SCHOOL OF GOVERNMENT
North Carolina Judicial College

Advanced Criminal Evidence for Superior Court Judges

April 29 – May 1, 2025
School of Government, Chapel Hill, NC
Room 2403

Tuesday, April 29 [5.75 CJE]

9:00 a.m. **Welcome** [0.25 CJE]
Daniel Spiegel, UNC School of Government

9:15 a.m. **Authentication, Digital and Video Evidence** [1.50 CJE]
Daniel Spiegel, UNC School of Government

10:45 a.m. ***Break***

11:00 a.m. **Character Evidence and Self-Defense Cases** [1.25 CJE]
Joe Hyde, UNC School of Government

12:15 p.m. ***Lunch at SOG***

1:30 p.m. **404(b)** [1.25 CJE]
Steve Friedland, Professor of Law, Elon University School of Law

2:45 p.m. ***Break***

3:00 p.m. **Witnesses and Impeachment** [1.50 CJE]
Steve Friedland, Professor of Law, Elon University School of Law

4:30 p.m. ***Recess***

Wednesday, April 30 [5.50 CJE]

9:00 a.m. **Hearsay** [1.50 CJE]
Timothy Heinle, UNC School of Government

10:30 a.m. ***Break***

10:45 a.m. **Confrontation** [1.25 CJE]
Phil Dixon, UNC School of Government

12:00 p.m. ***Lunch at SOG***

1:15 p.m. **Evidence Issues in Cases Involving Children** [1.50 CJE]
Daniel Spiegel, UNC School of Government

2:45 p.m. ***Break***

3:00 p.m. **Checking In/Miscellaneous Issues/Workshop** [1.25 CJE]
Daniel Spiegel, UNC School of Government

4:15 p.m. ***Recess***

6:00 p.m. ***Group Dinner***
Luna Rotisserie and Taproom, Carrboro

Thursday, May 1 [3.25 CJE]

9:00 a.m. **Experts** [1.50 CJE]
Hon. Alyson Grine, Resident Superior Court Judge, District 18

10:30 a.m. ***Break***

10:45 a.m. **Panel: Evidentiary Rulings in Practice** [1.50 CJE]
Hon. Ashley Gore, Senior Resident Superior Court Judge, District 15A
Hon. Keith Gregory, Resident Superior Court Judge, District 10
Hon. Thomas Lock, Resident Superior Court Judge, District 11B

12:15 p.m. **Wrap-Up** [0.25 CJE]

12:30 p.m. ***Adjourn***

This program will have **14.50** hours of instruction, all of which will qualify for continuing judicial education under rule II.C of Continuing Judicial Education.

Any breakfast or lunch provided as part of this program is paid for by the Administrative Office of the Courts. When claiming reimbursement for expenses for this program, the portion of the daily travel allowance allocated for these breakfasts or lunches may not be claimed.

Advanced Criminal Evidence for Superior Court Judges

UNC School of Government, Chapel Hill
April 29 – May 1, 2025

Name	Judicial District	Job Title
Stuart Albright	Judicial District 24	Senior Resident Superior Court Judge
George Bell	Judicial District 26C	Resident Superior Court Judge
Greg Bell	Judicial District 20	Senior Resident Superior Court Judge
Taylor Browne	Judicial District 37	Resident Superior Court Judge
Tonia Cutchin	Judicial District 24	Resident Superior Court Judge
Beth Freshwater-Smith	Judicial District 8	Special Superior Court Judge
Jimmy Hill	Judicial District 37	Senior Resident Superior Court Judge
Paul Holcombe	Judicial District 13	Resident Superior Court Judge
Dawn Layton	Judicial District 21	Resident Superior Court Judge
Jessica Locklear	Judicial District 20	Special Superior Court Judge
Will Long	Judicial District 32	Resident Superior Court Judge
Marty McGee	Judicial District 25	Senior Resident Superior Court Judge
Reggie McKnight	Judicial District 26E	Resident Superior Court Judge
Eric Morgan	Judicial District 31	Resident Superior Court Judge
Shamieka Rhinehart	Judicial District 16	Resident Superior Court Judge
Bob Roupe	Judicial District 5	Resident Superior Court Judge
Troy Stafford	Judicial District 32	Special Superior Court Judge
Billy Strickland	Judicial District 9B	Senior Resident Superior Court Judge
Hoyt Tessener	Judicial District 10	Special Superior Court Judge
Brian Wilks	Judicial District 16	Resident Superior Court Judge

Speaker Bios: 2025 Advanced Criminal Evidence for Superior Court Judges

Judge Alyson Adams Grine
NC Superior Court Judge
Judicial District 18
In January of 2011, Governor Roy Cooper appointed Alyson A. Grine to serve as a Resident Superior Court Judge for Judicial District 18 (Orange and Chatham Counties) and she was elected to a full term in November of 2022. Previously, Judge Grine was a prosecutor in Durham in the Homicide Unit. She also worked as an educator for over a decade, serving as a faculty member at the North Carolina Central University School of Law and the UNC School of Government, where she specialized in criminal law and procedure. Before joining UNC, Judge Grine worked as an Assistant Public Defender in District 18. Early in her career, she served as a judicial clerk for Chief Justice Henry Frye of the NC Supreme Court and for Justice (then Judge) Patricia Timmons-Goodson of the NC Court of Appeals. Judge Grine earned a BA with distinction and a JD with honors from UNC Chapel Hill as well as an MA in Spanish from the University of Virginia. In her spare time, she enjoys hiking, playing tennis, and fostering rescue dogs.

Phil Dixon
Teaching Associate Professor; Director, Public Defense Education
UNC School of Government
Phil Dixon primarily works with public defenders and defense lawyers. He joined the School of Government in 2017. Previously, he worked as a defense lawyer in eastern North Carolina for over eight years. During that time, he represented criminal defendants and juveniles charged with all types of crimes at the trial level. In 2023, he was named director of the School's Public Defense Education group. In collaboration with Indigent Defense Services, he works to provide training and consultation to defenders and other court system actors, as well as to research and write on criminal law and related issues. He earned a bachelor's degree from UNC-Chapel Hill and law degree with highest honors from North Carolina Central University School of Law.

Steve Friedland
Professor of Law
Elon University School of Law
Steve Friedland has taught Evidence Law at six different law schools, most recently at Wake Forest Law and Elon Law, where he is a Professor of Law and Senior Scholar. Friedland was an Assistant U.S. Attorney for the District of Columbia and Assistant Director of the Office of Legal Education of the Department of Justice. He graduated from Harvard Law School with honors and holds LLM and J.S.D. Degrees from Columbia University.

Timothy Heinle
Albert and Gladys Coates Term Professor; Teaching Assistant Professor
UNC School of Government
Timothy Heinle is an expert on North Carolina civil matters, including evidence; abuse, neglect, and dependency; incompetency and guardianship; and child support contempt proceedings. As a faculty member in the School's Public Defense Education program, his primary focus is on providing education and resources to civil defense attorneys, including parent attorneys and Chapter 35A guardian ad litem attorneys. In addition to his work with civil defenders, Heinle teaches other attorneys and judicial officials on matters of civil law. Heinle was awarded with an Albert and Gladys Coates Term Professorship for 2025-2027. In 2022, he received the School's Performance Excellence Award for "collaborative, dedicated, and innovative efforts that advance the mission of the School of Government," and the Margaret Taylor Writing Award for "outstanding writing that displays [a] clear and distinct style," for *The First Seven Days as a Parent Defender.* Heinle joined the School in 2020. Previously, he spent a decade as a civil litigator at the trial and appellate levels in the areas he now focuses on at the School. Heinle earned a J.D. from New England Law in Boston, MA.

Joe Hyde
Assistant Professor of Public Law and Government
UNC School of Government

Joseph L. Hyde is an expert in the areas of criminal law and procedure. His teaching and research support North Carolina's prosecutors. He also advises on issues related to evidence and appellate procedure. He is the lead contact for NC PRO, the School's online resource for prosecutors, and contributes to the *North Carolina Criminal Law Blog*. Hyde joined the School of Government in 2022. He completed state and federal clerkships for the Hon. James A. Wynn, Jr., on the North Carolina Court of Appeals and the U.S. Court of Appeals for the Fourth Circuit. He then worked for more than a decade at the North Carolina Department of Justice, Criminal Division, Appellate and Postconviction Section. Most recently, Hyde served as special deputy attorney general, representing the state in criminal appeals and post-conviction litigation. Hyde earned a bachelor's degree from Saint John's College and a J.D. with honors from the UNC School of Law.

Daniel Spiegel
Assistant Professor
UNC School of Government

Daniel Spiegel is an assistant professor at the School of Government, specializing in criminal law, procedure, and evidence. He joined the School's courts faculty in January 2024. Spiegel serves as a criminal law expert and teaches and consults with court actors on criminal justice issues, with an emphasis on public defense. Previously, he practiced criminal law in North Carolina for 13 years, serving as an assistant public defender in Mecklenburg and Hoke Counties, assistant appellate defender statewide, and assistant district attorney and policy counsel in Durham County. Spiegel earned a bachelor's degree from Johns Hopkins University, a Master of Music from The Juilliard School, and a J.D. *cum laude* from Harvard University.

School of Government - Courts Faculty List

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Areas of Expertise: Mental health law, including involuntary commitment procedures; Legal responsibilities of area boards; Client rights (especially confidentiality)

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Areas of Expertise: Criminal law and procedure; Computer crimes; Domestic violence; First appearances; Pretrial release; District Court Judges; Magistrates

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Areas of Expertise: Civil law; Landlord/tenant; Small claims; Magistrates

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Areas of Expertise: Child welfare law (abuse, neglect, dependency; termination of parental rights; emancipation); Adoptions of minors; Indian Child Welfare Act; Judicial waiver of parental consent; Legitimation; District Court Judges; Parent Attorneys; Social Service Attorneys

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Areas of Expertise: Cannabis/Hemp and drug crimes; Criminal law and procedure; Firearms law; Post-conviction; Right to counsel; Sex offenders; Search and seizure; Public Defense Education; Public Defenders

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Areas of Expertise: Incompetency and guardianship; Juvenile abuse, neglect, and dependency; Social services law (child welfare, protective services); Termination of parental rights; Evidence; Civil Defenders; Adult Guardian Ad Litems (GALs)

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Areas of Expertise: Criminal justice data and policy; Supporting stakeholder pilot projects and empirical evaluations in areas such as policing and responding, system scope and impact, case management, indigent defense, pretrial systems, and re-entry

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Areas of Expertise: Abuse, neglect, and exploitation (adults); Elder abuse; Estate administration; Foreclosures; Guardianship; Incompetency; Powers of attorney; Special proceedings; Trusts; Clerks of Superior Court

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Areas of Expertise: Criminal law and procedure; Evidence; Drug crime; Public Defenders

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Tab 1: Rules of Evidence (General), Intro, Rule 104

The Rules of Evidence - An Introduction

Penny J. White
May 2015

I. Learning Objectives for this Session:

Following this session, participants will be able to:

1. Appreciate the underlying bases for evidence rules and the role the underlying bases plays in evidentiary rulings;
2. Properly and efficiently make evidentiary rulings;
3. Carefully exercise discretion in making evidentiary rulings;
4. Appreciate the role of the judge in the evidentiary process; and
5. Embrace the significance and importance of evidentiary rulings.

II. Resources:

NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Ed.) (referred to herein as BENCHBOOK, at) (available at http://benchbook.sog.unc.edu/)

Kenneth S. Broun, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 1-23 (referred to herein as Broun, at __)

Judge Catherine C. Eagles, "North Carolina Rule of Evidence 104: The Overlooked but Omnipresent Rule," (referred to herein as Eagles, at)(available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/EaglesEvidencePaper.pdf)

III. The Rules of Evidence - Introduction

A. Purposes for Evidence Rules

1. General Purposes for Evidence Rules

Blackstone remarked that "experience will abundantly show, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of." 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 330 (Oxford, 1765-69). Fact-finding in the American court system is the job of the jury and the judge, in non-jury cases. Evidence principles affect what facts come before the factfinder and as a result regulate the proceeding. But prior to the codification of uniform evidence rules, a hodgepodge of principles were applied in somewhat random fashion leading commentators to refer to evidence law as in a "poor state" and in "shambles." To promote uniformity and fairness, an advisory committee worked for a decade before submitting a draft of what would become the Federal Rules of Evidence. On January 2, 1975, the Federal Rules of Evidence were signed into law. States, including North

Carolina, adopted most of the rules with some variation thereafter. *See State v. Bogle*, 324 N.C. 190, 202-03 (N.C. 1989) (quoting N.C.G.S. § 8C-1 noting that "uniformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical").

B. Stated Purposes and Rule of Construction – Rule 102

1. Overriding Purpose of Ascertaining Truth and Administering Justice

The purpose of the North Carolina Rules of Evidence, along with the manner of construction, is set forth in **Rule 102.** It provides that **"[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."** Moreover, the North Carolina Supreme Court has stated that the rules of evidence "are meant to assure that the evidence a jury hears and considers is *reliable*." *State v. Lopez*, 363 N.C. 535, 541 (N.C. 2009) (emphasis added). In essence, the overriding purpose of the rules is to ascertain the truth and administer justice by assuring that the evidence that the factfinder considers is reliable. While this lofty purpose may seem indefinite, and at times erroneous, it is not only an important reminder of the significance of evidentiary rulings, but also a helpful fallback position for the trial judge faced with a difficult issue which the rules do not definitively resolve.

2. Three Objectives of Construction

Similarly, Rule 102's description of the manner in which the rules should be construed aids the trial judge in applying the rules to indefinite situations. The rules are to be construed to accomplish three objectives: fairness (which anticipates reliability), elimination of unjustifiable expense and delay, and promotion of the growth and development of the law of evidence. A trial judge faced with a difficult evidentiary issue unresolved by application of the rules should construe the rules and render a decision, consistent with these objectives and with Rule 102's overriding purpose.

3. Application

Decisions of the North Carolina appellate courts frequently cite Rule 102 as an underlying basis for affirming a trial court's evidentiary ruling. *See e.g.*, *State v. Lopez*, 363 N.C. 535, 541 (N.C. 2009); *State v. Bogle*, 324 N.C. 190, 202-03 (N.C. 1989); *State v. Smith*, 315 N.C. 76, 97 (N.C. 1985). The appellate court's analysis of Rule 102 as a decisional tool provides guidance for trial judges relying upon Rule 102 as a basis for ruling on difficult evidence issues. Two examples are set forth below.

In *State v. Valentine*, 357 N.C. 512 (2003), various statements of the deceased victim were introduced under the residual exception to the hearsay clause. In reviewing the trial judge's determination, the North Carolina Supreme Court noted that the trial

judge had failed to make the requisite findings of fact with regard to the trustworthiness of the hearsay statements. Because of the trial courts failure, the Court conducted its own review and concluded that the statements were admissible under the residual exception. The Court then added that "the North Carolina Rules of Evidence provide that the rules 'shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.'" 357 N.C. at 517. The admission of the victim's statements served the interests of justice by providing jurors with the necessary tools to ascertain the truth. *Id.*

Valentine demonstrates an appropriate use of Rule 102. After analyzing the evidence under the applicable hearsay rule, the Court fortified its decision by reference to the underlying purpose of the rule of evidence. Rule 102 does not form an independent basis for admissibility of evidence. It would be error, for example, for a trial judge to admit evidence on the basis that the evidence might help the jury find the truth. Similarly, the rule does not allow the judge to admit inadmissible evidence "in the interests of justice." Rather than creating an independent basis for admissibility, Rule 102 requires the judge to tip the scales in favor of truth and justice in the close or uncertain situation.

In *State v. Smith*, 315 N.C. 76 (N.C. 1985), the North Carolina Supreme Court reviewed a trial court's decision to admit hearsay under the Rule 803(24) residual hearsay exception, an exception which requires a finding that the interests of justice will be served by admission of the hearsay evidence. In discussing that aspect of the Rule 803(24) residual hearsay exception, the North Carolina Supreme Court quoted and relied upon Rule 102 to inform the interests of justice analysis. "After considering whether admission of the proffered evidence would best serve *these* purposes *and* the interests of justice, the trial judge must state [the] conclusion. . . . [T]he trial judge will necessarily undertake the serious consideration and careful determination contemplated by the drafters of the Evidence Code." *State v. Smith*, 315 N.C. 76, 96-97 (1985).

C. Applicability of the Rules - General Applicability – Rules 101, 1101

The Rules of Evidence apply "[e]xcept as otherwise provided . . . to all actions and proceedings in the courts of this state." N.C.R. Evid. 1101. The rules do not apply to preliminary questions determined by the judge, N.C.R. Evid. 1101(b)(1); to proceedings before the Grand Jury, N.C.R. Evid. 1101(b)(2); to certain miscellaneous proceedings, N.C.R. Evid. 1101(b)(3);[1] or to summary contempt proceedings, N.C.R. Evid. 1101(b)(4). *See also* N.C. R. Evid. 101 (noting that rules "govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101").

The North Carolina Rules of Evidence are specifically inapplicable in sentencing hearings, including capital sentencing proceedings in North Carolina, *see State v. Carroll*,

[1] "These miscellaneous proceedings include – Proceedings for extradition or rendition; first appearance before district court judge or probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise." N.C.R. Evid. 1101(b)(3).

356 N.C. 526, 547 (N.C. 2002); *State v. Davis*, 353 N.C. 1, 18 (N.C. 2000)(but noting that rules of evidence may be used as a "guideline to reliability and relevance"), and in probation and parole revocation hearings, but may be helpful in determining reliability and relevance. *State v. Bond*, 345 N.C. 1 (1996). In addition, even in those proceedings in which the rules do not apply, constitutional due process standards always apply and may impact evidentiary rulings. *See e.g.*, *Holmes v. South Carolina*, 547 U.S. 319 (2006)(due process right to present a defense); *Bearden v. Georgia*, 461 U.S. 660 (1983)(probation revocation determination must include inquiry into reasons for failure to pay fines or restitution); *Gardner v. Florida*, 430 U.S. 349 (1977) (confrontation at capital sentencing hearing); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process requirements in parole revocation proceeding). The requirements of due process are ascertained on a case-by-case basis. *See e.g.*, *State v. Lombardo*, 306 N.C. 594 (1982) (consideration of unconstitutionally seized evidence in probation revocation hearing).

As noted, a trial judge who is determining preliminary questions, including the admissibility of evidence, is not bound by the rules. Therefore, the judge may consider otherwise inadmissible evidence in determining the threshold question of witness qualifications, privilege, and admissibility of evidence. N.C. R. Evid. 104(a).

D. Role of the Judge in the Evidentiary Process – "Governor" of Trial; "Gatekeeper" of Evidence

The United States Supreme Court has referred to the judge as "the governor of the trial." *Quercia v. United States*, 289 U.S. 466 (1933). As "governor," the trial judge plays the crucial goal of "gatekeeper" of the evidence at trial. It is the judge who must make preliminary decisions as to whether evidence is admissible, wholly or conditionally.

The judge's ruling on a preliminary question may require a factual determination, a legal determination, or both. As noted above, the judge is not bound by the rules of evidence in deciding preliminary questions, but is given leeway to consider all relevant and reliable information that may aid in the decision.

1. Preliminary Questions of Admissibility – Rule 104(a)

Very often, the admissibility of evidence, both tangible and verbal, will depend upon a number of threshold factual determinations. Is the witness competent to testify? Was the conversation privileged? Is the statement offered for its truth or for some other purpose? Is the document genuine? Was the weapon the one found at the scene of the crime? In each instance the admissibility of evidence will depend upon factual or legal findings made by the trial judge. In making these determinations, the trial judge is not bound by the rules of evidence.

Rule 104(a) provides that **"[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions**

of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges." N.C. R. Evid. 104(a). Thus, Rule 104 requires the judge to determine if evidence is admissible. The rule must be read in conjunction with Rule 103, which requires counsel to raise objections to evidence either by motion or objection.

The trial judge's determination of admissibility is basic threshold admissibility. The judge does not, except in unique situations,[2] weigh the evidence or consider its probativeness.[3] Rather, the judge's factual and legal determinations, which should be clearly stated on the record, determine only whether the evidence should be admitted for consideration by the trier of fact.

The judge's particular gatekeeper function under Rule 104(a) applies in three situations: whether a particular witness is competent to testify, either in general, or as an expert; whether statements are protected by evidentiary privileges and thus, inadmissible; and whether evidence is generally admissible under the rules of evidence.

a. Qualification of a Person to be a Witness

Preliminary questions concerning the qualifications of a person to be a witness may include issues about competence to testify generally. The rules of evidence presume competence, N.C.R. Evid. 601, and require only that a witness testify for personal knowledge, N.C.R. Evid. 602, and under oath or by affirmation, N.C.R. Evid. 603.[4]

i. Competence of a witness

In determining whether a witness is competent to testify, "the trial judge is not acting as the trier of fact, [but] is rather deciding a threshold question of law, which lies mainly, if not entirely, within the judge's discretion. . . . The trial court must make only sufficient inquiry as to satisfy itself that the witness is or is not competent to testify. The form and the manner of that inquiry rests in the discretion of the trial judge." *In re Will of Leonard*, 82 N.C. App. 646, 648 (1986).

The preliminary determination must be based on the judge's personal observation. As noted by the North Carolina Supreme Court in a case involving a child witness: "underlying our law governing competency is the assumption that a trial judge must rely on his personal observation of a child's demeanor and responses to inquiry at the competency hearing." A trial judge who does not personally examine or observe the

[2] For example, if a judge is determining admissibility under certain hearsay exceptions, the judge must evaluate trustworthiness and may disallow the evidence, despite the existence of a hearsay exception, when issues of trustworthiness are present. N.C.R. Evid. 803(6), (8); 804(b)(6).

[3] When the judge is asked to exclude otherwise relevant evidence under Rule 403, the judge does weigh the probativeness against the danger that the opponent claims; similarly, a judge must consider probativeness when admitting evidence under Rules 404(b), 608, and 609.

[4] Implicit in the witness' affirmation is the declaration that the witness understands the obligation to tell the truth. N.C.R. Evid. 602.

child cannot exercise informed discretion in determining competency. *State v. Deanes*, 323 N.C. 508, 522 (1988) (quoting *State v. Fearing*, 315 N.C. 167, 174 (1995)).

A recent case offers a good example of the types of facts that a trial judge might rely upon in ruling on a challenge to a witness' competence and how the judge can articulate the exercise of discretion. In *State v. Painter*, 173 N.C. App. 448 (2005), the defendant moved to strike the testimony of A.M., a witness. The court noted that it had observed the witness and the witnesses' responses to questions, "not only what is said but in the way that he said it." In great detail, the court explained:

> Both at voir dire and during the testimony of [A.M.] the court had the opportunity to observe him, both his demeanor and his manner in responding to questions. And I would note that although he appeared to be reluctant to respond to questions, particularly on, for one example but not intending to be exhaustive, I think he was, asked what if any nickname he might have for private parts. And he appeared at that time to the court to understand the question but really to be in some genuine embarrassment and unwilling to discuss it at that time.
>
> **describes demeanor**
>
> **makes specific reference**
>
> Both because of the youth of the witness, who the court finds to be eight years old and in the second grade, and the sensitive nature of the subject matter and his response to it, the court found that it would be appropriate to allow both the State and the defendant to ask leading questions of the defendant. And I did permit both the State -- certainly the State was given more leeway than would have been allowed with an adult witness. However, I think the same leeway was given to the defendant in terms of asking leading questions.
>
> **describes procedure**
>
> And I will note that although [A.M.] responded certainly more emphatically and more directly to leading questions, which again, I think is not unexpected from an eight year old witness, I will note that on occasion he was unable to respond to leading questions. And the court would find that on those occasions typically A.M. indicated that either he didn't remember or did not know the answer to those questions . . . .
>
> **describes responses**
>
> **analyzes responses**
>
> . . . And that it would be the court's evaluation of that testimony that he was responding truthfully and was doing the best that he could.
>
> **draws conclusion**

In denying the motion to strike the witness' testimony, the judge concluded that the witness was "capable of expressing himself so that he can be understood [and further found that the witness] is capable of understanding the duty to tell the truth as a witness pursuant to Rule 601." *State v. Painter*, 173 N.C. App. at 452.

ii. Qualifications of Expert Witness and Expert Opinion

The trial judge must also determine preliminary questions regarding the qualifications of a person to testify as an expert witness under Rule 104(a). The issue is whether the person has "sufficient knowledge, skill, experience, education, or training to testify" as an expert. N.C. R. Evid. 702(a).

Under North Carolina's revised Rule 702, the judge must also determine:

(1) whether scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
(2) whether the "testimony is based upon sufficient facts or data;"
(3) whether the "testimony is the product of reliable principles and methods," and
(4) whether "the witness has applied the principles and methods reliably to the facts of the case."

N.C.R. Evid. 702 (a) (1) – (3).

b. Existence of a privilege

Rule 104 also provides that questions concerning the existence of a privilege are preliminary questions to be determined by the trial judge.

c. Admissibility of evidence

The broadest category of preliminary questions is the "admissibility of evidence." N.C.R. Evid. 104(a). The trial judge must determine as a preliminary question, for example, whether an exhibit is authentic; whether evidence is relevant; whether an out of court statement is offered for some purpose other than the truth of the matter; whether the elements of a hearsay exception have been established; whether a document is the "original" under the best evidence rule; whether facts should be judicially noticed; whether impeachment evidence is collateral or non-collateral; whether a foundation has been laid for the introduction of reputation evidence; whether character evidence is offered for some purpose other than propensity; whether a specific act offered to impeach is one of untruthfulness; and dozens of other questions pertaining to the admissibility of evidence.

2. Conditional Admissibility – Rule 104(b)

Sometimes, evidence only becomes relevant, if other evidence exists. For example, a handwritten letter, asserted to be the defendant's confession, is relevant only if it can be established that the defendant wrote the letter. A prior act of assault is only relevant to establish the defendant's intent if defendant actually committed the prior assault. In these situations, if the judge acted as a strict gatekeeper, as under Rule 104(a) then the jury's role as trier of fact would be severely limited. Therefore, the rules treat these situations differently, providing in Rule 104(b) that **"[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."**

In situations of conditional admissibility, the judge determines first whether the foundation evidence is "sufficient to support a finding of fulfillment of the condition." N.C. R. Evid. 104 (b). If it is, then the judge admits the items subject to the introduction of the other evidence. If counsel fails to offer the other evidence, frequently referred to as "failing to connect it up," the court must strike the conditionally admitted evidence and instruct the jury to disregard it.

Rule 104(b) frequently applies to the introduction of evidence of other wrongs, crimes, or acts, under Rule 404(b) to establish motive, opportunity, plan, identity, absence of accident, or for some other legitimate purpose, other than propensity. North Carolina law requires consideration of both 104(a) and 104(b) preliminary questions for the proper introduction of this evidence. For example, the court must determine that the purpose for which the evidence is offered is proper given the issues in the case. The court must also determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. Both of these determinations are made under Rule 104(a).

Even after the court has made these preliminary findings, it is still necessary for the evidence of the other crimes, wrongs, and acts to be relevant and sufficiently connected to the defendant. Under North Carolina law, this is a Rule 104(b) determination. "The trial court is required to make an initial determination pursuant to Rule 104(b) of whether there is sufficient evidence that the defendant in fact committed the extrinsic act. The judge is not required to be convinced beyond a reasonable doubt, by clear and convincing evidence, or by a preponderance of the evidence, that defendant committed the extrinsic act. Rather, as a prerequisite to admitting the evidence, the trial court must find the evidence to be substantial." *State v. Williams,* 307 N.C. 452, 454, 298 S.E.2d 372, 374 (defining substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion"); *see also State v. Adam* , 220 N.C. App. 319, 322-23 (2012). If the court determines initially that the evidence is sufficient and allows admission, but the proponent fails to "connect the evidence," the trial court must instruct the jury to disregard the evidence.

3. Procedure for Determining Preliminary Questions – Rule 104(c)

Rule 104(c) establishes the procedure for determining preliminary questions. When the preliminary questions concern **the admissibility of a confession or "other motions to suppress evidence in criminal trials in Superior Court,"** the hearing on the preliminary question **"shall be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or, when an accused is a witness, if he so requests."** N.C.R. Evid. 104(c); *State v. Nackab*, 2013 N.C. App. 219 (2011). The rule has been interpreted to grant "inherent authority to conduct an evidentiary hearing outside the presence of the jury *sua sponte* to clarify questions to admissibility and to prevent undue delay in the proceedings." *State v. Brewington*, 170 N.C. App. 264, 280 (2005).

In evaluating whether the "interests of justice require" a jury-out hearing, trial judges should evaluate the "the potential for prejudice inherent in the evidence which will be produced by parties on the preliminary question." Eagles, at 14. While some confusion exists as to whether hearings on the admissibility of Rule 404(b) evidence must be held outside of the jury's presence, the better course of practice, if there is doubt, is to conduct the inquiry outside the presence of the jury. Eagles, at 13,

4. Effect of Preliminary Question Determinations – Rule 104(d) & (e)

Rule 104(d) provides that an accused who testifies concerning a preliminary matter does not "subject himself to cross-examination as to other issues in the case." This rule embodies the constitutional principle set forth in *Simmons v. United States*, 390 U.S. 377 (1968) that it is improper for the government to establish guilt at trial by using testimony given by the defendant in an effort to suppress illegally obtained evidence, but the rule does not address the subsequent use of testimony given by an accused at a hearing on a preliminary matter. *See e.g., Walder v. United States*, 347 U.S. 62 (1954). Courts frequently allow cross-examination on the issue of credibility, reasoning that by testifying at all, the defendant has placed his credibility in issue. *See e.g. United States v. Jaswal*, 47 F.3d 539 (2d Cir. 1995); *United States v. Grady*, 2005 WL 2739031 (M.D. N.C. Oct. 24, 2005).

A judge's determination of a preliminary question does not "limit the right of a party to introduce before the jury evidence relevant to weight or credibility." N.C.R. Evid. 104(e). As the North Carolina Supreme Court has aptly put it: "[a]dmissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge." *State v. Walker*, 266 N.C. 269, 273 (1966). *See e.g. State v. Hester*, 330 N.C. 547 (1992) (error to exclude evidence about police department's usual practice of recording confessions); *State v. Sanchez*, 328 N.C. 247 (1991) (error to exclude opinion evidence regarding defendant's understanding of *Miranda* warnings); *State v. Baldwin*, 125 N.C.App. 530 (1977) (evidence related to claim of coerced confession).

The often-repeated general rule in North Carolina, from *State v. Walker* is:

> If the judge determines the proffered testimony is admissible, the jury is recalled, the objection to the admission of the testimony is overruled, and the testimony is received in evidence for consideration by the jury. If admitted in evidence, it is for the jury to determine whether the statements referred to in the testimony of the witness were in fact made by the defendant and the weight, if any, to be given such statements if made. Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury. *Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge.*

State v. Walker, 266 N.C. 269, 273 (1966) (emphasis added).

5. Limited Admissibility – Rule 105

The judge may also limit the application of evidence to particular issues or parties. Rule 105 provides for limited admissibility by providing that **"[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."** *But see State v. Stager*, 329 N.C. 278, 310 (1991) (holding that defense was not entitled to have issue trial judge's failure to give limiting instruction reviewed on appeal when counsel did not request or tender a limiting instruction at the time evidence was admitted).

6. Judicial Instructions as to Limited Use of Evidence

The rule provides that limiting instructions are only to be given "upon request." In some circumstances, counsel may have strategic reasons for not requesting a limiting instruction. In other situations, the appellate courts have noted that instructions should be given *sua sponte*.

The jury instruction should be clear as to the permissible and impermissible uses of the evidence. The instruction should be given in plain and concise terms. If possible, the judge should refer to a model jury instruction, rather than delivering one extemporaneously. If the issue is crucial, the judge should compose the instruction and review it before delivering it.

An example of a model, which can be modified for each situation, follows:

> **The_____ (party) has offered evidence of _____ (witness, document). You may only consider this evidence for the purpose of _____ (the permissible purpose). I instruct you that you may not consider this evidence for the purpose of _____ (impermissible purpose).**

Within the North Carolina Pattern Jury Instructions for Criminal Cases is a pattern instruction that may also be used to limit the jury's consideration of evidence admitted for a limited purpose. N.C.P.I – Criminal 104.15 provides:

> Evidence has been received tending to show that (state specific evidence). This evidence was received solely for the purpose of showing [state legitimate purposes for the use of the evidence].[5]
>
> If you believe this evidence you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose. [6]

Additionally, North Carolina Pattern Jury Instructions for Civil Cases may also provide a helpful guide for general use when no specific pattern instruction is available. N.C.P.I. – Civil 101.33 provides:

> (You must not consider this evidence (describe forbidden use of evidence). If you [(believe this evidence) (find that this evidence (describe what must be found for evidence to be relevant))], then you may consider this evidence for the purpose(s) of (describe permissible purpose). Except as it bears upon (specify permissible purpose), [this evidence] [(describe evidence)] may not be used by you in your determination of any fact in this case.

When evidence has been admitted for a limited purpose, the judge should also monitor counsel's use of and reference to the evidence to assure that the jury is not

[5] The Pattern Instruction lists potential proper purposes for the admission of the evidence.
[6] The Pattern Instruction includes this footnote:

> Committee recommends that this instruction not be given in three instances in which proof of similar acts or crimes is generally admitted for substantive purposes: (1) where two crimes are so closely connected that neither can be adequately proved without the other; (2) where a similar sex offense is introduced either as general corroboration or to show the "unnatural" disposition of the defendant; (3) in a case involving the prosecution of a continuing offense. *See State v. McClain*, 240 N.C. 171 (1954). The Committee believes that in these instances the evidence of similar acts or crimes is introduced for such a broad purpose than any attempt to define and limit that purpose by an instruction such as this would be futile.

encouraged to use the evidence in an impermissible way. For example, if the court admits evidence against one party but not another, counsel should be prohibited from making a closing argument that urges the use of the evidence against the other party.

While Rule 105 allows a trial judge to admit evidence for a limited purpose, it does not require it. When, for example, an objection is made under Rule 403, the judge may consider the availability and effectiveness of Rule 105 admissibility and a contemporaneous limiting instruction in determining whether to exclude evidence under Rule 403.

7. Admission of Evidence –Admissibility vs. Weight

Although the rules of evidence do not generally address the applicable burden that rests upon the parties regarding the admission and exclusion of evidence, it is generally accepted that the proponent of evidence must establish admissibility of the evidence once admissibility has been challenged. When the general rule of evidence is a rule of inclusion, the party seeking to exclude the evidence must establish a basis for exclusion. Thus, for example, since all relevant evidence is admissible under Rule 402, a party relying upon Rule 403 as a basis for excluding relevant evidence, must establish the relevant grounds supporting exclusion under Rule 403. Conversely, if the general rule is a rule of exclusion, then the party claiming that the evidence should be admitted pursuant to an exception has the burden of establishing the requisite elements of the exception. Thus, for example, when evidence fits within the definition of hearsay under Rule 802, the evidence will be excluded unless the proponent establishes the existence of an exception under either Rule 803 or 804. In any of these scenarios, the court's decision to admit the evidence is merely a determination of threshold admissibility and does not affect the weight to be given to the evidence. As emphasized above, in Section 4, the matter of weight is left to the fact finder.

8. Other Gatekeeper Tools under Rules of Evidence

The Rules of Evidence incorporate various other tools for the trial judge, including the ability to take judicial notice of adjudicative facts under Rules 201. N.C. R. Evid. 201. Although the rule sets out limitations on the nature of judicially noticed facts, N.C.R. Evid. 201(b), the judge may take judicial notice whether requested or not. N.C. R. Evid. 201(c). A party is entitled to be heard as to the "propriety of taking judicial notice and the tenor of the matter noticed." N.C.R. Evid. 201(e). The judge must take judicial notice, however, when requested to do so by a party who supplies the necessary information. N.C.R. Evid. 201(d). In a criminal case in which judicial notice is taken, the trial court is required to instruct the jury that it "may, but is not required to, accept as conclusive any fact judicially noticed." N.C. R. Evid. 201(g).

An additional gatekeeper tool is found in Rule 611, which requires a trial court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the

ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C. R. Evid. 611(a).

E. Judicial Deference and Discretion Under the Rules of Evidence

1. Reason for Deference; Review of Judicial Deference and Discretion

Trial judges enjoy great deference and broad discretion in making evidentiary rulings. When the application of a rule of evidence is not discretionary, a trial judge's ruling will be given great deference because the trial judge "is better situated to evaluate" the evidence. *State v. Blakney*, ___ N.C. App. ___, ___ 756 S.E.2d 844, 847 (2014). But when an evidentiary ruling requires the exercise of judicial discretion, the trial judge's decision will not be disturbed on appeal unless the ruling constitutes an abuse of discretion. This discretion is appropriate because the trial judge is in the best position to observe the demeanor of the witness, assess the impact of the evidence, and evaluate the overall effect of the evidence on the proceedings.

2. Meaning of Abuse of Discretion

As Judge Friendly once observed, "[t]here are a half dozen different definitions of 'abuse of discretion,' ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes." Henry J. Friendly, INDISCRETION ABOUT DISCRETION, 31 Emory L.J. 747, 763 (1982). The standard results in most evidentiary decisions being affirmed and endorsed with repetitive, unhelpful phrases commending the sound use of judicial discretion. *See e.g.*, *State v. Peterson*, 361 N.C. 587, 607 (2003)(holding that " trial court did not act outside the bounds of reason in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.").

For those judges who have been reversed under the abuse of discretion standard, the concept seems amorphous. Reviewing courts often repeat phrases that offer little analysis of the trial judge's error. So, for example, an abuse of discretion occurs when a ruling is "manifestly unsupported by reason and could not have been the result of a reasoned decision" or when it is "patently arbitrary." *State v. Elliott*, 360 N.C. 400, 419 (2006)(quoting *State v. Hennis*, 323 N.C. 279, 285(1988)). Some courts have become so disenchanted with the phrase that they have replaced it with the phrase "exceeded its discretion," thus removing the negative implication that flows from the use of the word "abuse."

3. Examples of Rules Requiring Exercise of Judicial Discretion

a. Exclusion of Relevance Evidence – Rule 403

A trial court's ruling on relevancy is not discretionary, because relevant evidence is admissible under Rule 402. But, Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.R. Evid. 403. Therefore, the determination of whether to exclude evidence under Rule 403 is a matter of judicial discretion, subject to review under an abuse of discretion standard. *State v. Moctezuma*, 141 N.C. App. 90 (2000).

b. Rule of Completeness – Rule 106

When a portion of a writing or recorded statement is introduced, counsel may "require" that the court allow a contemporaneous admission of other portions under Rule 106's rule of completeness. N.C.R. Evid. 106. In this situation, the trial judge must exercise discretion to determine whether "any other part or any other writing or recorded statement ought *in fairness* be considered contemporaneously with it." *Id.* (emphasis added).

The party seeking to introduce evidence under the Rule of Completeness has the burden of contemporaneously seeking to introduce the evidence and of "demonstrating that the excluded parts are either explanatory or relevant." *See State v. Lloyd*, 354 N.C. 76 (2001). The party must show that the missing portion is needed "to explain the admitted portion, to place it into context, to ensure a fair and impartial understanding of the admitted portion, or to correct a misleading impression that might arise from excluding it." *See United States v. Rivera*, 61 F.3d 131, 135-36 (2nd Cir. 1995).

Thus, for example, if the state offers a defendant's written statement into evidence, but chooses to only offer the inculpatory parts of the statement, the defendant may require that the exculpatory parts of the same statement be admitted at the same time. The rule does not require the introduction of additional portions of the statements that are neither explanatory nor relevant, nor does it authorize the introduction of unrelated statements, statements made at different times or to different persons, or independent statements offered by the defendant. *See e.g., State v. Jackson*, 340 N.C. 301 (1995) (statement to a different person); *State v. Thompson*, 332 N.C. 204 (1992) (unrelated statements); *State v. Barnes*, 116 N.C. App. 311 (1994) (statement offered by defendant).

Rule 106 does not create a *per se* rule, but rather leaves the matter of admission to the trial judge. *See State v. Womble*, 343 N.C. 667, 668-69 (1996), *cert. denied*, 519 U.S. 1095 (1997), *but see United States v. Yevakpor*, 419 F.Supp.2d 242, 249-50, 252 (N.D.N.Y. 2006) (finding that the government cannot "make use of video segments that have been cherry-picked when the remainder of the recording has been erased or recorded-over subsequent to a defendant's arrest"). The trial court's decision under Rule 106 will not be reversed absent a showing of an abuse of discretion. *See State v. Hall*, 194 N.C. App. 42, 50-51 (2008).

c. Other Evidence Rules Requiring Judicial Discretion

Without intending to be exhaustive, other evidence rules requiring the exercise of judicial discretion include:

(1) Satisfaction of conditional relevancy under Rule 104(b);
(2) Evidence to prove other crimes, wrongs, or acts under Rule 104(b);[7]
(3) Inquiry, on cross-examination, into specific instances of conduct for purposes of attacking or supporting a witness' credibility under Rule 608(b);
(4) Evidence of a criminal conviction offered to impeach, when more than 10 years has elapsed since the date of conviction or release under Rule 609(b);
(5) Evidence of juvenile adjudications offered to impeach witness other than the accused when specific findings are made under Rule 609(d);
(6) Use of leading questions on direct examination to develop testimony under Rule 611(a);
(7) Exclusion of witnesses during testimony under Rule 615;
(8) Appointment of experts under Rule 706;
(9) Exclusion of record of regularly conducted activity, under Rule 803(6) when "source of information or the method or circumstances of preparation indicate lack of trustworthiness;"
(10) Exclusion of public record, under Rule 803(8) when "sources of information or other circumstances indicate lack of trustworthiness."

F. Warming Up the Cold Appellate Review

Trial judges benefit not only from the deference given by appellate courts to non-discretionary evidentiary rulings and the abuse of discretion standard applied to discretionary rulings, but also by the respect given by the appellate court to factual findings made by the judge in support of applying the applicable evidence rule. Thus, it is beneficial for a trial judge to articulate the underlying factual findings that support the ruling.

Great deference is given to the trial court's rulings, particularly when the based for rulings are clearly stated in the record of the proceedings. Thus, trial judge should carefully and thoroughly recite the factual findings and conclusions that lead to significant evidentiary rulings. When the trial court makes factual findings that are supported by competent evidence in the record, the appellate courts must consider the

[7] The procedure regarding the admission of evidence of other crimes, wrongs, or acts is highly particularized. The inclusion of this type of evidence on this list is meant to suggest *only* that judges may exercise discretion to *exclude* evidence under Rule 404(b) despite finding that a permissible purpose exists for the admission of the evidence.

facts conclusive on appeal. *State v. Wiggins*, 334 N.C. 18, 38 (1993). As such, the appellate court cannot substitute its judgment of the facts for the trial court's factual findings. But when the trial judge fails to make findings, the appellate court must exercise its own judgment in evaluating the facts, or remand for reconsideration. *See State v. Valentine*, 357 N.C. 512 (2003).

Thus, trial judges should aim to create a clear, cogent record of the underlying reasons and analytical bases for the evidentiary ruling. In addition to addressing the relevant rule of evidence, the parties' proof and argument, trial courts should remember to address the very important aspects of the decision that are not captured in the appellate record, including the tenor of the trial, the circumstances surrounding the offer of evidence, the demeanor of the witness, the existence or nonexistence of related evidence, and the overall posture of the case.

G. Benefits of the Standard of Review

Trial courts benefit from an exacting preservation process that often stumps trial counsel, N.C. R. Evid. 103; trial courts also benefit from a standard of review on appeal that favors affirmance of the lower court ruling.

