klauenberg v. State, 355 Md. 528, 566, 735 A.2d 1061, 1081 (1999) ("Because the evidence constituted 'bad acts' evidence under the circumstances of this case, and was objected to by Klauenberg, the trial court should have engaged in an on-the-record *Faulkner* analysis to determine whether the evidence had special relevance, whether there was clear and convincing evidence that the acts occurred, and whether the probative value of the evidence outweighed the unfair prejudice") (Raker, J., dissenting, joined by Bell, C.J., and Eldridge, J.) (citing *Streater*).

[42] Court of Appeals of Maryland's Standing Committee on Rules of Practice and Procedure, Minutes of Oct. 16, 1992 meeting, at 41.

[43] 352 Md. at 823, 827, 724 A.2d at 122-24 (Raker, J., dissenting, joined by Rodowsky and Cathell, JJ.).

[44] *Id.* at 827-28, 724 A.2d at 124-25 (citations omitted).

[45] 355 Md. 528, 735 A.2d 1061 (1999).

opposed to whether Rule 5-404(b) is applicable) it misapplied that definition.

In *Sessoms v. State*,[46] the court of appeals contradicted the text of Rule 5-404(b) and confounded "other acts" jurisprudence by holding that the Rule does not apply at all, in criminal cases, with regard to "other acts" of anyone except the accused. This decision undoes the careful structure and public policy resolutions of Rule 5-404(b) and leaves the trial judges equipped only with Rule 5-403 when ruling, in criminal cases, on the admissibility of "other acts" evidence of persons other than the accused. In reaching this decision, the *Sessoms* majority relied on Maryland cases that had not raised the issue before the *Sessoms* court and misjudged the weight of the federal case law on the question.

A. *Klauenberg*

Klauenberg was tried and convicted for soliciting the murder of court of special appeals Chief Judge Joseph Murphy, who had presided, in the circuit court, over a dispute between the defendant and his sister regarding their father's estate. Evidence was admitted at trial that the defendant had offered another person money to murder Chief Judge Murphy.

Evidence of some of Klauenberg's "other acts" was admitted: testimony was given regarding the defendant's threats and menacing behavior to others involved in the civil lawsuit (his sister, her attorney, and a special auditor), as well as of his possession of guns and ammunition. Klauenberg's conviction was not reversed.

1. If the Other Acts Do Not Need to be "Bad" to Fall Within Rule 5-404(b), Why Does the Court Allow Itself to Be Taken There?

The majority opinion of the court of appeals, authored by Judge Cathell, began its Rule 5-404(b) discussion with promise. It helpfully and correctly explained that Rule 5-404(b) concerns "other acts," which may be either "good" or "bad" and either prior or subsequent to the act at issue at trial.[47] Nonetheless, for the stated reason that the defendant's pretrial motion in limine and his trial objections had been to exclude "bad acts" evidence, the majority was seduced to define "bad acts" (a category to which, it had just explained, Rule 5-404(b) is not restricted).

The majority's definition was as follows: "[A] bad act is an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit. It is from this general proposition that we evaluate whether the evidence to which appellant protests as erroneously admitted were bad acts under Maryland Rule 5-404(b)."[48] The majority then evaluated the matters as to which the Rule 5-404(b) issue was preserved for appeal[49] and, having found that they did not qualify as "bad acts," concluded that they thus did not fall within Rule 5-404(b).

The first flaw in the majority's analysis was its focusing solely on whether the evidence objected to was of "bad acts" and not, as Rule 5-404(b) states (and as the majority itself had explained), of "other acts." If evidence of "other acts" is erroneously admitted, whether those acts were "bad" will be relevant only to whether prejudice is likely to have resulted or if the error is harmless. *Klauenberg*'s emphasis on whether acts are "bad," and its apparent holding that Rule 5-404(b) is inapplicable because the acts were not "bad," is misleading.

Whether admitted evidence is of "other acts" -- not necessarily "bad acts" -- is the key to whether Rule 5-404(b) comes into play. For example, circumstantial evidence that is relevant to placing a defendant at the scene of the crime, or as having an instrumentality or fruit of the crime, is admissible to prove the defendant's commission of the charged crime, even though it coincidentally proves

[46] 357 Md. 274, 744 A.2d 9 (2000).

[47] 355 Md. at 547 n.3, 735 A.2d at 1071 n.3.

[48] *Id.* at 549, 735 A.2d at 1072.

[49] A number of objections were waived. *Id.* at 539-46, 551-55, 735 A.2d at 1066-71, 1072-75.

the defendant's commission of another crime.[50] It is, under these circumstances, not considered to be evidence of acts "other" than the one charged.

2. Having Been Taken Down a Wrong Turn, The Majority Struggles to Find the Other Acts Not to Be "Bad"

Having incorrectly followed the defendant's lead and set up the inquiry, as to the scope of Rule 5-404(b), to be whether the defendant's "other acts" were "bad," the majority then evaluated the objected-to evidence to determine whether it was evidence of "bad acts." The majority first reached the noncontroversial conclusion that the defendant's mere involvement in a civil lawsuit was not evidence of a "bad act."[51] But then it stretched.

It asserted that the sister's lawyer's testimony that the defendant had become "verbally confrontational and poked [the sister's lawyer] in the chest .... is not conduct that tends to impugn [the defendant's] character."[52] It found that the lawyer's testimony that, during a police search of the defendant's house, "'[t]here was one place [defendant] stood without moving while people went into other rooms in the basement, and fortunately the police were literally right next to him surrounding him as he went through this exercise,'"[53] and the lawyer "later discovered that there was a gun stored in the ceiling tiles above the area in which appellant stood still,"[54] was not evidence of "bad acts":

> To be sure, the fact that the police stood near appellant while he was acting peculiarly imparts a general impression that they feared appellant might act out. But there is no indication that he did. Standing in place without moving, which is the supposed bad act appellant argues should not have been disclosed to the jury, does not impugn his character. Standing and watching while one's house is being searched is probably a common reaction. Therefore, because this conduct to which [the lawyer] testified is not a bad act, the court did not abuse its discretion in admitting it.
>
> ....
>
> Similarly, [the lawyer's] testimony that two guns and ammunition were found on appellant's premises, without more, does not constitute a bad act....There was no indication that these firearms were obtained or possessed illegally. No evidence was offered at trial that appellant's guns were to be used in the murder. Therefore, under the circumstances of this case, the evidence of appellant's conduct toward [the lawyer] and the evidence of the guns were not bad acts.[55]

The majority's reasoning here was unpersuasive. Certainly, the defendant's acts, *in the context of the case*, would not be perceived as innocent by most jurors. His possession of guns and ammunition, coupled with his anger and his threatening behavior toward a participant in the civil suit, would make him seem dangerous.

For this reason, it was not surprising that Judge Raker, joined by Chief Judge Bell and Judge Eldridge, again filed a strong dissent; they would have found reversible error under Rule 5-404(b) in the admission of this evidence, as well as in the admission of other evidence during the guilt/innocence phase of the trial, tending to show the defendant's "bizarre" behavior, when the trial court had bifurcated for a later trial the issue of lack of criminal

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[50] *See, e.g.*, Solomon v. State, 101 Md.App. 331, 370-74, 376-78, 646 A.2d 1064, 1083-85, 1086 (1994); Stancil v. State, 78 Md.App. 376, 381-84, 553 A.2d 268, 270-72 (evidence that defendant, charged with kidnapping a baby, subsequently applied for food stamps and falsely claimed that she was the mother of the baby with her, was relevant to show that she possessed a fruit of the crime and thus to show her identity as the kidnapper), *cert. denied*, 315 Md. 692, 556 A.2d 674 (1989).

