Higher-Level Felony Defense Training I

Electronic Materials

UNC SCHOOL OF GOVERNMENT

2018 Higher-Level Felony Defense Training I

April 9-10, 2018 / Chapel Hill, NC

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

Monday, April 9

12:15-1:00	Check-in
1:00-1:30	**Storytelling and Theory of Defense (30 mins.)** Joseph Ross, Assistant Federal Public Defender Office of the Federal Public Defender, Raleigh, NC
1:30-2:15	**Investigation and Discovery in High-level Felony Cases (45 mins.)** Faris Dixon, Attorney Dixon Law Firm, PLLC, Greenville, NC
2:15-2:30	**Break (15 mins.) Snack provided**
2:30-3:00	**Third-Party Records (30 mins.)** John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
3:00-3:45	**Working with Investigators and Experts (45 mins.)** Phil Dixon, Defender Educator UNC School of Government, Chapel Hill, NC Beth Winston, Investigator Orange County Public Defender's Office, Hillsborough, NC
3:45-4:00	**Break (15 mins.)**
4:00-5:00	**Client Rapport and Relations (60 mins. ETHICS)** Elaine Gordon, Attorney Chapel Hill, NC
5:00	Adjourn

*IDS employees may not claim reimbursement for lunch

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Tuesday, April 10

9:00-9:45	**Goals and Method of Jury Voir Dire (45 mins.)** Kevin Tully, Chief Public Defender Mecklenburg County Public Defender's Office, Charlotte, NC
9:45-10:15	**Basics of Batson Challenges (30 mins.)** Johanna Jennings, Attorney Center for Death Penalty Litigation, Durham, NC
10:15-10:30	**Break (15 mins.)**
10:30-12:30	**Voir Dire Workshops (120 mins.)**
12:30-1:30	Lunch *(provided in building)**
1:30-2:00	**Addressing Race and Other Sensitive Topics in Voir Dire (30 mins.)** Emily Coward, Research Attorney UNC School of Government, Chapel Hill, NC
2:15-3:15	**Race and Sensitive Topics in Voir Dire Workshops (60 mins.)**
3:15-3:30	Break
3:30-4:15	**Peremptory and For Cause Challenges (45 mins.)** James Davis, Attorney Davis and Davis Attorneys at Law, Salisbury, NC
4:15	Adjourn

CLE HOURS: 9.0
Includes 1 hour of ethics/professional responsibility

*IDS employees may not claim reimbursement for lunch

Storytelling and Theory of Defense

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

STORYTELLING: PERSUADING THE JURY TO ACCEPT YOUR THEORY OF DEFENSE

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What Does Telling a Story Have to Do With Our Theory of Defense?

Stories and storytelling are among the most common and popular features of all cultures. Humans have an innate ability to tell stories and an innate desire to be told stories. For thousands of years, religions have attracted adherents and passed down principles not by academic or theological analysis, but through stories, parables, and tales. The fables of Aesop, the epics of Homer, and the plays of Shakespeare have survived for centuries and become part of popular culture because they tell extraordinarily good stories. The modern disciplines of anthropology, sociology, and Jungian psychology have all demonstrated that storytelling is one of the most fundamental traits of human beings.

Unfortunately, courts and law schools are among the few places where storytelling is rarely practiced or honored. For three (often excruciating) years, fledgling lawyers are trained to believe that legal analysis is the key to becoming a good attorney. Upon graduation, law students often continue to believe that they can win cases simply by citing the appropriate legal principles and talking about reasonable doubt and the elements of crimes. Prisons are filled with victims of legal analysis and reasonable doubt arguments.

For public defenders, this approach is disastrous because it assumes that judges and jurors are persuaded by the same principles as law students. Unfortunately, this is not true. When they deal with criminal trials, lawyers spend a lot of time thinking about "reasonable doubt," "presumption of innocence," and "burden of proof." While these are certainly relevant considerations in an academic sense, the verdict handed down by a jury is usually based on more down-to-earth concerns:

1. "Did he do it?"

and

2. "Will he do it again if he gets out?"

A good story that addresses these questions will go much further towards persuading a jury than will the best-intentioned presentation about the burden of proof or presumption of innocence.

ETHICS NOTE: When we talk about storytelling, we are not talking about fiction. We are also not talking about hiding things, omitting bad facts, or making things up. Storytelling simply means taking the facts of your case and presenting them to the jury in the most persuasive possible way.

What Should the Story Be About?

A big mistake that many defenders make is to assume that the story of their case must be the story of the crime. While the events of the crime must be a part of your story, they do not have to be the main focus.

In order to persuade the jury to accept your theory of defense, your story must focus on one or more of the following:

Why your client is factually innocent of the charges against him.

Your client's lower culpability in this case.

The injustice of the prosecution.

How to Tell a Persuasive Story

I. Be aware that you are crafting a story with every action you take.

Any time you speak to someone about your case, you are telling a story. You may be telling it to your family at the kitchen table, to a friend at a party, or to a jury at trial, but it is always a story. Our task is to figure out how to make the story of our client's innocence persuasive to the jury. The best way to do this is to be aware that you are telling a story and make a conscious effort to make each element of your story as persuasive as possible. This requires you to approach the trial as if you were an author writing a book or a screenwriter creating a movie script. You should therefore begin to prepare your story by asking the following questions:

1. Who are the characters in this story of innocence, and what roles do they play?

2. Setting the scene -- Where does the most important part of the story take place?

3. In what sequence will I tell the events of this story?

4. From whose perspective will I tell the story?

5. What scenes must I include in order to make my story persuasive?

6. What emotions do I want the jury to feel when they are hearing my story? What character portrayals, scene settings, sequence, and perspective will help the jurors feel that emotion?

If you go through the exercise of answering all of these questions, your story will automatically become far more persuasive than if you just began to recite the events of the crime.

II. "But I Don't Have Enough Time to Write a Novel For Every Case"

We all have caseloads that are too heavy. A short way of making sure that you tell a persuasive story to the jurors is to make sure that you focus on at least three of the above elements:

1. Characters – before every trial, ask yourself, "Who are the characters in the story I am telling to the jury, and how do I want to portray them to the jurors?"

    a. Who is the hero and who is the villain?
    b. What role does my client play?
    c. What role does the complainant/victim play?
    d. What role do the police play?

2. Setting – Where does the story take place?

3. Sequence – In what order am I going to tell the story

    a. Decide what is most important for the jury to know
    b. Follow principles of primacy and recency:
        i. Front-load the strong stuff
        ii. Start on a high note and end on a high note

III. Once you have crafted a persuasive story, look for ways to tell it persuasively.

You will be telling your story to the jury through your witnesses, cross-examination of the State's witnesses, demonstrative evidence, and exhibits. When you design these parts of the trial, make sure that your tactics are tailored to the needs of your story.

A. The Language You Use to Communicate Your Story Is Crucial

1. Do not use pretentious "legalese" or "social worker-talk" You don't want to sound like a television social worker, lawyer, or cop.

2. Use graphic, colorful language.

3. Make sure your witnesses use clear, easy-to-follow, and lively language.

4. If your witnesses are experts, make sure they testify in language that laypeople can understand.

B. Don’t Just Tell the Jury What You Mean – Show Them

1. Don’t just state conclusions, such as “the officer was biased” or “my client is an honest man.” Instead, show the jury factual vignettes that will make the jurors reach those conclusions on their own.

2. Use demonstrative evidence to make your point.

3. Create and use charts, pictures, photographs, maps, diagrams, and other graphic evidence to help make things understandable to the jurors.

4. Visit the crime scene and any other places crucial to your theory of defense. That way when you are describing them to the jury, you will know exactly what you are talking about.

A TEMPLATE/WORKSHEET FOR DEVELOPING A PERSUASIVE STORY/THEORY OF DEFENSE AT TRIAL

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1. In factual terms, identify why your client is innocent – what really happened in this case?

2. Decide which genre of factual defense applies to your client's innocence.

    a. The criminal incident never happened.
    b. The criminal incident happened, but I didn't do it.
    c. The incident happened, I did it, but it wasn't a crime.
    d. The criminal incident happened, I did it, it was a crime, but not the crime charged.
    e. The criminal incident happened, I did it, it was the crime charged, but I'm not responsible.
    f. The criminal incident happened, I did it, it was the crime charged, I'm responsible, but who cares?

3. Craft the story that shows why your client is innocent.

    a. Who are the three main characters in the story of innocence?

    b. What are the three main scenes in the story of innocence?

    c. When and where does the story of innocence start?

4. What emotions do you want the jury (and/or judge) to feel when they hear your story?

5. What archetypes can you draw upon to evoke those emotions?

Creating a Theory of Defense

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

Steps in creating a theory of defense

Pick your genre

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

Identify your three best facts and three worst facts

- Helps to test the viability of your choice of genre

Come up with a headline

- Barstool or tabloid headline method

Write a theory paragraph

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

Develop recurring themes

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

Investigation and Discovery in High-level Felony Cases

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Investigation and Discovery

High Level Felonies

Initial Client Contact

- Meet with your client within 3 days
- Establish boundaries
- Dispel misinformation
  - Bond reduction whenever you like
  - Bond always gets reduced
  - They get 3 plea offers
  - Ability to talk to anyone without consent about the case
  - They didn't read me my rights
  - You work for the State
  - When do you get to be a real lawyer

Initial Client Contact

- Family history
- Where they are from (ties to the community)
- Education
- Employment
- Inquire about what happened

Client Contact

Subsequent Contact

- Meet with your client as often as possible, especially if in jail/prison
- Build more rapport and increase trust
- Ask what happened
- Client will provide more details about the case
- Discuss potential outcomes

Subsequent Client Contact

- Ask what happened again
- What will the officers say
- Why do they think you did it
- Stay focused on the facts and elements
- Identify potential witnesses

Initial Questions after Contact

- What does the State need to prove?
  - Not just "beyond a reasonable doubt"
  - Look at N.C. Pattern Jury Instruction
- Make a list of potential discovery items
- Begin listing/drafting your motions

Do you need an investigator?

- They help to gather additional information
- Witnesses
- Travel to the scene
- Photographs
- Determine whether alibis are plausible
- They provide another perspective

Locating an investigator

- List server
- Fellow attorneys recommendations

Go to the scene yourself?

- Take your own photographs
- Diagrams of the scene
- Do the witnesses description of the events fit with what you see at the scene:
  - Description of the scene
  - Description of buildings, vehicles, neighborhood, etc.
  - Timeframe of event (day/night, visibility, etc.)
  - Alibi travel time

Affirmative Defenses

- Alibi
- Self Defense
- Duress
- Insanity

Check the courts file periodically.

- Sometimes you will find letters from co-defendant to the court
  - Because high level felonies clients are likely to be in custody
  - Ex. Baker
- Look at when co-defendants were indicted
  - May give early indication of who is cooperating

Check the records of the witnesses

- Usual for cross examination
- Impeachment
- Also to see if they were charged with this crime also
  - Ex. Baker witness was originally charged with the crime then it was dismissed

Character Witnesses

- Creditability
- Good standing in the community
- Have known client for a minimum of a year:
  - Ex-girlfriend or Ex-boyfriend
  - Current or prior employer
  - Clergy

Discovery

- Draft motion and request discovery early
- Get it out to your client as soon as you receive it
- Review discovery as soon as you receive it
- Identify problem areas
- Become familiar with reports for discrepancies

Discovery

- Review for potential missing items
- Know your discovery to know your case
- Form your defense strategies
- Don't let it overwhelm you
  - Ex. Baker

Discovery Statutes

- 15A–902 Discovery Procedure
- 15A-903 Disclosure of Evidence by the State
- 15A-904 Certain Information not Subject to Disclosure
- 15A-905(a)(b) Disclosure of Evidence by Defendant-Reciprocal Discovery
- 15A-905(c)(1)(a) Alibi
- 15A-905(c)(2) Expert Witness
- 15A-905(c)(3) Jury Selection

Punishment for Violating this section

- 15A-903(d) willfully omits or misrepresents evidence or info required to be disclosed pursuant subdivision (1) of subsection (a) = Class H felony
  - anyone who willfully omits or misrepresents evid. Or info required to be disclosed pursuant to any other provision of this section = Class 1 misdemeanor

Sealing and preserved in the record.

- Submit supporting affidavits, or statements to the court for in camera inspection.
- Preserved in the record to be made available for appellate review

Required Electronic recording of interrogations

- Adults
  - 15A-211(b) Class A felony
  - Class B1 felony
  - Class B2 felony
  - Class C felony of rape, sex offense, or ASDWIKISI

Recordings may be used by the State even if not in total compliance. 15A-211(e)

- If the State shows good cause for failing to electronically recorded
- Good Cause
  - Accused refused to have recorded and the refusal was electronically recorded
  - Failure to electronically record was the result of unforeseeable equipment failure, and obtaining replacement equipment was not feasible

Remedies for Compliance or Noncompliance 15A-211(f)

- (1) Failure to comply considered by the court in adjudicating motions to suppress a statement
- (2) Failure to comply admissible in support of claims that a statement was involuntary or unreliable, provided the evidence is otherwise admissible
- (3) When evidence of compliance or noncompliance presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable.

Revisit the scene

- Studies show that people learn in different ways
- You have to be able to visualize the scene
- You have to be able to describe it for the jury

- Jury has to know that you know what the scene really looks like
- It will make the State's witnesses be honest about the scene

Trial Note Book

- Size will depend on amount of discovery
  - Ex. Baker
    - Three 5" notebooks--discovery
    - One 3" notebook—rest of the file
    - One 1' notebook--jury questions, witness list, witness questions, exhibits
- Arrange in a format that fits you best
  - Easily accessible
  - Chorological

Trial Notebook

- Use tabs to create sections
  - Ex. Jury questions
    - Motions
    - Witness list and questions
    - Correspondences
    - Discovery
- Use post it notes or flags to identify your important points
  - Ex. Police reports
    - Autopsy photos
    - Witness statements
    - Medical records

Thank for your time

STRATEGIES FOR DISCOVERY AND INVESTIGATION IN DEFENSE OF FELONY CASES

A PRESENTATION TO NEW FELONY DEFENDERS TRAINING
UNC SCHOOL OF GOVERNMENT
CHAPEL HILL, N.C.

April 3, 2017

BY:

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I. GETTING STARTED: THE DUTY TO INVESTIGATE[1]

The America Bar Association has published standards for the criminal defense attorney to follow concerning their duties regarding investigation and discovery and **duties owed to clients regarding their "discovery rights" and their rights to be informed and to share decisions about "strategies" for discovery and investigation**. Every new felony defense attorney should read, and periodically re-read, these standards. They are updated regularly and available online.[2] The duties and responsibilities of a criminal defense attorney regarding discovery and investigation are among the most complex and varied in the law. Mastery and knowledge of discovery statutes, constitutional law affecting discovery, and ethical duties surrounding discovery and

[1] This paper is meant to supplement, not duplicate, the very thorough discussions of ***Discovery in Criminal***

[2] AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS DEFENSE FUNCTION, Fourth Edition, viewable at: http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html .

investigation **can make or break a case** and will determine and shape the effectiveness and reputation of the criminal defense lawyer as an advocate for every client.

Issues surrounding discovery and investigation can literally be a matter of life or death for a client. The potential consequences to every client of any felony conviction or acquittal cannot be overestimated. The stakes involved in getting or not getting discovery, in enforcing or not enforcing discovery rights, cannot be any higher. Frequently overlooked defense obligations, such as t**he need to get orders to preserve evidence, to interview state witnesses, to view physical evidence, and to inspect the original state files,** are discussed herein. Sometimes fighting for discovery and discovering exculpatory evidence or weaknesses in the State's case may be your client's only good defense. Your client's liberty, citizenship, job, family, freedom, immigration or refugee status may be at stake depending on whether or not the attorney gets all the discovery to which the defendant is entitled.

Because discovery and investigation is akin to "an infinite regress," post conviction discovery can be considered a continuation of the discovery process that was cut off pretrial due to either prosecutorial concealment or suppression of *Brady* material, by deliberate or negligent misrepresentation of the prosecutor, or due to professional negligence of defense counsel.

This paper is intended to assist the new felony criminal defense attorney in identifying the "due diligence" required to effectively represent those charged with felony offenses by identifying many of the tools available under Article 48; through the use of other methods and motions that can be filed under the defendant's state and federal constitutional rights to discovery; and, through the use of an investigator or expert to get

as much information as possible concerning the State's case, its strengths and weaknesses. The defense attorney should also make efforts to identify and obtain information about relevant individual mental health and medical history of the client in appropriate cases which may be utilized to defend the client at trial and/or utilized in plea negotiations to minimize that client's risk of loss of life, liberty, property, citizenship, or possible deportation. Most of a defendant's prison, hospital, school, disability and mental health records can be easily obtained with a release, HIPPA release, and subpoena to produce records to the attorney's office. Sometimes it will take a court order to get these.

Every defense attorney, no matter how old or experienced they may be, will often need assistance from others in specialized forensic or legal matters. The new felony defense attorney should seek to maintain professional association memberships in groups such as the American Bar Association (ABA), the National Association of Criminal Defense Lawyers (NACDL), the North Carolina Advocates for Justice (NCAJ), the National Association for Public Defense (NAPD), and the N.C. Bar Association. Each of these organizations has monthly publications often concerning discovery issues. Be on the look-out for important annual trainings and CLE programs relevant to discovery and investigation of specialized matters such as forensics, drug testing, digital discovery, or intellectual disability. The new felony defender should not be afraid to reach out to colleagues or experts to find out what kind of specialized discovery may be needed to properly investigate and evaluate a case. This is especially true in cases involving digital or cell phone evidence, cell tower hits, DNA and serological evidence, and any case involving tool mark, trace evidence, or other technical matters.

N.C.I.D.S. maintains a database of experts, sample motions, and a wealth of advice on discovery of forensic issues. Its listed experts can be consulted as work product experts to find out what specific items of evidence not routinely turned over in discovery by the State need to be specifically requested in a written request and motion to compel discovery. These experts can remain "work product" to assist the attorney in cross examination of State experts, or be asked to evaluate or test evidence themselves, and/or be retained to testify for the defense.[3] Many of these experts will speak with you before being appointed about what they can actually do for the defens in a particular case. As with every expert, each expert will need to be properly vetted by the defense attorney before getting funds for their services to be sure they are credible and appropriate for the case.

II. THE ABA GUIDELINES AND CRIMINAL DEFENSE STANDARDS.

The key ABA standards relevant to discovery and investigation are:

Standard 4-3.7 Prompt and Thorough Actions to Protect the Client

(a) Many important rights of a criminal client can be protected and preserved only by prompt legal action. Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity, and timely plan and take necessary actions to vindicate such rights within the scope of the representation.

(b) **Defense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution.[4] Defense counsel should, when relevant, take prompt steps to ensure that the government's physical**

[3]http://www.ncids.com/forensic/index.shtml?c=Training%20%20and%20%20Resources,%20Forensic%20Resources .

[4] See: N.C. G.S. 15A-902, the need to file a written request/motion for voluntary discovery to trigger the State's obligations under G.S. 15A-903:
http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_15a/gs_15a-902.html .

evidence is preserved at least until the defense can examine or evaluate it.[5]

(c) **Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.**

(d) Not all defense actions need to be taken immediately. If counsel has evidence of innocence, mitigation, or other favorable information, defense counsel should discuss with the client and decide whether, going to the prosecution with such evidence is in the client's best interest, and if so, when and how.

(e) Defense counsel should consider whether an opportunity to benefit from cooperation with the prosecution will be lost if not pursued quickly, and if so, promptly discuss with the client and decide whether such cooperation is in the client's interest. Counsel should timely act in accordance with such decisions.

(f) For each matter, defense counsel should consider what procedural and investigative steps to take and motions to file, and not simply follow rote procedures learned from prior matters. Defense counsel should not be deterred from sensible action merely because counsel has not previously seen a tactic used, **or because such action might incur criticism or disfavor**. **Before acting, defense counsel should discuss novel or unfamiliar matters or issues with colleagues or other experienced counsel, employing safeguards to protect confidentiality and avoid conflicts of interest.**

(g) Whenever defense counsel is confronted with specialized factual or legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, **consider engaging or consulting with an expert in the specialized area.**[6]

(h) Defense counsel should always consider interlocutory appeals or other collateral proceedings as one option in response to any materially adverse ruling.

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[5] See sample defense motions for discovery and to preserve evidence here: http://ncids.org/MotionsBankNonCap/TriaMotionsLinks.htm; and here: https://ncforensics.wordpress.com/2015/07/09/sample-motion-for-preservation-of-forensic-evidence/.

[6] *State v. Ballard*, 333 N.C. 515 (1993) - Sixth Amendment right to assistance of counsel entitles defendant to apply ***ex parte for appointment of expert***. An indigent defendant is entitled to any form of expert assistance necessary to his or her defense, not just the assistance of a psychiatrist.

Standard 4-4.1 Duty to Investigate and Engage Investigators

(a) **Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.**

(b) **The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.**

(c) Defense counsel's investigative efforts should **commence promptly** and should explore appropriate avenues that **reasonably might lead to information relevant to the merits of the matter,** consequences of the criminal proceedings, and potential dispositions and penalties. **Although investigation will vary depending on the circumstances**, **it should always be shaped by what is in the client's best interests, after consultation with the client**. Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel's investigation should also include evaluation of the prosecution's evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client's interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. **Counsel should regularly re-evaluate the need for such services throughout the representation.**

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. **Application to the court should be made *ex parte* if appropriate to protect the client's confidentiality.**[7] Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a

[7] Guidelines of N.C. IDS and policies of the Office of the Capital Defender regarding when and how to engage experts, especially mental health experts can be very helpful when applying to a Superior Court judge for expert assistance, as well as, when to employ the expert and how to craft "referral questions" for the expert. See: http://www.ncids.com/forensic/experts/experts.shtml; Mechanics of Getting an Expert, by Cait Fenhagen, http://www.ncids.com/forensic/experts/Mechanics_of_Getting_Expert.pdf; http://www.ncids.org/Rules%20&%20Procedures/Policies%20By%20Case%20Type/CapCases/MentalHealthExperts.pdf.

regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective. (emphasis added). ABA Guidelines for Defense Function. Standard 4-4.1.

The ABA Standards also provide guidance with respect to witnesses and expert witnesses, how to deal with witnesses to avoid becoming a witness in your own case; and, how to manage work product and confidentiality in dealing with expert witnesses:

Standard 4-4.3 Relationship With Witnesses

(a) "Witness" in this Standard means any person who has or might have information about a matter, including victims and the client.

(b) Defense counsel should know and follow the law and rules of the jurisdiction regarding victims and witnesses. In communicating with witnesses, counsel should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons.[8]

(c) **Defense counsel or counsel's agents should seek to interview all witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness.**

(d) **Defense counsel should not use means that have no substantial purpose other than to embarrass, delay, or burden, and not use methods of obtaining evidence that violate legal rights. Defense counsel and their agents should not misrepresent their status, identity or interests when communicating with a witness.**

(e) Defense counsel should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses, other than expert witnesses, unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented so that they may be disclosed if required by law or court order. **Defense counsel should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness's testimony.**

(f) **Defense counsel should avoid the prospect of having to testify**

[8] Rule 7.4(a) of the N.C. Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question.

personally about the content of a witness interview. An interview of routine witnesses (for example, custodians of records) should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, counsel should be accompanied by another trusted and credible person during the interview. Defense counsel should avoid being alone with foreseeably hostile witnesses.

(g) **It is not necessary for defense counsel or defense counsel's agents, when interviewing a witness, to caution the witness concerning possible self-incrimination or a right to independent counsel. Defense counsel should, however, follow applicable ethical rules that address dealing with unrepresented persons. Defense counsel should not discuss or exaggerate the potential criminal liability of a witness with a purpose, or in a manner likely, to intimidate the witness, to intimidate the witness, or to influence the truthfulness or completeness of the witness's testimony, or to change the witness's decision about whether to provide information.**

(h) **Defense counsel should not discourage or obstruct communication between witnesses and the prosecution, other than a client's employees, agents or relatives if consistent with applicable ethical rules. Defense counsel should not advise any person, or cause any person to be advised, to decline to provide the prosecution with information which such person has a right to give. Defense counsel may, however, fairly and accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication.**

(i) **Defense counsel should give their witnesses reasonable notice of when their testimony at a proceeding is expected, and should not require witnesses to attend judicial proceedings unless their testimony is reasonably expected at that time, or their presence is required by law. When witnesses' attendance is required, defense counsel should seek to reduce to a minimum the time witnesses must spend waiting at the proceedings. Defense counsel should ensure that defense witnesses are given notice as soon as practicable of scheduling changes which will affect their required attendance at judicial proceedings.**

(j) **Defense counsel should not engage in any inappropriate personal relationship with any victim or other witness.**

Standard 4-4.4 Relationship With Expert Witnesses

(a) **An expert may be engaged to prepare an evidentiary report or testimony, or for consultation only. Defense counsel should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.**

(b) **Defense counsel should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of an expert based on employer, affiliation or prominence alone.**

(c) **Before engaging an expert, defense counsel should investigate the expert's credentials, relevant professional experience, and reputation in the field. Defense counsel should also examine a testifying expert's background and credentials for potential impeachment issues. Before offering an expert as a witness, defense counsel should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.**

(d) **Defense counsel who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.**

(e) **Before offering an expert as a witness, defense counsel should seek to learn enough about the substantive area of the expert's expertise, including ethical rules that may be applicable in the expert's field, to enable effective preparation of the expert, as well as to cross-examine any prosecution expert on the same topic. Defense counsel should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.**

(f) **Defense counsel should not pay or withhold a fee, or provide or withhold a benefit, for the purpose of influencing an expert's testimony. Defense counsel should not fix the amount of the fee contingent upon the substance of an expert's testimony or the result in the case. Nor should defense counsel promise or imply the prospect of future work for the expert based on the expert's testimony.**

(g) **Subject to client confidentiality interests, defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion. Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should be aware of expert discovery rules and act to protect confidentiality, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed. (emphasis added).**

III. GENERAL CONSIDERATIONS

The term "discovery" generally refers to documents and evidence made available by the prosecutor to the defendant through "informal" and "formal" means, under N.C. General Statutes, Article 48, either voluntarily or by court order, while the case is in District or Superior Court. The term "investigation" generally refers to all other matters of evidence or information not obtainable from the prosecutor. Investigation occurs through the efforts of counsel for defendant using computer search engines; *subpoenas*[9]; *ex parte* motions or other motions for records from third parties;[10] i.e.: motions and court orders for *in camera* review and production of DSS records, drug treatment, medical or psychiatric records of witnesses. These motions and orders are not filed pursuant to Article 48 and 15A-902, *et seq*. Specific other statutes may govern each kind of third party records or evidence.[11] They should be filed *ex parte* to protect confidential work product strategies and tactics of the defense.[12]

Investigation can occur through efforts of an investigator or an expert working on behalf of the defendant. As a general rule, once investigation and discovery turns up one set of documents or records these usually lead to the need to obtain other records and to interview other witnesses. In a complex felony case, such as a capital murder, multiple sex offense case involving multiple victims over a long period of time, historical drug conspiracies, complex "white collar" crimes with hundreds or thousands of pages of financial records and email accounts, the process of discovery and investigation may

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[9] SUBPOENA DUCES TECUM. --Documents not subject to [the discovery statute] may still be subject to a *subpoena duces tecum*. *State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).*

[10] See: https://benchbook.sog.unc.edu/criminal/defs-right-3rd-party-confidential-records.

[11] See generally: re medical records, G.S. 8-53 and 8-53.3: http://nccriminallaw.sog.unc.edu/obtaining-medical-records-under-gs-8-53/; obtaining DSS records: https://dcoba.memberclicks.net/assets/CLE2015/2%20moore%20how%20to%20obtain%20records%20from%20dss.pdf.

[12] http://www.ncids.com/forensic/experts/Mechanics_of_Getting_Expert.pdf.

never be complete. However, due to various deadlines, looming motion and trial dates, discovery and investigation eventually comes to an end before trial or plea resolution.

IV. WAIVER OF *BRADY* AND DISCOVERY RIGHTS BY PLEA OR FAILURE TO REQUEST/MOVE FOR DISCOVERY.

Because approximately 90 percent of all felony cases are resolved by plea, ABA Defense Guidelines, Standard 4-3.7 (b), requires that **prompt and zealous efforts to obtain discovery and investigate must occur *before* a plea resolution**. **Once a guilty plea is entered, the defendant *waives all outstanding discovery rights, including the right to DNA testing and the right to impeachment or Brady material.***[13]

If the defense has not *requested in writing* and ***filed* written motions to compel all discovery** required from the State under the provisions of G.S. 15A-903, the defendant may forfeit or waive their statutorily entitled right to a dismissal or other sanction, under G.S. 15A-910, to strike or suppress evidence during the trial as a result of the State's discovery violation. THIS IS VERY IMPORTANT BECAUSE many cases have been dismissed or resolved due to the discovery of "lost" or "misplaced" State's evidence which only comes to light when a State's witness is on the stand or otherwise ***discovered during a trial***; i.e.: when it is discovered by the prosecution or defense during a trial that a lead detective overlooked or lost a "supplement report," or the DA's office "misfiled" a report in the wrong filing cabinet.

V. THE MOTION TO PRESERVE ALL EVIDENCE, NOTES, AND REPORTS.

Consistent with ABA Defense Guidelines, Standard 4-3.7(b), *supra,* once an attorney is appointed to a case, or retained, they should consider immediately filing a

[13] See: http://nccriminallaw.sog.unc.edu/waivers-in-plea-agreements/; *United States v. Ruiz*, 536 U.S. 622 (2002) (no constitutional right to receive impeachment material prior to entering guilty plea).

Motion to Preserve All Evidence, including specific items that are suspected to have been seized or in the possession or control of the State and its investigators: all reports, notes, physical evidence; i.e.: all controlled substances, gunshot residue tests, projectiles and shell casings, weapons, blood swabs, DNA swabs, 911 recorded calls, radio dispatch traffic, police body cam records, security and surveillance camera recordings, weapons, tool mark evidence, hair and fiber samples, trace evidence, latent fingerprint lifts, digital evidence (both cell phone and computer) and documentary evidence, notebooks and personal papers located in the pockets or wallet of a victim or the defendant.

The defense attorney should get an order to inspect and preserve this evidence entered in District Court as soon as possible.[14] The defense attorney should serve the filed Order in person or by First Class Mail on the prosecutor, the Medical Examiner, the State Crime Lab, and all involved law enforcement agencies: police, sheriff, medical examiner, and SBI. The certificates of service should be filed with the Clerk of Court in the case file. The Motion and Order to Inspect and Preserve should be renewed in Superior Court so it more likely will be enforced. This is to protect the defendant's right to inspect and copy or test this evidence before trial and before it is lost, misplaced, destroyed, "consumed" or "damaged" by State testing before the defense or defense experts have had a chance to view or test the evidence as required under N.C.G.S. 15A-903. The defendant has state and federal constitutional rights to inspect

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[14] DESTRUCTION OF CARTRIDGE CASINGS NOT ERROR WHERE DISCOVERY REQUEST NOT FILED. -- Court properly allowed a police officer to testify concerning the type of pistol used in assault as the officer's testimony regarding the location of shell casings when a bullet was fired from two different weapons was based not upon any specialized expertise or training, but merely upon his own personal experience and observations in firing different kinds of weapons; defendant's due process rights were not violated by the destruction of the shell casings as the police had no duty to preserve the casings when defendant did not file a discovery request for the casings. *State v. Fisher, 171 N.C. App. 201, 614 S.E.2d 428 (2005),* cert. denied, *361 N.C. 223, 642 S.E.2d 711 (2007).*

and preserve evidence: Due Process and Effective Assistance of Counsel rights, and the Right to Confront and Cross Examine Witnesses, especially State experts. If the evidence is later destroyed in violation of the Order to Allow Inspection and to Preserve Evidence, the defense can seek appropriate sanctions ranging from suppression to dismissal of charges under 15A-910.

The defense attorney may wish to immediately subpoena facebook, cell phone service provider records of calls made and text messages, and cable and internet provider records of the defendant or other key witnesses or co-defendants before these records are lost or destroyed in the course of business. Email account evidence may not be around after 30 to 90 days without an order to preserve, subpoena, or release and request to produce. Information is usually available online as to how to obtain these records from each provider.

VI. GETTING INFORMAL DISCOVERY.

Although there is no statutory discovery in District Court under Article 48, there is nothing to prevent a prosecutor from allowing, or the defense attorney from asking, to see the State file or police reports in District Court. There are certain tactics that can be employed to get early disclosures or informal discovery in District Court. The defendant may agree not to request a bond motion or a probable cause hearing, or the defendant may agree to *waive* a probable cause hearing, in return for being allowed to see or obtain a copy of the State's file or "prosecution booklet" in District Court.[15]

[15] CAUTION: If the defendant is represented by counsel and has or waives a probable cause hearing, the defendant is required to serve a written request for discovery on the State within ten days of that waiver or hearing under G.S. 15A-902(d).

A bond motion may allow the defense to learn about the State's case and theory of guilt. This can have the double advantage of allowing the client to see that you are willing to fight for them by challenging the State's case, and by allowing the client to hear for themselves what the State contends its major evidence is all about. This can build your credibility with your client and earn their trust later on when advising the client about a plea or their chances at trial. A bond motion is not without risks unless the State and the defendant agree on a bond amount or conditions of pretrial release. Your client may be better off in custody in some cases and you may inadvertently force the State to adopt a less conciliatory stance to the defendant regarding plea negotiations by antagonizing victims and family members or law enforcement in a highly contested bond motion.

Therefore, you should use your professional discretion and discuss the pros and cons of having a bond motion or probable cause hearing with the defendant before asking to be heard on bond or moving for a probable cause hearing. **Sometimes a bond motion or a probable cause hearing, if a state's witness is placed under oath, can have the unforeseen consequence of inadvertently *preserving state's evidence* for a later jury trial if that witness later dies, refuses to testify under the Fifth Amendment, or is otherwise "unavailable."** This is because testimony under oath at any hearing in the case at which the defendant or his or her attorney had the "opportunity" to cross examine the witness, will preserve that testimony for the State by turning it into prior or recorded testimony admissible at trial under the N.C. Rules of Evidence, Rule 804(b)(1).[16] *Crawford v. Washington,* and the client's Sixth Amendment Rights to Confront

[16] http://nccriminallaw.sog.unc.edu/hearsay-exceptions-former-testimony-and-dying-declarations/. *See:* N.C. Rules of Evid., Rule 804(b)(1); *Crawford v. Washington,* 541 U.S. 36 (2004).

Witnesses *WILL NOT KEEP THIS PRIOR HEARING TESTIMONY OUT at A LATER TRIAL.* Conversely, if the defendant wishes to have a probable cause hearing and the State goes forward on one, the defense should always have it recorded and transcribed for later use at trial, especially if the defendant calls an alibi or other witness to an affirmative defense at the probable cause hearing. This will preserve that testimony in a credible way for defense use at a later trial, if the defense witness becomes unavailable, and allow a vehicle to impeach a State witness's inconsistent trial testimony.

GET ENFORCIBLE STATUTORY DISCOVERY: HAVE THE COURT SET SPECIFIC DEADLINES.

Even if you have obtained voluntary informal discovery from the State in District Court, or there is "an open file policy" in your prosecutorial district, once the case is in Superior Court by way of having or waiving a probable cause hearing if represented by counsel, or "no later than ten working days after appointment of counsel or service of the indictment (or consent to a bill of information), **the defendant MUST comply with 15A-902 by serving (and filing) a written request for voluntary discovery within the time limits imposed by 15A-902** so that the defendant can continue to request, file, AND ENFORCE motions to compel discovery and obtain additional discovery in Superior Court.[17] These steps are necessary to obtain sanctions against the State if it fails to comply with providing everything it should under 15A-903. The only statutory exception

[17] Before filing a motion for discovery before a judge, a defendant must make a written request for voluntary discovery from the State of North Carolina pursuant to *G.S. 15A-902(a)*. If the State voluntarily complies with the discovery request, the discovery is deemed to have been made under an order of the court, under *G.S. 15A-902(b)*, and the State then has a continuing duty to disclose additional evidence or witnesses. *State v. Cook, 362 N.C. 285, 661 S.E.2d 874 (2008).* **STATE DID NOT WAIVE ITS RIGHT TO RECEIVE A WRITTEN REQUEST FOR DEFENDANT'S ORAL STATEMENT by voluntarily producing defendant's written Statement pursuant to an informal oral agreement between the prosecutor and defense counsel**. *State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821,* rev'd on other grounds, *301 N.C. 508, 272 S.E.2d 123 (1980).*

to this rule is if the defendant and the State enter into a written agreement to be bound by Article 48 discovery. So if you miss the written request deadline, seek AND FILE a written agreement with the State for both sides to be bound by Article 48 discovery; i.e., GS-15A-902, 903, 904 (reciprocal discovery), *et seq.*

AT EVERY MOTION FOR DISCOVERY HEARING YOU MUST HAVE THE STATE PUT UNDER COURT-IMPOSED DEADLINES, AS REQUIRED BY G.S. 15A-909, to provide all discovery and/or certain items of evidence, such as forensic lab reports or access to physical evidence or digital recordings at a place, date, and time certain. Discovery must usually be litigated in contested cases, often after multiple requests in writing by letter or motion. Keep a log of your discovery requests and motions and when you received each item of discovery and refer to these efforts in your motions to compel.

BE VIGILANT: PAY ATTENTION TO DETAILS AND OMISSIONS IN REPORTS. There is a real risk that the court may not honor motions to compel the State to produce evidence or impose sanctions for failure to comply with discovery required under 15A-903, if the defendant does not first serve a written request for voluntary discovery on the State as required by 15A-902.[18] If the defendant fails to notice and seek remedies early on for obvious omissions or missing reports of which the defendant had notice early on, it will become difficult to enforce sanctions later when the omitted or lost reports turn up at trial. When a defendant may not have a clear statutory "right to be heard on a motion to compel discovery," due to failure to serve a timely written request

[18] *See: State v. Abbott*, 320 N.C. 475, 482 (1987)(prosecutor not barred from using defendant's statement at trial even though it was discoverable under statute and not produced before trial; open-file policy no substitute for formal request and motion.)

on the State, a trial court may still hear a motion to compel discovery by stipulation of the parties or "for good cause shown," G.S. 15A-902(f).

If the defendant files a written request for discovery or obtains an order compelling the State to provide discovery under G.S. 15A-903, the State must make available to the defendant "**the complete files of all law enforcement agencies, investigatory agencies, and prosecutor's offices involved in the investigation of the crimes committed or the prosecution of the defendant."** G.S. 15A-903(a)(1).

G.S. 15A-903(c) requires, under threat of criminal penalities for non-disclosure, that law enforcement and all investigatory agencies, public or private, turn over a copy of their complete files to the prosecutor on a timely basis. The defense may need to seek separate court orders to compel "assisting agencies" to provide the State and the defendant with complete sets of all supplements, notes, and reports created by officers called in to "assist" a lead agency. EMS and fire departments are notorious for not turning over to the prosecutor on a timely basis, everything required under 15A-903. EMS may require a special order as they are typically considered a "prosecutorial or investigative agency."

The defense attorney cannot assume that a copy of a "complete SBI file" will necessarily contain within it the complete files of a police or sheriff's department who requested assistance from the SBI, even if the SBI reports says it contains the complete files of another agency, and even if the "lead SBI agent" says the SBI received a complete copy of the local agency's file, notes, and documents generated in the case. The only way to "know" is to request an opportunity to inspect the original actual files of each agency involved in the prosecution of a case. Historically, the SBI has also used a

practice of turning over "typed interview summaries" from field notes which were then destroyed. This is a method practiced and taught by the FBI. Under the new G.S. 15A-903, this practice may has largely stopped, especially in light of the requirement to record custodial or police station interviews of defendants and witnesses in serious felony cases.[19] However, the vigilant attorney must determine whether or not all field notes corresponding to written reports and summaries have been preserved and produced. The vigilant attorney will also make a list of all officers or other investigators logged in at a crime scene or mentioned in any report of any other officer to see if those investigators and officers turned in reports or other written accounting of their role, activities and observations at a crime scene or in some other aspect of the investigation.

If the prosecution refuses to provide voluntary discovery, or does not respond at all, the defendant must move for a court order to trigger the State's discovery obligations.[20] **THE DEFENDANT MUST OBTAIN A RULING ON THE MOTION TO COMPEL OR RISK WAIVER.**[21]

If the State agrees to provide discovery pursuant to a written request for statutory discovery or the court orders discovery, the State has a continuing duty to disclose information (as does the defendant in providing reciprocal discovery to the State). G.S. 15A-907. The State always has a continuing constitutional duty to disclose material favorable or exculpatory evidence, with or without a request or court order, under *Brady v. Maryland,* 373 U.S. 83, 87 (1963). **However, without a defense request or motion**

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[19] See: G.S. 15A-211: viewable at: http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_15a/gs_15a-211.html.

[20] *State v. Keaton*, 61 N.C. App. 279, 282 (1983)(defendant has burden to make motion to compel before State's duty to provide statutory discovery arises.)

[21] *State v. Jones*, 295 N.C. 345, 356-58 (1978).

being filed, this "continuing constitutional duty," has little practical relevance outside post conviction proceedings.

WITHOUT AN ACTUAL MOTION HEARING RESULTING IN AN ORDER ON DISCOVERY, **THERE ARE VERY FEW DEFAULT STATUTORY DEADLINES FOR THE STATE TO COMPLY WITH ITS DISCOVERY OBLIGATIONS**. This is why it may be important to have hearings on your motions to compel in which you seek to have the trial court impose deadlines on the State. In fact, G.S. 15A-909 **REQUIRES the court to set a specific time, place and manner for the State to provide discovery whenever the Court grants a party's motion to compel discovery.** The few statutory deadlines the State operates under are G.S. 15A-903(a)(2) (State must give notice of expert witness and furnish report and CV within a reasonable time before trial); G.S. 15A-903(a)(3)(State must give notice of other witnesses at beginning of jury selection); and G.S. 15A-905(c)(1) a, (if ordered by court on showing of good cause and motion of defendant, State must give notice of rebuttal alibi witnesses no later than one week before trial unless parties and court agree to different times).

VII. INVESTIGATION AND DISCOVERY BY OTHER MEANS.

If the defense cannot get discovery under Article 48 and 15A-903 due to missed deadlines for filing a written request, the defense attorney should still file a written request, as soon as practical, followed by a motion to have the court find the written request or motion to compel discovery "deemed timely filed" in the discretion of the court by setting out reasons for the late request and/or motion: i.e. you were given early voluntary discovery by the State or you mistakenly believed you could rely on an "open file policy," or were relying on a negotiated plea in District or Superior Court which fell

through.[22] You do not want the court to find that the defendant has "waived" their rights to complete discovery by failure to request it and for failure to move to compel it when you are suddenly confronted with "surprise" evidence at trial.[23]

Even if you cannot compel discovery and obtain sanctions under Article 48 under 15A-910, you still have the chance to file motions and requests for "constitutional discovery" under *Brady v. Maryland* , *Kyles v. Whitley;* under N.C. Constitutional requirements under art. I, §19, the "Law of the Land Clause" and §23, the Right to Effective Assistance of Counsel, and general N.C. case law decided under N.C.G.S. 15A-903 before 2004, when the General Assembly passed the "open file" scheme we have now.

The defense attorney or investigator can seek to interview detectives and State witnesses, however they cannot be compelled to give pretrial interviews to the defense.[24] There is no legal or ethical reason why the defense cannot attempt to interview *any* State witness before trial. If the witness is represented by private counsel or a guardian *ad litem,* you can request permission of them to interview the victim or witness. In most cases there is an ethical duty to interview or attempt to interview important

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[22] G.S. 15A-902 (f): A motion for discovery made at any time prior to trial may be entertained if the parties so stipulate ***or if the judge for good cause shown*** determines that the motion should be allowed in whole or in part. (emphasis).

[23] **BURDEN IS ON DEFENDANT TO REQUEST DISCOVERY**. --Subdivision (a)(2) of this section makes it clear that the burden is on defendant to request discovery in writing prior to a motion to compel discovery. *State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821,* rev'd on other grounds, *301 N.C. 508, 272 S.E.2d 123 (1980).*

[24]**A prosecutor has an implicit duty not to obstruct defense attempts** to conduct interviews with any witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense. *State v. Pinch, 306 N.C. 1, 292 S.E.2d 203,* cert. denied, *459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982),* rehearing denied, *459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983),* overruled on other grounds, *State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994***). Nothing in this Article compels State witnesses to subject themselves to questioning by the defense before tri**al. *State v. Phillips, 328 N.C. 1, 399 S.E.2d 293,* cert. denied, *501 U.S. 1208, 111 S. Ct. 2804, 115 L. Ed. 2d 977 (1991).* Pursuant to *G.S. 15A-903(a)(1)*, the detective was not required to submit to a pretrial interview with defense counsel against the detective's wishes. *State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218 (2006).*

witnesses before trial or plea,[25] especially if you have learned a key witness has recanted or admitted to a third party their intent to perjure themselves on the stand. This kind of pretrial interview can also be seen as part of the defense attorney's duty to zealously represent the defendant under the N. C. Rules of Professional Conduct, Rule 0.1; to provide Effective Assistance of counsel under the Fifth and Sixth Amendments; and, to effectively Confront and Cross Examine witnesses against the defendant under the Sixth Amendment. However, be careful to ascertain whether or not a victim or witness is represented by an attorney or guardian *ad litem*, especially if the victim/witness is a minor.[26] It is highly advisable that the defense attorney send an investigator or have an investigator or third party present during any defense interview of a victim or witness to prevent the attorney from becoming a witness in the case and to preserve the defendant's right and ability to impeach that victim or witness if necessary at trial. If the witness consents, a recording of the interview may be helpful; consent is advisable but not necessary in this state for you or your investigator to record the interview or statement so long as one party to the conversation is aware it is being recorded.[27] If the witness recants, a copy of the recording or an affidavit of recantation from a material witness can

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[25] See: supra at p. 6, : ABA Guidelines and Standards for the Defense Function, 4-4.3 (c) **Defense counsel or counsel's agents should seek to interview all witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness.**

[26] Rule 7.4(a) of the Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question. The prosecuting witness in a criminal case is not represented, for the purposes of the rule, by the district attorney. For that reason, the lawyer for the defendant need not obtain the consent of the district attorney to interview the prosecuting witness. Nor may the district attorney instruct the witness not to communicate with the defense lawyer.

[27] *See*: http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations.

be presented to the State's attorney to negotiate a plea or dismissal of the case. The recording can be used to impeach or corroborate at trial.

VIII. RECIPROCAL DISCOVERY TO THE STATE.

Under G.S. 902 (e):

> The State may as a matter of right request voluntary discovery from the defendant, when authorized under this Article, at any time not later than the tenth working day after disclosure by the State with respect to the category of discovery in question.

The prosecution is entitled to reciprocal discovery from the defendant if the prosecution provides discovery to the defendant, either voluntarily or by court order, upon the defendant's written request or motion. Statutory reciprocal discovery duties of the defense are governed by G.S. 15A-905.[28] As part of the defendant's reciprocal discovery duties, the defense must give notice to the State of certain defenses and affirmative defenses once the case is set for trial.

G.S. 15A-905 requires the following notices of defenses and experts:

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

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[28] G.S. 15A-905, provides: (a) Documents and Tangible Objects. - If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.
(b) Reports of Examinations and Tests. - If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession and control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony. In addition, upon motion of the State, the court must order the defendant to permit the State to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it available to the defendant if the defendant intends to offer such evidence, or tests or experiments made in connection with such evidence, as an exhibit or evidence in the case.

motion of the State, order the defendant to:

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

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

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

(2) Give notice to the State of **any expert witnesses that the defendant reasonably expects to call as a witness at trial**. Each such witness shall prepare, and the defendant shall furnish to the State, a report of the results of the examinations or tests conducted by the expert. The defendant shall also furnish to the State the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. **The defendant shall give the notice and furnish the materials required by this subdivision within a reasonable time prior to trial, as specified by the court**. Standardized fee scales shall be developed by the Administrative Office of the Courts and Indigent Defense Services for all expert witnesses and private investigators who are compensated with State funds. (emphasis).

