UNC SCHOOL OF GOVERNMENT

2019 Higher-Level Felony Defense Training II

January 10-11, 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 Higher-Level Felony Defense Training II

January 10-11, 2019 / Chapel Hill, NC

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

Thursday, Jan. 10

12:15-1:15	Check-in
1:15-1:30	**Welcome**
1:30-2:15	**Defending Forcible Felony Cases** Phil Dixon, Defender Educator UNC School of Government, Chapel Hill, NC
2:15-3:00	**Defending Eyewitness Identification Cases** Laura Gibson, Assistant Public Defender Beaufort County Office of the Public Defender
3:00-3:15	**Break**
3:15-4:00	**Self-Defense Update** John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
3:45-4:00	**Break (15 mins.)**
4:00-5:00	**Preventing Low Level Felonies from Becoming High Level Habitual Felonies** P. Sunny Panyanouvong-Rubeck, Assistant Public Defender Mecklenburg County Office of the Public Defender
5:00	**Adjourn**

*IDS employees may not claim reimbursement for lunch

UNC SCHOOL OF GOVERNMENT

Friday, Jan. 11

8:45-9:45	**The Law of Sentencing Serious Felonies** Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
9:45-10:00	**Break**
10:00-10:45	**Mitigation Investigation** Josie Van Dyke, Mitigation Specialist Sentencing Solutions, Inc.
10:45-12:00	**Brainstorming Sentencing Strategy Workshop**
12:00-1:00	Lunch *(provided in building)**
1:00-2:00	**Storytelling and Visual Aides at Sentencing** Steven Lindsay, Attorney Sutton & Lindsay, PLLC Durham and Asheville, NC
2:00-2:15	**Break**
2:15-3:15	**Preparing a Sentencing Presentation Workshop**
3:15-3:30	**Break**
3:30-4:30	**Preservation** Glenn Gerding, Appellate Defender Office of the Appellate Defender, Durham, NC Kimmel McDiarmid, Official Court Reporter State of North Carolina
4:30	Adjourn

CLE HOURS: 9.25 general credit

*IDS employees may not claim reimbursement for lunch

UNC SCHOOL OF GOVERNMENT

ONLINE RESOURCES FOR INDIGENT DEFENDERS

ORGANIZATIONS

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

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

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

TRAINING

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

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

MANUALS

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

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

UPDATES

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

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

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

TOOLS and RESOURCES

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

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

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

DEFENDING EYEWITNESS IDENTIFICATION CASES

DEFENDING EYEWITNESS IDENTIFICATION

Laura Neal Gibson
Assistant Public Defender
Second Judicial District

Presented:
Higher Level Felony Defense – Part II
January 10, 2019
UNC School of Government

CONTENTS

NC EYEWITNESS IDENTIFICATION REFORM ACT

Article 14A.
Eyewitness Identification Reform Act.

§ 15A-284.50. Short title.

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

§ 15A-284.51. Purpose.

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

§ 15A-284.52. Eyewitness identification reform.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

f. The sources of all photographs or persons used.

g. In a photo lineup, the photographs themselves.

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

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

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

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

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

(3) Any other procedures that achieve neutral administration.

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

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

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

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

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

(1) Standard instructions for eyewitnesses.

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

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

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

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

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

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

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

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

THE BASICS

Types of Eyewitness Identification

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

Constitutional Issues that Arise with Eyewitness Identification

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

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

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

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

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

ISSUES OF MEMORY

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

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

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SAMPLE MOTIONS TO SUPPRESS AND OTHER RESOURCES

NCIDS Motions Bank

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

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

2) Motion for Disclosure of Identification Procedures

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

3) Ex Parte Motion for Expert Witness Funds

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

4) Motion to Suppress Show-up Identification

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

Eyewitness Identification: Tools for Litigating the Identification Case

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

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

Procedures for Challenging Eyewitness Identification Evidence

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

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JURY INSTRUCTIONS

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

Photo Lineup Requirements G.S. 15A-284.52

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

Live Lineup Requirements G.S. 15A-284.52

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

SELF-DEFENSE UPDATE

Issues in Self-Defense Law in North Carolina

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UNC School of Government

January 2019

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Contents

Earlier blog posts, cited in the above posts but not reprinted here, include:

- A Warning Shot about Self-Defense (Sept. 7, 2016)
- Is "Justification" a Defense to Possession of a Firearm by a Person with a Felony Conviction (Aug. 2, 2016)
- The Statutory Felony Disqualification for Self-Defense (June 7, 2016)

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

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : lawful place, retreatself-defense

Date : August 29, 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

Defensive Force in the Home

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

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

Date : August 7, 2018

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

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

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

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

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

The Conflict in *Kuhns*

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

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

home and watched him to be sure he complied.

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

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

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

The Meaning of Entry and Home

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

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

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

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

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

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

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

A Lose-Lose Situation for "Felonious" Defendants Who Act in Self-Defense

Author : John Rubin

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Tagged as : defensive force, felony disqualification, self-defense

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I previously wrote here about the statutory felony disqualification for self-defense in North Carolina, adopted in 2011 by the General Assembly alongside expanded castle protections and clearer stand-your-ground rights for law-abiding citizens. The felony disqualification, in G.S. 14-51.4, states that a person loses the right of self-defense if he or she "[w]as attempting to commit, committing, or escaping after the commission of a felony." A literal interpretation of the provision places "felonious" defendants in a lose-lose situation: if they defend themselves, they can be prosecuted for their use of force even if the force is otherwise permissible; if they don't defend themselves, they could suffer injury or even death. In my earlier blog post, I suggested that the felony disqualification may include a "nexus" requirement—that is, that the disqualification applies only if the defendant's felony in some way creates or contributes to the assault on the defendant and the resulting need for the defendant's use of force. The Court of Appeals in the recent case of *State v. Crump* took a literal approach, appearing to make the felony disqualification an absolute bar to self-defense if the defendant contemporaneously engages in a felony.

The evidence in *Crump.* The facts of the case aren't pretty. The State's evidence, detailed in the Court of Appeals' opinion (Slip Opinion at 2–3), was that the defendant and the co-defendant robbed several patrons at an illegal poker game a few days earlier on September 24. The defendant was charged with several counts of armed robbery and second-degree kidnapping as well as possession of a firearm by a felon, which were joined for trial with the incident that occurred a few days later. The later incident, on September 29, led to the defendant's claim of self-defense. An acquaintance of one of the patrons who was robbed on September 24 began receiving text messages from one of the stolen cell phones indicating that the people believed to be the robbers were looking for another poker game to rob. The acquaintance invited them to a fake poker game and, when they arrived, called 911. He told the emergency operator that there were two men in a car with loaded guns and that he thought they were intending to rob someone. The police arrived on the scene, an office complex, in the early hours of the morning on September 29.

The Court of Appeals' opinion doesn't describe what happened next, but the appellate briefs by the State and defendant largely agree on the facts (available here on the North Carolina Supreme Court and Court of Appeals Electronic Filing Site and Document Library). The State's evidence was that two police officers observed the defendant's car parked at the back of the office complex. The officers stepped toward the car, threading their way through a gap between two dump trucks, also parked at the back of the complex. The officer in front had shouldered his shotgun, the officer behind had drawn his service revolver. They were in uniform but had not yet announced that they were officers. The State's evidence was that the occupants of the car fired several times at them, and the officers returned fire.

The defendant's evidence was that he loaned his car to the co-defendant on September 24, which he frequently did; that the co-defendant and co-defendant's brother committed the robbery that day; and that the defendant was unaware until after the September 29 incident that the co-defendant and co-defendant's brother had used his car in the robbery. The defendant also offered evidence that the co-defendant and co-defendant's brother wanted to go to a poker game on September 29 and asked him to drive them there. After arriving at the office complex, the defendant waited in the car while the co-defendant's brother unsuccessfully tried to gain entry into the building. While waiting, the defendant saw a shadowy figure pointing a long gun at them. The defendant felt the impact of two shots on his car and,

unaware that the officers were officers, fired several shots at them to give himself time to start the car up and drive off.

The Court of Appeals' opinion picks up the September 29 incident from there. A low-speed pursuit ensued, ending when the defendant drove over stop sticks placed by the police. On searching the car, the police found several of the items stolen during the previous robbery. Based on the September 29 incident, the defendant was charged with two counts of assault with a deadly weapon with intent to kill, two counts of assault with a firearm on a law enforcement officer, and possession of a firearm by a felon. Slip Op. at 3–4.

The trial court dismissed the robbery and second-degree kidnapping charge involving one of the victims and the robbery charge involving another of the victims during the September 24 robbery. The jury found the defendant not guilty of assault with a firearm on a law-enforcement officer during the September 29 incident. The opinion does not indicate the basis for the acquittal, but the offense requires proof that the defendant knew that the officer was an officer. The jury convicted the defendant of all other charges. Slip Op. at 4.

The self-defense instructions given in *Crump*. Based on this evidence, the trial court gave the pattern jury instruction on self-defense in N.C.P.I.—Crim. 308.45, which applies to assaults involving deadly force. The instruction repeated verbatim the statutory felony disqualification in G.S. 14-51.4. The defendant requested that the judge instruct the jury that a disqualifying felony must have some connection to the need to use defensive force—specifically, that a felony is disqualifying only when the "felonious acts directly and immediately caused the confrontation that resulted in the deadly threat to him." Slip Op. at 8. The trial court declined to modify the instruction.

The Court of Appeals upheld the trial court's instruction. It recognized that the statutory felony disqualification requires a *temporal* connection—that is, the felony must occur contemporaneously with the need to act in self-defense. Thus, the earlier robbery would not be disqualifying. In the Court's view, however, the statute does not require a *causal* connection. The trial court therefore did not err in refusing to include the language requested by the defendant. The Court held further that the defendant was not entitled to self-defense instructions at all because he was committing the offense of possession of a firearm by a felon during the September 29 incident and no causal connection between that felony and the defendant's use of force was required.

The Court of Appeals gave two basic reasons for its interpretation. First, the Court stated that the plain language of the statute did not require a causal connection. That observation doesn't necessarily end the argument, however. In an opinion last year interpreting the self-defense statutes, *State v. Holloman*, 369 N.C. 615 (2017), the North Carolina Supreme Court addressed the aggressor disqualification in G.S. 14-51.4(2). That statute provides that a person who provokes the use of force against himself or herself may use force in return, including deadly force, if the person reasonably believes that he or she faces death or great bodily injury and has no reasonable means of escape. The defendant in *Holloman* argued that this provision applied even when the defendant begins a conflict with deadly force—that is, when the defendant is an aggressor with "murderous" intent. The Supreme Court recognized that the literal language of the statute did not distinguish between aggressors with or without "murderous intent." The Court held, however, that the General Assembly could not have intended to allow aggressors with "murderous intent" to rely on self-defense when the other person justifiably uses deadly force to meet the defendant's unjustified use of deadly force. Despite the literal language of the above exception to the aggressor disqualification, the Court concluded that it did not apply to aggressors with murderous intent. *See also State v. Jones*, 353 N.C. 159 (2000) (holding that despite literal language, felony murder statute did not apply to DWI as underlying felony).

Second, the Court of Appeals in *Crump* compared the felony disqualification in G.S. 14-51.4(1) to the wording of G.S. 14-51.2(c)(3). The latter provision is part of the statute on defensive force in one's home, workplace, or vehicle, which establishes a presumption of reasonableness when the defendant uses force against an unlawful, forcible entry into those places. The specific provision denies that presumption if the defendant is engaged in "any criminal offense that involves the use or threat of physical force or violence against any individual." The Court found that the inclusion of this language shows that the General Assembly intended to limit the denial of the presumption to offenses involving force or violence, while the absence of such language in the felony disqualification shows that the General Assembly

intended to impose no limits.

A difficulty with this interpretation is that it gives with one hand and takes away with the other. If a defendant is engaged in an offense that does not involve force or violence in one of the specified locations (home, workplace, vehicle), the defendant gets the presumption of reasonableness; however, if the offense is a felony, the defendant loses the right of self-defense entirely in those places, whether or not the offense involves force or violence. That's because G.S. 14-51.4 states that the justification in G.S. 14-51.2, which applies to self-defense within one's home, workplace, or vehicle, as well as the justification in G.S. 14-51.3, which applies to defense of person, is unavailable if the felony disqualification applies. The opinion in *Crump* does not address this issue.

Potential impact of holding in *Crump*. In light of the evidence of the earlier robbery and the shooting at the police, the jury in *Crump* might have decided that the defendant did not have the right of self-defense, even with the defendant's requested modification of the instruction. The Court of Appeals' discussion of the facts in *Crump* suggests that the Court had reservations about the defendant's version of the events. The trial court's literal instruction regarding the statutory felony disqualification, however, considerably narrowed the jury's ability to consider the defendant's claim of self-defense, if not effectively precluding it.

Moreover, a literal application of the statute may bar self-defense in a broader array of circumstances than presented in *Crump*. Here are a couple of examples that come to mind:

- Joan, a domestic violence victim, is addicted to opioids from medication previously prescribed to her for pain from her injuries. She is in illegal possession of opioids, a felony, when she is violently assaulted by her boyfriend for reasons that have nothing to do with the felony she was committing. She defends herself to avoid death or serious injury.
- Roger was convicted several years ago of a nonviolent property felony. Although unlawful, he keeps a gun in his home to protect himself and his family. Armed intruders break into his home one night. He shoots to defend himself and his family.

