UNC SCHOOL OF GOVERNMENT

2022 Higher-Level Felony Defense Training

September 20-22, 2022 / Chapel Hill, NC

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

Tuesday, Sept. 20

12:45-1:15 pm	Check-in
1:15-1:30 pm	**Welcome**
1:30-2:30 pm	**Preparing for Serious Felony Cases** (60 mins.) Phil Dixon, Teaching Assistant Professor UNC School of Government, Chapel Hill, NC
2:30-3:30 pm	**Defending Eyewitness Identification Cases** (60 mins.) Laura Gibson, Chief Public Defender Beaufort County Office of the Public Defender, Washington, NC
3:30-3:45 pm	**Break**
3:45-4:30 pm	**Preventing Low Level Felonies from Becoming High Level Habitual Felonies** (45 mins.) Jason St. Aubin, Assistant Public Defender Mecklenburg County Office of the Public Defender, Charlotte, NC
4:30-5:15 pm	**Self-Defense Update** (45 mins.) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
5:15 pm	**Adjourn**

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Wednesday, Sept. 21

9:00-10:00 am	**The Law of Sentencing Serious Felonies** (60 mins.) Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
10:00-10:15 am	**Break**
10:15-11:00 am	**Mitigation Investigation** (45 mins.) Josie Van Dyke, Mitigation Specialist Sentencing Solutions, Inc., Knightdale, NC
11:00-11:45 pm	**Storytelling and Visual Aides at Sentencing** (45 mins.) Sophorn Avitan and Susan Weigand, Assistant Public Defenders Mecklenburg Co. Public Defender's Office, Charlotte, NC
11:45-12:45 pm	Lunch *(provided in building)**
12:45-2:15 pm	**Brainstorming, Preparing, and Presenting a Sentencing Argument** (90 mins.) Small group workshops
2:15-2:30 pm	**Break**
2:30-3:30 pm	**Preservation Essentials** (60 mins.) Glenn Gerding, Appellate Defender Office of the Appellate Defender, Durham, NC
3:30-4:30 pm	**Client Rapport** (60 mins. ETHICS) Vicki Jayne, Assistant Capital Defender Office of the Capital Defender, Asheville, NC
4:30 pm	**Adjourn**
6:00 pm	**Optional Social Gathering** TBA

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Thursday, Sept. 22

9:00-10:00 am	**Basics of Batson Challenges** (60 mins.) Hannah Autry, Staff Attorney Center for Death Penalty Litigation, Durham, NC Johanna Jennings, Founder and Executive Director The Decarceration Project, Durham, NC
10:00-10:15 am	**Break**
10:15-11:00 am	**Addressing Race and Other Sensitive Topics in Voir Dire** (45 mins.) Emily Coward, Policy Director The Decarceration Project, Durham, NC
11:00-12:00 pm	**Peremptory and For Cause Challenges** (60 mins.) James Davis, Attorney Davis and Davis, Salisbury, NC
12:00 pm	**Wrap up and Adjourn**

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

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ONLINE RESOURCES FOR INDIGENT DEFENDERS

ORGANIZATIONS

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

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

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

TRAINING

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

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

MANUALS

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

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

UPDATES

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

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

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

TOOLS and RESOURCES

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

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

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

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PUBLIC DEFENSE EDUCATION INFORMATION & UPDATES

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

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

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

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

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(Public Defense Education)

&

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(twitter.com/NCIDE)

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Sept. 20, 2022

NAME
ADDRESS
ADDRESS

RE: XX CRS XXXX

Dear NAME:

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

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

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

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

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

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

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

Sincerely,

NAME
Attorney for DEFENDANT

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

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

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

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

Creating a Theory of Defense

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

Steps in creating a theory of defense

Pick your genre

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

Identify your three best facts and three worst facts

- Helps to test the viability of your choice of genre

Come up with a headline

- Barstool or tabloid headline method

Write a theory paragraph

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

Develop recurring themes

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

Defending Higher Level Felonies

Phil Dixon
UNC School of Government
Fall 2022

Forcible Felonies

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

Same as everything else?

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

Same as everything else?

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

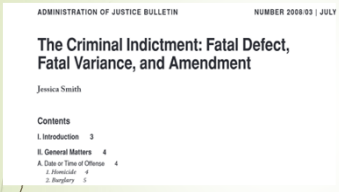
Know the Law!

Our Focus:

- Pleadings
- Inchoate Liability and General Crimes
- Jury Instructions
- Defenses

Why do Pleadings matter?

- Fatal flaw fails to confer jurisdiction
  - *E.G.*– fails to state an element, fails to name an assault victim, fails to name the defendant
- Typically no jeopardy problem, because no jurisdiction in the first place
- BUT, where the indictment is flawed as to the greater offense, it may properly charge a lesser, and no need for mistrial or dismissal


ADMINISTRATION OF JUSTICE BULLETIN NUMBER 2008/03 | JULY

The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment

Jessica Smith

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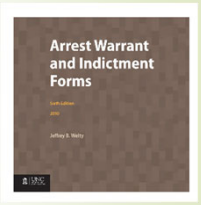


Examples

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

Variance Issues

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

Variance Issues

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

Common Assault Issues

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

Common Robbery Issues

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

Common Robbery Issues

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

Conspiracy Liability

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

Conspiracy Liability

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

Pleading and Proving Conspiracy

- Must allege agreement to do unlawful act
- Need not name co-conspirators. *St. v. Gallimore*, 272 N.C. 628 (1968)
- If named, State is generally stuck with proving agreement with those named people (and not other unnamed people) at trial. *St. v. Pringle*, 204 N.C. App. 562 (2010)
- May cover a lesser-included offense (where not punished at the same level)

Attempt Liability

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

Attempt Liability

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

Accessory Liability

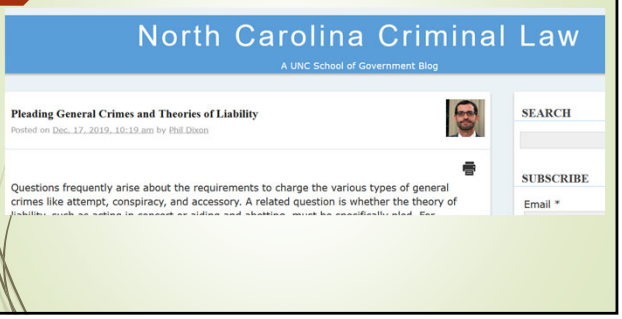
- Before the Fact? Treated as a principal
  - Think, aiding and abetting, but not present at time of crime
  - Solicitation is a lesser included to accessory before the fact. Unless D. charged with accessory after the fact, solicitation must be specifically pled
  - Can be convicted of conspiracy and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

Accessory Liability

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

Acting in Concert

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



Ginsburg the Cat

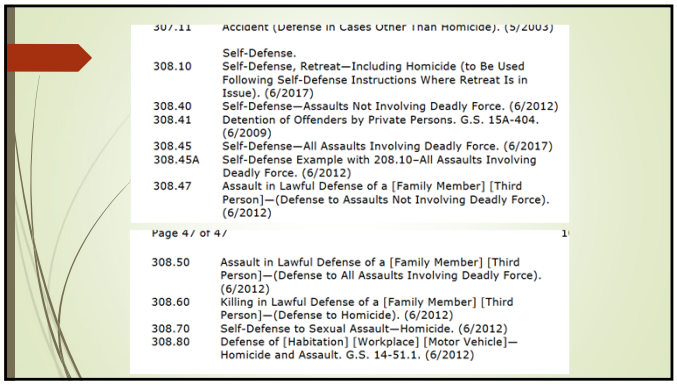
Jury Instructions

"If a request is made for a jury instruction which is correct in itself and supported by the evidence, the trial court must give the instruction *at least in substance*." *State v. Harvell*, 334 N.C. 356 (1993)

Standard: Evidence viewed in the light most favorable to the defendant; substantial, relevant evidence that a reasonable mind could accept as supporting the claim

Δ gets all factual inferences in his or her favor

Special instruction requests must be in writing, and you must object if the court refuses your requested instruction



307.11 Accident (Defense in Cases Other Than Homicide). (5/2003)

Self-Defense.

308.10 Self-Defense, Retreat—Including Homicide (to Be Used Following Self-Defense Instructions Where Retreat Is in Issue). (6/2017)
308.40 Self-Defense—Assaults Not Involving Deadly Force. (6/2012)
308.41 Detention of Offenders by Private Persons. G.S. 15A-404. (6/2009)
308.45 Self-Defense—All Assaults Involving Deadly Force. (6/2017)
308.45A Self-Defense Example with 208.10–All Assaults Involving Deadly Force. (6/2012)
308.47 Assault in Lawful Defense of a [Family Member] [Third Person]—(Defense to Assaults Not Involving Deadly Force). (6/2012)

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308.50 Assault in Lawful Defense of a [Family Member] [Third Person]—(Defense to All Assaults Involving Deadly Force). (6/2012)
308.60 Killing in Lawful Defense of a [Family Member] [Third Person]—(Defense to Homicide). (6/2012)
308.70 Self-Defense to Sexual Assault—Homicide. (6/2012)
308.80 Defense of [Habitation] [Workplace] [Motor Vehicle]—Homicide and Assault. G.S. 14-51.1. (6/2012)

Jury Instructions

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

Ideas for Special Instructions

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

Defenses Refresher

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

Defenses Refresher

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

Defenses Refresher

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

Defenses Refresher

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

(c) Notice of Defenses, Expert Witnesses, and Witness Lists. – If the court grants any relief sought by the defendant under G.S. 15A-903, or if disclosure is voluntarily made by the State pursuant to G.S. 15A-902(a), the court must, upon motion of the State, order the defendant to:

(1) Give notice to the State of the intent to offer at trial a defense of alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication. Notice of defense as described in this subdivision is inadmissible against the defendant. Notice of defense must be given within 20 working days after the date the case is set for trial pursuant to G.S. 7A-49.4, or such other later time as set by the court.

a. As to the defense of alibi, the court may order, upon motion by the State, the disclosure of the identity of alibi witnesses no later than two weeks before trial. If disclosure is ordered, upon a showing of good cause, the court shall order the State to disclose any rebuttal alibi witnesses no later than one week before trial. If the parties agree, the court may specify different time periods for this exchange so long as the exchange occurs within a reasonable time prior to trial.

b. As to only the defenses of duress, entrapment, insanity, automatism, or involuntary intoxication, notice by the defendant shall contain specific information as to the nature and extent of the defense.


"That's all Folks!"
Phil Dixon, Jr.
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High-Level Felony Defender
Sponsored by Indigent Defense Services and
the UNC School of Government
September 20-22 2022
Chapel Hill, North Carolina

FACT PROBLEM

State v. Jones, p. 2-3

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

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

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

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

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

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

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

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

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

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

§ 15A-1340.16. Aggravated and mitigated sentences.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEFENDING EYEWITNESS IDENTIFICATION

LAURA NEAL GIBSON
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL DISTRICT

OVERVIEW

Why is eyewitness identification an important issue for criminal defense attorneys?

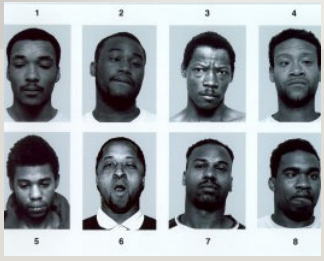
The Basics – a time for review

- Constitutional Arguments
- NC Eyewitness Identification Reform Act

Why is eyewitness identification such a problem?

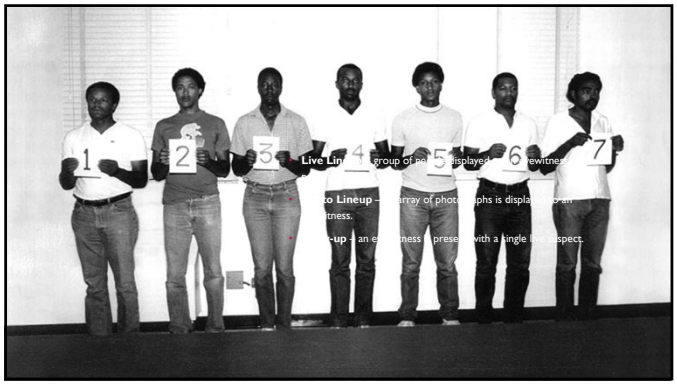
The Role of the Defense Attorney in Challenging Eyewitness Identification Issues

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



WHY IS EYEWITNESS IDENTIFICATION SO IMPORTANT?

- Eyewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 70% of convictions overturned through DNA testing nationwide.
- 41% of overturned cases involved cross-racial eyewitness identifications.
- Innocence Project



- **Live Lin** group of pe displayed witne
- **o Lineup** – array of phot phs is displa tness.
- **-up** – an e tness pres with a single live spect.

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

Upon Arrest

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

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

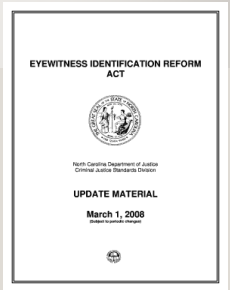
Upon Consent of the Defendant (even if not arrested)

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

Upon being served with a Nontestimonial Identification Order

EYEWITNESS IDENTIFICATIONS MUST COMPLY WITH CONSTITUTIONAL AND STATUTORY REQUIREMENTS:

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



EYEWITNESS IDENTIFICATION REFORM ACT

North Carolina Department of Justice
Criminal Justice Standards Division

UPDATE MATERIAL

March 1, 2008

FACT SCENARIO:

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

COMPLYING WITH THE DUE PROCESS CLAUSE

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

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

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

REMEDY FOR VIOLATION → EXCLUSION

BIGGERS FIVE FACTORS TO EVALUATE LIKELIHOOD OF MISIDENTIFICATION:

- *The Witness's Opportunity to View the Suspect During the Crime*
- *The Degree of Attention*
- *The Accuracy of a Prior Description of the Suspect*
- *The Degree of Certainty at the Identification Procedure*
- *The Length of Time Between the Crime and the Identification Procedure*

SIXTH AMENDMENT RIGHT TO COUNSEL

The right begins at the initial appearance after arrest that is conducted by a judicial official (usually a magistrate) or when an indictment or information has been filed, whichever occurs first. *Rothgery v. Gillespie Cty.*

Remedy for Violation of Right to Counsel → EXCLUSION

Right to Counsel can be knowingly and voluntarily waived.

SIXTH AMENDMENT RIGHT TO COUNSEL

ATTACHED

- In-Court show-up at a preliminary hearing. *Moore v. IL*
- Post-Indictment lineup. *U.S. v. Wade*, 388 U.S. 218 (1967).

NOT ATTACHED

- Show-up identification after arrest but before indictment, PC hearing or other proceeding. *Kirby v. IL*
- Photo Lineup. *U.S. v. Ash*
- *Victim encountering suspect in jail as long as no state action was taken to procure the interaction. Thompson v. Mississippi*

IN-COURT IDENTIFICATIONS

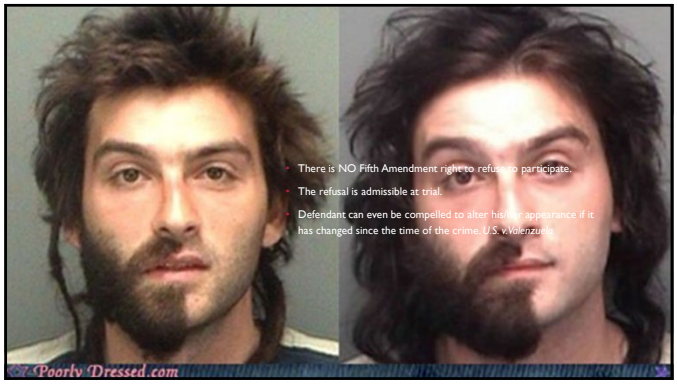
- An impermissibly suggestive pretrial identification procedure may taint an in-court identification. *State v. Flowers*, 318 N.C. 208 (1986).
- Independent Origin Standard: A witness's in-court identification is also inadmissible unless the State proves by clear and convincing evidence that the identification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

WADE FACTORS TO DETERMINE INDEPENDENT ORIGIN

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

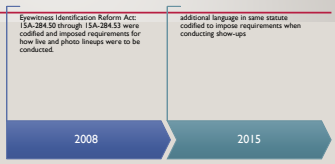
FACT SCENARIO:

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



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

EYEWITNESS IDENTIFICATION REFORM ACT



PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

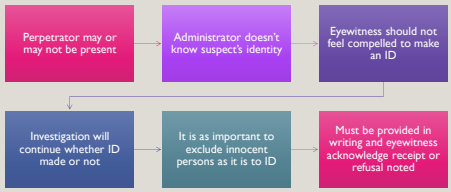
INDEPENDENT ADMINISTRATOR

- Double Blind Lineup
  - Not investigating the crime
  - Unaware of who is suspect is
- Alternative Methods allow for photo lineups (i.e. computer or folder method)

METHOD OF PRESENTATION

- Double Blind Sequential Lineup
  - Sequentially
  - Each presented separately and then removed before next presented

INSTRUCTIONS FOR LINEUPS NCGS 15A-284.52



PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

General Lineup

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

Fillers

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

Statement of Confidence

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

PRINCIPAL PROVISIONS FOR LINEUPS NCGS 15A-284.52

RECORDING OF ID

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

CONTENTS OF RECORD

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

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

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

STATUTORY REMEDIES FOR VIOLATION OF NCGS 15A-284.52

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

EVALUATING THE FACT SCENARIO IN LIGHT OF EIRA:

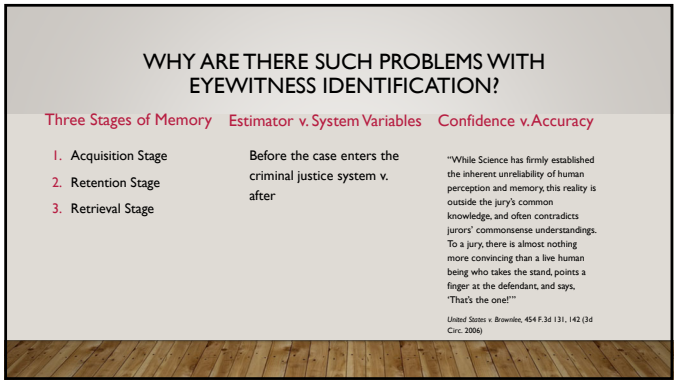
- Doesn't follow line-up requirements → not live/photo/single person
- Doesn't follow photo line-up requirements → single photo
- Doesn't follow show up requirements → not live/photo

THE HOLE LEFT BY NC EIRA

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


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


THE FALLIBILITY OF MEMORY
HTTPS://WWW.YOUTUBE.COM/WATCH?V=BUHMDC7MQ0U


WHY ARE THERE SUCH PROBLEMS WITH EYEWITNESS IDENTIFICATION?
Three Stages of Memory
1. Acquisition Stage
2. Retention Stage
3. Retrieval Stage
Estimator v. System Variables
Before the case enters the criminal justice system v. after
Confidence v. Accuracy
"While Science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury's common knowledge, and often contradicts jurors' commonsense understandings. To a jury, there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"
United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006)

MOTIONS TO SUPPRESS: IDENTIFY ISSUES

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

ARGUING THE MOTION TO SUPPRESS

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

JURY SELECTION

EDUCATION

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

SELECTING OPEN MINDS

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

Link for sample jury selection questions provided in the manuscript.

CROSS EXAMINATION

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

EXPERT TESTIMONY

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

Memory Factors | Estimator and System Variables

State v. Locklear – "expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified." 349 N.C. 118, 147 (1998) → helpfulness standard

Rule 702 and 403 Compliance

Important especially for cross-racial identifications.

If expert testimony denied → judicial notice of research on IDs

CLOSING ARGUMENT

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

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

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

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

Drive it home with jury instructions.

JURY INSTRUCTIONS

GENERALLY

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

EIRA INSTRUCTIONS

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

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

REMINDER OF WHY THIS IS IMPORTANT?

LAURA NEAL GIBSON
ASSISTANT PUBLIC DEFENDER
SECOND DISTRICT

252-940-4096

LAURA.N.GIBSON@NCCOURTS.ORG

DEFENDING EYEWITNESS IDENTIFICATION

Laura Neal Gibson
Assistant Public Defender
Second Judicial District

Presented:
Higher Level Felony Defense
UNC School of Government

CONTENTS

NC EYEWITNESS IDENTIFICATION REFORM ACT

Article 14A.
Eyewitness Identification Reform Act.

§ 15A-284.50. Short title.

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

§ 15A-284.51. Purpose.

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

§ 15A-284.52. Eyewitness identification reform.

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

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

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

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

(4) Lineup. – A photo lineup or live lineup.

(5) Lineup administrator. – The person who conducts a lineup.

(6) Live lineup. – A procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.

(7) Photo lineup. – A procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.

(8) Show-up. – A procedure in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime.

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

(1) A lineup shall be conducted by an independent administrator or by an alternative method as provided by subsection (c) of this section.

(2) Individuals or photos shall be presented to witnesses sequentially, with each individual or photo presented to the witness separately, in a previously determined order, and removed after it is viewed before the next individual or photo is presented.

(3) Before a lineup, the eyewitness shall be instructed that:

a. The perpetrator might or might not be presented in the lineup,

b. The lineup administrator does not know the suspect's identity,

c. The eyewitness should not feel compelled to make an identification,

d. It is as important to exclude innocent persons as it is to identify the perpetrator, and

e. The investigation will continue whether or not an identification is made. The eyewitness shall acknowledge the receipt of the instructions in writing. If the eyewitness refuses to sign, the lineup administrator shall note the refusal of the eyewitness to sign the acknowledgement and shall also sign the acknowledgement.

(4) In a photo lineup, the photograph of the suspect shall be contemporary and, to the extent practicable, shall resemble the suspect's appearance at the time of the offense.

(5) The lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers. In addition: a. All fillers selected shall resemble, as much as practicable, the eyewitness's description of the perpetrator in significant features, including any unique or unusual features. b. At least five fillers shall be included in a photo lineup, in addition to the suspect. c. At least five fillers shall be included in a live lineup, in addition to the suspect. d. If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the current suspect participates shall be different from the fillers used in any prior lineups.

(6) If there are multiple eyewitnesses, the suspect shall be placed in a different position in the lineup or photo array for each eyewitness.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

f. The sources of all photographs or persons used.

g. In a photo lineup, the photographs themselves.

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

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

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

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

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

(3) Any other procedures that achieve neutral administration.

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

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

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

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

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

(1) Standard instructions for eyewitnesses.

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

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

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

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

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

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

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

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

THE BASICS

Types of Eyewitness Identification

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

Constitutional Issues that Arise with Eyewitness Identification

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

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

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

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

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

ISSUES OF MEMORY

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

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

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SAMPLE MOTIONS TO SUPPRESS AND OTHER RESOURCES

NCIDS Motions Bank

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

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

2) Motion for Disclosure of Identification Procedures

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

3) Ex Parte Motion for Expert Witness Funds

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

4) Motion to Suppress Show-up Identification

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

Eyewitness Identification: Tools for Litigating the Identification Case

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

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

Procedures for Challenging Eyewitness Identification Evidence

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

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JURY INSTRUCTIONS

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

Photo Lineup Requirements G.S. 15A-284.52

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

Live Lineup Requirements G.S. 15A-284.52

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

Preventing Low Level Felonies from Becoming High Level Habitual Felonies

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

No Big Deal!

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

A Nationwide Trend

- **Persistent offender laws** to severely enhance sentences
- NC's habitual felon law is generally a *"fourth Strike"* situation
- "Primary purpose" is to "***deter repeat offenders***" and "***segregate that person from the rest of society for an extended period of time***."
  State v. Aldridge, 76 N.C. App. 638, 640 (1985)

Habitual Felons vs. Habitual Crimes

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

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

Habitual Felon Law in NC

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

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

How Does It Work?

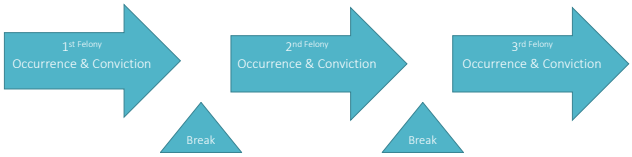
HF is a **status**, not a crime

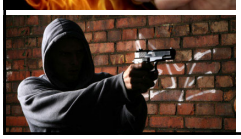
- Three previous ***non-overlapping*** convictions
  - Felony convictions since 1967 (N.C.G.S. §14-7.1)
- HF status is for ***life***
- ***Alleged by indictment***
- Convictions do not have to be for similar offenses or similar to the newly charged offense
- The convictions must be felonies in NC or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

Things to Watch For

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

Non-Overlapping





Eligibility for Violent HF

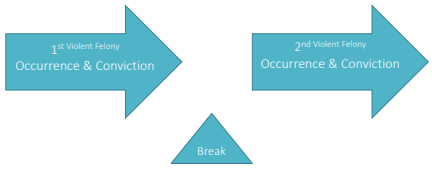
A defendant who:

Has been *convicted*,

Of *two violent felonies*,

Commits a third Class A through E felony

Non-Overlapping



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

- Any person with two (2) non-overlapping "violent felony" convictions
  - Any Class A through E felony convictions since 1967 in North Carolina
  - Any repealed or superseded offenses that are the substantial equivalent to a current Class A through E Felony in North Carolina
  - Any offense from another jurisdiction "substantially similar to" an A through E North Carolina offense
  - Need NOT be defined by "foreign sovereign" as felony
- **Note**: Excludes some felony offenses that might naturally be considered violent (assaults)

Punishment for Violent HF

When is Status Charged?

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

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

HF Indictment N.C.G.S. §14-7.3

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

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

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

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

Sample HF Indictment

STATE OF NORTH CAROLINA
County of Mecklenburg

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

File # [redacted]
Film #

In The General Court of Justice
Superior Court Division

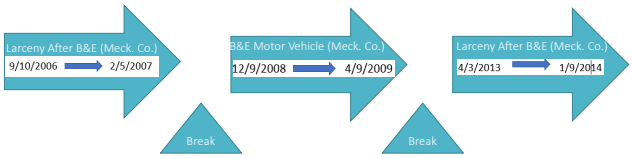
December 11, 2017

HABITUAL FELON G.S. 14-7.1

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

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

Non-Overlapping



How is HF Status Proven?

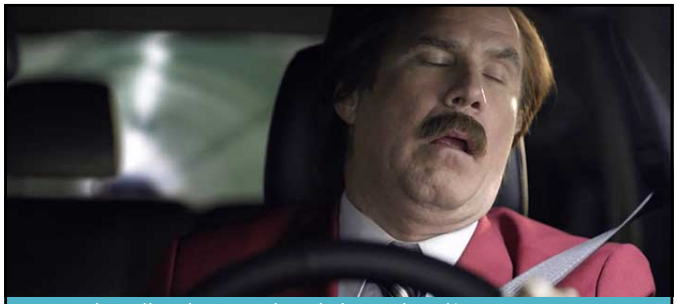
Stipulation of both parties (N.C.G.S. §14-7.4)

-OR-

The original or certified copy of the court record of the prior convictions

-OR- EVEN AN ACIS PRINTOUT CERTIFIED BY A CLERK! (State v. Waycaster, NC Supreme Court, 8/14/20)

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



Don't Fall Asleep Behind the Wheel!

Late Identification of HF Status by DA

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

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

State v. Hodge, NC. App. (Feb, 2020)

No OFA

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

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

Indictment generally served at Scheduling Conference date in Mecklenburg

Rapidly Escalating Severity

Misdemeanors can become HF cases!

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

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

Key Guilty Plea Considerations

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

- Ask your DA
- Write a letter of support
- Negotiate!
  - Two class H to run consecutive
  - Class I to E, rather than the offered H to D
  - Programs

Sample Non-HF Plea Transcript

STATE VERSUS	File No. NON-HABITUAL

Name Of Defendant
JOHN DOE

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

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

PLEA ARRANGEMENT

Defendant enters this plea of guilty to the following:

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

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

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

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

☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.
☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

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

Sample HF Plea Transcript

STATE VERSUS	File No. HABITUAL

Name Of Defendant
JOHN DOE

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

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

PLEA ARRANGEMENT

Defendant enters this plea of guilty to the following:

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

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

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

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

☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.
☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

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

Must Run Consecutive

Consecutive Sentence Prospects

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

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

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

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

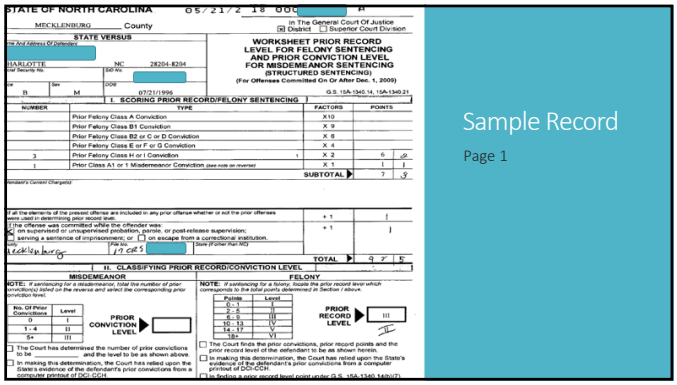
Critique Every HF Indictment

Look for irregularities in HF indictment:

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

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

Prior Record Level: No Double-Dipping



STATE OF NORTH CAROLINA — 17 CRS

MECKLENBURG County — In The General Court Of Justice ☒ District ☐ Superior Court Division

STATE VERSUS

CHARLOTTE NC 28204-8204

DOB: 07/21/1996

WORKSHEET PRIOR RECORD LEVEL FOR FELONY SENTENCING AND PRIOR CONVICTION LEVEL FOR MISDEMEANOR SENTENCING (STRUCTURED SENTENCING)

(For Offenses Committed On Or After Dec. 1, 2009)

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

I. SCORING PRIOR RECORD/FELONY SENTENCING

NUMBER	TYPE	FACTORS	POINTS
	Prior Felony Class A Conviction	X 10	
	Prior Felony Class B1 Conviction	X 9	
	Prior Felony Class B2 or C or D Conviction	X 6	
	Prior Felony Class E or F or G Conviction	X 4	
3	Prior Felony Class H or I Conviction	X 2	6
1	Prior Class A1 or 1 Misdemeanor Conviction (see note on reverse)	X 1	1
		SUBTOTAL	7

Defendant's Current Charge(s):

If all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining prior record level:

If the offender was committed while the offender was:
☒ on supervised or unsupervised probation, parole, or post-release supervision;
☐ serving a sentence of imprisonment; or ☐ on escape from a correctional institution.

	+ 1
	+ 1
TOTAL	9

II. CLASSIFYING PRIOR RECORD/CONVICTION LEVEL

MISDEMEANOR

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

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

PRIOR CONVICTION LEVEL

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

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

FELONY

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

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

PRIOR RECORD LEVEL: III

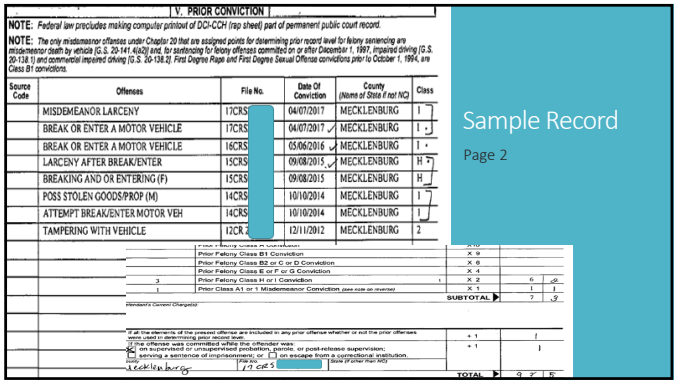
☐ The Court finds the prior convictions, prior record points and the prior record level of the defendant to be as shown herein.

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

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

Sample Record

Page 1



V. PRIOR CONVICTION

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

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

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

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

Defendant's Current Charge(s):

If all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining prior record level:

If the offense was committed while the offender was:
☒ on supervised or unsupervised probation, parole, or post-release supervision;
☐ serving a sentence of imprisonment; or ☐ on escape from a correctional institution.

Mecklenburg — File No. 17CRS — State (if other than NC)

+ 1 — 1
+ 1 — 1
TOTAL — 9

Sample Record

Page 2

Pre-Trial Issues

Anti-Collateral Attack Rule

- Don't wait until trial to challenge validity of prior felony conviction if you know it's mistaken
  - If a predicate felony conviction could be attacked, it must be done with an MAR prior to trial (*State v. Creason,* 123 N.C. App. 495 (1996))
- Exception:
  - A *Motion to Suppress* the prior conviction due to lack of counsel is viable at any time (N.C.G.S. §15A-980)
  - BUT you might not get relief… even for convictions that would not be adult felonies under current law *State v. McDougald* (NC App. August 2022)

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

Improper Collateral Attacks

My lawyer was ineffective

Court that took conviction lacked jurisdiction

Guilty plea was not knowing and/or voluntarily made

Going to Trial

Habitual Felon trials are bifurcated.

Phase One, Phase Two, & perhaps Phase Three

PHASE ONE

The guilt/innocence determination of the principal felony

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

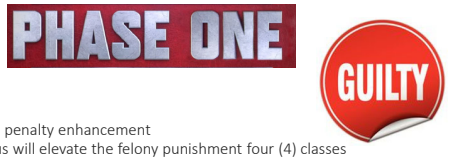
You may refer to the sentence your client might receive for the principal felony but NOT to the sentence as a HF

PHASE ONE

NOT GUILTY

If jury acquits or principal charge dismissed:

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



If convicted:

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

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

Should You Pass Go?

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

Sample HF Plea Transcript at Phase Two

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

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

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

PLEA ARRANGEMENT

The Defendant will plead guilty to the Habitual Felon status.

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

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

☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.
☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

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

PHASE TWO

Jury trial for HF Status

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

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

PHASE 3

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

Habitual Felon Sentencing

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

***Except pre-2011

Violent Habitual Felon Sentencing

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

HF & Prior Record Level Points

- Felony convictions used to establish the client's HF status cannot count toward the prior record level point system (N.C.G.S. §14-7.6)

- BUT…
  - If convicted of multiple felonies in one session of court, one of those felony convictions may be used as a predicate conviction toward HF status, and a second one can be used toward the prior record level (N.C.G.S. §14-7.12)
- **Special consideration**: PDP in Mecklenburg County

Special Client Concerns

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

Constitutional Issues

Generally, these claims have been rejected:

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

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

Can I Get a HF offer?

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

When being sentenced as a HF can benefit your client:
(1) Defendants with a Class C or a Class D felony
(2) Drug trafficking offenses

Can I get a reduction in prior record level?

N.C.G.S

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

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

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

THE STATUTORY LAW OF SELF-DEFENSE

JOHN RUBIN
UNC SCHOOL OF GOVERNMENT

SEPTEMBER 2022

1

GET YOUR MIND RIGHT

- READ THE STATUTES
- REMEMBER THE BASICS
  - REASONABLE NECESSITY
  - PROPORTIONALITY FOR DEADLY FORCE
  - ILLEGAL FAULT

2

G.S. 14-51.2

- THE LAWFUL OCCUPANT OF A HOME, WORKPLACE, OR MOTOR VEHICLE
- IS PRESUMED TO HAVE HELD A REASONABLE FEAR OF IMMINENT DEATH OR SERIOUS BODILY INJURY WHEN USING DEFENSIVE FORCE DURING OR AFTER AN UNLAWFUL, FORCIBLE ENTRY
- HOME MEANS "A BUILDING OR CONVEYANCE OF ANY KIND, TO INCLUDE ITS CURTILAGE"

3

4

APPELLATE DECISIONS

- STATE V. KUHNS, 260 N.C. APP. 281 (2018)
  - CURTILAGE INCLUDES AREA AROUND HOME
  - CURTILAGE NEED NOT BE ENCLOSED
  - THREAT OF VIOLENCE MAY CONSTITUTE FORCIBLE ENTRY
- STATE V. COPLEY, 265 N.C. APP. 254 (2019), *REV'D ON OTHER GROUNDS*, 374 N.C. 224 (2020)
  - REVISE PATTERN INSTRUCTION TO INCLUDE CURTILAGE
- STATE V. BENNER, 380 N.C. 621 (2022)
  - DEADLY FORCE IS NOT PRESUMPTIVELY PERMISSIBLE AGAINST A NONDEADLY ASSAULT BY A VISITOR

5

OTHER ISSUES

- COURT MAY DENY PRETRIAL IMMUNITY HEARING WHERE FACTS DISPUTED
  - STATE V. AUSTIN, 279 N.C. APP. 377 (2021)
- THE PRESUMPTION IS REBUTTABLE BY CIRCUMSTANCES OTHER THAN THE ENUMERATED EXCEPTIONS
  - *ID.*

6

14-51.3

- "A PERSON IS JUSTIFIED IN THE USE OF DEADLY FORCE AND DOES NOT HAVE A DUTY TO RETREAT IN ANY PLACE HE OR SHE HAS THE LAWFUL RIGHT TO BE"

7

APPELLATE DECISIONS

- COMMON AREA OF APARTMENT COMPLEX
  - STATE V. BASS, 371 N.C. 456 (2018)
- SIDEWALK
  - STATE V. LEE, 370 N.C. 671 (APR. 2018)
  - STATE V. IRABOR, 262 N.C. APP. 490 (2018)
- WHILE DRIVING ON PUBLIC ROAD
  - STATE V. AYERS, 261 N.C. APP. 220 (2018)

8

OTHER ISSUES

- 14-51.3 HAS SUPPLANTED THE COMMON LAW
  - STATE V. MCLYMORE, 380 N.C. 185 (2022)
- PATTERN JURY COMMITTEE SHOULD CONSIDER "BELIEF" INSTRUCTION IN HOMICIDE CASE
  - STATE V. LEAKS, 379 N.C. 57 (2021)
- INCLUSION OF AGGRESSOR INSTRUCTION IS ERROR WHERE DEFENDANT WAS NOT THE AGGRESSOR
  - STATE V. CORBETT & MARTENS, 269 N.C. APP. 509 (2020)
- IS NON-EXCESSIVE FORCE STILL A REQUIREMENT?

9

G.S. 14-51.4

- "THE JUSTIFICATION DESCRIBED IN G.S. 14-51.2 AND G.S. 14-51.3 IS NOT AVAILABLE TO A PERSON . . . WHO WAS ATTEMPTING TO COMMIT, COMMITTING, OR ESCAPING AFTER THE COMMISSION OF A FELONY"

10

APPELLATE DECISIONS

- 14-51.4 REQUIRES A "CAUSAL NEXUS"
  - STATE V. MCLYMORE, 380 N.C. 185 (2022)
  - *ACCORD* STATE V. WILLIAMS, ___ N.C. APP___, 873 S.E.2D 433 (JUNE 7, 2022)

11

OTHER SOURCES OF LAW

- COMMON LAW
  - AID IN INTERPRETING SIMILAR PRINCIPLES, E.G.,
    - EVIDENCE ABOUT THE VICTIM
    - REASONABLE NECESSITY
  - POTENTIAL SOURCE OF OTHER RIGHTS, E.G.,
    - DEFENSE OF HABITATION
    - CRIME PREVENTION
- CONSTITUTIONAL LAW
  - SUPPORT FOR SELF-DEFENSE CLAIM AT TRIAL, E.G.
    - SECOND AMENDMENT RIGHT IN FIREARM CASES
    - FOURTEENTH AMENDMENT RIGHT NOT TO BE DEPRIVED OF LIFE OR LIBERTY WITHOUT DUE PROCESS OF LAW
    - RIGHT TO LIFE ITSELF
  - CLOSER SCRUTINY ON APPEAL

12

Issues in Self-Defense Law in North Carolina

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UNC School of Government

September 2022

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Contents

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

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : lawful place, retreatself-defense

Date : August 29, 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

Defensive Force in the Home

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

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

Date : August 7, 2018

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

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

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

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

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

The Conflict in *Kuhns*

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

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

home and watched him to be sure he complied.

