UNC SCHOOL OF GOVERNMENT

2025 Higher-Level Felony Defense Training

September 9-11, 2025 / Chapel Hill, NC

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

Tuesday, Sept. 9

12:30-1:00 pm	*Check-in*
1:00-1:15 pm	Welcome (15 mins.)
1:15-2:15 pm	**Mitigation Investigation** (60 mins.) Josie Van Dyke, Mitigation Specialist Sentencing Solutions, Inc., Knightdale, NC
2:15-3:15 pm	**Defending Eyewitness Identification Cases** (60 mins.) Laura Gibson, Assistant Public Defender Beaufort County Office of the Public Defender, Washington, 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*

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Wednesday, Sept. 10

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 am-12:00 pm	**Preventing Low-Level Felonies from Becoming High Level Habitual Felonies** (45 mins.) Jason St. Aubin, Senior Trial Attorney 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	**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
4:45 pm	*Adjourn*
5:30 pm	**Optional Social Gathering** TBA

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Thursday, Sept. 11

9:00-10:00 am	**Client Rapport** (60 mins.) (ETHICS) Tucker Charns, Regional Defender Indigent Defense Services, 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
11:00 am-12:00 pm	**Peremptory and For Cause Challenges** (60 mins.) James Davis, Attorney Davis and Davis, Salisbury, NC
12:00 pm	*Wrap up and Adjourn*

TOTAL CLE HOURS: 12.50 (including 1.0 hours of Ethics credit)

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

Hannah Autry & Kailey Morgan

UNC School of Government – High Level Felony Defender Training

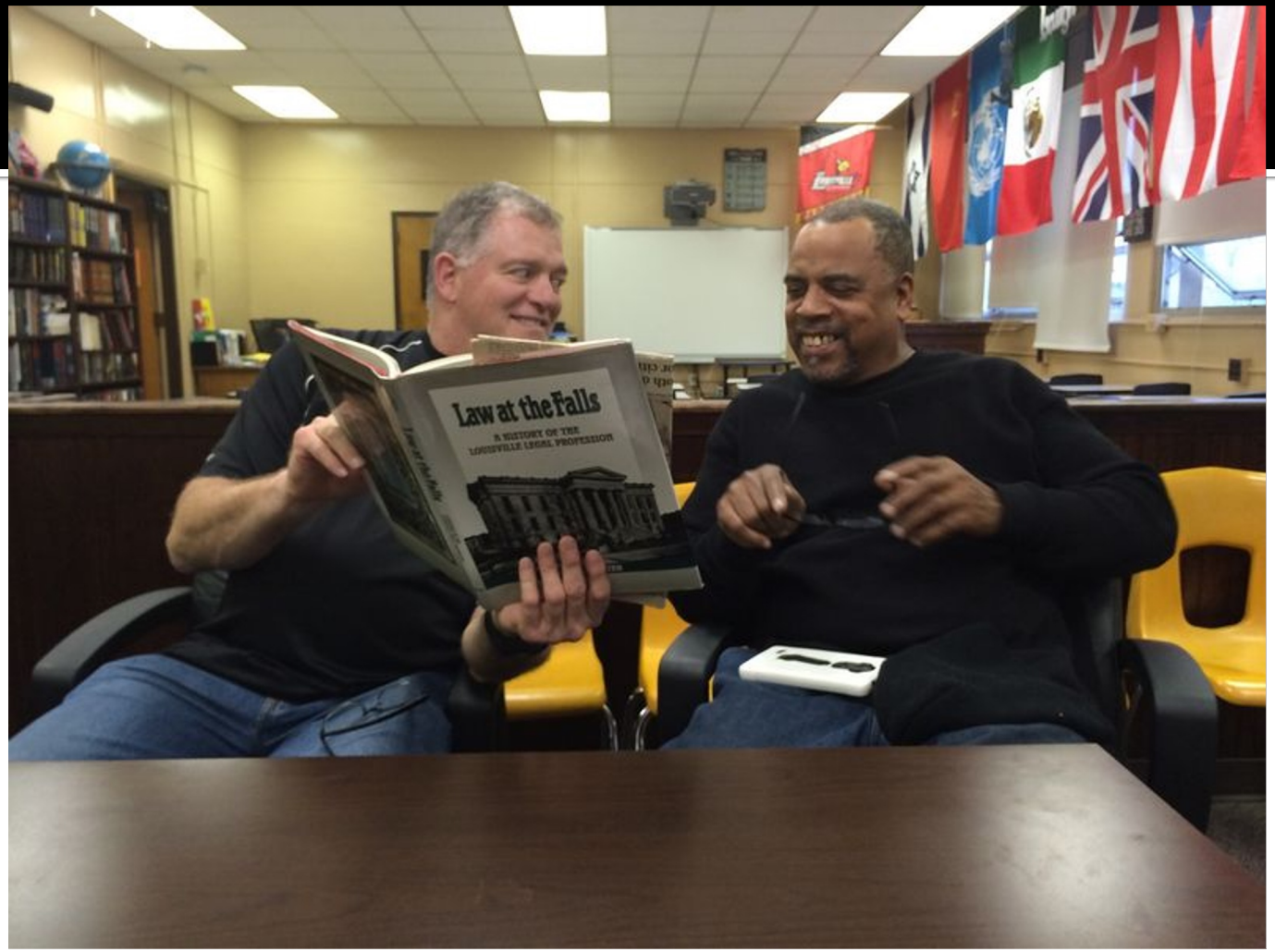
September, 2025

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)

- 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.

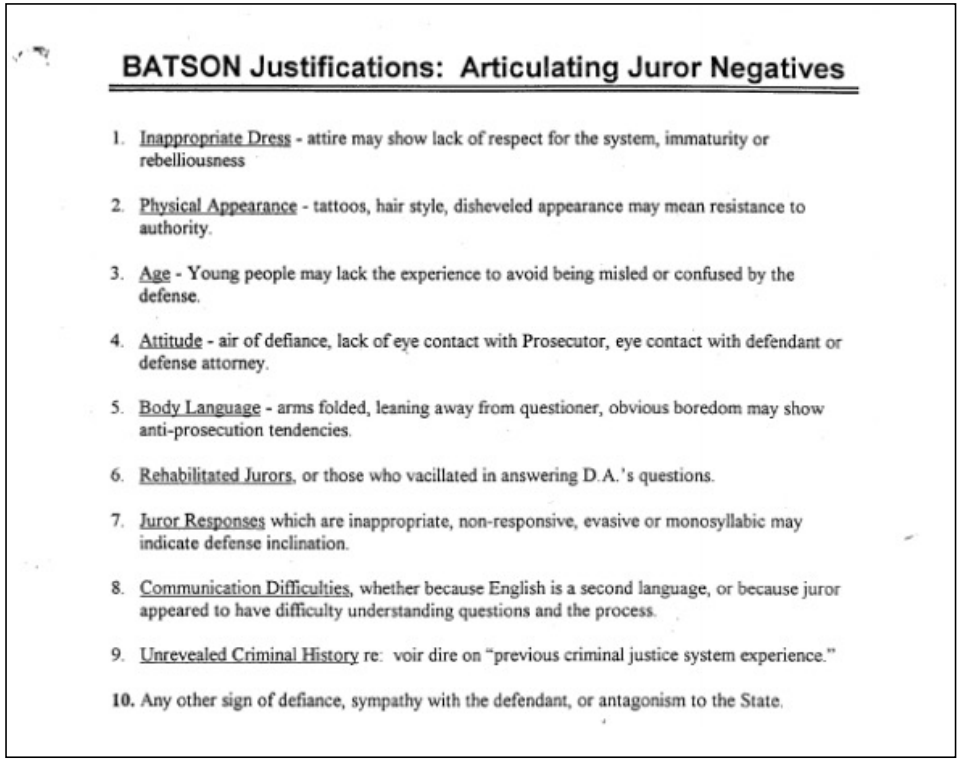


Podcast Episode:
"Object Anyway"
More Perfect
WNYC Radio
July 16, 2016

Batson & its progeny - takeaway

- One strike based on race is one too many

Batson Cheat Sheet



BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress - attire may show lack of respect for the system, immaturity or rebelliousness
2. Physical Appearance - tattoos, hair style, disheveled appearance may mean resistance to authority.
3. Age - Young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude - air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language - arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors, or those who vacillated in answering D.A.'s questions.
7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.
8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unrevealed Criminal History re: voir dire on "previous criminal justice system experience."
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

"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)

MSU Study (1990-2010)

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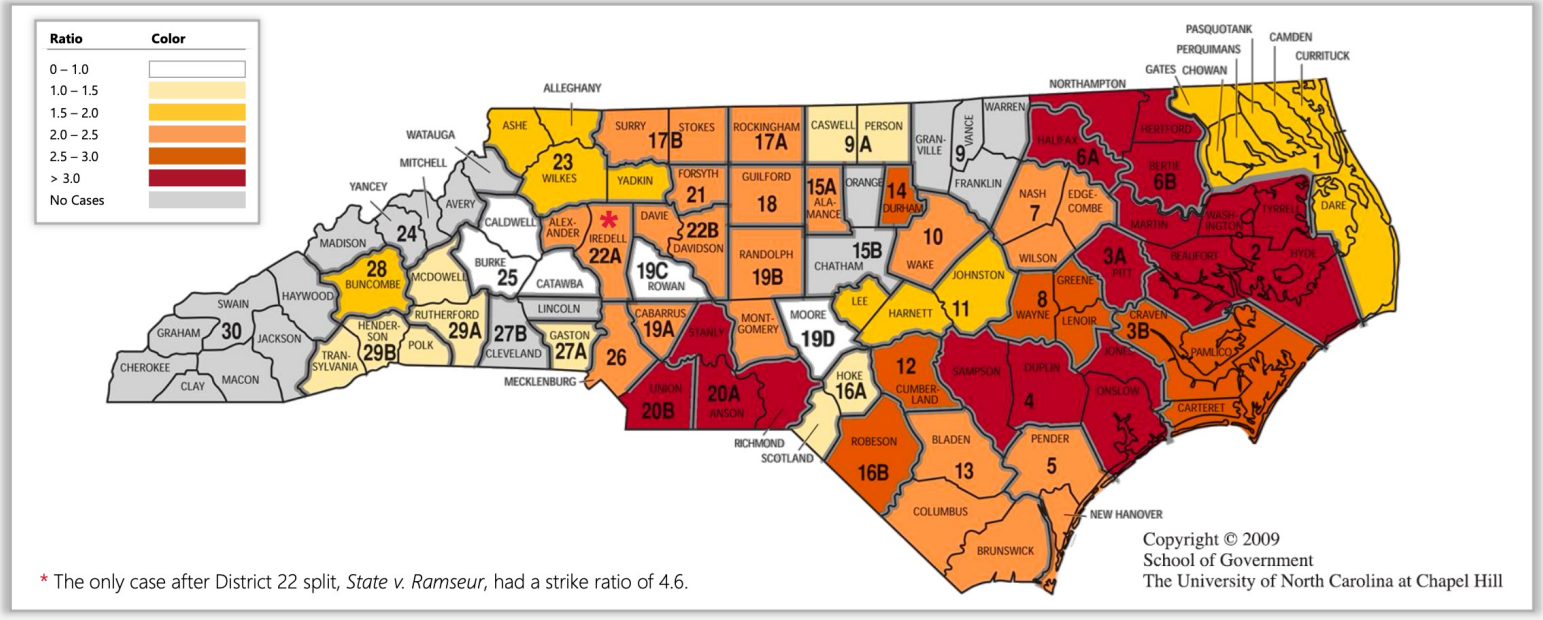
Statistics are powerful

Jury Selection – Ratio of Strike Rates Among Black and Non-Black Veniremembers (Reported by District)

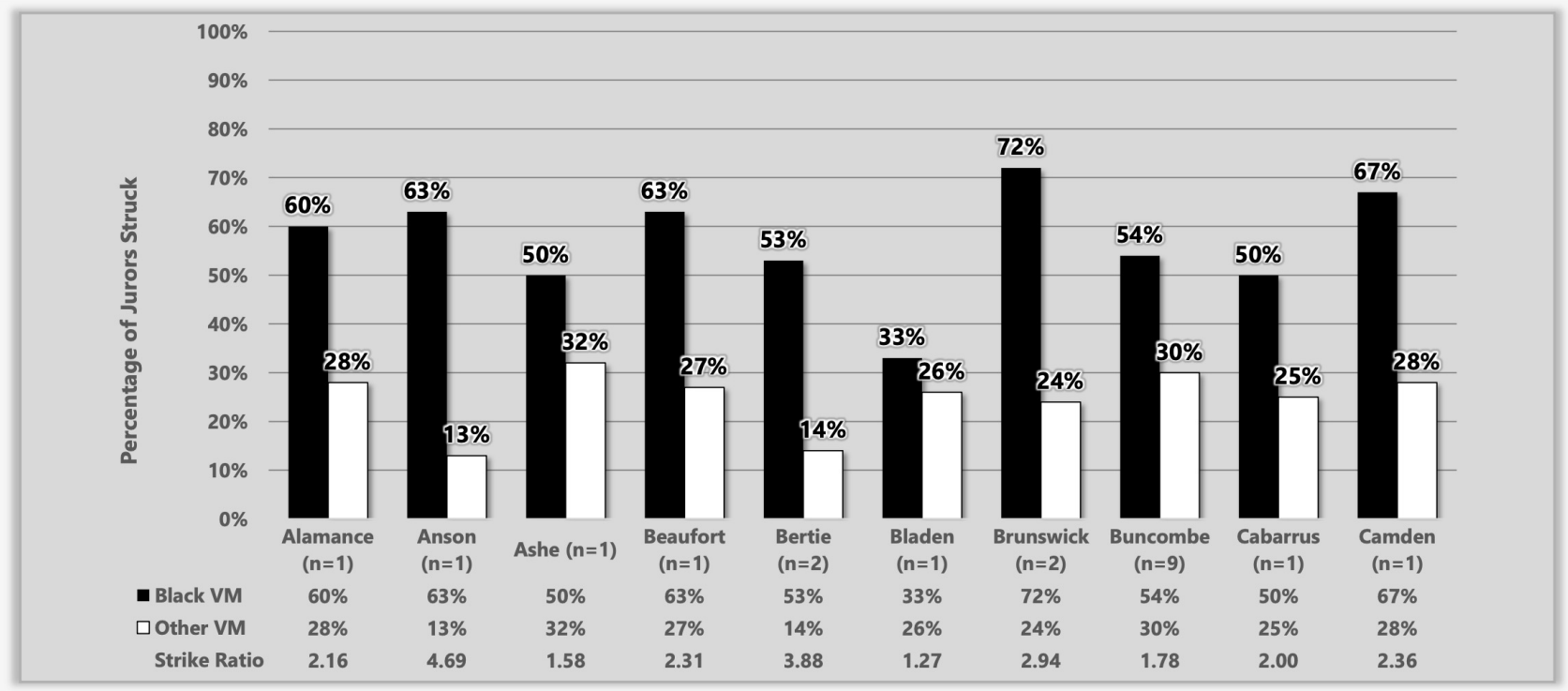
North Carolina Prosecutorial Districts (Effective January 15, 2009)



* The only case after District 22 split, *State v. Ramseur*, had a strike ratio of 4.6.

Statistics are powerful

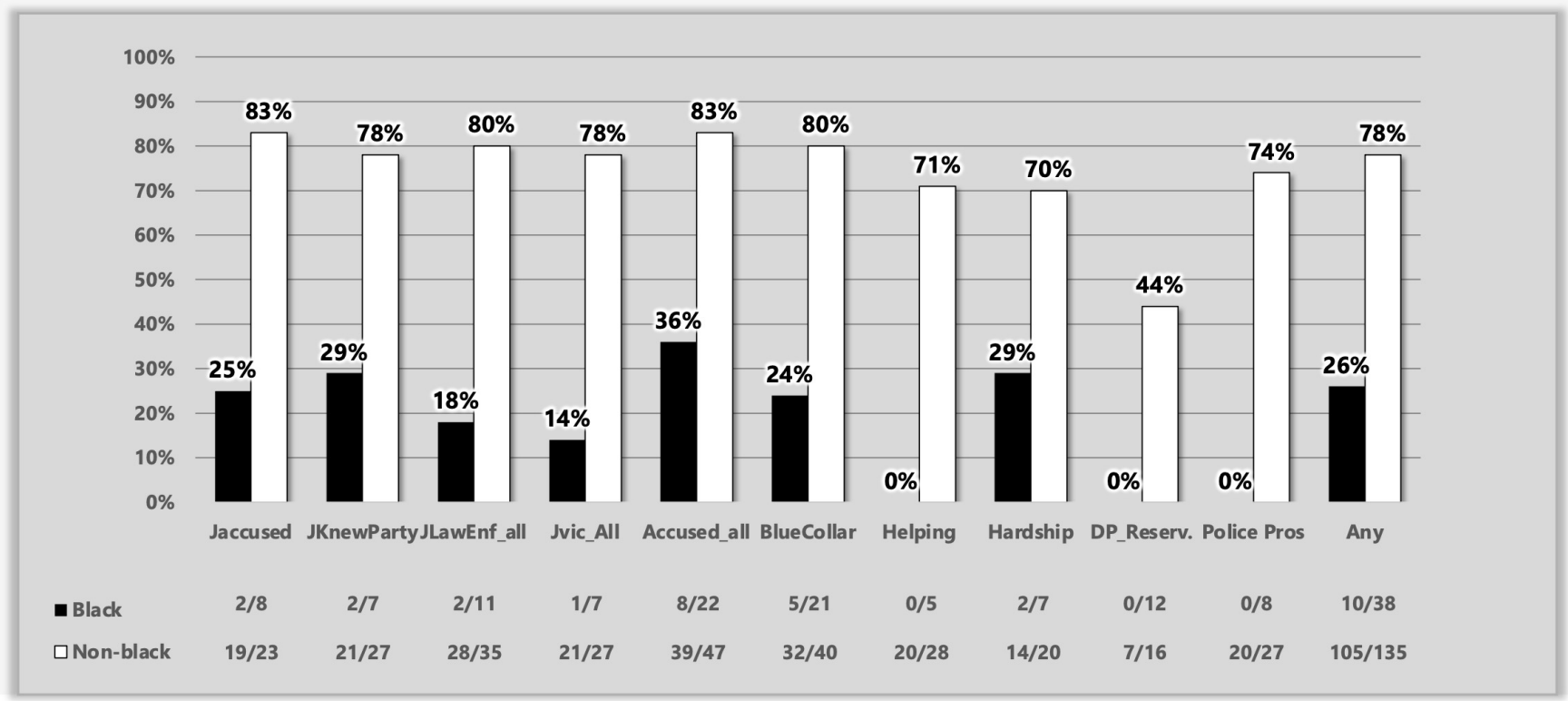
State Strikes by Counties



	Alamance (n=1)	Anson (n=1)	Ashe (n=1)	Beaufort (n=1)	Bertie (n=2)	Bladen (n=1)	Brunswick (n=2)	Buncombe (n=9)	Cabarrus (n=1)	Camden (n=1)
■ Black VM	60%	63%	50%	63%	53%	33%	72%	54%	50%	67%
□ Other VM	28%	13%	32%	27%	14%	26%	24%	30%	25%	28%
Strike Ratio	2.16	4.69	1.58	2.31	3.88	1.27	2.94	1.78	2.00	2.36

Statistics are powerful

Jurors *Accepted* by Prosecutor



WFU Jury Sunshine Project (2011)

Black/White Prosecutor Removal Ratios for Largest Cities in NC

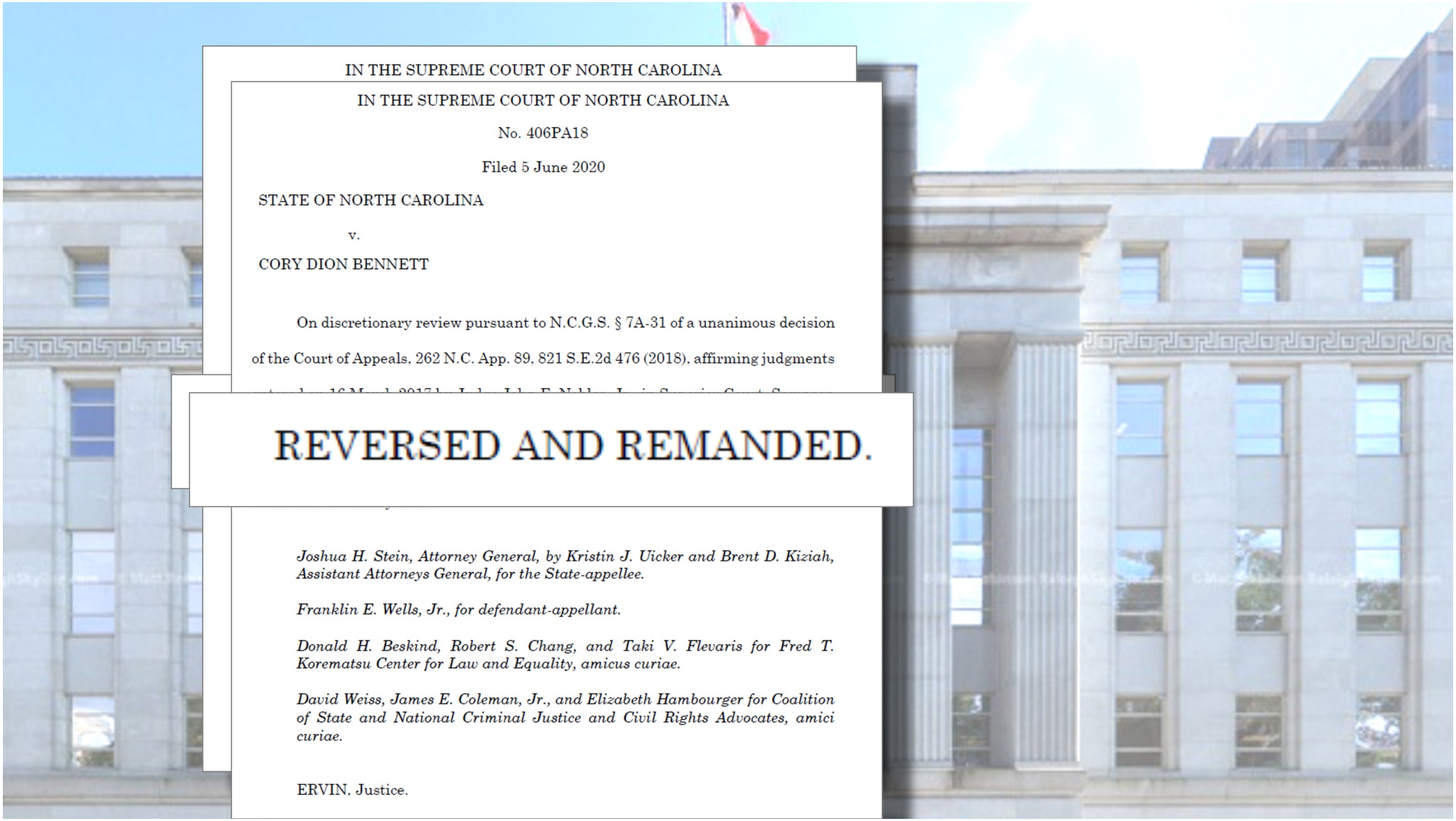
Winston-Salem (Forsyth)	3.0
Durham (Durham)	2.6
Charlotte (Mecklenburg)	2.5
Raleigh (Wake)	1.7
Greensboro (Guilford)	1.7
Fayetteville (Cumberland)	1.7

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

- 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."