Suppose in these examples that the police and prosecutor believe a different version of what transpired and pursue charges against Joan and Roger. I wonder whether our General Assembly really intended to preclude them from defending themselves when attacked and from telling their side of the story at trial. *See Perkins v. State,* 576 So. 2d 1310, 1314 (Fla. 1991) (concurring opinion) (stating that precluding self-defense for unrelated felony would violate a defendant's fundamental right to defend his or her life and liberty in court by asserting a reasonable defense and would violate the fundamental right to meet force with force in the field when attacked illegally and without justification, the "right to life itself"); *see also* R. Christopher Campbell, *Unlawful/Criminal Activity: The Ill-Defined and Inadequate Provision for a "Stand Your Ground" Defense*, 20 Barry L. Rev. 43 (Fall 2014) (discussing limits on right of person engaged in unlawful activity to use force without retreating). *But see Dawkins v. State*, 252 P.2d 214 (Okla. Crim. App. 2011) (refusing to require nexus when defendant used illegally modified shotgun in defense of another).

Other questions. The statutory felony disqualification raises additional questions, not specifically addressed in *Crump*.

- In its instructions, the trial court listed uncharged felonies as disqualifying the defendant from acting in self-defense, including the uncharged offenses of attempted robbery with a dangerous weapon and possession of stolen goods during the September 29 incident. Is that permissible? If so, what instructions does the judge have to give the jury on the uncharged crimes? *See generally* N.C.P.I.—Crim. 214.10 n.5 (directing for a first-degree burglary charge that the judge define the felony that the defendant intended to commit, an element of burglary).
- The trial court also listed as disqualifying felonies the charged offenses of assault with a deadly weapon with intent to kill (AWDWIK) and assault with a firearm on a law enforcement officer. The Court of Appeals recognized that AWDWIK could not be a disqualifying felony because it was the very act that the defendant claimed was in self-defense. The State in *Crump* agreed that the inclusion of this charge in the felony disqualification instructions was a "circularity error." The Court of Appeals indicated that assault with a firearm

on an officer was a disqualifying felony, but that statement seems incorrect because it too involved the act that the defendant claimed was in self-defense. A different issue is whether the jury can base a felony disqualification on an offense for which it acquits the defendant. It seems not.

- *Crump* did not discuss potential defenses to disqualifying felonies, such as a necessity defense to the offense of possessing a firearm by a felon. Presumably, the jury would have to be instructed on defenses to a disqualifying felony, which, if found by the jury, would allow the jury to consider self-defense.
- An additional issue [which I did not identify in my initial post] is the extent to which common law defensive force principles survive the adoption of the defensive force statutes. *Crump* considered the impact of the statutory felony disqualification on the defendant's statutory right of self-defense. Slip op. at 6 (stating that defendant raised statutory justifications to AWDWIK charge). It did not specifically address any rights under the common law. *See, e.g.,* G.S. 14-51.2(g) (stating that section does not repeal any other defense that may exist under common law); *State v. Lee,* ___ N.C. ___, 811 S.E.2d 563 (2018) (Martin, C.J., concurring) (querying whether defensive force statutes partially abrogate or completely replace common law on defensive force).
- As discussed in my earlier blog post on this subject, the statutory felony disqualification, when applicable, bars self-defense to assault charges such as those in *Crump*. In a homicide case, it probably does not bar imperfect self-defense, which reduces murder to manslaughter under North Carolina law. This is so because G.S. 14-51.4 states that the felony disqualification bars the "justification" in G.S. 14-51.2 (defense within home, workplace, or vehicle) and G.S. 14-51.3 (defense of person). Imperfect self-defense is not typically considered a justification defense so the disqualification would not apply.

These and other questions will need to be addressed in applying the felony disqualification. Should our Supreme Court grant review, however, the first question will be whether the felony disqualification includes a causal nexus requirement.

Court of Appeals Approves Justification Defense for Firearm by Felon

Author : Phil Dixon

Categories : Crimes and Elements, Uncategorized

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

North Carolina Criminal Law

A UNC School of Government Blog

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

John Rubin
September 18, 2018 at 10:43 am

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

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

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

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

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

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

Reply

Some Clarity on Self-Defense and Unintended Injuries

Author : John Rubin

Categories : Crimes and Elements, Uncategorized

Tagged as : involuntary manslaughter, self-defense

Date : June 5, 2018

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Self-Defense Provides Immunity from Criminal Liability

Author : John Rubin

Categories : Crimes and Elements, Procedure

Tagged as : immunityself-defense

Date : October 4, 2016

So say two statutes enacted by the General Assembly in 2011 as part of its revision of North Carolina's self-defense law. G.S. 14-51.2(e) and G.S. 14-51.3(b) both state that a person who uses force as permitted by those statutes—in defense of home, workplace, and vehicle under the first statute and in defense of self or others under the second statute—"is justified in using such force and is immune from civil or criminal liability for the use of such force . . . ." What does this protection mean in criminal cases? No North Carolina appellate cases have addressed the self-defense immunity provision. This blog post addresses possible implications.

Does North Carolina's immunity provision merely confirm that a person may rely on self-defense as an affirmative defense at trial and, if successful, not be convicted? Or, does it do more?

The immunity provision may do more. It may create a mechanism for a defendant to obtain a determination by the court, before trial, that he or she lawfully used defensive force and is entitled to dismissal of the charges.

Several states now have self-defense immunity provisions. The exact wording varies. Some have explicit procedures for determining immunity (*see* Ala. Code § 13A-3-23), but most are silent. In interpreting these statutes, the courts agree that the immunity provision does "not merely provide that a defendant cannot be convicted as a result of legally justified force." *See Dennis v. State*, 51 So.3d 456, 462 (Fla. 2010). Surveying the various states with immunity provisions, one commentator has observed: "There is consensus that "Stand Your Ground" statutory immunity is not an affirmative defense, but rather a true immunity to be raised pretrial." *See* Benjamin M. Boylston, Immune Disorder: Uncertainty Regarding the Application of "Stand Your Ground" Laws, 20 Barry Law Review 25, 34 (Fall 2014).

North Carolina's immunity statute is in the silent camp. It does not describe procedures for determining immunity or elaborate on the meaning of the term. The statute appears to distinguish between defensive force as an affirmative defense and defensive force as the basis for immunity, providing that a person who meets the statutory requirements for defensive force is "justified" in using such force and is "immune" from liability. The first term appears to afford the defendant an affirmative defense—a justification—against criminal charges, while the second term appears to afford the defendant something more. *See also* G.S. 15A-954(a)(9) (providing that on motion of defendant court must dismiss charges if defendant has been granted immunity by law from prosecution).

North Carolina's self-defense immunity provisions may differ in that they protect a person from criminal "liability" while other states' provisions protect a person from criminal "prosecution." *See, e.g.,* Fla. Stat. § § 776.032(a) (protecting person from criminal prosecution and civil action and defining criminal prosecution as including arresting, detaining in custody, and charging or prosecuting); Colo. Rev. Stat. § 18-1-704.5 (protecting person from criminal prosecution and civil liability but not defining terms). Whether the difference is legally significant is unclear.

Have other state courts interpreted their self-defense immunity statutes as giving the defendant a right to a pretrial hearing on immunity?

Yes. Although the courts differ on the requirements for such hearings, discussed below, they have found that their self-defense immunity statutes give defendants the right to a pretrial hearing to determine immunity. *See, e.g., People v.*

Guenther, 740 P.2d 971, 975 (Colo. 1987).

In what kinds of cases involving defensive force have courts found a right to a pretrial immunity determination?

The answer depends on the particular statute. For example, the Alabama Court of Criminal Appeals held that its immunity provision applies to all claims of self-defense, not just those involving a "stand-your-ground" defense. *Malone v. State*, 2016 WL 3136212 (Ala. Crim. App., June 3, 2016). The Colorado Supreme Court held that its immunity statute applies to occupants of dwellings who use force against an unlawful entry as provided in its statute. *Guenther*, 740 P.2d at 979.

North Carolina's immunity provision is included in both G.S. 14-51.2 and G.S. 14-51.3, which together cover defense of home, workplace, vehicle, and person. Therefore, regardless of its exact meaning, the immunity provision applies to the use of defensive force in compliance with either statute.

What is the standard of proof at a pretrial immunity determination?

Most courts have held that the defendant has the burden to establish immunity by a preponderance of the evidence. *See State v. Manning*, 2016 WL 4658956 (S.C., Sept. 7, 2016); *Bretherick v. State*, 170 So.3d 766, 779 (Fla. 2015); *Bunn v. State*, 667 S.E.2d 605, 608 (Ga. 2008); *Guenther*, 740 P.2d at 981; *see also Harrison v. State*, 2015 WL 9263815 (Ala. Crim. App., Dec. 18, 2015) (adopting this burden before statute was revised to impose this burden). Because the defendant has the burden of proof, presumably the defendant presents evidence first.

Courts taking this view have rejected other burdens making it easier or harder for the State to resist immunity motions. For example, the Florida Supreme Court held that the existence of disputed issues of material fact (a standard common to summary judgment motions in civil cases) does not warrant a denial of immunity. *See Dennis*, 51 So.2d at 462–63. Similarly, the Florida Supreme Court held that the existence of probable cause does not warrant a denial of immunity; the court reasoned that its legislature intended the immunity provision to provide greater rights than already existed under Florida law. *Id.* at 463. The Florida Supreme Court refused, however, to require the State to prove beyond a reasonable doubt that the defendant did not lawfully use defensive force, the standard at trial. *See Bretherick*, 170 So.2d at 775 (also citing decisions from other jurisdictions; two justices dissented).

Kansas and Kentucky appellate courts have held that the State need only establish probable cause that the defendant did not lawfully use defensive force. *See State v. Ultreras*, 295 P.3d 1020 (Kan. 2013); *Rodgers v. Commonwealth*, 285 S.W.3d 740, 756 (Ky. 2009). The Kansas Supreme Court has also held that a trial judge may set aside on immunity grounds a jury verdict of guilty. *See State v. Barlow*, 368 P.3d 331 (Kan. 2016).

What is the nature of the hearing?

In states in which the defendant has the burden of establishing immunity, the trial court holds an evidentiary hearing and resolves factual disputes. *See, e.g., Dennis*, 51 So.3d at 462–63; *Guenther*, 740 P.2d at 981. The South Carolina Supreme Court recently held that a judge may decide the immunity issue without an evidentiary hearing if undisputed evidence, such as witness statements, show that the defendant has not met his or her burden of proof. *See State v. Manning*, 2016 WL 4658956 (S.C., Sept. 7, 2016).

Kentucky and Kansas, which require only that the State establish probable cause that the defendant did not lawfully use defensive force, differ from each other. The Kentucky courts have held that an evidentiary hearing is not required and that the State may meet its burden with other record evidence. *See Rodgers*, 285 S.W.3d at 755–56. The Kansas Court of Appeals has held that an evidentiary hearing is required and that the rules of evidence apply at such hearings, but the judge should construe the evidence in a light favorable to the State, resolving conflicts in the evidence to the State's benefit and against immunity. *See State v. Hardy*, 347 P.3d 222, 228 (Kan. Ct. App. 2015), *review granted*, ___

P.3d ___ (Kan., Apr. 21 2016)

In all of the states, the court must dismiss the charges if the defendant prevails. *See also Fair v. State*, 664 S.E.2d 227, 230 (Ga. 2008) (holding that trial court may not reserve ruling until trial).

Is the defendant barred from relying on self-defense at trial if he or she loses a pretrial immunity motion?

No. Courts in other states have recognized that a defendant still may rely on defensive force as an affirmative defense at trial under the standards of proof applicable to the trial of criminal cases. *See, e.g., Bretherick*, 170 So.3d at 778; *Bunn*, 667 S.E.2d at 608. In North Carolina, the State has the burden at trial to prove beyond a reasonable doubt that the defendant did not lawfully use defensive force.

As the foregoing indicates, the North Carolina self-defense immunity provision raises several questions, which await further answers.

MITIGATION INVESTIGATION

9.4 Effective Sentencing Advocacy

The rules of evidence do not apply to sentencing hearings—any evidence that a court deems to have probative value may be received, including evidence of racial disparities. N.C. R. EVID. 1101(b)(3). Relevant information may include the client's cultural background; his or her experience with prejudice, racial profiling, or other forms of disadvantage; statistics reflecting racial disparities in the justice system; and social science evidence on the influence of implicit bias. In short, the door is open at sentencing in a way that it may not be at trial for defenders to place the full context of a client's life experience before the court and advocate for a just result. This section is not a comprehensive treatment of sentencing advocacy, but instead an outline of possibilities.

A. Early Advocacy

Sentencing advocacy begins at the outset of representation and lasts until the conclusion of your client's case. Rebecca Ballard DiLoreto, *Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process*, THE ADVOCATE, May 2008, at 15. In the initial client interview, counsel should begin to seek information not only about the charged offense, but also about the client's life, including his or her immigration status, children, public benefits, experiences with the police, cultural background, family obligations, mental health, substance abuse history, employment, housing, and educational background. Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, THE CHAMPION, July 2013, at 51, 52; *see also* The Bronx Defenders Arraignment Checklist, BRONXDEFENDERS.ORG (last visited Sept. 19, 2014). Such a "holistic" approach to advocacy may help to reduce potential racial disparities at sentencing and other stages of the case, and may have additional benefits, including:

1. An understanding of your client's life will strengthen your relationship with your client, particularly if he or she differs from you in terms of racial, ethnic, cultural, or socioeconomic background.