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

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

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

The Meaning of Entry and Home

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

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

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

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

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

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

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

Court of Appeals Approves Justification Defense for Firearm by Felon

Author : Phil Dixon

Categories : Crimes and Elements, Uncategorized

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

Date : August 21, 2018

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Another Self-Defense Decision on a Troublesome Doctrine

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : self-defense

Date : July 2, 2019

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

John Rubin
September 18, 2018 at 10:43 am

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

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

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

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

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

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

Reply

Some Clarity on Self-Defense and Unintended Injuries

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : involuntary manslaughter, self-defense

Date : June 5, 2018

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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A Warning Shot about Self-Defense

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Court of Appeals Rules on Pretrial Self-Defense Immunity Hearings

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

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

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

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

Background Issues and *Austin*

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

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

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

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

Is North Carolina alone in taking this view?

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

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

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

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

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

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

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

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

So is the issue finally settled now?

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

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

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

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

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

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

eport a Digital Access Issue

Evidence about the "Victim" in Self-Defense Cases

Author : John Rubin

Categories : Uncategorized

Date : February 5, 2019

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

Background

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

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

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

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

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

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

Evidence about the Victim

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

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

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

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

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

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

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

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

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

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

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

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

Fundamental Principles of Statutory Self-Defense

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

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

Date : August 6, 2019

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

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

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

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

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

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

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

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

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

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

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

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

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

The Statutory Law of Self-Defense in North Carolina

Author : John Rubin

Categories : Crimes and Elements, Evidence, Procedure, Uncategorized

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

Date : June 4, 2019

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

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

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

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

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

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

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

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

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

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

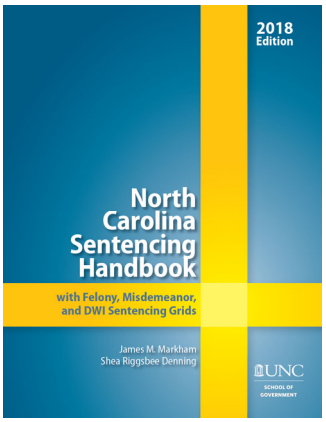
Going forward. Defensive force cases have always been complicated, perhaps more so than necessary. *See Brown v. United States*, 256 U.S. 335, 343 (1921) (Holmes, J.) (observing that the law of self-defense has had a "tendency to ossify into specific rules"). They will probably get more complicated in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

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

Sentencing Serious Felonies

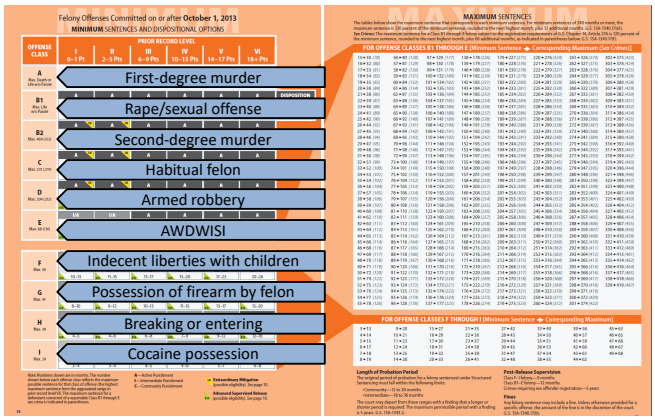
Jamie Markham
UNC School of Government
September 2022

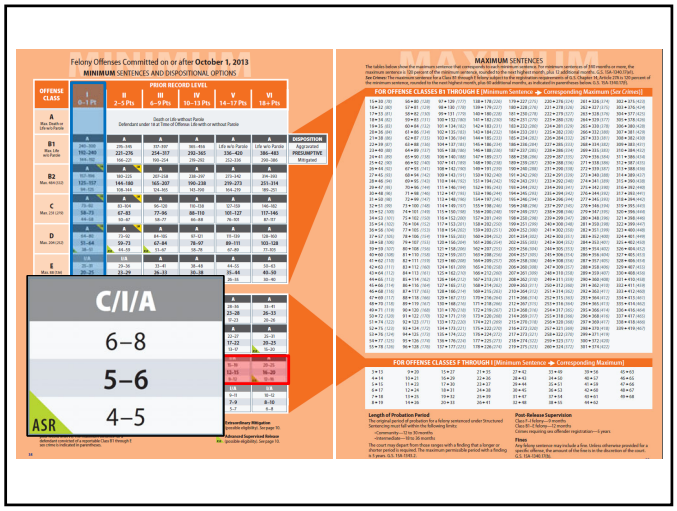
UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

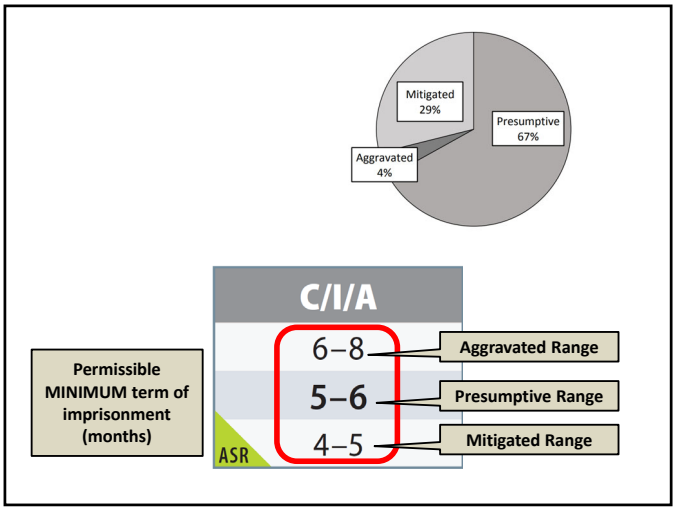


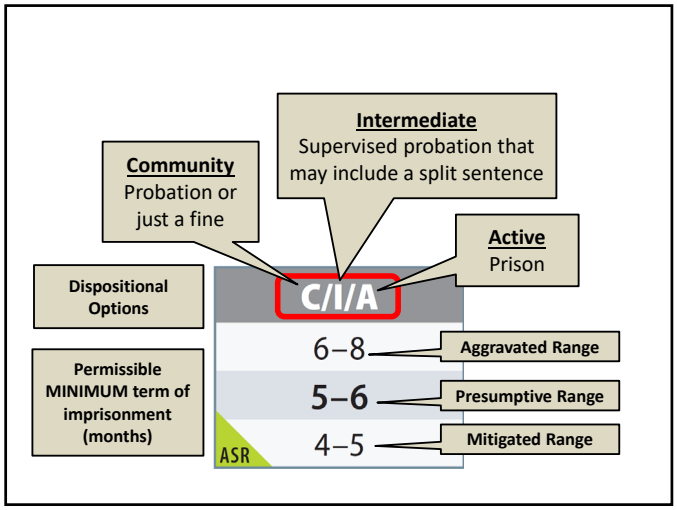
Objectives

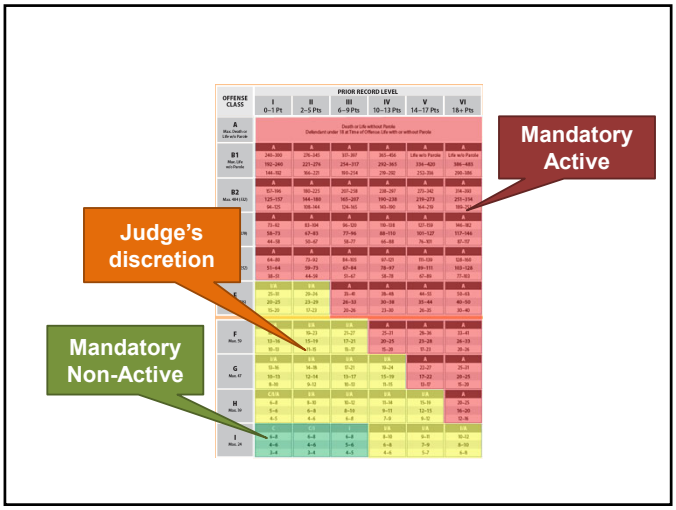
- Grid fluency
- Know what sentences mean
- Know enhancement and mitigation options

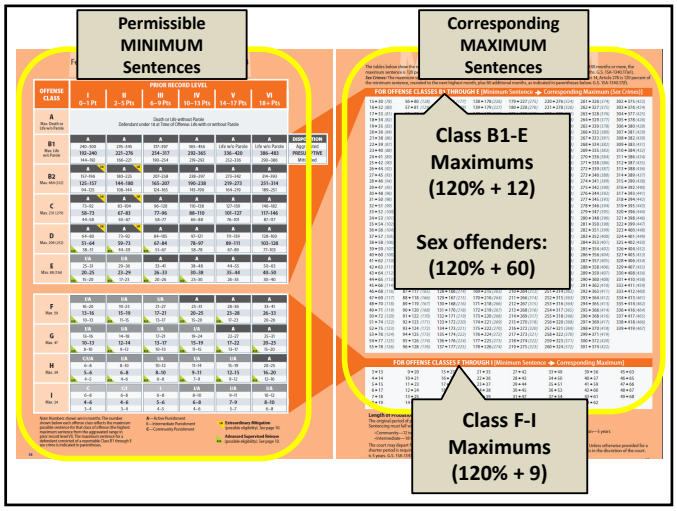



Felony Offenses Committed on or after October 1, 2013
MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS
MAXIMUM SENTENCES
C/I/A
6–8
5–6
4–5
ASR


Mitigated 29%
Presumptive 67%
Aggravated 4%
C/I/A
6–8
5–6
4–5
ASR
Permissible MINIMUM term of imprisonment (months)
Aggravated Range
Presumptive Range
Mitigated Range


Community
Probation or just a fine
Intermediate
Supervised probation that may include a split sentence
Active
Prison
Dispositional Options
Permissible MINIMUM term of imprisonment (months)
C/I/A
6–8
5–6
4–5
ASR
Aggravated Range
Presumptive Range
Mitigated Range

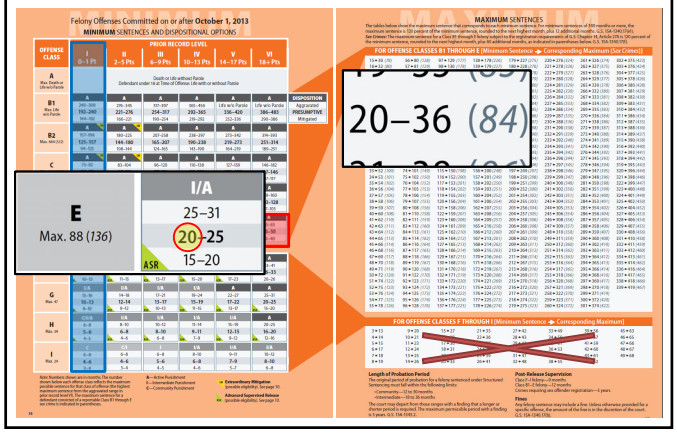

Mandatory Active
Judge's discretion
Mandatory Non-Active



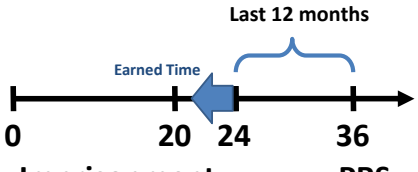
Example (Class B1-E felony)

- Discharge Weapon into Occupied Property (Class E)
- Prior Record Level I
- No aggravating or mitigating factors

Discharging a Weapon into Occupied Property
Prior Record Level I



Class B1-E Sentence Administration

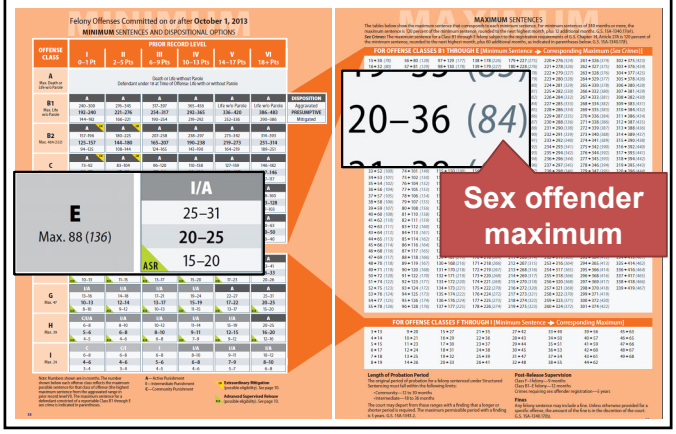


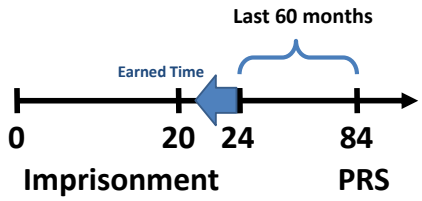
PRS period is 12 months

Example (Class B1-E felony)

- Second-degree kidnapping (Class E)
- Victim is 15 years old
- Prior Record Level I
- No aggravating or mitigating factors

Second-Degree Kidnapping
Prior Record Level I





PRS period is 5 years

Prior Record Level

Prior Record Level

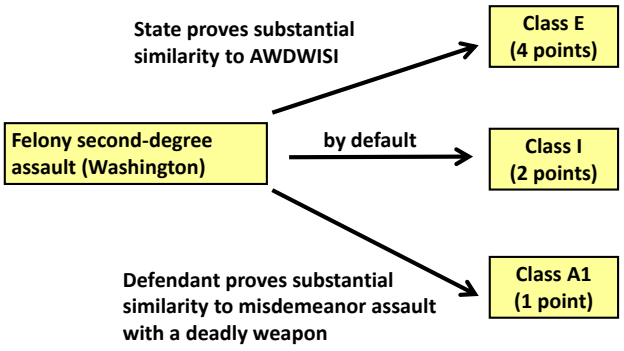
COUNT	DON'T COUNT
• All felonies	• Class 2 & 3 misdemeanors
• Class 1 and Class A1 non-traffic misdemeanors	• Traffic misdemeanors (other than DWI, commercial DWI, and death by vehicle)
• DWI, commercial DWI, and death by vehicle	• Infractions
• Prayer for Judgment (PJC)	• Contempt adjudications
• Crimes from other jurisdictions	• Convictions used to habitualize
	• Juvenile adjudications

- Count only the most serious conviction from a single calendar week of superior court, or session of district court

Out-of-State Prior Convictions

- By default:
  - Prior out-of-state felonies: Class I (2 points)
  - Prior out-of-state misdemeanors: Class 3 (0 points)
- With "substantial similarity" determination:
  - Count like the similar North Carolina offense
  - Proponent must prove by preponderance of evidence
  - Court must make findings; stipulations ineffective

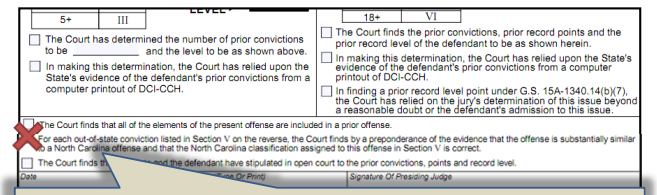
Crimes from other jurisdictions



Crimes from other jurisdictions

- No stipulations to substantial similarity
  - Similarity is a question of law
  - Must be determined by trial judge

Crimes from other jurisdictions



5+	III

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

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

18+	VI

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

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

☐ In finding a prior record level point under G.S. 15A-1340.14(b)(7), the Court has relied on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

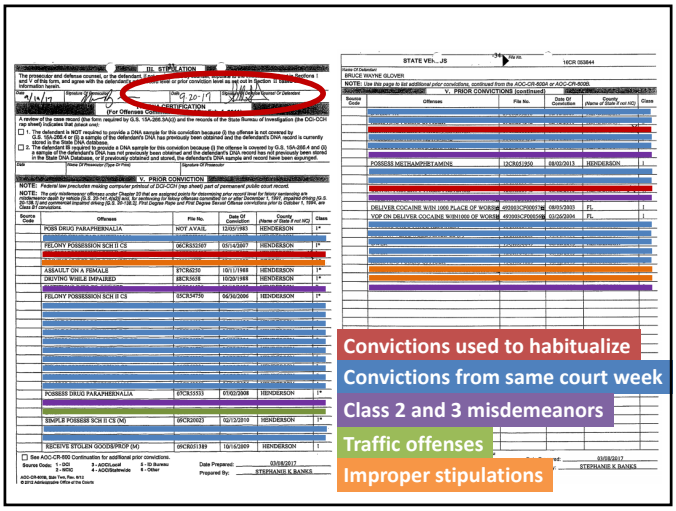
☒ The Court finds that all of the elements of the present offense are included in a prior offense.

☒ For each out-of-state conviction listed in Section V on the reverse, the Court finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section V is correct.

☐ The Court finds th… …ecause the defendant have stipulated in open court to the prior convictions, points and record level.

Date | Signature Of Presiding Judge

For each out-of-state conviction…the court finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that …classification assigned to this offense in Section V is correct.



Convictions used to habitualize

Convictions from same court week

Class 2 and 3 misdemeanors

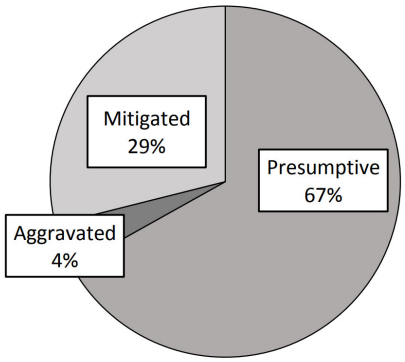
Traffic offenses

Improper stipulations

Aggravating Factors

H	C/I/A
Max. 39	6–8
	5–6
	ASR 4–5

D	A EM
Max. 204 (252)	64–80
	51–64
	ASR 38–51



Aggravating Factors: Procedure

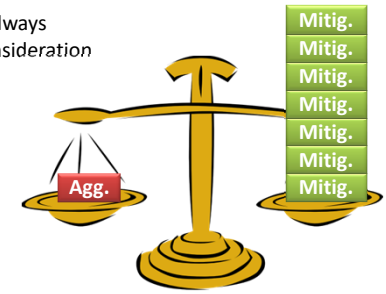
- State must give 30-day notice of intent to prove
  - Statutory aggravators need not be pled
  - Non-statutory aggravators must be pled
- Aggravating factors must be proved to jury beyond a reasonable doubt (or pled to)
- Prohibited aggravating factors
  - Evidence necessary to prove an element
  - Same item of evidence may not be used to prove more than one aggravating factor
  - Exercise of right to jury trial cannot be an aggravator

Mitigating Factors: Procedure

- Defendant must be given an opportunity to prove mitigating factors
- Defendant must prove to the judge by a preponderance of the evidence

Weighing factors

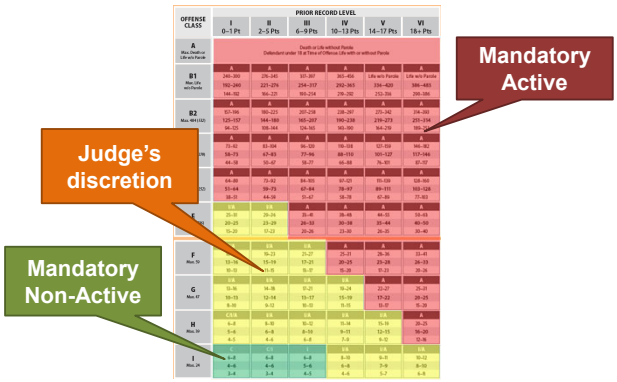
- A matter of judicial discretion
- Not a mathematical balance
- Presumptive range always permissible after consideration of offered factors



Extraordinary Mitigation

Extraordinary mitigation

- Allows an Intermediate sentence in certain "A"-only cells of the sentencing grid based on the presence of extraordinary factor(s)



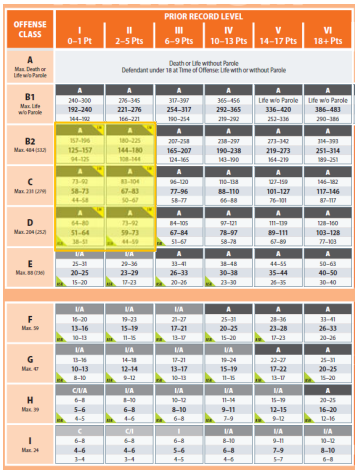
Extraordinary mitigation

- Exclusions
  - Cannot use with Class A or Class B1 felony
  - Cannot use for drug trafficking/conspiracy
  - Must have fewer than 5 prior record points

Page 10

EM

Grid cells in which EM might be possible are flagged with this symbol.



OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole					
B1 Max. Life w/o Parole	A 240–300 192–240 144–192	A 276–345 221–276 166–221	A 317–397 254–317 190–254	A 365–456 292–365 219–292	A Life w/o Parole 336–420 252–336	A Life w/o Parole 386–483 290–386
B2 Max. 484 (312)	A 157–196 125–157 94–125	A 180–225 144–180 108–144	A 207–258 165–207 124–165	A 238–297 190–238 143–190	A 273–342 219–273 164–219	A 314–393 251–314 189–251
C Max. 231 (279)	A 73–92 58–73 44–58	A 83–104 67–83 50–67	A 96–120 77–96 58–77	A 110–138 88–110 66–88	A 127–159 101–127 76–101	A 146–182 117–146 87–117
D Max. 204 (252)	A 64–80 51–64 38–51	A 73–92 59–73 44–59	A 84–105 67–84 51–67	A 97–121 78–97 58–78	A 111–139 89–111 67–89	A 128–160 103–128 77–103
E Max. 88 (136)	I/A 25–31 20–25 15–20	I/A 29–36 23–29 17–23	A 33–41 26–33 20–26	A 38–48 30–38 23–30	A 44–55 35–44 26–35	A 50–63 40–50 30–40
F Max. 59	I/A 16–20 13–16 10–13	I/A 19–23 15–19 11–15	I/A 21–27 17–21 13–17	A 25–31 20–25 15–20	A 28–36 23–28 17–23	A 33–41 26–33 20–26
G Max. 47	I/A 13–16 10–13 8–10	I/A 14–18 12–14 9–12	I/A 17–21 13–17 10–13	I/A 19–24 15–19 11–15	A 22–27 17–22 13–17	A 25–31 20–25 15–20
H Max. 39	C/I/A 6–8 5–6 4–5	I/A 8–10 6–8 4–6	I/A 10–12 8–10 6–8	I/A 11–14 9–11 7–9	I/A 15–19 12–15 9–12	A 20–25 16–20 12–16
I Max. 24	C 6–8 4–6 3–4	C/I 6–8 4–6 3–4	I 6–8 5–6 4–5	I/A 8–10 6–8 4–6	I/A 9–11 7–9 5–7	I/A 10–12 8–10 6–8

Extraordinary mitigation

- Permissible when court finds:
  - Extraordinary mitigating factors of a kind significantly greater than in the normal case;
  - Those factors substantially outweigh any factors in aggravation; and
  - It would be a manifest injustice to impose an active punishment in the case

Extraordinary mitigation

- Court must find extraordinary mitigating factors "significantly greater than in the normal case"
  - Quality, not quantity, makes mitigation extraordinary
  - Cannot be an ordinary mitigating factor

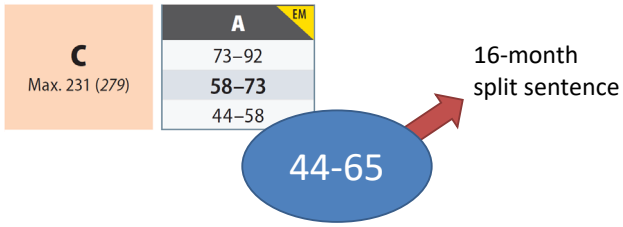
Example

- 18-year-old defendant has intercourse with a 13-year-old victim
- No prior record

C Max. 231 (*279*)	A (EM)
	73–92
	58–73
	44–58

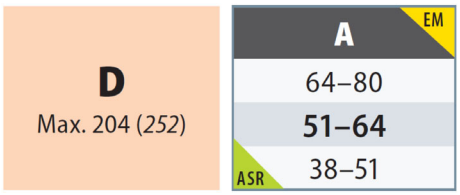
Example

- 18-year-old defendant has intercourse with a 13-year-old victim
- No prior record



Felony Death by Vehicle

Felony death by vehicle is a Class D felony. Notwithstanding the provisions of G.S. 15A-1340.17, intermediate punishment is authorized for a defendant who is a Prior Record Level I offender.



Advanced Supervised Release

Advanced Supervised Release

- Created by Justice Reinvestment Act
- Allows early release from prison to post-release supervision for identified defendants who complete "risk reduction incentives" in prison
- Used 150 times last year

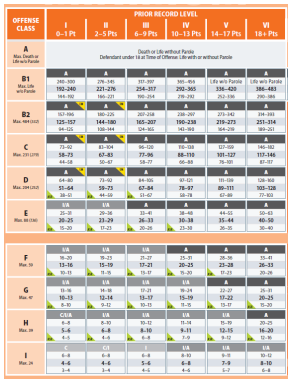
Eligibility

- Only certain grid cells
- Only Active sentences
- Only if court-ordered at sentencing
- Never over prosecutor objection

ASR

Grid cells in which ASR might be possible are flagged with this symbol.

Page 10



ASR Date

- Court imposes regular sentence from the grid
- ASR date, if ordered, flows from regular sentence
  - If **presumptive or aggravated**, ASR date is the lowest mitigated minimum sentence in the defendant's grid cell
  - If **mitigated**, ASR date is 80% of imposed minimum sentence

C/I/A
6–8
5–6
ASR 4–5

4-14 month sentence
ASR date: 3.2 months

Example

- PRL III defendant convicted of Obtaining Property by False Pretenses
  - Regular sentence: 8-19 months (presumptive)

H Max. 39	C/I/A	I/A	I/A
	6–8	8–10	10–12
	5–6	6–8	8–10
	ASR 4–5	ASR 4–6	ASR 6–8

What is the ASR date?

Example

- PRL III defendant convicted of Obtaining Property by False Pretenses
  - Regular sentence: 8-19 months

H Max. 39	C/I/A	I/A	I/A
	6–8	8–10	10–12
	5–6	6–8	8–10
	ASR 4–5	ASR 4–6	ASR 6–8

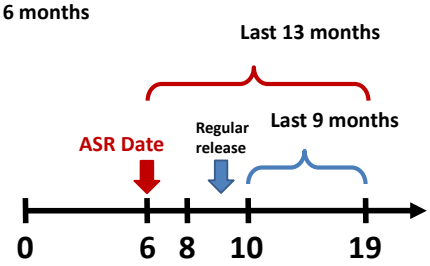
☐ to Life Imprisonment With Parole, pursuant to G.S. Chapter 15A, Article 81B, Part 2A.

for a minimum term of:	and a maximum term of:	☒ ASR term *(Order No. 4, Side Two)*
8 months	19 months	6 months

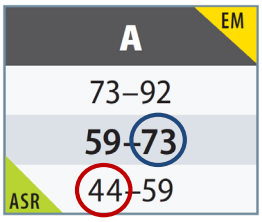
The defendant shall be given credit for _____ days spent in confinement prior to the date of this Judg

UNC SCHOOL OF GOVERNMENT

Regular sentence: 8-19 months
ASR date: 6 months

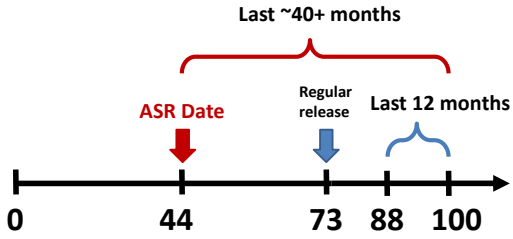


ASR Date (Class D, Level II)



Regular sentence: 73-100 months
Regular release: ~75 months
ASR: 44 months

Regular sentence: 73-100 months
ASR date: 44 months



Habitual Felon
Habitual B/E

Habitual Status Offenses (p. 8-9)

- Habitual felon
  - Defendants with 3+ prior felonies
  - Four-class sentence enhancement
- Habitual breaking and entering
  - Defendants with 1+ prior B/E
  - Sentenced as Class E

Habitual Felon

- Prior convictions used to habitualize do not count toward prior record level
  - State may choose which convictions to allege
  - State may allege more than three priors

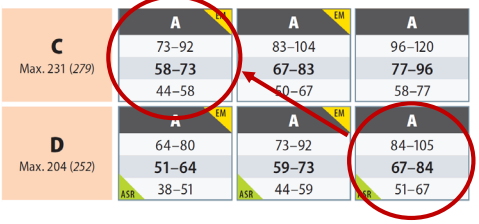
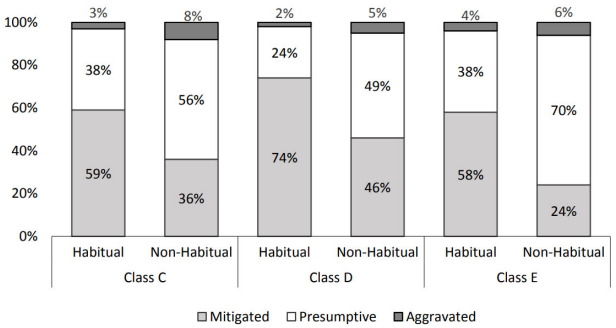


Figure 18: Sentencing Range by Offense Class for Habitual and Non-Habitual Felons (Active Sentences Only)



Drug Trafficking

Drug Trafficking

Drug Trafficking Sentencing (G.S. 90-95(h))

Drug trafficking is not sentenced using the regular Structured Sentencing grid. Instead, a person convicted of drug trafficking must be sentenced as set out below, including the mandatory fine, regardless of his or her prior criminal record.

Offense Class and Minimum Fines for Drug Trafficking

Drug	Amount	Class	Fine (not less than)
Marijuana	In excess of 10 lbs.–49 lbs.	H	$ 5,000
	50–1,999 lbs.	G	$ 25,000
	2,000–9,999	F	$ 50,000
	10,000 or more	D	$200,000
Methaqualone	1,000–4,999 dosage units	G	$ 25,000
	5,000–9,999	F	$ 50,000
	10,000 or more	D	$200,000
Cocaine	28–199 grams	G	$ 50,000
	200–399	F	$100,000
	400 or more	D	$250,000
Methamphetamine	28–199 grams	F	$ 50,000
	200–399	E	$100,000
	400 or more	C	$250,000
Amphetamine	28–199 grams	H	$ 5,000
	200–399	G	$ 25,000
	400 or more	E	$100,000
Opium, Opiate, Opioid, or Heroin*	4–13 grams	F	$ 50,000
	14–27	E	$100,000
	28 or more	C	$500,000
LSD	100–499 units	G	$ 25,000
	500–999	F	$ 50,000
	1,000 or more	D	$200,000
MDA/MDMA	100–499 units/28–199 grams	G	$ 25,000
	500–999 units/200–399 grams	F	$ 50,000
	1,000 units/400 grams or more	D	$250,000
Substituted Cathinones*	28–199 grams	F	$ 50,000
	200–399	E	$100,000
	400 or more	C	$250,000
Synthetic Cannabinoids	In excess of 50–249 dosage units**	H	$ 5,000
	250–1,249	G	$ 25,000
	1,250–3,749	F	$ 50,000
	3,750 or more	D	$200,000

Minimum-Maximum Sentences for Drug Trafficking Crimes, by Offense Class

	Offense Committed On/After 12/1/2012		Offense Committed Before 12/1/2012	
Class	Minimum	Maximum	Minimum	Maximum
Class C	225 mos.	282	225 mos.	279
Class D	175	222	175	219
Class E	90	120	90	117
Class F	70	93	70	84
Class G	35	51	35	42
Class H	25	39	25	30

Drug Trafficking

- Substantial assistance
- Attempted trafficking
- First Step Act

Substantial Assistance

- Drug trafficking only
- "Substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals."
  - Not limited to accomplices, etc., in *this case*
- Judge has discretion to give reduced sentence, reduced fine, or probation

Substantial Assistance

<u>2021</u>
278 trafficking convictions
37 probationary sentences

Attempted Trafficking

- Reverts to regular sentencing grid for that class of offense

Class E	90	120

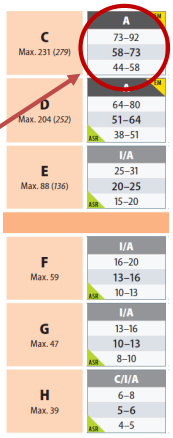
E Max. 88 (136)	I/A	I/A
	25–31	29–36
	20–25	**23–29**
ASR	15–20	ASR 17–23

- No mandatory fine

Habitual Trafficking

- Trafficking convictions may be sentenced under the habitual felon law. State v. Eaton (2011)

Class	Minimum	Maximum
Class C	225 mos.	282
Class D	175	222
Class E	90	120
Class F	70	93
Class G	35	51
Class H	25	39



First Step Act

- Applicable to Trafficking by Possession of Lowest Drug Amount
- Allows departure from mandatory sentence if defendant meets 11 conditions, including
  - No prior felony drug convictions
  - No violence or weapons used in the commission of offense
  - Admission to substance abuse disorder
  - Reasonable assistance in identifying accomplices
- Sentenced according to regular sentencing grid

Consecutive Sentences

- *"Sentences imposed under this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section."*
  - Habitual felon
  - Habitual DWI
  - Habitual B/E
  - Drug trafficking

- Always interpreted to allow consolidated or concurrent sentences for convictions sentenced together


Questions?

Mitigation Basics

Glenda Brooks and Josie Van Dyke
Sentencing Solutions, Inc.

1

What is mitigation and how do I use it?

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

2

"What Happened?"

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

3

How do you find out what happened?

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

4

Ask your client Questions

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

5

Ask your client Questions

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

6

What's Right

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

7

Be Patient and Persistent

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

8

ACES as an Interview Tool

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

9

Talk to family members (If appropriate)

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

10

Get the family on board!

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

11

Genograms

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

12

Read Police Reports

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

13

Send for Important Records

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

14

Records 101

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

15

Reading the Records

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

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

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

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

We will go over examples.

16

Expert Help

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

17

Contact Us

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

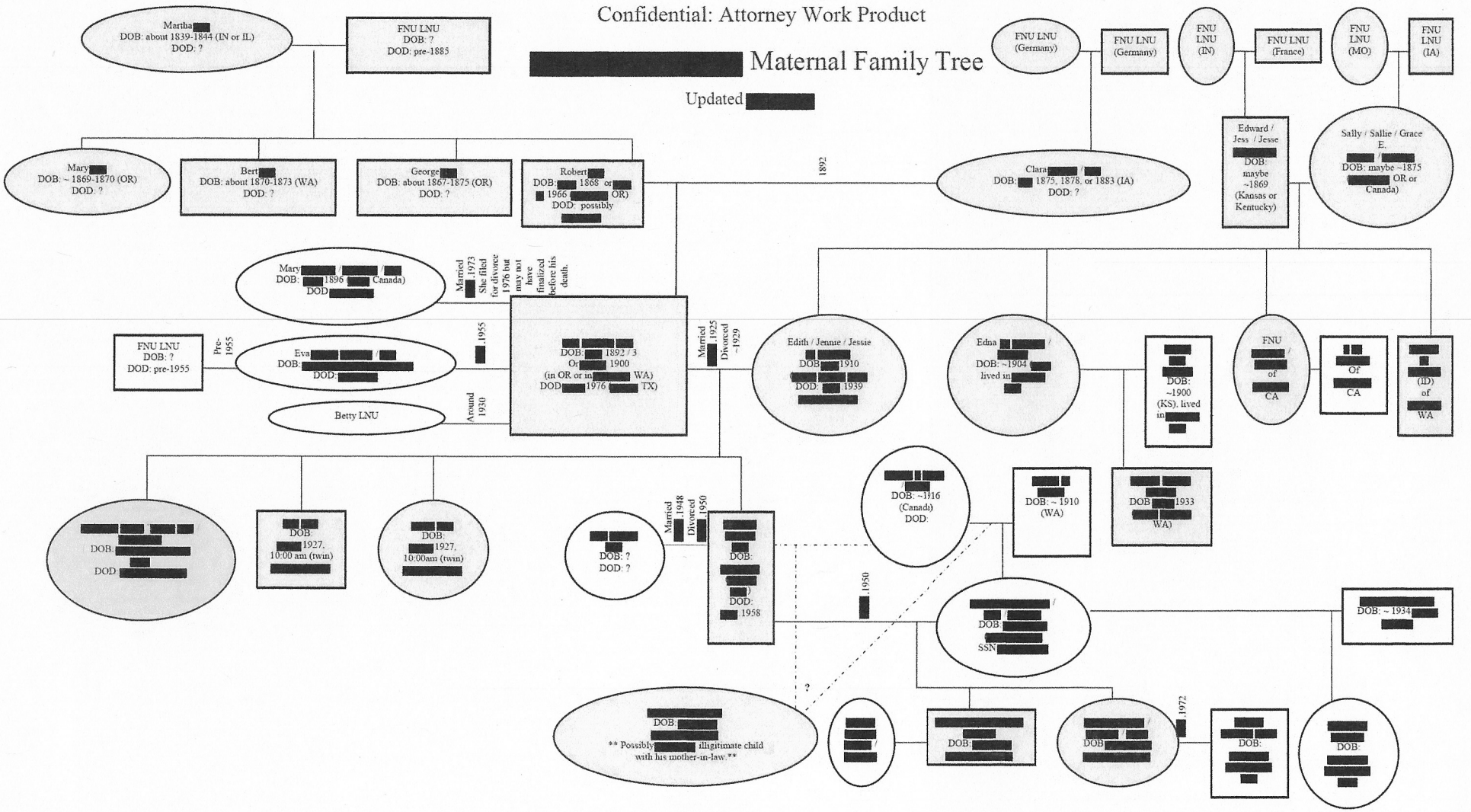
- Please feel free to email questions:
- josievandyke@aol.com

18

Confidential: Attorney Work Product

[redacted] Maternal Family Tree

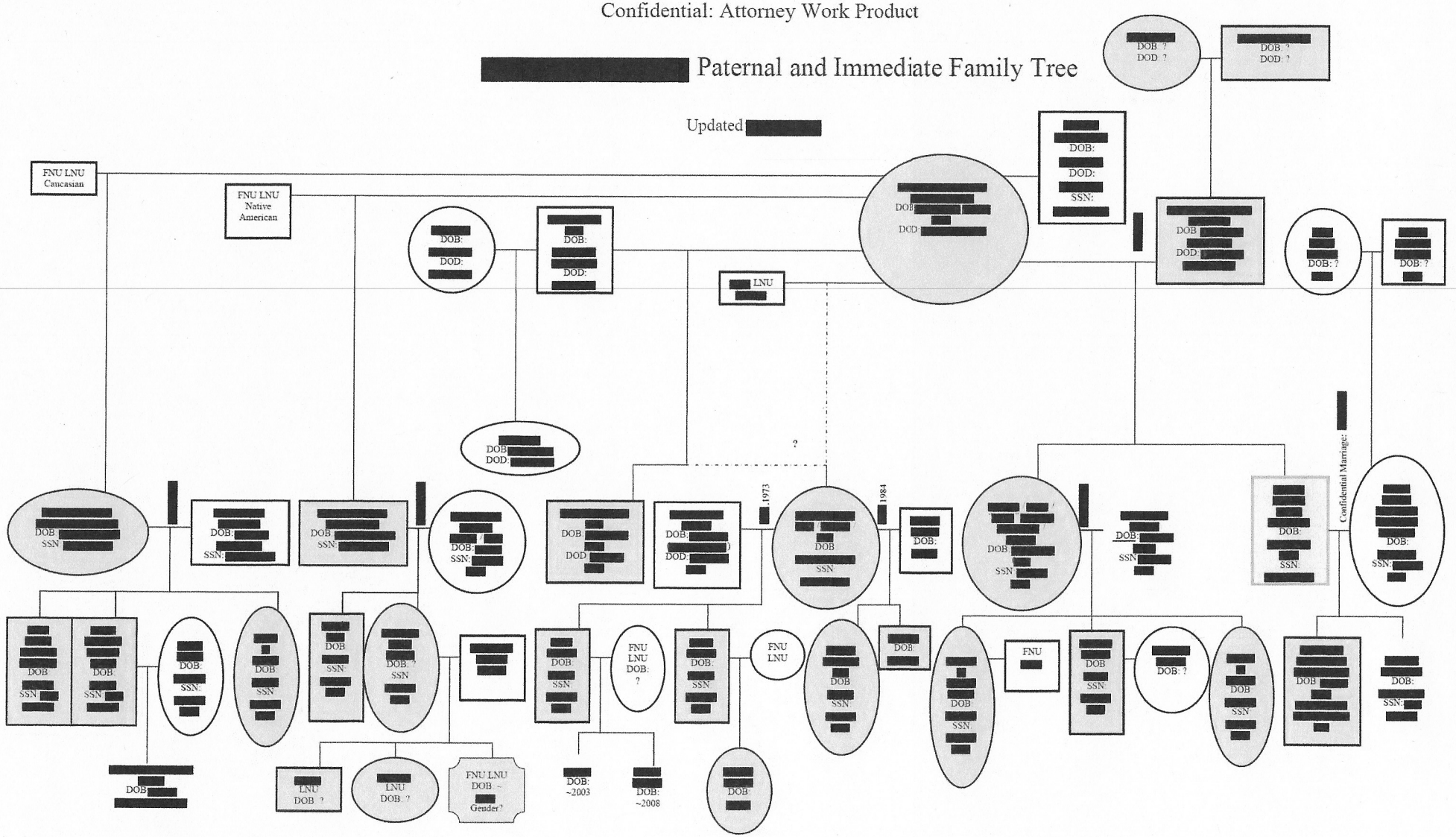
Updated [redacted]



Confidential: Attorney Work Product

[redacted] Paternal and Immediate Family Tree

Updated [redacted]



Psychiatric Clinic Follow-up Form

(?)