When counsel fails to preserve the issue of an evidentiary ruling in a criminal case by objecting and stating the reason for the objection (or by making an offer of proof when required), the evidentiary issue is generally waived on appeal. This means that even erroneous rulings by the trial judge will often be affirmed. Counsel may seek review on appeal of a waived issue, but that review, if any, will be governed by the heightened plain error standard.

In a recent decision by the North Carolina Supreme Court, the Court undertook to clarify "incomplete and inconsistent formulations" of the plain error rule that have been espoused by the appellate courts. *State v. Lawrence*, 365 N.C. 506, 508 (2012). The Court referred to the four-factor test, applied by federal courts, requiring that (1) an error, that is "a deviation from a legal rule;" (2) the error must be plain, meaning that the error must be clear or obvious; (3) the error must have affected a substantial right which means that it must have been prejudicial and affect the outcome of the trial; and (4) the rule is permissive, allowing the appellate court to reverse when it is satisfied that the error seriously affected the fairness, integrity, or public reputation of the proceeding. *Id.* at 515-16.

The Rules of Evidence – An Introduction
Problems Work Sheet – Judicial Tools

Penny J. White
May 2015

I. Judicial Notice

Which of the following are proper subjects for judicial notice, assuming objection by a party?

A. Time of sunset or sunrise, as computed by the Astronomical Applications Department of the United States Naval Observatory[1]

B. Time of sunset and phase of moon, as reported in local paper[2]

C. Driving distance between point A and point B, and the time taken to traverse the distance[3]

D. Published laboratory testing protocols pertaining to analysis of controlled substances[4]

What is the basis for the distinctions?

II. Judicial Discretion

Is admitting the following evidence a proper exercise of judicial discretion?[5]

A. Evidence concerning the history, organization, practices, and symbology of a particular gang as well as evidence that defendant was a member of the gang (as evidenced by his tattoos) for purposes of establishing defendant's membership and rank in the gang as a means of explaining why a third party might initially confess, but later claim innocence, on the charge defendant faced? [6]

_____Yes _____No

B. Footage from a store's surveillance video, as identified by a store detective who knows and explains how the surveillance system operates, but was not at the store during the time of the surveillance?[7]

_____Yes _____No

[1] *See State v. McCormick*, 204 N.C. App. 105 (2010).
[2] *See State v. Canady*, 110 N.C. App. 763 (1993).
[3] *See State v. Brown*, 211 N.C. App. 383 (2012).
[4] *See State v. James*, ___ N.C. App. ___ (2015).
[5] The case citations following each question are offered as illustrative, but not necessarily definitive, analyses for each question.
[6] *See State v. Jackson*, ___ N.C. App. ___ (2014); *State v. Hinton*, ___ N.C. App. ___ (2013); *State v. Privette*, 218 N.C. App. 459 (2012).
[7] *See State v. Snead*, ___ N.C. App. ___ (2015).

C. Video recording of detective's interrogation of defendant based upon counsel's representations about and arguments regarding admission of the recording, but without first reviewing the evidence entirely?[8]

_____Yes _____No

III. Judicial Control

In a pretrial motion in limine, the defense moves to exclude three video segments, which the State intends to use in its case in chief showing the police encounter with defendant. The video segments are taken from a body camera worn by the arresting officer. Each segment is time stamped, indicating that the three segments occurred at 2:04, 2:19, and 2:33, respectively. The State concedes that the remaining portions of the video have not been produced to the defense and further notes that they no longer exist due to the disposal protocol of the department. There is no indication that the State purposefully destroyed the other segments, only that the remainder was not preserved and was "taped over" in accordance with written procedures of the department.[9] In support of the motion, the defense relies upon Rule 106 [10] and Rule 611(a).[11]

_____Admit _____Exclude

Assume further that the body camera system has audio capacity. None of the three segments of video offered by the State contain any audible voices, although it is clear from the visual images that conversation is occurring. How, if at all, does this impact your ruling on the defense motion in limine?

_____Admit _____Exclude

IV. Preliminary Questions

A. Rule 104 Questions

1. Defendant objects to testimony by state witness who, while assisting the police acted as the buyer in an undercover cocaine operation. Witness testified that he was a drug user for three years before beginning to cooperate with the police and that he purchased a substance from defendant which was a "white, rock-like substance that I know to be cocaine." [12]

Defendant argues that the witness is not qualified to offer the testimony identifying the substance as cocaine. Rule on the objection.

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[8] *See State v. Miller*, 197 N.C. App. 78 (2009).

[9] *See State v. Hall*, 194 N.C. App. 42 (2008); *State v. Womble*, 343 N.C. 667, 668-69 (1996), *cert. denied*, 519 U.S. 1095 (1997), *but see United States v. Yevakpor*, 419 F.Supp.2d 242, 249-50, 252 (N.D.N.Y. 2006)(finding that government cannot "make use of video segments that have been cherry-picked when the remainder of the recording has been erased or recorded-over subsequent to a defendant's arrest").

[10] Rule 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

[11] Rule 611 (a) provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth . . . ."

[12] *See State v. Nabors*, 365 N.C. 306 (2011)(distinguishing *State v. Ward*, 364 N.C. 133 (2010)).

_____Admit _____Exclude

2. The State offers the testimony of an officer who has three-year's experience as an officer with specialized training in narcotics investigation who was part of an arrest team and who collected the evidence from the undercover operative. The officer testified that the substance received from the undercover operative was crack cocaine. [13]

_____Admit _____Exclude

Defendant argues that the officer is not qualified to offer the testimony identifying the substance as crack cocaine. Rule on the objection.

_____Admit _____Exclude

3. John, an inmate, committed suicide in his jail cell on February 15, while his brother, Robert, was being tried for murder. After his deaths, prison guards recovered a handwritten note addressed to Robert's attorney, dated February 12. The note was clearly legible at the beginning and printed in blue ink, but became less legible toward the end and included both printing and cursive in the last two paragraphs.

The note is attached as Exhibit A. Assume that the contents of the note, including the details of Robert's charge and his trial, are accurate as are the details concerning John's personal property.

Robert's lawyer calls a prison guard to testify that the note was found next to John's body when guards removed his body from his cell. The guard also testifies that the paper on which the note was written was the same as paper on a legal pad of the same size and color located in the cell. The guard also produced a known document written by John, which was contained in prison records. The State challenges the note on both authentication and admissibility grounds.

Assume that the defense argument is that the note is authenticated pursuant to Rule 901(b)(4), because of its "distinctive characteristic, taken in conjunction with circumstances" or under Rule 901(b)(3), by comparison by the trier of fact with a known specimen.[14] Assume that defense argues that the note is admissible as a declaration against penal interest under Rule 804(b)(3).[15] The defense contends that the note was sufficiently against the witness' interest at the time it was written to render it, at a minimum, conditionally admissible under Rule 104(b) and that remaining issues regarding weight should be resolved by the jury.[16] Over defense

[13] *Id.*

[14] Rule 901(b)(4) provides that the requirement of authentication is satisfied by "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Rule 901(b)(3) provides that the requirement of authentication is satisfied by "[c]omparison by the trier of fact or by expert witnesses with specimens which have been authenticated."

[15] The hearsay exception, which applies when the declarant is unavailable, provides that "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement." N.C.R. Evid. 804(b)(3).

[16] *See United States v. Angleton*, 269 F.Supp.2d 878 (S.D. Tex. 2003).

objection, the State asks you to consider prison medical records that document John's advancing liver disease.

Using Attachment B:

a. Rule on the authentication and admissibility of the note offered by the defense.

b. Is your ruling based on Rule 104(a),(b), or both. To the extent your ruling is based in whole or in part on Rule 104(b), how do you instruct the jury?

c. Do you consider the prison medical records.

Assume that you admit the note. The State wishes to admit, in rebuttal (1) testimony from the prison minister concerning conversations with John before John's death and (2) testimony from John's ex-wife that John and Robert's wife had an affair, which Robert learned about, and to argue that this explains John's desire to make amends with his brother.

a. Rule on the admissibility of the State's rebuttal evidence.

b. If you admit the State's rebuttal evidence, how do you instruct the jury?

Exhibit A

February 12, 2008

I am your client Robert's brother. I am on the inside serving 30 to life. Now I know I [sic]wrong and can't live with myself and my pain any longer. The purpose of the letter is to let the truth be known. I am in constant mental agny [sic] and no [sic] the pain won't stop till I do.

Please take care of this. I want my ma to take care of my services and have the militery [sic] there if she will. Give Mary my watch and other stuff except any money in my acct and give that to Jr. And give Robert the deer that we got when we was kids.

Tell Robert that I am sorry that things didn't work out so that you could have done something for him but I must die on you before the trial is done. Give this to Robert's judge and jury and make sure they no [sic] that Robert is an inncent [sic] man. I hereby certify and aknoledge [sic] it as my true word under penalty of perjury. I hereby autorize [sic[it to be evidence in a court of law.

I am sorry that my writing is so sloppey [sic[but painkiller tablets I took to kill pain of razors is [sic] getting me.

I did it. I killed the SOB and I did it for good reason as Robert and Mary knows. No one should live who done [sic] what he done to Jr. Robert didn't do nothing and should not go for what I did. My brother is innocent. May God forgive me – give this letter to the court. I just took a load of pain killers so I past the point of no return.

My true signature

John

Attachment B

1. The note offered by the defense is:
   a. authentic.
   b. not authentic.

2. If 1(a), the note is authentic because:
   a. it is an acknowledged document.
   b. its authenticity is established by the circumstances under Rule 901(b)(3).
   c. there is sufficient evidence to authenticity to admit it conditionally and to allow the jury to compare the writing with the known authenticated specimens under Rule 901(b)(4).
   d. _____.

3. If 2(c), I will tell the jury:

4. The prison medical records offered by the State to prove that John had advanced liver disease:
   a. should be considered on the preliminary question of the admissibility of the note offered by the defense, but not admitted.
   b. should be considered on the preliminary question of the admissibility of the note offered by the defense and admitted.
   c. should not be considered on the preliminary question.

5. The note offered by the defense is:
   a. admissible as a declaration against interest.
   b. admissible under the _____ hearsay exception.
   c. hearsay and not admissible.

6. If 5(a) or (b), I will tell the jury:

7. The testimony of the prison minister offered by the State:
   a. is admitted.
   b. is not admitted.

8. The testimony of John's ex-wife offered by the State:
   a. is admitted.
   b. is not admitted.

9. If either 7(a) or 8(a), the State's argument is:
   a. allowed
   b. not allowed

Tab 2: Relevancy , Rules 401 & 403

Rule 403 & Other Limits on Relevancy
In-Class Materials

Jessica Smith, UNC School of Government

Rule 403

What are the grounds for excluding evidence under Rule 403?

Turning Point Questions

1. D is on trial for rape. The State seeks to introduce a judgment showing that D previously was convicted of attempted rape. The State has convinced you that the prior conviction is sufficiently similar to the crime in question and not too remote in time, and thus that it satisfies Rule 404(b). However, the defense objects, arguing that Rule 403 bars the State from introducing the judgment of conviction as the sole evidence of the prior crime. How do you rule?

2. D is on trial for second-degree murder. He drove 100 mph on a rural road while having a blood-alcohol of .23 and after his friends begged him not to drive. He hit victim's car, killing her on the spot. At trial, the State seeks to introduce, under Rule 404(b), judgments of D's two prior DWI convictions. When D objects, the State argues that the convictions are admissible to show malice for second-degree murder.

3. D is on trial for P&D murder. Defense offers Expert who will testify that D's cocaine dependency impaired his ability to reason, plan, and think. Expert based his opinion on D's statements to Expert that he took cocaine on the day in question. No evidence is presented at trial indicating that D used cocaine on the day in question. The State objects to Expert's opinion on Rule 403 grounds, saying that the jury will be confused about the basis of Expert's opinion. The defense responds arguing that any Rule 403 issue can be dealt with by a limiting instruction telling the jury that D's statements regarding his cocaine use are to be considered only as the basis of the expert's opinion. How do you rule on the Rule 403 objection?

4. D is on trial for armed robbery. D's defense is mistaken identity. The defense offers the testimony of Expert Psychologist. Expert will testify regarding memory variables affecting eyewitness identification. Expert's testimony is on memory variables and the reliability of eyewitness identifications generally. Expert did not interview Victim or apply the research on memory variables to the identification at issue. The State objects on Rule 403 grounds. How do you rule?

5. D is on trial for having forcible sex with Victim, his 15-year-old stepdaughter. Victim has identified D as the perpetrator. Also, the State's medical expert has testified that Victim's injures are consistent with forcible penetration, although no DNA evidence identifies D as the perpetrator. The defense offers evidence (assume it is permissible under the Rape Shield Rule) that Victim had sex with her boyfriend on the day in question. The State objects under Rule 403. How do you rule?

6. D is being tried for common law robbery, allegedly committed with Accomplice. Defense counsel is moving very slowly and the case is taking much longer than expected. When D takes the stand, he testifies that when Accomplice asked him to help with the crime, D said no because he'd made a promise to his mother to stay out of trouble. To corroborate D's testimony, the defense offers D's mother, who will testify that D told her that when Accomplice asked him to help with the robbery, D said no because he had promised her he'd stay on the straight and narrow. The State objects on Rule 403 grounds, arguing that the case has dragged on long enough and that Mother's testimony is merely cumulative of D's testimony. How do you rule?

7. D is being tried for felony larceny. At trial, the State offers testimony of Eyewitness. The defense objects under Rule 403, arguing that they didn't know anything about this witness and that the witness's testimony should be excluded under Rule 403 for unfair surprise. The State concedes that Eyewitness wasn't included on the witness list. How do you rule?

Small Group Problem

Background: D is on trial for drug trafficking and felon in possession of a firearm. The following argument occurs before you:

DEFENSE COUNSEL Your honor, overwhelming prejudice will occur if the State introduces evidence of the details of the prior felony. The prior felony is rape that occurred 7 years ago. We've offered to stipulate to that. Our defense is that he didn't possess the firearm in question. We've offered to stipulate and under Rule 403 we ask that you preclude the State from introducing the details of the prior rape.

COURT: Mr. Prosecutor?

PROSECUTOR: One of the charged crimes is felon in possession. One of the elements is that he committed a prior felony. We need to be allowed to prove the State's case as we see fit, not how defense counsel wants it done.

DEFENSE COUNSEL: Your honor, may I respond?

COURT: By all means.

DEFENSE COUNSEL: There's case law on this, Old Chief by the U.S. Supreme Court. The same crime was at issue there--felon in possession of a firearm. It was just the federal version. The defendant offered to stipulate to the prior felony--assault causing serious bodily injury. The prosecutor said the same thing there, that he had a right to prove his case his own way. The trial court allowed the government to prove its case by introducing evidence of the prior crime. The Court held that because the nature of the prior offense raised a risk of a verdict tainted by improper considerations and the evidence was admitted solely to prove the fact of the prior conviction, the trial court abused its discretion under Rule 403 by admitting the record of the defendant's prior conviction. It so ruled because an admission was available as an alternative form of proof. May I hand the case up?

THE COURT: Yes. [DEFENSE CONSEL HANDS UP THE ATTACHED CASE].

PROSECUTOR: Your honor, that's a federal evidence case. We're under N.C. rules. It doesn't apply. Even if it did, the same risk isn't at issue here where the prior crime is a rape. I read that case. The Court said that when the prior offense is far removed in time or nature from the current charges, its potential to prejudice the defendant is minimal. Here we're talking about a 7-year-old rape. It removed in time and nature—it's not anything like the weapons charge or drug charge at issue here.

THE COURT: Give me a minute to read the case.

Supreme Court of the United States
Johnny Lynn OLD CHIEF, Petitioner,
v.
UNITED STATES.
No. 95-6556.
Decided Jan. 7, 1997.

Defendant was convicted in the U.S.D.C. for the District of Montana, of being a felon in possession of a firearm, using or carrying a firearm during the commission of a violent crime, and assault with a dangerous weapon. Defendant appealed. The Ninth Circuit Court of Appeals affirmed. Defendant sought certiorari. The Supreme Court, Justice Souter, held that: (1) district court abuses its discretion when it spurns defendant's offer to admit to evidence of prior conviction element of offense and instead admits full record of prior judgment of conviction when name or nature of prior offense raises risk of verdict, and (2) evidence of name and nature of defendant's conviction was not admissible to show prior felony conviction element of offense of possession of firearm by felon. Reversed and remanded.

***

Subject to certain limitations, 18 U.S.C. § 922(g)(1) prohibits possession of a firearm by anyone with a prior felony conviction, which the Government can prove by introducing a record of judgment or similar evidence identifying the previous offense. Fearing prejudice if the jury learns the nature of the earlier crime, defendants sometimes seek to avoid such an informative disclosure by offering to concede the fact of the prior conviction. The issue here is whether a district court abuses its discretion if it spurns such an offer and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction. [FN OMITTED] We hold that it does.

I

In 1993, petitioner, Old Chief, was arrested after a fracas involving at least one gunshot. The ensuing federal charges included not only assault with a dangerous weapon and using a firearm in relation to a crime of violence but violation of 18 U.S.C. § 922(g)(1). This statute makes it unlawful for anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm...." "[A] crime punishable by imprisonment for a term exceeding one year" is defined to exclude "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices" and "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." § 921(a)(20).

The earlier crime charged in the indictment against Old Chief was assault causing serious bodily injury. Before trial, he moved for an order requiring the Government "to refrain from mentioning-by reading the Indictment, during jury selection, in opening statement, or closing argument-and to refrain from offering into evidence or soliciting any testimony from any witness regarding the prior criminal convictions of the Defendant, *except* to state that the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year." App. 6. He said that revealing the name and nature of his prior assault conviction would unfairly tax the jury's capacity to hold the Government to its burden of proof beyond a reasonable doubt on current charges of assault, possession, and violence with a firearm, and he offered to "solve the problem here by stipulating, agreeing and requesting the Court to instruct the jury that he has been convicted of a crime punishable by imprisonment exceeding one (1) yea[r]." *Id.,* at 7. He argued that the offer to stipulate to the fact of the prior conviction rendered evidence of the name and nature of the offense inadmissible under Rule 403 of the Federal Rules of Evidence, the danger being that unfair prejudice from that evidence would substantially outweigh its probative value. He also proposed this jury instruction:

> "The phrase 'crime punishable by imprisonment for a term exceeding one year' generally means a crime which is a felony. The phrase does not include any state offense classified by the laws of that state as a misdemeanor and punishable by a term of imprisonment of two years or less and certain crimes concerning the regulation of business practices.
>
> "[I] hereby instruct you that Defendant JOHNNY LYNN OLD CHIEF has been convicted of a crime punishable by imprisonment for a term exceeding one year." *Id.,* at 11. [FOOTNOTE OMITTED]

The Assistant United States Attorney refused to join in a stipulation, insisting on his right to prove his case his own way, and the District Court agreed, ruling orally that, "If he doesn't want to stipulate, he doesn't have to." *Id.,* at 15-16. At trial, over renewed objection, the Government introduced the order of judgment and commitment for Old Chief's prior conviction. This document disclosed that on December 18, 1988, he "did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury," for which Old Chief was sentenced to five years' imprisonment. *Id.,* at 18-19. The jury found Old Chief guilty on all counts, and he appealed.

[PROCEDURAL HISTORY OMITTED]

We granted Old Chief's petition for writ of certiorari, because the Courts of Appeals have divided sharply in their treatment of defendants' efforts to exclude evidence of the names and natures of prior offenses in cases like this. [CITATIONS OMITTED] We now reverse the judgment of the Ninth Circuit.

II

A

[DISCUSSION OF RULE 401 AND RULE 402 ISSUES OMITTED]

B

The principal issue is the scope of a trial judge's discretion under Rule 403, which authorizes exclusion of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. Rule Evid. 403. Old Chief relies on the danger of unfair prejudice. [FOOTNOTE OMITTED]

1

The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. [CITATION OMITTED] So, the Committee Notes to Rule 403 explain, " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." [CITATION OMITTED]

Such improper grounds certainly include the one that Old Chief points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily). As then-Judge Breyer put it, "Although ... 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged-or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment-creates a prejudicial effect that outweighs ordinary relevance." *United States v. Moccia,* 681 F.2d 61, 63 (C.A.1 1982). Justice Jackson described how the law has handled this risk:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States,* 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson v. United States,* 335 U.S. 469, 475-476, 69 S.Ct. 213, 218-219, 93 L.Ed. 168 (1948) (footnotes omitted).

Rule of Evidence 404(b) reflects this common-law tradition by addressing propensity reasoning directly: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith." Fed. Rule Evid. 404(b). There is, accordingly, no question that propensity would be an "improper basis" for conviction and that evidence of a prior conviction is subject to analysis under Rule 403 for relative probative value and for prejudicial risk of misuse as propensity evidence. [CITATION OMITTED]

As for the analytical method to be used in Rule 403 balancing, two basic possibilities present themselves. An item of evidence might be viewed as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded. Or the question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case as the court understands it when the ruling must be made. [FOOTNOTE OMITTED] This second approach would start out like the first but be ready to go further. On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. As we will explain later on, the judge would have to make these calculations with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case, and the mere fact that two pieces of evidence might go to the same point would not, of course, necessarily mean that only one of them might come in. It would only mean that a judge applying Rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point. Even under this second approach, as we explain below, a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense. See *infra*, at 653-654. [FOOTNOTE OMITTED]

The first understanding of the Rule is open to a very telling objection. That reading would leave the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance. He could choose the available alternative carrying the greatest threat of improper influence, despite the availability of less prejudicial but equally probative evidence. The worst he would have to fear would be a ruling sustaining a Rule 403 objection, and if that occurred, he could simply fall back to offering substitute evidence. This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.

Rather, a reading of the companions to Rule 403, and of the commentaries that went with them to Congress, makes it clear that what counts as the Rule 403 "probative value" of an item of evidence, as distinct from its Rule 401 "relevance," may be calculated by comparing evidentiary alternatives. The Committee Notes to Rule 401 explicitly say that a party's concession is pertinent to the court's discretion to exclude evidence on the point conceded. Such a concession, according to the Notes, will sometimes "call for the exclusion of evidence offered to prove [the] point conceded by the opponent...." [CITATION OMITTED] As already mentioned, the Notes make it clear that such rulings should be made not on the basis of Rule 401 relevance but on "such considerations as waste of time and undue prejudice (see Rule 403)...." [CITATION OMITTED] The Notes to Rule 403 then take up the point by stating that when a court considers "whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may ... be an appropriate factor." [CITATION OMITTED] The point gets a reprise in the Notes to Rule 404(b), dealing with admissibility when a given evidentiary item has the dual nature of legitimate evidence of an element and illegitimate evidence of character: "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under 403." [CITATION OMITTED] Thus the notes leave no question that when Rule 403 confers discretion by providing that evidence "may" be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's ***185** twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives. [CITATION OMITTED]

2

In dealing with the specific problem raised by § 922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, but will be substantial whenever the official

record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious, and Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charge against him.[FN8]

> FN8. It is true that a prior offense may be so far removed in time or nature from the current gun charge and any others brought with it that its potential to prejudice the defendant unfairly will be minimal. Some prior offenses, in fact, may even have some potential to prejudice the Government's case unfairly. Thus an extremely old conviction for a relatively minor felony that nevertheless qualifies under the statute might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession. Since the Government could not, of course, compel the defendant to admit formally the existence of the prior conviction, the Government would have to bear the risk of jury nullification, a fact that might properly drive the Government's charging decision.

The District Court was also presented with alternative, relevant, admissible evidence of the prior conviction by Old Chief's offer to stipulate, evidence necessarily subject to the District Court's consideration on the motion to exclude the record offered by the Government. Although Old Chief's formal offer to stipulate was, strictly, to enter a formal agreement with the Government to be given to the jury, even without the Government's acceptance his proposal amounted to an offer to admit that the prior-conviction element was satisfied, and a defendant's admission is, of course, good evidence. See Fed. Rule Evid. 801(d)(2)(A).

Old Chief's proffered admission would, in fact, have been not merely relevant but seemingly conclusive evidence of the element. The statutory language in which the prior-conviction requirement is couched shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies, and Old Chief clearly meant to admit that his felony did qualify, by stipulating "that the Government has proven one of the essential elements of the offense." App. 7. As a consequence, although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission. Logic, then, seems to side with Old Chief.

3

There is, however, one more question to be considered before deciding whether Old Chief's offer was to supply evidentiary value at least equivalent to what the Government's own evidence carried. In arguing that the stipulation or admission would not have carried equivalent value, the Government invokes the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it. The authority usually cited for this rule is *Parr v. United States*, 255 F.2d 86 (CA5), cert. denied, 358 U.S. 824, 79 S.Ct. 40, 3 L.Ed.2d 64 (1958), in which the Fifth Circuit explained that the "reason for the rule is to permit a party 'to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.' " 255 F.2d, at 88 (quoting *Dunning v. Maine Central R. Co.*, 91 Me. 87, 39 A. 352, 356 (1897)).

This is unquestionably true as a general matter. The "fair and legitimate weight" of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can

accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault. Cf. *United States v. Gilliam*, 994 F.2d 97, 100-102 (CA2), cert. denied, 510 U.S. 927, 114 S.Ct. 335, 126 L.Ed.2d 280 (1993).

But there is something even more to the prosecution's interest in resisting efforts to replace the evidence of its choice with admissions and stipulations, for beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about. "If [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." [CITATION OMITTED] [FOOTNOTE OMITTED] Expectations may also arise in jurors' minds simply from the experience of a trial itself. The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.

In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

4

This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him. As in this case, the choice of evidence for such an element is usually not between eventful narrative and abstract proposition, but between propositions of slightly varying abstraction, either a record saying that conviction for some crime occurred at a certain time or a statement admitting the same thing without naming the particular offense. The issue of substituting one statement for the other normally arises only when the record of conviction would not be admissible for any purpose beyond proving status, so that excluding it would not deprive the prosecution of evidence with multiple utility; if, indeed, there were a justification for receiving evidence of the nature of prior acts on some issue other than status (*i.e.*, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," Fed. Rule Evid. 404(b)), Rule 404(b) guarantees the opportunity to seek its admission. Nor can it be argued that the events behind the prior conviction are proper nourishment for the jurors' sense of obligation to vindicate the public interest. The issue is not whether concrete details of the prior crime should come to the jurors' attention but whether the name or general character of that crime is to be disclosed. Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose; the fact of the qualifying conviction is alone what matters under the statute. "A defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters, *see* 16 U.S.C. § 3372, to the most aggravated murder." *Tavares*, 21 F.3d, at 4. The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instructions. Finally, the most obvious reason that the general presumption that the prosecution may choose its evidence is so remote from application here is that proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense.

Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.

Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other. In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available. [FN10] What we have said shows why this will be the general rule when proof of convict status is at issue, just as the prosecutor's choice will generally survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.

> FN10. There may be yet other means of proof besides a formal admission on the record that, with a proper objection, will obligate a district court to exclude evidence of the name of the offense. A redacted record of conviction is the one most frequently mentioned. Any alternative will, of course, require some jury instruction to explain it (just as it will require some discretion when the indictment is read). A redacted judgment in this case, for example, would presumably have revealed to the jury that Old Chief was previously convicted in federal court and sentenced to more than a year's imprisonment, but it would not have shown whether his previous conviction was for one of the business offenses that do not count, under § 921(a)(20). Hence, an instruction, with the defendant's consent, would be necessary to make clear that the redacted judgment was enough to satisfy the status element remaining in the case. The Government might, indeed, propose such a redacted judgment for the trial court to weigh against a defendant's offer to admit, as indeed the Government might do even if the defendant's admission had been received into evidence.

The judgment is reversed, and the case is remanded to the Ninth Circuit for further proceedings consistent with this opinion.[FN11]

> FN11. In remanding, we imply no opinion on the possibility of harmless error, an issue not passed upon below.

It is so ordered.

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting. [NOT REPRODUCED HERE]

Rule 410 – Self Test

1. If a guilty plea was not withdrawn, Rule 410 doesn't bar admission of statements made in connection with the plea.

True False I Don't Know

2. Rule 410 makes inadmissible pleas of no contest, regardless of whether the plea was withdrawn.

True False I Don't Know

3. Rule 410 covers any statement made in the course of a covered plea proceeding, including statements by defense counsel.

True False I Don't Know

4. Rule 410 covers statements in connection with plea discussions, including statements to law enforcement officers who have authority to negotiate pleas.

True False I Don't Know

5. Rule 410 makes plea evidence inadmissible when offered both for and against a defendant who made the plea.

True False I Don't Know

Relevancy—Discussion Questions
Jessica Smith, UNC Chapel Hill

1. D is on trial for armed robbery. Accomplice will testify for the State that shortly before he and D went into the store to commit the robbery, they were drinking liquor and smoking crack. Defense counsel objects on grounds that D's drug use is irrelevant to any issue in the robbery trial. How do you rule? Why?

2. D is on trial for rape. Victim testifies that she gave money to Friend to buy Ecstasy. When Friend didn't return with the drugs, Victim went looking for her. While looking for Friend, Victim met D. D told her that he was the main Ecstasy dealer in the area and that he knew all of the places that Friend would be looking for him. The rape occurred when Victim went with D to look for Friend. Defense counsel objects to the evidence that D told Victim that he was an Ecstasy dealer, saying it has no relevance to elements of rape. How do you rule? Why?

3. D is on trial for an armed robbery that occurred at Tripp's Service Station. The State presented eyewitness testimony identifying D as the sole perpetrator. D offers testimony of Witness who will testify as follows: Joe Cross, a third party, told Witness, on the night in question, that he needed a "score" and was "hitting Tripp's" to "get some green." Witness will testify that Joe Cross said that he was "carrying iron" and "would get the job done" even if it meant "bodies falling." Witness will testify that later that evening he saw Cross running away from Tripp's Service Station. The State objects on relevancy grounds, arguing that the evidence is speculative, since all of the witnesses put D, not Cross at the scene. How do you rule? Why

4. D is on trial for capital murder. The State's evidence shows that Godfrey watched D commit the murder and came with D when D buried the body. D, claiming that Godfrey was the killer, seeks to admit three pieces of evidence. First, testimony from Godfrey's mother that Godfrey had been hospitalized at Broughton Hospital because he was hearing voices telling him to kill people. Second, that Godfrey and Victim had a heated argument days before the homicide. Third, testimony from a Broughton Hospital staff psychiatrist that Godfrey said that he had hallucinations telling him to kill himself and others and that he had a history of violent conduct, including beating a man with a baseball bat. When the State objects on relevancy grounds, defense counsel argues that the evidence is relevant to guilt of another. How do you rule? Why?

5. D is on trial for murder. D wants to put on testimony that on the morning of Victim's death, Witness saw Victim in possession of a gold necklace. Witness will further testify that a few days after Victim's death, Witness saw Jill with the necklace. When the State objects on relevancy grounds, defense counsel says the evidence points to Jill as the perpetrator. How do you rule? Why?

6. D is on trial for murder. The evidence shows that Victim died of knife wounds. The State seeks to present evidence of a knife found three months after the murder in a pond some distance from the crime scene. The knife had no bloodstains on it and was not tested for fingerprints. The medical examiner will testify that some of the fatal knife wounds found on Victim were consistent with the length and width of the knife and that the knife could have been one of the murder weapons. The defense objects on relevancy grounds, arguing that the knife has not been sufficiently connected with the crime and that it is too tenuous to be admitted under Rule 401. How do you rule? Why?

7. D is on trial for armed robbery. The evidence shows that the offense was committed with a small handgun. At trial, the State seeks to admit evidence that a search of the defendant's house revealed a sawed-off shotgun. The sawed-off shotgun has no direct connection to the crime. The defense objects on grounds of relevancy. How do you rule? Why?

8. D is on trial for possession with intent to sell a controlled substance. The State seeks to introduce evidence that a search of D's house revealed a shotgun. The defense objects on relevancy grounds, arguing that there is no evidence that guns were involved in the crime at issue. How do you rule? Why?

9. D is on trial for murder. At trial, the State seeks to introduce the fact that D failed to appear on the date originally set for trial. When the defendant objects on relevancy grounds, the State says the evidence is relevant to consciousness of guilt. How do you rule? Why?

10. The State's theory of the case at D's felony assault trial is that D attacked Victim because D didn't like the fact that Victim was having a sexual relationship with D's sister. The ADA wants to ask the arresting Officer whether he noticed tattoos on D's neck and whether recognized those tattoos as indicating gang membership. D objects on relevancy grounds. How do you rule? Why?

Tab 3: Character Evidence, Rules 404, 405, & 406

CHARACTER EVIDENCE QUICK REFERENCE

reputation – opinion – specific instances of conduct - habit

Character of the Defendant – 404(a)(1)

(pages 4-8)

* *Test: Relevance (to the crime charged) + 403 balancing; rule of exclusion*

* Defendant gets to go first w/ "good character" evidence – reputation or opinion only (see rule 405)

^ State can cross-examine as to specific instances of bad character

* Law-abidingness ALWAYS relevant

* General good character not relevant

* Defendant's character is substantive evidence of innocence – entitled to instruction if requested

* D's evidence of self-defense does not automatically put character at issue

Character of the victim – 404(a)(2)

(pages 8-11)

* *Test: Relevance (to the crime charged) + 403 balancing; rule of exclusion*

* Defendant gets to go first w/ "bad character" evidence: reputation or opinion only (see rule 405)

^ State can cross-examine as to specific instances of good character

* Victim's violent disposition is relevant in **self-defense** cases to

(1) whether Defendant's fear was reasonable (D has to know about it)

^ not a 404 issue – goes to D's state of mind
^ V's criminal record can be admissible here if relevant to D's state of mind

(2) whether victim was the aggressor (D doesn't have to know about it)

^ if D doesn't know about it, evidence is carefully limited to close cases
^ V's criminal record not relevant here

Other acts – 404(b)

(pages 14-29)

* *Test: Proper Purpose + Relevance + Time + Similarity + 403 balancing; rule of inclusion*

* **Put basis for ruling in record (including 403 balancing analysis)**

* D has burden to keep 404(b) evidence out

* proper purposes: motive, opportunity, knowledge/intent, preparation/m.o., common scheme/plan, identity, absence of mistake/ accident/entrapment, res gestae (anything but propensity)

^ Credibility is never proper – 608(b), not 404(b)

* time: remoteness is less significant when used to show intent, motive, m.o., knowledge, or lack of mistake/accident -

* remoteness more significant when common scheme or plan (seven year rule)
^ unless continuous course of conduct, or D is gone

* similarity: particularized, but not necessarily bizarre
^ the more similar acts are, the less problematic time is

* convictions generally not 404(b) admissible
^ unless used for motive for assault, malice in DWI murder cases, or statute-based

Habit – 406

(pages 12-14)

Test: Relevance (to the crime charged) + 403 balancing

* Used to prove conformity of conduct

* Can be opinion or specific instances

* Factors: (1) similarity of conduct; (2) number of times; (3) regularity of conduct; (4) reliability of evidence

* Habit of *doing* something (admissible) vs. habit of *being* something (usually not)

* Harder to prove habit of *inaction* (not doing something) vs. habit of action

CHARACTER AND HABIT EVIDENCE

Rules 404, 405, and 406

Ripley Rand
Special Superior Court Judge

Advanced Criminal Evidence
May 2010

A. Generally Speaking

The general rule:

CHARACTER EVIDENCE IS NOT ADMISSIBLE.

More particularly, character evidence is generally not admissible when offered for the purposes of proving conduct in conformity with the character trait offered.

Character is the actual qualities of an individual; reputation is that person's standing in the community as viewed by other people. (As noted in *State v. Ussery*, 118 N.C. 1177 (1896), character is inside a person; reputation is outside a person.) Because of this distinction, courts typically limit the use of character evidence – it is not directly relevant to the charges at hand (except in very limited instances), and there is a danger that the jury will misuse it.

B. Use of Character Evidence

(1) Proof of character can be made in four ways:

Rule 404:	**Reputation***
	Opinion
	Specific Instances of Conduct
Rule 405:	**Mechanics of how character evidence works**
Rule 406:	**Habit**

* Reputation evidence (with associates, or in the community) is a hearsay exception set out in Rule 803(21).

(2) Standard of Proof for Character Evidence: Preponderance of the Evidence

(3) Rule 405 – circumstantial use of character evidence: Where character trait is admissible, proof on direct examination may be made by testimony involving **reputation** or **opinion** testimony (circumstantial use of character evidence). Cross-examination of witness who gives reputation or opinion evidence can be made on relevant **specific instances of conduct** (relevant to the character trait at issue).

* Cross-examiner has to have good faith basis for specific instance evidence. *State v. Flannigan*, 78 N.C. App. 629 (1985), *cert. denied*, 316 N.C. 197 (1986).

* Party seeking to admit reputation or opinion testimony has to lay appropriate foundation; you need more foundation as to reputation (based on familiarity with reputation in the community, etc.) than opinion (based on personal dealings). *State v. Morrison*, 84 N.C. App. 41, *cert. denied*, 319 N.C. 408 (1987).

* There is no time limit on specific instances cross-examination after Defendant puts on evidence of good character. *State v. Cummings*, 332 N.C. 487 (1992). *See also State v. Hargett*, 157 N.C. App. 90 (2003) (thirty-year old conviction OK); *State v. Rhue*, 150 N.C. App. 280 (2002), *cert. denied*, 356 N.C. 689 (2003) (twenty-year old conviction OK).

* Where charged with murder of child, Defendant can't offer specific instances where he did not abuse other children; reputation and opinion only. *State v. Murphy*, 172 N.C. App. 734 (2004), *vacated in part on other grounds and remanded*, 361 N.C. 264 (2006).

* Character evidence can also be used to respond to evidence presented by the other side.

> * Character evidence about defendant's reverence for mother and refusal to swear on her grave allowed where State elicited evidence that Defendant refused to swear on mother's grave that he was innocent. *State v. Powell*, 340 N.C. 674 (1995), *cert. denied*, 516 U.S. 1060 (1996).
>
> * Character evidence about victim's generally appropriate disposition and being a "perfect gentleman" allowed where Defendant elicited evidence that victim suffered from dementia and was dangerous to himself. *State v. Jennings*, 333 N.C. 579 (1993), *cert. denied*, 510 U.S. 1028 (1993).
>
> * Character evidence that victim was a good nephew and worked hard allowed where Defendant offered evidence that victim was a gang member. *State v. Taylor*, 344 N.C. 31 (1996).
>
> * Character evidence that Defendant was a gang member allowed where Defendant had put on character evidence of being a "good Marine." *State v. Perez*, 182 N.C. App. 294 (2007), *cert. denied*, 362 N.C. 248 (2008).

* be careful about mere evidence of gang **membership**, though (as opposed to gang-related activity) – evidence of gang membership must be relevant, as individual has a First Amendment right to association in a gang. *Dawson v. Delaware*, 503 U.S. 159 (1992), *cert. denied*, 519 U.S. 844 (1996). *See also State v. Gayton*, 185 N.C. App. 122 (2007) (admission of evidence about gang membership was error when it was not relevant to drug trafficking charge at issue); *State v. Hope*, ___ N.C. App. ___, 657 S.E.2d 909 (March 18, 2008) (admission of evidence about gang membership error when not relevant to murder charge). *But see also State v. Medina*, 174 N.C. App. 723 (2005), *rev. denied*, 360 N.C. 366 (2006) (admission of gang membership not error when it went to issue of identity); *State v. Ruof*, 296 N.C. 623 (1979) (same).

(4) Expert opinion as to character trait is INADMISSIBLE. *State v. Aguallo*, 318 N.C. 590 (1986) (opinion that victim was "believable" is inadmissible); *State v. Mixion*, 110 N.C. App. 138 (1993), *cert. denied*, 334 N.C. 437 (1993) (opinion that victim was "not homicidal" in murder case where Defendant claimed self-defense inadmissible); *State v. Randall*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1995 (November 4, 2008) (unpublished) (opinion that victim gave a "clear and credible disclosure" of sexual assault inadmissible).

* IMPORTANT DISTINCTION – Experts can testify as to the credibility of children in general, including the profiles of sexually abused children and whether the victim has characteristics or symptoms that are consistent with the profile. *See State v. Kennedy*, 320 N.C. 20 (1987); *State v. O'Connor*, 150 N.C. App. 710 (2002).

* Experts can testify as to whether the victim suffered from a psychological or emotional condition that would impair victim's ability to distinguish fantasy from reality, or to cause victim to fantasize or fabricate in general. *State v. Teeter*, 85 N.C. App. 624 (1987), *rev. denied*, 320 N.C. 175 (1987).

* BUT experts cannot testify to the effect that victim suffered from a psychological or emotional condition that caused the victim to "make up a story about the assault." *State v. Heath*, 316 N.C. 337 (1986).

* IMPORTANT DISTINCTION - look out for things that sound like expert's character assessments about victims but are not – "genuineness" or "reliability" of responses, or that victim "did not seem to be coached." *See State v. Jones*, 339 N.C. 114 (1994), *cert. denied*, 515 U.S. 1169 (1995) ("reliability"); *State v. Baymon*, 336 N.C. 748 (1994) (victim "did not seem to be coached"); *State v. Wise*, 326 N.C. 421 (1990), *cert. denied*, 498 U.S. 853 (1990) (victim's responses during interview seemed "genuine").

* Expert testimony about Defendant's specific mental condition (here, that Defendant's mental state makes him prone to false confessions – the defendant's personality makes him likely to fabricate stories to reduce stress in confrontation with authority) ruled admissible. *See State v. Baldwin*, 125 N.C. App. 530 (1997), *rev. dismissed*, 347 N.C. 348 (1997).

* when Defendant does not testify, expert can give opinion as to whether she thought Defendant was "lying" during evaluation, as it went to reliability of information received. *State v. Jones*, 339 N.C. 114 (1994).

(5) Direct use: Reputation, opinion, and specific instances of conduct evidence are all admissible where character trait is an essential element of a charge, claim, or defense.

* These are very rare in the criminal context. They include entrapment defense, seduction, perjury.

IMPORTANT NOTE – the violent disposition of a victim is NOT an "essential element" of a self-defense claim (as explained further below). So a defendant can offer only reputation and opinion testimony as a general rule. *See State v. Wall*, ___ N.C. App. ___, 2003 N.C. App. Lexis 392 (April 1, 2003) (unpublished), *rev. denied*, 357 N.C. 469 (2003).

C. Character Evidence about the Defendant – Rule 404(a)(1)

THE TEST: RELEVANCE + 403 BALANCING

(1) The State can't get into bad character of Defendant until Defendant puts on evidence of his own good character first. *See, e.g.*, *State v. Syriani*, 333 N.C. 350 (1993), *cert. denied*, 510 U.S. 948 (1993).

* Defendant can put evidence of good character on through character witnesses or through Defendant's own testimony.

* A judge can limit the number of character witnesses in an exercise of discretion (403 concerns). *State v. McCray*, 312 N.C. 519 (1985).

* Defendant's merely reciting criminal record (or lack thereof) on direct is not evidence of "good character" and does not open the door to cross on bad character. *State v. Lynch*, 334 N.C. 402 (1993).

* Generally, State cannot bolster cross-examination of character witness as to specific instances with extrinsic evidence as to those specific instances. *Cf. State v. Maynor*, 331 N.C. 695 (1992).

* Although that extrinsic evidence could be relevant under Rule 404(b) in certain circumstances. (See below.)

* This kind of evidence does not have to be explicitly character-related; where Defendant places character in evidence by "painting a picture," cross-examination as to relevant specific instances is appropriate. *State v. Garner*, 330 N.C. 273 (1991); *cf. State v. Dennison*, 163 N.C. App. 375 (2004), *rev'd per curiam*, 359 N.C. 312 (2005) (defendant was "not into fighting" and "don't like" violence).

