UNC SCHOOL OF GOVERNMENT

2024 Higher-Level Felony Defense Training

September 10-12, 2024 / Chapel Hill, NC

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

Tuesday, Sept. 10

12:30-1:00 pm	*Check-In*
1:00-1:15 pm	**Welcome**
1:15-2:15 pm	**Defending Eyewitness Identification Cases** (60 mins.) Laura Gibson, Assistant Public Defender Beaufort Co. Public Defender's Office, Washington, NC
2:15-3:15 pm	**Mitigation Investigation** (60 mins.) Josie Van Dyke, Mitigation Specialist Sentencing Solutions, Inc., Knightdale, NC
3:15-3:30 pm	*Break*
3:30-4:15 pm	**Preparing to Defend High Level Felonies** (45 mins.) Phil Dixon, Teaching Associate Professor UNC School of Government, Chapel Hill, NC
4:15-5:00 pm	**Self-Defense Update** (45 mins.) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
5:00 pm	*Adjourn*

UNC SCHOOL OF GOVERNMENT

Wednesday, Sept. 11

9:00-10:15 am	**The Law of Sentencing Serious Felonies** (75 mins.) Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
10:15-10:30 am	*Break*
10:30-11:15 am	**Storytelling and Visual Aides at Sentencing** (45 mins.) Sophorn Avitan and Susan Weigand, Assistant Public Defenders Mecklenburg Co. Public Defender's Office, Charlotte, NC
11:15-12:00 pm	**Preventing Low Level Felonies from Becoming High Level Habitual Felonies** (45 mins.) Jason St. Aubin, Assistant Public Defender Marcilliat & Mills, PLLC, Charlotte, NC
12:00-1:00 pm	*Lunch (provided)*
1:00-2:30 pm	**Brainstorming, Preparing, and Presenting a Sentencing Argument** (90 mins.) Small group workshops
2:30-2:45 pm	*Break*
2:45-3:45 pm	**Preservation Essentials** (60 mins.) Glenn Gerding, Appellate Defender Office of the Appellate Defender, Durham, NC
3:45-4:45 pm	**Client Rapport** (60 mins.) (ETHICS) Tucker Charns, Regional Defender Indigent Defense Services, Durham, NC
4:45 pm	*Adjourn*
5:30 pm	**Optional Social Gathering** TBA

UNC SCHOOL OF GOVERNMENT

Thursday, Sept. 12

9:00-10:00 am	**Basics of Batson Challenges** (60 mins.) Hannah Autry, Ass't. Capital Defender, Office of the Capital Defender, Durham, NC Kailey Morgan, Staff Attorney, Center for Death Penalty Litigation, Durham, NC
10:00-10:15 am	*Break*
10:15-11:00 am	**Protecting Jurors from Removals for Cause** (45 mins.) Emily Coward, Director of the Inclusive Juries Project, Johanna Jennings, Director, The Decarceration Project Duke University School of Law, Durham, NC
11:00am-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*

CLE HOURS: 12.50
includes 1.0 hour of ethics/professional responsibility
pending approval by the NC State Bar

DEFENDING EYEWITNESS IDENTIFICATION

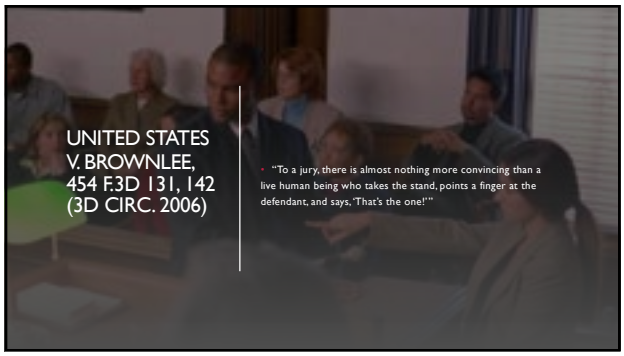
LAURA NEAL GIBSON
CHIEF PUBLIC DEFENDER
SECOND JUDICIAL DISTRICT

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



UNITED STATES V. BROWNLEE, 454 F.3D 131, 142 (3D CIRC. 2006)

- "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!'"

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?

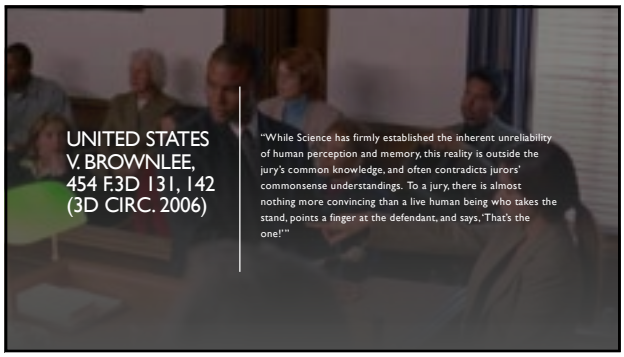
- Of course you remember the most stressful moment of your life!
- If he says he saw it, then he had to have seen it! He is sworn to tell the truth.
- He is so confident, so he must know for sure!
- He wouldn't put a person in prison if he doesn't believe that he is telling the truth.
- He doesn't seem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

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 Identifications?

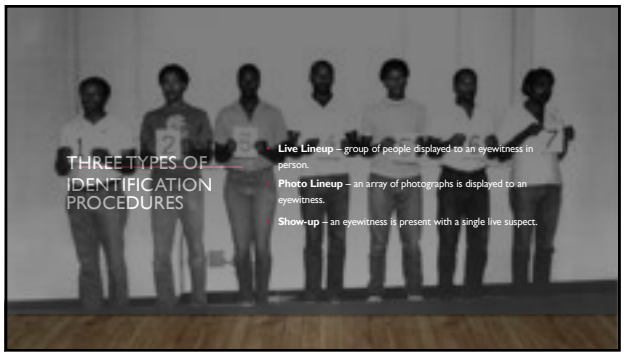
Motions to Suppress | Voir Dire | Cross-Examination | Expert Testimony | Closing | Jury Instructions

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** – group of people displayed to an 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

14

COMPLYING WITH THE DUE PROCESS CLAUSE

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

BIG ISSUE: WHETHER CONSIDERING THE TOTC, THE ID WAS RELIABLE EVEN THOUGH THE CONFRONTATION PROCEDURE MAY HAVE BEEN SUGGESTIVE.

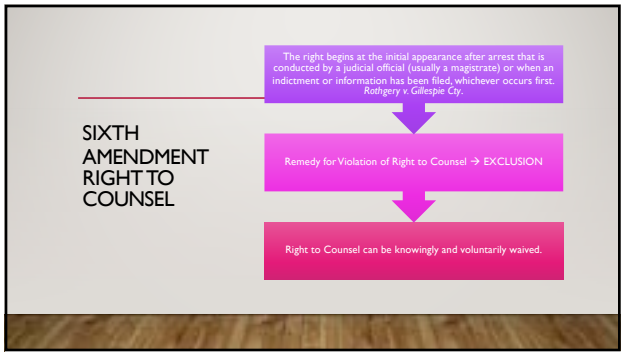
PRIMARY CASE →NEIL V. BIGGERS, 409 U.S. 188 (1972).

REMEDY FOR VIOLATION → EXCLUSION

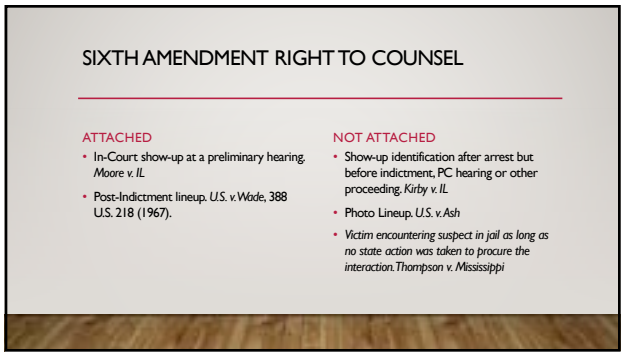
15


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

16


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

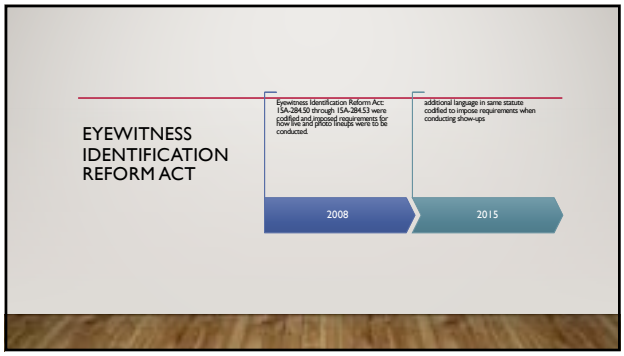
FACT SCENARIO:

- "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.

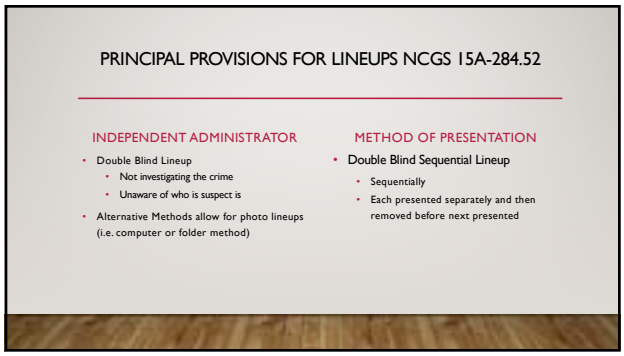
21


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.

22

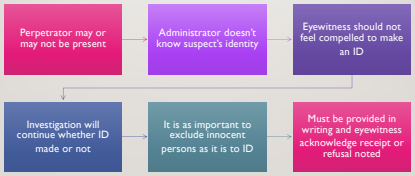

EYEWITNESS IDENTIFICATION REFORM ACT
Eyewitness Identification Reform Act: 15A-284.50 through 15A-284.53 were codified and imposed requirements for how live and photo lineups were to be conducted.
2008
additional language in same statute codified to impose requirements when conducting show-ups
2015

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

24

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

27

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).

29

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

CROSS-RACIAL IMPAIRMENT OR BIAS

Minnesota Innocence Project

34

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

35

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)

36

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?

37

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.

38

EXPERT TESTIMONY

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

Memory Factors | Estimator and System Variables

State v. Locklear – "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. 118, 147 (1998) → helpfulness standard

Rule 702 and 403 Compliance

Important especially for cross-racial identifications.

If expert testimony denied → judicial notice of research on IDs

39

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.

40

JURY INSTRUCTIONS

GENERALLY

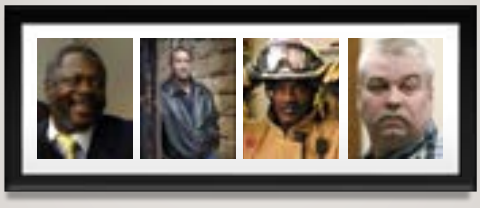
- 101.15 – Credibility
- 104.90 – Identification of the defendant as perpetrator of the crime
- 104.94 – testimony of expert witness

EIRA INSTRUCTIONS

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

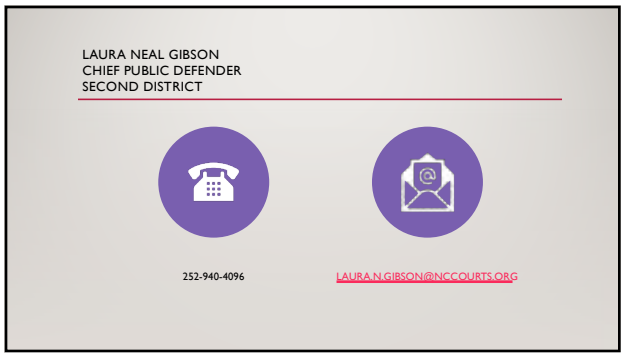
- 105.65 – Photo Lineup Requirements
- 105.70 – Live Lineup Requirements

41



REMINDER OF WHY THIS IS IMPORTANT?

42


LAURA NEAL GIBSON
CHIEF PUBLIC DEFENDER
SECOND DISTRICT
252-940-4096
LAURA.N.GIBSON@NCCOURTS.ORG

43

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 in school?
  - Can you tell me about the neighborhood where you grew up?
  - 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.
- The longer version is great for "digging deeper."
- Samples 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

ACEs Resource Packet: Adverse Childhood Experiences (ACEs) Basics

What are ACEs?

The term *Adverse Childhood Experiences* (ACEs) refers to a range of events that a child can experience, which leads to stress and can result in trauma and chronic stress responses. Multiple, chronic or persistent stress can impact a child's developing brain and has been linked in numerous studies to a variety of high-risk behaviors, chronic diseases and negative health outcomes in adulthood such as smoking, diabetes and heart disease. For example, having an ACE score of 4 increases a person's risk of emphysema or chronic bronchitis by 400 percent and suicide by 1200 percent.[i] [ii] [iii] [iv]

What is the "ACE Study"?

Published in 1998 as a collaboration between the Centers for Disease Control (CDC) and Kaiser Permanente, the original ACE study was one of the first studies to look at the relationship between chronic stress in childhood and adult health outcomes. Data were collected between 1995-1997 from 17,000 Kaiser members who completed surveys on their childhood experiences and current health status and behaviors. Many states are now collecting state-specific ACE data through the Behavioral Risk Factor Surveillance System (BRFSS), an annual phone survey established by the CDC that collects health-related risk factors, chronic health conditions and use of preventive services on U.S. adults.

How are ACEs measured?

ACEs have been measured in research, program and policy planning contexts. [v]For example, the 2011/12 National Survey Children's Health included nine ACEs items adopted from the original ACE study. Additionally, tools to assess ACES in clinical settings are available. In the original ACE study, researchers measured 10 ACEs. Counting each ACE as one, individuals were reported as having an ACE score of 0 to 10. Measures included:

- Physical, emotional and sexual abuse
- Physical and emotional neglect
- Households with mental illness, domestic violence, parental divorce or separation, substance abuse, or incarceration

You can calculate your own ACE score here: https://acestoohigh.com/got-your-ace-score/

Please note that there are many other sources of childhood trauma that are not included in the above mentioned ACEs scoring tool. For example, exposure to community violence or food insecurity is not included in the ACE score.

What is the prevalence of ACEs?

ACEs are common and pervasive in our society. In the original ACE study of adults, 64% of adults reported at least one ACE. More than one in five reported three or more ACEs and 12.4% reported four or more ACEs.

In a study based on the 2011-12 National Survey of Children's Health (NSCH), researchers found that almost half (47.9%) of US children ages 0-17 have had at least one of nine key adverse childhood experiences and 22.6% have had two or more. This study also looked at the variation among states and found the prevalence of children with one or more ACEs ranges from 40.6% in Connecticut to 57.5% in Arizona. [vi] To learn more about racial, gender and health status differences in ACEs prevalence, please visit the CAHMI Data Resource Center and explore the NSCH data (www.childhealthdata.org)

What is the impact of ACEs?

The original ACEs study found a relationship between the numbers of ACEs and a number of high-risk behaviors and negative health outcomes across the lifespan. As the number of ACEs a person has increases, so does the risk for outcomes such as heart disease, depression, heart disease, cancer, smoking and obesity.

Additional information on ACEs and the ACE study can be found here (see also the *Resources* section):

- Centers for Disease Control and Prevention, Violence Prevention Program, ACEs Study. http://www.cdc.gov/violenceprevention/acestudy/about.html
- Robert Wood Johnson Foundation, *The Truth about ACEs.* http://www.rwjf.org/en/library/infographics/the-truth-about-aces.html
- ACEs Connection. http://www.acesconnection.com/blog/aces-101-faqs

REFERENCES

[i] Felitti VJ, Anda RF, Nordenberg D, Williamson DF, Spitz AM, Edwards V, Koss MP, Marks JS. Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults: the adverse childhood experiences (ACE) study. *American Journal of Preventive Medicine* 1998;14:245–258.

[ii] Bethell C., Gombojav N., Solloway M. and Wissow, L. Adverse Childhood Experiences, Resilience and Mindfulness-Based Approaches: Common Denominator Issues for Children with Emotional, Mental, or Behavioral Problems. Child and Adolescent Psychiatric Clinics of North America, 2015 Apr;25(2):139-56. doi: 10.1016/j.chc.2015.12.001. Epub 2016 Jan 11.

[iii] Shonkoff J and Gardner A, (2012) The lifelong effects of early childhood adversity and toxic stress, *Pediatrics;* 129;e232.

[iv] Van der Kolk, BA (2014). The body keeps the score: Brain, mind and body in the healing of trauma. Penguin Random House, New York, NY. 10014. ISSN: 978-0-670-78593-3.

[v] Bethell, C. Carle, A., Hudziak, J., Gombojav, N., Powers, K., Wade, R., Braveman, P. Methods to Assess Adverse Childhood Experiences of Children and Families: Toward a Life Course and Well-Being Based Approach in Policy and Practice. Academic Pediatrics (forthcoming).

[vi] Bethell, C, Newacheck, P, Hawes, E, Halfon, N. Adverse childhood experiences: assessing the impact on health and school engagement and the mitigating role of resilience. (2014) Health Affairs Dec; 33(12);210-2016 .

Adverse Childhood Experiences (ACEs) Questionnaire

Prior to your 18th birthday:

1. Did a parent or other adult in the household often or very 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

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

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
   Attempt or actually have oral or anal intercourse with you?
   ◯ Yes ◯ No

4. Did you often or very 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

5. Did you often or very 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

6. Was a biological parent ever lost to you through divorced, abandonment, or other reason?
   ◯ Yes ◯ No

7. Was your mother or stepmother:
   Often or very often pushed, grabbed, slapped, or had something thrown at her? or
   Sometimes, often, or very 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

8. Did you live with anyone who was a problem drinker or alcoholic or who used street drugs?
   ◯ Yes ◯ No

9. Was a household member depressed or mentally ill? or
   Did a household member attempt suicide?
   ◯ Yes ◯ No

10. Did a household member go to prison?
    ◯ Yes ◯ No

JOHNS HOPKINS BLOOMBERG SCHOOL of PUBLIC HEALTH

CAHMI The Child & Adolescent Health Measurement Initiative

AcademyHealth

ACEs Resource Packet: The Science Behind ACEs

What is the neurobiology of trauma and stress?

Stress is a normal response to challenging life events. However, when stress reaches excessive levels, it can affect how a child's brain develops. The Center for the Developing Child at Harvard University has outlined three different types of responses to stress:

- **Positive stress response** is a normal part of healthy development in response to challenges such as attending a new school or a taking a test. It is characterized by brief increases in heart rate and mild elevations in stress hormones, which quickly return to normal.
- **Tolerable stress response** results from more serious events such as a car accident and results in a greater activation of the body's alert system. When a child has sufficient support with trusted adults, the body can recover from these effects.
- **Toxic stress response** can occur when a child is exposed to severe, frequent or prolonged trauma without the adequate support needed from trusted adults. Toxic stress can result in changes in the brain's architecture and function, can affect learning and development processes and can impact long-term health outcomes.

Evidence from the field of neuroscience clearly demonstrates that ongoing exposure to traumatic events in childhood (also commonly referred to as ACEs) -- such as physical or emotional abuse or neglect, witnessing or experiencing violence in the home or community, substance abuse or mental illness in the home, the absence of a parent due to divorce or incarceration, severe economic hardship, or discrimination -- disrupts brain development, leads to functional differences in learning, behaviors and health[i] and is associated with both immediate and long-term impacts on health.[ii, iii, iv, v]

What is epigenetics and how does it relate to ACEs?

Epigenetics is the study of how external factors can alter gene expression of one's DNA. Researchers are learning that environmental factors —such as the exposure to toxic stress — can influence how genes are expressed and cause changes in the body. Studies are now showing that both adverse experiences and resilience can affect gene expression.[vi vii] Even more profound is that epigenetic changes can be passed from one generation to another.[viii ix x]

The gift of resilience

The good news is that people can be extremely resilient in the face of adversity when provided with protective relationships, skills and experiences. Research has shown that resilience – which can be learned - can mitigate the impact of ACEs and produce better health and educational outcomes.[xi xii] At the heart of resiliency is the need to cultivate healthy social-emotional development in children and families. This includes both intrapersonal skills – self-regulation, self-reflection, creating and nurturing sense of self and confidence – and interpersonal skills – establishing safe, stable and nurturing relationships.[xiii xiv xv xvi]

Additional information on the neurobiology of stress and trauma can be found here (see also the *Resources* section of this ACEs Resource Packet):

- The Center on the Developing Child, Harvard University. http://developingchild.harvard.edu/science/
- The Community Resilience Cookbook. http://communityresiliencecookbook.org/your-body-brain/

REFERENCES

[i] Shonkoff J and Gardner A, (2012) The lifelong effects of early childhood adversity and toxic stress, *Pediatrics;* 129;e232

[ii] Felitti VJ, Anda RF, Nordenberg D, Williamson DF, Spitz AM, Edwards V, Koss MP, Marks JS. Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults: the adverse childhood experiences (ACE) study. *American Journal of Preventive Medicine* 1998;14:245–258.

[iii] Shonkoff J and Gardner A, (2012) The lifelong effects of early childhood adversity and toxic stress, *Pediatrics;* 129;e232

[iv] Wolff N, Shi J, "Childhood and Adult Trauma Experiences of Incarcerated Persons and Their Relationship to Adult Behavioral Health Problems and Treatment," 2012, Int. J. Environ. Res. Public Health, 9:1908-1926.

[v] Wallace BC, Conner LC, Dass-Brailsford P, "Integrating Trauma Treatment in Correctional Health Care and Community-Based Treatment Upon Reentry," Journal of Correctional Health Care, 2011, 17(4):329-343.

[vi] Schiele MA, Ziegler C, Holitschke K, Schartner C, Schmidt B, Weber H, Reif A, Romanos M, Pauli P, Zwanzger, P, Deckert J, Domschke K. Influence of 5-HTT variation, childhood trauma and self-efficacy on anxiety traits: a gene-environment-coping interaction study. J Neural Transm (Vienna). 2016 Aug;123(8):895-904. doi: 10.1007/s00702-016-1564-z. Epub 2016 May 4.

[vii] Lomanowska AM, Boivin M, Hertzman C, Fleming AS. Parenting begets parenting: A neurobiological perspective on early adversity and the transmission of parenting styles across generations. Neuroscience. 2015 Sep 16. pii: S0306-4522(15)00848-9. doi: 10.1016/j.neuroscience.2015.09.029. [Epub ahead of print]

[viii] Guarino, K., and Bassuk, E. (2010). Working with families experiencing homelessness: Understanding trauma and its impact. *Zero to Three (J), 30*(3).

[ix] Siegel DJ and Hartzell M. 2010.Parenting from the inside out: how a deeper self-understanding can help you raise children who thrive. *Mind Your Brain, Inc*

[x] Wickrama KA, Conger RD, Abraham WT. Early adversity and later health: the intergenerational transmission of adversity through mental disorder and physical illness. *J Gerontol B Psychol Sci Soc Sci.* 2005 Oct;60 Spec No 2:125-9.

[xi] Bethell C et al. Adverse Childhood Experiences: Assessing The Impact On Health And School Engagement And The Mitigating Role Of Resilience, Health Affairs, December 2014

[xii] Bethell, C, Gombojav, N, Solloway, M, Wissow, L. Adverse Childhood Experiences, Resilience and Mindfulness-based Approaches: Common Denominator Issues for Children with Emotional, Mental or Behavioral Problems. Child Adolesc Psychiatric Clin N Am 25 (2016) 139–156

[xiii] Bandura, A., G. V. Caprara, C. Barbaranelli, M. Gerbino, and C. Pastorelli. 2003. "Role of Affective Self-Regulatory Efficacy in Diverse Spheres of Psychosocial Functioning." Child Development 74 (3): 769–782. doi:10.1111/1467-8624.00567.

[xiv] McKay MT., Dempster, M. and Don G. Byrne DG., (2014). An examination of the relationship between self-efficacy and stress in adolescents: the role of gender and self-esteem, Journal of Youth Studies, 17:9, 1131-1151, DOI: 10.1080/13676261.2014.901494

[xv] Sege R, Linkenbach J. (2014) Essentials for childhood: promoting healthy outcomes from positive experiences. *Pediatrics*. 133(6):e1489-e1491. doi:10.1542/peds.2013-3425.

[xvi] Shonkoff JP. (2010) The Foundations of Lifelong Health Are Built in Early Childhood. *Cent Dev Child, Harvard Univ.* 2010. doi:papers://3A1C84B7-1D09-4494-9751-18F2A4917626/Paper/p6389.

ACEs Resource Packet: What Can We Do?

What is the role of healthcare providers?

The healthcare system is a natural place to respond to ACEs and promote resilience in children, youth and families. Guidelines for well childcare are extensive in the early years – 13 visits in the first three years of life[i] --, which is a crucial period of child development. Health systems, and in particular pediatric providers, are in a unique position to identify issues for both children and their families that contribute to either promoting or inhibiting healthy development. The American Association of Pediatrics (AAP) issued a policy statement in 2012 that encourages, among other things, pediatricians to take a more proactive role in educating patients and families about the impact of toxic stress and in advocating for the development of interventions that mitigate its impact. [ii]

What is trauma-informed care?

Trauma-informed care encompasses three levels of focus from a systems level: addressing policy and procedures, creating approaches for organizing and delivering services and providing specific programs or interventions for families.

The federal agency Substance Abuse and Mental Health Services Administration (SAMHSA) has outlined six principles for trauma informed care: (1) creating a culture of physical and psychological safety for staff and the people they serve; (2) building and maintaining trustworthiness and transparency among staff, clients and others involved with the organization; (3) utilizing peer support to promote healing and recovery; (4) leveling the power differences between staff and clients and among staff to foster collaboration and mutuality; (5) cultivating a culture of empowerment, voice and choice that recognizes individual strengths, resilience and an ability to heal from past trauma; and (6) recognizing and responding to the cultural, historical and gender roots of trauma.[iii, iv]

How can I talk to my patients and families about ACEs and toxic stress?

Organizations such as The Center for Youth Wellness (CYW) screen all of their patients for ACEs. CYW has developed and made available an *ACE questionnaire* designed help other providers screen for trauma. The American Association of Pediatrics (AAP) has developed *The Trauma Toolbox for Primary Care*, a 6-part series designed to educate pediatricians about ACEs and provide tools to help providers talk to their patients about them. As part of this toolkit, the AAP has identified a 4-step process to help identify children who have experienced or are affected by trauma that is framed by the following questions:

- Why are we asking about ACEs? Why is this important?
- What are we looking for?
- How do we find it?
- What do we do once we have found it? What supports are available for patients and how do you refer them to appropriate services?

These examples from the field can be used to talk about ACEs:

- The Resilience Project, from the American Academy of Pediatrics
- Adverse Childhood Experiences and the Lifelong Consequences of Trauma, from the American Academy of Pediatrics
- Addressing Adverse Childhood Experiences and Other Types of Trauma in the Primary Care Setting, from the American Academy of Pediatrics
- The Medical Home Approach to Identifying and Responding to Exposure to Trauma, from the American Academy of Pediatrics
- ACEs Elevator Pitches, from ACEs Connection
- Iowa ACEs 360 awareness resources, including media guidelines, press release and letter to the editor templates
- Iowa ACEs 360 advocacy materials

These resources can be used to talk to children about traumatic events and disasters:

- Talking to Children about Disasters, from the American Academy of Pediatrics
- Tips for Talking With and Helping Children and Youth Cope After a Disaster of Traumatic Event, from SAMHSA
- Helping Youth After Community Trauma: Tips for Educators, from the National Child Traumatic Stress Network
- Teaching Tolerance, from the Southern Poverty Law Center
- How to Talk to Your Kids about Ferguson (Time Magazine)
- How to Teach Kids about What's Happening in Ferguson (The Atlantic)
- To Talk Baltimore With Kids, Focus on the Positive (The New York Times)

The following examples provide some specific ways to talk to different groups about ACEs:

Group	Sample Scripts
Children and Families, from The Medical Home Approach to Identifying and Responding to Exposure to Trauma	"Has your home life changed in any significant way (eg, moving, new people in the home, people leaving the home)?" "Has anything bad, sad or scary happened to your child recently (or "to you" if it is an older child)?" "You have told me that your child is having difficulty with aggression, attention, and sleep. Just as fever is an indication the body is dealing with an infection, when these behaviors are present, they can indicate the brain and body are responding to a stress or threat. Do you have any concerns that your child is being exposed to stress or something that would be scary to him?"

Group	Sample Scripts
Colleagues, from ACEs Elevator Pitches	"As you probably know, if bad things happen to you to as a child, it can impact your health for the rest of your life. Research shows that kids who experience physical abuse or live with an alcoholic parent are more likely to have cancer as an adult. They are more likely to attempt suicide. And they are more likely to drop out of school or end up in prison. The good news is that there are doctors, teachers, social workers, judges, parents and others who are using this research (known as the Adverse Childhood Experiences Study) to create new tools to protect kids and families early, and give anyone who suffers the chance to heal."

We also recognize that asking about child abuse and neglect may trigger a need for mandated reporting. States differ on their use of mandatory reporter requirements. To find your state's requirements, please click here.

How can I help create a trauma-informed practice at my organization?

Creating a trauma-informed organization often involves a fundamental shift in culture, practices and policies throughout all levels of the practice. There are a number of existing models to help guide organizations in this transformation. One of the most well-known is the *Sanctuary Model*, an evidence-based model developed by Sandra Bloom, designed to help providers create and sustain a trauma-informed environment. This model consists of a set of tools designed to transform an organization's culture; these tools are designed to support the development of structures, processes and behaviors for both staff and clients that are responsive to the impact of trauma. A number of organizations, such as the National Technical Assistance Center for Children's Mental Health at the Georgetown Center for Center and Human Development and the Center for Health Strategies, have also published issue briefs on the key principles of creating trauma-informed organizations.

There are a number of training activities that can be useful for creating a trauma-informed organization and workforce. These include:

- Conducting an organizational assessment of policies, practices and capacity to implement trauma-informed care. A list of free organizational assessment tools is available at http://www.t2bayarea.org/resource/grid/index.html.
- Conducting training for leadership and staff on trauma-informed care;
- Undertaking a process of organizational cultural change to align with trauma-informed principles;
- Implementing or participating in a "Train the Trainer" model for enhancing and/or scaling existing efforts to provide trauma-informed care.

Core Competencies and Skills for Staff Training: Trauma-informed trainings are designed to *provide a set of critical skills and competencies* for staff that also result in new skills for families. Trauma-informed staff training should build skills and competencies, including the following (examples of trauma-informed training programs are shown in Table 1):

1. Understanding the neurobiology of trauma, with a subsequent shift away from "shame and blame" to a more compassionate understanding of what happened, or is happening, to them;
2. A focus on interpersonal interactions – the ability to create trust, respect and connection with others;
3. Creating safe, stable nurturing physical and social environments that can support trauma healing;
4. Deep and compassionate listening to self and others;
5. Self-reflection to develop the ability to shift perception and attitudes, release fear and promote choice and empowerment;
6. Understanding the historical trauma associated with race, culture and gender and the need for ongoing self-reflection of cultural biases;
7. Self-management of difficult emotions and behaviors; and,
8. Activation of self-care.[v]

Additional information on trauma-informed approaches can be found here:

- The Substance Abuse and Mental Services Administration: http://www.samhsa.gov/nctic/trauma-interventions
- The Center for Youth Wellness: http://www.centerforyouthwellness.org
- American Academy of Pediatrics: The Trauma Toolbox for Primary Care
- National Technical Assistance Center for Children's Mental Health's Trauma Informed Care: Perspectives and Resources: http://gucchdtacenter.georgetown.edu/TraumaInformedCare/Module3Resources.html#Downloadable
- Center for Health Care Strategies, Inc: http://www.chcs.org/project/advancing-trauma-informed-care/

Table 1: Examples of Trauma-Informed Training Programs

Trauma-Informed Training Programs	Program Focus
Risking Connection www.riskingconnection.com	Staff training that teaches a relational framework and skills for working with survivors of traumatic experiences
Sanctuary Model and S.E.L.F. (Safety, Emotional Management, Loss, Future) www.sanctuaryweb.com	Organizational model with training to shift organizational culture and promote recovery
Trauma Center at Justice Resource Institute www.traumacenter.org	Training programs for mental health professionals

Trauma-Informed Training Programs	Program Focus
Futures Without Violence: Measuring Trauma-Informed Practice: Tools for Organizations www.futureswithoutviolence.org/measuring-trauma-informed-practice-tools-for-organizations/	Training on validated tools for measuring organizational trauma-informed care
Trauma-Informed Guide Team (TIGT) created by San Diego County[vi]	"Train the Trainer" program for mental health specialists. Specifies core competencies: • Engaging leadership at the top; • Making trauma recovery consumer-driven; • Emphasizing early screening; • Developing a trauma-competent workforce; Instituting standard practice guidelines; and • Avoiding recurrence or re-traumatization

REFERENCES

[i] *Bright Futures: Guidelines for Health Supervision of Infants, Children, and Adolescents*, 3rd Edition, American Academy of Pediatrics (2008).

[ii] Committee on Psychosocial Aspects of Child and Family Health, Committee on Early Childhood, Adoption, and Dependent Care, and Section on Developmental and Behavioral Pediatrics, Andrew S. Garner, Jack P. Shonkoff, Benjamin S. Siegel, Mary I. Dobbins, Marian F. Earls, Andrew S. Garner, Laura McGuinn, John Pascoe, David L. Wood. Early childhood adversity, toxic stress, and the role of the pediatrician: translating developmental science into lifelong health. **Pediatrics. 2012.**

[iii] Substance Abuse and Mental Services Administration. http://www.samhsa.gov/nctic/trauma-interventions.

[iv] SAMHSA's Concept of Trauma and Guidance for a Trauma Informed Approach, July 2014. http://store.samhsa.gov/shin/content/SMA14-4884/SMA14-4884.pdf.

[v] CAHMI synthesis of in-depth literature reviews, environmental scans, and expert interviews, 2015-2016.

[vi] Leonelli, L. *Trauma-Informed Mental Health Care in California: A Snapshot*, California Mental Health Planning Council, Continuous System Improvement Committee, December 2014, p7.

ACEs Resource Packet: Resources on ACEs and Resilience

TOOLS FROM THE CHILD AND ADOLESCENT HEALTH MEASUREMENT INITIATIVE (CAHMI), JOHNS HOPKINS SCHOOL OF PUBLIC HEALTH

CAHMI's ACEs Champion's Communication Toolkit an online resource developed by the CAHMI designed to provide resources and tools to provider champions on ACEs and resilience, how to engage others and how to take action. *CAHMI's ACEs Page* provides a variety of resources and information on ACEs as well as an overview of the CAHMI's work in this area.

Get ACEs data at CAHMI's Data Resource Center for Child and Adolescent Health: The mission of the Data Resource Center for Child and Adolescent Health (DRC) is to advance the effective use of public data on the status of children's health and health-related services for children, youth and families in the United States. The DRC provides easily accessible national, state, and regional data from large, population-based, parent-reported surveys that do not require statistical expertise to use. Users can instantly browse ACEs and resilience data from the National Survey of Children's Health (NSCH) on the DRC's interactive data query.

ACES & RESILIENCE TOOLS

Individual ACEs Screening and Assessment

1. Adverse Childhood Experience (ACEs) Questionnaire, a tool to calculate your own ACE score
2. Adverse Childhood Experiences International Questionnaire, from the World Health Organization
3. Behavioral Risk Factor Surveillance System 2014, from the CDC
4. Standardized measures to assess complex trauma from the National Child Traumatic Stress Network

Organizational Assessment Tools

1. Organizational Assessment Tools from Trauma Transformed
2. Resilience Research Centre Evaluation Tool
3. Trauma Sensitive School Checklist
4. Trauma-Informed Organizational Toolkit for Homeless Services

ACEs Related Toolkits

1. A Trauma-Sensitive Toolkit for Caregivers of Children, from the Spokane Regional Health District
2. Community Conversations about Mental Health Toolkit and Brief, from SAMHSA
3. Essentials for Childhood: Steps for Creating Safe, Stable, Nurturing Relationships and Environments, from the CDC

4. Find Your ACE Score using the original ACEs survey tool (note that a research priority is to refine the measures and metrics used to assess ACEs)
5. Pediatric Medical Traumatic Stress Toolkit for Health Care Providers by the National Child Traumatic Stress Network
6. Resilience Research Centre Evaluation Tool
7. The Adverse Childhood Experiences (ACEs) Survey Toolkit for Providers by the National Crittenton Foundation
8. The Resilience Project Toolkit, by the American Academy of Pediatricians
9. The Trauma Toolbox for Primary Care by the American Academy of Pediatrics

Vicarious Trauma, Provider Burnout and Self-Care

1. The Trauma Stewardship Institute
2. Vicarious Trauma Fact Sheet, by the American Counseling Association
3. Joyful Heart Foundation
4. Self-Care Starter Kit, by the University of Buffalo Social Work School
5. American Academy of Pediatrics, Clinical Report on Physician Health and Wellness

READING LIST: SELECTED BOOKS, REPORTS AND SCHOLARLY ARTICLES

Books

1. Jackson Nakazawa, D. (2015). *Childhood Disrupted: How Your Biography Becomes your Biology and How You Can Heal.* Simon and Schuster, Inc. New York, NY.
2. Levine, Peter A. (2010*). In an Unspoken Voice: How the Body Releases Trauma and Restores Goodness*. North Atlantic Books. Berkeley, CA.
3. Porges, SW. (2011). *The Polyvagal Theory: Neurophysiological Foundations of Emotions, Attachment, Communications and Self-Regulation, First Edition*. WW Norton & Company, Inc. New York, NY. ISBN: 978-0-393-70800-7.
4. Siegel DJ and Hartzell M. (2010). *Parenting from the Inside Out: How a Deeper self-Understanding Can Help You Raise Children Who Thrive.* Mind Your Brain, Inc.
5. Van der Kolk, BA (2014*). The Body Keeps the Score: Brain, Mind and Body in the Healing of Trauma.* Penguin Random House. New York, NY. ISSN: 978-0-670-78593-3.

Reports

1. *Adverse Childhood Experiences and the Lifelong Consequences of Trauma*, American Academy of Pediatrics (2014).
2. *Bright Futures: Guidelines for Health Supervision of Infants, Children, and Adolescents*, 3rd Edition, American Academy of Pediatrics (2008).
3. *Early Childhood Adversity, Toxic Stress, and the Role of the Pediatrician: Translating Developmental Science into Lifelong Health*, American Academy of Pediatrics (2012).
4. *Essentials for Childhood: Steps for Creating Safe, Stable, Nurturing Relationships and Environments*, CDC (2016).

5. *Crossing the Quality Chasm: A New Health System for the 21st Century,* Institute of Medicine (2001).
6. *Adverse Childhood Experiences Reported by Adults in the BRFSS in Five States*, CDC (2010).
7. *Skills for Social Progress: The Power of Social and Emotional Skills*, OECD Skills Studies (2015).
8. *Safe Schools Healthy Children*, Substance Abuse Mental Health Services Administration (SAMHSA)(2015)
9. *National Registry of Evidence-Based Programs and Practices,* Substance Abuse Mental Health Services Administration (SAMHSA).
10. *Practice Guidelines for the Delivery of Trauma-Informed and GLBTQ Culturally-Competent Care*, American Institute for Research (2013).

Scholarly Articles

1. Bethell C., Gombojav N., Solloway M. and Wissow L. (2015). Adverse Childhood Experiences, Resilience and Mindfulness-Based Approaches: Common Denominator Issues for Children with Emotional, Mental, or Behavioral Problems. *Child and Adolescent Psychiatric Clinics of North America,* 25(2):139-56. doi: 10.1016/j.chc.2015.12.001. Epub 2016 Jan 11.
2. Bethell C., Newacheck P., Hawes E. and Halfon N. (2014). Adverse Childhood Experiences: Assessing the impact on health and school: engagement and the mitigating role of resilience. *Health Affairs*, 33(12):2106-2115. doi: 10.1377/hlthaff.2014.0914
3. Felitti VJ, Anda RF, Nordenberg D, Williamson DF, Spitz AM, Edwards V, Koss MP, Marks JS. (1998). Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults: the adverse childhood experiences (ACE) study. *American Journal of Preventive Medicine*, 14:245–258.
4. McLaughlin KA, Hatzenbuehler ML, Xuan Z, Conron KJ. (2012). Disproportionate exposure to early-life adversity and sexual orientation disparities in psychiatric morbidity. *Child Abuse & Neglect, 36*(9):645-55.
5. Schorr EL. (2015). Addressing millennial morbidities: accentuate the positive. *JAMA Pediatrics,*169(3):202-4.
6. Shonkoff JP. (2010). The Foundations of Lifelong Health Are Built in Early Childhood. Center on the Developing Child, Harvard MA. Retrieved from www.developingchild.harvard.edu.
7. Shonkoff J and Gardner A. (2012). The lifelong effects of early childhood adversity and toxic stress, *Pediatrics;* 129;(232).
8. Shonkoff JP and Phillips DA, eds. (2000). *From Neurons to Neighborhoods: The Science of Early Childhood Development*. National Academy Press, Washington, DC.
9. Wickrama KA, Conger RD, Abraham WT. Early adversity and later health: the intergenerational transmission of adversity through mental disorder and physical illness. *J Gerontol B Psychol Sci Soc Sci.* 60(2):125-9.
10. Wissow LS, Brown J, Fothergill KE, et al. Universal Mental Health Screening in Pediatric Primary Care: A Systematic Review. (2013). *Journal of the American Academy of Child & Adolescent Psychiatry*. 52(11):1134-1147. doi:10.1016/j.jaac.2013.08.013.