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

Date/Time [redacted] @ 1120

Current Medications

No 4 — can often see withdrawal prot.

Complaints

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

Side Effects

Per 5/15/17 nursing note + verbal report - pt became agitated, "upset" after receiving negative news from a family member & began banging & kicking door → SW. Was calm & cooperative on 5/9/17 & no signs of agony (scheduled to be seen by Mr Winter ...)

Suicide Precautions

☒ Yes ☐ No

Continue Precautions

☐ Yes ☐ No

Changes in Situation

... for consideration of → gen pop ... past Hx Rx ... would like to stay in 4 pts the whole time ... heard some bad stuff today ... no signs of self injury ...

Mental Status Exam

gait steady

affect appropriate

ø hallu, delus, FOI/LOA/FOR

insight/judgment fair (improved)

alert

o/x

speech normal rate/vol

IMPRESSION

Some degree of manipulation ... Bipolar NOS ... no psychosis

PLAN

1) Stop S.W.

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

3) begin 4 pt; ... with dinner

Return to Clinic: 5/19/17 to see Mr Winter

[signature]

Consultant Signature

WAKE COUNTY DETENTION FACILITY
Medical Department

PROGRESS NOTES

All entries must be signed and dated

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

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

Psychiatric Clinic Follow-up Form

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

BK [redacted]

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

Current Medications
Prozac 20mg q AM
Zyprexa 5mg q HS

Complaints Pt said N/O wanting meds on [illegible]

Side Effects Never took meds prescribed.

Suicide Precautions
☒ Yes ☐ No

Continue Precautions
☐ Yes ☐ No

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

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

IMPRESSION I BPAD NOS P/H Cocaine Use D/O dormant since 01/17
II PD NOS
III LBP + Lt Ft Pain

PLAN
1) Off S/W to Psychiatry
2) D/C meds
3) F/U 7/20/17

Return to Clinic: ______ [signature]
Consultant Signature

17.047-2/23/00

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

11/27/2013

STUDENT INFORMATION

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

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

SCHOOL INFORMATION

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

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

Check courses and grades

CREDIT HISTORY

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

UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS MINIMUM ADMISSION REQUIREMENTS REMAINING

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

PERFORMANCE INFORMATION

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

TESTING INFORMATION

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

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

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

CURRICULUM-RELATED WORK EXPERIENCE
No Data For Student

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

IMMUNIZATION INFORMATION

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

ATTENDANCE INFORMATION

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

!?

PREVIOUS SCHOOLS INFORMATION

No Data For Student

Signature of Principal or Designee Certifying This Transcript

Name: _____ Date: _____

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

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

STATE OF NORTH CAROLINA

_____ County

File No.(s)

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

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

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

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

I. DEFENSE REQUEST

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

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

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

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

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

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

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

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

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

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

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

II. COURT ORDER

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

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

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

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

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

Date	Name Of Judge	Signature Of Judge

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

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

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

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

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

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

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

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

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

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

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

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

IV. EXPERT COMPENSATION CALCULATOR

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

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

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

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

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

Date	*Signature Of Expert*

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

Adverse Childhood Experiences ("ACEs") Questionnaire

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

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

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

THE TRUTH ABOUT ACEs

WHAT ARE THEY?

ACEs are ADVERSE CHILDHOOD EXPERIENCES

The three types of ACEs include

ABUSE
- Physical
- Emotional
- Sexual

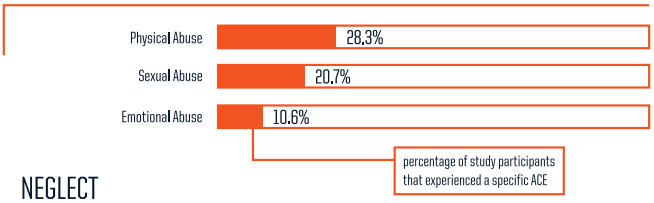
NEGLECT
- Physical
- Emotional

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

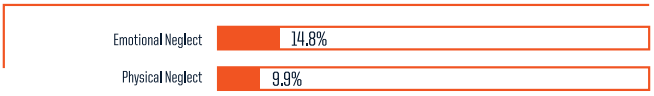
HOW PREVALENT ARE ACEs?

The ACE study revealed the following estimates:*

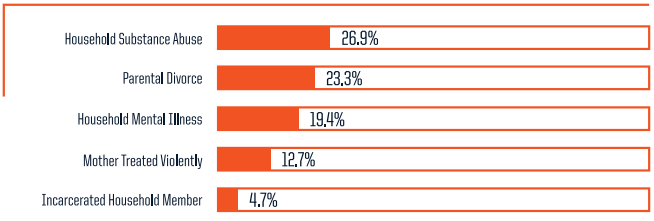
ABUSE



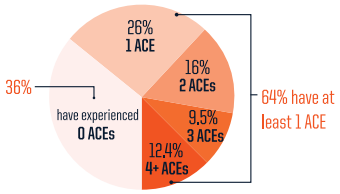
NEGLECT



HOUSEHOLD DYSFUNCTION

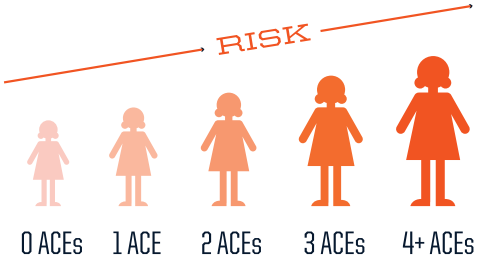


Of 17,000 ACE study participants:



WHAT IMPACT DO ACEs HAVE?

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



Possible Risk Outcomes:

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

PHYSICAL & MENTAL HEALTH
- Severe obesity
- Diabetes
- Depression
- Suicide attempts
- STDs
- Heart disease
- Cancer
- Stroke
- COPD
- Broken bones

rwjf.org/aces

Robert Wood Johnson Foundation

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

Reset

Adverse Childhood Experience (ACE) Questionnaire
Finding your ACE Score

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

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

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

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

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

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

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

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

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

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

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

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

STATE VS. GOLIATH IRVINE

BABY PRECIOUS

- 7lbs. 8 oz.
- 8 weeks old

STORYTELLING AND VISUAL AID IN SENTENCING

FACT PATTERN

- Client: Goliath 22 years old
- Charged with: Felony Child Abuse for Shaking his 8 weeks old, Class E Felony
- Background: Single Dad. Raised by Single mom then by Foster mom. Precious' mom ran off after baby was delivered, leaving Goliath to raise baby by himself. He was mechanic, he's always wanted kids. Didn't know who expensive it was. Lost all his savings in the first couple of month of having the child, behind on rent because he couldn't work. Excessive crying, panicked him. He shook baby. Took her to hospital immediately.
- Doctor calls Police and Department of Social Service after client admits to shaking baby. During interview with officers Zack admits to shaking baby.
- Zack signs a family services agreement, underwent a parent capacity evaluation and took parenting classes.

FACT PATTERN (CONTINUED)

- Family Youth Services not involved because paternal grandmother agrees to care for baby.
- Goliath is locked up but released under NCGS15A-534.4, because he was the sole caretaker up to his point and had connected with baby. Judge allows for supervised visitation at grandma's house.

NCGS 14-318.4 (A)(4)

Section 14-318.4. Child abuse a felony

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

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

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

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

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

GOAL IN SENTENCING

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

STORYTELLING IN TRIAL VS. SENTENCING

- STORY OF INNOCENCE
- STORY OF MITIGATION

STORYTELLING FOR MITIGATION

- Starts with Investigation
- Talk to your client and family and listen in **between the lines for mitigation.**
  - **So used to listening for legal issues and story of innocence**
  - **Train yourself to look and listen for mitigation**
- Investigate Mitigation not only Justification
  - That teacher/mentor, sponsor
  - That old man/woman who client took groceries to
  - Photos of house that client was brought up in

FACT PATTERN

- Client: Goliath, 23 years old
- Charged with: Felony Child Abuse for Shaking her 8 weeks old, Class E Felony
- Background: Single Dad. Raised by Single mom then by Foster mom. Precious' mom ran off after baby was delivered, leaving Zack to raise baby by himself. He was mechanic, he's always wanted kids. Didn't know who expensive it was. Lost all his savings, in the first months of having the child, behind on rent because he couldn't work. Excessive crying, panicked him. He shook baby. Took her to hospital immediately.
- Doctor calls Police and Department of Social Service after client admits to shaking baby. During interview with officers Zack admits to shaking baby.
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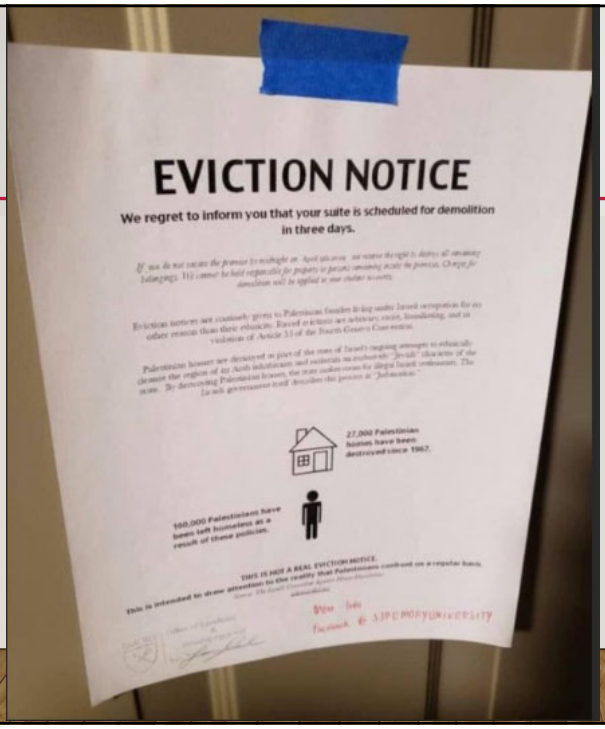


MITIGATION STARTS WITH INVESTIGATION

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

STORYTELLING STARTS AT PLEA BARGAINING

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

SENTENCING HEARING: WHAT THE JUDGE WANTS TO KNOW

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

WHY DID IT HAPPEN

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

WHY DID IT HAPPEN: IN GOLIATH'S CASE

- Young, but wanted to be the dad that he never had
- Eviction
- Didn't have family support
- Didn't know how to parent, no guidance or education
- Didn't know who to deal with stress (small apartment, incessant crying)

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

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

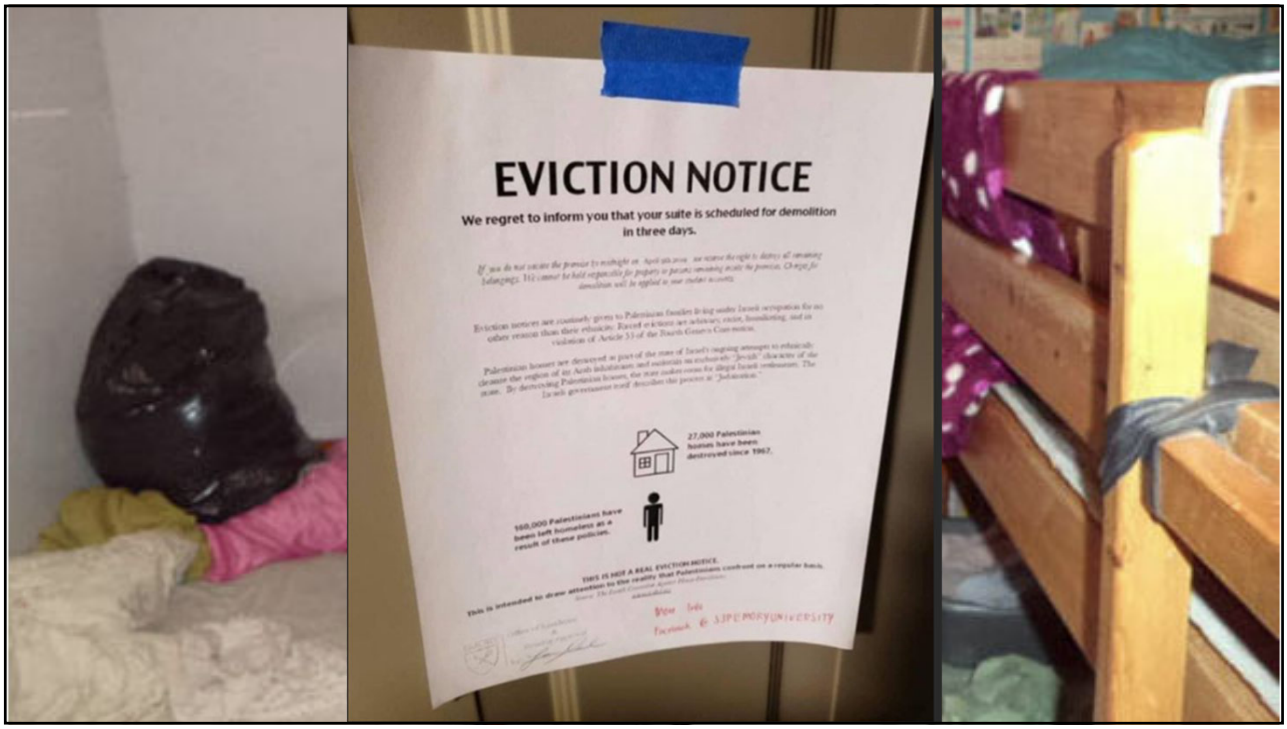
STATE WILL USE DEMONSTRATIVE EVIDENCE

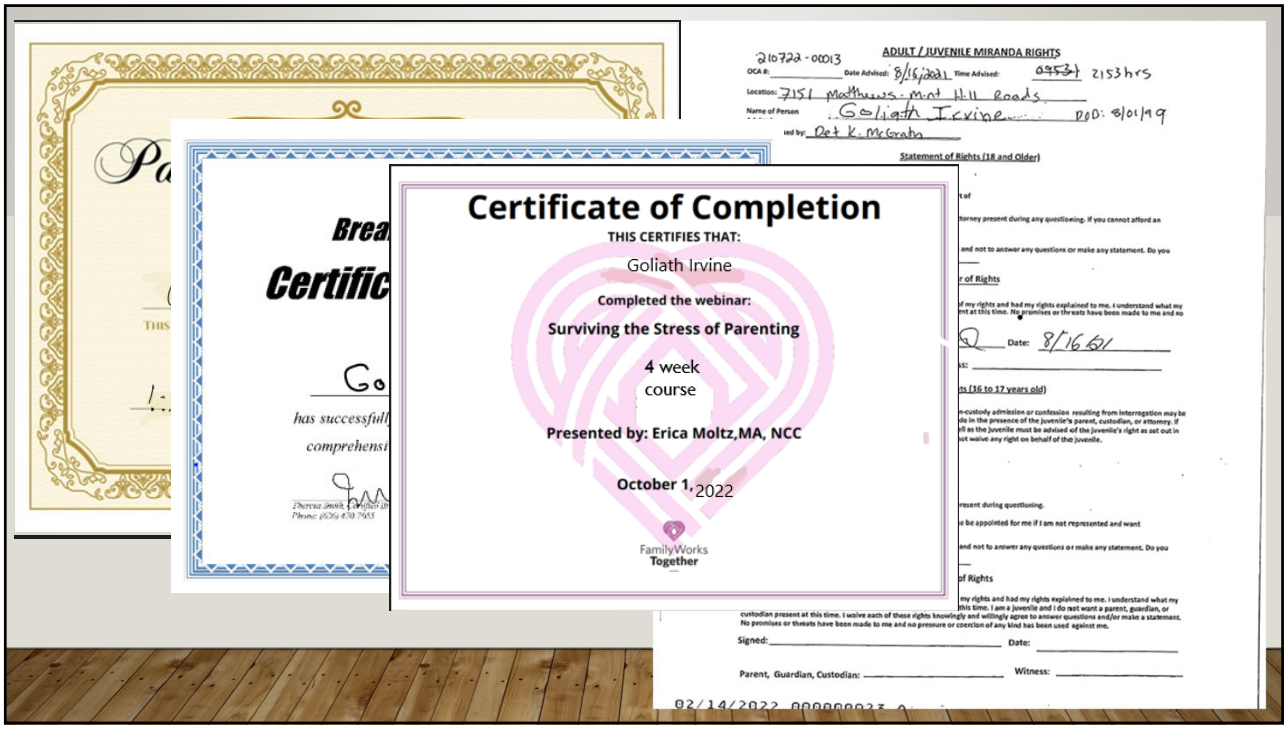
- Shake Doll
- Video
- Victim Impact Statement
- Its so easy for them, just roll in the victim

STATE VS. GOLIATH IRVINE

BABY PRECIOUS

- 7lbs. 8 oz.
- 8 weeks old


EVICTION NOTICE
We regret to inform you that your suite is scheduled for demolition in three days.
27,000 Palestinian homes have been destroyed since 1967.
THIS IS NOT A REAL EVICTION NOTICE.


Certificate of Completion
THIS CERTIFIES THAT:
Goliath Irvine
Completed the webinar:
Surviving the Stress of Parenting
4 week course
Presented by: Erica Moltz,MA, NCC
October 1, 2022
FamilyWorks Together
ADULT / JUVENILE MIRANDA RIGHTS
Statement of Rights (18 and Older)
Signed:
Date:
Parent, Guardian, Custodian:
Witness:

SIZE DOES NOT MATTER

September 14, 2022

To: Susan Weigand
Re: Goliath Irvine and Baby Precious

Dear Ms. Weigand:

At your request, I reviewed the discovery in *State v. Goliath Irvine* as well as the medical records for baby Precious.

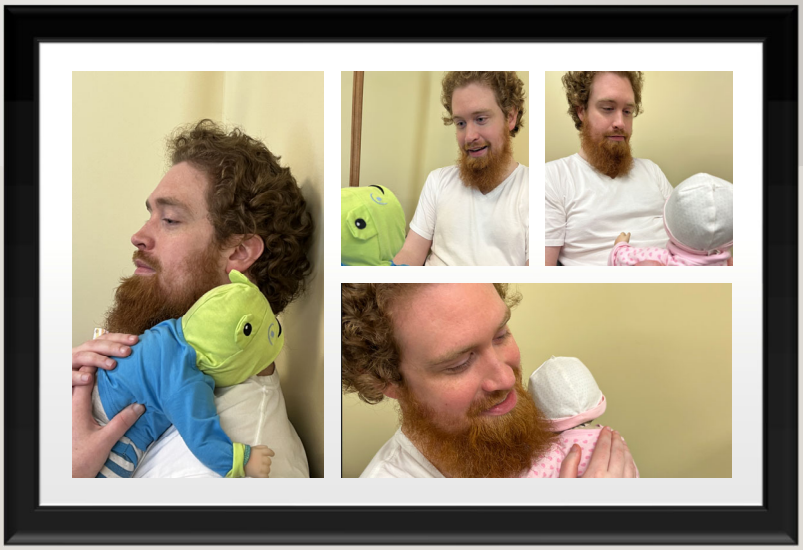
The questions you presented to me were:

1. Whether Mr. Goliath Irvine's size (6'5" and 245 pounds) contributed to baby Precious's injuries?
2. If Precious had been shaken by a smaller individual, would her injures have been the same?

The answer to both your questions is that the size of your client has nothing to do with the baby's injuries. At 8 weeks old a baby is as frail and has no control over his or her head. Had a smaller individual been accused of shaking Precious she would have suffered the same injuries.

Dr. Childless
Board Certified Pediatrician

- Father and Baby has bonded.



TAKE AWAY

- Set the scene:
  - Small apartment (photos, use the courtroom)
  - ***Incessant noise: play
  - Note: get rid of jury
- Exhibits: Prenatal Records, albums of pictures from each visitation
  - Hand up one by one
- Find out ahead of time who the state has and who will be speaking
  - Object if possible, to having victim rolled in until after plea, (at least can warn client)
- Prepare your client and family
  - "Sorry but not sorry"- not ok- no Alford plea


MITIGATION STARTS WITH INVESTIGATION

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

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

Bottom Line up Front

- To ensure appellate review on the merits of an issue, the trial attorney must:
  - preserve objections and arguments,
  - establish facts in the record, and
  - appeal correctly.

Pre-trial Preparation

- Preservation of issues, objections, and arguments begins during pre-trial preparation.
- Thoughtful and thorough preparation will lead to you properly preserving issues, objections, and arguments.

Pre-trial Preparation - Discovery

- Preserve discovery issues by filing written discovery requests, specifying what you want, and follow up with a motion to compel. If the motion to compel is allowed, get a written order from the judge.
- Keep a running list of items you need to ask the State to produce.
- Cite constitutional and statutory grounds for your entitlement to the discovery.

Pre-trial Preparation

- In reviewing discovery, you should ask yourself, "how will the State introduce this evidence? What objections will I make to this evidence?"
  - Will I need a limiting instruction? Come prepared.
- When you prepare questions for each of the State's witnesses, highlight in bold the expected testimony of the witness that is objectionable. Write down the basis for your objections.

Pre-trial Preparation

- Consider objections the State could make to your cross-examination questions and come prepared to defend the questions.
- Come to court prepared with evidence to support your cross-examination questions.

Pre-trial motions

- Request and motion for discovery
- Motion for complete recordation
- Motion for a bill of particulars
- Motion to sever charges or defendants
- Motion to suppress
  - You MUST attach an affidavit, and you can sign the affidavit
  - If the MTS is denied, you MUST object in front of the jury when the evidence is actually offered.

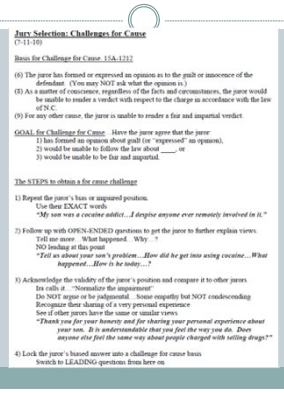
Error Preservation – Jury Selection

- Batson (race) and J.E.B. (gender) claims
  - A complete recordation is imperative for preserving
  - Our Supreme Court has revived Batson
- Manner of juror selection, including fair cross-section of the community.
- Challenges for Cause that are denied can be preserved for appellate review.
  - Specific, technical requirements to preserve
  - 15A-1214
  - Have a voir dire folder

Error Preservation – Jury Selection

- Spend time preparing your voir dire and considering if there are facts about your case that could lead to a challenge for cause.
- Have a script to help you develop and preserve a challenge for cause:

Error Preservation – Jury Selection



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

Basis for Challenge for Cause 15A-1212

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

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

The STEPS to obtain a for cause challenge

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

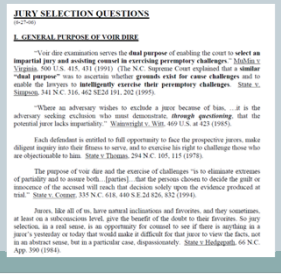
2) Follow up with OPEN-ENDED questions to get the juror to further explain views.
Tell me more… What happened…Why…?
NO leading at this point
"Tell us about your son's problem…How did he get into using cocaine…What happened…How is he today…?

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

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

Error Preservation – Jury Selection

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



JURY SELECTION QUESTIONS
(6-27-06)

I. GENERAL PURPOSE OF VOIR DIRE

"Voir dire examination serves the **dual purpose** of enabling the court to **select an impartial jury and assisting counsel in exercising peremptory challenges**." Mu'Min v Virginia, 500 U.S. 415, 431 (1991) (The N.C. Supreme Court explained that a **similar "dual purpose"** was to ascertain whether **grounds exist for cause challenges** and to enable the lawyers to **intelligently exercise their peremptory challenges**. State v. Simpson, 341 N.C. 316, 462 SE2d 191, 202 (1995).

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

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

The purpose of voir dire and the exercise of challenges "is to eliminate extremes of partiality and to assure both…[parties]…that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. State v Hedgepath, 66 N.C. App. 390 (1984).

Error Preservation – Jury Selection

- A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. *State v Leonard*, 295 N.C. 58, 62-63 (1978).
- Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989).

Error Preservation – voir dire

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

Error Preservation – voir dire

- 15A-1214(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
- (1) Had peremptorily challenged the juror; or
- (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

Joinder of Charges

- 15A-926(a): Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both,
- are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

Joinder of Defendants

- 15A-926(b): Charges against two or more defendants may be joined for trial:
- When each of the defendants is charged with accountability for each offense; or

Move to sever charges & defendants

- Objection to the State's motion to join charges is not sufficient to preserve for appellate review.
- A motion to sever preserves.
  - 15A-927(a)(1)-(2)
  - Motion must be pretrial, unless "based on grounds not previously known"
  - State v. Yarborough

Move to sever charges & defendants

- Assert constitutional and statutory grounds.
  - 5th Amendment and state constitutional grounds
  - 15A-926 (same transaction, single plan)
  - 15A-927 ("necessary to achieve a fair determination of the defendant's guilt or innocence")
- Assert how the defendant will be prejudiced.
- **Motions must be renewed** at close of State's evidence and at the close of ALL evidence to give the judge a chance to determine prejudice.

Preserving Evidentiary Error

- Objections must be:
  - Timely
  - In front of the jury, even if made outside the presence of the jury
  - Specific (cite rule/statute)
  - Include constitutional grounds
  - On the record (recordation motion)
  - Mitigated with a limiting instruction or mistrial request

Appellate Rule 10

- "In order to preserve an issue for appellate review, a party must have presented to the trial court a **timely** request, objection, or motion,
- "stating the **specific** grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.
- "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."

~~Rule 103(a)~~

- Rule 103: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."
- **Held unconstitutional in *State v. Oglesby*, 361 N.C. 550 (2007).**
- Even if a judge says an objection is preserved, that doesn't make it preserved.

Objections – Timeliness

- Motions to suppress and other motions before or during trial
  - Object at the moment the evidence is introduced in the presence of the jury, even if voir dire was held immediately before or earlier in case.
  - Object if the evidence is mentioned by a later witness.
  - Don't open the door if evidence is suppressed.

Objections – Timeliness

- When you prepare your cross-examination questions for each witness, highlight/bold/circle the evidence and questions that you must object to.
  - List the constitutional grounds and evidence rules

Objections – Timeliness

- Ask for a voir dire hearing to address witness testimony and exhibits.
  - A single document might contain various pieces of evidence that are inadmissible for different reasons.
  - During pre-trial preparation you should go through the documents sentence by sentence and note objections.
- But you must still object during the witness's testimony to the admission of the testimony and the exhibit.

Objections – Timeliness

- State v. Joyner, COA 2015
  - Before defendant testified, judge ruled he could be impeached with old convictions.
  - When defendant was cross-examined about the old convictions, defense attorney did not object.
- "As an initial matter, we note that defendant has no right to raise the Rule 609 issue on appeal."

Objections – Timeliness

- "For us to assess defendant's challenge, however, he was required to properly preserve the issue for appeal by making a timely objection at trial."
- "Here, defendant opposed the admission of all prior conviction evidence during a *voir dire* hearing held before his testimony, but he failed to object to the evidence in the presence of the jury when it was actually offered. Unfortunately for defendant, his objection was insufficient to preserve the issue for appellate review."

Objections – Timeliness

Here, Defendant filed a pretrial motion to suppress, *inter alia*, "evidence obtained as the result of an unconstitutional seizure of the [target package] addressed to . . . Defendant," and renewed his objection at trial to the introduction of evidence concerning the drug dog sniff. Nonetheless, Defendant concedes that he "did not object when the State elicited testimony about the removal of the [target package] from the conveyor belt." Therefore, Defendant has waived appellate review of the issue of the target package's removal from the conveyor belt, *see id.*, and the trial court's conclusion that "a reasonable and articulable suspicion existed sufficient to justify a brief detention of the package for purposes of having a drug dog sniff it" remains undisturbed.

Objections – Specificity

- Organize and label your questions to match up with the evidence rule that you are going to argue.
- Don't rely on your memory in court. Write it down.

Objections – Specificity

LACK OF RELIABILITY OF OPINION ISSUE – RULE 702

what are your opinions?

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

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

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

have you talked with Sally about a trial?

a courtroom?

a jury?

being in court with John?

have you asked what she thinks about it?

other sources of trauma – medical examinations

Objections – Specificity

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

(2) testimony is product of reliable principles and methods

cite the studies you have relied upon in reaching your opinion

what research has been done in this area

who are the leading experts in this area

what resources have you consulted in forming your opinion

what methods have you used to reach your opinion

what principles of psychology underlie your opinion

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

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

FACTS DO NOT SATISIFY THE STATUTORY REQUIREMENTS

p. 4 of state v. Jackson – distinguish facts

Objections – Specificity

- State v. Mosley, COA 2010
  - home invasion with testifying co-defendant
  - co-defendant had unrelated pending charges
  - defendant sought to cross-examine about pending charges
  - asserted Rule 608(b) as only basis

Objections – Specificity

- "As it does not affirmatively appear from the record that the issue of Defendant's constitutional right to cross-examine Crain about the pending criminal charge was raised and passed upon in the trial court
- or that Defendant timely objected to the trial court's ruling allowing the State's motion *in limine* to prohibit such questioning, this issue is not properly before us for appellate review. The assignment of error upon which Defendant's argument is based is dismissed."

Sufficiency & Variance

- Have a folder for a motion to dismiss.
- Move to dismiss **all** charges for **insufficient evidence and variance**.
  - Don't forget to make the motion.
  - If defense puts on evidence, the motion must be renewed or it is waived.
  - Make a motion to dismiss for insufficient evidence and variance after guilty verdict BEFORE judgment.

Sufficiency & Variance

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

MOTION TO DISMISS:

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

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

Charge Conference Page 155

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

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

MR. [redacted] Thank you.

Instructions

- Print pattern instructions for all offenses.
- Review pattern instructions – you might be surprised what's in there.
  - Read the footnotes and annotations.
  - Footnotes are not required unless requested!
  - Consider terms/phrases in brackets
- Limiting instructions are not required unless requested, so request it, and then remember to make sure it is actually given!
- Think outside the box and construct proposed instructions based on cases.

Instructions

- Requests for non-pattern instructions must be in writing to be preserved.
  - N.C.G.S. 15A-1231
  - Rule 21 General Rules of Practice
- This includes modifications of pattern instructions.
- Ask the judge for a written copy of instructions.

Objections – Closing Arguments

- Objections during argument are more important to protecting the defendant's rights on appeal than the attorney not appearing rude.
- Improper arguments are not preserved without objection.

Objections – Closing Arguments

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

Making A Complete Record

- Move for a complete recordation
- Basis for objection on the record
  - Even if stated at the bench or in chambers, put it on the record
- An oral proffer as to expected testimony is ineffective
  - The witness must testify
  - The exhibit/document must be given to the judge and be placed in the record

Making A Complete Record

- PowerPoints – get in the record
  - Printed copy is not always adequate
  - Compare DA's PowerPoint slides to the actual exhibits – object to manipulation
- Digital evidence – get in the record and keep copies
- Ex parte materials – clearly labeled and sealed and not served on the State
  - Ex parte is different than having something sealed and unavailable to the public.

Making A Complete Record

Courtroom conditions:

What can the jury see?

Law enforcement presence

Victim's rights advocates

Covid restrictions

Signs on the courtroom door restricting access

How big is the screen that shows gruesome pictures and where is it located?

Making A Complete Record

- Submit a photograph of evidence and make sure it's in the court file.
  - Picture of client's tattoo
- Describe what happens in court.
  - "Three men came into the courtroom wearing shirts that said "Justice for Trey."
- Describe what a witness does.
  - "Mr. Jones, I see that when you described the shooting, you raised your right hand in the air and moved your finger as if pulling the trigger of a gun two times. Is that correct?"

Making A Complete Record

- Defense wants to cross-examine State's witness about pending charges.
  - Ask to voir dire, and ask the questions.
  - Submit copies of indictments.
- Defendant wants to testify that he knows the alleged victim tried to kill someone five years ago. Judge won't let him.
  - Ask to voir dire, and ask the questions.
  - Make sure the answers are in the record.

Properly appealing

- Oral notice of appeal in open court – literally must be immediately after judgment is entered and client sentenced – otherwise, it must be in writing

Properly appealing

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

Properly appealing

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

Preventing Delay

- There are a number of steps in the process that can result in cases getting delayed or lost in a clerk's file cabinet.
- Trial attorneys should ensure continuity between trial and appellate counsel.
- Follow up after giving notice of appeal to ensure clerk has prepared Appellate Entries and that Office of the Appellate Defender is appointed.
- Make sure clerk knows dates of pretrial hearings and that the Appellate Entries shows all dates.

Resources

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

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

Glenn Gerding
Appellate Defender
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Durham, NC 27701
(919) 354-7210

Pre-Trial Preparation for Criminal Defense Practitioners
How To Make Sure Your Objections Are Heard On Appeal
(aka Preserving the Record)

Glenn Gerding, Appellate Defender

Top Tips To Ensure Full Appellate Review:

→ **Move for a complete recordation.**
→ **Objections must be made in front of the jury to be timely.**
→ **Objections must be specific (cite specific statute, rule of evidence, and constitutional basis)**
→ **Move to dismiss all charges for insufficient evidence and variance.**
→ **Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.**
→ **Give proper notice of appeal and ensure appellate counsel is appointed and that the Office of the Appellate Defender has received the case from the county clerk's office.**
→ **Thoughtful preparation, research, and brainstorming with an eye towards appeal will help you have confidence in objecting and preserving the record. Make it a habit to be forward thinking. Read appellate opinions not just for the legal ruling, but to learn how the issue was (or was not) properly preserved.**

****

→ **Move for a complete recordation.** – Make sure everything is in the record. Proffer evidence through witness testimony and documents.

In non-capital criminal cases, the court reporter is not required to record voir dire, opening statements, or closing arguments, except upon motion of any party or the judge's own motion. N.C.G.S. 15A-1241.

Counsel or the trial judge should ask for and ensure a complete recordation. Appellate review of *Batson* claims, in particular, are frustrated by the lack of a transcript of voir dire. In *State v. Campbell*, 846 S.E.2d 804 (N.C. Ct. App. 2020), voir dire was not recorded. Defense made a *Batson* objection and the parties tried to recreate the record. Judge Hampson noted in his concurrence/dissent that:

> our existing case law significantly limits a party's ability to preserve the issue absent not only complete recordation but also specific and direct voir dire questioning of prospective jurors (or other evidence) about their race. . . . In light of our case law indicating a trial lawyer cannot recreate the record of an unrecorded jury voir dire to preserve a *Batson* challenge, the obligation to recreate that record, it seems, must fall on the trial judge in conjunction with the parties.

→ **To be timely, objections must be made <u>in front of the jury</u>** to preserve any objections and arguments made in voir dire hearings. This includes preserving a ruling on a motion to suppress. You cannot rely on Rule 103(a) of the N.C. Rules of Evidence. Why not?

Our Supreme Court has held Rule 103(a) unconstitutional in part because only the Supreme Court, not the General Assembly, can create rules for preserving error. *State v. Oglesby*, 361 N.C. 550 (2007).

Rule 10(a) of the N.C. Rules of Appellate Procedure states:

> "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context…"

Therefore, our Supreme Court interprets Rule 10(a)(1) to require objections to evidence to be made <u>in front of the jury at the time the evidence is introduced</u>, even if the objection has been made and ruled upon previously. *State v. Ray*, 364 N.C. 272 (2010).

In *State v. Ray*, outside the presence of the jury, the defense attorney objected based on Rule 404(b) to the prosecutor's cross-examination of the defendant. Although the voir dire hearing occurred immediately before this line of questioning began in the presence of the jury, defendant's attorney did not object during the actual exchange in front of the jury. The Supreme Court held that the failure to object in front of the jury waived the 404(b) issue for appellate review.

An example of a case applying Rule 10(a)(1) and *State v. Ray* is *State v. Joyner*, 243 N.C. App. 644 (2015).

In *Joyner*, before the defendant testified, his attorney sought to preclude the State from cross-examining him about old convictions under Rule 609. The trial court allowed the defendant to testify during a voir dire hearing, heard arguments of counsel, and ruled that the State could cross-examine the defendant on the old convictions. When the jury was called back in and the defendant testified, the defense attorney failed to object to the State's cross-examination of the defendant about the old convictions. The Court of Appeals held that "the defendant has no right to raise the Rule 609 issue on appeal."

→ **Objections must be specific (cite specific statute, rule of evidence, and constitutional basis):**

Rule 10(a) of the N.C. Rules of Appellate Procedure requires the objecting party to cite the specific grounds for an objection. That means counsel must say the specific rule of evidence and constitutional provision in front of the jury. Examples:

Counsel's failure to cite Rules 403 and 404(b) waived appellate review:

In *State v. Allen*, COA17-973, 2018 N.C. App. LEXIS 554 (June 5, 2018) (unpublished op.), defense counsel sought to exclude evidence under Rules 403 and 404(b). During a hearing outside the presence of the jury the trial judge overruled the objections and ruled the evidence was admissible. Defense counsel acknowledged he would need to object when the State offered the evidence in front of the jury.

However, when the prosecutor questioned the witness in front of the jury defense counsel objected, stating "I apologize. Just for the record, we'd object to the proposed testimony on due process grounds, Federal Constitution, do not wish to be heard." The Court of Appeals held that the objection made in front of the jury was only on constitutional grounds, and not based on a rule of evidence. The issue was waived.

Counsel's failure to cite Sixth Amendment waived appellate review:

In *State v. Mosley*, COA09-1060, 2010 N.C. App. LEXIS 758 (May 4, 2010) (unpublished op.), the trial attorney sought to cross-examine a testifying co-defendant about his pending criminal charges to show bias. The trial attorney argued Rule 608 as the basis for admissibility. The trial court denied the request to allow cross-examination. On appeal, the defendant argued the cross-examination should have been allowed not just under Rule 608, but was required by the Sixth Amendment right to cross-examine and confront a witness. The Court of Appeals held the constitutional issue was waived because the trial attorney failed to assert the Sixth Amendment during trial.

→ **Move to dismiss all charges for insufficient evidence and variance**.

Rule 10(a)(3) of the N.C. Rules of Appellate Procedure states that: "In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial."

In *State v. Golder*, 374 N.C. 238 (2020), the Supreme Court made clear that when defense counsel moves to dismiss the charges, even if thereafter they argue only about certain charges or theories, they have preserved the issue of the sufficiency of the evidence for all charges and all theories of liability.

It is not clear after *Golder*, and a following case *State v. Smith*, 375 N.C. 224 (2020), whether a motion to dismiss for insufficient evidence also preserves a variance issue. To be safe, counsel should specifically move to dismiss all charges for variance in addition to insufficiency.