(2) Rule of exclusion: 404(a) is restrictively construed. *See, e.g.*, *State v. Sexton*, 336 N.C. 321 (1994), *cert. denied*, 513 U.S. 1006 (1994); *State v. Bogle*, 324 N.C. 190 (1989).

(3) Relevance: The character trait has to be relevant to crime charged.

* Types of Evidence: Defendant can establish these traits by **reputation** or **opinion** testimony ONLY (Rule 405) – D cannot put on evidence involving specific instances of conduct.

- Relevant character traits include:

*** Law-abiding nature**: whether Defendant is law-abiding is ALWAYS relevant. *State v. Bogle*, 324 N.C. 190 (1989).

* There is a difference in law-abidingness (admissible) and not having any criminal convictions, or of being a "good person," or "not dealing in drugs" (not admissible), though. *See Bogle*; *State v. Moreno*, 98 N.C. App. 642 (1990), *rev. denied*, 327 N.C. 640 (1990).

* where evidence of "law-abidingness" is contradictory, Defendant is still entitled to the instruction. *See Moreno*.

*** Peacefulness**: Relates to crime of violence. *State v. Gappins*, 320 N.C. 64 (1987).

*** Honesty**: Relates to crime of dishonesty (embezzlement, etc.). Does not relate to drug offenses. *See Bogle*, 324 N.C. 190 (1989)

* While it may not be relevant to the charge, character evidence about honesty of defendant can be relevant when defendant testifies. *Cf. Bogle; State v. Cardwell*, 133 N.C. App. 496 (1999) (honesty not relevant to DWI, but Defendant didn't testify).

*** But:** Where D does not testify but made statement to police about which State offers contradictory evidence at trial, D's credibility is "impugned," and D can offer reputation/opinion evidence as to truthfulness. *State v. Marecek*, 152 N.C. App. 479, 506-07 (2002).

*** Temperance (no drugs/drinking)**: Relates to crime involving drugs or alcohol.

* Reputation evidence that Defendant was not a drug user relevant to charge of drug trafficking. *State v. Moreno*, 98 N.C. App. 642 (1990).

- Irrelevant character traits include:

*** General "good character" or "moral character"** - *see State v. Fultz*, 92 N.C. App. 80 (1988); *State v. Squire*, 321 N.C. 541 (1988).

*** General "psychological make-up"** – an absence of mental health problems, absence of substance abuse problems, absence of sexual attraction to children, absence of "high risk" offender behaviors – all this is inadmissible. *State v. Wagoner*, 131 N.C. App. 285 (1998), *rev. denied*, 350 N.C. 105 (1999). *But compare with State v. Baldwin*, 125 N.C. App. 530 (1997), *rev. dismissed*, 347 N.C. 348 (1997), about the *presence* of problems – "evidence in the form of expert testimony as to conditions affecting a person's mental condition is not character evidence.")

* BUT reputation or opinion evidence about non-use of drug or alcohol can be admissible if tailored to a particular charge involving drug or alcohol use. *See Moreno*, 98 N.C. App. 642.

* history of military service (honorable discharge, etc.) is inadmissible. *See State v. Mustafa*, 113 N.C. App. 240 (1994), *cert. denied*, 336 N.C. 613 (1994).

(4) **INSTRUCTIONS**: The character traits of peacefulness, honesty, law-abidingness, etc., are **substantive evidence** of a defendant's guilt or innocence – so Defendant is entitled to an instruction on this issue **if he asks.** *State v. Bogle*, 324 N.C. 190 (1989).

* BUT you only get an instruction as to pertinent traits of character. Law-abidingness plus peacefulness in crimes of violence, or law-abidingness and honesty in crimes of dishonesty, etc.

(5) Once Defendant puts on evidence of his good character, State can cross-examine about specific instances of conduct involving relevant bad character.

* State cannot put on reputation or opinion evidence that goes straight to the heart of the charges at issue - where Defendant charged with drug offenses, his reputation for being a drug dealer is not admissible. *State v. McBride*, 173 N.C. App. 101 (2005), *rev. denied*, 360 N.C. 179 (2005).

* but evidence in a murder trial (or assault) that Defendant had a "temper" would be relevant once Defendant put on evidence of good character. *Cf. State v. Stafford*, 150 N.C. App. 566 (2002), *cert. denied*, 357 N.C. 169 (2003).

* extrinsic evidence about specific instances would have to be admissible under 404(b) before being let in.

* Defendant putting forth evidence of self-defense does not necessarily put character at issue; if evidence only goes to self-defense, then State can't get into specific instances of unrelated violent conduct (unless independently admissible under 404(b)). *See State v. Ammons*, 167 N.C. App. 721 (2005); *State v. Morgan*, 315 N.C. 626 (1986).

(6) IMPORTANT DISTINCTION: The State can argue that Defendant has bad character traits or overall bad character based on the (non-character) evidence presented without violating Rule 404. *State v. Taylor*, 344 N.C. 31 (1996); *State v. Abraham*, 338 N.C. 315 (1994).

* BUT the State can't argue bad general character if the evidence admitted went only to impeach defendant's credibility. *See State v. Tucker*, 317 N.C. 532 (1986) (where defendant was cross-examined about assault convictions under 609 as to credibility, State could not argue that Defendant had a violent character).

(7) CAPITAL CASES: Generally, State can present competent relevant evidence about Defendant's "bad character" during sentencing phase of capital trial when Defendant has placed character at issue by presenting evidence of good character (and to prevent arbitrary imposition of death penalty); this type of evidence also goes to jury's assessment of mitigating circumstances. *State v. Duke*, 360 N.C. 110 (2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 130 (2006); *State v. Williams*, 339 N.C. 1 (1994), *vacated on other grounds and remanded sub nom. Bryant v. North Carolina*, 511 U.S. 1001 (1994).

* once Defendant offers evidence about prior criminal activity, both the State and the Defendant are free to present all evidence concerning the extent and significance of that activity. *State v. Hedgepeth*, 350 N.C. 776 (1999), *cert. denied*, 529 U.S. 1006 (2000).

(8) Even after the 404(a) analysis, judge has to make 403 determination (whether probative value is substantially outweighed by the danger of undue prejudice) on the record.

(9) Standard of review on appeal: Harmless error.

* BUT more often than not the errors in dealing with character evidence under 404(a) are found to be harmless.

D. Character Evidence about the Victim – Rule 404(a)(2)

THE TEST: RELEVANCE + 403 BALANCING

(1) The State can't get into good character of victim until Defendant puts on evidence of victim's (bad) character. *See, e.g.*, *State v. Johnston*, 344 N.C. 596 (1996).

* "Putting on evidence of the victim's bad character" does not include defense counsel's forecast of victim's bad character during opening statements – has to be actual evidence during the evidentiary phase of the trial. *See State v. Buie*, ___ N.C. App. ___, 2009 N.C. App. Lexis 48 (No. COA-07-1522) (January 6, 2009) (unpublished).

* BUT reputation/opinion/specific instances evidence that the victim did not carry a weapon would be admissible in State's case-in-chief (in addition to in peacefulness context) as going to premeditation/deliberation in 1st degree murder case, or lack of provocation by the victim. *See Johnston*.

(2) Rule of exclusion: 404(a) is restrictively construed. *See, e.g.*, *State v. Sexton*, 336 N.C. 321 (1994), *cert. denied*, 513 U.S. 1006 (1994); *State v. Bogle*, 324 N.C. 190 (1989).

(3) RELEVANCE: The evidence must bear a relationship to the crime with which the defendant is charged.

* Victim's violent disposition: Relates to Defendant's crimes of violence (self-defense).

* Then the State could redirect with as to specific instances of peacefulness.

* Where Defendant goes beyond mere consent in rape/sex offense case and puts on evidence that, for example, victim wanted to cheat on spouse, Rule 412 does not apply, and 404(a) allows rebuttal evidence of marital fidelity and good moral character (Defendant opened the door). *State v. Sexton*, 336 N.C. 321 (1994).

* Victim's reputation for drunkenness not relevant to issue of consent in sexual assault case. *State v. Cronan*, 100 N.C. App. 641 (1990), *rev. dismissed*, 328 N.C. 573 (1991).

(4) SELF-DEFENSE CASES: The victim's violent disposition is relevant in self-defense cases when offered to show two things:

(a) **the defendant's fear or apprehension was reasonable.** *State v. Watson*, 338 N.C. 168 (1994), *cert. denied*, 514 U.S. 1071 (1995); *State v. Winfrey*, 298 N.C. 260 (1979).

*Victim's violent character is relevant ONLY as related to

(1) the reasonableness of Defendant's fear or apprehension, and

(2) the reasonableness of the Defendant's use of force.

* Defendant had to know about victim's violent character for this evidence to be admissible.

* Evidence about reasonableness of D's fear/apprehension can be reputation, opinion, or specific instances of conduct.

* deceased victim's criminal record is not admissible to show victim's reputation for violence in the community. *State v. Corn*, 307 N.C. 79 (1982); *State v. Adams*, 90 N.C. App. 145 (1988).

* consequently, State cannot argue that victim's lack of a criminal record goes to show that victim did not have a reputation for violence in the community. *State v. Burgess*, 76 N.C. App. 534 (1985).

* BUT the criminal record of a victim can be admissible to show reasonableness of D's belief or reasonableness of D's use of force where there is evidence that D knew about victim's criminal record. *See State v. Jacobs*, ___ N.C. ___, 2010 N.C. Lexis 195 (March 12, 2010).

* The Supreme Court analyzed this issue under 404(b) and found that introduction of a victim's convictions does not violate the *Wilkerson* rule (see page 24 *infra*) where conviction evidence is relevant.

* Watch for mix-and-match evidence – effect of intoxication on victim's (already) violent disposition is also relevant and therefore admissible. *State v. Watson*, 338 N.C. 168.

* THIS TYPE OF EVIDENCE IS NOT ADMITTED UNDER RULE 404 – it goes to prove Defendant's state of mind, not to prove conduct of the victim, so 404 does not apply.

(b) **the victim was the aggressor.** *Watson*.

* It doesn't matter whether Defendant knew of violent character or not.

* if Defendant did not know of violent character of victim at the time, admissibility of victim's character is carefully limited to when all the evidence in the case is circumstantial or the nature of the transaction is in doubt. *State v. Winfrey*, 298 N.C. 260 (1979); *State v. Everett*, 178 N.C. App. 44 (2006), *aff'd by an equally divided court*, 361 N.C. 217 (2007).

* Evidence about whether the victim was the aggressor is admitted under Rule 404(a), as it goes to prove conduct of the victim.

* This evidence can be reputation or opinion testimony **but not specific instances of conduct** (Rule 405 - prior specific acts of violence DO NOT go to essential element of claim of self-defense).

* State cannot go ahead and put on evidence of victim's peacefulness in case-in-chief even where it is obvious that Defendant will put on evidence that victim was aggressor. *State v. Faison*, 330 N.C. 347 (1991); *Buie*, ___ N.C. App. ___, 2009 N.C. App. Lexis 48 (January 6, 2009) (unpublished).

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* Again, watch for mix-and-match evidence – effect of intoxication on victim's violent disposition is relevant and therefore admissible. *See Watson*.

(c) "Reputation" or "opinion" or specific instances of conduct as to sexual orientation of victim is inadmissible – doesn't go to either reasonableness of defendant's fear or victim as the aggressor. *State v. Laws*, 345 N.C. 585 (1997).

(d) When Defendant is claiming accident (or that someone else did it, etc.), evidence of victim's violent disposition is not relevant, and therefore inadmissible. *State v. Goodson*, 341 N.C. 619 (1995).

(5) CAPITAL CASES: Generally, "good character" of victim is admissible **when relevant** in sentencing phase/closing arguments of capital trial. *See State v. Jennings*, 333 N.C. 579 (1993), *cert. denied*, 510 U.S. 1028 (1993).

* BUT **general good character of victim** is not admissible in sentencing phase when it goes too far. *See generally State v. Quick*, 329 N.C. 1 (1991) ("eulogistic manner" of testimony; "emotionally charged and inflammatory evidence" about admirable nature of victim; "extensive comments" during closing argument).

* Victim impact evidence (distraught character of victim's family/friends) is not admissible in sentencing phase. *See Booth v. Maryland*, 482 U.S. 496 (1987); *State v. Quick*, 329 N.C. 1 (1991).

(6) Character of Third Persons: Evidence of the character of someone who is not a witness or a party to an action is generally inadmissible. *State v. Winfrey*, 298 N.C. 260 (1979); *State v. McBride*, 173 N.C. App. 101 (2005), *rev. denied*, 360 N.C. 179 (2005).

(7) Even after the 404(a) analysis, judge has to make 403 determination (whether probative value is substantially outweighed by the danger of undue prejudice) on the record.

(8) Standard of review on appeal: Harmless error.

* BUT more often than not the errors in dealing with character evidence under 404(a) are found to be harmless.

* **Note**: As to character evidence involving consent issues with sexual assault/rape, see Rule 412 and cases interpreting it.

* **Note**: As to character evidence involving witnesses, see Rules 607/608/609 and cases interpreting them.

E. Habit Evidence – Rule 406

THE TEST: RELEVANCE + 403 BALANCING

(1) What is a habit? Habit evidence involves "systematic conduct" of doing something with "invariable regularity"; where there is a "regular response to a repeated specific situation." *See, e.g.*, *State v. Hill*, 331 N.C. 387 (1992), *cert. denied*, 507 U.S. 924 (1993). Habit evidence of a person, or of an organization, is admissible to prove that the conduct on a particular occasion was in conformity with the habit.

* Difference in habit of doing something (admissible) vs. habit of being something (usually not admissible).

    * habit of drinking (admissible), not of being drunk/impaired (inadmissible)

        * "mere evidence" of drunkenness typically does not rise to habit. *See Hill*, 331 N.C. 387.

    * habit of abiding by laws (admissible), not of being convicted of breaking laws (inadmissible)

* Habit evidence is different from 404(a) character evidence –

    * It refers to actual conduct of a person instead of character trait.

    * It is used to prove that the person's conduct at a certain time was in conformity with conduct at other times.

    * It can also refer to actions of organizations (businesses, etc.)

* It is harder to prove a "negative" habit (a habit of not doing something) than a positive habit (a habit of doing something).

    * Evidence from witnesses who knew Defendant for more than twenty years that Defendant was not known to carry a gun not sufficient to establish habit. *State v. Rice*, ___ N.C. App. ___, 2002 N.C. App. Lexis 2317 (August 6, 2002) (unpublished), *rev. denied*, 356 N.C. 689 (2003).

        * evidence proffered in this case was more reputation than specific instances or opinion, so didn't establish habit.

        * "regular response to repeated specific situation" implies action of some sort, as opposed to inaction in this case.

(2) Standard of proof – preponderance of the evidence.

* Habit can be proved two different ways:

* opinion of eyewitnesses to habit behavior

* specific instances of conduct.

* succession of witnesses testifying about relevant conduct on single, separate occasions is OK – *Crawford v.* Fayez, 112 N.C. App. 328 (1993), *rev. denied*, 335 N.C. 553 (1994).

* You don't need eyewitnesses or other corroborative evidence of the habit; just sufficient foundation as to how witness knows of habit.

(3) FACTORS in determining habit:

* sufficiency of the foundation -

- similarity of instances

* BUT habit of other people with same job as an individual not necessarily relevant to establish habit of another individual. *Cf. State v. Griffin*, 136 N.C. App. 531 (2000), *rev. denied*, 351 N.C. 644 (2000).

- number of instances

* where victim visited store "two or three times a month," not enough to show habit. *State v. Fair*, 354 N.C. 131 (2001), *cert. denied*, 535 U.S. 1114 (2002).

- regularity of instances

* where victim "always" carried money on person and body was found with no money on it, admitted as habit to support robbery conviction (and therefore felony murder). *See State v. Best*, 342 N.C. 502 (1996), *cert. denied*, 519 U.S. 878 (1996); *State v. Palmer*, 334 N.C. 104 (1993).

* where witness had operated breathalyzer machine "around a thousand times" the same way, admitted as habit to show that he complied with statutory provision about running simulator test before Defendant's test. *State v. Tappe*, 139 N.C. App. 33 (2000).

* where Defendant's evidence tended to show long-term abuse of alcohol and medication, not particular enough to show habit (and therefore insufficient to support diminished capacity). *State v. Hill*, 331 N.C. 387 (1992), *cert. denied*, 507 U.S. 824 (1993).

* Defendant's regular abuse of alcohol and drugs while driving sufficient to establish habit of willful and wanton behavior while driving (but not of use of alcohol or drugs while driving). *Anderson v. Austin*, 115 N.C. App. 134 (1994), *rev. denied*, 338 N.C. 514 (1994).

* reliability of the evidence

* where witness's testimony about driving conduct of defendant was "vague and imprecise," court's exclusion of evidence proffered as habit was not error. *Long v. Harris*, 137 N.C. App. 461 (2000).

(4) Even after the habit/406 analysis, judge has to make 403 determination (whether probative value is substantially outweighed by the danger of undue prejudice) on the record.

(5) Standard of Review: Abuse of discretion.

* North Carolina appellate courts have never reversed a ruling on habit evidence. So your case could be first.

F. "Other Acts" of the Defendant – Rule 404(b)

THE TEST: PROPER PURPOSE + RELEVANCE + TIME + SIMILARITY + 403 BALANCING

(1) This is where a lot of cases get reversed.

(2) Rule 404(b) – Evidence of other bad acts is not admissible to show character in conformity with bad act, but is admissible for any other reason.

* Act itself does not have to be "bad" – evidence that Defendant legally possessed firearm at time before victim was shot properly admitted under 404(b). *State v. Knight*, 87 N.C. App. 125 (1987), *rev. denied*, 321 N.C. 476 (1988).

* Defendant's conversation with witness about robbing convenience stores to get money admissible under 404(b) as to plan. *State v. Wilson*, 108 N.C. App. 117 (1992).

* Act itself also does not have to be prior bad act – can be subsequent as long as other tests are met. *State v. Hutchinson*, 139 N.C. App. 232 (2000).

(3) 404(b) is a rule of **inclusion**; other bad acts evidence admissible unless its only probative value is in showing propensity. *State v. Berry*, 356 N.C. 490 (2002), *writ denied*, 358 N.C. 236 (2004).

* while other criminal offenses may be admissible at trial under 404(b), standard for joinder of different criminal offenses in one trial is different – more stringent standard under N.C. Gen. Stat. § 15A-926(a). *State v. Bowen*, 139 N.C. App. 18 (2000).

* ruling on joinder is not relevant to issue whether evidence is admissible under 404(b). *State v. Locklear*, ___ N.C. ___, 2009 N.C. Lexis 814 (August 28, 2009).

* watch for inadmissible evidence that tries to come in as a part of proper 404(b) evidence – although 404(b) evidence about Defendant's acquisition of dynamite was properly admitted under 404(b) as part of plan to kill victim, the fact that Defendant stole dynamite is not relevant to plan and therefore not admissible under 404(b). *State v. Sullivan*, 86 N.C. App. 316 (1987), *rev. denied*, 321 N.C. 123 (1987).

(4) Standard of Proof: Preponderance of the evidence. Burden is on **Defendant** to show that the evidence should not be admitted. *State v. Moseley*, 338 N.C. 1, 32 (1994), *cert. denied*, 514 U.S. 1091 (1995).

* Evidence may include offenses committed by juveniles if they are Class A-E adult felonies.

(5) Procedure: The preferred way to deal with 404(b) evidence is to first hear it on *voir dire* outside the presence of the jury, make a ruling, and then bring the jury back in.

* **Put the basis for your ruling in the record.** "Admissible under 404(b)" is not enough – make sure record reflects what the purpose was, time and similarity, 403, etc.

* 404(b) "specific instance of conduct" evidence is not limited to cross-examination of defendant; can be extrinsic evidence offered in State's case-in-chief. *See State v. Morgan*, 315 N.C. 626 (1986).

* When you are dealing with evidence on *voir dire*, Defendant does have right to ask questions on cross outside the presence of the jury to get the whole story on the record for judge to make ruling. *Cf. State v. Smith*, 152 N.C. App. 514 (2002), *rev. denied*, 356 N.C. 623 (2002) (presumed error where trial judge refused to let defense counsel ask 404(b)-related questions on *voir dire* outside presence of jury).

* If judge fails to note additional 403 analysis of admitted 404(b) evidence on the record, it is presumed error. *See Smith*, 152 N.C. App. 514 (presumed error when trial judge does not note 403 analysis on the record); *State v. Washington*, 141 N.C. App. 354 (2000), *disc. rev. denied*, 353 N.C. 396 (2001) (no error where trial judge demonstrated 403 analysis in ruling); *State v. Rowland*, 89 N.C. App. 372, *rev. dismissed*, 323 N.C. 619 (1988) (evidence of Defendant's drug addiction inadmissible under 404(b) where trial judge did not make findings as to admissibility under 404(b)).

(6) Proper purposes: (This list is not exclusive – can be for "any purpose" other than to show propensity. *See State v. Moseley*, 338 N.C. 1, 32 (1994), *cert. denied*, 514 U.S. 1091 (1995)).

(a) Motive:

***** in drug cases, evidence of other drug violations is often admissible to prove motive where the other acts go to the chain of events explaining the context, motive, and set-up of the crime and are naturally a part of telling the whole story of the crime to the jury. *State v. Williams*, 156 N.C. App. 661 (2003); *see also State v. Welch*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1741 (October 7, 2008).

* evidence of prior drug dealing went to motive in murder case where there was a dispute between Defendant and victim over manner in which drug money was to be distributed. *State v. Lundy*, 135 N.C. App. 13 (1999), *rev. denied*, 351 N.C. 365 (2000).

* evidence of prior drug possession can go to motive in breaking and entering cases. *See State v. Martin*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1447 (August 5, 2008) (unpublished) (motivation for money – also goes to *res gestae*; see below).

* evidence of prior sex offense against victim A went to motive to murder victim B where previous sex offense was discovered and Defendant could have feared that victim B would report him. *State v. Coffey*, 326 N.C. 268 (1990).

(b) Opportunity:

* evidence of previous sex offenses and manner in which they occurred admissible under 404(b) to show Defendant took advantage of opportunity to assault victims when mother wasn't home. *State v. Morrison*, 94 N.C. App. 517 (1989), *cert. denied*, 325 N.C. 549 (1989).

* five-year period where Defendant did not assault victim was result of Defendant not having opportunity to be alone with victim during that time period, so prior sexual offenses were not too remote in time to be inadmissible as part of common scheme or plan to abuse victim. *State v. Thompson*, 139 N.C. App. 299 (2000).

(c) Intent/knowledge:

* evidence of similar murder committed seventeen years earlier went to intent to murder as well as knowledge that actions would in fact kill second victim. *State v. Hipps*, 348 N.C. 377 (1998), *cert. denied*, 525 U.S. 1180 (1999).

* evidence of threats and entry of domestic violence orders against Defendant proper to show intent to kill victim. *State v. Morgan*, 156 N.C. App. 523 (2003), *cert. denied*, 357 N.C. 254 (2003).

* evidence of prior violent conduct toward a particular victim can go to show absence of victim's consent to acts (kidnapping, sex offenses, etc.). *State v. Maysonet*, ___ N.C. App. ___, 2008 N.C. App. Lexis 2177 (December 16, 2008) (unpublished).

* evidence of previous DSS investigations as to care of Defendant's children went to intent to harm child – relevant to Defendant's knowledge of appropriate levels of care for children. *State v. Fritsch*, 351 N.C. 373 (2000), *cert. denied*, 531 U.S. 890 (2000).

* evidence of sex offense against victim A admissible as to the issue of intent to commit murder against victim B where evidence of sex offense against A went to specific intent to kidnapping of B (for purpose of sex offense against victim B). While it did show propensity, it also went to intent. *State v. Coffey*, 326 N.C. 268 (1990).

* evidence of previous drug sales (2½ years prior to offense date) was relevant to D's intent to commit offense of maintaining dwelling to keep controlled substances – since maintaining dwelling offense occurs over time, 2 ½ year period not too remote. *State v. Rogers*, ___ N.C. App. ___, 2009 N.C. App. Lexis 1284 (August 4, 2009) (unpublished).

(d) Preparation/plan/*modus operandi*:

* with sex offenses, evidence of preparation or plan involving pornography and other sexual paraphernalia must be tied to actual conduct with victim – introduction of sexually related evidence that is not related to conduct with victim at issue is error. *Compare State v. Smith*, 152 N.C. App. 514 (2002), *rev. denied*, 356 N.C. 623 (2002) (admission of unrelated pornographic videos and magazines is error) *with State v. Rael*, 321 N.C. 528 (1988) (admission of pornographic videos and magazines not error where defendant had showed them to victim).

* *See also State v. Maxwell*, 96 N.C. App. 19 (1989), *rev. denied*, 326 N.C. 53 (1990) (defendant's nudity and fondling himself not admissible where not related to any activity with victim); *State v. Owens*, ___ N.C. App. ___, 2009 N.C. App. Lexis 785 (May 19, 2009) (unpublished) (admission of incest-related and child pornography found on computer not error where D "considered himself to be uncle" to victim – also went to motive and intent).

* gang activity involving drug dealing and robberies can go to *modus operandi*. *State v. Hightower*, 168 N.C. App. 661, *disc. rev. denied*, 359 N.C. 639 (2005).

* domestic violence assault against different victim from 17 years earlier admissible under 404(b) where there were numerous similarities in the way the different assaults were carried out. *State v. Brooks*, 138 N.C. App. 185 (2000).

* where Defendant was charged with sexual offenses involving son, evidence of sex offenses involving daughter also admissible to establish plan to molest his children. *State v. DeLeonardo*, 315 N.C. 762 (1986); *see also State v. Owens*, ___ N.C. App. ___, 2009 N.C. App. Lexis 785 (May 19, 2009) (unpublished) (admission of evidence that D molested one sister not error as to trial involving molestation of other sister during same general time period).

(e) Identity:

* State can only use 404(b) for identity when identity is at issue in the case. *State v. White*, 101 N.C. App. 593 (1991), *rev. denied*, 329 N.C. 275 (1991).

* where evidence showed more than one possible perpetrator, 404(b) evidence of domestic violence against child's mother went to issue of identity of father as the perpetrator and was therefore admissible. *State v. Carrilo*, 149 N.C. App. 543 (2002).

* where Defendant "pleaded not guilty and denied that he was the assailant," identity was at issue, so 404(b) evidence to issue of identity was proper. *State v. Gilliam*, 317 N.C. 293 (1986); *State v. Morgan*, 359 N.C. 131 (2004), *cert. denied*, 546 U.S. 830 (2005).

* where Defendant admits identity during opening statement, identity may no longer be at issue. *Cf. White*.

* where officers knew Defendant from "past experiences" with him, use of 404(b) evidence was proper as to issue of identity. *State v. Valentine*, ___ N.C. App. ___, 2009 N.C. App. Lexis 1651 (October 20, 2009) (unpublished).

* be mindful of Rule 403 concerns with respect to how much information you let in about those "past experiences" like this, though.

* similar types of injuries to other victims admissible to show identity. *State v. Burr*, 341 N.C. 263 (1995), *cert. denied*, 517 U.S. 1123 (1996).

* use of same gun in multiple robberies/shootings sufficient to show identity. *State v. Brockett*, 185 N.C. App. 18 (2007), *rev. denied*, 361 N.C. 697 (2007).

* since evidence of other similar crimes can be admissible against defendant at trial, defendant can also offer 404(b) evidence of other similar crimes to show that someone else committed the offense at issue (doesn't just go to identity of defendant). *State v. Cotton*, 318 N.C. 663 (1987).

* BUT there has to be strong similarity between the prior acts of the other person and the crime with which Defendant is charged (has to raise more than an inference) – evidence has to "point directly" to the guilt of the other party. *State v. Deese*, 136 N.C. App. 413 (2000), *rev. denied*, 351 N.C. 476 (2000).

(f) Absence of accident/mistake/entrapment:

*where Defendant claims accident, evidence of similar acts is **more** probative than when accident is not an issue. *State v. Stager*, 329 N.C. 278 (1991).

* evidence of Defendant's prior assaults is not admissible against Defendant to show that his belief in self-defense was mistaken. *State v. Goodwin*, 186 N.C. App. 638 (2007).

* "absence of mistake on the part of the State (or of someone other than Defendant) is not proper purpose under 404(b). *State v. Fluker*, 139 N.C. App. 768 (2000) (error to admit prior incident offered to show that law enforcement had not made mistake in detaining defendant).

* evidence of drug possession and use admissible to show lack of entrapment. *State v. Goldman*, 97 N.C. App. 589 (1990), *rev. denied*, 327 N.C. 484 (1990).

* can't put it in until entrapment becomes an issue, though (in *Goldman*, defense counsel made reference to it in opening statement, so 404(b) about it was fair game).

(g) *res gestae*: to tell "the whole story" of the crime ("same transaction" or "course of conduct" rule). *See State v. Agee*, 326 N.C. 542 (1990).

* evidence that defendant gets violent when drinking admissible to show why victim told defendant to leave. *State v. Beal*, 181 N.C. App. 100 (2007).

* prior assaults by the defendant went directly to elements of charge of communicating threats (reasonable belief of the victim that threat would be carried out), so proper under 404(b). *State v. Elledge*, 80 N.C. App. 714 (1986); *State v. Young*, 317 N.C. 396 (1986) (prior assaults went to victim's fear of Defendant).

* victim’s knowledge of Defendant’s prior crimes can also go to issue of consent where crime at issue involves lack of consent or offense committed against will of victim. *See Young*, 317 N.C. 296.

* Defendant’s prior knowledge and involvement in drug activity went directly to elements of charge of maintaining a dwelling, so proper under 404(b). *State v. Rosario*, 93 N.C. App. 627 (1989), *rev. denied*, 325 N.C. 275 (1989); *State v. Moore*, 162 N.C. App. 268 (2004).

* Defendant’s long history of domestic violence admissible to show victim’s fear of Defendant and explain why victim did not move out. *State v. Everhardt*, 96 N.C. App. 1 (1989), *aff’d*, 326 N.C. 777 (1990).

* Defendant's prior history of domestic violence and deputy's knowledge of it, including that D was on probation for threatening wife, relevant to show deputy's conduct in going to victim's residence after he was unable to contact her. *State v. Madures*, ___ N.C. App. ___, 2009 N.C. App. Lexis 1077 (July 7, 2009).

* Defendant’s “bad acts” the day before, the day of, and the day after murder were “necessary to complete the story” for the jury and therefore admissible. *State v. Smith*, 152 N.C. App. 29 (2002), *cert. denied*, 356 N.C. 311 (2002).

* evidence that Defendant’s felony probation was revoked went to felony conviction for possession of firearm by felon and was therefore admissible. *State v. Boston*, 165 N.C. App. 214 (2004).

* evidence surrounding Defendant’s travel out of state and subsequent unrelated arrest went to manner in which confession to crimes charged was made and flight from crime scene, so admissible under 404(b). *State v. Rannels*, 333 N.C. 644 (1993).

* evidence about victim's knowledge of D's prior violent acts toward others relevant to victim's state of mind and lack of consent to sex offense. *State v. Parker*, ___ N.C. App. ___, 2009 N.C. App. Lexis 771 (June 16, 2009) (unpublished).

* IMPORTANT DISTINCTION: while evidence of other acts may be relevant under 404(b) when it comes through other witnesses, cross-examination of Defendant as to those acts may not be appropriate. Attacking credibility is not a proper purpose for 404(b) evidence. *State v. Cook*, 165 N.C. App. 630 (2004). Cross-examination of Defendant as to specific instances of misconduct **when used only to attack his credibility** goes **only** to truthfulness or untruthfulness under Rule 608(b). *State v. Gordon*, 316 N.C. 497 (1986); *State v. Morgan*, 315 N.C. 626 (1986); *State v. Frazier*, 121 N.C. App. 1 (1995), ***aff'd***, 344 N.C. 611 (1996); *State v. Brooks*, 113 N.C. App. 451 (1994).

***** when 404(b) offered on cross-examination of Defendant for purposes other than attacking credibility, specific instances are admissible. *Cf. State v. Scott*, 318 N.C. 237 (1986) (cross-examination on specific instances that goes to *modus operandi* or identity is appropriate).

* Victim impact testimony about the effect of the 404(b) evidence on victim is not admissible. *State v. Bowman*, 188 N.C. App. 635 (2008), *rev. denied*, 362 N.C. 475.

* exception where "victim impact" is part of an element of the crime charged. *See State v. Lofton*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1815 (October 21, 2008) (where "victim impact" of assault involved psychological damage to victim, this came in as element of aggravated assault on handicapped person with element of "serious injury," which includes "serious mental injury")

(7) Two main considerations: **time** and **similarity**. The more similar the acts are, the less problematic long periods of time are. *See State v. Sneeden*, 108 N.C. App. 506 (1993), ***aff'd***, 336 N.C. 482 (1994). BUT the passage of time between offenses tends to "erode" the commonality between offenses. *State v. Jones*, 322 N.C. 585.

* time:

* remoteness in time is less significant when 404(b) is being used to show intent, motive, *modus operandi*, knowledge, or lack of accident or mistake; generally goes to weight, not admissibility. *State v. Stager*, 329 N.C. 278 (1991) (ten year period between events); *State v. Peterson*, 361 N.C. 587 (2007), *cert. denied*, ___ U.S. ___, 170 L. Ed. 2d 377 (2008) (sixteen-year period between events); *State v. Sneeden*, 108 N.C. App. 506 (1993) (twenty-three years between events); *State v. Brooks*, 138 N.C. App. 185 (2000) (seventeen years between events); *State v. Hairston*, ___ N.C. App. ___, 2009 N.C. App. Lexis 1516 (September 15, 2009) (unpublished) (between twenty-seven and thirty-seven years between events).

* remoteness in time can be more problematic when 404(b) is being used to show common plan or scheme. *See State v. Jones*, 322 N.C. 585 (1988) (sexual offenses seven years apart offered as part of common plan were admitted in error); *State v. Scott*, 318 N.C. 237 (1986) (offenses nine years apart as part of common plan admitted in error). *But see State v. Patterson*, 149 N.C. App. 354 (2002) (sexual offenses between ten and fifteen years admissible as part of common scheme or plan where continuing pattern over time).

* where acts and conduct are regular or continuous over a long period of time, length of time actually increases relevance. *State v. Frazier*, 121 N.C. App. 1 (1995) (continuous offenses over twenty-six year period); *State v. Shamsid-Deen*, 324 N.C. 437 (1989) (twenty year period); *State v. Curry*, 153 N.C. App. 260 (2002) (ten year period).

* where Defendant is incarcerated or otherwise removed from access to victim for intervening time period, remoteness not as significant. *State v. Riddick*, 316 N.C. 127 (1986); *State v. Jacob*, 113 N.C. App. 605 (1994); *State v. Bryant*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1361 (July 15, 2008) (unpublished) (where Defendant is incarcerated in between B&E sprees, "it is proper to exclude time defendant spent in prison when determining whether prior acts are too remote").

* generally speaking, remoteness goes more to weight than to admissibility. *See State v. Maready*, 362 N.C. 614 (2008).

* similarity: where there are “some unusual facts” present in both crimes, or particularly similar sets of circumstances indicating that defendant committed both acts – where there is enough similarity that it results in the jury's reasonable inference that the defendant committed both the prior and the present acts. *See Stager*.

* on the other hand, where the similarities are inherent to "most crimes" of that type, then you don't have sufficient similarity for the evidence to be admissible under 404(b). (Example: prior robbery evidence involving use of weapon, demand for money, and immediate flight from the scene not enough. *State v. Al-Bayyinah*, 356 N.C. 150, 155 (2002))

* with respect to prior crimes of violence, where the only reasoning is to show Defendant’s “intent to assault,” not admissible. *State v. Brooks*, 113 N.C. App. 451 (1994).

* prior acts of unrelated violence are not admissible to show that Defendant was aggressor and did not act in self-defense. *State v. Morgan*, 315 N.C. 626 (1986) (defendant previously pointed gun at other people); *State v. Mills*, 83 N.C. App. 606 (1986) (defendant previously fired gun at various objects). The acts have to be related and have a connection to the crime charged. *Cf. Morgan; Mills*.

* garden-variety prior drug offenses (sales, PWISD, etc.) do not meet similarity requirement for 404(b) purposes without more particularized evidence. *State v. Carpenter*, 361 N.C. 382 (2007).

* BUT where there are similarities in drug sales that go to a *modus operandi* on part of Defendant, more likely that prior drug sales come in under 404(b). *State v. Welch*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1741 (October 7, 2008).

*evidence: sales in same general neighborhood, D working the streets on foot selling to people who drove by, D selling single rocks of crack for $20. NOTE also that these matters were much closer in time than in *Carpenter* (here – six days for one, ten months for another; *Carpenter* – eight years).

* for sexual assault cases, general similarity in ages of victims is not enough; does not go to motive to commit sex offense with young victim. *State v. White*, 135 N.C. App. 349 (1999).

* But where D's conduct towards similar aged victims is similar, evidence can be admissible as to common scheme or plan. *State v. Zeiglar*, ___ N.C. App. ___, 2010 N.C. App. 198 (February 2, 2010) (unpublished) (no error in admission of evidence that D molested one male grandchild ten years after molesting female grandchild where both courses of conduct involved similar activity).

* for breaking and entering cases, also goes to a *modus operandi*-type of analysis. *See State v. Martin*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1447 (August 5, 2008) (unpublished) (evidence: D goes through windows in homes in same neighborhoods, break-ins are at similar hours).

(8) Prior charges and 404(b):

(a) The "bare fact" of a prior conviction is not admissible under 404(b) absent some offer of evidence regarding facts and circumstances underlying prior convictions. *State v. Wilkerson*, 356 N.C. 418 (2002) (*per curiam* opinion adopting dissent in COA opinion at 148 N.C. App. 310 (2002)).

* "Bare fact of conviction" is only admissible to impeach a witness's credibility under Rule 609. *See Wilkerson.*

* State's admission of Defendant's plea transcripts from previous robbery charges did not violate *Wilkerson* rule – they contained Defendant's admission to previous robberies (not "brand" of convictions) and went to identity. *State v. Brockett*, 185 N.C. App. 18, 647 S.E.2d 628 (2007).

* State's admission of license revocation notification letters containing information about convictions resulting in revocation did violate *Wilkerson* rule. *State v. Scott*, 167 N.C. App. 783 (2005).

* evidence of Defendant's prior convictions in context of witness's having served time in DOC with Defendant and discussing proposed break-ins with him while in prison admissible under 404(b) going to opportunity of witness to gain that information. *State v. Tomlinson*, ___ N.C. App. ___, 2009 N.C. App. Lexis 1156 (July 7, 2009), *rev. denied*, 363 N.C. 588 (2009).

* BUT "bare fact of conviction plus" evidence could be admissible in very limited circumstances (for example – where defendant's motive for assault is prior conviction in which victim testified against defendant, etc.). *See Wilkerson*, 148 N.C. App. at 327 (Wynn, J., dissenting – n.2).

* convictions admissible as 404(b) where Defendant was behind in court-ordered restitution; went to motive, plan, and preparation. *State v. Parker*, 354 N.C. 268 (2001).

* a victim's convictions can be admissible where relevant (in this case, going to Defendant's state of mind in a self-defense case). *State v. Jacobs*, ___ N.C. ___, 2010 N.C. Lexis 195 (March 12, 2010).

* EXCEPTION: where there is a statutory provision approving use of conviction evidence, it comes in under that statute, and not 404(b). N.C. Gen. Stat. § 90-113.21(b) allows prior drug convictions to come in where D is charged with paraphernalia to show intent to use a matter to consume drugs. *State v. Bailey*, ___ N.C. App. ___, 2008 N.C. App. Lexis 1072 (June 3, 2008) (unpublished).

* A prior conviction can be a "bad act" for purposes of 404(b) when it is not used to show propensity – in murder case, evidence of death of prior spouse and resulting manslaughter conviction admissible where evidence went to show intent and absence of accident. *State v. Murillo*, 349 N.C. 573 (1998) (pre-*Wilkerson*).

* generally speaking, murder cases using prior convictions do pretty well in the appellate courts.

* Prior driving convictions can be used to show malice in impaired driving second degree murder cases. *See, e.g.*, *State v. Jones*, 353 N.C. 159 (2000); *State v. Goodman*, 149 N.C. App. 57 (2002), *rev'd in part on other grounds, disc. rev. improvidently allowed*, 357 N.C. 43 (2003).

* Determinations about whether prior driving convictions are too remote in time are to be made on a case-by-case basis based on a review of the totality of the circumstances. *State v. Maready*, 362 N.C. 614 (2008).

* evidence that D's license was revoked also comes in under 404(b) for malice purposes. *Jones.*

* AND prior convictions for sexual offenses can be used for any proper purpose in trials of subsequent sexual offenses. *See State v. Greene*, 294 N.C. 418 (1978); *State v. Hall*, 85 N.C. App. 447, *disc. rev. denied*, 320 N.C. 515 (1987) (NC has liberal admission policy with respect to similar sexual offense evidence). *See also Wilkerson* (Wynn, J., dissenting).

* BUT the COA recently ruled that admission of prior conviction for sexual battery was error (although not reversible error) in sex offense trial – apparently under a theory that the prejudicial effect of the conviction outweighed any probative value, given that a number of witnesses testified about the facts of the case underlying that conviction. *State v. Bowman*, 188 N.C. App. 635 (2008), *rev. denied*, 362 N.C. 475.

(b) Evidence of bad acts that result in acquittals can not be used in subsequent criminal trial to show that Defendant in fact committed the earlier crime. *State v. Scott*, 331 N.C. 39 (1992); *State v. Fluker*, 139 N.C. App. 768 (2000).

* this rule also applies to charges dismissed by the trial judge for insufficiency of the evidence. *State v. Ward*, ___ N.C. App. ___ (August 18, 2009), *rev. denied*, 363 N.C. 662 (2009) (Rule 403 prohibits the introduction of this type of evidence)

* where probative value of the earlier charge resulting in acquittal goes to something other than actual guilt of previous offense, can be admissible. *See State v. Robertson*, 115 N.C. App. 249 (1994) (evidence of prior assault resulting in acquittal went to victim's fear of defendant where victim knew of assault); *State v. Agee*, 326 N.C. 542 (1990) (evidence of prior marijuana possession resulting in acquittal went to "chain of circumstances" in defendant's drug charges). Note: Watch 403 concerns in a situation like this, though.

(9) Limiting Instructions: Court must give limiting instruction as to 404(b) evidence when Defendant asks for it. *State v. Haskins*, 104 N.C. App. 675 (1991), *disc. rev. denied*, 331 N.C. 287 (1992); *State v. Everette*, 111 N.C. App. 775 (1993). See page 29 for sample limiting instruction.

* where there are limiting instructions being given in cases where there is more than offense being tried, the limiting instruction given must make reference to the specific charge or charges to which the limiting instruction applies. *See State v. White*, 331 N.C. 604 (1992) (trial court's instruction limiting consideration of 404(b) evidence to intent was error when it did not specify that consideration of evidence was limited to intent as to burglary and not other charges).

* While limiting instructions "guard[] against the possibility of prejudice," *see State v. Stevenson*, 169 N.C. App. 797, 802 (2005), limiting instructions do not help make "harmless error" in close or circumstantial cases. *See State v. Moctezuma*, 141 N.C. App. 90 (2000).

* Limiting instruction about “bare fact of conviction” evidence will not keep case from getting reversed. *See, e.g.*, *State v. Hairston*, 156 N.C. App. 202 (2003).

