UNC SCHOOL OF GOVERNMENT

2023 Higher-Level Felony Defense Training

September 12-14, 2023 /Chapel Hill, NC

Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services

Tuesday, Sept. 12

12:45-1:15 pm	Check-in
1:15-1:30 pm	**Welcome**
1:30-2:30 pm	**Preparing for Serious Felony Cases** (60 mins.) Phil Dixon, Teaching Assistant Professor UNC School of Government, Chapel Hill, NC
2:30-3:30 pm	**Defending Eyewitness Identification Cases** (60 mins.) Laura Gibson, Assistant Public Defender Beaufort County Office of the Public Defender, Washington, NC
3:30-3:45 pm	**Break**
3:45-4:30 pm	**Storytelling and Visual Aides at Sentencing** (45 mins.) Sophorn Avitan and Susan Weigand, Assistant Public Defenders Mecklenburg Co. Public Defender's Office, Charlotte, NC
4:30-5:15 pm	**Self-Defense Update** (45 mins.) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
5:15 pm	**Adjourn**

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Wednesday, Sept. 13

9:00-10:00 am	**The Law of Sentencing Serious Felonies** (60 mins.) Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
10:00-10:15 am	**Break**
10:15-11:00 am	**Mitigation Investigation** (45 mins.) Josie Van Dyke, Mitigation Specialist Sentencing Solutions, Inc., Knightdale, NC
11:00-11:45 pm	**Preventing Low Level Felonies from Becoming High Level Habitual Felonies** (45 mins.) Jason St. Aubin, Senior Attorney Jetton & Meredith, Charlotte, NC
11:45-12:45 pm	Lunch *(provided in building)**
12:45-2:15 pm	**Brainstorming, Preparing, and Presenting a Sentencing Argument** (90 mins.) Small Group Workshops
2:15-2:30 pm	**Break**
2:30-3:30 pm	**Preservation Essentials** (60 mins.) Glenn Gerding, Appellate Defender Office of the Appellate Defender, Durham, NC
3:30-4:30 pm	**Client Rapport** (60 mins. ETHICS) Tucker Charns, Regional Defender Indigent Defense Services, Durham, NC
4:30 pm	**Adjourn**
6:00 pm	**Optional Social Gathering** TBA

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Thursday, Sept. 14

9:00-10:00 am	**Basics of Batson Challenges** (60 mins.) Hannah Autry, Staff Attorney Elizabeth Hambourger, Senior Attorney and Public Information Liaison Center for Death Penalty Litigation, Durham, NC
10:00-10:15 am	**Break**
10:15-11:00 am	**Addressing Race and Other Sensitive Topics in Voir Dire** (45 mins.) Emily Coward, Director of Inclusive Juries Project Center for Criminal Justice and Professional Responsibility, Duke Univ., Durham, NC
11:00-12:00 pm	**Peremptory and For Cause Challenges** (60 mins.) James Davis, Attorney Davis and Davis, Salisbury, NC
12:00 pm	**Wrap up and Adjourn**

TOTAL CLE HOURS: 12.25 (including 1.0 hours of Ethics credit)

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PUBLIC DEFENSE EDUCATION INFORMATION & UPDATES

If your e-mail address is *not* included on an IDS listserv and you would like to receive information and updates about Public Defense Education trainings, manuals, and other resources, please visit the School of Government's Public Defense Education site at:

www.sog.unc.edu/resources/microsites/public-defense-education

(Click *Sign Up for Program Information and Updates*)

Your e-mail address will not be provided to entities outside of the School of Government.

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High-Level Felony Defender
Sponsored by Indigent Defense Services
and the UNC School of Government
September 12-14 2023
Chapel Hill, North Carolina

FACT PROBLEMS

State v. Jones, p. 2-3

SENTENCING ADVOCACY WORKSHOP FACT PATTERN – *State v. Jones*

Johnnie Jones is an 18-year-old young man facing three counts of robbery with a dangerous weapon, class D felonies, along with a conspiracy to commit armed robbery. The State alleges that Johnnie was the driver, and acted in concert with his two co-defendants that robbed three people inside of a Sheetz gas station six months ago. Johnnie did not enter the store and initially told police that he did not realize his friends were planning to commit robbery inside.

Johnnie is the only child of an African American father and white mother, but was raised by his paternal grandparents. His mother is a heroin addict that has been in and out of prison her whole life and has never played a significant part of Johnnie's life. Johnnie does not know her extended family. Johnnie's father died in a car accident when he was 12. His father never lived with Johnnie but spent time with him on most weekends before his death.

Johnnie is a senior in high school and is passing all of his classes, but his grades have been slipping recently and he may not graduate on time without serious improvement in his studies. Johnnie played football and ran track for his first three years in high school, but recently quit the football team because of a disagreement with the coach over how much he should be playing.

His grandparents tell you that Johnnie is a good grandson that helps around the house and is generally respectful towards them. They are close with Johnnie, but they have been worried about Johnnie's recent lack of interest in sports and school, and have argued with him over his marijuana use. They mentioned that Johnnie is particularly close with a teacher, Mr. Rooney. Mr. Rooney was Johnnie's homeroom teacher in 9th grade, and now teaches Johnnie English literature. Mr. Rooney tutored Johnnie throughout high school and often would sit with Johnnie's grandparents at Johnnie's football games.

Last summer, Johnnie worked at a local car wash business in an effort to save for a car. He enjoyed the work and reports that he got along well with the owner. He loves cars and is interested in becoming an auto mechanic after graduation. He helped the owner on weekends last summer to rebuild a car engine. Johnnie reports that he learned a lot and was inspired to pursue a career in the field.

Johnnie spent some time in counseling after his father's death but has not received any treatment in several years. When asked, he says he doesn't think the counselor helped and doesn't remember where he was treated, although it was somewhere local. He recalls the therapist was a younger, blond female named Shelly (or Kelly, or maybe Terri) and that he saw her once a month for about a year.

In private with you, he denies being a part of the conspiracy or knowing that his friends were going to rob the store, but he admits he was driving the car where the gun and stolen property were found immediately following the robbery. Discovery shows that one of the wallets of a victim was found under the driver seat where Johnnie was sitting at the time of the arrest, although no fingerprints were recovered from it. Johnnie admits that he was drinking beer and smoking marijuana the night of the robberies, and probably shouldn't have been driving. When asked, he tells you he regularly uses alcohol and marijuana with friends, but mostly just on the weekends.

The Plea: The DA is currently offering two counts of armed robbery to run consecutively and to be sentenced at the bottom of the presumptive range in lieu of the original charges. Alternatively, the DA would be willing to agree to an open plea, where your client would plead guilty to all charges and the DA will ask for no more than two consecutive sentences in the presumptive range (and you would be free to advocate for a better sentence with the court). The DA is generally a reasonable and trustworthy adversary, but believes your client was fully involved in the planning and execution of the robberies and doesn't see why the plea offer isn't reasonable in light of the potential penalty at trial. Your client does not want to go to trial but is terrified of going to prison for a long time and has agreed to take the best deal you can get. Johnnie is a prior record level I for felony sentencing, with no prior convictions.

Objectives: In this workshop, you will identify areas of mitigation investigation, develop a plan for obtaining the information and create a sentencing strategy. A sentencing strategy is a specific plan to convince the court that the disposition you seek is appropriate and satisfies the interests of the parties involved and of the judicial system. Then, you will brainstorm how to effectively present the sentencing strategy and information in an effective and compelling manner, including the use of visual aids and storytelling principles.

SOME SAMPLE LIFE EXPERIENCE VOIR DIRE QUESTIONS

A. Race

1. "Tell us about the most serious incident you ever saw where someone was treated badly because of their race."

2. "Tell us about the worst experience you or someone close to you ever had because someone stereotyped you because of your (race, gender, religion, etc.).

3. Tell us about the most significant interaction you have ever had with a person of a different race.

4. Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their (race, gender, religion) and turned out to be wrong.

B. Alcohol/Alcoholism

1. "Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when they're drunk."

2. "Share with us a situation where you or a person you know of was seriously affected because someone in the family was an alcoholic."

C. Self-Defense

1. Tell me about the most serious situation you have ever seen where someone had no choice but to use violence to defend themselves (or someone else).

2. Tell us about the most frightening experience you or someone close to you had when they were threatened by another person.

3. Tell us about the craziest thing you or someone close to you ever did out of fear.

4. Tell us about the bravest thing you ever saw someone do out of fear.

5. Tell us about the bravest thing you ever saw someone do to protect another person.

D. Jumping to Conclusions

1. Tell us about the most serious mistake you or someone you know has ever made because you jumped to a snap conclusion.

E. False Suspicion or Accusation

1. Tell us about the most serious time when you or someone close to you was accused of doing something bad that you had not done.

2. Tell us about the most difficult situation you were ever in, where it was your word against someone else's, and even though you were telling the truth, you were afraid that no one would believe you.

3. Tell us about the most serious incident where you or someone close to you mistakenly suspected someone else of wrongdoing

F. Police Officers Lying/Being Abusive

1. Tell us about the worst encounter you or anyone close to you has ever had with a law enforcement officer.

2. Tell us about the most serious experience you or a family member or friend had with a public official who was abusing his authority.

3. Tell us about the most serious incident you know of where someone told a lie, not for personal gain, but because they thought it would ultimately bring about a fair result.

G. Lying

1. Tell us about the worst problem you ever had with someone who was a liar.

2. Tell us about the most serious time that you or someone you know told a lie to get out of trouble.

3. Tell us about the most serious time that you or someone you know told a lie out of fear.

4. Tell us about the most serious time that you or someone you know told a lie to protect someone else.

5. Tell us about the most serious time that you or someone you know told a lie out of greed.

6. Tell us about the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

7. Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out they were lying.

8. Tell us about the most serious incident where you really believed someone was lying, and it turned out they were telling the truth.

H. Prior Convictions/Reputation

1. Tell us about the most inspiring person you have known who had a bad history or reputation and really turned himself around.

2. Tell us about the most serious mistake you or someone close to you every made by judging someone by their reputation, when that reputation turned out to be wrong.

I. Persuasion/Gullibility/Human Nature

1. Tell us about the most important time when you were persuaded to believe that you were responsible for something you really weren't responsible for.

2. Tell us about the most important time when you or someone close to you was persuaded to believe something about a person that wasn't true.

3. Tell us about the most important time when you or someone close to you was persuaded to believe something about yourself that wasn't true.

J. Desperation

1. Tell us about the most dangerous thing you or someone you know did out of hopelessness or desperation.

2. Tell us about the most out-of-character thing you or someone you know ever did out of hopelessness or desperation.

3. Tell us about the worst thing you or someone you know did out of hopelessness or desperation.

First Panel	Juror 1:	Juror 2:	Juror 3:	Juror 4:	Juror 5:
LAWYER # 1: Issue 1:					
Issue 2:					
Issue 3:					
LAWYER # 2: Issue 1:					
Issue 2:					
Issue 3:					
LAWYER # 3: Issue1 :					
Issue 2:					
Issue 3:					

1. Legally excludable as biased for the defense
2. Overtly favorable to the defense
3. Truly open minded
4. Moderately pro-prosecution
5. Pro-prosecution
6. Very pro-prosecution
7. Legally excludable as biased for the State

Second Panel	Juror 1:	Juror 2:	Juror 3:	Juror 4:	Juror 5:
LAWYER # 1: Issue 1:					
Issue 2:					
Issue 3:					
LAWYER # 2: Issue 1:					
Issue 2:					
Issue 3:					
LAWYER # 3: Issue1 :					
Issue 2:					
Issue 3:					

1. Legally excludable as biased for the defense
2. Overtly favorable to the defense
3. Truly open minded
4. Moderately pro-prosecution
5. Pro-prosecution
6. Very pro-prosecution
7. Legally excludable as biased for the State

Creating a Theory of Defense

A theory of defense is a short written summary of the factual, emotional, and legal reasons why the jury (or judge) should return a favorable verdict. It gets at the essence of your client's story of innocence, reduced culpability, or unfairness; provides a roadmap for you for all phases of trial; and resolves problems or questions that the jury (or judge) may have about returning the verdict you want.

Steps in creating a theory of defense

Pick your genre

1. It never happened (mistake, setup)
2. It happened, but I didn't do it (mistaken id, alibi, setup, etc.)
3. It happened, I did it, but it wasn't a crime (self-defense, accident, elements lacking)
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser offense)
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity)
6. It happened, I did it, it was the crime charged, I'm responsible, so what? (jury nullification)

Identify your three best facts and three worst facts

- Helps to test the viability of your choice of genre

Come up with a headline

- Barstool or tabloid headline method

Write a theory paragraph

- Use your headline as your opening sentence
- Write three or four sentences describing the essential factual, emotional, and legal reasons why the jury (or judge) should return a verdict in your favor
- Conclude with a sentence describing the conclusion the jury (or judge) should reach

Develop recurring themes

- Come up with catch phrases or evocative language as a shorthand way to highlight the key themes in your theory of defense and move your audience

Sept. 20, 2022

NAME
ADDRESS
ADDRESS

RE: XX CRS XXXX

Dear NAME:

Thank you for agreeing to work as an expert in the case State v. DEFENDANT.

I am requesting that you perform [generic description of the type of work requested, including the type of mental health evaluation requested, if appropriate].

As I am sure you are aware, all work you do in this matter and all information you receive about this case is confidential and privileged pursuant to the attorney-client and work-product privileges. These privileges cover all oral discussions and written communications between us. Consequently, if prosecutors, law enforcement personnel, or investigators working for the State contact you regarding this case, you may not assist them. Nor may you reveal that the reason you cannot assist them is that you are working for me, as that information is privileged as well. If you are contacted about this case by anyone outside my office, please inform me and do not rely on the representations of anyone who claims that they are permitted to discuss this case with you. This obligation of confidentiality does not conclude upon the resolution of this case in court. Thus, absent my express authorization, you may not ever reveal your work in this case, including during discussions at conferences or other professional gatherings. Of course, should you become a witness in the case, your name would be disclosed to the State. If at that point you are contacted by the State, please refer the request to me without discussing the merits of the case as there may be limits to the topics about which they are permitted to question you.

I have obtained an authorization for your work [from the Court or from IDS if this is a potentially capital case] and am enclosing a copy of that authorization. You should keep track of all hours worked on this case and any expenses incurred and prepare an invoice as directed on the IDS website. You must ensure that your work and expenses in this case do not exceed the amount authorized. If you are approaching the maximum amount authorized and feel that you need an additional authorization to complete work on this case, you must contact me before you exceed the authorization. Any work that exceeds the authorization will not be compensated. The relevant Expert Fee and Expense Policies and Forms are linked and are available on the IDS website (www.ncids.org).

During the course of your work on this case I will be providing to you copies of reports or other case-related documents for your review. If there are additional materials that you need access to in order to form an opinion, please let me know specifically what items you need.

Please contact me when you have completed your evaluation to schedule a time to discuss your expert opinion. Please do not draft a report prior to discussing your findings with me. If a written report is needed, I will ask you to prepare a written report and will give you a deadline. A timely and complete report must be prepared if requested. If your testimony at a hearing or at trial is needed, I will inform you of the date when your testimony is needed. It is essential that you make yourself available if testimony is needed. If you know of any potential conflict dates, let me know as soon as possible. I will try to keep you informed of important case developments, such as resolution of the case. Please contact me at any time if you have questions about the status of the case.

Please do not hesitate to contact me for any reason. I look forward to working with you in this matter.

Sincerely,

NAME
Attorney for DEFENDANT

§ 15A-1340.16. Aggravated and mitigated sentences.

(a) Generally, Burden of Proof. – The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

(a1) Jury to Determine Aggravating Factors; Jury Procedure if Trial Bifurcated. – The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this subsection. Admissions of the existence of an aggravating factor must be consistent with the provisions of G.S. 15A-1022.1. If the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense. The jury impaneled for the trial of the felony may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination. If the court determines that a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of whether one or more aggravating factors exist, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which the juror was selected. If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue. A jury selected to determine whether one or more aggravating factors exist shall be selected in the same manner as juries are selected for the trial of criminal cases.

(a2) Procedure if Defendant Admits Aggravating Factor Only. – If the defendant admits that an aggravating factor exists, but pleads not guilty to the underlying felony, a jury shall be impaneled to dispose of the felony charge. In that case, evidence that relates solely to the establishment of an aggravating factor shall not be admitted in the felony trial.

(a3) Procedure if Defendant Pleads Guilty to the Felony Only. – If the defendant pleads guilty to the felony, but contests the existence of one or more aggravating factors, a jury shall be impaneled to determine if the aggravating factor or factors exist.

(a4) Pleading of Aggravating Factors. – Aggravating factors set forth in subsection (d) of this section need not be included in an indictment or other charging instrument. Any aggravating factor alleged under subdivision (d)(20) of this section shall be included in an indictment or other charging instrument, as specified in G.S. 15A-924.

(a5) Procedure to Determine Prior Record Level Points Not Involving Prior Convictions. – If the State seeks to establish the existence of a prior record level point under G.S. 15A-1340.14(b)(7), the jury shall determine whether the point should be assessed using the procedures specified in subsections (a1) through (a3) of this section. The State need not allege in an indictment or other pleading that it intends to establish the point.

(a6) Notice of Intent to Use Aggravating Factors or Prior Record Level Points. – The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

(a7) Procedure When Jury Trial Waived. – If a defendant waives the right to a jury trial under G.S. 15A-1201, the trial judge shall make all findings that are conferred upon the jury under the provisions of this section.

(b) When Aggravated or Mitigated Sentence Allowed. – If the jury, or with respect to an aggravating factor under G.S. 15A-1340.16(d)(12a) or (18a), the court, finds that aggravating factors exist or the court finds that mitigating factors exist, the court may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it may impose a sentence that is permitted by the mitigated range described in G.S. 15A-1340.17(c)(3).

(c) Written Findings; When Required. – The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If the jury finds factors in aggravation, the court shall ensure that those findings are entered in the court's determination of sentencing factors form or any comparable document used to record the findings of sentencing factors. Findings shall be in writing. The requirement to make findings in order to depart from the presumptive range applies regardless of whether the sentence of imprisonment is activated or suspended.

(d) Aggravating Factors. – The following are aggravating factors:

(1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

(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 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 avoiding or preventing a lawful arrest or effecting an escape from custody.

(4) The defendant was hired or paid to commit the offense.

(5) The offense was committed to disrupt or hinder the lawful exercise of any 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 of the Department of Public Safety, 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 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) 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.

(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.

(10) The defendant was armed with or used a deadly weapon at the time of the crime.

(11) The victim was very young, or very old, or mentally or physically infirm, or 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.

(13) The defendant involved a person under the age of 16 in the commission of the crime.

(13a) 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 an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved 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 for which the defendant stands convicted 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, B1, B2, C, D, or E felony if committed by an adult.

(19) The serious injury inflicted upon the victim is permanent and debilitating.

(19a) The offense is a violation of G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), or G.S. 14-43.13 (sexual servitude) and involved multiple victims.

(19b) The offense is a violation of G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), or G.S. 14-43.13 (sexual servitude), and the victim suffered serious injury as a result of the offense.

(20) Any other aggravating factor reasonably related to the purposes of sentencing.

Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under G.S. 15A-1340.16A may not be used to prove any factor in aggravation.

The judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial.

Notwithstanding the provisions of subsection (a1) of this section, the determination that an aggravating factor under G.S. 15A-1340.16(d)(18a) is present in a case shall be made by the court, and not by the jury. That determination shall be made in the sentencing hearing.

(e) Mitigating Factors. – The following are mitigating factors:

(1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.
(2) The defendant was a passive participant or played a minor role in the commission of the offense.
(3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
(4) The defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense.
(5) The defendant has made substantial or full restitution to the victim.
(6) The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.
(7) The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(8) The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.
(9) The defendant could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.
(10) The defendant reasonably believed that the defendant's conduct was legal.
(11) Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
(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 Armed Forces of the United States.
(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) Any other mitigating factor reasonably related to the purposes of sentences.

(f) Notice to State Treasurer of Finding. – If the court determines that an aggravating factor under subdivision (9) of subsection (d) of this section has been proven, the court shall notify the State Treasurer of the fact of the conviction as well as the finding of the aggravating factor. The indictment charging the defendant with the underlying offense must include notice that the State seeks to prove the defendant acted in accordance with subdivision (9) of subsection (d) of this section and that the State will seek to prove that as an aggravating factor. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 7, s. 6; c. 22, s. 22; c. 24, s. 14(b); 1995, c. 509, s. 13; 1997-443, ss. 19.25(w), 19.25(ee); 2003-378, s. 6; 2004-178, s. 2; 2004-186, s. 8.1; 2005-101, s. 1; 2005-145, s. 1; 2005-434, s. 4; 2007-80, s. 2; 2008-129, ss. 1, 2; 2009-460, s. 2; 2011-145, s. 19.1(h); 2011-183, s. 18; 2012-193, s. 9, 10; 2013-284, s. 2(b); 2013-368, s. 14; 2015-62, s. 4(a); 2015-264, s. 6; 2015-289, s. 3; 2017-186, s. 2(hhh); 2017-194, s. 17.)

DEFENDING EYEWITNESS IDENTIFICATION

LAURA NEAL GIBSON
CHIEF PUBLIC DEFENDER
SECOND JUDICIAL DISTRICT

1

WHY DO YOU THINK EYEWITNESS TESTIMONY IS SO POWERFUL FOR THE STATE?

This is the part where you have to respond! And yes I will use the Socratic method if forced.

2

3

THE PROSECUTOR'S OPENING STATEMENT

Ladies and Gentlemen, you don't have to take my word for it. The evidence will show that on December 2, 2022 at 2:15 am in the dark of night, a man went in to the home of Betty and Bob Smith and stole their tv. Yes, it was dark. Yes, they are both in their 90s. Yes, they both wear corrective lenses and had taken their glasses off to go to bed. No, there weren't any lights on. Sure, it happened in about 1 second. No, we don't have a single shred of physical evidence to show to you. But, ignore all of that, because you don't have to take my word for it.

When Betty Smith takes that witness stand, she will tell you that she is 100% confident that the man who poked his head in their bedroom and pointed a gun at her for that split second was the defendant, John Doe. She saw him with her own eyes. She is a sweet, old, church going lady. She wouldn't lie to you. She will tell you she could never forget the scariest moment of her life. You don't have to take my word for it. She will tell you herself!

4

WHY DO JURORS BELIEVE EYEWITNESSES?

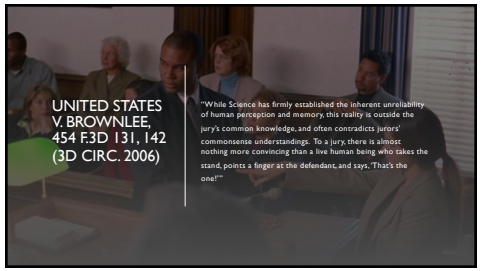
- Of course you remember the most stressful moment of your life!
- If he says he saw it, then he had to have seen it! He is sworn to tell the truth.
- He is so confident, so he must know for sure!
- He wouldn't put a person in prison if he doesn't believe that he is telling the truth.
- He doesn't seem like a racist.

5

NEXT QUESTION…I PROMISE THIS IS THE LAST!

YES, THIS IS A TRICK QUESTION.

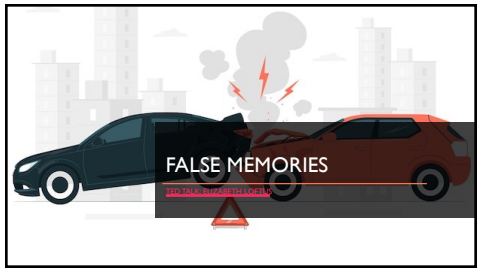
6


UNITED STATES V. BROWNLEE, 454 F.3D 131, 142 (3D CIRC. 2006)
"While Science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury's common knowledge, and often contradicts jurors' commonsense understandings. To a jury, there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"

7


RECONSTRUCTED MEMORY
TED TALK: SCOTT FRASER

8


FALSE MEMORIES

9

OK, MEMORY SUCKS AND JURIES GET IT WRONG… WHERE DO WE GO FROM HERE?

Ronald Cotton will remind you why this is important

What counts as an Eyewitness Identification and what is the law?

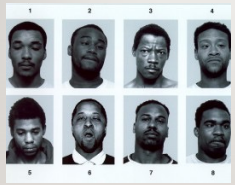
Constitutional Arguments | NC Eyewitness Identification Reform Act

How about some fact scenarios?

How do I challenge Eyewitness Identification?

Motions to Suppress | Voir Dire | Cross-Examination | Expert Testimony | Closing | Jury Instructions

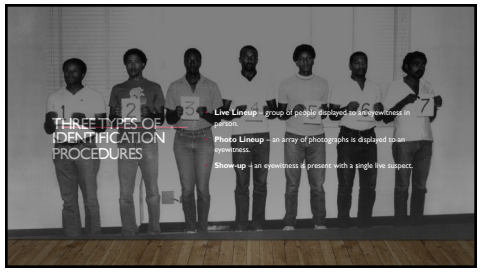
10



WHY IS EYEWITNESS IDENTIFICATION SO IMPORTANT?

- Eyewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 75% of convictions overturned through DNA testing nationwide.
- 41% of overturned cases involved cross-racial eyewitness identifications.
- Innocence Project

11



THREE TYPES OF IDENTIFICATION PROCEDURES

- **Live Lineup** – a group of people displayed to the eyewitness in person.
- **Photo Lineup** – an array of photographs is displayed to an eyewitness.
- **Show-up** – an eyewitness is present with a single live suspect.

12

WHEN IS IT PROPER FOR YOUR CLIENT TO BE REQUIRED TO PARTICIPATE IN AN IDENTIFICATION PROCEDURE?

Upon Arrest

If in custody, a nontestimonial identification order may NOT be used.

Officer must seek court order directing person to appear in lineup if consent not given.

Upon Consent of the Defendant (even if not arrested)

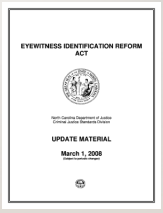
After a Brief Detention with Reasonable Suspicion (limited to an ID at or near scene)

Upon being served with a Nontestimonial Identification Order

13

EYEWITNESS IDENTIFICATIONS MUST COMPLY WITH CONSTITUTIONAL AND STATUTORY REQUIREMENTS:

- Due Process Clause under the Fourteenth Amendment
- Right to Counsel under the Sixth Amendment
- NC Eyewitness Identification Reform Act under N.C.G.S. 15A-284.50 through 15A-283.53



EYEWITNESS IDENTIFICATION REFORM ACT

North Carolina Department of Justice
Criminal Justice Standards Division

UPDATE MATERIAL

March 1, 2008

14

COMPLYING WITH THE DUE PROCESS CLAUSE

THE TEST FOR ADMISSIBILITY FOR AN OUT-OF-COURT IDENTIFICATION PROCEDURE: PROCEDURE MUST NOT BE SO **UNNECESSARILY SUGGESTIVE** THAT IT CREATES A SUBSTANTIAL RISK OF MISIDENTIFICATION. NEIL V. BIGGERS

BIG ISSUE: WHETHER CONSIDERING THE TOTAL THE ID WAS RELIABLE EVEN IF THE CONFRONTATION PROCEDURE MAY HAVE BEEN SUGGESTIVE.

PRIMARY CASE → NEIL V. BIGGERS, 409 U.S. 188 (1972).

REMEDY FOR VIOLATION → EXCLUSION

15


BIGGERS FIVE FACTORS TO EVALUATE LIKELIHOOD OF MISIDENTIFICATION:
The Witness's Opportunity to View the Suspect During the Crime
The Degree of Attention
The Accuracy of a Prior Description of the Suspect
The Degree of Certainty at the Identification Procedure
The Length of Time Between the Crime and the Identification Procedure

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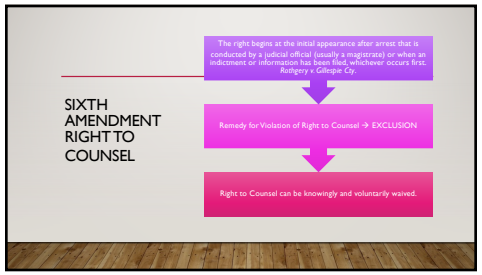
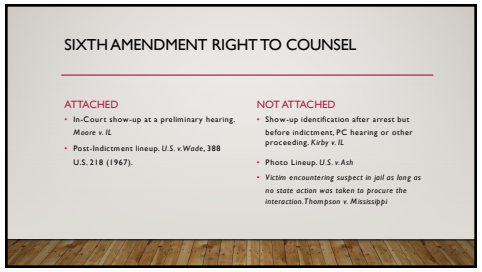

SIXTH AMENDMENT RIGHT TO COUNSEL
The right begins at the initial appearance after arrest that is conducted by a judicial official (usually a magistrate) or when an indictment or information has been filed, whichever occurs first. *Rothgery v. Gillespie Cty.*
Remedy for Violation of Right to Counsel → EXCLUSION
Right to Counsel can be knowingly and voluntarily waived.

17


SIXTH AMENDMENT RIGHT TO COUNSEL
ATTACHED
• In-Court show-up at a preliminary hearing. *Moore v. IL*
• Post-Indictment lineup. *U.S. v. Wade*, 388 U.S. 218 (1967).
NOT ATTACHED
• Show-up identification after arrest but before indictment, PC hearing or other proceeding. *Kirby v. IL*
• Photo Lineup. *U.S. v. Ash*
• *Victim encountering suspect in jail as long as no state action was taken to procure the interaction. Thompson v. Mississippi*

18

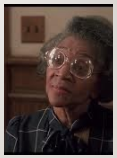
IN-COURT IDENTIFICATIONS

- An impermissibly suggestive pretrial identification procedure may taint an in-court identification. *State v. Flowers*, 318 N.C. 208 (1986).
- Independent Origin Standard: A witness's in-court identification is also inadmissible unless the State proves by clear and convincing evidence that the identification originated independent of the unconstitutional lineup (that the identification is based on the witness's observations of the deft during the crime and not tainted by the illegal out-of-court identification). *U.S. v Wade*, 388 U.S. 218 (1967).
- Several factors should be reviewed that are similar to those of *Biggers*.

19

WADE FACTORS TO DETERMINE INDEPENDENT ORIGIN

- Prior Opportunity to Observe the Offense
- Any Discrepancy Between the Pre-Lineup Description and the Defendant's Actual Description
- Any Identification of Another Person or of the Defendant by a Picture Before the Lineup Takes Place
- Failure to Identify the Defendant on a Prior Occasion
- Time Elapsed Between the Offense and the Lineup
- Facts Concerning the Conduct of the Illegal Lineup



20

FACT SCENARIO:

- "Local" cab driver is called by victim to pick man up from his home.
- Driver picks man up and drops him off at another location.
- Later that evening, man calls driver back and asks him to take him back to victim's home.
- Driver drops man off at victim's home and sees victim let man in.
- Victim is found the next morning stabbed to death.
- The next day, a photo line-up was given to driver and driver failed to identify anyone when defendant was in line-up.
- Driver attended a pre-trial hearing with victim's sister and was still not able to positively identify defendant, but was told by sister it was the guy who murdered her brother.
- Multiple news articles were written and media coverage included the picture of the defendant who was a VERY EASILY identified person with tattoos covering his face.
- State sought to have driver testify and we sought to keep out any in-court identification.

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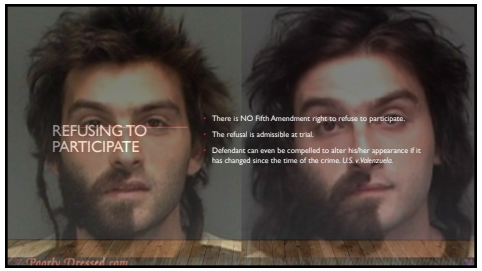
REFUSING TO PARTICIPATE
There is NO Fifth Amendment right to refuse to participate.
The refusal is admissible at trial.
Defendant can even be compelled to alter his/her appearance if it has changed since the time of the crime. U.S. v Valenzuela.

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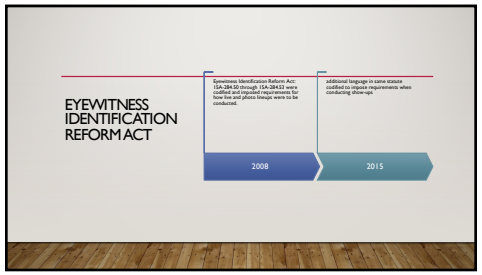
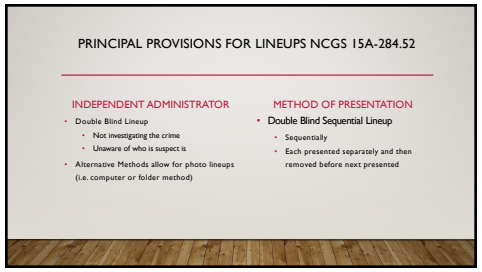

EYEWITNESS IDENTIFICATION REFORM ACT
Eyewitness Identification Reform Act: 15A-284.50 through 15A-284.53 were codified and required requirements for how and when photo lineups were to be conducted
2008
additional language in same statute codified to impose requirements when conducting show-ups
2015

23


PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52
INDEPENDENT ADMINISTRATOR
Double Blind Lineup
Not investigating the crime
Unaware of who is suspect is
Alternative Methods allow for photo lineups (i.e. computer or folder method)
METHOD OF PRESENTATION
Double Blind Sequential Lineup
Sequentially
Each presented separately and then removed before next presented

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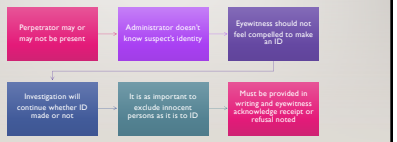
INSTRUCTIONS FOR LINEUPS NCGS 15A-284.52



25

PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

General Lineup

- Suspect's photo should be contemporary and appearance shall resemble that at the time of the offense (to extent practical.
- Only one suspect per lineup.
- Multiple eyewitnesses requires shuffling of suspect

Fillers

- Generally resemble eyewitness's description of perpetrator
- Ensure suspect does not unduly stand out
- At least 5 fillers for photo or live lineup
- Fillers in prior lineup of another suspect shall not be shown to same eyewitness with new suspect

Statement of Confidence

- Administrator shall seek and document a clear statement from the eyewitness in their own words as to the confidence level.
- Eyewitness shall not be provided any information concerning the person before the confidence statement.