The Court of Appeals has already started to distinguish *Golder*. In *State v. Gettleman*, 2020 N.C. App. LEXIS 895 (Dec. 15, 2020) (published op.), the defense attorney did not move to dismiss "all" charges but moved to dismiss certain charges specifically. The Court of Appeals held that when defense counsel failed to move to dismiss "all"

charges, he did not preserve for appellate review the sufficiency of the evidence as to the charge that he did not move to dismiss.

→ **Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.**

N.C.G.S. 15A-1231(a) "At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions. A party tendering instructions must furnish copies to the other parties at the time he tenders them to the judge."

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

→ **Give proper notice of appeal and ensure the Office of the Appellate Defender is appointed and that the Office of the Appellate Defender has received the case from the county clerk's office.**

Rules 3 and 4 of the N.C. Rules of Appellate Procedure

-Oral notice of appeal at trial (not later that day or that week)
-Written notice of appeal within 14 days
    -MUST be served on DA and must have cert. of service
-Appeal is from the "judgment" NOT from the "order denying the motion to suppress"
-Written notice of appeal is necessary to appeal satellite-based monitoring (SBM) orders

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

Client Rapport
Vicki Jayne

****

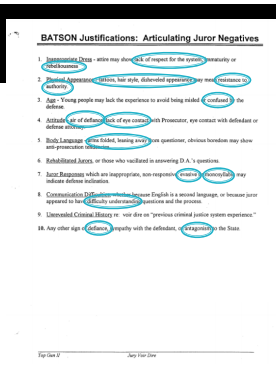
"OBJECT ANYWAY": Litigating *Batson* in North Carolina Trials

Hannah Autry & Johanna Jennings
UNC School of Government – High Level Felony Defender Training
September, 2022

Ugly truth

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

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



BATSON Justifications: Articulating Juror Negatives

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

Top Gun II — Jury Voir Dire

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

MSU Study (1990-2010)

≅ 2/1

WFU Jury Sunshine Project (2011)

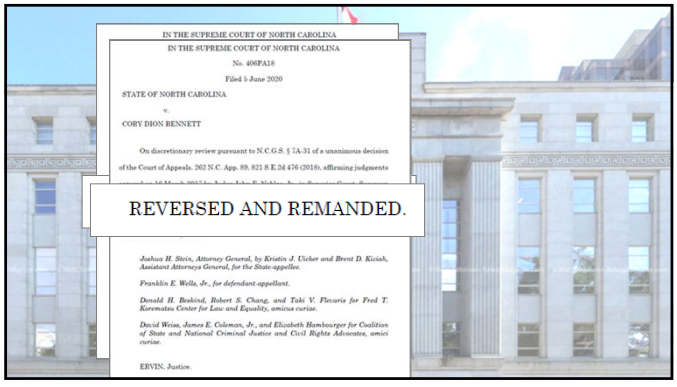
Black/White Prosecutor Removal Ratios for Largest Cities in NC

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

State v. Robinson

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

State v. Robinson, 2020



Batson remands

- State v. Clegg, 255 N.C.App. 449 (2017)
- State v. Hobbs, 347 N.C. 354 (2020)
- State v. Bennett, 374 N.C. 579 (2020)
- State v. Alexander, 274 N.C. App. 31 (2020)
- State v. Holden, 275 N.C. App. 421 (2020)
- State v. Hood, 273 N.C. App. 348 (2020)
- State v. Campbell, 376 N.C. 531 (2020)
- State v. Whiting, 852 S.E.2d 736 (2020)
- State v. Smith, 860 S.E.2d 51 (2021)
- State v. Hewitt, 857 S.E. 2d 147 (2021)
- State v. White* - resolved by consent after cert grant

VICTORY AT LAST!

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Clegg, continued:

- **"In step one . . . the defendant places his reasoning on the scale; in step two . . . the State places its counter-reasoning on the scale; in step three, the court carefully weighs all of the reasoning from both sides to ultimately decide whether it was more likely than not that the challenge was improperly motivated."**

Friendly SCOTUS caselaw

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

Reasons why *Batson* challenges aren't being made

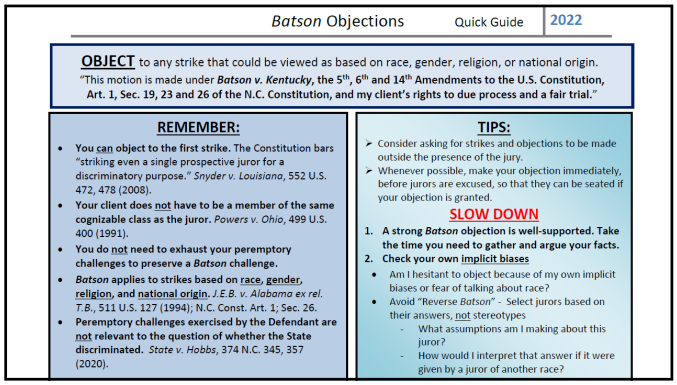
1. Didn't think of it at the time
2. Didn't know the law well enough
3. Didn't think the judge would grant it
4. Didn't feel comfortable making objection

Reasons to object, anyway!

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

When to use Batson?

ALWAYS



Batson Objections Quick Guide 2022

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

REMEMBER:

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

TIPS:

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

SLOW DOWN

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

Batson's Three Step Framework

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

STEP ONE: PRIMA FACIE CASE

You have burden to show an inference of discrimination

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

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

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

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

"All circumstances" are relevant, including history.
Snyder, 552 U.S. at 478; *Hobbs*, 374 NC at 350-51.

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

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

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

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

Defense Counsel:

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

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

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

Your Honor, we would ask the Court to consider the defendant's motion under Batson challenge to the State's removal of these last 2 jurors, however, we believe in order to make a full and complete record, and be able to direct Your Honor to concrete examples of despaired treatment of the African-American jurors that have been struck so far we would ask the Court for an overnight recess, and for us to compile the data on the jurors that have so far been excused, that have so far not been excused by the State, in order to make a more complete showing for the Court.

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

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

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

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

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

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

- **Juror Comparisons:** "if you look at the substance of what the jurors have said in this particular case there is little to no difference between what the African American juror said and the white juror said in substance."

Another factor the Court can look at questions and statements of the prosecutor which tend to support or refute an inference of discrimination. It is our contention in this case that if you look at the substance of what the jurors have said in this particular case there is little to no difference between what the African American juror said and the white juror said in substance. The only difference was that the African Americans were excluded because they were African American.

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

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

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

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

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

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

6 / 11 — Qualified Black Jurors

2 / 20 — Qualified White Jurors

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

(55%) (10%)

State Average ≅ 2/1

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

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

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

WFU Jury Sunshine Project (2011)

Black/White Prosecutor Removal Ratios for Largest Cities in NC

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

	Percent of Venire Members Removed by State Peremptory Strike							Number of Jury Venire Members Identified by Jury Sunshine							
County	Black	White	Native American	Hispanic	Asian	Other	Unknown	Black	White	Native American	Hispanic	Asian	Other	Unknown	Black/White Strike Disparity
Wilson	18.2%	1.8%	NA	NA	NA	NA	4.5%	33	57	0	0	0	0	44	10.4
Cleveland	3.0%	0.4%	NA	NA	0.0%	NA	1.6%	99	521	0	0	1	0	129	7.9
Edgecombe	12.4%	2.1%	NA	NA	NA	0.0%	14.3%	178	142	0	0	0	3	84	5.9
Henderson	75.0%	13.0%	NA	50.0%	NA	NA	27.3%	4	230	0	2	0	0	44	5.7
Halifax	26.7%	4.8%	0.0%	NA	NA	66.7%	13.1%	176	145	8	0	0	3	137	5.5
Craven	34.5%	6.4%	NA	NA	NA	NA	19.4%	29	109	0	0	0	0	31	5.4
Wilkes	33.3%	7.8%	NA	NA	NA	NA	47.1%	6	102	0	0	0	0	17	4.3
Nash	17.9%	4.3%	NA	0.0%	NA	NA	50.0%	151	305	0	4	0	0	2	4.2
Granville	21.1%	5.1%	NA	NA	NA	0.0%	5.3%	19	39	0	0	0	1	19	4.1
Scotland	33.3%	8.3%	100.0%	NA	NA	100.0%	20.0%	9	24	1	0	0	1	10	4.0
Iredell	35.5%	8.9%	NA	NA	0.0%	0.0%	15.9%	31	257	0	0	2	4	63	4.0
Brunswick	33.3%	8.7%	NA	NA	NA	NA	15.4%	9	103	0	0	0	0	39	3.8
Robeson	26.7%	7.1%	15.8%	NA	NA	0.0%	13.5%	30	42	38	0	0	1	52	3.7
Randolph	33.3%	9.8%	0.0%	NA	0.0%	0.0%	13.2%	3	215	1	0	2	2	38	3.4
Burke	57.1%	17.4%	NA	NA	NA	NA	16.0%	7	155	0	0	0	0	25	3.3
Cabarrus	37.5%	11.8%	100.0%	NA	33.3%	42.9%	24.8%	40	296	2	0	3	7	129	3.2
Hyde	16.7%	5.3%	NA	NA	NA	NA	27.3%	6	38	0	0	0	0	11	3.2
Catawba	4.5%	1.5%	NA	NA	0.0%	NA	5.1%	22	267	0	0	1	0	98	3.0
Pasquotank	13.0%	4.3%	NA	NA	0.0%	NA	18.8%	23	46	0	0	1	0	16	3.0
Forsyth	27.5%	9.3%	33.3%	0.0%	NA	100.0%	12.5%	120	474	6	1	0	1	112	3.0
New Hanover	26.5%	9.1%	NA	NA	0.0%	NA	14.3%	49	353	0	0	1	0	98	2.9
Wayne	26.0%	9.2%	NA	NA	0.0%	NA	16.4%	100	218	0	0	1	0	134	2.8
Chatham	25.0%	9.1%	NA	NA	NA	NA	12.5%	4	66	0	0	0	0	16	2.8
Beaufort	25.9%	9.5%	NA	0.0%	NA	0.0%	15.7%	58	179	0	1	0	3	70	2.7
Orange	37.5%	14.5%	NA	NA	0.0%	0.0%	37.5%	8	76	0	0	2	1	8	2.6
Durham	22.2%	8.6%	40.0%	0.0%	0.0%	0.0%	13.3%	212	313	5	2	2	6	240	2.6
Mecklenburg	29.0%	11.7%	14.3%	27.3%	17.6%	36.6%	14.9%	725	1903	7	33	34	41	823	2.5
Columbus	16.4%	6.7%	NA	NA	NA	20.0%	26.7%	67	208	0	0	0	5	60	2.4
Person	32.9%	13.8%	0.0%	NA	0.0%	NA	19.2%	79	246	2	0	1	0	125	2.4

STEP TWO: RACE-NEUTRAL EXPLANATION

Burden shifts to State to explain strike

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

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

STEP THREE: PURPOSEFUL DISCRIMINATION

You now have burden to prove it's more likely than not race was a significant factor

Judge must weigh all your evidence, including what you presented at Step One. ***Clegg***, 380 N.C. at 156.

You do not need smoking gun evidence of discrimination. ***Clegg***, 380 N.C. at 157-57.

Absolute certainty is not required. Standard is more likely than not, i.e. whether the risk of discrimination is unacceptable. ***Clegg***, 380 N.C at 162-63.

Race does not have to be the only factor. It need only be "significant" in determining who was challenged and who was not. ***Miller-El***, 545 U.S. at 252.

The defendant does not bear the burden of disproving every reason proffered by the State. ***Foster***, 578 U.S. at 512 (finding purposeful discrimination after debunking only four of eleven reasons given).

The best way to prove purposeful discrimination is to show the prosecutor's Step Two reasons are pretextual

- **Reason applies equally to white jurors the State has passed.** Compared jurors don't have to be identical. *Miller-El*, 545 U.S. at 247, n.6; *Hobbs*, 374 N.C. at 358-59.
- **Reason is not supported by the record.** *Foster*, 578 U.S. at 502-503; *Clegg*, 380 N.C. at 154 (pretext shown when a prosecutor misstates, mischaracterizes, or simply misremembers).
- **Reason is nonsensical or fantastic.** *Foster*, 578 U.S. at 509.
- **Reason is race-related.** E.g., juror supports Black Lives Matter
- **State failed to ask the juror any questions about the topic the State now claims is disqualifying.** *Miller-El*, 545 U.S. at 241.
- **State questioned Black and white jurors differently.** *Miller-El*, 545 U.S. at 255.
- **State gave shifting reasons.** *Foster*, 578 U.S. at 507; *Clegg*, 380 N.C. at 154.

Reasons courts have found inherently suspect

- **Juror's demeanor or body language.** *Snyder*, 552 U.S. at 479, 488; *Clegg*, 380 N.C. at 155 (should be viewed with "significant suspicion.")
- **Juror's expression of hardship or reluctance to serve.** *Snyder*, 552 U.S. at 482 (hardship and reluctance **does not bias the juror** against any one side; only causes them to prefer quick resolution, which might in fact favor the State).
- **A laundry list of reasons.** *Foster*, 578 U.S. at 502.

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

State Claims They Struck the Juror Because:

Juror's Criminal Record

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

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

State Claims They Struck the Juror Because:

Juror's Experience with Mental Illness

statements offered as a race neutral reason that a number of these black juries, jurors had mental health issues, had contact with mental health professionals, had some connections with the mental health field. That Mr. Stephens was in group therapy for eight years, suffers from depression.

Amber Williams suffers from anxiety and depression.

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

State Claims They Struck the Juror Because:

Juror Would Sympathize with Defendant

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

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

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

REMEDY FOR *BATSON* VIOLATION

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

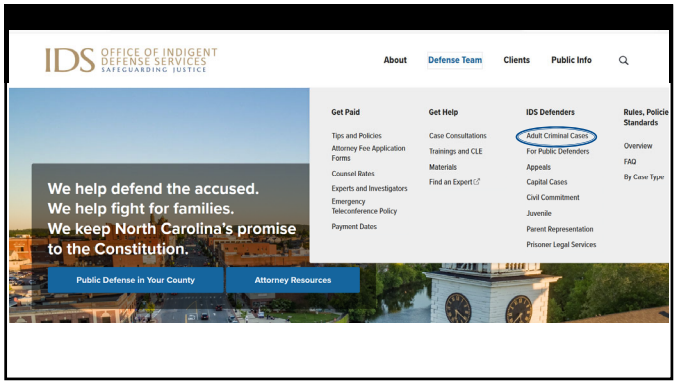
Batson Motions

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

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

*electronic copies of these and other *Batson*-related motions available at https://www.ncids.org/adult-criminal-cases/adult-criminal-motions/

www.cdpl.org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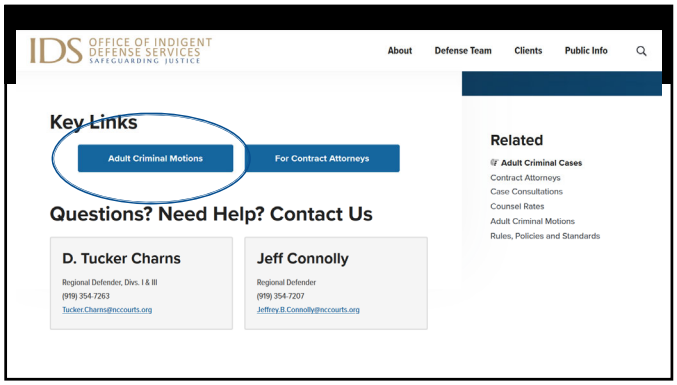
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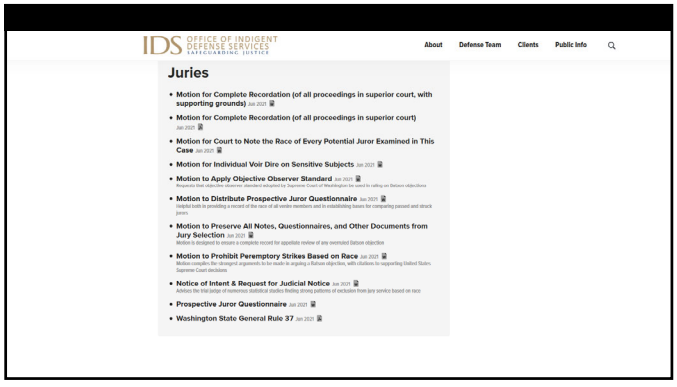
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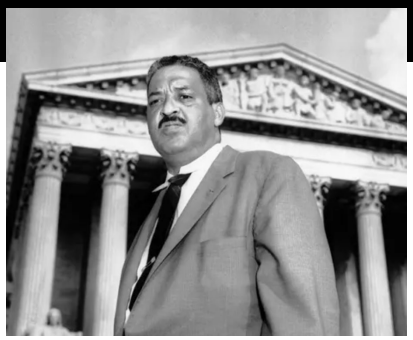
Motion for Court to Note the Race of Every Potential Juror Examined in This Case
Motion for Individual Voir Dire on Sensitive Subjects
Motion to Apply Objective Observer Standard
Motion to Distribute Prospective Juror Questionnaire
Motion to Preserve All Notes, Questionnaires, and Other Documents from Jury Selection
Motion to Prohibit Peremptory Strikes Based on Race
Notice of Intent & Request for Judicial Notice
Prospective Juror Questionnaire
Washington State General Rule 37



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

Questions?

Hannah Autry: hautry@cdpl.org

Johanna Jennings: jj@tdpnc.org

OBJECT to any strike that could be viewed as based on race, gender, religion, or national origin.

"This motion is made under ***Batson v. Kentucky*, the 5th, 6th and 14th Amendments to the U.S. Constitution, Art. 1, Sec. 19, 23 and 26 of the N.C. Constitution, and my client's rights to due process and a fair trial."**

REMEMBER:

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

TIPS:

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

SLOW DOWN

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

STEP ONE: PRIMA FACIE CASE

You have burden to show an inference of discrimination

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

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

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

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

"All circumstances" are relevant, including history.

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

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

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

- **Give the history of strike disparities and *Batson* violations by this DA's office/prosecutor.** *Miller-El*, 545 U.S. at 254, 264; *Flowers v. Mississippi,* 139 S.Ct. 2245 (2019) (Contact CDPL for supporting data from your county.)
- **State questioned juror differently or very little.** *Miller-El*, 545 U.S. at 241, 246, 255; *State v. Clegg*, 380 N.C. 127 (2022); *Hobbs*, 374 N.C. at 358-59.
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If the court sustains your *Batson* objection, the improperly struck juror(s) should be seated, or the entire venire should be struck. *State v. McCollum*, 334 N.C. 208, 235 (1993).

Addressing Race and Other Sensitive Topics in Voir Dire

Emily Coward

****

SOME SAMPLE LIFE EXPERIENCE VOIR DIRE QUESTIONS

A. Race

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

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

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

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

B. Alcohol/Alcoholism

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

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

C. Self-Defense

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

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

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

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

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

D. Jumping to Conclusions

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

E. False Suspicion or Accusation

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

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

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

F. Police Officers Lying/Being Abusive

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

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

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

G. Lying

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

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

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

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

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

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

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

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

H. Prior Convictions/Reputation

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

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

I. Persuasion/Gullibility/Human Nature

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

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

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

J. Desperation

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

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

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

Bias Checklist for Defenders

2022

STEP ONE: **REVIEW THE RISK FACTORS**

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

STEP TWO: **SLOW DOWN**

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

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

STEP THREE: **GENERAL BIAS CHECK**

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

STEP FOUR: **LISTEN, VALIDATE, COLLABORATE, ADVOCATE, REMAIN SELF-AWARE**

- **Communication** – Use clear, common language. Practice active, non-judgmental listening. Repeat, clarify, and validate client's concerns. Be mindful of the impact of your own identity and power/status as an attorney.
- **Prior Record** – Black and Latinx people are more likely to be arrested, charged, convicted, and incarcerated. Listen for how structural racism and racial trauma may have harmed your client.
- **Debiasing Strategies** – Notice when stereotypes arise. Combat them by learning about your client's life, understanding who and what are important to them, and gathering and referencing images of them at their best.
- **Advocate** – Notice and challenge when legal system actors make assumptions about your client.
- **Issues Specific to Your Case** – Consider the obvious and subtle ways racism or bias impacts your client's case, collaboratively craft a narrative that exposes this impact and reframes the story.
- **Support and Accountability Networks** – Discuss your bias check efforts with peers. Peer feedback loops support and sustain debiasing efforts. Make this practice habitual by combining your bias check with another regularly scheduled part of your week.

The Decarceration Project
TDP

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. [redacted]

FILED
2017 JUL 33 A 10:50
DURHAM CO., C.S.C.
BY

STATE OF NORTH CAROLINA)
)
v.)
)
[redacted],)
Defendant.)
)

MOTION FOR INDIVIDUAL VOIR DIRE ON SENSITIVE SUBJECTS

NOW COMES the defendant, [redacted], by and through counsel, and hereby respectfully requests this Court to allow counsel to voir dire the prospective jurors individually, separate, and apart each from the other, and to sequester the jurors from the courtroom during the voir dire when jurors are being questioned about certain, sensitive subjects. Counsel specifically requests individual voir dire for questions concerning race. This motion should be granted based on Mr. [redacted] right to due process and to an impartial jury as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution, Article I, §§ 19, 23, and 24 of the North Carolina Constitution, and *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981), *State v. Conner*, 335 N.C. 618, 629 (1994), and *Morgan v. Illinois*, 504 U.S. 719, 729–30 (1992).

The Defendant in this case is African American. Based on discovery provided, counsel believes the alleged victims in this matter are [redacted]. [redacted] are described by several witnesses as "light-skinned" and both are described as "white" in the Durham Police Department report. The U.S. Supreme Court has held that courts must allow voir dire questions concerning possible racial prejudice against a defendant when the defendant is charged with a violent crime and the defendant and the victim are of different racial or ethnic groups. *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981).

Discussing racial views and biases is a difficult task for any person. In order to obtain an open and honest discussion regarding a potential juror's racial bias, it is necessary to have individual, sequestered voir dire. Individual voir dire will help ensure each potential juror's honesty and candor regarding prior knowledge and current opinions about certain, sensitive subjects within this case. Moreover, individual voir dire will aid in minimizing the circumstances in which prospective jurors are exposed to potentially disqualifying, prejudicial information. Counsel will thereby be better suited to intelligently exercise preemptory challenges and challenges for cause in the instance of individual voir dire. *See, e.g.*, *State v. Wiley*, 355 N.C. 592 (2002) (The two purposes of voir dire are to help counsel determine whether a basis for challenge for cause exists and to assist counsel in intelligently exercising peremptory challenges.).

WHEREFORE, Defendant prays that the Court order individual voir dire for certain, sensitive subjects, specifically race. Defendant requests that each prospective juror be examined separately and privately when asked about these subjects. Such a procedure is necessary to ensure the Defendant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and Article I, §§ 19, 23, and 24 of the North Carolina Constitution.

Respectfully submitted this the 2nd day of August, 2017.

Johanna Jennings

Johanna Jennings
Staff Attorney
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned attorney served a copy of the foregoing Motion on the State of North Carolina by hand delivery to the District Attorney's Office:

- Assistant District Attorney [redacted]
  Durham County District Attorney's Office
  501 South Dillard St., 8th Floor
  Durham, NC 27701

This the 2nd day of August, 2017.

Johanna Jennings

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Attorneys for MICHAEL SMITH

Superior Court of the State of California
County of San Francisco

People of the State of California,

Plaintiff,

vs.

Michael Smith,

Defendant.

Ltd. Juris. No.: 16013940

Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans.

Date:
Time:
Dept:

To the District Attorney of San Francisco and to the above-entitled Court:

The defendant Michael Smith hereby moves for an extended voir dire, based on the specific facts of this case and the need to adequately question the jurors on their ability to be fair and impartial in this case. Defendant specifically requests up to 90 minutes with the first 24 jurors, and 45 minutes for each group of jurors thereafter. The legal justification for this request is set forth below.

1. Introduction

Michael Smith is accused of violating Penal Code § 243(six counts) and 148 (one count). The alleged facts contained in the police report are as follows:

On July 29, 2016, BART officers received a call that two suspects had threatened to rob a man and that a black male wearing a Mickey Mouse shirt, tan shorts and a backpack was armed with a gun. That call was made by Gilbert Rodriguez, who is identified as a

white male in the police report. Officers Trabanino, Wilson, Chung and Velasquez-Ocha responded to the Embarcadero BART Station. Immediately upon seeing Michael Smith and his girlfriend, Andrea Appleton, who was pregnant at the time, they ordered them to the ground at gunpoint. They then took Mr. Smith down to the ground forcibly and three officers jumped on top of him. After a brief struggle, Mr. Smith was taken into custody. No firearm was found on Mr. Smith. Mr. Smith is an African-American male, age 22, as is his girlfriend Andrea Appelton.

In this motion, Mr. Smith requests time to conduct voir dire in this case on the following issues: 1) race and racism; 2) jurors' knowledge and awareness of implicit or explicit bias and 3) attitudes, experiences and biases concerning African Americans.

2. Argument

A. The Right to an Impartial Jury is a Fundamental Due Process Right

In *Rosales-Lopez*,[1] the U.S. Supreme Court recognized voir dire plays a critical function in assuring a criminal defendant that his Sixth Amendment right to an impartial jury will be honored. A defendant is entitled to question prospective jurors on the issue of possible racial bias.[2] In *Taylor*, the California Supreme Court, citing *Mu'Min v. Virginia*,[3] notes broadly that "the 14th Amend[ment] requires inquiry into racial prejudice in cases involving a black defendant accused of violent crimes against a white victim."[4] To be sure, inquiries on voir dire regarding jurors' racial biases are not limited to capital cases.[5] In *Wilborn*, an African–American defendant's trial strategy was to challenge the credibility of the white officers who stopped and then arrested him for a drug offense; defense counsel asked that the prospective jurors be questioned about racial bias, but the trial court refused to inquire into the subject, saying it "would rather not get into race."[6]

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[1] *Rosales-Lopez v. U. S.* (1981) 451 U.S. 182, 188.
[2] *People v. Taylor* (2010) 48 Cal.4th 574, 608.
[3] *Mu'Min v. Virginia* (1991) 500 U.S. 415, 424.
[4] *People v. Taylor, supra*, 48 Cal. 4th at 608.
[5] *See, e.g., People v. Wilborn* (1999) 70 Cal.App.4th 339, 343-346.
[6] *Id*. at 345.

The Court of Appeal reversed concluding that under the circumstances of the case, the trial court had an obligation to make "*some* inquiry"[7] into racial bias and "[b]ecause none was made, the appellate court concluded, the defendant was deprived of his right to an impartial jury."[8]

As demonstrated in the many cases that have been overturned based on the denial of proper voir dire on the issue of racial bias, the trial judge's exercise of discretion in the questioning of prospective jurors during voir dire commands deference from an appellate court, but it is not without limit.[9] "[W]ith the heightened authority of the trial court in the conduct of voir dire ... goes an increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors."[10]

Where racial bias is concerned, the judge's duty to inquire comes from California law as well as from the Sixth and Fourteenth Amendments to the United States Constitution.[11] "If the judge fails so abjectly in this duty that prospective jurors can conceal racial bias with impunity, the judge's failure violates the defendant's right to a fair and impartial jury and renders the ensuing trial fundamentally unfair."[12] Without an adequate voir dire, the trial *judge's* responsibility to remove prospective jurors, who will not be able to impartially follow the court's instructions and evaluate the evidence, cannot be fulfilled.[13]

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[7] *Id*. at 348.
[8] *Id*.
[9] *People v. Mello* (2002) 97 Cal.App.4th 511, 516 *citing*: *Mu'Min v. Virginia*, *supra*, 500 U.S. at 424; *People v. Holt* (1997) 15 Cal.4th 619, 660-661; *People v. Wilborn*, *supra*, at 343-346.
[10] *Id*. at 516 citing: *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314.
[11] *People v. Mello*, *supra*, at 516; *Mu'Min v. Virginia* 500 U.S. 415, 424; *People v. Holt* 15 Cal.4th 619, 660-661; *People v. Wilborn* 70 Cal.App.4th 339, 343-346.
[12] *Id. citing*: *People v. Holt*, *supra*, 15 Cal.4th at 661; *People v. Wilborn*, *supra*, 70 Cal.App.4th at 346.
[13] *Rosales-Lopez, supra*, at 188.; See also: *Connors v. United States* (1895) 158 U.S. 408, 413.

Similarly, lack of adequate voir dire impairs the *defendant's* right to exercise peremptory challenges.[14]

In *Swain v. Alabama*,[15] the Court noted the connection between voir dire and the exercise of peremptory challenges: "The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories . . . ."[16] "[A] suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried."[17]

Recently, the California Supreme Court noted in *In re Boyette* that a "lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule. The ability of a defendant, either personally, through counsel, or by the court, to examine the prospective jurors during voir dire is thus significant in protecting the defendant's right to an impartial jury."[18] Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.[19] Indeed, "voir"[20] means "to see" and "dire"[21] means "to say" which suggests a duality; this duality is essential to the process of jury

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[14] *Id.*
[15] *Swain v. Alabama* (1965) 380 U.S. 202.
[16] *Id.*, at 218-219.
[17] *Mu'Min v. Virginia* (1991) 500 U.S. 415, 422.
[18] *In re Boyette* (2013) 56 Cal.4th 866, 888.
[19] *See, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 602 (1976) (voir dire "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); *United States v. Whitt*, 718 F.2d 1494, 1497 (10th Cir.1983) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges").
[20] *Voir Definition*, CollinsDictionary.com, http://www.collinsdictionary.com/dictionary/french-english/voir (last visited Aug. 23, 2016).
[21] *Dire Definition*, CollinsDictionary.com, http://www.collinsdictionary.com/dictionary/french-english/dire (last visited Aug. 23, 2016).

selection. For if conducted properly, voir dire can inform litigants about biases of potential jurors; and it can also enlighten prospective jurors that reliance upon stereotypical and pejorative notions about a particular gender or race are both unnecessary and unwise.

B. Code of Civil Procedure Section 223 Allows Counsel to Examine Any and All Prospective Jurors.

Civ. Proc., section 223, amended in 2000, provides that counsel for each party, on completion of initial examination by the court, "*shall have the right to examine*, by oral **and** direct questioning, **any and all of the prospective jurors**."[22] This amendment eliminated the previous need for counsel to demonstrate good cause to be allowed to examine prospective jurors that existed for a short window of time. Defense counsel is entitled to a "reasonable inquiry" into specific legal doctrines that are both "material to the trial and controversial."[23] A doctrine is considered "controversial" if it is likely to invoke strong feelings and resistance to [its] application."[24] "[L]ack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule . . ."[25] The statute is clear that the defense shall have the right to examine any and all prospective jurors. This mandate is not met with a limitation of voir dire where the venire will consist of 18-24 potential jurors. It must be that if everyone is to be examined, particularly in a serious case where bias is a component, then counsel must be given a significant amount of time in order for the court to abide by this statute. To be sure, at the very least, counsel cannot meaningfully discuss the potential bias in this case without having a seven to ten-minute discussion with each potential juror. Therefore, the request for four hours of voir dire appears to be proper and sufficient.

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[22] Code of Civil Procedure section 223 (emphasis added).
[23] *People v. Balderas* (1985) 41 Cal.3d 144, 183-184; *People v. Love* (1960) 53 Cal.2d 843, 852, fn. 1.
[24] *People v. Johnson* (1989) 47 Cal.3d 1194, 1225.
[25] *Rosales-Lopez v. U.S.*, *supra*, at 188.

C. Extensive Questioning on Jurors' Racial Biases Must Be Allowed in this Case Which Alleges an Assault on BART Police by an African American Defendant.

The U.S. Supreme Court has held that, upon request, voir dire questions concerning race must be allowed upon a showing that the circumstances of the case might suggest a 'reasonable possibility' that racial prejudice would influence the jury.[26]

In *Aldridge v. U.S.*, the U.S. Supreme Court reversed an African American defendant's murder conviction where the trial judge refused a defense request to question jurors on racial prejudice.[27] Aldridge was convicted of first degree murder and sentenced to death in the killing of a white police officer. In rejecting the government's argument that allowing inquiry into racism would be detrimental to the administration of the law in the courts, the Court said: "We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inequities designed to elicit the fact of disqualification were barred."[28] Allowing questioning of jurors on the issue of racial bias is not confined to serious or violent cases.

For instance, in *Ham v. South Carolina*[29], where an African American civil rights activist was charged with marijuana possession, the court held that a trial judge's refusal to question prospective jurors as to possible racial prejudice violated the defendant's constitutional rights.[30] The Court went further than it had in *Aldridge*, holding that "the Due Process Clause of the Fourteenth Amendment requires that ... the [defendant] be permitted to have the jurors interrogated on the issue of racial bias."[31] The law has evolved significantly from *Ham* to the present with a few, for lack of a better term, hiccups along the way.

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[26] *Id.* at 192.
[27] *Aldridge v. U.S.* (1931) 283 U.S. 308.
[28] *Id.* at 314.
[29] *Ham v. South Carolina* (1973) 409 U.S. 524, 529.
[30] *Ham v. South Carolina* (1973) 409 U.S. 524, 529.
[31] *Id.* at 527.

Just three years after *Ham*, in *Ristaino v. Ross*,[32] the United States Supreme Court dealt with two discreet questions. "[W]hether a defendant is entitled to require the asking of questions specifically directed to racial prejudice and whether *Ham* announced a requirement applicable whenever there may be a confrontation in a criminal trial between persons of different races or ethnic origins."[33] The court held, on the former issue, that such an inquiry is not always required absent a showing of a significant likelihood that racial prejudice might infect the trial.[34] In *Ristaino*, defendant failed to adequately articulate that there were racial factors in play in his particular case. He then relied on the status of the victim as a "security guard acting as a policeman"[35] to justify his request for inquiry on race. It is not surprising that the trial court allowed inquiry as to bias regarding police officers, but not as to race.[36] It is equally understandable that the trial court and the High Court found that the defendant's proffer was inadequate where the defense attorney himself, inartfully stated: "[t]here is only one thing. The only reference I would make to the facts of this case—the victim[]s being white, and that he was a security guard in uniform and acting as a policeman."[37] With nothing more to support a racial component to the case, the Court found that the trial court's decision to not allow questioning based on racial bias was within the Constitution.[38]

On the latter issue, the *Ristaino* court answered that *Ham* did not announce a requirement of "asking . . . a question specifically directed to racial prejudice" whenever there is a possibility of "a confrontation in a criminal trial between persons of different races or different ethnic origins."[39] The *Ristaino* Court explained that the determination of whether questions directed at ascertaining racial prejudice amongst prospective jurors are warranted is based upon the specific circumstances and "racial factors" of each case.[40]

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[32] *Ristaino v. Ross*, *supra*.
[33] *Id*.
[34] *Id*. at 598.
[35] *Id*. at 599 (J, Marshall dissenting).
[36] *Id*. at 598.
[37] *Id*. at 591 n.2.
[38] *Id*. at 598.
[39] *Ristaino v. Ross*, supra, at 590.
[40] *Id.* at 598.

As this area of law evolved from *Aldridge* to *Rosales-Lopez* and beyond, what has become abundantly clear is that the examination of prospective jurors on the issue of race is warranted in cases involving a violent criminal offense and racial difference between defendant(s) and the complaining witness(s). As stated in *Rosales-Lopez*, "*Aldridge* and *Ristaino* together fairly imply that federal trial courts **must make** such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial and ethnic groups."[41] As the High Court articulated, although judges are understandably hesitant to discuss the possibility that justice in a court of law may turn upon the pigmentation of skin, "this must be balanced against the criminal defendant's perception that avoiding this inquiry does not eliminate the problem, and that his trial is not the place in which to elevate appearance over reality."[42] In re-stating the principle announced in *Aldridge*—that it would be "far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inequities designed to elicit the fact of disqualification were barred"—The Court once again acknowledged the critical importance of conducting voir dire regarding racial bias.[43] The *Rosales-Lopez* Court articulated a standard that if the circumstances indicate that there was a 'reasonable possibility' that racial prejudice would influence the jury,[44] then inquiry as to racial bias would be required. *Rosales-Lopez* further explained:

> This supervisory rule is based upon and consistent with the "reasonable possibility standard" articulated above. It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise such a possibility. There may be other circumstances that suggest the need for such an inquiry, but the decision as to whether the total circumstances suggest a reasonable possibility that racial or ethnic prejudice will affect the jury remains primarily with the trial court, subject to case-by-case review by the appellate courts.[45]

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[41] *Rosales-Lopez v. U.S.*, *supra*, at 192 (emphasis added).
[42] *See, e.g.*, Rosales-Lopez, *supra*, at 191.
[43] *Id*. *citing*: *Aldridge*, *supra*, at 314-315.
[44] *Id.* at 192.
[45] *Id*.

In order for a court to abide by the Constitutional standards of *Aldridge* and its progeny, an inquiry regarding race bias must be made, upon the request of the defendant, where there is a crime of violence involving a defendant and victim of different races, and there is a reasonable possibility that racial prejudice would influence the jury. In the case now before this court, such is the circumstance. Defendant is charged with committing battery on BART police in an incident involving allegations made by a white male; he is African-American, the key witness is white and the complaining witnesses are White, Black, Latino and Asian. There is no question that the issue of race must be addressed in voir dire. To further make the point, there is a plethora of psychological research studies and papers published after *Aldridge*, *Ham*, *Ristaino*, and *Rosales-Lopez* that support this position. Not only has the case law evolved, but our understanding of bias, implicit bias, psychological factors, and how those factors could influence a jury and detrimentally impact an African American defendant are now well established.

D. Defendant Must Be Allowed to Address Implicit Bias in Voir Dire Due to the Potential Impact that Race May Play in the Outcome of This Trial.

The cases above make it clear that when racial attitudes may have an impact on the jurors' judgment and decision-making in a particular case, questioning regarding race must be allowed. California law is in accord.[46]

> voir dire examination serves to protect [a criminal defendant's right to a fair trial] by exposing biases, both known and unknown on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause. Hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.[47]

[46] *People v. Wilborn*, *supra*, 70 Cal.App.4th at 339; *People v. Mello*, *supra*, 97 Cal.App.4th at 516; *People v. Holt*, *supra*, 15 Cal.4th at 660-661.
[47] *In re Boyette*, *supra*, at 888-889.

Accordingly, in questioning the jurors on racial bias, defense counsel should also be allowed to voir dire on the subject of not only explicit, but implicit bias. This takes time and effort but is essential.

Research by psychologists have clearly demonstrated that race has the potential to impact trial outcomes.[48] According to the National Center for State Courts, unlike explicit bias—which reflects the attitudes or beliefs that one endorses at a conscious level—implicit bias is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control. Implicit bias may develop from a history of personal experiences that connect certain racial groups with fear or other negative affect or stereotypes. Recent developments in the field of cognitive neuroscience demonstrate a link between implicit (but not explicit) racial bias and neural activity in the amygdala, a region in the brain that scientists have associated with emotional learning and fear conditioning.[49]

Although people may not even be consciously aware that they hold biased attitudes, over the past few decades, scientists have developed new measures to identify these unconscious biases, including the Implicit Association Test (IAT). The IAT measures the amount of time that an individual takes to associate negative and positive words with images of African American and white individuals viewed on a computer screen. Of the 14 million who have taken the race IAT, seventy-five percent have demonstrated an implicit bias favoring whites and disfavoring African Americans.[50]

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[48] Samuel R. Sommers, *Race and the decision making of juries*. The British Psychological
Society, Legal and Criminological Psychology, 2007, 12, 171-187.

