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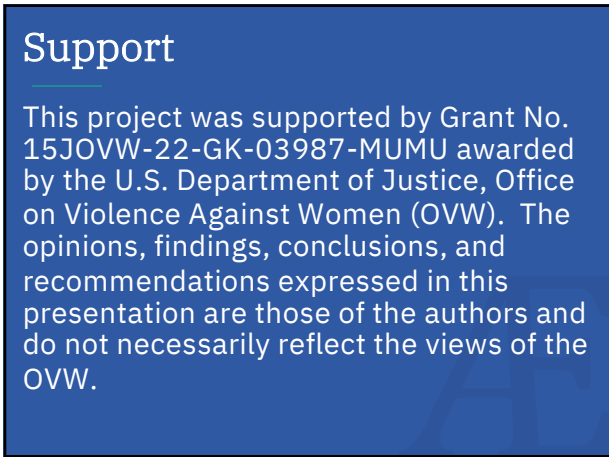
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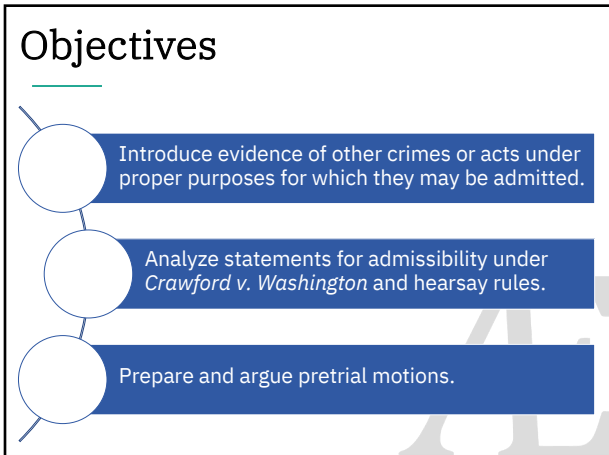
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## Evidence-Based

Building and presenting a case in which prosecutors can hold offenders accountable for their behavior with or without the victim's testimony.

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Evidence-based necessarily requires...

...evidence.

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## Duluth Police Domestic Abuse Policy

"The department is committed to engaging in a comprehensive approach to intervening in domestic abuse incidents.

**The investigation of these cases sets the foundation for almost every subsequent action by the courts and community-based agencies. It is the cornerstone of an effective, coordinated inter-agency response.** The intent of the law and this order is to protect victims from ongoing domestic abuse."

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## Investigations

- Photograph or video record crime scene
  - Body worn cameras
- Document demeanor
- Preserve statements
- Interview witnesses to crime and history of the relationship
- Investigate offender actions pre- and post-incident
- Conduct digital investigations

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## Evidence Collection

### 911 call

#### Statements

- Victim
- Witnesses
- Offender

#### Crime scene

- Damaged property
- Location of incident
- Interview of kids at the scene

#### Photos of victim

- Injuries
- Clothing
- Demeanor

#### Photos of defendant

- Lack of injury
- Defensive wounds inflicted by victim
- Demeanor

#### Medical records

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## Historical Evidence

- Police reports
  - Offender
  - Victim
  - Location
- Protective Orders
- Criminal histories
- Child Protection Services
- Case files
- Medical records
- With permission, counselors or shelter workers
- Statements
  - Family
  - Friends
  - Co-workers
- Prior relationships

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## Ongoing Investigation

- Social media
- Consistent contact with victim and/or advocate
- Follow-up with family, friends, and neighbors
- Visitor logs and jail phone calls

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## Why Prepare Pretrial Motions?

- Promote victim safety
- Prevent intimidation
- Prepare case for trial
- Educate judge
- Shield victims from harassment, invasion of privacy, and unfair prejudice
- Expose defendants
- Encourage guilty pleas
- Avoid mistrials; protect the record

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## Protecting the Victim

- Make appropriate arguments regarding bond/bail and conditions of any pretrial release
- Proactively investigate witness intimidation
- Hold offenders accountable for any violation of pretrial release conditions
  - Revoke release
  - Contempt of Court
  - File additional charges
- Use evidence as consciousness of guilt and/or “other bad acts”

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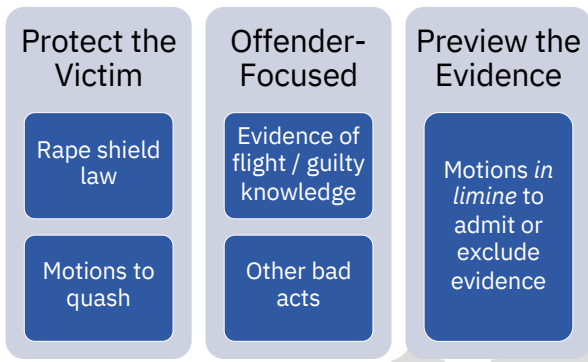
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## Pretrial Motions