IX. PROTECTIVE ORDERS

Protective Orders. G.S. 15A-908(a) allows either party to apply ex parte to the court, by written motion, for a protective order protecting information from disclosure for good cause, such as substantial risk to any person of physical harm, intimidation or embarrassment. A defendant may want to consent to a protective order not to disseminate sensitive information such as medical, psychological or DSS records of a State victim or witness. If either party obtains an *ex parte* protective order they must serve notice of the

existence of the protective order on the other side, but the subject matter of the order does not have to be disclosed to the other side. G.S. 15A-908(b).

X. MISCELLANEOUS DISCOVERY ISSUES.

Criminal Records of the Defendant or State Witnesses: A former version of of G.S. 15A-903 gave defendant's the right to their criminal record. Current G.S. 15A-903 does not state so explicitly. However, as a practical matter, most prosecutors will run complete criminal histories of defendants and co-defendants and these must be provided in discovery if they end up in the State's file. G.S. 15A-1340.14(f) requires the State to produce a copy of the defendant's record upon request in all felony cases. **Witness criminal records are not required to be run, however, if the State has them in their file they must be turned over. Under *Brady*, the defendant should argue that he has a Due Process and Confrontation Clause right to significant criminal record information about all state witnesses as relevant impeachment information.**

The State cannot be compelled to do scientific testing for the defendant **under formal discovery pursuant to 15A-903**;[29] however, the defense may seek an order compelling the State to perform DNA or other testing upon making a showing that the testing is reasonably likely to lead to exculpatory evidence under federal and State

[29] STATUTE DID NOT COMPEL DNA TEST BY STATE. --*G.S. 15A-903(e)* did not compel the State to perform a deoxyribonucleic acid test on a cap found at the scene of a crime. *State v. Ryals, 179 N.C. App. 733, 635 S.E.2d 470 (2006),* review denied, *362 N.C. 91, 657 S.E.2d 27 (2007). See: STATE V. DARRYL HUNT; STATE V. GELL, AND OTHER N.C. AND NATIONAL EXONERATION CASES for anecdotal evidence about exculpatory forensic testing in post-conviction cases.* DISCOVERY OF PROCEDURES USED TO CONDUCT LABORATORY TESTS. --State not required to provide defendant with information concerning peer review of procedures an analyst used to test substances police bought from defendant for the presence of drugs, but it did permit defendant to discover information about procedures the analyst used, and the trial court erred when it denied defendant's written request for an order requiring the State to provide discovery of data collection procedures. *State v. Fair, 164 N.C. App. 770, 596 S.E.2d 871 (2004).* TESTS AND PROCEDURES USED TO CREATE REPORTS --Under *G.S. 15A-903(e)*, the State was required, pursuant to defendant's request in a drug case, to produce not only conclusory lab reports, but also tests and procedures used to reach those results. *State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650 (2002).*

constitutional principles. If the State will not agree to test certain items of seized evidence and the court will not order *the State,* or the N.C. State Crime Lab, to so test the items, the defendant is nevertheless entitled to have his or her own expert or lab test the items.[30]

N.C.G.S. §15A-903 entitles the defendant to "everything" **in the prosecutor's file unless it is considered "work product."[31]** There is a wide range in actual practice across the State in terms of how and when a prosecutor's office will make this "file" available: whether you must copy or scan it yourself, whether you will be given a "copy" of it online in the N.C. AOC DAS system, on paper, or in a digital CD or DVD format.

You are entitled to ALL Statements of the defendant and witnesses known to law enforcement or in the possession of the prosecutor from sources other than law enforcement. All such Statements must be reduced to writing for the use of the defense. *But see*: *State v. Shannon,* 182 N.C. App. 350 (2007)(prosecutor not required to reduce witness interview to writing unless it is ***significantly different*** from previously recorded Statement disclosed to defense).[32] N.C.G.S. §15A-904(a)(1).

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[30] INDEPENDENT CHEMICAL ANALYSIS OF SEIZED SUBSTANCES. --Due process requires that defendants have the opportunity to have an independent chemical analysis performed upon seized substances. *State v. Jones, 85 N.C. App. 56, 354 S.E.2d 251,* cert. denied, *320 N.C. 173, 358 S.E.2d 61,* cert. denied, *484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404 (1987),* holding that the trial court's refusal to allow defendants further access to drugs did not violate that due process requirement. A defendant enjoys a concomitant statutory right to inspect the crime scene and to independently analyze seized substances. *State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).*

[31] STATEMENTS THAT ARE NOT WORK PRODUCT ARE DISCOVERABLE. --General Assembly expressly contemplated in *G.S. 15A-904(a)* that trial preparation interview notes might be discoverable except where they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff; accordingly, *G.S. 15A-904(a)* comports with *G.S. 15A-903(a)(1)*'s mandate that oral witness Statements shall be in written or recorded form because every writing evidencing a witness's assertions to a prosecutor will not necessarily include opinions, theories, strategies, or conclusions that are protected as work product under *G.S. 15A-904(a)*. *State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516 (2007),* review denied, *361 N.C. 436, 649 S.E.2d 893 (2007).*

[32] DISCLOSURE OF STATEMENTS MADE IN PRETRIAL INTERVIEWS REQUIRED. --*G.S. 15A-903(a)(1)* requires prosecutors to disclose, in written or recorded form, Statements made to them by witnesses during pretrial interviews; accordingly, where the trial court erred in denying defendant's motion to compel discovery of notes of pretrial interviews that the prosecutor had with a witness, and it could not be determined whether the error prejudiced the outcome of the case under *G.S. 15A-1443(a)*, a motion for appropriate relief was remanded for an evidentiary

Under Brady v. Maryland, and, Kyles v. Whitley, 514 U.S. 419 (1995), the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. The defense may file a motion, upon stating sufficient grounds to believe additional statements or exculpatory evidence is "out there," for an order requiring the prosecutor to make additional inquiries of the police or others about specific matters the defense cannot otherwise learn on its own. Under *Brady, Kyles*, and *Davis v. Alaska*, 415 U.S. 308 (1974), the defendant may file a **motion for an *in camera* inspection of a witness's complete adult or JUVENILE probation and parole file** for evidence of bias, substance abuse, mental infirmities affecting perception and memory, or lack of credibility or hope of reward or sentencing concessions in return for testimony favorable to the State.[33]

The defense is entitled to notice and disclosure of all State expert witnesses **(whether or not the State intends to call that expert as required by 15A-903(a)). The defense is entitled to a detailed report[34] setting out all opinions the expert is expected**

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hearing. *State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516 (2007),* review denied, *361 N.C. 436, 649 S.E.2d 893 (2007).* Trial court did not abuse its discretion in granting defendant a recess to review a witness's Statement and in allowing defendant to cross-examine the witness to expose inconsistencies in the witness's Statement after it was revealed that the State failed to provide defendant with additional discovery after a meeting with the witness gleaned new information crucial to the *State's case. State v. Pender, 218 N.C. App. 233, 720 S.E.2d 836 (2012).*

[33] *Davis v. Alaska held:* Petitioner was denied his right of confrontation of witnesses under the Sixth and Fourteenth Amendments. Pp. 415 U. S. 315-321((a) The defense was entitled to attempt to show that Green was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the burglary charged against petitioner, and limiting the cross-examination of Green precluded the defense from showing his possible bias. Pp. 415 U. S. 315-318. (b) Petitioner's right of confrontation is paramount to the State's policy of protecting juvenile offenders, and any temporary embarrassment to Green by disclosure of his juvenile court record and probation status is outweighed by petitioner's right effectively to cross-examine a witness. Pp. 415 U. S. 319-320).

[34] EXPERT WITNESS OPINIONS SHOULD HAVE BEEN DISCLOSED. --State failed to comply with the statute when responding to defendant's motion for discovery because two expert witnesses gave expert opinions that should have been disclosed in discovery; the experts offered expert opinion testimony about the characteristics of child sexual abuse victims, and the testimony went beyond the facts of the case and relied on inferences to reach the conclusion that certain characteristics were common among child sexual assault victims. *State v. Davis, -- N.C. --, 785 S.E.2d 312*

to offer at trial, and to the expert's curriculum vita. See: N.C.G.S. 15A-903(a)(2). You are also entitled to request/move for copies of the State expert's interview notes, psychological or neuropsychological test data, all records and other data or State discovery reviewed and relied upon by the State expert, prior payments and fee schedules for the State expert, bench notes, lab notes and equipment calibration and maintenance data, known error rates for the State lab expert, prior proficiency testing and scores of the expert, test data, photos of aspects of physical evidence upon which that expert's observations and opinions are based, e.g.: fingerprint close-up photos, photos of toolmark images and striations, ballistics and firearms shell casing and projectile markings, reagent papers in drug identification cases, luminol or BlueStar testing for presumptive blood results along with photo documentation of test results, DNA allele sheets and probability and statistics databases used and calculations employed.

You will have to conduct your own investigation into collateral matters affecting an expert's credibility such as a Google or Lexis search for prior testimony in appellate cases. Google or Lexis searches will help you locate copies of transcripts of that experts' prior testimony from court reporters or prior appellate or post conviction attorneys. You may wish to locate copies of prior talks, presentations, trainings, professional and other publications and pamphlets written by the expert. These may appear on their CV. Sometimes what is OMITTED from the CV is more important than what is on there. It is also a good idea to check out social media posts, Facebook friends,

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(2016). STATE FAILED TO COMPLY WITH DISCLOSURE REQUIREMENTS FOR EXPERT WITNESS. --SBI agent, who was better qualified than the jury to determine if the substance in defendant's shoe was marijuana, was erroneously allowed to testify as an expert where the State did not comply with discovery requirements in *G.S. 15A-902(a)(2)*. *State v. Moncree, 188 N.C. App. 221, 655 S.E.2d 464 (2008).*

and other contacts of the expert to identify bias. Former colleagues of the expert at prior employments may have information. N.C. AOC may have payment records for State experts which will tell you where to look for prior testimony and other defense attorneys who may have previously cross examined or vetted the State expert.

The defense is entitled to "everything" in the prosecutor's file: what the prosecutor's "file" consists of is set out in detail in 15A-903(a). Once you are given a copy of this file, often called a "prosecution book," you can examine it in detail for omissions: missing officers' field notes, illegible or poorly copied pages, documents seized and placed in "property control" or the evidence locker, etc. You should then file additional requests for voluntary discovery pointing out in detail what you are missing and follow that up with letters to the prosecutor and with additional motions to compel if you have not received the missing discovery. If you are running into trouble getting discovery you should try to schedule a hearing on your motions to compel and seek to have the Court impose discovery deadlines on the State to comply. Many discovery hearings or status conferences may be necessary in complex cases.

If the FBI is involved in a State criminal case and does a crime scene search or takes evidence to the FBI Crime Lab in Quantico, Va., or does any interviews in your case, state discovery statutes will not apply directly to the FBI. You will not without great difficulty be able to obtain copies of "every report" in the possession or control of the FBI because the FBI does not keep all reports filed in one place or even in one city. There are often many documents, such as Department of Justice or Homeland Security "review documents" which will not be turned over in State Court without a fight. However, you can seek to gain access to physical evidence in the possession of the FBI or seek to get

copies of FBI reports and interviews by seeking a State court order directing the State's attorney or prosecutor to obtain those items from the FBI, or other federal or "out-of-state" agency, by certain deadlines for disclosure to the defense, or suffer the consequences of dismissal of the State's case or suppression of the FBI or "out-of-state" lab results as appropriate sanctions under N.C.G.S. 15A-210 or general constitutional rights to Due Process. You will need to cite all your client's rights under the Fifth, Sixth, and Fourteenth Amendments to Due Process and to Present a Defense when litigating these extra-jurisdictional discovery motions.

State's Witness List The defense is entitled to a copy of the State's witness list including name, address, published phone number, and date of birth under 15A-904(a)(2); but ***only if*** the defendant requests it in writing. The best practice is to file the request/motion for a witness list with your initial request/motion for discovery with the Clerk of Court to enforce or preserve violation of this right on appeal if the State is allowed to call someone not on the list.

No Authority To Order Examination Of A State's Witness By Defense Expert. Under *State v. Horn*, 337 N.C. 449 (1994), the State will likely argue this cannot be done. In that case the defendant can request his own expert to evaluate the State's evidence and the State's expert's evaluation of a State witness for rebuttal purposes. If the defense is denied an opportunity for an examination of the State witness who was previously examined or evaluated by a State expert, or if the defense is denied its own expert to respond to or rebut the State expert, then move to dismiss the charges, or exclude the State's evidence under *Horn,* and under the defendant's Rights to Due Process, to Effective Assistance of Counsel, and to Present a Defense, under the Fifth,

Sixth, and Fourteenth Amendments; and, THE LAW OF THE LAND CLAUSE, art. I, Section 19, of the N.C. Constitution.

Missing , Lost, Or "Hidden" Discovery

Once the defendant has obtained disclosure of what may appear to be the State's "entire file," either prior to indictment or after, most cursory reviews of that file, especially copies of that file, will reveal that pages are missing or illegible, that many officers at the scene of a crime may not have turned in reports, or turned them in ***after*** a lead detective has submitted his initial copies of the "prosecution book" to the prosecutor. Sometimes typed supplements or summaries of a defendant or witness's interview is provided without the original field notes for those interviews. Ask your client if he saw an investigator taking notes and on what; i.e., a "007 pad," or "legal pad." Then see if those handwritten notes appear in the discovery. Be sure to look at all search warrant affidavits for information not disclosed in discovery, and seek to obtain disclosure of confidential informants.

Discovering Identity Of Confidential Informants

If the State has not moved to "seal" the identity of an informant, it is discoverable under G.S. 15A-903(a)(1); however, the State is not required to disclose the identity of a confidential informant unless required by law. G.S. 15A-904(a1). If the State has successfully moved to seal the identity of the informant, you cannot discover the informant's identity under the statute once the warrant has issued or if the existence (not truthfulness or reliability) of the informant is established. G.S. 15A-978(b)(1) and (b)(2). The provision that the State is not required to disclose the identity of a confidential informant unless it is "otherwise required by law," refers to "constitutional law." In that

case, you can make a constitutional argument that "disclosure is essential to a fair determination of a defendant's rights under the Fourth and Fifth Amendments." See: *Rovario v. United States*, 353 U.S. 53, 60-61 (1957). The defendant has the burden to show why they need the informant's identity. Factors the Court looks at include:

1) the crime charged
2) whether the informant was an actual participant. (*State v. Ketchie*, 286 N.C. 387, 390 (1975)(disclosure is where informer directly participates in the alleged crime so as to make him a material witness on the issue of guilt or innocence.) The defendant is not required to present proof of his need for the participant/informant's testimony; such a requirement would "place an unjustifiable burden on the defense." *McLawhorn v. North Carolina*, 484 F.2d 1, 7 (4th Cir.1973)
3) possible defenses. *Rovario*, 353 U.S. at 64 (informant played a prominent role in the offense; his testimony might have disclosed an entrapment issue), and
4) the significance of the informant's testimony. *Id.*

The whereabouts of the informant is subject to the same constitutional principles described above.[35]

Plea Arrangements, "Wink And Nod Deals," Immunity Agreements, Sentencing Concessions

One of the most difficult things to discover is the existence of plea arrangements, sentencing and charging concessions, bond reductions, and other "inducements" by the prosecutor or investigators for the State for the testimony of co-defendants, uncharged "co-defendants," jailhouse snitches, and other State witnesses for their testimony against the defendant. Sometimes the prosecutor will verbally communicate the hope of a deal to

[35] See: *United States v. Aguirre*, 716 F.2d 293 (5th Cir. 1983); *United States v. Tenorio-Angel*, 756 F.2d 1505 (11th Cir. 1985); *State v. Brockenborough*, 45 N.C. App. 121, 122 (1980); *Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957),* sets forth the test to be applied when the disclosure of an informant's identity is requested. The trial court must balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his case. *State v. Jackson, 103 N.C. App. 239, 405 S.E.2d 354 (1991),* aff'd, *331 N.C. 114, 413 S.E.2d 798 (1992).*

the attorney of a co-defendant in return for their client's testimony without putting that "hope of an offer" into writing. The attorney for that witness may or may not communicate that "hope" or "implied promise" to their client. Cross examination may or may not uncover it. Of course if any of the above is reduced to writing it must be disclosed pursuant to G.S. 15A-903. G.S. 15A-1054(a) complicates this because it authorizes prosecutors to agree not to try a suspect, to reduce the charges, and to recommend sentence concessions on the condition that the suspect will provide truthful testimony. This arrangement can be entered into without a formal grant of immunity under G.S. 15A-1054(c), and it requires written notice to the defense of any such arrangement within a reasonable time prior to that witness's testimony. State v. Spicer, 50 N.C. App. 214, 217 (1981); and, *State v. Brooks,* 83 N.C. App/ 179, 188 (1986), may be cited by the defense as authority for the State to disclose ALL plea arrangements and sentencing concessions whether *formal or informal, including, so-called "wink and nod" deals.* The defendant can also argue that "the complete files" provision of 15A-903 AND the constitutional duty to disclose exculpatory and impeachment evidence under *Brady, Giglio v. United States, 405 U.S. 150, 155 (1972)(evidence of ANY understanding or agreement as to future prosecution must be disclosed),* and their progeny, requires disclosure of all "informal deals or concessions" for testimony. See also: *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976)(North Carolina conviction vacated for failure to disclose promise of leniency by police officer). G.S. 15A-1052(a) requires not only disclosure to the defense, but that the trial court must inform the jury of any formal grant of immunity to a witness BEFORE the witness testifies.

Black Box Data from Automobiles

In **car crash cases** you may wish to obtain **black box data from airbag sensors** and retain an accident reconstructionist to interpret the data: see if it is consistent with eye-witness accounts.

Lost or Misplaced Reports

In some police and sheriff's departments, **late reports** can be scanned into a department's computerized case information system without a lead detective's or prosecutor's knowledge. Sometimes reports are turned into the "wrong detectives" or are simply lost. Sometimes documents are placed into "property control" or the evidence room without being copied or scanned into the prosecutor's file. A felony defense attorney cannot assume they have "everything" the defendant is entitled to simply because a law enforcement officer or lead investigator, even a prosecutor, certifies that "everything has been turned into the prosecutor." If more than one agency is involved in a felony investigation, additional motions and court orders directed to each agency are almost always necessary to insure that all reports and evidence collected by that agency are provided to the prosecutor and in turn to the defense.

Discovery Hearings to Voir Dire Each Investigator

Sometimes you need to be able to review and look at the agency's actual case file to be sure it's all be turned over to the prosecutor. If there are questions about what's been turned over, you may need to file a motion requesting a "pretrial discovery hearing" and *subpoena* lead agents and lead detectives along with all other investigators and examine them under oath about the discovery which has been turned over to identify

what may have been "misfiled" or "lost," and to commit the State to the discovery provided as a matter of record.

Review and Inspect the Original Files of DA and Law Enforcement

Before entering into a plea agreement on a serious felony, and especially before going to trial, the felony defense attorney should always request/move for a chance to review the actual case file of the prosecutor and lead detective as well as to look at the physical evidence seized and kept in property control or the evidence room. §15A-903 requires this upon request or motion of the defense. A "copy" does not suffice under the statute.

Sanctions Under §15A-910

Vigilance and repeat requests specifying as exactly as you can what is still missing are almost always required before the defense can expect to get sanctions for noncompliance by the State. Getting all the discovery from the State that the defendant is entitled to is extremely important because failure of the prosecutor to seek, find, and turn over what is required by §15A-903 entitles the defendant to sanctions under §15A-910. Depending on the materiality, unfair surprise, magnitude, and complexity of the late or non-disclosures, the Court may order anything from a continuance, a brief recess to review the new evidence, suppression of the late evidence, all the way up to dismissal of the charges or limitations on penalties or sentences available to be sought by the State.[36]

If discovery is not forthcoming on all or some items by a court-ordered deadline,

[36] STATE SPECIAL AGENT'S TESTIMONY MUST COMPLY WITH SECTION. --Trial court abused its discretion in allowing a State Bureau of Investigation special agent to testify without requiring the State to comply with the discovery requirements of *G.S. 15A-903*; although the State may not have known the specific witness it would be calling, the State did know it would be calling someone to testify concerning the process of manufacturing methamphetamine. *State v. Blankenship, 178 N.C. App. 351, 631 S.E.2d 208 (2006).*

the defendant must file a motion under 15A-910 for sanctions for failure to comply or be deemed to waive the available remedies. Be sure to pray the Court for **all remedies** which may be reasonably called for as sanctions depending on the severity, untimeliness, or prejudice to the defense for not being given this discovery. Be sure to ask for all or some of the remedies for noncompliance with discovery including: a continuance or recess to review late discovery; exclusion of the lately disclosed State's evidence, preclusion of the State trying your client on greater charges or for aggravated penalties at sentencing as a remedial sanction for last minute discovery if the State is allowed to use the late-disclosed evidence; and, ALWAYS seek dismissal of the charges. You will need to document for the Court all your timely requests and motions for discovery, the time of the State's responses or lack thereof, case law supporting your requests for sanctions and references to 15A-902, 903, and 910. It is advisable to attach an affidavit verifying your motion for sanctions which outlines all defense efforts to obtain the discovery, prior orders to compel discovery, and ***the prejudice*** resulting to the defense for late or non-disclosure.

It is a good idea to attach case law holding that the defense is entitled under Due Process to receive the discovery in a timely fashion, including exculpatory discovery, ***in time to make effective use of the discovery at trial, or that the State should face sanctions to protect those rights.*** That means the defendant must have time to not only read the late discovery but also time to investigate it and follow up on it and locate admissible evidence and witnesses to counter it or corroborate it before the jury at trial.[37]

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[37] *See State v. Canady* (2002)(viewable at: http://cases.justia.com/north-carolina/supreme-court/115a00-9.pdf?ts=1396137515.)(In *Brady v. Maryland*, the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good

Sanctions for Loss or Destruction of Evidence by the State

Absent a violation of a previously entered court order to preserve evidence in the defendant's case, in order to establish a Due Process Clause violation by the State for the loss or destruction of evidence, the defendant must show that an officer or state agent acted in bad faith in failing to preserve potentially useful evidence for trial. The burden is on the defendant to show that the lost or destroyed evidence was potentially exculpatory AND was lost or destroyed by the State in bad faith. See generally: *Illinois v. Fisher*, 540 U.S. 544, 547-48(2004)(evidence destroyed 11 years after traffic stop not a Due Process violation); *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (2004)(due process not violated by failure to refrigerate clothing with semen samples and no bad faith demonstrated); and State v. Williams, 362 N.C. 628, 638-39 (2008)(assault on officer properly dismissed when prosecutor flagrantly prejudiced defendant's due process rights to preparation of a defense by destroying material evidence favorable to defendant consisting of before and after time of offense photographs of defendant); and other cases collected on, pp 25-26, of the ***North Carolina Superior Court Judge's Benchbook***, *supra* at p. 1.

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faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963). "Favorable evidence is material if there is a 'reasonable probability' that its disclosure to the defense would result in a different outcome in the jury's deliberation." *State v. Strickland*, 346 N.C. 443, 456, 488 S.E.2d 194, 202 (1997), cert. denied, 522 U.S. 1078, 118 S.Ct. 858, 139 L.Ed.2d 757 (1998). The determination of the materiality of evidence must be made by examining the record as a whole. *State v. Howard,* 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993).***The State has not satisfied its duty to disclose unless the information was provided in a manner allowing defendant "to make effective use of the evidence."). See also State v. Taylor, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996).***

Sanctions for State Constitutional Violations under G.S. 15A-954.

A dismissal of criminal charges for a state or federal constitutional violation involving loss or destruction of exculpatory evidence may lie under G.S, 15A-954(a)(4), when the defendant's constitutional rights have been so flagrantly violated that there is such irreparable prejudice to the defendant's preparation of his or her case that no other remedy is adequate but dismissal. *State v. Joyner*, 295 N.C. 55,59 (1978)(this is a drastic remedy that should be granted sparingly).

Motion For Bill Of Particulars

Under the new "open file" provisions of 15A-903, Motions for Bills of Particular are largely a thing of the past. However, under G.S. §15A-925 the defendant can still move for a Bill of Particulars. The court has discretion to order one under certain conditions: you must request specific items of factual information not recited in the pleading and you must allege that you cannot adequately prepare or conduct a defense without it. Under *State v. Easterling*, 300 N.C. 594, 601 (1980), the court MUST order it disclosed if the items requested are necessary to an adequate defense. The defendant should State in the motion that without the court ordering the State to respond to a motion for bill of particulars, the defendant does not have the NOTICE required by the Fourteenth Amendment of the charges against him, and that the defendant is deprived of effective assistance of counsel required by the Sixth Amendment. *State v. Parker,* 350 N.C. 411, 516 S.E.2d 106 (1999). You may try to get the State to disclose theories of guilt, i.e., aggravating factors in a capital case or whether the State will proceed on felony murder or premeditation and deliberation or both. If the State responds to a motion or order to answer a Bill of Particulars it is bound by its answers at trial.

However, the court cannot order the State to "recite matters of evidence." This language is prior to the current "open file" language of 15A-903 and is open to interpretation. If the court orders the State to respond to the Bill of Particulars the State must recite every item of information required under the order. Proceedings are stayed until the State responds with filing and service on the defendant or defense attorney. If the State answers, it IS LIMITED at trial to the items set out in the bill of particulars. *State v. Stallings*, 107 N.C. App. 241, 245 (1992)(however, the court may permit the State to amend its response to a bill of particulars anytime prior to trial, but not afterwards). An oral recitation by the prosecutor in open court to the motion for a bill of particulars DOES NOT limit the State's evidence at trial, *Stallings, Id*.

Always File A Motion For Brady Materials & Constitutionalize All Motions

Under *Brady v. Maryland,* 373 U.S. 83,87 (1963), the prosecution has a general constitutional duty under the Due Process Clause to disclose evidence if it is favorable to the defense and material to the outcome of either the guilt-innocence or sentencing phase of a trial. See the ***North Carolina Superior Court Judge's Benchbook***, pp. 16-22, for a complete discussion and list of over thirty cases granting relief for specific kinds of *Brady* violations.[38] Although the U.S. Supreme has now held under *Kyles v. Whitley,* 514 U.S. 419, 433 (1995), that the prosecution has a duty to disclose favorable, material evidence whether or not the defendant makes a motion or files a request for it, there is no way to effectively litigate this issue pretrial or at trial without making and filing such request. The better practice then, is to file a motion for exculpatory evidence under *Brady*

[38] ***North Carolina Superior Court Judge's Benchbook (2015), pp 16-17,*** available online at **http://benchbook.sog.unc.edu/criminal/discovery.**

v. Maryland, and get the State under a deadline to reduce all such information to writing and provide it to the defense. Under *Kyles*, everything known to police investigators is imputed to the prosecutor, so the defense can seek an order requiring a prosecutor (for his or her own protection) to make further inquiries of all the investigators in the case for any remaining unreported exculpatory or impeaching information prior to trial. *Kyles* also held that a prosecutor has an ***affirmative duty*** to investigate and learn of any favorable evidence known to others acting on the government's behalf in a case. The prosecutor's duty to make inquiries of DSS, social workers, or mental health facilities depends on the degree these agencies have reported to or been involved in the investigation of the case, as they frequently are when the case involves child sexual abuse or child victims.

Don't forget to further "constitutionalize" all discovery and *Brady* motions by citing the right to Due Process, the Right to Effective Assistance of Counsel, and the Right to Confront and Cross Examine Witnesses under the Fifth, Sixth, and Fourteenth Amendments and parallel provisions of the North Carolina Constitution, art. I, §§ 19 & 23.

Continuing Duty to Disclose

Both the defendant and the State have a continuing duty to disclose information of a type that was ordered by the court to be provided or was voluntarily provided. N.C.G.S. §15A-907.

Special Rules for Treating or Examining Psychologists and Doctors in Sex Abuse Cases[39]

There appears to be a very hard to understand rule for "professional" testimony in sex abuse cases which exempts these witnesses from having to provide written reports under 15A-903 when testifying about "their own observations." My advice is to litigate this issue if you are aware of any "professional" counselor or medical provider on the witness list and the defense is not being provided with a detailed written report in discovery setting out all the opinions to be testified to at trial by that witness in order to preserve this issue under the defendant's right to Due Process, a Fair Trial, Effective Assistance of Counsel, and the Right to Confront and Cross Examine a Witness as well as under 15A-903, and the Law of the Land Clause of the N.C. Constitution.

XI. DEVELOPING A "REASONABLE" INVESTIGATION AND DISCOVERY STRATEGY

"Infinite reasonability" is not possible in the real world. The defense attorney does not have the luxury of inexhaustible time and unlimited resources to investigate every conceivable avenue of inquiry in every case. Indeed, not to narrow down, identify, and prioritize fruitful areas of discovery and investigation will compromise the attorney's ability to focus on necessary and material aspects of the defense case. The effective felony defense attorney, in addition to pursuing discovery and investigation, must also build client rapport, do legal research, engage in plea negotiations and trial preparation.

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[39] DISCLOSURE NOT REQUIRED. --Since the psychologist did not testify there was a specific set of characteristics of sexual abuse victims and did not opine on whether the victim met such a profile, but testified as to his own observations on sexual abuse, he did not offer an expert opinion requiring disclosure under this section. *State v. Davis, -- N.C. App. --, 768 S.E.2d 903 (2015).* Because the mental health counselor's testimony about sexual abuse victims was limited to her own observations and experience, it did not constitute expert opinion that had to be disclosed in advance of trial and the trial court did not abuse its discretion by admitting her testimony *State v. Davis, -- N.C. App. --, 768 S.E.2d 903 (2015).*

Therefore, the defense attorney must make effective and efficient use of time and resources to better serve each client by focusing on what matters most in each case. Being careful to draft detailed evidence specific discovery motions will save time in the long run and make your motions practice more effective.

Doing more with less is the very nature of contemporary criminal defense work. Therefore, the defense attorney must do everything they can to obtain and review as quickly and thoroughly as possible all information and reports available to the prosecutor through informal and formal means of discovery, as provided by Chapter 15A-902 through 903, through a vigorous, CASE SPECIFIC, and prompt motions practice.

The point here is that the defense attorney must be reasonably thorough, given limited time and limited funds, in deciding upon what is needed and required in the defense of each case, pursuing what is constitutionally required to provide effective assistance of counsel under the Fifth and Sixth Amendments, within the bounds of the law, and in a way that provides each client with the zealous and effective representation they deserve. You should not waste time or resources on matters that are not material or not reasonably likely to matter in the trial or disposition of each case.

On the other hand if you have a client who insists on your pursuing matters of investigation which are not likely to bear fruit, to maintain your relationship with the client, you must either attempt to locate those witnesses or evidence the client insists on finding, and after a reasonable inquiry or search you need to meet with the client to report on your efforts and come to an understanding about those matters to maintain your attorney/client relationship. There are specific ethical guidelines promulgated by the State Bar concerning impasses like this and how to resolve them.

With initial discovery requests and motions underway you should prioritize and design an appropriate investigation and additional discovery strategy for each case. Digital programs, such as "CaseMap" and internet-based "AirTable," and other available commercial programs, can help you organize and identify needed discovery.

Many discovery motions should be filed routinely, such as: filing a motion and obtaining an order to preserve all evidence while still in District Court and renewing that motion in Superior Court, or applying for statutory discovery and seeking required constitutional discovery of exculpatory and impeachment evidence under *Brady v. Maryland, et al*. Beyond these initial requests and motions, discovery and investigation strategies can and will be dramatically different depending on the nature of the offense: discovery needed in a drug trafficking case will differ from discovery and investigation in a sex offense case and from the extensive life history, records, and mitigation evidence needed in a murder case.

Some cases will require more investigation about your client's mental health records in a murder case than what you may need in a felony breaking or entering case. Where guilt is not an issue, you may need school records or Social Security Disability records to show the State that your client is "***not deserving"*** of a felony conviction or lengthy sentence due to mental impairments or intellectual disabilities or family hardships.

Not seeking out with a simple subpoena easy-to-obtain school and mental health records that may be used in plea negotiations or sentencing is probably the most neglected or overlooked aspect of investigation in defense of felony cases. This is often true of the 25 percent or more of all felony defendants who are statistically likely to be

intellectually disabled or seriously mentally ill. Obviously the State ***is not*** the source of "all information" about your client, especially in these kinds of cases. But what discovery the State has, it must turn it over to the defense or face sanctions under 15A-910.

After evaluating the legal issues in the case, which requires immediate assessment of whether or not the State has sufficient evidence to prove each and every element required to convict the defendant of every felony with which they are charged, the felony defense attorney is advised to sit down and evaluate what further investigation and discovery is needed or likely to lead to important admissible evidence.

If an obvious fatal defect is found in an indictment or fatal absence of proof is discovered with the State's case, then one is faced with the choice of using that information to negotiate a plea, or holding that defect in an indictment close to your vest until after State's evidence at trial. The degree of needed additional investigation and extraordinary efforts to obtain additional discovery may be limited in the case where you already know the State's case is dead on arrival.

In a case where the State's proof will be mainly through civilian witnesses you may need a private investigator appointed to attempt to interview these witnesses. Jailhouse snitches or civilian witnesses may recant or make exculpatory disclosures which an investigator may record or reduce to an affidavit which can then be presented to a prosecutor to negotiate a plea or dismissal.

Impeaching Jailhouse Snitches

Information that the defense attorney needs to discover, investigate, and collect to impeach jailhouse snitches can be found on the IDS website in an encyclopedic guide prepared by attorney, Mike Howell.[40]

Preserving Testimony Of Potentially Unavailable, Infirm Or Dying Witnesses

If your case involves a mental health expert, such as a forensic psychiatrist or psychologist, you may be able to preserve potentially unavailable exculpatory evidence by having your expert, with or without the help of your investigator, interview hard-to-locate witnesses and, if they can, base their opinions on information from that witness if the expert would normally rely upon it in forming their opinions under N.C. Rules of Evidence, Rules 702 and 703. This is especially useful if the witness is an infirm family member, an elderly schoolteacher, retired employer, co-worker, or supervisor. Consideration should also be given to the use of court-ordered depositions of infirm or dying witnesses in criminal cases under certain limited circumstances under G.S. 8-74.[41]

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[40] "Preparation for Cross Examining the Snitch," Michael Howell, viewable at: http://ncids.org/Defender%20Training/Drug%20Case%20Training/Cross%20Exam%20the%20Snitch.pdf.

[41] See: G.S. § 8-74. Depositions for defendant in criminal actions: In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this State, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: **provided, that the district attorney or prosecuting attorney of the district, county or town in which such action is pending have 10 days' notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. (emphasis).**

Getting an Investigator or Expert for the Defendant

In a first degree murder case you would apply to the Office of the Capital Defender for funding of private investigators, mitigation specialists, or other expert using a request form on the N.C. I.D.S. website. In all other cases you would apply to a District or Superior Court Judge for funding by filing an *ex parte* motion for funds setting out a particularized need for the investigator or expert. Sample *ex parte* motions are available on the N.C. IDS Defender website and are discussed in footnote 6, *supra*.[42]

Once you get an investigator provide them with a copy of *relevant* parts of the State's discovery. Don't waste their limited funds having them review things that don't matter to them. Go over with the investigator exactly what you are asking them to do. Their time and funds are limited so you must monitor them and use their time wisely. It is up to you to keep up with their funding and apply for additional funds BEFORE the case is disposed of. Don't send the investigator on obvious "wild goose chases." Tell the investigator how you wish them to write or summarize reports or summaries of witness interviews. For example, tell your expert whether or not to include "work product" comments in their reports to you as the attorney, or whether you wish them to provide "just the facts" of an interview for possible use or disclosure to the State or jury at trial for corroboration or impeachment purposes.

The investigation of exculpatory evidence that cannot be obtained with the simple use of a release, *subpoena* and/or court order and which is not in the possession of the State almost always requires the services of a private investigator; however, much can be learned from family and friends of the defendant and of course from the defendant.

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[42] http://www.ncids.com/forensic/experts/Mechanics_of_Getting_Expert.pdf.

Discovery of Forensic Evidence and Data

In a case which involves lots of forensic evidence you will need to seek additional discovery by way of *subpoena* or request for voluntary additional discovery and/or a motion to compel discovery of things such as State Crime lab protocols, test data and results,[43] individual forensic examiner proficiency testing results, expiration and quality control reports on lab equipment and testing chemicals, electronic copies of hard disc drives, or cell phone data contained in a seized cell phone. These matters of forensic evidence are not routinely produced without additional requests for more than the usual three page "lab report." Sarah Olson maintains sample motions for this kind of discovery on the Forensic Science section of the N.C.I.D.S. website discussed above.

Referral Questions for Experts

When using experts to generate evidence for the defendant, the attorney must identify exactly what the expert is being asked to look at and form an opinion about. Below are some examples of referral questions used with mental health experts to guide the formation of relevant defense evidence. It is a complete waste of time and resources to hire any expert and simply tell them to "examine the defendant" or "look at the evidence" and "tell the defense attorney what's there." The defense should also attempt to wait until all relevant mental health or other records and discovery necessary for the

[43] DISCOVERY OF PROCEDURES USED TO CONDUCT LABORATORY TESTS. --State not required to provide defendant with information concerning peer review of procedures an analyst used to test substances police bought from defendant for the presence of drugs, but it did permit defendant to discover information about procedures the analyst used, and the trial court erred when it denied defendant's written request for an order requiring the State to provide discovery of data collection procedures. *State v. Fair, 164 N.C. App. 770, 596 S.E.2d 871 (2004).* TESTS AND PROCEDURES USED TO CREATE REPORTS --Under *G.S. 15A-903(e)*, the State was required, pursuant to defendant's request in a drug case, to produce not only conclusory lab reports, but also tests and procedures used to reach those results. *State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650 (2002).*

expert to review are collected and reviewed by the attorney before the expert is retained. The exception would be if a defendant is floridly psychotic, for example, at the time of arrest, and time is of the essence for the expert to examine or recommend treatment for the defendant near the time of the offense.

Mental Health Evaluation – Potential Referral Questions:

- Is the client competent to assist in his defense?
    - Is the client aware of the charges he/she is facing?
    - Does the client seem to understand the court process?
    - Can the client help me defend him/her in this case?
- Does the client have mental retardation?
    - What is my client's IQ?
    - Does my client have significant adaptive deficits?
- Was the client's capacity to commit the crime diminished by alcohol intoxication/withdrawal, drug intoxication/withdrawal, mental illness, or some combination of these?
    - What symptoms, if any, of intoxication, withdrawal, or mental illness was the client experiencing at the time of the crime?
    - Did those symptoms impact his/her actions in any way?
    - Was the client able to make and carry out plans?
    - Was the client able to from the specific intent necessary to commit this crime?
- Was the client suffering from a mental or emotional disturbance at the time of the crime?
- Does the client have a neurological impairment that affected him or her at the time of the crime?
- Was the client insane at the time of the crime?
    - Did the client have mental health symptoms at the time of the crime?
    - If yes, did those symptoms prevent him/her from recognizing the nature and quality of his/her acts?
    - Even if the client understood the nature and quality of his/her acts, was he/she incapable of understanding the wrongfulness of his/her behavior as a result of mental health symptoms?
    - Does the client's mental health symptoms explain why he/she did what he/she did?
- Does the client have mental health or cognitive issues which might have caused him/her to be easily led by co-defendants?
- Does this client's history reveal other potential mitigation issues such as abuse history, neglect, low cognitive functioning, fear, etc? What treatment history has my client had?

After retaining a mental health expert, be sure to discuss exactly what testing the defense attorney does and DOES NOT want done.

CASES ON PRESERVING DISCOVERY RIGHTS FOR TRIAL & ON APPEAL

WHERE DEFENDANT DID NOT MOVE FOR DISCOVERY, RELYING ON WHAT HE CONSIDERED TO BE AN OPEN FILE POLICY of the district attorney, he could not complain that he did not know in advance of trial of the Statement of a certain witness which had not been reduced to writing. *State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987).*

DEFENDANT DENIED CONTINUANCE AFTER FAILURE TO MOVE FOR ADDITIONAL PRETRIAL DISCOVERY. --In a conviction of obtaining property by false pretenses and financial card fraud, defendant was properly denied a continuance because he failed to move for additional pretrial discovery, as required by *G.S. 15A-903(a)(1). State v. Flint, 199 N.C. App. 709, 682 S.E.2d 443 (2009).*

PRESERVATION OF DISCOVERY ISSUE FOR APPEAL. --While this section requires the trial judge on proper motion to order the prosecutor to permit certain kinds of discovery, the right must be asserted and the issue raised before the trial court. Further, the issue must be passed upon by the trial court in order for the right to be asserted in the appellate courts. *State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978).*

FELONY CRIMINAL CASE CHECKLIST

INITIAL CLIENT CONTACT

- **Counsel shall make personal contact with an incarcerated client within three working days of being appointed to the case**

- Ascertain whether a conflict or apparent conflict of interest exists which would prevent you from ethically representing the client

- Identify yourself by name and affiliation

- Inform the client of his/her legal rights

- Explain the charges to the client including possible penalties, registration requirements and enhancements

- Determine if the client has a history of any issues which could impair attorney-client communications

  - Language, literacy, chemicals, mental health, medications

- Make an initial determination regarding the client's mental competency
- Determine citizenship and identify relevant federal criminal law or immigration consequences

- **You must advise your client regarding federal or immigration consequences associated with state criminal law proceedings**

- Right to remain silent: Explain the right to remain silent

❖ Warn client regarding recorded calls, correspondence, visitors, jailers, other inmates, etc.

- Explain the attorney-client privilege

- Determine if the client has made any written or oral statements to anyone concerning the offense

❖ If the client has made such statements, get details, names, etc.

- Identify witnesses

- Obtain as complete a history from the client as possible, including criminal history
- Explain the bail process and identify how a meaningful bail argument can be made

PRETRIAL

- Obtain and carefully review the charging documents
- Develop a theory of the case with your client's input
- Conduct a meaningful investigation
- Identify affirmative defenses and file appropriate notice with the court ▪ Research all issues that may produce viable motions

- Prepare and file witness lists as soon as you determine that the witness will testify
- **The following decisions belong exclusively to the client:**

o Decision to plead guilty or not guilty
o Decision whether or not to testify at any point in the case o Decisionwhethertowaiveajury
o Decision whether to file an appeal if convicted

- All other decisions belong to counsel, although the client should be consulted and fully informed

FOR CASES RESULTING IN GUILTY PLEA

- Advocate for dismissal of as many charges as possible

- Advocate for reduction of charges
- Make sure disposition agreement is reduced to writing

- Make sure client is fully informed about all aspects of the plea and any plea agreement, and that the client understands the consequences of pleading guilty

  - Explain to client difference between binding vs. nonbinding plea agreement as to sentencing
  - Role of prosecutor, judge, probation officer, and victim in sentencing process
  - Determine whether grounds can be presented to secure release of client pending sentencing hearing

DISCOVERY AND INVESTIGATION

- **File a motion to preserve and to inspect all evidence including specific named items of physical evidence where possible**
- **Make sure you file a written timely request for voluntary discovery per G.S. 15A-902**
- **File a motion to compel production of *Brady* and impeachment materials, including a request for copies of criminal records of state witnesses**

- **File a request/motion for all lab reports including test data, lab protocols, bench notes, photographs of tested evidence, DNA allele runs, CV's of lab experts, any other items or documents identified as needed by defense experts**
- **File a timely written motion to compel discovery under G.S. 15A-902**
- **Review all discovery produced by State for missing documents**
- **File additional requests/motions to compel discovery as needed**
- **Be sure to have the court order State compliance by a date or dates certain**
- **File a written motion for sanctions for noncompliance by the State as required and ask for all available remedies under G.S. 15A-910**
- **File any necessary *ex parte* motions for investigator or experts**
- **File any necessary *ex parte* motions for third party records of defendant or witnesses, including possible DSS, SSI, medical, school, or mental health records**
- **Locate documents needed to impeach and cross examine co-defendants and jailhouse snitches**
- **Make sure you have ALL statements (including written statements and audio-video statements) which your client has provided to law enforcement or anyone else**
- **Interview all prosecution witnesses**
- **Inspect all physical evidence and request to inspect and view all original investigator's and prosecution files before trial to insure you have all discovery**
- **Visit crime scene, if possible**
- **Obtain prosecution expert reports and interview experts in advance of trial**

- **Demand and file written motion to compel discovery update immediately prior to trial**
- **Carefully review prosecution's likely jury instructions**
- **Make sure you have provided the prosecution with your expert's report prior to commencement of trial in a timely manner**

- **Prepare demonstrative exhibits prior to trial**

FOR CASES RESULTING IN A JUDGE/JURY TRIAL

- File Motions in Limine in advance of trial (per local court rule or practice)

- Brief and request oral argument for any viable pretrial legal motions

- Develop a witness list and keep it up to date

- Carefully review all prosecution trial material

JURY SELECTION

- Voir dire

    - Elicit attitudes of jurors to critical facts and issues for defense
    - Convey legal principles critical to case
    - Preview damaging information
    - Present client in favorable and appropriate light

    - Establish a positive relationship with jury

        - Outline opening and closing statements in advance of trial

        - Jury instructions

    - Reply to objectionable prosecution instructions

    - Submit written supportive pattern defense instructions

    - Be creative!!

- Prepare and keep handy a trial notebook

- statutes
- rules of evidence
- case law supporting anticipated trial issues

SENTENCING

- Ensure client is fully informed about likely and possible outcomes
- Prepare and present Witnesses / Letters / Sentencing options
- Ensure court has all other relevant information
- Inform client of the right to speak at sentencing, including effects of testimony on appeal, retrial, etc.

- Inform client of right of appeal

Chapter 4
Discovery

A defendant's right to discovery is based primarily on statute and due process. The main statutory provisions appear in Sections 15A-901 through 15A-910 of the North Carolina General Statutes (hereinafter G.S.). In 2004, the General Assembly significantly rewrote those provisions to give criminal defendants the right to "open-file" discovery. Since then, the General Assembly

has made minor revisions to the defendant's discovery rights but has maintained the commitment to open-file discovery for the defense.

This chapter discusses discovery in cases within the original jurisdiction of the superior court—that is, felonies and misdemeanors initiated in superior court. Discovery in misdemeanor cases tried in district court or for trial de novo in superior court is limited and is discussed only briefly. *See infra* § 4.1F, Discovery in Misdemeanor Cases. For a brief discussion of discovery in other types of cases, see *infra* § 4.1G, Postconviction Cases, and § 4.1H, Juvenile Delinquency Cases.

Sample discovery motions can be found in several places on the website of the Office of Indigent Defense Services (IDS), www.ncids.org: in the non-capital motions bank (select "Training and Resources," then "Motions Bank, Non-Capital"), in the juvenile motions bank (follow the same steps), and in the capital motions bank (select "Training & Resources," then "Capital Trial Motions"). These motions also can be accessed at www.sog.unc.edu/node/657. Whether denominated as non-capital, juvenile, or capital, the motions may be useful in a range of cases. Selected motions currently on the IDS website are identified in the discussion below. For additional motions, see MAITRI "MIKE" KLINKOSUM, NORTH CAROLINA CRIMINAL DEFENSE Ch. 4 (Motions for Discovery), at 180–298, and Ch. 5 (Preventing and Litigating the Illegal Destruction of Evidence), at 349–425 (2d ed. 2012) [hereinafter KLINKOSUM].

4.1 Types of Defense Discovery

A. Statutory Right to Open-File Discovery

Principal statutes. The principal discovery statutes in North Carolina are G.S. 15A-901 through G.S. 15A-910. They were first enacted in 1973 as part of Chapter 15A, the Criminal Procedure Act, and the basic approach remained largely the same until 2004, when the General Assembly significantly revised the statutes.

Before the 2004 changes, North Carolina law gave the defendant the right to discovery of specific categories of evidence only, such as statements made by the defendant and documents that were material to the preparation of the defense, intended for use by the State at trial, or obtained from or belonging to the defendant. These categories were comparable to the discovery available in federal criminal cases. *See State v. Cunningham*, 108 N.C. App. 185 (1992) (noting similarities). Some prosecutors voluntarily provided broader, "open-file" discovery, allowing the defendant to review materials the prosecutor had received from law enforcement, such as investigative reports. But, the extent to which prosecutors actually opened their files, and whether they opened their files at all, varied with each district and each prosecutor. *See generally State v. Moore*, 335 N.C. 567 (1994) (under previous discovery statutes, prosecutor in one district was not bound by open-file policy of prosecutor in another district).