[49] *Helping Courts Address Implicit Bias*, National Center for State Courts, www.ncsc.org/ibreport

[50] Banaji & Greenwald, *Blindspot: Hidden Biases of Good People* 69 (2013)

In the context of juror decision-making, implicit bias studies demonstrate a tendency to implicitly associate African Americans with crime[51] and racial biases in the context of detain-release decisions, verdicts, and sentencing.[52] However, the great body of research has shown that effect of implicit bias can be substantially reduced by taking certain steps.[53] Among them is the simple task of making people aware of their biases; once people are made aware of their own implicit biases, they can begin to consider ways in which to address them and ameliorate any unintended potential impact the bias may have on their decision-making. For instance, according to the National Center for State Courts, scientists have uncovered several promising implicit bias intervention strategies that may help individuals who strive to be egalitarian: 1) consciously acknowledge group and individual differences (i.e., adopt a multiculturalism approach to egalitarianism rather than a color-blindness strategy in which one tries to ignore these differences); 2) routinely check thought processes and decisions for possible bias (i.e., adopt a thoughtful, deliberative, and self-aware process for inspecting how one's decisions were made); 3) identify sources of stress and reduce them in the decision-making environment; 4) identify sources of ambiguity and impose greater structure in the decision-making context; 5) institute feedback mechanisms; and 6) increase exposure to stereotyped group members (e.g., seek out greater contact with the stigmatized group in a positive context). Thus, during voir dire, counsel can help jurors avoid relying on unconscious bias by making them aware that such biases exist.[54] By simply raising awareness of implicit bias in voir dire, it will not only allow for more seamless disclosure of possible biases by

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[51] Eberhardt, J., Goff, P., Purdie, V., & Davies, P. (2004). *Seeing Black: Race, crime, and visual processing*. Journal of Personality and Social Psychology, 87, 876-893.

[52] Gazal-Ayal, O., & Sulitzeanu-Kenan, R. (2010*). Let my people go: Ethnic in-group bias in judicial decisions - Evidence from a randomized natural experiment.* Journal of Empirical Legal Studies, 7, 403-428.

[53] Casey, P., Warren, R., Cheesman, F., & Elek, J. (2012). *Helping courts address implicit bias: Resources for education*. Williamsburg, VA: National Center for State Courts.

[54] Casey, P., Warren, R., Cheesman, F., & Elek, J. *Helping courts address implicit bias: Resources for education*. Williamsburg, VA: National Center for State Courts.

potential jurors, but it will also allow for self-reflection that will guard against having these biases play a role in the decision-making process.

Counsel should be given some latitude in questioning jurors on their implicit biases. As reported by the National Center for State Courts "[s]cientists realized long ago that simply asking people to report their attitudes was a flawed approach; people may not wish or may not be able to accurately do so. This is because people are often unwilling to provide responses perceived as socially undesirable and therefore tend to report what they think their attitudes should be rather than what they know them to be."[55] In the context of voir dire, this means that counsel should be given the opportunity to explore jurors' implicit biases, such as their emotional reaction to a young African American being charged with a crime and certain assumptions they might make about him or her because of race, or their experiences with young African American men and whether they are afraid of such young men based on their initial perceptions.

Studies using mock juries have demonstrated repeatedly that the race of the defendant and the complaining witness are salient factors that affect the jurors' perception and judgment of the facts of the case and evaluation of the testimony.[56] These studies have shown that the race of a defendant influences the decisions of many criminal juries and that juror bias is often influenced by the specific racial issues involved in a given trial.[57] This is particularly true where the jury is not diverse and does not include members of the same race as the defendant. "The problem of the effect of the racial composition of the

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[55] *Id.*

[56] Baldus, D.C., Woodworth, G & Pulaski C.A. Jr. (1990*) Equal justice and the death penalty: A legal and empirical analysis.* Boston: Northeastern University Press; Guinther. J. (1988) The jury in America. New York: Facts on File Publications; Lynch M. & Haney C. (2000) *Discrimination and instructional comprehension: Guided discretion, racial bias, and the death penalty*. Law and Human Behavior, 24, 337-358.

[57] Hans V.P. & Vidmar, N. (1986) *Judging the jury.* New York: Plenum; King, N.J. (1993) *Postconviction review of jury discrimination: Measuring the effects of juror race on jury decisions*. Michigan Law Review, 92, 63-130.

jury and its verdict is most noticeable when the trial involves a blatantly racial issue."[58] Other studies have found that when descriptions of the crime are identical, white jurors are more likely to vote to convict African American defendants than white defendants and give longer sentences to African American defendants.[59] Given the numerous studies, it is clear that jurors' negative attitudes regarding defendants of a different race—particularly African Americans—can be ferreted out and overcome through sensitive and probing questions on voir dire.[60]

Jury composition affects the outcome of cases because "there is an even more extreme form of attribution error that whites tend to commit when they interpret and judge the behavior of minority group members.[61] This tendency has been coined the "ultimate attribution error" because it is so pervasive and pernicious.[62] In a recent study that examined the impact of jury racial composition on trial outcomes using felony trials in Florida over a ten year period between 2000-2010, researchers found that juries formed from all-white jury pools convict African American defendants 16% more than white defendants. However, that same study found that this gap in conviction rates is entirely eliminated when the jury pool includes at least one African American member. The findings showed that "the application of justice is highly uneven and raise obvious concerns about the fairness of trials in jurisdictions with a small proportion of African Americans in the jury pool."[63] Studies have also shown that diversity of the jury affects

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[58] Fukurai, H., Butler, E.W. and Krooth, R (1993) *Race and the jury: Racial disenfranchisement and the search for justice.* New York: Plenum Press.

[59] Foley, L.A. & Chamblin, M. H. (1982) *The effect of race and personality on mock jurors' decisions,* Journal of Psychology, 112, 47-51; Klein, K & Creech. B. (1982*) Race, rape and bias: Distortion of prior odds and meaning changes. Basic and Applied Social Psychology,* 3, 21-33.

[60] Lynch M. & Haney C., *supra, Discrimination and instructional comprehension: Guided discretion, racial bias, and the death penalty*. Law and Human Behavior, 24, at 355.

[61] Haney, C. (2004) *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathetic Divide*. De Paul Law Review Vol. 53 Num. 4 p. 1583.

[62] *Id*. at 1583 *citing*: Anthony Amsterdam & Jerome Bruner, MINDING THE LAW 247 (2000).

[63] *Id.*

the quality of the deliberations. In San Francisco, where 57% of the persons charged with crimes are African American, African Americans constitute 5.7% of the population and an even smaller percentage of the jury pool.[64] "Compared to all-white juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial."[65]

Thus, it is critically important that, in a case involving the accusation of a serious crime of violence, coupled with the racial difference between the complaining witness, who is Asian, and the defendants, who are African American, both the defense and the prosecution are given sufficient time to voir dire the jury on the issues of race and racism, both explicit and implicit, thereby enabling the jurors to express their feelings and attitudes towards the defendant[66], the charges in this case[67], defendant's ethnicity and other issues related to bias they may feel.

3. Conclusion

For the foregoing reasons, Defendant requests up to 90 minutes with the first 24 jurors, and 45 minutes for each group of jurors thereafter.

Counsel will be respectful of the court's time and the prospective jurors' attention. Counsel does not seek a limitless voir dire, but rather requests that counsel be given leave to question each juror in both a meaningful and efficient manner.

Dated:

Respectfully Submitted

_____

JEFF ADACHI
Public Defender
Attorney for MICHAEL SMITH

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[64] Anwar, S., Bayer, P & Hjalmarsson, R. (2010) Impact of Jury Race in Criminal Trials, The Quarterly Journal of Economics, Oxford Journals.

[65] Samuel R. Sommers, Race and Juries: The Effects of Race-Salience and Racial Composition on Individual and Group Decision-Making (2002) (unpublished Ph.D. dissertation, University of Michigan) (on file with the Chicago-Kent Law Review).

[66] *People v. Simon* (1927) 80 Cal.App. 675, 685.

[67] *People v. Harrison* (1910) 13 Cal.App. 555, 558.

Proof of Service

I, the undersigned, say:

I am over eighteen years of age and not a party to the above action. My business address is 555 Seventh Street, San Francisco, California 94103.

On _____, I personally served copies of the attached on the following:

ATTN:
San Francisco District Attorney, 2nd Floor
850 Bryant Street
Francisco, CA 94103

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ in San Francisco, California.

_____

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
2018 DEC 31 PM 2:43
WAKE CO., C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. 16 CRS5702, 223351

STATE OF NORTH CAROLINA)
)
)
v.) **ORDER**
)
)
SEAGA E. GILLARD,)
Defendant)

THIS MATTER comes before the undersigned for hearing on December 20, 2018 upon the Defendant's Motion that Perspective Jurors be Shown a Video About Implicit Bias. In Defendant's motion, the Defendant requests that during the orientation process, jurors be shown a video prepared by the United States District Court, Western District of Washington for use in that court's jury orientation. (http://www.wawd.uscourts.gov/jury/unconsicous-bias).

Upon review of the motion, the arguments of counsel, and all matters of record, the Court, in its discretion ALLOWS the motion under the following conditions. Defendant shall provide to the jury clerk, no later than 2:00 p.m. Friday, January 4, 2019, a DVD with a copy of the video suitable for playing on a standard DVD player. The video shall be shown in the jury lounge only to those jurors who have been randomly selected to be included in the panel of prospective jurors for this trial.[1]

So ordered, this the 31st day of December, 2018.

Paul C. Ridgeway, Superior Court Judge

[1] The undersigned has obtained permission from the copyright holder, the US District Court for the Western District of Washington, to broadcast the video in connection with this trial.

Certificate of Service

THIS IS TO CERTIFY that a copy of the foregoing Order was served upon the following parties and persons by mailing a copy thereof by postage prepaid, first class mail or by otherwise approved delivery addressed as follows:

Kathryn Pomeroy
Assistant District Attorney
10th Prosecutorial District
Post Office Box 31
Raleigh, NC 27602

David J. Saacks
Assistant District Attorney
10th Prosecutorial District
Post Office Box 31
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Edd K. Roberts, III
Attorney for Defendant
Post Office Box 1608
Raleigh, NC 27602

Luiza Harrell, Assistant Clerk
Wake County Clerk of Superior Court
Post Office Box 351
Raleigh, NC 27602

This, the 31st day of December, 2018.

Davis Cooper
Judicial Assistant
Wake County Superior Court Judges' Office

PROPOSED IMPLICIT BIAS JURY INSTRUCTIONS

Developed by Video Advisory Group Guiding Creation of UNC School of Government Implicit Bias Video for Jurors, 2021

Proposed Preliminary Implicit Bias Instruction

We are about to begin the jury selection phase of the trial, when we will talk with you and ask questions about your views and attitudes. Our purpose is not to pry, but rather to ask you to look within yourselves and determine whether this is an appropriate case for you to serve on.

The Court's goal in every jury trial is to find jurors who will decide the case before them without prejudice or bias. I'd like to talk a little more with you about bias and why we should keep improper biases out of the courtroom.

[As the video explained,] [B/b]iases are prejudices in favor of or against a thing, person, or group, which may cause us to pre-judge in a positive or negative way. Bias can be conscious or implicit. For example, I may have a conscious bias in favor of one sports team and against another.

Implicit bias is different. It's been proven that most biases happen at an unconscious level. We all have implicit biases simply because we're human. They have evolved throughout our lifetimes to help us make quick, efficient judgments with minimal mental effort. They are automatic; we use them to make decisions without knowing it. However, when we stop and reflect, we might decide that our hasty judgments don't fit with the information before us and what we really know to be fair.

Our system of justice depends on the willingness and ability of judges like me and jurors like you to make careful, fair decisions. What we are asked to do is difficult because of the universal challenge we all face as human beings. Our biases can influence how we categorize information, the evidence we see and hear, what we notice, what we remember, and how we remember it. And they can influence the "gut feelings" and conclusions we form about people and events.

All of us want to believe that we are fair, open-minded and objective people. However, our perspectives are shaped by our personal experiences, identities, attitudes, and beliefs. Once we understand that implicit bias exists, we can take steps to counter it and ensure that we are making objective decisions and treating everyone fairly.

For this reason, you are encouraged to carefully examine your decision making to ensure that the conclusions you draw are a fair reflection of the law and the evidence. Please examine your reasoning for possible bias by reconsidering your first impressions of the people and evidence in this case.

Is it easier to believe statements or evidence when presented by people who are more like you? If the people involved in this case were from different backgrounds—richer or poorer, more or less educated, older or younger, or of a

different gender, race, religion, or sexual orientation—would you still view them and the evidence presented in the same way?

Please listen to the other jurors who will be viewing this case in light of their own insights, assumptions, and even biases. Their perspectives may help you to identify the possible effects these biases may have on decision making.

Our system of justice relies upon each of us to achieve a fair and informed verdict in this case. Working together, we can reach a fair result.

101.35 Concluding Instructions – Proposed Insertion

Members of the jury, you have heard the evidence and the arguments of counsel. If your recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection. Your duty is to remember the evidence whether called to your attention or not.

You should consider all the evidence, the arguments, contentions and positions urged by the attorneys, and any other contention that arises from the evidence.

You should not be influenced by race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances. Also, do not allow yourself to be influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or biases, including implicit biases. Implicit biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, implicit bias can affect how we evaluate information and make decisions.

The law requires the presiding judge to be impartial. You should not infer from anything I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be. It is your duty to find the facts and to render a verdict reflecting the truth. All twelve of you must agree to your verdict. You cannot reach a verdict by majority vote.

After reaching the jury room your first order of business is to select your foreperson. You may begin your deliberations when the bailiff delivers the verdict form to you. Your foreperson should lead the deliberations. When you have unanimously agreed upon a verdict, and if needed, each of the additional issues that I have instructed on, and are ready to announce them, your foreperson should record your verdict and answers, as needed, sign and date the verdict form, and notify the bailiff by knocking on the jury room door. You will be returned to the courtroom and your verdict will be announced.

NCPDCORE: Race Judicata

September 2016

This issue of Race Judicata will focus on resources for addressing race during voir dire, a challenging endeavor for even the most experienced of criminal defense attorneys. It has never been more important for defense attorneys to consider how to approach the topic of racial attitudes during voir dire. Since the subject of race in policing, crime, and punishment figures prominently in today's public discourse, this topic will be on jurors' minds whether you discuss it or not. If you avoid the issue where it is relevant, you may increase the likelihood that implicit or explicit racial bias will play a role in the jury's determination of your client's case. Fortunately, a number of recent publications contain helpful tips for addressing this topic thoughtfully and effectively:

Resources on Talking to Jurors about Race

Jury Selection and Race: Discovering the Good, the Bad, and the Ugly by Jeff Robinson
In this piece, ACLU Deputy Legal Director and veteran criminal defense attorney Jeff Robinson explains the importance of discussing race with jurors and includes several pages of specific questions and techniques that have proven effective at getting jurors to share opinions about this sensitive subject. It also contains a memorandum of law in support of a motion for individual voir dire, sample jury instructions on racial bias, and a sample legal argument in opposition to the introduction of a defendant's immigration status.

The Northwestern Law Review recently published three articles addressing the subject of discussing race with jurors. *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson* was written by St Louis County Deputy District Public Defender Patrick C. Brayer. In it, he reflects on discussing race during voir dire in a trial that occurred just days after the killing of Michael Brown against the backdrop of protests on the streets and at the courthouse. In *Race Matters in Jury Selection*, Peter A. Joy argues that lawyers need to discuss the topics they fear the most – including race – during voir dire, and provides practical tips for doing so. He explains why it was essential for Patrick C. Brayer to talk about race with his jury and why it is important for all defense attorneys: "If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client." In *The #Ferguson Effect: Opening the Pandora's Box of Implicit Racial Bias in Jury Selection*, Sarah Jane Forman sounds a cautionary note by examining the uncertain state of research into the efficacy of discussing implicit bias with jurors and argues that "unless done with great skill and delicacy," this approach may backfire. Her piece reinforces the importance of careful preparation before diving into this challenging subject with potential jurors.

Talking to Jurors About Race (PowerPoint presentation) by Archana Prakash
This PowerPoint presentation, prepared for a training for the Wisconsin State Public Defender's Office, contains a number of questions that may be useful in facilitating rich discussions with potential jurors about race. It also contains a sample jury questionnaire and sample legal argument for individual voir dire.

Chapter Eight of the SOG's Indigent Defense manual, *Raising Issues of Race in North Carolina Criminal Cases,* contains a section on addressing race during jury selection and at trial, with subsections on identifying stereotypes that might be at play in your trial, considering the influence of your own language and behavior on jurors' perceptions of your client, and reinforcing norms of fairness and equality.

What does Race have to do with the Presumption of Innocence?

Aside from discussing racial attitudes with potential jurors and raising *Batson* challenges where appropriate (the subject of our June 2016 Race Judicata e-blast), what else can you do in jury selection to make sure that race doesn't play an improper role in the jury's evaluation of your client's case? Another strategy is to explore potential jurors' understanding of the presumption of innocence during voir dire and de-select jurors who may not be able to grant the full presumption of innocence to your client.

Many concerns have been raised by community members, social scientists, lawyers, and judges that minority defendants (and in particular, Black males) are not granted the full presumption of innocence by jurors at trial. In fact, researchers recently concluded that mock jurors responded to jury instructions on the presumption of innocence in racially biased ways. Another study concluded the Black boys were viewed by police officers as both older and less innocent than White boys. In another study, researchers determined that study participants held implicit associations between the categories of "Black" and "guilty" and "White" and "not guilty" and that these associations influenced their evaluation of ambiguous evidence. Parents of children of color reasonably worry that *The Presumption of Innocence Doesn't Apply to My Child*.

In *Presumed Fair? Voir Dire on the Fundamentals of our Criminal Justice System*, Professor Vida Johnson makes the case for robust voir dire on the presumption of innocence, arguing that "the studies show that instructions alone do not serve to enforce the principles that are the foundation of a fair trial." She notes that, while many jurors do not appreciate the significance or meaning of the presumption of innocence, most jurisdictions treat the right to voir dire on this subject as a matter within the trial court's discretion. Professor Johnson provides practical tips for litigators interested in conducting voir dire on this topic, and explains how social science research can be used to secure the right to voir dire on this foundational principle of criminal justice.

Federal District Judge Mark Bennett, a pioneer in the field of addressing implicit bias in the courtroom, recently authored a brief piece in *The Champion* on the insufficiency of standard jury instructions on the presumption of innocence: *The Presumption of Innocence and Trial Court Judges: Our Greatest Failing*. In it, he argues that trial judges "vastly overestimate the ability of lay folks to fully appreciate and apply the most important presumption in law." In a video of Judge Bennett explaining his comprehensive approach to implicit bias education in the courtroom, he describes studies (cited above) concluding that minority defendants are less likely to receive the full benefit of the presumption of innocence. During jury selection, Judge Bennett incorporates his implicit bias presentation into his discussion of the presumption of innocence. Watch the video from minutes 7:00-11:20 to hear more about Judge Bennett's efforts to ensure that all jurors serving in his courtroom fully embrace and respect the defendant's entitlement to the presumption of innocence.

Emily Coward

SUGGESTED JURY PRACTICES
Superior and District Court Judges
North Carolina Governor's Task Force for Racial Equity in Criminal Justice

The Governor's Task Force on Racial Equity in Criminal Justice's jury recommendations seek to ensure fair and impartial juries, promote diverse and representative jury pools, and prevent bias from tainting the administration of criminal jury trials. These recommendations reflect state and federal constitutional prohibitions against discrimination in jury selection, the state and federal constitutional guarantee of a jury selected from a fair cross section of the community, and the importance of the jury's longstanding role as the "criminal defendant's fundamental protection of life and liberty against race or color prejudice." *McCleskey* v. *Kemp*, 481 U. S. 279, 310 (1987) (internal quotations omitted). As the U.S. Supreme Court has recognized, "racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (internal quotations omitted). Addressing racial bias and the underrepresentation of people of color in the jury system enables "our legal system [to come] ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Id.* The following suggested practices are offered in service of that aspiration.

I. Ensure Diverse, Representative Jury Pools (Recommendation 91)

Rationale for recommendation 91 and related suggested practices.

The importance of ensuring diverse, representative jury pools is threefold. Legally, the fair cross-section requirement—grounded in the Sixth Amendment and article I, sections 24 and 26 of the North Carolina Constitution—requires that juries reflect the demographic composition of the broader community. Practically, researchers have concluded that diverse juries perform better than less diverse juries: they make fewer errors, deliberate longer, consider more of the evidence, and come to fairer conclusions.[1] Ultimately, because public confidence in criminal justice outcomes depends upon the perceived fairness of the process, representative jury pools are critical to the integrity and credibility of the justice system.

a. Master jury lists should be updated annually.
    i. Pursuant to N.C.G.S. § 9-2(a), the senior regular resident superior court judge may direct the jury commission to update the master jury list annually rather than each biennium.[2]
    ii. As demonstrated in other jurisdictions, more frequent updating of the master jury list reduces the number of summonses sent to bad addresses and returned as undeliverable.[3] Research has demonstrated that increasing jury yield increases the diversity of the jury pool and reduces administrative costs.[4]

b. District and superior court judges should coordinate with the clerk of superior court to ensure that potential jurors receive more than one communication from the court.
    i. Jurisdictions have found that additional mailings to potential jurors following summonses to which no response was received increases juror yield.[5] Increasing juror yield has been shown to increase juror diversity.[6]

ii. Electronic juror reminders and notifications may also help reach a broader portion of the community.[7]

c. District and superior court judges should encourage the jury commission's use of additional source lists intended to increase the diversity of the jury pool.[8]
   i. N.C.G.S. § 9-2(b) authorizes jury commissions to use additional lists beyond the lists of drivers and voters when assembling the master jury list.
   ii. Other states have achieved more representative jury pools by pulling juror names from lists of non-driver IDs, tax filers, unemployment insurance recipients, newly naturalized citizens, recipients of public assistance, and other lists. Using lists beyond the voter and driver lists may result in broader demographic community representation in the jury pool.

d. District and superior court judges should encourage jury commissioners and/or jury trial administrators to confirm addresses of potential jurors using the National Change of Address Database. As demonstrated in a number of jurisdictions, this step reduces the number of summonses returned as undeliverable, improves jury yield, increases jury diversity, and reduces administrative costs.[9]

e. Local judicial district executive committees should develop transparent jury data collection efforts to enable oversight of the fair cross section guarantee.[10]
   i. Data collected should include demographic information (race, ethnicity, gender, age, and zip code) associated with:
      1. Mailed summonses
      2. Undeliverable summonses
      3. No shows
      4. Potential jurors appearing at the courthouse for service
      5. Potential jurors excused or deferred
      6. Potential jurors removed for cause
      7. Jurors removed for cause with the agreement of both parties
      8. Jurors removed with the consent of the prosecution only
      9. Jurors removed with the consent of the defense only
      10. Jurors removed with the consent of neither party
      11. Potential jurors peremptorily struck
      12. Jurors struck by defendant, any associated *Batson* challenges, and resolution of such challenges
      13. Jurors struck by prosecution, any associated *Batson* challenges, and resolution of such challenges
      14. Seated jurors
   ii. Collected data should be anonymized and made available to the public. Members of the public should be able to determine whether diversity of the community is fairly represented in all stages of North Carolina jury formation.[11]
   iii. As an interim step toward regular jury data collection, analysis, and reporting, senior resident superior court judges should issue administrative orders directing the distribution of demographic surveys to all potential jurors

arriving for jury service orientation, so that court officials, attorneys, and members of the public may compare the population of people appearing for jury service with the population of the broader community.[12] *See Beard v. North Carolina State Bar*, 320 N.C. 126, 129 (1987) ("Through its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice.").

iv. At least annually, the senior resident superior court judge should review the numbers reflected in the jury data and convene a meeting with stakeholders to discuss any disparities between the adult population of the community and the jury pools or seated juries.

f. Local judicial district executive committees should review jury operations to consider opportunities for removing barriers to jury service for low-income jurors or other jurors facing obstacles to jury service. While increasing juror pay would require legislative change, counties may be able to experiment with other supportive programs, including but not limited to:
   i. Supporting parents by piloting a childcare program at the courthouse and ensuring a private room at the courthouse for breastfeeding jurors to pump and/or breastfeed during court breaks.[13]
   ii. Partnering with local restaurants to offer discounts to jurors.
   iii. Contacting employers to inform them of legal protections of jurors any time workers express concerns over losing wages or employment as a result of jury service.[14]

II. Address Discrimination in Jury Selection (Recommendation 92)

Rationale for Recommendation 92 and related suggested practices.

Our judiciary must be proactive in preventing the exclusion of jurors based on race and other improper factors. Superior Court Judges should adopt the following practices to increase the capacity of courts to address juror discrimination, discourage the practice among attorneys, and facilitate well-constructed, representative juries in North Carolina.

a. Complete recordation of jury selection to enable effective review of *Batson* challenges.
   i. The absence of a jury selection transcript inhibits meaningful review of a *Batson* claim on appeal.[15]
   ii. For this reason, and because it is not clear in advance when a *Batson* challenge may be raised, judges should ensure complete recordation of jury selection in every case. G.S. 15A-1241(b) authorizes judges on their own motion to have jury selection recorded.
   iii. Consistent recordation of jury selection will enable more consistent and effective review of *Batson* challenges.

b. Require self-identification of race/gender/ethnicity by all potential jurors during jury selection.
    i. In order to review claims of discrimination in jury selection, appellate courts must have a "record which shows the race of a challenged juror." *State v. Willis,* 332 N.C. 151, 162 (1992), *quoted in State v. Bennett*, 374 N.C. 579, 592, (2020).
    ii. Self-identification of juror race, while not the only legitimate method of establishing juror race for the purpose of reviewing a *Batson* challenge, is the most reliable method of establishing juror race and least likely to lead to extensive litigation on the adequacy of the record. *See, e.g., State v. Bennett*, 374 N.C. 579 (2020) (reviewing whether juror race may be established by stipulation of parties).
    iii. Self-identification of race, gender, and ethnicity may be accomplished in one of two ways. The first is through distribution of juror questionnaires printed on forms in triplicate so that each party and the court receives a copy. The second is by instructing potential jurors to identify their race, gender, and ethnicity orally during recorded jury selection. For example, one North Carolina judge routinely instructs potential jurors as follows: "For statistical purposes, please identify your race, gender, and ethnic background."
    iv. It is not appropriate to place the burden of recording potential jurors' race on the parties, both because they will not necessarily have the opportunity to speak with the potential jurors prior to an exemption or strike, and because it could unfairly prejudice the party who is tasked with asking.

c. Raise *Batson* concerns sua sponte when opposing counsel fails to object to prima facie evidence of discrimination.[16] Such evidence may include disparate strike rates, differential questioning or other treatment of jurors correlated to race or another unlawful factor, or biased remarks during voir dire.

d. Demeanor-based strike justifications should be scrutinized carefully. Judges should make findings regarding the juror's non-verbal conduct on the record to enable appellate review of a *Batson* challenge when an attorney identifies non-verbal conduct as a reason for a peremptory strike.[17]

e. Hear objections to peremptory strikes outside of the earshot of the potential jurors, refrain from excusing potential jurors until objection has been resolved, and, upon finding of a *Batson* violation, seat improperly struck jurors whenever feasible.
    i. *Batson v. Kentucky* does not prescribe the remedy for a *Batson* violation.[18] However, given that *Batson* protects the rights of unlawfully struck jurors, judges should remedy *Batson* violations by seating improperly struck jurors whenever possible.[19]
    ii. Dismissing the entire venire is a less racially equitable remedy, as it upholds the unlawful strike, fails to vindicate the equal protection rights of the struck juror, wastes judicial time and resources, and may not deter improperly motivated peremptory strikes.[20]

iii. To enable reseating of an unlawfully struck juror, Superior Court judges should:
   1. At the outset of jury selection, instruct attorneys to make all challenges to juror strikes immediately in order to avoid a situation where an improperly struck juror becomes unavailable before the resolution of the *Batson* challenge.
   2. Hear all objections to peremptory strikes out of juror earshot by sending potential jurors out of the courtroom before conducting a *Batson* hearing.
   3. Refrain from excusing potential jurors until the objection has been resolved.

f. Critical perspectives on the criminal justice system are not equally distributed among races.[21] As such, challenges for cause related to this factor may have a disproportionate racial impact. Judges should focus on the juror's ability to be fair and impartial in the context of the particular case.[22]

g. Ultimately, as the North Carolina Supreme Court recently clarified, "the finding of a *Batson* violation does not amount to an absolutely certain determination that a peremptory strike was the product of racial discrimination. Rather, the *Batson* process represents our best, if imperfect, attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable." *State v. Clegg*, ___N.C.___, 2022-NCSC-11 (Feb. 11, 2022).

III. Implicit Bias Education for Jurors and Court Actors (Recommendation 93)

Rationale for Recommendation 93 and related suggested practices.

Implicit bias poses a significant challenge to the guarantee of fair and impartial juries. The influence of bias on juror conclusions contravenes the core Sixth Amendment principle of impartiality. Eliminating juror bias is a daunting task:

> [A] typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done--and be seen to be done.[23]

Judges should consider the following practices to strengthen the court's ability to mitigate the influence of implicit bias on criminal trials in North Carolina.

a. Take a comprehensive approach to guarding against the risks of implicit bias, as no single intervention will be sufficient to address the problem.[24]

b. Participate, along with other court actors who participate in the jury system, in meaningful implicit bias training and take implicit association tests to gain awareness of implicit biases.

c. Lead, in partnership with other court actors and community members, a review of courthouse imagery such as portraits and artwork to ensure that the courthouse environment is welcoming and inclusive.[25]

d. Consider using a checklist such as the "Mindful Courtroom Checklist" developed by the ABA to decrease the influence of implicit biases on the administration of justice.[26]
    i. The "Mindful Courtroom Checklist" was developed in response to research showing that checklists increase focus and may help counteract implicit biases.[27] The purpose of the checklist is to "combat quick unconscious responses by calling on more conscious, deliberative, reflective thinking and responses."[28] The list is meant to be illustrative and adapted by courts to fit the specific needs of the jurisdiction.
    ii. Examples of items on the suggested checklist include: "To avoid implicit cues regarding status, everyone in my courtroom is given similar time for responding and shown similar levels of attention" and "at key decision points, I ask myself if my opinion or decision would be different if the people participating looked different, or if they belonged to a different group."[29]

e. Screen an implicit bias video during orientation.
    i. To help jurors guard against the influence of implicit bias on decision making, potential jurors should be shown an educational video on implicit bias (also referred to as unconscious bias) during juror orientation.
    ii. The NC Judicial College at the UNC School of Government recently released the jury video Understanding and Countering Bias, which is available for screening in courthouses statewide.
    iii. This unconscious bias video, an adapted version of a video produced for the U.S. District Court for the Western District of Washington, has been shown in Buncombe, Durham, Wake, and other counties during jury orientation, immediately following screening of the "You, the Juror" Administrative Office of the Courts jury orientation video.

f. Instruct jurors to guard against the influence of implicit bias on their decision-making. Judges may consider using a range of implicit bias jury instructions developed or adopted in jurisdictions around the country.
    i. *See* Examples of Implicit Bias Jury Instructions, attached as Appendix C.
    ii. Implicit bias jury instructions used in *State v. Chauvin* (see *id.*).
    iii. Suggested implicit bias jury instructions developed by the NC Implicit Bias Video Advisory Group (see Appendix D).

g. Ask jurors to sign juror pledge to emphasize importance of guarding against the influence of implicit bias.[30]

h. Allow appropriate discussions of race during jury selection to enable removal of biased jurors.
    i. North Carolina Supreme Court decisions recognize the value of "making race salient" as a strategy for decreasing the influence of stereotypes and implicit

biases on decision-making. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1563 (2013), quoted in *State v. Crump*, 376 N.C. 375, 392 (2020) and *State v. Copley*, 374 N.C. 224, 235 (2020) (Earls, J., concurring).

ii. Superior court judges should allow appropriate discussions of race and racial bias during jury selection. *See State v. Crump*, 376 N.C. 375, 393 (2020) ("court abused its discretion and prejudiced defendant by restricting all inquiry into prospective jurors' racial biases and opinions regarding police-office shootings of black men").

i. Consider curative instructions or mistrial after improper or biased racial references that may prejudice jury.[31]

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[1] *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. Personality and Soc. Psychol. 597, 608 (2006) ("By every deliberation measure . . . heterogeneous groups outperformed homogeneous groups.").

[2] Both the American Bar Association and the National Center for State Courts recommend updating juror lists at least annually. *Assessing and Achieving Jury Pool Representativeness*, The Judges' Journal, Vol. 55 No. 2 (Spring 2016). *See also* National Center for State Courts Characteristics of an Effective Master Jury List (techniques to maintain accurate and updated jury lists can include renewing the master jury list more frequently than the maximum allowable period prescribed by law).

[3] *See, e.g.,* Judge William Caprathe (ret.) et al*., Assessing and Achieving Jury Pool Representativeness*, The Judges' Journal, Vol. 55 No. 2 (Spring 2016) (master jury list should be updated at least annually to ensure the accuracy of the addresses); *Improving Juror Response Rates in the District of Columbia: Final Report, Council for Court Excellence* March 2006, National Center for State Courts (13% reduction in undeliverable summonses by increasing frequency of juror list updates).

[4] *See Jury Managers' Toolbox: Best Practices for Jury Summons Enforcement*, National Center for State Courts (2009) (concluding that strategies that increase jury yield also increase jury representativeness).

[5] Paula Hannaford-Agor, National Center for State Courts, Center for Jury Studies, *An Overview of Jury System Management* (May 2011) (reporting that non-response and failure-to-appear rates are 34% - 46% less than in courts that do not follow up with additional mailings to non-responders).

[6] In response to TREC's judicial survey one judge noted, "We found that our biggest problem wasn't the composition of the list but rather the number of people who did not respond to the jury summons. We started sending letters to those who didn't respond, reminding them of their duty and the penalty for failing to respond. This improved our response rate. We think it improved the diversity of the jury pools but we don't have any data of which I'm aware."

[7] Jurisdictions, including New Jersey and Washington DC, have also experimented with text or email communication for summonses. *See* DC Superior Court Introduces New ESummons for Jurors.

[8] Elsewhere in the country, jury pools comprised of drivers and voters have been shown to underrepresent people of color. *See, e.g.*, Elizabeth M. Neeley, *Nebraska Minority Justice Committee, Representative Juries: Examining the Initial and Eligible Pools of Jurors* (2008) (where juror names are drawn from a combination of driver and voter lists, study concluded that racial and ethnic minorities were significantly underrepresented in the initial and eligible pools of jurors); *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service* 41-42 (Feb. 2004) ("The study concluded that the racial and ethnic composition of registered voters and licensed drivers did not totally reflect the diversity of the population of Lucas County."); Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 779–82 (2011) ("Courts have no control over whether an individual chooses to register to vote, but as the Supreme Court of California recognized, courts do have control over which source lists to use in compiling the master jury list."); Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52

U. Mich. J.L. Reform 1, 33 (2018) ("[i]f supplementing the voter registration list with other sources of juror names can eliminate these disparities, then courts should try supplementation").

[9] *National Center for State Courts Characteristics of an Effective Master Jury List* (many courts also conduct National Change of Address (NCOA) updates before printing and posting summonses).

[10] Guaranteeing representative juries involves actively monitoring jury pool demographic data to determine whether the jury pool reflects the community at large. For this reason, it is widely recognized that the routine collection, analysis, and reporting on jury data is critical. *See* Judge William Caprathe (ret.) et al., *Assessing and Achieving Jury Pool Representativeness*, The Judges' Journal, Vol. 55 No. 2 (Spring 2016) (identifying several recommended steps jurisdictions should take to safeguard the fair cross section guarantee); Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407 (2018). This could be accomplished through the development of court rules, *see, e.g.*, Minnesota Court Rule 2 (anonymized jury records presumptively accessible to the public). *See also* Nina W. Chernoff and Joseph B. Kadane, *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, The Justice System Journal, Vol. 33, Number 1 (2012) ("The best way to collect race, ethnicity, and gender data is to incorporate mandatory questions into the juror summons or questionnaire, along with the standard eligibility questions, such as citizenship and age."). Judges and or/judicial district executive committees may contact UNC Political Science Professor Frank Baumgartner for assistance with data collection and analysis. *See* Appendix A, Jury Study Proposal. Professor Baumgartner, University of Michigan Post-Doc Marty Davidson, and attorney Emily Coward have designed a study to begin comparing North Carolina jury pools with the adult population of North Carolina. Work on the first stage of the project—comparing statewide jury lists with the overall adult population—is underway.

[11] *See* Wright, Ronald F. and Chavis, Kami and Parks, Gregory Scott*, The Jury Sunshine Project: Jury Selection Data as a Political Issue* (June 28, 2017). 2018 U. Ill. L. Rev. 1407 (2018) ("accessible public [jury] records could transform criminal justice; [w]e believe that sunshine will open up serious community debates about what is possible and desirable in the local criminal justice system.").

[12] In June 2019, Senior Resident Superior Court Judge Joseph Crosswhite issued such an order in Iredell County. An example of a proposed order similar to the one issued by Judge Crosswhite is attached to these suggested practices as Appendix B.

[13] Mecklenburg County provides onsite childcare to children ages 6 weeks through 12 years for jurors and others conducting business at the courthouse through Larry King's Clubhouse, a non-profit organization. King County Washington currently offers childcare to jurors at the Regional Justice Center in Kent, Washington, and the Washington State Jury Diversity Task Force supports the concept of all courts providing childcare for jurors throughout the state. *See* Washington State Minority and Justice Commission Jury Diversity Task Force: 2019 Interim Report.

[14] *See* The Employers' Guide to Jury Service, North Carolina Judicial Branch Communications Office.

[15] "Defendants are entitled to have their *Batson* claims and the trial court's rulings thereon subjected to appellate scrutiny. . . . Thus, we urgently suggest that all criminal defense counsel follow the better practice and request verbatim transcription of jury selection if they believe a *Batson* challenge might be forthcoming. [Without all relevant evidence in the record], it is highly improbable that such a challenge will succeed. Such is the pitfall of defendant's case in this appeal." *State v. Campbell*, 272 N.C. App. 554, 846 S.E.2d 804, 811–12, review allowed, 376 N.C. 531, 851 S.E.2d 42 (2020).

[16] *See, e.g.*, *State v. Evans*, 998 P.2d 373, 383 (Wash. Ct. App. 2000) ("[W]e hold that a court may, in the sound exercise of its discretion, raise sua sponte a *Batson* issue."); *Williams v. State*, 669 N.E.2d 1372, 1382 (Ind. 1996); *Brogden v. State*, 649 A.2d 1196, 1199 (Md. Ct. Spec. App. 1994); *Lemley v. State*, 599 So. 2d 64, 70-71 (Ala. Crim. App. 1992).

[17] "[D]emeanor-based explanations . . . are particularly susceptible to serving as pretexts for discrimination" and are "not immune from scrutiny or implicit bias." *State v. Alexander*, ___ N.C. App. ___ (Oct. 20, 2020) (internal quotation omitted). *See also State v. Clegg*,– ___N.C. ___, 2022-NCSC-11 (Feb. 11, 2022) ("historical context cautions courts against accepting overly broad demeanor-based justifications without further inquiry or corroboration"); *Davis v. Fisk Elec. Co*., 268 S.W.3d 508, 518 (Tex. 2008) ("Peremptory strikes may legitimately be based on nonverbal conduct, but permitting strikes based on an assertion that nefarious conduct 'happened,' without identifying its nature and without any additional record support, would strip Batson of meaning."); *Avery v. State*, 545 So. 2d 123, 127 (Ala. Crim. App. 1988) (reasons such as looks, body language, and negative attitude are susceptible to abuse and must be "closely scrutinized" by courts); *Batson v. Kentucky*, 476 U.S. 79, 106 (1986)

(Marshall, J., concurring) ("[L]itigants [may] more easily conclude that a prospective black juror is 'sullen,' or 'distant"); Berkeley Law Death Penalty Clinic, Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors, 16 (June 2020) ("We determined that prosecutors most often relied on demeanor as a reason for striking Black juror . . . reasons correlate with racial stereotypes of African Americans because we unconsciously and reflexively categorize people based on demeanor"); *see also* Smith, Robert J. and Levinson, Justin D*., The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, SEATTLE U. L. REV., Vol. 35, No. 795, 2012 ("Implicit racial bias might help to explain why egalitarian-minded prosecutors nonetheless disproportionately strike black jurors. . . . If a prosecutor questions a prospective black juror, the simple act of even talking to that person might activate any of these negative stereotypes as well as more general negative implicit attitudes, causing the prosecutor to think or feel negative thoughts about the juror. The prosecutor might project this negativity through body language and gestures, which could, in turn, cause jurors to avoid eye contact, provide awkward answers that make the juror appear less intelligent, or simply fidget and look nervous. Thus, even accurate race-neutral behavior descriptions might stem from racialized assessments (albeit, without conscious thought) of the characteristics of individual jurors.").