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## Admissibility of Statements

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“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”

U.S. CONST. amend. VI, Confrontation Clause

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## Crawford v. Washington

541 U.S. 36 (2004)

Admissibility of hearsay statements of non-testifying witnesses:

- Depends on whether the statement is “testimonial” or “non-testimonial”



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## “Testimonial” Hearsay

*Crawford*, 541 U.S. 36

Admissible **ONLY** where:

- Declarant is available for cross-examination at trial, **OR**
- Prosecution shows that the declarant is unavailable AND defense had **prior opportunity to cross-examine**



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## “Nontestimonial” Hearsay

*Whorton v. Bockting*, 549 U.S. 406 (2007)

- Not covered by the Confrontation Clause
- Left to the states to decide admissibility under their hearsay rules



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## Davis / Hammon

Davis v. Washington, 547 U.S. 813 (2006)

Davis: 911 call seeking police assistance during DV assault was non-testimonial

+

Hammon: Statements of DV victim to police at scene after emergency ended were testimonial

→

Do circumstances *objectively* indicate *primary purpose* of questioning was to respond to emergency (non-testimonial) or to record events potentially relevant to future prosecution (testimonial)?

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## Michigan v. Bryant

121 S. Ct. 1143 (2011)

Existence of ongoing emergency is only ONE factor in determining “primary purpose”

- Formality vs. informality
- Statements / actions of both questioner and declarant help to determine primary purpose

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## Ohio v. Clark

135 S. Ct. 2173 (2015)

- Preschool child reported abuse to teacher; teacher's status as mandatory reporter did not make statements testimonial
- “Statements by very young children will rarely, if ever, implicate the Confrontation Clause.”
- “Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.”

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## WHAT IS “TESTIMONIAL”?

Generally more formal or made  
to law enforcement or their  
agents

Primary purpose is to report facts  
for later prosecution

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## WHAT IS “NONTTESTIMONIAL”?

Statements during ongoing  
emergency (911 call, to law  
enforcement to meet emergency)

Casual remarks to others

For purpose of medical treatment

Business records (not prepared for  
litigation purposes)

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## *Crawford* Doesn't Apply

- Statements not offered for the truth of the matter
- Admissions of the defendant
- Evidence in civil proceedings
- Non-capital sentencing proceedings
- Parole / probation / restitution hearings

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## Gray Areas

- Statements to SAFE/SANE
- Statements to child protective services personnel
- Statements to advocates
- Statements for dual purpose (e.g., evidence AND medical/safety)
- Redact testimonial portion?

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## *Crawford* is Only One Hurdle

If the statement is nontestimonial, *Crawford* doesn't apply but **hearsay rules still apply**—need an exception in order to admit the statement

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## Hearsay Exceptions

Fed. R. Evid. 803

- (1) Present sense impression
- (2) Excited utterance
- (3) Then-existing mental, emotional, or physical condition
- (4) Medical treatment
- (6) Business records

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## Sources of Nontestimonial Statements

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## 911 Calls

- May “evolve” into testimonial statements
  - Redact when necessary
- Uses:
  - To corroborate victim’s trial testimony
  - To refute recantation/minimization
  - As evidence of crime when victim does not testify

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## On-Scene Statements

- To children or others at scene
- To officers in response to ongoing emergency

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## Medical Treatment

- Statements to EMT
- Statements to nurse / physician
  - How injury occurred
  - Weapons / strangulation
  - Identity of assailant (when necessary for treatment—DV context)

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## Statements to Others

- Neighbors
- Family / friends
- Co-workers / employers
- Landlords

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## Unavailability of Witness and Prior Opportunity for Cross- Examination

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## Witness Must be Unavailable

Not Merely Absent

- State must show efforts to produce witness were both reasonable and made in good faith

Barber v. Page, 390 U.S. 719 (1968)

- “The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.”

Ohio v. Roberts, 448 U.S. 56, 74 (1980)

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## Reasonable Efforts

- Subpoena, writ, interstate witness subpoena, offer of travel/lodging expenses  
U.S. v. Yida, 498 F.3d 945, 960 (9th Cir. 2008); State v. Goddard, 685 P.2d 674 (Wash. Ct. App. 1984)

- Extensive efforts to locate witness may be insufficient if not commenced until eve of trial  
U.S. v. Tirado-Tirado, 563 F.3d 117 (5th Cir. 2009)

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## Prior Opportunity for Cross

### Probably sufficient

- Probable cause hearing
- Bail hearing
- Trial testimony against same defendant
- Deposition to preserve testimony

### Probably insufficient

- Civil proceedings
- Trial testimony against co-defendant
- Discovery depositions

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## Forfeiture By Wrongdoing

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## Exception to Confrontation

Reynolds v. U.S., 98 U.S. 145, 158 (1878)

“The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; **but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.**”

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## Public Policy

U.S. v. Thevis, 665 F.2d 616 (5th Cir. 1982)

“...to permit such a subversion of a criminal prosecution would be contrary to public policy, common sense, and the underlying purpose of the Confrontation Clause... and make a mockery of the system of justice that the right was designed to protect.”

