UNC SCHOOL OF GOVERNMENT

2021 Higher-Level Felony Defense Training

Sept. 14-16, 2021 / Chapel Hill, NC

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

Tuesday, Sept. 14

9:00-9:30 am	Check-in
9:30-9:45 am	**Welcome** (15 mins.)
9:45-10:45	**Preparing for Serious Felony Cases** (60 mins.) Phil Dixon, Defender Educator UNC School of Government, Chapel Hill, NC
10:45-11:00 am	*Break*
11:00-12:00 pm	**Defending Eyewitness Identification Cases** (60 mins.) Laura Gibson, Assistant Public Defender Beaufort County Office of the Public Defender, Washington, NC
12:00-1:00 pm	*Lunch* (provided in the building)
1:00-2:00 pm	**Habitual Felon Cases** (60 mins.) Jason St. Aubin, Assistant Public Defender Mecklenburg County Office of the Public Defender, Charlotte, NC
2:00-2:15 pm	*Break*
2:15-3:00 pm	**Mitigation Investigation** (45 mins.) Josie Van Dyke, Mitigation Specialist Sentencing Solutions, Inc.
3:00-4:00	**Client Rapport** (60 mins.) (Ethics) Tucker Charns, Regional Defender Office of Indigent Defense Services, Durham, NC
4:00 pm	**Adjourn**

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Wednesday, Sept. 15

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*
10:30-11:30 am	**Essentials of Preservation** (60 mins.) Glenn Gerding, Appellate Defender Office of the Appellate Defender, Durham, NC
11:30-12:30 pm	**Storytelling and Visual Aides at Sentencing** (60 mins.) Sophorn Avitan and Susan Weigand, Assistant Public Defenders Mecklenburg Co. Public Defender's Office, Charlotte, NC
12:30-1:30 pm	Lunch *(provided in building)**
1:30-3:00 pm	**Brainstorming, Preparing, and Presenting a Sentencing Argument** (90 mins.)
3:00-3:15 pm	*Break*
3:15-4:00 pm	**Working with Experts** (45 minutes) Sarah Olson, Forensic Resource Counsel Office of Indigent Defense Services, Durham, NC
4:00 pm	**Adjourn**

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Thursday, Sept. 16

9:30-10:15 am	**Addressing Race and Other Sensitive Topics in Voir Dire** (45 mins.) Emily Coward, Research Attorney UNC School of Government, Chapel Hill, NC
10:15-10:30	*Break*
10:30-11:30	**Basics of Batson Challenges** (60 mins.) Hannah Autry, Attorney Center for Death Penalty Litigation, Durham, NC Lisa Miles, Attorney, Durham NC
11:15-12:15 pm	**Peremptory and For Cause** (60 mins.) James Davis, Attorney Davis and Davis, Salisbury, NC
12:15 pm	**Concluding Remarks**
12:30 pm	**Adjourn**

TOTAL CLE HOURS: 13.00 (including 1.0 hours of Ethics credit) *pending CLE Approval

Note: State employees, including assistant public defenders, may not claim reimbursement for lunches provided during the course.

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ONLINE RESOURCES FOR INDIGENT DEFENDERS

ORGANIZATIONS

NC Office of Indigent Defense Services
http://www.ncids.org/

UNC School of Government
http://www.sog.unc.edu/

Indigent Defense Education at the UNC School of Government
https://www.sog.unc.edu/resources/microsites/indigent-defense-education

TRAINING

Calendar of Live Training Events
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/calendar-live-events

Online Training
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/online-training-cles

MANUALS

Orientation Manual for Assistant Public Defenders
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/orientation-manual-assistant-public-defenders-introduction

Indigent Defense Manual Series (collection of reference manuals addressing law and practice in areas in which indigent defendants and respondents are entitled to representation of counsel at state expense)
http://defendermanuals.sog.unc.edu/

UPDATES

On the Civil Side Blog
http://civil.sog.unc.edu/

NC Criminal Law Blog
https://www.sog.unc.edu/resources/microsites/criminal-law-north-carolina/criminal-law-blog

Criminal Law in North Carolina Listserv (to receive summaries of criminal cases as well as alerts regarding new NC criminal legislation)
http://www.sog.unc.edu/crimlawlistserv

TOOLS and RESOURCES

Collateral Consequences Assessment Tool (centralizes collateral consequences imposed under NC law and helps defenders advise clients about the impact of a criminal conviction)
http://ccat.sog.unc.edu/

Motions, Forms, and Briefs Bank
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/motions-forms-and-briefs

Training and Reference Materials Index (includes manuscripts and materials from past trainings co-sponsored by IDS and SOG)
http://www.ncids.org/Defender%20Training/Training%20Index.htm

DEFENDING EYEWITNESS IDENTIFICATION

Laura Neal Gibson Assistant
Public Defender Second
Judicial District

Presented:
Higher Level Felony Defense
September 14, 2021
UNC School of Government

CONTENTS

NC EYEWITNESS IDENTIFICATION REFORM ACT

Article 14A.
Eyewitness Identification Reform Act.

§ 15A-284.50. Short title.

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

§ 15A-284.51. Purpose.

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

§ 15A-284.52. Eyewitness identification reform.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

f. The sources of all photographs or persons used.

g. In a photo lineup, the photographs themselves.

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

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

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

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

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

(3) Any other procedures that achieve neutral administration.

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

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

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

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

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

(1) Standard instructions for eyewitnesses.

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

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

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

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

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

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

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

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

THE BASICS

Types of Eyewitness Identification

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

Constitutional Issues that Arise with Eyewitness Identification

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

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

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

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

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

ISSUES OF MEMORY

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

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

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SAMPLE MOTIONS TO SUPPRESS AND OTHER RESOURCES

NCIDS Motions Bank

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

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

2) Motion for Disclosure of Identification Procedures

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

3) Ex Parte Motion for Expert Witness Funds

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

4) Motion to Suppress Show-up Identification

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

Eyewitness Identification: Tools for Litigating the Identification Case

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

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

Procedures for Challenging Eyewitness Identification Evidence

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

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

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

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

FACTS

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

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

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

ARGUMENT

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

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

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

PRAYER FOR RELIEF

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

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

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

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

Respectfully submitted this the _____th day of April, 2019.

OFFICE OF THE PUBLIC DEFENDER
DEFENDER DISTRICT TWO

_____

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

OFFICE OF THE PUBLIC DEFENDER
DEFENDER DISTRICT TWO

_____

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

CERTIFICATE OF SERVICE

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

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

This, the _____th day of April, 2019.

OFFICE OF THE PUBLIC DEFENDER
DEFENDER DISTRICT TWO

_____

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

OFFICE OF THE PUBLIC DEFENDER
DEFENDER DISTRICT TWO

_____

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

JURY INSTRUCTIONS

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

Photo Lineup Requirements G.S. 15A-284.52

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

Live Lineup Requirements G.S. 15A-284.52

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

Habitual Felons (HF)

A law that allows for greater punishment for "repeat offenders."

1

No Big Deal!

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

2

A Nationwide Trend

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

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

3

Habitual Felons vs. Habitual Crimes

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

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

4

Habitual Felon Law in NC

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

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

5

How Does It Work?

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

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

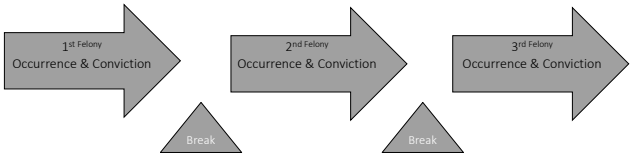
6

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

7

Non-Overlapping



8

Eligibility for Violent HF

A defendant who:

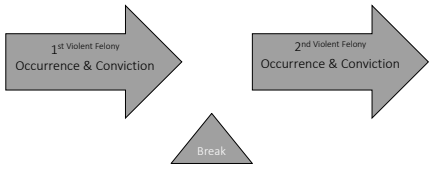
Has been *convicted*,

Of *two violent felonies*,

Commits a third Class A through E felony

9

Non-Overlapping



10

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
- **Note**: Excludes some felony offenses that might naturally be considered violent (assaults)

11

Punishment for Violent HF

12

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)

13

HF Indictment N.C.G.S. §14-7.3

- Must be separate from the principal felony Indictments
  - Can be listed a Count II to the Principal Felony

    State v. Young, 120 N.C. App. 456, 459-60 (1995)

- **Must** include the following (*for each of the 3 felonies)*:
  1. Date of the commission*;*
  2. Date of the conviction*;*
  3. State or sovereign against which the felony was committed*; and*
  4. Identity of the court in which the conviction took place

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Sample HF Indictment

STATE OF NORTH CAROLINA
County of Mecklenburg

The State of North Carolina
vs.
W/M DOB: January 26,
Charlotte, North Carolina 28208
Defendant.

File #
Film #

In The General Court of Justice
Superior Court Division

December 11, 2017

HABITUAL FELON G.S. 14-7.1

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

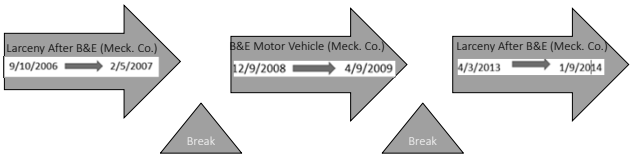
9/10/2006 → 2/5/2007 Larceny After B&E (Meck. Co.)

12/9/2008 → 4/9/2009 B&E Motor Vehicle (Meck. Co.)

4/3/2013 → 1/9/2014 Larceny After B&E (Meck. Co.)

15

Non-Overlapping



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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

Note: The original or certified copy of the court record of conviction is *prima facie* evidence of that prior conviction.

17

Don't Fall Asleep Behind the Wheel!

18

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
  - Client Example
  - Perhaps it's time to plead quick?

19

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

20

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

Note: It is important to analyze the record and interview client to determine exposure to these misdemeanor "bump-up" felonies and to the HF status.

21

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

22

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

23

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

24

Must Run Consecutive

25

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

26

Critique Every HF Indictment

Look for irregularities in HF indictment:

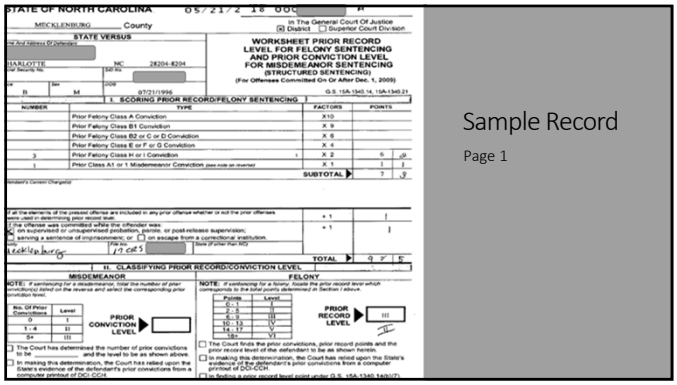
- Overlapping prior felonies
- Court records mistaken or missing
- Priors were not actually felonies. *State v. Moncree*, 188 N.C. App. 221 (2008).
- Different names or date of birth in court records

Suggestion: Make it a habit to obtain copies of the alleged prior judgments and transcripts prior to trial

27

Prior Record Level: No Double-Dipping

28

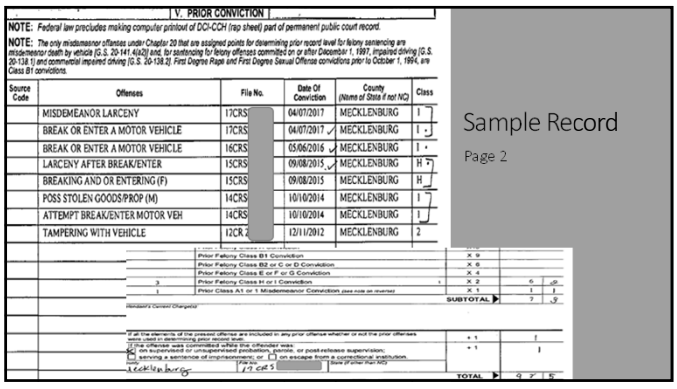


STATE OF NORTH CAROLINA
MECKLENBURG County
In The General Court Of Justice
STATE VERSUS
WORKSHEET PRIOR RECORD LEVEL FOR FELONY SENTENCING AND PRIOR CONVICTION LEVEL FOR MISDEMEANOR SENTENCING (STRUCTURED SENTENCING)
(For Offenses Committed On Or After Dec. 1, 2009)
I. SCORING PRIOR RECORD/FELONY SENTENCING
II. CLASSIFYING PRIOR RECORD/CONVICTION LEVEL
MISDEMEANOR
FELONY

Sample Record

Page 1

29



V. PRIOR CONVICTION

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

Source Code	Offenses	File No.	Date Of Conviction	County (Name of State if not NC)	Class
	MISDEMEANOR LARCENY	17CRS	04/07/2017	MECKLENBURG	1
	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	1
	ATTEMPT BREAK/ENTER MOTOR VEH	14CRS	10/10/2014	MECKLENBURG	1
	TAMPERING WITH VEHICLE	12CR 2	12/11/2012	MECKLENBURG	2

Sample Record

Page 2

30

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

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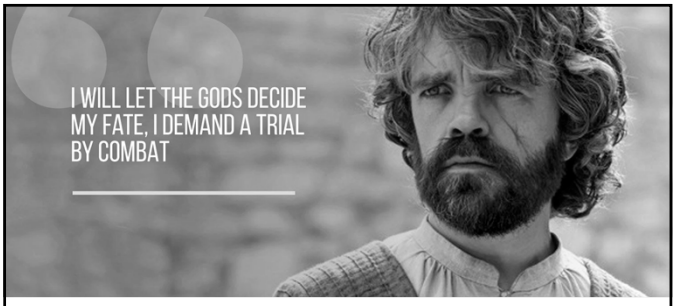
Improper Collateral Attacks

My lawyer was ineffective

Court that took conviction lacked jurisdiction

Guilty plea was not knowing and/or voluntarily made

32



Going to Trial

33

Habitual Felon trials are bifurcated.

Phase One, Phase Two, & perhaps Phase Three

34

PHASE ONE

The guilt/innocence determination of the principal felony

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

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

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PHASE ONE

NOT GUILTY

NOT GUILTY

If jury acquits or principal charge dismissed:

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

NOT GUILTY

36

PHASE ONE

<u>If convicted:</u>

- **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

**Sunny: Since this is sentencing AFTER HF status is proven, shouldn't this be under Phase TWO?

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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

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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

39

PHASE TWO

Jury trial for HF Status

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

- Permissible Closing Arguments in Phase 2:
  - May now refer to the enhanced sentence your HF client is exposed to
  - Watch for different names or dates of birth
  - Exploit sloppy judgments
    - When the stakes are this high, discrepancies like "that" are unacceptable

40

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.

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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

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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

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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 in Mecklenburg County

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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
  - Generally, younger/newer HF clients are more difficult to work with
  - Should a non-habitual offer be taken?

45

Constitutional Issues

Generally, these claims have been rejected:

Double Jeopardy
Equal Protection
Selective Prosecution
Separation of Powers
DA policy for going after all but not really doing so violates above
Gives DA the legislative power to define sentence for crimes
Cruel and Unusual Punishment

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

47

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?

48

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

49

"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.

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UNC SCHOOL OF GOVERNMENT

ADMINISTRATION OF JUSTICE BULLETIN NO. 2013/07 | AUGUST 2013

North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws

Jeffrey B. Welty

Jeff Welty is an assistant professor of public law and government at the UNC School of Government. He may be reached at (919) 843-8474 or welty@sog.unc.edu. Research attorney Christopher Tyner assisted in the preparation of this document.

I. Introduction

The General Assembly has addressed the issue of criminal recidivism in several ways. For example, defendants with extensive criminal histories are subject to greater punishment under Structured Sentencing.[1] And specific statutes apply to defendants who repeatedly drive while impaired[2] or assault others.[3]

This bulletin, an updated and expanded version of one published in 2008,[4] concerns three closely related statutory provisions that target repeat serious offenders: the habitual felon laws,[5] the violent habitual felon laws,[6] and the habitual breaking and entering laws.[7] The habitual felon laws were enacted in 1967. In simple terms, they provide for increased punishment for a defendant who, having already been convicted of three felonies, commits a fourth. The violent habitual felon laws were enacted in 1994. They provide for a mandatory sentence of life in prison without the possibility of parole for a defendant who, having already been convicted of two violent felonies, commits a third. Finally, the habitual breaking and entering laws were enacted in 2011. They provide for increased punishment for a defendant who, having already been convicted of one felony breaking and entering crime, commits a second.

The habitual felon, violent habitual felon, and habitual breaking and entering statutes do not define crimes. Rather, they are penalty enhancement provisions that apply to defendants who have achieved a specific status. Thus, a defendant cannot be prosecuted under these laws simply for having a qualifying criminal record. There must be a current offense to which the recidivist charge[8] can attach.

According to the Administrative Office of the Courts, 3,183 habitual felon charges were brought in 2012. By contrast, just seventeen violent habitual felon charges were brought that year. Two-hundred fifty habitual breaking and entering charges were brought in 2012, though that was the first year it was possible to bring such charges, so it is not clear yet whether that figure is typical or is likely to rise as prosecutors and others become more familiar with the law.

The habitual offender laws have created terminological confusion. Courts have referred to the prior convictions that render the defendant a habitual felon or a violent habitual felon as "previous felonies,"[9] "predicate felon[ies],"[10] and "underlying felonies."[11] Courts have used confusingly similar terms to refer to the new offense to which the recidivist charge attaches, describing

1. Section 15A-1340.14 of the North Carolina general Statutes (hereinafter G.S.) (rules for determining a felony defendant's prior record level); 15A-1340.17 (chart setting out sentencing ranges for each offense class and prior record level).
2. G.S. 20-138.5 (habitual driving while impaired).
3. G.S. 14-33.2 (habitual misdemeanor assault).
4. Jeff Welty, *North Carolina's Habitual Felon and Violent Habitual Felon Laws*, Admin. of Just. Bull. No. 2008/04 (UNC School of Government, June 2008), http://sogpubs.unc.edu/electronicversions/pdfs/aojb0804.pdf.
5. G.S. 14-7.1 through -7.6
6. G.S. 14-7.7 through -7.12.
7. G.S. 14-7.25 through -7.31.
8. Because the habitual offender laws do not define crimes, it is arguably inaccurate to refer to, for example, a habitual felon "charge." However, the usage is so convenient, and so universal, that it is adopted in this bulletin.
9. State v. Cogdell, 165 N.C. App. 368, 371 (2004).
10. State v. Brewington, 170 N.C. App. 264, 280 (2005).
11. State v. Scott, 167 N.C. App. 783, 786 (2005).

that offense as the "underlying felony,"[12] the "substantive felony,"[13] the "underlying substantive felony,"[14] and the "predicate substantive felony."[15] The habitual offender statutes refer to the new offense as the "principal felony."[16]

For the sake of clarity, this bulletin generally will use the terms "previous felony," "previous violent felony," and "previous felony offense of breaking and entering" to describe the prior convictions that render the defendant a habitual offender. This bulletin generally will use the terms "substantive felony," "substantive violent felony," or "substantive offense" to describe the new offense to which the recidivist charge attaches. This bulletin will not use, except when quoting court opinions, the terms "underlying" or "predicate," as those terms are ambiguous.

II. Substantive Offenses

This section describes the offenses that can, and cannot, serve as substantive offenses to which a habitual offender charge may attach.

A. Habitual Felon

Any offense that is a felony under state law can serve as a substantive felony to which a habitual felon charge may attach.[17] This includes offenses that are felonies only by virtue of their own recidivist provisions, such as habitual driving while impaired,[18] or habitual misdemeanor assault.[19] It also includes felony speeding to elude arrest, even though speeding to elude arrest also can sometimes be a misdemeanor.[20] And, although the court of appeals briefly held that simple possession of cocaine was a misdemeanor, the North Carolina Supreme Court has clarified that it, too, is a felony that can serve as a substantive felony.[21] However, a conviction of a felony breaking and entering offense that is elevated under the habitual breaking and entering statute likely cannot be further elevated under the habitual felon statute.[22]

B. Violent Habitual Felon

The violent habitual felon statutes provide for enhanced punishment for certain defendants who commit a "violent felony."[23] The statutes define "violent felony" to encompass all, and only, Class A through E felonies.[24] This excludes some felony offenses that might naturally be

12. State v. Davis, 186 N.C. App. 242, 248 (2007).
13. *Cogdell*, 165 N.C. App. at 373.
14. State v. Glasco, 160 N.C. App. 150, 160 (2003).
15. *Scott*, 167 N.C. App. at 786.
16. G.S. 14-7.3, -7.5, -7.6, -7.9, -7.11, -7.28, -7.30.
17. G.S. 14-7.2, -7.6 ("When an habitual felon . . . commits any felony under the laws of the State of North Carolina," he or she must be sentenced under the habitual felon provisions.)
18. G.S. 20-138.5. *See also* State v. Baldwin, 117 N.C. App. 713 (1995).
19. G.S. 14-33.2. *See also* State v. Holloway, ___ N.C. App. ___, 720 S.E.2d 412 (2011); State v. Smith, 139 N.C. App. 209 (2000). However, convictions of habitual misdemeanor assault cannot serve as previous convictions for habitual felon purposes. See *State v. Shaw*, ___ N.C. App. ___, 737 S.E.2d 596 (2012), discussed *infra* note 49 and accompanying text.
20. *Scott*, 167 N.C. App. at 786–87. *See also* G.S. 20-141.5.
21. *See* State v. Jones, 358 N.C. 473 (2004).
22. *See infra* note 231 and accompanying text.
23. G.S. 14-7.12.
24. G.S. 14-7.7.

considered violent. For example, it excludes assault inflicting serious bodily injury,[25] assault by strangulation,[26] aggravated assault on a handicapped person,[27] elder abuse,[28] and assault on a law enforcement officer inflicting serious bodily injury.[29] The statutory definition also includes a number of offenses that might not naturally be considered violent, such as embezzlement of more than $100,000,[30] obtaining more than $100,000 by false pretenses,[31] trafficking in stolen identities,[32] making a false report about a weapon of mass destruction or perpetrating a hoax involving a false weapon of mass destruction,[33] and a variety of drug manufacturing and trafficking offenses, such as manufacturing methamphetamine,[34] trafficking in more than 10,000 pounds of marijuana,[35] more than 400 grams of cocaine,[36] more than 200 grams of methamphetamine,[37] more than 14 grams of heroin,[38] and so forth.

C. Habitual Breaking and Entering

The statute applies only to defendants who are charged with "a felony offense of breaking and entering."[39] The statute defines "breaking and entering" to include:

- First-degree burglary, G.S. 14-51[40]
- Second-degree burglary, G.S. 14-51[41]
- Breaking out of dwelling house burglary, G.S. 14-53[42]
- Felony breaking or entering, G.S. 14-54(a)[43]
- Breaking or entering a building that is a place of religious worship, G.S. 14-54.1[44]
- Any repealed or superseded offense that is "substantially equivalent" to the above
- Any offense committed in another jurisdiction that is "substantially equivalent" to the above[45]

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25. G.S. 14-32.4(a) (Class F felony).
26. G.S. 14-32.4(b) (Class H felony).
27. G.S. 14-32.1(e) (Class F felony).
28. G.S. 14-32.3(a) (Class F or H felony, depending on seriousness of injury suffered by elder victim).
29. G.S. 14-34.7(a) (Class F felony).
30. G.S. 14-90 (Class C felony).
31. G.S. 14-100 (Class C felony).
32. G.S. 14-113.20A, -113.22(a1) (Class E felony).
33. G.S. 14-288.23, -288.24 (Class D felonies).
34. G.S. 90-95(b)(1a) (Class C felony).
35. G.S. 90-95(h)(1)d. (Class D felony).
36. G.S. 90-95(h)(3)c. (Class D felony).
37. G.S. 90-95(h)(3b)c. (Class C felony).
38. G.S. 90-95(h)(4)b., c. (Class C or E felony, depending on quantity).
39. G.S. 14-7.26, -7.27.
40. First-degree burglary is a Class D felony. G.S. 14-52.
41. Second-degree burglary is a Class G felony. G.S. 14-52.
42. This is a Class D felony. G.S. 14-53.
43. The reference to subsection (a) excludes misdemeanor breaking or entering under G.S. 14-54(b), consistent with the repeated statutory references to "felony offenses of breaking and entering." *See, e.g.,* G.S. 14-7.27. Felony breaking or entering requires the intent to commit any felony or larceny in the building and is a Class H felony. G.S. 14-54(a).
44. This is a Class G felony. G.S. 14-54.1.
45. *See* G.S. 14-7.25(1). This list defines both which offenses may be used as a substantive breaking and entering offense and which offenses may be used as previous breaking and entering offenses. Obviously, the references to repealed, superseded, and out-of-state convictions are included so that such convictions

III. Previous Offenses

This section describes the offenses that can, and cannot, serve as previous offenses on which a habitual offender charge may be based.

A. Habitual Felon

1. Offenses That May Be Used as Previous Felonies

In general, a conviction constitutes a previous felony conviction if it is a conviction for "an offense which is a felony under the laws of the State or other sovereign" where the conviction took place, "regardless of the sentence actually imposed."[46] (The fact that the sentence does not matter suggests that a previous North Carolina felony that resulted in a prayer for judgment continued, or PJC, may be used as a previous felony.[47])

However, there are several exceptions to the general rule. The following do not qualify as previous felonies:

- Convictions for "federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors"[48]
- Convictions for habitual misdemeanor assault[49]
- Convictions incurred prior to July 6, 1967[50]
- North Carolina convictions incurred prior to July 1, 1975, if based on a plea of no contest[51]
- Convictions that have been pardoned[52]

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may be used as previous felonies, a topic discussed *infra* notes 81–82 and accompanying text. The substantive felony will always be a current North Carolina felony offense.

46. G.S. 14-7.1.

47. The fact that the conviction, rather than the sentence, is critical is illustrated by *State v. McGee*, 175 N.C. App. 586, 589 (2006). In *McGee*, the defendant was found guilty of his first felony before he committed his second, but he fled before sentencing, so judgment was continued; final judgment was entered only after he committed and was arrested for his second felony. This did not violate the requirement of non-overlapping felonies, discussed *infra* note 58 and accompanying text, because "the plain language of the statute refers to 'conviction' and not entry of judgment or sentencing." Even if legally permissible, using a PJC as a previous conviction may create practical difficulties. For example, the usual way of proving the existence of a prior conviction is by introducing the judgment that embodies the conviction. But by definition, a conviction that results in a PJC does not result in a judgment. Depending on how the PJC was documented, this difficulty may not be insurmountable. The use of documents other than a judgment to prove a previous conviction is discussed *infra* notes 165–66 and accompanying text.

48. G.S. 14-7.1.

49. Convictions for habitual misdemeanor assault are felonies, and so, without some other provision to the contrary, would qualify. However, in 2004, the habitual misdemeanor assault statute, G.S. 14-33.2, was amended to provide that "[a] conviction under this section shall not be used as a prior conviction for any other habitual offense statute." The court of appeals has since ruled that even habitual misdemeanor assault convictions incurred before the amendment may not be used as previous convictions in habitual felon proceedings. State v. Shaw, ___ N.C. App. ___, 737 S.E.2d 596 (2012).

50. G.S. 14-7.1.

51. State v. Petty, 100 N.C. App. 465, 467–68 (1990). The reason for the distinction is that, prior to the 1975 enactment of G.S. 15A-1022(c), a no contest plea resulted in the imposition of a sentence without an adjudication of guilt. Afterwards, however, a court accepting a no contest plea was required to establish a factual basis for the plea, and upon acceptance of the plea adjudicated the guilt of the defendant.

52. G.S. 14-7.1 ("Any felony offense to which a pardon has been extended shall not for the purpose of this Article constitute a felony. The burden of proving such pardon shall rest with the defendant and the State shall not be required to disprove a pardon."). North Carolina law recognizes several kinds

Questions might arise regarding at least three additional classes of cases:

- Out-of-state convictions for offenses that are felonies under the law of the foreign jurisdiction but that would be misdemeanors if committed in North Carolina
- Offenses that were misdemeanors at the time of the previous convictions but now are felonies
- Offenses that were felonies at the time of the previous convictions but now are misdemeanors

There are no North Carolina appellate decisions on point as to any of the issues raised by these three classes of cases. The first is the simplest to analyze, for G.S. 14-7.1 refers to the classification of the offense "under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned." There is no suggestion that the offense needs to be compared or analogized to North Carolina law, unlike, for example, the provisions in G.S. 14-7.7(b) that apply to violent habitual felon proceedings. (Those provisions are discussed below.) Thus, the language of G.S. 14-7.1 weighs in favor of using the classification of the jurisdiction in which the conviction was incurred.[53]

The second and third classes of cases both involve convictions of offenses that have been reclassified since the conviction—either "upgraded" from misdemeanors to felonies, or "downgraded" from felonies to misdemeanors. The text of G.S. 14-7.1 is less clear on these points, and again, there are no appellate cases on point. The argument for judging a previous conviction by the present classification of the offense is twofold. First, as explained below, in the violent habitual felon context, the current classification of the offense of which the defendant was previously convicted controls, not the classification at the time the previous conviction was incurred.[54] Second, when calculating a defendant's prior record level under Structured Sentencing, the current classification of previous convictions controls the number of points assigned to the convictions.[55] However, these parallels are undermined by the fact that both the violent habitual felon and the Structured Sentencing laws contain specific statutory provisions that mandate judging a previous conviction by the present classification of the offense; that stands in stark contrast to G.S. 14-7.1, which contains no comparable language. The majority of cases in other jurisdictions support judging a conviction by its classification at the time it was incurred,[56] and this appears to be the better view under North Carolina's habitual felon statutes as well.

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of pardons, any of which is likely to place the offense off limits for habitual felon purposes. *Cf.* Booth v. State, ___ N.C. App. ___, ___, 742 S.E.2d 637, 639, *temporary stay allowed*, 743 S.E.2d 644 (2013) (concluding that while "[i]t is true that there are different types of pardons," the use of the word "pardon" without modification or limitation in the Felony Firearms Act, G.S. 14-415.1, means that "all types of pardons, whether they are denominated as unconditional, conditional, or of innocence," are sufficient to remove a conviction from the scope of the Act).

53. The rule is otherwise in some other states, *see, e.g.,* 6 Wayne R. LaFave et al., Criminal Procedure § 26.6(b) (3d ed. 2007), but the result in each jurisdiction is dictated by "the phraseology of the [recidivist] statute" in question, R. P. Davis, Annotation, *Determination of Character of Former Crime as a Felony, so as to Warrant Punishment of an Accused as a Second Offender,* 19 A.L.R. 2d 227 (1951; 2005).

54. G.S. 14-7.7(b)(2).

55. G.S. 15A-1340.14(c).

56. *See* Davis, *supra* note 53, § 5 (collecting cases).

2. Number

A habitual felon charge can only be brought against a defendant who has three previous felony convictions. In other words, it increases the punishment for a defendant's fourth "strike."[57]

3. Timing

For purposes of habitual felon proceedings, under G.S. 14-7.1, "[t]he commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony," and the third previous felony likewise must have been committed after the defendant was convicted of the second. This requirement is sometimes called the requirement of non-overlapping felonies.

For purposes of the requirement of non-overlapping felonies, the date of conviction is the date of the plea or verdict, not the date of sentencing.[58]

The statute does not explicitly address the situation where a defendant's third previous felony conviction is not obtained until after the defendant has committed a fourth felony offense. For example, suppose a defendant commits a fourth felony while the third felony charge is pending; is subsequently convicted of the third felony; and only later is arrested, charged, and convicted of the fourth felony. Reasonable arguments can be made both ways regarding the propriety of a habitual felon charge in such a case. The defendant might argue that a habitual felon charge would be improper, first because it would be anomalous for the requirement of non-overlapping felonies to apply to previous felonies but not to the substantive felony, and second because G.S. 14-7.6 provides for enhanced punishment when "an habitual felon . . . commits any felony," which arguably suggests that a defendant must already have obtained habitual felon status, by virtue of three convictions, prior to the commission of the substantive felony. The State might argue that a habitual felon charge is proper because, at the time of the conviction of the substantive felony, the defendant has "been convicted of . . . three felony offenses."[59] There is no North Carolina appellate case on point, and the case law from other states is mixed and heavily dependent on the wording of the specific statute at issue.[60]

4. Use of Offenses Committed Prior to Age 18

In habitual felon prosecutions, "felonies committed before a person attains the age of 18 years shall not constitute more than one felony."[61] In other words, regardless of how many felonies a defendant committed prior to the age of eighteen, only one conviction for such conduct may be used as a previous felony.

Because the statute requires that the defendant has "been convicted of or pled guilty to" the previous offense, the previous conviction must be an adult conviction, not a juvenile adjudication.[62]

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57. G.S. 14-7.1.

58. *See* State v. McGee, 175 N.C. App. 586, 589–90 (2006).

59. G.S. 14-7.1.

60. *See generally* Cynthia L. Sletto, Annotation, *Chronological or Procedural Sequence of Former Convictions as Affecting Enhancement of Penalty under Habitual Offender Statutes*, 7 A.L.R. 5th 263 §§ 7(c)–(d) (1992; 2008) (collecting cases).

61. G.S. 14-7.1.

62. *In re* Jones, 11 N.C. App. 437, 437 (1971) ("Juvenile proceedings in this State are not criminal prosecutions and a finding of delinquency in a juvenile proceeding is not synonymous with the conviction of a crime.").

5. Convictions Used for Other Purposes

If a defendant is prosecuted and convicted as a habitual felon, the previous felonies used to support the habitual felon conviction are not "used up." In other words, if the same defendant, after release from prison, commits another felony offense, the same previous felonies may be used to support the new habitual felon charge.[63]

Indeed, it is generally true that previous felonies used for some other purpose may also be used to support a habitual felon charge. Thus, previous convictions of habitual DWI may be used both to support a current charge of habitual DWI and to support a habitual felon charge for which the habitual DWI is the substantive felony.[64] Likewise, the same previous conviction may be used to support a current charge of felon in possession of a firearm and to support a habitual felon charge for which the felon in possession charge is the substantive felony.[65]

However, previous felonies used to support a habitual felon charge may not be used when determining a defendant's prior record level under Structured Sentencing.[66] The details of this prohibition are discussed below in the section of this bulletin regarding sentencing. Also discussed later in this bulletin[67] is the effect of an acquittal on a habitual felon charge; such an acquittal precludes the State from bringing a subsequent habitual felon charge based on the same previous felonies.

B. Violent Habitual Felon

1. Offenses That May Be Used as Previous Violent Felonies

Previous violent felonies are defined by statute to include: "(1) All Class A through Class E felonies[,] (2) Any repealed or superseded offense substantially equivalent to the offenses listed in subdivision (1)[, and] (3) Any offense committed in another jurisdiction substantially similar to the offenses set forth in subdivision (1) or (2)."[68] A previous conviction as a habitual felon does not constitute a previous violent felony.[69]

The simplest case is an in-state conviction that was Class E or higher when incurred and that remains Class E or higher at the time of the violent habitual felon proceeding; such a conviction plainly qualifies as a previous violent felony. "Upgraded" in-state convictions likewise qualify. In other words, an in-state conviction that was lower than Class E when incurred but that, as a result of statutory amendment, would be Class E or higher if committed at the time of the violent habitual felon proceeding, is a previous violent felony under the second prong of the definition, above.[70] Although there is no case law on point, the converse may also be true. That is, a

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63. State v. Smith, 112 N.C. App. 512, 517 (1993) ("[B]eing an habitual felon is a status, that once attained is never lost. If the legislature had wanted to require the State to show proof of three new underlying felonies before a new habitual felon indictment could issue, then the legislature could have easily stated such.").

64. State v. Misenheimer, 123 N.C. App. 156, 157–58 (1996).

65. *See* State v. Glasco, 160 N.C. App. 150, 160 (2003); State v. Crump, 178 N.C. App. 717, 719–22 (2006).

66. G.S. 14-7.6.

67. *See infra* note 144 and accompanying text.

68. G.S. 14-7.7(b).

69. G.S. 14-7.7(a).

70. State v. Wolfe, 157 N.C. App. 22, 37 (2003) (holding that conviction for voluntary manslaughter, which was a Class F felony at the time the conviction was incurred but which was a Class D felony at the time of the violent habitual felon proceeding, was a conviction of a "superseded offense substantially equivalent to" a current Class D felony, and therefore was a qualifying previous violent felony); State v. Mason, 126 N.C. App. 318, 323–24 (1997) (same, as to previous convictions for voluntary manslaughter

"downgraded" offense that was Class E or higher at the time of conviction but that was lower than Class E at the time of the violent habitual felon proceeding, might be held to be a "repealed or superseded offense" that is *not* "substantially equivalent to" a current Class E or higher felony, and therefore not a qualifying previous violent felony.

Out-of-state convictions work the same way. The simplest case is an out-of-state conviction for an offense that is substantially similar to a North Carolina offense that was Class E or higher when the out-of-state conviction was incurred and that remained Class E or higher at the time of the violent habitual felon proceeding; such a conviction would qualify as a previous violent felony. An unpublished case suggests that substantial similarity should be determined using an "elements-based approach."[71]

"Upgraded" out-of-state offenses also qualify. That is, if the analogous North Carolina offense was lower than Class E when the out-of-state conviction was incurred but was Class E or higher at the time of the violent habitual felon proceeding, the out-of-state conviction qualifies as a previous violent felony under the third prong of the definition.[72] Again, there is no case law on "downgraded" offenses, and they might be held not to qualify.

2. Number

A violent habitual felon charge can only be brought against a defendant who has two previous violent felony convictions.[73] In other words, it increases the punishment for a defendant's third "strike."

3. Timing

G.S. 14-7.7 provides that a defendant's second violent felony cannot be used to support a violent habitual felon charge "unless it is committed after the conviction or plea of guilty or no contest to the first violent felony." Thus, the requirement of non-overlapping felonies that is discussed above in connection with the habitual felon laws[74] also exists in the violent habitual felon context. And just as it is unclear in the habitual felon setting whether the final previous felony conviction must predate the defendant's commission of the current felony, it is unclear in the violent habitual felon setting whether the final previous violent felony must predate the defendant's commission of the current violent felony.[75]

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and assault with a deadly weapon inflicting serious injury; rejecting argument that this violates the Ex Post Facto Clause). Although *Wolfe* refers to the classification of the conviction "at the time the [violent habitual felon] case went to trial," 157 N.C. App. at 37, it is doubtful that a violent habitual felon charge could be predicated on a previous conviction that was Class E or higher at the time of the violent habitual felon trial but that was lower than Class E at the time when the substantive felony was committed.

71. State v. Snipes, No. COA12-542, 2013 WL 432582, at *3 (N.C. Ct. App. Feb. 5, 2013) (unpublished), *appeal dismissed*, 743 S.E.2d 217 (2013) (using such an approach to find substantial similarity between the Pennsylvania offense of rape and the North Carolina offense of second-degree sexual offense).

72. *See* State v. Stevenson, 136 N.C. App. 235, 245 (1999) (concerning a California conviction for assault with the intent to commit oral copulation; the analogous North Carolina offense is attempt to commit second-degree sex offense, which was a Class H felony at the time the conviction was incurred but a Class D felony at the time of the violent habitual felon proceeding; the conviction was properly counted as a previous violent felony).

73. G.S. 14-7.7.

74. *See supra* notes 58–60 and accompanying text.

75. *See supra* notes 59–60 and accompanying text.

4. Use of Offenses Committed Prior to Age 18

In habitual felon prosecutions, "felonies committed before a person attains the age of 18 years shall not constitute more than one felony."[76] In other words, regardless of how many felonies a defendant committed prior to the age of 18, only one conviction for such conduct may be used as a previous felony. No similar language appears in the violent habitual felon statutes. Therefore, there is likely no limit to the number of convictions for offenses committed prior to the age of 18 that may be used as previous violent felonies.

As in the habitual felon context, the violent habitual felon statute requires that the defendant has been "convict[ed]" of each previous offense, meaning that juvenile adjudications cannot be used as previous violent felonies.[77]

5. Convictions Used for Other Purposes

This issue is discussed above in connection with the habitual felon laws.[78] Although there are no violent habitual felon cases on point, the legal principles discussed there are equally applicable in the violent habitual felon context.

C. Habitual Breaking and Entering

1. Offenses That May Be Used as Previous Breaking and Entering Offenses

The statute applies to defendants who have been convicted[79] of "one or more prior felony offenses of breaking and entering in any federal court or state court in the United States."[80] Thus, the defendant must have a prior conviction that is (1) a felony, presumably as classified by the jurisdiction where the conviction took place,[81] and (2) for a crime within the definition of "breaking and entering" set out in G.S. 14-7.25 and discussed above.[82]

2. Number

The defendant needs only one previous conviction to qualify as a habitual breaking and entering status offender.[83] The law may be described as a "two strikes and you're out" law.

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76. G.S. 14-7.1.

77. G.S. 14-7.7(a). *See generally supra* note 62 and accompanying text.

78. *See supra* notes 63–66 and accompanying text.

79. As to whether a previous conviction that resulted in a prayer for judgment continued may be used to support a habitual offender charge, see *supra* note 47 and accompanying text.

80. G.S. 14-7.26.

81. Some question might arise about an out-of-state previous conviction that was a misdemeanor where it was incurred but that was for an offense that is substantially equivalent to a North Carolina felony.

82. *See supra* notes 39–45 and accompanying text. Recall that an out-of-state conviction may be used if it is for an offense that is "substantially equivalent" to a qualifying North Carolina crime. The statute does not say how substantial equivalence is to be determined. Courts might look to the Structured Sentencing context, where G.S. 15A-1340.14(e) sets out rules for assigning prior record level points to previous out-of-state convictions that are "substantially similar" to North Carolina offenses. The court of appeals has ruled that this determination is to be made by comparing the elements of the out-of-state and North Carolina crimes. *See, e.g.,* State v. Sanders, ___ N.C. App. ___, 736 S.E.2d 238 (2013) (citing State v. Fortney, 201 N.C. App. 662 (2010)); State v. Burgess, ___ N.C. App. ___, ___, 715 S.E.2d 867, 870 (2011) ("Whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense.").

83. G.S. 14-27.26.

3. Timing

The current offense must have been committed "after the conviction of the first felony offense of breaking and entering."[84] Because the habitual breaking and entering statute specifies that there can be no overlap between the previous conviction and the commission of the current offense, it is clearer than the habitual felon and violent habitual felon laws.[85]

4. Use of Offenses Committed Prior to Age 18

The statute states that "offenses of breaking and entering committed before the person is 18 years of age shall not constitute more than one felony of breaking and entering."[86] Because only one previous conviction is needed, as long as the defendant was at least 18 years old at the time he or she committed the current offense, the statute will be satisfied.

Because the statute requires that the defendant has "been convicted of or pled guilty to" the previous offense, the previous conviction must be an adult conviction, not a juvenile adjudication.[87]

5. Convictions Used for Other Purposes

This issue is discussed above in connection with the habitual felon laws.[88] Although there are no habitual breaking and entering cases on point, the legal principles discussed there are equally applicable in the habitual breaking and entering context.

IV. Charging

A. Who May Charge

The Justice Reinvestment Act of 2011 amended the habitual felon statute to provide that whether to charge a defendant as a habitual felon is a decision to be made by "[t]he district attorney, in his or her discretion."[89] Similar language is present in the habitual breaking and entering statute.[90] The violent habitual felon statute does not contain similar language, but given the close relationship between the habitual offender statutes, the decision whether to charge the defendant as a violent habitual felon should also be made by the district attorney.

Because the charging decision must be made by the district attorney, it is not appropriate for a magistrate to charge a defendant in an arrest warrant or a magistrate's order with being a habitual felon, a violent habitual felon, or a habitual breaking and entering status offender, even if the magistrate is aware that the defendant's criminal record renders him or her eligible for such a charge. Furthermore, arrest warrants and magistrates' orders may only be used to charge "crimes,"[91] while the recidivist offender statutes define statuses. Finally, each relevant statute

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84. *Id*.

85. See the discussion of those statutes *supra* at notes 58–60 and 74–75 and accompanying text.

86. G.S. 14-7.26.

87. *See supra* notes 61–62 and accompanying text (discussing this issue in the habitual felon context).

88. *See supra* notes 63–66 and accompanying text.

89. S.L. 2011-192, sec. 3(c), codified at G.S. 14-7.3. The use of the term "district attorney" instead of "prosecutor" or "district attorney or assistant district attorney" could be read to require the district attorney's personal involvement in the decision. *Cf.* G.S. 15A-101 (defining "district attorney" and "prosecutor"), though it seems unlikely that the General Assembly intended that result.

90. G.S. 14-7.28(a).

91. G.S. 15A-304 (arrest warrants); 15A-511(c) (magistrates' orders).

refers only to charges in the form of an "indictment,"[92] further solidifying the conclusion that charging decisions must be made by the district attorney rather than by a magistrate or other judicial official.[93]

B. Prosecutorial Discretion Regarding Whether to Charge and Which Previous Convictions to Include

As noted above, each district attorney has the discretion to charge, or not to charge, an eligible defendant with being a habitual offender. Different district attorneys exercise this discretion in different ways.[94] The fact that some prosecutors are more inclined to bring recidivist charges than others does not violate a defendant's equal protection rights, nor does it amount to selective prosecution.[95] Nor does a district attorney fail to exercise his or her discretion if he or she adopts a policy of charging all eligible defendants as habitual offenders.[96]

A prosecutor also has discretion concerning which previous felonies to include in the habitual offender indictment. When a defendant has more than the minimum number of previous convictions, the State is not required to list all of them in the habitual offender indictment. It may elect which to allege and is free to allege the least serious felonies in the indictment, leaving the most serious felonies available for prior record level purposes.[97]

C. Contents of Charging Document

A habitual felon indictment must set forth:

> [T]he date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.[98]

The violent habitual felon statute and the habitual breaking and entering statutes contain nearly identical language.[99] Thus, the statutes require that four facts be alleged in the indictment as to each previous felony:

(1) the date that the previous felony was committed,
(2) the name of the state or other sovereign against whom it was committed,
(3) the date of conviction of the previous felony, and
(4) the court in which the conviction took place.

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92. G.S. 14-7.3; 14-7.9; 14-7.28. As to the possibility of using an information in lieu of an indictment, see *infra* note 189 and accompanying text.

93. With the defendant's consent, it would probably also be permissible to charge a defendant with habitual status using an information. *See* State v. Bradley, 175 N.C. App. 234 (2005) (referencing the possibility in passing).

94. Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 Crime & Just. 211 (2012) (noting that in some offices, the district attorney brings habitual felon charges against all eligible defendants, while other prosecutors "use the habitual felon law more selectively").

95. *See infra* notes 236–37 and accompanying text.

96. *See*, *e.g.*, State v. Williams, 149 N.C. App. 795, 802 (2002).

97. *See* State v. Cates, 154 N.C. App. 737, 739–40 (2002). As discussed in detail below, previous convictions used to establish a defendant's habitual offender status may not be used when calculating a defendant's prior record level.

98. G.S. 14-7.3.

99. G.S. 14-7.9; 14-7.28(b).

The appellate courts have not required strict compliance with these statutory requirements. Instead, the courts have focused on whether the indictment gives the defendant adequate notice of the previous felonies on which the State seeks to rely.

As to item (1), the court of appeals ruled that an inaccurate date was not a fatal defect in *State v. Spruill*.[100] The appellate courts have also repeatedly ruled that the State may amend a habitual felon indictment to correct an error regarding the date that a previous felony was committed.[101] It is possible that a court would view an inaccurate or missing date as a more serious problem if it were combined with other errors that made it difficult to identify the previous conviction with certainty.

As to item (2), the court of appeals held in *State v. Mason* that "the name of the state need not be expressly stated if the indictment sufficiently indicates the state against whom the felonies were committed."[102] In *Mason*, the habitual felon indictment stated that the first previous felony was committed in "Wake County, North Carolina," but as to the second previous felony stated only that it was committed in "Wake County." The court of appeals held that the defendant was put on adequate notice that the second felony was committed in North Carolina because Wake County was linked to North Carolina with respect to the first felony. Likewise, in *State v. Montford*,[103] the defendant was charged with a substantive felony and as a habitual felon in Carteret County, North Carolina. The habitual felon indictment stated that the previous felonies were committed in Carteret County but did not specify that they were committed in North Carolina. Again, the court of appeals held that the defendant was put on adequate notice.[104]

As to item (3), the court of appeals has ruled repeatedly that the State may amend the date on which the defendant was convicted of the previous felony.[105]

As to item (4), the court of appeals likewise has held that so long as the indictment provides sufficient notice, technical defects in an indictment concerning the court in which a defendant's previous conviction took place may be corrected or overlooked.[106]

The statute does not require that the habitual felon indictment set forth the nature of the previous felony, that is, the name of the crime of which the defendant was previously convicted. That information may be helpful in giving the defendant proper notice, and it is routinely included in habitual felon indictments as a matter of practice. However, several unpublished decisions suggest that the omission of such information, or the inclusion of ambiguous or erroneous information, is not fatal to a habitual felon indictment.[107] Likewise, though it is common

100. 89 N.C. App. 580 (1988) (finding no fatal variance between the indictment, which alleged that a previous felony was committed on October 28, 1977, and the proof, which showed that it was committed on October 7, 1977).

101. *See infra* notes 112–15 and accompanying text.

102. 126 N.C. App. 318, 323 (1997).

103. 137 N.C. App. 495 (2000).

104. *See also* State v. Williams, 99 N.C. App. 333 (1990) (adequate notice provided where the habitual felon indictment stated that each previous felony was committed in violation of the North Carolina General Statutes, although the indictment did not specifically state that the previous felonies were committed in North Carolina).

105. *See infra* note 116 and accompanying text.

106. *See infra* note 117 and accompanying text.

107. *See* State v. Woods, No. COA05-671, 2005 WL 3291346, at *2 (N.C. Ct. App. Dec. 6, 2005) (unpublished) ("N.C. Gen. Stat. § 14-7.3 does not specifically require the prior convictions be identified in the indictment," so there was no fatal variance where the State alleged that the defendant's previous conviction was for felony breaking and entering but in fact it was for felony breaking and entering a motor

for a habitual felon indictment to include the case number associated with each of the defendant's previous convictions, that information is not required by statute.[108] Nor is it necessary to allege the defendant's age at the time of each of his or her previous convictions.[109] Finally, the special pleading requirements of G.S. 15A-928 do not apply to habitual felon indictments.[110]

D. Amending and Superseding Habitual Felon or Violent Habitual Felon Indictments

When an error in a habitual felon indictment is discovered, the State may seek to amend or supersede the indictment. Whether the State may do so depends on whether or not the change that the State seeks to make is a substantial alteration and on the timing of the change.

Amendments generally are prohibited by G.S. 15A-923(e), which states that "[a] bill of indictment may not be amended." However, this has been interpreted to prohibit only amendments that "substantially alter the charge set forth in the indictment."[111] Thus, the State may amend the indictment so long as the amendment does not substantially alter the charge.

Amendments to the date on which a previous felony was committed generally are permissible. In *State v. Taylor,*[112] the court of appeals considered a case in which the habitual felon indictment alleged that the defendant committed a previous felony on December 8, 1992, while in fact he had done so on December 18, 1992. The court ruled that "the discrepancy regarding the date of commission of defendant's prior felony offense is not material"[113] and did not render the indictment fatally defective. In fact, the court suggested that omitting the date completely would not be a fatal defect,[114] and it permitted the State to amend the indictment. Similarly, *State v. Locklear* concluded that "it was the fact that another felony was committed, not its

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vehicle); State v. Ball, No. COA04-1582, 2005 WL 1669755, at *3 (N.C. Ct. App. July 19, 2005) (unpublished) (amending indictment to reflect that one previous felony conviction for drug possession rather than for habitual DWI was permissible because it did not substantially alter the nature of the recidivist charge, and the other information in the indictment put the defendant on sufficient notice of the basis of the charge). *See also* State v. Briggs, 137 N.C. App. 125, 128 (2000) (the habitual felon charge referred to the defendant's previous conviction of "the felony of breaking and entering buildings"; although breaking or entering is a misdemeanor absent the intent to commit a felony therein, and the habitual felon indictment did not include the intent language, the court held that the use of the word "felony" put the defendant on notice that the basis of the habitual felon charge was felony breaking or entering).

108. In *State v. Oakley*, No. COA12-325, 2012 WL 6017952, at *3, *4 (N.C. Ct. App. Dec. 4, 2012) (unpublished), *discretionary review denied*, 739 S.E.2d 847 (2013), the court of appeals ruled that the State was properly permitted to "amend the indictment to reflect the proper file number for the [previous] conviction," which was off by one digit. The court noted that there was no requirement to include the number at all, making it "mere surplusage."

109. State v. Holcombe, No. COA09-147, 2009 WL 2370734 (N.C. Ct. App. Aug. 4, 2009) (unpublished) (apparently so holding).

110. *See* State v. Marshburn, 173 N.C. App. 749, 750 (2005). G.S. 15A-928 applies when "the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade," as is the case with, for example, habitual misdemeanor assault.

111. State v. Price, 310 N.C. 596, 598 (1984).

112. 203 N.C. App. 448 (2010).

113. *Id*. at 454.

114. The court approvingly cited and discussed *State v. Inman*, 174 N.C. App. 567 (2005) (ruling that although G.S. 14-415.1 states that an indictment charging a defendant with possession of a firearm after conviction of a felony "must set forth . . . the date that the defendant was convicted" of his or her previous felony, that requirement is directory rather than mandatory, and the omission of the date did not create a fatal defect).

specific date, which was the essential question in the habitual felon indictment," so the State was properly permitted to amend the indictment to reflect the correct date.[115]

The appellate courts have also ruled that the State may amend the date on which the defendant was convicted of a previous felony.[116]

Changes to the jurisdiction in which a previous felony conviction was incurred have also been deemed not to be substantial alterations,[117] as have changes to the number of previous convictions alleged to have been incurred before the defendant reached age 18.[118]

However, changes to the previous felony convictions themselves, that is, the substitution of one previous conviction for another, have been held to be substantial alterations and therefore not the proper subject of an amendment.[119] Making a substantial alteration by amendment is improper even with the defendant's consent.[120]

If it is otherwise proper, an amendment may be permitted as late as the close of the evidence on the habitual offender charge.[121]

If the State desires to make a substantial change to a habitual offender indictment, such as replacing an allegation regarding one previous conviction with another, it must do so by superseding the original indictment. This must be done before the trial of the substantive felony begins or before the court accepts a guilty plea to the substantive felony.[122]

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115. 117 N.C. App. 255, 260 (1994).

116. State v. Hargett, 148 N.C. App. 688 (2002) (trial court did not err in allowing the State to amend the date of the defendant's previous conviction, citing *Locklear*, 117 N.C. App. at 260 (upholding amendment of habitual felon indictment and noting that "it was the fact that another felony was committed, not its specific date, which was the essential question in the habitual felon indictment")). *See also* State v. Lowry, No. COA10-165, 2010 WL 4292052 (N.C. Ct. App. Nov. 2, 2010) (unpublished) (same), *cert. denied*, 731 S.E.2d 833 (2011); State v. Martin, No. COA05-579, 2006 WL 539376 (N.C. Ct. App. Mar. 7, 2006) (unpublished) (same); State v. Whittenburg, No. COA03-1267, 2004 WL 2585176 (N.C. Ct. App. Nov. 16, 2004) (unpublished) (same); State v. Cook, No. COA03-50, 2004 WL 1725156 (N.C. Ct. App. Aug. 3, 2004) (unpublished) (same).

117. *See*, *e.g.*, State v. Lewis, 162 N.C. App. 277 (2004) (amending date and county of previous conviction did not substantially alter the charge; the indictment "sufficiently notified defendant of the particular conviction that was being used to support his status as an habitual felon"); State v. Coltrane, 188 N.C. App. 498, 500–03 (2008) (no substantial alteration to felon-in-possession indictment where indictment amended to reflect correct county in which previous felony conviction was sustained). *See also supra* note 108 and accompanying text (discussing contents of charging documents); State v. Forte, No. COA06-595, 2007 WL 817439, at *1–2 (N.C. Ct. App. Mar. 20, 2007) (unpublished) (although the jury was asked to find only that the defendant had been convicted in "Mecklenburg County," rather than "Mecklenburg County Superior Court," that was sufficient to satisfy the statute).

118. State v. Hicks, 125 N.C. App. 158 (1997) (no substantial alteration where habitual felon indictment amended to state that one, rather than none, of the defendant's previous felony convictions was the result of felonies committed prior to age eighteen).

119. *See* State v. Little, 126 N.C. App. 262 (1997).

120. State v. De la Sancha Cobos, 211 N.C. App. 536, 542 (2011) ("Even if Defendant's acquiescence could be construed as consenting to the amendment, which was required to establish the trial court's jurisdiction, a party cannot consent to subject matter jurisdiction.").

121. *See*, *e.g.*, State v. Hill, 362 N.C. 169 (2008) (allowing amendment of sex offense indictments at the close of the evidence); State v. Van Trusell, 170 N.C. App. 33 (2005) (allowing amendment of armed robbery indictment at the close of the State's evidence).

122. *Compare Little*, 126 N.C. App. 262 (reversing habitual felon conviction because the State procured a superseding indictment that replaced one previous conviction with another after the defendant had been found guilty of several substantive felonies; the court of appeals held that superseding after

The State may also make a minor change by obtaining a superseding indictment, although an amendment is usually more expedient for this purpose. If the State chooses to supersede with a minor change, it may do so even after the trial of the substantive felony begins, or after the court accepts a guilty plea to the substantive felony, for the defendant was placed on adequate notice by the original indictment.[123]

E. Relationship of Habitual Offender Indictments to Indictments for Substantive Offenses

The habitual felon statutes provide:

> An indictment which charges a person who is an habitual felon . . . with the commission of any felony . . . must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony.[124]

The violent habitual felon statutes contain nearly identical language.[125] The statutes seem to suggest both that a *single* indictment should charge both the substantive felony and the habitual felon charge ("[a]n indictment . . . must . . . also charge that said person is an habitual felon") and that the two charges should be in *separate* indictments ("[t]he indictment charging the defendant as an habitual felon shall be separate"). This has prompted the court of appeals to recognize the statutes' "obvious internal inconsistencies."[126]

The habitual breaking and entering statutes are clearer. They state that "[t]he indictment charging the defendant as a status offender shall be separate from the indictment charging the person with the principal felony offense of breaking and entering."[127]

Using separate indictments to charge the substantive offense and the recidivist offense is also the best practice for the habitual felon and violent habitual felon contexts. In *State v. Allen*,[128] the North Carolina Supreme Court stated that, "[p]roperly construed [the habitual felon statute] clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a

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the substantive felony charges had been resolved deprived the defendant of fair notice; "the defendant is entitled to rely, at the time he enters his plea on the substantive felony, on the allegations contained in the habitual felon indictment in place at that time in evaluating the State's likelihood of success on the habitual felon indictment"), *with* State v. Cogdell, 165 N.C. App. 368, 371–74 (2004) (holding that the State may procure a superseding indictment that contains a substantial alteration after the defendant has been arraigned on the substantive felony, so long as the new indictment is returned before the trial of the substantive felony begins, or before the court accepts a guilty plea to the substantive felony).

123. *See* State v. Gant, 153 N.C. App. 136 (2002) (no error in allowing State's motion to continue judgment, after the defendant was convicted on the substantive felony, in order for State to seek superseding indictment to correct the date on which one of the previous felonies was committed); State v. Mewborn, 131 N.C. App. 495 (1998); State v. Oakes, 113 N.C. App. 332 (1994).

124. G.S. 14-7.3.

125. G.S. 14-7.9.

126. State v. Smith, 112 N.C. App. 512, 515 (1993).

127. G.S. 14-7.28(a).

128. 292 N.C. 431 (1977).

separate bill as being an habitual felon."[129] The use of a separate indictment is the overwhelming practice today, though other arrangements have been used successfully in the past.[130]

Not only may the habitual offender indictment be a separate document from the indictment for the substantive felony, it need not be filed at the same time. The habitual offender indictment may be filed before, together with, or after the indictment for the substantive felony.[131] However, there are some constraints on the timing of the habitual offender charge. It cannot stand alone; it must be ancillary to a substantive felony.[132] Because it must be ancillary to a substantive felony charge, it may not be brought after the defendant has been convicted of, or pled guilty to, the substantive felony.[133] And, a habitual offender charge cannot be "ancillary to felonies that had not yet occurred" when it was returned.[134] Therefore, if a defendant commits a new eligible offense after being charged as a habitual offender, a new habitual offender indictment must be obtained if the defendant is to be sentenced as a habitual offender in connection with the new crimes.

Although the habitual offender indictment must be ancillary to a substantive felony charge, the habitual offender indictment need not refer to or specify the substantive felony charge.[135] If the habitual offender indictment does specify the substantive felony charge, such language is mere surplusage; even if the defendant is ultimately convicted of a different felony, he or she may be sentenced as a habitual offender.[136] Indeed, the habitual offender indictment need not even

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129. *Id*. at 433. *See also* State v. Peoples, 167 N.C. App. 63 (2004) (approving use of separate indictment to bring habitual felon charge); State v. Patton, 342 N.C. 633, 635 (1996) (suggesting in dicta that the habitual felon charge must be brought in "a separate document"); State v. Hodge, 112 N.C. App. 462 (1993) (similar).

130. The appellate courts previously approved a variety of attempts to comply with the conflicting requirements of the habitual felon and violent habitual felon statutes. In *State v. Young*, 120 N.C. App. 456, 459–61 (1995), the State obtained a single indictment that charged the substantive felony in one count and habitual felon in a separate count, and the court of appeals approved the arrangement. In *Smith,* 112 N.C. App. at 515–16, the State obtained an indictment numbered 89 CRS 77510(A) for the substantive felony, and a separate indictment numbered 89 CRS 77510(B) for the habitual felon charge. Again, the court of appeals determined that this complied with the statute.

131. State v. Blakney, 156 N.C. App. 671, 674 (2003) ("The Habitual Felons Act requires two separate indictments, the substantive felony indictment and the habitual felon indictment, but does not state the order in which they must be issued.").

132. *Allen*, 292 N.C. 431.

133. *See id.*; *see also* State v. Bradley, 175 N.C. App. 234 (2005) (defendant pled guilty to substantive felonies and to a habitual felon charge, but sentencing was deferred; prior to sentencing, defendant committed a new felony and agreed to plead guilty to it; improper to sentence defendant as a habitual felon on the new felony, because the habitual felon charge was ancillary to the original substantive felonies, and those substantive felonies had been resolved when defendant pled guilty to them).

134. State v. Flint, 199 N.C. App. 709, 718 (2009). *See also* State v. Ross, ___ N.C. App. ___, 727 S.E.2d 370 (citing *Flint*), *temporary stay allowed*, 727 S.E.2d 285 (2012), *discretionary review denied*, 738 S.E.2d 369 (2013).

135. *See*, *e.g.*, State v. Smith, 160 N.C. App. 107, 124 (2003); State v. Cheek, 339 N.C. 725, 728 (1995) ("Nothing in the plain wording of N.C.G.S. § 14-7.3 requires a specific reference to the predicate substantive felony in the habitual felon indictment. The statute requires that the State give defendant notice of the felonies on which it is relying to support the habitual felon charge; nowhere in the statute does it mention the predicate substantive felony or require it to be included in the indictment.").

136. *See* State v. Bowens, 140 N.C. App. 217, 224–25 (2000) (defendant charged with three substantive felonies; habitual felon charge referred only to one of them; that substantive felony charge was dismissed,

allege that the defendant committed a substantive felony.[137] Similarly, the indictment for the substantive felony need not state that the defendant is being prosecuted as a habitual offender.[138]

Because a habitual offender indictment need not specify the substantive felony charge to which it applies, a single habitual offender indictment can apply to an unlimited number of substantive felony charges.[139] Alternatively, the State may elect to bring a habitual offender charge for each substantive felony charge,[140] although the court of appeals has suggested that this may create a confusingly large array of charges.[141] When the State uses a single habitual offender indictment in connection with multiple substantive offenses, it may "withdraw [the] habitual [offender] indictment as to some or all of the underlying felony charges . . . up until the time that the jury returns a verdict" at the habitual offender stage of the trial.[142]

F. Second and Subsequent Habitual Offender Indictments

As noted above, previous felonies used to support a habitual offender charge are not "used up," and thus they can be used to support a second or subsequent recidivist charge.[143] However, if a defendant is acquitted of a habitual offender charge, he or she cannot later be indicted as a habitual offender based on the same previous felonies. The rationale is not that the previous felonies were "used up"—indeed, they would not have been used at all—but, rather, that the State, having lost the habitual offender issue once, is collaterally estopped from re-litigating it.[144] Collateral

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but defendant was convicted of the other two; defendant was properly sentenced as a habitual felon because the inclusion of the first substantive felony in the habitual felon indictment was surplusage and defendant was on notice of the State's intent to convict him as a recidivist).