26

PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

RECORDING OF ID

- Video record of live ID shall be made unless not practical.
- Audio record if not video or written record if video nor audio practical.
- Reasons documented for method

CONTENTS OF RECORD

- Identification results
- Confidence statement
- Names of those present
- Date, time, and location
- Words of Eyewitness in ID
- Type of lineup and number of fillers
- Sources of fillers
- Photos used in lineup
- Photo or other visual recording of live lineup

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PROVISIONS RELATED TO SHOW-UPS IN NCGS 15A-284.52

- May ONLY be conducted:
  - when a suspect matching the perpetrator's description is located in close proximity in time and place to the crime or
  - when there is a reasonable belief that the perpetrator has changed his/her appearance close in time to the crime, and
  - only if there are circumstances that require the immediate display of a suspect to an eyewitness.
- Shall ONLY be performed using a live suspect (NOT A PHOTO).
- Record of the show-up should be preserved with a photograph.

28

STATUTORY REMEDIES FOR VIOLATION OF NCGS 15A-284.52

- Failure to comply shall be considered by the court in adjudicating motions to suppress.
- Failure to comply shall be admissible in support of claims of eyewitness misidentification.
- The jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identification.
- A violation doesn't necessarily require suppression, but Court must evaluate whether it constitutes a substantial violation or otherwise violates the Due Process Clause's TOTC test. *See State v. Stowes*, 220 N.C. App. 330 (2012).

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FACT SCENARIO:

- Hispanic male was stabbed, doused with rubbing alcohol, set on fire, and left for dead. He crawls to a neighbor's house, law enforcement responds and the victim is transported to the hospital.
- There were no other eyewitnesses to the actual crime other than the victim, but statements were taken from neighbors that placed a black male suspect who was familiar by name to the investigating officers in the same area interacting with the victim several hours earlier.
- Non-Spanish speaking investigators respond to the hospital where they attempt to interact with the victim who speaks broken English to obtain his statement. The victim identifies the person who assaulted him as someone he knows by "nasty dog and Jimmy".
- Investigators show the victim a picture of the black male suspect they were familiar with and tell the victim the individual's actual name. The victim identifies that person in the single photo as the person who assaulted him.

30

EVALUATING THE FACT SCENARIO IN LIGHT OF EIRA:

- Doesn't follow line-up requirements → not live/photo/single person
- Doesn't follow photo line-up requirements → single photo
- Doesn't follow show up requirements → not live/photo

31

THE HOLE LEFT BY NC EIRA

- What about Photo Show-ups?
  - An officer shows one photo to the witness of an individual believed to match the description of the perpetrator.
  - Clearly violates the EIRA procedures with regard to photo lineups (i.e. fillers, double-blind, non-sequential, etc.)
  - Clearly violates the EIRA procedures with regard to showups → statute requires a showup to be live

32

33

MOTIONS TO SUPPRESS: IDENTIFY ISSUES

- Does the case involve a cross-racial ID?
- Did a "suggestive" pretrial ID procedure take place?
- If so, did the suggestive procedure create a substantial risk of misidentification?
- Did the pre-trial ID procedure comply with EIRA?
- Is there a right to counsel issue?
- Will the illegal out-of-court ID impact an In-Court ID?
- *Raising Issues of Race in NC Criminal Cases* by Alyson Grine and Emily Coward

34

ARGUING THE MOTION TO SUPPRESS

Motion	Sample Motions to Suppress and Motion to Exclude Testimony – provided in the manuscript
Request	Request a Hearing to Voir Dire the eyewitness •State v. Flowers, 318 N.C. 208, 216 (1986) •Use information you have gathered for cross-examination if you are unsuccessful
Object	If unsuccessful, you MUST object during the trial to the admission of the pretrial identification procedure and tainted in-court identification. State v. Hunt, 324 N.C. 343 (1989)

35

JURY SELECTION

EDUCATION

- Common misconception → victim's never forget the face of his/her offender.
- Jurors overestimate the reliability of eyewitness testimony.
- Educate on the confidence conundrum.

SELECTING OPEN MINDS

- If you are arguing have a cross-racial identification, try to have a broad racial composition to your jury and explore issues of race with the potential jury members.
- Are any of the jurors overconfident about the accuracy of eyewitness IDs? Will they form independent opinions?

Link for sample jury selection questions provided in the manuscript.

36

CROSS EXAMINATION

- Lay out your argument through the witness.
- Avoid villainizing the witness.
- Avoid discussion of confidence.
- Establish the facts you need for your expert to testify.
- Familiarize yourself with department procedure for eyewitness ID and question officer about it.

37

EXPERT TESTIMONY

Goal of an expert witness → dispel the "confidence conundrum"

Memory Factors | Estimator and System Variables

State v. Lucidore – "expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified." 349 N.C. 1 (S. Ct. 1998) → helpfulness standard

Rule 702 and 403 Compliance

Important especially for cross-racial identifications

If expert testimony denied → judicial notice of research on IDs

38

CLOSING ARGUMENT

Opportunity to wrap it up with a bow and drive home the statistics if you have been able to get them in.

You must remind the jury of what you mentioned in voir dire with regards to having an open mind and about the common misconceptions.

You must paint a very clear picture of why you believe the identification to be faulty based on all the testimony presented from the officers and the eyewitness.

Lastly, incorporate expert testimony if presented or anything of which the court took judicial notice.

Drive it home with jury instructions.

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JURY INSTRUCTIONS

GENERALLY

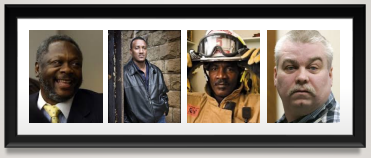
- 101.15 – Credibility
- 104.90 – Identification of the defendant as perpetrator of the crime
- 104.94 – testimony of expert witness

EIRA INSTRUCTIONS

Evidence of non-compliance with the EIRA is permitted to be considered credible evidence.

- 105.65 – Photo Lineup Requirements
- 105.70 – Live Lineup Requirements

40



REMINDER OF WHY THIS IS IMPORTANT?

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LAURA NEAL GIBSON
CHIEF PUBLIC DEFENDER
SECOND DISTRICT

252-940-4096

LAURA.N.GIBSON@NCCOURTS.ORG

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DEFENDING EYEWITNESS IDENTIFICATION

Laura Neal Gibson
Chief Public Defender
Second Judicial District

Presented:
Higher Level Felony Defense
September 12, 2023
UNC School of Government

CONTENTS

NC EYEWITNESS IDENTIFICATION REFORM ACT

Article 14A.
Eyewitness Identification Reform Act.

§ 15A-284.50. Short title.

This Article shall be called the "Eyewitness Identification Reform Act." (2007-421, s. 1.)

§ 15A-284.51. Purpose.

The purpose of this Article is to help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects. (2007-421, s. 1.)

§ 15A-284.52. Eyewitness identification reform.

(a) Definitions. – The following definitions apply in this Article:

(1) Eyewitness. – A person, including a law enforcement officer, whose identification by sight of another person may be relevant in a criminal proceeding.

(2) Filler. – A person or a photograph of a person who is not suspected of an offense and is included in a lineup.

(3) Independent administrator. – A lineup administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect.

(4) Lineup. – A photo lineup or live lineup.
(5) Lineup administrator. – The person who conducts a lineup.
(6) Live lineup. – A procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.
(7) Photo lineup. – A procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.
(8) Show-up. – A procedure in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime.

(b) Eyewitness Identification Procedures. – Lineups conducted by State, county, and other local law enforcement officers shall meet all of the following requirements:

(1) A lineup shall be conducted by an independent administrator or by an alternative method as provided by subsection (c) of this section.
(2) Individuals or photos shall be presented to witnesses sequentially, with each individual or photo presented to the witness separately, in a previously determined order, and removed after it is viewed before the next individual or photo is presented.
(3) Before a lineup, the eyewitness shall be instructed that:
    a. The perpetrator might or might not be presented in the lineup,
    b. The lineup administrator does not know the suspect's identity,
    c. The eyewitness should not feel compelled to make an identification,
    d. It is as important to exclude innocent persons as it is to identify the perpetrator, and
    e. The investigation will continue whether or not an identification is made.

    The eyewitness shall acknowledge the receipt of the instructions in writing. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the acknowledgement and shall also sign the acknowledgement.
(4) In a photo lineup, the photograph of the suspect shall be contemporary and, to the extent practicable, shall resemble the suspect's appearance at the time of the offense.
(5) The lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers. In addition: a. All fillers selected shall resemble, as much as practicable, the eyewitness's description of the perpetrator in significant features, including any unique or unusual features. b. At least five fillers shall be included in a photo lineup, in addition to the suspect. c. At least five fillers shall be included in a live lineup, in addition to the suspect. d. If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the current suspect participates shall be different from the fillers used in any prior lineups.
(6) If there are multiple eyewitnesses, the suspect shall be placed in a different position in the lineup or photo array for each eyewitness.

(7) In a lineup, no writings or information concerning any previous arrest, indictment, or conviction of the suspect shall be visible or made known to the eyewitness.

(8) In a live lineup, any identifying actions, such as speech, gestures, or other movements, shall be performed by all lineup participants.

(9) In a live lineup, all lineup participants must be out of view of the eyewitness prior to the lineup.

(10) Only one suspect shall be included in a lineup.

(11) Nothing shall be said to the eyewitness regarding the suspect's position in the lineup or regarding anything that might influence the eyewitness's identification.

(12) The lineup administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given lineup is the perpetrator. The lineup administrator shall separate all witnesses in order to discourage witnesses from conferring with one another before or during the procedure. Each witness shall be given instructions regarding the identification procedures without other witnesses present.

(13) If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning the person before the lineup administrator obtains the eyewitness's confidence statement about the selection. There shall not be anyone present during the live lineup or photographic identification procedures who knows the suspect's identity, except the eyewitness and counsel as required by law.

(14) Unless it is not practical, a video record of live identification procedures shall be made. If a video record is not practical, the reasons shall be documented, and an audio record shall be made. If neither a video nor audio record are practical, the reasons shall be documented, and the lineup administrator shall make a written record of the lineup.

(15) Whether video, audio, or in writing, the record shall include all of the following information:

a. All identification and nonidentification results obtained during the identification procedure, signed by the eyewitness, including the eyewitness's confidence statement. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the results and shall also sign the notation.

b. The names of all persons present at the lineup.

c. The date, time, and location of the lineup.

d. The words used by the eyewitness in any identification, including words that describe the eyewitness's certainty of identification.

e. Whether it was a photo lineup or live lineup and how many photos or individuals were presented in the lineup.

f. The sources of all photographs or persons used.

g. In a photo lineup, the photographs themselves.

h. In a live lineup, a photo or other visual recording of the lineup that includes all persons who participated in the lineup.

(c) Alternative Methods for Identification if Independent Administrator Is Not Used. – In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be

conducted using an alternative method specified and approved by the North Carolina Criminal Justice Education and Training Standards Commission. Any alternative method shall be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include any of the following:

(1) Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed.

(2) A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.

(3) Any other procedures that achieve neutral administration.

(c1) Show-Up Procedures. – A show-up conducted by State, county, and other local law enforcement officers shall meet all of the following requirements:

(1) A show-up may only be conducted when a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness.

(2) A show-up shall only be performed using a live suspect and shall not be conducted with a photograph.

(3) Investigators shall photograph a suspect at the time and place of the show-up to preserve a record of the appearance of the suspect at the time of the show-up procedure.

(c2) (See Editor's note) The North Carolina Criminal Justice Education and Training Standards Commission shall develop a policy regarding standard procedures for the conduct of show-ups in accordance with this section. The policy shall apply to all law enforcement agencies and shall address all of the following, in addition to the provisions of this section:

(1) Standard instructions for eyewitnesses.

(2) Confidence statements by the eyewitness, including information related to the eyewitness' vision, the circumstances of the events witnessed, and communications with other eyewitnesses, if any.

(3) Training of law enforcement officers specific to conducting show-ups.

(4) Any other matters deemed appropriate by the Commission.

(d) Remedies. – All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section:

(1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.

(2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.

(3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

(e) Nothing in this section shall be construed to require a law enforcement officer while acting in his or her official capacity to be required to participate in a show-up as an eyewitness. (2007-421, s. 1; 2015-212, s. 1.)

THE BASICS

Types of Eyewitness Identification

- **Live Lineup**: an eyewitness is shown a group of people "in person" for the witness to identify the perpetrator.
- **Photo Lineup**: an eyewitness is shown an array of photographs for the witness to identify the perpetrator.
- **Show-up**: an eyewitness views just one person "in person" for the witness to identify the perpetrator.

Constitutional Issues that Arise with Eyewitness Identification

- **Due Process Rights under the Fourteenth Amendment**
    - BIG ISSUE: Whether, considering the totality of the circumstances, the identification was reliable even though the confrontation procedure may have been suggestive.
        - In other words → officers should not conduct an identification in a manner that suggests who the suspect is.
        - Two Step Inquiry from *State v. Fowler,* 353 N.C. 599 (2001):
            - Was the identification procedure impermissibly suggestive?
            - If the procedures were impermissibly suggestive, did they create a substantial likelihood of irreparable misidentification?
    - *Neil v. Biggers*, 409 U.S. 188 (1972) →
        - The test for admissibility of an out-of-court identification is that "the procedure must not be so unnecessarily suggestive that it creates a substantial risk of misidentification."
        - The test for admissibility of an in-court identification is that "the procedure must not be so unnecessarily suggestive that it creates a substantial risk of irreparable misidentification."
    - The *Biggers* Court established five factors in determining whether a substantial likelihood of irreparable misidentification exists:
        - the opportunity of the witness to view the criminal at the time of the crime;
        - the witness' degree of attention;
        - the accuracy of his prior description of the criminal;
        - the level of certainty demonstrated at the confrontation; and
        - the length of time between the crime and the confrontation.

- The remedy if the Fourteenth Amendment Due Process Rights are violated → EXCLUSION
    - *See below* for in-court identifications following an excluded out-of-court identification.

- **Sixth Amendment Right to Counsel**
    - General Rule: A defendant has the right to counsel when the defendant personally appears in a lineup or showup after the right has attached.
        - When does the right attach → At or after the adversary judicial proceedings begin against the defendant or more specifically, at the initial appearance after arrest that is conducted by a judicial official (in NC, usually magistrate) or when an indictment or information has been filed, whichever occurs first.
            - *Not Attached*:
                - Showup identification after arrest but before indictment, PC hearing, or other proceeding. *See Kirby v. Illinois*, 406 U.S. 682 (1972).
                - Photographic identification procedure (regardless of when it occurs). *U.S. v. Ash*, 413 U.S. 300 (1973).
            - *Attached*:
                - In-Court showup at a preliminary hearing. *Moore v. Illinois*, 434 U.S. 220 (1977).
                - Post-Indictment lineup. *U.S. v. Wade*, 388 U.S. 218 (1967).
    - Other important information regarding Right to Counsel:
        - Defendant can *knowingly* and *voluntarily* waive this right orally or in writing.
        - There is a statutory right to counsel if it is being conducted as part of a nontestimonial identification order.
        - Attorney does NOT have the right to be present in the witness's viewing room. *U.S. v. Jones*, 907 F.2d 456 (4th Cir. 1990).
    - The remedy if the Sixth Amendment Right to Counsel is violated → EXCLUSION
        - When a defendant's right to counsel is violated at a lineup, evidence resulting from the lineup is inadmissible in court. *U.S. v. Wade*, 388 U.S. 218 (1967).

- **In-Court Identification Issues:**
    - Independent Origin Standard: A witness's in-court identification is also inadmissible unless the State proves by clear and convincing evidence that the identification originated independent of the unconstitutional lineup (that the identification is based on the witness's observations of the deft during the crime and not tainted by the illegal out-of-court identification). *Id.*
    - Factors for Court to consider from *Wade*:
        - Prior opportunity to observe the offense

        - Any discrepancy between any pre-lineup description and the defendant's actual description
        - Any identification of another person or of the defendant by a picture before the lineup takes place
        - Failure to identify the defendant on a prior occasion
        - Time elapsed between the offense and the lineup identification
        - Facts concerning the conduct of the illegal lineup
- **Due Process Issues with a Showup:**
    - Showing ONE person to an eyewitness is OBVIOUSLY suggestive. *State v. Harrison*, 169 N.C. App. 257, 262 (2005).
    - To not be considered *unnecessarily* suggestive:
        - It should be used in an emergency OR soon after the crime is committed
        - HOWEVER, showups under other circumstances have been found to be admissible when the witness ID was otherwise reliable.
            - Test: Whether based on the totality of the circumstances the showup resulted in a substantial risk of irreparable misidentification? *State v. Turner*, 305 N.C. 356, 364 (1982)
            - See *State v. Oliver*, 302 N.C. 28 (1980) and *State v. Jackson*, 229 N.C. App 644 (2013).
        - It must comply with NC statutory provisions.

ISSUES OF MEMORY

There is an excellent review of the factors affecting Eyewitness Testimony and specifically breaking down the three stages of memory and the difference between estimator and system variables found in Chapter 3 Eyewitness Identifications of *Raising Issues of Race in North Carolina Criminal Cases* by Alyson A. Grines and Emily Coward (2014).

https://defendermanuals.sog.unc.edu/race/3-eyewitness-identifications

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SAMPLE MOTIONS TO SUPPRESS AND OTHER RESOURCES

NCIDS Motions Bank

1) Motion to Suppress Testimony Concerning Certain Out-of-Court Identifications and Prevent Witnesses from Rendering In-Court Identifications

http://www.ncids.org/racebank/Eyewitness/Motion%20to%20Suppress%20Eyewitness%20Identification.pdf

2) Motion for Disclosure of Identification Procedures

http://www.ncids.org/Motions%20Bank/PreTrial/Motion%20for%20Disclosure%20of%20Identification%20Procedures.doc

3) Ex Parte Motion for Expert Witness Funds

http://www.ncids.org/motionsbanknoncap/Experts/ExParteMotionforFundsforExpertW.pdf

4) Motion to Suppress Show-up Identification

http://www.ncids.org/motionsbanknoncap/Suppression/FailureComplyWithEyeWitnessIdentification.doc

Eyewitness Identification: Tools for Litigating the Identification Case

1) Defendant's Motion for Discovery of Identification Evidence and proposed Order
2) Defendant's *Brady* Demand for Exculpatory and Mitigating Evidence Related to Eyewitness Identification and Proposed Order
3) Motion for Appointment of Eyewitness identification Expert
4) Subpoena *duces tecum* schedule for production of police procedures regarding eyewitness identification
5) Subpoena *duces tecum* schedule for production of eyewitness identification evidence in the case at bar
6) Motion to Suppress Out of Court Identifications and to Preclude In-Court Identifications
7) Voir dire – Questions for Jury Questionnaire in Identification Case
8) Voir dire – Questions for Jury Selection in Identification Case

http://www.ncids.org/racebank/Eyewitness/Eyewitness%20Identification%20-%20Tools%20for%20Litigating%20the%20Identification%20Case.pdf

Procedures for Challenging Eyewitness Identification Evidence

https://defendermanuals.sog.unc.edu/sites/default/files/pdf/3.6_1.pdf

SAMPLE MOTION - Motion to Exclude Testimony and Prevent the Rendering of an In-Court Identification

STATE OF NORTH CAROLINA _____ COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION _____
STATE OF NORTH CAROLINA,))) vs.))) _____,) Defendant)	MOTION TO EXCLUDE TESTIMONY AND PREVENT THE RENDERING OF AN IN-COURT IDENTIFICATION

NOW COMES THE DEFENDANT, through undersigned counsel, and moves the Court, pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 19, 23, and 36, of the Constitution of the State of North Carolina; as well as jurisprudential authorities cited below; and all other applicable authority, for entry of an order that excludes any and all testimony concerning an in-court identification of the Defendant by State's witness _____ and to prevent the witness from rendering an in-court identification of the Defendant. In support of his Motion the Defendant provides the following:

FACTS

1. The Defendant was arrested on January 25, 2016 and charged with first degree murder and robbery with a dangerous weapon in the death of VICTIM.
2. It is anticipated that the State will call EYEWITNESS to provide testimony with regard to his connection with the events that took place on January 18th and 19th on the night that it is believed VICTIM was killed.
3. Upon information and belief, in January 2016, EYEWITNESS was using his personal vehicle to provide transportation, often for payment, for certain acquaintances in the Martin County and Bertie County area.

4. Upon information and belief, EYEWITNESS will testify that he was contacted by VICTIM on the night of January 18th to pick up an individual from VICTIM'S home to provide him transportation.
5. Upon information and belief, EYEWITNESS was later contacted in the early morning hours of January 19th by the same individual and was requested by the individual to provide transportation back to VICTIM'S home.
6. Upon information and belief, EYEWITNESS did transport this individual back to VICTIM's home and observed the individual being let inside the home by VICTIM.
7. After law enforcement learned of the interaction between EYEWITNESS and VICTIM and the third individual, EYEWITNESS was interviewed on January 20th.
8. On January 20th, Cpl. Kit Campbell with the Williamston Police Department conducted a photo line-up with EYEWITNESS in which EYEWITNESS did not identify the Defendant, DEFENDANT by his photo as being the individual he transported away from and back to VICTIM'S residence on the night of January 18th and the morning of January 19th.
9. Upon information and belief, EYEWITNESS attended one of the Defendant's court settings in District Court with VICTIM'S sister, SISTER. At this court setting, EYEWITNESS was still not able to positively identify the Defendant as being the individual he interacted with on the night of the incident, but was instructed by VICTIM'S SISTER, that it was in fact the Defendant.
10. Upon information and belief, EYEWITNESS has also had multiple conversations with other family members of VICTIM in between the time of the incident and trial.

11. After the arrest of the Defendant, there were multiple news articles and other forms of media coverage that included the mug shot of the Defendant in relation to his arrest for the murder of VICTIM.
12. As of the filing of this Motion, the Defendant has received no discovery indicating that EYEWTINESS has ever positively identified the Defendant as being the individual EYEWITNESS provided transportation to on the night of the incident.

ARGUMENT

Courts have increasingly warned of the unreliability of eyewitness testimony and its devastating consequential effect. In *United States v. Wade*, 388 U.S. 218 (1966), the Court held, "But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eye-witness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Id*. at 228. In *State v. Flowers*, the North Carolina Supreme Court held that an impermissibly suggestive pre-trial identification procedure may also taint an in-court identification. 318 N.C. 2018 (1986). In an effort to prevent the taint of an improper in-court identification infringing on the Defendant's rights to a fair trial, the United States Supreme Court in *Wade* established an independent origin standard. *Id.* The Court essentially found in *Wade* and such has also been found in *State v. Thompson* by the North Carolina Supreme Court that a witness's in-court identification is inadmissible unless the State proves by clear and convincing evidence that the identification is of an independent origin and not the product of a suggestive identification. 303 N.C. 169, 172-73 (1981).

The Defendant would argue that any in-court identification of the Defendant by EYEWITNESS at trial would be unreliable as it would be based upon tainted pre-trial identifications coerced by family members of VICTIM, exposure of the witness to media coverage and other legal proceedings, and the extremely suggestive nature of courtroom confrontations and not upon the witnesses' brief opportunity to view the individual he provided transportation to over three years prior to his testifying in this trial.

On the day following EYEWITNESS'S interaction with the individual he transported to VICTIM'S home on the night of the incident, EYEWITNESS participated in a photo line-up and was unable to identify DEFENDANT as the individual. Since the time of that photo line-up, EYEWTINESS has been bombarded with information from family members, court proceedings, and news coverage all suggesting that DEFENDANT was the perpetrator of the crime. Any further in-court identification EYEWTINESS could make in this case would not be of independent origin, but would be tainted by the suggestive nature of all that he has been exposed to during the delay of trial. Furthermore, the very nature of a trial proceeding with DEFENDANT seated at the Defendant's table next to counsel and being identified to the jury as the individual charged with committing the crime is a taint that cannot be remedied with the totality of the circumstances in this case and particularly with the lack of any pre-trial identification by EYEWITNESS of the Defendant. The State cannot meet the burden of showing that an in-court identification of DEFENDANT by EYEWITNESS would be based on his observations of the individual on the night of the incident and not spoiled by all the Defendant has set forth in this Motion.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons and any others that may appear to this Court after a hearing, the Defendant respectfully requests that:

a. this Honorable Court enter an Order that excludes any testimony concerning an in-court identification of the Defendant by State's witness EYEWITNESS;

b. this Honorable Court enter an Order to prevent the witness from rendering an in-court identification of the Defendant; and

c. the Court grant any other relief that is appropriate and necessary.

Respectfully submitted this the _____th day of April, 2019.

OFFICE OF THE PUBLIC DEFENDER
DEFENDER DISTRICT TWO

_____

Thomas P. Routten
Chief Public Defender
Second District
227 N. Respess Street
Washington, NC 27889

OFFICE OF THE PUBLIC DEFENDER
DEFENDER DISTRICT TWO

_____

Laura Neal Gibson
Assistant Public Defender
Second District
227 N. Respess Street
Washington, NC 27889

CERTIFICATE OF SERVICE

This is to certify that I have this day served the District Attorney Office with the foregoing Motion to Exclude Testimony and Prevent the Rendering of In-Court Identification by hand-delivery to the District Attorney's Office.

Seth Edwards
District Attorney
Beaufort Co. Courthouse Annex
111 W. Second Street
Washington, NC 27889

This, the _____th day of April, 2019.

OFFICE OF THE PUBLIC DEFENDER
DEFENDER DISTRICT TWO

_____

Thomas P. Routten
Chief Public Defender
Second District
227 N. Respess Street
Washington, NC 27889

OFFICE OF THE PUBLIC DEFENDER
DEFENDER DISTRICT TWO

_____

Laura N. Gibson
Assistant Public Defender
Second District
227 N. Respess Street
Washington, NC 27889

JURY INSTRUCTIONS

One of the remedies for a violation of N.C.G.S. 15A-284.52 is to present admissible evidence of noncompliance with the EIRA and then to further request a jury instruction to allow the jury to determine the credibility and reliability of the eyewitness identifications.

Photo Lineup Requirements G.S. 15A-284.52

https://www.sog.unc.edu/sites/www.sog.unc.edu/files/pji-master/criminal/105.65.pdf

Live Lineup Requirements G.S. 15A-284.52

https://www.sog.unc.edu/sites/www.sog.unc.edu/files/pji-master/criminal/105.70.pdf

STATE VS. JANKI CLIENT

1

BABY PRECIOUS

- 7lbs. 8 oz.

2

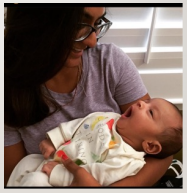
STORYTELLING AND VISUAL AID IN SENTENCING

3

4

FACT PATTERN

- Client: Janki, 18 years old
- Charged with: Felony Child Abuse for Shaking her 8 weeks old, Class E Felony
- Background: Single Mom. Janki's mother does not approve, kicks her out of house but pays for room and grocery money. She has access to OB/GYN through Medicaid. Rents room in her friend's 2 bedroom apartment.
- Doctor calls Police and Department of Social Service after client admits to shaking baby. During interview with officers Janki admits to shaking baby.
- Janki signs a family services agreement, underwent a parent capacity evaluation and took parenting classes.



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FACT PATTERN (CONTINUED)

- Family Youth Services not involved because maternal grandmother agrees to care for baby.
- Janki locked up but released under NCGS15A-534.4, because she was breastfeeding baby. Judge allows for supervised visitation at grandma's house.

6

NCGS 14-318.4 (A)(4)

Section 14-318.4. Child abuse a felony

(a) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class D felony, except as otherwise provided in subsection (a3) of this section.

(a1) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child, who commits, permits, or encourages any act of prostitution with or by the child is guilty of child abuse and shall be punished as a Class D felon.

(a2) Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class D felony.

(a3) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class B2 felony.

(a4) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class E felony if the act or omission results in serious bodily injury to the child.

7

GOAL IN SENTENCING

- I/A block sentencing block
- ultimate goal is probation

8

STORYTELLING IN TRIAL VS. SENTENCING

- STORY OF INNOCENCE
- STORY OF MITIGATION

9

10

STORYTELLING FOR MITIGATION

- Starts with Investigation
- Talk to your client and family and listen in **between the lines for mitigation.**
  - **So used to listening for legal issues and story of innocence**
  - **Train yourself to look and listen for mitigation**
- Investigate Mitigation not only Justification
  - Photos of house that client was brought up in

11

FACT PATTERN

- Client: Janki, 18 years old
- Charged with: Felony Child Abuse for Shaking her 8 weeks old, Class E Felony
- Background: Single Mom. Janki's mother does not approve, kicks her out of house but pays for room and grocery money. She has access to OB/GYN through Medicaid. Rents room in her friend's 2 bedroom apartment.
- Doctor calls Police and Department of Social Service after client admits to shaking baby. During interview with officers Janki admits to shaking baby.
- Janki signs a family services agreement, underwent a parent capacity evaluation and took parenting classes.

12

13

MITIGATION STARTS WITH INVESTIGATION

- Background: open your ears even to family and teachers
- HOW SMART IS SHE?
- LEVEL OF SCHOOL COMPLETED
- ***RECORDS TAKE A LONG TIME
- Experts
- Get releases signed, cast a big net

14

STORYTELLING STARTS AT PLEA BARGAINING

- Its too late if it starts at sentencing.
- Choose your strategy but, DA's also have discovery. You can tell them a persuasive story of mitigation.
- Story telling doesn't have to be about innocence, it can go to mitigation also

15

SENTENCING HEARING: WHAT THE JUDGE WANTS TO KNOW

- 1. WHY DID IT HAPPEN and
- 2. HOW TO PREVENT FROM HAPPENING AGAIN

16

WHY DID IT HAPPEN

- This is the Mitigation Evidence you collected before trial.
- Ex: 16 year old who killed her mother's boyfriend
  - Elementary school teacher called and wanted to talk
  - Provided family dynamics regarding neglect by family.
  - Mom had mental health issues
  - Teachers had to clean the kids, clothes, provide their
  - (here case was dismissed, but this is information that can be used for sentencing)

17

18

WHY DID IT HAPPEN: IN JANKI'S CASE

- Young
- Didn't have family support, mom kicked her out
- Didn't know how to parent, no guidance or education
- Didn't know who to deal with stress (small apartment, incessant crying)

19

HOW DO WE PREVENT IT FROM HAPPENING AGAIN: IN JANKI'S CASE

- PARENTING CLASSES
- Education on dealing with stress
- Help from Mom, Grandma
- Bonding with child
- Matured

20

STATE WILL USE DEMONSTRATIVE EVIDENCE

- Shake Doll
- Video
- Victim Impact Statement
- Its so easy for them, just roll in the victim

21

STATE VS. JANKI CLIENT

22

BABY PRECIOUS

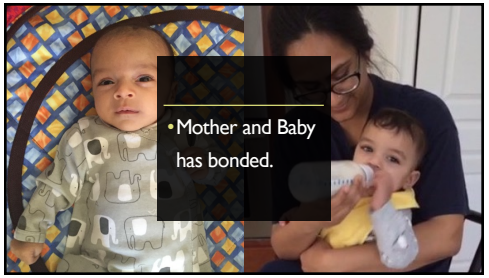
- 7lbs. 8 oz.

23

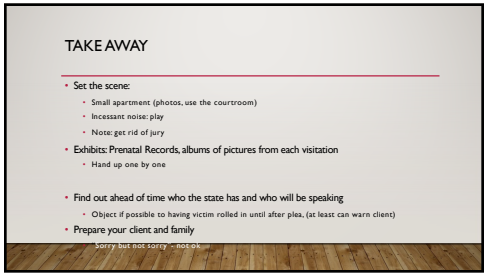
24


Certificate of Completion
Sunny Client
Completed the webinar:
Surviving the Stress of Parenting
4 week
course
Presented by: Erica Mukl, MA, NCC
October 1, 2019
11/2/2019

25


• Mother and Baby has bonded.

26


TAKE AWAY
• Set the scene:
• Small apartment (photos, use the courtroom)
• Incessant noise: play
• Note: get rid of jury
• Exhibits: Prenatal Records, albums of pictures from each visitation
• Hand up one by one
• Find out ahead of time who the state has and who will be speaking
• Object if possible to having victim rolled in until after plea, (at least can warn client)
• Prepare your client and family
Sorry but not sorry - not ok

27

28

The Statutory and Common Law of Self-Defense

JOHN RUBIN
UNC SCHOOL OF GOVERNMENT
SEPTEMBER 2023

1

General Rules of Interpretation

Start with the statutes
- They are the primary source of the right to use defensive force

Know the common law
- It aids in interpreting the statutes
- It supplies complementary principles
- It provides an additional source of some rights

2

The Statutes

G.S. 14-51.2
- Defense of home, workplace, and motor vehicle

G.S. 14-51.3
- Defense of person (self and others)

G.S. 14-51.4
- Disqualifications

3

G.S. 14-51.3

A person

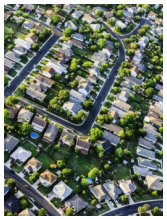
is justified in using deadly force

when they reasonably believe that such force is necessary to prevent imminent death or great bodily injury

without retreating if in a place they have the lawful right to be

if not disqualified under G.S. 14-51.4

4



Lawful Place

Common area of apartment complex

- State v. Bass, 371 N.C. 456 (2018)

Sidewalk

- State v. Lee, 370 N.C. 671 (2018)
- State v. Irabor, 262 N.C. App. 490 (2018)

While driving on a public road

- State v. Ayers, 261 N.C. App. 220 (2018)

Pattern instructions

- 206.10 (homicide), 308.45 (deadly assault), 308.10 (no duty to retreat)

5

Proportionality Limit

State v. Walker, 286 N.C. App. 438 (2022)

- "[T]he 'stand your ground' statute on which Defendant relies imposes the same requirement that any use of deadly force be proportional to that threatened against Defendant."