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## Fed. R. Evid. 804(b)

The following [is] **not excluded** by the hearsay rule **if the declarant is unavailable** as a witness:

(6) A statement offered against a party that wrongfully caused--**or acquiesced in wrongfully causing**--the declarant's **unavailability** as a witness, and did so **intending that result**.

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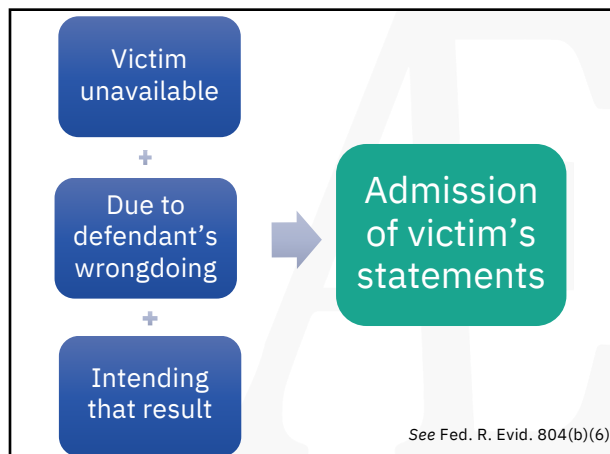
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## Invaluable Tool

Applies to any potential witness who is *unavailable*

- Jurisdictions may have different interpretations of unavailability

Opens the door to *any* hearsay

- Testimonial
- Nontestimonial
- No need for standard hearsay exception

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## Emerging Issue

*People v. Nelson*, 67 N.Y.S.3d 719 (N.Y.App.Div. 2017)

“‘Unavailability’ in this context is not limited to a witness's outright refusal to testify or physical absence from the proceedings; a witness is practically or effectively unavailable where the witness recants his or her initial statements or otherwise changes his or her version of the events as a result of misconduct on the part of the defendant.”

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## Giles v. California

554 U.S. 383 (2008)

- DV-related homicide: defendant shot ex-girlfriend
- Claimed self-defense
- 3 weeks prior → Police responded to DV call
- Statements allowed under FBW based upon intentional act of killing
- Appellate courts affirmed

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## Giles in U.S. Supreme Court

Case remanded:

- Defendant had to have **specific intent to make victim unavailable** as a witness when committing the wrongdoing
- Not enough evidence that defendant killed the victim **to prevent her from testifying**

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## Domestic Violence Context

Giles v. California, 554 U.S. 353 (2008)

“Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.”

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*[T]here is no requirement... that the defendant must engage in violence or employ threats of physical violence to cause fear in the victim in order to procure the witness's unavailability. The link between the defendant's actions and the victim's unavailability may be established when "a defendant puts forward to a witness the idea to avoid testifying, **either by threats, coercion, persuasion, or pressure ...**"*

State v. Aguilar,  
181 So. 3d 649 (La. 2015)

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## Forfeiture Hearing

### Judicial Determination

- Requires hearing outside of the jury
- Standard = “Preponderance of the evidence”
  - WA & NY require “clear and convincing evidence”
- Hearsay evidence admissible, including affidavits
- Statements you wish to introduce are admissible
- Consider using expert witness to educate
- Court may reserve ruling based on unavailability until trial

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## Forfeiture Hearing

- Preliminary question decided by judge (Fed. R. Evid. 104)
- Rules of evidence generally do not apply at a forfeiture hearing
  - Hearsay allowed
  - Affidavits allowed
  - Consider calling lead investigator
  - Consider calling expert to explain intimidation dynamics

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## Proof at Hearing

- Can use unavailable witness’s hearsay statements as evidence at hearing

Davis v. Washington, 547 U.S. 813, 833 (2006)
- Intent to make witness unavailable need not be only motive

U.S. v. Dhinsa, 243 F.3d 635 (2d Cir. 2001)

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## Evidence of Wrongdoing

- Jail calls
- History of relationship
- Witnesses to intimidation
- Prior civil or criminal cases
- Testimony at prior proceedings
- Can be proven circumstantially
  - See *United States v. Ledbetter*, 141 F. Supp. 3d 786 (S.D. Ohio 2015)

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## Prepare to Show Reasonable Efforts to Produce Witness

- Obtain multiple ways to contact / locate witness
- Document all contacts with witness and efforts to locate
- Document any statements of intention by witness not to appear or to refuse to testify
- Don't wait until the eve of trial!

