American Jury System

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History of the Jury System

- (Possible) Precursors to the English jury trial system
  - Ancient Athens, *dikastai*, 500 citizens selected to hear a case. 1000 to 1500 citizens selected for a capital case (neither unanimous)
  - In 1200's, early Norwegians held regular *things* - where men were selected and sworn to hear cases, all cases were presided over by a *Lögmann* or law-man (one who knew the law but had no say in the decision).
  - B/w 8th and 11th Century, Islamic *lafif,* 12 members of the community sworn to tell the truth and reach a unanimous verdict.
  - Early English law, juries were comprised of minor nobles, jury was charged to be impartial when uncovering the facts of the case.
  - 12 Century, King Henry II created a jury system of 12 free men similarly charged to uncover the facts of the case.

History of the Jury System

- "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. … Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge" - *Duncan v. Louisiana*, 391 U.S. 145 (1968).

- "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." - 6th Amendment

- The right to trial by jury, includes, "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty' " in all prosecutions for which the maximum potential punishment exceeds incarceration for six months. - *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

English Roots

- Assizes
- Magna Carta
- Separation of jurors as witnesses
- Writ of Attaint

Separation of Fact-Finder and Law-Giver

- *Bushell's Case*, 6 How. 999 (1670)
  - "And in these cases the jury, and not the judge, resolve and find what the fact is… But a jury-man swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment, from what a judge out of various cases considered by him, infers to be the law in the question before him."
- *Georgia v. Brailsford*, 3 U.S. 1 (1794)
- *Sparf v. U.S.*, 156 U.S. 51 (1895)
- *Dimick v. Schiedt*, 55 S.Ct. 296 (1935)

American Ideal

- Based on grievances against British rule
- The jury trial right was a check against the power of the British judiciary

American Ideal

- American Constitution
  - Article III – establishes trial by jury in criminal cases
  - Amendment VI – expands upon the right to a jury trial in criminal cases
  - Amendment VII – protects the right to jury trial in federal civil cases
  - Also Amendment V – preserves the role of the Grand Jury

American Ideal

- *Jacob v. City of New York*, 315 U.S. 752 (1942)

- *Duncan v. Louisiana*, 391 U.S. 145 (1968)
  - Trial by jury in criminal cases is a fundamental right; "[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."

American Ideal

- A Democratic Institution
  - Alexis de Tocqueville
    - “The institution of the jury…places the real direction of society in the hands of the governed, or of a portion of the governed, instead of leaving it under the authority of the Government.” (1835)
  - Francis Lieber
    - The jury “makes the administration of justice a matter of the people” and “binds the citizen with increased public spirit to the government of his commonwealth.” (1852)

Constitutionality of Jury Composition

- In federal system and most states (including CO), a jury in a criminal trial is composed of 12 persons, who must reach a unanimous verdict to acquit or to convict.

- Juries as small as 6 are constitutionally permissible
  - *Williams v. Florida*, 399 U.S. 78 (1970).

- Jury of 5 is unconstitutional
  - *Ballew v. Georgia*, 435 U.S. 223 (1978).

- In some states, unanimous verdict by 12-person jury is not required so long as the vote to convict constitutes a "substantial majority."
  - *Johnson v. Louisiana*, 406 U.S. 356 (1972). - (9-3 guilty verdict)

C.R.S. §16-10 Part 1
Composition & Selection of the Jury

- 16-10-102 - Jury panel exhausted
  - If the jury panel is exhausted, the court must make further orders for additional jurors until a full jury is obtained.
- 16-10-103 - Challenge of jurors for cause
- 16-10-104 - Peremptory challenges
- 16-10-105 - Alternate jurors
- 16-10-106 - Incapacity of juror
- 16-10-107 - Challenge to entire jury panel
- 16-10-108 - Verdict (unanimous & received in open court)
- 16-10-109 - Trial by jury for petty offenses
  - Defendant must request JT w/in 20 days of plea & pay $25 fee.
- 16-10-110 - Jury Instructions - possible DP cases
  - Court can instruct the jury during voir dire if prosecution in not seeking the death penalty in the case.

Jury Selection: *Voir Dire*

- Given the impartial jury requirement of the 6th Amendment, a process is necessary to ensure that impartiality.

- Challenges for Cause - used to excuse potential jurors who are not impartial - (state of mind in reference to the issues or parties involved in the case would impair performance in accordance with the court's instruction on the law).
  - *People v. Reddick*, 610 P.2d 1359 (1980). - Trial court abused discretion in failing to grant challenge for cause of prospective juror who had close association with law enforcement establishment.
- Challenges not for Cause - defense and prosecution are entitled to exercise a limited number of "peremptory challenges" - excuse potential jurors who either side believes is biased, but whose partiality was not proven through *voir dire*. (6 per side in CO)