2. An early understanding of your client's background, community, and individual challenges and opportunities will strengthen your argument for pretrial release. Pretrial release may decrease the chances that your client will receive a sentence of incarceration. *See supra* Chapter 4, Pretrial Release.

3. Early understanding of your client's struggles, needs, and assets provides an opportunity to help the client get engaged in beneficial activities, employment, or programs that may serve as mitigating factors in plea negotiations and at the sentencing hearing. *See* James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9.

4. Implicit bias research indicates that bias is most pronounced when individuals are unwilling to consider the possibility that they may be influenced by bias. In contrast, humility about the possible influence of bias causes people to think more carefully

and deliberately and may minimize the influence of bias. *See generally* Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2007). In the context of indigent representation, this research suggests that listening carefully and making an effort to avoid prejudgments about the conditions of your client's life will minimize the risk that you will make race-based assumptions about his or her circumstances.

B. Data and Record Collection

Data collection. Defense attorneys can benefit from gathering data concerning the individuals and communities they serve. Defender offices may rely on interns, volunteers, paralegals, or investigators to collect the following information.

1. **Sentencing patterns in your district.** The biographical data collected on intake forms, including the client's charges, prior record level, and racial and ethnic identity, may be entered into a database with the client's identity removed, so that defense counsel can track outcomes received by various categories of clients. For example, during plea negotiations, defense counsel may present the prosecutor with any data showing that Black defendants disproportionately received active sentences for the charge in question over the previous year in comparison with White defendants at the same prior record level. Sentences may be influenced by decisions that occur at earlier stages of the criminal justice process; therefore, it is important to record relevant data from all stages of a case, including the original charges, plea offers, plea entered, and sentences as well as any presentencing report or sentencing plan prepared before sentencing. *See infra* "Presentence reports and sentencing plans" in § 9.4E, Sentencing Hearing Advocacy.

2. **Favorable outcomes.** The office may maintain a file containing favorable plea offers and sentences that clients have received, including departures from presumptive ranges, deferred prosecutions, opportunities to receive substantial assistance departures pursuant to G.S. 90-95(h)(5), and charge dismissals, to use in plea negotiations and sentencing hearings. This data should include the race and ethnic background of the clients and the identity of the prosecutors and judges involved. The paralegal, administrative assistant, intern, or investigator tasked with collecting such information should make note of cases in which prosecutors declined to habitualize clients or declined to pursue trafficking charges.

3. **Sentencing patterns of judges.** Defenders may collect data on the sentencing patterns of judges, including which judges have found extraordinary mitigation pursuant to G.S. 15A-1340.13(g), which judges have a record of granting community-based sentences, and which judges have been receptive to arguments about implicit biases or sentencing disparities.

4. **Statewide averages.** In addition to collecting data, defenders may make use of available data sources reflecting the racial composition of those convicted of various offenses and the average sentences received for the charges your client faces. The

North Carolina Sentencing and Policy Advisory Commission prepares annual reports reflecting the type of and length of sentences imposed for all convictions. *See* North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing Statistical Report for Felonies and Misdemeanors,* NCCOURTS.ORG (last visited Sept. 19, 2014); *see also* Jamie Markham, *Sentencing Commission Annual Statistical Report*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (Sept. 19, 2013) (discussing the content and utility of the Commission's annual reports). Another useful compilation of North Carolina criminal justice data disaggregated by race can be found at the North Carolina Advocates for Justice Racial Justice Task Force page. For example, if your client is facing marijuana charges in Durham County, you may consider obtaining statistics of overall enforcement of marijuana laws in Durham County. *See, e.g.*, Ian Mance, Southern Coalition for Social Justice, *Durham Police Department Stop-and-Search Data* (on file with authors) (reporting that, in Durham, "African-Americans . . . are approximately four times as likely as whites to be arrested on a misdemeanor marijuana possession charge, despite strong evidence that both whites and blacks use the drug at roughly the same rate (11.7% v. 12.7%)"). While some of the data sources listed above reflect arrest and/or conviction rates rather than sentencing patterns, the information may be useful to reference in plea negotiations and at sentencing hearings.

5. **"School-to-prison pipeline."** You may consider collecting information about whether Black students are more likely to have school disciplinary problems referred to court, which leads to the development of criminal records at a young age. ASHLEY M. NELLIS, JUVENILE JUSTICE EVALUATION CENTER, SEVEN STEPS TO DEVELOP AND EVALUATE STRATEGIES TO REDUCE DISPROPORTIONATE MINORITY CONTACT (DMC) 16 (2005). If your client's criminal history was a result of a "school to prison pipeline" phenomenon, counsel can share the client's experience with the prosecutor along with data reflecting such disparities. *See, e.g.*, Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, POVERTY AND RACE (Poverty & Race Research Action Council, Washington D.C.), Jan.–Feb. 2011, at 5; SUSAN MCCARTER & JASON BARNETT, THE SCHOOL-TO-PRISON PIPELINE: IMPLICATIONS FOR NORTH CAROLINA SCHOOLS AND STUDENTS 15 (2013) (according to the N.C. Department of Public Safety, Division of Juvenile Justice, for students aged 15 and younger, "there were a total of 16,000 school-based delinquency complaints filed in 2011 and of this total, 46.2% of the complaints were filed against African-American students," who made up 26.8% of the student population).

The recently formed North Carolina Public Defender Committee on Racial Equity (NC PDCORE) may be able to assist in creating a standardized collection process for aggregating and analyzing this data for public defender offices. *See* NC PDCORE Website, NCIDS.COM (last visited Sept. 19, 2014).

Record collection. It is critical to gather records relevant to potential mitigating factors, any alleged aggravating factors, and the sentence proposed. When a defense attorney fails to present evidence reflecting factors that may improve a defendant's prospects at sentencing, she leaves an opening for assumptions about the defendant, potentially based

on racial or ethnic stereotypes, that may influence the discretionary process of sentencing. The following is a non-exclusive list of the type of records that may be useful:

- Employment history: paychecks, attendance history, W-2 forms, letter from employer
- Proof of education: transcript, class schedule, letter from registrar
- Medical/mental health records
- Any certifications and licenses
- Any evaluation and treatment documents
- Military documents
- Client's financial documents

See Robert C. Kemp, III, Art of Sentencing (Feb. 15, 2013) (training material presented at New Felony Defender Training, 2013).

C. Pretrial Strategies

Poverty can negatively affect defendants at multiple stages of the case, including the sentencing phase. Poor defendants, the majority of whom are racial or ethnic minorities, are less likely to be released pretrial, more likely to be convicted, more likely to be sentenced to a term of incarceration, and more likely to receive lengthier sentences than similarly situated offenders with greater financial resources. *See, e.g.*, Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 897 (2003) (finding that Black and Latino defendants are "significantly less able to post bail"); GERARD RAINVILLE & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000 24 & Table 24 (2003) (concluding that defendants detained pretrial achieve worse outcomes).

Defenders can play an important role in connecting indigent clients to services that address their extralegal needs and may lead to mitigating evidence for sentencing. Assessing clients' needs and helping to identify appropriate community-based programs, activities, and services is an important aspect of client advocacy. *See* Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, THE CHAMPION, JULY 2013, at 51, 52 (observing that "[s]eamless access to legal and nonlegal services . . . is crucial for clients from historically disenfranchised Black and Latino communities" and that lack of access to needed services has contributed to "instability, poverty, and criminal justice involvement"); *see also* ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 15 (2d ed. 2008) (noting that, in assessing how racial minorities may be disadvantaged at the sentencing stage of a case, court actors should consider whether a "range of community-based alternatives to detention [are] available in the lower and superior courts [and whether] this range [is] offered at the same rate to minorities and nonminorities with similar offenses and offense histories"). Pretrial efforts by defenders may include:

1. Staying informed of available community-based programs, including those that may be particularly effective at serving racial or ethnic minorities, such as programs offered in multiple languages. To the extent possible, determine the record of success of the programs under consideration, and your client's history, if any, with similar programs. One useful compilation of such programs is the Community Treatment and Resource Provider Directory an online directory maintained by the Office of Indigent Defense Services. *See also* Jamie Markham, *County Resource Guide*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (September 26, 2013).

2. Ensuring that the programs under consideration are culturally appropriate for your client. For example, if your client is Spanish-speaking, ensure that the drug treatment program under consideration provides programs in Spanish.

3. Developing a specialized sentencing advocate or advocates in your office to investigate and develop mitigation evidence and address extralegal needs of clients.

4. Considering whether to seek funding for a mitigation specialist. In serious cases—including Class A, B1, and B2 felonies—defense attorneys should consider seeking funding to hire a mitigation specialist. Though these specialists typically work on capital cases, because of the stiff penalties attached to serious, non-capital felonies, you may be able to persuade a judge to approve funding for a mitigation specialist. Mitigation specialists are trained and experienced in obtaining evidence that may be difficult or time-consuming for a lawyer to obtain, including school records, and affidavits from teachers, neighbors, church officials, or others who can reflect on the struggles faced by your client.

5. Considering whether it is in your client's interest to seek a presentence report or sentencing plan. *See infra* § 9.5E, Sentencing Hearing Advocacy.

D. Sentence Negotiation Strategies

Nationwide, approximately 95% of all felony convictions in state courts result from guilty pleas. MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004 1 (2004). For this reason, few stages of the criminal process are more crucial than plea negotiations. Since plea agreements in North Carolina may include a specific negotiated sentence, negotiations with prosecutors require the same knowledge, skills, and preparation required to handle a sentencing hearing. The following techniques may be helpful in addressing considerations of race during plea negotiations:

1. By addressing the subject of race with the prosecutor when pertinent, you may be able to reduce the likelihood that either of you will allow implicit biases to affect decision-making in the sentence negotiation process. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) (summarizing research findings indicating that open discussions of race can reduce the operation of implicit biases).

2. In negotiating a sentence, it may be useful to describe to the prosecutor what you have learned about the client's circumstances and the pressures he or she confronts, e.g., the influence of poverty, racial profiling, mental illness, or family circumstances. *See* James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9; *see also* Rebecca Ballard DiLoreto, *Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process*, THE ADVOCATE, May 2008, at 15, 20 (describing plea negotiations as a time when the prosecutor may be persuaded to "see helping your client as part of a larger systemic effort to do justice"). If defense counsel has a mitigation video about the client (*see infra* "Practice note" in § 9.4E, Sentencing Hearing Advocacy (discussing mitigation videos)), counsel may consider sharing the video with the prosecutor during plea negotiations.

3. Present the prosecutor with any statistics, disaggregated by race and ethnicity, of disparate sentencing and/or enforcement associated with the charges your client faces. *See supra* § 9.4B, Data and Record Collection. Even where such evidence may be insufficient to support a successful equal protection claim, prosecutors may be persuaded to reduce charges in light of such information. *See supra* "Case study: Pretextual traffic stops" in § 2.6B, The Fourth Amendment and Pretextual Traffic Stops (describing case in which public defender presented evidence of disparate enforcement to a prosecutor, who thereafter agreed to drop charges against her client).

4. Alert the prosecutor where there is evidence or data to suggest that your client's prior criminal history may have been influenced by improper racial considerations. *See supra* § 9.4B, Data and Record Collection.

5. Ensure that the opportunity to provide substantial assistance does not differ depending on the race of the defendant. For example, in cases involving drug trafficking charges, research from the federal criminal justice system indicates that Black and Latino offenders were significantly less likely to be recommended for substantial assistance departures, even when offense severity, criminal history, and the tendencies of the sentencing judge were taken into consideration. David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 J.L. & ECON. 285, 308–09 Table 10 (2001). It has been suggested that these disparities result from the tendency to assign qualities such as "sympathetic" or "salvageable" disproportionately to White offenders. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992) (introducing the concept of a "salvageable" or "sympathetic" defendant into the analysis of substantial assistance departures). The discretionary decision regarding a substantial assistance departure is a crucial one in North Carolina, as it is essentially the only way that people convicted under drug trafficking statutes in North Carolina (carrying mandatory minimum terms of imprisonment and fines) can receive a mitigated sentence. Jamie Markham, *Options to Mitigate Sentences for Drug Trafficking*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (August 15, 2013).

6. Be prepared with any data showing that White defendants facing similar charges have received more lenient sentences than faced by your minority client. *See supra* § 9.4B, Data and Record Collection.

7. Know your client well enough before plea negotiations to distinguish him or her from potential racial or ethnic stereotypes. For example, counter possible stereotypes of your client as a gang member because he is a young, Latino male who lives in an area where the Latin Kings gang is active. Evidence such as school attendance records, work records, or a letter from a local leader such as a pastor may assist in individualizing the client. Testimony from such character witnesses could also be included in a mitigation video. *See infra* "Practice note" in § 9.4E, Sentencing Hearing Advocacy.

8. If you present evidence of racial disparities to the prosecutor in negotiating a suggested plea and sentence, avoid stating or implying that the prosecutor is responsible for the disparities; doing so misstates the possible causes of disparities and may provoke defensiveness. Instead, frame the sentence you seek as an opportunity to offset factors that may have contributed to racial disparities (*see supra* § 1.3, Potential Factors Relevant to Racial Disparities in the Criminal Justice System), stressing that the sentencing stage provides the court system with a unique opportunity to achieve a just result for all involved.