137. State v. Roberts, 135 N.C. App. 690 (1999).

138. State v. Sanders, 95 N.C. App. 494 (1989).

139. State v. Patton, 342 N.C. 633, 635 (1996) ("[A] separate habitual felon indictment is not required for each substantive felony indictment.")

140. State v. Taylor, 156 N.C. App. 172, 174 (2003) (stating that "the State may choose to use multiple habitual felon indictments").

141. *Id.*

142. State v. Murphy, 193 N.C. App. 236, 239 (2008). In *Murphy*, the defendant was charged with armed robbery, attempted armed robbery, and possession of a firearm by a felon and was also indicted as a habitual felon. He was convicted of all three substantive offenses. Sentencing him as a habitual felon on the armed robbery and attempted armed robbery charges would have resulted in a shorter sentence than sentencing him under the usual Structured Sentencing rules: as a habitual felon, he would have been a Prior Record Level I, Class C offender, while under Structured Sentencing without the habitual felon charge, he would have been a Prior Record Level IV, Class D offender. The State therefore informed the trial judge before the habitual felon stage of the trial began that it did not wish to pursue the habitual felon charge as to the robbery offenses. The trial judge agreed, and the defendant was eventually sentenced as a habitual felon only as to the firearm offense. The court of appeals affirmed but noted that if the State does not withdraw the habitual felon charge as it relates to a substantive felony before the jury returns a verdict at the habitual offender phase of the proceedings, "the court must sentence the defendant as an habitual felon."

143. Of course, because a conviction as a violent habitual felon entails a mandatory life sentence, it would be quite unusual for a defendant to be convicted as a violent habitual felon and later be prosecuted as a habitual felon or a violent habitual felon.

144. State v. Safrit, 145 N.C. App. 541 (2001). However, the State may use the previous felonies to determine the defendant's prior record level. It is not collaterally estopped from doing so, in part because the standard of proof under which the jury failed to find the three previous felonies is a higher standard than the standard a judge must use at sentencing. *See* State v. Safrit, 154 N.C. App. 727, 729 (2002) (appeal following new sentencing hearing).

estoppel, or issue preclusion, "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[145] In criminal cases, defendants are entitled to rely on collateral estoppel because it is part of the Fifth Amendment's double jeopardy guarantee.[146]

Of course, the State would be free to bring a new habitual offender charge based on completely different previous felonies, as the issue of whether those convictions can support a habitual offender conviction would never have "been determined by a valid and final judgment." It is less clear whether there would be a collateral estoppel problem if a defendant were to have been acquitted of being a habitual offender, and then later were to be charged with being a habitual offender based on *some but not all* of the previous felonies used in the earlier habitual offender proceeding. The answer in most circumstances should be no, as any change in the combination of previous felonies would remove the identity of issues that is a requirement for the operation of collateral estoppel. However, the answer could be otherwise if, for example, the jury in the first proceeding returned special verdicts as to each of the previous felonies and found in the defendant's favor as to one of the previous felonies that the State sought to re-use.

Another open question is whether a defendant, previously found to be a habitual offender, is collaterally estopped from re-litigating his or her status as a habitual offender if he or she is later charged with being a habitual felon using the same previous felonies. Whether collateral estoppel may be used "offensively" against criminal defendants is a point of considerable controversy. There is some authority for it in North Carolina, though not in the habitual felon context.[147] Other jurisdictions are split.[148] The United States Supreme Court has twice suggested, but never held, that collateral estoppel cannot be used against criminal defendants.[149] As a practical matter, prosecutors would be wise not to attempt to use collateral estoppel to establish a defendant's status as a habitual offender unless and until the North Carolina appellate courts approve such an approach.

V. Procedure

A. Issuance of an Order for Arrest

Suppose that a defendant has been arrested for, and charged with, robbery. He is released on bond. The prosecutor subsequently determines that the defendant is a habitual felon and obtains an indictment charging him as such. May the clerk or a judge issue an order for arrest based on the return of the habitual felon indictment?

In some parts of the state, the issuance of an order for arrest in these circumstances is automatic or nearly so. Despite being widespread, however, this practice is legally questionable.

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145. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

146. *See id.* at 445.

147. State v. Cornelius, ___ N.C. App. ___, 723 S.E.2d 783 (2012) (regarding element of burglary in prosecution for felony murder); State v. Dial, 122 N.C. App. 298 (1996) (regarding jurisdiction to prosecute defendant for first-degree murder).

148. *Compare*, *e.g.*, United States v. Pelullo, 14 F.3d 881, 889 (3d Cir. 1994) (may not), *with*, *e.g.*, Hernandez-Uribe v. United States, 515 F.2d 20, 21–22 (8th Cir. 1975) (may).

149. *See* United States v. Dixon, 509 U.S. 688, 710 n.15 (1993) ("[A] conviction in the first prosecution would not excuse the Government from proving the same facts a second time."); Simpson v. Florida, 403 U.S. 384, 386 (1971).

There are two possible justifications for the procedure. First, an order for arrest may be issued when "[a] grand jury has returned a true bill of indictment against a defendant who is not in custody and who has not been released [on bail] to answer to the charges in the bill of indictment."[150] When an indictment for a habitual offense is returned, one could argue, the defendant has not been released on bail to answer the habitual charge, so it is appropriate for the defendant to be arrested and for a magistrate to set conditions of release for the habitual charge.[151]

Second, an order for arrest may be issued whenever "it becomes necessary to take the defendant into custody."[152] One could argue that it is necessary to take a defendant into custody when she is charged with a recidivist offense because she has a new incentive to flee, making it necessary to apprehend her in order to reconsider her conditions of release.

The difficulty with both arguments is that they assume that a magistrate may set new release conditions for a defendant who is arrested on a habitual offender indictment. As explained in the section of this bulletin immediately below, that is probably incorrect. And if a magistrate cannot set new release conditions as a result of the return of a habitual offender indictment, ordering that the defendant be arrested accomplishes little except to put the magistrate in a position of uncertainty. Instead, the habitual offender indictment could simply be "mailed or otherwise given to the defendant" or his or her attorney,[153] with any changes to the defendant's release conditions made upon the State's motion, as discussed below.

B. Bond

In setting bond, a court must consider "the nature and circumstances of the offense charged."[154] Whether a defendant has been charged as a habitual offender is obviously a relevant consideration. For example, a court might reasonably determine that a defendant facing a habitual offender charge is more likely to flee, and therefore the court might impose more stringent release conditions. But should the existence of a habitual offender charge be taken into account when determining the release conditions for the substantive felony, or may a separate release order be entered in connection with a habitual offender charge?

The better practice is not to set separate conditions of release in connection with the habitual offender charge. Generally, release conditions may be set only in connection with a criminal offense,[155] and being a habitual offender is a status, not a crime.

There are arguments to the contrary. For example, a probation violation is not a crime either, yet an alleged probation violation clearly supports the imposition of a bond.[156] And while the state's appellate courts have not confronted this issue directly, the court of appeals has dealt

150. G.S. 15A-305(b)(1).

151. This argument involves a broad interpretation of the word "charge." As noted above, the habitual felon, violent habitual felon, and habitual breaking and entering statutes define statuses, not crimes, and it is not clear that the word "charge" in the order for arrest statute should be read to include habitual offender status allegations. One point in favor of interpreting the statute that way is that the habitual offender statutes themselves refer to "charg[ing]" a person as a recidivist. *See, e.g.,* G.S. 14-7.1 (a defendant "may be charged as a status offender"); 14-7.3 (a prosecutor "may charge a person as an habitual felon").

152. G.S. 15A-305(b)(5).

153. G.S. 15A-630.

154. G.S. 15A-534(c).

155. *See generally* G.S. 15A-533, -534 (referring repeatedly to the "offense" and the "offense charged").

156. G.S. 15A-1345(b). However, there is express statutory authorization for the imposition of release conditions in this context, unlike the habitual offender context.

with a case involving a separate bond for a habitual felon charge, and it did not comment negatively on the procedure.[157]

Still, the surest course is to adjust the defendant's release conditions in connection with the substantive felony, not to impose separate release conditions for the habitual offender charge. So, for example, if the State believes that an increase in a defendant's bond is appropriate in light of a habitual felon indictment, it should move to modify the conditions of release imposed in connection with the substantive felony.

C. Timing

"No defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge within 20 days of the finding of a true bill by the grand jury; provided, the defendant may waive this 20-day period."[158] Similar language is present in the violent habitual felon[159] and habitual breaking and entering[160] statutes.

Issues regarding the twenty-day period arise most frequently when the defendant is at first charged only with a substantive felony, with a habitual felon charge following later. It is clear from the text of the statutes that the twenty-day period begins on the date of the habitual offender indictment, not on the date of the indictment for the substantive felony. The trial on the substantive felony may begin fewer than twenty days after the return of the habitual offender indictment, so long as at least twenty days elapse before the trial on the recidivist charge begins.[161] There is nothing in the statutes that compels the trial court to begin the habitual felon, violent habitual felon, or habitual breaking and entering trial immediately upon the completion of the trial of the substantive felony; thus, it would seem that the court could enforce compliance with the twenty-day rule by delaying the start of the habitual offender phase if necessary.

D. Proof of Previous Convictions

The habitual felon statute provides that "[a] prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction."[162] Similar language appears in the violent habitual felon[163] and habitual breaking and entering[164] statutes. The court of appeals has held that the methods of proof listed in the statutes are not exclusive and that, for example, a faxed copy of a certified judgment is an appropriate method of proof.[165] A "true" copy, if different from a certified copy, may also be used.[166] The court of appeals has also held that it is not error, or at least not prejudicial error, to introduce documents such as plea transcripts in addition to criminal judgments as "record[s] of the prior . . . conviction."[167]

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157. *See* State v. Lane, 163 N.C. App. 495 (2004).

158. G.S. 14-7.3.

159. G.S. 14-7.9.

160. G.S. 14-7.28(b).

161. *See* State v. Adams, 156 N.C. App. 318, 322–23 (2003) ("There is no language in the statute which bars trial of the underlying felony charges within twenty days of the habitual felon indictment.").

162. G.S. 14-7.4.

163. G.S. 14-7.10.

164. G.S. 14-7.29.

165. State v. Brewington, 170 N.C. App. 264, 281–82 (2005); State v. Wall, 141 N.C. App. 529 (2000).

166. State v. Gant, 153 N.C. App. 136, 143 (2002).

167. State v. Ross, 207 N.C. App. 379, 399 (2010) (transcript of plea for previous conviction should have been redacted to conceal defendant's acknowledgement of alcohol or drug use, as that information was irrelevant to the fact of conviction; but not prejudicial); State v. Stitt, 147 N.C. App. 77, 83–84 (2001)

However, care should be taken to redact consolidated judgments, multiple-count indictments, or other documents that could reveal to the jury charges or convictions other than the previous convictions on which the habitual offender charge is based; the use of unredacted documents could be unfairly prejudicial to the defendant.[168]

The several statutes further provide that "[t]he original or a certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein."[169] The constitutionality of this provision has been challenged and upheld.[170] The court of appeals has held that the prima facie evidence rule applies notwithstanding minor variations in the name.[171] So long as the name matches, the fact that there are other notations on the court records that do not match the defendant does not preclude the records from serving as prima facie evidence of the previous conviction.[172]

When evidence concerning one of a defendant's previous convictions is introduced during the trial of a substantive felony—as when the substantive felony is a sex offender registration offense, or possession of a firearm by a convicted felon—"[t]he evidence presented during the

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(transcript of plea forms for the defendant's three previous felonies were admitted; defendant failed to explain how this was prejudicial); State v. Massey, 195 N.C. App. 423 (2009) (not error to admit indictments for the defendant's three previous felonies; the prohibition on reading an indictment to the jury, G.S. 15A-1221(b), applies only to the indictment for the current charge); State v. Ore, No. COA11-1033, 2012 WL 379342 (N.C. Ct. App. Feb. 7, 2012) (unpublished) (transcript of plea together with unsigned copy of judgment sufficient to prove a defendant's previous conviction); State v. Chavis, No. COA11-388, 2011 WL 6046205, at *2 (N.C. Ct. App. Dec. 6, 2011) (unpublished) (if it was error to admit "a printout of Defendant's criminal history and a proposed sentencing worksheet" in addition to copies of the judgments for his previous convictions, it was not prejudicial, as the judgments sufficed to establish the defendant's habitual status); State v. Buck, No. COA07-471, 2008 WL 2735871 (N.C. Ct. App. July 15, 2008) (unpublished) (the transcript of plea form, and the plea agreement that it contained, were properly admitted as part of the State's proof that the defendant had been convicted of a previous felony).

168. *Ross,* 207 N.C. App. at 399–400 (transcript of plea should have been redacted to conceal defendant's acknowledgement of alcohol or drug use, but not prejudicial in this case); State v. Lotharp, 148 N.C. App. 435, *rev'd on other grounds*, 356 N.C. 420 (2002) (documents disclosing felony convictions beyond those forming the basis of the habitual felon charge should have been redacted or excluded as irrelevant, but not prejudicial in this case); State v. Walker, No. COA11-1093, 2012 WL 1116001 (N.C. Ct. App. Apr. 3, 2012) (unpublished) (the State introduced judgments that showed convictions in addition to the convictions on which the State relied to establish the defendant's habitual status; this information was irrelevant and should have been redacted; but the error was not prejudicial in light of the strong evidence of the defendant's status, so it was not plain error).

169. G.S. 14-7.4 (habitual felon); 14-7.10 (violent habitual felon); 14-7.29 (habitual breaking and entering).

170. *See* State v. Hairston, 137 N.C. App. 352, 355–56 (2000) (holding that the statute creates a permissive presumption that does not allow the jury to convict on less than proof beyond a reasonable doubt).

171. *See id.* at 354–55 (rule applies notwithstanding the fact that the defendant's name was sometimes appended with "Jr.," and sometimes not); State v. Petty, 100 N.C. App. 465, 469–70 (1990) (holding that "absolute identity of name is not required under this statute," and that "Martin Bernard Petty" and "Martin Petty" are sufficiently similar for purposes of the prima facie showing).

172. *See* State v. Tyson, 189 N.C. App. 408 (2008) (discrepancy of exactly one year regarding defendant's date of birth in the judgment for one of defendant's previous convictions did not preclude its use as prima facie evidence); *Petty*, 100 N.C. App. at 469–70 (difference in age goes to the weight of the evidence, not its admissibility); State v. Wolfe, 157 N.C. App. 22, 36 (2003) (same, as to difference in race).

trial for the [substantive felony] can be used to prove the habitual felon charge."[173] It need not be reintroduced during the habitual offender proceeding.

E. Proof That a Previous Conviction Was a Felony

Sometimes the issue is not the existence of a previous conviction, but whether the conviction was for a felony offense. This appears to be a matter of law for the court, not the jury, to decide.[174]

Controversies will rarely arise with North Carolina convictions, as both attorneys and judges are familiar with the classification of North Carolina offenses. But difficulties frequently crop up concerning out-of-state convictions, particularly from New Jersey. New Jersey classifies offenses as "crimes" and "disorderly persons offenses" rather than felonies and misdemeanors. Because the habitual felon statute requires that each of the defendant's previous convictions be for "an offense which is a felony under the laws of the State or other sovereign" where the conviction was incurred,[175] there is a plausible argument that previous convictions from New Jersey simply cannot be used to support a charge of habitual felon. Indeed, in several cases, the court of appeals has found insufficient evidence that a previous conviction from New Jersey was for a felony offense.[176] However, the court has never closed the door entirely to the use of New Jersey

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173. State v. Hoskins, ___ N.C. App. ___, 736 S.E.2d 631, *discretionary review denied*, 739 S.E.2d 847 (2013).

174. The habitual offender statutes are ambiguous on this point, stating only that "[i]f the jury finds that the defendant is an habitual felon," or a violent habitual felon, or a habitual breaking and entering status offender, the defendant should be sentenced accordingly. G.S. 14-7.5; 14-7.11; 14-7.30(c). The statutes do not say whether the jury should decide whether the defendant's previous convictions were for felony offenses, or whether it should focus only on whether the convictions were incurred by the defendant. As a matter of institutional competence, whether a previous conviction is a felony is a matter of law that a judge is better positioned to address than a jury. Because it is a matter of law, and because it involves a prior conviction, having a judge determine the issue does not violate a defendant's right to a jury trial as interpreted in the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the federal courts uniformly assign similar decisions to the court rather than to the jury. *See* United States v. Broadnax, 601 F.3d 336, 345 (5th Cir. 2010) (footnote, citations, internal quotation marks omitted) ("[T]he question whether a . . . conviction may serve as a predicate offense for a prosecution for being a felon in possession of a firearm . . . is purely a legal one."); United States v. Thompson, 421 F.3d 278, 281 (4th Cir. 2005) (whether the defendant's "three prior convictions were 'violent felonies' " was a legal question "inherent [to] the conviction[s]" that constitutionally could be, and properly was, decided by a judge rather than the jury). The habitual felon North Carolina Pattern Jury Instructions appear to contemplate the judge determining, prior to submitting them to the jury, whether the defendant's previous convictions were for felony offenses, as the instructions ask the jury only whether it finds that the defendant was convicted of "the felony of (name felony)." N.C.P.I.—Crim. 203.10.

175. G.S. 14-7.1.

176. *See* State v. Carpenter, 155 N.C. App. 35, 51 (2002) (citations, internal quotation marks omitted) (similar to *Lindsey,* immediately *infra;* the court of appeals was unmoved by the State's argument "that defendant could have received sentences exceeding one year for each of his two New Jersey convictions and that under New Jersey law, offenses punishable by more than one year in prison constitute common-law felonies"); State v. Lindsey, 118 N.C. App. 549, 553 (1995) (defendant had a New Jersey conviction for receiving stolen property; neither the judgment nor the indictment stated that the offense was a felony; the North Carolina Court of Appeals found the evidence insufficient, noting that the court documents did not state that the offense was a felony, that "[t]here was no certification from any official that the offense . . . was a felony in New Jersey," and that the court could not "conclude from the length

convictions, and New Jersey itself recognizes that its "crimes" are the functional equivalent of felonies. Furthermore, precluding their use altogether would create a windfall for defendants who happen to have a prior conviction from New Jersey instead of a jurisdiction that uses the conventional distinction between felonies and misdemeanors. New Jersey's statutory scheme, relevant decisions from the North Carolina Court of Appeals, and ways in which the State might try to comply with the opinions' dictates while using a defendant's previous conviction from New Jersey to support a habitual felon charge are discussed in detail elsewhere.[177]

The foregoing is not a problem in violent habitual felon cases because the violent habitual felon statute allows the use of out-of-state convictions that are "substantially similar" to qualifying North Carolina offenses, with no limitation on how the offense of conviction is classified in the other state.[178] The habitual breaking and entering statute is unclear on this point, but it may be more like the habitual felon statute than the violent habitual felon statute.[179]

F. Guilty Pleas

A defendant may plead guilty to a habitual offender charge.[180] A no contest plea is likewise permissible.[181] However, the mere fact that a defendant is willing to stipulate to the existence of the necessary number of qualifying previous felonies, or indeed is willing to stipulate to his or her status as a habitual offender, does not in itself constitute a guilty plea. Rather, the trial court must go through a full plea colloquy in keeping with the requirements of G.S. 15A-1022.[182] If the trial court completes an appropriate colloquy, the fact that the defendant does not expressly

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of defendant's sentence (two to three years) that the offense was a felony in New Jersey"). *Cf.* State v. Moncree, 188 N.C. App. 221 (2008) (the defendant had a prior conviction from New Jersey; on appeal, it was undisputed that it was the equivalent of a misdemeanor, not a felony; the court of appeals found that the habitual felon indictment was fatally defective because it alleged only two felonies, and that the trial court therefore lacked jurisdiction over the habitual felon charge).

177. *See* Jeff Welty, *Habitual Felon and Previous Convictions from New Jersey*, N.C. Crim. L., UNC Sch. of Gov't Blog (Feb. 11, 2013), http://nccriminallaw.sog.unc.edu/?p=4092. The comments to this blog post, including several from experienced defense attorneys, are worth reading and present a point of view that contrasts with the one expressed in the post itself.

178. G.S 14-7.7.

179. G.S. 14-7.25 defines "breaking and entering" as including "any of the following felony offenses: . . . Any offense committed in another jurisdiction substantially similar to [enumerated North Carolina offenses]." The reference to "[a]ny offense committed in another jurisdiction" does not require that the offense be a felony in the other state. However, the prefatory reference to "any of the following felony offenses" may do so. Further, G.S. 14-7.26 defines a habitual breaking and entering status offender as a person who has been convicted of "one or more prior felony offenses of breaking and entering in any federal court or state court." The reference to "felony" in this part of the statute may reinforce the idea that the previous conviction must be for an offense that was a felony where it was incurred.

180. State v. Bailey, 157 N.C. App. 80, 88 (2003) ("[A]lthough a defendant's status as an habitual felon should be determined by a jury, a defendant may choose to enter a guilty plea to such a charge.").

181. *See* State v. Jones, 151 N.C. App 317, 330 (2002) ("[T]he trial court did not err in accepting defendant's plea of no contest to being an habitual felon.").

182. *See* State v. Gilmore, 142 N.C. App. 465, 471 (2001) ("Although Defendant did stipulate to his habitual felon status, such stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea."); State v. Edwards, 150 N.C. App. 544, 549–50 (2002). Failure to conduct a complete plea colloquy with a defendant who wishes to admit his or her status as a habitual offender is an extremely common error. For a long list of cases reversed on this basis, see Jeff Welty, *"Stipulating" to Habitual Felon Status,* N.C. Crim. L., UNC Sch. of Gov't Blog (Feb. 12, 2013), http://nccriminallaw.sog.unc.edu/?p=4095.

admit his or her status is immaterial; it suffices that the defendant knowingly and voluntarily agrees to be sentenced as a habitual offender and to waive his or her right to a jury trial on the issue.[183]

As part of the plea colloquy, the judge is required to "inform[the defendant] of the maximum possible sentence" he or she may receive.[184] When a defendant pleads guilty to being a habitual offender, the defendant must be informed of the maximum sentence he or she faces *as a habitual offender*, because the enhanced sentence is a "direct consequence of [the defendant's] plea."[185] A failure to advise the defendant properly may violate the constitutional principles outlined in *Boykin v. Alabama*,[186] in addition to contravening the statute. Exactly what the "maximum possible sentence" means isn't completely clear, but as discussed at length elsewhere,[187] the safest course appears to be to advise the defendant of the maximum sentence that corresponds to the highest minimum sentence in the aggravated range of prior record level VI for the enhanced offense class. For example, a habitual felon who is to be sentenced as a Class C offender based on a recent substantive felony should be instructed that the maximum possible sentence is 231 months, because that is the maximum term that corresponds to a 182-month minimum term, which is the top of the aggravated range for Class C, prior record level VI.

In keeping with G.S. 15A-1022, the trial judge must find a factual basis for the plea. The State's oral recitation of a defendant's prior convictions is sufficient.[188] Although G.S. 14-7.3, -7.9, and -7.28 refer exclusively to "indictment[s]," a defendant may presumably waive indictment and plead guilty pursuant to a criminal information.[189] By pleading guilty, a defendant waives his or her right to raise a wide range of issues on direct appeal.[190]

G. Collateral Attacks on Previous Convictions

A defendant facing a habitual felon charge may wish to contest the validity of one or more of the previous convictions that form the basis for the charge. In general, the defendant must do so by filing a motion for appropriate relief in connection with the previous conviction, or convictions,

183. *See* State v. Williams, 133 N.C. App. 326, 329–30 (1999).

184. G.S. 15A-1022(a)(6).

185. State v. McNeill, 158 N.C. App. 96, 104 (2003). *See also Bailey*, 157 N.C. App. at 88 ("[A] trial court may not accept a defendant's plea of guilty as an habitual felon without first addressing the defendant personally and making the . . . inquiries of that defendant as required by" G.S. 15A-1022, including regarding the maximum possible sentence).

186. 395 U.S. 238 (1969).

187. Jeff Welty, *Advising a Defendant of the Maximum Possible Sentence During a Habitual Felon Plea*, N.C. Crim. L., UNC Sch. of Gov't Blog (June 12, 2013), http://nccriminallaw.sog.unc.edu/?p=4307.

188. *See* State v. Bivens, 155 N.C. App. 645, 647 (2002). *Cf.* State v. Gaddy, No. COA09-1013, 2010 WL 522704, at *3 (N.C. Ct. App. Feb. 16, 2010) (unpublished) (inadequate factual basis where "the only independent evidence provided to the trial court was the [prior record level] worksheet, which list[ed] only two prior felony convictions").

189. No reported case expressly so holds, but the right to indictment generally may be waived by represented defendants in noncapital cases. *See* G.S. 15A-642(b). Furthermore, the court of appeals has reviewed, without comment, cases in which habitual felon convictions were obtained using informations. *See, e.g.,* State v. Bradley, 175 N.C. App. 234 (2005).

190. *See*, *e.g.*, State v. McGee, 175 N.C. App. 586 (2006) (guilty plea waives claim regarding purported inaccuracy in date of previous conviction); State v. Jamerson, 161 N.C. App. 527 (2003) (guilty plea waives right to appeal whether the substantive felony was actually a felony, and whether the sentence imposed constituted cruel and unusual punishment; these issues must be raised in a motion for appropriate relief, if at all).

that he or she wishes to contest.[191] Collateral attacks, that is, attempts to contest the validity of a previous conviction during the habitual felon proceeding itself, are allowed only when the defendant asserts that he or she was denied counsel altogether in connection with his or her previous conviction.[192] The United States Constitution requires that defendants be permitted to raise such claims through collateral attack because the complete denial of counsel is a "unique constitutional defect."[193] A defendant may raise the issue by filing a motion to suppress the previous conviction under G.S. 15A-980.[194]

The appellate courts have consistently rejected defendants' attempts to raise other issues through collateral attack. For example, a defendant may not argue that the lawyer who represented him or her in connection with a previous felony was ineffective.[195] Nor may a defendant claim, during a habitual offender proceeding, that the court in which his or her previous felony conviction took place lacked jurisdiction over felony offenses.[196] Likewise, a defendant may not collaterally attack a previous felony conviction by arguing that a guilty plea to the previous felony was not knowing and voluntary.[197] Nonetheless, some judges permit such collateral attacks, on the theory that it promotes judicial economy to address them on the "front end" of the habitual offender proceeding, rather than requiring the defendant to file one or more motions for appropriate relief after the fact.

Although it will usually be clear whether the defendant seeks to allege a complete denial of counsel or ineffective assistance of counsel, this is not always so. In *State v. Hensley*,[198] the defendant alleged that he received appointed counsel in connection with a previous felony conviction, but that the lawyer later withdrew. The defendant then waived appointed counsel and retained a lawyer, but the retained lawyer failed to show up for court when the defendant was convicted and sentenced. This might reasonably have been viewed as a complete denial of counsel, but the court of appeals held otherwise: "The essence of defendant's claim is not that the State failed to appoint counsel but, rather, that the counsel procured by defendant provided ineffective assistance by failing to appear."[199] It therefore found that the defendant's argument was an improper collateral attack.

191. *See* State v. Creason, 123 N.C. App. 495, 501–02 (1996).

192. *Creason* might be read to hold that even the complete denial of counsel cannot be raised by collateral attack, but this is clearly incorrect, as explained immediately below.

193. Custis v. United States, 511 U.S. 485, 496 (1994).

194. *See generally* State v. Fulp, 355 N.C. 171 (2002).

195. *See* State v. Hensley, 156 N.C. App. 634, 637–38 (2003).

196. *See* State v. Flemming, 171 N.C. App. 413, 417 (2005).

197. *See, e.g.,* State v. Stafford, 114 N.C. App. 101, 104 (1994) (holding, in a habitual DWI case, that a defendant may not challenge the validity of a previous conviction based on his assertion that his guilty plea in the earlier case was not knowing and voluntary).

198. 156 N.C. App. 634 (2003).

199. *Id.* at 638.

VI. Sentencing

A. Habitual Felon

The Justice Reinvestment Act (JRA) made changes to the habitual felon statute, effective for substantive offenses committed on or after December 1, 2011. Because the courts are still processing a significant number of offenses before that date, this bulletin summarizes the law both before and after the Act.

The JRA provided that "[p]rosecutions for offenses committed before the effective date of this act are not abated or affected by this act."[200] Therefore, defendants sentenced under the former provisions of the habitual felon statutes are not entitled to be resentenced under the provisions of the amended law.[201]

1. Substantive Offenses Committed on or After December 1, 2011

When a defendant is convicted of a habitual felon charge, he or she is sentenced as if the substantive felony were four offense classes higher, but no higher than Class C.[202] However, if the substantive felony is a Class A, B1, or B2 offense, the defendant is sentenced according to the classification of the substantive felony.[203] The chart below summarizes the effect of the habitual felon statute on substantive felonies of each class.

Class of Substantive Felony	Sentencing Class under the Habitual Felon Statute
A	A
B1	B1
B2	B2
C	C
D	C
E	C
F	C
G	C
H	D
I	E

2. Substantive Felonies Committed Prior to December 1, 2011

Under the pre-JRA version of the habitual felon statute, when a defendant is convicted of a habitual felon charge, he or she is sentenced as if the substantive felony were a Class C felony, unless the substantive felony is a Class A, B1, or B2 offense, in which case the defendant is sentenced according to the usual classification of the substantive felony.

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200. S.L. 2011-192, sec. 10.

201. *Cf.* State v. Whitehead, 365 N.C. 444 (2012) (interpreting similar language in the bill that created Structured Sentencing to prohibit relief for defendants sentenced before Structured Sentencing to longer prison terms than they would have received under Structured Sentencing). *See also infra* note 235 (discussing a related issue).

202. G.S. 14-7.6.

203. *Id.*

3. Principles That Apply Regardless of the Date of the Substantive Felony

When a defendant is convicted of multiple substantive felonies to which a habitual felon indictment attaches, each is elevated according to the rules above, unless there is a reason to do otherwise, such as a plea agreement stipulating that one or more of the substantive felonies will not be elevated.

The previous felonies alleged in support of the habitual felon charge may not be used in determining the defendant's prior record level under Structured Sentencing.[204] This is so even if the State alleges more than three previous felonies; that is, if the State alleges five previous felonies in the habitual felon indictment, all five are off-limits for purposes of determining the defendant's prior record level, at least where the defendant pleads guilty to being a habitual felon.[205] However, as noted above, when a defendant has more than three previous felonies, the State is not required to list all of them in the habitual felon indictment. It may elect which to allege and is free to allege the least serious felonies in the indictment, leaving the most serious felonies available for prior record level purposes.[206] Furthermore, when a previous felony conviction listed in a habitual felon indictment was consolidated with another conviction, the other conviction may be used to determine the defendant's prior record level.[207] Finally, a previous felony conviction listed in a habitual felon indictment may nonetheless be used to support the imposition of prior record level points under G.S. 15A-1340.14(b)(6) (add one point if all the elements of the present offense are included in any prior offense) and G.S. 15A-1340.14(b)(7) (add one point if the present offense was committed while the defendant was on probation, parole, post-release supervision, and so forth).[208]

A sentence imposed under the habitual felon statute must run consecutive to any sentence that the defendant is already serving.[209] However, a habitual felon sentence may be consolidated with or run concurrent with other sentences imposed at the same time, including other habitual felon sentences[210] and probably including other active sentences that result from probation

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204. *Id*.

205. State v. Lee, 150 N.C. App. 701, 702–03 (2002). In *Lee*, the State listed five felonies in the habitual felon indictment, and the defendant pled guilty. The court of appeals ruled that none of the five listed felonies could be used in determining the defendant's prior record level. It is not clear how the court would rule on a case in which more than three felonies were listed in the indictment, but the habitual felon issue went to trial and only three felonies were submitted to the jury. The State could attempt to distinguish *Lee* by arguing that any felonies that were listed in the indictment but not submitted to the jury were not "used to establish [the defendant's] status as an habitual felon," G.S. 14-7.6, and so could be counted for prior record level purposes.

206. *See supra* note 97 and accompanying text; State v. Cates, 154 N.C. App. 737, 739–40 (2002).

207. *See*, *e.g.*, State v. Truesdale, 123 N.C. App. 639, 642 (1996) (emphasis in original) ("[W]e find nothing in these statutes to prohibit the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another *separate* conviction obtained the same week to determine prior record level.").

208. *See* State v. Bethea, 122 N.C. App. 623, 627–28 (1996).

209. *See* G.S. 14-7.6; State v. Watkins, 189 N.C. App. 784 (2008) (holding that the trial court erred in ordering a habitual felon sentence to run concurrent with a federal sentence that the defendant was then serving).

210. A sentence imposed at the same time as a habitual felon sentence is not "being served" at the time of the habitual felon sentence, G.S. 14-7.6, so there is no statutory bar to concurrent sentencing. *See generally* State v. Haymond, 203 N.C. App. 151 (2010) (consolidating multiple convictions as a habitual felon permissible); State v. Walston, 193 N.C. App. 134 (interpreting similar language in the drug trafficking

being revoked simultaneously with the entry of the habitual felon judgment.[211] Some habitual felon defendants who committed their substantive felonies on or after December 1, 2011, might receive probationary sentences. (The Structured Sentencing grid permits such sentences for Class E felons with Prior Record Levels I or II.) "Any suspended sentence ordered [under these circumstances] probably must be set to run at the expiration of any other sentence being served by the defendant in the event of revocation."[212]

When a defendant who has previously been convicted as a habitual felon is convicted of a new felony offense, it becomes necessary to calculate the defendant's prior record level. The felony for which the defendant was previously sentenced as a habitual felon is assigned prior record level points based on the classification of the substantive felony, not based on the elevated offense class under which the defendant was sentenced, because the substantive felony is a crime while being a habitual felon is not.[213]

When a habitual felon charge is brought in a separate indictment with a separate case number from the substantive felony, the proper procedure is to enter judgment on the substantive felony alone. No judgment should be entered in the habitual felon case file.[214]

4. When Being Sentenced as a Habitual Felon Benefits the Defendant

There are two types of cases in which a defendant might benefit from being sentenced as a habitual felon. The first involves Class C and D felonies, and the second involves drug trafficking offenses. Prosecutors should be aware of each situation and should consider withdrawing or dismissing a habitual felon charge if a habitual felon conviction would result in a reduction of the defendant's sentence.

a. Certain Defendants Convicted of Class C and Class D Felonies. Because the previous felonies used to support the habitual felon charge may not be used in determining the defendant's prior record level, a defendant who is charged with a Class C or a Class D felony will often benefit from being sentenced as a habitual felon because of a reduction in his or her prior record level.[215]

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statute to allow concurrent sentences); State v. Thomas, 85 N.C. App. 319 (1987) (similar, interpreting former provision concerning armed robbery). Further, a number of cases involving concurrent sentences have been affirmed without comment. *See, e.g.,* State v. King, 158 N.C. App. 60, 62–63 (2003) (affirming a case in which "[t]he trial court sentenced defendant as an habitual felon to three concurrent sentences of 120 to 153 months").

211. Although one could argue that the probationary sentence was "being served" prior to the defendant's conviction as a habitual felon and that consecutive time is therefore required, the Division of Adult Correction reportedly takes the position that because the suspended sentence was not activated prior to the imposition of the habitual felon sentence, concurrent sentencing is permissible. The Division's viewpoint, of course, is not binding on a court and there is no case law on this issue.

212. James M. Markham, *The North Carolina Justice Reinvestment Act* 28–29 (UNC School of Government, 2012).

213. *See* State v. Vaughn, 130 N.C. App. 456, 459–60 (1998). Although habitual felon convictions are ignored for prior record level purposes, the state's appellate courts have nonetheless held that a defendant who takes the stand may be cross-examined about a prior habitual felon conviction as part of his or her criminal record. *See* State v. Owens, 160 N.C. App. 494, 502 (2003).

214. *See*, *e.g.*, State v. Taylor, 156 N.C. App. 172, 175–76 (2003).

215. A number of common felonies are Class D offenses, including voluntary manslaughter, *see* G.S. 14-18; discharging a firearm into an occupied dwelling, *see* G.S. 14-34.1(b); first-degree burglary, *see* G.S. 14-51, -52; first-degree arson, *see* G.S. 14-58; and armed robbery, *see* G.S. 14-87.

This is obvious with respect to Class C felonies, where being sentenced as a habitual felon does not increase the offense class at all, but may decrease the defendant's prior record level. This is exactly what happened in *State v. Wells*.[216] The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and other offenses after shooting another man. He pled guilty to being a habitual felon. The judge entered several judgments against the defendant, including one for AWDWIKISI, a Class C felony. In that judgment, the trial court sentenced the defendant as a prior record level IV offender, counting all of the defendant's previous convictions. However, the court of appeals ruled that "the trial court was required to sentence defendant as an habitual felon" because the defendant had been indicted as such and the State had never withdrawn the habitual felon charge in connection with the assault. Therefore, the judge should have calculated the defendant's prior record level without including the convictions used to qualify the defendant as a habitual felon.

Class D felonies are sentenced as Class C felonies under the habitual felon laws. Sometimes that one-class increase is more than offset by the reduction in the defendant's prior record level that results from not counting the previous convictions that are used to support the habitual felon charge. Suppose that a defendant is charged with voluntary manslaughter, a Class D offense. The defendant has previous convictions for felony larceny (Class H, two prior record level points under Structured Sentencing), common-law robbery (Class G, four points), and assault inflicting serious bodily injury (Class F, four points). Under the current version of the sentencing grid, a conviction without a habitual felon charge would result in a presumptive range of minimum sentences of 78 to 97 months (Class D, prior record level IV, based on ten prior record points). A conviction with a habitual felon charge would increase the offense class to C, but would remove all of the prior record points, resulting in a presumptive range of minimum sentences of 58 to 73 months.[217]

b. Certain Defendants Convicted of Drug Trafficking. A defendant charged with drug trafficking may be convicted and sentenced as a habitual felon.[218] For many drug trafficking defendants, this will result in a shorter sentence than they would otherwise receive under the trafficking laws. For example, a defendant convicted of trafficking more than 10,000 pounds of marijuana normally would be sentenced "as a Class D felon . . . to a minimum term of 175 months and a maximum term

216. 196 N.C. App. 498 (2009).

217. *See generally* G.S. 15A-1340.17. Sentencing a Class D offender as a habitual felon does not always result in a lower sentence. For example, a defendant with a lengthy prior record, who would be in prior record level VI even without the previous felonies used to support the habitual felon charge, would face an increased sentence if convicted as a habitual felon.

218. G.S. 90-95(h) states that "[n]otwithstanding any other provision of law," defendants convicted of drug trafficking shall be sentenced as provided in that subsection. Any uncertainty about whether that provision trumped the habitual felon laws was removed in *State v. Eaton*, 210 N.C. App. 142, 150, 151–52 (2011), where the court of appeals rejected the defendant's argument that "individuals convicted of drug trafficking offenses are not subject to enhanced sentencing as habitual felons." The court stated that "a drug trafficker who has also attained habitual felon status [is] subject to even more enhanced sentencing pursuant to [the habitual felon laws]," reasoning that "[a] contrary holding could lead to the absurd result that a defendant convicted of simple possession of a controlled substance and of having attained the status of an habitual felon could receive a significantly longer sentence than an habitual felon convicted of drug trafficking on the basis of an act involving the same controlled substance. Furthermore, as a matter of public policy, it is reasonable to assume that the legislature intended to further enhance the sentences of drug traffickers who are also habitual felons rather than ignoring their habitual felon status for sentencing purposes."

of 222 months."[219] Under the habitual felon laws, however, the defendant would be sentenced as a Class C offender. The only way for a Class C offender to receive a sentence as long as the Class D trafficking sentence is for the defendant to be sentenced in the aggravated range with prior record level VI; all other Class C sentencing ranges are shorter than the Class D trafficking sentence, and many are less than half as long. Of course, for many other trafficking defendants, being sentenced as a habitual felon will result in an increased sentence.

B. Violent Habitual Felon

Violent habitual felon sentencing is simple. A defendant who is convicted as a violent habitual felon must be sentenced to life without parole.[220] The sentence must run consecutive to any sentence then being served by the defendant, though this provision has little if any practical effect.[221] A violent habitual felon sentence may be consolidated with or run concurrent with another sentence that is imposed at the same time.[222]

C. Habitual Breaking and Entering

A defendant who is convicted of habitual breaking and entering is sentenced as a Class E offender.[223] Therefore, defendants whose current offense is first-degree burglary or breaking out of dwelling house burglary, both Class D offenses, would benefit from being sentenced as habitual breaking and entering offenders, and it presumably will be rare for prosecutors to invoke the habitual breaking and entering statutes for such defendants.

As is the case with a habitual felon, "[i]n determining the prior record level, any conviction used to establish a person's status as a status offender shall not be used."[224] A court probably should apply the rule from the habitual felon context that any previous conviction listed in the indictment is off-limits for prior record level purposes, even when the indictment lists more than the minimum number of one previous conviction.[225] A court probably also should apply the rule that other convictions incurred in the same week as the previous conviction listed in the habitual indictment *may* be used when calculating prior record level.[226] And, a court should probably apply the rule that previous convictions listed in the habitual indictment *may* be used for purposes of the "bonus points" in G.S. 15A-1340.14(b)(6)–(7).[227]

The habitual breaking and entering statutes provide that "[s]entences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section."[228] Similar language in other statutes has been interpreted to allow consolidated or concurrent sentences for convictions sentenced at the

219. G.S. 90-95(h)(1)d.

220. G.S. 14-7.12.

221. *Id.*

222. This issue is discussed above in connection with the habitual felon laws. *See supra* notes 209–12 and accompanying text.

223. G.S. 14-7.31(a).

224. G.S. 14-7.31(b).

225. *See supra* note 205 for a discussion of this rule and whether it applies to previous convictions that are listed in a habitual offender indictment but that are not submitted to the jury.

226. State v. Truesdale, 123 N.C. App. 639 (1996).

227. State v. Bethea, 122 N.C. App. 623 (1996).

228. G.S. 14-7.31(b).

same time.[229] When a judge imposes a probationary sentence on a habitual breaking and entering defendant, the suspended sentence likely must be ordered to run consecutively with any sentence being served by the defendant in the event of revocation.[230]

The statutes also state that "[a] conviction as a status offender . . . shall not constitute commission of a felony for the purpose of [the habitual felon or violent habitual felon laws]."[231] The apparent meaning of this provision is that the State may not habitualize the defendant twice, taking, for example, a Class H felony breaking or entering and elevating it to Class E under the habitual breaking and entering statute, then taking that Class E and further elevating it to a Class C under the habitual felon statute.

VII. Constitutional Issues

A variety of constitutional challenges have been raised regarding the habitual felon and violent habitual felon laws. (There are not yet any appellate decisions involving the habitual breaking and entering statutes.) Generally, these claims have been rejected.

A. Double Jeopardy

First, some have argued that the habitual felon laws violate double jeopardy because, by increasing a defendant's sentence for the substantive felony, they effectively punish the defendant a second time for his or her previous convictions. This argument has regularly been rejected by the state's appellate courts.[232] Likewise, the state's appellate courts have held that the combination of the habitual felon laws and Structured Sentencing do not violate double jeopardy by twice increasing a defendant's sentence based on his or her prior record.[233]

B. Equal Protection and Selective Prosecution

It has been argued that the habitual felon laws violate equal protection, or permit selective prosecution, because a prosecutor may choose whether to seek habitual felon charges against a defendant, and some prosecutors will seek habitual felon charges more readily than others. These arguments, too, have been rejected.[234]

After the Justice Reinvestment Act (JRA) ameliorated the habitual felon laws, some defendants convicted and sentenced after December 1, 2011, based on substantive felonies committed before December 1, 2011, have argued that applying the harsher pre-JRA habitual felon laws to

229. *See supra* notes 210–11 and accompanying text.

230. *See supra* note 212 and accompanying text (discussing this issue in the habitual felon context).

231. G.S. 14-7.31(c).

232. *See, e.g.*, State v. Todd, 313 N.C. 110, 117–18 (1985); State v. Artis, 181 N.C. App. 601, 601 (2007). *See also* Monge v. California, 524 U.S. 721, 728 (1998) ("An enhanced sentence imposed on a persistent offender thus is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes but as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." (citations, internal quotation marks omitted)).

233. *See* State v. Brown, 146 N.C. App. 299, 302 (2001) ("[T]he Habitual Felons Act used in conjunction with structured sentencing [does] not violate . . . double jeopardy protections."). Other double jeopardy arguments and statutory limitations concerning the use of a single previous felony conviction for multiple purposes are discussed above. *See supra* notes 63–66; notes 144–46 and accompanying text.

234. *See, e.g.*, State v. Williams, 149 N.C. App. 795, 801 (2002).

them violates equal protection. The court of appeals has rejected this argument in an unpublished opinion.[235]

C. Separation of Powers

Two distinct separation of powers arguments have been made concerning the habitual felon laws. It has been argued that prosecutors who have a policy of charging all eligible defendants as habitual felons are failing to exercise their discretion and therefore are violating the separation of powers. This argument has been repudiated by the state's appellate courts.[236]

Alternatively, it has been argued that because the district attorney may decide whether to bring a habitual felon charge against an eligible defendant, the habitual felon laws unconstitutionally award to the district attorney the legislative power to define sentences for crimes. This argument has also been rejected.[237]

D. Ex Post Facto

The violent habitual felon laws have been attacked on ex post facto grounds because the statutes allow previous convictions back to 1967 to form the basis of a violent habitual felon charge, yet the violent habitual felon statutes were not enacted until 1994. Thus, the argument goes, defendants who committed violent felonies between 1967 and 1994 did so without knowing that they were moving towards violent habitual felon status. This argument has failed.[238]

E. Cruel and Unusual Punishment

Finally, many have argued that the habitual felon laws, because they often require lengthy sentences for relatively minor offenses, violate the Eighth Amendment's prohibition against cruel and unusual punishment. The United States Supreme Court has interpreted the Eighth Amendment to include a proportionality principle, which it has applied in one instance to invalidate a sentence imposed pursuant to a state recidivist statute.[239] However, the Court has otherwise rejected Eighth Amendment arguments of this type, even on seemingly favorable facts, and has emphasized the limited nature of proportionality review.[240] North Carolina's appellate courts

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235. State v. Shuler, No. COA12-986, 2013 WL 1315927, at *2 (N.C. Ct. App. Apr. 2, 2013) (unpublished) (the defendant pled guilty in 2012 to possessing cocaine in 2010 and to being a habitual felon; he was sentenced as a Class C felon under pre-JRA law based on his offense date; on appeal, the defendant claimed an equal protection violation in not being sentenced under the JRA; the court of appeals ruled that the issue was not preserved but also stated that G.S. 14-7.6 "treats habitual felons in different ways depending upon the date the principal felony is committed" and that "[t]his does not implicate an equal protection violation").

236. *See*, *e.g.*, *Williams,* 149 N.C. App. at 802.

237. State v. Wilson, 139 N.C. App. 544, 551 (2000).

238. *See* State v. Wolfe, 157 N.C. App. 22, 37 (2003) ("Because defendant's violent habitual felon status will only enhance his punishment for the [substantive violent felony], and not his punishment for the [previous violent felonies], there is no violation of the *ex post facto* clauses.").

239. *See* Solem v. Helm, 463 U.S. 277, 303 (1983) (holding that a sentence of life in prison without parole, imposed under South Dakota's recidivist statute, was a cruel and unusual punishment for the offense of writing a no-account check for $100, even though the defendant had six prior felony convictions).

240. *See*, *e.g.*, Lockyer v. Andrade, 538 U.S. 63, 64 (2003); Ewing v. California, 538 U.S. 11 (2003); Rummel v. Estelle, 445 U.S. 263, 272 (1980).

have never invalidated a habitual felon or violent habitual felon sentence on Eighth Amendment grounds and have rejected Eighth Amendment challenges many times.[241]

VIII. Conclusion

The habitual felon and violent habitual felon laws have created some confusion—and much litigation—since they were first enacted. The habitual breaking and entering statutes are new but also promise controversy. Hopefully, this bulletin will serve as a useful summary of settled law and will help judges and lawyers to recognize cases that pose unanswered questions.

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241. As to habitual felon sentences, see *State v. Lackey*, 204 N.C. App. 153 (2010) (rejecting Eighth Amendment challenge to habitual felon sentence of 84 to 110 months for possession of 0.1 grams of cocaine), and *State v. Hensley*, 156 N.C. App. 634 (2003) (finding no Eighth Amendment violation where defendant was sentenced as a habitual felon to 90 to 117 months for obtaining a $100 item by false pretenses). As to violent habitual felon sentences, see *State v. Mason*, 126 N.C. App. 318 (1997) (rejecting the defendant's argument that the violent habitual felon laws are facially unconstitutional under the Eighth Amendment). Note, however, *State v. Starkey*, 177 N.C. App. 264 (2006) (describing, but not reviewing, trial court's sua sponte holding that a habitual felon sentence of 70 to 93 months for possession of 0.1 grams of cocaine was cruel and unusual punishment).

Mitigation Basics

Glenda Brooks and Josie Van Dyke
Sentencing Solutions, Inc.

1

What is mitigation and how do I use it?

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

2

"What Happened?"

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

3

How do you find out what happened?

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

4

Ask your client Questions

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

5

Ask your client Questions

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

6

What's Right

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

7

Be Patient and Persistent

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

8

ACES as an Interview Tool

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

9

Talk to family members (If appropriate)

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

10

Get the family on board!

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

11

Genograms

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

12

Read Police Reports

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

13

Send for Important Records

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

14

Records 101

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

15

Reading the Records

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

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

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

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

We will go over examples.

16

Expert Help

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

17

Contact Us

- Sentencing Solutions. Incorporated
- Josie Van Dyke 919-418-2136
- Glenda Brooks 919-604-5348

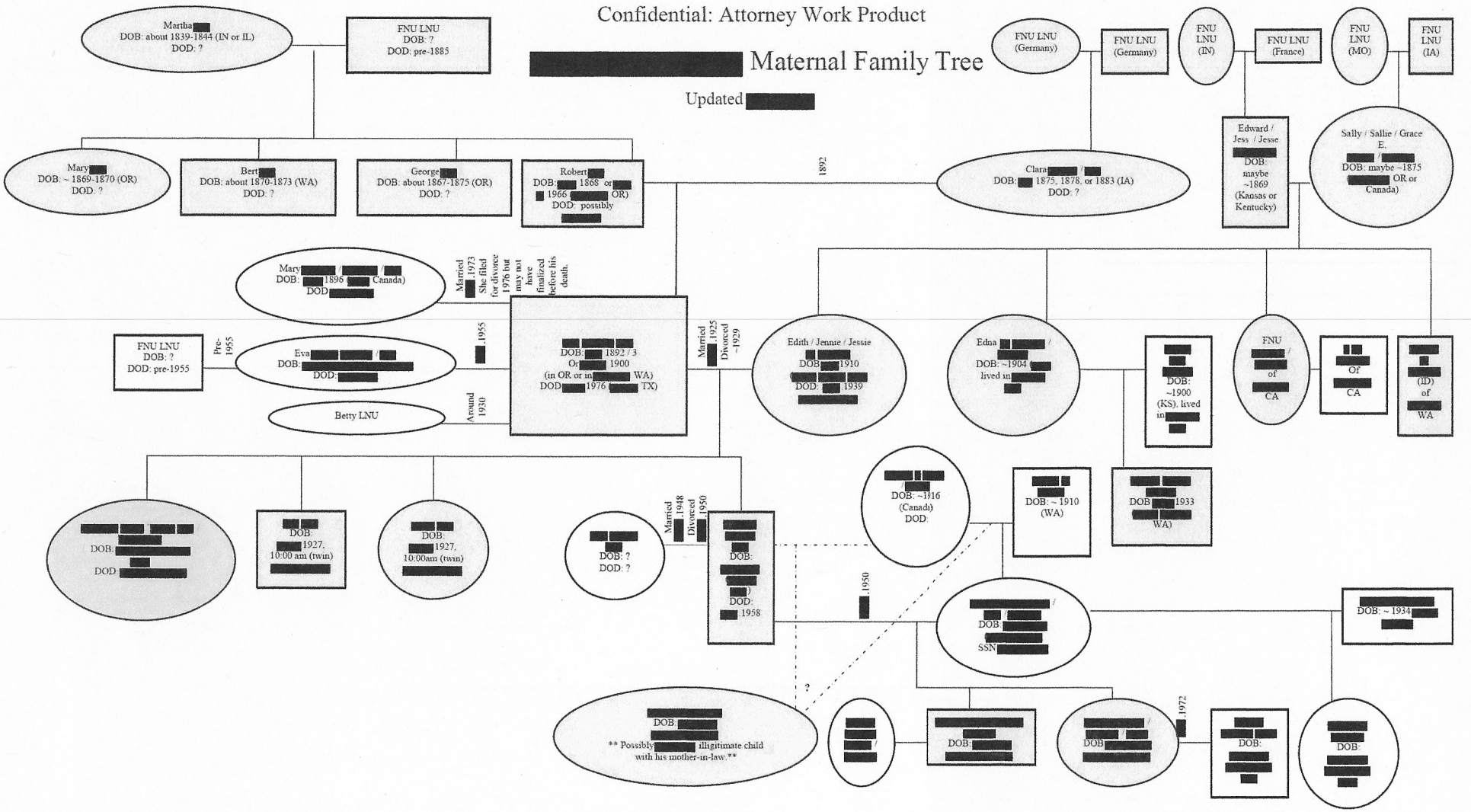
- Please feel free to email questions:
- josievandyke@aol.com

18

Confidential: Attorney Work Product

[redacted] Maternal Family Tree

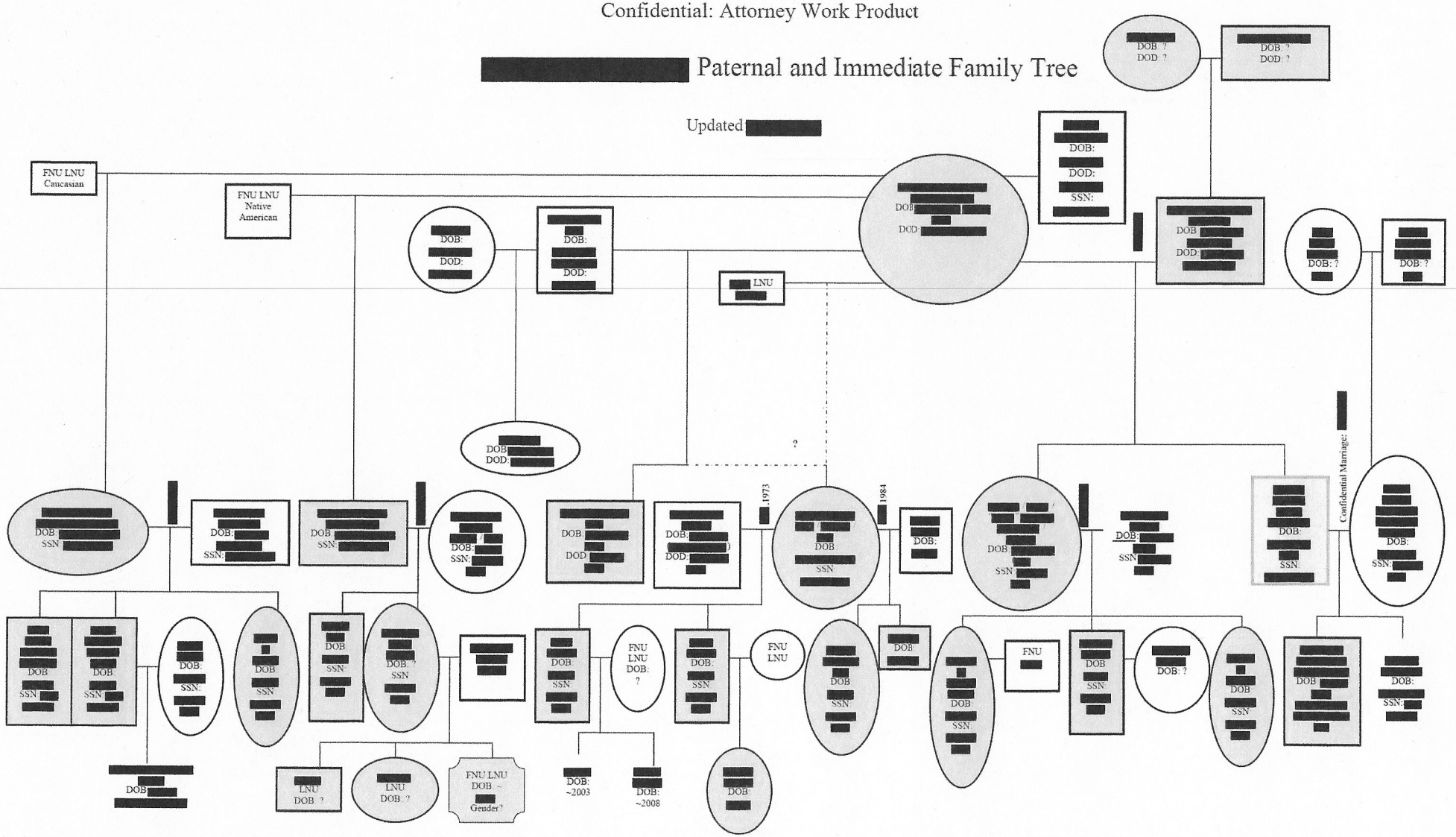
Updated [redacted]



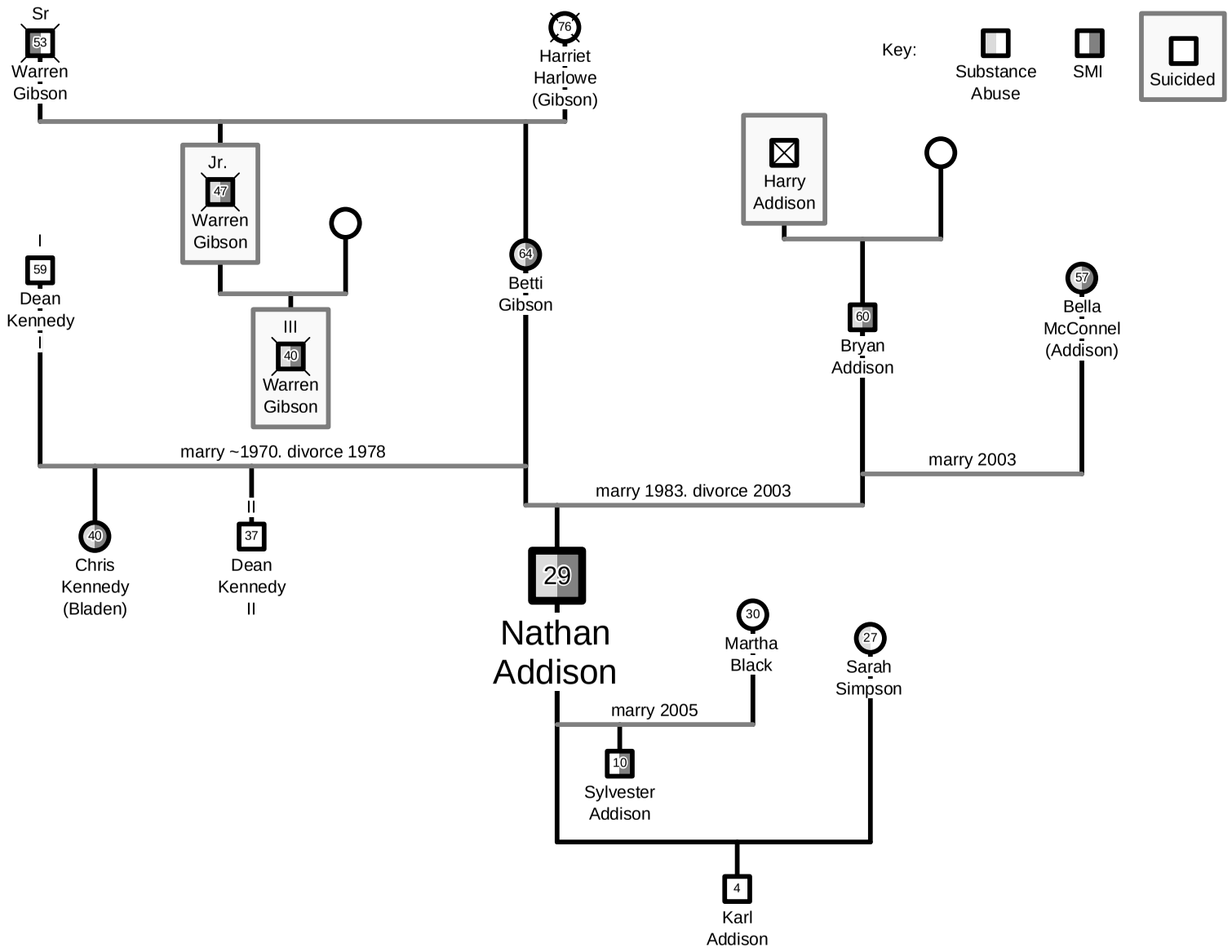
Confidential: Attorney Work Product

[redacted] Paternal and Immediate Family Tree

Updated [redacted]



Nathan Addison Genogram
04.05.2013



FACT SHEET
October 2017

Adverse Childhood Experiences Among US Children

This fact sheet presents the latest data on the prevalence of Adverse Childhood Experiences (ACEs) among children in the United States.[1] ACEs include a range of experiences (Table 1) that can lead to trauma and toxic stress which impact the early and lifelong health and well-being of children—particularly children who experience the compounding effects of multiple ACEs.[2-4] While children and families can thrive despite ACEs,[3-7] ACEs are a strong risk factor impacting child development and health across life.[2,3,7] ACEs are common among all children; most who have experienced one have experienced at least one other.[1,4,8] These impacts extend beyond children and can have far-reaching consequences for entire communities; families, caregivers.[9-12]

Parents, teachers, providers and communities can implement a range of strategies to reduce the negative health effects associated with ACEs.[9-13] Many resources and a new national research, policy and practice agenda are available to help translate these strategies, requiring policy and practice innovations, collaboration across sectors and common use of relationship-centered, hands on support for children and families to help them heal from trauma, build resilience and prevent ACEs.[13-23] A new science of thriving provides hope for all children and families.[24,25]

About the Study

All findings reported here are based on analysis of data from the 2016 National Survey of Children's Health (NSCH). See methods notes for more details.

In 2016, *34 million* children age 0–17—nearly half of all US children—had at least one of nine ACEs, and more than 20 percent had two or more.

Table 1: National and Across-State Prevalence of ACEs among Children and Youth

Adverse Childhood Experiences (ACEs)	National Prevalence, by Age of Child				Range Across States
	All Children	Age 0-5	Age 6-11	Age 12-17	
Child had ≥ 1 Adverse Childhood Experience	46.3%	35.0%	47.6%	55.7%	38.1% (MN) – 55.9% (AR)
Child had ≥ 2 Adverse Childhood Experiences	21.7%	12.1%	22.6%	29.9%	15.0% (NY) – 30.6% (AZ)
Nine assessed on the 2016 NSCH[1]					% with 1+ Additional ACEs
Somewhat often/very often hard to get by on income*	25.5%	24.1%	25.7%	26.5%	54.4%
Parent/guardian divorced or separated	25.0%	12.8%	27.5%	34.2%	68.0%
Parent/guardian died	3.3%	1.2%	2.9%	5.9%	74.7%
Parent/guardian served time in jail	8.2%	4.5%	9.2%	10.6%	90.6%
Saw or heard violence in the home	5.7%	3.0%	6.1%	8.0%	95.4%
Victim/witness of neighborhood violence	3.9%	1.2%	3.7%	6.5%	92.1%
Lived with anyone mentally ill, suicidal, or depressed	7.8%	4.4%	8.6%	10.3%	82.4%
Lived with anyone with alcohol or drug problem	9.0%	5.0%	9.3%	12.7%	90.7%
Often treated or judged unfairly due to race/ethnicity**	3.7%	1.2%	4.1%	5.7%	75.3%

*47% of children in households with poverty level incomes have parents who reported "often hard to get by on income". **1 in 10 black and "other" race/ethnicity children had parents who reported their children often were treated or judged unfairly. 4.4% of Hispanic and Asian/Non-Hispanic children had parents who reported this (1% for white children)

Table 2: Prevalence of ACEs by Race/Ethnicity and Income

	All Children	White, NH*	Hispanic	Black, NH*	Asian, NH*	Other, NH*
% of all US children		51.9%	24.5%	12.7%	4.5%	6.3%
% 1+ ACEs	46.3%	40.9%	51.4%	63.7%	25.0%	51.5%
% 2+ ACEs	21.7%	19.2%	21.9%	33.8%	6.4%	28.3%
% among children with 1+ ACES		46.0%	27.0%	17.4%	2.4%	7.1%
Income < 200% of Federal Poverty Level (43.7% of all US children; 58% of children with 1+ ACEs)						
% 1+ ACEs	61.9%	63.3%	57.0%	70.5%	36.4%	70.6%
% 2+ ACEs	31.9%	34.7%	25.1%	39.9%	9.0%	44.4%
Income 200-399% of Federal Poverty Level (26.8% of all US Children; 25.1% of children with 1+ ACEs)						
% 1+ ACEs	43.2%	39.7%	46.8%	59.1%	24.8%	50.7%
% 2+ ACEs	19.0%	17.2%	19.8%	29.4%	7.0%	24.5%
Income ≥ 400% of Federal Poverty Level (29.5% of all US Children; 17.0% of children with 1+ ACEs)						
% 1+ ACEs	26.4%	24.4%	35.5%	41.2%	14.3%	27.3%
% 2+ ACEs	9.2%	8.6%	12.1%	14.1%	3.6%	10.5%

*NH=Non-Hispanic

Key Findings

- The rate of children across U.S. states with one or more of nine ACEs assessed varies from 38.1% to 55.9%.
- Those with two or more ACEs varies from 15.0% to 30.6% across US states.
- Most children with any one ACE had at least one other, ranging from 54.4% to 95.4% across the nine ACEs assessed.
- ACEs are common across all income groups, though 58% of US children with ACEs live in homes with incomes less than 200% of the federal poverty level.
- ACEs are common across all race/ethnicity groups, though are somewhat disproportionately lower for White, Non-Hispanic and lowest for Asian children.
- Black children are disproportionately represented among children with ACEs. Over 6 in 10 have ACEs, representing 17.4% of all children in the US with ACEs.

