

Felony Defender Training

February 8-10, 2023

UNC School of Government, Chapel Hill, NC

*Co-sponsored by the UNC School of Government &
Office of Indigent Defense Services*

Wednesday, February 8

9:15-9:30 a.m.	<i>Check-in and Welcome</i>
9:30-10:30 a.m.	The Basics of Pleading Guilty in Superior Court (60 mins) Derek Brown, Attorney Brown Law Firm, PLLC, Greenville, NC
10:30-10:45 a.m.	<i>Break</i>
10:45-12:00 p.m.	Discovery and Investigation in Felony Cases (75 mins) Keith Williams, Attorney Law Offices of Keith William, Greenville, NC
12:00-12:45 p.m.	<i>Lunch</i>
12:45-2:00 p.m.	WORKSHOP: Developing an Investigative and Discovery Strategy (75 mins)
2:00-2:15 p.m.	<i>Break</i>
2:15-3:30 p.m.	Sentencing in Superior Court (75 mins) Jamie Markham, Associate Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
3:30-3:45 p.m.	<i>Break</i>
3:45-4:30 p.m.	Evidence Blocking (45 mins) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
4:30 p.m.	<i>Adjourn</i>

Thursday, Feb. 9

9:30-10:45 a.m.	Motions to Suppress: Statements, Property and Identification (75 mins) Woodrena Baker-Harrell, Chief Public Defender Chatham/Orange District, Hillsborough, NC
10:45-11:00 a.m.	<i>Break</i>
11:00-12:00 p.m.	Ethics for Felony Defenders (60 mins) (1.0 Ethics) Tom Maher, Attorney Law Offices of Amos Tyndall, Carrboro, NC
12:00-1:00 p.m.	<i>Lunch</i>
1:00-2:15 p.m.	WORKSHOP: Motions to Suppress and Evidence Blocking (75 mins)
2:15-2:30 p.m.	<i>Break</i>
2:30-3:45 p.m.	Voir Dire and Demonstration (75 mins) Michael Kabakoff, Assistant Public Defender Mecklenburg County Public Defender's Office, Charlotte, NC
3:45-4:00 p.m.	<i>Break</i>
4:00-5:00 p.m.	Preservation Essentials (60 mins) Glenn Gerding, Appellate Defender Office of the Appellate Defender, Durham, NC
5:00 p.m.	<i>Adjourn</i>

Friday, Feb. 10

9:00-9:45 a.m.	Combatting Biases in the Courtroom (45 mins) Dawn Blagrove, Executive Director and Attorney Emancipate NC, Durham, NC
9:45-10:45 a.m.	Lab Reports and Issues Surrounding Them (60 mins) Sarah R. Olson, Forensic Resource Counsel Office of Indigent Defense Services, Durham, NC
10:45-11:00 a.m.	<i>Break</i>
11:00-12:00 p.m.	Felony Case Preparation - What's Different in Superior Court (60 mins) Phil Dixon Jr., Defender Educator UNC School of Government, Chapel Hill, NC
12:00-1:00 p.m.	<i>Lunch</i>
1:00-2:00 p.m.	Jury Instructions (60 mins) Tamzin Kinnett, Assistant Public Defender Chatham County Public Defender's Office, Pittsboro, NC
2:00-2:15 p.m.	<i>Break</i>
2:15-3:15 p.m.	The Price We Pay as Professional Problem Solvers (60 mins.) (1.0 Mental Health/Substance Abuse) Candace Hoffman, Field Coordinator NC Lawyers Assistance Program
3:15 p.m.	<i>Final Remarks and Adjourn</i>

CLE HOURS: 16.0

*Includes 1.0 hour of ethics/professional responsibility and 1.0 hour of mental health/substance abuse

It Starts With You:
*Combatting Biases in
the Courtroom*



1

The Unspeakable

We all have at least one of the following two unspeakable flaws:

- **You are racist**
- **You are classist**

**Let's sit with that hard truth for a second*





2

Good News...

The unspeakables DO NOT have to dictate how you practice law if you practice the following exercises every single day.

- **Acceptance**
- **Be intentional and deliberate**
- **Be self aware**





3

Remember Your Inner Atticus Finch



- Write down why you became a lawyer.
- Remember what you wrote.
- Read it...often



4

Everybody is somebody's **BABY**



- Talk to your clients like they are YOUR family member.
- Represent your clients like Big Mama/Nana is watching.
- See your client in the best possible light.



5

Invest in Building Trust



- Ground yourself in their world
- Listen more than you talk
- Don't judge their life
- Get to know them
- Believe them
- Learn street code
- Be honest.



6

Shake Off Courthouse Culture

- Put 12 in the box
- Request bond reductions
- Don't abandon them
- Communicate with family
- Translate
- Cops lie



7

Advice From a DA

- Know the facts and the law
- Demand discovery
- Develop mitigation in every case



8

Parting Thoughts

- When you stop being outraged by injustice...leave.
- Advocates can say and do what you cannot.
- SELF CARE is necessary.



9

Contact:
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Emancipatenc.org

Questions??????



EMANCIPATE
A Carolina Justice Policy Center Project

GUIDE TO WORKING WITH EXPERTS

- **PRELIMINARY CONSIDERATIONS**

- Review your case, client's records (medical, educational, etc.), and discovery prior to contacting experts. This will help you determine exactly what type of expert assistance is needed and have a more productive conversation with an expert.
- Do not engage a mental health expert before obtaining substantial social history records unless the client is floridly psychotic upon your entry into the case. See IDS Policy on the [Effective Use of Mental Health Experts in Potentially Capital Cases](#).
- Educate yourself on the issues. Consult the [IDS Forensics website](#) for information on topics of forensic science, such as DNA, firearms, fingerprints, death investigation, etc. Scholarly articles are available such as Google Scholar and [PubMed](#).
- Do you need an expert?
 - Is the forensic evidence adverse to the defense theory of the case?
 - Do you need evidence re-tested?
 - Are you critiquing the state's testing of the evidence?
 - Even if the State is not using an expert, consider whether there are affirmative uses of experts that would support your theory of the case, such as crime scene experts, use of force experts, or mental health experts.

- **FINDING AN EXPERT:**

- Don't wait until the last minute – your desired expert may not be available. Any expert will need time to review your case prior to forming an opinion.
- Consider consulting with Sarah Olson, Forensic Resource Counsel or the Elaine Gordon, Trial Resource Counsel for additional ideas about what type of expert to use.
- Know what particular expertise you need before you start making phone calls: i.e., rather than looking for a "DNA expert," consider whether you need an expert on DNA mixtures, an expert who can challenge contamination, or an expert who can challenge the statistical computation.
- Consider the role of the expert: Do you need an expert to assist in evaluating the quality of the evidence? To explain the science to you or to the jury? Do you need an expert to develop mitigation evidence or to establish a defense such as self-defense or diminished capacity? Will assistance require access to a laboratory? Can a professor or academic fulfill the role or do you need a practicing analyst or scientist? Is the expert willing to testify?

- **RESEARCH THE EXPERT:**

- You should research your potential expert as thoroughly as you would research a State's witness that you are preparing to cross-examine.
- Review their CV. Do not assume that just because the expert has been used frequently that he/she has been properly vetted.
- Utilize disciplinary boards if available. If an expert lists a particular license or certification, see if that organization posts disciplinary information online.
- Ask the expert about any certifications or professional qualifications attempted—has the expert taken any certification exams or other professional exams that he/she has not passed? This [website](#) can be used to check to see whether an MD is certified in a particular specialty.
- Seek references on listserves, with the IDS Forensic Resource Counsel, NACDL Resource Center, American Academy of Forensic Sciences (AAFS), other lawyers, other experts and competitors, universities, and publicly-funded laboratories.
- Search LexisNexis and/or Westlaw for cases in which the expert testified.
- Additional information on how to research an expert online is available [here](#).

- **GUIDE TO YOUR FIRST CONVERSATION WITH EXPERT**

- Be able to explain to the expert what work you need performed, including specific [referral questions](#) you would like addressed if working with a mental health expert. Never ask a mental health expert simply to “evaluate” your client without providing specific guidance. Do not assume that the expert already knows what constitutes a potential defense or mitigating factor. Sometimes an expert who has not received proper guidance will tell an attorney that his or her evaluation has turned up nothing useful, when in fact the expert simply does not have the legal expertise to know what is useful and what is not.
- Get the expert to provide you with a copy of his/her CV.
- Discuss with the expert anticipated hours of work needed, any re-testing needed, any travel required in order to prepare a request for adequate funding. Discuss [AOC's rate schedule \(see p. 2\)](#) and prepare justification if the expert requires a deviation from the rate schedule.
- Discuss any potential conflicts with the expert due to co-defendants, scheduling, or any other professional or personal matter that would adversely affect the expert's work/testimony in the case.
- Verify that your expert will be able to testify. Do not assume that testimony will not be needed or promise your expert that testimony will not be needed.
- Your expert will need lab reports and the underlying data in order to analyze the evidence.
- Communication

- Can they explain their conclusions clearly and understandably?
 - Consider non-verbal communication: arrogance, bias, appearing defensive, organized, prepared, etc.
- o Considerations to discuss with expert(s)
- Position currently held.
 - Description of the subject matter of the expert's specialty.
 - Specializations within that field.
 - What academic degrees are held and from where and when obtained.
 - Specialized degrees and training.
 - Licensing in field, and in which state(s).
 - Length of time licensed.
 - Length of time practicing in this field.
 - Board certified as a specialist in this field.
 - Length of time certified as a specialist.
 - If certifications/proficiency tests/etc have been attempted, history of results.
 - Positions held since completion of formal education, and length of time in each position.
 - Duties and function of current position.
 - Length of time at current position.
 - Specific employment, duties, and experiences (optional).
 - Teaching or lecturing in the relevant field, dates and location of teaching.
 - Publications in this field and titles.
 - Membership in professional societies/associations/organizations, and special positions in them.
 - Requirements for membership and advancement within each of these organizations.
 - Honors, acknowledgments, and awards received by expert in the field.
 - Who is considered "the best" in the field?
 - Number of times testimony has been given in court as an expert witness in this field. (Case names and transcripts, if available.)
 - How has the expert's testimony been treated in the past? Did the expert appear balanced, knowledgeable, and credible? Has the expert ever not been qualified as an expert? Why?
 - Availability for consulting to any party, state agencies, law enforcement agencies, defense attorneys.

BY SARAH RACKLEY OLSON | OCTOBER 14, 2014 · 9:22 AM | EDIT

What is in a State Crime Laboratory Lab Report?

Many attorneys have asked me what should be included in a lab report from the State Crime Lab. Often in District Court DWI cases or through discovery, defense attorneys receive only a 1-2 page report called a Lab Report. For each case that is analyzed by the State Crime Laboratory, the lab produces a Case Record in Forensic Advantage (FA), the lab's electronic information management system. The Case Record contains many items, including the lab report, chain of custody information, analyst CV, and information about tests performed. Under [N.C. Gen. Stat. 15A-903](#), the lab provides this Case Record to the prosecution for disclosure to the defendant through discovery. If attorneys do not receive complete lab reports, they should request the items described below through discovery. This information is also available on the [IDS Forensic website](#).

How are reports accessed by the District Attorney's Office?

When the lab has completed its analysis and finalized its report, an email is automatically sent to the District Attorney's office and the law enforcement agency that requested the analysis, notifying them that the Case Record is available. These offices can access the Case Record using a web-based program called FA Web. There are legal assistants or victim-witness coordinators in each DA's office who are trained to use FA Web. They can access the Case Records using the emailed link (which remains active for seven days after the email is sent), or they can search for the report within FA Web even after the email link has expired. Some ADAs and DAs may also be trained in using FA Web, but typically it is a legal assistant who accesses the FA Web and downloads the Case Records.

Many defense attorneys are surprised to learn that a full Case Record is produced by the lab and sent to the DA's office for each case that is worked, including District Court cases. Depending on whether they have been trained in the use of FA Web, ADAs may or may not know that the lab provides complete Case Records for each case worked, but the legal assistant in their office who is trained to use FA Web can access these full reports.

How long has this system been in place?

FA was adopted by the lab in 2008 as the lab's electronic information management system. Since 2011, the lab has been providing Case Records to DA's offices through FA Web. Since June 2013, DA's offices have had the option to download and print partial "Ad Hoc" lab reports instead of printing the full Case Record.

What is included in a Case Record Full Packet?

The "Case Record Full Packet" may be downloaded as one zip file or portions of the Case Record may be

downloaded separately. **The Table of Contents is the most important page for a defense attorney to review in order to determine if the complete packet has been provided through discovery.** If items of evidence were analyzed in more than one section of the lab, each lab section will complete a separate Case Record for its analysis and Case Records will be numbered consecutively (for example, Record #1 may be from Trace Evidence, Record #2 may be from Forensic Biology and DNA, etc.) Some Case Records may not be needed once created, such as when an examination is redundant with another Case Record. These will be listed as “Terminated.”

The main PDF in the zip file Case Record Full Packet contains the Table of Contents. The Table of Contents will specify if it is a Case Record (Full), Ad Hoc or Officer. If an attorney sees on the Table of Contents that the packet is an Ad Hoc or Officer packet, the attorney will know that there were additional items provided by the lab that have not been provided to the defense. If the DA’s office downloads the Case Record Full Packet the entire packet will be paginated consecutively and state the total number of pages, such as Page 1 of 200. If only a partial Ad Hoc packet is downloaded, the portion that is downloaded will be paginated, such as Page 1 of 10.

The Case Record Full Packet will include the following items (though not necessarily in this order):

- **Table of Contents** – lists all items included in the main PDF file of the “Case Record Full Packet” as well as additional items that are sent as separate files. Every packet (including partial Ad Hoc packets) that is downloaded from FA Web will have a Table of Contents. This [Table of Contents](#) has been annotated to describe its various parts. These links show sample Table of Contents for Digital Evidence ([Audio Video](#) and [Computer](#)), [Drug Chemistry](#), [Firearms](#), [Toolmarks](#), Forensic Biology ([Blood](#), [DNA](#), and [Semen](#)) Latent Evidence ([Footwear-Tire](#) and [Latent](#)), [Toxicology](#), and Trace Evidence ([Arson](#), [Explosives](#), [Fiber](#), [Glass](#), [GSR](#), [Hair](#), [Paint](#), and [Trace](#)). Beneath each item listed in the Table of Contents will be an indented description of this item. Often the “description” just repeats the name of the document. Attorneys should know that indented description is not a separate or duplicate item, but is intended to describe the item listed above. The lab plans to remove the descriptions when it upgrades the FA Web program as they are mainly duplicative of the document name.
- **Lab Report** – a 1-2 page document that states the analyst’s conclusions. It will not identify what test was performed or how the analyst reached her conclusions. This is the notarized document that is found in the court file in District Court DWI cases. Many attorneys think this is the only report that the lab produces, but it is just one part of the entire Case Record that the lab produces for each case.
- **Case Report** – several pages that list the names of the analysts who performed the analysis and reviewed the case. If any problem is found when the case is reviewed by another analyst, the problem will be briefly described in this section in a written dialogue between the analysts.
- **Chain of Custody** – shows the chain of custody of the item of evidence within the lab.
- **Request for Examination of Physical Evidence** – a copy of the form that law enforcement submits to request that an item be analyzed by the lab.
- **Worksheets** – as the analyst works, she records which test is performed and her observations, measurements, and results using an electronic form on her computer. The Lab Worksheets are printouts of these electronic forms. The Lab Worksheets are one place to look to see what tests were performed.
- **Quality Control/Quality Assurance and sample preparation documentation** – this documentation will vary depending on the type of analysis completed, but many analyses will have documentation of calibration curves, positive and negative controls, instrument set-up, sample

preparation, instrument results, etc. Attorneys can consult with [Sarah Olson](#), their own expert, or the lab analyst for an explanation of these case-specific items.

- **Communication Log** – includes details of case-related phone conversations, including communications from law enforcement, prosecutors, and defense attorneys, if any such communications occurred. If communication has occurred by e-mail or memo, the e-mail or memo will be provided as part of the main PDF file in the Case Record Full Packet.
- **CV of Analyst(s)**
- **Messages Report** – these are messages that can be sent from external users to the State Crime Lab via the FA system, such as rush requests or stop work orders. Analysts can also send messages to each other through the FA system that will be recorded here.
- **Publish History and Packet History** – if this is the first publication of the packet, it will be noted here. If this is a subsequent publication of the packet, any information on previous publications, including downloads by FA Web users, will be listed.

Several additional items also make up the Case Record Full Packet. These items are listed in the Table of Contents but are not paginated with the previous documents.

- **Prior Versions of Worksheets and Lab Reports** – various versions of one Worksheet may be saved during analysis as the analyst progresses through her work. If an analyst has to go back and amend something in a completed Worksheet, the previous and new versions will be saved. If an analyst changes something in a Lab Report, the previous and new versions will be saved. These worksheets and reports are paginated separately from the Case Record Full Packet.
- **Worksheet Resources** – a list of all instruments, equipment, chemicals, reagents, kits, and other standards used in the analysis. The document also contains the maintenance history for the equipment and instruments used. This document is paginated.
- **All other items that cannot be made into PDFs, including images and some data files** – images may be printed by the DA's office, but attorneys should request them on a disc for better image quality. Raw data files cannot be printed and require proprietary software to open. Currently raw data files are being provided only in cases where DNA analysis was performed. These files can be opened by an expert who has the appropriate software to read this data.

How do I know if I received all documents that the lab has produced?

There are a number of steps that defense attorneys can take to ensure that they are receiving complete discovery:

1. **Review the Table of Contents** – Attorneys should look for the Table of Contents in the Case Record Full Packet and check to ensure that the type of Case Record that the DA's office downloaded was Full (rather than Ad Hoc) and that all documents listed in the Table of Contents are provided.
2. **Check pagination** – The FA Web system paginates everything that is downloaded. If, for example, only pages 4 and 5 of 200 are provided, the defense attorney will know that she doesn't have a copy of everything that the DA's office downloaded. However, if the DA's office chooses to only download a portion of the packet (Ad Hoc packet) rather than the Case Record Full Packet, only those downloaded pages will be paginated. For example, if the Case Record Full Packet has 200 pages but the DA's office

only downloads the Lab Report which is 2 pages, those pages will be paginated, 1 and 2 of 2.

3. **Request Forensic Advantage notification emails from the DA's office** – Whenever the lab updates a Case Record that has already been sent to the DA's office, FA will send an email notifying the DA's office that there has been a change and specifying which portion of the record is changed. Defense attorneys should request these emails from the DA's office through discovery. The updated Case Record may appear to be a duplicate of the original Case Record that was provided (and may be hundreds of pages long). These emails can help identify which document was changed.
4. **Meet with the ADA** – Defense attorneys may request to meet with the ADA assigned to the case to view all of the documents available on FA Web to ensure that everything has been downloaded and shared through discovery.
5. **Consult with the lab** – After reviewing the discovery and checking that the DA's office has provided everything available in the FA Web program to the defense, defense attorneys may consider scheduling a pre-trial meeting with the lab analyst if questions remain about reports. State Crime Lab analysts are available to meet with defense attorneys prior to trial and will answer questions about the analysis that was performed and what reports/documents were produced in the case. Defense attorneys may contact Lab Legal Counsel Assistant Attorney General [Joy Strickland](#) if there are issues with lab discovery that cannot be resolved with the ADA.

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In "Crime Labs"

CRIMINAL EVIDENCE: EXPERT TESTIMONY

Jessica Smith, UNC School of Government (August 2017)

Table of Contents

I.	Introduction.	3
II.	Standard for Admissibility under Rule 702(a).	4
A.	Generally.	4
1.	<i>Daubert, Joiner & Kumho Tire.</i>	4
2.	Effective Date of Amendments to Rule 702(a).	10
3.	Effect of Pre-Amendment Case Law.	10
B.	Relevancy.	11
1.	Generally.	11
2.	"Assist the Trier of Fact."	11
3.	"Fit" Test.	12
4.	Illustrative Cases.	12
C.	Qualifications.	14
1.	Generally.	14
2.	Illustrative Cases.	15
D.	Reliability.	18
1.	Generally.	18
2.	Illustrative Cases.	19
E.	Procedural Issues.	21
1.	Preliminary Question of Fact.	21
2.	Burden of Proof.	21
3.	Flexible Inquiry.	21
4.	Findings of Fact & Conclusion of Law.	22
5.	Informing the Jury of Witness's Expert Status.	22
F.	Particular Types of Experts.	23
1.	Use of Force & Self-Defense Experts.	23
2.	DNA Identification Evidence.	25
3.	Bite Mark Identification Evidence.	26
4.	Fingerprint Identification Evidence.	27
5.	Firearm Identification.	28
6.	Blood Alcohol Extrapolation.	28
7.	Blood Spatter Analysis.	29
8.	Fiber Analysis.	30
9.	Hair Analysis.	30
10.	Shoe Print Analysis.	32
11.	Handwriting Analysis.	32
12.	Horizontal Gaze Nystagmus (HGN).	33
13.	Eyewitness Identification Experts.	34
14.	Drug Identification & Quantity.	35
15.	Fire Investigation Experts.	40
16.	Accident Reconstruction.	41
17.	Pathologists & Cause of Death.	41
18.	Polygraphs.	42
19.	Penile Plethysmography.	42
20.	Experts in Crime & Criminal Practices.	43
III.	Form & Scope of Expert's Opinion.	46

A. Form of Testimony.	46
B. Opinion on Ultimate Issue & Legal Standards.	46
C. Opinion on Credibility of Witness.	49
D. Basis for Expert's Opinion.	50
1. Scope & Adequacy.	50
2. Of a Type Reasonably Relied Upon.	50
3. Need Not Be Admissible.	51
4. Expert Need Not Interview Victim.	51
5. Disclosure & Cross-Examination of Basis at Trial.	51
6. Status as Substantive Evidence; Limiting Instruction.	53
E. Testimony Outside of Expert's Expertise.	54
F. Terminology.	54
IV. Interplay Between Rule 403 & the 700 Rules.	54
V. Court Appointed Experts.	55
VI. Defendant's Right to Expert Assistance.	55
VII. Standard of Review on Appeal.	56

- I. Introduction.** This chapter discusses the admissibility of expert testimony under North Carolina's amended Evidence Rule 702. The 2011 amendments to subsection (a) of the rule adopted the federal standard for the admission of expert testimony, as articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *State v. McGrady*, 368 N.C. 880, 884 (2016). Before the rule was amended, making North Carolina a "Daubert state," the standard for admissibility of expert testimony came from a case called *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004). Under both the *Daubert* and *Howerton* tests, the trial court determines admissibility of expert testimony by examining relevancy, qualifications, and reliability. *McGrady*, 368 N.C. at 892. However, under the *Daubert* standard the trial court applies a more rigorous reliability analysis. *Id.*; see also *State v. Turbyfill*, ___ N.C. App. ___, 776 S.E.2d 249, 257 (2015) (*Daubert* is a "heightened" standard). In its discussion of the reliability prong of the analysis, this chapter focuses on the new *Daubert* standard.

For discussion of the proper scope of expert testimony in sexual assault cases, see [Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses](#) in this Benchbook.

For a discussion of Confrontation Clause issues that can arise with respect to expert testimony, see [Guide to Crawford and the Confrontation Clause](#) in this Benchbook.

For a discussion of what discovery must be provided in connection with expert witnesses, see [Discovery in Criminal Cases](#) in this Benchbook.

The text of Rule 702 is set out immediately below.

Rule 702. Testimony by experts

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

- (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.
- (2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

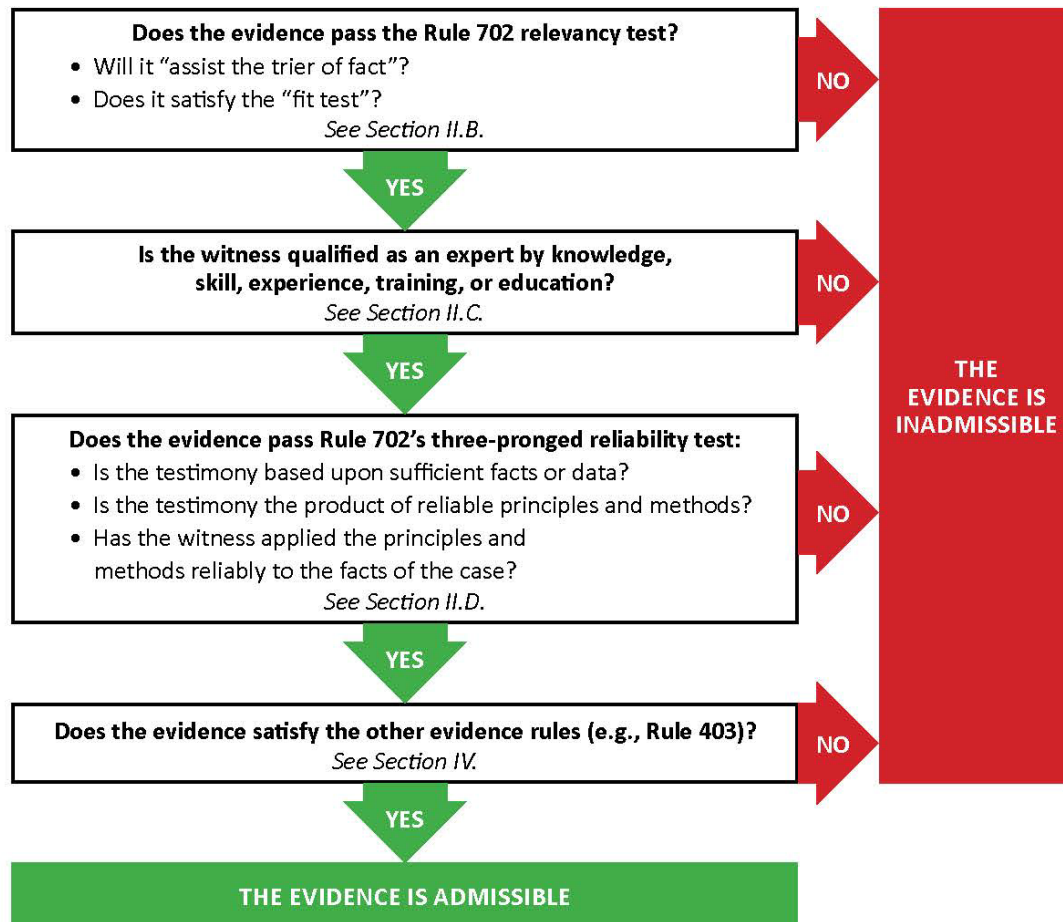
[subsections (b)-(f), dealing with medical malpractice cases, are not reproduced here]

(g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

[subsection (h), which deals with medical malpractice cases, is not reproduced here]

(i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

Figure 1. Analysis for Determining Admissibility of Expert Testimony



II. Standard for Admissibility under Rule 702(a).

A. **Generally.** As illustrated in Figure 1 above, Evidence Rule 702(a) sets forth a three-step framework for determining the admissibility of expert testimony: relevance, qualifications, and reliability, where reliability is assessed under the stricter *Daubert* standard rather than the old *Howerton* standard. See *supra* Section I.

1. ***Daubert, Joiner & Kumho Tire.*** The “*Daubert* standard” refers to a standard of admissibility laid out by the United States Supreme Court in a trio of cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Those three foundational cases are summarized here.

Daubert was a civil case in which children and their parents sued to recover for birth defects allegedly sustained because the mothers had taken Bendectin, a drug marketed by the defendant pharmaceutical company. The defendant moved for summary judgment, arguing that the

drug does not cause birth defects in humans and that the plaintiffs could not present admissible evidence establishing otherwise. The defendant supported its motion with an expert's affidavit concluding that Bendectin has not been shown to be a risk factor for human birth defects. The plaintiffs countered with eight experts; each of whom concluded that Bendectin can cause birth defects. The experts' conclusions were based on animal studies; pharmacological studies purporting to show that Bendectin's chemical structure was similar to that of other substances known to cause birth defects; and the "reanalysis" of previously published human statistical studies. Relying on the "general acceptance" test for admission of scientific evidence formulated in *Frye v. United States*, 293 F. 1013 (1923), the trial court found that because it was not generally accepted as reliable in the relevant scientific community the plaintiffs' expert evidence was inadmissible and granted the defendant's motion for summary judgment. After the Ninth Circuit affirmed, the United States Supreme Court agreed to hear the case, to resolve a split among the courts regarding whether the "general acceptance" test was the proper standard for admission of expert testimony.

The Court began by holding that the *Frye* "general acceptance" test for admission of expert testimony was superseded by the adoption of the Federal Rules of Evidence. Addressing the standard for admissibility under Rule 702, the Court stated that to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. 509 U.S. at 590. It explained: "[T]he requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." *Id.* The Court continued, noting that Rule 702 "further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue,'" a condition going primarily to relevance. *Id.* at 591. It clarified: "Expert testimony which does not relate to any issue with the case is not relevant and, ergo, non-helpful." *Id.* (quotation omitted). This prong of the admissibility analysis, it noted, has been described as one of "fit." *Id.* It continued:

Faced with a proffer of expert scientific testimony . . . , the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. at 592–93 (footnotes omitted). The Court noted that many factors will bear on the inquiry and that it would not "presume to set out a definitive checklist or test." *Id.* at 593. However, it went on to offer five "general observations" relevant to the analysis:

1. A "key question" is whether the theory or technique can be (and has been) tested. *Id.* ("Scientific methodology . . . is based on generating hypotheses and testing them to see if they can be

- falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry” (quotation omitted)).
2. Whether the theory or technique has been subjected to peer review and publication. *Id.* The Court noted that publication (one element of peer review) is not a “sine qua non of admissibility;” publication does not necessarily correlate with reliability, and in some cases well-grounded but innovative theories will not have been published. *Id.* It explained: “Some propositions . . . are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” *Id.* Thus, “[t]he fact of publication (or lack thereof) in a peer reviewed journal . . . will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.” *Id.* at 594.
 3. The theory or technique’s known or potential rate of error. *Id.* at 594.
 4. The existence and maintenance of standards controlling the technique’s operation. *Id.*
 5. The “general acceptance” of the theory or technique. *Id.* at 594. The Court explained:

“A reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community. Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism.”

Id. (quotations and citations omitted).

The Court was careful to note that the inquiry to be applied by the trial court in its “gatekeeping role,” *id.* at 597, is “a flexible one” in which the focus “must be solely on principles and methodology, not on the conclusions that they generate.” *Id.* at 594-95. In the end, the Court remanded for further proceedings consistent with the new test for admissibility. *Id.* at 597-98.

The second case in the *Daubert* trilogy was *Joiner*, another civil case. *Joiner*, 522 U.S. 136. Its main contribution to the trilogy is to establish that a trial court’s decision to admit or exclude expert testimony under Federal Rule 702 is reviewed under an abuse of discretion standard and to illustrate application of that standard to a trial court’s exclusion of expert testimony. In *Joiner*, an electrician who had lung cancer sued the manufacturer of PCBs and the manufacturers of electrical transformers and dielectric fluid for damages. The plaintiff, who

was a smoker and had a family history of lung cancer, claimed that his exposure on the job to PCBs and their derivatives promoted his cancer. In deposition testimony, the plaintiff's experts opined that his exposure to PCBs was likely responsible for his cancer. The district court found the testimony from these experts to be inadmissible and granted the defendants' motion for summary judgment. The Eleventh Circuit reversed and the Supreme Court granted certiorari.

The Court held that a trial court's decision to admit or exclude expert testimony will be reviewed under an abuse of discretion standard and that here, no abuse of discretion occurred. *Id.* at 143. The plaintiff proffered the deposition testimony of two expert witnesses: (1) Dr. Arnold Schecter, who testified that he believed it "more likely than not that [the plaintiff's] lung cancer was causally linked to cigarette smoking and PCB exposure;" and (2) Dr. Daniel Teitlebaum, who testified that the plaintiff's "lung cancer was caused by or contributed to in a significant degree by the materials with which he worked." *Id.* The defendants asserted that the experts' statements regarding causation were speculation, unsupported by epidemiological studies and based exclusively on isolated studies of laboratory animals. *Id.* The plaintiff responded, claiming that his experts had identified animal studies to support their opinions and directing the court to four epidemiological studies relied upon by his experts. *Id.* at 143-44. The district court had agreed with the defendants that the animal studies did not support the plaintiff's contention that PCB exposure contributed to his cancer. *Id.* at 144. The studies involved infant mice that developed cancer after being exposed to massive doses of concentrated PCBs injected directly into their bodies. *Id.* The plaintiff, by contrast, was an adult human whose alleged exposure was far less and in lower concentrations. *Id.* Also, the cancer that the mice developed was different than the plaintiff's cancer, no study demonstrated that adult mice developed cancer after being exposed to PCBs, and no study demonstrated that PCBs lead to cancer in other species. *Id.* The Court concluded: "[t]he studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court to have rejected the experts' reliance on them." *Id.* at 144-45.

The trial court also had concluded that the epidemiological studies were not a sufficient basis for the experts' opinions. After reviewing the studies, the Court found that they did not sufficiently suggest a link between the increase in lung cancer deaths and exposure to PCBs. *Id.* at 145-46. The Court went on to disagree with the plaintiff's assertion that *Daubert* requires a focus "solely on principles and methodology," not the conclusions that they generate, and that the trial court erred by focusing on the experts' conclusions, stating:

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146. The Court went on to hold that the trial court did not abuse its discretion by concluding that the studies on which the experts relied were not sufficient to support their conclusions that the plaintiff's exposure to PCBs contributed to his cancer. *Id.* at 146-47.

The final case in the trio was *Kumho Tire*, 526 U.S. 137. It answered a question left open by *Daubert*: Does the *Daubert* standard apply only to "scientific" expert testimony or to all expert testimony, including testimony based on technical or other specialized knowledge? The Court held that the test applies to *all* expert testimony. In *Kumho Tire* the Court also clarified the nature of the *Daubert* inquiry.

In *Kumho Tire*, the plaintiffs brought a products liability action against a tire manufacturer and distributor for injuries sustained when a vehicle tire failed. The plaintiffs rested their case on deposition testimony provided by an expert in tire failure analysis, Dennis Carlson. Carlson's testimony accepted certain background facts about the tire in question, including that it had traveled far; that the tire's tread depth had been worn down to depths that ranged from 3/32 of an inch to zero; and that the tire tread had at least two inadequately repaired punctures. Despite the tire's age and history, Carlson concluded that a defect in the tire's manufacture or design caused the blowout. His conclusion rested on several undisputed premises, including that the tread had separated from the inner carcass and that this "separation" caused the blowout. *Id.* at 143-44. However, his conclusion also rested on several disputed propositions. First, Carlson said that if a separation is not caused by a kind of misuse called "overdeflection" then ordinarily its cause is a tire defect. Second, that if a tire has been subject to sufficient overdeflection to cause a separation, it should reveal certain symptoms, which he identified. Third, that where he does not find at least two such symptoms, he concludes that a manufacturing or design defect caused the separation. Carlson conceded that the tire showed a number of symptoms, but in each instance he found them to be not significant and he explained why he believed they did not reveal overdeflection. He thus concluded that a defect must have caused the blowout.

The defendant moved to exclude Carlson's testimony on the ground his methodology failed Rule 702's reliability requirement. The trial court conducted a *Daubert* reliability analysis and granted the motion to exclude. The Eleventh Circuit reversed, holding that the *Daubert* analysis only applied to scientific evidence. The United States Supreme Court granted certiorari to resolve the question of whether or how *Daubert* applies to expert testimony based not on "scientific" knowledge but on "technical" or "other specialized" knowledge.

The Supreme Court began by holding that the *Daubert* standard applies to all expert testimony, not just scientific testimony. *Id.* at 147-49. It went on to hold that when determining the admissibility of the expert testimony at issue--engineering testimony--the trial court *may* consider the five *Daubert* factors: whether the theory or technique can and has been tested; whether it has been subjected to peer review and publication; the theory or technique's known or potential rate of error; whether there are standards controlling its operation; and whether the theory or technique enjoys general acceptance within the relevant

scientific community. *Id.* at 149-50. Emphasizing the word “may” in this holding, the Court explained:

Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. . . . [T]here are many different kinds of experts, and many different kinds of expertise. . . . We agree . . . that “[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.” The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Id. at 150 (quotations and citations omitted). It continued:

Daubert . . . made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

At the same time . . . some of *Daubert*'s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

Id. at 151. The Court emphasized that the purpose of *Daubert*'s gatekeeping requirement “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that

characterizes the practice of an expert in the relevant field.” *Id.* at 152. It further emphasized the considerable leeway that must be afforded to the trial court in determining whether particular expert testimony is reliable. *Id.* It clarified that when assessing reliability, the trial court must have flexibility in determining whether special briefing or other proceedings are necessary, and that, as it held in *Joiner*, the court’s decision will be reviewed under an abuse of discretion standard. *Id.*

Turning to the case at hand, the Court held that the trial court did not abuse its discretion by excluding the testimony. The district court had found unreliable the methodology employed by the expert in analyzing the data obtained through his inspection of the tire, and the scientific basis, if any, for his analysis. The Court noted that, among other things, the trial court could reasonably have wondered whether the expert’s method of visual and tactile inspection was sufficiently precise, and these concerns might have been amplified by Carlson’s repeated reliance on the subjectiveness of his analysis and the fact that he had inspected the tire for the first time the morning of his deposition, and only for a few hours, having based his initial conclusions on photographs. *Id.* at 155. Additionally, the trial court found that none of the *Daubert* factors, including that of general acceptance, indicated that Carlson’s testimony was reliable. *Id.* at 156. With respect to Carlson’s claim that his method was accurate, the court noted that, as stated in *Joiner*, “nothing . . . requires a district court to admit opinion evidence that it is connected to existing data only by the ipse dixit of the expert.” *Id.* at 157. For these and other reasons, the Court concluded that the trial court did not abuse its discretion by excluding the expert testimony. *Id.* at 158.

Stated broadly, these three cases hold that when assessing any type of expert testimony under Rule 702, the *Daubert* standard applies; the inquiry is a flexible one; and the trial court will be reversed only for an abuse of discretion.

2. **Effective Date of Amendments to Rule 702(a).** As noted above, the 2011 amendments to Rule 702(a) incorporate the *Daubert* standard. The amendments to section 702(a) apply to “actions commenced” on or after October 1, 2011. See S.L. 2011-283, secs. 1.3, 4.2. “[T]he trigger date” for applying the amended version of the rule is the date that the bill of indictment is filed. *State v. Walston*, 229 N.C. App. 141, 152 (2013), *rev’d on other grounds*, 367 N.C. 721 (2014); *State v. McLaughlin*, ___ N.C. App. ___, 786 S.E.2d 269, 286 (2016); *State v. Gamez*, 228 N.C. App. 329, 332-33 (2013). If a second indictment is filed on or after October 1, 2011 and is joined for trial with an indictment filed before the statute’s effective date, the proceeding is deemed to have commenced on the date the first indictment was filed. *Gamez*, 228 N.C. App. at 333. However, in a case involving one indictment in which a superseding indictment is filed, the date of the superseding indictment controls. *Walston*, 229 N.C. App. at 152.
3. **Effect of Pre-Amendment Case Law.** The North Carolina Supreme Court has stated that the 2011 amendments did not abrogate all North Carolina precedents interpreting that rule. Specifically, it has stated: “Our previous cases are still good law if they do not conflict with the *Daubert* standard.” *State v. McGrady*, 368 N.C. 880,

at 888 (2016). It is not entirely clear what that statement means. The 2011 amendments adopting the *Daubert* standard changed only the reliability prong of the Rule 702 analysis; the relevancy and qualifications prongs were not changed. Thus, this Chapter assumes that this statement means: (1) that cases applying the relevancy and qualifications prongs of the analysis remain good law; and (2) that cases applying the more lenient pre-*Daubert* standard to the reliability prong are inconsistent with the analysis under the new *Daubert* rule. However, cases applying the pre-*Daubert* standard to the reliability prong to hold that evidence is inadmissible are likely to be consistent with a result that obtains from application of the *Daubert* standard (after all, evidence that could not pass muster under the earlier standard is unlikely to do so under the new stricter standard). By contrast, cases applying the more lenient pre-*Daubert* standard to the reliability prong to hold that evidence is admissible may not be consistent with a result that obtains under the stricter *Daubert* test, and perhaps should be viewed with some skepticism.

B. Relevancy.

1. **Generally.** Rule 702 requires that the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” This prong of the analysis is referred to as the “relevancy test.” *Daubert*, 509 U.S. at 591 (“This condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” (quotation omitted)); see also *McGrady*, 368 N.C. at 889. As with any evidence, the expert testimony must meet the minimum standard for logical relevance under Rule 401. *McGrady*, 368 N.C. at 889. “In other words, the testimony must ‘relate to [an] issue in the case.’” *Id.* (quoting *Daubert*); see also *State v. Oakes*, 209 N.C. App. 18, 28-29 (2011) (the defendant was not prejudiced by the trial court’s decision to exclude testimony by the defendant’s use of force expert on the issue of the defendant’s intent to kill where intent to kill was irrelevant to the charge of felony-murder); see generally [Relevancy](#) in this Benchbook (discussing relevancy under Rule 401).
2. **“Assist the Trier of Fact.”** As used in this prong of the inquiry, the term relevance means something more than standard relevancy under Rule 401. *McGrady*, 368 N.C. at 889. As the North Carolina Supreme Court has explained, “In order to ‘assist the trier of fact,’ expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience.” *Id.* (going on to note: “An area of inquiry need not be completely incomprehensible to lay jurors without expert assistance before expert testimony becomes admissible. To be helpful, though, that testimony must do more than invite the jury to substitute the expert’s judgment of the meaning of the facts of the case for its own” (citation and quotation omitted)). Thus, in *McGrady*, the court held that the trial court did not abuse its discretion by excluding a defense expert proffered to testify to “pre-attack cues” and “use of force variables” to support the defense of self-defense and defense of others. 368 N.C. at 894-95. According to the expert, pre-attack cues are actions “exhibited by an aggressor as a possible precursor to an actual attack” including “actions consistent with an assault, actions consistent with retrieving a

weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others.” *Id.* at 894. He said that “use of force variables” refer to circumstances and events that influence a person's decision about the type and degree of force necessary to repel a perceived threat, such as the age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. *Id.* at 895. The court held that the trial court did not abuse its discretion by concluding that the expert's testimony about pre-attack cues and use of force variables would not assist the jury because these matters were within the jurors' common knowledge. The court noted: the factors the expert “cited and relied on to conclude that defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions.” *Id.*

3. **“Fit” Test.** Another aspect of relevancy is the “fit” of the expert testimony to the facts of the case. *Daubert*, 509 U.S. at 591-92. As referred to in this way, the fit test ensures that proffered “expert testimony . . . is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” *State v. Babich*, ___ N.C. App. ___, 797 S.E.2d. 359, 362 (2017) (quoting *Daubert*). Thus for example, the North Carolina Court of Appeals held that expert testimony on retrograde extrapolation that assumed, with no evidence, that the defendant was in a post-absorptive state failed the fit test and was inadmissible. *Id.* Issues of “fit” overlap with the third-prong of the reliability analysis, that the witness has applied the principles and methods reliably to the facts of the case, as discussed below in Section II.D.
4. **Illustrative Cases.** Illustrative cases addressing this prong of the test are annotated below. Because this prong of the Rule 702(a) admissibility inquiry was not altered by the 2011 amendments to the rule, the cases listed below include those decided both before and after the 2011 amendments.

State v. McGrady, 368 N.C. 880, 894–95 (2016). In this murder case, the trial court did not abuse its discretion by excluding a defense expert proffered to testify to “pre-attack cues” and “use of force variables” to support the defense of self-defense and defense of others. The expert's report stated that pre-attack cues are actions “exhibited by an aggressor as a possible precursor to an actual attack” including “actions consistent with an assault, actions consistent with retrieving a weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others.” He indicated that “use of force variables” refer to additional circumstances and events that influence a person's decision about the type and degree of force necessary to repel a perceived threat, such as age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. The trial court did not abuse its discretion by concluding that the expert's testimony about pre-attack cues and use of force variables would not assist the jury because these matters were within the jurors' common

knowledge. The court noted: the factors the expert “cited and relied on to conclude that defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions.” In fact, the expert’s own report stated that, even without formal training, individuals recognize and respond to these cues and variables when assessing a potential threat.

State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359, 361-64 (2017). Holding that an expert’s retrograde extrapolation testimony that assumed, with no evidence, that the defendant was in a post-absorptive state failed the “fit” test and was inadmissible. The court held:

[W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant’s own statements during the initial stop, from the arresting officer’s observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant’s consumption of alcohol.

When there are at least some facts that can support the expert’s assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony. But where, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* “fit” test because the expert’s otherwise reliable analysis is not properly tied to the facts of the case.

State v. Daughtridge, ___ N.C. App. ___, 789 S.E.2d 667, 675-76 (2016). The trial court improperly allowed a medical examiner to testify, as an expert in forensic pathology, that the victim’s death was a homicide when that opinion was based not on medical evidence but rather on non-medical information provided to the expert by law enforcement officers involved in the investigation of the victim’s death. The State failed to adequately explain how the medical examiner was in a better position than the jurors to evaluate whether the information provided by the officers was more suggestive of a homicide than a suicide.

State v. Martin, 222 N.C. App. 213, 216–18 (2012). The trial court did not abuse its discretion by excluding testimony by a defense

proffered “forensic scientist and criminal profiler.” During voir dire the witness identified what he considered to be inconsistencies in the victim's version of events leading up to and during the alleged sexual assaults and evidence consistent with what he described as “investigative red flags.” The witness's testimony, which would have discredited the victim's account of the defendant's action on the night in question and commented on the manner in which the criminal investigation was conducted “appears to invade the province of the jury.”

State v. Fox, 58 N.C. App. 231, 233 (1982). The trial court did not err by refusing to allow a psychiatrist testifying as an expert witness to give his opinion that the defendant believed he was acting in self-defense. The court held: “we do not find error in the trial court's conclusion that it was for the jury to ascertain defendant's motive for the killing.” The court concluded that the expert

certainly was qualified to give an opinion as to [the defendant's] mental capacity and any mental disorders he may have identified, and the record shows he was permitted to do so. Indeed, the psychiatrist was permitted to testify that defendant had told him he had acted in the belief that the victim was going to kill him and that he had been frightened. We find nothing in the record to indicate that the witness was better qualified than the jury to judge the defendant's veracity based on all the evidence.

C. Qualifications.

1. **Generally.** The second requirement for admissibility of expert testimony is that the witness must be “qualified as an expert by knowledge, skill, experience, training, or education.” N.C. R. EVID. 702(a). “This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony.” *McGrady*, 368 N.C. at 889. It asks: “Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?” *Id.*

The North Carolina Supreme Court has noted that “[e]xpertise can come from practical experience as much as from academic training” and that:

The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise.

Id. at 889-90. It also has noted that “[d]ifferent fields require different ‘knowledge, skill, experience, training, or education,’” *id.* at 896, explaining:

For example, a witness with a Ph.D. in organic chemistry may be able to describe in detail how flour, eggs, and sugar react on a molecular level when heated to 350 degrees, but would likely be less qualified to testify about the proper way to bake a cake than a career baker with no formal education.

Id.

Once a witness is found to be qualified to testify as an expert, issues sometimes arise about whether the expert is being asked to testify outside of his or her area of expertise. For a discussion of that issue, see Section III.E. below.

2. **Illustrative Cases.** Examples of North Carolina cases addressing this prong of the test are provided below. This list is meant to be illustrative, not exhaustive. Because this prong of the Rule 702(a) admissibility inquiry was not altered by the 2011 amendments to the rule, the cases below include those decided both before and after the 2011 amendments to the Rule.

State v. McGrady, 368 N.C. 880, 895–96 (2016). In this murder case, the trial court did not abuse its discretion by concluding that a defense expert, Mr. Cloutier, was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system. Cloutier’s report stated that an instinctive survival response to fear “can activate the body’s sympathetic nervous system” and the “‘fight or flight’ response.” He indicated that the defendant’s perception of an impending attack would cause an adrenaline surge “activat[ing] instinctive, powerful and uncontrollable survival responses.” He maintained that this nervous system response causes “perceptual narrowing,” focusing a person’s attention on the threat and leading to a loss of peripheral vision and other changes in visual perception. According to Cloutier, this nervous system response also can cause “fragmented memory,” or an inability to recall events. The expert, a former police officer, testified that he was not a medical doctor but had studied “the basics” of the brain in general college psychology courses. He also testified that he had read articles and been trained by medical doctors on how adrenaline affects the body, had personally experienced perceptual narrowing, and had trained numerous police officers and civilians on how to deal with these stress responses. Noting that Rule 702(a) “does not create an across-the-board requirement for academic training or credentials,” the court held that it was not an abuse of discretion to require a witness who intended to testify about the

functions of an organ system to have some formal medical training.

State v. Morgan, 359 N.C. 131, 159–61 (2004). The trial court did not abuse its discretion by holding that the State's witness was qualified to testify as an expert in the field of bloodstain pattern interpretation where the witness completed two training sessions on bloodstain pattern interpretation, had analyzed bloodstain patterns in dozens of cases, had previously testified in a homicide case as a bloodstain pattern interpretation expert, and described in detail to the judge and jury the difference between blood spatter and transfer stains and produced visual aids to illustrate his testimony. The witness's "qualifications are not diminished, as defendant suggests, by the fact that he has never written an article, lectured, or taken a college-level course on bloodstain or blood spatter analysis."

State v. Cooper, 229 N.C. App. 442, 461-63 (2013). In this murder case where files recovered from the defendant's computer linked the defendant to the crime, the trial court abused its discretion by concluding that a defense expert proffered to testify that the defendant's computer had been tampered with was not qualified to give expert testimony. The witness had worked for many years in the computer field, specializing in computer network security. However, the witness had no training and experience as a forensic computer analyst. The trial court erred by concluding that because the digital data in question was recovered using forensic tools and methods, only an expert forensic computer analyst was qualified to interpret and form opinions based on the data recovered. It concluded: "Nothing in evidence supports a finding that [the expert] was not qualified to testify using the data recovered by the State. [The expert], based upon expertise acquired through practical experience, was certainly better qualified than the jury to form an opinion as to the subject matter to which his testimony applie[d]." (quotation and citation omitted).

State v. Dew, 225 N.C. App. 750, 760-61 (2013). In this child sex case, the trial court did not err by qualifying as an expert a family therapist who provided counseling to the victims. Among other things, the witness had a master's degree in Christian counseling and completed additional professional training relating to the trauma experienced by children who have been sexually abused; she engaged in private practice as a therapist and was a licensed family therapist and professional counselor; and over half of her clients had been subjected to some sort of trauma, with a significant number having suffered sexual abuse.

State v. Britt, 217 N.C. App. 309, 314-15 (2011). SBI agents were properly qualified to give expert testimony regarding firearm tool mark identification.

State v. Norman, 213 N.C. App. 114, 122-24 (2011). The trial court did not abuse its discretion by qualifying the State's witness, Mr. Glover, as an expert in the fields of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior. Glover was the head of NC Department of Health and Human Services Forensic Test for Alcohol branch. He oversaw training of officers on the operation of alcohol breath test instruments and of drug recognition experts, who observed the effects of drugs in individuals. Glover had a bachelor of science and a master's degree in biology and was certified as a chemical analyst on breath test instruments used in North Carolina. He attended courses at Indiana University regarding the effects of alcohol on the human body, the various methods for determining alcohol concentrations, and on the effects of drugs on human psychomotor performance. Glover published several works and previously had been qualified as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior over 230 times in North Carolina. The court concluded that despite Glover's lack of a formal degree or certification in the fields of physiology and pharmacology, his extensive practical experience qualified him to testify as an expert. *See also* *State v. Green*, 209 N.C. App. 669, 672-75 (2011) (holding that the trial court did not abuse its discretion by finding that Glover was qualified to testify as an expert in the areas of pharmacology and physiology).

State v. Norton, 213 N.C. App. 75, 80-81 (2011). The trial court did not abuse its discretion by finding that a forensic toxicologist was qualified to testify about the effects of cocaine on the body. The court concluded: "As a trained expert in forensic toxicology with degrees in biology and chemistry, the witness . . . was plainly in a better position to have an opinion on the physiological effects of cocaine than the jury."

State v. Hargrave, 198 N.C. App. 579, 584-85 (2009). The court rejected the defendant's argument that the trial court erred by admitting testimony from the State lab technician (who testified that the substances found by law enforcement contained cocaine) because the expert did not have an advanced degree. The witness had a Bachelor's degree in chemistry, completed basic law

enforcement training and in-house training to be a forensic drug chemist and testified as an expert in that field on approximately forty previous occasions.

D. Reliability.

- 1. Generally.** The third requirement of Rule 702(a) is the three-pronged reliability test that is new to the amended rule:

- (1) the testimony must be based upon sufficient facts or data;
- (2) the testimony must be the product of reliable principles and methods; and
- (3) the witness must have applied the principles and methods reliably to the facts of the case.

N.C. R. EVID. 702(a). These three prongs together constitute the reliability inquiry discussed in the *Daubert* line of cases, *McGrady*, 368 N.C. at 890, discussed in Section II.A.1. above. Citing extensively from those cases, the North Carolina Supreme Court has noted that:

- Although the primary focus of this inquiry is the reliability of the witness's principles and methodology, not the conclusions that they generate, conclusions and methodology are not entirely distinct. Thus, when a trial court concludes that there is simply too great an analytical gap between the data and the opinion proffered, "the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *McGrady*, 368 N.C. at 890 (quotations and citations omitted).
- "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony" and the trial court has discretion in determining how to address the reliability analysis. *Id.*
- The five factors identified in *Daubert* (whether the theory or technique can and has been tested; whether it has been subjected to peer review and publication; the theory or technique's known or potential rate of error; whether there are standards controlling its operation; and whether the theory or technique enjoys general acceptance within the relevant scientific community) bear on the reliability of the evidence, but the trial court should use whatever factors it thinks most appropriate for the inquiry. *Id.*
- Other factors considered by courts in the reliability inquiry include whether:
 - (1) the expert is testifying based on research conducted independent of the litigation;
 - (2) the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
 - (3) the expert has adequately accounted for obvious alternative explanations;

- (4) the expert has employed the same care in reaching litigation-related opinions as the expert employs in performing the expert's regular professional work; and
- (5) the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

McGrady, 368 N.C. at 891.

- The inquiry remains a flexible one; neither *Daubert*'s five factors nor this additional list of factors constitute a checklist; the trial court is free to consider other factors, depending on the type of testimony at issue. *Id.* at 891-92.

Cases decided since *McGrady* have reiterated these points. See, e.g., *State v. Hunt*, ___ N.C. App. ___, 790 S.E.2d 874, 881 (2016); *State v. Turbyfill*, ___ N.C. App. ___, 776 S.E.2d 249, 258 (2015).

Note that the third-part of the reliability analysis—that the witness has applied the principles and methods reliably to the facts of the case—overlaps, in some respect, with issues of “fit” with respect to the relevancy prong of the analysis, discussed above in Section II.B.3.