IN THE SUPREME COURT OF NORTH CAROLINA

IN THE SUPREME COURT OF NORTH CAROLINA

No. 406PA18

Filed 5 June 2020

STATE OF NORTH CAROLINA

v.

CORY DION BENNETT

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 262 N.C. App. 89, 821 S.E.2d 476 (2018), affirming judgments

REVERSED AND REMANDED.

Joshua H. Stein, Attorney General, by Kristin J. Uicker and Brent D. Kiziah, Assistant Attorneys General, for the State-appellee.

Franklin E. Wells, Jr., for defendant-appellant.

Donald H. Beskind, Robert S. Chang, and Taki V. Flevaris for Fred T. Korematsu Center for Law and Equality, amicus curiae.

David Weiss, James E. Coleman, Jr., and Elizabeth Hambourger for Coalition of State and National Criminal Justice and Civil Rights Advocates, amici curiae.

ERVIN, Justice.

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:

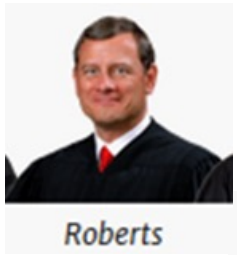
- Shifting and mischaracterized reasons were evidence of pre-text
- Demeanor-based explanations were insufficient without findings of fact on the point
- Trial court did not meaningfully apply the "more-likely-than not" burden of proof
- Prosecutor questioned jurors in a disparate manner
- Trial court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

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

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)



Comparative Juror Analysis

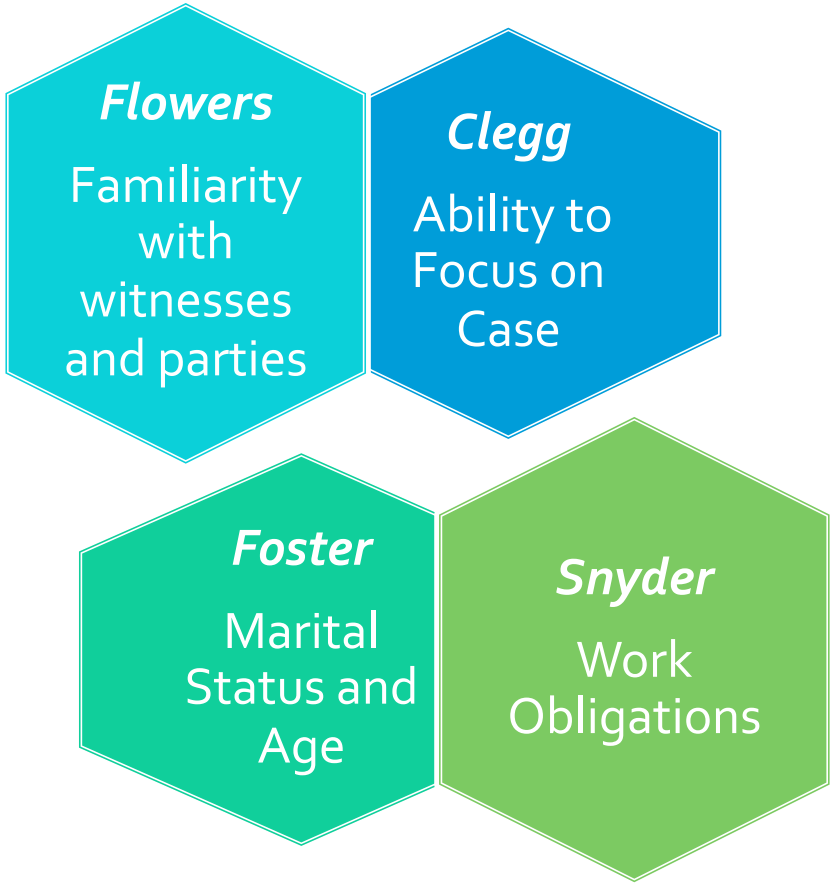
"**More powerful** than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."

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

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

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

Example: Single Factors



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)

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

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

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

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

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

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

When to use Batson?

ALWAYS

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

Batson Objections Quick Guide 2024

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?

Batson's Three Step Framework

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

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.**

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."

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

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

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).

Demo – Calculate Strike Rate & Make Objection!

Strike Ratio Worksheet
State v. _____

Date: _____
County: _____

Defense Counsel: _____
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

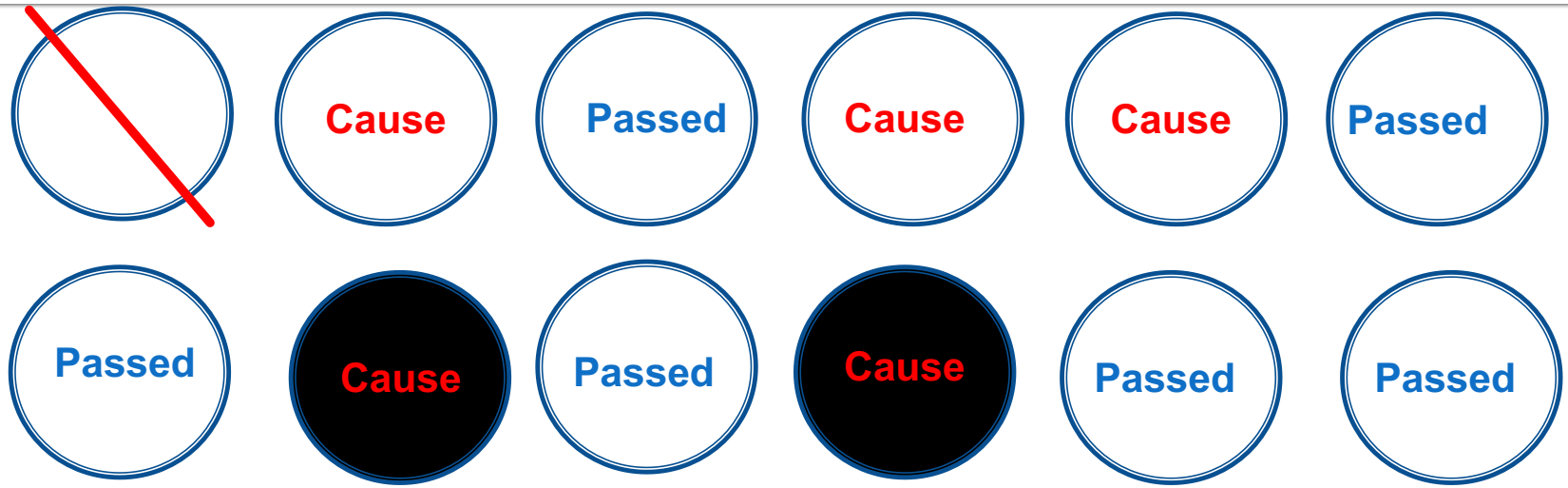
Your Honor, that means that the State is removing Black jurors at _____ times the rate of non-Black jurors.

*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.

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.

Panel 1 – strikes by the State



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*
𝍸 ||

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

In other words, the state has removed

_____% of non-Black jurors.

The State has removed _____ 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%

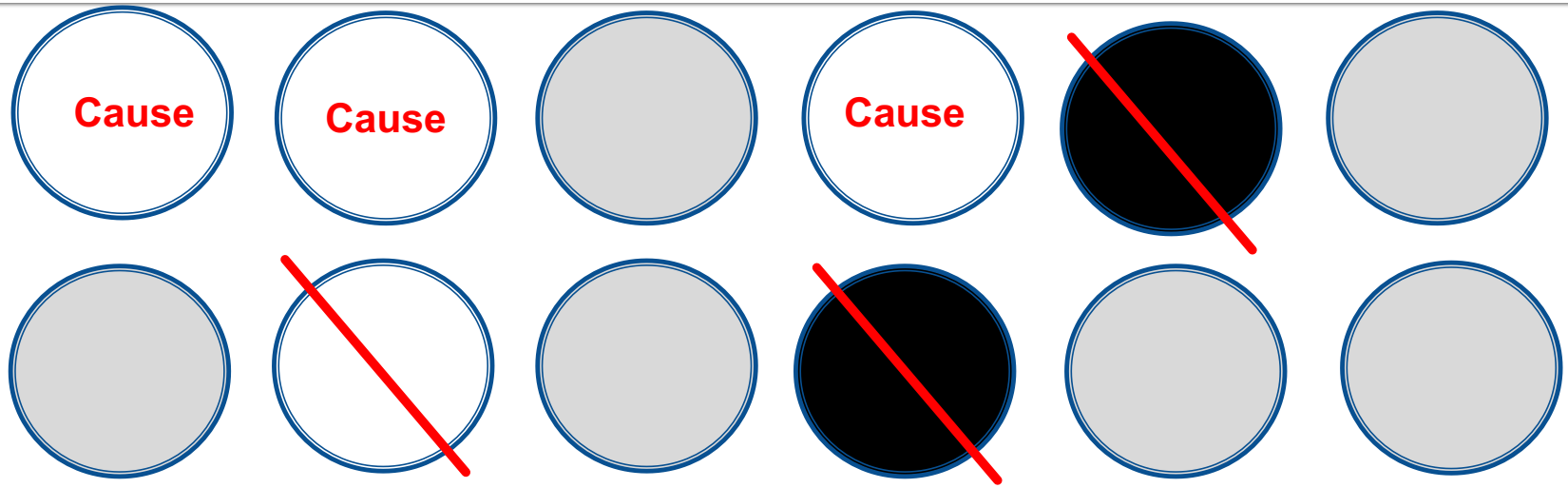
42 divided by 20 = 2.1 STRIKE RATIO

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.

Panel 2 – strikes by the State



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 __2__ Black jurors...

...out of __2__ Black jurors available to them.

In other words, the state has removed __100__ % of Black jurors.

NON-BLACK Venire Members

Peremptorily Struck by State	Passed plus struck by the State*
||	𝍸 |||

The State has removed __2__ non-Black jurors...

...out of __8__ non-Black jurors available to them.

In other words, the state has removed __25__ % 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

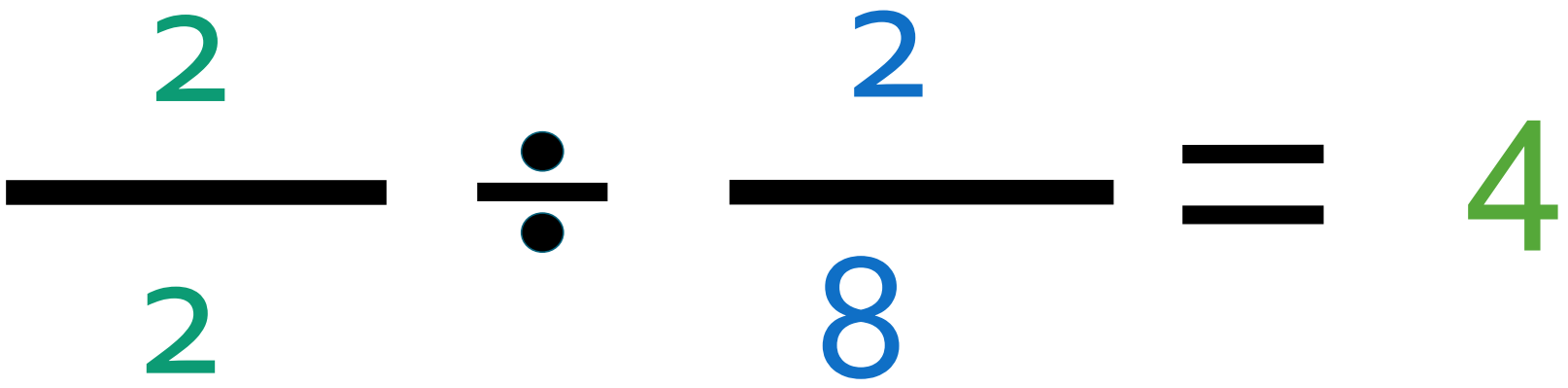
Convert to percentage by moving decimal to the right two spaces = 20%

42 divided by 20 = 2.1 STRIKE RATIO

Strike Ratio

Your Honor, that means that the State is removing Black jurors at __4__ 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.



(100%) (25%)

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?

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

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

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

THE CENTER FOR DEATH PENALTY LITIGATION

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Batson Resources

Jury service is, along with voting, one of the few ways that citizens participate directly in democracy. It gives ordinary people a voice in the criminal punishment system and is an established civil right. Studies show that diverse juries deliberate more thoroughly and are less likely to convict innocent people.

Yet, courts across the country have tried and failed to stamp out jury discrimination since the Civil Rights Movement made it possible for Black people to finally begin serving on juries in the South. Even *Batson v. Kentucky*, a 1986 U.S. Supreme Court ruling that explicitly outlawed the race-based exclusion of jurors, has failed to change the fact that Black citizens are systematically denied their right to jury service.

In recent years, CDPL has made the enforcement of *Batson*, in both captial and non-capital cases, a key part of our work. We helped expose North Carolina's 30-year failure to enforce the law, and then pushed forward the first case in which a sentence was struck down because of discrimination against a juror of color. Most recently, the litigation of a *Batson* claim in the case of Henry White led to him being freed after 25 years in prison. We continue to litigate *Batson* claims in several other cases and to train attorneys around the state to challenge *Batson* violations in their own cases.

A Batson challenge led to Henry White, center, being freed from prison after 25 years.

FOR ATTORNEYS:
BATSON QUICK GUIDE
BATSON SAMPLE PLEADINGS

www.cdpl.org

- 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

[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.

Questions?

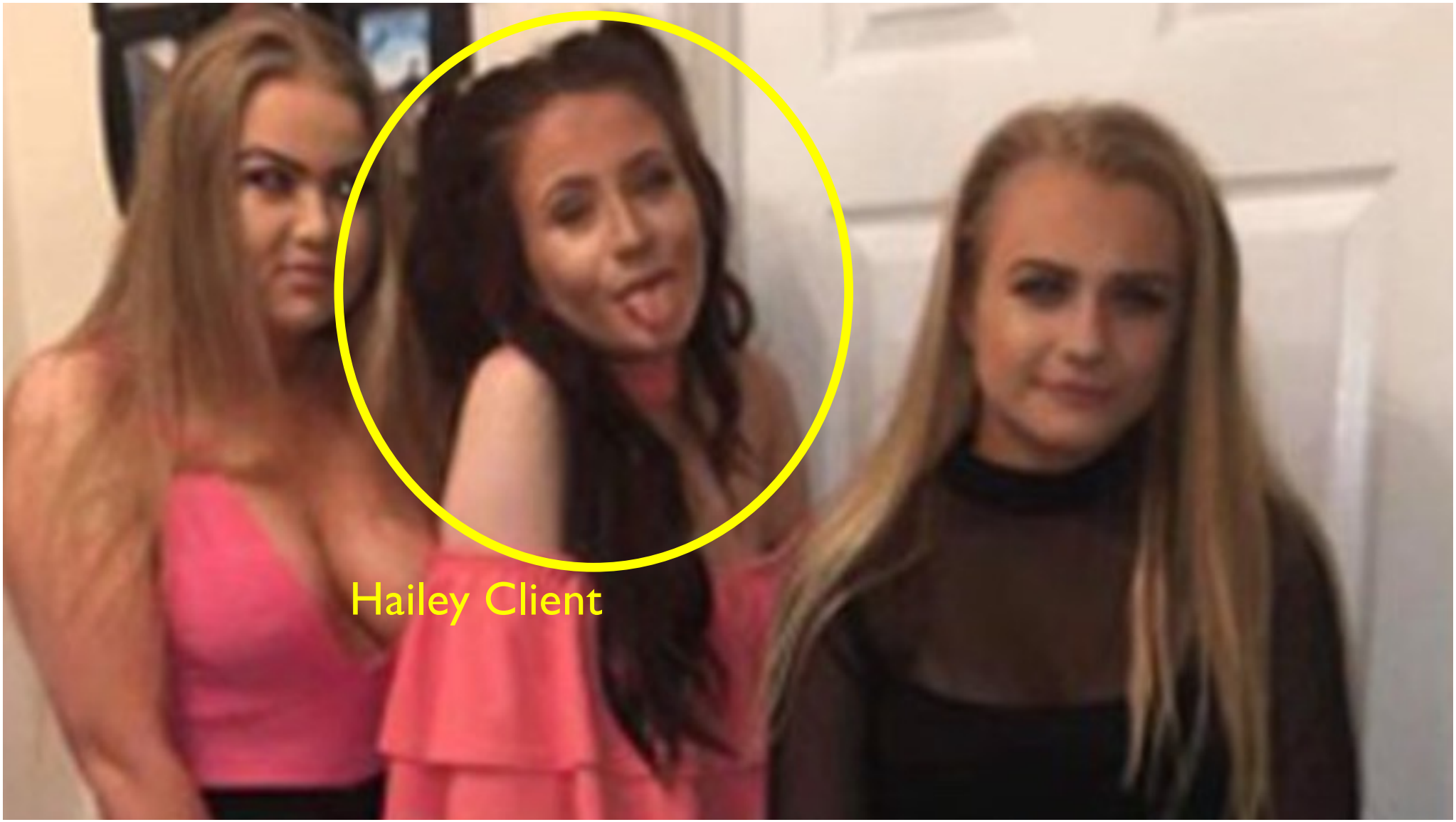
Hannah: Hannah.b.autry@nccourts.org

Kailey: Kmorgan@cdpl.org

STATE VS. HAILEY CLIENT

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

STORYTELLING AND VISUAL AID IN SENTENCING


Hailey Client

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.

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.

NCGS 14-318.4 (A)(4)

Section 14-318.4. Child abuse a felony

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

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

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

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

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

GOAL IN SENTENCING

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

STORYTELLING IN TRIAL VS. SENTENCING

- STORY OF INNOCENCE
- STORY OF MITIGATION

MITIGATION STARTS WITH INVESTIGATION

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

MITIGATION STARTS WITH INVESTIGATION

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

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
- Need to have a reasonable ask (need info for that)

SENTENCING HEARING: WHAT THE JUDGE WANTS TO KNOW

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

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)

MITIGATION STARTS WITH INVESTIGATION

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)

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

STATE WILL USE DEMONSTRATIVE EVIDENCE

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

STATE VS. HAILEY CLIENT

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

Parenting With Dignit
CERTIFICATE OF
PRESENTE
Hailey Clie
THIS IS TO CERTIFY THAT THE PARENTING
BEEN SUCCESSFULLY COMP
11/2/2019
DATE
PWD
Breakthr
Certificate
Thi
Haile
has successfully comp
comprehensive 12-w
Certificate of Completion
THIS CERTIFIES THAT:
Hailey Client
Completed the webinar:
Surviving the Stress of Parenting
4 week
course
Presented by: Erica Moltz,MA, NCC
October 1, 2019
FamilyWorks
Together

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
  - Prepare family

MITIGATION STARTS WITH INVESTIGATION

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).

DEFENDING EYEWITNESS IDENTIFICATION CASE LIST

DUE PROCESS

Neil v. Biggers, 409 U.S. 188 (1972) – Test for Due Process Violations (Out of Court ID)

United States v. Wade, 388 U.S. 218 (1967) – Test for Due Process Violations (In-Court ID)

State v. Headen, 295 N.C. 437 (1978) – 2 Step Test for Due Process Violations applied in NC

State v. Flowers, 318 N.C. 208 (1986) – In-Court ID

State v. Fowler, 353 N.C. 599 (2001) – Analysis of Due Process

State v. McCree, 160 N.C. App 19 (2013) – Must have Step 1 to get to Step 2

State v. Gamble, 243 N.C. App 414 (2015) – Applying 2 Step Test to EIRA

State v. Malone, 373 N.C. 134 (2019) – suggestiveness/state action

State v. Nieves (2023) No. COA22-993 – Using 5 Biggers Factors for In-Court ID

Smith v. Arizona, 602 U.S. 779 (2024) – Confrontation Clause

LINEUPS

State v. Robinson (2025) – No. COA24-735 - Fillers

State v. Grimes, 309 N.C. 606 (1983) – To avoid improper suggestion, investigators must FAIRLY administer lineup in a manner that does nothing to induce the witness to select one participant rather than another.

State v. Tutt, 171 N.C. App. 518 (2005) – Fillers don't have to be identical to suspect's appearance to pass muster.

PHOTO SHOW-UPS

State v. Simpson (2024) No. COA23-618 – EIRA doesn't apply to photo show-up because not for same purpose as covered by EIRA.

State v. Crumitie, 266 N.C. App 373 (2019) – Photo Show-Up was not a show-up

State v. Morris, 288 N.C. App 65 (2023) – Photo Show-Ups not allowed under EIRA, but EIRA doesn't apply.

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§ 15A-1340.16. Aggravated and mitigated sentences.

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

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

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

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

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

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

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

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

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

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

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

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

(2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

(2a) The offense was committed for the benefit of, or at the direction of, any criminal gang as defined by G.S. 14-50.16A(1), with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy.

(3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

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

(5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Division of Adult Correction and Juvenile Justice of the Department of Public Safety, jailer, fireman, emergency medical technician, ambulance attendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

(6a) The offense was committed against or proximately caused serious harm as defined in G.S. 14-163.1 or death to a law enforcement agency animal, an assistance animal, or a search and rescue animal as defined in G.S. 14-163.1, while engaged in the performance of the animal's official duties.

(7) The offense was especially heinous, atrocious, or cruel.

(8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(9) The defendant held public elected or appointed office or public employment at the time of the offense and the offense directly related to the conduct of the office or employment.

(9a) The defendant is a firefighter or rescue squad worker, and the offense is directly related to service as a firefighter or rescue squad worker.

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

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

(12) The defendant committed the offense while on pretrial release on another charge.

(12a) The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.

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

(13a) The defendant committed an offense and knew or reasonably should have known that a person under the age of 18 who was not involved in the commission of the offense was in a position to see or hear the offense.

(14) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

(15) The defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.

(16) The offense involved the sale or delivery of a controlled substance to a minor.

(16a) The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or was otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste.

(16b) The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings.

(17) The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.

(18) The defendant does not support the defendant's family.