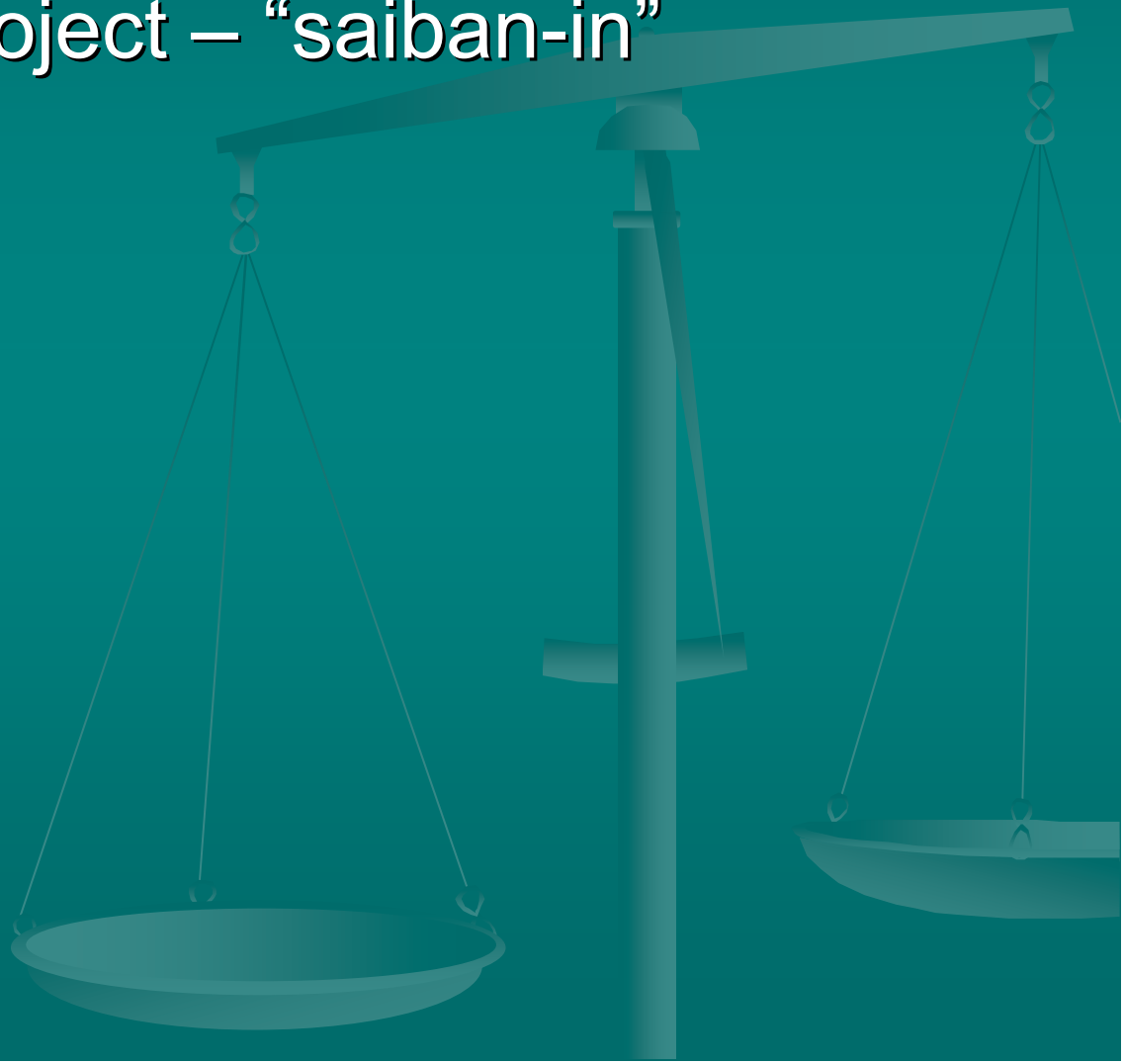
- The Equal Protection Clause of the 14th Amendment is violated if either attorney exercises a challenge solely on the basis of race, gender, or religion.
  - *Batson v. Kentucky*, 476 U.S. 79 (1986) - Prosecutor cannot make challenges based on race.
  - *Georgia v. McCollum*, 505 U.S. 42 (1992). - Criminal defendant cannot make challenges based on race.
  - *Montoya v. People*, 345 P.2d 1062 (1959). - Cannot exclude potential jurors based on Spanish-sounding names.

Batson Challenge

- *Batson v. Kentucky*, 476 U.S. 79 (1986)
  - 1. a defendant must make a prima facie showing that the challenge was based on race
  - 2. if so, the prosecution must offer a race-neutral basis for striking the juror in question
  - 3. in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination
- *Georgia v. McCollum*, 505 U.S. 42 (1992)

Worldwide use of Jury Trials

- Japan's Jury Project – "saiban-in"
- Italy
- France
- Germany
- Denmark



Jury Instructions

- After the close of all the evidence, the jury is given the instructions.
- This is usually done orally, but taped instructions have been upheld as constitutional.
  - *U.S. v. Previte*, 648 F.2d 73 (1981).
- A written copy of the instructions can be given to the jury for use during deliberation.
  - heightened comprehension and expedited proceedings
- Typically, instructions inform the jury of the elements of the charge, the prosecution's burden of proof, and defendant's theory of defense.
- If defendant does not object on the record to jury instructions, the instructions will only be reviewed for plain error.
  - *People v. Miller*, 113 P.3d 743, 749-50 (Colo.2005)

Questions during Deliberation

- The decision to give supplemental or clarifying instruction lies within the discretion of the trial court.
  - *People v. Martin*, 851 P.2d 186 (Colo. App. 1992)
- The reading of all or part of the testimony of one or more witnesses, at the specific request of the jury during deliberations, is likewise discretionary with the trial court.
  - *Settle v. People,* 504 P.2d 680 (1972) - Request allowed
  - *People v. Coit*, 961 P.2d 524 (Colo. App. 1997) - Denied request
- In responding to jury questions, the Court is not to make factual determinations.
  - *People v. Romero*, 767 P.2d 782 (Colo. App. 1988)
- It is proper to refer the jury back to the original jury instructions.
  - *Sanchez v. People*, 820 P.2d 1103 (1991)
  - *People v. Rivers*, 70 P.3d 531 (Colo. App. 2002)

Unanimity of Verdicts

- In Colorado, a jury verdict in criminal cases must be unanimous. If a jury is unable to reach a unanimous verdict, a mistrial is declared and the charge will be retried to a new jury.
- Hypothetical: Burglary - harassment vs. assault
- There need not, however, be a unanimous vote of acquittal on a charge before a jury may proceed to consider a lesser included offense as to that charge.
  - *People v. Bachicha*, 940 P.2d 965 (Colo.App.1996)

Deadlocked Juries: Allen Instructions

- After the jury has indicated that it has been unable to reach a verdict, the court may inquire of the jury as to the nature of the deadlock and whether further deliberations would be fruitful.
  - *People v. Lewis*, 676 P.2d 682 (Colo.1984).

- When a jury is having trouble reaching a unanimous verdict, the court may not, either expressly or impliedly, authorize the jury to render a compromised verdict.
  - *People v. Lewis*, 676 P.2d 682 (Colo.1984).

- The "Dynamite" instruction or "Allen charge" directs each juror to try to reach an agreement if that can be done "without violence to individual judgment," but not to surrender an honest conviction for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.
  - *People v. Schwartz*, 678 P.2d 1000, (Colo.1984)

Deadlocked Juries: Allen Instructions

- *Allen v. United States*, 164 U.S. 492 (1896).
- (Excerpted) "If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again, and most thoughtfully, whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.
- Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence; but, after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so.
- You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt the Defendant should have your unanimous verdict of Not Guilty."