E. Sentencing Hearing Advocacy

Effective sentencing advocacy involves the development of a sentencing theory that counsel can present to the judge in a sentencing hearing and/or sentencing memorandum. A sentencing theory serves to convince the court that the sentence you are asking the court to impose serves the interests of all relevant stakeholders, including the victim, the community, and the defendant. For example, if your theory is that your client suffers from drug addiction and the sentence you seek is an intermediate sentence at a drug treatment facility, be prepared to explain to the court how this result is in the best interests of all relevant stakeholders. *See* THE SENTENCING PROJECT, TEN PRINCIPLES OF SENTENCING ADVOCACY (2003) (listing, among other principles, that sentencing advocacy is "an exercise in problem-solving" and "opposes racial disparity and cultural bias"); *see also* James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9 (problem-solving advocacy views the offense as "a problem for society, for the community, for the victim, for the court and for the defendant," and attempts to craft a sentencing recommendation that benefits as many of those parties as possible).

Practice note: In recent years, some defense attorneys have created mitigation or sentencing videos to show during sentencing hearings and plea negotiations. *See* Joe Palazzolo, *Leniency Videos Make a Showing at Criminal Sentencings: Some Lawyers Supplement Letters of Support with Mini-Documentaries, Effectiveness is Debated*, WALL STREET JOURNAL, May 29, 2014 (quoting assistant federal defender Doug Passon as stating that, when sentencing videos are introduced, "[t]he sentences are almost always

better than they would otherwise be"). Mitigation video pioneer and assistant federal public defender Doug Passon, who made his first sentencing video in 1995, observes that such videos can be effective at bridging cultural gaps between defendants and court actors. *See* Doug Passon, *Using Mitigation Videos to Bridge the Cultural Gap at Sentencing*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 979, 981 (Linda Friedman Ramirez ed., 3d ed. 2010) (stating that criminal defense attorneys should make empathy the focus of sentencing presentations to "bridge the chasm of the cultural divide" and effectively convey the client's circumstances to the judge, which may include poverty, abuse, mental illness, addiction, and other suffering;); *see also* Regina Austin, "Not Just a Common Criminal": The Case for Sentencing Mitigation Videos (April 15, 2014) (University of Pennsylvania Law School Faculty Scholarship Paper). These videos may be particularly useful at illustrating circumstances such as the impoverished conditions of a defendant's home or neighborhood, and may be a good way of introducing the voices of character witnesses who face difficulties coming to court or preparing a written statement on behalf of the defendant. While some film-makers charge between $5,000 and $20,000 for producing such videos, it is possible for defenders or investigators to produce modest videos on their own. *See* Doug Passon, *Using Mitigation Videos to Bridge the Cultural Gap at Sentencing*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 979, 996 (Linda Friedman Ramirez, ed., 3d ed. 2010). Examples of sentencing videos may be viewed online. *See, e.g.*, *Don Ayala Sentencing Documentary*, NEW ORLEANS TIMES-PICAYUNE, Sept. 1, 2010 (sentencing video shown to a federal judge who ultimately imposed a term of probation on a defendant facing eight years in prison under federal sentencing guidelines for voluntary manslaughter).

Presenting evidence aimed at obtaining a favorable sentence. Defendants are entitled to sentencing hearings, during which the formal rules of evidence do not apply. G.S. 15A-1334. In a sentencing hearing, any evidence that a court deems to have probative value may be received. N.C. R. EVID. 1101(b)(3); *see also State v. Brown*, 320 N.C. 179, 203 (1987) ("the touchstone for propriety in sentencing arguments is whether the argument relates to the character of the [defendant] or the nature [or circumstances of the crime"). The court must consider any evidence presented by the defendant of mitigating factors. Mitigating factors must be proven to the court by a preponderance of the evidence. G.S. 15A-1340.16(a); *see State v. Knott*, 164 N.C. App. 212 (2004) (refusal to allow defense counsel an opportunity to present evidence of mitigating factors constitutes plain error). Twenty specific mitigating factors are set forth in G.S. 15A-1340.16(e), and the statute also allows judges to find "[a]ny other mitigating factor reasonably related to the purposes of sentences." G.S. 15A-1340.16(e)(21); *see also* G.S. 15A-1340.12 (describing the purposes of sentencing). This "catch-all" provision gives defense attorneys creative freedom to raise concerns about race that may be related to sentencing, including the potential impact of structural racialization and implicit bias (discussed *supra* in Chapter 1) and any disparity that may have affected an earlier stage of the case (for example, the inability of the client to obtain pretrial release). The following are possible strategies for addressing at sentencing the cumulative effects of any racial disparities:

1. Explain how any hardships associated with the defendant's racial, ethnic, or cultural background may support a reduced punishment. Some of the statutory mitigating factors, including successful completion of a drug treatment program, a positive employment history, or a defendant's support of his or her family, may carry more weight when presented alongside the defendant's struggles against racial barriers, poverty, or disadvantage. For example, in *United States v. Decora*, 177 F.3d 676 (8th Cir. 1999) and *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993), the extreme difficulties of life on an Indian reservation, viewed alongside the defendants' records, which included attributes such as community support, limited criminal history, and educational accomplishment, supported reduced sentences.

2. In cases in which you are concerned that racial stereotypes may influence the sentence under consideration, incorporate a race-switching exercise into your argument at the sentencing hearing or invite the court to engage in a race-switching exercise. A race-switching exercise is a mental exercise that involves switching the race of the parties to determine whether race may have played a role in assessing the evidence. *See supra* § 8.6D, Jury Instructions; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 482 (1996) (proposing race-switching jury instruction); James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 24 (describing a case in which a judge noted "that he personally engaged in a race-switching exercise whenever he was called upon to impose sentence on a member of a minority race, to insure that he was not being influenced by racial stereotypes"). To avoid suggesting that the judge alone may be affected by implicit bias, counsel may wish to present this as an exercise for the entire courtroom. For example, counsel may posit: "All of us who work in the court system, the prosecutor and myself included, need to ask ourselves whether we would be doing or thinking anything different today if the defendant were White and/or the victim were Black; as members of the bar sworn to uphold the Constitution, we can't allow race to play a role at sentencing."

3. Inform the judge of any cultural factors that may be relevant to an evaluation of defendant's blameworthiness. For example, in one case, a Korean man argued for a downward departure from the federal sentencing guidelines on the basis that his upbringing in Korea caused him to believe that the money he provided to an Internal Revenue Service agent in the form of a bribe was legally and socially obligatory. *United States v. Yu*, 954 F.2d 951, 953 (3d Cir. 1992).

4. Explain to the court how race may have affected earlier stages of the process in your client's case, and that sentencing provides an opportunity to redress any taint. *See, e.g.*, Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 380 (1994) (arguing that race should be considered as a mitigating factor where it is likely that racial discrimination occurred at an earlier stage of the case); *see also* Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, THE ADVOCATE, May 2008, at 22. For example, if you are able to show that a similarly situated White co-defendant was released

pretrial, completed drug treatment, and based on that treatment, received a reduced sentence, while your Black client was detained pretrial with no such opportunity to engage in productive activities, the judge may consider this as mitigating evidence. *See also* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1960 (1988) (arguing that "to help remedy the pervasive racial discrimination in our criminal justice system, judges should be given discretion to take into account an offender's race as a mitigating factor").

5. Explain to the court whether your client's prior criminal history may have been influenced by race. For example, in *U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998), a federal judge imposed a reduced sentence on a Black defendant based on a finding that most of the defendant's prior convictions arose out of traffic stops conducted by the Boston police, and that the unlawful practice of racial profiling may have contributed to his prior record. *See supra* § 2.2, Overview of Racial Profiling Concerns (discussing recent studies regarding racial disparities in traffic stops in North Carolina).

6. Forecast for the judge—based on available statistics, your client's history, and familiar anecdotes—the likely future your client faces if he or she receives the non-incarcerative, community-based, or reduced sentence you seek, and contrast it with decreased life chances he or she faces if sentenced to lengthy incarceration. *See* Robert C. Kemp, III, Art of Sentencing (Feb. 15, 2013) (training material presented at New Felony Defender Training, 2013). For example, you could explain to the judge that a prison sentence will result in the loss of your client's job, while a community or intermediate sentence will allow him to continue working and providing for his family. Additionally, you could present the court with evidence showing that recidivism rates are generally lower for probationers than for prisoners in North Carolina. NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, CORRECTIONAL PROGRAM EVALUATION: OFFENDERS PLACED ON PROBATION OR RELEASED FROM PRISON IN FISCAL YEAR 2008/09 27 (2012) (finding that probationers in FY 2008/2009 were less likely than people released from prison to be rearrested during both one-year and two-year follow up periods). Explain to the judge any concerns about any contemplated sentences that are in conflict with your client's cultural values and individual characteristics. For example, a devout Muslim client may not succeed in a drug treatment facility that includes mixed gender treatment groups.

7. Inform the judge of community-based alternative sentences that meet the needs of your client and address the problems underlying the crime of conviction. *See* North Carolina Office of Indigent Defense Services, Community Treatment and Resource Provider Directory, NCIDS.COM (last visited Sept. 22, 2014). Some judges may be reluctant to impose probationary sentences because they do not know of local programs for which the defendant is eligible. *See* Jamie Markham, *County Resource Guide*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (September 26, 2013). You can preliminarily evaluate your client's eligibility for programs and services and provide

information to the judge regarding such matters as the proximity of the proposed community-based program to the client's home, available modes of transportation, and available spots for new participants. Knowledge of available, appropriate programs for which your client is eligible may, "in a close case, inform the judge's decision between an active and probationary sentence." *Id.*

8. Stress to the judge the importance of taking into account the defendant's resources to avoid penalizing defendants who are poor, the majority of whom are racial minorities. For example, you may want to inform the judge of cases in which similarly situated defendants with private counsel have been able to craft desirable sentences funded by their own financial assets and argue that your client's sentence should not depend on his or her resources. Additionally, if your case is one in which your client may be ordered to pay restitution, present records regarding financial hardship, e.g. foreclosure records, a spreadsheet reflecting income vs. expenses, bankruptcy documents, etc., since the judge must take the defendant's ability to pay into consideration in ordering restitution. G.S. 15A-1340.36.

9. Explain to the judge the particular concerns about disparities in certain contexts, such as marijuana charges, drug trafficking charges, habitual felon charges, and substantial assistance departures. Sources for such data include your own collected reports of offender data as well as statistics collected by the NCAJ's Racial Justice Task Force, the Governor's Crime Commission, and the Department of Public Safety. This type of information has been referred to as "social framework evidence," and has been recognized as an important tool in mitigating the effects of race on criminal justice outcomes. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013). Argue that evidence of disparities provides support for a reduced sentence, as recognized by the U.S. Supreme Court in *Kimbrough v. United States*, 552 U.S. 85 (2007) (upholding district court's consideration of sentencing disparities as a basis for imposing a reduced sentence in a crack-cocaine case).

10. Make a formal presentation of mitigating evidence—which may include testimony from the client and witnesses, school or employment records, and a defense sentencing memorandum—aimed at constructing an individualized narrative supporting your sentencing recommendation. This approach may counter the potential effects of implicit bias by distinguishing your client from potential stereotypes, promoting a closer examination of your client's circumstances, and averting automatic or "snap" judgments. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1177 (2012).

11. Provide the sentencing judge with evidence about implicit racial bias. Jonathan Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions* 1040 (Working Paper, January 16, 2014). Because of the wide range of permissible considerations at sentencing, defense attorneys should use the opportunity to point out "how subconscious bias can affect how judges sentence." *Id.* This can be done by

directing judges to social science research on implicit biases and their potential influence on judges. *Id.; see, e.g.*, Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (study that involved administering the Implicit Association Test to trial judges concluded that judges do, in fact, harbor implicit racial bias).

12. Inform the judge about the connection between discretion and the operation of biases, including in evaluation of mitigating and aggravating factors. In the context of capital sentencing by juries, the U.S. Supreme Court recognized how the discretion involved in determining a criminal sentence provides "a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986). For example, the Court explained that someone "who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved . . . aggravating factors . . . [and] . . . might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case." *Id*. Risks of implicit biases may be present when a defendant is subject to a discretionary sentencing determination by a judge. *See, e.g.*, David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012) (finding that judges differ in the degree to which race influences their decisions regarding whether to incarcerate a defendant); *see also People v. Wardell*, 595 N.E.2d 1148, 1155 (Ill. App. Ct. 1992) (just as the trial judge must "shield the jury from considering racially prejudicial remarks by the participants during trial, so also must the judge at sentencing safeguard against racial considerations").

13. Learn the prosecutor's sentencing position before the sentencing hearing and devise a plan for responding to the aspects with which you disagree. If the prosecutor offers improper evidence during a sentencing hearing, object to the evidence as irrelevant to the purposes of sentencing. *See* G.S. 15A-1340.12; *see also People v. Riley*, 33 N.E.2d 872, 875 (Ill. 1941) (sentencing judge "owes the same duty to the defendant to protect his own mind from the possible prejudicial effect of incompetent evidence that he would owe in protecting a jury from the same contaminating influence").