2. Illustrative Cases. Examples of North Carolina cases applying *Daubert* to this prong of the analysis include:

State v. McGrady, 368 N.C. 880, 897–99 (2016). In this murder case, the trial court did not abuse its discretion by concluding that a defense expert's testimony regarding reaction times was unreliable. The testimony was offered to rebut any assumption in the jurors' minds that the defendant could not have acted defensively if he shot the victim in the back. Because the expert testified on voir dire that he interviewed the defendant and other witnesses; reviewed interviews of the defendant and a witness, the case file, and physical evidence collected by the Sheriff's Department; and visited the crime scene, the expert's testimony satisfied the “sufficient facts or data” requirement in Rule 702(a)(1). However, the expert based his testimony about average reaction times on statistics from two studies, but did not know whether or not those studies reported error rates and, if so, what those error rates were. Thus, a trial judge could reasonably conclude that the expert's degree of unfamiliarity with the studies rendered unreliable his testimony about them and the conclusions about the case that he drew from them. Also, while the expert established that a disability could affect reaction time, he failed to account for the defendant's back injury in his analysis. This failure relates both to the sufficiency of the facts and data relied upon and to whether the expert applied his own methodology reliably in this case.

State v. Hunt, 790 N.C. App. 874, 877, 880-81 (2016). In this drug case, the trial court properly allowed the State's witness, a special

agent and forensic chemist with the State Crime Lab, to testify as an expert in forensic chemistry. The expert testified that following Crime Lab administrative procedure, he applied a testing procedure called the “administrative sample selection” to the pharmaceutically manufactured pills in question. This involves visually inspecting the shape, color, texture, and manufacturer's markings or imprints of all units and comparing them to an online database to determine whether the pills are pharmaceutically prepared. After the chemist determines that the units are similar and not counterfeit, the protocol requires the chemist to weigh the samples, randomly select one, and chemically analyze that tablet, using gas chromatography and a mass spectrometer. The expert testified that upon receiving the pills, he divided them into four categories based on their physical characteristics. Using administrative sample selection, he tested one pill from the first three groups. Each tested positive for oxycodone. The combined weight of the pills in these categories exceeded the trafficking amount. Upon inspecting the pills that he did not chemically analyze according to their physical characteristics, he found them consistent with a pharmaceutical preparation containing oxycodone. The court held that, based on the expert's detailed explanation of his use of lab procedures, his testimony was the “product of reliable principles and methods.” The court rejected the defendant's argument that the expert's testimony regarding the pills that were not chemically analyzed was not “based upon sufficient facts or data” and did not reflect application of “the principles and methods reliably to the facts of the case.” Specifically, the defendant pointed to lab rules and regulations stating that under administrative sampling selection, no inferences about unanalyzed materials are to be made. The expert testified however that the lab rules and regulations regarding no inferences for unanalyzed substances does not apply to pharmaceutically prepared substances. For other cases involving sampling in drug testing, see Section II.F.14. below.

State v. Abrams, ____ N.C. App. ____, 789 S.E.2d 863, 864-65 (2016). In this drug case, the trial court did not abuse its discretion by admitting expert testimony identifying the substance at issue as marijuana. At trial, Agent Baxter, a forensic scientist with the State Crime Lab, testified that she examined the substance, conducted relevant tests, and found that the substance was marijuana. The court rejected the defendant's argument that the expert's testimony was not “the product of reliable principles and methods” and that the evidence failed to show that she applied the principles and methods reliably to the facts of the case. Baxter's testimony established that she analyzed the substance in accordance with State Lab procedures, providing detailed testimony regarding each step in her process. Specifically, identifying the substance as marijuana involves the following steps: separating weighable materials from packaging; recording the weight; conducting a preliminary analysis, such as a color test;

conducting a microscopic examination, looking for identified characteristics of marijuana (e.g., unique characteristics of the leaves); and conducting the Duquenois–Levine color test. The court concluded: “Based on her detailed explanation of the systematic procedure she employed to identify the substance . . . , a procedure adopted by the NC Lab specifically to analyze and identify marijuana, her testimony was clearly the ‘product of reliable principles and methods’ sufficient to satisfy . . . Rule 702(a).” The court went on to reject the defendant’s argument that Baxter’s testimony did not establish that she applied the principles and methods reliably to the facts of the case. Based on Baxter’s testimony regarding her handling of the sample at issue, the court held that Baxter’s testimony established that the principles and methods were applied reliably the substance at issue.

E. Procedural Issues.

1. **Preliminary Question of Fact.** The admissibility of expert testimony is determined by the trial court pursuant to Rule 104(a). *McGrady*, 368 N.C. at 892. *See generally* N.C. R. EVID. 104(a). In determining admissibility, the trial judge is not bound by the rules of evidence, except those with respect to privileges. *McGrady*, 368 N.C. at 892 (quoting N.C. R. EVID. 104(a)).

To the extent that factual findings are necessary to determine admissibility, the trial judge acts as the trier of fact. *Id.* at 892 (citing Commentary to N.C. R. EVID. 104(a)). The standard for factual findings is the greater weight of the evidence *Id.* at 892–93.

2. **Burden of Proof.** The proponent of the evidence bears the burden of establishing that the evidence is admissible. *State v. Ward*, 364 N.C. 133, 140 (2010) (pre-amendment expert witness case).
3. **Flexible Inquiry.** Because Rule 702(a) does not mandate any particular procedure for the court to determine the admissibility of expert testimony, the trial court has the discretion to determine how to best handle the matter. *Kumho Tire*, 526 U.S. at 152 (“The trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert’s relevant testimony is reliable.”); *see also McGrady*, 368 N.C. at 892; *State v. Walston*, ___ N.C. ___, 798 S.E.2d 741, 747 (2017) (citing *McGrady* and noting that “Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony”); *State v. Abrams*, ___ N.C. App. ___, 789 S.E.2d 863, 866 (2016) (quoting *McGrady*). In simple cases, an appropriate foundation may be laid on direct examination. *McGrady*, 368 N.C. at 893. In more complex cases, the trial court may opt for special briefings, submission of affidavits, voir dire testimony, or an *in limine* hearing. *Id.* Whatever the case, the trial court “should use a procedure that, given the circumstances of the case, will secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” *Id.* (quotation omitted).

Noting the difficulty a silent record creates for purposes of appeal, a concurring opinion in one post-*McGrady* cases suggests:

[B]est practice dictates parties should challenge an expert's admissibility through a motion *in limine*. In the event a trial court delays its ruling on the matter, or in the event a party fails to raise the challenge until the expert is called upon at trial, our trial courts should afford parties a *voir dire* hearing to examine the witness and submit evidence into the record, which this Court can review on appeal.

4. **Findings of Fact & Conclusion of Law.** In *McGrady*, the North Carolina Supreme Court stated that the trial court must find the relevant facts pertaining to admissibility and then, based on these findings, determine whether the proffered expert testimony meets the rule's requirements of qualification, relevance, and reliability. *McGrady*, 368 N.C. at 892–93. Although some language in at least one subsequent court of appeals case suggests that the trial courts are not required to make findings of fact or conclusions of law regarding the admissibility of expert testimony, *Abrams*, ___ N.C. App. at ___, 789 S.E.2d at 868 (Hunter, J., concurring) (“At the present, trial courts are not required to make findings of fact or conclusions of law when they accept or reject an expert witness.”), that same case suggests that the better practice in light of *McGrady* is to make such findings and conclusions on the record. *Id.* at 869 (“[T]he trial court should identify the *Daubert* factors and make findings of fact and conclusions of law, either orally or in writing, as to the expert's admissibility.”).
5. **Informing the Jury of Witness's Expert Status.** Some commentators and authority from other jurisdictions suggest that it is preferable for the trial court not to advise the jury that it has found a witness to be an expert, to avoid undue influence that the jury might place on the witness's testimony. See e.g., Advisory Committee Notes to FED. R. EVID. 702 (“[T]here is much to be said for a practice that prohibits the use of the term ‘expert’ by both the parties and the court at trial. Such a practice ensures that trial courts do not inadvertently put their stamp of authority on a witness's opinion, and protects against the jury's being overwhelmed by the so-called ‘experts.’” (quotation omitted)); National Commission on Forensic Science, Views of the Commission Regarding Judicial Vouching (June 21, 2016) (“The Commission is of the view that it is improper and misleading for a trial judge to declare a witness to be an expert in the presence of the jury.”), <https://www.justice.gov/ncfs/file/880246/download>; *United States v. Johnson*, 488 F.3d 690, 697–98 (6th Cir. 2007) (agreeing with decisions that have articulated “good reasons” for not informing the jury that a witness has been qualified as an expert); Michael H. Graham, *Expert Witness Testimony: Fed. R. Evid. 702-705 Primer; Hypothetical Question Discretionary Use*, 52 No. 5 CRIM. L. BULL. Art. 8 (2016) (“It is preferable that the court not advise the jury of its determination if it decides that the witness is in fact qualified as an expert as to a particular subject matter.”). However, several older North Carolina criminal cases

found no error when a trial court determined that a witness was an expert in the presence of the jury. *State v. Frazier*, 280 N.C. 181, 197, *vacated on other grounds*, 409 U.S. 1004 (1972) (the trial court determined, in the presence of the jury, that two witnesses were qualified to testify as experts; stating: "It has never been the general practice in the courts of this State for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert."); *State v. Edwards*, 24 N.C. App. 303, 305 (1974) (citing *Frazier* and holding that the trial court did not err by stating, in the presence of the jury, that it found a medical doctor to be expert witness). Additionally, N.C. Pattern Instruction – Crim 104.94 (Testimony of Expert Witness) expressly informs the jury of the witness's status as an expert and at least one unpublished case indicates that the better practice is to give this instruction. *State v. Dunn*, 220 N.C. App. 524, *9 (2012) (unpublished) (holding that no error occurred when the trial court failed to give the pattern instruction but noting: "the better practice is for the trial court to specifically instruct the jury on expert testimony when an expert has testified at trial"); see *generally* *State v. Prevatte*, 356 N.C. 178, 224 (2002) (noting that the court has approved of the pattern instruction).

- F. Particular Types of Experts.** Several common types of expertise are explored in the sections immediately below. This Chapter does not attempt to present an exhaustive evaluation of these areas of expert testimony. Rather, it provides the trial judge with an overview of the current state of North Carolina law with respect to each category and alerts the trial court to potential issues. As science and technology evolve, new tests and analyses may be developed providing a better understanding as to the strengths and weakness of tests and analyses currently being done and resulting in new tests and analyses. Either or both developments may impact existing law.

When discussing certain forensic science disciplines, this Chapter cites the following report: PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, *FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS* (2016) [hereinafter PCAST REPORT],

https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf. This report is cited because it is the most recent comprehensive evaluation of the relevant forensic science disciplines. Although some, such as the National Association of Criminal Defense Lawyers, have applauded that report, it was not adopted by the Department of Justice and others, including the National District Attorneys Association, have been critical of it or have challenged it. Jack D. Roady, *The PCAST Report: A Review and Moving Forward—A Prosecutor's Perspective*, CRIMINAL JUSTICE, Summer 2017, at 9 (discussing the reaction to the report by prosecutors, defense attorneys, and the forensic science community).

For discussion of the proper scope of expert testimony in sexual assault cases, see [Evidence Issues Criminal Cases Involving Child Victims and Child Witnesses](#) in this Benchbook.

- 1. Use of Force & Self-Defense Experts.** Although use of force and self-defense experts are used in North Carolina criminal trials, see, e.g., *State v. McDowell*, 215 N.C. App. 184, 189 (2011) (noting that Mr. Cloutier testified as an expert in "use-of-force science" and self-defense tactics),

few published cases directly address the admissibility of such evidence. One case that does is *State v. McGrady*, 368 N.C. 880 (2016), decided under amended Rule 702(a) and the *Daubert* standard. In *McGrady*, the North Carolina Supreme Court held that the trial court did not abuse its discretion by excluding testimony by a defense proffered expert. At trial the defendant sought to call Dave Cloutier as an expert in “the science of the use of force” *Id.* at 883. Cloutier was proffered to testify on three topics:

- (1) that, based on the “pre-attack cues” and “use of force variables” present in the interaction between defendant and the victim, the defendant's use of force was a reasonable response to an imminent, deadly assault that the defendant perceived;
- (2) that defendant's actions and testimony are consistent with those of someone experiencing the sympathetic nervous system's “fight or flight” response; and
- (3) that reaction times can explain why some of defendant's defensive shots hit the victim in the back.

Id. at 894. The Supreme Court held that the trial court did not abuse its discretion in excluding the expert's testimony about “pre-attack cues” and “use of force variables” on grounds that it was not relevant. *Id.* Cloutier's report indicated that pre-attack cues are actions “exhibited by an aggressor as a possible precursor to an actual attack,” and include “actions consistent with an assault, actions consistent with retrieving a weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others.” *Id.* According to Cloutier, “use of force variables” include additional circumstances and events that influence a person's decision about the type and degree of force necessary to repel a threat, such as age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. *Id.* at 895. The court found this testimony would not assist the jury because these matters were within the juror's common knowledge. *Id.*

Next, the *McGrady* court found that the trial court did not abuse its discretion by concluding that Cloutier was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system. *Id.* Cloutier's report stated that an instinctive survival response to fear “can activate the body's sympathetic nervous system” and the “‘fight or flight’ response.” *Id.* He indicated that the defendant's perception of an impending attack would cause an adrenalin surge “activat[ing] instinctive, powerful and uncontrollable survival responses.” *Id.* He further maintained that this nervous system response causes “perceptual narrowing,” focusing a person's attention on the threat and leading to a loss of peripheral vision and other changes in visual perception. *Id.* According to Cloutier, this nervous system response also can cause “fragmented memory,” or an inability to recall specific events related to the threatening encounter. *Id.* at 895-96. The court held that it was not an abuse of discretion to require “a witness who intended to testify about the functions of an organ system to have some formal medical training.” *Id.* at 896.

Finally, the court held that the trial court did not abuse its discretion by finding that the expert's testimony regarding reaction times

was unreliable. *Id.* at 897. This testimony was offered to rebut any assumption in the jurors' minds that the defendant could not have acted defensively if he shot the victim in the back. *Id.* Because the expert testified on voir dire that he interviewed the defendant and other witnesses; reviewed interviews of the defendant and a witness, the case file, and physical evidence collected by the Sheriff's Department; and visited the location of the incident, the expert's testimony satisfied the "sufficient facts or data" requirement in Rule 702(a)(1). *Id.* However, the expert based his testimony about average reaction times on statistics from two studies, but did not know whether or not those studies reported error rates and, if so, what those error rates were. Thus, a trial judge could reasonably conclude that the expert's degree of unfamiliarity with the studies rendered unreliable his testimony about them and the conclusions about the case that he drew from them. *Id.* at 898-99. Also, while the expert established that a disability could affect reaction time, he failed to account for the defendant's back injury in his analysis. The court found that this failure relates both to the sufficiency of the facts and data relied upon and to whether the expert applied his own methodology reliably in this case. *Id.* at 899.

2. **DNA Identification Evidence.** "Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms." FEDERAL JUDICIAL CENTER & NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 131 (3d ed. 2011) [hereinafter REFERENCE MANUAL ON SCIENTIFIC EVIDENCE], <https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf>. "DNA analysis involves comparing DNA profiles from different samples to see if a known sample may have been the source of an evidentiary sample." PCAST REPORT at 69. It is important to understand, however, that the term "DNA testing" encompasses different kinds of testing methods, different sources of bodily material, and differing statistical means of assessing the significance of a match, all of which has changed and likely will continue to change as science and technology advance. 4 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 157 (2016-17 ed.) [hereinafter MODERN SCIENTIFIC EVIDENCE]. Although some forms of DNA evidence are now admissible in all jurisdictions, there are many types of forensic DNA analysis, and more are being developed. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 131. Questions of admissibility will continue to arise as advancing methods of analysis and novel applications of established methods are introduced. *Id.*

This Chapter does not attempt to explain the wide variety of DNA testing that has been and currently is being done in forensic labs and potential issues regarding that testing. For a discussion of the history of DNA evidence, the types of scientific expertise that go into the analysis of DNA samples, the scientific principles behind DNA typing, issues regarding sample quantity and quality and laboratory performance, issues in the interpretation of laboratory results, special issues in human DNA testing for identification, and forensic analysis of nonhuman DNA, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 131-210. For the PCAST REPORT's assessment of DNA testing using single source samples,

simple mixture samples, and complex mixture samples, see PCAST REPORT at 69-83.

Although expert testimony regarding DNA analysis repeatedly has been found to be admissible in North Carolina prior to the 2011 amendments to Rule 702, see, e.g., *State v. Pennington*, 327 N.C. 89, 98-101 (1990), there do not appear to be any published North Carolina cases directly assessing any form of DNA testing under the new *Daubert* standard. Courts in other jurisdictions have allowed expert testimony regarding the polymerase chain reaction and short tandem repeats method of DNA typing under the *Daubert* standard. See generally 33A FED. PROC., L. ED. § 80:226 (“Applying the *Daubert* test, expert DNA evidence has generally been found to be admissible. More specifically, based on overwhelming scientific and forensic acceptance, as well as acceptance by the vast majority of courts, the polymerase chain reaction and short tandem repeats (PCR/STR) method of DNA typing has been held reliable and admissible under the rule governing expert opinion and *Daubert*.”).

Separate from *Daubert* standard issues, expert testimony that amounts to a “prosecutor’s fallacy” is improper. “The prosecutor’s fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample.” *McDaniel v. Brown*, 558 U.S. 120, 128 (2010). The U.S. Supreme Court has explained:

In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor’s fallacy. It is . . . error to equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA. This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a .01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.

Id.; see also *State v. Ragland*, 226 N.C. App. 547, 558-60 (2013) (the State’s expert improperly relied on the prosecutor’s fallacy, erroneously assuming that the random match probability was the same as the probability that the defendant was not the source of the DNA sample; this testimony was inadmissible).

3. **Bite Mark Identification Evidence.** Bite mark analysis “typically involves examining marks left on a victim or an object . . . and comparing those marks with dental impressions taken from a suspect.” PCAST REPORT at 83. For a discussion of the technique involved with this type of analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 103-08.

North Carolina cases decided prior to the 2011 amendment to Rule 702 have held that the trial court did not abuse its discretion by

admitting expert bite mark identification testimony. See, e.g., *State v. Temple*, 302 N.C. 1, 10-13 (1981) (deciding an issue of first impression, the court held that the trial court properly admitted expert testimony that bite marks appearing on the victim's body were made by the defendant's teeth); *State v. Green*, 305 N.C. 463, 470-72 (1982) (citing *Temple*, the court held that the trial court properly allowed an expert to testify that a bite mark on the victim's arm had been made by the defendant). However, there do not appear to be any published North Carolina cases analyzing bite mark identification analysis under the new *Daubert* standard. Research revealed only one North Carolina bite mark case decided under amended Rule 702(a), but that case did not deal with bite mark *identification* evidence. See *State v. Ford*, ___ N.C. App. ___, 782 S.E.2d 98, 107-08 (2016) (trial court did not commit plain error by allowing the State's forensic pathology expert to opine that victim's death was due to bites from a dog).

Although questions have been raised about the validity of bite mark analysis, see, e.g., PCAST REPORT at 83-87 (“[B]itemark analysis does not meet the scientific standards for foundational validity, and is far from meeting such standards. To the contrary, available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of bite mark with reasonable accuracy.”), courts in other jurisdictions have continued to admit the evidence. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 112.

4. **Fingerprint Identification Evidence.** Fingerprint identification evidence refers to the use of fingerprints as a means of personal identification, e.g., that fingerprints found at the murder scene match fingerprints on file for the defendant. For a discussion of the methodology used in fingerprint identification analysis, see REFERENCE MANUAL OF SCIENTIFIC EVIDENCE at 73-76, and PCAST REPORT at 88-91.

Expert testimony regarding fingerprint analysis has been admissible in North Carolina for many years under the state's pre-*Daubert* standards. *State v. Irick*, 291 N.C. 480, 488-89 (1977); see also *State v. Hoff*, 224 N.C. App. 155, 163 (2012) (citing *Irick* and noting “our Supreme Court's long-standing acceptance of the reliability of fingerprint evidence”); *State v. Parks*, 147 N.C. App. 485, 490-91 (2001) (no abuse of discretion in admitting officer's expert testimony in fingerprint analysis given that the state Supreme Court has “recognized that fingerprinting is an established and scientifically reliable method of identification”). There do not appear to be any published North Carolina criminal cases evaluating fingerprint analysis under the *Daubert* standard. Courts in other jurisdictions have—for the most part—held such testimony to be sufficiently reliable expertise under *Daubert*. See REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 82-83. The Fourth Circuit is among the courts to have found fingerprint evidence sufficiently reliable under *Daubert*. *United States v. Crisp*, 324 F.3d 261, 266-69 (4th Cir. 2003) (citing other circuit courts that have held similarly).

For a discussion of the empirical record regarding this type of identification, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 76-81, and PCAST REPORT at 91-100. For an assessment as to the foundational validity and validity as applied of fingerprint evidence, see PCAST

REPORT at 101-103 (finding that “latent fingerprint analysis is a foundationally valid subjective methodology” and that “[c]onclusions of a proposed identification may be scientifically valid, provided that they are accompanied by accurate information about limitations on the reliability of the conclusion”; going on to identify a number of issues regarding validity as applied).

5. **Firearm Identification.** In firearms identification analysis, sometimes called “ballistics,” “examiners attempt to determine whether ammunition is or is not associated with a specific firearm based on marks produced by guns on the ammunition.” PCAST REPORT at 104. For a discussion of the methodology of this analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 91-97, and PCAST REPORT at 104.

Pre-*Daubert* North Carolina cases had allowed this type of expert testimony. See, e.g., *State v. Britt*, 217 N.C. App. 309, 314 (2011) (“Courts in North Carolina have upheld the admission of expert testimony on firearm toolmark identification for decades.”). There do not appear to be any published North Carolina cases applying the new *Daubert* standard to this type of evidence.

Although testimony by firearms experts is widely admitted nationwide with little judicial scrutiny, provided the expert is qualified, 3 BARBARA E. BERGMAN ET AL., WHARTON'S CRIMINAL EVIDENCE § 13:59 (15th ed.) [hereinafter WHARTON'S CRIMINAL EVIDENCE] (but noting: “Little justification appears to warrant such a cavalier attitude toward this testimony.”), some post-*Daubert* decisions have excluded or limited expert firearms analysis testimony. See REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 101-02 (discussing cases). Questions have been raised about the foundational validity of firearms analysis. See PCAST REPORT at 112 (“PCAST finds that firearms analysis currently falls short of the criteria for foundational validity, because there is only a single appropriately designed study to measure validity and estimate reliability. The scientific criteria for foundational validity require more than one such study, to demonstrate reproducibility.”); REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 97-100 (discussing the empirical record on this type of evidence and noting, in part: “The issue of the adequacy of the empirical basis of firearms identification expertise remains in dispute”). Additionally, it has been suggested that if firearms analysis is allowed in court, validity as applied requires that the expert has undergone rigorous proficiency testing and that certain disclosures be made. PCAST REPORT at 113.

6. **Blood Alcohol Extrapolation.** “Retrograde extrapolation is a mathematical analysis in which a known blood alcohol test result is used to determine what an individual's blood alcohol level would have been at a specified earlier time.” *State v. Cook*, 362 N.C. 285, 288 (2008). The analysis determines the prior blood alcohol level based on (1) the time elapsed between the earlier event, such as a vehicle crash, and the blood test, and (2) the rate of elimination of alcohol from the subject's blood during the time between the event and the test. *Id.*

North Carolina cases decided under both *Howerton* and *Daubert* have held that the trial court does not abuse its discretion by admitting expert testimony regarding blood alcohol extrapolation. See, e.g., *State v. Turbyfill*, ___ N.C. App. ___, 776 S.E.2d 249, 255-58 (2015) (applying

Daubert and holding that testimony by the State's expert "confirmed that blood alcohol extrapolation is a scientifically valid field, which principles have been tested, subjected to peer review and publication, and undisputedly accepted in the scientific community and in our courts"); *State v. Green*, 209 N.C. App. 669, 677-680 (2011) (same, under earlier *Howerton* standard).

However, for expert testimony on retrograde extrapolation to be admissible it must be based on sufficiently reliable data and a reliable method of proof. Faulty assumptions in the expert's application of retrograde extrapolation analysis can render the expert testimony inadmissible. *Compare State v. Babich*, ___ N.C. App. ___, 797 S.E.2d 359, 361-364 (2017) (the trial court erred by admitting retrograde extrapolation expert testimony where the expert assumed that the defendant was in a post-absorptive state at the time of the stop (meaning that alcohol was no longer entering the defendant's bloodstream and thus her blood alcohol level was declining) but there were no facts to support this assumption; reasoning that such testimony was inadmissible "as a matter of law" because it failed *Daubert's* "fit" test in that the expert's analysis was not properly tied to the facts of the case; going on to hold: "[W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive . . . state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol."), *and State v. Davis*, 208 N.C. App. 26, 31-35 (2010) (holding, under the earlier and more lenient *Howerton* standard that the trial court committed reversible error by allowing expert Paul Glover to testify to the defendant's blood-alcohol level based on retrograde extrapolation where the alcohol concentration upon which Glover based the extrapolation was estimated to be .02 based on the fact that an officer smelled alcohol on the defendant's breath more than ten hours after the incident; Glover's "odor analysis" was not a sufficiently reliable method of proof), *with State v. Green*, 209 N.C. App. 669, 677-80 (2011) (holding, under the earlier and more lenient *Howerton* standard that the trial court did not abuse its discretion by allowing expert Paul Glover to testify regarding retrograde extrapolation notwithstanding the defendant's argument that Glover's testimony was based on impermissible factual assumptions regarding the amount of wine in the defendant's glass and when it was consumed).

7. **Blood Spatter Analysis.** Blood spatter analysis, sometimes called blood spatter interpretation or bloodstain analysis, is a forensic tool in which stains of blood at a crime scene are examined to provide information about the incident, such as where the victim was killed. For the purposes of this discussion, blood spatter analysis includes the process of examining blood that has struck a surface, and applying knowledge regarding the characteristics of blood and the shapes or patterns made by its impact, in order to determine things like the direction, angle, and speed of its flight prior to impact, and, ultimately, to assist in reconstructing events occurring in connection with an alleged crime. *See generally* Danny R. Veilleux, *Admissibility, in Criminal Prosecution, of Expert*

Opinion Evidence as to "Blood Spatter" Interpretation, 9 A.L.R.5th 369 (originally published 1993) (discussing the admissibility of evidence so described). For more information about the history of bloodstain analysis and the biology, physics and mathematics associated with it, see Aaron D. Gopen & Edward J. Imwinkelried, *Bloodstain Pattern Analysis Revisited*, 45 No. 3 CRIM. L. BULL. ART. 7 (2009) [hereinafter *Bloodstain Pattern Analysis Revisited*].

In cases decided under the old *Howerton* standard, North Carolina courts have found bloodstain analysis to be a sufficiently reliable area for expert testimony. See, e.g., *State v. Goode*, 341 N.C. 513, 530-31 (1995) (rejecting the defendant's argument that bloodstain pattern interpretation has not been established as a scientifically reliable field; also rejecting the defendant's argument that Agent Duane Deaver did not have sufficient qualifications to testify as an expert in the field); see also *State v. Morgan*, 359 N.C. 131, 160 (2004) (citing *Goode* for that proposition, although it was not an issue in that case); *State v. Bruton*, 165 N.C. App. 801, 809 (2004) (citing *Goode* and holding that the trial court did not err by allowing an expert in forensic serology to testify regarding the nature of blood spatter over the defendant's challenge to her qualifications as an expert).

There do not appear to be any North Carolina cases addressing the admissibility of this evidence under the *Daubert* standard. For a discussion of how this evidence is handled in other jurisdictions, see 9 A.L.R.5th 369 and *Bloodstain Pattern Analysis Revisited*, *supra* p. 28.

8. **Fiber Analysis.** In criminal cases, expert testimony may be offered to show that certain fibers do or do not "match", typically in the context of proving or disproving that the suspect had contact with a particular person or place. This section refers to this sort of testimony as fiber analysis.

In pre-*Daubert* North Carolina cases, fiber analysis testimony has been found to be admissible. See, e.g., *State v. Vestal*, 278 N.C. 561, 593-94 (1971) (no error to allow an expert in the field of analyzing and comparing fibers to testify "concerning the similarity of the drapes found in the defendant's warehouse with that found upon the body"). There do not appear to be any North Carolina cases analyzing this evidence under the *Daubert* standard. Some have raised questions about whether fiber analysis satisfies the *Daubert* standard. See, e.g., 4 MODERN SCIENTIFIC EVIDENCE at 114 ("The validity of fiber identification techniques is susceptible of objective testing, although this has not been accomplished on a scale and in such a manner as to satisfy *Daubert*. The error rate of fiber examination is unknown. The validity of the interpretation of the significance of a match in fiber evidence has not been subjected to systematic testing of the sort countenanced by *Daubert*.").

9. **Hair Analysis.** "Forensic hair examination is a process by which examiners compare microscopic features of hair to determine whether a particular person may be the source of a questioned hair." PCAST REPORT at 118. For a discussion of the technique used in this type of analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 113-14.

Several North Carolina cases decided prior to the 2011 amendment to Rule 702 approved of admitting expert testimony regarding hair analysis. See, e.g., *State v. Green*, 305 N.C. 463, 470 (1982) ("This Court has previously approved of testimony similar to that employed in the case before us and we are not inclined to reverse that holding."

(citation omitted)); *State v. Vestal*, 278 N.C. 561, 593–94 (1971) (no error to allow an expert in the field of analyzing and comparing hair to testify regarding the similarity of hairs found in a warehouse and trunk of the defendant's automobile with hairs taken from the head of the victim's body); *State v. McCord*, 140 N.C. App. 634, 659 (2000) (the trial court did not abuse its discretion by admitting expert testimony that a pubic hair taken from the victim was microscopically consistent with a known sample of defendant's pubic hair; "because the comparison of hair samples has been accepted as reliable scientific methodology in this State, the trial court properly allowed [the analyst] to testify regarding the results of his testing"); *State v. Suddreth*, 105 N.C. App. 122, 132 (1992) ("Our courts have liberally permitted the introduction of expert testimony as to hair analysis when relevant to aid in establishing the identity of the perpetrator.").

However, case law suggests that hair analysis is conclusive, if at all, only as to negative identity—that is, to exclude a suspect. *State v. Stallings*, 77 N.C. App. 189, 191 (1985). For example, if the hair in question is blonde, straight, and 12 inches long, an individual with black, curly, two inch long hair can be excluded as the source of the sample. 4 MODERN SCIENTIFIC EVIDENCE at 111. Cases also hold that microscopic hair analysis evidence is insufficient on its own to positively identify a defendant as the perpetrator. *Stallings*, 77 N.C. App. at 191 (hair analysis "must be combined with other substantial evidence to take a case to the jury"); *State v. Bridges*, 107 N.C. App. 668, 671 (1992) (citing *Stallings* and stating that it "may not be used to positively identify a defendant as the perpetrator of a crime"), *aff'd per curiam*, 333 N.C. 572 (1993); *State v. Faircloth*, 99 N.C. App. 685, 692 (1990) (same). As the court stated in *Stallings*: "Unlike fingerprint evidence . . . comparative microscopy of hair is not accepted as reliable for positively identifying individuals. Rather, it serves to exclude classes of individuals from consideration and is conclusive, if at all, only to negative identity." *Stallings*, 77 N.C. App. at 191.

Additionally, some pre-*Daubert* cases limit the scope of a hair analysis expert's testimony. See *Bridges*, 107 N.C. App. at 671-75 (the trial court erred by admitting the expert's testimony about the statistical probability of two Caucasians having indistinguishable head hair because there was insufficient foundation for this testimony); *Faircloth*, 99 N.C. App. at 690-92 (the trial court erred by allowing a hair examination and identification expert to testify that it was "improbable" that pubic hairs obtained from the victim's body and from a sheet on the victim's bed came from an individual other than the defendant and that it would be "impossible" for another person whose hair was consistent with the defendant's to have come in contact with the victim's bedsheets).

There do not appear to be any North Carolina cases ruling on the admissibility of this evidence under the *Daubert* standard. It should be noted that in recent years, serious questions have been raised about the validity of forensic hair analysis and associated expert testimony. See, e.g., Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, THE WASHINGTON POST, April 18, 2015 (reporting that "[t]he Justice Department and FBI have formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all

trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000"); 4 MODERN SCIENTIFIC EVIDENCE at 112 ("The validity of hair evidence is susceptible of objective testing, although this has not been accomplished on a scale and in such a manner as to satisfy *Daubert*. The error rate of hair examination is unknown."); PCAST REPORT 118-122 (finding that materials provided by the Department of Justice "do not provide a scientific basis for concluding that microscopic hair examination is a valid and reliable process"). Although many cases have continued to admit hair analysis post-*Daubert*, that is not universally true and "growing judicial support" for the view that this type of analysis is unreliable has been noted. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 119.

10. **Shoe Print Analysis.** "Footwear analysis is a process that typically involves comparing a known object, such as a shoe, to a complete or partial impression found at a crime scene, to assess whether the object is likely to be the source of the impression." PCAST REPORT at 114.

Although some North Carolina cases state that a non-expert may testify to shoe print comparisons, see, e.g., *State v. General*, 91 N.C. App. 375, 379 (1988) (citing *State v. Jackson*, 302 N.C. 101, 107 (1981)); *State v. Plowden*, 65 N.C. App. 408, 410 (1983) (same), trial courts have admitted expert testimony on this topic. See, e.g., *State v. Williams*, 308 N.C. 47, 60–61 (1983) (noting that an SBI Agent was accepted as an expert witness and testified extensively concerning the unique characteristics of the tread on the shoes taken from the defendant and the shoe prints found at the scene of the crime). However, there do not appear to be any North Carolina cases examining the admissibility of this evidence under the *Daubert* standard. Although federal courts have admitted expert shoe print testimony under *Daubert*, see, e.g., *United States v. Ford*, 481 F.3d 215, 217-21 (3d Cir. 2007); *United States v. Allen*, 390 F.3d 944, 949-50 (7th Cir. 2004); *United States v. Mahone*, 328 F. Supp. 2d 77, 90-92 (D. Me. 2004), *aff'd*, 453 F.3d 68 (1st Cir. 2006), questions have been raised about the foundational validity of this analysis. See PCAST REPORT at 117 (concluding that "there are no appropriate empirical studies to support the foundational validity of footwear analysis to associate shoeprints with particular shoes based on specific identifying marks (sometimes called [r]andomly acquired characteristics). Such conclusions are unsupported by any meaningful evidence or estimates of their accuracy and thus are not scientifically valid.").

11. **Handwriting Analysis.** Handwriting analysis seeks to determine the authorship of a piece of writing by examining the way in which the letters are inscribed, shaped and joined and comparing it to samples by a known author. 4 MODERN SCIENTIFIC EVIDENCE at 561-62. For a discussion of the technique used in this type of analysis and the empirical record regarding its validity, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 83-89.

North Carolina civil cases decided before the amendment to Rule 702(a) upheld admission of expert testimony regarding handwriting analysis, see, e.g., *Taylor v. Abernethy*, 149 N.C. App. 263, 270-74 (2002) (trial court erred by refusing to allow a handwriting expert to give his opinion regarding the validity of a signature on a contract). There do not appear to be any published North Carolina cases on point after North

Carolina became a *Daubert* state. In other jurisdictions, there is a three-way split of authority regarding this type of expert testimony:

The majority of courts permit examiners to express individuation opinions. As one court noted, “all six circuits that have addressed the admissibility of handwriting expert [testimony] . . . [have] determined that it can satisfy the reliability threshold” for nonscientific expertise. In contrast, several courts have excluded expert testimony, although one involved handprinting and another Japanese handprinting. Many district courts have endorsed a third view. These courts limit the reach of the examiner’s opinion, permitting expert testimony about similarities and dissimilarities between exemplars but not an ultimate conclusion that the defendant was the author (“common authorship” opinion) of the questioned document. The expert is allowed to testify about “the specific similarities and idiosyncrasies between the known writings and the questioned writings, as well as testimony regarding, for example, how frequently or infrequently in his experience, [the expert] has seen a particular idiosyncrasy.” As the justification for this limitation, these courts often state that the examiners’ claimed ability to individuate lacks “empirical support.”

REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 90. The Fourth Circuit is among the courts that have held that expert handwriting testimony passes muster under *Daubert*. See *United States v. Crisp*, 324 F.3d 261, 270-71 & n.5 (4th Cir. 2003) (deciding the issue as a matter of first impression; citing circuit court decisions that have held similarly but noting that some district courts recently had held that handwriting analysis does not meet the *Daubert* standard).

12. **Horizontal Gaze Nystagmus (HGN).** A leading treatise explains horizontal gaze nystagmus as follows:

Nystagmus is an involuntary rapid movement of the eyeball, which may be horizontal, vertical or rotary. An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN. Proponents of HGN tests believe that alcohol and drug use increases the frequency and amplitude of HGN and cause it to occur at a smaller angle of deviation from forward. Nystagmus tests are not done in a laboratory, but rather are given by police officers in the field or in a police station subsequent to arrest. The results of an HGN test are frequently introduced as part of the state’s case in drunk driving prosecutions and they also may be used when an individual is suspected to be under the influence of some other substance

5 MODERN SCIENTIFIC EVIDENCE at 459 (quotation omitted).

Rule 702(a1) provides that a witness qualified under Rule 702(a) “and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to . . . [t]he results of a [HGN] Test when the test is administered by a person who has successfully completed training in HGN.” This subsection obviates the State’s need to prove that the horizontal gaze nystagmus testing method is sufficiently reliable. *State v. Younts*, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017) (post-amendment case); *State v. Smart*, 195 N.C. App. 752, 755-56 (2009) (pre-amendment case); see also *State v. Godwin*, ___ N.C. ___, 800 S.E.2d 47 (2017) (“Furthermore, with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State.”). Whether there are due process limits on the legislature’s ability to declare certain expert testimony to be reliable is beyond the scope of this Chapter.

According to the text of the Rule 702(a1) HGN expert testimony is admissible when the witness is qualified under Rule 702(a) and a proper foundation is laid. N.C. R. EVID. 702(a1); see also *State v. Torrence*, ___ N.C. App. ___, 786 S.E.2d 40, 42 (2016) (“[I]f an officer is going to testify on the issue of impairment relating to the results of an HGN test, the officer must be qualified as an expert witness under Rule 702(a) and establish proper foundation.”). Although the better practice may be to do so, the court is not required to expressly determine that the witness is so qualified; such a determination can be implied from the record. *Godwin*, ___ N.C. ___, 800 S.E.2d 47, 52-53 (2017) (holding that the trial court implicitly found that the witness was qualified to testify but noting that “the appellate division’s ability to review the trial court’s oral order would have benefited from the inclusion of additional facts supporting its determination that [the] Officer . . . was qualified to testify as an expert regarding his observations of defendant’s performance during the HGN test”). Presumably a proper foundation would include establishing that the test was performed according to accepted protocol.

Once the witness is qualified and a proper foundation is laid, the witness may give expert testimony regarding the HGN test results, subject to the additional limitations in subsection (a1), namely, the witness may testify solely on the issue of impairment and not on the issue of specific alcohol concentration. N.C. R. EVID. 702(a1); see also *Torrence*, ___ N.C. App. ___, 786 S.E.2d at 43 (prejudicial error where officer testified to a specific alcohol concentration); see also *State v. Turbyfill*, ___ N.C. App. ___, 776 S.E.2d 249, 259 (2015) (officer’s testimony as to the defendant’s BAC appears to have violated Rule 702(a1)) but the error did not have a probable impact on the verdict).

13. **Eyewitness Identification Experts.** Several North Carolina appellate decisions have found no abuse of discretion where the trial court excluded testimony regarding reliability of eyewitness identification evidence when the expert’s testimony did not relate to the facts of the particular case, see, e.g., *State v. McLean*, 183 N.C. App. 429, 435 (2007) (expert did not interview the witnesses, visit the crime scene, or listen to court testimony), or because its prejudicial value outweighed its

probative value under Rule 403, *see, e.g., McLean*, 183 N.C. App. at 435 (no abuse of discretion where the trial court found that the value of the evidence was “marginally weak” and that it would confuse the jury, unnecessarily delay the proceeding, and would not significantly help the jury); *State v. Cotton*, 99 N.C. App. 615, 621-22 (1990), *aff’d*, 329 N.C. 764 (1991) (similar). However, a recent decision of the North Carolina Supreme Court suggests that it is not proper to exclude such testimony simply because the expert has not interviewed or examined the witness. *State v. Walston*, ___ N.C. ___, 798 S.E.2d 741, 747 (2017) (holding that the trial court did not abuse its discretion by excluding testimony from a defense expert regarding repressed memory and the suggestibility of memory; the court clarified that to be admissible, the expert need not have examined or interviewed the witness, noting: “[s]uch a requirement would create a troubling predicament given that defendants do not have the ability to compel the State’s witnesses to be evaluated by defense experts”).

The United States Supreme Court has noted that “some States . . . permit defendants to present expert testimony on the hazards of eyewitness identification evidence.” *Perry v. New Hampshire*, 565 U.S. 228, 247 (2012) (quoting *State v. Clopton*, 223 P.3d 1103, 1113 (“We expect . . . that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence].”). Commentators have noted that while eyewitness testimony identifying the perpetrator of the crime is often important evidence for the State in a criminal trial, such testimony has been found to be erroneous in some cases. 2 MODERN SCIENTIFIC EVIDENCE at 578 (noting that in cases where DNA evidence exonerated defendants, eyewitness evidence identified the defendant as the perpetrator). They argue that expert testimony may help explain why such testimony can be wrong, by, for example, describing the impact of “estimator variables” (factors that might affect the eyewitnesses ability to perceive the events accurately, e.g., lighting conditions, or to describe accurately what was perceived) and “system variables” (factors outside the control of the eyewitness, such as the suggestiveness of a photo array). *Id.*

14. Drug Identification & Quantity.

- a. **Chemical Analysis Generally Required.** In *State v. Ward*, 364 N.C. 133 (2010), a case decided under the more lenient *Howerton* standard, the North Carolina Supreme Court held that “[u]nless the State establishes . . . that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required” to identify a substance as a controlled substance. *Id.* at 147.

At least one post-*Ward* North Carolina case applying the *Daubert* standard has found no error when an expert testified to drug identification based on a chemical analysis. *See, e.g., State v. Abrams*, ___ N.C. App. ___, 789 S.E.2d 863, 865-67 (2016) (expert testified that the substance was marijuana based on a chemical analysis; the expert’s testimony was “clearly” the product of reliable principles and methods and her testimony established

that she applied those principles and methods reliability to the facts of the case).

- b. **Visual Identification.** In *Ward*, the North Carolina Supreme Court held that the visual inspection methodology proffered by the State's expert was not sufficiently reliable to identify the pills at issue as containing a controlled substance. *Ward*, 364 N.C. at 142-48 (method of proof was not sufficiently reliable); see also *State v. Brunson*, 204 N.C. App. 357, 359-61 (2010) (holding, in a pre-*Ward* case, that it was plain error to allow an expert to opine that the substance at issue was hydrocodone, an opium derivative, based on visual identification and Micromedex Literature). It is unlikely that the court's reasoning would lead it to a different result under the more stringent *Daubert* standard. And in fact, one court of appeals case has applied that rule to a case in which the amended rule applied. *State v. Alston*, ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017) (even if officer had been an expert it would have been error to allow him to testify that pills found at the defendant's home were Oxycodone and Alprazolam, where the basis of his identification was a visual inspection and comparison of the pills with a website).

In cases decided after *Ward*, the Court of Appeals has held that visual identification cannot be used to identify a substance as cocaine, *State v. Jones*, 216 N.C. App. 519, 526 (2011), or pills as a controlled substance. *State v. Alston*, ___ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). However, it has allowed visual identification to identify a substance as marijuana. *State v. Johnson*, 225 N.C. App. 440, 455 (2013) (holding that the State was not required to test the substance alleged to be marijuana where the arresting officer testified without objection that based on his training the substance was marijuana); *State v. Mitchell*, 224 N.C. App. 171, 178-79 (2012) (an officer properly was allowed to identify the substance at issue as marijuana based on his "visual and olfactory assessment"; a chemical analysis of the marijuana was not required); *Jones*, 216 N.C. App. at 526 (visual identification of marijuana was permissible); *State v. Garnett*, 209 N.C. App. 537, 546 (2011) (Special Agent, who was an expert in forensic chemistry, properly made an in-court visual identification of marijuana).

It is difficult to reconcile the Court of Appeals' post-*Ward* decisions on visual identification with respect to substances that are not controlled substances. Compare *State v. Hanif*, 228 N.C. App. 207, 209-13 (2013) (applying *Ward* in a counterfeit controlled substance case where the defendant was charged with representing tramadol hydrochloride, a substance that is not a controlled substance, as Vicodin, a Schedule III controlled substance; holding that the trial court committed plain error by admitting evidence identifying the substance as tramadol hydrochloride based solely upon an expert's visual inspection (a comparison of the tablets' markings to a Micromedex online database)), with *State v. Hooks*, ___ N.C. App. ___, 777 S.E.2d 133, 140-41 (2015) (in a case involving charges of possession of

the precursor chemical pseudoephedrine with intent to manufacture methamphetamine, the court rejected the defendant's argument that the evidence was insufficient because the substance was not chemically identified as pseudoephedrine; holding that *Ward* was limited to identifying controlled substances, and pseudoephedrine is not listed as such a substance).

- c. **Narcotics indicator field test kits (NIKs) & "NarTest" Machines.** In several cases decided under the more lenient *Howerton* standard, the North Carolina Court of Appeals held that the State failed to establish the reliability of certain narcotics indicator field tests. *State v. Meadows*, 201 N.C. App. 707, 708-12 (2010) (the trial court committed prejudicial error by admitting expert testimony on the identity of a controlled substance based on the results of a NarTest machine where the State failed to demonstrate the machine's reliability); *State v. Jones*, 216 N.C. App. 519, 523-25 (2011) (following *Meadows* and holding that the trial court erred by allowing a police captain to testify that the results from a NarTest machine analysis showed that the substance at issue was a controlled substance; also holding that the trial court erred by admitting testimony by the State's expert in forensic chemistry, a NarTest employee, regarding the reliability of the NarTest machine where the machine had not been licensed or certified by any state agency or department, the expert had not done any independent research on the machine outside of his duties as a company employee, the State presented no evidence that the machine had been recognized as a reliable method of testing by other experts in the field, the State presented no publications or research performed by anyone unassociated with NarTest, and although the State offered a visual aid to support the expert's testimony, that aid was a NarTest promotional video); *State v. Carter*, 237 N.C. App. 274, 281-84 (2014) (following *Meadows* and holding that the State failed to demonstrate the reliability of a NIK—apparently a wipe that turns blue when it comes into contact with cocaine—and that therefore the trial court abused its discretion by admitting an investigator's testimony that the NIK indicated the presence of cocaine). Absent different evidence, it is unlikely that the court's reasoning would lead it to a different result under the stricter *Daubert* standard.
- d. **Other Methods of Drug Identification.** In *Ward*, the Supreme Court held that "[u]nless the State establishes . . . that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required" to identify a substance as a controlled substance. *Ward*, 364 N.C. at 147 (emphasis added). This language opens the door, in certain circumstances, to the use of methods of drug identification other than chemical testing.

In *State v. Woodard*, 210 N.C. App. 725 (2011), an opium trafficking case arising from a pharmacy break-in, the court rejected the defendant's argument that the evidence was

insufficient to support the conviction because no chemical analysis was done on the pills at issue. *Id.* at 730-31. In so holding the court approved a method of drug identification other than chemical analysis. Citing *Ward*, the court determined that the State is not required to conduct a chemical analysis on a controlled substance, provided it establishes the identity of the controlled substance beyond a reasonable doubt by another method of identification. Here, the State did that through the drug store's pharmacist manager, Mr. Martin, who testified that 2,691 tablets of hydrocodone acetaminophen, an opium derivative, were stolen from the pharmacy. He testified that he kept "a perpetual inventory" of all drug items. Using that inventory, he could account for the type and quantity of every inventory item throughout the day, every day. Accordingly, he was able to identify which pill bottles were stolen from the pharmacy by examining his inventory against the remaining bottles, because each bottle was labeled with an identifying sticker, date of purchase and a partial pharmacy account number. These stickers helped the pharmacist to determine that 2,691 tablets of hydrocodone acetaminophen were stolen. He further testified, based on his experience and knowledge as a pharmacist, that the weight of the stolen pills was approximately 1,472 grams. The court concluded:

Based on Mr. Martin's thirty-five years of experience dispensing the same drugs that were stolen from the . . . Drugstore, and based on Mr. Martin's unchallenged and uncontroverted testimony regarding his detailed pharmacy inventory tracking process, we are persuaded that Mr. Martin's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence to establish the identity and weight of the stolen drugs and was not analogous to the visual identifications found to be insufficient in *Ward*

Id. at 732.

- e. **Sampling.** The *Ward* court stated that its ruling regarding visual identification did not mean that every single item at issue must be chemically tested. In that case, the State submitted sixteen batches of items consisting of over four hundred tablets to the SBI laboratory for testing. *Ward*, 364 N.C. at 148. The court held:

A chemical analysis of each individual tablet is not necessary. The SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures is not at issue here. A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable

determination of the chemical composition of the batch of evidence under consideration.

Id. Cases decided since *Ward* finding sampling analysis sufficient include:

State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874, 881-83 (2016). Testimony from the State's expert sufficiently established a trafficking amount of opium; following lab protocol, the forensic analyst grouped the pharmaceutically manufactured pills into four categories based on their physical characteristics and then chemically analyzed one pill from three categories and determined that they tested positive for oxycodone; he did not test the pill in the final category because the quantity was already over the trafficking amount; the pills that were not chemically analyzed were visually inspected; the analyst was not required to chemically analyze each tablet and his testimony provided sufficient evidence to establish a trafficking amount.

State v. Lewis, ___ N.C. App. ___, 779 S.E.2d 147, 148-49 (2015). In this conspiracy to traffic in opiates case, the evidence was sufficient where the State's expert analyzed only one of 20 pills, determined its weight and that it contained oxycodone, an opium derivative, and confirmed that the remaining pills were visually consistent with the one that was tested, in terms of size, shape, form and imprints; a chemical analysis of each individual pill was not necessary.

State v. James, 240 N.C. App. 456, 459 (2015). In this opium trafficking case, the evidence was sufficient to establish a trafficking amount where the expert chose at random certain pills for chemical testing and each tested positive for oxycodone; the expert visually inspected the remaining, untested pills and concluded that with regard to color, shape, and imprint, they were "consistent with" the pills that tested positive for oxycodone.

State v. Dobbs, 208 N.C. App. 272, 275-76 (2010). The trial court did not err by denying the defendant's motion to dismiss a trafficking charge where the State's expert testified that all eight tablets were similar with respect to color and imprint and that a test on one tablet revealed it to be an opiate derivative.

- f. **Unlicensed & Unaccredited Labs.** In a case decided under the more lenient *Howerton* standard, the North Carolina Court of Appeals held to be inadmissible results from a lab that was neither licensed nor accredited by any agency. *State v. Jones*, 216 N.C.

App. 519, 525-26 (2011) (the trial court improperly admitted evidence that an individual tested the substances at issue at a NarTest company laboratory using SBI protocol and determined that the substances were cocaine and marijuana). By comparison, test results from a NarTest lab showing that a substance was cocaine have been found to be admissible where the lab was not accredited but was licensed by the State of North Carolina and the Drug Enforcement Agency to perform analytical testing of controlled substances. *State v. McDonald*, 216 N.C. App. 161, 163-67 (2011) (note that a NarTest machine was not used in the testing of the substances at issue).

15. **Fire Investigation Experts.** In arson cases, an expert may be offered to opine on, for example, where or how the fire started and whether the fire was intentionally set. WHARTON'S CRIMINAL EVIDENCE § 13:55. At the outset, it should be noted that "fire and explosion investigation consists of a wide array of distinctive methods, techniques, and principles," 5 MODERN SCIENTIFIC EVIDENCE at 74, which must be assessed separately.

There do not appear to be any published North Carolina cases applying the *Daubert* standard to this type of expert testimony. Although one recent Court of Appeals case held that if a proper foundation is laid as to expertise, a fire marshal may offer his expert opinion that a fire was intentionally set, *State v. Jefferies*, ___ N.C. App. ___, 776 S.E.2d 872, 875 (2015), that case did not mention *Daubert* and it is not clear that amended Rule 702 applied to that case. Citing case law decided prior to the 2011 amendments to Rule 702, that court reasoned:

Generally, the admission of expert opinion testimony is only allowed where "the opinion expressed is ... based on the special expertise of the expert[.]" *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978). However, our Supreme Court has held that, with a proper foundation laid as to his expertise, a fire marshal may offer his expert opinion as to whether a fire was intentionally set. *State v. Hales*, 344 N.C. 419, 424-25, 474 S.E.2d 328, 330-31 (1996).

Id. The only other published criminal case decided after *Daubert* became the law in North Carolina declined to address the defendant's argument that the trial court erred by failing to evaluate, under *Daubert*, testimony by an investigator with the Fire Prevention Bureau of a city fire department that the fire in question was intentionally set. *State v. Hunt*, ___ N.C. App. ___, 792 S.E.2d 552, 560-61 (2016). Instead, that court concluded that even if error occurred, it did not rise to the level of plain error. *Id.*

It has been noted that after *Daubert* and *Kumho Tire*, some courts have examined this type of expert testimony more critically. 5 MODERN SCIENTIFIC EVIDENCE at 75, 78; see also WHARTON'S CRIMINAL EVIDENCE § 13:55 (noting that "[s]ince *Daubert* the qualifications and conclusions of arson investigators have been questioned with increasing frequency" and stating that scholarship has revealed that some investigators fail to base their conclusions adequately upon the scientific method or scientific tests

and has debunked several theories upon which investigators have historically relied; further indicating that inherent problems in the investigatory process have surfaced, and it has become apparent that some fire investigators over-exaggerate arson occurrence as well as the incidence of fire-related injury and death). For a survey of cases dealing with expert opinions in arson cases, see Jay M. Zitter, *Admissibility of Expert and Opinion Evidence as to Cause or Origin of Fire in Criminal Prosecution for Arson or Related Offense—Modern Cases*, 85 A.L.R.5th 187 (originally published 2001).

- 16. Accident Reconstruction.** In North Carolina, “[a]ccident reconstruction opinion testimony may only be admitted by experts.” *State v. Maready*, 205 N.C. App. 1, 17 (2010) (error to allow officers’ opinion testimony concerning their purported accident reconstruction conclusions where the officers were not qualified as experts).

Subsection (i) of Rule 702 provides that “[a] witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.”