[51] Klauenberg at 550, 735 A.2d at 1072-73.

[52] *Id.* at 551, 735 A.2d at 1073.

[53] *Id.* at 550, 735 A.2d at 1073.

[54] *Id.*

[55] *Id.* at 550-51, 735 A.2d at 1073.

responsibility.[56]

3. A Better Route to Affirmance

In order to affirm Klauenberg's conviction, the majority did not need to find that the objected-to evidence was not within the ambit of Rule 5-404(b). The defendant's involvement in the civil lawsuit was not a "bad act", but it was an "other act," so the court of appeals should have applied Rule 5-404(b). The civil lawsuit was properly admissible under Rule 5-404(b), because it had "special relevance" to the defendant's motive to have Judge Murphy murdered. Proving "motive" is one of the permissible purposes specifically listed in Rule 5-404(b) for "other acts" evidence. This was, correctly, the basis of Judge Hubbard's ruling at trial.[57]

Moreover, Klauenberg's defense apparently was lack of intent.[58] The menacing conduct toward the sister's lawyer was an "other act," so that Rule 5-404(b) applied. But it was "specially relevant" to prove the defendant's anger toward his perceived adversaries in the lawsuit and thus admissible, under Rule 5-404(b), to show his intent to commit the charged crime. The majority should have affirmed the trial court's ruling on that basis.

Because Klauenberg's ability to personally commit the murder was not at issue, the most problematic piece of "other acts" evidence, with the greatest potential for causing unfair prejudice, was the description of the guns and ammunition at his house. It is unclear whether he may have planned to provide a weapon to the man he asked to murder Chief Judge Murphy. But, given the fact that "[b]oth the State and the defense talked to the jury about whether Klauenberg had the means to commit the offense," even the dissent concluded that, "[u]nder these circumstances, Klauenberg's possession of guns and ammunition might well have been highly relevant to the proceedings."[59] Having the means was not only on its own a purpose other than merely proving character, it was also relevant to intent to have the murder committed, and thus its admission under Rule 5-404(b) was not an abuse of discretion.

4. Effect

The majority opinion in *Klauenberg* properly articulates, but then clouds, the fact that Rule 5-404(b) addresses "other acts," not only "bad acts." It also provides a strained interpretation of what types of acts are not "bad," rather than simply holding that the "other acts" evidence was properly admitted to prove motive and intent. For both of these reasons, the opinion may mislead trial courts in future cases.

B. *Sessoms*

The court of appeals' decision in *Sessoms* misconstrues Rule 5-404(b). Unlike Rule 5-404(a)(1)(A) and (B), which refer specifically to "the accused" and "the prosecution,"[60] Rule 5-404(b) speaks broadly of "a

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[56] *Id.* at 559-60, 563 n.5, 735 A.2d at 1077-78, 1079 n. 5 (Raker, J., dissenting, joined by Bell, C.J., and Eldridge, J.).

[57] *Id.* at 563, 735 A.2d at 1079 (Raker, J., dissenting, joined by Bell, C.J., and Eldridge, J.).

[58] *Id.* at 560 & n.2, 735 A.2d at 1078.

[59] *Id.* at 560-61, 735 A.2d at 1078.

[60] MD. RULE 5-404(a)(1) provides:

> (1) *In General.* Evidence of a person's character or a trait or character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> (A) Character of Accused. Evidence of a pertinent trait of character of *an accused* offered by *the accused*, or by *the prosecution* to rebut the same;
>
> (B) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by *an accused* or by *the prosecution* to rebut the same, or evidence of a character trait of peacefulness of the victim offered by *the prosecution* in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (C) Character of Witness. Evidence of the character of a witness with regard to credibility, as provided in Rules 5-607, 5-608, and 5-609. (Emphasis added.)

person."[61] Yet, in *Sessoms*, the court of appeals made the stunning announcement that, in criminal cases, Rule 5-404(b) applies only to "other acts" of the "accused." The *Sessoms* majority removes the Rule's carefully structured analysis from a criminal case in which evidence of other acts by anyone else is offered. Taking away the application of the propensity rule removes one of the central supports of our justice system, essential to keeping trials focused on the case at issue.

In *Sessoms,* this liberalization of the rules of evidence was accomplished with regard to a person neither defendant nor victim, whose other acts were not central to what happened between the defendant and the victim. The *Sessoms* majority found that the exclusion under Rule 5-404(b) of evidence of allegations of other crimes by the alleged rape victim's brother was reversible error.

Sessoms leaves criminal trial courts with only Rule 5-403 to assess the admissibility of evidence of "other acts" by persons other than the accused. The three dissenting judges, Judge Wilner, joined by Judges Rodowsky and Raker, would have affirmed the trial court's ruling as a proper exercise of discretion under Rule 5-403.

The court of appeals could better achieve the purpose it had in mind by leaving Rule 5-404(b) intact in its application to acts of all persons and tweaking instead that part of the *Faulkner* gloss that requires "clear and convincing evidence" of the other acts.

1. Facts and Holding

Sessoms, a man, was charged with raping a woman. The defendant was convicted only of a third-degree sexual offense.[62] The court of appeals reversed.

The victim testified that the defendant, who was a stranger to her, dragged her into an alley and raped her twice at knife point.[63] She testified that she ran away and told her brother, and that her brother and a friend subsequently severely beat the defendant.[64]

Medical testimony and other circumstantial evidence, some of which was testified to by the victim's brother, supported the victim's testimony of rape and of its having occurred in the alley.[65] The brother's character for truthfulness was impeached by his prior convictions for robbery, including a robbery the day after the alleged rape.[66]

The defendant testified that he was beaten unconscious by two men, one of whom claimed that the defendant had robbed the man's sister.[67] When he regained consciousness in the hospital, he noticed that money and lottery tickets were missing from his pockets.[68]

The trial court permitted the defense to question the victim to establish that, when a police officer drove her home from the hospital where she had been examined and treated, she initially identified a man on the street as her brother, but a moment later said, "'I ain't saying it is my brother or isn't my brother.'"[69] The trial court refused to allow the defense to show that, in the time intervening between those statements, a third man (not the defendant) ran up to the police car and said that he had just been robbed by the person whom the victim had identified as her brother.[70]

The court of appeals held, first, that Rule 5-404(b) and the three-step *Faulkner* analysis under it simply do "not apply [in criminal cases] to crimes, wrongs, or acts

[61] MD. RULE 5-404(b), *supra* at text accompanying note 4.

[62] Sessoms v. State, 357 Md.274, 281, 744 A.2d 9, 13 (2000).

[63] *Id.* at 277, 744 A.2d at 11.

[64] *Id.*

[65] *See id.* at 277-78, 744 A.2d at 11 (majority opinion); *id.* at 296-97, 744 A.2d at 21 (Wilner, J., dissenting, joined by Rodowsky and Raker, JJ.).

[66] *Id.* at 302-03, 744 A.2d 24-25 (Wilner, J., dissenting, joined by Rodowsky and Raker, JJ.).

[67] *Id.* at 278, 744 A.2d at 12.

[68] *Id.* at 279, 744 A.2d at 12.

[69] *Id.*

[70] *Id.* at 279-80, 744 A.2d at 12.

committed by anyone other than the defendant."[71] It then held that the trial court had committed reversible error in excluding the evidence of the allegation of another robbery by the victim's brother, as it was relevant to bias on the part of both the victim and the brother and should have been admitted under Rule 5-616(b)(3). The court of appeals was wrong on both counts.