Dead-locked Juries: Allen Instructions

- *An early Colorado case – Blash v. People*, 426 P.2d 966 (1967).
- (Excerpted) 'If a majority of your number are for conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one which makes no impression upon the minds of so many persons equally intelligent and honest with themselves, who under the sanction of the same oath have heard the same evidence, with the same attention and an equal desire to arrive at the truth.
- 'On the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment from which so many of their number dissent, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

Juror Misconduct: FRE 606(b)

Inquiry into validity of verdict or indictment

- Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.
- However, may testify about
  - whether extraneous prejudicial information was improperly brought to the jury's attention
  - whether any outside influence was improperly brought to bear upon any juror
  - whether there was a mistake in entering the verdict onto the verdict form.

Examples of Juror Misconduct

- Court must analyze whether there is reasonable probability that extraneous information or influence affected the verdict. If so, a new trial is required.
  - *Wiser v. People, 732 P.2d 1139 (Colo. 1987).*
- Mere speculation of extraneous influence is insufficient.
  - *People v. Wiedemer*, 692 P.2d 327 (Colo.App. 1984).
- Misconduct by bailiff or other 3rd party can be grounds for a new trial.
  - Early Colorado case
  - In violation of the instructions of the court,bailiff allowed the jury to separate, permitted intoxicants in the jury room, and engaged in conversations with members of the jury. – *Heller v. People*, 43 P. 124 (Colo. 1985).

Examples of Juror Misconduct

- New trial appropriate when death penalty juror was threatened with "physical combat", was sworn at repeatedly, and continuously followed around the jury room during 27 hours of deliberation, refusing to let him rest.
  - *People v. Wharton, 90 P.2d 615 (1939).*
- Juror consultation of a dictionary during deliberation was improper and constituted misconduct.
  - *Wiser v. People, 732 P.2d 1139 (Colo. 1987).*
- Allegations of juror falling asleep (not reflected by record) during trial was insufficient.
  - *People v. Hayes*, 923 P.2d 221 (Colo.App. 1995).
- Juror's use of Bible passages during death penalty deliberations to demonstrate propriety of death as sentence for murder constituted reversible error.
  - *People v. Harlan* 109 P.3d 616 (Colo. 2005)

New Concepts in the Jury System

Allowing Jurors to Question Witnesses

- Potential advantages:
  - Creates a more dynamic transfer of information.
  - Eliminates confusion as to the facts of the case creating a more focused deliberation.

- Potential concerns:
  - Objecting to juror questions may antagonize the juror, putting counsel in a precarious position.
  - Process could potentially encourage jurors to decide facts and form opinions about the case before all the evidence has been presented.

Allowing Jurors to Question Witnesses

- The practice of allowing jurors to ask questions of witnesses through the court is not per se unconstitutional.
  - *Medina v. People*, 114 P.3d 845 (Colo. 2005).
- While a defendant does have a right to an unbiased jury, he is not entitled to have his case presented to a jury that sits as a passive receptacle of information.
  - *Ibid*.
- A juror's question which is wrongfully introduced into the trial process can have its impact and that of the answer assessed on appellate review.
  - *Ibid.*
- Defendant's contention that the trial court's decision to allow written questions by the jurors constitutes structural error that requires automatic reversal was rejected. Defendant has not shown how these questions by the jurors prejudiced him.
  - *People v. Milligan*, 77 P.3d 771 (Colo.App. 2003)
- *U.S. v. Richardson*, 99-11126 (11th Cir. 2000)

"My question is for the medical examiner."

Recent Colorado Supreme Court Rule Change

- Colorado Rule of Crim. Pro. Rule 23

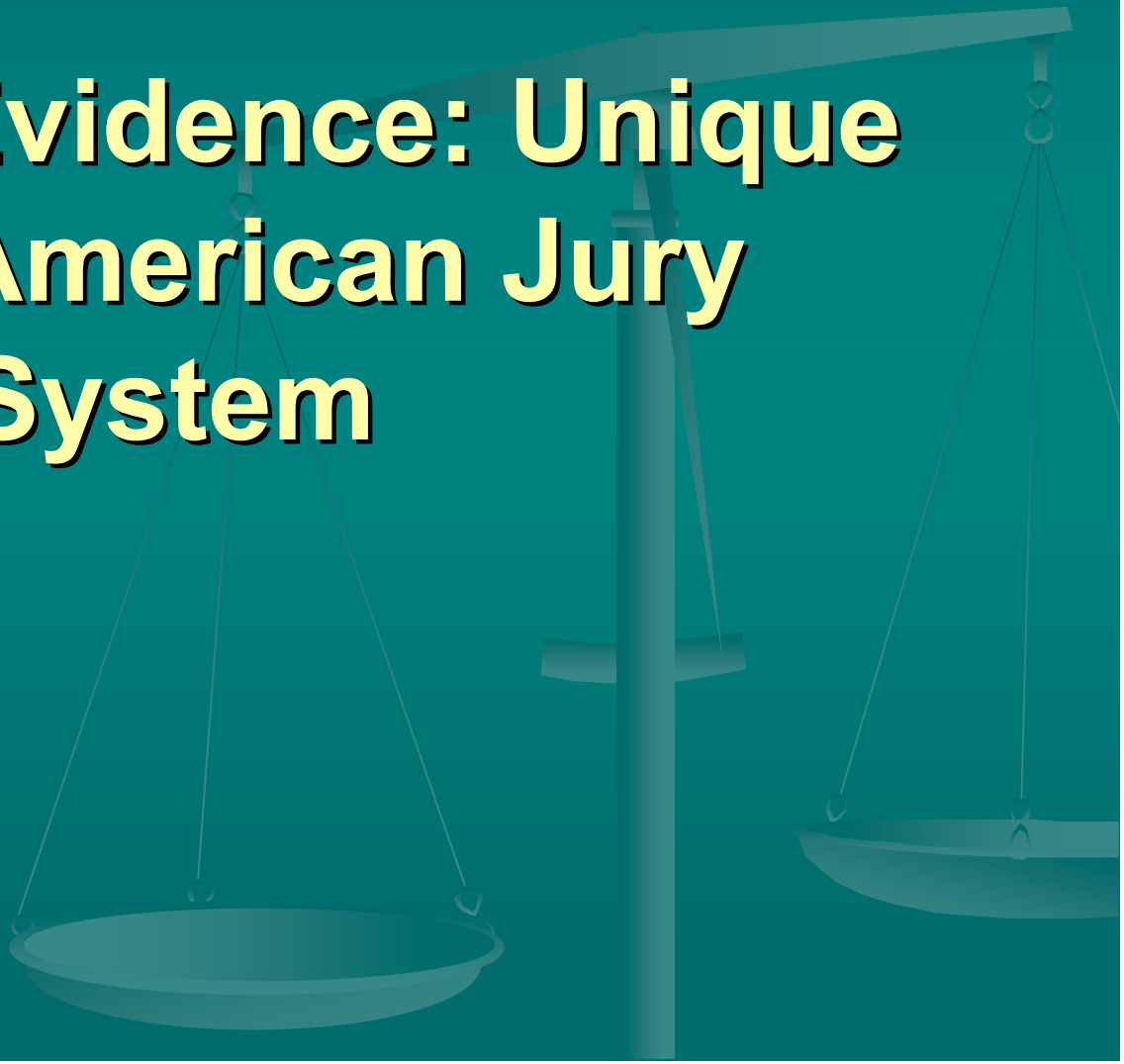
- (1) If accused of a felony, every person has a right to be tried by a jury of 12. However, the defendant may elect, except for class 1 felonies, to have a jury of less than twelve but no fewer than six, with the consent of the court.
  - Prior to rule change # of jurors in felony case was 12.