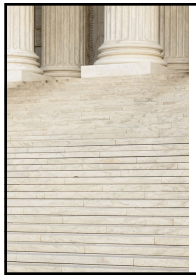
6

If Not Disqualified Under G.S. 14-51.4

"The justification described in G.S. 14-51.2 and G.S. 14-51.3 is not available to a person who used defensive force and who:

1. Was attempting to commit, committing, or escaping after the commission of a felony.
2. Initially provokes the use of force against himself or herself [except as provided in the remainder of this subsection]"

7

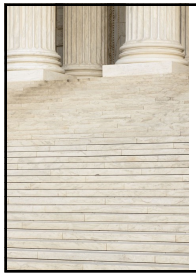


State v. McLymore, 380 N.C. 185 (2022)

Defendant argued that the felony disqualification applies to statutory self-defense only, not common law self-defense. HOWEVER,

- "[T]he General Assembly meant to replace the existing common law right to perfect self-defense with a new statutory right."
- Perfect self-defense is not available to a defendant in violation of the felony disqualification.

8



McLymore

The State argued that the statutory felony disqualification language should be construed literally. HOWEVER,

- "[S]tatutes which alter common law rules should be interpreted against the backdrop of the common law principles being displaced."
- The felony disqualification requires a causal nexus between the felony and the confrontation during which the defendant used force.

9

Repercussions for Instructions

Pattern Jury Committee has adopted causal connection wording
- PJI 308.90

Judge may be able to give peremptory instruction when evidence establishes causal connection
- *McLymore*

Judge may need to omit felony disqualification language when evidence does not show causal nexus
- *See generally* State v. Corbett & Martens, 269 N.C. App. 509 (2020) (exclusion of aggressor language)

10

Other Repercussions

Causal connection applies to other contexts
- State v. Williams, 283 N.C. App 538 (2022) (defense of others)

Defendant may be convicted of felony regardless of causal nexus
- State v. Swindell, 382 N.C. 602 (2022) (possession of a firearm after having been previously convicted of a felony)

Imperfect self-defense may remain available to reduce murder to manslaughter
- "[T]o the extent the relevant statutory provisions do not address an aspect of the common law of self-defense, the common law remains intact." *McLymore* note 2.

11

G.S. 14-51.2

A lawful occupant

of a home, workplace, or motor vehicle
- including the curtilage of a building

is presumed to have held a reasonable fear of imminent death or serious bodily injury

when using deadly force during or after an unlawful, forcible entry

subject to
- rebuttal, including circumstances in G.S. 14-51.2(c), and
- disqualifications under G.S. 14-51.4

12

Curtilage

State v. Kuhns, 260 N.C. App. 281 (2018)
- Curtilage includes area around home
- Curtilage need not be enclosed
- Threat of violence may constitute forcible entry

PJI 308.80
- Notes 1 and 2 refer to curtilage
- But, Court of Appeals questions notes and recommends revision. *See* State v. Copley, 265 N.C. App. 254 (2019), *rev'd on other grounds*, 374 N.C. 224 (2020)

13

Forcible and Unlawful Entry

State v. Dilworth, 274 N.C. App. 57 (2020)
- For statutory right to apply, unlawful and forcible entry must actually occur (citing 14-51.2(b)(1))

State v. Benner, 380 N.C. 621 (2022)
- Deadly force is not permissible under common law against a nondeadly assault by a guest

14

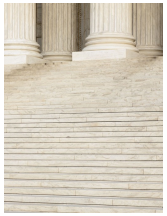
Statutory Presumption

State v. Austin, 279 N.C. App. 377 (2021)
- Presumption can be rebutted other than by one of factors listed in G.S. 14-51.2(c)

State v. Hicks, ___ N.C. ___ (Sept. 1, 2023)
- Three justices: jury could find that homeowner was aggressor after unlawful and forcible entry into her home
- Two concurring justices: decision leaves open meaning of aggressor under G.S. 14-51.2 and G.S. 14-51.4
- Two separately dissenting justices: evidence did not show that homeowner- was aggressor

G.S. 14-51.2(g)
- Statute does not repeal common law defenses, including potentially common law defense of habitation
- PJI 308.80 appears to combine defense of habitation under G.S. 14-51.2, repealed G.S. 14-51.1, and common law

15



Constitutional Grounds

Right to bear arms
- Second Amendment of US Constitution
- Section 30 of NC Constitution

Right not to be deprived of life or liberty without due process
- Due Process Clause of Fourteenth Amendment of US Constitution
- Law of Land clause of Section 19 of NC Constitution

Right to life itself
- Declaration of Independence
- Section 1 of NC Constitution

16

Mitigation Basics

Josie Van Dyke
Sentencing Solutions, Inc.

1

What is mitigation and how do I use it?

- Everything has mitigation possibilities!
- There are statutory guidelines, but the ADA, Judge, and jury may consider nearly limitless information.
- Know everything you can about your client. Tell their story.
- In addition to gathering information to "help" them in the traditional ways, anticipate difficult questions or things you may need to explain about your client. For example, "What has happened to this person?" "What was he/she thinking?"
- This information may take many forms and have many audiences.

2

"What Happened?"

- What conduct or problems in your client's life contributed to their criminal charges?
  - Substance abuse
  - Mental health problems
  - Financial/employment problems
  - Personality Disorders
  - Cognitive impairment
  - Adverse Childhood Experiences
  - Family History (of above items and criminality)
  - The list goes on ….

3

How do you find out what happened?

- Ask your client questions.
- Talk to family members and others who know them (as appropriate).
- Read police reports
- Send for important records
- Obtain additional assessments
- Follow up with more questions as you obtain more information.

4

Ask your client Questions

- You can ask direct questions such as:
  - Do you have any psychiatric or medical diagnoses?
  - Do you have a drug or alcohol problem?
  - What is your financial situation?
  - Was Social Services ever involved with your family?
  - Have you ever received services for a developmental disability or brain injury?
  - Can you read and write okay?
- Sometimes this will work.

5

Ask your client Questions

- More indirect questions:
  - Are you taking any medications?
  - Have you ever been hospitalized for any reason?
  - Who was your last doctor? Do you remember why you saw them?
  - Have you ever been to treatment for drugs or alcohol?
  - Have you ever been court ordered to have a substance abuse assessment?
  - Are there any drug or alcohol charges on your criminal record?
  - Did you receive special education services or have an IEP when you were in school?
  - Do you receive disability benefits?
  - Are you currently employed or where did you last work?
  - Where are you living? Have you ever been homeless?
  - How do you pay your bills?

6

What's Right

- Don't forget everyone has someone who loves them and thinks they are great!
- Who is the person who has treated you the best?
- Who do you love/like/respect?
- Did you play sports or were you involved in any extra activities?
- Did you go to Sunday School?
- What are your job skills?
- What classes have you taken (even while incarcerated)?
- This is just a starter list.

7

Be Patient and Persistent

- Gaining client trust and gathering information is a process.
- Be patient. Many of the topics you will discuss can be painful for your client.
- The client may not be fully aware of the impact of some experiences on him/her and may be processing issues as you are working with them.
- Your hard work will help earn your client's trust. This can make him/her more likely to take your advice regarding difficult legal decisions.

8

ACES as an Interview Tool

- Adverse Childhood Experiences Survey (ACES) may help identify particularly harmful experiences your client may have had.
- These early childhood experiences are linked to many problems in later life.
- The survey can be a good ice-breaker for difficult conversations
- This short survey is also very impactful when sharing information about your client.
- Sample is provided.

9

Talk to family members (If appropriate)

- Many clients will want you to speak with family members to show that they have support in the community or to verify their personal history.
- Understanding family history can often help explain a defendant's current situation, behaviors, and attitudes.
- If the client does not want you to talk to family, you need to ask yourself why. There is a reason for this also.
- Family can be a source of support and/or part of the reason your client is in trouble.
- Use caution when relying on family members for information.
- If your client has no "diagnosed" issues such as substance abuse, medical, mental health, or is not in crisis, family history may be the only thing that explains the criminal behavior.

10

Get the family on board!

- Visit them in person if you can.
- Have them tell you specific stories about the client.
- Ask open-ended questions whenever possible.
- Get pictures and awards!
- Have them tell you about others who are important in your client's life. (Get contact information.)
- Often families will help get character letters for the client.
- Building a relationship with the family will sometimes help build trust with your client.

11

Genograms

- Use Information gathered from client, family, and other documents to prepare a genogram (family tree).
- This is a great visual aid that shows a lot of information in a clear format.
- You can show substance abuse, mental health, criminal history, family dysfunction and much more in one visual aid.
- This can have a big impact on a prosecutor, judge, or jury.

12

Read Police Reports

- Police reports and other investigative reports may contain useful information about:
  - Substance use/ abuse
  - Your client's mental state
  - Financial situation
  - Cognitive ability
  - Family dynamic
- There may even be statements from the victim regarding a desire for the defendant to receive help or services.

13

Send for Important Records

- You have already asked their history so all you need is the appropriate signed release or court order!
- First try just asking clients, "Where do I need to send for records to verify your history?"
- Many clients want to help and understand documents are more convincing to district attorneys and judges than their report alone.
- This helps verify diagnoses, treatments, medications, family issues, educational problems.
- Can contain positive or negative information.
- Records can be VERY expensive. A solid court order will allow you to secure records without outrageous invoices.

14

Records 101

- If you do not regularly request records from a facility or agency, CALL (or go online) and ask about the correct procedure. This will save you a lot of time.
- Save this information for future use.
- Keep a list of records requested.
- Follow up if you do not receive them in a timely fashion.
- Requests get lost or delayed and your follow up may be appreciated.
- Your first set of records may be incomplete and you have to call again.

15

Reading the Records

Look for abnormalities/inconsistencies OR items which support the history your client reported.

Look for additional providers, schools, people, or facilities you may need to contact.

Don't limit yourself when reading particular sources to what you expect to see.

There can be a lot of "crossover" when reading records. For example, a client may have been in legal trouble as a juvenile and received evaluations from school and mental health providers.

We will go over examples.

16

Expert Help

- Know when to get help.
- Your mitigation specialist can request and review extensive records, locate and interview mitigation witnesses, and perform many other responsibilities.
- We can help prepare a mitigation packet/presentation.
- In many cases, records and interviews will indicate the services of a psychologist, psychiatrist or other expert is necessary.
- Keep in mind, this may be the first time your client has ever been evaluated and possibly diagnosed.

17

Contact Us

- Sentencing Solutions. Incorporated
- Josie Van Dyke 919-418-2136
- Please feel free to email questions:
- josievandyke@aol.com

18

Preventing Low Level Felonies from Becoming High Level Habitual Felonies

Habitual Felon laws: a law that allows for greater punishment for "repeat offenders."

1

No Big Deal!

If..... You just win the primary phase of trial

2

A Nationwide Trend

- **Persistent offender laws** to severely enhance sentences
- NC's habitual felon law is generally a *"fourth Strike"* situation
- "Primary purpose" is to "***deter repeat offenders***" and "***segregate that person from the rest of society for an extended period of time***."

State v. Aldridge, 76 N.C. App. 638, 640 (1985)

3

Habitual Felons vs. Habitual Crimes

Habitual Felon is *different* from **Habitual Crimes**:

- Habitual DWI (3+ prior impaired driving) N.C.G.S. §20-138.5
- Habitual Larceny (4+ prior larcenies) N.C.G.S. §14.72
- Habitual Misdemeanor Assault (2+ prior assaults) N.C.G.S. §14-33.2
- Habitual Breaking and/or Entering (1+ prior B&E) N.C.G.S. §§14-7.25-7.31
- Armed Habitual Felon (1+ prior Firearm related felony) N.C.G.S. §§14.7.35-7.41

4

Habitual Felon Law in NC

Vanilla: Defendant has three (or more) felony convictions, Federal or State.
- If convicted, defendant will be sentenced at **four** classes higher
- Capped at "C"

Rocky Road: Violent habitual felon.
- Defendant has two previous A-E felony convictions and is convicted of a new A-E felony
- Life sentence

5

How Does It Work?

HF is a **status**, not a crime

- Three previous ***non-overlapping*** convictions
  - Felony convictions since 1967 (N.C.G.S. §14-7.1)
- HF status is for ***life***
- ***Alleged by indictment***
- Convictions do not have to be for similar offenses or similar to the newly charged offense
- The convictions must be felonies in NC or defined as felonies under the laws of any sovereign jurisdiction where the convictions occurred

6

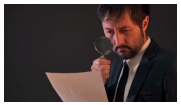
How Does It Work?

- Out of State Convictions can be used to determine HF Status
- To do that, a court must find by preponderance of the evidence that the out of state crime is "substantially similar to a North Carolina offense;"
- That is a legal determination which must be made by the trial court, it cannot be stipulated to, even by a client's plea! *State v. Bunting, 279 N.C. App. 636 (2021)*

7

Things to Watch For

- "Non-overlapping"
- Pardoned convictions
- NC convictions (prior to July 1, 1975) based on plea of no contest
- Convictions prior to July 6, 1967
- Convictions for habitual misdemeanor assaults (N.C.G.S. §14-33.2)
- Only **one** from before age 18 can be used



8

Non-Overlapping

9

Eligibility for Violent HF

A defendant who:

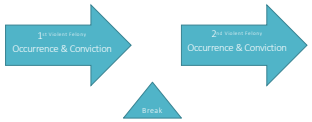
Has been *convicted*,

Of *two violent felonies*,

Commits a third Class A through E felony

10

Non-Overlapping



11

Violent Habitual Felon N.C.G.S. §14.7.7

- Any person with two (2) non-overlapping "violent felony" convictions
  - Any Class A through E felony convictions since 1967 in North Carolina
  - Any repealed or superseded offenses that are the substantial equivalent to a current Class A through E Felony in North Carolina
  - Any offense from another jurisdiction "substantially similar to" an A through E North Carolina offense
  - Need NOT be defined by "foreign sovereign" as felony
  - Even if a predicate offense was committed while the client was 16/17, it counts *State v. McDougald, 284 N.C. App. 695 (2022)*
- **Note**: Excludes some felony offenses that might naturally be considered violent (assaults)

12

Punishment for Violent HF

13

When is Status Charged?

The decision to charge an individual as a HF or a Violent HF is *entirely within the prosecutor's discretion*

State v. Parks, 146 N.C. App. 568 (2001)

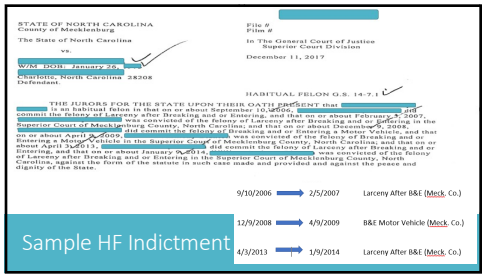
14

HF Indictment N.C.G.S. §14-7.3

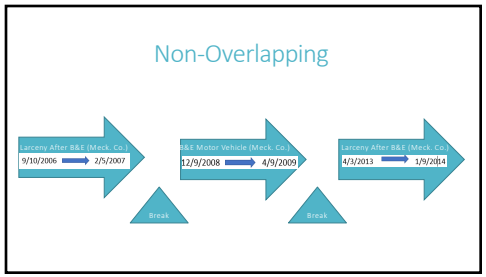
- Must be separate from the principal felony Indictments
  - Can be listed a Count II to the Principal Felony
    State v. Young, 120 N.C. App. 456, 459-60 (1995)

- **Must** include the following (*for each of the 3 felonies):*
  1. Date of the commission;
  2. Date of the conviction; (MUST have 1+2, *State v. Forte*, 260 NC App. 245 (2018)
  3. State or sovereign against which the felony was committed; *and*
  4. Identity of the court in which the conviction took place
     State v. Langley, 371 N.C. 389 (2018)

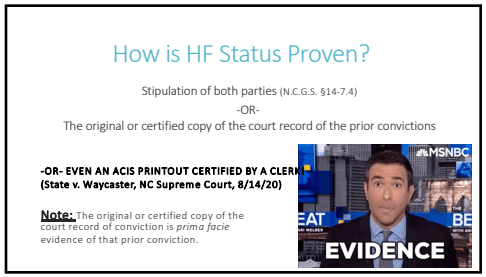
15


STATE OF NORTH CAROLINA
County of Mecklenburg
The State of North Carolina
vs.
W/M DOB: January 26,
Charlotte, North Carolina 28208
Defendant.
File #
Film #
In The General Court of Justice
Superior Court Division
December 11, 2017
HABITUAL FELON G.S. 14-7.1
THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that
is an habitual felon in that on or about September 10, 2004, and
commit the felony of Larceny after Breaking and or Entering, and that on or about February 5, 2007,
Superior Court of Mecklenburg County, North Carolina; and that on or about December 29, 2008,
on or about April 9, 2009, and commit the felony of
was convicted of the felony of Breaking and or
Entering a Motor Vehicle in the Superior Court of Mecklenburg County, North Carolina; and that on or
about January 9, 2014, and commit the felony of Larceny after Breaking and or
Entering, and that on or about January 9, 2014, was convicted of the felony
of Larceny after Breaking and or Entering in the Superior Court of Mecklenburg County, North
Carolina, against the form of the statute in such case made and provided and against the peace and
dignity of the State.
9/10/2006 2/5/2007 Larceny After B&E (Meck. Co.)
12/9/2008 4/9/2009 B&E Motor Vehicle (Meck. Co.)
4/3/2013 1/9/2014 Larceny After B&E (Meck. Co.)
Sample HF Indictment

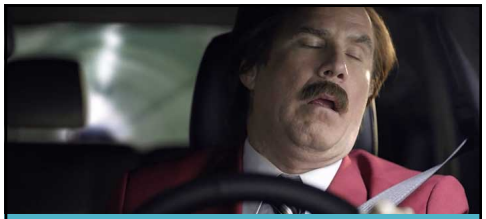
16


Non-Overlapping
Larceny After B&E (Meck. Co.)
9/10/2006 2/5/2007
B&E Motor Vehicle (Meck. Co.)
12/9/2008 4/9/2009
Larceny After B&E (Meck. Co.)
4/3/2013 1/9/2014
Break
Break

17


How is HF Status Proven?
Stipulation of both parties (N.C.G.S. §14-7.4)
-OR-
The original or certified copy of the court record of the prior convictions
-OR- EVEN AN ACIS PRINTOUT CERTIFIED BY A CLERK
(State v. Waycaster, NC Supreme Court, 8/14/20)
Note: The original or certified copy of the court record of conviction is prima facie evidence of that prior conviction.
MSNBC
EVIDENCE

18



Don't Fall Asleep Behind the Wheel!

19

Late Identification of HF Status by DA

- A client might not be identified as a HF until *after* Bond Hearing or Probable Cause Hearing date in District Court
- You may become aware of your client's HF status before the prosecutor does
  - Perhaps it's time to plead quick?
  - A habitual felon indictment must be part of a prosecution "for which no judgment" has yet been entered.

- Until that happens the State can obtain and prosecute a new habitual felon indictment
- The judge can even continue the case to allow the state time to secure the new indictment (even with a fatal error!)

State v. Hodge, 270 NC. App. 110 (2020)

20

No OFA

HF is a ***status*** and not a standalone offense

Therefore, a HF Indictment *should not result in a new bond or Order for Arrest*

Indictment generally served at Scheduling Conference date in Mecklenburg

21

Rapidly Escalating Severity

Misdemeanors can become HF cases!

Example: Client charged with Misd. Larceny in District Court. Prosecutor could indict client for Habitual Larceny, Class H, which could serve as the principal felony for a HF indictment

But! Attempts NOT included: *State v. Irvins, 277 NC App. 101 (2021)*

Drug misdemeanors elevated to felonies pursuant to 90-95(e)(3) can also be habitualized! (repeat class 1 offense)

State v. Howell 370 N.C. 647 (2018)

22

Key Guilty Plea Considerations

Most HF cases are resolved with non-habitual guilty pleas and sentences

- Ask your DA
- Write a letter of support
- Negotiate!
  - Two class H to run consecutive
  - Class I to E, rather than the offered H to D
  - Programs
- If the judge alters the terms of the written plea, you can withdraw it

State v. Wentz 284 N.C. App. 736 (2022)

23

Sample Non-HF Plea Transcript

STATE VERSUS	File No. NON-HABITUAL
Name Of Defendant JOHN DOE	

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) YES

21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

Defendant enters this plea of guilty to the following:

(1) Amended Larceny from the Person, 18CRS000010 and

(2) Amended Misdemeanor Assault Inflicting Serious Injury, 18CRS000011.

The State will dismiss the charges set out on page two, side two, of this transcript, which includes the habitual felon status. The sentence will be consolidated under the Amended Larceny from the Person charge, (18CRS000010). The defendant will receive 14-26 months, Active.

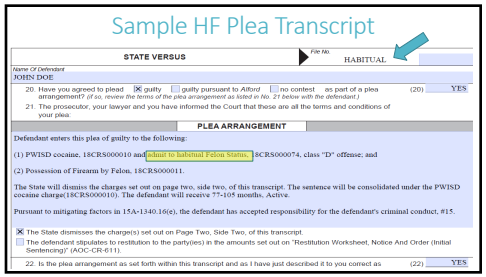
Pursuant to mitigating factors in 15A-1340.16(e), the defendant has accepted responsibility for the defendant's criminal conduct, #15.

☒ 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 (22) YES

24

Sample HF Plea Transcript



STATE VERSUS | File No. HABITUAL

Name Of Defendant
JOHN DOE

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) YES

21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea.

PLEA ARRANGEMENT

Defendant enters this plea of guilty to the following:

(1) PWISD cocaine, 18CRS000010 and admit to habitual Felon Status, 18CRS000074, class "D" offense; and

(2) Possession of Firearm by Felon, 18CRS000011.

The State will dismiss the charges set out on page two, side two, of this transcript. The sentence will be consolidated under the PWISD cocaine charge(18CRS000010). The defendant will receive 77-105 months, Active.

Pursuant to mitigating factors in 15A-1340.16(e), the defendant has accepted responsibility for the defendant's criminal conduct, #15.

☒ 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 (22) YES

25

Habitual Status Plea During Trial

A colloquy MUST be administered to any client admitting (pleading guilty) to Habitual Felon Status during trial before sentencing.

Failure to do so is reversible error! *State v. Williamson 272 N.C. App. 204 (2020)*

26

Must Run Consecutive

27

Consecutive Sentence Prospects

If client is serving time already or has multiple pending cases, try to wrap them up

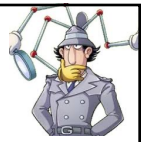
- Work with out of county attorneys
- Work with other units (Especially PV)
- Check pending

If the defendant is not currently serving a term of imprisonment, the trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences

State v. Duffie, 241 N.C. App. 88 (2015)

28

Critique Every HF Indictment



Look for irregularities in HF indictment:

- Overlapping prior felonies
- Court records mistaken or missing
- Priors were not actually felonies. *State v. Moncree*, 188 N.C. App. 221 (2008).
- Different names or date of birth in court records

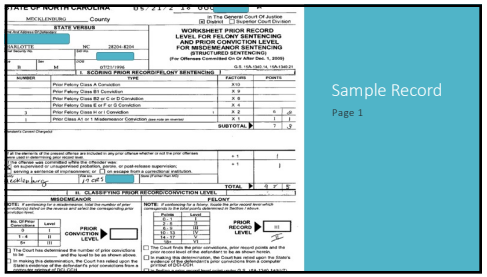
Suggestion: Make it a habit to obtain copies of the alleged prior judgments and transcripts prior to trial, or the underlying misdemeanors for a elevated felony

YOU WILL WAIVE these arguments if you stipulate to some of them

29

Prior Record Level: No Double-Dipping

30



Sample Record

Page 1

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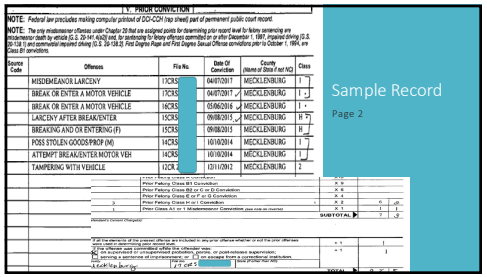


Sample Record

Page 2

32

Pre-Trial Issues

Anti-Collateral Attack Rule

- Don't wait until trial to challenge validity of prior felony conviction if you know it's mistaken
  - If a predicate felony conviction could be attacked, it must be done with an MAR prior to trial (*State v. Creason*, 123 N.C. App. 495 (1996))
- Exception:
  - A *Motion to Suppress* the prior conviction due to lack of counsel is viable at any time (N.C.G.S. §15A-980)

***Some judges may permit such collateral attacks on the theory that it promotes judicial economy

33

Improper Collateral Attacks

My lawyer was ineffective

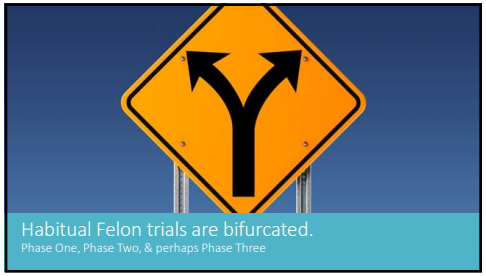
Court that took conviction lacked jurisdiction

Guilty plea was not knowing and/or voluntarily made

34

Going to Trial

35



Habitual Felon trials are bifurcated.

Phase One, Phase Two, & perhaps Phase Three

36

PHASE ONE

The guilt/innocence determination of the principal felony

Jury should ***not*** hear about HF status during Phase One (N.C.G.S. §14-7.5)

You may refer to the sentence your client might receive for the principal felony but NOT to the sentence as a HF

37

PHASE ONE

NOT GUILTY

NOT GUILTY

If jury acquits or principal charge dismissed:

- HF status has no effect and must be dismissed
- Status cannot stand alone
- Winner! Winner! Winner!

NOT GUILTY

37

PHASE TWO

GUILTY

If convicted:

- **HF status** is a penalty enhancement
  - HF status will elevate the felony punishment four (4) classes
  - Capped at "C"
- **Violent Habitual Felon** (N.C.G.S. §14-7.12):
  - If defendant is convicted of the principal Class A-E felony, sentence is Life without Parole

39

Should You Pass Go?

- If you get a Guilty verdict on the principal felony, don't give up!
- You have leverage:
  - Conference the case with the judge and the prosecutor
  - Ask for a mitigated range sentence or a bottom of the presumptive range sentence in exchange for a stipulation to the HF status
  - **Client must agree and execute a HF plea transcript that admits HF status

40

Sample HF Plea Transcript at Phase Two

STATE VERSUS	File No. HABITUAL (PHASE TWO)
Name Of Defendant JOHN DOE	

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) YES

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 Defendant will plead guilty to the Habitual Felon status.

The Defendant is a prior record level IV for Habitual Sentencing, pleading to a Class "C" felony.

That the sentence will be in the court's discretion.

☒ 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 (22) YES

41

Jury trial for HF Status

- Beyond reasonable doubt
- Three (3) prior non-overlapping felony convictions
- The main evidence typically is a certified court records
- Permissible Closing Arguments in Phase 2:
  - May now refer to the enhanced sentence your HF client is exposed to
  - Watch for different names or dates of birth
  - Exploit sloppy judgments
    - When the stakes are this high, discrepancies like that are unacceptable

42

PHASE 3

If aggravating factors have been alleged, the jury could be asked to deliberate a **third** time on whether aggravating factors have been proven beyond a reasonable doubt.

43

Habitual Felon Sentencing

Class of Substantive Felony	Will Be Enhanced to	Habitual Felon Class
Class I	⇒	Class E
Class H	⇒	Class D
Class G	⇒	Class C
Class F	⇒	Class C
Class E	⇒	Class C
Class D	⇒	Class C
Class A, Class B1, Class B2	⇒	Class A, Class B1, Class B2

***Except pre-2011

44

Violent Habitual Felon Sentencing

Class of Substantive Felony	Will Be Enhanced to	Habitual Felon Class
Class I	⇒	Not Applicable
Class H	⇒	Not Applicable
Class G	⇒	Not Applicable
Class F	⇒	Not Applicable
Class E	⇒	Life
Class D	⇒	Life
Class A, Class B1, Class B2	⇒	Life

45

HF & Prior Record Level Points

- Felony convictions used to establish the client's HF status cannot count toward the prior record level point system (N.C.G.S. §14-7.6)
- BUT…
  - If convicted of multiple felonies in one session of court, one of those felony convictions may be used as a predicate conviction toward HF status, and a second one can be used toward the prior record level (N.C.G.S. §14-7.12)
- **Special consideration**: PDP (cocaine vs. marijuana), in Habitual Crimes consider attempts vs. completed crimes (larceny, assault)

46

Special Client Concerns

- Unwillingness or inability to process or accept HF sentence
- Myths regarding priors
- Dangerous decision-making
  - Resist any urge to sugarcoat the news
    - Suppression motion? Great! But you are HF for life.
  - Give the worst
  - Visit clients early and often: build trust
  - Communicate offer is better than alternative
  - Should a non-habitual offer be taken?

47

Constitutional Issues

Generally, these claims have been rejected:

Double Jeopardy
Equal Protection
Selective Prosecution
Separation of Powers
Gives DA the legislative power to define sentence for crimes
Cruel and Unusual Punishment

48

This is real. They can do it. They are doing it.

49

Can I Get a HF offer?

Sometimes, a HF status client will face **more** time on a non-habitual plea or conviction

When being sentenced as a HF can benefit your client:

(1) Defendants with a Class C or a Class D felony

(2) Drug trafficking offenses

Can I get a reduction in prior record level?

50

N.C.G.S

- § 14-7.1 Persons defined as habitual felons.
- § 14-7.2 Punishment.
- § 14-7.3 Charge of habitual felon
- § 14-7.4 Evidence of prior convictions of felony offenses
- § 14-7.5 Verdict and judgment
- § 14-7.6 Sentencing of habitual felons
- § 14-7.7 Persons defined as violent habitual felons
- § 14-7.8 Punishment
- § 14-7.9 Charge of Violent Habitual Felon
- § 14-7.10 Evidence of prior convictions of violent felonies
- § 14-7.11 Verdict and judgement
- § 14-7.12 Sentencing of violent habitual felons

51

"Your Honor, we feel the trial failed to deliver on its pretrial publicity."

HF cases are regular cases with the only difference being the amount of time your client faces.

52

Adverse Childhood Experiences ("ACEs") Questionnaire

The attached self-administered ACEs questionnaire consists of ten questions intended to identify traumatic events involving abuse, neglect, and household dysfunction experienced during childhood (prior to age 18). The client shall answer "yes" or "no" to each of the ten questions. The total number of "yes" answers results in the client's ACEs score. The higher the ACEs score, the more likely the client is at risk for negative physical and mental health/behavioral outcomes.

Scoring the client's number of "yes" answers to the questions will aid the U.S. Probation Office, Bureau of Prisons (if incarcerated), and contracted treatment providers in connecting the client with appropriate support and treatment.

(While the questions contained in this form are personal in nature and may elicit memories of difficult childhood experiences, the intent of the questionnaire is to identify treatment and support needs, with the goal of furthering the client's success.)

THE TRUTH ABOUT ACEs

WHAT ARE THEY?

ACEs are ADVERSE CHILDHOOD EXPERIENCES

The three types of ACEs include

ABUSE

- Physical
- Emotional
- Sexual

NEGLECT

- Physical
- Emotional

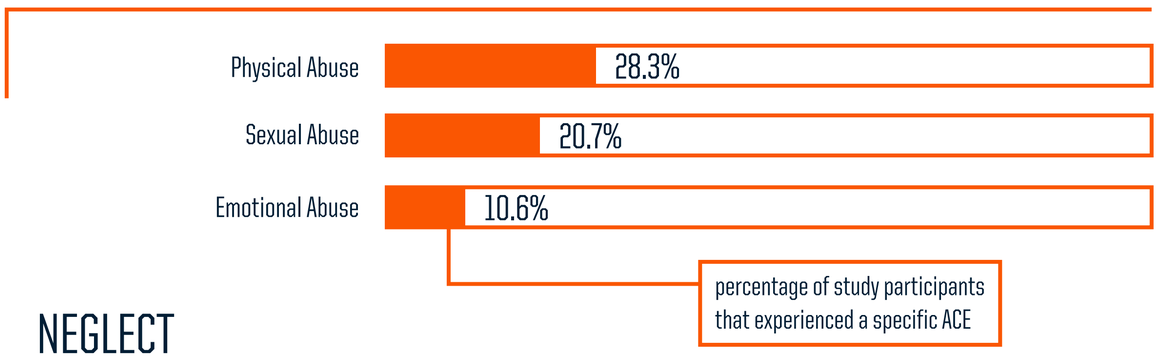
HOUSEHOLD DYSFUNCTION

- Mental Illness
- Mother treated violently
- Divorce
- Incarcerated Relative
- Substance Abuse

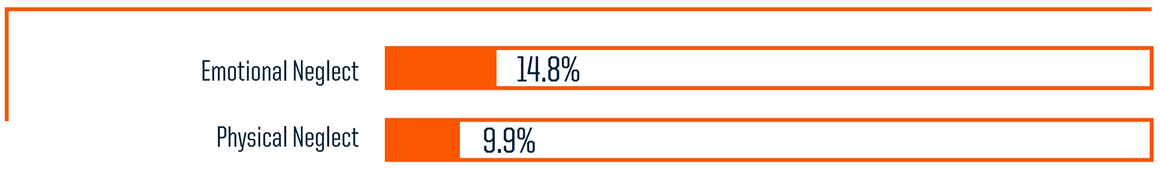
HOW PREVALENT ARE ACEs?