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23. National Agenda: http://www.academicpedsjnl.net/article/S1876-2859(17)30354-6/pdf
24. Beckman: http://www.academicpedsjnl.net/article/S1876-2859(16)30420-X/pdf
25. New Science of Thriving: http://bit.ly/2fasOEe

Additional Resources: Academic Pediatrics, 17(7S): S51-S69. Academic Pediatrics supplement, Sept/Oct 2017 – Child Well-being and Adverse Childhood Experiences in the US: http://www.academicpedsjnl.net/issue/S1876-2859(17)X0002-8

Citation: Bethell, CD, Davis, MB, Gombojav, N. Stumbo, S, Powers, K. Issue Brief: Adverse Childhood Experiences Among US Children, Child and Adolescent Health Measurement Initiative, Johns Hopkins Bloomberg School of Public Health, October 2017: cahmi.org/projects/adverse-childhood-experiences-aces

Methods Notes

See NSCH Learn About the Survey for sampling, administration and content included in the 2016 NSCH. Alll differences in rates of ACEs across age, income and race/ethnicity groups are statistically significant using standard tests of differences. All analysis presented here replicates those presented in peer reviewed publications using ACEs data from the 2011-12 NSCH. The NSCH is a child level household survey conducted with parents or guardians under the leadership of the Maternal and Child Health Bureau (MCHB) and implemented through the US Bureau of the Census. Data were weighted to represent the population of noninstitutionalized children ages 0–17 nationally and in each state.

About the Child Adolescent Health Measurement Initiative

The Child and Adolescent Health Measurement Initiative (CAHMI), a national initiative based in the Johns Hopkins Bloomberg School of Public Health, partners with MCHB and the US Bureau of the Census to develop and disseminates data files, variable coding and micro-data findings on its Data Resource Center website (www.childhealthdata.org) and with funding from MCHB. For this issue brief, CAHMI independently prepared the data files, constructed variables and analysis reported on here.

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CAHMI
The Child & Adolescent Health Measurement Initiative

Robert Wood Johnson Foundation

CHILDREN'S HOSPITAL ASSOCIATION

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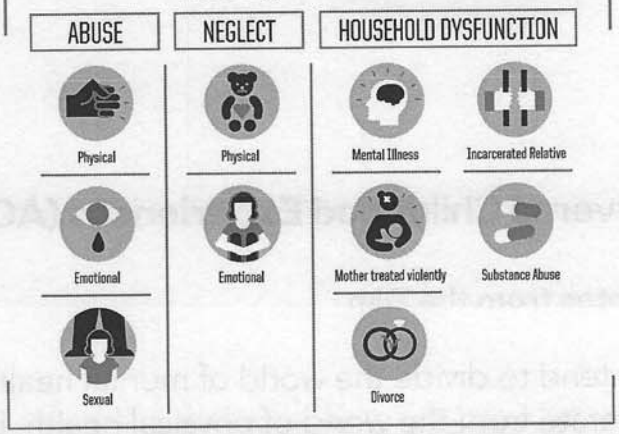
THE TRUTH ABOUT ACEs

WHAT ARE THEY?

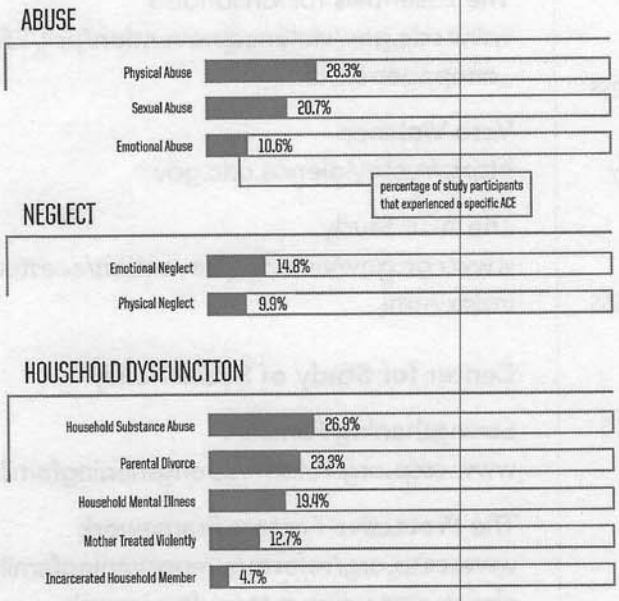
ACEs are ADVERSE CHILDHOOD EXPERIENCES

The three types of ACEs include

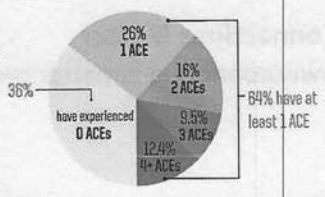


HOW PREVALENT ARE ACEs?

The ACE study revealed the following estimates:*

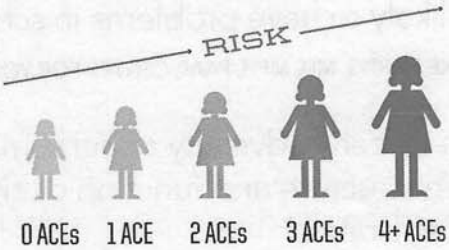


Of 17,000 ACE study participants:

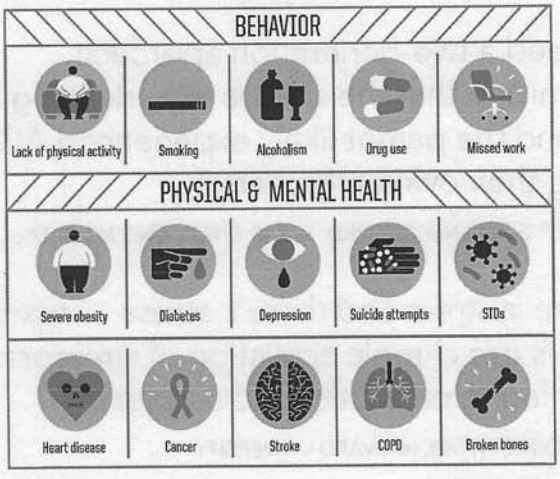


WHAT IMPACT DO ACEs HAVE?

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



Possible Risk Outcomes:



rwjf.org/aces

Robert Wood Johnson Foundation

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

MAKING GREAT PLACES

Advocates for Health in Action · WAKE COUNTY · the YMCA

GENEROUSLY HOSTED BY Marbles

Adverse Childhood Experiences (ACEs)

Quotes from the Film

"We tend to divide the world of mental health separate from the world of physical health, but the body doesn't do that."

NADINE BURKE HARRIS, MD, MPH, FAAP, CENTER FOR YOUTH WELLNESS

"An ACE score of 4 or more makes children 32 times as likely to have problems in school."

NADINE BURKE HARRIS, MD, MPH, FAAP, CENTER FOR YOUTH WELLNESS

"Exposure to early adversity and trauma literally affects the structure and function of children's developing brains."

NADINE BURKE HARRIS, MD, MPH, FAAP, CENTER FOR YOUTH WELLNESS

"We need a two-generation approach recognizing that the child is experiencing ACEs now and the parent likely experienced ACEs during their own early years."

ANGELO P. GIARDINO, MD, PhD, TEXAS CHILDREN'S HOSPITAL

"...there is stress and there's ***stress***. ...toxic stress is this chronic activation of stressors with no buffering protection, no support."

JACK SHONKOFF, MD, HARVARD UNIVERSITY

Resources

AHA Website
www.AdvocatesForHealthInAction.org

The ACES Connection
www.acesconnection.com

Centers for Disease Control and Prevention

The Essentials for Childhood
www.cdc.gov/violenceprevention/pdf/EfC_onepager-a.pdf

Veto Violence
https://vetoviolence.cdc.gov

The ACE Study
www.cdc.gov/violenceprevention/acestudy/index.html

Center for Study of Social Policy

Strengthening Families
www.cssp.org/reform/strengtheningfamilies

The Protective Factors Framework
www.cssp.org/reform/strengtheningfamilies/about/protective-factors-framework

Connections Matter
www.connectionsmatter.org

Advocates for Health in Action

Adverse Childhood Experience (ACE) Questionnaire

Finding your ACE Score ra hbr 10 24 06

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

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

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

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

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

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

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

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

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

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

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

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

RESILIENCE Questionnaire: Circle the most accurate answer under each statement.

1. I believe that my mother loved me when I was little.
Definitely true Probably true Not sure Probably Not True Definitely Not True

2. I believe that my father loved me when I was little.
Definitely true Probably true Not sure Probably Not True Definitely Not True

3. When I was little, other people helped my mother and father take care of me and they seemed to love me.
Definitely true Probably true Not sure Probably Not True Definitely Not True

4. I've heard that when I was an infant someone in my family enjoyed playing with me, and I enjoyed it, too.
Definitely true Probably true Not sure Probably Not True Definitely Not True

5. When I was a child, there were relatives in my family who made me feel better if I was sad or worried.
Definitely true Probably true Not sure Probably Not True Definitely Not True

6. When I was a child, neighbors or my friends' parents seemed to like me.
Definitely true Probably true Not sure Probably Not True Definitely Not True

7. When I was a child, teachers, coaches, youth leaders or ministers were there to help me.
Definitely true Probably true Not sure Probably Not True Definitely Not True

8. Someone in my family cared about how I was doing in school.
Definitely true Probably true Not sure Probably Not True Definitely Not True

9. My family, neighbors and friends talked often about making our lives better.
Definitely true Probably true Not sure Probably Not True Definitely Not True

10. We had rules in our house and were expected to keep them.
Definitely true Probably true Not sure Probably Not True Definitely Not True

11. When I felt really bad, I could almost always find someone I trusted to talk to.
Definitely true Probably true Not sure Probably Not True Definitely Not True

12. As a youth, people noticed that I was capable and could get things done.
Definitely true Probably true Not sure Probably Not True Definitely Not True

13. I was independent and a go-getter.
Definitely true Probably true Not sure Probably Not True Definitely Not True

14. I believed that life is what you make it.
Definitely true Probably true Not sure Probably Not True Definitely Not True

How many of these 14 protective factors did I have as a child and youth? (How many of the 14 were circled "Definitely True" or "Probably True"?) _____ Of these circled, how many are still true for me? _____ https://acestoohigh.com/got-your-ace-score/

Psychiatric Clinic Follow-up Form

(?)

Name [redacted] MR# [redacted] DOB [redacted]

Date/Time [redacted] @ 1120

Current Medications

no 4 can often see withdrawal prot.

Complaints

Last seen by Ms Walter 5/9/17 (see note) remained on 4 pts.

Side Effects

Per 5/15/17 nursing note + verbal report - pt became agitated, "upset" after receiving negative news from a family member & began banging & kicking door → SW [illegible] calm & cooperative on 5/9/17

Suicide Precautions

☒ Yes ☐ No

Continue Precautions

☐ Yes ☒ No

Changes in Situation

+ no signs of agony (scheduled to be seen by [illegible] [illegible] for consideration of → gen pop) [illegible]

Mental Status Exam

gait steady

affect [illegible]

[illegible] alert

IMPRESSION

Some degree of [illegible] Bipolar NOS [illegible]

no psychosis

PLAN

1) Stop S.W.

2) F/u med level 5/17/17

3) Begin [illegible] 40 / 80 with dinner

Return to Clinic: 5/19/17 to see Ms Walter

[signature]

Consultant Signature

WAKE COUNTY DETENTION FACILITY
Medical Department

PROGRESS NOTES

All entries must be signed and dated

Name: [redacted] Master ID #: Birthdate: [redacted]

DATE	FINDINGS (Subjective, Objective, Assessments, & Plan)
5/17/17	Inmate seen for MH f/u. Inmate was on SW + moved to Obs today by Dr. [illegible]. Court - 5/25 - murder charge. Mom is a support. Just started on Latuda for depression - has not taken yet. Discussed the possible side effect of headaches + to keep taking to see if side effects will resolve. Sleep + appetite - ok. Mood - sad but stable. Denies SI. Hx of prison, had been employed. Has a young daughter. Provided supportive counseling. TP - organized + goal directed. Reports that he is trying to take this situation one day at a time. Denies SI/HI/AVH, no evidence of psychosis. Plan MH f/u 2wks
	V [illegible], MS LPC [illegible]
5/22/17	Inmate seen emergently @ the request of Dorm CO who reported inmate is hearing voices. Inmate presented as very tearful + scared. He reported an increase in PTSD sxs to include nightmares, flashbacks, + hearing the victim's screams. Inmate reported feeling very fearful in current dorm due to multiple other individuals housed there knowing who inmate is + this situation. Inmate denied SI but reported feeling like he can not handle current stress. Repeatedly stated "I didn't mean to kill him." High risk inmate. Denies AVH, no evidence of psychosis. Plan Return to Psych Obs LOC, MH f/u 2 days
	V [illegible] MS LPC

Margin note: Nurse [illegible] informed [illegible] to obs

Psychiatric Clinic Follow-up Form

Name [redacted] MR# [redacted] DOB [redacted]

BK [redacted]

Date/Time 7/16/17 8:45 AM

Current Medications
Prozac 20mg ī QAM
Zyprexa 5mg ī QHS

Complaints Pt said [illegible] wanting meds on the outside

Side Effects Never took meds prescribed.

Suicide Precautions
☒ Yes ☐ No

Continue Precautions
☐ Yes ☐ No

Changes in Situation Pt says not SI + never really was SI

Mental Status Exam 21 y/o [illegible] who is alert + OR x3 + OK MA + P + No HI or SI + hears Paranoia + Denies A/V Hal, del. [illegible] + No FOI or LOA

IMPRESSION I BPAD NOS P/H Cocaine Use not done since 01/17
II PD NOS
III LBP + Lt Fr Pain

PLAN
1) Off S/W TO Psych Obs
2) D/C Meds
3) F/u 7/20/17

Return to Clinic: ______

[signature] Consultant Signature

[redacted] High School
[redacted], NC 28301
North Carolina Transcript

11/27/2013

STUDENT INFORMATION

Name: [redacted]
Address: [redacted] Old Shaw Rd
Fayetteville, NC 28303
[redacted]
Contacts: [redacted]
Mother

Student Id: [redacted]
Student No: [redacted]
Birthdate: [redacted]
Gender: Male
Graduation: (Undefined)
Course Of Study: FRC1 (7) 2009/10 (Intended)

SCHOOL INFORMATION

Contact: Reggie Pinkney
(910)437-5829
L.E.A.: Cumberland County
(910)678-2300

School No: 260449
Grades: 09,10,11,12
Accreditation: State & SACS
College Board Code:

Check courses and grades

CREDIT HISTORY

Course		Mark	Quality Points Weighted	Quality Points Unweighted	Earned Credits	Previous School	Flags
Grade: 09 2010/11							
64112XS	COMPUTER APPLICATS I	63	0.0000	0.0000	0.0000		
10212XS	ENGLISH I	74	1.0000	1.0000	1.0000		U
20182XS	FOUNDATIONS OF ALGEBRA	64	0.0000	0.0000	0.0000		
90152XS	PHYS ED (ELECT 9-12)	75	1.0000	1.0000	1.0000		

UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS MINIMUM ADMISSION REQUIREMENTS REMAINING

ENGLISH II
ENGLISH III
ENGLISH IV
MATH(4)
SCIENCE(3)
HISTORY(2)
FOREIGN LANGUAGE(2)
PHYSICAL EDUCATION(1)

PERFORMANCE INFORMATION

Cumulative GPA Total Points are Calculated as of the end of 11/27/2013
Cumulative GPA Weighted: 0.5000
Cumulative GPA Unweighted: 0.5000
Class Rank (): of
Total Points Weighted: 02.0000
Total Points Unweighted: 02.0000
Total Credits: Earned 2.0000 Potential 4.0000

TESTING INFORMATION

End of Grade Test
8th Grade Reading 05/01/2010
8th Grade Reading
Development Scale 350
Achievement Level II
Percentile 18
8th Grade Math 05/10/2010
8th Grade Math
Development Scale 348
Achievement Level I
Percentile 13

End of Course
English I 01/01/2011
English I
Percentile 9
Scale 138
Achievement Level II
English I 01/10/2011
English I
Percentile 13
Scale 140
Achievement Level II

AWARD/ACHIEVEMENTS AND EXTRA-CURRICULAR ACTIVITIES
No Data For Student

CURRICULUM-RELATED WORK EXPERIENCE
No Data For Student

Check students age- older students less likely to have Special Services

IMMUNIZATION INFORMATION

Diptheria/Tetanus/Pertussis	1	08/30/1995	Hepatitis B	2	02/09/1995
Diptheria/Tetanus/Pertussis	2	10/25/1995	Hepatitis B	3	01/03/1996
Diptheria/Tetanus/Pertussis	3	01/03/1996	MMR	1	01/03/1996
Diptheria/Tetanus/Pertussis	4	07/16/1996	MMR	2	08/09/2000
Diptheria/Tetanus/Pertussis	5	08/09/2000	Polio	1	08/30/1995
HIB	1	08/30/1995	Polio	2	10/25/1995
HIB	2	10/25/1995	Polio	3	01/03/1996
HIB	3	01/03/1996	Polio	4	08/09/2000
HIB	4	07/16/1996	Varicella	1	08/09/2000
Hepatitis B	1	01/02/1995			

ATTENDANCE INFORMATION

Year	School		Grade	Days Present	Abs
00/01	260400	Montclair Elementary	KI	96	6
00/01	260452	Westarea Elementary	KI	156	27
02/03	260400	Montclair Elementary	01	161	19
03/04	260400	Montclair Elementary	02	77	8
03/04	260405	Walker-Spivey Elementary	02	81	7
03/04	260452	Westarea Elementary	02	3	0
04/05	260400	Montclair Elementary	03	81	3
04/05	260361	Ferguson-Easley Elementary	03	22	3
04/05	260366	Howard Hall Classical Elem	03	52	10
05/06	260400	Montclair Elementary	04	157	21
06/07	260400	Montclair Elementary	05	93	9
06/07	260366	Howard Hall Classical Elem	05	12	2
06/07	260413	Pauline Jones Middle School	05	36	14
07/08	260371	Ireland Drive Middle	06	155	25
08/09	260428	Spring Lake Middle School	07	148	20
09/10	260365	R. Max Abbott Middle	08	34	25
09/10	260406	Pine Forest Middle	08	37	16
09/10	260428	Spring Lake Middle School	08	48	6
10/11	260446	Terry Sanford High	09	53	22
10/11	260449	Ramsey Street High School	09	42	9

!?

PREVIOUS SCHOOLS INFORMATION

No Data For Student

Signature of Principal or Designee Certifying This Transcript

Name: _____ Date: _____

OFFICIAL TRANSCRIPT
CUMBERLAND COUNTY SCHOOLS
NORTH CAROLINA
NOV 19 2018
CENTRAL RECORDS OFFICE
Teresa Adams

Sometimes have to call back and ask if there is more.

STATE OF NORTH CAROLINA

_____ County

File No.(s)

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

Name Of Indigent Defendant Or Respondent	APPLICATION AND ORDER FOR DEFENSE EXPERT WITNESS FUNDING IN NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES AT THE TRIAL LEVEL
Highest Original Charge (Criminal) Or Nature Of Proceeding (Civil)	G.S. 7A-314(d), 7A-454, 7A-498.5(f), 15A-905(c)(2)

INSTRUCTIONS: *Use this form only if you are representing an indigent person at state expense, or if you have been retained but the Court has entered an Order finding your client indigent for purposes of obtaining expert assistance, and then only in a case in which the Court is responsible for approving funds for experts, i.e., non-capital and non-criminal cases at the trial level. Do NOT use this form in case types where counsel must seek prior approval for expert funding from the Office of Indigent Defense Services (IDS) (e.g., potentially capital cases). Do NOT use this form for non-expert flat fee services, such as polygraph examinations, medical procedures, lab testing, or defense-requested sentencing plans; to seek prior approval for such services, the attorney should submit a motion and proposed Order to the Court.*

The attorney for the defendant or respondent completes Section I and submits the form and a supporting motion justifying the requested expert services to the Court. If permitted by case law, the attorney for the defendant or respondent may submit this form and the supporting motion ex parte. If funding is approved, the Court completes Section II and the attorney provides a copy of the form to the approved expert. The expert completes Section III and Section IV after services are rendered to apply for payment. The expert then submits the completed form, along with an itemized invoice and any required receipts, to IDS Financial Services, P.O. Box 2448, Raleigh, NC 27602. The expert also submits a copy to the requesting attorney.

I. DEFENSE REQUEST

Based on the factual showing in the attached supporting motion as required by *Ake v. Oklahoma* and its progeny, the undersigned attorney for the defendant or respondent named above requests funding for the following expert services. The attorney certifies that the information provided below is true and accurate.

☐ Check here if request and motion are being submitted ex parte.

Name And Address Of Expert	Is the expert a current State government employee? ☐ Yes ☐ No If Yes, Name And Address Of Employing Government Agency
Total Amount Of Funding Requested (time and expenses) $	Prior Total Funds Approved For This Expert $

Type Of Expert *(check one; if none apply, skip to expert's highest education level or area of expertise)*

☐ Paralegal ☐ Licensed Private Investigator ☐ Attorney Serving As Expert
☐ Transcriptionist (English Language) ☐ Mitigation Expert/Social Worker

If None Of The Above, Expert's Highest Level Of Education Or Area Of Expertise

☐ High School or GED ☐ Associate's Degree ☐ Linguist *(Federally Certified)* ☐ Bachelor's Degree
☐ Master's Degree ☐ Crime Scene and Related ☐ CPA/Financial Expert ☐ Pharmacy/Pharm.D.
☐ Information Technology ☐ Ph.D./Psy.D. ☐ Medical Doctor ☐ MD With Specialty

NOTE: *The IDS Director may grant deviations from the hourly rates in Section III when necessary and appropriate based on case-specific needs. To request a deviation, complete form AOC-G-310. If a deviation has been approved, attach a copy to this form.*

Expert's Years Of Experience *(check one if applicable)*

☐ Expert has more than 10 years of experience in the field in which he/she is providing services. Start date of experience: _____
☐ Expert has more than 20 years of experience in the field in which he/she is providing services. Start date of experience: _____

Date	Name Of Attorney Requesting Expert Funding	Telephone Number Of Attorney	Signature Of Attorney

II. COURT ORDER

☐ The Court finds that the expert identified in Section I would materially assist in the preparation of the defense in this case and that the denial of such expert assistance would deprive the defendant or respondent of a fair trial or other case resolution. Therefore, it is ORDERED that the defendant or respondent named above is entitled to $ _____ in funds appropriated to the Office of Indigent Defense Services (IDS) to employ the expert witness named in Section I; that the expert's fees and expenses shall not exceed this amount except by further Order of the Court; and that the expert witness named in Section I shall be compensated at the hourly rate specified in Section III and the applicable IDS policy.

☐ The Court finds that the expert identified in Section I would not materially assist in the preparation of the defense in this case. Therefore, it is ORDERED that this motion is denied.

It is ORDERED that *(check one only)*:

☐ The motion submitted by counsel and this Order shall be sealed in the court file and only opened upon further order of the Court.
☐ The motion submitted by counsel and this Order shall be sealed, and counsel shall retain the sealed motion and Order while this case is pending and file both in the court file within 30 days of final disposition at the trial level.

The motion and Order shall not be distributed beyond the defense team and IDS.

Date	Name Of Judge	Signature Of Judge

III. STANDARDIZED RATE SCHEDULE, EXPERIENCE, ENHANCEMENTS, AND DEFINITIONS

Standardized **Set** Compensation Rates *(check one box from this section if any apply; if none apply, skip to base rates below)*

☐ Paralegal	$15 per hour	☐ Mitigation Expert/Social Worker	$50 per hour
☐ Transcriptionist (English Language)	$20 per hour		
☐ Licensed Private Investigator	$50 per hour	☐ Attorney Serving as Expert	Same rate as the appointed attorney in the case

Standardized **Base** Compensation Rates *(if no set rates above apply, check one box from this section that represents highest level of education or expertise)*

☐ High School or GED	$30 per hour	☐ CPA/Financial Expert	$100 per hour
☐ Associate's Degree	$50 per hour	☐ Pharmacy/Pharm.D.	$125 per hour
☐ Linguist *(Federally Certified)*	$60 per hour	☐ Information Technology	$150 per hour
☐ Bachelor's Degree	$70 per hour	☐ Ph.D./Psy.D.	$200 per hour
☐ Master's Degree	$85 per hour	☐ Medical Doctor	$250 per hour
☐ Crime Scene and Related	$100 per hour	☐ MD with Specialty	$300 per hour

NOTE: *For experts with base compensation rates, Time In Court Waiting and Time Traveling is compensated at 1/2 of the base rate. This reduction does not apply to experts with set compensation rates.*

Experience Enhancements *(does not apply to experts with set compensation rates; applies only to experts with base compensation rates as identified above)*

☐ For expert with more than 10 years of experience in the field in which he or she is providing services, add $10 per hour.

☐ For expert with more than 20 years of experience in the field in which he or she is providing services, add $20 per hour.

Time In Court: time testifying or observing if asked to observe by the attorney requesting the expert's services.

Time In Court Waiting: time the expert is sitting in court waiting to testify when the expert has been called but not yet sworn in; does not include time spent in court observing if asked to observe by the attorney requesting the expert's services.

Time Out Of Court: time spent reviewing files, documents, or evidence; evaluating the defendant or respondent; preparing for testimony; meeting with the attorney; or advising the defense on the case.

IV. EXPERT COMPENSATION CALCULATOR

Time In Court	
Time Out Of Court	
Time In Court Waiting *(divide by 2 for experts with base rates only)* **NOTE***: Do NOT divide by 2 for experts with set rates.*	
Time Traveling *(divide by 2 for experts with base rates only)* **NOTE***: Do NOT divide by 2 for experts with set rates.*	
Total Time *(add all time above)*	
Hourly Rate *(as determined by Section III above or form AOC-G-310)*	$
Total Hourly Compensation *(Total Time multiplied by Hourly Rate)*	$
Mileage/Transportation	$
Meals	$
Lodging	$
Other *(explain)* _____	$
Total Reimbursable Expenses *(based on IDS reimbursement rates)*	$
TOTAL COMPENSATION TO BE PAID EXPERT	$

NOTE*: Total Compensation To Be Paid Expert may not exceed amount preapproved by Judge.*

Name And Address Of Expert	*Name And Address Of Payee (write "same" if same as expert)*

Telephone Number Of Expert	*Email Address Of Expert*	*Federal Tax ID Or Social Security Number Of Payee*

I, the undersigned expert, make application for payment of pre-authorized services rendered for the indigent defendant or respondent named above, and for reimbursement of necessary expenses incurred. I certify that the above information is complete and correct to the best of my knowledge. I further certify that I have submitted a copy of this form and my itemized time sheets to the attorney of record listed in Section I.

Date	*Signature Of Expert*

For payment, mail form to IDS Financial Services, P.O. Box 2448, Raleigh, NC 27602.
Attach itemized time sheets and receipts.

PREAMBLE AND SCOPE

Search Rules

0.1 PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of **client**s, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] As a representative of **client**s, a lawyer performs various functions. As advisor, a lawyer provides a **client with** an informed understanding of the **client**'s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the **client**'s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the **client** but consistent **with** requirements of honest dealing **with** others. As evaluator, a lawyer acts by examining a **client**'s legal affairs and reporting about them to the **client** or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. *See, e.g.* , Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication **with** a **client** concerning the representation. A lawyer should keep in confidence information relating to representation of a **client** except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to **client**s and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for **client**s, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] A lawyer should render public interest legal service and provide civic leadership. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, society, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

[8] The legal profession is a group of people united in a learned calling for the public good. At their best, lawyers assure the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation, lawyers use their education and experience to improve society. It is the basic responsibility of each lawyer to provide community service, community leadership, and public interest legal services **with**out fee, or at a substantially reduced fee, in such areas as poverty law, civil rights, public rights law, charitable organization representation, and the administration of justice.

[9] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in, or otherwise support, the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need.

Thus, the profession and government instituted additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs were developed, and programs will be developed by the profession and the government. Every lawyer should support all proper efforts to meet this need for legal services.

[10] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

[11] A lawyer's responsibilities as a representative of **client**s, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a **client** and, at the same time, assume that justice is being done. So also, a lawyer can be sure that preserving **client** confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[12] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to **client**s, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. **With**in the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a **client**'s legitimate interests, **with**in the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[13] Although a matter is hotly contested by the parties, a lawyer should treat opposing counsel **with** courtesy and respect. The legal dispute of the **client** must never become the lawyer's personal dispute **with** opposing counsel. A lawyer, moreover, should provide zealous but honorable representation **with**out resorting to unfair or offensive tactics. The legal system provides a civilized mechanism for resolving disputes, but only if the lawyers themselves behave **with** dignity. A lawyer's word to another lawyer should be the lawyer's bond. As professional colleagues, lawyers should encourage and counsel new lawyers by providing advice and mentoring; foster civility among members of the bar by acceding to reasonable requests that do not prejudice the interests of the **client**; and counsel and assist peers who fail to fulfill their professional duties because of substance abuse, depression, or other personal difficulties.

[14] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[15] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for the abuse of legal authority is more readily challenged by a self-regulated profession.

[16] The legal profession's relative autonomy carries **with** it a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[17] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 16, 2006

Ethics Opinion Notes

2008 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-2/). Opinion holds that a lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided.

2008 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-3/). Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a **client**'s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the **client** as to the means by which they are to be pursued. A lawyer may take such action on behalf of the **client** as is impliedly authorized to carry out the representation.

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

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a **client**, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a **client**, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the **client**.

(b) A lawyer's representation of a **client**, including representation by appointment, does not constitute an endorsement of the **client**'s political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances.

(d) A lawyer shall not counsel a **client** to engage, or assist a **client**, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a **client** and may counsel or assist a **client** to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

*Allocation of Authority between **Client** and Lawyer*

[1] Paragraph (a) confers upon the **client** the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the **client**. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the **client** about such decisions. With respect to the means by which the **client**'s objectives are to be pursued, the lawyer shall consult with the **client** as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. Lawyers are encouraged to treat opposing counsel with courtesy and to cooperate with opposing counsel when it will not prevent or unduly hinder the pursuit of the objective of the representation. To this end, a lawyer may waive a right or fail to assert a position of a **client** without first obtaining the **client**'s consent. For example, a lawyer may consent to an extension of time for the opposing party to file pleadings or discovery without obtaining the **client**'s consent.

[2] On occasion, however, a lawyer and a **client** may disagree about the means to be used to accomplish the **client**'s objectives. **Client**s normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the **client** regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and **client** might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the **client** and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the **client**, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the **client** may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the **client** may authorize the lawyer to take specific action on the **client**'s behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The **client** may, however, revoke such authority at any time.

[4] In a case in which the **client** appears to be suffering diminished capacity, the lawyer's duty to abide by the **client**'s decisions is to be guided by reference to Rule 1.14.

*Independence from **Client**'s Views or Activities*

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a **client** does not constitute approval of the **client**'s views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the **client** or by the terms under which the lawyer's services are made available to the **client**. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the **client** has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the **client**'s objectives. Such limitations may exclude actions that the **client** thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and **client** substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a **client**'s objective is limited to securing general information about the law the **client** needs in order to handle a common and typically uncomplicated legal problem, the lawyer and **client** may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the **client** could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] Although paragraph (c) does not require that the **client**'s informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of any written communication of the rate or basis of the lawyer's fee. See Rule 1.0(f) for the definition of "informed consent."

[9] All agreements concerning a lawyer's representation of a **client** must accord with the Rules of Professional Conduct and other law. See, e.g. , Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a **client** to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a **client**'s conduct. Nor does the fact that a **client** uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. There is also a distinction between giving a **client** legitimate advice about asset protection and assisting in the illegal or fraudulent conveyance of assets.

[11] When the **client**'s course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the **client**, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a **client** in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the **client** in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the **client**'s crime or fraud. See Rule 4.1.

[12] Where the **client** is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a **client** expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the **client**'s instructions, the lawyer must consult with the **client** regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

RPC 44 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-44/). Opinion rules that a closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 103 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-103/). Opinion rules that a lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent

RPC 114 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-114/). Opinion rules that attorneys may give legal advice and drafting assistance to persons wishing to proceed pro se without appearing as counsel of record.

RPC 118 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-118/). Opinion rules that an attorney should not waive the statute of limitations without the client's consent.

RPC 129 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-129/). Opinion rules that prosecutors and defense attorneys may negotiate plea agreements in which appellate and postconviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

RPC 145 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-145/). Opinion rules that a lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a civil case.

RPC 172 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-172/). Opinion rules that an attorney retained by an insurance carrier to defend an insured has no ethical obligation to represent the insured on a compulsory counterclaim provided the attorney apprises the insured of the counterclaim in sufficient time for the insured to retain separate counsel.

RPC 208 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-208/). Opinion rules that a lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.

RPC 212 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-212/). Opinion rules that a lawyer may contact an opposing lawyer who failed to file an answer on time in order to remind the other lawyer of the error and to give the other lawyer a last opportunity to file the pleading.

RPC 220 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-220/). Opinion rules that a lawyer should seek the court's permission to listen to a tape recording of a telephone conversation of his or her client made by a third party if listening to the tape recording would otherwise be a violation of the law.

RPC 223 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-223/). Opinion rules that when a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

RPC 240 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-240/). Opinion rules that a lawyer may decline to represent a client on the property damage claim while agreeing to represent the client on the personal injury claim arising out of a motor vehicle accident provided that the limited representation will not adversely affect the client's representation on the personal injury claim and the client consents after full disclosure.

RPC 252 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-252/). Opinion rules that a lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

98 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-2/). Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

99 Formal Ethics Opinion 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-12/). Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

2002 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-1/). Opinion rules that a lawyer may participate in a non-profit organization that promotes a cooperative method for resolving family law disputes although the client is required to make full disclosure and the lawyer is required to withdraw before court proceedings commence.

2003 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-2/). Opinion rules that a lawyer must report a violation of the Rules of Professional Conduct as required by Rule 8.3(a) even if the lawyer's unethical conduct stems from mental impairment (including substance abuse).

2003 Formal Ethics Opinion 7 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-7/). Opinion rules that a lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2003 Formal Ethics Opinion 16 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-16/). Opinion rules that a lawyer who is appointed to represent a parent in a proceeding to determine whether the parent's child is abused, neglected, or dependent, must seek to withdraw if the client disappears without communicating her objectives for the representation, and, if the motion is denied, must refrain from advocating for a particular outcome.

2005 Formal Ethics Opinion 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-10/). Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

2008 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-3/). Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 Formal Ethics Opinion 7 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-7/). Opinion rules that a closing lawyer shall not record and disburse when a seller has delivered the deed to the lawyer but the buyer instructs the lawyer to take no further action to close the transaction.

2010 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-1/). Opinion rules that a lawyer retained by an insurance carrier to represent an insured whose whereabouts are unknown and with whom the lawyer has no contact may not appear as the lawyer for the insured absent authorization by law or court order.

2011 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-3/). Opinion rules that a criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that the client will be deported.

2012 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-5/). Opinion rules that a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2012 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-9/). Opinion holds that a lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2012 Formal Ethics Opinion 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-10/). Opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-2/). Opinion rules that if, after providing an incarcerated criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to any of the discovery materials, the lawyer must afford the client the opportunity to meaningfully review relevant discovery materials unless certain conditions exist.

2014 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-5/). Opinion rules a lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

2016 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2016-formal-ethics-opinion-2/). Opinion rules that, when advancing claims on behalf of a criminal defendant who filed a pro se Motion for Appropriate Relief, subsequently appointed defense counsel must correct erroneous claims and statements of law or facts set out in the previous pro se filing.

2019 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2019-formal-ethics-opinion-2/). Opinion rules that a lawyer may not agree to terms in an ERISA plan agreement that usurp client's authority as to the representation.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.6 CONFIDENTIALITY OF INFORMATION

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

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the **client**;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a **client**'s criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the **client**; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the **client** was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the **client**;

(7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court; or

(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the **attorney-client** privilege or otherwise prejudice the **client**.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a **client**.

(d) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "**client**" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a **client** acquired during the lawyer's representation of the **client**. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective **client**, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former **client**, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of **client**s and former **client**s and Rule 8.6 for a lawyer's duty to disclose information to rectify a wrongful conviction.

[2] A fundamental principle in the **client**-lawyer relationship is that, in the absence of the **client**'s informed consent, the lawyer must not reveal information acquired during the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the **client**-lawyer relationship. The **client** is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the **client** effectively and, if necessary, to advise the **client** to refrain from wrongful conduct. Almost without exception, **client**s come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all **client**s follow the advice given, and the law is upheld.

[3] The principle of **client**-lawyer confidentiality is given effect by related bodies of law: the **attorney-client** privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The **attorney-client** privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence

concerning a **client**. The rule of **client**-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the **client** but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information acquired during the representation of a **client**. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the **client** or the situation involved.

Authorized Disclosure

[5] Except to the extent that the **client**'s instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a **client** when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a **client** of the firm, unless the **client** has instructed that particular information be confined to specified lawyers.

*Disclosure Adverse to **Client***

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information acquired during the representation of their **client**s, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a **client**, a lawyer may foresee that the **client** intends to commit a crime. Paragraph (b)(2) recognizes that a lawyer should be allowed to make a disclosure to avoid sacrificing the interests of the potential victim in favor of preserving the **client**'s confidences when the **client**'s purpose is wrongful. Similarly, paragraph (b)(3) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a **client** has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer may have been innocently involved in past conduct by a **client** that was criminal or fraudulent. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the **client**'s crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information acquired during the representation. Paragraph (b)(4) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

[8] Although paragraph (b)(2) does not require the lawyer to reveal the **client**'s anticipated misconduct, the lawyer may not counsel or assist the **client** in conduct the lawyer knows is criminal or fraudulent.See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the **client** in such circumstances. Where the **client** is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the **client**'s crime or fraud until after it has been consummated. Although the **client** no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information acquired during the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a **client**'s conduct or other misconduct of the lawyer involving representation of the **client**, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former **client**. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the **client** or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and **client** acting together. The

lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[12] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[13] Other law may require that a lawyer disclose information about a **client**. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information acquired during the representation appears to be required by other law, the lawyer must discuss the matter with the **client** to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(1) permits the lawyer to make such disclosures as are necessary to comply with the law.

[14] Paragraph (b)(1) also permits compliance with a court order requiring a lawyer to disclose information relating to a **client**'s representation. If a lawyer is called as a witness to give testimony concerning a **client** or is otherwise ordered to reveal information relating to the **client**'s representation, however, the lawyer must, absent informed consent of the **client** to do otherwise, assert on behalf of the **client** all nonfrivolous claims that the information sought is protected against disclosure by the **attorney-client** privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the **client** about the possibility of appeal. See Rule 1.4. Unless review is sought, however, paragraph (b)(1) permits the lawyer to comply with the court's order.

[15] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the **client** to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the **client**'s interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16] Paragraph (b) permits but does not require the disclosure of information acquired during a **client**'s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the **client** and with those who might be injured by the **client**, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. When practical, the lawyer should first seek to persuade the **client** to take suitable action, making it unnecessary for the lawyer to make any disclosure. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Detection of Conflicts of Interest

[17] Paragraph (b)(8) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [8]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the **attorney-client** privilege or otherwise prejudice the **client** (e.g., the fact that a corporate **client** is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the **client** or former **client** gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[18] Any information disclosed pursuant to paragraph (b)(8) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(8) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(8). Paragraph (b)(8) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See Comment [5].

Acting Competently to Preserve Confidentiality

[19] Paragraph (c) requires a lawyer to act competently to safeguard information acquired during the representation of a **client** against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the **client** or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information acquired during the professional relationship with a **client** does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent **client**s (e.g., by making a device or important piece of software excessively difficult to use). A **client** may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a **client**'s information to comply with other law—such as state and federal laws that govern data privacy, or that impose notification requirements upon the loss of, or unauthorized access to, electronic information—is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[20] When transmitting a communication that includes information acquired during the representation of a **client**, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the **client**'s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A **client** may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

*Former **Client***

[21] The duty of confidentiality continues after the **client**-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former **client**.

Lawyer's Assistance Program

[22] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their **client**s and the public. The rule, therefore, requires that any information received by a lawyer on behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional **client**-lawyer relationship.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; March 16, 2017

Ethics Opinion Notes

CPR 284. An attorney who, in the course of representing one spouse, obtains confidential information bearing upon the criminal conduct of the other spouse must not disclose such information.

CPR 300. An attorney, after being discharged, cannot discuss the client's case with the client's new attorney without the client's consent.

CPR 313. An attorney may not voluntarily disclose confidential information concerning a client's criminal record.

CPR 362. An attorney may not disclose the perjury of his partner's client.

CPR 374. Information concerning apparent tax fraud obtained by an attorney employed by a fire insurer to depose insureds concerning claims is confidential and may not be disclosed without the insurer's consent.

RPC 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-12/). Opinion rules that a lawyer may reveal confidential information to correct a mistake if disclosure is impliedly authorized by the client.

RPC 21 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-21/). Opinion rules that a lawyer may send a demand letter to the adverse party without identifying the client by name.

RPC 23 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-23/). Opinion rules that a lawyer may disclose information to the IRS concerning a real estate transaction which would otherwise be protected if required to do so by law, and further that notice of such required disclosure, should be given to the client and other affected parties.

RPC 33 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-33/). Opinion rules that an attorney who learns through a privileged communication of his client's alias and prior criminal record may not permit his client to testify under a false name or deny his prior record under oath. If the client does so, the attorney would be required to request the client to disclose the true name or record and, if the client refused, to withdraw pursuant to the rules of the tribunal.

RPC 62 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-62/). Opinion rules that an attorney may disclose client confidences necessary to protect her reputation where a claim alleging malpractice is brought by a former client against the insurance company which employed the attorney to represent the former client.

RPC 77 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-77/). Opinion rules that a lawyer may disclose confidential information to his or her liability insurer to defend against a claim but not for the sole purpose of assuring coverage.

RPC 113 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-113/). Opinion rules that a lawyer may disclose information concerning advice given to a client at a closing in regard to the significance of the client's lien affidavit.

RPC 117 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-117/). Opinion rules that a lawyer may not reveal confidential information concerning his client's contagious disease.

RPC 120 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-120/). Opinion rules that, for the purpose of the Rules of Professional Conduct, a lawyer may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement.

RPC 133 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-133/). Opinion rules that a law firm may make its waste paper available for recycling.

RPC 157 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-157/). Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.

RPC 175 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-175/). Opinion rules that a lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

RPC 179 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-179/). Opinion rules that a lawyer may not offer or enter into a settlement agreement that contains a provision barring the lawyer who represents the settling party from representing other claimants against the opposing party.

RPC 195 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-195/). Opinion rules that the attorney who formerly represented an estate may divulge confidential information relating to the representation of the estate to the substitute personal representative of the estate.

RPC 206 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-206/). Opinion rules that a lawyer may disclose the confidential information of a deceased client to the personal representative of the client's estate but not to the heirs of the estate.

RPC 209 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-209/). Opinion provides guidelines for the disposal of closed client files.

RPC 215 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-215/). Opinion rules that when using a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.

RPC 230 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-230/). Opinion rules that a lawyer representing a client on a good faith claim for social security disability benefits may withhold evidence of an adverse medical report in a hearing before an administrative law judge if not required by law or court order to produce such evidence.

RPC 244 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-244/). Opinion rules that although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

RPC 246 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-246/). Opinion rules that, under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

RPC 252 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-252/). Opinion rules that a lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

98 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-5/). Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court and, further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the prior driving record.

98 Formal Ethics Opinion 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-10/). Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

98 Formal Ethics Opinion 16 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-16/). Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 Formal Ethics Opinion 18 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-18/). Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

98 Formal Ethics Opinion 20 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-20/). Opinion rules that, subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

99 Formal Ethics Opinion 11 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-11/). Opinion rules that an insurance defense lawyer may not submit billing information to an independent audit company at the insurance carrier's request unless the insured's consent to the disclosure, obtained by the insurance carrier, was informed.

99 Formal Ethics Opinion 15 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-15/). Opinion rules that a lawyer with knowledge that a former client is defrauding a bankruptcy court may reveal the confidences of the former client to rectify the fraud if required by law or if necessary to rectify the fraud.

2000 Formal Ethics Opinion 11 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2000-formal-ethics-opinion-11/). Opinion rules that a lawyer who was formerly in-house legal counsel for a corporation must obtain the permission of a court prior to disclosing confidential information of the corporation to support a personal claim for wrongful termination.

2002 Formal Ethics Opinion 7 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-7/). Opinion clarifies RPC 206 by ruling that a lawyer may reveal the relevant confidential information of a deceased client in a will contest proceeding if the attorney/client privilege does not apply to the lawyer's testimony.

2003 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-9/). Opinion rules that a lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

2003 Formal Ethics Opinion 15 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-15/). Opinion rules that an attorney may provide an accounting of disbursements of sums recovered for a personal injury claimant as required by N.C.G.S. § 44-50.1.

2004 Formal Ethics Opinion 6 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2004-formal-ethics-opinion-6/). Opinion rules that a lawyer may disclose confidential client information to collect a fee, including information necessary to support a claim that the corporate veil should be pierced, provided the claim is advanced in good faith.

2005 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-4/). Opinion rules that absent consent to disclose from the parent, a lawyer may not reveal confidences received from a parent seeking representation of a minor.

2005 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-9/). Opinion rules that a lawyer for a publicly traded company does not violate the Rules of Professional Conduct if the lawyer "reports out" confidential information as permitted by SEC regulations.

2006 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-1/). Opinion rules that a lawyer who represents the employer and its workers' compensation carrier must share the case evaluation, litigation plan, and other information with both clients unless the clients give informed consent to withhold such information.

2007 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-2/). Opinion rules that a lawyer may not take possession of a client's contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

2007 Formal Ethics Opinion 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-12/). Opinion rules that a lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively "foreign assistants") provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2008 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-1/). Opinion rules that lawyer representing an undocumented worker in a workers' compensation action has a duty to correct court documents containing false statements of material fact and is prohibited from introducing evidence in support of the proposition that an alias is the client's legal name.

2008 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-3/). Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-5/). Opinion rules that client files may be stored on a website accessible by clients via the internet provided the confidentiality of all client information on the website is protected.

2008 Formal Ethics Opinion 13 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-13/). Opinion rules that, unless affected clients expressly consent to the disclosure of their confidential information, a lawyer may allow a title insurer to audit the lawyer's real estate trust account and reconciliation reports only if certain written assurances to protect client confidences are obtained from the title insurer, the audited account is only used for real estate closings, and the audit is limited to certain records and to real estate transactions insured by the title insurer.

2009 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-1/). Opinion rules that a lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

2009 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-3/). Opinion rules that a lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.

2009 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-8/). Opinion provides guidelines for a lawyer for a party to a partition proceeding and rules that the lawyer may subsequently serve as a commissioner for the sale but not as one of the commissioners for the partitioning of the property.

2009 Formal Ethics Opinion 14 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-14/). Opinion rules that a lawyer participating in a real estate transaction may not in such transaction place his client's title insurance in a title insurance agency in which the lawyer's spouse has any ownership interest.

2011 Formal Ethics Opinion 6 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-6/). Opinion rules that a lawyer may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.

2011 Formal Ethics Opinion 14 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-14/). Opinion rules that a lawyer must obtain client consent, confirmed in writing, before outsourcing its transcription and typing needs to a company located in a foreign jurisdiction.

2011 Formal Ethics Opinion 16 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-16/). Opinion rules that a criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

2012 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-5/). Opinion rules that a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2012 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-9/). Opinion holds that a lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2012 Formal Ethics Opinion 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-10/). Opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-5/). Opinion rules that a lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

2013 Formal Ethics Opinion 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-12/). Opinion rules that, in a worker's compensation case, when a client terminates representation, the subsequently hired lawyer may disclose the settlement terms to the former lawyer to resolve a pre-litigation claim for fee division pursuant to an applicable exception to the duty of confidentiality.

2014 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-1/). Opinion encourages lawyers to become mentors to law students and new lawyers ("protégés") who are not employees of the mentor's firm, and examines the application of the duty of confidentiality to client communications to which a protégé may be privy.

2015 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-5/). Opinion provides that in post-conviction or appellate proceedings, a discharged lawyer may discuss a former client's case and turn over the former client's file to successor counsel if the former client consents or the disclosure is impliedly authorized.

2016 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2016-formal-ethics-opinion-4/). Opinion rules that lawyer may not disclose financial information obtained during the representation of a former client to assist the sheriff with the execution on a judgment for unpaid legal fees.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.3 DILIGENCE

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

Comment

[1] A lawyer should pursue a matter on behalf of a **client** despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a **client**'s cause or endeavor. A lawyer must also act **with** commitment and dedication to the interests of the **client** and **with** zeal in advocacy upon the **client**'s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a **client**. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. SeeRule 1.2. The lawyer's duty to act **with** reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process **with** courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A **client**'s interests often can be adversely affected by the passage of time or the change of conditions. In extreme instances, as when a lawyer overlooks a statute of limitations, the **client**'s legal position may be destroyed. Even when the **client**'s interests are not affected in substance, however, unreasonable delay can cause a **client** needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act **with** reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's **client**.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a **client**. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a **client** over a substantial period in a variety of matters, the **client** sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of **with**drawal. Doubt about whether a **client**-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the **client** will not mistakenly suppose the lawyer is looking after the **client**'s affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the **client** and the lawyer and the **client** have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult **with** the **client** about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the **client** depends on the scope of the representation the lawyer has agreed to provide to the **client**. See Rule 1.2.

[5] To prevent neglect of **client** matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity **with** applicable rules, that designates another competent lawyer to review **client** files, notify each **client** of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf . 27 N.C.A.C. 1B, .0122 (providing for court appointment of a lawyer to inventory files and take other protective action to protect the interests of the **client**s of a lawyer who has disappeared or is deceased or disabled).

Distinguishing Professional Negligence

[6] Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a **client** diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this rule.

[7] Conduct warranting the imposition of professional discipline under the rule is characterized by the element of intent manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her **client**s. A pattern of delay, procrastination, carelessness, and forgetfulness regarding **client** matters indicates a knowing or reckless disregard for

the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 28, 2017

Ethics Opinion Notes

RPC 48 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-48/). Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

99 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-5/). Opinion rules that whether the lawyer for a residential real estate closing must obtain the cancellation of record of a prior deed of trust depends upon the agreement of the parties.

2013 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-8/). Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2014 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-5/). Opinion rules a lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a **client** in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former **client** unless the former **client** gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm **with** which the lawyer formerly was associated had previously represented a **client**

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former **client** gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a **client** in a matter or whose present or former firm has formerly represented a **client** in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former **client** except as these Rules would permit or require **with** respect to a **client**, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require **with** respect to a **client**.

Comment

[1] After termination of a **client**-lawyer relationship, a lawyer has certain continuing duties **with** respect to confidentiality and conflicts of interest and thus may not represent another **client** except in conformity **with** this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new **client** a contract drafted on behalf of the former **client**. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple **client**s in a matter represent one or more of the **client**s in the same or a substantially related matter after a dispute arose among the **client**s in that matter, unless all affected **client**s give informed consent or the continued representation of the **client**(s) is not materially adverse to the interests of the former **client**s. See Comment [9]. Current and former government lawyers must comply **with** this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other **client**s **with** materially adverse interests in that transaction clearly is prohibited. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the **client**'s position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a **client** in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former **client** ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational **client**, general knowledge of the **client**'s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former **client** is not required to reveal the information learned by the lawyer to establish a substantial risk that the

lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former **client** and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated **with**in a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the **client** previously represented by the former firm must be reasonably assured that the principle of loyalty to the **client** is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new **client**s after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied **with** unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of **client**s to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while **with** one firm acquired no knowledge or information relating to a particular **client** of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another **client** in the same or a related matter even though the interests of the two **client**s conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association **with** the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all **client**s of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's **client**s. In contrast, another lawyer may have access to the files of only a limited number of **client**s and participate in discussions of the affairs of no other **client**s; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the **client**s actually served but not those of other **client**s. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a **client** formerly represented.See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a **client** may not subsequently be used or revealed by the lawyer to the disadvantage of the **client**. However, the fact that a lawyer has once served a **client** does not preclude the lawyer from using generally known information about that **client** when later representing another **client**. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former **client**'s reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third) of The Law of Governing Lawyers, 111 cmt. d.

[9] The provisions of this Rule are for the protection of former **client**s and can be waived if the **client** gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). SeeRule 1.0(f). **With** regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. **With** regard to disqualification of a firm **with** which a lawyer is or was formerly associated, see Rule 1.10.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

CPR 140. It is improper for an attorney who formerly represented a creditor to later represent the debtor in the same action.

CPR 147. An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

CPR 159. It is proper for an attorney to prepare a will for a woman and later represent her husband in a domestic action so long as the prior representation is not substantially related to the present action.

CPR 195. An attorney may not act as a private prosecutor against a former client who sought his advice concerning the domestic problems which culminated in the subject homicide.

CPR 243. An attorney may certify title to the State for purposes of condemnation and later represent the landowner against the State in a suit for damages if all consent.

CPR 273. An attorney may not represent a neighborhood group in opposition to another group he previously represented concerning the same or substantially related subject matter.

RPC 32 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-32/). Opinion rules that an attorney who represented a husband and wife in certain matters may not represent the husband against the wife in a domestic action involving alimony and equitable distribution. Opinion further rules that an attorney associated with the firm which represented the husband and wife during marriage, but who did not himself represent the husband and wife during that time, may represent the wife in an action involving equitable distribution and alimony if he did not gain any confidential information from or on behalf of the husband.

RPC 137 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-137/). Opinion rules that a lawyer who formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate.

RPC 144 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-144/). Opinion rules that a lawyer, having undertaken to represent two clients in the same matter, may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.

RPC 168 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-168/). Opinion rules that a lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

RPC 229 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-229/). Opinion rules that a lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

RPC 244 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-244/). Opinion rules that although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

RPC 246 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-246/). Opinion rules that, under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

2000 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2000-formal-ethics-opinion-2/). Opinion rules that a lawyer who represented a husband and wife in a joint Chapter 13 bankruptcy case may continue to represent one of the spouses after the other spouse disappears or becomes unresponsive, unless the attorney is aware of any fact or circumstance which would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

2003 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-9/). Opinion rules that a lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

2003 Formal Ethics Opinion 14 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-14/). Opinion rules that if a current representation requires cross-examination of a former client using confidential information gained in the prior representation, then a lawyer has a disqualifying conflict of interest.

2009 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-8/). Opinion provides guidelines for a lawyer for a party to a partition proceeding and rules that the lawyer may subsequently serve as a commissioner for the sale but not as one of the commissioners for the partitioning of the property.

2010 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-3/). Opinion provides guidance on the cross-examination of current and former clients.

2011 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-2/). Opinion sets forth the factors to be taken into consideration when determining whether a former client's delay in objecting to a conflict constitutes a waiver.

2012 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-4/). Opinion rules that a lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against

the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known.

2012 Formal Ethics Opinion 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-10/). Opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2015 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-8/). Opinion rules that a lawyer who previously represented a husband and wife in several matters may not represent one spouse in a subsequent domestic action against the other spouse without the consent of the other spouse unless, after thoughtful and thorough analysis of a number of factors relevant to the prior representations, the lawyer determines that there is no substantial relationship between the prior representations and the domestic matter.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a **client**'s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal **client**-lawyer relationship with the **client**.

(b) When the lawyer reasonably believes that the **client** has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the **client**'s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the **client** and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a **client** with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the **client**, but only to the extent reasonably necessary to protect the **client**'s interests.

Comment

[1] The normal **client**-lawyer relationship is based on the assumption that the **client**, when properly advised and assisted, is capable of making decisions about important matters. When the **client** is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary **client**-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a **client** with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the **client**'s own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a **client** suffers a disability does not diminish the lawyer's obligation to treat the **client** with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of **client**, particularly in maintaining communication.

[3] The **client** may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the **attorney-client** evidentiary privilege. Nevertheless, the lawyer must keep the **client**'s interests foremost and, except for protective action authorized under paragraph (b), must to look to the **client**, and not family members, to make decisions on the **client**'s behalf.

[4] If a legal representative has already been appointed for the **client**, the lawyer should ordinarily look to the representative for decisions on behalf of the **client**. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a **client** is at risk of substantial physical, financial or other harm unless action is taken, and that a normal **client**-lawyer relationship cannot be maintained as provided in paragraph (a) because the **client** lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of **attorney** or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the **client**. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the **client** to the extent known, the **client**'s best interests and the goals of intruding into the **client**'s decision-making autonomy to the least extent feasible, maximizing **client** capacities and respecting the **client**'s family and social connections.

[6] In determining the extent of the **client**'s diminished capacity, the lawyer should consider and balance such factors as: the **client**'s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the **client**. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the **client**'s interests. Thus, if a **client** with diminished capacity has substantial property that should be sold for the **client**'s benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the **client** than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the **client**.

*Disclosure of the **Client**'s Condition*

[8] Disclosure of the **client**'s diminished capacity could adversely affect the **client**'s interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the **client** directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the **client**'s interests before discussing matters related to the **client**. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a **client**-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a **client**.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a **client**, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

CPR 314. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

RPC 157 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-157/). Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.

RPC 163 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-163/). Opinion rules that an attorney may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

98 Formal Ethics Opinion 16 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-16/). Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 Formal Ethics Opinion 18 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-18/). Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

2003 Formal Ethics Opinion 7 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-7/). Opinion rules that a lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2006 Formal Ethics Opinion 11 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-11/). Opinion rules that, outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a **client** or, where representation has commenced, shall **with**draw from the representation of a **client** if:

(1) the representation will result in violation of law or the Rules of Professional Conduct;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the **client**; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may **with**draw from representing a **client** if:

(1) **with**drawal can be accomplished **with**out material adverse effect on the interests of the **client**; or

(2) the **client** knowingly and freely assents to the termination of the representation; or

(3) the **client** persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

(4) the **client** insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or **with** which the lawyer has a fundamental disagreement; or

(5) the **client** has used the lawyer's services to perpetrate a crime or fraud; or

(6) the **client** fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will **with**draw unless the obligation is fulfilled; or

(7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the **client**; or

(8) the **client** insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(9) other good cause for **with**drawal exists.

(c) A lawyer must comply **with** applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation not**with**standing good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a **client**'s interests, such as giving reasonable notice to the **client**, allowing time for employment of other counsel, surrendering papers and property to which the **client** is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the **client** to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, **with**out improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5.See also Rule 1.3, Comment [4].

*Mandatory **With**drawal*

[2] A lawyer ordinarily must decline or **with**draw from representation if the **client** demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or **with**draw simply because the **client** suggests such a course of conduct; a **client** may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a **client**, **with**drawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer **with**draws from pending litigation. Difficulty may be encountered if **with**drawal is based on the **client**'s demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the **with**drawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both **client**s and the court under Rules 1.6 and 3.3.

Discharge

[4] A **client** has a right to discharge a lawyer at any time, **with** or **with**out cause, subject to liability for payment for the lawyer's services. Where future dispute about the **with**drawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a **client** can discharge appointed counsel may depend on applicable law. A **client** seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the **client**.

[6] If the **client** has severely diminished capacity, the **client** may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the **client**'s interests. The lawyer should make special effort to help the **client** consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

*Optional **With**drawal*

[7] A lawyer may **with**draw from representation in some circumstances. The lawyer has the option to **with**draw if it can be accomplished **with**out material adverse effect on the **client**'s interests. Forfeiture by the **client** of a substantial financial investment in the representation may have such effect on the **client**'s interests. **With**drawal is also justified if the **client** persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated **with** such conduct even if the lawyer does not further it. **With**drawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the **client**. The lawyer may also **with**draw where the **client** insists on taking action that the lawyer considers repugnant or imprudent or **with** which the lawyer has a fundamental disagreement.

[8] A lawyer may **with**draw if the **client** refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

*Assisting the **Client** upon **With**drawal*

[9] Even if the lawyer has been unfairly discharged by the **client**, a lawyer must take all reasonable steps to mitigate the consequences to the **client**.

[10] The lawyer may never retain papers to secure a fee. Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the **client** such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the **with**drawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

[11] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal, must turn over the transcript to the former **client** upon request, the transcript being property to which the former **client** is entitled.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

CPR 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-3/).

CPR 24. Withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

CPR 61. It is improper for a senior member of a law firm who is employed to represent a client to refer a case to a junior partner or associate without the client's consent.

CPR 269. An attorney whose motion to withdraw from representation of a corporation is denied must continue to represent the corporation.

CPR 315 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-315/).

CPR 322 (Revised) (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-322/).

RPC 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-8/). Opinion rules that a lawyer employed by an insurer to represent an uninsured motorist must not withdraw after settlement until he obtains permission of the tribunal and takes steps to minimize prejudice to his client [Originally published as RPC 8 (Revised)]

RPC 48 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-48/). Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 58 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-58/). Opinion rules that another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

RPC 79 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-79/). Opinion rules that a lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

RPC 106 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-106/). Opinion discusses circumstances under which a refund of a prepaid fee is required.

RPC 153 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-153/). Opinion rules that in cases of multiple representation a lawyer who has been discharged by one client must deliver to that client as part of that client's file information entrusted to the lawyer by the other client.

RPC 157 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-157/). Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.

RPC 158 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-158/). Opinion rules that a sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

RPC 169 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-169/). Opinion rules that a lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

RPC 178 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-178/). Opinion examines a lawyer's obligation to deliver the file to the client upon the termination of the representation when the lawyer represents multiple clients in a single matter.

RPC 223 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-223/). Opinion rules that when a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

RPC 227 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-227/). Opinion rules that a former residential real estate client is not entitled to the lawyer's title notes or abstracts regardless of whether such information is stored in the client's file. However, a lawyer formerly associated with a firm may be entitled to examine the title notes made by the lawyer to provide further representation to the same client.

RPC 234 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-234/). Opinion rules that an inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

RPC 245 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-245/). Opinion rules that a lawyer in possession of the legal file relating to the prior representation of co-parties in an action must provide the co-party the lawyer does not represent with access to the file and a reasonable opportunity to copy the contents of the file.

98 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-9/). Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

2002 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-5/). Opinion rules that whether electronic mail should be retained as a part of a client's file is a legal decision to be made by the lawyer.

2005 Formal Ethics Opinion 13 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-13/). Opinion rules that a minimum fee that will be billed against at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

2006 Formal Ethics Opinion 18 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-18/). Opinion rules that, when representation is terminated by a client, a lawyer who advances the cost of a deposition and transcript may not condition release of the transcript to the client upon reimbursement of the cost.

2007 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-8/). Opinion rules that a lawyer may not charge a client for filing and presenting a motion to withdraw unless withdrawal advances the client's objectives for the representation or the charge is approved by the court when ruling on a petition for legal fees from a court-appointed lawyer.

2009 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-8/). Opinion provides guidelines for a lawyer for a party to a partition proceeding and rules that the lawyer may subsequently serve as a commissioner for the sale but not as one of the commissioners for the partitioning of the property.

2010 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-1/). Opinion rules that a lawyer retained by an insurance carrier to represent an insured whose whereabouts are unknown and with whom the lawyer has no contact may not appear as the lawyer for the insured absent authorization by law or court order.

2013 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-8/). Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2013 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-9/). Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2013 Formal Ethics Opinion 15 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-15/). Opinion rules that records relative to a client's matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation, and may be provided in an electronic format if readily accessible to the client without undue expense.

2015 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-5/). Opinion provides that in post-conviction or appellate proceedings, a discharged lawyer may discuss a former client's case and turn over the former client's file to successor counsel if the former client consents or the disclosure is impliedly authorized.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.19 SEXUAL RELATIONS WITH CLIENTS PROHIBITED

(a) A lawyer shall not have **sex**ual relations **with** a current **client** of the lawyer.