- (2) If accused of a misdemeanor, right to a jury of six. However, defendant may elect a jury of less than six but no fewer than three, with the consent of the court.
  - Prior to rule change # of jurors in a misdemeanor case was 6.

- (4) In matters involving a class 1 or 2 petty offense, the jury shall consist of a greater number than three, not to exceed six.

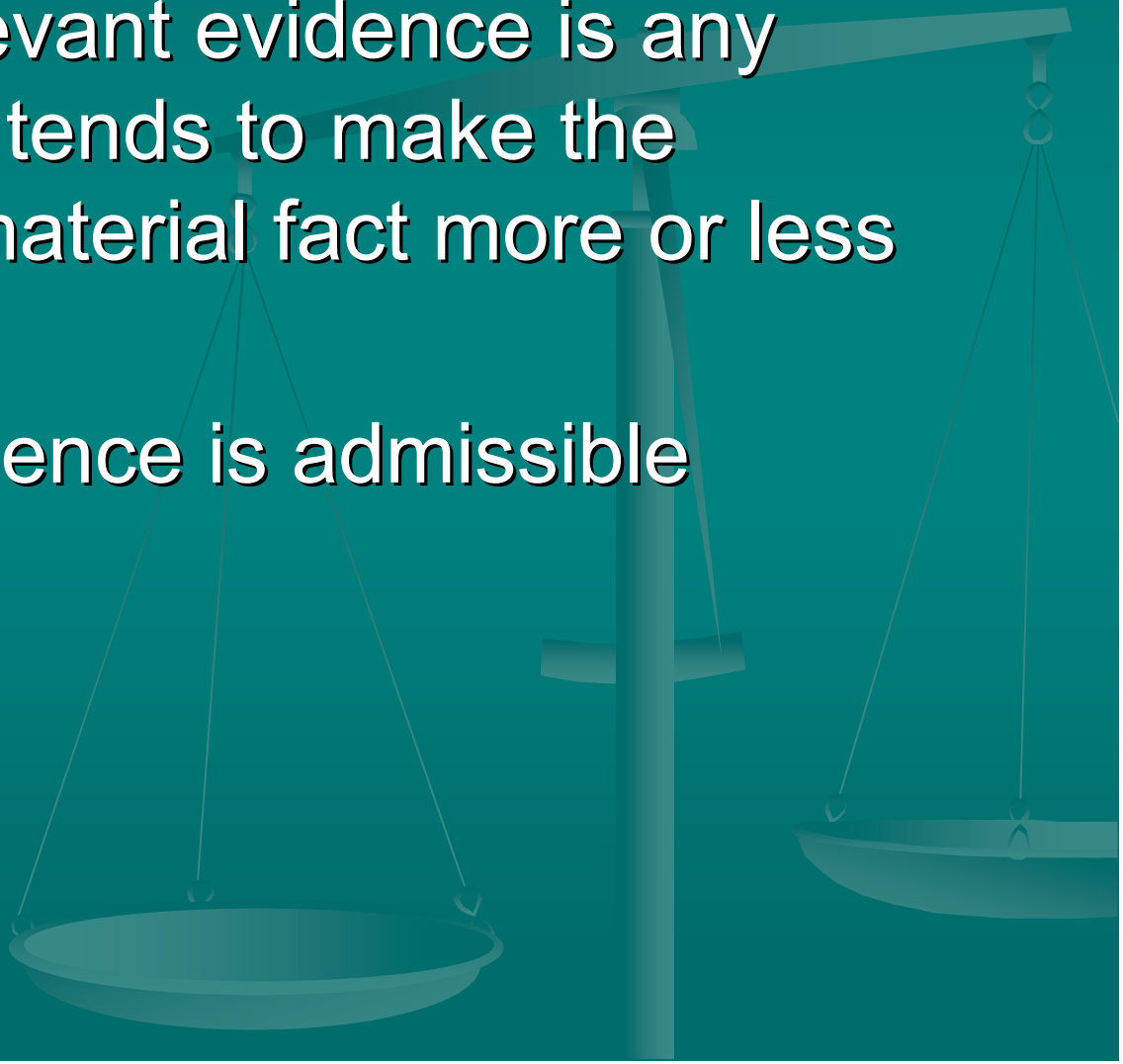
- (8) All jury verdicts must be unanimous.