SELECTED MEDIA: MOVIES AND PRESENTATIONS

Movies

1. *Toxic Stress, Health, and ACEs for Two Generations;* by Ascend at the Aspen Institute
2. *"Paper Tigers"*; a documentary about Adverse Childhood Experiences
3. *The Science of Youth Resilience;* by the Resilience Research Centre
4. *3 Ways Undiagnosed Trauma Disrupts Lives;* a short video from the National Institute for the Clinical Application of Behavioral Medicine discusses signs and symptoms of childhood trauma
5. *Childhood Trauma: America's Hidden Health Crisis*; a video from a national meeting sponsored by the CAHMI to begin to the design of a national research and action agenda on ACEs, summarizing the importance of looking at childhood trauma as a health issue
6. *Resilience Among LGB Youth*: Overcoming Victimization; video complementing research from the IMPACT LGBT Health and Development Program at Northwestern University

Presentations

1. *Dr. Christina Bethell: Thriving in a Changing Environment;* Child X Conference, Stanford University; 2016
2. *Dr. Nadine Burke-Harris, How Childhood Trauma Affects Health across a Lifetime;* TED Talk; 2014
3. *Dr. Peter Singer. Saving Brains: Innovations to Help Children Thrive*; Child X Conference, Stanford University; 2016
4. *Kudler, Presley, and Savage. Trauma-Informed Care: Addressing Mental Health Risk Factors*; Advancing Excellence in Transgender Health; 2015
5. *Reynolds and Tan. TIC TALK: Bringing Trauma-Informed Care to Trauma-Exposed LGBTQ Youth*; The Village Family Services

MAY 16, 2024

About Adverse Childhood Experiences

KEY POINTS

- Adverse childhood experiences can have long-term impacts on health, opportunity and well-being.
- Adverse childhood experiences are common and some groups experience them more than others.

What are adverse childhood experiences?

Adverse childhood experiences, or ACEs, are potentially traumatic events that occur in childhood (0-17 years). Examples include: [1]

- Experiencing violence, abuse, or neglect.
- Witnessing violence in the home or community.
- Having a family member attempt or die by suicide.

Also included are aspects of the child's environment that can undermine their sense of safety, stability, and bonding. Examples can include growing up in a household with: [1]

- Substance use problems.
- Mental health problems.
- Instability due to parental separation.
- Instability due to household members being in jail or prison.

The examples above are not a complete list of adverse experiences. Many other traumatic experiences could impact health and well-being. This can include not having enough food to eat, experiencing homelessness or unstable housing, or experiencing discrimination. [2] [3] [4] [5] [6]

Quick facts and stats

ACEs are common. About 64% of adults in the United States reported they had experienced at least one type of ACE before age 18. Nearly one in six (17.3%) adults reported they had experienced four or more types of ACEs. [7]

Preventing ACEs could potentially reduce many health conditions. Estimates show up to 1.9 million heart disease cases and 21 million depression cases potentially could have been avoided by preventing ACEs. [1]

Some people are at greater risk of experiencing one or more ACEs than others. While all children are at risk of ACEs, numerous studies show inequities in such experiences. These inequalities are linked to the historical, social, and economic environments in which some families live. [5] [6] ACEs were highest among females, non-Hispanic American Indian or Alaska Native adults, and adults who are unemployed or unable to work. [7]

ACEs are costly. ACEs-related health consequences cost an estimated economic burden of $748 billion annually in Bermuda, Canada, and the United States. [8]

Outcomes

ACEs can have lasting effects on health and well-being in childhood and life opportunities well into adulthood. [9] Life opportunities include things like education and job potential. These experiences can increase the risks of injury, sexually transmitted infections, and involvement in sex trafficking. They can also increase risks for maternal and child health problems including teen pregnancy, pregnancy complications, and fetal death. Also included are a range of chronic diseases and leading causes of death, such as cancer, diabetes, heart disease, and suicide. [1] [10] [11] [12] [13] [14] [15] [16] [17]

ACEs and associated social determinants of health, such as living in under-resourced or racially segregated neighborhoods, can cause toxic stress. Toxic stress, or extended or prolonged stress, from ACEs can negatively affect children's brain development, immune systems, and stress-response systems. These changes can affect children's attention, decision-making, and learning. [18]

Children growing up with toxic stress may have difficulty forming healthy and stable relationships. They may also have unstable work histories as adults and struggle with finances, jobs, and depression throughout life. [18] These effects can also be passed on to their own children. [19] [20] [21] Some children may face further exposure to toxic stress from historical and ongoing traumas. These historical and ongoing traumas refer to experiences of racial discrimination or the impacts of poverty resulting from limited educational and economic opportunities. [1] [6]

Prevention

Adverse childhood experiences can be prevented. Certain factors may increase or decrease the risk of experiencing adverse childhood experiences.

Preventing adverse childhood experiences requires understanding and addressing the factors that put people at risk for or protect them from violence.

Creating safe, stable, nurturing relationships and environments for all children can prevent ACEs and help all children reach their full potential. We all have a role to play.

We Can Prevent ACEs

Keep Reading:
Preventing Adverse Childhood Experiences

SOURCES

CONTENT SOURCE:
National Center for Injury Prevention and Control

REFERENCES

1. Merrick MT, Ford DC, Ports KA, et al. Vital Signs: Estimated Proportion of Adult Health Problems Attributable to Adverse Childhood Experiences and Implications for Prevention — 25 States, 2015–2017. MMWR Morb Mortal Wkly Rep 2019;68:999-1005. DOI: http://dx.doi.org/10.15585/mmwr.mm6844e1
2. Cain KS, Meyer SC, Cummer E, Patel KK, Casacchia NJ, Montez K, Palakshappa D, Brown CL. Association of Food Insecurity with Mental Health Outcomes in Parents and Children. Science Direct. 2022; 22:7; 1105-1114. DOI: https://doi.org/10.1016/j.acap.2022.04.010
3. Smith-Grant J, Kilmer G, Brener N, Robin L, Underwood M. Risk Behaviors and Experiences Among Youth Experiencing Homelessness—Youth Risk Behavior Survey, 23 U.S. States and 11 Local School Districts. Journal of Community Health. 2022; 47: 324-333.
4. Experiencing discrimination: Early Childhood Adversity, Toxic Stress, and the Impacts of Racism on the Foundations of Health | Annual Review of Public Health https://doi.org/10.1146/annurev-publhealth-090419-101940
5. Sedlak A, Mettenburg J, Basena M, et al. Fourth national incidence study of child abuse and neglect (NIS-4): Report to Congress. Executive Summary. Washington, DC: U.S. Department of Health an Human Services, Administration for Children and Families.; 2010.
6. Font S, Maguire-Jack K. Pathways from childhood abuse and other adversities to adult health risks: The role of adult socioeconomic conditions. Child Abuse Negl. 2016;51:390-399.

7. Swedo EA, Aslam MV, Dahlberg LL, et al. Prevalence of Adverse Childhood Experiences Among U.S. Adults — Behavioral Risk Factor Surveillance System, 2011–2020. MMWR Morb Mortal Wkly Rep 2023;72:707–715. DOI: http://dx.doi.org/10.15585/mmwr.mm7226a2
8. Bellis, MA, et al. Life Course Health Consequences and Associated Annual Costs of Adverse Childhood Experiences Across Europe and North America: A Systematic Review and Meta-Analysis. Lancet Public Health 2019.
9. Adverse Childhood Experiences During the COVID-19 Pandemic and Associations with Poor Mental Health and Suicidal Behaviors Among High School Students — Adolescent Behaviors and Experiences Survey, United States, January–June 2021 | MMWR
10. Hillis SD, Anda RF, Dube SR, Felitti VJ, Marchbanks PA, Marks JS. The association between adverse childhood experiences and adolescent pregnancy, long-term psychosocial consequences, and fetal death. Pediatrics. 2004 Feb;113(2):320-7.
11. Miller ES, Fleming O, Ekpe EE, Grobman WA, Heard-Garris N. Association Between Adverse Childhood Experiences and Adverse Pregnancy Outcomes. *Obstetrics & Gynecology*. 2021;138(5):770-776. https://doi.org/10.1097/AOG.0000000000004570
12. Sulaiman S, Premji SS, Tavangar F, et al. Total Adverse Childhood Experiences and Preterm Birth: A Systematic Review. *Matern Child Health J*. 2021;25(10):1581-1594. https://doi.org/10.1007/s10995-021-03176-6
13. Ciciolla L, Shreffler KM, Tiemeyer S. Maternal Childhood Adversity as a Risk for Perinatal Complications and NICU Hospitalization. *Journal of Pediatric Psychology*. 2021;46(7):801-813. https://doi.org/10.1093/jpepsy/jsab027
14. Mersky JP, Lee CP. Adverse childhood experiences and poor birth outcomes in a diverse, low-income sample. BMC pregnancy and childbirth. 2019;19(1). https://doi.org/10.1186/s12884-019-2560-8
15. Hillis SD, Anda RF, Dube SR, Felitti VJ, Marchbanks PA, Marks JS. The association between adverse childhood experiences and adolescent pregnancy, long-term psychosocial consequences, and fetal death. Pediatrics. 2004 Feb;113(2):320-7.
16. Reid JA, Baglivio MT, Piquero AR, Greenwald MA, Epps N. No youth left behind to human trafficking: Exploring profiles of risk. American journal of orthopsychiatry. 2019;89(6):704.
17. Diamond-Welch B, Kosloski AE. Adverse childhood experiences and propensity to participate in the commercialized sex market. Child Abuse & Neglect. 2020 Jun 1;104:104468.
18. Shonkoff, J. P., Garner, A. S., Committee on Psychosocial Aspects of Child and Family Health, Committee on Early Childhood, Adoption, and Dependent Care, & Section on Developmental and Behavioral Pediatrics (2012). The lifelong effects of early childhood adversity and toxic stress. Pediatrics, 129(1), e232–e246. https://doi.org/10.1542/peds.2011-2663
19. Narayan AJ, Kalstabakken AW, Labella MH, Nerenberg LS, Monn AR, Masten AS. Intergenerational continuity of adverse childhood experiences in homeless families: unpacking exposure to maltreatment versus family dysfunction. Am J Orthopsych. 2017;87(1):3. https://doi.org/10.1037/ort0000133
20. Schofield TJ, Donnellan MB, Merrick MT, Ports KA, Klevens J, Leeb R. Intergenerational continuity in adverse childhood experiences and rural community environments. Am J Public Health. 2018;108(9):1148-1152. https://doi.org/10.2105/AJPH.2018.304598
21. Schofield TJ, Lee RD, Merrick MT. Safe, stable, nurturing relationships as a moderator of intergenerational continuity of child maltreatment: a meta-analysis. J Adolesc Health. 2013;53(4 Suppl):S32-38. https://doi.org/10.1016/j.jadohealth.2013.05.004

MAY 16, 2024

Risk and Protective Factors

KEY POINTS

- Many factors can increase or decrease the likelihood of someone experiencing or perpetrating violence.
- Risk factors can increase the risk of experiencing or perpetrating violence and protective factors can reduce the risk.
- Preventing adverse childhood experiences requires understanding and addressing risk and protective factors.

What are risk and protective factors?

Adverse childhood experiences (ACEs) are not often caused by a single factor. Instead, a combination of factors at the individual, relationship, community, and societal levels can increase or decrease the risk of violence.

Although some risk and protective factors are at the individual and family level, no child or individual is at fault for the ACEs they experience.

Risk factors are characteristics that may increase the likelihood of experiencing adverse childhood experiences. However, they may or may not be direct causes.

Protective factors are characteristics that may decrease the likelihood of experiencing adverse childhood experiences.

Please note the term "caregiver" will be used throughout to refer to parents and those who care for children but may not be biological parents.

Watch the **Moving Forward** video to learn more about how increasing what protects people from violence and reducing what puts people at risk for it benefits everyone.

Moving Forward

Risk factors

Individual and family risk factors

- Families experiencing caregiving challenges related to children with special needs (for example, disabilities, mental health issues, chronic physical illnesses). [1]
- Children and youth who don't feel close to their parents/caregivers and feel like they can't talk to them about their feelings. [2]
- Youth who start dating early or engaging in sexual activity early. [3]
- Children and youth with few or no friends or with friends who engage in aggressive or delinquent behavior. [4]
- Families with caregivers who have a limited understanding of children's needs or development. [5]
- Families with caregivers who were abused or neglected as children. [6]
- Families with young caregivers or single parents. [7]
- Families with low income. [8]

- Families with adults with low levels of education. [9]
- Families experiencing high levels of parenting stress or economic stress. [7]
- Families with caregivers who use spanking and other forms of corporal punishment for discipline. [10]
- Families with inconsistent discipline and/or low levels of parental monitoring and supervision. [11]
- Families that are isolated from and not connected to other people (extended family, friends, neighbors). [12]
- Families with high conflict and negative communication styles. [13]

Community risk factors

- Communities with high rates of violence and crime. [5]
- Communities with high rates of poverty and limited educational and economic opportunities. [14]
- Communities with high unemployment rates. [15]
- Communities with easy access to drugs and alcohol. [16]
- Communities where neighbors don't know or look out for each other and there is low community involvement among residents. [17]
- Communities with few community activities for young people. [18]
- Communities with unstable housing and where residents move frequently. [19]
- Communities where families frequently experience food insecurity. [20]
- Communities with high levels of social and environmental disorder. [21]

Protective factors

Individual and family protective factors

- Families who create safe, stable, and nurturing relationships, meaning children have a consistent family life where they are safe, taken care of, and supported. [22] [23]
- Children who have positive friendships and peer networks. [24] [23] [25]
- Children who do well in school. [26] [27] [28] [25]
- Children who have caring adults outside the family who serve as mentors or role models. [29] [25]
- Families where caregivers can meet basic needs of food, shelter, and health services for children. [28] [25]
- Families where caregivers have college degrees or higher. [30] [31]
- Families where caregivers have steady employment. [28] [31]
- Families with strong social support networks and positive relationships with the people around them. [24] [27] [23] [32] [25]
- Families where caregivers engage in parental monitoring, supervision, and consistent enforcement of rules. [24] [27] [32] [28]
- Families where caregivers/adults work through conflicts peacefully. [27] [32] [30]
- Families where caregivers help children work through problems. [27] [32] [30]
- Families that engage in fun, positive activities together. [32] [30]
- Families that encourage the importance of school for children. [28]

Community protective factors

- Communities where families have access to economic and financial help. [33] [34] [35] [36]
- Communities where families have access to medical care and mental health services. [33] [35] [36]
- Communities with access to safe, stable housing. [33] [34] [36]
- Communities where families have access to nurturing and safe childcare. [33] [36]
- Communities where families have access to safe, engaging after school programs and activities. [34] [35] [36]
- Communities where families have access to high-quality preschool. [36]

- Communities where adults have work opportunities with family-friendly policies. [35] [36]
- Communities with strong partnerships between the community and business, health care, government, and other sectors. [35] [36]
- Communities where residents feel connected to each other and are involved in the community. [25] [35] [36]
- Communities where violence is not tolerated or accepted. [14] [36]

SOURCES

CONTENT SOURCE:
National Center for Injury Prevention and Control

REFERENCES

1. Crouch, E., Probst, J. C., Radcliff, E., Bennett, K. J., & McKinney, S. H. (2019). Prevalence of childhood experiences (ACES) among us children. *Child Abuse & Neglect, 92*, 209–218. https://doi.org/10.1016/j.chiabu.2019.04.010
2. Priyam, P., & Nath, S. (2021). A cross-sectional study on the effect of adverse childhood events and perception toward parents on emotional intelligence. *The Primary Care Companion For CNS Disorders, 23*(5). https://doi.org/10.4088/pcc.20m02861
3. Brown, M. J., Masho, S. W., Perera, R. A., Mezuk, B., & Cohen, S. A. (2015). Sex and sexual orientation disparities in adverse childhood experiences and early age at sexual debut in the United States: Results from a nationally representative sample. *Child Abuse & Neglect, 46*, 89–102. https://doi.org/10.1016/j.chiabu.2015.02.019
4. Biglan, A., Van Ryzin, M. J., & Hawkins, J. D. (2017). Evolving a more nurturing society to prevent adverse childhood experiences. *Academic Pediatrics, 17*(7), S150–S157. https://doi.org/10.1016/j.acap.2017.04.002
5. Wade, R., Shea, J. A., Rubin, D., & Wood, J. (2014). Adverse childhood experiences of low-income urban youth. *Pediatrics, 134*(1). https://doi.org/10.1542/peds.2013-2475
6. Schickedanz, A., Halfon, N., Sastry, N., & Chung, P. J. (2018). Parents' adverse childhood experiences and their children's Behavioral Health Problems. *Pediatrics, 142*(2). https://doi.org/10.1542/peds.2018-0023
7. Crouch, E., Radcliff, E., Brown, M., & Hung, P. (2019). Exploring the association between Parenting Stress and a child's exposure to adverse childhood experiences (aces). *Children and Youth Services Review, 102*, 186–192. https://doi.org/10.1016/j.childyouth.2019.05.019
8. Giovanelli, A., & Reynolds, A. J. (2021). Adverse childhood experiences in a low-income black cohort: The importance of context. *Preventive Medicine, 148*. https://doi.org/10.1016/j.ypmed.2021.106557
9. Hughes, K., Bellis, M. A., Hardcastle, K. A., Sethi, D., Butchart, A., Mikton, C., Jones, L., & Dunne, M. P. (2017). The effect of multiple adverse childhood experiences on health: A systematic review and meta-analysis. *The Lancet Public Health, 2*(8), e356–e366. https://doi.org/10.1016/s2468-2667(17)30118-4
10. Afifi, T. O., Ford, D., Gershoff, E. T., Merrick, M., Grogan-Kaylor, A., Ports, K. A., MacMillan, H. L., Holden, G. W., Taylor, C. A., Lee, S. J., & Peters Bennett, R. (2017). Spanking and adult mental health impairment: The case for the designation of spanking as an adverse childhood experience. *Child Abuse & Neglect, 71*, 24–31. https://doi.org/10.1016/j.chiabu.2017.01.014
11. Duke, N. N., Pettingell, S. L., McMorris, B. J., & Borowsky, I. W. (2010). Adolescent violence perpetration: Associations with multiple types of adverse childhood experiences. *Pediatrics, 125*(4). https://doi.org/10.1542/peds.2009-0597
12. Calvano, C., Engelke, L., Di Bella, J. *et al.* Families in the COVID-19 pandemic: parental stress, parent mental health and the occurrence of adverse childhood experiences—results of a representative survey in Germany. *Eur Child Adolesc Psychiatry* (2021). https://doi.org/10.1007/s00787-021-01739-0
13. Lackova Rebicova, M., Dankulincova Veselska, Z., Husarova, D. *et al.* Does family communication moderate the association between adverse childhood experiences and emotional and behavioural problems?. *BMC Public Health* 20, 1264 (2020). https://doi.org/10.1186/s12889-020-09350-9
14. Larkin, H., Shields, J. J., & Anda, R. F. (2012). The health and social consequences of adverse childhood experiences (ACE) across the lifespan: An introduction to prevention and intervention in the community. *Journal of Prevention & Intervention in the Community, 40*(4), 263–270. https://doi.org/10.1080/10852352.2012.707439
15. Manyema, M., & Richter, L. M. (2019). Adverse childhood experiences: Prevalence and associated factors among South African young adults. *Heliyon, 5*(12), e03003. https://doi.org/10.1016/j.heliyon.2019.e03003
16. Dube, S. R., Miller, J. W., Brown, D. W., Giles, W. H., Felitti, V. J., Dong, M., & Anda, R. F. (2006). Adverse childhood experiences and the association with ever using alcohol and initiating alcohol use during adolescence. *Journal of Adolescent Health, 38*(4), 444.e1–444.e10. https://doi.org/10.1016/j.jadohealth.2005.06.006
17. Khanijahani, A., Sualp, K. Adverse Childhood Experiences, Neighborhood Support, and Internalizing and Externalizing Mental Disorders among 6–17 years old US Children: Evidence from a Population-Based Study. *Community Ment Health J* 58, 166–178 (2022). https://doi.org/10.1007/s10597-021-00808-7
18. Bledsoe, M., Captanian, A., & Somji, A. (2021). Special report from the CDC: Strengthening Social Connections to prevent suicide and adverse childhood experiences (aces): Actions and opportunities during the COVID-19 pandemic. *Journal of Safety Research, 77*, 328–333.

https://doi.org/10.1016/j.jsr.2021.03.014

9. Barnes, A.J., Gower, A.L., Sajady, M. *et al.* Health and adverse childhood experiences among homeless youth. *BMC Pediatr* 21, 164 (2021). https://doi.org/10.1186/s12887-021-02620-4
10. Chilton, M., Knowles, M., Rabinowich, J., & Arnold, K. T. (2015). The relationship between childhood adversity and food insecurity: 'it's like a bird nesting in your head.' *Public Health Nutrition, 18*(14), 2643–2653. https://doi.org/10.1017/s1368980014003036
11. Gentner, M. B., & Leppert, M. L. (2019). Environmental influences on Health and Development: Nutrition, substance exposure, and adverse childhood experiences. *Developmental Medicine & Child Neurology, 61*(9), 1008–1014. https://doi.org/10.1111/dmcn.14149
12. Asmundson. (2019). ACEs : Using Evidence to Advance Research, Practice, Policy, and Intervention.
13. Luther. (2019). *Developing a More Culturally Appropriate Approach to Surveying Adverse Childhood Experiences Among Indigenous Peoples in Canada*
14. Guo, S., O'Connor, M., Mensah, F., Olsson, C. A., Goldfeld, S., Lacey, R. E., Slopen, N., Thurber, K. A., & Priest, N. (2021). Measuring Positive Childhood Experiences: Testing the structural and predictive validity of the Health Outcomes from Positive Experiences (HOPE) framework. Acad Pediatr. https://doi.org/10.1016/j.acap.2021.11.003
15. Narayan, A. J., Rivera, L. M., Bernstein, R. E., Harris, W. W., & Lieberman, A. F. (2018). Positive childhood experiences predict less psychopathology and stress in pregnant women with childhood adversity: A pilot study of the benevolent childhood experiences (BCEs) scale. *Child Abuse Negl, 78*, 19-30. https://doi.org/10.1016/j.chiabu.2017.09.022
16. Goetschius, L. G., McLoyd, V. C., Hein, T. C., Mitchell, C., Hyde, L. W., & Monk, C. S. (2021). School connectedness as a protective factor against childhood exposure to violence and social deprivation: A longitudinal study of adaptive and maladaptive outcomes. Dev Psychopathol, 1-16. https://doi.org/10.1017/S0954579421001140
17. Bethell, C. D., Garner, A. S., Gombojav, N., Blackwell, C., Heller, L., & Mendelson, T. (2022). Social and Relational Health Risks and Common Mental Health Problems Among US Children: The Mitigating Role of Family Resilience and Connection to Promote Positive Socioemotional and School-Related Outcomes. Child Adolesc Psychiatr Clin N Am, 31(1), 45-70. https://doi.org/10.1016/j.chc.2021.08.001
18. Liu, S. R., Kia-Keating, M., Nylund-Gibson, K., & Barnett, M. L. (2020). Co-occurring youth profiles of adverse childhood experiences and protective factors: Associations with health, resilience, and racial disparities. *American journal of community psychology, 65*(1-2), 173-186. https://onlinelibrary.wiley.com/doi/10.1002/ajcp.12387
19. Bellis, M. A., Hughes, K., Ford, K., Madden, H. C. E., Glendinning, F., & Wood, S. (2022). Associations between adverse childhood experiences, attitudes towards COVID-19 restrictions and vaccine hesitancy: a cross-sectional study. BMJ Open, 12(2), e053915. https://doi.org/10.1136/bmjopen-2021-053915
20. Nabors, L. A., Graves, M. L., Fiser, K. A., & Merianos, A. L. (2021). Family resilience and health among adolescents with asthma only, anxiety only, and comorbid asthma and anxiety. *J Asthma, 58*(12), 1599-1609. https://doi.org/10.1080/02770903.2020.1817939
21. Merrick, M. T., Ford, D. C., Ports, K. A., & Guinn, A. S. (2018). Prevalence of Adverse Childhood Experiences From the 2011-2014 Behavioral Risk Factor Surveillance System in 23 States. *JAMA Pediatr, 172*(11), 1038-1044. https://doi.org/10.1001/jamapediatrics.2018.2537
22. Bethell, C. D., Gombojav, N., & Whitaker, R. C. (2019). Family Resilience And Connection Promote Flourishing Among US Children, Even Amid Adversity. *Health Aff (Millwood), 38*(5), 729-737. https://doi.org/10.1377/hlthaff.2018.05425
23. Sege, R. D., & Harper Browne, C. (2017). Responding to ACEs With HOPE: Health Outcomes From Positive Experiences. *Acad Pediatr, 17*(7S), S79-S85. https://doi.org/10.1016/j.acap.2017.03.007
24. Liebenberg, L., Ungar, M., & LeBlanc, J. C. (2013). The CYRM-12: A brief measure of resilience. *Canadian Journal of Public Health, 104*(2). https://doi.org/10.1007/bf03405676
25. Dietz, E. (2017). A New Framework for Addressing Adverse Childhood and Community Experiences: The Building Community Resilience Model.
26. Benzies, K., & Mychasiuk, R. (2009). Fostering family resiliency: a review of the key protective factors. *Child & Family Social Work, 14*(1), 103-114. https://doi.org/10.1111/j.1365-2206.2008.00586.x

World Health Organization

Adverse Childhood Experiences International Questionnaire (ACE-IQ)

28 January 2020 | Publication

Overview

Adverse Childhood Experiences (ACE) refer to some of the most intensive and frequently occurring sources of stress that children may suffer early in life. Such experiences include multiple types of abuse; neglect; violence between parents or caregivers; other kinds of serious household dysfunction such as alcohol and substance abuse; and peer, community and collective violence.

It has been shown that considerable and prolonged stress in childhood has life-long consequences for a person's health and well-being. It can disrupt early brain development and compromise functioning of the nervous and immune systems. In addition because of the behaviours adopted by some people who have faced ACEs, such stress can lead to serious problems such as alcoholism, depression, eating disorders, unsafe sex, HIV/AIDS, heart disease, cancer, and other chronic diseases.

The ACE International Questionnaire (ACE-IQ) is intended to measure ACEs in all countries, and the association between them and risk behaviours in later life. ACE-IQ is designed for administration to people aged 18 years and older. Questions cover family dysfunction; physical, sexual and emotional abuse and neglect by parents or caregivers; peer violence; witnessing community violence, and exposure to collective violence.

Findings from ACE-IQ surveys can be of great value in advocating for increased investments to reduce childhood adversities, and to inform the design of prevention programmes. Researchers are encouraged to use the ACE-IQ materials on this site, and in doing so to reference WHO as the source, using the following citation:
World Health Organization. Adverse Childhood Experiences International Questionnaire. In Adverse Childhood Experiences International Questionnaire (ACE-IQ). [website]: Geneva: WHO, 2018.

Introductory materials

Questionnaire

Questionnaire in Portuguese

Guide to administering ACE-IQ

- Question-by-question document
- Interviewer's guide

Data management

- Guidance for analyzing ACE-IQ
- Questionnaire with data entry coding

Supporting documents

- Ethical approval overview
- Ethical approval form
- Participant information sheet
- Consent form

Participant Identification Number: [ ][ ] [ ][ ] [ ][ ]

Adverse Childhood Experiences International Questionnaire (ACE-IQ)

0	DEMOGRAPHIC INFORMATION	
0.1 [C1]	Sex (*Record Male / Female as observed)*	Male
		Female
0.2 [C2]	What is your date of birth?	Day [ ][ ] Month [ ][ ] Year [ ][ ][ ][ ]
		Unknown *(Go to Q.C3)*
0.3 [C3]	How old are you?	[ ][ ]
0.4 [C4]	What is your [*insert relevant ethnic group / racial group / cultural group / others*] background?	[*Locally defined*]
		[*Locally defined*]
		[*Locally defined*]
		Refused
0.5 [C5]	What is the highest level of education you have completed?	No formal schooling
		Less than primary school
		Primary school completed
		Secondary/High school completed
		College/University completed
		Post graduate degree
		Refused
0.6 [C6]	Which of the following best describes your main work status over the last 12 months?	Government employee
		Non-government employee
		Self-employed
		Non-paid
		Student
		Homemaker
		Retired
		Unemployed (able to work)
		Unemployed (unable to work)
		Refused
0.7 [C7]	What is your civic status?	Married *(Go to Q.M2)*
		Living as couple
		Divorced or separated
		Single
		Widowed *(Go to Q.M2)*
		Other
		Refused
1	**MARRIAGE**	
1.1 [M1]	Have you ever been married?	Yes
		No *(Go to Q.M5)*
		Refused
1.2 [M2]	At what age were you first married?	Age [ ][ ]
		Refused
1.3 [M3]	At the time of your first marriage did you yourself choose your husband/wife?	Yes *(Go to Q.M5)*
		No
		Don't know / Not sure
		Refused
1.4 [M4]	At the time of your first marriage if you did not choose your husband/wife yourself, did you give your consent to the choice?	Yes
		No
		Refused
1.5 [M5]	If you are a mother or father what was your age when your first child was born?	Age [ ][ ]
		Not applicable
		Refused

2	RELATIONSHIP WITH PARENTS/GUARDIANS	
	When you were growing up, during the first 18 years of your life . . .	
2.1 [P1]	Did your parents/guardians understand your problems and worries?	Always Most of the time Sometimes Rarely Never Refused
2.2 [P2]	Did your parents/guardians **really** know what you were doing with your free time when you were not at school or work?	Always Most of the time Sometimes Rarely Never Refused
3		
3.1 [P3]	How often did your parents/guardians **not** give you enough food even when they could easily have done so?	Many times A few times Once Never Refused
3.2 [P4]	Were your parents/guardians too drunk or intoxicated by drugs to take care of you?	Many times A few times Once Never Refused
3.3 [P5]	How often did your parents/guardians **not** send you to school even when it was available?	Many times A few times Once Never Refused
4	FAMILY ENVIRONMENT	
	When you were growing up, during the first 18 years of your life . . .	
4.1 [F1]	Did you live with a household member who was a problem drinker or alcoholic, or misused street or prescription drugs?	Yes No Refused
4.2 [F2]	Did you live with a household member who was depressed, mentally ill or suicidal?	Yes No Refused
4.3 [F3]	Did you live with a household member who was ever sent to jail or prison?	Yes No Refused
4.4 [F4]	Were your parents ever separated or divorced?	Yes No Not applicable Refused
4.5 [F5]	Did your mother, father or guardian die?	Yes No Don't know / Not sure Refused

These next questions are about certain things you may actually have heard or seen IN YOUR HOME. These are things that may have been done to another household member but not necessarily to you.

When you were growing up, during the first 18 years of your life . . .		
4.6 [F6]	Did you see or hear a parent or household member in your home being yelled at, screamed at, sworn at, insulted or humiliated?	Many times A few times Once Never Refused
4.7 [F7]	Did you see or hear a parent or household member in your home being slapped, kicked, punched or beaten up?	Many times A few times Once Never Refused
4.8 [F8]	Did you see or hear a parent or household member in your home being hit or cut with an object, such as a stick (or cane), bottle, club, knife, whip etc.?	Many times A few times Once Never Refused
These next questions are about certain things YOU may have experienced. **When you were growing up, during the first 18 years of your life . . .**		
5		
5.1 [A1]	Did a parent, guardian or other household member yell, scream or swear at you, insult or humiliate you?	Many times A few times Once Never Refused
5.2 [A2]	Did a parent, guardian or other household member threaten to, or actually, abandon you or throw you out of the house?	Many times A few times Once Never Refused
5.3 [A3]	Did a parent, guardian or other household member spank, slap, kick, punch or beat you up?	Many times A few times Once Never Refused
5.4 [A4]	Did a parent, guardian or other household member hit or cut you with an object, such as a stick (or cane), bottle, club, knife, whip etc?	Many times A few times Once Never Refused
5.5 [A5]	Did someone touch or fondle you in a sexual way when you did not want them to?	Many times A few times Once Never Refused
5.6 [A6]	Did someone make you touch their body in a sexual way when you did not want them to?	Many times A few times Once Never Refused
5.7 [A7]	Did someone attempt oral, anal, or vaginal intercourse with you when you did not want them to?	Many times A few times Once

		Never
		Refused
5.8 [A8]	Did someone actually have oral, anal, or vaginal intercourse with you when you did not want them to?	Many times
		A few times
		Once
		Never
		Refused
6	**PEER VIOLENCE**	
	These next questions are about BEING BULLIED when you were growing up. Bullying is when a young person or group of young people say or do bad and unpleasant things to another young person. It is also bullying when a young person is teased a lot in an unpleasant way or when a young person is left out of things on purpose. It is not bullying when two young people of about the same strength or power argue or fight or when teasing is done in a friendly and fun way. **When you were growing up, during the first 18 years of your life . . .**	
6.1 [V1]	How often were you bullied?	Many times
		A few times
		Once
		Never *(Go to Q.V3)*
		Refused
6.2 [V2]	How were you bullied most often?	I was hit, kicked, pushed, shoved around, or locked indoors
		I was made fun of because of my race, nationality or colour
		I was made fun of because of my religion
		I was made fun of with sexual jokes, comments, or gestures
		I was left out of activities on purpose or completely ignored
		I was made fun of because of how my body or face looked
		I was bullied in some other way
		Refused
	This next question is about PHYSICAL FIGHTS. A physical fight occurs when two young people of about the same strength or power choose to fight each other. **When you were growing up, during the first 18 years of your life . . .**	
6.3 [V3]	How often were you in a physical fight?	Many times
		A few times
		Once
		Never
		Refused
7	**WITNESSING COMMUNITY VIOLENCE**	
	These next questions are about how often, when you were a child, YOU may have seen or heard certain things in your NEIGHBOURHOOD OR COMMUNITY (not in your home or on TV, movies, or the radio). **When you were growing up, during the first 18 years of your life . . .**	
7.1 [V4]	Did you see or hear someone being beaten up in real life?	Many times
		A few times
		Once
		Never
		Refused
7.2	Did you see or hear someone being stabbed	Many times

[V5]	or shot in real life?	A few times
		Once
		Never
		Refused
7.3 [V6]	Did you see or hear someone being threatened with a knife or gun in real life?	Many times
		A few times
		Once
		Never
		Refused
8	**EXPOSURE TO WAR/COLLECTIVE VIOLENCE**	
	These questions are about whether YOU did or did not experience any of the following events when you were a child. The events are all to do with collective violence, including wars, terrorism, political or ethnic conflicts, genocide, repression, disappearances, torture and organized violent crime such as banditry and gang warfare. **When you were growing up, during the first 18 years of your life . . .**	
8.1 [V7]	Were you forced to go and live in another place due to any of these events?	Many times
		A few times
		Once
		Never
		Refused
8.2 [V8]	Did you experience the deliberate destruction of your home due to any of these events?	Many times
		A few times
		Once
		Never
		Refused
8.3 [V9]	Were you beaten up by soldiers, police, militia, or gangs?	Many times
		A few times
		Once
		Never
		Refused
8.4 [V10]	Was a family member or friend killed or beaten up by soldiers, police, militia, or gangs?	Many times
		A few times
		Once
		Never
		Refused

https://neurosciencenews.com/neurodevelopment-violent-neighborhoods-25647

Neuroscience News.com

Neuroscience News.com

The Impact of Violent Neighborhoods on Brain Development

Featured · Neuroscience · Psychology · February 22, 2024

Summary: Children living in violent neighborhoods exhibit increased amygdala reactivity, signaling heightened sensitivity to threats, which can affect mental health and socioemotional functioning. However, nurturing parenting can protect against these adverse effects, reducing exposure to community violence and its impact on the brain.

The study involved functional MRI scans of 708 children and teens, demonstrating that supportive parental relationships can act as a buffer against the negative influences of environmental stressors. This research underscores the crucial role of parental support in fostering resilience among youth facing neighborhood adversity.

Key Facts:

1. **Increased Amygdala Reactivity**: Children in violent neighborhoods show heightened amygdala responses to threatening stimuli, indicating increased stress sensitivity.

2. **Protective Role of Nurturing Parents:** Supportive parenting practices can shield children from the detrimental effects of community violence on brain development and mental health.
3. **Structural Solutions Needed:** While nurturing parents can mitigate some effects of neighborhood violence, broader policy efforts are necessary to address the root causes of community disadvantage and violence exposure.

Source: APA

Living in neighborhoods with high levels of violence can affect children's development by changing the way that a part of the brain detects and responds to potential threats, potentially leading to poorer mental health and other negative outcomes, according to research published by the American Psychological Association.

However, nurturing parents can help protect kids against these detrimental effects, according to the study, published in the journal *Developmental Psychology.*

Teens completed a set of surveys that asked about their exposure to community violence, their relationship with their parents and their parents' parenting style. Credit: Neuroscience News

"Decades of research has shown that growing up in neighborhoods with concentrated disadvantage can predict negative academic, behavioral and mental health outcomes in children and teens. And recent research is beginning to show that one way it does that is by impacting the developing brain," said study co-author Luke W. Hyde, PhD, of the University of Michigan.

"However, less is known about how neighborhood disadvantage 'gets under the skin' to impact brain development."

Hyde and his colleagues hypothesized that one way might be through the amygdala, the hub of the brain's stress response system that's involved in socioemotional functioning, threat processing and fear learning.

The amygdala is sensitive to facial expressions, and previous research has found that children who have been abused or neglected by family members, for example, show increased reactivity in the amygdala when looking at faces with negative, fearful or neutral expressions.

To study whether exposure to neighborhood violence might also affect children's amygdala reactivity, the researchers analyzed data from 708 children and teens ages 7 to 19, recruited from 354 families enrolled in the Michigan Twins Neurogenetic Study.

Most were from neighborhoods with above-average levels of poverty and disadvantage, as measured by the U.S. Census Bureau. Fifty-four percent of the participants were boys, 78.5% were white, 13% were Black and 8% were other races and ethnicities. The participants lived in a mix of rural, suburban and urban areas in and around Lansing, Michigan.

Teens completed a set of surveys that asked about their exposure to community violence, their relationship with their parents and their parents' parenting style. Participants also had their brains scanned by functional MRI while they looked at faces that were angry, fearful, happy or neutral.

Overall, the researchers found that participants who lived in more disadvantaged neighborhoods reported more exposure to community violence. And participants who reported more exposure to community violence showed higher levels of amygdala reactivity to fearful and angry faces.

The results held true even when controlling for an individual family's income, parental education and other forms of violence exposure in the home, such as harsh parenting and intimate partner violence.

"This makes sense as it's adaptive for adolescents to be more in tune to threats when living in a more dangerous neighborhood," said Hyde.

However, he and his colleagues also found that nurturing parents seemed to be able to break the link between community violence and amygdala reactivity in two ways.

"Despite living in a disadvantaged neighborhood, children with more nurturing and involved parents were not as likely to be exposed to community violence, and for those who were exposed, having a more nurturing parent diminished the impact of violence exposure on the brain," said Gabriela L. Suarez, a graduate student in developmental psychology at the University of Michigan and co-author of the study.

"These findings really highlight how nurturing and involved parents are helping to support their children's success, even in potentially harsh environments, and offer clues as to why some youth are resilient even when facing adversity."

Overall, the researchers said, the study highlights the need for structural solutions to protect children from the negative impact of exposure to community violence. It also points to the ways in which strong, positive parents can promote resilience among children and teens exposed to adversity.

"Parents may be an important buffer against these broader structural inequalities, and thus working with parents may be one way to help protect children — while we also work on policies to reduce the concentration of disadvantage in neighborhoods and the risk for exposure to violence in the community," said co-author Alex Burt, PhD, of Michigan State University.

About this environmental neuroscience and neurodevelopment research news

Author: Lea Winerman

Source: APA

Contact: Lea Winerman – APA

Image: The image is credited to Neuroscience News

Original Research: The findings will appear in *Developmental Psychology*

TAGS

#APA #BRAIN DEVELOPMENT #BRAIN RESEARCH #DEVELOPMENTAL NEUROSCIENCE #ENVIRONMENTAL NEUROSCIENCE #NEUROBIOLOGY #NEURODEVELOPMENT #NEUROSCIENCE #PSYCHOLOGY

Developmental Psychology

ISSN: 0012-1649

https://doi.org/10.1037/dev0001712

Exposure to Community Violence as a Mechanism Linking Neighborhood Disadvantage to Amygdala Reactivity and the Protective Role of Parental Nurturance

Gabriela L. Suarez[1], S. Alexandra Burt[2], Arianna M. Gard[3], Kelly L. Klump[2], and Luke W. Hyde[1, 4]

[1] Department of Psychology, The University of Michigan

[2] Department of Psychology, Michigan State University

[3] Department of Psychology, University of Maryland

[4] Survey Research Center at the Institute for Social Research, The University of Michigan

Emerging literature links neighborhood disadvantage to altered neural function in regions supporting socioemotional and threat processing. Few studies, however, have examined the proximal mechanisms through which neighborhood disadvantage is associated with neural functioning. In a sample of 7- to 19-year-old twins recruited from disadvantaged neighborhoods (354 families, 708 twins; 54.5% boys; 78.5% White, 13.0% Black, 8.5% other racial/ethnic group membership), we found that exposure to community violence was related to increased amygdala reactivity during socioemotional processing and may be one mechanism linking neighborhood disadvantage to amygdala functioning. Importantly, parenting behavior appeared to modulate these effects, such that high parental nurturance buffered the effect of exposure to community violence on amygdala reactivity. These findings elucidate the potential impact of exposure to community violence on brain function and highlight the role parents can play in protecting youth from the neural effects of exposure to adversity.

Public Significance Statement

Although prior studies have primarily focused on family-level adversities, developmental researchers are now paying increased attention to the effect of neighborhood-level adversity on youth brain development. We find that increased exposure to community violence is related to heightened amygdala reactivity to threat and may be a mechanism explaining the link between neighborhood disadvantage and brain function in youth. Further, the study highlights that nurturing parenting can protect children from the risks posed by living in a disadvantaged and dangerous neighborhood.

Keywords: neighborhood disadvantage, community violence, parenting, amygdala reactivity

Supplemental materials: https://doi.org/10.1037/dev0001712.supp

Gabriela L. Suarez https://orcid.org/0000-0002-7220-5860

Luke W. Hyde https://orcid.org/0000-0002-5947-7896

This work was supported by funds from the National Institute of Mental Health of the National Institutes of Health (NIH): UH3MH114249 (Principal Investigators: S. Alexandra Burt and Luke W. Hyde); the Eunice Kennedy Shriver National Institute of Child Health and Human Development of the NIH: R01HD093334 (PIs: S. Alexandra Burt and Luke W. Hyde) and R01HD093334-S1 (Gabriela L. Suarez); the Brain and Behavior Foundation: NARSAD young Investigator Grant (Luke W. Hyde); and the National Science Foundation (NSF): Graduate Research Fellowship (Gabriela L. Suarez). Any opinions, findings, and conclusions or recommendations expressed in this material are those of the authors and do not necessarily reflect the views of the NIH or the NSF. The authors would like to thank the staff of the Twin Study of Behavioral and Emotional Development—Child (TBED-C) and Michigan Twins Neurogenetics Study (MTwiNS) studies for their hard work, and the authors thank the families who participated in TBED-C and MTwiNS for sharing their lives with us. The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this article. All MTwiNS data for the current study will be shared publicly via the National Institute of Mental Health data archive, as mandated in our funding agreement. The study data are publicly available at https://nda.nih.gov/edit_collection.html?id=2818 (see the reference Burt & Hyde, 2017).