There do not appear to be any North Carolina criminal cases evaluating accident reconstruction experts under the *Daubert* standard. However, a number of criminal cases decided prior to the 2011 amendments to Rule 702(a) have admitted such evidence. See, e.g., *State v. Brown*, 182 N.C. App. 115, 120 (2007); *State v. Speight*, 166 N.C. App. 106, 116-17 (2005), *vacated on other grounds*, 548 U.S. 923 (2006); *State v. Holland*, 150 N.C. App. 457, 461-464 (2002); *State v. Purdie*, 93 N.C. App. 269, 274-76 (1989). Additionally, at least one North Carolina civil case has allowed accident reconstruction testimony under the new *Daubert* standard. *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 369-78 (trial court did not abuse its discretion by admitting expert accident reconstruction testimony), *review denied*, ___ N.C. ___, 775 S.E.2d 861 (2015). For a general discussion of courts’ treatment of expert accident reconstruction testimony, see 5 MODERN SCIENTIFIC EVIDENCE at 829-59.

- 17. Pathologists & Cause of Death.** In cases decided both before and after the amendments to Rule 702(a), North Carolina courts have admitted expert pathologist testimony regarding cause of death. Cases decided under the earlier version of Rule 702(a) include, for example: *State v. Johnson*, 343 N.C. 489, 492 (1996) (the trial court did not err in this murder case by allowing a fellow in the Chief Medical Examiner’s office to testify as an expert in pathology as to cause of death and the possible range from which the shots were fired where the witness was not yet certified and had not completed formal training as a forensic pathologist but had performed a number of autopsies prior to performing the one in question); *State v. Miller*, 302 N.C. 572, 580 (1981) (the trial court did not err by allowing an expert forensic pathologist to testify regarding the size or gauge of the gun used as the murder weapon); *State v. Morgan*, 299 N.C. 191, 206-07 (1980) (rejecting the defendant’s challenge to expert testimony offered by the N.C. Chief Medical Examiner that the cause of death was “a shotgun wound, shotgun blast” and noting: “It has long been the rule in North Carolina that the cause of an individual’s death is the

proper subject of expert testimony.”); *State v. Borders*, 236 N.C. App. 149, 175-76 (2014) (the trial court did not err by allowing the State’s forensic pathologists to testify that the cause of death was asphyxiation, even where no physical evidence supported that conclusion; the experts knew that the victim’s home was broken into, that she had been badly bruised, that she had abrasions on her arm and vagina, that her underwear was torn, and that DNA obtained from a vaginal swab containing sperm matched the defendant’s DNA samples; the experts’ physical examination did not show a cause of death, but both doctors drew upon their experience performing autopsies in stating that suffocation victims often do not show physical signs of asphyxiation and they eliminated all other causes of death before arriving at asphyxiation); *State v. Smith*, 157 N.C. App. 493, 498 (2003) (the trial court did not err by allowing the medical examiner to offer an opinion that the victim was killed when struck by the passenger side of the truck’s door frame); *State v. Evans*, 74 N.C. App. 31, 35 (1985) (in this involuntary manslaughter case, the trial properly allowed a pathologist to testify that the child victim’s injuries were not self-inflicted, that the child would not have died but for them, and that a subdural hematoma was a significant cause of death; he further testified that the hematoma could have been caused by violent shaking, causing tearing of the blood vessels between the dura and the brain, adding that death could result either from swelling of the brain or from rapid trauma to the brain from alteration of the blood supply), *aff’d*, 317 N.C. 326 (1986).

For a case decided under the amended version of Rule 702(a), see *State v. Ford*, ___ N.C. App. ___, 782 S.E.2d 98, 107-08 (2016) (in this involuntary manslaughter case, where the defendant’s pit bull attacked and killed the victim, the trial court did not commit plain error by allowing a forensic pathologist to opine that the victim’s cause of death was exsanguination due to dog bites).

For a discussion of expert testimony using the words “homicide” or “homicidal,” see Section III.B. below.

18. **Polygraphs.** In a case decided prior to the amendment to Rule 702(a), the North Carolina Supreme Court held that polygraph evidence is inadmissible at trial because of the inherent unreliability of polygraph tests. *State v. Grier*, 307 N.C. 628, 642–45 (1983) (polygraph evidence is inadmissible, even if the parties stipulate to its admissibility); see also *State v. Ward*, 364 N.C. 133, 146 (2010) (noting this holding). Absent some change in the relevant technology, there is little reason to think that the court would rule otherwise under the stricter *Daubert* standard.
19. **Penile Plethysmography.** Penile plethysmography tests a man’s level of sexual arousal. Michael C. Harlow & Charles L. Scott, *Penile Plethysmography Testing for Convicted Sex Offenders*, 35 J. OF AM. ACADEMY OF PSYCHIATRY & LAW 536 (2007), <http://jaapl.org/content/35/4/536>. It “involves placing a pressure-sensitive device around a man’s penis, presenting him with an array of sexually stimulating images, in determining his level of sexual attraction by measuring minute changes in his erectile responses.” *Id.* at 536 (quotation omitted).

Deciding an issue of first impression in a child sex case decided before the 2011 amendments to Rule 702(a), the North Carolina Court of Appeals held that the trial court did not abuse its discretion by excluding opinion testimony by a defense expert in clinical psychology based on penile plethysmograph testing administered to the defendant. *State v. Spencer*, 119 N.C. App. 662, 664-68 (1995) (the expert would have testified that the defendant had a normal arousal pattern and that there was no evidence of his being sexually aroused by children; the trial court did not abuse its discretion in finding the defendant's plethysmograph testing data insufficiently reliable to provide a basis for the opinion testimony).

Although there do not appear to be any North Carolina cases deciding this issue under the new, stricter *Daubert* test, the Fourth Circuit has held that a trial court did not abuse its discretion by ruling that a penile plethysmograph test did not meet *Daubert's* scientific validity prong. *United States v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995) (holding, in a child sex case, that the district court did not err by excluding the testimony of a clinical psychologist who would have testified that the results of a penile plethysmograph test did not indicate that the defendant exhibited pedophilic characteristics).

20. **Experts in Crime & Criminal Practices.** A number of North Carolina appellate cases decided under the pre-amendment version of Rule 702(a) found no error where the trial court allowed a law enforcement officer to testify as an expert regarding criminal practices and activity. For example, in *State v. Jennings*, 209 N.C. App. 329 (2011), a child sexual assault case, the court noted:

[T]his Court has held that law enforcement officers may properly testify as experts about the practices criminals use in concealing their identity or criminal activity. See *State v. Alderson*, 173 N.C. App. 344, 350–51, 618 S.E.2d 844, 848–49 (2005) (holding trial court properly permitted SBI agent to “give her opinion as to why the seizure of defendant's police frequency book was important, testifying that finding a police frequency book and a radio scanner can indicate those acting illegally may have a ‘jumpstart’ if they know which police frequencies to monitor.”); *State v. White*, 154 N.C. App. 598, 604, 572 S.E.2d 825, 830–31 (2002) (“Lieutenant Wood had ‘training, and various courses and experience in working certain cases’ which led him to conclude that ‘there are times that the significance of an object such as a pillow or a cloth being placed over somebody's face can mean in a case that the perpetrator knew the victim and did not want to see their face or have their face appear either before, during, or after the crime.’ Since Lieutenant Wood testified in the form of an opinion based on his expertise, and the testimony was likely to assist the jury making an inference from the circumstances of the crime, the trial court properly admitted the testimony.”).

Id. at 337–38. *Jennings* went on to hold that a law enforcement officer qualified as an expert in forensic computer examination properly was allowed to testify that those who have proof of criminal activity on a computer will attempt to hide that evidence and that the defendant would have been unlikely to save an electronic conversation that would have implicated him. That testimony was elicited by the State to explain why, despite the victim's testimony that she and the defendant routinely communicated through instant messaging and their MySpace web page and that the defendant took digital photographs of her vaginal area during sex, no evidence of these communications or photographs were recovered from the defendant's electronic devices.

There do not appear to be any published North Carolina criminal cases analyzing this type of expert testimony under the new *Daubert* standard. A number of federal circuit courts have allowed such testimony under that standard. For example, law enforcement officers have been allowed to testify as experts regarding:

- Drug code words. See, e.g., *United State v. York*, 572 F.3d 415, 422 (7th Cir. 2009) (“[W]e allow officers whose testimony is based on some aspect of that understanding (such as the meaning of drug code words), rather than on first-hand knowledge of the particular investigation in the case, to testify as experts.”); *United States v. Dukagjini*, 326 F.3d 45, 52 (2d Cir. 2003) (“[W]e have consistently upheld the use of expert testimony to explain both the operations of drug dealers and the meaning of coded conversations about drugs. In particular, we have recognized that drug dealers often camouflage their discussions and that expert testimony explaining the meanings of code words may ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’” (citation omitted)).
- The use of firearms in the drug trade and common practices of drug dealers. See, e.g., *United States v. Garza*, 566 F.3d 1194, 1199 (10th Cir. 2009) (“[W]e do not believe that *Daubert* and its progeny . . . provide any ground for us to depart from our pre-*Daubert* precedents recognizing that police officers can acquire specialized knowledge of criminal practices and thus the expertise to opine on such matters as the use of firearms in the drug trade.”); *United States v. Norwood*, 16 F. Supp. 3d 848, 852-54 (E.D. Mich. 2014) (citing cases and holding to be admissible testimony by a DEA agent with fifteen years’ experience regarding drug trafficking and use of firearms in drug trafficking).
- Gang practices. See, e.g., *United States v. Hankey*, 203 F.3d 1160, 1167-70 (9th Cir. 2000) (the trial court did not abuse its discretion in admitting an officer’s expert opinion testimony regarding the co-defendants’ gang affiliations and the consequences an individual would suffer if he were to testify against the defendant; among other things, the expert had been with the police department for twenty-one years, worked undercover “with gang members in the thousands,” received formal training in gang structure and organization, and he

taught classes about gangs; stating: “The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it.”).

However, some federal court *Daubert* decisions have excluded such testimony as unreliable, at least in certain circumstances. See, e.g., *Norwood*, 16 F. Supp. 3d at 854-64 (excluding proffered expert testimony concerning gangs where the witness formed his opinions based on his experience in Oklahoma, California, and Connecticut and from a national perspective while in Washington, D.C. but the case in question concerned a gang that operated in Flint, Michigan; the witness never investigated the gang in question or other Michigan gangs; “Simply put, [the witness’s] lack of familiarity with the particular gang or locale at issue in this case makes his opinions unreliable to be placed before the jury.”).

Other courts, while noting that an officer involved in an investigation may testify as both a fact and expert witness, also have noted the “inherent dangers” associated with this type of “dual testimony.” See, e.g., *York*, 572 F.3d at 425; *Dukagjini*, 326 F.3d at 53 (“While expert testimony aimed at revealing the significance of coded communications can aid a jury in evaluating the evidence, particular difficulties, warranting vigilance by the trial court, arise when an expert, who is also the case agent, goes beyond interpreting code words and summarizes his beliefs about the defendant’s conduct based upon his knowledge of the case.”). Those dangers include that the witness’s dual role might confuse the jury, that the jury might be impressed by an expert’s “aura of special reliability” and thus give his or her factual testimony undue weight, or that “the jury may unduly credit the opinion testimony of an investigating officer based on a perception that the expert was privy to facts about the defendant not presented at trial.” *York*, 572 F.3d at 425 (citing cases); see also *Dukagjini*, 326 F.3d at 53 (noting other dangers as well). Precautions that can mitigate these dangers include ensuring that the jury knows when an officer is testifying as an expert versus as a fact witness, through the use of cautionary instructions or witness examination that is structured to make clear when the witness is testifying to facts and when he or she is offering an expert opinion. *York*, 572 F.3d at 425-26 (discussing other precautions and going on to hold that admission of certain “dual testimony” by the officer in question was improper). And courts have noted that the trial court should be careful to ensure that the law enforcement officer expert does not “stray from his proper expert function” of offering opinions based on expertise and opine about matters based on his or her investigation in the case. *Dukagjini*, 326 F.3d at 54-55 (witness improperly acted “as a summary prosecution witness” when, for example, he testified about the meaning of conversations in general, as opposed to interpretation of drug code words).

Some commentators have been critical of decisions that reflexively allow police officers to testify as expert on criminal practices. See 1 MODERN SCIENTIFIC EVIDENCE at 101, 104 (although not advocating for a wholesale exclusion of such testimony, stating: “Somewhat disappointing has been the courts’ willingness to admit prosecution

experts who have little research or data to support their opinions. While there is some evidence that this is changing in some areas, such as the forensic sciences, courts continue to permit many prosecution experts with hardly a glance at the methods underlying their testimony. Perhaps the best example is the testimony of police officers testifying as expert witnesses.”).

III. Form & Scope of Expert's Opinion. For a discussion of the proper scope of an expert's opinion in sexual assault cases, see [Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses](#), in this Benchbook, and more current cases annotated in [Smith's Criminal Case Compendium](#) (under Evidence; Opinions; Experts; Sexual Assault Cases).

A. Form of Testimony. Rule 702(a) allows for flexibility as to the form of the expert's testimony, providing that the expert may testify to “an opinion, or otherwise.” Rule 705 provides that “[t]here shall be no requirement that expert testimony be in response to a hypothetical question.” See, e.g., *State v. Fearing*, 304 N.C. 499, 503-04 (1981) (no requirement that testimony of a forensic pathologist be given only in response to a hypothetical question); *State v. Morgan*, 299 N.C. 191, 205 (1980) (“It is settled law in North Carolina that an expert witness need not be interrogated by means of a hypothetical question . . .”).

B. Opinion on Ultimate Issue & Legal Standards. Although an expert may not testify to an opinion as to the defendant's guilt or innocence, see, e.g., *State v. Heath*, 316 N.C. 337, 341-42 (1986), Evidence Rule 704 provides that “[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” See also *State v. Hill*, 116 N.C. App. 573, 581 (1994) (noting this rule and rejecting the defendant's argument that testimony by the State's DNA expert regarding a DNA match improperly stated an opinion that the defendant had committed the rape in question).

The North Carolina Supreme Court has explained, however:

In interpreting Rule 704, this Court draws a distinction between testimony about legal standards or conclusions and factual premises. An expert may not testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable.

State v. Parker, 354 N.C. 268, 289-90 (2001) (internal citations and quotation marks omitted). Applying this rule, cases have held that it is not error to allow:

- a pathologist to testify that a killing was a “homicide” or “homicidal,” see, e.g., *State v. Flippen*, 344 N.C. 689, 699 (1996) (no error to allow the State's forensic pathologist expert to testify that the victim died as

a result of a "homicidal assault"); *State v. Parker*, 354 N.C. 268, 290 (2001) (citing *Flippen* and holding that it was not error to allow the State's forensic pathologist expert to testify that the victim's death was a homicide); *State v. Hayes*, 239 N.C. App. 539, 549-50 (2015) (no error to allow forensic pathology experts to testify that the cause of death was "homicide by unde[te]rmined means" and "homicidal violence");

- an expert in psychiatry and addiction medicine to testify that the defendant lacked the capacity to form the specific intent to kill, see, e.g., *State v. Daniel*, 333 N.C. 756, 760-64 (1993) (trial court erred by excluding testimony from a defense expert to this effect; noting that although it has held that expert testimony regarding precise legal terms should be excluded, "specific intent to kill" is not one of those precise legal terms that is off limits);
- a mental health expert to testify that the defendant lacked the capacity to plan, think, or reflect, *Daniel*, 333 N.C. at 760-64 (first-degree murder case), that the defendant's capacity to make and carry out plans was impaired, *State v. Shank*, 322 N.C. 243, 246-251 (1988) (new trial required in first-degree murder case where the trial court excluded this evidence); see also *State v. Fisher*, 336 N.C. 684, 704 (1994) (noting that a defense expert properly was allowed to opine regarding the defendant's ability to formulate and carry out a plan), or that the defendant acted while under the influence of a mental or emotional disturbance, *Shank*, 322 N.C. at 246-51 (new trial required in a first-degree murder case where the trial court excluded this evidence);
- an expert to testify that the defendant acted with an intent to cause death, *State v. Teague*, 134 N.C. App. 702, 708-09 (1999) (proper to allow expert to opine that one of the victim's "gunshot wounds to the head was consistent with an intent to cause death");
- an endocrinologist, in a case involving a defense of automatism, to testify that the defendant's actions were "not caused by automatism due to hypoglycemia" and that he reached this conclusion because the defendant did not experience amnesia, a characteristic feature of automatism caused by hypoglycemia, *State v. Coleman*, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017);
- a forensic pathologist who performed the autopsy to testify that the victim was "tortured," where the defendant was charged with first-degree murder on the basis of torture, *State v. Jennings*, 333 N.C. 579, 597-600 (1993);
- a forensic pathologist who conducted the autopsy to testify that the victim experienced a "sexual assault," *Jennings*, 333 N.C. at 600-601; see also *State v. O'Hanlan*, 153 N.C. App. 546, 553-57 (2002) (citing *Jennings* and holding that medical doctors who examined the victim properly testified that she was sexually assaulted);
- a pathologist who did the autopsy to testify that that defendant's account of the shooting was inconsistent with the type of wound suffered by victim and that the wound was not a self-defense type wound, even though self-defense was an ultimate issue in the case, *State v. Saunders*, 317 N.C. 308, 314 (1986);

- a physician to testify that a sexual assault victim's injuries were caused by a male penis, *State v. Smith*, 315 N.C. 76, 99-100 (1985) (noting that the witness did not testify that the victim had been raped or that the defendant had raped her);
- a radiologist to testify, in an assault inflicting serious injury case, that based on the victim's CT scan, the "trauma was definitely very serious intracranial trauma with serious brain injury and serious orbital injury with all the bone damage that was suffered," *State v. Liggins*, 194 N.C. App. 734, 743-44 (2009) (concluding that the expert's opinion was not inadmissible on the basis that it embraced an ultimate issue to be determined by the jury).

However, it is improper to allow:

- an expert in pathology and medicine, in a homicide case, to testify that injuries suffered by the victim were a "proximate cause of [the victim's] death," *State v. Ledford*, 315 N.C. 599, 617-19 (1986) (error to allow the expert to testify that a legal standard—"proximate cause"—had been met);
- a mental health expert to testify, in a murder case, that a defendant did or did not premeditate or deliberate, *State v. Weeks*, 322 N.C. 152, 166-67 (1988) (proper to exclude defense proffered expert testimony that the defendant did not act with deliberation); *State v. Cabe*, 131 N.C. App. 310, 313-14 (improper to allow the State's expert to testify that the defendant acted with premeditation and deliberation, but allowable here where the defendant opened the door), or that the defendant possessed or lacked the capacity to premeditate or deliberate, *State v. Rose*, 323 N.C. 455, 459-60 (1988) (*Rose I*) (proper to exclude such testimony); *State v. Rose*, 327 N.C. 599, 601-05 (1990) (*Rose II*) (the trial court committed reversible error by allowing the State's expert to testify that the defendant was capable of "premeditating"); *State v. Mash*, 328 N.C. 61, 65-66 (1991) (proper to exclude defense proffered expert testimony regarding the defendant's ability to premeditate and deliberate);
- a mental health expert to testify, in a murder case, that the defendant did not act in a "cool state of mind," *Weeks*, 322 N.C. at 165-67; *State v. Boyd*, 343 N.C. 699, 708-10 (1996) (holding that under *Weeks* and Rule 403, the trial court did not err by preventing a forensic psychologist from using the phrase "cool state of mind" to convey his opinion that the defendant lacked the specific intent necessary to commit premeditated and deliberate murder at the time of the shootings), or under a suddenly aroused violent passion, *Weeks*, 322 N.C. at 165-67.
- a mental health expert to testify that the defendant lacked the capacity to conspire, *State v. Brown*, 335 N.C. 477, 489 (1994) (no error to exclude testimony of defense expert in forensic psychiatry with a specialty in addictive medicine where the term "conspiracy" had a specific legal definition);

- a medical doctor who examined the victim to testify that she had been “raped” and “kidnapped,” *State v. O’Hanlan*, 153 N.C. App. 546, 557-58 (2002);
- a mental health expert to testify about the law of voluntary intoxication and its effect on the defendant’s insanity defense, *State v. Silvers*, 323 N.C. 646, 655-57 (1989) (agreeing with the defendant’s argument that a defense expert was erroneously permitted to offer legal conclusions during cross-examination by the State).

C. Opinion on Credibility of Witness. Expert testimony on the credibility of a witness is not admissible. *State v. Heath*, 316 N.C. 337, 340-43 (1986) (holding that the expert’s testimony was improper for this reason); *State v. Aguallo*, 318 N.C. 590, 598-99 (1986) (citing *Heath* and holding that the trial court erred by allowing a pediatrician to testify that a rape victim was “believable”); *State v. Green*, 209 N.C. App. 669, 676-77 (2011) (so stating this rule but holding that in this case, the expert’s testimony regarding the defendant’s blood alcohol level did not constitute impermissible opinion testimony). Thus, it is error to allow an expert to testify that she believed the victim and to the reason for this belief. *State v. Teeter*, 85 N.C. App. 624, 631-32 (1987) (testimony by a nurse tendered as an expert for the State with respect to sexually abused mentally retarded adults). However, drawing the line between permissible and impermissible expert testimony in this area can be difficult. In *Teeter*, for example, it was not error for a mental health expert to testify that an adult sexual assault victim who suffered certain mental impairments showed no evidence of a disorder that would impair her ability to distinguish reality from fantasy. *Id.* at 628-29. The court rejected the defendant’s argument that this testimony amounted to an impermissible expert opinion concerning the victim’s credibility. *Id.* Consider by contrast, *Heath*, in which clinical psychologist Deborah Broadwell testified as an expert for the State in a child sexual assault case involving victim Vickie. At trial, defense counsel asked Vickie if her sister thought she was lying about the attack because Vickie “had lied about so many other things,” asked Vickie’s mother if she had experienced difficulties with Vickie “making up stories,” and cross-examined Broadwell about alleged discrepancies in Vickie’s statements to hospital emergency room and mental health clinic personnel. *Heath*, 316 N.C. at 339-40. On redirect, the prosecutor asked Broadwell: “do you have an opinion . . . as to whether or not Vickie was suffering from any type of mental condition . . . which could or might have caused her to make up a story about *the* sexual assault?” *Id.* at 340 (emphasis added). Broadwell responded: “There is nothing in the record or current behavior that indicates that she has a record of lying.” *Id.* The court held, in part that the question, focusing as it did on “*the* sexual assault,” was improper. It explained:

We would be confronted with an entirely different situation had the assistant district attorney . . . asked the psychologist if she had an opinion as to whether Vickie was afflicted with any mental condition which might cause her to fantasize about sexual assaults in general or even had the witness confined her response to the subject of a “mental condition.”

Id. at 341. But because the question focused on *the* specific incident in question, it was improper under Evidence Rules 608 and 405(a), which “together, forbid an

expert's opinion as to the credibility of a witness.” *Id.* at 342. *Heath* thus emphasizes how fine the line can be between permissible and impermissible testimony. See also *State v. O'Hanlan*, 153 N.C. App. 546, 555 (2002) (“[T]he cases dealing with the line between discussing one's expert opinion and improperly commenting on a witness' credibility have made it a thin one.”).

Issues regarding impermissible expert opinion testimony on the credibility of a witness arise most frequently in child sexual assault cases. For a more detailed discussion of this issue in that context see [Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses](#), in this Benchbook. For more decisions decided after publication of that Benchbook Chapter, see [Smith's Criminal Case Compendium](#) (under Evidence; Opinions; Experts; Sexual Assault Cases).

D. Basis for Expert's Opinion.

1. **Scope & Adequacy.** Evidence Rule 703 provides that “[t]he facts or data . . . upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing.” N.C. R. EVID. 703. See generally *State v. Morgan*, 299 N.C. 191, 206 (1980) (testimony of Chief Medical Examiner regarding identification of human remains and cause of death was based on adequate data where the witness examined the remains, measuring, sorting and photographing them); *State v. McClary*, 157 N.C. App. 70, 79 (2003) (a forensic psychiatrist properly testified as an expert based on his own meetings with the defendant and his review of psychiatric evaluations done by other psychiatrists); *State v. McCall*, 162 N.C. App. 64, 71-73 (2004) (it was not error for an expert witness to testify that a child victim's behaviors suggested exposure to trauma, probably sexual abuse, where the expert did not personally examine the child; the expert obtained information about the child from a summary of the child's testimony, a DSS report, and the child's statement to the police; rejecting the defendant's argument that the expert's failure to examine the child rendered her expert opinion unreliable).

An opinion based on inadequate facts or data should be excluded. See 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE 742 (2011) [hereinafter BRANDIS & BROUN] (citing cases). As noted above, when expert testimony is not sufficiently tied to the facts of the case, it may fail the “fit test” that is part of the relevancy inquiry. See Section II.B.3. above.

2. **Of a Type Reasonably Relied Upon.** Rule 703 provides that the facts or data underlying the expert's opinion must be “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” N.C. R. EVID. 703. Compare *State v. Demery*, 113 N.C. App. 58, 65-66 (1993) (State's forensic serologist expert properly relied on statistical information concerning the frequency of blood group factors or characteristics in the North Carolina population compiled by the SBI with blood provided by the Red Cross and blood obtained in criminal cases; “The statistics on which he relied are commonly used and accepted in his field in North Carolina, and similar statistics are commonly used and accepted in forensic serology throughout the country”), *State v. Purdie*, 93 N.C. App. 269, 275-76 (1989) (expert in accident

reconstruction properly based his opinion on physical evidence), *and* State v. Teeter, 85 N.C. App. 624, 628-30 (1987) (clinical psychologist and expert in adult mental retardation and sexual abuse properly testified to the opinion that the victim exhibited behavioral characteristics consistent with sexual abuse; his opinion was based upon his experience in treating sexually abused mentally retarded persons, his familiarity with research and literature in that field, and his personal examination of the victim, all sources reasonably relied upon by experts in the field), *with* State v. Galloway, 145 N.C. App. 555, 564-65 (2001) (the trial court properly excluded statements made by the State's expert in the victim's medical discharge summary referencing the victim's psychiatric history, including substance abuse; because the expert was qualified as an expert in surgery, not psychiatry, the court rejected the defendant's assertion that the statements were admissible under Rule 703, finding that they did not contain facts or data reasonably relied upon by experts in the field of surgery).

3. **Need Not Be Admissible.** Rule 703 provides that if of a type reasonably relied upon by experts in the field, the facts or data forming the basis of the expert's opinion "need not be admissible in evidence." N.C. R. EVID. 703; see, e.g., State v. Jones, 322 N.C. 406, 410-14 (1988) (trial court did not err by admitting hearsay evidence as the basis of an expert's opinion); State v. Purdie, 93 N.C. App. 269, 277 (1989) (same).

For a discussion of confrontation clause issues related to the basis of the expert's opinion, see [Guide to Crawford and the Confrontation Clause](#), in this Benchbook.

4. **Expert Need Not Interview Victim.** Evidence Rule 703 provides that the facts or data on which an expert bases an opinion "may be those perceived by or made known to him at or before the hearing." N.C. R. EVID. 703; see *Purdie*, 93 N.C. App. at 276 ("It is well-settled that an expert witness need not testify from first-hand personal knowledge . . ."). Furthermore, the North Carolina Supreme Court has clarified that an expert "is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues relating to the prosecuting witness at trial," noting that "[s]uch a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts." State v. Walston, ___ N.C. ___, 798 S.E.2d 741, 747 (2017); accord State v. McCall, 162 N.C. App. 64, 71-73 (2004) (it was not error for an expert witness to testify that a child victim's behaviors suggested exposure to trauma, probably sexual abuse, where the expert did not personally examine the child; the expert obtained information about the child from a summary of the child's testimony, a DSS report and the child's statement to the police; rejecting the defendant's argument that the expert's failure to examine the child rendered her expert opinion unreliable).
5. **Disclosure & Cross-Examination of Basis at Trial.** Although an expert may testify without prior disclosure of the basis for his or her opinion, disclosure is required when requested by the other side. Rule 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

N.C. R. EVID. 705; see, e.g., *State v. Brown*, 101 N.C. App. 71, 76-77 (1990) (noting that under Rule 705 an expert does not have to identify the basis of his opinion, absent a specific request by opposing counsel; rejecting the defendant's argument that the State's failed to establish a proper foundation for its expert's opinion as to the weight of the cocaine where the expert testified to his opinion but the defendant made no inquiry as to basis on cross-examination); *State v. Fletcher*, 92 N.C. App. 50, 57 (1988) ("The basis of an expert's opinion need not be stated unless requested by an adverse party and here defendant made no such request.").

Courts have noted that "[d]isclosure of the basis of the opinion is essential to the factfinder's assessment of the credibility and weight to be given to it." *State v. Jones*, 322 N.C. 406, 412 (1988). If the party requesting disclosure does not specify disclosure on voir dire, the trial court probably can allow for disclosure on voir dire or direct examination without committing error. 2 BRANDIS & BROWN at 738 (so noting); see *State v. Pretty*, 134 N.C. App. 379, 382-83 (1999) (no error where disclosure occurred during direct and cross-examination rather than on voir dire and no prejudice was shown from the delay in obtaining the evidence). But, if the party seeking disclosure specifically asks for disclosure on voir dire and the trial court allows disclosure only on direct examination, prejudicial error may occur if improper evidence is presented to the jury. 2 BRANDIS & BROWN at 738. When disclosure is ordered through voir dire and the trial court admits the opinion, it has been suggested that the trial court has discretion to require the expert to state the facts or data before giving the opinion or leave them to be brought out on cross-examination. *Id.*

"Wide latitude is generally given to a cross-examiner in his attempts to discredit the expert witness, including questioning the expert in order to show that the facts or data forming the basis of the expert's opinion were incomplete." *State v. Black*, 111 N.C. App. 284, 293-94 (1993). As has been explained:

On cross-examination ... opposing counsel may require the expert to disclose the facts, data, and opinions underlying the expert's opinion not previously disclosed. With respect to facts, data, or opinions forming the basis of the expert's opinion, disclosed on direct examination or during cross-examination, the cross-examiner may explore whether, and if so how, the non-existence of any fact, data, or opinion or the existence of a contrary version of the fact, data, or opinion supported by the evidence, would affect

the expert's opinion. Similarly the expert may be cross-examined with respect to material reviewed by the expert but upon which the expert does not rely. Counsel is also permitted to test the knowledge, experience, and fairness of the expert by inquiring as to what changes of conditions would affect his opinion, and in conducting such an inquiry ... the cross-examiner is not limited to facts finding support in the record. It is, however, improper to inquire of the expert whether his opinion differs from another expert's opinion, not expressed in a learned treatise, if the other expert's opinion has not itself been admitted in evidence. An expert witness may, of course, be impeached with a learned treatise, admissible as substantive evidence . . .

Id. at 294 (quoting MCCORMICK, MCCORMICK ON EVIDENCE § 13 (1992), and going on to hold that the trial court properly allowed the defendant to elicit on cross-examination that the expert never examined certain medical records, that in formulating similar opinions she often relied upon such records, and that examination of the records would in fact have assisted the expert in formulating her opinion in this case; however, the trial could properly limit the defendant's cross-examination when he sought to question the expert regarding the contents of data that the expert had not considered or used in formulating her opinion and which was not contained in any recognized learned treatise); see also *State v. White*, 343 N.C. 378, 393 (1996) (the trial court properly allowed the State to cross-examine a defense psychiatry expert about the work of a clinical psychologist upon which the expert had relied where the expert disagreed with a conclusion drawn by the clinical psychologist).

Cases have held it to be error when the trial court prohibits defense counsel from asking a defense expert about the basis of his or her opinion. *State v. Davis*, 340 N.C. 1, 25-26 (1995) (error to sustain the State's objections to questions posed to the defendant's mental health expert about the basis of the expert's opinion); *State v. Allison*, 307 N.C. 411, 413-17 (1983) (the trial court committed prejudicial error in a case involving the insanity defense where it prohibited defense mental health experts from testifying to the basis of their opinions that the defendant was unable to distinguish between right and wrong with respect to his behavior at the time of the alleged crimes).

For a discussion of what discovery must be provided in connection with expert witnesses, see [Discovery in Criminal Cases](#) in this Benchbook.

6. **Status as Substantive Evidence; Limiting Instruction.** When evidence is admissible as the basis of an expert's opinion, it is not substantive evidence unless it qualifies for admission under some independently recognized principle, such as an exception to the hearsay rule. 2 BRANDIS & BROWN at 744-45. One exception to the hearsay rule that might apply is N.C. R. EVID. 803(18) (hearsay exceptions, availability of declarant immaterial), which provides an exception to the hearsay rule as follows:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct

examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

If the evidence does not qualify for admission as substantive evidence, its admission should be accompanied by an appropriate limiting instruction. See *State v. Jones*, 322 N.C. 406, 414 (1988) (noting that the defendant is entitled to a limiting instruction upon request).

- E. Testimony Outside of Expert's Expertise.** An expert's testimony should relate to the expert's area of expertise. *State v. Ward*, 364 N.C. 133, 146 n.5 (2010) ("[c]aution should be exercised in assuring that the subject matter of the expert witness's testimony relates to the expertise the witness brings to the courtroom" (quotation omitted)). For example, in one recent case the North Carolina Supreme Court noted that while a defense proffered witness who was a former police officer and trainer in police use of force matters would have been qualified to testify about standard police practices regarding the use of force, he was not qualified to testify about the human body's sympathetic nervous system. *State v. McGrady*, 368 N.C. 880, 896 (2016). By contrast, in another case the Court of Appeals rejected the defendant's argument that testimony by a forensic serologist that the defendant's blood profile was the same as .2% of the population and the victim's blood profile was the same as 8.2% of the population was beyond the scope of witness's expertise. *State v. Demery*, 113 N.C. App. 58, 63-64 (1993).

- F. Terminology.** Although not binding authority for a judge, the PCAST REPORT asserts that statements by experts suggesting or implying greater certainty than is shown by the empirical evidence "are not scientifically valid and should not be permitted." PCAST REPORT at 145. It continues:

In particular, courts should never permit scientifically indefensible claims such as: "zero," "vanishingly small," "essentially zero," "negligible," "minimal," or "microscopic" error rates; "100 percent certainty" or proof "to a reasonable degree of scientific certainty;" identification "to the exclusion of all other sources;" or a chance of error so remote as to be a "practical impossibility."

Id.; see also Paul C. Giannelli, *The NRC Report and Its Implications for Criminal Litigation*, 50 JURIMETRICS J. 53, 57-60 (2009) (discussing a similar position in the 2009 report by the National Research Council, entitled, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, and relevant cases).

- IV. Interplay Between Rule 403 & the 700 Rules.** Evidence that is admissible under Rule 702 still may be inadmissible under Rule 403. See N.C. R. EVID. 702(g) ("This section

does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.”). *Compare, e.g., State v. King*, 366 N.C. 68, 75-76 (2012) (holding that the trial court did not abuse its discretion by excluding under Rule 403 the expert testimony regarding repressed memory that was admissible under Rule 702), *and State v. Walston*, ___ N.C. ___, 798S.E.2d. 741, 746 (2017) (citing *King* and noting that Rule 403 would allow for the exclusion of expert testimony—in that case, regarding repressed memory and the suggestibility of memory—even if such evidence was admissible under Rule 702), *with State v. Cooper*, 229 N.C. App. 442, 463 (2013) (in this murder case where files recovered from the defendant’s computer linked the defendant to the crime, the trial court abused its discretion by excluding under Rule 403 a defense expert proffered to testify that the defendant’s computer had been tampered with).

Likewise, evidence admissible under Rule 705 may be excluded under Rule 403. *State v. Coffey*, 336 N.C. 412, 420-22 (1994) (although Rule 705 allows a party cross-examining an expert to inquire into the facts on which the expert’s opinion is based, that Rule “does not end the inquiry” and the trial court may exclude such evidence under Rule 403; where the probative value of evidence of the defendant’s convictions was substantially outweighed by the danger of unfair prejudice, evidence of the convictions was not admissible on grounds that they constituted a basis of the expert’s opinion).

V. Court Appointed Experts. Evidence Rule 706(a) provides for court appointed experts. It provides:

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

N.C. R. EVID. 706(a); *see also State v. Robinson*, 368 N.C. 596, 597 (2015) (instructing that on remand the trial court may, in its discretion appoint an expert under the rule).

If the court appoints an expert, the witness is “entitled to reasonable compensation in whatever sum the court may allow.” N.C. R. EVID. 706(b).

The rule allows the court, in the exercise of its discretion, to “authorize disclosure to the jury of the fact that the court appointed the expert witness.” N.C. R. EVID. 706(c). And it specifies that nothing in the rule limits the parties in calling expert witnesses of their own selection. N.C. R. EVID. 706(d).

VI. Defendant’s Right to Expert Assistance.

For a discussion of a criminal defendant’s right to expert assistance and the procedure for obtaining such assistance, see Chapter 5, Experts and Other Assistance, in JOHN

RUBIN & ALYSON A. GRINE, NORTH CAROLINA DEFENDER MANUAL VOL. 1, PRETRIAL (2013), <http://defendermanuals.sog.unc.edu/defender-manual/2>.

VII. Standard of Review on Appeal.

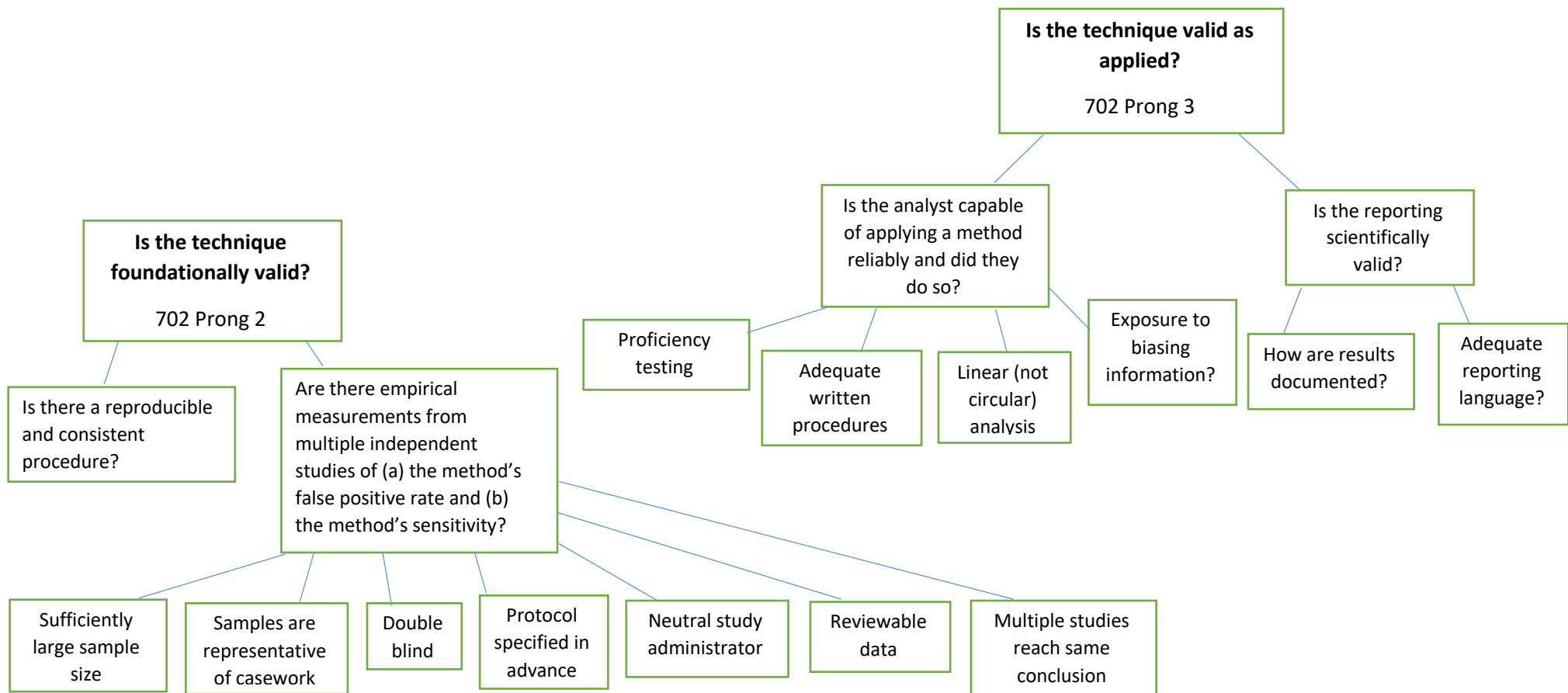
In reviewing a trial court's decision regarding the admissibility of expert testimony, the appellate courts apply the deferential abuse of discretion standard. *See, e.g., Walston*, ___ N.C. ___, 798 S.E.2d at 745; *McGrady*, 368 N.C. at 893; *State v. Babich*, ___ N.C. App. ___, 797 S.E.2d 359, 361 (2017); *State v. Hunt*, ___ N.C. App. ___, 790 S.E.2d 874, 881 (2016).

Rule 702 – Testimony by Experts

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Roadmap for scientific validity under Rule 702 (prongs 2 and 3)/PCAST Report



What's in the Felony File:
Organizing a Trial Notebook and Exhibits

Keith Williams
Greenville, North Carolina
Telephone: 252-931-9362
Email: keith@williamslawonline.com

- 1) Intro
 - a) The Vanishing Trial
 - i) How it used to be
 - (1) Various numbers
 - (a) 1962: 15% of all federal criminal cases went to trial
 - (b) 1976: 9% of all state criminal cases went to trial
 - (c) 1980: 18% of all federal criminal cases went to trial
 - (2) Sources
 - (a) *A World without Trials*, Journal of Dispute Resolution, Volume 2006, Issue I, <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1640&context=jdr>
 - (b) *The Vanishing Trial*, Journal of Empirical Legal Studies, November 2004, Volume I, Issue 3
 - ii) How it is now
 - (1) 2013: 3% of federal criminal cases went to trial
 - (a) https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?_r=0
 - iii) Most recent numbers for North Carolina
 - (1) From July 1, 2015, through June 30, 2016
 - (2) “Overall, 2% of convictions statewide resulted from jury trials”
 - (a) 28,593 total convictions
 - (b) 28,021 resulted from plea
 - (c) 572 resulted from jury trial
 - (3) did not break it down by county
 - (a) will vary based on population
 - (b) but rough number: 572 jury trials over 100 counties is 5.72 jury trials per year in each county: average 6 in a year; one every 2 months
 - (i) some more
 - (ii) some less
 - (4) January 2017 report from NC Sentencing and Policy Advisory Commission
 - (a) http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy15-16.pdf

- b) Causes?
 - i) Harsher sentences b/c of structured sentencing
 - (1) I would agree re federal court
 - (2) But probably not agree re state court
 - ii) Vicious cycle
 - (1) We are exposed to fewer jury trials
 - (2) Which deprives us of the opportunity to learn about them and become familiar with them
 - (3) Which makes us less likely to have the courage to engage in them
 - (4) Which means there are fewer jury trials
 - iii) Hard but honest assessment (opinions from me, not from the School of Government)
 - (1) Overworked lawyers
 - (2) Lazy lawyers
 - (3) Scared lawyers
- c) Question for me and for each one of us:
 - i) Am I a poser?
 - (1) A poser says they are a trial lawyer, but actually lacks the stomach for it
 - ii) Sometimes hard for us to know ourselves; easy for the prosecutors to tell
 - (1) They know who talks about going to trial – and almost always pleads
 - (2) They also know who talks about going to trial – and actually goes to trial
 - (3) One guess as to who gets the better plea offers
 - iii) Wade Smith: you need to be sure you are anything other than a “tasty morsel” for the prosecutors
 - (1) You want to be thick and grisly and unpleasant
- d) Is it OK to be a lawyer and avoid jury trials?
 - i) Yes, but not if you represent people charged with felonies in Superior Court
 - ii) We are not mediators; we are trial lawyers
 - (1) Even a civilized society needs a place to brawl
 - (2) No jousting; no bullfighting; no street fighting
 - (3) All replaced by trial lawyering
- e) Three steps to taking more cases to trial
 - i) Know the facts of your case
 - ii) Know the law that applies
 - iii) Prepare
 - (1) Buying a house: location, location, location
 - (2) Going to jury trial in a felony case: preparation, preparation, preparation
- f) Purpose of today is the third step: preparation
 - i) Demystify the process
 - ii) Makes us more likely to engage in the process
 - iii) One caveat: you will never feel 100% prepared
 - (1) There is also something more you can do
 - (2) But if you wait until you feel 100% prepared b/4 you try a case, you will never try a case

- 2) Order of preparation
 - a) Disclaimer: what I know, I have learned from others; hard for me to identify / recall all of the sources, but it would especially be from attorneys Roger Pozner and Chris Dodd
 - b) Decide on your theory of the case
 - i) Before you start the road trip, know your destination
 - ii) Example: rape case
 - (1) My client was not at the party: alibi
 - (2) My client was at the party but did not go in the room with her: mistaken identity
 - (3) My client was at the party and did go in the room with her, but they did not have sex: untruthful prosecuting witness
 - (4) My client was at the party and did go in the room and did have sex with her, but she was a willing participant: consent
 - c) Then think about your closing argument: your best points for winning the case
 - i) Shows you the points you need to make during trial
 - d) Cross-examination: try to make most of your points on cross of expected State's witnesses
 - e) Direct examination: call your own witnesses and possibly your client to testify if you have points you need to make that you cannot get from the State's witnesses
 - f) Opening statement: how best will you forecast the important points to the jury
 - g) Jury selection: what are the key points that you need to raise with the jury during voir dire
- 3) Trial Notebook
 - a) Tried a jury trial one time from folders
 - i) Never again
 - b) Take your materials and put them into a three-ring notebook with tabs
 - i) Jury selection (voir dire)
 - ii) Opening statement
 - iii) Cross-ex of State's witnesses
 - (1) One tab for each witness
 - iv) Motions at close of State's evidence
 - v) Presentation of Defense witnesses
 - (1) One tab for each witness
 - vi) Motions at close of all evidence
 - vii) Jury instructions / charge conference
 - (1) Available for free on School of Govt website
 - (2) Print the instructions you want
 - (3) Four copies: one for you, one for the judge, one for the clerk, one for the State
 - viii) Closing argument
 - ix) Sentencing
 - c) Inside front folder
 - i) My outline
 - ii) Index to trial notebook
 - iii) Spreadsheet of exhibits
 - d) Cover sheet: "TRIAL NOTEBOOK"
 - i) Let the client see that you are ready

- e) Forces you to go through the file and prune it
 - i) Keep what you need
 - ii) Get rid of the rest
 - (1) “A major preparation attribute that separates great trial lawyers from lesser advocates is the ability to streamline their cases. Highly effective trial lawyers jettison redundant witnesses, unnecessary exhibits, repetitive questions, causes of action, or defenses that detract from the principal theory of the case. All of this is critical to success at trial.”
 - (2) *Eight Traits of Great Trial Lawyers*, Judge Mark Bennett, Voir Dire, Summer 2014, <http://bit.ly/2n4JO3v>
- 4) Preparation for cross-examination
 - a) The most important skill of a criminal defense attorney
 - i) A skill that can be learned
 - b) Youtube: Terry McCarthy on Cross-Examination
 - i) <https://youtu.be/QcOkG9-TpEo>
 - c) Pozner and Dodd, Masters of Cross-Examination DVD
 - i) pozneranddodd.com
 - ii) chapter method of cross-examination
 - (1) break your questions down into smaller sub-questions
 - (2) each of the smaller questions is a chapter
 - (3) have a spreadsheet for each smaller question, and move through them in the order you believe most effective
 - (4) you are making statements, and the witness is saying yes or no
 - (5) you are using them to make your points; they are there to serve your purpose
 - (a) preparation: you know in advance the points you need to cover
- 5) Preparation for direct examination
 - a) If your client is going to testify, do a practice direct examination with them
 - i) Record it
 - ii) Give it to them to watch
 - b) Will make them a much better witness at trial
- 6) Exhibits
 - a) Decide what you need to admit through the various witnesses
 - i) You are allowed to admit your exhibits through the State’s witnesses if you can get a sufficient foundation
 - b) Decide how you want to display them
 - i) On the screen
 - (1) From your computer using something like Apple TV
 - (2) Note: you will still need a printed copy to give to the clerk for the court file
 - ii) In hard copy to be handed to the jury
 - iii) On an easel, blown up and displayed on foam board

- c) Have them marked and ready to go
 - i) In your trial notebook, in the tab for the witness through whom you plan to introduce the exhibit
 - ii) Defense Exhibit stickers – in the bottom right corner
 - (1) 1, 2, 3, 4, etc
 - iii) you need three copies of each
 - (1) one for you
 - (2) one for the court
 - (3) one for the prosecutor
 - iv) spreadsheet of exhibits will have the number the exhibit
- d) How you keep them for your own use: in paper form or electronic form?
 - i) Yes
 - ii) In paper – as part of trial notebook
 - iii) On computer
 - (1) Documents in PDF format so you can search as needed to find specific words or phrases on the fly in trial
 - (a) Tip: make all of your PDF documents word searchable by using the OCR process
 - (i) Optical character recognition; turns the scanned page into searchable text
 - (ii) Windows: Document – OCR text recognition
 - (iii) Mac: Tools – Text recognition
 - (2) Other exhibits – as backup on computer
- e) How to introduce them: don't make this harder than it has to be
 - i) The steps
 - (1) Identify the exhibit by number
 - (2) Have the witness describe it and lay the foundation for it
 - (3) Move to admit it
 - ii) Example for admitting a photo:
 - (1) I hand you what has been marked as Defense Exhibit number 1 for identification purposes
 - (2) Do you recognize it
 - (3) Can you tell us what it is
 - (4) Does it fairly and accurately depict the scene
 - (5) You honor, I move to admit Defense Exhibit number 1
 - iii) be familiar with the legal standards for laying a foundation for that type of exhibit
- f) With witnesses you present on direct examination, using exhibits opens the possibility of allowing your witness to testify twice in the same direct
 - i) First time through: without exhibits
 - ii) Second time through: with exhibits
- g) If possible, use key exhibits during opening
 - i) Will need to get judge's permission in advance

7) Conclusion

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CRS _____

STATE OF NORTH CAROLINA

vs.

JOHN DOE,

Defendant.

)
)
)
)
)
)
)

**MOTION FOR DECLARATION
OF INDIGENCE FOR PURPOSES OF
OBTAINING INVESTIGATIVE
& EXPERT ASSISTANCE**

NOW COMES the Defendant, *John DOe*, by and through the undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. § 7A-450(a), and *State v. Davis*, 168 N.C. App. 321, 608 S.E.2d 74 (2005), for an Order declaring the Defendant to be indigent and appointing second-counsel in this matter. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. On DATE, the Defendant, John Doe, was arrested and charged with three counts of Obtaining Property by False Pretenses in the above-captioned cases.
2. On DATE, Mr. Doe was indicted for three counts of Obtaining Property by False Pretenses in the above-captioned cases.
3. The charges of Obtaining Property by False Pretenses arise from allegations from the NC Department of Revenue that Mr. Doe obtained refunds on his North Carolina Individual Income Tax returns for the years _____.
4. Prior to being charged with the aforementioned offenses, Mr. Doe was employed as a Deputy for the ____ County Sheriff’s Department, as well as a law enforcement officer for other law enforcement agencies.
5. Upon being charged with the aforementioned offenses in DATE, Mr. Doe was suspended from the ____ County Sheriff’s Department, as well as the other law enforcement agencies with which he was previously employed.
6. Since being charged with the aforementioned offenses, Mr. Doe was not been able to obtain gainful employment in his chosen profession of law enforcement. Mr. Doe was required to obtain employment in other fields.
7. Only in the last few weeks has Mr. Doe been able to obtain employment in the law enforcement profession. However, due to Mr. Doe’s current financial situation involving the NC Department of Revenue and the Internal Revenue Service, much of Mr. Doe’s

income is being used to satisfy back taxes and tax penalties associated with his tax situation.

8. Due to being unemployed in the law enforcement profession, having to find other sources of income, and being required to satisfy back taxes and tax penalties, Mr. Doe is not able to obtain sufficient funds to hire the necessary experts for his defense.
9. Undersigned counsel has been provided discovery in this matter, much of which consists of income tax returns and other related documents.
10. Due to Mr. Doe's financial situation, undersigned counsel has agreed to represent Mr. Doe pro bono.
11. Due to his financial situation, Mr. Doe is an indigent individual and does not have the means with which to retain the necessary expert assistance required to defend against the aforementioned charges, namely a forensic accountant and/or a private investigator.
12. Under the Constitution of the United States and the State of North Carolina, a defendant facing criminal charges is entitled to expert assistance in defending against said charges. If the defendant is indigent, counsel and the necessary expert assistance must be appointed at state expense.
13. Neither the Defendant's family, nor the Defendant, can shoulder the financial burden of retaining the necessary expert assistance to defend against the aforementioned charges.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the Court enter an order declaring the Defendant to be an indigent individual;
2. That the Court enter an order allowing the Defendant to seek and obtain funds for expert assistance from the Court and that the Office of Indigent Defense Services and/or the Administrative Office of the Courts be directed to reimburse said experts for said services; and
3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the __th day of _____.

TIN FULTON WALKER & OWEN, PLLC

By:_____

Maitri “Mike” Klinkosum

Attorney for the Defendant

State Bar No.: _____

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett St., Suite 705

Raleigh, NC 27601

Telephone: -----

Facsimile: (919) 720-4640

Email: -----

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Declaration of Indigence for Purposes of Obtaining Investigative & Expert Assistance*** was this day served upon the prosecution by the following method:

☒ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

Special Deputy Attorney General
NC Departement of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

_____ by personally serving the Office of the Attorney General via hand delivery;

☒ by transmitting a copy via facsimile transmittal to the Special Deputy Attorney General;
and/or

_____ by depositing a copy in the box for the Office of the Attorney General maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____
Maitri “Mike” Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

STATE OF NORTH CAROLINA

COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT

DIVISION ____ CR_____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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**MOTION FOR PRESERVATION OF
ALL DOCUMENTS/EVIDENCE
& WORK PRODUCT**

NOW COMES the Defendant, *John Doe*, by and through the undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, Article 48 of the North Carolina General Statutes, N.C. Gen. Stat. §§ 15A-501(6), 15A-903(c) & (d), N.C.Gen.Stat. § 15A-1415(f), and *State of North Carolina vs. Theodore Jerry Williams*,¹ and hereby requests that this Honorable Court enter an Order commanding all law enforcement and prosecutorial agencies, officers, employees, agents and/or attorneys involved in the investigation and prosecution of the above-captioned matters to preserve and retain any and all documentation, physical evidence, and work product obtained and/or produced in the investigation and prosecution of these matters.

The Defendant further requests that this Honorable Court order all law enforcement agencies involved in the investigation of these matters to release to the prosecution all materials and information acquired during the course of the investigation into these matters, pursuant to N.C. Gen. Stat. §§ 15A-501(6) and 15A-903(c) and (d). In support of the foregoing Motion, the Defendant states unto the Court as follows:

1. The Defendant is charged with one count of first-degree murder.
2. The documentation and physical evidence the Defendant seeks to have preserved are discoverable under Article 48 of the North Carolina General Statutes.
3. N.C.Gen.Stat. § 15A-501(6) states:

Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer...must make available to the State on a timely basis all materials and information acquired in the course of all felony

¹ 362 N.C. 628, 669 S.E.2d 290 (2008).

investigations. This responsibility is a continuing and affirmative duty.