(18a) The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

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

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

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

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

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

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

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

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

(1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.
(2) The defendant was a passive participant or played a minor role in the commission of the offense.
(3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
(4) The defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense.
(5) The defendant has made substantial or full restitution to the victim.
(6) The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.
(7) The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(8) The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.
(9) The defendant could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.
(10) The defendant reasonably believed that the defendant's conduct was legal.
(11) Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
(12) The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.
(13) The defendant is a minor and has reliable supervision available.
(14) The defendant has been honorably discharged from the Armed Forces of the United States.
(15) The defendant has accepted responsibility for the defendant's criminal conduct.
(16) The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.
(17) The defendant supports the defendant's family.
(18) The defendant has a support system in the community.
(19) The defendant has a positive employment history or is gainfully employed.

(20) The defendant has a good treatment prognosis, and a workable treatment plan is available.

(21) Any other mitigating factor reasonably related to the purposes of sentences.

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

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.**
→ **Never agree that the instructions are correct.**
→ **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.**

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→ **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 (before court adjourns sine die)
-Written notice of appeal within 14 days
    -MUST be served on DA and must have cert. of service
-Appeal is from the "judgment" NOT from the "order denying the motion to suppress"
-Written notice of appeal is necessary to appeal satellite-based monitoring (SBM) orders

If notice of appeal is defective (ie. is not timely, does not include those items listed in Rule 3, fails to include a certificate of service, appeals from the denial of a motion, instead of from the judgment) then the appeal will be dismissed, and the Court will consider issues only by way of a petition for writ of certiorari under Rule 21 of the N.C. Rules of Appellate Procedure. Granting a petition for certiorari is discretionary and the Court of Appeals can decline to review issues, whereas if notice of appeal is proper, the Court is required to review the issues.

How To Make Sure Your Objections Are Heard On Appeal (aka Preserving the Record)

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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.

What's the Big Deal?

- How you preserve an issue, or whether you preserve it at all, controls:
  - (1) whether it can be argued on appeal, and if so,
  - (2) what standard of review the appellate court will apply.

What's the Big Deal?

- Some issues are completely unreviewable on appeal if you do nothing. The issues are waived. Examples:
  - No motion to sever charges or defendants = can't be argued on appeal, at all.
  - No motion to dismiss charges at close of state's evidence = argument waived.
  - No double jeopardy argument = can't be argued on appeal.

What's the Big Deal?

- Some issues can be raised without an objection, but the standard of review is so high, relief is rarely allowed:
  - No objection to admission of evidence = Court will review only for "plain error."
  - No objection to jury instructions = Court will review only for "plain error."

What's the Big Deal?

- Plain Error is a high standard:
  - Did a fundamental error occur?
  - Did the error have a "probable impact" on the outcome, meaning that "absent the error, the jury probably would have returned a different verdict"?
  - Was the error an "exceptional case" that warrants plain error review?
    - Did the error seriously affect the fairness, integrity or public reputation of the judicial proceedings.

What's the Big Deal?

- *But*, if there was an objection to admission of evidence or jury instructions standard of review is:
  - Did the error have a "possible" impact on the result. That's it. Much simpler and easier to win.

What's the Big Deal?

- And if a constitutional objection is made, the standard is even better:
  - The State must show the error is "harmless beyond a reasonable doubt."
    - Burden shifts to the State
    - Highest standard required in the law

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.

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.

Review Discovery to Plan Objections

- 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.

Anticipate the State's Objections

- Consider objections the State could make to your cross-examination questions and come prepared to defend the questions.
- Evidence of third-party guilt.
- Evidence of alleged victim's violent past.
- Come to court prepared with evidence to support the evidence you seek to admit.

Pre-trial motions

- **Motion for complete recordation**
- "Request and Motion for Discovery"
  - Seek orders to compel to preserve requests.
- 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.

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 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

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:

Error Preservation – Jury Selection

Jury Selection: Challenges for Cause
(7-11-10)

Basis for Challenge for Cause. 15A-1212

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

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

The STEPS to obtain a for cause challenge

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

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

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

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

Error Preservation – Jury Selection

- A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. *State v Leonard*, 295 N.C. 58, 62-63 (1978).

- Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989).

Error Preservation – voir dire

- 15A-1214(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
- (1) Exhausted the peremptory challenges available to him;
- (2) Renewed his challenge as provided in subsection (i) of this section; and
- (3) Had his renewal motion denied as to the juror in question.

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.

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.

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

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

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.

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

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."

~~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.

Objections – Timeliness

- To preserve an issue or objection, there must be an objection that is made at the right time.
- Make it too soon or too late, and it is the same as if you didn’t make the objection at all.
- There can be a cure for an objection that is too late, which is a motion to strike the answer, but it must be immediately after the inadmissible answer is stated.

Objections – Timeliness

- Motions to suppress and other motions before or during trial are not sufficient alone to preserve your motions.
  - 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.

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."

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."

Objections – Timeliness

- State v. Monk, COA 24-446
  - Motion to suppress statements denied

Defendant argues he preserved this issue by renewing his objection when the State began eliciting evidence of his statements at trial. Defendant correctly points out he objected during the testimony of Detective Moots:

> THE STATE: Okay. Were you there about – during the conversation about the safe keys?
>
> DETECTIVE MOOTS: Yes, I was.
>
> THE STATE: Tell us about that.
>
> DETECTIVE MOOTS: Once we located the drugs, Detective Pittman had made some conversation with him, he discussed about –
>
> DEFENDANT'S COUNSEL: Objection.

Objections – Timeliness

Defendant did not object during the introduction of the same evidence during the direct testimony of Detective Pittman:

> DETECTIVE PITTMAN: I spoke with [D]efendant, advised him that we were – we were going to go do a search of his Compass Landing apartment where he resided. I said, [i]s there anything illegal in there? And I said, [p]eople that reside there with you could be charged.
>
> And he then directed [Howard] to get his keys off the – to his safe off the Jeep keyring and go with them and open his safe.

Objections – Timeliness

- "Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost."
- "Defendant failed to object after Detective Pittman testified to the same information contained in his Motion in Limine and his prior preserved objection during the testimony of Detective Moots."
- "Defendant failed to preserve this issue for appellate review."

How to Be on Time!

- 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

How to Be on Time!

- 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.

Objections – Timeliness

- To preserve an issue or objection, you have to be very specific in what you say:
  - Evidence Rule Number, or
  - Evidence topic, ie. hearsay, relevance, authenticity
  - Constitutional provision, or
  - Constitutional topic, ie. due process, confrontation clause, right to present a defense
  - Specifically how is the instruction legally or factually incorrect? What's wrong with it?

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

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."

How to be Specific!

- 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.
- Be prepared in advance to say the correct rule and constitutional provision.

Objections – Specificity

LACK OF RELIABILITY OF OPINION ISSUE – RULE 702

what are your opinions?

-told ADA on 3/9/12 that having to testify with John in the room would affect Sally's ability to testify and effectively communicate all due to his presence in the room as well as other people being present talking about what happened

-thinks Sally will clam up at the sight of John in the courtroom – not sure whether that was due to fear or some other emotion but she said his presence would definitely hinder her ability to give truthful testimony

(1) testimony must be based on sufficient facts or data

have you talked with Sally about a trial?

a courtroom?

a jury?

being in court with John?

have you asked what she thinks about it?

other sources of trauma – medical examinations

Objections – Specificity

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

(2) testimony is product of reliable principles and methods

cite the studies you have relied upon in reaching your opinion

what research has been done in this area

who are the leading experts in this area

what resources have you consulted in forming your opinion

what methods have you used to reach your opinion

what principles of psychology underlie your opinion

(3) witness has applied the principles and methods reliably to the facts of the case

have you produced a report that applies your training and experience to the facts in this case

FACTS DO NOT SATISIFY THE STATUTORY REQUIREMENTS

p. 4 of state v. Jackson - distinguish facts

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.

Sufficiency & Variance

- Don’t limit your motion to dismiss.
- It’s OK to only argue some charges.
- But don’t say anything that suggests you’re limiting your motion.
- Best practice is at the end of your arguments to repeat that you are moving to dismiss **all** charges.

MOTION TO DISMISS:

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

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

Charge Conference Page 155

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

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

MR. [redacted] Thank you.

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.

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.

Instructions – Never Agree

- Never ever agree that the instructions are correct. This is especially true if you have objected to the instructions, or have proposed instructions that were not given.

- State v. Jenkins, 24-889, August 6, 2025
  - Judge Murry

- Where a defendant fails to object to the jury instructions and instead expressly agrees with them, he waives any "right to all appellate review concerning the invited error, including plain-error review."

Instructions – Never Agree

- Defendant did not object to the self-defense instruction, despite having at least three opportunities to do so.
- Defendant confirmed his satisfaction "with the way the instructions are to be read to the jury" and had "nothing to add [or]take away, or [any] concern[s] with the jury charge."
- Because his counsel repeatedly affirmed the jury instructions, Defendant waives the right to appellate review on this issue.

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.

Objections – Closing Arguments

- Burden shifting
- Name calling
- Arguing facts not in evidence
- Personal opinions
- Misrepresenting the law or the instructions
- Inflammatory arguments

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

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.

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?

Making A Complete Record

- Please object to the State submitting disks or thumb drives containing digital files that are not shown to the jury.

- Cellebrite phone extractions
- Interrogation, surveillance, bodycam videos

- Causes problems for clerks, appellate attorneys, appellate courts, and could be a problem if the jury wants to see an exhibit.

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 Meghan."
- Describe what a witness does.
  - "Mr. Smith, 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?"

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.

Properly appealing

- Oral notice of appeal in open court – must be after judgment is entered and before court session is closed sine die.
  - Don’t give notice of appeal before judgment is entered.
  - Do it after the judge finishes saying all of the sentence.

Properly appealing

- Written notice of appeal - 14 days
  - specify party appealing
  - designate judgment (not the ruling)
  - designate Court of Appeals
  - case number
  - signed
  - filed
  - Served on DA – not in DA's mailbox in clerk's office – You must attach a certificate of service

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.

Properly appealing

- If you litigated a MTS and lost, and defendant pleaded guilty, you must give prior notice to the court and DA that your client will appeal.
  - Put it in the transcript and state it on the record.
  - Give notice of appeal of the judgment.

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.

Resources

- OAD website:
  - https://ncappellatedefender.org/
- IDS website
  - http://www.aoc.state.nc.us/www/ids/
- SOG website
  - Defender Manual
  - http://defendermanuals.sog.unc.edu/
- OAD on-call attorneys

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

DEFENDING EYEWITNESS IDENTIFICATION

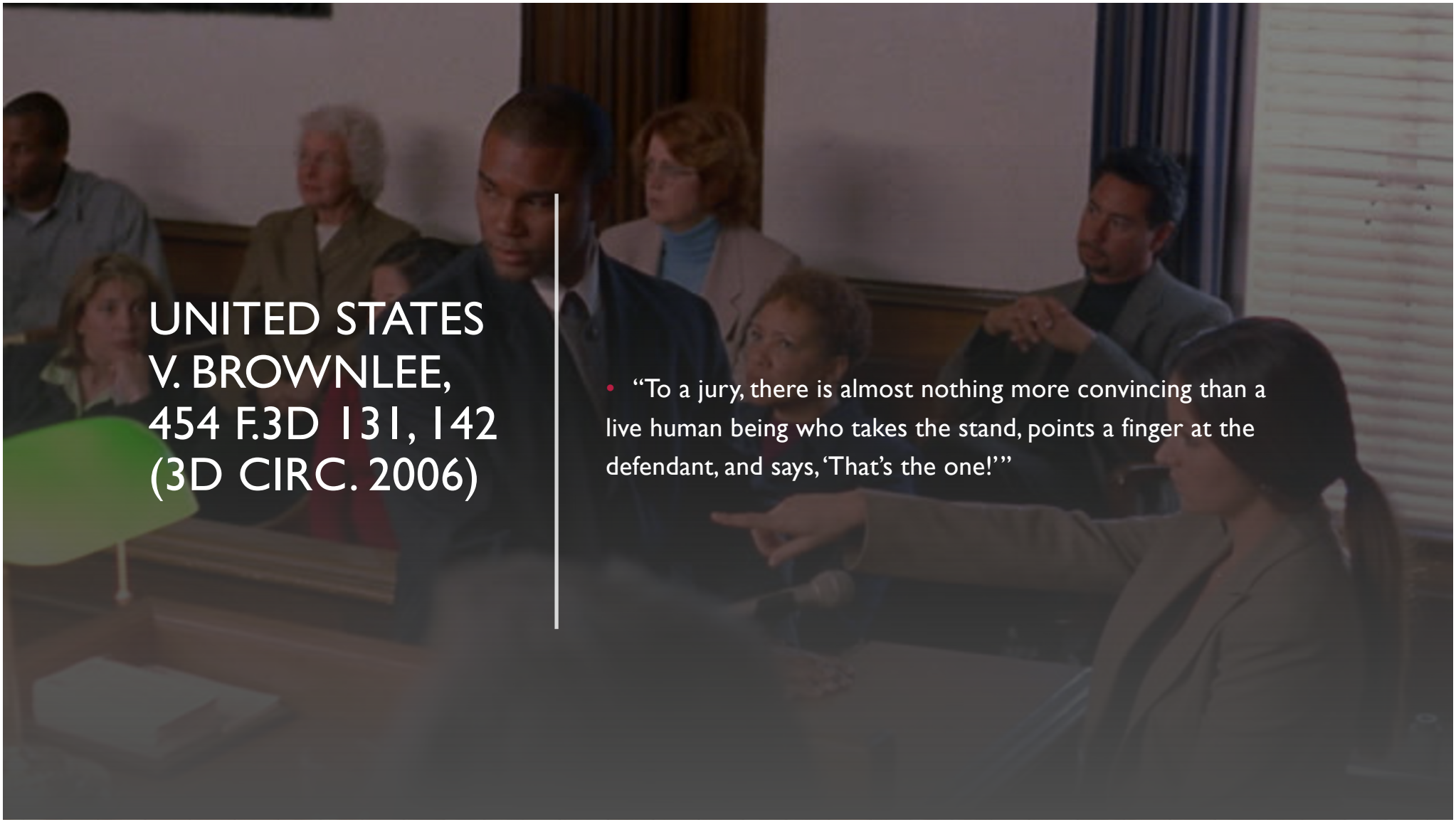
LAURA NEAL GIBSON

CHIEF PUBLIC DEFENDER

SECOND JUDICIAL DISTRICT

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.



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!'"

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.

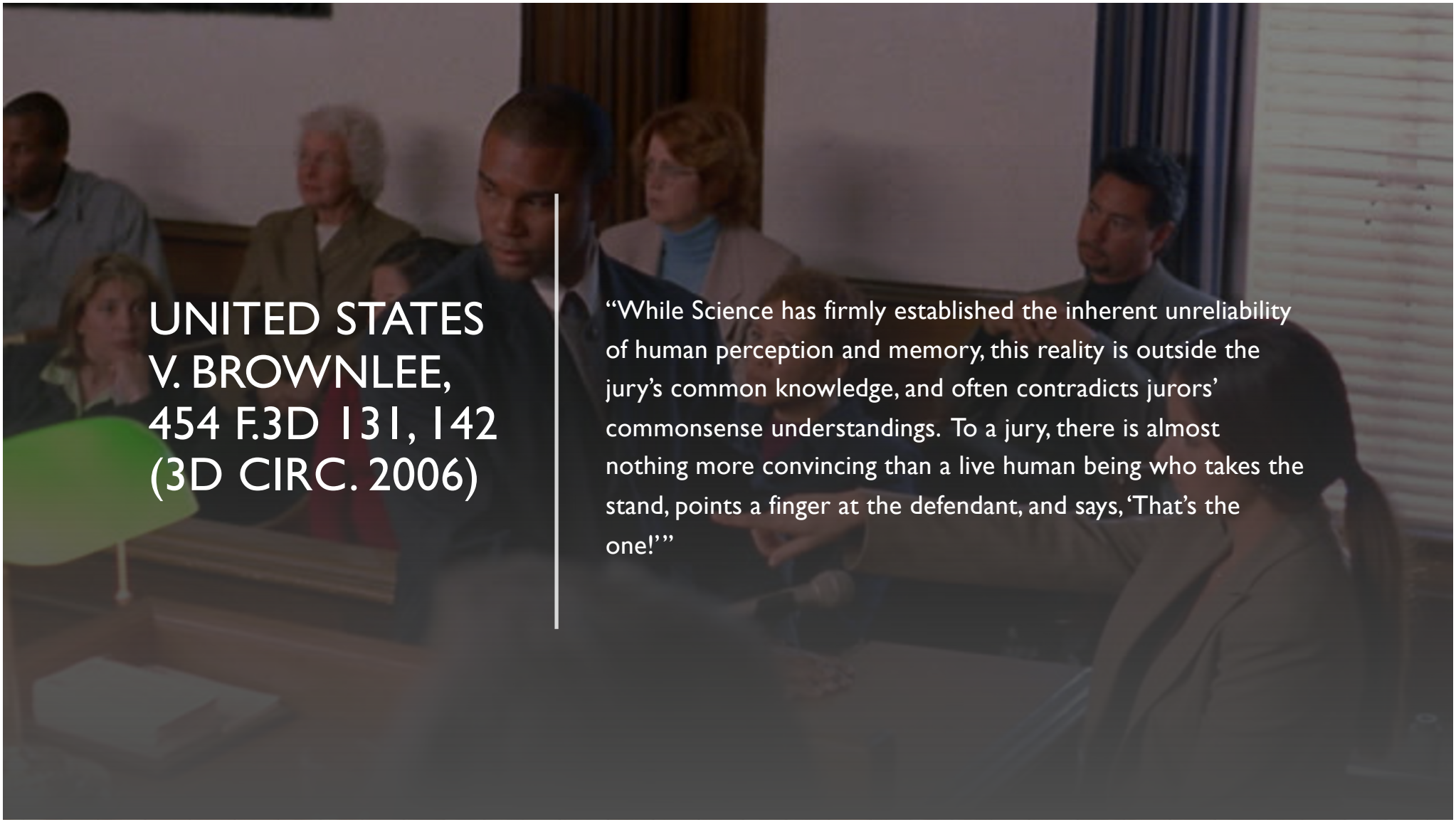
When Betty Smith takes that witness stand, she will tell you that she is 100% confident that the man who poked his head in their bedroom and pointed a gun at her for that split second was the defendant, John Doe. She saw him with her own eyes. She is a sweet, old, church going lady. She wouldn't lie 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!

WHY DO JURORS BELIEVE EYEWITNESSES?

- He MUST remember the most stressful moment of his 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.

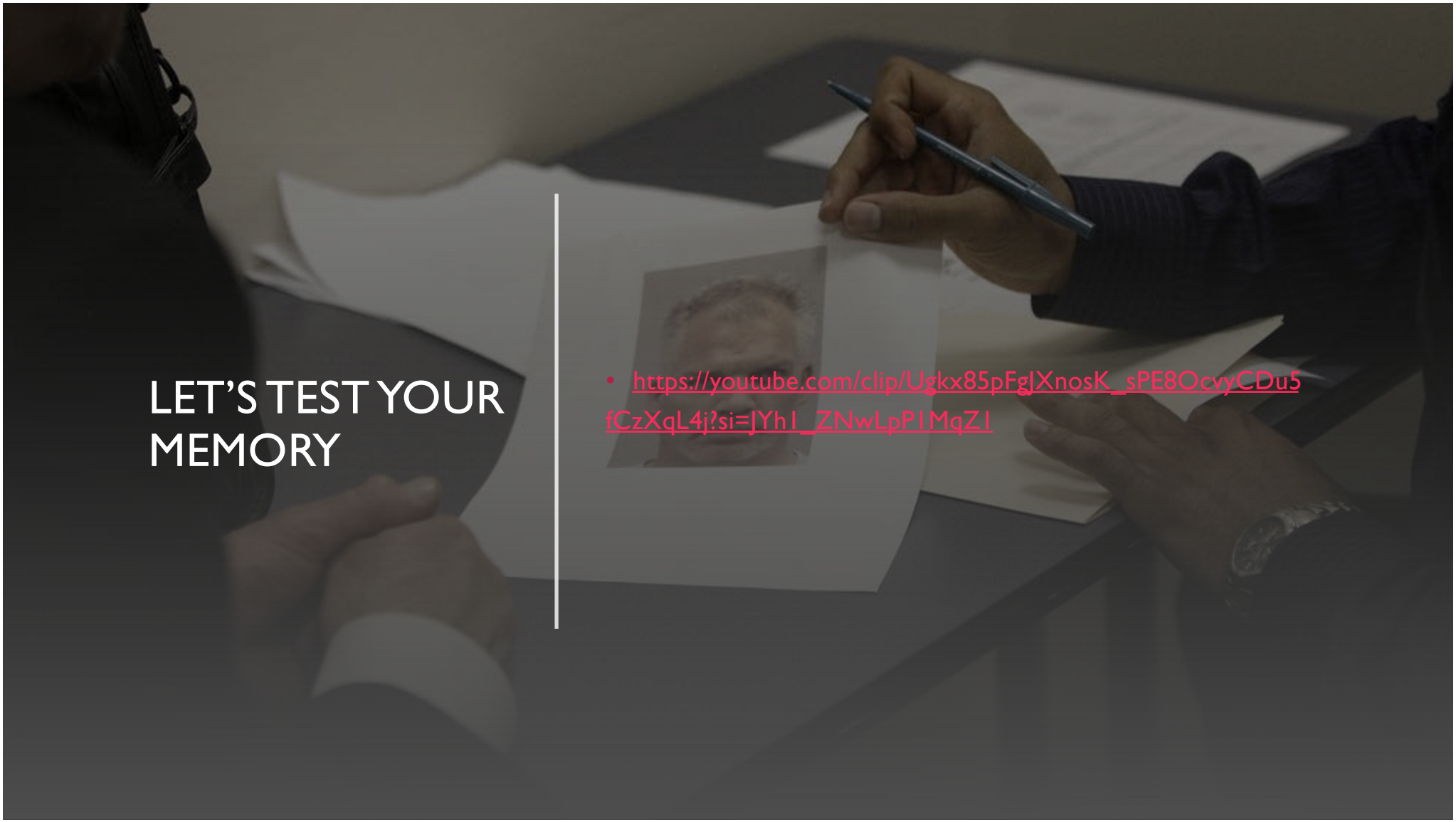
NEXT QUESTION…

YES, THIS IS A TRICK QUESTION.



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!'"



LET'S TEST YOUR MEMORY

- https://youtube.com/clip/Ugkx85pFgJXnosK_sPE8OcvyCDu5fCzXqL4j?si=JYh1_ZNwLpP1MqZ1

QUESTION # 1

WHAT COLOR WAS THE CAR THAT GOT HIT?

ANSWER….. BLUE

HOW FAST WAS THE CAR GOING WHEN IT SMASHED INTO THE OTHER CAR?