(10) 404(b) and discovery: While the North Carolina appellate courts have yet to address the issue specifically, the criminal discovery statutes essentially provide that 404(b) evidence be turned over to the Defendant. *See* N.C. Gen. Stat. § 15A-903(a)(1) (“Upon motion by the defendant, the Court must order the State to make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes **or of the prosecution of the defendant**.”); *cf. State v. Gaskins*, ___ N.C. App. ___, 2009 N.C. App. Lexis 1249 (July 21, 2009) (unpublished) (COA concludes that State met discovery obligations with respect to 404(b) evidence by turning it over "as soon as possible," which in that case was actually during the trial).

* BUT the State is not required to give notice of its intent to use 404(b) evidence other than providing a witness list prior to the beginning of trial. *See* N.C. Gen. Stat. § 15A-903(a)(3).

(11) Standard of Review: Abuse of Discretion.

* even where appellate courts find abuse of discretion, harmless error review still applies. *Cf. State v. White*, 331 N.C. 604 (1992).

G. Sample Limiting Instruction

Members of the jury, evidence has been received regarding (other crimes committed by/actions of/incidents involving) the defendant that are not a direct part of the crime(s) charged in this case.

Specifically, evidence has been received that (*describe act*). This evidence is being offered [*as to the specific charge(s) of* _____] solely on the issue(s) of

(**motive** – that is, whether the defendant has a reason to desire the result of the crime or crimes with which he has been charged)

(**opportunity** – that is, whether the defendant had the opportunity to commit the crime or crimes charged)

(**intent** – that is, whether the defendant acted with the state of mind that is required for this offense)

(**preparation/common scheme or plan/*modus operandi*** – that is, whether other actions of the defendant were part of a design or scheme that led to the commission of the offense charged)

(**knowledge** – that is, whether the defendant was aware of facts that are required to make criminal the conduct alleged as the crime or crimes charged)

(**identity** – that is, whether the prior conduct of the defendant is so similar to the crime or crimes charged that it tends to identify the defendant as the one who committed the offense)

(**absence of mistake/accident/entrapment** – that is, whether the defendant acted with the state of mind required for this crime or crimes.)

(***other***)

This is the only purpose for which this evidence is being offered. You may not consider this evidence for any other purpose. Specifically, you may not consider this evidence [*with respect to the charges I noted above*] to conclude that the defendant has a certain character or character trait, and you may not consider this evidence to conclude that he acted in conformity with that character or character trait with respect to the charged crime(s) [*I noted above*] in this case.

You may consider the evidence of other (crimes by) (actions of) (incidents involving) the defendant only for the purpose that I have described here, and you are to judge this evidence as to its weight and credibility just as you would judge any other piece of evidence. You may not conclude that the defendant committed the charged crime(s) [*as I noted above*] just because of something else he may have done in the past.

Character Evidence Case Study & Problems

Def is on trial for felony assault and possession with intent to sell and deliver controlled substances (cocaine). The State's theory of the case is that the crime occurred after a drug deal went bad. The State asserts that Def was a drug dealer. The State contends that Def was trying to consummate a drug sale with Victim, got angry when Victim tried to short him on payment, and shot Victim in the foot. Def admits that drugs were found on his person, but says that they were for personal use and that he wasn't involved in a drug sale. He also asserts self-defense, saying the Victim knew he had drugs, and tried to rob him with a gun.

1. The State wants to offer evidence that Def has a reputation as a drug dealer to show that a drug transaction was in fact involved here. Is this character evidence being admitted to show **propensity**? Why or why not?

2. Def wants to introduce evidence of Victim's violent character to show the reasonableness of Def's belief that he needed to use force to defend himself. Is this character evidence being admitted to show **propensity**? Why or why not?

3. Def wants to introduce evidence that he has a character trait of being law abiding. Is this admissible character evidence? Why or why not?

4. Def wants to introduce evidence that he has a peaceable character. Is this evidence admissible character evidence? Why or why not?

5. Def wants to introduce evidence that he has the character traits of being honest and truthful. Is this evidence admissible character evidence? Why or why not?

6. Assume that you let in Def's evidence regarding his peaceful character. The State now wants to cross-examine Def's character witness about whether the witness knew about two instances where Def attacked others. Is this evidence admissible character evidence? Why or why not?

7. Assume Def didn't testify and Def never tried to introduce evidence regarding his law abiding character. Nevertheless, while cross-examining Def's witness, the State seeks to elicit testimony regarding the defendant's propensity for violating the law. Is this evidence admissible character evidence? Why or why not?

8. Def offers evidence of Victim's violent character to show that Victim was the first aggressor. Is this character evidence admissible? Why or why not?

9. Def wants to introduce evidence of Victim's violent character to show the reasonableness of Def's belief that he needed to use force to defend himself. Is this character evidence admissible? Why or why not?

10. In its case in chief, the State seeks to have Victim's mother testify that the Victim was well respected, peaceful, a leader, a caring father, generous, and churchgoing. Is this character evidence admissible? Why or why not?

11. The State presented no character evidence in its case in chief. When presenting his case, Def presented no character evidence. However, Def took the stand and testified that Victim pulled a gun on him and threatened to kill him. Def testified that he shot Victim in the foot to disable Victim and that he acted in self-defense. In its rebuttal case, the State proffers Witness 1 who will testify that Victim has a reputation for being non-violent.
    a. Is this character evidence admissible? Why or why not?

    b. Suppose now that Victim dies of his injuries and Def is charged with murder. Does your answer to question 11a change? Why or why not?

12. Victim testifies at trial. In the defense case, Def. offers evidence that Victim has a reputation as a liar. Is this character evidence admissible? Why or why not?

13. Def wants to introduce evidence that he has a character trait of being law abiding. You have determined that this is a pertinent character trait. Def's witness will testify that Def has a reputation for being law abiding and that in the witness's opinion, Def is in fact law abiding. If Def lays a proper foundation for the reputation and opinion testimony, is this a permissible method of proof?

14. You allow the witness described in problem 13 to testify.
    a. On cross-examination, the State wants to ask Def's witness if he knows about Def's recent assault on Victim's sister. Is this permissible?

b. Same facts as in 13a but now the State wants to ask Def's witness if he knows that Def was recently arrested for assaulting Victim's sister. Is this permissible?

c. In its rebuttal case, the State wants to introduce its own witness who will say that Def has a reputation for breaking laws and rules. Is this permissible?

15. Assume Victim does not testify at trial. Def wants to offer Witness to testify that Victim has a reputation for having a violent character to show that Victim was the first aggressor. You have determined that because Def has asserted self-defense, Victim's character for violence is a pertinent character trial trait. Is this a permissible method of proof?

16. In its case in chief, the State offers Eyewitness who testifies that she saw Def shoot victim.
    a. The State then offers Witness 1 who will testify that Eyewitness has a reputation for law abidingness. Is this evidence admissible?

    b. The State then offers Witness 2 who will testify that Eyewitness has a reputation for truthfulness. Is this evidence admissible?

    c. In the defense case, Def offers Witness 3 who will testify that in Witness 3's opinion, Eyewitness is a dishonest person. Is this evidence admissible?

    d. Def. also offers Witness 4, Eyewitness's former boss, who will testify that Eyewitness was fired for embezzling. Is this evidence admissible?

Habit Evidence: Pop Quiz

1. Evidence of habit is evaluated under the same rules that are used to evaluate evidence character to show propensity

   True False

2. Evidence of habit never can be admitted as substantive evidence

   True False

3. What's the basic test for admissibility of habit evidence?

   _____

4. Opinion testimony never can be used to prove habit

   True False

5. Evidence of specific acts never can be used to prove habit

   True False

6. Habit evidence must be corroborated

   True False

7. The trial court's rulings on habit evidence are not reviewed under the abuse of discretion standard

   True False

Tab 4: Witnesses & Impeachment, Rules 608 & 609

Examination, Cross-Examination, and Redirect Examination

Penny J. White
May 2015

I. Learning Objectives for this Session:

Following this session, participants will be able to:

1. Exercise appropriate control over the presentation of evidence in the courtroom;
2. Appreciate the scope and limitations of witness examination;
3. Determine the permissible use of the refreshing recollection technique and the recorded recollection hearsay exception;
4. Fairly apply the concept of opening the door;
5. Embrace the extent and limitations of the constitutional right to present a defense.

II. Resources

Refreshed Recollection *in* NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Ed.) (referred to herein as BENCHBOOK) (available at http://benchbook.sog.unc.edu/)

Kenneth S. Broun, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 150 - 178 (referred to herein as Broun, at §__)

III. Introduction

Rule 611 is the starting point for analyzing issues related to direct, cross, and redirect examination. The rule is complimented by fundamental fairness concerns, embraced by the Due Process Clause, and is supplemented by statutes that establish procedure for the order and presentation of evidence.

Rule 611 requires a trial judge to "exercise reasonable control over the mode and order" of witness interrogation and evidence presentation. Like the overriding purpose of the rules of evidence, the purpose of the exercise of control is to further the interests of truth and justice in a fair and efficient proceeding. Thus, control is to be exerted "to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Case law offers numerous examples of trial judge's exercising appropriate control to accomplish these three purposes.[1]

[1] *See e.g., State v. Johnston*, 344 N.C. 596 (1996)(disallowing repetitive questions); *State v. Jaynes*, 342 N.C. 249 (1995) (limiting repetitious questions); *State v. Cook*, 280 N.C. 642 (1972) (prohibiting repetitious answer).

The broad duty to exercise control requires the judge to decide numerous questions that arise during the course of a trial "which can only be solved only by the judge's common sense and fairness in view of the particular circumstances." Advisory Committee Notes, Fed. R. Evid. 611 (identical to N.C. R. Evid. 611). The manner by which the trial judges exercises control over the presentation of evidence rests primarily within the judge's discretion. These decisions will not be "disturbed absent a manifest abuse of discretion." *State v. Harris*, 315 N.C. 556, 562 (1986).

Thus, a judge, exercising sound discretion, may, among other things, control the order in which witnesses are called and depart from the regular order of proof to allow witnesses to be recalled and cases to be reopened. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988) ("the trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial . . . "). However, a party has no right to these departures.

IV. Witness Examination

The examination of witnesses involves a number of issues in addition to the appropriate exercise of judicial control, including: (1) the methods of and limitations on eliciting testimony on direct examination; (2) the scope of cross-examination; and (3) the purpose of and limitations on redirect and recross examinations.

A. Direct Examination – Scope and Limitations

A trial judge's duty to exercise reasonable control over witness interrogation and evidence presentation covers issues related to the form of the question asked on direct. Testimony may be elicited through specific, generally nonleading questions, or by means of a "free narrative." Testimony elicited through a narrative has the advantage of being more natural, but the disadvantage of hindering objections. Judges, therefore, have discretion to preclude questions that call for a narrative on direct examination. Judges may also limit leading questions on direct examination except to the extent the questions are used to develop the testimony. The use of leading questions is discussed below.

B. Cross-Examination – Scope and Limitations

Subsections (b) and (c) of Rule 611 specifically addresses two issues related to the presentation of evidence – the scope of cross-examination and the use of leading questions. Both subsections establish limits within which a trial judge should exercise the broader discretion of maintaining control and order.

The scope of cross-examination is intentionally broad. Rule 611(b) allows cross-examination **"on any matter relevant to any issue in the case, including credibility."** When an objection is made that a question exceeds the permissible scope of cross-examination, the trial judge must overrule the objection if the question is "relevant to any issue in the case, including credibility." The North Carolina courts have consistently

held that cross-examination may serve four purposes: to expand on the details offered on direct examination; to develop new or different facts relevant to the case; to impeach the witness; or to raise issues about a witness' credibility.

Many decisions illustrate the breadth of the rule, but perhaps few better than the decision of *State v. Whaley*, 362 N.C. 156 (2008) in which the North Carolina Supreme court reversed a conviction based upon limitations imposed on cross-examination of the victim. The defense sought to cross-examine the victim about her answers to a questionnaire completed during a visit to a counseling center. The defense argued that the evidence was relevant to the issue of the victim's credibility. The trial court excluded the evidence based on the absence of proof that the victim suffered from a mental defect and under Rule 403.

In reversing the decision, the Supreme Court emphasized the scope of cross-examination, the importance of the testimony on the key issue in the case, and the presence of contradictory evidence. Although there was no evidence that the witness suffered from a mental defect, the questions nonetheless might "bear upon credibility in other ways, such as to cast doubt upon the capacity of a witness to observe, recollect, and recount." *Id*. at 161 (quoting *State v. Williams*, 330 N.C. 711, 719 (1992). "Excluding the cross-examination here had 'the effect of largely depriving defendant of [her] major defense." *Id*. (quoting *Williams*, 330 N.C. at 721-22).

C. Use of Leading Questions

A leading question is "generally defined as one which suggests the desired response and may frequently be answered yes or no." *State v. Britt*, 291 N.C. 528, 539 (1977) (citations omitted). Questions that "direct a witness towards a specific topic of discussion without suggesting any particular answer are not leading." *State v. White*, 349 N.C. 535, 557 (1998).

Rule 611(c) addresses the use of leading questions. As Professor Broun notes, leading questions is generally "one that suggests the answer." BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §169. The prohibition is based on fairness and the desire that the witness, not counsel, supply the answer to a question.

The subsection provides that leading questions **"should not be used on the direct examination of a witness except as may be necessary to develop [the] testimony."** Examples of situations in which leading questions are allowed because they are necessary to develop a witness' testimony include (1) questions that direct or redirect a witness' attention to a specific matter; (2) questions posed to a witness who demonstrates difficulty in understanding; (3) questions about sensitive or delicate matters; (4) questions that assist a witness in recollecting; (5) questions asked to contradict another witness' testimony; (6) questions regarding preliminary matters; and (7) questions about matters that are not in dispute.

The subsection also provides that leading questions **"ordinarily . . . should be permitted on cross-examination."** While this rule is consistent with the general trial practice principle that all questions on cross-examination should be leading, the rule preserves some discretion for the trial judge to limit leading questions in extraordinary situations consistent with the trial judge's general duty under Rule 611 (a), but a trial judge should not limit cross-examination. The North Carolina Supreme Court has recognized that the right to cross-examine is "absolute and not merely a privilege," and that its denial is "prejudicial and fatal error." *See State v. Short*, 322 N.C. 783, 791(1988) (quoting *Citizens Bank & Trust v. Reid Motor Co*., 216 N.C. 432, 434 (1939)). In addition, the right to cross-examination is an essential element of a defendant's constitutional right under the Sixth Amendment of the United States Constitution.

In addition to the general provision regarding the use of leading questions on cross-examination, Rule 611(c) allows the use of leading questions **"[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."** Whether a witness is "hostile" or "identified with an adverse party" is a threshold matter for the trial judge.

D. Redirect and Recross Examination

Redirect and recross examination are also subject to control by the trial judge. Redirect is for the purpose of clarifying the direct examination and addressing issues raised on cross-examination. Counsel is not entitled to repeat matters or bring out new matters on redirect examination. The trial judge may allow exceptions to this limitation if the circumstances require. If the trial judge allows counsel to elicit new matters on redirect, recross should be allowed, but otherwise the trial judge, in the exercise of reasonable discretion, may disallow a second cross-examination. *See generally State v. Cummings*, 352 N.C. 600 (2000); *see also United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991) (suggesting that denying recross if new matters are raised on redirect would violate Confrontation Clause).

Fairness may necessitate an opportunity for redirect or recross examination. As explained by the North Carolina Supreme Court more than a century ago:

> A party cannot be allowed to impeach a witness on the cross-examination by calling out evidence culpatory of himself and there stop, leaving the opposing party without opportunity to have the witness explain his conduct, and thus place it in an unobjectionable light if he can. In such case the opposing party has the right to such explanation, even though it may affect adversely the party who cross examined. Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so.

State v. Glenn, 95 N.C. 677, 679 (1886).

E. Rebuttal and Surrebuttal Evidence

In North Carolina, the "presentation of additional evidence, rebuttal, and surrebuttal evidence in a criminal trial is governed by Subsection 1226 of Chapter 15A of North Carolina's Criminal Procedures Act." *State v. Clark*, 128 N.C. App. 87, 97 (1997) That section provides that:

> [e]ach party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if evidence is allowed, the other party must be permitted further rebuttal.

Id. Thus, it is within the court's discretion to allow new evidence to be presented in rebuttal, but "it is an abuse of discretion for a trial court to disallow surrebuttal evidence when the State's rebuttal evidence presents new issues not raised in the defendant's case in chief. *Id.* (citing *United States v. King*, 879 F.2d 137 (4th Cir. 1989)).

F. Reopening the Proof

A party does not have a constitutional right to reopen its case after the party has rested its case. The decision whether to allow the party to reopen the case, therefore, is "strictly within the trial court's discretion." *State v. Hoover*, 174 N.C. App. 596, 599 (2005). The authority to allow a part to reopen the case stems from the trial court's "inherent authority to supervise and control trial proceedings." *State v. Davis*, 317 N.C. 315, 318 (1986). *See State v. McClaude*, 765 S.E.2d 104 (N.C. App. 2014)(finding no error in denying defense additional time to locate witness, who was not under subpoena, and in denying motion to reopen case once witness reappeared in the courtroom after charge had been delivered and jury had begun deliberations).

V. Specific Applications

A. Refreshing Recollection vs. Past Recollection Recorded

1. Refreshing Recollection – A technique

Refreshing recollection, a technique for prompting a witness' memory, varies substantially from past recollection recorded, an exception to the hearsay rule. Though completely different, the two are often confused; this is probably because when efforts to refresh fail, counsel will often seek to introduce the refreshing device through the recorded recollection exception to the hearsay rule.

The practice of refreshing recollection emerged at common law as a way of prompting a witness' memory. The foundation required for refreshing recollection is simply that the witness has a lapse in memory that might be revived by consulting some writing or object. If a witness is questioned about a matter that the witness is unable to

recall, the practice allows counsel to show the witness a writing or object that might stimulate the memory. The witness is allowed to review the writing or object in order to refresh memory. The object or writing is then taken from the witness and the witness is again asked the question. If the witness' memory has been refreshed, the witness' testimony, not the writing or object, is the evidence. The trial court, in its discretion, may allow the witness to reconsult the memory device, but when the witness' testimony is "*clearly* a mere recitation of the refreshing memorandum," it is not admissible. *See State v. Smith*, 291 N.C. 505, 518 (1977) (emphasis in original).

Counsel is generally allowed to use leading questions to lay the foundation for refreshing recollection. Thus, for example, counsel may ask, "If I showed you X, would it help to refresh your memory?" and "Having shown you X, is your memory now refreshed?" even though both questions are leading.

Rule 612(a) of the Rules of Evidence requires that an adverse party is entitled to have **"the writing or object [used to refresh memory] produced at the trial, hearing, or deposition in which the witness is testifying."** If the writing or object is used to refresh the witness' memory before the witness testifies and **"if the court in its discretion determines that the interests of justice so require, [then] an adverse party is entitled to have those portions of any writing or of the object which relate to the testimony produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying."** N.C.R. Evid. 612(b). The rule also provides that the court may order that the writing or object be "made available for inspection" if production is impracticable. Id.

Counsel may argue that parts of the writing or object are privileged or irrelevant and should be excluded from production. In this situation, the rule provides that the court **"shall examine the writing or object *in camera,* excise any such portions, and order delivery of the remainder of the party entitled thereto."** N.C.R. Evid. 612(c). Other portions **"shall be preserved and made available to the appellate court in the event of an appeal."** Id.

Some courts have analyzed what factors should affect the trial judge's exercise of discretion to require production under Rule 612. The relevant factors include the degree or extent of the witness' reliance on the writing or object, the significance of the information recalled, the effect or burden on the adverse party, and the potential disruption that production might cause. *See generally* MCCORMICK ON EVIDENCE §9 (5th ed. 1999).

Once a writing or object is used to refresh, and produced for the adverse party, the adverse party may seek to admit the writing or object into evidence. Rule 612(c) sets out the procedure which the trial court must follow in admitting the writing or object. The rule provides that the adverse party is entitled **"to inspect it, cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony at trial."** N.C.R. Evid. 612 (c). This provision creates a safeguard because it allows the

factfinder to inspect the writing or object and evaluate the witness' claim that it refreshed the witness' memory.

Thus the portions of a writing or object used to refresh a witness' memory which have been produced to the adverse party may be introduced into evidence by the adverse party. The writing or object may not be introduced by the party utilizing them to refresh unless they are independently admissible. This is consistent with the underlying theory that the writing or object used to refresh recollection is not evidence but a memory aid.

2. Recorded Recollection – A Hearsay Exception

In some situations, a witness' memory is not revived by viewing a writing or object. Counsel must then offer independent evidence to prove the matter. Often, counsel will attempt to introduce the attempted memory device. If the memory device is a writing, counsel will need to establish that the writing is admissible as an exception to the hearsay rule since the writing is being offered for its truth. If the memory device is a writing by the witness, counsel will frequently rely upon the recorded recollection hearsay exception.

To admit the memory device as a recorded recollection, counsel must lay a foundation that satisfies all of the elements of that exception. The elements are that the writing is a **(1)** "**memorandum or record" (2) "concerning a matter about which a witness once had knowledge but now has insufficient recollection to allow [the witness] to testify fully and accurately" (3) "shown to have been made or adopted by [the witness] when the matter was fresh in [the witness'] memory" and (4) shown "to have reflected that knowledge correctly.**" N.C.R. Evid. 803(5). Each of the foundational elements is a preliminary issue for the trial judge which must be established by the proponent of the evidence.

The critical differences between the refreshing recollection technique and the recorded recollection hearsay exception was the topic of a recent Court of Appeals decision. *State v. Harrison*, 218 N.C. App. 546 (2012). Because trial counsel failed to object, the appellate court's plain error analysis resulting in an affirmance.

B. Use of Prior Inconsistent Statements to Impeach

Following a witness' testimony, the witness will often be cross-examined concerning previous statements that are contradictory or inconsistent with the witness' in-court testimony. The foundational requirements are that the witness made the prior statement and that the statement may be seen as inconsistent with the present testimony.

This impeachment use of the prior statement does not depend upon the truthfulness of the statement's content. Rather, it is actually the inconsistent content that makes the prior statement relevant. The prior statement is being used to demonstrate that, on another occasion, the witness made inconsistent statements about the subject matter. Thus, the prior statement is not offered to prove the truth of its content, but is offered for

its impact on the witness credibility. Rule 612 provides that a witness may be asked about a prior written or oral statement without having the statement's content first disclosed. However, on request, the prior statement must be disclosed to opposing counsel. N.C.R. Evid. 612.

The admissibility of the prior inconsistent statement depends on other factors. Because when offered to prove the truth of its content, the prior inconsistent statement is classic hearsay (an out of court statement offered in court to prove the truth of the matter asserted, N.C.R. Evid. 801), the prior inconsistent statement is only admissible as substantive evidence if the proponent establishes that it fits within an exception to the hearsay rule.

If the prior inconsistent statement is used for impeachment purposes only, the factfinder should be instructed as to its limited use. North Carolina Pattern Jury Instructions Crim. 105.20 provides a general instruction as to the use of a prior inconsistent statement as impeachment evidence.

> When evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with his testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made, and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve the witness's testimony at this trial.

In addition to instructing the jury, the court must also be cautious in the actual use of the evidence. For example, the content of a prior inconsistent statement used to impeach may not be considered by the court in weighing the sufficiency of the evidence and may not be argued to the jury by counsel.

C. Concept of Opening the Door

As Justice Cardozo noted "[m]etaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey v. Third Ave. Railway Co*, 244 N.Y. 84, 94 (1926). Such is surely the case with the often used, and more often confused principle of "opening the door." A party opens the door to evidence when that party "introduces evidence or takes some action that makes admissible evidence that would have previously been inadmissible." 21 Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE EVIDENCE § 5039 (2d ed.1987).

The North Carolina Supreme Court has offered this general explanation: "Opening the door refers to the principle that where one party introduces evidence of a

particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal." *State v. Baymon*, 336 N.C. 748, 753 (1994) (quoting *State v. Sexton* 336 N.C. 321, 360 (1994)). Even if the evidence is otherwise inadmissible, it may be introduced to rebut or explain. *State v. Johnson*, 344 N.C. 596 (1996).

The analytical foundation for the opening the door principle at common law was that by raising a subject at trial, a party "expand[s] the realm of relevance" entitling the opposing party to introduce evidence on the subject. *Id.* Thus, the doctrine functions as a "a rule of expanded relevancy." *Clark v. State*, 629 A.2d 1239, 1242 (1993).

Although opening the door is a common-law concept, several Rules of Evidence provide for the admission of otherwise inadmissible evidence because of the action of a party. Rule 404(a)(1) and (2) allow the defendant to admit otherwise inadmissible propensity evidence concerning a trait of the defendant or victim's character, but once such evidence is introduced, the State has the right to rebut the evidence. Similarly, a party opens the door to admission of evidence of a witness' reputation for truthfulness by offering evidence that the witness has a reputation for untruthfulness. N.C. R. Evid. 608(a). A related concept, the Rule of Completeness, is discussed in the Introduction materials.

A few courts have differentiated between the principle of "opening the door" and related principles of "curative admissibility" and "specific contradiction." *See State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012); *State v. Morrill*, 154 N. H. 547 (2006). "Curative admissibility permits the admission of inadmissible evidence by a party in response to the opposing party admitting inadmissible evidence." *State v. Gomez*, 367 S.W.3d at 248 (citing Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE EVIDENCE § 5039.3. The doctrine, described as "fighting fire with fire," applies only when inadmissible prejudicial evidence has been allowed and when the proffered testimony counters the prejudice. Thus the doctrine is "triggered by the erroneous prior admission of inadmissible evidence." *Id.*

Thus, the two doctrines – opening the door and curative admissibility – apply to different circumstances and may require different responses. Judges may find it beneficial to require parties to be specific when claiming a right to introduce evidence in response to an opposing party's conduct or evidence. Identifying which doctrine a party is relying upon will inform the judge's decision as to the type of evidence that may be offered in response.

In determining whether a party has opened the door, triggering the right of the opposing party to offer evidence in response, the trial judge must, in the exercise of sound discretion, determine whether fairness requires that the responsive evidence be allowed. *See e.g., State v. Bishop*, 346 N.C. 365 (1997) (defendant's misleading testimony about prior conviction opened the door for state to cross-examine about details of prior conviction); *State v. Jefferies*, 333 N.C. 501 (1993) (state's direct exam of officer related to arrest of accomplice opened door for defendant's cross-exam that charges had been dismissed); *State v. Reavis*, 207 N.C. App. 218 (2010) (defense opened door to

cross-examination of expert about defendant's record, when expert reviewed defendant's mental health history and mentioned time in prison); *State v. Mason*, 159 N.C.App. 691 (2003)(defense cross-exam of officer about why other leads were not followed opened door for re-direct about other potential suspects and reasons they were not pursued).

D. Right to Present a Defense

A common claim of defense counsel is that an evidentiary ruling deprives the defendant of a right to present a defense. The claim may be raised when the court sustains an objection which limits the defense evidence in chief or which restricts defense cross-examination. While the claim is ambiguous, it is not necessarily without merit. The United States Supreme Court has recognized the constitutional right of a criminal defendant to present a defense, but has not tethered the right to any particular constitutional provision. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(holding that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.").

The Supreme Court illustrated the application of the ambiguous rule in *Holmes v. South Carolina*. A South Carolina court applied a state evidence rule precluding evidence of third-party guilt "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence." The Supreme Court noted that although "state and federal rulemakers have broad constitutional latitude to establish rules of evidence in criminal trials," this latitude is limited by the guarantee that criminal defendants have '"a meaningful opportunity to present a complete defense,' a right protected by both the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteeth Amendment. This right is violated by rules of evidence that 'infringe upon a weighty interest of the accused' and are arbitrary or 'disproportionate to the purposes they are designed to serve.'" 547 U.S. at 324, 326 (quoting numerous cases). Thus, the South Carolina rule violated the defendant's right to present a meaningful defense.

Rather than establishing an applicable standard for future cases, the Supreme Court reasoned by way of example, citing four cases in which the Court had previously overturned other rules of evidence found to be arbitrary and unconstitutional. The four cases were *Washington v. Texas*, 388 U.S. 14 (1967) (overturning Texas statute that prohibited coparticipant from testifying for defendant at trial); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (overturning Mississippi's common-law voucher rule); *Crane v. Kentucky*, 476 U.S. 683 (1986) (overturning Kentucky rule that prohibited defendant from introducing evidence of circumstances of confession); and *Rock v. Arkansas*, 483 U.S. 44 (1987) (overturning Arkansas per se rule that excluded all hypnotically induced testimony).

While these cases are the starting point for analyzing claims that evidentiary rulings violate the right to present a defense, the Supreme Court has also suggested that

the right is far from absolute. Generally, the Court has noted that "the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence," *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) and that the mere invocation of a right "cannot automatically and invariably outweigh countervailing public interests." *Taylor v. Illinois*, 484 U.S. 400, 414 (1988) But recently, in *Nevada v. Jackson*, 133 S.Ct. 1990 (2013), the Court found that a state rule that restricted the admission of extrinsic evidence of specific instances of conduct to impeach a key witness did not violate the right to present a defense. *Id.*

Examination, Cross-Examination, and Redirect Examination
Problems Worksheet

Penny J. White
May 2015

1. Witness Examination Problems

A. Direct Examination

Are the following questions leading?

1. Do you feel you have an expectation of privacy in that bathroom?
2. Did you ever give permission to anyone to place a camera in that room?
3. Did you consent to being filmed while visiting in that house?

Assume that the defense objects to these questions posed by the prosecution to the key adult witness in a felony secret peeping case.[1] How do you rule?

B. Cross-Examination

1. Defendant is charged with robbery with a dangerous weapon, which was alleged to have occurred in conjunction with a drug deal. Defendant and three others agreed in advance that they would rob the drug sellers, rather than purchase the drugs. Following arrest, two of the defendant's associates agreed to testify against defendant at trial. Both witnesses had criminal charges pending against them in other districts. Defendant seeks to cross-examine the witnesses about the pending charges in order to show bias, interest, and motive in testifying in favor of the state.[2] Do you allow the cross-examination?

Assume additionally that one of the witnesses has negotiated a plea agreement for probation that included consideration of the charges in the other prosecutorial district. Do you allow the cross-examination?

2. During cross-examination of an accomplice, counsel asks: "Hasn't your lawyer told you that the State won't press charges against you if you testify here today?" Assume that the witness' lawyer is present in court.[3] May the witness's lawyer object based upon the attorney-client privilege? Assume that the witness's lawyer does not object, may the State object based on the attorney-client privilege? Assume that you allow an objection and the defense argues that the privilege has been waived by the act of testifying and that the privilege must "give way" when it is in derogation to the search for the truth. How do you rule?

[1] *See State v. Mann*, 768 S.E.2d 138 (N.C. App. 2014).
[2] *See State v. Alston*, __ N.C. App. ___, 756 S.E.2d 70 (2014).
[3] *See State v. Lowery*, 219 N.C. App. 151 (2012).

3. Defendant testifies in his own behalf and denies involvement in the alleged offense of assault with a deadly weapon. On cross-examination, the prosecutor asks the following questions of defendant:

> When the police officers came to the hospital to talk to you, you did not tell them that they were focusing on the wrong person, did you?
>
> And today, you have sat through the entire trial and heard all of the witnesses testify, right?
>
> And you heard your own witnesses, right?
>
> And today is the very first time that you have given a statement in this case, isn't it?
>
> Everyone else involved, everyone but you gave the police a statement, isn't that right?
>
> And you've had almost three years to think about it, haven't you?
>
> And, before you were arrested, this officer explained to you that she'd like to hear your side of the story, that there's two sides to every story and she wanted to hear yours, didn't she?
>
> She offered to tape record you, she tried to get your side of the story on tape, didn't she?
>
> And, you didn't give her your side of the story, did you?[4]

Do you allow all or part of the cross-examination?

Assume instead that during the officer's testimony in the State's case in chief, the officer testifies that "the defendant provided me – he denied any involvement, but provided me with no statement, written or verbal to that effect? He waived his rights but he provided no statement, written or verbal." Do you sustain a defense objection and motion to strike to this testimony? If so, how do you instruct the jury? Do you grant a mistrial?

C. Rebuttal Testimony

Defendant is charged with aggravated assault of a prison guard. The guard testifies that defendant punched, kicked, and slapped him, without provocation. The defense presents the testimony of several inmates who witnessed the interaction between the guard and defendant. All of the inmates testified that the guard attacked defendant and that they did not see defendant punch, kick, or slap the guard. Defendant does not testify.

After the defense rests it case in chief, the State calls an investigating officer who interviewed defendant following the interaction as a rebuttal witness. Through the investigating

[4] *See State v. Richardson*, 741 S.E.2d 434 (N.C. App. 2013); *State v. Harrison*, 218 N.C. App. 546 (2012); *State v. Mendoza*, 206 N.C. App. 391 (2010).

officer, the State offers a copy of defendant's statement, in which defendant denies that he punched or kicked the guard, but admits that he "slapped his hands" but claims that he did so to keep from being tazed. Defendant objects to the rebuttal testimony arguing that the testimony does not address directly evidence offered in the defense case, merely reiterates the State's case in chief, and had to be presented, if at all, in the State's case in chief.[5] How do you rule?

a. Sustain the defense objection.
b. Overrule the defense objection.

2. Specific Application Problems

A. Refreshing Recollection

1. Following a witness's unresponsive answer to a question concerning what she told the police about a stolen dog, the prosecution handed the witness her statement and asked her to read it to herself. After the witness read the statement, the prosecution asked the witness if the statement was "true and accurate" and if it helped refresh her recollection about the statement she gave to the officer. When the witness answered yes, the prosecution again asked about the source of the stolen dog. When the witness answered, "he didn't exactly say who it was from," the prosecution asked "would you just read your statement to the jury, if you would please."[6] Assuming objection, how do you rule?

Assume further that during jury deliberations, the jury announces that it is deadlocked and asks to see the witness' written statement. How do you proceed?

2. Witness testifies to some of the events relevant to the crime which defendant is charged with committing. State then requests permission to show him a transcript of his police interview before continuing with the direct examination. When the witness is shown the transcript, he is equivocal about whether he remembered making the statements. The prosecution then requests permission to allow the witness to listen to the audio recording of his interview with the police.[7] Do you allow the witness to listen to the audio recording? If so, what procedure do you use? How do you respond to defense objections that the State has not established that either the transcript or the audio recording are recorded recollections or that the witness is using the transcript as a "testimonial crutch for something beyond his recall."

B. Opening the Door

1. Mother and father were tried jointly in a felony murder case, based on allegations of aggravated child abuse resulting in their child's death. On direct examination, mother testified that she had not noticed any injuries to her child before child's hospitalization that preceded her death. She also testified that she had never seen father mistreat the victim and that if she had, she would have called the police, filed a complaint, and sought medical treatment for the child. On cross-examination by father's counsel, mother was asked: "Did you ever think [father] could

[5] *See United States v. Moore*, 532 Fed. Appx. 336 (4th Cir. 2013).
[6] *See State v. Harrison*, 218 N.C. App. 546 (2012).
[7] *See State v. Black*, 197 N.C. App. 731 (2009); *see State v. York*, 347 N.C. 79, 89 (1997).

hurt his own daughter?" Mother responded, "No." Mother was then asked, "Do you think that he could hurt her today at this moment in time?" Mother responded, "I don't know what to believe." Neither mother's counsel nor father's counsel asked mother about incidents of violence between mother and father.

State wishes to cross-examine mother about her statements to the police in which she denied that father had ever hit her but, upon being confronted with documents, admitted that she had sought police assistance previously when father assaulted her. State argues that the cross-examination should be allowed in order to aid the jury in assessing mother's credibility and because the prior cross-examination opened the door.[8]

Father's counsel objects. Do you allow the State's cross-examination? How do you instruct the jury?

Assume you allow the cross-examination and give an instruction limiting the use of the evidence as a basis for determining the mother's credibility and not as a basis for finding facts against the father. In closing argument, the prosecution makes numerous references to mother's inconsistent statements about the assaults and argues that "she took the witness stand and promised to the truth and she lied repeatedly about domestic violence episodes." The State also argued that mother "knew the dangers and the risks of his behavior yet she put her child in harm's way." Mother's counsel moves for mistrial. How do you rule?

2. Victim testifies. On cross-examination, defendant asks witness about the statement she made to detective and about a typed statement that she prepared for the detective. In particular, defendant cross-examines about the sequence of events that led to the witness' discovery of a camera, which was recording her use of a bathroom, and the actions by the defendant's wife once the camera was discovered. On redirect examination, the State offers the typed statement as an exhibit, arguing that the defense opened the door to the admission of the statements as corroborative testimony. The defense challenges the admission of the statement and also argues that the statement included additional information that was not raised during cross-examination.[9] How do you rule?

3. Defendant testifies in a child sexual assault case. Over objection, the prosecutor cross-examines defendant with questions summarizing a psychological evaluation of defendant done in conjunction with a custody case. The psychologist did not testify and the report was not admitted. On cross-examination of defendant, reading from the report, the prosecutor asked questions, including:

> Isn't it true that you attempted to place yourself in an overly positive light by minimizing your faults and denying psychological problems?
>
> Doesn't it say that you have a prominent elevation on the psychopathic deviant scale?

[8] *See State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012).
[9] *See State v. Mann*, 768 S.E.2d 138 (N.C. App. 2014).

> These individuals may be risk takers who may do things others do not approve for the personal enjoyment. Doesn't it say that?
> May show bad judgment and tend to be self-centered, pleasure oriented, narcissistic, and manipulative. It says that, doesn't it?

Assume that the defense objects to each question. The State argues that defendant opened the door to the cross-examination, by his testimony that he was required to undergo an evaluation as part of his custody battle and that, as a result of the evaluation, he was awarded custody. How do you rule? [10]

C. Right to Present Defense Problems

1. Victim recants testimony in letter to judge. Victim then goes into hiding, but is eventually found and taken into custody as a material witness. At trial, victim testifies that defendant's associates threatened her and forced her to write the recantation letter. During cross-examination, defendant sought to introduce prior police reports filed by victim against defendant, which include details leading to police's inability to corroborate that the offenses alleged occurred. Defense also seeks to call the officers who investigated the prior charges to testify that following an investigation, the cases were closed. Defendant argues that the evidence is admissible to impeach the victim and that he is entitled to present the evidence under his constitutional right to present a defense.[11] Do you admit the reports? Do you allow the officers to testify?

[10] *See State v. Davis*, 222 N.C. App. 562 (2012).
[11] *Nevada v. Jackson*, ___ U.S. ___ , 133 S.Ct. 1990 (2013).

Witnesses and Impeachment
Problems Work Sheet

Penny J. White
May 2015

I. Learning Objectives for this Session:

1. Appreciate the available methods for impeaching witnesses;
2. Embrace how the substantive and procedural limitations on impeachment methods impact the admissibility of impeachment evidence;
3. Manage the presentation of impeachment and rehabilitation evidence fairly and efficiently.

II. Resources

Criminal Evidence: Impeachment in NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Ed.) (referred to herein as BENCHBOOK) (available at http://benchbook.sog.unc.edu/)

Rule 609: Impeachment By Evidence of Conviction of A Crime *in* NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Ed.) (referred to herein as BENCHBOOK) (available at http://benchbook.sog.unc.edu/)

Kenneth S. Broun, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 150 - 178 (referred to herein as Broun, at §__)

III. Preliminary Test

Indicate whether each statement is true or false.

1. When a witness admits a prior conviction, the witness may not be asked about the time and place of the conviction.

2. When a witness admits a prior conviction, the witness may be asked about the punishment imposed.

3. Despite a pretrial stipulation that defendant is a convicted felon for purposes of a possession of a firearm by a felon charge, defendant is subject to impeachment on the basis of the prior convictions if defendant testifies.

4. The purpose of allowing a witness to be impeached with a prior criminal conviction is that the conviction reveals the character of the witness.

5. If a juvenile adjudication is offered to impeach, the issue for the court is whether the offense would be admissible to attack the credibility of an adult.

6. Criminal convictions may be offered to impeach deceased hearsay declarants.

7. Before admitting a conviction to impeach a criminal defendant, the court must conduct a Rule 403 balancing test.

8. The test for inconsistency for purposes of using a prior statement to impeach is whether there is any material variance between the testimony and the prior statement.

9. A party may not cross-examine a witness about a collateral prior inconsistent statement.

10. Before cross-examining a witness about a prior inconsistent statement, the witness has a right to be shown the prior inconsistent statement.

11. Extrinsic evidence of a prior inconsistent statement that reveals bias on the part of the witness is admissible, even if the subject matter of the prior inconsistent statement is collateral to the subject matter of the trial.

12. When a witness denies making a prior statement, a party may not impeach the witness with extrinsic evidence of the substance of the prior inconsistent statement.

13. Even with regard to non-collateral, material matters, a witness must be given an opportunity to explain or deny inconsistencies before extrinsic evidence of the inconsistencies is admissible.

14. Reputation or opinion evidence pertaining to a witness's character for untruthfulness is admissible.

15. A witness who gives opinion testimony concerning the character for truthfulness of another witness may be asked about specific instances of her own conduct that are probative of untruthfulness.

16. The trial judge has discretion to disallow inquiry into specific instances of a witness's conduct even if the instances are probative of untruthfulness.

IV. Discussion Problems

A. Witnesses & Vouching

1. Prosecution asks witness in a series of questions on direct examination whether her office has made any promises to the witness in exchange for the witness's truthful testimony. Defendant objects on the basis that the prosecution is improperly vouching for the witness.[1] How do you rule?

2. Prosecutor asks the following questions at the end of the direct examination of a child witness:

> Q: Now, earlier when you came up to the witness stand and the judge had you put your hand on the Bible and swear that you would tell the truth, do you understand what that meant?
> A: Yes.
> Q: When you put your hand on the Bible, who were you swearing you were going to tell the truth to?
> A: Jesus.
> Q: Have you told the truth to these folks here today?
> A: Yes.

Defense objects and argues that the testimony allowed evidence concerning the witness's credibility before any attack on the witness's credibility had occurred.[2] How do you rule?

3. DSS social worker, testifying on direct examination, stated that "there was a substantiation of sex abuse of the victim by the defendant."[3] Defendant objects and moves for a mistrial. How do you rule and proceed?

4. During the State's case in chief, the following exchange took place between the prosecutor and a detective witness:

> Q: At any point did you ever question this case, this has a lot of family drama?
> A: Yes
> Q: What made you go forward?
> A: [The victim] seemed to be telling me the truth, she gave me all the information possible that she had and we are required to investigate everything to the fullest.

[1] *See State v. Powell*, 732 S.E.2d 491 (2012).
[2] *See State v. Streater*, 1997 N.C. App. 632 (2009).
[3] *See State v. Sprouse*, 217 N.C. App. 230 (2011); *State v. Giddens*, 199 N.C. App. 115 (2009), *aff'd* 363 N.C. 826 (2010).

Defense objects and argues that the detective's testimony vouched for the victim's credibility.[4] How do you rule?

B. Collateral, Non-Collateral Matters and Admission of Extrinsic Evidence

5. Defendant calls his brother to testify in his rape trial. The testimony tends to exculpate defendant. On cross-examination, the prosecution asks defendant's brother whether he told his probation officer that defendant had admitted to having sex with the victim. The brother denies having done so. The prosecution calls the brother's probation officer to testify that the brother did tell him that defendant had admitted the act. Defense objects on the basis that the matter is collateral and that extrinsic evidence is, therefore, barred.[5] How do you rule?

6. Defense witness testified that defendant, who was accused of sexual offenses, had never "improperly physically or emotionally or sexually abused" her. On cross-examination, the witness was asked whether they had told a detective that defendant had "done something sexual to both you and your sister and that you had gotten over it." The witness denied that she had told the detective the information.