Presentence reports and sentencing plans. Where the preparation of a presentence report by a probation officer or a sentencing plan by a sentencing specialist is an option, defense attorneys should consider whether one of these options may benefit the client. *See* Jamie Markham, *Presentence Reports and Sentencing Plans*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (August 27, 2010).

When a probation officer prepares a presentence report, defense attorneys should be involved in the preparation of the report to the extent possible. Defendants and defense attorneys have a right to view any presentence report prepared by probation. G.S. 15A-1333(b). Defendants should request to see any report before it is presented to a judge, and to have an opportunity to advocate to the preparer of the report for changes to any irrelevant or inaccurate content. While the preparation of presentence reports by

probation is permitted by statute, in practice, it rarely happens. NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, PRESENTENCE INVESTIGATIONS FEASIBILITY STUDY REPORT: SESSION LAW 2009-451, SECTION 19.14 (2010) (reporting that probation officers are rarely asked to prepare presentence reports, and that some superior and district court judges were unaware that existing law allowed for their preparation).

When reviewing a presentence report, be alert to any depictions of your client in an unflattering or racially stereotypical manner. For example, in a qualitative study performed in a northwestern city, researchers found that probation officers' assessments of motivations for offending differed by race in presentence reports in juvenile cases. In particular, the delinquency of Black youth was typically explained "as stemming from negative attitudinal and personality traits," while delinquent behavior of White youth "stressed the influence of the social environment." ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 14 (2d ed. 2008). "Black youth were judged to be more dangerous, which translated into harsher sentences than for comparable white youth." *Id*.

As a result of the elimination of the statewide Sentencing Services program, which evaluated defendants for possible non-incarcerative sentences at the request of the defendant or the court, independent sentencing specialists are available to produce sentencing plans only in certain counties. Where such specialists are available, counsel must cite specific grounds for preparation of a plan and a judge must determine whether one is warranted, at a cost of $500 (paid by the Office of Indigent Defense Services). To find out if there is a sentencing specialist in or near your area who is available to be appointed by the court to prepare a sentencing plan, consult the Community Treatment and Resource Provider Directory, an online directory maintained by the Office of Indigent Defense Services. Regardless of whether a sentencing specialist is available in your area, you may apply to the court for funds to hire a mitigation specialist and offer information obtained by such a specialist to the court during sentencing. *See* Ex Parte Motion to Hire Mitigation Investigator, available at www.ncids.org (select "Training and Resources," then "Motions Bank, Non-Capital").

Anecdotal evidence suggests that, in counties where sentencing specialists are available, defense attorneys tend to seek their services when the sentencing grid calls for an active or intermediate sentence, for assistance in structuring an appropriate intermediate sentence. The sentencing specialist's plan generally will include detailed background information about the client, a risk assessment, and available treatment options. In some cases, the most useful function a sentencing specialist can serve is getting the client into a treatment program, which may be difficult for the defense attorney to arrange. Consult with the sentencing specialist for further details about the process and requirements for obtaining a sentencing plan.

FACT SHEET
October 2017

Adverse Childhood Experiences Among US Children

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

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

About the Study

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

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

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

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

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

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

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

*NH=Non-Hispanic

Key Findings

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

References

1. NSCH ACEs Measure: http://www.academicpedsjnl.net/article/S1876-2859(17)30324-8/pdf
2. Shonkoff, et al: https://www.ncbi.nlm.nih.gov/pubmed/22201156
3. Arkin, et al: https://www.rwjf.org/content/dam/farm/reports/reports/2014/rwjf409002#page=44
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5. RWJF Commission: http://www.commissiononhealth.org/Recommendations.aspx
6. Sege, et al: http://www.academicpedsjnl.net/article/S1876-2859(17)30107-9/pdf
7. Jones, et al.: http://doi.org/10.2105/AJPH.2015.302630
8. Halfon, et al: http://www.academicpedsjnl.net/article/S1876-2859(16)30497-1/pdf
9. Pachter, et al: http://www.academicpedsjnl.net/article/S1876-2859(17)30168-7/pdf
10. Porter, et al: http://www.academicpedsjnl.net/article/S1876-2859(16)30496-X/pdf
11. Brown, et al: http://www.academicpedsjnl.net/article/S1876-2859(17)30015-3/pdf
12. Hargreaves, et al: http://www.academicpedsjnl.net/article/S1876-2859(17)30150-X/pdf
13. Davis, et al: http://www.academicpedsjnl.net/article/S1876-2859(16)30532-0/pdf
14. Stevens/ACES Connection: http://www.academicpedsjnl.net/article/S1876-2859(16)30556-3/pdf
15. National Child Traumatic Stress Network: http://www.nctsn.org/resources
16. Sesame Street in Communities: https://sesamestreetincommunities.org/
17. Provider Resources: http://www.cahmi.org/wp-content/uploads/2015/01/ACEs-Resource-Packet_all-pages_12_06-16.pdf
18. Bruner, et al: http://www.academicpedsjnl.net/article/S1876-2859(17)30352-2/pdf
19. Ellis, et al: http://www.academicpedsjnl.net/article/S1876-2859(16)30552-6/pdfBruner
20. Jones, et al: http://www.academicpedsjnl.net/article/S1876-2859(16)30423-5/pdf
21. Burke Harris: http://www.academicpedsjnl.net/article/S1876-2859(16)30505-8/pdf
22. Rosenbaum: http://www.academicpedsjnl.net/article/S1876-2859(17)30111-0/pdf
23. National Agenda: http://www.academicpedsjnl.net/article/S1876-2859(17)30354-6/pdf
24. Beckman: http://www.academicpedsjnl.net/article/S1876-2859(16)30420-X/pdf
25. New Science of Thriving: http://bit.ly/2fasOEe

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

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

Methods Notes

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

About the Child Adolescent Health Measurement Initiative

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

Acknowledgements

Work to conduct this study and prepare this report was supported through grants from the Robert Wood Johnson Foundation and the Children's Hospital Association in partnership with Academy Health.

CAHMI
The Child & Adolescent Health Measurement Initiative

Robert Wood Johnson Foundation

CHILDREN'S HOSPITAL ASSOCIATION

AcademyHealth

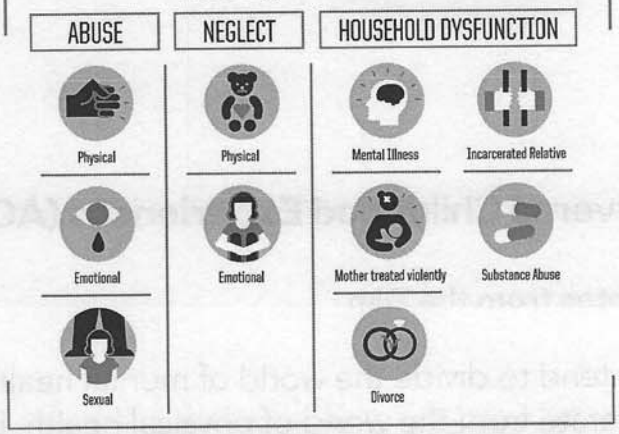
info@cahmi.org www.cahmi.org @CAHMI2Thrive

THE TRUTH ABOUT ACEs

WHAT ARE THEY?

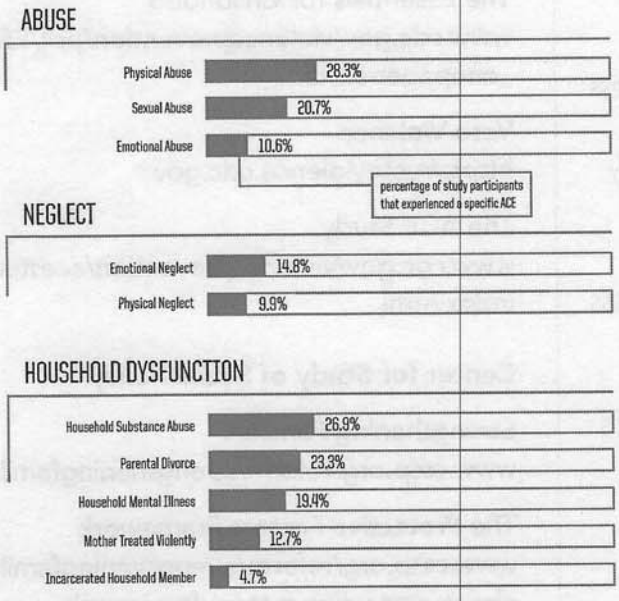
ACEs are ADVERSE CHILDHOOD EXPERIENCES

The three types of ACEs include

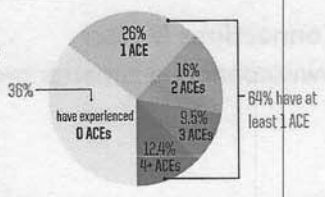


HOW PREVALENT ARE ACEs?

The ACE study revealed the following estimates:*

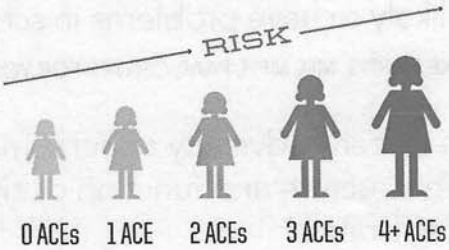


Of 17,000 ACE study participants:

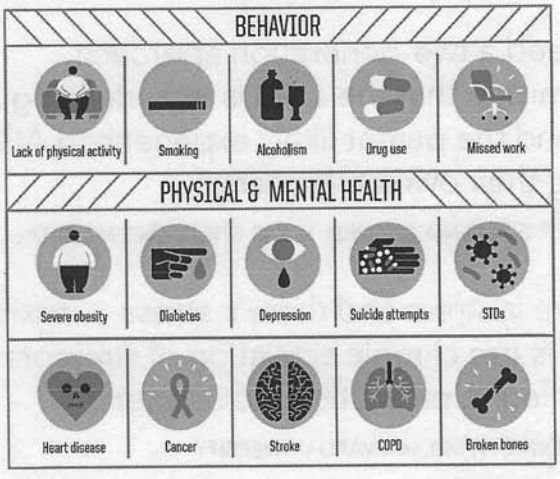


WHAT IMPACT DO ACEs HAVE?

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



Possible Risk Outcomes:



rwjf.org/aces

Robert Wood Johnson Foundation

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

MAKING GREAT PLACES

Advocates for Health in Action · WAKE COUNTY · the YMCA

GENEROUSLY HOSTED BY Marbles

Adverse Childhood Experiences (ACEs)

Quotes from the Film

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

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

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

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

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

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

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

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

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

JACK SHONKOFF, MD, HARVARD UNIVERSITY

Resources

AHA Website
www.AdvocatesForHealthInAction.org

The ACES Connection
www.acesconnection.com

Centers for Disease Control and Prevention

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

Veto Violence
https://vetoviolence.cdc.gov

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

Center for Study of Social Policy

Strengthening Families
www.cssp.org/reform/strengtheningfamilies

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

Connections Matter
www.connectionsmatter.org

Advocates for Health in Action

Adverse Childhood Experience (ACE) Questionnaire

Finding your ACE Score ra hbr 10 24 06

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Psychiatric Clinic Follow-up Form

(?)

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

Date/Time [redacted] @ 1120

Current Medications

NO 4 — can often see withdrawal prot.

Complaints

Last seen by Ms Winter 5/9/17 (see note) removed on 4 [illegible]

Side Effects

Per 5/15/17 nursing note + verbal report — pt became agitated, "upset" after receiving negative news from a family member & began banging & kicking door → SW

Suicide Precautions

☒ Yes ☐ No

Continue Precautions

☐ Yes ☐ No 4 [illegible]

Changes in Situation

[illegible] calm & cooperative on 5/9/17 & no signs of [illegible] (scheduled to be seen by [illegible] [illegible] for consideration of → gen pop) Report of [illegible] calm the whole time post Hx Rx [illegible] [illegible] like to stay in 4 [illegible] the whole time, We can try the meds & "I heard some bad stuff [illegible]" No signs of self injury, [illegible] to [illegible] a seat [illegible]

Mental Status Exam

gait steady

speech, nl [illegible]

[illegible] down

[illegible] well [illegible], [illegible], [illegible]

affect [illegible]

∅ [illegible], [illegible], F/F [illegible]

alert

o/x

[illegible] (Ativan)

Conc/memory [illegible]

no [illegible]

no [illegible]

IMPRESSION

Some degree of manipulation [illegible] when asked "my [illegible] seems to [illegible] a relationship [illegible] my [illegible]"

Bipolar NOS [illegible]

[illegible] NOS

PLAN

1) Stop S.W.

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

3) Begin 4 [illegible]
[illegible] 40 [illegible] PO with dinner

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

[signature]
Consultant Signature

WAKE COUNTY DETENTION FACILITY
Medical Department

PROGRESS NOTES

All entries must be signed and dated

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

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

Psychiatric Clinic Follow-up Form

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

BK [redacted]

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

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

Complaints
Pt said Not wanting meds on outside.

Side Effects
Never took meds prescribed.