In 2004, the North Carolina General Assembly effectively made open-file discovery mandatory, giving defendants the right to discovery of the complete files of the investigation and prosecution of their cases. The procedures for a defendant to obtain

discovery, beginning with a formal, written request to the prosecutor, remained largely the same. *See infra* § 4.2, Procedure to Obtain Discovery. But, the 2004 changes greatly expanded the information to which defendants are entitled in all cases. *See infra* § 4.3, Discovery Rights under G.S. 15A-903.

In reviewing discovery decisions issued by the North Carolina courts, readers should take care to note whether the decisions were decided under the former discovery statutes or the current ones. The discussion below includes cases decided before enactment of the 2004 changes if the cases remain good law or provide a useful contrast to the law now in effect.

Other statutes. In addition to the discovery provisions in G.S. 15A-901 through G.S. 15A-910, additional North Carolina statutes give a criminal defendant the right to obtain information from the State about his or her case, such as information about plea agreements. *See infra* § 4.4, Other Discovery Categories and Mechanisms. Counsel should include requests for other statutory discovery in their discovery requests and motions.

Legislative summaries. For a summary of the main changes made by the General Assembly to North Carolina's discovery requirements, see the following:

- John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2004/06, at 2–8 (Oct. 2004), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200406.pdf.
- John Rubin, *2007 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/01, at 14–19 (Jan. 2008), *available at* http://sogpubs.unc.edu//electronicversions/pdfs/aojb0801.pdf.

B. Constitutional Rights

U.S. Constitution. The U.S. Supreme Court has identified "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). The most well-known evidence of this type is *Brady* evidence—that is, favorable and material evidence. The defendant's right of access to *Brady* and other evidence is based primarily on the Due Process Clause. Sixth Amendment rights (right to effective assistance of counsel, to compulsory process, to confrontation, and to present a defense) also may support defense discovery.

State constitution. The North Carolina courts have recognized that a defendant has discovery rights under article I, section 19 of the North Carolina Constitution (law of land clause). *See State v. Cunningham*, 108 N.C. App. 185 (1992) (recognizing constitutional right to data underlying tests of evidence). Article I, section 23 (rights of accused, including right to counsel and confrontation) also may support defense discovery. *See State v. Canaday*, 355 N.C. 242, 253–54 (2002) (relying on article I, sections 19 and 23 of the state constitution as well as the Sixth Amendment in finding a discovery violation).

C. Court's Inherent Authority

The North Carolina Supreme Court has indicated that trial courts have the inherent authority to order discovery in the interests of justice. *See State v. Hardy*, 293 N.C. 105 (1977) (case analyzed under former G.S. 15A-903 and G.S. 15A-904). A trial court does not have the authority, however, to order discovery if a statute specifically restricts it. *Id.*, 293 N.C. at 125. Now that the defense is entitled to the State's complete files, this theory of discovery is less significant.

The courts have held that a trial court has greater authority to order disclosure of information once the trial commences. *Id.* (holding that after witness for State testified, trial court had authority to conduct in camera review of witness statements and disclose material, favorable evidence). Because of the breadth of the current discovery statutes, the defendant should have pretrial access to all information in the State's files.

D. Other "Discovery" Devices

Several other devices are available to the defense that technically do not constitute discovery but still may provide access to information.

Bill of particulars. The defense may request a bill of particulars in felony cases to flesh out the allegations in the indictment. *See* G.S. 15A-925; *see also infra* "Bill of particulars" in § 8.4B, Types of Pleadings and Related Documents.

Pretrial hearings. Several pretrial proceedings may provide the defense with discovery, including hearings on bail (*see supra* Chapter 1, Pretrial Release), probable cause (*see supra* Chapter 3, Probable Cause Hearings), and motions to suppress (*see infra* Chapter 14, Suppression Motions).

Subpoenas. *See infra* § 4.7, Subpoenas.

Public records. Counsel may make a public records request for information that would be useful generally in handling criminal cases as well as in specific cases. For example, counsel may obtain operations manuals, policies, and standard operating procedures developed by police and sheriffs' departments. *See* DAVID M. LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS at 204 (UNC School of Government, 2d ed. 2009) (unless within an exception, such material "appears to be standard public record, fully open to public access"). The Lawrence book addresses the coverage of public records laws and the procedures for obtaining public records.

E. Discovery in Misdemeanor Cases

Discovery in misdemeanor cases is limited. A defendant tried initially in district court does not have a right to statutory discovery under G.S. 15A-901 through G.S. 15A-910, whether the case is for trial in district court or for trial de novo in superior court. *See, e.g.*, *State v. Cornett*, 177 N.C. App. 452 (2006) (no statutory right to discovery in cases

originating in the district court); *State v. Fuller*, 176 N.C. App. 104 (2006) (same). Certain statutes give defendants limited discovery in particular types of misdemeanor cases. *See, e.g.,* G.S. 20-139.1(e) (right to copy of chemical analysis in impaired driving case). In the interest of fairness and efficiency, a prosecutor may voluntarily provide additional discovery in misdemeanor cases in district court. The arresting officer also may be willing to disclose pertinent evidence, such as police reports, videotapes of stops, and other information about the case.

Although statutory rights to discovery are limited in misdemeanor cases, defendants have the same constitutional discovery rights as in other cases. They have a constitutional right to obtain exculpatory evidence, discussed *infra* in § 4.5, *Brady* Material, and § 4.6A, Evidence in Possession of Third Parties. *See also Cornett*, 177 N.C. App. 452, 456 (recognizing right to exculpatory evidence in cases originating in district court but finding that defendant made no argument that he was denied *Brady* material). They also have a constitutional right to compulsory process to obtain evidence for their defense, discussed *infra* in § 4.7, Subpoenas. For violations of the defendant's constitutional rights in district court, the court may impose sanctions, including dismissal in egregious cases. *See State v. Absher*, 207 N.C. App. 377 (2010) (unpublished) (destruction of evidence).

A misdemeanor trial in district court also may provide considerable discovery for a later trial de novo. *See generally State v. Brooks*, 287 N.C. 392, 406 (1975) ("The purpose of our de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a 'speedy trial' in the District Court and to offer them an opportunity to learn about the State's case without revealing their own. In the latter sense, this procedure can be viewed as a method of 'free' criminal discovery.") In preparing a criminal case (misdemeanor or felony), it is ordinarily permissible for defense counsel to talk with victims and other witnesses as long as they are not represented by counsel. (Special rules apply to child victims under the age of 14 in physical or sexual abuse cases.) Defense counsel should identify the client he or she represents to ensure that the witness understands that counsel does not represent the witness's interests. *See* N.C. State Bar R. Professional Conduct 4.2, 4.3. Interviews are voluntary. Defense counsel generally cannot compel a person to submit to an interview; nor may a prosecutor forbid a witness from submitting to an interview. For a further discussion of interviews, see *infra* § 4.4C, Examinations and Interviews of Witnesses.

For misdemeanors within the superior court's original jurisdiction—that is, misdemeanors joined with or initiated in superior court—the defendant has the same statutory discovery rights as in felony cases in superior court. *See* G.S. 15A-901 (stating that discovery statutes apply to cases within the original jurisdiction of superior court); G.S. 7A-271(a) (listing misdemeanors within superior court's original jurisdiction).

F. Postconviction Cases

Defendants in postconviction cases have discovery rights comparable to open-file discovery rights in criminal cases at the trial level.

Capital cases. In 1996, the General Assembly made statutory changes authorizing open-file discovery in capital postconviction cases—that is, cases in which the defendant is convicted of a capital offense and sentenced to death. These discovery rights, in G.S. 15A-1415(f), were a precursor to the later changes to discovery in criminal cases at the trial level, but they are not identical. *See* John Rubin, *1996 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 96/03, at 5 (UNC School of Government, Aug. 1996), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb9603.pdf. The statute gives postconviction counsel the right to (1) the complete files of the defendant's prior trial and appellate counsel relating to the case, and (2) the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.

Before enactment of the statute, a defendant had the right to the files of his or her previous counsel under the North Carolina Rules of Professional Conduct. *See* N.C. State Bar R. Professional Conduct 1.16(d) & Comment 10 (so stating). The statute codifies the right and, to the extent the rules allowed prior counsel to withhold some materials (namely, personal notes and incomplete work product), the statute overrides any such limitations.

The obligation of the State to turn over its files broke new ground. *See State v. Bates*, 348 N.C. 29 (1998) (interpreting statute as requiring State to disclose complete files unless disclosure is prohibited by other laws or State obtains protective order; court recognizes that statute does not protect work product at postconviction stage). Other cases interpreting the statute include: *State v. Sexton*, 352 N.C. 336 (2000) (defendant not entitled to files of Attorney General's office when office did not participate in prosecution of capital case); *State v. Williams*, 351 N.C. 465 (2000) (describing requirements and deadlines for making motion for postconviction discovery).

As part of the 1996 changes, the General Assembly expressly provided that if a defendant alleges ineffective assistance of counsel as a ground for relief, he or she waives the attorney-client privilege with respect to communications with counsel to the extent reasonably necessary to the defense of an ineffectiveness claim. G.S. 15A-1415(e); *State v. Buckner,* 351 N.C. 401 (2000) (holding that court ultimately determines extent to which communications are discoverable and may enter appropriate orders for disclosure; finding that granting of State's request for ex parte interview of trial counsel was improper); *State v. Taylor*, 327 N.C. 147 (1990) (in case before statutory revisions, court recognized that defendant waives attorney-client and work-product privileges to extent relevant to allegations of ineffective assistance of counsel).

Noncapital cases. In 2009, the General Assembly extended G.S. 15A-1415(f) to noncapital defendants, giving them the right to discover the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The right to discovery is subject to the requirement that the defendant be "represented by counsel in postconviction proceedings in superior court." *Id.* In noncapital postconviction cases the requirement is significant because prisoners often proceed pro se, at least initially. The requirement serves as a

proxy for a determination that the case meets a minimum threshold of merit. Thus, counsel must agree to represent the defendant on a retained basis; Prisoners Legal Services must decide to take the case; or a court must appoint counsel under G.S. 7A-451(a)(3) and G.S. 15A-1420(b1)(2), which are generally interpreted as requiring appointment of counsel for an indigent defendant when the claim is not frivolous. *See infra* "MAR in noncapital case" in § 12.4C, Particular Proceedings (discussing right to counsel). Until the defendant meets this threshold, the State is not put to the burden of producing its files.

G.S. 15A-1415(f) also states that a defendant represented by counsel in superior court is entitled to the files of prior trial and appellate counsel. An unrepresented defendant is likely entitled to those files in any event. *See* N.C. State Bar R. Professional Conduct 1.16(d) & Comment 10 (so stating).

Postconviction DNA testing of biological evidence. *See* G.S. 15A-269 through G.S. 15A-270.1 (post-conviction procedures); G.S. 15A-268 (requirements and procedures for preservation of biological evidence); *State v. Gardner*, ___ N.C. App. ___, 742 S.E.2d 352 (2013) (discussing required showing); *see also* Jessica Smith, *Post-Conviction: Motions for DNA Testing and Early Disposal of Biological Evidence, in* THE SURVIVAL GUIDE: SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government, Feb. 2010), *available at* www.sog.unc.edu/node/2168. For a discussion of a defendant's right to counsel for such matters, see *infra* "DNA testing and biological evidence" in § 12.4C, Particular Proceedings.

For a discussion of pretrial discovery and testing of biological evidence, see *infra* § 4.4E, Biological Evidence.

Innocence Commission Cases. On receiving notice from the N.C. Innocence Inquiry Commission that it is conducting an investigation into a claim of factual innocence, the State must preserve all files and evidence in the case subject to disclosure under G.S. 15A-903, the principal statute governing the defendant's right to discovery in felony cases at the trial level. *See* G.S. 15A-1471(a). The Commission is entitled to a copy of the preserved records and to inspect, examine, and test physical evidence. G.S. 15A-1471.

G. Juvenile Delinquency Cases

The right to discovery in juvenile delinquency proceedings is governed by G.S. 7B-2300 through G.S. 7B-2303. A juvenile respondent's discovery rights in those proceedings are comparable to the limited discovery rights that adult criminal defendants had before the 2004 rewrite of the adult criminal discovery statutes. For a discussion of discovery in delinquency cases, see NORTH CAROLINA JUVENILE DEFENDER MANUAL Ch. 10 (UNC School of Government, 2008), *available at* www.ncids.org (select "Training & Resources," then "References Manuals"). Cases interpreting the comparable adult provisions before the 2004 changes to the discovery statutes are discussed in the first edition of this volume of the North Carolina Defender Manual.

4.2 Procedure to Obtain Discovery

This section lays out in roughly chronological order the procedures for obtaining discovery from the State. (For a discussion of discovery of records from third parties, see *infra* § 4.6A, Evidence in Possession of Third Parties.) Discovery is necessarily a fluid process, however, and may vary in each case.

A. Goals of Discovery

Defense counsel should keep two goals in mind in pursuing discovery. The foremost goal, of course, is to obtain information. Among other things, information gained in discovery may provide leads for further investigation, support motions to suppress or for expert assistance, help counsel develop a coherent theory of defense, and eliminate unwelcome surprises at trial. In rare instances, defense counsel may not want to pursue discovery to avoid educating the prosecution or triggering reciprocal discovery rights. *See infra* § 4.8, Prosecution's Discovery Rights. Generally, however, the benefits of aggressive discovery outweigh any drawbacks.

A second, but equally important, goal is to make a record of the discovery process that will provide a basis at trial for requesting sanctions for violations. Although informal communications with the prosecutor or law enforcement officers may be effective in obtaining information, they may not support sanctions should the State fail to reveal discoverable information.

B. Preliminary Investigation

Discovery begins with investigation (study of charging documents and other materials in the court file, interviews of witnesses and officers, visits to crime scene, etc.). Preliminary investigation enables counsel to request specific information relevant to the case in addition to making a general request for discovery.

C. Preserving Evidence for Discovery

As a matter of course, counsel may want to make a motion to preserve evidence that the State may routinely destroy or use up in testing. The motion would request generally that the State preserve all evidence obtained in the investigation of the case and would request specifically that the State preserve items of particular significance to the case. Such a motion not only helps assure access to evidence but also may put the defendant in a better position to establish a due process violation and to seek sanctions if the State loses or destroys evidence. *See infra* § 4.6C, Lost or Destroyed Evidence. A sample motion for preservation of evidence is available in the non-capital motions bank on the IDS website, www.ncids.org.

Types of evidence that may be a useful object of a motion to preserve, with statutory support, include:

- Rough notes of interviews by law-enforcement officers, tapes of 911 calls, and other materials that may be routinely destroyed. (G.S. 15A-903(a)(1)a. requires the State to provide the defense with investigating officers' notes, suggesting that the State must preserve the notes for production. *See also* G.S. 15A-903(c) (requiring law enforcement agencies to provide the prosecutor with their complete files); G.S. 15A-501(6) (to same effect).)
- Drugs, blood, and other substances that may be consumed in testing by the State. (G.S. 15A-268 requires the State to preserve "biological evidence," including blood and other fluids. *See infra* § 4.4E, Biological Evidence.) [*Legislative note:* Effective June 19, 2013, S.L. 2013-171 (S 630) adds G.S. 20-139.1(h) to require preservation of blood and urine samples subject to a chemical analysis for the period of time specified in that statute and, if a motion to preserve has been filed, until entry of a court order about disposition of the evidence.]
- Other physical evidence. (G.S. 15-11and G.S. 15-11.1 require law enforcement to maintain a log of and "safely keep" seized property.)

Counsel may make a motion to preserve even before requesting discovery of the evidence. If time is of the essence in a felony case, counsel may need to make the motion in district court, before transfer of the case to superior court. *See State v. Jones*, 133 N.C. App. 448 (1999) (district court has jurisdiction to rule on preliminary matters before transfer of a felony case to superior court; court could rule on motion for medical records), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000). The superior court also may have the authority to hear the motion in a felony case that is still pending in district court. *See State v. Jackson*, 77 N.C. App. 491 (1985) (court notes jurisdiction of superior court before indictment to enter commitment order to determine defendant's capacity to stand trial).

D. Requests for Discovery

Need for request for statutory discovery. To obtain discovery of the information covered under G.S. 15A-903, the defendant first must serve the prosecutor with a written request for voluntary discovery. A written request is ordinarily a prerequisite to a motion to compel discovery, discussed in E., below. *See* G.S. 15A-902(a); *State v. Anderson*, 303 N.C. 185 (1981), *overruled in part on other grounds by State v. Shank*, 322 N.C. 243 (1988). The court may hear a motion to compel discovery by stipulation of the parties or for good cause (G.S. 15A-903(f)), but the defendant does not have the right to be heard on a motion to compel without a written request.

Practice note: File your request for voluntary discovery with the court, with a certificate of service showing that you served it on the prosecutor within the required time period for requesting voluntary discovery. Doing so may prevent later disputes over whether you complied with the statutory requirements. *See* KLINKOSUM at 139–40 (recommending this approach). Some attorneys submit a combined discovery request and motion for discovery, requesting that the prosecution voluntarily comply with the request and, if the prosecution fails to do so, asking the court to issue an order compelling production. *Id.* at 140, A sample combined request and motion is available in the non-capital motions bank

on the IDS website, www.ncids.org. Separate requests and motions are also available in the capital trial motions bank.

In some counties, the prosecutor's office may have a standing policy of providing discovery to the defense without a written request. Even if a prosecutor has such a policy, defense counsel still should make a formal request for statutory discovery. If the defendant does not make a formal request, and the prosecution fails to turn over materials to which the defendant is entitled, the defendant may not be able to complain at trial. *See State v. Abbott*, 320 N.C. 475 (1987) (prosecutor not barred from using defendant's statement at trial even though it was discoverable under statute and not produced before trial; open-file policy no substitute for formal request and motion). *But cf. State v. Brown*, 177 N.C. App. 177 (2006) (in absence of written request by defense or written agreement, voluntary disclosure by prosecution is not deemed to be under court order; however, court notes that some decisions have held prosecution to requirements for court-ordered disclosure where prosecution voluntarily provides witness list to defense); *United States v. Cole*, 857 F.2d 971 (4th Cir. 1988) (prosecutors must honor informal discovery arrangement and, for violation of arrangement, trial court may exclude evidence under Federal Rule of Evidence 403 [comparable to North Carolina's Evidence Rule 403] on the ground of unfair prejudice and surprise); *see also Strickler v. Greene*, 527 U.S. 263 (1999) (defendant established cause for failing to raise *Brady* violation in earlier proceedings where, among other things, defendant reasonably relied on prosecution's open-file policy); *United States v. Spikes,* 158 F.3d 913 (6th Cir. 1998) (court may impose sanctions, including suppression of evidence and dismissal of charges in egregious cases, for prosecution's failure to honor agreement not to introduce certain evidence).

If the parties have entered into a written agreement or written stipulation to exchange discovery, counsel need not make a formal written request for statutory discovery. *See* G.S. 15A-902 (a) (written request not required if parties agree in writing to comply voluntarily with discovery provisions); *see also State v. Flint*, 199 N.C. App. 709 (2009) (recognizing that written agreement may obviate need for motion for discovery but finding no evidence of agreement); John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2004/06, at 3–4 (Oct. 2004) (noting that one of purposes of provision was to clarify enforceability of standing agreements such as in Mecklenburg County, where public defender's office and prosecutor's office entered into agreement to exchange discovery without a written request), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200406.pdf. If counsel has any doubts about whether an agreement adequately protects the client's rights, counsel should generate and serve on the prosecutor a written request for discovery.

If the defendant makes a written request for discovery (and thereafter the prosecution either voluntarily provides discovery or the court orders discovery), the prosecution is entitled on written request to discovery of the materials described in G.S. 15A-905. *See* G.S. 15A-905(a), (b), (c) (providing that prosecution has right to discovery of listed materials if the defense obtains "any relief sought by the defendant under G.S. 15A-

903"). Ordinarily, the advantages of obtaining discovery from the State will far outweigh any disadvantages of providing discovery to the State. For a further discussion of reciprocal discovery, see *infra* § 4.8, Prosecution's Discovery Rights.

Practice note: The defendant is not required to submit a request for *Brady* materials before making a motion to compel discovery. Requests for statutory discovery commonly include such requests, however, and judges may be more receptive to discovery motions when defense counsel first attempts to obtain the discovery voluntarily. The discovery request therefore should include all discoverable categories of information, including the State's complete files under G.S. 15A-903, other statutory categories of information, and constitutional categories of information. The discovery request should specify the items within each category, described further in subsequent sections of this chapter.

Timing of request. Under G.S. 15A-902(d), defense counsel must serve on the prosecutor a request for statutory discovery no later than ten working days after one of the following events:

- If the defendant is represented by counsel at the time of a probable cause hearing, the request must be made no later than ten working days after the hearing is held or waived.
- If the defendant is not represented by counsel at the probable cause hearing, or is indicted (or consents to a bill of information) before a probable cause hearing occurs, the request must be made no later than ten working days after appointment of counsel or service of the indictment (or consent to a bill of information), whichever is later.

G.S. 15A-902(f) may provide a safety valve if defense counsel fails to comply with the time limits for statutory discovery. It allows the court to hear a motion for discovery on stipulation of the parties or upon a finding of good cause.

Practice note: Because the deadlines for requesting statutory discovery are relatively early, counsel should set up a system for automatically generating and serving statutory discovery requests in every case.

E. Motions for Discovery

Motion for statutory discovery. On receiving a negative or unsatisfactory response to a request for statutory discovery, or after seven days following service of the request on the prosecution without a response, the defendant may file a motion to compel discovery. *See* G.S. 15A-902(a). Ordinarily, a written request for voluntary discovery or written agreement to exchange discovery is a prerequisite to the filing of a motion. *Id.* The motion may be heard by a superior court judge only. *See* G.S. 15A-902(c).

If the prosecution refuses to provide voluntary discovery, or does not respond at all, the defendant must move for a court order to trigger the State's discovery obligations. *See*

State v. Keaton, 61 N.C. App. 279 (1983) (when voluntary discovery does not occur, defendant has burden to make motion to compel before State's duty to provide statutory discovery arises).

If the prosecution has agreed to comply with a discovery request, a defendant is not statutorily required to file a motion for discovery. Once the prosecution agrees to a discovery request, discovery pursuant to that agreement is deemed to have been made under an order of the court, and the defendant may obtain sanctions if the State fails to disclose discoverable evidence. *See* G.S. 15A-902(b); G.S. 15A-903(b); *State v. Anderson*, 303 N.C. 185, 192 (1981) (under previous statutory procedures, which are largely the same, if prosecution agrees to provide discovery in response to request for statutory discovery, prosecution assumes "the duty fully to disclose all of those items which could be obtained by court order"), *overruled in part on other grounds by State v. Shank*, 322 N.C. 243 (1988); *see also State v. Castrejon*, 179 N.C. App. 685 (2006) (defendant apparently requested discovery pursuant to prosecutor's open-file policy and did not make written request for discovery and motion; defendant therefore was not entitled to discovery); *State v. Brown*, 177 N.C. App. 177 (2006) (in absence of written request by defense or written agreement, voluntary disclosure by prosecution is not deemed to be under court order; however, court notes that some decisions have held prosecution to requirements for court-ordered disclosure where prosecution voluntarily provides witness list to defense).

Nevertheless, counsel may want to follow up with a motion for discovery. Obtaining a court order may avoid disputes over whether the prosecution agreed to provide discovery and thereby assumed the obligation to comply with a discovery request. The hearing on a discovery motion also may give counsel an opportunity to explore on the record the prosecution's compliance.

A motion for statutory discovery should attest to the defendant's previous request for discovery and ask that the court order the prosecution to comply in full with its statutory obligations. *See State v. Drewyore*, 95 N.C. App. 283 (1989) (suggesting that defendant may not have been entitled to sanctions for prosecution's failure to disclose photographs that were discoverable under statute because motion did not track statutory language of former G.S. 15A-903(d)). If counsel learns of additional materials not covered by the motion, counsel should file a supplemental written motion asking the court to compel production. *See generally State v. Fair*, 164 N.C. App. 770 (2004) (finding under former statute that oral request for materials not sought in earlier written discovery motion was insufficient). [In *Fair,* counsel learned of additional materials and made an oral request for them only after a voir dire of a State's witness at a hearing on counsel's written discovery motion, held by the trial court immediately before trial. The appellate court's requiring of a written motion in these circumstances seems questionable, but the basic point remains that counsel should fashion a broad request for relief in the written motion and, when feasible, should follow up with a supplemental written motion on learning of materials not covered by the motion.] For additional types of relief, see *infra* § 4.2G, Forms of Relief, and § 4.2J, Sanctions.

As with other motions, the defendant must obtain a ruling on a discovery motion or risk waiver. *See State v. Jones*, 295 N.C. 345 (1978) (defendant waived statutory right to discovery by not making any showing in support of motion, not objecting when court found motion abandoned, and not obtaining a ruling on motion).

Practice note: Motions for statutory discovery commonly include a request for *Brady* evidence. Although the prosecution has the obligation to disclose *Brady* evidence without a request or motion (*see infra* § 4.5G, Need for Request), the motion reinforces the prosecution's obligation. As with motions for statutory discovery, as you learn more about the case, you may want to file additional motions specifying additional information you need and have not received.

Be sure to state all constitutional as well as statutory grounds for discovery in your motion. *See State v. Golphin*, 352 N.C. 364, 403–04 (2000) (defendant's discovery motion did not allege and trial court did not rule on possible constitutional violations; court therefore declines to rule on whether denial of motion was violation of federal or state constitutional rights). For an overview of the constitutional grounds for discovery, see *supra* § 4.1B, Constitutional Rights.

F. Hearing on Motion

Hearings on discovery motions often consist of oral argument only. Defense counsel should use this opportunity to explore on the record the prosecution's compliance with its discovery obligations. In some instances, counsel may want to subpoena witnesses and documents to the motion hearing. Examination of witnesses (such as law-enforcement officers) may reveal discoverable evidence that the State has not yet disclosed. For a discussion of the use of subpoenas for pretrial proceedings, see *infra* § 4.7, Subpoenas.

G. Forms of Relief

In addition to asking the court to order the prosecution to provide the desired discovery, defense counsel may want to seek the following types of relief.

Deadline for production. The discovery statutes set some deadlines for the State to produce discovery. *See* G.S. 15A-903(a)(2) (State must give notice of expert witness and furnish required expert materials a reasonable time before trial); G.S. 15A-903(a)(3) (State must give notice of other witnesses at beginning of jury selection); G.S. 15A-905(c)(1)a. (if ordered by court on showing of good cause, State must give notice of rebuttal alibi witnesses no later than one week before trial unless parties and court agree to different time frames).

The statutes do not set a specific deadline for the State to produce its complete files, which is the bulk of discovery due the defendant, but the judge may be willing to set a deadline for the prosecution to provide discovery. *See* G.S. 15A-909 (order granting discovery must specify time, place, and manner of making discovery). When setting a discovery deadline, the judge also may be willing to enter an order precluding the

prosecution from introducing discoverable evidence not produced by the deadline. *See, e.g., State v. Coward*, 296 N.C. 719 (1979) (trial court imposed such a deadline), *overruled in part on other grounds by State v. Adcock*, 310 N.C. 1 (1984); *State v. James*, 182 N.C. App. 698, 702 (2007) (trial court set deadline for State to produce discovery and excluded evidence produced after deadline).

Defense counsel also may file a motion in limine before trial requesting that the judge exclude any evidence that has not yet been produced. *See, e.g., State v. McCormick*, 36 N.C. App. 521 (1978) (trial court granted in limine motion excluding evidence not produced in discovery unless prosecution obtained court's permission).

Retrieve and produce information from other agencies involved in investigation or prosecution of defendant. If defense counsel believes that discoverable evidence is in the possession of other agencies involved in the investigation or prosecution of the defendant, such as law enforcement, counsel can ask the court to require the prosecutor to retrieve and produce the evidence. Although the prosecutor may not have actual possession of the evidence, he or she is obligated under the discovery statutes and potentially constitutional requirements to obtain the evidence. For a further discussion of the prosecution's obligation to obtain information from affiliated entities, see *infra* § 4.3B, Agencies Subject to Disclosure Requirements (statutory grounds) and § 4.5H, Prosecutor's Duty to Investigate (constitutional grounds).

If it is unclear to counsel whether the prosecution has the obligation to obtain the information from another entity, counsel may make a motion to require the entity to produce the records or may make a motion in the alternative—that is, counsel can move for an order requiring the prosecution to obtain and turn over the records or, in the alternative, for an order directing the agency to produce the records. *See infra* § 4.6A, Evidence in Possession of Third Parties.

Item-by-item response. The judge may be willing to require the prosecution to respond in writing to each discovery item in the motion, compelling the prosecution to examine each item individually and creating a clearer record.

In camera review. If counsel believes that the prosecution has failed to produce discoverable material, counsel may ask the judge to review the material in camera and determine the portions that must be disclosed. *See, e.g.*, *infra* § 4.5J, In Camera Review and Other Remedies (discussing such a procedure to ensure compliance with *Brady*).

H. Written Inventory

In providing discovery, the prosecution may just turn over documents without a written response and without identifying the materials produced. To avoid disputes at trial over what the prosecution has and has not turned over, counsel should review the materials, create a written inventory of everything provided, and serve on the prosecutor (and file with the court) the inventory documenting the evidence produced. The inventory also

should recite the prosecutor's representations about the nonexistence or unavailability of requested evidence. Supplemental inventories may become necessary as the prosecution discloses additional evidence or makes additional representations. A sample inventory is available in the non-capital motions bank on the IDS website, www.ncids.org.

I. Continuing Duty to Disclose

If the State agrees to provide discovery in response to a request for statutory discovery, or the court orders discovery, the prosecution has a continuing duty to disclose the information. *See* G.S. 15A-907; *State v. Cook*, 362 N.C. 285 (2008) (recognizing duty and finding violation by State's failure to timely disclose identity and report of expert witness); *State v. Jones*, 296 N.C. 75 (1978) (recognizing that prosecution was under continuing duty to disclose once it agreed to provide discovery in response to request, and ordering new trial for violation); *State v. Ellis*, 205 N.C. App. 650 (2010 (recognizing duty). The prosecution always has a duty to disclose *Brady* evidence, with or without a request or court order. *See infra* § 4.5G, Need for Request.

J. Sanctions

Generally. Under G.S. 15A-910, the trial court may impose sanctions for the failure to disclose or belated disclosure of discoverable evidence. The sanctions, in increasing order of severity, are:

- an order permitting discovery or inspection,
- a continuance or recess,
- exclusion of evidence,
- mistrial, and
- dismissal of charge, with or without prejudice.

G.S. 15A-910(a) also allows the court to issue any "other appropriate orders," including an order citing the noncomplying party for contempt. *See also* "Personal sanctions," below, in this subsection J. The court must make specific findings if it imposes any sanction. *See* G.S. 15A-910(d); *cf. State v. Ellis*, 205 N.C. App. 650 (2010) (noting that trial court is not required to make specific findings that it considered sanctions in denying sanctions; transcript indicated that trial court considered defendant's request for continuance and that denial of continuance was not abuse of discretion).

Showing necessary for sanctions. At a minimum, the defendant must do the following to obtain sanctions: (1) show that the prosecution was obligated to disclose the evidence (thus, the importance of making formal discovery requests and motions); (2) show that the prosecution violated its obligations (thus, the importance of making a record of the evidence disclosed by the prosecution); and (3) request sanctions. *See State v. Alston*, 307 N.C. 321 (1983) (defendant failed to advise trial court of violation and request sanctions; no abuse of discretion in trial court's failure to impose sanctions).

G.S. 15A-910(b) requires the court, in determining whether sanctions are appropriate, to consider (1) the materiality of the subject matter and (2) the totality of circumstances surrounding the alleged failure to comply with the discovery request or order. *See also State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452 (2013) (reversing order excluding State's evidence because order did not indicate court's consideration of these two factors), *review dismissed*, ___ N.C. ___, 743 S.E.2d 205 (2013) and *appeal dismissed, review denied*, ___ N.C. ___, 743 S.E.2d 206 (2013).

Appellate decisions (both before and after the enactment of G.S. 15A-910(b) in 2011) indicate that various factors may strengthen an argument for sanctions, although none are absolute prerequisites. Factors include:

- Importance of the evidence. *See State v. Walter Lee Jones*, 296 N.C. 75 (1978) (motion for appropriate relief granted and new trial ordered for prosecution's failure to turn over laboratory report bearing directly on guilt or innocence of defendant); *In re A.M.*, ___ N.C. App. ___, 724 S.E.2d 651 (2012) (ordering new trial for trial court's failure to allow continuance or grant other relief; State disclosed new witness, the only eyewitness to alleged arson, on day of adjudicatory hearing).
- Existence of bad faith. *See State v. McClintick*, 315 N.C. 649, 662 (1986) (trial judge "expressed his displeasure with state's tactics" and took several curative actions); *State v. Jaaber*, 176 N.C. App. 752, 756 (2006) (State took "appreciable action" to locate missing witness statements; trial court did not abuse discretion in denying mistrial).
- Unfair surprise. *See State v. King*, 311 N.C. 603 (1984) (no abuse of discretion in denial of mistrial, as defendant was aware of statements that prosecution had failed to disclose); *State v. Aguilar-Ocampo*, ___ N.C. App. ___, 724 S.E.2d 117 (2012) (defendant conceded that he anticipated that State would offer expert testimony, although he could not anticipate precise testimony).
- Prejudice to preparation for trial, including ability to investigate information, prepare motions to suppress, obtain expert witnesses, subpoena witnesses, and engage in plea bargaining. *See State v. Williams,* 362 N.C. 628 (2008) (photos destroyed by State were material evidence favorable to defense, which defendant never possessed, could not reproduce, and could not prove through testimony); *State v. Warren Harden Jones*, 295 N.C. 345 (1978) (defendants failed to suggest how nondisclosure hindered preparation for trial and failed to specify any items of evidence that they could have excluded or rebutted more effectively had they learned of evidence before trial).
- Prejudice to presentation at trial, such as ability to question prospective jurors, prepare opening argument and cross-examination, and determine whether the client should testify. *See State v. Pigott*, 320 N.C. 96 (1987) (no abuse of discretion in denial of mistrial; court finds that prosecution's failure to disclose discoverable photographs did not lead defense counsel to commit to theory undermined by photographs); *State v. King*, 311 N.C. 603 (1984) (no abuse of discretion in denial of mistrial; no suggestion that defendant would not have testified had prosecution disclosed prior conviction).

Practice note: In addition to citing the statutory basis for sanctions, be sure to constitutionalize your request for sanctions for nondisclosure of evidence. Failure to do so may constitute a waiver of constitutional claims. *See State v. Castrejon*, 179 N.C. App. 685 (2006).

Choice of sanction. The choice of sanction for a discovery violation is within the trial court's discretion and is rarely reversed. *See State v. Jaaber*, 176 N.C. App. 752 (2006) (finding that statute does not require that trial court impose sanctions and leaves choice of sanction, if any, in trial court's discretion).

Probably the most common sanction is an order requiring disclosure of the evidence and the granting of a recess or continuance. *See, e.g., State v. Pender*, ___ N.C. App. ___, 720 S.E.2d 836 (2012) (trial court did not abuse discretion in denying defendant's request for mistrial for State's failure to disclose new information provided by codefendant to State; trial court's order, in which court instructed defense counsel to uncover discrepancies on cross-examination and allowed defense recess thereafter to delve into matter, was permissible remedy); *State v. Remley*, 201 N.C. App. 146 (2009) (trial court did not abuse discretion in refusing to dismiss case or exclude evidence for State's disclosure of incriminating statement of defendant on second day of trial; granting of recess was adequate remedy where court said it would consider any additional request other than dismissal or exclusion of evidence and defendant did not request other sanction or remedy).

The failure of a trial court to grant a continuance may constitute an abuse of discretion when the defendant requires additional time to respond to previously undisclosed evidence. *See State v. Cook*, 362 N.C. 285, 295 (2008) (so holding but concluding that denial of continuance was harmless beyond reasonable doubt because other evidence against defendant was overwhelming); *In re A.M.*, ___ N.C. App. ___, 724 S.E.2d 651 (2012) (ordering new trial for trial court's failure to allow juvenile continuance; State disclosed new witness, the only eyewitness to alleged arson, on day of adjudicatory hearing); *see also infra* § 13.4A, Motion for Continuance (discussing constitutional basis for continuance).

Trial and appellate courts have imposed other, stiffer sanctions. They have imposed sanctions specifically identified in the statute, such as exclusion of evidence, preclusion of witness testimony, mistrial, and dismissal; and they have fashioned other sanctions to remedy the prejudice caused by the violation and deter future violations. *See, e.g., State v. Canaday*, 355 N.C. 242, 253–54 (2002) (ordering new trial for trial court's failure to exclude expert's testimony or order retesting of evidence where State could not produce underlying data from earlier test); *State v. Mills*, 332 N.C. 392 (1992) (trial court offered defendant mistrial for State's discovery violation); *State v. Taylor*, 311 N.C. 266 (1984) (trial court prohibited State from introducing photographs and physical evidence it had failed to produce in discovery); *State v. Barnes*, ___ N.C. App. ___, 741 S.E.2d 457 (2013) (trial court refused to exclude testimony for alleged untimely disclosure of State's intent to use expert but allowed defense counsel to meet privately with State's expert for over an hour before voir dire hearing); *State v. Icard*, 190 N.C. App. 76, 87 (2008) (trial

court allowed defendant right to final argument), *aff'd in part and rev'd in part on other grounds*, 363 N.C. 303 (2009); *State v. Moncree*, 188 N.C. App. 221 (2008) (finding that trial court should have excluded testimony of State's expert about identity of substance found in defendant's shoe where State failed to notify defendant of subject matter of expert's testimony; error not prejudicial); *State v. James*, 182 N.C. App. 698, 702 (2007) (trial court excluded witness statement produced by State after discovery deadline set by trial court); *State v. Blankenship*, 178 N.C. App. 351 (2006) (finding that trial court abused discretion in failing to preclude expert witness not on State's witness list from testifying); *State v. Banks*, 125 N.C. App. 681 (1997) (as sanction for failure to preserve evidence, trial court prohibited State from calling witness to testify about evidence, stripped prosecution of two peremptory challenges, and allowed defendant right to final argument before jury), *aff'd per curiam*, 347 N.C. 390 (1997); *State v. Hall*, 93 N.C. App. 236 (1989) (for belated disclosure of evidence, trial court ordered State's witness to confer with defense counsel and submit to questioning under oath before testifying); *State v. Adams*, 67 N.C. App. 116 (1984) (trial court acted within discretion in dismissing charges for prosecution's failure to comply with court order requiring statutory discovery); *see also United States v. Bundy*, 472 F.2d 1266 (D.C. Cir. 1972) (Levanthal, J., concurring) (concurring opinion suggests that, as sanction for law-enforcement officer's failure to preserve notes, trial court could instruct jury that it was free to infer that missing evidence would have been different from testimony at trial and would have been helpful to defendant).

Mistrial or dismissal as sanction. Counsel may need to make additional arguments to obtain a mistrial or dismissal for a discovery violation.

Some cases have applied the general mistrial standard to the granting of a mistrial as a sanction for a discovery violation. *See State v. Jaaber*, 176 N.C. App. 752, 756 (2006) ("mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law" (citation omitted)); *accord State v. Pender*, ___ N.C. App. ___, 720 S.E.2d 836 (2012).

Dismissal has been characterized as an extreme sanction, which should not be routinely imposed and which requires findings detailing the prejudice warranting dismissal. *State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452 (2013) (reversing order dismissing charge as sanction for State's discovery violation because trial court did not explain prejudice to defendant that warranted dismissal), *review dismissed*, ___ N.C. ___, 743 S.E.2d 205 (2013) and *appeal dismissed, review denied*, ___ N.C. ___, 743 S.E.2d 206 (2013); *State v. Allen*, ___ N.C. App. ___, 731 S.E.2d 510 (2012) (noting that dismissal is extreme sanction and reversing court's order of dismissal in circumstances of case); *State v. Adams*, 67 N.C. App. 116 (1984) (recognizing that dismissal is extreme sanction and upholding dismissal; because prejudice was apparent, trial court's failure to make findings did not warrant reversal or remand).

Personal sanctions. When determining whether to impose personal sanctions for untimely disclosure of law enforcement and investigatory agencies' files, the court must presume that prosecuting attorneys and their staff acted in good faith if they made a

reasonably diligent inquiry of those agencies and disclosed the responsive materials. *See* G.S. 15A-910(c).

Criminal penalties. In 2011, the General Assembly amended G.S. 15A-903 to impose criminal penalties for the failure to comply with statutory disclosure requirements. G.S. 15A-903(d) provides that a person is guilty of a Class H felony if he or she willfully omits or misrepresents evidence or information required to be disclosed under G.S. 15A-903(a)(1), the provision requiring the State to disclose its complete files to the defense. The same penalty applies to law enforcement and investigative agencies that fail to disclose required information to the prosecutor's office under G.S. 15A-903(c). A person is guilty of a Class 1 misdemeanor if he or she willfully omits or misrepresents evidence or information required to be disclosed under any other provision of G.S. 15A-903.

Sanctions for constitutional violations. A court has the discretion to impose sanctions under G.S. 15A-910 for failure to disclose exculpatory evidence. *See, e.g., State v. Silhan*, 302 N.C. 223 (1981) (trial court had authority to grant recess under G.S. 15A-910 for prosecution's failure to disclose exculpatory evidence), *abrogated in part on other grounds by State v. Sanderson*, 346 N.C. 669 (1997).

Stronger measures, including dismissal, may be necessary for constitutional violations. *See State v. Williams*, 362 N.C. 628 (2008) (upholding dismissal of charge of felony assault on government officer; destruction of evidence flagrantly violated defendant's constitutional rights and irreparably prejudiced preparation of defense under G.S. 15A-954).

Preservation of record. If the trial court denies the requested sanctions for a discovery violation, counsel should be sure to include the materials at issue in the record for a potential appeal. *See State v. Mitchell*, 194 N.C. App. 705, 710 (2009) (because defendant did not include any of discovery materials in record, court finds that it could not determine prejudice by trial court's denial of continuance for allegedly late disclosure by State); *see also State v. Hall*, 187 N.C. App. 308 (2007) (in finding that materials were not discoverable, trial court stated that it would place materials under seal for appellate review, but materials were not made part of the record and court of appeals rejected defendant's argument for that reason alone).

Sanctions against defendant for discovery violation. *See infra* "Sanctions" in § 4.8A, Procedures for Reciprocal Discovery by Prosecution.

K. Protective Orders

G.S. 15A-908(a) allows either party to apply to the court, by written motion, for a protective order protecting information from disclosure for good cause. Generally, the State is more likely than the defense to seek a protective order. *See infra* "Protective orders" in § 4.3E, Work Product and Other Exceptions. In some circumstances, a defendant may want to consent to a protective order limiting the use or dissemination of information as a condition of obtaining access to the information.

See infra "In camera review and alternatives" in § 4.6A, Evidence in Possession of Third Parties.

L. Importance of Objection at Trial

If the State offers evidence at trial that was not produced in discovery, the defendant must object and state the grounds for the objection to preserve the issue for appellate review. *See State v. Mack*, 188 N.C. App. 365 (2008) (defendant cannot argue on appeal that trial court abused its discretion in failing to sanction the State for discovery violation when defense counsel did not properly object at trial to previously undisclosed evidence).

Practice note: The State has argued in some cases that if the defendant has moved before trial for exclusion of evidence based on a discovery violation and the trial court denies relief, the defendant must renew the objection when the evidence is offered at trial. *State v. Herrera*, 195 N.C. App. 181 (2009) (assuming, arguendo, that objection requirement applies but not ruling on argument), *abrogation on other grounds recognized by State v. Flaugher*, ___ N.C. App. ___, 713 S.E.2d 576 (2011). Accordingly, counsel should always object at trial when the State offers evidence that has been the subject of a pretrial motion to suppress or exclude.

4.3 Discovery Rights under G.S. 15A-903

Before the 2004 revisions to the discovery statutes, the defendant's right to statutory discovery was limited to specific categories of information. The defendant was entitled to discovery of the defendant's own statements, statements of codefendants, the defendant's prior criminal record, certain documents and physical objects, reports of examinations and tests, and a witness's statement after the witness testified. The defendant's obligation to disclose information to the State was also limited. Under the revised discovery statutes, both the defendant and the prosecution are entitled to broader discovery. This section discusses the defendant's discovery rights under G.S. 15A-903. For further background on the changes in North Carolina's discovery laws, see *supra* § 4.1A, Statutory Right to Open-File Discovery. To the extent relevant, the discussion below includes a discussion of the statutory discovery provisions in effect before 2004.

A. Obligation to Provide Complete Files

The most significant provision in the discovery statute is the requirement that the State make available to the defendant "the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant." G.S. 15A-903(a)(1). The statute defines "file" broadly, stating that it includes "the defendant's statements, codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or *any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant*" (emphasis added). Specific aspects of this definition are discussed below.

B. Agencies Subject to Disclosure Requirements

Generally. General discovery principles have obligated prosecutors to provide to the defense discoverable material in their possession *and* to obtain and turn over discoverable material from other agencies involved in the investigation and prosecution of the defendant. The 2004 changes and subsequent amendments to the discovery statutes not only broadened the materials subject to discovery but also made clearer the obligation of prosecutors to obtain, and involved agencies to provide to prosecutors, information gathered in the investigation and prosecution of the defendant.

G.S. 15A-501(6), adopted in 2004, provides that following an arrest for a felony, a law enforcement officer must make available to the State all materials and information obtained in the course of the investigation. Because this obligation appears in the statutes on law enforcement, it was easy to overlook. G.S. 15A-903 was therefore amended in 2007 to reinforce the obligation of law enforcement agencies to provide discoverable material to the prosecutor. *See* G.S. 15A-903(c) (law enforcement and investigatory agencies must on a timely basis provide to the prosecutor a copy of their complete files related to a criminal investigation or prosecution).

G.S. 15A-903(a)(1)b1., also added in 2007 and revised in 2011, further clarifies the State's discovery obligation to turn over information obtained by investigatory agencies by defining such agencies as including any entity, "public or private," that obtains information on behalf of a law enforcement agency or prosecutor's office in connection with the investigation or prosecution of the defendant. This provision includes, for example, private labs that do testing as part of the investigation or prosecution.

Duty to investigate and obtain. Prosecutors, on behalf of the State, have a duty to investigate whether entities involved in the investigation and prosecution of the defendant have discoverable information. *See* G.S. 15A-903(a)(1) (making "State" responsible for providing complete files to defendant); *State v. Tuck*, 191 N.C. App. 768, 772–73 (2008) (rejecting argument that prosecutor complied with discovery statute by providing defense with evidence once prosecutor received it; State violates discovery statute if "(1) the law enforcement agency or prosecuting agency was aware of the statement or through due diligence should have been aware of it; and (2) while aware of the statement, the law enforcement agency or prosecuting agency should have reasonably known that the statement related to the charges against defendant yet failed to disclose it"); *see also* G.S. 15A-910(c) (personal sanctions against prosecutor inappropriate for untimely disclosure of discoverable information in law enforcement and investigatory agency files if prosecutor made reasonably diligent inquiry of agencies and disclosed the responsive materials). *But cf. State v. James*, 182 N.C. App. 698, 702 (2007) (State's discovery obligation applies to "all existing evidence known by the State but does not apply to evidence yet-to-be discovered by the State").

The State has a comparable constitutional obligation to investigate, obtain, and disclose records of others acting on the State's behalf. *See infra* § 4.5G, Prosecutor's Duty to Investigate.

Particular agencies. Clearly, files within the prosecuting district attorney's own office are subject to the obligation to produce. The files include any materials obtained from other entities; they need not be generated by the prosecutor's office.

The files of state and local law-enforcement offices, public and private entities, and other district attorney's offices involved in the investigation or prosecution are likewise subject to the obligation to produce.