A) 20 MPH
B) 30 MPH
C) 40 MPH
D) 50 MPH

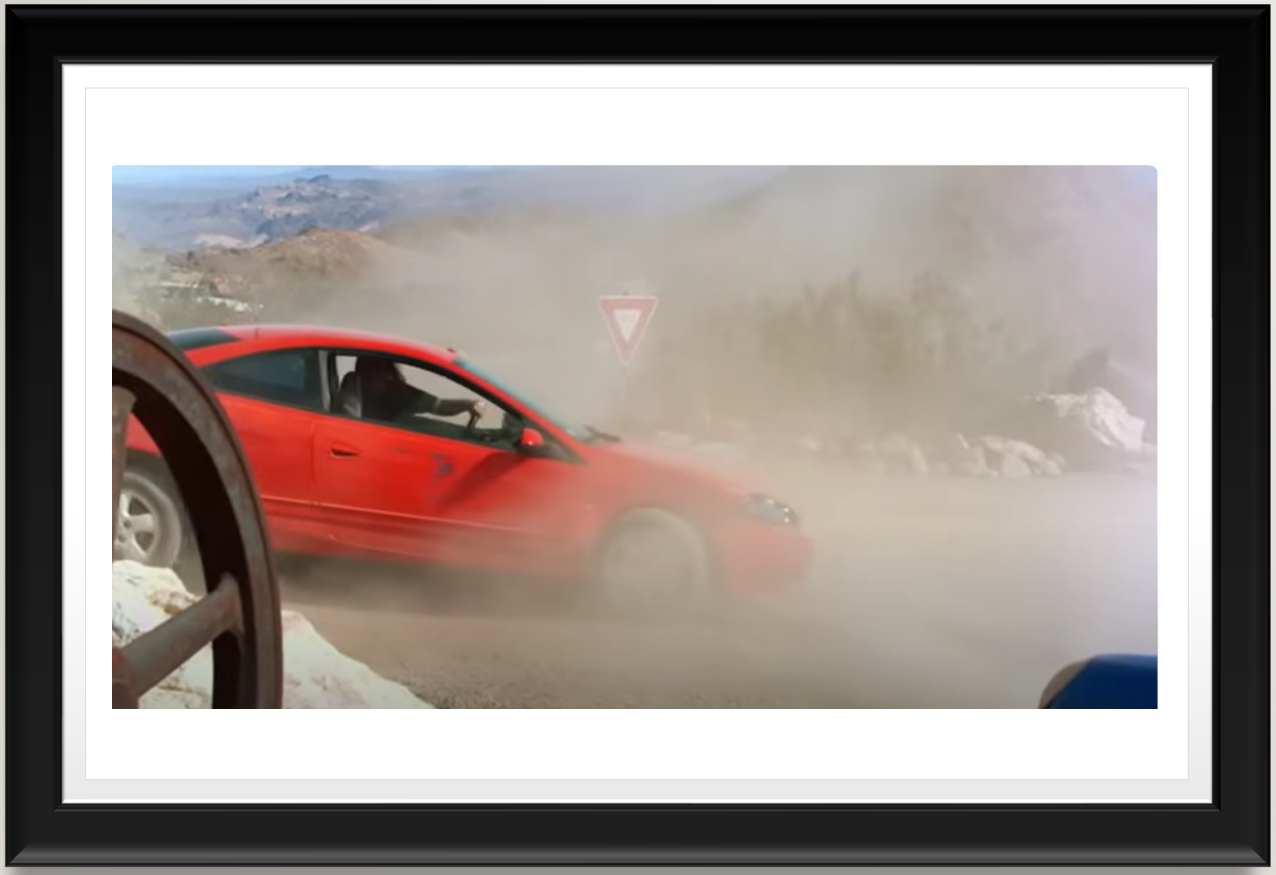
QUESTION # 2

ANSWER…

20 MPH

YOU SAW THE DRIVER BLOW PAST THE STOP SIGN AFTER THE ACCIDENT…YES OR NO?

QUESTION # 3



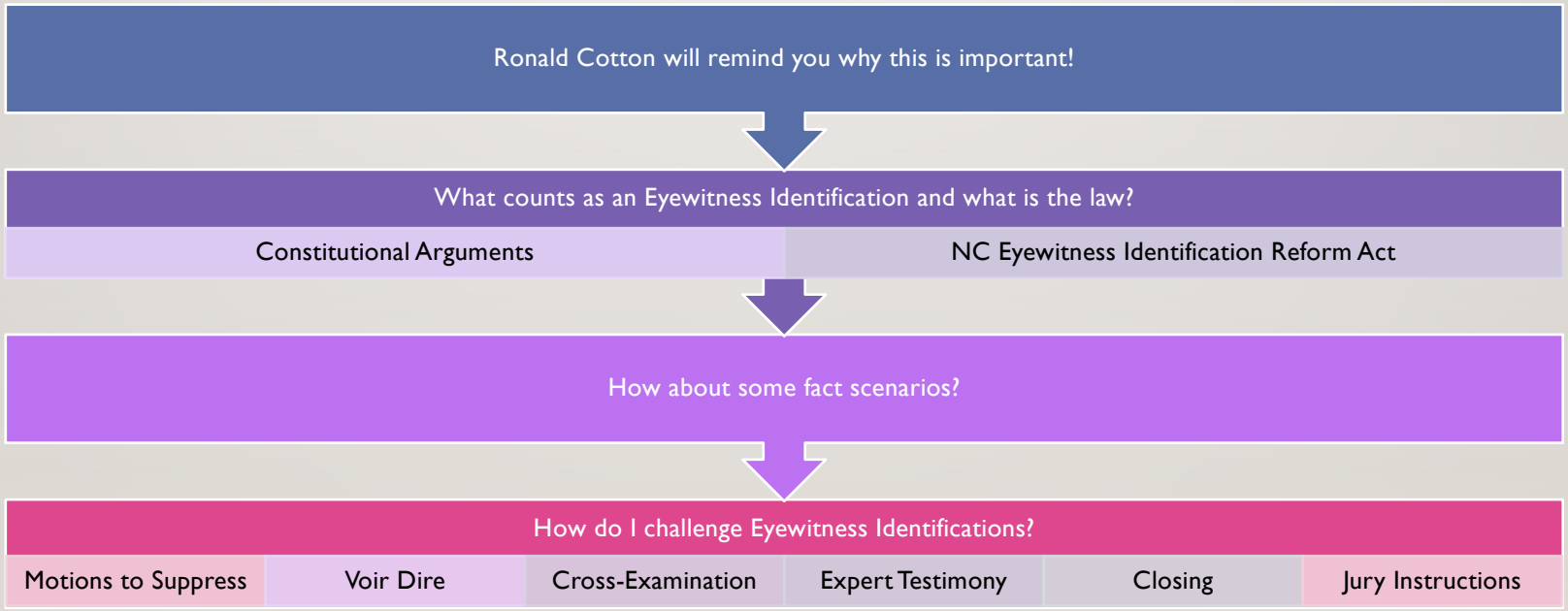
ANSWER…

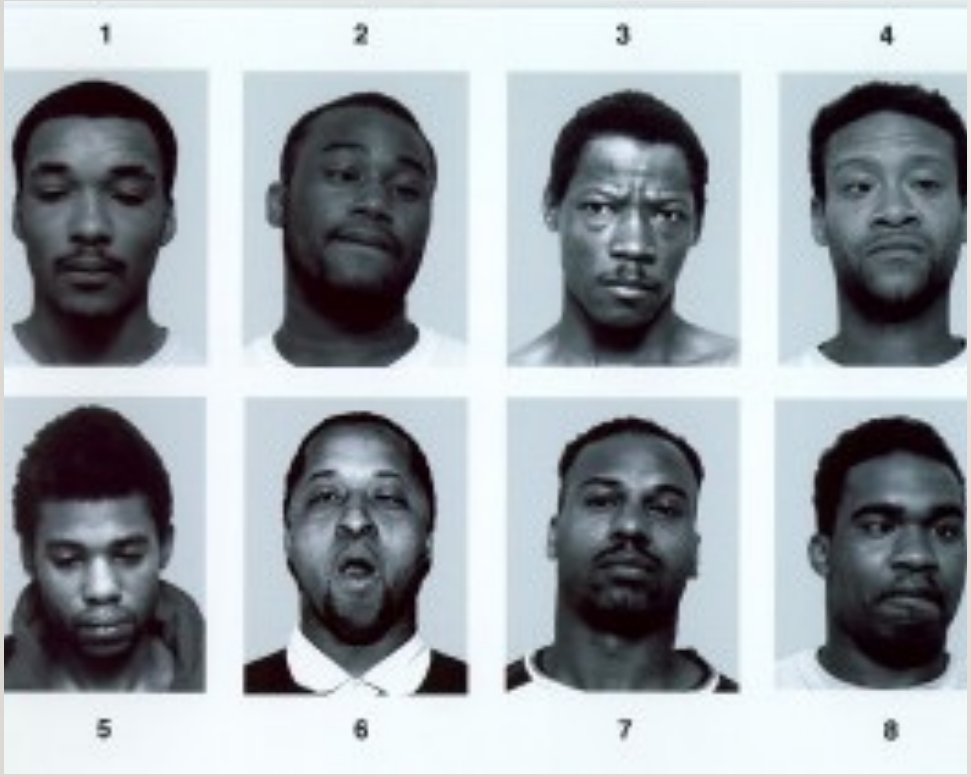
NO…IT WAS ACTUALLY A YIELD SIGN!

FALSE MEMORIES

TED TALK: ELIZABETH LOFTUS

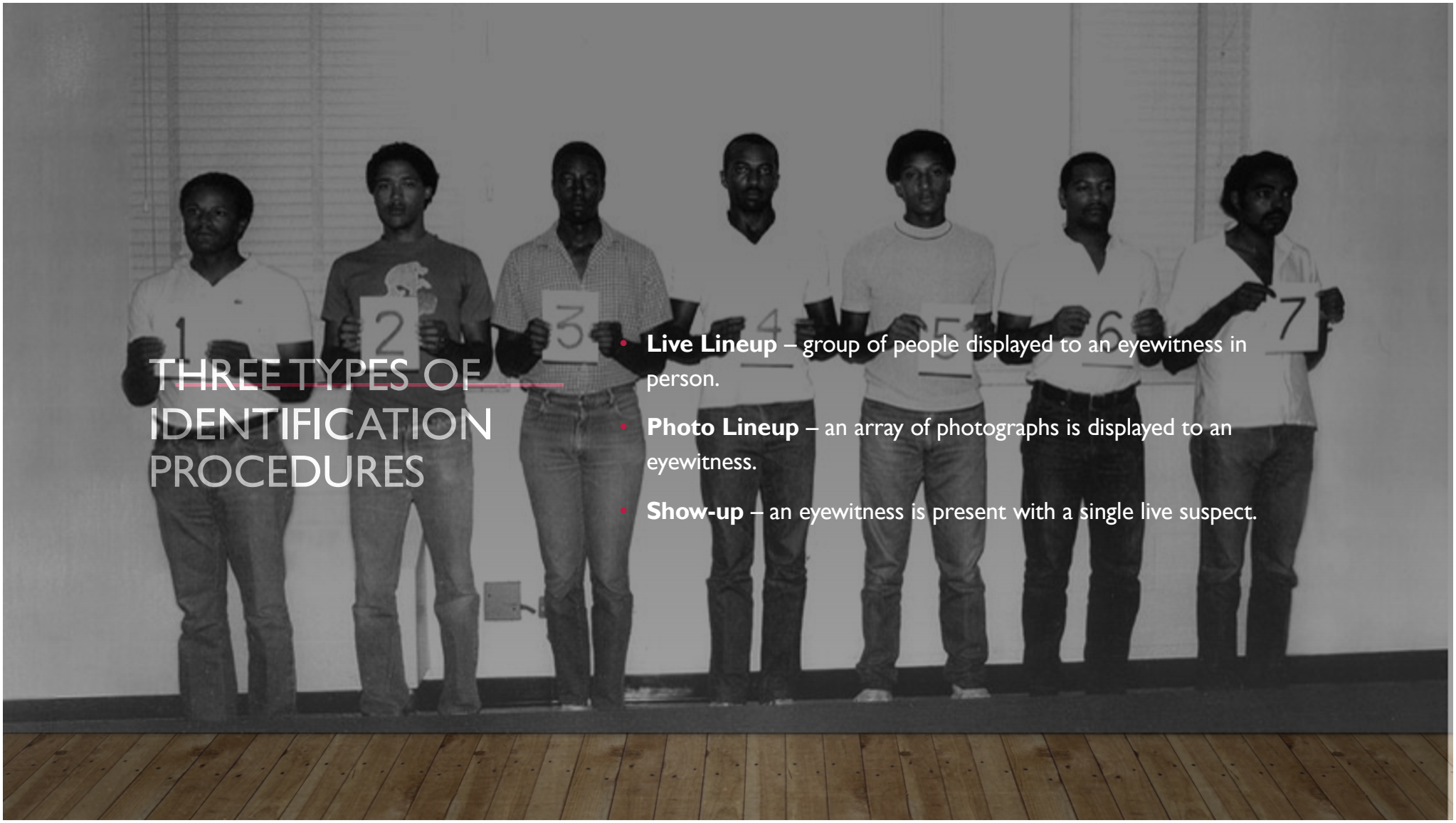
OK, MEMORY SUCKS AND JURIES GET IT WRONG… WHERE DO WE GO FROM HERE?





WHY IS EYEWITNESS IDENTIFICATION SO IMPORTANT?

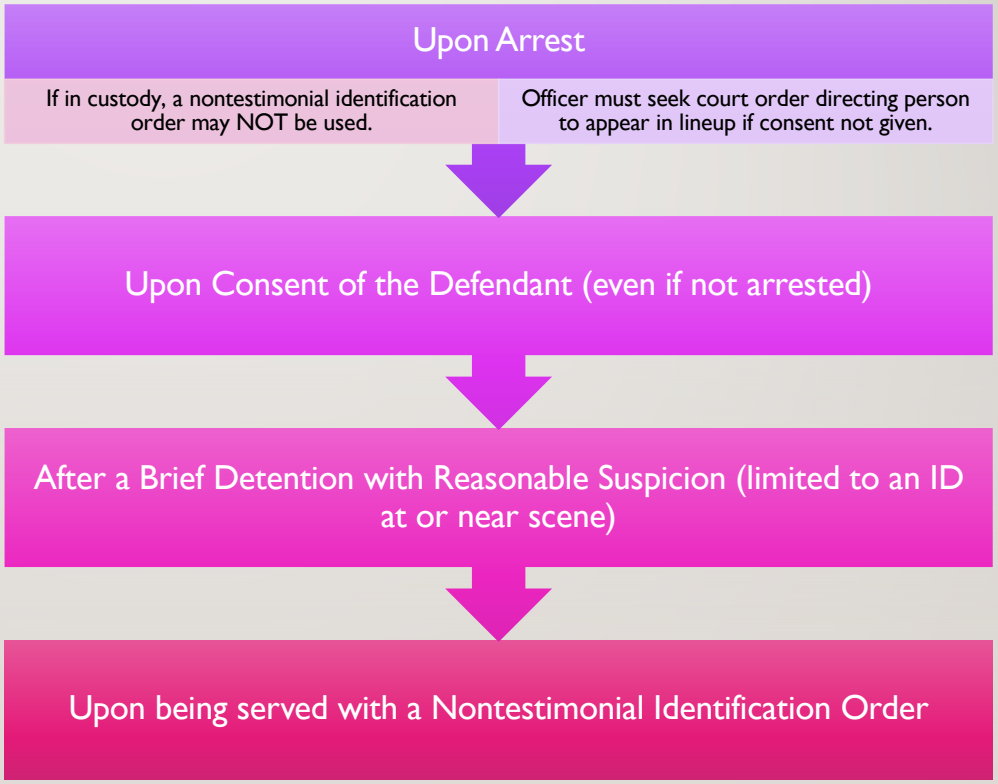
- Eyewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 75% of convictions overturned through DNA testing nationwide.
- 41% of overturned cases involved cross-racial eyewitness identifications.
- Innocence Project



THREE TYPES OF IDENTIFICATION PROCEDURES

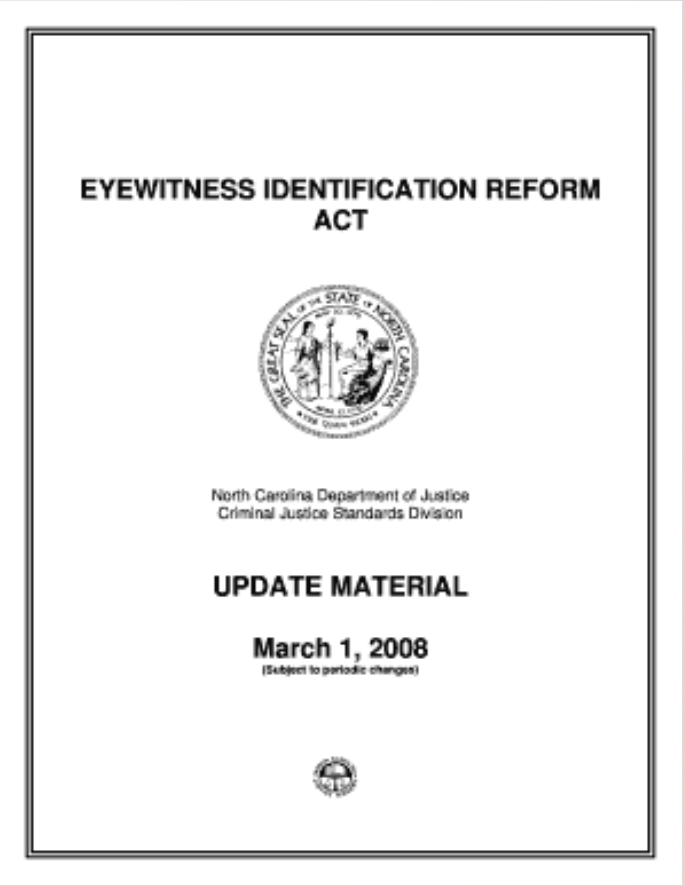
- **Live Lineup** – group of people displayed to an eyewitness in person.
- **Photo Lineup** – an array of photographs is displayed to an eyewitness.
- **Show-up** – an eyewitness is present with a single live suspect.

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



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



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

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*

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.

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*

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*.

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

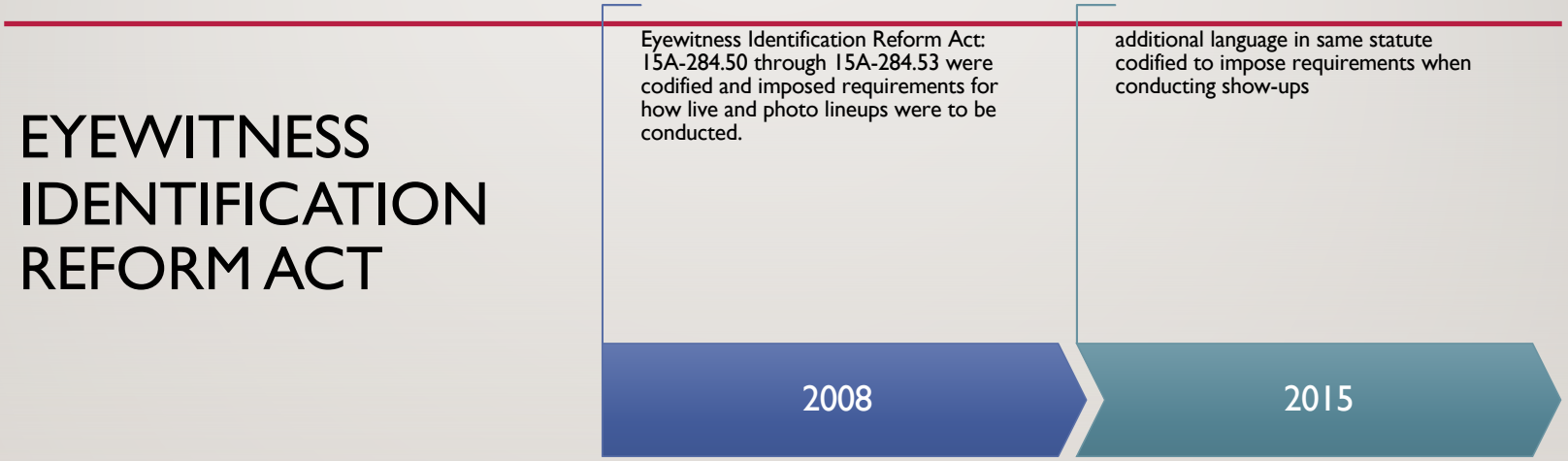
FACT SCENARIO:

- "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.

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.*

EYEWITNESS IDENTIFICATION REFORM ACT



PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

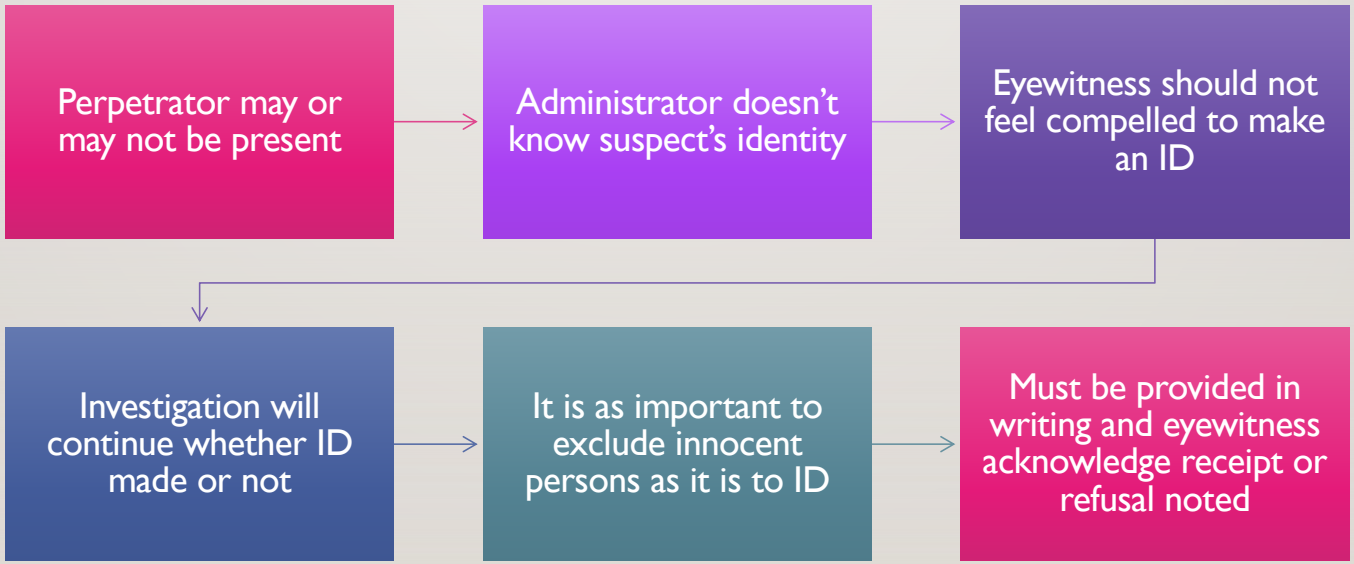
INDEPENDENT ADMINISTRATOR

- 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

INSTRUCTIONS FOR LINEUPS NCGS 15A-284.52



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.