A better course, which would achieve appropriate protection of the accused, would be to recognize that Rule 5-404(b) applies, but either to hold that the part of the *Faulkner* gloss that requires "clear and convincing evidence" of the other acts is applicable only to other acts of the accused, or to overrule *Faulkner* as to that higher standard altogether.

2. The Court of Appeals Incorrectly Held that Rule 5-404(b) is Inapplicable to Acts of Persons Other Than the Accused

Judge Cathell, writing for the *Sessoms* majority, stated:

> We hold that the test for admitting other crimes evidence in criminal proceedings enunciated in *Faulkner* generally does not apply to crimes, wrongs, or acts committed by someone other than a criminal defendant....Because this rule is premised upon protecting an accused from undue prejudice, it does not apply to exclude other crimes evidence involving alleged actions by others testifying in the criminal proceedings.[72]

Such evidence will be subject to exclusion pursuant only to Rule 5-403.

The removal of Rule 5-404(b)'s strictures tips the scales in favor of admission of "other acts" evidence in criminal cases with regard to acts of persons other than the accused, in two respects. First, Rule 5-403, unlike Rule 5-404(b), is a rule favoring admission, unless the probative value is "substantially outweighed" by one or more of the countervailing considerations. Second, the application of only Rule 5-403 removes the requirement that there be "clear and convincing"[73] proof of the other acts.

a. The Majority Misread Rule 5-404(b) and Prior Maryland Case Law

Traditional rules of statutory construction dictate that the phrase "a person" in Federal Rule of Evidence ("FRE") 404(b) and Maryland Rule 5-404(b) be read to mean "a person"[74] -- not, as *Sessoms* in effect has held, "a person in civil cases, but in criminal cases, only the accused."

The *Sessoms* majority cited Maryland cases applying the Rule 5-404(b) "propensity" rule to the accused, and the rationale therefor, stressing the risk of unfair conviction of the accused because of the admission of other acts evidence.[75] It jumped to the conclusion that, therefore, it had "consistently held that, in a criminal proceeding, [Rule 5-404(b), and its *Faulkner* analysis] is a standard limited to acts committed by a defendant."[76] This is an overstatement of the prior Maryland case law.

None of the Maryland cases cited for this proposition in *Sessoms* involved facts where "other acts" evidence

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[71] *Id.* at 281, 744 A.2d at 13.

[72] *Id.* at 294, 744 A.2d at 20.

[73] See *supra* note 14 and accompanying text.

[74] *See* United States v. McCourt, 925 F.2d1229, 1232 (9th Cir. 1991). ("Fed.R.Evid. 404(a) provides that evidence of "*a person's*" character is not admissible for the purpose of proving action in conformity therewith except for pertinent character traits of an '*accused*,' Fed.R.Evid. 404(a)(1), a '*victim*,' Fed.R.Evid. 404(a)(2), or a '*witness*,' Fed.R.Evid. 404(a)(3), 607, 608, 609. It therefore appears that Congress knew how to delineate subsets of 'persons' when it wanted to, and that it intended 'a person' and 'an accused' to have different meanings when the Rules speak of one rather than the other. Because Rule 404(b) plainly proscribes other crimes evidence of 'a person,' it cannot reasonably be construed as extending only to 'an accused'") (emphasis in original).

[75] *Id.* at 283-84, 744 A.2d at 14-15.

[76] *Id.* at 283, 744 A.2d at 14.

had been offered as to anyone other than the accused.[77] The issue never having arisen, it is misleading to state that the court of appeals thus had held that the "other acts" rule is limited to acts committed by only the accused.

In addition, the *Sessoms* court overlooked the fact that risk of an unfair conviction is not the lone rationale for Rule 5-404(b). If it were, Rule 5-404(b) would be restricted, as is Rule 5-404(a)(1), to "the accused" only. Rule 5-404(b) instead refers to "a person" and is applicable in both civil and criminal cases. Its rationale is comprised of all the considerations summarized generally in Rule 5-403: a balancing of the relevance, *i.e.*, the strength of the "probative value" of the evidence, against (1) the risk of "unfair prejudice" to any party (as well as the risk of unnecessary humiliation and embarrassment of a non-party witness, which concern is directly recognized in Rules 5-412 and 5-611(a)); (2) the "distraction" of the jury from the most important issues in the case; and (3) the injudicious use of precious court "time." Particularly in criminal cases, where discovery is narrower than in civil cases, the risk of surprise is also a factor.

All these concerns apply in a criminal case with regard to evidence of "other acts" of persons other than the accused. It is easy to foresee, for example, a defendant's argument that someone other than she committed the charged crime. The defendant then might offer "other acts" evidence of that third person to show that he committed this one. This possibility raises all the concerns of possible unfair prejudice to the State, confusion, and waste of time, which the drafters of the rules resolved by the combination of Rule 5-404(b) (which codifies *Faulkner*'s requirement of "special relevance") and Rule 5-403 (in its role to possibly exclude weak evidence that passes muster under Rule 5-404(b)).[78]

b. Federal Authority and Case Law of Other States is Less Supportive of *Sessoms* than the Court Indicates

The *Sessoms* majority overstates its support when it cites twelve federal cases and five cases from states outside Maryland as having adopted the interpretation of FRE 404(b) and its state corollaries (like Maryland Rule 5-404(b)) that the majority espouses: that in a criminal case, Rule 404(b) applies only to evidence of the accused's other acts.[79] It asserts that "[o]nly the Ninth Circuit has expressed the minority view," *i.e.*, that FRE 404(b) applies not only to acts by the accused but also to "acts committed by witnesses."[80] In a footnote, the *Sessoms* majority itself points out, however, that the United States Court of Appeals for the Eleventh Circuit "later questioned its own reasoning" in having held as *Sessoms* does.[81]

Indeed, a number of the non-Maryland cases cited by the *Sessoms* majority in support of its decision are not on point. Three, from the United States Courts of Appeals for the First and Eighth Circuits, concern other issues altogether, such as who has standing to object under FRE 404(b).[82] Several others, decided by the Second, Fifth, and Eleventh Circuits, did not involve FRE 404(b) "other acts" at all, but acts by co-conspirators that were part of

[77] The facts concerned other acts of only the accused in the following cases cited in *Sessoms*, *id.* at 283-84, 744 A.2d at 14-15; Wynn v. State, 351 Md. 307, 316-317, 718 A.2d 588, 592-593 (1998); State v. Taylor, 347 Md. 363, 368-369, 701 A.2d 389, 392 (1997); Conyers v. State, 345 Md. 525, 560, 693 A.2d 781, 798 (1997); Ayers v. State, 335 Md. 602, 630, 645 A.2d 22, 35 (1994); State v. Faulkner, 314 Md. 630, 633, 552 A.2d 869, 897 (1988); Straughn v. State, 297 Md. 329, 333, 465 A.2d 1166, 1168 (1983); State v. Jones, 284 Md. 232, 238, 395 A.2d 1182, 1185 (1979); Cross v. State, 282 Md. 468, 473, 386 A.2d 757, 761 (1978); McKnight v. State, 280 Md. 604, 612, 375 A.2d 551, 556 (1977); and Ross v. State, 276 Md. 664, 669, 350 A.2d 680, 684 (1976).

[78] See *infra* notes 91-113 and accompanying text.

[79] *Id.* at 287-91, 744 A.2d at 16-19.

[80] *Id.* at 290 n.5, 744 A.2d at 18.