Gabriela L. Suarez served as lead for formal analysis, writing–original draft, and writing–review and editing. S. Alexandra Burt served as lead for funding acquisition. Arianna M. Gard served in a supporting role for formal analysis. Luke W. Hyde served as lead for supervision and writing–review and editing, contributed equally to funding acquisition, and served in a supporting role for formal analysis. Gabriela L. Suarez, S. Alexandra Burt, and Luke W. Hyde contributed equally to conceptualization. S. Alexandra Burt, Kelly L. Klump, and Luke W. Hyde contributed equally to project administration and methodology. S. Alexandra Burt and Arianna M. Gard contributed equally to supervision. S. Alexandra Burt, Arianna M. Gard, and Kelly L. Klump contributed equally to writing–review and editing.

Correspondence concerning this article should be addressed to Luke W. Hyde, Department of Psychology, The University of Michigan, 2229 East Hall, 530 Church Street, Ann Arbor, MI 48109, United States. Email: lukehyde@umich.edu

In 2020, approximately 6.4 million children in the United States were living in neighborhoods with poverty rates of 30% or greater (The Annie E. Casey Foundation, 2021). Unfortunately, youth growing up in these disadvantaged neighborhoods are more likely to experience maladaptive outcomes, from psychiatric and behavioral problems to academic difficulties (Aneshensel & Sucoff, 1996; Kohen et al., 2008; Leventhal & Brooks-Gunn, 2000; Sastry, 2012; Xue et al., 2005). The high prevalence of neighborhood disadvantage and the maladaptive outcomes associated with it underscore the need to better understand how neighborhood disadvantage affects development, which can inform public policy to promote positive youth outcomes (National Academies of Sciences, Engineering, and Medicine, 2019). Although a large literature has established how exposure to neighborhood disadvantage predicts maladaptive academic, behavioral, and psychiatric outcomes, less is known about how neighborhood disadvantage "gets under the skin" to impact brain development.

Neighborhood disadvantage may influence development via the impact of stress on the structure and function of brain regions involved in socioemotional functioning, threat processing, and fear learning (Hyde et al., 2020). The amygdala, the hub of the stress response system, is highly sensitive to socioemotional faces, especially those signaling threat, uncertainty, or other salient information (Fusar-Poli et al., 2009; Shi et al., 2013; Tottenham & Sheridan, 2010). Adversity, including maltreatment, social deprivation, and poverty, has been linked to amygdala reactivity during socioemotional processing. For example, a meta-analysis found that maltreatment exposure (e.g., abuse, neglect) was associated with heightened amygdala reactivity during emotional face processing (e.g., fear, anger, neutral, sad) among youth (10–18 years) and adults (Hein & Monk, 2017). Previously institutionalized children (aged 9–10) also showed increased amygdala activity during an emotional faces go/no-go task, including fear and neutral facial expressions (Tottenham et al., 2011). Also, childhood poverty has been linked to greater amygdala reactivity in adulthood during the processing of threat-related emotional faces (e.g., fear) compared to happy faces (Javanbakht et al., 2015). In parallel, altered amygdala activation is associated with several related psychiatric outcomes, including depression and antisocial behavior (Etkin et al., 2004; Hyde et al., 2016; Monk, 2008). Though most studies have examined the impact of more proximal stressors (e.g., family poverty, harsh parenting, maltreatment) on amygdala function (Gard, Hein, et al., 2021; Hein & Monk, 2017; Javanbakht et al., 2015; Tottenham et al., 2011), recent work suggests that stressors in the child's broader context, especially neighborhood-level adversity, are also associated with amygdala structure and function (Gard et al., 2017; Gard, Maxwell, et al., 2021; Whittle et al., 2017). Moreover, these associations appear to persist even when accounting for family-level experiences and resources. Thus, these studies provocatively suggest that where a child lives can impact their developing brain (Hyde et al., 2022). Critically, however, these studies do not illuminate how living in a disadvantaged neighborhood acts to alter brain development.

Disadvantaged neighborhoods confer increased risks for children and adolescents beyond family-level factors by increasing their exposure to violent crime (Evans, 2004; Hyde et al., 2022). Concentrated neighborhood disadvantage undermines social and institutional controls of local crime and violence putting youth at increased risk for exposure (Morenoff et al., 2001; Sampson et al., 1997; Sampson & Groves, 1989). An alarming 68% of children in the United States have reported direct or indirect exposure to at least one form of violence within a year (Finkelhor et al., 2015), and youth growing up in disadvantaged neighborhoods have more than double the exposure to community violence (Stein et al., 2003). These high rates of violence exposure are troubling, particularly considering the link between exposure to community violence and multiple maladaptive outcomes for youth, including internalizing (e.g., posttraumatic stress disorder and anxiety) and externalizing problems (e.g., antisocial behavior and aggression) (Fowler et al., 2009; Mrug & Windle, 2010; Wilson et al., 2009; Zinzow et al., 2009). Research suggests that exposure to community violence is a consistent mechanism linking neighborhood disadvantage to maladaptive behavioral outcomes; however, few studies have examined whether exposure to community violence is related to amygdala reactivity during socioemotional processing (Aim 1) and no research has examined exposure to community violence as a mechanism linking neighborhood disadvantage to altered amygdala reactivity (Aim 2), primary aims of the current study.

The third core aim of the current study relates the fact that neither exposure to community violence nor neighborhood disadvantage predicts psychopathology or brain development for all youth. Many youth exhibit resilience in the face of adversity (Masten, 2001). What might account for their unexpectedly good outcomes? Parents play a critical role in promoting healthy development for youth in adverse contexts (Luthar, 2006). Aspects of parental nurturance, including warmth, involvement, and parental knowledge and monitoring may help youth avoid exposures to violence in the first place, and also, buffer the effects of violence exposure on mental health outcomes (Luthar & Goldstein, 2004). For example, studies find that youth from families with poor discipline, monitoring, and structure, and lower levels of emotional closeness, communication, and support were exposed to the highest levels of community violence (Gorman-Smith et al., 2004; Matjasko et al., 2013). In contrast, consistent parental monitoring over a 5-year period was associated with a steady decline in adolescent exposure to community violence in high poverty neighborhoods (Spano et al., 2011). Moreover, high levels of parental nurturance, including warmth, closeness, engagement, and support, mitigated the impact of violence exposure on adolescent internalizing and externalizing problems (Ozer et al., 2017); however, no study has examined whether parental nurturance buffers the effect of exposure to community violence on the brain. Numerous studies suggest that high-quality caregiving can exert powerful regulatory influences, including reducing stress, preventing the release of stress hormones, and modulating emotional reactivity and behavior (Caldji et al., 1998; Egliston & Rapee, 2007; Hostinar et al., 2014). Furthermore, the amygdala is part of a complex neural architecture involved in social buffering effects (Eisenberger, 2013), making the amygdala a likely candidate to observe potential parental buffering effects among youth exposed to community violence. Thus, our third aim was to examine whether greater parental nurturance (i.e., warmth, involvement) buffered the associations between neighborhood disadvantage and exposure to community violence, and exposure to community violence and amygdala reactivity.

In the current study, we examined pathways through which neighborhood disadvantage was associated with amygdala reactivity to socioemotional faces in a relatively large sample of youth (aged 7–19 years [94% of youth were age 10–17], $N = 708$ in 354 families), recruited from birth records from neighborhoods with above average levels of

disadvantage. First, we assessed whether exposure to community violence was associated with greater amygdala reactivity to threat (i.e., fearful and angry faces) as our primary aim. Additionally, since recent studies find that amygdala reactivity to neutral facial expressions can also be influenced by neighborhood-level adversities (Gard et al., 2017; Gard, Maxwell, et al., 2021), in exploratory analyses, we also examined associations between exposure to community violence and amygdala reactivity to ambiguity (i.e., neutral faces). Neutral faces can be perceived as hostile or threatening, particularly for individuals exposed to adversity (Gard et al., 2017; Marusak et al., 2017; Pollak et al., 2000). Second, we evaluated exposure to community violence as a potential mechanism linking neighborhood disadvantage to amygdala reactivity during socioemotional processing. Lastly, we examined whether parental nurturance moderated the associations between neighborhood disadvantage and exposure to community violence and violence exposure and amygdala reactivity. We examined these questions during late childhood and adolescence, a key period of brain development (Casey et al., 2019; Somerville et al., 2010) and one in which youth spend greater time in the neighborhood (Smetana et al., 2006). Finally, we controlled for family socioeconomic status (SES), to confirm that results were specific to neighborhood, rather than family-level resources and conducted sensitivity analyses in which we controlled for exposure to violence within the home to assess the specificity of exposure effects within the community. We hypothesized that (a) exposure to community violence would be associated with greater amygdala reactivity to threat, (b) neighborhood disadvantage would be indirectly associated with amygdala reactivity to threat through increased exposure to community violence, and (c) parental nurturance would moderate the pathways from neighborhood disadvantage to exposure to community violence and violence exposure to amygdala reactivity to threat. Lastly, we considered our examination of amygdala reactivity to ambiguity (i.e., neutral faces) to be exploratory and, thus, did not have a priori hypotheses for these analyses.

Method

Participants

Participants were part of the Michigan Twins Neurogenetics Study (MTwiNS), recruited from the Twin Study of Behavioral and Emotional Development—Child (TBED-C), a project within the broader Michigan State University Twin Registry (Burt & Klump, 2019). Using birth records, the TBED-C identified twin families living within 120 miles of East Lansing, Michigan, including urban (e.g., Detroit, Flint, and Lansing), suburban, and rural areas. The study included a population-based sample (528 twin families) with children aged 6–10 years, and an "at-risk" sample (502 twin families) from the same geographic region, but only recruited from neighborhoods with above average levels of poverty (>10.5% of families in the neighborhood living below the poverty line, the mean at study onset; Burt & Klump, 2019). In a follow-up neuroimaging study of the TBED-C, MTwiNS recruited families from the "at-risk" sample, as well as those in the population-based sample that would have met criteria for the at-risk sample (i.e., living in neighborhoods with above average levels of poverty). The current sample included 708 twins in 354 families (54.5% boys; 78.5% White, 13.0% Black, 8.5% other racial/ethnic group membership). Youth were between 7 and 19 years, though most of the sample was between 10 and 17 years ($M_{age} = 14.14$, $SD = 2.24$; 94.2% of the sample was between 10 and 17 years and 83.6% between 12 and 17 years; 48 twin pairs < 12 years; 10 twin pairs > 17 years; Figure S1 in the online supplemental materials). At the MTwiNS wave, 64.1% of twin families lived in neighborhoods with > 10.5% of families living below the poverty line ($M = 20\%$; ranged 0% to 77%). All participants met basic functional magnetic resonance imaging (fMRI) eligibility criteria, such as the absence of metal in their body and willingness to participate in the scanning session (i.e., 557 of 708 twins were eligible for scanning and agreed to scan; Table S1 in the online supplemental materials). Lastly, prior work evaluating power analyses and simulations for moderated mediation analyses suggest that sample sizes between 300 and 500 individuals have sufficient power to detect small effects (Preacher et al., 2007). Since our sample includes more than 300 families and well over 500 individuals, we should be sufficiently powered for the proposed analyses.

Procedure

Youth and their primary caregivers participated in a day-long visit to the University of Michigan (UM), including a 1-hr fMRI scan for each twin at the UM fMRI lab. Twins completed a mock scan and practice versions of the fMRI tasks. Youth were scanned using blood-oxygen-level-dependent (BOLD) fMRI. Families completed a battery of questionnaires, a demographic interview, and were provided lunch and compensated for their time. Twins provided assent and parents provided informed consent for themselves and their children. The study was approved by the UM Institutional Review Board.

Measures

Neighborhood Disadvantage

Neighborhood disadvantage was assessed using the Area Deprivation Index (ADI) at the census block group level (Kind et al., 2014), which measured concentrated neighborhood disadvantage via indicators of neighbors' education, employment, income, and poverty (e.g., home ownership rates, percentage of single-parent households, percentage of families living below the poverty line, percentage of those ≥ 16 years old unemployed). We used ADI scores from the 2015 American Community Survey 5-year estimate, which is a 5-year average of data obtained from 2011 to 2015. Higher ADI scores indicate higher levels of neighborhood disadvantage.

Exposure to Community Violence

Twins completed the child self-report version of the Screen for Adolescent Violence Exposure, assessing the severity of each twin's individual exposure to violence in their school or neighborhood in the past year (Flowers et al., 2000). We used the Indirect Violence frequency subscale for the current study (15 items; $\alpha = .86$), which contains items specifically related to exposure to community violence, including witnessing interpersonal violence (e.g., "Have you seen someone pull a gun on someone else?") or hearing about violent events (e.g., "Have you heard about someone getting badly beat up?"). We excluded one item from the original subscale, "I have seen a grownup hit a kid," as this item is not specifically related to community violence. Higher scores on the

Indirect Violence scale indicate more frequent exposure to violence in the community in the past year.

Parental Nurturance

Twin's perceptions of parenting were assessed using the Parental Environment Questionnaire, a 42-item inventory assessing five factorially derived aspects of the parent–child relationship (Elkins et al., 1997). For the present study, we used the Involvement subscale (12 items; $\alpha = .75$), which contains items assessing the extent to which the parent–child relationship is characterized by communication (e.g., "I talk about my concerns and my experiences with my parent"), closeness (e.g., "My parent and I do not do a lot of things together"), knowledge of the child's activities (e.g., "My parent doesn't know much about how I spend my time"), and support (e.g., "My parent comforts me when I am discouraged or have had a disappointment"). We focused on youth reports, which may be less influenced by social desirability bias, as parents are more motivated to report their parenting and parent–child relationship as more positive than it may be (Weis & Lovejoy, 2002). Higher scores on the Involvement subscale indicate greater twin-reported parental nurturance (i.e., closeness, communication, warmth, and support) within the parent–child relationship.

Socioemotional Face Processing fMRI Task

Amygdala reactivity was assessed using the socioemotional face matching paradigm, consisting of four perceptual face processing blocks interleaved with five sensorimotor control blocks (Hariri et al., 2002; Manuck et al., 2007; Suarez et al., 2022). Participants viewed a trio of faces and selected one of two faces (bottom) identical to a target face (top). Each face processing block included 18 images, balanced for sex and race, all derived from the NimStim standard set of facial affect pictures (Tottenham et al., 2009). Each face processing block consisted of a different emotional facial expression (i.e., anger, fear, happy, neutral), and participants were randomly assigned to one of four different block presentation orders. During the sensorimotor control blocks, participants viewed 12 trios of simple geometric shapes (circles, squares, and triangles) and selected one of two shapes (bottom) identical to a target shape (top). In the face processing blocks, each of the 18 face trios was presented for 2 s with a variable interstimulus interval of 2–6 s, used to minimize habituation and expectancy effects and maximize amygdala reactivity, for a total block length of 98 s. In the sensorimotor control blocks, each of the 12 shape trios was presented for 2 s followed by a fixation cross for 0.5 s, for a total block length of 30 s. An additional 4 s of crosshair presentation followed each block. Total task time was 578 s.

Covariates

Parents reported on their twin's race/ethnicity, gender (1 = *girls*, 0 = *boys*), and age. To control for race/ethnicity, a socially constructed category indexing unequal treatment, exposure, and opportunity in the United States, we coded: 0 = *Black, Asian American, Latino/a, Native American, and other* (i.e., identities most frequently marginalized in the United States and more likely to be exposed to discrimination and structural racism; Pager & Shepherd, 2008) and 1 = *White* (the largest single category). We also controlled for family-level socioeconomic context (family income, parent education) to assess whether findings were specific to neighborhood resources, rather than family resources. Family income was defined via primary caregiver reported annual household gross income including any outside additional sources of income (e.g., government assistance, child support). Income ranged from $4,999 or less (0.6%) to $90,000 or more (38%), and the mean annual household income was $60,000 to $69,999. Education was measured via the primary caregiver's highest level of education. The majority of primary caregivers completed some college (at least 1 year) or specialized training beyond high school (91%) and many were college graduates or had completed a graduate or professional degree (52%). Lastly, in sensitivity analyses, we included additional covariates, including quadratic age and pubertal status, measured using parent report on the Pubertal Development Scale (Carskadon & Acebo, 1993), as well as harsh and inconsistent parenting and interpartner violence. We measured harsh and inconsistent parenting using twin report on the Alabama Parenting Questionnaire (Essau et al., 2006; Frick, 1991). We calculated a mean score for harsh parenting using the six-item inconsistent discipline scale (e.g., "Your parents threaten to punish you and then do not do it") and one item of the corporal punishment scale (e.g., "Your parents yell or scream at you when you have done something wrong") (seven items total). We measured interpartner violence using primary caregiver report on the Conflict Tactics Scale (Straus, 1979; Straus et al., 1996). We calculated a mean score for interpartner violence using items from the violence/physical (i.e., the use of physical force against another person as a means of resolving the conflict) and verbal (i.e., the use of verbal and nonverbal acts, or the use of threats to hurt the other) aggression subscales.

fMRI Data Acquisition and Processing

Each participant was scanned with a general electric Discovery MR750 3T scanner located at the UM fMRI Laboratory (Suarez et al., 2022). To take advantage of improvements in magnetic resonance imaging data acquisition and harmonize our protocol with the adolescent brain cognitive development study (Casey et al., 2018), we altered our acquisition protocol after the first 140 families (i.e., 280 twins). For the first 140 families, one run of 298 volumes was collected for each participant with BOLD functional images acquired via an eight-channel head coil and a reverse spiral sequence (repetition time/echo time = 2,000/30 ms, flip angle = 90°, field of view = 22 cm), covering 43 interleaved oblique slices of 3 mm thickness. High-resolution, T1-weighted spoiled gradient recall images (156, 1-mm-thick slices) were aligned with the anterior commisure-posterior commisure plane, and later used during normalization of the functional images. For the subsequent 214 families (i.e., 428 twins), one run of 730 volumes was collected for each participant in which BOLD functional images were acquired with a 32-channel head coil and a gradient-echo sequence with multiband acquisition (repetition time/echo time = 800/30 ms, flip angle = 52°, field of view = 21.6 cm), covering 742 interleaved axial slices of 2.4-mm thickness. High-resolution, T1-weighted spoiled gradient recall images (208, 1-mm-thick slices) were aligned with the anterior commisure-posterior commisure plane and used during normalization of the functional images. For both acquisition sequences, BOLD functional images encompassed the entire cerebrum and most of the cerebellum to maximize coverage of limbic structures.

As previously described in this sample (Suarez et al., 2022), functional data for both acquisition sequences were preprocessed and analyzed using Statistical Parametric Mapping Version 12 (SPM12;

Wellcome Trust Centre, London, United Kingdom), with postprocessing control for artifacts using the Artifact Detection Tools (ART) software package (https://www.nitrc.org/projects/artifact_detect/). Furthermore, participants with low amygdala coverage (<90% signal coverage), low task performance (<70% accuracy), and >5% motion outliers identified using ART were excluded from analyses (Table S1 in the online supplemental materials). Twin characteristics, including gender, race/ethnicity, and age, were associated with missing data on one or more measure; thus, these were included as covariates in all models examined in SPM12 and in the path models in Mplus (see the online supplemental materials).

Experimental Design and Statistical Analyses

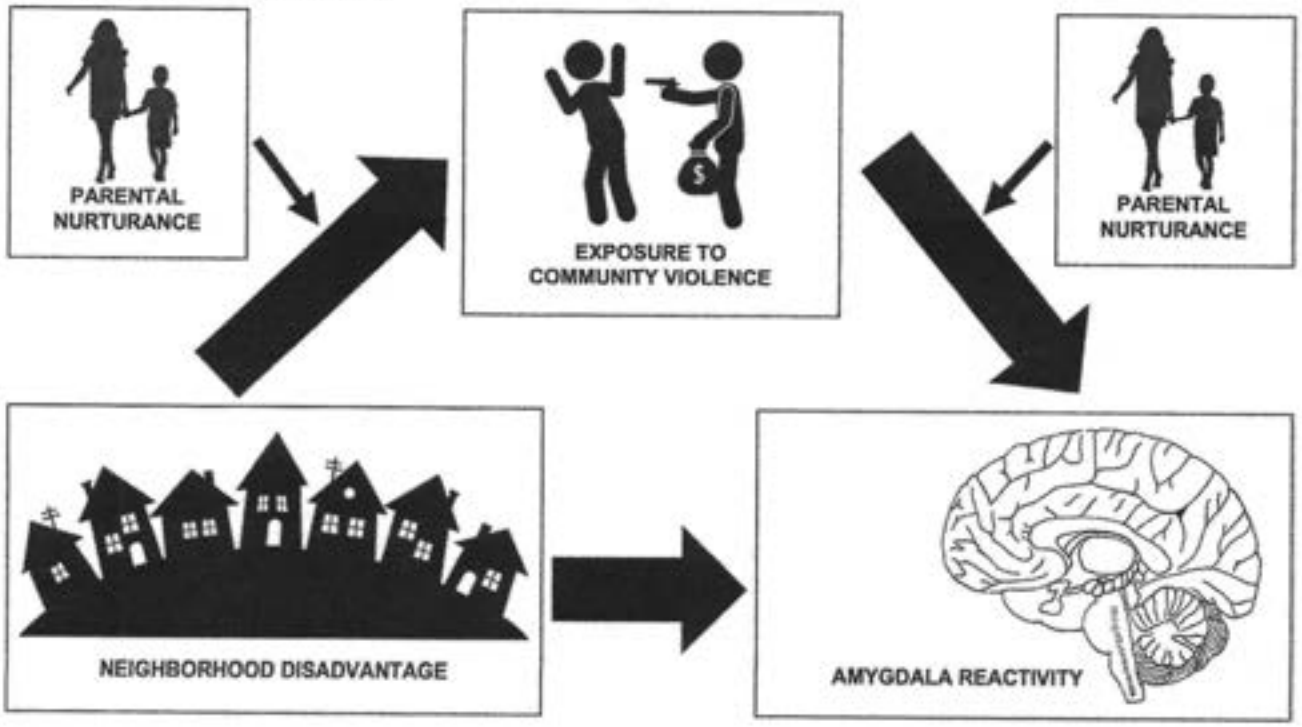
Statistical Analysis

To evaluate the pathways through which neighborhood disadvantage was associated with amygdala reactivity (Figure 1), we extracted amygdala activation with scan acquisition type as a covariate (i.e., multiband vs. spiral acquisition) from the main effects of the socioemotional faces task using an anatomical region of interest (ROI) for each participant to be used in structural equation models in MPlus v.8.1 (Muthén & Muthén, 2011). Consistent with past publications from our laboratory (e.g., Gard et al., 2018), we extracted data from a bilateral amygdala ROI defined structurally using the automated anatomical labeling Atlas definition in the Wake Forest University PickAtlas Tool, Version 1.04 (Maldjian et al., 2003). Importantly, these values were only extracted from the main effects of the task, not from regressions including neighborhood disadvantage or exposure to community violence, and thus, not susceptible to bias via double correlation (Kriegeskorte et al., 2009). Our primary aim was to examine amygdala reactivity to emotional faces relative to a nonfaces condition (shapes), with a primary focus on threat and distress conditions (i.e., fearful and angry faces). However, previous studies suggest that amygdala reactivity to ambiguity (i.e., neutral faces) may also be impacted by neighborhood-level adversities (Gard et al., 2017; Gard, Maxwell, et al., 2021). The unpredictability of ambiguous neutral faces may be interpreted as hostile or threatening, particularly for youth growing up in disadvantaged neighborhoods or exposed to community violence. Therefore, we extracted amygdala activation from the main effects of two contrasts: (a) fearful + angry faces > shapes to evaluate our primary aim and (b) neutral faces > shapes to evaluate our exploratory aim. Extracting amygdala activation for the main effects of these two planned contrasts allows us to evaluate the mean level of activity across all of the voxels in the amygdala ROI that show more activation for the emotional faces condition (i.e., fearful + angry faces and neutral faces) relative to the shapes condition.

In preliminary analyses, we examined zero-order correlations between neighborhood disadvantage, exposure to community violence, and amygdala reactivity to threat and ambiguity. Also, given that participants were from rural, urban, and suburban communities, we examined whether youth from different neighborhood settings differed in the primary study variables, including neighborhood disadvantage, exposure to community violence, parental nurturance, and amygdala reactivity to threat and ambiguity. We used the Department of Defense's definitions for rural, urban, and suburban zip codes created for the Medicare Modernization Act of 2003 (Texas A&M Transportation Institute, 2017). To address our first aim, we computed four multiple regression

Figure 1

Proposed Path Model Linking Neighborhood Disadvantage to Amygdala Reactivity via Exposure to Community Violence and the Moderating Role of Parental Nurturance



models examining exposure to community violence as a predictor of (a) right and (b) left amygdala reactivity to threat (our primary aim), and (c) right and (d) left amygdala reactivity to ambiguity (our exploratory aim). We only proceeded with testing our path models if two conditions were met: First, left or right amygdala reactivity from either the angry + fearful faces > shapes or the neutral face > shapes contrast was correlated with exposure to community violence. Second, neighborhood disadvantage was also significantly correlated with exposure to community violence. That is, if we have significant a and b paths, we proceeded with testing our overall path model (Figure 1). We further tested whether variability in twin-reported parental nurturance moderated pathways from neighborhood disadvantage to exposure to community violence and from exposure to community violence to amygdala reactivity. To evaluate significant moderation effects, we tested a moderated mediation model in which we also examined indirect effects at 1 *SD* above and below the mean to probe the nature of the moderated mediation effect (Preacher et al., 2007). Predictors were grand-mean-centered, and the interaction term was created as the product of the centered predictors outside the model and treated as a manifest variable. All analyses were conducted in Mplus v.8.1. We used the CLUSTER command to account for nesting within families and maximum likelihood estimation with robust standard errors to allow for missing data and protect against distortion of effects from violations of distributional assumptions (Falk, 2018). All models controlled for covariates, including twin demographic characteristics (age, sex, and race/ethnicity), as well as family income and primary caregiver education, in order to assess whether findings were unique to neighborhood-level adversity over and above family-level adversities.

Lastly, in sensitivity analyses we evaluated the strength and specificity of our results. First, in exploratory analyses, we examined the association between exposure to community violence and amygdala reactivity to fearful faces > shapes and angry faces > shapes separately in order to determine which type of face may be most important in the association. Second, given the wide age range of our sample, we examined age as a continuous moderator of the paths from neighborhood disadvantage to exposure to community violence and amygdala reactivity and from neighborhood disadvantage to exposure to community violence. Additionally, to focus more narrowly on adolescence, we tested our path model in a subset of participants that were 12- to 17-years-old ($N = 592$). Third, previous work demonstrates that amygdala reactivity to socioemotional faces varies across development (Bloom et al., 2022; Guyer et al., 2008), with some studies finding nonlinear associations and peaks in midadolescence (Hare et al., 2008; Vijayakumar et al., 2019). Also, studies report associations between pubertal development and amygdala reactivity to socioemotional faces (Ferri et al., 2014; Forbes et al., 2011; Moore et al., 2012; Spielberg et al., 2015). Therefore, we also included quadratic age and pubertal status as covariates in sensitivity analyses. Lastly, to examine whether our findings were specific to exposure to community violence and not violence and threat within the home, we examined harsh parenting and interpartner violence as additional covariates.

Functional Data Analysis/Visualization

Because our main analyses treat amygdala reactivity as mean activation across the entire ROI, if we found a significant association between exposure to community violence and amygdala reactivity for one of our planned contrasts, we also visualized the localization of the voxels most strongly related to exposure to community violence in SPM12. As the amygdala is a relatively large brain region made up of hundreds of voxels, this functional data analysis allows us to take a closer look and visualize the specific voxels that are associated with exposure to community violence. The general linear model in SPM12 was used to estimate condition-specific BOLD activation for each individual scan. Individual contrast images were then used in second-level random effects models to determine mean emotion-specific reactivity using one-sample *t*-tests (Gard et al., 2017; Gard, Maxwell, et al., 2021). All analyses were conducted using the most updated cluster correction method (3dttest++) via the 3dClustSim program using analysis of functional neuroimages software Version 16.1.14 (within the amygdala ROI) (Cox, 1996; Cox et al., 2017). We ran regression models within SPM12 (at the group level, across all participants) to examine the associations between exposure to community violence and amygdala reactivity for the contrasts fearful + angry faces > shapes and neutral faces > shapes. Group-level activation was analyzed within the same anatomically defined bilateral amygdala ROI from Wake Forest University PickAtlas, using a voxel-wise threshold of $p < .005$ (which resulted in a cluster threshold of $k = 8$, to achieve a region-wide $p < .05$ corrected for multiple comparison). Our models controlled for twin demographics (i.e., age, sex, race/ethnicity) and scan type (i.e., multiband vs. spiral acquisition).

Transparency and Openness

For the current study, we report all data exclusions and measures in the study, and we follow the American Psychological Association-Style Journal Article Reporting Standards (Kazak, 2018). All data for the current study will be shared publicly via the National Institute of Mental Health Data Archive, as mandated in our funding agreement, and will be publicly available at https://nda.nih.gov/edit_collection.html?id=2818. This study's design and its analysis were not preregistered. Data were analyzed using Mplus (Version 8.1), simple slopes for significant interactions were visualized in RStudio (Version 1.2.1335) with the package interactions (Long, 2022), and functional data analysis was conducted using SPM12 (Version 12). The code behind this analysis has been made publicly available at GitHub https://github.com/gabrielalsuarez/MTwiNS_Exposure_to_Community_Violence.

Results

Preliminary correlations indicated expected (though modest) positive associations between a census-derived measure of neighborhood disadvantage, twin reports of exposure to community violence, and right amygdala reactivity to threat (Table S2 in the online supplemental materials). The very modest correlation between neighborhood disadvantage and right amygdala reactivity to threat ($r = .09$) did not survive correction for multiple comparison. Of the 708 twins, 350 lived in rural neighborhoods (<1,000 people per square mile), 232 in suburban neighborhoods (between 1,000 and 3,000 people per square mile), and 120 in urban neighborhoods (>3,000 people per square mile)—six twins were missing neighborhood classification data. Using one-way analyses of variance, we found that youth living in different neighborhood settings (i.e., urban, rural, and suburban) did not differ in terms of neighborhood disadvantage, $F(2, 680) = 0.71$, $p = .49$, exposure to

community violence, $F(2, 670) = 2.03$, $p = .13$, parental nurturance, $F(2, 611) = 1.57$, $p = .21$, amygdala reactivity to threat, right: $F(2, 496) = 0.01$, $p = .99$; left: $F(2, 496) = 0.52$, $p = .60$, or amygdala reactivity to ambiguity, right: $F(2, 496) = 0.25$, $p = .78$; left: $F(2, 496) = 0.64$, $p = .53$.

Youth Exposed to More Community Violence Exhibit Greater Right Amygdala Reactivity to Threat

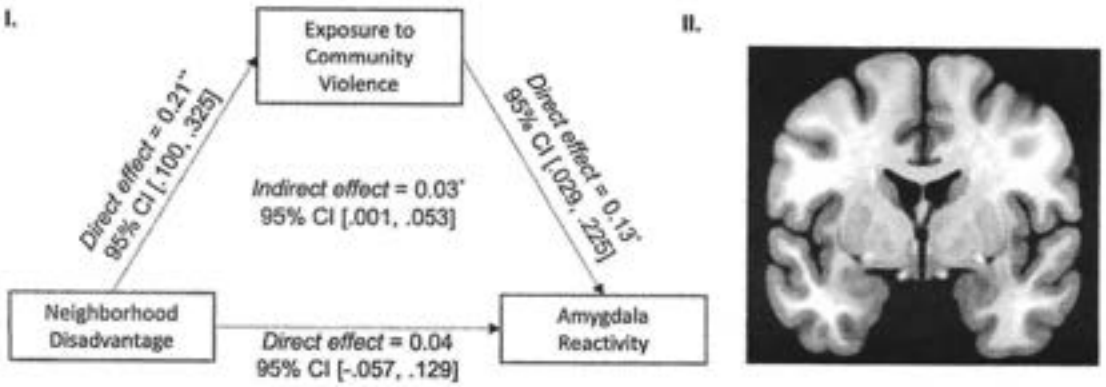
Accounting for twin demographic characteristics (i.e., age, gender, race/ethnicity) and family SES (i.e., income and primary caregiver education), we found that exposure to community violence was significantly associated with greater right ($\beta = .14$, $B = .14$, 95% confidence interval [CI] [.04, .23], $p_{fdr} < .05$) but not left ($\beta = .03$, $B = .03$, 95% CI [−.06, .11]) amygdala reactivity to threat (i.e., angry + fearful faces > shapes; Table S3 in the online supplemental materials). In exploratory analyses, we did not find any associations between exposure to community violence and amygdala reactivity to ambiguity (i.e., neutral faces > shapes; Table S3 in the online supplemental materials). Because our main analyses treat amygdala reactivity as mean activation across the entire ROI, we visualized the voxels most strongly related to exposure to community violence using SPM12 (Figure 2). Consistent with our extracted data, exposure to community violence was related to greater right amygdala reactivity to threat—peak centered within right amygdala: $(x, y, z) = (28, 4, -20)$; T extent threshold = 3.40; k cluster size = 8 (Figure 2). Exploratory analyses aimed at examining the specificity of activation to fearful versus angry faces revealed that the effect size of association with fearful faces ($Z = 3.95$) was larger than angry faces ($Z = 2.94$), suggesting potential specificity to fearful faces with a directed eye gaze. Lastly, in the supplement, using extracted data, we provide the correlations between left and right amygdala reactivity to fearful faces > shapes and angry faces > shapes in order to show how related amygdala reactivity was for these two contrasts (Table S6 in the online supplemental materials). Amygdala reactivity to fearful and angry faces was only modestly correlated (right: $r = .09$; left: $r = .08$).

Neighborhood Disadvantage Predicts Amygdala Reactivity to Threat Indirectly via Exposure to Community Violence

Using path modeling that accounted for the nesting of twins within families and all covariates (age, gender, race/ethnicity, family income, and primary caregiver education), we found that neighborhood disadvantage predicted exposure to community violence ($\beta = .21$, $p < .001$), which in turn predicted right amygdala reactivity to threat ($\beta = .13$, $p = .011$). Importantly, we found evidence for an indirect effect in which neighborhood disadvantage predicted amygdala reactivity to threat via exposure to community violence ($\alpha\beta = .027$, $SE = .013$, $p = .042$, bootstrapped 95% CI [.001, .053]; Figure 2 and Table S4 in the online supplemental materials). That is, twins living in more disadvantaged neighborhoods were more exposed to community violence, and those who were more exposed showed heightened right amygdala reactivity to threat. There was no significant direct effect of neighborhood disadvantage on amygdala reactivity to threat. In supplemental analyses, age did not moderate the paths from neighborhood disadvantage to exposure to community violence or amygdala reactivity to threat or from exposure to community violence to amygdala reactivity to threat (Table S7 in the online supplemental materials). Additionally, in order to focus more narrowly on the adolescent period, we examined the same mediation model including only adolescents (12- to 17-year-olds; $N = 592$), which made up a majority of the sample. The results all remained significant in the restricted sample of adolescents (Table S8 in the online supplemental materials).

Figure 2

Neighborhood Disadvantage Is Indirectly Associated With Amygdala Reactivity via Increased Exposure to Community Violence



Note. (I) Path results for the mediation model controlling for twin demographic characteristics, including gender (1 = *girls*, 0 = *boys*), race/ethnicity (1 = *White*, 0 = *Non-White*), and age, and family SES (i.e., family income and primary caregiver education). (II) Visualization of a significant cluster in SPM controlling for twin demographic characteristics and scan type (i.e., multiband vs. spiral). Exposure to community violence is associated with right amygdala reactivity to the contrast fearful and angry faces > shapes: $(x, y, z) = (28, 4, -20)$, $T = 3.40$, $k = 8$. CI = confidence interval; SES = socioeconomic status; SPM = statistical parametric mapping. See the online article for the color version of this figure.

* $p < .05$. ** $p < .001$.

Parental Nurturance Moderates the Pathways From Neighborhood Disadvantage to Amygdala Reactivity via Exposure to Community Violence

To examine the impact of parental nurturance on twin-reported violence exposure and amygdala reactivity, we conducted a moderated mediation analysis. First, as expected, neighborhood disadvantage was only associated with greater exposure to community violence at low (i.e., −1 *SD* below the mean) and mean levels of parental nurturance ($\beta = .32$, $B = .36$, $p = .001$ and $\beta = .18$, $B = .20$, $p = .003$, respectively; Figure 3). Neighborhood disadvantage was not associated with exposure to community violence exposure at high levels (i.e., +1 *SD* above the mean) of parental nurturance ($\beta = .04$, $B = .05$, $p = .521$). Second, results revealed that exposure to community violence was associated with heightened right amygdala reactivity to threat only at low levels of parental nurturance ($\beta = .21$, $B = .17$, $p = .002$; Figure 3). Exposure to community violence was not associated with amygdala reactivity at high and mean levels of parental nurturance ($\beta = -.04$, $B = -.03$, $p = .68$ and $\beta = .08$, $B = .07$, $p = .22$, respectively). Importantly, when testing a moderated mediation model, the indirect pathway linking neighborhood disadvantage to amygdala reactivity via exposure to community violence was also conditional on parental nurturance as indicated by a significant indirect effect at low, but not high or average, levels of parental nurturance (Table 1 and Table S5 in the online supplemental materials).

Sensitivity Analyses

The results reported in the mediation and moderated mediation models were robust to multiple sensitivity analyses. First, our findings remained when controlling for quadratic age and pubertal status (Tables S9 and S10 in the online supplemental materials): In the mediation model, the same path results and indirect effect remained significant (Table S9 in the online supplemental materials), and within the moderated mediation model, the same interactions and conditional indirect effect at low, but not high or average, levels of parental nurturance all remained significant when controlling for quadratic age and pubertal status (Table S10 in the online supplemental materials). Second, our findings appear unique to exposure to violence in the neighborhood over and above threatening and violent experiences within the home, as controlling for harsh parenting and interparental violence did not change the pattern of results (Tables S11 and S12 in the online supplemental materials).

Discussion

In the current study, we examined associations between exposure to community violence and amygdala reactivity to threat, whether exposure to community violence serves as a mechanism linking neighborhood disadvantage to amygdala reactivity to threat, and whether nurturing parenting could modulate these associations in a large sample of adolescent twins residing in disadvantaged neighborhoods. Importantly, we investigated these questions during late childhood and adolescence, a key period of youth brain development (Casey et al., 2019; Somerville et al., 2010) and increased time spent in the neighborhood (Smetana et al., 2006). Youth exposed to greater community violence displayed greater right amygdala reactivity to threat. Moreover, greater neighborhood disadvantage was associated with amygdala reactivity indirectly via greater exposure to community violence, suggesting that exposure to community violence may be one route through which living in a disadvantaged neighborhood impacts brain development. Importantly, however, parental nurturance buffered these effects, such that living in a disadvantaged neighborhood was not associated with increased exposure to community violence for youth with highly nurturing parents. Moreover, for youth who were exposed, high parental nurturance decreased the link between exposure to community violence and heightened amygdala reactivity. These strength-based results suggest that parents can buffer the adverse effects of exposure to community violence on their child's brain.

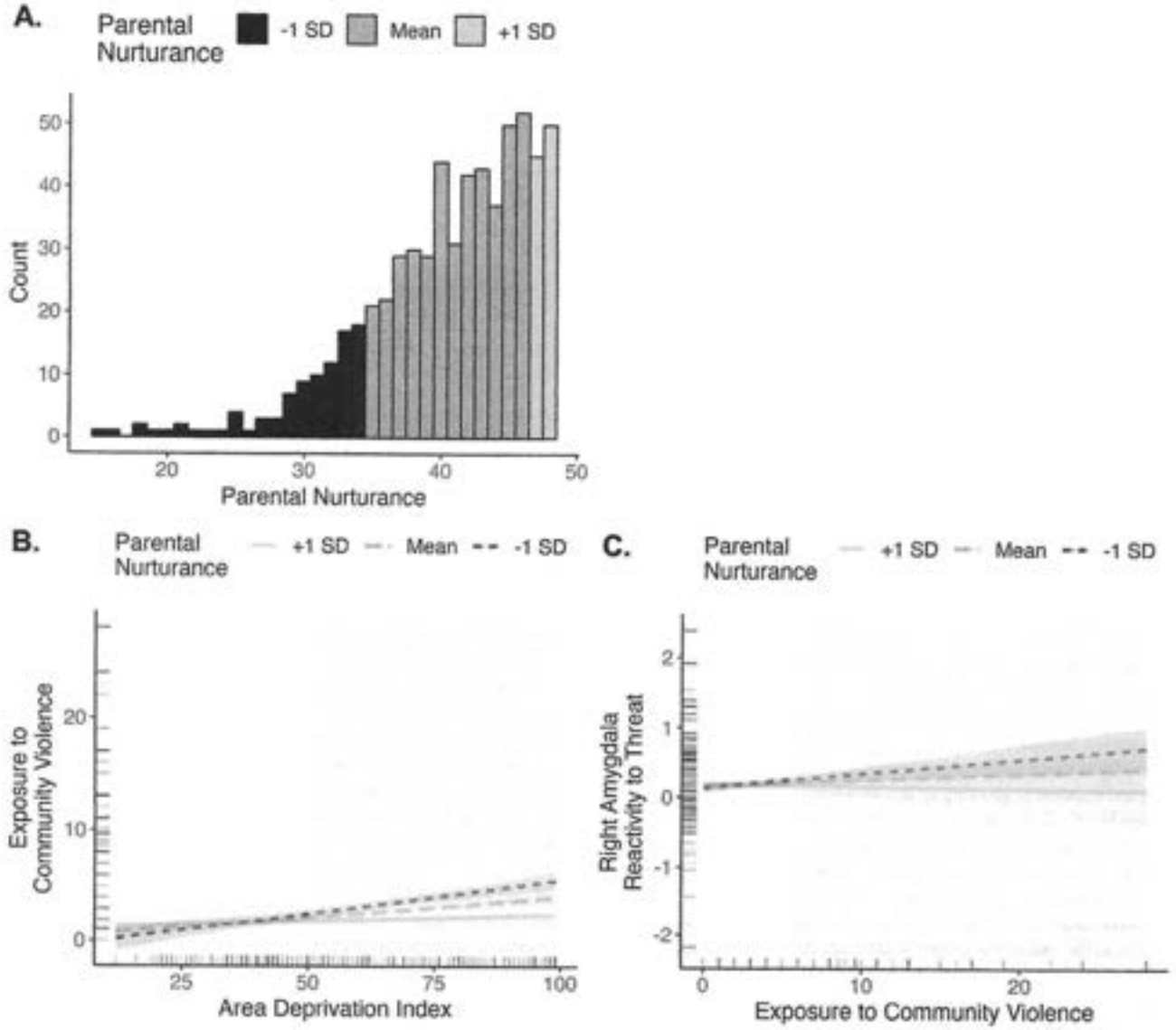
Exposure to Community Violence and Amygdala Reactivity to Threat

Our results provide important evidence that exposure to community violence is associated with greater right amygdala reactivity to threat. Our exploratory analysis did not reveal associations between exposure to community violence and amygdala reactivity to ambiguity, suggesting that effects may be more specific to faces signaling threat and distress. Interestingly, the findings were also specific to the right amygdala. The right amygdala automatically activates in response to an emotional stimuli and is thought to play a role in dynamically detecting the emotional significance of a stimulus (Glüscher & Adolphs, 2003; Wright et al., 2001). Moreover, dimensional models of adversity posit that the right amygdala may have a more important role in detecting and responding to threatening or hazardous experiences and situations, whereas the left amygdala may be more sensitive to conditions of deprivation (e.g., absence of support, nurturance, or cognitive/social stimulation) (Teicher & Khan, 2019). Overall, our findings fit with a wealth of literature demonstrating the negative behavioral effects of exposure to community violence (Cuartas & Leventhal, 2020; Fowler et al., 2009; Mrug & Windle, 2010; Wilson et al., 2009; Zinzow et al., 2009). Moreover, our results align with dimensional models of adversity, which posit that threat-related adversities (e.g., physical and sexual abuse, witnessing domestic violence) will selectively impact neural regions and systems, such as the amygdala and corticolimbic circuit, which are involved in threat detection and learning, salience processing, and emotion regulation (Sheridan & McLaughlin, 2014). Exposure to community violence represents a threat of harm and is therefore expected to impact amygdala sensitivity to threat. Studies consistently report heightened amygdala reactivity to threat-related stimuli in children and adolescents who were exposed to violence, threat, and hostile conditions (McLaughlin et al., 2019), and our findings extend this work to exposure to community violence.