(b) Paragraph (a) shall not apply if a consensual **sex**ual relationship existed between the lawyer and the **client** before the legal representation commenced.

(c) A lawyer shall not require or demand **sex**ual relations **with** a **client** incident to or as a condition of any professional representation.

(d) For purposes of this rule, "**sex**ual relations" means:

(1) **Sex**ual intercourse; or

(2) Any touching of the **sex**ual or other intimate parts of a person or causing such person to touch the **sex**ual or other intimate parts of the lawyer for the purpose of arousing or gratifying the **sex**ual desire of either party.

(e) For purposes of this rule, "lawyer" means any lawyer who assists in the representation of the **client** but does not include other lawyers in a firm who provide no such assistance.

Comment

[1] Rule 1.7, the general rule on conflict of interest, has always prohibited a lawyer from representing a **client** when the lawyer's ability competently to represent the **client** may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships **with client**s, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a **client** are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a **client** if a **sex**ual relationship **with** the **client** presents a significant danger to the lawyer's ability to represent the **client** adequately. The present rule clarifies that a **sex**ual relationship **with** a **client** is damaging to the **client**-lawyer relationship and creates an impermissible conflict of interest that cannot be ameliorated by the consent of the **client**.

Exploitation of the Lawyer's Fiduciary Position

[2] The relationship between a lawyer and **client** is a fiduciary relationship in which the lawyer occupies the highest position of trust and confidence. The relationship is also inherently unequal. The **client** comes to a lawyer **with** a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the **client**'s problem. The same factors that led the **client** to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the **client** in a position of vulnerability.

[3] A **sex**ual relationship between a lawyer and a **client** may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-**client** relationship, there is a significant possibility that a **sex**ual relationship **with** a **client** resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended **client** reliance and trust to become the catalyst for a **sex**ual relationship **with** a **client**, the lawyer violates one of the most basic ethical obligations; i.e., not to use the trust of the **client** to the **client**'s disadvantage. This same principle underlies the rules prohibiting the use of **client** confidences to the disadvantage of the **client** and the rules that seek to ensure that lawyers do not take financial advantage of their **client**s. See Rules 1.6 and 1.8.

*Impairment of the Ability to Represent the **Client** Competently*

[4] A lawyer must maintain his or her ability to represent a **client** dispassionately and **with**out impairment to the exercise of independent professional judgment on behalf of the **client**. The existence of a **sex**ual relationship between lawyer and **client**, under the circumstances proscribed by this rule, presents a significant danger that the lawyer's ability to represent the **client** competently may be adversely affected because of the lawyer's emotional involvement. This emotional involvement has the potential to undercut the objective detachment that is demanded for adequate representation. A **sex**ual relationship also creates the risk that the lawyer will be subject to a conflict of interest. For example, a lawyer who is **sex**ually involved **with** his or her **client** risks becoming an adverse witness to his or

her own **client** in a divorce action where there are issues of adultery and child custody to resolve. Finally, a blurred line between the professional and personal relationship may make it difficult to predict to what extent **client** confidences will be protected by the attorney-**client** privilege in the law of evidence since **client** confidences are protected by privilege only when they are imparted in the context of the **client**-lawyer relationship.

*No Prejudice to **Client***

[5] The prohibition upon representing a **client with** whom a **sex**ual relationship develops applies regardless of the absence of a showing of prejudice to the **client** and regardless of whether the relationship is consensual.

Prior Consensual Relationship

[6] **Sex**ual relationships that predate the **client**-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and **client** dependency are not present when the **sex**ual relationship exists prior to the commencement of the **client**-lawyer relationship. However, before proceeding **with** the representation in these circumstances, the lawyer should be confident that his or her ability to represent the **client** competently will not be impaired.

No Imputed Disqualification

[7] The other lawyers in a firm are not disqualified from representing a **client with** whom the lawyer has become intimate. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the **client with** whom he or she is having a **sex**ual relationship is specific to that lawyer's representation of the **client** and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the **client**.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

COUNSELOR

Search Rules

RULE 2.1 ADVISOR

In representing a **client**, a lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the **client**'s situation.

Comment

Scope of Advice

[1] A **client** is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a **client** may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the **client**'s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the **client**.

[2] Advice couched in narrow legal terms may be of little value to a **client**, especially where practical considerations such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A **client** may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a **client** experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a **client** inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems **with**in the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems **with**in the competence of the accounting profession or of financial specialists. Where consultation **with** a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the **client**. However, when a lawyer knows that a **client** proposes a course of action that is likely to result in substantial adverse legal consequences to the **client**, the lawyer's duty to the **client** under Rule 1.4 may require that the lawyer offer advice if the **client**'s course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the **client** of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a **client**'s affairs or to give advice that the **client** has indicated is unwanted, but a lawyer may initiate advice to a **client** when doing so appears to be in the **client**'s interest.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

2011 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-4/). Opinion rules that a lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

MAINTAINING THE INTEGRITY OF THE PROFESSION

Search Rules

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on a lawyer's fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. A lawyer's dishonesty, fraud, deceit, or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partner or law firm. A lawyer who steals funds, for instance, is guilty of a serious disciplinary violation regardless of whether the victim is the lawyer's employer, partner, law firm, client, or a third party.

[3] The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown by clear, cogent, and convincing evidence that the lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act although, to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.

[4] A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in *State Bar v. DuMont*,

52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. Conduct warranting the imposition of professional discipline under paragraph (d) is characterized by the element of intent or some other aggravating circumstance. The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In *State Bar v. Jerry Wilson*, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[5] Threats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass anyone associated with the judicial process including judges, opposing counsel, litigants, witnesses, or court personnel violate the prohibition on conduct prejudicial to the administration of justice. When directed to opposing counsel, such conduct tends to impede opposing counsel's ability to represent his or her client effectively. Comments "by one lawyer tending to disparage the personality or performance of another...tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand." State v. Rivera, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999). See Rule 3.5, cmt. [10] and Rule 4.4, cmt. [2].

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 5, 2015; September 28, 2017

Ethics Opinion Notes

CPR 110. An attorney may not advise a client to seek Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

CPR 168. An attorney may file personal bankruptcy.

CPR 188. An attorney may not draw deeds or other legal instruments based on land surveys made by unregistered land surveyors.

CPR 342. An attorney should not close a loan where the transaction is conditioned by the lender upon the placement of title insurance with a particular company.

CPR 369. An attorney may close a loan if the lender merely suggests rather than requires the placement of title insurance with a particular company.

RPC 127 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-127/). Opinion rules that deliberate release of settlement proceeds without satisfying conditions precedent is dishonest and unethical.

RPC 136 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-136/). Opinion rules that a lawyer may notarize documents which are to be used in legal proceedings in which the lawyer appears.

RPC 143 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-143/). Opinion rules that a lawyer who represents or has represented a member of the city council may represent another client before the council.

RPC 152 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-152/). Opinion rules that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court.

RPC 159 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-159/). Opinion rules that an attorney may not participate in the resolution of a civil dispute involving allegations against a psychotherapist of sexual involvement with a patient if the settlement is conditioned upon the agreement of the complaining party not to report the misconduct to the appropriate licensing authority.

RPC 162 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-162/). Opinion rules that an attorney may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

RPC 171 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-171/). Opinion rules that it is not a violation of the Rules of Professional Conduct for a lawyer to tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.

RPC 180 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-180/). Opinion rules that a lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

RPC 192 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-192/). Opinion rules that a lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case.

RPC 197 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-197/). Opinion rules that a prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

RPC 204 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-204/). Opinion rules that it is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

RPC 221 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-221/). Opinion rules that absent a court order or law requiring delivery of physical evidence of a crime to the authorities, a lawyer for a criminal defendant may take possession of evidence that is not contraband in order to examine, test, or inspect the evidence. The lawyer must return inculpatory physical evidence that is not contraband to the source and advise the source of the legal consequences pertaining to the possession or destruction of the evidence.

RPC 236 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-236/). Opinion rules that a lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

RPC 243 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-243/). Opinion rules that it is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

98 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-2/). Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

98 Formal Ethics Opinion 19 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-19/). Opinion provides guidelines for a lawyer representing a client with a civil claim that also constitutes a crime.

99 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-2/). Opinion rules that a defense lawyer may suggest that the records custodian of plaintiff's medical record deliver the medical record to the lawyer's office in lieu of an appearance at a noticed deposition provided the plaintiff's lawyer consents.

2000 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2000-formal-ethics-opinion-8/). Opinion rules that a lawyer acting as a notary must follow the law when acknowledging a signature on a document.

2001 Formal Ethics Opinion 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2001-formal-ethics-opinion-12/). Opinion rules that a closing lawyer may not counsel or assist a client to affix excess excise tax stamps on an instrument for registration with the register of deeds.

2003 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-5/). Opinion rules that neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

2003 Formal Ethics Opinion 11 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-11/). Opinion rules that a lawyer must deal honestly with the members of her former firm when dividing a legal fee.

2005 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-3/). Opinion rules that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations.

2007 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-2/). Opinion rules that a lawyer may not take possession of a client's contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

2008 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-3/). Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-4/). Opinion rules that a lawyer may issue a subpoena in compliance with Rule 45 of the Rules of Civil Procedure which authorizes a subpoena for the production of documents to the lawyer's office without the need to schedule a hearing, deposition or trial.

2008 Formal Ethics Opinion 14 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-14/). Opinion rules that it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer. .

2008 Formal Ethics Opinion 15 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-15/). Opinion rules that, provided the agreement does not constitute the criminal offense of compounding a crime and is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence, a lawyer may participate in a settlement agreement of a civil claim that includes a non-reporting provision prohibiting the plaintiff from reporting the defendant's conduct to law enforcement authorities.

2010 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-2/). Opinion rules that a lawyer may not serve an out of state health care provider with an unenforceable North Carolina subpoena and may not use documents produced pursuant to such a subpoena.

2010 Formal Ethics Opinion 14 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-14/). Opinion rules that it is a violation of the Rules of Professional Conduct for a lawyer to select another lawyer's name as a keyword for use in an Internet search engine company's search-based advertising program.

2011 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-9/). Opinion rules that a lawyer may not allow a person who is not employed by or affiliated with the lawyer's firm to use firm letterhead.

2011 Formal Ethics Opinion 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-12/). Opinion rules that a lawyer must notify the court when a clerk of court mistakenly dismisses a client's charges.

2012 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-5/). Opinion rules that a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2012 Formal Ethics Opinion 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-10/). Opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2014 Formal Ethics Opinion 7 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-7/). Opinion rules that a lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records.

2014 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-8/). Opinion rules that a lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

2014 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-9/). Opinion rules that a private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.

PROFESSIONAL RESPONSIBILITY IN A PANDEMIC

Monday, April 6, 2020

By Suzanne Lever and Brian Oten

As health concerns mandate social distancing and other precautions due to the COVID-19 (coronavirus) outbreak, many lawyers and their staff will find themselves working from home. The necessity to work remotely brings new challenges for lawyers as they continue to be governed by the Rules of Professional Conduct. However, despite the changes in the world around us, the Rules of Professional Conduct have not changed. Lawyers must continue to pursue their clients' matters "despite opposition, obstruction, or personal inconvenience to the lawyer," Rule 1.3, cmt. 1, and must otherwise strive to maintain as normal of a lawyer-client relationship as possible. This article examines professional responsibilities that demand special consideration during this unprecedented time. Lawyers may contact the State Bar's Ethics Staff for further guidance, if needed, by emailing ethicsadvice@ncbar.gov (mailto:ethicsadvice@ncbar.gov).

Diligence

Although legal services were deemed an essential business by Governor Cooper's Executive Order 121 (March 27, 2020) and law firms are permitted to remain open, lawyers may choose to reduce in-person legal activities without violating the Rules of Professional Conduct. Under the present circumstances, lawyers should weigh public health considerations when exercising their professional judgment to determine the scope of services the lawyer is comfortable offering to clients and requiring of staff.

Notwithstanding government mandates and altered life circumstances, lawyers must continue to be diligent during this pandemic. Rule 1.3 requires lawyers to act with "reasonable diligence and promptness in representing a client." The Judicial Branch is continually monitoring the COVID-19 situation throughout the state, and has taken substantial steps on both a local and statewide level to protect the public welfare and accommodate lawyers and their respective parties by reducing staff in the courthouse, continuing cases, and extending deadlines. The constant changes to court schedules require lawyers to be vigilant about maintaining and updating client files and calendars. Lawyers should make it a habit to review the updated information from the Judicial Branch on its website, nccourts.gov.

Regardless of the various extensions and continuances ordered across the state, a lawyer should continue to pursue a client's case to the extent reasonably possible under these unique circumstances. Lawyers can continue to prepare documents, respond to discovery, or even settle matters while working remotely. Of course, just as one lawyer can continue pursuing a particular case, so too can opposing counsel; lawyers should put a plan into place for someone at the law office to occasionally check the office's delivered mail. Again, the Rules require "reasonable diligence and promptness in representing a client"—it's reasonable to expect that the ongoing public health crisis may delay, stall, or otherwise impact the representation of a client depending on the case and the relevant circumstances, but it's also reasonable to expect a lawyer to continue pursuing a client's case when possible.

Communication

The duty to communicate with a client is more important now than ever. Rule 1.4 recognizes that effective lawyer-client communication is a two-way street: the rule requires lawyers to keep their clients "reasonably informed" about the status of their matter, and the rule anticipates client inquiries by requiring lawyers to "promptly comply with reasonable requests for information" from their clients. Clients should have the ability to communicate with their lawyer during this unique time in history, so basic updates to the law office's contact information are important. Lawyers should update their outward-facing communications—including their firm's website and voicemail —with information detailing how a client can reach someone at the law office and/or how often mail or voicemails are checked.

The duty to communicate during the COVID-19 crisis also encompasses the lawyer's responsibility to explain to clients how current events may affect their case and detailing ways in which the lawyer is responding to these events. Clients need to be advised of any changes to office hours, court closings, and scheduled court appearances. Even if there is nothing pressing in a client's case, lawyers should consider sending a brief message to reassure clients that, despite this crisis, their matters are important and are not being neglected.

Similarly, communication with opposing counsel and third parties is crucial not just for the lawyer's representation of a client, but for purposes of professionalism. Communicating expectations or delays during these difficult times helps ensure all involved are on the same page, and potentially prevents frustration or future disputes over deadlines.

Confidentiality

Technology enables lawyers to work remotely in a more productive and smoother manner than ever before. However, along with the ease of bringing the entire case file/client database/law firm home comes the increased vulnerability to the precious data that makes up a client's case and the lawyer's practice. Lawyers working remotely continue to have the duty to protect confidential client information. Rule 1.6(c) states that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Additionally, as a part of maintaining a lawyer's competency, comment 8 to Rule 1.1 states that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with

the technology relevant to the lawyer's practice[.]" Simply put, if a lawyer is going to utilize technology to work remotely, the lawyer needs to have a basic understanding of the technology to ensure that the lawyer complies with his or her professional obligations. *See also* 2011 FEO 6 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-6/) (Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property) and 2005 FEO 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-10/) (Virtual Law Practice and Unbundled Legal Services). Lawyers should consider the following when assessing the vulnerabilities of confidential information while working from home:

• Home network security – Lawyers put a great deal of effort into making their law office a secure environment, and for good reason. When working with and transmitting confidential client information from home, a lawyer must similarly take steps to ensure the confidential information on the home network is protected. At the very least, lawyers should ensure that the network has been updated with the latest security patches and is password protected. The same goes for all devices that are connecting to the home network—keep them updated, and at least password protect any device on your home network that you use to access confidential information. Lawyers who have questions about the security of their home network should contact a network security professional.

• Discussing confidential information at home – Lawyers should set up a reasonably confidential private workspace while working from home. When taking a call with a client, close the door or step into another room if sensitive information is discussed. Additionally, much has been reported and debated over the past few years about the security concerns surrounding voice assistants like Google Assistant, Amazon Echo, or Apple HomePod. These devices listen to conversations heard within range of the device; while they may not "turn on" unless the activation word is spoken, the device is nevertheless listening for that activation word (and what is heard may be processed and reviewed by a computer or even a person somewhere else). Lawyers should avoid discussing confidential information within earshot of such listening devices.

• Utilizing online software and services – Services like cloud storage, online case management/databases, and video conferencing are proving to be necessities in practicing law remotely. These services offer remarkable accessibility and facilitate efficient practice and communication like never before. However, as impressive as these services are, they nevertheless suffer from significant security vulnerabilities if mishandled. It is not a lawyer's duty to know the intricacies of security protocols employed by the services they utilize, but it is a lawyer's duty to take reasonable care in selecting and vetting a particular service to determine if confidential client information will be protected while using the service, what vulnerabilities might exist, and how the lawyer can best protect against those vulnerabilities. 2011 FEO 6 states, "[W]hile the duty of confidentiality applies to lawyers who choose to use technology to communicate, this obligation does not require that a lawyer use only infallibly secure methods of communication. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality." (internal citations omitted). This duty of reasonable care continues beyond initial selection of a service and extends during the lawyer's use of the service. Lawyers should continuously educate themselves on the ever-evolving state of technology and the services they employ to facilitate their practices, and make necessary adjustments (including abandonment, if necessary) when discoveries are made that call into question services previously thought to be secure.

All that is to say, lawyers can use online services in their respective practices; but at a minimum, lawyers should spend some time researching the online services they intend to use. Review the company's information on security, and search for third party reports about the services. Doing so may reveal past breaches and recent security concerns—s well as the company's response to those events—that can inform your selection.

Once you've made your selection, when accessing any online service to practice law and handle confidential information, lawyers should at least use a secure network and use strong passwords that are regularly changed to access your accounts.

Lastly on confidentiality, it is inevitable that a lawyer or someone the lawyer interacts with will test positive for COVID-19. A lawyer who is questioned by public health or medical officials about the lawyer's recent contacts due to the lawyer's exposure to COVID-19 may be asked to disclose her client's identity and contact information, which is confidential information pursuant to Rule 1.6. In such circumstances, pursuant to Rule 1.6(b)(3), the lawyer may disclose such confidential information "to the extent the lawyer reasonably believes necessary...to prevent reasonably certain death or bodily harm[.]" *See also* Rule 1.6, cmt. 6 ("Rule 1.6(b)(3) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm."). A lawyer who is exposed to COVID-19 may disclose confidential client information to medical officials to the extent the lawyer reasonably believes necessary to prevent the spread of the virus. Additionally, if a client is incapacitated due to COVID-19, Rule 1.14 requires a lawyer to "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Rule 1.14(a). If the client is unable to protect his or her own interests, the lawyer should consult Rule 1.14(b) and (c) for guidance on what a lawyer may do to facilitate the representation including what information the lawyer may reveal to third parties when seeking assistance and whether to seek the appointment of a guardian or other legal representative for the client.

Video Conferences

Video conferences are the hot trend in doing business remotely during this unique time, and for good reason—advances made in camera technology, processing power, and internet speed make real-time video conversations a viable, effective option for both tech-savvy and tech-challenged users. The Rules of Professional Conduct do not prohibit a lawyer's use of video conferences to speak with clients, attend mediations, or even participate in remote hearings (as permitted by the courts). However, in addition to the considerations mentioned above about vetting online services, lawyers should be mindful of three considerations when using video conferences to speak with clients. First, is the video conference secure? Lawyers should take the appropriate steps to ensure each video conference session is private, including employing unique password protection, when possible, to prevent uninvited third parties from accessing the video conference as has been recently reported. Given the general vulnerabilities of electronic communications, lawyers should consider sending the video conference link or meeting ID separate from the password needed to access the conference (e.g. send the meeting ID via email, and the password via text message). Second, is the conversation taking place actually confidential? Unless the client is using headphones, the conversation via video conference will be heard by physically present third parties. Lawyers may want to ask the client to pan the camera around the room to demonstrate and ensure that the conversation will be protected, and lawyers should watch to see if the client's behavior indicates another person has joined the room and/or is exerting undue influence. Third, is a video conference appropriate for the purpose of the communication? A video conference can be an effective tool to speak with a new client about potential representation, but may not be sufficient if attempting to determine whether a client has capacity to make decisions about his or her affairs. Such situations will need to be assessed on a case-by-case basis by the lawyer exercising his or her professional judgment.

Succession

Lawyers should plan now for the possibility that they may suddenly become incapacitated. In the face of increased risk of serious incapacitating illness, lawyers should have a ready succession plan for other lawyers to be available to assume responsibility for legal representations. At the very least, lawyers should have a plan that enables a court-appointed trustee for the law practice to access the necessary client files, trust account records, and other vital information that would enable clients to move to subsequent counsel. Assuring the continuity of representation can be difficult for solo practitioners. Comment [5] to Rule 1.3 provides that "to prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan...that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action." Lawyers should be mindful that the ultimate decision to transfer the file to new counsel remains with the client. Rule 1.2.

Staff

As lawyers and law offices embrace the reality of working remotely amidst a global pandemic, principals in a law firm and lawyers with managerial authority must make reasonable efforts to ensure the law office has measures in effect giving reasonable assurance that both lawyers and nonlawyers associated with the firm conform to the Rules of Professional Conduct. *See* Rules 5.1 and 5.3. Now is the time to update office procedures (or FINALLY write them down) that clearly state professional expectations and empower employees to ensure their conduct is compatible with the Rules of Professional Conduct. The law firm's malpractice insurance carrier can offer advice and resources to solo practitioners and law firms on the topics of succession planning, remote work, and cybersecurity.

Professionalism

This is a stressful time for everyone. We need to take care of ourselves and each other. Recently, US District Judge Amy Totenberg of the Northern District of Georgia issued an order to every case on her docket outlining new procedures and extended deadlines following the pandemic. Judge Totenberg's order contained the following words of advice:

> Be kind to one another in this most stressful of times. Remember to maintain your perspective about legal disputes, given the larger life challenges now besetting our communities and world. Good luck to one and all.

Lawyers are allowed to be kind. Rule 1.2(a)(2) encourages lawyers to accede to reasonable requests of opposing counsel that do not prejudice the rights of a client, avoid offensive tactics, and to treat all persons involved in the legal process with courtesy and consideration. Rule 1.2(a)(3) further allows a lawyer to "exercise his or her professional judgment to waive or fail to assert a right or position of the client." In sum, Rule 1.2 allows a lawyer to be gracious—to check with opposing counsel about a missed deadline, rather than file for sanctions at the first opportunity; or to pick up the phone and offer an extension to opposing counsel who is also dealing with the difficulties of the present crisis. Now is the time to be kind and considerate with each other. Now is the time to demonstrate your professionalism.

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Weighing Aggravating and Mitigating Factors

Author : Jamie Markham

Categories : Sentencing, Uncategorized

Tagged as : aggravating factors, loosey-goosey, structured sentencing

Date : March 29, 2016

Much has been written—and much of it by the Supreme Court—on the proper way to find aggravating factors for sentencing. After *Apprendi v. New Jersey*, *Blakely v. Washington*, and countless cases at the state level, it is of course clear that a defendant has a Sixth Amendment right to have aggravating factors proved to a jury beyond a reasonable doubt. Once sentencing factors are properly found, however, responsibility shifts back to the judge to decide what to do about them. The rules for *weighing* factors are as loosey-goosey as the rules for finding them are rigid.

Under Structured Sentencing, if aggravating factors are present and the court decides they are sufficient to outweigh any mitigating factors that are present, the court may impose a sentence from the aggravated range. Conversely, if mitigating factors are present and are deemed to outweigh any aggravating factors, the court may sentence from the mitigated range. G.S. 15A-1340.16(b).

Many, many appellate cases reinforce the rule that weighing of aggravating and mitigating factors is squarely within the sound discretion of the trial judge. It is for the judge to assign whatever weight he or she deems appropriate to any given factor. State v. Monserrate, 125 N.C. App. 22 (1997). A trial court's weighing of factors "will not be disturbed on appeal absent a showing that there was an abuse of discretion." State v. Garnett, 209 N.C. App. 537 (2011).

A recurrent theme in the cases on weighing aggravating and mitigating factors is that the process is not a mathematical balance. One factor in aggravation may outweigh more than one factor in mitigation (or vice-versa). State v. Allen, 112 N.C. App. 419 (1993) (decided under the similar rule under Fair Sentencing). An extreme case in that regard is State v. Vaughters, 219 N.C. App. 356 (2012), in which the court of appeals upheld a trial court's decision that one aggravating factor (the defendant was armed with a deadly weapon) outweighed 19 mitigating factors (5 statutory and 14 non-statutory).

An older case, State v. Parker, 315 N.C. 249 (1985), noted the possibility that "a single, relatively minor aggravating circumstance simply will not reasonably outweigh a number of highly significant mitigating factors." Nevertheless, the case affirmed that aspect of the trial judge's decision and concluded with a reminder that appellate courts are loathe to second-guess a trial judge on a question such as this. "It is, after all, the sentencing judge who hears and observes the witnesses and the defendant firsthand. We have before us only the cold record. We are, therefore, reluctant to overturn a sentencing judge's weighing of aggravating and mitigating factors even if, based solely on the record, we might have weighed them differently." *Id.* at 260.

Finally, note that G.S. 15A-1340.16(b) governs when aggravated or mitigated sentence are *permitted*. The court is never *required* to depart from the presumptive range, even if many aggravating factors and no mitigating factors are found (or vice-versa). In that respect, Structured Sentencing is a bit different from sentencing for impaired driving under G.S. 20-179. An impaired driving defendant with a single mitigating factor and no aggravating factors *must* be sentenced at Level Five. State v. Geisslercrain, 233 N.C. App. 186 (2014). In other words, Level Four is *not* the functional equivalent of the presumptive range under Structured Sentencing; the judge has no discretion to remain at Level Four if only one type of factor is found (aggravating or mitigating) and there is no opposite factor present to counterbalance it.

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

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1

Bottom Line up Front

- To ensure appellate review on the merits of an issue, the trial attorney must:
  - preserve objections and arguments,
  - establish facts in the record, and
  - appeal correctly.

2

Pre-trial Preparation

- Preservation of issues, objections, and arguments begins during pre-trial preparation.
- Thoughtful and thorough preparation will lead to you properly preserving issues, objections, and arguments.

3

Pre-trial Preparation - Discovery

- Preserve discovery issues by filing written discovery requests, specifying what you want, and follow up with a motion to compel. If the motion to compel is allowed, get a written order from the judge.
- Keep a running list of items you need to ask the State to produce.
- Cite constitutional and statutory grounds for your entitlement to the discovery.

4

Pre-trial Preparation

- In reviewing discovery, you should ask yourself, "how will the State introduce this evidence? What objections will I make to this evidence?"
  - Will I need a limiting instruction? Come prepared.
- When you prepare questions for each of the State's witnesses, highlight in bold the expected testimony of the witness that is objectionable. Write down the basis for your objections.

5

Pre-trial Preparation

- Consider objections the State could make to your cross-examination questions and come prepared to defend the questions.
- Come to court prepared with evidence to support your cross-examination questions.

6

Pre-trial motions

- Request and motion for discovery
- Motion for complete recordation
- Motion for a bill of particulars
- Motion to sever charges or defendants
- Motion to suppress
  - You MUST attach an affidavit, and you can sign the affidavit
  - If the MTS is denied, you MUST object in front of the jury when the evidence is actually offered.

7

Error Preservation – Jury Selection

- Batson (race) and J.E.B. (gender) claims
  - A complete recordation is imperative for preserving
  - Our Supreme Court has revived Batson
- Manner of juror selection, including fair cross-section of the community.
- Challenges for Cause that are denied can be preserved for appellate review
  - Specific, technical requirements to preserve
  - 15A-1214
  - Have a voir dire folder

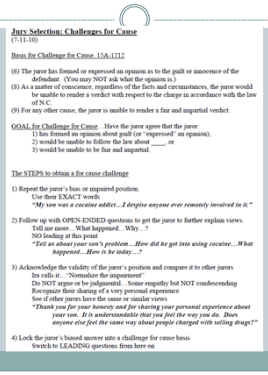
8

Error Preservation – Jury Selection

- Spend time preparing your voir dire and considering if there are facts about your case that could lead to a challenge for cause.
- Have a script to help you develop and preserve a challenge for cause:

9

Error Preservation – Jury Selection



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…?

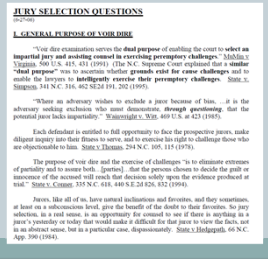
3) Acknowledge the validity of the juror's position and compare it to other jurors
Its calls it…"Normalize the impairment"
Do NOT argue or be judgmental…Some empathy but NOT condescending
Recognize their sharing of a very personal experience
See if other jurors have the same or similar views
"Thank you 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

10

Error Preservation – Jury Selection

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



JURY SELECTION QUESTIONS
(rev7/08)

I. GENERAL PURPOSE OF VOIR DIRE

"Voir dire examination serves the **dual purpose** of enabling the court to **select an impartial jury and assisting counsel in exercising peremptory challenges**." Mu'Min v Virginia, 500 U.S. 415, 431 (1991) (The N.C. Supreme Court explained that a **similar "dual purpose"** was to ascertain whether **grounds exist for cause challenges** and to enable the lawyers to **intelligently exercise their peremptory challenges**. State v. Simpson, 341 N.C. 316, 462 SE2d 191, 202 (1995).

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

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

The purpose of voir dire and the exercise of challenges "is to eliminate extremes of partiality and to assure both…[parties]…that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. State v Hedgepath, 66 N.C. App. 390 (1984).

11

Error Preservation – Jury Selection

- A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. *State v Leonard*, 295 N.C. 58, 62-63 (1978).
- Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989).

12

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

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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.

14

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

15

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."

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~~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.

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Objections – Timeliness

- Motions to suppress and other motions before or during trial
  - Object at the moment the evidence is introduced in the presence of the jury, even if voir dire was held immediately before or earlier in case.
  - Object if the evidence is mentioned by a later witness.
  - Don't open the door if evidence is suppressed.

18

Objections – Timeliness

- When you prepare your cross-examination questions for each witness, highlight/bold/circle the evidence and questions that you must object to.
  - List the constitutional grounds and evidence rules

19

Objections – Timeliness

- Ask for a voir dire hearing to address witness testimony and exhibits.
  - A single document might contain various pieces of evidence that are inadmissible for different reasons.
  - During pre-trial preparation you should go through the documents sentence by sentence and note objections.
- But you must still object during the witness's testimony to the admission of the testimony and the exhibit.

20

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."

21

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."

22

Objections – Specificity

- Organize and label your questions to match up with the evidence rule that you are going to argue.
- Don't rely on your memory in court. Write it down.

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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?

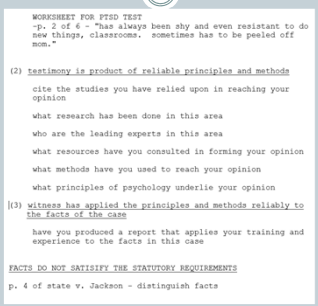
being in court with John?

have you asked what she thinks about it?

other sources of trauma - medical examinations

24

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

25

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

26

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."

27

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.

28

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.

29

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.

30

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

31

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.

32

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?

33

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.
  - "A white man with a clean shaven head and a long beard sat 3 feet from the jury and stared at Juror Number 5."
- Describe what a witness does.
  - "Mr. Jones, I see that when you described the shooting, you raised your right hand in the air and moved your finger as if pulling the trigger of a gun two times. Is that correct?"

34

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.

35

Properly appealing

- Oral notice of appeal in open court – literally must be immediately after judgment is entered and client sentenced – otherwise, it must be in writing

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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

37

Properly appealing

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

38

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.

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Resources

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

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

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Move to dismiss at the end of all the evidence as to every count in every case, whether that's at the end of state's evidence or the defense evidence (or rebuttal, surrebuttal, etc.). You never know when you might have not perceived a problem with the state's proof. When all the evidence is in, move to dismiss. Every time. Here's as certain a way as possible to preserve insufficiency of the evidence and variance between the charge and the evidence (variance is NOT preserved by a motion to dismiss for insufficiency):

> "Your Honor, the defense moves to dismiss each charge on the grounds that the evidence is **insufficient** as a matter of law on every element of each charge to support submission of the charge to the jury, AND that submission to the jury would therefore violate the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution.
>
> Further, the defense moves to dismiss each charge on the ground that, as to each charge, there is a **variance** between the crime alleged in the indictment and any crime for which the state's evidence may have been sufficient to warrant submission to the jury, AND that submission to the jury would therefore violate the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 19, 23, and 24 of the North Carolina Constitution."

[Then lay out specific insufficiency arguments, as well as specific variance arguments, if you have any.]

[If you made specific insufficiency or variance argument, then REPEAT "But I want to reiterate, your Honor, the defense …"]

If the judge wants to debate some particular obviously-proven element of an offense, just say, "Your Honor, I am making this motion to preserve the issues of <u>insufficiency and variance as to ALL elements</u> for appellate review and do not wish to be heard further." If the judge persists, just keep repeating the preceding sentence in a civil manner.

1) Move for a complete recordation – N.C.G.S. 15A-1241. Make sure everything is in the record. Proffer evidence through witness testimony and documents.

2) Make objections in front of the jury to preserve any objections and arguments made in voir dire hearings. Includes preserving a ruling on a motion to suppress. Objections must be:

-timely
-specific (cite statute/rule of evidence)
-constitutional basis
-on the record
-in front of the jury
-mitigated by request for limiting instruction or mistrial
-and there must be an actual ruling by the judge.

3) Move to dismiss for insufficiency AND variance. Use the script.

4) Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.

5) Give proper notice of appeal.

-Oral notice of appeal at trial (not later that day or that week)
-Written notice of appeal within 14 days
    -MUST be served on DA and must have cert. of service
-Appeal is from the "judgment" NOT from the "order denying the motion to suppress"
-Written notice of appeal is necessary for SBM hearings

6) 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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Pre-Trial Preparation for Criminal Defense Practitioners
How To Make Sure Your Objections Are Heard On Appeal
(aka Preserving the Record)

Glenn Gerding, Appellate Defender

Top Tips To Ensure Full Appellate Review:

→ **Move for a complete recordation.**
→ **Objections must be made in front of the jury to be timely.**
→ **Objections must be specific (cite specific statute, rule of evidence, and constitutional basis)**
→ **Move to dismiss all charges for insufficient evidence and variance.**
→ **Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.**
→ **Give proper notice of appeal and ensure appellate counsel is appointed and that the Office of the Appellate Defender has received the case from the county clerk's office.**
→ **Thoughtful preparation, research, and brainstorming with an eye towards appeal will help you have confidence in objecting and preserving the record. Make it a habit to be forward thinking. Read appellate opinions not just for the legal ruling, but to learn how the issue was (or was not) properly preserved.**

****

→ **Move for a complete recordation.** – Make sure everything is in the record. Proffer evidence through witness testimony and documents.

In non-capital criminal cases, the court reporter is not required to record voir dire, opening statements, or closing arguments, except upon motion of any party or the judge's own motion. N.C.G.S. 15A-1241.

Counsel or the trial judge should ask for and ensure a complete recordation. Appellate review of *Batson* claims, in particular, are frustrated by the lack of a transcript of voir dire. In *State v. Campbell*, 846 S.E.2d 804 (N.C. Ct. App. 2020), voir dire was not recorded. Defense made a *Batson* objection and the parties tried to recreate the record. Judge Hampson noted in his concurrence/dissent that:

> our existing case law significantly limits a party's ability to preserve the issue absent not only complete recordation but also specific and direct voir dire questioning of prospective jurors (or other evidence) about their race. . . . In light of our case law indicating a trial lawyer cannot recreate the record of an unrecorded jury voir dire to preserve a *Batson* challenge, the obligation to recreate that record, it seems, must fall on the trial judge in conjunction with the parties.

→ **To be timely, objections must be made <u>in front of the jury</u>** to preserve any objections and arguments made in voir dire hearings. This includes preserving a ruling on a motion to suppress. You cannot rely on Rule 103(a) of the N.C. Rules of Evidence. Why not?

Our Supreme Court has held Rule 103(a) unconstitutional in part because only the Supreme Court, not the General Assembly, can create rules for preserving error. *State v. Oglesby*, 361 N.C. 550 (2007).

Rule 10(a) of the N.C. Rules of Appellate Procedure states:

> "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context…"

Therefore, our Supreme Court interprets Rule 10(a)(1) to require objections to evidence to be made <u>in front of the jury at the time the evidence is introduced</u>, even if the objection has been made and ruled upon previously. *State v. Ray*, 364 N.C. 272 (2010).

In *State v. Ray*, outside the presence of the jury, the defense attorney objected based on Rule 404(b) to the prosecutor's cross-examination of the defendant. Although the voir dire hearing occurred immediately before this line of questioning began in the presence of the jury, defendant's attorney did not object during the actual exchange in front of the jury. The Supreme Court held that the failure to object in front of the jury waived the 404(b) issue for appellate review.

An example of a case applying Rule 10(a)(1) and *State v. Ray* is *State v. Joyner*, 243 N.C. App. 644 (2015).

In *Joyner*, before the defendant testified, his attorney sought to preclude the State from cross-examining him about old convictions under Rule 609. The trial court allowed the defendant to testify during a voir dire hearing, heard arguments of counsel, and ruled that the State could cross-examine the defendant on the old convictions. When the jury was called back in and the defendant testified, the defense attorney failed to object to the State's cross-examination of the defendant about the old convictions. The Court of Appeals held that "the defendant has no right to raise the Rule 609 issue on appeal."

→ **Objections must be specific (cite specific statute, rule of evidence, and constitutional basis):**

Rule 10(a) of the N.C. Rules of Appellate Procedure requires the objecting party to cite the specific grounds for an objection. That means counsel must say the specific rule of evidence and constitutional provision in front of the jury. Examples:

Counsel's failure to cite Rules 403 and 404(b) waived appellate review:

In *State v. Allen*, COA17-973, 2018 N.C. App. LEXIS 554 (June 5, 2018) (unpublished op.), defense counsel sought to exclude evidence under Rules 403 and 404(b). During a hearing outside the presence of the jury the trial judge overruled the objections and ruled the evidence was admissible. Defense counsel acknowledged he would need to object when the State offered the evidence in front of the jury.

However, when the prosecutor questioned the witness in front of the jury defense counsel objected, stating "I apologize. Just for the record, we'd object to the proposed testimony on due process grounds, Federal Constitution, do not wish to be heard." The Court of Appeals held that the objection made in front of the jury was only on constitutional grounds, and not based on a rule of evidence. The issue was waived.

Counsel's failure to cite Sixth Amendment waived appellate review:

In *State v. Mosley*, COA09-1060, 2010 N.C. App. LEXIS 758 (May 4, 2010) (unpublished op.), the trial attorney sought to cross-examine a testifying co-defendant about his pending criminal charges to show bias. The trial attorney argued Rule 608 as the basis for admissibility. The trial court denied the request to allow cross-examination. On appeal, the defendant argued the cross-examination should have been allowed not just under Rule 608, but was required by the Sixth Amendment right to cross-examine and confront a witness. The Court of Appeals held the constitutional issue was waived because the trial attorney failed to assert the Sixth Amendment during trial.

→ **Move to dismiss all charges for insufficient evidence and variance**.

Rule 10(a)(3) of the N.C. Rules of Appellate Procedure states that: "In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial."

In *State v. Golder*, 374 N.C. 238 (2020), the Supreme Court made clear that when defense counsel moves to dismiss the charges, even if thereafter they argue only about certain charges or theories, they have preserved the issue of the sufficiency of the evidence for all charges and all theories of liability.

It is not clear after *Golder*, and a following case *State v. Smith*, 375 N.C. 224 (2020), whether a motion to dismiss for insufficient evidence also preserves a variance issue. To be safe, counsel should specifically move to dismiss all charges for variance in addition to insufficiency.

The Court of Appeals has already started to distinguish *Golder*. In *State v. Gettleman*, 2020 N.C. App. LEXIS 895 (Dec. 15, 2020) (published op.), the defense attorney did not move to dismiss "all" charges but moved to dismiss certain charges specifically. The Court of Appeals held that when defense counsel failed to move to dismiss "all"

charges, he did not preserve for appellate review the sufficiency of the evidence as to the charge that he did not move to dismiss.

→ **Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.**

N.C.G.S. 15A-1231(a) "At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions. A party tendering instructions must furnish copies to the other parties at the time he tenders them to the judge."

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

→ **Give proper notice of appeal and ensure the Office of the Appellate Defender is appointed and that the Office of the Appellate Defender has received the case from the county clerk's office.**

Rules 3 and 4 of the N.C. Rules of Appellate Procedure

-Oral notice of appeal at trial (not later that day or that week)
-Written notice of appeal within 14 days
    -MUST be served on DA and must have cert. of service
-Appeal is from the "judgment" NOT from the "order denying the motion to suppress"
-Written notice of appeal is necessary to appeal satellite-based monitoring (SBM) orders

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

A TEMPLATE/WORKSHEET FOR DEVELOPING A PERSUASIVE STORY/THEORY OF DEFENSE AT TRIAL

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1. In factual terms, identify why your client is innocent – what really happened in this case?

2. Decide which genre of factual defense applies to your client's innocence.

    a. The criminal incident never happened.
    b. The criminal incident happened, but I didn't do it.
    c. The incident happened, I did it, but it wasn't a crime.
    d. The criminal incident happened, I did it, it was a crime, but not the crime charged.
    e. The criminal incident happened, I did it, it was the crime charged, but I'm not responsible.
    f. The criminal incident happened, I did it, it was the crime charged, I'm responsible, but who cares?

3. Craft the story that shows why your client is innocent.

    a. Who are the three main characters in the story of innocence?

    b. What are the three main scenes in the story of innocence?

    c. When and where does the story of innocence start?

4. What emotions do you want the jury (and/or judge) to feel when they hear your story?

5. What archetypes can you draw upon to evoke those emotions?

North Carolina Defender Trial School
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Chapel Hill, NC

STORYTELLING: PERSUADING THE JURY TO ACCEPT YOUR THEORY OF DEFENSE

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What Does Telling a Story Have to Do With Our Theory of Defense?

Stories and storytelling are among the most common and popular features of all cultures. Humans have an innate ability to tell stories and an innate desire to be told stories. For thousands of years, religions have attracted adherents and passed down principles not by academic or theological analysis, but through stories, parables, and tales. The fables of Aesop, the epics of Homer, and the plays of Shakespeare have survived for centuries and become part of popular culture because they tell extraordinarily good stories. The modern disciplines of anthropology, sociology, and Jungian psychology have all demonstrated that storytelling is one of the most fundamental traits of human beings.

Unfortunately, courts and law schools are among the few places where storytelling is rarely practiced or honored. For three (often excruciating) years, fledgling lawyers are trained to believe that legal analysis is the key to becoming a good attorney. Upon graduation, law students often continue to believe that they can win cases simply by citing the appropriate legal principles and talking about reasonable doubt and the elements of crimes. Prisons are filled with victims of legal analysis and reasonable doubt arguments.

For public defenders, this approach is disastrous because it assumes that judges and jurors are persuaded by the same principles as law students. Unfortunately, this is not true. When they deal with criminal trials, lawyers spend a lot of time thinking about "reasonable doubt," "presumption of innocence," and "burden of proof." While these are certainly relevant considerations in an academic sense, the verdict handed down by a jury is usually based on more down-to-earth concerns:

1. "Did he do it?"

and

2. "Will he do it again if he gets out?"

A good story that addresses these questions will go much further towards persuading a jury than will the best-intentioned presentation about the burden of proof or presumption of innocence.

ETHICS NOTE: When we talk about storytelling, we are not talking about fiction. We are also not talking about hiding things, omitting bad facts, or making things up. Storytelling simply means taking the facts of your case and presenting them to the jury in the most persuasive possible way.

What Should the Story Be About?

A big mistake that many defenders make is to assume that the story of their case must be the story of the crime. While the events of the crime must be a part of your story, they do not have to be the main focus.

In order to persuade the jury to accept your theory of defense, your story must focus on one or more of the following:

Why your client is factually innocent of the charges against him.

Your client's lower culpability in this case.

The injustice of the prosecution.

How to Tell a Persuasive Story

I. Be aware that you are crafting a story with every action you take.

Any time you speak to someone about your case, you are telling a story. You may be telling it to your family at the kitchen table, to a friend at a party, or to a jury at trial, but it is always a story. Our task is to figure out how to make the story of our client's innocence persuasive to the jury. The best way to do this is to be aware that you are telling a story and make a conscious effort to make each element of your story as persuasive as possible. This requires you to approach the trial as if you were an author writing a book or a screenwriter creating a movie script. You should therefore begin to prepare your story by asking the following questions:

1. Who are the characters in this story of innocence, and what roles do they play?

2. Setting the scene -- Where does the most important part of the story take place?

3. In what sequence will I tell the events of this story?

4. From whose perspective will I tell the story?

5. What scenes must I include in order to make my story persuasive?

6. What emotions do I want the jury to feel when they are hearing my story? What character portrayals, scene settings, sequence, and perspective will help the jurors feel that emotion?

If you go through the exercise of answering all of these questions, your story will automatically become far more persuasive than if you just began to recite the events of the crime.

II. "But I Don't Have Enough Time to Write a Novel For Every Case"

We all have caseloads that are too heavy. A short way of making sure that you tell a persuasive story to the jurors is to make sure that you focus on at least three of the above elements:

1. Characters – before every trial, ask yourself, "Who are the characters in the story I am telling to the jury, and how do I want to portray them to the jurors?"

    a. Who is the hero and who is the villain?
    b. What role does my client play?
    c. What role does the complainant/victim play?
    d. What role do the police play?

2. Setting – Where does the story take place?

3. Sequence – In what order am I going to tell the story

    a. Decide what is most important for the jury to know
    b. Follow principles of primacy and recency:
        i. Front-load the strong stuff
        ii. Start on a high note and end on a high note

III. Once you have crafted a persuasive story, look for ways to tell it persuasively.

You will be telling your story to the jury through your witnesses, cross-examination of the State's witnesses, demonstrative evidence, and exhibits. When you design these parts of the trial, make sure that your tactics are tailored to the needs of your story.

A. The Language You Use to Communicate Your Story Is Crucial

1. Do not use pretentious "legalese" or "social worker-talk" You don't want to sound like a television social worker, lawyer, or cop.

2. Use graphic, colorful language.

3. Make sure your witnesses use clear, easy-to-follow, and lively language.

4. If your witnesses are experts, make sure they testify in language that laypeople can understand.

B. Don’t Just Tell the Jury What You Mean – Show Them

1. Don’t just state conclusions, such as “the officer was biased” or “my client is an honest man.” Instead, show the jury factual vignettes that will make the jurors reach those conclusions on their own.

2. Use demonstrative evidence to make your point.

3. Create and use charts, pictures, photographs, maps, diagrams, and other graphic evidence to help make things understandable to the jurors.

4. Visit the crime scene and any other places crucial to your theory of defense. That way when you are describing them to the jury, you will know exactly what you are talking about.

"DO YOU SEE WHAT I SEE?"

Why Demonstrative Evidence Makes A Difference

Said a little lamb to a shepherd boy: "Do you hear what I hear?"

If the Shepherd boy was like our jurors – probably not!

[1]

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By:

Stephen P. Lindsay

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INTRODUCTION

Some time ago, as winter was turning to spring, I was traveling on Route 19-23 heading to the far western reaches of North Carolina for a trial. Christmas was a couple of months passed but the peaks of the surrounding mountains remained snow-covered. There was still a winter feeling in the air. I tried to concentrate on real business but kept drifting off into what some people refer to as "la-la land," that state of mind which lets you drive with precision even though your mind is somewhere else. I found myself humming a yuletide tune -- "Do You Hear What I Hear." Although lyrics are by no means my strong suit, I started singing the following rendition: "Said a little lamb

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to the shepherd boy, 'do you hear what I hear?'" At that very moment, for whatever reason, two distinct thoughts came to my mind. First, any ambition I had to become a singer was unquestionably wishful thinking. Second, and more importantly, if the shepherd boy was anything like our jurors, he probably did not hear the same thing that the lamb heard. However, the song goes on --- "Do you see what I see?" For several reasons, the chances are much better that the little lamb and the shepherd boy, although probably not hearing the same thing, did in fact see the same thing. From these events and observations comes an important lesson for those of us who are criminal defense litigators -- we must do more than present mere testimony to our jurors. We must find creative ways to present our cases that will cause jurors to do more than listen to testimony -- ways that will make them tap into their various senses -- while deciding the fates of our clients.

I have lectured on the use of demonstrative evidence in capital and non-capital litigation. There really isn't that much difference. However, I have seen a troublesome trend developing in capital litigation to overlook the basic principles of non-capital case demonstrative evidence and over emphasize things like family history charts, genographs, pressure charts, and various other visual aids used to try and explain the testimony of "experts." These things can be powerful and should continue to be used in capital trials, not in lieu of, but in addition to, more traditional, non-capital case demonstrative evidence

There is no "cookie cutter" demonstrative evidence. Each case is unique and provides for unique opportunities to show jurors what you are talking about. The ways of demonstrating your points is limited only by your creativity (and occasionally a bothersome rule or judge that can admittedly muck things up a bit). That which follows is applicable to the trial of all cases – criminal and civil – and is offered to hopefully rekindle the creative fires of all litigators.

The "Same Old - Same Old"

When it comes to demonstrative evidence, a majority of criminal defense lawyers get caught in the trap of doing the "same old-same old." Whether this stems from law school theoretical teaching, from a far too intense focus on Imwinkelried's "Evidentiary Foundations," from lawyers repeating what they have "learned" watching other lawyers, or from the sheer comfort that goes along with doing things the way they have always been done, wonderful opportunities to be incredibly persuasive are regularly lost. We must begin to be more creative with demonstrative evidence in our efforts to persuade jurors. In the words of Ralph Waldo Emerson:

> A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do ... Speak what you think today in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today.

Emerson's quote summarizes the all-too-obvious. When it comes to demonstrative evidence, we must change our ways, try new things, and work out of the demonstrative evidence rut into which many of us have fallen. The creative use of demonstrative evidence affords criminal defense attorneys numerous unique opportunities to become more powerful persuaders. Furthermore, preparing and presenting quality demonstrative evidence is not necessarily an expensive proposition..

What Is "Demonstrative Evidence?"

Black's Law Dictionary

> Demonstrative Evidence: That evidence addressed directly to the senses without intervention of testimony. Real ("thing") evidence such as the gun in a trial of homicide or the contract itself in the trial of a contract case. Evidence apart from the testimony of witnesses

> concerning the thing. Such evidence may include maps, diagrams, photographs, models, charts, medical illustrations, X-rays.

This definition, although commonly used, reminds me of fishing from an ocean pier -- it gets you out in the water a good way but it just doesn't go out far enough to let you fish for the big ones. Put another way, its good as far as it goes but lacks something to be desired. If we limit ourselves to defining demonstrative evidence in this manner (which I suggest is the way many of us tend to view the matter), "demonstrative evidence" becomes nothing more than a synonym for "exhibit." However, there is much more to demonstrative evidence than those items which we mark with an exhibit sticker, proffer to the court for introduction, and then pass to the jury.

The Definition We Must All Start Using

> Demonstrative evidence is anything and everything, regardless of whether admissible or even offered as evidence, including attorney/client/witness demeanor in the courtroom, which tends to convey to and evoke from the jurors a "sense impression" that will benefit our case, whether through advancing our case in chief or diminishing the prosecution's case.

By "sense impression" I mean everything which is calculated to target, or is likely to affect, the jurors' senses (i.e., sight, smell, hearing, touch). This then empowers the jurors to give greater

appreciation to our clients' defense(s) through interpreting various testimony, evidence, and arguments in a particular context which complements the themes and theory of our defense. In other words, our cases are like giant, roll-top desks with many slots for information. Some of these slots are

marked for the prosecution and some for the defense. The trial is a fight over getting jurors to place evidence in particular slots. Based upon our presentations, jurors will interpret evidence, assign weight to it, and place it into one of the slots in the desk. By effectively using demonstrative evidence and tapping into the jurors' sense impressions, our ability to get the jurors to place particular evidence into our slots is markedly increased.

Rationale Underlying the Enhanced Persuasiveness of Demonstrative Evidence

The trial of criminal cases continues to center around oral testimony. However, the second-hand sense impressions conveyed to jurors through verbal testimony have far less impact than the same information conveyed through the creative use of demonstrative evidence. But what is it about demonstrative evidence that gives it enhanced persuasiveness? In the words of McCormick:

> "Since 'seeing is believing,' and demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect."

McCormick On Evidence § 212 (E. Cleary 2d ed. 1981). Despite this rationale seeming all-too-obvious, criminal defense lawyers tend to leave demonstrative evidence consideration until the last minute, often times never getting around to creating or using demonstrative evidence at trial.

We Must Start Making Better Use of Demonstrative Evidence Now

Criminal defense lawyers often fail to make use of demonstrative evidence to its potential. However, there is no question but that demonstrative evidence is one of the MOST POWERFUL

persuasion tools a criminal defense attorney has in his or her litigation arsenal. Whether your audience is a jury or the judge, the rationale is the same -- "seeing is believing." For the reasons that follow, we must start changing our ways right now -- not tomorrow, next week, next month, or next year.

1. Diminishing Ability To Use Imagination: Back when I was a young lawyer, fresh out of law school, attorneys seemed to depend on their abilities to sway jurors through verbal gymnastics, fancy speeches, and a big dose of charisma during closing arguments. Although this Clarence Darrow-type approach worked for some lawyers, had they used more demonstrative evidence, their defenses would have been better. But in those times, the general public was, and consequently our jurors were, a different crowd than they are now.

a. Television Then And Now: Much of the change seen in the general public has been brought about by the advancement of television. Twenty years ago, television was largely two-dimensional. That is, the television shows that were being watched tended to be black and white, included such shows as "I Love Lucy," "The Andy Griffith Show," and "The Honeymooners," and were filmed using one or two cameras. By using a limited number of cameras, the viewer was forced to fill in various parts of the show that could not be seen. For example, on the "Andy Griffith Show," when Opie was being lectured by Andy, the viewer could not always see what Aunt Bee was doing. The viewer created his or her own version of what Aunt Bee was doing in the background. One viewer might have concluded that Aunt Bee was smirking, another that she was laughing, and yet another that she was

sympathetic. This required the viewer to use his or her own imagination to fill in the blanks. Now to be sure, most viewers probably came up with about the same conclusion because the structure of the program pushed them in that direction. The important thing was, and is, that the viewers made use of their imaginations.

Today, though, television has become multi-dimensional. Programs are filmed using ten or fifteen cameras giving the viewer a complete perspective of everything that is going on. There is little room, if any room at all, for the viewer to make use of his or her imagination.

b. Music And The MTV Generation: Not only has television gone hi-tech, but so too has the world of music. I think back to my early years and remember how we listened to music on the radio, on our record players, and ultimately on 8-Track tapes. Occasionally we would get to see the artists perform on television, usually on American Bandstand. There were no music video versions to watch. As a result, each listener used his or her imagination to decide what the song was about -- what the words actually meant. I can recall a time when one of my friends and I had a big disagreement about one of the popular songs by Bread. I thought the lyrics went "and taking them all for granted." He thought the lyrics were "and taking them off of branches." Needless to say, the two of us had extremely different opinions as to what the song actually meant. At least, though, we were using our imaginations.

Today the music industry has gone almost exclusively to the music video. A significant portion of the general public is tuned into MTV or its equivalent. The result is that, as with television, the listeners (viewers) are told what the song means,

in vivid color, with stereophonic sound, and from every available camera angle. With nothing left for the imagination, there is little room for disagreement over what the lyrics actually say. Consequently, there seldom are differences of opinion about what a particular song means. Most importantly, though, there presently are very few opportunities for the general public to tap into their imaginations.

c. The General Public Is Our Jury Pool: The viewers of modern television and the listeners to modern music and MTV are the same people who serve as our jurors. The younger ones will be our jurors of the future. Because the general public is now being media-trained to avoid using imagination, we, as lawyers, must work harder than we used to when attempting to persuade jurors in the courtroom. One of the best answers to this problem is to use demonstrative evidence to tap into the imaginations and sense impressions of jurors in ways we can't possibly do with just our charm, our charisma, and our fancy words.

2. Prosecutor's Have Figured It Out: The second reason we must start using demonstrative evidence right now is that prosecutors have figured out the power and persuasiveness of demonstrative evidence and are actively using it against us. In a recent capital murder case in my home town, a man was on trial for the kidnaping, rape, and ultimate murder of a young woman. He randomly selected her while she was out jogging, abducted her, took her to a remote place in the woods, tied her to a tree, then eventually took her life. The jury did not deliberate long at the guilt/innocence phase, finding the defendant

guilty of first degree murder. During the trial, the prosecutor brought in the actual tree to which the victim had been tied. During her penalty phase closing argument, the prosecutor bound herself to the tree and talked from the perspective of the victim in her final moments of life. The jury seemed to hardly hesitate in returning a death sentence. Compelling? Yes. Did it change the outcome? Maybe. Was it persuasive? ABSOLUTELY! And it was persuasive in a way mere words could not have as effectively conveyed. This is what prosecutors are doing in today's litigation arena. We simply cannot wait any longer to at least even the scales.

Some Creative Suggestions Given Limited Budgets

Some time ago, attorney Jon Sands, Assistant Federal Public Defender from Phoenix, Arizona, and I together presented a lecture on demonstrative evidence. I had been giving a presentation entitled "Demonstrative Evidence: Perspectives, Pointers, and your Pocketbooks." Jon had been doing one called "Guerilla Warfare Demonstrative Evidence." We combined these presentations and the following are some excerpts.

Very few of us have the opportunity to represent wealthy clients. As a result, most of us have very limited budgets when it comes to trial preparation. With limited budgets it becomes necessary to find ways to create quality demonstrative evidence that isn't too expensive -- "on the cheap" as Jon would say. Here are some ideas for demonstrative evidence which are inexpensive, easy to make and can be persuasively used in trial:

1. Diagrams: Use of diagrams is a wonderful way to get you up out of your seat, away from your podium and close to the jury. In that many jurisdictions require counsel to either remain at counsel table or at a podium, anything you can do to get away from these locales and closer to the jury **must** be exploited. Diagrams are an excellent way to do this. I have found that you can make diagrams for less than ten dollars. If you need a diagram that shows the floor plan of a house or building, use your computer. In the Windows program, under the "Accessories" section you will find a program called "Paintbrush" or "Paint." Through this program you can create small versions of floor plans which can then be enlarged and mounted at your local print shop. If you have a color printer, you can even use colors which are easily enlarged with a color copier (slightly more expensive).

You will find, though, that the end-product created out of "Paintbrush" is a bit rough around the edges. For about twenty-to-thirty dollars, you can purchase an architectural, home design program for your computer. These programs allow you to lay out floor plans to scale, include furnishings which you can place in various locations, and even allow you to add decks, swing sets, and landscaping. The program I use was a close-out and cost about seven dollars. The end product is extremely professional, is relatively easy and quick to prepare, and is an inexpensive addition to your trial preparation materials which can be used over and over again.

Diagrams also give you the opportunity to have a witness tell his or her story more than once. The more times the witness' version of the events is told, the more likely the jury

is to believe what is said. Use a funnel approach to diagrams. First use one showing a large area, then a second one using a smaller section of the first, then end up with one that focuses on the relevant location (i.e., neighborhood, house plan, room). This gives you and the witness multiple, legitimate opportunities to repeat the witness' version of the events.

Protect Your Diagrams: Prosecutors will often attempt to undermine your diagrams in a variety of ways. You must do what you can to protect the integrity of your evidence. Prosecutors often mark up our exhibits and leave the exhibits looking like a doodle pad. This is easily avoided through purchasing (at little cost) a sheet of clear plastic which you attach to your diagram following direct examination. Fasten it down forcing the prosecutor and his or her witnesses to mark on the plastic. Once done, you can remove the plastic and effectively use the diagram in closing without the distraction of the various markings made by the prosecutor and his or her witnesses.

Jon Sands uses PAM vegetable spray on his diagrams. He puts "Velcro" on the diagram where he wants to affix something. He then sprays the diagram with PAM. The magic of this is that you can't write on a diagram sprayed with PAM. The prosecutors usually don't have "Velcro" and when they try and write on the diagram the ink beads up. Even if the prosecutor does have some "Velcro," it doesn't stick to the PAM-covered diagrams either.

2. Make Use of Art Students: I have had great success in using local art students to create demonstrative evidence. Most of these people will want little or no money to

produce the work product -- usually they are so enamored with being involved in a criminal case that they will work for free. Have them produce their work then have it enlarged and mounted which will cost only a few dollars. The work product is attractive, usable, and uniquely different than anything you will see the prosecutor bring out.

3. Use Architect And Engineering Students: As with art students, these students will work cheap or for free. They can build models for you of just about anything. Houses and other buildings can be reproduced to scale. Models are impressive to use in the courtroom and are extremely helpful in demonstrating various points of your case to the jury.

4. Use Color Photocopies: Many of your photographs will be small. The cost of enlarging photographs into bigger photographs is significant. Take your small photos to the copy center and get them to do a color enlargement and mount these on a foam board. An enlargement from a snap shot to an 8 by 10 is about two dollars compared to the approximate fifteen-to-twenty dollars necessary to do a photo-to-photo enlargement. Given today's technology, the quality of photocopy enlargements is quite good. You can also scan the photos into your computer and enlarge them that way. Projecting them onto a screen is also a good idea.

5. Make Slides From Photos: Many of us use Power Point or Corel Presentations. Once you scan your photos, you can create a program to show them in a certain order. Turn down the lights, and show them to the jury. Often times the impact of

a slide is much greater than a photograph. Juries love it when you turn down the lights. There is also the added benefit that each juror will be taking in the information at the same time and under the same conditions. Think of what happens when a photograph is passed to the jury. Each juror looks at it separately while the judge is saying 'move along counselor.' The case keeps moving, other evidence which may be important is being offered, and the jury is called upon to look at the photo and also take in everything else. Slides make them do but one thing at a time -- look at the slides.

Using slides can also be justified to the trial judge as a "time-saving" procedure. If the witness has several photos to go through, put them in a single photo album. Have the witness identify each photo then offer the album into evidence. Advise the judge that there is only one set and rather than take the time for each juror to go through the album, you have made slides of each picture and they are merely copies of the actual exhibit. Then dim the lights, go through the slides one at a time as the witness describes what is being shown.

6. Make Use of Overhead Projector: If you don't have the funds for a computer and a projector to show your pictures via Power Point, go back to basics and find an overhead projector. You can probably find one in an antique store for about twenty dollars. Most copy machines will allow you to reproduce something onto acetate for use on an overhead projector. This is cheap and gives you an opportunity to get a lot of bang for your buck out of various aspects of the trial. I have used this for comparing the testimony of a witness at trial to that which he/she has said on an earlier occasion. Copy both, juxtaposition

the two and put them up on the overhead. Show the jury how the two differ. The fact that a witness has blown hot and cold is brought home much more effectively if you show them as opposed to just telling them. During closing use the witness' plea agreement comparing it to how he/she testified about having no expectations from providing testimony. You might want to put the relevant jury instructions on credibility up if you plan to talk with the jury about a particular witness' testimony. Many court reporters have the ability to down-load the daily testimony onto disk. You can then put it on your computer, print it out, and copy it to an overhead for use during cross examination, argument to the court, or closing argument to the jury.

7. Paint Chips: Paint chips are the sample colors you get from your paint store. Wal-Mart has them, K-Mart has them, they are easy to get hold of and they are free. The value of the paint chip is found in cross examination of an occurrence witness. Your client was apprehended driving a blue car. The witness who saw the incident says the bad guy was driving a blue car. On its face, and with nothing more, you have a problem here. By using paint chips you can approach the witness and say:

> Mrs. Smith, you said the car you saw was blue. Was it closer to this blue or to this blue?

By doing this, and you can do it over and over using various blue colors, you force the witness to select between options and make choices. This can create the appearance of uncertainty. It certainly makes the point that "blue" can mean a lot of things. The witness whose testimony was damaging is softened a bit. Paint chips can also be used with skin

tones. For example:

> Officer Jones, the store clerk told you the robber was a black man. Did you understand the clerk to mean his skin tone was closer to this color or to this color...

When you do the skin tone, paint chip cross with your police officer have him or her come down in front of the jury with his/her back to the defendant. When you start using the paint chips, nine times out of ten the police officer will peak over his or her shoulder to look at the defendant. This is a wonderful time to say "no cheating now." The point is brought home that even the officer isn't sure, and the point is brought home demonstratively, powerfully, and persuasively. Even if the officer does not sneak a peak, you can still say to the officer "now don't peek."

8. Modern Technology Isn't Always Good: One of the neatest contraptions to come on the market is the laser pointer. If you are in a jurisdiction where you are required to remain by a podium or at counsel table, laser pointers give the judge a basis to prevent you from moving up towards the jury because it can be used from across the room. The wooden pointer, on the other hand, puts you in a position where you must be allowed to move to the diagram, which if strategically placed by you near the jury, gives you the opportunity to move around in the courtroom. In addition, computers can crash. You must have a back-up plan in the event your computer refuses to cooperate with you in the courtroom.