Suicide Precautions
☒ Yes ☐ No

Continue Precautions
☐ Yes ☐ No

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

Mental Status Exam 21 y/o ♂ who is alert + OR x3 + OK MA + P + Not H/S or ID + has ↓ Paranoia + Denies A/V Hal, del. Tl of [illegible] + No FOI or LOA

IMPRESSION I BPAD NOS R/I Cocaine Use D/O [illegible] since 01/17
II PDNOS
III LBP + Lt Ft Pain

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

Return to Clinic: ______ [signature]
Consultant Signature

17.047-2/23/00

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

11/27/2013

STUDENT INFORMATION

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

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

SCHOOL INFORMATION

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

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

Check courses and grades

CREDIT HISTORY

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

UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS MINIMUM ADMISSION REQUIREMENTS REMAINING

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

PERFORMANCE INFORMATION

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

TESTING INFORMATION

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

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

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

CURRICULUM-RELATED WORK EXPERIENCE
No Data For Student

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

IMMUNIZATION INFORMATION

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

ATTENDANCE INFORMATION

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

!?

PREVIOUS SCHOOLS INFORMATION

No Data For Student

Signature of Principal or Designee Certifying This Transcript

Name: _____ Date: _____

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

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

STORYTELLING AND VISUAL AIDES AT SENTENCING

If You Build It, They Will Come....

Creating and Utilizing a Meaningful Theory of Defense

by
Stephen P. Lindsay[1]

Introduction

So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself "why me?" "Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. You reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to angel status. Just as you think a change in profession might be in order, your co-worker steps in the door -- new file in hand -- lets out a piercing howl, and says "this one is the dog of all dogs. The mutha of all dogs." Alas. You are not alone.

Dog files bark because there doesn't appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa (Kansas?). *If you build it, they will*

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[1] Stephen P. Lindsay is a solo practitioner in Asheville, North Carolina. He can be reached at (828)273-0869 and/or persuasionist@msn.com. Lindsay is a faculty member with the National Criminal Defense College in Macon, Georgia, lectures and teaches in numerous states and on behalf of several organizations including the NACDL, the NLADA, and the Institute of Criminal Defense Advocacy in San Diego, California.

come... And they came. And they watched. And they enjoyed. Truth be known, they would come again if invited -- even if not invited. Every dog case is like a field of dreams. Nothing to lose and everything to gain. Out of each dog case can rise a meaningful, believable, and solid defense. A defense that can win. But as Kevin Costner's wife said in the movie, [I]if all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

WHAT IS A THEORY AND WHY DO I NEED ONE?

Having listened over the last twenty years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear that there exists great confusion as to what a theory is and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. They are, though, very different concepts. So what is a theory? Here are a few definitions:

That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.

Tony Natale

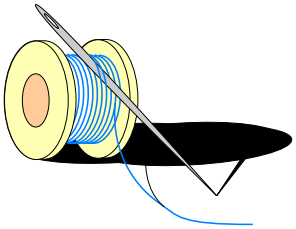
One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.

Mario Conte

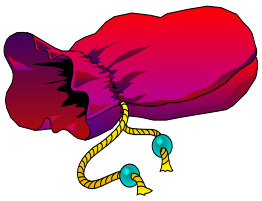
A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.

Vince Aprile

Although helpful, these definitions, without closer inspection, tend to leave the reader with a "huh" response. Rather than try and decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same, three essential elements.



Common Thread Theory Components



1. Each has a factual component (fact-crunching/brainstorming);
2. Each has a legal component (genre);
3. And each has an emotional component (themes/archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it is helpful to have a set of facts with which to work. These facts will then be used to create possible theories of defense.

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden: Is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with do to her history of abuse by her uncle and recently moved to a foster home in another school district).

She said that things were not going well at home. That her step-dad, Barry Rock was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside but when Barry got home he would send us to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning Barry came to school and told her teacher that he caught her cheating – copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she isn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class to then meet again later in the day with a police officer present. At that time Betty stated that since she was 10, Barry would tell her if she would do certain things he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded and before marrying Barry had quite

a bit of contact with social services due to her weak parenting skills. She stated that this has been going on more and more frequently in the last month and estimated it had happened ten times.

Betty is an A and B student who showed no sign of academic problems. After reporting the abuse she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden: is Betty's 35 year old mentally retarded mother. She is "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems which caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor b oy and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock: is a 39 year old mentally retarded man who has been married to Kim for 5 years and they live together in a small trailer living off the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor Barry was interviewed for 6 hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer yes when asked if he had sex with Betty and yes to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him and he knew that it was wrong but he did it anyway.

Barry has been tested with IQ's of 55, 57 and 59 over the last 3 years. Following a competency hearing, the trial court found Barry to be competent to go to trial. [2]

The Factual Component of the Theory of Defense

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming, is the essential process of setting forth facts that appear in the discovery and through investigation. It is critical to understand that the facts are nothing more, and nothing less, than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Don't draw conclusions as to what a fact or facts might mean. And don't make the common mistake of attributing the meaning to the facts given to them by the prosecution or its investigators. It is too

[2]This fact problem was developed by the Kentucky Department of Public Advocacy.

early in the process to give value or meaning to any particular fact. At this point the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

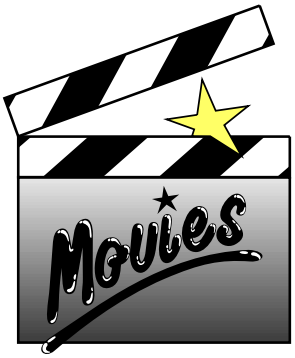
Judgmental Facts (wrong)		Non-Judgmental Facts (right)
Barry was retarded		Barry had an IQ of 70
Betty hated Barry		Barry went to Betty's school and went to her classroom confronted her about lying accused her of sexual misconduct talked with her about cheating dealt with her in front of her friends
Confession was coerced		Barry was questioned by several officers Barry was not free to leave the station Barry had no family to call The questioning lasted 6 hours

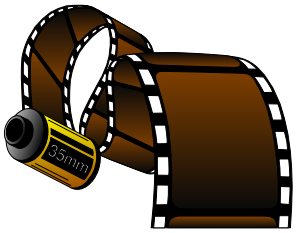
The Legal Component of the Theory of Defense

Now that the facts have been developed, in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense – the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self defense," "alibi," "reasonable

doubt" and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "he did it but has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as "he did it but they can't prove it." Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. By looking to Hollywood and cinema, thousands of movies have been made which have as their focus some type of alleged crime or criminal behavior. When these movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. ***It never happened (mistake, set-up);***
2. ***It happened but I didn't do it (mistaken identification, alibi, set-up, etc.);***
3. ***It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);***
4. ***It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);***
5. ***It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);***
6. ***It happened, I did it, it was the crime charged, I am responsible, so what? (Jury nullification).***[3]



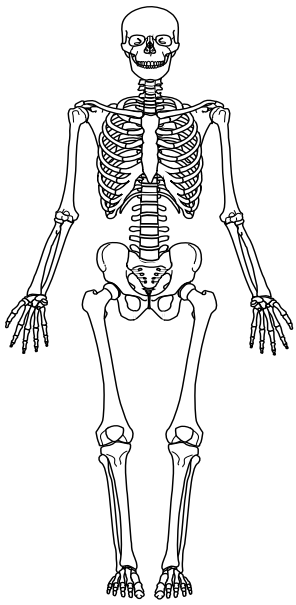


The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend

[3]The genres set forth herein were created by Cathy Kelly, Training Director for the Missouri Pubic Defender's Office.

a case based upon the legal genre "it never happened" than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example, as developed through non-judgmental brainstorming, try and determine which genre fits best. Occasionally facts will fit into two or three genres. It is important to settle on one genre and it should usually be the one closest to the top of the list thereby decreasing the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened) but could also fit into the second category (it happened but I didn't do it). The first genre should be the one selected.



WARNING ! ! ! !

The genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory and is not the your theory of defense. The genre is just the second element of the theory of defense and there is more to come. Where most lawyers fail in developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test-drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed From Home By Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

"Rock" – Barry, Innocent Man, Mentally Challenged Man;

"Wrongfully Tossed" – removed, ejected, sent-packing, calmly asked to leave;

"Troubled" – vindictive, wicked, confused;

"Stepdaughter" – brat, tease, teen, houseguest, manipulator.

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus is on someone or some thing other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus doesn't even have to be on an animate object. Consider the following examples:

– Troubled Teen Fabricates Story For Freedom;

– Overworked Guidance Counselor Unknowingly Fuels False Accusations;

– Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter;

– Underappreciated Detective Tosses Rock at Superiors.

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component of the Theory of Defense

The last element of a theory of defense is the emotional element. The factual element and the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability and believability to the facts and

the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes

Archetypes, as used herein, are basic, fundamental corollaries of life which transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when your child is in danger, you protect the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to their child.

Other archetypes include: love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

– The difficulties of dealing with a step-child;

– Children will lie to gain a perceived advantage;

– Maternity/Paternity is more powerful than marriage;

– Teenagers can be difficult to parent.

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

Themes

In addition to providing emotion through archetypes, primary and secondary themes should be utilized.

A ***primary theme*** is a word, phrase or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

Recalling the O.J. Simpson case, a primary theme developed in the theory of defense and advanced during the trial was "if it doesn't fit, you must acquit." Other examples of primary themes include: One for all and all for one; Looking for love in all the wrong places; Am I my brother's keeper? Stand by your man (woman?); wrong place, wrong time, wrong person; and when you play with fire you are going to get burned. Although originality can be successful, it is not necessary to re-design the wheel. Music, especially county/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the chapters of Nashville:

TOP 10 COUNTRY/WESTERN LINES

10. Get your tongue outta my mouth cause I'm kissen' you goodbye.

9. Her teeth was stained, but her heart was pure.

8. I bought a car from the guy who stole my girl, but it don't run so we're even.

7. I still miss you, baby, but my aim's gettin' better.

6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.

5. If I can't be number one in your life, then number two on you.

4. If I had shot you when I wanted to, I'd be out by now.

3. My wife ran off with my best friend, and I sure do miss him.

2. She got the ring and I got the finger.

1. She's actin' single and I'm drinkin' doubles.[4]

Primary themes can often be strengthened by incorporating secondary themes. A secondary theme is a word or a phrase used to identify, describe or label an aspect of the case.

Examples of Secondary or Sub-Themes

A person: "never his fault;"

An action: "acting as a robot;"

An attitude: "stung with lust;"

An approach: "no stone unturned;"

An omission: "not a rocket scientist;"

A condition: "too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. Some examples include:

– Blood is thicker than water;

– Bitter Betty comes a calling;

– To the detectives, interrogating Barry should have been like shooting fish in a barrel;

– Sex abuse is a serious problem in this country. In this case it was just an answer.

– The extent to which a person will lie in order to feel accepted knows no bounds.

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[4]Many thanks to Dale Cobb, and incredible criminal defense attorney from Charleston, South Carolina, who was largely responsible for assembling this list.

Creating The Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the theory of defense paragraph. Although there is no magical formula for structuring the paragraph, the adjacent template can be useful.

Theory of Defense Paragraph Template

Open with a theme;
Introduce protagonist/antagonist;
Introduce antagonist/protagonist;
Describe conflict;
Set forth desired resolution;
End with theme.

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and tinkered with to get them to this level. They are not perfect and can be improved. However, they serve as good examples of what is meant by a solid, valid and useful theory of defense.

THEORY OF DEFENSE ONE

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice but because he was born mentally challenged. The word of choice at that time was that he was "retarded." Despite these limitations Barry met Kim Gooden, herself mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home to live in, and provided for her many needs. Within a few years Betty became a teenager and with that came the difficulties all parents experience with teenagers. Not wanting to do homework, cheating to get better grades, wanting to stay out too late, and experimenting with sex. Being mentally challenged, and only being a step-parent, Barry tried to set some rules - rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker than water. All Barry wanted was for his family to be happy like it was in years gone by. "Everything will be okay Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

THEORY OF DEFENSE TWO

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled Betty Gooden walked into the Guidance Counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and her step-father were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her step-father punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself - NO. Of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would me so much simpler if her step-father were gone. As she waited in the Guidance Counselor's office, Bitter Betty decided there was no other option - just tell a simple, not-so-little lie. Sex abuse is a serious problem in this country. In this case it was not a problem at all because it never happened. Sex abuse was Betty's answer.

The highlighted portions in each of the examples denotes primary themes and secondary themes – the emotional component of the theory of defense. The emotional component is strengthened by describing the case in ways that embrace an archetype or archetypes (desperation in the first example and shame towards parents in the second). It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective – the first focusing on Barry and the second on Betty.

CONCLUSION

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. The theory will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, what witnesses are necessary to call in the defense case, and what to include and how to deliver the closing argument. The theory of defense may never be shared with the jurors word for word. But the essence of the

theory will be delivered through each witness so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you chose to call them dog cases or view them, as I suggest you should, as a field of dreams, cases are opportunities to build baseball fields, in the middle of corn fields, in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. If you build it, they will come.....

"DO YOU SEE WHAT I SEE?"

Why Demonstrative Evidence Makes A Difference

Said a little lamb to a shepherd boy: "Do you hear what I hear?"

If the Shepherd boy was like our jurors – probably not!