[18] *Batson v. Kentucky*, 476 U.S. 79, 99 n.24 (1986) (declining to determine whether it is "more appropriate in a particular case . . . to discharge the venire . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire").

[19] *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson's *Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1110-12 (2011) (seating unlawfully struck juror voids the unconstitutional act, vindicates equal protection right, promotes administrative efficiency, and is a remedy explicitly contemplated by the *Batson* court).

[20] Earlier *Batson* decisions in North Carolina recognized that a trial judge has the authority to seat an improperly struck juror but opined that the better practice was to dismiss the venire because an improperly struck juror may have difficulty being impartial. *See State v. McCollum*, 334 N.C. 208 (1993). This view did not consider the rights vindicated by the seating of the improperly struck juror, nor did it contemplate the court practices suggested here that protect the impartiality of the improperly struck juror. *See* Alyson A. Grine & Emily Coward, Raising Issues of Race in North Carolina Criminal Cases § 7.3F, Remedy for *Batson* Violations at Trial (2014).

[21] *See generally* John Gramlich, From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System, Pew Res. Ctr. (May 21, 2019); North Carolina Commission on the Administration of Law and Justice, Public Trust and Confidence in North Carolina State Courts (Dec. 15, 2015) (reporting that confidence in North Carolina courts varied with race of person surveyed, "Black and Other race groups more critical of system fairness").

[22] "The operative question is not whether the prospective juror is biased but whether that bias is surmountable with discernment and an obedience to the law…" *See State v. Smith*, 352 N.C. 531, 545 (2000). *See also State v. Cummings*, 361 N.C. 438, 453-56 (2007); *State v. Moses*, 350 N.C. 741, 757 (1999); *State v. McKinnon*, 328 N.C. 668, 676-77 (1991) *State v. Whitfield*, 310 N.C. 608 (1984). The Massachusetts Supreme Judicial Court recently held that a juror cannot be struck for cause for expressing her belief that "the system is rigged against young, African American males." *Commonwealth v. Quinton K. Williams* (2019) ("asking a prospective juror to put aside his or her preconceived notions about the case to be tried is entirely appropriate (and indeed necessary); however, asking him or her to put aside opinions formed based on his or her life experiences or belief system is not."). "To many people, excluding qualified Black jurors based on their negative experiences with law enforcement or the justice system must seem like adding insult to injury . . . It is time to reassess whether the law should permit the real-life experiences of our Black citizens to be devalued in this way. At stake is nothing less than public confidence in the fairness of our system of justice." *People v. Triplett*, 48 Cal. App. 5th 655, at *693-94 (2020) (Liu, with Cuéllar, J., dissenting from the denial of review).

[23] Jerry Kang, *Implicit Bias: A Primer for Courts* 6 (National Center for State Courts 2009).

[24] *See, e.g.*, Achieving an Impartial Jury Toolbox, American Bar Association (proposing a "rich set of tools that offer courts options for best practices"). Retired federal judge Mark Bennett, a pioneer in studying and addressing implicit juror bias, teaches that juror education on implicit bias is most effective when woven throughout the juror's courthouse experience. *See* Judge Bennett's Implicit Bias Jury Instructions; Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124, 1181–82 (2012) (describing Judge Bennett's use of an illustrative video, discussions of implicit bias throughout juror instructions, interactions with the defendant intended to counteract possible implicit biases, and a signed juror pledge).

[25] *See* North Carolina Bar Association Statement on Court Spaces, Adopted June 17, 2021 ("Court Spaces Should Reflect the Impartial Delivery of Justice: All persons entering courthouses and courtrooms in North Carolina should experience an environment which promotes trust and confidence that justice is administered fairly and without favor. If elements of the physical surroundings foster the perception of preference, bias, or prejudice, our court spaces cannot reflect fairness, respect, and equal justice to all who come there to seek it. We encourage careful evaluation of our court spaces to ensure each conveys the impartiality and neutrality of our legal system to all with business there and that appropriate changes be made where deficiencies exist.") *See also* Justin Jouvenal, *"Va. judge rules Black defendant can't get a fair trial in courtroom largely featuring portraits of White judges*," Washington Post, Dec. 22, 2020 (discussing judge's ruling in *Commonwealth of Virginia v. Terrance Shipp, Jr.*); Achieving Impartial Juries Toolbox American Bar Association (updated 2015) (observing that "a diverse environment and positive exemplars can be valuable de-biasing tools" and recommending courthouses create and display posters featuring counter-stereotypical images of people of color); Jerry Kang & Kristine Lane, *Seeing Through Colorblindness: Implicit Bias and the La*w, 58 UCLA L. REV. 465, 476–81 (2010); Supreme Court to Remove Portrait of Thomas Ruffin from its Courtroom, North Carolina Supreme Court Press Release, Dec. 22, 2020.

[26] Achieving an Impartial Jury Toolbox at 13-15, American Bar Association (updated 2015).

[27] *See generally* Atul Gawande, THE CHECKLIST MANIFESTO, Profile Books, 2011.

[28] Achieving an Impartial Jury Toolbox at 13-15, American Bar Association (updated 2015).

[29] *Id.*

[30] *See* Appendix E, Implicit Bias Juror Pledge developed by retired Judge Mark Bennett, US District Court Judge for the Northern District of Iowa.

[31] *State v. McCail*, 150 N.C. App. 643 (2002), (where the prosecutor compared the Black defendant to fictional monkey Curious George, the judge intervened ex mero motu and instructed the jury to disregard the characterization of the defendant); *State v. Jones,* 355 N.C. 117, 129 (2002) (it is incumbent on trial judge to vigilantly monitor closing arguments, "to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections"); *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473 (1967) (listing several methods by which a trial judge, in his or her discretion, may correct an improper argument). *See also* State v. Wilson, 404 So. 2d 968 (La. 1981) (in a case involving both indirect and direct appeals to racial prejudice in the prosecutor's closing argument to an all-white jury, references to the black defendants as animals were so prejudicial that a mistrial should have been granted).

TALKING WITH POTENTIAL JURORS ABOUT RACE

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I. OVERVIEW

Racial bias in the jury system is a "familiar and recurring evil that, [] left unaddressed, [] risk(s) systemic injury to the administration of justice."[1] Discovering the racial attitudes of potential jurors during jury selection is an "important mechanism[] for discovering bias," and therefore a critical safeguard against this pernicious problem.[2] In this manuscript, I will address why, when, and how defense attorneys should discuss race and racial bias with potential jurors during voir dire, and explore the legal protections applicable to voir dire on the subject of race.

II. WHY SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

Champions of racial justice-oriented criminal defense—including ACLU Deputy Legal Director Jeffery Robinson, Jonathan Rapping of Gideon's Promise, Dean Andrea Lyon of Valaparaiso Law School, and the late and legendary San Francisco Public Defender Jeff Adachi—agree that "[d]uring voir dire, defense counsel should [discuss] the problem of race bias and identify those jurors who appreciate its influence."[3] However, when I informally poll North Carolina criminal defense attorneys during sessions on this topic, I discover that very few of them have ever addressed race during voir dire. Reasons commonly cited for avoiding the topic of race during voir dire include the following:

- Concerns about making jurors uncomfortable; pessimism about jurors' willingness to discuss race honestly;
- Lack of experience and confidence discussing race generally;

[1] *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 2017 WL 855760 (2017).
[2] *Id.*, slip op. at 16.
[3] Jonathan Rapping, *The Role of the Defender in a Racially Disparate System*, THE CHAMPION, July 2013, at 46, 50; *see also* Jeff Robinson & Jodie English, Confronting the Race Issue During Jury Selection, THE ADVOCATE, May 2008; Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); Jeff Adachi's Sample Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans.

- "That won't fly in my jurisdiction" (aka "the jurisdictional defense");
- Concern that the lawyer's own racial, ethnic, or gender identity will interfere with their ability to connect with jurors on this topic;
- Lack of training/encouragement by supervisors/peers, "no one else is doing it";
- Worry that the judge will not permit this line of questioning;
- Unfamiliarity with legal protections applicable to voir dire on race;
- Perception that race is a historical phenomenon that is not relevant today;
- Impression that "color-blindness" is a norm that members of the bar are expected to uphold and a belief that all discussions of race amount to "playing the race card," which is frowned upon/discouraged.[4]

These worries are common, and they are real. However, they are outweighed by the critical importance of uncovering racial attitudes during voir dire, which will enable you to:

- Discover views on race that will impact potential jurors' assessment of evidence;[5]
- Discover which jurors appreciate that race matters and will be bold enough to discuss race thoughtfully during deliberations;[6]
- Discover how potential jurors respond to uncomfortable topics;
- Legitimize race/racial bias as a topic worthy of consideration and give jurors implicit permission to consider and discuss race/racial bias themselves;
- Improve your ability to exercise intelligent strikes/challenges;
- Avoid relying on stereotypes yourself;
- "Make race salient" and increase the likelihood that jurors will think critically about race and avoid reliance on stereotypes/bias.[7]

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[4] *See* Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57 (discussing some of these concerns).

[5] Ira Mickenberg, Voir Dire and Jury Selection 2 (training material presented at 2011 North Carolina Defender Trial School).

[6] Discussing race during voir dire allows defenders to explore whether individuals are comfortable discussing issues of race and to consider striking "jurors who ignored the issue or who asserted that race did not matter." Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1526 (2013) (quoting L. Song Richardson, Professor of Law, Univ. of Iowa Coll. Of Law).

[7] Implicit bias researchers have found that when race issues are brought to the forefront of a discussion or "made salient," the influence of stereotypes and implicit biases on decision-making recendes. *See, e.g.,* Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009) (voir dire regarding racial bias appeared to diminish racial bias from assessments of guilt)l; Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not-Yet Post-Racial Society*, 91 N.C. L.Rev. 1555

If you avoid the issue, you may increase the likelihood that bias will influence deliberation. You can build your competence in this area by reviewing the resources listed below, watching demonstrations of voir dire on race, writing out your questions ahead of time, and, of course, practicing!

III. WHEN SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

Former CDPL Director Tye Hunter once asked a group of attorneys, "How do you know if you have a case that involves race?" We thought for a moment until we realized it was a trick question. The answer is, "If you have a case." In other words, you should be thinking about the ways in which racial or ethnic stereotypes or biases may harm your client in *every single case*, not simply the cases with obvious racial overtones, such as an interracial crime of violence. Since implicit and explicit racial biases can influence the perceptions of guilt, you have a responsibility to keep people off your client's jury whose decision-making is particularly susceptible to such biases. If you fail to address race during jury selection, you are hamstrung in your ability to protect your client from racial bias on her/his jury.

Many, if not all, cases tried in front of a jury risk triggering racialized responses on the part of jurors. Here is a non-exhaustive list of scenarios in which a juror's racial attitudes or biases could influence their assessment of the evidence presented:

- All the key players in the case (the defendant, the victim, the police officers, and the witnesses) are Black;
- The defendant is married to a person of a different race;
- The defendant and the victim are White, and the arresting officer and witnesses are Black;
- The alleged crime occurred in a neighborhood that was recently the sight of a police shooting of an unarmed Black man;

(2013; Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U. C. Irvine L. Rev. 843, 861 (2015); JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS, NATIONAL CENTER FOR STATE COURTS 4–5 (National Center for State Courts 2009) (collecting evidence that "implicit biases are malleable and can be changed").

- The officer stopped your client, at least in part, on the basis of her presence in a "high crime area"?
- Your client is an activist who speaks out on issues of racial justice;
- Your client is a Latinx resident of a rural area that, until recently, was nearly 100% White, and now has a growing Latinx community;
- Your client is White and lost his job at the local police department for complaining about discrimination against White officers;
- Your client is the only Black person in the courtroom.

Each of these scenarios, none of which is particularly unusual, involve racial dynamics that could trigger biased responses from jurors. While you may not decide to voir dire on race in all of these cases, you should consider doing so, and be prepared to do so, in every single case.

IV. HOW SHOULD YOU ADDRESS RACE DURING VOIR DIRE?

There is no one correct approach to voir dire on race. The following tips will help you to develop your own unique approach to this subject.

A. PREPARING TO DISCUSS RACE WITH JURORS: A STEP-BY-STEP APPROACH

1. Reflection Questions to Use when Preparing Voir Dire

As with all other voir dire questions, voir dire on race needs to be "tailored to your factual theory of defense in each individual case."[8] Before drafting your questions about race, consider asking yourself the following questions. Your answers will help you identify what information you are seeking from potential jurors and craft questions aimed at eliciting that information. Imagine, for example, that your client is a Latino man charged with sexually assaulting a White woman.

a. What scares me about this case?

[8] Ira Mickenberg, Voir Dire and Jury Selection 6 (training material presented at 2011 North Carolina Defender Trial School).

e.g. That a jury might convict my client based on stereotypes of Latino men or immigrants.

b. What biases or stereotypes could lead a juror to vote to convict my client?
e.g. That Latino men are more likely to sexually assault women. That White women who speak English are more credible than Latino men who speak Spanish.

c. What does a juror need to believe in order for us to win?
e.g. That eyewitness identification is unreliable and that cross-racial eyewitness identification is even more unreliable. That my client's ethnic identity and language doesn't make him any less credible than the victim.

d. What do I need to know about a juror to determine if they are open to our theory of the case?
e.g. Whether they are likely to jump to conclusions about the alleged behavior of my client because he is Latino, whether they are open to the possibility that a White victim could sincerely believe that she has identified her assailant when, in fact, she is mistaken.

2. Tools in your Toolkit

a. Move for extra time for voir dire. When you explore race with potential jurors, voir dire takes longer. For this reason, you may consider filing a motion for extra time to explore sensitive topics during voir dire to help prepare the court for a lengthier voir dire. Also, as you all know, feathers may get ruffled when you bring up the subject of race. As CDPL Staff Attorney Johanna Jennings has observed, if there's going to be an argument about your plan to discuss race during voir dire, there is some value to getting that argument over with before jury selection begins. By the time the jurors enter the courtroom, the tension over the topic may have dissipated somewhat, and, hopefully, your right to discuss race with potential jurors will

be recognized by both the judge and the prosecutor. *See* Jeff Adachi's Sample Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans.

b. **Move for individual voir dire.** Potential jurors may be more willing to speak freely about a sensitive topic like race when questioned out of earshot of other jurors. Additionally, exploring race with potential jurors as a group may expose panelists to potentially disqualifying, prejudicial information. For these reasons, some attorneys who discuss race with potential jurors find it more effective to question jurors about racial attitudes individually. For an sample motion, *see* Johanna Jennings's Motion for Individual Voir Dire on Sensitive Subjects. Again, even if this motion is denied, filing and arguing it allows you to inform the judge and the prosecutor that you intend to get into the topic of race during voir dire before jury selection begins.

c. **Questionnaires.** Written questionnaires including questions about race may result in more revealing answers.[9] Additionally, written answers can serve as useful jumping off points for follow up questions during voir dire. Sample questionnaire questions on race can be found in ACLU Deputy Legal Director Jeffery Robinson's article, Jury Selection and Race: Discovering the Good, the Bad, and the Ugly. The questionnaire used in the trial of Derek Chauvin for the killing of George Floyd can be found here.

d. **Move to Show Jurors the 2022 UNC School of Government Judicial College Implicit Bias Video, *Understanding and Countering Bias*.** North Carolina has a new video available for educating jurors about implicit bias. If the potential jurors in your client's case see this implicit bias video, you can ask them about responses to the video during voir dire, uncover relevant

[9] Robert Hirschhorn. Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57, 60.

information about their perspectives on bias, and decrease the likelihood of successful objections to your questions about race and bias. A sample motion to show *Understanding and Countering Bias* is included in your materials.

3. How to Raise the Subject

a. Creating the Conditions for a Discussion of Race. Approach the subject of race intentionally and carefully; it should not be your first topic. Potential jurors, like all other people, generally appreciate a heads up before they asked sensitive or probing questions. You may try to get the jurors to introduce the topic themselves, (for example, "other than guilt, can you think of a reason someone might panic when questioned by police?"), or explicitly state that you are shifting gears to talk about race.

It can be helpful to name the discomfort that everyone feels when discussing race in a group of strangers. Acknowledge that it often makes people uncomfortable, including yourself. You may consider answering your own question to show you're not asking them to do something you're unwilling to do yourself.[10] Reassure panelists that you're not looking for any specific answers, and that there are no wrong answers. You are simply asking questions to help you determine if they are the right juror for this case.

b. What sort of questions should you ask? Your questions will vary depending on the facts of the case and your theory of the case. It goes without saying that direct questions about bias (i.e. "will racial bias influence your decision making in this case?") are ineffective.[11] After you've created the conditions for panelists to feel comfortable opening up, focus your questions on past, analogous behavior, stick with command superlative

[10] Ira Mickenberg, Voir Dire and Jury Selection 10 (training material presented at 2011 North Carolina Defender Trial School).
[11] Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C.L.REV. 1555 (2013).

analog method, and avoid asking questions that will provoke defensiveness. For example, you may ask, "Tell us about the worst experience you (or someone close to you) ever had because someone stereotyped you (or someone close to you) bc of race." Additional sample questions can be found in Jeff Robinson, Jill Otake, and Corrie Yackulic, Jury Selection and Race: Discovering the Good, the Bad, and the Ugly, and our manual, *Raising Issues of Race in North Carolina Criminal Cases,* Chapter 8. For a further discussion of how to construct such questions, see Ira Mickenberg, Voir Dire and Jury Selection 10 (training material presented at 2011 North Carolina Defender Trial School).

c. **Responding to Potential Jurors' Statements about Race.** When a juror answers a sensitive question relating to race or racial bias, thank them with almost over-the-top expressions of gratitude. This will encourage them to continue talking and send a message to other jurors that all views on race are welcome contributions to this conversation.[12] Only by encouraging frank comments on race will you succeed in uncovering jurors' views on race and discovering who to deselect from your client's jury. Your goal in jury selection is not to change juror attitudes on race. Instead, it is to discover racial attitudes that can harm your client, and to remove people who hold such attitudes from your client's jury.[13]

[12] Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1549 (2013) (quoting from telephone interview with Jeff Robinson).

[13] "Who can honestly believe that opinions on issues as sensitive as race, opinions which have been formed over a person's lifetime, could be changed in the time allowed for jury selection in a criminal case? If we cannot change people's opinions, we'd better get busy finding out what those opinions are, how strongly they are held, and how they may impact a verdict in our case. The challenge in jury selection is to get people to talk as forthrightly as possible about race so we can maximize our ability to intelligently exercise preemptory challenges and challenges for cause. If we succeed in getting people to talk about race, we may not change race relations in the world, but we may change the verdict in our case." Jeff Robinson, Jill Otake, and Corrie Yackulic, Jury Selection and Race: Discovering the Good, the Bad, and the Ugly, Materials accompanying 2015 ABA Event.

V. LEGAL PROTECTIONS APPLICABLE TO VOIR DIRE ON RACE

A. LEGAL PROTECTIONS APPLICABLE TO VOIR DIRE GENERALLY

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors."[14] North Carolina appellate courts have recognized that voir dire serves two basic purposes: 1) helping counsel determine whether a basis for a challenge for cause exists, and 2) assisting counsel in intelligently exercising peremptory challenges.[15] As you prepare your voir dire questions on the subject of race, keep these at the forefront of your mind so that you are always ready to link your questions to the purposes of voir dire.

B. THE NORTH CAROLINA SUPREME COURT HAS RECOGNIZED A RIGHT TO VOIR DIRE ON RACE

The right to voir dire on race has a long history in North Carolina. In 1870, our state Supreme Court found reversible error where a trial judge disallowed voir dire on racial bias.[16] In fact, North Carolina jurisprudence on this topic predates that of the US Supreme Court. An early US Supreme Court opinion relied in part on the *McAfee* ruling in reversing a conviction based on the court's refusal to inquire into possible racial bias where the defendant was Black and accused of an interracial crime of violence.[17] Both of these cases were decided before the U.S. Supreme Court cases clarifying the circumstances under which the right to voir dire on race is constitutionally protected. Those cases are discussed below.

C. WHAT ARE THE CONTOURS OF THE CONSTITUIONAL RIGHT TO VOIR DIRE ON RACE?

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[14] *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).
[15] *State v. Wiley,* 355 N.C. 592 (2002); *State v. Anderson*, 350 N.C. 152 (1999); *State v. Brown*, 39 N.C. App. 548 (1979); *see also Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) ("Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.").
[16] *State v. McAfee*, 64 NC 339, 340 (1870); *see also State v. Williams*, 339 N.C. 1, 18 (1994) (voir dire questions aimed at ensuring that "racially biased jurors [will] not be seated on the jury" are proper); *State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge retains discretion to determine the scope of questioning on racial bias).
[17] *Aldridge v. U.S.*, 283 U.S. 308 (1931).

In the recent US Supreme Court case of *Pena-Rodrigruez v. Colorado*, Justice Alito summarized the court's jurisprudence in this area as follows: "voir dire on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it....Thus, while voir dire is not a magic cure, there are good reasons to think that it is a valuable tool."[18] This is powerful language that you should be quoting any time your attempt to address race during voir dire is met with skepticism. Practice this response in advance: *"Your honor, according to Justices Alito, Thomas, and Roberts, voir dire on race is 'constitutionally required in some cases' and 'typically advisable in any case if the defendant requests it.' In this case it's constitutionally required because…."*. The section below will help you finish that sentence.

1) Constitutionally Guaranteed Right to Voir Dire on Race when Case Involves "Special Factors"

A defendant has a constitutional right to ask questions about race on voir dire when "racial issues [are] inextricably bound up with the conduct of the trial."[19] For example, in *Ham v. South Carolina*, 409 U.S. 524 (1973), the U.S. Supreme Court held that a Black defendant, who was a civil rights activist and whose defense was that he was selectively prosecuted for marijuana possession because of his civil rights activity, was entitled to voir dire jurors about racial bias. In *Ristaino v. Ross*, 424 U.S. 589, 597 (1976), the Court held that the Due Process Clause does not create a general right in non-capital cases to voir dire jurors about racial prejudice, but such questions are constitutionally protected when cases involve "special factors," such as those presented in *Ham*.

In *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981), the Court held that trial courts must allow voir dire questions concerning possible racial prejudice against a defendant when the defendant is

[18] Slip op at 13 n.9, Alito, J., dissenting, (citing authorities) (emphasis added).
[19] *Ristaino v. Ross*, 424 U.S. 589, 597 (1976).

charged with a violent crime and the defendant and victim are of different racial or ethnic groups.[20]

Any time your attempt to voir dire on race is met with objection, you should articulate the "special factors" that make such questions necessary and constitutionalize your asserted entitlement to voir dire on race. As explained in *Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion), special factors triggering constitutional protection for the right to voir dire on race are present whenever "there is a showing of a 'likelihood' that racial or ethnic prejudice may affect the jurors."[21] Given that the boundaries of the "special factors" category defy precise definition, you should be able to articulate such factors whenever you have reason to believe that racial attitudes or racial bias could influence the evaluation of the evidence in your client's case.

2) What About in All Other Cases?

In other cases, courts have held that whether to allow questions about racial and ethnic attitudes and biases is within the discretion of the trial judge.[22] Undue restriction of the right to voir dire is error.[23] If you encounter a judge who believes the issue of race is not relevant to your client's case, link your questions to the purposes of voir dire and present scholarly research concluding that "juror racial bias is most likely to occur in run-of-the mill trials without blatantly racial issues."[24]

3) Even in the Absence of a Constitutional Claim, the North Carolina Supreme Court Has Reversed a Conviction Based on the Court's Improper Refusal to Permit Voir Dire on Race.

[20] *See also Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion) (defendants in capital cases involving interracial crime have a right under the Eighth Amendment to voir dire jurors about racial biases).
[21] *Id.*, (Brennan, J., concurring in part, dissenting in part).
[22] *See State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge allowed defendant to question prospective jurors about whether racial prejudice would affect their ability to be fair and impartial and allowed the defendant to ask questions of prospective White jurors about their associations with Black people; trial judge did not err in sustaining prosecutor's objection to other questions, such as "Do you belong to any social club or political organization or church in which there are no black members?" and "Do you feel like the presence of blacks in your neighborhood has lowered the value of your property . . . ?").
[23] *See State v. Conner*, 335 N.C. 618, 629 (1994) (holding that pretrial order limiting right to voir dire to questions not asked by court was error).
[24] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006).

The North Carolina Supreme Court recently confronted this issue in *State v. Crump*, 376 N.C. 375 (2020), where a Black man was involved in a shootout and car chase with police officers and convicted on charges including armed robbery, kidnapping, assault with a deadly weapon with intent to kill, and assault of law enforcement officer with a firearm. During jury selection, the trial judge sustained objections to the defense attorney's questions about race and bias, ruling that they were impermissible "stake out" questions. The defendant preserved an objection to the judge's ruling but did not constitutionalize his objection. For this reason, the appellate courts reviewed the judge's refusal to permit these questions for abuse of discretion and prejudice rather than as a constitutional question. Nevertheless, even under this standard, the majority in *Crump* concluded that the trial "court abused its discretion and prejudiced defendant by restricting all inquiry into prospective jurors' racial biases and opinions regarding police-officer shootings of black men," and reversed the defendant's conviction. *Crump*, 376 N.C. at 393.

There are several key takeaways from *State v. Crump*. Again, in this case, the defendant did not argue that, because of the presence of "special factors," he had a constitutional right to explore racial bias during voir dire. For this reason, the appellate court did not engage consider whether such factors gave rise to a constitutional right to voir dire on race. In future cases, defendants should constitutionalize these objections to invoke even greater protection of the right to voir dire on race. Also, the majority held that by rejecting three questions on race, implicit bias, and officer shootings of civilians, the court demonstrated a total refusal to allow appropriate inquiry on a relevant topic. In the prejudice analysis, the North Carolina Supreme Court departed from the narrow approach taken by the Court of Appeals, treating the question as a broad one that accounted for the number of ways in which potential jurors' racial biases could "fairly and impartially determine whose testimony to credit, whose version of events to believe, and, ultimately, whether or not to find defendant guilty." The court held that questions regarding attitudes toward law

enforcement officers were no substitute for the missed opportunity to explore attitudes on race and officer shootings of Black men. Finally, the court held that the defendant does not need to exhaust his peremptory strikes to preserve this claim.

4) How Can you Protect Jurors Who Open up About Race During Voir Dire from Challenges for Cause?

What should you do if a juror opens up on the subject of race, expresses opinions that make you think they'd be a great juror in your client's case (for example, "I do have concerns about the practice of racial profiling"), and the prosecutor attempts to strike them for cause? In such a case, you can work to elicit a commitment on the part of the juror to keep an open mind, put their biases aside, and follow the law. Several North Carolina appellate opinions confirm that jurors expressing biases are competent to serve, so long as they commit to basing their judgments on the facts of the case. "The operative question is not whether the prospective juror is biased but whether that bias is surmountable with discernment and an obedience to the law…".[25] Additional support for the argument that this principle should also apply to jurors who express concerns about law enforcement can be found in *Commonwealth v. Quinton K. Williams*, in which the Massachusetts Supreme Judicial Court recently held that a juror cannot be struck for cause for expressing her belief that "the system is rigged against young, African American males."

V. TALKING TO JURORS ABOUT RACE: ADDITIONAL RESOURCES AND PUBLICATIONS

Jury Selection and Race: Discovering the Good, the Bad, and the Ugly by Jeff Robinson. In this piece, ACLU Deputy Legal Director and veteran criminal defense attorney Jeff Robinson explains the importance of discussing race with jurors and includes several pages of specific questions and techniques that have proven effective at getting jurors to share opinions

[25] *State v. Smith*, 352 N.C. 531, 545 (2000). *See also State v. Cummings*, 361 N.C. 438, 453-56 (2007); *State v. Moses*, 350 N.C. 741, 757 (1999); *State v. McKinnon*, 328 N.C. 668, 676-77 (1991) *State v. Whitfield*, 310 N.C. 608 (1984).

about this sensitive subject. It also contains a memorandum of law in support of a motion for individual voir dire, sample jury instructions on racial bias, and a sample legal argument in opposition to the introduction of a defendant's immigration status.

The Northwestern Law Review published three articles addressing the subject of discussing race with jurors. *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson* was written by St Louis County Deputy District Public Defender Patrick C. Brayer. In it, he reflects on discussing race during voir dire in a trial that occurred just days after the killing of Michael Brown against the backdrop of protests on the streets and at the courthouse. In *Race Matters in Jury Selection*, Peter A. Joy argues that lawyers need to discuss the topics they fear the most – including race – during voir dire, and provides practical tips for doing so. He explains why it was essential for Patrick C. Brayer to talk about race with his jury and why it is important for all defense attorneys: "If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client." In *The #Ferguson Effect: Opening the Pandora's Box of Implicit Racial Bias in Jury Selection*, Sarah Jane Forman sounds a cautionary note by examining the uncertain state of research into the efficacy of discussing implicit bias with jurors and argues that "unless done with great skill and delicacy," this approach may backfire. Her piece reinforces the importance of careful preparation before diving into this challenging subject with potential jurors.

In *A New Approach to Voir Dire on Racial Bias* Cynthia Lee argues "that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection." Her law review article on the value making race salient at trial, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, was cited twice by the North Carolina Supreme Court in cases addressing attempts to raise race with jurors.

Chapter Eight of the SOG's Indigent Defense manual, *Raising Issues of Race in North Carolina Criminal Cases*, contains a section on addressing race during jury selection and at trial, with subsections on identifying

stereotypes that might be at play in your trial, considering the influence of your own language and behavior on jurors' perceptions of your client, and reinforcing norms of fairness and equality.

Alyson Grine's North Carolina Bar Journal Article, *Questioning Prospective Jurors about Possible Racial or Ethnic Bias: Lessons From* Pena-Rodriguez v. Colorado, explores the Pena-Rodriguez decision in greater depth and helpfully dissects the case law governing the right to voir dire on race.

Mikah K. Thompson's *Bias on Trial: Toward and Open Discussion of Racial Stereotypes in the Courtroom*, helpfully collects resources and analysis related to discussions of race and racial bias during jury selection and during other stages of the criminal process.

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF XXXX	FILE NO. XXXXXXXXXXXXXXX

STATE OF NORTH CAROLINA

v.

XXXXXXXXXXXXX
Defendant.

****

REQUEST TO SHOW PROSPECTIVE JURORS A VIDEO ON UNDERSTANDING AND COUNTERING BIAS

****

NOW COMES Defendant, XXXXXXXXXXX, by and through undersigned counsel, and respectfully moves this Court that prospective jurors be shown the video, "Understanding and Countering Bias," from the UNC School of Government Judicial College ("the UNC Judicial College video"), as part of jury orientation, available at https://www.sog.unc.edu/resources/microsites/north-carolina-judicial-college/understanding-and-countering-bias (last checked Sept. 12, 2022). Use of this video will help ensure that Defendant receives a fair and impartial jury whose decisions are not tainted by implicit bias. Further, use of this video will help protect Defendant's right to due process and to be free from cruel and unusual punishment. This Court should require the showing of this educational video on implicit bias pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 19, 23, 24 and 27 of the North Carolina Constitution.

[*Where such information would provide relevant context:* Defendant is [describe defendant identity]. One [or more] of the victims in this case, XXXXXXXXX, is XXXX.] There

is a long history of racial discrimination and racialized outcomes in the criminal justice system in this country and in this state. This problem persists today. *See* Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010). It is a multifaceted problem that is exacerbated by the phenomenon of implicit bias.

> Implicit biases are attitudes and stereotypes that people are not aware of, but that can influence their thoughts and behavior. These biases result from the brain's natural tendency to categorize stimuli into various categories or "schemas." All people rely on schemas to help sort the vast amount of information facing them each day, and schemas often involve stereotypes. As scholar john powell puts it, '[w]e cannot live without schemas. Having biases and stereotypes does not make us racist, it makes us human.' Research suggests that people may not be aware of their own biases. In fact, an implicit bias may conflict with a consciously held belief.

Alyson A. Grine and Emily Coward, RECOGNIZING AND ADDRESSING ISSUES OF RACE IN CRIMINAL CASES, University of North Carolina School of Government, Chapter One, page 1-6 (Sept. 2014) ("RECOGNIZING RACE MANUAL").

Implicit bias poses a threat to the guarantee of fair and impartial juries and the promise of equal justice under law. *See generally* Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH J. RACE & L. 395, 419 (2003) ("[T]he unconscious nature of juror bias prevents the voir dire from impaneling fair and impartial jurors"). Social science research demonstrates what most of us in the criminal justice system realize: Implicit bias can influence jurors' decisions. RECOGNIZING RACE MANUAL at 1-6-7. Numerous studies raise concerns about the potential impact of implicit biases on fair trials. *See, e.g.*, Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL SCI. 383 (2006); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53

DEPAUL L. REV. 1539, 1542 (2004); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195–96 (2009). While it is not possible to eliminate the impact of implicit bias, there are steps that can be taken to mitigate its influence on juror decision-making. RECOGNIZING RACE MANUAL at 1-7-8.

There has been a growing recognition of the importance of educating jurors about the phenomenon and consequences of implicit bias. In 2017, United States Supreme Court of the United States emphasized the importance of employing various strategies to safeguard against the influence of juror bias. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (addressing bias in the jury system enables "our legal system [to come] ever closer to the promise of equal treatment under the law that is so central to a functioning democracy"); *see also* Hon. Kenneth V. Desmond, Jr., *The Road to Race and Implicit Bias Eradication*, BOSTON BAR JOURNAL, Summer 2016, at 3 ("Throughout the past several decades, State and Federal appellate courts have candidly acknowledged the implicit biases of litigants and jurors."). Legal experts have developed innovative approaches to educating jurors about the importance of guarding against the influence of implicit bias on decision-making.

Perhaps no innovation has been as broadly embraced as the juror orientation video produced by and for the US District Court for the Western District of Washington ("the WDWA video"), whose creators have shared the video with jurisdictions across the country. *See* Unconscious Bias Video, USDC for the Western District of Washington, available at https://www.wawd.uscourts.gov/jury/unconscious-bias (last checked May 8, 2022); *see also Memorandum from Jury Administrator Jeff Humenik to Judge John C. Coughenour*, Summary Report - Implicit Bias Questionnaire for Jurors, (Apr. 16, 2019), available at https://civiljuryproject.law.nyu.edu/wp-content/uploads/2019/04/Implicit-Bias-Summary-Report-

Judge-Coughenour.pdf (last checked May 8, 2022) (survey results revealing that jurors overwhelmingly find WDWA video useful).

In North Carolina, Superior Court judges in several counties have granted motions to show the WDWA video to prospective jurors. In 2019, Buncombe County Senior Resident Superior Court Judge Alan Thornburg created a modified version of the WDWA video for use in Buncombe County jury orientation. In 2020, Durham County Senior Resident Superior Court Judge Orlando Hudson instructed that the modified WDWA video should be shown to all jurors oriented in Durham County Superior Court. The North Carolina Governor's Task Force for Racial Equity in Criminal Justice, in its 2020 report, called for providing "implicit bias training to all jury system actors" and recommended "that jurors receive education and instructions on implicit bias by using jury videos, pattern jury instructions, and a juror pledge."

The UNC Judicial College video was released in early 2022, and, as of September 1, 2022, is now shown in all jury orientation sessions in Mecklenburg County Superior Court. The video identifies and addresses potential problems caused by implicit bias. It defines the concept of implicit bias and offers suggestions for noticing and countering the influence of such bias. Video content was "informed by [the WDWA video]" and created by a research and advisory group comprised of a wide array of court actors, including a current Senior Resident Superior Court Judge, retired Senior Resident Superior Court Judge, Chief District Court Judge, Trial Court Administrator, elected District Attorney, Indigent Defense Services Forensic Resource Counsel, Capital Defender Investigator, Law Professor, UNC School of Government Project Attorney, and a Court Management Specialist from the NC Administrative Office of the Courts. *See* North Carolina Judicial College: Understanding and Countering Bias, available at https://www.sog.unc.edu/resources/microsites/north-carolina-judicial-college/understanding-and-

countering-bias (last checked May 8, 2022). The information in the video is delivered by experts in North Carolina law: retired North Carolina Court of Appeals Chief Judge Linda McGee, Wake Forest Law Professor Kami Chavis, and UNC School of Government Professor James Drennan. *See* id. The video is neutral, clear, and evidence based, and it has the potential to reduce the influence of implicit bias on the administration of justice. The showing of this video would not be prejudicial to either side in a criminal case.

After years of experimenting with the use of a video produced for the US District Court for the Western District of Washington featuring Seattle attorneys and judges, North Carolina now has its own jury orientation video on understanding and countering bias. The need to address implicit bias with jurors is clear, and this court should use all tools at its disposal to minimize the possibility that implicit bias will undermine the integrity of juror decision-making in North Carolina jury trials.

[In this case, *and/or, if seeking an administrative order*: and as a standing matter], this Court should direct that the UNC Judicial College video be shown to potential jurors during juror orientation.

Respectfully submitted, this the _____ day of XXXXXXXX 20XX.

_____ _____

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **Motion** by first class mail or by hand delivery upon:

XXXXXXXXXXXX
Assistant District Attorney
Office of the District Attorney
XX Prosecutorial District
XXXXXXXXXXXX
XXXXXXXXXXXX

This the ___ day of XXXXXXX, 20XX.

_____
XXXXXXXXXXX

STATE OF NORTH CAROLINA COUNTY OF	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____

STATE OF NORTH CAROLINA	)	
	)	**DEFENDANT'S MOTION**
v.	)	**TO DISTRIBUTE JUROR**
	)	**QUESTIONNAIRE AND TO**
	)	**NOTE RACE AND GENDER OF**
	)	**EVERY POTENTIAL JUROR**
	)	**EXAMINED IN THIS CASE**
	)	
	)	

COMES NOW the Defendant, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section §§ 19, 24 and 26 of the North Carolina Constitution and respectfully moves the Court to allow the Defendant to distribute the proposed attached questionnaires to be answered by jurors who have been called for jury duty at the time of the Defendant's trial and prior to any voir dire of those jurors. In support of this motion, the Defendant shows unto the Court:

1. The attached questionnaire (Exhibit A) would simplify the questioning of jurors, as well as save valuable court time by eliminating the necessity of questioning jurors concerning basic factual information.
2. A defendant may not protect his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994), in the absence of a clear record of the race and gender of each juror examined during voir dire. *See State v. Campbell*, ____ N.C.App. ___, 846 S.E.2d 804 (2020); *State v. Mitchell*, 321 N.C. 650 (1988); *State v. Brogden*, 329 N.C. 534 (1991).
3. Additionally, a defendant may not protect his rights to a jury drawn from a fair cross section pursuant to *Duren v. Missouri*, 439 U.S. 357 (1979) and *State v.*

Williams, 355 N.C. 501, 549 (2002) without a clear record of the race and gender of each juror summonsed for jury service.

4. A questionnaire is less intrusive and more efficient than asking jurors to identify their race and gender in open court and consequently is the best method of establishing a clear record. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual's race "is not always easily discernible, and the potential for error by a court reporter acting alone is great").
5. If a juror neglects to fill in his or her race, Defendant requests that the Court make inquiry of the juror as to his or her race and gender prior to either party questioning that juror.
6. In the alternative, should the Court decline to order distribution of a questionnaire, Defendant requests that the Court inquire as to the race and gender of every juror prior to the questioning of that juror by either party.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Distribute Juror Questionnaire has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

The Atlantic

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IDEAS

The Chauvin Trial's Jury Wasn't Like Other Juries

Its guilty verdict resulted not just from the strength of the evidence, but from a jury-selection process that departed from American norms.

By Sonali Chakravarti

Image Source / Getty / The Atlantic

APRIL 28, 2021 SHARE

About the author: *Sonali Chakravarti is an associate professor of government at Wesleyan University. She is the author of* Radical Enfranchisement in the Jury Room and Public Life.