4. N.C.Gen.Stat. § 15A-903(a)(1) states:

Upon motion of the defendant, the court must order the State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the Defendant.

5. N.C. Gen. Stat. § 15A-903(a)(1)(a) states in part:

The term "file" includes the defendant's statements, the codefendant's statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

6. N.C. Gen. Stat. § 15A-903(c) states:

On a timely basis, law enforcement and investigatory agencies shall make available to the prosecutor's office a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section and any disclosure under G.S. 15A-902(a). Investigatory agencies that obtain information and materials listed in subdivision (1) of subsection (a) of this section shall ensure that such information and materials are fully disclosed to the prosecutor's office on a timely basis for disclosure to the defendant.

7. N.C. Gen. Stat. § 15A-903(d) states:

Any person who willfully omits or misrepresents evidence or information required to be disclosed pursuant to subsection (1) of subsection (a) of this section, or required to be provided to the prosecutor's office pursuant to subsection (c) of this section, shall be guilty of a Class H felony. Any person who willfully omits or misrepresents evidence or information required to be disclosed pursuant to any other provision of this section shall be guilty of a Class 1 misdemeanor.

8. In order, for the Defendant to be afforded his statutory right to inspect and copy all evidence under both the statutory and constitutional laws

governing discovery in criminal cases, any and all evidence must be made available to the Defendant for inspection.

9. N.C.Gen.Stat. § 15A-1415(f), in addressing discovery requirements in post-conviction proceedings in superior court, states in part:

...The State, to the extent allowed by law, shall make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the Defendant...

10. N.C.Gen.Stat. § 15A-1415(f) has been interpreted to require the prosecution to provide to the defense prosecutorial work product.²
11. In order to ensure all evidence is available and not inadvertently destroyed, the Court should enter an Order requiring all law enforcement and prosecutorial agencies involved in the investigation and prosecution of these matters to preserve any and all documents, evidence, and work product obtained and/or produced in connection with these matters.
12. The interests of justice and the rights of the Defendant require the preservation of all documents, evidence, and work product connected with these matters and, as such, the Court should enter an Order requiring that such materials be preserved.
13. Further, the defense hereby places the State on notice that the defense is demanding the preservation of any and all evidence in these matters in order that the State will have notice of the defense's demand and will not be able to assert the doctrine of "bad faith,"³ in the event any unwarranted loss or destruction of documentation or evidence occurs.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the Court enter an Order commanding all law enforcement and prosecutorial agencies, officers, employees, agents and/or attorneys involved in the investigation and prosecution of the above-captioned matters to preserve and retain any and all documentation, physical evidence, and work product obtained and/or produced in the investigation of these matters;
2. That the Court enter an Order requiring all law enforcement and prosecutorial agencies, officers, employees, agents and/or attorneys

² *State v. Bates*, 348 N.C. 62, 505 S.E.2d 97 (1998).

³ See *Arizona v. Youngblood*, 488 U.S., 109 S.Ct. 333, 102 L.Ed.2d 281 (1988),

involved in the investigation and prosecution of the above-captioned matters to release to the prosecution all materials and information acquired during the course of the investigation into these matters, pursuant to N.C.Gen.Stat. § 15A-501(6) and 15A-903(c) & (d); and

3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the ___th day of DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____

Maitri “Mike” Klinkosum

Attorney for the Defendant

North Carolina State Bar Number: _____

127 W. Hargett Street, Suite 705

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

By: _____

Emily D. Gladden

Attorney for the Defendant

North Carolina State Bar Number: _____

127 W. Hargett Street, Suite 705

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Appearance*** was this day served upon the District Attorney by the following method:

- _____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;
- __X__ by personally serving the Office of the District Attorney via hand delivery to the Office of the District Attorney – District __ (____ County);
- _____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or
- _____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the __th day of DATE.

TIN FULTON WALKER & OWEN, P.L.L.C.

By: _____

Maitri “Mike” Klinkosum

Attorney for the Defendant

North Carolina State Bar Number: _____

127 W. Hargett Street, Suite 705 Raleigh,
NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

DISTRICT COURT

COUNTY OF _____

DIVISION 16 C _____

STATE OF NORTH CAROLINA,

)

vs.

) ORDER ON DEFENDANT'S

)

MOTION FOR

)

PRESERVATION OF

)

DOCUMENTS,

)

EVIDENCE & WORK

JOHN DOE,

Defendant.

)

PRODUCT

THIS MATTER having come on to be heard before the Honorable _____, Chief District Court Judge, presiding at the DATE session of Criminal District Court for the County of _____, pursuant to the Defendant's ***Motion for Preservation of All Documents/Evidence & Work Product***, which was filed on DATE; and

IT APPEARING TO THE COURT, that at the time this matter was presented to the Court, the State of North Carolina was present and represented by Assistant District Attorney _____, and the Defendant was present and represented by Maitri "Mike" Klinkosum, Attorney at Law, and Emily D. Gladden, Attorney at Law;

IT APPEARING TO THE COURT, after determining that the Court has jurisdiction over the subject matter and the parties, and, after considering the Defendant's Motion, and after hearing the arguments of counsel for both the State and the Defense, finds the Defendant's ***Motion for Preservation of Documents/Evidence & Work Product*** should be allowed.

IT IS THEREFORE, ORDERED, ADJUDGED, and DECREED, that the ***Defendant's Motion for Preservation of Documents/Evidence & Work Product*** is hereby granted as follows:

1. All law enforcement and prosecutorial agencies, officers, employees, agents and/or attorneys involved in the investigation and prosecution of these matters shall preserve and retain any and all documentation, physical evidence, and work product obtained and/or produced in the investigation of these matters pursuant to all applicable statutory and constitutional law.
2. All law enforcement and prosecutorial agencies, officers, employees, agents, and/or attorneys involved in the investigation and prosecution of the above-captioned matters shall release to the prosecution all materials and information acquired during the course of the investigation into these matters, pursuant to N.C. Gen. Stat. § 15A-501(6) and N.C. Gen. Stat. § 15A -903(c).

This the _____ day of DATE.

The Honorable _____
Chief District Court Judge

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CRS ____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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REQUEST FOR
ARRAIGNMENT

NOW COMES the Defendant, *John Doe*, by and through the undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, pursuant to the “Law of the Land” Clause of Article I, Sections 19, 23 and 27 of the North Carolina Constitution, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and N.C.Gen.Stat. § 15A- 941, and hereby submits this written request for arraignment.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____

Maitri “Mike” Klinkosum

Attorney for the Defendant

State Bar No.: _____

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett St., Suite 705

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Request for Arraignment*** was this day served upon the prosecution by the following method:

 X depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

Special Deputy Attorney General
NC Department of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

 by personally serving the Office of the District Attorney via hand delivery;

 by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

 by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____

Maitri “Mike” Klinkosum

Attorney for the Defendant

State Bar No.: _____

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett St., Suite 705

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF _____

__ CRS _____

STATE OF NORTH CAROLINA

VS.

JOHN DOE,

Defendant.

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REQUEST FOR
VOLUNTARY DISCOVERY
(ALTERNATIVE MOTION FOR
DISCOVERY)

NOW COMES the Defendant, *John Doe*, by and through the undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and hereby requests voluntary discovery from the prosecution in this case, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19 and 23 of the North Carolina Constitution, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny, and Article 48 of the North Carolina General Statutes.

1. Pursuant to N.C. Gen. Stat. § 15A-903(a)(1), the Defendant requests the complete files of all law enforcement agencies, investigatory agencies, and prosecutor offices involved in the investigation of the crimes committed or the prosecution of the defendant.
2. Pursuant to N.C.Gen. Stat. § 15A-903(a)(1)(a), the Defendant requests the following:
 - (a) The defendant’s statements;
 - (b) The co-defendant’s statements;
 - (c) Witness statements;
 - (d) Investigating officers’ notes;
 - (e) Results of tests and examinations; and
 - (f) Any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.
3. Pursuant to N.C. Gen. Stat. § 15A-903(a)(1)(a), if any matter or evidence

has been submitted for testing or examination, the Defendant requests the following:

- (a) Any and all test and/or examination results;
 - (b) Any and all testing/examination data;
 - (c) Any and all calculations, or writings of any kind, generated in connection with said testing and/or examination results;
 - (d) Any and all preliminary test and/or screening results; and
 - (e) Any and all bench notes
4. Pursuant to N.C. Gen. Stat. § 15A-903(a)(1)(d), the Defendant invokes his the right to inspect and copy or photograph any materials in possession of the State and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample of physical evidence in possession of the State.
5. Pursuant to N.C. Gen. Stat. § 15A-903(a)(2), the Defendant requests, within a reasonable time prior to trial, as specified by the Court, that the State provide the following to the Defendant:
- (a) Notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial;
 - (b) A report of the results of any examinations or tests conducted by any State experts.
 - (c) The curriculum vitae of any State experts,
 - (d) The opinion, and the underlying basis for that opinion, of any State expert.
6. Pursuant to N.C. Gen. Stat. § 15A-903(a)(3), the Defendant requests that the State provided, at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial.
7. The Defendant requests a complete copy of the Defendant's prior criminal record, if any, including but not necessarily limited to:
- a. All juvenile and adult detention, jail, prison, parole, probation, and pre-sentence investigation records and reports;

- b. All arrest, conviction, and adult and juvenile criminal offense records and reports;
 - c. All records and reports of any law enforcement authority as that term is defined in paragraph 5(a) above;
 - d. All records and reports of any detention or court authority;
 - e. All records and reports of any prosecuting authority as that term is defined in paragraph 5(b) above;
8. The Defendant requests the opportunity to inspect and copy or photograph any and all books, papers, documents, photographs, motion pictures, videotapes, mechanical or electronic recordings, buildings and places, or any other crime scene, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the State and which are material to the preparation of the defense, or are intended for use by the State as evidence at the trial or were obtained from or allegedly belonged to the Defendant.
9. The Defendant requests a copy of any and all search warrants, arrest warrants and non-testimonial identification orders issued in connection with the case, as well as any supporting affidavits, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. §15A-971 *et seq.*
10. The Defendant requests a description of any and all pre-trial identification procedures conducted by the State or any of its agents in connection with the alleged crimes, and the date, time, place and persons present at such procedure, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*
11. The Defendant requests a description of any conversation between the Defendant and any law-enforcement officer, official or agent, and the date, time, place, and persons present at such time, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*
12. The Defendant requests a description of any and all property or contraband seized from the Defendant, Defendant's home, or an area under Defendant's control that the State intends to offer as evidence at trial, or which led to any other evidence the State intends to use at trial, and the time, place, and manner of any such seizure, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*;
13. The Defendant requests a description of any and all electronic, mechanical, visual or photographic surveillance of the Defendant conducted by State or federal law-enforcement officers, officials or agents, and the date, time, place and persons

present at such surveillance, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*

14. The Defendant requests a description of any electronic, mechanical, visual, or photographic surveillance of other persons, places or organizations conducted by State or federal law-enforcement officers, officials or agents which resulted in the interception and/or recording of any of the Defendant's conversations, photographs of the Defendant, or other information relating to the Defendant, and the date, time, location and manner of any such surveillance, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*
15. The Defendant requests information related to the nature of any other criminal acts, or prior bad acts, allegedly committed by the Defendant which the State intends to introduce as evidence in its case-in-chief or at sentencing, and the particulars of those acts, including but not limited to the time and place the acts were allegedly committed, whether the acts were the subject of any court proceedings, and the results of any such proceedings.
16. The Defendant requests a statement indicating whether or not any informants were involved in the investigation or preparation of the cases against the Defendant.
17. Pursuant to ***Brady v. Maryland***, 373 U.S. 83 (1963), ***United States v. Agurs***, 427 U.S. 97 (1976), ***United States v. Bagley***, 374 U.S. 667 (1985) and ***Kyles v. Whitley***, 514 U.S. 419 (1995) any and all documents, reports, facts or other information in whatever form which would tend to exculpate the Defendant, mitigate the degree of the offense or the appropriate punishment, weaken or overcome testimony adverse to the Defendant given by a State's witness, impeach the credibility of a State's witness, or would otherwise tend to be favorable to the Defendant in any way, including but not limited to:
 - a. Any notes or reports, in whatever form, which were prepared by any law-enforcement officer, official or agent and which would tend to refute, impeach or contradict any of the evidence the State intends to introduce at trial, or which tends to show or indicate in any way that the Defendant did not commit the crimes charged in the indictment or that he may have a legal defense to such crimes;
 - b. Any evidence or information which would tend to indicate in any way that someone other than the Defendant committed the crimes charged, including but not limited to any reports concerning any investigation of suspects other than the Defendant carried out in connection with this case or containing a description of the alleged perpetrator that is inconsistent

with the physical characteristics of the Defendant;

- c. The facts and circumstances surrounding any pretrial identification procedure conducted by any law-enforcement officer, official or agent in connection with this case in which any alleged witness failed to identify the Defendant or identified someone other than the Defendant;
 - d. Any written, recorded or oral statements made by any person which would tend to exculpate the Defendant or indicate in any way that Defendant may not have committed the alleged crimes or that Defendant may have a legal defense to such crimes;
 - e. The names and addresses of any witnesses who may have knowledge of facts which might be favorable to the Defendant, or who were interviewed by any law-enforcement officer, official or agent and failed to provide inculpatory information concerning the Defendant;
 - f. Any statements previously made by a prospective witness for the State, whether written or oral and whether made under oath or otherwise, which are inconsistent or at variance in any way with what the witness is anticipated to testify to at trial;
 - g. The complete prior criminal and juvenile records of all witnesses who may testify for the State, the nature of any criminal charges under investigation or pending against such witnesses in any jurisdiction, and a description of any prior bad acts engaged in by any such witnesses;
 - h. The details of any promises or indications of actual or possible immunity, leniency, favorable treatment or any other consideration whatsoever, or of any inducements or threats, made or suggested by any State or federal employee or agent to any person who has provided information to or will testify for the State in this case, or to anyone representing such a person;
 - i. Any information suggesting any bias or hostility by any prospective witness for the State toward the Defendant, or any other factor bearing on the credibility of any prospective witness for the State, including but not limited to any mental illness or condition, or dependence on or use of alcohol or drugs of any kind, whether or not received legally; and
18. All additional information of the type requested above that comes to the attention of the State or its agents after initial compliance with this request.
19. If the State intends to redact any portions of any discovery required to be provided to the Defendant under N.C. Gen. Stat. § 15A-903 *et seq.*, then the Defendant specifically requests that the State first seek a protective order, with notice to the

Defendant, from the Superior Court before any redacting is performed.

TIME OF REQUEST

This request for voluntary discovery is made not later than the tenth working day after the undersigned counsel was notified of the return of a true bill in the above-referenced matters. The undersigned counsel received said notification of the return of said true bill on DATE.

WHEREFORE the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the State voluntarily provide the aforementioned items of discovery within seven (7) days of the service of this Request upon the State, pursuant to N.C.Gen.Stat. § 15A-902(a);
2. That if the State fails or refuses to provide the requested voluntary discovery herein, within the time period prescribed by law, that the Court treat this voluntary discovery request as a motion for the Court to issue an Order compelling the Office of the District Attorney to provide the required discovery pursuant to Article 48 of the North Carolina General Statutes; and
3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the DATE.

By: _____

Maitri “Mike” Klinkosum

Attorney for the Defendant

State Bar No.: _____

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett Street, Suite 705

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Request for Voluntary Discovery (Alternative Motion for Discovery)*** was this day served upon the prosecution by the following method:

 X depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

Special Deputy Attorney General
NC Department of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

_____ by personally serving the Office of the District Attorney via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____

Maitri “Mike” Klinkosum

Attorney for the Defendant

State Bar No.: _____

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett Street, Suite 705

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

STATE OF NORTH CAROLINA

COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

__ CRS _____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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**MOTION FOR EXTENSION OF TIME
TO FILE FURTHER MOTIONS**

NOW COMES the Defendant, *John Doe*, by and through his undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the Constitution of the State of North Carolina, and applicable law of the State of North Carolina, for an Order permitting additional time to the defense in which to file further pre-trial motions in these cases. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged with first-degree murder and robbery with a dangerous weapon. The trial of this matter has been scheduled to commence on DATE.
2. During negotiations between the State and the Defense concerning the scheduling of a trial date, the Defense agreed to file all motions in this matter on or before DATE.
3. At the filing of this Motion, the defense has reviewed the discovery thus far in these matters and has, upon information and belief, drafted and filed those motions which the defense deems necessary and appropriate at this time.
4. Undersigned counsel has, to the best of his ability, attempted to identify the motions which need to be filed, based upon his review of discovery and has, in fact, drafted and filed such motions.
5. However, the reality of litigation in the criminal courts is such that information may become available to the defense at any time, such that a motion may be required to be filed in a period of time past the agreed upon DATE.

6. As such, the defense respectfully requests that the Court enter an Order permitting additional time in which to file further pre-trial motions in this matter should the need arise.
7. This Motion is made in good faith and is not filed for the purpose of obstruction or delay.

This the DATE.

By: _____
Maitri “Mike” Klinkosum
Attorney at Law
State Bar No.: _____
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 832-0739
Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Extension of Time to File Further Motions*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

 X by personally serving the Office of the District Attorney via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the 4th day of August, 2012.

By: _____

Maitri "Mike" Klinkosum

Attorney at Law

State Bar No.: _____

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 832-0739

Email: _____

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CRS ____

STATE OF NORTH CAROLINA

vs.

JOHN DOE,

Defendant.

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MOTION FOR COMPLETE
RECORDATION OF
ALL PROCEEDINGS

NOW COMES the Defendant, *John Doe*, by and through the undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-1241(b), the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1 §§ 19, 23, and 24 of the North Carolina Constitution, for an Order directing that all proceedings and any hearings and trials of the above-referenced matters be recorded, including, but not limited to, jury selection, opening statements, and closing arguments of counsel. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged with three counts of Obtaining Property by False Pretenses.
2. Because all aspects of a criminal trial encompass the constitutional rights of defendants, the interests of justice and the rights of the Defendant to due process, both substantive and procedural, would be best safeguarded by an Order directing that all parts of any hearings or trials in these matters be recorded.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court to enter an Order pursuant to N.C.Gen.Stat. § 15A-1241(b) directing that all proceedings held in these matters be recorded.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____

Maitri “Mike” Klinkosum

Attorney for the Defendant

State Bar No.: _____

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett St., Suite 705

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Complete Recordation of All Proceedings*** was this day served upon the prosecution by the following method:

 X depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

Special Deputy Attorney General
NC Department of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

 by personally serving the Office of the Attorney General via hand delivery;

 by transmitting a copy via facsimile transmittal to the Special Deputy Attorney General; and/or

 by depositing a copy in the box for the Office of the Attorney General maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____
Maitri “Mike” Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CRS ____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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**MOTION FOR
SEQUESTRATION OF
STATE'S WITNESSES**

NOW COMES the Defendant, *John Doe*, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-1225, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article 1 §§ 19 and 23 of the North Carolina Constitution, for an Order from this Court ordering the sequestration of all witnesses, other than the Defendant, outside of the courtroom until called to testify and instructing all witnesses not to discuss their testimony with other witnesses throughout the entirety of the trial. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged in with three counts of Obtaining Property by False Pretenses.
2. Over periods of time, memories of eye-witnesses, as well as other witnesses, fade, and thereby increase the possibility that a witness, either consciously or unconsciously, may tailor testimony to fit the majority view or rely less on his or her own recollection and more on an unobserved or unremembered fact offered by another witness.
3. The Court can further ensure untainted testimony and the preservation of the Defendant's rights to Due Process and Equal Protection by sequestering witnesses outside the courtroom during the trial of these matters until their testimony is needed.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for an Order sequestering all witnesses, other than the Defendant, outside of the courtroom until called to testify and instructing all witnesses not to discuss their testimony with other witnesses throughout the entirety of the trial.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____

Maitri “Mike” Klinkosum

Attorney for the Defendant

State Bar No.: _____

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett St., Suite 705

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Sequestration of State's Witnesses*** was this day served upon the prosecution by the following method:

 X depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

Special Deputy Attorney General
NC Department of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

_____ by personally serving the Office of the Attorney General via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Special Deputy Attorney General; and/or

_____ by depositing a copy in the box for the Office of the Attorney General maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____
Maitri “Mike” Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CRS _____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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MOTION FOR COURT TO NOTE
RACE OF ALL POTENTIAL JURORS
EXAMINED FOR SELECTION

NOW COMES the Defendant, *John Doe*, by and through the undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d. 411 (1991), to adopt a procedure in the trial of these matters which ensures that the race of every potential juror be examined to perfect any future appellate record. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged with three counts of Obtaining Property by False Pretenses.
2. These matters are scheduled for trial beginning on DATE.
3. In order to have the record accurately reflect the proceedings in the trial of this matter, and in order to perfect any future appellate record in this case, it is absolutely essential that the race of every potential juror be noted for the record. A record of the race of every juror is necessary to preserve the defendant’s rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, Article I, §§ 19, 24 and 27 of the North Carolina Constitution, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d. 411 (1991).
4. The North Carolina Supreme Court has held that a record must be made of the race of all potential jurors in order for appellate courts to properly review any *Batson* claims. See *State v. Mitchell*, 321 N.C. 650 (1988) and *State v. Brogden*, 329 N.C. 534 (1991).

5. Statements from defense counsel as to the race of the jurors is not sufficient and the North Carolina Supreme Court has expressly disapproved of the practice of having the court reporter attempt to record the race of every juror. **Brogden**. The most reliable source concerning the race of any juror is the juror himself/herself.
6. In order to properly record the race of potential jurors, the Defendant would propose the following statement and inquiry to prospective jurors:

Ladies and Gentlemen, as part of the Court's preliminary questions to you, in addition to asking to state your name and where you reside, the Court will ask you to provide us with the race and/or ethnic background with which you identify yourself. We do this for statistical purposes and, because the record of the jury selection proceedings is in written form only, without having you identify your race and/or ethnic background there will no record of that to which we can refer later if need be.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That every potential juror be asked to identify his/her race/ethnic background. In order to provide an accurate record, this procedure must include every juror, including those excused for hardship by the court, for cause at the request of either party, by use of peremptory by either party and those jurors who actually are selected to serve;
2. The defendant requests that jurors race be asked his or her race as part the court's preliminary inquiry of the potential jurors at the beginning of jury selection; and
3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____

Maitri “Mike” Klinkosum

Attorney for the Defendant

State Bar No.: _____

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett St., Suite 705

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Court to Note Race of All Potential Jurors Examined for Selection*** was this day served upon the prosecution by the following method:

 X depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

Special Deputy Attorney General
NC Department of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

_____ by personally serving the Office of the Attorney General via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Special Deputy Attorney General; and/or

_____ by depositing a copy in the box for the Office of the Attorney General maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____

Maitri “Mike” Klinkosum

Attorney for the Defendant

State Bar No.: _____

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett St., Suite 705

Raleigh, NC 27601

Telephone: _____

Facsimile: (919) 720-4640

Email: _____

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CRS _____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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MOTION FOR JOINDER OF
ALL OFFENSES FOR TRIAL WITH
CHARGE OF 1ST DEGREE MURDER

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NOW COMES the Defendant, *John Doe*, by and through his undersigned counsel, Maitri “Mike” Klinkosum, Assistant Capital Defender, and Barry T. Winston, Attorney at Law, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-926, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I §§ 19 and 23 of the Constitution of the State of North Carolina, to issue an Order that all of the above-referenced charges pending against the Defendant be joined for trial. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

PROCEDURAL BACKGROUND

1. John Doe is an indigent defendant charged with first-degree murder in __ CRS _____. The Court has held a Rule 24 conference concerning the charge of first-degree murder and the at said hearing the State announced its intention to seek the death penalty against Mr. Allen.
2. John Doe is also charged with the following offenses:
 - a.
 - b.
 - c.
 - d.
 - e.
 - f.
 - g.

- h.
- i.
- j.
- 3. Both undersigned counsel are appointed to represent Mr. Doe in the charge of first-degree murder, robbery with a dangerous weapon (__ CRS ____), attempted murder (CRS), attempted robbery with a dangerous weapon (CRS), and felony possession of cocaine (CRS).
- 4. Undersigned counsel, Maitri “Mike” Klinkosum is appointed to represent Mr. Doe in the six charges of robbery with a dangerous weapon numbered CRS through .
- 5. All of the charges pending against the Defendant arise out of a series of alleged acts and occurrences which began on DATE and which, according to the State’s rendition of the facts, culminated on DATE with the alleged murder of Jane Doe.
- 6. The charge of first degree murder () and the charges of robbery with a dangerous weapon (), attempted murder (), attempted robbery with a dangerous weapon (), and felony possession of cocaine () are scheduled for trial beginning on DATE.
- 7. The charges of robbery with a dangerous weapon () are scheduled to be tried beginning on DATE.
- 8. On DATE, at a motions hearing in the charges of robbery with a dangerous weapon (), the State moved the Court to join the charges of robbery with a dangerous weapon ()
for trial on DATE.
- 9. The Defendant had previously filed a Motion for Severance of Offenses related to the charges of robbery with a dangerous weapon ().
- 10. The Court, upon motion of the prosecution, and after a summation of the facts in the charges of robbery with a dangerous weapon (), and over objection of the Defendant, joined all of the charges of robbery with a dangerous weapon () for trial beginning on DATE.

11. After the ruling of the Court in joining the charges of robbery with a dangerous weapon () for trial, all of those charges are scheduled to be tried on DATE, while the remaining charges of first degree murder () and the charges of robbery with a dangerous weapon (), attempted murder (), attempted robbery with a dangerous weapon (), and felony possession of cocaine () are scheduled for trial beginning on DATE.

FACTUAL BACKGROUND

12. In the cases of robbery with a dangerous weapon (), which have been joined for trial, the Defendant, along with co-defendants, is accused of having committed the offenses on six separate occasions. Specifically, the State has alleged that the six offenses were committed on the following dates and against the following individuals:
- a.
 - b.
 - c.
 - d.
 - e.
 - f.
13. In the remaining cases which have not been joined for trial the State is alleging that the Defendant, along with the same co-defendants in CRS ____, committed those offenses, including the alleged murder of Jane Doe, during the early morning hours of DATE.
14. At the DATE hearing concerning the State's Motion for Joinder of _____ through _____, the State ~~aff~~ indicated that they were closely related in time to the remaining charges which have not been joined for trial.

15. The State further asserted that the joined charges (through) involved the Defendant and the same co-defendants. The co-defendants in through , Marvin Doe and Craig Doe, are the same co-defendants who have been charged with first-degree murder and the related offenses alleged to have occurred on DATE,
16. Further, on DATE, the State alleged that co-defendant, Marvin Doe, would be testifying against the Defendant as to all of the charges of robbery with a dangerous weapon in through , and that the same co-defendant made a statement incriminating the Defendant in all of the un-joined charges, including the charge of first-degree murder.
17. Further, on DATE, the State alleged that the Defendant confessed to some of the charges of robbery with a dangerous weapon in through CRS , and that the Defendant confessed to the un-joined charges as well, including the charge of first-degree murder.
18. Finally, the State asserted that the course of conduct and the modus operandi in the charges of robbery with a dangerous weapon () were the same or similar as the course of conduct and modus operandi in the un-joined charges and that the conduct which began on DATE and ended with the death of Jane Doe on DATE were part of a series of acts or transactions connected together and/or constituting parts of a single scheme or plan.
19. The Court, upon motion of the State and over objection of the Defendant, found that the facts as alleged in the charges of robbery with a dangerous weapon () indicated that there was a common conspiracy between the Defendant and the co-defendants, that the matters were close in time and related under the circumstances, that the Defendant confessed to some of the charges, that the Defendant would not be prejudiced in the trial of _____ through _____ because of the alleged confession of the Defendant and the testifying co-defendant(s).
20. The Court further found that there was a common scheme, plan, and a temporal connection between the charges in _____ through _____.

JOINDER OF ALL CHARGES IS REQUIRED

21. Pursuant to N.C.Gen.Stat. § 15A-926, the findings of the Court in ordering the joining of offenses in _____ through _____, and because of the underlying facts concerning all of the offenses alleged against the

Defendant, all of the offenses are related in time, place, and occasion and must be joined for trial.

22. Specifically, 15A-926(c)(1) states in part as follows:

When a defendant has been charged with two or more offenses joinable under subsection (a) his timely motion to join them for trial ***must be granted*** unless the court determines that because the prosecutor does not have sufficient evidence to warrant trying some of the offenses at that time or if, for some other reason, the ends of justice would be defeated if the motion were granted. (Emphasis added)

23. Based upon the factual summary of the State on DATE, which asserted, among other things, that all of the acts which culminated in the death of Jane Doe on DATE were part of a series of acts and transactions connected together and/or constituting a single scheme or plan, all of the charges against the Defendant, including the charges joined together () should all be joined for trial with the pending charge of first-degree murder in .
24. Based upon the allegations of the State on DATE, that the acts alleged to have been committed by the Defendant and the co-defendant occurred during the month of DATE, involved similar facts (including the robberies and attempted robberies of multiple victims during early morning hours, the use of firearms to commit such robberies, the use of disguises in the course of such robberies, the alleged confession of the Defendant most of the charges pending against him, the statements and anticipated testimony of co-defendants), and involved similar modus operandi, all of the charges pending against the defendant must be joined for trial with the pending charge of first-degree murder in DATE.
25. Based upon the findings of the Court in joining the charges in ____ through ____ for trial and based upon the fact that those same findings relate to the un-joined charges, all of the charges pending against the defendant must be joined for trial with the pending charge of first-degree murder in _____.

WHEREFORE, the Defendant respectfully prays unto this Court for the following relief:

1. That the Court enter an order joining all of the charges pending against the Defendant () for trial on the DATE.

2. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the DATE.

By: _____

Maitri “Mike” Klinkosum

Assistant Capital Defender

123 W. Main St., Suite 401

Durham, NC 27701

Telephone:

Facsimile: (919) 560-6900

Email:

By: _____

Barry T. Winston, by Maitri “Mike” Klinkosum

Attorney at Law

312 W. Franklin St.

Chapel Hill, NC 27514

Telephone:

Facsimile: (919) 929-4953

Email:

Certificate of Service

This shall certify that a copy of the foregoing **Motion for Joinder of All Offenses for Trial with Charge of 1st Degree Murder ()** was this day served upon the District Attorney for the th Judicial District, via Hand Delivery, at the address set forth below:

Office of the District Attorney for the ___th Judicial
District _____ County Courthouse
_____, NC

This the DATE.

By: _____

Maitri "Mike" Klinkosum

Assistant Capital Defender

123 W. Main St., Suite 401

Durham, NC 27701

Telephone:

Facsimile: (919) 560-6900

Email:

STATE OF NORTH CAROLINA
COUNTY OF

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CRS _____

STATE OF NORTH CAROLINA,)
)
vs.)
)
JANE DOE,)
)
Defendant.)

**NOTICE OF INTENT TO
INTRODUCE EXPERT TESTIMONY**

NOW COMES, the Defendant, *Jane Doe*, by and through her undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, pursuant to N.C.Gen.Stat. § 15A-905(c)(2), and hereby gives notice of intent to introduce expert testimony in the following fields with the listed experts:

1. Forensic Psychiatry and Psychiatry, via Dr. _____, M.D.

Copies of the curriculum vitae of the aforementioned expert have been provided to the prosecution by prior counsel. Undersigned counsel will provide a current curriculum vitae prior to the trial of these matters.

This the DATE.

By: _____
Maitri “Mike” Klinkosum
Attorney at Law
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
P.O. Box 1029
Raleigh, NC 27602
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Intent to Introduce Expert Testimony*** was this day served upon the District Attorney by the following method:

- _____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;
- _____ by personally serving the Office of the District Attorney via hand delivery;
- X by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or
- _____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By: _____
Maitri "Mike" Klinkosum
Attorney at Law
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
P.O. Box 1029
Raleigh, NC 27602
Telephone:
Facsimile: (919) 832-0739
Email:

**IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CRS _____**

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1. Breaking & Entering & Larceny, County, conviction date: DATE;
2. Armed Robbery, County, conviction date: ;
3. 2nd Degree Kidnapping, County, conviction date: ;
4. Robbery with a Dangerous Weapon, offense date: , County, conviction date: ;
- 5.
- 6.
- 7.
- 8.

9.

10.

This the DATE.

By:_____

Maitri “Mike” Klinkosum

Attorney at Law

Attorney for the Defendant

State Bar No.:

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone:

Facsimile: (919) 832-0739

Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Intent to Use Evidence of Prior Convictions More Than 10 Years Old*** was this day served upon the District Attorney by the following method:

- _____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;
- ☒ by personally serving the Office of the District Attorney via hand delivery (**Assistant District Attorney**);
- _____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney (); and/or
- _____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By: _____
Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA
COUNTY OF

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CRS _____

STATE OF NORTH CAROLINA,
vs.
JOHN DOE,
Defendant.

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NOTICE OF INTENT TO USE
EVIDENCE OF PRIOR
CONVICTIONS MORE
THAN 10 YEARS OLD

NOW COMES the Defendant, *John Doe* by and through his undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and hereby moves this Honorable Court pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, N.C.G.S. § 8C-1, Rule 609(b) of the North Carolina Rules of Evidence, and hereby gives notice to the prosecution of the Defendant’s intent to utilize evidence of prior convictions of the State’s cooperating witness, *Lying Bastard*, during the cross examination of said witness. Specifically, the Defendant intends to use evidence of the following prior convictions:

1. Assault on Govt. Official, County, conviction date: DATE;
2. ;
3. ;
4. ;
5. ;
6. ;
7. ;

This the DATE.

By: _____

Maitri "Mike" Klinkosum

Attorney at Law

Attorney for the Defendant

State Bar No.:

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone:

Facsimile: (919) 832-0739

Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Intent to Use Evidence of Prior Convictions More Than 10 Years Old*** was this day served upon the District Attorney by the following method:

- _____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;
- ☒ by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney***);
- _____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney (); and/or
- _____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By: _____
Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CRS _____

STATE OF NORTH CAROLINA)
)
vs.)
)
JANE DOE,)
)
Defendant.)

NOTICE OF INTENT TO ADMIT
STATEMENT OF MEDICAL STAFF
PURSUANT TO N.C. GEN. STAT. §
8C-1, RULES 803(24) & 804(b)(5)

NOW COMES the Defendant, *Jane Doe*, by and through the undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the North Carolina Constitution, and N.C. Gen. Stat. § 8C-1, Rules 803(24) and 804(b)(5), and hereby gives notice to the State that the defense intends to introduce statements provided by the medical staff at Southeastern Regional Medical Center to Investigating Officer _____, of the _____ Police Department, which has been provided to the defense in discovery. In support of this Notice, the defense would assert as follows:

1. Jane Doe is charged with two counts of second-degree murder, one count of assault with a deadly weapon inflicting serious injury, and one count of reckless driving to endanger.
2. The trial of these matters is scheduled to commence on DATE.
3. These matters arise from a motor vehicle accident which occurred on DATE in _____, North Carolina. It is uncontroverted that Ms. Doe was the driver of the vehicle in question and that said vehicle was involved in a traffic accident whereupon two individuals were killed and a third was critically injured.
4. Upon information and belief, the State may seek to introduce evidence of the fact that Ms. Doe’s blood was tested at Southeastern Regional Medical Center, after she was admitted to that facility following the aforementioned accident.
5. Upon information and belief, the toxicological testing on Ms. Doe’s blood at Southeastern Regional Medical Center revealed that Ms. Doe’s blood did not contain any alcohol.
6. Upon information and belief, the aforementioned testing of Ms. Doe’s blood by Southeastern Regional Medical Center did reveal the presence of opiates in Ms. Doe’s blood.

7. However, in his reports regarding his investigation of the motor vehicle accident, Detective ____ indicated that he inquired “the medical staff” at the “ER” regarding the toxicology screen on Ms. Doe’s blood and that “[i]t was explained to [the officer] however, that Doe was administered medication prior to her screening and this may have produced the reading for the opiates.”
8. Further in his report, Detective ____ states that “[He] learned that through hospital staff that Doe’s toxicology report of her blood revealed that she did in fact have opiates that exceeded the screening cut-off limits for this screening but as mentioned previously, she was administered medication prior to her blood being drawn for toxicology screening.”
9. Upon information and belief, neither law enforcement, nor the prosecution, has been able to determine that the opiates present in Ms. Doe’s blood was present for any reason other than lawfully administered pain medication, which she received during medical treatment for the motor vehicle accident in question.
10. Nowhere in the reports of Detective ____ can the defense find the identity of the “medical staff” who told Detective ____ that the opiates in Ms. Doe’s blood was the result of the pain medication she was administered at Southeastern Regional Medical Center.
11. Because the aforementioned “medical staff” is unidentified, that person or persons is/are “unavailable” as that term is defined under N.C. Gen. Stat. § 8C-1, Rule 804(a)(5).
12. Because the aforementioned “medical staff” is unidentified, that person’s or persons’ statement to Detective ____, regarding the opiates in Ms. Doe’s system, falls within the parameters of N.C. Gen. Stat. § 8C-1, Rule 804(a)(5).
13. Additionally, because the aforementioned “medical staff” is unidentified, that person’s or persons’ statement to Detective ____, regarding the opiates in Ms. Doe’s system, falls within the parameters of N.C. Gen. Stat. § 8C-1, Rule 803(24).
14. Because the “medical staff” is unidentified, should the prosecution attempt to place in evidence the reports indicating that Ms. Doe’s blood tested positive for the presence of opiates, the defense will seek to have the statements contained within Detective ____’s reports, as well as his hand written notes, admitted into evidence to rebut any claim that Ms. Doe had opiates in her system at the time of the motor vehicle accident in question in these matters.

This the DATE.

By:_____

Maitri “Mike” Klinkosum

Attorney at Law

State Bar No.:

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone:

Facsimile: (919) 832-0739

Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Intent to Admit Statement of Medical Staff Pursuant to N.C. Gen. Stat. § 8C-1, Rules 803(24) & 804(b)(5)*** was this day served upon the District Attorney by the following method:

- ☒ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;
- ☐ by personally serving the Office of the District Attorney via hand delivery;
- ☒ by transmitting a copy via facsimile transmittal to the Office of the District Attorney (Assistant District Attorney ☐); and/or
- ☐ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By: _____

Maitri "Mike" Klinkosum

Attorney at Law

State Bar No.:

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone:

Facsimile: (919) 832-0739

Email:

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CRS _____

STATE OF NORTH CAROLINA,
vs.
JOHN DOE,
Defendant.

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NOTICE OF DEFENSES

NOW COMES the Defendant, *John Doe*, by and through the undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and Jonathan E. Broun, Attorney at Law, pursuant to N.C.Gen.Stat. § 15A-905(c)(1) and hereby serves notice that the Defendant may assert the following defenses in the trial of the above-referenced matters: insanity, mental infirmity, diminished capacity, automatism, voluntary intoxication. This notice is filed and served upon the District Attorney for the —th Judicial District pursuant to N.C.Gen.Stat. § 15A-905(c)(1). The Defendant will provide the State with the required reciprocal discovery and specific information as to the nature and extent of the defenses once that documentation and evidence becomes available to the defense.

This the DATE.

By: _____
Maitri “Mike” Klinkosum
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

By: _____
Jonathan E. Broun
Attorney for the Defendant
State Bar No.:
Center for Death Penalty Litigation
201 W. Main Street, Suite 301
Durham, NC 27701
Telephone: Facsimile: (919)
956-9547 Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Defenses*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

 X by personally serving the Office of the District Attorney via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By: _____

Maitri "Mike" Klinkosum

Attorney for the Defendant

State Bar No.:

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone:

Facsimile: (919) 832-0739

Email:

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
___ CRS _____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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**OBJECTION TO JOINDER
& MOTION FOR
SEVERANCE OF DEFENDANTS**

NOW COMES the Defendant, *John Doe*, by and through his undersigned counsel, Maitri “Mike” Klinkosum, Assistant Capital Defender, and hereby opposes the joinder of the co-defendants in the above-referenced matters and further moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-927, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I §§ 19 and 23 of the Constitution of the State of North Carolina, to issue an Order that the co-defendants in the above-referenced matters be severed for purposes of a fair trial upon all charges against the Defendant.

The Defendant hereby moves that the cases of the co-defendants, identified as Craig Doe and Marvin Doe, charged with the same offenses as those against the Defendant in the charge of Attempted Robbery with a Dangerous Weapon in , the charges of Robbery with a Dangerous Weapon in , and the charge of Attempted Murder in , be severed and tried separately from the Defendant. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. Severance is necessary to promote a fair determination of the defendant’s guilt or innocence in each offense.
2. Craig Doe and Marvin Doe are, upon information and belief, charged with the same offenses as the Defendant arising out of the same transactions.
3. Upon information and belief, Craig Doe and Marvin Doe are charged with accountability for the same offenses as the Defendant, and that the offenses charged are part of a common scheme or plan, are part of the same act or transaction, and are so closely connected in time, place, and occasion, that it would be difficult to separate one charge from proof and of the others.

4. The undersigned counsel is informed and believes, and therefore alleges, that the State of North Carolina intends to offer into evidence out-of-court statements of both Craig Doe and Marvin Doe, which make reference to the Defendant but that are not admissible against the Defendant. Furthermore, it is impossible to delete all references to the Defendant so that the statement would not prejudice the Defendant.
5. In view of the number of offenses charged and the complexity of the evidence to be offered, the jury will not be able to distinguish between the evidence against the co-defendants and the Defendant, nor will the jury be able to apply the law intelligently to each offense as related to both co-defendants and the Defendant, if all the Defendants are tried together in front of the same jury.
6. To try the Defendant and Craig Doe and Marvin Doe jointly is a denial of the Defendant's right to Due Process under both the Constitution of the United States and the Constitution of North Carolina and, additionally, a violation of N.C.Gen.Stat. § 15A-927. There is a substantial likelihood that the Defendant could be convicted through association with the two co-defendants.

WHEREFORE, the Defendant prays for an order denying any motions for joinder of the defendants for trial by the State and granting the Defendant's motion for severance of defendants. It is requested that the Defendant be granted a hearing on said motion prior to the trial of these matters.

This the DATE.

By: _____
Maitri "Mike" Klinkosum
Assistant Capital Defender
123 W. Main St., Suite 401
Durham, NC 27701
Telephone:
Facsimile: (919) 560-6900
Email:

Certificate of Service

This shall certify that a copy of the foregoing **Objection to Joinder and Motion for Severance of Defendants** was this day served upon the District Attorney for the ___th Judicial District, via Hand Delivery, at the address set forth below:

Jeff Cruden-Assistant District Attorney
Office of the District Attorney for the ___th Judicial District
___ County Courthouse
_____, NC

This the DATE.

By: _____
Maitri "Mike" Klinkosum
Assistant Capital Defender
123 W. Main St., Suite 401
Durham, NC 27701
Telephone:
Facsimile: (919) 560-6900
Email:

STATE OF NORTH CAROLINA
COUNTY OF ____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CRS _____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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**OBJECTION TO JOINDER
& MOTION FOR
SEVERANCE OF OFFENSES**

NOW COMES the Defendant, *John Doe*, by and through his undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and hereby opposes joinder of the offenses in the above-referenced matters and further moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-927, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article 1 §§ 19 and 23 of the Constitution of the State of North Carolina, to issue an Order that the offenses in the above-referenced matters be severed for purposes of a fair trial upon all charges against the Defendant. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged in the bills of indictment with one count each of Possession of a Firearm by a Felon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, Assault Inflicting Serious Bodily Injury, and Robbery with a Dangerous Weapon..
2. The Defendant is accused of having all of the offenses on DATE and, upon information and belief, the charges are alleged to arise out of the same act or transaction.
3. Pursuant to N.C.Gen.Stat. § 15A-927(b)(1), if, before trial, it is found necessary to promote a fair determination of the defendant’s guilt or innocence of each offense, the court must grant a severance of offenses.
4. In these matters, severance of the offenses is “necessary to promote a fair determination of the defendant’s guilt or innocence of each offense.” See N.C.Gen.Stat. § 15A-827(b)(1).
5. If the offenses with which the Defendant is charged were tried jointly, the jury impaneled to hear the case would necessarily hear that the Defendant is charged with “Possession of a Firearm by a Convicted Felon.” This would mean that in a trial involving the charges of Robbery with a

Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury, the jury would hear, via the “possession of a firearm” charge, that the Defendant has a criminal history.

6. Were the charges to be tried separately, the Defendant’s criminal history would not be admissible at the trial of the Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury charges, unless and until the Defendant took the stand and subjected himself to cross-examination.
7. If the charges are tried jointly, the jury deciding all charges would, upon being advised that the Defendant is charged with Possession of a Firearm by a Felon, would then be apprised of the Defendant’s criminal history and would, therefore, be more likely to convict the Defendant of all charges, based upon being informed of the Defendant’s criminal history. For this reason, subjecting the Defendant to a joint trial of all offenses would prejudice the Defendant in defending against the charges of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury.
8. A combined trial of all offenses would, in relation to the charges of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury, result in otherwise inadmissible evidence (the Defendant’s prior criminal record) being received into evidence.
9. In order to ensure a fair trial, free from the prejudice caused by the admission of potentially inadmissible evidence, the charges of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury, should be severed from the charge of Possession of a Firearm by a Convicted Felon and separate trials should be conducted on said charges.
10. In the alternative, and in the interest of judicial economy, the Defendant would assert and request that, in lieu of two separate trials on the charges, the Court should, instead, bifurcate the trials of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury, from the trial of Possession of a Firearm by a Felon, such that the Possession of a Firearm by Felon charge be tried second, assuming the Defendant is convicted of the other charges.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the charges of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury in and Possession of a Firearm by a Convicted Felon in ~~be~~ severed and tried separately;
2. In the alternative, and in the interest of judicial economy, the Defendant would assert and request that, in lieu of two separate trials on the charges, the Court should, instead, bifurcate the trials of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury, from the trial of Possession of a Firearm by a Felon, such that the Possession of a Firearm by Felon charge be tried second, assuming the Defendant is convicted of the other charges; and
3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the DATE.

By: _____
Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Objection to Joinder and Motion for Severance of Offenses*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

 X by personally serving the Office of the District Attorney via hand delivery (**Assistant District Attorney**);

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By: _____
Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA
COUNTY OF

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CRS __

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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**MOTION FOR SEVERANCE
OF OFFENSES**

NOW COMES the Defendant, *John Doe*, by and through his undersigned counsel, Maitri “Mike” Klinkosum, Assistant Capital Defender, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-927, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I §§ 19 and 23 of the Constitution of the State of North Carolina, to issue an Order that the offenses against the Defendant be severed for purposes of a fair trial upon all charges.

The Defendant hereby moves that the charge of Attempted Robbery with a Dangerous Weapon in , the charges of Robbery with a Dangerous Weapon in and , the charge of Possession of Cocaine in , and the charge of Attempted Murder in , all be tried separately from one another. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. Severance is necessary to promote a fair determination of the defendant’s guilt or innocence in each offense.
2. The offenses are not properly joinable under N.C. Gen. Stat. § 15A-926 in that the offenses are not based upon the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.
3. In view of the number of offenses charged and the complexity of the evidence to be offered, the jury will not be able to distinguish the evidence and apply the law intelligently to each offense, if these indictments are tried together in front of the same jury.
4. Based upon the fact that the charges of Attempted Robbery with a Dangerous Weapon, Robbery with a Dangerous Weapon, Attempted Murder, and Possession of Cocaine, are alleged to have occurred on a different date and time from the other aforementioned charges and are not

part of the same acts or transactions, trying the Defendant for all of the charges at the same time would be unduly prejudicial to the Defendant, would prejudice the jury against the Defendant, and would result in a breach of the Defendant's right to a fair trial.

WHEREFORE, the Defendant prays for an order severing the offenses. It is requested that the Defendant be granted a hearing on said motion prior to the trial of these matters.

This DATE.

By: _____

Maitri "Mike" Klinkosum

Assistant Capital Defender

123 W. Main St., Suite 401

Durham, NC 27701

Telephone:

Facsimile: (919) 560-6900

Email:

Certificate of Service

This shall certify that a copy of the foregoing **Motion for Severance of Offenses** was this day served upon the District Attorney for the ___th Judicial District, via Hand Delivery, at the address set forth below:

_____-Assistant District Attorney
Office of the District Attorney for the ___th Judicial
District _____ County Courthouse
_____, NC

This the DATE.

By: _____

Maitri "Mike" Klinkosum

Assistant Capital Defender

123 W. Main St., Suite 401

Durham, NC 27701

Telephone:

Facsimile: (919) 560-6900

Email:

**IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CRS _____**

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7. In order for Mr. Doe's counsel to effectively represent Mr. Doe at the re-trial of these matters, counsel requires working access to an accurate and written copy of the testimony of all prosecution witnesses who testified in the first trial.
8. In order for Mr. Doe to be afforded his rights to confrontation, cross-examination, and effective assistance of counsel, counsel requires working access to an accurate and written copy of the testimony of all prosecution witnesses who testified in the first trial.
9. On DATE, the Court found Mr. Doe to be indigent for the purposes of obtaining second counsel¹ and for the purpose of obtaining expert assistance and other tools for an adequate defense.
10. In *Griffin v. Illinois*,² the U.S. Supreme Court held that the State is constitutionally required to provide indigent prisoners with the tools for an adequate defense or appeal when those tools are available to other prisoners who can pay for the costs.
11. In *State v. Britt*,³ the U.S. Supreme Court held that:

[w]hile the outer limits of [the Griffin v. Illinois] principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.

12. Written transcripts of the witnesses' testimony during the first trial will be invaluable to undersigned counsel's preparation for the re-trial of these matters, as well as cross-examination of said witnesses should said witnesses be called to testify at the second trial of these matters.
13. Mr. Doe does not have access to any other means, formal or informal, of obtaining an accurate record of the testimony offered during the first trial of these matters.
14. Accordingly, Mr. Doe is entitled to receive written transcripts of the testimony of all witnesses from the first trial of this matter.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

¹ At the time the order determining Mr. Baker to be indigent was entered, the State had announced its intention to seek the death penalty. The State declared the case non-capital on May, 2012.

² 351 U.S. 958, 76 S.Ct. 585 (1956)

³ 92 S.Ct. 431. 404 U.S. 226, 30 L.Ed.2d 400 (1971)

1. That the Court enter an Order requiring the production of transcripts of all witness testimony from the first trial of these matters, which occurred during the DATE term of Criminal Superior Court for the County of ;
2. That, due to the Defendant's status as an indigent, the State of North Carolina (North Carolina Administrative Office of the Courts) bear the costs of the production of said transcripts; and
3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the DATE.

By: _____
Maitri "Mike" Klinkosum
Attorney for John Doe
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Production of Transcripts of All Witness Testimony From First Trial of Phillip Scott Baker*** was this day served upon the District Attorney by the following method:

 X depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney as follows:

Mr. _____
Assistant District Attorney – 22nd Prosecutorial District
P.O. Box 1854
, NC

 by personally serving the Office of the District Attorney via hand delivery;

 by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

 by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By: _____
Maitri “Mike” Klinkosum
Attorney for John Doe
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA
COUNTY OF

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CRS _____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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**MOTION TO
EXCLUDE INFLAMMATORY
PHOTOGRAPHS**

NOW COMES the Defendant, *John Doe*, by and through the undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-1225, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. § 8C-1, Rules 401, 402 & 403, and *State v. Hennis*, 323 N.C. 279, 372 S.E.2d. 523 (1988), to conduct a pre-trial hearing to review any photographs, slides, videos or models that the State intends to offer for evidentiary or illustrative purposes; and

THE DEFENDANT further moves this Honorable Court to prohibit the State from the use of more than one photograph of the alleged victim in the charge of first-degree murder. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. John Doe is charged with first-degree murder, and robbery with a dangerous weapon.
2. The trial of these matters is scheduled to commence on DATE,
.
3. The photographs of the alleged victim in this case, both at the scene of the crime and/or autopsy photographs, beyond one selected by the state, would be void of probative value and redundant to the illustrations provided by the selected photograph. Such photographs would be prejudicial to the defendant by depicting scenes, which are inflammatory.

WHEREFORE, the Defendant, based upon the foregoing, respectfully prays that conduct a pre-trial hearing to review any photographs, slides, videos or models that the State intends to offer for evidentiary or illustrative purposes and that the Court prohibit the State from the use of more than one photograph of the alleged victim in the charge of first-degree murder.

This the DATE.

By:_____

Maitri “Mike” Klinkosum

Attorney at Law

State Bar No.:

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone:

Facsimile: (919) 832-0739

Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Motion To Exclude Inflammatory Photographs*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

 X by personally serving the Office of the District Attorney via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By: _____

Maitri "Mike" Klinkosum

Attorney at Law

State Bar No.:

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone:

Facsimile: (919) 832-0739

Email:

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CRS _____

STATE OF NORTH CAROLINA,
vs.
JOHN DOE,

Defendant.

)
) MOTION IN LIMINE TO RESTRICT
) INTRODUCTION OF EVIDENCE
) OF DEFENDANT'S INVOCATION
) OF 5TH AND 6TH
) AMENDMENT RIGHTS
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NOW COMES the Defendant, *John Doe*, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court pursuant the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, and N.C.Gen.Stat. § 8C-1, Rule 403 and requests that this Honorable Court issue an Order restricting the prosecution from admitting or introducing any evidence of the defendant's invocation of his 5th and 6th Amendment rights at the time of his arrest for the pending charges.

1. The Defendant is charged in the bills of indictment with one count each of 2nd Degree Rape and 2nd Degree Sexual Offense.
2. The alleged acts with which the Defendant is charged are alleged to have occurred on or about DATE.
3. Upon information and belief, the Defendant was arrested in DATE and, upon information and belief, at the time of his arrest, he invoked his right to remain silent and his right to counsel.
4. Additionally, prior to being arrested, when the Defendant was notified that an investigation against him was pending, he retained the services of an attorney.
5. Allowing the prosecution to admit or elicit any evidence or testimony regarding the Defendant's invocation of his Fifth and Sixth Amendment rights would violate the Defendant's constitutional rights and such evidence is not probative of any material fact and would severely prejudice the Defendant in the defense of the pending charges.

WHEREFORE, the defendant respectfully moves that the Court bar the prosecution from admitting or introducing any evidence of the Defendant's invocation of

his 5th and 6th Amendment rights.

This the DATE.