During rebuttal, the State called the detective to testify about her conversations with the witness. The defense objects. The State proffers that the detective will testify that "the witness told me that she and her sister had been sexually assaulted by defendant when they were children, but they had got along well in life and had put it behind them."[6] How do you rule?

7. Defendant testifies in a child sexual assault case. Over objection, the prosecutor cross-examines defendant with questions summarizing a psychological evaluation of defendant done in conjunction with a custody case. The psychologist did not testify and the report was not admitted. On cross-examination of defendant, reading from the report, the prosecutor asked questions, including:

> Isn't it true that you attempted to place yourself in an overly positive light by minimizing your faults and denying psychological problems?
>
> Doesn't it say that you have a prominent elevation on the psychopathic deviant scale?
>
> These individuals may be risk takers who may do things others do not approve for the personal enjoyment. Doesn't it say that?
>
> May show bad judgment and tend to be self-centered, pleasure oriented, narcissistic, and manipulative. It says that, doesn't it?

[4] *See State v. Taylor*, 767 S.E.2d 585 (N.C. App. 2014); *State v. O'Hanlan*, 153 N.C. App. 546 (2002), *cert. denied*, 358 N.C. 158 (2004).
[5] *See State v. Jerrells*, 98 N.C. App. 318 (1990).
[6] *See State v. Mitchell*, 169 N.C. 417 (2005).

Assuming that the State responds to the defense objection to each of these questions that the "evaluation is admissible through cross-examination, but not through extrinsic evidence as relating to defendant's credibility." How do you rule? [7]

C. Bias, Motive, Interest

8. In defendant's murder case, defendant's sister testified for the State. Her testimony included a description of defendant's appearance on the night of the murder; the presence of blood on defendant's clothing; and the defendant's inconsistent explanations for the blood. On cross-examination, defense counsel questioned the sister about prior inconsistent statements she had made to family members; about her mental health and drug use; and about her involvement in destroying evidence. Defense counsel sought to impeach the witness additionally with an voice message she had left with another family member stating that she would "call the law and the D.A." on her family. The message arose as a result of efforts to persuade the sister not to testify against defendant. Defendant argued that the cross-examination should be allowed to show the sister's bias toward defendant and defendant's family, but the State objected and argued that the message, while relevant in a witness intimidating case, was not relevant in the murder case and would tend to cast defendant in a negative light.[8] How do you rule?

9. Defendant was charged with assault with a deadly weapon with intent to kill. The State alleged that defendant enticed the victim to drive him to a location to buy marijuana, but en route pulled a gun, demanded money, and ultimately shot the victim in the stomach. Defendant sought to cross-examine the victim about an unrelated first-degree murder charge pending against the victim at the time of his testimony. The State objects to the cross-examination.[9] How do you rule?

10. During a break in defendant's trial for first-degree sexual offense and other offenses, the State's lead detective in the case said to a deputy sheriff juror "you know he flunked a polygraph, right?" The deputy sheriff juror knew about the polygraph examination because he defendant had told him during a transport while awaiting trial, but the juror did not disclose the comment to the judge. On retrial, defense counsel argues that he should be allowed to question the detective about the incident to establish the detective's bias against defendant. [10] Do you allow the cross-examination?

D. Prior Inconsistent Statements

10. During trial, State's witness testified that he did not see defendant at the scene of the crime. The State showed the witness a pretrial, unsworn written statement that he had given to the police and the witness acknowledged that it was his statement. But, the witness insisted that the statement was a "lie." In the pretrial statement, the witness had identified defendant as the assailant.[11] May the State introduce the prior inconsistent statement of the witness?

[7] *See State v. Davis*, 222 N.C. App. 562 (2012).
[8] *See State v. Triplett*, 762 S.E.2d 632 (2014).
[9] *See State v. Council*, 753 S.E.2d 223 (2014).
[10] *See State v. Lewis*, 365 N.C. 488 (2012).
[11] *See State v. Avent*, 222 N.C. App. 147 (2012).

Assume that you allow defense counsel to voir dire the witness before ruling on whether the pretrial statement would be admitted. On voir dire, defense counsel establishes that the State was aware that the witness would testify that the pretrial statement was untruthful. How, if at all, does this affect your ruling?

11. On direct examination, the State's witness denies telling a third party that on the day of the shooting, the witness saw defendant with a gun.[12] May the State call the third party to testify that the witness did in fact say he saw the defendant with a gun?

12. In defendant's murder trial, the State called witness Brown to testify to events leading up to and following the shooting, which took place near Brown's house. Brown testified that he did not recall seeing defendant enter his home immediately after the shooting with a weapon. The State moved to allow the State to treat Brown as a hostile witness. During the State's cross-examination, Brown denied telling police that he saw Brown with a gun following the shooting. The State then moved to introduce a redacted portion of a transcript of Brown's prior statements that included the following exchange:

Q: What did you notice that defendant had in his hand?
A: Something long.

Q: Okay.
A: Like a rifle or something . . .

Q: Alright. So you saw him with a gun?
A: Yes.

Q: You saw defendant with a gun?
A: Yes.

The defense objects that the extrinsic evidence is collateral and not admissible. How do you rule?

13. Defendant was charged with murder arising out of the death of his girlfriend's two-year old child. On direct examination, defendant claimed that the child died while left unattended in a bathtub while defendant conducted business with a drug dealer (who he knew only as Eric) outside of the apartment. On cross-examination, the prosecutor asked:

Q: Who is this Eric person you mentioned yesterday?
A: One of my blood friends. Who I purchase marijuana from.

Q: You talked to two detectives for almost three hours the day Junior died, correct?
A: Yes, ma'am.

Q: You never mentioned anyone named Eric to them, did you?

[12] *See State v. Wilson*, 197 N.C. App. 154 (2009).

A: No, ma'am.

Q: Not even when they came back and charged you with the death of the child did you mention anyone named Eric?[13]

Assume objection by the defense to this line of questioning. How do you rule?

E. Character for Untruthfulness

14. During a break in defendant's trial for first-degree sexual offense and other offenses, the State's lead detective in the case said to a deputy sheriff juror "you know he flunked a polygraph, right?" The deputy sheriff juror knew about the polygraph examination because he defendant had told him during a transport while awaiting trial, but the juror did not disclose the comment to the judge. On retrial, defense counsel argues that he should be allowed to question the detective about the incident because the incident is a specific instance of the detective's conduct that is probative of untruthfulness. [14] Do you allow the cross-examination? If the detective denies the statement, do you allow the defense to call the juror to whom the detective directed the comment?

F. Criminal Convictions

15. The State seeks to impeach defendant based upon a prior conviction that is more than ten years old, but has failed to give written notice as required by Rule 609(b). The defense was provided with a copy of the conviction as part of the State's open-file discovery and had moved to exclude all "stale convictions" in a pretrial motion, thus evidencing actual knowledge that the State would attempt to use the conviction.[15] What do you consider in determining whether to allow the state to impeach based upon the conviction?

16. The parties stipulated that the "defendant was a convicted felon on or about December 24, 2011." When defendant testified on his own behalf and was asked about his prior criminal record during direct examination, he stated he had been convicted "just maybe eleven years ago what the judge talked about earlier." On cross-examination, the prosecution asked: "Isn't it true you were convicted on April 29, 2002, in Michigan of felonious carrying a concealed weapon, that being a .22-caliber revolver?" After clarifying the date, defendant answered no.[16] May the prosecutor inquire further into the circumstances of the crime or admit the certified conviction?

17. In a trial occurring in 2011, prosecution seeks to cross-examine defense witness about a manslaughter conviction from March 1986, for which the witness was released from custody in January 1991. Defendant objects.[17] How do you rule?

[13] *See State v. Smith*, 206 N.C. App. 404 (2010).
[14] *See State v. Lewis*, 365 N.C. 488 (2012).
[15] *See State v. Shelly*, 176 N.C. App. 575 (2006).
[16] *See State v. Gayles*, 756 S.E.2d 46 (N.C. App. 2014).
[17] *See State v. Ellerbee*, 218 N.C. App. 596 (2012).

18. Victim in robbery and kidnapping case has extensive criminal record, including twelve felonies. Defense counsel offered in evidence an exhibit consisting of certified public records of the convictions. The State objected based on the fact that the victim had admitted his prior convictions.[18] Do you allow the admission of the exhibit?

[18] *See State v. Lynch*, 217 N.C. App. 455 (2011).

Tab 5: Hearsay, Rules 803 & 804

HEARSAY EXCEPTIONS—CASE PROBLEMS

QUESTION NO. 1. The defendant was charged with first degree murder. The State called Faye Puryear, the mother of the victim, to testify, regarding a conversation she shared with her daughter. Her daughter came over to her house crying and said to Ms. Puryear that the defendant had kicked her out of his house. Prior to making the statement, the witness' daughter drove from the defendant's house in Willow Springs, North Carolina (it's in Johnston County in case you don't know) to her mother's house in Raleigh. The defendant objected to this hearsay testimony. Despite the objection, the trial court admitted the statement. Did the trial court err in admitting this statement?

ANSWER: _____

QUESTION NO. 2. The defendant was on trial for murder. The State offered as evidence a tape recording of a 911 call made by the defendant's son immediately after hearing the gunshot and from the room in which the male victim lay dying. The contents of the tape reflected the following conversation:

911 Operator: Okay. Is he conscious?

Wright: I don't know. I don't know. He just fell over. He just fell over. I think he fell over. Mom shot.

911 Operator: So your mother did it?

Wright: Yeah.

911 Operator: When did this happen? How long ago?

Wright: A minute ago. I don't know. I heard it and I got up and I don't know. I don't know to touch him -- if I should touch him. I don't know.

911 Operator: Yeah. You were in the bed when it happened?

Wright: I was in the bedroom. Yeah. I wasn't -- I was in the room right next to 'em. Is there somebody on the way?

911 Operator: Yeah, they're all on the way and you say it's not bleeding right now?

Wright: I can't -- it looks -- it's not like its spurting.

911 Operator: Uh huh. And you don't know where she went for sure? You know she's not in the house.

Wright: No. I don't know. I don't know. I don't know. Oh God, Almighty. And my mom.

The trial court admitted this evidence over the defendant's objection that the statements were inadmissible hearsay. Did the trial court correctly overrule the objection and admit the evidence?

ANSWER: _____

QUESTION NO. 3. The defendant was on trial for the murder of his wife. The State called a day care worker to testify about statements that the defendant's two and a half year old daughter made at day care. The child made the statements in question while playing and without prompting or questioning. The defendant's daughter hit two female dolls together and told the worker that "Mommy's getting a spanking for biting, Mommy has boo-boos all over." The worker also indicated that the defendant's daughter said, "Mommy has boo-boos all over, mommy has red stuff all over." These statements were made six days after the child's mother was killed. Did the trial court properly admit these statements from the defendant's daughter?

ANSWER: _____

QUESTION NO. 4. The defendant was on trial for murder. During the trial, the prosecutor called the victim's mother and asked her to read the February 27, 1992 entry in the victim's diary to the jury. The diary entry for February 27, 1992 was read to the jury. It said:

Charlie (the defendant) went off this morning. He wanted to take his break and I said, 'Please, let's catch up the dishes first,' and he got mad. When we finished the dishes, he wouldn't leave. I said, 'Act immature, why don't you? Why don't you try acting like an adult male?' He hit me in the side of the head and slapped me across the face, then took off. He came back a little later, didn't apologize, and wanted to use the vacuum. David changed the lock on my break. Late that night, he went off berserk, threw water, dishes, ashtrays, paper at me. Screamed he was going to kill me. Alan came to help mop and tried to hold him back. He jumped up in the car and broke the steering wheel adjuster. We filed a harassment charge. Waiting twenty-four hours.

Defendant objected on the grounds the diary entry was hearsay. The trial court overruled the objection and ruled that the diary entry was admissible under Rule 803 to show "the relationship of the parties." Did the trial court err by admitting the diary excerpt?

ANSWER: _____

QUESTION NO. 5. The defendant was on trial and charged with first degree murder. The victim's mother, Faye Puryear, testified about a conversation she had with her daughter, the alleged victim. In that conversation, the victim told her mother that she had taken out a child support warrant against the defendant and had sought advice from an attorney regarding obtaining custody of the children. The defendant objected to this evidence on the ground that it was hearsay. The Court overruled the objection and admitted this evidence. Did the trial court rule correctly?

ANSWER: _____

QUESTION NO. 6. The defendant was on trial for rape. The State called as a witness the assistant director of nursing at the hospital where the victim was taken after the alleged assault. Frances Prevatte, assistant director of nursing, testified that on the morning of August 13, 1986 the victim told her that she was afraid of the defendant and requested that the defendant not be allowed near her. The defendant objected to this testimony on the ground that it was hearsay. The trial court overruled the objection and admitted the evidence. Was the trial judge correct?

ANSWER: _____

QUESTION NO. 7 The defendant was on trial for first degree murder. During the trial, the State offered as evidence a telephone message written by the victim's next-door neighbor, Sherri Elliott, to the victim's roommate. The victim, when he was unable to reach his roommate by telephone, called Elliott and left a message. Elliott reduced the following message to writing for the defendant's roommate:

Steve called and said that he was riding to Waynesville[,] North Carolina with his father-in-law. If he is not back by 5:00 call the Smyrna Police because something may have happened to him.

Sherri

The trial court admitted only the first sentence of this message into evidence over the defendant's objection. Did the trial court err by admitting that message?

ANSWER: _____

QUESTION NO. 8. The defendant was charged with involuntary manslaughter arising from a motor vehicle accident that occurred at approximately 10:00 p.m. Defendant's blood was tested one or two minutes after 11:00 p. m. at the major trauma area of the hospital emergency room. The defendant's blood was drawn pursuant to an emergency room doctor's orders as a part of routine emergency room treatment. A nurse, who testified, saw the defendant's blood being drawn and later the nurse retrieved a copy of the lab report and took it to the defendant's bedside. The surgeon on call testified that he received the lab reports and it indicated that the defendant's blood alcohol level was .254. The doctor recorded the result in his admission notes that were part of the defendant's records at the hospital. The actual lab report could not be located for use at trial. Is the doctor's own notation admissible?

ANSWER: _____

QUESTION NO. 9. The defendant was charged with first degree murder and robbery in connection with an incident at the Bishop Motel. The victim was the operator of the motel. Bhartsang Jadeja, the victim's brother, testified that the day after the stabbing he went to the Bishop Motel and checked the motel records to ascertain what, if anything, was missing.

According to the motel's daily records, $ 219.40 in receipts had been received since the last deposit of money received for the rental of rooms. Bhartsang Jadeja did not find any money in the motel office and no money was found on the body of the victim. Jadeja identified certain documents as the motel's daily records which indicated the number of rooms which had been rented and the amount of money received for each room. He further testified that these records were in the deceased's handwriting. Bhartsang Jadeja did not operate or work at the Bishop Motel. The defendant objected to the admission of the records from the Bishop Motel and the Court overruled the objection. Did the trial court err in admitting these records?

ANSWER: _____

QUESTION NO. 10. The defendant was on trial for rape and the victim's testimony was complicated by her difficulty identifying the location in the house where she was attacked and the car in which she was abducted. The victim testified that she suffered from "night blindness." The State offered the testimony of a medical assistant technician from the victim's ophthalmologist's office. The technician testified that she was the keeper and had the custody and control of the doctor's medical records, that they were made in the regular course of business and that they were made close to the time of the transaction indicated. The technician testified that the medical records disclosed that the victim had retinis pigmentosa or "night blindness." The defendant objected to the introduction of this medical opinion or diagnosis on the ground that it was hearsay. Did the trial court properly admit these records containing an opinion or diagnosis?

ANSWER: _____

QUESTION NO. 11. The defendant, who was on trial for rape and attempted murder, sought to offer into evidence medical records detailing the victim's medical history. In preparing the discharge summary, Dr. Clancy, who examined the victim the morning after the alleged attack, noted that the victim had a "psychiatric history including anti-social behavior, substance abuse, substance addiction, [and] uncooperativeness" and was "well-known to The Oaks [a psychiatric facility] for previous psychiatric history." When questioned, the doctor did not recall the source of this information. The doctor indicated that the victim's mother provided some information and that he had access to a medical record from previous treatment. Did the trial court err by sustaining the State's objection to the defendant's offer of these medical records?

ANSWER: _____

QUESTION NO. 12. The defendant was on trial for first-degree rape and first-degree kidnapping. During the trial, SBI agent Troy Hamlin, a specialist in fiber and hair analysis, testified that he conducted a hair comparison on hairs taken from the victim's head and pubic area and hairs taken from defendant's pubic area. The examination revealed that a negroid pubic hair found in the pubic hair combings received from the victim after the rape was microscopically different from defendant's pubic hairs, and therefore the pubic hair in question "did not originate from defendant." The State objected to the defendant's request to have the report introduced into evidence and this objection was sustained. SBI agent Jeb Taub, a specialist

in the analysis of bodily fluids, testified that he performed tests on a rape kit taken from the victim and on a blood sample taken from defendant. The tests disclosed that the semen found in the victim's panties was not attributable to defendant. The State also objected to the defendant's request to have Taub's report introduced into evidence and that objection was also sustained. Did the trial court err by sustaining these objections to exclude the reports as hearsay?

ANSWER: _____

QUESTION NO. 13. The defendant was on trial for first degree murder in a case that was the subject of considerable local controversy. Al Beaty, the assistant city manager for Winston-Salem, testified that after the first trial in this matter, he was asked by the city manager to do a review of the Winston-Salem Police Department's investigation of the Deborah Sykes murder. Beaty testified that he conducted this review by interviewing individuals who had information about the case, including persons employed by the Police Department, the District Attorney's office and the defendant's attorneys, and reading the transcript of the first trial. After conducting the review, Beaty testified that he prepared a report entitled, *Review of the Winston-Salem Police Department's Investigation of the Deborah B. Sykes Murder.* The report was released by the city manager's office. At the conclusion of Beaty's testimony, defendant's counsel moved to introduce the report and an exhibit from the report as evidence. The State's objection to defendant's request to introduce the report into evidence was sustained. Did the trial court err in sustaining the State's objection?

ANSWER: _____

QUESTION NO. 14. In an assault with a deadly weapon with intent to kill inflicting serious injury case, the defendant attempted to elicit certain testimony from an SBI agent. The SBI agent had arrived at the scene several hours after the shooting occurred and interviewed an eye-witness. The SBI agent interviewed the eyewitness in the agent's state issued vehicle outside the police department. The agent testified on voir dire that the eyewitness stated the victim's car was "flying down the road" followed by an SUV. The driver jumped out of the SUV, ran up to the victim's car, and shot out the rear windshield and one of the rear side windows. Then the victim staggered out of the car. The eyewitness called 911 and tried to plug the victim's wounds. The eyewitness told the SBI agent that he asked the victim who did this and the victim said, "Bruce did it." The defendant was not named Bruce. The eyewitness indicated to the SBI agent that he did not know how many people were in the SUV -- maybe two or three. This eyewitness was not available to testify at the trial. Did the trial court err by sustaining the State's objection to the admission of the statement made by the now unavailable eyewitness to the SBI agent that was contained in the agent's official report of his investigation?

ANSWER: _____

QUESTION NO. 15. The defendant was on trial for failure to register as a sex offender. During the presentation of the State's case, the following testimony was offered:

[PROSECUTOR]: (Hands Witness Exhibit) Now, I am going to show you another document that has previously been marked as State's Exhibit Number 12. Can you identify this document?

[DEPUTY BURGESS]: Yes that's the sex offender registration worksheet.

[PROSECUTOR]: As the custodian, was this a record that was made by the sheriff's department?

[DEPUTY BURGESS]: Yes, it was.

[PROSECUTOR]: Is it kept in the normal course of business by your office?

[DEPUTY BURGESS]: Yes, it is.

[PROSECUTOR]: Is it regular practice of the sheriff's department, in fact, to establish a sex offender worksheet when a person initially comes and registers?

[DEPUTY BURGESS]: Yes, sir. Every time.

The trial court admitted the document as a business record under *Rule 803(6)*. Was the trial court's ruling to admit the records as business records correct?

ANSWER: _____

QUESTION NO. 16. The defendant was on trial for first degree murder. During the cross-examination of the defendant's expert psychologist, the following colloquy occurred:

Q. . . . Have you ever seen an article called, "An Expert Witness in Psychology and Psychiatry" written by David Foust and Jay Siskan?

A. No, I have not, but I've been examined about it before.

Q. Did anyone point out to you that that article contains reference that studies show that professional clinicians do not, in fact, make a more accurate clinical judgment than lay persons?

A. Yes, I think that quote was read to me yesterday.

Q. And, in fact, was the follow up to that quote read to you that professional psychologists perform no better than office secretaries in distinguishing visual motor deductions on normal versus brain damaged individuals on commonly employed screening tests?

A. No, that was not read to me.

The defendant's counsel objected and moved to strike this testimony. The trial court denied the motion. Was the trial court correct?

ANSWER: _____

QUESTION NO. 17. During the trial of a wrongful death case against a pharmacist who prescribed certain medications that allegedly lead to the plaintiff's decedent's death, the plaintiff's attorney questioned one of the plaintiff's own expert witnesses concerning the contraindications of certain medications. The witness testified that the Physician's Desk Reference or "PDR" was an accepted and reliable authority in the field of medicine. Plaintiff's counsel then moved to admit into evidence blow-ups of relevant excerpts from the PDR. The trial court sustained the defense's objection to those exhibits. Did the trial court err?
ANSWER: _____

QUESTION NO. 18. During the trial of a criminal case, the defendant's attorney called a character witness and established that the witness was familiar with the reputation of the defendant in the community in which he lived for truthfulness. Then the defendant's attorney asked "what is the defendant's reputation for truthfulness?" The Assistant District Attorney loudly objected and contended that the witness' knowledge of the defendant's reputation must be based on statements by other people and is consequently hearsay. Should the trial court sustain this objection?

ANSWER: _____

QUESTION NO. 19. The defendant was on trial and charged with selling a counterfeit controlled substance and being a habitual felon. The following testimony was elicited by the Assistant District Attorney from a detective:

Q: For how long have you worked in that area [Martin and Freeman Streets]?

A: I rode a beat in that area for approximately a year and a half back when I was on uniformed division and that's a strong period as far as trying to work for drugs. We have--I have probably been on at least three or four searches in that area alone since I have been in drugs and vice.

MR. MANNING: Objection.

THE COURT: It's not responsive, but I will allow it. Overruled at the same time.

Q: In your experience have you found that in Raleigh, in the area of Martin and Freeman Street, that not only crack cocaine is sold, but also things that are sold as crack cocaine but turn out not to be?

MR. MANNING: Objection.

THE COURT: Overruled.

THE WITNESS: Yes.

Q: And are you aware of why Martin and Freeman Street has been targeted on those occasions by the police department?

A: Because it is an open air market for drugs.

MR. MANNING: Objection.

THE COURT: Overruled.

THE WITNESS: Numerous complaints from citizens, normal patrols. There is a high percentage of drug arrests made in that area.

MR. MANNING: Objection.

THE COURT: Overruled.

Did the trial court err by overruling the defendant's objections to this evidence concerning the Martin Street and Freeman Street neighborhood?

ANSWER: _____

QUESTION NO. 20. The defendant was on trial for first degree rape. When the victim was called to testify, the following exchange occurred:

Q. Will you please tell us your name?

A. (No response)

Q. Are you able to hear my question?

A. (No response)

Q. Can you understand what I'm trying to ask you?

A. (No response)

Q. Are you Virginia Vaughn Finney?

A. (No response)

THE COURT: Sheriff, take the jury to the jury room for just a moment, please.

(JURY OUT)

THE COURT: Ms. Finney. Ms. Finney, are you able to hear me? Answer up, yes or no. The jury is out of the courtroom now, Ms. Finney. I need to know from you, are you going to testify in this case, or not.

A. I do not wish to, to testify.

MR. ELLIS [PROSECUTOR]: May I ask a few questions in an attempt, Your Honor?

THE COURT: You may try.

Q. Ms. Finney, do you not wish to testify because you have problems recalling what happened to you.

A. Yes.

Q. I have a –

A. I've been threatened by the D.A. (Inaudible)

THE COURT: You've been threatened by whom?

A. The D.A., Corey Ellis. (Crying)

THE COURT: You've been threatened by the D.A.

A. Yes.

THE COURT: How has the D.A. threatened you, Ms. Finney?

A. I was doing good.

THE COURT: Do what?

A. I was doing a lot better.

THE COURT: You're going to have to slow down here.

A. (Crying) And I don't want to talk about it no more please. I just don't want to remember anything anymore. I don't want to go through this. I've been informed by the D.A. if I did not then I would be arrested, and I've been arrested at my work; and I lost my job and everything (inaudible). I was trying to go on with my life until Corey Ellis started aggravating me and my family constantly. They put me in a room, closed the door and would not let me out. I don't want to know anymore. I just want to get out of here. I do not wish to testify and I want to leave. And if I try to leave I'm arrested. I am harassed constantly. And I want out. (Crying)

THE COURT: Well, Mr. Ellis, I believe it's time to make a decision about whether or not you're going to have a witness.

A. (Crying) He's the cause of me losing my job, sir.

Q. Ms. Finney, were you served with a subpoena at your work?

A. Yes, sir, by you.

Q. And is it your belief that you lost your job because you got a subpoena at work?

A. Yes, sir, it is.

Q. Is that one of the reasons you're angry with me?

A. Part of it, because you aggravate me all the time. I don't wish to talk to you anymore.

Q. Can I ask you to look at what I've marked as State's Exhibit 10, ma'am. I marked this piece of paper as State's 10. Can you take a look at that and tell me if you've seen that before. I've laid it there on your knee, Ms. Finney, State's Exhibit 10, will you please take a look at it.

A. (No response)

Q. Is State's Exhibit 10 a written summation of what's happened to you?

A. (No response)

Q. Was State's Exhibit 10 written by you?

A. (No response)

MR. ELLIS: Well, Judge, I don't know that there's anything more I can do with this witness.

Later during the presentation of the State's case, the prosecutor apparently realized that Mrs. Finney was present in the courtroom. At the prosecutor's request, the trial court asked Mrs. Finney to come forward. The trial court then told her, "Mrs. Finney, I'm ordering you to come to the witness stand." Mrs. Finney responded, "When my lawyer is present I will come. My lawyer's not here." The trial court asked Mrs. Finney again to take the stand and she again informed the trial court that she would not testify without her lawyer. After the trial court ascertained that Mrs. Finney's lawyer had the flu, the trial court concluded that Mrs. Finney was unavailable to testify and admitted hearsay statements that the victim made to a detective. Did the trial court correctly determine that the victim was unavailable for refusing to testify?

ANSWER: _____

QUESTION NO. 21. The defendant was on trial for first degree murder. A witness made statements to law enforcement officers concerning the crime. The witness later moved to Philadelphia. Prior to the trial, the State filed a petition pursuant to *N. C. Gen. Stat. 15A-813* to summons this witness to testify. An officer from the local police department went to Pennsylvania and went to the address that the officers had for this witness. At that address, the

witness' mother told the officers that the witness had moved and she did not know her daughter's address or phone number. The officers searched the house and did not locate the witness. The defendant objected to the introduction of the witness' statement on the ground that the State had failed to establish that the witness was unavailable. The trial court overruled the defense's objection. Did the trial court err?

ANSWER: _____

QUESTION NO. 22. The defendant was on trial a second time for first degree murder. During the first trial, a witness testified for the defense in support of the defendant's alibi claim. In particular, the defendant contended at his first trial that he was with this witness on the night of the murder. Before the defendant's second trial, this witness was indicted as a co-defendant. The defendant's trial strategy at his second trial was to avoid connecting himself to his co-defendant. At the defendant's second trial, the State called the co-defendant to testify as a witness. Outside the presence of the jury, the witness took the stand, and when asked his name, he responded, "I refuse to answer any questions based on my Fifth Amendment right and the advice of my counsel." Upon being asked several more questions, this witness responded in the same manner. The prosecution then asked that the witness be declared an unavailable witness and asked that the court reporter be allowed to read his testimony from the first trial into the record. The trial judge found the witness to be an unavailable witness and under Rule 804(b)(1) permitted his testimony from the first trial to be read into evidence. Was the trial court's ruling correct?

ANSWER: _____

QUESTION NO. 23. The defendant was on trial for first degree murder. The State offered the testimony of a police officer who spoke with the victim at the emergency room. The victim had just undergone a procedure to drain fluids from his chest cavity and to re-inflate his lung. The victim told the officer several times that, "the defendant shot him, I'm dying" and that the defendant was mad at him because he had been out all day. At the time that this statement was made, the victim had been examined and treated by doctors who believed that the victim would recover and was in no imminent danger of dying. In fact, doctors and nurses had assured the victim that he was going to be alright. It was the doctor's opinion at the time that this statement was made that the victim's wound was not fatal and that he would recover. The defendant later developed a massive, uncontrolled infection and died eight days after the shooting. Did the trial court properly admit the victim's statements to the law enforcement officer?

ANSWER: _____

QUESTION NO. 24. The defendant, who was on trial for murder, offered the statement of his co-defendant, Umar Malik. Malik had married the defendant's sister and absconded to Pakistan prior to the trial. Malik gave a statement to police officers after his arrest that implicated himself in the victim's murder. In particular, Malik told the officers that the deceased was calling his spouse and being vulgar with her. According to Malik' s statement, when the defendant and Malik confronted the deceased, the deceased pulled out a firearm and Malik knocked the gun

from the deceased's hands. Malik then contended that the deceased grabbed a ball bat and swung at him. Malik admitted grabbing the bat from the deceased and beating him with it. Malik told the officers that the defendant was in a vehicle nearby when the victim was beaten to death. After Malik made the statement, police officers questioned the defendant about that statement and the defendant responded, "That's a lie." Only one witness testified who was present during the alleged murder and that witness indicated that he could not see what occurred. At trial, the defendant offered Malik's statement as a statement against penal interest. Did the trial court err by sustaining the State's objection to the admission of that statement?

ANSWER: _____

QUESTION NO. 25. The defendant was on trial for first degree rape and other sex offenses against minor children. The defense gave both oral and written notice of its intention to offer hearsay statements of a deceased declarant on the first day of trial. The deceased declarant was a cousin of the alleged child victims and the statement described events involving the victims that could provide an innocent explanation for the injuries described by the State. A voir dire hearing was held a day or two later and the trial court held that the defense had failed to provide sufficient notice to the State to permit the introduction of this evidence. Was the trial court correct?

ANSWER: _____

QUESTION NO. 26. At the defendant's trial for murder, the defense called its investigator to testify to a statement given to him by the defendant's girlfriend. The investigator testified in a voir dire hearing that the defendant's girlfriend told him that she had a party in her home on the date of the alleged murder. According to the girlfriend's statement to the investigator, she picked the defendant up between 7:00 and 8:00 p.m. and brought him to her house. The defendant, according to his girlfriend, remained at her house at a party that entire evening. As such, the defendant offered this evidence in support of an alibi defense. The State and the defendant stipulated that the defendant's girlfriend was unavailable. Did the trial court properly exclude this evidence?

ANSWER: _____

QUESTION NO. 27. At the defendant's trial for first degree murder, the State offered testimony concerning the victim's statements to Reverend Moore. The victim had known Moore for at least eight months and during that time her church attendance had increased. The victim called Reverend Moore and indicated to him that she was upset and needed to talk. Reverend Moore came to the victim's home. The victim recounted to Reverend Moore the defendant's sexual advance towards her earlier that evening. Reverend Moore then asked the victim if the defendant had a gun and the victim went to the defendant's room, retrieved his briefcase and opened it in the presence of Reverend Moore. The briefcase did not contain the defendant's gun. The defendant objected to the victim's statements to Reverend Moore on the ground that they lacked sufficient guarantees of trustworthiness. Did the trial court err in admitting this evidence?

ANSWER: _____

QUESTION NO. 28. The defendant was charged with two counts of first degree murder. The body of one of the victims was found in the crawl space of an abandoned house after a fire had been extinguished on the premises. The State's theory of the case was that the defendant and the victim were present at the house shortly before the fire and that the defendant started the fire in an effort to conceal the victim's body. At trial, the State called a city fire inspector to read into evidence a statement made to him by a homeless person who was present at the scene of the fire. The statement recited that:

There was a fire in the living room. There was clothing found in the area of the living room. I was in the hallway asleep upstairs. The smoke woke me up. I noticed a black male and a white female there this morning about day break. I stayed all night here. I am a smoker.

The homeless man could not be located by police officers at the time the trial was held. The State gave adequate notice of its intent to offer this evidence and the trial court admitted this evidence over the defendant's objection that it lacked sufficient indicia of trustworthiness. Did the trial court properly admit this evidence?

ANSWER: _____

QUESTION NO. 29. In a murder case, the State gave notice of it's intention to offer a declarant's statement into evidence under Rule 804(b)(5). At a voir dire hearing two law enforcement officers testified that the declarant told them that he met the defendant four days after the murder and that he purchased drugs for the defendant over a three day period. The declarant told the officers that the defendant spent freely and gave him $1,200 to $1,500 to purchase cocaine and heroin. The declarant also indicated that the defendant gave him money in small amounts and also that he paid for cabs for the declarant's use in purchasing these drugs. The declarant could not be located to appear and testify at trial. Subpoenas were issued for the declarant and officers checked at motels in the area where the declarant usually lived. The declarant had previous convictions for robbery with a dangerous weapon, common law robbery and assault. Law enforcement officials were able to corroborate or verify much of the information that the declarant provided including the location where the defendant was staying, the declarant's description of the defendant and the fact that the defendant paid the declarant's hotel bills. Based on these facts, the trial court admitted these statements concluding that they had sufficient guarantees of trustworthiness. Did the trial court err by admitting these hearsay statements?

ANSWER: _____

QUESTION NO. 30. The defendant was on trial for trafficking in heroin. The defendant gave notice to the State of his intent to offer as evidence two letters he claimed to have received after his arrest. The letters were written by one Patrick Babatundi and signed either "Pat" or "Patty." The author of the letters apologized to the defendant for "whatever has happened" and stated that "such product" is "mine." No one other than the defendant testified about Mr. Babatundi. The defendant could not locate Patrick Babatundi to testify at his trial and a subpoena issued to his

last known address was returned unserved. The trial court judge refused to permit the defendant to introduce these letters into evidence. Was the trial court's ruling correct?

ANSWER: _____

Tab 6: Cases Involving Children

Cheat Sheet

Expert Witness Testimony in Child Sex Cases

Jessica Smith, UNC School of Government

For more information on this topic and a host of other evidence issues that arise in child victim cases, see my bulletin entitled Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses, here online: http://sogpubs.unc.edu/electronicversions/pdfs/aojb0807.pdf

1. Testimony That Sexual Abuse Occurred
   - In a sexual offense prosecution involving a child victim, an expert may offer testimony that sexual abuse in fact occurred, if a proper foundation is laid.
   - To lay a proper foundation for such testimony, the proponent must establish physical evidence consistent with abuse.
   - If there are no physical findings supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility.

2. Profiles of Abused Children
   - An expert may testify as to the profiles of sexually abused children.
   - An expert also may testify as to whether the victim has symptoms and characteristics consistent with those profiles.

3. Identifying Defendant as the Perpetrator
   - Cases have held that in child abuse prosecutions, medical experts and experts in clinical psychology may not state an opinion about the identity of the perpetrator.
   - Note, however, that a victim's hearsay statements to a medical expert identifying a perpetrator may be admissible, such as when made for purposes of medical diagnosis and treatment.

4. Credibility, Believability, and Related Matters
   - An expert may not offer opinion testimony concerning the victim's credibility or believability or that the victim is not lying.

5. Post-Traumatic Stress Disorder
   - Evidence that a victim suffers from post-traumatic stress syndrome may not be admitted for the substantive purpose of proving that abuse has occurred.
   - However, such evidence may be admitted for other purposes, such as corroborating the victim's story, explaining delays in reporting the crime, or refuting the defense of consent.

In-Class Materials: Hearsay Issues in Child Victim Cases

Jessica Smith, UNC School of Government

Selected Hearsay Exceptions

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. – A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. – A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. – A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. – Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

. . . .

(24) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Rule 804. Hearsay exceptions; declarant unavailable.

. . . .

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(5) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Case Scenario: State v. Defendant

Defendant is charged with assault inflicting serious injury, first-degree rape, and indecent liberties. The victim is a five-year-old female ("Child"). Defendant is the live-in boyfriend of Child's mother. The following additional facts flesh out the case.

Suspecting that Defendant is abusing Child, Grandmother confronts Mother and tells her to kick Defendant out of the house. Mother doesn't believe that Defendant is abusing Child and does nothing. Later, Child visits Grandmother. While bathing Child, Grandmother sees that Child's bottom is cut and bruised. When Grandmother asks what happened, Child says: "Last night I been whipped with a belt until my bootie bled." Grandmother hugs Child and says, "Tell me everything. If mommy won't fix this, I will. We'll go to the police and end this forever. I will take care of you." Child then tells Grandmother that Defendant hurt her.

Two hours later, Grandmother takes Child to Pediatrician I's office. Pediatrician I examines Child, who is withdrawn and frightened. Pediatrician I provides treatment, including disinfecting and bandaging the wounds and giving a tetanus shot. While conducting an examination and in order to provide treatment, Pediatrician I asks Child what happened. Child, crying, says that Defendant hurt her with a belt. Pediatrician I makes a report to DSS, and a DSS Social Worker sees the Child and Grandmother that day. DSS files a petition and obtains a nonsecure custody order giving DSS custody and approving placement with Grandmother. Social Worker makes arrangements to take Child and Grandmother to the Care Bear Child Advocacy Center ("the Center"), a multidisciplinary child abuse center. Simultaneously with this, the police are notified and Officer begins a criminal investigation. A child abuse team consisting of Officer, Social Worker, a nurse, and a pediatrician with expertise in child abuse discusses Child's case in preparation for Child's interview and medical examination the next day.

Social Worker takes Grandmother and Child to the Center the next day where Child is interviewed by Social Worker and Nurse. According to Center protocol, the interview is taped and Officer watches through one-way glass. Social Worker is in regular "street" clothing, wearing a name badge; Nurse is in a uniform. The room is a child-friendly room, with child-sized furniture and toys. Social Worker introduces Nurse to Child and explains that Child will be examined by a doctor after they are done talking. Social Worker says that they need to get some information "for the doctor so that she can take care of your hurt parts." When Social Worker starts asking questions, Child is non-responsive, hides her face, and cries. Social Worker then gives Child anatomically correct dolls and asks Child to show her what happened. Child undresses an adult male doll and a female child doll. Child shows the male doll engaging in vaginal intercourse with the child doll and then beating the child doll when the child doll cries. Social Worker asks Child to identify the child doll and the Child says, "Me." Social Worker asks Child to identify the male doll and Child says, "Defendant." No leading questions are used. However, Social Worker did not discuss the need for truthfulness with Child.

Social Worker and Nurse brief Pediatrician II on the interview. Child is taken to a medical examination room, where Pediatrician II tells Child that she needs to do another examination to "check out some parts that the other doctor didn't look at so that we can take care of any part of you that is hurt." Pediatrician II also tells Child that she wants "to look at the boo-boos the other doctor took care of to see how they are doing." Pediatrician II is wearing a white medical coat. While examining Child, Pediatrician II asks Child what happened to her. Child repeats what she told Social Worker and Nurse, exhibiting the same demeanor as in the prior

interview. Pediatrician II's examination reveals injuries consistent with vaginal penetration, including the absence of a hymen and bruising and notching at six o'clock on the vaginal opening. Pediatrician II orders medical testing for sexually transmitted diseases, applies an antibiotic to the wounds on Child's buttocks, and provides Grandmother with instructions to treat Child's wounds at home. Pediatrician II schedules a follow-up appointment for 3 days later. Child then goes home with Grandmother.

Social Worker arranges for mental health treatment for Child by Psychologist, which begins the next week. Child's weekly appointments with Psychologist continue until present. At Child's first appointment with Psychologist, 5 days after the alleged abuse, Child described the alleged conduct, identifying Defendant as the perpetrator. At the time, Child was crying, shaking, and clearly frightened.

At trial, Social Worker testifies that the purpose of the interview was "forensic" and to determine if further medical treatment was necessary. Psychologist testifies that as a result of the abuse, Child suffers nightmares, is withdrawn, exhibits inappropriate sexual behavior with other children, and is extremely frightened by men. Psychologist further testifies that Child would be further traumatized by having to face Defendant in court and discuss the abuse and that requiring Child to do so would set back her treatment and recovery by months. Thus, the prosecutor seeks to establish that Child was abused without her testimony. Specifically, the prosecutor seeks to introduce Child's statements to Grandmother, Pediatrician I, Social Worker, Pediatrician II, and Psychologist.

Hinnant Worksheet

803(4) – Statement for Purposes of Medical Diagnosis and Treatment

In order to admit evidence under this exception the judge must find that the 2 prongs of the *Hinnant* test are satisfied. Those prongs are:

Prong (1)	**Prong (2)**
Factors considered when determining whether Prong (1) is satisfied: **(1) _____** **_____** **(2) _____** **_____** **(3) _____** **_____** **(4) _____** **_____**	**Does a child victim's identification of the alleged perpetrator satisfy this prong?** **Yes** **No**

Applying the *Hinnant* Test

Statements to Pediatrician I

Evidence suggesting admissibility under 803(4)

Evidence suggesting inadmissibility under 803(4)

Additional evidence you'd like to have

Statements to Social Worker

Evidence suggesting admissibility under 803(4)

Evidence suggesting inadmissibility under 803(4)

Additional evidence you'd like to have

Statements to Pediatrician II

Evidence suggesting admissibility under 803(4)

Evidence suggesting inadmissibility under 803(4)

Additional evidence you'd like to have

Statements to Grandmother

Evidence suggesting admissibility under 803(4)

Evidence suggesting inadmissibility under 803(4)

Additional evidence you'd like to have

Residual Hearsay Exception Worksheet

The 6-prongs of the test for admissibility under the Rule 803(24) & 804(b)(5) residual exceptions are:

1._____

2._____

3._____

4._____

5._____

6._____

The 3rd prong requires you to look at:

1. _____

_____

2. _____

_____

3. _____

_____

4. _____

_____*

* Note: For this factor watch out for:

The following occurs at a voir dire on Child's competency.

PROSECUTOR: Do you know why you are here today?

CHILD: Because of my story

PROSECUTOR: Your story?

CHILD: My story about Boyfriend

PROSECUTOR: If I told you that a unicorn was standing beside me right here and now, would that be a true story or a made up story?

CHILD: It could be real.

PROSECUTOR: Is there a unicorn standing beside me right now?

CHILD: There could be a magical no see you unicorn.

PROSECUTOR: When you told your story about D, was that a made up or a real story?

CHILD: I don't know.

PROSECUTOR: A real story is a story about something that really and truly happened. Do you understand that?

CHILD: Or it could be from a dream.

PROSECUTOR: Was your story about D from a dream or what really and truly happened.

CHILD: I believe in both.

EXPERT TESTIMONY IN CHILD VICTIM CASES

JESSICA SMITH, UNC CHAPEL HILL

SCORECARD & SCENARIOS

		Circle one	
1.	Is Dr. Prakash's testimony proper?	YES	NO
2.	a. Is Dr. Pringle's testimony proper as to the rape charge?	YES	NO
	b. Is Dr. Pringle's testimony proper as to the sexual offense charge?	YES	NO
3.	Is Dr. Everett's testimony proper?	YES	NO
4.	Is Dr. Loughlin's testimony proper?	YES	NO
5.	Is Dr. Jones' testimony proper?	YES	NO
6.	Is Dr. Powell's testimony proper?	YES	NO
7.	Is Dr. Moore's testimony proper?	YES	NO
8.	Is Dr. List's testimony proper?	YES	NO
9.	Is Dr. Everson's testimony proper?	YES	NO
10.	Is Ms. Fiore's testimony proper?	YES	NO
11.	Is Dr. Fine's testimony proper?	YES	NO

Scenario 1: State v. Stancil

A child went to a friend's home to play. The friend's uncle was there. She fell asleep on the couch. She then felt something "wet and yucky." The child looked down and saw the defendant licking her vaginal area.