The files of state and local agencies that are not law-enforcement or prosecutorial agencies, such as schools and social services departments, are not automatically subject to the State's obligation to produce. A defendant would still be entitled to the information in several instances.

- *Information part of State's file*. Because of sharing arrangements, law enforcement and prosecutorial agencies may have received a broad range of information from other agencies, which are then part of the State's files and must be disclosed. *See, e.g.,* G.S. 7B-307 (requiring that social services departments provide child abuse report to prosecutor's office and that local law enforcement coordinate its investigation with protective services assessment by social services department); G.S. 7B-3100 (authorizing sharing of information about juveniles by various agencies, including departments of social services, schools, and mental health facilities); 10A N.C. ADMIN. CODE 70A.0107 (requiring social services department to allow prosecutor access to case record as needed for prosecutor to carry out responsibilities). If the materials contain confidential information that the prosecutor believes should not be disclosed, the prosecutor must obtain a protective order under G.S. 15A-908 to limit disclosure.
- *Information in prosecutor's custody or control*. The State's obligation to disclose applies to materials "within the possession, custody or control of the prosecutor." *State v. Pigott*, 320 N.C. 96, 102 (1987) (citation omitted). "Custody" or "control" mean a right of access to the materials; the prosecutor need not have taken actual possession of the materials. *See State v. Crews*, 296 N.C. 607 (1979) (materials within possession of mental health center and social services department not discoverable because prosecution had neither authority nor power to release information and was denied access to it). A prosecutor may not simply leave materials in another entity's possession as a means of avoiding disclosure. *See generally Martinez v. Wainwright*, 621 F.2d 184, 188 (5th Cir. 1980) (prosecutor may not "avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial" (citation omitted)).
- *Information obtained on behalf of law enforcement or prosecutorial agency.* The State's obligation to disclose applies to materials of an outside agency if that agency obtains information on behalf of a law enforcement or prosecutorial agency and thus meets the definition of "investigatory agency" in G.S. 15A-903(a)(1)b1. *Compare State v. Pendleton*, 175 N.C. App. 230 (2005) (finding that social services department did not act in prosecutorial capacity when it referred matter to police and department employee sat in on interview between defendant and officer), *with State v. Morell*,

108 N.C. App. 465 (1993) (social worker in child abuse case acted as law-enforcement agent in interviewing defendant, rendering inadmissible custodial statements made to social worker without *Miranda* warnings).

A defendant also may obtain information directly from an agency or entity by subpoena or motion to the court. If counsel is uncertain whether the State is obligated to produce the information as part of its discovery obligations, counsel can move for an order compelling production by the State on the grounds described above or, in the alternative, compelling the agency to produce the materials. *See infra* § 4.6A, Evidence in Possession of Third Parties.

C. Categories of Information

The discussion below addresses categories of information potentially covered by G.S. 15A-903(a)(1). For a discussion of additional categories of information discoverable on statutory or constitutional grounds, see *infra* § 4.4, Other Discovery Categories and Mechanisms; § 4.5, *Brady* Material; and § 4.6, Other Constitutional Rights. Counsel should include in discovery requests and motions all pertinent categories of information.

Generally. G.S. 15A-903(a)(1) requires the State to disclose its complete files to the defense. The term "file" should not be construed in its everyday sense as the mere paper file kept by the prosecutor in a particular case. G.S. 15A-903(a)(1)a. defines the term to include several specific types of evidence, discussed below. It also includes a catch-all category of "any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." (The term "file" also covers every agency involved in the investigation and prosecution of the offenses. *See supra* § 4.3B, Agencies Subject to Disclosure Requirements). The disclosure requirements are considerably broader than under the pre-2004 discovery statutes.

Practice note: The defendant has the right to inspect the original of any discoverable item and to obtain a copy. G.S. 15A-903(a)(1)d. Defense counsel should not accept a copy if he or she needs to review the originals, e.g., examine photographs; nor should counsel accept the mere opportunity to review materials if he or she needs a copy for further study.

Statements of defendant. G.S. 15A-903(a)(1)a. requires the State to disclose all statements made by the defendant. *See also Clewis v. Texas*, 386 U.S. 707, 712 n.8 (1967) (suggesting that due process may require disclosure of a defendant's statements). In contrast to the pre-2004 statute, which required disclosure of the defendant's statements if relevant, the current statute contains no limitation on the obligation to disclose.

For a discussion of the State's obligation to record interrogations of defendants, see *infra* § 14.3G, Recording of Statements.

Statements of codefendants. G.S. 15A-903(a)(1)a. requires the State to disclose all statements made by codefendants. In contrast to the pre-2004 statute, which required disclosure if the State intended to offer a codefendant's statement at a joint trial, the statute contains no limitation on the obligation to disclose.

The statutory language requiring disclosure of a codefendant's statements applies whether the codefendant's statements are kept in the file in the defendant's case or are kept separately. G.S. 15A-903(a)(1)a. expressly defines the term "file" as including "codefendants' statements." The statute also includes "any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant," which presumably includes statements of codefendants obtained in the investigation of the defendant. (G.S. 15A-927(c)(3) continues to authorize the court to order the prosecutor to disclose the statements of all defendants in ruling on an objection to joinder or on a motion to sever; while the State has the general obligation to disclose such statements, a hearing on joinder or severance may provide additional discovery opportunities. *See infra* § 6.2, Joinder and Severance of Defendants.)

Written or recorded statements of witnesses. G.S. 15A-903(a)(1)a. requires the State to disclose all statements made by witnesses. The statute contains no limitation on this obligation, in contrast to the pre-2004 statute, which required disclosure of witness statements only after the witness testified and only if the statement met certain formal requirements (for example, the statement was signed or otherwise adopted or approved by the witness). The current statutes require the State to turn over, as part of pretrial discovery, any writing or recording evidencing a witness's statement. *See State v. Shannon*, 182 N.C. App. 350 (2007) (trial court committed prejudicial error by denying discovery motion for notes of pretrial conversations between prosecutor's office and witnesses; General Assembly intended to eliminate more formal requirements for witness statements by completely omitting such language from revised statute), *notice of appeal and petition for review withdrawn*, 361 N.C. 702 (2007), *superseded by statute in part on other grounds as recognized in State v. Zamora-Ramos*, 190 N.C. App. 420 (2008) (recognizing that discovery statutes, as amended, do not require prosecutor to reduce to writing oral witness statements if the statements do not significantly differ from previous statements given to law enforcement [court does not question holding of *Shannon* about elimination of formal requirements for witness statements]); *accord State v. Milligan*, 192 N.C. App. 677 (2008) (prosecutor's notes of witness interview were discoverable); *see also Palermo v. United States*, 360 U.S. 343, 362 (1959) (Brennan, J., concurring) (right to witness's statement rests in part on confrontation and compulsory process rights in Sixth Amendment).

The State also must disclose witness statements it may use for impeachment of defense witnesses. *See State v. Tuck*, 191 N.C. App. 768, 772–73 (2008) (holding that such statements are part of State's "file" and must be disclosed).

That notes and other materials reflect statements by witnesses and are therefore discoverable does not necessarily mean that the statements are admissible against the witness. *See Milligan*, 192 N.C. App. 677, 680–81 (defense counsel could ask witness on

cross-examination whether she made certain statements but could not impeach witness with prosecutor's notes of witness's statements, which were not signed or adopted by witness; court also holds that trial court did not err in precluding defense counsel from calling prosecutor as witness and offering notes, apparently on the ground that the notes constituted extrinsic evidence on a collateral matter).

Practice note: To determine whether the prosecution has disclosed the statements of a witness who testifies at trial, defense counsel may cross-examine the witness or request a voir dire outside the presence of the jury. Counsel also may ask the court to order the witness to turn over any materials he or she reviewed before taking the stand. *See* N.C. R. EVID. 612(b).

Oral statements of witnesses. G.S. 15A-903(a)(1)a. requires the State to reduce all oral statements made by witnesses to written or recorded form and disclose them to the defendant except in limited circumstances, described below. This obligation is broader than under the pre-2004 discovery statutes, which required the State to disclose oral statements of the defendant and codefendants only.

The State meets its discovery obligation by providing to the defense the substance of oral statements made by witnesses. *State v. Rainey*, 198 N.C. App. 427, 438–39 (2009) (court of appeals notes that G.S. 15A-903 does not have an express substance requirement in its current form, but "case law continues to use a form of the substance requirement for determining the sufficiency of disclosures to a defendant"); *State v. Zamora-Ramos*, 190 N.C. App. 420 (2008) (State met its obligation to provide oral statements of informant to defense by providing reports from the dates of each offense, which included notations of officer's meetings with informant after each controlled buy and summary of information told to officer during each meeting). *But cf. State v. Dorman*, ___ N.C. App. ___, 737 S.E.2d 452 (2013) (holding that discovery statutes did not require State to document and disclose conversations between police, prosecutor's office, other agencies, and the victim's family regarding return of victim's remains to family [decision appears to be inconsistent with statutory requirement and cases interpreting it and may be limited to circumstances of case]), *review dismissed*, ___ N.C. ___, 743 S.E.2d 205 (2013) and *appeal dismissed, review denied*, ___ N.C. ___, 743 S.E.2d 206 (2013).

G.S. 15A-903(a)(1)c. exempts oral statements made to a prosecuting attorney outside an officer's presence if they do not contain significantly new or different information than the witness's prior statements. *See also State v. Small*, 201 N.C. App. 331 (2009) (State did not violate discovery statute by failing to disclose victim's pretrial statement to prosecutor where State disclosed victim's statement to officers, given on the night of the offense, and victim's subsequent statement to prosecutor did not contain significantly new or different information).

Practice note: The statute does not require the State to provide a description of the facts and circumstances surrounding a witness's statement. *State v. Rainey*, 198 N.C. App. 427, 438. *But see infra* § 14.4B, Statutory Requirements for Lineups (describing documentation that law enforcement must keep of lineups); *see also State v. Hall*, 134

N.C. App. 417 (1999) (hypnotically refreshed testimony is inadmissible, but witness may testify to facts he or she recounted before being hypnotized; State must disclose whether witness had been hypnotized before witness testifies).

If the State fails to provide sufficient context for counsel to understand the statement—for example, the State discloses a statement made by a witness without providing information about the circumstances of the conversation—counsel should consider filing a motion to compel the additional information. *Rainey*, 198 N.C. App. 427, 438 ("purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate" (citation omitted)); *State v. Patterson*, 335 N.C. 437 (1994) (under previous version of discovery statute, under which State was required to disclose substance of defendant's oral statements, prosecution violated statute by first producing written statement made by defendant to officer and later producing defendant's oral statement without disclosing that statement was made to officer at time of written statement); *see also supra* § 4.1C, Court's Inherent Authority (discussing authority to compel disclosure if not prohibited by discovery statutes).

Investigating officer's notes. The State must disclose any notes made by investigating law-enforcement officers. This item is specifically identified as discoverable in G.S. 15A-903(a)(1)a. An officer's report, prepared from his or her notes, is not a substitute for the notes themselves. *See State v. Icard,* 190 N.C. App. 76, 87 (2008) (State conceded that failure to turn over officer's handwritten notes violated discovery requirements), *aff'd in part and rev'd in part on other grounds*, 363 N.C. 303 (2009).

The specific inclusion of officer's notes in the discovery statute suggests that the State must preserve the notes for production. *See also* G.S. 15A-903(c) (requiring law enforcement agencies to provide the prosecutor with their complete files); G.S. 15A-501(6) (to same effect); *United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976) (recognizing under narrower federal discovery rules that officers must preserve rough notes); *United States v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975) (to same effect). To be safe, counsel should file a motion to preserve early in the case. *See supra* § 4.2C, Preserving Evidence for Discovery.

Results of tests and examinations and underlying data. G.S. 15A-903(a)(1)a. requires the State to disclose the results of all tests and examinations. *See also* G.S. 15A-267(a)(1) (right to DNA analysis [discussed *infra* in § 4.4E, Biological Evidence]).

As amended in 2011, the statute explicitly requires the State to produce, in addition to the test or examination results, "all other data, calculations, or writings of any kind . . ., including but not limited to, preliminary test or screening results and bench notes." If the State cannot provide the underlying data, the court may order the State to retest the evidence. *State v. Canaday*, 355 N.C. 242, 253–54 (2002).

The requirement to produce underlying data is consistent with earlier cases, which recognized that the defendant has the right not only to conclusory reports but also to any tests performed, procedures used, calculations and notes, and other data underlying the

report. *State v. Cunningham*, 108 N.C. App. 185 (1992) (defendant has right to data underlying lab report on controlled substance); *accord State v. Dunn*, 154 N.C. App. 1 (2002) (relying on *Cunningham* and interpreting former G.S. 15A-903 as requiring that State disclose information pertaining to laboratory protocols, false positive results, quality control and assurance, and lab proficiency tests in drug prosecution); *cf. State v. Fair*, 164 N.C. App. 770 (2004) (finding under former G.S. 15A-903 that defendant was entitled to data collection procedures and manner in which tests were performed but that State did not have obligation to provide information about peer review of the testing procedure, whether the procedure had been submitted to scrutiny of scientific community, or is generally accepted in scientific community).

A defendant's right to underlying data and information also rests on the Law of the Land Clause (article 1, section 19) of the North Carolina Constitution. *Cunningham*, 108 N.C. App. 185, 195–96 (recognizing state constitutional right so that defendant is in position to meet scientific evidence; ultimate test results did not "enable defendant's counsel to determine what tests were performed and whether the testing was appropriate, or to become familiar with the test procedures"); *see also State v. Canady*, 355 N.C. 242, 253–54 (2002) (relying in part on N.C. Const., art. 1, sec. 19 and 23, in finding that trial court erred in allowing an expert for State to testify without allowing defendant an opportunity to examine the expert's testing procedure and data).

In cases decided under the former discovery statute, the defendant was not entitled to polygraph tests and results. *See State v. Brewington*, 352 N.C. 489 (2000) (finding that polygraph did not fall into category of physical or mental examinations discoverable under pre-2004 discovery statute); *accord State v. Allen*, ___ N.C. App. ___, 731 S.E.2d 510 (2012) (reaching same conclusion under pre-2004 statute, which court found applicable because discovery hearing was held in 1999). Polygraphs also have been found not to constitute *Brady* material. *Wood v. Bartholomew*, 516 U.S. 1 (1995). Under the current discovery statute, the defendant should be entitled to polygraph tests and results, either because they constitute tests or examinations under the statute or because they are part of the file in the investigation of the case.

If the State intends to call an expert to testify to the results of a test or examination, the State must provide the defense with a written report of the expert's opinion. *See infra* § 4.3D, Notice of Witnesses and Preparation of Reports.

Practice note: Under the former statute, a defendant may have needed to make a specific motion, sometimes called a *Cunningham* motion, asking specifically for both the test results or reports and the underlying data. Such a motion is not required under the current statute, which expressly requires the State to produce underlying data. If, however, counsel believes that the State has not produced the required information or counsel wants additional information about tests or examinations, counsel should specifically identify the information in the discovery request and motion. *See generally State v. Payne*, 327 N.C. 194, 201–02 (1990) (finding that discovery motion was not sufficiently explicit to inform either the trial court or the prosecutor that the defendant sought the underlying data). A sample motion for discovery of fingerprint evidence, including the

underlying data, is available in the non-capital motions bank on the IDS website, www.ncids.org.

Physical evidence. The defendant has the right, with appropriate safeguards, to inspect, examine, and test any physical evidence or sample. *See* G.S. 15A-903(a)(1)d.; *see also* G.S. 15A-267(a)(2), (3) (right to certain biological material and complete inventory of physical evidence [discussed *infra* in § 4.4E, Biological Evidence]).

In addition to the statutory right to test evidence, a defendant has a due process right to "examine a piece of critical evidence whose nature is subject to varying expert opinion." *State v. Jones*, 85 N.C. App. 56, 65 (1987) (citation omitted). In drug cases, this requirement means that the defendant has a constitutional as well as statutory right to conduct an independent chemical analysis of controlled substances. *Id.* Defense counsel should file a motion to preserve if he or she believes that the State may destroy evidence or use it up in testing. *See supra* § 4.2C, Preserving Evidence for Discovery.

Although the defendant has the right to inspect, examine, and test any physical evidence or sample in the State's file, the State may not have an obligation to seek out particular evidence for testing or perform any particular test. The North Carolina courts have held, for example, that defendants do not have a *constitutional* right to require the State to conduct DNA tests on evidence at the defendant's request. *See State v. Wright*, 210 N.C. App. 52 (2011) (defendant not entitled to a new trial when SBI Crime Lab tested only DNA from toboggan found at crime scene and not hair and fiber lifts; defendant did not argue that State failed to make the lifts available for testing, and one of defendant's previous attorneys requested and received an independent test of the toboggan; no constitutional duty to perform particular tests on evidence); *State v. Ryals*, 179 N.C. App. 733 (2006) (court finds that former discovery statute did not require State to obtain DNA from State's witness and compare it with DNA from hair found on evidence; court also finds no constitutional duty to perform test).

For DNA testing, the North Carolina General Assembly has now mandated that the State conduct DNA tests of biological evidence collected by the State if the defendant requests testing and meets certain conditions. *See* G.S. 15A-267(c); *see also infra* § 4.4E, Biological Evidence. If the defense wants to conduct its own DNA tests (or for evidence for which the defendant does not have a right to require the State to conduct testing), the defendant may seek funds for an expert to conduct testing of the evidence. *See infra* Ch. 5, Experts and Other Assistance. If the defendant decides not to use the test results at trial, the defendant generally does not have an obligation to disclose the test results to the State. *See infra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests.

A defendant may have greater difficulty in obtaining physical evidence that the State has not already collected, such as physical samples from a witness. *See infra* § 4.4F, Nontestimonial Identification Orders.

Crime scenes. The former discovery statutes explicitly gave defendants the right to inspect crime scenes under the State's control. If a crime scene is under the State's

control, crime scenes likely remain subject to inspection and discovery as "physical evidence," discussed immediately above, and as "any other matter or evidence" under the catch-all discovery language in G.S. 15A-903(a)(1)a.

The North Carolina courts also have recognized that the defendant has a constitutional right to inspect a crime scene. *See State v. Brown*, 306 N.C. 151 (1982) (violation of due process to deny defense counsel access to crime scene, which police had secured for extended time).

The State may not have an obligation to preserve a crime scene. *Id.,* 306 N.C. at 164 (stating that its holding that defense has right of access to crime scene should not "be construed to mean that police or prosecution have any obligation to preserve a crime scene for the benefit of a defendant's inspection"). Counsel therefore should request access to secured crime scenes and investigate unsecured scenes early in the case. If counsel cannot obtain access to a crime scene controlled by a third party, counsel may be able to obtain a court order allowing inspection of the scene under appropriate limitations. *See Henshaw v. Commonwealth*, 451 S.E.2d 415 (Va. Ct. App. 1994) (relying on North Carolina Supreme Court's opinion in *Brown* and finding state constitutional right to inspect crime scene controlled by private person—in this instance, apartment of alleged victim in self-defense case); *State v. Lee*, 461 N.W.2d 245 (Minn. Ct. App. 1990) (finding that prosecution had possession or control of premises where it had previously processed premises for evidence and could arrange for similar access by defense; noting that such access was not unduly intrusive); *United States v. Armstrong*, 621 F.2d 951 (9th Cir. 1980) (noting that court could base order authorizing inspection of third-party premises on its inherent authority).

A sample motion for entry and inspection of the premises of the alleged offense (based on legal authority applicable to delinquency cases) is available in the juvenile motions bank (under "Motions, Non-Capital") on the IDS website, www.ncids.org.

Prior criminal record of defendant and witnesses. Former G.S. 15A-903 gave defendants the right to their criminal record. Current G.S. 15A-903 does not contain an explicit provision to that effect. However, G.S. 15A-1340.14(f) retains the right, stating that if a defendant in a felony case requests his or her criminal record as part of a discovery request under G.S. 15A-903, the prosecutor must furnish the defendant's prior criminal record within sufficient time to allow the defendant to determine its accuracy. An attorney who has entered an appearance in a criminal case also has the right to obtain the client's criminal history through the Division of Criminal Information (DCI). G.S. 114-10.1(c). Defense attorneys do not have access to DCI and must request local law enforcement to run the search. *See State v. Thomas*, 350 N.C. 315, 340 (1999) (upholding trial court's denial of defense motion for access to Police Information Network [predecessor to DCI]; lack of access did not prejudice defendant); *accord State v. Williams*, 355 N.C. 501, 543–44 (2002).

The discovery statutes do not explicitly cover criminal record information of witnesses. *See also State v. Brown*, 306 N.C. 151 (1982) (finding under former discovery statute that

State was not obligated to provide criminal records of witnesses). If the State has obtained criminal records, however, they are part of the State's file and must be disclosed to the defense as part of the State's general obligation to disclose its complete files in the case. The State also has an obligation to disclose a witness's criminal record under *Brady*, which requires disclosure of impeachment evidence. *See infra* "Prior convictions and other misconduct" in § 4.5C, Favorable to Defense.

Defense counsel also can obtain a person's North Carolina criminal record through the Criminal Information System (CIS), a database of all North Carolina criminal judgments entered by court clerks. A terminal should be located in all public defender offices in North Carolina. Terminals are also located in the clerk of court's office. An attorney who has entered an appearance in a criminal case also has the right to obtain "relevant" information from DCI. G.S. 114-10.1(c). Some local agencies may not be willing, however, to run a criminal history search about anyone other than the defendant. (The cases have not specifically addressed whether this statute grants a defendant's attorney a broader right to information.)

D. Notice of Witnesses and Preparation of Reports

Requirement of request. The discovery statutes entitle the defendant to notice of the State's witnesses, both expert and lay. As with obtaining discovery of the State's files, the defendant must make a written request for discovery under G.S. 15A-903 and follow up with a written motion if the State does not comply. *See State v. Brown*, 177 N.C. App. 177 (2006) (not error for trial court to allow victim's father to testify although not included on State's witness list where defendant did not make request for witness list; court also holds that although some cases require State to abide by witness list it has provided without written request, State may call witness not on list if it has acted in good faith and defendant is not prejudiced). For a further discussion of the requirement of a request and motion, see *supra* § 4.2D, Requests for Discovery, and § 4.2E, Motions for Discovery.

Notice of expert witnesses, including report of results of examinations or tests, credentials, opinion, and basis of opinion. Within a reasonable time before trial, the prosecutor must give notice "of any expert witnesses that the State reasonably expects to call as a witness at trial." Each such witness must prepare and the State must provide to the defendant a report of the results of any examinations or tests conducted by the expert. The State also must provide the expert's credentials, opinion, and underlying basis for that opinion. *See* G.S. 15A-903(a)(2); *see also State v. Cook*, 362 N.C. 285, 292, 294 (2008) (State violated G.S. 15A-903(a)(2) when it gave notice of expert witness five days before trial and provided the witness's report three days before trial; "State's last-minute piecemeal disclosure . . . was not 'within a reasonable time prior to trial'"; trial court abused discretion in denying defendant's request for continuance); *State v. Aguilar-Ocampo*, ___ N.C. App. ___, 724 S.E.2d 117 (2012) (State violated discovery statute by failing to disclose identity of translator and State's intent to offer his testimony; because defendant anticipated testimony and fully cross-examined expert, trial court did not abuse discretion in failing to strike testimony); *State v. Moncree*, 188 N.C. App. 221, 227

(2008) (State violated G.S. 15A-903(a)(2) when SBI agent testified as expert witness concerning substance found in defendant's shoe and State did not notify defendant before trial; although State notified defendant about intent to introduce lab reports for substances found elsewhere during the stop, substance from defendant's shoe was never sent to lab; harmless error because defendant could have anticipated the evidence); *State v. Blankenship*, 178 N.C. App. 351 (2006) (State failed to comply with discovery statutes when it did not provide sufficient notice to defendant that an SBI agent would testify about methamphetamine manufacture; trial court permitted agent to testify, over defendant's objection, as a fact witness, but State tendered agent as an expert and court of appeals held that agent was an expert; trial court should not have allowed testimony and new trial ordered).

Practice note: The courts sometimes classify a witness as a lay or fact witness not subject to the expert witness discovery requirements (or the standards for admissibility of expert opinion). *See State v. Hall*, 186 N.C. App. 267, 273 (2007) (distinguishing *Blankenship*, court finds that physician assistant testified as fact witness, not as expert witness). If the testimony depends on specialized training or experience, counsel should argue that the testimony is subject to the standards on notice (and admissibility) of the testimony. *Cf.* ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 10-2(B), at 10-5 (2d ed. 2006) (expressing concern that offering of expert testimony "in lay witness clothing" evades disclosure and reliability requirements for expert testimony).

Before the 2004 revisions to the discovery statute, trial courts had the discretion to require a party's expert witness to prepare a written report of examinations or tests and provide it to the opposing party if the party intended to call the expert as a witness. *See State v. East*, 345 N.C. 535 (1997). The current statute mandates notice, including preparation of a written report of test and examination results, if a party reasonably expects to call an expert to testify (and the requesting party has complied with the requirements for requesting discovery).

Notice of other witnesses. At the beginning of jury selection, the prosecutor must provide the defendant with a list of the names of all other witnesses that the State reasonably expects to call during trial unless the prosecutor certifies in writing and under seal that disclosure may subject the witnesses or others to harm or coercion or another compelling need exists. The court may allow the State to call lay witnesses not included on the list if the State, in good faith, did not reasonably expect to call them. The court also may permit, in the interest of justice, any undisclosed witness to testify. *See* G.S. 15A-903(a)(3); *State v. Brown*, 177 N.C. App. 177 (2006) (relying, in part, on good faith exception to allow State to call witness not on witness list where State was unaware of witness until witness approached State on morning of trial and on voir dire witness confirmed State's representation).

If the defendant has given notice of an alibi defense and disclosed the identity of its alibi witnesses, the court may order on a showing of good cause that the State disclose any rebuttal alibi witnesses no later than one week before trial unless the parties and court

agree to different time frames. G.S. 15A-905(c)(1)a.; *see also infra* § 4.8E, Notice of Defenses.

Before the 2004 revisions, trial courts had the discretion to require the parties to disclose their witnesses during jury selection. *See, e.g., State v. Godwin*, 336 N.C. 499 (1994). The current statute makes disclosure mandatory (assuming the requesting party has complied with the requirements for requesting discovery).

E. Work Product and Other Exceptions

G.S. 15A-904 limits the discovery obligations of the prosecution in specified respects. Subsection (c) of G.S. 15A-904 makes clear that the statutory limits do not override the State's duty to comply with federal or state constitutional disclosure requirements.

Prosecutor work product. G.S. 15A-904(a) provides that the State is not required to disclose to the defendant "written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements, and closing arguments." *Id.* The State also is not required to disclose legal research, records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by the prosecuting attorney's legal staff if such documents contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or legal staff. *Id.* This formulation of "work product" is considerably narrower than the former statute's provisions. The rationale for the change is as follows.

The attorney work-product doctrine is "designed to protect the mental processes of the attorney from outside interference and provide a privileged area in which he can analyze and prepare his client's case." *State v. Hardy*, 293 N.C. 105, 126 (1977). At its broadest, the doctrine has been interpreted as protecting information collected by an attorney and his or her agents in preparing the case, including witness statements and other factual information. *See Hickman v. Taylor*, 329 U.S. 495 (1947) (discussing doctrine in civil cases). At its core, however, the doctrine is concerned with protecting the attorney's mental impressions, opinions, conclusions, theories, and strategies. *See Hardy*, 293 N.C. 105, 126. Former G.S. 15A-904 reflected the broader version of the work-product doctrine, although the statute did not specifically mention the term. *Id.* (discussing statute and doctrine). It allowed the State to withhold from the defendant internal documents made by the prosecutor, law enforcement, or others acting on the State's behalf in investigating or prosecuting the case unless the documents fell within certain discoverable categories (for example, a document contained the defendant's statement).

Current G.S. 15A-904 reflects the narrower version of the doctrine. It continues to protect the prosecuting attorney's mental processes while allowing the defendant access to factual information collected by the State. The revised statute provides that the State may withhold written materials drafted by the prosecuting attorney or legal staff for their own use at trial, such as opening statements and witness examinations, which inherently contain the prosecuting attorney's mental processes; and legal research, records,

correspondence, memoranda, and trial preparation notes to the extent they reflect such mental processes. The current statute does not protect materials prepared by non-legal staff or by personnel not employed by the prosecutor's office, such as law-enforcement officers. It also does not protect evidence or information obtained by a prosecutor's office. For example, interview notes reflecting a witness's statements, whether prepared by a law-enforcement officer or a member of the prosecutor's office, are not protected under the work-product provision; however, interview notes made by prosecutors or legal staff reflecting their theories, strategies, and the like are protected.

Cases interpreting the current version of G.S. 15A-904 reflect the narrower scope of the statute. *See State v. Shannon*, 182 N.C. App. 350, 361–62 (2007) (recognizing narrow scope of statute), *notice of appeal and petition for review withdrawn*, 361 N.C. 702 (2007), *superseded by statute in part on other grounds as recognized in State v. Zamora-Ramos*, 190 N.C. App. 420 (2008) (recognizing that discovery statutes, as amended, do not require prosecutor to reduce to writing oral witness statements if the statements do not significantly differ from previous statements given to law enforcement [court does not question holding of *Shannon* about narrower scope of work product protection]).

Work product principles are not the same throughout criminal proceedings. Protections for the defendant's "work product" are considerably broader. *See infra* § 4.8, Prosecution's Discovery Rights. In post-conviction proceedings, there is no protection for a prosecutor's work product related to the investigation and prosecution of the case. *See supra* § 4.1F, Postconviction Proceedings.

Practice note: If the trial court finds that materials are work product and are not discoverable, defense counsel must confirm that the materials are placed under seal and included as part of the record on appeal. *See State v. Hall*, 187 N.C. App. 308 (2007) (prosecutor prepared work product inventory and filed it with trial court; in finding that materials were not discoverable, trial court stated that it would place materials under seal for appellate review, but materials were not made part of the record and court of appeals rejected defendant's argument for that reason alone).

Confidential informants. Under 2007 amendments to the discovery law, the State is not required to disclose the identity of a confidential informant unless otherwise required by law. G.S. 15A-904(a1). The amended statute does not require the State to obtain a protective order to withhold the identity of a confidential informant. *See State v. Leyva*, 181 N.C. App. 491, 496 (2007) (State did not request a protective order because the discovery statutes did not require the State to disclose information about a confidential informant, who was not testifying at trial). A defendant may have a constitutional and statutory right in some circumstances to disclosure of an informant's identity. *See infra* § 4.6D, Identity of Informants.

Under a former provision of the discovery statute, the State could withhold a statement of the defendant to a confidential informant if the informant's identity was a prosecution secret, the informant was not going to testify for the prosecution, and the statement was not exculpatory. If the State withheld a statement on that ground, the informant could not

testify at trial. *See State v. Batchelor*, 157 N.C. App. 421 (2003). The current statute does not contain any exception for statements to confidential informants. Accordingly, the State would appear to need a protective order to withhold such statements (presumably on the ground that disclosure of the statements would disclose the informant's identity) and also could not call the informant to testify at trial.

Personal identifying information of witnesses. Under 2007 amendments to the discovery law, the State is not required to provide a witness's personal identifying information other than the witness's name, address, date of birth, and published phone number unless the court determines, on motion by the defendant, that additional information is required to identify and locate the witness. G.S. 15A-904(a2).

Under 2011 amendments, the State is not required to disclose the identity of any person who provides information about a crime or criminal conduct to a Crime Stoppers organization under promise of anonymity unless otherwise ordered by a court (G.S. 15A-904(a3)); and the State is not required to disclose a Victim Impact Statement, as defined in G.S. 15A-904(a4), unless otherwise required by law.

Protective orders. G.S. 15A-908(a) allows either party to apply to the court, by written motion, for a protective order protecting information from disclosure for good cause, such as substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment.

The State (or the defendant) may apply ex parte for a protective order. If an ex parte order is granted, the opposing party receives notice of entry of the order but not the subject matter of the order. G.S. 15A-908(a). If the court enters an order granting relief, the court must seal and preserve in the record for appeal any materials submitted to the court for review.

4.4 Other Discovery Categories and Mechanisms

The discussion below covers categories of information that may be discoverable under North Carolina law but are not specifically identified in G.S. 15A-903(a)(1) (right to complete files) or G.S. 15A-903(a)(2) (notice of expert and other witnesses). For a discussion of categories of information discoverable under those statutes, see *supra* § 4.3, Discovery Rights under G.S. 15A-903. *See also* § 4.5, *Brady* Material, and § 4.6, Other Constitutional Rights. Counsel should include in discovery requests and motions all pertinent categories of information.

A. Plea Arrangements and Immunity Agreements

G.S. 15A-1054(a) authorizes prosecutors to agree not to try a suspect, to reduce the charges, and to recommend sentence concessions on the condition that the suspect will provide truthful testimony in a criminal proceeding. Prosecutors may enter into such plea arrangements without formally granting immunity to the suspect. G.S. 15A-1054(c)

requires the prosecution to give written notice to the defense of the terms of any such arrangement within a reasonable time before any proceeding in which the person is expected to testify.

Some opinions have interpreted the statute to require the State to disclose all plea arrangements with witnesses, regardless with whom made and whether formal or informal. *See, e.g., State v. Brooks*, 83 N.C. App. 179 (1986) (law enforcement officer told witness he would talk to prosecutor and see about sentence reduction if witness testified against defendant; violation found for failure to disclose this information); *State v. Spicer*, 50 N.C. App. 214 (1981) (although prosecutor stated there was no agreement, witness stated that he expected prosecutor to drop felonies to misdemeanors; violation found for failure to disclose this information). Other opinions take a narrower view. *See, e.g., State v. Crandell*, 322 N.C. 487 (1988) (finding that State did not violate statute by failing to disclose plea arrangement with law enforcement agency; statute requires disclosure of plea arrangements entered into by prosecutors); *State v. Lowery*, 318 N.C. 54 (1986) (statute did not require disclosure because prosecutor had not entered into formal agreement with defendant).

Defense counsel therefore should draft a broad discovery request and motion for such information, including all evidence, documents, and other information concerning all deals, concessions, inducements, and incentives offered to any witness in the case. Counsel should base the request on: (1) the prosecutor's obligation under G.S. 15A-1054(c) to disclose such arrangements; (2) the prosecutor's obligation under G.S. 15A-903(a) to disclose the complete files of the investigation and prosecution of the offenses allegedly committed by the defendant, including oral statements by witnesses (*see supra "*Oral statements of witness" in § 4.3C, Categories of Information); and (3) the prosecutor's obligation under *Brady* to disclose impeachment evidence. *See Giglio v. United States*, 405 U.S. 150, 155 (1972) ("evidence of any understanding or agreement as to a future prosecution would be relevant to . . . credibility"); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976) (North Carolina conviction vacated on habeas for failure to disclose promise of leniency made by police officer); *see also infra* § 4.5C, Favorable to Defense (discussing *Brady* material). In addition to obtaining complete information, a discovery request and motion based on these additional grounds may provide for a greater remedy than specified in G.S. 15A-1054(c)—a recess—if the State fails to turn over the required information. A sample motion to reveal deals or concessions is available in the non-capital motions bank on the IDS website, www.ncids.org.

B. 404(b) Evidence

North Carolina Rule of Evidence 404(b) provides that a defendant's prior "bad acts" are admissible if offered for a purpose other than to prove his or her character. The prior acts need not have resulted in a conviction.

Before 2004, the discovery statutes did not give defendants the right to discover 404(b) evidence. Defendants argued that North Carolina Rule of Evidence Rule 404(b) mandated that the prosecution give notice of "bad acts" evidence before trial, an argument the

courts rejected. *See State v. Payne*, 337 N.C. 505 (1994). The revised discovery statutes and other grounds provide a basis for disclosure, however:

- If the prosecution intends to use 404(b) evidence against the defendant, the evidence is presumably part of the complete files of the investigation and prosecution of the defendant and so is subject to the State's general discovery obligations under G.S. 15A-903(a)(1).
- The trial court likely has the inherent authority to require disclosure in the interests of justice. *See generally* FED. R. EVID. 404(b) & Commentary to 1991 Amendment (recognizing that pretrial notice of such evidence serves to "reduce surprise and promote early resolution on the issue of admissibility").
- In addition to or in lieu of moving for disclosure of Rule 404(b) evidence, defense counsel may file a motion in limine to preclude admission of such evidence, which may reveal the existence of such evidence as well as limit its use.

A sample motion to disclose evidence of prior bad acts is available in the capital trial motions bank on the IDS website, www.ncids.org.

C. Examinations and Interviews of Witnesses

Examinations. In *State v. Horn*, 337 N.C. 449 (1994), the court held that a trial judge may not compel a victim or witness to submit to a psychological examination without his or her consent. *See also State v. Carter*, ___ N.C. App. ___, 718 S.E.2d 687 (2011) (mentioning *Horn* and finding that defendant presented no authority for argument on appeal that trial court violated his federal and state constitutional rights by refusing to order examination of victim), *rev'd on other grounds*, ___ N.C. ___, 739 S.E.2d 548 (2013).

Horn held further that a trial judge may grant other relief if the person refuses to submit to a voluntary examination. A judge may appoint an expert for the defense to interpret examinations already performed on the person, deny admission of the State's evidence about the person's condition, and dismiss the case if the defendant's right to present a defense is imperiled. Accordingly, counsel should consider filing a motion requesting that the person submit to an examination. If the person refuses, defense counsel may have grounds for asking for the relief described in *Horn.*

Additional decisions hold that a judge does not have the authority to order a victim or witness to submit to a physical examination without consent. *See State v. Hewitt*, 93 N.C. App. 1 (1989) (trial judge may order physical examination only if victim or victim's guardian consents). *But see People v. Chard*, 808 P.2d 351 (Colo. 1991) (reviewing *Hewitt* and finding that majority of courts have recognized the authority of trial courts to order a physical examination of the victim on a showing of compelling need).

The defendant's ability to require the State to obtain physical evidence from a victim or witness is also limited. *See supra* "Physical evidence" in § 4.3C, Categories of Information, and § 4.4F, Nontestimonial Identification Orders. Defendants may inspect

and, under appropriate safeguards, test physical evidence already collected by the State. The defendant also may request that the State conduct DNA tests of biological evidence collected by the State. *See infra* § 4.4E, Biological Evidence.

For a discussion of the State's ability to obtain an examination of a defendant who intends to introduce expert testimony on his or her mental condition, see *infra* "Insanity and other mental conditions" in § 4.8E, Defenses.

Interviews. The defendant generally does not have the right to compel a witness to submit to an interview. *See State v. Phillips*, 328 N.C. 1 (1991); *State v. Taylor*, 178 N.C. App. 395 (2006) (holding under revised discovery statutes that police detective was not required to submit to interview by defense counsel). The State may not, however, instruct witnesses not to talk with the defense. *See State v. Pinch*, 306 N.C. 1, 11–12 (1982) (obstructing defense access to witnesses may be grounds for reversal of conviction), *overruled in part on other grounds by State v. Robinson*, 336 N.C. 78 (1994); *see also* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(h), at 399–401 (3d ed. 2007) [hereinafter LAFAVE, CRIMINAL PROCEDURE] (interpreting *Webb v. Texas*, 409 U.S. 95 (1972), and other decisions as making it a due process violation for prosecutor to discourage prospective witnesses from testifying for defense).

In limited circumstances, defense counsel may have the right to depose a witness. *See infra* § 4.4D, Depositions. Courts also have compelled witness interviews for discovery violations. *See State v. Hall*, 93 N.C. App. 236 (1989) (as sanction for discovery violation, court ordered State's witness to confer with defense counsel and submit to questioning under oath before testifying).

Ethical rules may constrain the ability of defense counsel to interview a child in the absence of a parent or guardian. *See* KELLA W. HATCHER, JANET MASON & JOHN RUBIN, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA § 1.4.C.3 (Access to Information and People) (UNC School of Government, 2011) (discussing ethics opinions prohibiting attorney from communicating with child represented by guardian ad litem and from communicating with prosecuting witness who is less than 14 years old in physical or sexual abuse case without consent of parent or guardian), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/andtpr.pdf; *see also* N.C. State Bar R. Professional Conduct 4.2, 4.3 (interviewing represented and unrepresented witnesses).

D. Depositions

A defendant in a criminal case may take depositions for the purpose of preserving testimony of a person who is infirm, physically incapacitated, or a nonresident of this state. *See* G.S. 8-74; *State v. Barfield*, 298 N.C. 306 (1979), *disavowed in part on other grounds by State v. Johnson*, 317 N.C. 193 (1986).

A defendant may have a further right to take a deposition of a person residing in a state or U.S. territory outside North Carolina. In 2011, the General Assembly added G.S. Chapter

1F, the North Carolina Interstate Depositions and Discovery Act. Its principal purpose was to simplify the procedure for the parties in a civil case in one state to take depositions of witnesses in another state. The pertinent legislation also amended N.C. Rule of Civil Procedure 45, which applies to criminal cases pursuant to G.S. 15A-801 and G.S. 15A-802. Rule 45(f) sets forth the procedure for obtaining discovery, including depositions of a person residing outside North Carolina, and does not exclude criminal cases. If Rule 45(f) applies to criminal cases, a party in a North Carolina criminal case would be able to obtain a deposition (or other discovery) in another state if the state allows such discovery in criminal cases. *See* N.C. R. CIV. P. 45(f) (requiring party to follow available processes and procedures of jurisdiction where person resides). Rule 45(f) describes the procedure for obtaining a deposition, including obtaining a commission (an order) from a North Carolina court before seeking discovery in the other state.

E. Biological Evidence

G.S. 15A-267(a) gives the defendant a right of access before trial to the following:

- any DNA analysis in the case;
- any biological material that
  - has not been DNA tested
  - was collected from the crime scene, the defendant's residence, or the defendant's property
    [the punctuation in the statute makes it unclear whether both of the above conditions must be met or only one]; and
- a complete inventory of all physical evidence connected to the investigation.

G.S. 15A-267(b) states that access to the above is as provided in G.S. 15A-902, the statute on requesting discovery, and as provided in G.S. 15A-952, the statute on pretrial motions. Therefore, counsel should request the above in his or her discovery request and follow up with a motion as necessary. *See also* G.S. 15A-266.12(d) (State Bureau of Investigation not required to provide the state DNA database for criminal discovery purposes; request to access a person's DNA record must comply with G.S. 15A-902).

On motion of the defendant, the court must order the State to conduct DNA testing of biological evidence it has collected and run a comparison with CODIS (the FBI's combined DNA index system) if the defendant meets the conditions specified in G.S. 15A-267(c). In 2009, the General Assembly amended G.S. 15A-269(c) to make testing mandatory, not discretionary, if the defendant makes the required showing.

In lieu of or in addition to asking for the SBI to conduct DNA testing, the defendant may seek funds for an expert to conduct testing of the evidence. *See infra* Chapter 5, Experts and Other Assistance. If the defendant does not intend to offer the tests at trial, the defendant generally does not have an obligation to disclose the test results to the State. *See infra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests.

Legislative note: G.S. 15A-268 requires agencies with custody of biological evidence to retain the evidence according to the schedule in that statute. Effective June 19, 2013, S.L. 2013-171 (S 630) adds G.S. 20-139.1(h) to require preservation of blood and urine samples subject to a chemical analysis for the period of time specified in that statute and, if a motion to preserve has been filed, until entry of a court order about disposition of the evidence.

F. Nontestimonial Identification Orders

G.S. 15A-271 through G.S. 15A-282 allow the prosecution in some circumstances to obtain a nontestimonial identification order for physical evidence (fingerprints, hair samples, saliva, etc.) from a person suspected of committing a crime. *See generally* ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 433–36 (UNC School of Government, 4th ed. 2011). The defendant has the right to any report of nontestimonial identification procedures conducted on him or her. *See* G.S. 15A-282.

In some circumstances a defendant also has the right to request that nontestimonial identification procedures be conducted on himself or herself. *See* G.S. 15A-281 (specifying conditions for issuance of order). The defendant generally does not have the right to a nontestimonial identification order to obtain physical samples from a third party. *See State v. Tucker*, 329 N.C. 709 (1991) (defendant could not use nontestimonial identification order to obtain hair sample of possible suspect). *But cf. Fathke v. State*, 951 P.2d 1226 (Alaska Ct. App. 1998) (court had authority to issue subpoena compelling witness to produce fingerprints, which constitute objects subject to subpoena).

A sample motion for nontestimonial identification procedures to be conducted is in the non-capital motions bank on the IDS website, www.ncids.org.

G. Potential Suppression Issues

Generally. To enable defense counsel to determine whether to file a motion to suppress evidence (under G.S. 15A-971 through G.S. 15-980), counsel should seek discovery of the following (some of which may be in the court file and thus already accessible to counsel and some of which may be a part of the State's investigative and prosecutorial files and thus subject to the State's general discovery obligations under G.S. 15A-903(a)(1)):

- search warrants, arrest warrants, and nontestimonial identification orders issued in connection with the case;
- a description of any property seized from the defendant and the circumstances of the seizure;
- the circumstances of any pretrial identification procedures employed in connection with the alleged crimes (lineups, photo arrays, etc.);
- a description of any communications between the defendant and law-enforcement officers; and

- a description of any surveillance (electronic, visual, or otherwise) conducted of the defendant or others resulting in the interception of any information about the defendant and the offense with which he or she is charged.

Innocence initiatives. In the last several years, the General Assembly has enacted requirements for recording interrogations (G.S. 15A-211) and conducting lineups (G.S. 15A-284.52) as part of an effort to increase the reliability of convictions. For a discussion of these requirements, see *infra* § 14.3G, Recording of Statements, and § 14.4B, Statutory Requirements for Lineups.

The statutes containing these requirements do not contain specific procedures for discovery, but interrogations and lineups are part of the complete files of the investigation and prosecution and are therefore subject to discovery under G.S. 15A-903(a)(1). Counsel should specifically request the information as part of his or her discovery requests and motions.

Electronic surveillance. G.S. 15A-294(d) through (f) describe a defendant's rights to obtain information about electronic surveillance of him or her. For a further discussion of electronic surveillance and related investigative methods, which is regulated by both state and federal law, see ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 187–96 (UNC School of Government, 4th ed. 2011) and Jeff Welty, *Prosecution and Law Enforcement Access to Information about Electronic Communications*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/05 (Oct. 2009), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0905.pdf.

Chemical analysis results. A person charged with an implied consent offense has a right to a copy of the chemical analysis results the State intends to offer into evidence, whether in district or superior court. The statute, G.S. 20-139.1(e), provides that failure to provide a copy to the defendant before trial is grounds for a continuance but not grounds to suppress the chemical analysis results or dismiss the charges.

H. Other Categories

Joinder and severance. *See* G.S. 15A-927(c)(3) (right to codefendant's statements, discussed *supra* in " Statements of codefendants" in § 4.3C, Categories of Information).

Transcript of testimony before drug trafficking grand jury. *See* G.S. 15A-623(b)(2), discussed *infra* in "Discovery of testimony" in § 9.5, Drug Trafficking Grand Jury).

4.5 *Brady* Material

A. Duty to Disclose

Constitutional requirements. The prosecution has a constitutional duty under the Due Process Clause to disclose evidence if it is

- favorable to the defense and
- material to the outcome of either the guilt-innocence or sentencing phase of a trial.

