UNC | SCHOOL OF GOVERNMENT

2019 Felony Defender Training

February 20-22, 2019 / Chapel Hill, NC

ELECTRONIC PROGRAM MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC | SCHOOL OF GOVERNMENT

2019 Felony Defender Training

February 20-22
UNC School of Government, Chapel Hill, NC
Co-sponsored by the UNC School of Government &
Office of Indigent Defense Services

Wednesday, February 20

9:15 to 9:50	*Check-in*
9:50 to 10:00	Welcome Phil Dixon Jr., Defender Educator UNC School of Government, Chapel Hill, NC
10:00 to 10:45	**Felony Case Preparation - What's Different in Superior Court** (45 mins) Phil Dixon Jr., Defender Educator UNC School of Government, Chapel Hill, NC
10:45 to 11:00	*Break*
11:00 to 12:15	**Developing an Investigative and Discovery Strategy** (75 mins) Keith A. Williams, Attorney Law Offices of Keith Williams, Greenville, NC
12:15 to 1:15	*Lunch (provided in the building)*
1:15 to 2:45	**WORKSHOP: Developing an Investigative and Discovery Strategy** (90 mins)
2:45 to 3:00	*Break (snack provided)*
3:00 to 4:00	**Getting Lost In Our Own Lives** (60 mins) (1.0 substance abuse/mental health) Jonathan Washburn, Principal Attorney Washburn Law, PLLC, Wilmington, NC
4:00 to 5:00	**Ethics for Felony Defenders** (60 mins) (1.0 ethics) Tom Maher, Executive Director Office of Indigent Defense Services, Durham, NC
5:00p	*Adjourn*

Thursday, February 21

9:30 to 10:15	**The Basics of Pleading Guilty in Superior Court** (45 mins) Derek Brown, Attorney Brown Gibson, PC – Attorneys At Law, Greenville, NC
10:15 to 10:30	*Break*
10:30 to 11:45	**Voir Dire and Demonstration** (75 mins) Kelley DeAngelus, Assistant Public Defender Wake County Public Defender's Office, Raleigh, NC
11:45-12:30	**Evidence Blocking** (45 mins) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
12:30-1:30	*Lunch (provided in the building)*
1:30-2:30	**Motions to Suppress: Statements, Property and Identification** (60 mins) Susan Seahorn, Chief Public Defender Orange County Public Defender's Office, Hillsborough, NC
2:30-4:00	**WORKSHOP: Evidence Blocking and Motions to Suppress** (90 mins)
4:00-4:15	*Break (snack provided)*
4:15-5:15	**Preserving the Record** (60 mins) Glenn Gerding, Appellate Defender Office of the Appellate Defender, Durham, NC
5:15p	*Adjourn*
6:30p	Optional Dinner Gathering

Friday, February 22

9:00 to 10:00	**Sentencing in Superior Court** (60 mins) Jamie Markham, Associate Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
10:00 to 10:45	**Sentencing Advocacy-A View from the Bench** (45 mins) Honorable G. Bryan Collins, Resident Superior Court Judge 10th Judicial District, Raleigh, NC
10:45 to 11:00	*Break (snack provided)*
11:00-12:00	**Jury Instructions** (60 mins) Tamzin Kinnett, Assistant Public Defender Chatham County Public Defender's Office, Pittsboro, NC
12:00 to 1:00	**Lab Reports and Issues Surrounding Them** (60 mins) Sarah R. Olson, Forensic Resource Counsel Office of Indigent Defense Services, Durham, NC
1:00	*Adjourn*

CLE HOURS: 15.5

*Includes 1.0 hour of ethics/professional responsibility and 1.0 substance abuse/mental health awareness

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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
http://www.sog.unc.edu/node/117

TRAINING

Calendar of Live Training Events
http://www.sog.unc.edu/node/643

Online Training
http://www.sog.unc.edu/node/644

MANUALS

Orientation Manual for Assistant Public Defenders
http://www.sog.unc.edu/node/1002

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

NC Criminal Law Blog
www.sog.unc.edu/node/487

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
http://www.sog.unc.edu/node/657

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

FELONY CASE PREPARATION – WHAT'S DIFFERENT IN SUPERIOR COURT

What's in the Felony File:
Organizing a Trial Notebook and Exhibits

Keith Williams
Greenville, North Carolina
Telephone: 252-931-9362
Email: keith@williamslawonline.com

1) Intro
   a) The Vanishing Trial
      i) How it used to be
         (1) Various numbers
            (a) 1962: 15% of all federal criminal cases went to trial
            (b) 1976: 9% of all state criminal cases went to trial
            (c) 1980: 18% of all federal criminal cases went to trial
         (2) Sources
            (a) *A World without Trials,* Journal of Dispute Resolution, Volume 2006, Issue I,http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1640&context=jdr
            (b) *The Vanishing Trial,* Journal of Empirical Legal Studies, November 2004, Volume I, Issue 3
      ii) How it is now
         (1) 2013: 3% of federal criminal cases went to trial
            (a) https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?_r=0
      iii) Most recent numbers for North Carolina
         (1) From July 1, 2015, through June 30, 2016
         (2) "Overall, 2% of convictions statewide resulted from jury trials"
            (a) 28,593 total convictions
            (b) 28,021 resulted from plea
            (c) 572 resulted from jury trial
         (3) did not break it down by county
            (a) will vary based on population
            (b) but rough number: 572 jury trials over 100 counties is 5.72 jury trials per year in each county: average 6 in a year; one every 2 months
               (i) some more
               (ii) some **less**
         (4) January 2017 report from NC Sentencing and Policy Advisory Commission
            (a) http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy15-16.pdf

b) Causes?
   i) Harsher sentences b/c of structured sentencing
      (1) I would agree re federal court
      (2) But probably not agree re state court
   ii) Vicious cycle
      (1) We are exposed to fewer jury trials
      (2) Which deprives us of the opportunity to learn about them and become familiar with them
      (3) Which makes us less likely to have the courage to engage in them
      (4) Which means there are fewer jury trials
   iii) Hard but honest assessment (opinions from me, not from the School of Government)
      (1) Overworked lawyers
      (2) Lazy lawyers
      (3) Scared lawyers

c) Question for me and for each one of us:
   i) Am I a poser?
      (1) A poser says they are a trial lawyer, but actually lacks the stomach for it
   ii) Sometimes hard for us to know ourselves; easy for the prosecutors to tell
      (1) They know who talks about going to trial – and almost always pleads
      (2) They also know who talks about going to trial – and actually goes to trial
      (3) One guess as to who gets the better plea offers
   iii) Wade Smith: you need to be sure you are anything other than a "tasty morsel" for the prosecutors
      (1) You want to be thick and grisly and unpleasant

d) Is it OK to be a lawyer and avoid jury trials?
   i) Yes, but not if you represent people charged with felonies in Superior Court
   ii) <u>We are not mediators; we are trial lawyers</u>
      (1) Even a civilized society needs a place to brawl
      (2) No jousting; no bullfighting; no street fighting
      (3) All replaced by trial lawyering

e) Three steps to taking more cases to trial
   i) Know the facts of your case
   ii) Know the law that applies
   iii) Prepare
      (1) Buying a house: location, location, location
      (2) Going to jury trial in a felony case: preparation, preparation, preparation

f) Purpose of today is the third step: preparation
   i) Demystify the process
   ii) Makes us more likely to engage in the process
   iii) One caveat: you will never feel 100% prepared
      (1) There is also something more you can do
      (2) But if you wait until you feel 100% prepared b/4 you try a case, you will never try a case

2) Order of preparation
   a) Disclaimer: what I know, I have learned from others; hard for me to identify / recall all of the sources, but it would especially be from attorneys Roger Pozner and Chris Dodd
   b) Decide on your theory of the case
      i) Before you start the road trip, know your destination
      ii) Example: rape case
         (1) My client was not at the party: alibi
         (2) My client was at the party but did not go in the room with her: mistaken identity
         (3) My client was at the party and did go in the room with her, but they did not have sex: untruthful prosecuting witness
         (4) My client was at the party and did go in the room and did have sex with her, but she was a willing participant: consent
   c) Then think about your closing argument: your best points for winning the case
      i) Shows you the points you need to make during trial
   d) Cross-examination: try to make most of your points on cross of expected State's witnesses
   e) Direct examination: call your own witnesses and possibly your client to testify if you have points you need to make that you cannot get from the State's witnesses
   f) Opening statement: how best will you forecast the important points to the jury
   g) Jury selection: what are the key points that you need to raise with the jury during voir dire

3) Trial Notebook
   a) Tried a jury trial one time from folders
      i) Never again
   b) Take your materials and put them into a three-ring notebook with tabs
      i) Jury selection (voir dire)
      ii) Opening statement
      iii) Cross-ex of State's witnesses
         (1) One tab for each witness
      iv) Motions at close of State's evidence
      v) Presentation of Defense witnesses
         (1) One tab for each witness
      vi) Motions at close of all evidence
      vii) Jury instructions / charge conference
         (1) Available for free on School of Govt website
         (2) Print the instructions you want
         (3) Four copies: one for you, one for the judge, one for the clerk, one for the State
      viii) Closing argument
      ix) Sentencing
   c) Inside front folder
      i) My outline
      ii) Index to trial notebook
      iii) Spreadsheet of exhibits
   d) Cover sheet: "TRIAL NOTEBOOK"
      i) Let the client see that you are ready

e) Forces you to go through the file and prune it
    i) Keep what you need
    ii) Get rid of the rest
        (1) "A major preparation attribute that separates great trial lawyers from lesser advocates is the ability to streamline their cases. Highly effective trial lawyers jettison redundant witnesses, unnecessary exhibits, repetitive questions, causes of action, or defenses that detract from the principal theory of the case. All of this is critical to success at trial."
        (2) *Eight Traits of Great Trial Lawyers*, Judge Mark Bennett, Voir Dire, Summer 2014, http://bit.ly/2n4JO3v

4) Preparation for cross-examination
    a) The most important skill of a criminal defense attorney
        i) A skill that can be learned
    b) Youtube: Terry McCarthy on Cross-Examination
        i) https://youtu.be/QcOkG9-TpEo
    c) Pozner and Dodd, Masters of Cross-Examination DVD
        i) pozneranddodd.com
        ii) chapter method of cross-examination
            (1) break your questions down into smaller sub-questions
            (2) each of the smaller questions is a chapter
            (3) have a spreadsheet for each smaller question, and move through them in the order you believe most effective
            (4) you are making statements, and the witness is saying yes or no
            (5) you are using them to make your points; they are there to serve your purpose
                (a) preparation: you know in advance the points you need to cover

5) Preparation for direct examination
    a) If your client is going to testify, do a practice direct examination with them
        i) Record it
        ii) Give it to them to watch
    b) Will make them a much better witness at trial

6) Exhibits
    a) Decide what you need to admit through the various witnesses
        i) You are allowed to admit your exhibits through the State's witnesses if you can get a sufficient foundation
    b) Decide how you want to display them
        i) On the screen
            (1) From your computer using something like Apple TV
            (2) Note: you will still need a printed copy to give to the clerk for the court file
        ii) In hard copy to be handed to the jury
        iii) On an easel, blown up and displayed on foam board

c) Have them marked and ready to go
    i) In your trial notebook, in the tab for the witness through whom you plan to introduce the exhibit
    ii) Defense Exhibit stickers – in the bottom right corner
        (1) 1, 2, 3, 4, etc
    iii) you need three copies of each
        (1) one for you
        (2) one for the court
        (3) one for the prosecutor
    iv) spreadsheet of exhibits will have the number the exhibit
d) How you keep them for your own use: in paper form or electronic form?
    i) Yes
    ii) In paper – as part of trial notebook
    iii) On computer
        (1) Documents in PDF format so you can search as needed to find specific words or phrases on the fly in trial
            (a) Tip: make all of your PDF documents word searchable by using the OCR process
                (i) Optical character recognition; turns the scanned page into searchable text
                (ii) Windows: Document – OCR text recognition
                (iii)Mac: Tools – Text recognition
        (2) Other exhibits – as backup on computer
e) How to introduce them: don't make this harder than it has to be
    i) The steps
        (1) Identify the exhibit by number
        (2) Have the witness describe it and lay the foundation for it
        (3) Move to admit it
    ii) Example for admitting a photo:
        (1) I hand you what has been marked as Defense Exhibit number 1 for identification purposes
        (2) Do you recognize it
        (3) Can you tell us what it is
        (4) Does it fairly and accurately depict the scene
        (5) You honor, I move to admit Defense Exhibit number 1
    iii) be familiar with the legal standards for laying a foundation for that type of exhibit
f) With witnesses you present on direct examination, using exhibits opens the possibility of allowing your witness to testify twice in the same direct
    i) First time through: without exhibits
    ii) Second time through: with exhibits
g) If possible, use key exhibits during opening
    i) Will need to get judge's permission in advance

7) Conclusion

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF _____	**__ CRS _____**

STATE OF NORTH CAROLINA	**)**	
	)	
vs.	**)**	**MOTION FOR DECLARATION**
	)	**OF INDIGENCE FOR PURPOSES OF**
JOHN DOE,	**)**	**OF OBTAINING INVESTIGATIVE**
	)	**& EXPERT ASSISTANCE**
Defendant.	**)**	

NOW COMES the Defendant, ***John DOe***, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. § 7A-450(a), and ***State v. Davis***, 168 N.C. App. 321, 608 S.E.2d 74 (2005), for an Order declaring the Defendant to be indigent and appointing second-counsel in this matter. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. On DATE, the Defendant, John Doe, was arrested and charged with three counts of Obtaining Property by False Pretenses in the above-captioned cases.

2. On DATE, Mr. Doe was indicted for three counts of Obtaining Property by False Pretenses in the above-captioned cases.

3. The charges of Obtaining Property by False Pretenses arise from allegations from the NC Department of Revenue that Mr. Doe obtained refunds on his North Carolina Individual Income Tax returns for the years _____.

4. Prior to being charged with the aforementioned offenses, Mr. Doe was employed as a Deputy for the ___ County Sheriff's Department, as well as a law enforcement officer for other law enforcement agencies.

5. Upon being charged with the aforementioned offenses in DATE, Mr. Doe was suspended from the ___ County Sheriff's Department, as well as the other law enforcement agencies with which he was previously employed.

6. Since being charged with the aforementioned offenses, Mr. Doe was not been able to obtain gainful employment in his chosen profession of law enforcement. Mr. Doe was required to obtain employment in other fields.

7. Only in the last few weeks has Mr. Doe been able to obtain employment in the law enforcement profession. However, due to Mr. Doe's current financial situation involving the NC Department of Revenue and the Internal Revenue Service, much of Mr. Doe's

income is being used to satisfy back taxes and tax penalties associated with his tax situation.

8. Due to being unemployed in the law enforcement profession, having to find other sources of income, and being required to satisfy back taxes and tax penalties, Mr. Doe is not able to obtain sufficient funds to hire the necessary experts for his defense.

9. Undersigned counsel has been provided discovery in this matter, much of which consists of income tax returns and other related documents.

10. Due to Mr. Doe's financial situation, undersigned counsel has agreed to represent Mr. Doe pro bono.

11. Due to his financial situation, Mr. Doe is an indigent individual and does not have the means with which to retain the necessary expert assistance required to defend against the aforementioned charges, namely a forensic accountant and/or a private investigator.

12. Under the Constitution of the United States and the State of North Carolina, a defendant facing criminal charges is entitled to expert assistance in defending against said charges. If the defendant is indigent, counsel and the necessary expert assistance must be appointed at state expense.

13. Neither the Defendant's family, nor the Defendant, can shoulder the financial burden of retaining the necessary expert assistance to defend against the aforementioned charges.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the Court enter an order declaring the Defendant to be an indigent individual;

2. That the Court enter an order allowing the Defendant to seek and obtain funds for expert assistance from the Court and that the Office of Indigent Defense Services and/or the Administrative Office of the Courts be directed to reimburse said experts for said services; and

3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the __th day of _____.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: ------
Facsimile: (919) 720-4640
Email: --------

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Declaration of Indigence for Purposes of Obtaining Investigative & Expert Assistance*** was this day served upon the prosecution by the following method:

__X__ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

_____
Special Deputy Attorney General
NC Departement of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

_____ by personally serving the Office of the Attorney General via hand delivery;

__X__ by transmitting a copy via facsimile transmittal to the Special Deputy Attorney General; and/or

_____ by depositing a copy in the box for the Office of the Attorney General maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE DISTRICT COURT**
COUNTY OF _____	**DIVISION __ CR_____**

STATE OF NORTH CAROLINA,	**)**	
	)	**MOTION FOR PRESERVATION OF**
vs.	**)**	**ALL DOCUMENTS/EVIDENCE**
	)	**& WORK PRODUCT**
JOHN DOE,	**)**	
	)	
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe,*** by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, Article 48 of the North Carolina General Statutes, N.C. Gen. Stat. §§ 15A-501(6), 15A-903(c) & (d), N.C.Gen.Stat. § 15A-1415(f), and ***State of North Carolina vs. Theodore Jerry Williams***,[1] and hereby requests that this Honorable Court enter an Order commanding all law enforcement and prosecutorial agencies, officers, employees, agents and/or attorneys involved in the investigation and prosecution of the above-captioned matters to preserve and retain any and all documentation, physical evidence, and work product obtained and/or produced in the investigation and prosecution of these matters.

The Defendant further requests that this Honorable Court order all law enforcement agencies involved in the investigation of these matters to release to the prosecution all materials and information acquired during the course of the investigation into these matters, pursuant to N.C. Gen. Stat. §§ 15A-501(6) and 15A-903(c) and (d). In support of the foregoing Motion, the Defendant states unto the Court as follows:

1. The Defendant is charged with one count of first-degree murder.

2. The documentation and physical evidence the Defendant seeks to have preserved are discoverable under Article 48 of the North Carolina General Statutes.

3. N.C.Gen.Stat. § 15A-501(6) states:

> **Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer…must make available to the State on a timely basis all materials and information acquired in the course of all felony**

[1] 362 N.C. 628, 669 S.E.2d 290 (2008).

investigations. This responsibility is a continuing and affirmative duty.

4. N.C.Gen.Stat. § 15A-903(a)(1) states:

> **Upon motion of the defendant, the court must order the State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the Defendant.**

5. N.C. Gen. Stat. § 15A-903(a)(1)(a) states in part:

> **The term "file" includes the defendant's statements, the codefendant's statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.**

6. N.C. Gen. Stat. § 15A-903(c) states:

> **On a timely basis, law enforcement and investigatory agencies shall make available to the prosecutor's office a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section and any disclosure under G.S. 15A-902(a). Investigatory agencies that obtain information and materials listed in subdivision (1) of subsection (a) of this section shall ensure that such information and materials are fully disclosed to the prosecutor's office on a timely basis for disclosure to the defendant.**

7. N.C. Gen. Stat. § 15A-903(d) states:

> **Any person who willfully omits or misrepresents evidence or information required to be disclosed pursuant to subsection (1) of subsection (a) of this section, or required to be provided to the prosecutor's office pursuant to subsection (c) of this section, shall be guilty of a Class H felony. Any person who willfully omits or misrepresents evidence or information required to be disclosed pursuant to any other provision of this section shall be guilty of a Class 1 misdemeanor.**

8. In order, for the Defendant to be afforded his statutory right to inspect and copy all evidence under both the statutory and constitutional laws

governing discovery in criminal cases, any and all evidence must be made available to the Defendant for inspection.

9. N.C.Gen.Stat. § 15A-1415(f), in addressing discovery requirements in post-conviction proceedings in superior court, states in part:

> **…The State, to the extent allowed by law, shall make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the Defendant…**

10. N.C.Gen.Stat. § 15A-1415(f) has been interpreted to require the prosecution to provide to the defense prosecutorial work product.[2]

11. In order to ensure all evidence is available and not inadvertently destroyed, the Court should enter an Order requiring all law enforcement and prosecutorial agencies involved in the investigation and prosecution of these matters to preserve any and all documents, evidence, and work product obtained and/or produced in connection with these matters.

12. The interests of justice and the rights of the Defendant require the preservation of all documents, evidence, and work product connected with these matters and, as such, the Court should enter an Order requiring that such materials be preserved.

13. Further, the defense hereby places the State on notice that the defense is demanding the preservation of any and all evidence in these matters in order that the State will have notice of the defense's demand and will not be able to assert the doctrine of "bad faith,"[3] in the event any unwarranted loss or destruction of documentation or evidence occurs.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the Court enter an Order commanding all law enforcement and prosecutorial agencies, officers, employees, agents and/or attorneys involved in the investigation and prosecution of the above-captioned matters to preserve and retain any and all documentation, physical evidence, and work product obtained and/or produced in the investigation of these matters;

2. That the Court enter an Order requiring all law enforcement and prosecutorial agencies, officers, employees, agents and/or attorneys

[2] ***State v. Bates***, 348 N.C. 62, 505 S.E.2d 97 (1998).
[3] See ***Arizona v. Youngblood,*** 488 U.S., 109 S.Ct. 333, 102 L.Ed.2d 281 (1988),

involved in the investigation and prosecution of the above-captioned matters to release to the prosecution all materials and information acquired during the course of the investigation into these matters, pursuant to N.C.Gen.Stat. § 15A-501(6) and 15A-903(c) & (d); and

3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the __th day of DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
North Carolina State Bar Number: _____
127 W. Hargett Street, Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

By:_____
Emily D. Gladden
Attorney for the Defendant
North Carolina State Bar Number: _____
127 W. Hargett Street, Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Appearance*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery to the Office of the District Attorney – District __ (_____ County);

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the __th day of DATE.

TIN FULTON WALKER & OWEN, P.L.L.C.

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
North Carolina State Bar Number: ___
127 W. Hargett Street, Suite 705 Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE DISTRICT COURT**
COUNTY OF _____	**DIVISION 16 C__ _____**

STATE OF NORTH CAROLINA,	**)**	
	)	**ORDER ON DEFENDANT'S**
vs.	**)**	**MOTION FOR**
	)	**PRESERVATION OF**
JOHN DOE,	**)**	**DOCUMENTS,**
	)	**EVIDENCE & WORK**
Defendant.	**)**	**PRODUCT**

THIS MATTER having come on to be heard before the Honorable _____, Chief District Court Judge, presiding at the DATE session of Criminal District Court for the County of _____, pursuant to the Defendant's ***Motion for Preservation of All Documents/ Evidence & Work Product***, which was filed on DATE; and

IT APPEARING TO THE COURT, that at the time this matter was presented to the Court, the State of North Carolina was present and represented by Assistant District Attorney _____, and the Defendant was present and represented by Maitri "Mike" Klinkosum, Attorney at Law, and Emily D. Gladden, Attorney at Law;

IT APPEARING TO THE COURT, after determining that the Court has jurisdiction over the subject matter and the parties, and, after considering the Defendant's Motion, and after hearing the arguments of counsel for both the State and the Defense, finds the Defendant's ***Motion for Preservation of Documents/Evidence & Work Product*** should be allowed.

IT IS THEREFORE, ORDERED, ADJUDGED, and DECREED, that the ***Defendant's Motion for Preservation of Documents/Evidence & Work Product*** is hereby granted as follows:

1. All law enforcement and prosecutorial agencies, officers, employees, agents and/or attorneys involved in the investigation and prosecution of these matters shall preserve and retain any and all documentation, physical evidence, and work product obtained and/or produced in the investigation of these matters pursuant to all applicable statutory and constitutional law.

2. All law enforcement and prosecutorial agencies, officers, employees, agents, and/or attorneys involved in the investigation and prosecution of the above-captioned matters shall release to the prosecution all materials and information acquired during the course of the investigation into these matters, pursuant to N.C. Gen. Stat. § 15A-501(6) and N.C. Gen. Stat. § 15A -903(c).

This the _____ day of DATE.

_____
The Honorable _____
Chief District Court Judge

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF	**__ CRS _____**
STATE OF NORTH CAROLINA,	**)**
	)
vs.	**)**
	) **REQUEST FOR**
JOHN DOE,	**)** **ARRAIGNMENT**
	)
	)
Defendant.	**)**

NOW COMES the Defendant, ***John Doe,*** by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, pursuant to the "Law of the Land" Clause of Article I, Sections 19, 23 and 27 of the North Carolina Constitution, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and N.C.Gen.Stat. § 15A- 941, and hereby submits this written request for arraignment.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Request for Arraignment*** was this day served upon the prosecution by the following method:

__X__ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

_____
Special Deputy Attorney General
NC Departement of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

_____ by personally serving the Office of the District Attorney via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF _____	**__ CRS _____**

STATE OF NORTH CAROLINA	)	
	)	
VS.	)	**REQUEST FOR VOLUNTARY DISCOVERY (ALTERNATIVE MOTION FOR DISCOVERY)**
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

NOW COMES the Defendant, ***John Doe,*** by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby requests voluntary discovery from the prosecution in this case, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19 and 23 of the North Carolina Constitution, ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny, and Article 48 of the North Carolina General Statutes.

1. Pursuant to N.C. Gen. Stat. § 15A-903(a)(1), the Defendant requests the complete files of all law enforcement agencies, investigatory agencies, and prosecutor offices involved in the investigation of the crimes committed or the prosecution of the defendant.

2. Pursuant to N.C.Gen. Stat. § 15A-903(a)(1)(a), the Defendant requests the following:

    (a) The defendant's statements;

    (b) The co-defendant's statements;

    (c) Witness statements;

    (d) Investigating officers' notes;

    (e) Results of tests and examinations; and

    (f) Any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

3. Pursuant to N.C. Gen. Stat. § 15A-903(a)(1)(a), if any matter or evidence

has been submitted for testing or examination, the Defendant requests the following:

(a) Any and all test and/or examination results;

(b) Any and all testing/examination data;

(c) Any and all calculations, or writings of any kind, generated in connection with said testing and/or examination results;

(d) Any and all preliminary test and/or screening results; and

(e) Any and all bench notes

4. Pursuant to N.C. Gen. Stat. § 15A-903(a)(1)(d), the Defendant invokes his the right to inspect and copy or photograph any materials in possession of the State and, under appropriate safeguards, to inspect, examine, and test any physical evidence or sample of physical evidence in possession of the State.

5. Pursuant to N.C. Gen. Stat. § 15A-903(a)(2), the Defendant requests, within a reasonable time prior to trial, as specified by the Court, that the State provide the following to the Defendant:

(a) Notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial;

(b) A report of the results of any examinations or tests conducted by any State experts.

(c) The curriculum vitae of any State experts,

(d) The opinion, and the underlying basis for that opinion, of any State expert.

6. Pursuant to N.C. Gen. Stat. § 15A-903(a)(3), the Defendant requests that the State provided, at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial.

7. The Defendant requests a complete copy of the Defendant's prior criminal record, if any, including but not necessarily limited to:

a. All juvenile and adult detention, jail, prison, parole, probation, and pre-sentence investigation records and reports;

b. All arrest, conviction, and adult and juvenile criminal offense records and reports;

c. All records and reports of any law enforcement authority as that term is defined in paragraph 5(a) above;

d. All records and reports of any detention or court authority;

e. All records and reports of any prosecuting authority as that term is defined in paragraph 5(b) above;

8. The Defendant requests the opportunity to inspect and copy or photograph any and all books, papers, documents, photographs, motion pictures, videotapes, mechanical or electronic recordings, buildings and places, or any other crime scene, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the State and which are material to the preparation of the defense, or are intended for use by the State as evidence at the trial or were obtained from or allegedly belonged to the Defendant.

9. The Defendant requests a copy of any and all search warrants, arrest warrants and non-testimonial identification orders issued in connection with the case, as well as any supporting affidavits, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. §15A-971 *et seq*.

10. The Defendant requests a description of any and all pre-trial identification procedures conducted by the State or any of its agents in connection with the alleged crimes, and the date, time, place and persons present at such procedure, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq*.

11. The Defendant requests a description of any conversation between the Defendant and any law-enforcement officer, official or agent, and the date, time, place, and persons present at such time, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq*.

12. The Defendant requests a description of any and all property or contraband seized from the Defendant, Defendant's home, or an area under Defendant's control that the State intends to offer as evidence at trial, or which led to any other evidence the State intends to use at trial, and the time, place, and manner of any such seizure, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq*.;

13. The Defendant requests a description of any and all electronic, mechanical, visual or photographic surveillance of the Defendant conducted by State or federal law-enforcement officers, officials or agents, and the date, time, place and persons

present at such surveillance, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq.*

14. The Defendant requests a description of any electronic, mechanical, visual, or photographic surveillance of other persons, places or organizations conducted by State or federal law-enforcement officers, officials or agents which resulted in the interception and/or recording of any of the Defendant's conversations, photographs of the Defendant, or other information relating to the Defendant, and the date, time, location and manner of any such surveillance, sufficient to allow the Defendant to determine whether to proceed under N.C. Gen. Stat. § 15A-971, *et seq*.

15. The Defendant requests information related to the nature of any other criminal acts, or prior bad acts, allegedly committed by the Defendant which the State intends to introduce as evidence in its case-in-chief or at sentencing, and the particulars of those acts, including but not limited to the time and place the acts were allegedly committed, whether the acts were the subject of any court proceedings, and the results of any such proceedings.

16. The Defendant requests a statement indicating whether or not any informants were involved in the investigation or preparation of the cases against the Defendant.

17. Pursuant to ***Brady v. Maryland***, 373 U.S. 83 (1963), ***United States v. Agurs***, 427 U.S. 97 (1976), ***United States v. Bagley***, 374 U.S. 667 (1985) and ***Kyles v. Whitley***, 514 U.S. 419 (1995) any and all documents, reports, facts or other information in whatever form which would tend to exculpate the Defendant, mitigate the degree of the offense or the appropriate punishment, weaken or overcome testimony adverse to the Defendant given by a State's witness, impeach the credibility of a State's witness, or would otherwise tend to be favorable to the Defendant in any way, including but not limited to:

    a. Any notes or reports, in whatever form, which were prepared by any law-enforcement officer, official or agent and which would tend to refute, impeach or contradict any of the evidence the State intends to introduce at trial, or which tends to show or indicate in any way that the Defendant did not commit the crimes charged in the indictment or that he may have a legal defense to such crimes;

    b. Any evidence or information which would tend to indicate in any way that someone other than the Defendant committed the crimes charged, including but not limited to any reports concerning any investigation of suspects other than the Defendant carried out in connection with this case or containing a description of the alleged perpetrator that is inconsistent

with the physical characteristics of the Defendant;

c. The facts and circumstances surrounding any pretrial identification procedure conducted by any law-enforcement officer, official or agent in connection with this case in which any alleged witness failed to identify the Defendant or identified someone other than the Defendant;

d. Any written, recorded or oral statements made by any person which would tend to exculpate the Defendant or indicate in any way that Defendant may not have committed the alleged crimes or that Defendant may have a legal defense to such crimes;

e. The names and addresses of any witnesses who may have knowledge of facts which might be favorable to the Defendant, or who were interviewed by any law-enforcement officer, official or agent and failed to provide inculpatory information concerning the Defendant;

f. Any statements previously made by a prospective witness for the State, whether written or oral and whether made under oath or otherwise, which are inconsistent or at variance in any way with what the witness is anticipated to testify to at trial;

g. The complete prior criminal and juvenile records of all witnesses who may testify for the State, the nature of any criminal charges under investigation or pending against such witnesses in any jurisdiction, and a description of any prior bad acts engaged in by any such witnesses;

h. The details of any promises or indications of actual or possible immunity, leniency, favorable treatment or any other consideration whatsoever, or of any inducements or threats, made or suggested by any State or federal employee or agent to any person who has provided information to or will testify for the State in this case, or to anyone representing such a person;

i. Any information suggesting any bias or hostility by any prospective witness for the State toward the Defendant, or any other factor bearing on the credibility of any prospective witness for the State, including but not limited to any mental illness or condition, or dependence on or use of alcohol or drugs of any kind, whether or not received legally; and

18. All additional information of the type requested above that comes to the attention of the State or its agents after initial compliance with this request.

19. If the State intends to redact any portions of any discovery required to be provided to the Defendant under N.C. Gen. Stat. § 15A-903 *et seq*., then the Defendant specifically requests that the State first seek a protective order, with notice to the

Defendant, from the Superior Court before any redacting is performed.

TIME OF REQUEST

This request for voluntary discovery is made not later than the tenth working day after the undersigned counsel was notified of the return of a true bill in the above-referenced matters. The undersigned counsel received said notification of the return of said true bill on DATE.

WHEREFORE the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the State voluntarily provide the aforementioned items of discovery within seven (7) days of the service of this Request upon the State, pursuant to N.C.Gen.Stat. § 15A-902(a);

2. That if the State fails or refuses to provide the requested voluntary discovery herein, within the time period prescribed by law, that the Court treat this voluntary discovery request as a motion for the Court to issue an Order compelling the Office of the District Attorney to provide the required discovery pursuant to Article 48 of the North Carolina General Statutes; and

3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the DATE.

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett Street, Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Request for Voluntary Discovery (Alternative Motion for Discovery)*** was this day served upon the prosecution by the following method:

__X__ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

Special Deputy Attorney General
NC Departement of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

_____ by personally serving the Office of the District Attorney via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett Street, Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF _____	**__ CRS _____**
STATE OF NORTH CAROLINA,	**)**
	)
vs.	**) MOTION FOR EXTENSION OF TIME**
	) TO FILE FURTHER MOTIONS
JOHN DOE,	**)**
	)
Defendant.	**)**

NOW COMES the Defendant, ***John Doe***, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the Constitution of the State of North Carolina, and applicable law of the State of North Carolina, for an Order permitting additional time to the defense in which to file further pre-trial motions in these cases. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged with first-degree murder and robbery with a dangerous weapon. The trial of this matter has been scheduled to commence on DATE.

2. During negotiations between the State and the Defense concerning the scheduling of a trial date, the Defense agreed to file all motions in this matter on or before DATE.

3. At the filing of this Motion, the defense has reviewed the discovery thus far in these matters and has, upon information and belief, drafted and filed those motions which the defense deems necessary and appropriate at this time.

4. Undersigned counsel has, to the best of his ability, attempted to identify the motions which need to be filed, based upon his review of discovery and has, in fact, drafted and filed such motions.

5. However, the reality of litigation in the criminal courts is such that information may become available to the defense at any time, such that a motion may be required to be filed in a period of time past the agreed upon DATE.

6. As such, the defense respectfully requests that the Court enter an Order permitting additional time in which to file further pre-trial motions in this matter should the need arise.

7. This Motion is made in good faith and is not filed for the purpose of obstruction or delay.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
State Bar No.: _____
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 832-0739
Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Extension of Time to File Further Motions*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the 4th day of August, 2012.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
State Bar No.: _____
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 832-0739
Email: _____

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF _____	**__ CRS _____**

STATE OF NORTH CAROLINA	**)**	
	)	**MOTION FOR COMPLETE**
vs.	**)**	**RECORDATION OF**
	)	**ALL PROCEEDINGS**
JOHN DOE,	**)**	
	)	
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe***, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-1241(b), the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1 §§ 19, 23, and 24 of the North Carolina Constitution, for an Order directing that all proceedings and any hearings and trials of the above-referenced matters be recorded, including, but not limited to, jury selection, opening statements, and closing arguments of counsel. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged with three counts of Obtaining Property by False Pretenses.

2. Because all aspects of a criminal trial encompass the constitutional rights of defendants, the interests of justice and the rights of the Defendant to due process, both substantive and procedural, would be best safeguarded by an Order directing that all parts of any hearings or trials in these matters be recorded.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court to enter an Order pursuant to N.C.Gen.Stat. § 15A-1241(b) directing that all proceedings held in these matters be recorded.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Complete Recordation of All Proceedings*** was this day served upon the prosecution by the following method:

__X__ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

_____
Special Deputy Attorney General
NC Departement of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

_____ by personally serving the Office of the Attorney General via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Special Deputy Attorney General; and/or

_____ by depositing a copy in the box for the Office of the Attorney General maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE**
	SUPERIOR COURT DIVISION
COUNTY OF _____	**__ CRS __ __ ____**

STATE OF NORTH CAROLINA,	**)**	
	)	
vs.	**)**	**MOTION FOR**
	)	**SEQUESTRATION OF**
JOHN DOE,	**)**	**STATE'S WITNESSES**
	)	
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe***, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-1225, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article 1 §§ 19 and 23 of the North Carolina Constitution, for an Order from this Court ordering the sequestration of all witnesses, other than the Defendant, outside of the courtroom until called to testify and instructing all witnesses not to discuss their testimony with other witnesses throughout the entirety of the trial. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged in with three counts of Obtaining Property by False Pretenses.

2. Over periods of time, memories of eye-witnesses, as well as other witnesses, fade, and thereby increase the possibility that a witness, either consciously or unconsciously, may tailor testimony to fit the majority view or rely less on his or her own recollection and more on an unobserved or unremembered fact offered by another witness.

3. The Court can further ensure untainted testimony and the preservation of the Defendant's rights to Due Process and Equal Protection by sequestering witnesses outside the courtroom during the trial of these matters until their testimony is needed.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for an Order sequestering all witnesses, other than the Defendant, outside of the courtroom until called to testify and instructing all witnesses not to discuss their testimony with other witnesses throughout the entirety of the trial.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Sequestration of State's Witnesses*** was this day served upon the prosecution by the following method:

__X__ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

_____
Special Deputy Attorney General
NC Departement of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

_____ by personally serving the Office of the Attorney General via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Special Deputy Attorney General; and/or

_____ by depositing a copy in the box for the Office of the Attorney General maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF _____	**__ CRS _____**
STATE OF NORTH CAROLINA,	**)**
	)
vs.	**) MOTION FOR COURT TO NOTE**
	) RACE OF ALL POTENTIAL JURORS
JOHN DOE,	**) EXAMINED FOR SELECTION**
	)
Defendant.	**)**

NOW COMES the Defendant, ***John Doe,*** by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and ***Powers v. Ohio***, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d. 411 (1991), to adopt a procedure in the trial of these matters which ensures that the race of every potential juror be examined to perfect any future appellate record. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged with three counts of Obtaining Property by False Pretenses.

2. These matters are scheduled for trial beginning on DATE.

3. In order to have the record accurately reflect the proceedings in the trial of this matter, and in order to perfect any future appellate record in this case, it is absolutely essential that the race of every potential juror be noted for the record. A record of the race of every juror is necessary to preserve the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, Article I, §§ 19, 24 and 27 of the North Carolina Constitution, ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and ***Powers v. Ohio***, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d. 411 (1991).

4. The North Carolina Supreme Court has held that a record must be made of the race of all potential jurors in order for appellate courts to properly review any ***Batson*** claims. *See* ***State v. Mitchell***, 321 N.C. 650 (1988) and ***State v. Brogden***, 329 N.C. 534 (1991).

5. Statements from defense counsel as to the race of the jurors is not sufficient and the North Carolina Supreme Court has expressly disapproved of the practice of having the court reporter attempt to record the race of every juror. ***Brogden***. The most reliable source concerning the race of any juror is the juror himself/herself.

6. In order to properly record the race of potential jurors, the Defendant would propose the following statement and inquiry to prospective jurors:

   Ladies and Gentlemen, as part of the Court's preliminary questions to you, in addition to asking to state your name and where you reside, the Court will ask you to provide us with the race and/or ethnic background with which you identify yourself. We do this for statistical purposes and, because the record of the jury selection proceedings is in written form only, without having you identify your race and/or ethnic background there will no record of that to which we can refer later if need be.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That every potential juror be asked to identify his/her race/ethnic background. In order to provide an accurate record, this procedure must include every juror, including those excused for hardship by the court, for cause at the request of either party, by use of peremptory by either party and those jurors who actually are selected to serve;

2. The defendant requests that jurors race be asked his or her race as part the court's preliminary inquiry of the potential jurors at the beginning of jury selection; and

3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Court to Note Race of All Potential Jurors Examined for Selection*** was this day served upon the prosecution by the following method:

__X__ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

_____
Special Deputy Attorney General
NC Departement of Justice – Special Prosecutions Section
P.O. Box 629
Raleigh, NC 27602

_____ by personally serving the Office of the Attorney General via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Special Deputy Attorney General; and/or

_____ by depositing a copy in the box for the Office of the Attorney General maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: _____
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone: _____
Facsimile: (919) 720-4640
Email: _____

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF _____	**__ CRS _____**

STATE OF NORTH CAROLINA,	**)**	
	)	
vs.	**)**	**MOTION FOR JOINDER OF**
	)	**ALL OFFENSES FOR TRIAL WITH**
JOHN DOE,	**)**	**CHARGE OF 1ST DEGREE MURDER**
	)	**()**
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe***, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Assistant Capital Defender, and Barry T. Winston, Attorney at Law, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-926, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I §§ 19 and 23 of the Constitution of the State of North Carolina, to issue an Order that all of the above-referenced charges pending against the Defendant be joined for trial. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

PROCEDURAL BACKGROUND

1. John Doe is an indigent defendant charged with first-degree murder in __ CRS _____. The Court has held a Rule 24 conference concerning the charge of first-degree murder and the at said hearing the State announced its intention to seek the death penalty against Mr. Allen.

2. John Doe is also charged with the following offenses:

   a.

   b.

   c.

   d.

   e.

   f.

   g.

h.

i.

j.

3. Both undersigned counsel are appointed to represent Mr. Doe in the charge of first-degree murder, robbery with a dangerous weapon (__ CRS ____), attempted murder (CRS), attempted robbery with a dangerous weapon (CRS), and felony possession of cocaine (CRS).

4. Undersigned counsel, Maitri "Mike" Klinkosum is appointed to represent Mr. Doe in the six charges of robbery with a dangerous weapon numbered CRS through .

5. All of the charges pending against the Defendant arise out of a series of alleged acts and occurrences which began on DATE and which, according to the State's rendition of the facts, culminated on DATE with the alleged murder of Jane Doe.

6. The charge of first degree murder () and the charges of robbery with a dangerous weapon (), attempted murder (), attempted robbery with a dangerous weapon (), and felony possession of cocaine () are scheduled for trial beginning on DATE.

7. The charges of robbery with a dangerous weapon () are scheduled to be tried beginning on DATE.

8. On DATE, at a motions hearing in the charges of robbery with a dangerous weapon (), the State moved the Court to join the charges of robbery with a dangerous weapon ()
for trial on DATE.

9. The Defendant had previously filed a Motion for Severance of Offenses related to the charges of robbery with a dangerous weapon ().

10. The Court, upon motion of the prosecution, and after a summation of the facts in the charges of robbery with a dangerous weapon (), and over objection of the Defendant, joined all of the charges of robbery with a dangerous weapon () for trial beginning on DATE.

11. After the ruling of the Court in joining the charges of robbery with a dangerous weapon () for trial, all of those charges are scheduled to be tried on DATE, while the remaining charges of first degree murder () and the charges of robbery with a dangerous weapon (), attempted murder (), attempted robbery with a dangerous weapon (), and felony possession of cocaine () are scheduled for trial beginning on DATE.

FACTUAL BACKGROUND

12. In the cases of robbery with a dangerous weapon (), which have been joined for trial, the Defendant, along with co-defendants, is accused of having committed the offenses on six separate occasions. Specifically, the State has alleged that the six offenses were committed on the following dates and against the following individuals:

a.

b.

c.

d.

e.

f.

13. In the remaining cases which have not been joined for trial the State is alleging that the Defendant, along with the same co-defendants in __ CRS ____, committed those offenses, including the alleged murder of Jane Doe, during the early morning hours of DATE.

14. At the DATE hearing concerning the State's Motion for Joinder of__ through ___, the State of indicated that they were closely related in time to the remaining charges which have not been joined for trial.

15. The State further asserted that the joined charges (through) involved the Defendant and the same co-defendants. The co-defendants in through , Marvin Doe and Craig Doe, are the same co-defendants who have been charged with first-degree murder and the related offenses alleged to have occurred on DATE,

16. Further, on DATE, the State alleged that co-defendant, Marvin Doe, would be testifying against the Defendant as to all of the charges of robbery with a dangerous weapon in through , and that the same co-defendant made a statement incriminating the Defendant in all of the un-joined charges, including the charge of first-degree murder.

17. Further, on DATE, the State alleged that the Defendant confessed to some of the charges of robbery with a dangerous weapon in through CRS , and that the Defendant confessed to the un-joined charges as well, including the charge of first-degree murder.

18. Finally, the State asserted that the course of conduct and the modus operandi in the charges of robbery with a dangerous weapon () were the same or similar as the course of conduct and modus operandi in the un-joined charges and that the conduct which began on DATE and ended with the death of Jane Doe on DATE were part of a series of acts or transactions connected together and/or constituting parts of a single scheme or plan.

19. The Court, upon motion of the State and over objection of the Defendant, found that the facts as alleged in the charges of robbery with a dangerous weapon () indicated that there was a common conspiracy between the Defendant and the co-defendants, that the matters were close in time and related under the circumstances, that the Defendant confessed to some of the charges, that the Defendant would not be prejudiced in the trial of _____ through _____ because of the alleged confession of the Defendant and the testifying co-defendant(s).

20. The Court further found that there was a common scheme, plan, and a temporal connection between the charges in _____ through _____.

JOINDER OF ALL CHARGES IS REQUIRED

21. Pursuant to N.C.Gen.Stat. § 15A-926, the findings of the Court in ordering the joining of offenses in _____ through _____, and because of the underlying facts concerning all of the offenses alleged against the

Defendant, all of the offenses are related in time, place, and occasion and must be joined for trial.

22. Specifically, 15A-926(c)(1) states in part as follows:

> When a defendant has been charged with two or more offenses joinable under subsection (a) his timely motion to join them for trial ***must be granted*** unless the court determines that because the prosecutor does not have sufficient evidence to warrant trying some of the offenses at that time or if, for some other reason, the ends of justice would be defeated if the motion were granted. (Emphasis added)

23. Based upon the factual summary of the State on DATE, which asserted, among other things, that all of the acts which culminated in the death of Jane Doe on DATE were part of a series of acts and transactions connected together and/or constituting a single scheme or plan, all of the charges against the Defendant, including the charges joined together () should all be joined for trial with the pending charge of first-degree murder in .

24. Based upon the allegations of the State on DATE, that the acts alleged to have been committed by the Defendant and the co-defendant occurred during the month of DATE, involved similar facts (including the robberies and attempted robberies of multiple victims during early morning hours, the use of firearms to commit such robberies, the use of disguises in the course of such robberies, the alleged confession of the Defendant most of the charges pending against him, the statements and anticipated testimony of co-defendants), and involved similar modus operandi, all of the charges pending against the defendant must be joined for trial with the pending charge of first-degree murder in DATE.

25. Based upon the findings of the Court in joining the charges in ___ through ___ for trial and based upon the fact that those same findings relate to the un-joined charges, all of the charges pending against the defendant must be joined for trial with the pending charge of first-degree murder in _____.

WHEREFORE, the Defendant respectfully prays unto this Court for the following relief:

1. That the Court enter an order joining all of the charges pending against the Defendant () for trial on the **D**ATE.

2. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the DATE.

By:_____
Maitri "Mike" Klinkosum
Assistant Capital Defender
123 W. Main St., Suite 401
Durham, NC 27701
Telephone:
Facsimile: (919) 560-6900
Email:

By:_____
Barry T. Winston, by Maitri "Mike" Klinkosum
Attorney at Law
312 W. Franklin St.
Chapel Hill, NC 27514
Telephone:
Facsimile: (919) 929-4953
Email:

Certificate of Service

This shall certify that a copy of the foregoing **Motion for Joinder of All Offenses for Trial with Charge of 1st Degree Murder ()** was this day served upon the District Attorney for the th Judicial District, via Hand Delivery, at the address set forth below:

_____
Office of the District Attorney for the __th Judicial
District ____ County Courthouse
_____, NC

This the DATE.

By:_____
Maitri "Mike" Klinkosum
Assistant Capital Defender
123 W. Main St., Suite 401
Durham, NC 27701
Telephone:
Facsimile: (919) 560-6900
Email:

STATE OF NORTH CAROLINA | **IN THE GENERAL COURT OF JUSTICE**
SUPERIOR COURT DIVISION

COUNTY OF | **CRS _____**

STATE OF NORTH CAROLINA,	**)**	
	)	
vs.	**)**	**NOTICE OF INTENT TO**
	)	**INTRODUCE EXPERT TESTIMONY**
JANE DOE,	**)**	
	)	
Defendant.	**)**	

NOW COMES, the Defendant, ***Jane Doe***, by and through her undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, pursuant to N.C.Gen.Stat. § 15A-905(c)(2), and hereby gives notice of intent to introduce expert testimony in the following fields with the listed experts:

1. Forensic Psychiatry and Psychiatry, via Dr. _____, M.D.

Copies of the curriculum vitae of the aforementioned expert have been provided to the prosecution by prior counsel. Undersigned counsel will provide a current curriculum vitae prior to the trial of these matters.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
P.O. Box 1029
Raleigh, NC 27602
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Intent to Introduce Expert Testimony*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

_____ by personally serving the Office of the District Attorney via hand delivery;

__X__ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____
Maitri "Mike" Klinkosum
Attorney at Law
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
P.O. Box 1029
Raleigh, NC 27602
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA		**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF		**CRS _____**
STATE OF NORTH CAROLINA,	)	
	)	**NOTICE OF INTENT TO USE**
vs.	)	**EVIDENCE OF PRIOR**
	)	**CONVICTIONS MORE**
JOHN DOE,	)	**THAN 10 YEARS OLD**
	)	
Defendant.	)	

NOW COMES the Defendant, ***John Doe***, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, N.C.G.S. § 8C-1, Rule 609(b) of the North Carolina Rules of Evidence, and hereby gives notice to the prosecution of the Defendant's intent to utilize evidence of prior convictions of the State's cooperating witness, ***Sarah Snitch***, during the cross examination of said witness. Specifically, the Defendant intends to use evidence of the following prior convictions:

1. Breaking & Entering & Larceny, County, conviction date: DATE;

2. Armed Robbery, County, conviction date: ;

3. 2nd Degree Kidnapping, County, conviction date: ;

4. Robbery with a Dangerous Weapon, offense date: , County, conviction date: ;

5.

6.

7.

8.

9.

10.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Intent to Use Evidence of Prior Convictions More Than 10 Years Old*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney***);

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney (); and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA		**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF		**CRS _____**
STATE OF NORTH CAROLINA,	**)**	
	)	**NOTICE OF INTENT TO USE**
vs.	**)**	**EVIDENCE OF PRIOR**
	)	**CONVICTIONS MORE**
JOHN DOE,	**)**	**THAN 10 YEARS OLD**
	)	
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe*** by and through his undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, N.C.G.S. § 8C-1, Rule 609(b) of the North Carolina Rules of Evidence, and hereby gives notice to the prosecution of the Defendant's intent to utilize evidence of prior convictions of the State's cooperating witness, ***Lying Bastard***, during the cross examination of said witness. Specifically, the Defendant intends to use evidence of the following prior convictions:

1. Assault on Govt. Official, County, conviction date: DATE;

2. ;

3. ;

4. ;

5. ;

6. ;

7. ;

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Intent to Use Evidence of Prior Convictions More Than 10 Years Old*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney*** _____);

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney (); and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF	**CRS _____**

STATE OF NORTH CAROLINA	**)**	
	)	**NOTICE OF INTENT TO ADMIT**
vs.	**)**	**STATEMENT OF MEDICAL STAFF**
	)	**PURSUANT TO N.C. GEN. STAT. §**
JANE DOE,	**)**	**8C-1, RULES 803(24) & 804(b)(5)**
	)	
Defendant.	**)**	

NOW COMES the Defendant, ***Jane Doe,*** by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the North Carolina Constitution, and N.C. Gen. Stat. § 8C-1, Rules 803(24) and 804(b)(5), and hereby gives notice to the State that the defense intends to introduce statements provided by the medical staff at Southeastern Regional Medical Center to Investigating Officer ____, of the _____ Police Department, which has been provided to the defense in discovery. In support of this Notice, the defense would assert as follows:

1. Jane Doe is charged with two counts of second-degree murder, one count of assault with a deadly weapon inflicting serious injury, and one count of reckless driving to endanger.

2. The trial of these matters is scheduled to commence on DATE.

3. These matters arise from a motor vehicle accident which occurred on DATE in ____, North Carolina. It is uncontroverted that Ms. Doe was the driver of the vehicle in question and that said vehicle was involved in a traffic accident whereupon two individuals were killed and a third was critically injured.

4. Upon information and belief, the State may seek to introduce evidence of the fact that Ms. Doe's blood was tested at Southeastern Regional Medical Center, after she was admitted to that facility following the aforementioned accident.

5. Upon information and belief, the toxicological testing on Ms. Doe's blood at Southeastern Regional Medical Center revealed that Ms. Doe's blood did not contain any alcohol.

6. Upon information and belief, the aforementioned testing of Ms. Doe's blood by Southeastern Regional Medical Center did reveal the presence of opiates in Ms. Doe's blood.

7. However, in his reports regarding his investigation of the motor vehicle accident, Detective ____ indicated that he inquired "the medical staff" at the "ER" regarding the toxicology screen on Ms. Doe's blood and that "**[i]t was explained to [the officer] however, that Doe was administered medication prior to her screening and this may have produced the reading for the opiates.**"

8. Further in his report, Detective ____ states that "[He] learned that through hospital staff that Doe's toxicology report of her blood revealed that she did in fact have opiates that exceeded the screening cut-off limits for this screening but as mentioned previously, she was administered medication prior to her blood being drawn for toxicology screening."

9. Upon information and belief, neither law enforcement, nor the prosecution, has been able to determine that the opiates present in Ms. Doe's blood was present for any reason other than lawfully administered pain medication, which she received during medical treatment for the motor vehicle accident in question.

10. Nowhere in the reports of Detective _____ can the defense find the identity of the "medical staff" who told Detective _____ that the opiates in Ms. Doe's blood was the result of the pain medication she was administered at Southeastern Regional Medical Center.

11. Because the aforementioned "medical staff" is unidentified, that person or persons is/are "unavailable" as that term is defined under N.C. Gen. Stat. § 8C-1, Rule 804(a)(5).

12. Because the aforementioned "medical staff" is unidentified, that person's or persons' statement to Detective _____, regarding the opiates in Ms. Doe's system, falls within the parameters of N.C. Gen. Stat. § 8C-1, Rule 804(a)(5).

13. Additionally, because the aforementioned "medical staff" is unidentified, that person's or persons' statement to Detective ____, regarding the opiates in Ms. Doe's system, falls within the parameters of N.C. Gen. Stat. § 8C-1, Rule 803(24).

14. Because the "medical staff" is unidentified, should the prosecution attempt to place in evidence the reports indicating that Ms. Doe's blood tested positive for the presence of opiates, the defense will seek to have the statements contained within Detective ____'s reports, as well as his hand written notes, admitted into evidence to rebut any claim that Ms. Doe had opiates in her system at the time of the motor vehicle accident in question in these matters.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Intent to Admit Statement of Medical Staff Pursuant to N.C. Gen. Stat. § 8C-1, Rules 803(24) & 804(b)(5)*** was this day served upon the District Attorney by the following method:

__X__ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

_____ by personally serving the Office of the District Attorney via hand delivery;

__X__ by transmitting a copy via facsimile transmittal to the Office of the District Attorney (Assistant District Attorney _____); and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF _____	**__ CRS _____**

STATE OF NORTH CAROLINA,	**)**	
	)	
vs.	**)**	
	)	**NOTICE OF DEFENSES**
JOHN DOE,	**)**	
	)	
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe***, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and Jonathan E. Broun, Attorney at Law, pursuant to N.C.Gen.Stat. § 15A-905(c)(1) and hereby serves notice that the Defendant may assert the following defenses in the trial of the above-referenced matters: insanity, mental infirmity, diminished capacity, automatism, voluntary intoxication. This notice is filed and served upon the District Attorney for the —th Judicial District pursuant to N.C.Gen.Stat. § 15A-905(c)(1). The Defendant will provide the State with the required reciprocal discovery and specific information as to the nature and extent of the defenses once that documentation and evidence becomes available to the defense.

This the DATE.