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

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.

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).

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.

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

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

PRACTICE TIP:
BE ON THE LOOK-OUT FOR SOCIAL MEDIA IDENTIFICATIONS

CROSS-RACIAL IMPAIRMENT OR BIAS

Minnesota Innocence Project

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

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)

JURY SELECTION

EDUCATION

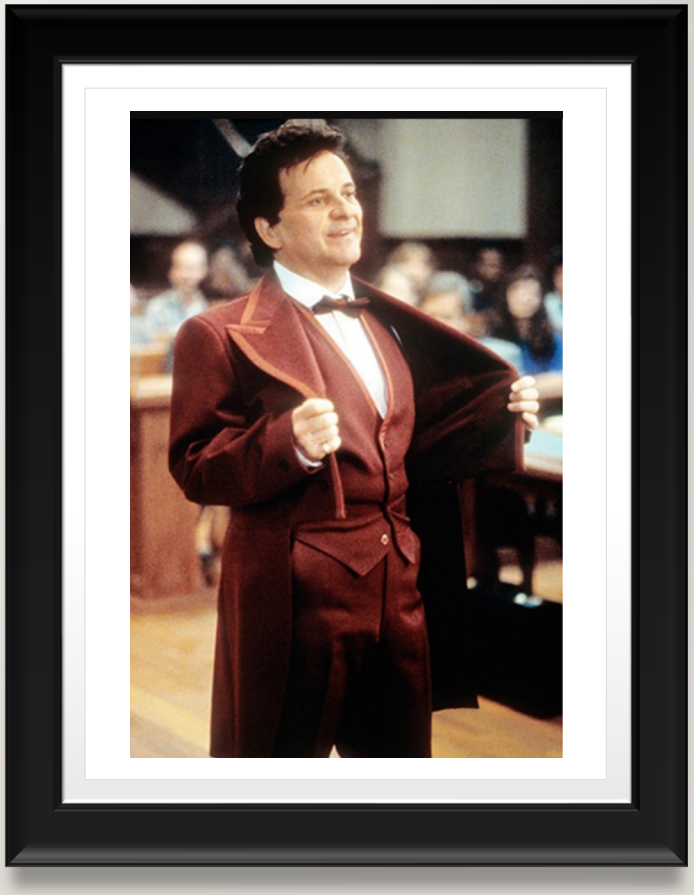
- Common misconception → victim's never forget the face of his/her offender.
- Jurors overestimate the reliability of eyewitness testimony.
- Educate on the confidence conundrum.

SELECTING OPEN MINDS

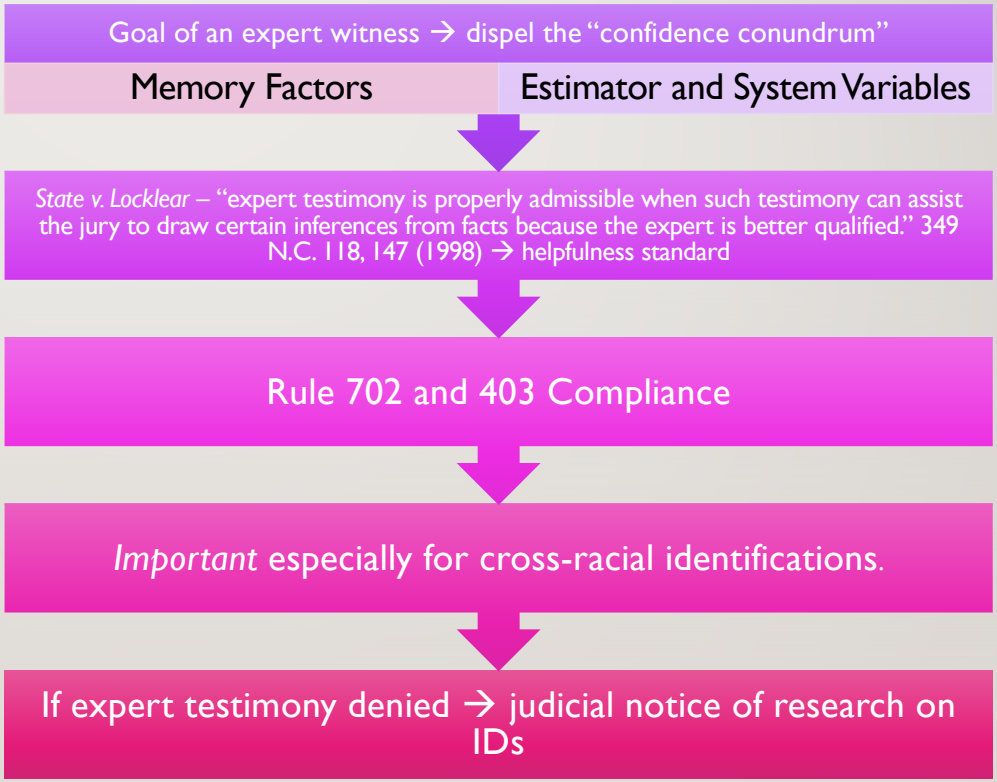
- If you are arguing have a cross-racial identification, try to have a broad racial composition to your jury and explore issues of race with the potential jury members.
- Are any of the jurors overconfident about the accuracy of eyewitness IDs? Will they form independent opinions?

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.



EXPERT TESTIMONY



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.

JURY INSTRUCTIONS

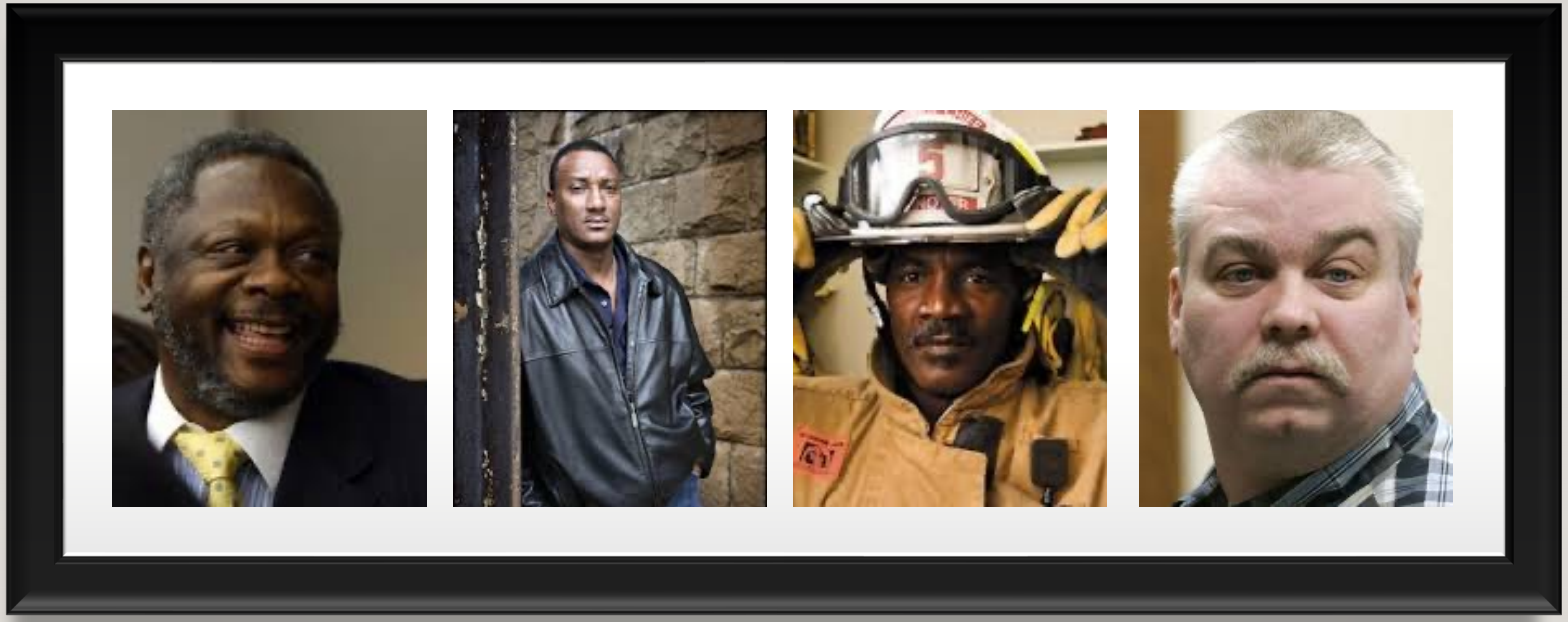
GENERALLY

- 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



REMINDER OF WHY THIS IS IMPORTANT?

LAURA NEAL GIBSON
CHIEF PUBLIC DEFENDER
SECOND DISTRICT

252-940-4096

LAURA.N.GIBSON@NCCOURTS.ORG

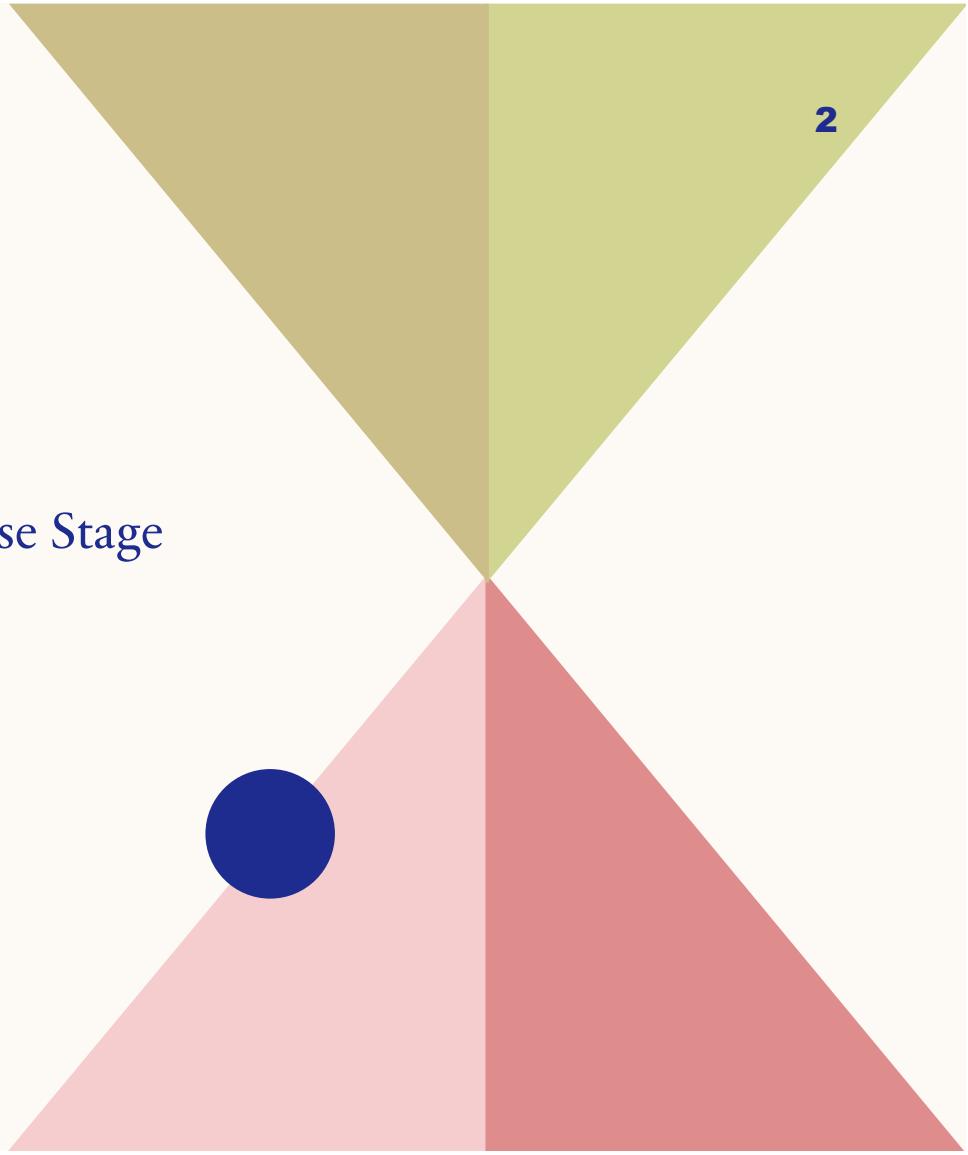
PROTECTING JURORS FROM STATE CHALLENGES FOR CAUSE

September 11, 2025

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

AGENDA

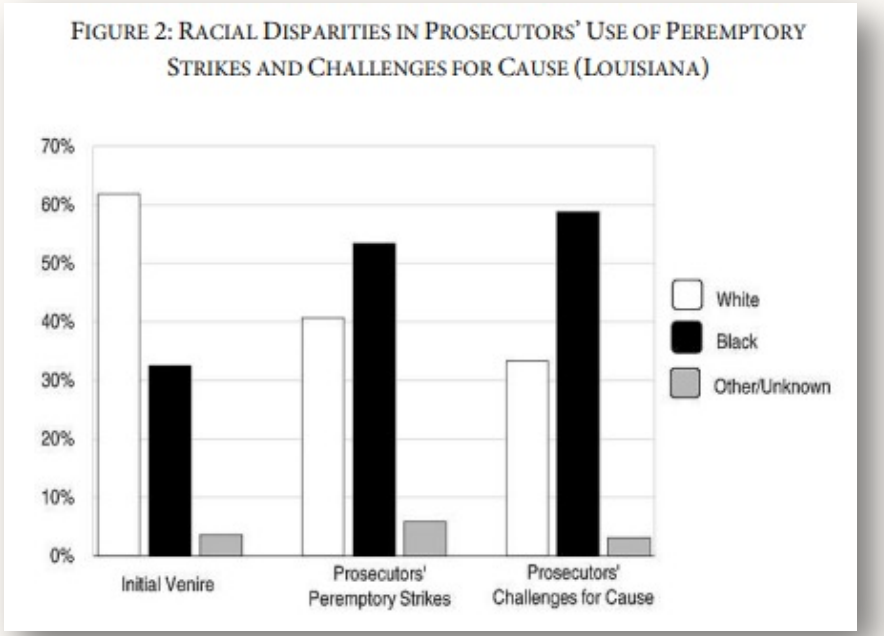
1. Whitewashing: Losing Jurors at the Cause Stage
2. Statutory Framework & Cause Standard
3. Putting Unfavorable Case Law to Use
4. Rehabilitation & Objection
5. Final Tips & Takeaways

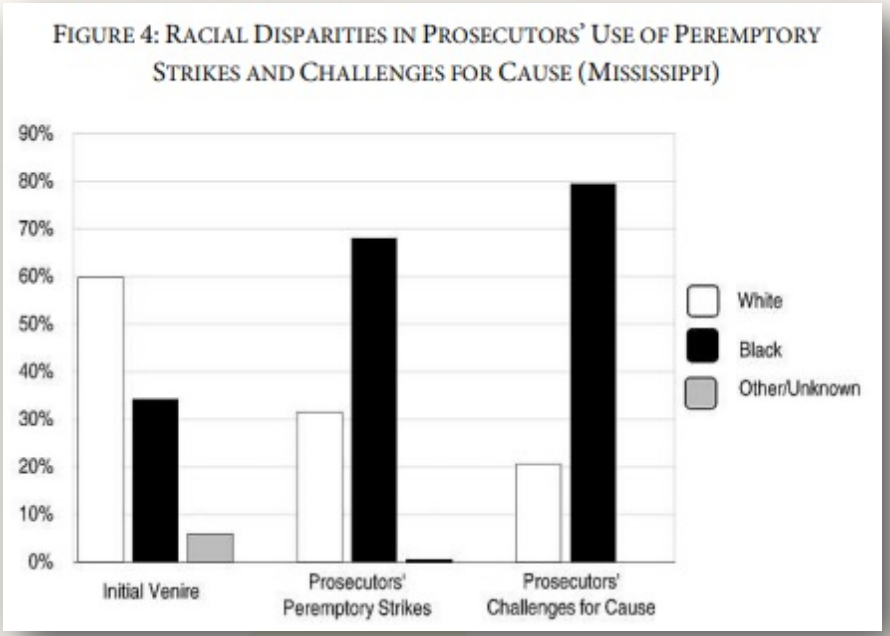


SOME CONTEXT

- 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

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

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

LITIGATION TOOL

Protecting Jurors from State Challenges for Cause

THE MECHANICS

- The State moves to challenge Juror X for cause
- "What say the defense?"
- Ask to question the juror
  - If yes, rehabilitate using step 1
  - If no, prepare objection using step 2
- **Ask to be heard** outside the presence of the jury AND **ask the Court to retain juror X** in the jury room until your objection has been heard
- Take a moment to form your argument
- *"The defense objects to the cause challenge under 6th and 14th Amendments to the U.S. Constitution, Article I, Sections 19, 24, and 26 of the N.C. Constitution, and N.C. Gen. Stat. Section 15A-1212. The statute is one of inclusion, allowing N.C. citizens the right to serve. Here, [use facts of your case and analogize to pro-state case law below]."*

STEP 1: REHABILITATE

- 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?*

STEP 2: OBJECT

1. The **6th & 14th Amendments** of the **U.S. Constitution** (due process, impartial jury)
2. **Article I, Sections 19, 24, and 26** of the **N.C. Constitution** (law of the land, equal protection, right to jury trial, right to jury service)
3. **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."**
4. **Relevant NC case law** (see below)

Protecting Jurors from State Challenges for Cause

5. Any other unfairness you see (disparate questioning, degree of vigor, structural unfairness)
6. **Bias/opinion is ok**, so long as juror can participate in rendering fair and impartial verdict.
   1. "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)

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. Cummings*, 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.

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.

***State v. Reed*, 355 N.C. 150, 151-60 (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.

HONEST-ABOUT-BIAS 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, 851 (2020).

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. 353 N.C. 50, 69 (2000)

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. 361 N.C. 299, 301-05 (2007)

State v. Hunt: Juror/officer knew the testifying officers and had heard the defendant's case discussed by other LEOs. 37 N.C. App. 315, 319-20 (1978)

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.

STEP 3: PRESERVE

Where it make sense for your case strategy, preserve the issue by:

(1) Exhaust your peremptories;

(2) Renew the objection to the cause challenge(s);

(3) Request an additional peremptory;

(4) Put on the record that, were you granted an additional peremptory, you would strike the juror; and

(5) **Always condition your acceptance of the jury, noting your continued objection to any overruled objections:**

"The defense is satisfied but for our continued objection to the challenge for cause of juror [name]."

NCGS § 15A-1212

GROUNDS FOR CHALLENGE FOR CAUSE

(1) Does not qualify under NCGS § 9-3

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

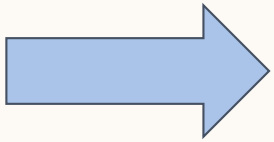
(9) "For any other cause is unable to render a fair and impartial verdict."

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.

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

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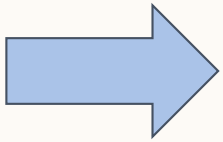

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Juror seated despite repeatedly voicing concerns that finances would be on his mind such that it would interfere with his ability to pay attention, to take his time, and to listen to the evidence.

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

A. Yes, I do.

Q. You do?

A. Yes.

***State v. Reed*, 355 N.C. 150, 151-60 (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.

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HOW TO OBJECT

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

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

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

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

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

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

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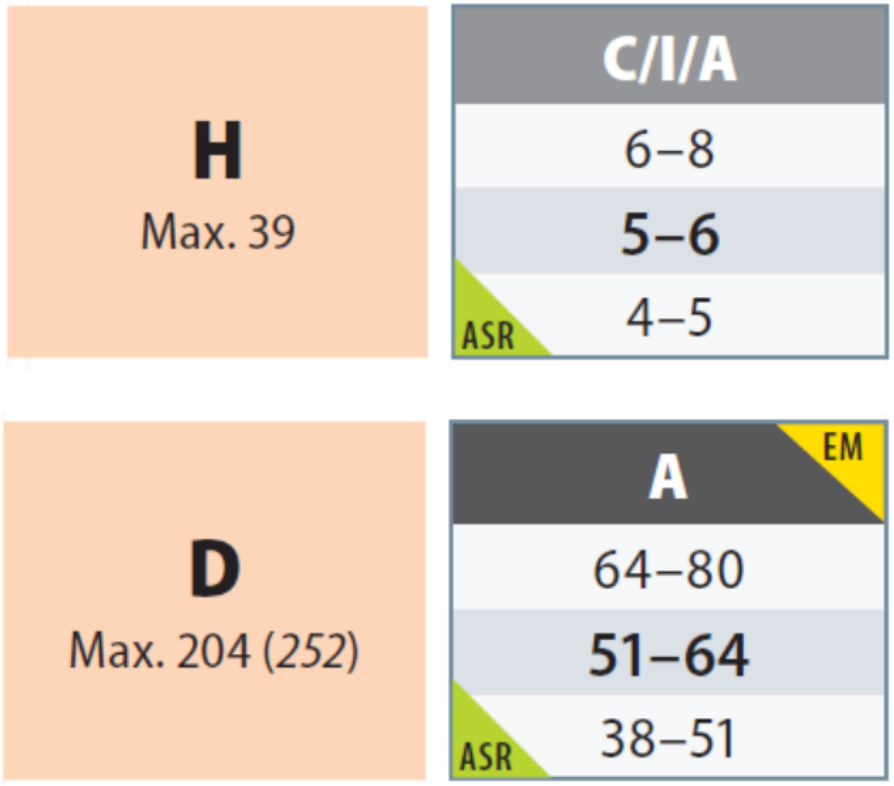
H
Max. 39
C/I/A
6–8
5–6
ASR
4–5
D
Max. 204 (252)
A
EM
64–80
51–64
ASR
38–51

Issues in Self-Defense Law in North Carolina

John Rubin

UNC School of Government

August 2025

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- John Rubin, Self-Defense Provides Immunity from Criminal Liability (Oct. 4, 2016)
- John Rubin, Is "Justification" a Defense to Possession of a Firearm by a Person with a Felony Conviction?
  (Aug. 2, 2016)
- John Rubin, The Statutory Felony Disqualification for Self-Defense (June 7, 2016)

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

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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.

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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.