The ACE study revealed the following estimates:*

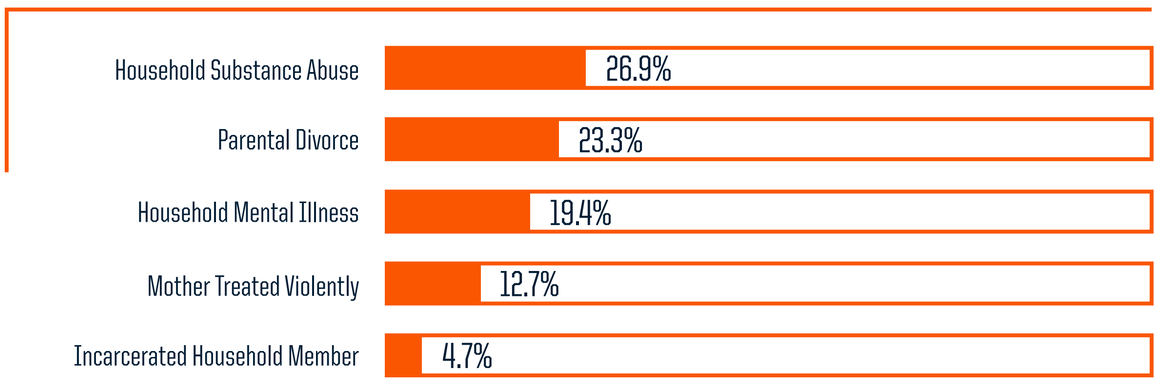
ABUSE



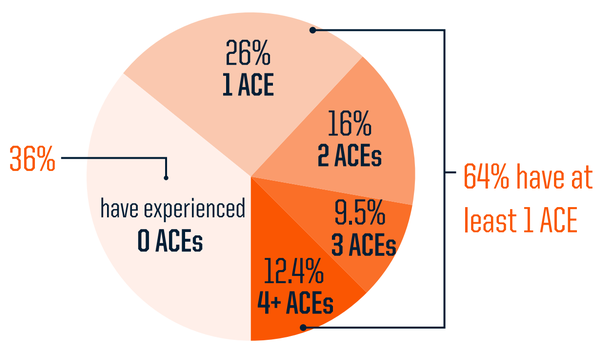
NEGLECT



HOUSEHOLD DYSFUNCTION

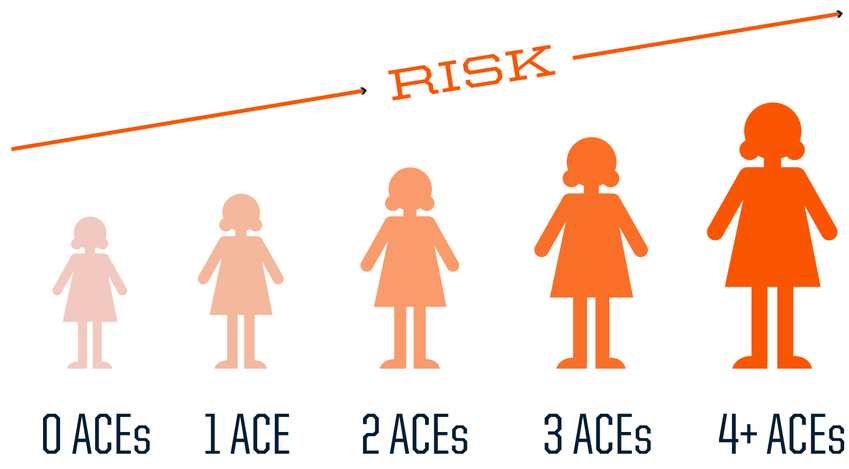


Of 17,000 ACE study participants:



WHAT IMPACT DO ACEs HAVE?

As the number of ACEs increases, so does the risk for negative health outcomes



Possible Risk Outcomes:

BEHAVIOR

- Lack of physical activity
- Smoking
- Alcoholism
- Drug use
- Missed work

PHYSICAL & MENTAL HEALTH

- Severe obesity
- Diabetes
- Depression
- Suicide attempts
- STDs
- Heart disease
- Cancer
- Stroke
- COPD
- Broken bones

rwjf.org/aces

Robert Wood Johnson Foundation

*Source: http://www.cdc.gov/ace/prevalence.htm

Reset

Adverse Childhood Experience (ACE) Questionnaire
Finding your ACE Score

While you were growing up, during your first 18 years of life:

1. Did a parent or other adult in the household **often** …
   Swear at you, insult you, put you down, or humiliate you?
   or
   Act in a way that made you afraid that you might be physically hurt?
   Yes No If yes enter 1 _____

2. Did a parent or other adult in the household **often** …
   Push, grab, slap, or throw something at you?
   or
   Ever hit you so hard that you had marks or were injured?
   Yes No If yes enter 1 _____

3. Did an adult or person at least 5 years older than you **ever**…
   Touch or fondle you or have you touch their body in a sexual way?
   or
   Try to or actually have oral, anal, or vaginal sex with you?
   Yes No If yes enter 1 _____

4. Did you **often** feel that …
   No one in your family loved you or thought you were important or special?
   or
   Your family didn't look out for each other, feel close to each other, or support each other?
   Yes No If yes enter 1 _____

5. Did you **often** feel that …
   You didn't have enough to eat, had to wear dirty clothes, and had no one to protect you?
   or
   Your parents were too drunk or high to take care of you or take you to the doctor if you needed it?
   Yes No If yes enter 1 _____

6. Were your parents **ever** separated or divorced?
   Yes No If yes enter 1 _____

7. Was your mother or stepmother:
   Often pushed, grabbed, slapped, or had something thrown at her?
   or
   Sometimes or often kicked, bitten, hit with a fist, or hit with something hard?
   or
   Ever repeatedly hit over at least a few minutes or threatened with a gun or knife?
   Yes No If yes enter 1 _____

8. Did you live with anyone who was a problem drinker or alcoholic or who used street drugs?
   Yes No If yes enter 1 _____

9. Was a household member depressed or mentally ill or did a household member attempt suicide?
   Yes No If yes enter 1 _____

10. Did a household member go to prison?
    Yes No If yes enter 1 _____

Now add up your "Yes" answers: 0 _____ **This is your ACE Score**

Preventing Low Level Felonies from Becoming High Level Habitual Felonies

Habitual Felon laws: a law that allows for greater punishment for "repeat offenders."

1

No Big Deal!

If..... You just win the primary phase of trial

2

A Nationwide Trend

- **Persistent offender laws** to severely enhance sentences
- NC's habitual felon law is generally a *"fourth Strike"* situation
- "Primary purpose" is to "***deter repeat offenders***" and "***segregate that person from the rest of society for an extended period of time***."

State v. Aldridge, 76 N.C. App. 638, 640 (1985)

3

Habitual Felons vs. Habitual Crimes

Habitual Felon is *different* from **Habitual Crimes**:

- Habitual DWI (3+ prior impaired driving) N.C.G.S. §20-138.5
- Habitual Larceny (4+ prior larcenies) N.C.G.S. §14.72
- Habitual Misdemeanor Assault (2+ prior assaults) N.C.G.S. §14-33.2
- Habitual Breaking and/or Entering (1+ prior B&E) N.C.G.S. §§14-7.25-7.31
- Armed Habitual Felon (1+ prior Firearm related felony) N.C.G.S. §§14.7.35-7.41

4

Habitual Felon Law in NC

Vanilla: Defendant has three (or more) felony convictions, Federal or State.
- If convicted, defendant will be sentenced at **four** classes higher
- Capped at "C"

Rocky Road: Violent habitual felon.
- Defendant has two previous A-E felony convictions and is convicted of a new A-E felony
- Life sentence

5

How Does It Work?

HF is a **status**, not a crime

- Three previous ***non-overlapping*** convictions
  - Felony convictions since 1967 (N.C.G.S. §14-7.1)
- HF status is for ***life***
- ***Alleged by indictment***
- Convictions do not have to be for similar offenses or similar to the newly charged offense
- The convictions must be felonies in NC or defined as felonies under the laws of any sovereign jurisdiction where the convictions occurred

6

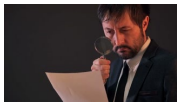
How Does It Work?

- Out of State Convictions can be used to determine HF Status
- To do that, a court must find by preponderance of the evidence that the out of state crime is "substantially similar to a North Carolina offense;"
- That is a legal determination which must be made by the trial court, it cannot be stipulated to, even by a client's plea! *State v. Bunting, 279 N.C. App. 636 (2021)*

7

Things to Watch For

- "Non-overlapping"
- Pardoned convictions
- NC convictions (prior to July 1, 1975) based on plea of no contest
- Convictions prior to July 6, 1967
- Convictions for habitual misdemeanor assaults (N.C.G.S. §14-33.2)
- Only **one** from before age 18 can be used



8

Non-Overlapping

9

Eligibility for Violent HF

A defendant who:

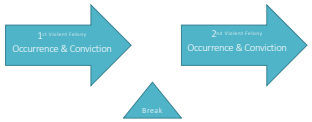
Has been *convicted*,

Of *two violent felonies*,

Commits a third Class A through E felony

10

Non-Overlapping



11

Violent Habitual Felon N.C.G.S. §14.7.7

- Any person with two (2) non-overlapping "violent felony" convictions
  - Any Class A through E felony convictions since 1967 in North Carolina
  - Any repealed or superseded offenses that are the substantial equivalent to a current Class A through E Felony in North Carolina
  - Any offense from another jurisdiction "substantially similar to" an A through E North Carolina offense
  - Need NOT be defined by "foreign sovereign" as felony
  - Even if a predicate offense was committed while the client was 16/17, it counts *State v. McDougald, 284 N.C. App. 695 (2022)*
- **Note**: Excludes some felony offenses that might naturally be considered violent (assaults)

12

Punishment for Violent HF

13

When is Status Charged?

The decision to charge an individual as a HF or a Violent HF is *entirely within the prosecutor's discretion*

State v. Parks, 146 N.C. App. 568 (2001)

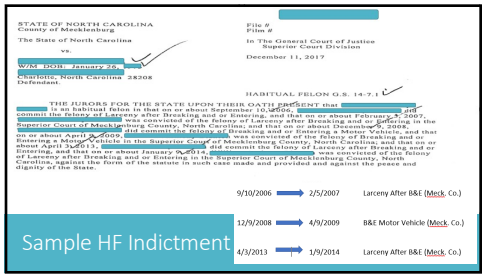
14

HF Indictment N.C.G.S. §14-7.3

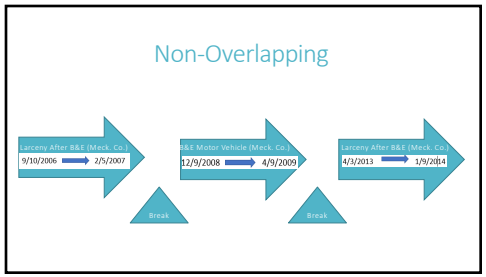
- Must be separate from the principal felony Indictments
  - Can be listed a Count II to the Principal Felony
    State v. Young, 120 N.C. App. 456, 459-60 (1995)

- **Must** include the following (*for each of the 3 felonies):*
  1. Date of the commission;
  2. Date of the conviction; (MUST have 1+2, *State v. Forte*, 260 NC App. 245 (2018)
  3. State or sovereign against which the felony was committed; *and*
  4. Identity of the court in which the conviction took place
     State v. Langley, 371 N.C. 389 (2018)

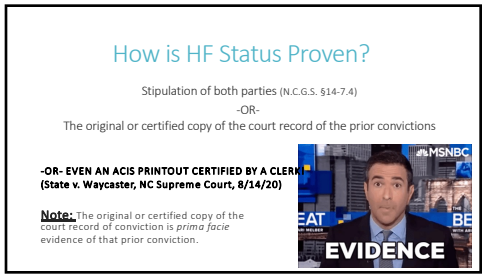
15


STATE OF NORTH CAROLINA
County of Mecklenburg
The State of North Carolina
vs.
W/M DOB: January 26,
Charlotte, North Carolina 28208
Defendant.
File #
Film #
In The General Court of Justice
Superior Court Division
December 11, 2017
HABITUAL FELON G.S. 14-7.1
THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that
is an habitual felon in that on or about September 10, 2004, and
commit the felony of Larceny after Breaking and or Entering, and that on or about February 5, 2007,
Superior Court of Mecklenburg County, North Carolina; and that on or about December 29, 2008,
on or about April 9, 2009, and commit the felony of
was convicted of the felony of Breaking and or
Entering a Motor Vehicle in the Superior Court of Mecklenburg County, North Carolina; and that on or
about January 9, 2014, and commit the felony of Larceny after Breaking and or
Entering, and that on or about January 9, 2014, was convicted of the felony
of Larceny after Breaking and or Entering in the Superior Court of Mecklenburg County, North
Carolina, against the form of the statute in such case made and provided and against the peace and
dignity of the State.
9/10/2006 2/5/2007 Larceny After B&E (Meck. Co.)
12/9/2008 4/9/2009 B&E Motor Vehicle (Meck. Co.)
4/3/2013 1/9/2014 Larceny After B&E (Meck. Co.)
Sample HF Indictment

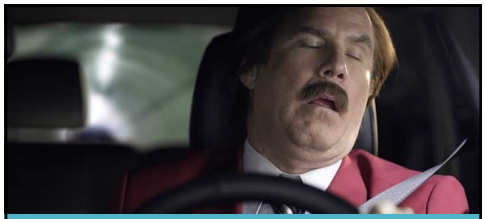
16


Non-Overlapping
Larceny After B&E (Meck. Co.)
9/10/2006 2/5/2007
B&E Motor Vehicle (Meck. Co.)
12/9/2008 4/9/2009
Larceny After B&E (Meck. Co.)
4/3/2013 1/9/2014
Break
Break

17


How is HF Status Proven?
Stipulation of both parties (N.C.G.S. §14-7.4)
-OR-
The original or certified copy of the court record of the prior convictions
-OR- EVEN AN ACIS PRINTOUT CERTIFIED BY A CLERK
(State v. Waycaster, NC Supreme Court, 8/14/20)
Note: The original or certified copy of the court record of conviction is prima facie evidence of that prior conviction.
MSNBC
EVIDENCE

18



Don't Fall Asleep Behind the Wheel!

19

Late Identification of HF Status by DA

- A client might not be identified as a HF until *after* Bond Hearing or Probable Cause Hearing date in District Court
- You may become aware of your client's HF status before the prosecutor does
  - Perhaps it's time to plead quick?
  - A habitual felon indictment must be part of a prosecution "for which no judgment" has yet been entered.

- Until that happens the State can obtain and prosecute a new habitual felon indictment
- The judge can even continue the case to allow the state time to secure the new indictment (even with a fatal error!)

State v. Hodge, 270 NC. App. 110 (2020)

20

No OFA

HF is a ***status*** and not a standalone offense

Therefore, a HF Indictment *should not result in a new bond or Order for Arrest*

Indictment generally served at Scheduling Conference date in Mecklenburg

21

Rapidly Escalating Severity

Misdemeanors can become HF cases!

Example: Client charged with Misd. Larceny in District Court. Prosecutor could indict client for Habitual Larceny, Class H, which could serve as the principal felony for a HF indictment

But! Attempts NOT included: *State v. Irvins, 277 NC App. 101 (2021)*

Drug misdemeanors elevated to felonies pursuant to 90-95(e)(3) can also be habitualized! (repeat class 1 offense)

State v. Howell 370 N.C. 647 (2018)

22

Key Guilty Plea Considerations

Most HF cases are resolved with non-habitual guilty pleas and sentences

- Ask your DA
- Write a letter of support
- Negotiate!
  - Two class H to run consecutive
  - Class I to E, rather than the offered H to D
  - Programs
- If the judge alters the terms of the written plea, you can withdraw it

State v. Wentz 284 N.C. App. 736 (2022)

23

Sample Non-HF Plea Transcript

STATE VERSUS	File No. NON-HABITUAL
Name Of Defendant JOHN DOE	

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) YES

21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

Defendant enters this plea of guilty to the following:

(1) Amended Larceny from the Person, 18CRS000010 and

(2) Amended Misdemeanor Assault Inflicting Serious Injury, 18CRS000011.

The State will dismiss the charges set out on page two, side two, of this transcript, which includes the habitual felon status. The sentence will be consolidated under the Amended Larceny from the Person charge, (18CRS000010). The defendant will receive 14-26 months, Active.

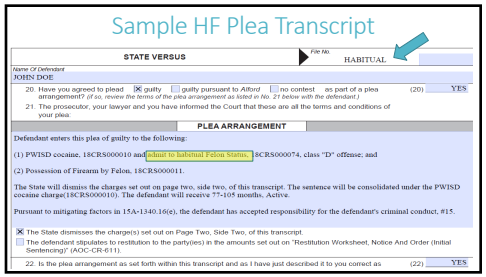
Pursuant to mitigating factors in 15A-1340.16(e), the defendant has accepted responsibility for the defendant's criminal conduct, #15.

☒ 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 (22) YES

24

Sample HF Plea Transcript



STATE VERSUS | File No. HABITUAL

Name Of Defendant
JOHN DOE

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) YES

21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea.

PLEA ARRANGEMENT

Defendant enters this plea of guilty to the following:

(1) PWISD cocaine, 18CRS000010 and admit to habitual Felon Status, 18CRS000074, class "D" offense; and

(2) Possession of Firearm by Felon, 18CRS000011.

The State will dismiss the charges set out on page two, side two, of this transcript. The sentence will be consolidated under the PWISD cocaine charge(18CRS000010). The defendant will receive 77-105 months, Active.

Pursuant to mitigating factors in 15A-1340.16(e), the defendant has accepted responsibility for the defendant's criminal conduct, #15.

☒ 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 (22) YES

25

Habitual Status Plea During Trial

A colloquy MUST be administered to any client admitting (pleading guilty) to Habitual Felon Status during trial before sentencing.

Failure to do so is reversible error! *State v. Williamson 272 N.C. App. 204 (2020)*

26

Must Run Consecutive

27

Consecutive Sentence Prospects

If client is serving time already or has multiple pending cases, try to wrap them up

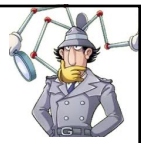
- Work with out of county attorneys
- Work with other units (Especially PV)
- Check pending

If the defendant is not currently serving a term of imprisonment, the trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences

State v. Duffie, 241 N.C. App. 88 (2015)

28

Critique Every HF Indictment



Look for irregularities in HF indictment:

- Overlapping prior felonies
- Court records mistaken or missing
- Priors were not actually felonies. *State v. Moncree*, 188 N.C. App. 221 (2008).
- Different names or date of birth in court records

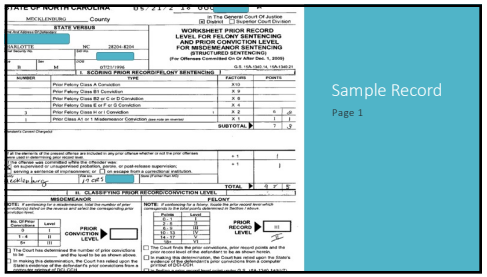
Suggestion: Make it a habit to obtain copies of the alleged prior judgments and transcripts prior to trial, or the underlying misdemeanors for a elevated felony

YOU WILL WAIVE these arguments if you stipulate to some of them

29

Prior Record Level: No Double-Dipping

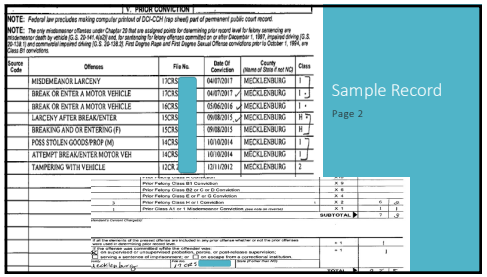
30



Sample Record

Page 1

31



Sample Record

Page 2

32

Pre-Trial Issues

Anti-Collateral Attack Rule

- Don't wait until trial to challenge validity of prior felony conviction if you know it's mistaken
  - If a predicate felony conviction could be attacked, it must be done with an MAR prior to trial (*State v. Creason*, 123 N.C. App. 495 (1996))
- Exception:
  - A *Motion to Suppress* the prior conviction due to lack of counsel is viable at any time (N.C.G.S. §15A-980)

***Some judges may permit such collateral attacks on the theory that it promotes judicial economy

33

Improper Collateral Attacks

My lawyer was ineffective

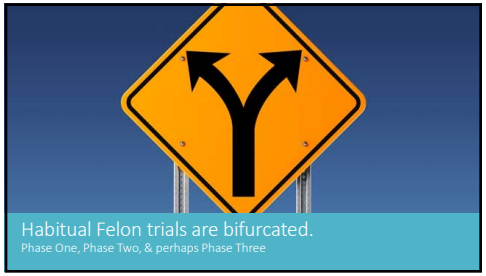
Court that took conviction lacked jurisdiction

Guilty plea was not knowing and/or voluntarily made

34

Going to Trial

35



Habitual Felon trials are bifurcated.

Phase One, Phase Two, & perhaps Phase Three

36

PHASE ONE

The guilt/innocence determination of the principal felony

Jury should ***not*** hear about HF status during Phase One (N.C.G.S. §14-7.5)

You may refer to the sentence your client might receive for the principal felony but NOT to the sentence as a HF

37

PHASE ONE

NOT GUILTY

NOT GUILTY

If jury acquits or principal charge dismissed:

- HF status has no effect and must be dismissed
- Status cannot stand alone
- Winner! Winner! Winner!

NOT GUILTY

37

PHASE TWO

GUILTY

If convicted:

- **HF status** is a penalty enhancement
  - HF status will elevate the felony punishment four (4) classes
  - Capped at "C"
- **Violent Habitual Felon** (N.C.G.S. §14-7.12):
  - If defendant is convicted of the principal Class A-E felony, sentence is Life without Parole

39

Should You Pass Go?

- If you get a Guilty verdict on the principal felony, don't give up!
- You have leverage:
  - Conference the case with the judge and the prosecutor
  - Ask for a mitigated range sentence or a bottom of the presumptive range sentence in exchange for a stipulation to the HF status
  - **Client must agree and execute a HF plea transcript that admits HF status

40

Sample HF Plea Transcript at Phase Two

STATE VERSUS	File No. HABITUAL (PHASE TWO)
Name Of Defendant JOHN DOE	

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) YES

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 Defendant will plead guilty to the Habitual Felon status.

The Defendant is a prior record level IV for Habitual Sentencing, pleading to a Class "C" felony.

That the sentence will be in the court's discretion.

☒ 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 (22) YES

41

Jury trial for HF Status

- Beyond reasonable doubt
- Three (3) prior non-overlapping felony convictions
- The main evidence typically is a certified court records
- Permissible Closing Arguments in Phase 2:
  - May now refer to the enhanced sentence your HF client is exposed to
  - Watch for different names or dates of birth
  - Exploit sloppy judgments
    - When the stakes are this high, discrepancies like that are unacceptable

42

PHASE 3

If aggravating factors have been alleged, the jury could be asked to deliberate a **third** time on whether aggravating factors have been proven beyond a reasonable doubt.

43

Habitual Felon Sentencing

Class of Substantive Felony	Will Be Enhanced to	Habitual Felon Class
Class I	⇒	Class E
Class H	⇒	Class D
Class G	⇒	Class C
Class F	⇒	Class C
Class E	⇒	Class C
Class D	⇒	Class C
Class A, Class B1, Class B2	⇒	Class A, Class B1, Class B2

***Except pre-2011

44

Violent Habitual Felon Sentencing

Class of Substantive Felony	Will Be Enhanced to	Habitual Felon Class
Class I	⇒	Not Applicable
Class H	⇒	Not Applicable
Class G	⇒	Not Applicable
Class F	⇒	Not Applicable
Class E	⇒	Life
Class D	⇒	Life
Class A, Class B1, Class B2	⇒	Life

45

HF & Prior Record Level Points

- Felony convictions used to establish the client's HF status cannot count toward the prior record level point system (N.C.G.S. §14-7.6)
- BUT…
  - If convicted of multiple felonies in one session of court, one of those felony convictions may be used as a predicate conviction toward HF status, and a second one can be used toward the prior record level (N.C.G.S. §14-7.12)
- **Special consideration**: PDP (cocaine vs. marijuana), in Habitual Crimes consider attempts vs. completed crimes (larceny, assault)

46

Special Client Concerns

- Unwillingness or inability to process or accept HF sentence
- Myths regarding priors
- Dangerous decision-making
  - Resist any urge to sugarcoat the news
    - Suppression motion? Great! But you are HF for life.
  - Give the worst
  - Visit clients early and often: build trust
  - Communicate offer is better than alternative
  - Should a non-habitual offer be taken?

47

Constitutional Issues

Generally, these claims have been rejected:

Double Jeopardy
Equal Protection
Selective Prosecution
Separation of Powers
Gives DA the legislative power to define sentence for crimes
Cruel and Unusual Punishment

48

This is real. They can do it. They are doing it.

49

Can I Get a HF offer?

Sometimes, a HF status client will face **more** time on a non-habitual plea or conviction

When being sentenced as a HF can benefit your client:

(1) Defendants with a Class C or a Class D felony

(2) Drug trafficking offenses

Can I get a reduction in prior record level?

50

N.C.G.S

- § 14-7.1 Persons defined as habitual felons.
- § 14-7.2 Punishment.
- § 14-7.3 Charge of habitual felon
- § 14-7.4 Evidence of prior convictions of felony offenses
- § 14-7.5 Verdict and judgment
- § 14-7.6 Sentencing of habitual felons
- § 14-7.7 Persons defined as violent habitual felons
- § 14-7.8 Punishment
- § 14-7.9 Charge of Violent Habitual Felon
- § 14-7.10 Evidence of prior convictions of violent felonies
- § 14-7.11 Verdict and judgement
- § 14-7.12 Sentencing of violent habitual felons

51

"Your Honor, we feel the trial failed to deliver on its pretrial publicity."

HF cases are regular cases with the only difference being the amount of time your client faces.

52

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 recordation
- 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 recordation is imperative for preserving.
  - Our Supreme Court revived Batson, but changes in the court composition likely mean no relief in state court.
  - Preserve for federal litigation.
- 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 folder with voir dire materials

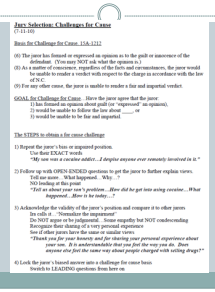
8

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



Jury Selection: Challenges for Cause
(7-31-10)

Basis for Challenge for Cause: 15A-1212

(6) The juror has formed or expressed an opinion as to the guilt or innocence of the defendant. (You may NOT ask what the opinion is.)
(8) As a matter of conscience, regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law of N.C.
(9) For any other cause, the juror is unable to render a fair and impartial verdict.

GOAL for Challenge for Cause: Have the juror agree that the juror:
1) has formed an opinion about guilt (or "expressed" an opinion),
2) would be unable to follow the law about _____, or
3) would be unable to be fair and impartial.

The STEPS to obtain a for cause challenge

1) Repeat the juror's bias or unjusted position.
Use their EXACT words
"My son was a cocaine addict…I despise anyone ever remately involved in it."

2) Follow up with OPEN-ENDED questions to get the juror to further explain views.
Tell me more…What happened… Why…?
NO leading at this point
"Tell us about your son's problem…How did he get into using cocaine…What happened…How is he today…?

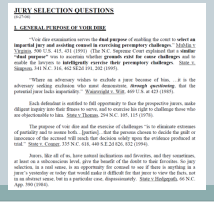
3) Acknowledge the validity of the juror's position and conquer it to other jurors
Its cult-it…- Normalize the impairment!
Do NOT argue or be judgmental… Some empathy but NOT condescending
Recognize their sharing of a very personal experience
See if other jurors have the same or similar views
"Thank you for your honesty and for sharing your personal experience about your son. It is understandable that you feel the way you do. Does anyone else feel the same way about people charged with selling drugs?"

4) Lock the juror's biased answer into a challenge for cause basis
Switch to LEADING questions from here on

10

Error Preservation – Jury Selection

- Have case law handy to support your client's right to have you ask certain questions.



JURY SELECTION QUESTIONS
(6/27/14)

I. GENERAL PURPOSE OF VOIR DIRE

"Voir dire examination serves the **dual purpose** of enabling the court to **select an impartial jury and assisting counsel in exercising peremptory challenges.**" Mu'Min v. Virginia, 500 U.S. 415, 431 (1991) (The N.C. Supreme Court explained that a **similar "dual purpose"** was to ascertain whether **grounds exist for cause challenges** and to enable the lawyers to **intelligently exercise their peremptory challenges.** State v. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995).

"Where an adversary wishes to exclude a juror because of bias, … it is the adversary seeking exclusion who must demonstrate, **through questioning**, that the potential juror lacks impartiality." Wainwright v. Witt, 469 U.S. at 423 (1985).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. State v Thomas, 294 N.C. 105, 115 (1978).

The purpose of voir dire and the exercise of challenges "is to eliminate extremes of partiality and to assure both, [parties], that the persons chosen to decide the guilt or innocence will be able to render a verdict based exclusively upon the evidence produced at trial." State v Cooper, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection is a critical part of the process. Counsel has to be able to get a sense of the juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. State v Hedgepath, 66 N.C. App. 590 (1984).

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).

12

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.

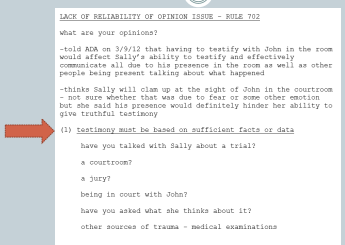
27

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 ISSUE – RULE 702

what are your opinions?

-told ADA on 3/9/12 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?

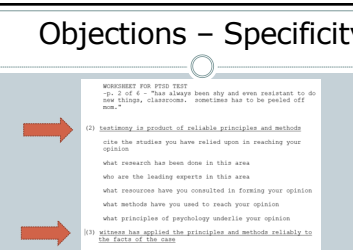
being in court with John?

have you asked what she thinks about it?

other sources of trauma – medical examinations

29

Objections – Specificity



WORKSHEET FOR PTSD TEST
-p. 2 of 6 – "has always been shy and even resistant to do new things, classrooms. sometimes has to be peeled off mom."

(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 produced 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

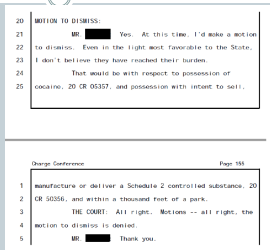
Sufficiency & Variance

- 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.



MOTION TO DISMISS:

MR. [redacted]: Yes. At this time, I'd make a motion to dismiss. Even in the light most favorable to the State, I don't believe they have reached their burden.

That would be with respect to possession of cocaine, 20 CR 05357, and possession with intent to sell.

Charge Conference Page 155

manufacture or deliver a Schedule 2 controlled substance, 20 CR 50356, and within a thousand feet of a park.

THE COURT: All right. Motions -- all right, the motion to dismiss is denied.

MR. [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)

Glenn Gerding
Appellate Defender
123 W. Main St.
Durham, NC 27701
(919) 354-7210

49

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 <u>in front of the jury</u>** 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 <u>in front of the jury at the time the evidence is introduced</u>, 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."

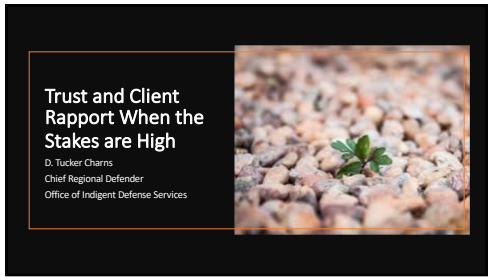
Rule 21 General Rules of Practice: "If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference."

→ **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.


Trust and Client Rapport When the Stakes are High
D. Tucker Charns
Chief Regional Defender
Office of Indigent Defense Services

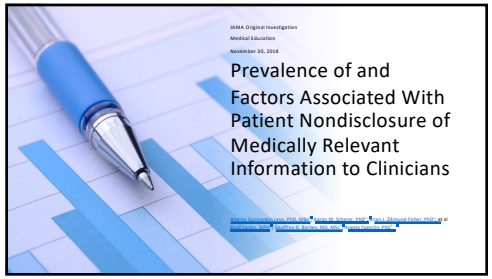
1

2

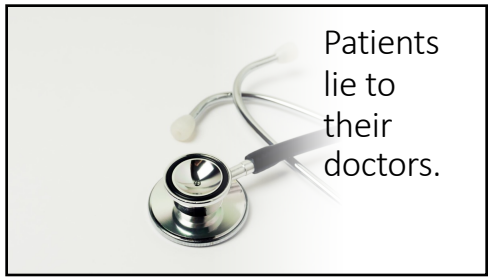
3

4

5


JAMA Original Investigation
Medical Education
November 30, 2018
Prevalence of and Factors Associated With Patient Nondisclosure of Medically Relevant Information to Clinicians

6

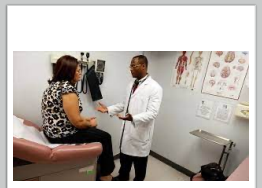


Patients lie to their doctors.

7

81% of patients said they had lied to their doctors about exercise, diet, medication and stress reduction.

50% reported they did not speak up about not understanding the doctor.



8

Why lie to someone trying to help you?

9

Fear of shame. Fear of judgment.

10

Why do clients lie to lawyers?

11

Fear of shame. Fear of judgment.

12

Fear we are not on their side.

13

Fear we won't work hard for them if they tell us everything.

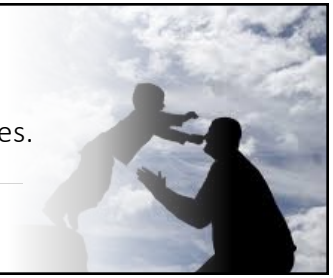
14

15

Trust.

16

Our own experiences.



17

The experiences of our clients.

18

Trust.

19

Ethics Based Client Centered Advocacy

Recognizing that an attorney is ethically bound to use any and all legal means necessary to get the best possible outcome for the fully informed client.

20

Thoroughness and preparation.

Communication.

Loyalty to the client.

Advocate for client's interest.

21

N.C. State Bar:

22

Rule 1.1 Competence

. . . Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

23

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

24

Rule 1.4 Communication

Consult/explain:

- Informed consent
- Case status
- Requests for information
- Attorney limitations
- What the client needs to make an informed decision about their choices

25

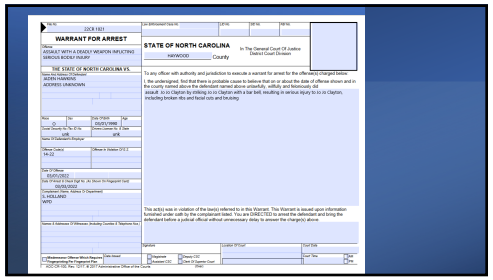
Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

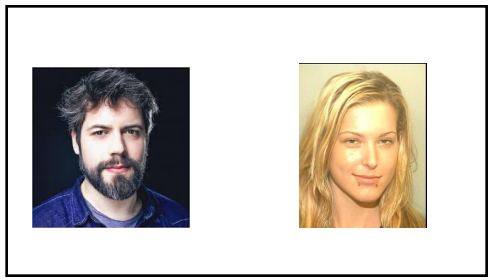
26

We know that!