By: _____

Maitri “Mike” Klinkosum

Attorney at Law

Attorney for the Defendant

State Bar No.:

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone:

Facsimile: (919) 832-0739

Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Motion in Limine to Restrict Introduction of Evidence of Defendant's Invocation of 5th and 6th Amendment Rights*** was this day served upon the District Attorney by the following method:

- _____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;
- ___X___ by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney***);
- _____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney (); and/or
- _____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By: _____
Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA
COUNTY OF

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CRS _____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

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**MOTION IN LIMINE TO
RESTRICT EVIDENCE
OF PRIOR CRIMES
& BAD ACTS**

NOW COMES the Defendant, *John Doe*, by and through his undersigned counsel, Maitri “Mike” Klinkosum, Attorney at Law, and hereby moves this Honorable Court pursuant to N.C.G.S. § 15A-952, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, and N.C.Gen.Stat. § 8C-1, Rules 403 and 404(a) and requests that this Honorable Court issue an Order restricting the prosecution from admitting or introducing any evidence of the defendant’s prior convictions unless and until the defendant chooses to testify in his own defense and restricting the prosecution from introducing any evidence of prior bad acts. In support of this Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged in the bills of indictment with one count each of Possession of a Firearm by a Felon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, Assault Inflicting Serious Bodily Injury, and Robbery with a Dangerous Weapon.
2. Upon information and belief, the Defendant may have prior convictions for criminal offenses.
3. Upon information and belief, the prosecution will attempt to rely on the Defendant’s prior convictions and/or alleged prior bad acts to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, absence of entrapment, absence of accident, or other purpose consistent with statutory and case law under the above-cited rules.
4. The probative value of said evidence, as to any of the present charges is minimal and would be outweighed by the undue prejudice to the Defendant should such evidence be introduced at trial.
5. In addition, there is little similarity and/or temporal proximity of the prior act evidence to the crimes with which the Defendant is currently charged.

6. Specifically, the prosecution should be barred from introducing any evidence of prior convictions, unless and until the Defendant takes the stand as a witness.

WHEREFORE, the defendant respectfully moves that the court restrict the prosecution from admitting or introducing any evidence of the defendant's prior convictions, as named above, or any detail of said convictions, unless the defendant chooses to testify in his own defense and from introducing any evidence of alleged prior bad acts on the part of the Defendant.

This the DATE.

By: _____

Maitri "Mike" Klinkosum

Attorney at Law

Attorney for the Defendant

State Bar No.:

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone:

Facsimile: (919) 832-0739

Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Motion in Limine to Restrict Evidence of Prior Crimes and Bad Acts*** was this day served upon the District Attorney by the following method:

- _____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;
- ___X___ by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney***);
- _____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney (); and/or
- _____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____

Maitri "Mike" Klinkosum

Attorney at Law

Attorney for the Defendant

State Bar No.:

Cheshire, Parker, Schneider, & Bryan, PLLC

133 Fayetteville St., Suite 500

Raleigh, NC 27601

Telephone:

Facsimile: (919) 832-0739

Email:

STATE OF NORTH CAROLINA
COUNTY OF

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CRS _____

STATE OF NORTH CAROLINA,

vs.

JOHN DOE,

Defendant.

)
) MOTION IN LIMINE TO RESTRICT
) INTRODUCTION OF EVIDENCE
) OF DEFENDANT'S INTERACTIONS/
) NEGOTIATIONS/PENALTIES &
) SANCTIONS RELATED TO THE
) INTERNAL REVENUE SERVICE

NOW COMES the Defendant, *John Doe*, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court pursuant the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, and N.C.Gen.Stat. § 8C-1, Rules 403 and 404(a) and requests that this Honorable Court issue an Order restricting the prosecution from admitting or introducing any evidence of the defendant's prior charge of assault.

1. John Doe is charged with three counts of Obtaining Property by False Pretenses. The North Carolina Department of Justice and the North Carolina Department of Revenue alleged that the Defendant committed the crimes by knowingly filing fraudulent North Carolina Individual Income Tax Returns with the North Carolina Department of Revenue for the years _____.
2. The trial of these matters is scheduled to commence on DATE.
3. The Defendant maintains that he did not knowingly file fraudulent income tax returns and that he did not intend to cheat and defraud the NC Department of Revenue or any other tax collection agency.
4. Upon information and belief, the Defendant's problems with his individual income tax returns for _____, triggered a review by the Internal Revenue Service (hereinafter referred to as the IRS).
5. Upon information and belief, although the IRS has not sought criminal charges against the Defendant, after the Defendant hired a Certified Public Accountant to amend his tax returns, and after said tax returns were amended in _____, the IRS levied fines, penalties, and liens against the Defendant.
6. The indictments against the Defendant only allege crimes against the

North Carolina Department of Revenue. No allegations are made regarding any crimes or wrongdoing against the IRS or the federal government.

7. As such, any mention to the jury of the Defendant's interaction and involvement with the IRS regarding tax years _____, and any problems arising therefrom will be more prejudicial than probative, will severely prejudice the Defendant in the trial of these matters, and will have no bearing or relevance on any legal or factual issue at the trial of the matters before this Court.

WHEREFORE, the defendant respectfully moves that the Court bar the prosecution from admitting or introducing any evidence of the Defendant's interaction/negotiations/penalties and/or sanctions with or from the Internal Revenue Service.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By: _____

Maitri "Mike" Klinkosum

Attorney for the Defendant

State Bar No.:

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett St., Suite 705

Raleigh, NC 27601

Telephone:

Facsimile: (919) 720-4640

Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Motion in Limine to Restrict Introduction of Evidence of Defendant's Interactions/Negotiations/Penalties & Sanctions Related to the Internal Revenue Service*** was this day served upon the prosecution by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

 X by personally serving the Office of the Attorney General (***Special Deputy Attorney General*** _____) via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Special Deputy Attorney General; and/or

_____ by depositing a copy in the box for the Office of the Attorney General maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____

Maitri "Mike" Klinkosum

Attorney for the Defendant

State Bar No.:

Tin Fulton Walker & Owen, P.L.L.C.

127 W. Hargett St., Suite 705

Raleigh, NC 27601

Telephone:

Facsimile: (919) 720-4640

Email:

USING JURY INSTRUCTIONS

Originally created by Phoebe Dee, Asst. Public Defender
All mistakes attributed to Richard Wells, Asst. Public Defender



WHY DO WE TRY THE CASES WE TRY?

- We have a great case, with great issues!
- Our client is being unreasonable and/or can't bring her/himself to sign up for time in prison.
- The DA is being unreasonable and, with a plea offer that lousy, there's nothing to lose in going to trial.



WHAT DOES THE LAST SLIDE HAVE TO DO WITH JURY INSTRUCTIONS?

You may not have a great case - there are problems with it. But you can still win the case. You need to focus yourself, the client and the jury on the real issues in the case.



WHY ARE JURY INSTRUCTIONS IMPORTANT?

- They are the law of the universe of your case.
- They are the only law the jurors will hear (*attorneys can read law, but . . .*)
- They come from the judge.
- They are the last thing the jurors hear.
- Because jurors **WANT TO DO THE RIGHT THING.**



PATTERN VS. NON-PATTERN JURY INSTRUCTIONS

- **PATTERN JURY INSTRUCTIONS** are written by a committee of Superior Court judges and are reviewed annually. The SOG regularly updates them.
- **NON-PATTERN JURY INSTRUCTIONS** are written by the trial judge, the DA or YOU in cases where the pattern instructions fail to address a legal question at issue in the case.



WHEN SHOULD I READ THE JURY INSTRUCTIONS?

AS SOON AS YOU THINK THERE IS ANY CHANCE THAT THE CASE IS GOING TO TRIAL!

Jury Instructions will help you focus on the issues. Doing so as early as possible will help you make better use of your prep time.



READ FREE GOOD STUFF

- Chapter 32 of Vol. 2 of the Defender Manual.
- Read the Pattern Jury Instructions Index. Get acclimated.
- It's easy to print these, whether you're a public defender or in private practice.



GIVE YOUR CLIENT A COPY

- First, it's easy to print the Pattern Instructions! If you're a PD, go to NC Jury Instructions on your computer. If you're in private practice, go to the School of Government:
<http://www.sog.unc.edu/programs/ncpi>
- Second, clients really like getting stuff. And having the Jury Instruction can focus a client's attention on relevant issues.
- Third, it focuses your attention on the relevant issues. The only law that matters in a jury trial is what the jury will hear. Facts win jury trials; run all your facts through the lens of the Jury Instructions.



THE TRIAL BEGINS – JURY SELECTION

- Educate the jury about the law (the Jury Instructions) during jury selection. It will focus their attention on the relevant issues during the trial. Often, no one tells the jury what the trial is about!
- “The judge will instruct you on the law. This case is about [Blank] and it is my understanding the judge will instruct you . . .”
- Every case: “Beyond a Reasonable Doubt” = “Fully Satisfied or Entirely Convinced.”
- Defenses such as self-defense – always touch on these.
- Quote to the jury from the likely Pattern Jury Instructions.



THE TRIAL

- A bunch of crazy stuff happened. But at the end . . . We come back to the Jury Instructions.
- The jury will now try to make the Crazy Trial Facts mesh with the Jury Instructions.
- Often just Pattern Instructions, but sometimes . . . Non-Pattern Jury Instructions



WHEN SHOULD YOU BE THINKING ABOUT
WRITING YOUR OWN INSTRUCTION?

***WHENEVER A CRITICAL
CONCEPT ISN'T CLEARLY
ARTICULATED BY ANY OF
THE PATTERN
INSTRUCTIONS.***



**EXAMPLES OF NON-PATTERN
INSTRUCTIONS**



EXAMPLE FROM DRUG TRAFFICKING CASE

- NCPI 260.17 – Drug Trafficking. If Trafficking Instruction given, Defendant requests additional instructions relating to the required *mens rea* of “knowledge.” **FIRST**, Defendant requests Footnote 4 to the NCPI instruction, specifically that “Defendant knew that what he possessed *was heroin*”. **SECOND**, from the NC Crimes guidebook and therein cited authority “[a] person does not act “knowingly” if he or she merely should have known; the person must actually know.” **THIRD**, Defendant requests further that the jury be instructed that Defendant knew the amount was at least the minimal 4 gram trafficking amount (*you will lose*). ATTACHED is relevant authority for these requests.
- NCPI 260.90 – Lesser-included misdemeanor charge. Also, “and” instead of “or” (“keeping and selling”) because this “and” language is in the indictment.



The following definition of “knowingly”, as used with the substantive drug charges, from the NC Crimes Book:

A person acts knowingly when the person is aware or conscious of what he or she is doing (278 N.C. 623). Similarly, a person has knowledge about the circumstances surrounding his or her act or about the results of an act when he or she is aware of or conscious of those circumstances or of those results (218 N.C. 258). A person does not act “knowingly” if he or she merely should have known; the person must actually know (212 N.C. 361). North Carolina does not accept the doctrine, accepted in some jurisdictions, that knowledge includes “willful blindness” of a highly probable fact, that is, deliberate avoidance of knowledge (324 N.C. 190).



WITNESS HAS BEEN GRANTED IMMUNITY:

- “There is evidence in this case which shows that the witness, Joe Plumber, is testifying under an agreement with the prosecutor, whereby he will not be prosecuted for his crimes in exchange for his testimony against the defendant.

In the situation presented, Mr. Plumber is considered, by law, to have an interest in the outcome of this case. You should therefore be suspicious of his testimony and approach it with the greatest care and caution.

In your deliberations you should carefully consider whether there are inconsistencies in the evidence of Mr. Plumber and what evidence exists to support what he is saying.”



MEER PRESENCE

- "I must caution you that merely being with the co-defendant at or near the location of the crimes, does not render the defendant guilty of any crime. Association or contact between the defendant the co-defendant before or after the commission of these crimes is not sufficient and will not justify the conclusion that the defendant is guilty." State v. Beach, 283 NC 261, 267-68 (1973)



ANALYST FAILED CERTIFICATION EXAM

- "You have heard evidence in this case that Ms. Smith, the DNA analyst employed by the State Bureau of Investigations, has not passed her certification exam, as required by the NC General Assembly. You may consider this evidence, along with other evidence about her qualifications, when determining what, if any, weight to give to her testimony"



VALUE IS CONTESTED

- "And Sixth, that the fair market value of the stolen property was greater than \$1000. The jury shall not consider the replacement cost for the property but only its fair market value."



OFFICER GIVES OPINION TESTIMONY

- “Officer Brady provided opinion testimony in this trial. Opinion testimony is offered, solely, for the purpose of corroborating other evidence. You should consider the officer’s opinion only if you believe it is consistent with the other evidence. Officer Brady is not an expert and his opinion should not be given more weight than that of any civilian witness.”



ALWAYS REMEMBER...

The Jury must consider the case in accordance with both the State and Defense Theories. Defendant in apt time requested that the law bearing upon his theory of the case be presented to the jury. He was merely asking the Court to charge the law arising on the evidence. Justice and the law countenance nothing less.
State v. Tioran, 65 N.C.App. 122, 125 (1983), citing State v. Harrington, 260 N.C. 663, 666 (1963).



THE CHARGE CONFERENCE

- After all evidence is presented. Often right after.
- You should request instructions in writing.
NCGS 15A-1231; *State v. Smith, 311 NC 287 (1984)*.
So plan ahead – before the crazy stuff happens!
- Think about lesser-included instructions!
Surprisingly, Judges often will give these.
Tender them in writing.
- Preserve the record on appeal! You don’t want Glen Gerding mad at you!



SO HOW DO I SUBMIT A JURY INSTRUCTION DURING THE CHARGE CONFERENCE?

- Have them prepared in advance. Often it is as simple as having 2 printed copies of each Pattern Instruction.
- Have a list of the Pattern Instructions and any Special Instructions you want; check them off because the judge speaks quickly. You DO NOT need to list all the Instructions the jury will hear.
- You may forget to tender them in writing – because crazy stuff happens in jury trials! If the requested (and denied) jury instruction is a contested point, hand up your copy of the Pattern Instruction or scribble something onto a piece of paper.
- **Defendant's Right to Remain Silent** – Ask for this Instruction. Failure to give this Instruction is NOT reversible error. *State v. Paige, 272 NC 417 (1968)*.
- **Preserve the Record for Appeal!**



FORM OF REQUESTED INSTRUCTIONS

- **NCGS 1-181(a)**
- **In Writing**
- **Entitled in the Cause**
- **Signed by Counsel Submitting**



THE STATE OF NORTH CAROLINA)

Vs.)

INNOCENT CLIENT,)
Defendant.)

Proposed
Jury Instructions

NOW COMES the DEFENDANT, through undersigned counsel, and respectfully requests that included within the jury instructions given be the following:

1. NCPI Crim 101.10 – Burden of Proof and Reasonable Doubt
2. NCPI Crim 104.20 – Testimony of Interested Witness
3. NCPI Crim 101.30 – Effect of Decision not to Testify
4. NCPI Crim 101.35 – Concluding Instructions
5. NCPI Crim 104.41 – Actual-Constructive Possession
6. NCPI Crim 104.60 – Admissions (request this be given instead of 104.70)
7. NCPI Crim 260.30 – Trafficking/Transportation. Include expanded definition of “knowingly” from footnote 4: “and that the defendant knew that what he transported was heroin.”
8. NCPI Crim 260.17 – Trafficking/Possession. Include expanded definition of “knowingly” from footnote 4: “and that the defendant knew that what he transported was heroin.”
9. NCPI Crim 202.80 – Criminal Conspiracy. Include expanded definition of Trafficking “and that the defendant knew that what he transported was heroin.”

Richard Wells
Asst. Public Defender



YOU ARGUE TO THE JURY

- Emphasize the Important Jury Instructions.
- Tell the story (truth) of innocence, but argue the story/facts as it relates to those few important Jury Instructions.
- Quote from the Jury Instructions.



THE JUDGE INSTRUCTS

- The judge will read the instructions to the jury. And the judge will (might) mess it up. Don't fall asleep! LISTEN!
- Make notes during judge's Instructions. Read along. Object after judge gives entire instruction (renew your objections before the jury retires to deliberate).
- If you submitted written instructions, this will preserve the record. But object anyway. *State v. Smith, 311 NC 287 (1984)*.
- Judges generally like it when you correct their mistakes on jury instructions. Because they get reversed on these mistakes a lot!
- Judges can give written instructions to the jury. Some judges hate doing it, some like doing it. Think about what you want.



STATE OF NORTH CAROLINA

COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NOS. 09CRS52679

STATE OF NORTH CAROLINA)

VS.)

CHERYL MCADOO ALSTON)

MOTION TO GIVE THE FOLLOWING
PRELIMINARY INSTRUCTION RE:
INTERROGATION BY POLICE

The accused, by and through undersigned counsel, moves this Court pursuant to existing North Carolina case law, cited below, and to the 5th and 14th Amendments, Due Process Clause and right to fundamental fairness, and the 6th Amendment right to effective assistance of counsel of the United States Constitution and the Constitution of North Carolina, Article I, §§ 18 and 23 and moves this Court to give as a preliminary instruction before the taped statement of the accused is admitted into evidence and played for the jury, the attached jury instruction. In support of this motion, the accused presents the following.

The long standing law of North Carolina has been that it is not illegal for officers to use false statements and trickery as an interrogation technique during interrogation of a suspected person concerning the commission of a crime. In State v. Jackson, 308 N.C. 549 (1983), during a series of interviews in which the defendant was questioned about a murder, investigators told the defendant the following outright lies in order to induce the defendant to confess: that they had found blood on his clothing, that they had a knife that was the murder weapon on which they had found defendant's fingerprints, and that a witness had seen the defendant fleeing the scene of the murder with a knife in his hand. In fact, none of the evidence listed above existed, but these statements were told the defendant in order to induce a confession. The North Carolina Supreme Court held that the use of lies as a part of an interrogation does not render the confession that results there from inadmissible.

Similarly, in State v. Barnes, 154 N.C.App. 111 (2002), defendant was suspected of having sex with his 13 year old daughter. The defendant agreed to talk with police.

During the interview of defendant by police, the officer falsely told the defendant that his daughter was pregnant, and thus successfully induced a confession being made by defendant. The officer who did this testified that she did it as an interview technique. Citing State v. Jackson, 308 N.C. 549 (1983), the North Carolina Court of Appeals held that, “the use of false statements and trickery by police officers during interrogations is not illegal as a matter of law.” State v. Barnes, 154 N.C.App. at 114.

As recently as 2010, the North Carolina Court of Appeals, in an unpublished opinion, again cited State v. Jackson, 308 N.C. 549 (1983), and also State v. Barnes, 154 N.C.App. 111 (2002), for the proposition that deceptive law enforcement tactics and false statements during questioning of a suspect do not render a confession inadmissible, thus continuing the acceptance of the interrogation by less than honest means policy until the present time. See State v. Smith, 2010 N.C. App. LEXIS 1474. It would therefore appear that the policy of the State of North Carolina for almost 30 years has been that police officers using lies and trickery as part of interrogation techniques is an acceptable practice in North Carolina.

The accused has previously moved that statements made by law enforcement officers during a tape recorded interview of the accused be redacted from the tape that will be played before the jury because the statements made by the officers include accusations against the accused that she is lying, that other persons know that the accused is guilty, and that things had to have happened in a manner known to the interrogating officers that would indicate that the accused is guilty of the offenses charged. None of these sorts of statements are independently admissible if made by the officers in open court before the jury. The Court had denied the accused’s motion to exclude these inflammatory and inadmissible statements made by the officers and, instead, has chosen to allow the State to introduce those portions of the tape that include inadmissible statements by the police. The Court has indicated that it will give a preliminary instruction to the jury to hopefully correct the clear damage that will be done if the jury believes what the officers say is true and based in fact.

The accused is fully aware that based on the above cited cases officers are allowed to do things in interrogation under the guise of “interrogation techniques” that are deceptive and dishonest, however, the accused does not believe the ordinary citizen

who may be a potential juror in this case is aware of North Carolina's policy to allow these tactics as acceptable and legal behavior. Quite to the contrary, the accused asserts that the average middle to upper class person who has no experience with law enforcement believes erroneously that police are honest and have vast and accurate knowledge about the charges they investigate. Since this Court has ruled that the statements that overstate the officer's knowledge, state that the accused is a liar, and give opinions of the officers and others as to the certainty of the guilt of the accused will be heard by the jury, the accused asserts that to counteract the impression that will be left with unknowledgeable jurors as to the certainty of the accused's guilt, it is necessary that the jury be educated as to the allowable techniques for police interrogation under the policies of the State of North Carolina.

Wherefore, the accused prays that this Court will give as a preliminary instruction to the jury, prior to the jury viewing the recording, the attached instruction concerning police interrogation techniques and the jury's consideration of the things they will see on the tape of the interview of the accused.

This the ____ day of August, 2011.

Susan Seahorn
Attorney for the Accused

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the forgoing motion was served on the State by delivery of a copy of same to the Office of the District Attorney for District 15B at Hillsborough, North Carolina on the above date.

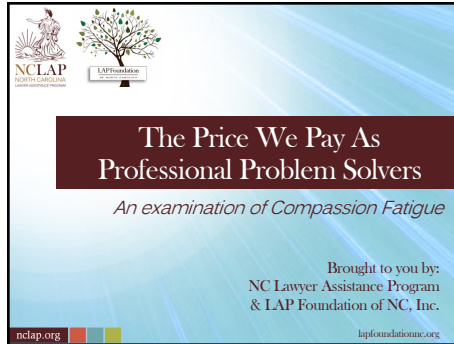
Susan Seahorn

Jury Instruction RE: Interrogation Statements Made by Police to the Accused

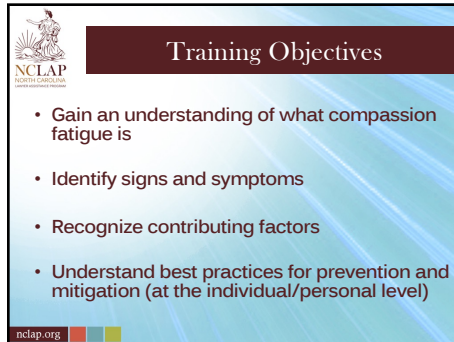
Members of the jury, you are about to have played for you the recording of an interview with Ms. Alston conducted by Orange County Sheriff's Investigators. During the playing of the tape, you will not only hear statements of Ms. Alston, you will also hear questions, statements, accusations and claims made by the investigating officers, Investigator Upchurch and Investigator Comar, concerning evidence that they state exists in this case against Ms. Alston and information that they tell her during the course of the interview they know to be true or false.

Members of the jury, you are not to accept as true any of the statements the investigators that are made about the facts of the case, the beliefs of the officers or the beliefs of other witnesses as stated by the investigators concerning guilt of Ms. Alston, or her honesty and truthfulness that are made by the investigators on the recording you are about to view. The only evidence that you should consider for the truth of what is offered is evidence that you hear from the witnesses who testify from the witness stand that has been allowed into evidence before you in this Courtroom. The reason for this, members of the jury, is that officers are authorized by the law of the State of North Carolina as part of interrogation techniques to lie to an accused, to trick an accused, and to use other methods of inducing the accused person to talk and make statements. For the reason that interrogation techniques that include dishonesty, lies and trickery are and have been authorized by the Courts of North Carolina for a long time, it is necessary that you not take as true the statements made by the investigating officers that you hear on this recording.

The statements of Ms. Alston herself that you see on this recording may be considered as part of the evidence you weigh in deciding the ultimate outcome of this case. The statements, questions and other comments made by investigators on the recording, however, are not to be considered by you as evidence in this case for any purpose.



1



2



3



Fill in the blanks...

- The world is a _____ place.
- Life is _____.
- I am _____ as a human being.
- I want to change _____ about my job.
- I want to change _____ about myself.
- Most often I feel _____.

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4



Compassion Fatigue Defined

- The cumulative physical/emotional/psychological effects of continual exposure to traumatic or distressing stories/events
- When working in a helping capacity
- Where demands outweigh resources

nclap.org

5



Doing...

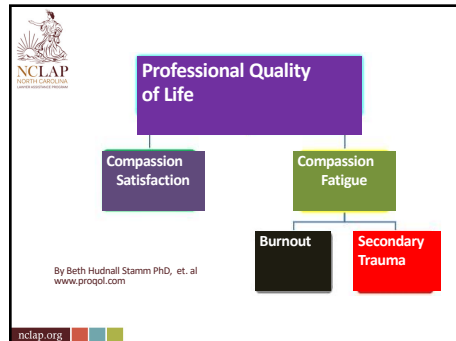
- Too much
- For too long
- With too few resources
- And working with the “big uglies” in life

nclap.org

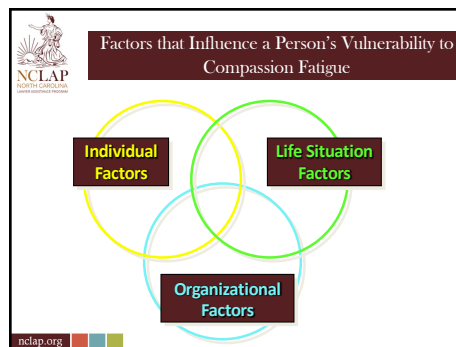
6



7



8



9



Individual Vulnerabilities and Life Situations

- History of or current trauma
- Health problems
- Alcohol or drug use/troubles
- Poor job performance
- Depression or anxiety
- Generic life problems-
 - Spouse/partner,
 - Children,
 - Parents
 - Finances





10

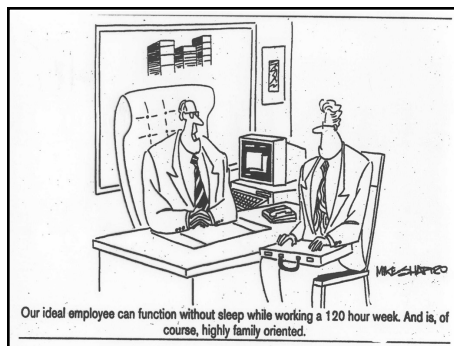


Organizational Stressors

- Unrealistic expectations
- Unrecognized accomplishments
- Budget cuts
- Eliminating positions
- Performing multiple jobs
- Personalities and politics
- Intense competition (within and without)



11



12



Workload: Look & Feel Familiar?



Statistically significant correlation with CF

13



Client Expectations/Stressors

- Unrealistic
- Want it now
- Unhappy, sad, mad, frustrated
- Stress from the pressure
- Stress from the difficult material being reviewed and the workload yet expected to appear and be completely unaffected by it (i.e. not be human)

14



Competitive Nature of Stress



15



16



Compassion Fatigue Advisory...

- Any person regardless of race, gender, ethnicity, age, occupation.... develop this condition
- Doesn't imply weakness, just "human-ness"
- Is more about "dis-ease" than disease.

Unfit/Unable to practice

Top of your game





17

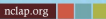


Symptoms Reported

- ▶ Intrusive thoughts
- ▶ Anger/anxiety/fear
- ▶ Sleep disturbance
- ▶ Fatigue
- ▶ Loss of Appetite

- ▶ Loss of empathy
- ▶ Loss of faith in humanity
- ▶ Sense of isolation from others
- ▶ Health problems & Physical symptoms

Source: Vrklevski et al. (2008) and Levin et al. (2003) and Jaffe et al. (2005)



18



Role of Mirror Neurons in the Brain



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19



20

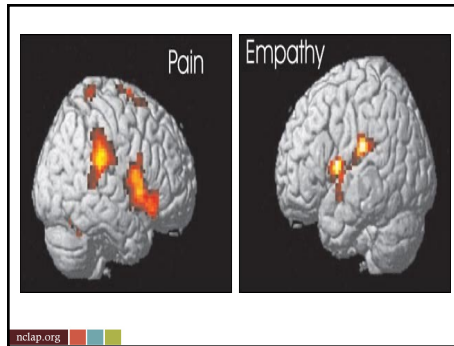


Empathy

- Experience the experiences of someone else (Shane, 2008)
- Enduring those same experiences and emotions (Lydiaalye Gibson)
- Empathy is involuntary: a shared emotion- this is hardwired into the brain (L. Gibson)
- Human beings who spend time with other human beings who are empathetic tend to feel better

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21



22



23



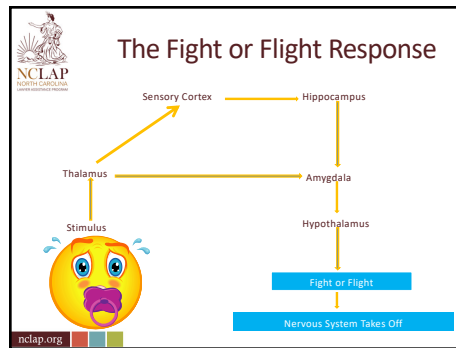
Brain Chemistry

- Reptilian Brain (instincts)
- Limbic Brain (emotion, memory)
- Frontal Lobe (reason)

• These work together, while we think, something else is going on.

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24



25

This movie sheds wonderful insight into the propagation of illness in today's society via the inner workings of the human stress response.

Only 50 minutes long.

Available on You Tube.

The slide features a National Geographic video cover titled 'STRESS: PORTRAIT OF A KILLER' showing a human head with a glowing brain.

26

The slide lists three primary assumptions:

- The World is Benevolent
- The World is Meaningful
- The Self is Worthy

Source: Bulman, Shattered Assumptions

27

One Attorney Says...

- "I think this happens to everyone whether they admit or not or show it or not. It is inevitable with that kind of caseload that one will at least at times go bonkers. This wears on all of us and on some of us more than others. We see colleagues severely affected all the time. I think the practice leaves scars. Some make it better than others, obviously, but everyone suffers....."

--criminal lawyer, PD office in Wisconsin

Source: WillAP Program permission granted

28

[illegible]

SPREADSHEET

Spreadsheets are a powerful tool for organizing and analyzing data. They allow you to input data into a grid of rows and columns, and then perform calculations and analysis on that data. Spreadsheets are used in a wide variety of applications, from budgeting and accounting to project management and data analysis.

Key Features:

- **Data Entry:** Easily input data into a grid of rows and columns.
- **Formulas:** Use formulas to perform calculations and analysis on the data.
- **Charts:** Create charts and graphs to visualize the data.
- **Sorting and Filtering:** Sort and filter data to find specific information.
- **Collaboration:** Share spreadsheets with others for collaboration.

Applications:

- **Budgeting and Accounting:** Track income and expenses, calculate taxes, and manage budgets.
- **Project Management:** Track project progress, manage resources, and create Gantt charts.
- **Data Analysis:** Analyze large datasets, identify trends, and create reports.
- **Marketing:** Track marketing campaigns, analyze customer behavior, and create reports.
- **Education:** Track student progress, manage grades, and create reports.

Conclusion:

Spreadsheets are a versatile and powerful tool for organizing and analyzing data. They are used in a wide variety of applications, from budgeting and accounting to project management and data analysis. By using spreadsheets, you can efficiently manage your data and make informed decisions.

Source: <https://www.excel-easy.com/>

29

[illegible]



Fill in the blanks

- The world is a _____ place.
- Life is _____.
- I am _____ as a human being.
- I want to change _____ about my job.
- I want to change _____ about myself.
- Most often I feel _____.

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30



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So slow, is it even moving?



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31



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That which is to give light must endure burning....



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Victor Frankl

32



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Rather slow and insidious....
then increases... then overwhelming....



Burning



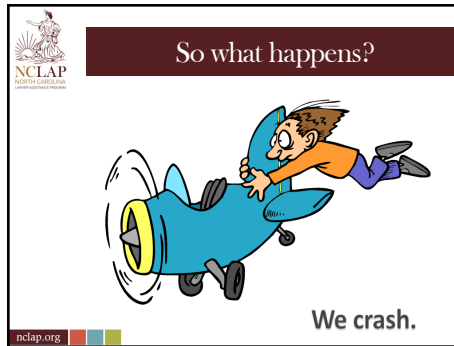
Uncomfortable



Overwhelming

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33



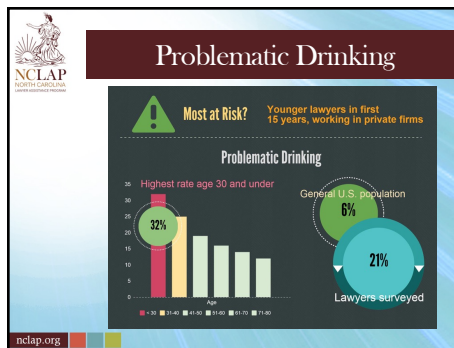
34

Visible Results

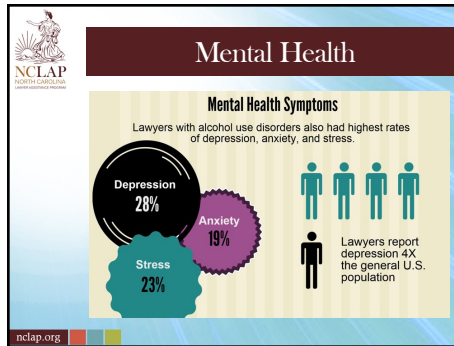
- Strong correlation with what is known as "Disruptive Behavior"
 - Intimidation, Anger and Lashing Out
 - At opposing counsel, support staff, associates
- "Kick the dog" syndrome: spouse/partner and kids take the brunt of the frustration
- Isolate/withdraw from clients and colleagues
- Enter the grievance and discipline process
- Physical manifestations: migraines, gastrointestinal problems, heart issues

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35



36



37

Impact on Lawyers

- Powerlessness
- Indecisive/Anxious
- Alienate from others

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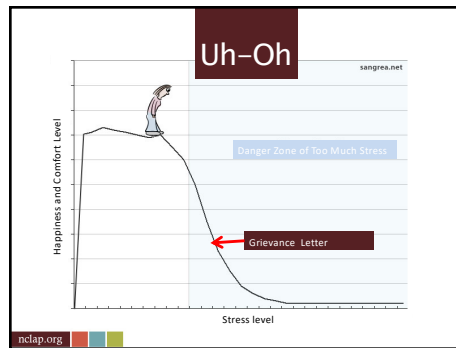
38

Most common client complaints & grievance notices

- Lack of communication
- Apathy (improper advocacy)
- Lack of Diligence
- i.e. "I just don't care anymore."

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39



40



Who most at risk?

- Personal Injury, Workers Comp, Bankruptcy, Wills, Trusts and Estates and Criminal or Family Law Attorneys/Judges
- High caseloads; long work hours
- High exposure to graphic evidence, 911 tapes, photos, videotapes, victim statements
- Serving clients with high levels of distress
- Little if any education on the subject of CF
- Little support from peers; isolation

41



42

Understanding Triggers



Emotional triggers are events or personality types that cause an intense emotional response.

43



Understanding Triggers

- Different for each one of us
- Examples:
 - Double Bind
 - Abuse of vulnerable populations
 - Disrespect from colleagues/judges/clients/people
 - Unfair, unjust realities of life and the system
 - The line at your door

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44



Research-based suggestions for improving mood, increasing life satisfaction and mitigating stress

- Recognize the risks for yourself
- Find a way to debrief distressing material
- Work on self awareness every day
- Take an inventory of how balanced your life is-be intentional about balancing it out
- Evaluate your tension reducing behaviors
- Be intentional about protecting yourself

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45



46

 **Becoming Happier**

- Spin fewer plates:
 - Squeeze in less.
 - Resume hobbies and activities that bring you joy and trigger the good stuff in the limbic brain

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47

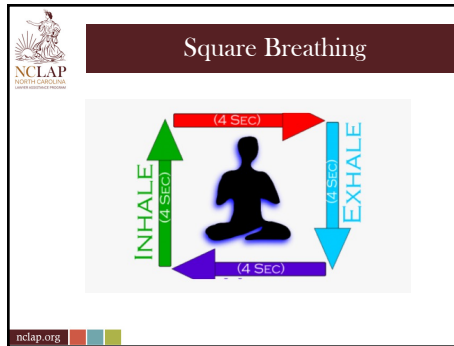
 **Becoming Happier**

- It is the obvious:
 - Sleep
 - Exercise
 - Eat

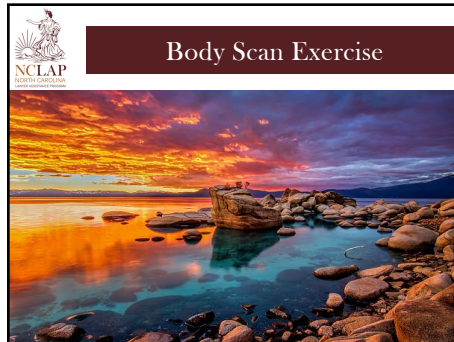
What do you do at the end of the day to transition out of work?
If nothing, admit that. Then change it.

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48



49



50



51



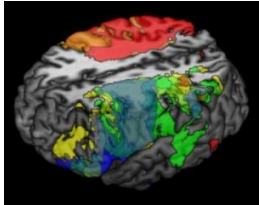
Becoming Happier

- Don't deny negative emotions [fear, sadness, anxiety] – move toward them and accept them.
- Identify and speak with a close person (or people) who you trust to share your internal experience.




52

Talking and Connections Help the Brain






53



Becoming Happier

- It is not state of status or bank account – “state of mind” is what matters most.
- While we may be paid well, money does not trigger the mirror neuron stimulus we (all humans) need to translate into better emotional health in our bodies and psyches.




54



Becoming Happier

- Intersect pleasure and meaning → interests are central.
- Express Gratitude
- Try making a gratitude list every morning of 3 things you are grateful for. Do it for a few months and see what you notice. It will change your life.

Adapted from T. Ben-Shahar

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55



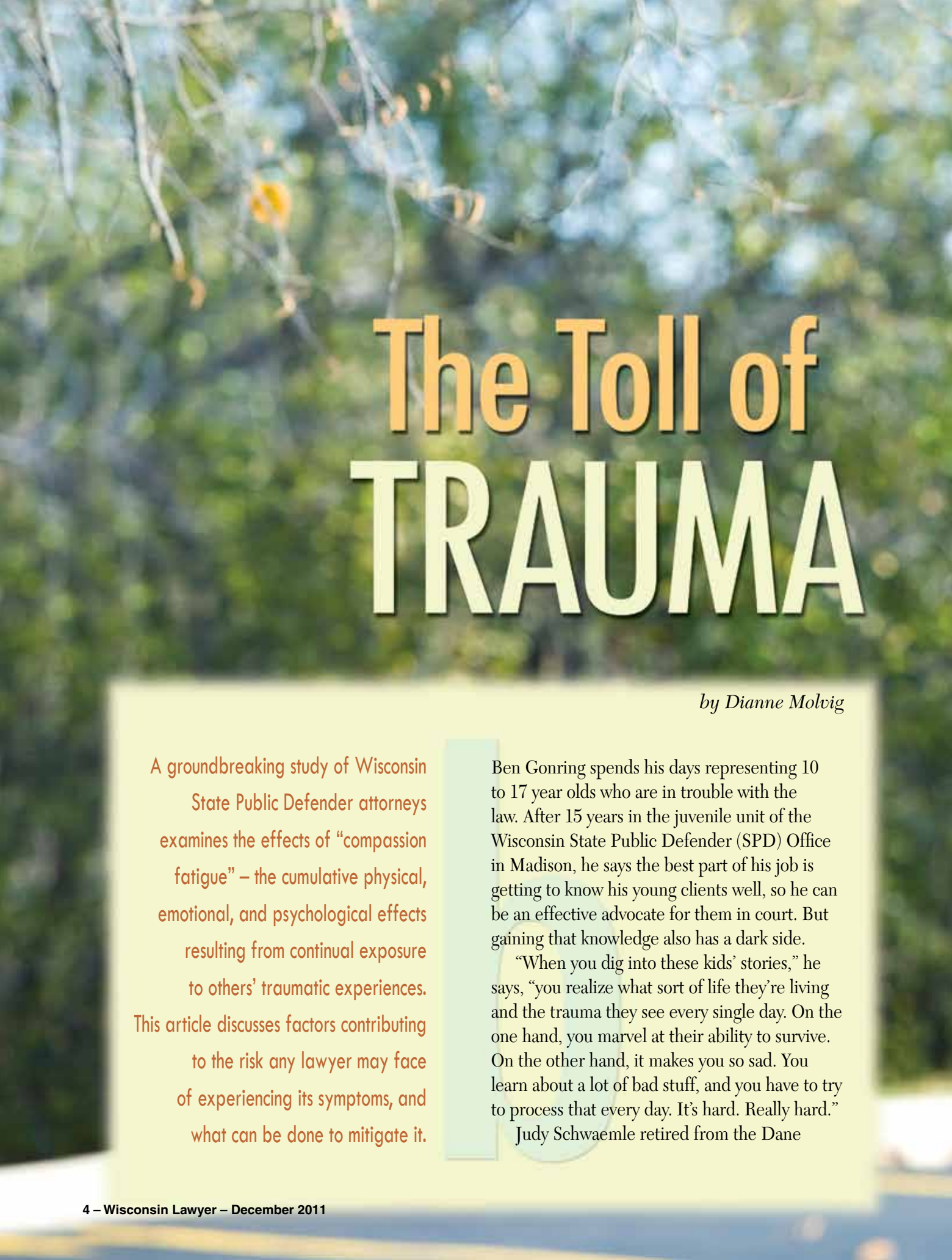
If you need to reach us

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Thank you!

56



The Toll of TRAUMA

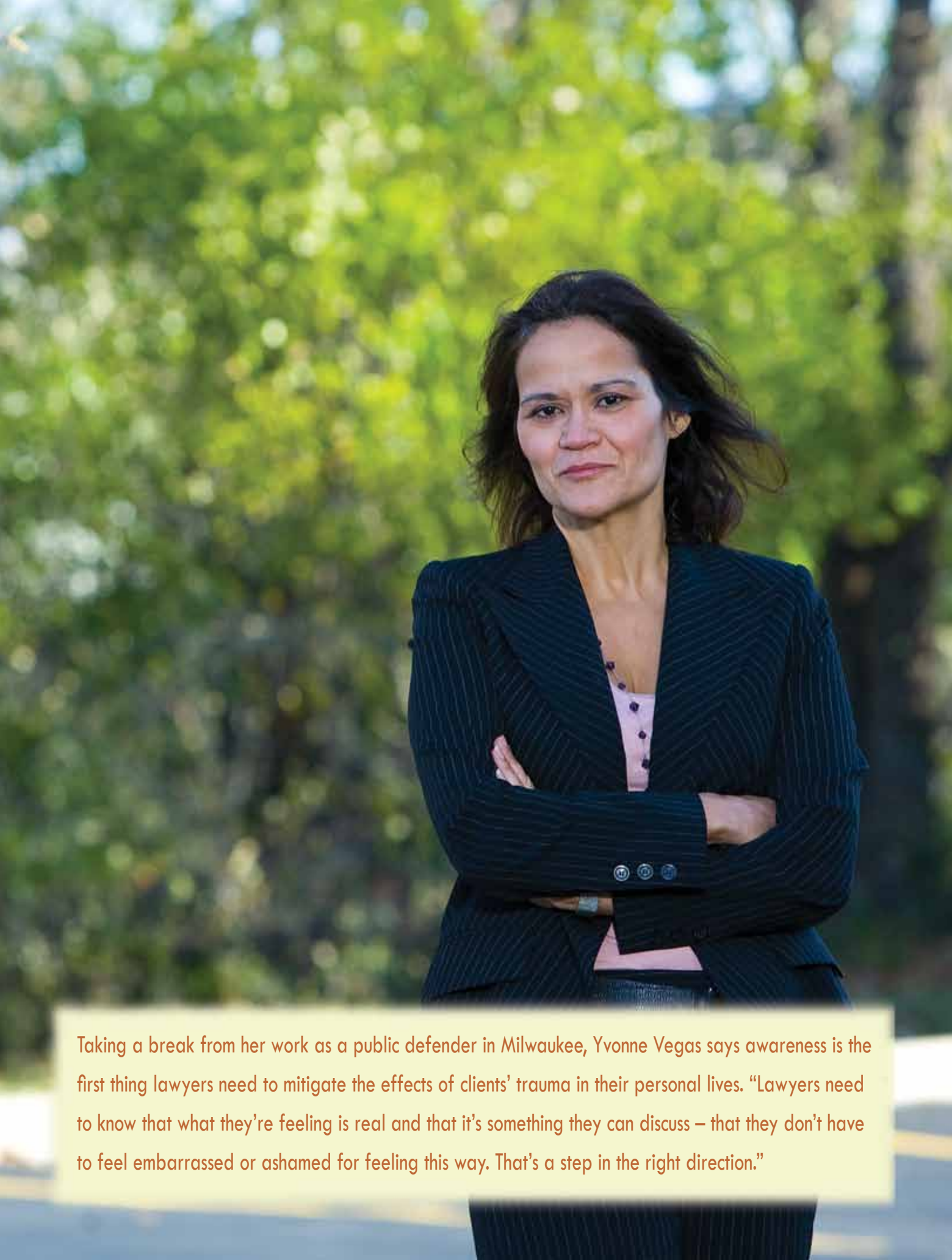
by Dianne Molvig

A groundbreaking study of Wisconsin State Public Defender attorneys examines the effects of “compassion fatigue” – the cumulative physical, emotional, and psychological effects resulting from continual exposure to others’ traumatic experiences. This article discusses factors contributing to the risk any lawyer may face of experiencing its symptoms, and what can be done to mitigate it.

Ben Gonring spends his days representing 10 to 17 year olds who are in trouble with the law. After 15 years in the juvenile unit of the Wisconsin State Public Defender (SPD) Office in Madison, he says the best part of his job is getting to know his young clients well, so he can be an effective advocate for them in court. But gaining that knowledge also has a dark side.

“When you dig into these kids’ stories,” he says, “you realize what sort of life they’re living and the trauma they see every single day. On the one hand, you marvel at their ability to survive. On the other hand, it makes you so sad. You learn about a lot of bad stuff, and you have to try to process that every day. It’s hard. Really hard.”

Judy Schwaemle retired from the Dane



Taking a break from her work as a public defender in Milwaukee, Yvonne Vegas says awareness is the first thing lawyers need to mitigate the effects of clients' trauma in their personal lives. "Lawyers need to know that what they're feeling is real and that it's something they can discuss – that they don't have to feel embarrassed or ashamed for feeling this way. That's a step in the right direction."

Key Study Findings

The study found that SPD attorneys reported significantly higher levels of compassion fatigue than administrative support staff and the general population, when data for the latter were available for comparison. The study's findings break down by specific symptoms of compassion fatigue as follows.

"A major finding of our study," Dr. Andrew Levin reports, "is that the extent of caseload and lawyers' exposure to other people's trauma were clearly related to symptoms of compassion fatigue." Interestingly, factors such as years on the job, age, office size, gender, and personal history of trauma made no significant differences in compassion fatigue levels.

Depression

Depressed mood, loss of interest or pleasure, disturbed sleep, loss of appetite, low energy, poor concentration, feelings of guilt or low self-worth

- General population: 10 percent
- SPD administrative support staff: 19.3 percent
- SPD attorneys: 39.5 percent

Post-traumatic Stress Disorder

PTSD, triggered by a terrifying event; symptoms include flashbacks, nightmares, severe anxiety, uncontrollable thoughts

- General population: 7 percent
- SPD support staff: 1 percent
- SPD attorneys: 11 percent

Functional Impairment

The extent to which exposure to traumatic material interferes with functioning in work, social/leisure life, and family/home life

- SPD support staff: 27.5 percent
- SPD attorneys: 74.8 percent

Secondary Traumatic Stress

The "cost of caring" about another person who has experienced trauma; symptoms are similar to those of PTSD

- SPD support staff: 10.1 percent
- SPD attorneys: 34 percent

Burnout

Job-induced physical, emotional, or mental exhaustion combined with doubts about one's competence and the value of one's work

- SPD support staff: 8.3 percent
- SPD attorneys: 37.4 percent

Compassion Satisfaction

The study also measured "compassion satisfaction," or the pleasure derived from one's work. Reports of high levels of satisfaction were as follows:

- SPD support staff: 25.7 percent
- SPD attorneys: 19.3 percent

What the Numbers Mean

Are we to conclude from the key findings that SPD attorneys are impaired on the job? Absolutely not, says Dr. Andrew Levin, medical director at the Westchester Jewish Community Center in Hartsdale, N.Y., and cofacilitator of the study. Bear in mind, he emphasizes, these results come from self-reporting instruments, which indicate trends, not diagnoses of conditions.

Take, for instance, the depression statistic. "It shows that almost 40 percent of attorneys are over the threshold number on the depression inventory," Levin explains. "That does not mean they have a clinical diagnosis of depression. All it means is that they have a likelihood for being at risk for depression."

Likewise, the functional impairment measure doesn't mean SPD lawyers are failing to function well on the job. "It may mean, for example, that you had a tough day at work," Levin explains, "and when you got home you weren't able to pay as much attention to your family as you would have liked, or you were irritable. Your job is interfering with your home life."

If anything, the data show just how resilient the study participants are, Albert points out. "Despite the fact that they endure ongoing exposure to trauma and have these high caseloads, they continue to meet the requirements of their employment," she says. "It's amazing that they do. They are handling the demands of the job, but not easily and not without it having an impact on their lives."



County District Attorney's Office last year after 27 years. Many times in her career, she saw horrifying evidence of what one human did to another. Those disturbing images often lingered and intruded into her thoughts away from work. Even now that she's retired, memories remain.

"To this day," she says, "when I go past a place where a homicide occurred that I prosecuted, I think about it, every time. I drive past and think, that's where Sarah was killed."

Experiences such as these can take a toll on lawyers. Recently, the State Bar of Wisconsin undertook a study to learn just how significant that toll is and what can be done to mitigate it.

The study examined the prevalence of what's known as "compassion fatigue" – that is, the cumulative physical, emotional, and psychological effects of continual exposure to traumatic stories or events when working in a helping capacity.

On a late fall day, State Public Defender lawyers Ben Gonring and Deb Smith talk about how the nature of their jobs may contribute to compassion fatigue. "When you dig into kids' stories, you realize what sort of life they're living and the trauma they see every single day. ... You learn about a lot of bad stuff, and you have to try to process that every day," says Gonring, who represents juveniles. "It's hard. Really hard."

Smith, SPD director of assigned counsel, agrees. "Many of us who have been around for a while know there can be a cost, emotionally and psychologically, to doing this kind of work. Even for lawyers who know how to maintain an appropriate professional demeanor and distance, this stuff seeps in. It changes your perspective on the world."



More from the authors ...

In this video, at www.wisbar.org/wl, WisLAP coordinator Linda Albert and Deb Smith, director of assigned counsel for the SPD, discuss the agency's involvement with the State Bar's compassion fatigue study, what it learned, and what it will do to help support its staff.

In psychological language, exposure to another person's trauma is referred to as secondary trauma. "There's research on the impact of secondary trauma on human beings, but it's never been looked at extensively with lawyers. We're on the forefront of this," says Linda Albert, coordinator of the State Bar's Wisconsin Lawyers Assistance Program (WisLAP) and cofacilitator of the compassion fatigue study.

Research exists on the effects of stress on attorneys, and some researchers have used some of the language related to compassion fatigue. "But no one has studied it systematically," says Dr. Andrew Levin, medical director at the Westchester Jewish Community Center in Hartsdale, N.Y., who facilitated the study with Albert. "So this was an effort to say, 'People have made these observations. They seem to have some validity. Can we establish that more rigorously?'"

Roots of the Study

As WisLAP coordinator, Albert has given presentations about compassion fatigue to many groups of legal professionals in recent years. She's seen the topic hit home again and again with various audiences.

"I've done this with bankruptcy lawyers, guardians ad litem, public defenders, prosecutors, judges, court commissioners. ... Every time it's resonated," she says.

Levin and Albert learned of their mutual interest in the topic of compassion fatigue and decided to do a formal study of its effects on Wisconsin attorneys. They decided to focus on one specific group: state public defenders.

"Compassion fatigue is an important issue," says Deb Smith, director of assigned counsel for the SPD and the agency's point person for the study. "Many of us who have been around for a while know there can be a cost, emotionally and psychologically, to doing this kind of work. We deal with a lot of unpleasantness. Even for lawyers who know how to maintain an appropriate professional demeanor and distance, this stuff seeps in. It changes your perspective on the world."

To learn more about such effects, study questionnaires went out to a total of 474 SPD attorneys and administrative support staff. Response rates for completed surveys were remarkable: 78 percent of attorneys and 65 percent of support staff.

While the study's target group was public defenders, Smith believes it will have value for the profession as a whole. "There's a large community of lawyers who deal with trauma-exposed clients and who need to be aware of compassion fatigue," she says. "These lawyers need to make sure they're taking care of themselves. This isn't just a public defender issue; it's a lawyer issue."

Count judges among those affected by compassion fatigue, as well. Neal Nielsen, an eight-year veteran on the circuit court bench in Vilas County, says judges' exposure to trauma differs from lawyers'. "Attorneys are much more closely related to the facts of the case for a much longer period of time than are judges," he notes.

Still, judges sit on the bench hearing, day in and day out, about a procession of incidents of trauma inflicted or endured by people in their courtrooms. "And I can sit here now and call up in my mind with great accuracy all the autopsy photos I've ever seen," Nielsen says.

In the Trenches

Dana Smetana sees a key message her fellow SPD attorneys ought to take away from the study results: There's nothing wrong with you. "I think sometimes lawyers think they're going crazy," says Smetana of the SPD Eau Claire office, where her duties include trying cases as well as being a regional supervisor. She's been with the SPD for 27 years. "If lawyers are feeling this

What you don't expect is that as you're trying to keep people safe – whether it's keeping an individual safe from an abuser or keeping society in general safe from a psychopath – you won't get the support you need to do your job.

– Robert Kaiser, Dane County assistant district attorney

To this day, when I go past a place where a homicide occurred that I prosecuted, I think about it, every time. I drive past and think, that's where Sarah was killed.

– Judy Schwaemle, Dane County assistant district attorney, retired

way, it's the symptoms of what's going on with this job. It's nothing negative about you as a person. Awareness of that is a huge factor."

As a supervisor, she knows young SPD lawyers must learn to put up protective boundaries, to keep their emotions in check. "The older attorneys get good at that," she observes, "but then when they go home, they have trouble lifting those boundaries" with families and friends.

Not letting the effects of exposure to trauma spill over into one's personal life is one of the most difficult aspects for lawyers, agrees Yvonne Vegas, a 22-year SPD veteran who's now in the Milwaukee office. "Our clients have a lot of trauma in their lives: poverty, lack of education, homelessness, joblessness, mental health issues, substance abuse issues," she says. "Their issues become ours. You absorb that on a day-to-day basis, and you take it home with you. It can make you irritable and short-fused with your family."

Like Smetana, Vegas believes awareness of these dynamics is critical for lawyers exposed to clients' trauma. "Lawyers need to know that what they're feeling is real," she says, "and that it's something they can discuss – that they don't have to feel embarrassed or ashamed for feeling this way. That's a step in the right direction."

Some observers, of course, might point out that public defenders and prosecutors know what they're in for when they decide to pursue this type

of law practice. True, says former district attorney Schwaemle. "You knew this would be coming," she says. "But there's knowing, and then there's *knowing*."

The effects can cut deeper than some might have imagined. Take, for instance, prosecuting a sexual assault case. "When you prepare for the trial," Schwaemle says, "you put

yourself in the place of the victim. You have to ask yourself why the victim behaved a certain way because you have to explain that to the jury. You relive the victim's experience and put yourself in her shoes."