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North Carolina Criminal Law Blog

O'er the Ramparts: Sizing Up the Castle Doctrine in State v. Carwile and State v. Williams

January 29, 2025 **Joseph L. Hyde** <https://nccriminallaw.sog.unc.edu/author/genegant/>

The castle doctrine statute, G.S. 14-51.2, provides that it is presumptively reasonable for the lawful occupant of a home or motor vehicle to respond to an intruder with deadly force. ***State v. Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , 386 N.C. 513, 527 (2024). Two recent decisions examine the scope of this protection. In ***State v. Carwile*** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793> , No. COA23-885 (N.C. Ct. App. Dec. 17, 2024), the Court of Appeals held that the castle doctrine did not apply when the defendant was outside his home. By contrast, in ***State v. Williams*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> , COA24-50 (N.C. Ct. App. Dec. 31, 2024), the Court of Appeals held the castle doctrine did apply though the defendant was outside of his car. This post seeks to harmonize *Carwile* and *Williams*.

The Castle Doctrine Statute

Until 1993, the law of self-defense in North Carolina was governed largely by the **common law** <https://nccriminallaw.sog.unc.edu/the-common-law-is-dead-long-live-the-common-law/> . Enacted in 1993, G.S. 14-51.1 broadened the common law defense of habitation to justify the use of force not only to prevent but also to terminate an unlawful entry. ***State v. Blue*** <https://appellate.nccourts.org/opinions/?c=1&pdf=8413> , 356 N.C. 79, 89 (2002). In 2011, however, the legislature repealed G.S. 14-51.1 and enacted our current defensive force statutes, G.S. 14-51.2, -51.3 and -51.4. *See* ***State v. Kuhns*** <https://appellate.nccourts.org/opinions/?c=2&pdf=36196> , 260 N.C. App. 281, 285 (2018).

Under G.S. 14-51.2, the lawful occupant of a home, motor vehicle, or workplace is presumed to have had a reasonable fear of death or serious bodily harm when using deadly force if (1) an intruder was unlawfully and forcefully entering, and (2) the occupant knew it. G.S. **14-51.2** <https://www.ncleg.gov/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.2.html> (b). The presumption is rebuttable and does not apply in five enumerated circumstances, including when the intruder has exited the premises and discontinued all efforts to enter. ***Id.*** <https://www.ncleg.gov/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.2.html> at (c)(5). Under the castle doctrine, excessive force is impossible unless the State rebuts the statutory presumption by proving one of the five circumstances prescribed. ***State v. Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , 386 N.C. 513, 527 (2024).

State v. Carwile

In *State v. Carwile*, the defendant, his wife, and Joshua Chinault were inside a home on September 4, 2018, when Christopher Easter entered, wearing a mask and wielding a chainsaw. Easter struck the defendant with the chainsaw. The defendant pushed Easter out of the house, and the two men fought while they crossed the yard. Easter dropped the chainsaw, raised his hands, and backed into a used car dealership lot about five hundred yards from the home. The defendant, his wife, and Chinault pursued him. Easter fell to the ground, and the defendant beat him to death. **Carwile** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793> , Slip Op. 1-3.

The defendant was tried for first-degree murder and convicted of second-degree murder. On appeal, the defendant argued the trial court erred by failing to instruct the jury on the castle doctrine. In particular, he claimed that the trial court should have advised the jury that his fear for his life was presumptively reasonable. **Carwile** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793>, Slip Op. 5.

The Court of Appeals disagreed. It recognized that, under G.S. 14-51.2, "a person has a presumptively reasonable fear of imminent death or serious bodily harm when another seeks to unlawfully and forcefully enter that person's home while he is present." **Carwile** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793>, Slip Op. 8. But the presumption does not apply in certain circumstances, including when the intruder has exited and discontinued all efforts to enter. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793> at 8-9 (citing G.S. **14-51.2** <https://www.ncleg.gov/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.2.html> (c)(5)). Here it was undisputed that, at the time the defendant used deadly force against Easter, Easter had exited the home. Further, it was evident that Easter had also discontinued all efforts to enter the home. The Court of Appeals noted in particular (1) that Easter was not moving toward the defendant or the home, (2) that there was a period of time when there was a distance between Easter and the defendant, and (3) that the defendant continued his attack while Easter lay motionless on the ground. It concluded that Easter had discontinued all efforts to enter the home, and the Castle Doctrine did not apply. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793> at 10-11.

State v. Williams

The defendant in *State v. Williams* was sitting in his car talking with his passenger, Miracle Lewis, when her ex-boyfriend Martin Penny approached the car. **Williams** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064>, Slip Op. 2. Penny opened the passenger side door, leaned in, and began punching the defendant. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 4-5. The defendant exited the car. Penny withdrew from the car, came around the front, and met the defendant in the street. Penny thereupon continued his attack, and the defendant shot him twice, killing Penny. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 6.

At the defendant's murder trial, he requested an instruction under the castle doctrine statute. The trial court refused, reasoning the statute applies to an occupant, and the car was not occupied at the time of the shooting. The defendant was convicted of manslaughter. **Williams** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> , Slip Op. 7-8.

On appeal, the defendant argued the trial court erred by failing to instruct on the castle doctrine. To warrant such an instruction, the Court of Appeal said, the evidence had to show (1) the defendant was an occupant of the vehicle, and (2) Penny had unlawfully and forcefully entered. **Williams** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> , Slip Op. 15. The Court of Appeals found the term "occupant" ambiguous, but concluded – based on "the language, object, and spirit" of the statute – that the lawful occupant of a home, vehicle, or workplace need not remain within in order to invoke the statute's protection. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 24.

Applying this interpretation, the Court of Appeals ruled that the trial court erred in finding the defendant was not an occupant of the vehicle at the pertinent time. **Williams** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> , Slip Op. 28. It further found that Penny had unlawfully and forcefully entered the car and the defendant knew it. It followed that the defendant was entitled to a Castle Doctrine instruction. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 29. As for the State's argument that Penny had exited and discontinued all efforts to enter the vehicle, the Court of Appeals said this was a question for the jury, "and one which we will not consider on appeal." **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 31. The error was prejudicial, it held, and the defendant was entitled to a new trial. **Id.** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064> at 32.

Conclusion

The concept of occupancy has proved troublesome before. Domestic criminal trespass occurs when a person makes an unauthorized entry into a premises "occupied" by an estranged partner. G.S. **14-134.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-134.3.html> (a). In ***State v. Vetter*** <https://appellate.nccourts.org/opinions/?c=2&pdf=36023>, 257 N.C. App. 915 (2018), the Court of Appeals addressed the argument that there was no domestic criminal trespass when the victim was not physically present at the time of the entry. The Court of Appeals rejected the argument, reasoning that the harm sought to be prevented, namely the infliction of mental distress, can occur whether the victim is physically present or not. ***Id.*** <https://appellate.nccourts.org/opinions/?c=2&pdf=36023> at 926. This sort of occupancy was distinguished from occupancy for purposes of discharging a firearm into occupied property, G.S. **14-34.1** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-34.1.html>, or secret peeping, G.S. **14-202** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-202.html>, where the harm "could not logically occur absent the victim's physical presence at the time." ***Id.*** <https://appellate.nccourts.org/opinions/?c=2&pdf=36023>

The prevailing understanding has been that the harm sought to be prevented by the defense of habitation is danger to one physically present inside the premises. As counsel noted in *Carwile*, defense of habitation did not apply because the killing occurred outside of the home. ***Carwile*** <https://appellate.nccourts.org/opinions/?c=2&pdf=43793>, Slip Op. 3-4. The trial court in *Williams* ruled the statutory privilege under G.S. 14-51.2 was similarly inapplicable because no one was inside the car at the time of the shooting. ***Williams*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44064>, Slip Op. 7-8. But the decision in *Carwile* did not turn on the fact that the killing occurred outside of the home; rather, the Court of Appeals there found sufficient evidence the victim had exited and discontinued all efforts to enter (the same issue *Williams* declined to consider). For its part, *Williams* challenges the prevailing understanding by extending the protection of the statute to one outside the premises.

For practitioners, the takeaway is that occupancy for purposes of G.S. 14-51.2 has both a temporal and spatial dimension. If the protection extends beyond the ramparts – and *Williams* says it does – then the limitation lies in other circumstances. As shown in *Carwile*, it does not permit a person no longer under attack to pursue an intruder into an adjoining property and kill him there.

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North Carolina Criminal Law Blog

Outsourcing Reasonableness: Redefining Defensive Force in State v. Phillips.

September 10, 2024 **Joseph L. Hyde** <https://nccriminallaw.sog.unc.edu/author/genegant/>

Coke claimed the common law was the perfection of reason. Our Supreme Court began its recent opinion in ***State v. Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , No. 281A23 (N.C. Aug. 23, 2024), by citing Coke, albeit for a different proposition (i.e., a person's home is his castle). Construing G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> , our Supreme Court held that the legislature has abrogated the common law rule that prohibited excessive force in defense of the home. The trial court erred therefore in instructing the jury that the defendant homeowner did not have the right to use excessive force. This post examines the recent opinion in ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> .

The Phillips Scenario

The facts in ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> were contested. In April 2021, the victim approached the defendant's home angry with a grievance (and possibly intoxicated), entered the front porch, and knocked on the door. The defendant answered and a brief confrontation followed, during which the defendant struck the victim (possibly with a gun). The defendant then fired multiple shots at the victim, one shot striking the victim's left side, leaving her permanently disabled. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 2.

The defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. At trial, the defendant asserted self-defense and defense of habitation. Over objection, the trial court instructed the jury that the defendant did not have the right to use excessive force in defense of the home. The defendant was convicted of assault with a deadly weapon inflicting serious injury and appealed, arguing error in the instruction. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 2-5.

Common Law and Statute

Our defensive force statutes date from 2011. As their placement in Chapter 14, Article 14 (Burglary) suggests, they can be traced to the common law privilege to use force to prevent a house breaking. Under the common law, a homeowner was permitted to use deadly force to prevent an unlawful entry if he reasonably believed an intruder intended to commit a felony or inflict serious injury upon the occupants. *See State v. Miller*, 267 N.C. 409, 411 (1966). By contrast, the privilege to use deadly force in self-defense required a person to have a reasonable belief such force was necessary to prevent death or great bodily harm. *See State v. Richardson*, 341 N.C. 585, 590 (1995).

By statute, a person is justified in the use of deadly force if: (1) he reasonably believes such force is necessary to prevent death or great bodily harm, or (2) "under the circumstances permitted pursuant to G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html>." G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html>. Curiously, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> does not explicitly permit the use of force. Instead, that statute creates two presumptions. First, a homeowner, when using deadly force, "is presumed to have held a reasonable fear of imminent death or serious bodily harm" if an intruder was unlawfully and forcefully entering and the homeowner knew it. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (b). This presumption is rebuttable and does not apply in several statutorily defined circumstances, such as when the victim was a lawful resident of the home, authorized to enter. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c). Second, a person who unlawfully and forcefully enters is presumed to be doing so with the intent to commit an unlawful act of force or violence. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (d). A person who uses force "as permitted by this section" is justified in using such force and is immune from civil or criminal liability. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (e). As my colleague John Rubin **noted** <https://nccriminallaw.sog.unc.edu/defensive-force-in-the-home/>, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> is a complex statute.

A presumption of reasonableness appears to be unique in our criminal statutes. The common law of self-defense employs both rules and standards. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, 1116 (3rd ed. 1982). One rule of law is that deadly force is not privileged against nondeadly force. *State v. Pearson*, 288 N.C. 34, 40 (1975). The jury then uses the reasonable person standard to assess the propriety of the defendant's conduct. *Id.* at 39. The role of excessive force is disputed. Some cases treated it as a manifestation of the proportionality rule and some as an application of the reasonable person standard. *Compare State v. Richardson*, 341 N.C. 585, 590 (1995) (when the assault on the defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, the use of deadly force "is excessive force as a matter of law"); *with State v. Norman*, 324 N.C. 253, 265 (1989) ("The use of deadly force in self-defense to prevent harm other than death or great bodily harm is excessive as a matter of law."). Prior to *Phillips*, it was thus unclear what component of the defense of habitation the statutory presumption of reasonableness was intended to address. *Cf.* ***State v. Walker*** *<https://appellate.nccourts.org/opinions/?c=2&pdf=41727>* , 286 N.C. App. 438, 448 (2022) (G.S. 14-51.2 creates "a rebuttable presumption that deadly force is reasonable").

Subsequent Caselaw

Courts have labored to reconcile the new statutes with the prior common law rules.

In ***State v. Benner*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> , 380 N.C. 621 (2022), the defendant (who was attacked in his home) argued the trial court erred by failing to instruct the jury that the defendant could stand his ground and repel force with force, regardless of the character of the assault. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> at 630; *cf.* **N.C.P.I. – Crim. 308.10** <https://www.sog.unc.edu/sites/default/files/pji-master/r/r308.10%20Self-Defense,%20Retreat%E2%80%94Including%20Homicide%20(to%20Be%20Used%20Following%20Self-Defense%20Instructions%20Where%20Retreat%20Is%20in%20Issue).%20%5b6-2019%5d.pdf> . But the trial court had instructed the jury that the defendant had no duty to retreat in the home, and our Supreme Court found no material difference between a no-duty-to-retreat and a stand-your-ground instruction. ***Benner*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> , 380 N.C. at 635. As for the qualifier, "regardless of the character of the assault," it had no application where there was no prior suggestion that the nature of the assailant's attack had any bearing on the defendant's duty to retreat. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> at 636. In any event, "the proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to stand his or her ground." ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245>

In ***State v. Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> , 386 N.C. 111 (2024), the defendant (who fired upon the victim from inside his home) argued the trial court erred by instructing the jury on lying-in-wait. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> at 120. Under a theory of lying in wait, the defendant is guilty of first-degree murder – absent any showing of premeditation or deliberation – if the evidence shows the defendant stationed himself or lay in wait for a private attack upon the victim. *See State v. Leroux*, 326 N.C. 368, 375 (1990); *cf.* **N.C.P.I. – Crim. 206.16** <https://www.sog.unc.edu/sites/default/files/pji-master/r/r206.16%20First%20Degree%20Murder%20by%20Lying%20in%20Wait.%20G.S.%2014-17.%20%5b6-2014%5d.pdf> . The defendant in *Copley* argued that the trial court's instruction on lying-in-wait undermined his right to defend the home under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> . Our Supreme Court agreed in part.

The right to use force in defense of the home under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> , it said, "is not a license to kill." ***Copley*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43700>* , 386 N.C. at 123. The State might rebut the presumption of reasonableness, and hence a homeowner's right to use deadly force, by means identified in the statute – the victim was a lawful resident of the home, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c)(1); or the victim was a law enforcement officer performing official duties, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c)(4) – or otherwise – the victim was an authorized invitee, a Girl Scout, or a trick-or-treater. ***Id.*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43700>* But a defendant entitled to the statutory presumption of G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> cannot be convicted of murder by lying in wait because a homeowner defending his castle from invasion cannot be characterized as an assassin waiting to ambush his victim. ***Id.*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43700>* at 123-34.

Benner <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> and ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> thus represent an accommodation of the common law to the new statutory scheme. Both recognized that the pattern jury instructions contain propositions derived from the common law and the new statutes. *Cf.* ***State v. Leaks*** <https://appellate.nccourts.org/opinions/?c=2&pdf=39021> , 270 N.C. App. 317, 324 (2020) (noting pattern instructions were revised "to harmonize" common law and 2011 statutes). *Benner* acknowledged a defendant's statutory right to stand his ground, while it retained the common law requirement that a defendant not use excessive force, even in instances where he is entitled to stand his ground. ***Benner*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> , 380 N.C. at 636 ("the proportionality rule"). ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> recognized that the privilege codified in G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> obviates in some circumstances the common law theory of lying in wait for first-degree murder, but it also construed the presumption created by G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (b) as rebuttable by both statutory and nonstatutory circumstances alike. ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> , 386 N.C. 111, 123; *see also* ***State v. Austin*** <https://appellate.nccourts.org/opinions/?c=2&pdf=40148> , 279 N.C. App. 377, 384 (2021) (G.S. 14-51.2's "rebuttable presumption is not limited" to enumerated circumstances). As our Supreme Court noted elsewhere, the judicial difficulty is in determining whether the new defensive force statutes merely restate, moderately revise, or entirely abrogate common law rules. *See* ***State v. McLymore*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41177> , 380 N.C. 185, 190 (2022).

State v. Phillips

The defendant in ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> (who fired upon the victim from inside her home) was convicted of assault with a deadly weapon inflicting serious injury and appealed, arguing the trial court erred by instructing the jury that the defendant did not have the right to use excessive force in defense of habitation. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 5. The Supreme Court agreed. Ultimately, it held that excessive force in defense of habitation is legally impossible unless the State rebuts the presumption of reasonableness created by G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> by proving one of the prescribed circumstances. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> at 20.

The logic of ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> appears essentially in a syllogism and a roadmap. The syllogism, which controls the outcome of the case, is as follows:

- S. 14-51.3 provides two separate and distinct grounds for the use of deadly force, (1) the reasonable person standard, and (2) under the circumstances permitted by G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> ;
- The reasonable person standard is equivalent to the prohibition on excessive force; hence,
- The circumstances permitted by G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> contain no prohibition on excessive force.

Phillips <https://appellate.nccourts.org/opinions/?c=1&pdf=43936>, Slip Op. at 11; *see also* ***id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> at 18-19 (prohibition on excessive force *is* the requirement that a defendant have a reasonable belief, etc.; this principle "is now codified" at G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html> (a)(1); and "[s]uch is not the case" with G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html> (a)(2), where legislature "abrogated this principle."). Consistent with its restrictive view of statutory provisions (*expression unius*), our Supreme Court added that the presumption that an intruder intends to commit an unlawful act of violence (G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (d)) is "non-rebuttable," whereas the presumption of the homeowner's reasonable fear (G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (b)) may be rebutted "only by the circumstances" listed (G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c)). ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> at 16.

The roadmap appears in the Supreme Court's explanation of how **G.S. 14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> operates: when a defendant asserts the G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> defense at trial, the jury must first determine whether the defendant is entitled to the presumption of a reasonable fear. If the jury finds the defendant is not entitled to the presumption, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> does not apply, and the defendant's culpability must be determined under G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html>. If the jury finds the defendant is entitled to the presumption, it then considers whether the State has rebutted the presumption by proving any of the circumstances set forth in G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c). If the jury finds the State has rebutted the presumption, it must consider "whether the defendant's use of force was proportional." If it finds the State has not rebutted the presumption, the defendant must be acquitted. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936>, Slip Op. at 17.

Turning to the facts of the case, the Supreme Court observed that the trial court advised the jury that, even if the defense of habitation applied, the defendant did not have the right to use excessive force. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 17. As illustrated by its syllogism (described above), however, that was an inaccurate statement of law. The jury "should not have considered the proportionality of defendant's force" unless it found that the defendant did not qualify for the presumption of reasonable fear or that the State had rebutted the presumption. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> at 20-21. Because the Court of Appeals failed, however, adequately to consider whether the instructional error was prejudicial, the Supreme Court remanded for that determination. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> at 21.

Concurring in part, Justice Earls agreed that the presumption of reasonableness essentially confers the privilege of using deadly force. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 24 (Earls, J., concurring in part) ("If the presumption applies. . . it permits the occupant to [use] deadly force."). She emphasized, however, that the presumption "does not attach" unless the statutory conditions are satisfied, namely that an intruder "unlawfully and forcefully" entered another's property. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> Exempt from the category, she said, are Girl Scouts, trick-or-treaters, visiting neighbors, and delivery people. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936>

The Future of Reasonableness

Blackstone reluctantly conceded that the legislature is not bound by the reasonableness of the common law, though he insisted such intent should be made to appear by such evident and explicit words as to leave no doubt. 1 Bl. Comm. *91. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> finds such an intent manifest in G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> : "Had the General Assembly intended to require lawful occupants to demonstrate a reasonable belief that deadly force was necessary, it would not have written a statute that explicitly provides the contrary." ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 20. *Phillips* thus relies on statutory construction, though it was not the first case decided under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> and its holding should be placed in context.

The immediate difficulty is with ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> and ***Benner*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41245> , though apparent inconsistencies may be superficial. As noted above, ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> seems to have recognized unenumerated circumstances whereby the presumption of reasonableness can be rebutted, e.g., Girl Scouts and trick-or-treaters. ***Copley*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43700> , 386 N.C. at 123; *see also* ***Austin*** <https://appellate.nccourts.org/opinions/?c=2&pdf=40148> , 279 N.C. App. at 384. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> now declares that the presumption of reasonableness may be rebutted only by the statutorily prescribed circumstances. In her concurrence, Justice Earls reiterates that Girl Scouts and trick-or-treaters are to be protected, if not by rebutting the presumption, then because they do not trigger the presumption to begin with. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. p. 24 (Earls, J., concurring in part). Either way, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> does not condone the use of deadly force against innocent children, as the majority acknowledges. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> Slip Op. p. 16.

Benner *<https://appellate.nccourts.org/opinions/?c=1&pdf=41245>* concluded that the prohibition on excessive force "continues to exist" even where, as in the home, the defendant is entitled to stand his ground. ***Benner*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=41245>* , 380 N.C. at 636. True, ***Benner*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=41245>* pertained to an instruction on self-defense within the home, not defense of habitation. So perhaps ***Benner's*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=41245>* conclusion can be squared with ***Phillips'*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43936>* conclusion that excessive force is impossible under the castle doctrine. ***Phillips*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43936>* , Slip Op. p. 20. The problem, of course, is that G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> , the so-called "castle doctrine statute," combines elements of self-defense and defense of habitation, such that it may be difficult for prosecutors to determine precisely which defense is being asserted. In any event, ***Phillips*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43936>* maintains the consideration of excessive force as it pertains to self-defense. ***Phillips*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43936>* , Slip Op. at 11 (noting that G.S. 14-51.3(a) requires a defendant to demonstrate "that the degree of force used was proportional and not excessive"). ***Benner*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=41245>* thus cabined may be preserved.

The key for prosecutors lies in ***Phillips'*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> roadmap. When a defendant asserts a defense under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html>, "the jury must first determine whether the defendant is entitled to the presumption" of reasonableness, which amounts to a rebuttable justification for deadly force. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936>, Slip Op. p. 17. By statute, the presumption of reasonableness applies if both: (1) the victim was unlawfully and forcefully entering, and (2) the defendant knew or had reason to believe it. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (b). Arguably, the defendant has the burden of presenting evidence to satisfy both conditions. *See* ***State v. Cook*** *<https://appellate.nccourts.org/opinions/?c=2&pdf=35251>*, 254 N.C. App. 150, 155 (2017), ***aff'd per curiam*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=36672>*, 370 N.C. 506 (2018); *cf.* ***Copley*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43700>*, 386 N.C. 111, 122 (G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> uses a "burden-shifting" provision). If a defendant fails to produce evidence that the victim was unlawfully and forcefully entering, and that the defendant knew or had reason to believe it, G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> simply "does not apply." ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936>, Slip Op. at 17.