Non-Evidence Demonstrative Evidence

By defining "demonstrative evidence" as I have suggested, anything you do in the courtroom which is calculated to demonstrate something, even if an exhibit sticker is never affixed, or even if it is not formally offered, is necessarily included. At a very basic level, non-evidence demonstrative evidence includes how you dress, how you act, react, or respond, and your overall attitude. However, the concept of non-evidence demonstrative evidence goes much farther, as illustrated by the following ideas and pointers.

1. What's Good For The Goose...: In almost every criminal trial, the prosecutor will ask a witness something along these lines:

- Mr. Jones, do you see the person who robbed you in the courtroom?

- Would you describe for the jury what he is wearing?

- Your Honor, could the record reflect that the witness has identified the defendant.

Maybe I'm just getting tired of hearing this line of questioning. However, it occurred to me that "what's good for the goose is good for the gander." Now whenever I have a snitch on the stand who I am cross examining, I include the following line of questioning:

- Sluggo, you met with the district attorney to cut a deal.

- That district attorney is in the courtroom.

- Describe for the jury what that district attorney is wearing.

- Your Honor, I ask that the record reflect that Sluggo has identified prosecutor Jonathon Johanson, this man right here, as being the person who cut the deal with him.

This process is intended to do two things. First, continue to establish Sluggo's "yuck" factor. Second, spread Sluggo's "yuck" factor onto the prosecutor. There is also the additional benefit that doing this is incredibly fun.

2. Observe Witness Demeanor: Through discovery or otherwise, you will likely know the probable substance of **what** a witness will say on the stand. However, until you actually get the witness on the stand, you will likely have little idea as to **how** the witness will testify. By this I mean that witness demeanor is something you will have to analyze quickly. Sometimes you can find a gem and use it demonstratively during your cross. For example, in a sex offense case where you suspect the child is being coached by his or her parent, when the child is testifying, position yourself between the child and the parent/coach. You will find that the child and/or the parent will move to maintain eye contact. Keep repositioning yourself and force them to do this over and over again. The jury will catch on and before long the jury will look like the gallery at a tennis match -- left, right, left, right, turning first to the child and then to the parent/coach. The point is brought home that the child is being coached. However, nowhere in the trial transcript will that which was so persuasive be revealed.

3. Make Quantity Testimony Visual: Find ways to make important quantities visual.

a. Quantity and Liquids: We often have witnesses testify who admit, either on direct or on cross, that they had been drinking at the time they

supposedly observed that to which they are now testifying. If the witness says he or she had consumed about a case of beer that night, bring in a case of beer, count out the cans or bottles with the witness in front of the jury. Use the cans demonstratively in closing argument to again bring home the point that the witnesses, by his or her own admission, had "this much alcohol to drink." The impact is much greater if you show quantities as opposed to just talk about them.

b. Quantity and Size: Sometimes there is an issue in our case about the size of something. For example, if your client is charged with breaking into a pinball machine and stealing $125.00, try and establish through the various witnesses that the defendant, who they say they saw leaving the area, didn't have anything in his hands, had no bulges under his shirt, his pockets or his clothing. Then go to the bank and get $125.00 worth of quarters. Show the jury the size of that much money. Thump it down on counsel table demonstrating its weight. The bottom line then becomes it could not have been your client or there would have been some evidence of this large, heavy amount of money in his possession.

c. Lack of Quantity in Rape Cases: In some rape cases, your defense will be, in essence, this was not rape it was regret. Establish through the investigating officers that they examined every article of the victim's clothing. Show that the detailed investigation, using microscopes and magnifying glasses, revealed that not a thread was loose, not a button torn

free, not a zipper out of line. Use the physician to show that no evidence of trauma was found. Make two boxes to use in closing argument. Label one "Regret" and the other "Rape." With the jury, go through each item of clothing, as well as the other physical evidence. Make sure to point out that each piece of evidence could support the conclusion that sex occurred but that nothing about the evidence supports the conclusion that there was any force used or rape. When you have finished talking with the jurors about each piece of evidence, place each item in the box marked "Regret." You are creating a full box marked "Regret" versus an empty box marked "Rape" thereby showing in a quantitative way that all of the evidence points to innocence. Attorney Sheila Lewis with the New Mexico Public Defender's Office in Santa Fe tells me that she used this idea in one of her cases and when she mistakenly started to place an item of evidence in the "Rape" box, one of the jurors corrected her.

4. Aural Demonstrative Evidence: Getting jurors to listen to things other than mere testimony can also be particularly persuasive. Again using an example provided by Jon Sands, in a sexual assault case, Jon subpoenaed the bed on which the sexual assault had allegedly occurred. His investigation had revealed that many people were at home when this supposedly happened, were each in close proximity to the bed, and the bed had extremely squeaky springs. He introduced the bed into evidence then made his closing argument to the jury while sitting on the bed, bouncing up and down, making the bed squeak loudly. Jon's

point was brought home perfectly -- listen to all of the noise that must have been made. Had a sexual assault occurred, the squeaking bed would have been heard by someone else in the house. No one heard it therefore it did not happen.

The aural senses of jurors can also be tapped into by using BB's and a metal bowl or galvanized pail. I use this in cases which center on fingerprints. We have all had cases like this where our client has been identified as the culprit but the identification is somewhat shaky. The strongest evidence against the defendant is that his fingerprint is found at the crime scene. In that the science of fingerprints is based upon similarities, not differences, and the examiners generally quit once they have found anywhere from six to twelve points of identification, there remains some 150 points of identification that are never discussed by the "expert." In closing argument you can ask the jurors to close their eyes and listen.

- This case boils down to whether this fingerprint is in fact the defendant's.

- But we know so little about the print. All we know is that it is supposedly the same in six places. (Slowly drop six BB's into the pail, one at a time).

- But there are some two-hundred places we know nothing about. (Slowly pour 150 BB's into the pail).

- I don't know how you define reasonable doubt, but I'd say you just heard it.

The impact of the differences in the two sounds is incredible. You can use the BB's in the pail in any situation where you have a large quantity versus a small quantity. Experiment with different types of pails. Some make better sounds than others. Although I started using BB's, I now use steel shot pellets which you can get in any sporting goods

store. Steel shot is heavier and makes a louder noise when the pellets hit the pail.

5. Humanize Your Client: Find ways to make jurors conclude that the defendant is a real person, possessed of life, emotion, and feelings. Especially in death cases, it is imperative to do more than just have witnesses tell about their past experiences with the defendant. When the football coach testifies that the defendant was on his team, find and use a photograph of the defendant in uniform. If he got a trophy, find it and use it at trial. Perhaps the best example of humanizing the defendant comes from Attorney Bryan Stevenson who tells a story that goes something like this:

In a little town in the South, a man was on trial for his life. The odds were already stacked against him for he was black and his victim was a young white woman. The evidence of guilt was strong and the jury didn't take long to convict him of first degree murder. At the sentencing hearing the defense called the man's third grade teacher. The teacher was an elderly, white-haired woman, having taught the young man some twenty-years before. She took the stand and told the jury how she had been impressed with the defendant when he was her student. She described how he had promise but that she instinctively knew it would never be achieved for he had come from a family that hadn't placed much emphasis on education. She recalled how one day she had taught his class how to make Gods eyes -- two sticks crossed over around which yarn of different colors is woven. A few days later, on her way to her car after school, she heard the pitter patter of little feet running after her and felt a tug on her skirt. She turned around and saw it was the young defendant. In his hand was a Gods eye -- one he had made for her in his home, at his kitchen table, using his yarn. She described to the jury how this had touched her deeply. Then she reached into her pocketbook, pulled out the Gods eye and said "I have kept it with me ever since."

The teacher's testimony by itself was powerful. However, by bringing out the Gods eye and showing it to the jury, an even more powerful and persuasive message was conveyed

to the jury -- the sincerity of this woman became unquestionable. That the young man had goodness somewhere inside him was established. No exhibit sticker was affixed to the Gods eye but it was probably the most powerful and persuasive piece of evidence presented by the defense. I'm told the jury spared this man's life.

CONCLUSION

When it comes to demonstrative evidence, the sky is the limit. Not every technique of demonstrative evidence has been discovered and used, and the techniques that have been used can always be done differently and better.. Evidence is important because it means something. Virtually all evidence can present more than one meaning. Constantly evaluate the evidence in your case to see not only how it might be perceived by the prosecution. If other meanings are helpful to your case, create ways to demonstrate those to the jury. Don't be confined to "the same old - same old," what other attorneys regularly do, or what you comfortably feel will be accepted without controversy. Be bold and creative -- make better use of that incredibly persuasive weapon in your litigation arsenal -- demonstrative evidence.

Creating a Theory of Defense

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

Steps in creating a theory of defense

Pick your genre

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

Identify your three best facts and three worst facts

- Helps to test the viability of your choice of genre

Come up with a headline

- Barstool or tabloid headline method

Write a theory paragraph

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

Develop recurring themes

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

If You Build It, They Will Come....

Creating and Utilizing a Meaningful Theory of Defense

by
Stephen P. Lindsay[1]

Introduction

So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself "why me?" "Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. You reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to angel status. Just as you think a change in profession might be in order, your co-worker steps in the door -- new file in hand -- lets out a piercing howl, and says "this one is the dog of all dogs. The mutha of all dogs." Alas. You are not alone.

Dog files bark because there doesn't appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa (Kansas?). *If you build it, they will*

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come... And they came. And they watched. And they enjoyed. Truth be known, they would come again if invited -- even if not invited. Every dog case is like a field of dreams. Nothing to lose and everything to gain. Out of each dog case can rise a meaningful, believable, and solid defense. A defense that can win. But as Kevin Costner's wife said in the movie, [I]if all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

WHAT IS A THEORY AND WHY DO I NEED ONE?

Having listened over the last twenty years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear that there exists great confusion as to what a theory is and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. They are, though, very different concepts. So what is a theory? Here are a few definitions:

That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.

Tony Natale

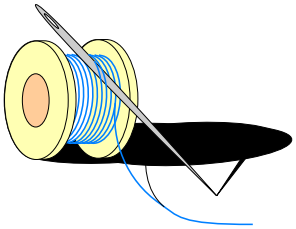
One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.

Mario Conte

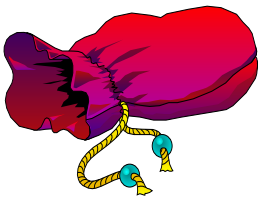
A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.

Vince Aprile

Although helpful, these definitions, without closer inspection, tend to leave the reader with a "huh" response. Rather than try and decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same, three essential elements.



Common Thread Theory Components



1. Each has a factual component (fact-crunching/brainstorming);
2. Each has a legal component (genre);
3. And each has an emotional component (themes/archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it is helpful to have a set of facts with which to work. These facts will then be used to create possible theories of defense.

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden: Is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with do to her history of abuse by her uncle and recently moved to a foster home in another school district).

She said that things were not going well at home. That her step-dad, Barry Rock was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside but when Barry got home he would send us to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning Barry came to school and told her teacher that he caught her cheating – copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she isn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class to then meet again later in the day with a police officer present. At that time Betty stated that since she was 10, Barry would tell her if she would do certain things he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded and before marrying Barry had quite

a bit of contact with social services due to her weak parenting skills. She stated that this has been going on more and more frequently in the last month and estimated it had happened ten times.

Betty is an A and B student who showed no sign of academic problems. After reporting the abuse she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden: is Betty's 35 year old mentally retarded mother. She is "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems which caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor b oy and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock: is a 39 year old mentally retarded man who has been married to Kim for 5 years and they live together in a small trailer living off the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor Barry was interviewed for 6 hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer yes when asked if he had sex with Betty and yes to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him and he knew that it was wrong but he did it anyway.

Barry has been tested with IQ's of 55, 57 and 59 over the last 3 years. Following a competency hearing, the trial court found Barry to be competent to go to trial. [2]

The Factual Component of the Theory of Defense

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming, is the essential process of setting forth facts that appear in the discovery and through investigation. It is critical to understand that the facts are nothing more, and nothing less, than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Don't draw conclusions as to what a fact or facts might mean. And don't make the common mistake of attributing the meaning to the facts given to them by the prosecution or its investigators. It is too

[2]This fact problem was developed by the Kentucky Department of Public Advocacy.

early in the process to give value or meaning to any particular fact. At this point the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

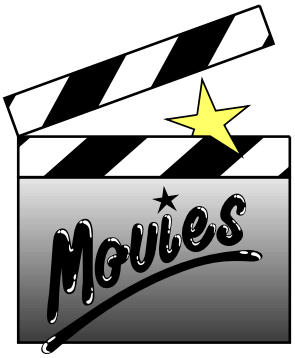
Judgmental Facts (wrong)		Non-Judgmental Facts (right)
Barry was retarded		Barry had an IQ of 70
Betty hated Barry		Barry went to Betty's school and went to her classroom confronted her about lying accused her of sexual misconduct talked with her about cheating dealt with her in front of her friends
Confession was coerced		Barry was questioned by several officers Barry was not free to leave the station Barry had no family to call The questioning lasted 6 hours

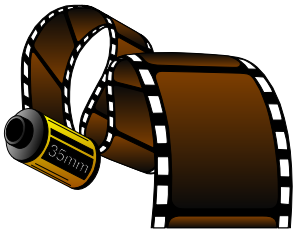
The Legal Component of the Theory of Defense

Now that the facts have been developed, in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense – the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self defense," "alibi," "reasonable

doubt" and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "he did it but has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as "he did it but they can't prove it." Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. By looking to Hollywood and cinema, thousands of movies have been made which have as their focus some type of alleged crime or criminal behavior. When these movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. ***It never happened (mistake, set-up);***
2. ***It happened but I didn't do it (mistaken identification, alibi, set-up, etc.);***
3. ***It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);***
4. ***It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);***
5. ***It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);***
6. ***It happened, I did it, it was the crime charged, I am responsible, so what? (Jury nullification).***[3]



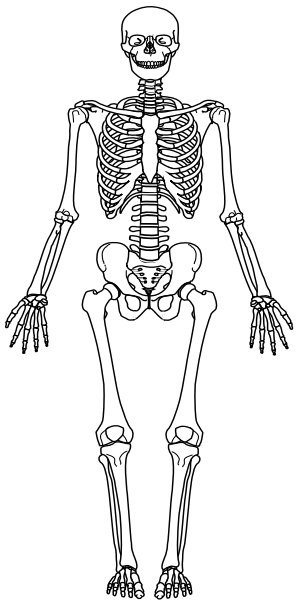


The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend

[3]The genres set forth herein were created by Cathy Kelly, Training Director for the Missouri Pubic Defender's Office.

a case based upon the legal genre "it never happened" than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example, as developed through non-judgmental brainstorming, try and determine which genre fits best. Occasionally facts will fit into two or three genres. It is important to settle on one genre and it should usually be the one closest to the top of the list thereby decreasing the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened) but could also fit into the second category (it happened but I didn't do it). The first genre should be the one selected.



WARNING ! ! ! !

The genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory and is not the your theory of defense. The genre is just the second element of the theory of defense and there is more to come. Where most lawyers fail in developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test-drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed From Home By Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

"Rock" – Barry, Innocent Man, Mentally Challenged Man;

"Wrongfully Tossed" – removed, ejected, sent-packing, calmly asked to leave;

"Troubled" – vindictive, wicked, confused;

"Stepdaughter" – brat, tease, teen, houseguest, manipulator.

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus is on someone or some thing other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus doesn't even have to be on an animate object. Consider the following examples:

– Troubled Teen Fabricates Story For Freedom;

– Overworked Guidance Counselor Unknowingly Fuels False Accusations;

– Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter;

– Underappreciated Detective Tosses Rock at Superiors.

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component of the Theory of Defense

The last element of a theory of defense is the emotional element. The factual element and the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability and believability to the facts and

the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes

Archetypes, as used herein, are basic, fundamental corollaries of life which transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when your child is in danger, you protect the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to their child.

Other archetypes include: love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

– The difficulties of dealing with a step-child;

– Children will lie to gain a perceived advantage;

– Maternity/Paternity is more powerful than marriage;

– Teenagers can be difficult to parent.

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

Themes

In addition to providing emotion through archetypes, primary and secondary themes should be utilized.

A ***primary theme*** is a word, phrase or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

Recalling the O.J. Simpson case, a primary theme developed in the theory of defense and advanced during the trial was "if it doesn't fit, you must acquit." Other examples of primary themes include: One for all and all for one; Looking for love in all the wrong places; Am I my brother's keeper? Stand by your man (woman?); wrong place, wrong time, wrong person; and when you play with fire you are going to get burned. Although originality can be successful, it is not necessary to re-design the wheel. Music, especially county/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the chapters of Nashville:

TOP 10 COUNTRY/WESTERN LINES

10. Get your tongue outta my mouth cause I'm kissen' you goodbye.

9. Her teeth was stained, but her heart was pure.

8. I bought a car from the guy who stole my girl, but it don't run so we're even.

7. I still miss you, baby, but my aim's gettin' better.

6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.

5. If I can't be number one in your life, then number two on you.

4. If I had shot you when I wanted to, I'd be out by now.

3. My wife ran off with my best friend, and I sure do miss him.

2. She got the ring and I got the finger.

1. She's actin' single and I'm drinkin' doubles.[4]

Primary themes can often be strengthened by incorporating secondary themes. A secondary theme is a word or a phrase used to identify, describe or label an aspect of the case.

Examples of Secondary or Sub-Themes

A person: "never his fault;"

An action: "acting as a robot;"

An attitude: "stung with lust;"

An approach: "no stone unturned;"

An omission: "not a rocket scientist;"

A condition: "too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. Some examples include:

– Blood is thicker than water;

– Bitter Betty comes a calling;

– To the detectives, interrogating Barry should have been like shooting fish in a barrel;

– Sex abuse is a serious problem in this country. In this case it was just an answer.

– The extent to which a person will lie in order to feel accepted knows no bounds.

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[4]Many thanks to Dale Cobb, and incredible criminal defense attorney from Charleston, South Carolina, who was largely responsible for assembling this list.

Creating The Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the theory of defense paragraph. Although there is no magical formula for structuring the paragraph, the adjacent template can be useful.

Theory of Defense Paragraph Template

Open with a theme;
Introduce protagonist/antagonist;
Introduce antagonist/protagonist;
Describe conflict;
Set forth desired resolution;
End with theme.

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and tinkered with to get them to this level. They are not perfect and can be improved. However, they serve as good examples of what is meant by a solid, valid and useful theory of defense.

THEORY OF DEFENSE ONE

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice but because he was born mentally challenged. The word of choice at that time was that he was "retarded." Despite these limitations Barry met Kim Gooden, herself mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home to live in, and provided for her many needs. Within a few years Betty became a teenager and with that came the difficulties all parents experience with teenagers. Not wanting to do homework, cheating to get better grades, wanting to stay out too late, and experimenting with sex. Being mentally challenged, and only being a step-parent, Barry tried to set some rules - rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker than water. All Barry wanted was for his family to be happy like it was in years gone by. "Everything will be okay Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

THEORY OF DEFENSE TWO

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled Betty Gooden walked into the Guidance Counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and her step-father were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her step-father punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself - NO. Of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would me so much simpler if her step-father were gone. As she waited in the Guidance Counselor's office, Bitter Betty decided there was no other option - just tell a simple, not-so-little lie. Sex abuse is a serious problem in this country. In this case it was not a problem at all because it never happened. Sex abuse was Betty's answer.

The highlighted portions in each of the examples denotes primary themes and secondary themes – the emotional component of the theory of defense. The emotional component is strengthened by describing the case in ways that embrace an archetype or archetypes (desperation in the first example and shame towards parents in the second). It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective – the first focusing on Barry and the second on Betty.

CONCLUSION

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. The theory will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, what witnesses are necessary to call in the defense case, and what to include and how to deliver the closing argument. The theory of defense may never be shared with the jurors word for word. But the essence of the

theory will be delivered through each witness so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you chose to call them dog cases or view them, as I suggest you should, as a field of dreams, cases are opportunities to build baseball fields, in the middle of corn fields, in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. If you build it, they will come.....

Higher Level Felony Defense, Part II

WORKSHOP FACT PATTERN

Client—Johnnie Jones

Johnnie Jones is an 18 year old young man facing three counts of robbery with a dangerous weapon, class D felonies, along with a conspiracy to commit armed robbery. The State alleges that Johnnie was the driver and acted in concert with his two co-defendants that robbed three people inside of a Sheetz gas station six months ago. Johnnie did not enter the store and initially told police that he did not realize his friends were planning to commit robbery inside. One of the co-defendants is 17 years old with prior felony convictions for B/E and larceny and a conviction for firearm by felon, in addition to a lengthy juvenile record. The other co-defendant is 21 and has a drug felony and a conviction for felony possession of a stolen firearm. Johnnie has no adult or juvenile convictions.

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

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

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

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

Johnnie spent some time in counseling after his father's death but has not received any treatment in several years. When asked, he says he doesn't think the counselor helped and doesn't remember where he was treated, although it was somewhere local. He recalls that the

therapist was a younger, blond female named Shelly (or Kelly or maybe Terri) and that he saw her once a month for about a year.

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

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

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

9.4 Effective Sentencing Advocacy

The rules of evidence do not apply to sentencing hearings—any evidence that a court deems to have probative value may be received, including evidence of racial disparities. N.C. R. EVID. 1101(b)(3). Relevant information may include the client's cultural background; his or her experience with prejudice, racial profiling, or other forms of disadvantage; statistics reflecting racial disparities in the justice system; and social science evidence on the influence of implicit bias. In short, the door is open at sentencing in a way that it may not be at trial for defenders to place the full context of a client's life experience before the court and advocate for a just result. This section is not a comprehensive treatment of sentencing advocacy, but instead an outline of possibilities.

A. Early Advocacy

Sentencing advocacy begins at the outset of representation and lasts until the conclusion of your client's case. Rebecca Ballard DiLoreto, *Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process*, THE ADVOCATE, May 2008, at 15. In the initial client interview, counsel should begin to seek information not only about the charged offense, but also about the client's life, including his or her immigration status, children, public benefits, experiences with the police, cultural background, family obligations, mental health, substance abuse history, employment, housing, and educational background. Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, THE CHAMPION, July 2013, at 51, 52; *see also* The Bronx Defenders Arraignment Checklist, BRONXDEFENDERS.ORG (last visited Sept. 19, 2014). Such a "holistic" approach to advocacy may help to reduce potential racial disparities at sentencing and other stages of the case, and may have additional benefits, including:

1. An understanding of your client's life will strengthen your relationship with your client, particularly if he or she differs from you in terms of racial, ethnic, cultural, or socioeconomic background.

2. An early understanding of your client's background, community, and individual challenges and opportunities will strengthen your argument for pretrial release. Pretrial release may decrease the chances that your client will receive a sentence of incarceration. *See supra* Chapter 4, Pretrial Release.

3. Early understanding of your client's struggles, needs, and assets provides an opportunity to help the client get engaged in beneficial activities, employment, or programs that may serve as mitigating factors in plea negotiations and at the sentencing hearing. *See* James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9.

4. Implicit bias research indicates that bias is most pronounced when individuals are unwilling to consider the possibility that they may be influenced by bias. In contrast, humility about the possible influence of bias causes people to think more carefully

and deliberately and may minimize the influence of bias. *See generally* Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2007). In the context of indigent representation, this research suggests that listening carefully and making an effort to avoid prejudgments about the conditions of your client's life will minimize the risk that you will make race-based assumptions about his or her circumstances.

B. Data and Record Collection

Data collection. Defense attorneys can benefit from gathering data concerning the individuals and communities they serve. Defender offices may rely on interns, volunteers, paralegals, or investigators to collect the following information.

1. **Sentencing patterns in your district.** The biographical data collected on intake forms, including the client's charges, prior record level, and racial and ethnic identity, may be entered into a database with the client's identity removed, so that defense counsel can track outcomes received by various categories of clients. For example, during plea negotiations, defense counsel may present the prosecutor with any data showing that Black defendants disproportionately received active sentences for the charge in question over the previous year in comparison with White defendants at the same prior record level. Sentences may be influenced by decisions that occur at earlier stages of the criminal justice process; therefore, it is important to record relevant data from all stages of a case, including the original charges, plea offers, plea entered, and sentences as well as any presentencing report or sentencing plan prepared before sentencing. *See infra* "Presentence reports and sentencing plans" in § 9.4E, Sentencing Hearing Advocacy.

2. **Favorable outcomes.** The office may maintain a file containing favorable plea offers and sentences that clients have received, including departures from presumptive ranges, deferred prosecutions, opportunities to receive substantial assistance departures pursuant to G.S. 90-95(h)(5), and charge dismissals, to use in plea negotiations and sentencing hearings. This data should include the race and ethnic background of the clients and the identity of the prosecutors and judges involved. The paralegal, administrative assistant, intern, or investigator tasked with collecting such information should make note of cases in which prosecutors declined to habitualize clients or declined to pursue trafficking charges.

3. **Sentencing patterns of judges.** Defenders may collect data on the sentencing patterns of judges, including which judges have found extraordinary mitigation pursuant to G.S. 15A-1340.13(g), which judges have a record of granting community-based sentences, and which judges have been receptive to arguments about implicit biases or sentencing disparities.

4. **Statewide averages.** In addition to collecting data, defenders may make use of available data sources reflecting the racial composition of those convicted of various offenses and the average sentences received for the charges your client faces. The

North Carolina Sentencing and Policy Advisory Commission prepares annual reports reflecting the type of and length of sentences imposed for all convictions. *See* North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing Statistical Report for Felonies and Misdemeanors,* NCCOURTS.ORG (last visited Sept. 19, 2014); *see also* Jamie Markham, *Sentencing Commission Annual Statistical Report*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (Sept. 19, 2013) (discussing the content and utility of the Commission's annual reports). Another useful compilation of North Carolina criminal justice data disaggregated by race can be found at the North Carolina Advocates for Justice Racial Justice Task Force page. For example, if your client is facing marijuana charges in Durham County, you may consider obtaining statistics of overall enforcement of marijuana laws in Durham County. *See, e.g.*, Ian Mance, Southern Coalition for Social Justice, *Durham Police Department Stop-and-Search Data* (on file with authors) (reporting that, in Durham, "African-Americans . . . are approximately four times as likely as whites to be arrested on a misdemeanor marijuana possession charge, despite strong evidence that both whites and blacks use the drug at roughly the same rate (11.7% v. 12.7%)"). While some of the data sources listed above reflect arrest and/or conviction rates rather than sentencing patterns, the information may be useful to reference in plea negotiations and at sentencing hearings.

5. **"School-to-prison pipeline."** You may consider collecting information about whether Black students are more likely to have school disciplinary problems referred to court, which leads to the development of criminal records at a young age. ASHLEY M. NELLIS, JUVENILE JUSTICE EVALUATION CENTER, SEVEN STEPS TO DEVELOP AND EVALUATE STRATEGIES TO REDUCE DISPROPORTIONATE MINORITY CONTACT (DMC) 16 (2005). If your client's criminal history was a result of a "school to prison pipeline" phenomenon, counsel can share the client's experience with the prosecutor along with data reflecting such disparities. *See, e.g.*, Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, POVERTY AND RACE (Poverty & Race Research Action Council, Washington D.C.), Jan.–Feb. 2011, at 5; SUSAN MCCARTER & JASON BARNETT, THE SCHOOL-TO-PRISON PIPELINE: IMPLICATIONS FOR NORTH CAROLINA SCHOOLS AND STUDENTS 15 (2013) (according to the N.C. Department of Public Safety, Division of Juvenile Justice, for students aged 15 and younger, "there were a total of 16,000 school-based delinquency complaints filed in 2011 and of this total, 46.2% of the complaints were filed against African-American students," who made up 26.8% of the student population).

The recently formed North Carolina Public Defender Committee on Racial Equity (NC PDCORE) may be able to assist in creating a standardized collection process for aggregating and analyzing this data for public defender offices. *See* NC PDCORE Website, NCIDS.COM (last visited Sept. 19, 2014).

Record collection. It is critical to gather records relevant to potential mitigating factors, any alleged aggravating factors, and the sentence proposed. When a defense attorney fails to present evidence reflecting factors that may improve a defendant's prospects at sentencing, she leaves an opening for assumptions about the defendant, potentially based

on racial or ethnic stereotypes, that may influence the discretionary process of sentencing. The following is a non-exclusive list of the type of records that may be useful:

- Employment history: paychecks, attendance history, W-2 forms, letter from employer
- Proof of education: transcript, class schedule, letter from registrar
- Medical/mental health records
- Any certifications and licenses
- Any evaluation and treatment documents
- Military documents
- Client's financial documents

See Robert C. Kemp, III, Art of Sentencing (Feb. 15, 2013) (training material presented at New Felony Defender Training, 2013).

C. Pretrial Strategies

Poverty can negatively affect defendants at multiple stages of the case, including the sentencing phase. Poor defendants, the majority of whom are racial or ethnic minorities, are less likely to be released pretrial, more likely to be convicted, more likely to be sentenced to a term of incarceration, and more likely to receive lengthier sentences than similarly situated offenders with greater financial resources. *See, e.g.*, Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 897 (2003) (finding that Black and Latino defendants are "significantly less able to post bail"); GERARD RAINVILLE & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000 24 & Table 24 (2003) (concluding that defendants detained pretrial achieve worse outcomes).

Defenders can play an important role in connecting indigent clients to services that address their extralegal needs and may lead to mitigating evidence for sentencing. Assessing clients' needs and helping to identify appropriate community-based programs, activities, and services is an important aspect of client advocacy. *See* Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, THE CHAMPION, JULY 2013, at 51, 52 (observing that "[s]eamless access to legal and nonlegal services . . . is crucial for clients from historically disenfranchised Black and Latino communities" and that lack of access to needed services has contributed to "instability, poverty, and criminal justice involvement"); *see also* ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 15 (2d ed. 2008) (noting that, in assessing how racial minorities may be disadvantaged at the sentencing stage of a case, court actors should consider whether a "range of community-based alternatives to detention [are] available in the lower and superior courts [and whether] this range [is] offered at the same rate to minorities and nonminorities with similar offenses and offense histories"). Pretrial efforts by defenders may include:

1. Staying informed of available community-based programs, including those that may be particularly effective at serving racial or ethnic minorities, such as programs offered in multiple languages. To the extent possible, determine the record of success of the programs under consideration, and your client's history, if any, with similar programs. One useful compilation of such programs is the Community Treatment and Resource Provider Directory an online directory maintained by the Office of Indigent Defense Services. *See also* Jamie Markham, *County Resource Guide*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (September 26, 2013).

2. Ensuring that the programs under consideration are culturally appropriate for your client. For example, if your client is Spanish-speaking, ensure that the drug treatment program under consideration provides programs in Spanish.

3. Developing a specialized sentencing advocate or advocates in your office to investigate and develop mitigation evidence and address extralegal needs of clients.

4. Considering whether to seek funding for a mitigation specialist. In serious cases—including Class A, B1, and B2 felonies—defense attorneys should consider seeking funding to hire a mitigation specialist. Though these specialists typically work on capital cases, because of the stiff penalties attached to serious, non-capital felonies, you may be able to persuade a judge to approve funding for a mitigation specialist. Mitigation specialists are trained and experienced in obtaining evidence that may be difficult or time-consuming for a lawyer to obtain, including school records, and affidavits from teachers, neighbors, church officials, or others who can reflect on the struggles faced by your client.

5. Considering whether it is in your client's interest to seek a presentence report or sentencing plan. *See infra* § 9.5E, Sentencing Hearing Advocacy.

D. Sentence Negotiation Strategies

Nationwide, approximately 95% of all felony convictions in state courts result from guilty pleas. MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004 1 (2004). For this reason, few stages of the criminal process are more crucial than plea negotiations. Since plea agreements in North Carolina may include a specific negotiated sentence, negotiations with prosecutors require the same knowledge, skills, and preparation required to handle a sentencing hearing. The following techniques may be helpful in addressing considerations of race during plea negotiations:

1. By addressing the subject of race with the prosecutor when pertinent, you may be able to reduce the likelihood that either of you will allow implicit biases to affect decision-making in the sentence negotiation process. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) (summarizing research findings indicating that open discussions of race can reduce the operation of implicit biases).

2. In negotiating a sentence, it may be useful to describe to the prosecutor what you have learned about the client's circumstances and the pressures he or she confronts, e.g., the influence of poverty, racial profiling, mental illness, or family circumstances. *See* James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9; *see also* Rebecca Ballard DiLoreto, *Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process*, THE ADVOCATE, May 2008, at 15, 20 (describing plea negotiations as a time when the prosecutor may be persuaded to "see helping your client as part of a larger systemic effort to do justice"). If defense counsel has a mitigation video about the client (*see infra* "Practice note" in § 9.4E, Sentencing Hearing Advocacy (discussing mitigation videos)), counsel may consider sharing the video with the prosecutor during plea negotiations.

3. Present the prosecutor with any statistics, disaggregated by race and ethnicity, of disparate sentencing and/or enforcement associated with the charges your client faces. *See supra* § 9.4B, Data and Record Collection. Even where such evidence may be insufficient to support a successful equal protection claim, prosecutors may be persuaded to reduce charges in light of such information. *See supra* "Case study: Pretextual traffic stops" in § 2.6B, The Fourth Amendment and Pretextual Traffic Stops (describing case in which public defender presented evidence of disparate enforcement to a prosecutor, who thereafter agreed to drop charges against her client).

4. Alert the prosecutor where there is evidence or data to suggest that your client's prior criminal history may have been influenced by improper racial considerations. *See supra* § 9.4B, Data and Record Collection.

5. Ensure that the opportunity to provide substantial assistance does not differ depending on the race of the defendant. For example, in cases involving drug trafficking charges, research from the federal criminal justice system indicates that Black and Latino offenders were significantly less likely to be recommended for substantial assistance departures, even when offense severity, criminal history, and the tendencies of the sentencing judge were taken into consideration. David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 J.L. & ECON. 285, 308–09 Table 10 (2001). It has been suggested that these disparities result from the tendency to assign qualities such as "sympathetic" or "salvageable" disproportionately to White offenders. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992) (introducing the concept of a "salvageable" or "sympathetic" defendant into the analysis of substantial assistance departures). The discretionary decision regarding a substantial assistance departure is a crucial one in North Carolina, as it is essentially the only way that people convicted under drug trafficking statutes in North Carolina (carrying mandatory minimum terms of imprisonment and fines) can receive a mitigated sentence. Jamie Markham, *Options to Mitigate Sentences for Drug Trafficking*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (August 15, 2013).

6. Be prepared with any data showing that White defendants facing similar charges have received more lenient sentences than faced by your minority client. *See supra* § 9.4B, Data and Record Collection.

7. Know your client well enough before plea negotiations to distinguish him or her from potential racial or ethnic stereotypes. For example, counter possible stereotypes of your client as a gang member because he is a young, Latino male who lives in an area where the Latin Kings gang is active. Evidence such as school attendance records, work records, or a letter from a local leader such as a pastor may assist in individualizing the client. Testimony from such character witnesses could also be included in a mitigation video. *See infra* "Practice note" in § 9.4E, Sentencing Hearing Advocacy.

8. If you present evidence of racial disparities to the prosecutor in negotiating a suggested plea and sentence, avoid stating or implying that the prosecutor is responsible for the disparities; doing so misstates the possible causes of disparities and may provoke defensiveness. Instead, frame the sentence you seek as an opportunity to offset factors that may have contributed to racial disparities (*see supra* § 1.3, Potential Factors Relevant to Racial Disparities in the Criminal Justice System), stressing that the sentencing stage provides the court system with a unique opportunity to achieve a just result for all involved.

E. Sentencing Hearing Advocacy

Effective sentencing advocacy involves the development of a sentencing theory that counsel can present to the judge in a sentencing hearing and/or sentencing memorandum. A sentencing theory serves to convince the court that the sentence you are asking the court to impose serves the interests of all relevant stakeholders, including the victim, the community, and the defendant. For example, if your theory is that your client suffers from drug addiction and the sentence you seek is an intermediate sentence at a drug treatment facility, be prepared to explain to the court how this result is in the best interests of all relevant stakeholders. *See* THE SENTENCING PROJECT, TEN PRINCIPLES OF SENTENCING ADVOCACY (2003) (listing, among other principles, that sentencing advocacy is "an exercise in problem-solving" and "opposes racial disparity and cultural bias"); *see also* James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9 (problem-solving advocacy views the offense as "a problem for society, for the community, for the victim, for the court and for the defendant," and attempts to craft a sentencing recommendation that benefits as many of those parties as possible).

Practice note: In recent years, some defense attorneys have created mitigation or sentencing videos to show during sentencing hearings and plea negotiations. *See* Joe Palazzolo, *Leniency Videos Make a Showing at Criminal Sentencings: Some Lawyers Supplement Letters of Support with Mini-Documentaries, Effectiveness is Debated*, WALL STREET JOURNAL, May 29, 2014 (quoting assistant federal defender Doug Passon as stating that, when sentencing videos are introduced, "[t]he sentences are almost always

better than they would otherwise be"). Mitigation video pioneer and assistant federal public defender Doug Passon, who made his first sentencing video in 1995, observes that such videos can be effective at bridging cultural gaps between defendants and court actors. *See* Doug Passon, *Using Mitigation Videos to Bridge the Cultural Gap at Sentencing*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 979, 981 (Linda Friedman Ramirez ed., 3d ed. 2010) (stating that criminal defense attorneys should make empathy the focus of sentencing presentations to "bridge the chasm of the cultural divide" and effectively convey the client's circumstances to the judge, which may include poverty, abuse, mental illness, addiction, and other suffering;); *see also* Regina Austin, "Not Just a Common Criminal": The Case for Sentencing Mitigation Videos (April 15, 2014) (University of Pennsylvania Law School Faculty Scholarship Paper). These videos may be particularly useful at illustrating circumstances such as the impoverished conditions of a defendant's home or neighborhood, and may be a good way of introducing the voices of character witnesses who face difficulties coming to court or preparing a written statement on behalf of the defendant. While some film-makers charge between $5,000 and $20,000 for producing such videos, it is possible for defenders or investigators to produce modest videos on their own. *See* Doug Passon, *Using Mitigation Videos to Bridge the Cultural Gap at Sentencing*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 979, 996 (Linda Friedman Ramirez, ed., 3d ed. 2010). Examples of sentencing videos may be viewed online. *See, e.g.*, *Don Ayala Sentencing Documentary*, NEW ORLEANS TIMES-PICAYUNE, Sept. 1, 2010 (sentencing video shown to a federal judge who ultimately imposed a term of probation on a defendant facing eight years in prison under federal sentencing guidelines for voluntary manslaughter).

Presenting evidence aimed at obtaining a favorable sentence. Defendants are entitled to sentencing hearings, during which the formal rules of evidence do not apply. G.S. 15A-1334. In a sentencing hearing, any evidence that a court deems to have probative value may be received. N.C. R. EVID. 1101(b)(3); *see also State v. Brown*, 320 N.C. 179, 203 (1987) ("the touchstone for propriety in sentencing arguments is whether the argument relates to the character of the [defendant] or the nature [or circumstances of the crime"). The court must consider any evidence presented by the defendant of mitigating factors. Mitigating factors must be proven to the court by a preponderance of the evidence. G.S. 15A-1340.16(a); *see State v. Knott*, 164 N.C. App. 212 (2004) (refusal to allow defense counsel an opportunity to present evidence of mitigating factors constitutes plain error). Twenty specific mitigating factors are set forth in G.S. 15A-1340.16(e), and the statute also allows judges to find "[a]ny other mitigating factor reasonably related to the purposes of sentences." G.S. 15A-1340.16(e)(21); *see also* G.S. 15A-1340.12 (describing the purposes of sentencing). This "catch-all" provision gives defense attorneys creative freedom to raise concerns about race that may be related to sentencing, including the potential impact of structural racialization and implicit bias (discussed *supra* in Chapter 1) and any disparity that may have affected an earlier stage of the case (for example, the inability of the client to obtain pretrial release). The following are possible strategies for addressing at sentencing the cumulative effects of any racial disparities:

1. Explain how any hardships associated with the defendant's racial, ethnic, or cultural background may support a reduced punishment. Some of the statutory mitigating factors, including successful completion of a drug treatment program, a positive employment history, or a defendant's support of his or her family, may carry more weight when presented alongside the defendant's struggles against racial barriers, poverty, or disadvantage. For example, in *United States v. Decora*, 177 F.3d 676 (8th Cir. 1999) and *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993), the extreme difficulties of life on an Indian reservation, viewed alongside the defendants' records, which included attributes such as community support, limited criminal history, and educational accomplishment, supported reduced sentences.

2. In cases in which you are concerned that racial stereotypes may influence the sentence under consideration, incorporate a race-switching exercise into your argument at the sentencing hearing or invite the court to engage in a race-switching exercise. A race-switching exercise is a mental exercise that involves switching the race of the parties to determine whether race may have played a role in assessing the evidence. *See supra* § 8.6D, Jury Instructions; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 482 (1996) (proposing race-switching jury instruction); James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 24 (describing a case in which a judge noted "that he personally engaged in a race-switching exercise whenever he was called upon to impose sentence on a member of a minority race, to insure that he was not being influenced by racial stereotypes"). To avoid suggesting that the judge alone may be affected by implicit bias, counsel may wish to present this as an exercise for the entire courtroom. For example, counsel may posit: "All of us who work in the court system, the prosecutor and myself included, need to ask ourselves whether we would be doing or thinking anything different today if the defendant were White and/or the victim were Black; as members of the bar sworn to uphold the Constitution, we can't allow race to play a role at sentencing."

3. Inform the judge of any cultural factors that may be relevant to an evaluation of defendant's blameworthiness. For example, in one case, a Korean man argued for a downward departure from the federal sentencing guidelines on the basis that his upbringing in Korea caused him to believe that the money he provided to an Internal Revenue Service agent in the form of a bribe was legally and socially obligatory. *United States v. Yu*, 954 F.2d 951, 953 (3d Cir. 1992).

4. Explain to the court how race may have affected earlier stages of the process in your client's case, and that sentencing provides an opportunity to redress any taint. *See, e.g.*, Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 380 (1994) (arguing that race should be considered as a mitigating factor where it is likely that racial discrimination occurred at an earlier stage of the case); *see also* Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, THE ADVOCATE, May 2008, at 22. For example, if you are able to show that a similarly situated White co-defendant was released

pretrial, completed drug treatment, and based on that treatment, received a reduced sentence, while your Black client was detained pretrial with no such opportunity to engage in productive activities, the judge may consider this as mitigating evidence. *See also* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1960 (1988) (arguing that "to help remedy the pervasive racial discrimination in our criminal justice system, judges should be given discretion to take into account an offender's race as a mitigating factor").

5. Explain to the court whether your client's prior criminal history may have been influenced by race. For example, in *U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998), a federal judge imposed a reduced sentence on a Black defendant based on a finding that most of the defendant's prior convictions arose out of traffic stops conducted by the Boston police, and that the unlawful practice of racial profiling may have contributed to his prior record. *See supra* § 2.2, Overview of Racial Profiling Concerns (discussing recent studies regarding racial disparities in traffic stops in North Carolina).

6. Forecast for the judge—based on available statistics, your client's history, and familiar anecdotes—the likely future your client faces if he or she receives the non-incarcerative, community-based, or reduced sentence you seek, and contrast it with decreased life chances he or she faces if sentenced to lengthy incarceration. *See* Robert C. Kemp, III, Art of Sentencing (Feb. 15, 2013) (training material presented at New Felony Defender Training, 2013). For example, you could explain to the judge that a prison sentence will result in the loss of your client's job, while a community or intermediate sentence will allow him to continue working and providing for his family. Additionally, you could present the court with evidence showing that recidivism rates are generally lower for probationers than for prisoners in North Carolina. NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, CORRECTIONAL PROGRAM EVALUATION: OFFENDERS PLACED ON PROBATION OR RELEASED FROM PRISON IN FISCAL YEAR 2008/09 27 (2012) (finding that probationers in FY 2008/2009 were less likely than people released from prison to be rearrested during both one-year and two-year follow up periods). Explain to the judge any concerns about any contemplated sentences that are in conflict with your client's cultural values and individual characteristics. For example, a devout Muslim client may not succeed in a drug treatment facility that includes mixed gender treatment groups.

7. Inform the judge of community-based alternative sentences that meet the needs of your client and address the problems underlying the crime of conviction. *See* North Carolina Office of Indigent Defense Services, Community Treatment and Resource Provider Directory, NCIDS.COM (last visited Sept. 22, 2014). Some judges may be reluctant to impose probationary sentences because they do not know of local programs for which the defendant is eligible. *See* Jamie Markham, *County Resource Guide*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (September 26, 2013). You can preliminarily evaluate your client's eligibility for programs and services and provide

information to the judge regarding such matters as the proximity of the proposed community-based program to the client's home, available modes of transportation, and available spots for new participants. Knowledge of available, appropriate programs for which your client is eligible may, "in a close case, inform the judge's decision between an active and probationary sentence." *Id.*

8. Stress to the judge the importance of taking into account the defendant's resources to avoid penalizing defendants who are poor, the majority of whom are racial minorities. For example, you may want to inform the judge of cases in which similarly situated defendants with private counsel have been able to craft desirable sentences funded by their own financial assets and argue that your client's sentence should not depend on his or her resources. Additionally, if your case is one in which your client may be ordered to pay restitution, present records regarding financial hardship, e.g. foreclosure records, a spreadsheet reflecting income vs. expenses, bankruptcy documents, etc., since the judge must take the defendant's ability to pay into consideration in ordering restitution. G.S. 15A-1340.36.

9. Explain to the judge the particular concerns about disparities in certain contexts, such as marijuana charges, drug trafficking charges, habitual felon charges, and substantial assistance departures. Sources for such data include your own collected reports of offender data as well as statistics collected by the NCAJ's Racial Justice Task Force, the Governor's Crime Commission, and the Department of Public Safety. This type of information has been referred to as "social framework evidence," and has been recognized as an important tool in mitigating the effects of race on criminal justice outcomes. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013). Argue that evidence of disparities provides support for a reduced sentence, as recognized by the U.S. Supreme Court in *Kimbrough v. United States*, 552 U.S. 85 (2007) (upholding district court's consideration of sentencing disparities as a basis for imposing a reduced sentence in a crack-cocaine case).

10. Make a formal presentation of mitigating evidence—which may include testimony from the client and witnesses, school or employment records, and a defense sentencing memorandum—aimed at constructing an individualized narrative supporting your sentencing recommendation. This approach may counter the potential effects of implicit bias by distinguishing your client from potential stereotypes, promoting a closer examination of your client's circumstances, and averting automatic or "snap" judgments. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1177 (2012).

11. Provide the sentencing judge with evidence about implicit racial bias. Jonathan Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions* 1040 (Working Paper, January 16, 2014). Because of the wide range of permissible considerations at sentencing, defense attorneys should use the opportunity to point out "how subconscious bias can affect how judges sentence." *Id.* This can be done by

directing judges to social science research on implicit biases and their potential influence on judges. *Id.; see, e.g.*, Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (study that involved administering the Implicit Association Test to trial judges concluded that judges do, in fact, harbor implicit racial bias).

12. Inform the judge about the connection between discretion and the operation of biases, including in evaluation of mitigating and aggravating factors. In the context of capital sentencing by juries, the U.S. Supreme Court recognized how the discretion involved in determining a criminal sentence provides "a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986). For example, the Court explained that someone "who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved . . . aggravating factors . . . [and] . . . might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case." *Id*. Risks of implicit biases may be present when a defendant is subject to a discretionary sentencing determination by a judge. *See, e.g.*, David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012) (finding that judges differ in the degree to which race influences their decisions regarding whether to incarcerate a defendant); *see also People v. Wardell*, 595 N.E.2d 1148, 1155 (Ill. App. Ct. 1992) (just as the trial judge must "shield the jury from considering racially prejudicial remarks by the participants during trial, so also must the judge at sentencing safeguard against racial considerations").

13. Learn the prosecutor's sentencing position before the sentencing hearing and devise a plan for responding to the aspects with which you disagree. If the prosecutor offers improper evidence during a sentencing hearing, object to the evidence as irrelevant to the purposes of sentencing. *See* G.S. 15A-1340.12; *see also People v. Riley*, 33 N.E.2d 872, 875 (Ill. 1941) (sentencing judge "owes the same duty to the defendant to protect his own mind from the possible prejudicial effect of incompetent evidence that he would owe in protecting a jury from the same contaminating influence").

Presentence reports and sentencing plans. Where the preparation of a presentence report by a probation officer or a sentencing plan by a sentencing specialist is an option, defense attorneys should consider whether one of these options may benefit the client. *See* Jamie Markham, *Presentence Reports and Sentencing Plans*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (August 27, 2010).

When a probation officer prepares a presentence report, defense attorneys should be involved in the preparation of the report to the extent possible. Defendants and defense attorneys have a right to view any presentence report prepared by probation. G.S. 15A-1333(b). Defendants should request to see any report before it is presented to a judge, and to have an opportunity to advocate to the preparer of the report for changes to any irrelevant or inaccurate content. While the preparation of presentence reports by

probation is permitted by statute, in practice, it rarely happens. NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, PRESENTENCE INVESTIGATIONS FEASIBILITY STUDY REPORT: SESSION LAW 2009-451, SECTION 19.14 (2010) (reporting that probation officers are rarely asked to prepare presentence reports, and that some superior and district court judges were unaware that existing law allowed for their preparation).

When reviewing a presentence report, be alert to any depictions of your client in an unflattering or racially stereotypical manner. For example, in a qualitative study performed in a northwestern city, researchers found that probation officers' assessments of motivations for offending differed by race in presentence reports in juvenile cases. In particular, the delinquency of Black youth was typically explained "as stemming from negative attitudinal and personality traits," while delinquent behavior of White youth "stressed the influence of the social environment." ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 14 (2d ed. 2008). "Black youth were judged to be more dangerous, which translated into harsher sentences than for comparable white youth." *Id*.

As a result of the elimination of the statewide Sentencing Services program, which evaluated defendants for possible non-incarcerative sentences at the request of the defendant or the court, independent sentencing specialists are available to produce sentencing plans only in certain counties. Where such specialists are available, counsel must cite specific grounds for preparation of a plan and a judge must determine whether one is warranted, at a cost of $500 (paid by the Office of Indigent Defense Services). To find out if there is a sentencing specialist in or near your area who is available to be appointed by the court to prepare a sentencing plan, consult the Community Treatment and Resource Provider Directory, an online directory maintained by the Office of Indigent Defense Services. Regardless of whether a sentencing specialist is available in your area, you may apply to the court for funds to hire a mitigation specialist and offer information obtained by such a specialist to the court during sentencing. *See* Ex Parte Motion to Hire Mitigation Investigator, available at www.ncids.org (select "Training and Resources," then "Motions Bank, Non-Capital").

Anecdotal evidence suggests that, in counties where sentencing specialists are available, defense attorneys tend to seek their services when the sentencing grid calls for an active or intermediate sentence, for assistance in structuring an appropriate intermediate sentence. The sentencing specialist's plan generally will include detailed background information about the client, a risk assessment, and available treatment options. In some cases, the most useful function a sentencing specialist can serve is getting the client into a treatment program, which may be difficult for the defense attorney to arrange. Consult with the sentencing specialist for further details about the process and requirements for obtaining a sentencing plan.

OBJECT

to any strike that could be viewed as based on race, gender, religion, or ethnicity

"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.** "Constitution forbids 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 member of same cognizable class as juror.** *Powers v. Ohio*, 499 U.S. 400 (1991).
- **You do not need to exhaust your peremptory challenges to preserve a *Batson* claim.**
- ***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*, 841 S.E.2d 492, 502 (N.C. 2020)

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 bias?
   - 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).

"Not intended to be a high hurdle for defendants to cross." *State v. Hoffman*, 348 N.C. 548, 553 (1998).

"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*, 841 S.E. 2d at 498.

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*, 841 S.E.2d at 497

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

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

- **Give the history of strike disparities and *Batson* violations in this DA's office/prosecutor.** *Miller-El*, 545 U.S. at 254, 264; *Flowers v. Mississippi,* 139 S.Ct. 2245 (2019); *Hobbs*, 841 S.E. 2d at 501 (Contact CDPL for data on your county to reference.)
- **State questioned juror differently or very little.** *Miller-El*, 545 U.S. at 241, 246, 255.
- **Juror is similar to white jurors passed (describe how).** *Foster v. Chatman,* 136 S.Ct. 1737, 1750 (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

- **If the State volunteers reasons without prompting from the Court, the prima facie showing is assumed; move to step 3.** *Hobbs*, 841 S.E. 2d at 500. *Hernandez v. New York*, 500 U.S. 352, 359 (1991).
- **Prosecutor must actually give a reason.** *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.

STEP THREE: PURPOSEFUL DISCRIMINATION

You now have burden to prove race was a <u>significant factor</u>

Argue the State's stated reasons are pretextual

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 each and every reason proffered by the State. *Foster*, 136 S. Ct. at 1754 (finding purposeful discrimination after debunking only four of eleven reasons given).

- **The reason <u>applies equally to white jurors</u> the State has passed.** *Miller-El,* 545 U.S. at 247, n.6. Jurors don't have to be identical; "would leave *Batson* inoperable;" "potential jurors are **not** products of a set of **cookie cutters**." *See also Hobbs*, 841 S.E.2d at 503.
- **The reason is <u>not supported by the record</u>.** *Foster,* 136 S.Ct. 1737, 1749.
- **The reason is <u>nonsensical or fantastic</u>.** *Foster*, 136 S.Ct. at 1752.
- **The prosecutor <u>failed to ask the juror any questions about the topic</u> that the State now claims disqualified them.** *Miller-El,* 545 U.S. at 241.
- **State's reliance on juror's <u>demeanor</u> is inherently suspect.** *Snyder*, 552 U.S. at 479, 488.
- **A <u>laundry list</u> of reasons is inherently suspect.** *Foster*, 136 S.Ct. at 1748.
- **<u>Shifting reasons</u> are inherently suspect.** *Foster*, 136 S.Ct. at 1754.
- **State's reliance on juror's expression of <u>hardship or reluctance to serve</u> is inherently suspect.** *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).
- **<u>Differential questioning</u> is evidence of racial bias.** *Miller-El,* 545 U.S. at 255.
- **<u>Prosecutor training and prior practices</u> are relevant.** *Miller-El*, 545 U.S. at 263-64.

<u>JUDGE GRANTS YOUR OBJECTION: REMEDY</u>

In judge's discretion to:

- **Dismiss the venire and start again** OR
- **Seat the improperly struck juror(s).** *State v. McCollum,* 334 N.C. 208 (1993).

2021 Update to Jury Selection:
The Art of Peremptories and Trial Advocacy

By: James A. Davis

September 16, 2021

About James A. Davis

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

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MASTERING THE ART OF JURY SELECTION

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

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

Public outrage decried the Rodney King, O.J. Simpson, McDonald's hot coffee spill, nanny Louise Woodward, and the 253 million dollar VIOXX verdicts, all of which had juries selected using trial consultants. After three decades, I now believe jury selection and closing argument decide most close cases. Second, I am an eclectic, taking the best I have ever seen or heard from others.

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

Virtually nothing herein is original, and I neither make any representations regarding accuracy nor claim any proprietary interest in the materials. Pronouns are in the masculine in accord with holdings of the cases referenced. Last, like the conductor of a symphony, be steadfast at the helm, remembering the basics: Preparation spawns the best examinations. Profile favorable jurors. File pretrial motions that limit evidence, determine critical issues, and create a clean trial. Be vulnerable, smart, and courageous in jury selection. Cross with knowledge and common sense. Be efficient on direct. Perfect the puzzle for the jury. Then close with punch, power, and emotion.

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I. Preliminary Observations (Return to TOC)

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

II. *Voir Dire*: State of the Law (Return to TOC)

Voir dire means to speak the truth.[1] Our highest courts proclaim its purpose. *Voir dire* serves a dual objective of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). The North Carolina Supreme Court held jury selection has a dual purpose, both to help counsel determine whether a basis for challenge for cause exists and assist counsel in intelligently exercising peremptory challenges. *State v. Wiley*, 355 N.C. 592 (2002); *State v. Simpson*, 341 N.C. 316 (1995).

A. Case Law:

Case law amplifies the aim of jury selection. Each defendant is entitled to a full opportunity to face prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Thomas*, 294 N.C. 105, 115 (1978). The purpose of *voir dire* and exercise of challenges "is to eliminate extremes of partiality and assure both . . . [parties] . . . that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." *State v. Conner*, 335 N.C. 618 (1994). We all have natural inclinations and favorites, and jurors sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. Jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for a juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. *State v. Hedgepath*, 66 N.C. App. 390 (1984).

B. Statutes:

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

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

peremptory challenges. N.C. Gen. Stat. § 15A-1217. Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges. *Id.*

C. Constitution:

Criminal defendants have a constitutional right under the Sixth and Fourteenth Amendments to *voir dire* jurors adequately. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. . . . *Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored." *Voir dire* must be available "to lay bare the foundation of a challenge for cause against a prospective juror." *Morgan v. Illinois*, 504 U.S. 719, 729, 733 (1992).[2] *See also Rosales-Lopez v. U.S.*, 451 U.S. 182, 188 (1981) (plurality opinion) ("Without an adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled.").[3]

Now, the foundational principles of jury selection.

III. Selection Procedure (Return to TOC)

A. Statutes:

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

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

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

B. Pattern Jury Instructions:

Read and recite to jurors the pattern jury instructions.

- Pattern Jury Instructions: Substantive Crime(s) and Trial Instructions[4]
- N.C.P.I. – Crim. 100.21: Remarks to Prospective Jurors After Excuses Heard (parties are entitled to jurors who approach cases with open minds until a verdict is reached; free from bias, prejudice or sympathy; must not be influenced by preconceived ideas as to facts or law; lawyers will ask if you have any experience that might cause you to identify yourself with either party, and these questions are necessary to assure an impartial jury; being fair-minded, none of you want to be tried based on what was reported outside the courtroom; the test for qualification for jury service is not the private feelings of a juror, but whether the juror can honestly set aside such feelings, fairly consider the law and evidence, and impartially determine the issues; we ask no more than you use the same good judgment and common sense you used in handling your own affairs last week and will use in the weeks to come; these remarks are to impress upon you the importance of jury service, acquaint you with what will be expected, and strengthen your will and desire to discharge your duties honorably).
- N.C.P.I. – Crim. 100.22: Introductory Remarks (this call upon your time may never be repeated in your lifetime; it is one of the obligations of citizenship, represents your contribution to our democratic way of life, and is an assurance of your guarantee that, if chance or design brings you to any civil or criminal entanglement, your rights and liberties will be regarded by the same standards of justice that you discharge here in your duties as jurors; you are asked to perform one of the highest duties imposed on any citizen, that is to sit in judgment of the facts which will determine and settle disputes among fellow citizens; trial by jury is a right guaranteed to every citizen; you are the sole judges of the weight of the evidence and credibility of each witness; any decision agreed to by all twelve jurors, free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment and based on credible evidence in accord with the court's instructions, becomes a final result; you become officers of the court, and your service will impose upon you important duties and grave responsibilities; you are to be considerate and tolerant of fellow jurors, sound and deliberate in your evaluations, and firm but not stubborn in your convictions; jury service is a duty of citizenship).
- N.C.P.I. – Crim. 100.25: Precautionary Instructions to Jurors (Given After Impaneled) (all the competent evidence will be presented while you are present in the courtroom; your duty is to decide the facts from the evidence, and you alone are the judges of the facts; you will then apply the law that will be given to you to those facts; you are to be

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

fair and attentive during trial and must not be influenced to any degree by personal feelings, sympathy for, or prejudice against any of the parties involved; the fact a criminal charge has been filed is not evidence; the defendant is innocent of any crime unless and until the state proves the defendant's guilt beyond a reasonable doubt; the only place this case may be discussed is in the jury room after you begin your deliberations; you are not to form an opinion about guilt or innocence or express an opinion about the case until you begin deliberations; news media coverage is not proper for your consideration; television shows may leave you with improper, preconceived ideas about the legal system as they are not subject to rules of evidence and legal safeguards, are works of fiction, and condense, distort, or even ignore procedures that take place in real cases and courtrooms; you must obey these rules to the letter, or there is no way parties can be assured of absolute fairness and impartiality).

- N.C.P.I. – Crim. 100.31: Admonitions to Jurors at Recesses[5] (during trial jurors should not talk with each other about the case; have contact of any kind with parties, attorneys or witnesses; engage in any form of electronic communication about the trial; watch, read or listen to any accounts of the trial from any news media; or go to the place where the case arose or make any independent inquiry or investigation, including the internet or other research; if a verdict is based on anything other than what is learned in the courtroom, it could be grounds for a mistrial, meaning all the work put into trial will be wasted, and the lawyers, parties and a judge will have to retry the case).

C. Case Law:

- *State v. Harbison*, 315 N.C. 175 (1985) (Defendant must knowingly and voluntarily consent to concessions of guilt made by trial counsel after a full appraisal of the consequences and before any admission); *State v. Berry*, 356 N.C. 490 (2002) (holding Defendant receives *per se* ineffective assistance of counsel when counsel concedes the defendant's guilt to the offense or a lesser-included offense without consent); *State v. McAlister*, 375 N.C. 455 (2020) (remanding for an evidentiary hearing whether (1) *Harbison* was violated or (2) Defendant knowingly consented in advance to his attorney's admission of guilt to the Assault on a Female charge when counsel stated that "things got physical . . . he did wrong . . . God knows he did" during closing argument); *State v. Wilson*, 236 N.C. App. 472 (2014) (holding defense counsel's admission of an element of a crime charged—while still maintaining Defendant's innocence—does not necessarily amount to ineffective assistance of counsel).
- *State v. Call*, 353 N.C. 400, 409–10 (2001) (after telling jurors the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, it is permissible to ask jurors "if they understand they have the right to stand by their beliefs in the case"); s*ee also State v. Elliott*, 344 N.C. 242, 263 (1996).
- *State v. Cunningham*, 333 N.C. 744 (1993) (Defendant's challenge for cause was proper when juror repeatedly said defendant's failure to testify "would stick in the back

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

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

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

D. Jury Indoctrination:

It is axiomatic that counsel should not engage in efforts to indoctrinate jurors, argue the case, visit with, or establish rapport with jurors. *State v. Phillips*, 300 N.C. 678 (1980). You may not ask questions which are ambiguous, confusing, or contain inadmissible evidence or incorrect statements of law. *State v. Denny*, 294 N.C. 294 (1978) (holding ambiguous or confusing questions are improper); *State v. Washington*, 283 N.C. 175 (1973) (finding a question containing potentially inadmissible evidence improper); *State v. Vinson*, 287 N.C. 326 (1975) (holding counsel's statements contained inadequate or incorrect statements of the law and were thus improper). The court may also limit overbroad, general or repetitious questions. *Id. But see* N.C. Gen. Stat. § 15A-1214(c) (defendant not prohibited from asking the same or a similar question previously asked by the prosecution).

E. Procedural Rules:

A primer on procedural rules[6]: The scope of permitted *voir dire* is largely a matter of the trial court's discretion. *See, e.g., State v. Knight*, 340 N.C. 531 (1995) (trial judge properly sustained State's objection to questions asked about victim's HIV status); *see generally State v. Phillips*, 300 N.C. 678 (1980) (opinion explains boundaries of *voir dire*; questions should not be overly repetitious or attempt to indoctrinate jurors or "stake them out"). The trial court has the duty to control and supervise the examination of jurors, and regulation of the extent and manner of questioning rests largely in the court's discretion. *State v. Wiley*, 355 N.C. 592 (2002). The prosecutor and defendant may personally question jurors individually concerning their competency to serve. N.C. Gen. Stat. § 15A-1214(c). The defendant is not prohibited from asking a question merely because the court or prosecutor has previously asked the same or a similar question. *Id.*; *State v. Conner*, 335 N.C. 618, 628–29 (1994). Leading questions are permitted. *State v. Fletcher*, 354 N.C. 455, 468 (2001). Finally, the judge has discretion to re-open

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

examination of a juror previously accepted if, at any time before the jury is impaneled, it is discovered the juror made an incorrect statement or other good reasons exists. Once the court re-opens examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse the juror. *State v. Womble*, 343 N.C. 667, 678 (1996).