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

By:_____
Jonathan E. Broun
Attorney for the Defendant
State Bar No.:
Center for Death Penalty Litigation
201 W. Main Street, Suite 301
Durham, NC 27701
Telephone: Facsimile: (919) 956-9547 Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Notice of Defenses*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF _____	**__ CRS _____**

STATE OF NORTH CAROLINA,	**)**	
	)	
vs.	**)**	**OBJECTION TO JOINDER**
	)	**& MOTION FOR**
JOHN DOE,	**)**	**SEVERANCE OF DEFENDANTS**
	)	
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe***, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Assistant Capital Defender, and hereby opposes the joinder of the co-defendants in the above-referenced matters and further moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-927, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I §§ 19 and 23 of the Constitution of the State of North Carolina, to issue an Order that the co-defendants in the above-referenced matters be severed for purposes of a fair trial upon all charges against the Defendant.

The Defendant hereby moves that the cases of the co-defendants, identified as Craig Doe and Marvin Doe, charged with the same offenses as those against the Defendant in the charge of Attempted Robbery with a Dangerous Weapon in , the charges of Robbery with a Dangerous Weapon in , and the charge of Attempted Murder in , be severed and tried separately from the Defendant. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. Severance is necessary to promote a fair determination of the defendant's guilt or innocence in each offense.

2. Craig Doe and Marvin Doe are, upon information and belief, charged with the same offenses as the Defendant arising out of the same transactions.

3. Upon information and belief, Craig Doe and Marvin Doe are charged with accountability for the same offenses as the Defendant, and that the offenses charged are part of a common scheme or plan, are part of the same act or transaction, and are so closely connected in time, place, and occasion, that it would be difficult to separate one charge from proof and of the others.

4. The undersigned counsel is informed and believes, and therefore alleges, that the State of North Carolina intends to offer into evidence out-of-court statements of both Craig Doe and Marvin Doe, which make reference to the Defendant but that are not admissible against the Defendant. Furthermore, it is impossible to delete all references to the Defendant so that the statement would not prejudice the Defendant.

5. In view of the number of offenses charged and the complexity of the evidence to be offered, the jury will not be able to distinguish between the evidence against the co-defendants and the Defendant, nor will the jury be able to apply the law intelligently to each offense as related to both co-defendants and the Defendant, if all the Defendants are tried together in front of the same jury.

6. To try the Defendant and Craig Doe and Marvin Doe jointly is a denial of the Defendant's right to Due Process under both the Constitution of the United States and the Constitution of North Carolina and, additionally, a violation of N.C.Gen.Stat. § 15A-927. There is a substantial likelihood that the Defendant could be convicted through association with the two co-defendants.

WHEREFORE, the Defendant prays for an order denying any motions for joinder of the defendants for trial by the State and granting the Defendant's motion for severance of defendants. It is requested that the Defendant be granted a hearing on said motion prior to the trial of these matters.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Assistant Capital Defender
123 W. Main St., Suite 401
Durham, NC 27701
Telephone:
Facsimile: (919) 560-6900
Email:

Certificate of Service

This shall certify that a copy of the foregoing **Objection to Joinder and Motion for Severance of Defendants** was this day served upon the District Attorney for the __th Judicial District, via Hand Delivery, at the address set forth below:

Jeff Cruden-Assistant District Attorney
Office of the District Attorney for the __th Judicial District
____ County Courthouse
_____, NC

This the DATE.

By:_____
Maitri "Mike" Klinkosum
Assistant Capital Defender
123 W. Main St., Suite 401
Durham, NC 27701
Telephone:
Facsimile: (919) 560-6900
Email:

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF ___	**CRS _____**

STATE OF NORTH CAROLINA,	**)**	
	)	
vs.	**)**	**OBJECTION TO JOINDER**
	)	**& MOTION FOR**
JOHN DOE,	**)**	**SEVERANCE OF OFFENSES**
	)	
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe***, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby opposes joinder of the offenses in the above-referenced matters and further moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-927, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article 1 §§ 19 and 23 of the Constitution of the State of North Carolina, to issue an Order that the offenses in the above-referenced matters be severed for purposes of a fair trial upon all charges against the Defendant. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged in the bills of indictment with one count each of Possession of a Firearm by a Felon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, Assault Inflicting Serious Bodily Injury, and Robbery with a Dangerous Weapon..

2. The Defendant is accused of having all of the offenses on DATE and, upon information and belief, the charges are alleged to arise out of the same act or transaction.

3. Pursuant to N.C.Gen.Stat. § 15A-927(b)(1), if, before trial, it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense, the court must grant a severance of offenses.

4. In these matters, severance of the offenses is "necessary to promote a fair determination of the defendant's guilt or innocence of each offense." See N.C.Gen.Stat. § 15A-827(b)(1).

5. If the offenses with which the Defendant is charged were tried jointly, the jury impaneled to hear the case would necessarily hear that the Defendant is charged with "Possession of a Firearm by a Convicted Felon." This would mean that in a trial involving the charges of Robbery with a

Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury, the jury would hear, via the "possession of a firearm" charge, that the Defendant has a criminal history.

6. Were the charges to be tried separately, the Defendant's criminal history would not be admissible at the trial of the Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury charges, unless and until the Defendant took the stand and subjected himself to cross-examination.

7. If the charges are tried jointly, the jury deciding all charges would, upon being advised that the Defendant is charged with Possession of a Firearm by a Felon, would then be apprised of the Defendant's criminal history and would, therefore, be more likely to convict the Defendant of all charges, based upon being informed of the Defendant's criminal history. For this reason, subjecting the Defendant to a joint trial of all offenses would prejudice the Defendant in defending against the charges of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury.

8. A combined trial of all offenses would, in relation to the charges of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury, result in otherwise inadmissible evidence (the Defendant's prior criminal record) being received into evidence.

9. In order to ensure a fair trial, free from the prejudice caused by the admission of potentially inadmissible evidence, the charges of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury, should be severed from the charge of Possession of a Firearm by a Convicted Felon and separate trials should be conducted on said charges.

10. In the alternative, and in the interest of judicial economy, the Defendant would assert and request that, in lieu of two separate trials on the charges, the Court should, instead, bifurcate the trials of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury, from the trial of Possession of a Firearm by a Felon, such that the Possession of a Firearm by Felon charge be tried second, assuming the Defendant is convicted of the other charges.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the charges of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury in and Possession of a Firearm by a Convicted Felon in be severed and tried separately;

2. In the alternative, and in the interest of judicial economy, the Defendant would assert and request that, in lieu of two separate trials on the charges, the Court should, instead, bifurcate the trials of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and Assault Inflicting Serious Bodily Injury, from the trial of Possession of a Firearm by a Felon, such that the Possession of a Firearm by Felon charge be tried second, assuming the Defendant is convicted of the other charges; and

3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Objection to Joinder and Motion for Severance of Offenses*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney***);

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF	**__ CRS _____**

STATE OF NORTH CAROLINA,	)	
	)	
vs.	)	**MOTION FOR SEVERANCE OF OFFENSES**
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

NOW COMES the Defendant, ***John Doe***, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Assistant Capital Defender, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-927, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I §§ 19 and 23 of the Constitution of the State of North Carolina, to issue an Order that the offenses against the Defendant be severed for purposes of a fair trial upon all charges.

The Defendant hereby moves that the charge of Attempted Robbery with a Dangerous Weapon in , the charges of Robbery with a Dangerous Weapon in and , the charge of Possession of Cocaine in , and the charge of Attempted Murder in , all be tried separately from one another. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. Severance is necessary to promote a fair determination of the defendant's guilt or innocence in each offense.

2. The offenses are not properly joinable under N.C. Gen. Stat. § 15A-926 in that the offenses are not based upon the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

3. In view of the number of offenses charged and the complexity of the evidence to be offered, the jury will not be able to distinguish the evidence and apply the law intelligently to each offense, if these indictments are tried together in front of the same jury.

4. Based upon the fact that the charges of Attempted Robbery with a Dangerous Weapon, Robbery with a Dangerous Weapon, Attempted Murder, and Possession of Cocaine, are alleged to have occurred on a different date and time from the other aforementioned charges and are not

part of the same acts or transactions, trying the Defendant for all of the charges at the same time would be unduly prejudicial to the Defendant, would prejudice the jury against the Defendant, and would result in a breach of the Defendant's right to a fair trial.

WHEREFORE, the Defendant prays for an order severing the offenses. It is requested that the Defendant be granted a hearing on said motion prior to the trial of these matters.

This DATE.

By:_____
Maitri "Mike" Klinkosum
Assistant Capital Defender
123 W. Main St., Suite 401
Durham, NC 27701
Telephone:
Facsimile: (919) 560-6900
Email:

Certificate of Service

This shall certify that a copy of the foregoing **Motion for Severance of Offenses** was this day served upon the District Attorney for the __th Judicial District, via Hand Delivery, at the address set forth below:

_____-Assistant District Attorney
Office of the District Attorney for the __th Judicial
District _____ County Courthouse
_____, NC

This the DATE.

By:_____
Maitri "Mike" Klinkosum
Assistant Capital Defender
123 W. Main St., Suite 401
Durham, NC 27701
Telephone:
Facsimile: (919) 560-6900
Email:

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF	**CRS _____**

STATE OF NORTH CAROLINA,	**)**	
	)	**MOTION FOR PRODUCTION**
vs.	**)**	**OF TRANSCRIPTS OF**
	)	**ALL WITNESS TESTIMONY**
JOHN DOE,	**)**	**FROM FIRST TRIAL OF**
	)	**STATE vs. JOHN DOE**
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe***, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1 §§ 19 and 23 of the North Carolina Constitution, and for an Order from this Court ordering the production of transcripts of any and all witness testimony from the first trial of this matter. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. John Doe is charged with one count of first-degree murder and robbery with a dangerous weapon. As such, he faces the possibility of life in prison without parole.

2. The trial of this matter commenced before a jury in _____ County Superior Court beginning on DATE. The presentation of the prosecution's case began on DATE.

3. On DATE, due to the introduction of certain evidence, upon the motion of the defendant, a mistrial was declared by the presiding judge, The Honorable _____.

4. The prosecution has elected to re-try Mr. Doe and, upon information and belief, has requested a special session of Criminal Superior Court for _____ County to begin on DATE.

5. Both the prosecution and the defense have agreed upon the date of DATE as a date upon which the re-trial of these matters will commence.

6. During the trial of these matters, and prior to the ordering of a mistrial, the prosecution presented several prosecution witnesses and elicited testimony from said witnesses.

7. In order for Mr. Doe's counsel to effectively represent Mr. Doe at the re-trial of these matters, counsel requires working access to an accurate and written copy of the testimony of all prosecution witnesses who testified in the first trial.

8. In order for Mr. Doe to be afforded his rights to confrontation, cross-examination, and effective assistance of counsel, counsel requires working access to an accurate and written copy of the testimony of all prosecution witnesses who testified in the first trial.

9. On DATE, the Court found Mr. Doe to be indigent for the purposes of obtaining second counsel[1] and for the purpose of obtaining expert assistance and other tools for an adequate defense.

10. In *Griffin v. Illinois*,[2] the U.S. Supreme Court held that the State is constitutionally required to provide indigent prisoners with the tools for an adequate defense or appeal when those tools are available to other prisoners who can pay for the costs.

11. In *State v. Britt*,[3] the U.S. Supreme Court held that:

> **[w]hile the outer limits of [the Griffin v. Illinois] principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal**.

12. Written transcripts of the witnesses' testimony during the first trial will be invaluable to undersigned counsel's preparation for the re-trial of these matters, as well as cross-examination of said witnesses should said witnesses be called to testify at the second trial of these matters.

13. Mr. Doe does not have access to any other means, formal or informal, of obtaining an accurate record of the testimony offered during the first trial of these matters.

14. Accordingly, Mr. Doe is entitled to receive written transcripts of the testimony of all witnesses from the first trial of this matter.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

---

[1] At the time the order determining Mr. Baker to be indigent was entered, the State had announced its intention to seek the death penalty. The State declared the case non-capital on May, 2012.
[2] 351 U.S. 958, 76 S.Ct. 585 (1956)
[3] 92 S.Ct. 431. 404 U.S. 226, 30 L.Ed.2d 400 (1971)

1. That the Court enter an Order requiring the production of transcripts of all witness testimony from the first trial of these matters, which occurred during the DATE term of Criminal Superior Court for the County of ;

2. That, due to the Defendant's status as an indigent, the State of North Carolina (North Carolina Administrative Office of the Courts) bear the costs of the production of said transcripts; and

3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney for John Doe
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Motion for Production of Transcripts of All Witness Testimony From First Trial of Phillip Scott Baker*** was this day served upon the District Attorney by the following method:

__X__ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney as follows:

Mr. _____
Assistant District Attorney – 22nd Prosecutorial District
P.O. Box 1854
, NC

_____ by personally serving the Office of the District Attorney via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____
Maitri "Mike" Klinkosum
Attorney for John Doe
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF	**CRS _____**

STATE OF NORTH CAROLINA,	**)**	
	)	
vs.	**)**	**MOTION TO**
	)	**EXCLUDE INFLAMMATORY**
JOHN DOE,	**)**	**PHOTOGRAPHS**
	)	
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe***, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, pursuant to N.C.Gen.Stat. § 15A-1225, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. § 8C-1, Rules 401, 402 & 403, and ***State v. Hennis***, 323 N.C. 279, 372 S.E.2d. 523 (1988), to conduct a pre-trial hearing to review any photographs, slides, videos or models that the State intends to offer for evidentiary or illustrative purposes; and

THE DEFENDANT further moves this Honorable Court to prohibit the State from the use of more than one photograph of the alleged victim in the charge of first-degree murder. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. John Doe is charged with first-degree murder, and robbery with a dangerous weapon.

2. The trial of these matters is scheduled to commence on DATE,
.

3. The photographs of the alleged victim in this case, both at the scene of the crime and/or autopsy photographs, beyond one selected by the state, would be void of probative value and redundant to the illustrations provided by the selected photograph. Such photographs would be prejudicial to the defendant by depicting scenes, which are inflammatory.

WHEREFORE, the Defendant, based upon the foregoing, respectfully prays that conduct a pre-trial hearing to review any photographs, slides, videos or models that the State intends to offer for evidentiary or illustrative purposes and that the Court prohibit the State from the use of more than one photograph of the alleged victim in the charge of first-degree murder.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Motion To Exclude Inflammatory Photographs*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney; and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF _____	**__ CRS _____**

STATE OF NORTH CAROLINA,	**)**	
	)	**MOTION IN LIMINE TO RESTRICT**
vs.	**)**	**INTRODUCTION OF EVIDENCE**
	)	**OF DEFENDANT'S INVOCATION**
JOHN DOE,	**)**	**OF 5TH AND 6TH**
	)	**AMENDMENT RIGHTS**
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe***, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court pursuant the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, and N.C.Gen.Stat. § 8C-1, Rule 403 and requests that this Honorable Court issue an Order restricting the prosecution from admitting or introducing any evidence of the defendant's invocation of his 5th and 6th Amendment rights at the time of his arrest for the pending charges.

1. The Defendant is charged in the bills of indictment with one count each of 2nd Degree Rape and 2nd Degree Sexual Offense.

2. The alleged acts with which the Defendant is charged are alleged to have occurred on or about DATE.

3. Upon information and belief, the Defendant was arrested in DATE and, upon information and belief, at the time of his arrest, he invoked his right to remain silent and his right to counsel.

4. Additionally, prior to being arrested, when the Defendant was notified that an investigation against him was pending, he retained the services of an attorney.

5. Allowing the prosecution to admit or elicit any evidence or testimony regarding the Defendant's invocation of his Fifth and Sixth Amendment rights would violate the Defendant's constitutional rights and such evidence is not probative of any material fact and would severely prejudice the Defendant in the defense of the pending charges.

WHEREFORE, the defendant respectfully moves that the Court bar the prosecution from admitting or introducing any evidence of the Defendant's invocation of

his 5th and 6th Amendment rights.

This the DATE.

By:_____
Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Motion in Limine to Restrict Introduction of Evidence of Defendant's Invocation of 5th and 6th Amendment Rights*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney***);

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney (); and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA		**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF		**CRS _____**
STATE OF NORTH CAROLINA,	**)**	
	)	
vs.	**)**	**MOTION IN LIMINE TO**
	)	**RESTRICT EVIDENCE**
JOHN DOE,	**)**	**OF PRIOR CRIMES**
	)	**& BAD ACTS**
Defendant.	**)**	

NOW COMES the Defendant, ***John Doe***, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court pursuant to N.C.G.S. § 15A-952, the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, and N.C.Gen.Stat. § 8C-1, Rules 403 and 404(a) and requests that this Honorable Court issue an Order restricting the prosecution from admitting or introducing any evidence of the defendant's prior convictions unless and until the defendant chooses to testify in his own defense and restricting the prosecution from introducing any evidence of prior bad acts. In support of this Motion, the Defendant would show unto the Court as follows:

1. The Defendant is charged in the bills of indictment with one count each of Possession of a Firearm by a Felon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, Assault Inflicting Serious Bodily Injury, and Robbery with a Dangerous Weapon.

2. Upon information and belief, the Defendant may have prior convictions for criminal offenses.

3. Upon information and belief, the prosecution will attempt to rely on the Defendant's prior convictions and/or alleged prior bad acts to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, absence of entrapment, absence of accident, or other purpose consistent with statutory and case law under the above-cited rules.

4. The probative value of said evidence, as to any of the present charges is minimal and would be outweighed by the undue prejudice to the Defendant should such evidence be introduced at trial.

5. In addition, there is little similarity and/or temporal proximity of the prior act evidence to the crimes with which the Defendant is currently charged.

6. Specifically, the prosecution should be barred from introducing any evidence of prior convictions, unless and until the Defendant takes the stand as a witness.

WHEREFORE, the defendant respectfully moves that the court restrict the prosecution from admitting or introducing any evidence of the defendant's prior convictions, as named above, or any detail of said convictions, unless the defendant chooses to testify in his own defense and from introducing any evidence of alleged prior bad acts on the part of the Defendant.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Motion in Limine to Restrict Evidence of Prior Crimes and Bad Acts*** was this day served upon the District Attorney by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, properly addressed to Office of the District Attorney;

__X__ by personally serving the Office of the District Attorney via hand delivery (***Assistant District Attorney*** _____);

_____ by transmitting a copy via facsimile transmittal to the Office of the District Attorney (); and/or

_____ by depositing a copy in the box for the Office of the District Attorney maintained by the Clerk of Superior Court.

This the DATE.

By:_____

Maitri "Mike" Klinkosum
Attorney at Law
Attorney for the Defendant
State Bar No.:
Cheshire, Parker, Schneider, & Bryan, PLLC
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone:
Facsimile: (919) 832-0739
Email:

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
COUNTY OF	**CRS _____**
STATE OF NORTH CAROLINA,	)
	) **MOTION IN LIMINE TO RESTRICT**
vs.	) **INTRODUCTION OF EVIDENCE**
	) **OF DEFENDANT'S INTERACTIONS/**
JOHN DOE,	) **NEGOTIATIONS/PENALTIES &**
	) **SANCTIONS RELATED TO THE**
Defendant.	) **INTERNAL REVENUE SERVICE**

NOW COMES the Defendant, ***John Doe***, by and through his undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court pursuant the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1 §§ 19 and 23 of the North Carolina Constitution, and N.C.Gen.Stat. § 8C-1, Rules 403 and 404(a) and requests that this Honorable Court issue an Order restricting the prosecution from admitting or introducing any evidence of the defendant's prior charge of assault.

1. John Doe is charged with three counts of Obtaining Property by False Pretenses. The North Carolina Department of Justice and the North Carolina Department of Revenue alleged that the Defendant committed the crimes by knowingly filing fraudulent North Carolina Individual Income Tax Returns with the North Carolina Department of Revenue for the years _____.

2. The trial of these matters is scheduled to commence on DATE.

3. The Defendant maintains that he did not knowingly file fraudulent income tax returns and that he did not intend to cheat and defraud the NC Department of Revenue or any other tax collection agency.

4. Upon information and belief, the Defendant's problems with his individual income tax returns for _____, triggered a review by the Internal Revenue Service (hereinafter referred to as the IRS).

5. Upon information and belief, although the IRS has not sought criminal charges against the Defendant, after the Defendant hired a Certified Public Accountant to amend his tax returns, and after said tax returns were amended in _____, the IRS levied fines, penalties, and liens against the Defendant.

6. The indictments against the Defendant only allege crimes against the

North Carolina Department of Revenue. No allegations are made regarding any crimes or wrongdoing against the IRS or the federal government.

7. As such, any mention to the jury of the Defendant's interaction and involvement with the IRS regarding tax years _____, and any problems arising therefrom will be more prejudicial than probative, will severely prejudice the Defendant in the trial of these matters, and will have no bearing or relevance on any legal or factual issue at the trial of the matters before this Court.

WHEREFORE, the defendant respectfully moves that the Court bar the prosecution from admitting or introducing any evidence of the Defendant's interaction/negotiations/penalties and/or sanctions with or from the Internal Revenue Service.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.:
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone:
Facsimile: (919) 720-4640
Email:

Certificate of Service

This shall certify that a copy of the foregoing ***Motion in Limine to Restrict Introduction of Evidence of Defendant's Interactions/Negotiations/Penalties & Sanctions Related to the Internal Revenue Service*** was this day served upon the prosecution by the following method:

_____ depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care, custody, and control of the United States Postal Service, addressed to the following:

__X__ by personally serving the Office of the Attorney General (***Special Deputy Attorney General*** _____) via hand delivery;

_____ by transmitting a copy via facsimile transmittal to the Special Deputy Attorney General; and/or

_____ by depositing a copy in the box for the Office of the Attorney General maintained by the Clerk of Superior Court.

This the DATE.

TIN FULTON WALKER & OWEN, PLLC

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.:
Tin Fulton Walker & Owen, P.L.L.C.
127 W. Hargett St., Suite 705
Raleigh, NC 27601
Telephone:
Facsimile: (919) 720-4640
Email:

DEVELOPING AN INVESTIGATIVE AND DISCOVERY STRATEGY

Sample Motion for Sanctions

STATE OF NORTH CAROLINA

COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NOS. _____

STATE OF NORTH CAROLINA

v.

JOHN DOE,

Defendant.

MOTION TO DISMISS FOR DENIAL OF DEFENSE ACCESS TO EVIDENCE

NOW COMES the Defendant, by and through the undersigned counsel, who does hereby make this Motion to Dismiss the above case with prejudice as a discovery sanction for the State's failure to allow the Defendant to have reasonable access to physical evidence in the above case, pursuant to N.C. Gen. Stat. § 15A-910. In support of the motion, the Defendant shows the following:

1. He is charged with various drug and related offenses in the above cases.

2. He received an _____, 2018, letter from the State advising that physical evidence was in possession of the Highway Patrol and could be examined by making an appointment with the Patrol.

3. The defense sent a fax to the Highway Patrol on May 21 asking to be able to examine the evidence. A copy of this fax and all other documents referenced in this motion is attached as Exhibit A.

4. The defense sent another fax to the Highway Patrol on May 25 and was advised that they would have to check with the District Attorney's Office.

5. The defense sent another fax to the Highway Patrol on June 4.

6. The District Attorney's office responded with an email on June 14 saying that the defense "would need to sign off on a stipulation" before being given access to the evidence. The proposed stipulation required the Defendant to waive chain of custody issues that could be raised at trial, saying that the Defendant must agree that "[t]here is no further contest or dispute regarding the chain of custody of evidence in this case being in the care, custody and control of the North Carolina Highway Patrol station in Greenville, North Carolina."

7. The defense responded on June 15 by refusing to sign the stipulation and offering instead a proposed Order addressing the State's concerns without causing the Defendant to waive his rights.

8. The matter remained unresolved until the Defendant brought the issue before the court and the court signed an Order granting the Defendant's motion for access to the evidence on July 12, 2010.

9. The defense faxed the Order to the Highway Patrol on July 30, with another request for an opportunity to examine the evidence. The fax was copied to the District Attorney's Office.

10. The District Attorney's Office sent an email to the defense on August 23 advising that they had contacted the Highway Patrol to advise that the defense needed access to the evidence and that a trooper "said that he would pass along the message." However, as

of the filing of this motion, the Highway Patrol has yet to respond to the July 30 request or the court's July 12 order.

11. The Defendant has now made four different requests over a span of three months and has not been given access to the evidence, despite having also obtained a court order directing the Highway Patrol to grant such access. At the very time that the SBI lab has come under increased scrutiny for fraud, the defense is being denied access to evidence tested by the SBI. Notwithstanding what were the apparent good intentions of the District Attorney's office, the defense has been denied reasonable access to the evidence in this case, in direct violation of the court's earlier order.

12. The Defendant asks the court to handle this discovery violation by "dismiss[ing] the charge with . . . prejudice" as authorized by N.C. Gen. Stat. § 15A-910(a)(3b). In the alternative, the Defendant asks the court to prohibit the State from admitting into evidence at trial any of the items that are in the custody of the Highway Patrol.

13. The Defendant also contends that this motion should be granted based upon the Defendant's federal and state constitutional right to due process of law as provided in the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, § 19, of the North Carolina Constitution.

WHEREFORE, the Defendant prays the court to grant this motion.

This the _____.

LAW OFFICES OF KEITH A. WILLIAMS, P.A.

By: _____

KEITH A. WILLIAMS
321 South Evans Street, Suite 103
P.O. Box 1965
Greenville, NC 27835
Telephone: 252 / 931-9362

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date shown below, he placed a copy of the foregoing document in the first class United States mail in an official depository under the exclusive care and custody of the United States Postal Service in a postpaid, properly addressed wrapper, sent to the following name and address:

This the _____

LAW OFFICES OF KEITH A. WILLIAMS, P.A.

By: _____

KEITH A. WILLIAMS
321 South Evans Street, Suite 103
P.O. Box 1965
Greenville, NC 27835
Telephone: 252 / 931-9362
Facsimile: 252 / 830-5155

Sample Motion for Production of Law Enforcement Recordings

STATE OF NORTH CAROLINA

File No.
17 CVS

PITT County

In The General Court Of Justice
Superior Court Division

IN THE MATTER OF
CUSTODIAL LAW ENFORCEMENT AGENCY
RECORDING SOUGHT BY:

Name Of Petitioner
JOHN DOE

Address
c/o Attorney Keith Williams, Personal Representative
321 South Evans Street
Suite 103

City, State, Zip
Greenville, NC 27835

Phone No. 252-931-9362

Fax No. 252-830-5155

Email Address
keith@williamslawonline.com

PETITION FOR RELEASE OF CUSTODIAL LAW ENFORCEMENT AGENCY RECORDING

☒ G.S. 132-1.4A(e1) – Person authorized to receive disclosure (No Filing Fee Applies)

☐ G.S. 132-1.4A(f) – General (CVS Filing Fee Applies)

I, the above-named petitioner, request the release of a custodial law enforcement agency recording to Attorney Keith Williams, state that at least some portion of the law enforcement agency recording was made in this county, and I further state the following:

Petitioner was charged as shown on the attached Exhibit A. I request a copy of any "recording" as defined by NCGS 132-1.4A(a)(6) showing the Petitioner or any portion of the alleged offense and/or the investigation of the alleged offense. This includes any video, audio, or visual and audio recording captured by a body-worn camera, a dashboard camera, or any other video or audio recording device operated by or on behalf of a law enforcement agency or law enforcement agency personnel when carrying out law enforcement responsibilities. This petition is filed by the undersigned as the personal representative for the petitioner (the petitioner's attorney of record, filed with petitioner's consent) under NCGS 132-1.4A(a)(5).

(Include date and approximate time of activity captured in the recording, or otherwise identify the activity with particularity sufficient to identity the recording at issue.)

CERTIFICATE OF SERVICE ON HEAD OF CUSTODIAL LAW ENFORCEMENT AGENCY

I certify that a filed copy of this Petition was served on the head of the custodial law enforcement agency as follows:

☐ Personal Delivery

☒ By Regular Mail, US postage prepaid, addressed as follows:

Chief of Police
East Carolina University Police Department
609 East Tenth Street
Greenville, NC 27858

Also via email to [campus attorney]

CERTIFICATE OF SERVICE ON DISTRICT ATTORNEY

I certify that a filed copy of this Petition was served on the District Attorney as follows *(only required for general release)*:

☐ Personal Delivery

☐ By Regular Mail, US postage prepaid, addressed as follows:

Not seeking general release; District Attorney not served.

Date	*Petitioner's Signature*

STATE OF NORTH CAROLINA

COUNTY OF PITT

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NO. 17 CVS _____

IN THE MATTER OF CUSTODIAL
LAW ENFORCEMENT RECORDING
SOUGHT BY PETITIONER

_____

NOTICE OF HEARING

NOW COMES the undersigned and does hereby file this Notice of Hearing in the above matter regarding the Petition for Release of Custodial Law Enforcement Agency Recording under North Carolina General Statute § 132-1.4A, on February 19, 2018, in Pitt County Superior Court at 10:00 a.m. or as soon thereafter as the matter can be heard.

This the _____ day of _____, 2018.

LAW OFFICES OF KEITH A. WILLIAMS, P.A.

By: _____

KEITH A. WILLIAMS
321 South Evans Street, Suite 103
P.O. Box 1965
Greenville, North Carolina 27835
Tel: 252 / 931-9362
Fax: 252 / 830-5155
N.C. State Bar Number 19333

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date shown below, he delivered a copy of the foregoing document to the following via first class United States mail:

Chief of Police
East Carolina University Police Department
609 East Tenth Street
Greenville, NC 27858

Also via email to [campus attorney email address]

This the _____ day of _____, 20_____.

LAW OFFICES OF KEITH A. WILLIAMS, P.A.

By: _____

KEITH A. WILLIAMS
321 South Evans Street, Suite 103
P.O. Box 1965
Greenville, North Carolina 27835
Tel: 252 / 931-9362
Fax: 252 / 830-5155
N.C. State Bar Number 19333

Sample Ritchie Motion

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF PITT	SUPERIOR COURT DIVISION
	FILE NO. _____
STATE OF NORTH CAROLINA	
v.	RITCHIE MOTION FOR PRODUCTION OF RECORDS
JOHN DOE,	
Defendant.	

NOW COMES the Defendant, by and through the undersigned counsel, and makes this motion for production of material that is or may be in the possession and control of third parties and that contains exculpatory or impeaching evidence for the Defendant's use at trial in the above case ("third party records").

This motion includes, but is not limited to, the following records concerning prosecuting witness JANE DOE: 1) the records of all health care providers who provided any type of health care to the prosecuting witness for injuries allegedly resulting from the incident occurring in the above case, and 2) the records of any domestic violence group providing counseling or guidance to the prosecuting witness since the alleged offense date, including but not limited to the Center for Family Violence Prevention, the REAL Crisis Center, or any other similar organization.

This motion is also made pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 19 and 23, of the North Carolina Constitution.

In support of the motion, the Defendant shows the following:

1. The Defendant contends said records and files are reasonably likely to contain material exculpatory and/or impeaching information which must be constitutionally provided to the Defendant as discovery materials pursuant to the Defendant's federal and state constitutional rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, § 19, of the North Carolina Constitution. *See Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987) (criminal defendant entitled to receive portions of state social service agency files that contain material information); *see also State v. Johnson,* 165 N.C. App. 854 (2004) ("[i]n the instant case, we have reviewed the DSS file sealed by the trial court in order to determine if information contained within the file is favorable and material to defendant's case. After reviewing the sealed documents, we conclude that there is favorable and material evidence in the file that should have been provided to defendant for review prior to trial").

2. The Defendant further contends he is entitled to production of said records and files so that he will have the ability to confront and cross-examine the witnesses against him. The Defendant contends that denial of this motion would violate his federal and state constitutional rights to confront and cross-examine the witnesses against her, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, § 23, of the North Carolina Constitution.

3. In the event the court finds that said records and files should not be produced directly to the Defendant, the Defendant requests that the court order that said materials be produced to the court for an *in camera* review, with the court providing the materials to the Defendant to which the court believes the Defendant is constitutionally entitled.

4. The Defendant requests that the court seal the remainder of the materials in the court's file for appellate review. *See Ritchie* at 58 (the defendant "is entitled to have the [social service agency] file reviewed by the trial court to determine whether it contains [material] information"); *see also State v. Thompson*, 139 N.C. App. 299, 307 (2000) (requiring *in camera* review of records where Defendant has "substantial basis" for inquiry). *See also State v. Webb*, 197 N.C. App. 619, 622 (2009) (regarding DSS records, "[t]he sealed records contain potentially exculpatory evidence; at the very least, they contain information that might cast doubt on the veracity of one or more State witnesses, including the victim and the victim's mother. The State is obligated by statute to turn over such evidence, and it was error for the trial court to seal the evidence without allowing defendant to inspect it *in camera")*

WHEREFORE, the Defendant moves the court:

1. To order production of the above-described records to the Defendant

2. Alternatively, the Defendant prays the court to compel the production of said materials to the court under seal and then to review *in camera* all of the materials, giving the Defendant information which, in the court's view, must be produced to the Defendant pursuant to her constitutional rights as listed above.

3. In the event the court conducts an *in camera* review and produces some, but not all, of the materials to the Defendant, the Defendant prays the court to seal for appellate review all such materials which are not provided to the Defendant.

This the _____ day of _____, 20____.

LAW OFFICES OF KEITH A. WILLIAMS, P.A.

By: _____

KEITH A. WILLIAMS
321 South Evans Street, Suite 103
P.O. Box 1965
Greenville, North Carolina 27835
Tel: 252 / 931-9362
Fax: 252 / 830-5155
N.C. State Bar Number 19333

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date shown below, he delivered a copy of the foregoing document to Assistant District Attorney _____ by leaving it at the front desk of the Pitt County District Attorney's Office with an employee of the office in the Pitt County Courthouse, Greenville, North Carolina, in compliance with N.C. Gen. Stat. § 15A-951.

This the _____ day of _____, 20_____.

LAW OFFICES OF KEITH A. WILLIAMS, P.A.

By: _____

KEITH A. WILLIAMS
321 South Evans Street, Suite 103
P.O. Box 1965
Greenville, North Carolina 27835
Tel: 252 / 931-9362
Fax: 252 / 830-5155
N.C. State Bar Number 19333

GETTING LOST IN OUR OWN LIVES

Getting Lost in Our Own Lives

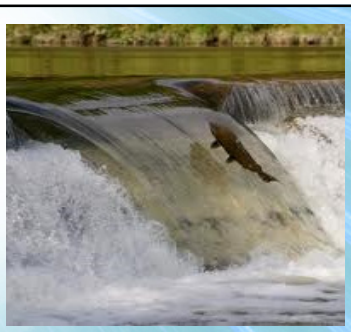
Robynn Moraites
Executive Director
NC Lawyer Assistance Program

nclap.org

Let's call a spade a spade. We must understand the true reality and nature of the system within which we operate.

Do we as a profession really practice what we preach?

We give it lip service until we hit a critical point personally.



Legal Profession and Self Care. See the reality for what it is, in order to better navigate it.

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Good News! You're a Lawyer! ...The Bad News:

Longitudinal Law School Study – you check in but you don't check out.

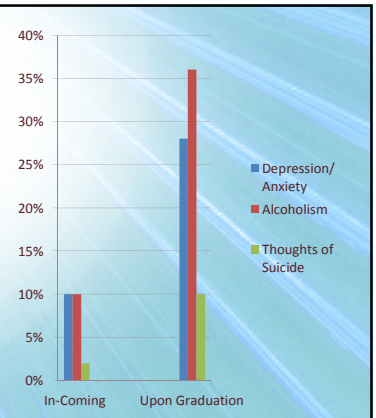
One Research Study:

-Loss to connection of intrinsic values

-Increase in identification with extrinsic values

-Loss in perceived autonomy

(18-25% range)



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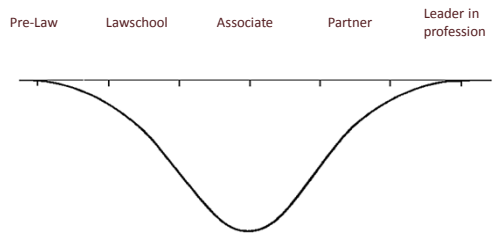
Happiness & Satisfaction Career Trajectory



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Current State of the Legal Profession

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Why?

- Being studied.
- Ideas include :
  - False Self Syndrome
  - Limbic brain resilience
  - Top two major contributors for Lawyers

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False Self Syndrome

- We all (meaning all people on the planet) have it to some degree.
  - The disconnection with true self if for no other reason than to fit in our society and culture
  - Need to meet expectations, to succeed
- In its basic form – being "out of touch" with ourselves and overly identifying with the roles we play.
  - Disconnection from feelings and authentic internal experience

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The Roles we Play – An Unspoken Agreement

Mores are one explanation. Society defines roles, too. The young can have fun in certain ways, but adults are discouraged from engaging in similar activities. Or visa versa.

- We all play roles, and they constantly change. The role of employee or entrepreneur differs from boss and manager or from parent, spouse or child.
- Peoples' personas change, even if subtly, as they play their everyday roles; they change depending upon the interaction or scenario.

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The Roles We Play

Rescuer
Manager
Super Mom
Chairperson
Devoted Dad
Taxi Driver
Referee

Counselor
Hero
Cruise Director
Problem Solver
Loving Spouse
Go-to Guy/Gal
Volunteer
The Advocate
Stellar Employee
Committee member
The Comedian
Financial Provider
Dependable One
The Intellectual

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Adding to that...False Self Syndrome

- Legal profession adds new layers and dimensions
  - Zealous advocacy;
  - Always the helper;
  - Law busts boundaries;
  - Confidentiality;
  - Isolated-workload;
  - Tomorrow never comes;
  - Success.

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Typical Attorney Workload

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Competitive Nature of Stress

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False Self

- The profession of law greatly reinforces the false self syndrome and encourages disconnection from authentic experience.
- Lawyers are a self-select group already prone to this tendency.
- Can be a recipe for disaster.

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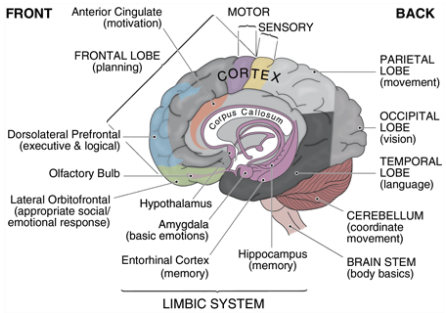
Our Poor, Ignored Limbic Brain



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Limbic Brain

- This is where emotional resilience resides.
- We must attend to it or ignore it at our peril.

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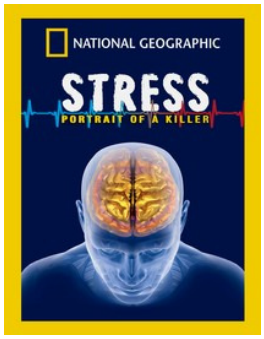
Stress: Portrait of a Killer

This movie sheds wonderful insight into the propagation of illness in today's society via the inner workings of the human stress response.

Only 50 minutes long.

Available on Netflix.



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So, what is a lawyer to do?

- Critical to maintain, renew or begin extracurricular activities that nurture the limbic brain
  - Focus is on heartfelt joy and connection to self, others, and community
    - This does NOT mean volunteering for a bar committee to add something to your résumé. That is OK, it just does not count for this purpose.
    - Not superficial connections. These are OK, they just do not count for this purpose.
    - The guiding features: it brings you no outer recognition or benefit other than joy to your heart.
  - Example of tomorrow never comes

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So, what is a lawyer to do?

- Practice good boundaries from the onset
  - Believe it or not, it is easier to start now than to try to turn it off later
    - We teach people how to treat us
    - Many lawyers think they do not have a choice – we always have a choice
  - Do something at the end of the day to affirmatively transition out of work into home life
  - Turn off the crackberries
  - TAKE vacations; USE those vacation hours
  - Make good choices now that do not limit future options
    - i.e. buy a less expensive/smaller house
  - Take 3-day weekends when things are quiet
    - Realize many practice areas are feast or famine and work within that framework.

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So, what is a lawyer to do?

- Activities that help us gain and maintain a broader perspective (beyond our jobs, beyond our false selves):
  - Some kind of mindfulness practice
    - Yoga, meditation, martial arts, etc.
  - Spiritual readings within your faith tradition
    - If you don't have a faith tradition, maybe explore it
  - A daily gratitude list
  - Regular exercise as part of a daily routine.
  - Finding ways to laugh and have real fun.

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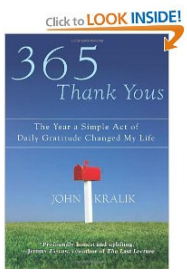
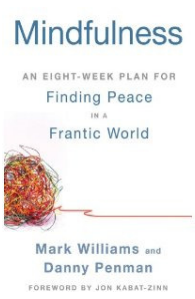
Some books on these topics...





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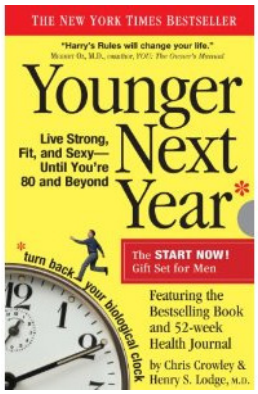
Regular Exercise Routine

- This book is written by a lawyer and his doctor and explains the evolutionary biology of aging. Most of what we call aging in this country is decay…
- This book explains in rather simple terms why exercise is so critical to our optimal functioning.



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Alas…you will forget…we all do.

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Future Practice Advisory…

- Doesn't imply weakness, just "human-ness"
- Is more about "dis-ease" than disease.

Disabled ⟷ Top of your game

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So slow, is it even moving?

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Rather slow and insidious.... then increases... then overwhelming.....

Burning

Uncomfortable

Overwhelming

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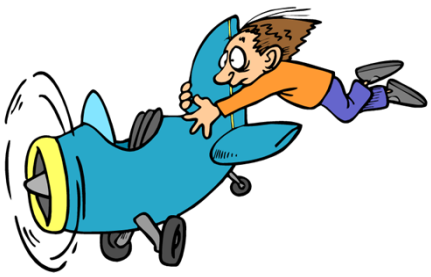
So what happens?



We crash.

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LAP: Safe, Confidential & Free

- Services are FREE, paid for by your State Bar dues
- Completely confidential – Pursuant to Rule 1.6
  - Assist
  - Assess
  - Educate
  - Refer
  - Support

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LAP: Safe, Confidential & Free

- Issues we help with include:
  - Depression
  - Anxiety
  - Career Counseling
  - Family Issues (including parent, spouse or child addiction - we can give you resources)
  - Alcoholism or Drug Addiction
  - Stress, Burnout, Compassion Fatigue
  - Trauma
  - Grief & Loss

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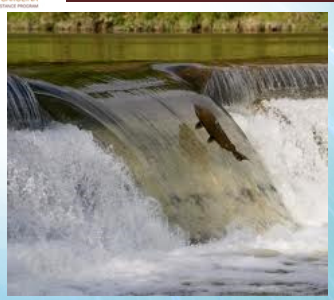
Remember... mighty forces are at work



Not the least of which is ourselves and our drive for recognition, success, achievement and perfection…in many ways we each are the single biggest force we must each overcome.

We always have a choice. (movie clip)

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But we always have a choice.

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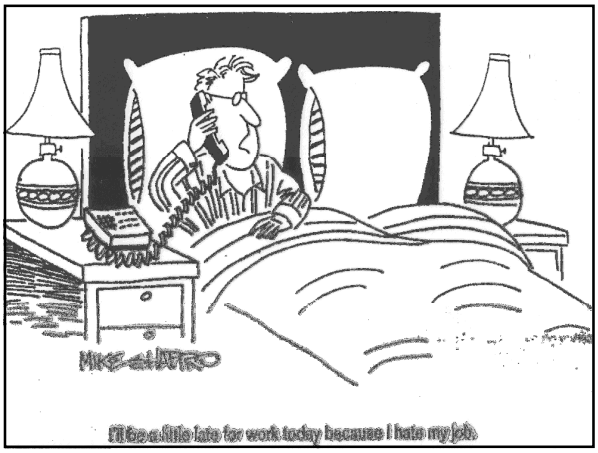

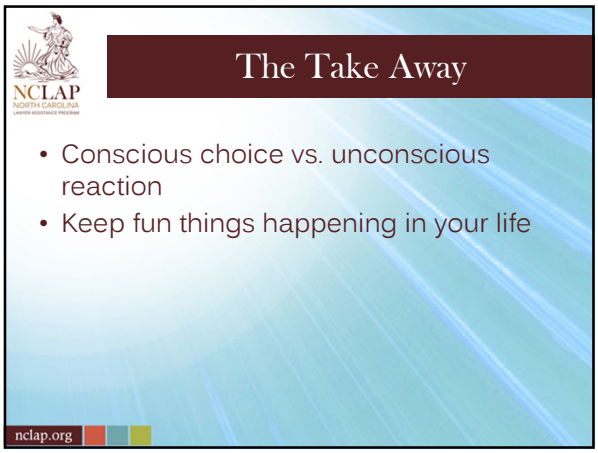
NCLAP
NORTH CAROLINA
The Take Away
• Conscious choice vs. unconscious reaction
• Keep fun things happening in your life
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NCLAP
NORTH CAROLINA
In the event you wind up there...
Robynn Moraites
Executive Director
704-892-5699
Robynn@nclap.org
Cathy Killian
Charlotte and Areas West
704-892-5699
Cathy@nclap.org
Nicole Ellington
Raleigh and Areas East
919-719-9267
Nicole@nclap.org
Towanda Garner
Piedmont Triad Areas
919-719-9290
Towanda@nclap.org
Thank you!
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How I Almost Became Another Lawyer Who Killed Himself

By Brian Clarke

The legal profession has a problem. Lawyers are suffering and, far too often, they are taking their own lives.

Lawyers, as a group, are 3.6 times more likely to suffer from depression than the average person. A John Hopkins study found that of 104 occupations, lawyers were the most likely to suffer depression.

Further, according to a two-year study completed in 1997, suicide accounted for 10.8% of all deaths among lawyers in the United States and Canada, and was the third leading cause of death. Of more importance was the suicide rate among lawyers, which was 69.3 suicide deaths per 100,000 individuals, as compared to 10-14 suicide deaths per 100,000 individuals in the general population. In short, the rate of death by suicide for lawyers was nearly six times the suicide rate of the general population.

A quality of life survey by the North Carolina Bar Association in the early 1990s revealed that almost 26% of respondents exhibited symptoms of clinical depression, and almost 12% said they contemplated suicide at least once a month. Studies in other states have found similar results. In recent years, several states have been averaging one lawyer suicide a month.

Before I tell my story, I want to spend a little time talking about why these diseases are so prevalent among lawyers.

One of the more eloquent "whys" for the high incidence of depression among lawyers was contained in an opinion piece by Patrick Krill (a lawyer, clinician, and board-certified counselor) that accompanied a CNN article on lawyer suicides. As Patrick put it, "lawyers are both the guardians of your most precious liberties, and the butts of your harshest jokes; inhabiting the unique role of both hero and villain in our cultural imagination…" Patrick explained that the high incidence of depression (and substance abuse, which is another huge problem) was due to a number of factors, but that "the rampant, multidimensional stress of the profession is certainly a factor." Further, "there are also some personality traits common among lawyers—self-reliance, ambition, perfectionism, and competitiveness—that aren't always consistent with healthy coping skills and the type of emotional elasticity necessary to endure the unrelenting pressures and unexpected disappointments that a career in the law can bring."

Patrick's discussion of this issue really struck a chord with me. Practicing law is hard. The law part is not that hard (that was the fun part for me), but the business side of law is a bear. Finding clients, billing time, and collecting money are just a few aspects of the business of law of which I was not a big fan. Keeping tasks and deadlines in dozens (or hundreds) of cases straight, and getting everything done well and on time, is a constant challenge. The fear of letting one of those balls drop can be terrifying, especially for the Type A perfectionist who is always terrified of making a mistake or doing a less than perfect job. Forget work-life balance. Forget vacations. Every day out of the office is another day you are behind.

Plus, as a lawyer (and especially as a litigator), no matter how good a job you do, sometimes you lose. That inevitable loss is made worse by the emotion that the lawyer often takes on from his or her client. Almost no client is excited to call her lawyer. Clients only call, of course, when they have problems. Those problems can range from the mild (for example, a traffic ticket) to the profound (like a capital murder charge). But whatever the problem, the client is counting on the lawyer to fix it. Every lawyer I know takes that expectation and responsibility very seriously. As much as you try not to get emotionally invested in your client's case or problem, you often do.

When that happens, losing hurts. Letting your client down hurts. This pain leads to reliving the case and thinking about all of the things you could have done better. This then leads to increased vigilance in the next case. While this is not necessarily a bad thing, for some lawyers this leads to a constant fear of making mistakes, then a constant spike of stress hormones that, eventually, wear the lawyer down. This constant bombardment of stress hormones can trigger a change in brain chemistry that, over time, leads to major depression.

Depression is a subtle and insidious disease. By the time you are sick enough to recognize that you have a problem, your ability to engage in accurate self-evaluation is significantly impaired. It is a strange thing to know, deep down, that something is wrong with you, but to not be able to recognize the massive changes in yourself. Helping yourself at that point is often impossible. Unfortunately, those suffering from depression become expert actors, extremely adept at hiding their problems and building a façade of normalcy. Eventually it takes all of your energy to maintain this façade. The façade becomes the only thing there is.

Depression is not a character flaw. It is

not a weakness. It is not a moral failing. You cannot "just get over it." No amount of will-power, determination, or intestinal fortitude will cure it. Depression is a disease caused (in very basic and general terms) by an imbalance and/or insufficiency of two neurotransmitters in the brain: serotonin and norepinephrine. In this way, it is biologically similar to diabetes, which is caused by the insufficiency of insulin in the body. As a disease, depression can be treated, and treated very effectively. But it takes time and it takes help—personal help and professional help.

And now we get to the personal part. Don't say I didn't warn you.

Though I likely had been depressed for a long while, I was diagnosed with severe clinical depression in late 2005. As another lawyer who helped me put it, suffering from depression is like being in the bottom of a dark hole with—as you perceive it from the bottom—no way out. The joy is sucked from everything. Quite often, you just want to end the suffering—not so much your own, but the perceived suffering of those around you.

You have frequent thoughts that everyone would be better off if you were not around anymore because, being in such misery yourself, you clearly bring only misery to those around you. When you are in the hole, suicide seems like the kindest think you can do for your family and friends, as ending your life would end their pain and misery.

While I do not remember all of the details of my descent into the hole, it was certainly rooted in trying to do it all—perfectly. After my second child was born, I was trying to be all things to all people at all times. Superstar lawyer. Superstar citizen. Superstar husband. Superstar father. Of course, this was impossible. The feeling that began to dominate my life was guilt. A constant, crushing guilt. Guilt that I was not in the office enough because I was spending too much time with my family. Guilt that I was letting my family down because I was spending too much time at work. Guilt that I was letting my bosses down because I was not being the perfect lawyer to which they had become accustomed. Guilt. Guilt. Guilt.

The deeper I sunk into the hole, the more energy I put into maintaining my façade of super-ness, and the less energy was left for either my family or my clients. And the guiltier I felt. It was a brutal downward spiral. Eventually it took every ounce of energy I had to maintain the façade and go through the motions of the day. The façade was all there was. Suicide seemed rational.

There were danger signs, of course, but neither I nor anyone around me recognized them for what they were. I burst into tears during a meeting with my bosses. I started taking the long way to work in the morning and home in the evenings—often taking an hour or more to make the five mile trip. Eventually—after months of this—my wife asked me what was wrong and I responded, "I just don't know if I can do this anymore." She asked what "this" was. I said, "You know...life," and started bawling. The façade crumbled and I was utterly adrift. (I don't actually remember this conversation with my wife, but she does.)

After getting over the initial shock of my emotional collapse, my wife forced me to go to the doctor and get help. She took the initiative to find a doctor, make me an appointment, and took me (which is good, because I was utterly incapable of doing any of those things). She called my firm and told them I needed FMLA leave. One of my colleagues put me in touch with the NC State Bar's Lawyer Assistance Program (LAP), which connected me with a LAP volunteer who had suffered from severe depression and recovered. I found the peer support of LAP to be a critical tool in my road to recovery. With his help, treatment from my doctor, and the support and love of my family, I got better and better. I started taking medication and clawed my way to the top of the hole.

But, for more than a year I was sort of clinging to the edge of the hole about to plummet back down. So I changed doctors and medications and did a lot of talk therapy. Eventually, more than 18 months later, I was finally back to some semblance of my "old self." I was happy again (mostly). I was a good father again (mostly). I was a good husband again (mostly). I enjoyed being a lawyer again (mostly). I enjoyed life again.

There have been a couple of relapses, where the hole tried to reclaim me. However, I never fell all the way back down. I will happily take medication for the rest of my life. And I will regularly see a therapist for the rest of my life. I will be forever vigilant regarding my mental state. Small prices to pay.

Had I not gotten help, I would not be writing this article because I would likely not be alive today. No amount of will power or determination could have helped me climb out of that hole. Only by treating my disease with medication and therapy was I able to recover, control my illness, and get my life back.

Now, I don't write any of this to solicit sympathy or pity. I am doing fine. I have five wonderful (if occasionally maddening) children and an amazing wife. I have a job that I love and am truly good at. I have the job that I was put on this earth to perform, which makes me incredibly lucky. I have wonderful students who will be outstanding lawyers. I have no complaints.

I write this because I know that when you are depressed you feel incredibly, profoundly alone. You feel that you are the only person on earth who has felt the way you do. You feel like no one out there in the world understands what you are dealing with. You feel like you will never feel "normal" again.

But you are not alone. You are not the only person to feel this way. There are lots of people who understand. I understand. I have been there. I got better. So can you.

So please, if you are suffering from depression or anxiety (or both) get help. Tell your spouse. Tell your partner. Tell a colleague. Ask for help. Asking for help does not make you weak. It takes profound strength to ask for help. You can get better. You can get your life back.

Trust me when I say that life is so much better once you get out of—and away from—that dark hole. It is well worth the effort. ■

Brain Clarke is an assistant professor of law at Charlotte School of Law.

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers, judges, and law students, which helps address problems of stress, depression, alcoholism, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you would like more information, go to nclap.org or call: Cathy Killian (for Charlotte and areas west) at 704-910-2310, Towanda Garner (in the Piedmont area) at 919-719-9290, or Robynn Moraites (for Raleigh and down east) at 704-892-5699.

NCLAP

An Important Free Resource for Lawyers

One of the free resources available to you as a State Bar member is the **Lawyer Assistance Program (LAP)**. From time to time, lawyers encounter a personal issue that, left unaddressed, could impair his or her ability to practice law. Accordingly, the LAP was created by lawyers for lawyers to assure that free, confidential assistance is available for any problem or issue that is impairing or might lead to impairment.

Lawyers at Particular Risk

Of all professionals, lawyers are at the greatest risk for anxiety, depression, alcoholism, drug addiction, and even suicide. As many as one in four lawyers are affected. This means it is likely that you, an associate, a partner, or one of your best lawyer friends will encounter one of these issues. Whether you need to call the LAP for yourself or to refer a colleague, all communications are completely confidential.

Anxiety and Depression

Anxiety and depression often go hand-in-hand. These conditions can be incapacitating and can develop so gradually that a lawyer is often unaware of the cumulative effect on his or her mood, habits, and lifestyle. Each condition is highly treatable, especially in the early stages. Asking for help, however, runs counter to our legal training and instincts. Most lawyers enter the profession to help others and believe they themselves should not need help. The good news is that all it takes is a phone call. The LAP works with lawyers exclusively. The LAP has been a trusted resource for thousands of lawyers in overcoming these conditions.

Alcohol and Other Substances

Often a lawyer will get depressed and self-medicate the depression with alcohol. Alcohol is a central nervous system depressant but acts like a stimulant in the first hour or two of consumption. The worse you feel, the more you drink initially to feel better, but the more you drink, the worse you feel. A vicious cycle begins. On the other hand, many alcoholic lawyers who have not had depression report that their drinking started normally at social events and increased slowly over time.