If the jury finds a defendant is entitled to the presumption, the State still has an opportunity to rebut the presumption of reasonableness. ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. at 17. The presumption may be rebutted "only by the circumstances set forth in" G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c). ***Phillips*** <https://appellate.nccourts.org/opinions/?c=1&pdf=43936> , Slip Op. p. 15. These include that the victim was a lawful resident of the home, authorized to enter; that the defendant was engaged in any violent criminal offense; and that the victim was a law enforcement officer performing official duties. G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c). When it appears that the defendant may be entitled to the presumption under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (b), the prosecutor should familiarize himself or herself with the bases for rebuttal under G.S. **14-51.2** <https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-51.2.html> (c). The common law might be the perfection of reason, as Coke claimed. In ***Phillips'*** *<https://appellate.nccourts.org/opinions/?c=1&pdf=43936>* rendition, reason is preempted by a presumption of reasonableness.

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Defensive Force in the Home

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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

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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

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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.

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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.

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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

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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.

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North Carolina Criminal Law Blog

Confession and Avoidance: Self-defense in State v. Myers

December 10, 2024 **Joseph L. Hyde** <https://nccriminallaw.sog.unc.edu/author/genegant/>

The defendant presented competent evidence tending to show that he was acting in self-defense when he shot Raquan Neal, the Court of Appeals recently said in ***State v. Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, No. COA24-435 (N.C. Ct. App. Nov. 19, 2024), and the trial court's failure to instruct on self-defense was error. Reciting both the common law and the statutory test for self-defense, the opinion in *Myers* seems to represent a straightforward application of settled law – except for one thing. The defendant "testified he was not trying to kill Neal." ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 3. Under the common law, a defendant was not privileged to use deadly force unless he believed at the time that it was necessary to kill his assailant. Prior cases found no error in the trial court's denying an instruction on self-defense when the defendant thus disavowed the requisite intent. This post considers the opinion in *Myers*.

An Unlawful Killing

There is no statutory definition of the term "murder." *Cf.* **G.S. 14-17** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-17.html>. Rather, murder is defined, as at common law, as an intentional and unlawful killing of another human being with malice aforethought. *State v. Crawford*, 329 N.C. 466, 480 (1991). Unlawfulness is thus an element of the offense. Indeed, the element of unlawfulness cannot be eliminated without removing murder from the category of crime. *See* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, 79 (3rd ed. 1982). Self-defense negates the element of unlawfulness. *State v. Marley*, 321 N.C. 415, 420 (1988).

Absent evidence of justification or excuse, the State carries its burden of proving unlawfulness by showing the killing resulted from the intentional use of a deadly weapon. *Marley*, 321 N.C. at 420. When, however, there is evidence of self-defense, the presumption of unlawfulness disappears but the logical inference from the facts proved may be weighed against this evidence. *State v. Hankerson*, 288 N.C. 632, 651 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977). Hence, to avoid the presumption, the defendant has the burden to produce some evidence of self-defense or rely on such evidence as may be present in the State's case. *Id.* at 650; *accord State v. Reynolds*, 307 N.C. 184, 190 (1982). In any event, the defendant's burden is not a heavy one. *See State v. Bush*, 307 N.C. 152, 160 (1982) ("when there is any evidence in the record"); *see also* John Rubin, *The Law of Self-Defense in North Carolina*, § 8.2(c), 186 (1996).

Defensive Force in Transition

Until the twentieth century, the law of self-defense in North Carolina was governed largely by common law. By the 1980s, the common law of self-defense had crystalized into a four-factor test. The law of perfect self-defense was said to excuse a killing if, at the time of the killing,

> *(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and*
>
> *(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and*
>
> *(3) defendant was not the aggressor in bringing on the affray, . . .*
>
> *(4) defendant did not use excessive force, ...*

State v. Norris, 303 N.C. 526, 530 (1981).

Under this formulation, perfect self-defense was available only if it appeared that the defendant believed it was necessary to kill his attacker in order to save himself. ***State v. Cook*** <https://appellate.nccourts.org/opinions/?c=2&pdf=35251>, 254 N.C. App. 150, 153 (2017), ***aff'd*** <https://appellate.nccourts.org/opinions/?c=1&pdf=36672>, 370 N.C. 506 (2018). Consequently, a defendant was not entitled to an instruction on self-defense "while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone and that he did not know anyone had been shot." *State v. Williams*, 342 N.C. 869, 873 (1996). The defendant's own testimony then "disproves the first element of self-defense." *Id.* In sum, "the use of a firearm that a defendant describes as something other than an aimed, deliberate attempt to kill the victim cannot support a finding of perfect self-defense." ***State v. Fitts*** <https://appellate.nccourts.org/opinions/?c=2&pdf=35413>, 254 N.C. App. 803, 807 (2017). My colleague John Rubin discussed the issue **here** <https://nccriminallaw.sog.unc.edu/warning-shot-self-defense/>.

Our current defensive force statutes date from 2011. Under G.S. 14-51.3, a person is justified in the use of deadly force and does not have a duty to retreat when, among other things, "[h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html> (a)(1). In ***State v. McLymore*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41177>, 380 N.C. 185 (2022), our Supreme Court observed that G.S. 14-51.3 "closely tracks" the earlier common law definition of self-defense. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41177> at 191. It concluded, however, that G.S. 14-51.3 supplants the common law on all aspects of the law of self-defense addressed by its provisions. ***Id.*** <https://appellate.nccourts.org/opinions/?c=1&pdf=41177>

State v. Myers

In December 2021, the defendant and his friend Zearious Miller visited Monroe Discount Beverage ("Joe's Store") where they ran into Deoveon Byrd and Raquan Neal. The defendant approached Byrd and spoke to him. Miller and Neal approached them, and Miller struck Byrd with a firearm. Neal ran to his car and retrieved a firearm, and Miller followed, trying to grab Neal's gun. The defendant heard gunshots and saw Miller fall, apparently shot by Neal. Neal ran into the store, and the defendant fired eight times at Neal, seriously injuring him. ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 2-3.

The defendant was charged with attempted murder, assault with a deadly weapon inflicting serious bodily injury, and discharging a weapon into occupied property. At trial, the defendant requested a jury instruction on self-defense. Based on the testimony and the caselaw, the trial court believed that an instruction was not warranted, and it refused the defendant's request. **Myers** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 6.

On appeal, the defendant argued the trial court erred by failing to instruct the jury on self-defense. The Court of Appeals recited the relevant statutory provisions: a person is justified in the use of deadly force if he or she reasonably believes such force is necessary to prevent imminent death or great bodily harm. ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 7 (quoting G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html> (a)). It also recited the four-factor common law test. ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 8 (quoting *State v. Bush*, 307 N.C. 152, 158 (1982)). Here, the evidence showed that the defendant fired at Neal as Neal went into the store; that the defendant testified he was scared, and that the defendant testified that he was trying to defend himself. Viewing the evidence in the light most favorable to the defendant, the Court of Appeals concluded "the evidence is sufficient to support an instruction of at least imperfect self-defense, if not perfect self-defense." ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 10. The trial court erred by failing to provide the requested instructions on self-defense, and the defendant was entitled to a new trial. ***Myers*** <https://appellate.nccourts.org/opinions/?c=2&pdf=44044>, Slip Op. 10-11.

Conclusion

It is not apparent from the opinion in *Myers* that the trial court's ruling, denying a self-defense instruction, was based on the defendant's own testimony, disavowing intent to kill. Indeed, the Court of Appeals does not grapple with that line of cases upholding the denial of an instruction in those circumstances. (The State certainly **argued** <https://www.ncappellatecourts.org/show-file.php?document_id=356047> that caselaw on appeal.) The result is an opinion that is somewhat difficult to square with recent precedent. *Cf.* ***Fitts*** *<https://appellate.nccourts.org/opinions/?c=2&pdf=35413>*, 254 N.C. App. 807.

One possible explanation is that the statutory right to use deadly force is not couched in terms of the defendant's belief in the necessity *to kill* his assailant. *Cf.* G.S. **14-51.3** <https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_14/gs_14-51.3.html> ("believes that such force is necessary"). Perhaps the abrogation of the common law recognized in *McLymore* compels reconsideration of those cases decided under the four-factor test. This is not the route *Myers* takes. It recites both the statutory and the common law tests for self-defense, giving preference to neither.

For prosecutors, the lesson is clear. Contesting an instruction on self-defense in doubtful cases provides the defendant with a powerful argument on appeal. The extent to which the old rules have survived the abrogation of the common law of self-defense remains to be seen.

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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-

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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

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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.

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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

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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*

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> *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

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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

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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.

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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

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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

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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

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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:

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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.

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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

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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.

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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

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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

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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.

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The Statutory and Common Law of Self-Defense

JOHN RUBIN
UNC SCHOOL OF GOVERNMENT

SEPTEMBER 2025

The Statutes

G.S. 14-51.2

- Defense in the home, workplace, and motor vehicle

G.S. 14-51.3

- Defense of person (self and others)

G.S. 14-51.4

- Disqualifications

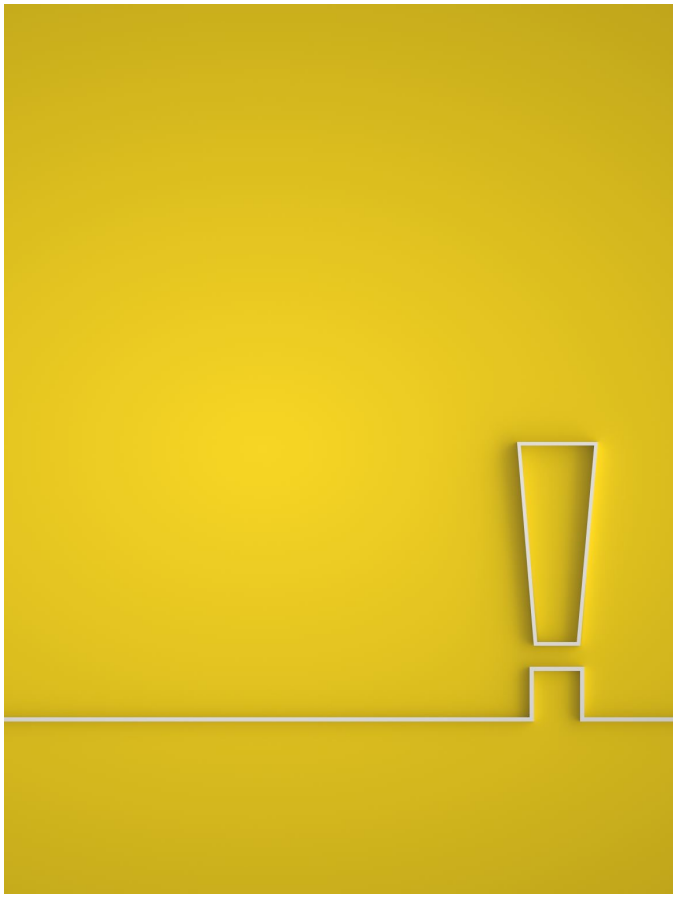
General Rules of Interpretation

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



G.S. 14-51.3

A person is justified

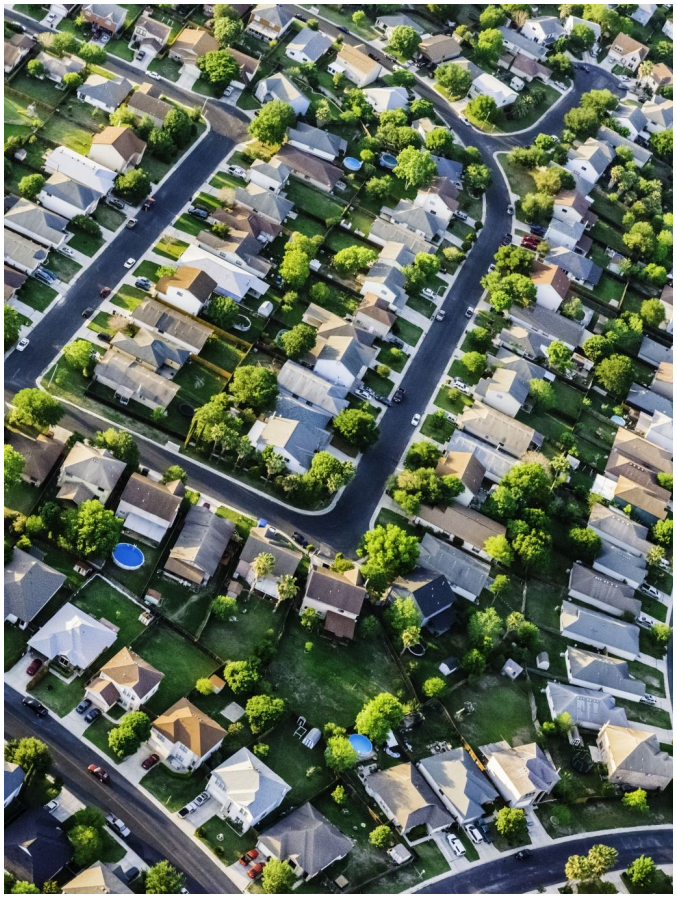
in using deadly force

when he or she reasonably believes that such force is necessary

to prevent imminent death or great bodily injury

without retreating where they have the lawful right to be

if not disqualified under G.S. 14-51.4



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)

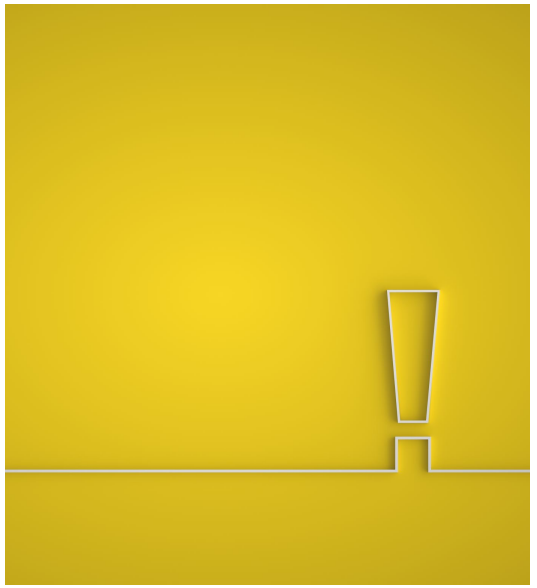
Pattern instructions

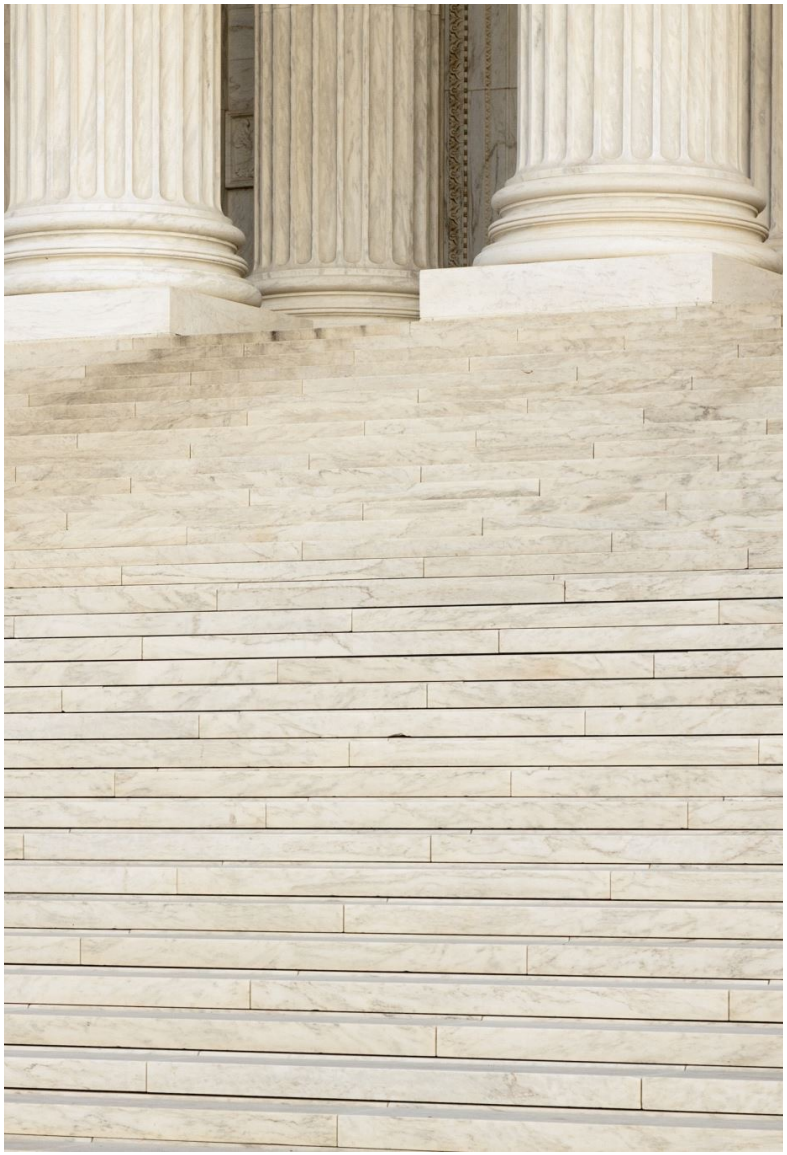
- 206.10 (homicide), 308.45 (deadly assault), 308.10 (no duty to retreat)

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]"





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

"[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.

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)

Other Repercussions

Causal connection applies to other contexts

- State v. Williams, 283 N.C. App 538 (2022) (defense of others)

Felony disqualification instruction apparently may be given for uncharged felonies

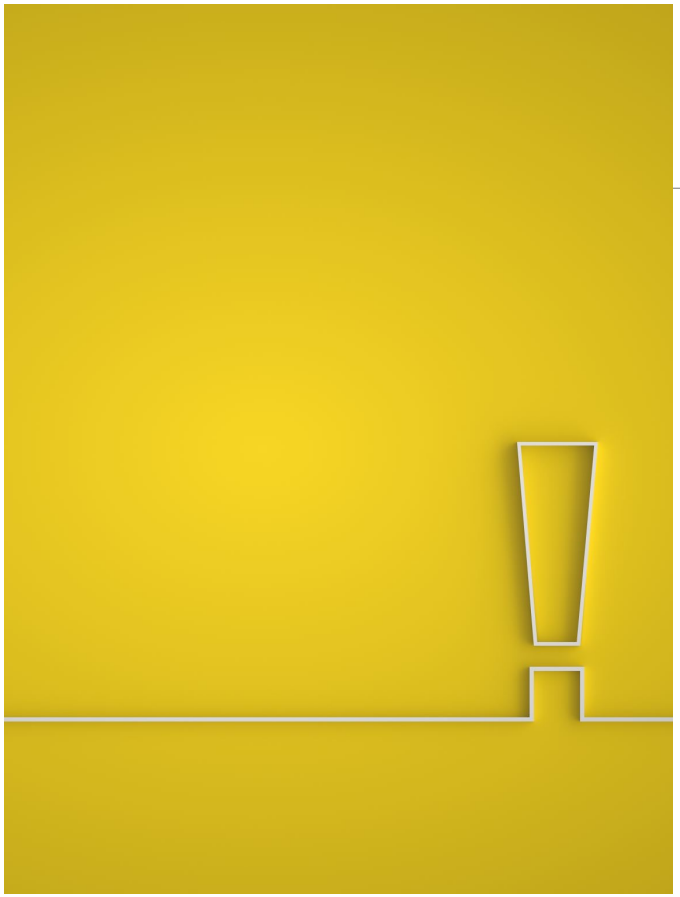
- State v. Townsend, ___ N.C. App. ___, 917 S.E.2d 342 (2025) (trial judge instructed on uncharged offenses for felony disqualification; appellate court did not address issue)

Defendant may be convicted of alleged felony without causal nexus

- State v. Swindell, 382 N.C. 602 (2022) (possession of a firearm by person previously convicted of felony)

Imperfect self-defense may remain available to reduce murder to manslaughter

- *McLymore* note 2; State v. Myers, 296 N.C. App. 524 (2024) (error not to instruct on imperfect)



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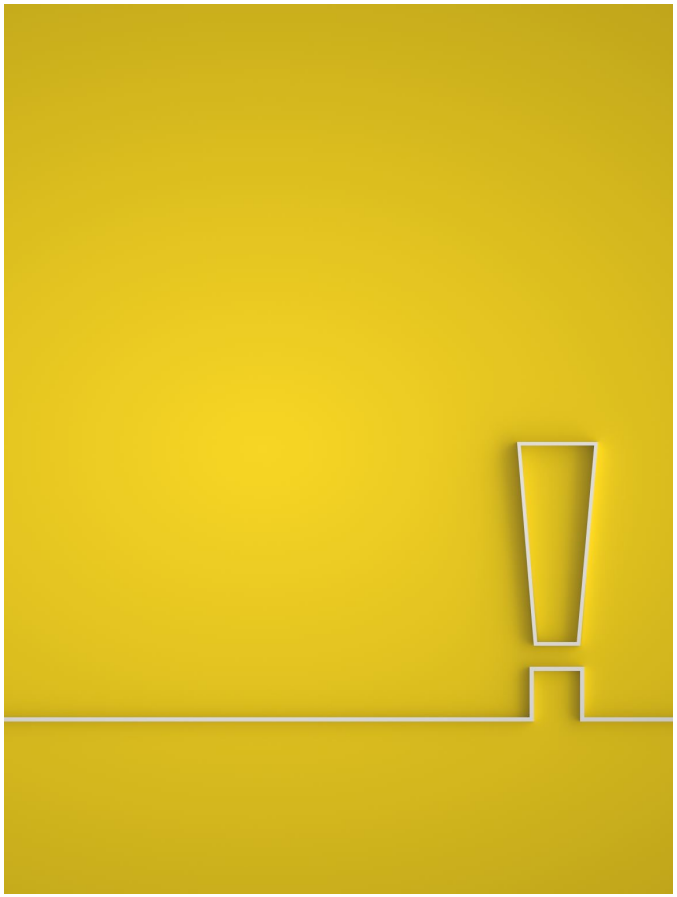


G.S. 14-51.2

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 under specified circumstances in G.S. 14-51.2(c), and
- disqualifications under G.S. 14-51.4

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
- 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)

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 G.S. 14-51.2(b)(1))

State v. Benner, 380 N.C. 621 (2022)

- Deadly force is not permissible against a nondeadly assault by a guest (at least under the common law)

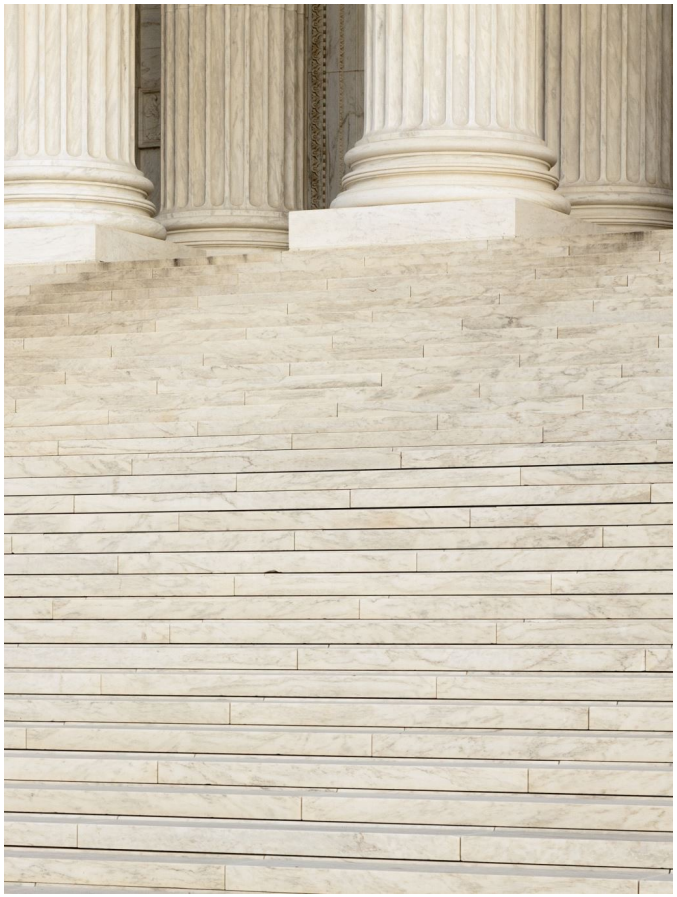
Rebuttal of Statutory Presumption

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, 386 N.C. 513 (2024)

- Excessive force is not an issue in a case under G.S. 14-51.2 and does not rebut the presumption
- Only the statutorily-listed circumstances can rebut the presumption
- NCPJI 308.80 has not been revised; therefore, request that it be modified to reflect the holding in *Phillips*



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

Sept. 20, 2022

NAME
ADDRESS
ADDRESS

RE: XX CRS XXXX

Dear NAME:

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

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

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

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

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

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

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

Sincerely,

NAME
Attorney for DEFENDANT

SOME SAMPLE LIFE EXPERIENCE VOIR DIRE QUESTIONS

A. Race

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

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

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

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

B. Alcohol/Alcoholism

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

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

C. Self-Defense

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

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

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

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

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

D. Jumping to Conclusions

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

E. False Suspicion or Accusation

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

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

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

F. Police Officers Lying/Being Abusive

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

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

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

G. Lying

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

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

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

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

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

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

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

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

H. Prior Convictions/Reputation

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

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

I. Persuasion/Gullibility/Human Nature

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

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

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

J. Desperation

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

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

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

Preventing Low Level Felonies from Becoming High Level Habitual Felonies

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

No Big Deal!