Our findings further align with prior work linking increased exposure to community violence to greater amygdala reactivity to threat cues in children and adolescents (van Rooij et al., 2020; White et al., 2019). Consistent with our results, White et al. (2019) similarly found that exposure to community violence was associated with right amygdala reactivity. However, these studies found associations with different fMRI tasks using different emotional faces. van Rooij et al. (2020) found that greater violence exposure was associated with increased bilateral amygdala activity during an emotional go/no-go task with alternating runs of fear as the target face and neutral as the distractor face, and vice versa, whereas White et al. (2019) used a morphed faces task, which measured BOLD response modulated by angry face intensity (and did not test fearful faces).

Figure 3

Nurturing Parenting Buffers Youth From Exposure to Community Violence and Its Neural Correlates



Note. We visualized the interactions from our moderated mediation model in RStudio (Version 1.2.1335). These figures are for visualization purposes only and may slightly differ from results using Mplus due to differences in the way R handles missing data and the nesting of children within families. Low parental nurturance was defined as −1 *SD* and high parental nurturance as +1 *SD* from the mean. The range of observed values of parental nurturance is [15.00, 48.00]. The shaded rectangle represents the region of statistical significance for the interaction and the rug plots display individual cases for the X and Y variables. (A) Histogram of parental nurturance with the bars color coded for −1 *SD* below the mean, between ± 1 *SD*, and +1 *SD* above the mean. (B) Simple slopes for the interaction between neighborhood disadvantage at different levels of parental nurturance predicting exposure to community violence. The slope is significant when the level of parental nurturance is outside of the interval [45.43, 62.52]. Forty-seven percentage of twins reported their parent's nurturance was below this interval and lived in neighborhoods where the Area Deprivation Index was above 50.12. (C) Simple slopes for the interaction between exposure to community violence at different levels of parental nurturance predicting right amygdala reactivity to threat. The slope is significant when the level of parental nurturance is outside of the interval [38.96, 76.72]. Six percentage of twins reported their parent's nurturance was below this interval and reported a frequency of violence exposure above 5.72. See the online article for the color version of this figure.

These differences in study design are important because emotional faces vary in terms of type or degree of threat or salience. For example, angry faces coupled with direct eye gaze indicates a clear and direct threat, whereas fearful faces with direct eye gaze may indicate an ambiguous or unclear threat in the environment (Adams et al., 2003).

Research on the neurobiological stress response explains how environmental stressors, such as exposure to community violence, can lead

Table 1

High Parental Nurturance Protects Children From Being Exposed to Violence and Buffers the Effects of Exposure to Community Violence on the Amygdala

Outcome/predictors (path)	β	*B*	*SE*	*p*	LLCI	ULCI
Violence exposure						
Neighborhood disadvantage (a1)	.202	.203	.056	.000**	.094	.312
Parenting (a2)	−.155	−.155	.050	.002*	−.254	−.056
Parenting × Neighborhood Disadvantage (a3)	−.139	−.155	.076	.041*	−.304	−.006
Amygdala reactivity to threat						
Violence exposure (b1)	.066	.066	.054	.218	−.039	.171
Parenting (b2)	−.011	−.011	.043	.789	−.095	.072
Parenting × Violence Exposure (b3)	−.127	−.100	.042	.017*	−.183	−.018
Neighborhood disadvantage (c1′)	.030	.031	.048	.525	−.064	.125
Conditional indirect effects						
Low parental nurturance	.066	.060	.022	.007**	.016	.103
Mean parental nurturance	.013	.013	.011	.233	−.009	.035
High parental nurturance	−.004	−.002	.004	.681	−.010	.006

Note. Results of the moderated mediation analysis, evaluating the moderating effect of parental nurturance on youth exposure to community violence and amygdala reactivity to threat controlling for twin demographic characteristics, including gender (1 = *girls*, 0 = *boys*), race/ethnicity (1 = *White*, 0 = *Non-White*), and age, and family SES, including family income and primary caregiver education. β = standardized estimate; *B* = unstandardized estimate; LLCI = lower limit of 95% confidence interval; ULCI = upper limit of 95% confidence interval; SES = socioeconomic status.
* $p < .05$. ** $p < .001$.

to alterations in stress signaling hormones (e.g., cortisol), which, in turn, can target brain regions with high concentrations of stress hormone receptors (e.g., the amygdala), potentially shaping functioning within these regions over time (Gunnar & Quevedo, 2006; Tottenham & Sheridan, 2010). A positive correlation between exposure to community violence and amygdala reactivity to threat may reflect that youth exposed to higher levels of community violence exhibit an appropriate level of increased vigilance and attention toward threatening stimuli (Heissel et al., 2018). Thus, increased amygdala reactivity to threat in this context possibly reflects an adaptive neurobiological response to growing up in a disadvantaged neighborhood with higher levels of violent crime (Varnum & Kitayama, 2017).

It should be noted that we did not examine direct exposure to community violence in the current study, which is not uncommon among youth growing up in disadvantaged neighborhoods. We may have observed larger effects among youth who experienced direct victimization, as the individual victim is most directly impacted by a violent incident. However, sociologists argue that the impact is not limited to the victim (Sharkey, 2018), but also extends to those who were present and watched the violence unfold and those who heard about the event. Also, Sharkey (2018) discusses that the impacts may extend even further, such that community violence exposes youth to dangerous situations and violent residential environments, which can alter an individual's decision making, routines, functioning, and behavior without youth ever being victimized themselves or directly witnessing ongoing violence. Therefore, future studies may consider measuring exposure to community violence at multiple levels, including both direct and indirect victimization and a broader conceptualization of violence exposure, to assess how results may differ.

Exposure to Community Violence as a Mechanism Linking Neighborhood Disadvantage to Neural Function

Identifying exposure to community violence as a possible mechanism through which neighborhood disadvantage is linked to amygdala reactivity to threat is an important contribution of the current study. Youth living in neighborhoods with greater disadvantage reported more frequent exposure to community violence, and those reporting higher exposure exhibited greater amygdala reactivity to threat. Importantly, adjusting for family-level SES (family income and primary caregiver education) and violence within the home (harsh parenting and interpartner violence), we found that the indirect effect of exposure to community violence was significant, supporting the notion that disadvantaged neighborhoods can confer risk via increased exposure to a multitude of stressors, including greater exposure to violent crime. Surprisingly, although recent studies have reported links between neighborhood disadvantage and structural and functional changes within the amygdala and the broader corticolimbic circuit (Bell et al., 2021; Gard, Maxwell, et al., 2021; Ramphal et al., 2020; Whittle et al., 2017), we did not find evidence for a strong direct relationship between neighborhood disadvantage and amygdala reactivity in this sample. Although the effects of neighborhood disadvantage were in the expected direction, the effects were relatively small and barely significant in zero-order correlations. In the path models there was no significant direct effect of neighborhood disadvantage on amygdala reactivity. In contrast exposure to community violence appeared to be a much stronger predictor of amygdala reactivity, possibly because it is a more proximal and specific experience. Alternatively, the neural effects of neighborhood disadvantage may be sensitive to developmental timing, whereas the effects of violence exposure are not. Supporting this notion, a recent study utilizing two diverse samples of U.S. children from low-income families found that neighborhood disadvantage experienced during childhood was more predictive of amygdala reactivity, whereas neighborhood disadvantage experienced during adolescence was more strongly related to prefrontal cortex activation (Gard, Maxwell, et al., 2021). In contrast, in our sample, which mostly covers adolescence, a weak association between neighborhood disadvantage and amygdala reactivity may be due to the developmental stage of our participants and measures of neighborhood disadvantage. In contrast, exposure to community violence appears to be a robust predictor of amygdala reactivity to

threat during this age period. Collectively, these results highlight exposure to community violence as an important mechanism through which neighborhood disadvantage impacts youth brain development. Of course, exposure to community violence is only one of many potential risk factors that are increased in disadvantaged neighborhoods. More research is needed to delineate the many other potential mechanisms (e.g., toxicant exposure, school quality differences) linking neighborhood disadvantage to brain structure and function (Hyde et al., 2022).

Parenting as a Buffer

Another major contribution of this work is in showing that parenting behavior has a buffering impact on the pathway linking neighborhood disadvantage to amygdala reactivity. For youth who reported their parents to be highly nurturing (i.e., warm, supportive, and communicative), living in a disadvantaged neighborhood did not seem to result in increased exposure to community violence, and for those that were exposed, nurturing parenting appeared to decrease the link between exposure to community violence and amygdala reactivity. Presumably, parents helped to guide children away from neighborhood stressors in the first place and then helped them cope with exposures in ways that buffered the effect of these experiences on amygdala function. Our results align with recent studies highlighting the protective effects of nurturing parenting. First, studies find that adolescents are more likely to be exposed to community violence when they experience lower levels of positive parenting, including nurturance, warmth, and support, and involvement and monitoring (Gorman-Smith et al., 2004; Matjasko et al., 2013). Second, recent studies demonstrate the regulatory influence that caregivers can have on their child's amygdala function. For example, maternal cues, warmth, and support attenuated amygdala responses to threat-related stimuli in healthy children and adolescents (Gee et al., 2014; Romund et al., 2016). Furthermore, greater security within the parent–child relationship and greater social support appeared to buffer the impact of adversity on amygdala reactivity in previously institutionalized (Callaghan et al., 2019) and maltreated youth (Wymbs et al., 2020). Also, maternal warmth protected against a pattern of amygdala sensitization in children exposed to violence in the home (Stevens et al., 2023). Our results align with these findings yet are novel in showing that nurturing parenting can also protect against the neural effects of adversity experienced outside of the home, in the neighborhood. They also align with recent work showing that positive relationships in the neighborhood can buffer the impacts of disadvantage and exposure to violence on amygdala reactivity (Gard et al., 2022; Suarez et al., 2022). Taken together, our findings, alongside existing research, provide a neuromechanistic framework for how caregiving behavior may buffer the impacts of adversity on the brain and increase resilience among youth.

Limitations

The present study had several methodological strengths, including recruitment of a large population-based sample with a specific sampling frame that included families from rural, urban, and suburban communities, with oversampling for families living in impoverished neighborhoods. Additionally, we examined the pathway between neighborhood disadvantage and amygdala reactivity within a sample of adolescents, an important sensitive period of brain development during which youth spend more time in their neighborhoods. At the same time, there are several limitations worth noting. First, the research findings are limited by the cross-sectional design, limiting any conclusions about the direction of effects or formal "mediation" of effects which are ideally tested with multiple time points. For example, although we conceptualize that neighborhood disadvantage predicts increased exposure to community violence, the association may be reversed. Increased community violence may lead to the outflow of vital resources, such as quality education and businesses, consequently worsening neighborhood disadvantage. As another example, rather than exposure to community violence leading to increased amygdala reactivity, it may be that youth who exhibit greater amygdala reactivity are more likely to be sensation-seeking and seek out dangerous or risky situations in the community. Second, due to the cross-sectional design, we could not examine whether the developmental timing of exposure to community violence is important in shaping neurobehavioral outcomes, a key next step in this research. Although we tried to account for important developmental processes in sensitivity analyses, including age, pubertal maturation, and nonlinear alterations in brain function, due to the cross-sectional design and the wide age range of our sample, we could not completely address these important issues. Future research is needed to examine the developmental unfolding of these processes and whether there are sensitive periods for exposure to risk. Third, though the current sample is relatively large for a developmental neuroimaging study, it is only modestly powered for moderated mediation analyses (Preacher et al., 2007), and links between brain and behavioral phenotypes have been found to stabilize and become more reproducible with samples sizes of $N \geq 2{,}000$. Thus, future replication of these findings is encouraged, particularly in even larger samples. Fourth, we focused exclusively on amygdala reactivity during socioemotional processing. Although we chose this ROI carefully and focused on data extracted from the main effects of task to examine more complex moderated mediation hypotheses, we did not examine effects across the entire brain, an important next step. Lastly, our measure of parental nurturance was only from adolescent reports, and we do not know how adolescents' perceptions might compare with parents' reports of their own behavior or observers' reports. Still, studies suggest that the adolescent's point of view should take precedence, as parental knowledge and parent–child communication comes mainly from child disclosure (Kerr et al., 2010; Stattin & Kerr, 2000). Adolescents' feelings toward the parent–child relationship, including their perception of their parents' trustworthiness, responsiveness, and warmth, and the absence of ridicule or punishment for confiding in them, are likely more important for adolescent outcomes.

Conclusions

The current study addresses important risk and protective factors contributing to brain function within a region important for socioemotional functioning, threat detection and fear learning. The findings have important implications for prevention and intervention efforts that aim to reduce the adverse consequences of community risk factors and provide instrumental support to youth and their families who are living in high-risk environments. First, elucidating exposure to community violence as an active ingredient within disadvantaged neighborhoods, including its impact on amygdala function, can help inform neighborhood-level interventions and public

policy to strengthen communities and improve child outcomes. Second, demonstrating the protective role of parents in mitigating the effect of exposure to community violence on amygdala function may help explain why, even in the face of adversity, some youth exhibit resilience, and also indicates the power of positive social support and experiences. Ultimately, this work highlights the need for structural solutions to protect children from the negative impact of exposure to community violence, while also highlighting the ways in which strong, positive parents are helping to promote resilience among youth exposed to adversity.

In conclusion, within a relatively large, well-sampled and enriched cohort of twins, we demonstrate how exposure to community violence may shape brain function and explain the link between neighborhood disadvantage and amygdala function, during adolescence, a period of substantial neural and social change. Further, we highlight how social exposures may serve as both risk (community violence) and protective factors (nurturing parenting) and elucidate the positive role parents can play in protecting their children from the toxic effects of exposure to concentrated neighborhood disadvantage and community violence. These findings can help inform future intervention and policy to promote healthy youth development and highlight the ways in which structural factors (e.g., concentrated neighborhood disadvantage that leads to increased community violence) undermine positive development, as well as highlight the ways in which so many parents work to protect their children from these structural risk factors.

References

Adams, R. B., Gordon, H. L., Baird, A. A., Ambady, N., & Kleck, R. E. (2003). Effects of gaze on amygdala sensitivity to anger and fear faces. *Science*, *300*(5625), 1536. https://doi.org/10.1126/science.1082244

Aneshensel, C. S., & Sucoff, C. A. (1996). The neighborhood context of adolescent mental health. *Journal of Health and Social Behavior*, *37*(4), 293–310. https://doi.org/10.2307/2137258

Bell, K. L., Purcell, J. B., Harnett, N. G., Goodman, A. M., Mrug, S., Schuster, M. A., & Elliott, M. N. (2021). White matter microstructure in the young adult brain varies with neighborhood disadvantage in adolescence. *Neuroscience*, *466*, 162–172. https://doi.org/10.1016/j.neuroscience.2021.05.012

Bloom, P. A., VanTieghem, M., Gabard-Durnam, L., Gee, D. G., Flannery, J., Caldera, C., Goff, B., Telzer, E. H., Humphreys, K. L., Fareri, D. S., Shapiro, M., Algharazi, S., Bolger, N., Aly, M., & Tottenham, N. (2022). Age-related change in task-evoked amygdala—Prefrontal circuitry: A multiverse approach with an accelerated longitudinal cohort aged 4–22 years. *Human Brain Mapping*, *43*(10), 3221–3244. https://doi.org/10.1002/hbm.25847

Burt, S. A., & Hyde, L. W. (2017). *Mechanisms underlying resilience to neighborhood disadvantage*. NIMH Data Archive; 2818.

Burt, S. A., & Klump, K. L. (2019). The Michigan State University Twin Registry (MSUTR): 15 years of twin and family research. *Twin Research and Human Genetics*, *22*(6), 741–745. https://doi.org/10.1017/thg.2019.57

Caldji, C., Tannenbaum, B., Sharma, S., Francis, D., Plotsky, P. M., & Meaney, M. J. (1998). Maternal care during infancy regulates the development of neural systems mediating the expression of fearfulness in the rat. *Proceedings of the National Academy of Sciences*, *95*(9), 5335–5340. https://doi.org/10.1073/pnas.95.9.5335

Callaghan, B. L., Gee, D. G., Gabard-Durnam, L., Telzer, E. H., Humphreys, K. L., Goff, B., Shapiro, M., Flannery, J., Lumian, D. S., Fareri, D. S., Caldera, C., & Tottenham, N. (2019). Decreased amygdala reactivity to parent cues protects against anxiety following early adversity: An examination across 3 years. *Biological Psychiatry: Cognitive Neuroscience and Neuroimaging*, *4*(7), 664–671. https://doi.org/10.1016/j.bpsc.2019.02.001

Carskadon, M. A., & Acebo, C. (1993). A self-administered rating scale for pubertal development. *Journal of Adolescent Health*, *14*(3), 190–195. https://doi.org/10.1016/1054-139X(93)90004-9

Casey, B. J., Cannonier, T., Conley, M. I., Cohen, A. O., Barch, D. M., Heitzeg, M. M., Soules, M. E., Teslovich, T., Dellarco, D. V., Garavan, H., Orr, C. A., Wager, T. D., Banich, M. T., Speer, N. K., Sutherland, M. T., Riedel, M. C., Dick, A. S., Bjork, J. M., Thomas, K. M., … Dale, A. M. (2018). The Adolescent Brain Cognitive Development (ABCD) study: Imaging acquisition across 21 sites. *Developmental Cognitive Neuroscience*, *32*, 43–54. https://doi.org/10.1016/j.dcn.2018.03.001

Casey, B. J., Heller, A. S., Gee, D. G., & Cohen, A. O. (2019). Development of the emotional brain. *Neuroscience Letters*, *693*, 29–34. https://doi.org/10.1016/j.neulet.2017.11.055

Cox, R. W. (1996). AFNI: Software for analysis and visualization of functional magnetic resonance neuroimages. *Computers and Biomedical Research*, *29*(3), 162–173. https://doi.org/10.1006/cbmr.1996.0014

Cox, R. W., Chen, G., Glen, D. R., Reynolds, R. C., & Taylor, P. A. (2017). fMRI clustering and false-positive rates. *Proceedings of the National Academy of Sciences*, *114*(17), E3370–E3371. https://doi.org/10.1073/pnas.1614961114

Cuartas, J., & Leventhal, T. (2020). Exposure to community violence and children's mental health: A quasi-experimental examination. *Social Science & Medicine*, *246*, Article 112740. https://doi.org/10.1016/j.socscimed.2019.112740

Egliston, K.-A., & Rapee, R. M. (2007). Inhibition of fear acquisition in toddlers following positive modelling by their mothers. *Behaviour Research and Therapy*, *45*(8), 1871–1882. https://doi.org/10.1016/j.brat.2007.02.007

Eisenberger, N. I. (2013). An empirical review of the neural underpinnings of receiving and giving social support: Implications for health. *Psychosomatic Medicine*, *75*(6), 545–556. https://doi.org/10.1097/PSY.0b013e31829de2e7

Elkins, I. J., McGue, M., & Iacono, W. G. (1997). Genetic and environmental influences on parent–son relationships: Evidence for increasing genetic influence during adolescence. *Developmental Psychology*, *33*(2), 351–363. https://doi.org/10.1037/0012-1649.33.2.351

Essau, C. A., Sasagawa, S., & Frick, P. J. (2006). Psychometric properties of the Alabama Parenting Questionnaire. *Journal of Child and Family Studies*, *15*(5), 595–614. https://doi.org/10.1007/s10826-006-9036-y

Etkin, A., Klemenhagen, K. C., Dudman, J. T., Rogan, M. T., Hen, R., Kandel, E. R., & Hirsch, J. (2004). Individual differences in trait anxiety predict the response of the basolateral amygdala to unconsciously processed fearful faces. *Neuron*, *44*(6), 1043–1055. https://doi.org/10.1016/j.neuron.2004.12.006

Evans, G. W. (2004). The environment of childhood poverty. *American Psychologist*, *59*(2), 77–92. https://doi.org/10.1037/0003-066X.59.2.77

Falk, C. F. (2018). Are robust standard errors the best approach for interval estimation with nonnormal data in structural equation modeling? *Structural Equation Modeling*, *25*(2), 244–266. https://doi.org/10.1080/10705511.2017.1367254

Ferri, J., Bress, J. N., Eaton, N. R., & Proudfit, G. H. (2014). The impact of puberty and social anxiety on amygdala activation to faces in adolescence. *Developmental Neuroscience*, *36*(3–4), 239–249. https://doi.org/10.1159/000363736

Finkelhor, D., Turner, H. A., Shattuck, A., & Hamby, S. L. (2015). Prevalence of childhood exposure to violence, crime, and abuse: Results from the national survey of children's exposure to violence. *JAMA Pediatrics*, *169*(8), 746–754. https://doi.org/10.1001/jamapediatrics.2015.0676

Flowers, A. L., Hastings, T. L., & Kelley, M. L. (2000). Development of a screening instrument for exposure to violence in children: The KID-SAVE. *Journal of Psychopathology and Behavioral Assessment*, *22*(1), 91–104. https://doi.org/10.1023/A:1007580616096

Forbes, E. E., Phillips, M. L., Silk, J. S., Ryan, N. D., & Dahl, R. E. (2011). Neural systems of threat processing in adolescents: Role of pubertal maturation and relation to measures of negative affect. *Developmental Neuropsychology, 36*(4), 429–452. https://doi.org/10.1080/87565641.2010.550178

Fowler, P. J., Tompsett, C. J., Braciszewski, J. M., Jacques-Tiura, A. J., & Baltes, B. B. (2009). Community violence: A meta-analysis on the effect of exposure and mental health outcomes of children and adolescents. *Development and Psychopathology, 21*(1), 227–259. https://doi.org/10.1017/S0954579409000145

Frick, P. J. (1991). *The Alabama Parenting Questionnaire*. University of Alabama.

Fusar-Poli, P., Placentino, A., Carletti, F., Landi, P., Allen, P., Surguladze, S., & Benedetti, F. (2009). Functional atlas of emotional faces processing: A voxel-based meta-analysis of 105 functional magnetic resonance imaging studies. *Journal of Psychiatry & Neuroscience, 34*(6), 418–432. https://www.jpn.ca/content/34/6/418.short

Gard, A. M., Brooks-Gunn, J., McLanahan, S. S., Mitchell, C., Monk, C. S., & Hyde, L. W. (2022). Deadly gun violence, neighborhood collective efficacy, and adolescent neurobehavioral outcomes. *PNAS Nexus, 1*(3), Article pgac061. https://doi.org/10.1093/pnasnexus/pgac061

Gard, A. M., Hein, T. C., Mitchell, C., Brooks-Gunn, J., McLanahan, S. S., Monk, C. S., & Hyde, L. W. (2021). Prospective longitudinal associations between harsh parenting and corticolimbic function during adolescence. *Development and Psychopathology, 34*(3), 981–996. https://doi.org/10.1017/S0954579420001583

Gard, A. M., Maxwell, A. M., Shaw, D. S., Mitchell, C., Brooks-Gunn, J., McLanahan, S. S., Forbes, E. E., Monk, C. S., & Hyde, L. W. (2021). Beyond family-level adversities: Exploring the developmental timing of neighborhood disadvantage effects on the brain. *Developmental Science, 24*(1), Article e12985. https://doi.org/10.1111/desc.12985

Gard, A. M., Waller, R., Shaw, D. S., Forbes, E. E., Hariri, A. R., & Hyde, L. W. (2017). The long reach of early adversity: Parenting, stress, and neural pathways to antisocial behavior in adulthood. *Biological Psychiatry: Cognitive Neuroscience and Neuroimaging, 2*(7), 582–590. https://doi.org/10.1016/j.bpsc.2017.06.005

Gard, A. M., Waller, R., Swartz, J. R., Shaw, D. S., Forbes, E. E., & Hyde, L. W. (2018). Amygdala functional connectivity during socioemotional processing prospectively predicts increases in internalizing symptoms in a sample of low-income, urban, young men. *NeuroImage, 178*, 562–573. https://doi.org/10.1016/j.neuroimage.2018.05.079

Gee, D. G., Gabard-Durnam, L., Telzer, E. H., Humphreys, K. L., Goff, B., Shapiro, M., Flannery, J., Lumian, D. S., Fareri, D. S., Caldera, C., & Tottenham, N. (2014). Maternal buffering of human amygdala-prefrontal circuitry during childhood but not during adolescence. *Psychological Science, 25*(11), 2067–2078. https://doi.org/10.1177/0956797614550878

Glüscher, J., & Adolphs, R. (2003). Processing of the arousal of subliminal and supraliminal emotional stimuli by the human amygdala. *The Journal of Neuroscience, 23*(32), 10274–10282. https://doi.org/10.1523/JNEUROSCI.23-32-10274.2003

Gorman-Smith, D., Henry, D. B., & Tolan, P. H. (2004). Exposure to community violence and violence perpetration: The protective effects of family functioning. *Journal of Clinical Child & Adolescent Psychology, 33*(3), 439–449. https://doi.org/10.1207/s15374424jccp3303_2

Gunnar, M., & Quevedo, K. (2006). The neurobiology of stress and development. *Annual Review of Psychology, 58*(1), 145–173. https://doi.org/10.1146/annurev.psych.58.110405.085605

Guyer, A. E., Monk, C. S., McClure-Tone, E. B., Nelson, E. E., Roberson-Nay, R., Adler, A. D., Fromm, S. J., Leibenluft, E., Pine, D. S., & Ernst, M. (2008). A developmental examination of amygdala response to facial expressions. *Journal of Cognitive Neuroscience, 20*(9), 1565–1582. https://doi.org/10.1162/jocn.2008.20114

Hare, T. A., Tottenham, N., Galvan, A., Voss, H. U., Glover, G. H., & Casey, B. J. (2008). Biological substrates of emotional reactivity and regulation in adolescence during an emotional Go-Nogo task. *Biological Psychiatry, 63*(10), 927–934. https://doi.org/10.1016/j.biopsych.2008.03.015

Hariri, A. R., Mattay, V. S., Tessitore, A., Kolachana, B., Fera, F., Goldman, D., Egan, M. F., & Weinberger, D. R. (2002). Serotonin transporter genetic variation and the response of the human amygdala. *Science, 297*(5580), 400–403. https://doi.org/10.1126/science.1071829

Hein, T. C., & Monk, C. S. (2017). Research Review: Neural response to threat in children, adolescents, and adults after child maltreatment—A quantitative meta-analysis. *Journal of Child Psychology and Psychiatry, 58*(3), 222–230. https://doi.org/10.1111/jcpp.12651

Heissel, J. A., Sharkey, P. T., Torrats-Espinosa, G., Grant, K., & Adam, E. K. (2018). Violence and vigilance: The acute effects of community violent crime on sleep and cortisol. *Child Development, 89*(4), e323–e331. https://doi.org/10.1111/cdev.12889

Hostinar, C. E., Sullivan, R. M., & Gunnar, M. R. (2014). Psychobiological mechanisms underlying the social buffering of the hypothalamic–pituitary–adrenocortical axis: A review of animal models and human studies across development. *Psychological Bulletin, 140*(1), 256–282. https://doi.org/10.1037/a0032671

Hyde, L. W., Gard, A. M., Tomlinson, R. C., Burt, S. A., Mitchell, C., & Monk, C. S. (2020). An ecological approach to understanding the developing brain: Examples linking poverty, parenting, neighborhoods, and the brain. *American Psychologist, 75*(9), 1245–1259. https://doi.org/10.1037/amp0000741

Hyde, L. W., Gard, A. M., Tomlinson, R. C., Suarez, G. L., & Westerman, H. B. (2022). Parents, neighborhoods, and the developing brain. *Child Development Perspectives, 16*(3), 148–156. https://doi.org/10.1111/cdep.12453

Hyde, L. W., Shaw, D. S., Murray, L., Gard, A., Hariri, A. R., & Forbes, E. E. (2016). Dissecting the role of amygdala reactivity in antisocial behavior in a sample of young, low-income, urban men. *Clinical Psychological Science, 4*(3), 527–544. https://doi.org/10.1177/2167702615614511

Javanbakht, A., King, A. P., Evans, G. W., Swain, J. E., Angstadt, M., Phan, K. L., & Liberzon, I. (2015). Childhood poverty predicts adult amygdala and frontal activity and connectivity in response to emotional faces. *Frontiers in Behavioral Neuroscience, 9*, Article 154. https://doi.org/10.3389/fnbeh.2015.00154

Kazak, A. E. (2018). Editorial: Journal article reporting standards. *American Psychologist, 73*(1), 1–2. https://doi.org/10.1037/amp0000263

Kerr, M., Stattin, H., & Burk, W. J. (2010). A reinterpretation of parental monitoring in longitudinal perspective. *Journal of Research on Adolescence, 20*(1), 39–64. https://doi.org/10.1111/j.1532-7795.2009.00623.x

Kind, A. J. H., Jencks, S., Brock, J., Yu, M., Bartels, C., Ehlenbach, W., Greenberg, C., & Smith, M. (2014). Neighborhood socioeconomic disadvantage and 30-day rehospitalization. *Annals of Internal Medicine, 161*(11), 765–774. https://doi.org/10.7326/M13-2946

Koben, D. E., Leventhal, T., Dahinten, V. S., & McIntosh, C. N. (2008). Neighborhood disadvantage: Pathways of effects for young children. *Child Development, 79*(1), 156–169. https://doi.org/10.1111/j.1467-8624.2007.01117.x

Kriegeskorte, N., Simmons, W. K., Bellgowan, P. S. F., & Baker, C. I. (2009). Circular analysis in systems neuroscience: The dangers of double dipping. *Nature Neuroscience, 12*(5), 535–540. https://doi.org/10.1038/nn.2303

Leventhal, T., & Brooks-Gunn, J. (2000). The neighborhoods they live in: The effects of neighborhood residence on child and adolescent outcomes. *Psychological Bulletin, 126*(2), 309–337. https://doi.org/10.1037/0033-2909.126.2.309

Long, J. A. (2022). *interactions: Comprehensive, user-friendly toolkit for probing interactions* (R package Version 1.1.6) [Computer software]. https://interactions.jacob-long.com/authors#citation

Luthar, S. S. (2006). Resilience in development: A synthesis of research across five decades. In D. Cicchetti & D. J. Cohen (Eds.), *Developmental*

psychopathology: Risk, disorder, and adaptation (Vol. 3, 2nd ed., pp. 739–795). John Wiley & Sons.

Luthar, S. S., & Goldstein, A. (2004). Children's exposure to community violence: Implications for understanding risk and resilience. *Journal of Clinical Child & Adolescent Psychology, 33*(3), 499–505. https://doi.org/10.1207/s15374424jccp3303_7

Maldjian, J. A., Laurienti, P. J., Kraft, R. A., & Burdette, J. H. (2003). An automated method for neuroanatomic and cytoarchitectonic atlas-based interrogation of fMRI data sets. *NeuroImage, 19*(3), 1233–1239. https://doi.org/10.1016/S1053-8119(03)00169-1

Manuck, S. B., Brown, S. M., Forbes, E. E., & Hariri, A. R. (2007). Temporal stability of individual differences in amygdala reactivity. *American Journal of Psychiatry, 164*(10), 1613–1614. https://doi.org/10.1176/appi.ajp.2007.07040609

Marusak, H. A., Zundel, C. G., Brown, S., Rabinak, C. A., & Thomason, M. E. (2017). Convergent behavioral and corticolimbic connectivity evidence of a negativity bias in children and adolescents. *Social Cognitive and Affective Neuroscience, 12*(4), 517–525. https://doi.org/10.1093/scan/nsw182

Masten, A. S. (2001). Ordinary magic: Resilience processes in development. *The American Psychologist, 56*(3), 227–238. https://doi.org/10.1037/0003-066X.56.3.227

Matjasko, J. L., Vivolo-Kantor, A. M., Henry, D. B., Gorman-Smith, D., Schoeny, M. E., & The Multisite Violence Prevention Project. (2013). The relationship between a family-focused preventive intervention, parenting practices, and exposure to violence during the transition to adolescence: Testing a mediational model. *Journal of Aggression, Maltreatment & Trauma, 22*(1), 45–66. https://doi.org/10.1080/10926771.2013.743947

McLaughlin, K. A., Weissman, D., & Bitrán, D. (2019). Childhood adversity and neural development: A systematic review. *Annual Review of Developmental Psychology, 1*(1), 277–312. https://doi.org/10.1146/annurev-devpsych-121318-084950

Monk, C. S. (2008). The development of emotion-related neural circuitry in health and psychopathology. *Development and Psychopathology, 20*(4), 1231–1250. https://doi.org/10.1017/S095457940800059X

Moore, W. E., III, Pfeifer, J. H., Masten, C. L., Mazziotta, J. C., Iacoboni, M., & Dapretto, M. (2012). Facing puberty: Associations between pubertal development and neural responses to affective facial displays. *Social Cognitive and Affective Neuroscience, 7*(1), 35–43. https://doi.org/10.1093/scan/nsr066

Morenoff, J. D., Sampson, R. J., & Raudenbush, S. W. (2001). Neighborhood inequality, collective efficacy, and the spatial dynamics of urban violence. *Criminology, 39*(3), 517–558. https://doi.org/10.1111/j.1745-9125.2001.tb00932.x

Mrug, S., & Windle, M. (2010). Prospective effects of violence exposure across multiple contexts on early adolescents' internalizing and externalizing problems. *Journal of Child Psychology and Psychiatry, 51*(8), 953–961. https://doi.org/10.1111/j.1469-7610.2010.02222.x

Muthén, L. K., & Muthén, B. O. (2011). *Mplus User's Guide. 1998–2011.*

National Academies of Sciences, Engineering, and Medicine. (2019). *A roadmap to reducing child poverty*. National Academies Press.

Ozer, E. J., Lavi, I., Douglas, L., & Wolf, J. P. (2017). Protective factors for youth exposed to violence in their communities: A review of family, school, and community moderators. *Journal of Clinical Child & Adolescent Psychology, 46*(3), 353–378. https://doi.org/10.1080/15374416.2015.1046178

Pager, D., & Shepherd, H. (2008). The sociology of discrimination: Racial discrimination in employment, housing, credit, and consumer markets. *Annual Review of Sociology, 34*(1), 181–209. https://doi.org/10.1146/annurev.soc.33.040406.131740

Pollak, S. D., Cicchetti, D., Hornung, K., & Reed, A. (2000). Recognizing emotion in faces: Developmental effects of child abuse and neglect. *Developmental Psychology, 36*(5), 679–688. https://doi.org/10.1037/0012-1649.36.5.679

Preacher, K. J., Rucker, D. D., & Hayes, A. F. (2007). Addressing moderated mediation hypotheses: Theory, methods, and prescriptions. *Multivariate Behavioral Research, 42*(1), 185–227. https://doi.org/10.1080/00273170701341316

Ramphal, B., DeSerisy, M., Pagliaccio, D., Raffanello, E., Rauh, V., Tau, G., Posner, J., Marsh, R., & Margolis, A. E. (2020). Associations between amygdala-prefrontal functional connectivity and age depend on neighborhood socioeconomic status. *Cerebral Cortex Communications, 1*(1), Article tgaa033. https://doi.org/10.1093/texcom/tgaa033

Romund, L., Raufelder, D., Flemming, E., Lorenz, R. C., Pelz, P., Gleich, T., Heinz, A., & Beck, A. (2016). Maternal parenting behavior and emotion processing in adolescents—An fMRI study. *Biological Psychology, 120*, 120–125. https://doi.org/10.1016/j.biopsycho.2016.09.003

Sampson, R. J., & Groves, W. B. (1989). Community structure and crime: Testing social-disorganization theory. *American Journal of Sociology, 94*(4), 774–802. https://doi.org/10.1086/229068

Sampson, R. J., Raudenbush, S. W., & Earls, F. (1997). Neighborhoods and violent crime: A multilevel study of collective efficacy. *Science, 277*(5328), 918–924. https://doi.org/10.1126/science.277.5328.918

Sastry, N. (2012). *Neighborhood effects on children's achievement: A review of recent research*. Oxford University Press. https://doi.org/10.1093/oxfordhb/9780199769100.013.0024

Sharkey, P. (2018). The long reach of violence: A broader perspective on data, theory, and evidence on the prevalence and consequences of exposure to violence. *Annual Review of Criminology, 1*(1), 85–102. https://doi.org/10.1146/annurev-criminol-032317-092316

Sheridan, M. A., & McLaughlin, K. A. (2014). Dimensions of early experience and neural development: Deprivation and threat. *Trends in Cognitive Sciences, 18*(11), 580–585. https://doi.org/10.1016/j.tics.2014.09.001

Shi, H., Wang, X., & Yao, S. (2013). Comparison of activation patterns between masking and inattention tasks: A coordinate-based meta-analysis of implicit emotional face processing. *Frontiers in Human Neuroscience, 7*, Article 459. https://doi.org/10.3389/fnhum.2013.00459

Smetana, J. G., Metzger, A., Gettman, D. C., & Campione-Barr, N. (2006). Disclosure and secrecy in adolescent–parent relationships. *Child Development, 77*(1), 201–217. https://doi.org/10.1111/j.1467-8624.2006.00865.x

Somerville, L. H., Jones, R. M., & Casey, B. J. (2010). A time of change: Behavioral and neural correlates of adolescent sensitivity to appetitive and aversive environmental cues. *Brain and Cognition, 72*(1), 124–133. https://doi.org/10.1016/j.bandc.2009.07.003

Spano, R., Rivera, C., & Bolland, J. M. (2011). Does parenting shield youth from exposure to violence during adolescence? A 5-year longitudinal test in a high-poverty sample of minority youth. *Journal of Interpersonal Violence, 26*(5), 930–949. https://doi.org/10.1177/0886260510365873

Spielberg, J. M., Forbes, E. E., Ladouceur, C. D., Worthman, C. M., Olino, T. M., Ryan, N. D., & Dahl, R. E. (2015). Pubertal testosterone influences threat-related amygdala–orbitofrontal cortex coupling. *Social Cognitive and Affective Neuroscience, 10*(3), 408–415. https://doi.org/10.1093/scan/nsu062

Stattin, H., & Kerr, M. (2000). Parental monitoring: A reinterpretation. *Child Development, 71*(4), 1072–1085. https://doi.org/10.1111/1467-8624.00210

Stein, B. D., Jaycox, L. H., Kataoka, S., Rhodes, H. J., & Vestal, K. D. (2003). Prevalence of child and adolescent exposure to community violence. *Clinical Child and Family Psychology Review, 6*(4), 247–264. https://doi.org/10.1023/B:CCFP.0000006292.61072.d2

Stevens, J. S., van Rooij, S. J. H., Stenson, A. F., Ely, T. D., Powers, A., Clifford, A., Kim, Y. J., Hinrichs, R., Tottenham, N., & Jovanovic, T. (2023). Amygdala responses to threat in violence-exposed children depend on trauma context and maternal caregiving. *Development and Psychopathology, 35*(3), 1159–1170. https://doi.org/10.1017/S0954579421001085

Straus, M. A. (1979). Measuring intrafamily conflict and violence: The Conflict Tactics (CT) Scales. *Journal of Marriage and the Family, 41*(1), 75–88. https://doi.org/10.2307/351733

Straus, M. A., Hamby, S. L., Boney-McCoy, S., & Sugarman, D. B. (1996). The Revised Conflict Tactics Scales (CTS2): Development and preliminary psychometric data. *Journal of Family Issues, 17*(3), 283–316. https://doi.org/10.1177/019251396017003001

Suarez, G. L., Burt, S. A., Gard, A. M., Burton, J., Clark, D. A., Klump, K. L., & Hyde, L. W. (2022). The impact of neighborhood disadvantage on amygdala reactivity: Pathways through neighborhood social processes. *Developmental Cognitive Neuroscience, 54*, Article 101061. https://doi.org/10.1016/j.dcn.2022.101061

Teicher, M. H., & Khan, A. (2019). Childhood maltreatment, cortical and amygdala morphometry, functional connectivity, laterality, and psychopathology. *Child Maltreatment, 24*(4), 458–465. https://doi.org/10.1177/1077559519870845

Texas A&M Transportation Institute. (2017, March 30). *There's no such thing as the suburbs*. https://policy.tti.tamu.edu/theres-no-such-thing-as-the-suburbs/#_edn6

The Annie E. Casey Foundation. (2021). *2021 KIDS COUNT Data Book: State trends in child well-being*. https://www.aecf.org/resources/2021-kids-count-data-book

Tottenham, N., Hare, T. A., Millner, A., Gilhooly, T., Zevin, J. D., & Casey, B. J. (2011). Elevated amygdala response to faces following early deprivation. *Developmental Science, 14*(2), 190–204. https://doi.org/10.1111/j.1467-7687.2010.00971.x

Tottenham, N., & Sheridan, M. (2010). A review of adversity, the amygdala and the hippocampus: A consideration of developmental timing. *Frontiers in Human Neuroscience, 3*, Article 68. https://doi.org/10.3389/neuro.09.068.2009

Tottenham, N., Tanaka, J. W., Leon, A. C., McCarry, T., Nurse, M., Hare, T. A., Marcus, D. J., Westerlund, A., Casey, B., & Nelson, C. (2009). The NimStim set of facial expressions: Judgments from untrained research participants. *Psychiatry Research, 168*(3), 242–249. https://doi.org/10.1016/j.psychres.2008.05.006

van Rooij, S. J. H., Smith, R. D., Stenson, A. F., Ely, T. D., Yang, X., Tottenham, N., Stevens, J. S., & Jovanovic, T. (2020). Increased activation of the fear neurocircuitry in children exposed to violence. *Depression and Anxiety, 37*(4), 303–312. https://doi.org/10.1002/da.22994

Varnum, M. E., & Kitayama, S. (2017). The neuroscience of social class. *Current Opinion in Psychology, 18*, 147–151. https://doi.org/10.1016/j.copsyc.2017.07.032

Vijayakumar, N., Pfeifer, J. H., Flournoy, J. C., Hernandez, L. M., & Dapretto, M. (2019). Affective reactivity during adolescence: Associations with age, puberty and testosterone. *Cortex, 117*, 336–350. https://doi.org/10.1016/j.cortex.2019.04.024

Weis, R., & Lovejoy, M. C. (2002). Information processing in everyday life: Emotion-congruent bias in mothers' reports of parent-child interactions. *Journal of Personality and Social Psychology, 83*(1), 216–230. https://doi.org/10.1037/0022-3514.83.1.216

White, S. F., Voss, J. L., Chiang, J. J., Wang, L., McLaughlin, K. A., & Miller, G. E. (2019). Exposure to violence and low family income are associated with heightened amygdala responsiveness to threat among adolescents. *Developmental Cognitive Neuroscience, 40*, Article 100709. https://doi.org/10.1016/j.dcn.2019.100709

Whittle, S., Vijayakumar, N., Simmons, J. G., Dennison, M., Schwartz, O., Pantelis, C., Sheeber, L., Byrne, M. L., & Allen, N. B. (2017). Role of positive parenting in the association between neighborhood social disadvantage and brain development across adolescence. *JAMA Psychiatry, 74*(8), 824–832. https://doi.org/10.1001/jamapsychiatry.2017.1558

Wilson, H. W., Stover, C. S., & Berkowitz, S. J. (2009). Research review: The relationship between childhood violence exposure and juvenile antisocial behavior: A meta-analytic review. *Journal of Child Psychology and Psychiatry, 50*(7), 769–779. https://doi.org/10.1111/j.1469-7610.2008.01974.x

Wright, C. I., Fischer, H., Whalen, P. J., McInerney, S. C., Shin, L. M., & Rauch, S. L. (2001). Differential prefrontal cortex and amygdala habituation to repeatedly presented emotional stimuli. *NeuroReport, 12*(2), 379–383. https://doi.org/10.1097/00001756-200102120-00039

Wymbs, N. F., Orr, C., Albaugh, M. D., Althoff, R. R., O'Loughlin, K., Holbrook, H., Garavan, H., Montalvo-Ortiz, J. L., Mostofsky, S., Hudziak, J., & Kaufman, J. (2020). Social supports moderate the effects of child adversity on neural correlates of threat processing. *Child Abuse & Neglect, 102*, Article 104413. https://doi.org/10.1016/j.chiabu.2020.104413

Xue, Y., Leventhal, T., Brooks-Gunn, J., & Earls, F. J. (2005). Neighborhood residence and mental health problems of 5- to 11-year-olds. *Archives of General Psychiatry, 62*(5), 554–563. https://doi.org/10.1001/archpsyc.62.5.554

Zinzow, H. M., Ruggiero, K. J., Resnick, H., Hanson, R., Smith, D., Saunders, B., & Kilpatrick, D. (2009). Prevalence and mental health correlates of witnessed parental and community violence in a national sample of adolescents. *Journal of Child Psychology and Psychiatry, 50*(4), 441–450. https://doi.org/10.1111/j.1469-7610.2008.02004.x

Received June 29, 2023
Revision received December 20, 2023
Accepted December 20, 2023 ■

Living in a violent neighborhood affects children's brain development

February 22, 2024Jared Wadley

Nurturing parents can buffer against harmful effects, study finds

Living in neighborhoods with high levels of violence can affect children's development by changing the way that a part of the brain detects and responds to potential threats, which could lead to poorer mental health and other negative outcomes.