The child went home and told her father, who immediately called the police. After being interviewed by the police, the child's parents took her to a medical center for treatment. She was interviewed by Chris Ragsdale, a psychologist and Dr. Prakash, a pediatrician who also performed a physical examination.

At trial, Dr. Prakash testified as an expert in pediatric medicine specializing in child abuse. Prakash testified that the child related the same facts that she had previously told her parents and the psychologist. Prakash noted that the child was very intelligent and articulate. The physical examination itself revealed no abnormalities. However, Prakash testified that in 60-80% of cases with similar facts, the physical examinations were normal. She added that, in her opinion, the child's history, demeanor, and exam were consistent with sexual abuse.

Prakah saw the child again five days after first examining her. The child reported abdominal pains and headaches. No physical causes were found. Prakash attributed the symptoms to anxiety from the earlier events. When asked if they were symptoms of "someone who had been abused," she responded, "Yes, it can be."

Prakash's overall conclusion was that the child "was sexually assaulted and [that there was] maltreatment, emotionally, physically and sexually."

Was Dr. Prakash's testimony proper?

Scenario 2: State v. Streater

PROSECUTOR: Please describe what you found during your examination of the victim's vaginal opening.

DR. PRINGLE: The victim's vaginal opening was abnormal in several ways. It was slightly larger than a child of her age. There were deep notches at the upper part of the vaginal opening at 10:00 o'clock and 2:00 o'clock. And there was a small scar just inside the rim of the vaginal opening that looked like a healed laceration. This was a significant finding.

PROSECUTOR: Would you find that based on the victim's statements that the defendant did penetrate her with his penis on many occasions, would you find that that is consistent with a finding of two deep notches in the vaginal tissue?

DR. PRINGLE: Yes, I would think so. The penetration split the opening at the margins of the vaginal opening and created the tears that resulted in these notches as they healed.

PROSECUTOR: Based on the history that you received from the victim of repeated penile intercourse by the defendant, did you find that's consistent with that history?

DR. PRINGLE: I believe so. It was not a normal finding.

PROSECUTOR: Moving to the next part of that examination, you also had a history from the victim, as you indicated in your testimony, of anal penetration by the defendant's penis; is that correct?

DR. PRINGLE: That is correct.

PROSECUTOR: After you finished your vaginal examination did you examine her anal area?

DR. PRINGLE: Yes, I did.

PROSECUTOR: And in reviewing of the examination at that time, did you make any significant findings there?

DR. PRINGLE: No. I thought her anal opening looked normal in her size, shape and caliber. There were no hemorrhoids or fissures or splits in the anal wall. It looked normal.

PROSECUTOR: Based on the history that you received from the victim, potentially repeated penetration of the defendant's penis into the anal area, would you find that inconsistent with your medical findings of no trauma or would you find that consistent with it?

DR. PRINGLE: I think it was consistent with the findings. She may not, despite having been anally penetrated, she may not have had any physical findings. In many cases it is common to have a normal exam even after an allegation of physical sexual abuse in that area.

Was Dr. Pringle's testimony proper as to the rape charge?

Was Dr. Pringle's testimony proper as to the sexual offense charge?

Scenario 3: State v. Towe

PROSECUTOR: Do you have an opinion, ma'am, based upon your knowledge, experience and training, and the articles that you have read in your professional capacity as to the percentage of children who report sexual abuse who exhibit no physical findings of abuse?

DR. EVERETT: I would say approximately 70 to 75% of the children who have been sexually abused have no abnormal findings, meaning that the exams are either completely normal or very non-specific findings, such as redness.

PROSECUTOR: And that's the category that you would place Shirley in; is that correct?

DR. EVERETT: Yes, correct.

Is Dr. Everett's testimony proper?

Scenario 4: State v. Ray

L.G. was examined by Dr. Loughlin, an expert in pediatrics and child abuse pediatrics. Loughlin testified that his examination of L.G. included an interview and a physical examination. L.G. told Dr. Loughlin that the defendant had "touched [her] down there" while she was using the bathroom at the defendant's

house. She said that the defendant came into the bathroom and “put his finger in [my] private” and described the penetration as painful. Dr. Loughlin testified that L.G. experienced “intrusive thoughts” about the incident. Dr. Loughlin also interviewed L.G.'s mother and a Detective.

Although Dr. Loughlin's examination revealed no physical indicia of sexual abuse or trauma, he offered an expert opinion that L.G.'s history was “consistent” with having been sexually abused. His opinion was based in part upon the consistency between L.G.'s statements to him and to others. He also noted L.G.'s description of digital penetration as painful, her bad dreams and intrusive thoughts about the incident, and unspecified behavioral changes reported by her mother.

Is Dr. Loughlin’s testimony proper?

Scenario 5: State v. Jennings

Dr. Jones testified on direct-examination about the healing process of the vaginal orifice. Using a “hair scrunchie,” Dr. Jones illustrated how the vaginal opening in mature females stretches and retracts after they begin “making estrogen.” Dr. Jones also showed the jury a time-lapse photographic display of an “obvious [hymen] tear” healing over a four month period to the extent that the tear is no longer visible. Based on her illustrations, Dr. Jones explained that if she performed an initial examination of a child four months after an alleged incident of sexual abuse, she would be unable to conclude “one way or the other” as to whether the child had been sexually abused. The prosecutor then asked Dr. Jones about her examination of Anna:

PROSECUTOR: Dr. Jones, when [Anna] presented to your office, it was one year after this event, correct?

DR. JONES: Yes.

PROSECUTOR: Is it possible that she could have had a tear or some of these items that you just pointed out, but by the time you get her a year later, it could be gone?

DR. JONES: More than possible, probable.

PROSECUTOR: Is it also possible because she was estrogenized like you talked about with the scrunchie that there wasn't any injuries at all to begin with?

DR. JONES: It is possible.

PROSECUTOR: That he just didn't cause any [injury] when he—if—if he engaged in sexual activity with her?

DR. JONES: It's possible.

Is Dr. Jones’ testimony proper?

Scenario 6: State v. Wallace

The State presented testimony from Dr. Powell, a clinical psychologist with a specialization in child sex abuse cases. Dr. Powell met the victim A.W. after she was expelled from school for drug possession.

During these meetings Dr. Powell learned about defendant's conduct with the victim. He testified that A.W.'s behaviors were consistent with those of a sexually abused child. Specifically, he stated that A.W.'s behavior, sense of trust, & emotional problems were consistent with behaviors of other sexually molested children.

Is Dr. Powell's testimony proper?

Scenario 7: State v. Khouri

DR MOORE: [T]he statements and my observation of her testimony today showed me that there is a lot of confusion not in the details so much as just in her emotions. What I noticed was that there were times when she appeared to be trying to hold back emotional display, lips quivering, those kinds of things and you know this is -- making this sort of allegation if it is true and facing one's abuser is a very difficult and painful thing to do and sometimes what victims will do is sort of shut off emotions and become rather stoic looking as a defense, psychological defense against having to be in this situation. Just sort of turn it off momentarily and I witnessed that about her behavior on the stand.

Is Dr. Moore's testimony proper?

Scenario 8: State v. Webb

Defendant's daughter was referred by her pediatrician to a child psychologist, Dr. List, after exhibiting anger problems. At trial, on direct examination, the following occurred:

PROSECUTOR: In your expert opinion, does the victim fit the profile of a child who has been exposed to trauma and sexual abuse?

DR. LIST: In my opinion, and in the time that I spent with her, and the manner in which she reported and described things, and her emotional responses, all suggested to me that yes, she had been exposed to trauma. And the manner of her description gave me no reason to doubt that there—make sure I phrase it—I believe that yes, she had been exposed to sexual abuse.

Is Dr. List's testimony proper?

Scenario 9: State v. Figured

PROSECUTOR: What if anything did Child B tell you in the course of treatment about these incidents?

DR. EVERSON: Child B told me that the defendant inserted a screwdriver into his bottom and into Child C's bottom, inserted his penis into the bottoms of all three children, made Child B and Child C lick white powder off defendant's penis, and threatened them to keep them from telling.

PROSECUTOR: What if anything did Child A tell you in the course of treatment about these incidents?

DR. EVERSON: Child A told me that she saw white stuff come out of the defendant's penis when he stuck it in Child C's bottom.

PROSECUTOR: Did the children tell you anything else?

DR. EVERSON: Child A and Child B told me that the defendant threatened to kill their parents if they told on him.

PROSECUTOR: On the basis of your medical treatment of the children have you formed an opinion about whether they were sexually abused by the defendant?

DR. EVERSON: In my opinion, Child A and Child B were sexually abused by the defendant.

Is Dr. Everson's testimony proper?

Scenario 10: State v. Horton

MS. FIORE: Over the course of counseling, the child described details of the alleged sexual abuse. She was very specific in her descriptions of the various events. For example, the child described an incident in which the defendant's knee was hurting the child's hip. The child told me that the defendant said he was sorry for hurting the child.

PROSECUTOR: As far as treatment for victims, for counseling victims, why would that detail be significant?

MS. FIORE: In all of my training and experience, when children provide those types of specific details it enhances their credibility.

Is Ms. Fiore's testimony proper?

Scenario 11: State v. Hensley

DR. FINE: I first examined J.C. at the recommendation of the Haywood County Department of Social Services. I saw J.C. on several occasions following the initial interview.

PROSECUTOR: Based on your treatment of J.C., were you able to diagnose J.C.?

DR. FINE: Yes.

PROSECUTOR: What was your diagnosis?

DR. FINE: My clinical opinion and clinical diagnosis of J.C. actually consisted of three diagnoses: sexual abuse by history, adjustment disorder with mixed disturbance of emotions and conduct, and post-traumatic stress disorder.

PROSECUTOR: Did you form an opinion as to the possible cause of J.C.'s post-traumatic stress disorder?

DR. FINE: Yes. The cause would be the sexual abuse that he received, was the victim of, specifically anal penetration.

Is Dr. Fine's testimony proper?

Tab 7: Lay & Expert Opinion, Rules 701 & 702

Opinion Evidence

Penny J. White
May 2015

I. Learning Objectives for this Session:

Following this session, participants will be able to:

1. Distinguish between lay and expert opinion;
2. Understand and apply Rule 702, as amended, as it relates to the admissibility of expert opinions;
3. Properly perform the tasks of gatekeeper relative to the admission of scientific, technical, and specialized knowledge;
4. Rule on objections to expert opinion raised under Rules 703-705; and
5. Properly instruct the jury regarding the use of expert opinion.

II. Resources

Kenneth S. Broun, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 1-23

Jessica Smith, CRIMINAL CASE COMPENDIUM (available at http://www.sog.unc.edu/casecompendium)

State Justice Institute, A JUDGE'S DESKBOOK ON THE BASIC PHILOSOPHIES AND METHODS OF SCIENCE, MODEL CURRICULUM (March 1999) (available at http://www.judicialstudies.unr.edu/JudgesDeskbookFullDoc.pdf).

Sanford L. Steelman, "Welcome Back Daubert!" (June 2012) (available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Steelman_702%20Manuscript.pdf).

III. Opinion Evidence

A. Introduction

To protect juries from unreliable evidence, the common law trial system heavily favored testimony from first-hand observers and strictly regulated testimony in the form of opinions, inferences, or conclusions. Opinion testimony, as a small exception, was rarely allowed. When expert opinion testimony was allowed, it was strictly policed by arcane mechanisms such as the required use of hypothetical questions. Modern-day evidence rules eliminate the near-complete ban on opinion testimony, but retains many restrictions on both lay and expert opinion testimony.

B. Lay Opinion, Rule 701

Within the limits of these restrictions, both lay and expert witnesses may offer some opinions. Lay opinion is limited to testimony that is based on the witness' first-hand knowledge and that is also (a) rationally based on the witness' perceptions and (2) helpful to a clear understanding of the testimony or the determination of a fact in issue. The requirement that the lay opinion be based on a witness' perception is the embodiment of the first-hand knowledge requirement of Rule 602. The rule requires both that the lay opinion be based on the witness' first-hand perception and that the opinion be rationally derived from first-hand perceptions. The helpfulness requirement revolves around the witness' ability to articulate facts that are helpful to the jury's decision.

Implicitly, lay opinion may also not be based on scientific, technical, or other specialized knowledge. This requirement is not clearly spelled out in North Carolina Rule of Evidence 701, as it is in Federal Rule of Evidence 701, but is effectually the rule.

Lay witnesses are allowed to give opinions on some issues that would appear to require scientific, technical, or specialized knowledge when the witness' opinion is actually a composite expression of observations that are otherwise difficult to explain such as speed, size, weight, and physical condition. North Carolina courts characterize this type of evidence as a "shorthand statement of fact" and seem to admit this evidence freely, without regard to whether the evidence is actually helpful to the jury. For example, in *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130 (2001), the North Carolina Supreme Court affirmed rulings allowing police officers to testify that a victim's screaming sounded like somebody fearing for his life and that the crime scene was worse than a hog killing and that defendant "looked guilty" when he raised his hands as the officers approached. Similarly, two other witnesses were allowed to testify that defendant appeared calm, relaxed, and without remorse. The North Carolina Supreme Court's rationale was that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." *Id.* at 187 (*quoting State v. Skeen*, 182 N.C. 844, 845–46, 109 S.E. 71, 72 (1921)), *death sentence vacated*, 428 U.S. 904 (1976)). Notably, the decision does not indicate how these conclusions were actually *helpful* to the jury, which is an independent requirement of Rule 701. While testimony that amounts to no more than a witness's unsubstantiated conclusions is excluded, the lay opinion cases notably give little effect to Rule 701's helpfulness requirement. *See also State v. McVay*, 174 N.C. App. 335 (2005).

North Carolina case law also generously admits opinion testimony from police officers that have not been qualified as experts by virtue of their skill, experience, education, and training. Officers have been allowed to give their opinion regarding fingerprinting techniques, shoe impressions, location of shell casings, drug behavior, and various other topics despite their lay status. These cases are collected in the Criminal Case Compendium (available at http://www.sog.unc.edu/casecompendium) and also in

Sanford L. Steelman, "Welcome Back Daubert!" (June 2012) (available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Steelman_702%20Manuscript.pdf).

C. Expert Opinion, Rule 702

Opinion testimony may also be offered by a properly qualified expert when the opinion involves a proper subject matter for expert testimony, specified as involving "scientific, technical, or specialized knowledge." N.C. Evid. R. 702. The general standard for admissibility, set out in Rule 702 of the North Carolina Rules of Evidence, was changed to mirror the changes in Federal Rule of Evidence 702, which was amended following the United States Supreme Court's decision in *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993).

Before the amendment, the North Carolina Supreme Court observed that the North Carolina approach to expert testimony was "decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach." *Howerton v. Arai Helmet*, 358 N.C. 440, 464 (2004). The *Howerton* Court further noted that once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable and relevant, any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility. *Id*. at 461. A chart showing a side-by-side comparison of the former and current Rule 702 is presented in Appendix 1 on page 12 at the end of these materials. A detailed comparison between the North Carolina and federal approaches is presented graphically in Appendices 2 and 3 on pages 13-14 at the end of these materials.

With the verbatim adoption of the federal rule's language, multiple issues arise with regard to the approach that North Carolina courts should now take in determining the reliability and relevance of expert testimony. In applying amended Rule 702, North Carolina courts may use federal precedent as guidance. Commentary to Rule 102 of the North Carolina Rules of Evidence (which, of course, predates the Rule 702 amendment) provides that "federal precedents are not binding on the courts of this State in construing these rules. Nonetheless, these rules were not adopted in a vacuum. A substantial body of law construing these rules exists and should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly in adopting these rules. Uniformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical."

Despite this more general recognition that federal precedent can be utilized by state courts for guidance, the North Carolina Court of Appeals recently rejected federal precedent in a case that raised the issue of the appropriate standard of review for evaluating error alleged to have occurred when the trial court excluded defendant's expert witness. In *State v. Cooper*, 747 S.E.2d 398 (N.C. Ct. App. 2013), the North Carolina Court of Appeals rejected the abuse of discretion standard adopted by the United States Supreme Court in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). Because the

evidentiary ruling denied a "defendant's right to present a witness through the misapplication of a rule of evidence," the appellate court found constitutional error, concluded that the state failed to show that the error was "harmless beyond a reasonable doubt," and ordered a new trial. *State v. Cooper*, 747 S.E.2d at 413; *but see State v. Bullard*, 312 N.C. 129, 140 (1984) (holding that trial courts are given "wide latitude of discretion when making a determination about the admissibility of expert testimony"); *State v. Anderson*, 322 N.C. 22, 28, *cert. denied*, 488 US. 975 (1988) (holding that the trial court decision regarding competence of witness to testify as an expert will not be reversed absent an abuse of discretion). It is notable that the appellate court relied upon the North Carolina Supreme Court's expressed concern in *Howerton*, which rejected the *Daubert* approach, fearing "that trial courts asserting sweeping pre-trial 'gatekeeping' authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence." *Howerton*, 358 N.C. at 468.

The amended rule applies to scientific, technical, and specialized knowledge. The plain language of Rule 702 makes it clear that the rule applies to technical and specialized knowledge, as well as to scientific knowledge. This is consistent with the United States Supreme Court's approach to Rule 702 in *Daubert* and in the subsequent case of *Kumho Tire, Ltd. v. Carmichael*, 526 U.S. 137 (1999). This means that the gatekeeper function, anticipated for trial judges, extends to all expert witnesses, not just experts testifying about scientific knowledge. Consequently, trial judges "must determine whether [all] testimony [based on scientific, technical, or specialized knowledge] has a reliable basis in the knowledge and experience of [the relevant] discipline." *Kumho Tire, Ltd.*, 526 U.S. at 149.

Rule 702 continues to include Section (a1) pertaining to the admissibility of testimony by a witness on the issue of impairment related to the results of a Horizontal Gaze Nystagmus test, when the test is administered by a person who has successfully completed training in HGN, N.C. Evid. R. 702 (a1), and pertaining to accident reconstruction in section (i), providing that a "witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving."

1. Qualifications

Experts may be qualified based on their knowledge, skill, experience, training, or education. In interpreting the qualifications requirement, courts generally consider the respective fields for guidance as to expert qualifications. The issue of whether an individual has sufficient qualifications to testify as an expert is a fact-based, Rule 104 preliminary question that is committed to the trial judge's discretion.

2. Proper Subject Matter

Qualified experts may testify in the form of an opinion or otherwise "[i]f

scientific, technical or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. Evid. R. 702(a). Thus, the proper subject matter for expert testimony is scientific, technical, or other specialized knowledge.

3. Trial Judge as Gatekeeper

Both the issue of sufficient qualifications and the issue of proper subject matter are issues to be determined by the trial judge. The Supreme Court chose the metaphor of "gatekeeper" in *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993) to refer to the trial judge's role, which includes the responsibility to determine the admissibility of the scientific, technical, or specialized knowledge by determining that the underlying bases is valid and that the evidence will assist the trier of fact.

At the time that *Daubert* was decided, the predominant rule in the United States for the admissibility of expert testimony was the "general acceptance" standard set out by in *Frye v. United States*, 293 F. 1013 (D.C. App. 1923), which focuses on whether experts in a given field generally accept the underlying empirical basis for an expert opinion. Under the *Frye* test, courts generally defer to experts for admissibility determinations. The decision in *Daubert* constructed a new approach. Rather than focus on whether members of a given field accepted a scientific proposition, the *Daubert* focus is on whether the underlying science is based on sound principles and methodology. *Daubert*, 509 U.S. 579.. Additionally, rather than defer to experts in a given field to determine whether opinion evidence should be admissible in the courts, *Daubert* places the burden of determining admissibility on the trial judge.

The trial judge must determine, as a threshold matter, whether the proffered expert opinion is reliable. The reliability of a qualified expert's opinion depends upon the validity of the underlying theory, the validity of the technique applying the theory, and the proper application of the technique on a particular occasion. A reliable result is contingent on a valid theory and the valid and proper application of a valid technique. The validity of the theory and the application of the valid technique are two discrete issues. The validity of the scientific principle and technique may be stipulated; judicially notice; legislatively dictated; or proven through the presentation of expert testimony. Thus, for example the parties could stipulate that a particular scientific theory was valid, but could disagree that the expert had properly applied the theory to the case at hand. Although the *Daubert* approach arose in the context of scientific expert opinion, its reliability focus and rationale applies also to non-scientific, technical and specialized knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Although the *Daubert* approach on paper appears very different from the *Frye* approach, the two approaches often yield similar results. When principles and methodology underlying a given field have a strong scientific foundation, they also will likely be generally accepted by the relevant scientific community. When they have a weak scientific foundation, they likely will not be generally accepted. In both situations, the admissibility determination under either a *Frye* or *Daubert* approach would be the same. But on occasion, the underlying principles and methodology will be scientifically

sound, yet not generally accepted, rendering the evidence admissible in a *Daubert* jurisdiction but not a *Frye* jurisdiction. Similarly, some scientific areas are generally accepted, but upon inspection, have not met the threshold requirement for validity because the underlying methodology and principles are not sound.

Under the federal approach, the gatekeeper function applies to all types of scientific, technical, or specialized evidence, not only to novel or non-conventional types of evidence. *Dauber v. Merrill Dow Pharm., Inc.,* 509 U.S. 579, 593 n.11 (1993)(noting that the rule does not apply exclusively to unconventional evidence, but to "well-established propositions are less likely to be challenged than those that are novel"). This has led to some federal courts excluding evidence that had been previously determined to be admissible.

Additionally, the federal approach includes a recognition that even though an expert's methodology is scientifically valid, the expert opinion may nonetheless be excluded because of what is referred to as an "analytical gap." "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert).

a. Preliminary Questions

A practical aspect of the *Daubert* approach is a shift in the court's management of expert testimony. Most courts conduct Rule 104(a) hearings in advance of trial to determine the validity of the underlying science or technology. Some courts do so even in the absence of an objection, viewing their gatekeeper role as requiring a threshold determination of admissibility. But preliminary hearings are not mandated and may, in certain cases, not be necessary. As a rule of thumb, whether a hearing is necessary will turn on whether the record is sufficient without a hearing to enable the trial judge to make an informed decision as to admissibility and to allow the appellate court to conduct a meaningful review in the event of appeal. Special consideration should always be given to the difficulties that might be created by requiring counsel to "explore an expert's qualifications and the bases for the expert's opinion in the presence of the jury, and depending on the circumstances of the case, [the trial judge] should give due consideration to requests that questioning occur unconstrained by that pressure." *United States v. Alatorre*, 222 F.3d 1098, 1105 (9th Cir. 2000).

Additionally, trial judges should remain mindful of the need to create a sufficient record for appellate review. Thus, trial judges should make specific findings on the record which are sufficient for an appellate court to review the trial court's conclusion concerning whether the testimony was scientifically reliable and factually relevant.

b. Burden of Proof

The burden of proof lies with the proponent of the expert testimony to establish its

admissibility. A preponderance standard applies. *Daubert*, 509 U.S. at 593 n.20. Because the party opposing the evidence often moves in limine to exclude the evidence, the burden is sometimes mistakenly reversed and placed on the opposing party. But, the proponent has the initial burden of production and the ultimate burden of persuading the trial judge that the basis for the expert's opinion is more likely than not valid.

c. Assessing Relevancy

Rule 702 is, in fact, a special relevancy rule, which focuses on "fit," i.e., whether a valid science or technology applies to some disputed issue in the case. As the *Daubert* Court noted, Rule 702 "requires a valid scientific connection to a pertinent inquiry as a precondition to admissibility." *Id.* at 591-92. Only then, will the expert opinion be helpful to the trier of fact, as Rule 702 also requires.

d. Helpfulness Standard

Rule 702's requirement that expert testimony "assist" the trier of fact is referred to as the helpfulness standard. Most commentators consider the helpfulness standard in Rule 702 to be a departure from common law principles. Traditionally, expert testimony had to be "beyond the ken" of the average juror to be admissible. The requirement of helpfulness is less stringent, allowing some expert testimony that would not be admissible under the previous standard.

e. Validity Standards

The *Daubert* Court set out four non-exclusive factors to guide the trial judge's determination of the validity of the underlying science or technology. Those factors are: (1) testability or falsifiability; (2) error rate; (3) peer review and publication; and (4) general acceptance. For some subject matters, the factors may not apply and other factors may be utilized to determine the underlying validity. Trial judges should use the factors as a starting point and should make it clear which of the factors and what additional factors they are applying in assessing the underlying validity. The judge should not apply the factors as a checklist. Rather, the judge's ultimate gatekeeper role is to apply the applicable *Daubert* factors and any relevant additional factors to determine if it is more likely than not that the expert's principles and methods validly support the expert's opinion.

In prior case law, the North Carolina Supreme Court cited scholars who indicated that trial judges predictably have been hampered by the list of factors and are reluctant to consider or apply different or additional factors. *Howerton v. Arai Helmet*, 358 N.C. 440, 465-66 (2004). To stimulate thinking about what other types of factors may be appropriate considerations, trial judges might find a list compiled by another state court judge helpful. The list included the *Daubert* factors and, additionally: (1) the existence and maintenance of standards governing the technique or method; (2) the presence of safeguards in the characteristics of the technique or methodology; (3) analogy to other scientific techniques or methods whose results are admissible; (4) the nature and breadth

of the inference involved; (5) the clarity and simplicity with which the technique can be described and the results explained; (6) the extent to which the basic data are verifiable by the court and the jury; (7) the availability of other experts to test and evaluate the technique; (8) the probative significance of the evidence in the circumstances of the case; (9) and the care with which the technique was employed in the case. McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 911-12 (1982). Although some of these factors may risk merging the issue of admissibility with that of weight, the list may help stimulate thought about what types of factors are appropriate to assess the validity of different methods and techniques.

If North Carolina courts follow the federal courts' lead, the trial judge will retain considerable latitude in deciding which factors and what additional factors provide reasonable measures of validity for a particular area of knowledge. *See Kumho Tire Co., Ltd.*, 52 U.S. at 152. The Supreme Court's position on this issue is that the "[w]hether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. . . . The trial court must have the same latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are need to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is relevant." *Kumho Tire Co., Ltd.*, 52 U.S. at 153 & 152.

-Testability or Falsifiability

The *Daubert* Court noted that a "key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Daubert*, 509 U.S. at 593. The factor of testability or falsifiability provides that "a statement or theory is falsifiable . . . if and only if there exists at least one potential falsifier—at least one possible basic statement that conflicts with it logically."[1] A less philosophical, more practical approach for judges would be to consider whether the opinion is whether the expert's statements are testable and how difficult or expensive testing would be. Because the other *Daubert* factors depend upon testability, many courts consider testability as a foundational inquiry.

The concept of falsifiability is different from the question of whether a scientific principle has been falsified or corroborated. Both concepts are subject to assessment under the *Daubert* factor but the manner of assessment was not specified. Thus, judges must evaluate the research methods used and distinguish reliable scientific research methods used to test a hypothesis from methods that merely mimic science.

-Error Rate

Error rate refers to the typical number of mistakes or errors that a technique or method will make in a set number of trials. The error rate factor focuses on actual errors and looks to what percentage of error is acceptable as well as whether most errors are

[1]Karl Popper, Realism and the Aim of Science x (W. Bartley III, ed. 1983)(quoted in *Daubert v. Merrill Dow Pharm. Inc.*, 509 U.S. 579, 593 (1993).

false negatives or false positives.

No court, including the *Daubert* Court, has set an acceptable rate of error. Rather, this too must be determined by the trial judge depending on the particular circumstance and must include an analysis of the costs associated with error.

-Peer Review and Publication

The *Daubert* Court considered "the fact of publication (or lack thereof) in a peer-reviewed journal" as a "relevant, though not dispositive consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." *Daubert*, 509 U.S. at 594. The factor should be considered as it reflects upon the larger issue – whether the technique or methodology has been subject to the scrutiny of the scientific community. *Id.* at 593. Judges must consider not only the fact of publication, but the nature of the publication since journals vary in stature and reputation.

-General Acceptance

In utilizing general acceptance as a factor in determining scientific validity under *Daubert*, the inquiry is not merely whether the relevant community has generally accepted the proposition as was the inquiry under *Frye.* Rather, a judge must evaluate also consider whether the relevant community "has the expertise critically to evaluate the methods and principles that underlie the test of opinion in question." *United States v. Horn*, 185 F Supp. 2d 530, 557 (D. Md. 2002).

4. Applicability of new Rule 702

The amended rule applies in actions arising on or after October 1, 2011. The amended rule applies to criminal actions arising after the effective date. "A criminal action arises when the defendant is indicted." *See State v. Gamez*, 745 S.E.2d 876, 878 (N.C. Ct. App. 2013). The amended rule does not apply to a second indictment joined with the first indictment even when the second indictment is filed after the effective date of the rule. Rather, "the criminal proceeding arose on the date of the filing of the first indictment." *Id*. at 879. But the trigger date of a superseding indictment is "the date the superseding indictment was filed" because a "superseding indictment annuls or voids the original indictment." *State v. Walston*, 747 S.E.2d 720 (N.C. Ct. App. 2013).

5. Appellate Review of Gatekeeper Function

The proper standard of review for the trial judge's decision as to admissibility of expert testimony is an abuse of discretion standard. *General Elec. Co. v. Joiner*, 522 U.S. 136 (1967).

6. Disclosure of Facts or Data Underlying Opinion

When an expert witness is called, the proponent of the expert testimony is not

required to have the expert testify to the facts or data which underlie the opinion, but the expert must disclose the underlying facts and data on cross-examination. N.C. Evid. R.. 705.

7. Bases of Opinion

Rule 703 addresses the bases of the expert opinion and makes it clear that unlike a lay witness, the bases of an expert's opinion need not be first-hand knowledge. An expert may base an opinion on facts or data perceived by the expert or made known to the expert before or at the hearing. If the underlying facts or data are reasonably relied upon by expert in the field, the facts or data may be relied upon even if they are not admissible.

When the Federal Rules of Evidence were amended to reflect the *Daubert* holding, Rule 703 was amended in addition to Rule 702. The amendment provided that:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

This amendment provides a presumption against disclosure to the jury of otherwise inadmissible information that the expert used to base the opinion upon. Scholars have noted that the question of the reliability of inadmissible evidence is integrally related to the *Daubert* analysis, but North Carolina has not adopted this portion of Rule 703.
Two recent North Carolina decisions consider the issue of the admissibility of bases of opinion evidence in support of a testifying expert's opinion. In *State v. Craven*, 367 N.C. 51 (2013), the court held that the admission of lab reports through the testimony of a substitute analyst violated the defendant' confrontation clause rights. In *Craven*, the analyst who testified did not testify to an independent opinion, but rather relied upon the opinion of the analysts who tested the substances to conclude that the substances were cocaine. The court held that the testimony was impermissible surrogate testimony repeating testimonial out-of-court statements made by non-testifying analysts' conclusions from their lab reports."

The *Craven* court distinguished the facts in the case from those in *State v. Ortiz-Zape*, 367 N.C. 1 (2013), in which an expert testified based upon her independent analysis of testing performed by another analyst in her laboratory. In finding no confrontation violation, the North Carolina Supreme Court considered *Williams v. Illinois*, 132 S. Ct. 2221 (2012), a plurality opinion of the United States Supreme Court, as standing for the proposition "that a qualified expert may provide an independent opinion based on otherwise inadmissible out-of-court statements in certain contexts." The North Carolina Court reasoned that:

> when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the

> expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert.

State v. Ortiz-Zape, 367 N.C. 1, 8 (2013).

8. Opinion on Ultimate Issue

At common-law opinions on the ultimate issue in the case were barred. Rule 704 removes the common-law bar by providing that opinion evidence "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Evid. R. 704(a).

9. Court-appointed Experts

Rule 706 sets out the procedure to be followed when the court on its own motion or on the motion of a party appoints an expert.

APPENDIX 1

Comparison of Current and Former Rule 702,
North Carolina Rules of Evidence

Current Rule 702.
Testimony by experts. (a) If scientific, technical or other specialized knowledge will **assist** the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, **or otherwise, if all of the following apply: (1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case.**

Former Rule 702(a).
If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

APPENDIX 2	***Howerton*'s Take on Federal Approach**	***Goode*[2] Approach**
Admissibility Standard	Ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable by determining whether reasoning or methodology is scientifically valid and can be applied to facts in issue (*Daubert* [3])	1. Is expert's proffered method reliable? Reliability determined by testimony, judicial notice, or precedent, but when novel, focus on use of established techniques, professional background, use of visual aids, and independent research 2. Is witness qualified as expert in area of testimony?[4] 3. Is testimony relevant? Relevance determined by whether testimony can assist jury in drawing inferences from facts because expert is better qualified than jury to do so
Measures of scientific reliability	Testability Subject to Peer Review and Publication Known or Potential Rate of Error Existence and Maintenance of Standards General Acceptance within Relevant Community (*Daubert*)	Use of established techniques Professional background Visual aids to allow jury to visualize Independent research
Standard of review of trial judge's decision	Abuse of Discretion (*Joiner*[5]) Failure to apply relevant factor may constitute abuse of discretion (*Kumho Tire*,[6] concurring) Appellate court may reverse, rather than remand, when opinion incorrectly admitted (*Weisgram*[7])	Abuse of Discretion
Prerogative of judge	May exclude testimony though methodologically sound if reaches questionable conclusions due to analytical gap (*Joiner)*	
Application	Scientific, Technical, and Specialized Knowledge (*Kumho Tire*)	
Determination	Pretrial, via Rule 104 hearing Not bound by Rules of Evidence	Rule 104 determination, potentially pretrial; not bound by rules of evidence

[2] *State v. Goode*, 341 N.C. 513 (N.C.1995).
[3] *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993).
[4] Both the federal and North Carolina rules contain a separate, identical phrase requiring that the expert be qualified by virtue of "knowledge, skill, experience, training, or education." Fed. R. Evid. 702; N.C. Evid. R. 702.
[5] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).
[6] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
[7] *Weisgram v. Marley Co.*, 528 U.S. 440 (2000(.

APPENDIX 3

Goode* on why we don't follow *Daubert

North Carolina Approach[8]	Federal Approach
North Carolina approach is "less mechanistic and rigorous"	Federal approach is "more exacting standard of reliability demanded"
Gatekeeper role places trial judges in "onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion."	Federal approach demands that trial judges pass judgment on underlying validity of scientific or technological theory.
North Carolina is unwilling to expend the "human resources required to delve into complex scientific and technical issues."[9]	To undertake federal approach, judges must become knowledgeable of underlying scientific and technical theories.
North Carolina courts have historically embraced flexible approach.	Federal standard has proven to be "anything but liberal or relaxed" and trial courts are "reluctant to stray far from the original *Daubert* factors in their analysis of the reliability" of expert opinion.
North Carolina Supreme Court is concerned with case-dispositive nature of *Daubert* proceedings where pretrial *Daubert* motions are used to "bootstrap motions for summary judgment that otherwise would not likely succeed" brought about by different evidentiary standards.	Federal approach allows pretrial *Daubert* motion to substitute for trial because party may be able to exclude opponent's expert on essential element of cause due to lessened standard that applies to the determination under Rule 104(a).
Trial judge's "sweeping pre-trial 'gatekeeping' authority may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issue of fact and to assess the weight of the evidence."	Under federal approach, pretrial determination replace need for jury trials, by eliminating party's proof on essential element of the case, thereby depriving party of ability to have jury hear and weigh conflicting evidence.

[8] The quotations in this chart are taken from *State v. Goode*, 341 N.C. 513 (N.C.1995) and *Howerton v. Arai Helmet*, 358 N.C. 440, 464 (2004).

[9] Judges who are now delving into these difficult arenas may benefit from reviewing the Deskbook prepared by the State Justice Institute. State Justice Institute, A JUDGE'S DESKBOOK ON THE BASIC PHILOSOPHIES AND METHODS OF SCIENCE, MODEL CURRICULUM (March 1999) (available at http://www.judicialstudies.unr.edu/JudgesDeskbookFullDoc.pdf).

Opinion Evidence
Problems Worksheet

Penny J. White
May 2015

I. Pretest

Answer each question true or false.

1. The rules governing the admission of lay and expert opinion were altered with the 2011 amendment.

2. Both lay and expert opinion must be helpful to or assist the jury in order to be admissible.

3. Both lay and expert opinion is subject to the first-hand knowledge requirement of Rule 602.

4. North Carolina courts may use federal precedent in determining the validity and admissibility of scientific evidence.

5. The amendment to Rule 702 affects opinion evidence related to all scientific, technical, and specialized evidence.

6. Rule 702, as amended, applies to all cases tried after October 1, 2011.

7. Under Rule 702, as amended, it is no longer appropriate to consider whether a particular scientific methodology has been generally accepted by those in the scientific field.

8. Rule 702, as amended, applies only to novel or unconventional scientific or technical evidence and does not apply to scientific or technical evidence that has been traditionally admitted in North Carolina courts.

9. Rule 702, as amended, requires trial judges to conduct Rule 104 hearings in advance of trial any time either party plans to offer evidence under Rule 702.

10. Once an expert is qualified under Rule 702, the expert's opinion is admissible, subject to weighing by the trier of fact.

11. The burden of establishing the admissibility of expert opinion is on the party offering the opinion.

12. Trial judges may raise issues of admissibility of expert opinion even absent objection by a party.

II. Would the outcome be different?

A. Lay Opinion – Small Group Discussions

The amendment to North Carolina's opinion rule affected only Rule 702, pertaining to expert opinion, and not Rule 701 pertaining to lay opinion. But will the new threshold for expert opinion have a spillover effect on the standards for the admission of lay opinion? Given what you know about opinion testimony or what you have read, heard, or believe about the amendment to Rule 702, how would you rule if you were required to review the admission of the opinion evidence in the following cases?

1. The State did not seek to qualify deputy police officer who was in charge of the Criminal Investigations Division as an expert, but asked questions concerning fingerprint technique as set forth below, based upon the officer's opportunity for observation of the processing of crime scenes over the course of his ten-year law enforcement career.

Q: Why would law enforcement officials not look for fingerprint evidence on the stolen property once it was recovered?
Q: Would it be likely or unlikely that useful fingerprint evidence would have been located on this recovered stolen property?
Q: What effect would the availability of eye witnesses have on whether a department will look for fingerprint evidence?

State v. Friend, 164 N.C. App. 430 (N.C. App. 2004).

2. The State questions an officer who responded to a crime scene as set out below without attempting to qualify the officer as an expert in any particular technique or methodology. Upon objection, the State argues that the officer was responding as a lay, not expert, witness and that the testimony was rationally based on the officer's perception and admissible under Rule 701.

Q: Did you recover any shoes behind the victim's house?
A: Yes.
Q: What did you do with those shoes?
A: I measured them and determined that they were eleven inches long.
Q: Then what did you do?
A: I compared the shoes to a pair of defendant's shoes that I retrieved from defendant's house. They also were eleven inches long.
Q: What did you use to measure the shoes?
A: A ruler.
Q: Did you notice any other similarities between the shoes you located behind victim's house and the defendant's shoes?
A: Yes. Each pair of shoes showed signs of wearing on the heel and ball areas.
Q: What did this mean to you?
A: I concluded that the shoes I located outside the victim's house were Defendant's shoes.

State v. Shaw, 322 N.C. 797 (N.C. 1988).

3. The State offers the testimony of a nurse in a first-degree murder case concerning the effects of ten milligrams of Valium. The testimony is offered to question defendant's claim that he was under a combination of drugs at the time of the murder and was not capable of premeditation and deliberation. Assume that the nurse testifies that she has seen the effects of Valium on other patients in her care. The nurse's testimony includes details as to the defendant's physical condition at the time she treated him at the hospital and includes testimony that his temperature, pulse rate, respiration, blood pressure, and oxygen saturation levels were all in the normal range for a man of his age and size. Assume additionally that the nurse testifies that defendant's pupils reacted normally to light and that defendant did not appear intoxicated or otherwise impaired.

May the State elicit the nurse's opinion as to whether the defendant's mental state would have rendered him incapable of premeditation and deliberation?

If so, would the nurse's testimony be subject to the Rule 701 or Rule 702 standard?

If the State may not ask this question, what question(s) might they pose to the nurse either as a lay or expert witness?

State v. Smith, 357 N.C. 604 (N.C. 2003).

B. Expert Opinion – Small Group Discussions

Rule 702 pertaining to expert opinion now has language which is identical to Federal Rule of Evidence 702, which was amended to reflect the decisions in *Daubert* and *Kumho Tire*. The language is significantly different from the former Rule 702 in North Carolina, but how does the application under the amended Rule 702 differ from that embraced in the North Carolina decisions of *Howerton* and *Goode*?

1. What is required of trial judges when ruling on motions to exclude expert opinion under current Rule 702 that was not required under former Rule 702?

2. To what extent may a trial judge rely upon prior precedent admitting or excluding particular types of scientific or technical evidence in cases arising after the effective date of current Rule 702?

3. Are trial judges required to conduct pretrial Rule 104 hearings to determine the admissibility of expert opinion when requested by a party or may trial judges rely upon precedent and avoid a pretrial hearing?

4. Does the amendment to Rule 702 affect a trial judge's ability to exclude expert opinion that satisfies the Rule702 standards based upon a Rule 403 analysis?

See State v. King, 366 N.C. 68 (2012)(noting that although evidence was "technically" admissible and relevant, it had "uncertain authenticity" and was susceptible to alternative possible

explanations, enabling trial judge to exclude upon finding that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury."), *aff'g State v. King,* 214 N.C. App. 114 (2011).

C. Expert Opinion – Individual Work

1. Would you admit this expert opinion under current Rule 702?

a. A detective is called to testify concerning glass fragments found at the scene of the crime and in defendant's boot. The State proffers that the detective will testify that the glass found at the point of broken entry of a school was "consistent" with that found in defendant's boot. Assume that the State established that the detective:

1. collected a known glass standard from the scene and glass particles (unknown) from defendant's boot.
2. conducted a "visual test," comparing the color, coating, tint, thickness, and texture.
3. conducted an ultraviolet test to determine the fluoresces of each.
4. tested the density of the standard and the unknown in a test tube by varying the density of a solution in which each was placed.
5. observed whether the standard and the unknown stayed suspended at the same level as each other in the varying densities of solution.
6. microscopically tested and graphed the refractive indexes of the standard and the unknown by heating the samples separately at various temperatures in an oil for which the refractive indexes at varying temperatures were known, enabling the detective to compare the indexes of the standard and the unknown at different heats.

Assume that the detective has not previously testified to glass comparison. How does this impact your ruling?

Assume that no precedent exists in your jurisdiction for this type of expert opinion? How does this impact your ruling?

Assume that you have been guided to cases in two other jurisdictions (Indiana and Missouri) allowing this type of expert opinion? How does this impact your ruling?

State v. McVay, 167 N.C. App. 588 (N.C. App. 2004).

b. The State calls and qualifies a medical doctor to testify in the specialty of forensic psychiatry. Based upon a report of the State Bureau of Investigation concerning the location of blood spatter and smears at the crime scene, the doctor is asked to state her opinion on the following:

(1) whether the attack on the victim occurred in one or more than one location;
(2) whether an attack occurring in multiple locations suggested intent on defendant's part;
(3) whether an attack occurring in multiple locations is inconsistent with acting in a state of panic;

(4) whether an attack on the victim, while victim was lying on the floor, was consistent with specific intent to kill; and

(5) whether the location of certain bloodied items in different locations established an absence of panic on the part of defendant.