The jury convicted the former Minnesota police officer Derek Chauvin on the weight of the evidence before it: video footage, expert testimony, and eyewitness accounts.

But even with all that evidence, convictions don't happen on their own. Twelve people, selected by lot from the public, must come to a unanimous decision. That jury—who it comprised, how those people saw the world—was of enormous consequence. This wasn't just any jury, and the difference that made should invite a major reckoning with how juries—the deciding bodies of the country's judicial system—are selected in America.

I have been studying juries for many years. I have written about juries in historic trials such as those for the Camden 28, the Central Park Five, and Angela Davis. But starting late last year, one took over my work: the Chauvin trial. Great interest in it led the Hennepin County clerk to make public the initial questionnaire sent to jurors, and District Judge Peter Cahill decided to allow television cameras in the courtroom, a first for the state of Minnesota. From voir dire—the interview between the judge, attorneys, and each potential juror before a jury is selected—to the attorneys' opening and closing statements to the testimony of more than 40 witnesses during the trial, everything was viewable via live-stream. What I saw was a jury-selection process that substantially departed from the country's norms, resulting in a racially mixed jury, a number of whose members criticized American law enforcement for systematically discriminating against Black people.

David A. Graham: Chauvin's conviction is the exception that proves the rule

All the jurors interviewed during voir dire were familiar with the case, and some had seen the video of George Floyd's death. To varying degrees, they all understood the weight of the case and the intense media scrutiny it would undoubtedly receive, yet many were eager to serve. When interviewed by the defense counsel, Juror 27, who identifies as Black and an immigrant and who ultimately ended up on the jury, said that he had spoken with his wife about the killing shortly after it happened. "We talked about how it could have been me," he said. Juror 91 put it simply when she said, "I'm Black and my life matters." That these people held these views and still served on the jury shows a path toward greater democratic representation in America's courtrooms.

There were many reasons to think things would not go this way—that Chauvin would be tried by a mostly white or all-white jury, and that people with systemic critiques of how criminal justice works in America would be struck from the jury pool. For one, Hennepin County, where the killing took place and where the trial was held, is nearly three-quarters white. For another, studies have found that Black jurors are less likely

to be called for jury duty and less likely to be selected to serve. And finally, there was the complication of having the trial during the coronavirus pandemic, which has disproportionately affected Black and brown communities. According to the former Minneapolis public defender Mary Moriarty, during the pandemic, juries have been even whiter, on average, than before the pandemic.

Yet ultimately the jury seated in the Chauvin case included four Black people, two people who identify as mixed race, and six white people. (The jury comprised 14 people, including two alternates who were both white.) Much of the credit goes to Judge Cahill, who conducted the jury-selection process. Cahill set a tone of honesty and inclusivity during jury selection, emphasizing that he would consider the totality of a juror's answers and not focus on individual statements when determining whether a juror was qualified to serve. He expected jurors to have strong feelings about Floyd's death, but what was most important to him was a juror's willingness to take on the responsibilities of legal judgment, including a commitment to the conventions of a fair trial.

Evidence of his approach was apparent from the start. The selection process began in December when an in-depth questionnaire was mailed to more than 300 prospective jurors. It contained detailed questions about Black Lives Matter, Blue Lives Matter, and impressions of the police. Given how Floyd's killing galvanized the Black Lives Matter movement, both sides in the trial had an interest in learning how jurors understood the protests and the concurrent civil unrest, including instances of looting and the destruction of property.

But stating views sympathetic to Black Lives Matter did not result in jurors getting removed from the jury pool. During voir dire, a majority of the 12 seated jurors said they "somewhat agreed" or "strongly agreed" with the statement on the questionnaire that "Blacks and whites don't receive equal justice in this country," implying that they believe that racial discrimination in the legal system goes beyond isolated incidents and a few bad actors. The same majority also had favorable opinions of Black Lives Matter and disagreed with a statement that the media exaggerate claims of racial discrimination.

It's difficult to overstate how significant a departure from the norm this is. In many similar cases, a potential juror's mere intimation of a belief in systemic injustice makes judges and attorneys nervous—especially when the juror is a person of color. When Crishala Reed said that she supported Black Lives Matter during voir dire for a 2016 case (*People v. Silas*) in Contra Costa County, in the San Francisco Bay Area, the prosecution asked her if that meant she supported the destruction of property. Reed answered that she did not, but the attorney did not think the response was credible and struck her from the jury, saying that she "rolled her eyes" when she answered. Therefore, the attorney later explained, her attitude and not her race was the basis for the strike. The judge upheld the strike, expressing similar concerns about whether any supporter of Black Lives Matter could fairly apply the law as a juror. In another example—the Connecticut case of *State v. Holmes*—a Black juror who was employed as a social worker said that he had observed clients and family members who were treated unfairly by the legal system because of their race. At the same time, he affirmed that he could make decisions as a juror based on the facts of the case and be open to both sides. After the prosecutor expressed his concern about people who use their time as jurors "to fix the system," the juror was excused. While the dismissal was found to be appropriate on appeal, the case prompted a statewide commission to study the problem of racial bias in jury selection.

But in the Chauvin trial, the attorneys and the judge did not treat critiques of racial bias in the legal system as something that would inherently bias a juror. This was clear once voir dire began. In one instance, a potential juror—a Black man—spoke about the sadness and outrage he felt at seeing the cellphone video that had circulated around the world: "It's another Black man being murdered at police hands," he said. Judge Cahill said that he believed this was an "honest opinion," "widely held," and not necessarily an obstacle to being an impartial juror. This may seem like a small thing, but to say that jurors can hold systemic critiques and still be fair inverts the old paradigm, which saw an absence of such critiques as a harbinger of neutrality—which of course is its own kind of bias.

Additionally, during voir dire, several jurors spoke about their own experiences with police violence, and those accounts were not disqualifying, as they almost certainly

would have been in other trials. Doing so is a particularly egregious practice because it ensures that for many Black jurors, past unequal treatment by the police will result in continued alienation from the legal system. Rather than allowing these jurors to draw on what they have learned through their lived experiences as citizens—one of the reasons the Founders fought to include "trial by jury" in the Sixth Amendment—judges have often conveyed to Black jurors that their experiences make them ineligible for service. But, again, that was not the case under Judge Cahill. When questioned about his perspective on the police, Juror 52, a Black man who works in the banking industry and coaches youth sports, spoke of witnessing a Minneapolis Police Department officer "body slam and then mace an individual simply because they did not obey an order quick enough." Juror 52 was nevertheless seated.

Adam Serwer: There will be more Derek Chauvins

Even with Judge Cahill's more open standards, certain political ideas do seem to have remained outside the bounds of the court's approval. Almost all of the jurors who made it to voir dire had a negative impression of the movement to defund the police or were unable to express an opinion about it, because they didn't have enough information. While a critique of the police and the legal system was not a bar to being a juror in this case, believing that radical changes to the structure or purpose of the police are necessary most likely was. A strong agreement with that position on the questionnaire was possibly a valid reason for the judge to dismiss a juror prior to the interview stage.

In voir dire, potential jurors can be rejected either by the judge—which is called dismissal for cause—or by the attorneys via peremptory strike. As is clear, Judge Cahill did not dismiss jurors who held systemic critiques of law enforcement. But what's maybe even more surprising is that neither did the attorneys. The only limitation on the use of strikes is that a juror cannot be dismissed on the basis of race alone. In the Chauvin case, the defense was entitled to 18 peremptory strikes and the

prosecution 10, but both sides had strikes remaining when all jurors, including the alternates, had been selected.

This suggests that both sides were being cautious with their strikes, declining to use them on jurors who appeared only slightly unfavorable to their side. The prosecution didn't strike Juror 92, a white woman who said that she had great respect for police officers and thought that citizens should cooperate with the police, as she herself had done at traffic stops. Similarly, the defense did not strike Juror 44, a white woman who testified that "we have disenfranchised [minority citizens]. Laws were created many years ago that have not kept up with society and cultural changes." Later, she said, "There's inherent bias in the system." The defense attorney forcefully pushed her to clarify whether she thought all officers were complicit in wrongdoing (she did not) and whether the media had ever exaggerated bias (sometimes), but did not dismiss her.

While we can't know why the attorneys proceeded so cautiously with their strikes, we can clearly see the effect of that choice, and the implications for the rules that govern peremptory-strike use are enormous. The improper use of strikes to dramatically curtail the number of Black jurors has long been seen as an intractable problem. Judges have been inclined to give attorneys the benefit of the doubt when asking them to provide racially neutral reasons for the strike, as required by the procedure articulated in *Batson v. Kentucky* (1986), and neither prosecutors nor defense attorneys want to give up their right to peremptory strikes. The result has been—especially in certain southern states—trial after trial with all-white (or nearly all-white) juries, even in counties that are heavily Black.

This has led California and Washington State to change their procedures in the interest of more representative juries. Now, according to Washington's General Rule 37, objections to peremptory strikes will no longer be restricted to instances of *purposeful* discrimination by the attorneys; rather, a judge must consider whether an "objective observer" would view race or ethnicity as a factor leading to the peremptory strike. This change opens up the possibility of a judge recognizing implicit biases in the use of peremptory strikes, and draws the judge's (and attorneys') attention to the

composition of the jury as a whole. A judge must now pay heed to the ideal of a racially diverse jury through the fiction of an "objective observer"—one who would presumably be concerned if jurors of color kept being dismissed either for marginal reasons or for reasons stemming from the history of policing in their communities.

While Minnesota has not adopted such a rule, the actions of the attorneys and the judge in the Chauvin case evinced a similar sensibility, because they all seemed to be committed to a racially and politically mixed jury—within certain limitations. When the defense used a peremptory strike against Juror 76, a Black man who used to live in the neighborhood where Floyd was killed, the dismissal followed a familiar script and showed how, even in this case, Black jurors who are candid about their life experiences may be more likely than other jurors to be dismissed by the attorneys. The defense counsel, Eric Nelson, asked the potential juror more questions about a variety of topics—his previous jury service, his brother's experience with the law, his military service—than he asked other jurors. Once Juror 76 recalled that the police officers in his old neighborhood used to blast "Another One Bites the Dust" from their squad car after someone in the community was arrested or shot, Nelson asked him over and over again whether he could be fair, expressed incredulity when he stated that he could, and then proceeded to ask him the question in a different way. Nelson petitioned the judge to remove the juror for cause; when the judge declined, Nelson decided to use a peremptory strike.

Read: Why Minneapolis was the breaking point

Another limit of the more capacious approach to jury selection came with Juror 120, who was dismissed not for his critique of the legal system but for an analogy that dominated his reaction to the video of Floyd's death. During Juror 120's initial questioning by the judge, he started expressing his uncertainty about whether he could truly be fair in the case. He turned to the judge and said, "Do you have any brothers?" "I do," Judge Cahill replied. The juror went on to describe an analogy that kept coming to mind when he thought about Chauvin. "So you're tussling with your

brothers. If one of your brothers says, 'I give up, etc., etc.,' you stop, right? ... You have to stop when someone says, 'No more.'" Judge Cahill suddenly grew still, touched his mask, and replied: "As the little brother to three older brothers, I know exactly what you are talking about." Then, almost apologetically, he added, "I am going to release you." No further discussion of the case, the police, or Black Lives Matter was necessary for the judge to decide that this juror was unfit for the case.

In many cases, a disqualifying life experience involves a prospective juror's firsthand witnessing of police violence or coercive plea bargaining, for instance. In the case of Juror 120, however, the issue almost appeared to be one of excessive moral clarity. It illustrates the paradoxical nature of jury service—and the expectations of the ideal juror. Juror 120's moral clarity was what made him unfit for service. In other words, for a juror, moral clarity can conflict with the openness needed to fairly consider both verdicts. A juror who is too convinced of a defendant's guilt before hearing the evidence, as Juror 120 seemed to be, cannot be a fair juror. But Judge Cahill recognized that jurors in this trial might hold views about the reality of systemic racism and its deep moral costs while still being able to perform their role as impartial jurors. The result might in fact be greater fairness and—perhaps—healing: A fair trial by jury may be one of the best ways to foster trust in the legal system.

Watching the three weeks of jury selection and hearing potential jurors speak about their pets and favorite sports teams, in addition to their perceptions of racial discrimination, I was reminded that jurors are called to serve precisely because of their lack of expertise in the law. They are not repeat players in the courtroom with incentives to reach a particular verdict. But this has it backwards: It is *because* of their distance from the work of the court that they are better able to understand what it means to feel the power of law enforcement as an external force in their lives and to determine its legitimacy. The jury in the Chauvin trial included a broader perspective of life experiences than is typical in America's courtrooms, better fulfilling the ideal of why we have juries in the first place. During jury selection, the jurors who spoke about Black Lives Matter and the pattern of police violence in this country were unusually honest about who we, as Americans, have been. And, with their verdict, they showed us where we might yet be going.

2022 Update to Jury Selection:
The Art of Peremptories and Trial Advocacy

By: James A. Davis

September 22, 2022

About James A. Davis

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

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MASTERING THE ART OF JURY SELECTION

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

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

Public outrage decried the Rodney King, O.J. Simpson, McDonald's hot coffee spill, nanny Louise Woodward, and the 253-million-dollar VIOXX verdicts, all of which had juries selected using trial consultants. After three decades, I now believe jury selection and closing argument decide most close cases. Second, I am an eclectic, taking the best I have ever seen or heard from others.

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

Virtually nothing herein is original, and I neither make any representations regarding accuracy nor claim any proprietary interest in the materials. Pronouns are in the masculine in accord with holdings of the cases referenced.

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

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I. Preliminary Observations (Return to TOC)

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

II. Jury Pool (Return to TOC)

A. Fair Cross-Section: (Return to TOC)

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

B. Prospective Juror Qualifications: (Return to TOC)

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

A few points to know about juror qualification. First, a juror is not considered to have served until sworn. *State v. Golphin*, 352 N.C. 364 (2000). Second, the date of swearing serves as the relevant date in calculating the juror's next lawful date of service. *Id.* Third, a defendant does not have a statutory or constitutional right to be present for District Court proceedings regarding juror qualification. *State v. McCarver*, 341 N.C. 364 (1995).

C. Informing Prospective Jurors: (Return to TOC)

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

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

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

Voir dire means to speak the truth.[1] Our highest courts proclaim its purpose. *Voir dire* serves a dual objective of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). The North Carolina Supreme Court held jury selection has a dual purpose, both to help counsel determine whether a basis for challenge for cause exists and assist counsel in intelligently exercising peremptory challenges. *State v. Wiley*, 355 N.C. 592 (2002); *State v. Simpson*, 341 N.C. 316 (1995).

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

A. Case Law: (Return to TOC)

Case law amplifies the aim of jury selection. Each defendant is entitled to a full opportunity to face prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Thomas*, 294 N.C. 105, 115 (1978). The purpose of *voir dire* and exercise of challenges "is to eliminate extremes of partiality and assure both . . . [parties] . . . that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." *State v. Conner*, 335 N.C. 618 (1994). We all have natural inclinations and favorites, and jurors sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. Jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for a juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. *State v. Hedgepath*, 66 N.C. App. 390 (1984).

B. Statutes: (Return to TOC)

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

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

allowed fourteen peremptory challenges, and in non-capital cases, each defendant is allowed six peremptory challenges. N.C. Gen. Stat. § 15A-1217. Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges. *Id.*

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

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

C. Constitution: (Return to TOC)

Criminal defendants have a constitutional right under the Sixth and Fourteenth Amendments to *voir dire* jurors adequately. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. . . . *Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored." *Voir dire* must be available "to lay bare the foundation of a challenge for cause against a prospective juror." *Morgan v. Illinois*, 504 U.S. 719, 729, 733 (1992).[2] *See also Rosales-Lopez v. U.S.*, 451 U.S. 182, 188 (1981) (plurality opinion) ("Without an adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled.").[3]

Now, the foundational principles of jury selection.

IV. Selection Procedure (Return to TOC)

A. Statutes: (Return to TOC)

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

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

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

B. Pattern Jury Instructions: (Return to TOC)

Read and recite to jurors the pattern jury instructions.

- Pattern Jury Instructions: Substantive Crime(s) and Trial Instructions[4]
- N.C.P.I. – Crim. 100.21: Remarks to Prospective Jurors After Excuses Heard (parties are entitled to jurors who approach cases with open minds until a verdict is reached; free from bias, prejudice or sympathy; must not be influenced by preconceived ideas as to facts or law; lawyers will ask if you have any experience that might cause you to identify yourself with either party, and these questions are necessary to assure an impartial jury; being fair-minded, none of you want to be tried based on what was reported outside the courtroom; the test for qualification for jury service is not the private feelings of a juror, but whether the juror can honestly set aside such feelings, fairly consider the law and evidence, and impartially determine the issues; we ask no more than you use the same good judgment and common sense you used in handling your own affairs last week and will use in the weeks to come; these remarks are to impress upon you the importance of jury service, acquaint you with what will be expected, and strengthen your will and desire to discharge your duties honorably).
- N.C.P.I. – Crim. 100.22: Introductory Remarks (this call upon your time may never be repeated in your lifetime; it is one of the obligations of citizenship, represents your contribution to our democratic way of life, and is an assurance of your guarantee that, if chance or design brings you to any civil or criminal entanglement, your rights and liberties will be regarded by the same standards of justice that you discharge here in your duties as jurors; you are asked to perform one of the highest duties imposed on any citizen, that is to sit in judgment of the facts which will determine and settle disputes among fellow citizens; trial by jury is a right guaranteed to every citizen; you are the sole judges of the weight of the evidence and credibility of each witness; any decision agreed to by all twelve jurors, free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment and based on credible evidence in accord with the court's instructions, becomes a final result; you become officers of the court,

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

and your service will impose upon you important duties and grave responsibilities; you are to be considerate and tolerant of fellow jurors, sound and deliberate in your evaluations, and firm but not stubborn in your convictions; jury service is a duty of citizenship).

- N.C.P.I. – Crim. 100.25: Precautionary Instructions to Jurors (Given After Impaneled) (all the competent evidence will be presented while you are present in the courtroom; your duty is to decide the facts from the evidence, and you alone are the judges of the facts; you will then apply the law that will be given to you to those facts; you are to be fair and attentive during trial and must not be influenced to any degree by personal feelings, sympathy for, or prejudice against any of the parties involved; the fact a criminal charge has been filed is not evidence; the defendant is innocent of any crime unless and until the state proves the defendant's guilt beyond a reasonable doubt; the only place this case may be discussed is in the jury room after you begin your deliberations; you are not to form an opinion about guilt or innocence or express an opinion about the case until you begin deliberations; news media coverage is not proper for your consideration; television shows may leave you with improper, preconceived ideas about the legal system as they are not subject to rules of evidence and legal safeguards, are works of fiction, and condense, distort, or even ignore procedures that take place in real cases and courtrooms; you must obey these rules to the letter, or there is no way parties can be assured of absolute fairness and impartiality).
- N.C.P.I. – Crim. 100.31: Admonitions to Jurors at Recesses[5] (during trial jurors should not talk with each other about the case; have contact of any kind with parties, attorneys or witnesses; engage in any form of electronic communication about the trial; watch, read or listen to any accounts of the trial from any news media; or go to the place where the case arose or make any independent inquiry or investigation, including the internet or other research; if a verdict is based on anything other than what is learned in the courtroom, it could be grounds for a mistrial, meaning all the work put into trial will be wasted, and the lawyers, parties and a judge will have to retry the case).

C. Case Law: (Return to TOC)

<u>*Harbison* and IAC Issues</u>

- *State v. Harbison*, 315 N.C. 175 (1985) (Defendant must knowingly and voluntarily consent to <u>concessions of guilt</u> made by trial counsel after a full appraisal of the consequences and before any admission);
- *State v. Berry*, 356 N.C. 490 (2002) (holding Defendant receives *per se* IAC when counsel <u>concedes</u> the defendant's <u>guilt to the offense or a lesser-included offense</u> without consent);
- *State v. McAlister*, 375 N.C. 455 (2020) (holding *Harbison* errors may also exist when defense counsel "<u>impliedly—rather than expressly—admits the defendant's guilt</u> to a

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

charged offense" and remanding for an evidentiary hearing whether (1) *Harbison* was violated or (2) Defendant knowingly consented in advance to his attorney's admission of guilt to the Assault on a Female charge when counsel stated that "things got physical . . . he did wrong . . . God knows he did" during closing argument);

- *State v. Arnett*, 276 N.C. App. 106 (2021) (*Harbison* inquiry also applies when counsel concedes an element of a crime. Counsel conceded Defendant committed the physical act of the offense. Trial court conducted two *Harbison* inquiries of Defendant regarding the concession, finding he knowingly and voluntarily agreed to same.); *see also State v. Wilson*, 236 N.C. App. 472 (2014) (holding defense counsel's admission of an element of a crime charged—while still maintaining Defendant's innocence—does not necessarily amount to IAC).

Other Issues

- *State v. Call*, 353 N.C. 400, 409–10 (2001) (after telling jurors the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, it is permissible to ask jurors "if they understand they have the right to stand by their beliefs in the case"); s*ee also State v. Elliott*, 344 N.C. 242, 263 (1996).
- *State v. Cunningham*, 333 N.C. 744 (1993) (Defendant's challenge for cause was proper when juror repeatedly said defendant's failure to testify "would stick in the back of my mind"); *see also State v. Hightower*, 331 N.C. 636 (1992) (although juror stated he "could follow the law," his comment that Defendant's failure to testify "would stick in the back of [his] mind" while deliberating mandated approval of a challenge for cause).
- *Duncan v. Louisiana*, 391 U.S. 145 (1968) (held the Fourteenth Amendment guarantees a right of jury trial in all criminal cases and comes within the Sixth Amendment's assurance of a trial by an impartial jury; that trial by jury in criminal cases is fundamental to the American system of justice; that fear of unchecked power by the government found expression in the criminal law in the insistence upon community participation in the determination of guilt or innocence; and a right to trial by jury is granted to criminal defendants in order to prevent oppression by the government; providing an accused with the right to be tried by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge).

D. Jury Indoctrination: (Return to TOC)

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

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

E. Procedural Rules: (Return to TOC)

A primer on procedural rules[6]: The scope of permitted *voir dire* is largely a matter of the trial court's discretion. *See, e.g.*, *State v. Knight*, 340 N.C. 531 (1995) (trial judge properly sustained State's objection to questions asked about victim's HIV status); *see generally State v. Phillips*, 300 N.C. 678 (1980) (opinion explains boundaries of *voir dire*; questions should not be overly repetitious or attempt to indoctrinate jurors or "stake them out"). The trial court has the duty to control and supervise the examination of jurors, and regulation of the extent and manner of questioning rests largely in the court's discretion. *State v. Wiley*, 355 N.C. 592 (2002). The prosecutor and defendant may personally question jurors individually concerning their competency to serve. N.C. Gen. Stat. § 15A-1214(c). The defendant is not prohibited from asking a question merely because the court or prosecutor has previously asked the same or a similar question. *Id.*; *State v. Conner*, 335 N.C. 618, 628–29 (1994). Leading questions are permitted. *State v. Fletcher*, 354 N.C. 455, 468 (2001). Finally, the court has discretion under statute to reopen examination of a juror previously accepted if, at any time before the jury is impaneled, it is discovered the juror made an incorrect statement or other good reasons exists. N.C. Gen. Stat. § 1214(g). Although undefined by statute, "reopening" occurs when the court allows counsel to question a juror directly at any time. *State v. Boggess*, 358 N.C. 676 (2004). Once the court reopens examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse the juror. *State v. Womble*, 343 N.C. 667, 678 (1996).

Even after the jury is impaneled, case law gives the court discretion to reopen examination of a juror and allow for cause and peremptory challenges. *State v. Johnson*, 161 N.C. App. 68 (2003).

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

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

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

F. Stake-out Questions: (Return to TOC)

A common issue is an improper stake-out question. *State v. Simpson*, 341 N.C. 316 (1995) (holding staking-out jurors is improper). Our highest court has defined staking-out as questions that tend to commit prospective jurors to a specific future course of action in the case. *State v. Chapman*, 359 N.C. 328, 345–46 (2005). Counsel may not pose hypothetical questions designed to elicit what a juror's decision will be under a certain state of the evidence or a given state of facts. *State v. Vinson*, 287 N.C. 326, 336–37 (1975). Counsel should not question prospective jurors as to the kind of verdict they would render, how they would be inclined to vote, or what their decision would be under a certain state of evidence or given state of facts. *State v. Richmond*, 347 N.C. 412 (1998). My synthesis of the cases suggests counsel is in danger of an objection on this ground when the question refers to a verdict or encroaches upon issues of law. A proposed *voir dire* question is legitimate if the question is necessary to determine whether a juror is excludable for cause or assist you in intelligently exercising your peremptory challenges. If the State objects to a particular line of questioning, defend your proposed questions by (1) linking them to the purposes of *voir dire*[7] or (2) demonstrating you may ask whether jurors will follow the law in a certain area. *State v. Hedgepeth*, 66 N.C. App. 390 (1984).

G. *Batson* Challenges: (Return to TOC)

Race, gender, and religious discrimination in the selection of trial jurors is unconstitutional. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding race discrimination violates the Equal Protection Clause of the Fourteenth Amendment); *State v. Locklear*, 349 N.C. 118 (1998) (holding Native Americans are a racial group under *Batson*); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding gender discrimination violates the Equal Protection Clause of the Fourteenth Amendment); U.S. Const. amends. V and XIV (providing for equal protection and due process); N.C. Const. art. I § 26 (no person may be excluded from jury service on account of sex, race, color, religion, or national origin). *Batson* does not require trait alignment between jurors and litigants. *See Powers v. Ohio*, 499 U.S. 400 (1991). As a practical matter, counsel should request the Court to ask jurors to state their race on the record. *See State v. Mitchell*, 321 N.C. 650 (1988) (holding counsel's statements alone were insufficient to show discriminatory use of peremptory challenges).

The U.S. Supreme Court established a three-step test for *Batson* challenges: (1) the defendant must make a *prima facie* showing the prosecutor's strike was discriminatory; (2) the burden shifts to the prosecutor to offer a race-neutral explanation for the strike; and (3) the trial court decides whether the defendant has proven purposeful discrimination. The first step is merely a burden of production for the defendant. *Johnson v. California*, 545 U.S. 162 (2005). The defendant carries the burden of proof at the third step. *Id.*

To determine whether the prosecutor's strikes were discriminatory, the U.S. Supreme Court has considered, *inter alia*, a prosecutor's history of striking and questioning black jurors in deciding a *Batson* case. *Flowers v. Mississippi*, 588 U.S. ___, 139 S. Ct. 2228 (2019) (holding that, in defendant's sixth trial, the prosecutor's historical use of peremptory strikes in the first four trials,

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

145 questions for five black prospective jurors contrasted with only 12 questions for 11 white jurors, and misstatement of the record were motivated in substantial part by discriminatory intent). Conversely, *Batson* also prohibits criminal defendants from race, gender, or religious based peremptory challenges, known as a reverse *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42 (1992).

1. *State v. Clegg*, 380 N.C. 127, 2022-NCSC-11 (2022): (Return to TOC)

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

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

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

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

2. *Batson* Violation Remedies: (Return to TOC)

If a *Batson* violation occurs, the court should dismiss the venire and begin jury selection again. *State v. McCollum*, 334 N.C. 208 (1993). *But see State v. Fletcher*, 348 N.C. 292 (1998) (affirming

trial court allowing prosecutor to withdraw strike and pass on juror rather than dismissing the venire).

3. History Before *State v. Clegg*: (Return to TOC)

It is noteworthy that our appellate courts had decided well over 100 cases in which defendants alleged purposeful discrimination by prosecutors against minorities, never finding a *Batson* violation until *State v. Clegg*. Defense counsel should remain vigilant in making a *Batson* challenge. *See State v. Bennett*, 374 N.C. 579 (2020) (holding, although the State "excused two but kept three African-Americans," Defendant met his burden of a *prima facie* showing at the first step; that the Court further held a numerical analysis of strike patterns for race was not necessarily was dispositive as, in this case, all of the State's peremptory challenges were used to exclude black prospective jurors). Appellate courts are receptive *Batson* reviews. *See, e.g.*, *State v. Hobbs*, 374 N.C. 345 (2020) (holding, *inter alia*: (1) because the trial court analyzed all three *Batson* steps—although ruling against the defendant at the first step—a full *Batson* review was required; and (2) a defendant meets the first step by showing the totality of the relevant facts gives rise to an inference of racial discrimination—a burden not intended to be a high hurdle and only of production, not persuasion). Counsel should conduct a robust hearing for the record; some authorities believe these hearings will become more akin to suppression hearings. Remember the remedy: the judge may either dismiss the entire venire or seek the improperly struck juror. *See State v. McCollum*, 334 N.C. 208 (1993).

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

Jury diversity matters. A 2012 study of 102 jury trials and 10 bench trials in North Carolina demonstrated African-Americans and Latinos had the lowest favorable verdict outcomes.[8] Implicit bias research[9] indicates racial bias is pervasive among people. Implicit bias originates in the mental processes over which people have little knowledge or control and includes the

[8] Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209 (Jan. 2012).
[9] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 956 (2006).

formation of perceptions, impressions, and judgments, which impacts how people behave.[10] Literature supports counsel raising issues of race and unconscious bias during jury selection helps jurors guard against implicit bias during trial proceedings.[11] Studies show diverse juries perform fact-finding tasks more effectively, lessen individual biases, and provide more fair and impartial results.[12]

H. Implicit Bias: (Return to TOC)

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

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

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

I. Challenges for Cause: (Return to TOC)

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

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> (1) Does not have the qualifications required by G.S. 9-3.
> (2) Is incapable by reason of mental or physical infirmity of rendering jury service.
> (3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.

[10] *Id.* at 946.
[11] Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026-27 (2003).
[12] Edward S. Adams, *Constructing a Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 709 (1998).

(4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
(5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime. *See* **Exhibit A**.
(6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.
(7) Is presently charged with a felony.
(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
(9) For any other cause is unable to render a fair and impartial verdict.

Certain phrases are determinative in challenges for cause. For example, you may ask if a prospective juror would "automatically vote" for either side or a certain sentence or if a juror's views or experience would "prevent or substantially impair" his ability to hear the case. *State v. Chapman*, 359 N.C. 328, 345 (2005) (holding counsel may ask, if based on a response, if a juror would vote automatically for either side or a particular sentence); *see also State v. Teague*, 134 N.C. App. 702 (1999) (finding counsel may ask if certain facts cause jurors to feel like they "will automatically turn off the rest of the case"); s*ee also Morgan v. Illinois*, 504 U.S. 719, 723 (1992) (Court approved the question "would you automatically vote [for a particular sentence] no matter what the facts were?"); *Wainright v. Witt*, 469 U.S. 412 (1985) (established the standard for challenges for cause, that being when the juror's views would "prevent or substantially impair" the performance of his duties in accord with his instructions and oath, modifying the more stringent language of *Witherspoon*[13] which required an unmistakable commitment of a juror to automatically vote against the death penalty, regardless of the evidence); *State v. Cummings*, 326 N.C. 298 (1990) (holding State's challenge for cause is proper against jurors whose views against the death penalty would "prevent or substantially impair" their performance of duties as jurors). Considerable confusion about the law could amount to "substantial impairment." *Uttecht v. Brown*, 551 U.S. 1 (2007). A juror may be removed for cause due to inability to follow the law. *State v. Cunningham*, 333 N.C. 744 (1993) (trial court erred by not removing juror for cause who would not grant the presumption of innocence to the defendant). A juror may also be removed for cause due to bias. *State v. Allred*, 275 N.C. 554 (1969) (trial court erred by not removing a juror for cause who stated that he was related to the witnesses and would likely believe them); *State v. Lee*, 292 N.C. 617 (1977) (trial court erred by not removing a juror for cause who was married to a police officer and stated that she may believe law enforcement more than others).

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

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

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

J. Other Jury Selection Issues: (Return to TOC)

Other issues may include *voir dire* with co-defendants, order of questioning, challenging a juror, preserving denial of cause challenges and prosecutor objection to a line of questioning, right to individual *voir dire*, and right to rehabilitate jurors.[14] In cases involving co-defendants, the order of questioning begins with the State and, once it is satisfied, the panel should be passed to each co-defendant consecutively, continuing in this order until all vacancies are filled, including alternate juror(s). N.C. Gen. Stat. § 15A-1214(e). For order of questioning, the prosecutor is required to question prospective jurors first and, when satisfied with a panel of twelve, he passes the panel to the defense. This process is repeated until the panel is complete. N.C. Gen. Stat. § 15A-1214(d); *see also State v. Anderson*, 355 N.C. 136, 147 (2002) (holding the method by which jurors are selected, challenged, selected, impaneled, and seated is within the province of the legislature). Regarding challenges, when a juror is challenged for cause, the party should state the ground(s) so the trial judge may rule. No grounds need be stated when exercising a peremptory challenge. Direct oral inquiry, or questioning a juror, does not constitute a challenge. N.C. Gen. Stat. § 9-15(a). Preserving a denial of cause challenge or sustained objection to your line of questioning requires exhaustion of peremptory challenges and a showing of prejudice from the ruling. *See, e.g.*, *State v. Billings*, 348 N.C. 169 (1998); *State v. McCarver*, 341 N.C. 364 (1995). After exhaustion of peremptory challenges, counsel must also renew the motion for cause against the juror at the end of jury selection as required by statute. N.C. Gen. Stat. § 15A-1214(i). The right to individual *voir dire* is found in the trial judge's duty to oversee jury selection, implying that the judge has authority to order individual *voir dire* in a non-capital case if necessary to select an impartial jury. *See State v. Watson*, 310 N.C. 384, 395 (1984) ("The trial judge has broad discretion in the manner and method of jury *voir dire* in order to assure that a fair and impartial jury is impaneled . . . ."). As to the right to rehabilitate jurors, the trial judge must exercise his discretion in determining whether to permit rehabilitation of particular jurors. Issues include whether a juror is equivocal in his response, clear and explicit in his answer, or if additional examination would be a "purposeless waste of valuable court time." *State v. Johnson*, 317 N.C. 343, 376 (1986). A blanket rule prohibiting rehabilitation is error. *State v. Brogden*, 334 N.C. 39 (1993); *see also State v. Enoch*, 261 N.C. App. 474 (2018) (holding no error when the trial court denied the defendant's request to rehabilitate two jurors when, although initially misapprehending that rehabilitation was impermissible in non-capital cases, the court later allowed for the possibility of rehabilitation, thus not establishing a blanket rule against all rehabilitation).

[14] *See generally* N.C. DEFENDER MANUAL, *supra* note 7, at 25-1, *et seq.*

V. Theories of Jury Selection (Return to TOC)

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

- Traditional approach: lecture with leading and closed questions to program the jury about law and facts and establish authority and credibility with the jury; a prosecutor favorite.
- Wymore (Colorado) method: *See infra text at* IV. The Wymore Method.
- Scientific jury selection: employs demographics, statistics, and social psychology to examine juror background characteristics and attitudes to predict favorable results.
- Game theory: uses mathematical algorithms to decide the outcome of trial.
- Command Superlative Analogue (New Mexico Public Defender's) method: focus on significant life experiences relating to the central trial issue.
- Psychodramatic (Trial Lawyers College) method: identify the most troubling aspects of the case, tell jurors and ask about the concerns, and validate jurors' answers.
- Reptilian theory: focus on facts and behavior to make the jury angry by concentrating on the opponent's failures and resulting injuries, all intended to evoke a visceral, subliminal reaction.
- Demographic theory[15]: stereotype jurors based on race, gender, ethnicity, age, income, occupation, social status, socioeconomic status/affluence, religion, political affiliation, avocations, urbanization, experience with the legal system, and other factors.
- Listener method: learn about jurors' experiences and beliefs to predict their views of the facts, law, and each other.

Strategies abound for jury selection methods. Jury consultants and trial lawyers use mock trials, focus groups, and telephone surveys to profile community characteristics and favorable jurors. Research scientists believe – and most litigators have been taught - demographic factors predict attitudes which predict verdicts, although empirical data and trial experience militate against this approach.[16] Many lawyers believe our experience hones our ability to sense and discern favorable jurors, although this belief has marginal support in practice and is speculative at best.

I use a blend of the above models. However, I focus upon one core belief illustrated in the ethical and moral dilemma of an overcrowded lifeboat lost at sea. As individuals weaken, starve, and become desperate, who is chosen to survive? Do we default to women, children, or the elderly? Who lives or dies? Using this hypothetical in the context of a courtroom, I believe the answer is

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

[16] *See* Ken Broda-Bahm, *supra* note 24.

jurors save themselves.[17] The basic premise is that jurors, primarily on a subconscious level, choose who they like the most and connect to parties, witnesses, and court personnel who are characteristically like them. Therefore, the party - or attorney - whom the jury likes the most, feels the closest to, or has some conscious or subconscious relationship with typically wins the trial. This concept is the central tenet of our jury selection strategies.

VI. The Wymore Method (Return to TOC)

David Wymore, former Chief Trial Deputy for the Colorado Public Defender system, revolutionized capital jury selection. The Wymore method, or Colorado method of capital *voir dire*, was created to combat "death qualified" juries[18] by utilizing a non-judgmental, candid, and respectful atmosphere during jury selection which allows defense counsel to learn jurors' views about capital punishment and imposition of a death sentence, employ countermeasures by life qualifying the panel, and thereafter teach favorable jurors how to get out of the jury room.

In summary form, the Wymore method is as follows: Defense counsel focuses upon jurors' death penalty views, learns as much as possible about their views, rates their views, eliminates the worst jurors, educates both life-givers and killers separately, and teaches respect for both groups—particularly the killers. In other words, commentators state Wymore places the moral weight for a death sentence onto individual jurors, making it a deeply personal choice.[19] Wymore himself has stated he tries to find people who will give life, personalize the kill question, and find other jurors who will respect that decision.[20]

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

1. *Witt* excludable: The automatic life adherent. One who will never vote for the death penalty and is vocal, adamant, and articulate about it.
2. One who is hesitant to say he believes in the death penalty. This person values human life and recognizes the seriousness of sitting on a capital jury. However, this person says he can give meaningful consideration to the death penalty.
3. This person is quickly for the death penalty and has been for some time. However, he is unable to express why he favors the death penalty (e.g., economics, deterrence, etc.).

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[17] In panic, most people abandon rules in order to save themselves, although some may do precisely the opposite. DENNIS HOWITT, MICHAEL BILLIG, DUNCAN CRAMER, DEREK EDWARDS, BROMELY KNIVETON, JONATHAN POTTER & ALAN RADLEY, SOCIAL PSYCHOLOGY: CONFLICTS AND CONTINUITIES (1996).

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

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

[20] *Id.*

He may wish to hear mitigation or be able to make an argument against the death penalty if asked, and is willing to respect views of those more hesitant about the death penalty.

4. This person is comfortable and secure in his death penalty view. He is able to express why he is for the death penalty and believes it serves a good purpose. His comfort level and ability to develop arguments in favor of the death penalty differentiates him from a number three. However, he wants to hear both sides and straddles the fence with penalty phase evidence, believing some mitigation could result in a life sentence despite a conviction for a cold-blooded, deliberate murder.
5. A sure vote for death, he is vocal and articulate in his support for the death penalty. He is not a bully, however, and, because he is sensitive to the views of other jurors, can think of two or three significant mitigating factors which would allow him to follow a unanimous consensus for life in prison. This person is affected by residual doubt.
6. A strong pro-death juror, he escapes an automatic death penalty challenge because he can perhaps consider mitigation. A concrete supporter of the death penalty who believes it not used enough, he is influenced by the economic burden of a life sentence and believes in death penalty deterrence. Essentially, he nods his head with the prosecutor.
7. The automatic death penalty proponent. He believes in the *lex talionis* principle of retributive justice, or an eye for an eye. Mitigation is manslaughter or self-defense. Hateful and proud of it, he must be removed for cause or peremptory challenge. If the defendant is convicted of capital murder, this juror will impose the death penalty.