[81] *Id.* at 289 n.5, 744 A.2d at 18.

[82] Of those cases, United States v. David, 940 F.2d 722, 736 (1st Cir. 1991) (cited in *Sessoms*, 357 Md. at 288, 744 A.2d at 18) addressed only the issue of standing to object.

David, 940 F.2d at 737, cites United States v. Gonzalez-Sanchez, 825 F.2d 572 (1st Cir.), *cert. denied*, 484 U.S. 989 (1987) (cited in *Sessoms*, 357 Md. at 289, 744 A.2d at 18). In *Gonzalez-*

the charged crime or conspiracy at issue at trial.[83]

Nor do the cases the *Sessoms* court cited that did concern "other acts" by third parties provide the overwhelming support that its opinion suggests. Several of the cited cases from two circuits (the Fifth and Eleventh) and three states (Colorado, Massachusetts, and New Jersey) unthinkingly rely on dictum in one Fifth Circuit case, in which evidence of a third person's acts was admitted in the government's case against the accused. And other cases from six federal circuits (the Second, Third, Fifth, Sixth, Ninth, and Eleventh) and three states (Michigan, Nebraska, and Ohio) support the view characterized in *Sessoms* as the "minority" view.

(1) Evidence of Others' Acts Admitted Against the Accused

In three federal cases cited by the *Sessoms* majority, the evidence of others' "other acts" was admitted against the accused. The first, decided in the Fifth Circuit, stated in dictum that FRE 404(b) might not apply; the second and third, decided in the Eleventh Circuit, relied on that dictum.

In *United States v. Krezdorn*,[84] the United States Court of Appeals for the Fifth Circuit found no error in the admission, against the accused, of evidence of a third person's acts, saying that, "[a]rguably,"[85] Rule 404(b) did not apply. The court went on to hold that, even if Rule 404(b) applied, the evidence was properly admitted as proof of a "common scheme" between that third person and the accused, regarding the charged crimes themselves. Therefore, its decision did not rest on the "arguable" inapplicability of FRE 404(b).

Yet this dictum bred a number of progeny, including two cases decided *per curiam* by the United States Court of Appeals for the Eleventh Circuit in 1983 (which in 1990 questioned its own reasoning in the case[86]). In *United States v. Edwards*,[87] the court of appeals correctly held that the "other acts" evidence, a co-conspirator's statements regarding the illegal drug business, was properly admissible as to the "knowledge" of that co-conspirator, which is a permissible purpose listed explicitly in FRE 404(b). It also went on to state, however, that the evidence in any event would not be subject to FRE 404(b), and

Sanchez, FRE 404(b) was inapplicable, because the evidence in question was not offered to prove anyone's propensity to commit crime. 825 F.2d at at 582-83. The part of the case quoted by the *Sessoms* Court is dictum, citing *Morano* (see *infra* notes 88-90 and accompanying text). The *Gonzalez-Sanchez* court also found as an alternative that, even if FRE 404(b) applied, the evidence was properly admitted; but, if error, it was harmless error. *Id.* at 583.

In United States v. Kelley, 545 F.2d 619, 622-23 (8th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977) (cited in *Sessoms*, 357 Md. at 290, 744 A.2d at 18), the defendants, who were union officials charged with acts of violence towards the victims, had wished to cross-examine the victims about their having threatened the defendants and having been violent towards them on other occasions. But, as there was no claim of self-defense, this evidence was held to be irrelevant as substantive evidence. FRE 404(b) therefore was inapplicable. The court of appeals also held that the trial court had not clearly abused its discretion in finding the evidence irrelevant to the witness's propensity for truthfulness. 545 F.2d at 623.

[83] United States v. Diaz, 878 F.2d 608, 616 (2d Cir. 1989); United States v. Norton, 867 F.2d 1354, 1360-61 (11th Cir.1989); United States v. Sepulveda, 710 F.2d 188, 189 (5th Cir. 1983); United States v. Bates, 600 F.2d 505, 509 (5th Cir. 1979) (cited in *Sessoms*, 357 Md. at 289-90, 744 A.2d at 18).

[84] 639 F.2d 1327, 1332-33 (5th Cir. 1981). Additionally, the court of appeals did not find reversible error in the admission of other acts evidence regarding the accused, even though the appellate court found it not to have special relevance. *Id.* at 1331-32.

[85] *Id.* at 1332. *See id.* at 1333 ("We need not decide, however, whether Rule 404(b) applies to this situation since the evidence of monetary payments is admissible whether or not Rule 404(b) applies").

[86] United States v. Sellers, 906 F.2d 597, 604-05 & n.11 (11th Cir. 1990) (also stating that admission of that evidence would have complied with FRE 404(b), anyway, because it was offered to show law enforcement defendants' knowledge that a third person, whom they allowed to beat a prisoner, was violent).

[87] 696 F.2d 1277, 1279-81 (11th Cir. 1983) (per curiam), *cert. denied*, 461 U.S. 909 (1983).

cited *Krezdorn*.

In *United States v. Morano*,[88] the Eleventh Circuit court of appeals again stated that FRE 404(b) was inapplicable with regard to evidence of prior arsons of the "torch" whom the accused had allegedly hired to commit the charged arson, offered by the prosecution to show modus operandi, identity, and common plan with the accused. The court explicitly relied on "dictum" in *Krezdorn* as support for its conclusion.[89] But the court explained that the same principles that underlie FRE 404(b), regarding special relevance, should be followed in applying FRE 403[90] and affirmed the decision not to exclude the evidence under FRE 403 (the *Sessoms* dissent would have followed this approach).

Clearly, none of these cases provides strong support for *Sessoms*. Moreover, the stated rationale of *Sessoms* -- to protect only "the accused" against unfair prejudice -- is not at all advanced by more freely admitting this "other acts" evidence offered by the prosecution as part of its case: quite the contrary.

(2) Evidence of Others' Acts, Offered or Admitted by the Accused

The cases in which, like *Sessoms*, the accused is the party offering the "other acts" evidence regarding third persons, are not nearly as one-sided as the *Sessoms* majority asserts. The United States Court of Appeals for the Ninth Circuit's decision in *United States v. McCourt*[91] is the most thoughtful of the cases holding FRE 404(b) applicable to such "other acts" evidence concerning persons other than the accused, but it does not stand alone. Three other federal courts of appeal and appellate courts in three states concur with *McCourt*.

(a) Cases *Contra* to *Sessoms*

In *McCourt*, in an opinion authored by Judge Rymer, the court of appeals affirmed the district court's exclusion, under FRE 404(b), of evidence offered by the accused that a third person had committed other crimes and therefore had likely committed the charged crimes. The court of appeals found that the proffered evidence was merely of propensity (*i.e.*, in Maryland's phrase, it had no "special relevance") and was properly excluded. The court reviewed many of the decisions cited in *Sessoms*, as well as others, and pointed out their shortcomings. Judge Rymer pointed out:

> While [the appellant] correctly notes that several opinions "state" that Rule 404(b) applies to acts committed by the defendant, none holds that it applies *only* to the defendant.
>
> Most circuits which have commented on the applicability of Rule 404(b) to prior acts of persons other than the defendant draw on dicta from *United States v. Krezdorn*, 639 F.2d 1327 (5th Cir. 1981).[92]

McCourt cited favorably three decisions of the Fifth and Third Circuits that had affirmed the exclusion, under FRE 404(b), of evidence of "other crimes" by persons other

[88] 697 F.2d 923, 926 (11th Cir. 1983) (per curiam).