Specifically, do you allow the forensic psychiatrist to testify that "if the forensic evidence indicates that there was only one location where blows were delivered to the head of the victim, that means one thing; if there were two locations, that tends to mean another thing. Two locations means less chance of panic, at least, in my opinion."

Specifically, do you allow the State to ask: "Assuming that the victim is laying on the floor of his own home for at least one of those blows, is that also consistent with the specific intent to kill?"

State v. Campbell, 359 N.C. 644 (2005).

c. Is "crime scene investigation" a valid area for expert testimony under current Rule 702?

State v. White, 340 N.C. 264, 293, *cert. denied*, 516 U.S. 994 (1995)

d. May a police officer who has several years of experience in crime scene investigation and who has a degree in criminal justice and training in the field of criminal justice, but who is not a medical examiner, testify concerning the approximate time of death under the theory that the officer's "expertise in death scene investigations puts him in a better position to give an opinion on the subjects of lividity and approximate time of death than the trier of fact."

State v. Steelmon, 177 N.C. App. 127 (N. C. App. 2006).

D. Group Discussion

You are trying a case in which defendant is charged with possession with intent to sell or deliver cocaine and with being a felon in possession of a firearm. Police officers receive a tip that defendant will be making drug deliveries to a housing project. When police arrive, they see defendant and begin to pursue him. Defendant flees, but is ultimately overtaken by officers who place him under arrest. When defendant is searched incident to his arrest, officers find a cellophane bag containing 22 smaller cellophane packages inside defendant's underwear. They also confiscate defendant's cellphone. A handgun is found near where the police first spotted defendant. The substances in the cellophane packages are later determined to be cocaine.

At trial, the State calls the arresting officer, who is a seventeen year veteran with the police force. The officer has worked for fourteen years in the narcotics division. On direct examination, after detailing his history with the department and with the narcotics division, the State intends to elicit the following information from the officer.

Assuming objection, what is your analysis of the admissibility of the following officer's testimony?

1. Testimony regarding use of guns by drug dealers

In my experience, it is very common for drug dealers to carry weapons, particularly small handguns capable of being carried in a pants pocket, and particularly when they are making drug deliveries. I recovered a handgun right next to where defendant was standing when we tried to stop him. It was a small handgun like those commonly carried by drug dealers. It was the right size to carry easily in a front pants pocket.

It is my opinion that defendant was in possession of the handgun and discarded it when we began pursuit.

2. Testimony regarding intent to sell or deliver

The fact that defendant had the cocaine in his underwear and the fact that it was individually packaged and that there were 22 packages indicates that defendant had the cocaine for the purpose of selling or delivering the cocaine to others. It indicates that he did not have the cocaine for his personal use.

3. What facts are contained in the officer's testimony?

4. What opinions are contained in the officer's testimony?

5. Are any of the opinions based on scientific, technical, or specialized knowledge?

6. Is the officer sufficiently qualified by virtue of skill, experience, education, or training to give an opinion? To give *this* opinion?

7. If so, is the officer's opinion "based upon sufficient facts and data?"

8. If so, is the officer's opinion "the product of reliable principles and methods?

9. If so, has the officer applied the principles and methods reliably to the facts of the case?

10. Do the officer's opinions assist the jury?

11. Should the opinion be allowed or should it be excluded under Rule 403 or on some other basis?

Tab 8: Digital & Video Evidence, Rule 901

ADEQUATE

Foundation for Surveillance Video*

***State v. Jones*, 288 N.C. App. 175 (2023)**

Officer testified that:

1. Video was same as footage she saw on night of incident;
2. Homeowner's description of events matched the video;
3. Surveillance system was working correctly "to [her] knowledge."

***State v. Snead*, 368 N.C. 811 (2016)**

Loss prevention manager testified that:

1. He was familiar with recording equipment and it was in working order;
2. He viewed the footage on the recording equipment and video was same as the footage he viewed.

***State v. Fleming*, 247 N.C. App. 812 (2016)**

Corporate investigator testified that:

1. He was familiar with the recording system, it was functioning properly, and he made a copy of footage;
2. Video was the same as footage he copied, unedited, and same as that created by system.

***State v. Ross*, 249 N.C. App. 672 (2016)**

Store manager testified that:

1. Cameras were working properly because time and date stamps were accurate;
2. A security company manages the system and routinely checks to make sure cameras are online;
3. The video was same as footage he saw immediately following the incident and was not edited nor altered in any way.

***State v. Cook*, 218 N.C. App. 245 (2012)**

Facilities manager testified that:

1. He viewed the footage as a technician made a copy immediately after incident and video showed the same footage;
2. He didn't know how it worked, but the recording device live-streamed footage to a server.

***State v. Mewborn*, 131 N.C. App. 495 (1998)**

Officer testified that video was the same as footage he saw on the day of the incident and had not been edited.

Another officer and an assistant store manager testified that the recording equipment was working properly.

INADEQUATE

Foundation for Surveillance Video*

***State v. Moore*, 254 N.C. App. 544 (2017)**

Officer testified that:

1. The day after the incident, since store manager was unable to make a copy of the footage, officer recorded footage on the store's equipment with his cell phone;
2. The video, which was a copy of the cell phone recording, accurately showed footage he had reviewed at the store.

Store clerk testified that the defendant was seen on video, but did not testify as to whether the video accurately depicted events he observed on day in question.

No testimony pertaining to type of recording equipment and whether it was in good working order/reliable.

***State v. Mason*, 144 N.C. App. 20 (2001)**

Two store employees testified that surveillance system was in working order but were unfamiliar with maintenance, testing, or operation.

Store employee testified to the accuracy of a portion of the video for which he was present, but not to another more significant part.

Chain of custody was not established as a store employee gave a tape to an officer on the night of offense but the officer who testified at trial did not get tape from a police locker until several days after the robbery.

*The term "video" refers to the exhibit introduced at trial.

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Authentication of Digital Communications

(social media content and text messages)

To authenticate digital evidence, the proponent must show that "the [evidence] in question is what its proponent claims." N.C. R. Evid. 901. A party may offer testimony of a "[w]itness with [k]nowledge" that evidence is what it is claimed to be. *See* Rule 901(b)(1). Alternatively, a party may rely on circumstantial factors such as the "distinctive characteristics" of the evidence. *See* Rule 901(b)(4). "The burden to authenticate… is not high—only a prima facie showing is required." *State v. Ford,* 245 N.C. App. 510 (2016).

Authentication of digital communications involves two questions:

1. **Does the exhibit (screen capture, photo, video) accurately reflect the communication?**
2. **Is there reason to believe that the purported author wrote the communication?**

See State v. Clemons, 274 N.C. App. 401 (2020) ("To authenticate [social media] evidence …there must be circumstantial or direct evidence sufficient to conclude a **screenshot accurately represents the content** on the website it is claimed to come from and to conclude the **written statement was made by who is claimed** to have written it") (emphasis added).

The rules of evidence do not apply when addressing preliminary questions such as the authenticity of digital evidence (*see* Rule 104(a)). Thus, the court may consider the substance of the evidence offered or reliable hearsay in determining whether the evidence has been properly authenticated.

The following memory tool may be helpful in thinking about the various types of circumstantial evidence frequently used to authenticate digital communications.

SANDVAT

S is for **"Substance"**
How does the substantive content of the digital evidence itself tend to authenticate it? e.g., does the communication reference a particular event, nickname, or private topic, thereby tending to show that a particular person was the author?

A is for **"Account"**
Is there information about the account (username/login, digital properties, identifying information associated with account profile) that suggests ownership or authorship?

N is for **"Name"**
Is there a name or "handle" associated with the social media account that indicates authorship?

D is for **"Device"**
Who possessed the phone, computer, or device used to make the communication? What is distinctive about the hardware and is there information as to ownership or possession?

V is for **"Visuals"**
Does the webpage or account display photographs or videos that indicate ownership or authorship?

A is for **"Address"**
What can be learned from the IP address, physical address, or email address associated with the communication?

T is for **"Timing"**
When was the communication made? How does this relate to larger questions of chronology?

The following chart gives examples of adequate and inadequate foundations for digital communications. The types of circumstantial evidence used to authenticate the communication are emphasized.

ADEQUATE

Foundation for Digital Communication

***State v. Davenport*, No. COA24-330, __ N.C. App. __ (2025)**

In murder case, **Facebook messages (social media)** were properly authenticated where:

- A witness identified phone (**device**) found at the crime scene as decedent's
- Messages were found on the phone in a message thread under defendant's **name**
- A witness testified that the defendant did not have a phone and communicated with the witness and the decedent through Facebook Messenger app
- **Substance** of messages contained distinctive personal details such as name of decedent's son

***State v. Clemons*, 274 N.C. App. 401 (2020)**

In domestic violence protective order violation case, **Facebook comments made on victim's posts** were properly authenticated where:

- Although the comments originated from the victim's daughter's **account**, not defendant's, the daughter rarely commented on victim's Facebook page and the **style of communication** did not match that of the daughter
- The **timing** indicated that the defendant made the comments in that the daughter picked up the defendant upon his release from prison and the comments were posted shortly after
- Facebook messages occurred around the same **time** that voicemails were left on victim's phone; victim recognized defendant's voice in a threatening message

***State v. Ford*, 245 N.C. App. 510 (2016)**

In involuntary manslaughter trial involving dangerous dog, **screenshots of video and audio of a song**, both posted on **Myspace webpage (social media)**, were properly authenticated where:

- **Name of webpage** contained **defendant's nickname,** "Flex," and video depicting defendant's dog was captioned with **dog's name,** "DMX"
- Social media webpage contained distinctive **substantive content** such as **photos** of the defendant, **videos** of defendant's dog on a chain being called, and a song with lyrics denying that the victim's death was caused by defendant's dog
- A detective testified that he recognized the voice on the song as defendant's, and a neighbor testified that he heard the song coming from defendant's house

Ford cites to *United States v. Hassan,* 742 F.3d 104 (4th Cir. 2014) (**Facebook messages** properly authenticated where Facebook pages and Facebook **accounts** were tracked to defendant's mailing and email **addresses** using **IP (internet protocol) addresses)**.

***State v. Gray*, 234 N.C. App. 197 (2014)**

In robbery case, **text messages** between co-conspirators were properly authenticated where:

- **Substance** of text messages referred to location of trailer where victim was located, how many people were in the trailer, and the trailer door being open
- Officer testified that the text messages were found on defendant's cell phone (**device**) and that officer took a screenshot of them
- A **co-conspirator testified** that the screenshot accurately depicted the text messages she exchanged with the defendant

***State v. Taylor*, 178 N.C. App. 395 (2006)**

In kidnapping and murder case, **text messages** sent to and from victim's phone were properly authenticated where:

- A telecommunications employee testified that the messages were stored on the company server and accessible with access code
- The manager of cellphone store testified that he issued the victim the **cell phone (device)** with a particular phone number, and the text messages associated with that number were retrieved from the telecommunication company's server using the victim's access code

The **substance** of the text messages referred to the victim's first **name**, "Sean," as well as a 1998 Contour, which was the make of victim's car

INADEQUATE

Foundation for Digital Communication

***State v. Thompson*, 254 N.C. App. 220 (2017)**

In robbery case, Facebook messages allegedly sent between the defendant and victim referencing drug activity were properly excluded where:

- Defense attempted to use screenshot of messages as extrinsic evidence to impeach victim, but the subject of impeachment may have been collateral rather than material to the pending matter, and defense did not argue that it was material. *See State v. Hunt*, 324 N.C. 343 (1989) (extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern a collateral, rather than a material, matter)
- Defense did not attempt to lay a foundation for the text messages

Rankin v. Food Lion, 210 N.C. App. 213 (2011)

In hearing on motion for summary judgment in civil trial, printouts from internet webpages offered to show ownership of a Food Lion store were properly excluded where:

- Plaintiff failed to offer "any evidence tending to show what the documents in question were… " and failed to "make any other effort to authenticate [the] documents."

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AUTHENTICATION AND "ORIGINAL" WRITINGS

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May 11, 2010

I. Standard for Authenticating Verbal and Physical Evidence

A. GENERAL PRINCIPLES:

1. **Determine the relevance, or connection of the evidence to the case.**
2. **Determine whether there has been a sufficient preliminary showing from which a jury can rationally find that the evidence is what it purports to be? (Low threshold. Indulge in all reasonable assumptions/inferences. Judge is generally not bound by the Rules of Evidence.)**
3. **Judge generally has a limited screening role. Jury finally determines authenticity.**
4. **Be familiar with the illustrations, or examples of authentication set out in Rule 901.**
5. **Determine whether *other prerequisites to admissibility* have been met, including "Best Evidence Rule;" application of Hearsay Rule; Rule 403 balancing test (does probative value outweigh unfair prejudice?)**

B. CASES/STATUTES ON AUTHENTICATING VERBAL AND PHYSICAL EVIDENCE

1. Defendant's recorded confession:

State v. Detter, 298 N.C. 604 (1979)To lay a proper foundation for the admission of a defendant's recorded confession or incriminating statement made to police officers, the state must show (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and (7) the custody and manner in which the recording has been preserved since it was made. Whenever a recorded statement is introduced

into evidence, the seven steps set forth above should be followed to insure proper authentication of that recording.

2. Characteristics of the evidence, in conjunction with circumstances:

State v. Jacobs, 2005 N.C.App.LEXIS 2415 (2005) (UNPUBLISHED) Victim was shot with a .380 caliber firearm. During a consent search of defendant's mobile home, as to which defendant was the sole occupant, police found a box containing various receipts, including receipts for firearms. One receipt described a .380 pistol, including serial number, and had the last name of the defendant ("Jacobs") on it. The gun described in the receipt was never found. Authentic and admissible?

Authentication of documents is governed by N.C. Gen. Stat. § 8C-1, Rule 901 (2003), which provides in relevant part that the requirement that evidence be authenticated "is satisfied by evidence . . . that the matter in question is what its proponent claims." Rule 901(a). Further, the rule lists, as an example of proper authentication, evidence of an item's appearance, contents, or "other distinctive characteristics, taken in conjunction with circumstances." Rule 901(b)(4).

The receipt was relevant in that it tended to make it more likely that defendant had at some point been in possession of a firearm of the same caliber as the murder weapon.

Defendant also argued that admission of the receipt was prejudicial. "Certainly, the evidence was prejudicial to the defendant in the sense that any evidence probative of the State's case is always prejudicial to the defendant. The trial court did not abuse its discretion under the balancing test of Rule 403, however, in concluding in this case that the probative value of the [receipt] evidence outweighed any possible unfair prejudice."

3. Evidence not admitted, but used to refresh recollection:

State v. Gregory, 37 N.C.App. 693 (1978) Defendant contended that the purported transcript of a tape recording was improperly admitted without authentication and evidence was improperly allowed as to its contents. The record revealed that the document was not shown to the jury, but that it was used by the testifying officer Officer to "refresh his recollection." When it appeared that the witness was reading from it, defendant's objection had been sustained.

4. No appeal where no objection at trial:

State v. Terry, 329 N.C. 191 (1991) Mrs. Greene and her husband showed a deputy enlarged photographs of her that had been defaced. Mrs. Greene identified the photographs

as those defendant had given to Mr. Greene. Defendant did not object at trial to any lack of proper authentication. The trial court allowed admission of the photographs.

State v. York, 347 N.C. 79 (1997) Citing Terry, *supra*. the court held that assignments of error based on improper authentication of exhibits introduced at trial will not be heard unless objection was made in a timely manner at trial.

State v. McNeil, 165 N.C.App. 777 (2004) It was not plain error to admit copies of defendant's previous judgments during his habitual felon proceedings because defendant did not challenge the authenticity of the certified judgment sheets or the veracity of the convictions.

II. Identification of Self-Authenticating Documents

A. GENERAL PRINCIPLES:

1. **In applying the self-authenticating provisions of Rule 902, interpret "domestic" to include the United States, together with any of its states, territories or possessions.**
2. **Official signatures on public documents should be *under seal*.**
3. **Although Rule 902 eliminates extrinsic evidence as a condition precedent to admissibility, other admissibility requirements remain, e.g., relevancy, Rule 403 balancing test.**
4. **Opposing party is not foreclosed from disputing authenticity.**
5. **In addition to the documents and records set out in Rule 902, a self-authenticating *statute* may be applicable.**

B. CASES/STATUTES ON SELF-AUTHENTICATION

1. Testimony as to certified documents from another state:

State v. Carroll, 356 N.C.526 (2002), U.S.Sup.Ct. *cert. denied*, 2003 U.S.LEXIS 4928 (U.S., June 23, 2003). In a capital sentencing proceeding, a court clerk testified that the Florida documents were signed and certified in a manner verifying their authenticity. The documents were thus shown to be reliable. Even though the Rules of Evidence do not apply in a capital sentencing proceeding, the Court noted that even if the Rules of Evidence were applied here, the documents could have been properly admitted under Rule 902 concerning self-authenticating documents**.** Additionally, defendant did not object to expert testimony that defendant's fingerprints matched the fingerprints of the defendant in the Florida case. The Court concluded that the State fully established the reliability of the fingerprint card the expert used to conduct her fingerprint comparison.

2. Statutory Self-Authentication: SBI Lab Analysis:

N.C.Gen.Stat. §90-95 (g) and (g1):

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, ***the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication*** in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, that a report is admissible in a criminal proceeding in the superior court division or in an adjudicatory hearing in juvenile court in the district court division only if:

(1) The State notifies the defendant at least 15 days before trial of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and

(2) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the report into evidence.

Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report.

(g1) Procedure for establishing chain of custody without calling unnecessary witnesses. --

(1) For the purpose of establishing the chain of physical custody or control of evidence consisting of or containing a substance tested or analyzed to determine whether it is a controlled substance, *a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.*

(2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the

report provided for in subsection (g) of this section.

(3) The provisions of this subsection may be utilized by the State only if:

a. The State notifies the defendant at least 15 days before trial of its intention to introduce the statement into evidence under this subsection and provides the defendant with a copy of the statement, and

b. The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the statement into evidence.

(4) Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the statement.

3. SBI lab results admissible where statutory compliance:

State v. Baldwin, 161 N.C.App. 382(2003). N.C.Gen.Stat. § 90-95(g) (2001) provides that a State Bureau of Investigation laboratory report is admissible in a criminal proceeding without further authentication as evidence of the nature, quality, and amount of the substance analyzed if statutory prerequisites have been met.

4. N.C.Gen.Stat. §90-95(g) is an exception to the Hearsay Rule:

State v. Moore, 2002 N.C.App.LEXIS 1929(2002) (UNPUBLISHED) N.C.G.S. § 90-95(g), specifically provides that a chemical analysis report is admissible without further authentication, the legislature having created *an exception to Rule 801(c)* (the Hearsay Rule,) pertaining to the admissibility of reports of chemical analyses.

5. N.C.Gen.Stat. §90-95(g) not intended as *exclusive* procedure:

State v. Greenlee, 146 N.C.App. 729 (2001) N.C.G.S. § 90-95(g)-(g1) does not represent the *exclusive* procedure for authenticating a report on the chemical analysis of a controlled substance and for establishing chain of custody, and the laboratory report determining that the substance purchased from defendant was cocaine was admissible because: (1) N.C.G.S. § 90-95(g) merely establishes a procedure through which the State may introduce into evidence the laboratory report of a chemical analysis conducted on an alleged controlled substance without further authentication; (2) a forensic chemist testified and authenticated the report, making it irrelevant whether the State complied with the notice requirements set forth in

N.C.G.S. § 90- 95(g); and (3) the State's evidence as to the chain of custody was sufficient.

6. Statutory Self-Authentication: Chemical Analyst's Affidavit in **District Court**:

N.C.Gen.Stat. §20-139.1(e1), applicable only in District Court, provideds, in part:

(e1) Use of Chemical Analyst's Affidavit in District Court. -- An affidavit by a chemical analyst sworn to and properly executed before an official authorized to administer oaths is admissible in evidence without further authentication in any hearing or trial in the District Court Division of the General Court of Justice with respect to the following matters:

(1) The alcohol concentration or concentrations or the presence or absence of an impairing substance of a person given a chemical analysis and who is involved in the hearing or trial.

(2) The time of the collection of the blood, breath, or other bodily fluid or substance sample or samples for the chemical analysis.

(3) The type of chemical analysis administered and the procedures followed.

(4) The type and status of any permit issued by the Department of Health and Human Services that the analyst held on the date the analyst performed the chemical analysis in question.

(5) If the chemical analysis is performed on a breath-testing instrument for which regulations adopted pursuant to subsection (b) require preventive maintenance, the date the most recent preventive maintenance procedures were performed on the breath-testing instrument used, as shown on the maintenance records for that instrument.

7. Motor vehicle collision reports (accident reports) are ***not*** self-authenticating:

§ 20-166.1. Reports and investigations required in event of accident:
(i) Effect of Report. -- A report of an accident made under this section by a person who is not a law enforcement officer is without prejudice, is for the use of the Division, and shall not be used in any manner as evidence, or for any other purpose in any trial, civil or criminal, arising out of the accident. Any other report of an accident made under this section may be used in any manner as evidence, or for any

other purpose, in any trial, civil or criminal, as permitted under the rules of evidence. At the demand of a court, the Division must give the court a properly executed certificate stating that a particular accident report has or has not been filed with the Division solely to prove a compliance with this section.

III. Determining Whether New Technology has been Properly Authenticated

A. GENERAL PRINCIPLES

1. **Read (or at least peruse) the seminal Federal decision regarding the authenticity and admissibility of electronically stored information (ESI): Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D.Md. May 4, 2007).**
2. **Engage in Five-part Inquiry: (1) Is the evidence *relevant* under Rule 401?; (2) Has the evidence been *authenticated* in accordance with the standards of Rule 901 (or is it *self-authenticating* under Rule 902)?; (3) Is it *hearsay* under Rule 801? If so, does it fall within an exception under Rule 801, 803, or 804?; (4) Does it comply with the *"Best Evidence Rule"*?; and (5) Does its probative value outweigh unfair prejudice under Rule 403 *balancing test*?**

B. CASES INVOLVING NEW TECHNOLOGY

1. Computer Records; Printouts:

State v. Springer, 283 N.C. 627 (1973) The Court initially noted that N.C.Gen.Stat. § 55-37.1 and N.C.Gen.Stat. "§ 55A-27.1 (now repealed) were designed to give broad legislative approval to the use in evidence of corporate computer records. The Court noted, however, that these statutes did not deal with the special problems of reliability created by the use of computers. The Springer Court therefore construed them as authorizing the admission of corporate computer records under appropriate safeguards deemed sufficient to render them trustworthy. The Court opined that "the rules of evidence governing the admissibility of computerized business records should be consistent with the reality of current business methods and should be adjusted to accommodate the techniques of a modern business world, with adequate safeguards to insure reliability." The specific holding was that printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods

under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy. Computer printout evidence may be refuted to the same extent as business records made in books of account.

Applying the above rule, the Court concluded that the computer printout referred to in the testimony of the special investigator was inadmissible since no foundation was laid for its admission. In fact, the printout itself was not offered in evidence. Instead, the witness was permitted to testify as to the contents of the printout.
The Court determined that this evidence was likewise inadmissible under the best evidence rule.

Our Court of Appeals, applying the Springer rule, reached the opposite result where the printout was actually offered into evidence upon the laying of a proper foundation. See In re West, 60 N.C.App. 388 (1983).

IV. Applying the Original Writing Rule

A. GENERAL PRINCIPLES:

1. **Determine whether the writing is being offered to prove the *content* of the writing.**
2. **If content of the writing is at issue, the original must be produced, unless a statute or the Rules of Evidence provide an exception.**
3. **Exceptions as to admission of *duplicates* are set forth in Rule 1003. ((1) where genuine question of authenticity, or (2) unfair to admit duplicate under the particular circumstances.)**
4. **Exceptions permitting *"other evidence"* of the writings contents are set forth in Rule 1004. ((1) original lost or destroyed, (2) original not obtainable, (3) original in possession of opponent, or (4) the writing is a collateral matter.)**
5. **Rule 1005 excepts from the "original" writing requirement our public records, including data compilations.**
6. **Rule 1007 excepts from the "original" writing requirement a document as to which the opposing party admits that the copy offered in evidence is correct.**

B. CASES APPLYING THE "BEST EVIDENCE RULE"

1. Admission of writing before contents read to jury:

   State v. Walker, 343 N.C. 216 (1996) The "best evidence rule," Rule 1002 of the North Carolina Rules of Evidence, states: "To prove the content of a writing, . . . the original writing . . . is required, except as otherwise provided in these rules or by statute." N.C.G.S. § 8C-1, Rule 1002 (1992). Therefore, the trial court did not err in requiring that the writings be admitted into evidence before Haizlip could read their contents aloud.

2. Rule not applicable where writing used to refresh recollection:

   State v.Ysut Mlo, 335 N.C. 353 (1994) Here, the detective was not attempting to prove the contents of the tape recording or the transcript of the recorded statement given by defendant. Rather, he used the transcript of the recorded statement to *refresh his personal recollection* of defendant's responses to the questions asked. The "best evidence" rule does not apply to a document that serves only to refresh a witness' memory and is not offered into evidence.

3. Duplicate admitted where evidence as to non-production of original:

   Investors Title Ins. v. Herzig, 330 N.C. 681 (1992): Plaintiff introduced a duplicate of a document. The defendant contested the authenticity of the duplicate, arguing that the admitted document was textually inconsistent with the original. The defendant had refused to sign the original, and contended that the duplicate with its signature was neither indicative of an agreement nor authentic. The Supreme Court held that the plaintiff had satisfied the requirements of authenticity by providing evidence sufficient to support a finding by the jury that the document had shown the basis of an agreement. Even though the defendant's testimony was inconsistent as to the signing of various contracts, the credibility of his testimony was for the jury. Defendant then argued that no evidence existed to support the court's findings that plaintiff searched for the original. As contemplated in Rule 1004(2), the trial court
   found that the original could not be obtained by any available judicial process or procedure, thereby placing the duplicate within an exception to the Best Evidence Rule and allowing its admission into evidence. The jury made the final decision of whether the duplicate was convincing evidence.

4. Writing offered to show knowledge of its existence (and not its content):

   State v. Clark, 324 N.C. 146 (1989) The best evidence rule applies only when the *contents* of a writing are in question. Where an insurance policy was offered not to prove contents or terms, but simply to show defendant's knowledge that the policy existed, it was properly admitted. *See* N.C.G.S. § 8C-1, Rule 1004(4) (1988).

5. Original writing generally required where content is at issue:

   State v. Branch, 288 N.C. 514 (1975) The best evidence rule requires the production of the original writing if it is available in preference to other species of evidence *where the contents or terms of that writing are in question.*

6. Rule inapplicable where witness possesses independent knowledge:

   State v. Williams, 2004 N.C.App.LEXIS 2290 (UNPUBLISHED) Defendant argued that the trial court violated the best evidence rule by failing to have the minor child's diary entered into evidence in a sex abuse case. While noting that the best evidence rule applies only when the *'content'* of a writing, recording, or photograph is in question, the Court concluded that if the fact exists independently of such content, it may be proved by other competent evidence, such as oral testimony by one with knowledge, without producing or accounting for nonproduction of the original. In this case, the testifying witness offered a firsthand account of defendant's alleged abuse. Since a witness with personal knowledge testified to facts that exist independently of the diary which recorded those same facts, the best evidence rule does not apply.

7. "Real evidence" admitted where sufficient foundation:

   State v. Williamson, 146 N.C.App. 325 (2001) A pornographic videotape seized from defendant's residence, which one victim testified the victims watched with defendant, was properly authenticated, as real evidence, by having the officer who seized it identify it as the videotape he seized. The Court noted that the videotape was "real" evidence, or an object "offered as having played an actual, direct role in the incident giving rise to the trial." Authentication of real evidence "'can be done only by calling a witness, presenting the exhibit to him and asking him if he recognizes it and, if so, what it is.'" *Id.* (quoting 1 Stansbury's North Carolina Evidence § 26 (Brandis rev. 1973)). Moreover, "as there are no specific rules for determining whether an object has been sufficiently

identified, the trial judge possesses, and must exercise, sound discretion."

8. Best evidence rule inapplicable to "inscribed chattels":

State v. Powell, 61 N.C.App. 124, *disc. review denied*, 308 N.C. 194 (1983) The defendant challenged the testimony of a detective as to the identity of stolen tractors. The court held that the best evidence rule was inapplicable, concluding that the rule did not require that actual tractor serial number inscription to be introduced, and that the witness' oral testimony as to the serial numbers was competent to establish the inscription of the serial numbers on the tractors. Specifically, the Court held that the best evidence rule did not apply to *inscribed chattels.*

V. Ruling on Admissibility and Use of Charts and Summaries

A. GENERAL PRINCIPLES:

1. **Under Rule 1006, where the writings or recordings are voluminous and cannot conveniently be examined in court, a qualified witness may testify to the results of his/her examination of the documents.**
2. **The originals, or duplicates, must be made available to opposing party for examination and/or copying.**
3. **Judge may also require production of the writings or recordings in court.**
4.

B. Cases Regarding Charts/Summaries

1. Video summary admissible where jury informed of editing:

Broadbent v. Allison, 176 N.C.App. 359 (2006) Voluminous videotape recordings were edited and presented in summary form. Jury was informed that the videos had been edited from many hours of tape recorded over a period of several months.

2. Generation of chart during trial governed by Rule 611, not Rule 1006:

Marley v. Graper, 135 N.C.App. 423 (1999) Use of demonstrative evidence (in this instance a chart prepared by plaintiffs during the testimony of the adverse witness) is subject to the discretionary control of the trial judge.

3. Trial judge may exclude a summary not fairly representative of the underlying document:

> **Coman v. Thomas Mfg. Co.**, 105 N.C.App. 88 (1992) Summaries of these trip reports also contained additional information as to the hourly time of departure and arrival of the drivers. This information was based upon speculation by the witness and was not an accurate summarization of the underlying material. The trial court properly excluded the summaries.

Tab 9: Privileges

ADVANCED CRIMINAL EVIDENCE: PRIVILEGES

Paul M. Newby, Associate Justice of the Supreme Court of North Carolina
May 21, 2015

Rule 501, North Carolina Rules of Evidence: "Except as otherwise required by the Constitution of the United States, the privileges of a witness, person, government, state or political subdivision thereof shall be determined in accordance with the law of this State."

OVERVIEW

1) Purpose behind privilege
2) Sources of privilege: Constitution, common law, statute
3) Analysis of privilege:
   a) Who may claim the privilege?
   b) When may it be invoked?
   c) What is the scope of the privilege?
   d) In what way is the privilege limited?
   e) When is the privilege waived?
   f) If privileged information is disclosed during trial, is a cure required? If so, what?

PRIVILEGE AGAINST SELF-INCRIMINATION

1) Constitutional
   a) Fifth Amendment of the U.S. Constitution
   b) Article I, Section 23 of the N.C. Constitution
2) Analysis of privilege
   a) Who: protects individuals
   b) When: any type of proceeding
   c) Scope: Covers admissions of guilt and any answer that might tend to prove or provide a clue as to guilt, but there are limits
   d) Waiver: *Miranda* rights

ATTORNEY-CLIENT PRIVILEGE

1) Common law
   A communication is privileged if made:
   i) During attorney-client relationship;
   ii) In confidence;
   iii) Regarding a matter for which attorney is professional consulted; and
   iv) In the course of seeking/giving legal advice.
2) Analysis of privilege
   a) Who: Belongs to the client but attorney should claim it
   b) When: Whenever disclosure is sought
   c) Scope: All communications between client and attorney in confidence
   d) Limits: can be limited by the court
   e) Waiver: Express or implied
2) **Work Product**: Even if material is not privileged, it may be protected from disclosure as attorney work product

HUSBAND-WIFE PRIVILEGE

1) Statutory
2) Analysis of privilege
   a) Who: The communicating spouse is protected from disclosure of the communication by the other spouse.
   b) When: may be invoked in any civil, criminal, or judicial proceeding
   c) Scope: Covered marital communication, even after couple divorces
   d) Limits
   e) Waiver: implied waiver – no objection

CLERGYMAN-COMMUNICANT PRIVILEGE

1) Statutory
   Communicant must be
   i) seeking advice and counsel of minister and
   ii) The information is entrusted as a confidential communication
2) An absolute privilege

ADDITIONAL STATUTORY PRIVILEGES

1) Physician-patient
2) Psychologist-patient
3) School counselor
4) Licensed marital and family therapist
5) Social worker
6) Counselor
7) Optometrist-patient
8) Peer support group
9) Journalist (includes newspapers and other news agencies)
10) Agents of rape crisis centers and domestic violence programs
11) Nurse

ADVANCED CRIMINAL EVIDENCE: PRIVILEGES[1]

Paul M. Newby
Associate Justice
Supreme Court of North Carolina
North Carolina Judicial College
Chapel Hill, NC
May 21, 2015

Rule 501, North Carolina Rules of Evidence

"Except as otherwise required by the Constitution of the United States, the privileges of a witness, person, government, state or political subdivision thereof shall be determined in accordance with the law of this State."

OVERVIEW

Certain communications are protected from compulsory disclosure because both their content and context involve a natural expectation of privacy. The privileges protecting these communications are rooted in the federal and state constitutions, common law, and statutes. This manuscript discusses, in the context of criminal evidence in North Carolina, the privilege against self-incrimination, the attorney-client privilege, the husband-wife privilege, and the physician-patient privilege, as well as noting additional statutory privileges.

When confronted with a claim of privilege, the court should apply a basic rubric addressing who, when, scope, limits, and waiver. If the privilege applies, yet some information has been exposed, the court must consider how to cure the disclosure. The court must also be mindful of the interplay between privileges and our Rules of Professional Conduct.

PRIVILEGE AGAINST SELF-INCRIMINATION

Brandis & Broun § 126.

General Rule. The right against self-incrimination means that a witness is privileged, or not compellable, to answer any question that may incriminate him. This privilege is recognized by both the federal and state constitutions. U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); N.C. Const. art. I § 23 ("In all criminal prosecutions, every person charged with crime has the right to . . . not be compelled to give self-incriminating evidence . . . ."); *see also Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (making the Fifth Amendment of the U.S. Constitution applicable to the states by the Fourteenth Amendment).

Who may claim privilege. The privilege protects individuals—whether or not a witness or a criminal defendant. *United States v. Kordel*, 397 U.S. 1, 90 S. Ct. 763,

[1]This manuscript is derived in large part from a previous manuscript on this topic, written, and generously shared with me by the Honorable W. David Lee, Senior Resident Superior Court Judge, District 20B. My senior law clerk Elizabeth Henderson also provided valuable assistance in developing this manuscript and accompanying presentation.

25 L. Ed. 2d 1 (1970). It is personal to a witness and may be claimed only by him, not a person for whom he is testifying. *Boyer v. Teague*, 106 N.C. 576, 11 S.E. 665 (1890).

When it may be invoked. The privilege may be invoked in any proceeding: civil, criminal, administrative, judicial, investigatory, or adjudicatory. *Maness v. Meyers*, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975)

Scope. The privilege covers direct admissions of guilt and any answer that might tend to prove or provide a clue ultimately incriminating. It does not include silence without a direct invocation of one's rights. *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed .2d 376 (2013) (allowing comment on defendant's silence in response to noncustodial police questioning and requiring defendant to expressly invoke the privilege against self-incrimination in order to subsequently benefit from it).

Limits. Acts that are neither "testimonial" nor "communicative" such as being fingerprinted, photographed, measured, giving a voice or handwriting sample, appearance in court, standing, walking, or making a particular gesture are not covered by the privilege. *See Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Relatedly, a defendant's refusal to submit to such procedures does not violate the privilege. *State v. Paschal*, 253 N.C. 795, 117 S.E.2d 749 (1961).

DNA evidence. Although taking physical specimens, such as blood, urine, or saliva, does not implicate the privilege against self-incrimination, such nontestimonial means of identification may not be obtained in violation of the Fourth Amendment—*i.e.*, by means of an "unreasonable search or seizure." *See State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986). *See also Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (blood alcohol tests are not per se admissible under an exigent circumstances exception and must be subject to a totality of the circumstances analysis for nonconsensual, warrantless blood draws). Section 15A-273 provides for the issuance of a nontestimonial identification order (NIO) upon a showing of the existence of "a minimal amount of objective justification, something more than an 'unparticularized suspicion or hunch.' " *State v. Pearson*, 356 N.C. 22, 28-29, 566 S.E.2d 50, 54 (2002) (citation and quotation marks omitted). *See also State v. McMillan*, 214 N.C. App. 320, 718 S.E.2d 640 (2011) (holding trial court properly concluded that defendant freely and voluntarily consented to swabbing of mouth, photographs of his injuries, and collection of his belt and shoes).

Photo identifications. While these are not covered by the privilege, defendant does have a right to have counsel present if done after the initiation of judicial proceedings. *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

Papers and documents. The privilege does not protect against compulsory production of certain documents merely because they tend to incriminate. *Couch v. United States*, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973). The protection afforded by the privilege is confined to personal records prepared by the person claiming privilege and retained in his possession. *Fisher v. United* States, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed.

2d 39 (1976). Lawful seizure does not violate the privilege. *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). Voluntary production waives the privilege. *See State v. Hollingsworth*, 191 N.C. 595, 132 S.E. 667 (1926); *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012) ("[T]he act of Doe's decryption and production of the contents of the hard drives would sufficiently implicate the Fifth Amendment privilege.").

Waiver. The privilege can be waived by voluntarily giving testimony, whether in court or out of court.

Testifying defendant. The privilege is not waived by testifying before a jury when the privilege is a defense on the merits to the crime charged. *See, e.g.*, *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969) (failing to pay taxes under marijuana statute); *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968) (failing to pay gambling tax).

Testifying witness. When a witness testifies, the privilege is not waived until that witness gives a specific answer to a question that might incriminate him. *Ward v. Martin*, 175 N.C. 287, 95 S.E. 621 (1918).

***Miranda* rights.** Prior to a custodial interrogation, a defendant must be advised that, among other things, "he has the right to remain silent [and] that anything he says can be used against him in a court of law." *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966). No precise language is required as long as the language used conveys the right. *Florida v. Powell*, 559 U.S. 50, 130 S. Ct. 1195, 175 L. Ed .2d 1009 (2010). But, the witness must explicitly invoke the right. *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013) ("[A] defendant normally does not invoke the privilege by remaining silent.").

Custodial Interrogation. The rights protected by *Miranda* and N.C.G.S. § 7B-2101 apply only to custodial interrogations. *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997). To determine whether a defendant is in custody for *Miranda* purposes, the test is whether a reasonable person in the suspect's position would feel free to leave or would feel compelled to stay. *See State v. Hicks*, 333 N.C. 467, 478, 428 S.E.2d 167, 173 (1993). Questioning a prisoner does not necessarily convert a noncustodial situation to one in which *Miranda* applies. *Howes v. Fields*, ___ U.S. ___, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012). *See also State v. Braswell*, 222 N.C. App. 176, 181, 729 S.E.2d 697 (2012) ("[T]raffic stops are not 'custodial interrogations' and thus not subject to the mandates of *Miranda*.").

Juveniles. A juvenile in custody must be advised before questioning that: (1) he has the right to remain silent; (2) any statement he makes can be and may be used against him; (3) he has a right to have a parent, guardian, or custodian present during questioning; (4) he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation. N.C.G.S. § 7B-2101(a). A juvenile does not have a right to speak to a relative who is not a guardian

or custodian. *State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007). The Supreme Court of North Carolina recently allowed discretionary review of *State v. Benitez*, __ N.C. App. __, 768 S.E.2d 201 (2014), to determine whether the presence of a foreign juvenile defendant's uncle, with whom the defendant was living, was sufficient to satisfy the requirements of N.C.G.S. § 7B-2101(b). That provision states that "no in-custody admission or confession . . . may be admitted into evidence unless . . . made in the presence of the juvenile's parent, guardian, custodian, or attorney."

A juvenile's age should be considered when it is known to the officer or readily apparent and can influence a determination of whether a reasonable person would believe they were free to leave. *J.D.B. v. North Carolina,* ___ U.S. ___, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). Before a trial court may admit into evidence a statement resulting from the custodial interrogation of the juvenile, "the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." N.C.G.S. § 7B-2101(d).

Admissibility of Miranda Waivers. When faced with the issue of the admissibility of a defendant's confession, the trial court should conduct a *voir dire* hearing to determine whether a defendant waived his *Miranda* rights, and its findings of fact are binding upon appellate review. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984). Our Supreme Court has stated:

> The validity of a waiver as knowingly and intelligently executed depends on the specific facts and circumstances of the particular case, including the background, conduct, and experience of the accused. A defendant's waiver is valid if it is determined that his decision not to rely on his rights was not the product of coercion, that he was aware at all times that he could remain silent and request counsel, and that he was cognizant of the intention of the prosecution to use his statements against him.

State v. Barnes, 345 N.C. 184, 243, 481 S.E.2d 44, 77 (1997) (citing *Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988)). The State "bears the burden of demonstrating that the waiver was knowingly and intelligently made." *State v. Simpson*, 314 N.C. 359, 334 S.E.2d 53 (1985). Even after having properly invoked the privilege, the defendant may subsequently waive it. *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010) (break in custody of 14 days sufficient to allow subsequent waiver and questioning).

Comment prohibited. Once invoked, the Fifth Amendment prohibits comment on the defendant's silence. *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965); *State v. Moore*, 366 N.C. 100, 726 S.E.2d 168 (2012) (finding error in testimony referring to the defendant's exercise of his right to silence and its admission by the trial judge); *State v. Richardson*, ___ N.C. App. ___, 741 S.E.2d 445 (2013) (concluding the prosecutor's final argument to the jury impermissibly emphasized the fact that the defendant chose to remain silent after being placed under arrest and advised of his Miranda rights). *But see State v.*

Rogers, 355 N.C. 420, 452, 562 S.E.2d 859, 879 (2002) ("A prosecutor's argument pointing out a defendant's failure to answer the State's evidence " 'is not a comment on the defendant's failure to testify.' ").

Statutory immunity. Some testimony is required by statute if the witness is granted immunity. *See, e.g.*, N.C.G.S. § 1-357 (proceedings supplemental to execution of civil judgment); *id.* § 16-2 (gambling); *id.* § 49-6 (mother of child born out of wedlock).

ATTORNEY-CLIENT PRIVILEGE

Brandis & Broun § 129.

General Rule. A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege. It is, however, a qualified privilege subject to the general supervisory powers of the trial court. *State v. McIntosh*, 336 N.C. 517, 444 S.E.2d 438 (1994).

Who may claim privilege. The privilege belongs to the client. When the attorney is a witness and the client is neither present nor a party, the client's disapproval is presumed, and thus the attorney may claim the privilege on the client's behalf. N.C. Rev. R. Prof. Conduct, 1.6(d)(14) (2014).

When it may be invoked. The privilege exists when communications are made after an attorney-client relationship has begun. *State v. Smith*, 138 N.C. 700, 50 S.E. 859 (1905). Even if the attorney has not been specially retained for the particular matter, the privilege exists if an attorney-client relationship exists and the client made the communication seeking legal advice. *Guy v. Avery Cty. Bank*, 206 N.C. 322, 173 S.E. 600 (1934). The privilege may be claimed whenever disclosure of privileged communications is sought, whether in litigation or not. When the client sues the attorney, or otherwise charges the attorney with professional incompetence, the client may not claim the privilege. N.C. Rev. R. Prof. Conduct, 1.6(b)(6); *see also State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990) (defendant waived the benefits of both the attorney-client privilege and the work product privilege, but only with respect to matters relevant to his allegations of ineffective assistance of counsel); *State v. Buckner*, 351 N.C. 401, 527 S.E.2d 307 (2000).