F. Stake-out Questions:

A common issue is an improper stake-out question. *State v. Simpson*, 341 N.C. 316 (1995) (holding staking-out jurors is improper). Our highest court has defined staking-out as questions that tend to commit prospective jurors to a specific future course of action in the case. *State v. Chapman*, 359 N.C. 328, 345–46 (2005). Counsel may not pose hypothetical questions designed to elicit what a juror's decision will be under a certain state of the evidence or a given state of facts. *State v. Vinson*, 287 N.C. 326, 336–37 (1975). Counsel should not question prospective jurors as to the kind of verdict they would render, how they would be inclined to vote, or what their decision would be under a certain state of evidence or given state of facts. *State v. Richmond*, 347 N.C. 412 (1998). My synthesis of the cases suggests counsel is in danger of an objection on this ground when the question refers to a verdict or encroaches upon issues of law. A proposed *voir dire* question is legitimate if the question is necessary to determine whether a juror is excludable for cause or assist you in intelligently exercising your peremptory challenges. If the State objects to a particular line of questioning, defend your proposed questions by linking them to the purposes of *voir dire*.[7]

G. *Batson* Challenges:

Race, gender, and religious discrimination in the selection of trial jurors is unconstitutional. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding race discrimination); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (finding gender discrimination); U.S. Const. amends. V and XIV (referencing due process); N.C. Const. art. I § 26 (no person may be excluded from jury service on account of sex, race, color, religion, or national origin). *Batson* does not require trait alignment between jurors and litigants. *See Powers v. Ohio*, 499 U.S. 400 (1991). As a practical matter, counsel should request the Court to ask jurors to state their race on the record. The U.S. Supreme Court established a three-step test for such challenges: 1) defendant must make a *prima facie* showing the prosecutor's strike was discriminatory; 2) the burden shifts to the State to offer a race-neutral explanation for the strike; and 3) the trial court decides whether the defendant has proven purposeful discrimination. The U.S. Supreme Court recently considered, *inter alia*, a prosecutor's history of striking and questioning black jurors in deciding a *Batson* case. *Flowers v. Mississippi*, 588 U.S. ___, 139 S. Ct. 2228 (2019) (holding that, in defendant's sixth trial, the prosecutor's historical use of peremptory strikes in the first four trials, 145 questions for five black prospective jurors contrasted with only 12 questions for 11 white jurors, and misstatement of the record were motivated in substantial part by discriminatory intent). Conversely, *Batson* also prohibits criminal defendants from race, gender, or religious based peremptory challenges, known as a reverse *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42 (1992). It is noteworthy that our appellate courts have decided over 100 cases in which defendants have alleged purposeful discrimination by prosecutors against minorities, never finding a *Batson* violation. However, recent case law

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

suggests defense counsel should be vigilant in making a *Batson* challenge. *See State v. Bennett*, 374 N.C. 579 (2020) (holding, although the State "excused two but kept three African-Americans," Defendant met his burden of a *prima facie* showing at the first step; that the Court further held a numerical analysis of strike patterns for race was not necessarily was dispositive as, in this case, all of the State's peremptory challenges were used to exclude black prospective jurors). Appellate courts appear receptive to *Batson* reviews. *See State v. Hobbs*, 374 N.C. 345 (2020) (holding, *inter alia*: (1) because the trial court analyzed all three *Batson* steps—although ruling against the defendant at the first step—a full *Batson* review was required; and (2) a defendant meets the first step by showing the totality of the relevant facts gives rise to an inference of racial discrimination—a burden not intended to be a high hurdle and only of production, not persuasion). Counsel should conduct a robust hearing for the record; some authorities believe these hearings will become more akin to suppression hearings. Remember the remedy: the judge may either dismiss the entire venire or seek the improperly struck juror. *See State v. McCollum*, 334 N.C. 208 (1993).

Beware of reverse *Batson* challenges. North Carolina appellate courts have twice upheld prosecutors reverse *Batson* challenges on the ground the defendant engaged in purposeful discrimination against Caucasian jurors. *State v. Hurd*, 246 N.C. App. 281 (2016) (holding trial court did not err in sustaining a reverse *Batson* challenge; Defendant exercised eleven peremptory challenges, ten against white and Hispanic jurors; Defendant's acceptance rate of black jurors was eighty-three percent in contrast to twenty-three percent for white and Hispanic jurors; the one black juror challenged was a probation officer; Defendant accepted jurors who had strikingly similar views); *see also State v. Cofield*, 129 N.C. App. 268 (1998). Finally, should a judge find the State has violated *Batson*, the venire should be dismissed and jury selection should begin again. *State v. McCollum*, 334 N.C. 208 (1993). *But cf. State v. Fletcher*, 348 N.C. 292 (1998) (following a judge's finding the prosecutor made a discriminatory strike, he withdrew the strike, passed on the juror, the trial court found no *Batson* violation, and the N.C. Supreme Court affirmed).

Jury diversity matters. A 2012 study of 102 jury trials and 10 bench trials in North Carolina demonstrated African-Americans and Latinos had the lowest favorable verdict outcomes.[8] Implicit bias research[9] indicates racial bias is pervasive among people. Implicit bias originates in the mental processes over which people have little knowledge or control and includes the formation of perceptions, impressions, and judgments, which impacts how people behave.[10] Literature supports counsel raising issues of race and unconscious bias during jury selection helps jurors guard against implicit bias during trial proceedings.[11] Studies show diverse juries perform fact-finding tasks more effectively, lessen individual biases, and provide more fair and impartial results.[12]

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

H. Implicit Bias:

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

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

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

I. Challenges for Cause:

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

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> (1) Does not have the qualifications required by G.S. 9-3.
> (2) Is incapable by reason of mental or physical infirmity of rendering jury service.
> (3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.
> (4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
> (5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime. *See* **Exhibit A**.
> (6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.
> (7) Is presently charged with a felony.

(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
(9) For any other cause is unable to render a fair and impartial verdict.

Certain phrases are determinative in challenges for cause. For example, you may ask if a prospective juror would "automatically vote" for either side or a certain sentence or if a juror's views or experience would "prevent or substantially impair" his ability to hear the case. *State v. Chapman*, 359 N.C. 328, 345 (2005) (holding counsel may ask, if based on a response, if a juror would vote automatically for either side or a particular sentence); *see also State v. Teague*, 134 N.C. App. 702 (1999) (finding counsel may ask if certain facts cause jurors to feel like they "will automatically turn off the rest of the case"); s*ee also Morgan v. Illinois*, 504 U.S. 719, 723 (1992) (Court approved the question "would you automatically vote [for a particular sentence] no matter what the facts were?"); *Wainright v. Witt*, 469 U.S. 412 (1985) (established the standard for challenges for cause, that being when the juror's views would "prevent or substantially impair" the performance of his duties in accord with his instructions and oath, modifying the more stringent language of *Witherspoon*[13] which required an unmistakable commitment of a juror to automatically vote against the death penalty, regardless of the evidence); *State v. Cummings*, 326 N.C. 298 (1990) (holding State's challenge for cause is proper against jurors whose views against the death penalty would "prevent or substantially impair" their performance of duties as jurors). Considerable confusion about the law could amount to "substantial impairment." *Uttecht v. Brown*, 551 U.S. 1 (2007).

J. Other Jury Selection Issues:

Other issues may include *voir dire* with co-defendants, order of questioning, challenging a juror, preserving denial of cause challenges and prosecutor objection to a line of questioning, right to individual *voir dire*, and right to rehabilitate jurors.[14] In cases involving co-defendants, the order of questioning begins with the State and, once it is satisfied, the panel should be passed to each co-defendant consecutively, continuing in this order until all vacancies are filled, including alternate juror(s). N.C. Gen. Stat. § 15A-1214(e). For order of questioning, the prosecutor is required to question prospective jurors first and, when satisfied with a panel of twelve, he passes the panel to the defense. This process is repeated until the panel is complete. N.C. Gen. Stat. § 15A-1214(d); *see also State v. Anderson*, 355 N.C. 136, 147 (2002) (holding the method by which jurors are selected, challenged, selected, impaneled, and seated is within the province of the legislature). Regarding challenges, when a juror is challenged for cause, the party should state the ground(s) so the trial judge may rule. No grounds need be stated when exercising a peremptory challenge. Direct oral inquiry, or questioning a juror, does not constitute a challenge. N.C. Gen. Stat. § 9-15(a). Preserving a denial of cause challenge or sustained objection to your line of questioning requires exhaustion of peremptory challenges and a showing of prejudice from the ruling. *See, e.g.*, *State v. Billings*, 348 N.C. 169 (1998); *State v. McCarver*, 341 N.C. 364 (1995).

[13] *Witherspoon v. Illinois*, 39 U.S. 510 (1968).
[14] *See generally* N.C. DEFENDER MANUAL, *supra* note 7, at 25-1, *et seq.*

The right to individual *voir dire* is found in the trial judge's duty to oversee jury selection, implying that the judge has authority to order individual *voir dire* in a non-capital case if necessary to select an impartial jury. *See State v. Watson*, 310 N.C. 384, 395 (1984) ("The trial judge has broad discretion in the manner and method of jury *voir dire* in order to assure that a fair and impartial jury is impaneled . . . ."). As to the right to rehabilitate jurors, the trial judge must exercise his discretion in determining whether to permit rehabilitation of particular jurors. Issues include whether a juror is equivocal in his response, clear and explicit in his answer, or if additional examination would be a "purposeless waste of valuable court time." *State v. Johnson*, 317 N.C. 343, 376 (1986). A blanket rule prohibiting rehabilitation is error. *State v. Brogden*, 334 N.C. 39 (1993); *see also State v. Enoch*, 261 N.C. App. 474 (2018) (holding no error when the trial court denied the defendant's request to rehabilitate two jurors when, although initially misapprehending that rehabilitation was impermissible in non-capital cases, the court later allowed for the possibility of rehabilitation, thus not establishing a blanket rule against all rehabilitation).

IV. Covid Corner (Return to TOC)

Covid's effects on juries are becoming clear. American adults surveyed report that—among those fearing prolonged exposure to others in a courtroom—they may rush to reach a verdict and return home.[15] American adults further indicate: (1) 74% state the pandemic has led to more stress and anxiety; (2) 51% felt sadder; and (3) by more than two-to-one, they state their emotional health and well-being grew worse rather than better.[16]

Recent research also suggests that three out of four jurors are nervous to attend trial due to Covid.[17] Generally, Caucasian and younger adults are the least concerned groups concerning the spread of the virus while non-Caucasian and older adults are the most concerned.[18] For Americans fearing the contagion, they tend to show greater deference to authority figures and decreased tolerance for

[15] *See* Melanie D. Wilson, *The Pandemic Juror*, WASHINGTON AND LEE LAW REV. ONLINE, Vol. 77, Issue 1, Art. 6 (September 29, 2020), *available at* https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1132&context=wlulr-online.

[16] *See* Douglas Schoen, Carly Cooperman and Daniel Cooper, *Addressing the "New Normal" for Jurors and Jury Pools* (September 24, 2020), *available at* https://www.law.com/newyorklawjournal/2020/09/24/covid-19-will-create-a-new-normal-for-jury-pools.

[17] *See* Wilson, *supra* note 15.

[18] *See* Brandon Marc Draper, *And Justice for None: How COVID-19 Is Crippling the Criminal Jury Right*, 62 B.C. L. REV. E. SUPP. I.-1 (2021), *available at* https://lawdigitalcommons.bc.edu/bclr/vol62/iss9/1 (last accessed December 27, 2020).

those defying authority.[19] Americans also tend to more favorably view doctors and nurses during the pandemic.[20]

Face masks shielding the mouth and nose cover between 60% to 70% of the face relevant to emotional expression and, thus, emotion reading.[21] In a recent German study, the ability of participants to detect a range of six emotions (i.e., angry, disgusted, fearful, happy, neutral, and sad) was, generally, significantly reduced with use of face masks.[22]

For further guidance regarding Covid, please refer to publications by John Rubin and Ian Mance with the UNC School of Government.[23]

V. Theories of Jury Selection (Return to TOC)

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

- Traditional approach: lecture with leading and closed questions to program the jury about law and facts and establish authority and credibility with the jury; a prosecutor favorite.
- Wymore (Colorado) method: *See infra text at* IV. The Wymore Method.
- Scientific jury selection: employs demographics, statistics, and social psychology to examine juror background characteristics and attitudes to predict favorable results.
- Game theory: uses mathematical algorithms to decide the outcome of trial.
- Command Superlative Analogue (New Mexico Public Defender's) method: focus on significant life experiences relating to the central trial issue.
- Psychodramatic (Trial Lawyers College) method: identify the most troubling aspects of the case, tell jurors and ask about the concerns, and validate jurors' answers.
- Reptilian theory: focus on facts and behavior to make the jury angry by concentrating on the opponent's failures and resulting injuries, all intended to evoke a visceral, subliminal reaction.
- Demographic theory[24]: stereotype jurors based on race, gender, ethnicity, age, income, occupation, social status, socioeconomic status/affluence, religion, political affiliation, avocations, urbanization, experience with the legal system, and other factors.

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[19] *See* Lorie Sicafuse, *Impact of COVID-19 Crisis on Jurors' Attitudes & Decisions* (2020), available at https://www.courtroomsciences.com/blog/the-csi-blog-1/post/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-135.

[20] *See Analysis of the Impact of COVID-19 on Jury Attitudes, Behavior, and Willingness to Serve*, Empirical Jury LLC (July 14, 2020), *available at* https://triallawyernation.com/wp-content/uploads/2020/07/Empirical-Jury-Covid-Effect-Analysis-July-2020.pdf.

[21] *See* Claus-Christian Carbon, *Wearing Face Masks Strongly Confuses Counterparts in Reading Emotions*, FRONT. PSYCHOL. (September 25, 2020), *available at* https://www.frontiersin.org/articles/10.3389/fpsyg.2020.566886/full.

[22] *See id.*

[23] *COVID-19 Tool Kit*, UNC SCHOOL GOV'T, https://www.sog.unc.edu/resources/microsites/public-defense-education/covid-19-tool-kit.

[24] Research on the correlation of demographic data with voting preferences is conflicted. *See* Professor Dru Stevenson's article in the 2012 George Mason Law Review, asserting the "Modern Approach to Jury Selection" focuses on biases related to factors such as race and gender; s*ee also Glossy v. Gross*, 576 U.S. 863 (2015) (racial and gender biases may reflect deeply rooted community biases either consciously or unconsciously). *But see* Ken Broda-

- Listener method: learn about jurors' experiences and beliefs to predict their views of the facts, law, and each other.

Strategies abound for jury selection methods. Jury consultants and trial lawyers use mock trials, focus groups, and telephone surveys to profile community characteristics and favorable jurors. Research scientists believe – and most litigators have been taught - demographic factors predict attitudes which predict verdicts, although empirical data and trial experience militate against this approach.[25] Many lawyers believe our experience hones our ability to sense and discern favorable jurors, although this belief has marginal support in practice and is speculative at best.

I use a blend of the above models. However, I focus upon one core belief illustrated in the ethical and moral dilemma of an overcrowded lifeboat lost at sea. As individuals weaken, starve, and become desperate, who is chosen to survive? Do we default to women, children, or the elderly? Who lives or dies? Using this hypothetical in the context of a courtroom, I believe the answer is **jurors save themselves**.[26] The basic premise is that jurors, primarily on a subconscious level, choose who they like the most and connect to parties, witnesses, and court personnel who are characteristically like them. Therefore, the party - or attorney - whom the jury likes the most, feels the closest to, or has some conscious or subconscious relationship with typically wins the trial. This concept is the central tenet of our jury selection strategies.

VI. The Wymore Method (Return to TOC)

David Wymore, former Chief Trial Deputy for the Colorado Public Defender system, revolutionized capital jury selection. The Wymore method, or Colorado method of capital *voir dire*, was created to combat "death qualified" juries[27] by utilizing a non-judgmental, candid, and respectful atmosphere during jury selection which allows defense counsel to learn jurors' views about capital punishment and imposition of a death sentence, employ countermeasures by life qualifying the panel, and thereafter teach favorable jurors how to get out of the jury room.

In summary form, the Wymore method is as follows: Defense counsel focuses upon jurors' death penalty views, learns as much as possible about their views, rates their views, eliminates the worst jurors, educates both life-givers and killers separately, and teaches respect for both groups—

Bahm, *Don't Select Your Jury Based on Demographics: A Skeptical Look at JuryQuest*, PERSUASIVE LITIGATOR (April 12, 2012), https://www.persuasivelitigator.com/2012/04/dont-select-your-jury-based-on-demographics.html (for at least three decades, researchers have known that demographic factors are very weak predictors of verdicts).

[25] *See* Ken Broda-Bahm, *supra* note 24.

[26] In panic, most people abandon rules in order to save themselves, although some may do precisely the opposite. DENNIS HOWITT, MICHAEL BILLIG, DUNCAN CRAMER, DEREK EDWARDS, BROMELY KNIVETON, JONATHAN POTTER & ALAN RADLEY, SOCIAL PSYCHOLOGY: CONFLICTS AND CONTINUITIES (1996).

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

particularly the killers. In other words, commentators state Wymore places the moral weight for a death sentence onto individual jurors, making it a deeply personal choice.[28] Wymore himself has stated he tries to find people who will give life, personalize the kill question, and find other jurors who will respect that decision.[29]

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

1. *Witt* excludable: The automatic life adherent. One who will never vote for the death penalty and is vocal, adamant, and articulate about it.
2. One who is hesitant to say he believes in the death penalty. This person values human life and recognizes the seriousness of sitting on a capital jury. However, this person says he can give meaningful consideration to the death penalty.
3. This person is quickly for the death penalty and has been for some time. However, he is unable to express why he favors the death penalty (e.g., economics, deterrence, etc.). He may wish to hear mitigation or be able to make an argument against the death penalty if asked, and is willing to respect views of those more hesitant about the death penalty.
4. This person is comfortable and secure in his death penalty view. He is able to express why he is for the death penalty and believes it serves a good purpose. His comfort level and ability to develop arguments in favor of the death penalty differentiates him from a number three. However, he wants to hear both sides and straddles the fence with penalty phase evidence, believing some mitigation could result in a life sentence despite a conviction for a cold-blooded, deliberate murder.
5. A sure vote for death, he is vocal and articulate in his support for the death penalty. He is not a bully, however, and, because he is sensitive to the views of other jurors, can think of two or three significant mitigating factors which would allow him to follow a unanimous consensus for life in prison. This person is affected by residual doubt.
6. A strong pro-death juror, he escapes an automatic death penalty challenge because he can perhaps consider mitigation. A concrete supporter of the death penalty who believes it not used enough, he is influenced by the economic burden of a life sentence and believes in death penalty deterrence. Essentially, he nods his head with the prosecutor.
7. The automatic death penalty proponent. He believes in the *lex talionis* principle of retributive justice, or an eye for an eye. Mitigation is manslaughter or self-defense. Hateful and proud of it, he must be removed for cause or peremptory challenge. If the defendant is convicted of capital murder, this juror will impose the death penalty.

Wymore teaches the concepts of isolation and insulation. Isolation means that each juror makes an individual, personal judgment. Insulation means each juror understands he makes his decision with the knowledge and comfort it will be respected, he will not be bullied or intimidated by others, and the court and parties will respect his decision. In essence, every juror serves as a jury, and his

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

decision should by right be treated with respect and dignity. These concepts are intended to equip individual jurors to stick with and stand by their convictions.

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

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

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

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

VII. Our Method: Modified Wymore (Return to TOC)

Our approach is a modified version of Wymore, merging various strategies including the use of select statutory language[30] originating in part from the old *Allen* charge;[31] studies on the

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

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

psychology of juries;[32] identifying individual and personal characteristics of the defendant, victim, and material witnesses; profiling our model jury; and a simple rating system for prospective jurors. One other fine trial lawyer has recently written, at least in part, on a non-capital, modified Wymore version of jury selection as well.[33]

Our case preparation process is as follows. First, we start by considering the nature of the charge(s), the material facts, whether we will need to adduce evidence, and assess candidly prosecution and defense witnesses. Second, we identify personal characteristics of the defendant, victim, family members, and other important witnesses, all in descending order of priority. We do the same for prosecution witnesses. Individual characteristics include age, education, occupation, marital status, children, means, residential area, socioeconomic status, lifestyle, criminal record, and any other unique, salient factor. Third, we bear in mind typical demographics like race, age, gender, ethnicity, and so forth. Fourth, we review the jury pool list, both for individuals we may know and for characteristic comparison. Finally, we prepare motions designed to address legal issues and limit evidence for hearing pretrial.[34]

We incorporate multiple theories and our own strategies in jury selection. At the beginning, I spend a few minutes utilizing the **traditional** approach, educating the jury about the criminal justice system, emphasizing the jury's preeminent role, magnifying the moment, and simplifying the process.[35] I often tell them I am afraid they will think my client did something wrong by his mere presence, thereafter underscoring they are at the pinnacle of public service, serve as the conscience of the community, and must protect and preserve the sanctity of trial.[36] In a sense I am using the **lecture** method to establish leadership and credibility. I then transition to the dominant method, the **listener** method, asking many open-ended group questions followed by precise individual questions. I speak to every juror—even if only to greet and acknowledge them—to address their specific backgrounds, comments, or seek disclosure of significant life experiences

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

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

[34] As a practice tip, ask to hear all motions pre-trial and before jury selection. Knowledge of the judge's rulings may be central to your jury selection strategy, often revealing damaging evidence which should be disclosed during the selection process. Motions must precisely address issues and relevant facts within a constitutional context. If a judge refuses to hear, rule upon, or defers a ruling on your motion(s), recite on the record the course of action is not a strategic decision by the defense, thereby alerting the court of and protecting the defendant's recourse for post-conviction relief. *Strickland v. Washington*, 466 U.S. 668 (1984).

[35] Tools that can help jurors frame the trial, remain engaged, and retain information received include the use of a "mini-opening" at the beginning of *voir dire*, or delivering preliminary instructions of the process, law, and relevant legal concepts. *See* Susan J. MacPherson & Elissa Krauss, *Tools to Keep Jurors Engaged*, TRIAL (Mar. 2008), at 33.

[36] Trial by a jury of one's peers is a cornerstone of the principle of democratic representation set out in the U.S. Constitution. U.S. CONST. amend. VI.

relating to key trial issues. We look closely at jurors, including their family and close friends, to discern identified characteristics, favorable or unfavorable. I always address concerning issues, stripping and re-stripping per **Wymore**. We strip by using uncontroverted facts (e.g., "my client blew a .30") and by addressing extraneous issues and circumstances (i.e., inapplicable facts and defenses like "this is not an accident case") as they arise to find jurors who do not have the ability to be fair and impartial or hear the instant case. In a sense, **stripping** is accomplished by drawing the sting: we tell bad facts to strip bad jurors. During the entire process I am **profiling** jurors, searching for select characteristics previously deemed favorable or unfavorable. We also focus on **juror receptivity** to our presentation, looking at their individual responses, physical reactions, and exact comments. For jurors of which I am simply unsure, I fall back on **demographic** data, using social psychology and my **gut** as additional filters. Last, we **isolate and insulate** each juror per Wymore, attempting to create **twelve individual juries** who will respect each other in the process.

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

I commonly draw the sting by telling the jury of uncontroverted facts, thereafter addressing their ability to hear the case. Prosecutors may object, citing an improper stake-out question as the basis. In your response, tie the uncontroverted fact to the juror's ability to follow the law or be fair and impartial. Case law supports my approach. *See State v. Nobles*, 350 N.C. 483, 497–98 (1999) (finding it proper for the prosecutor to describe some uncontested details of the crime before he asked jurors whether they knew or read anything about the case; ADA told the jury the defendant was charged with discharging a firearm into a vehicle "occupied by his wife and three small children"); *State v. Jones*, 347 N.C. 193, 201–02, 204 (1997) (holding a proper non-stake-out question included telling the jury there may be a witness who will testify pursuant to a deal with the State, thereafter asking if the mere fact there was a plea bargain with one of the State's witnesses would affect their decision or verdict in the case); *State v. Williams*, 41 N.C. App. 287, *disc. rev. denied*, 297 N.C. 699 (1979) (finding prosecutor properly allowed, in a common law robbery and assault trial, to tell prospective jurors a proposed sale of marijuana was involved and thereafter inquire if any of them would be unable to be fair and impartial for that reason). Another helpful technique is to ask the jury "if [they] can consider" all the admissible evidence, again linking the bad facts you have revealed to the juror's ability to be fair and impartial or follow the law. *State v. Roberts*, 135 N.C. App. 690, 697 (1999); *see also U.S. v. Johnson*, 366 F. Supp. 2d 822, 842–44 (N.D. Iowa 2005) (finding case specific questions in the context of whether a juror could consider life or death proper under *Morgan*). In sum, a juror who is predisposed to vote a certain way or recommend a particular sentence regardless of the unique facts of the case or judge's instruction on the law is not fair and impartial. You have the right to make a diligent inquiry into a juror's fitness to serve. *State v. Thomas*, 294 N.C. 105, 115 (1978). When you are defending a stake-out issue, argue to the extent a question commits a juror, it commits him to a fair consideration of the accurate facts in the case and to a determination of the appropriate outcome.

The prime directive: Adhere to the profile, suppressing what my gut tells me unless objectively supported.

Using the current state of the law with my "Modified Wymore" approach, please see the outline I use for jury selection attached hereto as **Exhibit B**.

VIII. The Fundamentals (Return to TOC)

"While the lawyers are picking the jury, the jurors are picking the lawyer."[37]

Voir dire is distilled into three objectives: Deselect those who will hurt you or are leaning against you;[38] educate jurors about the trial process and your case; and be more likeable than your counterpart, concentrating on professionalism, honesty, and a smart approach.

I share a three-tier approach to jury selection: Core concepts that are threshold principles, fine art methods, and my personal tips and techniques.

Now for foundational principles:

- Deselect those who will hurt your client. Move for cause, if possible. Identify the worst jurors and remove them.
- Jurors bring personal bias and preconceived notions about crime, trials, and the criminal justice system. You must find out whether they lean with you or the prosecution.
- Jurors who honestly believe they will be fair decide cases based on personal bias and preconceived ideas. Bias or prejudice can take many forms: racial, religious, national origin, ageism, sexism, class (including professionals), previous courtroom experience, prior experience with a certain type of case, beliefs, predispositions, emotional response systems,[39] and more.
- Jurors decide cases based on bias and beliefs, regardless of the judge's instructions.
- There is little correlation between the similarity of the demographic factors (e.g., race, gender, age, ethnicity, education, employment, class, hobbies, or the like) of a juror and defendant and how one will vote.
- Cases are often decided before jurors hear any evidence.

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[37] RAY MOSES, JURY SELECTION IN CRIMINAL CASES (1998).

[38] I have heard skilled lawyers espouse a view in favor of accepting the first twelve jurors seated. It is difficult to comprehend a proper *voir dire* in which no challenges are made as chameleons are lurking within. As a rule of thumb, never pass on the original panel seated.

[39] Recent research has highlighted the important role of emotions in moral judgment and decision-making, particularly the emotional response to morally offensive behavior. June P. Tangnet, Jeff Stuewig & Debra J. Mashek, *Moral Emotions and Moral Behavior*, 58 ANNUAL REVIEW OF PSYCHOLOGY 345 (2007).

- Traditional *voir dire* is meaningless.[40] Social desirability and pressure to conform inhibits effective jury selection when using traditional or hypothetical questions.[41] Asking jurors if they can put aside bias, be fair and impartial, and follow the judge's instructions are ineffective. Traditional questions grossly underestimate and fail to detect the degree of anti-defendant bias in the community.[42]
- Hypothetical questions about the justice system result in aspirational answers and have little meaning.
- You can neither change a strongly held belief nor impose your will upon a juror in the time you have in *voir dire*.[43]

IX. Fine Art Techniques (Return to TOC)

"*The evidence won't shape the jurors. The jurors will shape the evidence."*[44]

The higher art form:[45]

- Make a good first impression. Remember primacy and recency[46] at all phases, even jury selection. There is only one first impression. Display warmth, empathy, and

[40] Post-trial interviews reveal jurors lose interest and become disengaged with the use of technical terms and legal jargon, without an early and simple explanation of the case, and during a long trial. *See* MacPherson & Krauss, *supra* note 35, at 32. Studies by social scientists on non-capital felony trials reveal the following findings: (1) On average, jury selection took almost five hours, yet jurors as a whole talked only about thirty-nine percent of the time; (2) lawyers spent two percent of the time teaching jurors about their legal obligations and, in post-trial interviews assessing juror comprehension, many jurors were unable to distinguish between or explain the terms "fair" and "impartial"; and (3) one-half the jurors admitted post-trial they could not set aside their personal opinions and beliefs, although they had agreed to do so in *voir dire*. Cathy Johnson & Craig Haney, *Felony Voir Dire, an Exploratory Study of its Content and Effect*, 18 LAW AND HUMAN BEHAVIOR 487 (1991).

[41] James Lugembuhl, *Improving Voir Dire*, THE CHAMPION (Mar. 1986).

[42] *Id.*

[43] Humans have a built-in mechanism called scripting for dealing with unfamiliar situations like a trial. This mechanism lessens anxiety by promoting conforming behavior and drawing on bits and pieces of one's life experience – whether movies, television, friends or family – to make sense of the world around them. Unless you intercede, the script will be that lawyers are not to be trusted, trials are boring, people lie for gain, judges are fair and powerful, and the accused would not be here if he did not do something wrong. OFFICE OF THE STATE PUBLIC DEFENDER, JURY SELECTION (2016).

[44] MOSES, *supra* note 37.

[45] Ask about the trial judge and how he handles *voir dire*. Consider informing the trial judge in advance of jury selection about features of your *voir dire* which may be deemed unusual by the prosecutor or the court, thus allowing the judge time to consider the issue, preventing disruption of the selection process, and affording you an opportunity to make a record.

[46] The law of primacy in persuasion, also known as the primacy effect, was postulated by Frederick Hansen Lund in 1926 and holds the side of an issue presented first will have greater effect in persuasion than the side presented subsequently. Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors*, 19 JOURNAL OF COMMUNICATION 239 (1969). The principle of recency states things most recently learned are best remembered. Also known as the recency effect, studies show we tend to remember the last few things more than those in the middle, assume items at the end are of greater importance, and the last message has the most effect when there is a delay between repeated messages. The dominance of primacy or recency depends on intrapersonal variables like the degree of familiarity and

respect for others and the process. Show the jurors you are fair, trustworthy, and know the rules.

- Understand trial is an unknown world to lay persons or jurors. They feel ignored and are unaware of their special status, the rules of propriety, and that soon almost everyone will be forbidden to speak with them.
- Comfortable and safe *voir dire* will cause you to lose. Do not fear bad answers. Embrace them. They reveal the juror's heart which will decide your case.
- Tell jurors about incontrovertible facts or your affirmative defense(s).[47] Be prepared to address the law on staking-out the jury for a judge who restricts your approach to this area. Humbly make a record.
- Tell jurors they have a personal safety zone. Be careful of and sensitive to a juror's personal experience. When jurors share painful or emotional experiences, acknowledge their pain and express appreciation for their honesty.
- When a juror expresses concern with employment, tell them the law prohibits discharging or demoting citizens for jury service. N.C. Gen. Stat. § 9-32.
- When a juror expresses bias, the best approach is counter-intuitive. Do not stop, redirect them, or segue. Immediately address and confront the issue. Mirror the answer back, invite explanation, reaffirm the position, and then remove for cause. Use the moment to teach the jury the fairness of your position.
- Use fact questions to get fact answers. Ask jurors about analogous situations in their past. This will help profile the juror.
- Listen. Force yourself to listen more. Open-ended questions (e.g., "Tell us about…, Share with us…, Describe for us…," etc.) keep jurors talking, revealing life experiences, attitudes, opinions, and views. Have a conversation. Spend time discussing their personal background, relevant experiences, and potential bias. Make it interesting to them by making the conversation about them. Use the ninety/ten rule, jurors talking ninety percent of the time.
- Consider what the juror needs to know to understand the case and what you need to know about the juror.
- Seek first to understand, then to be understood.
- Personal experiences shape juror's views and beliefs and best predict how jurors view facts, law, and each other.
- Do not be boring, pretentious, or contentious.
- Look for non-verbal signals like nodding, gestures, or expressions.
- Spot angry jurors. "To the mean-spirited, all else becomes mean."[48]

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controversy as well as the interest of a particular issue. Curtis T. Haughtvedt & Duane T. Wegener, *Message Order Effects in Persuasion: An Attitude Strength Perspective*, 21 JOURNAL OF CONSUMER RESEARCH 205 (1994).

[47] Prior to the selection of jurors, the judge must inform prospective jurors of any affirmative defense(s) for which notice was given pretrial unless withdrawn by the defendant. N.C. GEN. STAT. § 15A-1213; N.C. GEN. STAT. § 15A-905(c)(1) (notice of affirmative defense is inadmissible against the defendant); N.C.P.I. – Crim. 100.20 (instructions to be given at jury selection).

[48] MOSES, *supra* note 37.

- Refer back to specific answers. Let them know you were listening. Then build on the answers. Remember, a scorpion is a scorpion, regardless of one's trappings (i.e., presentation, words, or appearance).
- Deselect delicately. Tell them they sound like the kind of person who thinks before forming an opinion and the law is always satisfied when a juror gives an honest opinion, even if it is different from that of the lawyers or the judge. All the law asks is that jurors give their honest opinions and feelings. Stand and say, "We thank and respectfully excuse juror number . . . ."
- Juror personalities and attitudes are far more predictive of juror choices.
- Jury selection is about jurors educating us about themselves.

X. My Side Bar Tips (Return to TOC)

"*We don't see things as they are. We see them as we are."*[49]

My personal palette of jury selection techniques:

- At the very outset, tell the jury the defendant is innocent (or not guilty), be vulnerable, and tell the jury about yourself. Become one of them.
- You must earn credibility in jury selection.[50] Many jurors believe your client is guilty before the first word is spoken. Aligned with the accused, you are viewed with suspicion, serving as a mouthpiece. Start sensibly and strong. Be a lawyer, statesman, and one of them – a caring, community member. Earn respect and credibility when it counts – right at the start.
- We develop a relationship with jurors throughout the trial. Find common ground, mirroring back the intelligence and social level of the individual jurors. Be genuine. Become the one jurors trust in the labyrinth called trial.
- Encourage candor. Tell the jury there are no right or wrong answers, and you are interested in them and their views. Tell them citizens have the right to hold different views on topics, and so do jurors. Tell them you will be honest with them, asking for honest and complete answers in return. Assure them honest responses are the only thing expected of them. Reward the honest reply, even if it hurts.
- Listen to and observe opposing counsel. Purposefully contrast with the prosecutor. If he is long-winded, be precise and efficient. If he misses key points, spend time educating the jury. Entice jurors who choose early to choose you.
- Humanize the client. Touch, talk with, and smile at him.

[49] ANAIS NIN, SEDUCTION OF THE MINOTAUR (1961).

[50] According to the National Jury Project, sixty-seven percent of jurors are unsympathetic to defendants, thirty-six percent believe it is the defendant's responsibility to prove his innocence, and twenty-five percent believe the defendant is guilty or he would not have been charged. Now known as National Jury Project Litigation Consulting, this trial consulting firm publicizes its use of social science research to improve jury selection and case presentation.

- Remind the client continually of appropriate eye contact, posture, and perceived interest in the case.
- Beware of a reverse *Batson* challenge when there is an obvious trend by the defense using peremptory challenges based on race, gender, or religion.
- Propensity is the worst evidence.
- If jurors fear or do not understand your client or his actions, whether due to violence, mental health, or the unexplained, they will convict your client - quickly.
- Pick as many leaders[51] as possible, creating as many juries as possible. Do not pick followers: you shrink the size of the jury. Avoid young, uneducated, and apparently weak, passive, or submissive jurors. Target and engage them to sharpen your view. Remember: you only need one juror to exonerate, hang, or persuade the jury to a lesser-included verdict.
- Look for jurors who are resistant to social pressure (e.g., piercings, tattoos, etc.).
- The best predictor of human behavior is past behavior.
- Let the client exhibit manners. Typically, my paralegal is present during much of the trial, most importantly in jury selection. When it is our turn to deselect or dismiss jurors, she approaches, the defendant stands and relinquishes his chair, and we discuss and decide who to deselect. Ms. Brown also interacts with the defendant regularly during trial, recesses, and other opportunities, communicating perceived respect and a genuine concern for the client.
- Use the term fair and impartial when engaging the jaundiced juror, skewed in beliefs or position. Talk about the highest aim of a jury.
- Older women will exonerate your client in a rape or sex offense case, particularly if a young female victim has credibility issues. Conversely, beware of the grandfatherly, white knight.[52]
- Fight the urge to use your last peremptory challenge. You may be left with the equivalent of an automatic death penalty juror.
- Draw the sting (i.e., strip). Tell the jury incontrovertible bad facts and your affirmative defense(s). Some jurors will react verbally, some visibly. Let the bad facts sink in. Engage the juror who reacts badly.[53] Reaffirm his commitment to your client's presumed innocence. Then tell them there is more to the story. The sting fades and loses its impact during trial.
- Use the language of the former highest aim Pattern Jury Instruction, telling jurors they have no friend to reward, no enemy to punish, but a duty to let their verdict speak the everlasting truth.

[51] Leaders include negotiators and deal-makers, all of whom wield disproportionate power within the group. *See* MOSES, *supra* note 37.

[52] White knights are individuals who have a compulsive need to be a rescuer. *See* MARY C. LAMIA & MARILYN J. KRIEGER, THE WHITE KNIGHT SYNDROME: RESCUING YOURSELF FROM YOUR NEED TO RESCUE OTHERS (2009).

[53] To deselect jurors, commit the juror to a position (e.g., "So you believe . . . ."), normalize the impairment by acknowledging there are no right or wrong answers and citizens are free to have different opinions, and recommit the juror to his position (e.g., "So because of . . . , you would feel somewhat partial . . . ."), thus immunizing him from rehabilitation.

- Mirror the judge's instructions to the jury, early and often, using phrases from the judges various instructions including fair and impartial, the same law applies to everyone, they are not to form an opinion about guilt or innocence until deliberations begin, and so forth.[54] Forecast the law for them. Clothe yourself with vested authority.
- Commit the jury, individually and as a whole to principles of isolation and insulation. Ask them if they understand and appreciate they are not to do violence to their individual judgment, they must decide the case for themselves, and they are not to surrender their honest convictions merely for the purpose of returning a verdict.[55] Extract a group commitment that they will respect the personal judgment of each and every juror. Target an oral commitment from unresponsive or questionable jurors. Seek twelve individual juries. If done well, you increase your chances of a not guilty verdict, lesser-included judgment, hung jury, or a successful motion to poll the jury post-trial.
- Tell the jury the law never requires a certain outcome. Inform them that the judge has no interest in a particular outcome and will be satisfied with whatever result they decide. Emphasize the law recognizes that each juror must make his own decision.

XI. Subject Matter of *Voir Dire* (Return to TOC)

Case law on proper subject matter for *voir dire*[56] follows.

Accomplice Culpability: *State v. Cheek*, 351 N.C. 48, 65–68 (1999) (prosecutor properly asked about jury's ability to follow the law regarding acting in concert, aiding and abetting, and felony murder rule).

Circumstantial Evidence: *State v. Teague*, 134 N.C. App. 702 (1999) (prosecutor allowed to ask if jurors would require more than circumstantial evidence, that is eyewitnesses, to return a verdict of first degree murder).

Child Witnesses: *State v. Hatfield*, 128 N.C. App. 294 (1998) (trial judge erred by not allowing defendant to ask prospective jurors "if they thought children were more likely to tell the truth when they allege sexual abuse").

Defendant's Prior Record: *State v. Hedgepath*, 66 N.C. App. 390 (1984) (trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow the judge's instructions they are to consider the defendant's prior record only for the purpose of determining credibility).

[54] N.C. GEN. STAT. § 15A-1236(a)(3), *et al.*; *see also supra text* at III. Selection Procedure.
[55] N.C. GEN. STAT. §§ 15A-1235(b)(1) and (4).
[56] *See* MICHAEL G. HOWELL, STEPHEN C. FREEDMAN, & LISA MILES, JURY SELECTION QUESTIONS (2012).

Defendant Not Testifying: *State v. Blankenship*, 337 N.C. 543 (1994) (proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense; however, the court has discretion to disallow the same).

Expert Witness: *State v. Smith*, 328 N.C. 99 (1991) (asking the jury if they could accept the testimony of someone offered in a particular field like psychiatry was not a stake-out question.

Eyewitness Identification: *State v. Roberts*, 135 N.C. App. 690, 697 (1999) (prosecutor properly asked if eyewitness identification in and of itself was insufficient to deem a conviction in the juror's minds regardless of the judge's instructions as to the law)

Identifying Family Members: *State v. Reaves*, 337 N.C. 700 (1994) (no error for prosecutor to identify members of murder victim's family in the courtroom during jury selection).

Intoxication: *State v. McKoy*, 323 N.C. 1 (1988) (proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense).

Legal Principles: *State v. Parks*, 324 N.C. 420 (1989) (defense counsel may question jurors to determine if they completely understood the principles of reasonable doubt and burden of proof; however, once fully explored, the judge may limit further inquiry).

Pretrial Publicity: *Mu'Min v. Virginia*, 500 U.S. 415, 419–21 (1991) (inquiries should be made regarding the effect of publicity upon a juror's ability to be impartial or keep an open mind; questions about the content of the publicity may be helpful in assessing whether a juror is impartial; it is not required that jurors be totally ignorant of the facts and issues involved; the constitutional question is whether jurors had such fixed opinions they could not be impartial).

Racial/Ethnic Background[57]: *Ristaino v. Ross*, 424 U.S. 589 (1976) (although the due process clause creates no general right in non-capital cases to *voir dire* jurors about racial prejudice, such questions are constitutionally mandated under "special circumstances" like in *Ham*); *Ham v. South Carolina*, 409 U.S. 524 (1973) ("special circumstances" were present when the defendant, an African-American civil rights activist, maintained the defense of selective prosecution in a drug charge); *Rosales-Lopez v. U.S.*, 451 U.S. 182 (1981) (trial courts must allow questions whether jurors might be prejudiced about the defendant because of race or ethnic group when the defendant is accused of a violent crime and the defendant and victim were members or difference races or ethnic groups); *see also Turner v. Murray*, 476 U.S. 28 (1986) (such questions must be asked in capital cases in charge of murder of a white victim by a black defendant).

[57] Considerations of race can be critical in any case, and *voir dire* may be appropriate and permissible to determine bias under statutory considerations of one's fitness to serve as a juror. *See generally* N.C. GEN. STAT. § 15A-1212(9) (challenges for cause may be made . . . on the ground a juror is unable to render a fair and impartial verdict). Strategically, try to show how questions on racial attitudes are relevant to the theory of defense. If the inquiry is particularly sensitive, request an individual *voir dire*. *See* N.C. DEFENDER MANUAL, *supra* note 7, at 25-18.

Sexual Offense/Medical Evidence: *State v. Henderson*, 155 N.C. App. 719, 724–27 (2003) (prosecutor properly asked in sex offense case if jurors would require medical evidence "that affirmatively says an incident occurred" to convict as the question measured jurors' ability to follow the law).

Sexual Orientation: *State v. Edwards*, 27 N.C. App. 369 (1975) (proper for prosecutor to question jurors regarding prejudice against homosexuality to determine if they could impartially consider the evidence knowing the State's witnesses were homosexual).

Specific Defenses: *State v. Leonard*, 295 N.C. 58, 62–63 (1978) (a juror who is unable to accept a particular defense recognized by law is prejudiced to such an extent he can no longer be considered competent and should be removed when challenged for cause).

XII. Other Important Considerations (Return to TOC)

It is axiomatic you must know the case facts, theory of defense, theme(s) of the case, and applicable law to conduct an effective *voir dire*. An example of a theory of defense—a short story of reasonable and believable facts—follows: "Ms. Jones was robbed . . . but not by [the Defendant] who was at work eight miles away. This is a case of mistaken identity." Beyond these fundamentals, I offer a few practice tips. First, every jury selection is different, tailored to the unique facts, law, and individuals before you. Second, we meet with the defendant and witnesses on the eve of trial for a last review. Often, we learn new facts, good and bad, as witnesses are sometimes impressive but are more commonly afraid, experience memory loss, present poorly, or will not testify. We re-cover the material points of trial, often illuminating important facts that require disclosure in the selection process. Last, I like to use common sense analogies and life themes to which we can all relate in my conversation with jurors.

Look, act, and dress professionally. Make sure your client and witnesses dress neatly and act respectfully. Of all the things you wear, your expression is most important. A pleasant expression adds face value to your case.[58]

Use plain language. Distill legal concepts into simple terms and phrases.

At the outset, tell the jury they have nothing to fear. Inform them the judge, the governor[59] of the trial, will tell them everything they need to know, and the bailiffs are there for their assistance, security, and comfort. Instruct the jury they need only tell the bailiffs or judge of any needs or concerns they may have.

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[58] MOSES, *supra* note 37.

[59] Judges are sometimes referenced as the governor or gatekeeper of the trial, particularly when deciding admissibility of expert evidence. *See State v. McGrady*, 368 N.C. 880 (2016) (amended Rule 702(a) implements the standards set forth in *Daubert*); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (defines the judge's gatekeeping role under FED. R. EVID. 702).

Be respectful of opposing counsel, not obsequious. You reap what you sow. Promote respect for the process. Be mindful of how you address opposing counsel. He is the prosecutor, not the State of North Carolina (or the government). If the prosecution invokes such authority, tell the jury you represent the citizens of this state, protecting the rights of the innocent from the power of the government.

Sun Tzu, author of *The Art of War*, provides timeless lessons on how to defeat your opponent. A fellow lawyer, Michael Waddington, in *The Art of Trial Warfare*, applies Sun Tzu's principles to the courtroom. I share a sampling for your consideration. Trial is war. To the trial warrior, losing can mean life or death for the client. Therefore, the warrior constantly learns, studies, and practices the art of trial warfare, employing the following principles: Because no plan survives contact with the enemy, he is always ready to change his strategy to exploit a weakness or seize an opportunity. He strikes at bias, arrogance, and evasive answers. He prepares quietly, keeping the element of surprise. He makes his point efficiently, knowing juries have limited attention spans and dislike rambling lawyers. He impeaches only the deserving and when necessary. He is self-disciplined, preparing in advance, capitalizing on errors, and maintaining momentum. He is unintimidated by legions of lawyers or a wealth of witnesses, knowing they are bloated prey. He sets up the hostile witness, luring misstatements and exaggerations for the attack. He does not become defensive, make weak arguments, or present paltry evidence. He focuses on crucial points, attacking the witnesses in his opponent's case. He neither moves nor speaks without reflection or consideration. He never trusts co-defendants or their counsel, for danger looms. He remains calm and composed, unflinching when speared. He neither takes tactical advice nor allows his client to dictate the trial,[60] recognizing why his client sits next to him. He is not reckless, cowardly, hasty, oversensitive, or overly concerned what others think. He prepares for battle, even in the midst of negotiation. He keeps his skills sharp with constant practice and strives to stay in optimal physical and emotional shape – for trial requires the stamina of a warrior. The trial lawyer understands mastery of the craft is an ongoing, lifetime journey.

We summarize life experiences and belief systems via themes which are used to deliver core facts or arguments. An example of a core argument follows: "This is a case of an untrained employee . . . ." The best themes are succinct, memorable, and powerful emotionally. We motivate and lure jurors to virtuosity – or difficult verdicts – through life themes. Consider the powerful themes within this argument:

> The first casualty of war – or trial – is innocence. Fear holds you prisoner; faith sets you free. How many wars have been fought and lives lost because men have dared to insist to be free? Did you ever think you would have the opportunity to affect the life of one person so profoundly while honoring the principles for which our forefathers fought? Stand up for freedom today; for many, freedom is more important than life itself. Partial or perverted justice is no justice; it is injustice. Stop at nothing to find the truth. You have no friend to reward and no enemy to

[60] *But see State v. Ali*, 329 N.C. 304 (1991) (when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, the client's wishes must control).

> punish. Your duty is to let your verdict speak the everlasting truth. His triumph today will trigger change tomorrow. Investigations will improve, and justice will have meaning. Trials will no longer be a rush to judgment but instead a road to justice.

A trial lawyer without a theme is a warrior without a weapon.[61]

XIII. Integrating *Voir Dire* into Closing Argument (Return to TOC)

At the end of closing argument, I return to central ideas covered in *voir dire*. I remind the jury the defendant is presumed innocent even now, walk over to my client and touch him – often telling the jury this is the most important day of my client's life. I then remind them they are not to surrender their honest and conscientious convictions or do violence to their individual judgment merely to return a verdict, purposefully re-isolating and re-insulating the jury before stating my theme and asking for them to return a verdict of not guilty.

XIV. Summary (Return to TOC)

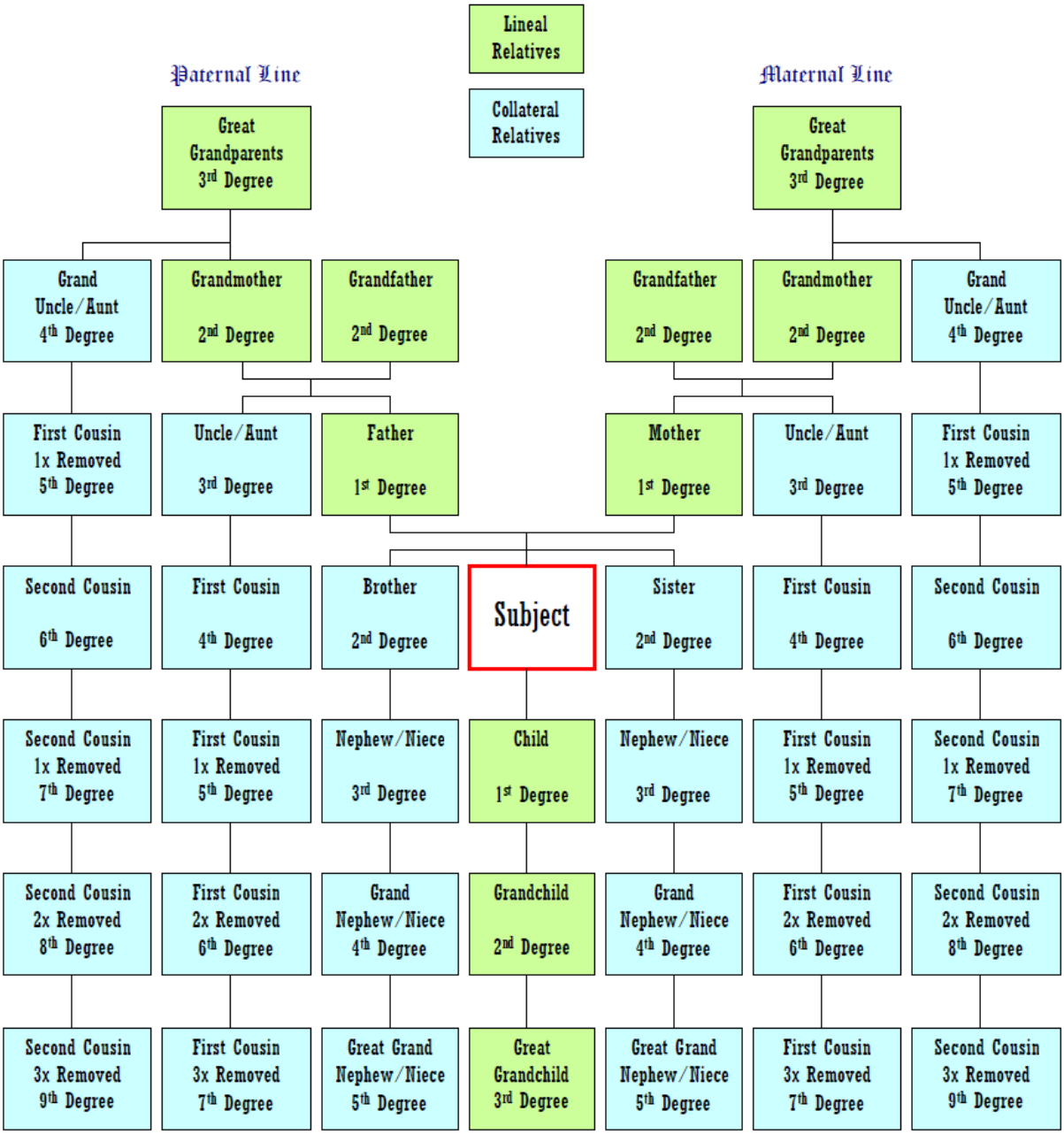
Prepare, research, consult, and try cases. Be objective about your case. Be courageous. Stand up to prosecutors, judges and court precedent, if you believe you are right. Make a complete record. I leave you with words of hope and inspiration from Joe Cheshire, an icon of excellence, and one of many to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

> "A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end."
>
> "The day may come when we are unable to muster the courage to keep fighting … but it is not this day."[62] ■

[61] Charles L. Becton, *Persuading Jurors by Using Powerful Themes*, TRIAL 63 (July 2001).
[62] THE LORD OF THE RINGS: RETURN OF THE KING (New Line Cinema 2003).

2021 Update to Jury Selection: The Art of Peremptories and Trial Advocacy

Exhibit A



2021 Update to Jury Selection: The Art of Peremptories and Trial Advocacy

Exhibit B

REFERENCES

1. *Voir Dire*: 15A-1211 to 1217
2. Jury Trial Procedure: 15A-1221 to 1243
3. Bifurcation: 15A-928
4. Jury Instruction Conference: Gen. R. of Prac. 21; 15A-1231

NEED

1. Witness List
2. Jury Profile
3. Jury Pool List
4. 12 Leaders/They save themselves

VOIR DIRE

(Humble/vulnerable; Introduce/tell about self/firm/defendant; Charge; Innocent/Not guilty; Use analogy)

EXPLAIN THE PROCESS

1. Search for truth: not CSI; often slow and deliberate.
2. Ideal jury: fair and impartial cross section of community.
3. Juror service: Pinnacle of public service; conscience of community; protect/preserve process.
4. You bring life experience and common sense.
5. May be a great juror in one case but not another.
6. Judge: gatekeeper/governor of trial. Will tell us all we need to know.
7. Length of trial.

GROUP QUESTIONS

(You, close friend, family member)

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

INDIVIDUAL QUESTIONS

21. Where live? Employment? Spouse? Family/children?
22. Any disability/physical/medical problems?
23. Any personal/business commitments?
24. Any specialized medical/psychological, legal/law enforcement, scientific/forensic training?

KEY POINTS

25. Supervise any employees?
26. Know anyone else on the jury panel/pool?
27. Ever serve as sworn LEO or similar capacity?
28. Military service?
29. Rescue squad/EMS/Fire Dept. service?
30. Teacher/Pastor/Church member/Government employee?
31. Serve on another jury this week?

PROCESS OF TRIAL

32. State goes first; defense goes last; do not decide; address judge's instruction.
33. Will be objections/interruptions based on rules of evidence/procedure? Matters of law.
34. DRAW THE STING/STRIP. Cover BAD/UNDISPUTED FACTS/AFFIRMATIVE DEFENSES or IRRELEVANT ISSUES/FACTS (weapons, bad injuries, criminal record, drugs, alcohol, relationships, etc.). The law recognizes certain defenses. Not every death, injury or bad act is a crime.
35. Race/gender/religion issues? (white victim/black defendant); Batson; *Prima facie* case (raise inference?)/Race-neutral reasons/Purposeful discrimination? Judge elicit?

See Reverse

36. Some witnesses are everyday folks. Will anyone give testimony of LEO any greater weight solely because he wears a uniform? Judge will charge on credibility of witnesses. Promise to follow law?
37. You may hear from expert witnesses. Can you consider?
38. The charge is _____. Judge will explain the law. Burden of proof is "beyond a reasonable doubt" (fully satisfies/entirely convinces). State must prove each and every element beyond burden. Promise to hold to burden? Same burden as Capital Murder.
39. A charge is not evidence.
40. Defendant presumed innocent. Defendant may choose, or not choose, to take the stand. He remains clothed with the presumption of innocence now and throughout this trial. Not a blank chalk board or level playing field. Will you now conscientiously apply the presumption of innocence to the Defendant?
41. Must you hear from the Defendant to follow the law? Must the Defendant "prove his innocence?" You are "not to consider" whether defendant testifies. PJI - Crim. 101.30

CONCLUSION

41. You have the right to hear and see all the evidence, voice your opinion, and have it respected by others.
42. You are to "reason together…but not surrender your honest convictions" as deliberate toward the end of reaching a verdict. You are "not to do violence to your individual judgment." "You must decide the case for yourself." N.C. Gen. Stat. §15A-1235.
43. Use your "sound and conscientious judgment." Be "firm but not stubborn in your convictions." PJI – Crim. 101.40.
44. Believe the opinions of other jurors are worthy of respect? Will you?
45. No crystal ball. Do you know of any reason this case may not be good for you? Any questions I haven't asked that you believe are important?

CHALLENGES FOR CAUSE

1. Grounds. N.C. Gen. Stat. § 15A-1212.
    a. Is incapable by reason of mental or physical infirmity.
    b. Has been or is a party, witness, grand juror, trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge.
    c. Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
    d. Is related by blood or marriage within the sixth degree to the defendant or victim of the crime.
    e. Has formed or expressed an opinion as to the guilt or innocence of defendant.
    f. Is presently charged with a felony.
    g. As a matter of conscience, would be unable to render a verdict with respect to the charge in accord with the law.
    h. For any other cause is unable to render a fair and impartial verdict.

BUZZ PHRASES

1. Substantially impair? Automatically vote? *State v. Cummings*, 326 N.C. 298 (1990); *State v. Chapman*, 359 N.C. 328 (2005).
2. Juror statement he could follow the law but defendant's failure to testify would "stick in the back of his mind" while deliberating should have been excused for cause. *State v. Hightower*, 331 N.C. 636 (1992).
3. "Stake-out" questions? Defense has a right to a full opportunity to make diligent inquiry into "fitness and competency to serve" and "determine whether there is a basis for a challenge for cause or a peremptory challenge." N.C. Gen. Stat. § 15A-1214(c). Ask: Can you consider? *State v. Roberts*, 135 N.C. App. 690 (1999). Can you set aside your opinion and reach decision solely upon evidence?
4. After telling jurors the law requires them to deliberate to try to reach a verdict, it is permissible to ask "if they understand they have the right to stand by their beliefs in the case." *State v. Elliott*, 344 N.C. 242 (1996).
5. "A juror can believe a person is guilty and not believe it beyond a reasonable doubt." Hence, it is error for D.A. to argue if a juror believes the defendant is guilty then he necessarily believes it BRD. *State v. Corbin*, 48 N.C. App. 194 (1980).

TALKING WITH JURORS ABOUT RACE

Emily Coward
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I. OVERVIEW

Racial bias in the jury system is a "familiar and recurring evil that, [] left unaddressed, [] risk(s) systemic injury to the administration of justice."[1] Discovering the racial attitudes of potential jurors during jury selection is an "important mechanism[] for discovering bias," and therefore a critical safeguard against this pernicious problem.[2] In this manuscript, I will address why, when, and how defense attorneys should discuss race and racial bias during voir dire, and explore the legal protections applicable to voir dire on the subject of race.

II. WHY SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

Champions of racial justice-oriented criminal defense—including ACLU Deputy Legal Director Jeffery Robinson, Jonathan Rapping of Gideon's Promise, Dean Andrea Lyon of Valaparaiso Law School, and legendary San Francisco Public Defender Jeff Adachi—agree that "[d]uring voir dire, defense counsel should [discuss] the problem of race bias and identify those jurors who appreciate its influence."[3] However, when I informally poll North Carolina criminal defense attorneys during sessions on this topic, I discover that very few of them have ever addressed race during voir dire. Reasons commonly cited for avoiding the topic of race during voir dire include the following:

- Concerns about making jurors uncomfortable; pessimism about jurors' willingness to discuss race honestly;
- Lack of experience and confidence discussing race generally;
- "That won't fly in my jurisdiction" (aka "the jurisdictional defense");

[1] *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 2017 WL 855760 (2017).
[2] *Id.*, slip op. at 16.
[3] Jonathan Rapping, *The Role of the Defender in a Racially Disparate System*, THE CHAMPION, July 2013, at 46, 50; *see also* Jeff Robinson & Jodie English, Confronting the Race Issue During Jury Selection, THE ADVOCATE, May 2008; Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); Jeff Adachi's Sample Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans.

- Concern that the lawyer's own racial, ethnic, or gender identity will interfere with their ability to connect with jurors on this topic;
- Lack of training/encouragement by supervisors/peers, "no one else is doing it";
- Worry that the judge will not permit this line of questioning;
- Unfamiliarity with legal protections applicable to voir dire on race;
- Perception that race is a historical phenomenon that is not relevant today;
- Impression that "color-blindness" is a norm that members of the bar are expected to uphold and a belief that all discussions of race amount to "playing the race card," which is frowned upon/discouraged.[4]

These worries are common. However, they are outweighed by the critical advantages that you can gain by exploring race with jurors during voir dire, which enables you to:

- Uncover views on race that will impact potential jurors' assessment of evidence[5];
- Discover which jurors appreciate that race matters and will be bold enough to discuss race thoughtfully during deliberations[6];
- Discover how potential jurors respond to uncomfortable topics;
- Legitimize bias as a topic worthy of consideration and give jurors implicit permission to consider and discuss race/racial bias themselves;
- Improve your ability to exercise intelligent strikes/challenges;
- Avoid relying on stereotypes yourself;
- "Make race salient"[7] and increase the likelihood that jurors will think critically about race and avoid reliance on stereotypes/bias.

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[4] *See* Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57 (discussing some of these concerns).

[5] Ira Mickenberg, Voir Dire and Jury Selection 2 (training material presented at 2011 North Carolina Defender Trial School).

[6] Discussing race during voir dire allows defenders to explore whether individuals are comfortable discussing issues of race and to consider striking "jurors who ignored the issue or who asserted that race did not matter." Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1526 (2013) (quoting L. Song Richardson, Professor of Law, Univ. of Iowa Coll. Of Law).

[7] Implicit bias researchers have found that when race issues are brought to the forefront of a discussion or "made salient," the influence of stereotypes and implicit biases on decision-making recendes. *See, e.g.,* Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009) (voir dire regarding racial bias appeared to diminish racial bias from assessments of guilt)l; Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not-Yet Post-Racial Society*, 91 N.C. L.Rev. 1555 (2013; Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U. C. Irvine L. Rev. 843, 861 (2015); JERRY

If you avoid the issue, you may increase the likelihood that bias will influence deliberation. You can address concerns about incompetence in this area by reviewing the resources listed below, watching demonstrations of voir dire on race, writing out your questions ahead of time, and practicing!

III. WHEN SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

Former CDPL Director Tye Hunter once asked a group of attorneys, "How do you know if you have a case that involves race?" We thought for a moment until we realized it was a trick question. The answer is, "If you have a case." In other words, you should be thinking about the ways in which racial or ethnic stereotypes or biases may harm your client in *every single case*, not simply the cases with obvious racial overtones, such as an interracial crime of violence. Since implicit and explicit racial biases can influence the likelihood that a juror will find your client guilty, you have a responsibility to keep people off your client's jury whose decision-making is particularly susceptible to such biases. If you fail to address race during jury selection, you are hamstrung in your ability to protect your client from racial bias on her/his jury.

Many, if not all, cases tried in front of a jury risk triggering racialized responses on the part of jurors. Here is a non-exhaustive list of scenarios in which a juror's racial attitudes or biases could influence their assessment of the evidence presented:

- All the key players in the case (the defendant, the victim, the police officers, and the witnesses) are Black;
- The defendant is married to a person of a different race;
- The defendant and the victim are White, and the arresting officer and witnesses are Black;
- The alleged crime occurred in a neighborhood that was recently the sight of a police shooting of an unarmed Black man;

KANG, IMPLICIT BIAS: A PRIMER FOR COURTS, NATIONAL CENTER FOR STATE COURTS 4–5 (National Center for State Courts 2009) (collecting evidence that "implicit biases are malleable and can be changed").

- The officer stopped your client, at least in part, on the basis of her presence in a "high crime area"?
- Your client is an activist who speaks out on issues of racial justice;
- Your client is a Latinx resident of a rural area that, until recently, was nearly 100% White, and now has a growing Latinx community;
- Your client is White and lost his job at the local police department for complaining about discrimination against White officers;
- Your client is the only Black person in the courtroom.

Each of these scenarios, none of which is particularly unusual, involve racial dynamics that could trigger biased responses on the part of people called upon to sit in judgment of your client. While you may not decide to voir dire on race in each of these cases, you should consider carefully the advantages of doing so in these, and all other, cases.

IV. HOW SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

There is no one correct approach to voir dire on race. The following tips will help you to develop your own unique approach to this subject.

A. PREPARING TO DISCUSS RACE WITH JURORS: A STEP-BY-STEP APPROACH

1. Reflection Questions to Use when Preparing Voir Dire

As with all other voir dire questions, voir dire on race needs to be "tailored to your factual theory of defense in each individual case."[8] Before drafting your questions about race, consider asking yourself the following questions. Your answers will help you identify what information you are seeking from potential jurors and craft questions aimed at eliciting that information. Imagine, for example, that your client is a Latino man charged with sexually assaulting a White woman.

a. What scares me about this case?