[1]

****

By:

Stephen P. Lindsay

****

INTRODUCTION

Some time ago, as winter was turning to spring, I was traveling on Route 19-23 heading to the far western reaches of North Carolina for a trial. Christmas was a couple of months passed but the peaks of the surrounding mountains remained snow-covered. There was still a winter feeling in the air. I tried to concentrate on real business but kept drifting off into what some people refer to as "la-la land," that state of mind which lets you drive with precision even though your mind is somewhere else. I found myself humming a yuletide tune -- "Do You Hear What I Hear." Although lyrics are by no means my strong suit, I started singing the following rendition: "Said a little lamb

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to the shepherd boy, 'do you hear what I hear?'" At that very moment, for whatever reason, two distinct thoughts came to my mind. First, any ambition I had to become a singer was unquestionably wishful thinking. Second, and more importantly, if the shepherd boy was anything like our jurors, he probably did not hear the same thing that the lamb heard. However, the song goes on --- "Do you see what I see?" For several reasons, the chances are much better that the little lamb and the shepherd boy, although probably not hearing the same thing, did in fact see the same thing. From these events and observations comes an important lesson for those of us who are criminal defense litigators -- we must do more than present mere testimony to our jurors. We must find creative ways to present our cases that will cause jurors to do more than listen to testimony -- ways that will make them tap into their various senses -- while deciding the fates of our clients.

I have lectured on the use of demonstrative evidence in capital and non-capital litigation. There really isn't that much difference. However, I have seen a troublesome trend developing in capital litigation to overlook the basic principles of non-capital case demonstrative evidence and over emphasize things like family history charts, genographs, pressure charts, and various other visual aids used to try and explain the testimony of "experts." These things can be powerful and should continue to be used in capital trials, not in lieu of, but in addition to, more traditional, non-capital case demonstrative evidence

There is no "cookie cutter" demonstrative evidence. Each case is unique and provides for unique opportunities to show jurors what you are talking about. The ways of demonstrating your points is limited only by your creativity (and occasionally a bothersome rule or judge that can admittedly muck things up a bit). That which follows is applicable to the trial of all cases – criminal and civil – and is offered to hopefully rekindle the creative fires of all litigators.

The "Same Old - Same Old"

When it comes to demonstrative evidence, a majority of criminal defense lawyers get caught in the trap of doing the "same old-same old." Whether this stems from law school theoretical teaching, from a far too intense focus on Imwinkelried's "Evidentiary Foundations," from lawyers repeating what they have "learned" watching other lawyers, or from the sheer comfort that goes along with doing things the way they have always been done, wonderful opportunities to be incredibly persuasive are regularly lost. We must begin to be more creative with demonstrative evidence in our efforts to persuade jurors. In the words of Ralph Waldo Emerson:

> A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do ... Speak what you think today in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today.

Emerson's quote summarizes the all-too-obvious. When it comes to demonstrative evidence, we must change our ways, try new things, and work out of the demonstrative evidence rut into which many of us have fallen. The creative use of demonstrative evidence affords criminal defense attorneys numerous unique opportunities to become more powerful persuaders. Furthermore, preparing and presenting quality demonstrative evidence is not necessarily an expensive proposition..

What Is "Demonstrative Evidence?"

Black's Law Dictionary

> Demonstrative Evidence: That evidence addressed directly to the senses without intervention of testimony. Real ("thing") evidence such as the gun in a trial of homicide or the contract itself in the trial of a contract case. Evidence apart from the testimony of witnesses

> concerning the thing. Such evidence may include maps, diagrams, photographs, models, charts, medical illustrations, X-rays.

This definition, although commonly used, reminds me of fishing from an ocean pier -- it gets you out in the water a good way but it just doesn't go out far enough to let you fish for the big ones. Put another way, its good as far as it goes but lacks something to be desired. If we limit ourselves to defining demonstrative evidence in this manner (which I suggest is the way many of us tend to view the matter), "demonstrative evidence" becomes nothing more than a synonym for "exhibit." However, there is much more to demonstrative evidence than those items which we mark with an exhibit sticker, proffer to the court for introduction, and then pass to the jury.

The Definition We Must All Start Using

> Demonstrative evidence is anything and everything, regardless of whether admissible or even offered as evidence, including attorney/client/witness demeanor in the courtroom, which tends to convey to and evoke from the jurors a "sense impression" that will benefit our case, whether through advancing our case in chief or diminishing the prosecution's case.

By "sense impression" I mean everything which is calculated to target, or is likely to affect, the jurors' senses (i.e., sight, smell, hearing, touch). This then empowers the jurors to give greater

appreciation to our clients' defense(s) through interpreting various testimony, evidence, and arguments in a particular context which complements the themes and theory of our defense. In other words, our cases are like giant, roll-top desks with many slots for information. Some of these slots are

marked for the prosecution and some for the defense. The trial is a fight over getting jurors to place evidence in particular slots. Based upon our presentations, jurors will interpret evidence, assign weight to it, and place it into one of the slots in the desk. By effectively using demonstrative evidence and tapping into the jurors' sense impressions, our ability to get the jurors to place particular evidence into our slots is markedly increased.

Rationale Underlying the Enhanced Persuasiveness of Demonstrative Evidence

The trial of criminal cases continues to center around oral testimony. However, the second-hand sense impressions conveyed to jurors through verbal testimony have far less impact than the same information conveyed through the creative use of demonstrative evidence. But what is it about demonstrative evidence that gives it enhanced persuasiveness? In the words of McCormick:

> "Since 'seeing is believing,' and demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect."

McCormick On Evidence § 212 (E. Cleary 2d ed. 1981). Despite this rationale seeming all-too-obvious, criminal defense lawyers tend to leave demonstrative evidence consideration until the last minute, often times never getting around to creating or using demonstrative evidence at trial.

We Must Start Making Better Use of Demonstrative Evidence Now

Criminal defense lawyers often fail to make use of demonstrative evidence to its potential. However, there is no question but that demonstrative evidence is one of the MOST POWERFUL

persuasion tools a criminal defense attorney has in his or her litigation arsenal. Whether your audience is a jury or the judge, the rationale is the same -- "seeing is believing." For the reasons that follow, we must start changing our ways right now -- not tomorrow, next week, next month, or next year.

1. Diminishing Ability To Use Imagination: Back when I was a young lawyer, fresh out of law school, attorneys seemed to depend on their abilities to sway jurors through verbal gymnastics, fancy speeches, and a big dose of charisma during closing arguments. Although this Clarence Darrow-type approach worked for some lawyers, had they used more demonstrative evidence, their defenses would have been better. But in those times, the general public was, and consequently our jurors were, a different crowd than they are now.

a. Television Then And Now: Much of the change seen in the general public has been brought about by the advancement of television. Twenty years ago, television was largely two-dimensional. That is, the television shows that were being watched tended to be black and white, included such shows as "I Love Lucy," "The Andy Griffith Show," and "The Honeymooners," and were filmed using one or two cameras. By using a limited number of cameras, the viewer was forced to fill in various parts of the show that could not be seen. For example, on the "Andy Griffith Show," when Opie was being lectured by Andy, the viewer could not always see what Aunt Bee was doing. The viewer created his or her own version of what Aunt Bee was doing in the background. One viewer might have concluded that Aunt Bee was smirking, another that she was laughing, and yet another that she was

sympathetic. This required the viewer to use his or her own imagination to fill in the blanks. Now to be sure, most viewers probably came up with about the same conclusion because the structure of the program pushed them in that direction. The important thing was, and is, that the viewers made use of their imaginations.

Today, though, television has become multi-dimensional. Programs are filmed using ten or fifteen cameras giving the viewer a complete perspective of everything that is going on. There is little room, if any room at all, for the viewer to make use of his or her imagination.

b. Music And The MTV Generation: Not only has television gone hi-tech, but so too has the world of music. I think back to my early years and remember how we listened to music on the radio, on our record players, and ultimately on 8-Track tapes. Occasionally we would get to see the artists perform on television, usually on American Bandstand. There were no music video versions to watch. As a result, each listener used his or her imagination to decide what the song was about -- what the words actually meant. I can recall a time when one of my friends and I had a big disagreement about one of the popular songs by Bread. I thought the lyrics went "and taking them all for granted." He thought the lyrics were "and taking them off of branches." Needless to say, the two of us had extremely different opinions as to what the song actually meant. At least, though, we were using our imaginations.

Today the music industry has gone almost exclusively to the music video. A significant portion of the general public is tuned into MTV or its equivalent. The result is that, as with television, the listeners (viewers) are told what the song means,

in vivid color, with stereophonic sound, and from every available camera angle. With nothing left for the imagination, there is little room for disagreement over what the lyrics actually say. Consequently, there seldom are differences of opinion about what a particular song means. Most importantly, though, there presently are very few opportunities for the general public to tap into their imaginations.

c. The General Public Is Our Jury Pool: The viewers of modern television and the listeners to modern music and MTV are the same people who serve as our jurors. The younger ones will be our jurors of the future. Because the general public is now being media-trained to avoid using imagination, we, as lawyers, must work harder than we used to when attempting to persuade jurors in the courtroom. One of the best answers to this problem is to use demonstrative evidence to tap into the imaginations and sense impressions of jurors in ways we can't possibly do with just our charm, our charisma, and our fancy words.

2. Prosecutor's Have Figured It Out: The second reason we must start using demonstrative evidence right now is that prosecutors have figured out the power and persuasiveness of demonstrative evidence and are actively using it against us. In a recent capital murder case in my home town, a man was on trial for the kidnaping, rape, and ultimate murder of a young woman. He randomly selected her while she was out jogging, abducted her, took her to a remote place in the woods, tied her to a tree, then eventually took her life. The jury did not deliberate long at the guilt/innocence phase, finding the defendant

guilty of first degree murder. During the trial, the prosecutor brought in the actual tree to which the victim had been tied. During her penalty phase closing argument, the prosecutor bound herself to the tree and talked from the perspective of the victim in her final moments of life. The jury seemed to hardly hesitate in returning a death sentence. Compelling? Yes. Did it change the outcome? Maybe. Was it persuasive? ABSOLUTELY! And it was persuasive in a way mere words could not have as effectively conveyed. This is what prosecutors are doing in today's litigation arena. We simply cannot wait any longer to at least even the scales.

Some Creative Suggestions Given Limited Budgets

Some time ago, attorney Jon Sands, Assistant Federal Public Defender from Phoenix, Arizona, and I together presented a lecture on demonstrative evidence. I had been giving a presentation entitled "Demonstrative Evidence: Perspectives, Pointers, and your Pocketbooks." Jon had been doing one called "Guerilla Warfare Demonstrative Evidence." We combined these presentations and the following are some excerpts.

Very few of us have the opportunity to represent wealthy clients. As a result, most of us have very limited budgets when it comes to trial preparation. With limited budgets it becomes necessary to find ways to create quality demonstrative evidence that isn't too expensive -- "on the cheap" as Jon would say. Here are some ideas for demonstrative evidence which are inexpensive, easy to make and can be persuasively used in trial:

1. Diagrams: Use of diagrams is a wonderful way to get you up out of your seat, away from your podium and close to the jury. In that many jurisdictions require counsel to either remain at counsel table or at a podium, anything you can do to get away from these locales and closer to the jury **must** be exploited. Diagrams are an excellent way to do this. I have found that you can make diagrams for less than ten dollars. If you need a diagram that shows the floor plan of a house or building, use your computer. In the Windows program, under the "Accessories" section you will find a program called "Paintbrush" or "Paint." Through this program you can create small versions of floor plans which can then be enlarged and mounted at your local print shop. If you have a color printer, you can even use colors which are easily enlarged with a color copier (slightly more expensive).

You will find, though, that the end-product created out of "Paintbrush" is a bit rough around the edges. For about twenty-to-thirty dollars, you can purchase an architectural, home design program for your computer. These programs allow you to lay out floor plans to scale, include furnishings which you can place in various locations, and even allow you to add decks, swing sets, and landscaping. The program I use was a close-out and cost about seven dollars. The end product is extremely professional, is relatively easy and quick to prepare, and is an inexpensive addition to your trial preparation materials which can be used over and over again.

Diagrams also give you the opportunity to have a witness tell his or her story more than once. The more times the witness' version of the events is told, the more likely the jury

is to believe what is said. Use a funnel approach to diagrams. First use one showing a large area, then a second one using a smaller section of the first, then end up with one that focuses on the relevant location (i.e., neighborhood, house plan, room). This gives you and the witness multiple, legitimate opportunities to repeat the witness' version of the events.

Protect Your Diagrams: Prosecutors will often attempt to undermine your diagrams in a variety of ways. You must do what you can to protect the integrity of your evidence. Prosecutors often mark up our exhibits and leave the exhibits looking like a doodle pad. This is easily avoided through purchasing (at little cost) a sheet of clear plastic which you attach to your diagram following direct examination. Fasten it down forcing the prosecutor and his or her witnesses to mark on the plastic. Once done, you can remove the plastic and effectively use the diagram in closing without the distraction of the various markings made by the prosecutor and his or her witnesses.

Jon Sands uses PAM vegetable spray on his diagrams. He puts "Velcro" on the diagram where he wants to affix something. He then sprays the diagram with PAM. The magic of this is that you can't write on a diagram sprayed with PAM. The prosecutors usually don't have "Velcro" and when they try and write on the diagram the ink beads up. Even if the prosecutor does have some "Velcro," it doesn't stick to the PAM-covered diagrams either.