Scope. The privilege applies only to communications made in confidence. *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539 (1973) (rendering communication not confidential when the wife's presence was not essential to the communication). The privilege exists if it was made between the attorney and the client or in the presence of those acting as the attorney's or client's agents.

Limits. The trial court determines the propriety of a claim of privilege. N.C. R. Evid. 104(a). This can be done by an initial inquiry, including an in camera inspection. *See State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977). The privilege is strictly construed to those matters covering its policy. The identity of a client is not privileged. *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978).

Mere assertion of the privilege is insufficient. The party asserting the privilege "can only meet its burden by providing some *objective* indicia that the exception is applicable under the circumstances." *Multimedia Publ'g of N.C., Inc. v. Henderson Cty.*, 136 N.C. App. 567, 525 S.E.2d 786, *rev. denied*, 351 N.C. 474, 543 S.E.2d 492 (2000).

Common interest; joint client. In North Carolina, our courts recognize the common interest or joint client doctrine, noting that "as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged inter sese." *Dobias v. White*, 240 N.C. 680, 685, 83 S.E.2d 785, 788 (1954). The rationale for the doctrine rests upon the non-confidential nature of communications between the parties during the tripartite relationship. *But see Raymond v. N.C. Police Benevolent Ass'n, Inc.*, 365 N.C. 94, 721 S.E.2d 923 (2011) (holding that a tri-partite attorney-client relationship existed between former officer, association, and officer's attorney selected by association and in camera review was the appropriate remedy to determine which communications between officer, association, and counsel were protected by attorney-client privilege).

In *Nationwide Mutual Fire Insurance Co. v. Bourlon*, 172 N.C. App. 595, 617 S.E.2d 40 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006), the Court of Appeals held that the common interest or joint client doctrine applies to the context of insurance litigation in North Carolina. Therefore, where an insurance company retains counsel for the benefit of its insured, those communications related to the representation and directed to the retained attorney by the insured are not privileged as between the insurer and the insured. The attorney-client privilege still attaches, however, to those communications unrelated to the defense of the underlying action, as well as those communications regarding issues adverse between the insurer and the insured, such as coverage issues.

Will contest. When all parties claim under the client in a contest over a deceased client's will, no party has the privilege regarding communications between the client and the attorney. *In re Kemp's Will*, 236 N.C. 680, 73 S.E.2d 906 (1953).

Communications related to a third party when client is deceased. When a client is deceased and a party makes a non-frivolous assertion that the attorney client privilege does not apply, a trial court may conduct an in camera review of the substance of the communications. To the extent any portion of the communications between the attorney and the deceased client relate *solely* to a third party, such communications are not privileged. If the trial court finds that some or all of the communications are outside the scope of the privilege, the trial court may compel the attorney to provide the substance of the communications to the State for its use in a criminal investigation, consistent with certain procedural formalities. To the extent the communications relate to a third party *but also affect the client's own rights or interests* and thus remain privileged, such communications may be revealed only upon a clear and convincing showing that their disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation. *In re Miller*, 358 NC 364, 595 S.E.2d 120 (2004).

Billing records. Billing records do not automatically fall under the attorney-client privilege. *In re Grand Jury Proceedings*, 33 F.3d 342 (4th Cir. 1994). The attorney-client privilege, however, *may* protect information in a billing record showing the "motive of the client in seeking representation, litigation strategy, or the specific nature of the service provided, such as researching particular areas of law." *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir.), *cert. denied*, 528 U.S. 891, 145 L. Ed. 2d 181, 120 S. Ct. 215 (1999) (citations omitted).

Open Meetings Law Exception. Section 143-318.11(3) authorizes closed sessions:

> To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

With the open meetings law exception, the burden is on the governmental unit to demonstrate that the attorney-client exception applies. Discussions regarding the drafting, phrasing, scope, and meaning of proposed enactments would be permissible during a closed session, but as soon as discussions move beyond legal technicalities and into the propriety and merits of proposed enactments, the legal justification for closing the session ends. *Multimedia Publ'g of N.C., Inc.*, 136 N.C. App. 567, 525 S.E.2d 786.

Waiver. The privilege belongs to the client and may be waived by him. *State v. Bronson*, 333 N.C. 67, 423 S.E.2d 772 (1992). Such waiver may be express or implied. In *State v. Campbell*, 177 N.C. App. 520, 629 S.E.2d 345 , *disc. review denied*, 360 N.C. 578, 635 S.E.2d. 902 (2006), the defendant argued on appeal that defense counsel breached the attorney-client privilege by telling the jury that the defendant had lied to his attorneys. The defendant, citing *In re Miller*, contended that the lies he told his counsel were confidential communications, and those communications were "privileged and may not be disclosed." The appellate court held, however, that since defendant admitted he lied to his attorneys in both his direct examination and cross-examination at trial, he had waived this privilege.

Privilege distinguished from attorney work-product. Rule 26(b)(3) of the North Carolina Rules of Civil Procedure provides:

> Trial Preparation; Materials. -- Subject to the provisions of subsection (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that

> other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

In civil matters, this "work product," or trial preparation exception of Rule 26(b)(3), although not a *privilege*, is a "qualified immunity" and extends to all materials prepared "in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent." The protection covers materials prepared after the other party has secured an attorney and those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Materials prepared in the ordinary course of business are not protected, nor does the protection extend to *facts* known by any party. *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976). As related to the agent-attorney, our courts narrowly construe the work product doctrine, consistent with its purpose, which is to safeguard the lawyer's work in developing his client's case. *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 628 S.E.2d 458 (2006). *See also Dickson v. Rucho*, 366 N.C. 332, 737 S.E.2d 362 (2013) (holding that a statute relating to redistricting communications did not waive the right of legislators to assert attorney-client privilege or work-product doctrine in litigation concerning redistricting).

Under Rule 26(b)(3), the work product exception may apply to materials prepared in anticipation of *any* litigation, even if the earlier litigation was between different parties.

As is generally the rule applicable to a trial court's discovery order, the appellate courts will apply an "abuse of discretion" standard in determining whether the work product, or trial preparation exception applies. *Isom*, 177 N.C. App. 406, 628 S.E.2d 458. To demonstrate such abuse, the trial court's ruling must be shown to be "manifestly unsupported by reason" or not the product of a "reasoned decision." *Nationwide Mut. Fire Ins. Co.*, 172 N.C. App. 595, 617 S.E.2d 40.

The work product immunity is ordinarily a *qualified immunity*. If a party seeking information protected by the work product doctrine demonstrates a substantial need and inability to obtain the information elsewhere, disclosure may be required. In *Isom*, the plaintiff's cause of action and theory of the case was based on proving that the plaintiff was fired for refusing to sign a particular document. Since the bank was the only party in possession of this particular document, the appellate court upheld the trial judge's determinations of substantial need and inability to otherwise obtain the document. Nonetheless, *absolute immunity* still protects disclosure "of mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation." Rule 26(b)(3).

Work product in criminal proceedings. Separate statutes address prosecution and defense work product in criminal matters.

> **§ 15A-904. Disclosure by the State -- Certain information not subject to disclosure**
>
> (a) The State is not required to disclose written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements, and closing arguments. Disclosure is also not required of legal research or of records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by members of the prosecuting attorney's legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff.
>
> (a1) The State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law.
>
> (a2) The State is not required to provide any personal identifying information of a witness beyond that witness's name, address, date of birth, and published phone number, unless the court determines upon motion of the defendant that such additional information is necessary to accurately identify and locate the witness.
>
> (a3) The State is not required to disclose the identity of any individual providing information about a crime or criminal conduct to a Crime Stoppers organization under promise or assurance of anonymity unless ordered by the court. For purposes of this Article, a Crime Stoppers organization or similarly named entity means a private, nonprofit North Carolina corporation governed by a civilian volunteer board of directors that is operated on a local or statewide level that (i) offers anonymity to persons providing information to the organization, (ii) accepts and expends donations for cash rewards to persons who report to the organization information about alleged criminal activity and that the organization forwards to the appropriate law enforcement agency, and (iii) is established as a cooperative alliance between the news media, the community, and law enforcement officials.

(a4) The State is not required to disclose the Victim Impact Statement or its contents unless otherwise required by law. For purposes of this Chapter, a Victim Impact Statement is a document submitted by the victim or the victim's family to the State pursuant to the Victims' Rights Amendment.

(b) Nothing in this section prohibits the State from making voluntary disclosures in the interest of justice nor prohibits a court from finding that the protections of this section have been waived.

(c) This section shall have no effect on the State's duty to comply with federal or State constitutional disclosure requirements.

§ 15A-906. Disclosure of evidence by the defendant--Certain evidence not subject to disclosure

Except as provided in G.S. 15A-905(b) this Article does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution witnesses or defense witnesses, to the defendant, his agents, or attorneys.

HUSBAND-WIFE PRIVILEGE

Brandis & Broun §§ 127-28.

N.C.G.S. § 8-56. Husband and wife as witnesses in civil action

In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

N.C.G.S. § 8-57. Husband and wife as witnesses in criminal actions

(a) The spouse of the defendant shall be a competent witness for the defendant in all criminal actions, but the failure of the defendant to call such spouse as a witness shall not be used against him. Such spouse is subject to cross-examination as are other witnesses.

(b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:

(1) In a prosecution for bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;

(2) In a prosecution for assaulting or communicating a threat to the other spouse;

(3) In a prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;

(4) In a prosecution for abandonment of or failure to provide support for the other spouse or their child;

(5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any child of either spouse who is born out of wedlock or adopted or a foster child.

(c) No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.

Overview. At common law, husband and wife could not testify in an action to which either was a party. The English Act of 1853 abolished this disqualification, but enacted that "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

General rule in civil actions. Section 8-56, relating only to *civil proceedings*, while making spouses competent and compellable under all circumstances to testify, includes provisions according privilege to confidential communications between them during the marriage.

General rule in criminal actions. Although the spouse of the defendant is always a *competent* witness, (1) the defendant's failure to call the witness cannot be used against him or her, and (2) the spouse of the defendant is *not compellable* to testify for the State unless one of the five exceptions in (b) of the statute applies. Section 8-57 includes, however, the statutory privilege relating to confidential communications between husband and wife.

Summary. Thus, in both civil and criminal proceedings, adverse spousal testimony is allowed (and even compellable by the state in those circumstances set forth in any of the five situations set out in section 8-57(b)). Both statutes, however, preserve the protection from disclosure of confidential marital communications.

Who may claim the privilege. Neither spouse may be compelled to disclose a confidential communication between husband and wife. The communicating spouse is protected from disclosure of the communications by the other spouse. *Whitford v. North State Life Ins. Co.*, 163 N.C. 223, 79 S.E. 501 (1913).

When may it be invoked. The privilege may be invoked in any civil, criminal, or judicial proceeding.

Scope. The privilege covers confidential communications made during marriage.

Divorce. Marital communications are privileged, even after the couple divorces. *State v. Jolly*, 20 N.C. 108 (1938).

Form of the communication. Tape recordings of confidential marital communications, as well as letters are also within the privilege. *See Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967). Acts of sexual intercourse are also "confidential communications" within the meaning of the statutory privilege. *Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972). Acts accompanying statements intended as confidential marital communications are also within the privilege. *State v. Holmes*, 101 N.C. App. 229, 398 S.E.2d 873 (1990), *aff'd*, 330 N.C. 826, 412 S.E.2d 660 (1992) (holding that a wife's testimony regarding the defendant's removal of the gun was inadmissible over defendant's objection when induced by the confidence of the marital relationship).

Limits. The scope of the privilege is limited by the nature of the communication and when it is made.

Nature of communication; subsisting marriage. A communication made in the known presence of a third party is not protected. Similarly, a person who obtains writings of one of the spouses or overhears a communication between the spouses may testify, as long as that person did not do so through the connivance of one of the spouses. *Hicks*, 271 N.C. 204, 155 S.E.2d 799. Communications related to business matters which by their nature might be expected to be divulged are also not privileged. *Whitford v. N. State Life Ins. Co.*, 163 N.C. 223, 79 S.E. 501 (1913). Casual remarks not made in the confidence of the marriage are not privileged. In *State v. Gladden*, 168 N.C. App. 548, 608 S.E.2d 93, *appeal dismissed, disc. rev. denied*, 359 N.C. 638, 614 S.E.2d 312 (2005), the Court of Appeals upheld the admission of the wife's testimony that while her husband (the defendant) was retrieving a gun he told her that he was using the gun "to help grandpa kill some chicken hawks."

Communications "during the marriage." In *State v. Carter*, 156 N.C. App. 446, 577 S.E.2d 640 (2003), *cert. denied*, 543 U.S. 1048, 125 S. Ct. 868, 160 L. Ed. 2d 784 (2005), the defendant's wife refused to testify for the State at trial. She had given the police a videotaped statement almost three years after the end of her marriage to the defendant. The Court of Appeals held that the privilege did not apply to certain communications referred to in the video that had occurred approximately one week *before the marriage*. Other communications, however, referred to in the same post-marriage video, relating to other criminal conduct, but which had taken place *after the marriage*, were held to be within the privilege. Still other post-marriage communications on the same video were properly admitted when the defendant had made the statements to his wife in the presence of a third party, the court determining in this latter instance that the privilege had been waived.

No reasonable expectation of privacy. In *State v. Rollins*, 363 N.C. 232, 675 S.E.2d 334 (2009), the incarcerated defendant admitted to murder during several recorded conversations with his wife in the public visiting areas of three prisons. The defendant claimed the conversations were confidential communications protected by the marital privilege. The Supreme Court held the marital privilege did not apply because the defendant did not have a reasonable expectation of privacy in the public visiting areas. *See also State*

v. Terry, 207 N.C. App. 311, 699 S.E.2d 671 (2010) (finding marital privilege inapplicable to conversations between the defendant and his wife in county sheriff's department).

Waiver.

Holder of the privilege. The non-witness spouse holds the privilege and may prevent the witness spouse from testifying about confidential communications. The non-witness spouse is deemed to waive the privilege, however, when the witness spouse testifies without objection regarding the communication. *Scott v. Kiker*, 59 N.C. App. 458, 297 S.E.2d 142 (1982).

Statutory waiver in child abuse matters. Section 8-57.1 statutorily waives the privilege, in both civil and criminal matters, when the evidence sought relates either (1) to the abuse or neglect of a child under the age of 16 or (2) an illness of or injuries to such child or a cause in any proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes.

CLERGYMEN-COMMUNICANT PRIVILEGE

N.C.G.S. § 8-53.2. Communications between clergymen and communicants

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

Absolute privilege. This privilege is absolute. A trial court has no discretion to compel disclosure when the privilege exists.

Two statutory requirements. (1) The communicant must be seeking the counsel and advice of his minister and (2) the information must be entrusted to the minister as a confidential communication. When a minister was a personal friend of defendant and initiated contact with defendant instead of defendant seeking the advice of the minister, the privilege does not apply. *State v. Andrews*, 131 N.C. App. 370, 507 S.E.2d 305 (1998), *disc. rev. denied*, 350 N.C. 100, 533 S.E.2d 471 (1999).

PHYSICIAN-PATIENT PRIVILEGE

Brandis & Broun § 130.

N.C.G.S. § 8-53. Communications between physician and patient

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to

> enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

General Rule. At common law, communications from patients to physicians were not privileged. *State v. Martin*, 182 N.C. 846, 109 S.E. 74 (1921). Section 8-53 amends the common law rule and provides for a qualified privilege, granting power to the trial judge to compel disclosure of communications from patient to physician "if necessary to a proper administration of justice." Compelling disclosure is intended to apply to "exceptional" factual situations. *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E.2d 67 (1964). The judge's decision to compel disclosure is reversible only for abuse of discretion. *See State v. Drdak*, 330 N.C. 587, 591-92, 411 S.E.2d 604, 607 (1992) (allowing disclosure if necessary to the proper administration of justice and requiring the defendant to show an abuse of discretion in order to successfully challenge that ruling).

Who may claim the privilege. The privilege belongs to the patient alone. It is the patient's privilege to waive, and that waiver cannot be used to the advantage of another. *See, e.g.*, *Martin*, 182 N.C. 846, 109 S.E. 74 (holding a criminal defendant could not object to disclosure by victim's physician).

When may it be invoked. The privilege may be invoked anytime disclosure of privileged information is sought.

Scope. The privilege covers communications between patient and physician as well as knowledge gained by the physician through observing or examining the patient in the physician's professional capacity. *Smith v. John L. Roper Lumber Co.*, 147 N.C. 62, 60 S.E. 717 (1908). The privilege also extends to entries in hospital records made by physicians, or at their direction, when those entries pertain to communications and information obtained by the physician in attending to the patient. *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962). As long as they are assisting or acting under the direction of a treating physician, the privilege covers nurses, technicians, and others. *State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975).

Limits. The statute creates a qualified, as opposed to absolute, privilege. A trial judge has discretion to compel disclosure even when the information otherwise qualifies as privileged "if in his opinion the same is necessary to a proper administration of justice."

> **Victim's medical records.** A trial court may examine the sealed medical records of a victim. In *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987), the United States Supreme Court recognized the defendant's Sixth Amendment right to confront witnesses at trial, but held that the defendant was entitled only to the victim's medical records that the

trial court determined to be material in that they were either (1) exculpatory of defendant's guilt or (2) material to defense or punishment. In a criminal proceeding, when the State does not possess the victim's records, the defendant may use a subpoena *duces tecum* directed to the victim's medical provider(s). If the provider asserts the privilege under section 8-53, the trial judge should make an *in camera* review pursuant to *Ritchie*.

Manner of disclosure. The scope and method of disclosure can be problematic for a trial judge faced with volumes of medical records spanning many years. A developing practice, although not specifically addressed in our appellate decisions, is for the trial judge to delegate to the attorneys, as "officers of the court" the in camera review of such records. Justification for this practice is that the attorneys are in the best position to determine whether the records are material—*i.e.*, whether the records are either exculpatory or material to defense or punishment in the case.

Waiver. The doctor is duty-bound to protect the communications, a duty he cannot waive. The privilege is for the benefit of the *patient* and can be waived only by the patient. Such waiver, however, may be express or implied. A waiver, as well as a court inquiry on the necessity of compelling disclosure, may be either before trial or during trial.

Implied waiver. The privilege is impliedly waived when (1) the patient fails to object to testimony on the privileged matter, (2) the patient calls the physician as a witness and examines him or her as to the patient's physical condition, (3) the patient testifies to the communication between himself or herself and the physician, or (4) a patient by bringing an action, counterclaim, or defense directly places his or her medical condition at issue. *Mims v. Wright*, 157 N.C. App. 339, 578 S.E.2d 606 (2003). The patient does not, by voluntarily testifying as to his or her own physical condition or to his or her injuries or ailments, without going into detail and without referring to communications made to the physician, waive the privilege. But when the patient voluntarily goes into detail regarding the nature of his or her injuries and either testifies to what the physician did or said while in attendance, or relates what he or she communicated to the physician, the privilege is waived, and the adverse party may examine the physician. *Capps v. Lynch*, 253 N.C. 18, 116 S.E.2d 137 (1960). *See also Midkiff v. Compton*, 204 N.C. App. 21, 693 S.E.2d 172, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922 (2010) (plaintiff impliedly waived physician-patient privilege as to medical records casually or historically related to "great pain of body and mind" claimed in her complaint; no abuse of discretion to fail to conduct *in camera* review). The question of implied waiver is largely determined by the facts and circumstances of the particular case and depends upon the statute and the extent and ultimate materiality of the testimony given with respect to the nature, treatment, and effect of the injury or ailment. *Neese v. Neese*, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

Statutory waiver in child abuse matters. Section 8-53.1 statutorily waives both the physician-patient and the nurse privilege (§ 8-53.13) where the evidence sought relates either (1) to the abuse or neglect of a child under the age of 16 or (2) an illness of or injuries to such child or a cause in any proceeding related to a report pursuant to the North Carolina Juvenile Code.

Privilege distinguished from prohibition on unauthorized *ex parte* contacts with physician in civil practice. Defense counsel may not interview plaintiff's nonparty treating physicians privately without plaintiff's express consent; defendant must instead utilize the statutorily recognized methods of discovery enumerated in Rule 26 of the NCRCP. Considerations of patient privacy, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contact places the nonparty physician supersede defendant's interest in a less expensive and more convenient method of discovery. *Crist v. Moffatt*, 326 N.C. 326, 335, 389 S.E.2d 41, 46 (1990). Additionally, federal courts have interpreted the Health Insurance Portability and Accessibility Act of 1996 (HIPAA), 42 USCS sec. 1320d et seq., as prohibiting *ex parte* interviews of plaintiff's treating physician by defense counsel in absence of strict compliance with HIPAA. *See In re Vioxx Products Liability Litigation* 230 F.R.D. 470, *order modified on reconsideration*, 230 F.R.D. 473 (E.D. La. 2005).

HIPAA. HIPAA is intended to insure the integrity and confidentiality of patient information and to protect against unauthorized uses or disclosures of the information. The regulations implementing HIPAA, which became effective on April 14, 2003, establish procedures for the disclosure of "protected health information." Although beyond the scope of this presentation, that portion of the regulation relating to disclosures for judicial and administrative proceedings is found at 45 C.F.R. § 164.512(e), while that portion relating to law enforcement purposes is found at 45 C.F.R. § 164.512(f).

PSYCHOLOGIST-PATIENT PRIVILEGE

N.C.G.S. § 8-53.3. Communications between psychologist and client or patient

> No person, duly authorized as a licensed psychologist or licensed psychological associate, nor any of his or her employees or associates, shall be required to disclose any information which he or she may have acquired in the practice of psychology and which information was necessary to enable him or her to practice psychology. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his or her opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.
>
> Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for failure to report suspected child abuse or neglect to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes.

Not applicable to criminal defendant's competency examination. No psychologist-client privilege is created when a defendant is examined at his request for purposes of evaluating his mental status. Even if it were, the court could order disclosure if the records were "necessary to the proper administration of justice." *State v. Williams*, 350 N.C. 1, 21, 510 S.E.2d 626, 639, *cert. denied*, 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999) (citation omitted).

OTHER STATUTORY PRIVILEGES

N.C.G.S. § 8-53.4. School counselor privilege

No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open court waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending may compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be the district court judge, and if the case is in superior court the judge shall be a superior court judge.

N.C.G.S. § 8-53.5. Communications between licensed marital and family therapist and client(s)

No person, duly licensed as a licensed marriage and family therapist, nor any of the person's employees or associates, shall be required to disclose any information which the person may have acquired in rendering professional marriage and family therapy services, and which information was necessary to enable the person to render professional marriage and family therapy services. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in the court's opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

N.C.G.S. § 8-53.6. No disclosure in alimony and divorce actions

In an action pursuant to G.S. 50-5.1, 50-6, 50-7, 50-16.2A, and 50-16.3A if either or both of the parties have sought and obtained marital counseling by a licensed physician, licensed psychologist, licensed psychological associate, licensed clinical social worker, or licensed marriage and family therapist, the person or persons rendering such counseling shall not be competent to testify in the action concerning information acquired while rendering such counseling.

N.C.G.S. § 8-53.7. Social worker privilege

No person engaged in delivery of private social work services, duly licensed or certified pursuant to Chapter 90B of the General Statutes shall be required to disclose any information that he or she may have acquired in rendering professional social services, and which information was necessary

to enable him or her to render professional social services: provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by G.S. 8-53.6 or any other statute or regulation.

Asserting the statutory social worker privilege requires some action or objection by the holder of the privilege to protect communications with a social worker in child custody and support action. *Mosteller v. Stiltner*, 221 N.C. App. 486, 727 S.E.2d 601 (2012).

N.C.G.S. § 8-53.8. Counselor privilege

No person, duly licensed pursuant to Chapter 90, Article 24, of the General Statutes, shall be required to disclose any information which he or she may have acquired in rendering professional counseling services, and which information was necessary to enable him or her to render professional counseling services: Provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by other statute or regulation.

N.C.G.S. § 8-53.9. Optometrist/patient privilege

No person licensed pursuant to Article 6 of Chapter 90 of the General Statutes shall be required to disclose any information that may have been acquired in rendering professional optometric services and which information was necessary to enable that person to render professional optometric services, except that the presiding judge of a superior or district court may compel this disclosure, if, in the court's opinion, disclosure is necessary to a proper administration of justice and disclosure is not prohibited by other statute or rule.

N.C.G.S. § 8-53.10. Peer support group counselors

(a) Definitions. -- The following definitions apply in this section:

(1) Client law enforcement employee. -- Any law enforcement employee or a member of his or her immediate family who is in need of and receives peer counseling services offered by the officer's employing law enforcement agency.

(2) Immediate family. -- A spouse, child, stepchild, parent, or stepparent.

(3) Peer counselor. -- Any law enforcement officer or civilian employee of a law enforcement agency who:

a. Has received training to provide emotional and moral support and counseling to client law enforcement employees and their immediate families; and

b. Was designated by the sheriff, police chief, or other head of a law enforcement agency to counsel a client law enforcement employee.

(4) Privileged communication. -- Any communication made by a client law enforcement employee or a member of the client law enforcement employee's immediate family to a peer counselor while receiving counseling.

(b) A peer counselor shall not disclose any privileged communication that was necessary to enable the counselor to render counseling services unless one of the following apply:

(1) The disclosure is authorized by the client or, if the client is deceased, the disclosure is authorized by the client's executor, administrator, or in the case of unadministrated estates, the client's next of kin.

(2) The disclosure is necessary to the proper administration of justice and, subject to G.S. 8-53.6, is compelled by a resident or presiding judge. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

(c) The privilege established by this section shall not apply:

(1) If the peer counselor was an initial responding officer, a witness, or a party to the incident that prompted the delivery of peer counseling services.

(2) To communications made while the peer counselor was not acting in his or her official capacity as a peer counselor.

(3) To communications related to a violation of criminal law. This subdivision does not require the disclosure of otherwise privileged communications related to an officer's use of force.

(d) Notwithstanding the provisions of this section, the peer counselor privilege shall not be grounds for failure to report suspected child abuse or neglect to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this section, the peer counselor privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes.

N.C.G.S. § 8-53.11. Persons, companies, or other entities engaged in gathering or dissemination of news

(a) Definitions. -- The following definitions apply in this section:

(1) Journalist. -- Any person, company, or entity, or the employees, independent contractors, or agents of that person,

company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium.

(2) Legal proceeding. -- Any grand jury proceeding or grand jury investigation; any criminal prosecution, civil suit, or related proceeding in any court; and any judicial or quasi-judicial proceeding before any administrative, legislative, or regulatory board, agency, or tribunal.

(3) News medium. -- Any entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public.

(b) A journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist.

(c) In order to overcome the qualified privilege provided by subsection (b) of this section, any person seeking to compel a journalist to testify or produce information must establish by the greater weight of the evidence that the testimony or production sought:

(1) Is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought;

(2) Cannot be obtained from alternate sources; and

(3) Is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought.

Any order to compel any testimony or production as to which the qualified privilege has been asserted shall be issued only after notice to the journalist and a hearing and shall include clear and specific findings as to the showing made by the person seeking the testimony or production.

(d) Notwithstanding subsections (b) and (c) of this section, a journalist has no privilege against disclosure of any information, document, or item obtained as the result of the journalist's eyewitness observations of criminal or tortious conduct, including any physical evidence or visual or audio recording of the observed conduct.

N.C.G.S. § 8-53.12. Communications with agents of rape crisis centers and domestic violence programs privileged

(a) Definitions. -- The following definitions apply in this section:

(1) Agent. -- An employee or agent of a center who has completed a minimum of 20 hours of training as required by the center, or a volunteer, under the direct supervision of a center supervisor, who has completed a minimum of 20 hours of training as required by the center.

(2) Center. -- A domestic violence program or rape crisis center.

(3) Domestic violence program. -- A nonprofit organization or program whose primary purpose is to provide services to domestic violence victims.

(4) Domestic violence victim. -- Any person alleging domestic violence as defined by G.S. 50B-1, who consults an agent of a domestic violence program for the purpose of obtaining, for himself or herself, advice, counseling, or other services concerning mental, emotional, or physical injuries suffered as a result of the domestic violence. The term shall also include those persons who have a significant relationship with a victim of domestic violence and who have sought, for themselves, advice, counseling, or other services concerning a mental, physical, or emotional condition caused or reasonably believed to be caused by the domestic violence against the victim.

(5) Rape crisis center. -- Any publicly or privately funded agency, institution, organization, or facility that offers counseling and other services to victims of sexual assault and their families.

(6) Services. -- Includes, but is not limited to, crisis hotlines; safe homes and shelters; assessment and intake; children of violence services; individual counseling; support in medical, administrative, and judicial systems; transportation, relocation, and crisis intervention. The term does not include investigation of physical or sexual assault of children under the age of 16.

(7) Sexual assault. -- Any alleged violation of G.S. 14-27.2, 14-27.3, 14-27.4, 14-27.5, 14-27.7, 14-27.7A, or 14-202.1, whether or not a civil or criminal action arises as a result of the alleged violation.

(8) Sexual assault victim. -- Any person alleging sexual assault, who consults an agent of a rape crisis center for the purpose of obtaining, for themselves, advice, counseling, or other services concerning mental, physical, or emotional injuries suffered as a result of sexual assault. The term shall also include those persons who have a significant relationship with a victim of sexual assault and who have sought, for themselves, advice, counseling, or other services concerning a mental, physical, or emotional condition caused or reasonably believed to be caused by sexual assault of a victim.

(9) Victim. -- A sexual assault victim or a domestic violence victim.

(b) Privileged Communications. -- No agent of a center shall be required to disclose any information which the agent acquired during the provision of services to a victim and which information was necessary to enable the agent to render the services; provided, however, that this subsection shall not apply where the victim waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending shall compel disclosure, either at the trial or prior thereto, if the court finds, by a preponderance of the evidence, a good faith, specific and reasonable

basis for believing that (i) the records or testimony sought contain information that is relevant and material to factual issues to be determined in a civil proceeding, or is relevant, material, and exculpatory upon the issue of guilt, degree of guilt, or sentencing in a criminal proceeding for the offense charged or any lesser included offense, (ii) the evidence is not sought merely for character impeachment purposes, and (iii) the evidence sought is not merely cumulative of other evidence or information available or already obtained by the party seeking the disclosure or the party's counsel. If the case is in district court, the judge shall be a district court judge, and if the case is in superior court, the judge shall be a superior court judge.

Before requiring production of records, the court must find that the party seeking disclosure has made a sufficient showing that the records are likely to contain information subject to disclosure under this subsection. If the court finds a sufficient showing has been made, the court shall order that the records be produced for the court under seal, shall examine the records in camera, and may allow disclosure of those portions of the records which the court finds contain information subject to disclosure under this subsection. After all appeals in the action have been exhausted, any records received by the court under seal shall be returned to the center, unless otherwise ordered by the court. The privilege afforded under this subsection terminates upon the death of the victim.

(c) Duty in Case of Abuse or Neglect. -- Nothing in this section shall be construed to relieve any person of any duty pertaining to abuse or neglect of a child or disabled adult as required by law.

N.C.G.S. § 8-53.13. Nurse privilege

No person licensed pursuant to Article 9A of Chapter 90 of the General Statutes shall be required to disclose any information that may have been acquired in rendering professional nursing services, and which information was necessary to enable that person to render professional nursing services, except that the presiding judge of a superior or district court may compel disclosure if, in the court's opinion, disclosure is necessary to a proper administration of justice and disclosure is not prohibited by other statute or rule. Nothing in this section shall preclude the admission of otherwise admissible written or printed medical records in any judicial proceeding, in accordance with the procedure set forth in G.S. 8-44.1, after a determination by the court that disclosure should be compelled as set forth herein.

CURING THE PREJUDICIAL EFFECT OF INADMISSIBLE EVIDENCE

Brandis & Broun §§ 19-22.

The trial court, being careful to avoid appearances of partiality, may *ex mero motu* properly exclude inadmissible evidence. *State v. Overman*, 284 N.C. 335, 200 S.E.2d 604 (1973). However, under ordinary circumstances, the court is not required to exclude evidence when there is no objection; failure to make an objection waives it. N.C. R. Evid. 103(a)(1); N.C.G.S. § 15A-1446(b). Exceptional situations in which an evidentiary ruling may be reversed even in the absence of an objection include: (1) when there is plain error, *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012); (2) when use of the evidence violates statute in the furtherance of public policy, *State v. McCall*, 289 N.C. 570, 223 S.E.2d 334 (1976); (3) when on the face of the record, a criminal defendant's confession is inadmissible, *State v. Pearce*,

266 N.C. 234, 145 S.E.2d 918 (1966); and (4) when a question is asked by the judge or a juror, N.C.G.S. § 15A-1446(d)(11).

When the trial court allows a motion to strike certain questions or testimony, general curative instructions given at the outset of the trial that admonish the jury to disregard stricken matters will suffice to cure any prejudicial effect. The court does not have to reissue these instructions, but "the better procedure is to give the instruction to disregard the answer immediately after allowing the motion to strike." *State v. Franks*, 300 N.C. 1, 13, 265 S.E.2d 177, 184 (1980). Counsel can move for a mistrial if it is believed the curative instruction will not be sufficient. By statute, the court must declare a mistrial "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061. A trial court's decision regarding whether to declare a mistrial will not be reversed "unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. Diehl*, 353 N.C. 433, 436, 545 S.E.2d 185, 187 (2001).

Again, ordinarily instructions to the jury to disregard the evidence will sufficiently cure even an erroneous ruling admitting evidence if the trial court later withdraws that ruling and strikes the evidence. If the admission of the evidence is manifestly prejudicial—*e.g.*, emphasized by repetition or allowed to remain with the jury for an undue length of time—the withdrawal may be too late to cure the prejudicial effect. *State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981) (testimony of fruits of a search later determined to be unlawful).

Tab 10: Rape Shield, Rule 412

Application of the Rape Shield Rule

Advanced Criminal Evidence for Superior Court Judges
May 2015

Famous basketball player Danny Defense is charged with raping Cindy Complainant in the parking lot behind an upscale nightclub in Charlotte. You are presiding over the trial.

The parties agree on many facts, including that Cindy saw Danny in the club that night; that she approached Danny and asked him for an autograph; that the two had a drink together; and that they went outside together. There are no third-party witnesses to what happened in the parking lot. Cindy left the area shortly after she went outside with Danny, and immediately contacted the police. A rape kit was performed at a local hospital, and pubic hair and semen were recovered and analyzed; the DNA contained therein is consistent with Danny's. Danny's defense is that he and Cindy had consensual sex and that Cindy is claiming rape to cover up her infidelity to her boyfriend and/or in order to extort money from Danny.

Several evidentiary issues arise:

1. Danny is prepared to testify that he and Cindy went to the same high school in Fayetteville, North Carolina; that they were not close friends but ran in similar social circles; that at a party after their senior prom, he and Cindy "made out" but did not have sex; and that he has not seen Cindy since he graduated from high school seven years ago. Does this evidence fall within an exception to the rape shield rule?

   Yes. It falls under the exception in Rule 412(b)(1) for sexual behavior between the defendant and the complainant. Nothing in the rule limits sexual activity or behavior to intercourse. Cf. State v. Everidge, 702 So. 2d 680 (La. 1997) (ruling that a trial court improperly excluded evidence that the complainant hugged and kissed the defendant hours before the alleged rape, and noting that "[p]ast sexual behavior is not limited to sexual intercourse").

   However, the fact that the prior activity did not involve intercourse, and the fact that it took place a long time before the events at issue in the trial, tend to reduce the relevance of the prior activity to whether Cindy consented on the night in question. So, although this evidence is not barred by Rule 412, it might be subject to exclusion under Rule 403.

2. Danny wants to call Cindy's then-boyfriend, Bob, to testify that he and Cindy had sex the day before the night in question. Assuming that Danny follows the required procedures regarding an in camera hearing and the like, should this evidence be admitted under an exception to the rape shield rule?

   No. If Danny were denying sexual contact with Cindy, this evidence would be admissible. It would fall within the exception in Rule 412(b)(2) for specific instances of behavior that show that the acts in question were not committed by the defendant, because it would provide an alternate explanation for the semen and pubic hair that were recovered from Cindy. State v. Davis, __ N.C. App. __, 767 S.E.2d 565 (2014). However, Danny is not denying that he had sex with Cindy. There is no issue in this case regarding whether Danny committed the acts. He admits that he did, leaving only the question of

whether Cindy consented to them. The evidence regarding Bob should therefore be excluded. See generally State v. Harris, 360 N.C. 145 (2005).

3. For this question, assume that Danny's defense is not consent, but rather that he did not have any sexual contact with Cindy. Assume further that he has been allowed to introduce evidence about Cindy's sex with Bob the day before he saw Cindy at the nightclub. Should he also be allowed to introduce evidence that Cindy had sex with a neighbor the day before she had sex with Bob?

   Probably not. Under this scenario, the evidence about Bob is admissible under the exception in Rule 412(b)(2) for specific instances of behavior that show that the acts in question were not committed by the defendant, because it provides an alternate explanation for the semen and pubic hair that were recovered from Cindy. But once a viable alternate source for the physical evidence has been established, introducing evidence of other possible sources adds little probative value and risks embarrassing or humiliating the complainant. State v. Khouri, 214 N.C. App. 389 (2011) (once the defendant had established that another man might be responsible for the victim's pregnancy, evidence of a third sexual partner was properly excluded).

4. Back to the consent defense. Danny wants to call two professional football players who also live in Charlotte. Quincy Quarterback is prepared to testify that he often saw Cindy at clubs that were popular with professional athletes; that Cindy approached him in such a club about a year earlier; and that she performed oral sex on him in his car within a few hours of meeting him. Lenny Linebacker is prepared to testify that Cindy approached him in a bar about two years ago, and that the two had sex in a bathroom at the bar that night. Does this evidence fall within an exception to the rape shield rule?

   Probably so. The question is whether this evidence is admissible under Rule 412(b)(3) as a distinctive pattern of sexual behavior that tends to prove consent. Although one prior incident would not be enough to establish a pattern, two might be, especially given that they were relatively recent. The similarities here include (1) the profession of the men involved, (2) the setting of each meeting, (3) the rapid progress from the initial meeting to sexual activity, and (4) the location of the sexual activity. The similarities here are stronger than those found sufficient in State v. Shoffner, 62 N.C. App. 245 (1983) (finding a pattern where the complainant had a history of seducing men at nightclubs).

5. For this question, assume that none of the evidence about Cindy's recent sexual activity with Bob Boyfriend, discussed above, is offered in the case. Danny still wants to (1) call Bob to testify that he and Cindy were dating exclusively and were in a sexual relationship at the time of Cindy's encounter with Danny, and (2) call a bartender from the club who is prepared to testify that one of Bob's friends was at the club on the night in question and saw Cindy and Danny together. Danny asserts that this evidence will support his theory that Cindy fabricated the rape charge in part to avoid accusations of infidelity from Bob. Is the evidence admissible?

   Some is and some isn't. The fact that Cindy and Bob were in a <u>dating</u> relationship is not evidence of Cindy's sexual behavior, so it is not barred by Rule 412. When combined with the bartender's testimony, the evidence is relevant because it suggests a motive for Cindy to lie. Therefore, it is admissible. The fact that Cindy and Bob were in a <u>sexual</u> relationship, on the other hand, is evidence of Cindy's sexual behavior, and none of the exceptions in Rule 412 apply. If the fact that Cindy and Bob

were in a sexual relationship added something to Cindy's motive to lie, Danny might be able to argue that he has a constitutional right to introduce evidence of the sexual relationship that trumps the strictures of Rule 412. See Olden v. Kentucky, 488 U.S. 227 (1988) (similar facts). But it doesn't appear to add much to the motive that exists because of the dating relationship, so this argument doesn't work.

6. Danny wants to introduce evidence that, five years earlier, Cindy claimed to have been raped by a co-worker. She reported the incident to the police, but no charges were ever filed. The co-worker is prepared to testify that the claim was false, while the officer who investigated the incident would testify that Cindy was adamant about the rape but that no charges were filed because the investigation did not turn up any corroborating evidence. May Danny introduce evidence about Cindy's previous accusation?

   Yes. If a complainant previously made a false accusation concerning a sexual assault, that is not sexual behavior and therefore is outside the scope of Rule 412. On the other hand, if the accusation is truthful, then evidence about the accusation is evidence about the complainant's sexual behavior and is barred by Rule 412. Therefore, this question boils down to whether Danny can make a sufficient showing that Cindy's prior accusation was false. The mere fact that charges were not brought or were dropped is not enough to establish the falsity of the underlying accusation. But it is sufficient if the defendant can show that charges were "withdrawn" by the complainant after she changed her story several times, or if the person formerly accused by the complainant is willing to testify that the accusations were false. See State v. Ginyard, 122 N.C. App. 25 (1996); State v. Baron, 58 N.C. App. 150 (1982). The testimony from the co-worker satisfies the latter test, so this evidence is admissible.

   You get extra credit if you considered whether this evidence is excluded by Rule 608(b), which says that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by extrinsic evidence." There's no North Carolina appellate case right on point, but Baron suggests that evidence of prior false accusations should be admitted. (If not admissible under the evidence rules, such evidence may be so critical that its admission is required by the Constitution.)

7. For this question, assume that the evidence about Cindy's previous claim of rape is admissible. Must Danny request an in camera hearing before introducing this evidence? Or does it fall outside the procedures required by Rule 412 because it does not involve evidence of Cindy's sexual conduct?

   Although it may not be obvious from the face of Rule 412, Danny must request an in camera hearing. State v. Okawara, __ N.C. App. __, 733 S.E.2d 576 (2012). At such a hearing, you must determine whether Danny's evidence that the prior allegation was false is sufficient to allow Danny to introduce the evidence.

8. Danny wants to introduce evidence that, the day after Danny allegedly raped her, Cindy was in another club, dancing closely with a man she had just met there. Is this evidence excluded by Rule 412?

   No. This is not evidence of Cindy's sexual behavior, so it is not covered by Rule 412.

   This evidence is, of course, subject to the usual Rule 401/403 analysis. It is admissible if you find that Cindy's behavior is inconsistent with, or tends to cast doubt upon, her claim of having been raped.

Note that if Danny had evidence that Cindy had sex with someone the next day, this evidence would not fall within any of the exceptions in Rule 412, and would seem to be inadmissible. But it may be unconstitutional to exclude such evidence. See State v. Horrocks, 747 A.2d 25 (Conn. Ct. App. 2000) (ruling that the defendant should have been allowed to introduce evidence that complainant had "wild sex" with the officer investigating her rape allegation on the night of the alleged rape, because such evidence cast serious doubt on the veracity of her claim of rape).

9. In rebuttal, the State wants to have Cindy testify that she is a lesbian and is not sexually interested in men. The state claims that this evidence tends to undercut Danny's claim of consent. Is it admissible?

   Unclear. The key question is whether evidence of sexual orientation is evidence of sexual behavior. Some cases say so, on the theory that orientation implies behavior. If this is correct, then Rule 412 likely prohibits the introduction of such evidence, and the fact that the State is the proponent of the evidence is immaterial. See, e.g., People v. Kemblowski, 559 N.E.2d 247 (Ill. Ct. App. 1990) (ruling that the fact that the victim was a lesbian was not admissible under the state's rape shield law).

   Alternatively, one could argue that having a sexual orientation does not imply sexual activity. On this view, evidence of sexual orientation would fall outside the scope of Rule 412, and it would probably be relevant and admissible to rebut Danny's claim of consent. Of course, admitting this evidence would open the door to evidence of prior heterosexual activity by Cindy. See State v. Lessley, 601 N.W. 2d 521 (Neb. 1999) (complainant testified that she was a lesbian; male defendant who claimed consent should have been allowed to introduce evidence of victim's encounters with men).