[8] Ira Mickenberg, Voir Dire and Jury Selection 6 (training material presented at 2011 North Carolina Defender Trial School).

e.g. That a jury might convict my client based on stereotypes of Latino men and Spanish-language speakers.

b. What biases or stereotypes could lead a juror to vote to convict my client?
e.g. That Latino men are more likely to sexually assault women. That White women who speak English are more credible than Latino men who speak Spanish.

c. What does a juror need to believe in order for us to win?
e.g. That eyewitness identification is unreliable and that cross-racial eyewitness identification is even more unreliable. That my client's ethnic identity and language doesn't make him any less credible than the victim.

d. What do I need to know about a juror to determine if they are open to our theory of the case?
e.g. Whether they are likely to jump to conclusions about the alleged behavior of my client because he is Latino, whether they are open to the possibility that a White victim could sincerely believe that she has identified her assailant when, in fact, she is mistaken.

2. Tools in your Toolkit

a. Move for extra time for voir dire. When you explore race with potential jurors, voir dire takes longer. For this reason, you may consider filing a motion for extra time to explore sensitive topics during voir dire to help prepare the court for a lengthier voir dire. Also, as you all know, feathers may get ruffled when you bring up the subject of race. As CDPL Staff Attorney Johanna Jennings has observed, if there's going to be an argument about your plan to discuss race during voir dire, there is some value to getting that argument over with before jury selection begins. By the time the jurors enter the courtroom, the tension over the topic has dissipated, and, hopefully, your right to discuss race with potential jurors will be recognized by both

the judge and the prosecutor. *See* Jeff Adachi's Sample Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans.

b. **Move for individual voir dire.** Potential jurors may be more willing to speak freely about a sensitive topic like race when questioned out of earshot of other jurors. Additionally, exploring race with potential jurors as a group may expose panelists to potentially disqualifying, prejudicial information. For these reasons, some attorneys who voir dire on race find it more effective to question jurors about racial attitudes individually. For an sample motion, *see* Johanna Jennings's Motion for Individual Voir Dire on Sensitive Subjects. Again, even if this motion is denied, filing and arguing it allows you to inform the judge and the prosecutor that you intend to get into the topic of race during voir dire before jury selection begins.

c. **Questionnaires.** Written questionnaires including questions about race may result in more revealing answers.[9] Additionally, written answers can serve as useful jumping off points for follow up questions during voir dire. Sample questionnaire questions on race can be found in ACLU Deputy Legal Director Jeffery Robinson's article, Jury Selection and Race: Discovering the Good, the Bad, and the Ugly.

d. **Request that Jurors be Shown a Video About Implicit Bias.** Recently, some courts have begun addressing the subject of implicit bias with potential jurors during jury orientation. If the potential jurors in your client's case see a video about implicit bias, you can ask about responses to the video during voir dire and decrease the likelihood of successful objections to your questions about race and bias. At least one North Carolina Superior Court Judge, Wake County Chief Resident Superior Court Judge Ridgeway, recently showed jurors an implicit bias

[9] Robert Hirschhorn. Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57, 60.

video created for jury orientation in the US District Court for the Western District of Washington. This video was shown at the request of defense attorneys Jonathan Broun and Edd K. Roberts III. The request, and the order granting the request, can be found in the materials associated with this session.

3. How to Raise the Subject

a. Creating the Conditions for a Discussion of Race. Approach the subject of race intentionally and carefully; it should not be your first topic. Potential jurors, like all other people, generally appreciate a heads up before they asked sensitive or probing questions. You may try to get the jurors to introduce the topic themselves, (for example, "other than guilt, can you think of a reason someone might panic when questioned by police?"), or explicitly state that you are shifting gears to talk about race.

It can be helpful to name the discomfort that everyone feels when discussing race in a group of strangers. Acknowledge that it often makes people uncomfortable, including yourself. You may consider answering your own question to show you're not asking them to do something you're unwilling to do yourself.[10] Reassure panelists that you're not looking for any specific answers, and that there are no wrong answers. You are simply asking questions to help you determine if they are the right juror for this case.

b. What sort of questions should you ask? Again, your questions will differ depending on the facts of the case and your theory of the case. It goes without saying that direct questions about bias (i.e. "will racial bias influence your decision making in this case?") are ineffective.[11] After you've created the conditions for panelists to feel comfortable opening up, focus

[10] Ira Mickenberg, Voir Dire and Jury Selection 10 (training material presented at 2011 North Carolina Defender Trial School).
[11] Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C.L.REV. 1555 (2013).

your questions on past, analogous behavior, stick with command superlative analog method, and avoid asking questions that will provoke defensiveness. For example, you may ask, "Tell us about the worst experience you (or someone close to you) ever had because someone stereotyped you (or someone close to you) bc of race." Additional sample questions can be found in Jeff Robinson, Jill Otake, and Corrie Yackulic, Jury Selection and Race: Discovering the Good, the Bad, and the Ugly, and *Raising Issues of Race in North Carolina Criminal Cases* Chapter 8, co-authored by Alyson A. Grine and Emily Coward. For a further discussion of how to construct such questions, see Ira Mickenberg, Voir Dire and Jury Selection 10 (training material presented at 2011 North Carolina Defender Trial School).

c. Responding to Potential Jurors' Statements about Race. When a juror answers a sensitive question relating to race or racial bias, thank them with almost over-the-top expressions of gratitude. This will encourage them to continue talking and send a message to other jurors that all views on race are welcome contributions to this conversation.[12] Only by encouraging frank comments on race will you succeed in uncovering jurors' views on race and discovering who to deselect from your client's jury. Remember, your goal in jury selection is not to change juror attitudes on race. Instead, it is to discover racial attitudes that can harm your client, and to remove people who hold such attitudes from your client's jury.[13]

[12] Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1549 (2013) (quoting from telephone interview with Jeff Robinson).

[13] "Who can honestly believe that opinions on issues as sensitive as race, opinions which have been formed over a person's lifetime, could be changed in the time allowed for jury selection in a criminal case? If we cannot change people's opinions, we'd better get busy finding out what those opinions are, how strongly they are held, and how they may impact a verdict in our case. The challenge in jury selection is to get people to talk as forthrightly as possible about race so we can maximize our ability to intelligently exercise preemptory challenges and challenges for cause. If we succeed in getting people to talk about race, we may not change race relations in the world, but we may change the verdict in our case." Jeff Robinson, Jill Otake, and Corrie Yackulic, Jury Selection and Race: Discovering the Good, the Bad, and the Ugly, Materials accompanying 2015 ABA Event.

V. LEGAL PROTECTIONS APPLICABLE TO VOIR DIRE ON RACE

A. LEGAL PROTECTIONS APPLICABLE TO VOIR DIRE GENERALLY

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors."[14] North Carolina appellate courts have recognized that voir dire serves two basic purposes: 1) helping counsel determine whether a basis for a challenge for cause exists, and 2) assisting counsel in intelligently exercising peremptory challenges.[15] As you prepare your voir dire questions on the subject of race, keep these at the forefront of your mind so that you are always ready to link your questions to the dual purposes of voir dire.

B. THE NORTH CAROLINA SUPREME COURT HAS RECOGNIZED A RIGHT TO VOIR DIRE ON RACE

The right to voir dire on race has a long history in North Carolina. As long ago as 1870, our state Supreme Court found reversible error where a trial judge disallowed voir dire on racial bias.[16] In fact, North Carolina jurisprudence on this topic predates that of the US Supreme Court. An early US Supreme Court opinion relied in part on the *McAfee* ruling in finding reversible error to refuse to inquire into possible racial bias where the defendant was Black and accused of an interracial crime of violence.[17] Both of these cases were decided before the U.S. Supreme Court cases clarifying the circumstances under which the right to voir dire on race is constitutionally protected. Those cases are discussed below.

C. WHAT ARE THE CONTOURS OF THE CONSTITUIONAL RIGHT TO VOIR DIRE ON RACE?

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[14] *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).
[15] *State v. Wiley*, 355 N.C. 592 (2002); *State v. Anderson*, 350 N.C. 152 (1999); *State v. Brown*, 39 N.C. App. 548 (1979); *see also Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) ("Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.").
[16] *State v. McAfee*, 64 NC 339, 340 (1870); *see also State v. Williams*, 339 N.C. 1, 18 (1994) (voir dire questions aimed at ensuring that "racially biased jurors [will] not be seated on the jury" are proper); *State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge retains discretion to determine the scope of questioning on racial bias).
[17] *Aldridge v. U.S.*, 283 U.S. 308 (1931).

In the recent US Supreme Court case of *Pena-Rodrigruez v. Colorado*, Justice Alito summarized the court's jurisprudence in this area as follows: "voir dire on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it....Thus, while voir dire is not a magic cure, there are good reasons to think that it is a valuable tool."[18] This is powerful language that you should be quoting any time your attempt to address race during voir dire is met with skepticism. Practice this response in advance: *"Your honor, according to Justices Alito, Thomas, and Roberts, voir dire on race is 'constitutionally required in some cases' and 'typically advisable in any case if the defendant requests it.' In this case it's constitutionally required because…."*. The section below will help you finish that sentence.

1) Reversible Error to Prohibit Voir Dire on Race when Case Involves "Special Factors"

A defendant has a constitutional right to ask questions about race on voir dire when "racial issues [are] inextricably bound up with the conduct of the trial."[19] For example, in *Ham v. South Carolina*, 409 U.S. 524 (1973), the U.S. Supreme Court held that a Black defendant, who was a civil rights activist and whose defense was that he was selectively prosecuted for marijuana possession because of his civil rights activity, was entitled to voir dire jurors about racial bias. In *Ristaino v. Ross*, 424 U.S. 589, 597 (1976), the Court held that the Due Process Clause does not create a general right in non-capital cases to voir dire jurors about racial prejudice, but such questions are constitutionally protected when cases involve "special factors," such as those presented in *Ham*.

In *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981), the Court held that trial courts must allow voir dire questions concerning possible racial prejudice against a defendant when the defendant is

[18] Slip op at 13 n.9, Alito, J., dissenting, (citing authorities) (emphasis added).
[19] *Ristaino v. Ross*, 424 U.S. 589, 597 (1976).

charged with a violent crime and the defendant and victim are of different racial or ethnic groups.[20]

Any time your attempt to voir dire on race is met with objection, you should articulate the "special factors" that make such questions necessary and constitutionalize your asserted entitlement to voir dire on race. As explained in *Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion), special factors triggering constitutional protection for the right to voir dire on race are present whenever "there is a showing of a 'likelihood' that racial or ethnic prejudice may affect the jurors."[21] Given that the boundaries of the "special factors" category defy precise definition, you should be able to articulate such factors whenever you have reason to believe that racial attitudes or racial bias could influence the evaluation of the evidence in your client's case.

2) What About in All Other Cases?

In other cases, courts have held that whether to allow questions about racial and ethnic attitudes and biases is within the discretion of the trial judge.[22] Undue restriction of the right to voir dire is error.[23] If you encounter a judge who believes the issue of race is not relevant to your client's case, link your questions to the purposes of voir dire and inform the judges that "juror racial bias is most likely to occur in run-of-the mill trials without blatantly racial issues."[24]

3) Lessons from *State v. Crump*, ___ N.C. App. ___ (2018) (PDR granted)

[20] *See also Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion) (defendants in capital cases involving interracial crime have a right under the Eighth Amendment to voir dire jurors about racial biases).
[21] *Id.*, (Brennan, J., concurring in part, dissenting in part).
[22] *See State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge allowed defendant to question prospective jurors about whether racial prejudice would affect their ability to be fair and impartial and allowed the defendant to ask questions of prospective White jurors about their associations with Black people; trial judge did not err in sustaining prosecutor's objection to other questions, such as "Do you belong to any social club or political organization or church in which there are no black members?" and "Do you feel like the presence of blacks in your neighborhood has lowered the value of your property . . . ?").
[23] *See State v. Conner*, 335 N.C. 618, 629 (1994) (holding that pretrial order limiting right to voir dire to questions not asked by court was error).
[24] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006).

The most recent North Carolina appellate opinion to address this subject is in *State v. Crump*, ___ N.C. App. ___ (2018) (PDR granted). That case, which is now before the North Carolina Supreme Court, involved a Black defendant involved in a shootout with the police. The Court of Appeals found no prejudicial error where the judge stopped the defendant from asking jurors about race; the defendant apparently couldn't tell he was shooting at police when he began shooting, and the court therefore concluded that questions on the racial issues and police shootings were not relevant. However, the Court of Appeals "expressed [] concern that the trial court flatly prohibited questioning as to issues of race and implicit bias during voir dire."[25] In another case, this inquiry could be proper or "even necessary."[26]

There are a few important takeaways from the *Crump* case, and there will doubtless be more to learn once the NC Supreme Court has ruled on it. First, the court confirmed that defendant does not need to exhaust his peremptory strikes to preserve this claim. Second, in this case, the defendant did not argue that, because of the presence of "special factors," he had a constitutional right to explore race during voir dire. For this reason, the appellate court considered only whether the trial court erred in rejecting the defendant's questions on race and police shootings as "stake out" questions, and did not engage in the more searching analysis of whether there were "special factors" present giving rise to a constitutional right to voir dire on race.

4) How Can you Protect Jurors Who Open up About Race During Voir Dire from Challenges for Cause?

What should you do if a juror opens up on the subject of race, expresses opinions that make you think they'd be a great juror in your client's case (for example, "I do have concerns that some police officers engage in racial profiling,"), and the prosecutor attempts to

[25] *State v. Crump*, ___ N.C. App. ___ (2018) (PDR granted). Moreover, the Court "caution[ed] trial courts to consider 'the importance of acknowledging issues of race and bias in voir dire.' Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*, 109 NW. U. L. REV. 163, 169 (2015)."
[26] *Id.*

strike them for cause? Attorney Elizabeth Gerber, Assistant Public Defender in Mecklenburg County, has written a helpful piece on protecting such jurors from challenges for cause. Her PD CORE Race Judicata newsletter on this topic is attached as part of the materials for this session. In short, Gerber suggests that you elicit a commitment on the part of the juror to keep an open mind, put their biases aside, and follow the law. Several North Carolina appellate opinions confirm that jurors expressing pro-prosecution biases are competent to serve, so long as they commit to basing their judgments on the facts of the case. "The operative question is not whether the prospective juror is biased but whether that bias is surmountable with discernment and an obedience to the law…".[27] Additional support for the argument that this principle should also apply to jurors who express concerns about law enforcement can be found in *Commonwealth v. Quinton K. Williams*, in which the Massachusetts Supreme Judicial Court recently held that a juror cannot be struck for cause for expressing her belief that "the system is rigged against young, African American males."

V. TALKING TO JURORS ABOUT RACE: ADDITIONAL RESOURCES AND PUBLICATIONS

Jury Selection and Race: Discovering the Good, the Bad, and the Ugly by Jeff Robinson. In this piece, ACLU Deputy Legal Director and veteran criminal defense attorney Jeff Robinson explains the importance of discussing race with jurors and includes several pages of specific questions and techniques that have proven effective at getting jurors to share opinions about this sensitive subject. It also contains a memorandum of law in support of a motion for individual voir dire, sample jury instructions on racial bias, and a sample legal argument in opposition to the introduction of a defendant's immigration status.

The Northwestern Law Review published three articles addressing the subject of discussing race with jurors. *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson* was written by St Louis County Deputy

[27] *State v. Smith*, 352 N.C. 531, 545 (2000). *See also State v. Cummings*, 361 N.C. 438, 453-56 (2007); *State v. Moses*, 350 N.C. 741, 757 (1999); *State v. McKinnon*, 328 N.C. 668, 676-77 (1991) *State v. Whitfield*, 310 N.C. 608 (1984).

District Public Defender Patrick C. Brayer. In it, he reflects on discussing race during voir dire in a trial that occurred just days after the killing of Michael Brown against the backdrop of protests on the streets and at the courthouse. In *Race Matters in Jury Selection*, Peter A. Joy argues that lawyers need to discuss the topics they fear the most – including race – during voir dire, and provides practical tips for doing so. He explains why it was essential for Patrick C. Brayer to talk about race with his jury and why it is important for all defense attorneys: "If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client." In *The #Ferguson Effect: Opening the Pandora's Box of Implicit Racial Bias in Jury Selection*, Sarah Jane Forman sounds a cautionary note by examining the uncertain state of research into the efficacy of discussing implicit bias with jurors and argues that "unless done with great skill and delicacy," this approach may backfire. Her piece reinforces the importance of careful preparation before diving into this challenging subject with potential jurors.

In *A New Approach to Voir Dire on Racial Bias* Cynthia Lee argues "that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection."

Chapter Eight of the SOG's Indigent Defense manual, *Raising Issues of Race in North Carolina Criminal Cases*, contains a section on addressing race during jury selection and at trial, with subsections on identifying stereotypes that might be at play in your trial, considering the influence of your own language and behavior on jurors' perceptions of your client, and reinforcing norms of fairness and equality.

Alyson Grine's North Carolina Bar Journal Article, *Questioning Prospective Jurors about Possible Racial or Ethnic Bias: Lessons From* Pena-Rodriguez v. Colorado, explores the Pena-Rodriguez decision in greater depth and helpfully dissects the case law governing the right to voir dire on race.

Mikah K. Thompson's *Bias on Trial: Toward and Open Discussion of Racial Stereotypes in the Courtroom*, helpfully collects resources and

analysis related to discussions of race and racial bias during jury selection and during other stages of the criminal process. Forthcoming, 2019 MICH. ST. L. REV. ___

JURY SELECTION QUESTIONS

(2-14-12)

I. GENERAL PURPOSE OF VOIR DIRE

"Voir dire examination serves the **dual purpose** of enabling the court to **select an impartial jury and assisting counsel in exercising peremptory challenges**." MuMin v Virginia, 500 U.S. 415, 431 (1991). The N.C. Supreme Court explained that a **similar "dual purpose"** was to ascertain whether **grounds exist for cause challenges** and to enable the lawyers to **intelligently exercise their peremptory challenges**. State v. Simpson, 341 N.C. 316, 462 SE2d 191, 202 (1995).

"A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror." State v. Harris, 338 N.C. 211, 227 (1994).

The purpose of voir dire and the exercise of challenges "is to eliminate extremes of partiality and to assure both…[parties]…that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. State v Hedgepath, 66 N.C. App. 390 (1984).

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

II. PROCEDURAL RULES of VOIR DIRE

Overall: The trial court has the duty to control and supervise the examination of prospective jurors. Regulation of the extent and manner of questioning during voir dire rests largely in the trial court's discretion. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995).

Group v. Individual Questions: "The prosecutor and the…defendant…may **personally question prospective jurors individually** concerning their competency to serve as jurors…." NCGS 15A-1214(c).

The trial judge has the discretion to limit individual questioning and require that certain general questions be submitted to the panel as a whole in an effort to expedite jury selection. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Same or Similar Questions: The defendant may not be prohibited from asking a question merely because the court [or prosecutor] has previously asked the same or similar question. N.C.G.S. 15A-1214(c); State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Leading Questions: Leading questions are permitted during jury voir dire [at least by the prosecutor]. State v. Fletcher, 354 N.C. 455, 468, 555 S.E.2d 534, 542 (2001).

Re-Opening Voir Dire: N.C.G.S. 15A-1214(g) permits the trial judge to reopen the examination of a prospective juror if, at any time before the jury has been impaneled, it is discovered that the juror has made an incorrect statement or that some other good reason exists. Whether to reopen the examination of a passed juror is within the judge's discretion. Once the trial court reopens the examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse such a juror. State v. Womble, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996). For example, in State v. Wiley, 355 N.C. 592, 607-610 (2002), the prosecution passed a "death qualified" jury to the defense. During defense questioning, a juror said that he would automatically vote for LWOP over the death penalty. The trial judge re-opened the State's questioning of this juror and allowed the prosecutor to remove the juror for cause.

Preserving Denial of Challenges for Cause: In order to preserve the denial of a challenge for cause for appeal, the defendant must adhere to the following procedure:

1) The defendant must have exhausted the peremptory challenges available to him;
2) After exhausting his peremptory challenges, the defendant must move (orally or in writing) to renew a challenge for cause that was previously denied if he either:
    a) Had peremptorily challenged the juror in question, or
    b) Stated in the motion that he would have peremptorily challenged the juror if he had not already exhausted his peremptory challenges; and
3) The judge denied the defendant's motion for renewal of his cause challenge.

N.C.G.S 15A-1214(h) and (i).

Renewal of Requests for Disallowed Questions: Counsel may renew its requests to ask questions that were previously denied. Occasionally, a trial court may change its mind. See, State v. Polke, 361 N.C. 65, 68-69 (2006); State v. Green, 336 N.C. 142, 164-65 (1994).

III. SUBSTANTIVE AREAS OF INQUIRY

Accomplice Liability: Prosecutor properly asked about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule by the following "non-stake-out" questions in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"

"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"

"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"

Accomplice/Co-Defendant (or Interested Witness) Testimony:

It is proper to ask about prospective jurors' abilities to follow the law with respect to interested witness testimony…When an accomplice is testifying for the State, the accomplice is considered an interested witness, and his testimony is subject to careful [or the highest of] scrutiny. State v. Jones, 347 N.C. 193, 201-204 (1997). See, NCPI-Crim. 104.21, 104.25 and 104.30.

The following were proper questions (asked by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?

[According to the N.C. Supreme Court, **these 3 questions were proper and not stake-out questions**…They were designed to determine if jurors could follow the law and be impartial and unbiased. Jones, 347 N.C. at 204. The prosecutor accurately stated the law. An accomplice testifying for the State is considered an interested witness and his testimony is subject to careful scrutiny. The jury should analyze

such testimony in light of the accomplice's interest in the outcome of the case. If the jury believes the witness, it should give his testimony the same weight as any other credible witness. Jones, 347 N.C. at 203-204.]

You may hear testimony from a witness who is testifying pursuant to a plea agreement. This witness has pled guilty to a lesser degree of murder in exchange for their promise to give truthful testimony in this case. Do you have opinions about plea agreements that would make it difficult or impossible for you to believe the testimony of a witness who might testify under a plea agreement? The prosecutor's inquiry merely (and properly) sought to determine whether a plea agreement would have a negative effect on prospective jurors' ability to believe testimony from such witnesses. State v. Gell, 351 N.C. 192, 200-01 (2000).

Age of Juror and Effects of It: N.C.G.S. 9-6.1 allows jurors age 72 years or older to request excusal or deferral from jury service but it does not prohibit such jurors from serving. In State v. Elliott, 360 N.C. 400, 408 (2006), the Court recognized that it is sensible for trial judges to consider the effects of age on the individual juror since the adverse effects of growing old do not strike all equally or at the same time. [Based on this, it appears that the trial court and the parties should be able to inquire into the effects of aging with older jurors.]

Circumstantial Evidence/Lack of Eyewitnesses:

Prosecutor informed prospective jurors that *"only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer."* He then asked: *"Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?"* The court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

It was proper in first degree murder case for State to tell the jury that they will be relying upon circumstantial evidence with no witnesses to the shooting and then ask them if that will cause any problems. State v Clark, 319 N.C. 215 (1987).

Child Witnesses: Trial judge erred in not allowing the defendant to ask prospective jurors "*if they thought children were more likely to tell the truth when they allege sexual abuse."* State v Hatfeld, 128 N.C. App. 294 (1998)

Defendant's Prior Record: In State v Hedgepath, 66 N.C. App. 390 (1984), the trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow judge's instructions that they are to consider defendant's prior record only for purposes of determining credibility.

Defenses (i.e., Specific Defenses): 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).

a) Accident: 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).

b) Insanity: It was reversible error for trial court to fail to dismiss juror who indicated he was not willing to return a verdict of NGRI even though defendant introduced evidence that would satisfy them that the defendant was insane at the time of the offense. State v Leonard, 295 N.C. 58,62-63 (1978); see also Vinson.

c) Mental Health Defense: The defendant has the right to question jurors about their attitudes regarding a potential insanity or lack of mental capacity defense, including questions about: "*courses taken and books read on psychiatry, contacts with psychiatrist or persons interested in psychiatry, members of family receiving treatment, inquiry into feelings on insanity defense and ability to be fair."* U.S. v Robinson, 475 F.2d 376 (D.C. Cir. 1973); U.S. v Jackson, 542 F.2d 403 (7th Cir. 1976).

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

Drug-Related Context of Non-Drug Offense: In a prosecution for common law robbery and assault, there was no error in allowing prosecutor (after telling prospective jurors that a proposed sale of marijuana was involved) to inquire into whether any of them would be unable to be fair and impartial for that reason. State v Williams, 41 N.C. App. 287, disc. rev. denied, 297 N.C. 699 (1979).

The following was not a "stake-out" question and was a proper inquiry to determine the impartiality of the jurors: "*Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these people were out looking for drugs and involved in the drug environment, and became victims as a result of that?"* State v Teague, 134 N.C. App. 702 (1999)

Eyewitness Identification: The following prosecutor's question was upheld as proper (and non-stake-out): *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

Expert Witness: *"If someone is offered as an expert in a particular field such as psychiatry, **could** you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was not an attempt to stake out jurors.

It was not an abuse of discretion for the judge to prevent defense counsel from asking jurors *"whether they **would** automatically reject the testimony of mental health professionals."* This was apparently a stake out question. State v. Neal, 346 N.C. 608, 618 (1997).

Focusing on "The Issue":
In a child homicide case, the prosecutor was allowed to ask a prospective juror *"if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

Following the Law: "The right to an impartial jury contemplates that each side will be allowed to make inquiry into the ability of prospective jurors to follow the law. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

If a juror's answers about a fundamental legal concept (such as the presumption of innocence) demonstrated either **confusion about**, or **a fundamental misunderstanding** of the principles…or **a simple reluctance to apply** those principles, its effect on the juror's inability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Hold-Out Jurors During Deliberations: Generally, questions designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to impermissible "stake-out" questions. State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001).

It is permissible, however, to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the right to stand by their beliefs in the case."* (Note that, if this permissible question is followed by the question, *"And would you do that?,"* this crosses the line into an impermissible stake-out question.) State v. Elliott, 344 N.C. 242, 262-63, 475 S.E.2d 202, 210 (1997); see also, State v. Maness, 363 N.C. 261 (2009).

Where defense counsel had already inquired into whether jurors could follow the law as specified in N.C.G.S. 15A-1235 by asking if they could *"independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to*

to respect his opinion," the trial judge properly limited a redundant question that was based on an Allen jury instruction. (N.C.P.I.-Crim. 101-40). State v. Maness, 363 N.C. 261 (2009).

Identifying Family Members: Not error to allow the prosecutor during jury selection to identify members of the murder victim's family who are in the courtroom. State v Reaves, 337 N.C. 700 (1994).

Intoxication: Proper for Prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. *"If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict."* State v McKoy, 323 N.C. 1 (1988).

Law Enforcement Witness Credibility: If a juror would automatically give enhanced credibility or weight to the testimony of a law enforcement witness (or any particular class of witness), he would be excused for cause. State v. Cummings, 361 N.C. 438, 457-58 (2007); State v. McKinnon, 328 N.C. 668, 675-76, 403 S.E.2d 474 (1991).

Legal Principles: Defense counsel may question jurors to determine whether they completely understood the principles of **reasonable doubt** and **burden of proof**. Once counsel has fully explored an area, however, the judge may limit further inquiry. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"The right to an impartial jury contemplates that each side will be allowed to make ***inquiry into the ability of prospective jurors to follow the law***. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

> **Defendant Not Testifying**: It is proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense. A court, however, may disallow questioning about the defendant's failure to offer evidence in his defense. State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994).
>
> Court erred in denying the defendant's challenge for cause of juror who repeatedly said that the defendant's failure to testify would stick in the back of my mind while he was deliberating (in response to question *"whether the defendant's failure to testify would affect his ability to give him a fair trial"*). State v Hightower, 331 N.C. 636 (1992).
>
> **Presumption of Innocence and Burden of Proof**: A juror gave conflicting and ambiguous answers about whether she could presume the defendant innocent and whether she would require him to prove his innocence. The Supreme Court awarded the defendant a new trial because the trial judge denied the defendant's challenge for cause. The Supreme Court said that **the juror's answers**

demonstrated either confusion about, or a fundamental misunderstanding of the principles of the presumption of innocence, or a simple reluctance to apply those principles. Regardless whether the juror was confused, had a misunderstanding, or was reluctant to apply the law, its effect on her ability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Pretrial Publicity: Inquiry should be made regarding the effect of the publicity upon jurors' ability to be impartial or keep an open mind. Mu'min, 500 U.S. 415, 419-421, 425 (1991). Although "Questions about the content of the publicity…might be helpful in assessing whether a juror is impartial," they are not constitutionally required. Id. at 425. The constitutional question is *whether jurors had such fixed opinions that they could not be impartial*, not whether or what they remembered about the publicity. It is not required that jurors be totally ignorant of the facts and issues involved. Id., 500 U.S. at 426 and 430.

It was deemed proper for a prosecutor to describe some of the "uncontested" details of the crime before he asked jurors whether they knew or read anything about the case. State v. Nobles, 350 N.C. 483, 497-498, 515 S.E.2d 885, 894-895 (1999) (ADA noted that defendant was charged with discharging a firearm into a vehicle occupied by his wife and three small children). It was not a "stake-out" question.

Racial/Ethnic Background: Trial courts must allow questions regarding whether any jurors might be prejudiced against the defendant because of his race or ethnic group where the defendant is accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups. (If this criteria is not met, racial and ethnic questions are discretionary.) Rosales-Lopez v. United States, 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). Such questions must be allowed in capital cases involving a charge of murder of a white person by a black defendant. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986).

Sexual Offense/Medical Evidence: In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was a proper, non-stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003).

Sexual Orientation: Proper for prosecutor to question jurors regarding prejudice against homosexuality for the purpose of determining whether they could impartially consider the evidence knowing that the State's witnesses were homosexual. State v Edwards, 27 N.C. App. 369 (1975).

IV. IMPROPER QUESTIONS OR IMPROPER PURPOSES

Answers to Legal Questions: Counsel should not "fish" for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). [Does this mean can counsel get judge to give preliminary instructions before voir dire, and then ask questions about the law?]

Arguments that are Prohibited: A lawyer (even a prosecutor) may not make statements during jury selection that would be improper if they were later argued to the jury. State v. Hines, 286 N.C. 377, 385, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to make improper statements during voir dire about how the death penalty is rarely enforced).

Confusing and Ambiguous Questions: Hypothetical questions so phrased to be ambiguous and confusing are improper. For example, *"Now, everyone on the jury is in favor of capital punishment for this offense…Is there anyone on the jury, because the nature of the offense, feels like you might be a little bit biased or prejudiced, either consciously or unconsciously, because of the type or the nature of the offense involved; is there anyone on the jury who feels that they would be in favor of a sentence other than death for rape?"* (see, Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975)); or, *"Would you be willing to be tried by one in your present state of mind if you were on trial in this case?"* State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Inadmissible Evidence: An attorney may not ask prospective jurors about inadmissible evidence. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Incorrect Statements of Law: Questions containing incorrect or inadequate statements of the law are improper. State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

Indoctrination of Jurors: Counsel should not engage in efforts to indoctrinate jurors and counsel should not argue the case in any way while questioning jurors. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). In order to constitute an attempt to indoctrinate potential jurors, the improper question would be aimed at indoctrinating jurors with views favorable to the [questioning party]…or…advancing a particular position. State v. Chapman, 359 N.C. 328, 346 (2005). An **example of a non-indoctrinating question** is: *Can you imagine a set of circumstances in which…your personal beliefs conflict with the law? In that situation, what would you do?* See Chapman.

Overbroad and General Questions: *"Would you consider, if you had the opportunity, evidence about this defendant, either good or bad, other than that arising from the incident here?"* This question was overly broad and general, and not proper for voir dire. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Rapport Building: Counsel should not visit with or establish "rapport" with jurors. State v. Phillips, 300 NC 678, 268 SE2d 452 (1980).

Repetitive Questions: The court may limit repetitious questions. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975). Where defense counsel had already inquired into whether jurors could *"independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. State v. Maness, 363 N.C. 261 (2009).

Stake-Out Questions:

"Staking out" jurors is improper. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995). "Staking out" is seen as an attempt to indoctrinate potential jurors as to the substance of defendant's defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"Staking out" defined***: Questions that tend to commit prospective jurors to a specific future course of action in the case***. Chapman, 359 N.C. 328, 345-346 (2005).

Counsel may not pose hypothetical questions designed to elicit in advance what the jurors' decision will be under a certain state of the evidence or upon a given state of facts...The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts. State v Vinson, 287 N.C. 326, 336-37 (1975), death sentence vacated, 428 U.S. 902 (1976).

Examples of Stake-Out Questions:

1) "*Is there anyone on the jury who feels that because the defendant had a gun in his hand, no matter what the circumstances might be, that if that-if he pulled the trigger to that gun and that person met their death as result of that, that simply on those facts alone that he must be guilty of something?"* Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

2) Improper "reasonable doubt" questions:

a) *What would your verdict be if the evidence were evenly balanced?*

b) What would your verdict be if you had a reasonable doubt about the defendant's guilt?

c) What would your verdict be if you were convinced beyond a reasonable doubt of the defendant's guilt? State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

d) The judge will instruct you that *"you have to find each element beyond a reasonable doubt. Mr. [Juror], if you hear the evidence that comes in and find three elements beyond a reasonable doubt, but you don't find on the fourth element, what would your verdict be?"* State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 796 (2011)

3) *Whether you would vote for the death penalty […in a specified hypothetical situation…]?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

4) *If you find from the evidence a conclusion which is susceptible to two reasonable interpretations; that is, one leading to innocence and one leading to guilt, will you adopt the interpretation which points to innocence and reject that of guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

5) *If it was shown…that the defendant couldn't control his actions and didn't know what was going on…,would you still be inclined to return a verdict which would cause the imposition of the death penalty?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

6) *If you are satisfied from the evidence that the defendant was not conscious of his act at the time it allegedly was committed, would you still feel compelled to return a guilty verdict?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

7) *If you are satisfied beyond a reasonable doubt that the defendant committed the act but you believed that he did not intentionally or willfully commit the crime, would you still return a guilty verdict knowing that there would be a mandatory death sentence?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

8) Improper Burden of Proof Questions:

a) *If the defendant chose not to put on a defense, would you hold that against him or take it as an indication that he has something to hide?*

b) *Would you feel the need to hear from the defendant in order to return a verdict of not guilty?*

c) *Would the defendant have to prove anything to you before he would be entitled to a not guilty verdict?* State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980), or

d) *Would the fact that the defendant called fewer witnesses than the State make a difference in your decision as to her guilt?* State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986).

9) Improper Insanity Questions:

a) *Do you know what a dissociative period is and do you believe that it is possible for a person not to know because some mental disorder where they actually are, and do things that they believe they are doing in another place and under circumstances that are not actually real?*

b) *Are you thinking, well if the defendant says he has PTSD, for that reason alone, I would vote that he is guilty?* State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

10) Improper "Hold-out" Juror Questions:

a) A question designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to an impermissible "stake-out." State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001). For example, *"if you personally do not think that the State has proved something beyond a reasonable doubt*

and the other 11 jurors have, could you maintain the courage of your convictions and say, they've not proved that?"

b) It is permissible to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the rights to stand by their beliefs in the case."* If this permissible question is followed by the question, *"And would you do that?"* this crosses the line into an impermissible stake-out question. State v. Elliott, 344 N.C. 242, 263, 475 S.E.2d 202, 210 (1996).

c) The following hypothetical inquiry was deemed an improper stake-out question: "*If you were convinced that life imprisonment without parole was the appropriate penalty after hearing the facts, the evidence, and the law, could you return a verdict of life imprisonment without parole even if you fellow jurors were of different opinions?"* State v. Maness, 363 N.C. 261, 269-70 (2009).

11) Improper Questions about Witness Credibility:

a) *"What type of facts would you look at to make a determination if someone's telling the truth?"*

b) In determining whether to believe a witness, *"would it be important to you that a person could actually observe or hear what they said [that] they have [seen or heard] from the witness stand?"* State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 793-94 (2011).

c) 11) "*Whether you **would** automatically reject the testimony of mental health professionals."* State v. Neal, 346 N.C. 608, 618 (1997).

Examples of NON-Stake Out Questions:

1) Prosecutor asked the jurors *"if they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor."* The Supreme Court stated, "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994)

2) Prosecutor informed prospective jurors that *"only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer."* He then asked: *Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?* Court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

3) *"Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these people were out looking for drugs and involved in the drug environment, and became victims as a result of that?"* State v Teague, 134 N.C. App. 702 (1999).

4) *"If someone is offered as an expert in a particular field such as psychiatry, could you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was NOT an attempt to stake out jurors.

5) Proper "non-stake-out" questions (by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 204, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) *After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?*

6) Proper "non-stake-out" questions asked by prosecutor about views on death penalty from State v. Chapman, 359 N.C. 328, 344-346 (2005):

a) As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?

b) Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?

c) Can you imagine a set of circumstances in which…your personal beliefs [for or against the death penalty] conflict with the law? In that situation, what would you do?

A federal court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005), explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror* ***could find*** *(instead of would find)* ***that certain facts call for the imposition of life or death****, or 2) whether a juror* ***could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

7) The prosecutor's question, *"Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* was NOT a stake-out attempt to get jurors to not consider defendant's appearance and humanity in capital sentencing hearing. Chapman, 359 N.C. 328, 346-347 (2005).

8) Prosecutor properly asked "non-stake-out" questions about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

a) *"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"*

b) *"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"*

c) *"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"*

9) In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was NOT a stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003) (The court said that the following question would have been a stake-out if the ADA had asked it, *"If there is medical evidence stating that some incident has occurred, will you find the defendant guilty beyond a reasonable doubt*).

10) In a case involving eyewitness identification, the prosecutor asked: *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The Court said that this question did NOT cause the jurors to commit to a future course of action. The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

11) In a child homicide case, the prosecutor was allowed to ask a prospective juror *"if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

JURY SELECTION IN DEATH PENALTY CASES

I. GENERAL PRINCIPLES

Both the defendant and the state have the right to question prospective jurors about their views on capital punishment…The extent and manner of the inquiry by counsel lies within the trial court's discretion and will not be overturned absent an abuse of discretion. State v. Brogden, 334 N.C. 39, 430 S.E.2d 905, 908 (1993).

A defendant on trial for his life should be given great latitude in examining potential jurors. State v Conner, 335 N.C. 618 (1995).

[C]ounsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted).

"Part of the Sixth Amendment's guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors…Voir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored." Morgan v Illinois, 504 U.S. 719, 729, 733 (1992)

Voir dire must be available ***"to lay bare the foundation"*** of a challenge for cause against a prospective juror. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so. Morgan, 504 U.S. at 733-34.

In voir dire, "what matters is how…[the questions regarding capital punishment] might be understood-or misunderstood-by prospective jurors." For example, "a general question as to the presence of reservations [against the death penalty] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases." One cannot assume the position of a venireman regarding this issue absent his own unambiguous statement of his beliefs. Witherspoon, 391 U.S. at 515, n. 9.

The trial court **must allow a defendant to go beyond the standard "fair and impartial" question**: "As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed...It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." Morgan, 504 U.S. at 735-36.

It is not necessary for the trial court to explain or **for a juror to understand the process of a capital sentencing proceeding before the juror can be successfully challenged for his answers to questions.** An **understanding of the process should not affect one's beliefs regarding the death penalty**. Simpson, 341 N.C. 316, 462 SE2d 191, 202, 206 (1995).

II. Death Qualification: General Opposition to Death Penalty Not Enough

Under the "impartial jury" guarantee of the Sixth Amendment, death penalty jurors may not be excused "for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"…, or "that there are some kinds of cases in which they would refuse to recommend capital punishment. Witherspoon, 391 U.S. at 522, 512-13.

The Supreme Court recognized that "A man who opposes the death penalty…can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror." Id., 391 U.S. at 519.

"Not all [jurors] who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors…so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137, 149 (1986). [Note that the Court in Lockhart reaffirmed its position that death-qualified juries are not conviction-prone, and it is constitutional for a death-qualified jury to decide the guilt/innocence phase. The Court rejected the "fair-cross-section" argument against death-qualified juries deciding guilt.]

"[A] ***juror is not automatically excluded from jury service merely because that juror may have an opinion*** about the propriety of the death penalty." State v. Elliott, 360 N.C. 400, 410 (2006). General opposition to the death penalty will not support a challenge for cause for a potential juror who will "conscientiously apply the law to the facts adduced at trial." Such a **juror may be properly excluded "if he refuses to follow the statutory scheme and truthfully answer the questions** put by the trial judge." State v. Brogden, 430 S.E.2d at 907-08 (1993)(citing Witt, Adams v. Texas, and Lockhart).

III. Death Qualification Rules: Witherspoon and Witt Standards

The State may excuse jurors who make it **"unmistakably clear" that (1) they would "automatically vote against the death penalty" no matter what the facts of the case were, or (2) "their attitude about the death penalty would prevent them from making an impartial decision" regarding the defendant's guilt.** Witherspoon, 391 U.S. at 522, n. 21 (1968).

A...prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be **willing to consider all of the penalties** provided by state law, and that he **not be irrevocably committed against the penalty of death regardless of the facts and circumstances**..." that might emerge during the trial. Witherspoon v Illinois, 391 U.S. 510, 523 n.21 (1968).

The proper standard for excusing a prospective juror for cause because of his views on capital punishment is: **"Whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction or his oath."** Wainwright v. Witt, 469 U.S. at 424.

Note that **considerable confusion regarding the law** on the part of the juror could amount to **"substantial impairment."** Uttecht v. Brown, 551 U.S. 1, 127. S.Ct. 2218, 167 L.Ed.2d 1014, 1029 (2007).

Prospective jurors may not be excused for cause simply because of the possibility "of the **death penalty may affect** what their **honest judgment of the facts** will be or **what they may deem to be a reasonable doubt**." The fact that the possible imposition of the death penalty would **"affect" their deliberations by causing them to be more emotionally involved or to view their task with greater seriousness** is not grounds for excusal. The same rule against exclusion for cause applies to **jurors who could not confirm or deny** that their **deliberations would be affected** by their views about the death penalty or by the possible imposition of the death penalty. Adams v. Texas, 448 U.S. 38, 49-50 (1980).

The State may excuse for cause a juror if he affirmatively answers the following question: **"Is your conviction [against the death penalty] so strong that you cannot take an oath [to fairly try this case and follow the law], knowing that a possibility exists in regard to capital punishment."** Lockett v. Ohio, 438 U.S. 586, 595-96 (1978). This ruling was based on the impartiality prong of the Witherspoon standard (i.e., their attitudes toward the death penalty would prevent them from making an **impartial decision as to the defendant's guilt**.)

The N.C. Supreme Court has upheld the removal of potential jurors **who equivocate** or who state that although they believe generally in the death penalty, they indicate that they personally **would be unable or would find it difficult to vote for the**

death penalty. Simpson, 341 N.C. 316, 462 S.E.2d 191, 206 (1995); State v. Gibbs, 335 NC 1, 436 SE2d 321 (1993), cert. denied, 129 L.Ed.2d 881 (1994).

The following questions **by the prosecutor** were found to be proper:

1) [Mr. Juror…], *how do you feel about the death penalty, sir, are you opposed to it or [do] you feel like it is a necessary law?*

2) *Do you feel that you could be part of the legal machinery which might bring it about in this particular case?* State v Willis, 332 N.C. 151, 180-81 (1992).

IV. Rehabilitation of Death Challenged Juror

It is not an abuse of for the trial court to deny the defendant the chance to rehabilitate a juror **who has expressed clear and unequivocal** opposition to the death penalty in response to questions asked by the prosecutor and judge **when further questioning by defendant would not have likely produced different answers**. Brogden, 334 N.C. 39, 430 SE2d 905, 908-09 (1993); see also State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992). [In Brogden, a juror said that he could consider the evidence, was not predisposed either way, and could vote for death in an appropriate case. The same juror also said his feelings about the death penalty would "partially" or "to some extent" affect his performance as a juror. The trial court **erroneously** denied the defendant the opportunity to rehabilitate this juror.]

It is **error** for a trial court to enter "**a general ruling, as a matter of law," a defendant will never be allowed to rehabilitate** a juror when the juror's answers…have indicated that the **juror may be unable to follow the law** and fairly consider the possibility of recommending a sentence of death. State v. Green, 336 N.C. 142, 161 (1994) (based on Brogdon).

V. Life Qualifying Questions: Morgan v. Illinois

"If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts were?" Morgan, 504 U.S. at 723. A juror who will automatically vote for the death penalty in every case will fail to follow the law about considering aggravating and mitigating evidence, and has already formed an opinion on the merits of the case. Id. at 504 U.S. at 729, 738.

"Clearly, the extremes must be eliminated-i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence." Morgan, 504 U.S. at 734, n. 7.

"General fairness and follow the law questions" are not sufficient. **A capital defendant is entitled to inquire and ascertain a potential juror's predeterminations regarding the imposition of the death penalty.** Morgan, 504 U.S. at 507; State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 840 (1994).

[For a good summary of Morgan, see U.S. v. Johnson, 366 F.Supp. 2d 822, 826-831 (N.D. Iowa 2005).]

Proper Questions:

1) ***As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?*** Chapman, 359 N.C. 328, 344-345 (2005).

2) ***Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?***

[According to the Supreme Court, these general questions (asked by the prosecutor, i.e., #1 and #2 herein) did not tend to commit jurors to a specific future course of action. Instead, the questions helped to clarify whether the jurors' personal beliefs would substantially impair their ability to follow the law. Such inquiry is not only permissible, it is desirable to safeguard the integrity of a fair and impartial jury" for both parties. Chapman, 359 N.C. 328, 344-345 (2005).]

3) ***Can you imagine a set of circumstances in which…your personal beliefs*** *[…for or against the death penalty…]* ***conflict with the law? In that situation, what would you do?***

[While a party may not ask questions that tend to "stake out" the verdict a prospective juror would render on a particular set of facts…, **counsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence**….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted)…..The Supreme Court said that, although the prosecutor's questions (numbered 1-3 above) were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).]

4) ***Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994)

5) ***Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994). [The gist of the above two questions (numbered 4 and 5) was to determine whether the juror was willing to consider a life sentence in the appropriate circumstances or would automatically vote for death upon conviction. Conner, 440 SE2d at 841.]

6) ***If at the first stage of the trial you voted guilty for first-degree murder, do you think that you could at sentencing consider a life sentence or would your feelings about the death penalty be so strong that you could not consider a life sentence?*** State v Conner, 335 N.C. 618, 643-45 (1994) (referring to State v Taylor).

7) ***If you had sat on the jury and had returned a verdict of guilty, would you then presume that the penalty should be death?*** State v Conner, 335 N.C. 618, 643-45 (1994). [Referring to questions used in State v Taylor, 304 N.C. at 265, would now be acceptable). Also approved in State v. Ward, 354 N.C. 231, 254, 555 S.E.2d 251, 266 (2001) when asked by the prosecutor.]

8) ***If the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned a verdict of guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?*** State v Conner, 335 N.C. 618, 643-45 (1994). [The Court recognized that questions (numbered here as 6-8) that were deemed inappropriate in State v Taylor, 304 N.C. at 265, would now be acceptable.]

9) A capital defendant **must be allowed** to ask, ***"whether prospective jurors would automatically vote to impose the death penalty in the event of a conviction."*** State v. Wiley, 355 N.C. 592, 612 (2002) (citing Morgan 504 U.S. 719, 733-736).

Improper Questions:

1) Improper questions due to "**form**" (according to Simpson, 341 N.C. 316, 462 S.E.2d 191, 203 (1995)):

a) *Do you think that a sentence to life imprisonment is a sufficiently harsh punishment for someone who has committed cold-blooded, premeditated murder?*

b) *Do you think that before you would be willing to consider a death sentence for someone who has committed cold-blooded, premeditated murder, that they would have to show you something that justified that sentence?*

2) Questions that were **argumentative, incomplete statement of the law, and "stake-outs"** are improper. Simpson, 341 N.C. at 339-340.

3) The following question was properly disallowed under Morgan because it was **overly broad and called for a legislative/policy decision**: *Do you feel that the death penalty is the appropriate penalty for someone convicted of first-degree murder?* Conner, 335 N.C. at 643.

4) Defense counsel was not allowed to ask the following questions because they were **hypothetical stake-out questions** designed to pin down jurors regarding the kind of fact scenarios they would deem worthy of LWOP or the death penalty:

a) *Have you ever heard of a case where you thought that LWOP should be the appropriate punishment?*

b) *Have you ever heard of a case where you thought that the death penalty should be the punishment?*

c) *Whether you could conceive of a case where LWOP ought to be the punishment? What type of case is that?* State v. Wiley, 355 N.C. 592, 610-613 (2002).

Case-Specific Questions under Morgan:

The court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005) addressed the issue of whether Morgan allows for case-specific questions (i.e., questions that ask whether jurors can consider life or death in a case involving stated facts). The court decided that Morgan did not preclude (or even address) case-specific questions. 366 F.Supp. 2d at 844-845. ***The essence of the Supreme Court's decision in Morgan was that, in order to empanel a fair and impartial jury, a defendant must be afforded the opportunity to question jurors about their ability to consider life and death sentences based on the facts and law in a particular case rather than automatically imposing a particular sentence no matter what the facts were.*** Therefore, the court in Johnson found that case-specific questions (other than stake-out questions) are appropriate under Morgan. 366 F.Supp. 2d at 845-846.

In fact case-specific questions may be constitutionally required since a prohibition on such questions could impede a party's ability to determine whether jurors are unwaveringly biased for or against a death sentence. 366 F.Supp. 2d at 848.

The Johnson court explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror* ***could find*** *(instead of would find)* ***that certain facts call for the imposition of life or death****, or 2) whether a juror* ***could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

VI. Consideration of MITIGATION Evidence

General Principles:

Pursuant to Morgan v. Illinois, capital jurors must be able to consider and give weight to mitigating circumstances. "Any juror who states that he or she will automatically **vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider mitigating evidence** and to decide if it is sufficient to preclude imposition of the death penalty." Morgan, 504 U.S. at 738, 119 L.Ed.2d at 508. Such jurors "not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." Morgan, 504 U.S. at 736, 119 L.Ed.2d at 507. **"Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause**, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." Morgan, 504 U.S. at 739, 119 L.Ed.2d at 509.

Not only must the defendant be allowed to offer all relevant mitigating circumstance, "the sentencer [must] listen-that is **the sentencer must consider the mitigating circumstances when deciding the appropriate sentence.** Eddings v Oklahoma, 455 U.S. 104, 115 n.10 (1982)

[Jurors] may determine the weight to be given relevant mitigating evidence...[b]ut **they may not give it no weight by excluding such evidence from their consideration**. Eddings v Oklahoma, 455 U.S. 104, 114 (1982)

[The] decision to impose the death penalty is a reasoned moral response to the defendant's background, character and crime…Jurors make individualized assessments of the appropriateness of the death penalty. Penry v. Lynaugh, 109 S.Ct. 2934, 2948-9 (1988)

Procedure must require the sentencing body **to consider the character and record of the individual offender and the circumstances of the particular offense**. Woodsen v North Carolina, 428 U.S. 280, 304 (1976)

In a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique individualized judgment regarding the punishment that a particular person deserves. Turner v Murray, 476 U.S. 23, 33-34 (1985) (quoting Caldwell v Mississippi, 472 U.S. 320, 340 n.7 (1985).

Potential Inquiries into Mitigation Evidence:

[The N.C. Supreme Court] conclude[d] that, in permitting defendant to inquire generally into jurors' feelings about mental illness and retardation and other mitigating circumstances, he was given an adequate opportunity to discover any bias on the part of the juror…[That, combined with questions] asking jurors if they would automatically vote for the death penalty…and if they could consider mitigating circumstances.., satisfies the constitutional requirements of Morgan.
State v. Skipper, 337 N.C. 1, 21-22 (1994). [Note that the only restriction…was whether a juror could "consider" a specific mitigating circumstance in reaching a decision. State v. Skipper, 337 N.C. 1, 21 (1994)]

The Supreme Court had the following to say about the following question (and two other questions) originally asked by a prosecutor: *"**Can you imagine a set of circumstances in which…your personal beliefs** [about __?] **conflict with the law? In that situation, what would you do?"*** Although the prosecutor's questions were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).

Note, however, the following questions were deemed improper because 1) they "fished" for answers to legal questions before the judge instructed the jury about the applicable law, and 2) the questions "staked-out" jurors about what kind of verdict they would render under certain named circumstances:

a) *"If the State is able to prove that the defendant premeditatedly and deliberately killed three people…, would you be able to fairly consider things like sociological background, the way he grew up, if he had an alcohol problem, things like that in weighing whether he should get death or LWOP?"*;

b) *"Assuming the State proves three cold-blooded P&D murders, can you conceive in your own mind the mitigating factors that would let you find your ability for a penalty less than death?"* State v. Mitchell, 353 N.C. 309, 318-319 543 S.E.2d 830, 836-837 (2001).

The following question was allowed by the trial court: ***"Do you feel like whatever we propose to you as a potential mitigating factor that you can give that fair consideration and not already start out dismissing those and saying those don't count because of the severity of the crime."*** State v Jones, 336 N.C. 229, 241 (1994).

An inquiry into jurors' **latent bias against any type of mitigation evidence** may be appropriate. In Simpson, 341 N.C. 316, 340-341, 462 S.E.2d 191, 205 (1995), the "majority" of the following questions **were deemed improper** questions about whether jurors could consider certain mitigating circumstances due to "form" or "staking out":

a) *"Do you think that the punishment that should be imposed for anyone in a criminal case in general should be effected [sic] by their mental or emotional state at the time that the crime was committed?"*

b) *"If you were instructed by the Court that certain things are mitigating, that is they are a basis for rendering or returning a verdict of life imprisonment as opposed to death and were those circumstances established you must give them some weight or consideration, could you do that?"*

c) *"Mr. [Juror], in this case if there was evidence to support, evidence to show that the defendant was under the influence of a mental or emotional disturbance at the time of the commission of the murder and if the Court instructed you that was a mitigating circumstance, if proven, that must be given some weight, could you follow that instruction?"*

d) *"If the Court advises you that by the preponderance of the evidence that if you are shown that the capability of the defendant to conform his conduct to the requirements of the law was impaired at the time of the murder, and the Court instructed you that was a circumstance to which you must give some consideration, could you follow that instruction?"*

e) *"Do you believe that a psychologist or a psychiatrist can be successful in treating people with mental or emotional disturbances?"*

f) *"Do you personally believe, and I am talking about your personal beliefs, that if by the preponderance of evidence, that is evidence that is established, that a person who committed premeditated murder was under the influence of a mental or emotional*

disturbance at the time that the crime was committed, do you personally consider that as mitigating, that is as far as supporting a sentence of less than the death penalty?"

g) *"Now if instructed by the Court and if it is supported by the evidence, could you take into account the defendant's age at the time of the commission of the crime?"*

h) *"Do you believe that you could fairly and impartially listen to the evidence and consider whether any mitigating circumstances the judge instructs you on are found in the jury consideration at the end of the case?"*

In finding "most" of the above-cited questions improper, it was important to the Supreme Court that the trial court had allowed the defense lawyers to asked jurors about their experiences with mental problems, mental health professions, and foster care. **Such questions allowed the defendant to explore whether jurors had any latent bias against any type of mitigation evidence.** Simpson, 341 N.C. at 341-342.

See discussion of U.S. v. Johnson, 366 F.Supp. 822 (N.D. Iowa 2005) above for authority or argument that case-specific inquiry about mitigation should be allowed under Morgan.

*For more mitigation questions, see below for "specific areas of inquiry."

VII. Specific Areas of Inquiry

Accomplice Liability: It was proper for prosecutor to ask prospective juror if he would be able to recommend the death penalty for someone who did not actually pull the trigger since it was uncontroverted that the defendant was an accessory. The State could inquire about the jurors' ability to impose the death penalty for an accessory to first-degree murder. State v Bond, 345 N.C. 1, 14-17, 478 S.E.2d 163 (1996):

a) *"The evidence will show [the defendant] did not actually pull the trigger. Would any of you feel like simply because he did not pull the trigger, you could not consider the death penalty and follow the law concerning the death penalty."*

b) *"Regardless of the facts and circumstances concerning the case, you could not recommend the death penalty for anyone unless it was the person who pulled the trigger."*

Age of Defendant:

The following question was asked by defense counsel: *"[T]he defendant will introduce things that he contends are mitigating circumstances, things like his age at the time of the crime...Do you feel like you can consider the defendant's age at the time the crime was committed ...and give it fair consideration?"* The Supreme Court assumed it was error for the trial court to sustain the State's objection to this question. In finding it harmless, however, the Court stated, "[i]n the context that this question was propounded, the juror is bound to have known the circumstance to which the defendant referred was the age of the defendant." State v Jones, 336 N.C. 229, 241 (1994)

Note, however, the question *"Would you consider the age of the defendant to be of any importance in this case [in deciding whether the death penalty is appropriate]?"* was found to be a "stake-out" question in State v. Womble, 343 N.C. 667, 682 473 S.E.2d 291, 299 (1996).

Aggravating Circumstances:

The Supreme Court has held that **questions about a specific aggravating circumstance that will arise in the case amounts to a stake–out question**. State v. Richmond, 347 N.C. 412, 424, 495 S.E.2d 677 (1998)(*"could you still consider mitigating circumstances knowing that the defendant had a prior first-degree murder conviction"*); State v. Fletcher, 354 N.C. 455, 465-66 (2001)(in a re-sentencing in which the first-degree murder conviction was accompanied by a burglary conviction, counsel asked, the State has *"to prove at least one aggravating factor, that is…the fact that the murder was part of a burglary. That's true in this case because [the defendant] was also convicted of burglary. Knowing that about this case, could you still consider a life sentence…?"*)

Cost of Life Sentence vs. Death Sentence

In State v. Elliott, 360 N.C. 400, 409-10 (2006), the Supreme Court held that "we cannot say that the trial court clearly abused its discretion" when it did not allow defense counsel to ask, *"Do you have any preconceived notions about the costs of executing someone compared to the cost of keeping him in prison for the rest of his life."* The Supreme Court admitted that the question was "relevant" but, in light of the inquiry the trial court allowed, it was not a clear abuse of discretion to disallow the question. See also, State v. Cummings, 361 N.C. 438, 465 (2007). On the other hand, a trial court may reverse its previous denial and allow the "costs" question. State v. Polke, 361 N.C. 65, 68 (2006).

Course of Conduct Aggravator (or Multiple Murders):

Prosecutor was not staking out juror when asking: *"If the State satisfied you... that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, then I take it you could give the defendant the death penalty for beating two humans to death with a hammer, is that correct?"* State v Laws, 325 N.C. 81 (1989).

Felony Murder Defined:

Prosecutor properly defined felony murder as *"a killing which occurs during the commission of a violent felony, such as _____"* (the felony in this case was discharging a firearm into an occupied vehicle). State v. Nobles, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999).

Forecast of Aggravating or Mitigating Circumstance(s):

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: **[I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence**

may show, provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

A defendant is not entitled to put on a mini-trial of his evidence during voir dire by using hypothetical situations to determine whether a juror would cast his vote for his theory. The trial court in Cummings **allowed defense counsel to question prospective jurors about whether they had been personally involved** in any of those situations [such as domestic violence, child abuse, and alcohol and drug abuse], however, the judge **properly refused to allow defense counsel to ask hypothetical and speculative questions** that were being used to try the mitigation evidence during jury selection. State v. Cummings, 361 N.C. 438, 464-65 (2007).

Foster Care:

It was proper to ask, *Whether any jurors have had any experience with foster care?* Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995).

Gender of Defendant [or Victim?]:

The prosecutor properly asked, *"Would the fact that the Defendant is a female in any way affect your deliberations with regard to the death penalty?"* This was not a stake-out question. It was appropriate to inquire into the possible sensitivities of prospective jurors toward a female defendant facing the death penalty in an effort to ferret out any prejudice arising out of defendant's gender. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999).

HAC Aggravator:

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: [I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show, provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

Impaired Capacity (f)(6):

Could the juror consider impaired capacity due to intoxication by drugs or alcohol as a mitigating circumstance and give the evidence such weight as you believe it is due ? Would your feelings about drugs or alcohol prevent you from considering the evidence ? State v Smith, 328 N.C. 99, 127 (1991). (See, where Court found that the following was a stake-out question: *"How many of you think that drug abuse is irrevelant to punishment in this case."* State v. Ball, 344 N.C. 290, 304, 474 S.E.2d 345, 353 (1996).

Prosecuting attorney asked the jurors, "*If they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor.* The Supreme Court stated: "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994).

It was proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. (*If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict.*) State v McKoy, 323 N.C. 1 (1988).

Lessened Juror Responsibility:

In closing argument and during jury selection, **it is improper for a prosecutor to make statements that lessens the jury's role or responsibility** in imposing a potential death penalty **or lessens the seriousness or reality of a death sentence**. State v. Hines, 286 N.C. 377, 381-86, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to tell a prospective juror, *"to ease your feelings [about imposing the death penalty], I might say…that one [person] has been put to death in N.C. since 1961"*; State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975), State v. Jones, 296 N.C. 495, 497-502 (1979) (it is error for *a prosecutor to suggest that the appellate process or executive clemency will correct any errors in a jury's verdict*); State v. Jones, 296 N.C. at 501-502 (prosecutor improperly discussed how *15A-2000(d) provides for an automatic appeal and how the Supreme Court must overturn a death sentence if it makes certain findings*. This had the effect of minimizing in the jurors' minds their role in recommending a death sentence).

Life Sentence (Without Parole):

During jury selection, a prospective juror indicated that he did not feel that a life sentence actually meant life (prior to LWOP statute). The trial court then instructed the jury that they should consider a life sentence to mean that defendant would be imprisoned for life and that they should not take the possibility of parole into account in reaching a verdict. The juror indicated that he would have trouble following that instruction and was excused for cause. Defense counsel requested that he be allowed to ask the other prospective jurors whether they could follow the court's instructions on parole. The trial court erroneously refused to allow the question. The Supreme Court held that **the defendant has a right to inquire as to whether a prospective juror will follow the court's instruction (i.e., life means life).** State v Jones, 336 N.C. 229, 239-40 (1994).

In several cases, the Supreme Court has upheld the refusal to allow defense counsel to ask about jurors' *"understanding of the meaning of a sentence of life without parole", "conceptions of the parole eligibility of a defendant serving a life sentence", or their feelings about whether the death penalty is more or less harsh that life in prison without parole."* State v. Neal, 346 N.C. 608, 617-18 (1997); State v. Jones, 358 N.C. 330 (2004); State v. Garcell, 363 N.C. 10, 30-32 (2009). These decisions were based on the principle that a defendant does not have the constitutional right to question the venire about parole. State v. Neal, 346 N.C. at 617.

In light of this, a safe inquiry might avoid the topic of "parole" and simply ask jurors about "their views of a life sentence for first-degree murder."

Another safe inquiry might be based on 15A-2002 which provides that "the judge shall instruct the jury…that a sentence of life imprisonment means a sentence of life without parole." There is no doubt that the jury will hear this instruction and, generally, the parties should be allowed to inquire whether jurors hold misconceptions that will affect their ability to "follow the law." **"Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection voir dire."** See, State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990); State v. Henderson, 155 N.C.App. 719, 727 (2003)

A juror's misperception about a life sentence with no possibility of parole may substantially impair his or her ability to follow the law. Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). In Uttecht, despite a juror being informed four or five times that a life sentence meant "life imprisonment without the possibility of parole," the juror continued to say that he would support the death penalty if the defendant would be released to re-offend. That juror was properly removed for cause. 167 L.E.d2d at 1025-30.

In a pre-LWOP case, the prosecutor improperly argued that the defendant could be paroled in 20 years if the jury awarded him a life sentence. The Supreme Court stated that, **"The jury's sentence recommendation should be based solely on their balancing the aggravating and mitigating factors before them. The possibility of parole is not such a factor, and it has no place in the jury's recommendation of their sentence to be imposed."** State v. Jones, 296 N.C. 495, 502-503 (1979). This principle might provide authority for inquiring into jurors' erroneous beliefs about parole to determine if they can follow the law.

Mental or Emotional Disturbance:

If the court instructs you that you should consider whether or not a person is suffering from mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow the instruction? State v Skipper, 337 N.C. 1, 20 (1994)).

The following were proper mental health related questions as found in Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995):

1) *Whether the jurors had any background or experience with mental problems in their families ?*

2) *Whether the jurors have any bias against or problem with any mental health professionals ?*

Murder During Felony Aggravator (e)(5):

Prosecutor informed jury about aggravating factors and indicated that the State *is relying upon...the capital felony was committed while the defendant was engaged, or was an aider and abettor in the commission of, or attempt to commit...any homicide, robbery, rape....* Supreme Court said that the prosecutor during jury voir dire should limit reference to aggravating factors, including the underlying felonies listed in G.S. 15A-2000(e)(5), to those of which there will be evidence and upon which the prosecutor intends to rely. Payne, 328 N.C. 377 (1991)

No Significant Criminal Record:

The following question was deemed improper as hypothetical and an impermissible attempt to indoctrinate a juror: *"Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether or not to impose the death penalty?"* State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989).