27


WARRANT FOR ARREST
STATE OF NORTH CAROLINA
HAYWOOD
County
In The General Court Of Justice
District Court Division
THE STATE OF NORTH CAROLINA VS.
ADDRESS UNKNOWN

28



29

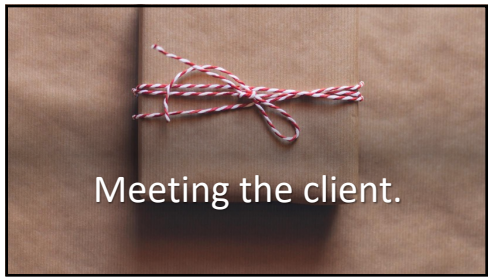
30

When we think we know the story, we don't hear the story.

31

Trust.

32



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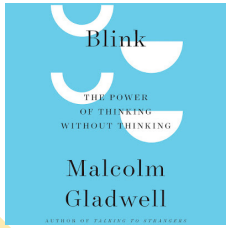


34

"(First) judgments are, first of all, enormously quick: they rely on the thinnest slices of experience…they are also unconscious."

35

Prepare for the meeting.

36

What our client has seen.

37

What our client has lost.

38

Trust.

39

Check the warrant for conflicts.

Check the warrant for defects.

40

Know the elements and defenses to the charges.

41

Know the next court date.

42

Meet the client as soon as possible after the event.

43

Communication.

44

In the interview, the attorney talks first.

45

Confidentiality.

46

Explain the elements.
Explain the defenses.
Explain the process and what happens next.

47

What they should expect.

48

What they should really expect.

49

If you ask questions about the event, be mindful of how you ask the questions.

50

Words are our tools.

51

Instead of:

"Where did they find the drugs?"

52

Try:

"Where will the officer say she found the drugs?"

53

Instead of:

"What did you tell the police?"

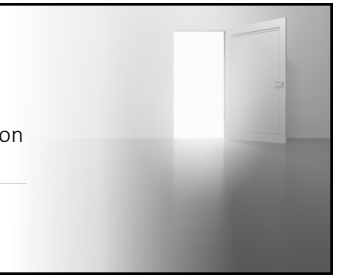
54

Try:

"What will they say you said?"

55

Keep the communication door open.



56

Instead of:

"So, you admit that…."

57

Try:

"Let's talk about…."

58

Instead of:

"Your record will kill you."

59

Try:

"Let's think about what the jury/judge would think about a that…"

60

61

62

63

64

65

In court.....

66

NO CLIENT

67

68

I do not have any information that I am able to provide.

69

70

71

Advocate for the Client's Interest

72

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a **lawyer shall abide by a client's decisions concerning the objectives of representation and,** as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

73

(1) **A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**

74

Conflict about the case.

75

What do you do with a client who won't do what is best?

76

The fully informed client's expressed outcome controls.

77

Bond hearing.

78

Plea or trial.

79

Trial strategy.

80

"[W]hen counsel and a fully informed criminal defendant reach an absolute impasse as to such tactical decisions, the client's wishes must control…in accord with the principal-agent nature of the attorney-client relationship."

State v. Ali
329 N.C. 394 (1991)

81

82

"I told my lawyer, 'man, you work for me.
Object. Object.
This ain't right.'"

83

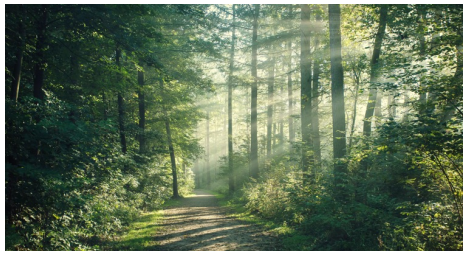
84

Batson v. Kentucky,
476 U.S. 79 (1985)

85

Simeon v. Hardin,
339 N.C. 358 (1994)

86



87

That moment.

88

That moment.

89

You work for the State.
You are not fighting for me.
Others get better pleas.
You are selling me out to the DA.

90

Oh, fuck.

91

92

You need to get from
“Oh, fuck”
to
“OK”.

93

Recognize the “oh, fuck”.

94

95

Don’t get hijacked.

96

Get to okay.

97

At okay, turn to the client.

98

Recognize that the client's rational brain has been hijacked by the reptile brain.

99

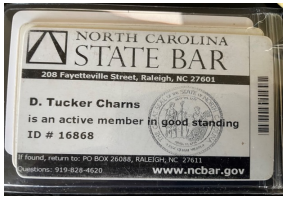
100

Don’t make it worse.

101

Don’t interrupt.
Don’t correct.
Don’t argue.

102



103

Anything else you want to tell me?

104

105

Anything else you want to tell me?

106

Respond, don't react.

107

Your goal right now is not to solve the problem/s in the rant but to stop talking AT each other.

108

Getting some yes answers.

109

I bet you think no one understands how trapped you feel right now.

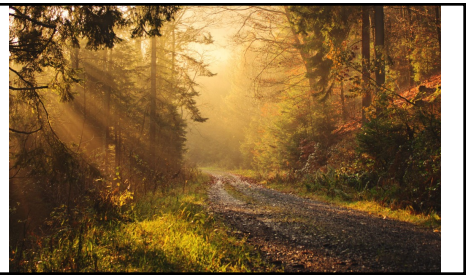
110

I guess you think I'm against you sometimes because when you say A, I say Z.

111

You've been thinking on this for a while, yes?

112



113

Three steps to re-building trust.

114

1. Start with with seeing the client's perspective.

115

Every living thing wants to be seen.

116

117

Seeing someone means understanding their perspective.

118

You have to ask.

119

Guess the emotion.
Cite the facts for that.
Ask the question.

120

Wow. You seem very cross. What happened between now and the last time we talked?

121

You seem to be saying that you are worried I am out to get you. What makes you say that?

122

You are saying that I'm making you take a plea. We have talked about that being your call. What else is going on here?

123

2. Seeing the client's view of the facts the case.

124

What are you seeing that I am not seeing?

125

How hard do you really believe that?

126

How would a jury handle that?

127

3. Seeing the client's view of the law of the case.

128

129

130

131

You work for the State.

132

Other plea offers.

133

Family.

134

What CCA requires.

135

The heart of a warrior.

136

"We are all broken by something. We have all hurt someone and have been hurt. We all share the condition of brokenness even if our brokenness is not equivalent."

- Bryan Stevenson

137

138

"OBJECT ANYWAY": Litigating *Batson* in North Carolina Trials

Hannah Autry & Elizabeth Hambourger
UNC School of Government – High Level Felony Defender Training

September, 2023

1

- Before the *Batson* decision in 1986, trial courts followed the thinking that the parties could use peremptory strikes to "strike anybody they want to." (Batson, 476 U.S. 79, 83) as long as that person wasn't striking people based on race every single time in every single case.

2

Podcast Episode:
"Object Anyway"
More Perfect
WNYC Radio
July 16, 2016

3

Batson & its progeny - takeaway

- One strike based on race is one too many

4

MSU Study (1990-2010)

≅ 2/1

5

WFU Jury Sunshine Project (2011)

Black/White Prosecutor Removal Ratios for Largest Cities in NC

Winston-Salem (Forsyth)	3.0
Durham (Durham)	2.6
Charlotte (Mecklenburg)	2.5
Raleigh (Wake)	1.7
Greensboro (Guilford)	1.7
Fayetteville (Cumberland)	1.7

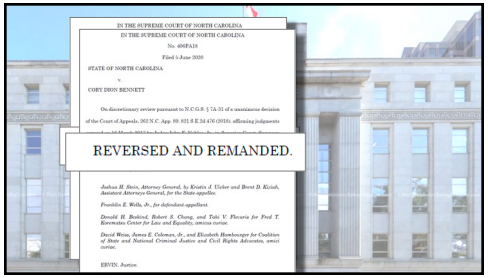
6

State v. Robinson

- "In stark contrast to these findings, this Court has *never* ruled that the State intentionally discriminated against a juror of color in violation of *Batson.*"

State v. Robinson, 2020

7



8

Key Takeaways from *State v. Hobbs I*, *State v. Bennet*, and *State v. Clegg*

- ❖Prima facie case = low bar (we really mean it this time!)
- ❖Strikes by Objecting Party are Irrelevant
- ❖Review of History is Required
- ❖No smoking gun needed!
- ❖Reasons contradicted by record are weightless
- ❖Shifting reasons are suspicious
- ❖Demeanor-based reasons valid only if credited by court
- ❖Court cannot invent own reasons for strikes

9

Key Takeaways from *State v. Hobbs I*, *State v. Bennet*, and *State v. Clegg*

- Absolute certainty of unlawful motivation is not required
- Question is whether the **RISK** of discrimination is unacceptably high such that strike should be disallowed

10

NC finally caught up with SCOTUS

- Miller-El v. Cockrell (Miller-El I), 537 U.S. 322 (2003)
  Miller-El v. Dretke (Miller-El II), 545 U.S. 231 (2005)
- Snyder v. Louisiana, 552 U.S. 472 (2008)
- Foster v. Chatman, 136 S.Ct. 1737 (2016)
- Flowers v. Mississippi, 139 S.Ct. 2228 (2019)

11

Historical Deference to Trial Court Rulings on Strikes Justified by Juror Demeanor

No error to permit strike explained by the following juror demeanor:

- *State v. White*, 349 N.C. 535 (1998) ("arms crossed")
- *State v. Robinson*, 336 N.C. 78, 95 (1994) ("arms folded")
- *State v. Lyons*, 343 N.C. 1, 12 (1996) ("leaning away")
- *State v. Smith*, 328 N.C. 99, 125 (1991) ("nervous")
- *State v. Floyd*, 115 N.C. App. 412, 415 (1994) ("head-strong")
- *State v. Gaines*, 345 N.C. 647, 668 (1997) ("softspoken")
- *State v. Bonnett*, 348 N.C. 417, 434 (1998) ("belligerent")
- *State v. Jackson*, 322 N.C. 251, 255 (1988) ("hostile")
- *State v. Locklear*, 349 N.C. 118, 139 (1998) ("smiling")

12

Evolving *Batson* Doctine in North Carolina

- ***Skepticism Towards Demeanor Justifications:*** Observing that "demeanor-based explanations . . . are particularly susceptible to serving as pretexts for discrimination" and are "not immune from scrutiny or implicit bias."
- *State v. Alexander*, 274 N.C. App. 31 (2020) (internal quotations omitted)

13

Reasons why *Batson* challenges aren't being made

1. Didn't think of it at the time
2. Didn't know the law well enough
3. Didn't think the judge would grant it
4. Didn't feel comfortable making objection

14

Reasons to object, anyway!

- **Create appellate issue (no need to exhaust peremptories)**
- **Get future jurors passed by State in your case**
- **Strengthen later *Batson* objections**
- **Alert attentive jurors to flawed, racially biased system**
- **Right thing to do/duty to the client**

15

When to use Batson?

ALWAYS

16

Batson Objections Quick Guide 2022

OBJECT to any strike that could be viewed as based on race, gender, religion, or national origin.
"This motion is made under ***Batson v. Kentucky***, the 5th, 6th and 14th Amendments to the U.S. Constitution, Art. 1, Sec. 19, 23 and 26 of the N.C. Constitution, and my client's rights to due process and a fair trial."

REMEMBER:

- **You can object to the first strike.** The Constitution bars "striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).
- **Your client does not have to be a member of the same cognizable class as the juror.** *Powers v. Ohio*, 499 U.S. 400 (1991).
- **You do not need to exhaust your peremptory challenges to preserve a *Batson* challenge.**
- ***Batson* applies to strikes based on race, gender, religion, and national origin.** *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); N.C. Const. Art. 1, Sec. 26.
- **Peremptory challenges exercised by the Defendant are not relevant to the question of whether the State discriminated.** *State v. Hobbs*, 374 N.C. 345, 357 (2020).

TIPS:

- ✓ Consider asking for strikes and objections to be made outside the presence of the jury.
- ✓ Whenever possible, make your objection immediately, before jurors are excused, so that they can be seated if your objection is granted.

SLOW DOWN

1. **A strong *Batson* objection is well-supported. Take the time you need to gather and argue your facts.**
2. **Check your own implicit biases**
   - Am I hesitant to object because of my own implicit biases or fear of talking about race?
   - Avoid "Reverse *Batson*" – Select jurors based on their answers, not stereotypes
     - What assumptions am I making about this juror?
     - How would I interpret that answer if it were given by a juror of another race?

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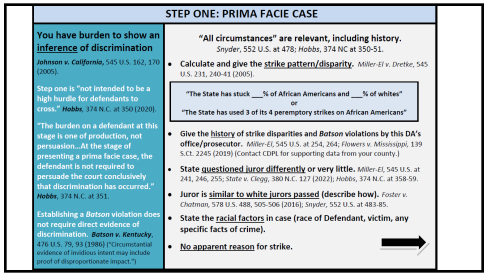
Batson's Three Step Framework

1. Prima facie case
2. Race neutral justification
3. Purposeful discrimination

18



19

Example of objection at Step 1: *State v. Bennett*

Defense Counsel:

"the basis of my motion goes to the fact that in Seat Number[ ] 10, we had two jurors, [Mr. Smith] and [Ms. Brunson], both of whom were black jurors, and both of whom were excused."

"there was no overwhelming evidence, there was nothing about any prior criminal convictions, any feelings about—towards or against law enforcement, there's no basis, other than the fact that those two jurors happen to be of African[ ]American de[s]cent [and] they were excused."

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Example of objection at Step 1: *State v. Hobbs*

- **Race of Parties:** "there's a very real possibility that the only African American that you're going to see in this entire trial is the defendant. To my knowledge everyone else involved is white."

Another factor the Court can look at is the victim's race. I think in this case it's Caucasian, Mr. Harris. But we also have the other victims in this case Derrick Blackwell, Sean Collins, employees of Cumberland Pawn. All the victims in this case are Caucasian, they're all white.

In fact, if the Court were to sit through this trial, theres's a very real possibility that the only African American that you're going to see in this entire trial is the defendant. To my knowledge everyone else involved is white.

So that would include the third factor, the race of the key witnesses in the case. Almost everyone, if not everyone, is white.

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Example of objection at Step 1: *State v. Hobbs*

- **Strike Rate:** "Eight peremptory challenges have been registered by the State, six of those challenges were made against African Americans. I believe that's a 75 percent strike rate."

Another factor the Court can look at repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire. Eight peremptory challenges have been registered by the State, six of those challenges were made against African Americans. I believe that's a 75 percent strike rate. Now, I'm not proud of the fact that I'm not a great mathematician but I believe that's what it says. In fact, we've got some others we anticipate to point out to Your Honor that Ms. Miles will have for you.

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Example of objection at Step 1: *State v. Hobbs*

Your Honor by my count 31 death qualified jurors have come through the courtroom in this case. There have been eleven black death qualified jurors. There have been twenty white death qualified jurors. The number of death qualified blacks struck by the State is six. The number of death qualified white jurors struck by the State is two. In other words, the State has struck 55 percent of the death qualified black jurors as opposed to having struck 10 percent of the death qualified white jurors.

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Strike Rate Worksheet

State v. _____ Date:_____ County:_____ Defense Counsel:_____ Prosecutor(s):_____

BLACK Venire Members

Peremptorily Struck by State

Passed and struck by the State

Your honor, the State has removed this many Black jurors...

...out of this many Black jurors available to them.

When you divide the first number by the second, it shows that the state has removed _____% of Black jurors.

NON-BLACK Venire Members

Peremptorily Struck by State

Passed and Struck by State

The State has removed this many non-Black jurors...

...out of this many non-Black jurors available to them.

When you divide the first number by the second, it shows that the state has removed _____% of non-Black jurors.

Strike Ratio

____% divided by ____% means that the state is removing Black jurors at _____ times the rate of non-Black jurors.

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$$\frac{6}{11} \div \frac{2}{20} = \text{“STRIKE RATIO”}$$

6 / 11 — Qualified Black Jurors

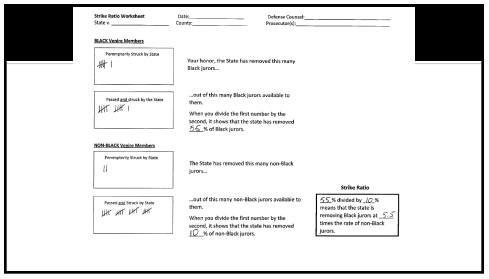
2 / 20 — Qualified White Jurors

25

$$\frac{6}{11} \div \frac{2}{20} = 5.5$$

(55%) (10%)

26



Strike Ratio Worksheet

State v. _____ Date: _____ Defense Counsel: _____

County: _____ Prosecutor(s): _____

BLACK Venire Members

Peremptorily Struck by State: 𝍸 I

Passed and struck by the State: 𝍸 𝍸 I

Your honor, the State has removed this many Black jurors...

...out of this many Black jurors available to them.

When you divide the first number by the second, it shows that the state has removed 55 % of Black jurors.

NON-BLACK Venire Members

Peremptorily Struck by State: II

Passed and Struck by State: 𝍸 𝍸 𝍸 𝍸

The State has removed this many non-Black jurors...

...out of this many non-Black jurors available to them.

When you divide the first number by the second, it shows that the state has removed 10 % of non-Black jurors.

Strike Ratio

55 % divided by 10 % means that the state is removing Black jurors at 5.5 times the rate of non-Black jurors.

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State Average ≅ 2/1

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WFU Jury Sunshine Project (2011)

Black/White Prosecutor Removal Ratios for Largest Cities in NC

Winston-Salem (Forsyth)	3.0
Durham (Durham)	2.6
Charlotte (Mecklenburg)	2.5
Raleigh (Wake)	1.7
Greensboro (Guilford)	1.7
Fayetteville (Cumberland)	1.7

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Example of objection at Step 1: *State v. Hobbs*

- **History:** "This isn't a case with a clean slate, this is a case that already has history behind it from this particular county, this particular Judicial District."

> matters the Superior Court Judge, that being Judge Gregory Weeks, found that there is both a historical finding of racial discrimination in jury selection that's happened in this county, he also found that there was racial discrimination in the actual jury selection of the particular cases. That was the State v Golphin finding.

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State v. Richardson (2023)

"The North Carolina court system has a well-documented problem with Black citizens being disproportionately excluded from the fundamental civil right to serve on juries."

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STEP TWO: RACE-NEUTRAL EXPLANATION	
Burden shifts to State to explain strike ***Hobbs***, 374 N.C. at 354.	• **If the State volunteers reasons without prompting from the Court, the prima facie showing is assumed; move to step 3.** *Hobbs*, 374 N.C. at 354; *Hernandez v. New York*, 500 U.S. 352, 359 (1991). • **Prosecutor must give a reason and the reason offered must be the actual reason.** *Clegg*, 380 N.C. at 149; *State v. Wright*, 189 N.C. App. 346 (2008). • **Court cannot suggest its own reason for the strike.** *Miller-El*, 545 U.S. at 252; *Clegg*, 380 N.C. at 144. • **Argue reason is not race-neutral (e.g., NAACP membership)**

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STEP THREE: PURPOSEFUL DISCRIMINATION		
You now have burden to prove it's more likely than not race was a significant factor Judge must weigh all your evidence, including what you presented at Step One. ***Clegg***, 380 N.C. at 156. You do not need smoking gun evidence of discrimination. ***Clegg***, 380 N.C. at 157-57. Absolute certainty is not required. Standard is more likely than not, i.e. whether the risk of discrimination is unacceptable. ***Clegg***, 380 N.C. at 162-63. Race does not have to be the only factor. It need only be "significant" in determining who was challenged and who was not. ***Miller-El***, 545 U.S. at 252. The defendant does not bear the burden of disproving every reason proffered by the State. *Foster*, 578 U.S. at 512 (finding purposeful discrimination after debunking only four of eleven reasons given).	The best way to prove purposeful discrimination is to show the prosecutor's Step Two reasons are pretextual • **Reason applies equally to white jurors the State has passed.** Compared jurors don't have to be identical. *Miller-El*, 545 U.S. at 247, n.6; *Hobbs*, 374 N.C. at 358-59. • **Reason is not supported by the record.** *Foster*, 578 U.S. at 502-503; *Clegg*, 380 N.C. at 154 (pretext shown when a prosecutor misstates, mischaracterizes, or simply misremembers). • **Reason is nonsensical or fantastic.** *Foster*, 578 U.S. at 509. • **Reason is race-related.** E.g., juror supports Black Lives Matter • **State failed to ask the juror any questions about the topic the State now claims is disqualifying.** *Miller-El*, 545 U.S. at 241. • **State questioned Black and white jurors differently.** *Miller-El*, 545 U.S. at 255. • **State gave shifting reasons.** *Foster*, 578 U.S. at 507; *Clegg*, 380 N.C. at 154.	**Reasons courts have found inherently suspect** • **Juror's demeanor or body language.** *Snyder*, 552 U.S. at 479, 488; *Clegg*, 380 N.C. at 153 (should be viewed with "significant suspicion") • **Juror's expression of hardship or reluctance to serve.** *Snyder*, 552 U.S. at 482 (hardship and reluctance **does not bias** the juror against any one side; only causes them to prefer quick resolution, which might in fact favor the State). • **A laundry list of reasons.** *Foster*, 578 U.S. at 502.

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Example of ARGUMENT at Step 3: *State v. Hobbs*

State Claims They Struck the Juror Because:

Juror's Criminal Record

MS. MILES: Mr. Carter was passed by the State and lied about his criminal history; Ms. Bowman was struck by the State, a black female that was struck by the State and the State represented that they were concerned because of her criminal history, that being a reported assault on her daughter; the State also represented they were concerned about her own reported contact with the criminal system, and I would ask the Court to contrast that with their acceptance of Mr. Carter who frankly lied about his prior arrests.

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Example of ARGUMENT at Step 3: *State v. Hobbs*

State Claims They Struck the Juror Because:

Juror Would Sympathize with Defendant

MS. MILES: With regard to Mr. O'Hara, who is a seated white juror, Your Honor, the State has offered as one of its race neutral reasons as to one of the black jurors that had been excused, they were concerned that, I think Mr. Dedeauex would be likely to relate to our client because of his abandonment. Your Honor, Mr. O'Hara indicated that he was a foster child, he had been bounced around from home to home during his foster childhood. That he is now adopted. A situation that is also very much like our own client's.

The State offered as a race neutral reason they were concerned that Mr. Dedeauex would try to get into people's heads because of his interest in psychology.

Mr. O'Hara, the seated white juror, has a degree in sociology and he said he loves studying people. A very similar response to that given by Mr. Dedeauex.

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REMEDY FOR *BATSON* VIOLATION

If the court sustains your *Batson* objection, the improperly struck juror(s) should be seated, or the entire venire should be struck. *State v. McCollum*, 334 N.C. 208, 235 (1993).

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Batson Motions

1. Record jury selection/complete recordation (15A-1241)

2. Record juror race (via questionnaire or self identify on record)

3. Motion Seeking Strike and *Batson* Hearing Procedures

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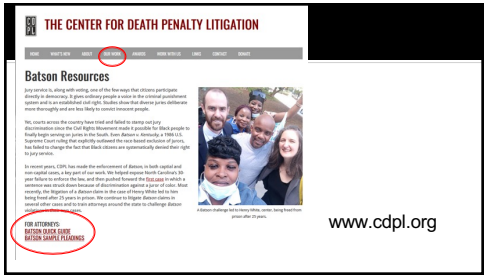

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- WHEN to object?
  - Approach the bench pursuant to pre-established strike/hearing procedures
  - Make objection as soon as possible after objectionable strike, then renew
- WHAT to say?
  - Strike ratio, CJA, historical data, put observations of demeanor on the record
- WHAT remedy to seek?
  - When possible, seek seating of wrongly struck juror

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Practice!

Step 1: Prima Facie Case

- State struck 2 of 14 qualified white jurors and 2 of 2 qualified Black jurors. Calculate the strike ratio!
- What else to say?

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Step 2: Prosecutor's reasons

- Ms. Jeffreys –Worked as nurse aid at Dorthea Dix
- Ms. Aubrey – Black Woman - "I suppose so" in response to "can you focus?"
- Both: Failure to look at me when I was trying to communicate with them
- Both: body language

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Step 3: Response?

- Mr Smith – White Man, Passed by the State, has a business and it will be difficult to serve, wasn't asked if he could focus
- Ms Fleming – White Woman, Passed by the State, has two children and child care issues, wasn't asked if she could focus

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[W]hen you see that [the defendant is] going to get stuck being judged by middle-aged white women, middle-aged white men, as a black man, I didn't feel like that was— it kind of hurt me that I didn't get picked.

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Questions?

Hannah: Hannah.b.autry@nccourts.org

Elizabeth: Elizabeth@cdpl.org

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STEP ONE: PRIMA FACIE CASE

You have burden to show an inference of discrimination

***Johnson v. California*,** 545 U.S. 162, 170 (2005).

Step one is "not intended to be a high hurdle for defendants to cross." *Hobbs,* 374 N.C. at 350 (2020).

"The burden on a defendant at this stage is one of production, not persuasion…At the stage of presenting a prima facie case, the defendant is not required to persuade the court conclusively that discrimination has occurred." *Hobbs*, 374 N.C. at 351.

Establishing a *Batson* violation does not require direct evidence of discrimination. *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) ("Circumstantial evidence of invidious intent may include proof of disproportionate impact.")

"All circumstances" are relevant, including history.

Snyder, 552 U.S. at 478; *Hobbs*, 374 NC at 350-51.

- **Calculate and give the strike pattern/disparity.** *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005).

> **"The State has stuck ___% of African Americans and ___% of whites"**
> **or**
> **"The State has used 3 of its 4 peremptory strikes on African Americans"**

- **Give the history of strike disparities and *Batson* violations by this DA's office/prosecutor.** *Miller-El*, 545 U.S. at 254, 264; *Flowers v. Mississippi,* 139 S.Ct. 2245 (2019) (Contact CDPL for supporting data from your county.)
- **State questioned juror differently or very little.** *Miller-El*, 545 U.S. at 241, 246, 255; *State v. Clegg*, 380 N.C. 127 (2022); *Hobbs*, 374 N.C. at 358-59.
- **Juror is similar to white jurors passed (describe how).** *Foster v. Chatman,* 578 U.S. 488, 505-506 (2016); *Snyder,* 552 U.S. at 483-85.
- **State the racial factors in case (race of Defendant, victim, any specific facts of crime).**
- **No apparent reason for strike.**

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Burden shifts to State to explain strike

***Hobbs*, 374 N.C. at 354.**

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Reasons courts have found inherently suspect

- **Juror's demeanor or body language.** *Snyder*, 552 U.S. at 479, 488; *Clegg*, 380 N.C. at 155 (should be viewed with "significant suspicion.")
- **Juror's expression of hardship or reluctance to serve.** *Snyder*, 552 U.S. at 482 (hardship and reluctance **does not bias the juror** against any one side; only causes them to prefer quick resolution, which might in fact favor the State).
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Strike Ratio Worksheet Date:_____ Defense Counsel:_____

State v. _____ County:_____ Prosecutor(s):_____

BLACK Venire Members

Peremptorily Struck by State	Your honor, the State has removed this many Black jurors…
Passed and struck by the State	…out of this many Black jurors available to them. When you divide the first number by the second, it shows that the state has removed _____% of Black jurors.

NON-BLACK Venire Members

Peremptorily Struck by State	The State has removed this many non-Black jurors…
Passed and Struck by State	…out of this many non-Black jurors available to them. When you divide the first number by the second, it shows that the state has removed _____% of non-Black jurors.

Strike Ratio

_____% divided by _____% means that the state is removing Black jurors at _____ times the rate of non-Black jurors.

Strike Ratio Worksheet Date:_____ Defense Counsel:_____

State v. _____ County:_____ Prosecutor(s):_____

[_____] Venire Members

Peremptorily Struck by State

Your honor, the State has removed this many

[ ] jurors…

Passed and struck by the State

…out of this many [ ] jurors available to them.

When you divide the first number by the second, it shows that the state has removed _____% of [ ] jurors.

NON-[_____] Venire Members

Peremptorily Struck by State

The State has removed this many non-[ ] jurors…

Passed and Struck by State

…out of this many non-[ ] jurors available to them.

When you divide the first number by the second, it shows that the state has removed _____% of non-[ ] jurors.

Strike Ratio

____% divided by ____% means that the state is removing [ ] jurors at _____ times the rate of non-[ ] jurors.

ADDRESSING RACE AND BIAS IN JURY SELECTION

Emily Coward
Duke Law Inclusive Juries Project Director
September 14, 2023

1

My Goal Today is to Help You…

- Seat Diverse, Inclusive Juries
- Uncover and Address Bias with Jurors

2

Why are Diverse Juries Important?

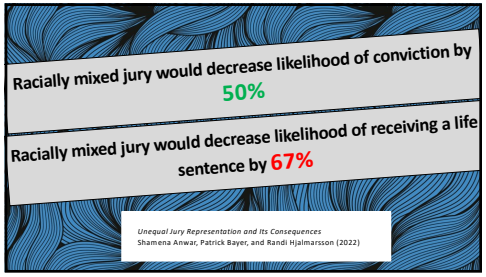
3


Why Jury Pool Diversity Matters
❖Jury Exclusion Confers Second-Class Citizenship
❖Diverse Juries Return Less Biased Verdicts
❖Diverse Juries Perform Better Overall than Homogenous Juries
❖Critical to Public Confidence in Legal System

4


Racially mixed jury = any outcome is seen as fair
All white jury = convictions are seen as less fair
Ellis & Diamond, Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy, (2003)

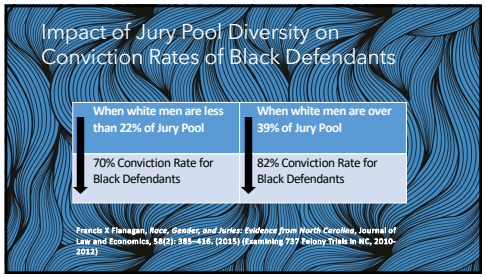
5


Racially mixed jury would decrease likelihood of conviction by 50%
Racially mixed jury would decrease likelihood of receiving a life sentence by 67%
Unequal Jury Representation and Its Consequences
Shamena Anwar, Patrick Bayer, and Randi Hjalmarsson (2022)

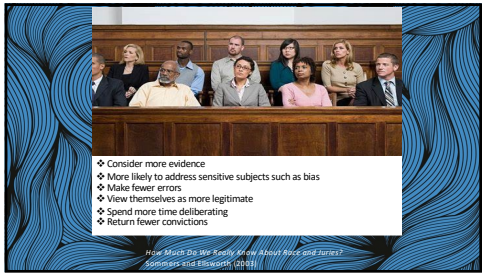
6


Key findings:
POTENTIAL JURORS
In cases with no black people in the jury pool (typically consisting of around 27 people) blacks were convicted 81 percent of the time, and whites were convicted 66 percent of the time.
81% CONVICTION
66% CONVICTION
POTENTIAL JURORS
When the jury pool included at least one black person, the conviction rates were nearly identical.
71% CONVICTION
73% CONVICTION
The Impact of Race in Criminal Trials,
Shamena Anwar, Patrick Bayer, Randi Hjalmarsson (2012)

7


Impact of Jury Pool Diversity on Conviction Rates of Black Defendants
When white men are less than 22% of Jury Pool
70% Conviction Rate for Black Defendants
When white men are over 39% of Jury Pool
82% Conviction Rate for Black Defendants
Francis X Flanagan, Race, Gender, and Juries: Evidence from North Carolina, Journal of Law and Economics, 58(2): 385–416. (2015) (Examining 737 Felony Trials in NC, 2010-2012)

8


❖ Consider more evidence
❖ More likely to address sensitive subjects such as bias
❖ Make fewer errors
❖ View themselves as more legitimate
❖ Spend more time deliberating
❖ Return fewer convictions
How Much Do We Really Know About Race and Juries?
Sommers and Ellsworth (2003)

9

When the jury formation process is perceived as *unfair* …

- Loss of public trust in prosecutorial function
- May chill future participation by marginalized groups
- Cynicism about system causes disrespect for and failure to follow law
- Undermines democratic check on state's power
- Undermines defendant's right to a fair trial
- Legitimacy of system tied to perceived fairness of the process

10

Addressing Bias With Jurors

11

"A typic…s together many pe…erent social backgro…tional, and sometim…ronments, a complex… biases will inevitabl…onsibility of the judg…anage this complex…**TION** to the end that …d be seen to be done

Jerry …Courts

12

Factors that exacerbate implicit bias

- **Time Pressure**
- **Incomplete Information/Ambiguity**: We unknowingly use our schemas to fill in the gaps
- **Presence of Discretion**: Fewer constraints on our decisions, greater the influence of unconscious bias
- **Easily Accessible Social Categories:** Implicit bias more likely to exert influence where social category is easily visible
- **Refusal** to acknowledge possibility of bias
- **Stress, Cognitive Load, or Agitated Emotional State**
- **Lack of Feedback**: Bias exerts more influence where there are few organizational checks/feedback

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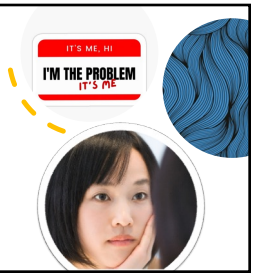
Facing Our Own Biases

- "Bias is easy to attribute to others and difficult to discern in oneself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).
- Magical thinking: 87% of judges are in the top 25% of their colleagues in making non-biased judgments. Mark Bennett, 2017.
- Learn about your implicit biases by taking a free implicit association test: https://implicit.harvard.edu/implicit/takeatest.html



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Conscious values may conflict with implicit biases

- "Cognitive biases that affect all decision making, **rather than flawed values**, can distort decision-making."
  Alafair Burke, Prosecutorial Nonmuteness
- "[W]e're all vulnerable to biases. If you think that you're [] uniquely fair, the best scientific evidence suggests that you're more likely [] to discriminate. Paradoxically, the only way to be fair, is to assume that you are not."
  Jerry Kang, UCLA Implicit Bias Video: Lesson 6- Countermeasures

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How Implicit Bias May Influence Voir Dire

PBS POV: Implicit Bias

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Bias Checklist for Defenders

STEP ONE: **REVIEW THE RISK FACTORS**

- **Emotional state** – anger, disgust, stress, and fatigue exacerbate implicit bias
- **Pressured decision making** –stress, distraction, and time pressure increase risk of stereotyping
- **Low-effort cognitive processing** – less thoughtful, deliberative process = greater implicit bias
- **Easily-accessible social categories** – implicit bias more likely when a trait is easy to see
- **Ambiguity** – judgment calls based on vague criteria or information increases implicit bias
- **Lack of feedback** – less likely to check bias where no organizational feedback or checks

STEP TWO: **SLOW DOWN**

Take a moment to assess your mental state, stress, distractions, and time pressure.