Rules of Evidence: Unique to the American Jury System



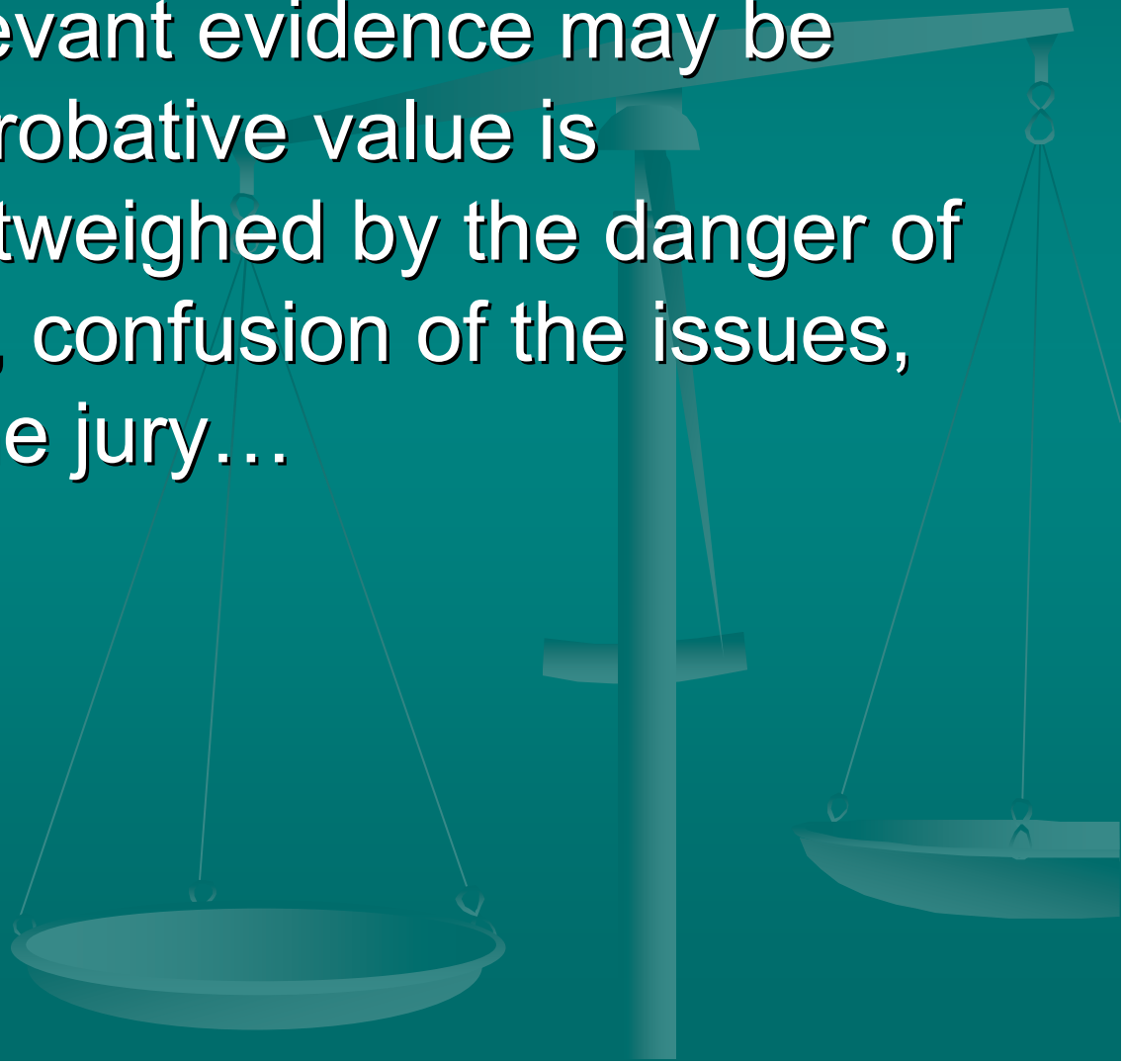
Admissibility and Relevance

- Rule 402 – Relevant evidence is any evidence which tends to make the existence of a material fact more or less probable.
- All relevant evidence is admissible