Personal Strength to Vote for Death:

Prosecutor asked: *"Are you strong enough to recommend the death penalty ?"* State v Smith, 328 N.C. 99, 128 (1991). This repeated inquiry by prosecutor is not an attempt to see how jurors would be inclined to vote on a given state of facts. State v. Fleming, 350 N.C. 109, 125, 512 S.E.2d 720, 732 (1999).

Prosecutors were allowed to ask jurors *"whether they possessed the intestinal fortitude [or "courage", or "backbone"] to vote for a sentence of death."* When jurors equivocated on the imposition of the death penalty, prosecutors were allowed to ask these questions to determine whether they could comply with the law. State v. Murrell, 362 N.C. 375, 389-91 (2008); State v. Oliver, 309 N.C. 326, 355 (1983); State v. Flippen, 349 N.C. 264, 275 (1998); State v. Hinson, 310 N.C. 245, 252 (1984).

Religious Beliefs:

The defendant's "right of inquiry" includes "the right to make appropriate inquiry concerning a prospective juror's moral or religious scruples, morals, beliefs and attitudes toward capital punishment." State v. Vinson, 287 N.C. 326, 337, 215 S.E.2d 60, 69 (1975), death sentence vacated, 428 U.S. 902, 49 L.Ed.2d 1206 (1976). The issue is whether the prospective juror's religious views would impair his ability to follow the law. State v. Fletcher, 354 N.C. 455, 467 (2001). This right of inquiry does not extend to all aspects of the jurors' private lives or of their religious beliefs. State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625 (1989).

General questions about the effect of a juror's religious views on his ability to follow the law are favored over detailed questions about Biblical concepts or doctrines. It was held improper to ask about a juror's *"understanding of the Bible's teachings on the death penalty."* State v. Mitchell, 353 N.C. 309, 318, 543 S.E.2d 830, 836 (2001). The Defendant, however, was allowed to ask the juror about her religious affiliation and whether any teachings of her church would interfere with her ability to perform her duties as a juror. In State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625-626 (1989), sentence

vacated on other grounds, 494 U.S. 1022, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990), the trial court did not abuse its discretion by not allowing defense counsel to ask a juror *"whether she believed in a literal interpretation of the Bible."*

In State v. Fletcher, 354 N.C. 455, 467, 555 S.E.2d 534, 542 (2001), defense counsel was allowed to inquire into a juror's religious affiliation and his activities with a Bible distributing group, but the trial court properly disallowed the question, whether the juror is a person *"who believes in the Biblical concept of an eye for an eye."* On the other hand, another trial court did not allow counsel to ask questions about jurors' *"church affiliations and the beliefs espoused by others [about the death penalty] representing their churches."* State v. Anderson, 350 N.C. 152, 171-172, 513 S.E.2d 296, 308 (1999).

Sympathy for the Defendant [or the Victim?]:

An inquiry into the sympathies of prospective jurors is part of the exercise of (the prosecutor's) right to secure an unbiased jury. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999). (Arguably, the same right applies to the defendant.)

Prosecutor properly asked, *"Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* Jurors may consider a defendant's demeanor in recommending a sentence. The question did not "stake out" jurors so that they could not consider the defendant's appearance and humanity. The question did not address definable qualities of the defendant's appearance and demeanor. It addressed jurors' feelings toward the defendant, notwithstanding his courtroom appearance or behavior. Chapman, 359 N.C. 328, 346-347.

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Jury Selection: The Art of Peremptories and Trial Advocacy Techniques

November 14, 2019

By: James A. Davis

About James A. Davis

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

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MASTERING THE ART OF JURY SELECTION

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

A few preliminary comments. First, trial is a mosaic, a work of art. Each part of a trial is important; however, jury selection and closing argument— the beginning and end—are the lynchpins to success. Clarence Darrow once claimed, "Almost every case has been won or lost when the jury is sworn." Public outrage decried the Rodney King, O.J. Simpson, McDonald's hot coffee spill, nanny Louise Woodward, and the 253 million dollar VIOXX verdicts, all of which had juries selected using trial consultants. After a quarter of a century, I now believe jury selection and closing argument decide most close cases. Second, I am an eclectic, taking the best I have ever seen or heard from others. Virtually nothing herein is original, and I neither make any representations regarding accuracy nor claim any proprietary interest in the materials. Pronouns are in the masculine in accord with holdings of the cases referenced. Last, like the conductor of a symphony, be steadfast at the helm, remembering the basics: Preparation spawns the best examinations. Profile favorable jurors. File pretrial motions that limit evidence, determine critical issues, and create a clean trial. Be vulnerable, smart, and courageous in jury selection. Cross with knowledge and common sense. Be efficient on direct. Perfect the puzzle for the jury. Then close with punch, power, and emotion.

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

I. *Voir Dire*: State of the Law

Voir dire means to speak the truth.[1] Our highest courts proclaim its purpose. *Voir dire* serves a dual objective of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). The North Carolina Supreme Court held jury selection has a dual purpose, both to help counsel determine whether a basis for challenge for cause exists and assist counsel in intelligently exercising peremptory challenges. *State v. Wiley*, 355 N.C. 592 (2002); *State v. Simpson*, 341 N.C. 316 (1995).

Case law amplifies the aim of jury selection. Each defendant is entitled to a full opportunity to face prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Thomas*, 294 N.C. 105, 115 (1978). The purpose of *voir dire* and exercise of challenges "is to eliminate extremes of partiality and assure both . . . [parties] . . . that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." *State v. Conner*, 335 N.C. 618 (1994). We all have natural inclinations and favorites, and jurors sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. Jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for a juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. *State v. Hedgepath*, 66 N.C. App. 390 (1984).

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

Criminal defendants have a constitutional right under the Sixth and Fourteenth Amendments to *voir dire* jurors adequately. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. . . . *Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored." *Voir dire* must be available "to lay bare the foundation of a challenge for cause against a prospective juror." *Morgan v. Illinois*, 504 U.S. 719, 729, 733 (1992).[2] *See also Rosales-Lopez v. U.S.*, 451 U.S. 182, 188 (1981) (plurality opinion) ("Without an adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled.").[3]

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

Now, the foundational principles of jury selection.

II. Selection Procedure

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

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

Read and recite to jurors the pattern jury instructions.

- Pattern Jury Instructions: Substantive Crime(s) and Trial Instructions[4]
- N.C.P.I. – Crim. 100.21: Remarks to Prospective Jurors After Excuses Heard (parties are entitled to jurors who approach cases with open minds until a verdict is reached; free from bias, prejudice or sympathy; must not be influenced by preconceived ideas as to facts or law; lawyers will ask if you have any experience that might cause you to identify yourself with either party, and these questions are necessary to assure an impartial jury; being fair-minded, none of you want to be tried based on what was reported outside the courtroom; the test for qualification for jury service is not the private feelings of a juror, but whether the juror can honestly set aside such feelings, fairly consider the law and evidence, and impartially determine the issues; we ask no more than you use the same good judgment and common sense you used in handling your own affairs last week and will use in the weeks to come; these remarks are to impress upon you the importance of jury service, acquaint you with what will be expected, and strengthen your will and desire to discharge your duties honorably).
- N.C.P.I. – Crim. 100.22: Introductory Remarks (this call upon your time may never be repeated in your lifetime; it is one of the obligations of citizenship, represents your contribution to our democratic way of life, and is an assurance of your guarantee that, if chance or design brings you to any civil or criminal entanglement, your rights and liberties will be regarded by the same standards of justice that you discharge here in your duties as jurors; you are asked to perform one of the highest duties imposed on any citizen, that is to sit in judgment of the facts which will determine and settle disputes among fellow citizens; trial by jury is a right guaranteed to every citizen; you

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

are the sole judges of the weight of the evidence and credibility of each witness; any decision agreed to by all twelve jurors, free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment and based on credible evidence in accord with the court's instructions, becomes a final result; you become officers of the court, and your service will impose upon you important duties and grave responsibilities; you are to be considerate and tolerant of fellow jurors, sound and deliberate in your evaluations, and firm but not stubborn in your convictions; jury service is a duty of citizenship).

- N.C.P.I. – Crim. 100.25: Precautionary Instructions to Jurors (Given After Impaneled) (all the competent evidence will be presented while you are present in the courtroom; your duty is to decide the facts from the evidence, and you alone are the judges of the facts; you will then apply the law that will be given to you to those facts; you are to be fair and attentive during trial and must not be influenced to any degree by personal feelings, sympathy for, or prejudice against any of the parties involved; the fact a criminal charge has been filed is not evidence; the defendant is innocent of any crime unless and until the state proves the defendant's guilt beyond a reasonable doubt; the only place this case may be discussed is in the jury room after you begin your deliberations; you are not to form an opinion about guilt or innocence or express an opinion about the case until you begin deliberations; news media coverage is not proper for your consideration; television shows may leave you with improper, preconceived ideas about the legal system as they are not subject to rules of evidence and legal safeguards, are works of fiction, and condense, distort, or even ignore procedures that take place in real cases and courtrooms; you must obey these rules to the letter, or there is no way parties can be assured of absolute fairness and impartiality).
- N.C.P.I. – Crim. 100.31: Admonitions to Jurors at Recesses[5] (during trial jurors should not talk with each other about the case; have contact of any kind with parties, attorneys or witnesses; engage in any form of electronic communication about the trial; watch, read or listen to any accounts of the trial from any news media; or go to the place where the case arose or make any independent inquiry or investigation, including the internet or other research; if a verdict is based on anything other than what is learned in the courtroom, it could be grounds for a mistrial, meaning all the work put into trial will be wasted, and the lawyers, parties and a judge will have to retry the case).

Relevant case law follows:

- *State v. Harbison*, 315 N.C. 175 (1985) (defendant must knowingly and voluntarily consent to concessions of guilt made by trial counsel after a full appraisal of the consequences and before any admission); *State v. Berry*, 356 N.C. 490 (2002) (holding the defendant receives *per se* ineffective assistance of counsel when counsel concedes the defendant's guilt to the offense or a lesser-included offense without consent); *State v. McAlister*, ___ N.C. App. ___, 827 S.E.2d 538 (2019) (holding defense counsel's statement, during closing argument, that "things got physical . . . he did wrong . . . God

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

knows he did" was not an admission of a specific act or element as alleged by the State, thus not violating *Harbison*); *State v. Wilson*, 236 N.C. App. 472 (2014) (holding defense counsel's admission of an element of a crime charged—while still maintaining the defendant's innocence—does not necessarily amount to ineffective assistance of counsel).

- *State v. Call*, 353 N.C. 400, 409–10 (2001) (after telling jurors the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, it is permissible to ask jurors "if they understand they have the right to stand by their beliefs in the case"); s*ee also State v. Elliott*, 344 N.C. 242, 263 (1996).
- *State v. Cunningham*, 333 N.C. 744 (1993) (defendant's challenge for cause was proper when juror repeatedly said defendant's failure to testify "would stick in the back of my mind"); *see also State v. Hightower*, 331 N.C. 636 (1992) (although juror stated he "could follow the law," his comment that the defendant's failure to testify "would stick in the back of [his] mind" while deliberating mandated approval of a challenge for cause).
- *Duncan v. Louisiana*, 391 U.S. 145 (1968) (held the Fourteenth Amendment guarantees a right of jury trial in all criminal cases and comes within the Sixth Amendment's assurance of a trial by an impartial jury; that trial by jury in criminal cases is fundamental to the American system of justice; that fear of unchecked power by the government found expression in the criminal law in the insistence upon community participation in the determination of guilt or innocence; and a right to trial by jury is granted to criminal defendants in order to prevent oppression by the government; providing an accused with the right to be tried by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge).

It is axiomatic that counsel should not engage in efforts to indoctrinate jurors, argue the case, visit with, or establish rapport with jurors. *State v. Phillips*, 300 N.C. 678 (1980). You may not ask questions which are ambiguous, confusing, or contain inadmissible evidence or incorrect statements of law. *State v. Denny*, 294 N.C. 294 (1978) (holding ambiguous or confusing questions are improper); *State v. Washington*, 283 N.C. 175 (1973) (finding a questions containing potentially inadmissible evidence improper); *State v. Vinson*, 287 N.C. 326 (1975) (holding counsel's statements contained inadequate or incorrect statements of the law and were thus improper). The court may also limit overbroad, general or repetitious questions. *Id. But see* N.C. Gen. Stat. § 15A-1214(c) (defendant not prohibited from asking the same or a similar question previously asked by the prosecution).

A primer on procedural rules[6]: The scope of permitted *voir dire* is largely a matter of the trial court's discretion. *See, e.g., State v. Knight*, 340 N.C. 531 (1995) (trial judge properly sustained State's objection to questions asked about victim's HIV status); *see generally State v. Phillips*, 300 N.C. 678 (1980) (opinion explains boundaries of *voir dire*; questions should not be overly repetitious or attempt to indoctrinate jurors or "stake them out"). The trial court has the duty to control and supervise the examination of jurors, and regulation of the extent and manner of

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

questioning rests largely in the court's discretion. *State v. Wiley*, 355 N.C. 592 (2002). The prosecutor and defendant may personally question jurors individually concerning their competency to serve. N.C. Gen. Stat. § 15A-1214(c). The defendant is not prohibited from asking a question merely because the court or prosecutor has previously asked the same or a similar question. *Id.*; *State v. Conner*, 335 N.C. 618, 628–29 (1994). Leading questions are permitted. *State v. Fletcher*, 354 N.C. 455, 468 (2001). Finally, the judge has discretion to re-open examination of a juror previously accepted if, at any time before the jury is impaneled, it is discovered the juror made an incorrect statement or other good reasons exists. Once the court re-opens examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse the juror. *State v. Womble*, 343 N.C. 667, 678 (1996).

A common issue is an improper stake-out question. *State v. Simpson*, 341 N.C. 316 (1995) (holding staking-out jurors is improper). Our highest court has defined staking-out as questions that tend to commit prospective jurors to a specific future course of action in the case. *State v. Chapman*, 359 N.C. 328, 345–46 (2005). Counsel may not pose hypothetical questions designed to elicit what a juror's decision will be under a certain state of the evidence or a given state of facts. *State v. Vinson*, 287 N.C. 326, 336–37 (1975). Case law disfavors reference to unrelated, high-profile cases. *State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415 (2018) (holding no error when the trial court disallowed as stake-out questions the opinions of jurors regarding an unrelated, well-publicized case involving a deadly shooting by a police officer and police shootings of black men in general). Counsel should not question prospective jurors as to the kind of verdict they would render, how they would be inclined to vote, or what their decision would be under a certain state of evidence or given state of facts. *State v. Richmond*, 347 N.C. 412 (1998). My synthesis of the cases suggests counsel is in danger of an objection on this ground when the question refers to a verdict or encroaches upon issues of law. A proposed *voir dire* question is legitimate if the question is necessary to determine whether a juror is excludable for cause or assist you in intelligently exercising your peremptory challenges. If the State objects to a particular line of questioning, defend your proposed questions by linking them to the purposes of *voir dire*.[7]

Beware of reverse *Batson* challenges. Generally, race, gender and religious discrimination in the selection of trial jurors is unconstitutional. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding race discrimination); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (finding gender discrimination); U.S. Const. amends. V and XIV (referencing due process); N.C. Const. art. I, § 26 (no person may be excluded from jury service on account of sex, race, color, religion, or national origin). The U.S. Supreme Court established a three-step test for such challenges: 1) defendant must make a *prima facie* showing the prosecutor's strike was discriminatory; 2) the burden shifts to the State to offer a race-neutral explanation for the strike; and 3) the trial court decides whether the defendant has proven purposeful discrimination. The U.S. Supreme Court recently considered, *inter alia*, a prosecutor's history of striking and questioning black jurors in deciding a *Batson* case. *Flowers v. Mississippi*, 588 U.S. ___, 139 S. Ct. 2228 (2019) (holding that, in defendant's sixth trial, the prosecutor's historical use of peremptory strikes in the first four trials, 145 questions for five black prospective jurors contrasted with only 12 questions for 11 white jurors, and misstatement of the record were motivated in substantial part by discriminatory intent). Conversely, *Batson* also prohibits criminal defendants from race, gender, or religious based

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

peremptory challenges, known as a reverse *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42 (1992). It is noteworthy that our appellate courts have decided over 100 cases in which defendants have alleged purposeful discrimination by prosecutors against minorities, never finding a *Batson* violation. Defense counsel should be vigilant in making a *Batson* challenge. *See State v. Hobbs*, ___ N.C. App. ___, 817 S.E.2d 779 (2018) (holding when defense counsel asserts his first *Batson* challenge after the State exercised its eighth peremptory strike—six against black jurors—the trial court is not obligated to inquire into the reasons for striking those previously excused). In contrast, North Carolina appellate courts have twice upheld prosecutors reverse *Batson* challenges on the ground the defendant engaged in purposeful discrimination against Caucasian jurors. *State v. Hurd*, 246 N.C. App. 281 (2016) (holding trial court did not err in sustaining a reverse *Batson* challenge; defendant exercised eleven peremptory challenges, ten against white and Hispanic jurors; defendant's acceptance rate of black jurors was eighty-three percent in contrast to twenty-three percent for white and Hispanic jurors; the one black juror challenged was a probation officer; defendant accepted jurors who had strikingly similar views); *see also State v. Cofield*, 129 N.C. App. 268 (1998). Finally, should a judge find the State has violated *Batson*, the venire should be dismissed and jury selection should begin again. *State v. McCollum*, 334 N.C. 208 (1993). *But cf. State v. Fletcher*, 348 N.C. 292 (1998) (following a judge's finding the prosecutor made a discriminatory strike, he withdrew the strike, passed on the juror, the trial court found no *Batson* violation, and the N.C. Supreme Court affirmed).

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

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
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> (1) Does not have the qualifications required by G.S. 9-3.
> (2) Is incapable by reason of mental or physical infirmity of rendering jury service.
> (3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.
> (4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
> (5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime. *See* **Exhibit A**.
> (6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.
> (7) Is presently charged with a felony.
> (8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
> (9) For any other cause is unable to render a fair and impartial verdict.

Certain phrases are determinative in challenges for cause. For example, you may ask if a prospective juror would "automatically vote" for either side or a certain sentence or if a juror's views or experience would "prevent or substantially impair" his ability to hear the case. *State v. Chapman*, 359 N.C. 328, 345 (2005) (holding counsel may ask, if based on a response, if a juror would vote automatically for either side or a particular sentence); *see also State v. Teague*, 134 N.C. App. 702 (1999) (finding counsel may ask if certain facts cause jurors to feel like they "will automatically turn off the rest of the case"); s*ee also Morgan v. Illinois*, 504 U.S. 719, 723 (1992) (Court approved the question "would you automatically vote [for a particular sentence] no matter what the facts were?"); *Wainright v. Witt*, 469 U.S. 412 (1985) (established the standard for challenges for cause, that being when the juror's views would "prevent or substantially impair" the performance of his duties in accord with his instructions and oath, modifying the more stringent language of *Witherspoon*[8] which required an unmistakable commitment of a juror to automatically vote against the death penalty, regardless of the evidence); *State v. Cummings*, 326 N.C. 298 (1990) (holding State's challenge for cause is proper against jurors whose views against the death penalty would "prevent or substantially impair" their performance of duties as jurors). Considerable confusion about the law could amount to "substantial impairment." *Uttecht v. Brown*, 551 U.S. 1 (2007).

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

[8] *Witherspoon v. Illinois*, 39 U.S. 510 (1968).
[9] *See generally* N.C. DEFENDER MANUAL, *supra* note 7, at 25-1, *et seq.*

343, 376 (1986). A blanket rule prohibiting rehabilitation is error. *State v. Brogden*, 334 N.C. 39 (1993); *see also State v. Enoch*, ___ N.C. App. ___, 820 S.E.2d 543 (2018) (holding no error when the trial court denied the defendant's request to rehabilitate two jurors when, although initially misapprehending that rehabilitation was impermissible in non-capital cases, the court later allowed for the possibility of rehabilitation, thus not establishing a blanket rule against all rehabilitation).

III. Theories of Jury Selection

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

- Traditional approach: lecture with leading and closed questions to program the jury about law and facts and establish authority and credibility with the jury; a prosecutor favorite.
- Wymore (Colorado) method: *See infra text at* IV. The Wymore Method.
- Scientific jury selection: employs demographics, statistics, and social psychology to examine juror background characteristics and attitudes to predict favorable results.
- Game theory: uses mathematical algorithms to decide the outcome of trial.
- Command Superlative Analogue (New Mexico Public Defender's) method: focus on significant life experiences relating to the central trial issue.
- Psychodramatic (Trial Lawyers College) method: identify the most troubling aspects of the case, tell jurors and ask about the concerns, and validate jurors' answers.
- Reptilian theory: focus on facts and behavior to make the jury angry by concentrating on the opponent's failures and resulting injuries, all intended to evoke a visceral, subliminal reaction.
- Demographic theory[10]: stereotype jurors based on race, gender, ethnicity, age, income, occupation, social status, socioeconomic status/affluence, religion, political affiliation, avocations, urbanization, experience with the legal system, and other factors.
- Listener method: learn about jurors' experiences and beliefs to predict their views of the facts, law, and each other.

Strategies abound for jury selection methods. Jury consultants and trial lawyers use mock trials, focus groups, and telephone surveys to profile community characteristics and favorable jurors. Research scientists believe – and most litigators have been taught - demographic factors predict attitudes which predict verdicts, although empirical data and trial experience militate against this

[10] Research on the correlation of demographic data with voting preferences is conflicted. *See* Professor Dru Stevenson's article in the 2012 George Mason Law Review, asserting the "Modern Approach to Jury Selection" focuses on biases related to factors such as race and gender; s*ee also Glossy v. Gross*, 576 U.S. ___, 135 S. Ct. 2726 (2015) (racial and gender biases may reflect deeply rooted community biases either consciously or unconsciously). *But see* Ken Broda-Bahm, *Don't Select Your Jury Based on Demographics: A Skeptical Look at JuryQuest*, PERSUASIVE LITIGATOR (April 12, 2012), https://www.persuasivelitigator.com/2012/04/dont-select-your-jury-based-on-demographics.html (for at least three decades, researchers have known that demographic factors are very weak predictors of verdicts).

approach.[11] Many lawyers believe our experience hones our ability to sense and discern favorable jurors, although this belief has marginal support in practice and is speculative at best.

I use a blend of the above models. However, I focus upon one core belief illustrated in the ethical and moral dilemma of an overcrowded lifeboat lost at sea. As individuals weaken, starve, and become desperate, who is chosen to survive? Do we default to women, children, or the elderly? Who lives or dies? Using this hypothetical in the context of a courtroom, I believe the answer is **jurors save themselves**.[12] The basic premise is that jurors, primarily on a subconscious level, choose who they like the most and connect to parties, witnesses, and court personnel who are characteristically like them. Therefore, the party - or attorney - whom the jury likes the most, feels the closest to, or has some conscious or subconscious relationship with typically wins the trial. This concept is the central tenet of our jury selection strategies.

IV. The Wymore Method

David Wymore, former Chief Trial Deputy for the Colorado Public Defender system, revolutionized capital jury selection. The Wymore method, or Colorado method of capital *voir dire*, was created to combat "death qualified" juries[13] by utilizing a non-judgmental, candid, and respectful atmosphere during jury selection which allows defense counsel to learn jurors' views about capital punishment and imposition of a death sentence, employ countermeasures by life qualifying the panel, and thereafter teach favorable jurors how to get out of the jury room.

In summary form, the Wymore method is as follows: Defense counsel focuses upon jurors' death penalty views, learns as much as possible about their views, rates their views, eliminates the worst jurors, educates both life-givers and killers separately, and teaches respect for both groups—particularly the killers. In other words, commentators state Wymore places the moral weight for a death sentence onto individual jurors, making it a deeply personal choice.[14] Wymore himself has stated he tries to find people who will give life, personalize the kill question, and find other jurors who will respect that decision.[15]

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

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[11] *See* Ken Broda-Bahm, *supra* note 10.

[12] In panic, most people abandon rules in order to save themselves, although some may do precisely the opposite. DENNIS HOWITT, MICHAEL BILLIG, DUNCAN CRAMER, DEREK EDWARDS, BROMELY KNIVETON, JONATHAN POTTER & ALAN RADLEY, SOCIAL PSYCHOLOGY: CONFLICTS AND CONTINUITIES (1996).

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

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

[15] *Id.*

1. *Witt* excludable: The automatic life adherent. One who will never vote for the death penalty and is vocal, adamant, and articulate about it.
2. One who is hesitant to say he believes in the death penalty. This person values human life and recognizes the seriousness of sitting on a capital jury. However, this person says he can give meaningful consideration to the death penalty.
3. This person is quickly for the death penalty and has been for some time. However, he is unable to express why he favors the death penalty (e.g., economics, deterrence, etc.). He may wish to hear mitigation or be able to make an argument against the death penalty if asked, and is willing to respect views of those more hesitant about the death penalty.
4. This person is comfortable and secure in his death penalty view. He is able to express why he is for the death penalty and believes it serves a good purpose. His comfort level and ability to develop arguments in favor of the death penalty differentiates him from a number three. However, he wants to hear both sides and straddles the fence with penalty phase evidence, believing some mitigation could result in a life sentence despite a conviction for a cold-blooded, deliberate murder.
5. A sure vote for death, he is vocal and articulate in his support for the death penalty. He is not a bully, however, and, because he is sensitive to the views of other jurors, can think of two or three significant mitigating factors which would allow him to follow a unanimous consensus for life in prison. This person is affected by residual doubt.
6. A strong pro-death juror, he escapes an automatic death penalty challenge because he can perhaps consider mitigation. A concrete supporter of the death penalty who believes it not used enough, he is influenced by the economic burden of a life sentence and believes in death penalty deterrence. Essentially, he nods his head with the prosecutor.
7. The automatic death penalty proponent. He believes in the *lex talionis* principle of retributive justice, or an eye for an eye. Mitigation is manslaughter or self-defense. Hateful and proud of it, he must be removed for cause or peremptory challenge. If the defendant is convicted of capital murder, this juror will impose the death penalty.

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

Wymore also teaches <u>stripping</u>, a means of culling extraneous issues and circumstances from the jurors' minds. In essence, you strip the venire of misconceptions they may have about irrelevant facts, law, defenses, or punishments as they arise. You simply strip away topics broached by jurors which are inapplicable to the case and could change a juror's mind. In a capital murder, you use a hypothetical like the following: "Ladies and gentlemen, I want you to imagine a hypothetical case, not this case. After hearing the evidence, you were convinced the defendant was guilty of premeditated, deliberate, intentional murder. He meant to do it, and he did it. It was neither an

accident nor self-defense, defense of another, heat of passion, or because he was insane. There was no legal justification or defense. He thought about it, planned it, and did it. Now, can you consider life in prison?" Note the previous question incorporates case specific facts disguised as elements which avoids pre-commitment or staking out objections.

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

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

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

V. Our Method: Modified Wymore

Our approach is a modified version of Wymore merging various strategies including the use of select statutory language[16] originating in part from the old *Allen* charge;[17] studies on the psychology of juries;[18] identifying individual and personal characteristics of the defendant, victim, and material witnesses; profiling our model jury; and a simple rating system for prospective jurors. One other fine trial lawyer has recently written, at least in part, on a non-capital, modified Wymore version of jury selection as well.[19]

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

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

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

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

Our case preparation process is as follows. First, we start by considering the nature of the charge(s), the material facts, whether we will need to adduce evidence, and assess candidly prosecution and defense witnesses. Second, we identify personal characteristics of the defendant, victim, family members, and other important witnesses, all in descending order of priority. We do the same for prosecution witnesses. Individual characteristics include age, education, occupation, marital status, children, means, residential area, socioeconomic status, lifestyle, criminal record, and any other unique, salient factor. Third, we bear in mind typical demographics like race, age, gender, ethnicity, and so forth. Fourth, we review the jury pool list, both for individuals we may know and for characteristic comparison. Finally, we prepare motions designed to address legal issues and limit evidence for hearing pretrial.[20]

We use several methods in jury selection. At the beginning, I spend a few minutes educating the jury about the criminal justice system and the jury's preeminent role, magnifying the moment and simplifying the process.[21] I often tell them I am afraid they will think my client did something wrong by his mere presence, thereafter underscoring they are at the pinnacle of public service, serve as the conscience of the community, and must protect and preserve the sanctity of trial.[22] In a sense I am using the **lecture method** to establish leadership and credibility. I then transition to the dominant method, the **listener method**, asking many open-ended group questions followed by precise individual questions. I speak to every juror, even if only to greet and acknowledge them, but more often to address specific comments, backgrounds, or engage them in areas of concern. We look closely at jurors, including their family and close friends, focusing on the characteristics we have identified, good or bad. I always address concerning issues, stripping and re-stripping per **Wymore**. We strip by using uncontroverted facts (e.g., "my client blew a .30") and by addressing extraneous issues and circumstances (i.e., inapplicable facts and defenses like "this is not an accident case") as they arise to find jurors who do not have the ability to be fair and impartial or hear the instant case. In a sense, stripping is accomplished via drawing the sting. We tell bad facts to strip bad jurors. During the entire process I am **profiling** jurors, searching for select characteristics previously deemed favorable or unfavorable. We also focus on **juror receptivity** to our presentation, looking at their individual responses, physical reactions, and exact comments. For jurors of which I am simply unsure, I fall back on **demographic** data, then using my **gut** as a final filter. Last, we isolate and insulate each juror per **Wymore**, attempting to create twelve individual juries who will respect each other in the process.

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[20] As a practice tip, ask to hear all motions pre-trial and before jury selection. Knowledge of the judge's rulings may be central to your jury selection strategy, often revealing damaging evidence which should be disclosed during the selection process. Motions must precisely address issues and relevant facts within a constitutional context. If a judge refuses to hear, rule upon, or defers a ruling on your motion(s), recite on the record the course of action is not a strategic decision by the defense, thereby alerting the court of and protecting the defendant's recourse for post-conviction relief. *Strickland v. Washington*, 466 U.S. 668 (1984).

[21] Tools that can help jurors frame the trial, remain engaged, and retain information received include the use of a "mini-opening" at the beginning of *voir dire*, or delivering preliminary instructions of the process, law, and relevant legal concepts. *See* Susan J. MacPherson & Elissa Krauss, *Tools to Keep Jurors Engaged*, TRIAL, Mar. 2008, at 33.

[22] Trial by a jury of one's peers is a cornerstone of the principle of democratic representation set out in the U.S. Constitution. U.S. CONST. amend. VI.

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

I commonly draw the sting by telling the jury of uncontroverted facts, thereafter addressing their ability to hear the case. Prosecutors may object, citing an improper stake-out question as the basis. In your response, tie the uncontroverted fact to the juror's ability to follow the law or be fair and impartial. Case law supports my approach. *See State v. Nobles*, 350 N.C. 483, 497–98 (1999) (finding it proper for the prosecutor to describe some uncontested details of the crime before he asked jurors whether they knew or read anything about the case; ADA told the jury the defendant was charged with discharging a firearm into a vehicle "occupied by his wife and three small children"); *State v. Jones*, 347 N.C. 193, 201–02, 204 (1997) (holding a proper non-stake-out question included telling the jury there may be a witness who will testify pursuant to a deal with the State, thereafter asking if the mere fact there was a plea bargain with one of the State's witnesses would affect their decision or verdict in the case); *State v. Williams*, 41 N.C. App. 287, *disc. rev. denied*, 297 N.C. 699 (1979) (finding prosecutor properly allowed, in a common law robbery and assault trial, to tell prospective jurors a proposed sale of marijuana was involved and thereafter inquire if any of them would be unable to be fair and impartial for that reason). Another helpful technique is to ask the jury "if [they] can consider" all the admissible evidence, again linking the bad facts you have revealed to the juror's ability to be fair and impartial or follow the law. *State v. Roberts*, 135 N.C. App. 690, 697 (1999); *see also U.S. v. Johnson*, 366 F. Supp. 2d 822, 842–44 (N.D. Iowa 2005) (finding case specific questions in the context of whether a juror could consider life or death proper under *Morgan*). In sum, a juror who is predisposed to vote a certain way or recommend a particular sentence regardless of the unique facts of the case or judge's instruction on the law is not fair and impartial. You have the right to make a diligent inquiry into a juror's fitness to serve. *State v. Thomas*, 294 N.C. 105, 115 (1978). When you are defending a stake-out issue, argue to the extent a question commits a juror, it commits him to a fair consideration of the accurate facts in the case and to a determination of the appropriate outcome.

The prime directive: Adhere to the profile, suppressing what my gut tells me unless objectively supported.

Using the current state of the law with my "Modified Wymore" approach, please see the outline I use for jury selection attached hereto as **Exhibit B**.

VI. The Fundamentals

"While the lawyers are picking the jury, the jurors are picking the lawyer."[23]

Voir dire is distilled into three objectives: Deselect those who will hurt you or are leaning against you;[24] educate jurors about the trial process and your case; and be more likeable than your counterpart, concentrating on professionalism, honesty, and a smart approach.

I share a three tier approach to jury selection: Core concepts that are threshold principles, fine art methods, and my personal tips and techniques.

Now for foundational principles:

- Deselect those who will hurt your client. Move for cause, if possible. Identify the worst jurors and remove them.
- Jurors bring personal bias and preconceived notions about crime, trials, and the criminal justice system. You must find out whether they lean with you or the prosecution.
- Jurors who honestly believe they will be fair decide cases based on personal bias and preconceived ideas. Bias or prejudice can take many forms: racial, religious, national origin, ageism, sexism, class (including professionals), previous courtroom experience, prior experience with a certain type of case, beliefs, predispositions, emotional response systems,[25] and more.
- Jurors decide cases based on bias and beliefs, regardless of the judge's instructions.
- There is little correlation between the similarity of the demographic factors (e.g., race, gender, age, ethnicity, education, employment, class, hobbies, or the like) of a juror and defendant and how one will vote.
- Cases are often decided before jurors hear any evidence.
- Traditional *voir dire* is meaningless.[26] Social desirability and pressure to conform inhibits effective jury selection when using traditional or hypothetical questions.[27]

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[23] RAY MOSES, JURY SELECTION IN CRIMINAL CASES (1998).

[24] I have heard skilled lawyers espouse a view in favor of accepting the first twelve jurors seated. It is difficult to comprehend a proper *voir dire* in which no challenges are made as chameleons are lurking within. As a rule of thumb, never pass on the original panel seated.

[25] Recent research has highlighted the important role of emotions in moral judgment and decision-making, particularly the emotional response to morally offensive behavior. June P. Tangnet, Jeff Stuewig, & Debra J. Mashek, *Moral Emotions and Moral Behavior*, 58 ANNUAL REVIEW OF PSYCHOLOGY 345 (2007).

[26] Post-trial interviews reveal jurors lose interest and become disengaged with the use of technical terms and legal jargon, without an early and simple explanation of the case, and during a long trial. *See* MacPherson & Krauss, *supra* note 21, at 32. Studies by social scientists on non-capital felony trials reveal the following findings: (1) On average, jury selection took almost five hours, yet jurors as a whole talked only about thirty-nine percent of the time; (2) lawyers spent two percent of the time teaching jurors about their legal obligations and, in post-trial interviews assessing juror comprehension, many jurors were unable to distinguish between or explain the terms "fair" and "impartial"; and (3) one-half the jurors admitted post-trial they could not set aside their personal opinions and beliefs, although they had agreed to do so in *voir dire*. Cathy Johnson & Craig Haney, *Felony Voir Dire, an Exploratory Study of its Content and Effect*, 18 LAW AND HUMAN BEHAVIOR 487 (1991).

[27] James Lugembuhl, *Improving Voir Dire*, THE CHAMPION (Mar. 1986).

Asking jurors if they can put aside bias, be fair and impartial, and follow the judge's instructions are ineffective. Traditional questions grossly underestimate and fail to detect the degree of anti-defendant bias in the community.[28]

- Hypothetical questions about the justice system result in aspirational answers and have little meaning.
- You can neither change a strongly held belief nor impose your will upon a juror in the time you have in *voir dire*.[29]

VII. Fine Art Techniques

"*The evidence won't shape the jurors. The jurors will shape the evidence."*[30]

The higher art form:[31]

- Make a good first impression. Remember primacy and recency[32] at all phases, even jury selection. There is only one first impression. Display warmth, empathy, and respect for others and the process. Show the jurors you are fair, trustworthy, and know the rules.
- Understand trial is an unknown world to lay persons or jurors. They feel ignored and are unaware of their special status, the rules of propriety, and that soon almost everyone will be forbidden to speak with them.
- Comfortable and safe *voir dire* will cause you to lose. Do not fear bad answers. Embrace them. They reveal the juror's heart which will decide your case.

[28] *Id.*

[29] Humans have a built-in mechanism called scripting for dealing with unfamiliar situations like a trial. This mechanism lessens anxiety by promoting conforming behavior and drawing on bits and pieces of one's life experience – whether movies, television, friends or family – to make sense of the world around them. Unless you intercede, the script will be that lawyers are not to be trusted, trials are boring, people lie for gain, judges are fair and powerful, and the accused would not be here if he did not do something wrong. OFFICE OF THE STATE PUBLIC DEFENDER, JURY SELECTION (2016).

[30] MOSES, *supra* note 23.

[31] Ask about the trial judge and how he handles *voir dire*. Consider informing the trial judge in advance of jury selection about features of your *voir dire* which may be deemed unusual by the prosecutor or the court, thus allowing the judge time to consider the issue, preventing disruption of the selection process, and affording you an opportunity to make a record.

[32] The law of primacy in persuasion, also known as the primacy effect, was postulated by Frederick Hansen Lund in 1926 and holds the side of an issue presented first will have greater effect in persuasion than the side presented subsequently. Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors,* 19 JOURNAL OF COMMUNICATION 239 (1969). The principle of recency states things most recently learned are best remembered. Also known as the recency effect, studies show we tend to remember the last few things more than those in the middle, assume items at the end are of greater importance, and the last message has the most effect when there is a delay between repeated messages. The dominance of primacy or recency depends on intrapersonal variables like the degree of familiarity and controversy as well as the interest of a particular issue. Curtis T. Haughtvedt & Duane T. Wegener, *Message Order Effects in Persuasion: An Attitude Strength Perspective,* 21 JOURNAL OF CONSUMER RESEARCH 205 (1994).

- Tell jurors about incontrovertible facts or your affirmative defense(s).[33] Be prepared to address the law on staking-out the jury for a judge who restricts your approach to this area. Humbly make a record.
- Tell jurors they have a personal safety zone. Be careful of and sensitive to a juror's personal experience. When jurors share painful or emotional experiences, acknowledge their pain and express appreciation for their honesty.
- When a juror expresses bias, the best approach is counter-intuitive. Do not stop, redirect them, or segue. Immediately address and confront the issue. Mirror the answer back, invite explanation, reaffirm the position, and then remove for cause. Use the moment to teach the jury the fairness of your position.
- Use fact questions to get fact answers. Ask jurors about analogous situations in their past. This will help profile the juror.
- Listen. Force yourself to listen more. Open-ended questions (e.g., "Tell us about…, Share with us…, Describe for us…," etc.) keep jurors talking, revealing life experiences, attitudes, opinions, and views. Have a conversation. Spend time discussing their personal background, relevant experiences, and potential bias. Make it interesting to them by making the conversation about them. Use the ninety/ten rule, jurors talking ninety percent of the time.
- Consider what the juror needs to know to understand the case and what you need to know about the juror.
- Seek first to understand, then to be understood.
- Personal experiences shape juror's views and beliefs and best predict how jurors view facts, law, and each other.
- Do not be boring, pretentious, or contentious.
- Look for non-verbal signals like nodding, gestures, or expressions.
- Spot angry jurors. "To the mean-spirited, all else becomes mean."[34]
- Refer back to specific answers. Let them know you were listening. Then build on the answers. Remember, a scorpion is a scorpion, regardless of one's trappings (i.e., presentation, words, or appearance).
- Deselect delicately. Tell them they sound like the kind of person who thinks before forming an opinion and the law is always satisfied when a juror gives an honest opinion, even if it is different from that of the lawyers or the judge. All the law asks is that jurors give their honest opinions and feelings. Stand and say, "We thank and respectfully excuse juror number . . . ."
- Juror personalities and attitudes are far more predictive of juror choices.
- Jury selection is about jurors educating us about themselves.

[33] Prior to the selection of jurors, the judge must inform prospective jurors of any affirmative defense(s) for which notice was given pretrial unless withdrawn by the defendant. N.C. GEN. STAT. § 15A-1213; N.C. GEN. STAT. § 15A-905(c)(1) (notice of affirmative defense is inadmissible against the defendant); N.C.P.I. – Crim. 100.20 (instructions to be given at jury selection).

[34] MOSES, *supra* note 23.

VIII. My Side Bar Tips

"*We don't see things as they are. We see them as we are.*"[35]

My personal palette of jury selection techniques:

- At the very outset, tell the jury the defendant is innocent (or not guilty), be vulnerable, and tell the jury about yourself. Become one of them.
- You must earn credibility in jury selection.[36] Many jurors believe your client is guilty before the first word is spoken. Aligned with the accused, you are viewed with suspicion, serving as a mouthpiece. Start sensibly and strong. Be a lawyer, statesman, and one of them – a caring, community member. Earn respect and credibility when it counts – right at the start.
- We develop a relationship with jurors throughout the trial. Find common ground, mirroring back the intelligence and social level of the individual jurors. Be genuine. Become the one jurors trust in the labyrinth called trial.
- Encourage candor. Tell the jury there are no right or wrong answers, and you are interested in them and their views. Tell them citizens have the right to hold different views on topics, and so do jurors. Tell them you will be honest with them, asking for honest and complete answers in return. Assure them honest responses are the only thing expected of them. Reward the honest reply, even if it hurts.
- Listen to and observe opposing counsel. Purposefully contrast with the prosecutor. If he is long-winded, be precise and efficient. If he misses key points, spend time educating the jury. Entice jurors who choose early to choose you.
- Humanize the client. Touch, talk with, and smile at him.
- Remind the client continually of appropriate eye contact, posture, and perceived interest in the case.
- Beware of a reverse *Batson* challenge when there is an obvious trend by the defense using peremptory challenges based on race, gender, or religion.
- Propensity is the worst evidence.
- If jurors fear or do not understand your client or his actions, whether due to violence, mental health, or the unexplained, they will convict your client - quickly.
- Pick as many leaders[37] as possible, creating as many juries as possible. Do not pick followers: you shrink the size of the jury. Avoid young, uneducated, and apparently weak, passive, or submissive jurors. Target and engage them to sharpen your view. Remember: you only need one juror to exonerate, hang, or persuade the jury to a lesser-included verdict.
- Look for jurors who are resistant to social pressure (e.g., piercings, tattoos, etc.).

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[35] ANAIS NIN, SEDUCTION OF THE MINOTAUR (1961).

[36] According to the National Jury Project, sixty-seven percent of jurors are unsympathetic to defendants, thirty-six percent believe it is the defendant's responsibility to prove his innocence, and twenty-five percent believe the defendant is guilty or he would not have been charged. Now known as National Jury Project Litigation Consulting, this trial consulting firm publicizes its use of social science research to improve jury selection and case presentation.

[37] Leaders include negotiators and deal-makers, all of whom wield disproportionate power within the group. *See* MOSES, *supra* note 23.

- The best predictor of human behavior is past behavior.
- Let the client exhibit manners. My paralegal, Candace Brown, is present during much of the trial, most importantly in jury selection. When it is our turn to deselect or dismiss jurors, she approaches, the defendant stands and relinquishes his chair, and we discuss and decide who to deselect. Ms. Brown also interacts with the defendant regularly during trial, recesses, and other opportunities, communicating perceived respect and a genuine concern for the client.
- Use the term fair and impartial when engaging the jaundiced juror, skewed in beliefs or position. Talk about the highest aim of a jury.
- Older women will exonerate your client in a rape or sex offense case, particularly if a young female victim has credibility issues. Conversely, beware of the grandfatherly, white knight.[38]
- Fight the urge to use your last peremptory challenge. You may be left with the equivalent of an automatic death penalty juror.
- Draw the sting (i.e., strip). Tell the jury incontrovertible bad facts and your affirmative defense(s). Some jurors will react verbally, some visibly. Let the bad facts sink in. Engage the juror who reacts badly.[39] Reaffirm his commitment to your client's presumed innocence. Then tell them there is more to the story. The sting fades and loses its impact during trial.
- Use the language of the former highest aim Pattern Jury Instruction, telling jurors they have no friend to reward, no enemy to punish, but a duty to let their verdict speak the everlasting truth.
- Mirror the judge's instructions to the jury, early and often, using phrases from the judges various instructions including fair and impartial, the same law applies to everyone, they are not to form an opinion about guilt or innocence until deliberations begin, and so forth.[40] Forecast the law for them. Clothe yourself with vested authority.
- Commit the jury, individually and as a whole to principles of isolation and insulation. Ask them if they understand and appreciate they are not to do violence to their individual judgment, they must decide the case for themselves, and they are not to surrender their honest convictions merely for the purpose of returning a verdict.[41] Extract a group commitment that they will respect the personal judgment of each and every juror. Target an oral commitment from unresponsive or questionable jurors. Seek twelve individual juries. If done well, you increase your chances of a not guilty verdict, lesser-included judgment, hung jury, or a successful motion to poll the jury post-trial.

[38] White knights are individuals who have a compulsive need to be a rescuer. *See* MARY C. LAMIA & MARILYN J. KRIEGER, THE WHITE KNIGHT SYNDROME: RESCUING YOURSELF FROM YOUR NEED TO RESCUE OTHERS (2009).

[39] To deselect jurors, commit the juror to a position (e.g., "So you believe . . . ."), normalize the impairment by acknowledging there are no right or wrong answers and citizens are free to have different opinions, and recommit the juror to his position (e.g., "So because of . . . , you would feel somewhat partial . . . ."), thus immunizing him from rehabilitation.

[40] N.C. GEN. STAT. § 15A-1236(a)(3), *et al*; *see also supra text* at II. Selection Procedure.

[41] N.C. GEN. STAT. §§ 15A-1235(b)(1) and (4).

- Tell the jury the law never requires a certain outcome. Inform them that the judge has no interest in a particular outcome and will be satisfied with whatever result they decide. Emphasize the law recognizes that each juror must make his own decision.

IX. Subject Matter of *Voir Dire*

Case law on proper subject matter for *voir dire*[42] follows.

Accomplice Culpability: *State v. Cheek*, 351 N.C. 48, 65–68 (1999) (prosecutor properly asked about jury's ability to follow the law regarding acting in concert, aiding and abetting, and felony murder rule).

Circumstantial Evidence: *State v. Teague*, 134 N.C. App. 702 (1999) (prosecutor allowed to ask if jurors would require more than circumstantial evidence, that is eyewitnesses, to return a verdict of first degree murder).

Child Witnesses: *State v. Hatfield*, 128 N.C. App. 294 (1998) (trial judge erred by not allowing defendant to ask prospective jurors "if they thought children were more likely to tell the truth when they allege sexual abuse").

Defendant's Prior Record: *State v. Hedgepath*, 66 N.C. App. 390 (1984) (trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow the judge's instructions they are to consider the defendant's prior record only for the purpose of determining credibility).

Defendant Not Testifying: *State v. Blankenship*, 337 N.C. 543 (1994) (proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense; however, the court has discretion to disallow the same).

Expert Witness: *State v. Smith*, 328 N.C. 99 (1991) (asking the jury if they could accept the testimony of someone offered in a particular field like psychiatry was not a stake-out question.

Eyewitness Identification: *State v. Roberts*, 135 N.C. App. 690, 697 (1999) (prosecutor properly asked if eyewitness identification in and of itself was insufficient to deem a conviction in the juror's minds regardless of the judge's instructions as to the law)

Identifying Family Members: *State v. Reaves*, 337 N.C. 700 (1994) (no error for prosecutor to identify members of murder victim's family in the courtroom during jury selection).

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

Intoxication: *State v. McKoy*, 323 N.C. 1 (1988) (proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense).

Legal Principles: *State v. Parks*, 324 N.C. 420 (1989) (defense counsel may question jurors to determine if they completely understood the principles of reasonable doubt and burden of proof; however, once fully explored, the judge may limit further inquiry).

Pretrial Publicity: *Mu'Min v. Virginia*, 500 U.S. 415, 419–21 (1991) (inquiries should be made regarding the effect of publicity upon a juror's ability to be impartial or keep an open mind; questions about the content of the publicity may be helpful in assessing whether a juror is impartial; it is not required that jurors be totally ignorant of the facts and issues involved; the constitutional question is whether jurors had such fixed opinions they could not be impartial).

Racial/Ethnic Background[43]: *Ristaino v. Ross*, 424 U.S. 589 (1976) (although the due process clause creates no general right in non-capital cases to *voir dire* jurors about racial prejudice, such questions are constitutionally mandated under "special circumstances" like in *Ham*); *Ham v. South Carolina*, 409 U.S. 524 (1973) ("special circumstances" were present when the defendant, an African-American civil rights activist, maintained the defense of selective prosecution in a drug charge); *Rosales-Lopez v. U.S.*, 451 U.S. 182 (1981) (trial courts must allow questions whether jurors might be prejudiced about the defendant because of race or ethnic group when the defendant is accused of a violent crime and the defendant and victim were members or difference races or ethnic groups); *See also Turner v. Murray*, 476 U.S. 28 (1986) (such questions must be asked in capital cases in charge of murder of a white victim by a black defendant).

Sexual Offense/Medical Evidence: *State v. Henderson*, 155 N.C. App. 719, 724–27 (2003) (prosecutor properly asked in sex offense case if jurors would require medical evidence "that affirmatively says an incident occurred" to convict as the question measured jurors' ability to follow the law).

Sexual Orientation: *State v. Edwards*, 27 N.C. App. 369 (1975) (proper for prosecutor to question jurors regarding prejudice against homosexuality to determine if they could impartially consider the evidence knowing the State's witnesses were homosexual).

Specific Defenses: *State v. Leonard*, 295 N.C. 58, 62–63 (1978) (a juror who is unable to accept a particular defense recognized by law is prejudiced to such an extent he can no longer be considered competent and should be removed when challenged for cause).

[43] Considerations of race can be critical in any case, and *voir dire* may be appropriate and permissible to determine bias under statutory considerations of one's fitness to serve as a juror. *See generally* N.C. GEN. STAT. § 15A-1212(9) (challenges for cause may be made . . . on the ground a juror is unable to render a fair and impartial verdict). Strategically, try to show how questions on racial attitudes are relevant to the theory of defense. If the inquiry is particularly sensitive, request an individual *voir dire*. *See* N.C. DEFENDER MANUAL, *supra* note 7, at 25-18.

X. Other Important Considerations

It is axiomatic you must know the case facts, theory of defense, theme(s) of the case, and applicable law to conduct an effective *voir dire*. Beyond these fundamentals, I offer a few practice tips. First, every jury selection is different, tailored to the unique facts, law, and individuals before you. Second, we meet with the defendant and witnesses on the eve of trial for a last review. Often, we learn new facts, good and bad, as witnesses are sometimes impressive but are more commonly afraid, experience memory loss, present poorly, or will not testify. We re-cover the material points of trial, often illuminating important facts that require disclosure in the selection process. Last, I like to use common sense analogies and life themes to which we can all relate in my conversation with jurors.

Look, act, and dress professionally. Make sure your client and witnesses dress neatly and act respectfully. Of all the things you wear, your expression is most important. A pleasant expression adds face value to your case.[44]

Use plain language. Distill legal concepts into simple terms and phrases.

At the outset, tell the jury they have nothing to fear. Inform them the judge, the governor[45] of the trial, will tell them everything they need to know, and the bailiffs are there for their assistance, security, and comfort. Instruct the jury they need only tell the bailiffs or judge of any needs or concerns they may have.

Be respectful of opposing counsel, not obsequious. You reap what you sow. Promote respect for the process. Be mindful of how you address opposing counsel. He is the prosecutor, not the State of North Carolina (or the government). If the prosecution invokes such authority, tell the jury you represent the citizens of this state, protecting the rights of the innocent from the power of the government.

Sun Tzu, author of *The Art of War*, provides timeless lessons on how to defeat your opponent. A fellow lawyer, Michael Waddington, in *The Art of Trial Warfare*, applies Sun Tzu's principles to the courtroom. I share a sampling for your consideration. Trial is war. To the trial warrior, losing can mean life or death for the client. Therefore, the warrior constantly learns, studies, and practices the art of trial warfare, employing the following principles: Because no plan survives contact with the enemy, he is always ready to change his strategy to exploit a weakness or seize an opportunity. He strikes at bias, arrogance, and evasive answers. He prepares quietly, keeping the element of surprise. He makes his point efficiently, knowing juries have limited attention spans and dislike rambling lawyers. He impeaches only the deserving and when necessary. He is self-disciplined, preparing in advance, capitalizing on errors, and maintaining momentum. He is unintimidated by

[44] MOSES, *supra* note 23.

[45] Judges are sometimes referenced as the governor or gatekeeper of the trial, particularly when deciding admissibility of expert evidence. *See State v. McGrady*, 368 N.C. 880 (2016) (amended Rule 702(a) implements the standards set forth in *Daubert*); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (defines the judge's gatekeeping role under FED. R. EVID. 702).

legions of lawyers or a wealth of witnesses, knowing they are bloated prey. He sets up the hostile witness, luring misstatements and exaggerations for the attack. He does not become defensive, make weak arguments, or present paltry evidence. He focuses on crucial points, attacking the witnesses in his opponent's case. He neither moves nor speaks without reflection or consideration. He never trusts co-defendants or their counsel, for danger looms. He remains calm and composed, unflinching when speared. He neither takes tactical advice nor allows his client to dictate the trial,[46] recognizing why his client sits next to him. He is not reckless, cowardly, hasty, oversensitive, or overly concerned what others think. He prepares for battle, even in the midst of negotiation. He keeps his skills sharp with constant practice and strives to stay in optimal physical and emotional shape – for trial requires the stamina of a warrior. The trial lawyer understands mastery of the craft is an ongoing, lifetime journey.

We summarize life experiences and belief systems via themes. The best themes are succinct, memorable, and powerful emotionally. We motivate and lure jurors to virtuosity – or difficult verdicts – through life themes. Consider the powerful themes within this argument:

> The first casualty of war – or trial – is innocence. Fear holds you prisoner; faith sets you free. How many wars have been fought and lives lost because men have dared to insist to be free? Did you ever think you would have the opportunity to affect the life of one person so profoundly while honoring the principles for which our forefathers fought? Stand up for freedom today; for many, freedom is more important than life itself. Partial or perverted justice is no justice; it is injustice. Stop at nothing to find the truth. You have no friend to reward and no enemy to punish. Your duty is to let your verdict speak the everlasting truth. His triumph today will trigger change tomorrow. Investigations will improve, and justice will have meaning. Trials will no longer be a rush to judgment but instead a road to justice.

A trial lawyer without a theme is a warrior without a weapon.[47]

XI. Integrating *Voir Dire* into Closing Argument

At the end of closing argument, I return to central ideas covered in *voir dire*. I remind the jury the defendant is presumed innocent even now, walk over to my client and touch him – often telling the jury this is the most important day of my client's life. I then remind them they are not to surrender their honest and conscientious convictions or do violence to their individual judgment merely to return a verdict, purposefully re-isolating and re-insulating the jury before stating my theme and asking for them to return a verdict of not guilty.

[46] *But see State v. Ali*, 329 N.C. 304 (1991) (when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, the client's wishes must control).
[47] Charles L. Becton, *Persuading Jurors by Using Powerful Themes*, TRIAL 63 (July 2001).

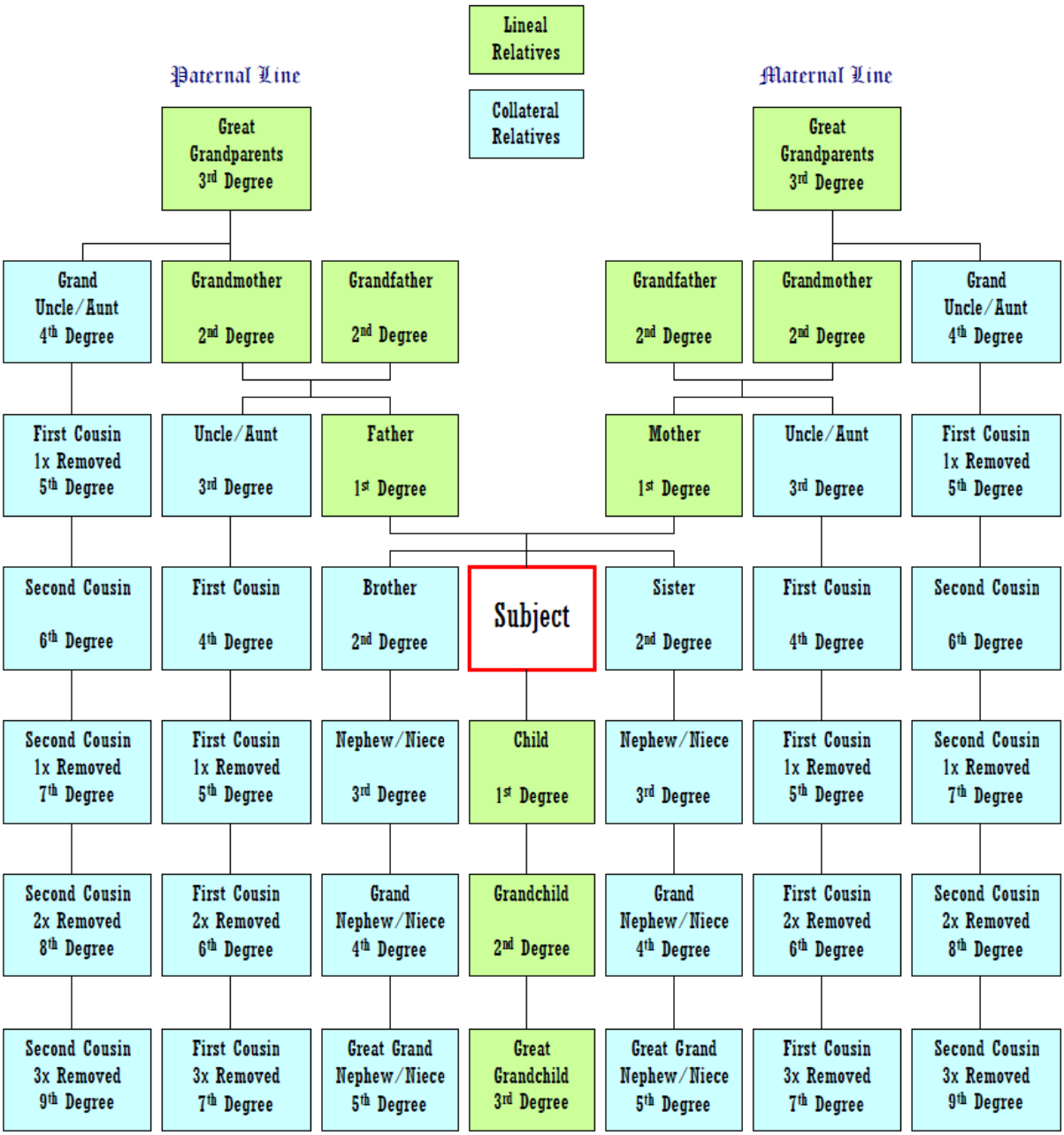
XII. Summary

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

> "A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end."
>
> "The day may come when we are unable to muster the courage to keep fighting … but it is not this day."[48]

[48] THE LORD OF THE RINGS: RETURN OF THE KING (New Line Cinema 2003).

EXHIBIT A



JURY SELECTION: THE ART OF PEREMPTORIES AND TRIAL ADVOCACY TECHNIQUES
BY: JAMES A. DAVIS

EXHIBIT B

REFERENCES

1. *Voir Dire*: 15A-1211 to 1217
2. Jury Trial Procedure: 15A-1221 to 1243
3. Bifurcation: 15A-928
4. Jury Instruction Conference: Gen. R. of Prac. 21; 15A-1231

NEED

1. Witness List
2. Jury Profile
3. Jury Pool List
4. 12 Leaders/They save themselves

VOIR DIRE

(Humble/vulnerable; Introduce/tell about self/firm/defendant; Charge; Innocent/Not guilty; Use analogy)

EXPLAIN THE PROCESS

1. Search for truth: not CSI; often slow and deliberate.
2. Ideal jury: fair and impartial cross section of community.
3. Juror service: Pinnacle of public service; conscience of community; protect/preserve process.
4. You bring life experience and common sense.
5. May be a great juror in one case but not another.
6. Judge: gatekeeper/governor of trial. Will tell us all we need to know.
7. Length of trial.

GROUP QUESTIONS

(You, close friend, family member)

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

INDIVIDUAL QUESTIONS

21. Where live? Employment? Spouse? Family/children?
22. Any disability/physical/medical problems?
23. Any personal/business commitments?
24. Any specialized medical/psychological, legal/law enforcement, scientific/forensic training?

KEY POINTS

25. Supervise any employees?
26. Know anyone else on the jury panel/pool?
27. Ever serve as sworn LEO or similar capacity?
28. Military service?
29. Rescue squad/EMS/Fire Dept. service?
30. Teacher/Pastor/Church member/Government employee?
31. Serve on another jury this week?

PROCESS OF TRIAL

32. State goes first; defense goes last; do not decide; address judge's instruction.
33. Will be objections/interruptions based on rules of evidence/procedure? Matters of law.
34. DRAW THE STING/STRIP. Cover BAD/UNDISPUTED FACTS/AFFIRMATIVE DEFENSES or IRRELEVANT ISSUES/FACTS (weapons, bad injuries, criminal record, drugs, alcohol, relationships, etc.). The law recognizes certain defenses. Not every death, injury or bad act is a crime.
35. Race/gender/religion issues? (white victim/black defendant); Batson; *Prima facie* case (raise inference?)/Race-neutral reasons/Purposeful discrimination? Judge elicit?

EXHIBIT B

36. Some witnesses are everyday folks. Will anyone give testimony of LEO any greater weight solely because he wears a uniform? Judge will charge on credibility of witnesses. Promise to follow law?
37. You may hear from expert witnesses. Can you consider?
38. The charge is _____. Judge will explain the law. Burden of proof is "beyond a reasonable doubt" (fully satisfies/entirely convinces). State must prove each and every element beyond burden. Promise to hold to burden? Same burden as Capital Murder.
39. Defendant presumed innocent. Defendant may choose, or not choose, to take the stand. He remains clothed with the presumption of innocence now and throughout this trial. Not a blank chalk board or level playing field. Will you now conscientiously apply the presumption of innocence to the Defendant?
40. Must you hear from the Defendant to follow the law? Must the Defendant "prove his innocence?" You are "not to consider" whether defendant testifies. PJI - Crim. 101.30

CONCLUSION

41. You have the right to hear and see all the evidence, voice your opinion, and have it respected by others.
42. You are to "reason together…but not surrender your honest convictions" as deliberate toward the end of reaching a verdict. You are "not to do violence to your individual judgment." "You must decide the case for yourself." N.C. Gen. Stat. §15A-1235.
43. Use your "sound and conscientious judgment." Be "firm but not stubborn in your convictions." PJI – Crim. 101.40.
44. Believe the opinions of other jurors are worthy of respect? Will you?
45. No crystal ball. Do you know of any reason this case may not be good for you? Any questions I haven't asked that you believe are important?

CHALLENGES FOR CAUSE

1. Grounds. N.C. Gen. Stat. § 15A-1212.
    a. Is incapable by reason of mental or physical infirmity.
    b. Has been or is a party, witness, grand juror, trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge.
    c. Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
    d. Is related by blood or marriage within the sixth degree to the defendant or victim of the crime.
    e. Has formed or expressed an opinion as to the guilt or innocence of defendant.
    f. Is presently charged with a felony.
    g. As a matter of conscience, would be unable to render a verdict with respect to the charge in accord with the law.
    h. For any other cause is unable to render a fair and impartial verdict.

BUZZ PHRASES

1. Substantially impair? Automatically vote? *State v. Cummings*, 326 N.C. 298 (1990); *State v. Chapman*, 359 N.C. 328 (2005).
2. Juror statement he could follow the law but defendant's failure to testify would "stick in the back of his mind" while deliberating should have been excused for cause. *State v. Hightower*, 331 N.C. 636 (1992).
3. "Stake-out" questions? Defense has a right to a full opportunity to make diligent inquiry into "fitness and competency to serve" and "determine whether there is a basis for a challenge for cause or a peremptory challenge." N.C. Gen. Stat. § 15A-1214(c). Ask: Can you consider? *State v. Roberts*, 135 N.C. App. 690 (1999). Can you set aside your opinion and reach decision solely upon evidence?
4. After telling jurors the law requires them to deliberate to try to reach a verdict, it is permissible to ask "if they understand they have the right to stand by their beliefs in the case." *State v. Elliott*, 344 N.C. 242 (1996).
5. "A juror can believe a person is guilty and not believe it beyond a reasonable doubt." Hence, it is error for D.A. to argue if a juror believes the defendant is guilty then he necessarily believes it BRD. *State v. Corbin*, 48 N.C. App. 194 (1980).