Robert Kaiser also has seen "inexplicably, indescribably horrible evidence" in his 34 years as a district attorney, the last 24 of those in Dane

Coping with Compassion Fatigue

Exposure to clients' trauma isn't going to stop. But you can mitigate the effects this exposure has on you. Here are a few strategies:

- **Debrief.** Talk with another lawyer who understands what you're going through and can offer support. Debriefing can become a part of the office culture. Remember, this is a discussion about how the case is affecting you as a person, not a rehashing of legal strategies.
- **Take care of yourself.** Eat healthy foods. Exercise regularly. Get enough sleep. Learn relaxation techniques so you can let go of stress and disturbing, repetitive thoughts. Know what truly brings you joy in life and make time for it.
- **Strive for balance and interconnection.** Give up the urge to be all things to all people, including clients. Allow time to connect with friends and family to counter-balance the stresses you feel at work and put everything back in perspective.
- **Come up with a plan.** When compassion fatigue is weighing on you, it can be difficult to get off the treadmill and set a new course. Stop long enough to notice how you're feeling, reacting, and behaving at work and at home. Develop a plan of action for yourself. What needs to change? Where can you start?
- **Seek help.** If you think compassion fatigue is interfering with your work or personal life, reach out for help. A good place to start is WisLAP. Call the 24-hour helpline, at (800) 543-2625, or coordinator Linda Albert at (800) 444-9404, ext. 6172. All inquiries are confidential.

“We have to acknowledge what people in criminal justice, not just public defenders, go through. We need to recognize how difficult it is to see people in crisis every single day. And we have to be able to talk about it.”

— Kelli Thompson, State Public Defender

County and the remainder in Chicago. He never wanted to be anything but a district attorney, and he knew exposure to trauma would be part of the job.

“What you don’t expect,” Kaiser says, “is that as you’re trying to keep people safe – whether it’s keeping an individual safe from an abuser, or keeping society in general safe from a psychopath who will victimize anybody he can get his hands on – you won’t get the support you need to do your job.”

The combination of burgeoning caseloads and shrinking budgets makes it increasingly difficult for district attorneys to fulfill their duty to protect the public, Kaiser notes. In his eyes, lack of support sends a message that crime victims and the district attorneys’ work don’t matter.

“We’re saddened by our work,” he says. “We’re certainly affected by it. But when you live it and then people act as though what you do is not important, that’s trauma.”

Public defenders, too, are hurt by budget cuts. And they’re targets of public scorn for simply doing their job: defending people’s constitutional rights.

Thus, heavy caseload and exposure to trauma aren’t the only factors fueling compassion fatigue in attorneys. In the State Bar’s study, SPD participants wrote in comments about additional contributing factors. The top three were lack of respect, lack of control in one’s work life, and

lack of enough time to process issues and give or get support.

“When you have those factors,” observes WisLAP’s Albert, “on top of exposure to trauma and heavy caseloads, that’s where I see the perfect storm.”

Next Steps

The State Bar’s study puts compassion fatigue on the legal profession’s radar. “We have to acknowledge what people in criminal justice, not just public defenders, go through,” says State Public Defender Kelli Thompson. “We need to recognize how difficult it is to see people in crisis every single day. And we have to be able to talk about it.”

Going forward, she says, the SPD will provide more staff training to educate people about compassion fatigue and to learn coping skills. Open day-to-day communication in the office is also critical, she says. “Our lawyers

need to know it’s okay to take a breath,” she says. “You can’t live with a terrible case for a year, close it, and then just say, ‘On to the next one.’”

The results of the study, the first of its kind, appear in the December issue of the *Journal of Nervous and Mental Disease* and will draw wider attention to the topic of attorneys’ compassion fatigue. Albert already has spoken about it at a Canadian conference and for the national conference of the American Bar Association’s Commission on Lawyer Assistance Programs. In addition, Albert is working with the SPD to develop strategies that both individual attorneys and the agency can use to minimize work-related stress. She anticipates adapting these strategies for use by lawyers in other practice areas.

“I think these findings will be unsettling for the legal profession,” Albert says. “The implications of this study definitely will go way beyond Wisconsin.”

The State Bar is one of several bar associations participating in a second study that seeks information on factors, personal and professional, that contribute to life and career satisfaction or dissatisfaction. The study, to be conducted in May 2012, is headed by Dr. Kennon Sheldon, University of Missouri, Department of Psychology, and Prof. Lawrence Krieger, Florida State University College of Law. “WisLAP will use the data to develop ways to prevent and mitigate professionalism, ethics, and mental health and substance abuse problems within the profession,” Albert says. ☐

There’s research on the impact of secondary trauma on human beings, but it’s never been looked at extensively with lawyers. We’re on the forefront of this.

— Linda Albert, WisLAP coordinator

First Self Assessment Exercise

Observe the work that you do. Does it have:

- A large volume of demand (and often increasing demands, such as more and more clients to see or more and more paperwork to do)?
- Continually dwindling resources?
- Exposure to difficult stories of loss, pain, death and suffering?
- Do you work with clients who face seemingly insurmountable obstacles, have chronic needs or even clients who get worse rather than get better?

All of these elements can contribute to compassion fatigue and vicarious trauma.

Ask yourself the four following questions:

1) Where do the stories go?

What do you do at the end of a work day to put difficult client stories away and go home to your friends and family?

2) Were you trained for this?

Did your training offer you an education on self care, compassion fatigue, vicarious trauma or burnout? If it did, how up to date are you on those strategies? If it didn't, which is still true for the majority of us over a certain age, how much do you know about these concepts?

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3) What are your particular vulnerabilities?

Two things we know for sure about the field of helping: one, that a large percentage of helpers have experienced primary trauma at some point in their past, which may have led them to being attracted to the field in the first place. Two, that personality types who are attracted to the field of helping (rather than, say, mechanical engineering) are more likely to feel highly attuned and empathy towards others, which makes them good at their job and also more vulnerable to developing CF, VT and Burnout.

4) How do you protect yourself while doing this very challenging work?

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Compassion Fatigue and Vicarious Trauma – Signs and Symptoms

Physical Signs and Symptoms

- ☐ Exhaustion
- ☐ Insomnia
- ☐ Headaches
- ☐ Increased susceptibility to illness
- ☐ Somatization and hypochondria

Behavioral Signs and Symptoms

- ☐ Increased use of alcohol and drugs
- ☐ Absenteeism
- ☐ Anger and Irritability
- ☐ Avoidance of clients
- ☐ Impaired ability to make decisions
- ☐ Problems in personal relationships
- ☐ Attrition
- ☐ Compromised care for clients
- ☐ The Silencing Response
- ☐ Depleted parenting

Psychological signs and symptoms

- ☐ Emotional exhaustion
- ☐ Distancing
- ☐ Negative self image
- ☐ Depression
- ☐ Sadness, Loss of hope
- ☐ Anxiety
- ☐ Guilt
- ☐ Reduced ability to feel sympathy and empathy
- ☐ Cynicism
- ☐ Resentment
- ☐ Dread of working with certain clients
- ☐ Feeling professional helplessness
- ☐ Diminished sense of enjoyment/career
- ☐ Depersonalization/numbness
- ☐ Disruption of world view/ heightened anxiety or irrational fears
- ☐ Inability to tolerate strong feelings
- ☐ Problems with Intimacy
- ☐ Intrusive imagery – preoccupation with trauma
- ☐ Hypersensitivity to emotionally charged stimuli
- ☐ Insensitivity to emotional material
- ☐ Difficulty separating personal and professional lives
- ☐ Failure to nurture and develop non work related aspects of life

Sources: Saakvitne (1995), Figley (1995), Gentry, Baranowsky & Dunning (1997), Yassen (1995)

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EVALUATING YOUR CONTRIBUTING FACTORS:

Assess the following elements with this continuum in mind:

Annoying→Distressing→Traumatic

Nature of the work, the cases and the workplace; in your role:

- what events, incidents, cases, stories are the most difficult? Why?
- how much control do you have over your schedule?
- does this schedule work for you; can you adequately negotiate your workload?
- how has the workload changed over the years?
- do your work tasks vary from day to day; do you like the work you do;
- are you sufficiently trained to do the work you do?
- how much support do you have; is supervision adequate; helpful; supportive?

Nature of the clientele; in your role:

- how many clients do you have contact with each day?
- do you have variety with the types of clients you work with?
- what types of clients are the most difficult for you and why?
- how do your clients treat you?
- are you ever afraid of your clients? -ever been harmed by a client?
- how do you treat your clients?

Nature of the worker; for you personally:

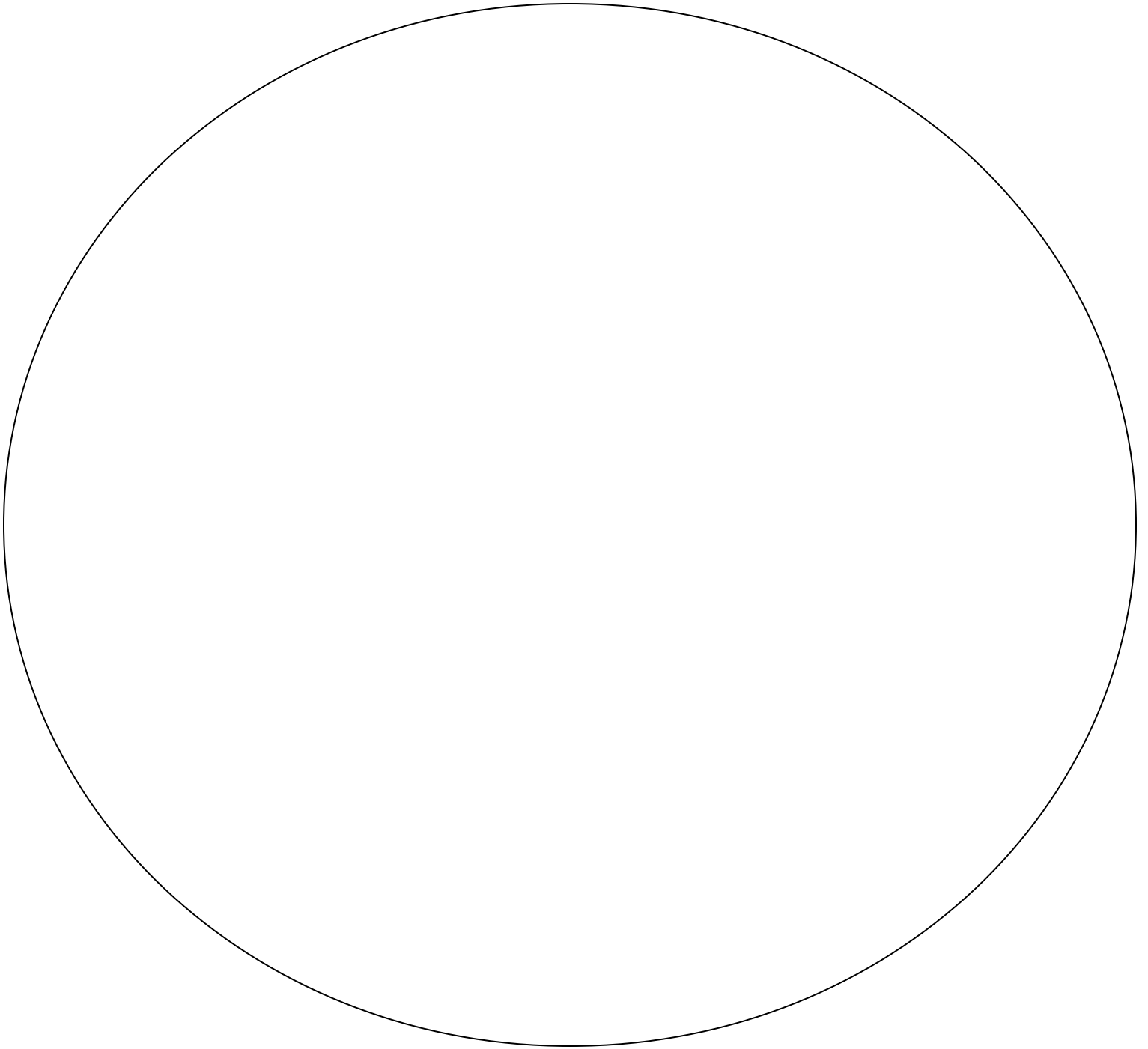
- how well suited are you personally for the work you do?
- how well does the work you do match your values and beliefs?
- what does your current stress index look like on a scale of 1(no stress) to 10 (extreme stress)?
- can you identify the factors in your life that produce the most stress?
- what coping mechanisms do you use to manage or decrease stress?
- do you have supportive interpersonal relationships?
- do you engage in a hobby or leisure activity every week?

Nature of the social/cultural context: in your role:

- what are the social obstacles to doing your work? (funding cuts, furlough days etc)
- how are you received within the community based on the work that you do and the work of your organization; do you feel respected?
- what does the community say about the clientele you serve?
- what effect, if any, does the above have upon you personally?

Excerpted from *Transforming the Pain* (1996) pp 53-55 and *Compassion Fatigue Train the Trainer Workbook* (2008) pp 42-43.

WHAT'S ON YOUR PLATE?



SELF CARE INVENTORY (Reprinted with permission)

Mark "X" for what you already do. Mark "O" for what you wish you did more often.

Physical Self-Care ☐ Eat Regularly (e.g. breakfast, lunch, and dinner) ☐ Eat healthily ☐ Exercise ☐ Get regular medical care for prevention ☐ Get medical care when needed ☐ Take time off when sick ☐ Get massages ☐ Dance, swim, walk, run, play sports, sing, or do some other physical activity that is fun ☐ Take time to be sexual – with yourself, with a partner ☐ Get enough sleep ☐ Wear clothes you like ☐ Take vacations ☐ Take day trips or mini-vacations ☐ Make time away from telephones ☐ Other: Psychological Self-Care ☐ Make time for self-reflection ☐ Have your own personal psychotherapy ☐ Write in a journal ☐ Read literature that is unrelated to work ☐ Do something at which you are not expert or in charge of ☐ Decrease stress in your life	☐ Notice your inner experience – listen to your thoughts, judgments, beliefs, attitudes and feelings ☐ Let others know different aspects of you ☐ Engage your intelligence in a new area (e.g. go to an art museum, history exhibit, sports event, auction, theater performance) ☐ Practice receiving from others ☐ Be curious ☐ Say no to extra responsibilities sometimes ☐ Other: Emotional Self-Care ☐ Spend time with others whose company you enjoy ☐ Stay in contact with important people in your life ☐ Give yourself affirmations, praise yourself ☐ Love yourself ☐ Reread favorite books, re-view favorite movies ☐ Identify comforting activities, objects, people, relationships, places, and seek them out ☐ Allow yourself to cry ☐ Find things that make you laugh ☐ Express your outrage in social action, letters, donations, marches, protests ☐ Play with children ☐ Other:
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Spiritual Self-Care ☐ Make time for reflection ☐ Spend time with nature ☐ Find a spiritual connection or community ☐ Be open to inspiration ☐ Cherish your optimism and hope ☐ Be aware of non-material aspects of life ☐ Try at times not to be in charge or the expert ☐ Be open to not knowing ☐ Identify what you is meaningful to you and notice its place in your life ☐ Meditate ☐ Pray ☐ Sing ☐ Spend time with children ☐ Have experiences of awe ☐ Contribute to causes in which you believe ☐ Read inspirational literature (e.g. talks, music) ☐ Other:	Workplace or Professional Self-Care ☐ Take a break during the work day (e.g. lunch) ☐ Take time to chat with co-workers ☐ Make quiet time to complete tasks ☐ Identify projects or tasks that are exciting and rewarding ☐ Set limits with clients and colleagues ☐ Balance your caseload so no one day or part of a day is “too much.” ☐ Arrange your work space so it is comfortable and comforting ☐ Get regular supervision or consultation ☐ Negotiate for your needs (benefits, pay raise) ☐ Have a peer support group ☐ Develop a non-trauma area of professional interest ☐ Other: Balance: ☐ Strive for balance with your work life and work day ☐ Strive for balance among work, family, relationships, play and rest
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Adapted from *Transforming the Pain: A Workbook on Vicarious Traumatization* by Karen W. Saakvitne & Laurie Anne Pearlman. Copyright (c) 1996 by the Traumatic Stress Institute/Center for Adult & Adolescent Psychotherapy. Used by permission of W.W. Norton & Company, Inc.

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Developing a Compassion Fatigue Protection Plan

What components will go into my plan?

What are my warning signs and symptoms?

Who will I check in with to hold me accountable or to cue me?

What things do I have control over in my life?

How will I relieve stress in a way that works for me?
(Intervention)

What stress prevention/reduction strategies will I use?
(Prevention)

Adapted from Francoise Mathieu: Compassion Fatigue Train the Trainer Workbook (2008)

IDEA FACTORY

Commitment to Changes I could make in the next...

Week:

Month:

Year:

Mitigating Compassion Fatigue

EVALUATION FORM

Date of Program: _____

☐ Support/Clerical ☐ Investigator ☐ CSS ☐ Attorney ☐ Other: _____ ☐ Manager

Directions: Read each of the statements and rank your understanding of the issue before and after you participated in the Mitigating Compassion Fatigue program. Circle the appropriate number using the following range:

1 = no understanding

4 = little understanding

6 = moderate understanding

8 = quite a bit of understanding

10 = almost complete understanding

How would you describe your understanding of the following?	My understanding before the program.	My understanding after the program.
1. The definition of compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10
2. The brain's role in compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10
3. Your own personal level of compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10
4. What factors contribute to your compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10
5. Actions we can take as an office to decrease compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10
6. Actions you can take individually to decrease your compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10

What overall rating would you give the Mitigating Compassion Fatigue program?

Excellent

Very Good

Good

Fair

Poor

Explain Briefly:

What do you think was the most successful part of the experience?

What do you think was the least successful part of the experience?

Are there any compassion fatigue questions or related topics you would like to learn more about?

Do you have suggestions we can take as an agency to reduce the risks of compassion fatigue?

Thank you for taking the time to evaluate this program.



NCLAP
NORTH CAROLINA
LAWYER ASSISTANCE PROGRAM

Identifying Illness Based Impairment in Colleagues

Depression, Anxiety and Stress

Alcoholism and Substance Abuse

Every aspect of an addicted or depressed attorney's life is affected. When there are problems at work or home, with health or finances, or there is police involvement, chances are the attorney is suffering from a medically based illness which can be successfully treated. If you recognize the following warning signs in a colleague, call us. ***We can help.*** Visit NCLAP.org

Relationship Problems

- ☐ Complaints from clients
- ☐ Problems with supervisors
- ☐ Disagreements or inability to work with colleagues
- ☐ Avoidance of others
- ☐ Irritable, impatient
- ☐ Angry outbursts
- ☐ Inconsistencies or discrepancies in describing events
- ☐ Hostile attitude
- ☐ Overreacts to criticism
- ☐ Unpredictable, rapid mood swings
- ☐ Non-responsive communication

Performance Problems

- ☐ Missed deadlines
- ☐ Decreased efficiency
- ☐ Decreased performance after long lunches involving alcohol
- ☐ Inadequate follow through
- ☐ Lack of attention
- ☐ Poor judgment
- ☐ Inability to concentrate
- ☐ Difficulty remembering details or instructions
- ☐ General difficulty with recall
- ☐ Blaming or making excuses for poor performance
- ☐ Erratic work patterns

Personal Problems

- ☐ Legal separation or divorce
- ☐ Credit problems, judgments, tax liens, bankruptcy
- ☐ Decreased performance after lunches involving alcohol
- ☐ Frequent illnesses or accidents
- ☐ Arrests or warnings while under the influence of alcohol or drugs
- ☐ Isolating from friends, family and social activities

Attendance Problems

- ☐ Arrive late and/or leaving early
- ☐ Taking "long lunches"
- ☐ Not returning to work after lunch
- ☐ Missing appointments
- ☐ Unable to be located
- ☐ Ill with vague ailments
- ☐ Absent (especially Mondays/Fridays)
- ☐ Frequent rest room breaks
- ☐ Improbable excuses for absences
- ☐ Last minute cancellations

Self-Care vs. Car Wrecks: A Compassion Fatigue Story

BY ANONYMOUS

I am smart. I really enjoy using my smarts to solve problems: logic problems, crossword puzzles, strangers needing directions, my clients' problems, my friends' problems, and my family's problems. But, fixing problems has a sinister side, just like any addiction, and one can develop compassion fatigue.



The best way to explain “compassion fatigue” comes from my therapist. During a session,

as I was throwing off my defensive statements to her regarding “not caring” or “it’s not my problem,” she openly scoffed that I enjoyed fixing other’s problems the same way alcoholics drink beer. She observed that I would never be the person who just didn’t care. She is so right. I like helping people. I like being smart and solving problems. I discovered, however, that the bad side of caring too much and about the wrong things can lead to not caring at all about most everything.

My story starts sometime in 2014. On my way to work, I started (at least once a week) contemplating driving my car off a seven-to-eight foot cliff overlooking the railroads. At the time, my family law practice was thriving, and I doubt anyone could have known the feelings and thoughts that I was having. The thoughts increased in frequency, but each time I had these thoughts, I always convinced myself not to do it because I couldn’t guarantee that I wouldn’t kill myself or inflict life-long trauma, which would just cause more problems. I didn’t want to die. I just wanted a break from my life. However, each day I invested a little more time in trying to plan how I could do it and manage to get a short stint in the hospital

and a much-needed break.

I tried so many things to stop the thoughts and get over being so tired all the time. I tried vacations. I went to the beach, the mountains, Florida, and New York City. But I’d be exhausted before I left on the trip and even more exhausted upon my return, faced with catching up on the backlog. Not only didn’t they fix my problem, vacations seemed to exacerbate it.

Diet and exercise helped somewhat. I was running a 5K a month and participating in Crossfit and Spartan races. I was the most physically fit that I have ever been in my life during this same time. No processed foods for me. This was wonderful compared to my

chubby, middle-school days where I hated the PE and would eat an entire pan of Rice Krispy treats in a single sitting. Unfortunately, except for the hour or so that I was participating in the exercise or event, it really didn’t change any of my thoughts or my mentally exhausted state.

Sleep was minimal during this time. I routinely woke up at 3 AM and couldn’t go back to sleep because of thoughts racing through my head. I stayed up late at night rehearsing my statements for trial, arguments that would usually never even be spoken. I considered going to the doctor, but I had heard strange things about sleep meds like Ambien. I didn’t want to murder someone in

my sleep or go parading around my neighborhood in the nude, so I stayed on course with my preferred plan—contemplating my car wreck/hospital stay.

This went on for about a year, until I had had enough. I decided I would address my problem, even though I had no idea what my problem actually was at that time. Unaware of how much I was subverting my needs to everyone else's, my life presented the perfect opportunity for me to finally focus on myself. My 11-year-old was going on a school trip for almost a week with no access to a cell phone or me. You see, I didn't want to upset her or inconvenience her, because I was responsible for driving her to school, helping her with homework, and generally making sure her life was good. Plus, her not having a cell phone meant that if she had any problems, then she couldn't call me to fix the problem. In addition, I didn't have court that week either. My clients didn't have pressing problems to fix! So, I dropped her off at school and watched her get on the bus. Now I could finally focus on me and this problem, whatever it was. I was sure a trip to the doctor would somehow fix it all.

My regular doctor couldn't see me. I started to get frazzled and after casting about for ways to avoid doing so, I finally relented and told my husband that I needed to go to the ER. At the ER all went smoothly until the doctor asked me the standard question, "Are you suicidal?" Even though I knew the question was coming, I hadn't rehearsed or even thought about what I'd say. However, the most profound words came to me regarding my current state of mind and problem. I blurted out, "I don't think so, but I don't know what I am going to do if I have to hear another f***ing person's problems." With that statement I meant "person" to include every single living thing on this earth: family, friends, clients, political activist groups, donation seekers, Leonardo DiCaprio, random strangers asking for directions...EVERYONE! He responded with, "So possibly homicidal or suicidal," and laughed kindly.

I got through that day and was given a prescription for the normal stuff doctors hand out for depression and anxiety. I scheduled some follow-up doctor appointments. It was a lackluster resolution. None of the medications worked for me; they only exacerbated my problems over the following week. I discovered I don't synthesize those medications well, so they were not going to be

an option for me, which was thoroughly disappointing. Not to mention, my kid was back and court appearances were looming. This problem seemed to now be out of hand. I couldn't just return to the way things were before, but did not know what to do differently.

It was at my first follow-up appointment with my doctor that my "problem" started getting defined. My doctor said that I didn't have a support system. Eureka! I KNEW IT! I finally had confirmation that I was surrounded by hapless, greedy, needy people that constantly took and took and took from me. So it turns out they were all jerks after all! Then he went on to say, "You have no support system because you don't tell anybody what is going on and instead just try and handle it all on your own."

Wait.

What?

But there it was. I was the jerk. I thought I was so smart. That I was above it all. That I did not need community. You did. But not me. I was different and special. The realization was gut wrenching.

I was told I could resolve my issues by "just sharing." Ah, ok. Maybe "just sharing" is easy for you. Not me.

Here is where my anxiety started amping up. In order to be effective, my sharing had to be regardless of how others responded to what I was sharing. And I needed to share it all, especially the toes-curling-in-my-shoes stuff. I discovered that I was really a people-pleasing, low-self-esteem fraud. I faked life well. I pretended to have it all together, but I was constantly speaking unkindly to myself. I created unrealistic expectations for myself and was way too consumed by others' perception of my life. Or what I imagined their perception to be. In sharing, I started really discovering what was going on in my head and my life and why I was always so tired. I was exhausted because I was battling this inner jerk. As I shared this with my support people, I realized that I could change the script going through my head. Noteworthy, my support system was and still is a work in progress. Some people didn't make the cut and I limited their role in my life. I am working on me and I need truly supportive friends and allies to help with that project.

The lone soldier approach doesn't work. Neither does working by yourself on problems that you aren't properly trained to fix. Reluctantly, my next step was an appointment

for therapy with a psychologist. I hated the thought of talking to a therapist, but it didn't matter, because I needed to talk to one. Just as many people with legal problems need an attorney but hate coming to and paying for one, I knew going to a therapist was the best thing to do. I was sure a therapist would want to talk it out and want me to say that I was depressed, and anxiety-ridden, and admit that attorneys just have sucky lives. Well, she didn't. She told me about "Compassion Fatigue." It's like burnout, but it is from dealing with other peoples' problems. For example, like where you solve people's problems for a living but also put yourself in a position to have everyone come to you with their problems because you really like solving others' problems, and they don't know to stop because you haven't told them to stop and now you're ill because of it. She explained that in her profession, compassion fatigue is common and they have workshops, conferences, and retreats to deal with compassion fatigue/vicarious trauma.

The first thing that she taught me was that I need to put myself first. If I am exhausted, I am of no use to my clients, my family, or anyone. She spoke about the teapot needing to be full in order to pour tea out for others. I left therapy with homework. My homework was to do three things over the weekend that would bring me joy. She could have asked me to murder someone and it would have been easier. I seriously couldn't come up with anything. I gave up golf years ago because I didn't have four to five hours to be detached from the world. This rationale is why I gave up most things that I enjoyed: I was too busy solving others' problems or being there for others to be there for myself. I completed her homework, but not until stressing about it all weekend. I ended up with a nice bath, Rice Krispy treats, and moving furniture around in my house. I stumbled on to the big secret to joy that weekend—it comes from the simplest of things. I am happy to say I can easily come up with three things to do everyday to bring myself joy.

Next, I learned how to prevent compassion fatigue with self-care. Honestly, I had no idea what that meant other than taking a bath and getting my eyebrows done. Being an attorney really put me in a good place to help myself here. I started doing research and reading about self-care. After a few years of managing this, I can say that my self-care seems to be

CONTINUED ON PAGE 37

in the processes designed to help safeguard entrusted funds is good for clients because it ensures that their funds remain protected. Additionally, a collateral benefit to the client of an efficient trust account manager is increased time and energy to focus on the substance of the representation.

3. Peace of Mind – Good for Lawyers

There are risks associated with maintaining one or more trust accounts, and those risks can be a source of anxiety for lawyers. Those risks include employee embezzlement and fraud. History has shown that trusted staff upon whom lawyers rely to help manage and maintain entrusted funds may instead help themselves to money in the trust account. In many instances, this embezzlement could have been detected if the lawyer had regularly performed three-way reconciliation of the trust account and quarterly random transaction reviews in accordance with the applicable rules. The same is true regarding discovery of fraud. Increasingly, lawyers' trust accounts have been targeted by external actors perpetrating fraud. In some cases, the fraud is promptly discovered when a rightful recipient of a large sum of money does not

receive payment because a scammer was successful in getting the lawyer to disburse the funds to the thief and not the true owner. However, in other cases, the fraud is more passive and ongoing in the form of spoofed trust account checks for small amounts that can go undetected unless the lawyer regularly performs the prescribed reconciliations and reviews. Another source of anxiety for lawyers is the random audit. Anyone who has ever been the subject of a random audit knows the angst that typically accompanies the news that you will be audited. While nothing can entirely alleviate this stress, confidence in knowing that the trust account is properly maintained and holds the funds you are required to keep in trust for your clients can certainly help minimize any anxiety. I have a friend who is fond of saying, "If your house is clean, you don't mind company." This is true of reconciliation and review as pertains to a random audit—when routinely performed, three-way reconciliation and quarterly random transaction review make the prospect of a random audit less of a concern. As lawyers, peace of mind can be that elusive holy grail. Performing three-way reconcilia-

tion and quarterly random transaction reviews can support peace of mind, at least as it relates to trust account management, thereby moving lawyers one step closer to that seemingly impossible aim. I can think of many reasons why peace of mind is a good thing for lawyers, but I cannot conceive of even one reason why it is not.

There you have it. The case is closed, my argument is finished. I hope I have persuaded you, even if you dread the tasks, that regular three-way reconciliation of the general trust account and quarterly random transaction review of all trust and fiduciary accounts are good things worthy of the routine commitment of your time and attention. Such a commitment is our ethical duty, and regular completion of these acts can increase proficiency and efficiency in the execution of these tasks. Also, regular (at least quarterly) three-way reconciliation of the general trust account and quarterly random transaction review of all trust and fiduciary accounts can help foster lawyer peace of mind. Promotion of lawyer peace of mind is good for you, good for the public, good for the profession, and good for your clients. ■

LAP (cont.)

balancing the joys of a 12- year old with the obligations of a 40+ year old. Sleep is first and foremost. I discovered that if I want good sleep, then I need a schedule for sleep, much like my morning schedule to get ready for my waking hours. No matter how good of a parent, attorney, caregiver, or friend that I can be, if I have eight to ten hours of sleep then I can be 500 times better. Second, I deserve just as much love and kindness as everyone else. I buy myself flowers. I skip work on Friday afternoons to watch *Star Wars* and Marvel movies. I really try to connect with the things that I enjoy. I have found that meditation and mindfulness greatly help me connect to finding those things that bring me joy and understanding the things that impede my joy. Lastly, practicing meditation and mindfulness helps me let go of a lot of useless thoughts and worry.

My new self-care regimen also meant a big change at work. I needed to set up and maintain good boundaries with clients. I don't give my cell phone number to clients

anymore. I don't email with my clients on the weekend, and they know upfront to never expect a response from me on the weekend. My clients need to be more invested in their case than I am, and they also need to have good self-care. I have advised lots of clients to seek therapy because I recognize their mental health issues or poor self-care. It makes so much sense because poor self-care can lead to numerous marital issues, thereby leading them to my office. Being more present to my needs has put me in a good place to give my clients really good advice for their lives and inevitably their cases.

I still really enjoy fixing other's problems, but I really enjoy working on my own, too. For years I have heard the remarks about attorneys fixing others' problems and neglecting their own. While that may be true, I also believe that attorneys have a very good skill set for solving problems, even when those problems are their own. As I look back I have enjoyed my learning experience and am so grateful for where I am today. I still want to solve others' problems, especially in the form of sharing my experience to help peers who

may be suffering from compassion fatigue. I am now a LAP volunteer and have shared this story at CLE events. It has been cathartic for me. So many lawyers have told me they relate to my story. It is not so hard sharing now. Not hard at all.

If you think my story sounds even remotely close to what you are going through, please look at the LAP website under "compassion fatigue" for some wonderful info and advice and call LAP. Hindsight being 20/20, if I had looked at that website earlier, then I could have prevented about a year of my suffering and started on the road to recovery sooner. ■

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers, judges, and law students, which helps address problems of stress, depression, alcoholism, addiction, or other problems that may impair a lawyer's ability to practice. If you would like more information, go to nclap.org or call: Cathy Killian (western areas of the state) at 704-910-2310, or Nicole Ellington (for eastern areas of the state) at 919-719-9267.

How judges can mitigate vicarious trauma

BY JUDGE VICTOR REYES

MAY 9, 2022, 11:19 AM CDT



In January 2011, I presided over a jury trial in which a 14-year-old child was sexually assaulted and brutally killed by a neighbor who left her body in a trash bag in a field. Daily, I was completely overwhelmed by what I was seeing and hearing and by the stressors of managing the proceedings.

During the trial, the prosecution asked that I review a photo that eventually would be introduced as evidence to the jury. During my 25 years as a public defender and on the bench, I had seen hundreds of grisly pictures in civil and criminal matters. Still, I was seriously triggered by the horrific picture of this deceased young girl who

was the same age as my own children.

Internally, it was unbearable; externally, I had to be stoic and show no reaction during the bench conference on whether the photo was admissible.

Considerations of fairness and procedural justice outweighed my natural human response. The irony of this moment was the decision I had to make as the judge: whether the photo from the scene was so disturbing that it would prejudice the 12 human beings in the jury box against the defendant.

My visceral reaction included clammy hands, shortness of breath and a stomachache. I apologized after the trial to my court reporter for quickly handing her the photo (face-up), so I could rush it out of my sight. The effects I suffered from seeing that picture outwardly manifested two days later when I sternly scolded the sheriff's security detail assigned to the courtroom over something that was ultimately my responsibility.

A photo of me presiding over the trial is one I still use when training on the impact of trauma because it vividly captured the stress and turmoil going on inside. Regularly, I have to drive by the field where the child was found, and I always think of her. I feel a tightness in my body as I type these words 11 years later.

I share this story because most people think judicial officers should have complete control over their emotions, and they are somehow insulated from their exposure to traumatic events. While I attended lectures and trainings about vicarious trauma and how to mitigate its effects, I never fully integrated what I heard into my personal or professional life until later in my career. My “nothing phases me, I’ve seen it all” attitude was based on a lack of awareness of the gross and subtle effects of vicarious trauma.

Trauma is inherent to the work of the judicial system and vicarious trauma and stress are natural by-products. [Vicarious trauma](#) has been defined as the cumulative inner transformative effect of bearing witness to abuse, violence and trauma in the lives of people who we care about and are committed to helping. Although vicarious trauma can be a natural and normal occurrence for workers who provide care to others, failure to address the causes and symptoms can lead to negative outcomes in one’s life.

[Effects of unaddressed vicarious trauma](#) may include a negative world view, perceived threats to personal safety, loss of spirituality, or changes in self-identity, fear, empathetic distress/burnout, loss of relationships, mental or physical health issues, depression, or even coping with stress through food or substances. Political considerations may lead a judge to distrust openly sharing ideas and experiences of trauma and distrust that what is said will be understood; or he or she might simply want to numb their brain after dealing with court hearings all day.



Judge Victor Reyes in court.

One method of mitigating the effects of trauma is developing resilience through a practice of wellness. Personal wellness means committing to a way of life. Wellness has to be embodied on a physical, mental, emotional and spiritual level. This is a slow, lifelong process from which the rewards are immeasurable.

My own health impact from vicarious trauma manifesting into stress eating was so devastating that my doctor’s diagnosis was either a massive heart attack or a stroke. Looking at a potentially shortened life span, I made the commitment to myself to become healthier. Only by recognizing my destructive behaviors and working on them would I be more available to my family and the community I swore to serve.

Since 2014, I have developed presentations and have led wellness workshops and sessions for the National Council of Juvenile and Family Court Judges and other organizations on techniques that enhanced my judicial well-being and lessen the effects of trauma. These are some of the many practical tools my experience and research indicate would help mitigate stress:

1. Maintaining a regular schedule of rest, relaxation, along with proper nutrition. There is plenty of information about [food and drink that nourish—instead of depleting—the body](#). Drinking enough water daily has an impact on our mood, clarity of thought and balances bodily functions. Relaxation may include reading, soothing music, setting aside computers, television or the phone at least one hour before going to bed.

2. Mindfulness practices [have been described](#) as the “slowing down one’s mental processes enough to allow one to notice as much as possible about a given moment or situation, and then to act thoughtfully based on what one has noticed,” according to a 2016 Federal Judicial Center paper called “Mindfulness and Judging” by Judge Jeremy D. Fogel. The practice has been described as approaching each moment with an open awareness. Meditation practices with a focus on the breath to calm the body and minimize our “monkey mind” chatter can be helpful. Guided meditations with visualizations—especially of a place of sanctuary—breathing techniques designed to access the parasympathetic nerve system, and using the chair on the bench or in chambers to learn how to ground the body help stabilize attention and the bio-physiological processes. Yoga and other forms of movement also connect us deeper and require us to be present to reap their benefits.

3. Connection with others and the world around us allows us to be heard, which breaks the feeling of isolation and reminds of us our common humanity. Judges feel more supported by sharing their thoughts in a healthy, constructive way with family, friends and colleagues. Going outside of ourselves and connecting to nature through techniques such as [forest bathing](#) are being prescribed and recommended by doctors, therapists and insurance companies.

4. Developing self-compassion can only strengthen our compassion for others. Making a deep commitment to yourself is a mindset, especially when we are mired in self-critical thought and self-judgments. Through this practice, we celebrate when we are doing well, are grateful for our good qualities, recognize that change is constant and acknowledge that we are lifelong learners.

To encourage effective leadership, promote compassion and healthy decision-making, the NCJFCJ incorporates aspects of the above practices and other elements of wellness at its conferences and trainings. The NCJFCJ has created the [Judicial Wellness Initiative](#), which provides information on breathing techniques, nutrition, physical exercise, mindfulness practices, self-compassion

and advice from national experts on developing the tools needed to reduce stress and mitigate vicarious trauma. States are encouraging judicial officers to access their Employee Assistance Programs for confidential counseling sessions. Some states have even created specific wellness programs for judges and court employees.

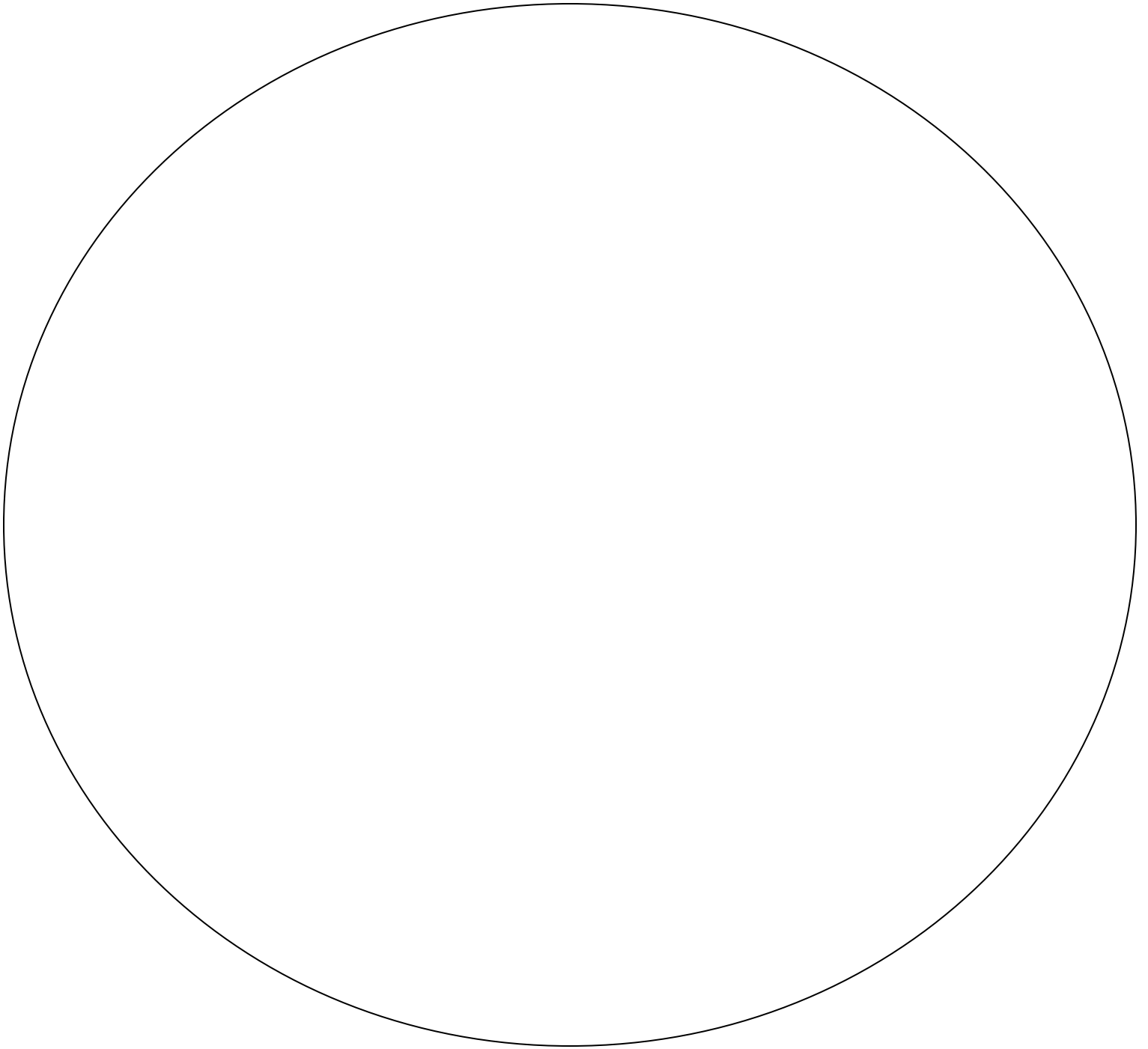
A healthier and more self-compassionate judicial officer makes for a better decision-maker and community leader and should not be seen as weakness. To the contrary, it takes an incredible amount of honesty and self-awareness for anyone to admit the adverse impact of our work on our personal and professional lives so we can begin the process of accessing the tools available to develop resiliency. A judicial system with healthy, balanced professionals meeting the needs of those who are relying on the judiciary for help will result in more just and humane results for the community.

Judge Victor Reyes is the judge-in-residence for the National Council of Juvenile and Family Court Judges. He served as a judge from January 1999 through Dec. 31, 2014, in the 10th Judicial District located in Pueblo, Colorado. Reyes has facilitated international and nationwide training on issues related to mindfulness, domestic violence, the effects of vicarious trauma on judicial officers, judicial leadership and wellness. He currently leads yoga and meditation classes for incarcerated people in several facilities in Colorado.

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This column reflects the opinions of the author and not necessarily the views of the ABA Journal—or the American Bar Association.

WHAT'S ON YOUR PLATE?



Suppression of Evidence 101

1

6 Reasons to file a suppression motion.

- 1- You have great facts and the law is good for you. You should win.
- 2- You need to know what a witness is going to say and they will be under oath.
- 3- Your client needs to hear how bad things are.
- 4- It is a serious case and you need to preserve every issue.

2

More reasons to file suppression motions.

- 5- There is no defense other than suppression and if you win, the case is over.
- 6- Some DA's don't want to do the work and will make a better offer.

3

TYPES OF EVIDENCE YOU CAN SUPPRESS

- 1- IDENTIFICATION of your client.
- 2- STATEMENTS of your client.
- 3- PHYSICAL EVIDENCE that hurts your client's case.

4

STATE ACTION NOT ALWAYS REQUIRED FOR IDENTIFICATION SUPPRESSION

- ▶ When a tainted IDENTIFICATION is involved, you do not always have to have state action.
- ▶ The issue is the reliability of the identification.
- ▶ It is a issue of fundamental fairness or due process.
- ▶ Though the Federal Courts require State action, you can raise the issue under the State constitution without State action.
- ▶ In North Carolina raise an identity suppression issue under the North Carolina Constitution, Article I, §19 if there is not state action, but there are facts tainting reliability.

5

3 REQUIREMENTS FOR SUPPRESSION OF STATEMENTS MADE PRIOR TO FORMAL ARREST

- 1- Your client must have been in CUSTODY when the statement was made.
- AND
- 2- Your client was questioned by police OR the police said something to goad your client to respond.
- AND
- 3- Your client did not waive his Miranda rights.
- *** There can also be a violation when client has said doesn't want to talk and police continue to question.

6

VIOLATION OF THE RIGHT TO COUNSEL SITUATIONS FOR STATEMENT SUPPRESSION

1- Your client was charged **AND** has asked for a lawyer (or has a lawyer), **AND** someone working for the police elicited a statement from your client.

The client can be in or out of custody.

2- A) Client is in jail **AND**

B) Client has asked for an attorney **AND**

C) Police go to see your client **UNSOLICITED** by the client to question about the case for which is in jail.

7

RULES YOU MUST OBEY

1- Must file motion **no later than 10 working days** after receiving notice of intent to use evidence by the state. N.C.G.S. §15A-976.

2- Motion **must be accompanied by an affidavit that alleges facts** to support the violations you allege. If your motion doesn't state sufficient facts on its face to support the violations you are alleging, the motion may be dismissed without a hearing.

3- Unless your client's **standing** to raise the claim is obvious, the motion or affidavit must state why he/she has standing.

8

PRACTICAL CONSIDERATIONS

1- Always **cite the State Constitution** in addition to the Federal.

2- It is a good idea to **prepare a memorandum of law** to support your argument. Unless judge will have a problem with it, do not file it prior to the hearing.

3- The judge **MUST** rule on the motion in the session it is heard **UNLESS** you agree on the record to the ruling being out of session, or out of term, or out of county.

9

SELF TEST ON SUPPRESSION

1) Name 3 types of evidence that may be suppressed through a suppression motion?

2) List 5 tactical reasons to file a suppression motion other than that you have great facts and should win?

3) List 3 technical requirements that may cause a suppression motion to be denied without a hearing if you fail to meet these requirements?

10

ANSWERS TO QUESTION 1
SELF TEST ON SUPPRESSION

1) Name 3 types of evidence that may be suppressed through a suppression motion?

a. Identifications

b. Statements

c. Physical evidence

11

ANSWERS TO QUESTION 2 SELF TEST ON SUPPRESSION

2) List 5 tactical reasons to file a suppression motion other than that you have great facts and should win?

a. The DA may make a **better plea offer** rather than having to do the work to do the motion, or may fear losing and make a better offer.

b. You get to **question witnesses** who may not consent to be interviewed, and you get their answers under oath and on the record for later use.

c. Your **client will see the evidence** and hear testimony against him so that he will have a better idea of the case against him and may become more realistic about the case.

d. It is a **serious case** and you need to **preserve** all the **issues**.

e. Your **only defense** is to get the evidence suppressed.

12

4

ANSWERS TO QUESTION 3
SELF TEST ON SUPPRESSION

3) List 3 technical requirements that may cause a suppression motion to be denied without a hearing if you fail to meet these requirements?

a. If it is not **filed in a timely manner**. That is within 10 days after they State gives you notice of intent to use the evidence if that notice was received at least 20 days before trial.

b. If it is not accompanied by an **affidavit**.

c. If it **does not raise a legal issue on its face** that would justify suppression and that is **supported by facts** set forth in the motion that show the issue exists.

13

Problem 1

About 10:30 pm two officers on bike patrol saw two black males standing in the roadway in a part of the town that is known to have a high drug trade and usage. One of the men, A, was known to the officers as a drug user and alcoholic. The second man, B, who later becomes the defendant, is not known to the police. According to the police reports generated, the man B handed something to the man known to the police, A. The officer suspected a drug transaction and moved towards the men to investigate. The two officers approached the two men. One of the officers saw that man B appeared to have something clutched in his fist which was not visible. The officer upon approaching the man, immediately, ordered man B to put his hands on his head with his fingers interlaced on his head. Man B put his hands on his head, but did not interlace his fingers. The officer then grabbed Man B's arm and pulled it in front of Man B. The officer continued to order Man to place his hands with interlocked fingers on his head. Man B refused to comply. The officer then began to tell Man B that he would taze Man B if he did not get on his knees. Man B got on his knees. The officer tried to force Man B to put his hands behind his back and continued to order him to open his hands. Man B failed to comply. The Officer pushed Man B onto his chest, and the other officer tazed Man B. Man B was handcuffed. Man B was found to have a crack rock inside a Newport cigarette box that was crushed in his hand.

14

Issues in Problem 1

1. Information known to the police was not sufficient to make the encounter more than a consensual encounter from the outset because it was based wholly on a hunch.

2. No reasonable suspicion existed because Officer didn't know anything specific when he approached Man B. Suspected he knew that something was in D's hand, but didn't know what. Didn't ask any investigatory questions. Immediately exerted authority over D before establishing any more information by questioning. No particularized suspicion as to D or what crime if any was committed.

15

5

Additional Issues in Problem 1

3. D was not free to leave as soon as the officer began to order him around. Was seized no basis upon which to seize.

4. The most that the officer was entitled to do was to conduct a consensual encounter, during which the D had the right to refuse to comply.

5. The officer exceeded the bounds of his authority based on his current knowledge which made the whole thing suppressible.

16

Problem 2

An early morning cleaning crew in a church hears a noise and believes there has been a breaking and that the person is still in the building. Police are called. Police respond and reportedly see a man in the parking lot carrying wine. When the officer yells at the man to stop, he runs into the woods. Client is apprehended in the woods and is handcuffed. Police are escorting client to the police car, and he has not been Mirandized or waived his rights. Client says, "this is a motherfucker". The policeman says back to client, "Breaking into a church is a motherfucker." Client responds, "the door was open."

17

Issue in Problem 2

1. Client is in custody at the time the exchange occurred. No Miranda warning had been given or rights waiver made. Was the officer's remark intended to get a response?

If so that is questioning?

18

Problem 3

A home invasion robbery occurs. One of the perpetrators was wearing a mask and was described as being 6' 2", 200lbs., black male with medium length hair. A few days later client is stopped. Client is 5'11", 175lbs. black male with short braids that stick out from his head. Client is shown to the witness. At the time the witness views the client he is sitting alone in the rear of a marked patrol car, and the officer told the witness at the time they contacted the witness to view client that, "they thought they had the guy".

19

Issues in Problem 3

1. It is a single person show up. It is per se suggestive.
2. It is not shortly after the crime, so there is less reason for a show up. No need to keep looking or to know if should let person go immediately.
3. Remarks of the officer are inappropriate and suggestive. In addition, the fact the person is in side a police car is suggestive.
4. Person doesn't really fit the description.

20

Issues in Problem 4

1. The application fails to implicate the premises to be searched. No connection between client living in Durham 4 months before and having stolen property confiscated from him in Durham, and new apartment in Carrboro.
2. The affiant makes a personal conclusion that probable cause exists without supplying any factual information to establish that probable cause exists to search for the property at the place to be searched. Does not set out facts that support his conclusion.
3. The information concerning break-ins and burglaries was stale as to a search for the current residence of the accused because it was between 4 to 7 months old on the date of the application for the warrant.

21

More issues in Problem 4

4. Property that was allegedly stolen in the break-ins and burglaries being investigated that previously was found to be in the possession of the accused at his previous residence had already been confiscated by the Durham Police Department on May 3, 2004. There was no reason stated in the application to believe that the accused was still in possession of additional stolen property and no facts stated to establish that if such property was in the accused's possession that it was probably located at his new residence.

5. Investigator Vaughn executed a warrant outside his territorial jurisdiction which is a violation of N.C.G.S.15A-247.

Observations are fruit of the poisonous tree.

22

More Issues in Problem 4

6. Because the warrant was facially invalid, the investigators were not legally in the place searched and any observations made by them during the search must also be suppressed. Observations are fruit of the poisonous tree.

7. The warrant application is for a general warrant, to look for things that they cannot name that they hope might be there, and that is prohibited by North Carolina Statutes, the Constitution of North Carolina and the Constitution of the United States.

23

File No.	STATE OF NORTH CAROLINA	In the General Court of Justice
SEARCH WARRANT		District Court Division
In the Matter of		ORANGE County

Date Issued	Time Issued
8-4-04	11:50 AM ☒
Name of Applicant	
Investigator Stephen Vaughan	
Name of Additional Affiant	
Name of Additional Affiant	

RETURN OF SERVICE	
I Certify that this Search WARRANT was received and executed as follows:	
Date Received	Time Received
08-04-04	1200 PM ☒
Date Executed	Date and Time of Return
08-04-04 / 1235	
☒ I made a search of 306 Estes Dr Apt. J-13, Cambridge, NC	
_____ as commanded.	

☒ I seized the items listed on the attached inventory	
☐ I did not seize any items.	
☐ This warrant was not executed within 48 hours of the date of issuance and I hereby return it not executed	
Signature of Officer Making Return	Time
W. J. [Signature]	3:30 PM
Department or Agency of Officer	
Carroll's Police Dept	
This Search Warrant was returned to me on the date and time shown below	
Date	Time
8-4-04	3:30 PM
Signature	
[Signature]	
☐ Deputy CSC ☐ Asst. CSC ☐ Clerk of Superior Court ☐ Magistrate ☐ District Ct. Judge ☐ Superior Ct. Judge	

APPLICATION FOR SEARCH WARRANT

I, Investigator Stephen Vaughan of the Durham City Police Department

(Insert name and address; or if law enforcement officer, name, rank and agency)

being duly sworn, request that the court issue a warrant to search the person, place, vehicle, and other items described in this application and to find and seize the property and person described in this application. There is probable cause to believe that SEE ATTACHMENT

(Describe property to be seized; or if search warrant is to be used for searching a place

to serve an arrest warrant or other process, name person to be arrested)

constitutes evidence of a crime and the identity of a person participating in a crime,

SEE ATTACHMENT

(Name Crime)

, and is located

(check appropriate box(es) and fill-in specified information)

☒ in the following premises 306 N. Estes Drive EXt. Apartment J13 Carrboro North Carolina
(Give address and, if useful, describe premises)

(and)
☐ on the following person(s) _____
(Give name(s) and, if useful, describe person(s))

(and)
☒ in the following vehicle(s) Honda Civic with NC RZV-9200
(Describe vehicle(s))

(and)
☐ N/A
(Name and/or describe other places or items to be searched, if applicable)

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: _____

SEE ATTACHMENT

SWORN AND SUBSCRIBED TO BEFORE ME _____ H

Date

8-4-04

Signature

(Signature of Applicant)
Stephen Vaughan

☐ Deputy CSC ☐ Asst. CSC ☐ Clerk of Superior Court ☒ Mag. ☐ Judge

☐ In addition to the affidavit included above, this application is supported by additional affidavit(s) attached, made by _____

☐ In addition to the affidavit included above, this application is supported by sworn testimony, given by _____

This testimony has been (check appropriate box) ☐ reduced to writing ☐ tape recorded and I have filed each with the Clerk.