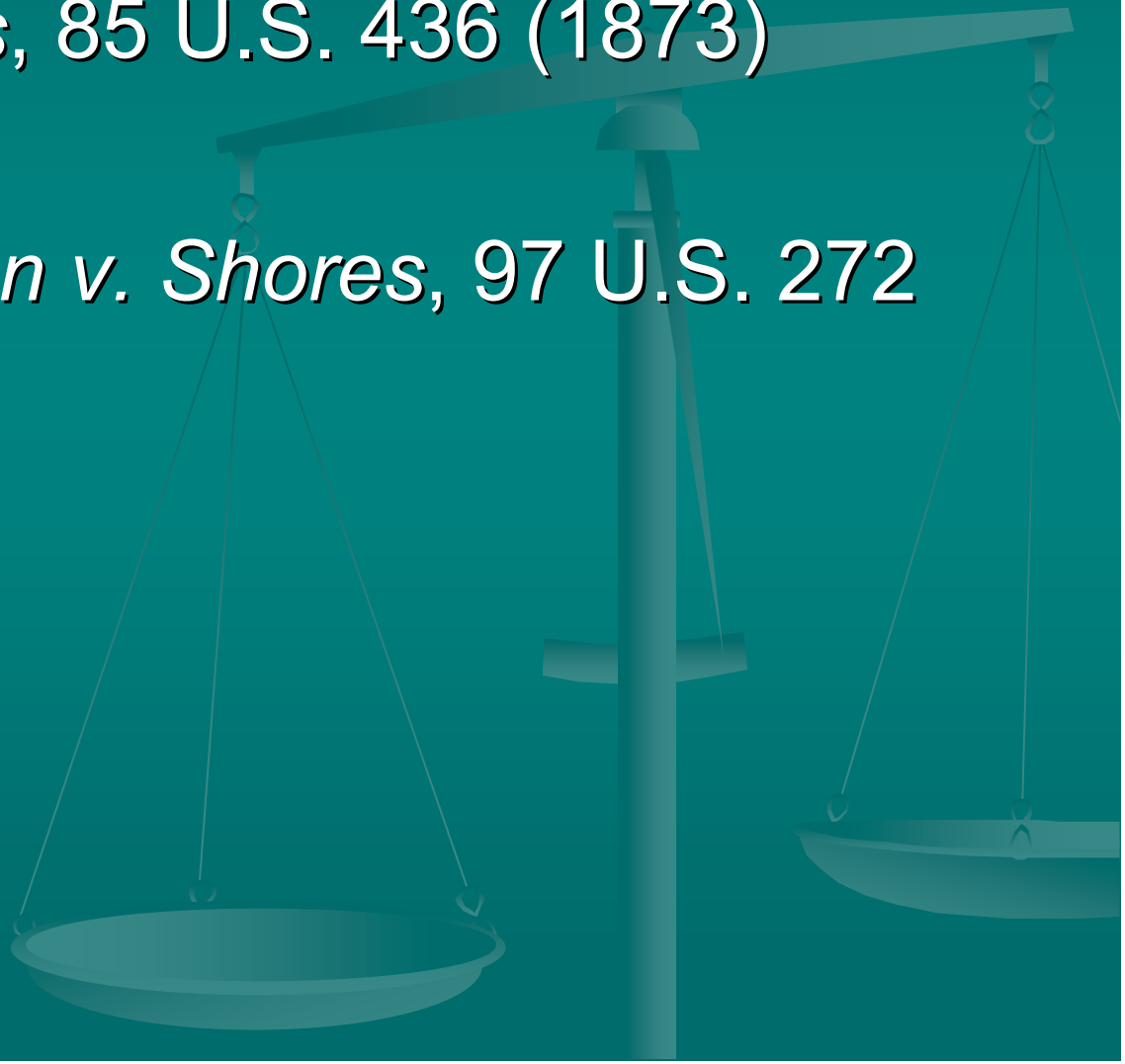
Admissibility and Relevance

- Rule 403 – 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…



Admissibility and Relevance

- *Lucas v. Brooks*, 85 U.S. 436 (1873)
- *County of Macon v. Shores*, 97 U.S. 272 (1877)



Rule 404 – Character Evidence

- *Michelson v. U.S.*, 335 U.S. 469 (1948)
- *People v. Spoto*, 795 P.2d 1314 (Colo. 1990)
  - Spoto Test
    - Whether proffered evidence relates to material fact
    - Whether evidence is logically related
    - Whether logical relevance is independent of intermediate inference that defendant has bad character which would then be employed to suggest probability that defendant committed crime
    - Whether probative value is substantially outweighed by danger of unfair prejudice
- *People v. Garner*, 806 P.2d 366 (Colo 1991)

Hearsay and the Confrontation Clause

- U.S. Constitution, Amendent VI
- Rules (Federal and State) 801 – 807

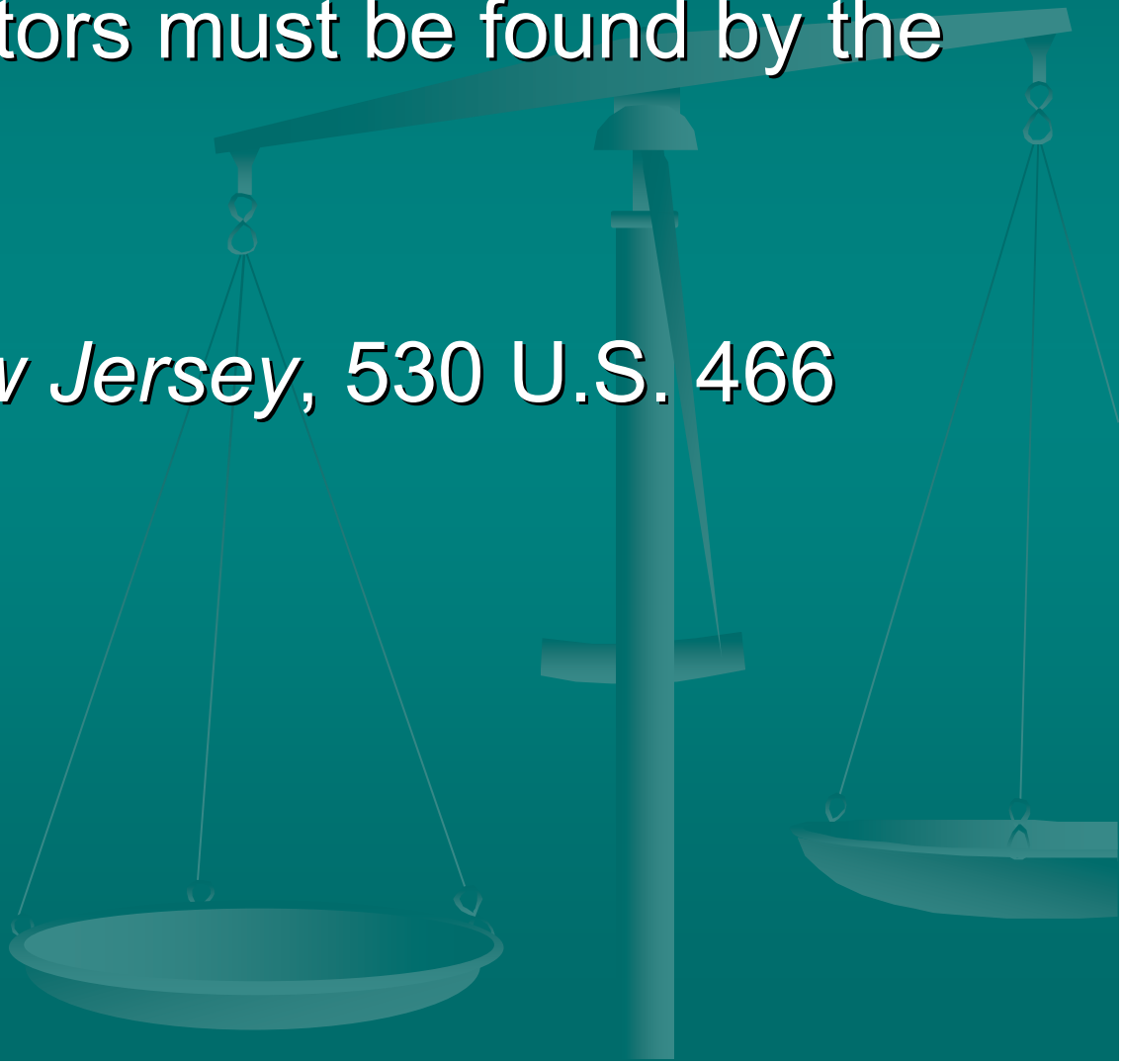
- *Trial of Sir Walter Raleigh*, 1 Criminal Trials 389-20 (1603)
  - One of the first documented requests for the defendant's accuser to give testimony in court instead of evidence of a pre-trial examination read into the court.
- *Sparf v. U.S.*, 156 U.S. 51 (1895)
- *Mattox v. U.S.*, 156 U.S. 237 (1895)