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

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***."

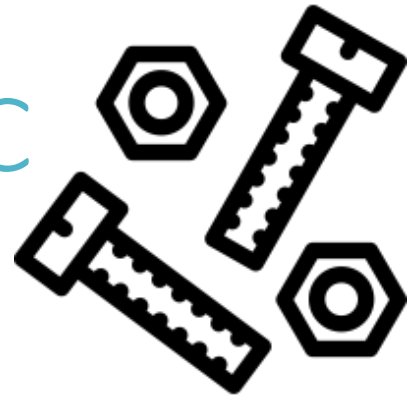
  State v. Aldridge, 76 N.C. App. 638, 640 (1985)

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

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

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)

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)*

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

Non-Overlapping

Eligibility for Violent HF

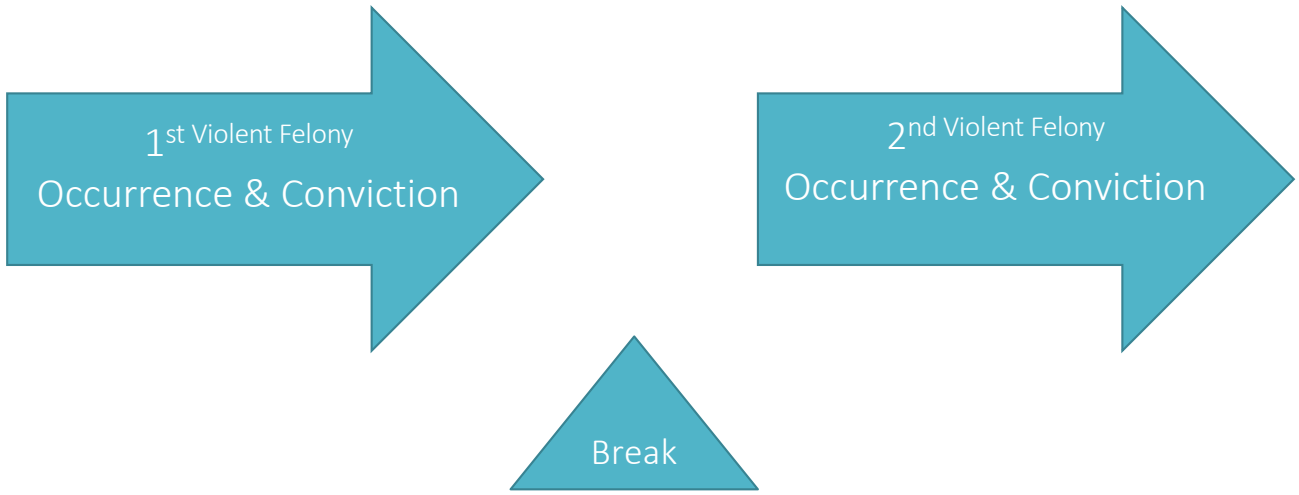
A defendant who:

Has been *convicted*,

Of *two violent felonies*,

Commits a third Class A through E felony

Non-Overlapping



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)

Punishment for Violent HF

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)

HF Indictment N.C.G.S. §14-7.3

- Must be separate from the principal felony Indictments (can be separate count) – ALSO there must be pending felony prosecution to attach to, can't be filed prior

  State v. Smith 2024 N.C. App. LEXIS 978, *State v. Garmon,* 296 N.C. App, 725 (2024)

- **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)

Sample HF Indictment

STATE OF NORTH CAROLINA
County of Mecklenburg

The State of North Carolina

vs.

[redacted]
W/M DOB: January 26, [redacted]
[redacted]
Charlotte, North Carolina 28208
Defendant.

[redacted]

File #
Film #

In The General Court of Justice
Superior Court Division

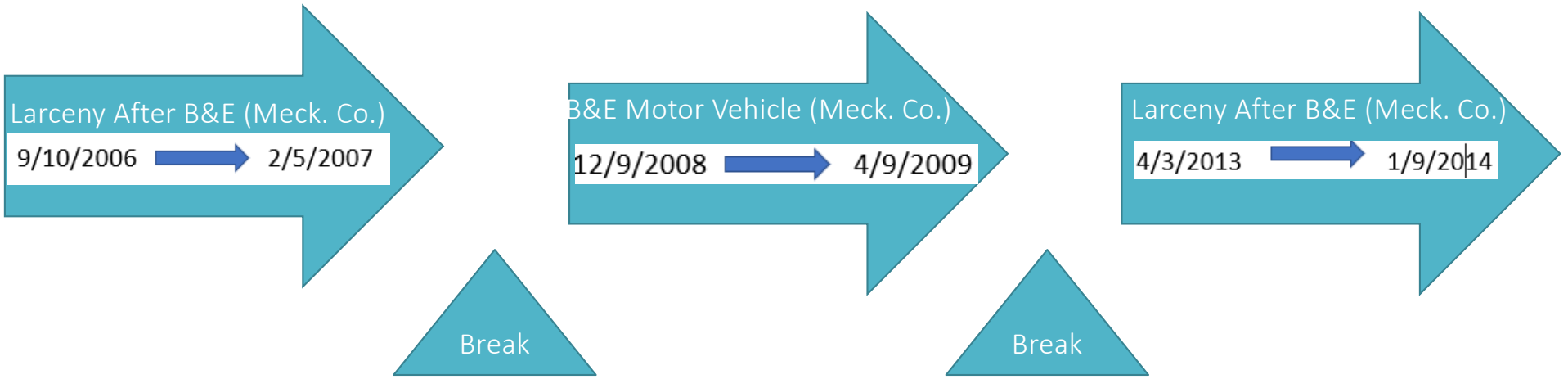
December 11, 2017

HABITUAL FELON G.S. 14-7.1

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that [redacted] is an habitual felon in that on or about September 10, 2006, [redacted] did commit the felony of Larceny after Breaking and or Entering, and that on or about February 5, 2007, [redacted] was convicted of the felony of Larceny after Breaking and or Entering in the Superior Court of Mecklenburg County, North Carolina; and that on or about December 9, 2008, [redacted] did commit the felony of Breaking and or Entering a Motor Vehicle, and that on or about April 9, 2009, [redacted] was convicted of the felony of Breaking and or Entering a Motor Vehicle in the Superior Court of Mecklenburg County, North Carolina; and that on or about April 3, 2013, [redacted] did commit the felony of Larceny after Breaking and or Entering, and that on or about January 9, 2014, [redacted] was convicted of the felony of Larceny after Breaking and or Entering in the Superior Court of Mecklenburg County, North Carolina, against the form of the statute in such case made and provided and against the peace and dignity of the State.

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

Non-Overlapping



How is HF Status Proven?

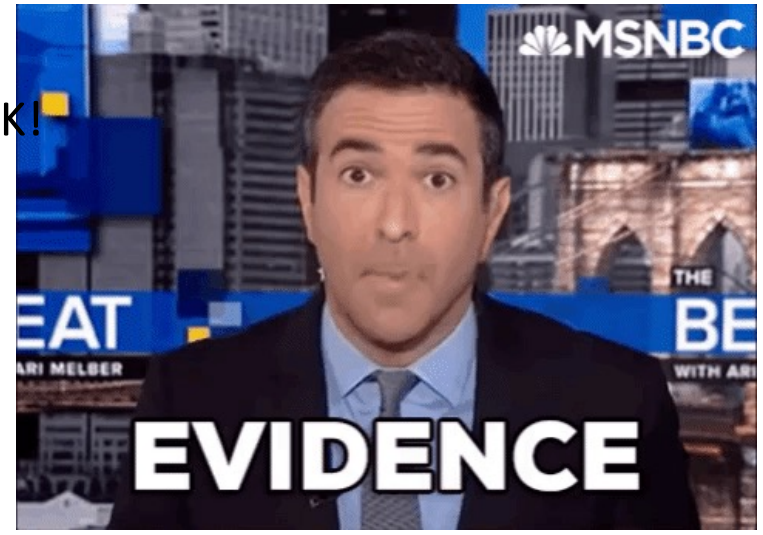
Stipulation of both parties (N.C.G.S. §14-7.4)

-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.



Don’t Fall Asleep Behind the Wheel!

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)

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

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)

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)

Sample Non-HF Plea Transcript

STATE VERSUS	File No. NON-HABITUAL

Name Of Defendant
JOHN DOE

20. Have you agreed to plead ☒ guilty ☐ guilty pursuant to *Alford* ☐ no contest as part of a plea arrangement? *(if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)* (20) YES

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

PLEA ARRANGEMENT

Defendant enters this plea of guilty to the following:

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

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

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

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

☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as (22) YES

Sample HF Plea Transcript

STATE VERSUS	File No. HABITUAL

Name Of Defendant
JOHN DOE

20. Have you agreed to plead ☒ guilty ☐ guilty pursuant to *Alford* ☐ no contest as part of a plea arrangement? *(if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)* (20) YES

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

PLEA ARRANGEMENT

Defendant enters this plea of guilty to the following:

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

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

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

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

☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as (22) YES

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)*

Must Run Consecutive

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)

Critique Every HF Indictment

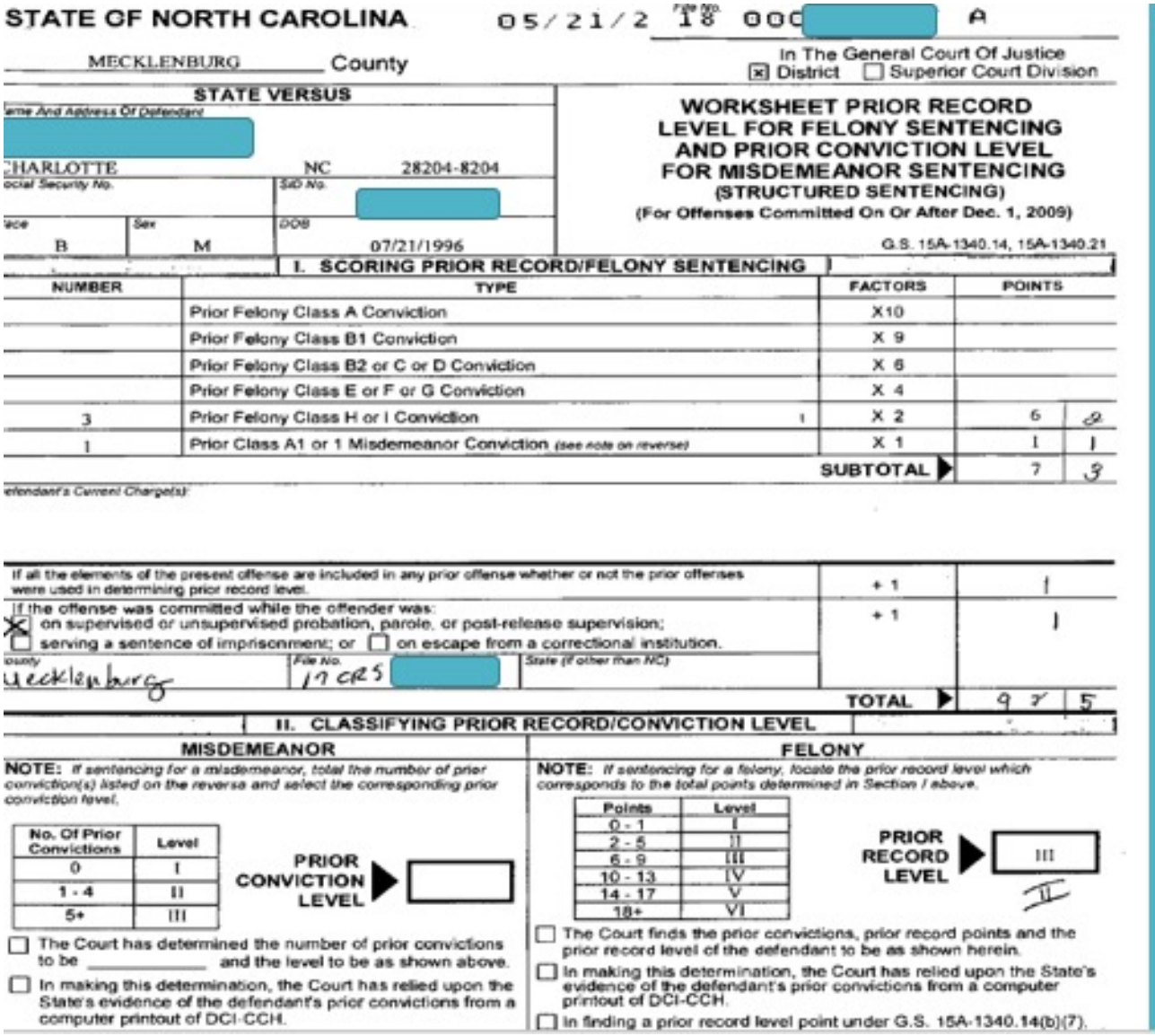
Look for irregularities in HF indictment:

- 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

Prior Record Level: No Double-Dipping



STATE OF NORTH CAROLINA 05/21/2 File No. 18 000 [redacted] A

MECKLENBURG County

In The General Court Of Justice
☒ District ☐ Superior Court Division

STATE VERSUS

Name And Address Of Defendant
[redacted]
CHARLOTTE NC 28204-8204

Social Security No. | SID No. [redacted]

Race: B | Sex: M | DOB: 07/21/1996

WORKSHEET PRIOR RECORD LEVEL FOR FELONY SENTENCING AND PRIOR CONVICTION LEVEL FOR MISDEMEANOR SENTENCING
(STRUCTURED SENTENCING)
(For Offenses Committed On Or After Dec. 1, 2009)

G.S. 15A-1340.14, 15A-1340.21

I. SCORING PRIOR RECORD/FELONY SENTENCING

NUMBER	TYPE	FACTORS	POINTS	
	Prior Felony Class A Conviction	X10		
	Prior Felony Class B1 Conviction	X 9		
	Prior Felony Class B2 or C or D Conviction	X 6		
	Prior Felony Class E or F or G Conviction	X 4		
3	Prior Felony Class H or I Conviction	X 2	6	2
1	Prior Class A1 or 1 Misdemeanor Conviction (see note on reverse)	X 1	1	1
		SUBTOTAL ▶	7	3

Defendant's Current Charge(s):

If all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining prior record level.		+ 1	1
If the offense was committed while the offender was: ☒ on supervised or unsupervised probation, parole, or post-release supervision; ☐ serving a sentence of imprisonment; or ☐ on escape from a correctional institution.		+ 1	1
County: Mecklenburg	File No.: 17 CRS [redacted]	State (if other than NC):		
		TOTAL ▶	9 7	5

II. CLASSIFYING PRIOR RECORD/CONVICTION LEVEL

MISDEMEANOR

NOTE: *If sentencing for a misdemeanor, total the number of prior conviction(s) listed on the reverse and select the corresponding prior conviction level.*

No. Of Prior Convictions	Level
0	I
1 - 4	II
5+	III

PRIOR CONVICTION LEVEL ▶ [ ]

☐ The Court has determined the number of prior convictions to be _____ and the level to be as shown above.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

FELONY

NOTE: *If sentencing for a felony, locate the prior record level which corresponds to the total points determined in Section I above.*

Points	Level
0 - 1	I
2 - 5	II
6 - 9	III
10 - 13	IV
14 - 17	V
18+	VI

PRIOR RECORD LEVEL ▶ III II

☐ The Court finds the prior convictions, prior record points and the prior record level of the defendant to be as shown herein.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

☐ In finding a prior record level point under G.S. 15A-1340.14(b)(7).

Sample Record

Page 1

Sample Record

Page 2

V. PRIOR CONVICTION

NOTE: *Federal law precludes making computer printout of DCI-CCH (rap sheet) part of permanent public court record.*

NOTE: *The only misdemeanor offenses under Chapter 20 that are assigned points for determining prior record level for felony sentencing are misdemeanor death by vehicle [G.S. 20-141.4(a2)] and, for sentencing for felony offenses committed on or after December 1, 1997, impaired driving [G.S. 20-138.1] and commercial impaired driving [G.S. 20-138.2]. First Degree Rape and First Degree Sexual Offense convictions prior to October 1, 1994, are Class B1 convictions.*

Source Code	Offenses	File No.	Date Of Conviction	County (Name of State if not NC)	Class
	MISDEMEANOR LARCENY	17CRS	04/07/2017	MECKLENBURG	I
	BREAK OR ENTER A MOTOR VEHICLE	17CRS	04/07/2017 ✓	MECKLENBURG	I
	BREAK OR ENTER A MOTOR VEHICLE	16CRS	05/06/2016 ✓	MECKLENBURG	I
	LARCENY AFTER BREAK/ENTER	15CRS	09/08/2015 ✓	MECKLENBURG	H
	BREAKING AND OR ENTERING (F)	15CRS	09/08/2015	MECKLENBURG	H
	POSS STOLEN GOODS/PROP (M)	14CRS	10/10/2014	MECKLENBURG	I
	ATTEMPT BREAK/ENTER MOTOR VEH	14CRS	10/10/2014	MECKLENBURG	I
	TAMPERING WITH VEHICLE	12CR	12/11/2012	MECKLENBURG	2

	Prior Felony Class B1 Conviction	X 9		
	Prior Felony Class B2 or C or D Conviction	X 6		
	Prior Felony Class E or F or G Conviction	X 4		
3	Prior Felony Class H or I Conviction	X 2	6	2
1	Prior Class A1 or 1 Misdemeanor Conviction *(see note on reverse)*	X 1	1	1
		SUBTOTAL ▶	7	3

Defendant's Current Charge(s):

If all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining prior record level.	+ 1	1
If the offense was committed while the offender was: ☒ on supervised or unsupervised probation, parole, or post-release supervision; ☐ serving a sentence of imprisonment; or ☐ on escape from a correctional institution.	+ 1	1
	TOTAL ▶	9 7 5

County: Mecklenburg | File No.: 17 CRS [redacted] | State (if other than NC):

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

Improper Collateral Attacks

My lawyer was ineffective

Court that took conviction lacked jurisdiction

Guilty plea was not knowing and/or voluntarily made

Going to Trial

Habitual Felon trials are bifurcated.

Phase One, Phase Two, & perhaps Phase Three

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

PHASE ONE

If jury acquits or principal charge dismissed:

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

- Winner! Winner! Winner!

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

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

Sample HF Plea Transcript at Phase Two

STATE VERSUS	File No. HABITUAL (PHASE TWO)

Name Of Defendant
JOHN DOE

20. Have you agreed to plead ☒ guilty ☐ guilty pursuant to *Alford* ☐ no contest as part of a plea arrangement? *(if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)* (20) YES

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

PLEA ARRANGEMENT

The Defendant will plead guilty to the Habitual Felon status.

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

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

☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as (22) YES

Jury trial for HF Status

- Beyond reasonable doubt
- Three (3) prior non-overlapping felony convictions
- The main evidence typically is a certified court records

- <u>Permissible Closing Arguments in Phase 2</u>:
  - 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

PHASE 3

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

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

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

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)

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?

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

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

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?

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

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

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

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%

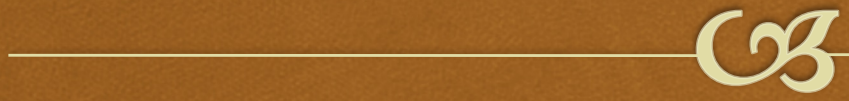
42 divided by 20 = 2.1 STRIKE RATIO

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.

Mitigation Basics



Josie Van Dyke

Sentencing Solutions, Inc.

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.

"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 (Can be broad)
  - Family History (of above items and criminality)
  - The list goes on ….

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.

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.

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?

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?
- Were you ever involved in religious activites?
- What are your job skills?
- What classes have you taken (even while incarcerated)?
- This is just a starter list.

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.

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.”

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.

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.

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.

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.

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.

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 may need to call again.

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.

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 involvement 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.

Connection is Key

- Identify key mitigation points or themes
- Provide support and specifics related to those themes.
- Explain how they connect to the criminal offense or behavior surrounding the charges.
- Describe how this is mitigating for the particular client and this charge/offense.
- This can be useful not only in presenting to the ADA and Judge but also shows the client how hard you are working for them.

Contact Us

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