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## Litigate FBW Motions

- "Forfeiture file" for any witnesses vulnerable to intimidation
- Prior to trial; on the fly when necessary
- Where statement might be admissible either as nontestimonial or under FBW, argue both and get rulings on both

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## Expose Defendants

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## Without Context

- Jurors fail to understand...
  - What really happened
  - Why the defendant committed the crime
  - Why the victim responded as they did
- Jurors who fail to understand what happened equate that confusion with reasonable doubt

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## Other Bad Acts

Evid. R. Rule 404(B)

**Other Crimes, Wrongs or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. **It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.** In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

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## Proper Purposes Under 404(b)

<b>Motive</b> Showing history of possessiveness / jealousy	<b>Opportunity</b> Access to weapon
<b>Intent</b> Circumstantial evidence of mens rea	<b>Prep, Plan, Knowledge</b> Efforts to isolate, groom victim vulnerabilities
<b>Identity</b>	<b>Absence of Accident/Mistake</b> Prior acts showing current act didn't "get out of hand"

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Some jurisdictions allow evidence of propensity for certain types of case.

- Typically, certain sex crimes
- A *few* allow it for domestic violence offenses
- Consult your criminal code
- These are *exceptions* to general rule of exclusion of evidence to prove propensity

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## Purposes Listed are Not Exclusive

Other commonly accepted purposes in DV cases are ...

- To shed light on the parties' relationship
- As evidence of consciousness of guilt (e.g., attempts at witness tampering, intimidation, or manipulation)

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## "Other acts" need not be *prior* acts.

- The evidence rule is not limited to "prior" acts
- Acts may have occurred *after* the charged crime
  - E.g., intimidation or witness tampering

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## Most DV cases will have a history of numerous "bad acts".

- DV cases often have a wealth of prior incidents
- Remember, we are generally seeing the tip of the iceberg
- Some may have been charged; most probably have not
- Some may not be crimes at all (e.g., emotional or economic abuse)

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### Against whom were the other acts committed?

- Typically much easier to admit prior acts against the same victim
- Abuse against other victims may be admitted to prove knowledge, intent, or lack of mistake/accident
- Consider whether other acts against those close to the victim (victim's family, friends, pets, etc.) might be relevant to prove intent toward the victim

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### Admissibility Analysis

Is it offered for a proper purpose under the rule?

Is it relevant?

Is it unfairly prejudicial?

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### Prior Incidents with Victim

- |                                      |                                |
|--------------------------------------|--------------------------------|
| • Police reports                     | • Victim advocates             |
| • Applications for protection orders | • Trial transcripts            |
| • 911 calls                          | • Cell phone and computer data |
| • Photos                             | • "Honeymoon phase"            |
| • Medical records                    | • Jail calls                   |
| • Witnesses                          | • Writings                     |

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## General Tips

- Plan ahead
- File written motions when possible
- Hold evidentiary hearings prior to trial
- Be creative
- Be precise
- Make defense jump through the hoops
- Make a good record for appeal
- Give the court what it needs to rule in your favor
- Don't be greedy

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## Small Group Exercise

Groups 1, 2, and 3 will be the prosecution.  
Groups 4, 5, and 6 will be the defense.

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## State v. Adams

Small Group

Assume Eva is unavailable. Litigate the admissibility of any of her specific statements as nontestimonial coming under a hearsay rule (*Crawford* argument)

- Group 1: Prosecution
- Group 4: Defense

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## State v. Adams

Small Group

Assume Eva is unavailable. Litigate the admissibility of any/all of her statements under forfeiture by wrongdoing (FBW argument)

- Group 2: Prosecution
- Group 5: Defense



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## State v. Adams

Small Group

Litigate the admissibility of other acts not charged in second incident (which is the only incident to be tried) (404(b) argument)

- Group 3: Prosecution
- Group 6: Defense



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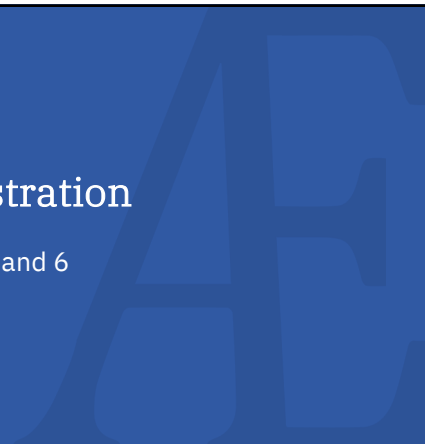
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## Demonstration

Groups 4, 5, and 6



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## Going Forward

Introduce evidence of other crimes or acts under proper purposes for which they may be admitted.

Analyze statements for admissibility under *Crawford v. Washington* and hearsay rules.

Prepare and argue pretrial motions.

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