[89] *Id.*

[90] *Id.* ("[A]lthough Rule 404(b) does not control this situation, the exceptions listed in the Rule should be considered in weighing the balance between the relevancy of this evidence and its prejudice under Rule 403. In this case, the arson at [defendant's business] and the arson for which [the torch] was convicted bear such striking similarities as to 'mark them as the handiwork of the same individual.' *United States v. Goodwin*, 492 F.2d 1141, 1154 (5th Cir. 1974); *cf.* Fed.R.Evid. 404(b) (evidence of plan or identity)").

[91] 925 F.2d 1229 (9th Cir.), *cert. denied*, 502 U.S. 837 (1991). *Accord* United States v. Spencer, 1 F.3d 742, 744-45 (9th Cir. 1992) (no abuse of discretion in precluding defendant charged with being convicted felon in possession of firearm, based on gun seized from owner's automobile in which defendant was passenger, from presenting evidence of unrelated arrest and seizure of another handgun from car owner in another car).

[92] 925 F.2d at 1233.

than the accused.[93]

In 1983 the Fifth Circuit affirmed the exclusion, under FRE 404(b), of evidence of a non-accused's other acts, that would have been favorable to the defense. The defendants were charged with conspiracy to commit extortion regarding a rape allegedly committed on one of them by the government's witness. The government's witness testified that the sexual act had been consensual. The trial court refused to permit the defense to prove that the witness had previously raped other persons, in order to show that he had raped the defendant. The appellate court affirmed, stating that "the defendants' purpose in attempting to introduce such evidence was precisely what is forbidden under this rule [FRE 404(b)]."[94]

The Third Circuit also affirmed the exclusion of third persons' "other acts" evidence offered by the defense. In a 1983 drug case, the informant testified for the government. The defendant, who argued that he had been entrapped by the informant's convincing him to get drugs, offered evidence of previous fraudulent schemes by the informant, to show that the informant had been duplicitous with others and thus with the accused.[95] The trial court was held to have correctly excluded the evidence, under both FRE 404(b) and 608(b), as well as to have excluded it as cumulative when it was offered for impeachment purposes.

In a 1982, *per curiam* decision, the Third Circuit similarly held that the district court had properly applied FRE 404(b) to exclude evidence of a government witness's involvement in a past scheme, when there was no evidence that the defendant had been the victim of a similar scheme.[96]

McCourt also quotes four leading treatises on the Federal Rules of Evidence, the authors of which all agree that FRE 404(b) applies to acts of persons other than the accused.[97]

Subsequent to *McCourt*, state appellate courts in Michigan,[98] Nebraska,[99] and Ohio[100] have followed *McCourt* on this issue. In addition, the United States Court of Appeals for the Sixth Circuit[101] has twice ruled contrary to *Sessoms*.

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[93] *Id.* at 1235.

[94] United States v. Reed, 715 F.2d 870, 876 (5th Cir. 1983).

[95] United States v. Dalfonso, 707 F.2d 757, 762 (3d Cir. 1983).

[96] United States v. Sturm, 671 F.2d 749, 751 (3d Cir.1982) (per curiam), *cert. denied*, 459 U.S. 842 (1982).

[97] 925 F.2d at 1232 n.2 (quoting 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 140, at 175 (rev. ed. 1985); 2 WEINSTEIN & BERGER, EVIDENCE ¶ 404[04], at 404-39-40 (1989); WEISSENBERGER, FEDERAL EVIDENCE § 404.4, § 404.12, at 80, 88 (1987); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5239, at 457-58 (1978)).

[98] People v. Catanzarite, 536 N.W.2d 570, 572-73 (Mich. App. 1995) (defendant must comply with Rule 404(b) when offering other crimes evidence regarding third person; under facts, no abuse of discretion in excluding evidence); People v. Rockwell, 470 N.W.2d 673, 674-75 (1991) (per curiam) (*semble*).

[99] State v. Gardner, 498 N.W.2d 605, 609-10 (Neb. App. 1993) (propensity evidence offered by defendant to show that third person had committed charged child molestation was properly excluded under Rule 404(b)).

[100] State v. Mason, 694 N.E.2d 932, 950-51 (Ohio 1998) (some evidence offered by defense qualified under Rule 404(b), *e.g.*, to explain blood in car, and some did not).

[101] United States v. Hart, 70 F.3d 854, 859 (6th Cir. 1995) (evidence of alleged accomplice's prior deceptions of FBI and IRS agents in unrelated case was inadmissible in defendant's prosecution for embezzlement and filing false income tax returns, when defendant offered it to show that accomplice's past success in conning federal agents made it more likely that he would have succeeded in conning defendant in instant case; "As [the accomplice] was neither the accused, a victim, nor a witness in this case, none of the Rule 404(b) exceptions would permit the introduction of the proffered character evidence"), *reh'g denied, cert. denied*, 517 U.S. 1127 (1996); United States v. Peters, 15 F.3d 540, 545 (6th Cir. 1994) (excluding, under FRE 404(b), allegations that police officer had previously planted cocaine on suspect in unrelated case for prosecution for possession and conspiracy to possess crack cocaine with intent to distribute was not abuse of discretion, in absence of evidence that officer had opportunity to plant drugs in instant case), *reh'g denied, cert. denied*, 513 U.S. 883 (1994).

(b) Cases Supportive of *Sessoms*: Defense of Mistaken Identity

On the other side of the scales, decisions from three states, cited by *Sessoms*, have held that FRE 404(b) does not apply to evidence of acts of third persons. These cases involved evidence offered by the accused in support of a defense of mistaken identity.

(i) Cases Supporting *Sessoms*

Four of these cases -- from Colorado and New Jersey -- involved defenses of misidentification by eyewitnesses; evidence of the third person's similar acts was offered to identify him, rather than the accused, as the perpetrator of the charged crime.[102] Another case, from Massachusetts, involved the defendant's offering evidence of his having been misidentified earlier by another victim, in another case.[103]

The courts in these cases seemed to feel constrained to avoid FRE 404(b) so as to lower the bar for the degree of distinctiveness that the defendant would have to show in order to make the "other crimes" evidence sufficiently similar to the charged crime. They overlooked the fact that the language of the Rule does not require such distinctiveness. The degree of distinctiveness is merely a factor, instead, in the balancing of probative value versus the risk of unfair prejudice. The Colorado, New Jersey, and Massachusetts courts could have reached the same result, as to admissibility, under FRE 404(b), coupled with FRE 403 (*i.e.*, two parts of the *Faulkner*-5-404(b) tripartite analysis).

(ii) A 404(b) Approach Was Possible

Thus, the better approach, leading to the same result, would have been to resolve these cases under FRE 404(b), by finding the evidence admissible to prove "identity," if the other crimes were sufficiently similar to the charged crime so as to have enough probative value to be worthy of admission.[104] Several other cases not cited in *Sessoms* -- from the District of Columbia and from Maryland's Court of Special Appeals -- properly have affirmed the exclusion of such evidence when it lacks sufficiently strong probative value to have the necessary "special relevance" under 404(b).[105] Both

[102] People v. Flowers, 644 P.2d 916, 918-20 (Colo. 1982) (but no error in exclusion under facts of case), *appeal dismissed*, 459 U.S. 803(1982); People v. Bueno, 626 P.2d 1167, 1170 (Colo. Ct. App. 1981) (evidence should have been admitted); State v. Garfole, 76 N.J. 445, 388 A.2d 587 (1978) (remanding, however, to determine strength of defendant's proffer; defendant wanted to show that similar crimes had been committed at times for which he had alibis, to show that he had been misidentified) (see also discussion of other jurisdictions' cases, 388 A.2d at 591-92) (note that three dissenting justices would not have remanded; of these, two would have affirmed, and one reversed, the conviction); State v. Williams, 214 N.J. Super. 12, 20, 518 A.2d 234, 238 (App. Div. 1986). *See also* Winfield v. United States, 676 A.2d 1 (D.C. App. 1996) (reversible error to exclude evidence). *See generally* Annot., *Admissibility of Evidence of Commission of Similar Crime by One Other Than Accused*, 22 A.L.R.5th (1994).