But these findings from a new University of Michigan study, published in Developmental Psychology, also indicate that nurturing parents can help protect kids against these detrimental effects.

Study (PDF): Exposure to Community Violence as a Mechanism Linking Neighborhood Disadvantage to Amygdala Reactivity and the Protective Role of Parental Nurturance

Decades of research have shown that growing up in neighborhoods with concentrated disadvantages can predict negative academic, behavioral and mental health outcomes in children and teens. Recent research is beginning to show that one way it does that is by impacting the developing brain, said study co-author Luke Hyde, U-M professor of psychology.

"However, less is known about how neighborhood disadvantage 'gets under the skin' to impact brain development," he said.

Hyde and colleagues hypothesized that one way might be through the amygdala, the hub of the brain's stress response system that's involved in socioemotional functioning, threat processing and fear learning.

The amygdala is sensitive to facial expressions. Previous research has found that children who have been abused or neglected by family members, for example, show increased reactivity in the amygdala when looking at faces with negative, fearful or neutral expressions.

To study whether exposure to neighborhood violence might also affect youth's amygdala reactivity, the researchers analyzed data from 708 children and teens ages 7 to 19, recruited from 354 families enrolled in the Michigan Twins Neurogenetic Study.

Most were from neighborhoods with above-average levels of poverty and disadvantage, as measured by the U.S. Census Bureau. Fifty-four percent of the participants were boys, 78.5% were white, 13% were Black and 8% were other races and ethnicities. The participants lived in a mix of rural, suburban and urban areas in and around Lansing, Michigan.

Participants completed surveys that asked about their exposure to community violence, their relationship with their parents, and their parents' parenting style. They also took part in an experiment in which their brains were scanned by functional MRI while they looked at faces that were angry, fearful, happy or neutral.

Overall, the researchers found that participants who lived in more disadvantaged neighborhoods reported more exposure to community violence. And participants who reported more exposure to community violence showed higher levels of amygdala reactivity to fearful and angry faces. The results held even when controlling for an individual family's income, parental education and other socioeconomic factors as well as forms of violence exposure in the home.

"This makes sense as it's adaptive for adolescents to be more in tune to threats when living in a more dangerous neighborhood," Hyde said.

However, the researchers also found that nurturing parents seemed to be able to break the link between community violence and amygdala reactivity.

"Children with more nurturing and involved parents were not as likely to be exposed to community violence, and for those who were exposed, having a more nurturing parent diminished the impact of violence exposure on the brain," said Gabriela Suarez, a U-M graduate student in developmental psychology and the study's lead author.

"These findings highlight how nurturing and involved parents are helping to support their children's success, even in potentially harsh environments, and offer clues as to why some youth are resilient even when facing adversity."

The study highlights the need for structural solutions to protect children from the negative impact of exposure to community violence. It also points to how strong, positive parents can promote resilience among children and teens exposed to adversity, the researchers said.

"Parents may be an important buffer against these broader structural inequalities, and thus working with parents may be one way to help protect children—while we also work on policies to reduce the concentration of disadvantage in neighborhoods and the risk for exposure to violence in the community," said co-author Alex Burt, professor of psychology at Michigan State University.

Other study co-authors are Kelly Klump, MSU professor of psychology, and Arianna Gard, a doctoral student at the University of Maryland.

Defending Higher Level Felonies

Phil Dixon
UNC School of Government
Fall 2024

1

Forcible Felonies

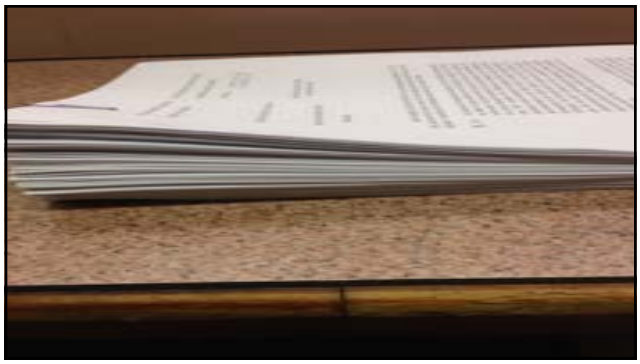
- Robbery
- Deadly Weapon Assaults and Attempted Murder
- Sexual Assaults
- Burglary
- Kidnapping
- Related Inchoate Crimes and Conspiracy

2

Same as everything else?

- Investigation and Client Rapport
- Discovery Motions and Litigation
- Pretrial Motions – Motions in Limine, Suppression, Notices of Defenses, Experts, etc.

3



4

Same as everything else?

- Expert Assistance and Rule 702 Challenges
- Jury Selection Preparation
- Witness Preparation
- Trial Prep.
- Sentencing Prep.

5

Know the Law!

6

Our Focus:

- Assault and Robbery Issues
- Inchoate Liability and General Crimes
- Jury Instructions
- Defenses
- Pleadings*

7

Common Assault Issues

- Assault indictments must name a victim; error to allow amendment to change the name; fatal variance where proof doesn't match victim named in indictment
- Assault indictments often accompany attempted murder. Why?
  - AWDWISI; AWDWIKISI not lesser-included, and a D. may be convicted of both one of these and attempted murder for the same act. *State v. Rogers*, 219 N.C. App. 296 (2012)
- Not so for multiple different assaults– "unless greater punishment provided…"

8

Common Robbery Issues

- Often charged with assault, and D. may be convicted of both for same conduct
- Lesser offense included: Common law robbery, AWDW, larceny. Note attempted CL robbery is a lesser of attempted armed robbery, but not for armed robbery.
  - *State v. White*, 322 N.C. 506 (1988)
- Rob one store with multiple people? One robbery. *St. v. Ballard*, 280 N.C. 479 (1972)
- Rob multiple people in one store? Multiple robberies. *St. v. Beaty*, 306 N.C. 491 (1982)

9

Common Robbery Issues

- Beware the Dangerous Weapon Presumption:
  - Mandatory presumption that weapon was dangerous where victim testifies that they thought D. had a dangerous weapon. Where it applies, no common law instruction
  - Becomes a permissive presumption if there is evidence that the weapon was not, in fact, dangerous (i.e., BB gun, inoperable weapon, etc.). Becomes a question for the jury
  - No evidence of dangerousness, or all evidence shows not dangerous? Only common law robbery goes to the jury
    - *State v. Allen*, 317 N.C. 119 (1986)

10

Conspiracy Liability

- Complete with agreement between two or more people with intent to carry out; no overt act requirement in NC
- No firm test for whether single or multiple conspiracy:
  - Look at agreement and analyze with time intervals, participants, objectives, and number of meetings
  - *See State v. Stimpson*,256 N.C. App. 364 (2017) for a terrible case on this

11

Conspiracy Liability

- Organized Plan? More likely one conspiracy, regardless of number of crimes
- Ad hoc crimes? More likely to support multiple conspiracies.
- "Unless otherwise provided by law", one class lower than substantive offense
- Conspiracy to Traffic Drugs, Exploit Elder Adults, Commit Residential Mortgage Fraud or Forgery, and B/E of jail to injure prisoner all examples of where conspiracy is punished at same level as underlying

12

Pleading and Proving Conspiracy

- Must allege agreement to do unlawful act
- Need not name co-conspirators. *St. v. Gallimore*, 272 N.C. 628 (1968)
- If named, State is generally stuck with proving agreement with those named people (and not other unnamed people) at trial. *St. v. Pringle*, 204 N.C. App. 562 (2010)
- May cover a lesser-included offense (*e.g.*, a conspiracy to commit RWDW charge allows conviction on conspiracy to commit CL Robbery)

13

Attempt Liability

- Specific intent to commit crime, overt act in furtherance of the crime (beyond mere preparation), that falls short
- "Unless otherwise provided" – usually one level lower than substantive crime
- Not so for Armed Robbery, Indecent Liberties, Obtaining Property by False Pretenses, Safecracking, Discharging Weapon into Occupied Property (all the same level as substantive offense)

14

Attempt Liability

- Indictment for substantive offense includes attempt as lesser included
- No such thing as attempted second-degree murder, and no such thing as attempted felony murder
- Probably not any such thing as attempted assault—but there is attempted AWDWISI, apparently (*St. v. Floyd*, 369 N.C. 329 (2016))

15

Accessory Liability

- Before the Fact? Treated as a principal
  - Think, aiding and abetting, but not present at time of crime
  - Solicitation is a lesser included to accessory before the fact. Unless D. charged with accessory after the fact, solicitation must be specifically pled
  - Can be convicted of conspiracy and accessory before the fact
  - Cannot convict if all principals are acquitted. Where principals only convicted of lesser, Δ can't be convicted of more than accessory before the fact of that lesser offense. *St. v. Wilson*, 338 N.C. 244 (1994) (only for verdicts, not pleas)

16

Accessory Liability

- After the Fact? Two levels lower (usually)
  - Not a lesser-included offense of the substantive crime
  - May be tried for crime and accessory after the fact but can't be convicted for both
  - Acquittal of named principal bars conviction for accessory after the fact *St. v. Robey*, 91 N.C. App. 198 (1988)
  - Failure to report or cooperate is generally not accessory after. *St. v. Potter*, 221 N.C. 153 (1953) (*but see St. v. Ditenhafer, 373 N.C. 116 (2019)*)

17

Acting in Concert

- D. is actually or constructively present, acts together to commit crime, pursuant to common plan. Punished as a principal
- Need not be separately pled but must be evidence to support theory
- Mere Presence Defense:
  - "Mere presence at the scene of the crime is not itself a crime, absent at least some sharing of criminal intent." *State v. Williams*, 299 N.C. 652 (1980)
  - See NCPJI 202.10 (Acting in Concert), footnote 6

18

19

Jury Instructions

- "If a request is made for a jury instruction which is correct in itself and supported by the evidence, the trial court must give the instruction *at least in substance*." *State v. Harvell*, 334 N.C. 356 (1993)
- Standard: Evidence viewed in the light most favorable to the defendant; substantial, relevant evidence that a reasonable mind could accept as supporting the claim
- Δ gets all factual inferences in his or her favor
- Special instruction requests must be in writing, and you must object if the court refuses your requested instruction

20

21

Jury Instructions

- Where the trial court fails to instruct the jury on a charged offense at all, that charge (and any lesser included offenses) are dismissed *State v. Williams*, 318 N.C. 624 (1986)
- You must be prepared to argue for your instructions, object when the court refuses to give them, and listen to the instructions when given to the jury—the judge doesn't always give the instructions they plan to
- Don't be afraid to alert the judge if he or she misses something

22

Ideas for Special Instructions

- Definition of "knowingly" or "willfully"
- Immune, interested, or informant witnesses
- Defenses!
- Evidence issues – lost or destroyed evidence, failure of agency or analyst to secure accreditation, opinion versus expert testimony, limited purpose of evidence, etc.
- Look to other states and the federal system for samples and ideas 5th, 7th, and 11th Circuits (at least) all have their pattern instructions online, for free

23

Defenses Refresher

- Self-Defense, defense of others – NCPJI 308.10 through 308.80
- Unconsciousness/Automatism – where the D. did not act under own volition
  NCPJI 302.10
- Insanity – defect of reason caused by mental disease that person cannot know the nature and quality of act; or if they did, could not distinguish right and wrong in relation to the act. NCPJI 304.10

24

Defenses Refresher

- "Negating" Defenses
  - Accident – lawful conduct not involving culpable negligence. Not a defense to felony murder. NCPJI 307.10-.11
  - Justification – defense to Firearm by Felon, narrow.
    NCPJI 254A.11, n. 7 (Firearm by Felon instruction)
  - Mistake of Fact – where mistake of fact negates required mental state of the crime. No NCPJI; *State v. Breathette*, 202 N.C. App. 697 (2010)

25

Defenses Refresher

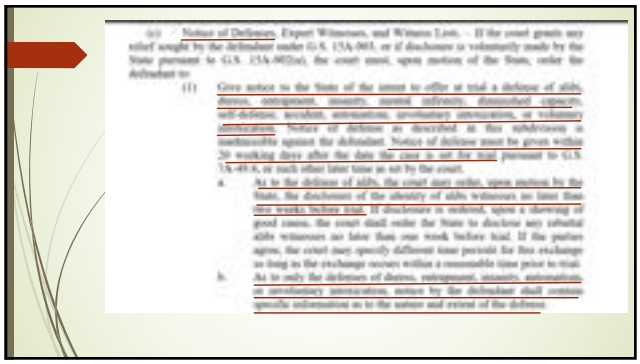
- Coercion/Duress – act caused by reasonable fear of immediate death or bodily harm. Not available for murder. NCPJI 310.10
- Necessity – act to protect life, limb, or health done in reasonable manner with no legal alternatives. Probably also not a defense to murder. NCPJI 310.12
- Entrapment – D. induced by law enforcement with trickery, fraud, or persuasion, where D. not predisposed to commit crime. NCPJI 309.10

26

Defenses Refresher

- "Negating" Defenses
  - Voluntary Intoxication – D. so intoxicated from drugs or alcohol that he could not form specific intent to commit crime. Only for specific intent crimes; negates specific intent. NCPJI 305.10-.11
  - Diminished Capacity – D., while not insane, suffers from mental or physical conditions that prevent the defendant from forming specific intent to commit crime. Only for specific intent crimes; negates specific intent. NCPJI 305.10 and 305.11 (but needs adjustment for other than murder cases)

27



28

Do Pleadings matter?

- Formerly, a fatal flaw would fail to confer jurisdiction
  - *E.G.*– fails to state an element, fails to name an assault victim, fails to name the defendant
- *State v. Singleton*, No. 318PA22, ___ N.C. ___ (2024) did away with the old rule
- Defects only matter now to the extent the indictment wholly fails to charge a crime, or where it fails to provide sufficient notice and protection against double jeopardy

29

- Consider Bills of Particular and Discovery litigation to fills the gaps
- Constitutionalize argument in terms of due process notice and protection from double jeopardy
- Articulate prejudice to defense

30

May Still Have an Argument for Lessers

- *State v. Murrell*, 370 N.C. 187 (2017) – Indictment for armed robbery that failed to allege any dangerous weapon; properly charged common law robbery (must name weapon, or state the weapon is a deadly one, or allege such facts as would necessarily demonstrate deadly nature of weapon) (same rule for assault cases)
- *State v. Hill*, 262 N.C. App. 113 (2018) – Indictment for kidnapping alleged restraint for purpose of committing misdemeanor assault; failed to allege felony; properly charged misdemeanor false imprisonment
- *State v. Schalow*, 251 N.C. App. 334 (2016); *disc. review improvidently granted*, 370 N.C. 525 (2018) – Indictment for first-degree attempted murder that failed to allege malice properly charged attempted manslaughter. But . . .

31

32

Variance Issues

- Valid indictment may still be challenged where evidence does not conform to allegation in charging document
- Inessential or unnecessary language in a charging document is surplusage and will not support a variance
- Language of charging document speaking to essential elements of the crime supports a fatal variance
- Waived if not raised at trial. May require a separate motion?

33

Variance Issues

- *State v. McRae*, 231 N.C. App. 602 (2014) – State need not allege specific felony for 1st degree kidnapping, but when it does, it's bound by it and cannot amend.
  - Same rule for burglary, breaking or entering
- *State v. Faircloth*, 297 N.C. 100 (1979) –State bound by allegation of purpose of kidnapping in indictment; variance where allegation was for purposes of facilitating flight from felony and proof showed purpose of facilitating rape
- *State v. Skinner*, 162 N.C. App. 434 (2004) – Where D. charged with assault with his hands as a deadly weapon, fatal variance where proof showed blunt object used

34

35

Ginsburg the Cat

36

37

The Statutory and Common Law of Self-Defense

JOHN RUBIN
UNC SCHOOL OF GOVERNMENT

SEPTEMBER 2024

1

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

2

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 rights

Make sure the court understands the basis of your claim

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

The defendant has a horse rescue farm. The defendant walks onto his neighbor's property, where the victim had the neighbor's permission to hunt there. The defendant asks the victim not to shoot near the defendant's property so as not to scare his horses. A conflict ensues, and the defendant shoots the victim. There was no evidence whether the defendant could go on the neighbor's property.

- Was the defendant entitled to a stand-your-ground instruction as part of the self-defense instruction to the jury?
- State v. Hague, ___ N.C. App. ___ (Aug. 20, 2024)

Example # 1

6

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."

7

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]"

8

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.

9

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.

10

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)

11

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.

12

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 actual unlawful, forcible entry

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

13

The victim drove onto the defendant's driveway despite being told to stay off the defendant's property. The victim pushed the defendant. The defendant got her gun. The State's evidence showed that a bystander saw the defendant in her driveway with a gun standing over the unarmed victim as he pleaded "Please, please, just let me go. Let me go." The bystander saw the defendant take several steps back and shoot the victim in the head from 3 to 6 feet away.

Example # 2

14

Issues

1. Did the victim forcibly and unlawfully enter the defendant's home?
2. If so, could the defendant use deadly force after the victim pleaded for his life?

15

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 instruction for not defining curtilage for jury. *See* State v. Copley, 265 N.C. App. 254 (2019), *rev'd on other grounds*, 374 N.C. 224 (2020)

16

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

17

Rebuttal of Statutory Presumption

State v. Austin, 279 N.C. App. 377 (2021)
- Presumption can be rebutted other than by one of the five statutory exceptions in G.S. 14-51.2(c)
- NCPJI 308.80 on defense of habitation refers to both the statutory exceptions and potentially "evidence to the contrary"

Overruled sub silentio by State v. Phillips, ___ N.C. ___ (Aug. 23, 2024)?
- Excessive force is not an issue in a case under 14-51.2 and does not rebut the presumption
- Only the statutorily-listed circumstances can rebut the presumption

18

More about Statutory Presumption

State v. Hicks, 382 N.C. 52 (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

19

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

20

Issues in Self-Defense Law in North Carolina

John Rubin

UNC School of Government

September 2024

rubin@sog.unc.edu

Contents

Self-Defense and Retreat from Places Where the Defendant Has a "Lawful Right to Be"

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : lawful place, retreatself-defense

Date : August 29, 2017

Our appellate courts are beginning to issue decisions concerning the impact of the General Assembly's 2011 changes to North Carolina law on self-defense. A case earlier this summer addressed whether a defendant has a duty to retreat before using deadly force in self-defense in a place where he or she has a "lawful right to be." *See State v. Bass*, ___ N.C. App. ___, 802 S.E.2d 477, *temp. stay and rev. granted*, ___ N.C. ___, 800 S.E.2d 421 (2017). In *Bass*, the Court of Appeals held that the defendant did not have a duty to retreat and further had the right to have the jury instructed that he did not have a duty to retreat.

Defendant's evidence. The case concerned an ongoing conflict between the defendant, Bass, and the alleged victim, Fogg, which resulted in Bass shooting Fogg. Bass was charged with attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. The jury convicted him of assault with a deadly weapon inflicting serious injury.

In determining whether a defendant is entitled to instructions on self-defense and other defenses, the court must consider the evidence in the light most favorable to the defendant. In this case, Bass's evidence showed that ten days before the shooting, Fogg assaulted him and broke his jaw in three places, requiring surgery, placement of screws in his jaw, and wiring of his jaw shut. Fogg was 240 pounds, Bass was 165 pounds. This incident was captured on video on Fogg's cellphone. *Bass*, slip op. at 2–3.

Bass's evidence showed that on the day of the shooting, July 3, he was watching fireworks with friends at the apartment complex where he lived. He was standing on the sidewalk at the complex when he saw a car pull into the parking lot, with Fogg in the passenger seat. In an effort to avoid Fogg, Bass walked to the breezeway of another building in the apartment complex, "praying and hoping" that Fogg would not approach him, but Fogg did. Fogg began speaking aggressively to Bass, who observed that Fogg was carrying a large knife in a sheath attached to his belt. The knife, which was in the record on appeal, resembled a short machete with a wide, curved blade approximately ten inches long. Fearing that Fogg was going to beat him up or cut him and not wanting to be trapped in the breezeway, Bass moved to a grassy area outside the breezeway. After Fogg demanded that Bass get "on the concrete," Bass pulled out a gun and pointed it at Fogg, hoping to scare him into leaving. Fogg said "oh . . . you wanna shoot me?" and approached Bass while reaching for his knife. Bass testified that he then shot Fogg because he was "scared for [his] life." Slip op. at 3–5.

Jury instructions and deliberations. The trial judge instructed the jury on the defendant's right to use deadly force in self-defense when the defendant reasonably believes that the force is necessary to protect the defendant from imminent death or great bodily harm. The trial judge used North Carolina Pattern Jury Instruction ("N.C.P.I.") 308.45 to convey these principles.

The defendant further requested that the trial judge instruct the jury that he did not have a duty to retreat because he was in a place where he had a "lawful right to be." The pattern jury instruction includes such a statement, providing that "the defendant has no duty to retreat in a place where the defendant has a lawful right to be." N.C.P.I. 308.45. The trial judge declined to include this part of the instruction because the defendant was not within the curtilage of his

home when he shot Fogg. Slip op. at 9–11.

During deliberations, the jury sent a note to the judge asking for "further explanation on NC law with regard to 'duty to retreat.'" The judge instructed the jury that "by North Carolina statute, a person has no duty to retreat in one's home, one's own premises, one's place of residence, one's workplace, or one's motor vehicle. This law does not apply in this case." Slip op. at 12.

Majority applies statutory language. A majority of the Court of Appeals found that the trial judge erred in his initial instruction by omitting the statement that the defendant did not have a duty to retreat and erred in his supplemental instruction by advising the jury that the principle did not apply in this case. The Court of Appeals recognized that North Carolina's self-defense statutes address two different situations: defensive force in a person's home, workplace, or vehicle under G.S. 14-51.2; and defense of oneself and others under G.S. 14-51.3.

The first statute, sometimes referred to as the castle doctrine, creates a rebuttable presumption that the defendant has a reasonable fear of death or great bodily injury when an intruder forcibly and unlawfully enters the premises, and it provides that the defendant does not have a duty to retreat. Under the second statute, the presumption does not apply; a defendant who uses deadly force must produce evidence that he or she had a reasonable fear of death or great bodily injury. The second statute still provides, however, that a person does not have a duty to retreat in a place where he or she has a "lawful right to be."

Because both statutes recognize that a defendant does not have a duty to retreat, the majority found it unnecessary to determine whether the defendant was in the curtilage of his home. The majority observed that a defendant has a lawful right to be in a public place, including the common area of the apartment complex where Fogg approached Bass. Therefore, Bass did not have a duty to retreat before acting in self-defense and the jury should have been so instructed. Sl. op. at 14–15, 23.

Dissent finds earlier decision controlling but agrees with majority's no duty to retreat analysis. The dissent believed that the court was bound by its earlier decision in *State v. Lee*, ___ N.C. App. ___, 789 S.E.2d 679 (2016), *rev. granted*, ___ N.C. ___, 796 S.E.2d 790 (2017). There, the trial judge failed to instruct the jury that the defendant did not have a duty to retreat in a place he had a lawful right to be—in that case, a public street near his home. The court in *Lee* acknowledged that the defendant may not have had a duty to retreat before acting in self-defense, recognizing that G.S. 14-51.3 provides that "'a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be . . . .'" 789 S.E.2d at 686 (quoting G.S. 14-51.3). But, the court found that to the extent the statute applies to any public place, the trial judge's failure to instruct on the principle did not warrant a new trial. *Id.* at 686–87.

The majority in *Bass* found that the circumstances in *Lee* were distinguishable and did not control the outcome in *Bass*. The dissent in *Bass* believed that *Lee* was not distinguishable, but her opinion indicates that she agreed with the majority's analysis of the law on retreat in North Carolina. The dissent recognized that a defendant does not have a duty to retreat in a place where he or she has a lawful right to be. The dissent based this conclusion on both the statutory provisions and common law. Slip. Op. at 4 (Bryant, J., dissenting). The dissent also found that the trial judge in *Bass* should have instructed the jury that the defendant did not have a duty to retreat, stating "candidly, I tend to agree with the majority's opinion that a new trial is necessary . . . ." *Id.* at 1. Likewise, the dissent found that the trial judge in *Lee* should have instructed the jury on this principle, stating that "it would seem that basic rules of statutory construction indicate that a no duty to retreat instruction should have been given." *Id.* at 6. The dissenting judge ended by expressing her "reluctant[] dissent" from the majority's decision that the trial judge's instructions to the jury warranted a new trial. *Id.* at 13. She noted that should the North Carolina Supreme Court reverse *Lee*—review is pending in both *Lee* and *Bass*—her dissent on that portion of the majority's opinion in *Bass* would be moot. *Id.* at 13 n.6.

North Carolina Criminal Law Blog

The Common Law is Dead; Long Live the Common Law!

January 25, 2023 **Joseph L. Hyde** <https://nccriminallaw.sog.unc.edu/author/genegant/>

In State v. McLymore, 380 N.C. 185, 868 S.E.2d 67 (2022), our Supreme Court held that Section 14-51.3 "supplants the common law on all aspects of the law of self-defense addressed by its provisions," and "the only right to perfect self-defense available in North Carolina [is] the right provided by statute." Id. at 191, 868 S.E.2d at 72-73. At the same time, it interpreted the felony disqualifier provision of Section 14-51.4 – consistently with "common law principles" – to require a causal nexus between the felony and the use of force. Id. at 197, 868 S.E.2d at 77. The common law is apparently not so easily dispensed with. This post – my first contribution to this forum – addresses the persistence of the common law in the area of self-defense. My colleague Phil Dixon provided color commentary on McLymore **here** <https://www.sog.unc.edu/blogs/nc-criminal-law/color-commentary-recent-cases>. My colleague John Rubin discussed the felony disqualifier provision (and anticipated the holding in McLymore) **here** <https://nccriminallaw.sog.unc.edu/statutory-felony-disqualification-self-defense/>.

Our Reception Statute: G.S. Section 4-1.

The American Revolution was not a rejection of English law. The law familiar to the colonists, and which they largely retained, was the English common law. This body of law found its most accessible form in Blackstone's *Commentaries*, published between 1765 and 1770. Until the 1930s, Blackstone was required reading for admission to the North Carolina bar. See John V. Orth, Blackstone's Ghost: Legal Education in North Carolina, chapter in Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Context (Wilfred Prest ed.) (Hart Publishing Ltd. 2014).

By statute, the common law is declared to be in force within this State except where it has been abrogated, been repealed, or become obsolete. N.C.G.S. § 4-1. Our Supreme Court has said the common law referred to in Section 4-1 is the common law of England as it existed at the time of the signing of the Declaration of Independence. See e.g., State v. Buckom, 328 N.C. 313, 316, 401 S.E.2d 362, 364 (1991). Hence, absent a contrary decision by the General Assembly, the common law remains in effect in North Carolina. E.g., State v. Rankin, 371 N.C. 885, 896, 821 S.E.2d 787, 796 (2018); cf. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 472, 515 S.E.2d 675, 691 (1999) (North Carolina Supreme Court may modify the common law where obsolete), cert. denied, 529 U.S. 1033, 146 L. Ed. 2d. 337 (2000).

The Common Law: Crimes and Defenses.

Unlike the federal government and some states, North Carolina recognizes a number of common law crimes, that is, offenses not defined by statute. See Carissa Byrne Hessick, The Myth of Common Law Crimes, 105 Va. L. Rev. 965, 980-81 (2019). Common law robbery, as its name implies, obviously depends on elements specified by caselaw. See State v. Bond, 345 N.C. 1, 22, 478 S.E.2d 163, 174 (1996), cert. denied, 521 U.S. 1124, 138 L. Ed. 2d. 1002 (1997). Statutes enumerating the degrees of burglary and arson explicitly incorporate the common law. See N.C.G.S. §§ 14-51 ("burglary as defined at the common law"), 14-58 ("arson as defined at the common law"). And offenses like murder and assault, though the subject of criminal statutes, are still defined by the common law. See State v. Vance, 328 N.C. 613, 622, 403 S.E.2d 495, 501 (1991) (murder); State v. Floyd, 369 N.C. 329, 335, 794 S.E.2d 460, 464 (2016) (assault).

Just as there are common law crimes, so too there are common law defenses. Necessity may constitute a defense to driving while impaired. See State v. Miller, 258 N.C. App. 325, 327, 812 S.E.2d 692, 694 (2018); State v. Hudgins, 167 N.C. App. 705, 710, 606 S.E.2d 443, 447 (2005). Similarly, our Supreme Court recently recognized duress (somewhat anomalously titled "justification") as a defense to possession of a firearm by a felon. See State v. Mercer, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020).

Until 1993, self-defense was governed largely by the common law. As John Rubin **noted** <https://nccriminallaw.sog.unc.edu/the-statutory-law-of-self-defense-in-north-carolina/> , "North Carolina was a common law state when it came to self-defense." At common law, an innocent person was privileged to use deadly force to prevent a forcible felony. See State v. Hornbuckle, 265 N.C. 312, 315, 14 S.E.2d 12, 14 (1965). Developed as an imperfect privilege available to those whose fault in the affray precluded the justification of crime prevention, self-defense excused a killing if it was shown to be necessary to preserve life and limb. See Rollin Perkins & Ronald N. Boyce, Criminal Law, 1126 (3rd ed. 1982). This historical distinction between a *justifiable* homicide and an *excusable* homicide finds some parallel in the present difference between perfect and imperfect self-defense. The concept of fault was retained in the modern rule that one may not claim self-defense who brought upon himself the need to use force. See State v. McCray, 312 N.C. 519, 530, 324 S.E.2d 606, 614 (1985). A person committing robbery, for example, cannot claim self-defense. See State v. Jacobs, 363 N.C. 815, 822, 689 S.E.2d 859, 864 (2010).

Self-defense: Statutes and Precedents.

Our legislature apparently made its first foray into the lawful use of defensive force with Section 14-51.1 (enacted 1993, repealed 2011). That statute provided that the lawful occupant of a home was justified in using deadly force to prevent or to terminate a forcible entry into the home. This section, it said, is not intended to repeal, expand, or limit any other defense that may exist under the common law. N.C.G.S. § 14-51.1. Insofar as Section 14-51.1 codified a defense against burglary, it was placed reasonably enough in Chapter 14, Article 14 (re burglary). As recognized in State v. Blue, 356 N.C. 79, 565 S.E.2d 133 (2002), this statute broadened the defense of habitation to justify the use of force not only to prevent an unlawful entry (as the common law had done) but also *to terminate* an unlawful entry. Id. at 89, 565 S.E.2d at 139.

In 2011, our legislature repealed Section 14-51.1 and enacted Sections 14-51.2, -51.3, and -51.4. Defense of habitation, such as was implicated by the prior 14-51.1, is now addressed by Section 14-51.2. The remaining additions – Sections 14-51.3 and 14-51.4 – deal with defense of person: self-defense and defense of others. Accordingly, a person is "justified" in using deadly force when he or she reasonably believes such force is necessary to prevent imminent death or great bodily harm. N.C.G.S. § 14-51.3(a)(1). Under Section 14-51.4, however, this justification is not available to one who: (1) was committing a felony, or (2) initially provoked the use of force against himself (except as provided). N.C.G.S. § 14-51.4.

Our Court of Appeals interpreted the felony disqualifier provision of Section 14-51.4 literally, according to the plain language of the statute, to preclude a defendant who was committing any felony – in that case, possession of a firearm by a felon – from asserting a statutory right to self-defense. See State v. Crump, 259 N.C. App. 144, 151, 815 S.E.2d 415, 420 (2018) (finding no "causal nexus requirement"). The Court of Appeals thus declined to read the felony disqualifier as codifying the common law concept of "fault," which would deny self-defense to one committing a felony only if it precipitated the use of force. There is some support for this conclusion in the structure of Section 14-51.4, which lists as discrete bases for ineligibility commission of a felony and provocation for the use of force. The provocation prong reflects the common law idea of fault; the felony disqualifier arguably does something more. The Court of Appeals evidently did not consider a hybrid category, an intermediate position soon taken up by our Supreme Court.

State v. McLymore: Out with the Old, In with the Old.

The defendant in McLymore, who previously had been convicted of multiple felonies, was working as a door-to-door salesman in April 2014. While riding in a car with his supervisor, the defendant shot and killed his supervisor, dumped the body, and fled in his supervisor's car. Claiming that his supervisor had attacked him while the vehicle was stopped at a traffic light, the defendant alleged self-defense. At trial, the trial court instructed the jury that the defendant was not entitled to the benefit of self-defense if he was committing possession of a firearm by a felon. The defendant was convicted of first-degree murder, armed robbery, and speeding to elude arrest and appealed, arguing error in the jury instructions. McLymore, 380 N.C. at 187-89, 868 S.E.2d at 70-71. Relying on Crump, the Court of Appeals found no error. Our Supreme Court allowed discretionary review and ultimately overruled Crump. Id. at 189, 868 S.E.2d at 71-72.

Our Supreme Court first considered whether the common law defense survived the 2011 statutes. Reciting its own four-elements test for self-defense (including the concept of fault), it observed that Section 14-51.3 "closely tracks this earlier common law definition of the right to self-defense." Id. at 191, 868 S.E.2d at 72. It concluded "the General Assembly meant to replace the existing common law right to perfect self-defense with a new statutory right" and that, after the enactment of Section 14-51.3, "there is only one way a criminal defendant can claim perfect self-defense: by invoking the statutory right to perfect self-defense." Id. Hence, "Section 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions." Id. "[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." Id. at 191 n.2, 868 S.E.2d at 72 n.2.

Our Supreme Court next addressed the scope of the felony disqualifier created by Section 14-51.4. It posited that "statutes which alter common law rules should be interpreted against the backdrop of the common law principles being displaced." Id. at 196, 868 S.E.2d at 76. Our Supreme Court acknowledged that the plain language of Section 14-51.4 does not support a causal nexus requirement. Id. at 194, 868 S.E.2d at 75. It declared, however, that "a literal interpretation of the felony disqualifier is fundamentally inconsistent with common law principles," raises constitutional issues, and would produce absurd results. Id. at 197, 868 S.E.2d at 77. Reviewing the common law concept of "fault," our Supreme Court decided that the imposition of a causal nexus requirement better reflected "a sensible broadening of the common-law" concept. Id. at 196, 868 S.E.2d at 76. "It is doubtful," it said, "that the General Assembly intended to completely disavow a fundamental common law principle in a statute which otherwise closely hews to the common law." Id. at 197, 868 S.E.2d at 76. Accordingly, in order to disqualify a defendant from asserting self-defense under Section 14-51.4, "the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force." Id. at 197, 868 S.E.2d at 77. Because the trial court failed to instruct the jury on this causal nexus requirement, the jury instructions were erroneous. Id. at 198, 868 S.E.2d at 77.

The Law after McLymore.

1. Statutory Construction. Despite McLymore's insistence that our defensive force statutes track the common law, it is beyond dispute that the terminology used is not the same. That leaves the duty of reconciliation to the courts. It is of course not unusual for our Supreme Court to acknowledge preexisting law when construing a new statute. See Blue, 356 N.C. at 88-89, 565 S.E.2d at 139. What is surprising about McLymore is that the common law is given such a prominent place in the analysis. See McLymore, 380 N.C. at 196-97, 868 S.E.2d at 76. Indeed, the methodology is reminiscent of a time when statutes were fewer and farther between. See Samuel L. Bray, The Mischief Rule, 109 Geo. L.J. 967, 1007 (2021). Whatever might be the consequences for criminal law, McLymore revives a canon of statutory construction that prioritizes the common law. That aspect of the case may transcend the law of self-defense; anyone puzzling over a new statute take note.

2. Footnote 2. As stated above, McLymore held that Section 14-51.3 supplants the common law on all aspects of the law addressed by its provisions. At the same time, it declared in Footnote 2 that "the common law remains intact" to the extent the statutes do not address an aspect of the common law of self-defense. McLymore, 380 N.C. at 191 n.2, 868 S.E.2d at 72 n.2. Our Supreme Court may have been thinking of State v. Holloman, 369 N.C. 615, 799 S.E.2d 824 (2017), where it noted that Section 14-51.4 does not appear to recognize the common law distinction between an aggressor with murderous intent and one without. Id. at 627, 799 S.E.2d at 832. In that case, as in McLymore, our Supreme Court decided the legislature had marginally changed the common law, while refusing to adopt the drastic departure advocated by one of the parties. The General Assembly certainly has the authority to alter the common law. McLymore, 380 N.C. at 196, 868 S.E.2d at 76. But the assertion in Footnote 2 that the common law remains intact when the statutes are silent, coupled with a mode of statutory interpretation that looks to the common law even when they are not, shows the common law is not dead. Indeed, taken as a whole, McLymore rather affirms the vitality of the common law in the area of self-defense, notwithstanding its declaration the General Assembly intended to "abolish the common law right." McLymore, 380 N.C. at 190, 868 S.E.2d at 72.