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

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

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

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

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

VII. Our Method: Modified Wymore (Return to TOC)

Our approach is a modified version of Wymore, merging various strategies including the use of select statutory language[21] originating in part from the old *Allen* charge;[22] studies on the psychology of juries;[23] identifying individual and personal characteristics of the defendant, victim, and material witnesses; profiling our model jury; and a simple rating system for prospective jurors. One other fine trial lawyer has recently written, at least in part, on a non-capital, modified Wymore version of jury selection as well.[24]

Our case preparation process is as follows. First, we start by considering the nature of the charge(s), the material facts, whether we will need to adduce evidence, and assess candidly prosecution and defense witnesses. Second, we identify personal characteristics of the defendant,

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

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

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

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

victim, family members, and other important witnesses, all in descending order of priority. We do the same for prosecution witnesses. Individual characteristics include age, education, occupation, marital status, children, means, residential area, socioeconomic status, lifestyle, criminal record, and any other unique, salient factor. Third, we bear in mind typical demographics like race, age, gender, ethnicity, and so forth. Fourth, we review the jury pool list, both for individuals we may know and for characteristic comparison. Finally, we prepare motions designed to address legal issues and limit evidence for hearing pretrial.[25]

We incorporate multiple theories and our own strategies in jury selection. At the beginning, I spend a few minutes utilizing the **traditional** approach, educating the jury about the criminal justice system, emphasizing the jury's preeminent role, magnifying the moment, and simplifying the process.[26] I often tell them I am afraid they will think my client did something wrong by his mere presence, thereafter underscoring they are at the pinnacle of public service, serve as the conscience of the community, and must protect and preserve the sanctity of trial.[27] In a sense I am using the **lecture** method to establish leadership and credibility. I then transition to the dominant method, the **listener** method, asking many open-ended group questions followed by precise individual questions. I speak to every juror—even if only to greet and acknowledge them—to address their specific backgrounds, comments, or seek disclosure of significant life experiences relating to key trial issues. We look closely at jurors, including their family and close friends, to discern identified characteristics, favorable or unfavorable. I always address concerning issues, stripping and re-stripping per **Wymore**. We strip by using uncontroverted facts (e.g., "my client blew a .30") and by addressing extraneous issues and circumstances (i.e., inapplicable facts and defenses like "this is not an accident case") as they arise to find jurors who do not have the ability to be fair and impartial or hear the instant case. In a sense, **stripping** is accomplished by drawing the sting: we tell bad facts to strip bad jurors. During the entire process I am **profiling** jurors, searching for select characteristics previously deemed favorable or unfavorable. We also focus on **juror receptivity** to our presentation, looking at their individual responses, physical reactions, and exact comments. For jurors of which I am simply unsure, I fall back on **demographic** data, using social psychology and my **gut** as additional filters. Last, we **isolate and insulate** each juror per Wymore, attempting to create **twelve individual juries** who will respect each other in the process.

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[25] As a practice tip, ask to hear all motions pre-trial and before jury selection. Knowledge of the judge's rulings may be central to your jury selection strategy, often revealing damaging evidence which should be disclosed during the selection process. Motions must precisely address issues and relevant facts within a constitutional context. If a judge refuses to hear, rule upon, or defers a ruling on your motion(s), recite on the record the course of action is not a strategic decision by the defense, thereby alerting the court of and protecting the defendant's recourse for post-conviction relief. *Strickland v. Washington*, 466 U.S. 668 (1984).

[26] Tools that can help jurors frame the trial, remain engaged, and retain information received include the use of a "mini-opening" at the beginning of *voir dire*, or delivering preliminary instructions of the process, law, and relevant legal concepts. *See* Susan J. MacPherson & Elissa Krauss, *Tools to Keep Jurors Engaged*, TRIAL (Mar. 2008), at 33.

[27] Trial by a jury of one's peers is a cornerstone of the principle of democratic representation set out in the U.S. Constitution. U.S. CONST. amend. VI.

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

I commonly draw the sting by telling the jury of uncontroverted facts, thereafter addressing their ability to hear the case. Prosecutors may object, citing an improper stake-out question as the basis. In your response, tie the uncontroverted fact to the juror's ability to follow the law or be fair and impartial. Case law supports my approach. *See State v. Nobles*, 350 N.C. 483, 497–98 (1999) (finding it proper for the prosecutor to describe some uncontested details of the crime before he asked jurors whether they knew or read anything about the case; ADA told the jury the defendant was charged with discharging a firearm into a vehicle "occupied by his wife and three small children"); *State v. Jones*, 347 N.C. 193, 201–02, 204 (1997) (holding a proper non-stake-out question included telling the jury there may be a witness who will testify pursuant to a deal with the State, thereafter asking if the mere fact there was a plea bargain with one of the State's witnesses would affect their decision or verdict in the case); *State v. Williams*, 41 N.C. App. 287, *disc. rev. denied*, 297 N.C. 699 (1979) (finding prosecutor properly allowed, in a common law robbery and assault trial, to tell prospective jurors a proposed sale of marijuana was involved and thereafter inquire if any of them would be unable to be fair and impartial for that reason). Another helpful technique is to ask the jury "if [they] can consider" all the admissible evidence, again linking the bad facts you have revealed to the juror's ability to be fair and impartial or follow the law. *State v. Roberts*, 135 N.C. App. 690, 697 (1999); *see also U.S. v. Johnson*, 366 F. Supp. 2d 822, 842–44 (N.D. Iowa 2005) (finding case specific questions in the context of whether a juror could consider life or death proper under *Morgan*). In sum, a juror who is predisposed to vote a certain way or recommend a particular sentence regardless of the unique facts of the case or judge's instruction on the law is not fair and impartial. You have the right to make a diligent inquiry into a juror's fitness to serve. *State v. Thomas*, 294 N.C. 105, 115 (1978). When you are defending a stake-out issue, argue to the extent a question commits a juror, it commits him to a fair consideration of the accurate facts in the case and to a determination of the appropriate outcome. The prime directive: Adhere to the profile, suppressing what my gut tells me unless objectively supported.

Using the current state of the law with my "Modified Wymore" approach, please see the outline I use for jury selection attached hereto as **Exhibit B**.

VIII. The Fundamentals (Return to TOC)

"While the lawyers are picking the jury, the jurors are picking the lawyer."[28]

Voir dire is distilled into three objectives: Deselect those who will hurt you or are leaning against you;[29] educate jurors about the trial process and your case; and be more likeable than your counterpart, concentrating on professionalism, honesty, and a smart approach.

I share a three-tier approach to jury selection: Core concepts that are threshold principles, fine art methods, and my personal tips and techniques.

Now for foundational principles:

- Deselect those who will hurt your client. Move for cause, if possible. Identify the worst jurors and remove them.
- Jurors bring personal bias and preconceived notions about crime, trials, and the criminal justice system. You must find out whether they lean with you or the prosecution.
- Jurors who honestly believe they will be fair decide cases based on personal bias and preconceived ideas. Bias or prejudice can take many forms: racial, religious, national origin, ageism, sexism, class (including professionals), previous courtroom experience, prior experience with a certain type of case, beliefs, predispositions, emotional response systems,[30] and more.
- Jurors decide cases based on bias and beliefs, regardless of the judge's instructions.
- There is little correlation between the similarity of the demographic factors (e.g., race, gender, age, ethnicity, education, employment, class, hobbies, or the like) of a juror and defendant and how one will vote.
- Cases are often decided before jurors hear any evidence.

[28] RAY MOSES, JURY SELECTION IN CRIMINAL CASES (1998).

[29] I have heard skilled lawyers espouse a view in favor of accepting the first twelve jurors seated. It is difficult to comprehend a proper *voir dire* in which no challenges are made as chameleons are lurking within. As a rule of thumb, never pass on the original panel seated.

[30] Recent research has highlighted the important role of emotions in moral judgment and decision-making, particularly the emotional response to morally offensive behavior. June P. Tangnet, Jeff Stuewig & Debra J. Mashek, *Moral Emotions and Moral Behavior*, 58 ANNUAL REVIEW OF PSYCHOLOGY 345 (2007).

- Traditional *voir dire* is meaningless.[31] Social desirability and pressure to conform inhibits effective jury selection when using traditional or hypothetical questions.[32] Asking jurors if they can put aside bias, be fair and impartial, and follow the judge's instructions are ineffective. Traditional questions grossly underestimate and fail to detect the degree of anti-defendant bias in the community.[33]
- Hypothetical questions about the justice system result in aspirational answers and have little meaning.
- You can neither change a strongly held belief nor impose your will upon a juror in the time you have in *voir dire*.[34]

IX. Fine Art Techniques (Return to TOC)

"*The evidence won't shape the jurors. The jurors will shape the evidence."*[35]

The higher art form:[36]

- Make a good first impression. Remember primacy and recency[37] at all phases, even jury selection. There is only one first impression. Display warmth, empathy, and

[31] Post-trial interviews reveal jurors lose interest and become disengaged with the use of technical terms and legal jargon, without an early and simple explanation of the case, and during a long trial. *See* MacPherson & Krauss, *supra* note 35, at 32. Studies by social scientists on non-capital felony trials reveal the following findings: (1) On average, jury selection took almost five hours, yet jurors as a whole talked only about thirty-nine percent of the time; (2) lawyers spent two percent of the time teaching jurors about their legal obligations and, in post-trial interviews assessing juror comprehension, many jurors were unable to distinguish between or explain the terms "fair" and "impartial"; and (3) one-half the jurors admitted post-trial they could not set aside their personal opinions and beliefs, although they had agreed to do so in *voir dire*. Cathy Johnson & Craig Haney, *Felony Voir Dire, an Exploratory Study of its Content and Effect*, 18 LAW AND HUMAN BEHAVIOR 487 (1991).

[32] James Lugembuhl, *Improving Voir Dire*, THE CHAMPION (Mar. 1986).

[33] *Id.*

[34] Humans have a built-in mechanism called scripting for dealing with unfamiliar situations like a trial. This mechanism lessens anxiety by promoting conforming behavior and drawing on bits and pieces of one's life experience – whether movies, television, friends or family – to make sense of the world around them. Unless you intercede, the script will be that lawyers are not to be trusted, trials are boring, people lie for gain, judges are fair and powerful, and the accused would not be here if he did not do something wrong. OFFICE OF THE STATE PUBLIC DEFENDER, JURY SELECTION (2016).

[35] MOSES, *supra* note 37.

[36] Ask about the trial judge and how he handles *voir dire*. Consider informing the trial judge in advance of jury selection about features of your *voir dire* which may be deemed unusual by the prosecutor or the court, thus allowing the judge time to consider the issue, preventing disruption of the selection process, and affording you an opportunity to make a record.

[37] The law of primacy in persuasion, also known as the primacy effect, was postulated by Frederick Hansen Lund in 1926 and holds the side of an issue presented first will have greater effect in persuasion than the side presented subsequently. Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors*, 19 JOURNAL OF COMMUNICATION 239 (1969). The principle of recency states things most recently learned are best remembered. Also known as the recency effect, studies show we tend to remember the last few things more than those in the middle, assume items at the end are of greater importance, and the last message has the most effect when there is a delay between repeated messages. The dominance of primacy or recency depends on intrapersonal variables like the degree of familiarity and controversy as well as the interest of a particular issue. Curtis T. Haughtvedt & Duane T. Wegener, *Message Order Effects in Persuasion: An Attitude Strength Perspective*, 21 JOURNAL OF CONSUMER RESEARCH 205 (1994).

respect for others and the process. Show the jurors you are fair, trustworthy, and know the rules.

- Understand trial is an unknown world to lay persons or jurors. They feel ignored and are unaware of their special status, the rules of propriety, and that soon almost everyone will be forbidden to speak with them.
- Comfortable and safe *voir dire* will cause you to lose. Do not fear bad answers. Embrace them. They reveal the juror's heart which will decide your case.
- Tell jurors about incontrovertible facts or your affirmative defense(s).[38] Be prepared to address the law on staking-out the jury for a judge who restricts your approach to this area. Humbly make a record.
- Tell jurors they have a personal safety zone. Be careful of and sensitive to a juror's personal experience. When jurors share painful or emotional experiences, acknowledge their pain and express appreciation for their honesty.
- When a juror expresses concern with employment, tell them the law prohibits discharging or demoting citizens for jury service. N.C. Gen. Stat. § 9-32.
- When a juror expresses bias, the best approach is counter-intuitive. Do not stop, redirect them, or segue. Immediately address and confront the issue. Mirror the answer back, invite explanation, reaffirm the position, and then remove for cause. Use the moment to teach the jury the fairness of your position.
- Use fact questions to get fact answers. Ask jurors about analogous situations in their past. This will help profile the juror.
- Listen. Force yourself to listen more. Open-ended questions (e.g., "Tell us about…, Share with us…, Describe for us…," etc.) keep jurors talking, revealing life experiences, attitudes, opinions, and views. Have a conversation. Spend time discussing their personal background, relevant experiences, and potential bias. Make it interesting to them by making the conversation about them. Use the ninety/ten rule, jurors talking ninety percent of the time.
- Consider what the juror needs to know to understand the case and what you need to know about the juror.
- Seek first to understand, then to be understood.
- Personal experiences shape juror's views and beliefs and best predict how jurors view facts, law, and each other.
- Do not be boring, pretentious, or contentious.
- Look for non-verbal signals like nodding, gestures, or expressions.
- Spot angry jurors. "To the mean-spirited, all else becomes mean."[39]
- Refer back to specific answers. Let them know you were listening. Then build on the answers. Remember, a scorpion is a scorpion, regardless of one's trappings (i.e., presentation, words, or appearance).

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[38] Prior to the selection of jurors, the judge must inform prospective jurors of any affirmative defense(s) for which notice was given pretrial unless withdrawn by the defendant. N.C. GEN. STAT. § 15A-1213; N.C. GEN. STAT. § 15A-905(c)(1) (notice of affirmative defense is inadmissible against the defendant); N.C.P.I. – Crim. 100.20 (instructions to be given at jury selection).

[39] MOSES, *supra* note 37.

- Deselect delicately. Tell them they sound like the kind of person who thinks before forming an opinion and the law is always satisfied when a juror gives an honest opinion, even if it is different from that of the lawyers or the judge. All the law asks is that jurors give their honest opinions and feelings. Stand and say, "We thank and respectfully excuse juror number . . . ."
- Juror personalities and attitudes are far more predictive of juror choices.
- Jury selection is about jurors educating us about themselves.

X. My Side Bar Tips (Return to TOC)

"*We don't see things as they are. We see them as we are."*[40]

My personal palette of jury selection techniques:

- At the very outset, tell the jury the defendant is innocent (or not guilty), be vulnerable, and tell the jury about yourself. Become one of them.
- You must earn credibility in jury selection.[41] Many jurors believe your client is guilty before the first word is spoken. Aligned with the accused, you are viewed with suspicion, serving as a mouthpiece. Start sensibly and strong. Be a lawyer, statesman, and one of them – a caring, community member. Earn respect and credibility when it counts – right at the start.
- We develop a relationship with jurors throughout the trial. Find common ground, mirroring back the intelligence and social level of the individual jurors. Be genuine. Become the one jurors trust in the labyrinth called trial.
- Encourage candor. Tell the jury there are no right or wrong answers, and you are interested in them and their views. Tell them citizens have the right to hold different views on topics, and so do jurors. Tell them you will be honest with them, asking for honest and complete answers in return. Assure them honest responses are the only thing expected of them. Reward the honest reply, even if it hurts.
- Listen to and observe opposing counsel. Purposefully contrast with the prosecutor. If he is long-winded, be precise and efficient. If he misses key points, spend time educating the jury. Entice jurors who choose early to choose you.
- Humanize the client. Touch, talk with, and smile at him.
- Remind the client continually of appropriate eye contact, posture, and perceived interest in the case.

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[40] ANAIS NIN, SEDUCTION OF THE MINOTAUR (1961).

[41] According to the National Jury Project, sixty-seven percent of jurors are unsympathetic to defendants, thirty-six percent believe it is the defendant's responsibility to prove his innocence, and twenty-five percent believe the defendant is guilty or he would not have been charged. Now known as National Jury Project Litigation Consulting, this trial consulting firm publicizes its use of social science research to improve jury selection and case presentation.

- Beware of a reverse *Batson* challenge when there is an obvious trend by the defense using peremptory challenges based on race, gender, or religion.
- Propensity is the worst evidence.
- If jurors fear or do not understand your client or his actions, whether due to violence, mental health, or the unexplained, they will convict your client - quickly.
- Pick as many leaders[42] as possible, creating as many juries as possible. Do not pick followers: you shrink the size of the jury. Avoid young, uneducated, and apparently weak, passive, or submissive jurors. Target and engage them to sharpen your view. Remember: you only need one juror to exonerate, hang, or persuade the jury to a lesser-included verdict.
- Look for jurors who are resistant to social pressure (e.g., piercings, tattoos, etc.).
- The best predictor of human behavior is past behavior.
- Let the client exhibit manners. Typically, my paralegal is present during much of the trial, most importantly in jury selection. When it is our turn to deselect or dismiss jurors, she approaches, the defendant stands and relinquishes his chair, and we discuss and decide who to deselect. Ms. Brown also interacts with the defendant regularly during trial, recesses, and other opportunities, communicating perceived respect and a genuine concern for the client.
- Use the term fair and impartial when engaging the jaundiced juror, skewed in beliefs or position. Talk about the highest aim of a jury.
- Older women will exonerate your client in a rape or sex offense case, particularly if a young female victim has credibility issues. Conversely, beware of the grandfatherly, white knight.[43]
- Fight the urge to use your last peremptory challenge. You may be left with the equivalent of an automatic death penalty juror.
- Draw the sting (i.e., strip). Tell the jury incontrovertible bad facts and your affirmative defense(s). Some jurors will react verbally, some visibly. Let the bad facts sink in. Engage the juror who reacts badly.[44] Reaffirm his commitment to your client's presumed innocence. Then tell them there is more to the story. The sting fades and loses its impact during trial.
- Use the language of the former highest aim Pattern Jury Instruction, telling jurors they have no friend to reward, no enemy to punish, but a duty to let their verdict speak the everlasting truth.
- Mirror the judge's instructions to the jury, early and often, using phrases from the judges various instructions including fair and impartial, the same law applies to

[42] Leaders include negotiators and deal-makers, all of whom wield disproportionate power within the group. *See* MOSES, *supra* note 37.

[43] White knights are individuals who have a compulsive need to be a rescuer. *See* MARY C. LAMIA & MARILYN J. KRIEGER, THE WHITE KNIGHT SYNDROME: RESCUING YOURSELF FROM YOUR NEED TO RESCUE OTHERS (2009).

[44] To deselect jurors, commit the juror to a position (e.g., "So you believe . . . ."), normalize the impairment by acknowledging there are no right or wrong answers and citizens are free to have different opinions, and recommit the juror to his position (e.g., "So because of . . . , you would feel somewhat partial . . . ."), thus immunizing him from rehabilitation.

everyone, they are not to form an opinion about guilt or innocence until deliberations begin, and so forth.[45] Forecast the law for them. Clothe yourself with vested authority.

- Commit the jury, individually and as a whole to principles of isolation and insulation. Ask them if they understand and appreciate they are not to do violence to their individual judgment, they must decide the case for themselves, and they are not to surrender their honest convictions merely for the purpose of returning a verdict.[46] Extract a group commitment that they will respect the personal judgment of each and every juror. Target an oral commitment from unresponsive or questionable jurors. Seek twelve individual juries. If done well, you increase your chances of a not guilty verdict, lesser-included judgment, hung jury, or a successful motion to poll the jury post-trial.
- Tell the jury the law never requires a certain outcome. Inform them that the judge has no interest in a particular outcome and will be satisfied with whatever result they decide. Emphasize the law recognizes that each juror must make his own decision.

XI. Subject Matter of *Voir Dire* (Return to TOC)

Case law on proper subject matter for *voir dire*[47] follows.

Accomplice Culpability: *State v. Cheek*, 351 N.C. 48, 65–68 (1999) (prosecutor properly asked about jury's ability to follow the law regarding acting in concert, aiding and abetting, and felony murder rule).

Circumstantial Evidence: *State v. Teague*, 134 N.C. App. 702 (1999) (prosecutor allowed to ask if jurors would require more than circumstantial evidence, that is eyewitnesses, to return a verdict of first degree murder).

Child Witnesses: *State v. Hatfield*, 128 N.C. App. 294 (1998) (trial judge erred by not allowing defendant to ask prospective jurors "if they thought children were more likely to tell the truth when they allege sexual abuse").

Defendant's Prior Record: *State v. Hedgepath*, 66 N.C. App. 390 (1984) (trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow the judge's instructions they are to consider the defendant's prior record only for the purpose of determining credibility).

[45] N.C. GEN. STAT. § 15A-1236(a)(3), *et al.*; *see also supra text* at III. Selection Procedure.
[46] N.C. GEN. STAT. §§ 15A-1235(b)(1) and (4).
[47] *See* MICHAEL G. HOWELL, STEPHEN C. FREEDMAN, & LISA MILES, JURY SELECTION QUESTIONS (2012).

Defendant Not Testifying: *State v. Blankenship*, 337 N.C. 543 (1994) (proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense; however, the court has discretion to disallow the same).

Expert Witness: *State v. Smith*, 328 N.C. 99 (1991) (asking the jury if they could accept the testimony of someone offered in a particular field like psychiatry was not a stake-out question.

Eyewitness Identification: *State v. Roberts*, 135 N.C. App. 690, 697 (1999) (prosecutor properly asked if eyewitness identification in and of itself was insufficient to deem a conviction in the juror's minds regardless of the judge's instructions as to the law)

Identifying Family Members: *State v. Reaves*, 337 N.C. 700 (1994) (no error for prosecutor to identify members of murder victim's family in the courtroom during jury selection).

Intoxication: *State v. McKoy*, 323 N.C. 1 (1988) (proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense).

Legal Principles: *State v. Parks*, 324 N.C. 420 (1989) (defense counsel may question jurors to determine if they completely understood the principles of reasonable doubt and burden of proof; however, once fully explored, the judge may limit further inquiry).

Pretrial Publicity: *Mu'Min v. Virginia*, 500 U.S. 415, 419–21 (1991) (inquiries should be made regarding the effect of publicity upon a juror's ability to be impartial or keep an open mind; questions about the content of the publicity may be helpful in assessing whether a juror is impartial; it is not required that jurors be totally ignorant of the facts and issues involved; the constitutional question is whether jurors had such fixed opinions they could not be impartial).

Racial/Ethnic Background[48]: *Ristaino v. Ross*, 424 U.S. 589 (1976) (although the due process clause creates no general right in non-capital cases to *voir dire* jurors about racial prejudice, such questions are constitutionally mandated under "special circumstances" like in *Ham*); *Ham v. South Carolina*, 409 U.S. 524 (1973) ("special circumstances" were present when the defendant, an African-American civil rights activist, maintained the defense of selective prosecution in a drug charge); *Rosales-Lopez v. U.S.*, 451 U.S. 182 (1981) (trial courts must allow questions whether jurors might be prejudiced about the defendant because of race or ethnic group when the defendant is accused of a violent crime and the defendant and victim were members or difference races or ethnic groups); *see also Turner v. Murray*, 476 U.S. 28 (1986) (such questions must be asked in capital cases in charge of murder of a white victim by a black defendant).

[48] Considerations of race can be critical in any case, and *voir dire* may be appropriate and permissible to determine bias under statutory considerations of one's fitness to serve as a juror. *See generally* N.C. GEN. STAT. § 15A-1212(9) (challenges for cause may be made . . . on the ground a juror is unable to render a fair and impartial verdict). Strategically, try to show how questions on racial attitudes are relevant to the theory of defense. If the inquiry is particularly sensitive, request an individual *voir dire*. *See* N.C. DEFENDER MANUAL, *supra* note 7, at 25-18.

Sexual Offense/Medical Evidence: *State v. Henderson*, 155 N.C. App. 719, 724–27 (2003) (prosecutor properly asked in sex offense case if jurors would require medical evidence "that affirmatively says an incident occurred" to convict as the question measured jurors' ability to follow the law).

Sexual Orientation: *State v. Edwards*, 27 N.C. App. 369 (1975) (proper for prosecutor to question jurors regarding prejudice against homosexuality to determine if they could impartially consider the evidence knowing the State's witnesses were homosexual).

Specific Defenses: *State v. Leonard*, 295 N.C. 58, 62–63 (1978) (a juror who is unable to accept a particular defense recognized by law is prejudiced to such an extent he can no longer be considered competent and should be removed when challenged for cause).

XII. Other Important Considerations (Return to TOC)

It is axiomatic you must know the case facts, theory of defense, theme(s) of the case, and applicable law to conduct an effective *voir dire*. An example of a theory of defense—a short story of reasonable and believable facts—follows: "Ms. Jones was robbed . . . but not by [the Defendant] who was at work eight miles away. This is a case of mistaken identity." Beyond these fundamentals, I offer a few practice tips. First, every jury selection is different, tailored to the unique facts, law, and individuals before you. Second, we meet with the defendant and witnesses on the eve of trial for a last review. Often, we learn new facts, good and bad, as witnesses are sometimes impressive but are more commonly afraid, experience memory loss, present poorly, or will not testify. We re-cover the material points of trial, often illuminating important facts that require disclosure in the selection process. Last, I like to use common sense analogies and life themes to which we can all relate in my conversation with jurors.

Look, act, and dress professionally. Make sure your client and witnesses dress neatly and act respectfully. Of all the things you wear, your expression is most important. A pleasant expression adds face value to your case.[49]

Use plain language. Distill legal concepts into simple terms and phrases.

At the outset, tell the jury they have nothing to fear. Inform them the judge, the governor[50] of the trial, will tell them everything they need to know, and the bailiffs are there for their assistance, security, and comfort. Instruct the jury they need only tell the bailiffs or judge of any needs or concerns they may have.

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[49] MOSES, *supra* note 37.

[50] Judges are sometimes referenced as the governor or gatekeeper of the trial, particularly when deciding admissibility of expert evidence. *See State v. McGrady*, 368 N.C. 880 (2016) (amended Rule 702(a) implements the standards set forth in *Daubert*); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (defines the judge's gatekeeping role under FED. R. EVID. 702).

Be respectful of opposing counsel, not obsequious. You reap what you sow. Promote respect for the process. Be mindful of how you address opposing counsel. He is the prosecutor, not the State of North Carolina (or the government). If the prosecution invokes such authority, tell the jury you represent the citizens of this state, protecting the rights of the innocent from the power of the government.

Sun Tzu, author of *The Art of War*, provides timeless lessons on how to defeat your opponent. A fellow lawyer, Michael Waddington, in *The Art of Trial Warfare*, applies Sun Tzu's principles to the courtroom. I share a sampling for your consideration. Trial is war. To the trial warrior, losing can mean life or death for the client. Therefore, the warrior constantly learns, studies, and practices the art of trial warfare, employing the following principles: Because no plan survives contact with the enemy, he is always ready to change his strategy to exploit a weakness or seize an opportunity. He strikes at bias, arrogance, and evasive answers. He prepares quietly, keeping the element of surprise. He makes his point efficiently, knowing juries have limited attention spans and dislike rambling lawyers. He impeaches only the deserving and when necessary. He is self-disciplined, preparing in advance, capitalizing on errors, and maintaining momentum. He is unintimidated by legions of lawyers or a wealth of witnesses, knowing they are bloated prey. He sets up the hostile witness, luring misstatements and exaggerations for the attack. He does not become defensive, make weak arguments, or present paltry evidence. He focuses on crucial points, attacking the witnesses in his opponent's case. He neither moves nor speaks without reflection or consideration. He never trusts co-defendants or their counsel, for danger looms. He remains calm and composed, unflinching when speared. He neither takes tactical advice nor allows his client to dictate the trial,[51] recognizing why his client sits next to him. He is not reckless, cowardly, hasty, oversensitive, or overly concerned what others think. He prepares for battle, even in the midst of negotiation. He keeps his skills sharp with constant practice and strives to stay in optimal physical and emotional shape – for trial requires the stamina of a warrior. The trial lawyer understands mastery of the craft is an ongoing, lifetime journey.

We summarize life experiences and belief systems via themes which are used to deliver core facts or arguments. An example of a core argument follows: "This is a case of an untrained employee . . . ." The best themes are succinct, memorable, and powerful emotionally. We motivate and lure jurors to virtuosity – or difficult verdicts – through life themes. Consider the powerful themes within this argument:

> The first casualty of war – or trial – is innocence. Fear holds you prisoner; faith sets you free. How many wars have been fought and lives lost because men have dared to insist to be free? Did you ever think you would have the opportunity to affect the life of one person so profoundly while honoring the principles for which our forefathers fought? Stand up for freedom today; for many, freedom is more important than life itself. Partial or perverted justice is no justice; it is injustice. Stop at nothing to find the truth. You have no friend to reward and no enemy to

[51] *But see State v. Ali*, 329 N.C. 304 (1991) (when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, the client's wishes must control).

> punish. Your duty is to let your verdict speak the everlasting truth. His triumph today will trigger change tomorrow. Investigations will improve, and justice will have meaning. Trials will no longer be a rush to judgment but instead a road to justice.

A trial lawyer without a theme is a warrior without a weapon.[52]

XIII. Integrating *Voir Dire* into Closing Argument (Return to TOC)

At the end of closing argument, I return to central ideas covered in *voir dire*. I remind the jury the defendant is presumed innocent even now, walk over to my client and touch him – often telling the jury this is the most important day of my client's life. I then remind them they are not to surrender their honest and conscientious convictions or do violence to their individual judgment merely to return a verdict, purposefully re-isolating and re-insulating the jury before stating my theme and asking for them to return a verdict of not guilty.

XIV. Summary (Return to TOC)

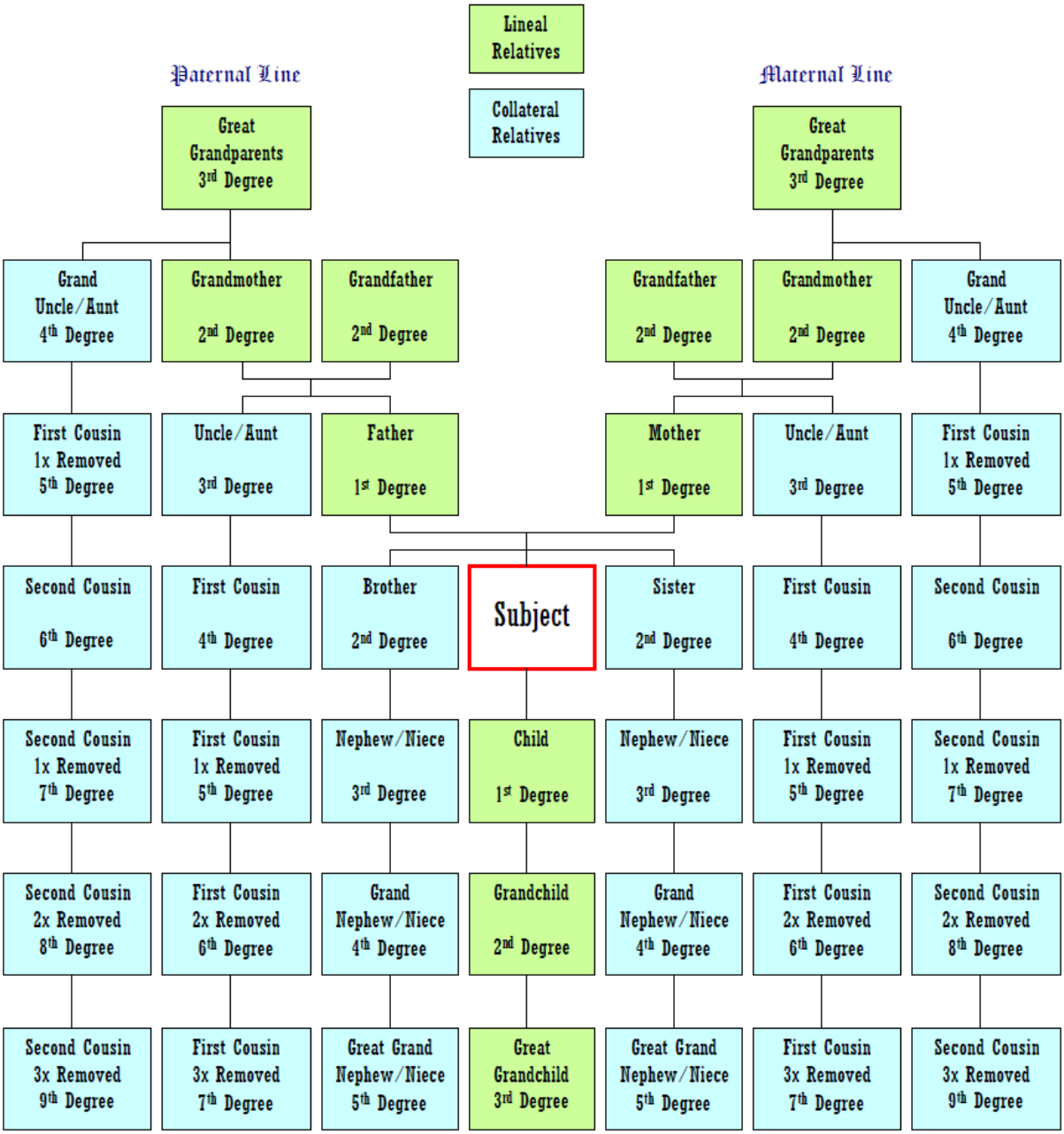
Prepare, research, consult, and try cases. Be objective about your case. Be courageous. Stand up to prosecutors, judges and court precedent, if you believe you are right. Make a complete record. I leave you with words of hope and inspiration from Joe Cheshire, an icon of excellence, and one of many to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

> "A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end."
>
> "The day may come when we are unable to muster the courage to keep fighting … but it is not this day."[53] ■

[52] Charles L. Becton, *Persuading Jurors by Using Powerful Themes*, TRIAL 63 (July 2001).
[53] THE LORD OF THE RINGS: RETURN OF THE KING (New Line Cinema 2003).

2022 Update to Jury Selection: The Art of Peremptories and Trial Advocacy

Exhibit A



2022 UPDATE TO JURY SELECTION: THE ART OF PEREMPTORIES AND TRIAL ADVOCACY

EXHIBIT B

REFERENCES

1. *Voir Dire*: 15A-1211 to 1217
2. Jury Trial Procedure: 15A-1221 to 1243
3. Bifurcation: 15A-928
4. Jury Instruction Conference: Gen. R. of Prac. 21; 15A-1231

NEED

1. Witness List
2. Jury Profile
3. Jury Pool List
4. 12 Leaders/They save themselves

VOIR DIRE

(7/27/2022)

(Humble/vulnerable; Introduce/tell about self/firm/defendant; Charge; Innocent/Not guilty; Use analogy)

EXPLAIN THE PROCESS

1. Search for truth: not CSI; often slow and deliberate.
2. Ideal jury: fair and impartial cross section of community.
3. Juror service: Pinnacle of public service; conscience of community; protect/preserve process.
4. You bring life experience and common sense.
5. May be a great juror in one case but not another.
6. Judge: gatekeeper/governor of trial. Will tell us all we need to know.
7. You are safe (only life experience/common sense, judge will instruct, jurors rights).
8. Length of trial.

GROUP QUESTIONS

(You, close friend, family member)

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

INDIVIDUAL QUESTIONS

22. Where live? Employment? Spouse? Family/children?
23. Any disability/physical/medical problems? Covid?
24. Any personal/business commitments?
25. Any specialized medical/psychological, legal/law enforcement, scientific/forensic training?

KEY POINTS

26. Supervise any employees?
27. Know anyone else on the jury panel/pool?
28. Ever serve as sworn LEO or similar capacity?
29. Military service?
30. Rescue squad/EMS/Fire Dept. service?
31. Teacher/Pastor/Church member/Government employee?
32. Serve on another jury this week?

PROCESS OF TRIAL

33. State goes first; defense goes last; do not decide; address judge's instruction.
34. Will be objections/interruptions based on rules of evidence/procedure? Matters of law.
35. Draw the Sting/Strip. Cover Bad/Undisputed Facts/Affirmative Defenses or Irrelevant Issues/Facts (weapons, bad injuries, criminal record, drugs, alcohol, relationships, etc.). The law recognizes certain defenses. Not every death, injury, or questionable act is a crime.

SEE REVERSE

36. Race/gender/religion issues? (white victim/black defendant); Batson; *Prima facie* case (raise inference?)/Race-neutral reasons/Purposeful discrimination? Judge elicit?
37. Some witnesses are everyday folks. Will anyone give testimony of LEO any greater weight solely because he wears a uniform? Judge will charge on credibility of witnesses. Promise to follow law?
38. You may hear from expert witnesses. Can you consider?
39. The charge is _____. Judge will explain the law/not us. Burden of proof is "beyond a reasonable doubt" (fully satisfies/entirely convinces). State must prove each and every element beyond burden. Promise to hold to burden? Same burden as Capital Murder.
40. A charge is not evidence.
41. Defendant presumed innocent. Defendant may choose, or not choose, to take the stand. He remains clothed with the presumption of innocence now and throughout this trial. Not a blank chalk board or level playing field. Will you now conscientiously apply the presumption of innocence to the Defendant?
42. Must you hear from the Defendant to follow the law? Must the Defendant "prove his innocence?" You are "not to consider" whether defendant testifies. PJI - Crim. 101.30

CONCLUSION/JUROR'S RIGHTS

43. You have the right to hear and see all the evidence, voice your opinion, and have it respected by others.
44. You are to "reason together…but not surrender your honest convictions" as deliberate toward the end of reaching a verdict. You are "not to do violence to your individual judgment." "You must decide the case for yourself." N.C. Gen. Stat. § 15A-1235.
45. After telling jurors the law requires them to deliberate to try to reach a verdict, it is permissible to ask "if they understand they have the right to stand by their beliefs in the case." *State v. Elliott*, 344 N.C. 242 (1996).
46. Use your "sound and conscientious judgment." Be "firm but not stubborn in your convictions." PJI – Crim. 101.40.
47. Believe the opinions of other jurors are worthy of respect? Will you?
48. No crystal ball. Do you know of any reason this case may not be good for you? Any questions I haven't asked that you believe are important?
49. The law never demands a verdict. The judge has no interest in a particular outcome and will be well-satisfied with your individual decision.

CHALLENGES FOR CAUSE

1. Grounds. N.C. Gen. Stat. § 15A-1212.
    a. Is incapable by reason of mental or physical infirmity.
    b. Has been or is a party, witness, grand juror, trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge.
    c. Has been or is a party adverse to the Defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
    d. Is related by blood or marriage within the sixth degree to the Defendant or victim of the crime.
    e. Has formed or expressed an opinion as to the guilt or innocence of Defendant.
    f. Is presently charged with a felony.
    g. As a matter of conscience, would be unable to render a verdict with respect to the charge in accord with the law.
    h. For any other cause is unable to render a fair and impartial verdict.

BUZZ PHRASES

1. Substantially impair? Automatically vote? *State v. Cummings*, 326 N.C. 298 (1990); *State v. Chapman*, 359 N.C. 328 (2005).
2. Juror statement he could follow the law but Defendant's failure to testify would "stick in the back of his mind" while deliberating should have been excused for cause. *State v. Hightower*, 331 N.C. 636 (1992).
3. Be Alert for "Stake-out" questions (asking "how will vote under particular fact/set of facts?"): Can you convict without physical evidence/witnesses? A question that tends to commit jurors to a specific future course of action. Defense has a right to a full opportunity to make diligent inquiry into "fitness and competency to serve" and "determine whether there is a basis for a challenge for cause or a peremptory challenge." N.C. Gen. Stat. § 15A-1214(c). Ask: Can you consider? *State v. Roberts*, 135 N.C. App. 690 (1999). Can you set aside your opinion and reach decision solely upon evidence?
4. "A juror can believe a person is guilty and not believe it beyond a reasonable doubt." Hence, it is error for D.A. to argue if a juror believes the defendant is guilty then he necessarily believes it BRD. *State v. Corbin*, 48 N.C. App. 194 (1980).