There is no perfect picture of the alcoholic or addicted lawyer. It may be surprising to learn that he or she probably graduated in the top one-third of the class. Also surprising, lawyers may find themselves in trouble with addiction due to the overuse or misuse of certain prescription medications that were originally prescribed to address a temporary condition. Use of these kinds of medications, combined with moderate amounts of alcohol, greatly increases the chances of severe impairment requiring treatment. The LAP knows the best treatment options available, guides lawyers through this entire process, and provides on-going support at every stage.

LAP recognizes alcoholism, addiction, and mental illness as diseases, not moral failures. The only stigma attached to these illnesses is the refusal to seek or accept help.

Confidentiality

All communications with the LAP are **strictly confidential** and subject to the attorney-client privilege. If you call to seek help for yourself, your inquiry is confidential. If you call as the spouse, child, law partner, or friend of a lawyer whom you suspect may need help, your communication is also treated confidentially and is never relayed without your permission to the lawyer for whom you are seeking help. The LAP has a committee of trained lawyer volunteers who have personally overcome these issues and are committed to helping other lawyers overcome them. If you call a LAP volunteer, your communication is also treated as confidential.

The LAP is completely separate from the disciplinary arm of the State Bar. If you disclose to LAP staff or to a LAP volunteer any misconduct or ethical violations, it is confidential and cannot be disclosed. *See* Rules 1.6(c) and 8.3(c) of the Rules of Professional Conduct and 2001 FEO 5. The LAP works because it provides an opportunity for a lawyer to get ***safe, free, confidential*** help before the consequences of any impairment become irreversible.

Know the signs. Make the call.
You could save a colleague's life.

Take the Test for Depression

YES NO

- ❑ ❑ 1. Do you feel a deep sense of depression, sadness, or hopelessness most of the day?
- ❑ ❑ 2. Have you experienced diminished interest in most or all activities?
- ❑ ❑ 3. Have you experienced significant appetite or weight change when not dieting?
- ❑ ❑ 4. Have you experienced a significant change in sleeping patterns?
- ❑ ❑ 5. Do you feel unusually restless...or unusually sluggish?
- ❑ ❑ 6. Do you feel unduly fatigued?
- ❑ ❑ 7. Do you experience persistent feelings of hopelessness or inappropriate feelings of guilt?
- ❑ ❑ 8. Have you experienced a diminished ability to think or concentrate?
- ❑ ❑ 9. Do you have recurrent thoughts of death or suicide?

If you answer yes to five or more of these questions (including questions #1 or #2), and if the symptoms described have been present nearly every day for two weeks or more, you should consider speaking to a health care professional about treatment options for depression.

Other explanations for these symptoms may need to be considered. Call the Lawyer Assistance Program.

Adapted from *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders*. Fourth Edition. Washington, DC. American Psychiatric Association: 1994.

Take the Test for Alcoholism

YES NO

- ❑ ❑ 1. Do you get to work late or leave early due to drinking?
- ❑ ❑ 2. Is drinking disturbing your home life?
- ❑ ❑ 3. Do you drink because you are shy with other people?
- ❑ ❑ 4. Do you wonder if drinking is affecting your reputation?
- ❑ ❑ 5. Have you gotten into financial difficulties as a result of drinking?
- ❑ ❑ 6. Does drinking make you neglect your family or family activities?
- ❑ ❑ 7. Has your ambition decreased since drinking?
- ❑ ❑ 8. Do you often drink alone?
- ❑ ❑ 9. Does drinking determine the people you tend to be with?
- ❑ ❑ 10. Do you want a drink at a certain time of day?
- ❑ ❑ 11. Do you want a drink the next morning?
- ❑ ❑ 12. Does drinking cause you to have difficulty sleeping?
- ❑ ❑ 13. Do you drink to build up your confidence?
- ❑ ❑ 14. Have you ever been to a hospital or institution because of drinking?
- ❑ ❑ 15. Do family or friends ever question the amount you drink?

If your answer is yes to two or more of these questions you may have a problem. Call the Lawyer Assistance Program.

FREE • SAFE • CONFIDENTIAL

Western Region
Cathy Killian 704.910.2310

Piedmont Region
Towanda Garner 919.719.9290

Eastern Region
Nicole Ellington 919.719.9267

NCLAP
NORTH CAROLINA
LAWYER ASSISTANCE PROGRAM

Identifying Illness Based Impairment in Colleagues

Depression, Anxiety and Stress

Alcoholism and Substance Abuse

Every aspect of an addicted or depressed attorney's life is affected. When there are problems at work or home, with health or finances, or there is police involvement, chances are the attorney is suffering from a medically based illness which can be successfully treated. If you recognize the following warning signs in a colleague, call us. ***We can help.*** Visit NCLAP.org

Relationship Problems

- ❑ Complaints from clients
- ❑ Problems with supervisors
- ❑ Disagreements or inability to work with colleagues
- ❑ Avoidance of others
- ❑ Irritable, impatient
- ❑ Angry outbursts
- ❑ Inconsistencies or discrepancies in describing events
- ❑ Hostile attitude
- ❑ Overreacts to criticism
- ❑ Unpredictable, rapid mood swings
- ❑ Non-responsive communication

Performance Problems

- ❑ Missed deadlines
- ❑ Decreased efficiency
- ❑ Decreased performance after long lunches involving alcohol
- ❑ Inadequate follow through
- ❑ Lack of attention
- ❑ Poor judgment
- ❑ Inability to concentrate
- ❑ Difficulty remembering details or instructions
- ❑ General difficulty with recall
- ❑ Blaming or making excuses for poor performance
- ❑ Erratic work patterns

Personal Problems

- ❑ Legal separation or divorce
- ❑ Credit problems, judgments, tax liens, bankruptcy
- ❑ Decreased performance after lunches involving alcohol
- ❑ Frequent illnesses or accidents
- ❑ Arrests or warnings while under the influence of alcohol or drugs
- ❑ Isolating from friends, family and social activities

Attendance Problems

- ❑ Arrive late and/or leaving early
- ❑ Taking "long lunches"
- ❑ Not returning to work after lunch
- ❑ Missing appointments
- ❑ Unable to be located
- ❑ Ill with vague ailments
- ❑ Absent (especially Mondays/Fridays)
- ❑ Frequent rest room breaks
- ❑ Improbable excuses for absences
- ❑ Last minute cancellations

What's All the Buzz About?

By Robynn Moraites

A recent national ABA study on attorney mental health and drinking has been getting a lot of buzz. Pun intended. Based on some small, historic studies and anecdotally, to be sure, we have known for years that attorneys are at greater risk for depression, anxiety, and alcohol problems than the general public and even other professionals. This landmark study, however, is the first to ever bring into sharp focus, with hard data and real numbers, what we are facing in our profession across a spectrum of mental health issues. The study was conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs. The findings were published in the peer-reviewed *Journal of Addiction Medicine* in February 2016.

Over 15,000 attorneys participated in the national study, and the dataset was culled to retain only currently licensed and employed attorneys. Responses from attorneys who were retired, unemployed, working outside of the legal profession, suspended, or otherwise on any form of inactive status were eliminated, leaving approximately 12,800 responses. Demographics were diverse in both gender and race and captured a robust range of practice settings, practice areas, years in practice, and positions held. This is the most comprehensive data ever collected regarding attorney mental health, and the single largest dataset.

Drinking: 21% Drinking at Harmful or Dependent Levels and 36% Drinking at Problematic Levels

Study participants completed a ten-question instrument known as the Alcohol Use Disorders Identification Test (AUDIT-10), which screens for different levels of problematic alcohol use, including hazardous use, harmful use, and possible alcohol dependence. The test asks about quantity and frequency of use and includes questions as to whether an individual has experienced consequences from drinking. The study found that 21% scored at levels consistent with harmful use including possible alcohol dependence. Males scored higher at 25%, compared to 16% for women. When examining responses purely for quantity and frequency of use (known as the AUDIT-3), the study found an astonishing 36% of respondents drinking at problematic levels. While there is no hard and fast line to define "problematic" levels, problematic drinking behaviors can include drinking at lunch or regularly binge drinking. Binge drinking is typically defined as consuming enough to have a blood alcohol content level of 0.08. That's about four drinks for women and five drinks for men in a two hour timeframe. When the same AUDIT-3 screening measure was used in a comprehensive survey of physicians, 15% of physicians reported use at this level—less than half of the number of attorneys reporting such use. It appears that more than one in three attorneys are crossing the line from social drinking to using alcohol as a coping mechanism.

Shocking Reversal of Earlier Findings: Today's Younger Lawyers at Far Greater Risk

In a significant reversal of a conclusion reached by the last documented, statistically valid study—a 1990 study out of Washington State—the study found that younger lawyers struggle the most with alcohol abuse. Respondents identified as 30 years or younger had a 32% rate of problem drinking, almost one in three, higher than any other age group. This finding directly contradicts the Washington study that found the longer an attorney practiced, the greater the risk of developing problems with alcohol. That data reversal is very significant, signaling major changes in the profession in the last 20 to 30 years. And with job prospects at an all-time low, and student debt at an all-time high, these younger lawyers who are most in need of treatment are least able to afford it. The LAP Foundation of NC, Inc. is working to bridge that gap. Please see page 20 for the story.

Depression, Stress, and Anxiety: 28% Report Concerns with Depression

Depression and anxiety often go hand in hand. The study found that 28% of attorneys, more than one in four, struggle with some level of depression, representing almost a ten percent increase from the 1990 Washington study. Males reported at a higher rate than females for depression. Nineteen percent reported mild or high levels of anxiety, with females reporting at a higher rate than males. Interestingly, when examining the full span of one's career, approximately 61% and 46% reported experiencing concerns with anxiety and depression, respectively, at some point in their career. Respondents also reported experiencing unreasonably high levels of stress (23%), social anxiety (16%), attention deficit hyperactivity disorder (12.5%), panic disorder (8%), and bipolar disorder (2.4%). More than 11% reported suicidal thoughts during their career. Three percent reported self-injurious behavior, and 0.7% reported at least one suicide attempt during the course of their career.

Like the findings associated with alcohol use, mental health conditions were higher in younger, less experienced attorneys and generally decreased as age and years of experience increased. The study also revealed significantly higher levels of anxiety, depression, and stress among those with problematic alcohol use, meaning mental health concerns often co-

occurred with an alcohol use disorder.

Barriers to Seeking Help – No Surprises

As part of the study, participants were asked to identify the biggest barriers to seeking treatment or assistance. Categorically, fear of being "found out" or stigmatized was the overwhelming first choice response. Regarding alcohol use, 67.5% said they didn't want others to find out, and 64% identified privacy and confidentiality as a major barrier. The responses for mental health concerns for these same two reasons were 55% and 47%, respectively. Additional reasons included concerns about losing their law license, not knowing who to ask for help, and not having insurance or money for treatment.

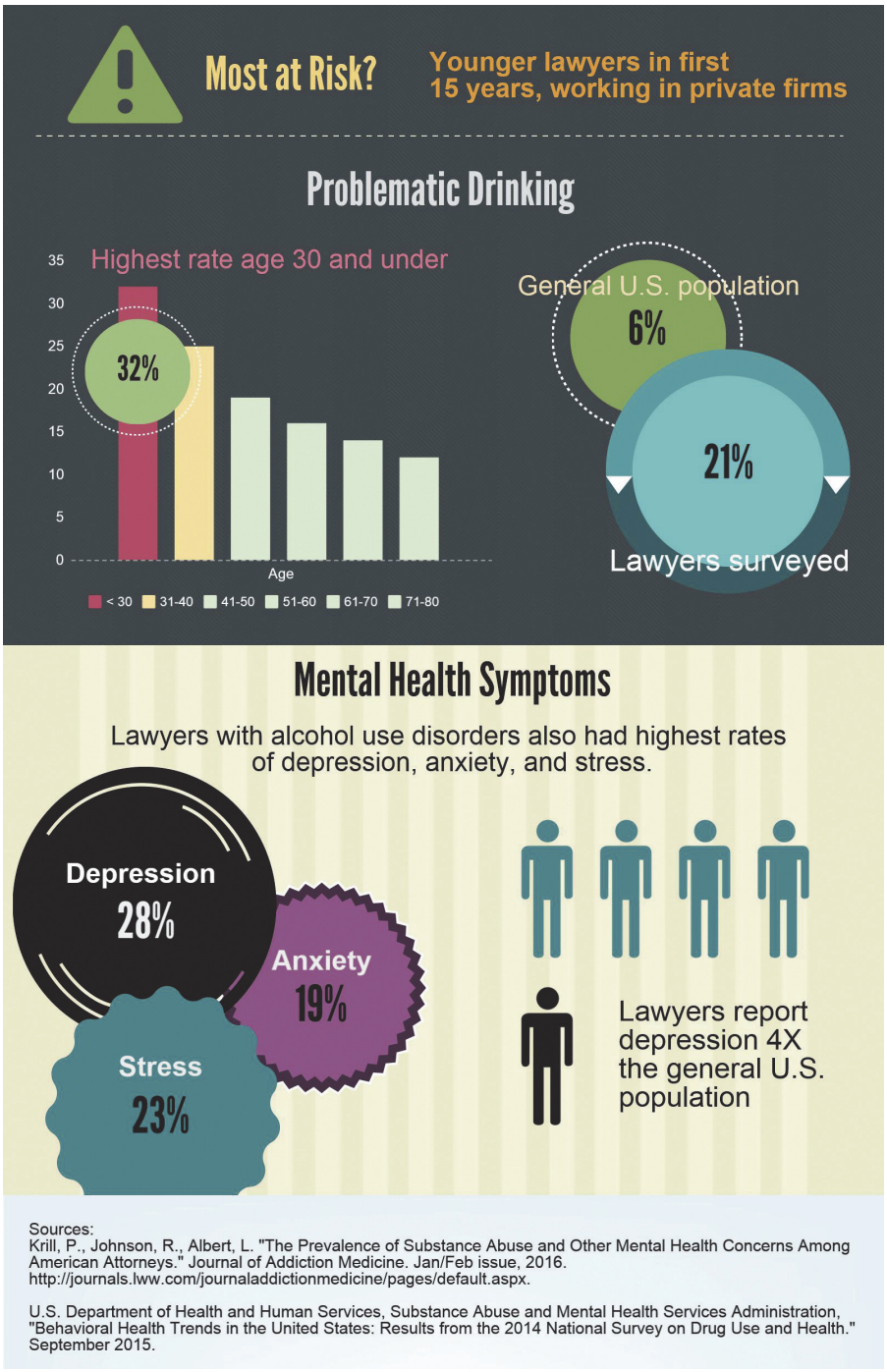
A surprising 84% indicated awareness and knowledge of lawyer assistance programs (LAPs), but only 40% would be likely to utilize the services of a LAP with privacy and confidentiality concerns again cited as the major barrier to seeking help through LAP programs.

Help and Hope

The data is far more extensive than can be outlined in this short article. There are telling findings about drug use, including use of prescription stimulants. Rates of depression, anxiety, and problematic drinking were also correlated to practice setting, with large firms and bar associations ranking highest. We can slice the data and analyze it extensively for years to come. But the key takeaway is that we now have hard data showing that one in three-to-four of us are at real risk and are not likely to seek out assistance.

Only 7% of participants reported that they obtained treatment for alcohol or drug use, and only 22% of those respondents went through programs tailored to legal professionals. Participants who sought help from programs tailored specifically for legal professionals had significantly better outcomes and lower (healthier) scores than those who sought treatment elsewhere. This suggests that programs with a unique understanding of lawyers and their work can better address the problems.

When I first took this job as director of our NC LAP, I met a lawyer in a spin class. She was sitting on the bike next to me and recognized me because my photo had appeared in a local bar newsletter. She said, "I hope I never have to call you or have need for your program's services." I thought about her comment for a moment and said, "Our volunteers are some of the happiest, most balanced, most resilient lawyers—people—you could ever hope to meet. They don't come to us that way. But if they follow our suggestions, they become so. And they even like being lawyers again." She said, "Wow. That's cool. I never thought about it like that." Because we are confidential, most lawyers never see the miracles of healing and regeneration that take place every day in the transformed lives of those who are willing to pocket their pride and simply ask for help. There is help and there is hope, and plenty of it. ■



Sources:
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U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, "Behavioral Health Trends in the United States: Results from the 2014 National Survey on Drug Use and Health." September 2015.

Robynn Moraites is the executive director of the North Carolina Lawyer Assistance Program.

Infographic reprinted with permission from the February 2016 Wisconsin Lawyer article, "Landmark Study: US Lawyers Face High Rates of Problem Drinking and Mental Health Issues," published by the State Bar of Wisconsin.

BASICS OF PLEADING GUILTY IN SUPERIOR COURT

STATE OF NORTH CAROLINA

File No.

_____ County

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

STATE VERSUS		
Name Of Defendant		
DOB	*Age*	*Highest Level Of Education Completed*

TRANSCRIPT OF PLEA

G.S. 15A-1022, 15A-1022.1

NOTE: *Use this section **ONLY** when the Court is rejecting the plea arrangement.*

☐ The plea arrangement set forth within this transcript is hereby rejected and the clerk shall place this form in the case file. *(Applies to plea arrangements disclosed on or after December 1, 2009.)*

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered a plea of ☐ guilty ☐ guilty pursuant to *Alford* decision ☐ no contest, and (3) offered the following answers to the questions set out below:

	Answers
1. Are you able to hear and understand me?	(1) _____
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you?	(2) _____
3. At what grade level can you read and write?	(3) _____
4. (a). Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other substances?	(4a) _____
(b). When was the last time you used or consumed any such substance?	(4b) _____
5. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?	(5) _____
6. (a). Have you and your lawyer discussed the possible defenses, if any, to the charges?	(6a) _____
(b). Are you satisfied with your lawyer's legal services?	(6b) _____
7. (a). Do you understand that you have the right to plead not guilty and be tried by a jury?	(7a) _____
(b). Do you understand that at such trial you have the right to confront and to cross examine witnesses against you?	(7b) _____
(c). Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors that may apply to your case *(and, if applicable, additional sentencing points not related to prior convictions)* beyond a reasonable doubt?	(7c) _____
(d). Do you understand that by your plea(s) you give up these and other valuable constitutional rights to a jury trial *(and, if applicable, rights related to sentencing)*?	(7d) _____
8. Do you understand that, if you are not a citizen of the United States of America, your plea(s) of guilty or no contest may result in your deportation from this country, your exclusion from admission to this country, or the denial of your naturalization under federal law?	(8) _____
☐ 9. Do you understand that upon conviction of a felony you may forfeit any State licensing privileges you have in the event that you refuse probation or that your probation is revoked?	(9) _____
10. Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal?	(10) _____
11. Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved?	(11) _____

(Over)

12. Do you understand that you are pleading ☐ guilty ☐ no contest to the charges shown below? (12) _____
(Describe charges, total maximum punishments, and applicable mandatory minimums for those charges.)

PLEAS

✓	Plea*	File Number	Count No.(s)	Offense(s)	Date Of Offense	G.S. No.	F/M	CL.	‡Pun. CL.	Maximum Punishment

☐ See attached AOC-CR-300A, for additional charges.

*G = Guilty GA = *Alford* plea
NC = No Contest

TOTAL MAXIMUM PUNISHMENT

MANDATORY MINIMUM FINES & SENTENCES *(if any)*

✓ **NOTE TO CLERK:** If this column is checked this is an added offense or reduced charge.

‡ **NOTE:** *Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).*

13. Do you now personally plead ☐ guilty ☐ no contest to the charges I just described? (13) _____

14. ☐ (a) Are you in fact guilty? (14a) _____
☐ (b) *(no contest plea)* Do you understand that, upon your plea of no contest, you will be treated as being guilty whether or not you admit that you are in fact guilty? (14b) _____
☐ (c) *(*Alford *guilty plea)*
(1) Do you now consider it to be in your best interest to plead guilty to the charges I just described? (14c1) _____
(2) Do you understand that, upon your "*Alford* guilty plea," you will be treated as being guilty whether or not you admit that you are in fact guilty? (14c2) _____

☐ 15. *(Use if aggravating factors are listed below)* Have you admitted the existence of the aggravating factors shown below, have you agreed that there is evidence to support these factors beyond a reasonable doubt, have you agreed that the Court may accept your admission to these factors, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these aggravating factors ☐ agree that the State has provided you with appropriate notice about these aggravating factors? *(If so, review the aggravating factors with the defendant.)* (15) _____

☐ 16. *(Use if sentencing points are listed below)* Have you admitted the existence of the sentencing points not related to prior convictions shown below, have you agreed that there is evidence to support these points beyond a reasonable doubt, have you agreed that the Court may accept your admission to these points, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these sentencing points ☐ agree that the State has provided you with appropriate notice about these sentencing points? *(If so, review the sentencing points with the defendant.)* (16) _____

17. Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (17) _____

18. Do you understand that the courts have approved the practice of plea arrangements and you can discuss your plea arrangement with me without fearing my disapproval? (18) _____

STATE VERSUS	File No.
Name Of Defendant	

19. Have you agreed to plead ☐ guilty ☐ no contest as part of a plea arrangement? *(If so, review the terms of the plea arrangement as listed in No. 20 below with the defendant.)* (19) _____
20. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

☐ 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).

21. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement? (21) _____
22. Do you now personally accept this arrangement? (22) _____
23. *(Other than the plea arrangement between you and the prosecutor)* has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes? (23) _____
24. Do you enter this plea of your own free will, fully understanding what you are doing? (24) _____
25. Do you agree that there are facts to support your plea ☐ and admission to aggravating factors ☐ and sentencing points not related to prior convictions, and do you consent to the Court hearing a summary of the evidence? (25) _____
26. Do you have any questions about what has just been said to you or about anything else connected to your case? (26) _____

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my plea in this case. The terms and conditions of the plea as stated within this transcript, if any, are accurate.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		Date
Date	Signature	Signature Of Defendant
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court		Name Of Defendant (Type Or Print)

CERTIFICATION BY LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature and elements of the charges to which the defendant is pleading, and the aggravating and mitigating factors and prior record points for sentencing, if any.

Date	Name Of Lawyer For Defendant (Type Or Print)	Signature Of Lawyer For Defendant

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of the plea by the defendant to the charges in this case.

Date	Name Of Prosecutor (Type Or Print)	Signature Of Prosecutor

PLEA ADJUDICATION

Upon consideration of the record proper, evidence or factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigned finds that:

1. There is a factual basis for the entry of the plea *(and for the admission as to aggravating factors and/or sentencing points)*;
2. The defendant is satisfied with his/her lawyer's legal services;
3. The defendant is competent to stand trial;
4. ☐ The State has provided the defendant with appropriate notice as to the aggravating factors and/or points; ☐ The defendant has waived notice as to the aggravating factors and/or points; and
5. The plea *(and admission)* is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's plea *(and admission)* is hereby accepted by the Court and is ordered recorded.

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

SUPERIOR COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

DISTRICT COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

CERTIFICATION BY PROSECUTOR

The undersigned prosecutor enters a dismissal to the above charges pursuant to a plea arrangement shown on this Transcript Of Plea.

Date	*Name Of Prosecutor (Type Or Print)*	*Signature Of Prosecutor*

STATE OF NORTH CAROLINA

File No.

_____ County

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

STATE VERSUS

Name And Address Of Defendant

Social Security No. | *SID No.*

Race | *Sex* | *DOB*

WORKSHEET PRIOR RECORD LEVEL FOR FELONY SENTENCING AND PRIOR CONVICTION LEVEL FOR MISDEMEANOR SENTENCING

(STRUCTURED SENTENCING)

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

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

I. SCORING PRIOR RECORD/FELONY SENTENCING

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

Defendant's Current Charge(s):

If all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining prior record level.	+ 1	
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. *County* / *File No.* / *State (if other than NC)*	+ 1	
	TOTAL	

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 ▶ ☐

☐ 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 that the State and the defendant have stipulated in open court to the prior convictions, points and record level.

Date | *Name Of Presiding Judge (Type Or Print)* | *Signature Of Presiding Judge*

III. STIPULATION

The prosecutor and defense counsel, or the defendant, if not represented by counsel, stipulate to the information set out in Sections I and V of this form, and agree with the defendant's prior record level or prior conviction level as set out in Section II based on the information herein.

Date	*Signature Of Prosecutor*	*Date*	*Signature Of Defense Counsel Or Defendant*

IV. DNA CERTIFICATION (For Offenses Committed On Or After Feb. 1, 2011)

A review of the case record (the form required by G.S. 15A-266.3A(c)) and the records of the State Bureau of Investigation (the DCI-CCH rap sheet) indicates that *(check one):*

☐ 1. The defendant is **NOT** required to provide a DNA sample for this conviction because (i) the offense is not covered by G.S. 15A-266.4 or (ii) a sample of the defendant's DNA has previously been obtained and the defendant's DNA record is currently stored in the State DNA database.

☐ 2. The defendant **IS** required to provide a DNA sample for this conviction because (i) the offense is covered by G.S. 15A-266.4 and (ii) a sample of the defendant's DNA has not previously been obtained and the defendant's DNA record has not previously been stored in the State DNA Database, or if previously obtained and stored, the defendant's DNA sample and record have been expunged.

Date	*Name Of Prosecutor (Type Or Print)*	*Signature Of Prosecutor*

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

☐ See AOC-CR-600 Continuation for additional prior convictions.

Source Code: **1 - DCI** **2 - NCIC** **3 - AOC/Local** **4 - AOC/Statewide** **5 - ID Bureau** **6 - Other**

Date Prepared: _____

Prepared By: _____

VOIR DIRE AND DEMONSTRATION

Jury Selection (or Jury De-selection) (6-29-11)

Michael G. Howell
Capital Defender's Office
123 West Main Street, Ste. 601, Durham, NC 27701
(919) 354-7220

Purpose of Jury De-selection: **IDENTIFY the worst jurors and REMOVE them**.

Means for removal

1) Challenge for Cause § 15A-1212…The 3 most common grounds are:

(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 North Carolina.

(9) **For any other cause**, the juror is ***unable to render a fair and impartial verdict***.

2) Peremptory Challenges § 15A-1217

Each defendant is allowed ***six (6) challenges*** (in non-capital cases).

Each party is entitled to ***one (1) peremptory challenge for each alternate juror*** in addition to any unused challenges.

Law of Jury Selection

Statutes (read N.C.G.S. 15A-1211 to 1217)
Case law (See outline, Freedman and Howell, *Jury Selection Questions*, 25 pp.)
Jury instructions (applicable to your case)
Recordation (N.C.G.S. 15A-1241)

Two Main Methods of Jury Selection

1) Traditional Approach or "Lecturer" Method

Lecture technique (almost entirely) with leading or closed-ended questions
Purposes…Indoctrinate jury about law and facts of your case, and establish lawyer's authority or credibility with jury
Commonly used by prosecutors (and some civil defense lawyers)
In the "sermon" or lecture, the lawyer does over 95% of the talking
Example…*"Can everyone set aside what if any personal feelings you have about drugs and follow the law and be a fair and impartial juror?"*
Problem…Learn very little (if anything) about jurors

2) The "Listener" Method of Jury Selection

Purpose…Learn about the jurors' experiences and beliefs (instead of trying to change their beliefs)

The premise…Personal experiences shape jurors' views and beliefs, and can help predict how jurors will view facts, law, and each other.

Open-ended questions will get and keep jurors talking and reveal information about
Jurors' life experiences,
Attitudes, opinions, and views, and
Interpersonal relations with each other and their communication styles

Information will allow attorney to achieve GOAL of jury selection…
Identify the worst jurors for your case, and
Remove them (for cause or by peremptory strike)

Basically, a conversation with lawyer doing 10% of talking (the "90/10 rule")

Quote from life-long Anonymous public defender…*"I used to think that jury selection was my chance to educate the jurors about the law or the facts of my case. Now, I realize that jury selection is about the jurors educating me about themselves."*

"Default positions"
Lecturer… "Can you follow the law and be fair and impartial?"
Listener…"Please tell me more about that…"

Command Superlative Analogue Technique (New Mexico Public Defenders)

Effective technique within Listener Method
Ask about significant or memorable life experiences
It will trigger a conversation about jurors' life experiences and views

Three Elements of Command Superlative Analogue Technique
1) Ask about a personal experience relating to the issue, or an experience of a family member or someone close to the juror [*analogue*]
2) Add superlative adjective (best, worst, etc.) to help them recall [*superlative*]
3) Put question in command form (i.e., "Tell us about…) [*command*]

Example…*"Tell me about your closest relationship with a person who has been affected by illegal drugs."*

Caution…Time consuming…Cannot use it for everything…Save it for the key issues

(*For sample questions, see Mickenberg, *Voir Dire and Jury Selection*, pp. 11-13; Trial School Workshop Aids, pp. 5-7).

Listener Method in Practice

Preparation

Know the case and law…Develop theory and theme
Pick the pertinent issues or areas (in that case) that you want jurors to talk about
Cannot do the same voir dire in every case…It varies with the theory of each case
Outline your questions (or offensive plays) for each area
-Superlative memory technique and follow-up (for 3-4 key topics)

-Open-ended questions for each area or topic
-Introductions (*see below)
-Standard group questions (that may lead to open-ended, individual follow-up)
-Key legal concepts (for the most important issues)

***Introductions**…to jury selection overall…and to each issue or topic
It makes the issue relevant
It puts jurors at ease and increases their chances of talking to you
Introductions need to be concise, straightforward, and honest
Example…*"Joe is charged in this case with selling cocaine. For decades, illegal drugs have been a problem for our society. Because of that, many of us have strong feelings about people who use and sell illegal drugs. I want to talk to you all about that."*
For motor-mouths…if you have to talk, do it here…At least it serves a purpose.

Jury selection "playbook"
Questions
Statutes and pertinent jury instructions
Case law outline and copies of key cases
Blank seating chart

<u>Three (3) Rules for the Courtroom</u>

1) Always use **PLAIN LANGUAGE**
Never talk like a lawyer…Be your pre-lawyer self
Talking to communicate with average folks…not to impress with vocabulary

2) **Get the jurors talking**…and keep them talking
Superlative memory questions (for the key issues)
Open-ended questions (who, what, how, why, where, when)
Give up control…let jurors go wherever they want
Follow "the 90/10 rule"…a conversation with lawyer doing 10% of talking
Be empathetic and respectful…encourage them to tell you more
Do NOT argue with, bully, or cross-examine a juror

The "superlative memory technique" example…*"Tell me about your closest relationship with a person who has been affected by illegal drugs."*
Open-ended examples…*"What are your views about illegal drugs? Why do you feel that way? What are your experiences with folks who use or sell drugs? How have you or anyone close to you been affected by people who use or sell drugs?"*

3) **Catch every response**…Both verbal and non-verbal
Must LISTEN to every word…and WATCH every gesture or expression
Essential to catch every response to follow-up and keep them talking

Do NOT ignore a juror or cut off an answer
Use reflective questions in follow-up (*Some people believe "x" and others believe "y"…What do you think?*)

Decision-Making Time

Assess the answers and the jurors…Decide what to do..?
NEVER make decision based on stereotypes or demographics
ALWAYS judge a juror based on individual responses

Challenge for cause…The decision whether to challenge is easy
Do you immediately challenge or search for other areas of bias (?)
The hard part is executing a challenge for cause
See handouts, *Jury Selection: Challenges for Cause* (7-11-10) and Mickenberg, *Voir Dire and Jury Selection*, pp. 13-15)

Peremptory challenges...rank the severity of bad jurors with 6 strikes in mind
Severity issue…"Wymore Method" for capital cases uses a rating system
Need to use your limited number of strikes wisely

North Carolina Defender Trial School
Sponsored by the
The University of North Carolina School of Government and
Office of Indigent Defense Services
Chapel Hill, North Carolina

VOIR DIRE AND JURY SELECTION

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Thanks to Ann Roan and many other fine defenders for their advice and input.

LOOKING FOR A DIFFERENT, MORE EFFECTIVE WAY OF CHOOSING A JURY

For more than twenty years, I have been privileged to teach public defenders all over the country. And it pains me to conclude that when it comes to jury selection, almost all of us are doing a lousy job.

What passes for good voir dire is often glibness and a personal style that is comfortable with talking to strangers. The lawyer looks good and feels good but ends up knowing very little that is useful about the jurors.

More typically, voir dire is awkward, and consists of bland questions that tell us virtually nothing about how receptive a juror will be to our theory of defense, or whether the juror harbors some prejudice or belief that will make him deadly to our client.

We ask lots of leading questions about reasonable doubt, or presumption of innocence, or juror unanimity, or self defense, or witness truth-telling. Then when a juror responds positively to one of these questions, we convince ourselves that we have successfully "educated" the juror about our defense or about a principle of law. In reality, the juror is just giving us what she knows we want to hear, and we don't know anything about her.

Because the questions we are comfortable with asking elicit responses that don't help us evaluate the juror, we fall back on stereotypes (race, gender, age, ethnicity, class, employment, hobbies, reading material) to decide which jurors to keep and which to challenge. Or even worse, we go with our "gut feeling" about whether we like the juror or the juror likes us.

And then we are surprised when what seemed like a good jury convicts our client.

This short treatise, and the seminar it is meant to supplement, are a first effort at finding a more effective way of selecting jurors. It draws on:

- Scientific research done over the last decade or two about juror behavior and attitudes.
- Excellent work done by defenders in Colorado in devising a new and very effective method for voir dire in both capital and non-capital cases.
- Some very creative work done by defense lawyers all over the country.
- My own observations of too many trial transcripts from too many jurisdictions, in which good lawyers delude themselves into thinking that a comfortable voir dire has been an effective voir dire.

I. SOME BASIC THINGS ABOUT VOIR DIRE – WHY JURY SELECTION IS HARD. WHY WE FAIL.

A. It is suicidal to just "take the first twelve." It is arrogant and stupid to choose jurors based on stereotypes of race, gender, age, ethnicity, or class.

Every study ever done of jurors and their behavior tells us several things:

- People who come to jury duty bring with them many strong prejudices, biases, and preconceived notions about crime, trials, and criminal justice.
- Jurors are individuals. There is very little correlation between the stereotypical aspects of a juror's makeup (race, gender, age, ethnicity, education, class, hobbies, reading material) and whether a particular juror may have one of those strong biases or preconceived notions in any individual case.
- The prejudices and ideas jurors bring to court affect the way they decide cases – even if they honestly believe they will be fair and even if they honestly believe they can set their preconceived notions aside.
- Jurors will decide cases based on their prejudices and preconceived notions regardless of what the judge may instruct them. Rehabilitation and curative instructions are completely meaningless.
- Many jurors don't realize it, but they have made up their minds about the defendant's guilt before they hear any evidence. In other words . . .
- Many trials are over the minute the jury is seated.

For this reason it is absolutely essential that we do a thorough and meaningful voir dire – not to convince jurors to abandon their biases, but to find out what those biases are and get rid of the jurors who hold them.

The lawyer who waives voir dire, or just asks some perfunctory, meaningless questions, or relies on stereotypes or "gut feelings" to choose jurors is not doing his or her job.

B. Traditional voir dire is structured in a way that makes it very hard to disclose a juror's preconceived notions

The very nature of jury selection forces potential jurors into an artificial setting that is itself an impediment to obtaining honest and meaningful answers to typical voir dire questions. Here is how the voir dire process usually looks from the jurors' perspective:

1. When asked questions about the criminal justice system, prospective jurors know what

the "right," or expected answer is. Sometimes they know this from watching television. Sometimes the trial judge has given them preliminary instructions that contain the "right" answers to voir dire questions. Sometimes the questions are couched in terms of "can you follow the judge's instructions," which tells the jurors that answering "no" means that they are defying the judge. Jurors will almost always give the "right" answer to avoid getting in trouble with the court, to avoid seeming to be a troublemaker, and to avoid looking stupid in front of their peers.

EX: Q: The judge has told you that my client has a right to testify if he wishes and a right not to testify if he so wishes. Can you follow those instructions and not hold it against my client if he chooses not to testify?

A: Yes.

While it would be nice to believe that the juror's answer is true, there is just no way of knowing. The judge has already told the juror what the "correct" answer is, and the way we phrased our question has reinforced that knowledge. All the juror's answer tells us is that he or she knows what we want to hear.

2. Jurors view the judge as a very powerful authority figure. If the judge suggests the answer she would like to hear, most jurors will give that answer.

EX: Q: Despite your belief that anyone who doesn't testify must be hiding something, can you follow the judge's instructions and not take any negative inferences if the defendant does not take the stand?

A: Yes.

The juror may be trying his best to be honest, but does anyone really believe this answer?

3. When asked questions about opinions they might be embarrassed to reveal in public (such as questions about racial bias or sex), jurors will usually avoid the possibility of public humiliation by giving the socially acceptable answer – even if that answer is false.

4. When asked about how they would behave in future situations, jurors will usually give an aspirational answer. This means they will give the answer they hope will be true, or the answer that best comports with their self-image. These jurors are not lying. Their answers simply reflect what they hope (or want to believe or want others to believe) is the truth, even if they may be wrong.

EX: Q: If you are chosen for this jury, and after taking a first vote you find that the vote is 11-1 and you are the lone holdout, would you change your vote simply because the others all agree that you are wrong?

A: No.

We all know that this juror's response is not a lie – the juror may actually believe that he

or she would be able to hold out (or at least would like to believe it). On the other hand, we also know there is nothing in the juror's response that should make us believe he or she actually has the courage to hold out as a minority of one.

C. The judge usually doesn't make it any easier

1. Judges frequently restrict the time for voir dire. Often this is a result of cynicism – their experience tells them that most voir dire is meaningless, so why not cut it short and get on with the trial?

2. Judges almost always want to prevent defense counsel from using voir dire as a means of indoctrinating jurors about the facts of the case or about their theory of defense. And the law says they are allowed to limit us this way.

D. And we often engage in self-defeating behavior by choosing comfort and safety over effectiveness

1. Voir dire is the only place in the trial where we have virtually no control over what happens. Jurors can say anything in response to our questions. We are afraid of "bad" answers to voir dire questions that might taint the rest of the pool or expose weaknesses in our case. We are afraid of the judge cutting us off and making us look bad in front of the jury. We are afraid of saying something that might alienate a juror or even the entire pool of jurors.

2. If a juror gives a "bad" answer we rush to correct or rehabilitate him to make sure the rest of the panel is not infected by the bias.

3. As a result of these fears, we often ask bland meaningless questions that we know the judge will allow and that we know the jurors will give bland, non-threatening answers to.

4. We then fall back on stereotypes of race, age, gender, ethnicity, employment, education, and class to decide who to challenge. Or worse, we persuade ourselves that our "gut feelings" about whether we like a juror or whether the juror likes us are an intelligent basis for exercising our challenges.

Given all these obstacles to effective jury selection, how can we start figuring out how to do it better? My suggestion is to start with some of the things social scientists and students of human behavior have taught us about jurors.

II. THE PRIME DIRECTIVE: VOIR DIRE'S MOST IMPORTANT BEHAVIORAL PRINCIPLE

It is impossible to "educate" or talk a complete stranger out of a strongly held belief in the time available for voir dire.

Think about this for a moment. Everyone in the courtroom tells the juror what the "right" answers are to voir dire questions. Everyone tries hard to lead the juror into giving the "right" answer. And if the juror is honest enough to admit to a bias or preconceived notion about the case, everyone tries to rehabilitate him until he says he can follow the correct path (the judge's instructions, the Constitution, the law). And if we are honest with ourselves, everyone knows this is pure garbage.

Assume a juror says that she would give police testimony more weight than civilian testimony. The judge or a lawyer then "rehabilitates" her by getting her to say she can follow instructions and give testimony equal weight. When this happens, even an honest juror will deliberate, convince herself that she is truly weighing all testimony, and then reach the conclusion that the police were telling the truth. The initial bias, which the juror acknowledged and tried hard to tell us about, determines the outcome every time. It is part of the juror's personality, a product of her upbringing, education, and daily life. And no matter how good a lawyer you are, you can't talk her out of it.

Imagine, though, what would happen if we gave up on the idea of "educating" the juror, or "rehabilitating" her – If we admitted to ourselves that it is impossible to get that juror beyond her bias. We would then be able to completely refocus the goal of our voir dire:

III. THE ONLY PURPOSE OF VOIR DIRE

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

When a juror tells us something bad, there are only two things we should do:

- Believe them
- Get rid of them

This leads us to the most important revision we must make in our approach to voir dire:

We Are Not Selecting Jurors – We Are De-Selecting Jurors

The purpose of voir dire is not to "establish a rapport," or "educate them about our defense," or "enlighten them about the presumption of innocence or reasonable doubt." It is not to figure out whether we like them or they like us. To repeat:

The only purpose of voir dire is to discover which jurors are going to hurt our client, and to get rid of them.

IV. HOW TO ASK QUESTIONS IN VOIR DIRE

Once we accept that the only purpose of voir dire is to get rid of impaired jurors, we have a clear path to figuring out what questions to ask and how to ask them. The only reason to ask a question on voir dire is to give the juror a chance to reveal a reason for us to challenge him. These reasons fall into two categories:

- The juror is unable or unwilling to accept our theory of defense in this case.

- The juror has some bias that impairs his or her ability to sit on any criminal case.

This leads us to two more principles of human behavior that will guide us in asking the right questions on voir dire:

The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.

The more removed a question is from a person's normal, everyday experience, the more likely the person will give an aspirational answer rather than an honest one. Factual questions about personal experiences get factual answers. Theoretical questions about how they will behave in hypothetical courtroom situations get aspirational answers.

A. ***Stop talking and listen*** – the goal of voir dire is to get the juror talking and to listen to his or her answers. You should not be doing most of the talking. You should start by asking open-ended, non-leading questions. Leading questions will get the juror to verbally agree with you but won't let you learn anything about the juror. Voir dire is not cross-examination.

B. Let the jurors do most of the talking. Your job is to listen to them.

C. ***You can't do the same voir dire in every case***

1. Your voir dire must be tailored to your factual theory of defense in each individual case.

2. You must devise questions that will help you understand how each juror will respond to your theory of defense. This means asking questions about how the juror has responded in the

past when faced with an analogous situation.

D. Our tactics should not be aimed at asking the jurors how they would behave if certain situations come up during the trial or during deliberations. That kind of question only gets aspirational answers (how the juror hopes he would behave) or false answers (how the juror would like us to think he would behave). They tell us nothing about how the juror will actually behave. They also invite the judge to shut us down.

E. Out tactics should be aimed at asking jurors about how they behaved in the past when faced with situations analogous to the situation we are dealing with at trial.

1. It is essential that our questions not be about the same situation the juror is going to be considering at trial or about a crime or criminal justice situation – such questions only get aspirational answers.

2. Instead the question should be about an analogous, non-law related situation the juror was actually in. And we must be careful to ask about events that are really analogous to the issues we are interested in learning about.

EX: Your theory of defense is that the police planted evidence to frame your client because the investigating officer is a racist and your client is black. (Remember OJ?)

a. Asking jurors, “are you a racist?” or “do you think it is possible that the police would frame someone because of his race?” will get you nowhere. Most jurors will say “I am not a racist,” and “Of course it’s possible the police are lying. Anything is possible. I will keep an open mind.” And you will have no way of knowing what they are actually thinking.

b. You have a much better chance of learning something useful about the juror by asking an analogous question about the juror’s experience with racial bias.

EX: Asking the juror to, “tell us about the most serious incident you ever saw where someone was treated badly because of their race” will help you learn a lot about whether that juror is willing to believe your theory of defense. If the juror tells you about an incident, you will be able to gauge her response and decide how a similar response would affect her view of your case. If the juror says she has never seen such an incident, you have also learned a lot about her view of race.

F. You must consider and treat every prospective juror as a unique individual. It is your job on voir dire to find out about that unique person.

IV. WHAT SUBJECTS SHOULD YOU ASK ABOUT?

A. Look to Your Theory of Defense --

1. What do you really need a juror to believe or understand in order to win the case?

2. What do you really need to know about the juror to decide whether he or she is a person you want on the jury for this particular case?

B. What kind of life experiences might a juror have that are analogous to the thing you need a juror to understand about your case or to the things you really need to know about the jurors?

EX: Assume that your client is accused of sexually molesting his 9 year old daughter. Your theory of defense is that your client and his wife were in an ugly divorce proceeding, and the wife got the kid to lie about being abused.

The things you really need to get jurors to believe are:

1. A kid can be manipulated into lying about something this serious.

2. The wife would do something this evil to get what she wanted in the divorce.

The kind of questions you might ask the jurors should focus on analogous situations they may have experienced or seen, such as:

1. Situations they know of where someone in a divorce did something unethical to get at their ex-spouse.

2. Situations they know of where someone got really carried away because they became obsessed with holding a grudge.

3. Situations they know of where an adult convinced a kid to do something she probably knew was wrong.

4. Situations they know of where an adult convinced a kid that something that is really wrong is right.

A fact you really need to know about the jurors is whether they have any experience with child sex abuse that might affect their ability to be fair. Therefore, you must ask them:

5. If they or someone close to them had any personal experience with sexual abuse.

C. When you are choosing which question to ask a particular juror, you should build on the answers the juror gave to the standard questions already asked by the judge and the prosecutor. Often the things you learn about the juror from these questions will give you the opening you need to decide how to ask for a life-experience analogy. Areas that are often fertile ground for

seeking analogies are:

1. Does the juror have kids?
2. Does the juror supervise others at work?
3. Is the juror interested in sports?
4. Who does the juror live with?
5. What are the juror's interests?

D. Another reason to pay attention to the court's and prosecutor's voir dire is that it will often lead you to general subjects that may cause the juror to be biased or impaired. Judges and prosecutors always spend a lot of time talking about reasonable doubt, presumption of innocence, elements of crimes, unanimity, etc. It can be very effective to refer back to the answers the juror gave to the court or prosecutor, and follow up with an open-ended question that allows the juror to elaborate on his answer or explain what those principles mean to him.

V. HOW TO ASK THE QUESTIONS

Although the substance of the questions must be individually tailored to your theory of defense and to the individual jurors, there is a pretty simple formula for effectively structuring the form of the questions:

A. Start with an IMPERATIVE COMMAND:

1. "Tell us about"
2. "Share with us"
3. "Describe for us"

The reason we start the question with an imperative command is to make sure that the juror feels it is proper and necessary to give a narrative answer, not just a "yes" or "no."

B. Use a SUPERLATIVE to describe the experience you want them to talk about:

1. "The best"
2. "The worst"
3. "The most serious"

The reason we ask the question in terms of a superlative is to make sure we do not get a trivial experience from the juror.

C. ASK FOR A PERSONAL EXPERIENCE

1. "That you saw"
2. "That happened to you"
3. "That you experienced"

This is the crucial part of the question where you ask the juror to relate a personal experience. Be sure to keep the question open-ended, not leading.

D. ALLOW THEM TO SAVE FACE

1. “That you or someone close to you saw”
2. “That happened to you or someone you know”
3. “That you or a friend or relative experienced”

The reason we ask for the personal experience in this way is:

a. Give the juror the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them.

b. To give the juror the chance to relate an experience that happened to them but to avoid embarrassment by attributing it to someone else.

VI. PUTTING THE QUESTION TOGETHER

EX: Assume we are dealing with the same hypothetical about the child sex case and the divorcing parents. Some of the questions might come out like this:

1. “Tell us about the worst situation you’ve ever seen where someone involved in a divorce went way over the line in trying to hurt their ex.”

2. “Please describe for us the most serious situation when as a child, you or someone you know had an adult try to get you to do something you shouldn’t have done.”

VII. GETTING JURORS TO TALK ABOUT SENSITIVE SUBJECTS

If you are going to ask about sex, race, drugs, alcohol, or anything else that might be a sensitive topic there are several ways of making sure the jurors aren’t offended.

A. Before you introduce the topic, tell the jurors that if any of them would prefer to answer in private or at the bench, they should say so.

B. Explain to them why you have to ask about the subject.

C. It often helps to share a personal experience or observation you have had with the subject you will be asking questions about. By doing so, you legitimize the juror’s willingness to speak, and show that you are not asking them to do anything that you are not willing to do. If you decide to use this kind of self-revelation as a tool, be sure to follow these rules:

1. Keep your story short.

2. Make sure your story is exactly relevant to the point of the voir dire.
3. Keep your story short.

D. If you are going to voir dire on sensitive subjects, prepare those questions in advance, and try them out on others, to make sure you are asking them in a non-offensive way. Don't make this stuff up in the middle of voir dire.

E. If a juror reveals something that is very personal, painful, or embarrassing, it is essential that you immediately say something that acknowledges their pain and thanks them for speaking so honestly. You cannot just go on with the next question, or even worse, ask something meaningless like, "how did that make you feel."

VIII. SOME SAMPLE QUESTIONS ON IMPORTANT SUBJECTS

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.

IX. HOW TO FOLLOW-UP WHEN A JUROR SHOWS BIAS

This is the crucial moment of voir dire. Having defined the purpose of voir dire as

identifying and challenging biased or impaired jurors, we now have to figure out what to do when our questions have revealed bias or impairment.

The key to success is counter-intuitive. When a juror gives an answer that suggests (or openly states) some prejudice or preconceived notion about the case, our first instinct is to run away from the answer. We don't want the rest of the panel to be tainted by it. We want to show the juror the error of his ways. We want to convince him to be fair. Actually we should do the exact opposite.

- There is no such thing as a bad answer. An answer either displays bias or it doesn't. If it does, we should welcome an opportunity to establish a challenge for cause.

- If an answer displays or hints at bias, we must immediately address and confront it. Colorado defenders have referred to this strategy as "Run to the Bummer."

A. How To "Run to the Bummer"

Steps to take when a juror suggests some bias or impairment:

1. Mirror the juror's answer: "So you believe that . . . ."

    a. Use the juror's exact language
    b. Don't paraphrase
    c. Don't argue

2. Then ask an open-ended question inviting the juror to explain:

    "Tell me more about that"
    "What experiences have you had that make you believe that?"
    "Can you explain that a little more?"

    No leading questions at this point.

3. Normalize the impairment

    a. Get other jurors to acknowledge the same idea, impairment, bias, etc.
    b. Don't be judgmental or condemn it.

4. Now switch to leading questions to lock in the challenge for cause:

    a. Reaffirm where the juror is:

"So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense"

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

Q: “So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense.”

A: “Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn’t need your client to testify.”

Q: “How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?”

c. Reaffirm where the juror is not (i.e., what the law requires).

“And it would be very difficult, if not impossible for you to say this was self-defense unless the defendant testified that he acted in self-defense.”

d. Get the juror to agree that there is a big difference between these two positions.

“And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn’t testify at all.”

e. Immunize the juror from rehabilitation

“It sounds to me like you are the kind of person who thinks before they form an opinion, and then won’t change that opinion just because someone might want you to agree with them. Is that correct?”

“You wouldn’t change your opinion just to save a little time and move this process along?”

“You wouldn’t let anyone intimidate you into changing your opinion just to save a little time and move the process along?”

“Are you comfortable swearing an oath to follow a rule 100% even though it’s the opposite of the way you see the world?”

“Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings.”

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

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Basis for Challenge for Cause. 15A-1212

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

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

The STEPS to obtain a for cause challenge

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

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

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

4) Lock the juror's biased answer into a challenge for cause basis
Switch to LEADING questions from here on
Repeat the juror's biased views and emphasize the strength of the views
If the juror tries to wiggle out or qualify the answer, strip or take away their

qualifier and repeat the essence of their views

"Your son's struggles with cocaine has caused you to have very strong and personal feelings against anyone charged with a drug crime."

5) Suggest how the bias or impairment "might" provide the grounds for challenge

First, just raise the issue…do not go for the kill

The bias may provide more than one basis for challenge [see below examples]

Use leading questions but do not be confrontational

You may have to re-validate the juror's belief and right to hold those beliefs

"Your feelings about someone charged with a drug crime might affect your ability to be a neutral juror in this case?

[or your ability to presume innocence…or may make you lean toward an opinion of guilt before the trial starts…or prevent you from considering all the evidence]"

6) Get the juror to agree that their bias will affect their ability to serve

This may be tricky…you have to go from "might affect" to "would affect"

It might take several closely worded questions quantifying the effect...from "might" to "possible" to "probable" to "likely" to "substantially", etc.

You need to discuss how every case is not a right fit for every juror

Another type of case would be better for that juror…a case not involving that bias

Do not argue with the juror…You need the juror to agree with you

You may need to praise their honesty or right to hold their beliefs

"Your views about someone charged with a drug crime would affect your ability to be a neutral juror in this case?

[or your ability to presume innocence…or may make you lean toward an opinion of guilt before the trial starts…]"

This should provide the basis for a challenge for cause but beware "rehabilitation"

7) Protect your challenged juror's answers from "rehabilitation"

Commend the juror's honesty and willingness to talk about this personal issue

Remind juror of appropriateness of having strong views

Lock juror in on strength of views and views are part of who they are

Reassure juror that there is nothing wrong with having views that differ

from lawyers, other jurors, or judge

from the rules about jury service

Note that the juror does not appear the type who change opinions for convenience

Make your Challenge for CAUSE

JURY SELECTION QUESTIONS

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(Feb. 14, 2012)

I. GENERAL PURPOSE OF VOIR DIRE

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

"A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror." State v. Harris, 338 N.C. 211, 227 (1994).

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

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

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

II. PROCEDURAL RULES OF VOIR DIRE

Overall: The trial court has the duty to control and supervise the examination of prospective jurors. Regulation of the extent and manner of questioning during voir dire rests largely in the trial court's discretion. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995).

Group v. Individual Questions: "The prosecutor and the…defendant…may **personally question prospective jurors individually** concerning their competency to serve as jurors…." NCGS 15A-1214(c).

The trial judge has the discretion to limit individual questioning and require that certain general questions be submitted to the panel as a whole in an effort to expedite jury selection. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Same or Similar Questions: The defendant may not be prohibited from asking a question merely because the court [or prosecutor] has previously asked the same or similar question. N.C.G.S. 15A-1214(c); State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Leading Questions: Leading questions are permitted during jury voir dire [at least by the prosecutor]. State v. Fletcher, 354 N.C. 455, 468, 555 S.E.2d 534, 542 (2001).

Re-Opening Voir Dire: N.C.G.S. 15A-1214(g) permits the trial judge to reopen the examination of a prospective juror if, at any time before the jury has been impaneled, it is discovered that the juror has made an incorrect statement or that some other good reason exists. Whether to reopen the examination of a passed juror is within the judge's discretion. Once the trial court reopens the examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse such a juror. State v. Womble, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996). For example, in State v. Wiley, 355 N.C. 592, 607-610 (2002), the prosecution passed a "death qualified" jury to the defense. During defense questioning, a juror said that he would automatically vote for LWOP over the death penalty. The trial judge re-opened the State's questioning of this juror and allowed the prosecutor to remove the juror for cause.

Preserving Denial of Challenges for Cause: In order to preserve the denial of a challenge for cause for appeal, the defendant must adhere to the following procedure:
1) The defendant must have exhausted the peremptory challenges available to him;
2) After exhausting his peremptory challenges, the defendant must move (orally or in writing) to renew a challenge for cause that was previously denied if he either:
   a) Had peremptorily challenged the juror in question, or

b) Stated in the motion that he would have peremptorily challenged the juror if he had not already exhausted his peremptory challenges; and

3) The judge denied the defendant's motion for renewal of his cause challenge.

N.C.G.S 15A-1214(h) and (i).

Renewal of Requests for Disallowed Questions: Counsel may renew its requests to ask questions that were previously denied. Occasionally, a trial court may change its mind. See, State v. Polke, 361 N.C. 65, 68-69 (2006); State v. Green, 336 N.C. 142, 164-65 (1994).

III. SUBSTANTIVE AREAS OF INQUIRY

Accomplice Liability: Prosecutor properly asked about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule by the following "non-stake-out" questions in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"

"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"

"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"

Accomplice/Co-Defendant (or Interested Witness) Testimony:

It is proper to ask about prospective jurors' abilities to follow the law with respect to interested witness testimony…When an accomplice is testifying for the State, the accomplice is considered an interested witness, and his testimony is subject to careful [or the highest of] scrutiny. State v. Jones, 347 N.C. 193, 201-204 (1997). See, NCPI-Crim. 104.21, 104.25 and 104.30.

The following were proper questions (asked by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?