[103] Commonwealth v. Jewett, 392 Mass. 558, 563, 467 N.E.2d 155, 158 (1984) (earlier misidentification of defendant as to another crime, where defendant could not have committed it). The evidence in *Jewett* would not seem to fit the "identity" route for substantive evidence in FRE 404(b), yet the appellate court puzzlingly stated that the evidence did not come in to impeach the second victim's identification -- suggesting, therefore, that the evidence was substantive.

[104] *See* Gates v. United States, 481 A.2d 120, 124-25 (D.C. App. 1984) (no abuse of discretion in excluding hearsay evidence offered by defense regarding a rape, of which rape defendant was wrongly accused, for purposes of arguing that defendant had a look-alike who was a rapist, where the proffer lacked details as to *modus operandi*, characteristics of the victim, and time of day), *cert. denied*, 470 U.S. 1058 (1985).

[105] Jamison v. United States, 600 A.2d 65, 69-70 (D.C. App. 1991) (evidence that defendant's son, who lived elsewhere but visited defendant's house regularly, had been seen in possession of cocaine outside of house, was properly excluded in narcotics prosecution based on discovery of cocaine in house, absent evidence of temporal connection); Johnson v. State, 4 Md. App. 648, 244 A.2d 632 (1968) (proper to have excluded evidence of witness's prior conviction for possession of barbiturates, which would have been admissible only with regard to impeachment of credibility of witness and would have

the United States Courts of Appeals for the Second and Third Circuits in the *Stevens*[106] and *Aboumoussallem*[107] cases, cited favorably in *Sessoms*, have held that a defendant is free to offer "reverse 404(b)" evidence concerning another person, to identify that person as the perpetrator of the charged crime, as long as its probative value is not substantially outweighed by FRE 403 considerations.

c. Half and Half: *Aboumoussallem* and *Stevens* Provided Greater Protection for the Accused, But Utilized Both FRE 404(b) and 403

The Second and the Third Circuits have applied both FRE 404(b) and 403 to "other acts" evidence offered by the accused regarding another person. In *Aboumoussallem*, decided in 1984 by the United States Court of Appeals for the Second Circuit, the accused's defense was that he had been duped into carrying drugs. He offered evidence that his coconspirators had duped others, on the theory that it was admissible under FRE 404(b) to show that they had duped him as part of a "common plan."[108] The court of appeals stated that the trial court had erred not in applying FRE 404(b) at all, but in applying the same standard, under FRE 404(b), to exculpatory evidence of "other crimes" of third parties relevant to the accused's defense, as it would to evidence of the accused's similar acts, offered by the government.[109] The court of appeals reasoned that "when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense, ... the only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense."[110] Thus, the court chose to apply an "asymmetric" standard under FRE 404(b), depending on whether the evidence was offered by or against the defendant.[111]

Nonetheless, on the facts before it, the court of appeals in *Aboumoussallem* affirmed the exclusion of the exculpatory evidence under FRE 403 on the grounds of low probative value as to "common scheme," trial delay, and potential jury confusion,[112] as not having been an abuse of discretion.

In *Stevens*, on the other hand, the Third Circuit found that it was reversible error to have excluded the exculpatory evidence of similar crimes by a third person, as the proffered evidence survived both a FRE 404(b) and 403 analysis.[113]

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been collateral and irrelevant to issue of innocence of defendant, who claimed that witness, and not defendant, was participant in the charged crime). See also *supra* note 104.

[106] United States v. Stevens, 935 F.2d 1380, 1384, 1401-07 (3d Cir. 1991) (reversible error to exclude evidence that victim of very similar crime, who was of same race as his assailant, did not identify defendant, to show that eyewitness of another race had misidentified defendant in charged crime; evidence qualified under FRE 404(b) and 403).

[107] 726 F.2d 906 (2d Cir. 1984) (cited in *Sessoms*, 357 Md. at 287-88, 744 A.2d at 17).

[108] *Id.* at 911.

[109] *Id.* ("Whether or not evidence concerning a co-conspirator's 'plan' to inform his couriers could be introduced by a prosecutor to prove a defendant's knowledge, we believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword").

[110] *Id.* at 911-12 (footnotes and citations omitted).

[111] The Second Circuit relied on the fact that FRE 609, regarding impeachment of witnesses by their prior convictions, was asymmetric in its treatment of the accused versus other witnesses, explicitly providing (before its amendment in 1990) for consideration only of a prejudicial effect to the defendant. *Id.* at 912 n.5. In this author's opinion, the fact that FRE 609 is explicit in such treatment, and FRE 404(b) is not is, to the contrary, clear evidence that FRE 404(b) itself was not intended to treat accuseds and non-accuseds differently. Any desirable flexibility may be accommodated via FRE 403.

[112] *Id.* at 912 n.5.

[113] 935 F.2d at 1107.

d. The *Sessoms* Court Should Have Held that the Trial Judge Correctly Found that Rule 5-404(b) Applied

The court of appeals' decision in *Sessoms* involved evidence that was offered by the defense. The court may have thought it was "helping" criminal defendants by holding that Rule 5-404(b) applies only with regard to evidence of other acts by an accused. But the court did not restrict its decision to evidence offered by the accused. *Sessoms*' plain language applies equally to free the government from the strictures of Rule 5-404(b) when it offers "other acts" evidence regarding co-conspirators or defense witnesses other than the accused. Certainly a criminal accused might suffer unfair prejudice from such evidence.[114]

The policy reasons underlying FRE 404 and Md. Rule 5-404 support the application of FRE 404(b) and Rule 5-404(b) to all persons' "other acts," no matter by whom offered. Only if the "other acts" evidence has some "special relevance" should the trial court admit it; to hold otherwise would waste precious court time and confuse and distract the fact-finder, as well as risk unfairly prejudicing one or the other party's case.

e. A Better Path Would Be to Limit *Faulkner*

It may be that the Court of Appeals of Maryland did not want to impose the high *Faulkner* standard of "clear and convincing evidence" on an accused who wished to offer exculpatory evidence -- in *Sessoms*, of a third person's other acts. This problem, however, would be better solved in a way other than making Rule 5-404(b) altogether inapplicable to acts of persons other than the accused.

First, the court could have reasonably held that, for policy reasons, the *Faulkner* gloss regarding "clear and convincing evidence" applies only when the "other acts" evidence is offered against a criminal accused. There are good reasons to single out the accused for special protection from the risk of unfair prejudice, as well as not to erect too high a bar against the accused's admission of relevant evidence in his or her defense.[115] This approach would have been the easiest one to take.