Take your time. It is better to slow down now than cause harm later.

STEP THREE: **GENERAL BIAS CHECK**

- ✓ Do you have enough information? Are you making any assumptions?
- ✓ Are you requiring more from this person than you would from others?
- ✓ How would you feel if person's answers were given by a person of another demographic group?

STEP FOUR: **LISTEN, DEBIAS, ADVOCATE**

- **Communication** – Use clear, common language. Practice non-judgmental listening. Repeat, clarify, and validate client's concerns. Be mindful of the impact of your own identity and power/status as an attorney.
- **Debiasing Strategies** – Notice when stereotypes arise. Combat them by learning about your client's life, understanding who and what are important to them, and gathering and referencing images of them at their best.
- **Prior Record** – Black and Latinx people are more likely to be arrested, charged, convicted, and incarcerated. View with skepticism habitual charges or other ways in which your client is treated more harshly due to prior convictions.
- **Issues Specific to Your Case** – Consider the obvious and subtle ways racism or bias impacts your client's case. Work with your client to tell their story.
- **Advocate** – Notice and challenge when legal system actors make assumptions about your client.
- **Accountability**– Regularly discuss your bias check efforts with peers. Tie this bias check to another habit or regularly scheduled part of your week.

The Decarceration Project TDP

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Understanding and Countering Bias

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If the Court Shows the Video, it has Already Legitimized the Discussion

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Why do people avoid the elephant?

- Discomfort with discomfort
- Lack of practice, experience, and confidence
- "That won't fly in front of this judge"
- Concern that lawyer's own racial, ethnic, or gender identity will interfere with ability to connect with jurors about bias
- A belief that "colorblindness" is the preferred approach

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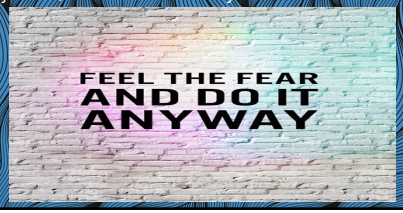
Why is it important to discuss bias with jurors, even if it scares you?



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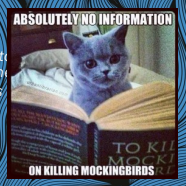
What the heck does "making race salient" mean?

When race issues are brought to discussion or "made salient," the stereotypes and implicit biases recedes.

Sommers & Ellsworth (2003)



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Q: How do I know when I have a case that involves issues of race?

A: When you have a case.
-Attorney Tye Hunter

In other words, you should identify the racial issues—both the obvious and the subtle ones—in ***every single case****.*

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"I'm not afraid of people exposing their dark side. It doesn't frighten me. Hiding it does."

-Kyana Givens

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Two Goals When Discussing Bias with Jurors:

- Remove Jurors with Concerning Bias
- Encourage Seated Jurors to be Proactive in Guarding Against Influence of Bias

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Reflect and Prepare:

- What scares me about this case?
  - *The jury might reject my client's claim of self defense based on the stereotype of black male criminality.*
- What does a juror need to believe in order for us to win?
  - *People make assumptions based on race.*
- What do I need to know about a juror to determine if they are open to our theory of the case?
  - *Do they understand the concept of implicit bias? Do they believe that it can shape perceptions of criminality?*

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But what do I actually ASK the jurors?

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DISCUSSION
DEEP LISTENING
DETECT
DESELECT

-Kyana Givens

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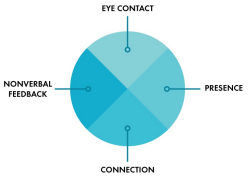
4 TENETS OF DEEP LISTENING



Elements of Deep Listening:

Non-judgmental
Open
Calm
Fresh
Alert
Attentive
Receptive

You're more like a satellite dish, turned on but waiting to absorb information, than a radar going out in search of something.

Bonus: You are demonstrating the kind of listening you hope your jurors will engage in during the trial.
Kyana Givens, Sylvia Bootsen

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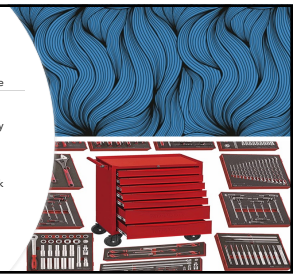
Relevant Materials:

- Motion for Extra Time to Explore Sensitive Subjects
- Written Questionnaires
  - Jeffrey Robinson article "Jury Selection and Race: Discovering the Good, the Bad, and the Ugly" contains sample questionnaires
  - Questionnaire used in Derek Chauvin case
- Motion for Individual Voir Dire
- Proposed Jury Instructions on Implicit Bias
- Motion to Screen Video



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Defending Your Right to Discuss Race and Bias During Voir Dire

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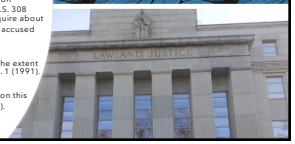
The North Carolina Supreme Court has long recognized a right to voir dire on racial attitudes.

- ***State v. McAfee***, 64 NC 339, 340 (1870): Reversible error to block voir dire on racial bias.
  - Early US Supreme Court opinion relies on *McAfee* ruling: ***Aldridge v. U.S.***, 283 U.S. 308 (1931). Reversible error to refuse to inquire about racial bias, where Black defendant was accused of interracial crime of violence.
- Trial judge retains discretion to determine the extent of questioning. ***State v. Robinson***, 330 N.C. 1 (1991).
- NCSC recently reversed serious conviction on this basis. ***State v. Crump***, 376 N.C. 375 (2020).



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Pena-Rodriguez v. Colorado supports your right to voir dire on race

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When is voir dire on the subject of race "constitutionally required"?

- When "racial issues [are] inextricably bound up with the conduct of the trial." (*Ristaino v. Ross*, 424 U.S. 589, 597 (1976)):
  - Interracial capital crime of violence (*Turner v. Murray*, 476 US 28 (1986) (plurality)
  - Defense theory of selective prosecution based on race/civil rights activity (*Ham v. South Carolina*, 409 U.S. 524 (1973))
- Reversible error to prevent defense counsel from asking about race in such circumstances; no showing of prejudice necessary.

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State v. Crump - NC Supreme Court

REVERSED

- Holding: "**court abused its discretion and prejudiced defendant by restricting all inquiry into prospective jurors' racial biases and opinions regarding police-officer shootings of black men.**"
- Dissent disagreed that restriction was absolute and would find no error.

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Why did the NCSC reverse?

- Three rejected questions = rejected line of questioning
- Prejudicial error
  - COA – narrow/technical
  - NCSC – broad account of context
- No substitute for questions on race/implicit bias/shootings
- Racial bias raises unique concerns

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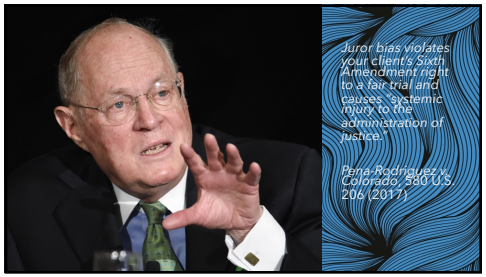

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Key Takeaways from *State v. Crump*

- Importance of competency in this area.
- Post- *Pena-Rodriguez* and *Crump*, IAC for failure to explore racial bias?
- Constitutionalize the objection
- Value of "making race salient"

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Protecting against cause challenges

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Seeking Diverse and Inclusive Juries

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NC GOVERNOR'S TASK FORCE FOR RACIAL EQUITY IN CRIMINAL JUSTICE

JURY RECOMMENDATIONS

SOLUTION #	SECTION HEADER	RECOMMENDATION	SOLUTION
91	Eliminating Racial Disparities in the Courts	Facilitate fair trials	**Increase representation of North Carolinians serving on juries through expanded and more frequent sourcing, data transparency, and compensation**
92	Eliminating Racial Disparities in the Courts	Facilitate fair trials	**Broaden protection against the use of preemptory challenges in jury selection for discriminatory purposes**
93	Eliminating Racial Disparities in the Courts	Facilitate fair trials	**Provide implicit bias training to all jury system actors**
94	Eliminating Racial Disparities in the Courts	Facilitate fair trials	**Establish a state commission on the jury system, with an eye towards comprehensive reform**

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Suggested Jury Practices for District and Superior Court Judges

https://ncdoj.gov/trec

Model Policies and Publications

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Higher-Level Felony Defense Training Program

September 14, 2023

Sponsored by: UNC School of Government

Jury Selection

The Art of Peremptories and Trial Advocacy

James A. Davis

James is a N.C. Board Certified Specialist in Federal Criminal Law, State Criminal Law, and Family Law with a trial practice in criminal, domestic, and general litigation. He is deeply committed to excellence and professionalism in the practice of law, having served on the N.C. State Bar Specialization Criminal Law Committee, the N.C. State Bar Board of Continuing Legal Education, the N.C. State Bar Disciplinary Hearing Commission, and was Issue Planning Editor of the Law Review at Regent University. James also lectures at criminal, family law, and trial practice CLE programs, and has been regularly designated by the Capital Defender as lead counsel in capital murders.

This paper is derived from my original paper entitled Modified Wymore for Non-Capital Cases utilizing many CLEs, reading many studies, consulting with and observing great lawyers, and, most importantly, trial experience in approximately 100 jury trials ranging from capital murder, personal injury, torts, to an array of civil trials. I have had various experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, drug trafficking, and a myriad of other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious prosecution, assault and other civil jury trials. I attribute any success to those willing to help me, the courage to try cases, and God's grace. My approach to seminars is simple: if it does not work, I am not interested. Largely in outline form, the paper is crafted as a practice guide.

A few preliminary comments. First, trial is a mosaic, a work of art. Each part of a trial is important; however, jury selection and closing argument—the beginning and end—are the lynchpins to success. Clarence Darrow once claimed, "Almost every case has been won or lost when the jury is sworn."

Second, jury selection is a critical art. Public outrage decried the Rodney King, O.J. Simpson, McDonald's hot coffee spill, nanny Louise Woodward, and the 253-million-dollar VIOXX verdicts, all of which had juries selected using trial consultants. After three-plus decades, I now believe jury selection and closing argument decide most close cases.

Third, I am an eclectic, taking the best I have ever seen or heard from others. Virtually nothing herein is original, and I neither make any representations regarding accuracy nor claim any proprietary interest in the materials. Pronouns are in the masculine in accord with holdings of the cases referenced.

Last, like the conductor of a symphony, be steadfast at the helm, remembering the basics: Preparation spawns the best examinations. Profile favorable jurors. File pretrial motions that limit evidence, determine critical issues, and create a clean trial. Be vulnerable, smart, and courageous in jury selection. Cross with knowledge and common sense. Be efficient on direct. Perfect the puzzle for the jury. Then close with punch, power, and emotion.

I wish to acknowledge Timothy J. Readling, Esq., for his able assistance in researching, drafting, and editing this presentation.

TABLE OF CONTENTS

I. Preliminary Observations (TOC)

You can try the best case ever tried, but with the wrong jury you will lose. Lawyers who espouse "Let's go with the first twelve" are either unwilling to do the work necessary for the best chance of success or think far too highly of themselves. The trial lawyer must be aware of the world in which we live: jurors bring—besides their life experience and common sense—their individual stories, unconscious beliefs, current concerns, and society's moods and narratives. You cannot protect your client unless you address, and undress, these issues during jury selection.

II. Jury Pool (TOC)

A. Fair Cross-Section: (TOC)

The U.S. and N.C. Constitutions require that petit juries (i.e., trial juries) be selected from a fair cross-section of the community. *See* U.S. Cont. amend. VI; N.C. Const. art. I §§ 24 & 26; *Duren v. Missouri*, 439 U.S. 357 (1979); *State v. Bowman*, 349 N.C. 459 (1998). A violation of the fair cross-section requirement occurs when a defendant proves: (1) the group alleged to be excluded is a distinctive group in the community; (2) the representation of such group in the jury pool is not fair and reasonable in relation to the number of such persons in the community; and (3) underrepresentation is due to the systematic exclusion of such group in the jury selection process. *See Duren*, 439 U.S. at 364. Jury lists are comprised currently of citizens who are voters or licensed drivers. One study reports this practice results in the underrepresentation of minorities.[1]

B. Prospective Juror Qualifications: (TOC)

A prospective juror is qualified to serve as a juror upon meeting the following requirements of N.C. Gen. Stat. § 9-3, summarized as follows: (1) a North Carolina citizen; (2) a resident of the county; (3) has not served as a juror in the last two years; (4) has not served a full term as a grand juror in the last six years; (5) is at least 18 years old; (6) is physically and mentally competent; (7) understands English; and (8) has not been convicted of or pled guilty or no contest to a felony (unless citizenship rights were restored). Note a prospective juror with a pending felony charge may be challenged for cause. N.C. Gen. Stat. § 15A-1212(7).

A few points to know about juror qualification. First, a juror is not considered to have served until sworn. *State v. Golphin*, 352 N.C. 364 (2000). Second, the date of swearing serves as the relevant date in calculating the juror's next lawful date of service. *Id.* Third, a defendant does not have a

[1] Mary R. Rose, Raul S. Casarez & Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts* (2018).

statutory or constitutional right to be present for District Court proceedings regarding juror qualification. *State v. McCarver*, 341 N.C. 364 (1995).

C. Informing Prospective Jurors: (TOC)

Prior to jury selection, prospective jurors are required to be informed by the trial court of the following: (1) the identities of the parties and counsel; (2) the defendant's charges; (3) the alleged victim's name; (4) the defendant's plea to the charge; and (5) any affirmative defense for which the defendant gave pre-trial notice. N.C. Gen. Stat. § 15A-1213.

While the defendant is required to give pre-trial notice of any affirmative defense (e.g., alibi, self-defense, etc.), this notice is inadmissible against the defendant pursuant to the reciprocal discovery statute. N.C. Gen. Stat. § 15A-905(c)(1). The conflict between the statutes is resolved by the defendant informing the trial court that he or she will not use a particular defense for which notice was given. *See State v. Clark*, 231 N.C. App. 421 (2013) (holding trial court did not err by informing prospective jurors of an affirmative defense when record did not show defendant informed the trial court that he would not pursue self-defense).

III. *Voir Dire*: State of the Law (TOC)

Voir dire means to speak the truth.[2] Our highest courts proclaim its purpose. *Voir dire* serves a dual objective of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). The North Carolina Supreme Court held jury selection has a dual purpose, both to help counsel determine whether a basis for challenge for cause exists and assist counsel in intelligently exercising peremptory challenges. *State v. Wiley*, 355 N.C. 592 (2002); *State v. Simpson*, 341 N.C. 316 (1995).

If the prosecutor objects during questioning, demonstrate how your questions relate to the dual objectives of *voir dire*.

A. Case Law: (TOC)

Case law amplifies the aim of jury selection. Each defendant is entitled to a full opportunity to face prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Thomas*, 294 N.C. 105, 115 (1978). The purpose of *voir dire* and exercise of challenges "is to eliminate extremes of partiality and assure both . . . [parties] . . . that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." *State v. Conner*, 335 N.C. 618 (1994). We all have natural inclinations and favorites, and jurors, at least on a subconscious level, give the benefit of the doubt to their favorites. Jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for a

[2] In Latin, *verum dicere*, meaning "to say what is true."

juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. *State v. Hedgepath*, 66 N.C. App. 390 (1984).

B. Statutes: (TOC)

Statutory authority empowers defense counsel to "personally question prospective jurors individually concerning their fitness and competency to serve" and determine whether there is a basis for a challenge for cause or to exercise a peremptory challenge. N.C. Gen. Stat. § 15A-1214(c); *see also* N.C. Gen. Stat. § 9-15(a) (counsel shall be allowed to make direct oral inquiry of any juror as to fitness and competency to serve as a juror). In capital cases, each defendant is allowed fourteen peremptory challenges, and in non-capital cases, each defendant is allowed six peremptory challenges. N.C. Gen. Stat. § 15A-1217. Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges. *Id.*

A peremptory challenge is a "creature of statute" and not a constitutional right. *Rivera v. Illinois*, 556 U.S. 148 (2009). The court may remove peremptory challenges as a sanction. *State v. Banks*, 125 N.C. App. 681 (1997). The court may not grant additional peremptory challenges. *State v. Hunt*, 325 N.C. 187 (1989). *But see State v. Barnes*, 345 N.C. 184 (1997) (trial court did not err by granting each defendant a peremptory challenge when a juror was dismissed due to an emergency). A peremptory challenge may be exercised without explanation with one limitation: the challenge may not be used if due to a constitutionally protected characteristic of a juror (e.g., race, gender, etc.).

Never lose sight of the purpose of a peremptory challenge: "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury." *Holland v. Illinois*, 493 U.S. 474 (1990). Case law approves of deselection as a central purpose of peremptory challenges.

C. Constitution: (TOC)

Criminal defendants have a constitutional right under the Sixth and Fourteenth Amendments to *voir dire* jurors adequately. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. . . . *Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored." *Voir dire* must be available "to lay bare the foundation of a challenge for cause against a prospective juror." *Morgan v. Illinois*, 504 U.S. 719, 729, 733 (1992);[3] *see also Rosales-Lopez v. U.S.*, 451 U.S. 182, 188 (1981) (plurality opinion) ("Without an adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled.").[4]

[3] This language was excised from a capital murder case. *See Morgan v. Illinois*, 504 U.S. 719 (1992).
[4] *Rosales-Lopez* was a federal charge alleging defendant's participation in a plan to smuggle Mexican aliens into the country, and defendant sought to questions jurors about possible prejudice toward Mexicans.

Now, the foundational principles of jury selection.

IV. Selection Procedure (TOC)

A. Statutes: (TOC)

Trial lawyers should review and be familiar with the following statutes. Two sets govern *voir dire*. N.C. Gen. Stat. § 15A-1211 through 1217; and N.C. Gen. Stat. §§ 9-1 through 9-18.

- N.C. Gen. Stat. §§ 15A-1211 through 1217: Selecting and Impaneling the Jury;
- N.C. Gen. Stat. § 15A-1241(b): Record of Proceedings;
- N.C. Gen. Stat. §§ 9-1 through 9-9: Preparation of Jury List, Qualifications of Jurors, Request to be Excused, *et seq.*; and
- N.C. Gen. Stat. §§ 9-10 through 9-18: Petit Jurors, Judge Decides Competency, Questioning Jurors without Challenge, Challenges for Cause, Alternate Jurors, *et seq*.

B. Pattern Jury Instructions: (TOC)

Recite the pattern jury instructions to jurors.

- Pattern Jury Instructions: Substantive Crime(s) and Trial Instructions[5]
- N.C.P.I. – Crim. 100.21: Remarks to Prospective Jurors After Excuses Heard (parties are entitled to jurors who approach cases with open minds until a verdict is reached; free from bias, prejudice or sympathy; must not be influenced by preconceived ideas as to facts or law; lawyers will ask if you have any experience that might cause you to identify yourself with either party, and these questions are necessary to assure an impartial jury; being fair-minded, none of you want to be tried based on what was reported outside the courtroom; the test for qualification for jury service is not the private feelings of a juror, but whether the juror can honestly set aside such feelings, fairly consider the law and evidence, and impartially determine the issues; we ask no more than you use the same good judgment and common sense you used in handling your own affairs last week and will use in the weeks to come; these remarks are to impress upon you the importance of jury service, acquaint you with what will be expected, and strengthen your will and desire to discharge your duties honorably).

[5] The North Carolina pattern jury instructions are sample instructions for criminal, civil, and motor vehicle negligence cases used by judges as guidance for juries for reaching a verdict. Created by the Pattern Jury Instruction Committee, eleven trial judges, assisted by the School of Government and supported by the Administrative Office of the Courts, produce supplemental instructions yearly based on changes in statutory and case law. While not mandatory, the pattern jury instructions have been cited as the "preferred method of jury instruction" at trial. *State v. Sexton*, 153 N.C. App. 641 (2002).

- N.C.P.I. – Crim. 100.22: Introductory Remarks (this call upon your time may never be repeated in your lifetime; it is one of the obligations of citizenship, represents your contribution to our democratic way of life, and is an assurance of your guarantee that, if chance or design brings you to any civil or criminal entanglement, your rights and liberties will be regarded by the same standards of justice that you discharge here in your duties as jurors; you are asked to perform one of the highest duties imposed on any citizen, that is to sit in judgment of the facts which will determine and settle disputes among fellow citizens; trial by jury is a right guaranteed to every citizen; you are the sole judges of the weight of the evidence and credibility of each witness; any decision agreed to by all twelve jurors, free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment and based on credible evidence in accord with the court's instructions, becomes a final result; you become officers of the court, and your service will impose upon you important duties and grave responsibilities; you are to be considerate and tolerant of fellow jurors, sound and deliberate in your evaluations, and firm but not stubborn in your convictions; jury service is a duty of citizenship).
- N.C.P.I. – Crim. 100.25: Precautionary Instructions to Jurors (Given After Impaneled) (all the competent evidence will be presented while you are present in the courtroom; your duty is to decide the facts from the evidence, and you alone are the judges of the facts; you will then apply the law that will be given to you to those facts; you are to be fair and attentive during trial and must not be influenced to any degree by personal feelings, sympathy for, or prejudice against any of the parties involved; the fact a criminal charge has been filed is not evidence; the defendant is innocent of any crime unless and until the state proves the defendant's guilt beyond a reasonable doubt; the only place this case may be discussed is in the jury room after you begin your deliberations; you are not to form an opinion about guilt or innocence or express an opinion about the case until you begin deliberations; news media coverage is not proper for your consideration; television shows may leave you with improper, preconceived ideas about the legal system as they are not subject to rules of evidence and legal safeguards, are works of fiction, and condense, distort, or even ignore procedures that take place in real cases and courtrooms; you must obey these rules to the letter, or there is no way parties can be assured of absolute fairness and impartiality).
- N.C.P.I. – Crim. 100.31: Admonitions to Jurors at Recesses[6] (during trial, jurors should not talk with each other about the case; have contact of any kind with parties, attorneys or witnesses; engage in any form of electronic communication about the trial; watch, read or listen to any accounts of the trial from any news media; or go to the place where the case arose or make any independent inquiry or investigation, including the internet or other research; if a verdict is based on anything other than what is learned in the courtroom, it could be grounds for a mistrial, meaning all the work put into trial will be wasted, and the lawyers, parties and a judge will have to retry the case).

[6] N.C. GEN. STAT. § 15A-1236 (addresses admonitions that must be given to the jury in a criminal case, typically at the first recess and at appropriate times thereafter).

C. Case Law: (TOC)

Harbison and IAC Issues

Counsel must not concede guilt without client approval on the record as a best practice. Under *Harbison*, the defendant must knowingly and voluntarily consent to concessions of guilt made by counsel after a full appraisal of the consequences and before any admission. *State v. Harbison*, 315 N.C. 175 (1985). *Harbison* is broader than you may think.

1. The defendant receives *per se* IAC when counsel concedes guilt to the offense or a lesser-included offense without consent. *State v. Berry*, 356 N.C. 490 (2002).

2. *Harbison* error may exist when counsel "impliedly—rather than expressly—admits the defendant's guilt to a charged offense" and remanding for an evidentiary hearing whether: (1) *Harbison* was violated; or (2) the defendant knowingly consented in advance to his counsel's admission of guilt to the Assault on a Female charge when counsel stated that "things got physical . . . he did wrong . . . God knows he did" during closing argument. *State v. McAlister*, 375 N.C. 455 (2020).

3. *Harbison* inquiry applies when counsel concedes an element of a crime. *State v. Arnett*, 276 N.C. App. 106 (2021). Counsel conceded the defendant committed the physical act of the offense. The trial court conducted two *Harbison* inquiries of the defendant regarding the concession, finding he knowingly and voluntarily agreed to the same. That said, this form of a concession does not necessarily amount to IAC when counsel maintains the defendant's innocence. *State v. Wilson*, 236 N.C. App. 472 (2014).

4. *Harbison* inquiry applies to defenses when they constitute an admission to elements or lesser-included offenses, such as intoxication or insanity defenses to First Degree Murder under a premeditation and deliberation theory. *State v. Johnson*, 161 N.C. App. 68 (2003); *State v. Berry*, 356 N.C. 490 (2002). Certain defenses are not complete defenses and expose the defendant to lesser-included offenses (e.g., voluntary intoxication, diminished capacity, self-defense [perfect to imperfect], etc.).

    - Remember: The defendant must give pre-trial notice to the prosecution of an intent to offer certain defenses at trial (e.g., self-defense, intoxication, etc.). N.C. Gen. Stat. § 15A-905(c)(1). Such defenses are required to be read to prospective jurors before jury selection. N.C. Gen. Stat. § 15A-1213. However, the same is not read to the jury when counsel informs the Court that the defendant will not pursue the noticed defense. *State v. Clark*, 231 N.C. App. 421 (2013).

5. Appellate courts "urge[] both the bar and the trial bench to be diligent in making a full record of a defendant's consent when a *Harbison* issue arises at trial." *State v. Berry*, 356 N.C. 490 (2002).

6. Practice Pointers: Counsel should ensure the record reflects the defendant's express consent prior to any admission. *State v. Maready*, 205 N.C. App. 1 (2010). A lack of objection by or silence from the defendant is insufficient under *Harbison*. *Id.* Additionally, counsel should ensure the record reflects whether consent is contingent upon presentation of a certain defense. *State v. Berry*, 356 N.C. 490 (2002).

   - My Tip: I now conduct *Harbison* inquiries before jury selection to address admissions (fact, element, etc.) made by the defense throughout trial to include, *inter alia*, jury selection, opening statement, and closing argument. I often have the client sign a document authorizing the same for my file.

Helpful Language in *Voir Dire*

1. *State v. Call*, 353 N.C. 400, 409–10 (2001) (after telling jurors the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, it is permissible to ask jurors "if they understand they have the right to stand by their beliefs in the case"); s*ee also State v. Elliott*, 344 N.C. 242, 263 (1996).

2. *State v. Cunningham*, 333 N.C. 744 (1993) (Defendant's challenge for cause was proper when juror repeatedly said defendant's failure to testify "would stick in the back of my mind"); *see also State v. Hightower*, 331 N.C. 636 (1992) (although juror stated he "could follow the law," his comment that Defendant's failure to testify "would stick in the back of [his] mind" while deliberating mandated approval of a challenge for cause).

3. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (held the Fourteenth Amendment guarantees a right of jury trial in all criminal cases and comes within the Sixth Amendment's assurance of a trial by an impartial jury; that trial by jury in criminal cases is fundamental to the American system of justice; that fear of unchecked power by the government found expression in the criminal law in the insistence upon community participation in the determination of guilt or innocence; and a right to trial by jury is granted to criminal defendants in order to prevent oppression by the government; providing an accused with the right to be tried by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge).

D. Jury Indoctrination: (TOC)

It is axiomatic that counsel should not engage in efforts to indoctrinate jurors, argue the case, visit with, or establish rapport with jurors. *State v. Phillips*, 300 N.C. 678 (1980). You may not ask questions which are ambiguous, confusing, or contain inadmissible evidence or incorrect statements of law. *State v. Denny*, 294 N.C. 294 (1978) (holding ambiguous or confusing questions are improper); *State v. Washington*, 283 N.C. 175 (1973) (finding a question containing potentially inadmissible evidence improper); *State v. Vinson*, 287 N.C. 326 (1975) (holding

counsel's statements contained inadequate or incorrect statements of the law and were thus improper). The court may also limit overbroad, general or repetitious questions. *Id.* *But see* N.C. Gen. Stat. § 15A-1214(c) (defendant not prohibited from asking the same or a similar question previously asked by the prosecution).

E. Procedural Rules: (TOC)

A primer on procedural rules[7]: The scope of permitted *voir dire* is largely a matter of the trial court's discretion. *See, e.g.*, *State v. Knight*, 340 N.C. 531 (1995) (trial judge properly sustained State's objection to questions asked about victim's HIV status); *see generally State v. Phillips*, 300 N.C. 678 (1980) (opinion explains boundaries of *voir dire*; questions should not be overly repetitious or attempt to indoctrinate jurors or "stake them out"). The trial court has the duty to control and supervise the examination of jurors, and regulation of the extent and manner of questioning rests largely in the court's discretion. *State v. Wiley*, 355 N.C. 592 (2002). The prosecutor and defendant may personally question jurors individually concerning their competency to serve. N.C. Gen. Stat. § 15A-1214(c). The defendant is not prohibited from asking a question merely because the court or prosecutor has previously asked the same or a similar question. *Id.*; *State v. Conner*, 335 N.C. 618, 628–29 (1994). Leading questions are permitted. *State v. Fletcher*, 354 N.C. 455, 468 (2001).

The court has discretion under statute to reopen examination of a juror previously accepted if, at any time before the jury is impaneled, it is discovered the juror made an incorrect statement or other good reasons exists. N.C. Gen. Stat. § 1214(g). Even after the jury is impaneled, case law gives the court discretion to reopen examination of a juror and allow for cause and peremptory challenges. *State v. Johnson*, 161 N.C. App. 68 (2003). Although undefined by statute, "reopening" occurs when the court allows counsel to question a juror directly at any time. *State v. Boggess*, 358 N.C. 676 (2004). Once the court reopens examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse the juror. *State v. Womble*, 343 N.C. 667, 678 (1996).

Note that the court has the power to direct counsel ask particular questions to the entire jury panel rather than a single juror. *State v. Campbell*, 340 N.C. 612 (1995). However, the court does not have the power to completely ban questions to individual jurors. N.C. Gen. Stat. § 1214(c); *see State v. Payne*, 328 N.C. 377 (1991).

Also note that the order of jury selection is complicated by co-defendants. Statute requires the prosecutor to accept 12 jurors before tendering the panel to the defendant. N.C. Gen. Stat. § 1214(d). After the defendant exercises his or her desired peremptory or for cause challenges, the panel is to be tendered to the co-defendant for the same exercise. N.C. Gen. Stat. § 1214(e) and (f). The process continues until a final jury panel is selected.

[7] MICHAEL G. HOWELL, STEPHEN C. FREEDMAN & LISA MILES, JURY SELECTION QUESTIONS (2012).

F. Stake-out Questions: (TOC)

A common issue is an improper stake-out question. *State v. Simpson*, 341 N.C. 316 (1995) (holding staking-out jurors is improper). Our highest court defines stake-out questions as those which tend to commit jurors to a specific course of action in the case. *State v. Chapman*, 359 N.C. 328, 345–46 (2005). Counsel may not pose hypothetical questions designed to elicit what a juror's decision will be under a certain state of the evidence or a given state of facts. *State v. Vinson*, 287 N.C. 326, 336–37 (1975). Counsel should not question prospective jurors as to the kind of verdict they would render, how they would be inclined to vote, or what their decision would be under a certain state of evidence or given state of facts. *State v. Richmond*, 347 N.C. 412 (1998). My synthesis of the cases suggests counsel is in danger of an objection on this ground when the question refers to a verdict or encroaches upon issues of law. A proposed *voir dire* question is legitimate if the question is necessary to determine whether a juror is excludable for cause or assist you in intelligently exercising your peremptory challenges. If the State objects to a particular line of questioning, defend your proposed questions by linking them to: (1) the purposes of *voir dire*[8] or (2) whether jurors will follow the law in a certain area. *State v. Hedgepeth*, 66 N.C. App. 390 (1984).

G. *Batson* Challenges: (TOC)

1. Introduction: (TOC)

Race, gender, and religious discrimination in the selection of trial jurors is unconstitutional. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding race discrimination violates the Equal Protection Clause of the Fourteenth Amendment); *State v. Locklear*, 349 N.C. 118 (1998) (holding Native Americans are a racial group under *Batson*); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding gender discrimination violates the Equal Protection Clause of the Fourteenth Amendment); U.S. Const. amends. V and XIV (providing for equal protection and due process); N.C. Const. art. I § 26 (no person may be excluded from jury service on account of sex, race, color, religion, or national origin). *Batson* does not require trait alignment between jurors and litigants. *See Powers v. Ohio*, 499 U.S. 400 (1991).

The U.S. Supreme Court established a three-step test for *Batson* challenges: (1) the defendant must make a *prima facie* showing the prosecutor's strike was discriminatory (i.e., producing evidence sufficient to permit an "inference" that discrimination occurred). *State v. Hobbs*, 374 N.C. 345 (2020). This is merely a burden of production for the defendant. *Johnson v. California*, 545 U.S. 162 (2005); (2) the burden shifts to the prosecutor to offer a race-neutral explanation for the strike; and (3) the trial court decides whether the defendant has proven purposeful discrimination (i.e., whether it is "more likely than not" that the strike was motivated in substantial part by an unlawful factor). *State v. Hobbs*, 374 N.C. 345 (2020). The defendant carries the burden of proof at this step. *Johnson v. California*, 545 U.S. 162 (2005).

Under step one (determining whether the prosecutor's strikes were discriminatory), the U.S. Supreme Court has considered, *inter alia*, a prosecutor's history of striking and questioning black

[8] *See* N.C. DEFENDER MANUAL 25-17 (John Rubin ed., 2d. ed. 2012).

jurors in deciding a *Batson* case. *Flowers v. Mississippi*, 588 U.S. ___, 139 S. Ct. 2228 (2019) (holding that, in defendant's sixth trial, the prosecutor's historical use of peremptory strikes in the first four trials, 145 questions for five black prospective jurors contrasted with only 12 questions for 11 white jurors, and misstatement of the record were motivated in substantial part by discriminatory intent). Conversely, *Batson* also prohibits criminal defendants from race, gender, or religious based peremptory challenges, known as a reverse *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42 (1992).