[According to the N.C. Supreme Court, **these 3 questions were proper and not stake-out questions**…They were designed to determine if jurors could follow the law and be impartial and unbiased. Jones, 347 N.C. at 204. The prosecutor accurately stated the law. An accomplice testifying for the State is considered an interested witness and his testimony is subject to careful scrutiny. The jury should analyze such testimony in light of the accomplice's interest in the outcome of the case. If the jury believes the witness, it should give his testimony the same weight as any other credible witness. Jones, 347 N.C. at 203-204.]

You may hear testimony from a witness who is testifying pursuant to a plea agreement. This witness has pled guilty to a lesser degree of murder in exchange for their promise to give truthful testimony in this case. Do you have opinions about plea agreements that would make it difficult or impossible for you to believe the testimony of a witness who might testify under a plea agreement? The prosecutor's inquiry merely (and properly) sought to determine whether a plea agreement would have a negative effect on prospective jurors' ability to believe testimony from such witnesses. State v. Gell, 351 N.C. 192, 200-01 (2000).

Age of Juror and Effects of It: N.C.G.S. 9-6.1 allows jurors age 72 years or older to request excusal or deferral from jury service but it does not prohibit such jurors from serving. In State v. Elliott, 360 N.C. 400, 408 (2006), the Court recognized that it is sensible for trial judges to consider the effects of age on the individual juror since the adverse effects of growing old do not strike all equally or at the same time. [Based on this, it appears that the trial court and the parties should be able to inquire into the effects of aging with older jurors.]

Circumstantial Evidence/Lack of Eyewitnesses:

Prosecutor informed prospective jurors that "*only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer.*" He then asked: "*Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?*" The court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

It was proper in first degree murder case for State to tell the jury that they will be relying upon circumstantial evidence with no witnesses to the shooting and then ask them

if that will cause any problems. State v Clark, 319 N.C. 215 (1987).

Child Witnesses: Trial judge erred in not allowing the defendant to ask prospective jurors "*if they thought children were more likely to tell the truth when they allege sexual abuse.*" State v Hatfeld, 128 N.C. App. 294 (1998)

Defendant's Prior Record: In State v Hedgepath, 66 N.C. App. 390 (1984), the trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow judge's instructions that they are to consider defendant's prior record only for purposes of determining credibility.

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

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

b) Insanity: It was reversible error for trial court to fail to dismiss juror who indicated he was not willing to return a verdict of NGRI even though defendant introduced evidence that would satisfy them that the defendant was insane at the time of the offense. State v Leonard, 295 N.C. 58,62-63 (1978); see also Vinson.

c) Mental Health Defense: The defendant has the right to question jurors about their attitudes regarding a potential insanity or lack of mental capacity defense, including questions about: "*courses taken and books read on psychiatry, contacts with psychiatrist or persons interested in psychiatry, members of family receiving treatment, inquiry into feelings on insanity defense and ability to be fair.*" U.S. v Robinson, 475 F.2d 376 (D.C. Cir. 1973); U.S. v Jackson, 542 F.2d 403 (7th Cir. 1976).

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

Drug-Related Context of Non-Drug Offense: In a prosecution for common law robbery and assault, there was no error in allowing prosecutor (after telling prospective jurors that a proposed sale of marijuana was involved) to inquire into whether any of them would be unable to be fair and impartial for that reason. State v Williams, 41 N.C. App. 287, disc. rev. denied, 297 N.C. 699 (1979).

The following was not a "stake-out" question and was a proper inquiry to determine the impartiality of the jurors: "*Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these*

people were out looking for drugs and involved in the drug environment, and became victims as a result of that?" State v Teague, 134 N.C. App. 702 (1999)

Eyewitness Identification: The following prosecutor's question was upheld as proper (and non-stake-out): *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

Expert Witness: *"If someone is offered as an expert in a particular field such as psychiatry, **could** you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was not an attempt to stake out jurors.

It was not an abuse of discretion for the judge to prevent defense counsel from asking jurors "*whether they **would** automatically reject the testimony of mental health professionals."* This was apparently a stake out question. State v. Neal, 346 N.C. 608, 618 (1997).

Focusing on "The Issue":
In a child homicide case, the prosecutor was allowed to ask a prospective juror "*if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

Following the Law: "The right to an impartial jury contemplates that each side will be allowed to make inquiry into the ability of prospective jurors to follow the law. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

If a juror's answers about a fundamental legal concept (such as the presumption of innocence) demonstrated either **confusion about**, or **a fundamental misunderstanding** of the principles…or **a simple reluctance to apply** those principles, its effect on the juror's inability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Hold-Out Jurors During Deliberations: Generally, questions designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to impermissible "stake-out" questions. State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001).

It is permissible, however, to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the right to stand by their beliefs in the case."* (Note that, if this permissible question is followed by the question, *"And would you do that?,"* this crosses the line into an impermissible stake-out question.) State v. Elliott, 344 N.C. 242, 262-63, 475 S.E.2d 202, 210 (1997); see also, State v. Maness, 363 N.C. 261 (2009).

Where defense counsel had already inquired into whether jurors could follow the law as specified in N.C.G.S. 15A-1235 by asking if they could *"independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. (N.C.P.I.-Crim. 101-40). State v. Maness, 363 N.C. 261 (2009).

Identifying Family Members: Not error to allow the prosecutor during jury selection to identify members of the murder victim's family who are in the courtroom. State v Reaves, 337 N.C. 700 (1994).

Intoxication: Proper for Prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. *"If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict."* State v McKoy, 323 N.C. 1 (1988).

Law Enforcement Witness Credibility: If a juror would automatically give enhanced credibility or weight to the testimony of a law enforcement witness (or any particular class of witness), he would be excused for cause. State v. Cummings, 361 N.C. 438, 457-58 (2007); State v. McKinnon, 328 N.C. 668, 675-76, 403 S.E.2d 474 (1991).

Legal Principles: Defense counsel may question jurors to determine whether they completely understood the principles of **reasonable doubt** and **burden of proof**. Once counsel has fully explored an area, however, the judge may limit further inquiry. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"The right to an impartial jury contemplates that each side will be allowed to make ***inquiry into the ability of prospective jurors to follow the law***. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

Defendant Not Testifying: It is proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense. A court, however, may disallow questioning about the defendant's failure to offer evidence in his defense. State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994).

Court erred in denying the defendant's challenge for cause of juror who

repeatedly said that the defendant's failure to testify would stick in the back of my mind while he was deliberating (in response to question "*whether the defendant's failure to testify would affect his ability to give him a fair trial"*). State v Hightower, 331 N.C. 636 (1992).

Presumption of Innocence and Burden of Proof: A juror gave conflicting and ambiguous answers about whether she could presume the defendant innocent and whether she would require him to prove his innocence. The Supreme Court awarded the defendant a new trial because the trial judge denied the defendant's challenge for cause. The Supreme Court said that **the juror's answers demonstrated either confusion about, or a fundamental misunderstanding of the principles of the presumption of innocence, or a simple reluctance to apply those principles**. Regardless whether the juror was confused, had a misunderstanding, or was reluctant to apply the law, its effect on her ability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Pretrial Publicity: Inquiry should be made regarding the effect of the publicity upon jurors' ability to be impartial or keep an open mind. Mu'min, 500 U.S. 415, 419-421, 425 (1991). Although "Questions about the content of the publicity…might be helpful in assessing whether a juror is impartial," they are not constitutionally required. Id. at 425. The constitutional question is *whether jurors had such fixed opinions that they could not be impartial*, not whether or what they remembered about the publicity. It is not required that jurors be totally ignorant of the facts and issues involved. Id., 500 U.S. at 426 and 430.

It was deemed proper for a prosecutor to describe some of the "uncontested" details of the crime before he asked jurors whether they knew or read anything about the case. State v. Nobles, 350 N.C. 483, 497-498, 515 S.E.2d 885, 894-895 (1999) (ADA noted that defendant was charged with discharging a firearm into a vehicle occupied by his wife and three small children). It was not a "stake-out" question.

Racial/Ethnic Background: Trial courts must allow questions regarding whether any jurors might be prejudiced against the defendant because of his race or ethnic group where the defendant is accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups. (If this criteria is not met, racial and ethnic questions are discretionary.) Rosales-Lopez v. United States, 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). Such questions must be allowed in capital cases involving a charge of murder of a white person by a black defendant. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986).

Sexual Offense/Medical Evidence: In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was a proper, non-stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003).

Sexual Orientation: Proper for prosecutor to question jurors regarding prejudice against homosexuality for the purpose of determining whether they could impartially consider the evidence knowing that the State's witnesses were homosexual. State v Edwards, 27 N.C. App. 369 (1975).

IV. IMPROPER QUESTIONS OR IMPROPER PURPOSES

Answers to Legal Questions: Counsel should not "fish" for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). [Does this mean can counsel get judge to give preliminary instructions before voir dire, and then ask questions about the law?]

Arguments that are Prohibited: A lawyer (even a prosecutor) may not make statements during jury selection that would be improper if they were later argued to the jury. State v. Hines, 286 N.C. 377, 385, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to make improper statements during voir dire about how the death penalty is rarely enforced).

Confusing and Ambiguous Questions: Hypothetical questions so phrased to be ambiguous and confusing are improper. For example, *"Now, everyone on the jury is in favor of capital punishment for this offense…Is there anyone on the jury, because the nature of the offense, feels like you might be a little bit biased or prejudiced, either consciously or unconsciously, because of the type or the nature of the offense involved; is there anyone on the jury who feels that they would be in favor of a sentence other than death for rape?"* (see, Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975)); or, *"Would you be willing to be tried by one in your present state of mind if you were on trial in this case?"* State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Inadmissible Evidence: An attorney may not ask prospective jurors about inadmissible evidence. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Incorrect Statements of Law: Questions containing incorrect or inadequate statements of the law are improper. State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

Indoctrination of Jurors: Counsel should not engage in efforts to indoctrinate jurors and counsel should not argue the case in any way while questioning jurors. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). In order to constitute an attempt to indoctrinate potential jurors, the improper question would be aimed at indoctrinating jurors with views favorable to the [questioning party]…or…advancing a particular position. State v. Chapman, 359 N.C. 328, 346 (2005). An **example of a non-indoctrinating question** is: *Can you imagine a set of circumstances in which…your personal beliefs conflict with the law? In that situation, what would you do?* See Chapman.

Overbroad and General Questions: *"Would you consider, if you had the opportunity,*

evidence about this defendant, either good or bad, other than that arising from the incident here?" This question was overly broad and general, and not proper for voir dire. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Rapport Building: Counsel should not visit with or establish "rapport" with jurors. State v. Phillips, 300 NC 678, 268 SE2d 452 (1980).

Repetitive Questions: The court may limit repetitious questions. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975). Where defense counsel had already inquired into whether jurors could "*independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. State v. Maness, 363 N.C. 261 (2009).

Stake-Out Questions:
"Staking out" jurors is improper. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995). "Staking out" is seen as an attempt to indoctrinate potential jurors as to the substance of defendant's defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"Staking out" defined***: Questions that tend to commit prospective jurors to a specific future course of action in the case***. Chapman, 359 N.C. 328, 345-346 (2005).

Counsel may not pose hypothetical questions designed to elicit in advance what the jurors' decision will be under a certain state of the evidence or upon a given state of facts...The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts. State v Vinson, 287 N.C. 326, 336-37 (1975), death sentence vacated, 428 U.S. 902 (1976).

Examples of Stake-Out Questions:

1) "*Is there anyone on the jury who feels that because the defendant had a gun in his hand, no matter what the circumstances might be, that if that-if he pulled the trigger to that gun and that person met their death as result of that, that simply on those facts alone that he must be guilty of something?"* Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

2) Improper "reasonable doubt" questions:
- a) *What would your verdict be if the evidence were evenly balanced?*
- *b) What would your verdict be if you had a reasonable doubt about the defendant's guilt?*
- *c) What would your verdict be if you were convinced beyond a reasonable doubt of the defendant's guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).
- d) The judge will instruct you that *"you have to find each element beyond a reasonable doubt. Mr. [Juror], if you hear the evidence that comes in and find three elements beyond a reasonable doubt, but you don't find on the*

fourth element, what would your verdict be?" State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 796 (2011)

3) *Whether you would vote for the death penalty […in a specified hypothetical situation…]?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

4) *If you find from the evidence a conclusion which is susceptible to two reasonable interpretations; that is, one leading to innocence and one leading to guilt, will you adopt the interpretation which points to innocence and reject that of guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

5) *If it was shown…that the defendant couldn't control his actions and didn't know what was going on…,would you still be inclined to return a verdict which would cause the imposition of the death penalty?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

6) *If you are satisfied from the evidence that the defendant was not conscious of his act at the time it allegedly was committed, would you still feel compelled to return a guilty verdict?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

7) *If you are satisfied beyond a reasonable doubt that the defendant committed the act but you believed that he did not intentionally or willfully commit the crime, would you still return a guilty verdict knowing that there would be a mandatory death sentence?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

8) Improper Burden of Proof Questions:

a) *If the defendant chose not to put on a defense, would you hold that against him or take it as an indication that he has something to hide?*

b) *Would you feel the need to hear from the defendant in order to return a verdict of not guilty?*

c) *Would the defendant have to prove anything to you before he would be entitled to a not guilty verdict?* State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980), or

d) *Would the fact that the defendant called fewer witnesses than the State make a difference in your decision as to her guilt?* State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986).

9) Improper Insanity Questions:

a) *Do you know what a dissociative period is and do you believe that it is possible for a person not to know because some mental disorder where they actually are, and do things that they believe they are doing in another place and under circumstances that are not actually real?*

b) *Are you thinking, well if the defendant says he has PTSD, for that reason alone, I would vote that he is guilty?* State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

10) Improper "Hold-out" Juror Questions:

a) A question designed to determine how well a prospective juror would stand up

to other jurors in the event of a split decision amounts to an impermissible "stake-out." State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001). For example, *"if you personally do not think that the State has proved something beyond a reasonable doubt and the other 11 jurors have, could you maintain the courage of your convictions and say, they've not proved that?"*

b) It is permissible to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the rights to stand by their beliefs in the case."* If this permissible question is followed by the question, *"And would you do that?"* this crosses the line into an impermissible stake-out question. State v. Elliott, 344 N.C. 242, 263, 475 S.E.2d 202, 210 (1996).

c) The following hypothetical inquiry was deemed an improper stake-out question: *"If you were convinced that life imprisonment without parole was the appropriate penalty after hearing the facts, the evidence, and the law, could you return a verdict of life imprisonment without parole even if you fellow jurors were of different opinions?"* State v. Maness, 363 N.C. 261, 269-70 (2009).

11) Improper Questions about Witness Credibility:

a) *"What type of facts would you look at to make a determination if someone's telling the truth?"*

b) In determining whether to believe a witness, *"would it be important to you that a person could actually observe or hear what they said [that] they have [seen or heard] from the witness stand?"* State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 793-94 (2011).

c) 11) *"Whether you **would** automatically reject the testimony of mental health professionals."* State v. Neal, 346 N.C. 608, 618 (1997).

Examples of NON-Stake Out Questions:

1) Prosecutor asked the jurors *"if they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor."* The Supreme Court stated, "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994)

2) Prosecutor informed prospective jurors that *"only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer."* He then asked: *Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?* Court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

3) *"Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these people were out looking for drugs and involved in the drug environment, and became victims as a result of that?"* State v Teague, 134 N.C. App. 702 (1999).

4) *"If someone is offered as an expert in a particular field such as psychiatry, could you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was NOT an attempt to stake out jurors.

5) Proper "non-stake-out" questions (by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 204, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) *After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?*

6) Proper "non-stake-out" questions asked by prosecutor about views on death penalty from State v. Chapman, 359 N.C. 328, 344-346 (2005):

a) As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?

b) Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?

c) Can you imagine a set of circumstances in which…your personal beliefs [for or against the death penalty] conflict with the law? In that situation, what would you do?

A federal court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005), explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror* ***could find*** *(instead of would find)* ***that certain facts call for the imposition of life or death****, or 2) whether a juror* ***could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

7) The prosecutor's question, *"Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* was NOT a stake-out attempt to get jurors to not consider defendant's appearance and humanity in capital sentencing hearing. Chapman, 359 N.C. 328, 346-347 (2005).

8) Prosecutor properly asked "non-stake-out" questions about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

a) *"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"*

b) *"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"*

c) *"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"*

9) In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was NOT a stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003) (The court said that the following question would have been a stake-out if the ADA had asked it, *"If there is medical evidence stating that some incident has occurred, will you find the defendant guilty beyond a reasonable doubt*).

10) In a case involving eyewitness identification, the prosecutor asked: *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The Court said that this question did NOT cause the jurors to commit to a future course of action. The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

11) In a child homicide case, the prosecutor was allowed to ask a prospective juror *"if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The

Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

JURY SELECTION IN DEATH PENALTY CASES

I. GENERAL PRINCIPLES

Both the defendant and the state have the right to question prospective jurors about their views on capital punishment…The extent and manner of the inquiry by counsel lies within the trial court's discretion and will not be overturned absent an abuse of discretion. State v. Brogden, 334 N.C. 39, 430 S.E.2d 905, 908 (1993).

A defendant on trial for his life should be given great latitude in examining potential jurors. State v Conner, 335 N.C. 618 (1995).

[C]ounsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted).

"Part of the Sixth Amendment's guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors…Voir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored." Morgan v Illinois, 504 U.S. 719, 729, 733 (1992)

Voir dire must be available ***"to lay bare the foundation"*** of a challenge for cause against a prospective juror. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so. . Morgan, 504 U.S. at 733-34.

In voir dire, "what matters is how…[the questions regarding capital punishment] might be understood-or misunderstood-by prospective jurors." For example, "a general question as to the presence of reservations [against the death penalty] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases." One cannot assume the position of a venireman regarding this issue absent his own unambiguous statement of his beliefs. Witherspoon, 391 U.S. at 515, n. 9.

The trial court **must allow a defendant to go beyond the standard "fair and impartial" question**: "As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed...It

may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." Morgan, 504 U.S. at 735-36.

It is not necessary for the trial court to explain or **for a juror to understand the process of a capital sentencing proceeding before the juror can be successfully challenged for his answers to questions.** An **understanding of the process should not affect one's beliefs regarding the death penalty**. Simpson, 341 N.C. 316, 462 SE2d 191, 202, 206 (1995).

II. Death Qualification: General Opposition to Death Penalty Not Enough

Under the "impartial jury" guarantee of the Sixth Amendment, death penalty jurors may not be excused "for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"…, or "that there are some kinds of cases in which they would refuse to recommend capital punishment. Witherspoon, 391 U.S. at 522, 512-13.

The Supreme Court recognized that "A man who opposes the death penalty…can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror." Id., 391 U.S. at 519.

"Not all [jurors] who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors…so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137, 149 (1986). [Note that the Court in Lockhart reaffirmed its position that death-qualified juries are not conviction-prone, and it is constitutional for a death-qualified jury to decide the guilt/innocence phase. The Court rejected the "fair-cross-section" argument against death-qualified juries deciding guilt.]

"[A] ***juror is not automatically excluded from jury service merely because that juror may have an opinion*** about the propriety of the death penalty." State v. Elliott, 360 N.C. 400, 410 (2006). General opposition to the death penalty will not support a challenge for cause for a potential juror who will "conscientiously apply the law to the facts adduced at trial." Such a **juror may be properly excluded "if he refuses to follow the statutory scheme and truthfully answer the questions** put by the trial judge." State v. Brogden, 430 S.E.2d at 907-08 (1993)(citing Witt, Adams v. Texas, and Lockhart).

III. Death Qualification Rules: Witherspoon and Witt Standards

The State may excuse jurors who make it **"unmistakably clear" that (1) they**

would "automatically vote against the death penalty" no matter what the facts of the case were, or (2) "their attitude about the death penalty would prevent them from making an impartial decision" regarding the defendant's guilt. Witherspoon, 391 U.S. at 522, n. 21 (1968).

A . . . prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be **willing to consider all of the penalties** provided by state law, and that he **not be irrevocably committed against the penalty of death regardless of the facts and circumstances**..." that might emerge during the trial. Witherspoon v Illinois, 391 U.S. 510, 523 n.21 (1968).

The proper standard for excusing a prospective juror for cause because of his views on capital punishment is: **"Whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction or his oath."** Wainwright v. Witt, 469 U.S. at 424.

Note that **considerable confusion regarding the law** on the part of the juror could amount to **"substantial impairment."** Uttecht v. Brown, 551 U.S. 1, 127. S.Ct. 2218, 167 L.Ed.2d 1014, 1029 (2007).

Prospective jurors may not be excused for cause simply because of the possibility "of the **death penalty may affect** what their **honest judgment of the facts** will be or **what they may deem to be a reasonable doubt**." The fact that the possible imposition of the death penalty would **"affect" their deliberations by causing them to be more emotionally involved or to view their task with greater seriousness** is not grounds for excusal. The same rule against exclusion for cause applies to **jurors who could not confirm or deny** that their **deliberations would be affected** by their views about the death penalty or by the possible imposition of the death penalty. Adams v. Texas, 448 U.S. 38, 49-50 (1980).

The State may excuse for cause a juror if he affirmatively answers the following question: **"Is your conviction [against the death penalty] so strong that you cannot take an oath [to fairly try this case and follow the law], knowing that a possibility exists in regard to capital punishment."** Lockett v. Ohio, 438 U.S. 586, 595-96 (1978). This ruling was based on the impartiality prong of the Witherspoon standard (i.e., their attitudes toward the death penalty would prevent them from making an **impartial decision as to the defendant's guilt**.)

The N.C. Supreme Court has upheld the removal of potential jurors **who equivocate** or who state that although they believe generally in the death penalty, they indicate that they personally **would be unable or would find it difficult to vote for the death penalty**. Simpson, 341 N.C. 316, 462 S.E.2d 191, 206 (1995); State v. Gibbs, 335 NC 1, 436 SE2d 321 (1993), cert. denied, 129 L.Ed.2d 881 (1994).

The following questions **by the prosecutor** were found to be proper:

1) [Mr. Juror…], *how do you feel about the death penalty, sir, are you opposed to it or [do] you feel like it is a necessary law?*

2) *Do you feel that you could be part of the legal machinery which might bring it about in this particular case?* State v Willis, 332 N.C. 151, 180-81 (1992).

IV. Rehabilitation of Death Challenged Juror

It is not an abuse of for the trial court to deny the defendant the chance to rehabilitate a juror **who has expressed clear and unequivocal** opposition to the death penalty in response to questions asked by the prosecutor and judge **when further questioning by defendant would not have likely produced different answers**. Brogden, 334 N.C. 39, 430 SE2d 905, 908-09 (1993); see also State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992). [In Brogden, a juror said that he could consider the evidence, was not predisposed either way, and could vote for death in an appropriate case. The same juror also said his feelings about the death penalty would "partially" or "to some extent" affect his performance as a juror. The trial court **erroneously** denied the defendant the opportunity to rehabilitate this juror.]

It is **error** for a trial court to enter "**a general ruling, as a matter of law," a defendant will never be allowed to rehabilitate** a juror when the juror's answers…have indicated that the **juror may be unable to follow the law** and fairly consider the possibility of recommending a sentence of death. State v. Green, 336 N.C. 142, 161 (1994) (based on Brogdon).

V. Life Qualifying Questions: Morgan v. Illinois

"If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts were?" Morgan, 504 U.S. at 723. A juror who will automatically vote for the death penalty in every case will fail to follow the law about considering aggravating and mitigating evidence, and has already formed an opinion on the merits of the case. Id. at 504 U.S. at 729, 738.

"Clearly, the extremes must be eliminated-i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence." Morgan, 504 U.S. at 734, n. 7.

"General fairness and follow the law questions" are not sufficient. **A capital defendant is entitled to inquire and ascertain a potential juror's predeterminations regarding the imposition of the death penalty.** Morgan, 504 U.S. at 507; State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 840 (1994).

[For a good summary of Morgan, see U.S. v. Johnson, 366 F.Supp. 2d 822, 826-831 (N.D. Iowa 2005).]

Proper Questions:

1) ***As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?*** Chapman, 359 N.C. 328, 344-345 (2005).

2) ***Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?***

[According to the Supreme Court, these general questions (asked by the prosecutor, i.e., #1 and #2 herein) did not tend to commit jurors to a specific future course of action. Instead, the questions helped to clarify whether the jurors' personal beliefs would substantially impair their ability to follow the law. Such inquiry is not only permissible, it is desirable to safeguard the integrity of a fair and impartial jury" for both parties. Chapman, 359 N.C. 328, 344-345 (2005).]

3) ***Can you imagine a set of circumstances in which…your personal beliefs*** *[…for or against the death penalty…]* ***conflict with the law? In that situation, what would you do?***

[While a party may not ask questions that tend to "stake out" the verdict a prospective juror would render on a particular set of facts…, **counsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence**….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted)…..The Supreme Court said that, although the prosecutor's questions (numbered 1-3 above) were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).]

4) ***Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994)

5) ***Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994). [The gist of the above two questions (numbered 4 and 5) was to determine whether the juror was willing to consider a life sentence in the appropriate circumstances or would automatically vote for death upon conviction. Conner, 440 SE2d at 841.]

6) ***If at the first stage of the trial you voted guilty for first-degree murder, do you think that you could at sentencing consider a life sentence or would your feelings about the death penalty be so strong that you could not consider a life sentence?*** State v Conner, 335 N.C. 618, 643-45 (1994) (referring to State v Taylor).

7) ***If you had sat on the jury and had returned a verdict of guilty, would you then presume that the penalty should be death?*** State v Conner, 335 N.C. 618, 643-45 (1994). [Referring to questions used in State v Taylor, 304 N.C. at 265, would now be acceptable). Also approved in State v. Ward, 354 N.C. 231, 254, 555 S.E.2d 251, 266 (2001) when asked by the prosecutor.]

8) ***If the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned a verdict of guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?*** State v Conner, 335 N.C. 618, 643-45 (1994). [The Court recognized that questions (numbered here as 6-8) that were deemed inappropriate in State v Taylor, 304 N.C. at 265, would now be acceptable.]

9) A capital defendant **must be allowed** to ask, ***"whether prospective jurors would automatically vote to impose the death penalty in the event of a conviction."*** State v. Wiley, 355 N.C. 592, 612 (2002) (citing Morgan 504 U.S. 719, 733-736).

Improper Questions:

1) Improper questions due to "**form**" (according to Simpson, 341 N.C. 316, 462 S.E.2d 191, 203 (1995)):

a) *Do you think that a sentence to life imprisonment is a sufficiently harsh punishment for someone who has committed cold-blooded, premeditated murder?*

b) *Do you think that before you would be willing to consider a death sentence for someone who has committed cold-blooded, premeditated murder, that they would have to show you something that justified that sentence?*

2) Questions that were **argumentative, incomplete statement of the law, and "stake-outs"** are improper. Simpson, 341 N.C. at 339-340.

3) The following question was properly disallowed under Morgan because it was **overly broad and called for a legislative/policy decision**: *Do you feel that the death penalty is the appropriate penalty for someone convicted of first-degree murder?* Conner, 335 N.C. at 643.

4) Defense counsel was not allowed to ask the following questions because they were **hypothetical stake-out questions** designed to pin down jurors regarding the kind of fact scenarios they would deem worthy of LWOP or the death penalty:

a) *Have you ever heard of a case where you thought that LWOP should be the appropriate punishment?*

b) *Have you ever heard of a case where you thought that the death penalty should be the punishment?*

c) *Whether you could conceive of a case where LWOP ought to be the punishment? What type of case is that?* State v. Wiley, 355 N.C. 592, 610-613 (2002).

Case-Specific Questions under Morgan:

The court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005) addressed the issue of whether Morgan allows for case-specific questions (i.e., questions that ask whether jurors can consider life or death in a case involving stated facts). The court decided that Morgan did not preclude (or even address) case-specific questions. 366 F.Supp. 2d at 844-845. ***The essence of the Supreme Court's decision in Morgan was that, in order to empanel a fair and impartial jury, a defendant must be afforded the opportunity to question jurors about their ability to consider life and death sentences based on the facts and law in a particular case rather than automatically imposing a particular sentence no matter what the facts were.*** Therefore, the court in

Johnson found that case-specific questions (other than stake-out questions) are appropriate under Morgan. 366 F.Supp. 2d at 845-846.

In fact case-specific questions may be constitutionally required since a prohibition on such questions could impede a party's ability to determine whether jurors are unwaveringly biased for or against a death sentence. 366 F.Supp. 2d at 848.

The Johnson court explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror **could find** (instead of would find) **that certain facts call for the imposition of life or death**, or 2) whether a juror **could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

VI. Consideration of MITIGATION Evidence

General Principles:

Pursuant to Morgan v. Illinois, capital jurors must be able to consider and give weight to mitigating circumstances. "Any juror who states that he or she will automatically **vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider mitigating evidence** and to decide if it is sufficient to preclude imposition of the death penalty." Morgan, 504 U.S. at 738, 119 L.Ed.2d at 508. Such jurors "not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." Morgan, 504 U.S. at 736, 119 L.Ed.2d at 507. **"Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause**, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." Morgan, 504 U.S. at 739, 119 L.Ed.2d at 509.

Not only must the defendant be allowed to offer all relevant mitigating circumstance, "the sentencer [must] listen-that is **the sentencer must consider the mitigating circumstances when deciding the appropriate sentence.** Eddings v Oklahoma, 455 U.S. 104, 115 n.10 (1982)

[Jurors] may determine the weight to be given relevant mitigating evidence...[b]ut **they may not give it no weight by excluding such evidence from their consideration**. Eddings v Oklahoma, 455 U.S. 104, 114 (1982)

[The] decision to impose the death penalty is a reasoned moral response to the

defendant's background, character and crime…Jurors make individualized assessments of the appropriateness of the death penalty. Penry v. Lynaugh, 109 S.Ct. 2934, 2948-9 (1988)

Procedure must require the sentencing body **to consider the character and record of the individual offender and the circumstances of the particular offense**. Woodsen v North Carolina, 428 U.S. 280, 304 (1976)

In a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique individualized judgment regarding the punishment that a particular person deserves. Turner v Murray, 476 U.S. 23, 33-34 (1985) (quoting Caldwell v Mississippi, 472 U.S. 320, 340 n.7 (1985).

Potential Inquiries into Mitigation Evidence:

[The N.C. Supreme Court] conclude[d] that, in permitting defendant to inquire generally into jurors' feelings about mental illness and retardation and other mitigating circumstances, he was given an adequate opportunity to discover any bias on the part of the juror…[That, combined with questions] asking jurors if they would automatically vote for the death penalty…and if they could consider mitigating circumstances.., satisfies the constitutional requirements of Morgan.
State v. Skipper, 337 N.C. 1, 21-22 (1994). [Note that the only restriction…was whether a juror could "consider" a specific mitigating circumstance in reaching a decision. State v. Skipper, 337 N.C. 1, 21 (1994)]

The Supreme Court had the following to say about the following question (and two other questions) originally asked by a prosecutor: "***Can you imagine a set of circumstances in which…your personal beliefs*** *[about __?]* ***conflict with the law? In that situation, what would you do?"*** Although the prosecutor's questions were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).

Note, however, the following questions were deemed improper because 1) they "fished" for answers to legal questions before the judge instructed the jury about the applicable law, and 2) the questions "staked-out" jurors about what kind of verdict they would render under certain named circumstances:

a) "*If the State is able to prove that the defendant premeditatedly and deliberately killed three people…, would you be able to fairly consider things like sociological background, the way he grew up, if he had an alcohol problem, things like that in weighing whether he should get death or LWOP?"*;

b) "*Assuming the State proves three cold-blooded P&D murders, can you conceive in your own mind the mitigating factors that would let you find your ability for a*

penalty less than death?" State v. Mitchell, 353 N.C. 309, 318-319 543 S.E.2d 830, 836-837 (2001).

The following question was allowed by the trial court: ***"Do you feel like whatever we propose to you as a potential mitigating factor that you can give that fair consideration and not already start out dismissing those and saying those don't count because of the severity of the crime."*** State v Jones, 336 N.C. 229, 241 (1994).

An inquiry into jurors' **latent bias against any type of mitigation evidence** may be appropriate. In Simpson, 341 N.C. 316, 340-341, 462 S.E.2d 191, 205 (1995), the "majority" of the following questions **were deemed improper** questions about whether jurors could consider certain mitigating circumstances due to "form" or "staking out":

a) "*Do you think that the punishment that should be imposed for anyone in a criminal case in general should be effected [sic] by their mental or emotional state at the time that the crime was committed?"*

b) *"If you were instructed by the Court that certain things are mitigating, that is they are a basis for rendering or returning a verdict of life imprisonment as opposed to death and were those circumstances established you must give them some weight or consideration, could you do that?"*

c) *"Mr. [Juror], in this case if there was evidence to support, evidence to show that the defendant was under the influence of a mental or emotional disturbance at the time of the commission of the murder and if the Court instructed you that was a mitigating circumstance, if proven, that must be given some weight, could you follow that instruction?"*

d) *"If the Court advises you that by the preponderance of the evidence that if you are shown that the capability of the defendant to conform his conduct to the requirements of the law was impaired at the time of the murder, and the Court instructed you that was a circumstance to which you must give some consideration, could you follow that instruction?"*

e) *"Do you believe that a psychologist or a psychiatrist can be successful in treating people with mental or emotional disturbances?"*

f) *"Do you personally believe, and I am talking about your personal beliefs, that if by the preponderance of evidence, that is evidence that is established, that a person who committed premeditated murder was under the influence of a mental or emotional disturbance at the time that the crime was committed, do you personally consider that as mitigating, that is as far as supporting a sentence of less than the death penalty?"*

g) *"Now if instructed by the Court and if it is supported by the evidence, could you take into account the defendant's age at the time of the commission of the crime?"*

h) *"Do you believe that you could fairly and impartially listen to the evidence and consider whether any mitigating circumstances the judge instructs you on are found in the jury consideration at the end of the case?"*

In finding "most" of the above-cited questions improper, it was important to the Supreme Court that the trial court had allowed the defense lawyers to asked jurors about their experiences with mental problems, mental health professions, and foster care. **Such questions allowed the defendant to explore whether jurors had any latent bias**

against any type of mitigation evidence. Simpson, 341 N.C. at 341-342.

See discussion of U.S. v. Johnson, 366 F.Supp. 822 (N.D. Iowa 2005) above for authority or argument that case-specific inquiry about mitigation should be allowed under Morgan.

*For more mitigation questions, see below for "specific areas of inquiry."

VII. Specific Areas of Inquiry

Accomplice Liability: It was proper for prosecutor to ask prospective juror if he would be able to recommend the death penalty for someone who did not actually pull the trigger since it was uncontroverted that the defendant was an accessory. The State could inquire about the jurors' ability to impose the death penalty for an accessory to first-degree murder. State v Bond, 345 N.C. 1, 14-17, 478 S.E.2d 163 (1996):

a) *"The evidence will show [the defendant] did not actually pull the trigger. Would any of you feel like simply because he did not pull the trigger, you could not consider the death penalty and follow the law concerning the death penalty."*

b) *"Regardless of the facts and circumstances concerning the case, you could not recommend the death penalty for anyone unless it was the person who pulled the trigger."*

Age of Defendant:

The following question was asked by defense counsel: *"[T]he defendant will introduce things that he contends are mitigating circumstances, things like his age at the time of the crime...Do you feel like you can consider the defendant's age at the time the crime was committed ...and give it fair consideration?"* The Supreme Court assumed it was error for the trial court to sustain the State's objection to this question. In finding it harmless, however, the Court stated, "[i]n the context that this question was propounded, the juror is bound to have known the circumstance to which the defendant referred was the age of the defendant." State v Jones, 336 N.C. 229, 241 (1994)

Note, however, the question *"Would you consider the age of the defendant to be of any importance in this case [in deciding whether the death penalty is appropriate]?"* was found to be a "stake-out" question in State v. Womble, 343 N.C. 667, 682 473 S.E.2d 291, 299 (1996).

Aggravating Circumstances:

The Supreme Court has held that **questions about a specific aggravating circumstance that will arise in the case amounts to a stake–out question**. State v. Richmond, 347 N.C. 412, 424, 495 S.E.2d 677 (1998)(*"could you still consider mitigating circumstances knowing that the defendant had a prior first-degree murder conviction"*); State v. Fletcher, 354 N.C. 455, 465-66 (2001)(in a re-sentencing in which

the first-degree murder conviction was accompanied by a burglary conviction, counsel asked, the State has *"to prove at least one aggravating factor, that is…the fact that the murder was part of a burglary. That's true in this case because [the defendant] was also convicted of burglary. Knowing that about this case, could you still consider a life sentence…?"*)

Cost of Life Sentence vs. Death Sentence

In State v. Elliott, 360 N.C. 400, 409-10 (2006), the Supreme Court held that "we cannot say that the trial court clearly abused its discretion" when it did not allow defense counsel to ask, *"Do you have any preconceived notions about the costs of executing someone compared to the cost of keeping him in prison for the rest of his life."* The Supreme Court admitted that the question was "relevant" but, in light of the inquiry the trial court allowed, it was not a clear abuse of discretion to disallow the question. See also, State v. Cummings, 361 N.C. 438, 465 (2007). On the other hand, a trial court may reverse its previous denial and allow the "costs" question. State v. Polke, 361 N.C. 65, 68 (2006).

Course of Conduct Aggravator (or Multiple Murders):

Prosecutor was not staking out juror when asking: *"If the State satisfied you... that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, then I take it you could give the defendant the death penalty for beating two humans to death with a hammer, is that correct?"* State v Laws, 325 N.C. 81 (1989).

Felony Murder Defined:

Prosecutor properly defined felony murder as *"a killing which occurs during the commission of a violent felony, such as _____"* (the felony in this case was discharging a firearm into an occupied vehicle). State v. Nobles, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999).

Forecast of Aggravating or Mitigating Circumstance(s):

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: **[I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show,** provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

A defendant is not entitled to put on a mini-trial of his evidence during voir dire by using hypothetical situations to determine whether a juror would cast his vote for his theory. The trial court in Cummings **allowed defense counsel to question prospective jurors about whether they had been personally involved** in any of those situations [such as domestic violence, child abuse, and alcohol and drug abuse], however, the judge **properly refused to allow defense counsel to ask hypothetical and speculative questions** that were being used to try the mitigation evidence during jury selection. State v. Cummings, 361 N.C. 438, 464-65 (2007).

Foster Care:

It was proper to ask, *Whether any jurors have had any experience with foster care?* Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995).

Gender of Defendant [or Victim?]:

The prosecutor properly asked, *"Would the fact that the Defendant is a female in any way affect your deliberations with regard to the death penalty?"* This was not a stake-out question. It was appropriate to inquire into the possible sensitivities of prospective jurors toward a female defendant facing the death penalty in an effort to ferret out any prejudice arising out of defendant's gender. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999).

HAC Aggravator:

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: [I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show, provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

Impaired Capacity (f)(6):

Could the juror consider impaired capacity due to intoxication by drugs or alcohol as a mitigating circumstance and give the evidence such weight as you believe it is due ? Would your feelings about drugs or alcohol prevent you from considering the evidence ? State v Smith, 328 N.C. 99, 127 (1991). (See, where Court found that the following was a stake-out question: *"How many of you think that drug abuse is irrevelant to punishment in this case."* State v. Ball, 344 N.C. 290, 304, 474 S.E.2d 345, 353 (1996).

Prosecuting attorney asked the jurors, *"If they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor.* The Supreme Court stated: "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994).

It was proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. (*If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict.*) State v McKoy, 323 N.C. 1 (1988).

Lessened Juror Responsibility:

In closing argument and during jury selection, **it is improper for a prosecutor to make statements that lessens the jury's role or responsibility** in imposing a potential death penalty **or lessens the seriousness or reality of a death sentence**. State v. Hines, 286 N.C. 377, 381-86, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to tell a

prospective juror, *"to ease your feelings [about imposing the death penalty], I might say…that one [person] has been put to death in N.C. since 1961"*; State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975), State v. Jones, 296 N.C. 495, 497-502 (1979) (it is error for *a prosecutor to suggest that the appellate process or executive clemency will correct any errors in a jury's verdict*); State v. Jones, 296 N.C. at 501-502 (prosecutor improperly discussed how *15A-2000(d) provides for an automatic appeal and how the Supreme Court must overturn a death sentence if it makes certain findings*. This had the effect of minimizing in the jurors' minds their role in recommending a death sentence).

Life Sentence (Without Parole):

During jury selection, a prospective juror indicated that he did not feel that a life sentence actually meant life (prior to LWOP statute). The trial court then instructed the jury that they should consider a life sentence to mean that defendant would be imprisoned for life and that they should not take the possibility of parole into account in reaching a verdict. The juror indicated that he would have trouble following that instruction and was excused for cause. Defense counsel requested that he be allowed to ask the other prospective jurors whether they could follow the court's instructions on parole. The trial court erroneously refused to allow the question. The Supreme Court held that **the defendant has a right to inquire as to whether a prospective juror will follow the court's instruction (i.e., life means life).** State v Jones, 336 N.C. 229, 239-40 (1994).

In several cases, the Supreme Court has upheld the refusal to allow defense counsel to ask about jurors' *"understanding of the meaning of a sentence of life without parole", "conceptions of the parole eligibility of a defendant serving a life sentence", or their feelings about whether the death penalty is more or less harsh that life in prison without parole."* State v. Neal, 346 N.C. 608, 617-18 (1997); State v. Jones, 358 N.C. 330 (2004); State v. Garcell, 363 N.C. 10, 30-32 (2009). These decisions were based on the principle that a defendant does not have the constitutional right to question the venire about parole. State v. Neal, 346 N.C. at 617.

In light of this, a safe inquiry might avoid the topic of "parole" and simply ask jurors about "their views of a life sentence for first-degree murder."

Another safe inquiry might be based on 15A-2002 which provides that "the judge shall instruct the jury…that a sentence of life imprisonment means a sentence of life without parole." There is no doubt that the jury will hear this instruction and, generally, the parties should be allowed to inquire whether jurors hold misconceptions that will affect their ability to "follow the law." **"Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection voir dire."** See, State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990); State v. Henderson, 155 N.C.App. 719, 727 (2003)

A juror's misperception about a life sentence with no possibility of parole may substantially impair his or her ability to follow the law. Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). In Uttecht, despite a juror being informed four

or five times that a life sentence meant "life imprisonment without the possibility of parole," the juror continued to say that he would support the death penalty if the defendant would be released to re-offend. That juror was properly removed for cause. 167 L.E.d2d at 1025-30.

In a pre-LWOP case, the prosecutor improperly argued that the defendant could be paroled in 20 years if the jury awarded him a life sentence. The Supreme Court stated that, **"The jury's sentence recommendation should be based solely on their balancing the aggravating and mitigating factors before them. The possibility of parole is not such a factor, and it has no place in the jury's recommendation of their sentence to be imposed."** State v. Jones, 296 N.C. 495, 502-503 (1979). This principle might provide authority for inquiring into jurors' erroneous beliefs about parole to determine if they can follow the law.

Mental or Emotional Disturbance:

If the court instructs you that you should consider whether or not a person is suffering from mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow the instruction? State v Skipper, 337 N.C. 1, 20 (1994)).

The following were proper mental health related questions as found in Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995):

1) *Whether the jurors had any background or experience with mental problems in their families ?*

2) *Whether the jurors have any bias against or problem with any mental health professionals ?*

Murder During Felony Aggravator (e)(5):

Prosecutor informed jury about aggravating factors and indicated that the State *is relying upon...the capital felony was committed while the defendant was engaged, or was an aider and abettor in the commission of, or attempt to commit...any homicide, robbery, rape....* Supreme Court said that the prosecutor during jury voir dire should limit reference to aggravating factors, including the underlying felonies listed in G.S. 15A-2000(e)(5), to those of which there will be evidence and upon which the prosecutor intends to rely. Payne, 328 N.C. 377 (1991)

No Significant Criminal Record:

The following question was deemed improper as hypothetical and an impermissible attempt to indoctrinate a juror: *"Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether or not to impose the death penalty?"* State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989).

Personal Strength to Vote for Death:

Prosecutor asked: *"Are you strong enough to recommend the death penalty ?"*

State v Smith, 328 N.C. 99, 128 (1991). This repeated inquiry by prosecutor is not an attempt to see how jurors would be inclined to vote on a given state of facts. State v. Fleming, 350 N.C. 109, 125, 512 S.E.2d 720, 732 (1999).

Prosecutors were allowed to ask jurors *"whether they possessed the intestinal fortitude [or "courage", or "backbone"] to vote for a sentence of death."* When jurors equivocated on the imposition of the death penalty, prosecutors were allowed to ask these questions to determine whether they could comply with the law. State v. Murrell, 362 N.C. 375, 389-91 (2008); State v. Oliver, 309 N.C. 326, 355 (1983); State v. Flippen, 349 N.C. 264, 275 (1998); State v. Hinson, 310 N.C. 245, 252 (1984).

Religious Beliefs:

The defendant's "right of inquiry" includes "the right to make appropriate inquiry concerning a prospective juror's moral or religious scruples, morals, beliefs and attitudes toward capital punishment." State v. Vinson, 287 N.C. 326, 337, 215 S.E.2d 60, 69 (1975), death sentence vacated, 428 U.S. 902, 49 L.Ed.2d 1206 (1976). The issue is whether the prospective juror's religious views would impair his ability to follow the law. State v. Fletcher, 354 N.C. 455, 467 (2001). This right of inquiry does not extend to all aspects of the jurors' private lives or of their religious beliefs. State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625 (1989).

General questions about the effect of a juror's religious views on his ability to follow the law are favored over detailed questions about Biblical concepts or doctrines. It was held improper to ask about a juror's *"understanding of the Bible's teachings on the death penalty."* State v. Mitchell, 353 N.C. 309, 318, 543 S.E.2d 830, 836 (2001). The Defendant, however, was allowed to ask the juror about her religious affiliation and whether any teachings of her church would interfere with her ability to perform her duties as a juror. In State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625-626 (1989), sentence vacated on other grounds, 494 U.S. 1022, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990), the trial court did not abuse its discretion by not allowing defense counsel to ask a juror *"whether she believed in a literal interpretation of the Bible."*

In State v. Fletcher, 354 N.C. 455, 467, 555 S.E.2d 534, 542 (2001), defense counsel was allowed to inquire into a juror's religious affiliation and his activities with a Bible distributing group, but the trial court properly disallowed the question, whether the juror is a person *"who believes in the Biblical concept of an eye for an eye."* On the other hand, another trial court did not allow counsel to ask questions about jurors' *"church affiliations and the beliefs espoused by others [about the death penalty] representing their churches."* State v. Anderson, 350 N.C. 152, 171-172, 513 S.E.2d 296, 308 (1999).

Sympathy for the Defendant [or the Victim?]:

An inquiry into the sympathies of prospective jurors is part of the exercise of (the prosecutor's) right to secure an unbiased jury. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999). (Arguably, the same right applies to the defendant.)

Prosecutor properly asked, "*Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* Jurors may consider a defendant's demeanor in recommending a sentence. The question did not "stake out" jurors so that they could not consider the defendant's appearance and humanity. The question did not address definable qualities of the defendant's appearance and demeanor. It addressed jurors' feelings toward the defendant, notwithstanding his courtroom appearance or behavior. Chapman, 359 N.C. 328, 346-347.

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EVIDENCE BLOCKING

Evidence Blocking*

Jonathan Rapping**

* The term "evidence blocking" and the ideas set forth in this paper come from my colleague and mentor at the D.C. Public Defender Service, Jonathan Stern. Mr. Stern honed the practice of evidence blocking to an art. There is not a concept in this paper that I did not steal from Mr. Stern, including examples presented. He deserves full credit for this paper.

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I. Facts of the World v. Facts of the Case

If a tree falls in the woods and no one is there to hear it, does it make a sound? We may confidently answer, "yes." However, we cannot, with certainty, know what exactly it sounded like. Scientists might estimate what the sound would have been based on whatever factors scientists use, but that will be an approximation. They may disagree on the density of other vegetation in the area that would affect the sound, or the moisture in the soil that may be a factor. Perhaps the guess will be close to the actual sound. Perhaps not. We can never know for sure. A trial is the same way. It is a recreation, in a courtroom, of a series of events that previously took place. There are disagreements over factors that impact the picture that is created for the jury. The picture painted for the jury is affected by biases of the witnesses, the quality and quantity of evidence that is admitted, and the jury's own viewpoint. In the end, the picture the jury sees may be close to what actually occurred or may be vastly different.

Understanding that the picture that is painted for the jury is the one that matters is central to the trial lawyer's ability to be an effective advocate. It is helpful to think of facts in two categories: facts of the world and facts of the case. The first category, facts of the world, are the facts that actually occurred surrounding the event in question in our case. We will never know with certainty what the facts of the world are. The second category, facts of the case, are the facts that are presented at trial. It is from these facts that the fact-finder will attempt to approximate as closely as possible the facts of the world. The fact-finder will never be able to perfectly recreate a picture of what happened during the incident in question. How close the fact-finder can get will be a function of the reliability and completeness of the facts that are presented at trial.

II. The Difference Between Prosecutors and Defense Attorneys

By understanding that the outcome of the trial is a function of the facts of the case, we have a huge advantage over the prosecution. The prosecutor tends to believe he knows the "truth." He thinks the facts of the world are perfectly reflected by his view of the evidence known to him. When the facts of the case point to a conclusion that is different from the one he believes he knows to be true, the prosecutor is unable to adjust. He can't move from the picture he has concluded in his mind to be "true." Therefore, he renders himself unable to see the same picture that is painted before the jury at trial. The good defense attorney understands she is incapable of knowing the "truth." She focuses on the facts of the case. She remains flexible to adjust to facts that are presented, or excluded, that she did not anticipate. In that sense she is better equipped to see

the picture the jury sees and to effectively argue that picture as one of innocence, or that at least raises a reasonable doubt.

The ability to think outside the box is one of the main advantages defense attorneys have over prosecutors. It is a talent honed out of necessity. We necessarily have to reject the version of events that are sponsored by the prosecution. They are a version that points to our client's guilt. We must remain open to any alternative theory, and proceed with that open mind throughout our trial preparation.

Prosecutors generally develop a theory very early on in the investigation of the case. Before the investigation is complete they have usually settled on a suspect, a motive, and other critical details of the offense. In the prosecutor's mind, this version of events is synonymous with what actually happened. In other words, the prosecutor assumes he knows the "truth." The fundamental problem with this way of thinking is that all investigation from that point on is with an eye towards proving that theory. Instead of being open minded about evidence learned, there is a bias in the investigation. Evidence that points to another theory must be wrong. When it comes to a witness who supports the government's theory but, to an objective observer, has a great motive to lie, the prosecutor assumes the witness is truthful and that the motive to lie is the product of creative defense lawyering. This way of thinking infects the prosecution at every level: from the prosecutor in charge of the case to law enforcement personnel who are involved with the prosecution. Whether the prosecution theory ultimately is right or wrong, this mid-set taints the ability to critically think about the case.

Good defense attorneys don't do this!!! We understand that the "truth" is something we will almost certainly never know and that, more importantly, will not be accurately represented by the evidence that makes it into the trial. We understand that a trial is an attempt to recreate a picture of historical events through witnesses who have biases, mis-recollections, and perceptions that can be inaccurate. We know trials are replete with evidence that is subject to a number of interpretations and that the prism through which the jury views this evidence depends on the degree to which, and manner in which, it is presented. In short, as defense attorneys, we understand that a trial is not about what "really happened." Rather, it is about the conclusions to which the fact-finder is led by the facts that are presented at trial. This may closely resemble what actually occurred or be far from it. We will never know. As defense attorneys we deal with the facts that will be available to our fact-finder. To do otherwise would be to do a disservice to our client.

For example, imagine a case that hinges on one issue, whether the traffic light was red or green. The prosecutor has interviewed ten nuns, all of whom

claim to have witnessed the incident in question. Each of the ten nuns insists that the light was green. The defense has one lone witness. This witness says the light was red. At trial, not a single nun shows up to court. The only witness to testify to the color of the light is the lone defense witness, who says it was red. The prosecutor sees this case as a green light case in which one witness was wrong. The jury, on the other hand, sees only a red light case. It knows nothing of the nuns. The only evidence is that the light was red. As defense attorneys we must also see the case as a red light case. These are the only facts of the case. Even assuming the ten nuns were correct, that the light was green, those facts are irrelevant to this case and the jury that will decide it.

III. The Art of Evidence Blocking

The defense attorney's job is to shape the facts of the case in a manner most favorable to her client. She must be able to identify as many ways as possible to keep facts that hurt her client from becoming facts of the case. Likewise, she must be thoughtful about how to argue the admissibility of facts that are helpful to her client's case. This requires a keen understanding of the facts that are potentially part of the case and a mastery of the law that will determine which of these facts become facts of the case.

As a starting proposition, the defense attorney should consider every conceivable way to exclude every piece of evidence in the case. Under the American system of justice, the prosecution has the burden of building a case against the defendant. The prosecution must build that case beyond a reasonable doubt. The facts available to the prosecution are the bricks with which the prosecutor will attempt to build that case. At the extreme, if we can successfully exclude all of the facts, there will be no evidence for the jury. It follows that the more facts we can successfully keep out of the case, the less bricks available to the prosecution from which to build the case against our client.

A wise advocacy principle is to never underestimate your opponent. Along this line it would behoove you to assume that if the prosecutor wants a piece of evidence in a case, it is because it is helpful to his plan to win a conviction against your client. Assume he is competent. Assume he knows what he is doing. Assume that fact is good for his case, and therefore bad for your client. Therefore, you do not want that fact in the case. Resist the temptation to take a fact the prosecution will use, and make it a part of your defense before you have considered whether you can have that fact excluded from the trial and how the case will look without it. Far too often defense attorneys learn facts in a case and begin thinking of how those facts will fit into a defense theory without considering whether the fact can be excluded from the trial. This puts the cart

before the horse. We must train ourselves to view every fact critically. We must consider whether that fact is necessarily going to be a part of the case before we decide to embrace it[1].

The prosecutor obviously knows his case, and how he plans to build it, much better than you do. If you accept the premise prosecutors tend to do things for a reason, i.e. to help convict your client, then it follows that any fact the prosecution wishes to use to build its case against your client is one we should try to keep out of evidence. Even if you are unwilling to give the prosecutor that much credit, limiting the facts at his disposal to use against your client can only be beneficial. This defines a method of practice coined by Jonathan Stern as "evidence blocking." Put plainly, evidence blocking is the practice of working to keep assertions about facts of the world out of the case. This exercise is one that forces us to consider the many ways facts can be kept out of evidence, and therefore made to be irrelevant to the facts of the case, and the derivative benefits of litigating these issues.

It is helpful to think of evidence blocking in four stages: 1) suppression/discovery violations; 2) witness problems; 3) evidence problems; and presentation problems.

A. Suppression / Discovery and Other Statutory Violations

The first stage we must think about when seeking to block evidence includes violations by the prosecution team of the Constitution, statutory authority, or court rule. We must think creatively about how evidence gathered by the State may be the fruit of a Constitutional violation. Generally, in this regard, we consider violations of the Fourth, Fifth, and Sixth Amendments. We look to any physical evidence seized by the government, statements allegedly made by your client, and identifications that arguably resulted from a government-sponsored identification procedure. We consider theories under which this evidence was obtained illegally and we move to suppress that evidence. We also must look to any violations of a statute or rule that might arguably warrant exclusion of evidence as a sanction. A prime example of this is a motion to exclude evidence based on a violation of the law of discovery. How we litigate these issues will define how much of the evidence at issue is admitted

[1] Of course, after going through this exercise, there will be facts that you have concluded are going to be part of the "facts of the case." These are "facts beyond control." At that point it is wise to consider how your case theory might embrace these facts beyond control, thereby neutralizing their damaging impact. However, this paper is meant to serve as a caution to the defense attorney to not engage in the exercise of developing a case theory around seemingly bad facts until she has thoroughly considered whether she can exclude those facts from the case.

at trial and how it can be used. We must use our litigation strategy to define how these issues are discussed.