Brady v. Maryland, 373 U.S. 83 (1963). Several U.S. Supreme Court cases have addressed the prosecution's obligation to disclose what is known as *Brady* material, including:

- *Smith v. Cain*, ___ U.S. ___, 132 S. Ct. 627 (2012) (reversing defendant's conviction for *Brady* violation; eyewitness's undisclosed statements to police that he could not identify defendant contradicted his trial testimony identifying defendant as perpetrator);
- *Cone v. Bell*, 556 U.S. 449 (2009) (undisclosed documents strengthened inference that defendant was impaired by drugs around the time his crimes were committed; remanded for further consideration of potential impact on sentencing);
- *Banks v. Dretke*, 540 U.S. 668 (2004) (failure to disclose that one of witnesses was paid police informant and that another witness's trial testimony had been intensively coached by prosecutors and law enforcement officers; evidence met materiality standard and therefore established sufficient prejudice to overcome procedural default in state postconviction proceedings);
- *Strickler v. Greene*, 527 U.S. 263 (1999) (contrast between witness's trial testimony of terrifying circumstances she observed and initial statement to detective describing incident as trivial established impeaching character of initial statement, which was not disclosed; evidence was not sufficiently material to outcome of proceedings and therefore did not establish sufficient prejudice to overcome procedural default);
- *Kyles v. Whitley*, 514 U.S. 419 (1995) (cumulative effect of undisclosed evidence favorable to defendant required reversal of conviction and new trial);
- *United States v. Bagley*, 473 U.S. 667 (1985) (favorable evidence includes impeachment evidence, in this instance, agreements by government to pay informants for information; remanded to determine whether nondisclosure warranted relief);
- *United States v. Agurs*, 427 U.S. 97 (1976) (nondisclosure of victim's criminal record to defense did not meet materiality standard and did not require relief in circumstances of case); and
- *Brady v. Maryland*, 373 U.S. 83 (1963) (violation of due process by failure of prosecutor to disclose statement that codefendant did actual killing; because statement would only have had impact on capital sentencing proceeding and not on guilt-innocence determination, case remanded for resentencing).

North Carolina cases. North Carolina cases granting *Brady* relief include: *State v. Williams*, 362 N.C. 628 (2008) (dismissal upheld where State created and then destroyed a poster that was favorable to the defense, was material, and could have been used to impeach State's witness); *State v. Canady*, 355 N.C. 242 (2002) (defendant had right to know about informants in a timely manner so he could interview individuals and develop leads; new trial ordered); *State v. Absher*, 207 N.C. App. 377 (2010) (unpublished) (dismissing case for destruction of evidence); *State v. Barber*, 147 N.C. App. 69 (2001) (finding *Brady* violation for State's failure to disclose cell phone records showing that

person made several calls to decedent's house the night of his death, which would have bolstered defense theory that person had threatened decedent with arrest shortly before his death and that defendant committed suicide); *see also infra* § 4.6A, Evidence in Possession of Third Parties (discussing cases in which North Carolina courts found that evidence in possession of third parties was favorable and material and nondisclosure violated due process).

North Carolina also recognizes that prosecutors have an ethical obligation to disclose exculpatory evidence to the defense. N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.8(d) (prosecutor has duty to make timely disclosure to defense of all evidence that tends to negate guilt or mitigate offense or sentence); *see also* N.C. CONST. art 1, sec. 19 (Law of Land Clause), sec. 23 (rights of accused).

Sample motions for *Brady*/exculpatory material are available in the non-capital, juvenile, and capital trial motions banks on the IDS website, www.ncids.org.

B. Applicable Proceedings

The due process right to disclosure of favorable, material evidence applies to guilt-innocence determinations and sentencing. *See Brady v. Maryland,* 373 U.S. 83, 87 (1963) (nondisclosure "violates due process where the evidence is material either to guilt or to punishment"); *see also Cone v. Bell*, 556 U.S. 449 (2009) (applying *Brady* to capital sentencing); *Basden v. Lee*, 290 F.3d 602 (4th Cir. 2002) (confirming that *Brady* applies to sentencing phase).

Brady may give defendants the right to exculpatory evidence for suppression hearings. *See United States v. Barton*, 995 F.2d 931 (9th Cir. 1993) (holding that *Brady* applies to suppression hearing involving challenge to truthfulness of allegations in affidavit for search warrant). *But cf. United States v. Stott*, 245 F.3d 890 (7th Cir. 2001) (noting that there is not a consensus among federal circuit courts as to whether *Brady* applies to suppression hearings), *amended on rehearing in part on other grounds*, 15 F. App'x 355 (7th Cir. 2001).

A constitutional violation also may result from nondisclosure when the defendant pleads guilty or pleads not guilty by reason of insanity. *See White v. United States*, 858 F.2d 416 (8th Cir. 1988) (violation may affect whether *Alford* guilty plea was knowing and voluntary); *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988) (to same effect for plea of not guilty by reason of insanity); *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985) (to same effect for guilty plea); *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(b), at 368–70 (discussing split in authority among courts). The U.S. Supreme Court has held, however, that *Brady* does not require disclosure of impeachment information before a defendant enters into a plea arrangement. *See United States v. Ruiz*, 536 U.S. 622 (2002) (stating that impeachment information relates to the fairness of a trial, not to the voluntariness of a plea); *State v. Allen*, ___ N.C. App. ___, 731 S.E.2d 510 (2012) (following *Ruiz*).

The U.S. Supreme Court has said that "*Brady* is the wrong framework" for analyzing whether a defendant in postconviction proceedings has the right to obtain physical evidence from the State for DNA testing. *Dist. Attorney's Office for Third Judicial Dist. v. Osbourne*, 557 U.S. 52, 69 (2009). Rather, in assessing the adequacy of a state's postconviction procedures, including the right to postconviction discovery, the question is whether the procedures are "fundamentally inadequate to vindicate the substantive rights provided." *Id.* (finding that Alaska's procedures were not inadequate). For a discussion of North Carolina's post-conviction discovery procedures, see *supra* § 4.1F, Postconviction Cases, and §4.4E, Biological Evidence.

C. Favorable to Defense

To trigger the prosecution's duty under the Due Process Clause, the evidence first must be favorable to the defense. The right is broad. Favorable evidence includes evidence that tends to negate guilt, mitigate an offense or sentence, *or* impeach the truthfulness of a witness or reliability of evidence. The defendant does not have a constitutional right to discovery of inculpatory evidence. Some generally-recognized categories of favorable evidence are discussed below.

Impeachment evidence. The courts have recognized that favorable evidence includes several different types of impeachment evidence, including:

- False statements of a witness. *See United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992).
- Prior inconsistent statements. *See Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980); *see also United States v. Service Deli Inc.*, 151 F.3d 938 (9th Cir. 1998) (attorney's handwritten notes taken during interview with key witness constituted *Brady* evidence and new trial required where government provided typewritten summary instead of notes).
- Bias of a witness. *See Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989) (State's witness had applied for sentence commutation); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (threat of prosecution if witness did not testify); *see also State v. Prevatte*, 346 N.C. 162 (1997) (reversible error to preclude defendant from cross-examining witness about pending criminal charges, which gave State leverage over witness).
- Witness's capacity to observe, perceive, or recollect. *See Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991) (failure to disclose that State's witnesses had been hypnotized); *see also State v. Williams*, 330 N.C. 711 (1992) (defendant had right to cross-examine witness about drug habit and mental problems to cast doubt on witness's capacity to observe and recollect).
- Psychiatric evaluations of witness. *See State v. Thompson*, 187 N.C. App. 341 (2007) (impeachment information may include prior psychiatric treatment of witness; records that were made part of record on appeal did not contain material, favorable evidence); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980) (evaluation of witness); *see also United States v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992) (evaluation of defendant). *But cf. State v. Lynn*, 157 N.C. App. 217, 219–23 (2003)

(upholding denial of motion to require State to determine identity of any mental health professionals who had treated witness).

Prior convictions and other misconduct. A significant subcategory of impeachment evidence is evidence of a witness's criminal convictions or other misconduct. *See, e.g., State v. Kilpatrick*, 343 N.C. 466, 471–72 (1996) (witnesses did not have significant criminal record so nondisclosure was not material to outcome of case); *State v. Ford*, 297 N.C. 144 (1979) (no showing by defense that witness had any criminal record); *see also Crivens v. Roth*, 172 F.3d 991 (7th Cir. 1999) (failure to provide criminal records of State's witnesses required new trial); *United States v. Stroop*, 121 F.R.D. 269, 274 (E.D.N.C. 1988) ("the law requires that . . . the defendants shall be provided the complete prior criminal record of the witness as well as information regarding all prior material acts of misconduct of the witness"); N.C. R. EVID. 609(d) (allowing impeachment of witness by juvenile adjudication).

If a witness's criminal record would be admissible for substantive as well as impeachment purposes, the defendant may have an even stronger claim to disclosure under *Brady*. For example, in cases in which the defendant intends to claim self-defense, the victim's criminal record (and other misconduct) may be relevant to why the defendant believed it necessary to use force to defend himself or herself. *See Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980) (requiring disclosure of victim's rap sheet, which confirmed defendant's fear of victim and supported self-defense claim).

Evidence discrediting police investigation and credibility, including prior misconduct by officers. Information discrediting "the thoroughness and even the good faith" of an investigation are appropriate subjects of inquiry for the defense. *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (information discrediting caliber of police investigation and methods employed in assembling case).

Personnel files of law enforcement officers may contain evidence that bears on an officer's credibility or discredits the investigation into the alleged offense, including prior misconduct by officers. Several cases have addressed the issue, in which the courts followed the usual procedure of conducting an in camera review to determine whether the files contained material, exculpatory information. *See State v. Raines*, 362 N.C. 1, 9–10 (2007) (reviewing officer's personnel file, which trial court had placed under seal, and finding that it did not contain exculpatory information to which the defendant was entitled); *State v. Cunningham*, 344 N.C. 341, 352–53 (1996) (finding that officer's personnel file was not relevant where defendant shot and killed officer as officer was walking around police car); *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013) (granting habeas relief where defendant was denied access to detective's personnel records, which indicated that detective had lied under oath to secure convictions in other cases and engaged in other misconduct); *United States v. Veras*, 51 F.3d 1365 (7th Cir. 1995) (personnel information bearing on officer's credibility was favorable but was not sufficiently material to require new trial for failure to disclose); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991) (requiring in camera review of personnel files of officers for impeachment evidence); *United States v. Kiszewski*, 877 F.2d 210 (2d Cir.

1989) (to same effect); *see also* Jeff Welty, *Must Officers' Prior Misconduct Be Disclosed in Discovery?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 8, 2012) (recognizing that officer's prior dishonesty or misconduct may be material, impeachment evidence in the pending case), http://nccriminallaw.sog.unc.edu/?p=3575.

To avoid disputes over the proper recipient, counsel should consider directing a motion to produce the files to the applicable law-enforcement agency as well as to the prosecution. *See State v. Golphin*, 352 N.C. 364, 403–05 (2000) (finding no violation of State's statutory discovery obligations because, among other reasons, officer's personnel files were not in possession, custody, or control of prosecutor); *State v. Smith*, 337 N.C. 658, 663–64 (1994) (defense requested documentation of any internal investigation of any law enforcement officer whom the State intended to call to testify at trial; court finds that motion was fishing expedition and that State was not required to conduct independent investigation to determine possible deficiencies in case).

Sample motions for police personnel records are available in the non-capital motions bank on the IDS website, www.ncids.org.

Other favorable evidence. Listed below are several other categories of evidence potentially subject to disclosure.

- Evidence undermining identification of defendant. *See Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (evolution over time of eyewitness's description); *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988) (witnesses' testimony differed from previous accounts); *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (eyewitness stated he could not identify person in initial police report and later identified defendant at trial); *Cannon v. Alabama*, 558 F.2d 1211 (5th Cir. 1977) (witness identified another).
- Evidence tending to show guilt of another. *See Barbee v. Warden,* 331 F.2d 842 (4th Cir. 1964) (forensic reports indicated that defendant was not assailant).
- Physical evidence. *See United States ex rel. Smith v. Fairman,* 769 F.2d 386 (7th Cir. 1985) (evidence that gun used in shooting was inoperable).
- "Negative" exculpatory evidence. *See Jones v. Jago,* 575 F.2d 1164 (6th Cir. 1978) (statement of codefendant did not mention that defendant was present or participated).
- Identity of favorable witnesses. *See United States v. Cadet,* 727 F.2d 1453 (9th Cir. 1984) (witnesses to crime that State does not intend to call); *Freeman v. Georgia,* 599 F.2d 65 (5th Cir. 1979) (whereabouts of witness); *Collins v. State,* 642 S.W.2d 80 (Tex. App. 1982) (failure to disclose correct name of witness who had favorable evidence).

D. Material to Outcome

Standard. In addition to being "favorable" to the defense, evidence must be material to the outcome of the case. Evidence is material, and constitutional error results from its nondisclosure, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Impact of *Kyles v. Whitley*. To reinforce the prosecution's duty to disclose, the U.S. Supreme Court in *Kyles*, 514 U.S. 419 (1995), emphasized four aspects of the materiality standard.

- The defendant does not need to show that more likely than not (i.e., by a preponderance of evidence) he or she would have received a different verdict with the undisclosed evidence, but whether in its absence the defendant received a fair trial—that is, "a trial resulting in a verdict worthy of confidence." A "reasonable probability" of a different verdict is shown when suppression of the evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (citation omitted).
- The materiality standard is not a sufficiency-of-evidence test. The defendant need not prove that, after discounting inculpatory evidence in light of the undisclosed favorable evidence, there would not have been enough left to convict. Instead, the defendant must show only that favorable evidence could reasonably place the whole case in such a different light as to undermine confidence in the verdict. *Id.* at 434–35.
- Once a reviewing court finds constitutional error, there is no harmless error analysis. A new trial is required. *Id.*
- The suppressed favorable evidence must be considered collectively, not item-by-item. The reviewing court must consider the net effect of all undisclosed favorable evidence in deciding whether the point of "reasonable probability" is reached. *Id.* at 436–37.

Application before and after trial. The standard of materiality is essentially a retrospective standard—one that appellate courts apply after conviction in viewing the impact of undisclosed evidence on the outcome of the case. How does the materiality standard apply prospectively, when prosecutors and trial courts determine what must be disclosed? As a practical matter, the materiality standard may be lower before trial because the judge and prosecutor must speculate about how evidence will affect the outcome of the case. *See Kyles*, 514 U.S. 419, 439 ("prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence"); *United States v. Agurs*, 427 U.S. 97, 106 (1976) ("if a substantial basis for claiming materiality exists, it is reasonable to require the prosecution to respond either by furnishing the information or by submitting the problem to the trial judge"); *Lewis v. United States*, 408 A.2d 303 (D.C. 1979) (court recognizes difficulty in applying material-to-outcome standard before outcome is known and therefore holds that on pretrial motion defendant is entitled to disclosure if "substantial basis" for claiming materiality exists).

E. Time of Disclosure

The prosecution must disclose favorable, material evidence in time for the defendant to make effective use of it at trial. *See State v. Canady*, 355 N.C. 242 (2002) (defendant had right to know of informants in timely manner so he could interview individuals and develop leads; new trial ordered); *State v. Taylor*, 344 N.C. 31, 50 (1996) (*Brady* obligations satisfied "so long as disclosure is made in time for the defendants to make effective use of the evidence"); *State v. Spivey*, 102 N.C. App. 640, 646 (1991) (finding

no violation on facts but noting that courts "strongly disapprove of delayed disclosure of *Brady* materials" (citation omitted)); *see also Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001) (disclosure of key witness nine days before opening arguments and 23 days before defense began case afforded defense insufficient opportunity to use information); *United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984) ("longstanding policy of encouraging early production"); *United States v. Campagnuolo*, 592 F.2d 852, 859 (5th Cir. 1979) ("It should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is only given at trial . . . ." (citation omitted)); *Grant v. Alldredge*, 498 F.2d 376 (2d Cir. 1974) (failure to disclose before trial required new trial). Consequently, trial courts often require the prosecution to disclose *Brady* evidence before trial.

Several appellate decisions have found that disclosure at trial satisfied the prosecution's *Brady* obligations. These rulings rest on the materiality requirement, however, under which the court assesses whether there was a reasonable probability of a different result had the defendant learned of the particular information earlier. The rulings do not create a rule that the prosecution may delay disclosure until trial; nor do they necessarily reflect the actual practice of trial courts.

F. Admissibility of Evidence

The prosecution must disclose favorable, material evidence even if it would be inadmissible at trial. *See State v. Potts*, 334 N.C. 575 (1993) (evidence need not be admissible if it would lead to admissible exculpatory evidence), *citing Maynard v. Dixon*, 943 F.2d 407, 418 (4th Cir. 1991) (indicating that evidence must be disclosed if it would assist the defendant in discovering other evidence or preparing for trial); *see also* 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(b), at 356–57 (discussing approaches taken by courts on this issue).

G. Need for Request

At one time, different standards of materiality applied depending on whether the defendant made a general request for *Brady* evidence, a request for specific evidence, or no request at all. In *United States v. Bagley*, 473 U.S. 667 (1985), and then *Kyles v. Whitley*, 514 U.S. 419 (1995), the U.S. Supreme Court confirmed that a single standard of materiality exists and that the prosecution has an obligation to disclose favorable, material evidence whether or not the defendant makes a request.

Defense counsel still should make a request for *Brady* evidence, which should include all generally recognized categories of favorable information and to the extent possible specific evidence pertinent to the case and the basis for believing the evidence exists. (Counsel may need to make follow-up requests and motions as counsel learns more about the case.) Specific requests may be viewed more favorably by the courts. *See Bagley*, 473 U.S. 667, 682–83 ("the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and

trial decisions on the basis of this assumption"; reviewing court may consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case"); *State v. Smith*, 337 N.C. 658, 664 (1994) ("State is not required to conduct an independent investigation to determine possible deficiencies suggested by defendant in State's evidence").

H. Prosecutor's Duty to Investigate

Law-enforcement files. Numerous cases have held that favorable, material evidence within law-enforcement files, or known to law-enforcement officers, is imputed to the prosecution and must be disclosed. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"; good or bad faith of individual prosecutor is irrelevant to obligation to disclose); *State v. Bates*, 348 N.C. 29 (1998) (*Brady* obligates prosecution to obtain information from SBI and various sheriffs' departments involved in investigation); *State v. Smith*, 337 N.C. 658 (1994) (prosecution deemed to have knowledge of information in possession of law enforcement); *see also Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam) (remanding to allow state court to address *Brady* issue where officer suppressed a note that contradicted State's account of events and directly supported defendant's version); *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991) (prosecutors have obligation to make thorough inquiry of all law enforcement agencies that had potential connection with the witnesses); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964) (prosecutor's lack of knowledge did not excuse failure by police to reveal information).

Files of other agencies. The prosecution's obligation to obtain and disclose evidence in the possession of other agencies (such as mental health facilities or social services departments) depends on the extent of the agency's involvement in the investigation and the prosecution's knowledge of and access to the evidence. *See supra* § 4.3B, Agencies Subject to Disclosure Requirements (discussing similar issue under discovery statute); *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980) (prosecution obligated to disclose evidence in medical examiner's possession; although not a law-enforcement agency, medical examiner's office was participating in investigation); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973) (prosecution obligated to obtain personnel file of postal employee who was State's principal witness), *overruled in part on other grounds by United States v. Henry*, 749 F.2d 203 (5th Cir. 1984); *United States v. Hankins*, 872 F. Supp. 170, 173 (D.N.J. 1995) ("when the government is pursuing both a civil and criminal prosecution against a defendant stemming from the same underlying activity, the government must search both the civil and criminal files in search of exculpatory material"; prosecution obligated to search related files in civil forfeiture action).

If the prosecution's access to the evidence is unclear, defense counsel may want to make a motion to require the entity to produce the records or make a motion in the alternative—that is, counsel can move for an order requiring the prosecution to obtain the records and review them for *Brady* material or, in the alternative, for an order directing

the agency to produce the records. *See infra* § 4.6A, Evidence in Possession of Third Parties.

I. Defendant's Knowledge of Evidence

United States v. Agurs, 427 U.S. 97 (1976), held that the prosecution violates its *Brady* obligations by failing to disclose favorable, material evidence known to the prosecution but unknown to the defense. As a result, the courts have held that nondisclosure does not violate *Brady* if the defendant knows of the evidence and has access to it. *See State v. Wise*, 326 N.C. 421 (1990) (defendant knew of examination of rape victim and results; prosecution's failure to provide report therefore not *Brady* violation); *see also Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001) (declining to find that any information known to a defense witness is imputed to the defense for *Brady* purposes); 6 LAFAVE, CRIMINAL PROCEDURE § 24.3(b), at 362 (defendant must know not only of existence of evidence but also of its potentially exculpatory value).

J. In Camera Review and Other Remedies

If defense counsel doubts the adequacy of disclosure by the prosecution, counsel may request that the trial court conduct an in camera review of the evidence in question. *See State v. Hardy*, 293 N.C. 105 (1977) (stating general right to in camera review); *State v. Kelly*, 118 N.C. App. 589 (1995) (new trial for failure of trial court to conduct in camera review); *State v. Jones*, 85 N.C. App. 56 (1987) (new trial). To obtain an in camera review, counsel must make some showing that the evidence may contain favorable, material information. *See State v. Soyars*, 332 N.C. 47 (1992) (court characterized general request as "fishing expedition" and found no error in trial court's denial of in camera review).

If the court refuses to review the documents, or after review refuses to require production of some or all of the documents, counsel should move to have the documents sealed and included in the record in the event of appeal. *See Hardy*, 293 N.C. 105, 128. If the judge refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

In some instances, counsel may want to subpoena witnesses and documents to the motion hearing. Examination of witnesses (such as law-enforcement officers) may reveal discoverable evidence that the State has not yet disclosed. *See infra* § 4.7, Subpoenas.

4.6 Other Constitutional Rights

A. Evidence in Possession of Third Parties

This section focuses on records in a third party's possession concerning a victim or witness. Records concerning the defendant are discussed briefly at the end of this section.

Third-Party Records

Obtaining Records from Third Parties

John Rubin

UNC School of Government

April 2018

4.6 Other Constitutional Rights

A. Evidence in Possession of Third Parties

This section focuses on records in a third party's possession concerning a victim or witness. Records concerning the defendant are discussed briefly at the end of this section.

Right to obtain confidential records. Due process gives the defendant the right to obtain from third parties records containing favorable, material evidence even if the records are confidential under state or federal law. This right is an offshoot of the right to favorable, material evidence in the possession of the prosecution. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (records in possession of child protective agency); *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (North Carolina state courts erred in failing to review records in possession of county medical center, mental health department, and department of social services).

Other grounds, including the right to compulsory process, the court's inherent authority, and state constitutional and statutory requirements, may support disclosure of confidential records in the hands of third parties. *See State v. Crews*, 296 N.C. 607 (1979) (recognizing court's inherent authority to order disclosure); *In re Martin Marietta Corp.*, 856 F.2d 619, 621 (4th Cir. 1988) (federal rule allowing defendant to obtain court order for records in advance of trial "implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor"); G.S. 8-53 (under this statute, which is representative of several on privileged communications, court may compel disclosure of communications between doctor and patient when necessary to proper administration of justice).

Right to obtain DSS records. Several cases have addressed a defendant's right under *Ritchie* to department of social services (DSS) records that contain favorable, material evidence in the criminal case against the defendant. The North Carolina courts have recognized the defendant's right of access. For example, in *State v. McGill*, 141 N.C. App. 98, 101 (2000), the court stated:

> A defendant who is charged with sexual abuse of a minor has a constitutional right to have the records of the child abuse agency that is charged with investigating cases of suspected child abuse, as they pertain to the prosecuting witness, turned over to the trial court for an in camera review to determine whether the records contain information favorable to the accused and material to guilt or punishment.

In numerous instances, the North Carolina courts have found error in the failure to disclose DSS records to the defendant. *See State v. Martinez*, 212 N.C. App. 661 (2011) (DSS files contained exculpatory impeachment information; court reverses conviction for other reasons and directs trial court on remand to make information available to defendant); *State v. Webb*, 197 N.C. App. 619 (2009) (error for trial court not to disclose information in DSS file to defendant; new trial); *State v. Johnson*, 165 N.C. App. 854

(2004) (child victim's DSS file contained information favorable and material to defendant's case, reviewed at length in court's opinion, and should have been disclosed; new trial); *McGill*, 141 N.C. App. 98 (error in failing to require disclosure of evidence bearing on credibility of State's witnesses; new trial). *Cf. State v. Tadeja*, 191 N.C. App. 439 (2008) (following *Ritchie* but finding that disclosure of DSS records was not required because they did not contain favorable evidence; contents of sealed records not described in opinion); *State v. Bailey*, 89 N.C. App. 212 (1988) (same).

Right to school records. *See State v. Taylor*, 178 N.C. App. 395 (2006) (following *Ritchie* but finding that disclosure of accomplice's school records was not required because they did not contain evidence favorable to defendant); *State v. Johnson*, 145 N.C. App. 51 (2001) (in case involving charges of multiple sex offenses against students by defendant, who was a middle school teacher and coach, court finds that trial judge erred in quashing subpoena duces tecum for school board documents without conducting in camera review for exculpatory evidence; some of documents were from witnesses who would testify at trial).

Right to mental health records. *See State v. Chavis*, 141 N.C. App. 553, 561 (2003) (recognizing right to impeachment information that may be in mental health records of witness, but finding that record did not show that State had information in its possession or that information was favorable to defendant); *see also supra* "Impeachment evidence," in § 4.5C, Favorable to Defense (discussing right under *Brady* to mental health records that impeach witness's credibility).

Right to medical records. *See State v. Thompson*, 139 N.C. App. 299 (2000) (finding that trial court did not err in failing to conduct in camera review of victim's medical records where defense counsel conceded that he was not specifically aware of any exculpatory information in the records); *State v. Jarrett*, 137 N.C. App. 256 (2000) (trial court reviewed hospital records and disclosed some and withheld others; appellate court reviewed remaining records, which were sealed for appellate review, and found they did not contain favorable, material evidence).

Directing production of records. Three main avenues exist for compelling production of materials from third parties before trial.

- Counsel may move for a judge to issue an order requiring the third party to produce the records in court so the judge may review them and determine those portions subject to disclosure.
- Rather than asking the judge to issue an order, counsel may issue a subpoena directing the third party to produce the records in court for the judge to review and rule on the propriety of disclosure. Often, a custodian of confidential records will object to or move to quash a subpoena so defense counsel may be better off seeking an order initially from a judge.
- In some instances (discussed below), counsel may move for a judge to issue an order requiring the third party to provide the records directly to counsel.

Defense counsel also may have the right to subpoena documents directly to his or her office. This approach is *not* recommended for records that contain confidential information because it may run afoul of restrictions on the disclosure of such information. *See infra* § 4.7D, Production of Documents in Response to Subpoena Duces Tecum. Counsel should obtain a court order directing production or should subpoena the records to be produced in court, leaving to a judge the determination whether the defendant is entitled to obtain the information.

Specific procedures may need to be followed to obtain disclosure of some records. Consult the statute governing the records at issue. For example, some statutes require that notice be given to the person who is the subject of the records being sought (as well as to the custodian of the records). *See infra* § 4.7F, Specific Types of Confidential Records (listing reference sources on health department, mental health, and school records).

Sample motions for the production of various types of records are available in the non-capital, juvenile, and capital trial motions bank on the IDS website, www.ncids.org.

Who hears a motion for an order for records. In felony cases still pending in district court, a defendant may move for an order from a district court judge. *See State v. Jones*, 133 N.C. App. 448, 463 (1999) (before transfer of felony case to superior court, district court has jurisdiction to rule on preliminary matters, in this instance, production of certain medical records), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000); *see also State v. Rich*, 132 N.C. App. 440, 451 (1999) (once case was in superior court, district court should not have entered order overriding doctor-patient privilege; district court's entry of order compelling disclosure was not prejudicial, however).

A superior court also may have authority in a felony case to hear the motion while the case is pending in district court. *See State v. Jackson*, 77 N.C. App. 491 (1985) (superior court had jurisdiction before indictment to enter order to determine defendant's capacity to stand trial because G.S. 7A-21 gives superior court exclusive, original jurisdiction over criminal actions in which a felony is charged).

In camera review and alternatives. Under *Ritchie*, a defendant may obtain an in camera review of confidential records in the possession of a third party and, to the extent the records contain favorable, material evidence, the judge must order the records disclosed to the defendant.

The in camera procedure has some disadvantages, however, and may not always be required. Principally, the court may not know the facts of the case well enough to recognize evidence important to the defense. Some alternatives are as follows:

- If the evidence is part of the files of a law enforcement agency, investigatory agency, or prosecutor's office, defense counsel may move to compel the prosecution to disclose the evidence, without an in camera review, based on the State's general obligation to disclose the complete files in the case under G.S. 15A-903. Because it may be unclear whether the prosecution has access to the records, counsel may need

to move for an order requiring the prosecution to disclose the records or, in the alternative, requiring the third party to provide the records to the court for an in camera review.

- Some judges may be willing to order disclosure of records in the possession of third parties without conducting an in camera review. Defense counsel can argue that the interest in confidentiality does not warrant restricting the defendant's access to potentially helpful information or imposing the burden on the judge of conducting an in camera review. *See Ritchie*, 480 U.S. 39, 60 (authorizing in camera review if necessary to avoid compromising interest in confidentiality).
- Defense counsel can move to participate in any review of the records under a protective order. Such an order might provide that counsel may not disclose the materials unless permitted by the court. *See* G.S. 15A-908 (authorizing protective orders); *Zaal v. State*, 602 A.2d 1247 (Md. 1992) (court may conduct review of records in presence of counsel or permit review by counsel alone, as officer of court, subject to restrictions protecting confidentiality).

In camera review of DSS records. In 2009, the General Assembly added G.S. 7B-302(a1)(4) to require the court in a criminal or delinquency case to conduct an in camera review before releasing confidential DSS records to a defendant or juvenile respondent. *See also* G.S. 7B-2901(b)(4) (imposing same requirement for court records in abuse, neglect, and dependency cases). While the statutes mandate an in camera procedure for DSS records, it does not affect the applicable standard for release of records under *Ritchie. See also In re J.L.*, 199 N.C. App. 605 (2009) (under G.S. 7B-2901(b), trial court abused discretion by denying juvenile right to review own court records in abuse, neglect, and dependency case).

If a defendant is also a respondent parent in an abuse, neglect, and dependency proceeding, counsel for the client in that proceeding may be able to obtain DSS records in discovery and, with the client's consent, provide them to criminal defense counsel without court involvement.

Required showing. The courts have used various formulations to describe the showing that a defendant must make in support of a motion for confidential records from a third party. They have said that defendants must make some plausible showing that the records might contain favorable, material evidence; have a substantial basis for believing that the records contain such evidence; or show that a possibility exists that the records contain such evidence. All of these formulations emphasize the threshold nature of the showing required of the defendant. *See Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (defendant made "plausible showing"); *State v. Thompson*, 139 N.C. App. 299, 307 (2000) ("although asking defendant to affirmatively establish that a piece of evidence not in his possession is material might be a circular impossibility, we at least require him to have a substantial basis for believing such evidence is material"); *see also United States v. King*, 628 F.3d 693 (4th Cir. 2011) (remanding for in camera review because defendant gave required plausible showing); *United States v. Trevino*, 89 F.3d 187 (4th Cir. 1996) (defendant must "plainly articulate" how the information in the presentence investigation report is material and favorable).

If the court refuses to require the third party to produce the documents, or after reviewing the documents refuses to require disclosure of some or all of them, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *State v. McGill*, 141 N.C. App. 98, 101 (2000); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial court's denial of motion to require production of witness's medical records because defendant failed to make documents part of record on appeal). If the court refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

Ex parte application. In some circumstances, counsel seeking records in the possession of third parties may want to apply to the court ex parte. Although the North Carolina courts have not specifically addressed this procedure in the context of third-party records, they have allowed defendants to apply ex parte for funds for an expert (*see infra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases). Some of the same reasons and authority for allowing ex parte applications for experts support ex parte motions for records in the possession of third parties (that is, need to develop trial strategy, protections for confidential attorney-client communications, etc.). In view of these considerations, some courts have held that a defendant may move ex parte for an order requiring pretrial production of documents from a third party. *See United States v. Tomison*, 969 F. Supp. 587 (E.D. Cal. 1997) (court reviews Federal Rule of Criminal Procedure 17(c), which authorizes court to issue subpoena duces tecum for pretrial production of documents, and rules that defendant may move ex parte for issuance of subpoena duces tecum to third party); *United States v. Daniels*, 95 F. Supp. 2d 1160 (D. Kan. 2000) (following *Tomison*); *United States v. Beckford*, 964 F. Supp. 1010 (E.D. Va. 1997) (allowing ex parte application for subpoena for third-party records but noting conflicting authority). These authorities should give counsel a sufficient basis to request to be heard ex parte. *See* North Carolina State Bar, 2001 Formal Ethics Opinion 15 (2002) (ex parte communications not permissible unless authorized by statute or case law), *available at* www.ncbar.gov/ethics/.

A separate question is whether the prosecution has standing to object to a motion to compel production of records from a third party or to obtain copies of records ordered to be disclosed to the defendant. *See Tomison*, 969 F. Supp. 587 (prosecution lacked standing to move to quash subpoena to third party because prosecution had no claim of privilege, proprietary right, or other interest in subpoenaed documents; prosecution also did not have right to receive copies of the documents unless defendant intended to introduce them at trial). *But cf. State v. Clark*, 128 N.C. App. 87 (1997) (court had discretion to require Department of Correction to provide to prosecution records that it had provided to defendant). For a discussion of these issues in connection with subpoenas, see *infra* "Notice of receipt and opportunity to inspect; potential applicability to criminal cases" in § 4.7D, Production of Documents in Response to Subpoena Duces Tecum; and § 4.7E, Objections to and Motions to Modify or Quash Subpoena Duces Tecum.

Records concerning defendant. When records in a third party's possession concern the defendant (for example, the defendant's medical records), defense counsel often can obtain them without court involvement by submitting a release from the defendant to the custodian of records. If you are seeking your client's medical records and know the hospital or other facility that has the records, obtain the form release used by the facility to avoid potential objections by the facility that the form does not comply with HIPAA or other laws. Other entities also may have their own release forms, which will facilitate obtaining client records. Notwithstanding the submission of a release, some agencies may be unwilling to release the records without a court order or payment of copying costs. In these instances, applying to the court ex parte for an order requiring production of the records would seem particularly appropriate.

Sample motions for defendants' records are available in the non-capital motions bank on the IDS website, www.ncids.org.

4.7 Subpoenas

Although not a formal discovery device, subpoenas (particularly subpoenas duces tecum) may be a useful tool for obtaining information material to the case. *See State v. Burr*, 341 N.C. 263, 302 (1995) (subpoena duces tecum is permissible method for obtaining records not in possession, custody, or control of State); *State v. Newell*, 82 N.C. App. 707, 708 (1986) (although discovery is not proper purpose for subpoena duces tecum, subpoena duces tecum is proper process for obtaining documents material to the inquiry in the case).

The mechanics of subpoenas are discussed in detail in Chapter 29 (Witnesses) of Volume 2 of the North Carolina Defender Manual (UNC School of Government, 2d ed. 2012). The discussion below briefly reviews the pretrial use of subpoenas, particularly for documents.

A. Constitutional Right to Subpoena Witnesses and Documents

A defendant has a constitutional right to subpoena witnesses and documents, based primarily on the Sixth Amendment right to compulsory process. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) (right to compel attendance of witnesses is "in plain terms the right to present a defense"); *State v. Rankin*, 312 N.C. 592 (1985) (recognizing Sixth Amendment basis of subpoena power). Due process also gives a defendant the right to obtain material, favorable evidence in the possession of third parties (*see supra* § 4.6A, Evidence in Possession of Third Parties); and article 1, section 23 of the North Carolina Constitution guarantees a criminal defendant the right to confront one's accusers and witnesses with other testimony.

The right to compulsory process is not absolute. Although the defendant does not have to make any showing to obtain a subpoena, the court on proper objection or motion may deny, limit, or quash a subpoena. *See infra* § 4.7E, Objections to and Motions to Modify or Quash Subpoena Duces Tecum (discussing permissible scope of subpoena duces tecum); *see generally* 2 NORTH CAROLINA DEFENDER MANUAL § 29.1A (Constitutional Basis of Right to Compulsory Process).

B. Reach of Subpoena

A subpoena may be directed to any person within North Carolina who is capable of being a witness, including law-enforcement officers, custodians of records of public agencies, and private businesses and individuals.

To obtain witnesses or documents located outside of North Carolina, defense counsel must use the Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings. *See* G.S. 15A-811 through G.S. 15A-816 The uniform act has been interpreted as authorizing subpoenas for the production of documents. *See* Jay M. Zitter, Annotation, *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R.4th

836 (1981) (uniform act has been interpreted as allowing subpoena to out-of-state witness to produce documents). Counsel may not use an ordinary subpoena to compel an out-of-state witness to produce records. *See* North Carolina State Bar, 2010 Formal Ethics Opinion 2 (2010), *available at* www.ncbar.gov/ethics/. For a discussion of the mechanics of the Uniform Act, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.1E (Securing the Attendance of Nonresident Witnesses).

C. Issuance and Service of Subpoena

Rule 45 of the North Carolina Rules of Civil Procedure governs the issuance and service of subpoenas. *See* G.S. 15A-801 (subpoenas to testify in criminal cases governed by Rule 45, subject to limited exceptions); G.S. 15A-802 (to same effect for subpoenas for documents); G.S. 8-59 (so stating for subpoenas to testify); G.S. 8-61 (so stating for subpoenas for documents). The court need not be involved in the issuance of a subpoena to testify or to produce documents; defense counsel may issue either. *See* AOC Form AOC-G-100, "Subpoena" (May 2013), *available at* www.nccourts.org/Forms/Documents/556.pdf. The AOC form subpoena may be used to subpoena a witness to testify, produce documents, or do both.

The sheriff, sheriff's deputy, coroner, or any person over age 18 who is not a party, may serve a subpoena. Service may be by personal delivery to the person named in the subpoena, by registered or certified mail, return receipt requested, or by telephone communication by law enforcement for subpoenas to testify (but not for subpoenas for documents). *See* N.C. R. CIV. P. 45(b)(1); G.S. 8-59.

Practice note: Because the court may not be able to issue a show cause order re contempt (with an order for arrest) to enforce a subpoena served by telephone communication (*see* G.S. 8-59), and because disputes may arise about whether a person named in a subpoena signed for and received a subpoena served by mail, counsel should consider serving all subpoenas by personal delivery on the person whose attendance is sought.

The defendant need not tender any witness fee at the time of service. *See* G.S. 6-51 (witness not entitled to receive fees in advance). Rather, the witness must apply to the clerk after attendance for payment of the daily witness fee and reimbursement of allowable travel expenses. G.S. 6-53; G.S. 7A-316. Generally, the court may assess witness fees against the defendant only on completion of the case. *See* G.S. 7A-304 (costs may be assessed against defendant on conviction or entry of plea of guilty or no contest).

A copy of the subpoena need not be served on other parties in a criminal case. *See* G.S. 15A-801 (exempting criminal cases from service requirement for witness subpoenas in N.C. R. Civ. P. 45(b)(2)), G.S. 15A-802 (to same effect for document subpoenas).

For a further discussion of issuance and service of subpoenas to testify, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.1B (Securing the Attendance of In-State Witnesses). For a further discussion of issuance and service of subpoenas for documents, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.2A (Statutory Authorization) and § 29.2B

(Statutory Requirements).

For reference sources on obtaining particular types of records, see *infra* § 4.7F, Specific Types of Confidential Records (health department, mental health, and school records).

D. Production of Documents in Response to Subpoena Duces Tecum

The person named in a subpoena duces tecum ordinarily must appear on the date and at the place designated in the subpoena and must produce the requested documents.

Place of production. Typically, a subpoena duces tecum requires production at some sort of proceeding in the case to which the recipient is subpoenaed, such as a pretrial hearing, deposition (rare in criminal cases but common in civil cases), or trial. In 2003, the General Assembly amended Rule 45 of the N.C. Rules of Civil Procedure to modify this requirement for subpoenas for documents (but not subpoenas to testify). Thus, before the amendment, a party in a civil case would have to schedule a deposition, to which the party would subpoena the records custodian, even if the party merely wanted to inspect records in the custodian's possession and did not want to take any testimony. Under the revised rule, a party may use a subpoena in a pending case to direct the recipient to produce documents at a designated time and place, such as at the issuing party's office, even though no deposition or other proceeding is scheduled for that time and place. Because G.S. 15A-802 makes Rule 45 applicable to criminal cases, this use of a subpoena appears to be permissible in a criminal case.

The change in Rule 45 authorizing an "office" subpoena may not be readily apparent. It is reflected in the following italicized portion of revised Rule 45(a)(2): "A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, *or any subpoena may be issued separately*." *See* North Carolina State Bar, 2008 Formal Ethics Opinion 4 (2008) (so interpreting quoted language), *available at* www.ncbar.gov/ethics/; Bill Analysis, H.B. 785: Rules of Civil Proc/Rewrite Rule 45 (S.L. 2003-276), from Trina Griffin, Research. Div., N.C. General Assembly (June 27, 2003) (same); Memorandum to Superior Court Judges et al. re: Subpoena Form Revised (AOC-G-100) & S.L. 2003-276 (HB 785), from Pamela Weaver Best, Assoc. Counsel, Div. of Legal & Legislative Servs., N.C. Admin. Office of the Courts (Sept. 29, 2003) (same). The latter two memos are available from the authors of this manual. The revised language is comparable to Rule 45(a)(1) of the Federal Rules of Civil Procedure, which has authorized a similar procedure in federal cases. *See* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.02[3], at 45-21 (3d ed. 2011).

Practice note: When seeking sensitive records, defense counsel may not want to use an "office" subpoena or a subpoena at all and instead may want to seek an order of the court compelling production. Because a subpoena is generally insufficient to authorize a custodian of confidential records to disclose records, the custodian will often contest the subpoena, necessitating a court order in any event. Further, if a records custodian who is subpoenaed discloses confidential information to defense counsel without proper authorization (typically, consent by the subject of the records or a court order, not just a subpoena),

defense counsel may be subject to sanctions. *See* North Carolina State Bar Ethics Opinion RPC 252 (1997) (attorneys should refrain from reviewing confidential materials inadvertently sent to them by opposing party), *available at* www.ncbar.gov/ethics/; *Susan S. v. Israels*, 67 Cal. Rptr. 2d 42 (Cal. Ct. App. 1997) (attorney read and disseminated patient's confidential mental health records that treatment facility mistakenly sent directly to him in response to subpoena; court allowed patient's suit against attorney for violation of state constitutional right of privacy); *see also Bass v. Sides*, 120 N.C. App. 485 (1995) (before obtaining judge's permission, plaintiff's attorney reviewed confidential medical records of defendant that records custodian had sealed and provided to clerk of court in response to subpoena; judge ordered plaintiff's attorney to pay defendant's attorney fees, totaling approximately $7,000, and prohibited plaintiff from using the records at trial).

Notice of receipt and opportunity to inspect; potential applicability to criminal cases. Rule 45(d1) of the N.C. Rules of Civil Procedure states that within five business days of receipt of materials produced in compliance with a subpoena duces tecum, the party who was responsible for issuing the subpoena must serve all other parties with notice of receipt. On request, the party receiving the material must provide the other parties a reasonable opportunity to copy and inspect such material at the inspecting party's expense.

The applicability of this requirement to criminal cases is not entirely clear, particularly when the defendant is the subpoenaing party. In 2007, the General Assembly revised Rule 45 to add the notice and inspection requirements in subsection (d1) of Rule 45. This change appears to have been prompted by concerns from civil practitioners after the 2003 changes to Rule 45. The earlier changes, discussed above under "Place of production" in this subsection D., authorized a party to issue a subpoena for the production of documents without also scheduling a deposition, at which the opposing party would be present and would have an opportunity to review and obtain copies of the subpoenaed records.

Criminal cases are not specifically exempted from the notice and inspection requirements enacted in 2007, although somewhat paradoxically the subpoenaing party in a criminal case is not required to give notice of the service of a subpoena (discussed above under subsection C., Issuance and Service of Subpoena). The 2007 subpoena provisions also are in tension with G.S. 15A-905 and G.S. 15A-906, which essentially provide that a criminal defendant is only obligated to disclose to the State evidence that he or she intends to use at trial. (If the State is the subpoenaing party, the records become part of the State's file and are subject to the State's general discovery obligations under G.S. 15A-903.)

If the notice and inspection requirements in Rule 45(d1) apply in criminal cases, a defendant may have grounds to seek a protective order under G.S. 15A-908 to withhold records from disclosure. Alternatively, instead of using a subpoena, a defendant may move for a court order for production of records, which is not governed by Rule 45. *See supra* "Ex parte application" in § 4.6A, Evidence in Possession of Third Parties.

Public and hospital medical records. If a custodian of public records or hospital medical records (as defined in G.S. 8-44.1) has been subpoenaed to appear for the sole purpose of producing records in his or her custody and not also to testify, the custodian may elect to

tender the records to the court in which the action is pending instead of making a personal appearance. N.C. R. CIV. P. 45(c)(2). For a discussion of these procedures, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.2C (Production of Public Records and Hospital Medical Records).

E. Objections to and Motions to Modify or Quash Subpoena Duces Tecum

N.C. Rule of Civil Procedure 45(c)(3) and (c)(5) set forth the procedures for a person to serve a written objection on the subpoenaing party or file a motion to modify or quash a subpoena. The mechanics of these procedures are discussed in detail in 2 NORTH CAROLINA DEFENDER MANUAL § 29.2D (Objections to a Subpoena Duces Tecum) and § 29.2E (Motions to Modify or Quash a Subpoena Duces Tecum).

If an objection rather than a motion is made, the party serving the subpoena is not entitled to inspect or copy the designated materials unless the court enters an order permitting him or her to do so. N.C. R. CIV. P. 45(c)(4). In some instances, the subpoenaed party will appear in court at the time designated in the subpoena and make an objection to disclosure. If this procedure is followed, the defendant will have an opportunity to obtain a ruling from the court then and there. In other instances, the subpoenaed party will object before the scheduled proceeding. The subpoenaing party then will have to file a motion to compel production, with notice to the subpoenaed person, in the court of the county where the production is to occur. *Id.*

In reviewing an objection or motion to quash or modify, "the trial judge should consider the relevancy and materiality of the items called for [by the subpoena], the right of the subpoenaed person to withhold production on other grounds, such as privilege, and also the policy against 'fishing expeditions.'" *State v. Newell*, 82 N.C. App. 707, 709 (1986). The subpoena should "specify with as much precision as fair and feasible the particular items desired." *Id.*, 82 N.C. App. at 708. Otherwise, the court may view the subpoena as a "fishing or ransacking expedition." *Vaughan v. Broadfoot*, 267 N.C. 691, 699 (1966) (quashing subpoena for production of mass of records on first day of trial); *see also Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (finding that North Carolina trial judge violated defendant's due process rights by quashing subpoena on overbreadth grounds without requiring that records be produced for review by court after defendant made a plausible showing that records contained information material and favorable to his defense). On finding that a subpoena is overbroad, a trial court may modify rather than quash it. *State v. Richardson*, 59 N.C. App. 558 (1982).

In some North Carolina cases, trial courts have granted motions by the prosecution to quash a subpoena duces tecum directed to a third party, but the decisions do not explicitly address whether the prosecution had standing to do so. *See, e.g.*, *State v. Love*, 100 N.C. App. 226 (1990), *conviction vacated on habeas sub. nom.*, *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995). Because prosecutors do not represent third parties and do not have a legally recognized interest in their records, they may not have standing to object or move to quash. *See United States v. Tomison*, 969 F. Supp. 587 (E.D. Cal. 1997) (prosecution lacked standing to move to quash subpoena to third party because prosecution had no

claim of privilege, proprietary right, or other interest in subpoenaed documents); 2 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 45-4, at 45-14 (3d ed. 2007) ("A party does not have standing to challenge a subpoena duces tecum issued to a nonparty witness unless he can claim some privilege in the documents sought."). Some cases have taken a more expansive view of prosecutor standing because of the prosecutor's overall interest in the handling of the prosecution. *See Commonwealth v. Lam*, 827 N.E.2d 209, 228–29 & n.8 (Mass. 2005) (finding that prosecutor had standing to object to issuance of summons [subpoena] because prosecutor may be able to assist judge in determining whether subpoena is improper fishing expedition and in preventing harassment of witnesses by burdensome, frivolous, or improper subpoenas; court notes without deciding that there may be occasions "in which a defendant seeks leave from the court to move ex parte for the issuance of a summons [subpoena]").