2. History Before *State v. Clegg*, 380 N.C. 127 (2022): (TOC)

Historically, *Batson* challenges have proven burdensome. Between 1986 and 2021, North Carolina appellate courts reviewed over 160 cases with *Batson* challenges raised by defendants, never finding a single instance of juror discrimination.[9] During this period, the N.C. Supreme Court reviewed evidence at step one in 32 published opinions, finding the burden was satisfied in only three cases although the law provides step one is "not intended to be a high hurdle."[10] Also during this period, studies examining North Carolina juries concluded that prosecutors were striking black jurors at nearly twice the rate of white jurors. Even in a death penalty case, no *Batson* violation was found despite the prosecutor's admission to striking two black women for reasons including their race and gender.[11]

Defense counsel should remain vigilant in making a *Batson* challenge. *See State v. Bennett*, 374 N.C. 579 (2020) (holding, although the State "excused two but kept three African-Americans," Defendant met his burden of a *prima facie* showing at the first step; that the Court further held a numerical analysis of strike patterns for race was not necessarily was dispositive as, in this case, all of the State's peremptory challenges were used to exclude black prospective jurors). Appellate courts are increasingly receptive to *Batson* reviews. *See, e.g.*, *State v. Hobbs*, 374 N.C. 345 (2020) ("*Hobbs I*") (holding, *inter alia*: (1) because the trial court analyzed all three *Batson* steps—although ruling against the defendant at the first step—a full *Batson* review was required; and (2) a defendant meets the first step by showing the totality of the relevant facts gives rise to an inference of racial discrimination—a burden not intended to be a high hurdle and only of production, not persuasion); *State v. Hobbs*, 384 N.C. 144 (2023) ("*Hobbs II*") (without disturbing the logic of *Hobbs I*, holding the trial court must show its work when reviewing evidence relevant to a *Batson* challenge, that historical evidence and comparative juror analysis are important, and that strikes by the objecting party are irrelevant).

[9] *See* Thirty Years at 1986-1990, Tables A-D. No other state in the region shared this appellate Batson record of zero reversals on the merits. *See* James E. Coleman, Jr., and David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, The N.C. State Bar Journal, Fall 2017. ("Among other southern states, appellate courts in South Carolina have found a dozen Batson violations since 1989, and those in Virginia have found six. As of 2010, Alabama had over 80 appellate reversals because of racially-tainted jury selection, Florida had 33, Mississippi and Arkansas had ten each, Louisiana had 12, and Georgia had eight.").
[10] *State v. Waring*, 364 N.C. 443, 478 (2010) (internal quotations omitted).
[11] *State v. White*, 131 N.C. App. 734, 740 (1998).

3. *State v. Clegg*, 380 N.C. 127 (2022): (TOC)

On February 11, 2022, the N.C. Supreme Court held—for the first time ever in any appellate opinion—that a *Batson* violation occurred, reversing the trial court. *State v. Clegg*, 380 N.C. 127 (2022). In *Clegg*, the defendant was an African-American male who was charged with Armed Robbery and Possession of Firearm by Felon. During jury selection, the prosecutor used peremptory strikes against two African-American jurors. Thereafter, defense counsel made a *Batson* challenge.

The prosecutor proffered the following four race-neutral reasons for the strikes: (1) for both jurors, their body language, (2) for both jurors, their failure to look at the prosecutor during questioning, (3) for Juror One, allegedly stating "I suppose" when asked whether she could be fair and impartial, and (4) for Juror Two, having been employed as a nurse for mental health patients. The first two reasons for strikes were not considered since the trial court failed to make findings as to the jurors' body language or eye contact. The third reason was not accurate as Juror One stated "I suppose" when asked if she could focus on the case rather than if she could be fair and impartial. Hence, the trial court refused to have this reason serve in the analysis as it was not articulated by the prosecutor. For Juror One, the prosecution failed to offer a race-neutral reason to strike. Nonetheless, the trial court ruled that the defendant did not prove purposeful discrimination on the basis of race as to Juror One. For Juror Two, the trial court accepted as a race-neutral reason she had been employed as a nurse for mental health patients (relevant to the defendant's history). The trial court ruled that the defendant did not prove purposeful discrimination on the basis of race as to Juror Two.

On appeal, as to Juror One, the N.C. Supreme Court held that the trial court erred by not finding purposeful discrimination at the third step of the *Batson* analysis since there was no valid race-neutral reason articulated by the prosecution, remarking that if "the prosecutor's proffered race-neutral justifications are invalid," it is the functional equivalent of offering no race-neutral justifications at all, leading to the conclusion that the prosecutor's peremptory strike was "motivated . . . by discriminatory intent."

As to Juror Two, the N.C. Supreme Court also held that the trial court erred by (1) misapplying the standard of purposeful discrimination by looking for "smoking gun" evidence, (2) considering race-neutral reasons not articulated by the prosecutor, and (3) not adequately considering—via side-by-side, comparative juror analysis—the disparate questioning and disparate acceptance of comparable prospective white and African-American jurors.

4. *Batson* Violation Remedies: (TOC)

If a *Batson* violation occurs, the court should dismiss the venire and begin jury selection again. *State v. McCollum*, 334 N.C. 208 (1993). Additionally, the court may seat the improperly struck juror. *Id.* Case law further allows the prosecutor to withdraw the strike and pass on the juror rather than dismissing the venire. *State v. Fletcher*, 348 N.C. 292 (1998).

5. My Practical Advice: (TOC)

As a preliminary matter, counsel should request the Court to ask jurors to state their race and gender on the record. *See State v. Mitchell*, 321 N.C. 650 (1988) (holding counsel's statements alone were insufficient to show discriminatory use of peremptory challenges). If the Court defers to counsel, ask jurors, "How do you identify yourself according to race and gender?" Counsel should use terms like "underrepresented groups" in lieu of other references.

Counsel should conduct a robust hearing for the record by raising well-supported objections to purported juror discrimination, requesting reinstatement of improperly stricken jurors, and moving for a complete recordation of jury selection. Some authorities believe *Batson* hearings will become similar to suppression hearings. Remember the remedy: the judge may either dismiss the entire venire or seek the improperly struck juror. *See State v. McCollum*, 334 N.C. 208 (1993).

Beware of reverse *Batson* challenges. North Carolina appellate courts have twice upheld prosecutors' reverse *Batson* challenges on the ground the defendant engaged in purposeful discrimination against white jurors. *State v. Hurd*, 246 N.C. App. 281 (2016) (holding trial court did not err in sustaining a reverse *Batson* challenge; Defendant exercised eleven peremptory challenges, ten against white and Hispanic jurors; Defendant's acceptance rate of black jurors was eighty-three percent in contrast to twenty-three percent for white and Hispanic jurors; the one black juror challenged was a probation officer; Defendant accepted jurors who had strikingly similar views); *see also State v. Cofield*, 129 N.C. App. 268 (1998). Finally, should a judge find the State has violated *Batson*, the venire should be dismissed and jury selection should begin again. *State v. McCollum*, 334 N.C. 208 (1993). *But cf. State v. Fletcher*, 348 N.C. 292 (1998) (following a judge's finding the prosecutor made a discriminatory strike, he withdrew the strike, passed on the juror, the trial court found no *Batson* violation, and the N.C. Supreme Court affirmed). In defending a reverse *Batson* challenge, counsel should, if applicable, note the racial makeup of the jury for the record (e.g., if the defendant is given a jury which is 95% white, then it is unsurprising that his or her challenges would apply to a white juror. Notably, reverse *Batson* challenges may be risky for the prosecution as an appellate court may find structural error and grant a new trial.

H. Implicit Bias: (TOC)

N.C. Supreme Court precedent acknowledges implicit bias questions are proper. *See State v. Crump*, 376 N.C. 375 (2020) (holding the trial court abused its discretion when it "flatly prohibited" questions about racial bias and "categorically denied" Defendant the opportunity to ask prospective jurors about police officer shootings of black men, particularly in a case with a black male defendant involved in a shooting with police officers).

Methods for raising implicit bias include: (1) disclosing a personal story (e.g., about wrong assumptions); (2) sharing the greatest concern in your case (e.g., nervous talking about race); (3) expressing concerns about pre-conceived ideas and beliefs (e.g., address implicit bias); and (4) using scaled questions (e.g., asking, on a scale of one to ten, if one strongly agrees or disagrees that there is more racial prejudice today than forty years ago, racism is a thing of the past, or you get what you deserve in life). If you receive an objection, cite the research and return to the basic proposition that you are entitled to a full opportunity to make diligent inquiry about fitness and

competency to serve, intelligently exercise peremptory challenges, and determine whether a basis for challenge for cause exists.

Jury diversity matters. A 2012 study of 102 jury trials and 10 bench trials in North Carolina demonstrated African-Americans and Latinos had the lowest favorable verdict outcomes.[12] Implicit bias research[13] indicates racial bias is pervasive among people. Implicit bias originates in the mental processes over which people have little knowledge or control and includes the formation of perceptions, impressions, and judgments, which impacts how people behave.[14] Literature supports counsel raising issues of race and unconscious bias during jury selection helps jurors guard against implicit bias during trial proceedings.[15] Studies show diverse juries perform fact-finding tasks more effectively, lessen individual biases, and provide more fair and impartial results.[16]

Be aware there is no general right in non-capital cases to *voir dire* jurors about racial prejudice. *Ristaino v. Ross*, 424 U.S. 589 (1976). However, such questions are allowed under "special circumstances," including capital cases and contextually appropriate circumstances. *See, e.g., Ham v. South Carolina*, 409 U.S. 524 (1973); *State v. Robinson*, 330 N.C. 1 (1991).

Remember, you must make a record of relevant jury traits. *See State v. Brogden*, 329 N.C. 534, 545 (1991). Consider asking the judge to instruct jurors to (1) state how they identify by race, gender, or ethnicity, or (2) complete a questionnaire inclusive of same.

I. Challenges for Cause: (TOC)

Grounds for challenge for cause are governed by N.C. Gen. Stat. § 15A-1212:

A challenge for cause to an individual juror may be made by any party on the ground that the juror:

(1) Does not have the qualifications required by G.S. 9-3.
(2) Is incapable by reason of mental or physical infirmity of rendering jury service.
(3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.
(4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
(5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime. *See* **Exhibit A**.

[12] Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209 (Jan. 2012).
[13] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 956 (2006).
[14] *Id.* at 946.
[15] Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026-27 (2003).
[16] Edward S. Adams, *Constructing a Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 709 (1998).

(6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.
(7) Is presently charged with a felony.
(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
(9) For any other cause is unable to render a fair and impartial verdict.

Certain phrases are determinative in challenges for cause. For example, you may ask if a prospective juror would "automatically vote" for either side or a certain sentence or if a juror's views or experience would "prevent or substantially impair" his ability to hear the case. *State v. Chapman*, 359 N.C. 328, 345 (2005) (holding counsel may ask, if based on a response, if a juror would vote automatically for either side or a particular sentence); *see also State v. Teague*, 134 N.C. App. 702 (1999) (finding counsel may ask if certain facts cause jurors to feel like they "will automatically turn off the rest of the case"); s*ee also Morgan v. Illinois*, 504 U.S. 719, 723 (1992) (Court approved the question "would you automatically vote [for a particular sentence] no matter what the facts were?"); *Wainright v. Witt*, 469 U.S. 412 (1985) (established the standard for challenges for cause, that being when the juror's views would "prevent or substantially impair" the performance of his duties in accord with his instructions and oath, modifying the more stringent language of *Witherspoon*[17] which required an unmistakable commitment of a juror to automatically vote against the death penalty, regardless of the evidence); *State v. Cummings*, 326 N.C. 298 (1990) (holding State's challenge for cause is proper against jurors whose views against the death penalty would "prevent or substantially impair" their performance of duties as jurors). Considerable confusion about the law could amount to "substantial impairment." *Uttecht v. Brown*, 551 U.S. 1 (2007). A juror may be removed for cause due to inability to follow the law. *State v. Cunningham*, 333 N.C. 744 (1993) (trial court erred by not removing juror for cause who would not grant the presumption of innocence to the defendant). A juror may also be removed for cause due to bias. *State v. Allred*, 275 N.C. 554 (1969) (trial court erred by not removing a juror for cause who stated that he was related to the witnesses and would likely believe them); *State v. Lee*, 292 N.C. 617 (1977) (trial court erred by not removing a juror for cause who was married to a police officer and stated that she may believe law enforcement more than others).

It is reversible error per se when the court excludes a qualified juror for cause. *Gray v. Mississippi*, 481 U.S. 648 (1987). Counsel should articulate a constitutional objection (e.g., under the Sixth and Fourteenth Amendment rights to an impartial jury).

A juror can have prior knowledge of case facts and still serve. Knowledge alone will not justify a challenge for cause. The relevant inquiry remains whether the juror can render an impartial verdict. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

[17] *Witherspoon v. Illinois*, 39 U.S. 510 (1968).

J. Other Jury Selection Issues: (TOC)

Other issues may include *voir dire* with co-defendants, order of questioning, challenging a juror, preserving denial of cause challenges and prosecutor objection to a line of questioning, right to individual *voir dire*, and right to rehabilitate jurors.[18] In cases involving co-defendants, the order of questioning begins with the State and, once it is satisfied, the panel should be passed to each co-defendant consecutively, continuing in this order until all vacancies are filled, including alternate juror(s). N.C. Gen. Stat. § 15A-1214(e). For order of questioning, the prosecutor is required to question prospective jurors first and, when satisfied with a panel of twelve, he passes the panel to the defense. This process is repeated until the panel is complete. N.C. Gen. Stat. § 15A-1214(d); *see also State v. Anderson*, 355 N.C. 136, 147 (2002) (holding the method by which jurors are selected, challenged, selected, impaneled, and seated is within the province of the legislature). Regarding challenges, when a juror is challenged for cause, the party should state the ground(s) so the trial judge may rule. No grounds need be stated when exercising a peremptory challenge. Direct oral inquiry, or questioning a juror, does not constitute a challenge. N.C. Gen. Stat. § 9-15(a). Preserving a (1) denial of cause challenge or (2) sustained objection to your line of questioning requires exhaustion of peremptory challenges and a showing of prejudice from the ruling. *See, e.g.*, *State v. Billings*, 348 N.C. 169 (1998); *State v. McCarver*, 341 N.C. 364 (1995). After exhaustion of peremptory challenges, counsel must also renew the motion for cause against the juror at the end of jury selection as required by statute. N.C. Gen. Stat. § 15A-1214(i). The right to individual *voir dire* is found in the trial judge's duty to oversee jury selection, implying that the judge has authority to order individual *voir dire* in a non-capital case if necessary to select an impartial jury. *See State v. Watson*, 310 N.C. 384, 395 (1984) ("The trial judge has broad discretion in the manner and method of jury *voir dire* in order to assure that a fair and impartial jury is impaneled . . . ."). As to the right to rehabilitate jurors, the trial judge must exercise his discretion in determining whether to permit rehabilitation of particular jurors. Issues include whether a juror is equivocal in his response, clear and explicit in his answer, or if additional examination would be a "purposeless waste of valuable court time." *State v. Johnson*, 317 N.C. 343, 376 (1986). A blanket rule prohibiting rehabilitation is error. *State v. Brogden*, 334 N.C. 39 (1993); *see also State v. Enoch*, 261 N.C. App. 474 (2018) (holding no error when the trial court denied the defendant's request to rehabilitate two jurors when, although initially misapprehending that rehabilitation was impermissible in non-capital cases, the court later allowed for the possibility of rehabilitation, thus not establishing a blanket rule against all rehabilitation).

V. Theories of Jury Selection (TOC)

There are countless articles on and ideas about jury selection. A sampling includes:

- Traditional approach: lecture with leading and closed questions to program the jury about law and facts and establish authority and credibility with the jury; a prosecutor favorite.
- Wymore (Colorado) method: *See infra text at* IV. The Wymore Method.

[18] *See generally* N.C. DEFENDER MANUAL, *supra* note 8, at 25-1, *et seq.*

- Scientific jury selection: employs demographics, statistics, and social psychology to examine juror background characteristics and attitudes to predict favorable results.
- Game theory: uses mathematical algorithms to decide the outcome of trial.
- Command Superlative Analogue (New Mexico Public Defender's) method: focus on significant life experiences relating to the central trial issue.
- Psychodramatic (Trial Lawyers College) method: identify the most troubling aspects of the case, tell jurors and ask about the concerns, and validate jurors' answers.
- Reptilian theory: focus on facts and behavior to make the jury angry by concentrating on the opponent's failures and resulting injuries, all intended to evoke a visceral, subliminal reaction.
- Demographic theory[19]: stereotype jurors based on race, gender, ethnicity, age, income, occupation, social status, socioeconomic status/affluence, religion, political affiliation, avocations, urbanization, experience with the legal system, and other factors.
- Listener method: learn about jurors' experiences and beliefs to predict their views of the facts, law, and each other.

Strategies abound for jury selection methods. Jury consultants and trial lawyers use mock trials, focus groups, and telephone surveys to profile community characteristics and favorable jurors. Research scientists believe—and most litigators have been taught—demographic factors predict attitudes which predict verdicts, although empirical data and trial experience militate against this approach.[20] Many lawyers believe our experience hones our ability to sense and discern favorable jurors, although this belief has marginal support in practice and is speculative at best.

I use a blend of the above models. However, I focus upon one core belief illustrated in the ethical and moral dilemma of an overcrowded lifeboat lost at sea. As individuals weaken, starve, and become desperate, who is chosen to survive? Do we default to women, children, or the elderly? Who lives or dies? In panic, most people abandon rules in order to save themselves, although some may act heroically in the moment.[21] Using this behavioral principle in the courtroom, I believe the answer is **jurors save themselves**.[22] The basic premise is that jurors, primarily on a subconscious level, choose who they like the most and connect to parties, witnesses, and court personnel who are characteristically like them. Therefore, the party—or attorney—whom the jury likes the most, feels the closest to, or has some conscious or subconscious relationship with typically wins the trial. This concept is the central tenet of our jury selection strategies.

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[19] Research on the correlation of demographic data with voting preferences is conflicted. *See* Professor Dru Stevenson's article in the 2012 George Mason Law Review, asserting the "Modern Approach to Jury Selection" focuses on biases related to factors such as race and gender; s*ee also Glossy v. Gross*, 576 U.S. 863 (2015) (racial and gender biases may reflect deeply rooted community biases either consciously or unconsciously). *But see* Ken Broda-Bahm, *Don't Select Your Jury Based on Demographics: A Skeptical Look at JuryQuest*, PERSUASIVE LITIGATOR (April 12, 2012), https://www.persuasivelitigator.com/2012/04/dont-select-your-jury-based-on-demographics.html (for at least three decades, researchers have known that demographic factors are very weak predictors of verdicts).

[20] *See* Ken Broda-Bahm, *supra* note 19.

[21] DENNIS HOWITT, MICHAEL BILLIG, DUNCAN CRAMER, DEREK EDWARDS, BROMELY KNIVETON, JONATHAN POTTER & ALAN RADLEY, SOCIAL PSYCHOLOGY: CONFLICTS AND CONTINUITIES (1996).

[22] *Id.*

VI. The Wymore Method (TOC)

David Wymore, former Chief Trial Deputy for the Colorado Public Defender system, revolutionized capital jury selection. The Wymore method, or Colorado method of capital *voir dire*, was created to combat "death qualified" juries[23] by utilizing a non-judgmental, candid, and respectful atmosphere during jury selection which allows defense counsel to learn jurors' views about capital punishment and imposition of a death sentence, employ countermeasures by life qualifying the panel, and thereafter teach favorable jurors how to get out of the jury room.

In summary form, the Wymore method is as follows: Defense counsel focuses upon jurors' death penalty views, learns as much as possible about their views, rates their views, eliminates the worst jurors, educates both life-givers and killers separately, and teaches respect for both groups—particularly the killers. In other words, commentators state Wymore places the moral weight for a death sentence onto individual jurors, making it a deeply personal choice.[24] Wymore himself has stated he tries to: (1) find people who will give life; (2) personalize the kill question; and (3) find other jurors who will respect that decision.[25]

In short, jurors are rated on a scale of one to seven using the following guidelines:

1. *Witt* excludable: The automatic life adherent. One who will never vote for the death penalty and is vocal, adamant, and articulate about it.
2. One who is hesitant to say he believes in the death penalty. This person values human life and recognizes the seriousness of sitting on a capital jury. However, this person says he can give meaningful consideration to the death penalty.
3. This person is quickly for the death penalty and has been for some time. However, he is unable to express why he favors the death penalty (e.g., economics, deterrence, etc.). He may wish to hear mitigation or be able to make an argument against the death penalty if asked, and is willing to respect views of those more hesitant about the death penalty.
4. This person is comfortable and secure in his death penalty view. He is able to express why he is for the death penalty and believes it serves a good purpose. His comfort level and ability to develop arguments in favor of the death penalty differentiates him from a number three. However, he wants to hear both sides and straddles the fence with penalty phase evidence, believing some mitigation could result in a life sentence despite a conviction for a cold-blooded, deliberate murder.

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[23] Jurors must express their willingness to kill the defendant to be eligible to serve in a capital murder trial. In one study, a summary of fourteen investigations indicates a favorable attitude toward the death penalty translates into a 44% increase in the probability of a juror favoring conviction. Mike Allen, Edward Mabry & Drew-Marie McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 LAW AND HUMAN BEHAVIOR 715 (1998).

[24] John Ingold, *Defense Jury Strategy Could Decide Aurora Theater Shooting Trial*, THE DENVER POST (March 29, 2015), https://www.denverpost.com/2015/03/28/defense-jury-strategy-could-decide-aurora-theater-shooting-trial.

[25] *Id.*

5. A sure vote for death, he is vocal and articulate in his support for the death penalty. He is not a bully, however, and, because he is sensitive to the views of other jurors, can think of two or three significant mitigating factors which would allow him to follow a unanimous consensus for life in prison. This person is affected by residual doubt.
6. A strong pro-death juror, he escapes an automatic death penalty challenge because he can perhaps consider mitigation. A concrete supporter of the death penalty who believes it not used enough, he is influenced by the economic burden of a life sentence and believes in death penalty deterrence. Essentially, he nods his head with the prosecutor.
7. The automatic death penalty proponent. He believes in the *lex talionis* principle of retributive justice, or an eye for an eye. Mitigation is manslaughter or self-defense. Hateful and proud of it, he must be removed for cause or peremptory challenge. If the defendant is convicted of capital murder, this juror will impose the death penalty.

Wymore teaches the concepts of isolation and insulation. Isolation means that each juror makes an individual, personal judgment. Insulation means each juror understands he makes his decision with the knowledge and comfort it will be respected, he will not be bullied or intimidated by others, and the court and parties will respect his decision. In essence, every juror serves as a jury, and his decision should by right be treated with respect and dignity. These concepts are intended to equip individual jurors to stick with and stand by their convictions.

Wymore also teaches stripping, a means of culling extraneous issues and circumstances from the jurors' minds. In essence, you strip the venire of misconceptions they may have about irrelevant facts, law, defenses, or punishments as they arise. You simply strip away topics broached by jurors which are inapplicable to the case and could change a juror's mind. In a capital murder, you use a hypothetical like the following: "Ladies and gentlemen, I want you to imagine a hypothetical case, not this case. After hearing the evidence, you were convinced the defendant was guilty of premeditated, deliberate, intentional murder. He meant to do it, and he did it. It was neither an accident nor self-defense, defense of another, heat of passion, or because he was insane. There was no legal justification or defense. He thought about it, planned it, and did it. Now, can you consider life in prison?" Note the previous question incorporates case specific facts disguised as elements which avoids pre-commitment or staking out objections.

When adverse jurors offer any extraneous reason to consider life in prison, Wymore teaches to continue the process of re-stripping jurors. For example, if a juror says he would give life if the killing was accidental, thank the juror for his honesty and tell him that an accidental killing would be a defense, thus eliminating a capital sentencing hearing. Recommit the juror to his position, keep stripping, and then challenge for cause. Frankly, this process is unending and critical to success.

Wymore emphasizes the importance of recording the exact language stated by jurors. Not only does this assist with the grading process, but it serves as an important tool when you dialogue with jurors, mirroring their language back to them, whether to educate or remove.

Finally, Wymore eventually transcends jury selection from information gathering to record building, or the phase when you are developing challenges for cause by reciting their words, recommitting them to their position, and moving for removal.

VII. Our Method: Modified Wymore (TOC)

Our approach is a modified version of Wymore, merging various strategies including: (1) using select statutory language[26] originating in part from the old *Allen* charge;[27] (2) using studies on the psychology of juries;[28] (3) identifying individual and personal characteristics of the defendant, victim, and material witnesses; (4) profiling our model jury; and (5) using a simple rating system for prospective jurors. One other fine trial lawyer has recently written, at least in part, on a non-capital, modified Wymore version of jury selection as well.[29]

Our case preparation process is as follows. First, we start by considering the nature of the charge(s), the material facts, whether we will need to adduce evidence, and assess candidly prosecution and defense witnesses. Second, we identify personal characteristics of the defendant, victim, family members, and other important witnesses, all in descending order of priority. We do the same for prosecution witnesses. Individual characteristics include age, education, occupation, marital status, children, means, residential area, socioeconomic status, lifestyle, criminal record, and any other unique, salient factor. Third, we bear in mind typical demographics like race, age, gender, ethnicity, and so forth. Fourth, we review the jury pool list, both for individuals we may

[26] N.C. GEN. STAT. §§ 15A-1235(b)(1), (2), and (4). These subsections have language which insulate and isolate jurors, including phrases addressing the duty to consult with one another with a view to reaching an agreement if it can be done without violence to individual judgment, each juror must decide the case for himself, and no juror should surrender his honest conviction for the mere purpose of returning a verdict.

[27] *Allen v. United States*, 164 U.S. 492 (1896) (approving a jury instruction to prevent a hung jury by encouraging jurors in the minority to reconsider their position; some of the language in the instruction included the verdict must be the verdict of each individual juror and not a mere acquiescence to the conclusion of others, examination should be with a proper regard and deference to the opinion of others, and it was their duty to decide the case if they could conscientiously do so).

[28] Part of my approach includes strategies learned from David Ball, one of the nation's leading trial consultants. Mr. Ball is the author of two best-selling trial strategy books, "David Ball on Damages" and "Reptile: The 2009 Manual of the Plaintiff's Revolution," and he lectures at CLE's, teaches trial advocacy, and has taught at six law schools.

[29] *See* Jay Ferguson's CLE paper on "Transforming a Mental Health Diagnosis into Mental Health Defense," presented at the 2016 Death Penalty seminar on April 22, 2016, wherein Mr. Ferguson, addressing Modified Ball/Wymore *Voir Dire* in non-capital cases, asserts, among other points, the only goal of jury selection is to get jurors who will say not guilty, listen with an open mind to mental health evidence, not shift the burden of proof, apply the fully satisfied/entirely convinced standard of reasonable doubt, and discuss openly their views of the nature of the charge(s) and applicable legal elements and principles.

know and for characteristic comparison. Finally, we prepare motions designed to address legal issues and limit evidence for hearing pretrial.[30]

We incorporate multiple theories and our own strategies in jury selection. At the beginning, I spend a few minutes utilizing the **traditional** approach, educating the jury about the criminal justice system, emphasizing the jury's preeminent role, magnifying the moment, and simplifying the process.[31] I often tell them I am afraid they will think my client did something wrong by his mere presence, thereafter underscoring they are at the pinnacle of public service, serve as the conscience of the community, and must protect and preserve the sanctity of trial.[32] In a sense I am using the **lecture** method to establish leadership and credibility. I then transition to the dominant method, the **listener** method, asking many open-ended group questions followed by precise individual questions. I speak to every juror—even if only to greet and acknowledge them—to address their specific backgrounds, comments, or seek disclosure of significant life experiences relating to key trial issues. We look closely at jurors, including their family and close friends, to discern identified characteristics, favorable or unfavorable. I always address concerning issues, stripping and re-stripping per **Wymore**. We strip by using uncontroverted facts (e.g., "my client blew a .30") and by addressing extraneous issues and circumstances (i.e., inapplicable facts and defenses like "this is not an accident case") as they arise to find jurors who do not have the ability to be fair and impartial or hear the instant case. In a sense, **stripping** is accomplished by drawing the sting: we tell bad facts to strip bad jurors. During the entire process I am **profiling** jurors, searching for select characteristics previously deemed favorable or unfavorable. We also focus on **juror receptivity** to our presentation, looking at their individual responses, physical reactions, and exact comments. For jurors of which I am simply unsure, I fall back on **demographic** data, using social psychology and my **gut** as additional filters. Last, we **isolate and insulate** each juror per Wymore, attempting to create **twelve individual juries** who will respect each other in the process.

I use a simple grading scale as time management is always paramount during jury selection. As a parallel, the automatic life juror (or Wymore numbers one through three) gets a plus symbol (+), the automatic death juror (or Wymore numbers four through seven) gets a negative symbol (x), and the undetermined juror get a question mark (?). While every jury is different, I try to deselect no more than three on the first round and strive to leave one peremptory challenge, if possible, never forgetting I am one killer away from losing the trial.

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[30] As a practice tip, ask to hear all motions pre-trial and before jury selection. Knowledge of the judge's rulings may be central to your jury selection strategy, often revealing damaging evidence which should be disclosed during the selection process. Motions must precisely address issues and relevant facts within a constitutional context. If a judge refuses to hear, rule upon, or defers a ruling on your motion(s), recite on the record the course of action is not a strategic decision by the defense, thereby alerting the court of and protecting the defendant's recourse for post-conviction relief. *Strickland v. Washington*, 466 U.S. 668 (1984).

[31] Tools that can help jurors frame the trial, remain engaged, and retain information received include the use of a "mini-opening" at the beginning of *voir dire*, or delivering preliminary instructions of the process, law, and relevant legal concepts. *See* Susan J. MacPherson & Elissa Krauss, *Tools to Keep Jurors Engaged*, TRIAL (Mar. 2008), at 33.

[32] Trial by a jury of one's peers is a cornerstone of the principle of democratic representation set out in the U.S. Constitution. U.S. CONST. amend. VI.

I commonly draw the sting by telling the jury of uncontroverted facts, thereafter addressing their ability to hear the case. Prosecutors may object, citing an improper stake-out question as the basis. In your response, tie the uncontroverted fact to the juror's ability to follow the law or be fair and impartial. Case law supports my approach. *See State v. Nobles*, 350 N.C. 483, 497–98 (1999) (finding it proper for the prosecutor to describe some uncontested details of the crime before he asked jurors whether they knew or read anything about the case; ADA told the jury the defendant was charged with discharging a firearm into a vehicle "occupied by his wife and three small children"); *State v. Jones*, 347 N.C. 193, 201–02, 204 (1997) (holding a proper non-stake-out question included telling the jury there may be a witness who will testify pursuant to a deal with the State, thereafter asking if the mere fact there was a plea bargain with one of the State's witnesses would affect their decision or verdict in the case); *State v. Williams*, 41 N.C. App. 287, *disc. rev. denied*, 297 N.C. 699 (1979) (finding prosecutor properly allowed, in a common law robbery and assault trial, to tell prospective jurors a proposed sale of marijuana was involved and thereafter inquire if any of them would be unable to be fair and impartial for that reason). Another helpful technique is to ask the jury "if [they] can consider" all the admissible evidence, again linking the bad facts you have revealed to the juror's ability to be fair and impartial or follow the law. *State v. Roberts*, 135 N.C. App. 690, 697 (1999); *see also U.S. v. Johnson*, 366 F. Supp. 2d 822, 842–44 (N.D. Iowa 2005) (finding case specific questions in the context of whether a juror could consider life or death proper under *Morgan*). In sum, a juror who is predisposed to vote a certain way or recommend a particular sentence regardless of the unique facts of the case or judge's instruction on the law is not fair and impartial. You have the right to make a diligent inquiry into a juror's fitness to serve. *State v. Thomas*, 294 N.C. 105, 115 (1978). When you are defending a stake-out issue, argue to the extent a question commits a juror, it commits him to a fair consideration of the accurate facts in the case and to a determination of the appropriate outcome. The prime directive: Adhere to the profile, suppressing what my gut tells me unless objectively supported.

Using the current state of the law with my "Modified Wymore" approach, please see the outline I use for jury selection attached hereto as **Exhibit B**.

VIII. The Fundamentals (TOC)

"*While the lawyers are picking the jury, the jurors are picking the lawyer."*[33]

Voir dire is distilled into three objectives: Deselect those who will hurt you or are leaning against you;[34] educate jurors about the trial process and your case; and be more likeable than your counterpart, concentrating on professionalism, honesty, and a smart approach.

[33] RAY MOSES, JURY SELECTION IN CRIMINAL CASES (1998).

[34] I have heard skilled lawyers espouse a view in favor of accepting the first twelve jurors seated. It is difficult to comprehend a proper *voir dire* in which no challenges are made as chameleons are lurking within. As a rule of thumb, never pass on the original panel seated.

I share a three-tier approach to jury selection: threshold principles, fine art methods, and my personal tips and techniques.

Now for foundational principles:

- Deselect those who will hurt your client. Move for cause, if possible. Identify the worst jurors and remove them.
- Jurors bring personal bias and preconceived notions about crime, trials, and the criminal justice system. You must find out whether they lean with you or the prosecution.
- Jurors who honestly believe they will be fair will decide cases based on personal bias and preconceived ideas. Bias or prejudice can take many forms: racial, religious, national origin, ageism, sexism, class (including professionals), previous courtroom experience, prior experience with a certain type of case, beliefs, predispositions, emotional response systems,[35] and more.
- Jurors decide cases based on bias and beliefs, regardless of the judge's instructions.
- There is little correlation between demographic similarities of a juror and defendant and the manner in which jurors vote (e.g., race, gender, age, ethnicity, education, employment, class, hobbies, or the like).
- Traditional *voir dire* is meaningless.[36] Social desirability and pressure to conform inhibits effective jury selection when using traditional or hypothetical questions.[37] Asking jurors if they can put aside bias, be fair and impartial, and follow the judge's instructions are ineffective. Traditional questions grossly underestimate and fail to detect the degree of anti-defendant bias in the community.[38]
- Hypothetical questions about the justice system result in aspirational answers and have little meaning.
- You can neither change a strongly held belief nor impose your will upon a juror in the time you have in *voir dire*.[39]

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[35] Recent research has highlighted the important role of emotions in moral judgment and decision-making, particularly the emotional response to morally offensive behavior. June P. Tangnet, Jeff Stuewig & Debra J. Mashek, *Moral Emotions and Moral Behavior*, 58 ANNUAL REVIEW OF PSYCHOLOGY 345 (2007).