B. Witness Problems

A second stage of evidence blocking involves identifying problems with government witnesses. This includes considering the witness' basis of knowledge. A witness may not testify regarding facts about which she does not have personal knowledge. It also includes thinking about any privileges the witness may have. Be thoughtful about whether a witness has a Fifth Amendment privilege. Consider marital privilege, attorney/client privilege, and any other privilege that could present an obstacle to the government's ability to introduce testimony it desires in its case. Another example of a witness problem is incompetency. We should always be on the lookout for information that arguable renders a witness incompetent to testify and move to have that witness excluded from testifying at trial. These are some examples of witness problems.

C. Evidence Problems

While witness problems relate to problems with the witness herself, we must also consider a third stage of evidence blocking: problems with the evidence itself. Even with a witness who has no problems such as those described above, there may be problems with the evidence the government wishes for them wish to present. Perhaps the information the witness has is barred because it is hearsay. Consider whether the evidence is arguably irrelevant. Think about whether the evidence is substantially more prejudicial than probative. These are all examples of problems with the evidence.

D. Presentation Problems

A final stage of evidence blocking involves a problem with the method of presentation of the evidence. Maybe the government is unable to complete the necessary chain of custody. The prosecutor may be missing a witness who is critical to completing the chain of custody. Maybe the prosecutor has never been challenged with respect to chain of custody and is unaware of who he needs to get the evidence admitted. By being on your feet you may successfully exclude the evidence the prosecutor needs to make its case against your client. Another example of a presentation problem is where the prosecutor is unable to lay a proper foundation for admission of some evidence. A third example is a prosecutor who is unable to ask a proper question (for example, leading on

direct). These are all examples of problems the prosecutor could have in getting evidence before the jury if you are paying attention and making the appropriate objections.

IV. How Do You Raise An Issue

Once you have decided that there is evidence that should not be admitted at your trial you must consider the best method for bringing the issue to the Court's attention. You essentially have three options: 1) file a pretrial written Motion in Limine, 2) raise the issue orally as a preliminary matter, or 3) lodge a contemporaneous objection. There are pros and cons to each of these methods.

Some motions must be filed in writing prior to trial, such as motions to suppress. Each jurisdiction is different on the requirement regarding what must be filed pre-trial and the timing of the filing[2]. For any motions that must be filed pretrial, you should always file pretrial motions whenever possible, for reasons stated below. However, many evidentiary issues may be raised without filing a motion. Objections to evidence on grounds that it is hearsay, irrelevant, substantially more prejudicial than probative, or any number of evidentiary grounds, are routinely made contemporaneously during trial. Certainly, should you anticipate an evidentiary issue in advance of trial you may raise it with the court. This may be done orally as a preliminary matter or in writing as a motion in limine.

What are the pros and cons of the different methods of raising an objection? Let's first consider a written, pretrial motion in limine. There are several advantages to filing a pretrial motion in limine to exclude evidence on evidentiary grounds. One is that it gives you a chance to educate the judge on the issue. Judges, like all of us, often do not know all of the law governing a particular issue off the top of their heads. If forced to rule on an issue without giving it careful thought, most judges rely on instinct. It is the rare judge whose instinct it is to help the criminal defendant. If the judge is going to rely on one of the parties to guide her, it is more often than not the prosecutor[3]. Therefore, you are often better often having had the chance to educate the judge than to rely on her ruling in your favor on a contemporaneous objection when the answer is not obvious.

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[2] In Georgia, pursuant to O.C.G.A. 17-7-110, all pretrial motions, demurrers, and special pleas must be filed within ten days of the date of arraignment unless the trial court grants additional time pursuant to a motion.

[3] To the extent that you have previous experience with that judge and you have developed a reputation for being thorough, smart, and honest, you may be the person upon whom the judge relies. If that is the case with the judge before whom you will be in trial, that may factor into your decision about whether to object contemporaneously.

A second reason for filing a written motion pretrial is that you are entitled to a response from the prosecutor. This benefits you in several ways. First, every time you force the prosecution to commit something to writing, you learn a little more about their case. Filing motions are a great way to get additional discovery by receiving a response. Second, whenever the prosecutor commits something to writing, he is locking himself into some version of the facts. If he characterizes a witnesses testimony in a particular way and that witness ends up testifying differently, you have an issue to litigate. Presumably, the prosecutor accurately stated in his response to your motion what the witness told him or his agent. You now are entitled to call the prosecutor, or his agent, to impeach the witness. Maybe the response is an admission of the party opponent that can be introduced at trial. The bottom line is that there is now an issue where there would not have been one had you not forced the response to your motion[4].

A third reason for filing a written motion is that there is always the chance that the prosecutor will fail to respond, despite being required to by law or ordered to by the court. Whenever the prosecutor fails to respond to a written motion you are in a position to ask for sanctions. Sanctions may be for the court to treat your motion as conceded. They might be exclusion of some evidence. Perhaps you may get an instruction in some circumstances. Be creative in the sanctions you request.

A fourth reason is that when you file a motion, you get a hearing. Pretrial hearings are great things. They give us a further preview of the prosecutions case, commit the prosecution to the evidence presented at the hearing, and may result in sanctions.

A fifth reason for filing motions whenever you can is that it increases the size of your client's court file. A thick court file can be beneficial to your client in several ways. The shear size of a large court file is intimidating to judges and prosecutors. Judges like to move their dockets. Thick case files tend to be trials that take a long time to complete. Judges will be less likely to force you to trial in a case with a thick case jacket. Similarly, prosecutors often have to make choices about which cases to offer better pleas in or to dismiss outright. The more of a hassle it is to deal with a case, the greater the chance the prosecutor will offer a good plea to your client or dismiss the case outright.

A sixth reason is that by taking the time to research and write the motion, you are better preparing yourself to deal with the issue and to consider how it impacts your trial strategy.

[4] One of Jonathan Stern's cardinal rules that I have taken to heart is that you always want to be litigating something other than guilt or innocence.

A final reason for filing pretrial motions even when not required is that you appear to be honest and concerned with everyone getting the result right. By appearing to be on the up and up you can gain points with the court that will spill over to other aspects of the trial.

What are the downsides to filing a motion in advance of trial. One is certainly that you give the prosecution a heads up to an issue you seek to raise. To the extent that you identify a problem with the government's case, they may be able to fix it with advance notice. Certainly this is an important consideration that must be factored into your decision about whether to raise an evidentiary issue in writing, pretrial. A second issue, which concerns me much less, is that it allows the prosecutor to do the research he needs to do to address the legal issue you raise. Certainly by filing a pretrial motion you allow everyone to be more prepared. However, if the issue is an important one, and the judge's ruling depends on the prosecutor having a chance to do some research, most judges will give the prosecutor time to research the question before ruling whenever you raise it. To the extent this holds up the trial, there is always the risk the judge will fault you for not raising the issue earlier.

The third option, raising the issue orally as a preliminary matter, is a compromise between the other two alternatives. Obviously, it has some of the pros and cons of the other alternatives. How you handle any given issue must be the product of careful thought and analysis.

V. Conclusion

In conclusion, as defense attorneys we must take advantage of any tools at our disposal to alter the landscape of the trial in our client's favor. In order to do this we must understand and appreciate the difference between facts in the world and facts in the case. By undergoing a rigorous analysis of the facts that are potentially part of the case against our client, we may be able to keep some of those facts out of evidence. This exercise has the benefit of keeping from the prosecutor some of the blocks he hoped to use to build the case against you client. It alters the facts of the case in a way the prosecutor may be unable to deal with. And by litigating these issues we stand to derive residual benefits that will shape the outcome of the trial.

If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay

Stephen P. Lindsay is a senior partner in the law firm of Cloninger, Lindsay, Hensley & Searson, P.L.L.C, in Asheville. His firm specializes in all types of litigation. Lindsay focuses primarily on criminal defense in both state and federal courts. He graduated from Guilford College with a BS in Administration of Justice and earned his JD from the University of North Carolina School of Law. A faculty member of the National Criminal Defense College in Macon, Georgia, Lindsay dedicates between four and six weeks per year teaching and lecturing for various public defender organizations and criminal defense bar associations both within and outside of the United States.

So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, "Why me? Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. Your reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to "Angel" status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, "This one is the dog of all dogs. The mother of all dogs!" Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams,* "If you build it, they will come . . ." And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited —even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner's wife said in the movie, "[I]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.* —Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.* —Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking "Huh?" Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/ archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she wasn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty's 35-year-old mentally retarded mother. She is a "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor, Barry was interviewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer "yes" when asked if he had sex with Betty and "yes" to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty's school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self-defense," "alibi," "reasonable doubt," and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "He did it, but he has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as, "He did it, but they can't prove it."

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Pubic Defender's Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn't do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre "it never happened" (mistake, set-up) than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn't do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

Rock →	***Barry, Innocent Man, Mentally Challenged Man***
Wrongfully Tossed →	***Removed, Ejected, Sent Packing, Calmly Asked To Leave***
Troubled →	***Vindictive, Wicked, Confused***
Stepdaughter →	***Brat, Tease, Teen, Houseguest, Manipulator***

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one's child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.
2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph
- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ▪

MOTIONS TO SUPPRESS

Suppression of Evidence 101

6 Reasons to file a suppression motion.

1- You have great facts and the law is good for you. You should win.

2- You need to know what a witness is going to say and they will be under oath.

3- Your client needs to hear how bad things are.

4- It is a serious case and you need to preserve every issue.

More reasons to file suppression motions.

5- There is no defense other than suppression and if you win, the case is over.

6- Some DA's don't want to do the work and will make a better offer.

TYPES OF EVIDENCE YOU CAN SUPPRESS

1- IDENTIFICATION of your client.

2- STATEMENTS of your client.

3- PHYSICAL EVIDENCE that hurts your client's case.

STATE ACTION NOT ALWAYS REQUIRED FOR IDENTIFICATION SUPPRESSION

- When a tainted IDENTIFICATION is involved, you do not always have to have state action.
- The issue is the reliability of the identification.
- It is a issue of fundamental fairness or due process.
- Though the Federal Courts require State action, you can raise the issue under the State constitution without State action.
- In North Carolina raise an identity suppression issue under the North Carolina Constitution, Article I, §19 if there is not state action, but there are facts tainting reliability.

3 REQUIREMENTS FOR SUPPRESSION OF STATEMENTS MADE PRIOR TO FORMAL ARREST

1- Your client must have been in CUSTODY when the statement was made.

AND

2- Your client was questioned by police OR the police said something to goad your client to respond.

AND

3- Your client did not waive his Miranda rights.

*** There can also be a violation when client has said doesn't want to talk and police continue to question.

VIOLATION OF THE RIGHT TO COUNSEL SITUTATIONS FOR STATEMENT SUPPRESSION

1- Your client was charged AND has asked for a lawyer (or has a lawyer), AND someone working for the police elicited a statement from your client.

The client can be in or out of custody.

2- A) Client is in jail AND

B) Client has asked for an attorney AND

C) Police go to see your client UNSOLICITED by the client to question about the case for which is in jail.

RULES YOU MUST OBEY

1- Must file motion **no later than 10 working days** after receiving notice of intent to use evidence by the state. N.C.G.S. §15A-976.

2- Motion **must be accompanied by an affidavit that alleges facts** to support the violations you allege. If your motion doesn't state sufficient facts on its face to support the violations you are alleging, the motion may be dismissed without a hearing.

3- Unless your client's **standing** to raise the claim is obvious, the motion or affidavit must state why he/she has standing.

PRACTICAL CONSIDERATIONS

1- Always **cite the State Constitution** in addition to the Federal.

2- Always **prepare a memorandum of law** to support your argument. Unless judge will have a problem with it, do not file it prior to the hearing.

3- The judge MUST rule on the motion in the session it is heard UNLESS you agree on the record to the ruling being out of session, or out of term, or out of county.

SELF TEST ON SUPPRESSION

1) Name 3 types of evidence that may be suppressed through a suppression motion?

2) List 5 tactical reasons to file a suppression motion other than that you have great facts and should win?

3) List 3 technical requirements that may cause a suppression motion to be denied without a hearing if you fail to meet these requirements?

ANSWERS TO QUESTION 1
SELF TEST ON SUPPRESSION

1) Name 3 types of evidence that may be suppressed through a suppression motion?

a. Identifications

b. Statements

c. Physical evidence

ANSWERS TO QUESTION 2 SELF TEST ON SUPPRESSION

2) List 5 tactical reasons to file a suppression motion other than that you have great facts and should win?

a. The DA may make a **better plea offer** rather than having to do the work to do the motion, or may fear losing and make a better offer.

b. You get to **question witnesses** who may not consent to be interviewed, and you get their answers under oath and on the record for later use.

c. Your **client will see the evidence** and hear testimony against him so that he will have a better idea of the case against him and may become more realistic about the case.

d. It is a **serious case** and you need to **preserve** all the **issues**.

e. Your **only defense** is to get the evidence suppressed.

ANSWERS TO QUESTION 3
SELF TEST ON SUPPRESSION

3) List 3 technical requirements that may cause a suppression motion to be denied without a hearing if you fail to meet these requirements?

a. If it is not **filed in a timely manner**. That is within 10 days after they State gives you notice of intent to use the evidence if that notice was received at least 20 days before trial.

b. If it is not accompanied by an **affidavit**.

c. If it **does not raise a legal issue on its face** that would justify suppression and that is **supported by facts** set forth in the motion that show the issue exists.

Problem 1

About 10:30 pm two officers on bike patrol saw two black males standing in the roadway in a part of the town that is known to have a high drug trade and usage. One of the men, A, was known to the officers as a drug user and alcoholic. The second man, B, who later becomes the defendant, is not known to the police. According to the police reports generated, the man B handed something to the man known to the police, A. The officer suspected a drug transaction and moved towards the men to investigate. The two officers approached the two men. One of the officers saw that man B appeared to have something clutched in his fist which was not visible. The officer upon approaching the man, immediately, ordered man B to put his hands on his head with his fingers interlaced on his head. Man B put his hands on his head, but did not interlace his fingers. The officer then grabbed Man B's arm and pulled it in front of Man B. The officer continued to order Man to place his hands with interlocked fingers on his head. Man B refused to comply. The officer then began to tell Man B that he would taze Man B if he did not get on his knees. Man B got on his knees. The officer tried to force Man B to put his hands behind his back and continued to order him to open his hands. Man B failed to comply. The Officer pushed Man B onto his chest, and the other officer tazed Man B. Man B was handcuffed. Man B was found to have a crack rock inside a Newport cigarette box that was crushed in his hand.

Issues in Problem 1

1. Information known to the police was not sufficient to make the encounter more than a consensual encounter from the outset because it was based wholly on a hunch.

2. No reasonable suspicion existed because Officer didn't know anything specific when he approached Man B. Suspected he knew that something was in D's hand, but didn't know what. Didn't ask any investigatory questions. Immediately exerted authority over D before establishing any more information by questioning. No particularized suspicion as to D or what crime if any was committed.

Additional Issues in Problem 1

3. D was not free to leave as soon as the officer began to order him around. Was seized no basis upon which to seize.

4. The most that the officer was entitled to do was to conduct a consensual encounter, during which the D had the right to refuse to comply.

5. The officer exceeded the bounds of his authority based on his current knowledge which made the whole thing suppressible.

Problem 2

An early morning cleaning crew in a church hears a noise and believes there has been a breakin and that the person is still in the building. Police are called. Police respond and reportedly see a man in the parking lot carrying wine. When the officer yells at the man to stop, he runs into the woods. Client is apprehended in the woods and is handcuffed. Police are escorting client to the police car, and he has not been Mirandized or waived his rights. Client says, "this is a motherfucker". The policeman says back to client, "Breaking into a church is a motherfucker." Client responds, "the door was open."

Issue in Problem 2

1. Client is in custody at the time the exchange occurred. No Miranda warning had been given or rights waiver made. Was the officer's remark intended to get a response?

If so that is questioning?

Problem 3

A home invasion robbery occurs. One of the perpetrators was wearing a mask and was described as being 6' 2", 200lbs., black male with medium length hair. A few days later client is stopped. Client is 5'11", 175lbs. black male with short braids that stick out from his head. Client is shown to the witness. At the time the witness views the client he is sitting alone in the rear of a marked patrol car, and the officer told the witness at the time they contacted the witness to view client that, "they thought they had the guy".

Issues in Problem 3

1. It is a single person show up. It is per se suggestive.

2. It is not shortly after the crime, so there is less reason for a show up. No need to keep looking or to know if should let person go immediately.

3. Remarks of the officer are inappropriate and suggestive. In addition, the fact the person is in side a police car is suggestive.

4. Person doesn't really fit the description.

Issues in Problem 4

1. The application fails to implicate the premises to be searched. No connection between client living in Durham 4 months before and having stolen property confiscated from him in Durham, and new apartment in Carrboro.

2. The affiant makes a personal conclusion that probable cause exists without supplying any factual information to establish that probable cause exists to search for the property at the place to be searched. Does not set out facts that support his conclusion.

3. The information concerning break-ins and burglaries was stale as to a search for the current residence of the accused because it was between 4 to 7 months old on the date of the application for the warrant.

More issues in Problem 4

4. Property that was allegedly stolen in the break-ins and burglaries being investigated that previously was found to be in the possession of the accused at his previous residence had already been confiscated by the Durham Police Department on May 3, 2004. There was no reason stated in the application to believe that the accused was still in possession of additional stolen property and no facts stated to establish that if such property was in the accused's possession that it was probably located at his new residence.

5. Investigator Vaughn executed a warrant outside his territorial jurisdiction which is a violation of N.C.G.S.15A-247.
Observations are fruit of the poisonous tree.

More Issues in Problem 4

6. Because the warrant was facially invalid, the investigators were not legally in the place searched and any observations made by them during the search must also be suppressed. Observations are fruit of the poisonous tree.

7. The warrant application is for a general warrant, to look for things that they cannot name that they hope might be there, and that is prohibited by North Carolina Statutes, the Constitution of North Carolina and the Constitution of the United States.

PRESERVING THE RECORD

PRESERVING THE RECORD ON APPEAL

Originally Presented in 2001 and Updated in 2003 by
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Updated for Summer 2004 New Felony Public Defender Training by
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Updated for Spring 2006 Public Defender Conference and
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I. INTRODUCTION:

- Our appellate courts are increasingly using "waiver" to avoid reaching the merits of defense challenges in criminal cases.
- While appellate attorneys can and do fail to preserve appellate issues, "waiver" most often begins at the trial level . . . . . .

II. BASIC PRESERVATION PRINCIPLES:

- **Express disagreement with what the trial court did (or did not do) and the complete grounds for that disagreement by objection, exception, motion, request, or otherwise**.
- Assert your position in a timely fashion.
- Assert your position in the form required by the applicable rule or statute.
- **Constitutionalize your position whenever possible by explicitly asserting both Federal and State constitutional grounds.**
- Re-assert your position every time the same or a substantially similar issue arises.
- Obtain a ruling on your request, motion, or objection. If the judge says he or she will rule "later," make sure that he or she does so.
- Make an offer of proof if your evidence is wrongly excluded.
- Case Note: In *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002), the trial attorneys preserved a number of statutory and constitutional errors. While the individual errors may not have warranted a new trial, the Supreme Court held that, when "taken as a whole," the cumulative preserved errors "deprived defendant of his due process right to a fair trial." *Id.* at 254, 559 S.E.2d at 768. The Court's opinion in *Canady* demonstrates the benefit of lodging timely, specific, and frequent objections.

III. PRE-TRIAL:

A. Short-Form Indictments:

- N.C. Gen. Stat. §§ 15-144, 15-144.1, and 15-144.2 permit short-form indictments in first-degree murder, first-degree rape, and first-degree sexual offense cases. In all cases utilizing such a short-form indictment, as well as any cases where the indictment does not in fact set forth all elements of the offense, you should move to dismiss the indictment on the ground that it violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *See Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435 (2000). In capital cases, you should move to strike the death penalty from consideration because no aggravating factors are alleged in the indictment. *See Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002) (aggravating factors are elements of a capital offense and must be found by the jury).
- Make a motion for a bill of particulars asking the State to identify the degrees of the offense (*e.g.*, first-degree vs. second-degree) and the theories (*e.g.*, premeditation and deliberation vs. felony murder). If the judge denies the motion, the State cannot then argue on appeal that the defense attorney waived any opportunity to obtain adequate notice of the charge.
- In numerous cases, the Supreme Court of North Carolina has rejected the argument that short-form first-degree murder indictments that do not allege premeditation and deliberation violate *Apprendi*. The Supreme Court has also rejected a challenge to the failure of an indictment to allege aggravating factors in a capital case. *See State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003). Regardless of the Court's decisions, you should still preserve the issue for federal review.
- For preservation purposes, you should also move to dismiss under Article I, §§ 22 and 23 of the North Carolina Constitution. Argue two bases for the motion: (1) that the indictment does not give the trial court jurisdiction to try the defendant or to enter a judgment; and (2) that the indictment does not give the defendant adequate notice of the charge.

B. Miscellaneous:

- If your *ex parte* motion for expert assistance is denied, make sure you get the substance of your motion and the trial judge's order on the record.
- If you believe that your client's right to presence has been violated by an *ex parte* contact, find a way to have the record reflect that the contact occurred.

IV. GUILTY PLEAS:

- **The ONLY pretrial motion that you can preserve for appeal after a guilty plea is the denial of a motion to suppress.** N.C. Gen. Stat. § 15A-979(b); *State v. Smith*, --- N.C.

App. ---, 668 S.E.2d 612, 614, *disc. review denied*, No. 534P08, 2009 N.C. LEXIS 764 (N.C. August 27, 2009). **To preserve this error, you must notify the State and the trial court during plea negotiations of your intention to appeal the denial of the motion, or the right to do so is waived by the guilty plea.** *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990); *State v. Brown*, 142 N.C. App. 491, 492, 543 S.E.2d 192, 192 (2001). The best way to do this is to put it in writing.

V. COMPLETE RECORDATION:

- In criminal cases, the trial judge must require the court reporter to record all proceedings *except* non-capital jury selection, opening and closing statements to the jury, and legal arguments of the attorneys. *See* N.C. Gen. Stat. § 15A-1241(a).
- However, **you should move to have *everything* recorded under § 15A-1241(b)!!** Upon motion, the court reporter "must" record all proceedings. You should also ensure that the court reporter is actually present and recording at all stages of trial.
- If a bench conference is not recorded, ask the trial judge to reproduce it for the record and ensure that all of your objections are in the record.
- If something "non-verbal" happens at trial, ask to have the record reflect what happened.
  - ✓ *e.g.*: In *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), the trial attorneys should have asked to have the record reflect that the prosecutor pointed a gun at the only African American juror during closing arguments.
  - ✓ *e.g.*: If your client is shackled without the necessary hearing and factual findings required by N.C. Gen. Stat. § 15A-1031, and the jury saw the shackles, ask to have the record reflect that fact. Also describe for the record what type of restraint was being used.

VI. JURY SELECTION:

A. Preserving Your Right to Ask a Question on *Voir Dire*:

- *e.g.*: In a case involving an interracial crime, you want to ask prospective jurors questions about their views on interracial dating. However, the trial court sustains the State's objections to your questions.
- N.C. Gen. Stat. § 15-1212(9) provides that "[a] challenge for cause to an individual juror may be made by any party on the ground that the juror . . . [f]or any other cause is unable to render a fair and impartial verdict." This section allows a statutory challenge for cause based on juror bias and, thus, should give a defendant a statutory right to explore possible sources of bias.
- In addition, you should try to constitutionalize your right to ask the question. *See, e.g.*, *Turner v. Murray*, 476 U.S. 28, 90 L. Ed. 2d 27 (1986) (right to impartial jury under the Fifth, Sixth, and Fourteenth Amendments guarantees a capital defendant accused of

interracial crime the right to question prospective jurors about racial bias; violation of right requires death sentence to be vacated).

- To fully preserve any error based on curtailed defense questioning during *voir dire*, you should submit a written motion listing the questions you want to ask and obtain a ruling on the record. You also need to exhaust your peremptory challenges. *See State v. Fullwood*, 343 N.C. 725, 734-35, 472 S.E.2d 883, 888 (1996).

B. Preserving Your Denied Motion to Excuse for Cause:

- State clearly and completely the grounds for your challenge for cause. If the trial court denies your challenge, you *must* use a peremptory to excuse that juror unless you have already exhausted all peremptories.
- In addition, N.C. Gen. Stat. § 15A-1214(h) and (i) require that you then: **(1) exhaust all peremptories; (2) renew your challenge for cause; and (3) have your renewed challenge denied.** *See State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993) (ordering a new trial where defendant satisfied requirements of § 15A-1214(h)); *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992) (same). This procedure is mandatory and must be precisely followed or the error is waived on appeal. *State v. Garcell*, 363 N.C. 10, 678 S.E.2d 618 (2009).

C. *Batson* Error:

- **Establish the races of all prospective jurors for the record**: File a pre-trial motion asking the trial court to ensure that the races of prospective jurors are recorded by (1) the judge inquiring and making findings for the record, or (2) the judge requiring the parties to stipulate to jurors' races as selection proceeds. If the court will not permit any other way, ask each juror to put his or her race on the record orally or by questionnaire.
- **If you use juror questionnaires, move to have them admitted into evidence and made part of the record.** If the questionnaires are left in your possession, save them for the appellate attorney.
- Object every time the prosecutor excuses a juror for even arguably racial reasons. *See State v. Smith*, 351 N.C. 251, 524 S.E.2d 28 (2000). If you are prepared to make a *prima facie* showing, ask the trial court for an opportunity to present evidence. The court is required to honor this request. *See State v. Green*, 324 N.C. 238, 376 S.E.2d 727 (1989).
- If the trial court declines to find a *prima facie* case, object. If the court asks the prosecutor to offer race-neutral reasons, ask for an opportunity to rebut the prosecutor's showing.
- Remember that *Batson* applies to gender-based challenges as well!

VII. EVIDENTIARY RULINGS:

- If you do not make timely and proper objections at trial, erroneous evidentiary rulings will only be reviewed for "plain error" – an extremely difficult standard to meet. On

appeal, the defendant will have to show the error was so fundamental that it denied him a fair trial or had a probable impact on the jury's verdict. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

A. Objecting to the State's Evidence:

- Make timely objections. *See* N.C. Gen. Stat. § 15A-1446(a); N.C. Gen. Stat. § 8C-1, Rule 103(a)(1); N.C. R. App. P. 10(b)(1). If the prosecutor asks a question that you think is improper or may elicit improper testimony, enter a quick *general* objection. If the trial court invites you to argue the objection or rules against you, you should follow up by stating the *basis* for your objection.
  - ✓ **A defendant's general objection to the State's evidence is ineffective unless there is *no* proper purpose for which the evidence is admissible.** *See State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994) (burden on defendant to show no proper purpose).
  - ✓ **If evidence is objectionable on more than one ground, *every* ground must be asserted at the trial level. Failure to assert a specific ground waives that ground on appeal.** *See State v. Moore*, 316 N.C. 328, 334, 341 S.E.2d 733, 737 (1986); N.C. R. App. P. 10(b)(1).
- If evidence is admissible for a limited purpose, object to its use for all other improper purposes and request a limiting instruction. *See State v. Stager*, 329 N.C. 278, 309-10, 406 S.E.2d 876, 894 (1991). Upon request, the trial court is required to restrict such evidence to its proper scope and to instruct the jury accordingly. *See* N.C. Gen. Stat. § 8C-1, Rule 105.
  - ✓ *e.g.*: If the trial court rules that hearsay statements are admissible for corroboration, ask the trial court to instruct the jury about the permissible uses of that evidence.
  - ✓ If there are portions of the statements that are non-corroborative, specify those portions and ask to have them excised.
  - ✓ If there are portions of the statements that are objectionable on other grounds (*e.g.*, inadmissible "other crimes" evidence), specify those portions and ask to have them excised.
- **When appropriate, constitutionalize your objections.** If a defendant wishes to claim error on appeal under the Federal Constitution as well as state law, the defendant must have raised the constitutional claim when the error occurred at trial. *See State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 222 (1994); *State v. Skipper*, 337 N.C. 1, 56, 446 S.E.2d 252, 283 (1994).
  - ✓ *e.g.*: If the trial court excludes your proffered evidence, do not object solely on state law relevance grounds. You should also cite your client's constitutional due process right to present evidence in his defense.
  - ✓ *e.g.*: If the State offers hearsay evidence, do not object solely on state law hearsay grounds. You should also cite the Confrontation Clause.

- Object to any attempts by the prosecutor to admit substantive or impeachment evidence about your client's post-*Miranda* exercise of his constitutional rights to remain silent and have an attorney present. *See Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976).
  - ✓ *e.g.*: If the State offers police testimony that your client refused to talk and asked for his attorney, object.
  - ✓ *e.g.*: If the State tries to cross-examine your client about his failure to tell certain facts to the police, object.

B. Moving to Strike the State's Evidence:

- If the prosecutor's question was not objectionable (or if your objection to a question is overruled and it later becomes apparent that the testimony is inadmissible) but the witness' *answer* was improper in form or substance, you must make a timely motion to strike that answer. *See State v. Grace*, 287 N.C. 243, 213 S.E.2d 717 (1975); *State v. Marine*, 135 N.C. App. 279, 285, 520 S.E.2d 65, 68 (1999).
- Similarly, if the trial judge sustains your objection but the witness answers anyway, you must make a timely motion to strike the answer. *See State v. Barton*, 335 N.C. 696, 709, 441 S.E.2d 295, 302 (1994); *State v. McAbee*, 120 N.C. App. 674, 685, 463 S.E.2d 281, 286 (1995).

C. Waiving Prior Objections:

- **If you make a motion *in limine* to exclude certain evidence but then fail to object when the evidence is actually offered and admitted at trial, the issue is *not* preserved for appeal.** *See State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (*per curiam*); *State v. Wynne*, 329 N.C. 507, 515, 406 S.E.2d 812, 815-16 (1991). Similarly, if your suppression motion is denied, you must renew that motion or object to the evidence when it is introduced at trial to preserve the error. *See State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000). **You must do this even if the trial judge specifically says you don't have to.** *State v. Goodman*, 149 N.C. App. 57, 66, 560 S.E.2d 196, 203 (2002), *rev'd in part on other grounds*, 357 N.C. 43, 577 S.E.2d 619 (2003).
- **Do NOT rely on N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) to preserve the issue!!!** Although the Legislature attempted to make things easier by amending Evidence Rule 103(a)(2) in 2003 to add a second sentence that states that once the trial court makes a definitive ruling admitting or excluding evidence, either at or before trial, there is no need to later renew the objection, do not rely on this rule. Rule 103(a)(2) has been held to be invalid because it conflicts with Appellate Rule 10(b)(1) which has been consistently interpreted to provide that an evidentiary ruling on a pretrial motion is not sufficient to preserve the issue for appeal unless the defendant renews the objection during trial. *See State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007).
- **If you initially object but then allow the same or similar evidence to be admitted later without objection, the issue is not preserved for appeal.** *See State v. Jolly*, 332 N.C. 351, 361, 420 S.E.2d 661, 667 (1992). Likewise, you waive appellate review if you fail to object at the time the testimony is first admitted, even if you object when the same

or similar evidence is later admitted. *See State v. Davis*, 353 N.C. 1, 19, 539 S.E.2d 243, 256 (2000). **Bottom line:** You must object each and every time the evidence is admitted.

- ❖ One way to deal with this problem is to enter a standing line objection to the evidence when it is offered at trial. *See* N.C. Gen. Stat. § 15A-1446(d)(9) & (10); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 22, at 92 (Michie Co., 6th ed. 2004) (discussing waiver and the status of line objections in North Carolina).
  - ✓ To preserve a line objection, you must ask the trial court's permission to have a standing objection to a particular line of questions. *See, e.g., State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996). In addition, you should clearly state your grounds for the standing objection. If the court denies your request, object to every question that is asked.
  - ✓ **You cannot make a line objection at the time you lose your motion to suppress or your motion *in limine*; you must object to the evidence at the time it is offered.** *See State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48 (2000).
  - ✓ If there are additional grounds for objection to a specific question within that line, you must interpose an objection on the additional ground.
    - *e.g.*: If you have a standing line objection based on relevance and a specific question in that line calls for hearsay, you need to interpose an additional hearsay objection.

D. Making an Offer of Proof:

- ❖ Evidence Rule 103(a)(2) provides that "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." N.C. Gen. Stat. § 15A-1446(a) provides that "when evidence is excluded a record must be made . . . in order to assert upon appeal error in the exclusion of that evidence."
- ❖ Thus, **if the trial court sustains the prosecutor's objection and precludes you from presenting evidence, making an argument, or asking a question, you must make an offer of proof.** For further discussion of this topic, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 18, at 70 (Michie Co., 6th ed. 2004).
- ❖ **You should make your offer of proof by actually filing the documentary exhibit or by eliciting testimony from the witness outside the presence of the jury.** It is not enough to rely on the context surrounding the question. *See State v. Williams*, 355 N.C. 501, 534, 565 S.E.2d 609, 629 (2002). Summarizing what the witness would have said also may not be sufficient. *See State v. Long*, 113 N.C. App. 765, 768-69, 440 S.E.2d 576, 578 (1994).
- ❖ If the court does not allow you to make an offer of proof, state: "Defendant wants the record to reflect that we have tried to make an offer of proof." Also state that the trial court's failure to allow you to do so violates the defendant's constitutional rights to confrontation, to present a defense, and, if applicable, to compulsory process. It is error

for the court to prohibit you from making an offer of proof. *State v. Silva*, 304 N.C. 122, 134-36, 282 S.E.2d 449, 457 (1981).

- ❖ If the court tells you to make your offer "later," the burden is on you to remember and to make sure that the offer is made.

VIII. MOTIONS TO DISMISS:

- ❖ Always move to dismiss at the close of the State's case. *See* N.C. Gen. Stat. 15-173; N.C. Gen. Stat. § 15A-1227.
- ❖ **Always renew your motion to dismiss at the close of all the evidence (even if you only introduce exhibits)**. The defendant is barred from raising insufficiency of the evidence on appeal if you fail to do so. *See* N.C. R. App. P. 10(b)(3); *see also State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987) (appellate rule abrogates the contrary provision in N.C. Gen. Stat. § 15A-1446(d)(5)). Furthermore, the appellate courts will not even review the error using the "plain error" standard of review if the motion is not renewed. *See State v. Freeman*, 164 N.C. App. 673, 596 S.E.2d 319 (2004) (plain error analysis only applies to jury instructions and evidentiary matters in criminal cases).
- ❖ If you forget to renew your motion to dismiss at the close of all the evidence, after the verdict you should move to dismiss based on the insufficiency of the evidence or move to set aside the verdict as contrary to the weight of the evidence. *See* N.C. Gen. Stat. § 15A-1414(b). These motions are addressed to the discretion of the trial court and are reviewable on appeal under an abuse of discretion standard. *See State v. Fleming*, 350 N.C. 109, 512 S.E.2d 720 (1999); *State v. Batts*, 303 N.C. 155, 277 S.E.2d 385 (1981).

IX. CLOSING ARGUMENTS:

- ❖ Always object to improper arguments. Failure to timely object to the prosecutor's argument constitutes a waiver of the alleged error. In the absence of an objection, appellate courts will review the prosecutor's argument to determine "whether it was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error." *State v. Taylor*, 337 N.C. 597, 447 S.E.2d 360 (1994). This is a much more stringent standard of review than is applied to preserved errors so it is critically important for appellate purposes to timely object to improper statements made by the prosecutor and to request curative instructions if the objection is sustained.

- ❖ If your objection is sustained, immediately ask the judge to instruct the jury to disregard the improper statements. You should also carefully consider whether further remedy is necessary or whether it would serve to draw further negative attention to the comments. If you decide that the prejudice resulting from a prosecutor's improper argument was severe and in need of further remedy, you may ask the judge to:
  - admonish the prosecutor to refrain from that line of argument;
  - require the prosecutor to retract the improper argument;
  - repeat the curative instruction during the jury charge; or

- grant a mistrial.

See State Jones, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (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, 153 S.E.2d 76 (1967) (listing several methods by which a trial judge, in his or her discretion, may correct an improper argument).

❖ The filing of a motion *in limine* regarding closing arguments is not sufficient, by itself, to preserve closing argument error. Appellate Rule 10(b)(1) requires that you actually obtain a ruling on the motion from the trial judge. *See State v. Daniels*, 337 N.C. 243, 275-76 n.1, 446 S.E.2d 298, 318 n.1 (1994). In addition, you should renew the motion or object during the prosecutor's closing argument.

❖ Object to any attempts by the prosecutor to argue in closing that your client's post-*Miranda* exercise of his constitutional rights to silence and counsel support an inference of guilt. *See Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976).

❖ The Supreme Court of North Carolina has displayed an increasing willingness to find reversible error due to improper closing arguments by prosecutors. Be vigilant to improper arguments and object!

X. JURY INSTRUCTIONS:

❖ Clearly and specifically object to erroneous jury instructions before the jury retires to deliberate. *See* N.C. R. App. P. 10(b)(2); *see also State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983) (appellate rule abrogates the contrary provision in N.C. Gen. Stat. § 15A-1231(d)). If you do not object at trial, instructional errors will only be reviewed for plain error – an extremely difficult standard to meet. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

❖ **Submit all of your proposed jury instructions -- especially special instructions -- *in writing*.** *See* N.C. Gen. Stat. § 1-181; N.C. Gen. Stat.§ 15A-1231(a). Requested instructions that are refused then become a part of the record on appeal by statute. N.C. Gen. Stat. § 15A-1231(d). Then follow along on your copy as the judge instructs the jury. Judges very often make unintentional mistakes while instructing the jury.

❖ **Submit your proposed jury instructions as early as possible so the judge will have a chance to review them and make a ruling.** Parties may submit proposed jury instructions at the close of the evidence or at an earlier time if directed by the judge. N.C. Gen. Stat. § 15A-1231(a). Requests for special instructions must be submitted to the judge before the judge begins to give the jury charge. N.C. Gen. Stat. § 1-181(b); *see also* N.C. Gen. R. Prac. Super. & Dist. Ct. 21 (providing that "[i]f special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference"); *State v. Long*, 20 N.C. App. 91, 200 S.E.2d 825 (1973) (holding that a request for special instruction is not timely if it is tendered after the jury retires to deliberate). However, the judge may, in his or her discretion, consider requests for special instructions regardless of the time they are made. N. C. Gen. Stat. § 1-181(b).

XI. JURY DELIBERATIONS:

- Before consenting to the jury's request to take an exhibit into the jury room pursuant to N.C. Gen. Stat. § 15A-1233(b), carefully consider how the jury may use the exhibit during its deliberations and decide whether it would be in the defendant's best interest to consent. If the trial judge, without obtaining consent from all parties, sends an exhibit to the jury room that you believe is harmful to the defendant's case, object on the record in order to ensure preservation of the issue on appeal.
- Make sure that the timing of jury deliberations is made a part of the record. Lengthy or troubled jury deliberations are an extremely helpful way to show prejudice on appeal.
- Make sure that all jury notes and other communications between the judge and jury are made a part of the record.

XII. SENTENCING:

- **Do not stipulate as a matter of course to the prior record level worksheet or to the defendant's prior convictions, especially if they are out-of-state convictions.** The burden is on the prosecution to prove that the defendant's prior convictions exist. N.C. Gen. Stat. § 15A-1340.14(f). If they are out-of-state convictions, the State must prove they are substantially similar to North Carolina convictions or else they must be classified at the lowest punishment level (Class I for felonies, Class 3 for misdemeanors). N.C. Gen. Stat. § 15A-1340.14(e). If you stipulate (or fail to object when asked or agree in any way), the State does not have to prove anything. *See State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914 (2005). The issue will most likely be preserved if you "take no position" but the safer position is to object (even if you do not wish to be heard).
- Errors that occur during sentencing are supposed to be automatically preserved for review. *See* N.C. Gen. Stat. § 15A-1446(d)(18); *State v. McQueen*, 181 N.C. App. 417, 639 S.E.2d 139 (2007), *appeal dismissed and disc. review denied*, 361 N.C. 365, 646 S.E.2d 535 (2007); *State v. Hargett*, 157 N.C. App. 90, 577 S.E.2d 703 (2003) (citing *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991)). However, the Court of Appeals has also repeatedly found that a defendant waives appellate review of a sentencing error when he or she fails to object. *See, e.g.*, *State v. Black*, --- N.C. App. ---, 678 S.E.2d 689 (2009) (right to appellate review of constitutional issue was waived because defendant failed to raise it at the sentencing hearing); *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000) (issue regarding sufficiency of the evidence to support the finding of aggravating factors was not properly before the Court because defendant did not object during the sentencing hearing). To be safe, always object to errors that occur during the sentencing hearing.
- In response to the United States Supreme Court decision in *Blakely v. Washington*, our legislature substantially amended the Structured Sentencing Act. Session Law 2005-145, referred to as the *Blakely* bill, went into effect on June 30, 2005 and applies to prosecutions for all offenses committed on or after that date. It is prudent to preserve all *Blakely* issues just as you would preserve other issues during a trial. This includes

motions to dismiss for failure to prove an aggravating factor beyond a reasonable doubt, objections to evidence, and objections to erroneous jury instructions.

- Present evidence to support mitigating factors if the evidence was not presented at trial. *E.g.*, Have your client's mom testify about his support system in the community. If the mitigating factors are supported by documentary evidence, ask that the documents be entered into evidence.

New Felony Defender Training
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PRESERVING THE RECORD AND MAKING OBJECTIONS AT TRIAL:

A Win-Win Proposition for Client and Lawyer

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I. The Prime Directive For Preserving the Record and Making Objections at Trial

WHEN IN DOUBT -- OBJECT

A. This cannot be overstated. If you do not object, you have lost -- regardless of whether you are right or wrong about the issue. If you do object, two things can happen, and both of them leave your client in a better position than if you were silent:

1. The objection will be sustained. Whatever you were objecting to has been excluded, and some prejudice has been kept out of the trial. You have also seized the moral high ground for future objections, if the prosecutor violates the judge's ruling.

2. The objection will be overruled. This is not great, but at least you have preserved the issue so that on appeal or habeas, your client will have a chance for reversal. Almost as important, you have begun to educate the judge on the issue, which maximizes your chances of limiting the prosecution's ability to expand the prejudice later in the trial.

B. Many lawyers are afraid to make objections because they think the court may get angry at them for daring to object. There are two answers to this:

1. It is more important to preserve your client's right to appellate and habeas review than it is to have the court happy with you.

2. If a judge is going to get upset with you for objecting, he or she is probably the kind of judge who is already upset with your very existence as a defense lawyer. It's part of our job, so we have to learn to live with it.

MYTH ALERT #1 Objecting too much will make the jurors angry:

When I took trial advocacy courses in law school, I was advised not to object too much, because it will make the jury angry. This is nonsense for two reasons:

1. Jurors don't get angry because you are objecting. They get angry if you are behaving like a jerk when you object. Whining, eye-rolling and other stereotypical lawyer histrionics might offend a jury. Making your objection in an intelligent, calm, sincere and respectful-sounding way lets the jury know you are doing your job and care about your case.

2. The law professors who keep advising you not to object have never gone to jail because they were procedurally barred from raising a winning issue on habeas. Your client will.

II. How to Prepare For Objections and Record Preservation

MYTH ALERT #2: You can't prepare for trial objections. You just have to be very smart and very fast on your feet.

This is also nonsense. It was probably made up by a trial attorney who was invited to teach at an advocacy seminar, and wanted to convince the audience that he was smarter and faster than they were. Like every aspect of a trial, knowing your theory of defense, thinking about your case critically and doing your homework in advance will allow you to make effective objections even if you are really slow on your feet.

A. Know your theory of defense inside out. Go through the exercise of writing out your theory of defense paragraph. Know what story you are going to tell the jury that will convince them to return the verdict you want.

B. Then ask yourself four questions:

1. What evidence, arguments and general prejudice might the prosecutor come up with that will hurt my theory of defense?

2. What legal objections can I make to those tactics?

3. What evidence and arguments will the prosecutor offer in support of his or her theory of the case?

4. What legal objections can I make to the prosecutor's evidence and arguments?

C. Once you have answered these four questions, take the following steps:

1. Go to the law library and research the law on those objections.

2. If you find supportive law, make copies of the relevant cases or statutes. Bring them to court with you, and cite them if you make a motion in limine.

D. If appropriate, make a motion in limine, in writing and on the record, to obtain the evidentiary ruling you want before trial.

E. If a motion in limine is not appropriate, bring the copies of the law you have found with you to trial. This will guarantee that when you make the objection, you will be the only one in the courtroom who is able to cite directly relevant law.

MYTH ALERT #3: You have to choose between preserving the record, and following a good trial strategy.

Baloney. If you know your theory of defense, you will know whether an objection advances the theory or conflicts with it. Object when it advances your theory. Don't object if it conflicts with your theory. Just make sure you know the difference.

III. How to Make Objections

A. Whenever you anticipate a problem, consider making a motion in limine to head off the difficulty and get an advance ruling.

B. When you are unsure whether to object, DO IT. You have far less to lose if you have an objection overruled than if you allow the damaging evidence in without a fight.

C. Be unequivocal when you object, don't waffle.

1. RIGHT: I object.
   WRONG: Excuse, me you honor, but I think that may possibly be objectionable.

2. Don't ever let the judge bully you into withdrawing an objection. If the judge goes ballistic because you have made an objection, just make sure you get it all on the record -- including his ruling.

D. If the objection is sustained, ask for a remedy.

1. Mistrial.

2. Strike testimony.

3. Curative instruction.

E. If you realize that you have neglected to make an objection which you should have made:

1. DON'T PANIC -- but don't just forget about it.

2. Make a late objection on the record.

3. Ask for a remedy which the court can grant now.

a. Curative instruction/strike testimony.

b. Mistrial.

IV. If You Happen To Have A Capital Case, Remember To Make Objections On Non-Capital Issues

NOTE: This particularly important because in many jurisdictions death penalty law is so bad that if a reviewing court feels that an injustice is being done, you have to give the court a non-death penalty issue on which to peg its reversal.

A. If you are objecting to the admission of evidence, raise every possible ground:

EX: If you are objecting to admission of a photo array, don't just cite your state's equivalent of Wade. You may also wish to raise:

1. Suggestive behavior by police
2. Photo array unreliable based on nature of the witness
3. Right to counsel.
4. Fruit of an illegal arrest or other police misconduct.
5. Fruit of an illegally obtained statement

a. Coerced statement
b. Miranda
c. Right to counsel

6. The photo array is biased, based on the latest scientific research on photo arrays.

B. If you are relying on scientific or technical information as the basis for your objection, give the court a copy of the relevant articles in advance of the court proceeding. This not only helps your chances of winning the objection, but it educates the judge about the issue.

C. Prosecutorial Misconduct in Summation

1. In General

a. ***It is not impolite to interrupt opposing counsel's summation -- it is mandatory to preserve error and stop the prejudice.***

b. Be sure to ask for some remedy any time an objection is sustained to remarks in a prosecutor's closing argument.

1. Admonish the jury to ignore the statements.
2. Admonish the prosecutor not to do it again.
3. Mistrial.

2. Some common objections to prosecutorial summations.

a. Distorting or lessening the burden of proof.

b. Negative references to the defendant's exercise of a constitutional or statutory right.

1. Pre- and post- arrest silence.
2. Requests for counsel.
3. Not testifying at trial.

c. Religious or patriotic appeals -- particularly now that the government is asserting that everything it doesn't like (including your client) is tied to terrorism.

d. Appeals to sympathy, passion or sentiment.

e. Name-calling or other invective directed at either the defendant, defense counsel or the defense theory.

f. References to evidence that has been suppressed or not introduced.

g. Attacks on the defendant's character, when character has not been made an issue in the case.

D. Some Common Objections in the Evidentiary Portion of the Trial

1. Improper introduction of uncharged crimes or bad acts attributed to the defendant

2. The court improperly limited the defense right to cross-examine witnesses.

3. The court wrongfully permitted the prosecutor to cross-examine the defendant in a prejudicial manner or about improper subjects.

a. The defendant's pre- and post-arrest silence.

b. The defendant's request for a lawyer and consultation with counsel.

4. The prosecutor tried to have a police officer testify about the defendant's invocation of his right to silence or his request for a lawyer.

5. Improper use of expert testimony.

a. There was no need for an expert because a lay jury could understand the subject on its own.

b. The opinion evidence was given outside the area of the expert's expertise.

c. The expert is unqualified.

d. The expert's opinion is so far outside the mainstream of current thought as to be junk science. Make a Daubert challenge.

SENTENCING ADVOCACY

ART OF SENTENCING

Robert C. Kemp, III
Pitt County Public Defender
New Felony Defender Training
February 19, 2016

A judge is a man who ends a sentence with a sentence.

-Unknown

Guideline 8.1 Obligations of Counsel in Sentencing

1) Manage Client's Expectations
   a. Fully inform client of potential sentences. See *Strickland v. Washington*, 466 U.S. 668 (1984).
   b. Explain to client left/right limits of sentencing options.

2) Sell The Plea
   a. To the Prosecutor
   b. To the Client
   c. To the Judge

Guideline 8.2 Sentencing Options, Consequences, and Procedures

1) Know your options and its consequences, to include collateral consequences

Options:	Deferred prosecution, NCGS 90-96 sentencing, consolidation of charges, probation, split-sentence, incarceration, drug rehabilitation programs, drug court, and post-release supervision.
Consequences:	Loss of driver's license, deportation, violation of probation, no contact order, loss of certification/professional license, loss of the use of a firearm, loss of rights of citizenship, etc.

2) See Collateral Consequences Assessment Tool (C-CAT): http://ccat.sog.unc.edu/

3) Immigration Consequences:

a. See below hyperlinks:
http://www.nlada.org/Defender/Defender_Immigrants/Defender_Immigrants/Defender_Immigrants_Consequence

http://defendermanuals.sog.unc.edu/defender-manual/6

b. See *Padilla v. Kentucky*, 130 S.Ct. 1473 (2000) and *State v. Nkiam*, 778 S.E.2d 437 (N.C. Ct. App. 2015*), temp. stay allowed*, ___N.C.___ (Nov 23, 2015)

1) "Correct advice", if immigration consequences are clear.

4) Sex Offender Registration

a. Prof. Markham Chart (Oct. 15) (SOG)

http://nccriminallaw.sog.unc.edu/wp-content/uploads/2015/10/Sex-offender-flow-chart-Oct-2015.pdf

b. "Consequences of Conviction of Offenses Subject to Sex Offender Registration" (Revised Jan. 2016), Prof. John Rubin (SOG)

http://ccat.sog.unc.edu/sites/ccat.sog.unc.edu/files/Consequences%20of%20Conviction%20of%20Offenses%20Subject%20to%20Sex%20Offender%20Registration%20Jan.%202016.pdf

5) Capital Sentence Hearing

- What does ineffective Counsel look like? See *Porter v. McCollum*, 558 U.S. 30 (2009).

6) Review NCGS 15A-1334—The Sentencing Hearing

- Formal rules of evidence do not apply.

Guideline 8.3 Preparation for Sentencing

1) Gather helpful documents

a. Employment history: paychecks, attendance history, W-2 forms, letter from employer
b. Proof of education: transcript, class schedule, letter from registrar
c. Medical/mental health records
d. Any certifications and licenses
e. Any evaluation and treatment documents
f. Military documents
g. Client's financial documents

2) Determine who will be in court on behalf of your client.
   a. Parents, spouse, children, church official, doctor, etc.

3) Do you need a mitigation specialist?
   a. Serious cases (A, B1, B2 Felonies).
   b. Will the court grant you the funds to hire one?

4) Appearance of Client (You are an artist! Know your audience!)
   a. Haircut
   b. Clean Clothes
   c. Tie (if male)
   d. Belt
   e. Shoes/Socks (no flip-flops)
   f. No jewelry (except wedding ring), conservative earrings on females, tasteful religious symbol
   g. Hide Tattoos! (If possible)
   h. No gum
   i. Stay in courtroom unless official break
   j. No hands in pockets
   k. No cell phone
   l. No crossed arms
   m. "Dress like you are going to your Grandmother's funeral"

5) Will Client Address the Court?
   - Address the Court "Your Honor" or "Yes Ma'am/Sir".

6) Will anyone else address the Court?
   - Deviation from NCGS 15A-1334.

Guideline 8.4 The Sentencing Services Plan or Presentence Report

1) If your district provides such a service, this is a valuable option.
   a. Make a tactical decision on whether such a plan/report is prepared.
   b. If your client participates, ensure the plan/report is accurate and complete.
   c. If approved by the Court, IDS will authorize, and pay, a flat fee of $500 for defense requested sentencing plans.

Guideline 8.5 The Prosecution's Sentencing Position

1) Determine prosecutor's position on sentencing
   a. Agree to no jail, will not object to probationary sentence, consolidation of sentences, concurrent sentences, restitution issues, etc.

b. Factual Basis: minimum or no gruesome details [Remember: If a sentence is recommended, a Judge may change her mind and refuse plea deal. (NCGS 15A–1021, 1023)].

2) Restitution
   a. Agree to amount ahead of time (leverage).
   b. If no such agreement, judge shall determine whether Defendant pays. (NCGS 15A-1340.34).
   c. Amount of restitution must be supported by the record/evidence. (NCGS 15A-1340-36); See *State v. Hammonds*, 777 S.E.2d 359, (N.C. Ct. App. 2015).

   d. Examples:

      i. Bodily injuries—medical bills/income lost. [NCGS 15A-1340.35(a)(1)].
      ii. Real/personal property—value of the property on the date of the damage. [NCGS 15A-1340.35(a)(2)].
      iii. Death of individual—funeral expenses/medical bills/income lost. [NCGS 15A-1340.35(a)(4)].

   e. Court must take into account ability to pay. (NCGS 15A-1340.36).
   f. Prosecutor's unsworn statement or restitution worksheet not enough. See *State v. Smith*, 210 N.C. App. 439 (2011).

Guideline 8.6 The Defense Sentencing Theory

1) Mitigation Factors: (NCGS 15A-1340.16)

   a. Burden of Proof—on Defendant
      - Preponderance of the evidence

   b. Proven at sentencing hearing

   c. Must produce evidence in support

2) Aggravating Factors: (NCGS 15A-1340.16)

   a. Burden of Proof—on State
      - Beyond a reasonable doubt

   b. Must be admitted by Defendant or determined by a jury

3) Departing from the presumptive range is in the discretion of the court. (NCGS 15A-1340.13)

4) Recommended Sentence:
   a. Use the phrase: "I would respectfully request the Court to consider …..when fashioning a judgment."
   b. Use the phrase: "Would the Court consider……"

5) KNOW THE JUDGE!
   a. Her peculiarities;
   b. Her idiosyncrasies;
   c. Her typical judgments for certain offenses;
   d. Her willingness to predict sentence pre-plea; or
   e. Her "pet peeves"

6) Most of the time: CLEAR, CONCISE, CREDIBLE AND CONFIDENT
   a. Credibility can be lost in a sentencing hearing
      i. Do not guess
      ii. Do not embellish/exaggerate
      iii. No ridiculous points
   b. Do not get a reputation for coming to court unprepared. (Asking your client the answer to a judge's question IN COURT!)

7) Examples of theories (not necessarily good ones): one of the crowd; a pawn in the crime; substance abuse; spousal abuse; parent abuse, stupid mistake; youngest one involved; has taken responsibility and ready to pay for her deeds, financially destitute, etc.

8) Substantial Assistance [NCGS 90-95(h)(5)]
   - Have officer and ADA locked into the deal.

9) Extraordinary Mitigation [NCGS 15A1340.13(g)]—Good Luck
   - Do not ask for it without permission of your supervising attorney.

10) Advanced Supervised Release—if DA does not object. (NCGS 15A-1340.18).

11) Sex Offender Registration and Satellite-Based Monitoring
   a. Professor Markham Chart (Oct. 15) (SOG)
   b. Static-99
   c. Form AOC-CR-615 (Judicial Findings and Order for Sex Offenders)

12) Know your record level points
   a. Elements of present offense are included in any prior conviction. (NCGS 15A-1340.14(b)(6). See *State v. Eury*, ___N.C. App. ___, No. COA 15-15-709 (Feb. 2, 2106).
   b. Out of state conviction. See *State v. Sanders*, 367 N.C. 716 (2014).
      -"substantial similarity" test

13) Federal Charges and Court
- Trafficking of drugs, child pornography, illegal firearm possession
- Target Letter
- Proffer Agreement
- If you think your case may go Federal, talk to your supervising attorney.