Practice note: If the judge quashes a subpoena requiring the production of documents, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial judge's denial of motion to require production of witness's medical records because defendant failed to make documents part of record). If the judge refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

Rather than quash or modify a subpoena, a judge may order the subpoenaed person to be "reasonably compensated" for the cost, if "significant," of producing the designated material. N.C. R. CIV. P. 45(c)(6). Typically, judges do not order reimbursement of document production expenses because compliance with a subpoena is an ordinary, not significant, expense of responding to court proceedings. If the court orders payment, defense counsel for an indigent defendant may request the court to authorize payment from state funds as a necessary expense of representation. *See* G.S. 7A-450(b); G.S. 7A-454.

F. Specific Types of Confidential Records

Specific procedures may need to be followed to obtain disclosure of some records. Consult the statute governing the records at issue. For example, some statutes require that notice be given to the person who is the subject of the records being sought (as well as to the custodian of records). For a discussion of subpoenas for particular types of records from the perspective of the recipient, see the following:

- John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (Sept. 2005), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/hlb82.pdf.
- John Rubin, *Subpoenas and School Records: A School Employee's Guide*, SCHOOL LAW BULLETIN No. 30/2 (Spring 1999), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/slb/sp990111.pdf.
- John Rubin & Mark Botts, *Responding to Subpoenas: A Guide for Mental Health Facilities*, POPULAR GOVERNMENT No. 64/4 (Summer 1999), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/pg/botts.pdf.

How O.J. Got the Fuhrman Tapes (and You Can Get Out-of-State Materials)

Author : John Rubin

Categories : Evidence, Procedure, Uncategorized

Tagged as : discovery, interstate, subpoenauniform

Date : April 4, 2017

Almost everyone knows about the trial of O.J. Simpson for the murders of Nicole Brown Simpson and Ronald Goldman. Many people also know about a key piece of evidence introduced by the defense—taped interviews in which one of the investigating officers, Los Angeles Police Department detective Mark Fuhrman, used racial slurs. Less well known is the legal mechanism that the defense team used to obtain the tapes, which were in the possession of a North Carolina writer who refused to turn them over voluntarily. How did O.J.'s lawyers compel a resident of North Carolina to produce the tapes in faraway Los Angeles, California? This post reviews the procedure used in the O.J. case and other ways to obtain out-of-state materials in a criminal case.

What Doesn't Work

Let's look first at what doesn't work. An ordinary North Carolina subpoena does not obligate a person in another state to produce records in a North Carolina case. The United States Supreme Court held long ago, in the 1902 case of *Minder v. Georgia,* 183 U.S. 559, 562 (1902), that a state court does not have the power "to compel the attendance of witnesses who are beyond the limits of the state." So, in the O.J. case, the defense team could not have used and did not use an ordinary California subpoena to compel production of the Fuhrman tapes.

The North Carolina State Bar has stated further that it is unethical for a North Carolina attorney to mislead an out-of-state entity that an ordinary North Carolina subpoena obligates the recipient to comply. *See* Obtaining Medical Records from Out of State Health Care Providers, 2010 Formal Ethics Opinion 2 (2010). The opinion addresses subpoenas for medical records to out-of-state health care providers, but the reasoning would seem to apply to subpoenas to other out-of-state entities. (A later State Bar opinion, discussed below, suggests an alternative approach.)

What Does Work, with Court Orders

Because of the limited range of state court subpoenas, the Uniform Law Commission adopted the Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings way back in 1936. Every state has enacted this interstate subpoena procedure, which is codified in North Carolina in G.S. 15A-811 through G.S. 15A-816. An attorney first must apply to a North Carolina court for an order for production of the desired records. The attorney then must take the order to the state trial court where the record holder is located and move for an order compelling the person or entity to produce the records. The attorney must show that the records are material. Because the procedure requires a court appearance in another state, the attorney must engage local counsel to move for the order in the other state or obtain permission to appear pro hac vice in the other state's courts. For a further discussion of the requirements, see Julie Lewis & John Rubin, 2 North Carolina Defender Manual § 29.1E (2d ed. 2012).

The above procedure was the one used in the O.J. case, resulting in a reported opinion bearing the writer's name, *In re McKinny,* 462 S.E.2d 530 (N.C. App. 1995). When O.J.'s attorneys came to North Carolina with a California court order in hand and moved for a North Carolina order, the trial judge initially denied the request. The North Carolina Court of Appeals reversed, compelling the North Carolina writer to appear at O.J.'s trial in Los Angeles and produce and testify about the tapes.

The uniform act does not explicitly refer to a subpoena for documents. It refers to subpoenas, orders, and other notices requiring the appearance of a witness. Generally states have held, including North Carolina in the O.J. case, that the act provides a mechanism to obtain documents. *See* Jay M. Zitter, Annotation, *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R.4th 836.

What May Work, without Court Orders

The uniform interstate subpoena act is obviously cumbersome, requiring two court orders and an appearance in another state. Three simpler approaches may be possible.

An ordinary North Carolina subpoena if voluntary. Some entities may be willing to produce materials located outside North Carolina as long as they receive a subpoena, even an ordinary North Carolina subpoena. The North Carolina State Bar recognized this possibility in a later opinion, finding that an attorney may issue a North Carolina subpoena for out-of-state records as long as the attorney advises the out-of-state entity that production is voluntary. *See* Use of North Carolina Subpoena to Obtain Documents from Foreign Entity or Individual, 2014 Formal Ethics Opinion 7 (2014). An attorney should contact the entity ahead of time to determine whether it will produce the records voluntarily in response to a North Carolina subpoena.

An ordinary North Carolina subpoena if served on a registered agent of a foreign corporation. The issue posed in the above ethics opinion was the proper procedure to follow when an out-of-state corporation, commonly called a foreign corporation, does not have a registered agent for service of process in North Carolina. What if a foreign corporation has a registered agent here? Can an attorney compel a foreign corporation to produce records by serving the corporation's registered agent? The State Bar opinion doesn't specifically address the issue. Nor do there appear to be any North Carolina appellate decisions.

Some decisions from other states take the position that service of a subpoena on a registered agent is not sufficient to obligate a foreign corporation to comply. According to these decisions, service of process on a registered agent may obligate a foreign corporation to respond to a lawsuit against the corporation. But, the decisions distinguish being sued as a party from being subpoenaed to produce records in a proceeding in which the corporation is not a party. The decisions hold that doing business in a state and having a registered agent there does not necessarily obligate a corporation to produce records located outside the state. *See, e.g., Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440 (Va. 2015); *Ulloa v. CMI, Inc.*, 133 So. 3d 914 (Fla. 2013).

These decisions seem out of step with the current era of electronic storage and transmission of records. It is not clear where records are located when they are electronically accessible from just about anywhere. Further, the burden of electronically generating and producing records is considerably less than copying, packing up, and shipping off hard copies. *See Yelp,* 770 S.E.2d at 446 (dissenting and concurring opinion) (arguing that Virginia legislature provided for exercise of subpoena power over foreign corporation that had registered agent in Virginia but concluding that evidence failed to show that corporation had sufficient contacts with Virginia for court to exercise jurisdiction); *CMI, Inc. v. Landrum*, 64 So. 3d 693, 695 (Fla. Dist. Ct. App. 2010) (holding that service of subpoena duces tecum on registered agent of "foreign corporation authorized to do, registered to do, and doing business in Florida" was sufficient), *disapproved by Ulloa v. CMI*, above.

In most cases, attorneys are unlikely to encounter such fierce resistance over service on a registered agent. In the above cases, the corporations were keen to protect the information being sought: in *Yelp,* the identity of anonymous authors of negative reviews of the civil plaintiff's business; in the *CMI* cases, the computer source codes for the intoxilyzer machine manufactured by CMI and used against the criminal defendant. Larger, national companies often have subpoena compliance departments, which handle subpoenas as routine matters and can advise attorneys where to send a subpoena, the cost of generating the records, and other logistics. Contact information for many companies is available here from the Forensic Resource Counsel of the Office of Indigent Defense Services.

A subpoena under the Uniform Interstate Deposition and Discovery Act (UIDDA). In 2007, the Uniform Law Commission adopted UIDDA, a simpler interstate procedure to obtain evidence. Most although not all states have adopted some version of UIDDA, codified in North Carolina in G.S. 1F-1 through 1F-7. Generally, an attorney issues a North Carolina subpoena identifying the records being sought and submits it to the appropriate clerk of court in the state where the records are located, called the foreign state, along with a completed but unexecuted subpoena from the foreign state. The clerk in the foreign state issues the foreign state subpoena, which the attorney serves on the recipient in accordance with the rules of that state. Under UIDDA, no appearance is required in the foreign state, by local counsel or by the North Carolina attorney appearing pro hac vice, and no hearing or action is required by a judge. The specifics may vary in different states, so attorneys should check the particular state's law before proceeding.

Although the title of UIDDA refers to depositions, which is typically a civil discovery device, the provisions are not specifically limited to civil cases. North Carolina appears to allow parties in a criminal case to utilize UIDDA. In addition to enacting the provisions of the uniform act, North Carolina added subsection (f) to Rule 45 of the North Carolina Rules of Civil Procedure. *See* S.L. 2011-247. That subsection authorizes a party in a North Carolina case to obtain discovery from a person in another state, including production of documents, in accordance with the processes and procedures in the other state. With the exception of provisions not applicable here, G.S. 15A-802 makes Rule 45 applicable to criminal cases. Again, attorneys should review the UIDDA procedures of the other state, as some may exclude criminal cases. *Compare* N.D. R. Ct. 5.1(d) ("Depending on the type of case involved, the discovery rules contained in the North Dakota Rules of Civil Procedure, Criminal Procedure or Juvenile Procedure apply to subpoenas issued under Rule 5.1(b) [the rule implementing UIDDA].") *with* Ga. Code Ann. § 24-13-112(e) ("This Code section [implementing UIDDA] shall not apply to criminal proceedings.").

Unlike a court order issued under the earlier interstate act, a UIDDA subpoena does not compel the recipient to appear in North Carolina. Discovery takes place in the foreign state, not the trial state, and is governed by the laws of the foreign state. Whether the recipient of a UIDDA subpoena is obligated to take the less burdensome step of transmitting records to the subpoenaing party in North Carolina likewise appears to be governed by the laws of the foreign state. *Cf. Estate of Klieman v. Palestinian Authority*, 293 F.R.D. 235, 240–41 (D. D.C. 2013) (holding that although a subpoena under Rule 45 of the Federal Rules of Civil Procedure could not compel a foreign entity to appear for a deposition in a federal case, it could compel the entity to produce records). Attorneys should check with the out-of-state entity to determine how it wants to proceed. Sometimes an out-of-state entity may be willing to produce documents in response to an ordinary North Carolina subpoena; other times the entity may want the protection of a UIDDA subpoena from the court of the state in which the entity is located.

For a further discussion of UIDDA, where I first learned about this relatively new procedure, see Ann Tolliver, A Guide to Using the UIDDA, Forensic Science in N.C. Blog (Feb. 17, 2017).

Cellular Telephone and Social Media Subpoena Guide – updated May 2015

The chart below contains the contact information for the Subpoena Compliance Centers for a few major cell phone companies and social media networks. These existing contacts may be out of date; if so, more updated contact information for subpoena compliance centers for law enforcement can be found here. Additionally included are the NC registered agents for the out of state entities. If this information is out of date, the registered agent information can be found on the North Carolina Secretary of State's website.

To comply with the North Carolina rules of ethics, an attorney should serve the subpoena on the NC registered agent or local office capable of accepting service. Then the attorney may send a courtesy copy of the subpoena to the out-of-state Subpoena Compliance Center, explaining to the local office that they are being served to comply with the Rules of Professional Conduct and a courtesy copy is being sent to the out-of-state Subpoena Compliance Center. The courtesy copy should clearly state that it is a courtesy copy (no legal effect).

NC State Bar 2014 Formal Ethics Opinion 7 (October 24, 2014) requires that a lawyer inform an out of state entity without a registered agent in North Carolina that North Carolina subpoenas are unenforceable out of state. A written letter/statement explaining that the subpoena is not enforceable, that the recipient is not required comply with the subpoena, and that the subpoena is being supplied solely for the entity's records should accompany the subpoena. The out of state entity may decide whether to voluntarily comply with the subpoena.

Provider	NC Registered Agent	Address of Subpoena Compliance Center	Phone	Fax	Notes

AT&T
Landline service
a.k.a. BellSouth
	AT&T
	c/o CT Corporation System
	150 Fayetteville St., Box 1011
	Raleigh, NC 27601-2957
	Phone: (919) 821-7139
		AT&T Southeast
		Custodian of records
		308 S. Akard, 14th Floor – L
		Dallas, TX 75202
			(800) 291-4952	SE Landline
				(248) 395-4398
				
				Online Tool
				(248) 552-3233
					- www.att.com/subpoena
					- Can fax subpoena to them
					- WARNING
					  - Typically takes 3 months to get their records
					
					Information Required for Subpoena
					- Full description of information requested
					  - Subscriber information
					  - Usage records for outgoing calls
					  - Timeframes
					- Complete list of target telephone numbers
					  - Include area code
					- Electronic method for return of records produced (i.e., email address / fax number)
					
					Procedure for Service of Process
					- Can use "online tool" for certain requests
					  - Is used to expedite subpoena requests
					  - Go to www.att.com/subpoena

					- Address subpoena to proper AT&T legal entity
					  - Wireless → AT&T Mobility, LLC
					- Use corresponding AT&T legal entity fax
					  - Or "online tool" fax if applicable

AT&T wireless (includes Cingular, Cricket, GoPhone)	AT&T c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	AT&T Wireless Subpoena Compliance Center 11760 US Highway 1, Ste. 600 North Palm Beach FL 22408	(800) 291-4952	National Compliance (888) 938-4715 Wireless (877) 971-6093	Provide email for response AT&T will charge $40 per hour to process subpoena AT&T will accept email service at attmobility.ncc@att.com Additionally see AT&T Line notes regarding AT&T's "online tool."
Century Link	CenturyLink Communications LLC c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	Century Link Custodian of Records 5454 W. 110th Street Overland Park, KS 6621	(877) 451-1980	(844) 254-5800	- Offers cell service through Verizon - May be necessary to send subpoena to both CenturyLink and to Verizon Information Required for Subpoena - Phone number - Timeframe
Facebook (also accepts service for Instagram)	Facebook, Inc. c/o Corporation Service Company 327 Hillsborough Street Raleigh, NC 27603 Phone: (866) 403-5272	Facebook, Inc. Attn: Facebook LE Response Team 1601 Willow Road Menlo Park, CA 94025	(650) 543-4800	(650) 644-0239	Procedure - Contact via email (legal@facebook.com) or phone to inform them a request is coming. - Fax subpoena then follow-up with email copy and a paper copy - Facebook requires that its legal name of Facebook Inc. not Facebook.com be used Required Information for Subpoena - Facebook user ID or Group ID - If ID is unknown, give account email address Other Helpful Information for Subpoena - Full name - School or Networks - Date of birth - Known email addresses - AIM ID - Known phone numbers - Full address

					- URL to Facebook profile - Other known website - Known IP addresses <u>Information Available from Facebook</u> - User Neoprint - User Photoprint - User Contact Info - Group Contact Info - IP Logs
Google (including Gmail)	Google, Inc. c/o Corporation Service Company 327 Hillsborough Street Raleigh, NC 27603 Phone: (866) 403-5272	Google Inc. c/o Custodian of Records 1600 Amphitheatre Parkway Mountain View, CA 94043	(650) 253-3425	(650) 253-0001	Google will notify users before disclosure of any information. <u>Required Information for Subpoena</u> - Product/service requested - identify email address or unique identifier
Hotmail	Microsoft Corporation c/o Corporation Service Company 327 Hillsborough Street Raleigh, NC 27603 Phone: (866) 403-5272	Microsoft Corporation Online Services 1065 La Avenida, SVC4/1120 Mountain View, CA 94043	(425) 722-1299	(425) 708-0096	<u>Required Information</u> - Account requested
MagicJack (voIP phone service)	YMax Communication Corp. c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	MagicJack YMax Communications ATTN: Lorraine Fancher PO Box 6785 West Palm Beach, FL 33405	(561) 586-3380	(888) 762-2120	- http://www.magicjack.com - Lorrain.Fancher@ymaxcorp.com <u>Information Required for Subpoena</u> - Phone number - Timeframe - Requested information
MetroPCS	MetroPCS c/o Corporation Service Company 327 Hillsborough Street Raleigh, NC 27603 Phone: (866) 403-	MetroPCS Attn: Custodian of Records 2250 Lakeside Boulevard Richardson, TX 75782	(800) 571-1265	(972) 860-2635	<u>Information Required for Subpoena</u> - Phone number - Timeframe - Requested information <u>Email</u> <u>subpoenas@metropcs.com</u>

	5272				Procedure for Service of Process - Via fax or email is preferred * Call records are kept for 6 months * Text records are kept for 60 days
MySpace		Custodian of Records MySpace.com 407 N. Maple Drive Beverly Hills, CA 90210	(888) 309-1311	(310) 362-8854	Required Information for Subpoena - The "Friend ID" - Requested information Sample Language for Subpoena Records concerning the identify of the user with the Friend ID #### consisting of name, postal code, county, e-mail address, date of account creation, IP address at account sign-up, logs showing IP address and date stamps for account access, and the contents of private messages in the user's inbox, and sent mail folders. Compliance@support.myspace.com
Sprint (includes Virgin Mobile and Boost Mobile)	Sprint PCS Wireless Sprint Spectrum, L.P. c/o Corporation Service Company 327 Hillsborough Street Raleigh, NC 27603 Phone: (866) 403-5272	Sprint PCS Wireless Sprint Spectrum, L.P. 6160 Sprint Parkway Overland Park, KS 66251	Sprint Spectrum (800) 829-0965 Compliance HQ (913) 315-0660 ASAP Requests (913) 315-8774	Compliance HQ (913) 315-0736 (816) 600-3111 ASAP Requests (816) 600-3121	See manual for specific/additional information http://info.publicintelligence.net/SprintSubpoenaManual.pdf Trials and/or Appearances CSTrialTeam@sprint.com
Time Warner Cable/Road Runner	Time Warner Cable c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	Time Warner Cable Subpoena Compliance 13820 Sunrise Valley Drive Herndon, VA 20171	(703) 345-3422	(704) 697-4911	Time Warner Cable accepts service electronically subpoenainquiry@twcable.com For additional information about compliance policies see http://help.twcable.com/subpoena-compliance.html
T-Mobile	T-Mobile USA, Inc. c/o Corporation Service Company 327 Hillsborough Street	Subpoena Compliance Department 4 Sylvan Way Parsippany, NJ 07054	(973) 292-8911	(973) 292-8697	Information Required for Subpoena - Phone number - Timeframe - Requested information

	Raleigh, NC 27603 Phone: (866) 403-5272				Procedure for Service of Process - Via U.S. mail or fax
TracFone Wireless (including Straight Talk Wireless, Net10, Total Wireless, TelCel, and Safelink)	TracFone Wireless, Inc. c/o Corporate Creations Network Inc. 15720 Brixham Hill Avenue #300 Charlotte, NC 28277 Phone: (704) 248-2540	TracFone Wireless, Inc. Subpoena Compliance 9700 NW 112th Avenue Miami, FL 33178	(800) 810-7094	(305) 715-6932	Information Required for Subpoena - Phone number - Timeframe - Requested information Procedure for Service of Process - Via fax is preferred *Allow 7 – 10 days for processing of request
Twitter		Twitter, Inc. c/o Trust & Safety 1355 Market Street, Ste. 900 San Francisco, CA 94103		Attn: Trust & Safety (415) 222-9958	Required Information for Subpoena - Username and URL of Twitter profile - Details of specific information requested - Relationship of information to the investigation - Valid e-mail address so Twitter can contact you Service of Process Twitter accepts legal process ONLY from LEO delivered by mail or by fax Questions can be sent to: lawenforcement@twitter.com
U.S. Cellular		U.S. Cellular Subpoena Compliance Department One Pierce Place, Suite 800 Itasca, IL 60143	(630) 875-8270	(866) 669-0894	- Roaming partner with Verizon Information Required for Subpoena - Phone number - Timeframe - Very specific details re: requested information Procedure for Service of Process - Via U.S. mail or fax - subpoenacompliance@uscellular.com
Verizon (includes INpulse, Alltell, AirTouch, and Jitterbug services)	Cellco Partnership dba Verizon Wireless c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-	Cellco Partnership dba Verizon Wireless Custodian of Records 180 Washington Valley Road Bedminster, NJ 07921	(800) 451-5242	Subpoenas (888) 667-0028	Information Required for Subpoena - Phone number - Timeframe - Detailed description of information requested Procedure for Service of Process - Via fax is preferred

	2957 Phone: (919) 821-7139				
Vonage	Vonage Holdings Corp. c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	Vonage Holdings Corp. ATTN: Legal Affairs Administrator – Legal Department 23 Main Street Holmdel, NJ 07733	(732) 231-6705	(732) 202-5221	- http://www.vonage.com Email SubpoenaProcessTeam@vonage.com Information Required for Subpoena - Phone number - Timeframe - Requested information Procedure for Service of Process - Via U.S. mail or by fax
Yahoo!	Yahoo! Inc. c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	Yahoo! Inc. Compliance team 701 First Avenue Sunnyvale, CA 94089	408-349-3687	408-349-5400	Required Information for Subpoena - Username or email address

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

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

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

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

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

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

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

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

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

WHEREFORE, the Defendant moves the court:

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

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

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

This the _____ day of _____, 20____.

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

By: _____

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

CERTIFICATE OF SERVICE

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

This the _____ day of _____, 20_____.

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

By: _____

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

Sample Motions on IDS Website

Defendant's Records

Ex parte motion and order for jail records

Ex parte motion for production or records of Dorothea Dix Hospital

Ex Parte Motion and Order to Provide Defendant's Medical, Mental Health, and School Records to Defense Counsel

Request for release of juvenile records

Confidential Witness Records

Motion to obtain mental health records

Motion for production and inspection of confidential records

Sample Motion for Production of Law Enforcement Recordings

STATE OF NORTH CAROLINA

File No.
17 CVS

PITT County

In The General Court Of Justice
Superior Court Division

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

Name Of Petitioner
JOHN DOE

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

City, State, Zip
Greenville, NC 27835

Phone No. 252-931-9362

Fax No. 252-830-5155

Email Address
keith@williamslawonline.com

PETITION FOR RELEASE OF CUSTODIAL LAW ENFORCEMENT AGENCY RECORDING

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

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

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

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

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

CERTIFICATE OF SERVICE ON HEAD OF CUSTODIAL LAW ENFORCEMENT AGENCY

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

☐ Personal Delivery

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

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

Also via email to [campus attorney]

CERTIFICATE OF SERVICE ON DISTRICT ATTORNEY

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

☐ Personal Delivery

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

Not seeking general release; District Attorney not served.

Date	*Petitioner's Signature*

STATE OF NORTH CAROLINA

COUNTY OF PITT

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NO. 17 CVS _____

IN THE MATTER OF CUSTODIAL
LAW ENFORCEMENT RECORDING
SOUGHT BY PETITIONER

_____

NOTICE OF HEARING

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

This the _____ day of _____, 2018.

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

By: _____

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

CERTIFICATE OF SERVICE

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

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

Also via email to [campus attorney email address]

This the _____ day of _____, 20_____.

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

By: _____

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Obtaining Records from Third Parties

John Rubin

UNC School of Government

April 2018

4.6 Other Constitutional Rights

A. Evidence in Possession of Third Parties

This section focuses on records in a third party's possession concerning a victim or witness. Records concerning the defendant are discussed briefly at the end of this section.

Right to obtain confidential records. Due process gives the defendant the right to obtain from third parties records containing favorable, material evidence even if the records are confidential under state or federal law. This right is an offshoot of the right to favorable, material evidence in the possession of the prosecution. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (records in possession of child protective agency); *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (North Carolina state courts erred in failing to review records in possession of county medical center, mental health department, and department of social services).

Other grounds, including the right to compulsory process, the court's inherent authority, and state constitutional and statutory requirements, may support disclosure of confidential records in the hands of third parties. *See State v. Crews*, 296 N.C. 607 (1979) (recognizing court's inherent authority to order disclosure); *In re Martin Marietta Corp.*, 856 F.2d 619, 621 (4th Cir. 1988) (federal rule allowing defendant to obtain court order for records in advance of trial "implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor"); G.S. 8-53 (under this statute, which is representative of several on privileged communications, court may compel disclosure of communications between doctor and patient when necessary to proper administration of justice).

Right to obtain DSS records. Several cases have addressed a defendant's right under *Ritchie* to department of social services (DSS) records that contain favorable, material evidence in the criminal case against the defendant. The North Carolina courts have recognized the defendant's right of access. For example, in *State v. McGill*, 141 N.C. App. 98, 101 (2000), the court stated:

> A defendant who is charged with sexual abuse of a minor has a constitutional right to have the records of the child abuse agency that is charged with investigating cases of suspected child abuse, as they pertain to the prosecuting witness, turned over to the trial court for an in camera review to determine whether the records contain information favorable to the accused and material to guilt or punishment.

In numerous instances, the North Carolina courts have found error in the failure to disclose DSS records to the defendant. *See State v. Martinez*, 212 N.C. App. 661 (2011) (DSS files contained exculpatory impeachment information; court reverses conviction for other reasons and directs trial court on remand to make information available to defendant); *State v. Webb*, 197 N.C. App. 619 (2009) (error for trial court not to disclose information in DSS file to defendant; new trial); *State v. Johnson*, 165 N.C. App. 854

(2004) (child victim's DSS file contained information favorable and material to defendant's case, reviewed at length in court's opinion, and should have been disclosed; new trial); *McGill*, 141 N.C. App. 98 (error in failing to require disclosure of evidence bearing on credibility of State's witnesses; new trial). *Cf. State v. Tadeja*, 191 N.C. App. 439 (2008) (following *Ritchie* but finding that disclosure of DSS records was not required because they did not contain favorable evidence; contents of sealed records not described in opinion); *State v. Bailey*, 89 N.C. App. 212 (1988) (same).

Right to school records. *See State v. Taylor*, 178 N.C. App. 395 (2006) (following *Ritchie* but finding that disclosure of accomplice's school records was not required because they did not contain evidence favorable to defendant); *State v. Johnson*, 145 N.C. App. 51 (2001) (in case involving charges of multiple sex offenses against students by defendant, who was a middle school teacher and coach, court finds that trial judge erred in quashing subpoena duces tecum for school board documents without conducting in camera review for exculpatory evidence; some of documents were from witnesses who would testify at trial).

Right to mental health records. *See State v. Chavis*, 141 N.C. App. 553, 561 (2003) (recognizing right to impeachment information that may be in mental health records of witness, but finding that record did not show that State had information in its possession or that information was favorable to defendant); *see also supra* "Impeachment evidence," in § 4.5C, Favorable to Defense (discussing right under *Brady* to mental health records that impeach witness's credibility).

Right to medical records. *See State v. Thompson*, 139 N.C. App. 299 (2000) (finding that trial court did not err in failing to conduct in camera review of victim's medical records where defense counsel conceded that he was not specifically aware of any exculpatory information in the records); *State v. Jarrett*, 137 N.C. App. 256 (2000) (trial court reviewed hospital records and disclosed some and withheld others; appellate court reviewed remaining records, which were sealed for appellate review, and found they did not contain favorable, material evidence).

Directing production of records. Three main avenues exist for compelling production of materials from third parties before trial.

- Counsel may move for a judge to issue an order requiring the third party to produce the records in court so the judge may review them and determine those portions subject to disclosure.
- Rather than asking the judge to issue an order, counsel may issue a subpoena directing the third party to produce the records in court for the judge to review and rule on the propriety of disclosure. Often, a custodian of confidential records will object to or move to quash a subpoena so defense counsel may be better off seeking an order initially from a judge.
- In some instances (discussed below), counsel may move for a judge to issue an order requiring the third party to provide the records directly to counsel.

Defense counsel also may have the right to subpoena documents directly to his or her office. This approach is *not* recommended for records that contain confidential information because it may run afoul of restrictions on the disclosure of such information. *See infra* § 4.7D, Production of Documents in Response to Subpoena Duces Tecum. Counsel should obtain a court order directing production or should subpoena the records to be produced in court, leaving to a judge the determination whether the defendant is entitled to obtain the information.

Specific procedures may need to be followed to obtain disclosure of some records. Consult the statute governing the records at issue. For example, some statutes require that notice be given to the person who is the subject of the records being sought (as well as to the custodian of the records). *See infra* § 4.7F, Specific Types of Confidential Records (listing reference sources on health department, mental health, and school records).

Sample motions for the production of various types of records are available in the non-capital, juvenile, and capital trial motions bank on the IDS website, www.ncids.org.

Who hears a motion for an order for records. In felony cases still pending in district court, a defendant may move for an order from a district court judge. *See State v. Jones*, 133 N.C. App. 448, 463 (1999) (before transfer of felony case to superior court, district court has jurisdiction to rule on preliminary matters, in this instance, production of certain medical records), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000); *see also State v. Rich*, 132 N.C. App. 440, 451 (1999) (once case was in superior court, district court should not have entered order overriding doctor-patient privilege; district court's entry of order compelling disclosure was not prejudicial, however).

A superior court also may have authority in a felony case to hear the motion while the case is pending in district court. *See State v. Jackson*, 77 N.C. App. 491 (1985) (superior court had jurisdiction before indictment to enter order to determine defendant's capacity to stand trial because G.S. 7A-21 gives superior court exclusive, original jurisdiction over criminal actions in which a felony is charged).

In camera review and alternatives. Under *Ritchie*, a defendant may obtain an in camera review of confidential records in the possession of a third party and, to the extent the records contain favorable, material evidence, the judge must order the records disclosed to the defendant.

The in camera procedure has some disadvantages, however, and may not always be required. Principally, the court may not know the facts of the case well enough to recognize evidence important to the defense. Some alternatives are as follows:

- If the evidence is part of the files of a law enforcement agency, investigatory agency, or prosecutor's office, defense counsel may move to compel the prosecution to disclose the evidence, without an in camera review, based on the State's general obligation to disclose the complete files in the case under G.S. 15A-903. Because it may be unclear whether the prosecution has access to the records, counsel may need

to move for an order requiring the prosecution to disclose the records or, in the alternative, requiring the third party to provide the records to the court for an in camera review.

- Some judges may be willing to order disclosure of records in the possession of third parties without conducting an in camera review. Defense counsel can argue that the interest in confidentiality does not warrant restricting the defendant's access to potentially helpful information or imposing the burden on the judge of conducting an in camera review. *See Ritchie*, 480 U.S. 39, 60 (authorizing in camera review if necessary to avoid compromising interest in confidentiality).
- Defense counsel can move to participate in any review of the records under a protective order. Such an order might provide that counsel may not disclose the materials unless permitted by the court. *See* G.S. 15A-908 (authorizing protective orders); *Zaal v. State*, 602 A.2d 1247 (Md. 1992) (court may conduct review of records in presence of counsel or permit review by counsel alone, as officer of court, subject to restrictions protecting confidentiality).

In camera review of DSS records. In 2009, the General Assembly added G.S. 7B-302(a1)(4) to require the court in a criminal or delinquency case to conduct an in camera review before releasing confidential DSS records to a defendant or juvenile respondent. *See also* G.S. 7B-2901(b)(4) (imposing same requirement for court records in abuse, neglect, and dependency cases). While the statutes mandate an in camera procedure for DSS records, it does not affect the applicable standard for release of records under *Ritchie. See also In re J.L.*, 199 N.C. App. 605 (2009) (under G.S. 7B-2901(b), trial court abused discretion by denying juvenile right to review own court records in abuse, neglect, and dependency case).

If a defendant is also a respondent parent in an abuse, neglect, and dependency proceeding, counsel for the client in that proceeding may be able to obtain DSS records in discovery and, with the client's consent, provide them to criminal defense counsel without court involvement.

Required showing. The courts have used various formulations to describe the showing that a defendant must make in support of a motion for confidential records from a third party. They have said that defendants must make some plausible showing that the records might contain favorable, material evidence; have a substantial basis for believing that the records contain such evidence; or show that a possibility exists that the records contain such evidence. All of these formulations emphasize the threshold nature of the showing required of the defendant. *See Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (defendant made "plausible showing"); *State v. Thompson*, 139 N.C. App. 299, 307 (2000) ("although asking defendant to affirmatively establish that a piece of evidence not in his possession is material might be a circular impossibility, we at least require him to have a substantial basis for believing such evidence is material"); *see also United States v. King*, 628 F.3d 693 (4th Cir. 2011) (remanding for in camera review because defendant gave required plausible showing); *United States v. Trevino*, 89 F.3d 187 (4th Cir. 1996) (defendant must "plainly articulate" how the information in the presentence investigation report is material and favorable).

If the court refuses to require the third party to produce the documents, or after reviewing the documents refuses to require disclosure of some or all of them, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *State v. McGill*, 141 N.C. App. 98, 101 (2000); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial court's denial of motion to require production of witness's medical records because defendant failed to make documents part of record on appeal). If the court refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

Ex parte application. In some circumstances, counsel seeking records in the possession of third parties may want to apply to the court ex parte. Although the North Carolina courts have not specifically addressed this procedure in the context of third-party records, they have allowed defendants to apply ex parte for funds for an expert (*see infra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases). Some of the same reasons and authority for allowing ex parte applications for experts support ex parte motions for records in the possession of third parties (that is, need to develop trial strategy, protections for confidential attorney-client communications, etc.). In view of these considerations, some courts have held that a defendant may move ex parte for an order requiring pretrial production of documents from a third party. *See United States v. Tomison*, 969 F. Supp. 587 (E.D. Cal. 1997) (court reviews Federal Rule of Criminal Procedure 17(c), which authorizes court to issue subpoena duces tecum for pretrial production of documents, and rules that defendant may move ex parte for issuance of subpoena duces tecum to third party); *United States v. Daniels*, 95 F. Supp. 2d 1160 (D. Kan. 2000) (following *Tomison*); *United States v. Beckford*, 964 F. Supp. 1010 (E.D. Va. 1997) (allowing ex parte application for subpoena for third-party records but noting conflicting authority). These authorities should give counsel a sufficient basis to request to be heard ex parte. *See* North Carolina State Bar, 2001 Formal Ethics Opinion 15 (2002) (ex parte communications not permissible unless authorized by statute or case law), *available at* www.ncbar.gov/ethics/.

A separate question is whether the prosecution has standing to object to a motion to compel production of records from a third party or to obtain copies of records ordered to be disclosed to the defendant. *See Tomison*, 969 F. Supp. 587 (prosecution lacked standing to move to quash subpoena to third party because prosecution had no claim of privilege, proprietary right, or other interest in subpoenaed documents; prosecution also did not have right to receive copies of the documents unless defendant intended to introduce them at trial). *But cf. State v. Clark*, 128 N.C. App. 87 (1997) (court had discretion to require Department of Correction to provide to prosecution records that it had provided to defendant). For a discussion of these issues in connection with subpoenas, see *infra* "Notice of receipt and opportunity to inspect; potential applicability to criminal cases" in § 4.7D, Production of Documents in Response to Subpoena Duces Tecum; and § 4.7E, Objections to and Motions to Modify or Quash Subpoena Duces Tecum.

Records concerning defendant. When records in a third party's possession concern the defendant (for example, the defendant's medical records), defense counsel often can obtain them without court involvement by submitting a release from the defendant to the custodian of records. If you are seeking your client's medical records and know the hospital or other facility that has the records, obtain the form release used by the facility to avoid potential objections by the facility that the form does not comply with HIPAA or other laws. Other entities also may have their own release forms, which will facilitate obtaining client records. Notwithstanding the submission of a release, some agencies may be unwilling to release the records without a court order or payment of copying costs. In these instances, applying to the court ex parte for an order requiring production of the records would seem particularly appropriate.

Sample motions for defendants' records are available in the non-capital motions bank on the IDS website, www.ncids.org.

4.7 Subpoenas

Although not a formal discovery device, subpoenas (particularly subpoenas duces tecum) may be a useful tool for obtaining information material to the case. *See State v. Burr*, 341 N.C. 263, 302 (1995) (subpoena duces tecum is permissible method for obtaining records not in possession, custody, or control of State); *State v. Newell*, 82 N.C. App. 707, 708 (1986) (although discovery is not proper purpose for subpoena duces tecum, subpoena duces tecum is proper process for obtaining documents material to the inquiry in the case).

The mechanics of subpoenas are discussed in detail in Chapter 29 (Witnesses) of Volume 2 of the North Carolina Defender Manual (UNC School of Government, 2d ed. 2012). The discussion below briefly reviews the pretrial use of subpoenas, particularly for documents.

A. Constitutional Right to Subpoena Witnesses and Documents

A defendant has a constitutional right to subpoena witnesses and documents, based primarily on the Sixth Amendment right to compulsory process. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) (right to compel attendance of witnesses is "in plain terms the right to present a defense"); *State v. Rankin*, 312 N.C. 592 (1985) (recognizing Sixth Amendment basis of subpoena power). Due process also gives a defendant the right to obtain material, favorable evidence in the possession of third parties (*see supra* § 4.6A, Evidence in Possession of Third Parties); and article 1, section 23 of the North Carolina Constitution guarantees a criminal defendant the right to confront one's accusers and witnesses with other testimony.

The right to compulsory process is not absolute. Although the defendant does not have to make any showing to obtain a subpoena, the court on proper objection or motion may deny, limit, or quash a subpoena. *See infra* § 4.7E, Objections to and Motions to Modify or Quash Subpoena Duces Tecum (discussing permissible scope of subpoena duces tecum); *see generally* 2 NORTH CAROLINA DEFENDER MANUAL § 29.1A (Constitutional Basis of Right to Compulsory Process).

B. Reach of Subpoena

A subpoena may be directed to any person within North Carolina who is capable of being a witness, including law-enforcement officers, custodians of records of public agencies, and private businesses and individuals.

To obtain witnesses or documents located outside of North Carolina, defense counsel must use the Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings. *See* G.S. 15A-811 through G.S. 15A-816 The uniform act has been interpreted as authorizing subpoenas for the production of documents. *See* Jay M. Zitter, Annotation, *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R.4th

836 (1981) (uniform act has been interpreted as allowing subpoena to out-of-state witness to produce documents). Counsel may not use an ordinary subpoena to compel an out-of-state witness to produce records. *See* North Carolina State Bar, 2010 Formal Ethics Opinion 2 (2010), *available at* www.ncbar.gov/ethics/. For a discussion of the mechanics of the Uniform Act, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.1E (Securing the Attendance of Nonresident Witnesses).

C. Issuance and Service of Subpoena

Rule 45 of the North Carolina Rules of Civil Procedure governs the issuance and service of subpoenas. *See* G.S. 15A-801 (subpoenas to testify in criminal cases governed by Rule 45, subject to limited exceptions); G.S. 15A-802 (to same effect for subpoenas for documents); G.S. 8-59 (so stating for subpoenas to testify); G.S. 8-61 (so stating for subpoenas for documents). The court need not be involved in the issuance of a subpoena to testify or to produce documents; defense counsel may issue either. *See* AOC Form AOC-G-100, "Subpoena" (May 2013), *available at* www.nccourts.org/Forms/Documents/556.pdf. The AOC form subpoena may be used to subpoena a witness to testify, produce documents, or do both.

The sheriff, sheriff's deputy, coroner, or any person over age 18 who is not a party, may serve a subpoena. Service may be by personal delivery to the person named in the subpoena, by registered or certified mail, return receipt requested, or by telephone communication by law enforcement for subpoenas to testify (but not for subpoenas for documents). *See* N.C. R. CIV. P. 45(b)(1); G.S. 8-59.

Practice note: Because the court may not be able to issue a show cause order re contempt (with an order for arrest) to enforce a subpoena served by telephone communication (*see* G.S. 8-59), and because disputes may arise about whether a person named in a subpoena signed for and received a subpoena served by mail, counsel should consider serving all subpoenas by personal delivery on the person whose attendance is sought.

The defendant need not tender any witness fee at the time of service. *See* G.S. 6-51 (witness not entitled to receive fees in advance). Rather, the witness must apply to the clerk after attendance for payment of the daily witness fee and reimbursement of allowable travel expenses. G.S. 6-53; G.S. 7A-316. Generally, the court may assess witness fees against the defendant only on completion of the case. *See* G.S. 7A-304 (costs may be assessed against defendant on conviction or entry of plea of guilty or no contest).

A copy of the subpoena need not be served on other parties in a criminal case. *See* G.S. 15A-801 (exempting criminal cases from service requirement for witness subpoenas in N.C. R. Civ. P. 45(b)(2)), G.S. 15A-802 (to same effect for document subpoenas).

For a further discussion of issuance and service of subpoenas to testify, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.1B (Securing the Attendance of In-State Witnesses). For a further discussion of issuance and service of subpoenas for documents, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.2A (Statutory Authorization) and § 29.2B

(Statutory Requirements).

For reference sources on obtaining particular types of records, see *infra* § 4.7F, Specific Types of Confidential Records (health department, mental health, and school records).

D. Production of Documents in Response to Subpoena Duces Tecum

The person named in a subpoena duces tecum ordinarily must appear on the date and at the place designated in the subpoena and must produce the requested documents.

Place of production. Typically, a subpoena duces tecum requires production at some sort of proceeding in the case to which the recipient is subpoenaed, such as a pretrial hearing, deposition (rare in criminal cases but common in civil cases), or trial. In 2003, the General Assembly amended Rule 45 of the N.C. Rules of Civil Procedure to modify this requirement for subpoenas for documents (but not subpoenas to testify). Thus, before the amendment, a party in a civil case would have to schedule a deposition, to which the party would subpoena the records custodian, even if the party merely wanted to inspect records in the custodian's possession and did not want to take any testimony. Under the revised rule, a party may use a subpoena in a pending case to direct the recipient to produce documents at a designated time and place, such as at the issuing party's office, even though no deposition or other proceeding is scheduled for that time and place. Because G.S. 15A-802 makes Rule 45 applicable to criminal cases, this use of a subpoena appears to be permissible in a criminal case.

The change in Rule 45 authorizing an "office" subpoena may not be readily apparent. It is reflected in the following italicized portion of revised Rule 45(a)(2): "A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, *or any subpoena may be issued separately*." *See* North Carolina State Bar, 2008 Formal Ethics Opinion 4 (2008) (so interpreting quoted language), *available at* www.ncbar.gov/ethics/; Bill Analysis, H.B. 785: Rules of Civil Proc/Rewrite Rule 45 (S.L. 2003-276), from Trina Griffin, Research. Div., N.C. General Assembly (June 27, 2003) (same); Memorandum to Superior Court Judges et al. re: Subpoena Form Revised (AOC-G-100) & S.L. 2003-276 (HB 785), from Pamela Weaver Best, Assoc. Counsel, Div. of Legal & Legislative Servs., N.C. Admin. Office of the Courts (Sept. 29, 2003) (same). The latter two memos are available from the authors of this manual. The revised language is comparable to Rule 45(a)(1) of the Federal Rules of Civil Procedure, which has authorized a similar procedure in federal cases. *See* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.02[3], at 45-21 (3d ed. 2011).

Practice note: When seeking sensitive records, defense counsel may not want to use an "office" subpoena or a subpoena at all and instead may want to seek an order of the court compelling production. Because a subpoena is generally insufficient to authorize a custodian of confidential records to disclose records, the custodian will often contest the subpoena, necessitating a court order in any event. Further, if a records custodian who is subpoenaed discloses confidential information to defense counsel without proper authorization (typically, consent by the subject of the records or a court order, not just a subpoena),

defense counsel may be subject to sanctions. *See* North Carolina State Bar Ethics Opinion RPC 252 (1997) (attorneys should refrain from reviewing confidential materials inadvertently sent to them by opposing party), *available at* www.ncbar.gov/ethics/; *Susan S. v. Israels*, 67 Cal. Rptr. 2d 42 (Cal. Ct. App. 1997) (attorney read and disseminated patient's confidential mental health records that treatment facility mistakenly sent directly to him in response to subpoena; court allowed patient's suit against attorney for violation of state constitutional right of privacy); *see also Bass v. Sides*, 120 N.C. App. 485 (1995) (before obtaining judge's permission, plaintiff's attorney reviewed confidential medical records of defendant that records custodian had sealed and provided to clerk of court in response to subpoena; judge ordered plaintiff's attorney to pay defendant's attorney fees, totaling approximately $7,000, and prohibited plaintiff from using the records at trial).

Notice of receipt and opportunity to inspect; potential applicability to criminal cases. Rule 45(d1) of the N.C. Rules of Civil Procedure states that within five business days of receipt of materials produced in compliance with a subpoena duces tecum, the party who was responsible for issuing the subpoena must serve all other parties with notice of receipt. On request, the party receiving the material must provide the other parties a reasonable opportunity to copy and inspect such material at the inspecting party's expense.

The applicability of this requirement to criminal cases is not entirely clear, particularly when the defendant is the subpoenaing party. In 2007, the General Assembly revised Rule 45 to add the notice and inspection requirements in subsection (d1) of Rule 45. This change appears to have been prompted by concerns from civil practitioners after the 2003 changes to Rule 45. The earlier changes, discussed above under "Place of production" in this subsection D., authorized a party to issue a subpoena for the production of documents without also scheduling a deposition, at which the opposing party would be present and would have an opportunity to review and obtain copies of the subpoenaed records.

Criminal cases are not specifically exempted from the notice and inspection requirements enacted in 2007, although somewhat paradoxically the subpoenaing party in a criminal case is not required to give notice of the service of a subpoena (discussed above under subsection C., Issuance and Service of Subpoena). The 2007 subpoena provisions also are in tension with G.S. 15A-905 and G.S. 15A-906, which essentially provide that a criminal defendant is only obligated to disclose to the State evidence that he or she intends to use at trial. (If the State is the subpoenaing party, the records become part of the State's file and are subject to the State's general discovery obligations under G.S. 15A-903.)

If the notice and inspection requirements in Rule 45(d1) apply in criminal cases, a defendant may have grounds to seek a protective order under G.S. 15A-908 to withhold records from disclosure. Alternatively, instead of using a subpoena, a defendant may move for a court order for production of records, which is not governed by Rule 45. *See supra* "Ex parte application" in § 4.6A, Evidence in Possession of Third Parties.

Public and hospital medical records. If a custodian of public records or hospital medical records (as defined in G.S. 8-44.1) has been subpoenaed to appear for the sole purpose of producing records in his or her custody and not also to testify, the custodian may elect to

tender the records to the court in which the action is pending instead of making a personal appearance. N.C. R. CIV. P. 45(c)(2). For a discussion of these procedures, see 2 NORTH CAROLINA DEFENDER MANUAL § 29.2C (Production of Public Records and Hospital Medical Records).

E. Objections to and Motions to Modify or Quash Subpoena Duces Tecum

N.C. Rule of Civil Procedure 45(c)(3) and (c)(5) set forth the procedures for a person to serve a written objection on the subpoenaing party or file a motion to modify or quash a subpoena. The mechanics of these procedures are discussed in detail in 2 NORTH CAROLINA DEFENDER MANUAL § 29.2D (Objections to a Subpoena Duces Tecum) and § 29.2E (Motions to Modify or Quash a Subpoena Duces Tecum).

If an objection rather than a motion is made, the party serving the subpoena is not entitled to inspect or copy the designated materials unless the court enters an order permitting him or her to do so. N.C. R. CIV. P. 45(c)(4). In some instances, the subpoenaed party will appear in court at the time designated in the subpoena and make an objection to disclosure. If this procedure is followed, the defendant will have an opportunity to obtain a ruling from the court then and there. In other instances, the subpoenaed party will object before the scheduled proceeding. The subpoenaing party then will have to file a motion to compel production, with notice to the subpoenaed person, in the court of the county where the production is to occur. *Id.*

In reviewing an objection or motion to quash or modify, "the trial judge should consider the relevancy and materiality of the items called for [by the subpoena], the right of the subpoenaed person to withhold production on other grounds, such as privilege, and also the policy against 'fishing expeditions.'" *State v. Newell*, 82 N.C. App. 707, 709 (1986). The subpoena should "specify with as much precision as fair and feasible the particular items desired." *Id.*, 82 N.C. App. at 708. Otherwise, the court may view the subpoena as a "fishing or ransacking expedition." *Vaughan v. Broadfoot*, 267 N.C. 691, 699 (1966) (quashing subpoena for production of mass of records on first day of trial); *see also Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (finding that North Carolina trial judge violated defendant's due process rights by quashing subpoena on overbreadth grounds without requiring that records be produced for review by court after defendant made a plausible showing that records contained information material and favorable to his defense). On finding that a subpoena is overbroad, a trial court may modify rather than quash it. *State v. Richardson*, 59 N.C. App. 558 (1982).