If a continuation is necessary, continue the statement on an attached sheet of paper with a notation saying "see attachment." Date the continuation and include on it the signatures of the applicant and issuing official.

ATTACHMENT FOR APPLICATION FOR SEARCH WARRANT

IN THE MATTER OF: *Client*

306 N. Estes Drive Ext. Apt. J13 Carrboro North Carolina

I, Investigator Stephen Vaughan being a duly sworn officer, request that the COURT to issue a warrant to search the place, and any other items or places of control by the person described in this application; and to find and seize the property described in this application. There is probable cause to believe that stolen property and personal property of several victims of the crime of Burglary North Carolina General Statute 14-51 and the crime of Felonious Larceny North Carolina General Statute 14-72 are contained in the residence to be searched. The premise to be searched is located at 306 N. Estes Drive Ext. Apt. J13 in Carrboro, North Carolina. The suspect in this crime is *Client*.

The suspect is a Hispanic male, born on July the 18th, 1981. The suspect was in the possession of stolen laptop computers that were taken during a series of Burglaries that occurred in the Belmont Apartment complex located at 601 S. LaSalle St. in Durham North Carolina.

The affiant swears to the following facts to establish probable cause for the issuance of a search warrant. I, Investigator Stephen Vaughan, am a sworn law enforcement officer since 1997 and have been with the Durham City Police Department since 1999. I am currently an Investigator with the Durham City Police Department's Criminal Investigation Division and am primarily assigned to investigate crimes involving domestic violence. I have been involved in countless investigation ranging from domestic violence assault cases to homicide investigations. I have assisted district property crimes investigators with commercial and vehicle breaking and entering investigations, including surveillance operations. I have received training in the area of criminal investigation over my years with the department.

The affiant has been investigating a series of Burglaries and Breaking and Entering in the Belmont Apartments located at 601 S. LaSalle St in Durham North Carolina, along with District 3 Property Crimes Investigator A. Tyndall. I have also been assisting Sgt. J. Sheley with Duke University Police Department with a related case that occurred at 1913 Erwin Rd in Durham North Carolina. The incidents have occurred between the dates of 1/17/04 to 4/18/04. The suspect has entered the apartments through an unsecured door of the victim's residence between the times of 0130 hours and 0600 hours.

The suspect has taken items from each of the residence when entry was made. The suspect has taken one Fuji Finepix Digital camera Model A310, one Canon L 35mm camera, one pair of pink women's wool gloves made in Spain, one Jetta Laptop computer silver in color with serial number TN4M17008079, two Dell Laptop computers purple incolor, one Canon Power Shot Digital camera model SD100 with serial number 7023521104, a pair of men's Bape sneakers gold and silver in color size 7 1/2, and one


MAGISTRATE / JUDGE


APPLICANT

DATE: *8-4-04*

DATE: *8-4-04*

ATTACHMENT FOR APPLICATION FOR SEARCH WARRANT

IN THE MATTER OF: Client

306 N. Estes Drive Ext. Apt. J13 Carrboro North Carolina

Men's Swiss Army Watch stainless steel in color with a black face and smooth wristband with links.

The victim's reported that they had downloaded photographic images onto their computer hard drives and had photographs stored in their digital cameras. The stored photographic images contained possible photographs of other victims of burglaries in the Belmont Apartment complex. The suspect may have downloaded these images onto his computer system or printed images of his next intended victims. I believe this to be true, because during my investigation I learned that four of the victims participated in the same social events and lived and associated in the Belmont Apartment complex.

On May 3rd, 2004 Investigator Pennica, with Durham City Police Department's District One Property Crimes Unit, responded to 1703 Ruffin St in Durham North Carolina. Uniform Patrol Officers, called him to location in reference to a subject in the possession of six laptop computers, several of which were reported to be stolen. The subject in possession of the stolen laptop computers was Client, with a date of birth of 1/1/2001. The suspect was in possession of three computers that were taken from the Belmont Apartment complex. These three computers were the Jetta laptop computer silver in color with the serial number of TN4M17008079 and two Dell laptops that were purple in color. The computers were confirmed to be stolen and linked back to the owner reporting the theft. Investigator Pennica interviewed and gathered Client's information for further investigation. Investigator Pennica learned from Client, that he was storing the computers in his room at 1703 Ruffin St. in Durham North Carolina. The computers were seized by Investigator Pennica and turned into the Durham City Police Department Property and Evidence Unit.

During the follow up investigation of Client it was learned that the he had gathered his belongings, including several cameras, and left 1703 Ruffin St. Mr. Client new location was unknown. We also learned that Mr. Client had left his North Carolina Driver License with Investigator Pennica on May 3rd, 2004. It was then learned that Client had renewed his driver license on May 5th, 2004, but the he retained the 1703 Ruffin St address in Durham North Carolina. Client, was making an obvious attempt to conceal his new location from the investigators involved in this matter. It was furthered learned that the suspect sold his vehicle before leaving the Durham area. Client owned a Honda Civic with North Carolina registration plate RZV-9200. On August 4th, 2004, I had a conversation with Investigator Lamb with the Carrboro Police Department revealed that a Honda Civic bearing RZV-9200 was

MAGISTRATE / JUDGE

APPLICANT

DATE: 8-4-04

DATE: 8-4-04

ATTACHMENT FOR APPLICATION FOR SEARCH WARRANT

IN THE MATTER OF: Client

306 N. Estes Drive Ext. Apt. J13 Carrboro North Carolina

Client listed on Client's lease agreement for 306 N. Estes Drive Ext. Apt. J13 in Carrboro North Carolina, and in fact, had recently been parked at that address.

During the investigation further information about Client was gathered. I learned that the suspect had close friends and may have lived in the Duke Manor Apartments at 311 S. LaSalle St in Durham North Carolina prior to moving into 1703 Ruffin St. The Duke Manor Apartment complex is located adjacent to the Belmont Apartment complex which offered the suspect the ability to conduct surveillance on the residents of the complex and the ability to quickly exited the area and return to a safe hiding location.

Client's physical description is in close relation to the description of the suspect that entered the homes of the victim while they were asleep and awakened by his presence. The suspect in the Burglaries is described as Indian or Hispanic male with olive to dark complexion. The suspect is 5'5" to 5'9" in height and weighing between 140 to 170 lbs and medium build. The suspect is stated to have dark brown or black hair that is close cut.

The physical description of Client is a Hispanic Male with light to medium skin complexion. He is 5'6" in height and 150 lbs in weight and medium build. His hair is black and closely cut. This was confirmed when the suspect was arrested and photographed on August 1st, 2004. The suspect stopped by a Carrboro Police Officer for suspicion of breaking and entering into a residence. The Carrboro Officer then learned that Client had outstanding arrest warrants from the Durham City Police Department for the Possession of Stolen Property.

There is reason to believe Client still has in his possession at his residence at 306 Estes Drive Ext. in Carrboro North Carolina property that belongs to other residents of the Belmont Apartment complex in Durham North Carolina. The property being one Fuji Film Finepix A310 Digital Camera, one Canon L 35mm Camera silver in color, one pair of women's pink wool gloves that were made in Spain, one Canon Power Shot Digital camera Model SD100 Serial Number 7023521104, on pair on men's Bape sneakers gold and silver in color and size 7 1/2, and one Men's Swiss Army Watch stainless steel in color with a black face and smooth links on the wristband. Client may also have photographic images of victims from the Belmont Apartment Complex. These images maybe printed or stored in a computer.

MAGISTRATE / JUDGE

APPLICANT

DATE: 8-4-04

DATE: 8-4-04

ATTACHMENT FOR APPLICATION FOR SEARCH WARRANT

IN THE MATTER OF: Client

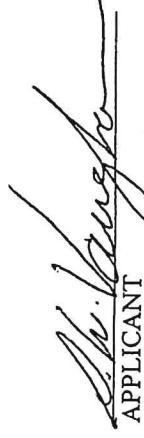
306 N. Estes Drive Ext. Apt. J13 Carrboro North Carolina

Based on the above information, I respectfully request the Court to issue a warrant to search the residence, personal property of Client, and any other rooms, including attached storage rooms of 306 N. Estes Drive Ext. Apt. J13 in Carrboro North Carolina to search for and seize any of the afore mentioned stolen property that are still believed to be in the possession of Client and stored in his residence in Carrboro North Carolina and documents that show that Client resides at the search location of 306 N. Estes Drive Ext. Apt. J13 in Carrboro North Carolina. And further seize any photographic images of know victims and any computer that is in the possession of Client



MAGISTRATE / JUDGE

DATE: 8-4-04

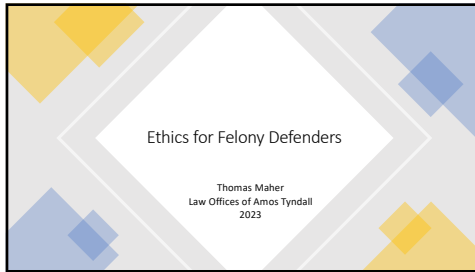


APPLICANT

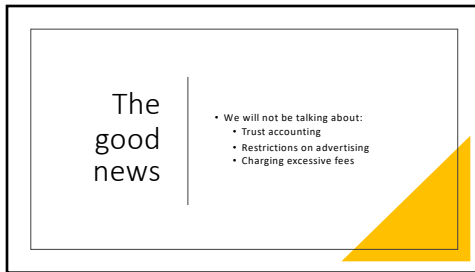
DATE: 8-4-04

Problem 5

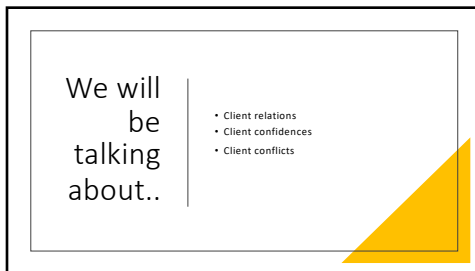
About 10:30pm Officer A sees a Honda Civic driving on Highway 64. The registration plate on the car looks old and worn so the officer decides to “run the tag” through the system. The officer learns the registration plate belongs to a Jeep Wrangler so he initiates a traffic stop. As the officer approaches the Honda, he notices the back window is spray painted and he cannot see inside of the vehicle. When the officer reaches the driver’s window, the driver informs him the window is not working and opens the driver’s side passenger window. Client is the driver and there is a female in the passenger seat. Officer notices a handgun on the floorboard of the car behind the driver’s seat. The officer removes the handgun from the vehicle for his safety. Officer B has now arrived to assist Officer A. Client informs the officer he does not have his license on him but client provides his name and license number. The female passenger provides a name to the officer. While Officer A is checking the serial number on the gun and the names of the client and passenger Officer B stands beside the Honda observing the occupants of the vehicle. Officer A remembers the female passenger and believes she has provided him with a fake name. Officer A asks the female passenger to get out of the car so he may ask several more questions to confirm her true identity. Officer A determines the female passenger has provided a false name and there are outstanding warrants for her so he places her under arrest. When Officer A searches the female, he finds what he believes to be drug paraphernalia in her pockets. The female passenger is placed in handcuffs in a patrol car. Officer A approaches the client and asks him to step out of the car because the officer wants to search the car pursuant to his arrest of the female passenger. Officer A tells client he is going to search him for weapons. As the officer searches the client for weapons, he finds a small pocket knife and a propane lighter. As the officer continues to search the client a leather pouch about the size of an iPhone falls from the client’s pants. Client reaches to pick it up and Officer A and Officer B grab the client and place him against the rear of the Honda where they place him in handcuffs. Officer A picks up the leather pouch, opens it and pulls out another leather bag. Officer A unzips the second leather wallet and finds methamphetamine in the wallet.



1



2



3

Case hypothetical #1

- You are asked by the SOG to present on ethics. You plan on using some of the cases you are currently working on as "hypotheticals." Can you use examples from real cases to teach?

4

Case hypothetical #1

Answer:

Rule 1.6 requires protecting the confidentiality of client information. 2014 Formal Ethics Opinion 1 says lawyer can share information with law students with client's informed consent. There was a proposed opinion limiting use of confidential information in CLE and other presentations

5

Case hypothetical #2

[and yes, I have my client's permission]

- You represent a client who has been charged with a variety of misdemeanor and felony offenses that all stem from his habit of threatening to "slaughter" people – wife, wife's family, ADA's, LEO's, magistrates etc – who violate his "constitutional rights" or otherwise do not do what he wants. He expresses the belief that he is legally and morally entitled to make these threats – and to slaughter these people. He also expressed the belief that a major computer virus [that was created in Korea] was targeted at him because it was released on his wedding anniversary. He clearly understands the court system and wants to go to trial as he believes jurors will agree with him and acquit him without leaving the court room.

6

Case hypothetical #2

- Are you required to get a qualified mental health expert to do an evaluation?
- Does your client have any say in whether you get an evaluation?

7

Case hypothetical #2

- If your expert informs you that some of your client's beliefs are the result of a delusional disorder, and that this impacts his ability to cooperate in his defense, are you required to file a motion to determine competency even if the client objects?
- Does it matter whether the client may be better off being convicted at trial than being involuntarily committed?

8

Case hypothetical #2

- The expert for the State does their evaluation and determines that the client in fact has a delusional disorder, but that the client is intelligent, understands the court system, and his delusions do not impact his competency to stand trial [although various personality disorders do make the client's decision to go to trial irrational]
- Can you simply agree that the client is competent?
- If you proceed with a hearing, are you required to try to persuade the court to find your client incompetent?

9

Case hypothetical #2

- Your client is found competent. In preparing for trial, you explain to your client for the umpteenth time that he in fact does not have the legal right to slaughter those who oppose him. He responds "Oh...well I will do it anyway" and explains that by "it" he means he will slaughter his foes when he is released. You know that he had 75+ guns when arrested, and that there are 200+ recorded calls in the State's possession in which your client explains his beliefs and plans.
 - Do you have any obligation to warn any of the intended victims? Does it matter that he is currently held on a bond he cannot meet?

10

Case hypothetical #2

- Answers: Rule 1.14 Client with Diminished Capacity
 - (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
 - (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

11

Case hypothetical #2

- Answers: Rule 1.14 Client with Diminished Capacity
 - CPR 314 –
 - Attorney who believes that client is not competent to make a will may not prepare or preside over the execution of a will for that client
 - 98 Formal Ethics Opinion 16
 - Lawyer may represent client who suffers from a mental disability in resisting an incompetency petition providing that resisting the petition is not frivolous.

12

Case hypothetical #2

- Answers:

- Rule 1.6 Confidentiality of Information
 - A lawyer **may** reveal confidential information to "prevent the commission of a crime by the client," and to "prevent reasonably certain death or bodily harm." Commentary states that "Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat"
 - RPC 1.17 – lawyer may not reveal information about a client [who is waiter] having a contagious disease – this was issued before amendment regarding preventing death or bodily harm.

13

Case hypothetical #3

- You represent a client who is charged with a variety of sex offenses. Your client explains that the sex – with a 16-year-old – was consensual, but that the complaining witness's belief that he took a video of them engaged in sex without her consent is accurate.
 - Can you examine the video to determine if it constitutes child pornography?
 - Can you take possession of the video – does it matter if it is CP?
 - Client asks if he should delete the video – what advice can you give?

14

Case hypothetical #3

- Answers

- 2007 Formal Ethics Opinion 2
 - Lawyer may not take possession of contraband – drugs – in course of representation.
 - Cites 4-4.6 ABA Standards for Criminal Justice, which says lawyer can advise client to destroy contraband if there is "no pending case or investigation relating to this evidence."
- 2021 Formal Ethics Opinion 4
 - Because possession of child pornography is a crime, and there is not exception for possessing in the course of representing a client in a legal matter, a lawyer may not possess child pornography.
 - Lawyer should also consider whether they have an obligation to report this as child abuse.

15

Case hypothetical #3

• **Answers:**

- Rule 3.4 Fairness to Opposing Party and Counsel
- A lawyer may not (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- Comment suggests lawyer may take possession of non-contraband evidence, but only for limited purpose of examination, and may then have to turn it over the State.

16

Case hypothetical #4

You are approached by the family of a person currently in jail on various felony offenses. The client is represented by someone they view as "not a real lawyer," aka a lawyer who has been appointed to the case. They want you to get a bond but are not in a position to hire you to take over the case.

- Can you enter an appearance limited to litigating pre-trial release?
- Are you required to contact and coordinate with the appointed lawyer?
- Can you make any representations in your bond motion or hearing that go to the merits of the case, i.e., claim that the client has a solid alibi?
- What if the client has threatened to "slaughter" the ADA and suffers from a delusional disorder? Can you seek bond without a determination of competency?
- You get a bond, the client is released, and then the State moves to revoke the bond because the client has engaged in continued criminal behavior. Are you on the hook for representing the client on this issue?

17

Case hypothetical #4

Answers:

2022 Formal Ethics Opinion 2

A lawyer may enter an appearance limited to seeking bond when client is represented by an appointed lawyer. The lawyer should consult with the appointed lawyer but is not required to do so. Client needs to be informed of risks of this limited representation, such as potential impact of status as indigent, and limits of representation need to be spelled out with the client and must be reasonable under the circumstances.

18

Case
hypothetical
#5

- You represent a client on several low-level felonies. The ADA sends you a plea offer and a completed prior record level worksheet, which reflects several prior convictions and a determination that your client is a Level II for sentencing purposes. In reviewing this with your client, your client is pleased that the prosecution missed one of his out-of-state convictions, which would have moved him to a Level III.
 - Are you obliged to educate the prosecution on your client's actual record?
 - Can you sign the stipulation that you "agree with the defendant's prior record level" as set out on the form?
 - Can you enter a plea that places your client on a conditional discharge if the out-of-state conviction resulted in your client being on probation?

19

Case
hypothetical
#5

- **Answers:**
 - Rule 3.3 Candor Toward the Tribunal
 - (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know or has information that creates a serious doubt as to its truth, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
 - (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

20

Case
hypothetical
#5

- **Answers:**
 - RPC 33
 - Lawyer who learns of client's alias and true criminal record through privileged communication cannot permit client to testify falsely and must move to withdraw if client does not consent to disclosure of true name and record.
 - 98 Formal Ethics Opinion 5
 - Lawyer may remain silent when ADA presents incomplete record provided record was not misrepresented to ADA by lawyer or client. Lawyer may seek limited driving privilege based upon incomplete record.
 - 2003 Formal Ethics Opinion
 - Defense and prosecution cannot misrepresent defendant's record, even with knowledge of the court.

21

Case
hypothetical
#6

- You are appointed to represent a client on a serious felony, who is detained in the local detention center. The ADA informs you that you will need to provide a hard drive that can hold 500GB so they can provide you with hours of video, audio, crime scene photos and written discovery. You see that there are over 50 hours of video, hundreds of recorded jail calls (with no transcripts) and several thousand pages of reports and other documents. Your client insists on getting a copy of his "motion for discovery," meaning that he wants to see all of his discovery.
- Do you need to review all of this discovery? What if the charges are numerous low-level felonies, and IDS is paying you \$65 an hour (and two dozen eggs if you win the case)?
- Do you need to review all of this with your client?
- Do you have to provide the discovery to your client? To his family?

22

Case
hypothetical
#6

- Answers:
 - Rule 1.2 Allocation of Authority Between Client and Lawyer
 - Defendant, after consultation with the lawyer, has the right to determine whether to plea, waive jury trial and whether to testify
 - Rule 1.4
 - Must keep client reasonably informed
- 2013 Formal Ethics Opinion 2
 - If client insists on reviewing discovery, lawyer must provide client with opportunity for meaningful review of the material. This does not apply if lawyer determines that it is in the best interests of client's defense that client not review all discovery, review is limited by court order or rule or agreement with prosecution, review is not feasible in light of time and volume of discovery, or disclosure will endanger the safety of client or others. Lawyer does not have to provide the client with a set of discovery to keep in the jail.

23

**Pre-Trial Preparation for Criminal Defense Practitioners
How To Make Sure Your Objections Are Heard On Appeal
(aka Preserving the Record)
Glenn Gerding, Appellate Defender**

Top Tips To Ensure Full Appellate Review:

- Move for a complete recordation.
- Objections must be made in front of the jury to be timely.
- Objections must be specific (cite specific statute, rule of evidence, and constitutional basis)
- Move to dismiss all charges for insufficient evidence and variance.
- Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.
- Give proper notice of appeal and ensure appellate counsel is appointed and that the Office of the Appellate Defender has received the case from the county clerk's office.
- Thoughtful preparation, research, and brainstorming with an eye towards appeal will help you have confidence in objecting and preserving the record. Make it a habit to be forward thinking. Read appellate opinions not just for the legal ruling, but to learn how the issue was (or was not) properly preserved.

- **Move for a complete recordation.** – Make sure everything is in the record. Proffer evidence through witness testimony and documents.

In non-capital criminal cases, the court reporter is not required to record voir dire, opening statements, or closing arguments, except upon motion of any party or the judge's own motion. N.C.G.S. 15A-1241.

Counsel or the trial judge should ask for and ensure a complete recordation. Appellate review of *Batson* claims, in particular, are frustrated by the lack of a transcript of voir dire. In *State v. Campbell*, 846 S.E.2d 804 (N.C. Ct. App. 2020), voir dire was not recorded. Defense made a *Batson* objection and the parties tried to recreate the record. Judge Hampson noted in his concurrence/dissent that:

our existing case law significantly limits a party's ability to preserve the issue absent not only complete recordation but also specific and direct voir dire questioning of prospective jurors (or other evidence) about their race. . . . In light of our case law indicating a trial lawyer cannot recreate the record of an unrecorded jury voir dire to preserve a *Batson* challenge, the obligation to recreate that record, it seems, must fall on the trial judge in conjunction with the parties.

→ **To be timely, objections must be made in front of the jury** to preserve any objections and arguments made in voir dire hearings. This includes preserving a ruling on a motion to suppress. You cannot rely on Rule 103(a) of the N.C. Rules of Evidence. Why not?

Our Supreme Court has held Rule 103(a) unconstitutional in part because only the Supreme Court, not the General Assembly, can create rules for preserving error. *State v. Oglesby*, 361 N.C. 550 (2007).

Rule 10(a) of the N.C. Rules of Appellate Procedure states:

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context...”

Therefore, our Supreme Court interprets Rule 10(a)(1) to require objections to evidence to be made in front of the jury at the time the evidence is introduced, even if the objection has been made and ruled upon previously. *State v. Ray*, 364 N.C. 272 (2010).

In *State v. Ray*, outside the presence of the jury, the defense attorney objected based on Rule 404(b) to the prosecutor's cross-examination of the defendant. Although the voir dire hearing occurred immediately before this line of questioning began in the presence of the jury, defendant's attorney did not object during the actual exchange in front of the jury. The Supreme Court held that the failure to object in front of the jury waived the 404(b) issue for appellate review.

An example of a case applying Rule 10(a)(1) and *State v. Ray* is *State v. Joyner*, 243 N.C. App. 644 (2015).

In *Joyner*, before the defendant testified, his attorney sought to preclude the State from cross-examining him about old convictions under Rule 609. The trial court allowed the defendant to testify during a voir dire hearing, heard arguments of counsel, and ruled that the State could cross-examine the defendant on the old convictions. When the jury was called back in and the defendant testified, the defense attorney failed to object to the State's cross-examination of the defendant about the old convictions. The Court of Appeals held that "the defendant has no right to raise the Rule 609 issue on appeal."

→ **Objections must be specific (cite specific statute, rule of evidence, and constitutional basis):**

Rule 10(a) of the N.C. Rules of Appellate Procedure requires the objecting party to cite the specific grounds for an objection. That means counsel must say the specific rule of evidence and constitutional provision in front of the jury. Examples:

Counsel's failure to cite Rules 403 and 404(b) waived appellate review:

In *State v. Allen*, COA17-973, 2018 N.C. App. LEXIS 554 (June 5, 2018) (unpublished op.), defense counsel sought to exclude evidence under Rules 403 and 404(b). During a hearing outside the presence of the jury the trial judge overruled the objections and ruled the evidence was admissible. Defense counsel acknowledged he would need to object when the State offered the evidence in front of the jury.

However, when the prosecutor questioned the witness in front of the jury defense counsel objected, stating "I apologize. Just for the record, we'd object to the proposed testimony on due process grounds, Federal Constitution, do not wish to be heard." The Court of Appeals held that the objection made in front of the jury was only on constitutional grounds, and not based on a rule of evidence. The issue was waived.

Counsel's failure to cite Sixth Amendment waived appellate review:

In *State v. Mosley*, COA09-1060, 2010 N.C. App. LEXIS 758 (May 4, 2010) (unpublished op.), the trial attorney sought to cross-examine a testifying co-defendant about his pending criminal charges to show bias. The trial attorney argued Rule 608 as the basis for admissibility. The trial court denied the request to allow cross-examination. On appeal, the defendant argued the cross-examination should have been allowed not just under Rule 608, but was required by the Sixth Amendment right to cross-examine and confront a witness. The Court of Appeals held the constitutional issue was waived because the trial attorney failed to assert the Sixth Amendment during trial.

→ **Move to dismiss all charges for insufficient evidence and variance.**

Rule 10(a)(3) of the N.C. Rules of Appellate Procedure states that: "In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial."

In *State v. Golder*, 374 N.C. 238 (2020), the Supreme Court made clear that when defense counsel moves to dismiss the charges, even if thereafter they argue only about certain charges or theories, they have preserved the issue of the sufficiency of the evidence for all charges and all theories of liability.

It is not clear after *Golder*, and a following case *State v. Smith*, 375 N.C. 224 (2020), whether a motion to dismiss for insufficient evidence also preserves a variance issue. To be safe, counsel should specifically move to dismiss all charges for variance in addition to insufficiency.

The Court of Appeals has already started to distinguish *Golder*. In *State v. Gettleman*, 2020 N.C. App. LEXIS 895 (Dec. 15, 2020) (published op.), the defense attorney did not move to dismiss "all" charges but moved to dismiss certain charges specifically. The Court of Appeals held that when defense counsel failed to move to dismiss "all"

charges, he did not preserve for appellate review the sufficiency of the evidence as to the charge that he did not move to dismiss.

→ **Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.**

N.C.G.S. 15A-1231(a) “At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions. A party tendering instructions must furnish copies to the other parties at the time he tenders them to the judge.”

Rule 21 General Rules of Practice: “If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.”

→ **Give proper notice of appeal and ensure the Office of the Appellate Defender is appointed and that the Office of the Appellate Defender has received the case from the county clerk’s office.**

Rules 3 and 4 of the N.C. Rules of Appellate Procedure

- Oral notice of appeal at trial (not later that day or that week)
- Written notice of appeal within 14 days
 - MUST be served on DA and must have cert. of service
- Appeal is from the “judgment” NOT from the “order denying the motion to suppress”
- Written notice of appeal is necessary to appeal satellite-based monitoring (SBM) orders

If notice of appeal is defective (ie. is not timely, does not include those items listed in Rule 3, fails to include a certificate of service, appeals from the denial of a motion, instead of from the judgment) then the appeal will be dismissed, and the Court will consider issues only by way of a petition for writ of certiorari under Rule 21 of the N.C. Rules of Appellate Procedure. Granting a petition for certiorari is discretionary and the Court of Appeals can decline to review issues, whereas if notice of appeal is proper, the Court is required to review the issues.

**How To Make Sure Your
Objections Are Heard On Appeal
(aka Preserving the Record)**

**Glenn Gerding
Appellate Defender
123 W. Main St.
Durham, NC 27701
(919) 354-7210**

1

Bottom Line up Front

- To ensure appellate review on the merits of an issue, the trial attorney must:
 - preserve objections and arguments,
 - establish facts in the record, and
 - appeal correctly.

2

Pre-trial Preparation

- Preservation of issues, objections, and arguments begins during pre-trial preparation.
- Thoughtful and thorough preparation will lead to you properly preserving issues, objections, and arguments.

3

Pre-trial Preparation - Discovery

- Preserve discovery issues by filing written discovery requests, specifying what you want, and follow up with a motion to compel. If the motion to compel is allowed, get a written order from the judge.
- Keep a running list of items you need to ask the State to produce.
- Cite constitutional and statutory grounds for your entitlement to the discovery.

4

Pre-trial Preparation

- In reviewing discovery, you should ask yourself, "how will the State introduce this evidence? What objections will I make to this evidence?"
 - Will I need a limiting instruction? Come prepared.
- When you prepare questions for each of the State's witnesses, highlight in bold the expected testimony of the witness that is objectionable. Write down the basis for your objections.

5

Pre-trial Preparation

- Consider objections the State could make to your cross-examination questions and come prepared to defend the questions.
- Come to court prepared with evidence to support your cross-examination questions.

6

Pre-trial motions

- Request and motion for discovery
- Motion for complete recodation
- Motion for a bill of particulars
- Motion to sever charges or defendants
- Motion to suppress
 - You MUST attach an affidavit, and you can sign the affidavit
 - If the MTS is denied, you MUST object in front of the jury when the evidence is actually offered.

7

Error Preservation – Jury Selection

- Batson (race) and J.E.B. (gender) claims
 - A complete recodation is imperative for preserving
 - Our Supreme Court has revived Batson
- Manner of juror selection, including fair cross-section of the community.
- Challenges for Cause that are denied can be preserved for appellate review.
 - Specific, technical requirements to preserve
 - 15A-1214
 - Have a voir dire folder

8

Error Preservation – Jury Selection

- Spend time preparing your voir dire and considering if there are facts about your case that could lead to a challenge for cause.
- Have a script to help you develop and preserve a challenge for cause:

9

Error Preservation – Jury Selection

[illegible]

10

Error Preservation – Jury Selection

- Have case law handy to support your client's right to have you ask certain questions.

[illegible]

11

Error Preservation – Jury Selection

- A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. *State v. Leonard*, 295 N.C. 58, 62-63 (1978).
- Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989).

Error Preservation – voir dire

- 15A-1214(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
- (1) Exhausted the peremptory challenges available to him;
- (2) Renewed his challenge as provided in subsection (i) of this section; and
- (3) Had his renewal motion denied as to the juror in question.

13

Error Preservation – voir dire

- 15A-1214(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
- (1) Had peremptorily challenged the juror; or
- (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

14

Joinder of Charges

- 15A-926(a): Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both,
- are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

15

Joinder of Defendants

- 15A-926(b): Charges against two or more defendants may be joined for trial:
- When each of the defendants is charged with accountability for each offense; or

16

Move to sever charges & defendants

- Objection to the State's motion to join charges is not sufficient to preserve for appellate review.
- A motion to sever preserves.
 - 15A-927(a)(1)-(2)
 - Motion must be pretrial, unless "based on grounds not previously known"
 - State v. Yarborough

17

Move to sever charges & defendants

- Assert constitutional and statutory grounds.
 - 5th Amendment and state constitutional grounds
 - 15A-926 (same transaction, single plan)
 - 15A-927 ("necessary to achieve a fair determination of the defendant's guilt or innocence")
- Assert how the defendant will be prejudiced.
- **Motions must be renewed** at close of State's evidence and at the close of ALL evidence to give the judge a chance to determine prejudice.

18

Preserving Evidentiary Error

- Objections must be:
 - Timely
 - In front of the jury, even if made outside the presence of the jury
 - Specific (cite rule/statute)
 - Include constitutional grounds
 - On the record (recordation motion)
 - Mitigated with a limiting instruction or mistrial request

19

Appellate Rule 10

- "In order to preserve an issue for appellate review, a party must have presented to the trial court a **timely** request, objection, or motion,
- "stating the **specific** grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.
- "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."

20

~~Rule 103(a)~~

- Rule 103: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."
- **Held unconstitutional in *State v. Oglesby*, 361 N.C. 550 (2007).**
- Even if a judge says an objection is preserved, that doesn't make it preserved.

21

Objections – Timeliness

- Motions to suppress and other motions before or during trial
 - Object at the moment the evidence is introduced in the presence of the jury, even if voir dire was held immediately before or earlier in case.
 - Object if the evidence is mentioned by a later witness.
 - Don't open the door if evidence is suppressed.

22

Objections – Timeliness

- When you prepare your cross-examination questions for each witness, highlight/bold/circle the evidence and questions that you must object to.
 - List the constitutional grounds and evidence rules

23

Objections – Timeliness

- Ask for a voir dire hearing to address witness testimony and exhibits.
 - A single document might contain various pieces of evidence that are inadmissible for different reasons.
 - During pre-trial preparation you should go through the documents sentence by sentence and note objections.
- But you must still object during the witness's testimony to the admission of the testimony and the exhibit.

24

Objections – Timeliness

- State v. Joyner, COA 2015
 - Before defendant testified, judge ruled he could be impeached with old convictions.
 - When defendant was cross-examined about the old convictions, defense attorney did not object.
- “As an initial matter, we note that defendant has no right to raise the Rule 609 issue on appeal.”

25

Objections – Timeliness

- “For us to assess defendant’s challenge, however, he was required to properly preserve the issue for appeal by making a timely objection at trial.”
- “Here, defendant opposed the admission of all prior conviction evidence during a *voir dire* hearing held before his testimony, but he failed to object to the evidence in the presence of the jury when it was actually offered. Unfortunately for defendant, his objection was insufficient to preserve the issue for appellate review.”

26

Objections – Timeliness

Here, Defendant filed a pretrial motion to suppress, *inter alia*, “evidence obtained as the result of an unconstitutional seizure of the [target package] addressed to . . . Defendant,” and renewed his objection at trial to the introduction of evidence concerning the drug dog sniff. Nonetheless, Defendant concedes that he “did not object when the State elicited testimony about the removal of the [target package] from the conveyor belt.” Therefore, Defendant has waived appellate review of the issue of the target package’s removal from the conveyor belt, *see id.*, and the trial court’s conclusion that “a reasonable and articulable suspicion existed sufficient to justify a brief detention of the package for purposes of having a drug dog sniff it” remains undisturbed.

27

Objections – Specificity

- Organize and label your questions to match up with the evidence rule that you are going to argue.
- Don't rely on your memory in court. Write it down.

28

Objections – Specificity

LACK OF RELIABILITY OF OPINION TEST - RULE 702

What are your opinions?

-told ADA on 3/2/12 that having to testify with John in the room would affect Sally's ability to testify and effectively communicate all due to his presence in the room as well as other people being present talking about what happened

-thinks Sally will clam up at the sight of John in the courtroom - not sure whether that was due to fear or some other emotion but she said his presence would definitely hinder her ability to give truthful testimony

(1) testimony must be based on sufficient facts or data

have you talked with Sally about a trial?

a courtroom?

a jury?

being in court with John?

have you asked what she thinks about it?

other sources of trauma - medical examinations

29

Objections – Specificity

WORKSHEET FOR PYD TEST

-J. 2 of 4 - "has always been shy and even reluctant to do new things, classroom. sometimes has to be pulled off him."

(2) testimony is product of reliable principles and methods

cite the studies you have relied upon in reaching your opinion

what research has been done in this area

who are the leading experts in this area

what resources have you consulted in forming your opinion

what methods have you used to reach your opinion

what principles of psychology underlie your opinion

(3) witness has applied the principles and methods reliably to the facts of the case

have you prepared a report that applies your training and experience to the facts in this case

FACTS DO NOT SATISFY THE STATUTORY REQUIREMENTS

p. 4 of state v. Jackson - distinguish facts

30

Objections – Specificity

- State v. Mosley, COA 2010
 - home invasion with testifying co-defendant
 - co-defendant had unrelated pending charges
 - defendant sought to cross-examine about pending charges
 - asserted Rule 608(b) as only basis

31

Objections – Specificity

- “As it does not affirmatively appear from the record that the issue of Defendant’s constitutional right to cross-examine Crain about the pending criminal charge was raised and passed upon in the trial court
- or that Defendant timely objected to the trial court’s ruling allowing the State’s motion *in limine* to prohibit such questioning, this issue is not properly before us for appellate review. The assignment of error upon which Defendant’s argument is based is dismissed.”

32

Sufficiency & Variance

- Have a folder for a motion to dismiss.
- Move to dismiss **all** charges for **insufficient evidence and variance**.
 - Don’t forget to make the motion.
 - If defense puts on evidence, the motion must be renewed or it is waived.
 - Make a motion to dismiss for insufficient evidence and variance after guilty verdict BEFORE judgment.

33

Sufficiency & Variance

- Don't limit your motion to dismiss.
- It's OK to only argue some charges.
- But don't say anything that suggests you're limiting your motion.
- Best practice is at the end of your arguments to repeat that you are moving to dismiss **all** charges.

20 MOTION TO DISMISS: [REDACTED] Yes. At this time, I'd make a motion
21 to dismiss. Even in the right most favorable to the State,
22 I don't believe they have crossed their burden.
23 That would be with respect to possession of
24 cocaine, 20 CR 00307, and possession with intent to sell.
25

Charge Conference Page 186

1 manufacture or deliver a Schedule 2 controlled substance, 20
2 CR 00306, and within a thousand feet of a park.
3 THE COURT: All right. Motions -- all right, the
4 motion to dismiss is denied.
5 [REDACTED] Thank you.

34

Instructions

- Print pattern instructions for all offenses.
- Review pattern instructions – you might be surprised what's in there.
 - Read the footnotes and annotations.
 - Footnotes are not required unless requested!
 - Consider terms/phrases in brackets
- Limiting instructions are not required unless requested, so request it, and then remember to make sure it is actually given!
- Think outside the box and construct proposed instructions based on cases.

35

Instructions

- Requests for non-pattern instructions must be in writing to be preserved.
 - N.C.G.S. 15A-1231
 - Rule 21 General Rules of Practice
- This includes modifications of pattern instructions.
- Ask the judge for a written copy of instructions.

36

Objections – Closing Arguments

- Objections during argument are more important to protecting the defendant's rights on appeal than the attorney not appearing rude.
- Improper arguments are not preserved without objection.

37

Objections – Closing Arguments

- Burden shifting
- Name calling
- Arguing facts not in evidence
- Personal opinions
- Misrepresenting the law or the instructions
- Inflammatory arguments

38

Making A Complete Record

- Move for a complete recordation
- Basis for objection on the record
 - Even if stated at the bench or in chambers, put it on the record
- An oral proffer as to expected testimony is ineffective
 - The witness must testify
 - The exhibit/document must be given to the judge and be placed in the record

39

Making A Complete Record

- PowerPoints – get in the record
 - Printed copy is not always adequate
 - Compare DA's PowerPoint slides to the actual exhibits – object to manipulation
- Digital evidence – get in the record and keep copies
- Ex parte materials – clearly labeled and sealed and not served on the State
 - Ex parte is different than having something sealed and unavailable to the public.

40

Making A Complete Record



- Courtroom conditions:
- What can the jury see?
 - Law enforcement presence
 - Victim's rights advocates
 - Covid restrictions
 - Signs on the courtroom door restricting access
 - How big is the screen that shows gruesome pictures and where is it located?

41

Making A Complete Record

- Submit a photograph of evidence and make sure it's in the court file.
 - Picture of client's tattoo
- Describe what happens in court.
 - "Three men came into the courtroom wearing shirts that said "Justice for Trey."
- Describe what a witness does.
 - "Mr. Jones, I see that when you described the shooting, you raised your right hand in the air and moved your finger as if pulling the trigger of a gun two times. Is that correct?"

42

Making A Complete Record

- Defense wants to cross-examine State's witness about pending charges.
 - Ask to voir dire, and ask the questions.
 - Submit copies of indictments.
- Defendant wants to testify that he knows the alleged victim tried to kill someone five years ago. Judge won't let him.
 - Ask to voir dire, and ask the questions.
 - Make sure the answers are in the record.

43

Properly appealing

- Oral notice of appeal in open court – literally must be immediately after judgment is entered and client sentenced – otherwise, it must be in writing

44

Properly appealing

- Written notice of appeal - 14 days
 - specify party appealing
 - designate judgment (not the ruling)
 - designate Court of Appeals
 - case number
 - signed
 - filed
 - Served on DA – not in DA's mailbox in clerk's office – You must attach a certificate of service

45

Properly appealing

- If defense litigated a MTS and lost, and defendant pleaded guilty, defense must give prior notice to the court and DA that defendant will appeal.
 - Put it in the transcript and state it on the record.
 - Give notice of appeal of the judgment.

46

Preventing Delay

- There are a number of steps in the process that can result in cases getting delayed or lost in a clerk's file cabinet.
- Trial attorneys should ensure continuity between trial and appellate counsel.
- Follow up after giving notice of appeal to ensure clerk has prepared Appellate Entries and that Office of the Appellate Defender is appointed.
- Make sure clerk knows dates of pretrial hearings and that the Appellate Entries shows all dates.

47

Resources

- IDS website
 - Training Presentations
 - <http://www.aoc.state.nc.us/www/ids/>
- SOG website
 - Defender Manual
 - <http://defendermanuals.sog.unc.edu/>
- OAD on-call attorneys

48

**How To Make Sure Your
Objections Are Heard On Appeal
(aka Preserving the Record)**

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Appellate Defender
123 W. Main St.
Durham, NC 27701
(919) 354-7210**

State of North Carolina

> File No. County of Hearing _____
> File No. County of C gin 14050054

PITT County GREENVILLE

In the General Court of Justice
Seat of Court District ☒ Superior

STATE VERSUS

HADDOCK JR, STEVEN EARL.
1525 DAILS LN
GREENVILLE

NC 278347131

2018 JAN 17 AM 9:47
VIOLATION REPORT
PITT COUNTY, C.S.C.

BY Lo

AKA: HADDOCK, STEVE JR

WHITE MALE DOB: 12/09/1977

G.S. 15A-1345

ADMINISTRATIVE REVIEW

The violations listed on this Violation Report were reviewed with
MCCARTHY, DAVID M. Chief Probation Officer on 01/16/2018

OATH AND SIGNATURE OF OFFICER

I have read the Violation Report, and state that the contents are true to my own knowledge except those which are stated upon information and belief, and as to them I believe that they are true.

Signature

Name (Type or Print)

Title

Date

SWORN AND SUBSCRIBED TO

on

Date

Signature of Person Authorized to Administer Oaths.

Deputy CSC/Assist CSC

Superior Court Clerk

☒ Magistrate

Notary Public

Date Commission Expires _____

SIGNATURE OF PROBATIONER

I have received a copy of this Violation Report and understand its contents and that I must appear in Court as directed by my Probation/Parole Officer.

Signature of Probationer

Date

HEARING NOTICE

WHEREFORE, the above signed requests that a hearing on the charge(s) contained in this report be conducted pursuant to G.S. 15A-1345(e) on the date and at the time and place set forth below, that the notice of this hearing be given in any manner provided by law, and that after such hearing the Court take the action which it considers proper under G.S. 15A-1344(d) and/or 15A-1344(e1).

Hearing Date: 1/23/18

Time: 9:30 AM/PM

Place: SCC2

HADDOCK JR, STEVEN EARL. DOC# 1021297
DCC10 Rev. 2/12.

14050054

GBR13

01/16/18 08:45:22 page: 1

he probation officer, being duly sworn, states that the defendant was placed on probation pursuant to the following Judgment Suspending Sentence

Date of Judgment	Court	County-- of Origin	File No.	Offense	Counts
5/05/2014	DIST	PITT	14050054	DWI LEVEL 3	001

length of Sentence Min: 0YR 6MO 0DY Max: 0YR 6MO 0DY
length of Term of Probation: 0 YRS. 24 MOS. 0 DYS.
extended Period of Probation: 0 YRS. 24 MOS. 0 DYS. End Supv Date:05/04/2018
sentencing Judge: COLE, J CARLTON

THE DEFENDANT HAS PREVIOUSLY SERVED 0 PERIODS OF CONFINEMENT IN RESPONSE TO VIOLATIONS. *

THE DEFENDANT HAS THE FOLLOWING 2 OR 3 DAY PERIODS OF CONFINEMENT. *

of the conditions of probation imposed in that judgment, the defendant has willfully violated:

1. Condition of Probation "... and participate in further evaluation, counseling, treatment or education programs recommended as a result of that evaluation, and comply with all further therapeutic requirements of those programs until discharged" in that THE DEFENDANT HAS FAILED TO COMPLETE HIS DWI TREATMENT.

2. Condition of Probation "Defendant shall be returned to Court upon first positive drug screen" in that

THE DEFENDANT TESTED POSITIVE FOR COCAINE ON A 2 PANEL DRUG SCREEN ON 01/16/2018

STATE OF NORTH CAROLINA

File No.

14CRS050054 51

PITT County GREENVILLE Seat of Court

(NOTE: Except in cases involving a violation of both G.S. 20-138.1 and 138.2, this form should be used for only one DWI conviction, and no other offense should be consolidated for judgment with the DWI offense.)

In The General Court Of Justice
☐ District ☒ Superior Court Division

STATE VERSUS

Name Of Defendant

HADDOCK, STEVEN, EARL, JR

Race Sex Drivers License No. State Date Of Birth
W M 09782251 NC 12/9/1977

IMPAIRED DRIVING - JUDGMENT SUSPENDING SENTENCE

(For Offenses Committed On Or After Dec. 1, 2011)

☒ COMMITMENT ON SPECIAL PROBATION G.S. 20-179

Date Of Offense Attorney For State Def. Found Not Indigent Def. Waived Attorney Attorney For Defendant Appointed Crt Rptr Initials
1/3/2014 EVERETT, CLARK ☐ ☐ CLEMONS, CHARLES, TYRELL ☒ Retained KN

Offense ☒ Impaired Driving (G.S. 20-138.1). ☐ Impaired Driving in a commercial vehicle (G.S. 20-138.2). ☐ Operating a commercial vehicle after consuming alcohol and this was the defendant's second or subsequent conviction of this offense (G.S. 20-138.2A). ☐ Operating a school bus, school activity bus, child care vehicle, ambulance, other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol and this was the defendant's second or subsequent conviction of this offense (G.S. 20-138.2B).

The defendant ☒ pled guilty (☐ pursuant to Alford) to ☐ was found guilty by the Court of ☐ was found guilty by a jury of ☐ pled no contest to the offense specified above. The Court, based upon the determinations shown on the attached Determination of Sentencing Factors form (AOC-CR-311, Rev. 12/11), has imposed the following punishment level.

☐ Aggravated Level One. ☐ Level One. ☐ Level Two. ☒ Level Three. ☐ Level Four. ☐ Level Five.

The Court, having considered evidence, arguments of counsel and statement of defendant, ORDERS that defendant be imprisoned

for a minimum term of 6 Month(s) for a maximum term of 6 Month(s) in the custody of the ☒ N.C. Division of Adult Correction. ☐ Sheriff of County.

☐ This sentence shall run at the expiration of sentence imposed in file number

The defendant shall be given credit for 12 days spent in confinement prior to the date of this Judgment as a result of this charge ☐ and as an inpatient at a facility operated or licensed by the State for the treatment of alcoholism or substance abuse after the commission of the above offense. Credit shall be applied against the ☐ minimum and maximum terms above.

☒ imprisonment for special probation below. (NOTE: No credit may be given for the first 24 hours spent in confinement.)

SUSPENSION OF SENTENCE

Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on

☐ unsupervised probation for months.
☒ supervised probation for 24 months, the Court having received evidence and having found as a fact that supervision is necessary.

SPECIAL PROBATION - G.S. 15A-1351

☐ As a condition of special probation, the defendant shall ☒ serve an active term of 6 ☒ days ☐ months in the custody of the ☐ N.C. DAC. ☒ Sheriff of this County. ☐ pay jail fees.

(NOTE: This term shall NOT be reduced by good time, gain time or parole, or, unless provided above, by jail or treatment time.)

The defendant shall report in a sober condition to begin serving this term on: Day Date Hour AM and shall remain in custody until: Day Date Hour AM PM

☐ The defendant shall again report in a sober condition to continue serving this term on the same day of the week for the next consecutive weeks, and shall remain in custody during the same hours each week.

☐ The defendant shall serve the active term above as an inpatient in (Name treatment facility) and shall follow the rules of that facility until discharged and not leave its premises except as authorized under those rules.

MONETARY CONDITIONS

The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below, plus the probation supervision fee, pursuant to a schedule ☒ determined by the probation officer. ☐ set out by the court as follows:

Costs	Fine	Restitution*	Attorney's Fees	Community Service Fee	EHA Fee/CAM Fee	Appt Fee/Misc	Total Amount Due
\$ 594.50	\$	\$	\$	\$	\$	\$	\$ 594.50

NOTE: In addition to all other costs, G.S. 7A-304(a)(10) requires a fee of \$100.00 for a conviction of any of the four offenses sentenced on this form.

*See attached "Restitution Worksheet, Notice And Order (Initial Sentencing)" AOC-CR-611, which is incorporated by reference.

☐ The Court finds just cause to waive costs, as ordered on the attached ☐ AOC-CR-618. ☐ Other:

☐ Upon payment of the "Total Amount Due," the probation officer may transfer the defendant to unsupervised probation.

REGULAR CONDITIONS OF PROBATION - G.S. 15A-1343(b)

NOTE: Any probationary judgment may be extended pursuant to G.S. 15A-1342. The defendant shall: (1) Commit no criminal offense in any jurisdiction. (2) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269. (3) Remain gainfully and suitably employed or faithfully pursue a course of study or vocational training, that will equip the defendant for suitable employment, and abide by all rules of the institution. (4) Satisfy child support and family obligations, as required by the Court. If the defendant is on supervised probation, the defendant shall also: (5) Not abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer. (6) Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer. (7) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment. (8) Notify the probation officer if the defendant fails to obtain or retain satisfactory employment. (9) Submit at reasonable times to warrantless searches by a probation officer of the defendant's person and of the defendant's vehicle and premises while the defendant is present, for purposes directly related to the probation supervision, but the defendant may not be required to submit to any other search that would otherwise be unlawful. (10) Submit to warrantless searches by a law enforcement officer of the defendant's person and of the defendant's vehicle, upon a

Original - File Copy - DMV
Material opposite unmarked squares is to be disregarded as surplusage.
(Over)

reasonable suspicion that the defendant is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without written permission of the court. (11) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used. (12) Supply a breath, urine, or blood specimen for analysis of the possible presence of prohibited drugs or alcohol when instructed by the defendant's probation officer for purposes directly related to the probation supervision. If the results of the analysis are positive, the probationer may be required to reimburse the Division of Adult Correction for the actual costs of drugs or alcohol screening and testing. If the defendant is to serve an active sentence as a condition of special probation, the defendant shall also: (13) Obey the rules and regulations of the Division of Adult Correction governing the conduct of inmates while imprisoned. (14) Report to a probation officer in the State of North Carolina within seventy-two (72) hours of the defendant's discharge from the active term of imprisonment.

SPECIAL CONDITIONS OF PROBATION - G.S. 15A-1343(b1); 20-179

15. Obtain a substance abuse assessment and all recommended education or treatment.
- ☒ 16. Surrender the defendant's drivers license to the Clerk of Superior Court for transmittal/notification to the Division of Motor Vehicles; and not operate a motor vehicle until the defendant's driving privilege is restored by that Division, except as may be permitted in a limited privilege.
- ☐ 17. Complete _____ hours of community service during the first _____ days of the period of probation, as directed by the judicial service coordinator. The fee prescribed by G.S. 143B-708 is
☐ not due because it is assessed in a case adjudicated during the same term of court.
☐ to be paid ☐ pursuant to the schedule set out under Monetary Conditions above ☐ within _____ days of this Judgment and before beginning service.
- ☐ 18. Abstain from alcohol consumption for _____ days, ☐ months, as verified by a continuous alcohol monitoring (CAM) system.
☐ a. (offenses committed prior to December 1, 2012, only) The defendant shall pay to the Clerk the fees associated with the system.
☐ b. (offenses committed on or after December 1, 2012) The fees for the system shall be paid directly to the monitoring provider by
☐ the defendant. ☐ _____, the local government entity responsible for the defendant's incarceration in the local confinement facility, upon the Court's finding, for good cause shown, that the defendant should not be required to pay the fees and the local government's agreement to pay them.
☐ c. (Levels 1 and 2, only, for offenses committed on or after December 1, 2012) The defendant shall be given credit against this period of abstinence and monitoring for (maximum of 60) _____ days spent on CAM prior to trial.
- ☒ 19. Other:
NOT POSSESS/CONSUME ALCOHOL. AFTER 18 MONTHS IF ALL MONIES ARE PAID THEN TRANSFER
UNSUPERVISED PROBATION.

- ☐ 20. Comply with the Additional Conditions of Probation which are set forth on AOC-CR-603C, Page Two, attached.

[Check any that apply - G.S. 20-179(r)]

- ☐ The probation officer may transfer the defendant to unsupervised probation upon completion of _____ the community service required by Special Condition No. 17 above. ☐ payment of all fines, costs and fees required above.

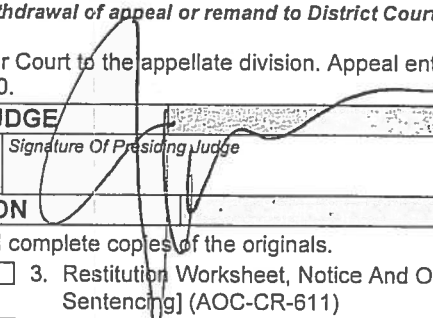
SPECIAL ALCOHOL CONCENTRATION FINDING

- ☐ The defendant's alcohol concentration was 0.15 or greater. ☐ Other: _____

ORDER OF COMMITMENT/APEAL ENTRIES

- ☒ 1. It is ORDERED that the Clerk deliver two certified copies of this Commitment on Special Probation to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.
- ☐ 2. The defendant gives notice of appeal from the judgment of the District Court to the Superior Court. The current pretrial release order is modified as follows: _____
NOTE: Upon notice of appeal, the District Court sentence is vacated. Withdrawal of appeal or remand to District Court requires that a new sentencing hearing be scheduled.
- ☐ 3. The defendant gives notice of appeal from the judgment of the Superior Court to the appellate division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date 5/5/2014	Name Of Presiding Judge (Type Or Print) J. CARLTON COLE	Signature Of Presiding Judge 
------------------	--	--

CERTIFICATION

I certify that this Judgment and the attachment(s) marked below are true and complete copies of the originals.

- ☐ 1. Determination Of Sentencing Factors (AOC-CR-311, Rev. 12/11) ☐ 3. Restitution Worksheet, Notice And Order [Initial Sentencing] (AOC-CR-611)
- ☒ 2. Judgment Suspending Sentence (AOC-CR-603C, Page Two) (additional conditions of probation) ☐ 4. Other: _____

Date 5/5/2014	Date Certified Copies Delivered To Sheriff 5/5/2014	Signature Of Clerk _____	☒ Deputy CSC ☐ Assistant CSC ☐ CSC	SEAL
------------------	--	-----------------------------	--	------

NOTE TO CLERK: If the defendant's conviction is based on a violation of an offense involving impaired driving while the defendant's drivers license is revoked as a result of a prior impaired driving license revocation as defined in G.S. 20-28.2, report DWI Defendant Registration Stop to DMV using menu item #9 in STARS. Also report the defendant's conviction to DMV in the usual manner. If there is a non-defendant vehicle owner, report registration stop to DMV using menu item #10 in STARS (unless the owner has been found to be an innocent owner).