Exclusionary Rule

- A judicially created remedy that results in suppression, at a criminal trial, of evidence obtained directly or indirectly in violation of a criminal defendant's constitutional rights by state action.
  - The Exclusionary Rule is a prophylactic rule.
- *Weeks v. U.S.*, 232 U.S. 383 (1914)
- *Wolf v. Colorado*, U.S. 25 (1949)
- *Mapp v. Ohio*, 367 U.S. 643 (1961)

Recent Court Rulings

- Aggravating factors must be found by the jury.
- *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

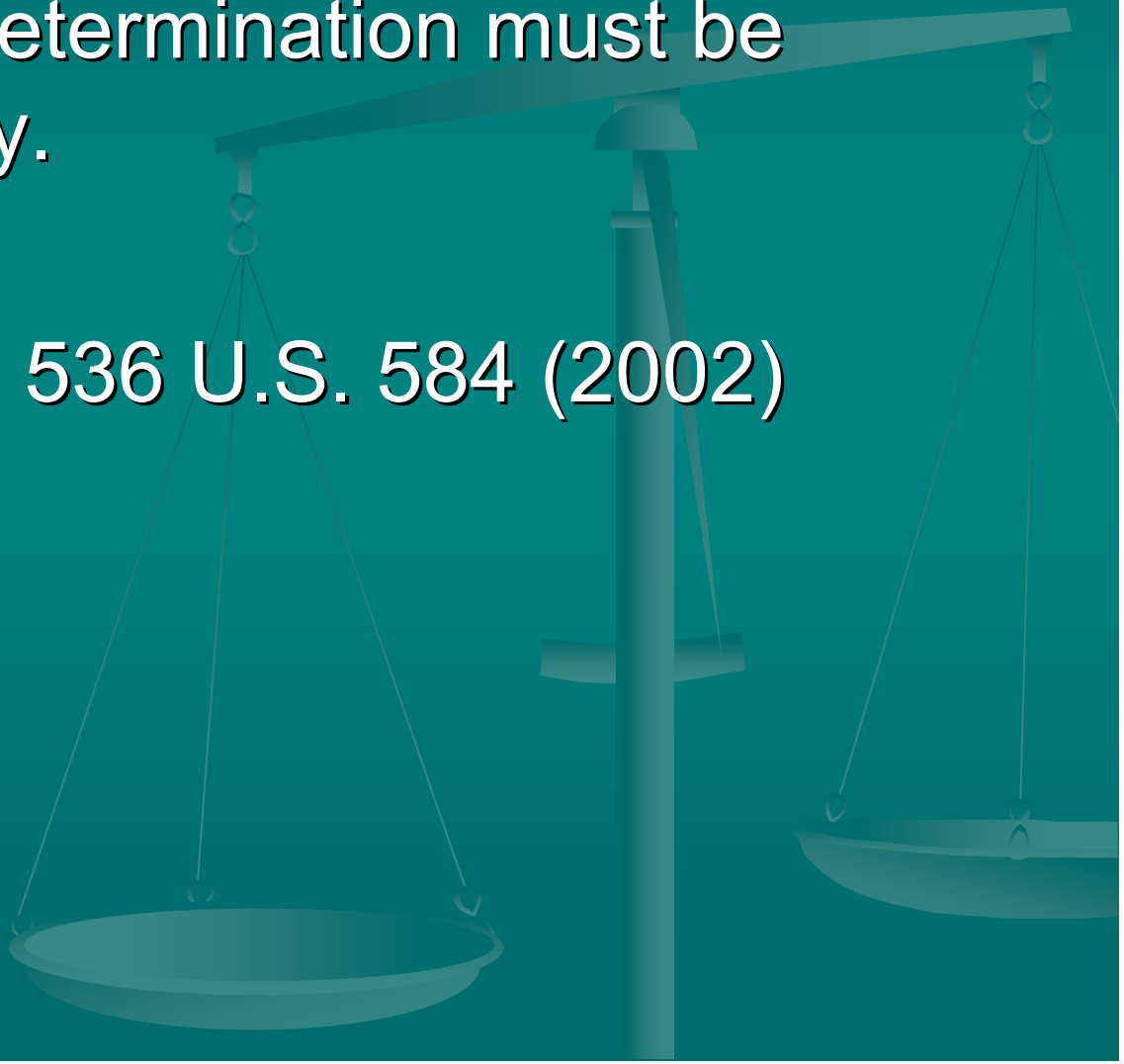


Recent Court Rulings

- *Blakely v. Washington*, 542 U.S. 296 (2004)
  - "[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury… [T]he jury's traditional function [is] finding the facts essential to lawful imposition of the penalty."