In some North Carolina cases, trial courts have granted motions by the prosecution to quash a subpoena duces tecum directed to a third party, but the decisions do not explicitly address whether the prosecution had standing to do so. *See, e.g.*, *State v. Love*, 100 N.C. App. 226 (1990), *conviction vacated on habeas sub. nom.*, *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995). Because prosecutors do not represent third parties and do not have a legally recognized interest in their records, they may not have standing to object or move to quash. *See United States v. Tomison*, 969 F. Supp. 587 (E.D. Cal. 1997) (prosecution lacked standing to move to quash subpoena to third party because prosecution had no

claim of privilege, proprietary right, or other interest in subpoenaed documents); 2 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 45-4, at 45-14 (3d ed. 2007) ("A party does not have standing to challenge a subpoena duces tecum issued to a nonparty witness unless he can claim some privilege in the documents sought."). Some cases have taken a more expansive view of prosecutor standing because of the prosecutor's overall interest in the handling of the prosecution. *See Commonwealth v. Lam*, 827 N.E.2d 209, 228–29 & n.8 (Mass. 2005) (finding that prosecutor had standing to object to issuance of summons [subpoena] because prosecutor may be able to assist judge in determining whether subpoena is improper fishing expedition and in preventing harassment of witnesses by burdensome, frivolous, or improper subpoenas; court notes without deciding that there may be occasions "in which a defendant seeks leave from the court to move ex parte for the issuance of a summons [subpoena]").

Practice note: If the judge quashes a subpoena requiring the production of documents, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial judge's denial of motion to require production of witness's medical records because defendant failed to make documents part of record). If the judge refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

Rather than quash or modify a subpoena, a judge may order the subpoenaed person to be "reasonably compensated" for the cost, if "significant," of producing the designated material. N.C. R. CIV. P. 45(c)(6). Typically, judges do not order reimbursement of document production expenses because compliance with a subpoena is an ordinary, not significant, expense of responding to court proceedings. If the court orders payment, defense counsel for an indigent defendant may request the court to authorize payment from state funds as a necessary expense of representation. *See* G.S. 7A-450(b); G.S. 7A-454.

F. Specific Types of Confidential Records

Specific procedures may need to be followed to obtain disclosure of some records. Consult the statute governing the records at issue. For example, some statutes require that notice be given to the person who is the subject of the records being sought (as well as to the custodian of records). For a discussion of subpoenas for particular types of records from the perspective of the recipient, see the following:

- John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (Sept. 2005), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/hlb82.pdf.
- John Rubin, *Subpoenas and School Records: A School Employee's Guide*, SCHOOL LAW BULLETIN No. 30/2 (Spring 1999), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/slb/sp990111.pdf.
- John Rubin & Mark Botts, *Responding to Subpoenas: A Guide for Mental Health Facilities*, POPULAR GOVERNMENT No. 64/4 (Summer 1999), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/pg/botts.pdf.

How O.J. Got the Fuhrman Tapes (and You Can Get Out-of-State Materials)

Author : John Rubin

Categories : Evidence, Procedure, Uncategorized

Tagged as : discovery, interstate, subpoenauniform

Date : April 4, 2017

Almost everyone knows about the trial of O.J. Simpson for the murders of Nicole Brown Simpson and Ronald Goldman. Many people also know about a key piece of evidence introduced by the defense—taped interviews in which one of the investigating officers, Los Angeles Police Department detective Mark Fuhrman, used racial slurs. Less well known is the legal mechanism that the defense team used to obtain the tapes, which were in the possession of a North Carolina writer who refused to turn them over voluntarily. How did O.J.'s lawyers compel a resident of North Carolina to produce the tapes in faraway Los Angeles, California? This post reviews the procedure used in the O.J. case and other ways to obtain out-of-state materials in a criminal case.

What Doesn't Work

Let's look first at what doesn't work. An ordinary North Carolina subpoena does not obligate a person in another state to produce records in a North Carolina case. The United States Supreme Court held long ago, in the 1902 case of *Minder v. Georgia,* 183 U.S. 559, 562 (1902), that a state court does not have the power "to compel the attendance of witnesses who are beyond the limits of the state." So, in the O.J. case, the defense team could not have used and did not use an ordinary California subpoena to compel production of the Fuhrman tapes.

The North Carolina State Bar has stated further that it is unethical for a North Carolina attorney to mislead an out-of-state entity that an ordinary North Carolina subpoena obligates the recipient to comply. *See* Obtaining Medical Records from Out of State Health Care Providers, 2010 Formal Ethics Opinion 2 (2010). The opinion addresses subpoenas for medical records to out-of-state health care providers, but the reasoning would seem to apply to subpoenas to other out-of-state entities. (A later State Bar opinion, discussed below, suggests an alternative approach.)

What Does Work, with Court Orders

Because of the limited range of state court subpoenas, the Uniform Law Commission adopted the Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings way back in 1936. Every state has enacted this interstate subpoena procedure, which is codified in North Carolina in G.S. 15A-811 through G.S. 15A-816. An attorney first must apply to a North Carolina court for an order for production of the desired records. The attorney then must take the order to the state trial court where the record holder is located and move for an order compelling the person or entity to produce the records. The attorney must show that the records are material. Because the procedure requires a court appearance in another state, the attorney must engage local counsel to move for the order in the other state or obtain permission to appear pro hac vice in the other state's courts. For a further discussion of the requirements, see Julie Lewis & John Rubin, 2 North Carolina Defender Manual § 29.1E (2d ed. 2012).

The above procedure was the one used in the O.J. case, resulting in a reported opinion bearing the writer's name, *In re McKinny,* 462 S.E.2d 530 (N.C. App. 1995). When O.J.'s attorneys came to North Carolina with a California court order in hand and moved for a North Carolina order, the trial judge initially denied the request. The North Carolina Court of Appeals reversed, compelling the North Carolina writer to appear at O.J.'s trial in Los Angeles and produce and testify about the tapes.

The uniform act does not explicitly refer to a subpoena for documents. It refers to subpoenas, orders, and other notices requiring the appearance of a witness. Generally states have held, including North Carolina in the O.J. case, that the act provides a mechanism to obtain documents. *See* Jay M. Zitter, Annotation, *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R.4th 836.

What May Work, without Court Orders

The uniform interstate subpoena act is obviously cumbersome, requiring two court orders and an appearance in another state. Three simpler approaches may be possible.

An ordinary North Carolina subpoena if voluntary. Some entities may be willing to produce materials located outside North Carolina as long as they receive a subpoena, even an ordinary North Carolina subpoena. The North Carolina State Bar recognized this possibility in a later opinion, finding that an attorney may issue a North Carolina subpoena for out-of-state records as long as the attorney advises the out-of-state entity that production is voluntary. *See* Use of North Carolina Subpoena to Obtain Documents from Foreign Entity or Individual, 2014 Formal Ethics Opinion 7 (2014). An attorney should contact the entity ahead of time to determine whether it will produce the records voluntarily in response to a North Carolina subpoena.

An ordinary North Carolina subpoena if served on a registered agent of a foreign corporation. The issue posed in the above ethics opinion was the proper procedure to follow when an out-of-state corporation, commonly called a foreign corporation, does not have a registered agent for service of process in North Carolina. What if a foreign corporation has a registered agent here? Can an attorney compel a foreign corporation to produce records by serving the corporation's registered agent? The State Bar opinion doesn't specifically address the issue. Nor do there appear to be any North Carolina appellate decisions.

Some decisions from other states take the position that service of a subpoena on a registered agent is not sufficient to obligate a foreign corporation to comply. According to these decisions, service of process on a registered agent may obligate a foreign corporation to respond to a lawsuit against the corporation. But, the decisions distinguish being sued as a party from being subpoenaed to produce records in a proceeding in which the corporation is not a party. The decisions hold that doing business in a state and having a registered agent there does not necessarily obligate a corporation to produce records located outside the state. *See, e.g., Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440 (Va. 2015); *Ulloa v. CMI, Inc.*, 133 So. 3d 914 (Fla. 2013).

These decisions seem out of step with the current era of electronic storage and transmission of records. It is not clear where records are located when they are electronically accessible from just about anywhere. Further, the burden of electronically generating and producing records is considerably less than copying, packing up, and shipping off hard copies. *See Yelp,* 770 S.E.2d at 446 (dissenting and concurring opinion) (arguing that Virginia legislature provided for exercise of subpoena power over foreign corporation that had registered agent in Virginia but concluding that evidence failed to show that corporation had sufficient contacts with Virginia for court to exercise jurisdiction); *CMI, Inc. v. Landrum*, 64 So. 3d 693, 695 (Fla. Dist. Ct. App. 2010) (holding that service of subpoena duces tecum on registered agent of "foreign corporation authorized to do, registered to do, and doing business in Florida" was sufficient), *disapproved by Ulloa v. CMI*, above.

In most cases, attorneys are unlikely to encounter such fierce resistance over service on a registered agent. In the above cases, the corporations were keen to protect the information being sought: in *Yelp,* the identity of anonymous authors of negative reviews of the civil plaintiff's business; in the *CMI* cases, the computer source codes for the intoxilyzer machine manufactured by CMI and used against the criminal defendant. Larger, national companies often have subpoena compliance departments, which handle subpoenas as routine matters and can advise attorneys where to send a subpoena, the cost of generating the records, and other logistics. Contact information for many companies is available here from the Forensic Resource Counsel of the Office of Indigent Defense Services.

A subpoena under the Uniform Interstate Deposition and Discovery Act (UIDDA). In 2007, the Uniform Law Commission adopted UIDDA, a simpler interstate procedure to obtain evidence. Most although not all states have adopted some version of UIDDA, codified in North Carolina in G.S. 1F-1 through 1F-7. Generally, an attorney issues a North Carolina subpoena identifying the records being sought and submits it to the appropriate clerk of court in the state where the records are located, called the foreign state, along with a completed but unexecuted subpoena from the foreign state. The clerk in the foreign state issues the foreign state subpoena, which the attorney serves on the recipient in accordance with the rules of that state. Under UIDDA, no appearance is required in the foreign state, by local counsel or by the North Carolina attorney appearing pro hac vice, and no hearing or action is required by a judge. The specifics may vary in different states, so attorneys should check the particular state's law before proceeding.

Although the title of UIDDA refers to depositions, which is typically a civil discovery device, the provisions are not specifically limited to civil cases. North Carolina appears to allow parties in a criminal case to utilize UIDDA. In addition to enacting the provisions of the uniform act, North Carolina added subsection (f) to Rule 45 of the North Carolina Rules of Civil Procedure. *See* S.L. 2011-247. That subsection authorizes a party in a North Carolina case to obtain discovery from a person in another state, including production of documents, in accordance with the processes and procedures in the other state. With the exception of provisions not applicable here, G.S. 15A-802 makes Rule 45 applicable to criminal cases. Again, attorneys should review the UIDDA procedures of the other state, as some may exclude criminal cases. *Compare* N.D. R. Ct. 5.1(d) ("Depending on the type of case involved, the discovery rules contained in the North Dakota Rules of Civil Procedure, Criminal Procedure or Juvenile Procedure apply to subpoenas issued under Rule 5.1(b) [the rule implementing UIDDA].") *with* Ga. Code Ann. § 24-13-112(e) ("This Code section [implementing UIDDA] shall not apply to criminal proceedings.").

Unlike a court order issued under the earlier interstate act, a UIDDA subpoena does not compel the recipient to appear in North Carolina. Discovery takes place in the foreign state, not the trial state, and is governed by the laws of the foreign state. Whether the recipient of a UIDDA subpoena is obligated to take the less burdensome step of transmitting records to the subpoenaing party in North Carolina likewise appears to be governed by the laws of the foreign state. *Cf. Estate of Klieman v. Palestinian Authority*, 293 F.R.D. 235, 240–41 (D. D.C. 2013) (holding that although a subpoena under Rule 45 of the Federal Rules of Civil Procedure could not compel a foreign entity to appear for a deposition in a federal case, it could compel the entity to produce records). Attorneys should check with the out-of-state entity to determine how it wants to proceed. Sometimes an out-of-state entity may be willing to produce documents in response to an ordinary North Carolina subpoena; other times the entity may want the protection of a UIDDA subpoena from the court of the state in which the entity is located.

For a further discussion of UIDDA, where I first learned about this relatively new procedure, see Ann Tolliver, A Guide to Using the UIDDA, Forensic Science in N.C. Blog (Feb. 17, 2017).

Cellular Telephone and Social Media Subpoena Guide – updated May 2015

The chart below contains the contact information for the Subpoena Compliance Centers for a few major cell phone companies and social media networks. These existing contacts may be out of date; if so, more updated contact information for subpoena compliance centers for law enforcement can be found here. Additionally included are the NC registered agents for the out of state entities. If this information is out of date, the registered agent information can be found on the North Carolina Secretary of State's website.

To comply with the North Carolina rules of ethics, an attorney should serve the subpoena on the NC registered agent or local office capable of accepting service. Then the attorney may send a courtesy copy of the subpoena to the out-of-state Subpoena Compliance Center, explaining to the local office that they are being served to comply with the Rules of Professional Conduct and a courtesy copy is being sent to the out-of-state Subpoena Compliance Center. The courtesy copy should clearly state that it is a courtesy copy (no legal effect).

NC State Bar 2014 Formal Ethics Opinion 7 (October 24, 2014) requires that a lawyer inform an out of state entity without a registered agent in North Carolina that North Carolina subpoenas are unenforceable out of state. A written letter/statement explaining that the subpoena is not enforceable, that the recipient is not required comply with the subpoena, and that the subpoena is being supplied solely for the entity's records should accompany the subpoena. The out of state entity may decide whether to voluntarily comply with the subpoena.

Provider	NC Registered Agent	Address of Subpoena Compliance Center	Phone	Fax	Notes

AT&T
Landline service
a.k.a. BellSouth
	AT&T
	c/o CT Corporation System
	150 Fayetteville St., Box 1011
	Raleigh, NC 27601-2957
	Phone: (919) 821-7139
		AT&T Southeast
		Custodian of records
		308 S. Akard, 14th Floor – L
		Dallas, TX 75202
			(800) 291-4952	SE Landline
				(248) 395-4398
				
				Online Tool
				(248) 552-3233
					- www.att.com/subpoena
					- Can fax subpoena to them
					- WARNING
					  - Typically takes 3 months to get their records
					
					Information Required for Subpoena
					- Full description of information requested
					  - Subscriber information
					  - Usage records for outgoing calls
					  - Timeframes
					- Complete list of target telephone numbers
					  - Include area code
					- Electronic method for return of records produced (i.e., email address / fax number)
					
					Procedure for Service of Process
					- Can use "online tool" for certain requests
					  - Is used to expedite subpoena requests
					  - Go to www.att.com/subpoena

					- Address subpoena to proper AT&T legal entity
					  - Wireless → AT&T Mobility, LLC
					- Use corresponding AT&T legal entity fax
					  - Or "online tool" fax if applicable

AT&T wireless (includes Cingular, Cricket, GoPhone)	AT&T c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	AT&T Wireless Subpoena Compliance Center 11760 US Highway 1, Ste. 600 North Palm Beach FL 22408	(800) 291-4952	National Compliance (888) 938-4715 Wireless (877) 971-6093	Provide email for response AT&T will charge $40 per hour to process subpoena AT&T will accept email service at attmobility.ncc@att.com Additionally see AT&T Line notes regarding AT&T's "online tool."
Century Link	CenturyLink Communications LLC c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	Century Link Custodian of Records 5454 W. 110th Street Overland Park, KS 6621	(877) 451-1980	(844) 254-5800	- Offers cell service through Verizon - May be necessary to send subpoena to both CenturyLink and to Verizon Information Required for Subpoena - Phone number - Timeframe
Facebook (also accepts service for Instagram)	Facebook, Inc. c/o Corporation Service Company 327 Hillsborough Street Raleigh, NC 27603 Phone: (866) 403-5272	Facebook, Inc. Attn: Facebook LE Response Team 1601 Willow Road Menlo Park, CA 94025	(650) 543-4800	(650) 644-0239	Procedure - Contact via email (legal@facebook.com) or phone to inform them a request is coming. - Fax subpoena then follow-up with email copy and a paper copy - Facebook requires that its legal name of Facebook Inc. not Facebook.com be used Required Information for Subpoena - Facebook user ID or Group ID - If ID is unknown, give account email address Other Helpful Information for Subpoena - Full name - School or Networks - Date of birth - Known email addresses - AIM ID - Known phone numbers - Full address

					- URL to Facebook profile - Other known website - Known IP addresses <u>Information Available from Facebook</u> - User Neoprint - User Photoprint - User Contact Info - Group Contact Info - IP Logs
Google (including Gmail)	Google, Inc. c/o Corporation Service Company 327 Hillsborough Street Raleigh, NC 27603 Phone: (866) 403-5272	Google Inc. c/o Custodian of Records 1600 Amphitheatre Parkway Mountain View, CA 94043	(650) 253-3425	(650) 253-0001	Google will notify users before disclosure of any information. <u>Required Information for Subpoena</u> - Product/service requested - identify email address or unique identifier
Hotmail	Microsoft Corporation c/o Corporation Service Company 327 Hillsborough Street Raleigh, NC 27603 Phone: (866) 403-5272	Microsoft Corporation Online Services 1065 La Avenida, SVC4/1120 Mountain View, CA 94043	(425) 722-1299	(425) 708-0096	<u>Required Information</u> - Account requested
MagicJack (voIP phone service)	YMax Communication Corp. c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	MagicJack YMax Communications ATTN: Lorraine Fancher PO Box 6785 West Palm Beach, FL 33405	(561) 586-3380	(888) 762-2120	- http://www.magicjack.com - Lorrain.Fancher@ymaxcorp.com <u>Information Required for Subpoena</u> - Phone number - Timeframe - Requested information
MetroPCS	MetroPCS c/o Corporation Service Company 327 Hillsborough Street Raleigh, NC 27603 Phone: (866) 403-	MetroPCS Attn: Custodian of Records 2250 Lakeside Boulevard Richardson, TX 75782	(800) 571-1265	(972) 860-2635	<u>Information Required for Subpoena</u> - Phone number - Timeframe - Requested information <u>Email</u> <u>subpoenas@metropcs.com</u>

	5272				Procedure for Service of Process - Via fax or email is preferred * Call records are kept for 6 months * Text records are kept for 60 days
MySpace		Custodian of Records MySpace.com 407 N. Maple Drive Beverly Hills, CA 90210	(888) 309-1311	(310) 362-8854	Required Information for Subpoena - The "Friend ID" - Requested information Sample Language for Subpoena Records concerning the identify of the user with the Friend ID #### consisting of name, postal code, county, e-mail address, date of account creation, IP address at account sign-up, logs showing IP address and date stamps for account access, and the contents of private messages in the user's inbox, and sent mail folders. Compliance@support.myspace.com
Sprint (includes Virgin Mobile and Boost Mobile)	Sprint PCS Wireless Sprint Spectrum, L.P. c/o Corporation Service Company 327 Hillsborough Street Raleigh, NC 27603 Phone: (866) 403-5272	Sprint PCS Wireless Sprint Spectrum, L.P. 6160 Sprint Parkway Overland Park, KS 66251	Sprint Spectrum (800) 829-0965 Compliance HQ (913) 315-0660 ASAP Requests (913) 315-8774	Compliance HQ (913) 315-0736 (816) 600-3111 ASAP Requests (816) 600-3121	See manual for specific/additional information http://info.publicintelligence.net/SprintSubpoenaManual.pdf Trials and/or Appearances CSTrialTeam@sprint.com
Time Warner Cable/Road Runner	Time Warner Cable c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	Time Warner Cable Subpoena Compliance 13820 Sunrise Valley Drive Herndon, VA 20171	(703) 345-3422	(704) 697-4911	Time Warner Cable accepts service electronically subpoenainquiry@twcable.com For additional information about compliance policies see http://help.twcable.com/subpoena-compliance.html
T-Mobile	T-Mobile USA, Inc. c/o Corporation Service Company 327 Hillsborough Street	Subpoena Compliance Department 4 Sylvan Way Parsippany, NJ 07054	(973) 292-8911	(973) 292-8697	Information Required for Subpoena - Phone number - Timeframe - Requested information

	Raleigh, NC 27603 Phone: (866) 403-5272				Procedure for Service of Process - Via U.S. mail or fax
TracFone Wireless (including Straight Talk Wireless, Net10, Total Wireless, TelCel, and Safelink)	TracFone Wireless, Inc. c/o Corporate Creations Network Inc. 15720 Brixham Hill Avenue #300 Charlotte, NC 28277 Phone: (704) 248-2540	TracFone Wireless, Inc. Subpoena Compliance 9700 NW 112th Avenue Miami, FL 33178	(800) 810-7094	(305) 715-6932	Information Required for Subpoena - Phone number - Timeframe - Requested information Procedure for Service of Process - Via fax is preferred *Allow 7 – 10 days for processing of request
Twitter		Twitter, Inc. c/o Trust & Safety 1355 Market Street, Ste. 900 San Francisco, CA 94103		Attn: Trust & Safety (415) 222-9958	Required Information for Subpoena - Username and URL of Twitter profile - Details of specific information requested - Relationship of information to the investigation - Valid e-mail address so Twitter can contact you Service of Process Twitter accepts legal process ONLY from LEO delivered by mail or by fax Questions can be sent to: lawenforcement@twitter.com
U.S. Cellular		U.S. Cellular Subpoena Compliance Department One Pierce Place, Suite 800 Itasca, IL 60143	(630) 875-8270	(866) 669-0894	- Roaming partner with Verizon Information Required for Subpoena - Phone number - Timeframe - Very specific details re: requested information Procedure for Service of Process - Via U.S. mail or fax - subpoenacompliance@uscellular.com
Verizon (includes INpulse, Alltell, AirTouch, and Jitterbug services)	Cellco Partnership dba Verizon Wireless c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-	Cellco Partnership dba Verizon Wireless Custodian of Records 180 Washington Valley Road Bedminster, NJ 07921	(800) 451-5242	Subpoenas (888) 667-0028	Information Required for Subpoena - Phone number - Timeframe - Detailed description of information requested Procedure for Service of Process - Via fax is preferred

	2957 Phone: (919) 821-7139				
Vonage	Vonage Holdings Corp. c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	Vonage Holdings Corp. ATTN: Legal Affairs Administrator – Legal Department 23 Main Street Holmdel, NJ 07733	(732) 231-6705	(732) 202-5221	- http://www.vonage.com Email SubpoenaProcessTeam@vonage.com Information Required for Subpoena - Phone number - Timeframe - Requested information Procedure for Service of Process - Via U.S. mail or by fax
Yahoo!	Yahoo! Inc. c/o CT Corporation System 150 Fayetteville St., Box 1011 Raleigh, NC 27601-2957 Phone: (919) 821-7139	Yahoo! Inc. Compliance team 701 First Avenue Sunnyvale, CA 94089	408-349-3687	408-349-5400	Required Information for Subpoena - Username or email address

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

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

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

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

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

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

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

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

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

WHEREFORE, the Defendant moves the court:

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

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

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

This the _____ day of _____, 20____.

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

By: _____

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

CERTIFICATE OF SERVICE

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

This the _____ day of _____, 20_____.

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

By: _____

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

Sample Motions on IDS Website

Defendant's Records

Ex parte motion and order for jail records

Ex parte motion for production or records of Dorothea Dix Hospital

Ex Parte Motion and Order to Provide Defendant's Medical, Mental Health, and School Records to Defense Counsel

Request for release of juvenile records

Confidential Witness Records

Motion to obtain mental health records

Motion for production and inspection of confidential records

Working with Investigators and Experts

Ms. Jane Doe
Expert Document Log

Expert 1, George Corvin:

Date Sent	Records	Page #s	Method
5/17/2015	Police Reports, Ms. Doe UNC Medical Records, Mr. Doe UNC Medical Records	Discovery pp 1-527	DVD in US Mail
	Tennessee Medical Center Records	B65-B533	
	TMC Summary	PD Work Product	
	Police Body Cams & 911 Calls	From Disc 7 in Discovery	
	Body Cam Summary	PD Work Product	
	California Medical Center	B541-580	
	California Medical Center Summary	PD Work Product	
	Military Records	Discovery pp 2328 – 2374	
	Women's Prison	B2215-B2647	
12/8/15	Neurology Records	B2648-B2703	USB Flash Drive in person

NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
WAKE COUNTY		XX CRS XXXXX
STATE OF NORTH CAROLINA	)	
	)	
VS.	)	*EX PARTE* MOTION FOR
	)	FUNDS FOR DEFENSE EXPERT
DEFENDANT,	)	
	)	
Defendant.	)	

NOW COMES the Defendant, DEFENDANT, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, on an *ex parte* basis, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. §§ 7A-450(b), 7A-451, and 7A-454, as well as *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53 (1985), *State v. Ballard*, 333 N.C. 515 (1993) and *State v. Bates*, 333 N.C. 523 (1993), for an *Ex Parte* Order allocating funds to assist the defense in the evaluation and preparation of the defense of the Defendant. In Support of the foregoing *Ex Parte* Motion, the Defendant would show unto the Court as follows:

1. The Defendant is an indigent person charged in these matters with one count each of Attempted First-Degree Murder, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and First-Degree Arson.

2. The prosecution has alleged by indictment that on or about DATE, the Defendant allegedly attempted to kill, and assaulted with the intent to kill, ALLEGED VICTIM, by pouring gasoline on her and setting her on fire.

3. The prosecution has also alleged by indictment that the Defendant committed arson on DATE by willfully and maliciously burning ADDRESS, the home of the Defendant and the alleged victim.

4. Based upon a review of the discovery provided to the defense thus far, undersigned counsel believes that the prosecution will call experts in the area of arson/fire investigation, from both local law enforcement and the NC State Bureau of Investigation, to testify on behalf of the State.

5. Based upon interviews with the Defendant and upon information and evidence gathered in the investigation of these matters, the undersigned attorney has determined that in order to properly investigate the

allegations made against the Defendant and to insure that the Defendant is provided with effective assistance of counsel, the defense must be provided with monetary funding for the retention of the services of an expert in the field of arson/fire investigation.

6. Undersigned counsel lacks the necessary expertise to determine from the physical evidence and the law enforcement/fire department investigation in this case, whether or not the prosecution's claims, that the Defendant assaulted and attempted to murder the alleged victim by pouring gasoline on her and setting her on fire, are meritorious.

7. Undersigned counsel lacks the necessary expertise to determine from the physical evidence and the law enforcement/fire department investigation in this case, whether or not the prosecution's claim, that the Defendant committed the crime of arson as alleged in the indictment, is meritorious

8. Due to the fact that the undersigned counsel lacks the necessary expertise required to determine whether the prosecution's allegations are meritorious, and due to the fact that the prosecution appears likely to call its own experts to testify on behalf of the State, the Court should provide the Defendant with funding to retain the services of an arson/fire investigation expert to examine the evidence in this case and render any assistance available to the defense.

9. Denial of funding to the Defendant under the circumstances such as those existing in the present case would amount to a violation of, at the least, the Defendant's right to effective assistance of counsel, due process, and compulsory due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53 (1985); *Williams v. Martin*, 618 F.2d 571 (4th Cir. 1980); *Jacobs v. United States*, 350 F.2d 571 (4th Cir. 1965); *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967); *State v. Ballard*, 333 N.C. 515 (1983); *State v. Bates*, 333 N.C. 523 (1993).

10. Undersigned counsel has contacted an expert in the field of arson/fire investigation. The expert is _____. _____ is the Vice-President and Principal Engineer for _____. _____ charges a fee of $200.00 per hour. Upon information and belief, _____ has assisted other Defendants in NC charged with arson/fire related crimes, and other defense counsel, in the evaluation and assessment of said charges.

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

1. That this Honorable Court issue an Order authorizing counsel for the Defendant to retain the services of the aforementioned expert in the field of arson/fire investigation for the purpose of evaluating and the prosecution's claims, as well as the opinions of the prosecution's experts, in an initial amount not to exceed $3,500.00 at a rate of $200.00 per hour unless further ordered by this Court;

2. That the State of North Carolina be required to pay the costs of the aforementioned expert's evaluation and assistance to the defense in accordance with the Order of the Court;

3. That this *Ex Parte* Motion and any Orders resulting from said *Ex Parte* Motion be sealed in the Court file of this case for appellate review and that said *Ex Parte* Motion and any Orders resulting from the same not be opened except upon order of this Court; and

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

This the __ day of _____ 2010.

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: [redacted]
Cheshire, Parker, Scheider, Bryan & Vitale
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone: [redacted]
Facsimile:
Email: [redacted]

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
WAKE COUNTY	FILE NOS: _____
STATE OF NORTH CAROLINA)	
)	
vs.)	EX PARTE MOTION FOR
)	FUNDS FOR PSYCHOLOGICAL
_____)	EXPERT
)	
Defendant.)	

NOW COMES the Defendant, _____, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Assistant Public Defender, and hereby moves this Honorable Court, on an ***ex parte*** basis, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. §§ 7A-450(b), 7A-451, and 7A-454, as well as ***Ake v. Oklahoma***, 470 U.S. 68, 84 L.Ed.2d 53 (1985), ***State v. Ballard***, 333 N.C. 515 (1993) and ***State v. Bates***, 333 N.C. 523 (1993), for an Order allocating funds to assist the defense in the evaluation and preparation of the defense of the Defendant. In Support of the foregoing Motion, the Defendant would show unto the Court as follows"

1. The Defendant is an indigent person charged with one count of Attempted 2nd Degree Rape.

2. Based upon interviews with the Defendant and upon information and evidence gathered in the investigation of these matters, the undersigned attorney has determined that an evaluation of the Defendant by an expert in the field of neuropsychology is necessary to determine whether, at the time of the alleged offenses, the Defendant was insane and/or able to comprehend the consequences of his actions, whether his capacity to conform his conduct to the requirements of the law was impaired, and to identify and provide expert testimony as to statutory and non-statutory mitigating factors in the event the defendant is convicted of any crime.

3. Further, an evaluation by a neuropsychologist is necessary to determine the extent to which the Defendant suffers from brain damage. It has been documented that the Defendant has brain damage, however, the extent of the brain damage and the areas of damage have not been determined. The testing available through a neuropsychologist should be able to help determine the extent and location of the brain damage.

4. The Defendant's attorney lacks the necessary expertise to determine the

existence of any such disorders or defects which may be crucial to the outcome of the Defendant's cases. Counsel is in need of the assistance of a neuropsychologist to assist the defense in evaluating the possibility of the existence of such psychiatric conditions and the importance they may have in defending the Defendant against the charges or in sentencing.

5. The Defendant has obtained funds from the Court for the employment of a psychiatrist who is in the process of evaluating the Defendant. However, the psychiatrist's evaluation will be limited in that the psychiatrist is not the individual to give tests to the Defendant to determine the existence of any mental health problems and/or brain damage.

6. Denial of funding to the Defendant under the circumstances such as those existing in the present case would amount to a violation of, at least, the Defendant's right to effective assistance of counsel, due process, and compulsory due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. ***Ake v. Oklahoma***, 470 U.S. 68, 84 L.Ed.2d 53 (1985); ***Williams v. Martin***, 618 F.2d 571 (4th Cir. 1980); ***Jacobs v. United States***, 350 F.2d 571 (4th Cir. 1965); ***Hintz v. Beto***, 379 F.2d 937 (5th Cir. 1967); ***State v. Ballard***, 333 N.C. 515 (1983); ***State v. Bates***, 333 N.C. 523 (1993).

7. Undersigned counsel has already contacted a forensic neuropsychologist that undersigned counsel has retained for similar work in the past. The forensic psychiatrist is _____ of Durham, NC. Dr. _____ practices in the field of forensic neuropsychology and has assisted undersigned counsel, and other defense counsel, in the evaluation and assessment of clients. She has been admitted to testify as an expert in the field of forensic neuropsychology in several capital and non-capital trials throughout this State. She charges a fee of $300 per hour. She has indicated her willingness to provide undersigned counsel with the services needed.

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

1. That this Motion be treated as a verified affidavit for the purposes of all trials and hearings in this matter;

2. That this Honorable Court issue an Order authorizing counsel for the Defendant to retain the services of the aforementioned forensic neuropsychologist for the purpose of evaluating and the Defendant's mental capacity and assess sanity issues, in an initial amount no to exceed $3,500.00 at a rate of $300 per hour unless further ordered by this Court;

3. That the State of North Carolina be required to pay the costs of the

psychological evaluation and assessments in accordance with the Order of the Court;

4. That this Motion and any Orders resulting therefrom be sealed in the Court file of this case for appellate review and that said Motion and any Orders not be opened except upon order of this Court; and

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

This the _____ day of _____, 2007.

By:_____
Maitri "Mike" Klinkosum
Assistant Public Defender
Attorney for the Defendant
227 Fayetteville St. Mall, Suite 500
Raleigh, NC 27601
Telephone: (919) [redacted]
Facsimile: (919) [redacted]
Email: [redacted]

NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
WAKE COUNTY		XX CRS XXXXX
STATE OF NORTH CAROLINA	)	
	)	
VS.	)	*EX PARTE* MOTION FOR
	)	FUNDS FOR
DEFENDANT,	)	DEFENSE INVESTIGATOR
	)	
Defendant.	)	

NOW COMES the Defendant, ***Defendant***, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, on an *ex parte* basis, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. §§ 7A-450(b), 7A-451, and 7A-454, as well as Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed.2d 53 (1985), State v. Ballard, 333 N.C. 515 (1993) and State v. Bates, 333 N.C. 523 (1993), for an *Ex Parte* Order allocating funds to assist the defense in the evaluation and preparation of the defense of the Defendant. In Support of the foregoing *Ex Parte* Motion, the Defendant would show unto the Court as follows"

1. The Defendant is an indigent person charged in these matters with one count each of Attempted First-Degree Murder, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and First-Degree Arson.

2. The prosecution has alleged by indictment that on or about DATE, the Defendant allegedly attempted to kill, and assaulted with the intent to kill, ALLEGED VICTIM, by pouring gasoline on her and setting her on fire.

3. The prosecution has also alleged by indictment that the Defendant committed arson on DATE by willfully and maliciously burning ADDRESS, the home of the Defendant and the alleged victim.

4. Based upon a review of the discovery provided to the defense thus far, undersigned counsel believes that the prosecution intends to call several witnesses in this matter, including law enforcement and fire department investigation witnesses.

5. Based upon interviews with the Defendant and upon information and evidence gathered in the investigation of these matters, the undersigned attorney has determined that in order to properly investigate the

allegations made against the Defendant and to insure that the Defendant is provided with effective assistance of counsel, the defense must attempt to interview several witnesses involved in the investigation of the above-entitled action, as well as witnesses who, while not involved in the investigation itself, were questioned as part of the investigation.

6. Based upon the fact that undersigned counsel has a significant caseload, including several homicide cases, undersigned counsel is in need of investigative assistance in locating and interviewing the aforementioned witnesses.

7. In addition, were undersigned counsel required to interview the aforementioned witnesses himself, a very real possibility exists that undersigned counsel could unintentionally cause himself to become a witness in the trial of the above-referenced matter.

8. Based upon the foregoing, the Court should provide the Defendant with funding to retain the services of a private investigator to locate and interview witnesses and render any investigative assistance available to the defense.

9. Denial of funding to the Defendant under the circumstances such as those existing in the present case would amount to a violation of, at the least, the Defendant's right to effective assistance of counsel, due process, and compulsory due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. ***Ake v. Oklahoma***, 470 U.S. 68, 84 L.Ed.2d 53 (1985); ***Williams v. Martin***, 618 F.2d 571 (4th Cir. 1980); ***Jacobs v. United States***, 350 F.2d 571 (4th Cir. 1965); ***Hintz v. Beto***, 379 F.2d 937 (5th Cir. 1967); ***State v. Ballard***, 333 N.C. 515 (1983); ***State v. Bates***, 333 N.C. 523 (1993).

10. Undersigned counsel has contacted a private investigator, _____. Upon information and belief, _____ has assisted other defendants and defense attorneys in Wake County and the State of NC with the investigation of their cases and charges a fee of $55 per hour.

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

1. That this Honorable Court issue an Order authorizing counsel for the Defendant to retain the services of the aforementioned private investigator for the purposes of locating and interviewing witnesses in the above-referenced matter and rendering any investigative assistance available to the defense, in an initial amount no to exceed $3,500.00 at a rate of $55 per hour unless further ordered by this Court;

2. That the State of North Carolina be required to pay the costs of the aforementioned expert's evaluation and assistance to the defense in accordance with the Order of the Court;

3. That this *Ex Parte* Motion and any Orders resulting from said *Ex Parte* Motion be sealed in the Court file of this case for appellate review and that said *Ex Parte* Motion and any Orders resulting from the same not be opened except upon order of this Court; and

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

This the ___ day of _____ 2010.

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: [redacted]
Cheshire, Parker, Scheider, Bryan & Vitale
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone: (919) [redacted]
Facsimile: (919) [redacted]
Email: [redacted]

*344 N.C. 722, *; 477 S.E.2d 147, **;*
*1996 N.C. LEXIS 521, ****

STATE OF NORTH CAROLINA v. ELWIN ANEURIN JONES

No. 545A95

SUPREME COURT OF NORTH CAROLINA

344 N.C. 722; 477 S.E.2d 147; 1996 N.C. LEXIS 521

October 15, 1996, Heard In The Supreme Court
November 8, 1996, Filed

PRIOR HISTORY: **[***1]** Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Seay, J., at the 7 August 1995 Criminal Session of Superior Court, Wilkes County, upon a jury verdict finding defendant guilty of first-degree murder.

DISPOSITION: NEW TRIAL.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed from the judgment of the Criminal Session of Superior Court, Wilkes County (North Carolina), which imposed a sentence of life imprisonment upon a jury verdict finding defendant guilty of first-degree murder.

OVERVIEW: Defendant was tried for the first-degree murder of his estranged wife. Defendant contended that the trial court committed reversible error in denying his pretrial motion for the appointment of a psychiatric expert to assist in the preparation of his defense. The court ordered a new trial. The court determined that defendant's counsel demonstrated that the only defense he intended to raise or could have raised was that at the time of the killing, defendant suffered from diminished capacity. The court determined that there was sufficient evidence, which indicated that defendant suffered from mental illness and that he had suicidal inclinations. The court concluded that defendant made the requisite threshold showing that his mental capacity when the offense was committed would have been a significant factor at trial and that there was a reasonable likelihood that an expert would have been of material assistance in the preparation of his defense. The court noted that defendant was entitled to present information on defendant's mental state at the time of the murder to the jury in an intelligible manner so as to assist it in making an informed and sensible determination.

OUTCOME: The court reversed the judgment of the trial court, which convicted defendant of first-degree murder and imposed a life sentence. The court ordered a new trial.

CORE TERMS: murder, psychiatric expert, preparation, depression, threshold, killing, appointment, intent to kill, premeditation, medication, suicidal, defense counsel, prescribed, mental illness, mental processes, side effects, deliberation, counteract, requisite, violence, mental condition, pretrial, diminished capacity, reasonable likelihood, circumstances known, premeditated, psychiatric, inclinations, indigent, estranged wife

LEXISNEXIS® HEADNOTES ⊟ Hide

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

HN1 When an indigent defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. More Like This Headnote

Criminal Law & Procedure > Counsel > Costs & Attorney Fees

HN2 Upon a threshold showing of a specific need for expert assistance, the provision of funds for an expert is required. To make a threshold showing of specific need for the assistance of an expert, a defendant must demonstrate either that he will be deprived of a fair trial without expert assistance or that there is a reasonable likelihood that it will materially assist him in the preparation of his case. In determining whether a defendant makes the requisite threshold showing, the court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made. More Like This Headnote

HEADNOTES ⊞ Show

COUNSEL: Michael F. Easley, Attorney General, by Daniel F. McLawhorn, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.

JUDGES: WHICHARD, Justice.

OPINION BY: WHICHARD

OPINION

[*724] [147]** WHICHARD, Justice.

Defendant was tried noncapitally for the first-degree murder of his estranged wife, Lisa Jones. The jury found defendant guilty as charged. The trial court sentenced him to a mandatory term of life imprisonment.

The evidence presented at trial tended to show that in January 1994, defendant and his wife, Lisa Jones, lived in Richmond, Virginia. They were having marital difficulties, and defendant suffered from severe depression as a result. In February 1994 defendant went to see Dr. J. Daniel Foster for advice and treatment concerning his mental condition. Dr. Foster found

defendant to be suffering from depression and hypertension and prescribed **[***2]** the medication Prozac. The Prozac made defendant nervous and unable to sleep, so Dr. Foster prescribed additional drugs to counteract its side effects.

Sometime in February, Lisa told defendant that she no longer loved him and wished to separate. In March the two had a heated argument in the course of which defendant threatened to kill himself, pulled out a gun, and fired a shot. On 1 June 1994 Lisa obtained a restraining order barring defendant from their apartment. Shortly thereafter, defendant left for Europe. When he returned, he learned that Lisa had moved to **[**148]** Wilkesboro, North Carolina, due to a job transfer. He further learned that she was accompanied by her daughter and by Ed Jordan, a man with whom she had forged a close personal relationship.

Defendant went to Wilkesboro in pursuit of Lisa. On 23 July 1994 defendant followed her from her hotel towards the K-Mart where she worked. He caught up with her in a parking lot near Wal-Mart and asked if they could work things out, to which Lisa replied that their relationship was over. Defendant then asked her if it was true that Ed Jordan had been staying at their apartment while defendant was out of town. Lisa responded that it **[***3]** was. She then drove away.

Defendant followed Lisa to the K-Mart. Once there, he parked and walked over to her car. He opened the door, grabbed Lisa by the neck, and fired multiple shots into the back of her head. Defendant immediately fled the scene. He was apprehended six months later in Calhoun, Georgia.

Defendant contends the hearing court committed reversible error in denying his pretrial motion for the appointment of a psychiatric expert to assist in the preparation of his defense. We agree.

[*725] Defense counsel filed a written pretrial motion requesting the appointment of a psychiatric expert to evaluate defendant's mental condition. On 24 April 1995 Judge Julius Rousseau conducted an *ex parte* hearing on the motion. At the hearing defense counsel argued that he had a medical statement from Dr. Foster in Richmond establishing that defendant had been treated for depression and suicidal tendencies in the months preceding the murder. Counsel further noted that defendant had no history of violence or criminal activity of any sort prior to this incident. He concluded that without professional evaluation of defendant's mental state at the time of this crime, defendant could not **[***4]** be provided a proper and adequate defense.

In response Judge Rousseau stated that a particularized need for an expert had to be shown and that defendant's motion had fallen short of meeting that threshold. He left the motion open with instructions for defense counsel to file a supplementary supporting affidavit demonstrating a particularized need for a psychiatric expert.

The hearing resumed on 2 May 1995. At that time defense counsel presented his own affidavit, wherein he stated in part:

> I believe that a psychological evaluation of the Defendant is absolutely necessary for me to properly defend him. The Defendant is charged with first degree murder in this case and has absolutely no history of criminal or violent behavior. Prior to the alleged murder, the Defendant had been treated by Dr. J. Daniel Foster of Richmond, Virginia for depression and other medical problems. On or about the time of the alleged murder, the Defendant was taking Prozac as prescribed by Dr. Foster, as well as other medications. These medications may have had an effect on the Defendant's mentality or behavior at the time of said murder. The Defendant has advised Counsel that he had no intent or **[***5]** premeditation with respect to the alleged murder, and further, that the mental processes which controlled his behavior at that time were not within his own control. Based on the history of the Defendant given to Counsel, he has made a number of suicide attempts both before

> and after the alleged murder.
>
> . . . Evaluation is crucial to my defending the Defendant in that his entire defense in this case may revolve around the question of whether there was premeditation and deliberation.

Attached to the affidavit were copies of three pages of medical notes from Dr. Foster, documenting his treatment of defendant for **[*726]** mental illness from 11 February 1994 until 17 May 1994. According to the notes, defendant suffered from depression as a result of family stress and marital discord. He had frequent suicidal ideations and felt like he "[was] falling apart." He had difficulty sleeping and was described as "listless, agitated and hostile." Over the course of his treatment, defendant lost seventeen pounds. At each visit, Dr. Foster prescribed Prozac in an attempt to stabilize defendant's mental condition.

Judge Rousseau subsequently denied defendant's motion for the appointment **[***6]** of a **[**149]** psychiatric expert. He made no findings of fact or conclusions of law.

Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985), and our cases decided pursuant to *Ake*, compel the conclusion that the hearing court erred in denying defendant's motion for a psychiatric expert to assist in the preparation of his defense. In *Ake*, the United States Supreme Court held:

> *HN1*When a[n indigent] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83, 84 L. Ed. 2d at 66. This Court, following *Ake*, has required, *HN2*upon a threshold showing of a specific need for expert assistance, the provision of funds for an expert. *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988).

To make a threshold showing of specific need for the assistance of an expert, a defendant must demonstrate either that he will be deprived of a fair trial without expert assistance or that there is a reasonable likelihood **[***7]** that it will materially assist him in the preparation of his case. *State v. Phipps*, 331 N.C. 427, 446, 418 S.E.2d 178, 187 (1992). In determining whether a defendant has made the requisite threshold showing, the court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made. *State v. Gambrell*, 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986).

In this case, counsel for defendant clearly demonstrated to the hearing court that the only defense he intended to raise or could raise **[*727]** was that at the time of the killing, defendant suffered from diminished capacity and therefore may not have acted with premeditation and deliberation or the specific intent to kill. There was sufficient evidence before the court, in the form of Dr. Foster's dated medical notes, indicating that defendant suffered from mental illness, particularly depression, and that he had suicidal inclinations. Defendant was being treated with Prozac, a psychotropic drug, as well as other drugs to counteract the side effects of the Prozac. He had been taking this medication for more than five months prior to the killing, with only variable results. Defendant **[***8]** had no history of prior violence, and it was evident that his homicidal conduct in this instance was inconsistent with this prior history. Defense counsel presented his own affidavit wherein, under oath, he stated that defendant admitted to not being in control of his mental processes at the time of the murder and had advised counsel that he had no premeditated intent to kill.

We conclude that, under all the facts and circumstances known at the time the motion for psychiatric assistance was ruled upon, defendant had made the requisite threshold showing that

his mental capacity when the offense was committed would be a significant factor at trial and that there was a reasonable likelihood that an expert would be of material assistance in the preparation of his defense. Defendant's mental state at the time of the murder was the only triable issue of fact in this case. He was entitled to present information on this issue to the jury in an intelligible manner so as to assist it in making an informed and sensible determination. He must therefore be given a new trial at which the court must, upon the threshold showing of need made here, appoint a psychiatric expert for the purpose of evaluating **[***9]** defendant and assisting him in preparing and presenting his defense.

In view of our disposition of this issue and the improbability that the other errors assigned will recur upon retrial, we find it unnecessary to address defendant's remaining arguments.

NEW TRIAL.

Service: **Get by LEXSEE®**
Citation: **344 N.C. 722**
View: Full
Date/Time: Friday, April 20, 2012 - 11:59 AM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
WAKE COUNTY	**FILE NOS: _____**
STATE OF NORTH CAROLINA	)
	)
vs.	) **EX PARTE MOTION FOR**
	) **FUNDS FOR PSYCHOLOGICAL**
_____	) **EXPERT**
	)
Defendant.	)

NOW COMES the Defendant, **_____**, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Assistant Public Defender, and hereby moves this Honorable Court, on an ***ex parte*** basis, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. §§ 7A-450(b), 7A-451, and 7A-454, as well as ***Ake v. Oklahoma***, 470 U.S. 68, 84 L.Ed.2d 53 (1985), ***State v. Ballard***, 333 N.C. 515 (1993) and ***State v. Bates***, 333 N.C. 523 (1993), for an Order allocating funds to assist the defense in the evaluation and preparation of the defense of the Defendant. In Support of the foregoing Motion, the Defendant would show unto the Court as follows"

1. The Defendant is an indigent person charged with one count of Attempted 2nd Degree Rape.

2. Based upon interviews with the Defendant and upon information and evidence gathered in the investigation of these matters, the undersigned attorney has determined that an evaluation of the Defendant by an expert in the field of neuropsychology is necessary to determine whether, at the time of the alleged offenses, the Defendant was insane and/or able to comprehend the consequences of his actions, whether his capacity to conform his conduct to the requirements of the law was impaired, and to identify and provide expert testimony as to statutory and non-statutory mitigating factors in the event the defendant is convicted of any crime.