Guideline 8.7 The Sentencing Process

1) Know the Basics of your case:

a. The facts of the case.
b. Client's background: born and raised, education, family life, work history
c. Forecast the future for your client if the Court gives your client a second chance.
d. What has the client done since being arrested?
e. Client must be present. *State v. Leaks*, 771 S.E.2d 795 (N.C. Ct. App. 2015), *disc. rev. denied*, 368 N.C. 285 (2015).

2) Weave your facts into your mitigation factors.

3) If a factual basis exists, court must accept plea arrangement with no sentencing Agreement. [NCGS 15A-1023(c)].

4) If court rejects plea deal with sentencing recommendations, defendant is entitled to a continuance. [NCGS 15A-1023(b)].

5) District Attorney may withdraw guilty plea at ANYTIME before the Court accepts it. See *State v. Collins*, 300 N.C. 142 (1980).

6) If your client has first been found incompetent to stand trial and then is rehabilitated, do not forget the competency hearing BEFORE you take the plea. (NCGS 15A-1006-7).

7) Verify jail credit with Clerk of Court. See new changes to jail credit (NCGS 15-196.1).

JURY INSTRUCTIONS

USING JURY INSTRUCTIONS

Originally created by Phoebe Dee, Asst. Capital Defender

All mistakes attributed to Richard Wells, Asst. Public Defender

WHY DO WE TRY THE CASES WE TRY?

- We have a great case, with great issues!
- Our client is being unreasonable and/or can't bring him/herself to sign up for time in prison.
- The DA is being unreasonable and, with a plea offer that lousy, there's nothing to lose in going to trial.

WHAT DOES THE LAST SLIDE HAVE TO DO WITH JURY INSTRUCTIONS?

You probably don't have a great case - there are problems with it. But you can still win the case. You need to focus yourself, the client and the Jury on the real issues in the case.

WHY ARE JURY INSTRUCTIONS IMPORTANT?

- **They are the law of the universe of your case.**
- **They are the <u>only</u> law the Jurors will hear (*attorneys can read law, but . . .*)**
- **They come from the Judge.**
- **They are the last thing the Jurors hear.**
- **Because Jurors want to do the right thing.**

PATTERN VS. NON-PATTERN JURY INSTRUCTIONS

- **PATTERN JURY INSTRUCTIONS** are written by a committee of Superior Court Judges and are reviewed annually. The SOG regularly updates them.
- **NON-PATTERN JURY INSTRUCTIONS** are written by the trial judge, the DA or YOU in cases where the pattern instructions fail to address a legal question at issue in the case.

WHEN SHOULD I READ THE JURY INSTRUCTIONS?

AS SOON AS YOU THINK THERE IS ANY CHANCE THAT THE CASE IS GOING TO TRIAL!

Jury Instructions will help you focus on the issues. Doing so as early as possible will help you make better use of your prep time.

READ FREE GOOD STUFF

- Chapter 32 of Vol. 2 of the Defender Manual.
- Read the Pattern Jury Instructions Index. Get acclimated.
- It's easy to print these! If you're a PD, go to NC Jury Instructions on your computer. If you're in private practice, go to the School of Government: http://www.sog.unc.edu/programs/ncpji

GIVE YOUR CLIENT A COPY

- First, it's easy to print the Pattern Instructions! If you're a PD, go to NC Jury Instructions on your computer. If you're in private practice, go to the School of Government: http://www.sog.unc.edu/programs/ncpji
- Second, Clients really like getting stuff. And having the Jury Instruction can focus a client's attention on relevant issues. (*I also always give highlighted copies of sentencing charts*).
- Third, It focuses your attention on the relevant issues. The only law that matters in a jury trial is what the Jury will hear. Facts win jury trials; run all your facts through the lens of the Jury Instructions.

THE TRIAL BEGINS – JURY SELECTION

- Educate the Jury about the Law (the Jury Instructions) during Jury Selection. It will focus their attention on the relevant issues during the trial. Often, no one tells the jury what the trial is about.
- "The Judge will instruct you on the law; This case is about [Blank] and it is my understanding the Judge will instruct you . . . ."
- Every case: "Beyond a Reasonable Doubt" = "Fully Satisfied or Entirely Convinced." (*Hopefully you will have a LEO in the jury pool*).
- Defenses such as self-defense – always touch on.
- Quote to the Jury from the likely Pattern Jury Instructions.

THE TRIAL

THE TRIAL

- The Crazy Stuff happened. But at the end . . . . We come back to the Jury Instructions.
- the Jury will now try to make the Crazy Trial Facts mesh with the Jury Instructions.
- Often just Pattern Instructions, but sometimes . . . Non-Pattern Instructions

WHEN SHOULD YOU BE THINKING ABOUT WRITING YOUR OWN INSTRUCTION?

WHENEVER A CRITICAL CONCEPT ISN'T CLEARLY ARTICULATED BY ANY OF THE PATTERN INSTRUCTIONS.

EXAMPLES OF NON-PATTERN INSTRUCTIONS

EXAMPLE FROM DRUG TRAFFICKING CASE

- NCPI 260.17 – Drug Trafficking. If Trafficking instruction given, defendant requests additional instructions relating to the required *mens rea* of "knowledge." **FIRST**, Defendant requests Footnote 4 to the NCPI instruction, specifically that "defendant knew that what he possessed *was heroin*". **SECOND**, from the NC Crimes guidebook and therein cited authority *"[a] person does not act "knowingly" if he or she merely should have known; the person must actually know."* **THIRD**, Defendant requests further that the jury be instructed that defendant knew the amount was at least the minimal 4 gram trafficking amount (*you will lose*). ATTACHED is relevant authority for these requests.
- NCPI 260.90 – Lesser-included misdemeanor charge. Also, "**and**" instead of "**or**" ("keeping and selling") because this "and" language is in the indictment.

The following definition of "knowingly", as used with the substantive drug charges, from the NC Crimes Book:

A person acts knowingly when the person is aware or conscious of what he or she is doing (278 N.C. 623). Similarly, a person has knowledge about the circumstances surrounding his or her act or about the results of an act when he or she is aware of or conscious of those circumstances or of those results (218 N.C. 258). A person does not act "knowingly" if he or she merely should have known; the person must actually know (212 N.C. 361). North Carolina does not accept the doctrine, accepted in some jurisdictions, that knowledge includes "willful blindness" of a highly probable fact, that is, deliberate avoidance of knowledge (324 N.C. 190).

WITNESS HAS BEEN GRANTED IMMUNITY:

- "There is evidence in this case which shows that the witness, Joe Plumber, is testifying under an agreement with the prosecutor, whereby he will not be prosecuted for his crimes in exchange for his testimony against the defendant.

  In the situation presented, Mr. Plumber is considered, by law, to have an interest in the outcome of this case. You should therefore be suspicious of his testimony and approach it with the greatest care and caution.

  In your deliberations you should carefully consider whether there are inconsistencies in the evidence of Mr. Plumber and what evidence exists to support what he is saying."

MERE PRESENCE

- "I must caution you that merely being with the co-defendant at or near the location of the crimes, does not render the defendant guilty of any crime. Association or contact between the defendant the co-defendant before or after the commission of these crimes is not sufficient and will not justify the conclusion that the defendant is guilty." *State v. Beach, 283 NC 261, 267-68 (1973)*

ANALYST FAILED CERTIFICATION EXAM

- "You have heard evidence in this case that Ms. Smith, the DNA analyst employed by the State Bureau of Investigations, has not passed her certification exam, as required by the NC General Assembly. You may consider this evidence, along with other evidence about her qualifications, when determining what, if any, weight to give to her testimony"

VALUE IS CONTESTED

- "And Sixth, that the fair market value of the stolen property was greater than $1000. The jury shall not consider the replacement cost for the property but only its fair market value."

OFFICER GIVES OPINION TESTIMONY

- "Officer Brady provided opinion testimony in this trial. Opinion testimony is offered, solely, for the purpose of corroborating other evidence. You should consider the officer's opinion only if you believe it is consistent with the other evidence. Officer Brady is not an expert and his opinion should not be given more weight than that of any civilian witness."

ALWAYS REMEMBER…

The Jury must consider the case in accordance with both the State and Defense Theories. Defendant in apt time requested that the law bearing upon his theory of the case be presented to the jury. He was merely asking the Court to charge the law arising on the evidence. Justice and the law countenance nothing less. State v. Tioran, *65 N.C.App.122, 125 (1983), citing* State v. Harrington, *260 N.C. 663, 666 (1963).*

THE CHARGE CONFERENCE

- After all evidence is presented. Often right after.
- You should request instructions in writing. NCGS 15A-1231; *State v. Smith, 311 NC 287 (1984).* So plan ahead – before the crazy stuff happens!
- Think about lesser-included instructions! Surprisingly, Judges often will give these. Tender them in writing.
- Preserve the record on appeal! You don't want Glen Gerding mad at you!

SO HOW DO I SUBMIT A JURY INSTRUCTION DURING THE CHARGE CONFERENCE?

- Have them prepared in advance. Often it is as simple as having 2 printed copies of each Pattern Instruction.
- Have a list of the Pattern Instructions and any Special Instructions you want, check them off because the Judge speaks quickly. You DON'T need to list all the Instructions the Jury will hear
- You'll forget to tender them in writing – because crazy stuff happens in Jury Trials! If the requested (and denied) jury instruction is a contested point, hand up your copy of the Pattern Instruction or scribble something onto a piece of paper.
- **Defendant's Right to Remain Silent** – Ask for it. Failure to give this instruction is not reversible error. *State v. Paige, 272 NC 417 (1968).*
- Preserve the Record on Appeal!

FORM OF REQUESTED INSTRUCTIONS

- **NCGS 1-181(a)**
- In Writing
- Entitled in the Cause
- Signed by Counsel Submitting

THE STATE OF NORTH CAROLINA)
)
) Proposed
) **Jury Instructions**
Vs.)
)
)
INNOCENT CLIENT, ,)
Defendant.)

NOW COMES the DEFENDANT, through undersigned counsel, and respectfully requests that included within the jury instructions given be the following:

1. NCPI Crim 101.10 – Burden of Proof and Reasonable Doubt
2. NCPI Crim 104.20 – Tes timony of Interested Witness
3. NCPI Crim 101.30 – Effect of Decision not to Testify
4. NCPI Crim 101.35 – Concluding Instructions
5. NCPI Crim 104.41 – Actual -Constructive Possession
6. NCPI Crim 104.60 – Admissions (request this be given instead of 104.70)
7. NCPI Crim 260.30 – Trafficking/Transportation. Include expanded definition of "knowingly" from footnote 4: "and that the defendant knew that what he transported was heroin."
8. NCPI Crim 260.17 – Trafficking/Possession. Include expanded definition of "knowingly" fro m footnote 4: "and that the defendant knew that what he transported was heroin."
9. NCPI Crim 202.80 – Criminal Conspiracy . Include expanded definition of Trafficking "and that the defendant knew that what he transported was heroin."

Richard Wells
Asst. Pu blic Defender

YOU ARGUE TO THE JURY

- Emphasize the Important Jury Instructions.
- Tell the story (truth) of innocence, but argue the story/facts as it relates to those few important Jury Instructions.
- Quote from the Jury Instructions.

THE JUDGE INSTRUCTS

- The Judge will read the instructions to the Jury. And the Judge will (might) mess it up. Don't fall asleep! LISTEN!
- Make notes during Judge's Instructions. Read along. Object after Judge gives entire instruction (renew your objections).
- If you submitted written instructions, this will preserve the record. But object anyway. *State v. Smith, 311 NC 287 (1984).*
- Judges like it when you correct their mistakes on jury instructions. Because they get reversed on these mistakes a lot!
- Judges can give written instructions to the jury. Some judges hate doing it, some like doing it. Think about that you want.

LAB REPORTS

CRIMINAL EVIDENCE: EXPERT TESTIMONY

Jessica Smith, UNC School of Government (August 2017)

Table of Contents

I. Introduction. This chapter discusses the admissibility of expert testimony under North Carolina's amended Evidence Rule 702. The 2011 amendments to subsection (a) of the rule adopted the federal standard for the admission of expert testimony, as articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). State v. McGrady, 368 N.C. 880, 884 (2016). Before the rule was amended, making North Carolina a "*Daubert* state," the standard for admissibility of expert testimony came from a case called *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004). Under both the *Daubert* and *Howerton* tests, the trial court determines admissibility of expert testimony by examining relevancy, qualifications, and reliability. *McGrady*, 368 N.C. at 892. However, under the *Daubert* standard the trial court applies a more rigorous reliability analysis. *Id.*; *see also* State v. Turbyfill, ___ N.C. App. ___, 776 S.E.2d 249, 257 (2015) (*Daubert* is a "heightened" standard). In its discussion of the reliability prong of the analysis, this chapter focuses on the new *Daubert* standard.

For discussion of the proper scope of expert testimony in sexual assault cases, see *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses* in this Benchbook.

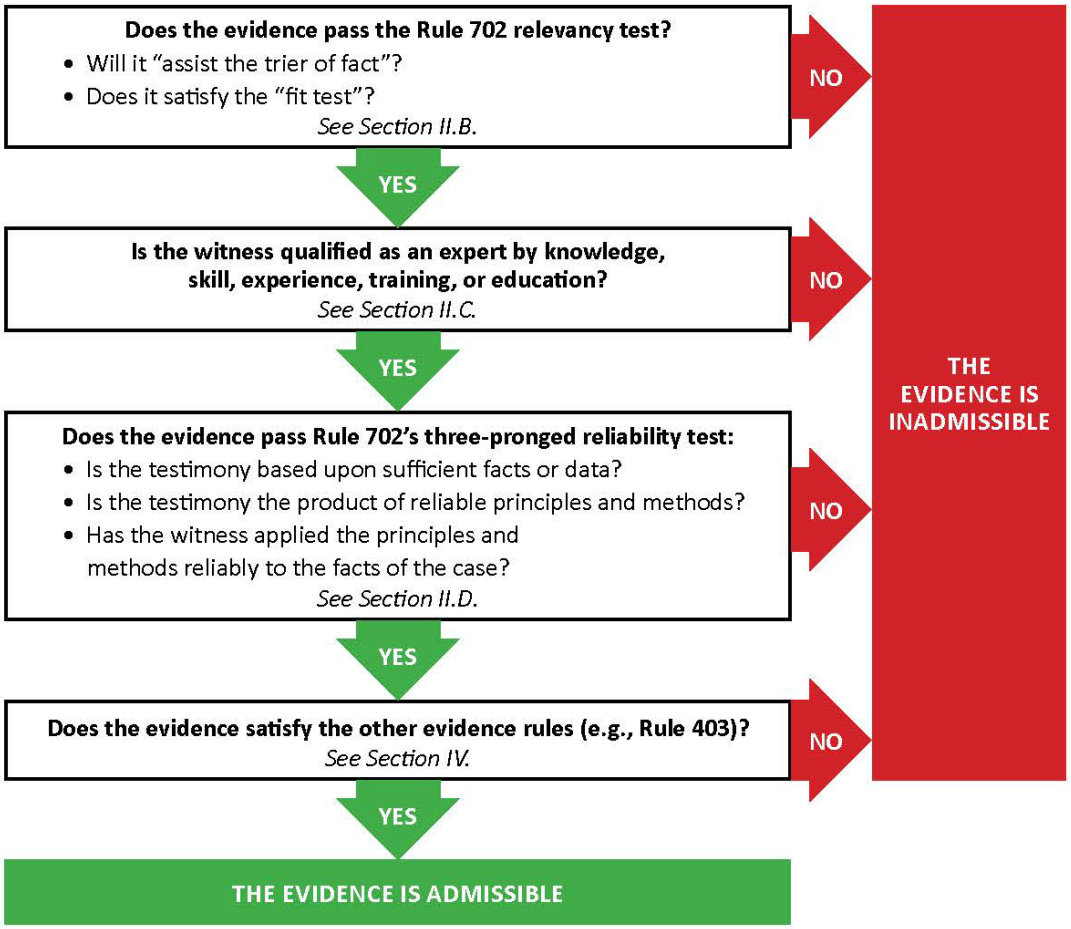
For a discussion of Confrontation Clause issues that can arise with respect to expert testimony, see *Guide to Crawford and the Confrontation Clause* in this Benchbook.

For a discussion of what discovery must be provided in connection with expert witnesses, see *Discovery in Criminal Cases* in this Benchbook.

The text of Rule 702 is set out immediately below.

> Rule 702. Testimony by experts
>
> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.
>
> (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.
>
> (2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.
>
> *[subsections (b)-(f), dealing with medical malpractice cases, are not reproduced here]*
>
> (g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.
>
> *[subsection (h), which deals with medical malpractice cases, is not reproduced here]*
>
> (i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

Figure 1. Analysis for Determining Admissibility of Expert Testimony



II. Standard for Admissibility under Rule 702(a).

A. Generally. As illustrated in Figure 1 above, Evidence Rule 702(a) sets forth a three-step framework for determining the admissibility of expert testimony: relevance, qualifications, and reliability, where reliability is assessed under the stricter *Daubert* standard rather than the old *Howerton* standard. *See supra* Section I.

1. *Daubert*, *Joiner* & *Kumho Tire*. The "*Daubert* standard" refers to a standard of admissibility laid out by the United States Supreme Court in a trio of cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Those three foundational cases are summarized here.

Daubert was a civil case in which children and their parents sued to recover for birth defects allegedly sustained because the mothers had taken Bendectin, a drug marketed by the defendant pharmaceutical company. The defendant moved for summary judgment, arguing that the

drug does not cause birth defects in humans and that the plaintiffs could not present admissible evidence establishing otherwise. The defendant supported its motion with an expert's affidavit concluding that Bendectin has not been shown to be a risk factor for human birth defects. The plaintiffs countered with eight experts; each of whom concluded that Bendectin can cause birth defects. The experts' conclusions were based on animal studies; pharmacological studies purporting to show that Bendectin's chemical structure was similar to that of other substances known to cause birth defects; and the "reanalysis" of previously published human statistical studies. Relying on the "general acceptance" test for admission of scientific evidence formulated in *Frye v. United States*, 293 F. 1013 (1923), the trial court found that because it was not generally accepted as reliable in the relevant scientific community the plaintiffs' expert evidence was inadmissible and granted the defendant's motion for summary judgment. After the Ninth Circuit affirmed, the United States Supreme Court agreed to hear the case, to resolve a split among the courts regarding whether the "general acceptance" test was the proper standard for admission of expert testimony.

The Court began by holding that the *Frye* "general acceptance" test for admission of expert testimony was superseded by the adoption of the Federal Rules of Evidence. Addressing the standard for admissibility under Rule 702, the Court stated that to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. 509 U.S. at 590. It explained: "[T]he requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." *Id.* The Court continued, noting that Rule 702 "further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue,'" a condition going primarily to relevance. *Id.* at 591. It clarified: "Expert testimony which does not relate to any issue with the case is not relevant and, ergo, non-helpful." *Id.* (quotation omitted). This prong of the admissibility analysis, it noted, has been described as one of "fit." *Id.* It continued:

> Faced with a proffer of expert scientific testimony . . . , the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. at 592–93 (footnotes omitted). The Court noted that many factors will bear on the inquiry and that it would not "presume to set out a definitive checklist or test." *Id.* at 593. However, it went on to offer five "general observations" relevant to the analysis:

1. A "key question" is whether the theory or technique can be (and has been) tested. *Id.* ("Scientific methodology . . . is based on generating hypotheses and testing them to see if they can be

falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry" (quotation omitted)).

2. Whether the theory or technique has been subjected to peer review and publication. *Id.* The Court noted that publication (one element of peer review) is not a "sine qua non of admissibility;" publication does not necessarily correlate with reliability, and in some cases well-grounded but innovative theories will not have been published. *Id.* It explained: "Some propositions . . . are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Id.* Thus, "[t]he fact of publication (or lack thereof) in a peer reviewed journal . . . will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." *Id.* at 594.
3. The theory or technique's known or potential rate of error. *Id.* at 594.
4. The existence and maintenance of standards controlling the technique's operation. *Id.*
5. The "general acceptance" of the theory or technique. *Id.* at 594. The Court explained:

> "A reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community. Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism."

Id. (quotations and citations omitted).

The Court was careful to note that the inquiry to be applied by the trial court in its "gatekeeping role," *id.* at 597, is "a flexible one" in which the focus "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 594-95. In the end, the Court remanded for further proceedings consistent with the new test for admissibility. *Id.* at 597-98.

The second case in the *Daubert* trilogy was *Joiner,* another civil case. *Joiner,* 522 U.S. 136. Its main contribution to the trilogy is to establish that a trial court's decision to admit or exclude expert testimony under Federal Rule 702 is reviewed under an abuse of discretion standard and to illustrate application of that standard to a trial court's exclusion of expert testimony. In *Joiner*, an electrician who had lung cancer sued the manufacturer of PCBs and the manufacturers of electrical transformers and dielectric fluid for damages. The plaintiff, who

was a smoker and had a family history of lung cancer, claimed that his exposure on the job to PCBs and their derivatives promoted his cancer. In deposition testimony, the plaintiff's experts opined that his exposure to PCBs was likely responsible for his cancer. The district court found the testimony from these experts to be inadmissible and granted the defendants' motion for summary judgment. The Eleventh Circuit reversed and the Supreme Court granted certiorari.

The Court held that a trial court's decision to admit or exclude expert testimony will be reviewed under an abuse of discretion standard and that here, no abuse of discretion occurred. *Id.* at 143. The plaintiff proffered the deposition testimony of two expert witnesses: (1) Dr. Arnold Schecter, who testified that he believed it "more likely than not that [the plaintiff's] lung cancer was causally linked to cigarette smoking and PCB exposure;" and (2) Dr. Daniel Teitlebaum, who testified that the plaintiff's "lung cancer was caused by or contributed to in a significant degree by the materials with which he worked." *Id.* The defendants asserted that the experts' statements regarding causation were speculation, unsupported by epidemiological studies and based exclusively on isolated studies of laboratory animals. *Id.* The plaintiff responded, claiming that his experts had identified animal studies to support their opinions and directing the court to four epidemiological studies relied upon by his experts. *Id.* at 143-44. The district court had agreed with the defendants that the animal studies did not support the plaintiff's contention that PCB exposure contributed to his cancer. *Id* at 144. The studies involved infant mice that developed cancer after being exposed to massive doses of concentrated PCBs injected directly into their bodies. *Id.* The plaintiff, by contrast, was an adult human whose alleged exposure was far less and in lower concentrations. *Id.* Also, the cancer that the mice developed was different than the plaintiff's cancer, no study demonstrated that adult mice developed cancer after being exposed to PCBs, and no study demonstrated that PCBs lead to cancer in other species. *Id.* The Court concluded: "[t]he studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court to have rejected the experts' reliance on them." *Id.* at 144-45.

The trial court also had concluded that the epidemiological studies were not a sufficient basis for the experts' opinions. After reviewing the studies, the Court found that they did not sufficiently suggest a link between the increase in lung cancer deaths and exposure to PCBs. *Id.* at 145-46. The Court went on to disagree with the plaintiff's assertion that *Daubert* requires a focus "solely on principles and methodology," not the conclusions that they generate, and that the trial court erred by focusing on the experts' conclusions, stating:

> [C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146. The Court went on to hold that the trial court did not abuse its discretion by concluding that the studies on which the experts relied were not sufficient to support their conclusions that the plaintiff's exposure to PCBs contributed to his cancer. *Id.* at 146-47.

The final case in the trio was *Kumho Tire,* 526 U.S. 137. It answered a question left open by *Daubert:* Does the *Daubert* standard apply only to "scientific" expert testimony or to all expert testimony, including testimony based on technical or other specialized knowledge? The Court held that the test applies to *all* expert testimony. In *Kumho Tire* the Court also clarified the nature of the *Daubert* inquiry.

In *Kumho Tire,* the plaintiffs brought a products liability action against a tire manufacturer and distributor for injuries sustained when a vehicle tire failed. The plaintiffs rested their case on deposition testimony provided by an expert in tire failure analysis, Dennis Carlson. Carlson's testimony accepted certain background facts about the tire in question, including that it had traveled far; that the tire's tread depth had been worn down to depths that ranged from 3/32 of an inch to zero; and that the tire tread had at least two inadequately repaired punctures. Despite the tire's age and history, Carlson concluded that a defect in the tire's manufacture or design caused the blowout. His conclusion rested on several undisputed premises, including that the tread had separated from the inner carcass and that this "separation" caused the blowout. *Id.* at 143-44. However, his conclusion also rested on several disputed propositions. First, Carlson said that if a separation is not caused by a kind of misuse called "overdeflection" then ordinarily its cause is a tire defect. Second, that if a tire has been subject to sufficient overdeflection to cause a separation, it should reveal certain symptoms, which he identified. Third, that where he does not find at least two such symptoms, he concludes that a manufacturing or design defect caused the separation. Carlson conceded that the tire showed a number of symptoms, but in each instance he found them to be not significant and he explained why he believed they did not reveal overdeflection. He thus concluded that a defect must have caused the blowout.

The defendant moved to exclude Carlson's testimony on the ground his methodology failed Rule 702's reliability requirement. The trial court conducted a *Daubert* reliability analysis and granted the motion to exclude. The Eleventh Circuit reversed, holding that the *Daubert* analysis only applied to scientific evidence. The United States Supreme Court granted certiorari to resolve the question of whether or how *Daubert* applies to expert testimony based not on "scientific" knowledge but on "technical" or "other specialized" knowledge.

The Supreme Court began by holding that the *Daubert* standard applies to all expert testimony, not just scientific testimony. *Id.* at 147-49. It went on to hold that when determining the admissibility of the expert testimony at issue--engineering testimony--the trial court *may* consider the five *Daubert* factors: whether the theory or technique can and has been tested; whether it has been subjected to peer review and publication; the theory or technique's known or potential rate of error; whether there are standards controlling its operation; and whether the theory or technique enjoys general acceptance within the relevant

scientific community. *Id.* at 149-50. Emphasizing the word "may" in this holding, the Court explained:

> Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. . . . [T]here are many different kinds of experts, and many different kinds of expertise. . . . We agree . . . that "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Id. at 150 (quotations and citations omitted). It continued:

> *Daubert* . . . made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.
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> At the same time . . . some of *Daubert*'s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

Id. at 151. The Court emphasized that the purpose of *Daubert*'s gatekeeping requirement "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that

characterizes the practice of an expert in the relevant field." *Id.* at 152. It further emphasized the considerable leeway that must be afforded to the trial court in determining whether particular expert testimony is reliable. *Id.* It clarified that when assessing reliability, the trial court must have flexibility in determining whether special briefing or other proceedings are necessary, and that, as it held in *Joiner,* the court's decision will be reviewed under an abuse of discretion standard. *Id.*

Turning to the case at hand, the Court held that the trial court did not abuse its discretion by excluding the testimony. The district court had found unreliable the methodology employed by the expert in analyzing the data obtained through his inspection of the tire, and the scientific basis, if any, for his analysis. The Court noted that, among other things, the trial court could reasonably have wondered whether the expert's method of visual and tactile inspection was sufficiently precise, and these concerns might have been amplified by Carlson's repeated reliance on the subjectiveness of his analysis and the fact that he had inspected the tire for the first time the morning of his deposition, and only for a few hours, having based his initial conclusions on photographs. *Id.* at 155. Additionally, the trial court found that none of the *Daubert* factors, including that of general acceptance, indicated that Carlson's testimony was reliable. *Id.* at 156. With respect to Carlson's claim that his method was accurate, the court noted that, as stated in *Joiner*, "nothing . . . requires a district court to admit opinion evidence that it is connected to existing data only by the ipse dixit of the expert." *Id.* at 157. For these and other reasons, the Court concluded that the trial court did not abuse its discretion by excluding the expert testimony. *Id.* at 158.

Stated broadly, these three cases hold that when assessing *any* type of expert testimony under Rule 702, the *Daubert* standard applies; the inquiry is a flexible one; and the trial court will be reversed only for an abuse of discretion.

2. Effective Date of Amendments to Rule 702(a). As noted above, the 2011 amendments to Rule 702(a) incorporate the *Daubert* standard. The amendments to section 702(a) apply to "actions commenced" on or after October 1, 2011. *See* S.L. 2011-283, secs. 1.3, 4.2. "[T]he trigger date" for applying the amended version of the rule is the date that the bill of indictment is filed. State v. Walston, 229 N.C. App. 141, 152 (2013), *rev'd on other grounds*, 367 N.C. 721 (2014); State v. McLaughlin, ___ N.C. App. ___, 786 S.E.2d 269, 286 (2016); State v. Gamez, 228 N.C. App. 329, 332-33 (2013). If a second indictment is filed on or after October 1, 2011 and is joined for trial with an indictment filed before the statute's effective date, the proceeding is deemed to have commenced on the date the first indictment was filed. *Gamez,* 228 N.C. App. at 333. However, in a case involving one indictment in which a superseding indictment is filed, the date of the superseding indictment controls. *Walston*, 229 N.C. App. at 152.

3. Effect of Pre-Amendment Case Law.
The North Carolina Supreme Court has stated that the 2011 amendments did not abrogate all North Carolina precedents interpreting that rule. Specifically, it has stated: "Our previous cases are still good law if they do not conflict with the *Daubert* standard." State v. McGrady, 368 N.C. 880,

at 888 (2016). It is not entirely clear what that statement means. The 2011 amendments adopting the *Daubert* standard changed only the reliability prong of the Rule 702 analysis; the relevancy and qualifications prongs were not changed. Thus, this Chapter assumes that this statement means: (1) that cases applying the relevancy and qualifications prongs of the analysis remain good law; and (2) that cases applying the more lenient pre-*Daubert* standard to the reliability prong are inconsistent with the analysis under the new *Daubert* rule. However, cases applying the pre-*Daubert* standard to the reliability prong to hold that evidence is inadmissible are likely to be consistent with a result that obtains from application of the *Daubert* standard (after all, evidence that could not pass muster under the earlier standard is unlikely to do so under the new stricter standard). By contrast, cases applying the more lenient pre-*Daubert* standard to the reliability prong to hold that evidence is admissible may not be consistent with a result that obtains under the stricter *Daubert* test, and perhaps should be viewed with some skepticism.

B. Relevancy.

1. Generally. Rule 702 requires that the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." This prong of the analysis is referred to as the "relevancy test." *Daubert,* 509 U.S. at 591 ("This condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." (quotation omitted)); *see also McGrady*, 368 N.C. at 889. As with any evidence, the expert testimony must meet the minimum standard for logical relevance under Rule 401. *McGrady*, 368 N.C. at 889. "In other words, the testimony must 'relate to [an] issue in the case.'" *Id. (*quoting *Daubert*)*; see also* State v. Oakes, 209 N.C. App. 18, 28-29 (2011) (the defendant was not prejudiced by the trial court's decision to exclude testimony by the defendant's use of force expert on the issue of the defendant's intent to kill where intent to kill was irrelevant to the charge of felony-murder); *see generally* Relevancy in this Benchbook (discussing relevancy under Rule 401).

2. "Assist the Trier of Fact." As used in this prong of the inquiry, the term relevance means something more than standard relevancy under Rule 401. *McGrady*, 368 N.C. at 889. As the North Carolina Supreme Court has explained, "In order to 'assist the trier of fact,' expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *Id.* (going on to note: "An area of inquiry need not be completely incomprehensible to lay jurors without expert assistance before expert testimony becomes admissible. To be helpful, though, that testimony must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case for its own" (citation and quotation omitted)). Thus, in *McGrady*, the court held that the trial court did not abuse its discretion by excluding a defense expert proffered to testify to "pre-attack cues" and "use of force variables" to support the defense of self-defense and defense of others. 368 N.C. at 894-95. According to the expert, pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack" including "actions consistent with an assault, actions consistent with retrieving a

weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." *Id*. at 894. He said that "use of force variables" refer to circumstances and events that influence a person's decision about the type and degree of force necessary to repel a perceived threat, such as the age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. *Id*. at 895. The court held that the trial court did not abuse its discretion by concluding that the expert's testimony about pre-attack cues and use of force variables would not assist the jury because these matters were within the jurors' common knowledge. The court noted: the factors the expert "cited and relied on to conclude that defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions." *Id*.

3. **"Fit" Test.** Another aspect of relevancy is the "fit" of the expert testimony to the facts of the case. *Daubert*, 509 U.S. at 591-92. As referred to in this way, the fit test ensures that proffered "'expert testimony . . . is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" State v. Babich, ___ N.C. App. ___, 797 S.E.2d. 359, 362 (2017) (quoting *Daubert*). Thus for example, the North Carolina Court of Appeals held that expert testimony on retrograde extrapolation that assumed, with no evidence, that the defendant was in a post-absorptive state failed the fit test and was inadmissible. *Id.* Issues of "fit" overlap with the third-prong of the reliability analysis, that the witness has applied the principles and methods reliably to the facts of the case, as discussed below in Section II.D.

4. **Illustrative Cases.** Illustrative cases addressing this prong of the test are annotated below. Because this prong of the Rule 702(a) admissibility inquiry was not altered by the 2011 amendments to the rule, the cases listed below include those decided both before and after the 2011 amendments.

> *State v. McGrady*, 368 N.C. 880, 894–95 (2016). In this murder case, the trial court did not abuse its discretion by excluding a defense expert proffered to testify to "pre-attack cues" and "use of force variables" to support the defense of self-defense and defense of others. The expert's report stated that pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack" including "actions consistent with an assault, actions consistent with retrieving a weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." He indicated that "use of force variables" refer to additional circumstances and events that influence a person's decision about the type and degree of force necessary to repel a perceived threat, such as age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. The trial court did not abuse its discretion by concluding that the expert's testimony about pre-attack cues and use of force variables would not assist the jury because these matters were within the jurors' common

knowledge. The court noted: the factors the expert "cited and relied on to conclude that defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions." In fact, the expert's own report stated that, even without formal training, individuals recognize and respond to these cues and variables when assessing a potential threat.

State v. Babich, ___ N.C. App. ___, 797 S.E.2d. 359, 361-64 (2017). Holding that an expert's retrograde extrapolation testimony that assumed, with no evidence, that the defendant was in a post-absorptive state failed the "fit" test and was inadmissible. The court held:

> [W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol.
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> When there are at least some facts that can support the expert's assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony. But where, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* "fit" test because the expert's otherwise reliable analysis is not properly tied to the facts of the case.

State v. Daughtridge, ___ N.C. App. ___, 789 S.E.2d 667, 675-76 (2016). The trial court improperly allowed a medical examiner to testify, as an expert in forensic pathology, that the victim's death was a homicide when that opinion was based not on medical evidence but rather on non-medical information provided to the expert by law enforcement officers involved in the investigation of the victim's death. The State failed to adequately explain how the medical examiner was in a better position than the jurors to evaluate whether the information provided by the officers was more suggestive of a homicide than a suicide.

State v. Martin, 222 N.C. App. 213, 216–18 (2012). The trial court did not abuse its discretion by excluding testimony by a defense

> proffered "forensic scientist and criminal profiler." During voir dire the witness identified what he considered to be inconsistencies in the victim's version of events leading up to and during the alleged sexual assaults and evidence consistent with what he described as "investigative red flags." The witness's testimony, which would have discredited the victim's account of the defendant's action on the night in question and commented on the manner in which the criminal investigation was conducted "appears to invade the province of the jury."
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> *State v. Fox*, 58 N.C. App. 231, 233 (1982). The trial court did not err by refusing to allow a psychiatrist testifying as an expert witness to give his opinion that the defendant believed he was acting in self-defense. The court held: "we do not find error in the trial court's conclusion that it was for the jury to ascertain defendant's motive for the killing." The court concluded that the expert
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> > certainly was qualified to give an opinion as to [the defendant's] mental capacity and any mental disorders he may have identified, and the record shows he was permitted to do so. Indeed, the psychiatrist was permitted to testify that defendant had told him he had acted in the belief that the victim was going to kill him and that he had been frightened. We find nothing in the record to indicate that the witness was better qualified than the jury to judge the defendant's veracity based on all the evidence.

C. Qualifications.

1. Generally. The second requirement for admissibility of expert testimony is that the witness must be "qualified as an expert by knowledge, skill, experience, training, or education." N.C. R. EVID. 702(a). "This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony." *McGrady*, 368 N.C. at 889. It asks: "Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?" *Id.*

The North Carolina Supreme Court has noted that "[e]xpertise can come from practical experience as much as from academic training" and that:

> The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise.

Id. at 889-90. It also has noted that "[d]ifferent fields require different 'knowledge, skill, experience, training, or education,'" id. at 896, explaining:

> For example, a witness with a Ph.D. in organic chemistry may be able to describe in detail how flour, eggs, and sugar react on a molecular level when heated to 350 degrees, but would likely be less qualified to testify about the proper way to bake a cake than a career baker with no formal education.

Id.

Once a witness is found to be qualified to testify as an expert, issues sometimes arise about whether the expert is being asked to testify outside of his or her area of expertise. For a discussion of that issue, see Section III.E. below.

2. Illustrative Cases. Examples of North Carolina cases addressing this prong of the test are provided below. This list is meant to be illustrative, not exhaustive. Because this prong of the Rule 702(a) admissibility inquiry was not altered by the 2011 amendments to the rule, the cases below include those decided both before and after the 2011 amendments to the Rule.

> *State v. McGrady*, 368 N.C. 880, 895–96 (2016). In this murder case, the trial court did not abuse its discretion by concluding that a defense expert, Mr. Cloutier, was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system. Cloutier's report stated that an instinctive survival response to fear "can activate the body's sympathetic nervous system" and the "'fight or flight' response." He indicated that the defendant's perception of an impending attack would cause an adrenalin surge "activat[ing] instinctive, powerful and uncontrollable survival responses." He maintained that this nervous system response causes "perceptual narrowing," focusing a person's attention on the threat and leading to a loss of peripheral vision and other changes in visual perception. According to Cloutier, this nervous system response also can cause "fragmented memory," or an inability to recall events. The expert, a former police officer, testified that he was not a medical doctor but had studied "the basics" of the brain in general college psychology courses. He also testified that he had read articles and been trained by medical doctors on how adrenalin affects the body, had personally experienced perceptual narrowing, and had trained numerous police officers and civilians on how to deal with these stress responses. Noting that Rule 702(a) "does not create an across-the-board requirement for academic training or credentials," the court held that it was not an abuse of discretion to require a witness who intended to testify about the

functions of an organ system to have some formal medical training.

State v. Morgan, 359 N.C. 131, 159–61 (2004). The trial court did not abuse its discretion by holding that the State's witness was qualified to testify as an expert in the field of bloodstain pattern interpretation where the witness completed two training sessions on bloodstain pattern interpretation, had analyzed bloodstain patterns in dozens of cases, had previously testified in a homicide case as a bloodstain pattern interpretation expert, and described in detail to the judge and jury the difference between blood spatter and transfer stains and produced visual aids to illustrate his testimony. The witness's "qualifications are not diminished, as defendant suggests, by the fact that he has never written an article, lectured, or taken a college-level course on bloodstain or blood spatter analysis."

State v. Cooper, 229 N.C. App. 442, 461-63 (2013). In this murder case where files recovered from the defendant's computer linked the defendant to the crime, the trial court abused its discretion by concluding that a defense expert proffered to testify that the defendant's computer had been tampered with was not qualified to give expert testimony. The witness had worked for many years in the computer field, specializing in computer network security. However, the witness had no training and experience as a forensic computer analyst. The trial court erred by concluding that because the digital data in question was recovered using forensic tools and methods, only an expert forensic computer analyst was qualified to interpret and form opinions based on the data recovered. It concluded: "Nothing in evidence supports a finding that [the expert] was not qualified to testify using the data recovered by the State. [The expert], based upon expertise acquired through practical experience, was certainly better qualified than the jury to form an opinion as to the subject matter to which his testimony applie[d]." (quotation and citation omitted).

State v. Dew, 225 N.C. App. 750, 760-61 (2013). In this child sex case, the trial court did not err by qualifying as an expert a family therapist who provided counseling to the victims. Among other things, the witness had a master's degree in Christian counseling and completed additional professional training relating to the trauma experienced by children who have been sexually abused; she engaged in private practice as a therapist and was a licensed family therapist and professional counselor; and over half of her clients had been subjected to some sort of trauma, with a significant number having suffered sexual abuse.

State v. Britt, 217 N.C. App. 309, 314-15 (2011). SBI agents were properly qualified to give expert testimony regarding firearm tool mark identification.

State v. Norman, 213 N.C. App. 114, 122-24 (2011). The trial court did not abuse its discretion by qualifying the State's witness, Mr. Glover, as an expert in the fields of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior. Glover was the head of NC Department of Health and Human Services Forensic Test for Alcohol branch. He oversaw training of officers on the operation of alcohol breath test instruments and of drug recognition experts, who observed the effects of drugs in individuals. Glover had a bachelor of science and a master's degree in biology and was certified as a chemical analyst on breath test instruments used in North Carolina. He attended courses at Indiana University regarding the effects of alcohol on the human body, the various methods for determining alcohol concentrations, and on the effects of drugs on human psychomotor performance. Glover published several works and previously had been qualified as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior over 230 times in North Carolina. The court concluded that despite Glover's lack of a formal degree or certification in the fields of physiology and pharmacology, his extensive practical experience qualified him to testify as an expert. *See also* State v. Green, 209 N.C. App. 669, 672-75 (2011) (holding that the trial court did not abuse its discretion by finding that Glover was qualified to testify as an expert in the areas of pharmacology and physiology).

State v. Norton, 213 N.C. App. 75, 80-81 (2011). The trial court did not abuse its discretion by finding that a forensic toxicologist was qualified to testify about the effects of cocaine on the body. The court concluded: "As a trained expert in forensic toxicology with degrees in biology and chemistry, the witness . . . was plainly in a better position to have an opinion on the physiological effects of cocaine than the jury."

State v. Hargrave, 198 N.C. App. 579, 584-85 (2009). The court rejected the defendant's argument that the trial court erred by admitting testimony from the State lab technician (who testified that the substances found by law enforcement contained cocaine) because the expert did not have an advanced degree. The witness had a Bachelor's degree in chemistry, completed basic law

enforcement training and in-house training to be a forensic drug chemist and testified as an expert in that field on approximately forty previous occasions.

D. Reliability.

1. Generally. The third requirement of Rule 702(a) is the three-pronged reliability test that is new to the amended rule:

(1) the testimony must be based upon sufficient facts or data;
(2) the testimony must be the product of reliable principles and methods; and
(3) the witness must have applied the principles and methods reliably to the facts of the case.

N.C. R. EVID. 702(a). These three prongs together constitute the reliability inquiry discussed in the *Daubert* line of cases, *McGrady,* 368 N.C. at 890, discussed in Section II.A.1. above. Citing extensively from those cases, the North Carolina Supreme Court has noted that:

- Although the primary focus of this inquiry is the reliability of the witness's principles and methodology, not the conclusions that they generate, conclusions and methodology are not entirely distinct. Thus, when a trial court concludes that there is simply too great an analytical gap between the data and the opinion proffered, "the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *McGrady*, 368 N.C. at 890 (quotations and citations omitted).
- "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony" and the trial court has discretion in determining how to address the reliability analysis. *Id*.
- The five factors identified in *Daubert* (whether the theory or technique can and has been tested; whether it has been subjected to peer review and publication; the theory or technique's known or potential rate of error; whether there are standards controlling its operation; and whether the theory or technique enjoys general acceptance within the relevant scientific community) bear on the reliability of the evidence, but the trial court should use whatever factors it thinks most appropriate for the inquiry. *Id.*
- Other factors considered by courts in the reliability inquiry include whether:

  (1) the expert is testifying based on research conducted independent of the litigation;
  (2) the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
  (3) the expert has adequately accounted for obvious alternative explanations;

(4) the expert has employed the same care in reaching litigation-related opinions as the expert employs in performing the expert's regular professional work; and
(5) the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

McGrady, 368 N.C. at 891.

- The inquiry remains a flexible one; neither *Daubert*'s five factors nor this additional list of factors constitute a checklist; the trial court is free to consider other factors, depending on the type of testimony at issue. *Id.* at 891-92.

Cases decided since *McGrady* have reiterated these points. *See, e.g.,* State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874, 881 (2016); State v. Turbyfill, ___ N.C. App. ___, 776 S.E.2d 249, 258 (2015).

Note that the third-part of the reliability analysis—that the witness has applied the principles and methods reliably to the facts of the case—overlaps, in some respect, with issues of "fit" with respect to the relevancy prong of the analysis, discussed above in Section II.B.3.

2. Illustrative Cases. Examples of North Carolina cases applying *Daubert* to this prong of the analysis include:

State v. McGrady, 368 N.C. 880, 897–99 (2016). In this murder case, the trial court did not abuse its discretion by concluding that a defense expert's testimony regarding reaction times was unreliable. The testimony was offered to rebut any assumption in the jurors' minds that the defendant could not have acted defensively if he shot the victim in the back. Because the expert testified on voir dire that he interviewed the defendant and other witnesses; reviewed interviews of the defendant and a witness, the case file, and physical evidence collected by the Sherriff's Department; and visited the crime scene, the expert's testimony satisfied the "sufficient facts or data" requirement in Rule 702(a)(1). However, the expert based his testimony about average reaction times on statistics from two studies, but did not know whether or not those studies reported error rates and, if so, what those error rates were. Thus, a trial judge could reasonably conclude that the expert's degree of unfamiliarity with the studies rendered unreliable his testimony about them and the conclusions about the case that he drew from them. Also, while the expert established that a disability could affect reaction time, he failed to account for the defendant's back injury in his analysis. This failure relates both to the sufficiency of the facts and data relied upon and to whether the expert applied his own methodology reliably in this case.

State v. Hunt, 790 N.C. App. 874, 877, 880-81 (2016). In this drug case, the trial court properly allowed the State's witness, a special

agent and forensic chemist with the State Crime Lab, to testify as an expert in forensic chemistry. The expert testified that following Crime Lab administrative procedure, he applied a testing procedure called the "administrative sample selection" to the pharmaceutically manufactured pills in question. This involves visually inspecting the shape, color, texture, and manufacturer's markings or imprints of all units and comparing them to an online database to determine whether the pills are pharmaceutically prepared. After the chemist determines that the units are similar and not counterfeit, the protocol requires the chemist to weigh the samples, randomly select one, and chemically analyze that tablet, using gas chromatography and a mass spectrometer. The expert testified that upon receiving the pills, he divided them into four categories based on their physical characteristics. Using administrative sample selection, he tested one pill from the first three groups. Each tested positive for oxycodone. The combined weight of the pills in these categories exceeded the trafficking amount. Upon inspecting the pills that he did not chemically analyze according to their physical characteristics, he found them consistent with a pharmaceutical preparation containing oxycodone. The court held that, based on the expert's detailed explanation of his use of lab procedures, his testimony was the "product of reliable principles and methods." The court rejected the defendant's argument that the expert's testimony regarding the pills that were not chemically analyzed was not "based upon sufficient facts or data" and did not reflect application of "the principles and methods reliably to the facts of the case." Specifically, the defendant pointed to lab rules and regulations stating that under administrative sampling selection, no inferences about unanalyzed materials are to be made. The expert testified however that the lab rules and regulations regarding no inferences for unanalyzed substances does not apply to pharmaceutically prepared substances. For other cases involving sampling in drug testing, see Section II.F.14. below.

State v. Abrams, ___ N.C. App. ___, 789 S.E.2d 863, 864-65 (2016). In this drug case, the trial court did not abuse its discretion by admitting expert testimony identifying the substance at issue as marijuana. At trial, Agent Baxter, a forensic scientist with the State Crime Lab, testified that she examined the substance, conducted relevant tests, and found that the substance was marijuana. The court rejected the defendant's argument that the expert's testimony was not "the product of reliable principles and methods" and that the evidence failed to show that she applied the principles and methods reliably to the facts of the case. Baxter's testimony established that she analyzed the substance in accordance with State Lab procedures, providing detailed testimony regarding each step in her process. Specifically, identifying the substance as marijuana involves the following steps: separating weighable materials from packaging; recording the weight; conducting a preliminary analysis, such as a color test;

conducting a microscopic examination, looking for identified characteristics of marijuana (e.g., unique characteristics of the leaves); and conducting the Duquenois–Levine color test. The court concluded: "Based on her detailed explanation of the systematic procedure she employed to identify the substance . . ., a procedure adopted by the NC Lab specifically to analyze and identify marijuana, her testimony was clearly the 'product of reliable principles and methods' sufficient to satisfy . . . Rule 702(a)." The court went on to reject the defendant's argument that Baxter's testimony did not establish that she applied the principles and methods reliably to the facts of the case. Based on Baxter's testimony regarding her handling of the sample at issue, the court held that Baxter's testimony established that the principles and methods were applied reliably the substance at issue.

E. Procedural Issues.

1. Preliminary Question of Fact. The admissibility of expert testimony is determined by the trial court pursuant to Rule 104(a). *McGrady*, 368 N.C. at 892. *See generally* N.C. R. EVID. 104(a). In determining admissibility, the trial judge is not bound by the rules of evidence, except those with respect to privileges. *McGrady*, 368 N.C. at 892 (quoting N.C. R. EVID. 104(a)).

To the extent that factual findings are necessary to determine admissibility, the trial judge acts as the trier of fact. *Id.* at 892 (citing Commentary to N.C. R. EVID. 104(a)). The standard for factual findings is the greater weight of the evidence *Id.* at 892–93.

2. Burden of Proof. The proponent of the evidence bears the burden of establishing that the evidence is admissible. State v. Ward, 364 N.C. 133, 140 (2010) (pre-amendment expert witness case).

3. Flexible Inquiry. Because Rule 702(a) does not mandate any particular procedure for the court to determine the admissibility of expert testimony, the trial court has the discretion to determine how to best handle the matter*. Kumho Tire,* 526 U.S. at 152 ("The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable."); *see also McGrady*, 368 N.C. at 892; State v. Walston, ___ N.C. ___, 798 S.E.2d 741, 747 (2017) (citing *McGrady* and noting that "Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony"); State v. Abrams, ___ N.C. App. ___, 789 S.E.2d 863, 866 (2016) (quoting *McGrady*). In simple cases, an appropriate foundation may be laid on direct examination. *McGrady*, 368 N.C. at 893. In more complex cases, the trial court may opt for special briefings, submission of affidavits, voir dire testimony, or an *in limine* hearing. *Id*. Whatever the case, the trial court "should use a procedure that, given the circumstances of the case, will secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.* (quotation omitted).

Noting the difficulty a silent record creates for purposes of appeal, a concurring opinion in one post-*McGrady* cases suggests:

> [B]est practice dictates parties should challenge an expert's admissibility through a motion *in limine*. In the event a trial court delays its ruling on the matter, or in the event a party fails to raise the challenge until the expert is called upon at trial, our trial courts should afford parties a *voir dire* hearing to examine the witness and submit evidence into the record, which this Court can review on appeal.

Abrams, ___ N.C. App. at ___, 789 S.E.2d at 869 (Hunter, J., concurring).

4. **Findings of Fact & Conclusion of Law.** In *McGrady,* the North Carolina Supreme Court stated that the trial court must find the relevant facts pertaining to admissibility and then, based on these findings, determine whether the proffered expert testimony meets the rule's requirements of qualification, relevance, and reliability. *McGrady*, 368 N.C. at 892–93. Although some language in at least one subsequent court of appeals case suggests that the trial courts are not required to make findings of fact or conclusions of law regarding the admissibility of expert testimony, *Abrams*, ___ N.C. App. at ___, 789 S.E.2d at 868 (Hunter, J., concurring) ("At the present, trial courts are not required to make findings of fact or conclusions of law when they accept or reject an expert witness."), that same case suggests that the better practice in light of *McGrady* is to make such findings and conclusions on the record. *Id.* at 869 ("[T]he trial court should identify the *Daubert* factors and make findings of fact and conclusions of law, either orally or in writing, as to the expert's admissibility.").

5. **Informing the Jury of Witness's Expert Status.** Some commentators and authority from other jurisdictions suggest that it is preferable for the trial court not to advise the jury that it has found a witness to be an expert, to avoid undue influence that the jury might place on the witness's testimony. *See e.g.,* Advisory Committee Notes to FED. R. EVID. 702 ("[T]here is much to be said for a practice that prohibits the use of the term 'expert' by both the parties and the court at trial. Such a practice ensures that trial courts do not inadvertently put their stamp of authority on a witness's opinion, and protects against the jury's being overwhelmed by the so-called 'experts.'" (quotation omitted)); National Commission on Forensic Science, Views of the Commission Regarding Judicial Vouching (June 21, 2016) ("The Commission is of the view that it is improper and misleading for a trial judge to declare a witness to be an expert in the presence of the jury."), https://www.justice.gov/ncfs/file/880246/download; United States v. Johnson, 488 F.3d 690, 697-98 (6th Cir. 2007) (agreeing with decisions that have articulated "good reasons" for not informing the jury that a witness has been qualified as an expert); Michael H. Graham, *Expert Witness Testimony: Fed. R. Evid. 702-705 Primer; Hypothetical Question Discretionary Use*, 52 No. 5 CRIM. L. BULL Art. 8 (2016) ("It is preferable that the court not advise the jury of its determination if it decides that the witness is in fact qualified as an expert as to a particular subject matter."). However, several older North Carolina criminal cases

found no error when a trial court determined that a witness was an expert in the presence of the jury. State v. Frazier, 280 N.C. 181, 197, *vacated on other grounds*, 409 U.S. 1004 (1972) (the trial court determined, in the presence of the jury, that two witnesses were qualified to testify as experts; stating: "It has never been the general practice in the courts of this State for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert."); State v. Edwards, 24 N.C. App. 303, 305 (1974) (citing *Frazier* and holding that the trial court did not err by stating, in the presence of the jury, that it found a medical doctor to be expert witness). Additionally, N.C. Pattern Instruction – Crim 104.94 (Testimony of Expert Witness) expressly informs the jury of the witness's status as an expert and at least one unpublished case indicates that the better practice is to give this instruction. State v. Dunn, 220 N.C. App. 524, *9 (2012) (unpublished) (holding that no error occurred when the trial court failed to give the pattern instruction but noting: "the better practice is for the trial court to specifically instruct the jury on expert testimony when an expert has testified at trial"); *see generally* State v. Prevatte, 356 N.C. 178, 224 (2002) (noting that the court has approved of the pattern instruction).

F. Particular Types of Experts. Several common types of expertise are explored in the sections immediately below. This Chapter does not attempt to present an exhaustive evaluation of these areas of expert testimony. Rather, it provides the trial judge with an overview of the current state of North Carolina law with respect to each category and alerts the trial court to potential issues. As science and technology evolve, new tests and analyses may be developed providing a better understanding as to the strengths and weakness of tests and analyses currently being done and resulting in new tests and analyses. Either or both developments may impact existing law.

When discussing certain forensic science disciplines, this Chapter cites the following report: PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) [hereinafter PCAST REPORT], https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf. This report is cited because it is the most recent comprehensive evaluation of the relevant forensic science disciplines. Although some, such as the National Association of Criminal Defense Lawyers, have applauded that report, it was not adopted by the Department of Justice and others, including the National District Attorneys Association, have been critical of it or have challenged it. Jack D. Roady*, The PCAST Report: A Review and Moving Forward−A Prosecutor's Perspective*, CRIMINAL JUSTICE, Summer 2017, at 9 (discussing the reaction to the report by prosecutors, defense attorneys, and the forensic science community).

For discussion of the proper scope of expert testimony in sexual assault cases, see *Evidence Issues Criminal Cases Involving Child Victims and Child Witnesses* in this Benchbook.