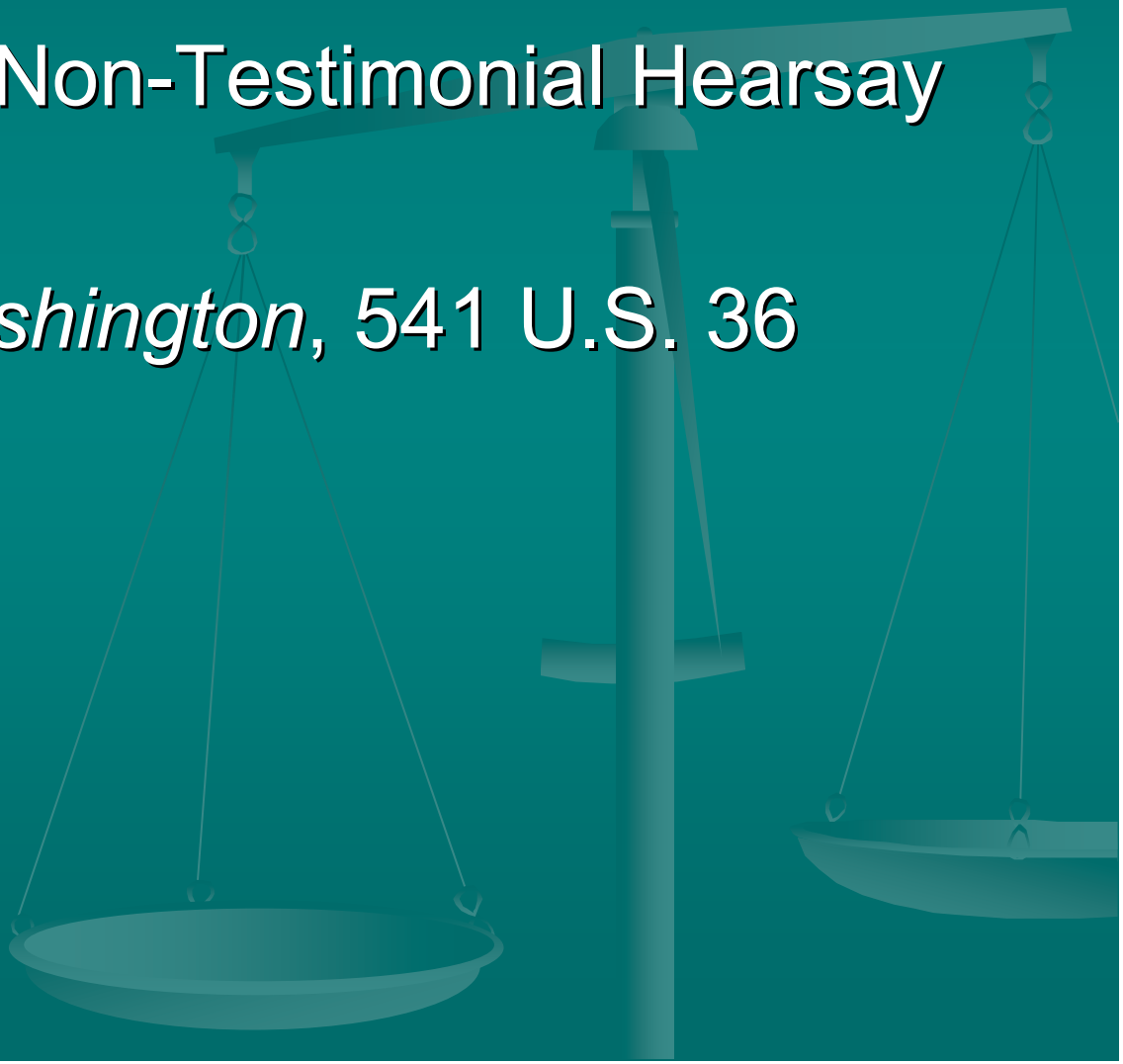
Recent Court Rulings

- Death penalty determination must be made by the jury.
- *Ring v. Arizona*, 536 U.S. 584 (2002)



Recent Court Rulings

- Testimonial vs. Non-Testimonial Hearsay
- *Crawford v. Washington*, 541 U.S. 36 (2004)



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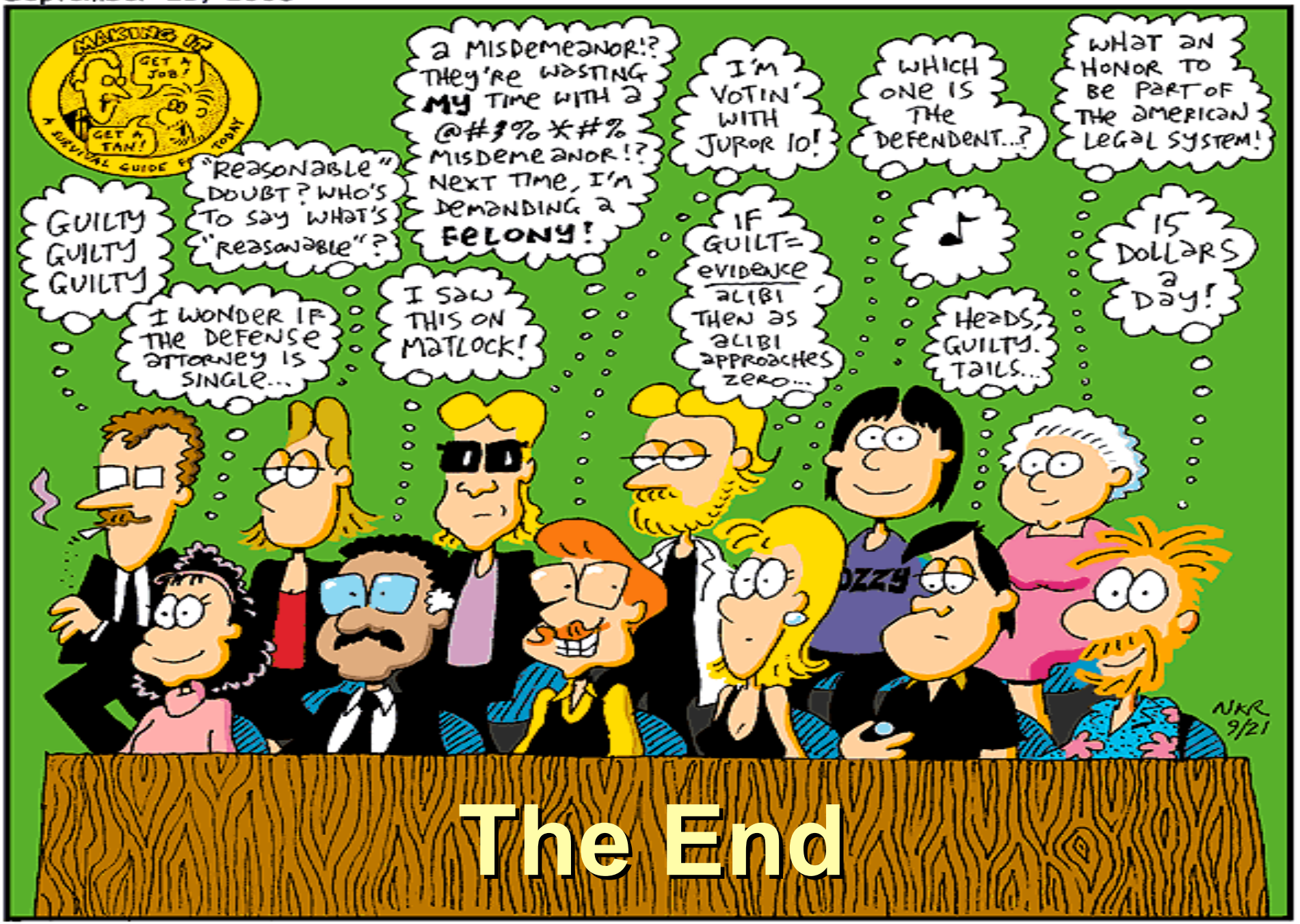

The End