3. Imperfect Self-defense. Our Supreme Court took great care in McLymore to articulate that the common law supplanted by statute was the right to *perfect* self-defense. McLymore, 380 N.C. at 191, 868 S.E.2d at 72. Perhaps the most significant question after McLymore is the status of *imperfect* self-defense. At common law, a defendant tried for murder may be convicted of manslaughter when, though he killed with a reasonable belief deadly force was necessary to prevent death or great bodily harm, yet the defendant was the aggressor (without murderous intent) or used excessive force. See State v. McAvoy, 331 N.C. 583, 596, 417 S.E.2d 489, 497 (1992). If the "justification" prescribed by our defensive force statutes pertains only to perfect self-defense, there is a good argument that the law of imperfect self-defense (understood as an *excuse*) remains intact via Footnote 2. Alternatively, our defensive force statutes might be interpreted – consistently with common law principles – to retain the same factors that would otherwise partially excuse a homicide. In any event, the courts are not likely to dispense entirely with the common law of imperfect self-defense.

4. Causal Nexus. After McLymore, a defendant may be denied the benefit of self-defense under Section 14-51.4(1) when the State establishes that, but for the defendant's felony, the confrontation would not have occurred. McLymore, 380 N.C. at 197, 868 S.E.2d at 77. This obstacle exists *in addition to* that concept of fault that denies self-defense to a person who provoked the use of force against himself. See N.C.G.S. § 14-51.4(2). If the provocation prong largely codifies the common law, the felony disqualifier is something new. And while it is not as harsh as the Court of Appeals in Crump believed, still it provides the prosecution with a powerful tool. If, as McLymore said, the felony disqualifier expands the common law concept of fault, it must include circumstances beyond that which traditionally would have rendered a defendant ineligible. Scenarios can be imagined, but the precise parameters of the disenfranchisement remain to be seen.

UNC SCHOOL OF GOVERNMENT

Knapp-Sanders Building
Campus Box 3330, UNC Chapel Hill
Chapel Hill, NC 27599-3330
T: (919) 966-5381 | F: (919) 962-0654

Defensive Force in the Home

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : curtilage, Deadly Force, defense of home, habitation, self-defense

Date : August 7, 2018

We now have a number of appellate opinions interpreting the defensive force statutes enacted by the North Carolina General Assembly in 2011. In State v. Kuhns, ___ N.C. App. ___ (July 3, 2018), we have our first opinion squarely addressing the provisions of G.S. 14-51.2, which deals with defensive force in a home, workplace, or motor vehicle. This post focuses on the home, where the conflict in *Kuhns* occurred, but some of the same principles apply to the workplace and motor vehicles.

The Statutory Castle Doctrine in G.S. 14-51.2

Initially, I want to point out that I am intentionally using the phrase defensive force in the home instead of defense of home or defense of habitation. Under the North Carolina common law, a person had the right to use deadly force to *prevent* an unlawful, forcible entry into the home if the occupant reasonably feared death or great bodily injury or reasonably believed that the intruder intended to commit a felony. Under G.S. 14-51.1, enacted in 1994 and repealed in 2011 (when the new defensive force statutes were passed), a person had the right to use deadly force to *prevent* or *terminate* an unlawful, forcible entry into the home in the same circumstances. Under both formulations, a person relying on defense of habitation was claiming that he or she was defending against a wrongful entry.

New G.S. 14-51.2 continues to require an unlawful, forcible entry as a condition of the right to use deadly force. As under repealed G.S. 14-51.1, the entry may be ongoing or may have already occurred. *See* G.S. 14-51.2(b)(1), (2). But, the new statute does not require that the occupant act for the purpose of preventing or terminating the entry. Rather, the impact of an unlawful, forcible entry is that the occupant is presumed to have feared death or great bodily injury to himself or another person. G.S. 15-51.2(b)(1). It is also presumed that the intruder intended to commit an unlawful act involving force or violence. G.S. 14-51.2(d). Unless the presumptions are rebutted or an exception applies, the occupant is justified in using deadly force and is immune from criminal liability. *See* G.S. 14-51.3.

Thus, new G.S. 14-51.2 represents a modified castle doctrine. The essence of the statutory defense is not defending the habitation, or castle, from being attacked or stormed. Rather, G.S. 14-51.2 presumes that the occupants have the right to use defensive force, including deadly force, if their castle is attacked or stormed. (The extent to which common law defenses involving defensive force continue to be available remains to be determined. *See, e.g.,* G.S. 14-51.2(g) (stating that statute is not intended to repeal or limit common law defenses).)

The Conflict in *Kuhns*

In *Kuhns*, the occupant of the home was Donald Kuhns, the defendant. Sadly, he shot and killed his neighbor and friend, Johnny Dockery, after a series of conflicts with him that night. On the night of the shooting, both had been drinking with other friends in the neighborhood. Dockery and his girlfriend got in an argument, and Kuhns told Dockery to leave her alone. Dockery got angry and said that if he caught anyone with his girlfriend he'd kill them. After Dockery's girlfriend drove off, Dockery called 911 to report that she was driving while intoxicated.

When a deputy arrived, Dockery was standing in the middle of the road shouting in the direction of Kuhns' home. Kuhns told the deputy that Dockery needed to leave before something bad happened. The deputy told Dockery to go

home and watched him to be sure he complied.

About an hour later, Kuhns called 911 and said that Dockery was standing in Kuhns' yard threatening his life. When law enforcement officers arrived a second time, Dockery was "yelling pretty loud." Slip Op. at 3. The officers again instructed Dockery to go home and followed him to make sure he complied.

According to Kuhns' evidence, Dockery returned about 45 minutes later for the final, fatal confrontation. Kuhns was inside his trailer trying to go to sleep when he heard Dockery yelling, "[C]ome on out here, you son of a bitch, I'm going to kill you." Slip Op. at 4. Kuhns retrieved his 32-caliber pistol and went outside onto his porch. Dockery was in the yard of Kuhns' home, beside the porch, "cussing and hollering" at Kuhns. *Id.* Kuhns told Dockery to go home. When Dockery saw the gun, he said, "[Y]ou're going to need more than that P shooter, motherf---er, I've been shot before." *Id.* Dockery was pacing back and forth and then came at Kuhns fast. Kuhns took a step back, fired one shot, and killed Dockery.

At the defendant's trial on the charge of first-degree murder, the judge instructed the jury on self-defense but refused the defendant's request for the pattern jury instruction on defense of habitation, N.C.P.I—Crim. 308.80 (Jun. 2012). The judge stated that there was no evidence that Dockery was trying to break in. According to the judge, the defendant's evidence showed he was attempting to prevent injury to himself, not trying to prevent Dockery from coming into the curtilage or Kuhns' home. Therefore, the defendant was not entitled to a defense of habitation instruction. The defendant was convicted of voluntary manslaughter and appealed.

The Meaning of Entry and Home

On appeal, the defendant argued that the trial judge erred in failing to give the requested instruction. The State countered that the defendant was not entitled to the instruction because Dockery never came onto the defendant's porch and never tried to enter his trailer. For two interrelated reasons, the Court of Appeals rejected the State's argument and reversed the defendant's conviction.

First, the Court recognized that G.S. 14-51.2 expressly applies when an intruder is in the process of unlawfully and forcibly entering a person's home *or* has already unlawfully and forcibly entered. The Court found that Dockery, by repeatedly returning to Kuhns' property and threatening Kuhns with bodily harm, had unlawfully and forcibly entered his home. Second, the Court recognized that G.S. 14-51.2 expressly applies to the curtilage of the home. *See* G.S. 14-51.2(a)(1). The statute does not define curtilage, but the term generally means the area immediately surrounding a dwelling. The Court found that Dockery was within the curtilage of Kuhns' property and therefore within his home.

The Court did not specifically discuss the actions that made Dockery's entry forcible, but the opinion indicates that the Court was satisfied that this condition was met. It found that despite numerous requests to leave, Dockery continued to return to Kuhns' property while threatening Kuhns with bodily harm. Slip Op. at 11. The Court also did not distinguish the parts of the property that constituted the curtilage, finding it undisputed that Dockery was within the curtilage of Kuhns' home. *Id.* Presumably, both the yard, which Dockery had entered, and the porch, which Dockery was in the process of trying to enter, were within the curtilage.

The Court concluded that the defendant was prejudiced by the trial judge's failure to give the pattern instruction on defense of habitation. The Court recognized that the instruction, which recites the presumptions discussed above, would have been more favorable to the defendant than an instruction on self-defense alone. Slip Op. at 12.

The specific wording of the pattern jury instruction on defense of habitation was not at issue. At trial the defendant requested the pattern instruction on defense of habitation, and on appeal the State argued that the defendant was not entitled to the instruction. In rejecting the State's argument that defense of habitation applies only when the defendant is acting to prevent an unlawful, forcible entry, the Court of Appeals noted that the language of the instruction correctly states that an occupant may use deadly force to prevent or terminate entry. The Court did not consider whether it is

proper to instruct the jury that the occupant must have acted with this purpose. As discussed at the beginning of this post, the new statute requires that an unlawful, forcible entry be occurring or have occurred; it no longer seems to require that the occupant have acted with the purpose of preventing or terminating the entry.

As you handle these cases, please keep in mind that G.S. 14-51.2 is a complex statute. *Kuhns* only scratches the surface. While the new statute bears similarities to the common law and earlier statute on defense of habitation, it is not identical and affords occupants of a home, workplace, and motor vehicle different and in a number of respects greater rights.

Court of Appeals Approves Justification Defense for Firearm by Felon

Author : Phil Dixon

Categories : Crimes and Elements, Uncategorized

Tagged as : defense, justification, possession of firearm by felon, State v. Mercer

Date : August 21, 2018

For several years now, it has been an open question in North Carolina whether a justification defense to possession of firearm by felon is available. John Rubin blogged about the issue back in 2016, here. Our courts have assumed without deciding that the defense might apply in several cases but have never squarely held the defense was available, finding instead in each previous case that defendants didn't meet the admittedly rigorous standards for the defense. This month, the Court of Appeals unanimously decided the issue in favor of the defendant. In State v. Mercer, ___ N.C. App. ___ (August 7, 2018), the court found prejudicial error in the trial judge's refusal to instruct the jury on justification in a firearm by felon case and granted a new trial. Read on for more details.

Defense of Justification. As John wrote, the leading case on the defense is *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), which is referenced in the pattern jury instruction for possession of firearm by felon. N.C.P.I-Crim. 254A.11, n.7. That footnote quotes *State v. Edwards*, 239 N.C. App. 391 (2015):

> The test set out in *Deleveaux* requires a criminal defendant to produce evidence of the following to be entitled to an instruction on justification as a defense to a charge of possession of firearm by felon: (1) that the defendant was under unlawful and present, imminent and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *Edwards* at 393-94.

At least 11 federal circuit courts have recognized the defense, including the Fourth Circuit. *See, e.g., U.S. v. Mooney*, 497 F.3d 397 (4th Cir. 2007). North Carolina now joins them. So what was different about *Mercer*?

State's Evidence. The facts of the case were, perhaps unsurprisingly, a little messy—beyond the numerous witnesses and parties involved in the fracas, there are mysterious references to "Shoe" and "the candy man" in the opinion. The State's evidence tended to show that the defendant's cousin, Wardell, got into an altercation with a Mr. Mingo regarding a missing phone. Mingo lived in the neighborhood near the defendant's home. The next day, Wardell (along with another man, according to Mingo) engaged in a fight with Mingo while he was on his way to see "the candy man". Within a few minutes of the fight, Mingo contacted various family members about the incident. A group of around fifteen family members (including Mingo) then walked to the defendant's home where Wardell was visiting, with the intention of fighting Wardell. The defendant and Wardell pulled into the driveway as the crowd was arriving, and the defendant got out of the car with a gun in his waistband. The group insisted on fighting despite seeing the defendant's gun, and the defendant fired shots over the crowd's head. Mingo ultimately acknowledged that at least two people in his group also had guns and shot at the defendant. The altercation came to an end without anyone being injured. The Mingo family members left and contacted the police, resulting in the defendant being charged with two counts of assault with a deadly weapon with intent to kill and one count of possession of firearm by felon.

Defendant's Evidence. The defendant's mother testified about the earlier fight between Wardell and Mingo.

According to her, that first fight was only between those two men and did not involve a third person. She added that Mingo left that incident threatening to "get his brothers . . . and kill [Wardell]." *Mercer* slip op. at 6. She later heard a disturbance outside of her home and came out to discover the crowd of Mingo family members "basically ambushing her son." *Id.* She saw that Mingo's brother had a gun, and the defendant also had a gun. Mingo's mother was encouraging her son to shoot the defendant, and the defendant's mother tried to get in between her son and the armed person in the Mingo crowd. That person fired their gun towards the defendant, and Mingo's mother also later fired a gun at him.

The defendant took the stand and testified that, upon his arrival at home and seeing the crowd, he tried to explain that he had no role in the earlier fight between Wardell and Mingo, but "the group kept approaching the defendant, stating they were 'done talking.'" *Id.* at 7. The defendant saw at least three guns among the Mingo group. Wardell pulled out a gun, and the defendant heard people in the crowd "cocking their guns." The defendant then told Wardell to give him the gun because Wardell "didn't know what he was doing [with the gun]." *Id.* The defendant acknowledged on the stand that he knew he was a felon and therefore unable to lawfully possess a firearm, but explained he only did so out of a fear of injury or death to himself or his family members: "So at that time, my mother being out there . . . I would rather make sure we [are] alive versus my little cousin making sure, who was struggling with the gun." *Id.* He repeatedly tried to get the crowd to back away to no avail, and someone shot in the Mingo group shot at "Shoe" (apparently a person in the defendant's group). He further testified that shots were fired at him, but he couldn't determine from whom. The defendant claimed he only fired his gun once, after a Mingo group member fired at him as he fled across the street. The gun malfunctioned after that shot, so he tossed the gun back to his cousin and ran home. The defendant turned himself in to the police the next day.

Jury Instructions at Trial. The defendant requested an instruction in writing on the justification defense for the firearm charge before the charge conference. The trial judge agreed to instruct the jury on self-defense as to the assaults, but refused to give the justification instruction, over the defendant's objection. During deliberations, the jury sent the judge a note specifically asking about whether possession of a firearm by a felon could ever be justified. The trial judge declined to answer the question directly and instead repeated the instructions on firearm by felon and reasonable doubt. The jury acquitted the defendant of both assaults but convicted on firearm by felon. The defendant appealed, arguing that his evidence, taken in the light most favorable to the defendant, supported his proposed justification instruction.

***Mercer* Opinion.** The opinion begins by acknowledging the *Deleveaux* opinion and the state of the law in North Carolina regarding the defense. John's post summarizes most of those earlier cases so I won't rehash them here, but suffice it to say the court distinguished the defendant's situation in *Mercer* from the previous cases. The court agreed that there was an imminent threat of death or serious bodily injury—the defendant only possessed the gun once he heard other guns being cocked and saw "[Wardell] struggling with the gun." *Id.* at 13. While not specifically discussed in the opinion, the large crowd determined to fight at the defendant's home likely also helped to establish an imminent threat. The defendant didn't recklessly or negligently place himself in the situation—the situation was unfolding as he arrived in his driveway, only to meet a large crowd (with at least some in the crowd armed) ready to fight. The defendant repeatedly tried to talk to the crowd and calm things down, and only grabbed the gun from his cousin when it was clear that talk wasn't working—thus, there was no reasonable alternative to his act of possessing the weapon. Put another way, it was unforeseeable that the act of pulling up in the driveway of his own home would create a need to engage in criminal activity, and the defendant didn't have other realistic options at that point to defending himself with the weapon. Finally, the causal relationship between the crime of possessing the weapon and the avoidance of the threatened harm was met—the defendant only possessed the gun once the situation became extremely serious (i.e., guns being cocked) and gave the gun back to his cousin as soon as he got away from the situation. The harm avoided was death or serious injury to himself and his family members by the Mingo crowd, and the defendant possessed the weapon no longer (or sooner) than was necessary to deal with the situation.

The State focused on the defendant's alleged reasonable alternatives. The defendant had a cell phone and could have called 911, they argued, or he could have fled the scene sooner—he had alternatives to grabbing the gun. The

court rejected this argument, citing to the defendant's brief: "[O]nce guns were cocked, time for the State's two alternative courses of action—calling 911 or running away—had passed." *Id*. at 14.

To be clear, the opinion doesn't say that the possession of the firearm *was* justified in this case. Rather, it was a question for the jury to resolve "after appropriate instruction." *Id*. at 14. The fact they were not so instructed was error. The court had no difficulty concluding that this error was prejudicial. For one, the defendant was acquitted of the assault charges, presumably on the basis of self-defense. For another, the jury specifically asked the trial judge about a justification defense. This, the court held, strongly suggested that there was a reasonable probability of a different result at trial had the jury received the justification instruction. *Id*. at 15-16.

Impact of *Mercer*. Justification for firearm by felon is now here, at least with the right set of facts. Beyond that, *Mercer* raises another interesting point: how should this defense work with self-defense or defense of others? In another recent post, John talked about the felony disqualification in the self-defense statutes. *See* G.S. 14-51.4 (self-defense not available to one committing a felony). In *State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415 (April 17, 2018), the Court of Appeals took a strict interpretation, indicating that one engaged in contemporaneous felony conduct loses the right to self-defense, regardless of any causal connection between the felony and defensive act—that is, one is disqualified by *any* felony being committed at the time of the defensive act, whether or not the felony was related to the need to act defensively, and without regard to whether the felony involved violent force or serious risk of death or physical harm. *Mercer* suggests, however, that the disqualification doesn't apply where the defendant has a defense to the underlying felony. The parties in *Mercer* agreed on the self-defense instructions, and the felony disqualification apparently wasn't argued. A lot potentially turns on that point though. Would a defendant previously convicted of a felony always lose the right to self-defense if he picks up a gun? Or would an act excused by justification overcome the disqualification? The latter view has greater appeal as matter of logic and fairness and seems in line with the holding in *Mercer*: if a jury finds that a person previously convicted of a felony is justified in possessing a weapon, the possession would not constitute a felony and therefore would not disqualify the person from acting in defending himself and his family. The scenario isn't just a thought experiment. In *Crump,* the court of appeals stated that the defendant stipulated to being a felon in possession and held that he was disqualified from a self-defense instruction on that basis (although the jury in Crump was still instructed on self-defense). [As an aside, a petition for discretionary review has been filed in the N.C. Supreme Court in *Crump*]. When the facts are contested or support a justification defense to what otherwise may be a disqualifying felony, the jury would seem to have to decide the issue.

Perhaps the trickier question is whether a defendant who *doesn't* meet the strict standards for a justification instruction always loses the right to defend him or herself or others in all cases. It isn't difficult to imagine a situation where the defendant might not meet the standard for justification (and thus is contemporaneously committing a felony), but the use of defensive force was still necessary to protect life and the requirements of self-defense were otherwise met. Or even more broadly, what about when a defendant contemporaneously commits a felony (any felony) completely unrelated to the need for self-defense? Is there a due process limit on the disqualification in that scenario? And does the disqualification apply to both statutory and common law self-defense? *Mercer* perhaps raises more questions than it answers in this regard.

Moving on to procedure, when deciding the case, should the jury first have to determine whether or not the possession of the weapon was justified before they are instructed on self-defense? Or, would the question of justification be part of the larger self-defense instructions? If the former, a special verdict form might be useful. We'll have to wait for additional cases to see how justification works in other circumstances. If you have thoughts on *Mercer*, justification, or self-defense (or the Charlotte candy man), post a comment and let me know.

Another Self-Defense Decision on a Troublesome Doctrine

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : self-defense

Date : July 2, 2019

In *State v. Harvey*, ___ N.C. ___, ___ S.E.2d ___ (June 14, 2019), a five to one majority of the North Carolina Supreme Court affirmed the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 500 (2018), holding that the trial judge properly refused to instruct the jury on perfect and imperfect self-defense in a homicide case. In so ruling, the majority in the Supreme Court and Court of Appeals relied on the "belief" doctrine created by our courts over the last 25 years. The opinions, four in all, show that our courts are continuing to wrestle with the implications of that doctrine.

Facts of the Case. The majority and dissenting opinions in *Harvey*, in both the Supreme Court and Court of Appeals, had differing views of the evidence. Here is a summary of the facts described by the majority of the Supreme Court, with some of the differences noted.

Briefly, the decedent, Tobias Toler, went to a party at the mobile home of the defendant, Alphonzo Harvey. Toler was drinking a high alcohol beer and began staggering around Harvey's home, acting in a loud and rowdy manner, and cussing. Harvey told Toler to leave about seven or eight times, but Toler refused to leave unless Harvey went outside with him. Once the two were outside, Toler said he ought to whip Harvey's "damn ass." He threw a plastic bottle at Harvey and missed; he also threw a small broken piece of brick at Harvey, cutting Harvey's finger. (The dissent in the Supreme Court observed that other testimony indicated that the bottle was glass and that the brick hit the side of the mobile home with a loud thud. Slip op., dissent, at 3 n.1.)

While outside, Harvey again told Toler to leave, and Toler hit Harvey in the face. Harvey hit him back in the face. At some point in the conflict, Toler produced a small pocketknife, telling Harvey he ought to kill his "damn ass," and Harvey went inside and retrieved a knife of his own. (The majority noted that witnesses testified that Harvey's knife resembled an iron pipe with a blade on the end, Slip op., majority, at 3 n.3, while the dissent cited Harvey's testimony that the knife was mounted on the end of a wooden rod. Slip op., dissent, at 4.).

The majority and dissenting opinions describe the fatal exchange differently. According to the majority, after returning to the yard, Harvey approached Toler while swinging the knife, made a stabbing motion three times, and pierced Toler's chest, which resulted in Toler's death. Slip op. at 3–4. The dissenting opinion relied on Harvey's testimony that Toler "came up on" him with his pocketknife in hand, which is when Harvey hit Toler with his knife. Slip op., dissent, at 4.

Counsel for Harvey gave notice of the intent to rely on self-defense before trial and requested self-defense instructions at trial, including an instruction on voluntary manslaughter. The trial judge refused these instructions and instructed the jury to consider only whether the defendant was guilty of first-degree murder, guilty of second-degree murder, or not guilty. The jury convicted Harvey of second-degree murder, and the trial judge sentenced him to a term of 483 months (about 40 years) to 592 months imprisonment. (The record indicates that Harvey was in prior record level VI, having been convicted of 16 misdemeanors and one Class I felony during a span of 30 years. Settled Record on Appeal at 37–40.)

The Majority Opinion. The majority of the North Carolina Supreme Court began by recognizing two types of self-

defense in North Carolina—perfect and imperfect self-defense. To obtain an instruction on either of the two, the defendant must produce evidence that (1) he in fact formed a belief that it was necessary to kill his adversary to protect himself from death or great bodily harm and (2) his belief was reasonable. Slip op., majority, at 6–7. Previous decisions have used this phrasing to describe these requirements. *See State v. Bush*, 307 N.C. 152 (1982), *quoting State v. Norris*, 303 N.C. 526 (1981). The majority found that the evidence "fails to manifest any circumstances existing at the time defendant stabbed Toler which would have justified an instruction on either perfect or imperfect self-defense." Slip op., majority, at 8.

Under the majority's view, the problem was essentially with the first requirement.

> Despite his extensive testimony recounting the entire transaction of events from his own perspective, defendant never represented that Toler's actions in the moments preceding the killing had placed defendant in fear of death or great bodily harm . . . . On the other hand, defendant's own testimony undermines his argument that any self-defense instruction was warranted. Slip op., majority, at 8–9.

The majority pointed to portions of Harvey's testimony in which he referred to the stabbing as "the accident," stated that his purpose in getting the knife was because he was "scared" that Toler was going to hurt him, and represented that what he sought to do with the knife was to make Toler leave. *Id.* at 9–10. The majority pointed to prior decisions holding that the defendant was not entitled to self-defense instructions where he claimed the killing was accidental, made self-serving statements that he was scared, or fired a gun to make the victim and others retreat. *Id. at* 9. Because Harvey failed to present evidence that he believed it was necessary to fatally stab Toler in order to protect himself from death or great bodily harm, he was not entitled to an instruction on perfect or imperfect self-defense.

The Dissenting Opinion. Justice Earls, in dissent, found that the trial judge and the majority "are making the judgment that should be made by the jury . . . who heard the evidence and saw the witnesses testify at trial." Slip. op., dissent, at 1.

Justice Earls found that the majority opinion imposed a "magic words" requirement, denying Harvey the right to have the jury decide his self-defense claim because he failed to testify specifically that he was in fear for his life and believed he needed to kill Toler to save himself from death or great bodily injury. She found that Harvey met this requirement based on his "repeated testimony that he was scared of Toler, was afraid he would be hurt, and was being threatened with a knife by Toler, who was drunk and just said he ought to kill him." *Id.* at 6. She found the cases cited by the majority inapplicable. They involved situations in which the defendant claimed that a gun went off by accident, testified that he was firing warning shots to get the victim to retreat, or offered no evidence of the requirements of self-defense other than his self-serving statements that he was scared. Justice Earls found that Harvey's isolated use of these words—such as his reference to the incident as "the accident"—did not negate other evidence showing that he intentionally acted in self-defense. "To imply otherwise is to elevate form over substance." *Id.* at 9.

Justice Earls also noted that the transcript of the testimony showed that defendant was not an articulate person. He had completed the ninth or tenth grade and had sustained a severe head injury in a car accident in 2008, requiring insertion of a metal plate in his head and affecting his memory and ability to talk and function. She observed: "Inarticulate and less well coached defendants should be treated equally with those who can easily learn the 'magic words' the majority would require for a self-defense instruction." *Id.* at 8. Justice Earls concluded that the jury, not the trial judge or majority, had the responsibility to weigh the persuasiveness of the evidence, resolve contradictions in the testimony, and determine whether Harvey acted in self-defense, perfectly or imperfectly.

Open Issues. In my previous post on self-defense, I wrote about the importance of considering the impact of North Carolina's statutory law of self-defense. None of the opinions in *Harvey* mention the self-defense statutes other than to note that counsel for Harvey conceded at trial that a jury instruction on the statutory castle doctrine in G.S. 14-51.2 was not warranted in the circumstances of the case. Slip op., majority, at 4 n.4. The scope of the statutory protections is

therefore left to future cases. The statute may apply, for example, when a person is lawfully on the curtilage of a person's home and then unlawfully and forcibly tries to enter the dwelling itself.

The wording of the statute on defense of person, G.S. 14-51.3, also may have a bearing on whether the belief doctrine, developed by the courts under the common law and the focus of the *Harvey* opinions, applies under the statute. G.S. 14-51.3 states that when using force (that is, nondeadly force), the defendant must reasonably believe the "conduct" is necessary to defend against unlawful force. When using deadly force, the person must reasonably believe "such force" is necessary to prevent death or great bodily harm. This simpler phrasing may lead to a simpler view of the testimony defendants must give to rely on self-defense and avoid complicated, uncertain, and divided views on the adequacy of such testimony.

North Carolina Criminal Law

A UNC School of Government Blog

Self-defense, Intent to Kill and the Duty to Retreat

Posted on Sep. 18, 2018, 9:44 am by Phil Dixon • 2 comments

Consider the following scenario: Driver Dan is traveling down a dark county two-lane road in his sedan. Traffic is light but slow due to the cold weather and mist. Another driver in a truck appears behind Dan and starts tailgating him, getting within a few feet of his bumper. After unsuccessfully trying to pass Dan, the other driver begins tailgating Dan even more, now staying within inches of his bumper. When the cars ahead turn off and the road is clear, slows to let the other driver pass, but the other driver continues closely riding Dan's bumper for several miles, flashing high beams at times. Eventually, the other driver pulls alongside Dan and begins "pacing" him, staying beside Dan's car instead of passing. The other driver then begins to veer into Dan's lane, forcing Dan's passenger-side tires off the road. As Dan feels the steering wheel begin to shake, he fears losing control of his car and decides to defend himself with his (lawfully possessed) pistol. He aims through his open window at the other driver's front tire and shoots, striking it and halting the other vehicle. The other driver stops without further incident, and Dan leaves. Dan is eventually charged with shooting into an occupied and operating vehicle, a class D felony and general intent crime.

Pop quiz: taking the evidence in the light most favorable to the defendant, is Dan entitled to a self-defense instruction?

- No, because Dan did not intend to kill the other driver when he shot at the tire
- No, because Dan could have stopped his car
- Yes, but without the no-duty-to-retreat language in the instruction
- Yes, with the no-duty-to-retreat language, because Dan intended to shoot the tire and was in a place he had a lawful

SEARCH

Search

LINKS

About this Blog
ASSET Mobile App

SUBSCRIBE

Email *

Subscribe

ARCHIVES

Select Month

CATEGORIES

Crimes and Elements
Evidence
Motor Vehicles
Procedure
Search and Seizure
Sentencing
Uncategorized

RECENT COMMENTS

walter rand on Limits on Procreation as a Condition of Probation
DefenderPerson on Second Amendment

right to be

Vote

View Results

Vote here, and then read on for the answer.

Trial. At least according to the defendant's evidence, those were essentially the facts in *State v. Ayers*, ___ N.C. App. ___ (Sept. 4, 2018); *temp. stay allowed*, ___ N.C. ___ (Sept. 12, 2018). The defendant was a 49 year-old retired Army paratrooper. He was returning from the Veterans Administration hospital in Durham in January 2015 when the above events occurred. He testified at trial to his fear and his intent to shoot the tire. He thought at the time: "I don't have to shoot the guy. I can just disable his vehicle." Slip Op. at 5. The trial judge instructed the jury on self-defense pursuant to N.C.P.I-Crim. 308.45, but omitted the no-duty-to-retreat language of the pattern instruction, consistent with choice C) above. The jury convicted (although, notably, the judge found extraordinary mitigation and suspended the sentence). The defendant appealed, arguing that the jury should have been instructed that he had no duty to retreat under G.S. 14-51.3.

Entitlement to Self-Defense Instruction. Before addressing whether the defendant had a duty to retreat, the court implicitly considered the State's preliminary argument on appeal (seen in its brief)—that the defendant wasn't entitled to a self-defense instruction at all since he didn't shoot with the intent to kill the other driver. Any error in the trial judge's omission of the no-duty-to-retreat language from the instructions was therefore harmless. The Court of Appeals rejected this view, clarifying the intent needed to justify a self-defense instruction:

> *Although the Supreme Court has held that a self-defense instruction is not available where the defendant claims the victim's death was an 'accident', each of these cases involved facts where the defendant testified he did not intend to strike the blow. For example, a self-defense instruction is not available where the defendant states he killed the victim because his gun accidentally discharged. A self-defense instruction is not available when a defendant claims he was only firing a warning shot*

Update
Che on New Legislation Regarding the Restoration of Felons' Gun Rights
News Roundup – North Carolina Criminal LawNorth Carolina Criminal Law on News Roundup
Appellate Attorney on What Happens When the Jury Is Instructed on the Wrong Theory?

AUTHOR ARCHIVES

SOG Staff (RSS)
Emily Coward (RSS)
Michael Crowell (RSS)
Sara DePasquale (RSS)
Shea Denning (RSS)
Phil Dixon (RSS)
James Drennan (RSS)
Whitney Fairbanks (RSS)
Bob Farb (RSS)
Jacquelyn Greene (RSS)
Alyson Grine (RSS)
Jonathan Holbrook (RSS)
Jamie Markham (RSS)
Chris McLaughlin (RSS)
LaToya Powell (RSS)
John Rubin (RSS)
Jessica Smith (RSS)
Christopher Tyner (RSS)
Jeffrey Welty (RSS)

META

Log in
Entries RSS
Comments RSS
WordPress.org

> *that was not intended to strike the victim. These lines of cases are factually distinguishable from the present case and are not controlling, because it is undisputed Defendant intended to 'strike the blow' and shoot [the other driver's] tires, even if he did not intend to kill [him]. Id. at 10 (internal citations omitted).*

In other words, it was the intentional use of force against his assailant that mattered, not whether the defendant meant for the "blow" to specifically kill. The court said that self-defense, at least in the context of this case, did not require lethal intent, merely a "general intent to strike the blow." *Id*. at 8. John Rubin has been analyzing this issue for several years, both in his book on self-defense and in recent blog posts. Be sure to read his comments at the end of this post, where he explains his views in greater detail.

Duty to Retreat. Turning to the question of whether the jury was properly instructed, the State advanced the argument that the defendant had no right to "stand his ground," in part because he wasn't "standing" anywhere:

> *In the present case, defendant was not standing anywhere. He was in motion on a highway. Nor, by virtue of defendant being in motion, could he necessarily retreat. Defendant is essentially contending that he had a right to stay the course, or to stay in motion driving upwards of thirty miles per hour on a busy highway, rather than a duty to stop to avoid the necessary use of force. Brief of State-Appellee at 29, State v. Ayers, ___ N.C. App. ___ (Sept. 4, 2018).*

Therefore, the argument went, there was no error in failing to instruct the jury on no-duty-to-retreat.

The court rejected this argument and held that the defendant had no duty to retreat on a public highway. G.S. 14-51.3(a) states, in pertinent part: "A person is justified in the use of deadly force and does not have a duty to retreat *in any place he or she has a lawful right to be* if . . . (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or

another." The highway was a public place where the defendant was lawfully present in his own vehicle and, under the statute, he had no duty to stop to avoid the use of force. "Defendant was under no legal obligation to stop, pull off the road, veer from his lane of travel, or to engage his brakes and risk endangering himself." *Id*. at 13. Thus, the no-duty-to-retreat language of the instruction should have been given, and the failure to do so was prejudicial. "Without the jury being instructed that Defendant had no duty to retreat from a place where he lawfully had a right to be, the jury could have determined, as the prosecutor argued in closing, that Defendant was under a legal obligation to cower and retreat." *Id*. The court's holding reinforces the breadth of the statutory language that a person has the right to "stand" his or her ground in any lawful place, even when driving and not literally standing.

Takeaway. So, the answer to the poll is D): The defendant was entitled to a self-defense instruction, including a no-duty-to retreat provision. To be clear, the court doesn't say that the defensive force was justified by the defendant in *Ayers*. The court recognized, however, that whether the defendant's use of force was reasonable is a question of fact for the jury to determine upon proper instructions. For, as the court observed in its concluding remarks: "Self-preservation is the most basic and fundamental natural right any individual possesses." *Id*. at 14.

Category: Crimes and Elements, Uncategorized | Tags: duty to retreat, intent to kill, self-defense, State v. Ayers

2 comments on "Self-defense, Intent to Kill and the Duty to Retreat"

John Rubin
September 18, 2018 at 10:43 am

Ayers is an important development with respect to the troublesome question of whether a defendant must intend to kill to rely on self-defense, a requirement that made its way into North Carolina case law in the 1990s and has appeared in some non-homicide cases more recently. At least on the facts of the case before it, the court in Ayers recognized that a person who intentionally uses force, including deadly force, against another person is entitled

to rely on self-defense, whether or not he or she intended to kill. The case leaves some issues open about other offenses and circumstances, however.

• The court in Ayers stated that shooting into occupied property is a general intent crime; therefore, it was sufficient for the defendant to have the general intent to "strike the blow" of intentionally firing at the other vehicle. Does this mean that the defendant in Ayers could not have relied on self-defense if charged with a specific intent crime, such as assault with a deadly weapon with intent to kill? Such a rule could continue to create confusion over the intent required of the defendant. Thus, if the defendant denied the intent to kill, he could not rely on self-defense to assault with a deadly weapon with intent to kill but arguably could rely on self-defense to the lesser offense of assault with a deadly weapon. Apart from being potentially confusing to the jury, it is not clear why the charge chosen by the State, and the elements of the charged offense, should determine whether a jury decides whether a defendant's intentional, defensive act is justified in self-defense.

• The court in Ayers relied on a North Carolina Supreme Court decision from the 1990s, State v. Richardson, 341 N.C. 585 (1995), in which the Supreme Court sought to clarify the intent required of a defendant. In Richardson, the Supreme Court held that a specific intent to kill is not actually required for a defendant to rely on self-defense against a murder charge. The court in Ayers observed that, like the charge before it, the charge in Richardson was a general intent crime—second-degree murder. Thus, Ayers suggests that self-defense is available as a defense to second-degree murder whether or not the defendant intended to kill. It does not appear, however, that the Supreme Court in Richardson intended to limit its holding to second-degree murder (despite later decisions finding an intent-to-kill requirement without discussing the impact of Richardson). The Supreme Court stated generally that although the pattern jury instructions on self-defense for murder required that the defendant have reasonably believed in the need to kill to defend against death or great bodily harm, the instruction didn't mean, and the jury would not have interpreted the instruction as requiring, that the defendant must have had the intent to kill.

• The Ayers court continued to distinguish cases in which the defendant does not specifically intend to injure another person, as in cases in which the defendant fires a warning

shot defensively and hits the victim. In that instance, the defendant does not intend to "strike the blow." This approach distinguishes the facts in Ayers from a decision last year involving a charge of shooting into occupied property, State v. Fitts, ___ N.C. App. ___, 803 S.E.2d 654 (2017). There, the court held that the defendant was not entitled to rely on self-defense where he fired behind him while running in the opposite direction and hit the victim in a car. While the court in Fitts stated the defendant must have intended to kill to rely on self-defense, which the court found he did not have, the facts seem to be in accord with the approach in Ayers. Thus, when a person intentionally fires at a vehicle, he or she intends to "strike the blow" and may rely on self-defense, as in Ayers; when a person fires without regard to whether he hits a vehicle, he may not rely on self-defense, as in Fitts. The drawback to this approach is that it continues to draw potentially difficult distinctions about the defendant's intent. Arguably, a clearer approach would be to allow self-defense when the defendant engages in an intentional, defensive act, whether the act is a shot at a person, a warning shot, a struggle over a gun, or other intentional act; and to disallow self-defense and permit the defendant to rely on accident only when the defendant acts inadvertently, as when the defendant is cleaning a gun, pointing a gun at someone in jest, or engaging in other non-defensive acts. New G.S. 14-51.3 provides support for an approach not dependent on the exact intent of the defendant, as it allows nondeadly force when a defendant reasonably believes the conduct is necessary to defendant against imminent, unlawful force and allows deadly force when a defendant reasonably believes such force is necessary to prevent imminent death or great bodily harm.

Reply

Some Clarity on Self-Defense and Unintended Injuries

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : involuntary manslaughter, self-defense

Date : June 5, 2018

Earlier this year, in *State v. Gomola*, ___ N.C. App. ___, 810 S.E.2d 797 (Feb. 6, 2018), the Court of Appeals addressed a self-defense issue that has sometimes puzzled the North Carolina courts. The question in *Gomola* was whether a person can rely on self-defense to a charge of involuntary manslaughter. The Court answered with a decisive yes . . . if the basis for the involuntary manslaughter charge is an unlawful act such as an assault or affray.

The Conflict in *Gomola.* The events leading to the death of the decedent in *Gomola* were as follows. Some of the evidence came from a video of the incident, some from the testimony of witnesses. The defendant and friends were at a waterfront bar overlooking a marina in Morehead City. One of the defendant's friends saw another customer throw a beer bottle over the railing into the water and asked the customer not to do it again. When the defendant's friend made this request, the decedent shoved him. The defendant stepped in and shoved the decedent, who fell over the railing into the water. The video showed that within six to eight seconds the people at the bar were trying to locate the decedent in the water. He did not resurface and drowned. An autopsy showed that the decedent had a blood alcohol content of .30 or more at the time of his death.

The evidence conflicted over whether the defendant did more than shove the decedent. Some testimony indicated that he flipped the decedent over the railing, but other testimony indicated that his role was limited to an initial shove after his friend was shoved by the decedent. The video did not capture the entire scene.

The defendant was charged with involuntary manslaughter. The trial judge instructed the jury that it could find the defendant guilty if it found beyond a reasonable doubt that the defendant acted unlawfully and that his unlawful act proximately caused the decedent's death. The trial judge further instructed the jury that the "unlawful act" was the crime of participating in an affray, a fight between two or more people in a public place. The trial judge denied the defendant's request to instruct the jury on defense of others, and the jury convicted the defendant of involuntary manslaughter.

The Court's Decision. The Court of Appeals held that the trial judge properly instructed the jury on involuntary manslaughter because the jury could find that the defendant acted unlawfully in shoving the decedent and that the shove proximately caused the decedent's death. The trial judge erred, however, by refusing to instruct the jury on defense of others as a defense to the crime of affray, the underlying act for involuntary manslaughter in the case.

The Court recognized that a person may legally use nondeadly force in defense of another person (as well as in defense of one's self) in response to unlawful force. The Court found that the use of nondeadly force in defense of others is a valid defense under both the common law and statutory law, specifically, G.S. 14-51.3, which describes the statutory standard for defense of person (self or others). The Court held that the defense is proper in a case in which the defendant is charged with affray or assault as well as in a case in which the defendant is charged with involuntary manslaughter based on those offenses and, presumably, other acts to which self-defense would normally apply. Taking the evidence in the light most favorable to the defendant, as courts must do in deciding whether to instruct the jury on a defense, the Court concluded that the jury could have found from the evidence that the defendant's actions were limited to protecting his friend, who had just been assaulted by the decedent. The defendant therefore was entitled to an instruction on defense of others in connection with the trial judge's instruction on affray. Had the jury received this

additional instruction, it could have found that the defendant's involvement in the affray was lawful and therefore that the defendant was not guilty of involuntary manslaughter. The Court reversed the conviction and ordered a new trial.

Open Issues. The Court of Appeals distinguished an earlier decision, *State v. Alston*, 161 N.C. App. 367 (2003), which held that "'self-defense, as an *intentional act*, [cannot] serve as an excuse for the negligence or recklessness required for a conviction of involuntary manslaughter' under the culpable negligence prong." *Gomola,* 810 S.E.2d at 802 (quoting *Alston*) (emphasis in original). The *Gomola* court found this holding inapplicable to the case before it because the State's theory was that the defendant intentionally committed an unlawful act by participating in an affray. "And certainly self-defense/defense of others may serve as an excuse for intentionally participating in a fight." *Id.*

The Court in *Gomola* did not rule out the possibility that self-defense or defense of others may be available as a defense to involuntary manslaughter when the State relies on the culpable negligence prong. In the earlier *Alston* decision, the defendant challenged his conviction of involuntary manslaughter on the ground that the trial judge erred in failing to instruct the jury on self-defense at all. In finding that the failure to instruct on self-defense did not invalidate the involuntary manslaughter conviction, the court reasoned that a reasonable juror could have found from the evidence that the defendant and decedent were struggling with each other, that the decedent introduced a gun during the struggle, and that at some point during the struggle the defendant handled the gun and shot the decedent. From this evidence, according to the court in *Alston*, the jury could have found that the defendant shot the decedent in a culpably negligent or reckless manner without the intent to assault or kill him. If the jury so found, self-defense would not be a defense because it requires an intentional act.