Another, more intellectually attractive possibility would have been to overrule that part of *Faulkner* which requires "clear and convincing evidence" of the other acts, leaving the strength of proof as a factor in *Faulkner*'s final step of balancing probative value versus competing considerations. This approach would put Maryland squarely in line with the federal cases,[116] such as *McCourt* and *Aboumoussallem*, that apply FRE 404(b) and then FRE 403. Indeed, Maryland followed this same approach in Rule 5-609, when it rejected as unnecessary FRE 609(a)(1)'s explicitly asymmetric

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[114] *See, e.g.*, United States v. Sellers, 906 F.2d 597, 604 n.11 (11th Cir. 1990) ("The plain language of Rule 404(b) refers to 'persons,' not 'defendants,' and Rule 404(a) carves out specific exceptions relating to the 'accused,' 'victim[s],' and 'witness[es].' Where, as in *Morano* and this case, the non-defendant's 'extraneous' act, if proved, directly supports the guilt of the defendant as to the crime charged, that 'extraneous' act should not, it seems, be subject to proof through the improper character-evidence route condemned by Rule 404"); United States v. Cardall, 885 F.2d 656, 671, *rehearing denied* (10th Cir. 1989) (evidence of unlawful acts in connection with business that was predecessor to one involved in prosecution was not admissible against defendant where evidence concerned bad acts of defendant's other associates, not defendant, and was not sufficiently tied to him). See also *supra* notes 84-90 and accompanying text.

[115] *E.g.*, State v. Garfole, 388 A.2d 587, 591 (N.J. 1978) ("[A] lower standard of degree of similarity of offenses may justly be required of a defendant using other-crimes evidence defensively than is exacted from the State when such evidence is used incriminatorily"). *See* United States v. Stevens, 935 F.2d 1380, 1384, 1405 (3d Cir. 1991) ("When a *defendant* proffers 'other crimes' evidence under Rule 404(b), there is no possibility of prejudice to the defendant; therefore, the other crime need not be a 'signature' crime. Instead, it only need be sufficiently similar to the crime at bar so that it is relevant under Fed.R.Evid. 401 and 402, and that its probative value is not substantially outweighed by Fed.R.Evid. 403 considerations").

[116] *See* Huddleston v. United States, 485 U.S. 681 (1988) (proponent need only provide sufficient evidence to support fact-finder's reasonable finding of fact that the alleged actor committed the act).

treatment of accuseds and other witnesses, with regard to impeachment by prior conviction, because the role of the witness will affect the trial court's determination of the degree of risk of unfair prejudice.[117]

3. *Sessoms* Majority Both Misconstrues Rule 5-616(b)(3) and Overlooks the Hearsay Rule

The *Sessoms* majority misinterpreted Rule 5-616(b)(3)[118] when it held that evidence of the allegation of a robbery of a third person by the victim's brother, a few hours after the defendant's alleged rape of the victim and the defendant's being beaten by the brother and his friend, should have been admitted to show a "motive to lie"[119] on the part of the victim and the brother, both of whom testified at trial.

a. The Brother's Alleged Robbery of a Third Person Provided No Motive to Falsely Claim that the Defendant Had Raped the Victim

Rule 5-616(a)(3) permits evidence of other acts that directly create a motive to testify falsely in the case before the court, as was the situation in the United States Supreme Court's decision in *Davis v. Alaska*.[120] There the government's principal witness's juvenile probationary status was held to be relevant to show his motive to shift the blame for the charged crime from himself to the defendant. Had the witness been charged with the crime, he would have been incarcerated. His probationary status "upped the stakes" for the witness with regard to the outcome of the particular case before the court.

In *Sessoms*, the defendant testified to facts suggesting that the victim's brother beat and robbed him and that the victim and her brother concocted the rape allegation as a cover-up for that robbery. The trial court properly admitted that evidence as relevant to the occurrence or nonoccurrence of the alleged rape.

But the court of appeals went too far in holding that it was error to exclude evidence of another alleged robbery by the brother. This robbery had nothing to do with the defendant. Its alleged commission gave the victim and her brother no reason to falsely accuse the defendant of anything.

Its only relevance would be as pure propensity evidence. The logical progression would have to be that (1) the brother robbed the third person, therefore (2) it is more likely that he robbed the defendant, too. And if the accusation is offered for its truth, as it had

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[117] MD. RULE 5-609(a) provides, in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if ... (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

[118] MD. RULE 5-616(b)(3) provides: "Extrinsic evidence of bias, prejudice, interest, or other motive to testify falsely may be admitted whether or not the witness has been examined about the impeaching fact and has failed to admit it."

[119] 357 Md. at 292, 744 A.2d at 19.

[120] 415 U.S. 308, 316 (1974) ("A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand"); Ebb v. State, 341 Md. 578, 589 & n.2, 671 A.2d 974, 980 & n.2 (1996).

For an example of a case where the proffered evidence was insufficiently related to the pending case to be admissible under *Davis*, *see, e.g.*, United States v. Barrett, 598 F.Supp. 469, 474-75 (D.Me. 1984) (court having provided two opportunities for defense counsel to examine prosecution witness to show, as foundation, any potential bias on his part resulting from unrelated, pending indictment against such witness, evidence of pending homicide charge against witness was properly excluded as irrelevant), *aff'd*, 766 F.2d 609, 615 (1st Cir. 1985), *cert. denied*, 474 U.S. 923 (1985), *post-conviction relief denied*, 763 F.Supp. 658, 666 (D.Me. 1991), *aff'd*, 965 F.2d 1184,1185 (1st Cir. 1992), *dismissal of post-conviction relief affirmed*, 178 F.3d 34,57 (1st Cir. 1999). *See also* United States v. Young, 952 F.2d 1252, 1259 (10th Cir. 1991) (whether employer accused former employee of embezzlement was collateral to whether another employee committed bank fraud, and, thus, former employee's testimony was inadmissible to refute employer's denial that he accused former employee of embezzlement).

to be, to logically help to prove what it is offered to prove, then, as Judge Wilner pointed out in dissent, it is a "rank hearsay accusation ... [properly] excluded because it was hearsay, irrelevant, and, on balance, unduly prejudicial to the State."[121]

b. Even if the Court Had Been Correct that the Evidence Was Relevant to Impeachment, It Was Cumulative, and Its Exclusion Was an Appropriate Exercise of the Trial Court's Discretion

The only remotely plausible non-propensity argument for admission of any of the scenario regarding the accusation of a second robbery -- although it is one not made by the court -- is that the victim's subsequent retraction of her identification of her brother is somehow a "prior bad act" relevant to her character for truthfulness that she may be asked about on cross-examination,[122] in the trial court's discretion under Rule 5-608(b), to impeach her.[123] Under the facts, even this argument is not compelling. She did not lie: she simply said she would not say if the man pointed out was her brother. The trial court's exclusion of the evidence would not have been an abuse of discretion under Rule 5-608(b), even if it had been offered under that Rule.

Moreover, the trial court admitted evidence of the victim's initial identification of her brother and of her subsequent statement, "I ain't saying if he is my brother or he isn't." Certainly its exclusion of the third person's tangential, intervening accusation ought not to have been held to be an abuse of discretion. The jury had already learned of the sister's loyalty to the brother and the brother's prior robbery convictions for other robberies, and the excluded evidence would have been merely cumulative.[124]

It was essentially this position that the *Sessoms* dissent took. Judge Wilner, joined by Judges Raker and Rodowsky, would have affirmed the trial court's line-drawing as an appropriate exercise of its discretion under Rule 5-403.[125] The majority's refusal to do so -- having taken away Rule 5-404(b)'s propensity rule, read Rule 5-616(b)(3) too broadly, and left the trial court empowered only with Rule 5-403 to exclude

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[121] 357 Md. at 296, 744 A.2d at 21 (Wilner, J., dissenting, joined by Rodowsky and Raker, JJ.).