STATE OF NORTH CAROLINAIn the General Court of Justice
Superior Court Division

File No. 600000148

PITT

County

Film No.

STATE VERSUS

Defendant

JEFFON JONES

Date of Offense

August 12, 2015

Offense in Violation of G.S.

14-33(a)

INDICTMENT**(M) SIMPLE AFFRAY**

The jurors for the State upon their oath present that on or about the date of offense shown and in the County named above the defendant named above unlawfully and willfully did make an affray to the terror and disturbance of other citizens at Paladin Village Apartments, Greenville, NC, a public place. At that public place the defendant and other persons whose names are not known did assault and strike each other by punching, kicking and hitting each other.

Signature of Prosecutor

**WITNESSES**☒ B. Gillen, GPD☐☐☐☐☐☐☐

The witnesses marked "X" were sworn by the undersigned Foreman of the Grand Jury and, after hearing testimony, this bill was found to be:

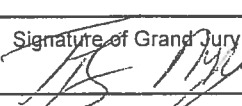
☒ A TRUE BILL by twelve or more grand jurors, and I the undersigned Foreman of the Grand Jury, attest the concurrence of twelve or more grand jurors in this Bill of Indictment.

☐ NOT A TRUE BILL

Date

1-25-16

Signature of Grand Jury Foreman



STATE OF NORTH CAROLINA

File No.

County

In The General Court Of Justice

☐ District ☐ Superior Court Division**STATE VERSUS**

Name And Address Of Defendant

INFORMATION

Race

Sex

Date Of Birth

G.S. 15A-644

Offense(s)Date Of Offense
OR
Date Range Of Offense

G.S. No.

CL.

I.

II.

III.

I. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

II. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

(Over)

III. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

Signature Of Prosecutor

WAIVER

I, the undersigned defendant, waive the finding and return of a Bill of Indictment into Court and agree that the case may be tried upon the above information.

Date

Signature Of Defendant

Signature Of Attorney For Defendant

STATE OF NORTH CAROLINA

File No.

County

In The General Court Of Justice
Superior Court Division

STATE VERSUS

Name Of Defendant

NOTICE OF GROSSLY AGGRAVATING AND AGGRAVATING FACTORS (DWI)

(For Offenses Committed On Or After DEC. 1, 2011)

G.S. 20-179

Pursuant to G.S. 20-179(a1), the defendant is hereby notified that the State of North Carolina intends to prove the existence of grossly aggravating and aggravating factors under G.S. 20-179(c) and (d), as indicated below.

GROSSLY AGGRAVATING FACTORS - G.S. 20-179(c)

- ☐ 1. The State intends to prove that the defendant
- ☐ a. has been convicted of a prior offense involving impaired driving which conviction occurred within seven (7) years before the date of this offense.
 - ☐ b. has ☐ two ☐ three or more convictions as described in No. 1.a.
 - ☐ c. has been convicted of an offense involving impaired driving which conviction occurred after the date of the offense for which the defendant is being sentenced but before or contemporaneously with the sentencing in this case.
 - ☐ d. has ☐ two ☐ three or more convictions as described in No. 1.c.
 - ☐ e. has a prior conviction in District Court for an offense involving impaired driving, the conviction was appealed to Superior Court, the appeal has been withdrawn or the case has been remanded back to District Court, and a new sentencing hearing for the case has not been held pursuant to G.S. 20-38.7.
 - ☐ f. has ☐ two ☐ three or more convictions as described in No. 1.e.
 - ☐ g. drove, at the time of the current offense, while the defendant's drivers license was revoked ☐ (use for offenses committed prior to December 1, 2015) under G.S. 20-28 and the revocation was an impaired driving revocation under G.S. 20-28.2(a).
☐ (use for offenses committed on or after December 1, 2015) pursuant to G.S. 20-28(a1).
 - ☐ h. caused, by the defendant's impaired driving at the time of the current offense, serious injury to another person.
 - ☐ i. drove, at the time of the current offense, while a child under the age of 18 years was in the vehicle.
 - ☐ j. drove, at the time of the current offense, while a person with the mental development of a child under the age of 18 years was in the vehicle.
 - ☐ k. drove, at the time of the current offense, while a person with a physical disability preventing unaided exit from the vehicle was in the vehicle.
- ☐ 2. The State does not intend to prove any grossly aggravating factors.

AGGRAVATING FACTORS - G.S. 20-179(d)

- ☐ 1. The State intends to prove the following:
- ☐ a. The defendant's faculties were grossly impaired at the time the defendant was driving.
 - ☐ b. The defendant had an alcohol concentration of at least 0.15 within a relevant time after the driving.
 - ☐ c. The driving of the defendant was especially reckless.
 - ☐ d. The driving of the defendant was especially dangerous.
 - ☐ e. The negligent driving of the defendant led to an accident causing property damage of \$1,000.00 or more, or property damage of any amount to a vehicle seized pursuant to G.S. 20-28.3.
 - ☐ f. The negligent driving of the defendant led to an accident causing personal injury.
 - ☐ g. The defendant was driving while the defendant's drivers license was revoked.
 - ☐ h. The defendant had at least two prior convictions of a motor vehicle offense not involving impaired driving, which occurred within five (5) years of this offense, and
 - ☐ 1. all were offenses for which at least three (3) points were assigned under G.S. 20-16.
 - ☐ 2. all were offenses for which the defendant's drivers license was subject to revocation.
 - ☐ 3. at least one was an offense for which at least three (3) points were assigned under G.S. 20-16 and at least one was an offense for which the defendant's drivers license was subject to revocation.
 - ☐ i. The defendant had at least one prior conviction of an offense involving impaired driving that occurred more than seven (7) years before the date of this offense.
 - ☐ j. The defendant has been convicted under G.S. 20-141.5 of speeding while fleeing or attempting to elude apprehension.
 - ☐ k. The defendant has been convicted under G.S. 20-141 of speeding by at least 30 m.p.h. over the legal limit.
 - ☐ l. The defendant passed a stopped school bus in violation of G.S. 20-217.
 - ☐ m. Additional factors that aggravate the seriousness of this offense:
- ☐ 2. The State does not intend to prove any aggravating factors.

SIGNATURE OF PROSECUTOR		
Date	Name Of Prosecutor (Type Or Print)	Signature Of Prosecutor

CERTIFICATE OF SERVICE

I certify that a copy of this notice was served by:

- ☐ delivering a copy personally to the
 ☐ defendant's attorney.
 ☐ defendant.
- ☐ depositing a copy, enclosed in a postpaid properly addressed envelope, in a post office or official depository under the exclusive care and custody of the U. S. Postal Service directed to the
 ☐ defendant's attorney
 ☐ defendant
 at the address shown below.

Address

- ☐ leaving a copy at the office of the defendant's attorney with a partner or employee.

Name And Title Of Person With Whom Copy Left

- ☐ Other:

Date Served	Signature Of Person Serving	Title
-------------	-----------------------------	-------

ACCEPTANCE OF SERVICE

- ☐ Service accepted by:
 ☐ defendant's attorney.
 ☐ defendant.

Date Service Accepted	Signature Of Person Accepting Service
-----------------------	---------------------------------------

STATE OF NORTH CAROLINA

File No.

County

In The General Court Of Justice

☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

Offense

FELONY JUDGMENT FINDINGS OF AGGRAVATING AND MITIGATING FACTORS (STRUCTURED SENTENCING)

G.S. 15A-1340.16

NOTE: When consolidating offenses for judgment, findings of aggravating factors and mitigating factors should be made only for the most serious offense. Separate findings of aggravating factors and mitigating factors should be made for each offense that is not consolidated.

AGGRAVATING FACTORS

- ☐ 1. The Defendant: ☐ a. induced others to participate in the commission of the offense.
☐ b. occupied a position of leadership or dominance of other participants in the commission of the offense.
- ☐ 2. The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.
- ☐ 2a. The offense was committed for the benefit of, or at the direction of, any (check one) ☐ (offenses committed Dec. 1, 1997 - Nov. 30, 2017) criminal street gang, ☐ (offenses committed on or after Dec. 1, 2017) criminal gang as defined by G.S. 14-50.16A(1), with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy.
- ☐ 3. The offense was committed for the purpose of: ☐ a. avoiding or preventing a lawful arrest. ☐ b. effecting an escape from custody.
- ☐ 4. The defendant was: ☐ a. hired to commit the offense. ☐ b. paid to commit the offense.
- ☐ 5. The offense was committed to: ☐ a. disrupt ☐ b. hinder the lawful exercise of a governmental function or the enforcement of laws.
- ☐ 6. The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Division of Adult Correction and Juvenile Justice, jailer, fireman, emergency medical technician, ambulance attendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.
- ☐ 6a. The offense was committed against or proximately caused serious harm as defined in G.S. 14-163.1 or death to a law enforcement agency animal, an assistance animal, or a search and rescue animal (Applies to offenses committed on or after December 1, 2009.) as defined in G.S. 14-163.1, while engaged in the performance of the animal's official duties.
- ☐ 7. The offense was especially heinous, atrocious or cruel.
- ☐ 8. The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.
- ☐ 9. (select appropriate option depending on date of offense)
☐ a. (use for offenses committed prior to December 1, 2012) The defendant held public office at the time of the offense and the offense related to the conduct of the office.
☐ b. (use for offenses committed on or after December 1, 2012) The defendant held public elected or appointed office or public employment at the time of the offense and the offense directly related to the conduct of the office or employment. (NOTE: The court must notify the State Treasurer as required by G.S. 15A-1340.16(f).)
- ☐ 9a. The defendant is a firefighter or rescue squad worker, and the offense is directly related to service as a firefighter or rescue squad worker. (Applies to offenses committed on or after December 1, 2013.)
- ☐ 10. The defendant: ☐ a. was armed with a deadly weapon at the time of the crime. ☐ b. used a deadly weapon at the time of the crime.
- ☐ 11. The victim was: ☐ a. very young. ☐ b. very old. ☐ c. mentally infirm. ☐ d. physically infirm. ☐ e. handicapped.
- ☐ 12. The defendant committed the offense while on pretrial release on another charge.
- ☐ 12a. The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration. The Court finds this aggravating factor beyond a reasonable doubt. (Applies to offenses committed on or after December 1, 2008.)
- ☐ 13. The defendant involved a person under the age of 16 in the commission of the crime.
- ☐ 13a. (for offenses committed on or after December 1, 2015) The defendant committed an offense and knew or reasonably should have known that a person under the age of 18 who was not involved in the commission of the offense was in a position to see or hear the offense.
- ☐ 14. The offense involved: ☐ a. an attempted taking of property of great monetary value. ☐ b. the actual taking of property of great monetary value.
☐ c. damage causing great monetary loss. ☐ d. an unusually large quantity of contraband.
- ☐ 15. The defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.
- ☐ 16. The offense involved the sale or delivery of a controlled substance to a minor.
- ☐ 16a. The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or was otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste.
- ☐ 16b. The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings.
- ☐ 17. The offense was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.
- ☐ 18. The defendant does not support the defendant's family.
- ☐ 18a. The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B, C, D, or E felony if committed by an adult.
☐ The Court finds this aggravating factor beyond a reasonable doubt.
- ☐ 19. The victim of this offense suffered serious injury that is permanent and debilitating.
- ☐ 19a. The offense is a violation of G.S. 14-43.11, G.S. 14-43.12, or G.S. 14-43.13, and involved multiple victims. (Applies to offenses committed on or after October 1, 2013.)
- ☐ 19b. The offense is a violation of G.S. 14-43.11, G.S. 14-43.12, or G.S. 14-43.13, and the victim suffered serious injury as a result of the offense. (Applies to offenses committed on or after October 1, 2013.)
- ☐ 20. Additional written findings of factors in aggravation:

- ☐ The Court accepts the defendant's admission to the aggravating factor(s) noted above and finds the supporting evidence to be beyond a reasonable doubt.
- ☐ The trier of fact finds these aggravating factors beyond a reasonable doubt.
- ☐ There are no findings of any aggravating factors.

MITIGATING FACTORS

- ☐ 1. The defendant committed the offense under:
- ☐ a. duress which was insufficient to constitute a defense but significantly reduced the defendant's culpability.
 - ☐ b. coercion which was insufficient to constitute a defense but significantly reduced the defendant's culpability.
 - ☐ c. threat which was insufficient to constitute a defense but significantly reduced the defendant's culpability.
 - ☐ d. compulsion which was insufficient to constitute a defense but significantly reduced the defendant's culpability.
- ☐ 2. The defendant:
- ☐ a. was a passive participant in the commission of the offense.
 - ☐ b. played a minor role in the commission of the offense.
- ☐ 3. The defendant was suffering from a:
- ☐ a. mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
 - ☐ b. physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
- ☐ 4. The defendant's:
- ☐ a. age, or immaturity, at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.
 - ☐ b. limited mental capacity at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.
- ☐ 5. The defendant has made:
- ☐ a. substantial restitution to the victim.
 - ☐ b. full restitution to the victim.
- ☐ 6. The victim was more than 16 years of age and:
- ☐ a. was a voluntary participant in the defendant's conduct.
 - ☐ b. consented to the defendant's conduct.
- ☐ 7. The defendant:
- ☐ a. aided in the apprehension of another felon.
 - ☐ b. testified truthfully on behalf of the State in another prosecution of a felony.
- ☐ 8. ☐ a. The defendant acted under strong provocation.
- ☐ b. The relationship between the defendant and the victim was otherwise extenuating.
- ☐ 9. The defendant:
- ☐ a. could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear.
 - ☐ b. exercised caution to avoid serious bodily harm or fear to other persons.
- ☐ 10. The defendant reasonably believed that the defendant's conduct was legal.
- ☐ 11. The defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer:
- ☐ a. at an early stage of the criminal process.
 - ☐ b. prior to arrest.
- ☐ 12. The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.
- ☐ 13. The defendant is a minor and has reliable supervision available.
- ☐ 14. The defendant has been honorably discharged from the United States Armed Services.
- ☐ 15. The defendant has accepted responsibility for the defendant's criminal conduct.
- ☐ 16. The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.
- ☐ 17. The defendant supports the defendant's family.
- ☐ 18. The defendant has a support system in the community.
- ☐ 19. The defendant has a positive employment history or is gainfully employed.
- ☐ 20. The defendant has a good treatment prognosis and a workable treatment plan is available.
- ☐ 21. Additional written findings of factors in mitigation:

☐ The Court makes no findings of any mitigating factors.

DETERMINATION

1. The Court finds that:
- ☐ the State provided the defendant with appropriate notice of the aggravating factor(s) in this case.
 - ☐ the defendant waived any notice requirements as to the aggravating factor(s) in this case.
2. The Court finds that the State included in its criminal pleading the statement required by G.S. 15A-924(a)(7), if necessary.
3. The Court, having considered the evidence and arguments presented at the trial and sentencing hearing, and based on the admission(s) and findings of aggravating and mitigating factors as noted above,
- ☐ finds that the factors in aggravation outweigh the factors in mitigation and that an aggravated sentence is justified.
 - ☐ finds that the factors in mitigation outweigh the factors in aggravation and that a mitigated sentence is justified.
 - ☐ makes no determination as to the relative weights of the factors found above, because the sentence imposed is in the presumptive range.

Date

Name Of Presiding Judge (Type Or Print)

Signature Of Presiding Judge

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA

County

JURY

File No.

Scan No.

VS.

BACK ROW

1	2	3	4	5	6
7	8	9	10	11	12

FRONT ROW

CHALLENGES

CERTIFICATION

For Cause

State Or Plaintiff

Defendant

I certify that in the above-numbered case the persons whose names appear above were called as jurors, that those whose names are marked through were excused, and that those whose names are not marked through were empanelled to serve as jurors.

Date

Signature

☐ Deputy CSC ☐ Asst. CSC
☐ Clerk Of Superior Court

STATE OF NORTH CAROLINA

File No.

County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

DOB

Age

Highest Level Of Education Completed

TRANSCRIPT OF PLEA

G.S. 15A-1022, 15A-1022.1

NOTE: Use this section **ONLY** when the Court is rejecting the plea arrangement.

☐ The plea arrangement set forth within this transcript is hereby rejected and the clerk shall place this form in the case file. (Applies to plea arrangements disclosed on or after December 1, 2009.)

Date

Name Of Presiding Judge (type or print)

Signature Of Presiding Judge

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered a plea of ☐ guilty ☐ guilty pursuant to *Alford* decision ☐ no contest, and (3) offered the following answers to the questions set out below:

Answers

1. Are you able to hear and understand me? (1) _____
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you? (2) _____
3. At what grade level can you read and write? (3) _____
4. (a) Are you now using or consuming alcohol, drugs, narcotics, medicines, pills, or any other substances? (4a) _____
 (b) When was the last time you used or consumed any such substance? (4b) _____
 (c) How long have you been using or consuming this medication or substance? (4c) _____
 (d) Do you believe your mind is clear, and do you understand what you are doing in this hearing? (4d) _____
5. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge? (5) _____
6. (a) Have you and your lawyer discussed the possible defenses, if any, to the charges? (6a) _____
 (b) Are you satisfied with your lawyer's legal services? (6b) _____
7. (a) Do you understand that you have the right to plead not guilty and be tried by a jury? (7a) _____
 (b) Do you understand that at such trial you have the right to confront and to cross examine witnesses against you? (7b) _____
 (c) Do you understand that by your plea(s) you give up these and other important constitutional rights to a jury trial? (7c) _____
8. Do you understand that, if you are not a citizen of the United States of America, your plea(s) of guilty or no contest may result in your deportation from this country, your exclusion from admission to this country, or the denial of your naturalization under federal law? (8) _____
- ☐ 9. Do you understand that upon conviction of a felony you may forfeit any State licensing privileges you have in the event that your probation is revoked? (9) _____
10. Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal? (10) _____
11. Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved? (11) _____

(Over)

12. Do you understand that you are pleading ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest to the (12) _____ charges shown below? (Describe charges, total maximum punishments, and applicable mandatory minimums for those charges.)

PLEAS

✓	Plea*	File Number	Count No.(s)	Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	F/M	CL.	‡Pun. CL.	Maximum Punishment

☐ See attached AOC-CR-300A, for additional charges.

*G = Guilty GA = *Alford* plea
NC = No Contest

TOTAL MAXIMUM PUNISHMENT ▶

MANDATORY MINIMUM FINES & SENTENCES (if any) ▶

✓ NOTE TO CLERK: If this column is checked this is an added offense or reduced charge.

‡ NOTE: Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).

13. Do you now personally plead ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest to the charges (13) _____ I just described?

14. ☐ (a) Are you in fact guilty? (14a) _____

☐ (b) (no contest plea) Do you understand that, upon your plea of no contest, you will be treated as being guilty whether or not you admit that you are in fact guilty? (14b) _____

☐ (c) (*Alford* guilty plea)
(1) Do you now consider it to be in your best interest to plead guilty to the charges I just described? (14c1) _____

(2) Do you understand that, upon your "*Alford* guilty plea," you will be treated as being guilty whether or not you admit that you are in fact guilty? (14c2) _____

☐ 15. (Use if aggravating factors are listed below) Have you admitted the existence of the following aggravating factors: (15) _____

have you agreed that there is evidence to support these factors beyond a reasonable doubt, have you agreed that the Court may accept your admission to these factors, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these aggravating factors ☐ agree that the State has provided you with appropriate notice about these aggravating factors?

☐ 16. (Use if sentencing points are selected below) Have you admitted the existence of the following sentencing points not related to prior convictions: ☐ offense committed while on supervised or unsupervised probation, parole, or post-release supervision ☐ offense committed while serving a sentence of imprisonment ☐ offense committed while on escape from a correctional institution, have you agreed that there is evidence to support these points beyond a reasonable doubt, have you agreed that the Court may accept your admission to these points, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these sentencing points ☐ agree that the State has provided you with the appropriate notice about these sentencing points? (16) _____

☐ 17. (Use if No. 15 or 16 selected above) Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors and any additional sentencing points not related to prior convictions that may apply to your case beyond a reasonable doubt, and that by your plea(s) you give up this constitutional right to a jury determination? (17) _____

18. Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (18) _____

19. Do you understand that the courts have approved the practice of plea arrangements and you can discuss your plea arrangement with me without fearing my disapproval? (19) _____

STATE VERSUS

File No.

Name Of Defendant

20. Have you agreed to plead ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest as part of a plea arrangement? (if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.) (20) _____
21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

- ☐ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.
- ☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement? (22) _____
23. Do you now personally accept this arrangement? (23) _____
24. (Other than the plea arrangement between you and the prosecutor) has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes? (24) _____
25. Do you enter this plea of your own free will, and do you fully understand what you are doing? (25) _____
26. Do you agree that there are facts to support your plea ☐ and admission to aggravating factors ☐ and sentencing points not related to prior convictions, and do you consent to the Court hearing a summary of the evidence? (26) _____
27. Do you have any questions about what has just been said to you or about anything else connected to your case? (27) _____

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my plea in this case. The terms and conditions of the plea as stated within this transcript, if any, are accurate.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date

Date

Signature

Signature Of Defendant

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

Name Of Defendant (type or print)

CERTIFICATION BY LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature and elements of the charges to which the defendant is pleading, and the aggravating and mitigating factors and prior record points for sentencing, if any.

Date

Name Of Lawyer For Defendant (type or print)

Signature Of Lawyer For Defendant

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of the plea by the defendant to the charges in this case.

Date

Name Of Prosecutor (type or print)

Signature Of Prosecutor

PLEA ADJUDICATION

Upon consideration of the record proper, evidence or factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigned finds that:

1. There is a factual basis for the entry of the plea (*and for the admission as to aggravating factors and/or sentencing points*);
2. The defendant is satisfied with his/her lawyer's legal services;
3. The defendant is competent to stand trial;
4. ☐ The State has provided the defendant with appropriate notice as to the aggravating factors and/or points; ☐ The defendant has waived notice as to the aggravating factors and/or points; and
5. The plea (*and admission*) is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's plea (*and admission*) is hereby accepted by the Court and is ordered recorded.

Date	Name Of Presiding Judge (type or print)	Signature Of Presiding Judge
------	---	------------------------------

SUPERIOR COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

DISTRICT COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

CERTIFICATION BY PROSECUTOR

The undersigned prosecutor enters a dismissal to the above charges pursuant to a plea arrangement shown on this Transcript Of Plea.

Date	Name Of Prosecutor (type or print)	Signature Of Prosecutor
------	------------------------------------	-------------------------

STATE OF NORTH CAROLINA

File No.

County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name And Address Of Defendant

Social Security No.

SID No.

Race

Sex

DOB

WORKSHEET PRIOR RECORD LEVEL FOR FELONY SENTENCING AND PRIOR CONVICTION LEVEL FOR MISDEMEANOR SENTENCING (STRUCTURED SENTENCING)

(For Offenses Committed On Or After Dec. 1, 2009)

G.S. 15A-1340.14, 15A-1340.21

I. SCORING PRIOR RECORD/FELONY SENTENCING

NUMBER	TYPE	FACTORS	POINTS
	Prior Felony Class A Conviction	X10	
	Prior Felony Class B1 Conviction	X 9	
	Prior Felony Class B2 or C or D Conviction	X 6	
	Prior Felony Class E or F or G Conviction	X 4	
	Prior Felony Class H or I Conviction	X 2	
	Prior Class A1 or 1 Misdemeanor Conviction (see note on reverse)	X 1	
SUBTOTAL			

Defendant's Current Charge(s):

If all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining prior record level.		+ 1	
If the offense was committed while the offender was: ☐ on probation, parole, or post-release supervision; ☐ serving a sentence of imprisonment; or ☐ on escape from a correctional institution. NOTE: If part of a plea transcript, use form AOC-CR-300 ("Transcript Of Plea"), Nos. 16 and 17.		+ 1	
County	File No.	State (if other than NC)	
TOTAL			

II. CLASSIFYING PRIOR RECORD/CONVICTION LEVEL

MISDEMEANOR

No. Of Prior Convictions	Level
0	I
1 - 4	II
5 +	III

NOTE: If sentencing for a misdemeanor, total the number of prior conviction(s) listed on the reverse and select the corresponding prior conviction level.

PRIOR CONVICTION LEVEL 

- ☐ The Court has determined the number of prior convictions to be _____ and the level to be as shown above.
- ☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

FELONY

Points	Level
0 - 1	I
2 - 5	II
6 - 9	III
10 - 13	IV
14 - 17	V
18 +	VI

NOTE: If sentencing for a felony, locate the prior record level which corresponds to the total points determined in Section I above.

PRIOR RECORD LEVEL 

- ☐ The Court finds the prior convictions, prior record points and the prior record level of the defendant to be as shown herein.
- ☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.
- ☐ In finding a prior record level point under G.S. 15A-1340.14(b)(7), the Court has relied on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

- ☐ The Court finds that all of the elements of the present offense are included in a prior offense.
- ☐ For each out-of-state conviction listed in Section V on the reverse, the Court finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section V is correct.
- ☐ The Court finds that the State and the defendant have stipulated in open court to the prior convictions, points, and record level.

Date	Name Of Presiding Judge (type or print)	Signature Of Presiding Judge
------	---	------------------------------

(Over)

Developing an Investigative and Discovery Strategy

Keith Williams
Greenville, North Carolina
252-931-9362 keith@williamslawonline.com

1

Credits

- 2016 Power Point from Glenn Gerding
- 2017 Power Point from Vince Rabil
- Phil Dixon, Jr., School of Government Faculty Member

2

Three Points

1. What They Give You
2. What You Give Them
3. What You Get on Your Own

3

1. What They Give You

4

1. What They Give You

- Constitutional (due process)

- Exculpatory Material

- *Brady v Maryland*, 373 US 83 (1963)

- Information relevant to guilt or punishment that is favorable to the defendant

5

1. What They Give You

- Impeachment Material

- *Giglio v United States*, 405 US 150 (1972)

- Prosecutor has the duty to find any exculpatory or impeachment material known to law enforcement

- *Kyles v. Whitley*, 514 US 419 (1995)

6

1. What They Give You

•Old Rule

- Prosecutor decides what is exculpatory or impeaching and gives it to you
- Or if s/he wanted to, they could give you open file discovery

7

1. What They Give You

•New Rule: mandatory open file discovery

- Fox should not guard henhouse
- They give you everything they have, per 15A-903
- More than just exculpatory or impeaching; everything

8

1. What They Give You

•Procedure

- File Request for Discovery 15A-902
 - Generally within 10 working days after being notified of the indictment

9

1. What They Give You

- After 7 days, make motion for discovery 15A-902
 - If State has not provided it
 - And even if State has provided it
 - "This motion is made for the record, to assert fully the Defendant's rights to discovery"

10

1. What They Give You

- After you get the discovery
 - Read it and make note of anything mentioned but not provided
 - Example: "Officer A took pictures of the scene" – but no pictures provided
 - Example: "Officer B sent items to the State Crime Lab for analysis" – but no lab report provided

11

1. What They Give You

- Then file a motion for additional discovery
 - Citing Brady, Giglio, and the open file discovery statutes
 - Ask the court to order production of the missing items
 - Most prosecutors will work with you

12

1. What They Give You

- If the State is playing games, file a motion for sanctions (sample attached; first attachment)
- 15A-910: asking for a continuance, a mistrial, a dismissal, or “other appropriate orders”
- Cross the offending officer with the issue at trial

13

1. What They Give You

- In a drug case in which the State used a confidential informant (CI), include in your motion a request for the CI file
- most agencies maintain files on their CI's, showing the CI's history with the agents, payments made to the CI, and other information concerning the CI

14

1. What They Give You

- Especially if the agency is certified by CALEA (the Commission on Accreditation for Law Enforcement Agencies)
- Argue as part of open file discovery because “the complete files of all law enforcement agencies . . . involved in the investigation of the crimes committed or the prosecution of the defendant.” 15A-903(a1)

15

1. What They Give You

• From Greenville Police Department Manual:

- directs that GPD maintain a file on all informants that includes a record of payments made to the informant and a copy of the informant's criminal record.

16

1. What They Give You

- provides that "[a]ll meetings with informants in which information is obtained or investigative progress is made shall be documented and included in the investigation file related to the case."
- has a section headed "Guidelines for Paying Informants." It directs the officer to meet with a supervisor "to determine [the] value" of information provided by an informant. It requires that payments to informants "be documented on Report of Special Expenditures."

17

2. What You Give Them

18

2. What You Give Them

- Constitutional
 - No because State has no constitutional rights
- Statutory
 - Yes per statute, 15A-905
 - State's Motion for Reciprocal Discovery

19

2. What You Give Them

- Within 20 working days after final administrative setting ("within 20 working days after the date the case is set for trial" 15A-905(c)(1))
- Notice of Defenses: if you are going to rely on alibi, duress, entrapment, insanity, mental

20

2. What You Give Them

infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication

- If alibi, State can ask for disclosure of alibi witnesses no later than 2 weeks before trial

21

2. What You Give Them

- More detailed notice required for duress, entrapment, insanity, automatism, or involuntary intoxication: "specific information as to the nature and extent of the defense"
- OK to give the notice and later change your mind; giving the notice is "inadmissible against the defendant." 15A-905(c)(1)

22

2. What You Give Them

- Around two to three weeks before trial
("reasonable time prior to trial") 15A-905(c)
- Any exhibits or other materials you plan to admit
- Results of any examinations or tests you plan to admit
- Expert witness reports and curricula vitae for experts you will call

23

2. What You Give Them

- Caveats
 - Only what you plan to admit
 - Not your whole file
 - No reciprocal open file discovery

24

2. What You Give Them

• At beginning of jury selection

• Your witness list per 15A-905(c)(3)

• “a written list of the names of all other witnesses whom the defendant reasonably expects to call during the trial”

25

2. What You Give Them

• If you play games with them: they can move for sanctions

• 15A-910

26

3. What You Get on Your Own

27

3. What You Get on Your Own

- Anybody can pick up a rock
- It takes imagination, effort, and discipline to dig and find the gemstones hidden underground
- That's where the good stuff is

28

3. What You Get on Your Own

- Imagination
- Think beyond what is there
- To what *could* be there
- And how you can make it be there

29

3. What You Get on Your Own

- Sometimes your investigation changes everything
- Sometimes you win because you did more investigation than the State

30

3. What You Get on Your Own

- Imagination at work

- My Cousin Vinny

- https://www.youtube.com/watch?v=_T24IHnB7N8

31

3. What You Get on Your Own

- Sky is the limit. Ceiling is the roof.

- Spend your time on what is needed for the theory of your case

- Example: bank robbery; your client is alleged to be driver of the getaway car

32

3. What You Get on Your Own

- If your theory is mistaken identity, spend your time getting evidence of his whereabouts on the offense date

- But if your theory is that he acted under duress b/c threatened by codefendant, spend your time going into codefendant's background

33

3. What You Get on Your Own

• Some common examples

- Social media
- Video and audio recordings
- Medical records and other material from third parties

34

3. What You Get on Your Own

• Social media

- Facebook, twitter, instagram, VSCO, Venmo
- Get it if public
- But do not “friend” them to get it

35

3. What You Get on Your Own

• Video and Audio Recordings

- Dashcam from the patrol car
- Bodycam from the officer

36

What You Get on Your Own

- Surveillance cameras
 - City-owned
 - Private businesses
- 911 Call Recordings

37

3. What You Get on Your Own

- Recordings from private business or individual (surveillance cameras)
 - Work on these right away
 - Many are gone within 2-4 weeks
 - Go out to the scene and look for cameras

38

3. What You Get on Your Own

- Issue subpoenas
 - if you are not sure who owns the business, check the records in Register of Deeds, Tax Office, or Secretary of State
- Direct production of the recording in court on the court date

39

3. What You Get on Your Own

- Or better: direct production to your office prior to the court date so you can get it ASAP
- Permitted by 2008 Formal Ethics Opinion 4

40

3. What You Get on Your Own

- Recordings from law enforcement (dash cams, body cams, etc.)
- Cannot use subpoena
- Must file a petition under NCGS § 132-1.4A(e1)
- File in civil Superior Court (no filing fee)

41

3. What You Get on Your Own

- Not as bad as it sounds; really just a subpoena using a different form
 - AOC-CV-270
 - Sample attached (second attachment)
- File it with Notice of Hearing
 - Set on next available civil Superior Court term

42

3. What You Get on Your Own

- Mail to the Chief of Police (or Sheriff)
- As a courtesy, copy to the city attorney or county attorney who will handle it for them
- Generally, they give you the recording with little trouble; and often without the need to appear in civil court

43

3. What You Get on Your Own

- Medical records and other records held by third parties (doctors, counselors, schools, etc.)
- Example: mental health treatment records concerning the prosecuting witness
- Sometimes called "third party discovery" or "Ritchie records"

44

3. What You Get on Your Own

- *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987): criminal defendant entitled to receive portions of state social service agency files that contain material information
- You file the motion requesting the records
 - Sample attached (third attachment)

45

3. What You Get on Your Own

- You send a subpoena to the third party that holds the records
- Directing production under seal to the court (the Clerk's Office)
- Note: these records are generally privileged, so do not direct production to your office; you need a court order to set aside the privilege

46

3. What You Get on Your Own

- On court date, ask for a motions hearing
- Ask the judge to order the records be given to you outright
- If not, then ask for the judge to review *in camera* and give to you after reviewing; or to seal for appellate review if withheld

47

3. What You Get on Your Own

- If you are not sure where the prosecuting witness received treatment, then just file the motion without the subpoena
- Stating what you know about the prosecuting witness potentially having treatment records out there
- At least asking for the prosecutor to provide any such records in their possession (putting it on the record)

48

Conclusion



Evidence Blocking*

Jonathan Rapping**

* The term “evidence blocking” and the ideas set forth in this paper come from my colleague and mentor at the D.C. Public Defender Service, Jonathan Stern. Mr. Stern honed the practice of evidence blocking to an art. There is not a concept in this paper that I did not steal from Mr. Stern, including examples presented. He deserves full credit for this paper.

** Jonathan Rapping is the Executive Director of the Southern Public Defender Training Center and is on the faculty of Atlanta’s John Marshall law School.

I. Facts of the World v. Facts of the Case

If a tree falls in the woods and no one is there to hear it, does it make a sound? We may confidently answer, “yes.” However, we cannot, with certainty, know what exactly it sounded like. Scientists might estimate what the sound would have been based on whatever factors scientists use, but that will be an approximation. They may disagree on the density of other vegetation in the area that would affect the sound, or the moisture in the soil that may be a factor. Perhaps the guess will be close to the actual sound. Perhaps not. We can never know for sure. A trial is the same way. It is a recreation, in a courtroom, of a series of events that previously took place. There are disagreements over factors that impact the picture that is created for the jury. The picture painted for the jury is affected by biases of the witnesses, the quality and quantity of evidence that is admitted, and the jury’s own viewpoint. In the end, the picture the jury sees may be close to what actually occurred or may be vastly different.

Understanding that the picture that is painted for the jury is the one that matters is central to the trial lawyer’s ability to be an effective advocate. It is helpful to think of facts in two categories: facts of the world and facts of the case. The first category, facts of the world, are the facts that actually occurred surrounding the event in question in our case. We will never know with certainty what the facts of the world are. The second category, facts of the case, are the facts that are presented at trial. It is from these facts that the fact-finder will attempt to approximate as closely as possible the facts of the world. The fact-finder will never be able to perfectly recreate a picture of what happened during the incident in question. How close the fact-finder can get will be a function of the reliability and completeness of the facts that are presented at trial.

II. The Difference Between Prosecutors and Defense Attorneys

By understanding that the outcome of the trial is a function of the facts of the case, we have a huge advantage over the prosecution. The prosecutor tends to believe he knows the “truth.” He thinks the facts of the world are perfectly reflected by his view of the evidence known to him. When the facts of the case point to a conclusion that is different from the one he believes he knows to be true, the prosecutor is unable to adjust. He can’t move from the picture he has concluded in his mind to be “true.” Therefore, he renders himself unable to see the same picture that is painted before the jury at trial. The good defense attorney understands she is incapable of knowing the “truth.” She focuses on the facts of the case. She remains flexible to adjust to facts that are presented, or excluded, that she did not anticipate. In that sense she is better equipped to see

the picture the jury sees and to effectively argue that picture as one of innocence, or that at least raises a reasonable doubt.

The ability to think outside the box is one of the main advantages defense attorneys have over prosecutors. It is a talent honed out of necessity. We necessarily have to reject the version of events that are sponsored by the prosecution. They are a version that points to our client's guilt. We must remain open to any alternative theory, and proceed with that open mind throughout our trial preparation.

Prosecutors generally develop a theory very early on in the investigation of the case. Before the investigation is complete they have usually settled on a suspect, a motive, and other critical details of the offense. In the prosecutor's mind, this version of events is synonymous with what actually happened. In other words, the prosecutor assumes he knows the "truth." The fundamental problem with this way of thinking is that all investigation from that point on is with an eye towards proving that theory. Instead of being open minded about evidence learned, there is a bias in the investigation. Evidence that points to another theory must be wrong. When it comes to a witness who supports the government's theory but, to an objective observer, has a great motive to lie, the prosecutor assumes the witness is truthful and that the motive to lie is the product of creative defense lawyering. This way of thinking infects the prosecution at every level: from the prosecutor in charge of the case to law enforcement personnel who are involved with the prosecution. Whether the prosecution theory ultimately is right or wrong, this mid-set taints the ability to critically think about the case.

Good defense attorneys don't do this!!! We understand that the "truth" is something we will almost certainly never know and that, more importantly, will not be accurately represented by the evidence that makes it into the trial. We understand that a trial is an attempt to recreate a picture of historical events through witnesses who have biases, mis-recollections, and perceptions that can be inaccurate. We know trials are replete with evidence that is subject to a number of interpretations and that the prism through which the jury views this evidence depends on the degree to which, and manner in which, it is presented. In short, as defense attorneys, we understand that a trial is not about what "really happened." Rather, it is about the conclusions to which the fact-finder is led by the facts that are presented at trial. This may closely resemble what actually occurred or be far from it. We will never know. As defense attorneys we deal with the facts that will be available to our fact-finder. To do otherwise would be to do a disservice to our client.

For example, imagine a case that hinges on one issue, whether the traffic light was red or green. The prosecutor has interviewed ten nuns, all of whom

claim to have witnessed the incident in question. Each of the ten nuns insists that the light was green. The defense has one lone witness. This witness says the light was red. At trial, not a single nun shows up to court. The only witness to testify to the color of the light is the lone defense witness, who says it was red. The prosecutor sees this case as a green light case in which one witness was wrong. The jury, on the other hand, sees only a red light case. It knows nothing of the nuns. The only evidence is that the light was red. As defense attorneys we must also see the case as a red light case. These are the only facts of the case. Even assuming the ten nuns were correct, that the light was green, those facts are irrelevant to this case and the jury that will decide it.

III. The Art of Evidence Blocking

The defense attorney's job is to shape the facts of the case in a manner most favorable to her client. She must be able to identify as many ways as possible to keep facts that hurt her client from becoming facts of the case. Likewise, she must be thoughtful about how to argue the admissibility of facts that are helpful to her client's case. This requires a keen understanding of the facts that are potentially part of the case and a mastery of the law that will determine which of these facts become facts of the case.

As a starting proposition, the defense attorney should consider every conceivable way to exclude every piece of evidence in the case. Under the American system of justice, the prosecution has the burden of building a case against the defendant. The prosecution must build that case beyond a reasonable doubt. The facts available to the prosecution are the bricks with which the prosecutor will attempt to build that case. At the extreme, if we can successfully exclude all of the facts, there will be no evidence for the jury. It follows that the more facts we can successfully keep out of the case, the less bricks available to the prosecution from which to build the case against our client.

A wise advocacy principle is to never underestimate your opponent. Along this line it would behoove you to assume that if the prosecutor wants a piece of evidence in a case, it is because it is helpful to his plan to win a conviction against your client. Assume he is competent. Assume he knows what he is doing. Assume that fact is good for his case, and therefore bad for your client. Therefore, you do not want that fact in the case. Resist the temptation to take a fact the prosecution will use, and make it a part of your defense before you have considered whether you can have that fact excluded from the trial and how the case will look without it. Far too often defense attorneys learn facts in a case and begin thinking of how those facts will fit into a defense theory without considering whether the fact can be excluded from the trial. This puts the cart

before the horse. We must train ourselves to view every fact critically. We must consider whether that fact is necessarily going to be a part of the case before we decide to embrace it¹.

The prosecutor obviously knows his case, and how he plans to build it, much better than you do. If you accept the premise prosecutors tend to do things for a reason, i.e. to help convict your client, then it follows that any fact the prosecution wishes to use to build its case against your client is one we should try to keep out of evidence. Even if you are unwilling to give the prosecutor that much credit, limiting the facts at his disposal to use against your client can only be beneficial. This defines a method of practice coined by Jonathan Stern as “evidence blocking.” Put plainly, evidence blocking is the practice of working to keep assertions about facts of the world out of the case. This exercise is one that forces us to consider the many ways facts can be kept out of evidence, and therefore made to be irrelevant to the facts of the case, and the derivative benefits of litigating these issues.

It is helpful to think of evidence blocking in four stages: 1) suppression/discovery violations; 2) witness problems; 3) evidence problems; and presentation problems.

A. Suppression / Discovery and Other Statutory Violations

The first stage we must think about when seeking to block evidence includes violations by the prosecution team of the Constitution, statutory authority, or court rule. We must think creatively about how evidence gathered by the State may be the fruit of a Constitutional violation. Generally, in this regard, we consider violations of the Fourth, Fifth, and Sixth Amendments. We look to any physical evidence seized by the government, statements allegedly made by your client, and identifications that arguably resulted from a government-sponsored identification procedure. We consider theories under which this evidence was obtained illegally and we move to suppress that evidence. We also must look to any violations of a statute or rule that might arguably warrant exclusion of evidence as a sanction. A prime example of this is a motion to exclude evidence based on a violation of the law of discovery. How we litigate these issues will define how much of the evidence at issue is admitted

¹ Of course, after going through this exercise, there will be facts that you have concluded are going to be part of the “facts of the case.” These are “facts beyond control.” At that point it is wise to consider how your case theory might embrace these facts beyond control, thereby neutralizing their damaging impact. However, this paper is meant to serve as a caution to the defense attorney to not engage in the exercise of developing a case theory around seemingly bad facts until she has thoroughly considered whether she can exclude those facts from the case.

at trial and how it can be used. We must use our litigation strategy to define how these issues are discussed.

B. Witness Problems

A second stage of evidence blocking involves identifying problems with government witnesses. This includes considering the witness' basis of knowledge. A witness may not testify regarding facts about which she does not have personal knowledge. It also includes thinking about any privileges the witness may have. Be thoughtful about whether a witness has a Fifth Amendment privilege. Consider marital privilege, attorney/client privilege, and any other privilege that could present an obstacle to the government's ability to introduce testimony it desires in its case. Another example of a witness problem is incompetency. We should always be on the lookout for information that arguable renders a witness incompetent to testify and move to have that witness excluded from testifying at trial. These are some examples of witness problems.

C. Evidence Problems

While witness problems relate to problems with the witness herself, we must also consider a third stage of evidence blocking: problems with the evidence itself. Even with a witness who has no problems such as those described above, there may be problems with the evidence the government wishes for them wish to present. Perhaps the information the witness has is barred because it is hearsay. Consider whether the evidence is arguably irrelevant. Think about whether the evidence is substantially more prejudicial than probative. These are all examples of problems with the evidence.

D. Presentation Problems

A final stage of evidence blocking involves a problem with the method of presentation of the evidence. Maybe the government is unable to complete the necessary chain of custody. The prosecutor may be missing a witness who is critical to completing the chain of custody. Maybe the prosecutor has never been challenged with respect to chain of custody and is unaware of who he needs to get the evidence admitted. By being on your feet you may successfully exclude the evidence the prosecutor needs to make its case against your client. Another example of a presentation problem is where the prosecutor is unable to lay a proper foundation for admission of some evidence. A third example is a prosecutor who is unable to ask a proper question (for example, leading on

direct). These are all examples of problems the prosecutor could have in getting evidence before the jury if you are paying attention and making the appropriate objections.

IV. How Do You Raise An Issue

Once you have decided that there is evidence that should not be admitted at your trial you must consider the best method for bringing the issue to the Court's attention. You essentially have three options: 1) file a pretrial written Motion in Limine, 2) raise the issue orally as a preliminary matter, or 3) lodge a contemporaneous objection. There are pros and cons to each of these methods.

Some motions must be filed in writing prior to trial, such as motions to suppress. Each jurisdiction is different on the requirement regarding what must be filed pre-trial and the timing of the filing². For any motions that must be filed pretrial, you should always file pretrial motions whenever possible, for reasons stated below. However, many evidentiary issues may be raised without filing a motion. Objections to evidence on grounds that it is hearsay, irrelevant, substantially more prejudicial than probative, or any number of evidentiary grounds, are routinely made contemporaneously during trial. Certainly, should you anticipate an evidentiary issue in advance of trial you may raise it with the court. This may be done orally as a preliminary matter or in writing as a motion in limine.

What are the pros and cons of the different methods of raising an objection? Let's first consider a written, pretrial motion in limine. There are several advantages to filing a pretrial motion in limine to exclude evidence on evidentiary grounds. One is that it gives you a chance to educate the judge on the issue. Judges, like all of us, often do not know all of the law governing a particular issue off the top of their heads. If forced to rule on an issue without giving it careful thought, most judges rely on instinct. It is the rare judge whose instinct it is to help the criminal defendant. If the judge is going to rely on one of the parties to guide her, it is more often than not the prosecutor³. Therefore, you are often better off having had the chance to educate the judge than to rely on her ruling in your favor on a contemporaneous objection when the answer is not obvious.

² In Georgia, pursuant to O.C.G.A. 17-7-110, all pretrial motions, demurrers, and special pleas must be filed within ten days of the date of arraignment unless the trial court grants additional time pursuant to a motion.

³ To the extent that you have previous experience with that judge and you have developed a reputation for being thorough, smart, and honest, you may be the person upon whom the judge relies. If that is the case with the judge before whom you will be in trial, that may factor into your decision about whether to object contemporaneously.

A second reason for filing a written motion pretrial is that you are entitled to a response from the prosecutor. This benefits you in several ways. First, every time you force the prosecution to commit something to writing, you learn a little more about their case. Filing motions are a great way to get additional discovery by receiving a response. Second, whenever the prosecutor commits something to writing, he is locking himself into some version of the facts. If he characterizes a witnesses testimony in a particular way and that witness ends up testifying differently, you have an issue to litigate. Presumably, the prosecutor accurately stated in his response to your motion what the witness told him or his agent. You now are entitled to call the prosecutor, or his agent, to impeach the witness. Maybe the response is an admission of the party opponent that can be introduced at trial. The bottom line is that there is now an issue where there would not have been one had you not forced the response to your motion⁴.

A third reason for filing a written motion is that there is always the chance that the prosecutor will fail to respond, despite being required to by law or ordered to by the court. Whenever the prosecutor fails to respond to a written motion you are in a position to ask for sanctions. Sanctions may be for the court to treat your motion as conceded. They might be exclusion of some evidence. Perhaps you may get an instruction in some circumstances. Be creative in the sanctions you request.

A fourth reason is that when you file a motion, you get a hearing. Pretrial hearings are great things. They give us a further preview of the prosecutions case, commit the prosecution to the evidence presented at the hearing, and may result in sanctions.

A fifth reason for filing motions whenever you can is that it increases the size of your client's court file. A thick court file can be beneficial to your client in several ways. The sheer size of a large court file is intimidating to judges and prosecutors. Judges like to move their dockets. Thick case files tend to be trials that take a long time to complete. Judges will be less likely to force you to trial in a case with a thick case jacket. Similarly, prosecutors often have to make choices about which cases to offer better pleas in or to dismiss outright. The more of a hassle it is to deal with a case, the greater the chance the prosecutor will offer a good plea to your client or dismiss the case outright.

A sixth reason is that by taking the time to research and write the motion, you are better preparing yourself to deal with the issue and to consider how it impacts your trial strategy.

⁴ One of Jonathan Stern's cardinal rules that I have taken to heart is that you always want to be litigating something other than guilt or innocence.

A final reason for filing pretrial motions even when not required is that you appear to be honest and concerned with everyone getting the result right. By appearing to be on the up and up you can gain points with the court that will spill over to other aspects of the trial.

What are the downsides to filing a motion in advance of trial. One is certainly that you give the prosecution a heads up to an issue you seek to raise. To the extent that you identify a problem with the government's case, they may be able to fix it with advance notice. Certainly this is an important consideration that must be factored into your decision about whether to raise an evidentiary issue in writing, pretrial. A second issue, which concerns me much less, is that it allows the prosecutor to do the research he needs to do to address the legal issue you raise. Certainly by filing a pretrial motion you allow everyone to be more prepared. However, if the issue is an important one, and the judge's ruling depends on the prosecutor having a chance to do some research, most judges will give the prosecutor time to research the question before ruling whenever you raise it. To the extent this holds up the trial, there is always the risk the judge will fault you for not raising the issue earlier.

The third option, raising the issue orally as a preliminary matter, is a compromise between the other two alternatives. Obviously, it has some of the pros and cons of the other alternatives. How you handle any given issue must be the product of careful thought and analysis.

V. Conclusion

In conclusion, as defense attorneys we must take advantage of any tools at our disposal to alter the landscape of the trial in our client's favor. In order to do this we must understand and appreciate the difference between facts in the world and facts in the case. By undergoing a rigorous analysis of the facts that are potentially part of the case against our client, we may be able to keep some of those facts out of evidence. This exercise has the benefit of keeping from the prosecutor some of the blocks he hoped to use to build the case against you client. It alters the facts of the case in a way the prosecutor may be unable to deal with. And by litigating these issues we stand to derive residual benefits that will shape the outcome of the trial.

If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay



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So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, “Why me? Why do I always get the dog cases? It must be fate.” You calmly place the file on top of the stack of ever-growing canine files. Your reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to “Angel” status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, “This one is the dog of all dogs. The mother of all dogs!” Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams*, “If you build it, they will come . . .” And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited—even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner’s wife said in the movie, “[I]f all of these people are going to come, we have a lot of work to do.” The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has

become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words “theory” and “theme” are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.*—Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused’s acquittal or conviction on a lesser charge while telling the defense’s story of innocence or reduces culpability.*—Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking “Huh?” Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/ archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621
(Buncombe County)

Betty Gooden is a “pretty, very intelligent young lady” as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone’s homework. She denied having sex with the boy or cheating. She was very upset that she wasn’t allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no

sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty’s 35-year-old mentally retarded mother. She is a “very meek and introverted person” who is “very soft spoken and will not make eye contact.” She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn’t have normal parents and can’t do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty’s report to the counselor, Barry was inter-

viewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer “yes” when asked if he had sex with Betty and “yes” to other leading questions based on Betty’s story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as “fact-busting,” brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty’s school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as “self-defense,” “alibi,” “reasonable doubt,” and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. “Alibi” is usually interpreted by jurors as “He did it, but he has some friends that will lie about where he was.” “Reasonable doubt” is often interpreted as, “He did it, but they can’t prove it.”

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Public Defender’s Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn’t do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn’t a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn’t this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I’m not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre “it never happened” (mistake, set-up) than it is on “the defendant is not responsible” (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit

into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn’t do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

<i>Rock</i> →	<i>Barry, Innocent Man, Mentally Challenged Man</i>
<i>Wrongfully Tossed</i> →	<i>Removed, Ejected, Sent Packing, Calmly Asked To Leave</i>
<i>Troubled</i> →	<i>Vindictive, Wicked, Confused</i>
<i>Stepdaughter</i> →	<i>Brat, Tease, Teen, Houseguest, Manipulator</i>

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the de-

fendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one’s child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent’s love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.

2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph

- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others

knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

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than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would

be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action

taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ■



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Leonard T. Jernigan, Jr., attorney and adjunct professor of law, is pleased to announce that the 4th edition of *North Carolina Workers' Compensation - Law and Practice* is now available from Thomson West Publishing (1-800-328-4880).

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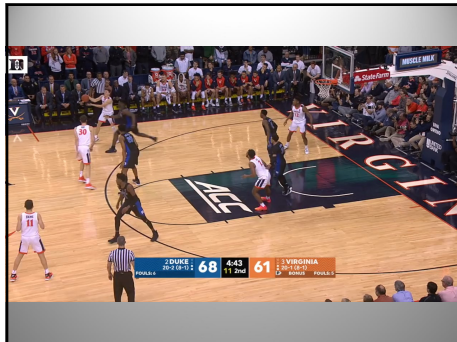
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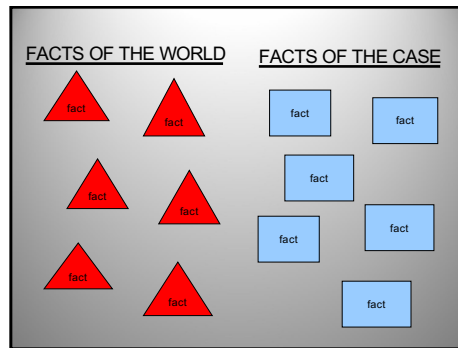
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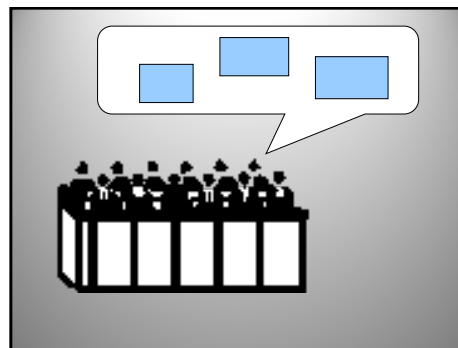
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4



5



6

1. Learn Facts of the World

- Discovery
- Investigation
- Motions and Hearings



7

2. Know the Ways of the Block

- Suppression/exclusion
- Problems with witnesses
- Problems with evidence
- Problems with presentation



8

3. Think

- Problems with their evidence so you can keep them from telling their narrative
- Problems with your evidence so you're in a position to tell your narrative



9

4. Choose

- Assess what will likely become "facts of the case"
- Decide on your best theory of defense



10

Possible Theories

- The sale happened, I talked to Officer Thomas, but I committed no crime because I had no involvement in Stapp's drug business.
- The sale happened, but I wasn't there and wasn't involved.
- No sale ever happened. The cops made it up to get my client.

11

1: Documents

- Your client says he was working at McDonalds at the time / tells you 2 months later
- No one remembers him working that day
- Time card says he did work that day

12

2: State's Witness

- Says he was in area at the time but didn't see Carper
- A friend told State's Witness, "Carper and Stapp just sold to an undercover cop; Stapp got arrested; Carper got away"
- Your investigator learns from other witnesses that State's Witness was selling drugs that day

13

#3: Client Statement

- Client tells you that when he was arrested, he told arresting officers he was selling with Stapp that day
- He hoped they would go easy on him
- Statement was not disclosed

14

#4: Experts

- Week before trial, prosecutor tells you of audio tape of drug sale with Carper's voice on it
- Tape was lost, but officer who heard it will testify as expert that it was Carper
- Prosecutor says she just learned about the tape

15