The distinction in *Alston* seems questionable or, at the least, difficult to apply. It isn't clear from the decision what actions the defendant took that were allegedly reckless or culpably negligent. In trying to wrest the gun from his assailant, the defendant in *Alston* certainly was acting intentionally and defensively even if the fatal shot was unintentional. It would probably come as a surprise to someone who found himself in that situation to learn that the law of self-defense would not protect his actions.

Other decisions over the last several years have also imposed intent requirements that people might consider counterintuitive. *See* John Rubin, *A Warning Shot about Self-Defense*, N.C. Crim. L. Blog (Sept. 7, 2016). For example, in *State v. Cook,* ___ N.C. App. ___, 802 S.E.2d 575 (2017), the Court of Appeals held that the defendant was not entitled to rely on self-defense against a felony assault charge when he feared that intruders were trying to break down the door to his bedroom and he fired at the door in response. (The defendant's evidence also showed that he jumped out of the window into the snow, wearing only a tank top and underwear, and ran to a neighbor's house to call the police, not realizing that the police were the ones trying to get into his bedroom.) The Court of Appeals found that the defendant's testimony that he shot at the door, not at his attackers, showed that he did not fear death or great bodily injury, a requirement for the use of deadly force in self-defense. According to the decision, a defendant is not entitled to have the jury instructed on self-defense if he testifies that he was not trying to shoot his attacker.

Two of the three appellate judges in *Cook* expressed doubts about this approach. One dissented and one concurred, with the concurring judge observing that the dissenting judge's approach "more accurately represents what most citizens would believe our law to be and what I believe self-defense law *should* be in our state." 802 S.E.2d at 579 (emphasis in original). The concurring judge encouraged the Supreme Court "to reverse our ruling today and accept the reasoning of the dissent." *Id.* The North Carolina Supreme Court affirmed the decision per curiam without elaboration. ___ N.C. ___, 809 S.E.2d 566 (2018).

A simpler approach would seem to be to consider whether the defendant intended to take the actions he took to defend himself—whether they involved struggling over a gun, shooting at a door, or other defensive actions. *See generally* 2 Wayne R. LaFave, Substantive Criminal Law § 10.4(c) at 200 & nn. 32–33 (3d ed. 2018) (defendant must have a reasonable belief "as to the need for force of the amount used"); *Beard v. United States*, 158 U.S. 550, 560 (1895) (question for jury was whether defendant had reasonable grounds to believe and in good faith believed he could not save his life or protect himself from great bodily harm "except by doing what he did"). This approach would still require

a determination of whether the defendant acted reasonably in taking the actions he took and met the other requirements of self-defense. But, the defense would not stand or fall on the basis of whether the defendant acted with a more specific intent.

Earlier decisions in North Carolina provide some support for this approach. *See* John Rubin, The Law of Self-Defense in North Carolina at 22 & n.4, 41–53 (UNC School of Government, 1996). North Carolina's self-defense statutes also may have an impact. G.S. 14-51.3 states that a person is justified in using force other than deadly force when the person reasonably believes that "the conduct" is necessary to defend one's self or other person against another's use of "unlawful force." The quoted language may justify a person's use of nondeadly force against unlawful force, whether deadly or nondeadly, if it was reasonable for the person to believe that his or her actions were necessary.

By focusing on the defensive action taken by the defendant and not the result intended, decisions such as *Gomola* come closer to this approach. Intent requirements are currently a part of our self-defense law, however. Although difficult to apply in real time, they must be carefully considered by defendants who are charged criminally and who are evaluating the availability of self-defense in their case.

North Carolina Criminal Law

A UNC School of Government Blog

A Warning Shot about Self-Defense

Posted on Sep. 7, 2016, 2:03 pm by John Rubin

Suppose John is facing a deadly assault and fears that he will be killed or suffer great bodily harm. John has a firearm but, rather than shoot his assailant, he fires a warning shot. The shot goes awry, strikes John's assailant, and kills him. May John rely on self-defense if charged with murder? The answer may be surprising.

John may not be able to rely on self-defense in this scenario. Under current North Carolina case law, his defense may be accident. Here's why.

Focusing on the intended result. Generally, a person may use deadly force—that is, force likely to cause death or great bodily harm—if reasonably necessary to save himself from death or great bodily harm. *See, e.g., State v. Pearson*, 288 N.C. 34 (1975). Thus, in the above scenario, John would have the right to shoot and even kill his assailant if he met the other requirements for self-defense (for example, John wasn't the aggressor).

One might assume from this principle that if faced with a deadly assault, a person could opt to use nondeadly force if the person thought that a lesser degree of force would be sufficient to end the threat. North Carolina decisions define nondeadly force as force neither intended nor likely to cause death or great bodily harm. *See, e.g., State v. Pearson*, 288 N.C. at 39. North Carolina decisions have also found that a warning shot may constitute nondeadly force. *See State v. Whetstone*, 212 N.C. App. 551, 558 n.4 (2011); *State v. Polk*, 29 N.C. App. 360 (1976). Thus, in the above scenario, one might conclude that John could rely on self-defense if he used non-deadly force to defend himself and unintentionally killed his assailant.

Since the mid-1990s, however, the North Carolina courts have tried to establish a firmer boundary between intentional and unintentional killings for purposes of self-defense. In various situations, they have held that a defendant who used nondeadly force and unintentionally killed could not rely on self-defense despite his claim that he was defending against a deadly assault. Thus, in addition to the warning shot scenario above, the courts have held that the defendant was not entitled to rely on self-defense based on evidence that he grabbed a gun from an assailant (or the assailant tried to grab the defendant's gun) and in the ensuing struggle the gun inadvertently went off and killed the assailant. *See, e.g., State v. Nicholson*, 355 N.C. 1, 30–31 (2002)

(warning shots); *State v. Gray,* 347 N.C. 143, 166–67 (1997) (gun struggle), *overruled on other grounds*, *State v. Long*, 354 N.C. 534 (2001); *State v. Hinnant*, ___ N.C. App. ___, 768 S.E.2d 317, 319–20 (2014) (warning shots); *State v. Gaston*, 229 N.C. App. 407 (2013) (gun struggle).

To make a long story short, these decisions rest on the phrasing of the first requirement for self-defense in murder cases. The requirement is often phrased as follows: The defendant must have believed in the need to kill to avoid death or great bodily injury. Focusing on the first part of this requirement, decisions have held that the defendant must literally "believe in the need to kill," shown by an intent to kill or at least an intent to use deadly force. *See also* North Carolina Pattern Jury Instruction—Crim. 206.10 at p. 2 n.4 (June 2014). In other words, the evidence must show that the defendant intentionally shot *at* his assailant in self-defense. Under this approach, a defendant who uses nondeadly force, such as firing a warning shot or struggling over a gun without intending to fire it, is not entitled to claim self-defense even if he believes his actions will address the threat he is facing. Because he does not believe in the need to kill, his defense, if any, is accident, not self-defense.

It's possible that the courts did not intend to impose such a blanket requirement. The courts may have rejected the defendant's claim of self-defense in particular cases because they doubted that the defendant believed he was facing death or great bodily harm, which is also part of the "belief" requirement. Language from some cases suggests that the defendant's perception of the threat against him is the critical inquiry for the "belief" requirement, not the method of force he used or the ultimate result. *See State v. Richardson*, 341 N.C. 585, 590 (1995); *see also* John Rubin, The Law of Self-Defense in North Carolina at 47–48 (UNC Sch. of Gov. 1996). The literal language of the "belief" requirement and cases applying it may not support this narrower focus, however. *See also State v. Crawford*, 344 N.C. 65, 77 (1996) (refusing to modify jury instruction requiring that defendant have believed in need to kill).

The potential impact of accident as a defense instead of self-defense. What is the impact of applying accident instead of self-defense principles to warning shot, gun struggle, and other murder prosecutions in which the defendant acted defensively but did not intend to kill or use deadly force? The case law on accident is relatively undeveloped in these situations, making the rules less certain than in self-defense cases. Based on the above decisions and the additional ones cited below, here are some possibilities to consider.

1. Jury instructions. The courts have held that the defendant is not entitled to have the jury instructed on self-defense in these cases. Still, some explanation to the jury about self-defense principles may be necessary. For the defense of accident to apply, the defendant must have engaged in lawful conduct and must not have acted with culpable negligence. *See, e.g., State v. Riddick*, 340 N.C. 338 (1995). The firing of warning shots or use of physical force to gain control of a gun could be considered unlawful or

criminally negligent unless the defendant had the right to take those actions to defend himself. Accordingly, a hybrid instruction of some kind, explaining how principles of self-defense may make the defendant's actions permissible, may be necessary.

2. Evidence. The courts have sometimes found that the defendant could not offer the sort of evidence allowed in self-defense cases to explain why the defendant believed it necessary to take defensive action—for example, evidence of previous instances in which the victim acted violently, which made the defendant reasonably believe it necessary to use force in self-defense. *See State v. Strickland*, 346 N.C. 443, 445–46 (1997) (finding such evidence inadmissible in support of defense that court characterized as accident defense). Again, however, for the jury to determine whether the defendant acted lawfully and without culpable negligence—requirements for an accident defense—such evidence would seem to be relevant.

3. Lesser offenses. The courts have held that a defendant who did not act with the intent to kill or at least use deadly force is not entitled to a jury instruction on imperfect self-defense, which reduces murder to voluntary manslaughter. A defendant may still be entitled to an instruction on involuntary manslaughter. A person may be found guilty of involuntary manslaughter if he killed another person by either (1) an unlawful act that does not amount to a felony and is not ordinarily dangerous to human life or (2) a culpably negligent act or omission. *See State v. Wilkerson*, 295 N.C. 559, 579 (1978). The cases do not provide clear direction on how to apply these elements to the kinds of cases discussed in this post, however. For example, *State v. Hinnant*, 768 S.E.2d at 320–21, presented a seeming Catch-22 to a defendant who claimed that he fired two warning shots and inadvertently hit the victim. The court held that he was not entitled to a voluntary manslaughter instruction based on imperfect self-defense because he did not intend to shoot anyone, but he was not entitled to an involuntary manslaughter instruction because he intentionally discharged a firearm under circumstances naturally dangerous to human life.

4. Whether the defendant testifies. The cases recognize that for a defendant to rely on self-defense, he need not testify. Other evidence may show that he met the requirements of self-defense, including the requirement in a murder case that he believed in the need to kill to avoid death or great bodily harm. *See State v. Broussard*, ___ N.C. App. ___, 768 S.E.2d 367, 370 (2015). As a practical matter, however, a defendant who relies on self-defense will often take the stand to explain what happened. The defendant's testimony about his intent when he fired or took other actions will likely be critical to whether the case is governed by self-defense principles or the evolving rules on accident.

Category: Uncategorized | Tags: defenses, self-defense, warning shots

This blog post is published and posted

eport a Digital Access Issue

North Carolina Criminal Law

A UNC School of Government Blog

Court of Appeals Rules on Pretrial Self-Defense Immunity Hearings

Posted on Oct. 13, 2021, 2:15 pm by Jonathan Holbrook

Last month, the Court of Appeals decided *State v. Austin*, ___ N.C. App. ___, 2021-NCCOA-494 (Sept. 21, 2021), and a summary of the opinion is available here. *Austin* addressed several noteworthy self-defense issues, including the sufficiency of the state's evidence to rebut the presumption of reasonable fear under the "castle doctrine" statutes added in 2011 and whether the trial court's jury instructions on that issue were proper.

But first, the court had to decide whether the statutory language conferring "immunity from liability" meant that the defendant was entitled to have this issue resolved by the judge at a pretrial hearing. That's a question I've been asked fairly often over the past few years, and my sense is that prior to *Austin* there were divergent practices on this point around the state.

This post takes a closer look at that portion of the court's opinion, and explores what we now know and what we still don't.

Background Issues and *Austin*

My colleague John Rubin previously wrote an excellent blog post summarizing this issue, which you can revisit here. As his post explains in more detail, G.S. 14-51.2(e) and G.S. 14-51.3(b) provide that a person who uses force as permitted under the statutes in defense of self or others, or in defense of the home, workplace, or vehicle, is "justified in using such force and is immune from civil or criminal liability for the use of such force." In most other states with similar statutes, their courts have consistently interpreted these statutes to mean that the defendant has a right to a pretrial hearing and a judicial determination of the immunity issue. However, unlike in North Carolina, most of those other states provide immunity from *prosecution*, rather than immunity from *liability*. John's post presciently noted back in 2016 that it was unclear whether that difference in phrasing might be legally significant, and therefore our state's "self-defense immunity provision raises several questions, which await further answers."

Austin has now answered the pretrial hearing question in the negative, holding that the trial court did not err by declining to conduct such a hearing on the defendant's claim of

statutory immunity under G.S. 14-51.2(e). The court noted that "traditional immunity" means that a defendant is not merely protected from having a judgment entered against him, but rather that he has "a right not to be forced into court" to defend himself in a trial at all. The court cited several examples of other criminal statutes that confer or address this type of immunity (G.S. 14-205.1, 15A-954(a)(9), 15A-1051, 75-11, 90-96.2, and 90-113.27), and pointed out that those statutes are all couched in terms of immunity from *prosecution*. By contrast, the castle doctrine statutes only provide immunity from *liability*, which means that the "immunity is from a conviction and judgment, not the prosecution itself." This conclusion was reinforced by the fact that, unlike traditional immunity provisions, the immunity conferred under the castle doctrine statutes typically involves "deeply fact-intensive questions" that must be resolved by the jury. Therefore, the court held, "where, as here, the trial court determined that there were fact questions concerning the applicability of the castle doctrine defense, the trial court properly permitted the case to proceed to trial so that a jury can resolve those disputed facts."

So far, I haven't offered very much that you didn't already know from reading the case itself or the earlier blog posts. Let's dig a little deeper.

Is North Carolina alone in taking this view?

Not quite. As noted above, there is a broad consensus among other castle doctrine states that a pretrial hearing before the judge is required, but those states generally confer immunity from prosecution rather than liability. To date, I am aware of one other state (Iowa) with immunity statutes more closely analogous to North Carolina's and whose courts have adopted an interpretation similar to *Austin*. In fact, the Iowa Supreme Court referenced North Carolina's statutes in reaching its conclusion that a pretrial hearing was not required:

> *This case is our attempt to resolve another open question under the 2017 "stand your ground" legislation. […] On appeal, the defendant argues that Iowa Code section 704.13 entitled him to a pretrial evidentiary hearing where he could have presented his justification defense and been vindicated without need for a trial. See Iowa Code § 704.13. We conclude, however, that the 2017 legislation does not require pretrial hearings. Significantly, section 704.13 provides an immunity from "liability," id., not an immunity from "prosecution" as in some other states with stand-your-ground laws. […] Other state laws, similar to Iowa's, do not afford immunity from criminal prosecution. In North Carolina, the statute uses the phrase "immune from civil or criminal liability." N.C. Gen. Stat. Ann. § 14-51.3(b)[….] In any event, Iowa did not opt for the "prosecution" language that has generally been interpreted as affording a right to a pretrial hearing.*

State v. Wilson, 941 N.W.2d 579 (Iowa 2020). In other words, it's undoubtedly a minority view, but perhaps less strikingly so once the different wording of the statutes is taken into account.

Is this <u>really</u> the first case we've ever had on this issue?

For the most part, yes. These statutes have been around for ten years, but until last month there was no clear North Carolina appellate guidance on this point. During several case updates last year, I incorrectly predicted that we might get an answer to this question in *State v. Fernandez*, __ N.C. App. __, 852 S.E.2d 447 (2020), a case that raised many of the same arguments. But *Fernandez* was issued as an unpublished decision, and the court held that it did not need to resolve the matter because even if the defendant was entitled to a pretrial hearing, he waived it:

> *The State contends North Carolina General Statutes §§ 15A-51.2-.3 do not "mandate a pretrial determination" of immunity. The State is correct that "[b]oth statutes are silent about the procedure for raising immunity." See N.C. Gen. Stat. §§ 15A-51.2-.3. But since Defendant waived any potential right to a pretrial determination of immunity, we need not address the proper procedure for determining immunity prior to trial.*

Id. In another interesting twist, *Austin* actually began its appellate journey back in 2017, more than two years before the defendant in *Fernandez* was convicted. The defendant in *Austin* sought interlocutory review of the trial court's order denying her request for a pretrial immunity hearing and motion to dismiss. After the Court of Appeals denied the defendant's petitions for writ of mandamus and writ of certiorari, the state Supreme Court initially allowed a petition for writ of certiorari in December of 2017 to review the appellate court's denial (370 N.C. 378), but then reversed course in a per curiam decision in September of 2018 and concluded that cert had been improvidently allowed (371 N.C. 465). The Court of Appeals opinion being discussed here arose out of the defendant's subsequent conviction at trial in May of 2019.

If you're a fan of appellate procedural labyrinths or interpreting tea leaves, those details may be intriguing. For everyone else, the short answer is yes — this is basically our first direct guidance on the issue.

So is the issue finally settled now?

Not just yet, for a few reasons. First, under Rule 32 of the Rules of Appellate Procedure, the court's mandate normally issues 20 days after the opinion is published, unless the court orders otherwise. The defendant in *Austin* filed a <u>motion</u> last week requesting a rehearing *en banc* and asking that the court stay the issuance of its mandate until the

motion is resolved. In addition to challenging the court's rulings on the issue of rebutting the statutory presumption of reasonableness, the defendant's motion argues that the pretrial hearing issue is one of "exceptional importance" that warrants *en banc* review. And, of course, depending on how the Court of Appeals rules on that motion, the defendant might once again choose to seek discretionary review at the state Supreme Court. I'm not expressing an opinion about the merits of those arguments or speculating about how either court might respond, but simply pointing out that as of the time of this writing (and potentially as of the time that many of us are participating in case updates later this month), there is still a possibility that the final outcome will be different.

Even if the current *Austin* opinion stands unaltered, there are some lingering issues that may arise in future cases. For example, the court said that it was appropriate to have the statutory immunity issue decided by the jury "where, as here, the trial court determined that there were fact questions concerning the applicability of the castle doctrine defense." One could imagine a situation, however rare, where the relevant facts are *not* in dispute and the applicability of statutory self-defense immunity turns solely on a legal determination, such as whether a particular location qualifies as being within the curtilage of the home. That wasn't the issue before the court in *Austin*, but the limiting introductory phrase used in the opinion may indicate that a separate hearing before the judge would be the appropriate procedure in such cases.

Furthermore, if it's correct that there are still some types of criminal cases in which statutory self-defense immunity should be decided by the judge at a hearing rather than by the jury at a trial, when should that hearing be held? G.S. 15A-952(f) states that "when a motion is made before trial, the court in its discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial." A key holding in *Austin* was the court's conclusion that the castle doctrine statutes only provide a defendant with immunity from conviction and judgment, not immunity from undergoing a trial at all. So it seems that it would still be within the trial judge's discretion to conduct the hearing at some later point "during trial," such as after all the evidence has been presented, but it may be just as much within the judge's discretion to conduct that hearing "before trial" if she chooses.

Will the *Austin* opinion stand as currently issued? Are there still some criminal cases in which a separate hearing before the judge would be appropriate? If so, what exactly is the test for distinguishing between the two types? When should the hearing be held? Additionally, to circle back to John Rubin's earlier post, if the trial court does conduct such a hearing, what are the procedural rules and the parties' respective burdens of proof? I'm afraid those are all questions which continue to "await further answers," but with this latest case we finally seem to be getting a little closer to finding out.

Category: Case Summaries, Crimes and Elements, Procedure, Uncategorized | Tags: castle doctrine, G.S. 14-51.2(e), G.S. 14-51.3(b), immunity, pretrial hearing, self-defense, state v. austin

eport a Digital Access Issue

Evidence about the "Victim" in Self-Defense Cases

Author : John Rubin

Categories : Uncategorized

Date : February 5, 2019

In self-defense cases, the defendant typically claims that the "victim" was actually the assailant and that the defendant needed to use force to defend himself, family, home, or other interests. Because of this role reversal, the rules of evidence allow the defendant to offer evidence to show that the victim was the assailant or at least that the defendant reasonably believed that the victim intended to do harm. In *State v. Bass*, ___ N.C. ___, 819 S.E.2d 322 (2018), the North Carolina Supreme Court clarified one form of evidence that a defendant may *not* offer about the victim in a self-defense case. This post reviews the evidence found impermissible in *Bass* as well as several types of evidence that remain permissible.

Background

To make a long story short, the defendant, Bass, shot Fogg while the two were in the breezeway of Bass's apartment complex. He relied on self-defense against the charges of attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. The jury convicted him of assault with a deadly weapon inflicting serious injury.

One issue concerned the jury instructions given by the trial judge. Although the judge instructed the jury on self-defense, he denied Bass's request for an instruction that he did not have a duty to retreat in a place where he had a "lawful right to be," as provided in G.S. 14-51.3 on defense of person. The judge reasoned that Bass was not entitled to the instruction because the breezeway was not within the curtilage of Bass's home. The Court of Appeals reversed and granted a new trial, essentially finding that the statutory language means what it says—a person does not have a duty to retreat in a place where he has a lawful right to be, including a public place. I wrote a previous post about this aspect of the Court of Appeals' decision. The Supreme Court affirmed, holding that when a defendant is entitled to a self-defense instruction, he "is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." Slip Op. at 10, 819 S.E.2d at 326 (emphasis in original).

A second issue concerned the admissibility of testimony about previous violent acts by Fogg.

> Williford, Fogg's ex-girlfriend, would have testified that Fogg had, without provocation and in front of Williford's three-year-old daughter, pulled a gun on Williford and choked her until she passed out. She also would have testified that Fogg beat her so badly that her eyes were swollen shut and she was left with a bruise reflecting an imprint of Fogg's shoe on her back. Michael Bauman would have testified that, on one occasion, he witnessed Fogg punch his own dog in the face because it approached another individual for attention. On another occasion, Bauman encountered Fogg at a restaurant, where Fogg initiated a fight with Bauman and also "grabbed" and "threw" Bauman's mother-in-law when she attempted to defuse the situation. Terry Harris would have testified that Fogg, a complete stranger to him, initiated a verbal altercation with him in a convenience store. Two or three weeks later, Fogg pulled over when he saw Harris walking on the side of the road and hit him until Harris was knocked unconscious. According to Harris, Fogg "[s]plit the side of [his] face" such that he required stitches. Slip Op. at 14–15, 819 S.E.2d at 328.

The trial judge excluded this testimony. The Court of Appeals held that the evidence was admissible in support of Bass's defense that Fogg was the aggressor on the night Bass shot him. The Court of Appeals also held the trial judge erred in denying the defendant's motion to continue after the prosecutor learned the night before trial of five additional

instances of assaultive behavior by Fogg, which the prosecutor disclosed to defense counsel. The Supreme Court reversed, holding that the testimony offered by the defendant was inadmissible character evidence and that evidence of the additional acts would have been inadmissible for the same reason.

Evidence about the Victim

Character to show conduct. The rules on character evidence, the subject of the Supreme Court's opinion, have several precise steps. Please bear with me.

Generally, evidence of a person's character is not admissible to prove he "acted in conformity therewith on a particular occasion." N.C. R. Ev. 404(a). In other words, a party may not offer evidence of a person's past character to show that he committed the current deed. An exception to this general rule allows a defendant in a criminal case to offer evidence of "a pertinent trait of character of the victim." N.C. R. Ev. 404(a)(2). The Supreme Court in *Bass* recognized that evidence of a victim's violent character is pertinent and thus admissible in determining whether the victim was the aggressor in a case in which the defendant claims self-defense. Slip Op. at 13, 819 S.E.2d at 327.

The inquiry does not end there. North Carolina Rule of Evidence 405 specifies the forms of evidence that are permissible to show character, including violent character. Rule 405(a) allows reputation and opinion testimony in "all cases in which evidence of character or a trait of character of a person is admissible." Thus, a witness who knows the victim can give an opinion that the victim is a violent person. However, Rule 405(b) only allows evidence of specific instances of conduct to show character when "character or a trait of character of a person is an essential element of a charge, claim, or defense." Thus, a witness can testify that the victim engaged in specific acts of violence only if the victim's character for violence is an essential element.

Here, the Court of Appeals and Supreme Court disagreed. The Court of Appeals held that whether the defendant or victim was the aggressor is an essential inquiry, or element, of self-defense. Rule 405(b) therefore allowed Bass to present evidence of specific acts of violence by Fogg to show that he had a violent character and therefore was the aggressor. The Supreme Court agreed that whether the defendant or victim was the aggressor is a central inquiry. However, to the Supreme Court, the determinative question under Rule 405(b) is whether the victim's violent or aggressive character is an essential element, which is a different question than whether the victim was the aggressor in the current incident. The Supreme Court answered no. Accordingly, Fogg's past acts were not admissible under Rule 405(b) to show that he was the aggressor. Contrary language in another recent Court of Appeals decision, *State v. Greenfield*, ___ N.C. App. ___, Slip Op. at 6–8 (Dec. 4, 2018), probably does not survive the ruling in *Bass*.

But wait, there's more. *Bass* does not address or rule out other theories of admissibility of prior violent acts by the victim. These are discussed at greater length in Chapter 7 of my book The Law of Self-Defense in North Carolina (1996), which obviously has aged but still reflects the applicable evidence principles and includes cites to pertinent court decisions.

Known acts to show reasonable fear. If the defendant knows of prior violent acts by the victim, longstanding law in North Carolina recognizes that the defendant may offer evidence about the acts to show why he feared the victim and why his fear was reasonable. *See, e.g., State v. Johnson*, 270 N.C. 215, 218–20 (1970). The evidence is not subject to the limitations on character evidence because its relevance is to show the defendant's state of mind and the reasonableness of his apprehension of the victim. The *Bass* decision, which dealt with prior acts by the victim that were *not* known by the defendant, does not affect this theory of admissibility. Another recent decision, in which the Court of Appeals relied on this type of evidence to show that the defendant reasonably believed it was necessary to use deadly force, should remain good law. See *State v. Irabor*, ___ N.C. App. ___, Slip Op. at 7–9 (Nov. 20, 2018).

Threats by the victim. Evidence of threats by the victim against the defendant are admissible under North Carolina law for various reasons. Whether known or unknown by the defendant, such threats show the victim's intent. The cases treat threatening statements by the victim against the defendant like threats by the defendant against the victim:

they are statements of intent tending to show how the person making the threat later acted. Thus, in a self-defense case, threats by the victim against the defendant are relevant to show that the victim was the aggressor. *See, e.g., State v. Ransome*, 342 N.C. 847 (1996). If the defendant knows of the threats, they are relevant and admissible for the additional reason that they show the defendant's reasonable apprehension of the victim. *See, e.g., State v. Macon*, 346 N.C. 109, 114–15 (1997). Again, this evidence is not subject to the limitations on character evidence.

Impeachment. When the rules on character evidence apply, other exceptions allow the defendant to offer evidence of specific acts by the victim. If a witness testifies about the victim's peaceful character or otherwise opens the door, North Carolina Rule of Evidence 405(a) allows cross-examination into "relevant specific instances of conduct." For example, if a witness testifies about the victim's peaceful character (permitted under Evidence Rule 404(a)(2) in some instances), the defendant may impeach the witness through cross-examination about prior violent acts of the victim. *See generally State v. Gappins*, 320 N.C. 64, 68–70 (1987) (applying this rule to allow State's cross-examination of defendant's character witnesses).

Rule 404(b). North Carolina Rule of Evidence 404(b) creates another exception to the limits on character evidence. It allows evidence of specific crimes, wrongs, or acts "for other purposes," such as motive, intent, preparation, plan, and absence of mistake. The North Carolina courts have held that Rule 404(b) is a rule of inclusion. *See State v. Coffey*, 326 N.C. 268, 278–79 (1990). Prior acts, including acts of the victim, are admissible if they are relevant for some purpose other than to show that the person has the propensity, or character, to commit the current act under consideration. *See, e.g., State v. Smith*, 337 N.C. 658, 664–67 (1994) (holding that prior acts of victim were not admissible under Rule 404(b) in this case). Whether Fogg's prior acts might have been admissible under Rule 404(b) for a non-character purpose was not considered in *Bass*.

Potential impact of defensive-force statutes. Another question concerns the impact of the defensive-force statutes enacted by the General Assembly in 2011, which recent cases have recognized depart from prior law in some important respects. Provisions potentially relevant to this discussion include G.S. 14-51.2(d), which establishes a presumption that a person who unlawfully and forcibly enters a person's home, motor vehicle, or workplace is presumed to be doing so with the intent to commit an unlawful act involving force or violence. Suppose the State tries to rebut this presumption by offering evidence that the person did not enter with this intent. Would such evidence open the door to further rebuttal by the defendant through evidence of prior acts by the victim?

On their face, this provision and others in the defensive-force statutes do not address evidence law. I wonder, however, whether the expanded rights enacted by the General Assembly could be read as affecting, or at least simplifying, the overall approach to evidence issues in self-defense cases. Although many avenues remain after *Bass* for the defendant to introduce evidence about the victim's prior conduct, the road map is complicated and has some unexpected potholes.

Fundamental Principles of Statutory Self-Defense

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : defense of habitation, defense of home, defense of others, self-defense

Date : August 6, 2019

The common law right to use defensive force in North Carolina rests on three fundamental principles: necessity, proportionality, and fault. Ordinarily, when a person uses defensive force, the force must be reasonably necessary to prevent harm; the force must be proportional to the threatened harm; and the person using defensive force must not be at fault in the conflict. *See* John Rubin, The Law of Self-Defense § 2.1(b), at 14–15 (UNC School of Government, 1996). North Carolina's new statutes on defensive force continue to rely on these principles. As under the common law, the statutes do not always refer to these principles in describing the circumstances in which a person may use defensive force. But, as this post is intended to show, the basic principles of necessity, proportionality, and fault remain central to the statutory rights.

Necessity. Under the common law, defensive force is permissible only when necessary, or more accurately when it reasonably appears to be necessary, to prevent harm. The common law expresses this principle in the requirement that the defendant must have a reasonable belief in the need to use defensive force.

The principle of reasonable necessity can be seen in the statutes on defensive force. A lawful occupant of a home, workplace, or motor vehicle has the right to use deadly force against a person who is unlawfully, forcibly entering those areas or had done so. This right arises because the statutes create a presumption of "reasonable" fear of imminent death or great bodily injury in those circumstances. G.S. 14-51.2(b) (stating presumption and also applying it to unlawful removal of person from those areas); G.S. 14-51.3(a)(2) (stating right to use deadly force in circumstances permitted by G.S. 14-51.2(b)); *see also State v. Coley*, ___ N.C. App. ___, 822 S.E.2d 762 (2018) (recognizing presumption of reasonable fear), *review granted*, ___ N.C. ___, 824 S.E.2d 428 (2019).

The presumption is new, but the principle of reasonable necessity underlies it. The presumption essentially views an unlawful, forcible entry as creating a reasonable necessity for the use of defensive force, including deadly force. The presumption is rebuttable as provided in the statute, a topic for another post.

The statute on defense of person also expresses the principle of reasonable necessity through a reasonable belief requirement. It states that a person is justified in using nondeadly force when the person "reasonably believes that the conduct is necessary" to defend against the imminent use of unlawful force. Likewise, the statute recognizes a person's right to use deadly force when the person "reasonably believes that such force is necessary" to prevent imminent death or great bodily harm. G.S. 14-51.3(a), (a)(1); *see also State v. Parks*, ___ N.C. App. ___, 824 S.E.2d 881 (2019) (holding that trial judge erred in failing to instruct on self-defense where evidence was sufficient to support defendant's assertion of reasonable apprehension of death or great bodily harm).

Proportionality. The common law distinguishes between situations in which a person may use deadly force against a threat of harm—that is, force likely to cause death or great bodily harm—and nondeadly force. This distinction implements the principle of proportionality, recognizing that deadly force is not permissible to prevent relatively minor harms such as a nondeadly assault or the loss of property.

The statutes retain this distinction by allowing deadly force against some threats of harm and not others. Under G.S. 14-51.2, an unlawful, forcible entry into the home, workplace, or motor vehicle is considered so threatening that deadly

force is presumptively permissible. Under G.S. 14-51.3, deadly force is permissible to prevent imminent death or great bodily harm but not to prevent mere "unlawful force." *See also State v. Pender*, ___ N.C. App. ___ (June 18, 2019) (recognizing distinction).

Both statutes contain a "stand-your-ground" provision, which allows a person to use deadly force without retreating. The right of a person to stand his or her ground, however, does not give the person the right to use deadly force when only nondeadly force is permissible. For example, if A slaps B, the stand-your-ground provision does *not* give B the right to use deadly force in response. B may only use nondeadly force if reasonably necessary to defend himself—his response must be proportional to the harm he faces.

Fault. The common law ordinarily takes away the right to use defensive force when the person is the aggressor in the encounter. There are different kinds of aggressors and different circumstances in which an aggressor may regain the right to use defensive force. Generally, the aggressor doctrine reflects the principle that a person is not justified in using defensive force if he or she was at fault, as that term is used in the law, in bringing about the conflict.

The statutes include an aggressor provision, which recognizes that the statutory rights to use defensive force are ordinarily unavailable to a person who provokes the use of force against himself or herself. G.S. 14-51.4(2); *see also State v. Holloman*, 369 N.C. 615 (2017) (holding that statutory provision allowing initial aggressor to regain right to use defensive force without withdrawing does not apply to aggressor with murderous intent).

The statutes contain an additional fault disqualification. The statutory rights of defensive force are unavailable to a person who was attempting to commit, committing, or escaping after the commission of a felony. G.S. 14-51.4(1). Two cases pending in the North Carolina Supreme Court raise the question of how far this disqualification goes. *See State v. Coley*, ___ N.C.___, 824 S.E.2d 428 (2019); *State v. Crump*, ___ N.C. ___, 820 S.E.2d 811 (2018); *see also* Wayne R. LaFave, Substantive Criminal Law § 10.4(c), at 211 & n.74 (3d ed. 2018) (noting that some state statutes declare that people involved in certain criminal activities do not have a right of self-defense).

In future posts, I will delve further into the specific conditions and circumstances in which a person has the statutory right to use defensive force.

The Statutory Law of Self-Defense in North Carolina

Author : John Rubin

Categories : Crimes and Elements, Evidence, Procedure, Uncategorized

Tagged as : defense of habitation, defense of others, self-defense

Date : June 4, 2019

Several years ago (some might say that's an understatement) I wrote The Law of Self-Defense in North Carolina, in which I looked at over 200 years' worth of North Carolina court opinions on self-defense and related defenses, such as defense of others and defense of habitation. The book's approach reflected that North Carolina was a common law state when it came to self-defense. The right to act in self-defense depended primarily on the authority of court decisions. The General Assembly's adoption in 2011 of three defensive force statutes—G.S. 14-51.2, G.S. 14-51.3, and G.S. 14-51.4—changed that. An understanding of the law of self-defense in North Carolina now must begin with the statutory law of self-defense.

I must admit that I did not fully appreciate the significance of the statutes when they first appeared. I saw them as revising, supplementing, and clarifying the common law. Now that we have almost twenty reported appellate decisions that have grappled with the statutes (as well as some unpublished decisions), I can see I had it wrong. The statutes create independent defenses, with their own requirements. The enormous body of common law remains significant, both as a means for interpreting and applying the statutes and as a source of additional rights. It is important to recognize, however, that the statutes do not necessarily align with the common law.

The statutory defenses affect both the right to use defensive force outside the courtroom in the real world and the procedures used in the formal world of the courtroom for judging acts of defensive force. The statutes affect such important procedural issues as whether evidence is relevant and admissible, the circumstances in which the jury should be instructed about defensive force, and the wording of those instructions.

Below are some initial takeaways from the cases, which illustrate the importance of closely examining the statutory provisions in every case involving defensive force. In future posts, I intend to discuss the impact of the statutes on specific rules and procedures.

The statutory defenses. G.S. 14-51.2 creates a statutory right to use defensive force in one's home, workplace, or motor vehicle under the conditions stated there. There are obvious and subtle differences between the statutory defense and the common law defense of habitation. Among other things, the statute's protections extend to motor vehicles as well as homes and businesses and include presumptions that insulate a lawful occupant's use of deadly force against someone who unlawfully and forcibly enters those areas. The cases recognize the statute's expanded scope. For example, in *State v. Kuhns*, ___ N.C. App. ___, 817 S.E.2d 828 (2018), the court recognized that the statutory protections apply to the "curtilage" of the home, including in that case the yard around the defendant's home, and not just the home and structures attached to the home. *See also State v. Copley*, ___ N.C. App. ___ (May 7, 2019) (directing pattern jury committee to revise pattern instruction to include broader definition of curtilage), *temp stay allowed*, __ N.C. ___ (May 23, 2019). The statute does not merely enlarge the common law defense of habitation. It creates a separate and different right to use deadly force in one's home, workplace, or motor vehicle (discussed further in my blog post here).

G.S. 14-51.3 creates a statutory right to use force in defense of one's self or another person, which differs from the common law on defense of person. Most notably, the statute includes an explicit stand-your-ground provision, stating that a person does not have a duty to retreat "in any place he or she has the lawful right to be" when the person meets

the requirements of the statute. G.S. 14-51.3(a). In several cases, the courts have reversed convictions for the failure to instruct the jury about this right. *See, e.g., State v. Lee*, 370 N.C. 671 (2018); *State v. Bass*, __ N.C. __, 819 S.E.2d 322 (2018); *State v. Irabor*, ___ N.C. App. ___, 822 S.E.2d 421 (2018); *State v. Ayers*, ___ N.C. App. ___, 819 S.E.2d 407 (2018). Other cases working their way through the courts will show the extent to which the defense-of-person statute diverges from the common law in other respects.

G.S. 14-51.4 elaborates on the right to use defensive force in the above two statutes. Thus, a person may not rely on the statutory defenses if he or she was "[w]as attempting to commit, committing, or escaping after the commission of a felony." G.S. 14-51.4(1). The courts are currently considering the meaning of this provision, which differs from the phrasing of common law aggressor principles. One panel of the Court of Appeals has applied the felony disqualification literally, holding that a defendant who had a previous felony conviction and was unlawfully in possession of a firearm was not entitled to a jury instruction on the statutory right of defense of person. The North Carolina Supreme Court has agreed to hear the case. *See State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415 (2018), *discretionary review allowed*, ___ N.C. ___, 820 S.E.2d 811 (2018). (The Court of Appeals opinion is discussed further in my blog post here.) In a more recent case, another panel of the Court of Appeals didn't mention the felony disqualification in considering whether the trial judge should have instructed the jury on defensive force. In *State v. Coley*, ___ N.C. App. ___, 822 S.E.2d 762 (2018), the defendant had a broken leg and was using crutches and a wheelchair. His evidence showed that he had been repeatedly assaulted by the victim and, when the victim reentered the defendant's home, the defendant managed to climb back into his wheelchair, retrieve a gun, and shoot the victim. The majority found that the trial judge erred in failing to instruct the jury on self-defense and defense of habitation. The dissent would have found no error. Neither the majority nor the dissent addressed whether the felony disqualification applied to the defendant, who had a previous felony conviction and was actually convicted in the case of being a felon in possession of a firearm. The North Carolina Supreme Court has also accepted review of this case.

The common law still matters. Although the statutes establish independent rights to use defensive force, the common law still matters. For one, the statutes restate bedrock common law principles. For example, the defensive force statutes incorporate the concept of "reasonable necessity"—that is, that a person may use defensive force if reasonably necessary to defend against harm (although reasonableness is presumed in the statute on defensive force in the home, workplace, or motor vehicle). Common law decisions involving this central tenet of defensive force therefore remain significant in interpreting and applying the statutory provisions. Among other things, as under the common law, a defendant may offer evidence about why he or she had a reasonable apprehension of harm from the victim, including evidence about prior violence by the victim. *See State v. Irabor*, ___ N.C. App. ___, 822 S.E.2d 421 (2018) (holding that such evidence supported instruction on statutory self-defense). [The admissibility of evidence about the victim in self-defense cases is discussed further in my blog post here]. The cases rely on other common law principles in addressing the statutory defenses, such as the requirement that the evidence must be considered in the light most favorable to the defendant when determining whether the defendant is entitled to a jury instruction on the defense. *Id.*; *see also State v. Coley*, above.

The common law also may be a source of additional rights. The statute on defensive force in the home, workplace, and motor vehicle explicitly states that it does not repeal or limit other common law defenses. The statute on defense of person does not contain such a provision, but it also does not state that it abrogates common law rights. Imperfect self-defense, which reduces murder to voluntary manslaughter, is an example of a common law defense that isn't mentioned in the statute but probably remains viable. It is difficult to imagine that the General Assembly intended to eliminate that common law doctrine. *Cf. State v. Lee*, 370 N.C. 671, 678–79 (2018) (Martin, C.J., concurring) (observing that defendant may be entitled to perfect defense of another based on statutory defense of person in situations in which the common law only allows imperfect defense of another).

Going forward. Defensive force cases have always been complicated, perhaps more so than necessary. *See Brown v. United States*, 256 U.S. 335, 343 (1921) (Holmes, J.) (observing that the law of self-defense has had a "tendency to ossify into specific rules"). They will probably get more complicated in the near future as the courts sort out the meaning and impact of the defensive force statutes. Based on my understanding of the cases so far, the best course is

to figure out the statutory rights in each case, use the common law as appropriate in interpreting and applying the statutes, and identify the potential applicability of common law rights in addition to the statutory rights. These principles will determine such critical issues as whether the defendant is entitled to instructions to the jury on defensive force, what instructions should be given, and how the instructions should be worded, which have been central concerns in many of the recent decisions.

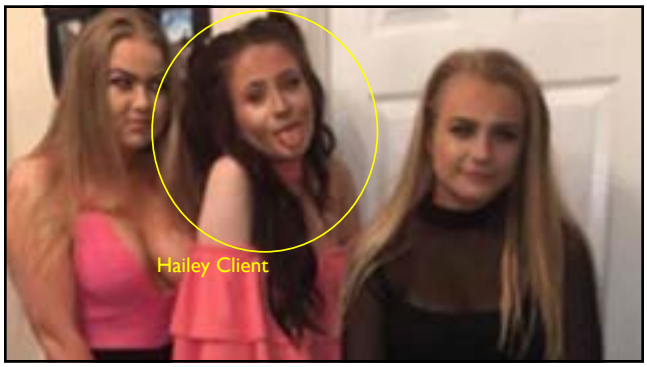
STATE VS. HAILEY CLIENT

- Baby Precious
- 7lbs. 8 oz.
- 8 weeks old

1

STORYTELLING AND VISUAL AID IN SENTENCING

2



3

FACT PATTERN

- Client: Hailey, 18 years old
- Charged with: Felony Child Abuse for Shaking her 8 weeks old, Class E Felony
- Background: Single Mom. Hailey's mother does not approve, kicks her out of house but pays for room and grocery money. She has access to OBGYN 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 Hailey admits to shaking baby.
- Hailey signs a family services agreement, underwent a parent capacity evaluation and took parenting classes.