2. Make Use of Art Students: I have had great success in using local art students to create demonstrative evidence. Most of these people will want little or no money to

produce the work product -- usually they are so enamored with being involved in a criminal case that they will work for free. Have them produce their work then have it enlarged and mounted which will cost only a few dollars. The work product is attractive, usable, and uniquely different than anything you will see the prosecutor bring out.

3. Use Architect And Engineering Students: As with art students, these students will work cheap or for free. They can build models for you of just about anything. Houses and other buildings can be reproduced to scale. Models are impressive to use in the courtroom and are extremely helpful in demonstrating various points of your case to the jury.

4. Use Color Photocopies: Many of your photographs will be small. The cost of enlarging photographs into bigger photographs is significant. Take your small photos to the copy center and get them to do a color enlargement and mount these on a foam board. An enlargement from a snap shot to an 8 by 10 is about two dollars compared to the approximate fifteen-to-twenty dollars necessary to do a photo-to-photo enlargement. Given today's technology, the quality of photocopy enlargements is quite good. You can also scan the photos into your computer and enlarge them that way. Projecting them onto a screen is also a good idea.

5. Make Slides From Photos: Many of us use Power Point or Corel Presentations. Once you scan your photos, you can create a program to show them in a certain order. Turn down the lights, and show them to the jury. Often times the impact of

a slide is much greater than a photograph. Juries love it when you turn down the lights. There is also the added benefit that each juror will be taking in the information at the same time and under the same conditions. Think of what happens when a photograph is passed to the jury. Each juror looks at it separately while the judge is saying 'move along counselor.' The case keeps moving, other evidence which may be important is being offered, and the jury is called upon to look at the photo and also take in everything else. Slides make them do but one thing at a time -- look at the slides.

Using slides can also be justified to the trial judge as a "time-saving" procedure. If the witness has several photos to go through, put them in a single photo album. Have the witness identify each photo then offer the album into evidence. Advise the judge that there is only one set and rather than take the time for each juror to go through the album, you have made slides of each picture and they are merely copies of the actual exhibit. Then dim the lights, go through the slides one at a time as the witness describes what is being shown.

6. Make Use of Overhead Projector: If you don't have the funds for a computer and a projector to show your pictures via Power Point, go back to basics and find an overhead projector. You can probably find one in an antique store for about twenty dollars. Most copy machines will allow you to reproduce something onto acetate for use on an overhead projector. This is cheap and gives you an opportunity to get a lot of bang for your buck out of various aspects of the trial. I have used this for comparing the testimony of a witness at trial to that which he/she has said on an earlier occasion. Copy both, juxtaposition

the two and put them up on the overhead. Show the jury how the two differ. The fact that a witness has blown hot and cold is brought home much more effectively if you show them as opposed to just telling them. During closing use the witness' plea agreement comparing it to how he/she testified about having no expectations from providing testimony. You might want to put the relevant jury instructions on credibility up if you plan to talk with the jury about a particular witness' testimony. Many court reporters have the ability to down-load the daily testimony onto disk. You can then put it on your computer, print it out, and copy it to an overhead for use during cross examination, argument to the court, or closing argument to the jury.

7. Paint Chips: Paint chips are the sample colors you get from your paint store. Wal-Mart has them, K-Mart has them, they are easy to get hold of and they are free. The value of the paint chip is found in cross examination of an occurrence witness. Your client was apprehended driving a blue car. The witness who saw the incident says the bad guy was driving a blue car. On its face, and with nothing more, you have a problem here. By using paint chips you can approach the witness and say:

> Mrs. Smith, you said the car you saw was blue. Was it closer to this blue or to this blue?

By doing this, and you can do it over and over using various blue colors, you force the witness to select between options and make choices. This can create the appearance of uncertainty. It certainly makes the point that "blue" can mean a lot of things. The witness whose testimony was damaging is softened a bit. Paint chips can also be used with skin

tones. For example:

> Officer Jones, the store clerk told you the robber was a black man. Did you understand the clerk to mean his skin tone was closer to this color or to this color...

When you do the skin tone, paint chip cross with your police officer have him or her come down in front of the jury with his/her back to the defendant. When you start using the paint chips, nine times out of ten the police officer will peak over his or her shoulder to look at the defendant. This is a wonderful time to say "no cheating now." The point is brought home that even the officer isn't sure, and the point is brought home demonstratively, powerfully, and persuasively. Even if the officer does not sneak a peak, you can still say to the officer "now don't peek."

8. Modern Technology Isn't Always Good: One of the neatest contraptions to come on the market is the laser pointer. If you are in a jurisdiction where you are required to remain by a podium or at counsel table, laser pointers give the judge a basis to prevent you from moving up towards the jury because it can be used from across the room. The wooden pointer, on the other hand, puts you in a position where you must be allowed to move to the diagram, which if strategically placed by you near the jury, gives you the opportunity to move around in the courtroom. In addition, computers can crash. You must have a back-up plan in the event your computer refuses to cooperate with you in the courtroom.

Non-Evidence Demonstrative Evidence

By defining "demonstrative evidence" as I have suggested, anything you do in the courtroom which is calculated to demonstrate something, even if an exhibit sticker is never affixed, or even if it is not formally offered, is necessarily included. At a very basic level, non-evidence demonstrative evidence includes how you dress, how you act, react, or respond, and your overall attitude. However, the concept of non-evidence demonstrative evidence goes much farther, as illustrated by the following ideas and pointers.

1. What's Good For The Goose...: In almost every criminal trial, the prosecutor will ask a witness something along these lines:

- Mr. Jones, do you see the person who robbed you in the courtroom?

- Would you describe for the jury what he is wearing?

- Your Honor, could the record reflect that the witness has identified the defendant.

Maybe I'm just getting tired of hearing this line of questioning. However, it occurred to me that "what's good for the goose is good for the gander." Now whenever I have a snitch on the stand who I am cross examining, I include the following line of questioning:

- Sluggo, you met with the district attorney to cut a deal.

- That district attorney is in the courtroom.

- Describe for the jury what that district attorney is wearing.

- Your Honor, I ask that the record reflect that Sluggo has identified prosecutor Jonathon Johanson, this man right here, as being the person who cut the deal with him.

This process is intended to do two things. First, continue to establish Sluggo's "yuck" factor. Second, spread Sluggo's "yuck" factor onto the prosecutor. There is also the additional benefit that doing this is incredibly fun.

2. Observe Witness Demeanor: Through discovery or otherwise, you will likely know the probable substance of **what** a witness will say on the stand. However, until you actually get the witness on the stand, you will likely have little idea as to **how** the witness will testify. By this I mean that witness demeanor is something you will have to analyze quickly. Sometimes you can find a gem and use it demonstratively during your cross. For example, in a sex offense case where you suspect the child is being coached by his or her parent, when the child is testifying, position yourself between the child and the parent/coach. You will find that the child and/or the parent will move to maintain eye contact. Keep repositioning yourself and force them to do this over and over again. The jury will catch on and before long the jury will look like the gallery at a tennis match -- left, right, left, right, turning first to the child and then to the parent/coach. The point is brought home that the child is being coached. However, nowhere in the trial transcript will that which was so persuasive be revealed.

3. Make Quantity Testimony Visual: Find ways to make important quantities visual.

a. Quantity and Liquids: We often have witnesses testify who admit, either on direct or on cross, that they had been drinking at the time they

supposedly observed that to which they are now testifying. If the witness says he or she had consumed about a case of beer that night, bring in a case of beer, count out the cans or bottles with the witness in front of the jury. Use the cans demonstratively in closing argument to again bring home the point that the witnesses, by his or her own admission, had "this much alcohol to drink." The impact is much greater if you show quantities as opposed to just talk about them.

b. Quantity and Size: Sometimes there is an issue in our case about the size of something. For example, if your client is charged with breaking into a pinball machine and stealing $125.00, try and establish through the various witnesses that the defendant, who they say they saw leaving the area, didn't have anything in his hands, had no bulges under his shirt, his pockets or his clothing. Then go to the bank and get $125.00 worth of quarters. Show the jury the size of that much money. Thump it down on counsel table demonstrating its weight. The bottom line then becomes it could not have been your client or there would have been some evidence of this large, heavy amount of money in his possession.

c. Lack of Quantity in Rape Cases: In some rape cases, your defense will be, in essence, this was not rape it was regret. Establish through the investigating officers that they examined every article of the victim's clothing. Show that the detailed investigation, using microscopes and magnifying glasses, revealed that not a thread was loose, not a button torn

free, not a zipper out of line. Use the physician to show that no evidence of trauma was found. Make two boxes to use in closing argument. Label one "Regret" and the other "Rape." With the jury, go through each item of clothing, as well as the other physical evidence. Make sure to point out that each piece of evidence could support the conclusion that sex occurred but that nothing about the evidence supports the conclusion that there was any force used or rape. When you have finished talking with the jurors about each piece of evidence, place each item in the box marked "Regret." You are creating a full box marked "Regret" versus an empty box marked "Rape" thereby showing in a quantitative way that all of the evidence points to innocence. Attorney Sheila Lewis with the New Mexico Public Defender's Office in Santa Fe tells me that she used this idea in one of her cases and when she mistakenly started to place an item of evidence in the "Rape" box, one of the jurors corrected her.

4. Aural Demonstrative Evidence: Getting jurors to listen to things other than mere testimony can also be particularly persuasive. Again using an example provided by Jon Sands, in a sexual assault case, Jon subpoenaed the bed on which the sexual assault had allegedly occurred. His investigation had revealed that many people were at home when this supposedly happened, were each in close proximity to the bed, and the bed had extremely squeaky springs. He introduced the bed into evidence then made his closing argument to the jury while sitting on the bed, bouncing up and down, making the bed squeak loudly. Jon's

point was brought home perfectly -- listen to all of the noise that must have been made. Had a sexual assault occurred, the squeaking bed would have been heard by someone else in the house. No one heard it therefore it did not happen.

The aural senses of jurors can also be tapped into by using BB's and a metal bowl or galvanized pail. I use this in cases which center on fingerprints. We have all had cases like this where our client has been identified as the culprit but the identification is somewhat shaky. The strongest evidence against the defendant is that his fingerprint is found at the crime scene. In that the science of fingerprints is based upon similarities, not differences, and the examiners generally quit once they have found anywhere from six to twelve points of identification, there remains some 150 points of identification that are never discussed by the "expert." In closing argument you can ask the jurors to close their eyes and listen.

- This case boils down to whether this fingerprint is in fact the defendant's.

- But we know so little about the print. All we know is that it is supposedly the same in six places. (Slowly drop six BB's into the pail, one at a time).

- But there are some two-hundred places we know nothing about. (Slowly pour 150 BB's into the pail).

- I don't know how you define reasonable doubt, but I'd say you just heard it.

The impact of the differences in the two sounds is incredible. You can use the BB's in the pail in any situation where you have a large quantity versus a small quantity. Experiment with different types of pails. Some make better sounds than others. Although I started using BB's, I now use steel shot pellets which you can get in any sporting goods

store. Steel shot is heavier and makes a louder noise when the pellets hit the pail.

5. Humanize Your Client: Find ways to make jurors conclude that the defendant is a real person, possessed of life, emotion, and feelings. Especially in death cases, it is imperative to do more than just have witnesses tell about their past experiences with the defendant. When the football coach testifies that the defendant was on his team, find and use a photograph of the defendant in uniform. If he got a trophy, find it and use it at trial. Perhaps the best example of humanizing the defendant comes from Attorney Bryan Stevenson who tells a story that goes something like this:

In a little town in the South, a man was on trial for his life. The odds were already stacked against him for he was black and his victim was a young white woman. The evidence of guilt was strong and the jury didn't take long to convict him of first degree murder. At the sentencing hearing the defense called the man's third grade teacher. The teacher was an elderly, white-haired woman, having taught the young man some twenty-years before. She took the stand and told the jury how she had been impressed with the defendant when he was her student. She described how he had promise but that she instinctively knew it would never be achieved for he had come from a family that hadn't placed much emphasis on education. She recalled how one day she had taught his class how to make Gods eyes -- two sticks crossed over around which yarn of different colors is woven. A few days later, on her way to her car after school, she heard the pitter patter of little feet running after her and felt a tug on her skirt. She turned around and saw it was the young defendant. In his hand was a Gods eye -- one he had made for her in his home, at his kitchen table, using his yarn. She described to the jury how this had touched her deeply. Then she reached into her pocketbook, pulled out the Gods eye and said "I have kept it with me ever since."

The teacher's testimony by itself was powerful. However, by bringing out the Gods eye and showing it to the jury, an even more powerful and persuasive message was conveyed

to the jury -- the sincerity of this woman became unquestionable. That the young man had goodness somewhere inside him was established. No exhibit sticker was affixed to the Gods eye but it was probably the most powerful and persuasive piece of evidence presented by the defense. I'm told the jury spared this man's life.

CONCLUSION

When it comes to demonstrative evidence, the sky is the limit. Not every technique of demonstrative evidence has been discovered and used, and the techniques that have been used can always be done differently and better.. Evidence is important because it means something. Virtually all evidence can present more than one meaning. Constantly evaluate the evidence in your case to see not only how it might be perceived by the prosecution. If other meanings are helpful to your case, create ways to demonstrate those to the jury. Don't be confined to "the same old - same old," what other attorneys regularly do, or what you comfortably feel will be accepted without controversy. Be bold and creative -- make better use of that incredibly persuasive weapon in your litigation arsenal -- demonstrative evidence.