1. Use of Force & Self-Defense Experts. Although use of force and self-defense experts are used in North Carolina criminal trials, *see, e.g.,* State v. McDowell, 215 N.C. App. 184, 189 (2011) (noting that Mr. Cloutier testified as an expert in "use-of-force science" and self-defense tactics),

few published cases directly address the admissibility of such evidence. One case that does is *State v. McGrady*, 368 N.C. 880 (2016), decided under amended Rule 702(a) and the *Daubert* standard. In *McGrady*, the North Carolina Supreme Court held that the trial court did not abuse its discretion by excluding testimony by a defense proffered expert. At trial the defendant sought to call Dave Cloutier as an expert in "the science of the use of force" *Id.* at 883. Cloutier was proffered to testify on three topics:

> (1) that, based on the "pre-attack cues" and "use of force variables" present in the interaction between defendant and the victim, the defendant's use of force was a reasonable response to an imminent, deadly assault that the defendant perceived;
> (2) that defendant's actions and testimony are consistent with those of someone experiencing the sympathetic nervous system's "fight or flight" response; and
> (3) that reaction times can explain why some of defendant's defensive shots hit the victim in the back.

Id. at 894. The Supreme Court held that the trial court did not abuse its discretion in excluding the expert's testimony about "pre-attack cues" and "use of force variables" on grounds that it was not relevant. *Id.* Cloutier's report indicated that pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack," and include "actions consistent with an assault, actions consistent with retrieving a weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." *Id.* According to Cloutier, "use of force variables" include additional circumstances and events that influence a person's decision about the type and degree of force necessary to repel a threat, such as age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. *Id.* at 895. The court found this this testimony would not assist the jury because these matters were within the juror's common knowledge. *Id.*

Next, the *McGrady* court found that the trial court did not abuse its discretion by concluding that Cloutier was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system. *Id.* Cloutier's report stated that an instinctive survival response to fear "can activate the body's sympathetic nervous system" and the "'fight or flight' response." *Id.* He indicated that the defendant's perception of an impending attack would cause an adrenalin surge "activat[ing] instinctive, powerful and uncontrollable survival responses." *Id.* He further maintained that this nervous system response causes "perceptual narrowing," focusing a person's attention on the threat and leading to a loss of peripheral vision and other changes in visual perception. *Id.* According to Cloutier, this nervous system response also can cause "fragmented memory," or an inability to recall specific events related to the threatening encounter. *Id.* at 895-96. The court held that it was not an abuse of discretion to require "a witness who intended to testify about the functions of an organ system to have some formal medical training." *Id.* at 896.

Finally, the court held that the trial court did not abuse its discretion by finding that the expert's testimony regarding reaction times

was unreliable. *Id.* at 897. This testimony was offered to rebut any assumption in the jurors' minds that the defendant could not have acted defensively if he shot the victim in the back. *Id.* Because the expert testified on voir dire that he interviewed the defendant and other witnesses; reviewed interviews of the defendant and a witness, the case file, and physical evidence collected by the Sherriff's Department; and visited the location of the incident, the expert's testimony satisfied the "sufficient facts or data" requirement in Rule 702(a)(1). *Id.* However, the expert based his testimony about average reaction times on statistics from two studies, but did not know whether or not those studies reported error rates and, if so, what those error rates were. Thus, a trial judge could reasonably conclude that the expert's degree of unfamiliarity with the studies rendered unreliable his testimony about them and the conclusions about the case that he drew from them. *Id.* at 898-99. Also, while the expert established that a disability could affect reaction time, he failed to account for the defendant's back injury in his analysis. The court found that this failure relates both to the sufficiency of the facts and data relied upon and to whether the expert applied his own methodology reliably in this case. *Id.*at 899.

2. DNA Identification Evidence. "Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms." FEDERAL JUDICIAL CENTER & NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 131 (3d ed. 2011) [hereinafter REFERENCE MANUAL ON SCIENTIFIC EVIDENCE], https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf. "DNA analysis involves comparing DNA profiles from different samples to see if a known sample may have been the source of an evidentiary sample." PCAST REPORT at 69. It is important to understand, however, that the term "DNA testing" encompasses different kinds of testing methods, different sources of bodily material, and differing statistical means of assessing the significance of a match, all of which has changed and likely will continue to change as science and technology advance. 4 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 157 (2016-17 ed.) [hereinafter MODERN SCIENTIFIC EVIDENCE]. Although some forms of DNA evidence are now admissible in all jurisdictions, there are many types of forensic DNA analysis, and more are being developed. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 131. Questions of admissibility will continue to arise as advancing methods of analysis and novel applications of established methods are introduced. *Id.*

This Chapter does not attempt to explain the wide variety of DNA testing that has been and currently is being done in forensic labs and potential issues regarding that testing. For a discussion of the history of DNA evidence, the types of scientific expertise that go into the analysis of DNA samples, the scientific principles behind DNA typing, issues regarding sample quantity and quality and laboratory performance, issues in the interpretation of laboratory results, special issues in human DNA testing for identification, and forensic analysis of nonhuman DNA, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 131-210. For the PCAST REPORT's assessment of DNA testing using single source samples,

simple mixture samples, and complex mixture samples, see PCAST REPORT at 69-83.

Although expert testimony regarding DNA analysis repeatedly has been found to be admissible in North Carolina prior to the 2011 amendments to Rule 702, *see, e.g.,* State v. Pennington, 327 N.C. 89, 98-101 (1990), there do not appear to be any published North Carolina cases directly assessing any form of DNA testing under the new *Daubert* standard. Courts in other jurisdictions have allowed expert testimony regarding the polymerase chain reaction and short tandem repeats method of DNA typing under the *Daubert* standard. *See generally* 33A FED. PROC., L. ED. § 80:226 ("Applying the *Daubert* test, expert DNA evidence has generally been found to be admissible. More specifically, based on overwhelming scientific and forensic acceptance, as well as acceptance by the vast majority of courts, the polymerase chain reaction and short tandem repeats (PCR/STR) method of DNA typing has been held reliable and admissible under the rule governing expert opinion and *Daubert*.").

Separate from *Daubert* standard issues, expert testimony that amounts to a "prosecutor's fallacy" is improper. "The prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample." McDaniel v. Brown, 558 U.S. 120, 128 (2010). The U.S. Supreme Court has explained:

> In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy. It is . . . error to equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA. This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a .01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.

Id.; see also State v. Ragland, 226 N.C. App. 547, 558-60 (2013) (the State's expert improperly relied on the prosecutor's fallacy, erroneously assuming that the random match probability was the same as the probability that the defendant was not the source of the DNA sample; this testimony was inadmissible).

3. Bite Mark Identification Evidence. Bite mark analysis "typically involves examining marks left on a victim or an object . . . and comparing those marks with dental impressions taken from a suspect." PCAST REPORT at 83. For a discussion of the technique involved with this type of analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 103-08.

North Carolina cases decided prior to the 2011 amendment to Rule 702 have held that the trial court did not abuse its discretion by

admitting expert bite mark identification testimony. *See, e.g.,* State v. Temple, 302 N.C. 1, 10-13 (1981) (deciding an issue of first impression, the court held that the trial court properly admitted expert testimony that bite marks appearing on the victim's body were made by the defendant's teeth); State v. Green, 305 N.C. 463, 470-72 (1982) (citing *Temple,* the court held that the trial court properly allowed an expert to testify that a bite mark on the victim's arm had been made by the defendant). However, there do not appear to be any published North Carolina cases analyzing bite mark identification analysis under the new *Daubert* standard. Research revealed only one North Carolina bite mark case decided under amended Rule 702(a), but that case did not deal with bite mark *identification* evidence. *See* State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98, 107-08 (2016) (trial court did not commit plain error by allowing the State's forensic pathology expert to opine that victim's death was due to bites from a dog).

Although questions have been raised about the validity of bite mark analysis, *see, e.g.,* PCAST REPORT at 83-87 ("[B]itemark analysis does not meet the scientific standards for foundational validity, and is far from meeting such standards. To the contrary, available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of bite mark with reasonable accuracy."), courts in other jurisdictions have continued to admit the evidence. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 112.

4. Fingerprint Identification Evidence. Fingerprint identification evidence refers to the use of fingerprints as a means of personal identification, e.g., that fingerprints found at the murder scene match fingerprints on file for the defendant. For a discussion of the methodology used in fingerprint identification analysis, see REFERENCE MANUAL OF SCIENTIFIC EVIDENCE at 73-76, and PCAST REPORT at 88-91.

Expert testimony regarding fingerprint analysis has been admissible in North Carolina for many years under the state's pre-*Daubert* standards. State v. Irick, 291 N.C. 480, 488-89 (1977); *see also* State v. Hoff, 224 N.C. App. 155, 163 (2012) (citing *Irick* and noting "our Supreme Court's long-standing acceptance of the reliability of fingerprint evidence"); State v. Parks, 147 N.C. App. 485, 490-91 (2001) (no abuse of discretion in admitting officer's expert testimony in fingerprint analysis given that the state Supreme Court has "recognized that fingerprinting is an established and scientifically reliable method of identification"). There do not appear to be any published North Carolina criminal cases evaluating fingerprint analysis under the *Daubert* standard. Courts in other jurisdictions have—for the most part—held such testimony to be sufficiently reliable expertise under *Daubert*. *See* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 82-83. The Fourth Circuit is among the courts to have found fingerprint evidence sufficiently reliable under *Daubert*. United States v. Crisp, 324 F.3d 261, 266-69 (4th Cir. 2003) (citing other circuit courts that have held similarly).

For a discussion of the empirical record regarding this type of identification, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 76-81, and PCAST REPORT at 91-100. For an assessment as to the foundational validity and validity as applied of fingerprint evidence, see PCAST

REPORT at 101-103 (finding that "latent fingerprint analysis is a foundationally valid subjective methodology" and that "[c]onclusions of a proposed identification may be scientifically valid, provided that they are accompanied by accurate information about limitations on the reliability of the conclusion"; going on to identify a number of issues regarding validity as applied).

5. **Firearm Identification.** In firearms identification analysis, sometimes called "ballistics," "examiners attempt to determine whether ammunition is or is not associated with a specific firearm based on marks produced by guns on the ammunition." PCAST REPORT at 104. For a discussion of the methodology of this this analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 91-97, and PCAST REPORT at 104.

Pre-*Daubert* North Carolina cases had allowed this type of expert testimony. *See, e.g.,* State v. Britt, 217 N.C. App. 309, 314 (2011) ("Courts in North Carolina have upheld the admission of expert testimony on firearm toolmark identification for decades."). There do not appear to be any published North Carolina cases applying the new *Daubert* standard to this type of evidence.

Although testimony by firearms experts is widely admitted nationwide with little judicial scrutiny, provided the expert is qualified, 3 BARBARA E. BERGMAN ET AL., WHARTON'S CRIMINAL EVIDENCE § 13:59 (15th ed.) [hereinafter WHARTON'S CRIMINAL EVIDENCE] (but noting: "Little justification appears to warrant such a cavalier attitude toward this testimony."), some post-*Daubert* decisions have excluded or limited expert firearms analysis testimony. *See* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 101-02 (discussing cases). Questions have been raised about the foundational validity of firearms analysis. *See* PCAST REPORT at 112 ("PCAST finds that firearms analysis currently falls short of the criteria for foundational validity, because there is only a single appropriately designed study to measure validity and estimate reliability. The scientific criteria for foundational validity require more than one such study, to demonstrate reproducibility."); REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 97-100 (discussing the empirical record on this type of evidence and noting, in part: "The issue of the adequacy of the empirical basis of firearms identification expertise remains in dispute . . . ."). Additionally, it has been suggested that if firearms analysis is allowed in court, validity as applied requires that the expert has undergone rigorous proficiency testing and that certain disclosures be made. PCAST REPORT at 113.

6. **Blood Alcohol Extrapolation.** "Retrograde extrapolation is a mathematical analysis in which a known blood alcohol test result is used to determine what an individual's blood alcohol level would have been at a specified earlier time." State v. Cook, 362 N.C. 285, 288 (2008).The analysis determines the prior blood alcohol level based on (1) the time elapsed between the earlier event, such as a vehicle crash, and the blood test, and (2) the rate of elimination of alcohol from the subject's blood during the time between the event and the test. *Id.*

North Carolina cases decided under both *Howerton* and *Daubert* have held that the trial court does not abuse its discretion by admitting expert testimony regarding blood alcohol extrapolation. *See, e.g.,* State v. Turbyfill, ___ N.C. App.___, 776 S.E.2d 249, 255-58 (2015) (applying

Daubert and holding that testimony by the State's expert "confirmed that blood alcohol extrapolation is a scientifically valid field, which principles have been tested, subjected to peer review and publication, and undisputedly accepted in the scientific community and in our courts"); State v. Green, 209 N.C. App. 669, 677-680 (2011) (same, under earlier *Howerton* standard).

However, for expert testimony on retrograde extrapolation to be admissible it must be based on sufficiently reliable data and a reliable method of proof. Faulty assumptions in the expert's application of retrograde extrapolation analysis can render the expert testimony inadmissible. *Compare* State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359, 361-364 (2017) (the trial court erred by admitting retrograde extrapolation expert testimony where the expert assumed that the defendant was in a post-absorptive state at the time of the stop (meaning that alcohol was no longer entering the defendant's bloodstream and thus her blood alcohol level was declining) but there were no facts to support this assumption; reasoning that such testimony was inadmissible "as a matter of law" because it failed *Daubert's* "fit" test in that the expert's analysis was not properly tied to the facts of the case; going on to hold: "[W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive . . . state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol."), *and* State v. Davis, 208 N.C. App. 26, 31-35 (2010) (holding, under the earlier and more lenient *Howerton* standard that the trial court committed reversible error by allowing expert Paul Glover to testify to the defendant's blood-alcohol level based on retrograde extrapolation where the alcohol concentration upon which Glover based the extrapolation was estimated to be .02 based on the fact that an officer smelled alcohol on the defendant's breath more than ten hours after the incident; Glover's "odor analysis" was not a sufficiently reliable method of proof), *with* State v. Green, 209 N.C. App. 669, 677-80 (2011) (holding, under the earlier and more lenient *Howerton* standard that the trial court did not abuse its discretion by allowing expert Paul Glover to testify regarding retrograde extrapolation notwithstanding the defendant's argument that Glover's testimony was based on impermissible factual assumptions regarding the amount of wine in the defendant's glass and when it was consumed).

7. Blood Spatter Analysis. Blood spatter analysis, sometimes called blood spatter interpretation or bloodstain analysis, is a forensic tool in which stains of blood at a crime scene are examined to provide information about the incident, such as where the victim was killed. For the purposes of this discussion, blood spatter analysis includes the process of examining blood that has struck a surface, and applying knowledge regarding the characteristics of blood and the shapes or patterns made by its impact, in order to determine things like the direction, angle, and speed of its flight prior to impact, and, ultimately, to assist in reconstructing events occurring in connection with an alleged crime. *See generally* Danny R. Veilleux, *Admissibility, in Criminal Prosecution, of Expert*

Opinion Evidence as to "Blood Splatter" Interpretation, 9 A.L.R.5th 369 (originally published 1993) (discussing the admissibility of evidence so described). For more information about the history of bloodstain analysis and the biology, physics and mathematics associated with it, see Aaron D. Gopen & Edward J. Imwinkelried, *Bloodstain Pattern Analysis Revisited*, 45 No. 3 CRIM. L. BULL. ART. 7 (2009) [hereinafter *Bloodstain Pattern Analysis Revisited*].

In cases decided under the old *Howerton* standard, North Carolina courts have found bloodstain analysis to be a sufficiently reliable area for expert testimony. *See, e.g.,* State v. Goode, 341 N.C. 513, 530-31 (1995) (rejecting the defendant's argument that bloodstain pattern interpretation has not been established as a scientifically reliable field; also rejecting the defendant's argument that Agent Duane Deaver did not have sufficient qualifications to testify as an expert in the field); *see also* State v. Morgan, 359 N.C. 131, 160 (2004) (citing *Goode* for that proposition, although it was not an issue in that case); State v. Bruton, 165 N.C. App. 801, 809 (2004) (citing *Goode* and holding that the trial court did not err by allowing an expert in forensic serology to testify regarding the nature of blood spatter over the defendant's challenge to her qualifications as an expert).

There do not appear to be any North Carolina cases addressing the admissibility of this evidence under the *Daubert* standard. For a discussion of how this evidence is handled in other jurisdictions, see 9 A.L.R.5th 369 and *Bloodstain Pattern Analysis Revisited*, *supra* p. 28.

8. Fiber Analysis. In criminal cases, expert testimony may be offered to show that certain fibers do or do not "match", typically in the context of proving or disproving that the suspect had contact with a particular person or place. This section refers to this sort of testimony as fiber analysis.

In pre-*Daubert* North Carolina cases, fiber analysis testimony has been found to be admissible. *See, e.g.,* State v. Vestal, 278 N.C. 561, 593–94 (1971) (no error to allow an expert in the field of analyzing and comparing fibers to testify "concerning the similarity of the drapes found in the defendant's warehouse with that found upon the body"). There do not appear to be any North Carolina cases analyzing this evidence under the *Daubert* standard. Some have raised questions about whether fiber analysis satisfies the *Daubert* standard. *See, e.g,* 4 MODERN SCIENTIFIC EVIDENCE at 114 ("The validity of fiber identification techniques is susceptible of objective testing, although this has not been accomplished on a scale and in such a manner as to satisfy *Daubert*. The error rate of fiber examination is unknown. The validity of the interpretation of the significance of a match in fiber evidence has not been subjected to systematic testing of the sort countenanced by *Daubert*.").

9. Hair Analysis. "Forensic hair examination is a process by which examiners compare microscopic features of hair to determine whether a particular person may be the source of a questioned hair." PCAST REPORT at 118. For a discussion of the technique used in this type of analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 113-14.

Several North Carolina cases decided prior to the 2011 amendment to Rule 702 approved of admitting expert testimony regarding hair analysis. *See, e.g.*, State v. Green, 305 N.C. 463, 470 (1982) ("This Court has previously approved of testimony similar to that employed in the case before us and we are not inclined to reverse that holding."

(citation omitted)); State v. Vestal, 278 N.C. 561, 593–94 (1971) (no error to allow an expert in the field of analyzing and comparing hair to testify regarding the similarity of hairs found in a warehouse and trunk of the defendant's automobile with hairs taken from the head of the victim's body); State v. McCord, 140 N.C. App. 634, 659 (2000) (the trial court did not abuse its discretion by admitting expert testimony that a pubic hair taken from the victim was microscopically consistent with a known sample of defendant's pubic hair; "because the comparison of hair samples has been accepted as reliable scientific methodology in this State, the trial court properly allowed [the analyst] to testify regarding the results of his testing"); State v. Suddreth, 105 N.C. App. 122, 132 (1992) ("Our courts have liberally permitted the introduction of expert testimony as to hair analysis when relevant to aid in establishing the identity of the perpetrator.").

However, case law suggests that hair analysis is conclusive, if at all, only as to negative identify—that is, to exclude a suspect. State v. Stallings, 77 N.C. App. 189, 191 (1985). For example, if the hair in question is blonde, straight, and 12 inches long, an individual with black, curly, two inch long hair can be excluded as the source of the sample. 4 MODERN SCIENTIFIC EVIDENCE at 111. Cases also hold that microscopic hair analysis evidence is insufficient on its own to positively identify a defendant as the perpetrator. *Stallings,* 77 N.C. App. at 191 (hair analysis "must be combined with other substantial evidence to take a case to the jury"); State v. Bridges, 107 N.C. App. 668, 671 (1992) (citing *Stallings* and stating that it "may not be used to positively identify a defendant as the perpetrator of a crime"), *aff'd per curiam*, 333 N.C. 572 (1993); State v. Faircloth, 99 N.C. App. 685, 692 (1990) (same). As the court stated in *Stallings:* "Unlike fingerprint evidence . . . comparative microscopy of hair is not accepted as reliable for positively identifying individuals. Rather, it serves to exclude classes of individuals from consideration and is conclusive, if at all, only to negative identity." *Stallings*, 77 N.C. App. at 191.

Additionally, some pre-*Daubert* cases limit the scope of a hair analysis expert's testimony. *See Bridges*, 107 N.C. App. at 671-75 (the trial court erred by admitting the expert's testimony about the statistical probability of two Caucasians having indistinguishable head hair because there was insufficient foundation for this testimony); *Faircloth*, 99 N.C. App. at 690-92 (the trial court erred by allowing a hair examination and identification expert to testify that it was "improbable" that pubic hairs obtained from the victim's body and from a sheet on the victim's bed came from an individual other than the defendant and that it would be "impossible" for another person whose hair was consistent with the defendant's to have come in contact with the victim's bedsheets).

There do not appear to be any North Carolina cases ruling on the admissibility of this evidence under the *Daubert* standard. It should be noted that in recent years, serious questions have been raised about the validity of forensic hair analysis and associated expert testimony. *See, e.g.*, Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, THE WASHINGTON POST, April 18, 2015 (reporting that "[t]he Justice Department and FBI have formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all

trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000"); 4 MODERN SCIENTIFIC EVIDENCE at 112 ("The validity of hair evidence is susceptible of objective testing, although this has not been accomplished on a scale and in such a manner as to satisfy *Daubert*. The error rate of hair examination is unknown."); PCAST REPORT 118-122 (finding that materials provided by the Department of Justice "do not provide a scientific basis for concluding that microscopic hair examination is a valid and reliable process"). Although many cases have continued to admit hair analysis post-*Daubert,* that is not universally true and "growing judicial support" for the view that this type of analysis is unreliable has been noted. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 119.

10. Shoe Print Analysis. "Footwear analysis is a process that typically involves comparing a known object, such as a shoe, to a complete or partial impression found at a crime scene, to assess whether the object is likely to be the source of the impression." PCAST REPORT at 114.

Although some North Carolina cases state that a non-expert may testify to shoe print comparisons, *see, e.g.,* State v. General, 91 N.C. App. 375, 379 (1988) (citing State v. Jackson, 302 N.C. 101, 107 (1981)); State v. Plowden, 65 N.C. App. 408, 410 (1983) (same), trial courts have admitted expert testimony on this topic. *See, e.g.,* State v. Williams, 308 N.C. 47, 60–61 (1983) (noting that an SBI Agent was accepted as an expert witness and testified extensively concerning the unique characteristics of the tread on the shoes taken from the defendant and the shoe prints found at the scene of the crime). However, there do not appear to be any North Carolina cases examining the admissibility of this evidence under the *Daubert* standard. Although federal courts have admitted expert shoe print testimony under *Daubert*, *see, e.g.,* United States v. Ford, 481 F.3d 215, 217-21 (3d Cir. 2007); United States v. Allen, 390 F.3d 944, 949-50 (7th Cir. 2004); United States v. Mahone, 328 F. Supp. 2d 77, 90-92 (D. Me. 2004), *aff'd*, 453 F.3d 68 (1st Cir. 2006), questions have been raised about the foundational validity of this analysis. *See* PCAST REPORT at 117 (concluding that "there are no appropriate empirical studies to support the foundational validity of footwear analysis to associate shoeprints with particular shoes based on specific identifying marks (sometimes called []randomly acquired characteristics). Such conclusions are unsupported by any meaningful evidence or estimates of their accuracy and thus are not scientifically valid.").

11. Handwriting Analysis. Handwriting analysis seeks to determine the authorship of a piece of writing by examining the way in which the letters are inscribed, shaped and joined and comparing it to samples by a known author. 4 MODERN SCIENTIFIC EVIDENCE at 561-62. For a discussion of the technique used in this type of analysis and the empirical record regarding its validity, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 83-89.

North Carolina civil cases decided before the amendment to Rule 702(a) upheld admission of expert testimony regarding handwriting analysis, *see, e.g.,* Taylor v. Abernethy, 149 N.C. App. 263, 270-74 (2002) (trial court erred by refusing to allow a handwriting expert to give his opinion regarding the validity of a signature on a contract). There do not appear to be any published North Carolina cases on point after North

Carolina became a *Daubert* state. In other jurisdictions, there is a three-way split of authority regarding this type of expert testimony:

> The majority of courts permit examiners to express individuation opinions. As one court noted, "all six circuits that have addressed the admissibility of handwriting expert [testimony] . . . [have] determined that it can satisfy the reliability threshold" for nonscientific expertise. In contrast, several courts have excluded expert testimony, although one involved handprinting and another Japanese handprinting. Many district courts have endorsed a third view. These courts limit the reach of the examiner's opinion, permitting expert testimony about similarities and dissimilarities between exemplars but not an ultimate conclusion that the defendant was the author ("common authorship" opinion) of the questioned document. The expert is allowed to testify about "the specific similarities and idiosyncrasies between the known writings and the questioned writings, as well as testimony regarding, for example, how frequently or infrequently in his experience, [the expert] has seen a particular idiosyncrasy." As the justification for this limitation, these courts often state that the examiners' claimed ability to individuate lacks "empirical support."

REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 90. The Fourth Circuit is among the courts that have held that expert handwriting testimony passes muster under *Daubert*. *See* United States v. Crisp, 324 F.3d 261, 270-71 & n.5 (4th Cir. 2003) (deciding the issue as a matter of first impression; citing circuit court decisions that have held similarly but noting that some district courts recently had held that handwriting analysis does not meet the *Daubert* standard).

12. Horizontal Gaze Nystagmus (HGN). A leading treatise explains horizontal gaze nystagmus as follows:

> Nystagmus is an involuntary rapid movement of the eyeball, which may be horizontal, vertical or rotary. An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN. Proponents of HGN tests believe that alcohol and drug use increases the frequency and amplitude of HGN and cause it to occur at a smaller angle of deviation from forward. Nystagmus tests are not done in a laboratory, but rather are given by police officers in the field or in a police station subsequent to arrest. The results of an HGN test are frequently introduced as part of the state's case in drunk driving prosecutions and they also may be used when an individual is suspected to be under the influence of some other substance . . . .

5 MODERN SCIENTIFIC EVIDENCE at 459 (quotation omitted).

Rule 702(a1) provides that a witness qualified under Rule 702(a) "and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to . . . [t]he results of a [HGN] Test when the test is administered by a person who has successfully completed training in HGN." This subsection obviates the State's need to prove that the horizontal gaze nystagmus testing method is sufficiently reliable. State v. Younts, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017) (post-amendment case); State v. Smart, 195 N.C. App. 752, 755-56 (2009) (pre-amendment case); *see also* State v. Godwin, ___ N.C. ___, 800 S.E.2d 47 (2017) ("Furthermore, with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State."). Whether there are due process limits on the legislature's ability to declare certain expert testimony to be reliable is beyond the scope of this Chapter.

According to the text of the Rule 702(a1) HGN expert testimony is admissible when the witness is qualified under Rule 702(a) and a proper foundation is laid. N.C. R. EVID. 702(a1); *see also* State v. Torrence, ___ N.C. App. ___, 786 S.E.2d 40, 42 (2016) ("[I]f an officer is going to testify on the issue of impairment relating to the results of an HGN test, the officer must be qualified as an expert witness under Rule 702(a) and establish proper foundation."). Although the better practice may be to do so, the court is not required to expressly determine that the witness is so qualified; such a determination can be implied from the record. *Godwin*, ___ N.C. ___, 800 S.E.2d 47, 52-53 (2017) (holding that the trial court implicitly found that the witness was qualified to testify but noting that "the appellate division's ability to review the trial court's oral order would have benefited from the inclusion of additional facts supporting its determination that [the] Officer . . . was qualified to testify as an expert regarding his observations of defendant's performance during the HGN test"). Presumably a proper foundation would include establishing that the test was performed according to accepted protocol.

Once the witness is qualified and a proper foundation is laid, the witness may give expert testimony regarding the HGN test results, subject to the additional limitations in subsection (a1), namely, the witness may testify solely on the issue of impairment and not on the issue of specific alcohol concentration. N.C. R. EVID. 702(a1); *see also Torrence*, ___ N.C. App. ___, 786 S.E.2d at 43 (prejudicial error where officer testified to a specific alcohol concentration); *see also* State v. Turbyfill, ___ N.C. App. ___, 776 S.E.2d 249, 259 (2015) (officer's testimony as to the defendant's BAC appears to have violated Rule 702(a1)) but the error did not have a probable impact on the verdict).

13. Eyewitness Identification Experts. Several North Carolina appellate decisions have found no abuse of discretion where the trial court excluded testimony regarding reliability of eyewitness identification evidence when the expert's testimony did not relate to the facts of the particular case, *see, e.g.,* State v. McLean, 183 N.C. App. 429, 435 (2007) (expert did not interview the witnesses, visit the crime scene, or listen to court testimony), or because its prejudicial value outweighed its

probative value under Rule 403, *see, e.g., McLean*, 183 N.C. App. at 435 (no abuse of discretion where the trial court found that the value of the evidence was "marginally weak" and that it would confuse the jury, unnecessarily delay the proceeding, and would not significantly help the jury); State v. Cotton, 99 N.C. App. 615, 621-22 (1990), *aff'd*, 329 N.C. 764 (1991) (similar). However, a recent decision of the North Carolina Supreme Court suggests that it is not proper to exclude such testimony simply because the expert has not interviewed or examined the witness. State v. Walston, ___ N.C. ___, 798 S.E.2d 741, 747 (2017) (holding that the trial court did not abuse its discretion by excluding testimony from a defense expert regarding repressed memory and the suggestibility of memory; the court clarified that to be admissible, the expert need not have examined or interviewed the witness, noting: "[s]uch a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts").

The United States Supreme Court has noted that "some States . . . permit defendants to present expert testimony on the hazards of eyewitness identification evidence." Perry v. New Hampshire, 565 U.S. 228, 247 (2012) (quoting State v. Clopten, 223 P.3d 1103, 1113 ("We expect … that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence].")). Commentators have noted that while eyewitness testimony identifying the perpetrator of the crime is often important evidence for the State in a criminal trial, such testimony has been found to be erroneous in some cases. 2 MODERN SCIENTIFIC EVIDENCE at 578 (noting that in cases where DNA evidence exonerated defendants, eyewitness evidence identified the defendant as the perpetrator). They argue that expert testimony may help explain why such testimony can be wrong, by, for example, describing the impact of "estimator variables" (factors that might affect the eyewitnesses ability to perceive the events accurately, e.g., lighting conditions, or to describe accurately what was perceived) and "system variables" (factors outside the control of the eyewitness, such as the suggestiveness of a photo array). *Id.*

14. Drug Identification & Quantity.

a. Chemical Analysis Generally Required. In *State v. Ward*, 364 N.C. 133 (2010), a case decided under the more lenient *Howerton* standard, the North Carolina Supreme Court held that "[u]nless the State establishes . . . that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required" to identify a substance as a controlled substance. *Id.* at 147.

At least one post-*Ward* North Carolina case applying the *Daubert* standard has found no error when an expert testified to drug identification based on a chemical analysis. *See, e.g.,* State v. Abrams, ___ N.C. App. ___, 789 S.E.2d 863, 865-67 (2016) (expert testified that the substance was marijuana based on a chemical analysis; the expert's testimony was "clearly" the product of reliable principles and methods and her testimony established

that she applied those principles and methods reliability to the facts of the case).

b. **Visual Identification.** In *Ward,* the North Carolina Supreme Court held that the visual inspection methodology proffered by the State's expert was not sufficiently reliable to identify the pills at issue as containing a controlled substance. *Ward*, 364 N.C. at 142-48 (method of proof was not sufficiently reliable); *see also* State v. Brunson, 204 N.C. App. 357, 359-61 (2010) (holding, in a pre-*Ward* case, that it was plain error to allow an expert to opine that the substance at issue was hydrocodone, an opium derivative, based on visual identification and Micromedex Literature). It is unlikely that the court's reasoning would lead it to a different result under the more stringent *Daubert* standard. And in fact, one court of appeals case has applied that rule to a case in which the amended rule applied. State v. Alston, __ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017) (even if officer had been an expert it would have been error to allow him to testify that pills found at the defendant's home were Oxycodone and Alprazolam, where the basis of his identification was a visual inspection and comparison of the pills with a website).

In cases decided after *Ward,* the Court of Appeals has held that visual identification cannot be used to identify a substance as cocaine, State v. Jones, 216 N.C. App. 519, 526 (2011), or pills as a controlled substance. State v. Alston, __ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). However, it has allowed visual identification to identify a substance as marijuana. State v. Johnson, 225 N.C. App. 440, 455 (2013) (holding that the State was not required to test the substance alleged to be marijuana where the arresting officer testified without objection that based on his training the substance was marijuana); State v. Mitchell, 224 N.C. App. 171, 178-79 (2012) (an officer properly was allowed to identify the substance at issue as marijuana based on his "visual and olfactory assessment"; a chemical analysis of the marijuana was not required); *Jones*, 216 N.C. App. at 526 (visual identification of marijuana was permissible); State v. Garnett, 209 N.C. App. 537, 546 (2011) (Special Agent, who was an expert in forensic chemistry, properly made an in-court visual identification of marijuana).

It is difficult to reconcile the Court of Appeals' post-*Ward* decisions on visual identification with respect to substances that are not controlled substances. *Compare* State v. Hanif, 228 N.C. App. 207, 209-13 (2013) (applying *Ward* in a counterfeit controlled substance case where the defendant was charged with representing tramadol hydrochloride, a substance that is not a controlled substance, as Vicodin, a Schedule III controlled substance; holding that the trial court committed plain error by admitting evidence identifying the substance as tramadol hydrochloride based solely upon an expert's visual inspection (a comparison of the tablets' markings to a Micromedex online database)), *with* State v. Hooks, ___ N.C. App. ___, 777 S.E.2d 133, 140-41 (2015) (in a case involving charges of possession of

the precursor chemical pseudoephedrine with intent to manufacture methamphetamine, the court rejected the defendant's argument that the evidence was insufficient because the substance was not chemically identified as pseudoephedrine; holding that *Ward* was limited to identifying controlled substances, and pseudoephedrine is not listed as such a substance).

c. Narcotics indicator field test kits (NIKs) & "NarTest" Machines. In several cases decided under the more lenient *Howerton* standard, the North Carolina Court of Appeals held that the State failed to establish the reliability of certain narcotics indicator field tests. State v. Meadows, 201 N.C. App. 707, 708-12 (2010) (the trial court committed prejudicial error by admitting expert testimony on the identity of a controlled substance based on the results of a NarTest machine where the State failed to demonstrate the machine's reliability); State v. Jones, 216 N.C. App. 519, 523-25 (2011) (following *Meadows* and holding that the trial court erred by allowing a police captain to testify that the results from a NarTest machine analysis showed that the substance at issue was a controlled substance; also holding that the trial court erred by admitting testimony by the State's expert in forensic chemistry, a NarTest employee, regarding the reliability of the NarTest machine where the machine had not been licensed or certified by any state agency or department, the expert had not done any independent research on the machine outside of his duties as a company employee, the State presented no evidence that the machine had been recognized as a reliable method of testing by other experts in the field, the State presented no publications or research performed by anyone unassociated with NarTest, and although the State offered a visual aid to support the expert's testimony, that aid was a NarTest promotional video); State v. Carter, 237 N.C. App. 274, 281-84 (2014) (following *Meadows* and holding that the State failed to demonstrate the reliability of a NIK—apparently a wipe that turns blue when it comes into contact with cocaine—and that therefore the trial court abused its discretion by admitting an investigator's testimony that the NIK indicated the presence of cocaine). Absent different evidence, it is unlikely that the court's reasoning would lead it to a different result under the stricter *Daubert* standard.

d. Other Methods of Drug Identification. In *Ward,* the Supreme Court held that *"[u]nless the State establishes . . . that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt*, some form of scientifically valid chemical analysis is required" to identify a substance as a controlled substance. *Ward,* 364 N.C. at 147 (emphasis added). This language opens the door, in certain circumstances, to the use of methods of drug identification other than chemical testing.

In *State v. Woodard*, 210 N.C. App. 725 (2011), an opium trafficking case arising from a pharmacy break-in, the court rejected the defendant's argument that the evidence was

insufficient to support the conviction because no chemical analysis was done on the pills at issue. *Id.* at 730-31. In so holding the court approved a method of drug identification other than chemical analysis. Citing *Ward*, the court determined that the State is not required to conduct a chemical analysis on a controlled substance, provided it establishes the identity of the controlled substance beyond a reasonable doubt by another method of identification. Here, the State did that through the drug store's pharmacist manager, Mr. Martin, who testified that 2,691 tablets of hydrocodone acetaminophen, an opium derivative, were stolen from the pharmacy. He testified that he kept "a perpetual inventory" of all drug items. Using that inventory, he could account for the type and quantity of every inventory item throughout the day, every day. Accordingly, he was able to identify which pill bottles were stolen from the pharmacy by examining his inventory against the remaining bottles, because each bottle was labeled with an identifying sticker, date of purchase and a partial pharmacy account number. These stickers helped the pharmacist to determine that 2,691 tablets of hydrocodone acetaminophen were stolen. He further testified, based on his experience and knowledge as a pharmacist, that the weight of the stolen pills was approximately 1,472 grams. The court concluded:

> Based on Mr. Martin's thirty-five years of experience dispensing the same drugs that were stolen from the . . . Drugstore, and based on Mr. Martin's unchallenged and uncontroverted testimony regarding his detailed pharmacy inventory tracking process, we are persuaded that Mr. Martin's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence to establish the identity and weight of the stolen drugs and was not analogous to the visual identifications found to be insufficient in *Ward* . . . .

Id. at 732.

e. Sampling. The *Ward* court stated that its ruling regarding visual identification did not mean that every single item at issue must be chemically tested. In that case, the State submitted sixteen batches of items consisting of over four hundred tablets to the SBI laboratory for testing. *Ward,* 364 N.C. at 148. The court held:

> A chemical analysis of each individual tablet is not necessary. The SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures is not at issue here. A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable

determination of the chemical composition of the batch of evidence under consideration.

Id. Cases decided since *Ward* finding sampling analysis sufficient include:

State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874, 881-83 (2016). Testimony from the State's expert sufficiently established a trafficking amount of opium; following lab protocol, the forensic analyst grouped the pharmaceutically manufactured pills into four categories based on their physical characteristics and then chemically analyzed one pill from three categories and determined that they tested positive for oxycodone; he did not test the pill in the final category because the quantity was already over the trafficking amount; the pills that were not chemically analyzed were visually inspected; the analyst was not required to chemically analyze each tablet and his testimony provided sufficient evidence to establish a trafficking amount.

State v. Lewis, ___ N.C. App. ___, 779 S.E.2d 147, 148-49 (2015). In this conspiracy to traffic in opiates case, the evidence was sufficient where the State's expert analyzed only one of 20 pills, determined its weight and that it contained oxycodone, an opium derivative, and confirmed that the remaining pills were visually consistent with the one that was tested, in terms of size, shape, form and imprints; a chemical analysis of each individual pill was not necessary.

State v. James, 240 N.C. App. 456, 459 (2015). In this opium trafficking case, the evidence was sufficient to establish a trafficking amount where the expert chose at random certain pills for chemical testing and each tested positive for oxycodone; the expert visually inspected the remaining, untested pills and concluded that with regard to color, shape, and imprint, they were "consistent with" the pills that tested positive for oxycodone.

State v. Dobbs, 208 N.C. App. 272, 275-76 (2010). The trial court did not err by denying the defendant's motion to dismiss a trafficking charge where the State's expert testified that all eight tablets were similar with respect to color and imprint and that a test on one tablet revealed it to be an opiate derivative.

f. Unlicensed & Unaccredited Labs. In a case decided under the more lenient *Howerton* standard, the North Carolina Court of Appeals held to be inadmissible results from a lab that was neither licensed nor accredited by any agency. State v. Jones, 216 N.C.

> App. 519, 525-26 (2011) (the trial court improperly admitted evidence that an individual tested the substances at issue at a NarTest company laboratory using SBI protocol and determined that the substances were cocaine and marijuana). By comparison, test results from a NarTest lab showing that a substance was cocaine have been found to be admissible where the lab was not accredited but was licensed by the State of North Carolina and the Drug Enforcement Agency to perform analytical testing of controlled substances. State v. McDonald, 216 N.C. App. 161, 163-67 (2011) (note that a NarTest machine was not used in the testing of the substances at issue).

15. Fire Investigation Experts. In arson cases, an expert may be offered to opine on, for example, where or how the fire started and whether the fire was intentionally set. WHARTON'S CRIMINAL EVIDENCE § 13:55. At the outset, it should be noted that "fire and explosion investigation consists of a wide array of distinctive methods, techniques, and principles," 5 MODERN SCIENTIFIC EVIDENCE at 74, which must be assessed separately.

There do not appear to be any published North Carolina cases applying the *Daubert* standard to this type of expert testimony. Although one recent Court of Appeals case held that if a proper foundation is laid as to expertise, a fire marshal may offer his expert opinion that a fire was intentionally set, State v. Jefferies, ___ N.C. App. ___, 776 S.E.2d 872, 875 (2015), that case did not mention *Daubert* and it is not clear that amended Rule 702 applied to that case. Citing case law decided prior to the 2011 amendments to Rule 702, that court reasoned:

> Generally, the admission of expert opinion testimony is only allowed where "the opinion expressed is ... based on the special expertise of the expert[.]' State v. Wilkerson, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978). However, our Supreme Court has held that, with a proper foundation laid as to his expertise, a fire marshal may offer his expert opinion as to whether a fire was intentionally set. State v. Hales, 344 N.C. 419, 424–25, 474 S.E.2d 328, 330–31 (1996).

Id. The only other published criminal case decided after *Daubert* became the law in North Carolina declined to address the defendant's argument that the trial court erred by failing to evaluate, under *Daubert,* testimony by an investigator with the Fire Prevention Bureau of a city fire department that the fire in question was intentionally set. State v. Hunt, ___ N.C. App. ___, 792 S.E.2d 552, 560-61 (2016). Instead, that court concluded that even if error occurred, it did not rise to the level of plain error. *Id.*

It has been noted that after *Daubert* and *Kumho Tire,* some courts have examined this type of expert testimony more critically. 5 MODERN SCIENTIFIC EVIDENCE at 75, 78; *see also* WHARTON'S CRIMINAL EVIDENCE § 13:55 (noting that "[s]ince *Daubert* the qualifications and conclusions of arson investigators have been questioned with increasing frequency" and stating that scholarship has revealed that some investigators fail to base their conclusions adequately upon the scientific method or scientific tests

and has debunked several theories upon which investigators have historically relied; further indicating that inherent problems in the investigatory process have surfaced, and it has become apparent that some fire investigators over-exaggerate arson occurrence as well as the incidence of fire-related injury and death). For a survey of cases dealing with expert opinions in arson cases, see Jay M. Zitter, *Admissibility of Expert and Opinion Evidence as to Cause or Origin of Fire in Criminal Prosecution for Arson or Related Offense—Modern Case*s, 85 A.L.R.5th 187 (originally published 2001).

16. Accident Reconstruction. In North Carolina, "[a]ccident reconstruction opinion testimony may only be admitted by experts." State v. Maready, 205 N.C. App. 1, 17 (2010) (error to allow officers' opinion testimony concerning their purported accident reconstruction conclusions where the officers were not qualified as experts).

Subsection (i) of Rule 702 provides that "[a] witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving."

There do not appear to be any North Carolina criminal cases evaluating accident reconstruction experts under the *Daubert* standard. However, a number of criminal cases decided prior to the 2011 amendments to Rule 702(a) have admitted such evidence. *See, e.g.,* State v. Brown, 182 N.C. App. 115, 120 (2007); State v. Speight, 166 N.C. App. 106, 116-17 (2005), *vacated on other grounds*, 548 U.S. 923 (2006); State v. Holland, 150 N.C. App. 457, 461-464 (2002); State v. Purdie, 93 N.C. App. 269, 274-76 (1989). Additionally, at least one North Carolina civil case has allowed accident reconstruction testimony under the new *Daubert* standard. Pope v. Bridge Broom, Inc., 240 N.C. App. 365, 369-78 (trial court did not abuse its discretion by admitting expert accident reconstruction testimony), *review denied*, ___ N.C. ___, 775 S.E.2d 861 (2015). For a general discussion of courts' treatment of expert accident reconstruction testimony, *see* 5 MODERN SCIENTIFIC EVIDENCE at 829-59.

17. Pathologists & Cause of Death. In cases decided both before and after the amendments to Rule 702(a), North Carolina courts have admitted expert pathologist testimony regarding cause of death. Cases decided under the earlier version of Rule 702(a) include, for example: *State v. Johnson*, 343 N.C. 489, 492 (1996) (the trial court did not err in this murder case by allowing a fellow in the Chief Medical Examiner's office to testify as an expert in pathology as to cause of death and the possible range from which the shots were fired where the witness was not yet certified and had not completed formal training as a forensic pathologist but had performed a number of autopsies prior to performing the one in question); *State v. Miller*, 302 N.C. 572, 580 (1981) (the trial court did not err by allowing an expert forensic pathologist to testify regarding the size or gauge of the gun used as the murder weapon); *State v. Morgan*, 299 N.C. 191, 206-07 (1980) (rejecting the defendant's challenge to expert testimony offered by the N.C. Chief Medical Examiner that the cause of death was "a shotgun wound, shotgun blast" and noting: "It has long been the rule in North Carolina that the cause of an individual's death is the

proper subject of expert testimony."); *State v. Borders*, 236 N.C. App. 149, 175-76 (2014) (the trial court did not err by allowing the State's forensic pathologists to testify that the cause of death was asphyxiation, even where no physical evidence supported that conclusion; the experts knew that the victim's home was broken into, that she had been badly bruised, that she had abrasions on her arm and vagina, that her underwear was torn, and that DNA obtained from a vaginal swab containing sperm matched the defendant's DNA samples; the experts' physical examination did not show a cause of death, but both doctors drew upon their experience performing autopsies in stating that suffocation victims often do not show physical signs of asphyxiation and they eliminated all other causes of death before arriving at asphyxiation); *State v. Smith*, 157 N.C. App. 493, 498 (2003) (the trial court did not err by allowing the medical examiner to offer an opinion that the victim was killed when struck by the passenger side of the truck's door frame); *State v. Evans*, 74 N.C. App. 31, 35 (1985) (in this involuntary manslaughter case, the trial properly allowed a pathologist to testify that the child victim's injuries were not self-inflicted, that the child would not have died but for them, and that a subdural hematoma was a significant cause of death; he further testified that the hematoma could have been caused by violent shaking, causing tearing of the blood vessels between the dura and the brain, adding that death could result either from swelling of the brain or from rapid trauma to the brain from alteration of the blood supply), *aff'd*, 317 N.C. 326 (1986).

For a case decided under the amended version of Rule 702(a), see *State v. Ford,* ___ N.C. App. ___, 782 S.E.2d 98, 107-08 (2016) (in this involuntary manslaughter case, where the defendant's pit bull attacked and killed the victim, the trial court did not commit plain error by allowing a forensic pathologist to opine that the victim's cause of death was exsanguination due to dog bites).

For a discussion of expert testimony using the words "homicide" or "homicidal," see Section III.B. below.

18. Polygraphs. In a case decided prior to the amendment to Rule 702(a), the North Carolina Supreme Court held that polygraph evidence is inadmissible at trial because of the inherent unreliability of polygraph tests. State v. Grier, 307 N.C. 628, 642–45 (1983) (polygraph evidence is inadmissible, even if the parties stipulate to its admissibility); *see also* State v. Ward, 364 N.C. 133, 146 (2010) (noting this holding). Absent some change in the relevant technology, there is little reason to think that the court would rule otherwise under the stricter *Daubert* standard.

19. Penile Plethysmography. Penile plethysmography tests a man's level of sexual arousal. Michael C. Harlow & Charles L. Scott, *Penile Plethysmography Testing for Convicted Sex Offenders*, 35 J. OF AM. ACADEMY OF PSYCHIATRY & LAW 536 (2007), http://jaapl.org/content/35/4/536. It "involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, in determining his level of sexual attraction by measuring minute changes in his erectile responses." *Id.* at 536 (quotation omitted).

Deciding an issue of first impression in a child sex case decided before the 2011 amendments to Rule 702(a), the North Carolina Court of Appeals held that the trial court did not abuse its discretion by excluding opinion testimony by a defense expert in clinical psychology based on penile plethysmograph testing administered to the defendant. State v. Spencer, 119 N.C. App. 662, 664-68 (1995) (the expert would have testified that the defendant had a normal arousal pattern and that there was no evidence of his being sexually aroused by children; the trial court did not abuse its discretion in finding the defendant's plethysmograph testing data insufficiently reliable to provide a basis for the opinion testimony).

Although there do not appear to be any North Carolina cases deciding this issue under the new, stricter *Daubert* test, the Fourth Circuit has held that a trial court did not abuse its discretion by ruling that a penile plethysmograph test did not meet *Daubert*'s scientific validity prong. United States v. Powers, 59 F.3d 1460, 1471 (4th Cir. 1995) (holding, in a child sex case, that the district court did not err by excluding the testimony of a clinical psychologist who would have testified that the results of a penile plethysmograph test did not indicate that the defendant exhibited pedophilic characteristics).

20. Experts in Crime & Criminal Practices. A number of North Carolina appellate cases decided under the pre-amendment version of Rule 702(a) found no error where the trial court allowed a law enforcement officer to testify as an expert regarding criminal practices and activity. For example, in *State v. Jennings*, 209 N.C. App. 329 (2011), a child sexual assault case, the court noted:

> [T]his Court has held that law enforcement officers may properly testify as experts about the practices criminals use in concealing their identity or criminal activity. *See* State v. Alderson, 173 N.C. App. 344, 350–51, 618 S.E.2d 844, 848–49 (2005) (holding trial court properly permitted SBI agent to "give her opinion as to why the seizure of defendant's police frequency book was important, testifying that finding a police frequency book and a radio scanner can indicate those acting illegally may have a 'jumpstart' if they know which police frequencies to monitor."); State v. White, 154 N.C. App. 598, 604, 572 S.E.2d 825, 830–31 (2002) ("Lieutenant Wood had 'training, and various courses and experience in working certain cases' which led him to conclude that 'there are times that the significance of an object such as a pillow or a cloth being placed over somebody's face can mean in a case that the perpetrator knew the victim and did not want to see their face or have their face appear either before, during, or after the crime.' Since Lieutenant Wood testified in the form of an opinion based on his expertise, and the testimony was likely to assist the jury making an inference from the circumstances of the crime, the trial court properly admitted the testimony.").

Id. at 337–38. *Jennings* went on to hold that a law enforcement officer qualified as an expert in forensic computer examination properly was allowed to testify that those who have proof of criminal activity on a computer will attempt to hide that evidence and that the defendant would have been unlikely to save an electronic conversation that would have implicated him. That testimony was elicited by the State to explain why, despite the victim's testimony that she and the defendant routinely communicated through instant messaging and their MySpace web page and that the defendant took digital photographs of her vaginal area during sex, no evidence of these communications or photographs were recovered from the defendant's electronic devices.

There do not appear to be any published North Carolina criminal cases analyzing this type of expert testimony under the new *Daubert* standard. A number of federal circuit courts have allowed such testimony under that standard. For example, law enforcement officers have been allowed to testify as experts regarding:

- Drug code words. *See, e.g.,* United State v. York, 572 F.3d 415, 422 (7th Cir. 2009) ("[W]e allow officers whose testimony is based on some aspect of that understanding (such as the meaning of drug code words), rather than on first-hand knowledge of the particular investigation in the case, to testify as experts."); United States v. Dukagjini, 326 F.3d 45, 52 (2d Cir. 2003) ("[W]e have consistently upheld the use of expert testimony to explain both the operations of drug dealers and the meaning of coded conversations about drugs. In particular, we have recognized that drug dealers often camouflage their discussions and that expert testimony explaining the meanings of code words may 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" (citation omitted)).
- The use of firearms in the drug trade and common practices of drug dealers. *See, e.g.,* United States v. Garza, 566 F.3d 1194, 1199 (10th Cir. 2009) ("[W]e do not believe that *Daubert* and its progeny . . . provide any ground for us to depart from our pre-*Daubert* precedents recognizing that police officers can acquire specialized knowledge of criminal practices and thus the expertise to opine on such matters as the use of firearms in the drug trade."); United States v. Norwood, 16 F. Supp. 3d 848, 852-54 (E.D. Mich. 2014) (citing cases and holding to be admissible testimony by a DEA agent with fifteen years' experience regarding drug trafficking and use of firearms in drug trafficking).
- Gang practices. *See, e.g.,* United States v. Hankey, 203 F.3d 1160, 1167-70 (9th Cir. 2000) (the trial court did not abuse its discretion in admitting an officer's expert opinion testimony regarding the co-defendants' gang affiliations and the consequences an individual would suffer if he were to testify against the defendant; among other things, the expert had been with the police department for twenty-one years, worked undercover "with gang members in the thousands," received formal training in gang structure and organization, and he

> taught classes about gangs; stating: "The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it.").

However, some federal court *Daubert* decisions have excluded such testimony as unreliable, at least in certain circumstances. *See, e.g., Norwood*, 16 F. Supp. 3d at 854-64 (excluding proffered expert testimony concerning gangs where the witness formed his opinions based on his experience in Oklahoma, California, and Connecticut and from a national perspective while in Washington, D.C. but the case in question concerned a gang that operated in Flint, Michigan; the witness never investigated the gang in question or other Michigan gangs; "Simply put, [the witness's] lack of familiarity with the particular gang or locale at issue in this case makes his opinions unreliable to be placed before the jury.").

Other courts, while noting that an officer involved in an investigation may testify as both a fact and expert witness, also have noted the "inherent dangers" associated with this type of "dual testimony." *See, e.g., York,* 572 F.3d at 425; *Dukagjini*, 326 F.3d at 53 ("While expert testimony aimed at revealing the significance of coded communications can aid a jury in evaluating the evidence, particular difficulties, warranting vigilance by the trial court, arise when an expert, who is also the case agent, goes beyond interpreting code words and summarizes his beliefs about the defendant's conduct based upon his knowledge of the case."). Those dangers include that the witness's dual role might confuse the jury, that the jury might be impressed by an expert's "aura of special reliability" and thus give his or her factual testimony undue weight, or that "the jury may unduly credit the opinion testimony of an investigating officer based on a perception that the expert was privy to facts about the defendant not presented at trial." *York,* 572 F.3d at 425 (citing cases); *see also Dukagjini*, 326 F.3d at 53 (noting other dangers as well). Precautions that can mitigate these dangers include ensuring that the jury knows when an officer is testifying as an expert versus as a fact witness, through the use of cautionary instructions or witness examination that is structured to make clear when the witness is testifying to facts and when he or she is offering an expert opinion. *York*, 572 F.3d at 425-26 (discussing other precautions and going on to hold that admission of certain "dual testimony" by the officer in question was improper). And courts have noted that the trial court should be careful to ensure that the law enforcement officer expert does not "stray from his proper expert function" of offering opinions based on expertise and opine about matters based on his or her investigation in the case. *Dukagjini*, 326 F.3d at 54-55 (witness improperly acted "as a summary prosecution witness" when, for example, he testified about the meaning of conversations in general, as opposed to interpretation of drug code words).

Some commentators have been critical of decisions that reflexively allow police officers to testify as expert on criminal practices. *See* 1 MODERN SCIENTIFIC EVIDENCE at 101, 104 (although not advocating for a wholesale exclusion of such testimony, stating: "Somewhat disappointing has been the courts' willingness to admit prosecution

> experts who have little research or data to support their opinions. While there is some evidence that this is changing in some areas, such as the forensic sciences, courts continue to permit many prosecution experts with hardly a glance at the methods underlying their testimony. Perhaps the best example is the testimony of police officers testifying as expert witnesses.").

III. Form & Scope of Expert's Opinion. For a discussion of the proper scope of an expert's opinion in sexual assault cases, see *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, in this Benchbook, and more current cases annotated in Smith's Criminal Case Compendium (under Evidence; Opinions; Experts; Sexual Assault Cases).

A. Form of Testimony. Rule 702(a) allows for flexibility as to the form of the expert's testimony, providing that the expert may testify to "an opinion, or otherwise." Rule 705 provides that "[t]here shall be no requirement that expert testimony be in response to a hypothetical question." *See, e.g.,* State v. Fearing, 304 N.C. 499, 503-04 (1981) (no requirement that testimony of a forensic pathologist be given only in response to a hypothetical question); State v. Morgan, 299 N.C. 191, 205 (1980) ("It is settled law in North Carolina that an expert witness need not be interrogated by means of a hypothetical question . . . .").