[36] Post-trial interviews reveal jurors lose interest and become disengaged with the use of technical terms and legal jargon, without an early and simple explanation of the case, and during a long trial. *See* MacPherson & Krauss, *supra* note 31, at 32. Studies by social scientists on non-capital felony trials reveal the following findings: (1) On average, jury selection took almost five hours, yet jurors as a whole talked only about thirty-nine percent of the time; (2) lawyers spent two percent of the time teaching jurors about their legal obligations and, in post-trial interviews assessing juror comprehension, many jurors were unable to distinguish between or explain the terms "fair" and "impartial"; and (3) one-half the jurors admitted post-trial they could not set aside their personal opinions and beliefs, although they had agreed to do so in *voir dire*. Cathy Johnson & Craig Haney, *Felony Voir Dire, an Exploratory Study of its Content and Effect*, 18 LAW AND HUMAN BEHAVIOR 487 (1991).

[37] James Lugembuhl, *Improving Voir Dire*, THE CHAMPION (Mar. 1986).

[38] *Id.*

[39] Humans have a built-in mechanism called scripting for dealing with unfamiliar situations like a trial. This mechanism lessens anxiety by promoting conforming behavior and drawing on bits and pieces of one's life experience – whether movies, television, friends or family – to make sense of the world around them. Unless you intercede, the script will be that lawyers are not to be trusted, trials are boring, people lie for gain, judges are fair and powerful, and

- Demonstrate and teach respect for the court, the trial process, and other jurors.
- As Clarence Darrow provides, "Almost every case has been won or lost when the jury is sworn."

IX. Fine Art Techniques (TOC)

"*The evidence won't shape the jurors. The jurors will shape the evidence."*[40]

The higher art form:[41]

- Make a good first impression. Remember primacy and recency[42] at all phases, even jury selection. There is only one first impression. Display warmth, empathy, and respect for others and the process. Show the jurors you are fair, trustworthy, and know the rules.
- Understand trial is an unknown world to lay persons or jurors. They feel ignored and are unaware of their special status, the rules of propriety, and that soon almost everyone will be forbidden to speak with them.
- Tell jurors they have a personal safety zone. Be careful of and sensitive to a juror's personal experience. When jurors share painful or emotional experiences, acknowledge their pain and express appreciation for their honesty.
- Comfortable and safe *voir dire* will cause you to lose. Ask for their opinion of the defendant's guilt or innocence at this time. Do not fear bad answers. Embrace them. They reveal the juror's heart which will decide your case.
- When a juror expresses bias, counsel should not stop, redirect them, or segue. Simply address and confront the issue. Mirror the answer back, invite explanation, reaffirm the position, and then remove for cause. Use the moment to teach the jury the fairness of your position.

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the accused would not be here if he did not do something wrong. OFFICE OF THE STATE PUBLIC DEFENDER, JURY SELECTION (2016).

[40] MOSES, *supra* note 33.

[41] Ask about the trial judge and how he handles *voir dire*. Consider informing the trial judge in advance of jury selection about features of your *voir dire* which may be deemed unusual by the prosecutor or the court, thus allowing the judge time to consider the issue, preventing disruption of the selection process, and affording you an opportunity to make a record.

[42] The law of primacy in persuasion, also known as the primacy effect, was postulated by Frederick Hansen Lund in 1926 and holds the side of an issue presented first will have greater effect in persuasion than the side presented subsequently. Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors*, 19 JOURNAL OF COMMUNICATION 239 (1969). The principle of recency states things most recently learned are best remembered. Also known as the recency effect, studies show we tend to remember the last few things more than those in the middle, assume items at the end are of greater importance, and the last message has the most effect when there is a delay between repeated messages. The dominance of primacy or recency depends on intrapersonal variables like the degree of familiarity and controversy as well as the interest of a particular issue. Curtis T. Haughtvedt & Duane T. Wegener, *Message Order Effects in Persuasion: An Attitude Strength Perspective*, 21 JOURNAL OF CONSUMER RESEARCH 205 (1994).

- Tell jurors about incontrovertible facts or your affirmative defense(s).[43] Be prepared to address the law on staking-out the jury for a judge who restricts your approach to this area. Humbly make a record.
- Ask jurors about important topics in your case. Ask jurors about analogous situations in their past. This will help profile jurors.
- Listen. Force yourself to listen more. Open-ended questions keep jurors talking (e.g., "Tell us about…, Share with us…, Describe for us…," etc.) and reveal life experiences, attitudes, opinions, and views. Have a conversation. Spend time discussing their personal background, relevant experiences, and potential bias. Make it interesting to them by making the conversation about them. Use the ninety-ten rule with jurors talking ninety percent of the time.
- Consider what the juror needs to know to understand the case and what you need to know about the juror.
- Seek first to understand, then to be understood.
- Personal experiences shape juror's views and beliefs and best predict how jurors view facts, law, and each other.
- Do not be boring, pretentious, or contentious.
- Look for non-verbal signals like nodding, gestures, or expressions.
- Spot angry jurors. "To the mean-spirited, all else becomes mean."[44]
- Refer back to specific answers. Let them know you were listening. Then build on the answers. Remember, a scorpion is a scorpion, regardless of one's appearance (i.e., presentation or words).
- When a juror expresses concern with employment, tell them the law prohibits discharging or demoting citizens for jury service. N.C. Gen. Stat. § 9-32.
- Deselect delicately. Tell them they sound like the kind of person who thinks before forming an opinion and the law is always satisfied when a juror gives an honest opinion, even if it is different from that of the lawyers or the judge. All the law asks is that jurors give their honest opinions and feelings. Stand and say, "We thank and respectfully excuse juror number . . . ."
- Juror personalities and attitudes are far more predictive of juror choices.
- Jury selection is about jurors educating us about themselves.

[43] Prior to the selection of jurors, the judge must inform prospective jurors of any affirmative defense(s) for which notice was given pretrial unless withdrawn by the defendant. N.C. GEN. STAT. § 15A-1213; N.C. GEN. STAT. § 15A-905(c)(1) (notice of affirmative defense is inadmissible against the defendant); N.C.P.I. – Crim. 100.20 (instructions to be given at jury selection).
[44] MOSES, *supra* note 33.

X. My Side Bar Tips (TOC)

"*We don't see things as they are. We see them as we are.*"[45]

My personal palette of jury selection techniques:

- At the very outset, tell the jury the defendant is innocent (or not guilty), be vulnerable, and tell the jury about yourself. Become one of them.
- You must earn credibility in jury selection.[46] Many jurors believe your client is guilty before the first word is spoken. Aligned with the accused, you are viewed with suspicion, serving as a mouthpiece. Start sensibly and strong. Be a lawyer, statesman, and one of them—a caring, community member. Earn respect and credibility when it counts—right at the start.
- We develop a relationship with jurors throughout the trial. Find common ground, mirroring back the intelligence and social level of the individual jurors. Be genuine. Become the one jurors trust in the labyrinth of trial.
- Encourage candor. Tell jurors there are no right or wrong answers, and you are interested in them and their views. Tell them citizens have the right to hold different views on topics, and so do jurors. Tell them you will be honest with them, asking for honest and complete answers in return. Assure them honest responses are the only thing expected of them. Reward the honest reply, even if it hurts.
- Listen to and observe opposing counsel. Purposefully contrast with the prosecutor. If he is long-winded, be precise and efficient. If he misses key points, spend time educating the jury. Entice jurors early to choose you.
- Humanize the client. Touch, talk with, and smile at him.
- Remind the client continually of appropriate eye contact, posture, and perceived interest in the case.
- Beware of a reverse *Batson* challenge when there is an appearance by the defense to use peremptory challenges on race, gender, or religion.
- Propensity is the worst evidence.
- If jurors fear or do not understand your client or his actions, whether due to violence, mental health, or the unexplained, they will convict your client. Quickly.
- Pick as many leaders[47] as possible, creating as many juries as possible. Do not pick followers: you shrink the size of the jury. In general, avoid young, uneducated, and apparently weak, passive, or submissive jurors. Target and engage them to sharpen your view. Remember, you only need one juror to exonerate, hang, or persuade the jury to a lesser-included verdict.

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[45] ANAIS NIN, SEDUCTION OF THE MINOTAUR (1961).

[46] According to the National Jury Project, sixty-seven percent of jurors are unsympathetic to defendants, thirty-six percent believe it is the defendant's responsibility to prove his innocence, and twenty-five percent believe the defendant is guilty or he would not have been charged. Now known as National Jury Project Litigation Consulting, this trial consulting firm publicizes its use of social science research to improve jury selection and case presentation.

[47] Leaders include negotiators and deal-makers, all of whom wield disproportionate power within the group. *See* MOSES, *supra* note 33.

- Look for jurors who are resistant to social pressure (e.g., piercings, tattoos, etc.).
- The best predictor of human behavior is past behavior.
- Let the client exhibit manners. Typically, my paralegal is present during much of the trial, most importantly in jury selection. When it is our turn to deselect or dismiss jurors, she approaches, the defendant stands and relinquishes his chair, and we discuss and decide who to deselect. My paralegal also interacts with the defendant regularly during trial, recesses, and other opportunities, communicating perceived respect and a genuine concern for the client.
- Use the phrase "fair and impartial" when engaging the jaundiced juror, skewed in beliefs or positions. Talk about the highest aim of a jury.
- Older women will exonerate your client in a rape or sex offense case, particularly if a young female victim has credibility issues. Conversely, beware of the grandfatherly, white knight.[48]
- Fight the urge to use your last peremptory challenge. You may be left with the equivalent of an automatic death penalty juror.
- Draw the sting (i.e., strip). Tell the jury incontrovertible bad facts and your affirmative defenses. Ask if they will "fairly and conscientiously deliberate and give meaningful consideration" to defenses as instructed by the Court. If irrelevant issues are raised, inform the jurors of the same. Inform them of gut-wrenching, graphic evidence. Some jurors will react verbally, some visibly. Let the bad facts sink in. Engage the juror who reacts badly.[49] Reaffirm his commitment to your client's presumed innocence. Then tell them there is more to the story. The sting fades and loses its impact during trial.
- Use the language of the former highest aim Pattern Jury Instruction, telling jurors they have no friend to reward, no enemy to punish, but a duty to let their verdict speak the everlasting truth.
- Mirror the judge's instructions to the jury, early and often, using phrases from the judge's various instructions including fair and impartial, the same law applies to everyone, they are not to form an opinion about guilt or innocence until deliberations begin, and so forth.[50] Forecast the law for them. Clothe yourself with vested authority.
- Commit the jury, individually and as a whole, to principles of isolation and insulation. Ask them if they understand and appreciate they are not to do violence to their individual judgment, must decide the case for themselves, and are not to surrender their honest convictions merely for the purpose of returning a verdict.[51] Extract a group commitment that they will respect the personal judgment of each and every juror. Target an oral commitment from unresponsive or questionable jurors. Seek twelve

[48] White knights are individuals who have a compulsive need to be a rescuer. *See* MARY C. LAMIA & MARILYN J. KRIEGER, THE WHITE KNIGHT SYNDROME: RESCUING YOURSELF FROM YOUR NEED TO RESCUE OTHERS (2009).
[49] To deselect jurors, commit the juror to a position (e.g., "So you believe . . . ."), normalize the impairment by acknowledging there are no right or wrong answers and citizens are free to have different opinions, and recommit the juror to his position (e.g., "So because of . . . , you would feel somewhat partial . . . ."), thus immunizing him from rehabilitation.
[50] N.C. GEN. STAT. § 15A-1236(a)(3), *et al.*; *see also supra text* at III. Selection Procedure.
[51] N.C. GEN. STAT. §§ 15A-1235(b)(1) and (4).

individual juries. If done well, you increase your chances of a not guilty verdict, lesser-included judgment, hung jury, or a successful motion to poll the jury post-trial.

- Tell the jury the law never requires a certain outcome. Inform them that the judge has no interest in a particular outcome and will be satisfied with whatever result they decide. Emphasize the law recognizes that each juror must make his own decision.

XI. Subject Matter of *Voir Dire* (TOC)

Case law on proper subject matter for *voir dire*[52] follows.

Accomplice Culpability: *State v. Cheek*, 351 N.C. 48, 65–68 (1999) (prosecutor properly asked about jury's ability to follow the law regarding acting in concert, aiding and abetting, and felony murder rule).

Circumstantial Evidence: *State v. Teague*, 134 N.C. App. 702 (1999) (prosecutor allowed to ask if jurors would require more than circumstantial evidence, that is eyewitnesses, to return a verdict of first degree murder).

Child Witnesses: *State v. Hatfield*, 128 N.C. App. 294 (1998) (trial judge erred by not allowing defendant to ask prospective jurors "if they thought children were more likely to tell the truth when they allege sexual abuse").

Defendant's Prior Record: *State v. Hedgepath*, 66 N.C. App. 390 (1984) (trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow the judge's instructions they are to consider the defendant's prior record only for the purpose of determining credibility).

Defendant Not Testifying: *State v. Blankenship*, 337 N.C. 543 (1994) (proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense; however, the court has discretion to disallow the same).

Expert Witness: *State v. Smith*, 328 N.C. 99 (1991) (asking the jury if they could accept the testimony of someone offered in a particular field like psychiatry was not a stake-out question.

Eyewitness Identification: *State v. Roberts*, 135 N.C. App. 690, 697 (1999) (prosecutor properly asked if eyewitness identification in and of itself was insufficient to deem a conviction in the juror's minds regardless of the judge's instructions as to the law)

Identifying Family Members: *State v. Reaves*, 337 N.C. 700 (1994) (no error for prosecutor to identify members of murder victim's family in the courtroom during jury selection).

[52] *See* MICHAEL G. HOWELL, STEPHEN C. FREEDMAN, & LISA MILES, JURY SELECTION QUESTIONS (2012).

Intoxication: *State v. McKoy*, 323 N.C. 1 (1988) (proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense).

Legal Principles: *State v. Parks*, 324 N.C. 420 (1989) (defense counsel may question jurors to determine if they completely understood the principles of reasonable doubt and burden of proof; however, once fully explored, the judge may limit further inquiry).

Pretrial Publicity: *Mu'Min v. Virginia*, 500 U.S. 415, 419–21 (1991) (inquiries should be made regarding the effect of publicity upon a juror's ability to be impartial or keep an open mind; questions about the content of the publicity may be helpful in assessing whether a juror is impartial; it is not required that jurors be totally ignorant of the facts and issues involved; the constitutional question is whether jurors had such fixed opinions they could not be impartial).

Racial/Ethnic Background[53]: *Ristaino v. Ross*, 424 U.S. 589 (1976) (although the due process clause creates no general right in non-capital cases to *voir dire* jurors about racial prejudice, such questions are constitutionally mandated under "special circumstances" like in *Ham*); *Ham v. South Carolina*, 409 U.S. 524 (1973) ("special circumstances" were present when the defendant, an African-American civil rights activist, maintained the defense of selective prosecution in a drug charge); *Rosales-Lopez v. U.S.*, 451 U.S. 182 (1981) (trial courts must allow questions whether jurors might be prejudiced about the defendant because of race or ethnic group when the defendant is accused of a violent crime and the defendant and victim were members or difference races or ethnic groups); *see also Turner v. Murray*, 476 U.S. 28 (1986) (such questions must be asked in capital cases in charge of murder of a white victim by a black defendant).

Sexual Offense/Medical Evidence: *State v. Henderson*, 155 N.C. App. 719, 724–27 (2003) (prosecutor properly asked in sex offense case if jurors would require medical evidence "that affirmatively says an incident occurred" to convict as the question measured jurors' ability to follow the law).

Sexual Orientation: *State v. Edwards*, 27 N.C. App. 369 (1975) (proper for prosecutor to question jurors regarding prejudice against homosexuality to determine if they could impartially consider the evidence knowing the State's witnesses were homosexual).

Specific Defenses: *State v. Leonard*, 295 N.C. 58, 62–63 (1978) (a juror who is unable to accept a particular defense recognized by law is prejudiced to such an extent he can no longer be considered competent and should be removed when challenged for cause).

[53] Considerations of race can be critical in any case, and *voir dire* may be appropriate and permissible to determine bias under statutory considerations of one's fitness to serve as a juror. *See generally* N.C. GEN. STAT. § 15A-1212(9) (challenges for cause may be made . . . on the ground a juror is unable to render a fair and impartial verdict). Strategically, try to show how questions on racial attitudes are relevant to the theory of defense. If the inquiry is particularly sensitive, request an individual *voir dire*. *See* N.C. DEFENDER MANUAL, *supra* note 8, at 25-18.

XII. Other Important Considerations (TOC)

It is axiomatic you must know the case facts, theory of defense, theme(s) of the case, and applicable law to conduct an effective *voir dire*. An example of a theory of defense—a short story of reasonable and believable facts—follows: "Ms. Jones was robbed . . . but not by [the Defendant] who was at work eight miles away. This is a case of mistaken identity."

My Practice Tips

Beyond these fundamentals, I offer a few practice tips.

1. Every jury selection is different, tailored to the unique facts, law, and individuals before you.

2. Meet with the defendant and witnesses on the eve of trial for a last review. Often, we learn new facts, good and bad, as witnesses are sometimes impressive but more commonly afraid, experience memory loss, present poorly, or will not testify. We re-cover the material points of trial, often illuminating important facts that require disclosure in the selection process.

3. Use common sense analogies and life themes to which we can all relate in conversation with jurors.

4. Look, act, and dress professionally. Make sure your client and witnesses dress neatly and act respectfully. Of all the things you wear, your expression is most important. A pleasant expression adds face value to your case.[54]

5. Use plain language. Distill legal concepts into simple terms and phrases.

6. At the outset, tell the jury they have nothing to fear. Inform them the judge, the governor[55] of the trial, will tell them everything they need to know, and the bailiffs are there for their assistance, security, and comfort. Instruct the jury they need only tell the bailiffs or judge of any needs or concerns they may have.

7. Be respectful of opposing counsel, not obsequious. You reap what you sow. Promote respect for the process. Be mindful of how you address opposing counsel. He is the prosecutor, not the State of North Carolina (or the government). If the

[54] MOSES, *supra* note 33.

[55] Judges are sometimes referenced as the governor or gatekeeper of the trial, particularly when deciding admissibility of expert evidence. *See State v. McGrady*, 368 N.C. 880 (2016) (amended Rule 702(a) implements the standards set forth in *Daubert*); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (defines the judge's gatekeeping role under FED. R. EVID. 702).

prosecution invokes such authority, tell the jury you represent the citizens of this state, protecting the rights of the innocent from the power of the government.

Sun Tzu: Timeless Lessons

Sun Tzu, author of *The Art of War*, provides timeless lessons on how to defeat your opponent. A fellow lawyer, Michael Waddington, in *The Art of Trial Warfare*, applies Sun Tzu's principles to the courtroom. I share a sampling for your consideration. Trial is war. To the trial warrior, losing can mean life or death for the client. Therefore, the warrior constantly learns, studies, and practices the art of trial warfare, employing the following principles: Because no plan survives contact with the enemy, he is always ready to change his strategy to exploit a weakness or seize an opportunity. He strikes at bias, arrogance, and evasive answers. He prepares quietly, keeping the element of surprise. He makes his point efficiently, knowing juries have limited attention spans and dislike rambling lawyers. He impeaches only the deserving and when necessary. He is self-disciplined, preparing in advance, capitalizing on errors, and maintaining momentum. He is unintimidated by legions of lawyers or a wealth of witnesses, knowing they are bloated prey. He sets up the hostile witness, luring misstatements and exaggerations for the attack. He does not become defensive, make weak arguments, or present paltry evidence. He focuses on crucial points, attacking the witnesses in his opponent's case. He neither moves nor speaks without reflection or consideration. He never trusts co-defendants or their counsel, for danger looms. He remains calm and composed, unflinching when speared. He neither takes tactical advice nor allows his client to dictate the trial,[56] recognizing why his client sits next to him. He is not reckless, cowardly, hasty, oversensitive, or overly concerned what others think. He prepares for battle, even in the midst of negotiation. He keeps his skills sharp with constant practice and strives to stay in optimal physical and emotional shape – for trial requires the stamina of a warrior. The trial lawyer understands mastery of the craft is an ongoing, lifetime journey.

Power-Packed Themes

We summarize life experiences and belief systems via themes which are used to deliver core facts or arguments. An example of a core argument follows: "This is a case of an untrained employee . . . ." The best themes are succinct, memorable, and powerful emotionally. We motivate and lure jurors to virtuosity— or difficult verdicts—through life themes. Consider the powerful themes within this argument:

> The first casualty of war— or trial—is innocence. Fear holds you prisoner; faith sets you free. How many wars have been fought and lives lost because men have dared to insist to be free? Did you ever think you would have the opportunity to affect the life of one person so profoundly while honoring the principles for which our forefathers fought? Stand up for freedom today; for many, freedom is more important than life itself. Partial or perverted justice is no justice; it is injustice.

[56] *But see State v. Ali*, 329 N.C. 304 (1991) (when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, the client's wishes must control).

> Stop at nothing to find the truth. You have no friend to reward and no enemy to punish. Your duty is to let your verdict speak the everlasting truth. His triumph today will trigger change tomorrow. Investigations will improve, and justice will have meaning. Trials will no longer be a rush to judgment but instead a road to justice.

A trial lawyer without a theme is a warrior without a weapon.[57]

XIII. Integrating *Voir Dire* into Closing Argument (TOC)

At the end of closing argument, I return to central ideas covered in *voir dire*. I remind the jury the defendant is presumed innocent even now, walk over to my client and touch him – often telling the jury this is the most important day of my client's life. I then remind them they are not to surrender their honest and conscientious convictions or do violence to their individual judgment merely to return a verdict, purposefully re-isolating and re-insulating the jury before stating my theme and asking for them to return a verdict of not guilty.

XIV. Summary (TOC)

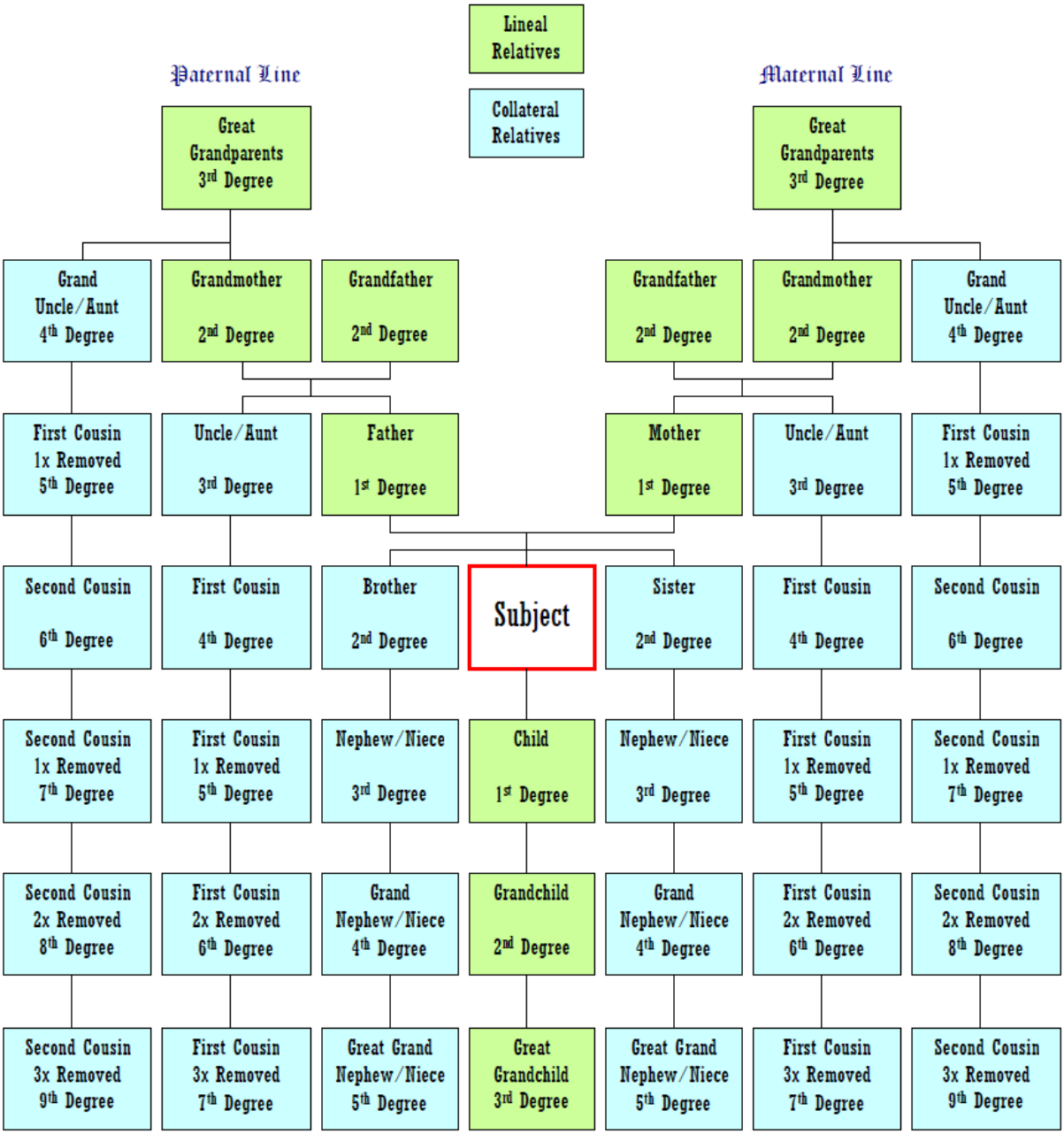
Prepare, research, consult, and try cases. Be objective about your case. Be courageous. Stand up to prosecutors, judges and court precedent, if you believe you are right. Make a complete record. I leave you with words of hope and inspiration from Joe Cheshire, an icon of excellence, and one of many to whom I esteem and aspire. Hear the message. Go make a difference.

> "A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end."
>
> "The day may come when we are unable to muster the courage to keep fighting … but it is not this day."[58]

[57] Charles L. Becton, *Persuading Jurors by Using Powerful Themes*, TRIAL 63 (July 2001).
[58] THE LORD OF THE RINGS: RETURN OF THE KING (New Line Cinema 2003).

2023 Update to Jury Selection:
The Art of Peremptories and Trial Advocacy

Exhibit A



2023 UPDATE TO JURY SELECTION:
THE ART OF PEREMPTORIES AND TRIAL ADVOCACY

EXHIBIT B

REFERENCES

1. *Voir Dire*: 15A-1211 to 1217
2. Jury Trial Procedure: 15A-1221 to 1243
3. Bifurcation: 15A-928
4. Jury Instruction Conference: Gen. R. of Prac. 21; 15A-1231

NEED

1. Witness List
2. Jury Profile
3. Jury Pool List
4. 12 Leaders/They save themselves

VOIR DIRE

(3/20/2023)

(Humble/vulnerable; Introduce/tell about self/firm/Defendant; Charge; Innocent/Not Guilty; Represent Citizens against Govt.; Insist on community participation as a safeguard in the process)

EXPLAIN THE PROCESS

Are you able to . . . ? Do you believe . . . ? Do you appreciate . . . ? Are you willing . . . ? Do you know . . . ?

1. Search for truth: Meaning of voir dire. Not CSI; often slow and deliberate.
2. Ideal jury: fair and impartial cross section of community.
3. Juror service: Pinnacle of public service; conscience of community; protect/preserve process.
4. You bring life experience and common sense.
5. May be a great juror in one case but not another.
6. Judge: gatekeeper/governor of trial. Will tell us all we need to know.
7. You are safe (only life experience/common sense, judge will instruct, jurors rights).
8. Length of trial.

GROUP QUESTIONS

(You, close friend, family member)

9. News accounts?
10. Ever employed us? Other side of legal proceeding? DLF adverse to you?
11. Ever been on a jury or a witness in a trial where I was the lawyer?
12. Ever associate with DA's? (Know/served with/visit in home/relationship to favor/disfavor?)
13. Know Defendant?
14. Know victim/family?
15. Know any witnesses?
16. Ever serve on jury? Foreperson? (different civil/criminal burdens of proof) Verdict? Respected?
17. Ever testified as witness/participant in legal proceeding?
18. You/family/close friends in law enforcement? Working for law enforcement (C.I.)?
19. You/family/close friends been victims of a crime/had similar experience?
20. Any strong opinions regarding this type of charge; "touched" by this type of crime; be fair and impartial?
21. Examples: MADD, Leadership Rowan, believe any use is wrong, gun owners, NRA, CCP vs. Prison Ministry, LGBT, reluctant juror.

INDIVIDUAL QUESTIONS

22. Where live? Employment? Spouse? Family/children?
23. Any disability/physical/medical problems? Covid?
24. Any personal/business commitments?
25. Any specialized medical/psychological, legal/law enforcement, scientific/forensic training?

KEY POINTS

26. Supervise any employees?
27. Know anyone else on the jury panel/pool?
28. Ever serve as sworn LEO or similar capacity?
29. Military service?
30. Rescue squad/EMS/Fire Dept. service?
31. Teacher/Pastor/Church member/Government employee?
32. Serve on another jury this week?

UNCONTROVERTED FACTS

1.
2.
3.
4.

SEE REVERSE

PROCESS OF TRIAL

33. State goes first; defense goes last; do not decide; address judge's instruction.
34. Will be objections/interruptions based on rules of evidence/procedure? Matters of law.
35. Draw the Sting/Strip. Cover Bad/Undisputed Facts/Affirmative Defenses or Irrelevant Issues/Facts (weapons, bad injuries, criminal record, drugs, alcohol, relationships, etc.). The law recognizes certain defenses. Not every death, injury, or questionable act is a crime.
36. Race/gender/religion issues? (white victim/black defendant); Batson; *Prima facie* case (raise inference?)/Race-neutral reasons/Purposeful discrimination? Judge elicit?
37. Some witnesses are everyday folks. Will anyone give testimony of LEO any greater weight solely because he wears a uniform? Judge will charge on credibility of witnesses. Promise to follow law?
38. You may hear from expert witnesses. Can you consider?
39. The charge is _____. Judge will explain the law/not us. Burden of proof is "beyond a reasonable doubt" (fully satisfies/entirely convinces). State must prove each and every element beyond burden. Promise to hold to burden? Same burden as Capital Murder.
40. A charge is not evidence.
41. Defendant presumed innocent. Defendant may choose, or not choose, to take the stand. He remains clothed with the presumption of innocence now and throughout this trial. Not a blank chalk board or level playing field. Will you now conscientiously apply the presumption of innocence to the Defendant?
42. Must you hear from the Defendant to follow the law? Must the Defendant "prove his innocence?" You are "not to consider" whether defendant testifies. PJI - Crim. 101.30

CONCLUSION/JUROR'S RIGHTS

Do you know . . . ? Do you understand . . . ? Do you appreciate . . .?

43. Highest aim: You have no friend to reward, no enemy to punish, but a duty to let your verdict speak the everlasting truth.
44. You have the right to hear and see all the evidence, voice your opinion, and have it respected by others.
45. You are to "reason together…but not surrender your honest convictions" as deliberate toward the end of reaching a verdict. You are "not to do violence to your individual judgment." "You must decide the case for yourself." N.C. Gen. Stat. § 15A-1235.
46. After telling jurors the law requires them to deliberate to try to reach a verdict, it is permissible to ask "if they understand they have the right to stand by their beliefs in the case." *State v. Elliott*, 344 N.C. 242 (1996).
47. Use your "sound and conscientious judgment." Be "firm but not stubborn in your convictions." PJI – Crim. 101.40.
48. Believe the opinions of other jurors are worthy of respect? Will you?
49. No crystal ball. Do you know of any reason this case may not be good for you? Any questions I haven't asked that you believe are important?
50. The law never demands a certain outcome. The judge has no interest in a particular outcome and will be well-satisfied with your individual decision. The law recognizes that each juror must make his or her own decision.

CHALLENGES FOR CAUSE

1. Grounds. N.C. Gen. Stat. § 15A-1212.
    a. Is incapable by reason of mental or physical infirmity.
    b. Has been or is a party, witness, grand juror, trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge.
    c. Has been or is a party adverse to the Defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
    d. Is related by blood or marriage within the sixth degree to the Defendant or victim of the crime.
    e. Has formed or expressed an opinion as to the guilt or innocence of Defendant.
    f. Is presently charged with a felony.
    g. As a matter of conscience, would be unable to render a verdict with respect to the charge in accord with the law.
    h. For any other cause is unable to render a fair and impartial verdict.

BUZZ PHRASES

1. Substantially impair? Automatically vote? *State v. Cummings*, 326 N.C. 298 (1990); *State v. Chapman*, 359 N.C. 328 (2005).
2. Juror statement he could follow the law but Defendant's failure to testify would "stick in the back of his mind" while deliberating should have been excused for cause. *State v. Hightower*, 331 N.C. 636 (1992).
3. Be Alert for "Stake-out" questions (asking "how will vote under particular fact/set of facts?"): Can you convict without physical evidence/witnsesses? A question that tends to commit jurors to a specific future course of action. Defense has a right to a full opportunity to make diligent inquiry into "fitness and competency to serve" and "determine whether there is a basis for a challenge for cause or a peremptory challenge." N.C. Gen. Stat. § 15A-1214(c). Ask: Can you consider? *State v. Roberts*, 135 N.C. App. 690 (1999). Can you set aside your opinion and reach decision solely upon evidence?
4. "A juror can believe a person is guilty and not believe it beyond a reasonable doubt." Hence, it is error for D.A. to argue if a juror believes the defendant is guilty then he necessarily believes it BRD. *State v. Corbin*, 48 N.C. App. 194 (1980).