4

FACT PATTERN (CONTINUED)

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

5

NCGS 14-318.4 (A)(4)

Section 14-318.4. Child abuse a felony

6

GOAL IN SENTENCING

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

7

STORYTELLING IN TRIAL VS. SENTENCING

- STORY OF INNOCENCE
- STORY OF MITIGATION

8

9

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
  - That teacher/mentor, sponsor
  - That old man/woman who client took groceries to
  - Photos of house that client was brought up in

10

MITIGATION STARTS WITH INVESTIGATION

- HOW SMART IS SHE
- LEVEL OF SCHOOL COMPLETED
- ***RECORDS TAKE A LONG TIME

11

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

12

SENTENCING HEARING: WHAT THE JUDGE WANTS TO KNOW

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

13

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)

14

15

WHY DID IT HAPPEN: IN HAILEY'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)

16

17

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

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

18

STATE WILL USE DEMONSTRATIVE EVIDENCE

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

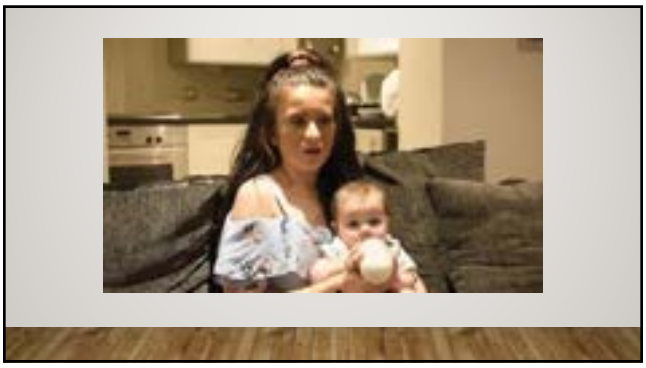
19

STATE VS. HAILEY CLIENT

- Baby Precious
- 7lbs. 8 oz.
- 8 weeks old

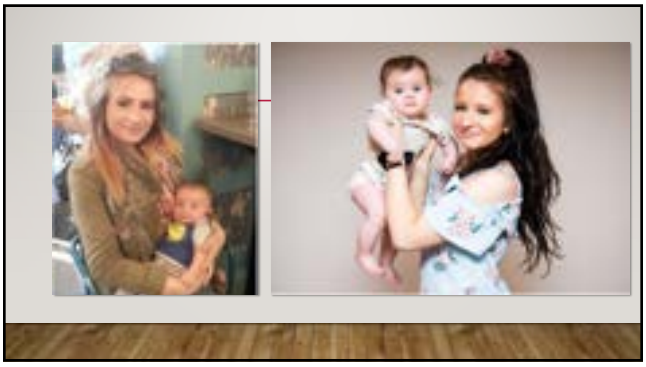
20

21



22

23



24

TAKE AWAY

- Set the scene:
  - Small apartment (photos, use the courtroom)
  - Incessant noise: play
- 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)
  - Sorry not sorry doesn't work
  - Prepare your client

25

26

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
- Convictions must be felonies in NC or felonies under the laws of any sovereign jurisdiction where the convictions occurred
- Relevant consideration is the status of the offense at the time of conviction *State v. Hefner,* 289 N.C. App. 223 (2023), *State v. Mincey,* 292 N.C. App. 345 (2024)

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)*

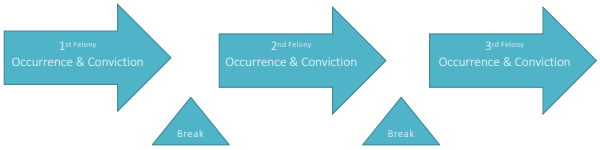
7

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

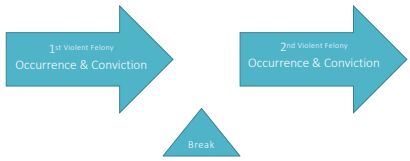
Eligibility for Violent HF

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)

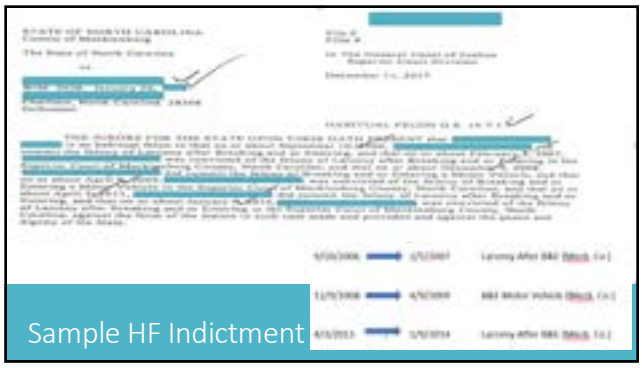
14

HF Indictment N.C.G.S. §14-7.3

- Must be separate from the principal felony Indictments
- **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

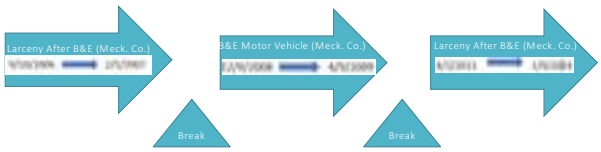
     State v. Langley, 371 N.C. 389 (2018)

15



16

Non-Overlapping



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.

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

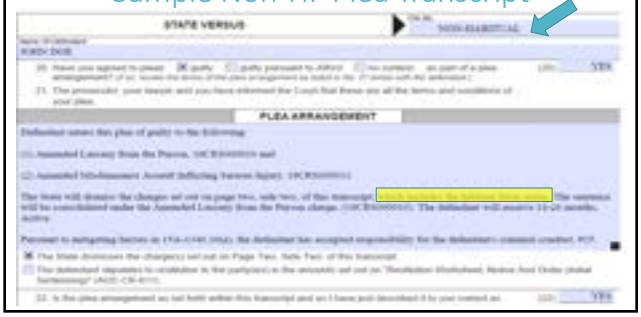
Most HF cases are resolved with non-habitual guilty pleas and sentences

- 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)

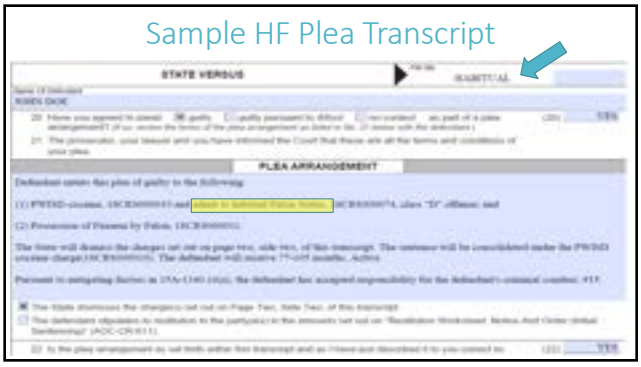
23

Sample Non-HF Plea Transcript



24

Sample HF Plea Transcript



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

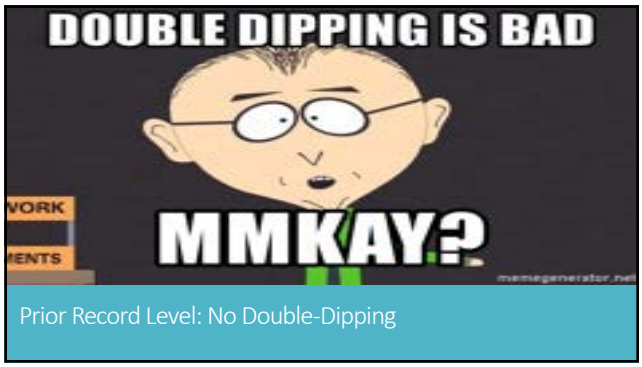
Look for irregularities in HF indictment:

- Overlapping prior felonies
- Court records mistaken or missing
- Priors were not actually felonies
- Different names or date of birth in court records

BUT you won't get far: *State v. Singleton,* 386 N.C. 183 (2024) - bills of indictment that contain non-jurisdictional deficiencies will no longer be cast aside by reason of any informality when they expressed the crime charged in "a plain, intelligible, and explicit manner"

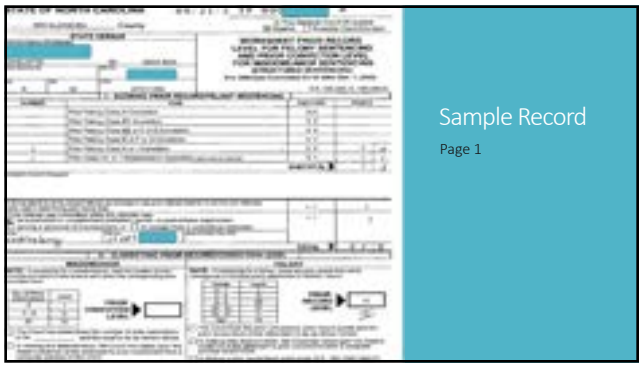
Suggestion: Make it a habit to obtain copies of the alleged prior judgments and transcripts prior to trial, or the underlying misdemeanors for a elevated felony

29



Prior Record Level: No Double-Dipping

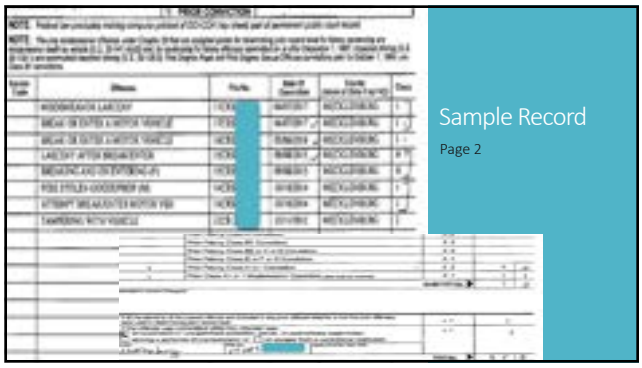
30



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

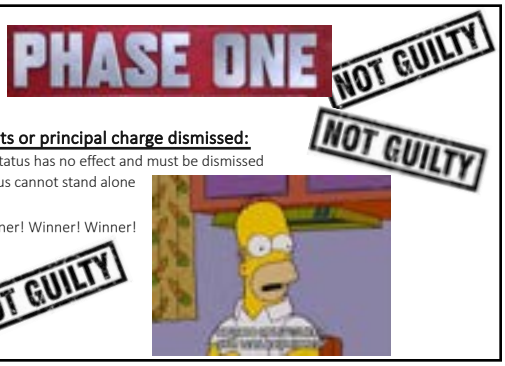
36

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



If jury acquits or principal charge dismissed:

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

38

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

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

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?

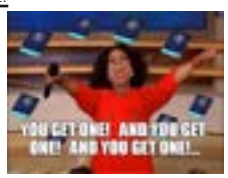
Sometimes, a HF status client will face **more** time on a non-habitual plea or conviction

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

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

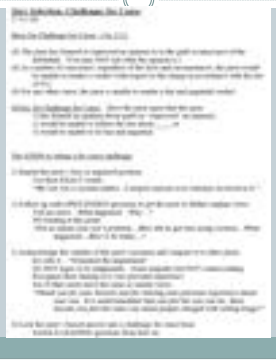
8

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

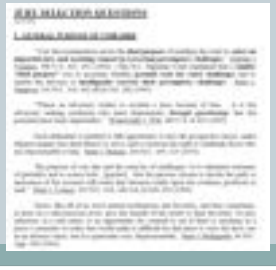
Error Preservation – Jury Selection



10

Error Preservation – Jury Selection

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



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

29

Objections – Specificity

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

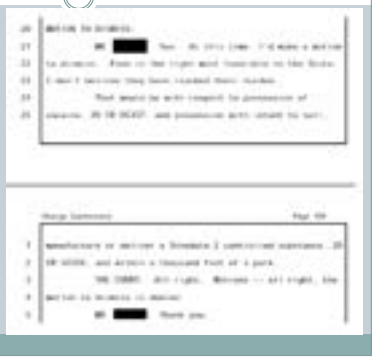
Sufficiency & Variance

- 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.



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 – must be <u>after</u> judgment is entered and before court session is closed sine die.

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
  - <u>Served on DA – not in DA's mailbox in clerk's office – You must attach a certificate of service</u>

45

Properly appealing

- Do not say you're giving notice of appeal from "the denial of the suppression motion," or any other specific ruling. Notice of appeal is from the judgment.
- Our website has a sample written notice of appeal that includes a request for appointment of counsel.

46

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.

47

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.

48

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

49

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

50

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.

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

Hannah Autry & Kailey Morgan
UNC School of Government – High Level Felony Defender Training
September, 2024

1

Jury Service

Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.

***Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019)**

2

- 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.

3

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

4

Batson & its progeny - takeaway

- One strike based on race is one too many

5

Batson Cheat Sheet

"For example, as recently as 1995, prosecutorial training sessions conducted by the North Carolina Conference of District Attorneys included a 'cheat sheet' titled 'Batson Justifications: Articulating Juror Negatives.'

State v. Clegg, 380 N.C. 127, 155 (2022)

"[M]ere possession of a CLE handout from a State Bar sanctioned CLE class does not raise an inference that a peremptory challenge was based on race."

State v. Tucker, 895 S.E.2d 532, 550 (2023)

6

MSU Study (1990-2010)

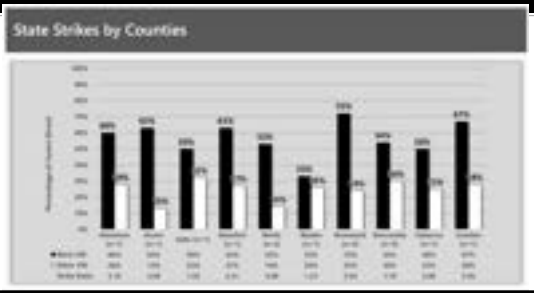
≅ 2/1

7

Statistics are powerful

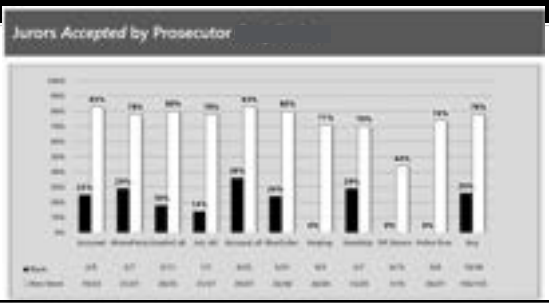
8

Statistics are powerful



9

Statistics are powerful



10

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

11

State v. Robinson

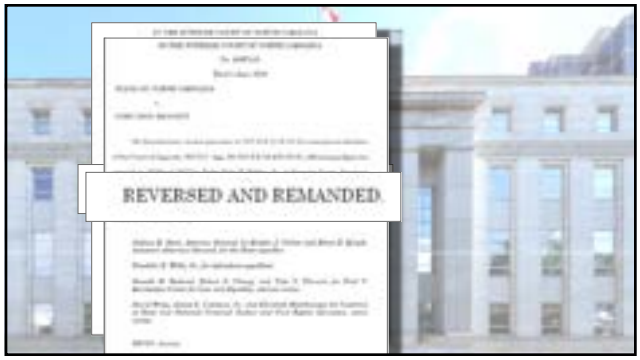
- "In stark contrast to these findings, this Court has *never* ruled that the State intentionally discriminated against a juror of color in violation of *Batson.*"

  State v. Robinson, 2020

12

- State v. Clegg (2016): "based on their body language, based on their failure to look at me when I was trying to communicate with them"
- State v. Campbell (2017): "she was a participant, if not an organizer, for Black Lives Matter."
- State v. Hood (2018): prosecutor assumed Black male juror had been a participant in crime rather than a victim
- State v. Alexander (2019): "[T]he gentleman struck me as someone who was just not a reasonable citizen basically. "
- State v. Smith (2021): struck the only two Black jurors called thus far; "she was giving me a mean look the whole time."

13



14

VICTORY AT LAST!

State v. Clegg, 380 N.C. 127 (2022)

The defendant was tried for armed robbery and possession of firearm by felon in Wake County. When the prosecution struck two Black jurors from the panel, defense counsel made a Batson challenge. The prosecution argued the strikes were based on the jurors' body language and failure to look at the prosecutor during questioning. The prosecution also pointed to one of the juror's answer of "I suppose" in response to a question on her ability to be fair, and to the other juror's former employment at Dorothea Dix, as additional race-neutral explanations for the strikes. The trial court initially found that these reasons were not pretextual and overruled the Batson challenge.

At NCSC, Court found:
- Shifting and mischaracterized reasons were evidence of pre-text
- Demeanor-based explanations were insufficient without findings of fact on the point
- Trial court did not meaningfully apply the "more-likely-than not" burden of proof
- Prosecutor questioned jurors in a disparate manner
- Trial court recited a reason for the strike not offered by the prosecution

15

Key Takeaways from *State v. Hobbs I*, *State v. Bennett*, 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

16

SCOTUS is your friend!

- 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)



17

Comparative Juror Analysis

"**More powerful** than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."

Miller-El v. Dretke, 545 U.S. 231, 241 (2005).

18

"Potential jurors are not products of a set of cookie cutters."

Miller-El v. Dretke, 545 U.S. 231, 247 n.6 (2005)

19

Example: Single Factors

Flowers
Familiarity with witnesses and parties

Clegg
Ability to Focus on Case

Foster
Marital Status and Age

Snyder
Work Obligations

20

Identical Jurors?

NC Supreme Court

"The trial court declined to adopt defendant's suggested 'single factor approach' to compare the prospective jurors because that approach fails to consider each juror's characteristics 'as a totality.' **Instead, the trial court adopted the State's "whole juror" approach in its comparisons**."

State v Hobbs, 884 S.E.2d 639 (2023) (emphasis added).

Clarence Thomas Dissent

"Similarly situated does not mean matching any one of several reasons the prosecution gave for striking a potential juror — **it means matching *all* of them.**"

Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 291 (2005) (Thomas, J., dissenting) (emphasis added)

21

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, 93 (1994) ("arms folded")
- State v. Lyons, 340 N.C. 1, 12 (1995) ("leaning away")
- State v. Smith, 328 N.C. 99, 125 (1991) ("nervous")
- State v. Floyd, 115 N.C. App. 472, 475 (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")

22

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) *Batson remand, still ongoing

23

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

24

Reasons to object, anyway!

- Create appellate issue (no need to exhaust peremptories) – potential for new trial!
- Potential for a *Batson* remand
- Get future jurors passed by State in your case
- Strengthen later *Batson* objections
- Right thing to do/duty to the client

25

When to use Batson?

ALWAYS

26

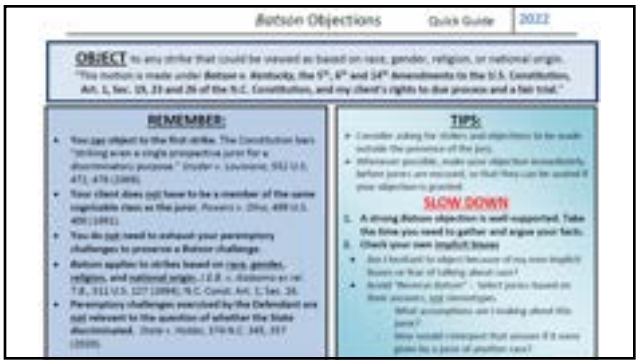
Batson Motions

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

27

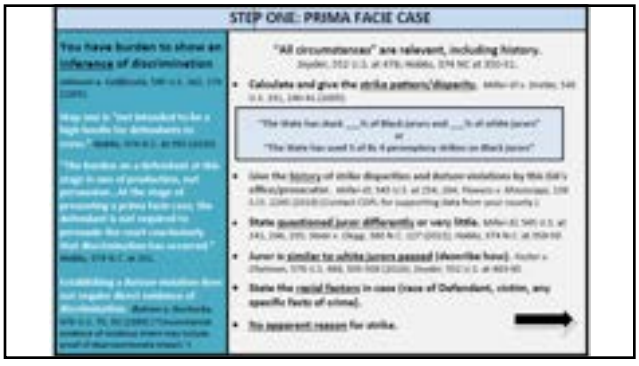


28

Batson's Three Step Framework

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

29



30

State v. Richardson, 385 N.C. 101, 195 (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."

31

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

32

How to collect data

- Jury seating charts from past trials in your jurisdiction
- Transcripts from jury selection
- Questionnaires from case file
- Affidavits from seasoned attorneys
- Strike rate sheets – file away in your office for future cases

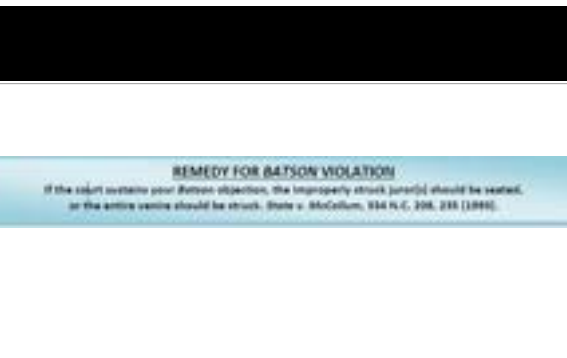
33


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 356; 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)

34


STEP THREE: PURPOSEFUL DISCRIMINATION

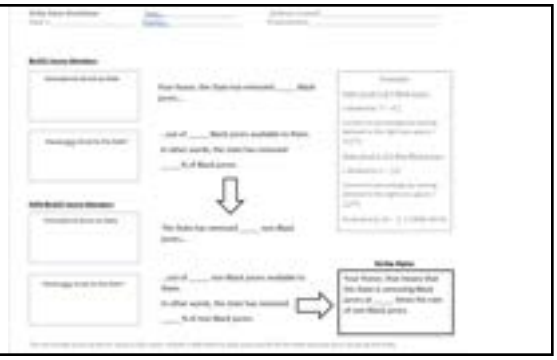
35


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).

36

Demo – Calculate Strike Rate & Make Objection!

37



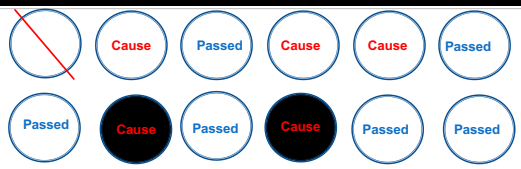
38

Caveat: Multiple Strike Rate Sheets

- Print out multiple sheets for your trial binder. Designate one for Black vs. Non-Black, Latino vs. Non-Latino, and Women vs. Non-Women (i.e. Men), and any other scenarios that may arise.

39

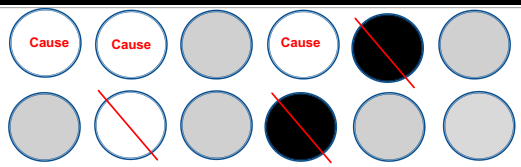
Panel 1 – strikes by the State



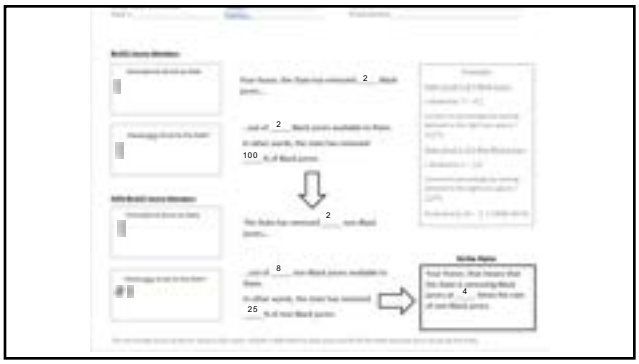
40

41

Panel 2 – strikes by the State



42



43

$$\frac{2}{2} \div \frac{2}{8} = 4$$

(100%) (25%)

44

Practice!

Step 1: Prima Facie Case

- State struck 2 of 8 qualified white jurors and 2 of 2 qualified Black jurors. Calculate the strike ratio!
- What else to say?

45

Step 2: Prosecutor's reasons

- Ms. Jeffreys –Black Woman. Worked as nurse aid at Dorthea Dix (record shows no other juror asked questions about work in mental health field).
- Ms. Aubrey – Black Woman - "I suppose so" in response to "can you be fair?" (record shows that she said that in response to "can you focus?")
- Both: Failure to look at me when I was trying to communicate with them
- Both: body language

46

What does the record show?

- 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
- Defense attorney did not observe inappropriate body language

47

Step 3: Response?

- Shifting reasons
- Reasons not supported by record
- Disparate questioning
- Non-specific reasons (gave reasons as to body language of both jurors collectively)
- Reasons based on demeanor and body language inherently suspect
- Did not observe the demeanor cited by prosecutor
- Repeat of the strike data

48

49

- 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

50

[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.

51

Questions?

Hannah: Hannah.b.autry@nccourts.org

Kailey: Kmorgan@cdpl.org

52

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?

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 Black jurors and ___% of white jurors"**
> **or**
> **"The State has used 3 of its 4 peremptory strikes on Black jurors"**

- **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.**

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)**

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.

Peremptory challenges exercised by the Defendant are not relevant. *Hobbs*, 380 N.C. at 357.

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.

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 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).
- **A laundry list of reasons.** *Foster*, 578 U.S. at 502.

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).

Strike Ratio Worksheet Date:_____ Defense Counsel:_____

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

BLACK Venire Members

Peremptorily Struck by State

Passed plus struck by the State*

Your honor, the State has removed _____ Black jurors…

…out of _____ Black jurors available to them.

In other words, the state has removed

_____% of Black jurors.

NON-BLACK Venire Members

Peremptorily Struck by State

Passed plus struck by the State*

The State has removed _____ non-Black jurors…

…out of _____ non-Black jurors available to them.

In other words, the state has removed

_____% of non-Black jurors.

Example

State struck 3 of 7 Black jurors:

3 divided by 7 = .42

Convert to percentage by moving decimal to the right two spaces = 42%

State struck 1 of 5 Non-Black jurors:

1 divided by 5 = .20

Convert to percentage by moving decimal to the right two spaces = 20%

42 divided by 20 = 2.1 STRIKE RATIO

Strike Ratio

Your Honor, that means that the State is removing Black jurors at _____ times the rate of non-Black jurors.

*Do not include jurors struck for cause in this count. Include a tally mark for each juror passed by the State and each juror struck by the State.

PROTECTING JURORS FROM STATE CHALLENGES FOR CAUSE

September 12, 2024
Inclusive Juries Project, Duke University School of Law
Emily Coward, Director
Johanna Jennings, Consultant

1

AGENDA

1. Whitewashing: Losing Jurors at the Cause Stage
2. Statutory Framework & Cause Standard
3. Putting Unfavorable Case Law to Use
4. Rehabilitation & Objection
5. Final Tips & Takeaways

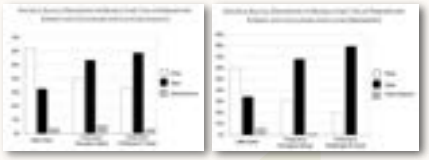
2

SOME CONTEXT

- We are talking about the moment in trial where the **judge** or the **prosecutor** is attempting to remove a juror for cause
- We will go over best practices to make the state use a peremptory or give yourself a chance to talk to that juror
- Empirically, diverse juries are better juries
  - longer deliberations
  - discussed more case facts
  - made fewer inaccurate statements
  - more likely to correct inaccurate statements

3

PROSECUTORS' PROBLEMATIC RECORD



Thomas Ward Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 Mich. L. Rev. 785 (2020).

Available at: https://repository.law.umich.edu/mlr/vol118/iss5/3

4

U.S. CONSTITUTION REMEDY?

Unfair Cause Challenge Practices →

- ~~6th A. Fair Cross Section~~
- ~~14th A. Equal Protection Clause~~
- ~~6th A. Impartial Jury~~ ~~14th A. Due Process Clause~~

Thomas Ward Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 Mich. L. Rev. 785 (2020).

Available at: https://repository.law.umich.edu/mlr/vol118/iss5/3

5

LITIGATION TOOL

6

NCGS § 15A-1212

GROUNDS FOR CHALLENGE FOR CAUSE

(1) Does not qualify under NCGS § 9-3

(2) Mental or physical infirmity

(6) Formed opinion on guilt/innocence

(7) Presently charged with a felony

(8) "As a matter of conscience," unable to render a verdict

(9) "For any other cause is unable to render a fair and impartial verdict."

7

RENDER A FAIR AND IMPARTIAL VERDICT

- It is ok for the juror to have biases!
  - "The operative question is not whether the prospective juror is biased but whether that bias is surmountable with discernment and obedience to the law . . ." *State v. Smith*, 352 N.C. 531, 545 (2000)
- The standard is not "can you be fair and impartial?"
- Be prepared to educate the judge on the case law.

8

CASE LAW TRANSLATOR*

Case law protecting the right of a juror with pro-state bias → Protect the right of the juror with a [insert state's complaint] bias

*Credit to Elizabeth Gerber of the Mecklenburg County Defender's Office

9

BLACK LIVES MATTER JUROR

Law

Carolina Beach Chief of Detectives, Lt. Goodson, was properly retained on the jury where the Lt. said he:

- "attach[ed] a great deal of credibility to law enforcement officers"
- Felt "a closeness to law enforcement officers" in his "bones"
- Would "be more inclined to assign more credibility to the officer over . . . the civilian"

State v. Cumming, 361 N.C. 438, 453-56 (2007)

Argument

The State's cause challenge is properly denied even where:

- A juror is skeptical of the credibility of law enforcement officers
- A juror feels aligned with racial justice issues including BLM and criminal legal reform
- A juror is more inclined to assign credibility to a civilian over an officer

So long as the juror will participate in reaching a fair and impartial verdict by listening to the evidence in *this* case and apply the law in *this* case.

10

HONEST-TO-A-FAULT JUROR

Law

Two jurors (a police officer and a relative of an ADA) were retained where both:

- Could not positively rule out having a pro-prosecution bias, but
- Ultimately "indicated that [they] would render a fair and impartial decision."

Because:

The jurors' responses "represent nothing more than total honesty and their import is characteristic of any prospective juror whose individual biases are not instantly shed upon being summoned for jury duty."

State v. Whitfield, 310 N.C. 608, 612 (1984)

Argument

Whitfield directs that a juror who has **expressed a bias** or preference, **but** ultimately indicates they **can participate** in coming to a **fair and impartial verdict**, should be seated.

Research indicates jurors' self-assessment of their biases is unrelated to jurors' ability to determine facts and "largely independent of their final verdict preferences."

Thomas Ward Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 Mich. L. Rev. 785, 831 (2020).

11

JUROR WHO KNOWS THE CASE, CLIENT, OR PLACE

Law

State v. Grooms: Juror knew victim and attended a pretrial protest of delay in bringing case to trial

State v. Lasiter: Juror had "several personal and social" ties to LEOs and courthouse personnel, her husband was a bailiff, and she knew the ADA trying the case.

State v. Hunt: Juror/officer knew the testifying officers and had heard the defendant's case discussed by other LEOs

Argument

Juror who knows your client and expresses concern about the prosecution of the case should be allowed to serve.

Juror who knows anyone associated with the client or the defense should be allowed to serve.

Juror who knows testifying witnesses and has heard others discussing the case should be allowed to serve.

12

DISTRACTED-BY-CIRCUMSTANCE JUROR

Law

Juror seated despite repeatedly voicing concerns that finances would be on his mind such that it would interfere with his ability to pay attention, to take his time, and to listen to the evidence.

Q. Do you think it [would] impair your ability to listen to the evidence in the case [further]?

A. Yes, I do.

Q. You do?

A. Yes.

***State v. Reed*, 353 N.C. 150, 153-60 (2002)**

Argument

Juror who repeatedly expresses concerns about circumstances (finances, job, caretaking, etc.) is still qualified where the juror can follow the law, listen to the evidence, and be fair to both sides.

13

REHABILITATION

- Tell the juror about SCT language about the role of the jury:
  - "The diverse and representative character of the jury must be maintained 'partly as an assurance of diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility'" Justice Kennedy in *J.E.B. v. Alabama*, 511 U.S. 127, 134 (1994).
  - "[T]he jury is a necessary check on governmental power." *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 860 (2017).
- Tell the juror having different perspectives and opinions is ok!
  - We all come with biases and perspectives. Our differences and perspectives make the jury system function.
- Walk the juror toward questions about ~~the verdict~~ being fair and impartial. Step by step. Be patient.
  - Ex: Knowing that it's individual citizens like you that make the jury system work, could you listen to the evidence in this case? Could you determine what the facts are based on what you see and hear? Could you listen to the judge explain the law? Could you deliberate with other jurors? And, if or when you and your other jurors reach a verdict, would your participation in with your jurors render that verdict unfair or unjust?

14

HOW TO OBJECT

- Use your quick guide!
- State the legal basis
- Translate the case law
- Point out any other relevant unfairness you see

15

PRESERVATION

- Mechanics are on the quick guide
- Focus on the impact at your trial
  - Possible to win the issue
  - Stem the unfair actions of the prosecutor/judge
  - Ripple effects

16

FINAL TIPS & TAKEAWAYS

- Expand the notion of who is a qualified juror
- If you see unfairness, say something
  - Disparate questioning
  - Different degree of vigor
  - Structural issues - childcare, low juror pay
- Consider:
  - A pretrial motion alerting the court to the data/issue
  - Bring copies of the case law and Frampton article

17

CONTACT INFO

Emily Coward
Director, Inclusive Juries Project
coward@law.duke.edu

Johanna Jennings
Consultant, Inclusive Juries Project
Jennings.Johanna@gmail.com

18

Jury Selection

The Art of Peremptories and Trial Advocacy

James A. Davis

James is honored to present his 42nd CLE at the 2024 Higher-Level Felony Defense Training.

He 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: (1) determine whether a basis for challenge for cause exists; and (2) intelligently exercise peremptory challenges. *State v. Wiley*, 355 N.C. 592 (2002); *State v. Simpson*, 341 N.C. 316 (1995).

Counsel who wishes to exclude a potential juror for bias must demonstrate, through questioning, that the potential juror lacks impartiality. *Wainwright v. Witt*, 469 U.S. 412 (1985). If the Court attempts to limit questioning or the prosecutor objects during questioning, demonstrate how your questions relate to the dual objectives of *voir dire*. In other words, fulfilling the objectives of jury selection requires the ability to question jurors for those purposes.

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,

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

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 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

[3] This language was excised from a capital murder case. *See Morgan v. Illinois*, 504 U.S. 719 (1992).

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]
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

[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.
[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).

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).

- 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

[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).

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).

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).

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

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.

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;

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

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 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

[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).

to a *Batson* challenge, that historical evidence and comparative juror analysis are important, and that strikes by the objecting party are irrelevant).

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.

For example, a prospective juror who is unable to accept a particular defense recognized by law is not a competent juror and should be removed when challenged for cause. *State v. Leonard*, 296 N.C. 58, 62-63 (1978). Defense counsel is free to inquire into jurors' attitudes concerning the specific defenses of accident or self-defense. *State v. Parks*, 324 N.C. 420 (1989).

Practically speaking, counsel should draw the sting of uncontroverted facts to determine an appropriate jury.

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).

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

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).

SCENARIO: FOR CAUSE CHALLENGE

Imagine the following voir dire during an Armed Robbery case:

Defense Counsel:	Mr. Smith (Juror #1), you *shared* that your brother was a victim of a robbery last year. Can you *tell us more* about that experience?
Juror #1:	Yes, it was very traumatic for my family. My brother was hurt really bad. It is something that has really stuck with me.
Defense Counsel:	Given that experience, do you think it would *substantially impair* your ability to serve on this jury?
Juror #1:	I am not sure. I would try to be fair. I know it would be difficult.
Defense Counsel:	Thank you for your honesty. We all appreciate your circumstances. Saying it differently, do you believe it would *stick in the back of your mind* as you deliberate?
Juror #1:	Um. I'm not sure. I think it probably would.
Defense Counsel:	Your Honor, the defense thanks and respectfully moves to excuse Mr. Smith for cause.
Judge:	Mr. Smith, thank you for your time today. You are excused.

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

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

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 challenge 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.
- 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.

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*

---

[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.*

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.
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.

---

[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*.

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 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

---

[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.

[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).

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.

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

[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.

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.

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.

[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.

- 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]
- 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."

---

[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 the accused would not be here if he did not do something wrong. OFFICE OF THE STATE PUBLIC DEFENDER, JURY SELECTION (2016).

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.
- 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.

---

[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).

[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).

- 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.

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.

[44] MOSES, *supra* note 33.
[45] ANAIS NIN, SEDUCTION OF THE MINOTAUR (1961).

- 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.
- 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.

---

[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.

- 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 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.

---

[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).

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).

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).

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

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)

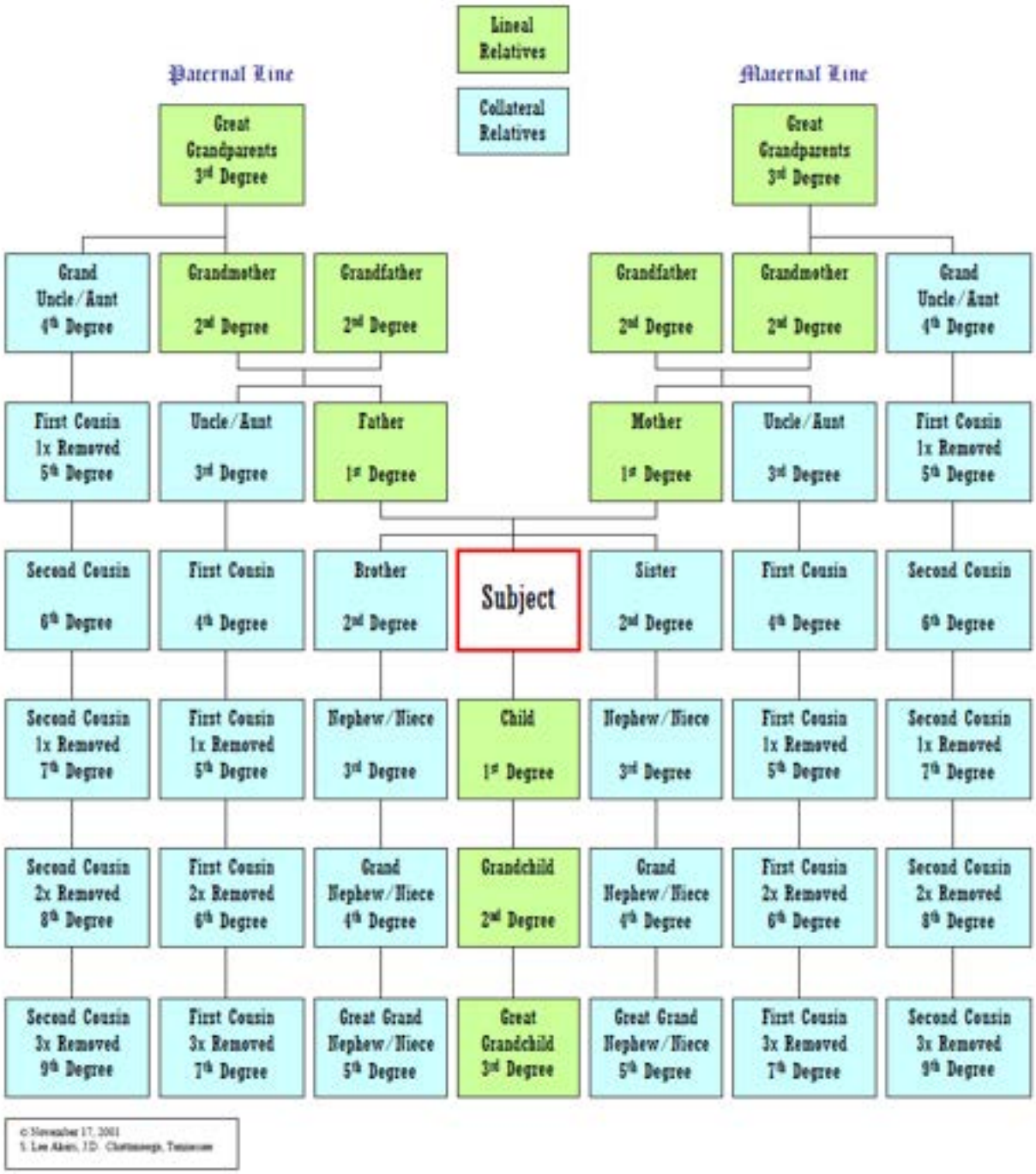
Prepare, research, consult, and try cases. Be objective about your case. Be courageous. Stand up to prosecutors, judges and court precedent, if you believe you are right. Make a complete record. I leave you with words of hope and inspiration from Joe Cheshire, an icon of excellence, and one of many to 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).

2024 Update to Jury Selection:
The Art of Peremptories and Trial Advocacy

Exhibit A



2024 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

(7/23/2024)

(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.
9. Defendant is not on trial. State's case is on trial.

GROUP QUESTIONS

(You, close friend, family member)

10. News accounts?
11. Ever employed us? Other side of legal proceeding? DLF adverse to you?
12. Ever been on a jury or a witness in a trial where I was the lawyer?
13. Ever associate with DA's? (Know/served with/visit in home/relationship to favor/disfavor?)
14. Know Defendant?
15. Know victim/family?
16. Know any witnesses?
17. Ever serve on jury? Foreperson? (different civil/criminal burdens of proof) Verdict? Respected?
18. Ever testified as witness/participant in legal proceeding?
19. You/family/close friends in law enforcement? Working for law enforcement (C.I.)?
20. You/family/close friends been victims of a crime/had similar experience?
21. Any strong opinions regarding this type of charge; "touched" by this type of crime; be fair and impartial?
22. Examples: MADD, Leadership Rowan, believe any use is wrong, gun owners, NRA, CCP vs. Prison Ministry, LGBT, reluctant juror.

INDIVIDUAL QUESTIONS

23. Where live? Employment? Spouse? Family/children?
24. Any disability/physical/medical problems? Covid?
25. 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.

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).