B. Opinion on Ultimate Issue & Legal Standards. Although an expert may not testify to an opinion as to the defendant's guilt or innocence, *see, e.g.,* State v. Heath, 316 N.C. 337, 341-42 (1986), Evidence Rule 704 provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *See also* State v. Hill, 116 N.C. App. 573, 581 (1994) (noting this rule and rejecting the defendant's argument that testimony by the State's DNA expert regarding a DNA match improperly stated an opinion that the defendant had committed the rape in question).

The North Carolina Supreme Court has explained, however:

> In interpreting Rule 704, this Court draws a distinction between testimony about legal standards or conclusions and factual premises. An expert may not testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable.

State v. Parker, 354 N.C. 268, 289-90 (2001) (internal citations and quotation marks omitted). Applying this rule, cases have held that it is not error to allow:

- a pathologist to testify that a killing was a "homicide" or "homicidal," *see, e.g.,* State v. Flippen, 344 N.C. 689, 699 (1996) (no error to allow the State's forensic pathologist expert to testify that the victim died as

a result of a "homicidal assault"); State v. Parker, 354 N.C. 268, 290 (2001) (citing *Flippen* and holding that it was not error to allow the State's forensic pathologist expert to testify that the victim's death was a homicide); State v. Hayes, 239 N.C. App. 539, 549-50 (2015) (no error to allow forensic pathology experts to testify that the cause of death was "homicide by unde[te]rmined means" and "homicidal violence");

- an expert in psychiatry and addiction medicine to testify that the defendant lacked the capacity to form the specific intent to kill, *see, e.g.,* State v. Daniel, 333 N.C. 756, 760-64 (1993) (trial court erred by excluding testimony from a defense expert to this effect; noting that although it has held that expert testimony regarding precise legal terms should be excluded, "specific intent to kill" is not one of those precise legal terms that is off limits);
- a mental health expert to testify that the defendant lacked the capacity to plan, think, or reflect, *Daniel,* 333 N.C. at 760-64 (first-degree murder case), that the defendant's capacity to make and carry out plans was impaired, State v. Shank, 322 N.C. 243, 246-251 (1988) (new trial required in first-degree murder case where the trial court excluded this evidence); *see also* State v. Fisher, 336 N.C. 684, 704 (1994) (noting that a defense expert properly was allowed to opine regarding the defendant's ability to formulate and carry out a plan), or that the defendant acted while under the influence of a mental or emotional disturbance, *Shank,* 322 N.C. at 246-51 (new trial required in a first-degree murder case where the trial court excluded this evidence);
- an expert to testify that the defendant acted with an intent to cause death*,* State v. Teague, 134 N.C. App. 702, 708–09 (1999) (proper to allow expert to opine that one of the victim's "gunshot wounds to the head was consistent with an intent to cause death");
- an endocrinologist, in a case involving a defense of automatism, to testify that the defendant's actions were "not caused by automatism due to hypoglycemia" and that he reached this conclusion because the defendant did not experience amnesia, a characteristic feature of automatism caused by hypoglycemia, State v. Coleman, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017);
- a forensic pathologist who performed the autopsy to testify that the victim was "tortured," where the defendant was charged with first-degree murder on the basis of torture, State v. Jennings, 333 N.C. 579, 597-600 (1993);
- a forensic pathologist who conducted the autopsy to testify that the victim experienced a "sexual assault," *Jennings*, 333 N.C. at 600-601; *see also* State v. O'Hanlan, 153 N.C. App. 546, 553-57 (2002) (citing *Jennings* and holding that medical doctors who examined the victim properly testified that she was sexually assaulted);
- a pathologist who did the autopsy to testify that that defendant's account of the shooting was inconsistent with the type of wound suffered by victim and that the wound was not a self-defense type wound, even though self-defense was an ultimate issue in the case, State v. Saunders, 317 N.C. 308, 314 (1986);

- a physician to testify that a sexual assault victim's injuries were caused by a male penis, State v. Smith, 315 N.C. 76, 99-100 (1985) (noting that the witness did not testify that the victim had been raped or that the defendant had raped her);
- a radiologist to testify, in an assault inflicting serious injury case, that based on the victim's CT scan, the "trauma was definitely very serious intracranial trauma with serious brain injury and serious orbital injury with all the bone damage that was suffered," State v. Liggons, 194 N.C. App. 734, 743-44 (2009) (concluding that the expert's opinion was not inadmissible on the basis that it embraced an ultimate issue to be determined by the jury).

However, it is improper to allow:

- an expert in pathology and medicine, in a homicide case, to testify that injuries suffered by the victim were a "proximate cause of [the victim's] death," State v. Ledford, 315 N.C. 599, 617-19 (1986) (error to allow the expert to testify that a legal standard—"proximate cause"—had been met);
- a mental health expert to testify, in a murder case, that a defendant did or did not premeditate or deliberate, State v. Weeks, 322 N.C. 152, 166–67 (1988) (proper to exclude defense proffered expert testimony that the defendant did not act with deliberation); State v. Cabe, 131 N.C. App. 310, 313-14 (improper to allow the State's expert to testify that the defendant acted with premeditation and deliberation, but allowable here where the defendant opened the door), or that the defendant possessed or lacked the capacity to premeditate or deliberate, State v. Rose, 323 N.C. 455, 459-60 (1988) (*Rose* I) (proper to exclude such testimony); State v. Rose, 327 N.C. 599, 601-05 (1990) (*Rose* II) (the trial court committed reversible error by allowing the State's expert to testify that the defendant was capable of "premeditating"); State v. Mash, 328 N.C. 61, 65-66 (1991) (proper to exclude defense proffered expert testimony regarding the defendant's ability to premediate and deliberate);
- a mental health expert to testify, in a murder case, that the defendant did not act in a "cool state of mind," *Weeks*, 322 N.C. at 165–67; State v. Boyd, 343 N.C. 699, 708-10 (1996) (holding that under *Weeks* and Rule 403, the trial court did not err by preventing a forensic psychologist from using the phrase "cool state of mind" to convey his opinion that the defendant lacked the specific intent necessary to commit premeditated and deliberate murder at the time of the shootings), or under a suddenly aroused violent passion, *Weeks,* 322 N.C. at 165-67.
- a mental health expert to testify that the defendant lacked the capacity to conspire, State v. Brown, 335 N.C. 477, 489 (1994) (no error to exclude testimony of defense expert in forensic psychiatry with a specialty in addictive medicine where the term "conspiracy" had a specific legal definition);

- a medical doctor who examined the victim to testify that she had been "raped" and "kidnapped," State v. O'Hanlan, 153 N.C. App. 546, 557-58 (2002);
- a mental health expert to testify about the law of voluntary intoxication and its effect on the defendant's insanity defense, State v. Silvers, 323 N.C. 646, 655-57 (1989) (agreeing with the defendant's argument that a defense expert was erroneously permitted to offer legal conclusions during cross-examination by the State).

C. Opinion on Credibility of Witness. Expert testimony on the credibility of a witness is not admissible. State v. Heath, 316 N.C. 337, 340-43 (1986) (holding that the expert's testimony was improper for this reason); State v. Aguallo, 318 N.C. 590, 598-99 (1986) (citing *Heath* and holding that the trial court erred by allowing a pediatrician to testify that a rape victim was "believable"); State v. Green, 209 N.C. App. 669, 676-77 (2011) (so stating this rule but holding that in this case, the expert's testimony regarding the defendant's blood alcohol level did not constitute impermissible opinion testimony). Thus, it is error to allow an expert to testify that she believed the victim and to the reason for this belief. State v. Teeter, 85 N.C. App. 624, 631-32 (1987) (testimony by a nurse tendered as an expert for the State with respect to sexually abused mentally retarded adults). However, drawing the line between permissible and impermissible expert testimony in this area can be difficult. In *Teeter,* for example, it was not error for a mental health expert to testify that an adult sexual assault victim who suffered certain mental impairments showed no evidence of a disorder that would impair her ability to distinguish reality from fantasy. *Id.* at 628-29. The court rejected the defendant's argument that this testimony amounted to an impermissible expert opinion concerning the victim's credibility. *Id.* Consider by contrast, *Heath,* in which clinical psychologist Deborah Broadwell testified as an expert for the State in a child sexual assault case involving victim Vickie. At trial, defense counsel asked Vickie if her sister thought she was lying about the attack because Vickie "had lied about so many other things," asked Vickie's mother if she had experienced difficulties with Vickie "making up stories," and cross-examined Broadwell about alleged discrepancies in Vickie's statements to hospital emergency room and mental health clinic personnel. *Heath,* 316 N.C. at 339-40. On redirect, the prosecutor asked Broadwell: "do you have an opinion . . . as to whether or not Vickie was suffering from any type of mental condition . . . which could or might have caused her to make up a story about *the* sexual assault?" *Id.* at 340 (emphasis added). Broadwell responded: "There is nothing in the record or current behavior that indicates that she has a record of lying." *Id.* The court held, in part that the question, focusing as it did on "*the* sexual assault," was improper. It explained:

> We would be confronted with an entirely different situation had the assistant district attorney . . . asked the psychologist if she had an opinion as to whether Vickie was afflicted with any mental condition which might cause her to fantasize about sexual assaults in general or even had the witness confined her response to the subject of a "mental condition."

Id. at 341. But because the question focused on *the* specific incident in question, it was improper under Evidence Rules 608 and 405(a), which "together, forbid an

expert's opinion as to the credibility of a witness." *Id.* at 342. *Heath* thus emphasizes how fine the line can be between permissible and impermissible testimony. *See also* State v. O'Hanlan, 153 N.C. App. 546, 555 (2002) ("[T]he cases dealing with the line between discussing one's expert opinion and improperly commenting on a witness' credibility have made it a thin one.").

Issues regarding impermissible expert opinion testimony on the credibility of a witness arise most frequently in child sexual assault cases. For a more detailed discussion of this issue in that context see *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, in this Benchbook. For more decisions decided after publication of that Benchbook Chapter, see *Smith's Criminal Case Compendium* (under Evidence; Opinions; Experts; Sexual Assault Cases).

D. Basis for Expert's Opinion.

1. Scope & Adequacy. Evidence Rule 703 provides that "[t]he facts or data . . . upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing." N.C. R. EVID. 703. *See generally* State v. Morgan, 299 N.C. 191, 206 (1980) (testimony of Chief Medical Examiner regarding identification of human remains and cause of death was based on adequate data where the witness examined the remains, measuring, sorting and photographing them); State v. McClary, 157 N.C. App. 70, 79 (2003) (a forensic psychiatrist properly testified as an expert based on his own meetings with the defendant and his review of psychiatric evaluations done by other psychiatrists); State v. McCall, 162 N.C. App. 64, 71-73 (2004) (it was not error for an expert witness to testify that a child victim's behaviors suggested exposure to trauma, probably sexual abuse, where the expert did not personally examine the child; the expert obtained information about the child from a summary of the child's testimony, a DSS report, and the child's statement to the police; rejecting the defendant's argument that the expert's failure to examine the child rendered her expert opinion unreliable).

An opinion based on inadequate facts or data should be excluded. *See* 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE 742 (2011) [hereinafter BRANDIS & BROUN] (citing cases). As noted above, when expert testimony is not sufficiently tied to the facts of the case, it may fail the "fit test" that is part of the relevancy inquiry. *See* Section II.B.3. above.

2. Of a Type Reasonably Relied Upon. Rule 703 provides that the facts or data underlying the expert's opinion must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." N.C. R. EVID. 703. *Compare* State v. Demery, 113 N.C. App. 58, 65-66 (1993) (State's forensic serologist expert properly relied on statistical information concerning the frequency of blood group factors or characteristics in the North Carolina population compiled by the SBI with blood provided by the Red Cross and blood obtained in criminal cases; "The statistics on which he relied are commonly used and accepted in his field in North Carolina, and similar statistics are commonly used and accepted in forensic serology throughout the country"), State v. Purdie, 93 N.C. App. 269, 275-76 (1989) (expert in accident

reconstruction properly based his opinion on physical evidence), *and* State v. Teeter, 85 N.C. App. 624, 628-30 (1987) (clinical psychologist and expert in adult mental retardation and sexual abuse properly testified to the opinion that the victim exhibited behavioral characteristics consistent with sexual abuse; his opinion was based upon his experience in treating sexually abused mentally retarded persons, his familiarity with research and literature in that field, and his personal examination of the victim, all sources reasonably relied upon by experts in the field), *with* State v. Galloway, 145 N.C. App. 555, 564-65 (2001) (the trial court properly excluded statements made by the State's expert in the victim's medical discharge summary referencing the victim's psychiatric history, including substance abuse; because the expert was qualified as an expert in surgery, not psychiatry, the court rejected the defendant's assertion that the statements were admissible under Rule 703, finding that they did not contain facts or data reasonably relied upon by experts in the field of surgery).

3. **Need Not Be Admissible.** Rule 703 provides that if of a type reasonably relied upon by experts in the field, the facts or data forming the basis of the expert's opinion "need not be admissible in evidence." N.C. R. EVID. 703; *see, e.g.,* State v. Jones, 322 N.C. 406, 410-14 (1988) (trial court did not err by admitting hearsay evidence as the basis of an expert's opinion); State v. Purdie, 93 N.C. App. 269, 277 (1989) (same).

   For a discussion of confrontation clause issues related to the basis of the expert's opinion, see *Guide to Crawford and the Confrontation Clause*, in this Benchbook.

4. **Expert Need Not Interview Victim.** Evidence Rule 703 provides that the facts or data on which an expert bases an opinion "may be those perceived by or made known to him at or before the hearing." N.C. R. EVID. 703; *see Purdie*, 93 N.C. App. at 276 ("It is well-settled that an expert witness need not testify from first-hand personal knowledge . . . ."). Furthermore, the North Carolina Supreme Court has clarified that an expert "is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues relating to the prosecuting witness at trial," noting that "[s]uch a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts." State v. Walston, ___ N.C. ___, 798 S.E.2d 741, 747 (2017); *accord* State v. McCall, 162 N.C. App. 64, 71-73 (2004) (it was not error for an expert witness to testify that a child victim's behaviors suggested exposure to trauma, probably sexual abuse, where the expert did not personally examine the child; the expert obtained information about the child from a summary of the child's testimony, a DSS report and the child's statement to the police; rejecting the defendant's argument that the expert's failure to examine the child rendered her expert opinion unreliable).

5. **Disclosure & Cross-Examination of Basis at Trial.**
   Although an expert may testify without prior disclosure of the basis for his or her opinion, disclosure is required when requested by the other side. Rule 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

N.C. R. EVID. 705; *see, e.g.,* State v. Brown, 101 N.C. App. 71, 76-77 (1990) (noting that under Rule 705 an expert does not have to identify the basis of his opinion, absent a specific request by opposing counsel; rejecting the defendant's argument that the State's failed to establish a proper foundation for its expert's opinion as to the weight of the cocaine where the expert testified to his opinion but the defendant made no inquiry as to basis on cross-examination); State v. Fletcher, 92 N.C. App. 50, 57 (1988) ("The basis of an expert's opinion need not be stated unless requested by an adverse party and here defendant made no such request.").

Courts have noted that "[d]isclosure of the basis of the opinion is essential to the factfinder's assessment of the credibility and weight to be given to it." State v. Jones, 322 N.C. 406, 412 (1988). If the party requesting disclosure does not specify disclosure on voir dire, the trial court probably can allow for disclosure on voir dire or direct examination without committing error. 2 BRANDIS & BROUN at 738 (so noting)*; see* State v. Pretty, 134 N.C. App. 379, 382-83 (1999) (no error where disclosure occurred during direct and cross-examination rather than on voir dire and no prejudice was shown from the delay in obtaining the evidence). But, if the party seeking disclosure specifically asks for disclosure on voir dire and the trial court allows disclosure only on direct examination, prejudicial error may occur if improper evidence is presented to the jury. 2 BRANDIS & BROUN at 738. When disclosure is ordered through voir dire and the trial court admits the opinion, it has been suggested that the trial court has discretion to require the expert to state the facts or data before giving the opinion or leave them to be brought out on cross-examination. *Id.*

"Wide latitude is generally given to a cross-examiner in his attempts to discredit the expert witness, including questioning the expert in order to show that the facts or data forming the basis of the expert's opinion were incomplete." State v. Black, 111 N.C. App. 284, 293–94 (1993). As has been explained:

> On cross-examination ... opposing counsel may require the expert to disclose the facts, data, and opinions underlying the expert's opinion not previously disclosed. With respect to facts, data, or opinions forming the basis of the expert's opinion, disclosed on direct examination or during cross-examination, the cross-examiner may explore whether, and if so how, the non-existence of any fact, data, or opinion or the existence of a contrary version of the fact, data, or opinion supported by the evidence, would affect

> the expert's opinion. Similarly the expert may be cross-examined with respect to material reviewed by the expert but upon which the expert does not rely. Counsel is also permitted to test the knowledge, experience, and fairness of the expert by inquiring as to what changes of conditions would affect his opinion, and in conducting such an inquiry ... the cross-examiner is not limited to facts finding support in the record. It is, however, improper to inquire of the expert whether his opinion differs from another expert's opinion, not expressed in a learned treatise, if the other expert's opinion has not itself been admitted in evidence. An expert witness may, of course, be impeached with a learned treatise, admissible as substantive evidence . . . .

Id. at 294 (quoting MCCORMICK, MCCORMICK ON EVIDENCE § 13 (1992), and going on to hold that the trial court properly allowed the defendant to elicit on cross-examination that the expert never examined certain medical records, that in formulating similar opinions she often relied upon such records, and that examination of the records would in fact have assisted the expert in formulating her opinion in this case; however, the trial could properly limit the defendant's cross-examination when he sought to question the expert regarding the contents of data that the expert had not considered or used in formulating her opinion and which was not contained in any recognized learned treatise); *see also* State v. White, 343 N.C. 378, 393 (1996) (the trial court properly allowed the State to cross-examine a defense psychiatry expert about the work of a clinical psychologist upon which the expert had relied where the expert disagreed with a conclusion drawn by the clinical psychologist).

Cases have held it to be error when the trial court prohibits defense counsel from asking a defense expert about the basis of his or her opinion. State v. Davis, 340 N.C. 1, 25-26 (1995) (error to sustain the State's objections to questions posed to the defendant's mental health expert about the basis of the expert's opinion); State v. Allison, 307 N.C. 411, 413-17 (1983) (the trial court committed prejudicial error in a case involving the insanity defense where it prohibited defense mental health experts from testifying to the basis of their opinions that the defendant was unable to distinguish between right and wrong with respect to his behavior at the time of the alleged crimes).

For a discussion of what discovery must be provided in connection with expert witnesses, see *Discovery in Criminal Cases* in this Benchbook.

6. Status as Substantive Evidence; Limiting Instruction. When evidence is admissible as the basis of an expert's opinion, it is not substantive evidence unless it qualifies for admission under some independently recognized principle, such as an exception to the hearsay rule. 2 BRANDIS & BROUN at 744-45. One exception to the hearsay rule that might apply is N.C. R. EVID. 803(18) (hearsay exceptions, availability of declarant immaterial), which provides an exception to the hearsay rule as follows:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct

> examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

If the evidence does not qualify for admission as substantive evidence, its admission should be accompanied by an appropriate limiting instruction. *See* State v. Jones, 322 N.C. 406, 414 (1988) (noting that the defendant is entitled to a limiting instruction upon request).

E. Testimony Outside of Expert's Expertise. An expert's testimony should relate to the expert's area of expertise. State v. Ward, 364 N.C. 133, 146 n.5 (2010) ("[c]aution should be exercised in assuring that the subject matter of the expert witness's testimony relates to the expertise the witness brings to the courtroom" (quotation omitted)). For example, in one recent case the North Carolina Supreme Court noted that while a defense proffered witness who was a former police officer and trainer in police use of force matters would have been qualified to testify about standard police practices regarding the use of force, he was not qualified to testify about the human body's sympathetic nervous system. State v. McGrady, 368 N.C. 880, 896 (2016). By contrast, in another case the Court of Appeals rejected the defendant's argument that testimony by a forensic serologist that the defendant's blood profile was the same as .2% of the population and the victim's blood profile was the same as 8.2% of the population was beyond the scope of witness's expertise. State v. Demery, 113 N.C. App. 58, 63-64 (1993).

F. Terminology.

Although not binding authority for a judge, the PCAST REPORT asserts that statements by experts suggesting or implying greater certainty than is shown by the empirical evidence "are not scientifically valid and should not be permitted." PCAST REPORT at 145. It continues:

> In particular, courts should never permit scientifically indefensible claims such as: "zero," "vanishingly small," "essentially zero," "negligible," "minimal," or "microscopic" error rates; "100 percent certainty" or proof "to a reasonable degree of scientific certainty;" identification "to the exclusion of all other sources;" or a chance of error so remote as to be a "practical impossibility."

Id.; see also Paul C. Giannelli, *The NRC Report and Its Implications for Criminal Litigation*, 50 JURIMETRICS J. 53, 57-60 (2009) (discussing a similar position in the 2009 report by the National Research Council, entitled, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, and relevant cases).

IV. Interplay Between Rule 403 & the 700 Rules. Evidence that is admissible under Rule 702 still may be inadmissible under Rule 403. *See* N.C. R. EVID. 702(g) ("This section

does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section."). *Compare, e.g.,* State v. King, 366 N.C. 68, 75-76 (2012) (holding that the trial court did not abuse its discretion by excluding under Rule 403 the expert testimony regarding repressed memory that was admissible under Rule 702), *and* State v. Walston, ___ N.C. ___, 798S.E.2d. 741, 746 (2017) (citing *King* and noting that Rule 403 would allow for the exclusion of expert testimony—in that case, regarding repressed memory and the suggestibility of memory—even if such evidence was admissible under Rule 702), *with* State v. Cooper, 229 N.C. App. 442, 463 (2013) (in this murder case where files recovered from the defendant's computer linked the defendant to the crime, the trial court abused its discretion by excluding under Rule 403 a defense expert proffered to testify that the defendant's computer had been tampered with).

Likewise, evidence admissible under Rule 705 may be excluded under Rule 403. State v. Coffey, 336 N.C. 412, 420-22 (1994) (although Rule 705 allows a party cross-examining an expert to inquire into the facts on which the expert's opinion is based, that Rule "does not end the inquiry" and the trial court may exclude such evidence under Rule 403; where the probative value of evidence of the defendant's convictions was substantially outweighed by the danger of unfair prejudice, evidence of the convictions was not admissible on grounds that they constituted a basis of the expert's opinion).

V. Court Appointed Experts. Evidence Rule 706(a) provides for court appointed experts. It provides:

> The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

N.C. R. EVID. 706(a); *see also* State v. Robinson, 368 N.C. 596, 597 (2015) (instructing that on remand the trial court may, in its discretion appoint an expert under the rule).

If the court appoints an expert, the witness is "entitled to reasonable compensation in whatever sum the court may allow." N.C. R. EVID. 706(b).

The rule allows the court, in the exercise of its discretion, to "authorize disclosure to the jury of the fact that the court appointed the expert witness." N.C. R. EVID. 706(c). And it specifies that nothing in the rule limits the parties in calling expert witnesses of their own selection. N.C. R. EVID. 706(d).

VI. Defendant's Right to Expert Assistance.

For a discussion of a criminal defendant's right to expert assistance and the procedure for obtaining such assistance, see Chapter 5, Experts and Other Assistance, in JOHN

RUBIN & ALYSON A. GRINE, NORTH CAROLINA DEFENDER MANUAL VOL. 1, PRETRIAL (2013), http://defendermanuals.sog.unc.edu/defender-manual/2.

VII. Standard of Review on Appeal.

In reviewing a trial court's decision regarding the admissibility of expert testimony, the appellate courts apply the deferential abuse of discretion standard. *See, e.g., Walston*, ___ N.C. ___, 798 S.E.2d at 745; *McGrady,* 368 N.C. at 893; State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359, 361 (2017); State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874, 881 (2016).

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISON
COUNTY OF XXXX	XX CRS XXXX

STATE OF NORTH CAROLINA	)	
	)	
vs.	)	
	)	MOTION FOR
NAME,	)	INDEPENDENT TESTING
DEFENDANT.	)	
	)	

NOW COMES the Defendant, by and through counsel, and respectfully moves this Honorable Court for the entry of an Order requiring the State to produce for the undersigned the item(s) as described below for independent testing. The Defendant contends that he is entitled to production of the item(s) for independent testing prior to trial pursuant to N.C.G.S. 15A-902, N.C.G.S. 15A-903(a)(1)(d), in sufficient time to enable him to meaningfully examine said items and test them to prepare for trial. Failure to grant the Defendant's motion would violate the Defendant's rights to Due Process of Law under the Fifth and Fourteenth Amendments to the United States Constitution; Article I, Sections 18, 19, and 23, of the Constitution of North Carolina; and effective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution; Article I, Sections 19 and 23 of the Constitution of North Carolina; and his discovery rights under N.C. Gen. Stat. §15A-903. In support of the foregoing Motion, the Defendant would show unto the Court as follows:

1. The BLOOD SAMPLE [OR OTHER ITEM OF EVIDENCE] was collected from the Defendant on DATE by XXXX POLICE DEPARTMENT OFFICER SMITH.

2. The State has provided discovery that the STATE CRIME LABORATORY [OR OTHER CRIME LABORATORY] has tested TOXICOLOGY evidence in this case [OR THE STATE HAS PROVIDED NOTICE OF ITS INTENTION TO PROCEED TO TRIAL WITHOUT THE TESTING OF THIS ITEM OF EVIDENCE]. The Defendant requests additional independent testing of these items. The Defendant is, by law, presumed to be innocent of these charges.

3. The TOXICOLOGY evidence is material to both the State and the Defendant in this case. The State contends that this evidence is inculpatory, whereas the Defendant contends that his expert should be allowed to inspect, test, and analyze the evidence to determine the accuracy of the State's contention or to determine whether the evidence is in fact exculpatory.

4. The Defendant requests that ONE VIAL [or TWO VIALS or ALL EVIDENCE OR A SPECIFIC PORTION THEREOF] be made available for testing as quickly as possible.

5. The sample shall be mailed to NAME OF THE LAB at the following ADDRESS [INCLUDE COMPLETE MAILING ADDRESS]. Should there be questions regarding

this sample, the contact person and phone number or email address from NAME OF LAB is _____.

6. Items must be maintained and shipped under chain of custody control. (Include here any shipping requirements of the independent lab, such as items should be shipped by overnight trackable delivery. Items should be kept chilled but not frozen. Items should be secured and padded so they won't break in shipment. Absorbent material should be placed with the items in a sealed plastic bag. Documents should be in a separate sealed plastic bag. The box should be sealed in a manner so that any tampering will be evident on arrival at the lab.)

7. The Defendant shall be responsible for payment for the testing including the shipping cost. The Defendant shall make arrangements with the shipping company and the independent lab prior to the STATE CRIME LAB/OTHER CRIME LAB shipping the evidence. (After shipping arrangements have been made with UPS, Fed-Ex or other shipping company, provide information about which service will be used to the Crime Lab. At the State Crime Lab, Joy Strickland may be contacted if you have questions.)

8. Upon completion of testing by NAME OF LAB, the remaining portion of the sample shall be returned to SUBMITTING LAW ENFORCEMENT AGENCY. (Find out whether the State Lab or other Crime Lab is going to be doing any testing or further testing. If they are, then have the sample returned to the Crime Lab.)

WHEREFORE, the undersigned prays that this Court will enter such Orders as are just and proper with respect to production of the above-mentioned items and the inspection and independent testing by the experts appointed to assist the defense.

Respectfully submitted this the ____ day of ____, 2013.

_____
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an Attorney at Law licensed to practice in the State of North Carolina, that he is the attorney for the Defendant, in the above-entitled action, and that he is a person of such age and discretion as to be competent to serve process.

That on the ____ day of _____, 2013, he served the foregoing **MOTION FOR INDEPENDENT TESTING** upon the Office of the District Attorney, through hand delivery at the following address:

_____
Attorney for Defendant

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISON
COUNTY OF XXXX	XX CRS XXXX

STATE OF NORTH CAROLINA	)	
	)	
vs.	)	ORDER REQUIRING CRIME LAB
	)	TO PRODUCE ITEMS FOR
NAME,	)	INDEPENDENT TESTING
DEFENDANT.	)	
	)	

THIS CAUSE CAME ON TO BE HEARD before the undersigned Superior Court Judge on the __ day of _____, 20__, upon the Defendant's Motion for Independent Testing; the Defendant was represented by his attorney XXXX and the State was represented by District Attorney XXXX; and the Court, having reviewed the Motion, and having considered the arguments of counsel hereby finds and concludes as follows:

1. The BLOOD SAMPLE [OR OTHER ITEM OF EVIDENCE] was collected from the Defendant on DATE by XXXX POLICE DEPARTMENT OFFICER SMITH.

2. The State has provided discovery that the STATE CRIME LABORATORY [OR OTHER CRIME LABORATORY] has tested TOXICOLOGY evidence in this case [OR THE STATE HAS PROVIDED NOTICE OF ITS INTENTION TO PROCEED TO TRIAL WITHOUT THE TESTING OF THIS ITEM OF EVIDENCE]. The Defendant requests additional independent testing of these items. The Defendant is, by law, presumed to be innocent of these charges.

3. The TOXICOLOGY evidence is material to both the State and the Defendant in this case. The State contends that this evidence is inculpatory, whereas the Defendant contends that his expert should be allowed to inspect, test, and analyze the evidence to determine the accuracy of the State's contention or to determine whether the evidence is in fact exculpatory.

4. The Court finds and concludes that the STATE CRIME LABORATORY/OTHER CRIME LAB should be Ordered to produce items for independent testing, subject to the terms and conditions set forth below:

    a. ONE VIAL [or TWO VIALS or ALL EVIDENCE OR A SPECIFIC PORTION THEREOF] be made available for testing as quickly as possible.

    b. The sample shall be mailed to NAME OF THE LAB at the following ADDRESS [INCLUDE COMPLETE MAILING ADDRESS]. Should there be questions regarding this sample, the contact person and phone number or email address from NAME OF LAB is _____.

c. Items must be maintained and shipped under chain of custody control. (Include here any shipping requirements of the independent lab, such as items should be shipped by overnight trackable delivery. Items should be kept chilled but not frozen. Items should be secured and padded so they won't break in shipment. Absorbent material should be placed with the items in a sealed plastic bag. Documents should be in a separate sealed plastic bag. The box should be sealed in a manner so that any tampering will be evident on arrival at the lab.)

d. The Defendant shall be responsible for payment for the testing including the shipping cost. The Defendant shall make arrangements with the shipping company and the independent lab prior to the STATE CRIME LAB/OTHER CRIME LAB shipping the evidence. (After shipping arrangements have been made with UPS, Fed-Ex or other shipping company, provide information about which service will be used to the Crime Lab. At the State Crime Lab, Joy Strickland may be contacted if you have questions.)

e. Upon completion of testing by NAME OF LAB, the remaining portion of the sample shall be returned to SUBMITTING LAW ENFORCEMENT AGENCY. (Find out whether the State Lab or other Crime Lab is going to be doing any testing or further testing. If they are, then have the sample returned to the Crime Lab.)

This the ____ day of ____, 20__.

_____
Superior Court Judge

STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE**
	XXXX COURT DIVISION
COUNTY OF XXXX	**15 CRS 000000**

STATE OF NORTH CAROLINA	)	
	)	
v.	)	**MOTION FOR PRESERVATION**
	)	**OF ANY AND ALL EVIDENCE**
XXXX,	)	
	)	
Defendant.	)	

NOW COMES the Defendant, by and through the undersigned counsel, XXXX, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article 1 §§ 19 and 23 of the North Carolina Constitution; Article 48 of the North Carolina General Statutes; N.C. Gen. Stat. §§ 15A-501(6), 15A-903, 15A-268, 15A-1415(f); ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) and its progeny, ***Arizona v. Youngblood***, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed. 2d 281 (1988) and its progeny, and ***State v. Williams***, 362 N.C. 628, 669 S.E.2d 290 (2008) and its progeny, and hereby requests that this Honorable Court enter an Order commanding all law enforcement officers, employees, agents and/or attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters to preserve and retain any and all evidence obtained in the investigation of these matters.

Such evidence shall include, but is not limited to, all files, notes, audio or video recordings, and any and all physical evidence, including but not limited to, hair, fibers, other trace evidence, fingerprints and other latent evidence, biological specimens including the body of any decedent, clothing, firearms and projectiles, other weapons, vehicles, suspected controlled substances and packaging, computer or other digital evidence, and any and all other physical evidence that has been or will be collected in this case.

The Defendant further requests that this Honorable Court order all law enforcement agencies to release to the prosecution for disclosure to the defense all materials and information acquired during the course of the investigation into these matters, pursuant to N.C. Gen. Stat. §15A-501(6). In support of the foregoing Motion, the Defendant states unto the Court as follows:

1. The materials the Defendant seeks to have preserved are discoverable under Article 48 of the North Carolina General Statutes.

2. At the filing of this motion, the defense has not been provided with discovery, as the Defendant has not been indicted for the offenses for which he has been arrested.

3. N.C. Gen. Stat. § 15A-501(6) states:

> Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer…must make available to the State on a timely basis all materials and information acquired in the course of all felony investigations. This responsibility is a continuing and affirmative duty.

4. N.C. Gen. Stat. § 15A-903(a)(1) states:

> Upon motion of the defendant, the court must…make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.

5. In order for the Defendant to be afforded his statutory right to inspect and copy all evidence under N.C. Gen. Stat. § 15A-903(a)(1), the evidence must be available to the Defendant for inspection.

6. N.C. Gen. Stat. § 15A-268 states:

> [A] custodial agency shall preserve any physical evidence, regardless of the date of collection, that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution. Evidence shall be preserved in a manner reasonably calculated to prevent contamination or degradation of any biological evidence that might be present, subject to a continuous chain of custody, and securely retained with sufficient official documentation to locate the evidence…The duty to preserve may not be waived knowingly and voluntarily by a defendant, without a court proceeding.

7. N.C .Gen. Stat. § 15A-1415(f), in addressing discovery requirements in post-conviction proceedings in superior court, states in part:

> …The State, to the extent allowed by law, shall make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the Defendant…

8. Upon information and belief, the State may seek forensic analysis/testing of physical evidence. If it is reasonable to expect that such testing would entirely consume an item of evidence or consume enough of the evidence so as to preclude additional testing, prior to such testing being conducted, any laboratory or expert conducting such testing should notify both the prosecution and the Defendant that such testing will consume or preclude

additional testing of said evidence. Upon such notification, the laboratory or expert shall not conduct any further testing of said evidence until receipt of an Order from the Court allowing further testing. Within 30 days of receiving such notification, the prosecution and the defense shall submit proposals for how such testing should be conducted such that the Defendant's right to view and test such evidence, under the case law cited in the preamble to this Motion, is preserved. The proposals shall be submitted to the Court and a copy shall be served upon the testing laboratory or expert;

9. In order to ensure all evidence is available and not inadvertently destroyed, the Court should enter an Order requiring law enforcement to preserve any and all evidence associated with these matters.

10. The interests of justice and the rights of the Defendant require the preservation of all evidence connected with these matters and, as such, the Court should enter an Order requiring that any and all evidence in these matters be preserved.

11. The defense hereby places the State on notice that the defense is demanding the preservation of any and all evidence in these matters in order that the State will have notice of the defense's demand and will not be able to assert the doctrine of "bad faith,"[1] in the event any unwarranted loss or destruction of documentation or evidence occurs.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the Court enter an Order commanding all law enforcement agencies, officers, employees, agents and/or attorneys including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters to preserve and retain any and all evidence in this case; and

2. That the Court enter an Order commanding the prosecution to provide all law enforcement agencies, officers, employees, agents, and/or attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters with any orders directing the preservation and retention of any and all evidence in this case; and

3. That the Court order any laboratory or expert conducting any testing on any evidence, which would consume or preclude additional testing, to notify both the prosecution and the Defendant that such testing will consume or preclude additional testing of said evidence using the following contact information;

Defense Attorney (name)
Mailing Address or Email address

[1] See ***Arizona v. Youngblood,*** 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

Prosecutor (name)
Mailing Address or Email address

Upon such notification, the laboratory or expert shall not conduct any further testing of said evidence until receipt of an Order from the Court allowing further testing.

4. That the Court order that within 30 days of receiving such notification as set forth in paragraph three (3) above, the prosecution and the defense shall be required to submit proposals for how such testing should be conducted. The proposals shall be submitted to the Court and a copy shall be served upon the testing laboratory or expert;
   [The State Crime Lab's legal counsel can be served by mail using the following address:
   NC State Crime Laboratory, Lab Legal Counsel
   121 East Tryon Road
   Raleigh NC 27603]

5. That the Court order that within 30 days of receiving the proposals set forth in paragraph four (4) above, any agency that wishes to be heard about the proposals shall submit any comments to the Court with service to the prosecution and defense;

6. That the Court order that upon receipt of the comments referenced in paragraph five (5) above, the Court will hold a hearing to determine what if any further Orders are necessary to facilitate forensic testing. The parties shall ensure that the testing laboratory or expert is notified of the hearing;

7. That the Court order that any destruction, total consumption (or consumption that would preclude additional testing), or loss of any evidence (regardless of the intent or nature of the conduct resulting in the destruction, total consumption, or loss of any evidence), may be deemed a violation of the Court's order to preserve any and all evidence, and such conduct may warrant at least an instruction to any jury, impaneled to try these matters, on the spoliation of evidence, if not dismissal of the charges.

8. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the ____ day of _____.

_____
Attorney Name
Bar Number
Address

The undersigned attorney certifies that this motion and proposed order have been served on the State Crime Lab's legal counsel [or lab director if a lab other than the State Crime Lab is to perform the testing] and

[The State Crime Lab's legal counsel can be served by mailing the motion and proposed order to:
NC State Crime Laboratory, Lab Legal Counsel
121 East Tryon Road
Raleigh NC 27603]

(Check any that apply after speaking with NCSCL Lab Legal Counsel.)
___ The State Crime Lab received a copy of the motion and proposed order.
___ The State Crime Lab wishes to be heard prior to the entry of any order.

_____
Signed and certified as true

STATE OF NORTH CAROLINA		**IN THE GENERAL COURT OF JUSTICE** **XXXX COURT DIVISION**
COUNTY OF XXXX		**15 CRS 000000**
STATE OF NORTH CAROLINA	)	
	)	**ORDER ALLOWING**
v.	)	**MOTION FOR PRESERVATION**
	)	**OF ANY AND ALL EVIDENCE**
XXXX,	)	
Defendant.	)	

THIS MATTER having come before the undersigned Judge, presiding at the _____, session of Criminal XXXX Court for the County of XXXX, pursuant to the Defendant's ***Motion for Preservation of Any and All Evidence***, which was filed on _____;

AND THE COURT, finding that at the time this matter was presented to the Court, the State of North Carolina was represented by Assistant District Attorney _____, and the Defendant was represented by _____ and the North Carolina State Crime Laboratory was served with the Motion For Preservation of Any and All Evidence and noted that there was no objection to the Order;

AND THE COURT, after determining that it has jurisdiction over the subject matter and the parties, after considering the Defendant's Motion, and after noting that the prosecution has no objection to granting of the Motion, finds that the Defendant's ***Motion for Preservation of Any and All Evidence*** should be allowed;

IT IS THEREFORE ORDERED that

1. All law enforcement officers, employees, agents, and attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters shall preserve and retain any and all evidence in this case;

2. The prosecution shall provide all law enforcement agencies, officers, employees, agents, and/or attorneys, including laboratories and/or experts conducting forensic testing, involved in the investigation of the above-captioned matters with any orders directing the preservation and retention of any and all evidence in this case;

3. Any laboratory or expert conducting any testing on any evidence, which would result in consuming or precluding additional testing, shall notify both the prosecution and the Defendant that such testing will consume or preclude additional testing of said evidence using the following contact information;

Defense Attorney (name)
Mailing Address or Email address

Prosecutor (name)

Mailing Address or Email address

Upon such notification, the laboratory or expert shall not conduct any further testing of said evidence until receipt of an Order from the Court allowing further testing.

4. Within 30 days of receiving such notification as set forth in paragraph three (3) above, the prosecution and the defense shall be required to submit proposals for how such testing should be conducted. The proposals shall be submitted to the Court and a copy shall be served upon the testing laboratory or expert;

   [The State Crime Lab's legal counsel can be served by mail using the following address:
   NC State Crime Laboratory, Lab Legal Counsel
   121 East Tryon Road
   Raleigh NC 27603]

5. Within 30 days of receiving the proposals set forth in paragraph four (4), any agency that wishes to be heard about the proposals shall submit any comments to the Court with service to the prosecution and defense;

6. Upon receipt of the comments referenced in paragraph five (5) the Court will hold a hearing to determine what if any further Orders are necessary to facilitate forensic testing. The parties shall ensure that the testing laboratory or expert is notified of the hearing;

7. Any destruction, total consumption (or consumption that would preclude additional testing), or loss of any evidence (regardless of the intent or nature of the conduct resulting in the destruction, total consumption, or loss of any evidence), may be deemed a violation of the Court's order to preserve any and all evidence, and such conduct may warrant at least an instruction to any jury, impaneled to try these matters, on the spoliation of evidence, if not dismissal of the charges.

This the _____ day of _____.

_____
Presiding Judge

Appendix:

The parties may want to consider using one of more of these options if testing would consume the entire sample:

1. Allow the Defendant (i.e., defense counsel and defense expert(s)) to view the item of evidence and photograph prior to testing. The item shall be viewed and photographed in accordance with any required procedures and policies of the agency in possession of the items at the time of inspection to ensure the integrity of the item(s);
2. Request that the lab analyst or expert photograph the item of evidence prior to testing;
3. Allow the Defendant's expert to observe any testing that is conducted (this option is objectionable to the State Crime Laboratory);
4. Send the item to an agreed-upon independent lab for testing;
5. Allow the State Crime Laboratory to consume portions of the evidence or the evidence items entirely if such consumption is necessary to complete the forensic testing.

GUIDE TO WORKING WITH EXPERTS

- **PRELIMINARY CONSIDERATIONS**

    - Review your case, client's records (medical, educational, etc.), and discovery prior to contacting experts. This will help you determine exactly what type of expert assistance is needed and have a more productive conversation with an expert.
    - Do not engage a mental health expert before obtaining substantial social history records unless the client is floridly psychotic upon you entry into the case. See IDS Policy on the Effective Use of Mental Health Experts in Potentially Capital Cases.
    - Educate yourself on the issues. Consult the IDS Forensics website for information on topics of forensic science, such as DNA, firearms, fingerprints, death investigation, etc. Scholarly articles are available such as Google Scholar and PubMed.
    - Do you need an expert?
        - Is the forensic evidence adverse to the defense theory of the case?
        - Do you need evidence re-tested?
        - Are you critiquing the state's testing of the evidence?
        - Even if the State is not using an expert, consider whether there are affirmative uses of experts that would support your theory of the case, such as crime scene experts, use of force experts, or mental health experts.

- **FINDING AN EXPERT:**

    - Don't wait until the last minute – your desired expert may not be available. Any expert will need time to review your case prior to forming an opinion.
    - Consider consulting with Sarah Olson, Forensic Resource Counsel or the Elaine Gordon, Trial Resource Counsel for additional ideas about what type of expert to use.
    - Know what particular expertise you need before you start making phone calls: i.e., rather than looking for a "DNA expert," consider whether you need an expert on DNA mixtures, an expert who can challenge contamination, or an expert who can challenge the statistical computation.
    - Consider the role of the expert: Do you need an expert to assist in evaluating the quality of the evidence? To explain the science to you or to the jury? Do you need an expert to develop mitigation evidence or to establish a defense such as self-defense or diminished capacity? Will assistance require access to a laboratory? Can a professor or academic fulfill the role or do you need a practicing analyst or scientist? Is the expert willing to testify?

- **RESEARCH THE EXPERT:**

    - You should research your potential expert as thoroughly as you would research a State's witness that you are preparing to cross-examine.
    - Review their CV. Do not assume that just because the expert has been used frequently that he/she has been properly vetted.
    - Utilize disciplinary boards if available. If an expert lists a particular license or certification, see if that organization posts disciplinary information online.
    - Ask the expert about any certifications or professional qualifications attempted—has the expert taken any certification exams or other professional exams that he/she has not passed? This website can be used to check to see whether an MD is certified in a particular specialty.
    - Seek references on listserves, with the IDS Forensic Resource Counsel, NACDL Resource Center, American Academy of Forensic Sciences (AAFS), other lawyers, other experts and competitors, universities, and publicly-funded laboratories.
    - Search LexisNexis and/or Westlaw for cases in which the expert testified.
    - Additional information on how to research an expert online is available here.

- **GUIDE TO YOUR FIRST CONVERSATION WITH EXPERT**

    - Be able to explain to the expert what work you need performed, including specific referral questions you would like addressed if working with a mental health expert. Never ask a mental health expert simply to "evaluate" your client without providing specific guidance. Do not assume that the expert already knows what constitutes a potential defense or mitigating factor. Sometimes an expert who has not received proper guidance will tell an attorney that his or her evaluation has turned up nothing useful, when in fact the expert simply does not have the legal expertise to know what is useful and what is not.
    - Get the expert to provide you with a copy of his/her CV.
    - Discuss with the expert anticipated hours of work needed, any re-testing needed, any travel required in order to prepare a request for adequate funding. Discuss AOC's rate schedule (see p. 2) and prepare justification if the expert requires a deviation from the rate schedule.
    - Discuss any potential conflicts with the expert due to co-defendants, scheduling, or any other professional or personal matter that would adversely affect the expert's work/testimony in the case.
    - Verify that your expert will be able to testify. Do not assume that testimony will not be needed or promise your expert that testimony will not be needed.
    - Your expert will need lab reports and the underlying data in order to analyze the evidence.
    - Communication

- Can they explain their conclusions clearly and understandably?
- Consider non-verbal communication: arrogance, bias, appearing defensive, organized, prepared, etc.

- Considerations to discuss with expert(s)
  - Position currently held.
  - Description of the subject matter of the expert's specialty.
  - Specializations within that field.
  - What academic degrees are held and from where and when obtained.
  - Specialized degrees and training.
  - Licensing in field, and in which state(s).
  - Length of time licensed.
  - Length of time practicing in this field.
  - Board certified as a specialist in this field.
  - Length of time certified as a specialist.
  - If certifications/proficiency tests/etc have been attempted, history of results.
  - Positions held since completion of formal education, and length of time in each position.
  - Duties and function of current position.
  - Length of time at current position.
  - Specific employment, duties, and experiences (optional).
  - Teaching or lecturing in the relevant field, dates and location of teaching.
  - Publications in this field and titles.
  - Membership in professional societies/associations/organizations, and special positions in them.
  - Requirements for membership and advancement within each of these organizations.
  - Honors, acknowledgments, and awards received by expert in the field.
  - Who is considered "the best" in the field?
  - Number of times testimony has been given in court as an expert witness in this field. (Case names and transcripts, if available.)
  - How has the expert's testimony been treated in the past? Did the expert appear balanced, knowledgeable, and credible? Has the expert ever not been qualified as an expert? Why?
  - Availability for consulting to any party, state agencies, law enforcement agencies, defense attorneys.

BY SARAH RACKLEY OLSON | OCTOBER 14, 2014 · 9:22 AM | EDIT

What is in a State Crime Laboratory Lab Report?

Many attorneys have asked me what should be included in a lab report from the State Crime Lab. Often in District Court DWI cases or through discovery, defense attorneys receive only a 1-2 page report called a Lab Report. For each case that is analyzed by the State Crime Laboratory, the lab produces a Case Record in Forensic Advantage (FA), the lab's electronic information management system. The Case Record contains many items, including the lab report, chain of custody information, analyst CV, and information about tests performed. Under N.C. Gen. Stat. 15A-903, the lab provides this Case Record to the prosecution for disclosure to the defendant through discovery. If attorneys do not receive complete lab reports, they should request the items described below through discovery. This information is also available on the IDS Forensic website.

How are reports accessed by the District Attorney's Office?

When the lab has completed its analysis and finalized its report, an email is automatically sent to the District Attorney's office and the law enforcement agency that requested the analysis, notifying them that the Case Record is available. These offices can access the Case Record using a web-based program called FA Web. There are legal assistants or victim-witness coordinators in each DA's office who are trained to use FA Web. They can access the Case Records using the emailed link (which remains active for seven days after the email is sent), or they can search for the report within FA Web even after the email link has expired. Some ADAs and DAs may also be trained in using FA Web, but typically it is a legal assistant who accesses the FA Web and downloads the Case Records.

Many defense attorneys are surprised to learn that a full Case Record is produced by the lab and sent to the DA's office for each case that is worked, including District Court cases. Depending on whether they have been trained in the use of FA Web, ADAs may or may not know that the lab provides complete Case Records for each case worked, but the legal assistant in their office who is trained to use FA Web can access these full reports.

How long has this system been in place?

FA was adopted by the lab in 2008 as the lab's electronic information management system. Since 2011, the lab has been providing Case Records to DA's offices through FA Web. Since June 2013, DA's offices have had the option to download and print partial "Ad Hoc" lab reports instead of printing the full Case Record.

What is included in a Case Record Full Packet?

The "Case Record Full Packet" may be downloaded as one zip file or portions of the Case Record may be

downloaded separately. **The Table of Contents is the most important page for a defense attorney to review in order to determine if the complete packet has been provided through discovery.** If items of evidence were analyzed in more than one section of the lab, each lab section will complete a separate Case Record for its analysis and Case Records will be numbered consecutively (for example, Record #1 may be from Trace Evidence, Record #2 may be from Forensic Biology and DNA, etc.) Some Case Records may not be needed once created, such as when an examination is redundant with another Case Record. These will be listed as "Terminated."

The main PDF in the zip file Case Record Full Packet contains the Table of Contents. The Table of Contents will specify if it is a Case Record (Full), Ad Hoc or Officer. If an attorney sees on the Table of Contents that the packet is an Ad Hoc or Officer packet, the attorney will know that there were additional items provided by the lab that have not been provided to the defense. If the DA's office downloads the Case Record Full Packet the entire packet will be paginated consecutively and state the total number of pages, such as Page 1 of 200. If only a partial Ad Hoc packet is downloaded, the portion that is downloaded will be paginated, such as Page 1 of 10.

The Case Record Full Packet will include the following items (though not necessarily in this order):

- **Table of Contents** – lists all items included in the main PDF file of the "Case Record Full Packet" as well as additional items that are sent as separate files. Every packet (including partial Ad Hoc packets) that is downloaded from FA Web will have a Table of Contents. This Table of Contents has been annotated to describe its various parts. These links show sample Table of Contents for Digital Evidence (Audio Video and Computer), Drug Chemistry, Firearms, Toolmarks, Forensic Biology (Blood, DNA, and Semen) Latent Evidence (Footwear-Tire and Latent), Toxicology, and Trace Evidence (Arson,Explosives, Fiber, Glass, GSR, Hair, Paint, and Trace). Beneath each item listed in the Table of Contents will be an indented description of this item. Often the "description" just repeats the name of the document. Attorneys should know that indented description is not a separate or duplicate item, but is intended to describe the item listed above. The lab plans to remove the descriptions when it upgrades the FA Web program as they are mainly duplicative of the document name.
- **Lab Report** – a 1-2 page document that states the analyst's conclusions. It will not identify what test was performed or how the analyst reached her conclusions. This is the notarized document that is found in the court file in District Court DWI cases. Many attorneys think this is the only report that the lab produces, but it is just one part of the entire Case Record that the lab produces for each case.
- **Case Report** – several pages that list the names of the analysts who performed the analysis and reviewed the case. If any problem is found when the case is reviewed by another analyst, the problem will be briefly described in this section in a written dialogue between the analysts.
- **Chain of Custody** – shows the chain of custody of the item of evidence within the lab.
- **Request for Examination of Physical Evidence** – a copy of the form that law enforcement submits to request that an item be analyzed by the lab.
- **Worksheets** – as the analyst works, she records which test is performed and her observations, measurements, and results using an electronic form on her computer. The Lab Worksheets are printouts of these electronic forms. The Lab Worksheets are one place to look to see what tests were performed.
- **Quality Control/Quality Assurance and sample preparation documentation** – this documentation will vary depending on the type of analysis completed, but many analyses will have documentation of calibration curves, positive and negative controls, instrument set-up, sample

preparation, instrument results, etc. Attorneys can consult with Sarah Olson, their own expert, or the lab analyst for an explanation of these case-specific items.

- **Communication Log** – includes details of case-related phone conversations, including communications from law enforcement, prosecutors, and defense attorneys, if any such communications occurred. If communication has occurred by e-mail or memo, the e-mail or memo will be provided as part of the main PDF file in the Case Record Full Packet.
- **CV of Analyst(s)**
- **Messages Report** – these are messages that can be sent from external users to the State Crime Lab via the FA system, such as rush requests or stop work orders. Analysts can also send messages to each other through the FA system that will be recorded here.
- **Publish History and Packet History** – if this is the first publication of the packet, it will be noted here. If this is a subsequent publication of the packet, any information on previous publications, including downloads by FA Web users, will be listed.

Several additional items also make up the Case Record Full Packet. These items are listed in the Table of Contents but are not paginated with the previous documents.

- **Prior Versions of Worksheets and Lab Reports** – various versions of one Worksheet may be saved during analysis as the analyst progresses through her work. If an analyst has to go back and amend something in a completed Worksheet, the previous and new versions will be saved. If an analyst changes something in a Lab Report, the previous and new versions will be saved. These worksheets and reports are paginated separately from the Case Record Full Packet.
- **Worksheet Resources** – a list of all instruments, equipment, chemicals, reagents, kits, and other standards used in the analysis. The document also contains the maintenance history for the equipment and instruments used. This document is paginated.
- **All other items that cannot be made into PDFs, including images and some data files** – images may be printed by the DA's office, but attorneys should request them on a disc for better image quality. Raw data files cannot be printed and require proprietary software to open. Currently raw data files are being provided only in cases where DNA analysis was performed. These files can be opened by an expert who has the appropriate software to read this data.

How do I know if I received all documents that the lab has produced?

There are a number of steps that defense attorneys can take to ensure that they are receiving compete discovery:

1. **Review the Table of Contents** – Attorneys should look for the Table of Contents in the Case Record Full Packet and check to ensure that the type of Case Record that the DA's office downloaded was Full (rather than Ad Hoc) and that all documents listed in the Table of Contents are provided.
2. **Check pagination** – The FA Web system paginates everything that is downloaded. If, for example, only pages 4 and 5 of 200 are provided, the defense attorney will know that she doesn't have a copy of everything that the DA's office downloaded. However, if the DA's office chooses to only download a portion of the packet (Ad Hoc packet) rather than the Case Record Full Packet, only those downloaded pages will be paginated. For example, if the Case Record Full Packet has 200 pages but the DA's office

only downloads the Lab Report which is 2 pages, those pages will be paginated, 1 and 2 of 2.

3. **Request Forensic Advantage notification emails from the DA's office** – Whenever the lab updates a Case Record that has already been sent to the DA's office, FA will send an email notifying the DA's office that there has been a change and specifying which portion of the record is changed. Defense attorneys should request these emails from the DA's office through discovery. The updated Case Record may appear to be a duplicate of the original Case Record that was provided (and may be hundreds of pages long). These emails can help identify which document was changed.
4. **Meet with the ADA** – Defense attorneys may request to meet with the ADA assigned to the case to view all of the documents available on FA Web to ensure that everything has been downloaded and shared through discovery.
5. **Consult with the lab** – After reviewing the discovery and checking that the DA's office has provided everything available in the FA Web program to the defense, defense attorneys may consider scheduling a pre-trial meeting with the lab analyst if questions remain about reports. State Crime Lab analysts are available to meet with defense attorneys prior to trial and will answer questions about the analysis that was performed and what reports/documents were produced in the case. Defense attorneys may contact Lab Legal Counsel Assistant Attorney General Joy Strickland if there are issues with lab discovery that cannot be resolved with the ADA.

Related

Draft Policy Recommendations by the National Commission on Forensic Science
In "Crime Labs"

Meeting with lab analysts and forensic pathologists prior to trial

Where's my lab report?

In "Crime Labs"