[122] Rule 5-608(b), by its clear terms, does not permit extrinsic evidence, such as the police officer's testimony, had it been sought in *Sessoms*. Rule 5-608(b) provides:

The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. *The conduct may not be proved by extrinsic evidence.* (Emphasis added).

[123] The case that supports this reading of Rule 5-608(b) is another rape case, *State v. Cox*, 298 Md. 173, 468 A.2d 319 (1983), where a rape conviction was reversed, because the defense counsel had not been permitted to ask the victim about her alleged earlier recantation on cross-examination in another trial of her testimony on direct in that trial, accusing another of assault. Ironically, on retrial, the defense was unable to deliver what it had promised. *Second Conviction in Rape Case*, BALTIMORE EVENING SUN, Apr. 10, 1984, at B12, col. 3 ("The matter was not brought up at the retrial because it was subsequently learned that the perjury incident never occurred....").

The federal courts do not share what seems to be Maryland's bent toward particularly liberal admissibility of prior statements by rape victims regarding unrelated cases. United States v. Withorn, 204 F.3d 790, 795 (8th Cir. 2000) (allegedly false prior rape accusations by victim are inadmissible under either FRE 412 or 608(b)).

[124] *See, e.g.*, United States v. Delfonso, 707 F.2d 757, 762 (3d Cir. 1982).

[125] 357 Md. at 294-302, 744 A.2d at 21-25 (Wilner, J., dissenting, joined by Rodowsky and Raker, JJ.).

[126] *See, e.g.*, United States v. Miller, 115 F.3d 361, 365 (6th Cir. 1997) (in prosecution of inmate for mailing threatening message to President and Vice President of United States, trial court properly excluded "distracting and immaterial collateral allegations" against prison guards, through which inmate

unhelpful evidence -- unduly curtails the trial judges' gatekeeping role in monitoring the admission of evidence.

More fundamentally, it loses sight of the purpose of the rules of evidence in the criminal trial system: fairness and justice to all defendants, victims, and witnesses.[126] The following excerpt from *Boyd v. United States*, quoted by the court of appeals in *Wynn*, regarding other crimes there by the accused, can just as easily be applied to the danger of unfair prejudice against the rape victim and her brother in *Sessoms*:

> Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried.... Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law...."[127]

Putting the victim on trial is a time-honored defense strategy.[128] *Sessoms* facilitates general character attacks on victims and their families, tending to portray them as undeserving of protection.

The *Sessoms* majority reversed the trial court, apparently because the majority thought that the rape victim and her brother might have lied about the rape.

"improperly sought to garner the jurors' sympathy for himself, and inflame them against the authorities").

[127] 142 U.S. 450, 457-58 (1892) (quoted in *Wynn*, 351 Md. at 311, 718 A.2d at 589-90).

[128] *E.g.*, United States v. Sellers, 906 F.2d 597, 604 (11th Cir. 1990).

[129] 357 Md. at 302-03, 744 A.2d at 25 ("The only possible basis for [the alleged second robbery victim's] hearsay statement, to show propensity for violence or robbery on the part of [the rape victim's brother] would be as an attack on his credibility, allowed by Rule 5-607. As noted, however, [the brother's] past criminal record was fully exposed to the jury. He admitted to being convicted of armed robbery in 1997, of robbery committed the day after the alleged rape of [his sister], and of robbery committed in 1988. What [the third person's] unsubstantiated hearsay accusation would have added to this attack on [the brother's] credibility is a mystery to me. Rule 5-403, which sits atop nearly all rules of admissibility, provides that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or by considerations of needless presentation of cumulative evidence. The trial judge determined that [the third person's] accusation was irrelevant and, to the extent it had any probative value, that value was outweighed by undue prejudice to the State. That is quintessentially a judgment call, to which great deference is due....") (Wilner, J., dissenting, joined by Rodowsky and Raker, JJ.).

[130] After all:

> "[Important coordinate factors, highly material to the sound administration of the trial process, require appraisal along with the factor of the degree of relevance of defendant's proffered proofs. ...
>
> Defendant's proffer ... does create the possibility of undue consumption of time and of danger that the jury might be confused or misled. ... Defendant's proofs of the other occurrences ... would generate ... *mini*-trials as to the truth of those claims."

State v. Garfole, 388 A.2d 587, 592-93 (N.J. 1978). *See, e.g.*, United States v. Westbrook, 125 F.3d 996, 1006-08 (7th Cir. 1997) (no abuse of discretion in excluding some of defendant's evidence of gang affiliation of third parties, offered by defendant to explain his fear of reprisals, in drug conspiracy prosecution; defendant was permitted to testify that his alleged confederate was gang member, that gang's members were dangerous, and no relationship was drawn between charged conspiracy and gang membership), *cert. denied*, 522 U.S. 1036, 118 S.Ct. 643 (1997); United States v. Pascarella, 84 F.3d 61, 70 (2d Cir. 1996) (proper to have excluded some evidence proffered by defendant to show that codefendant had duped him into depositing stolen checks in his personal account; excluded evidence was repetitive, inadmissible hearsay, confusing, or of only marginal relevance; defendant was permitted to present considerable evidence on claim; much of excluded evidence could have led to "trial within a trial" on whether codefendant

The jury had ample impeachment evidence with which to gauge the credibility of the victim and her brother. As Judge Wilner aptly pointed out,[129] the majority should have stepped back and respected the trial judge's appropriate exercise of discretion,[130] even though it may not have been the same ruling the appellate judges would have made, had they sat as trial judges.

Arming the trial courts only with Rule 5-403 opens too wide a window for evidence of other acts of persons other than the accused, whether offered by the defense or the prosecution. The court of appeals would be better advised to simply remove the *Faulkner* "clear and convincing evidence" standard from the application of Rule 5-404(b).

IV. CONCLUSION

Four recent decisions by the Court of Appeals of Maryland have unduly burdened trial courts in their rulings regarding "other acts" evidence. Unnecessary reversals will result from *Wynn*'s refusal to evaluate whether the trial court's decision was justified on a ground not stated explicitly at the trial level. The same is true of *Streater*'s requirements that the trial judge, having ruled correctly on the stated objection, rule sua sponte under Rule 5-404(b) and then provide a detailed *Faulkner* analysis on the record. *Klauenberg*'s misapplication of the Rule is sure to add to the confusion.

Contrary to the majority federal law, *Sessoms* leaves the courts unable to use Rule 5-404(b) in analyzing "other acts" evidence in criminal cases concerning acts of persons other than the accused. Far better to apply Rule 5-404(b), which provides a route for the admission of sufficiently probative "other acts" evidence, remove the *Faulkner* gloss requiring clear and convincing proof of those acts, and rely on the trial courts' application of Rule 5-403 to exclude insufficiently probative evidence, regardless which party offers it.

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had duped defendant and others in past by depositing checks in their accounts without their knowledge); United States v. Sanchez, 74 F.3d 562, 566-67 (5th Cir. 1996) (in prosecution of police officer for violating civil rights of prostitutes by using threat of arrest to coerce them to perform sexual acts, no abuse of discretion to exclude testimony of another officer that prostitute who had no association with victims told him that he "would be next," where there was no evidence that any of officer's victims conspired to conjure charges against him and there was substantial and corroborated evidence of officer's guilt); United States v. Sellers, 906 F.2d 597, 602-03 (11th Cir. 1990) (affirming exclusion of evidence proffered by defense as appropriate exercises of trial court's discretion under FRE 608(b), 609(a)(1), and 403).

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