3. Further, an evaluation by a neuropsychologist is necessary to determine the extent to which the Defendant suffers from brain damage. It has been documented that the Defendant has brain damage, however, the extent of the brain damage and the areas of damage have not been determined. The testing available through a neuropsychologist should be able to help determine the extent and location of the brain damage.

4. The Defendant's attorney lacks the necessary expertise to determine the

existence of any such disorders or defects which may be crucial to the outcome of the Defendant's cases. Counsel is in need of the assistance of a neuropsychologist to assist the defense in evaluating the possibility of the existence of such psychiatric conditions and the importance they may have in defending the Defendant against the charges or in sentencing.

5. The Defendant has obtained funds from the Court for the employment of a psychiatrist who is in the process of evaluating the Defendant. However, the psychiatrist's evaluation will be limited in that the psychiatrist is not the individual to give tests to the Defendant to determine the existence of any mental health problems and/or brain damage.

6. Denial of funding to the Defendant under the circumstances such as those existing in the present case would amount to a violation of, at least, the Defendant's right to effective assistance of counsel, due process, and compulsory due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. ***Ake v. Oklahoma***, 470 U.S. 68, 84 L.Ed.2d 53 (1985); ***Williams v. Martin***, 618 F.2d 571 (4th Cir. 1980); ***Jacobs v. United States***, 350 F.2d 571 (4th Cir. 1965); ***Hintz v. Beto***, 379 F.2d 937 (5th Cir. 1967); ***State v. Ballard***, 333 N.C. 515 (1983); ***State v. Bates***, 333 N.C. 523 (1993).

7. Undersigned counsel has already contacted a forensic neuropsychologist that undersigned counsel has retained for similar work in the past. The forensic psychiatrist is _____ of Durham, NC. Dr. _____ practices in the field of forensic neuropsychology and has assisted undersigned counsel, and other defense counsel, in the evaluation and assessment of clients. She has been admitted to testify as an expert in the field of forensic neuropsychology in several capital and non-capital trials throughout this State. She charges a fee of $300 per hour. She has indicated her willingness to provide undersigned counsel with the services needed.

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

1. That this Motion be treated as a verified affidavit for the purposes of all trials and hearings in this matter;

2. That this Honorable Court issue an Order authorizing counsel for the Defendant to retain the services of the aforementioned forensic neuropsychologist for the purpose of evaluating and the Defendant's mental capacity and assess sanity issues, in an initial amount no to exceed $3,500.00 at a rate of $300 per hour unless further ordered by this Court;

3. That the State of North Carolina be required to pay the costs of the

psychological evaluation and assessments in accordance with the Order of the Court;

4. That this Motion and any Orders resulting therefrom be sealed in the Court file of this case for appellate review and that said Motion and any Orders not be opened except upon order of this Court; and

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

This the _____ day of _____, 2007.

By:_____
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The Mechanics of Getting Your Own Expert

Materials prepared for 2015 Criminal Law Contractors Training at the UNC School of Government
June 12, 2015

Phillip R. Dixon, Jr., Attorney at Law
Caitlin Fenhagen, Deputy Capital Defender

Index of Materials

Statutes and Rules

1. North Carolina General Statute § 7A-450 – Indigency; Definition; Entitlement; Determination; Change of Status.
2. North Carolina General Statute § 7A-454 – Supporting Services
3. North Carolina General Statute § 7A-314 – Uniform Fees for Witnesses; Experts; Limit on Number
4. North Carolina General Statute § 15A-905 –Disclosure of Evidence by the Defendant
5. North Carolina Indigent Defense Services Rule 1.10 – Supporting Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level.

AOC and IDS Forms and Policies Regarding Expert Services for Non-Capital Criminal and Non-Criminal Cases and Potentially Capital Cases at the Trial Level

1. Form AOC-G-309 – Application and Order for Defense Expert Witness Funding in Non-Capital Criminal and Non-Criminal Cases at the Trial Level
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3. IDS Memorandum on Expert Fee and Expense Applications in Non-Capital Criminal and Non-Criminal Cases at the Trial Level
4. IDS Attorney Fee Application Policies in Non-Capital Criminal and Non-Criminal Cases at the Trial Level –Expert and Support Services. See pp. 10-11.
5. North Carolina Commission on Indigent Defense Services Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level – Assistance from Experts, Investigators, and Interpreters. See p. 8.

Sample Motions

1. Ex Parte Motion for Appointment of Expert (Arson)
2. Ex Parte Motion for Appointment of Expert (Forensic Neuropsychologist)
3. Ex Parte Motion for Appointment of Private Investigator

Relevant Case Law

1. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)
2. State v. Ballard, 333 N.C. 515, 428 S.E. 2d 178 (1993)
3. State v. Bates, 333 N.C. 523, 428 S.E. 2d 693 (1993)
4. State v. Tatum, 291 N.C. 73, 229 S.E. 2d 562 (1976)
5. State v. Jones, 344 N.C. 722, 477 S.E. 2d 147 (1996)

Chapter 5
Experts and Other Assistance

This chapter focuses on motions for funds for the assistance of an expert (including the assistance of an investigator). Such motions are most appropriate in felony cases. Other forms of state-funded assistance (such as interpreters) are discussed briefly at the end of this chapter.

Experts can assist the defense in various ways, including among other things:

- reviewing the discovery relevant to their expertise, including any materials prepared by the State's experts,
- identifying gaps in the discovery that has been produced and additional discovery that should be requested,
- evaluating the client's mental state for purposes of suppression motions, trial defenses, and sentencing,
- preparing for any hearing to exclude testimony by the State's expert witnesses,
- helping defense counsel prepare for cross-examination of the State's experts, and
- testifying before the jury.

5.1 Right to Expert

A. Basis of Right

Due process. An indigent defendant's right to expert assistance rests primarily on the due process guarantee of fundamental fairness. The leading case is *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985), in which the United States Supreme Court held that the failure to provide an expert to an indigent defendant deprived him of a fair opportunity to present his defense and violated due process. North Carolina cases, both before and after *Ake,* recognize that fundamental fairness requires the appointment of an expert at state expense on a proper showing of need. *See, e.g., State v. Tatum*, 291 N.C. 73 (1976).

Other constitutional grounds. Other constitutional rights also may support appointment of an expert for an indigent defendant, including equal protection and the Sixth Amendment right to effective assistance of counsel. *See Ake*, 470 U.S. at 87 n.13 (because its ruling was based on due process, court declined to consider applicability of equal protection clause and Sixth Amendment); *State v. Ballard*, 333 N.C. 515 (1993) (Sixth Amendment right to assistance of counsel entitles defendant to apply ex parte for appointment of expert).

State constitutional provisions, such as article I, section 19 (law of the land) and article I, section 23 (rights of accused), also may support appointment of an expert. *See generally State v. Trolley,* 290 N.C. 349, 364 (1976) (law of the land clause requires that

administration of justice "be consistent with the fundamental principles of liberty and justice"); *State v. Hill*, 277 N.C. 547, 552 (1971) (under article I, section 23, "accused has the right to have counsel for his defense and to obtain witnesses in his behalf").

Statutory grounds. Section 7A-450(b) of the North Carolina General Statutes (hereinafter G.S.) provides that an indigent defendant is entitled to the assistance of counsel and other "necessary expenses of representation." Necessary expenses include expert assistance. *See State v. Tatum*, 291 N.C. 73 (1976); G.S. 7A-454 (authorizing payment of fees and other expenses for expert witnesses and other witnesses for an indigent person).

IDS rules. The Rules of the N.C. Commission on Indigent Defense Services (IDS Rules) recognize the right of an indigent defendant to expert assistance when needed and incorporate procedures for obtaining funding, discussed throughout this chapter. The IDS Rules reinforce a defendant's constitutional and statutory rights to an expert; they do not alter them.

B. Breadth of Right

The North Carolina courts have recognized that a defendant's right to expert assistance extends well beyond the specific circumstances presented in *Ake*, a capital case in which the defendant requested the assistance of a psychiatrist for the purpose of raising an insanity defense and contesting aggravating factors at sentencing.

Type of case. On a proper showing of need, an indigent defendant is entitled to expert assistance in both capital and noncapital cases. *See State v. Ballard*, 333 N.C. 515 (1993) (right to expert in noncapital murder case); *State v. Parks*, 331 N.C. 649 (1992) (right to expert in non-murder case).

Type of expert. An indigent defendant is entitled to any form of expert assistance necessary to his or her defense, not just the assistance of a psychiatrist. *See Ballard*, 333 N.C. 515, 518 (listing some of the experts considered by the North Carolina courts); *State v. Moore*, 321 N.C. 327 (1988) (defendant entitled to appointment of psychiatrist and fingerprint expert in same case).

Stage of case. A defendant has the right to the services of an expert on pretrial issues, such as suppression of a confession, as well as on issues that may arise in the guilt-innocence and sentencing phases of a trial or in post-conviction proceedings. *See State v. Taylor*, 327 N.C. 147 (1990) (recognizing right to expert assistance in post-conviction proceedings); *Moore*, 321 N.C. 327 (right to psychiatrist for purpose of assisting in preparation and presentation of motion to suppress confession); *State v. Gambrell*, 318 N.C. 249 (1986) (right to psychiatrist for both guilt and sentencing phases); *see also United States v. Cropp*, 127 F.3d 354 (4th Cir. 1997) (indigent defendant has right to gather psychiatric evidence relevant to sentencing, and trial judge may authorize psychiatric evaluation for this purpose).

Other cases in which a defendant has the right to expert assistance. For a discussion of the right to expert assistance in abuse, neglect, and dependency cases, see KELLA W. HATCHER, JANET MASON & JOHN RUBIN, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA § 2.5E, at 44–45 (Funds for Experts and Other Expenses) (UNC School of Government, 2011), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/andtpr.pdf.

C. Right to Own Expert

Under *Ake* and North Carolina case law, a defendant has the right to an expert *for the defense*, not merely an independent expert employed by the court. *See Ake*, 470 U.S. at 83 (defendant has right to psychiatrist to "assist in evaluation, preparation, and presentation of the defense"); *Gambrell*, 318 N.C. 249 (recognizing requirements of majority opinion in *Ake*); *see also Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990) (stating the "right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate"). Thus, the defense determines the work to be performed by the expert (although not, of course, the expert's conclusions).

The courts have stopped short of holding that a defendant has a constitutional right to choose the individual who will serve as his or her expert. *See Ake*, 470 U.S. at 83 (defendant does not have constitutional right to choose particular psychiatrist or to receive funds to hire his or her own expert); *State v. Campbell*, 340 N.C. 612 (1995) (on defendant's motion for psychiatric assistance, no error where trial court appointed state psychiatrist who had performed earlier capacity examination); *see also Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970) (error to appoint FBI as investigator for defendant, as FBI had inescapable conflict of interest). However, trial judges generally allow the defendant to hire an expert of his or her choosing.

5.2 Required Showing for Expert

To obtain the services of an expert at state expense, a defendant must be (1) indigent and (2) in need of an expert's assistance. The procedure for applying for an expert differs in noncapital and capital cases, discussed *infra* in § 5.3, Applying for Funding, but the basic showing is the same.

A. Indigency

To qualify for a state-funded expert, the defendant must be indigent or at least partially indigent. Defendants represented by a public defender or other appointed counsel easily meet this requirement, as the court already has determined their indigency. A defendant able to retain counsel also may be considered indigent for the purpose of obtaining an expert if he or she cannot afford an expert's services. *See State v. Boyd*, 332 N.C. 101 (1992) (trial court erred in refusing to consider providing expert to defendant who was

able to retain counsel); *see also State v. Hoffman*, 281 N.C. 727, 738 (1972) (an indigent person is "one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense").

A third party, such as a family member, may contribute funds for support services, such as the assistance of an expert, for an indigent defendant. *See* IDS Rule 1.9(e) & Commentary (prohibiting outside compensation for appointed attorneys beyond fees awarded in case, but permitting outside funds for support services).

B. Preliminary but Particularized Showing of Need

An indigent defendant must make a "threshold showing of specific necessity" to obtain the services of an expert. A defendant meets this standard by showing either that:

- he or she will be deprived of a fair trial without the expert's assistance; or
- there is a reasonable likelihood that the expert will materially assist the defendant in the preparation of his or her case. *See State v. Parks*, 331 N.C. 649 (1992) (finding that formulation satisfies requirements of *Ake*); *State v. Moore*, 321 N.C. 327 (1988) (defendant must show either of above two factors).

The cases emphasize both the preliminary *and* particularized nature of this showing. Thus, a defendant need not make a "prima facie" showing of what he or she intends to prove at trial; nor must the defendant's evidence be uncontradicted. *See, e.g.*, *Parks*, 331 N.C. 649 (defendant need not make prima facie showing of insanity to obtain expert's assistance; defendant need only show that insanity likely will be a significant factor at trial); *State v. Gambrell*, 318 N.C. 249, 256 (1986) (court should not base denial of psychiatric assistance on opinion of one psychiatrist "if there are other facts and circumstances casting doubt on that opinion"); *Moore*, 321 N.C. 327, 345 (defendant need not "discredit the state's expert witness before gaining access to his own").

A defendant must do more, however, than offer "undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985); *see also State v. Mills*, 332 N.C. 392, 400 (1992) (explaining that "[m]ere hope or suspicion that favorable evidence is available" is insufficient to support motion for expert assistance (citation omitted)); *State v. Speight*, 166 N.C. App. 106 (2004) (trial court did not err in denying funds for medical expert and accident reconstruction expert where defendant made unsupported and admittedly speculative assertions), *aff'd as modified*, 359 N.C. 602 (2005), *vacated on other grounds*, *North Carolina v. Speight*, 548 U.S. 923 (2006). In short, defense counsel may need to make a fairly detailed, but not conclusive, showing of need.

5.3. Applying for Funding

Since the creation of the Office of Indigent Defense Services (IDS) in 2000, the procedures for applying for funding have become more regularized. IDS has adopted

form applications for funding, rates of compensation, and procedures for payment. This section reviews the basic procedures for applying for funding. Additional resources are available on the IDS website (www.ncids.org) under the links for "Information for Counsel" and "Information for Experts."

A. Noncapital Cases

In non-capital cases (as well as non-criminal cases, such as juvenile delinquency cases), application for funding for expert assistance, investigators, and other related services is to the court. Compensation rates for expert witnesses paid from funds managed by the Office of Indigent Defense Services may not be higher than the rates set by the Administrative Office of the Courts (AOC) for expert witnesses paid from AOC funds. *See* G.S. 7A-498.5(f).

Two form applications for funding are available. A more detailed supporting motion should accompany the application. One form application contains standard compensation rates; the other requests a deviation from the standard rate. *See* AOC Form AOC-G-309, "Application and Order for Defense Expert Witness Funding in Non-Capital Criminal and Non-Criminal Cases at the Trial Level" (June 2012), *available at* www.nccourts.org/Forms/Documents/1265.pdf; AOC Form AOC-G-310, "Defense Petition for Expert Hourly Rate Deviation in Non-Capital Criminal and Non-Criminal Cases at the Trial Level and IDS Approval or Denial (June 2012), *available at* www.nccourts.org/Forms/Documents/1266.pdf. The forms state that they should be used in noncapital cases for all requests for funding for expert services except for certain flat fee services, such as lab tests. Counsel still must obtain prior approval from the court for funding for such services.

Because of the detail that counsel may need to provide, counsel should ordinarily ask to be heard ex parte on a motion for expert funding. *See infra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases.

B. Capital Cases

In capital cases, requests for expert funding are governed by Part 2D of the IDS Rules. A "capital" case is defined as any case that includes a charge of first-degree murder or an undesignated degree of murder, except cases in which the defendant was under 18 years of age at the time of the offense and therefore ineligible for the death penalty. *See* IDS Rule 2A.1. Counsel first must apply to the Director of IDS or his or her designee for authorization to retain and pay for an expert. The director's designee for requests for expert funding in capital cases is the Capital Defender. Counsel must apply in writing, and the request should be as specific as the motion required under *Ake* and G.S. 7A-450(a). Applications to IDS for funding in capital cases are automatically ex parte and confidential. *See* IDS Rule 2D.2. Counsel should use the form request developed by IDS. *See* Form IDS-028, "Ex Parte Request for Expert Funding: Potentially Capital Cases at the Trial Level" (June 2012), *available at*

www.ncids.org/Forms&Applications/Capital_Trial_Forms/%28ids28%29ExpertRequest.pdf.

If IDS does not approve a request for expert funding in a capital case, counsel then may apply to the court in which the case is pending; counsel must attach to the application a copy of IDS's notice of disapproval and a copy of counsel's original request. If application to the court is necessary, counsel should apply ex parte. Counsel must send to IDS a copy of any court order approving expert funds. If counsel discovers new or additional information relevant to the request, counsel should submit a new application to IDS before submitting a request to the court.

C. Inmate Cases

In cases in which IDS provides counsel in cases pursuant to the State's obligation to provide inmates with legal assistance and access to the courts (*see infra* § 12.1A, Right to Appointed Counsel), requests for funds for experts go to IDS. The procedure is similar to the procedure for obtaining funds in capital cases, discussed above. *See* IDS Rule 4.6.

5.4 Components of Request for Funding

A. Generally

This section discusses potential ingredients of a motion for funds for an expert. Many of these ingredients are now included in the form applications for expert funding, referenced *supra* in § 5.3, Applying for Funding. Some of these components, such as a more detailed description of and justification for the work to be performed, should be included in the supporting motion.

In motions to a judge in a noncapital case, some defense attorneys make a detailed showing in the motion itself; others make a relatively general showing in the motion and present the supporting reasons and evidence (documents, affidavits, counsel's own observations, etc.) when making the motion to the judge. In either event, counsel should be prepared to present all of the supporting evidence to make the request as persuasive as possible and to preserve the record for appeal.

The exact showing will vary with the type of expert sought. For a discussion of different types of experts, see *infra* § 5.6, Specific Types of Experts. Sample motions for experts are available on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

B. Area of Expertise

Defense counsel should specify the particular kind of expert needed (e.g., psychiatrist, pathologist, fingerprint expert, etc.). A general description of a vague area of expertise may not be sufficient. *See, e.g.*, *State v. Johnson*, 317 N.C. 193 (1986) (trial court did not

err in denying general request for "medical expert" to review medical records, autopsy reports, and scientific data). Although a defendant may obtain more than one type of expert on a proper showing, a blunderbuss request for several experts is unlikely to succeed. *See, e.g.*, *State v. Mills*, 332 N.C. 392 (1992) (characterizing motion as fanciful "wish list" and denying in entirety motion for experts in psychiatry, forensic serology, DNA identification testing, forensic chemistry, statistics, genetics, metallurgy, pathology, private investigation, and canine tracking).

C. Name of Expert

Counsel should determine the expert he or she wants to use before applying for funding. Identifying the expert (and describing his or her qualifications) not only authorizes payment to the expert if the motion is granted but also helps substantiate the need for expert assistance. A curriculum vitae can be included with the motion. Counsel should interview the prospective expert before making the motion, both to determine his or her and suitability and availability for the case (before and during trial) and to obtain information in support of the motion.

Several sources may be helpful in locating suitable experts. Often the best sources of referrals are other criminal lawyers. In addition to public defender offices and private criminal lawyers, it may be useful to contact the Forensic Resource Counsel Office of IDS, www.ncids.com/forensic/experts/experts.shtml, which maintains a database of forensics experts; the Trial Resource Unit of IDS, www.ncids.org, and the Center for Death Penalty Litigation, www.cdpl.org, which work on capital cases but may have information about experts who would be helpful in noncapital cases; and organizations of criminal lawyers (such as the National Association of Criminal Defense Lawyers, www.nacdl.org, and National Legal Aid & Defender Association, www.nlada100years.org). Counsel also can look at university faculty directories, membership lists of professional associations, and professional journals for potential experts.

D. Amount of Funds

The actual relief requested in a motion for expert assistance is authorization to expend state funds to retain an expert. Counsel should specify the amount of money needed (based on compensation rate, number of hours required to do the work, costs of testing or other procedures, travel expenses, etc.) and should be prepared to explain the reasonableness of the amount. Counsel may reapply for additional funds as needed. The expert may not be paid if his or her time exceeds the preapproved amount.

Compensation rates for expert witnesses paid from IDS funds may not be higher than the rates set by the Administrative Office of the Courts (AOC) for expert witnesses paid from AOC funds under G.S. 7A-314(d). *See* G.S. 7A-498.5(f). Counsel therefore should find out from the potential expert whether he or she is willing to work within state rates. IDS may authorize a deviation from the standard rates when justified. The applicable form applications, referenced *supra* in § 5.3, Applying for Funding, contain the standard rates

and grounds for requesting a deviation. *See also* "Information for Experts" on the IDS website, www.ncids.org.

Practice note: The form application for funding in noncapital cases includes an order by the court authorizing a specified amount of money for the expert's services as well as a compensation calculator to be filled out by the expert on completion of the work. The expert submits the entire form to IDS for payment on completion of the work and provides a copy, along with an itemized time sheet, to defense counsel.

E. What Expert Will Do

Counsel should specifically describe the work to be performed by the expert—review of records, examination of defendant, interview of particular witnesses, testifying at trial, etc. Failure to explain what the expert will do may hurt the motion. *Compare State v. Parks*, 331 N.C. 649 (1992) (trial court erred in denying motion for psychiatric assistance where defendant intended to raise insanity defense and needed psychiatrist to evaluate his condition, testify at trial, and counter opinion of State's expert), *with State v. Wilson*, 322 N.C. 117 (1988) (motion denied where defendant indicated only that assistance of psychologist might be helpful to him in preparing his defense).

F. Why Expert's Work Is Necessary

This part is the most fluid—and by far the most critical—part of a showing of need. *See generally State v. Jones*, 344 N.C. 722, 726 (1996) (to determine the requisite showing, the "court should consider all the facts and circumstances known to it at the time the motion" is made (citation omitted)). Although there are no rigid rules on what to present, consider doing the following:

- Identify the issues that you intend to pursue and that you need expert assistance to develop. To the extent then available, provide specific facts supporting your position on those issues. For example, if you are considering a mental health defense, describe the evidence supporting the defense. *See, e.g.*, *Parks*, 331 N.C. 649 (court found persuasive the nine circumstances provided in support of request, including previous diagnosis of defendant and counsel's own observations of and conversations with defendant).
- Emphasize the significance of the issues: the more central the issue, the more persuasive the assertion of need may be. *See, e.g.*, *Jones*, 344 N.C. 722 (1996) (defendant entitled to psychiatric expert because only possible defense to charges was mental health defense); *State v. Moore*, 321 N.C. 327 (1988) (defendant entitled to fingerprint expert where contested palm print was only physical evidence connecting defendant to crime scene).
- Deal with contrary findings by the State's experts. For example, if the State already has conducted an analysis of blood or other physical evidence, explain what a defense expert may be able to add. Although the cases state that the defendant need not show that the State's expert is wrong (*see Moore*, 321 N.C. 327), you can strengthen your

motion by pointing out areas of weakness in the State's analysis or at least areas where reasonable people might differ. Before making the motion, try to interview the State's expert and obtain any reports, test results, or other information that may support the motion. If the State's expert is uncooperative, that fact may bolster your showing.

- Explain why you cannot perform the tasks with existing resources and why you require special expertise or assistance. In some instances, the point is self-evident. *See, e.g.*, *Moore*, 321 N.C. 327 (defense could not challenge fingerprint evidence without fingerprint expert). In other instances, you may need to convince the court that the expert would bring unique abilities to the case. *See, e.g.*, *State v. Kilpatrick*, 343 N.C. 466 (1996) (defense failed to present any specific evidence or argument on why counsel needed assistance of jury selection expert in conducting voir dire).

G. Documentation

Counsel should provide documentary support for the motion—affidavits of counsel and prospective experts, information obtained through discovery, scientific articles, etc. How to present this evidence to minimize the risk of disclosure to the prosecution is discussed further in the next section.

5.5 Obtaining an Expert Ex Parte in Noncapital Cases

A. Importance of Ex Parte Hearing

Grounds to obtain ex parte hearing. In noncapital cases, the court hears requests for expert funding. Regardless of the type of expert sought, defense counsel should always ask that the court hear the motion ex parte—that is, without notice to the prosecutor and without the prosecutor present. In capital cases, applications for funding are made to IDS and are always ex parte; however, if IDS denies the application and the defendant requests funding from the court, the defendant should ask the court to hear the request ex parte. *See supra* § 5.3, Applying for Funding.

North Carolina first recognized the defendant's right to an ex parte hearing in *State v. Ballard*, 333 N.C. 515 (1993), and *State v. Bates*, 333 N.C. 523 (1993), which held that an indigent defendant is entitled to an ex parte hearing when moving for the assistance of a mental health expert. The court found that a hearing open to the prosecution would jeopardize a defendant's right to effective assistance of counsel under the Sixth Amendment because it would expose defense strategy to the prosecution and inhibit defense counsel from putting forward his or her best evidence. An open hearing also could expose privileged communications between lawyer and client (which the court found to be an essential part of the Sixth Amendment right to counsel) and force the defendant to reveal incriminating information (in violation of the Fifth Amendment privilege against self-incrimination). *See also State v. Greene*, 335 N.C. 548 (1994) (error to deny ex parte hearing on motion for mental health expert).

Although *Ballard* and *Bates* involved mental health experts, the reasoning of those cases supports ex parte hearings for all types of experts. Most judges now proceed ex parte as a matter of course if requested by the defendant. (Although earlier appellate cases in North Carolina found that the trial court did not abuse its discretion in refusing to hold an ex parte hearing (*see State v. White*, 340 N.C. 264 (1995); *State v. Garner*, 136 N.C. App. 1 (1999)), no reported appellate decision has addressed the issue recently.) If counsel must argue the point, he or she should emphasize the factors identified in *Ballard* and *Bates*—namely, that an open hearing could expose defense strategy and confidential attorney-client communications and impinge on the privilege against self-incrimination. The defendant need not meet the threshold for obtaining funding for an expert to justify the holding of an ex parte hearing. *See State v. White*, 340 N.C. 264, 277 (so stating); *see also State v. Phipps*, 331 N.C. 427, 451 (1992) (although the court denied defendant's motion for an ex parte hearing on a fingerprint identification expert, the court stated that there are "strong reasons" to hold all hearings for expert assistance ex parte); *United States v. Sutton*, 464 F.2d 552 (5th Cir. 1972) (per curiam) (trial court erred by failing to hold hearing ex parte, as required by federal law, on motion for investigator); *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970) (use of adversarial rather than ex parte hearing to explore defendant's need for investigator was error).

If request for ex parte hearing denied. If counsel cannot obtain an ex parte hearing, he or she must decide whether to make the motion for expert assistance in open court (and expose potentially damaging information to the prosecution) or forego the motion altogether (and give up the chance of obtaining funds for an expert). Some of the implications for appeal are discussed below. These principles may make it riskier for a trial court to refuse to hear a request for funding ex parte.

- If the defendant makes the motion in open court and the trial judge refuses to fund an expert, the defendant can argue on appeal that he or she could have made a stronger showing if allowed to do so ex parte. *See Bates*, 333 N.C. 523 (court finds it impossible to determine what evidence defendant might have offered had he been allowed to do so out of prosecutor's presence).
- If the defendant decides not to pursue the motion in open court, *Ballard* indicates that the defendant may not need to make an offer of proof to preserve for appellate review the trial judge's refusal to hold an ex parte hearing (*Ballard*, 333 N.C. 515, 523 n.2); nevertheless, counsel should ask to submit the supporting evidence to the trial court under seal.

Regardless of which way you proceed, make a record of the trial court's decision not to hear the motion ex parte.

B. Who Hears the Motion

After transfer of case to superior court. An ex parte motion for expert assistance in a noncapital case ordinarily may be heard by any superior court judge of the judicial district in which the case is pending. *Compare* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 25(2) (for capital motions for appropriate relief (MARs), rule requires that expert funding

requests made before filing of MAR and after denial of funding by IDS [discussed *supra* in § 5.3, Applying for Funding] be ruled on by senior resident judge or designee). Thus, any superior court judge assigned to hold court in the district ordinarily has authority to hear the motion, whether or not actually holding court at the time. *See* G.S. 7A-47 (in-chambers jurisdiction extends until adjournment or expiration of session to which judge is assigned). Any resident superior court judge also has authority to hear the motion, whether or not currently assigned to hold court in the district. *See* G.S. 7A-47.1 (resident superior court judge has concurrent jurisdiction with judges holding court in district to hear and pass on matters not requiring jury).

Before transfer of case to superior court. In some felony cases, a defendant may need an expert before the case is transferred to superior court. For example, in a case involving a mental health defense such as diminished capacity or insanity, which turns on the defendant's state of mind at the time of the offense, counsel may want to retain a mental health expert as soon after the offense as possible. Counsel should be able to obtain authorization for funding for an expert from a district court judge in that instance. *See State v. Jones*, 133 N.C. App. 448, 463 (1999), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000) (holding that before transfer of a felony case to superior court, the district court has jurisdiction to rule on preliminary matters, in this instance, production of certain medical records). The superior court also may have authority to hear the motion. *See State v. Jackson*, 77 N.C. App. 491 (1985) (court notes jurisdiction of superior court before indictment to enter commitment order to determine defendant's capacity to stand trial).

C. Filing, Hearing, and Disposition of Motion

In moving ex parte for funds for an expert in a noncapital case, counsel should keep in mind maintaining the confidentiality of the proceedings as well as preserving the record for appeal.

The motion papers and any other materials should be presented directly to the judge who will hear the matter. Ordinarily, a separate written motion requesting to be heard ex parte (in addition to the motion for funds for an expert) is unnecessary. The request to be heard ex parte and request for funding for an expert can be combined into a single motion. Sample motions can be found on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

If the judge hears the motion ex parte but denies funds for an expert, counsel may renew the motion upon obtaining additional supporting evidence. *See generally State v. Jones*, 344 N.C. 722 (1996) (after court initially denied motion for psychiatrist, counsel renewed motion and attached own affidavit that related his conversations with defendant and included medical notes of defendant's previous doctor; court erred in denying motion). If the motion ultimately is denied, obtain a court reporter and ask the judge to hear and rule on the motion on the record (but still in chambers). For purposes of appeal, it is imperative to present on the record all of the evidence and arguments supporting the motion. You should ask the judge to order that the motion, supporting materials, and

order denying the motion be sealed and that the court reporter not transcribe or disclose the proceedings except on the defendant's request.

If the motion is granted, counsel likewise should ask that the order and motion papers be sealed and preserved for the record. Be sure to keep a copy of the motion and order for your own files. Also provide a copy of the signed order to the expert, which is necessary for the expert to obtain payment for his or her work.

D. Other Procedural Issues

There is no time limit on a motion for expert assistance. *But cf. State v. Jones*, 342 N.C. 523 (1996) (defendant requested expert day before trial; belated nature of request and other factors demonstrated lack of need).

The defendant ordinarily does not need to be present at the hearing on the motion. *See State v. Seaberry*, 97 N.C. App. 203 (1990) (finding on facts that motion hearing was not critical stage of proceedings and that defendant did not have right to be present; court finds in alternative that noncapital defendants may waive right to be present and that this defendant waived right by not requesting to be present). For a further discussion of the right to presence, see 2 NORTH CAROLINA DEFENDER MANUAL § 21.1 (Right to Be Present) (UNC School of Government, 2d ed. 2012).

5.6 Specific Types of Experts

The legal standard for obtaining an expert is the same in all cases—that is, the defendant must make a preliminary showing of specific need—but application of the standard may vary with the type of expert sought. For example, in some cases the courts have found that the defendant did not make a sufficient showing of need for a jury consultant; however, these cases may have little bearing on the required showing for other types of assistance. The discussion below reviews cases involving requests for funding for different types of experts. For additional case summaries, see JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK at 44–48 (UNC School of Government, 3d ed. 2013).

A. Mental Health Experts

Case law. North Carolina case law is generally favorable to the defense on motions for mental health experts. On a number of occasions, the N.C. Supreme Court has reversed convictions for failure to grant the defense a mental health expert. *See, e.g., State v. Jones*, 344 N.C. 722 (1996); *State v. Parks*, 331 N.C. 649 (1992); *State v. Moore*, 321 N.C. 327 (1988); *State v. Gambrell*, 318 N.C. 249 (1986). *Compare, e.g., State v. Anderson*, 350 N.C. 152, 160–63 (1999) (defendant claimed that she needed a psychiatric expert to respond to the State's evidence and did not claim that her sanity at the time of the offense or apparently any other mental health issue was a significant factor in the case; court found that the request "was based on mere speculation of what trial tactic the

State would employ rather than the requisite showing of specific need"); *State v. Sokolowski*, 344 N.C. 428 (1996) (upholding denial of funding for psychiatric expert to develop insanity defense where defendant testified he did not want to plead insanity and relied on self-defense). These cases illustrate the kinds of information that counsel can and should marshal when moving for mental health experts (e.g., counsel's observations of and conversations with the client; treatment, social services, school, and other records bearing on client's mental health; etc.). *See also* Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Psychiatrist or Psychologist*, 85 A.L.R.4th 19 (1991).

If the defendant already has a psychological or psychiatric expert, he or she may need to make an additional showing to obtain funds for a more specialized mental health expert. *See State v. Page*, 346 N.C. 689 (1997) (upholding denial of funds for forensic psychiatrist when defendant had assistance of both a psychiatric and psychological expert and failed to make showing of need for more specialized expert); *State v. Rose*, 339 N.C. 172 (1994) (upholding denial of funds for neuropsychologist where defendant had already been examined by two psychiatrists); *State v. Reeves*, 337 N.C. 700 (1994) (upholding denial of funds for sexual disorder expert when defendant had assistance of psychiatric expert, who consulted with sexual disorder expert, and failed to show how specialized expert would have added to defense of case).

Impact of capacity examination. Cases involving mental health issues also may involve issues about the client's capacity to stand trial. In such cases, counsel should consider moving for funds for a mental health expert on all applicable mental health issues (defenses, mitigating factors, etc.), including capacity. *See supra* § 2.4, Obtaining an Expert Evaluation (discussing options for obtaining capacity evaluation). Once the expert has evaluated the client, counsel will be in a better position to determine whether there are grounds for questioning capacity.

Once counsel questions a client's capacity, the court may order a capacity examination at a state facility (i.e., Central Regional Hospital) or at a local mental health facility depending on the offense. *See supra* § 2.5, Examination by State Facility or Local Examiner. The impact of such an examination may vary.

- A state-conducted capacity examination may have no impact on a later motion for expert assistance. The courts have held that a capacity examination does not satisfy the State's obligation to provide the defendant with a mental health expert to assist with preparation of a defense. *See Moore*, 321 N.C. 327 (examination to determine capacity not substitute for mental health expert's assistance in preparing for trial); *see also Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) (psychiatry is "not . . . an exact science, and psychiatrists disagree widely and frequently").
- A capacity examination may lend support to a motion for a mental health expert, as it could show that the defendant, even if capable to proceed, suffers from some mental health problems.
- A capacity examination may undermine a later motion for a mental health expert as well as presentation of the defense in general. *See State v. Pierce*, 346 N.C. 471

(1997) (in finding that defendant had not made sufficient showing of need, court relied in part on findings from earlier capacity examination); *State v. Campbell*, 340 N.C. 612 (1995) (on motion for assistance of mental health expert, trial court appointed same psychiatrist who had earlier found defendant capable of standing trial); *see also supra* § 2.9, Admissibility at Trial of Results of Capacity Evaluation (evidence from capacity examination may be admissible to rebut mental health defense).

Victim's mental health. A defendant does not have the right to compel a victim to submit to a mental health examination; however, a defendant may be able to obtain funds for an expert to review mental health evaluations and records of the victim. *See State v. Horn*, 337 N.C. 449, 453–54 (1994). For a discussion of obtaining information about the victim's mental health, including the potential importance of first making a motion for a mental health examination of the victim, see *supra* § 4.4C, Examinations and Interviews of Witnesses.

B. Experts on Physical Evidence

Some favorable case law exists on obtaining experts on physical evidence. *See, e.g., State v. Bridges*, 325 N.C. 529 (1989); *State v. Moore*, 321 N.C. 327 (1988). In both cases, the only direct evidence connecting the defendant to the crime scene was physical evidence (fingerprints), and the only expert testimony was from witnesses for the State, not independent experts. In those circumstances, the defendants were entitled to their own fingerprint experts without any further showing of need. When physical evidence is not as vital to the State's case, counsel may need to make an additional showing of need for an expert. *See, e.g.*, *State v. Seaberry*, 97 N.C. App. 203 (1990) (ballistics evidence was important to State's case but was not only evidence connecting defendant to crime; defendant made insufficient showing of need for own ballistics expert).

If the defense needs more than one expert on physical evidence, counsel should make a showing of need as to each expert. *See, e.g., State v. McNeill*, 349 N.C. 634, 649–50 (1998) (finding that the defendant failed to make a sufficient showing for funds for a forensic crime-scene expert in addition to funds already authorized for investigator, fingerprint expert, and audiologist), *vacated sub nom. on other grounds*, *McNeill v. Branker*, 601 F. Supp. 2d 694 (E.D.N.C. 2009); *see also* Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Chemist, Toxicologist, Technician, Narcotics Expert, or Similar Nonmedical Specialist in Substance Analysis*, 74 A.L.R.4th 388 (1989); Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Fingerprint Expert*, 72 A.L.R.4th 874 (1989); Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Ballistics Experts*, 71 A.L.R.4th 638 (1989).

Concerns about the reliability of particular forensic tests and crime lab procedures in general may bolster a defense request for an expert on physical evidence. *See, e.g.*, State Crime Laboratory—Reports, Forms and Legislation, www.ncids.com/forensic/sbi/reports.shtml

(collecting documents indicating concerns about forensic tests and procedures in North Carolina). For additional assistance in identifying areas in which an expert on physical evidence would be useful as well as information about possible experts, defense counsel should contact IDS's Forensic Resource Counsel. For additional information about the resources available through the Forensic Resource Counsel's office, see www.ncids.com/forensic/index.shtml.

C. Investigators

Case law. The courts have adhered to the general legal standard for appointment of an expert when ruling on a motion for an investigator—that is, the defendant must make a preliminary showing of specific need. But, defendants sometimes have had difficulty meeting the standard because, until they get an investigator, they may not know what evidence is available or helpful. *See, e.g.*, *State v. McCullers*, 341 N.C. 19 (1995) (motion for investigator denied where defense presented no specific evidence indicating how witnesses may have been necessary to his defense or in what manner their testimony could assist defendant); *State v. Tatum*, 291 N.C. 73 (1976) (court states that defendants almost always would benefit from services of investigator; court therefore concludes that defendant must make clear showing that specific evidence is reasonably available and necessary for a proper defense). *See also State v. Potts*, 334 N.C. 575 (1993) (defendant entitled to funds for investigator on proper showing); Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Investigators*, 81 A.L.R.4th 259 (1990).

Points of emphasis. To the extent possible, counsel should forecast for the court the information that an investigator may be able to obtain. Thus, counsel should identify the witnesses to be interviewed, the information that the witnesses may have, and why the information is important to the defense. If the witness's name or location is unknown and the witness must be tracked down, indicate that problem. Identify any other tasks that an investigator would perform (obtaining documents, photographing locations, etc.).

Counsel also should indicate why he or she cannot do the investigative work. General assertions that counsel is too busy or lacks the necessary skills may not suffice. *See, e.g.*, *State v. Phipps*, 331 N.C. 427 (1992). Identify the obligations (case load, trial schedule, etc.) that prevent you from doing the investigative work. If you are an attorney in a public defender's office, indicate why your office's investigator is unable to do the investigation (e.g., investigator is unavailable, investigation requires additional resources, etc.). If the investigation requires special skills, indicate that as well. *See generally State v. Zuniga*, 320 N.C. 233 (1987) (defendant did not demonstrate language barrier requiring appointment of investigator). Remind the court that counsel ordinarily should not testify at trial to impeach a witness who has changed his or her story. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.7 (2003) (disapproving of lawyer acting as witness except in certain circumstances). Private counsel appointed to represent an indigent defendant also can point out that an investigator would cost the State less than if appointed counsel did the investigative work.

D. Other Experts

Selected appellate opinions on other types of expert assistance are cited below, but opinions upholding the denial of funds may not reflect the actual practice of trial courts, which may be more favorable to the defense. In addition to those listed below, trial courts have authorized funds for mitigation specialists, social workers, eyewitness identification experts, polygraph experts, DNA experts, handwriting experts, and others.

Medical experts. *See, e.g.*, *State v. Brown*, 357 N.C. 382 (2003) (trial court approved defendant's initial request for mental health expert; defendant not entitled to additional expert on physiology of substance induced mood disorder); *State v. Cummings*, 353 N.C. 281, 293–94 (2001) (upholding denial of funds for optometrist to demonstrate that defendant could not read *Miranda* waiver form); *State v. Penley*, 318 N.C. 30, 50–52 (1986) (defendant "arguably made a threshold showing" for medical expert, but for other reasons court finds no error in denial of funds).

Pathologists. *See, e.g.*, *Penley*, 318 N.C. 30, 50–52 (defendant "arguably made a threshold showing" for pathologist); *see also Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (error to deny pathologist).

Jury consultants. *See, e.g.*, *State v. Zuniga*, 320 N.C. 233 (1987) (jury selection expert denied; requested expert lacked skills for stated purpose); *State v. Watson*, 310 N.C. 384 (1984) (denial of expert to evaluate effect of pretrial publicity for purposes of moving to change venue and selecting jury; insufficient showing of need). *See also* Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Expert in Social Attitudes*, 74 A.L.R.4th 330 (1989).

Statisticians. *See, e.g.*, *State v. Moore*, 100 N.C. App. 217 (1990) (initial motion for statistical expert to analyze race discrimination in grand and petit juries granted; motion for funds for additional study denied), *rev'd on other grounds*, 329 N.C. 245 (1991).

5.7 Confidentiality of Expert's Work

If counsel obtains funds for expert assistance, counsel will need to meet with the expert and provide the expert with information on those aspects of the case with which the expert will be involved. Depending on the type of expert, counsel may need to provide the expert with witness statements, reports, photographs, physical evidence, and other information obtained through discovery and investigation; in cases in which the defendant's state of mind is at issue, the expert may need to meet with and interview the client. To make the most effective use of the funds authorized for the expert's work, counsel may not want to provide the expert with all of the discovery in the case, particularly if voluminous, but counsel should provide the expert with all pertinent information. The failure to do so may make it more difficult for the expert to form an opinion and expose him or her to damaging cross-examination.

Counsel should anticipate that the information reviewed and work generated by an expert will be discoverable by the prosecution, including statements by the defendant and correspondence between the expert and counsel. Some protections exist, however.

- If the defense does not call the expert as a witness, the prosecution generally does *not* have a right to discover the expert's work, including materials on which the expert relied if not otherwise discoverable. *See supra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests (discussing restrictions on discovery of expert's work and circumstances when work may be discoverable).
- If the defense intends to call the expert as a witness, the prosecution generally is entitled to pretrial discovery about the expert and his or her findings. *See supra* § 4.8C, Results of Examinations and Tests. The expert also must prepare a written report and provide it to the prosecution. *See supra* § 4.8D, Witnesses.
- Once on the stand, an expert may be required to disclose the basis of his or her opinion, including materials he or she reviewed and communications with the defendant, if not revealed earlier in discovery. *See supra* "Testifying experts" in § 4.8C, Results of Examinations and Tests; *see also generally* N.C. R. EVID. 705 (disclosure of basis of opinion); 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 188, at 736-47 (7th ed. 2011) (discussing application of Rule 705).

To prevent disclosure of the expert's work until required, counsel may want to have the expert enter into a nondisclosure agreement. A sample agreement is available on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital"). *See also* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.4(f) (2006) (lawyer may request person other than client to refrain from voluntarily giving relevant information to another party if person is agent of client and the lawyer reasonably believes that person's interests will not be adversely affected by refraining from giving the information).

In *Crist v. Moffatt*, 326 N.C. 326 (1990), the Supreme Court held in a civil case that the defendant's lawyer could not interview the plaintiff's physician without the plaintiff's consent and could obtain information from the plaintiff's physician only through statutorily recognized methods of discovery. In *State v. Jones*, 133 N.C. App. 448, 463 (1999), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000), the Court of Appeals questioned whether this prohibition applies in criminal cases but did not decide the issue because it was not properly preserved. Regardless of whether a prosecutor may contact a defense expert without the defendant's consent, defense counsel still may instruct a defense expert not to discuss the case without the defendant's consent or unless otherwise ordered to do so.

5.8 Right to Other Assistance

A. Interpreters

For deaf clients. Under G.S. Ch. 8B, a deaf person is entitled to a qualified interpreter for any interrogation, arraignment, bail hearing, preliminary proceeding, or trial. *See also* G.S. 8B-2(d) (no statement by a deaf person without a qualified interpreter present is admissible for any purpose); G.S. 8B-5 (if a communication made by a deaf person through an interpreter is privileged, the privilege extends to the interpreter).

Obtaining an interpreter is a routine matter, not subject to the requirements on appointment of experts discussed above. An AOC form for appointment of a deaf interpreter (AOC-G-116, "Motion, Appointment and Order Authorizing Payment of Deaf Interpreter or Other Accommodation" (Mar. 2007)) is available at www.nccourts.org/Forms/Documents/1020.pdf. The superior court clerk should have a list of qualified interpreters. *See* G.S. 8B-6.

For clients with limited English proficiency (LEP). An indigent criminal defendant with limited English proficiency is entitled to a foreign language interpreter for in-court proceedings (such as trials, hearings, and other appearances) and out-of-court matters (such as interviews of the defendant and of LEP witnesses). Obtaining an interpreter is a routine matter, not subject to the requirements on appointment of experts discussed above. The AOC is responsible for administering the foreign language interpreter program, and an AOC form for appointment of a foreign language interpreter (AOC-G-107, "Motion and Appointment Authorizing Foreign Language Interpreter/Translator" (Mar. 2007)) is available at www.nccourts.org/Forms/Documents/833.pdf. The form covers both in-court and out-of-court services. Under an agreement between IDS and AOC, IDS funds out-of-court interpreter services for defendants and AOC funds in-court services, but the procedure for obtaining an interpreter is the same. *See* Office of Indigent Defense Services, Out-of-Court Foreign Language Interpretation and Translation for Indigent Defendants and Respondents (Oct. 11, 2012), *available at* www.ncids.org/Rules%20&%20Procedures/Other%20Policies/foreign%20language%20interpreter%20policy.pdf.

No North Carolina statute specifically addresses the right to a foreign language interpreter. *See generally* G.S. 7A-343(9c) (AOC director's duties include prescribing policies and procedures for appointment and payment of foreign language interpreters); *see also State v. Torres*, 322 N.C. 440 (1988) (recognizing court's inherent authority to appoint foreign language interpreter). G.S. 7A-314(f), which dealt specifically with interpreters for indigent defendants, was repealed in 2012 and was replaced by an uncodified provision directing the Judicial Department to provide assistance to LEP individuals, assist the courts in the fair, efficient, and accurate transaction of business, and provide more meaningful access to the courts. *See* 2012 N.C. Sess. Laws Ch. 142, § 16.3(c) (H 950). The 2012 legislative change was intended to expand services. *See* John W. Smith, Memorandum: Notice of Expansion and Enhancement of Foreign Language Interpreting Services (Admin. Office of the Courts, Aug. 8, 2012), *available at*

www.nccourts.org/Citizens/CPrograms/Foreign/Documents/Foreign_Language_Access_and_Interpreting_Services_Memo.pdf. The change was prompted by a March 2012 report from the U.S. Department of Justice finding that North Carolina's provision of interpreter services was unduly limited and did not comply with federal law. *See* Report of Findings (U.S. Dep't. of Justice, Mar. 8, 2012), *available at* www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf.

An indigent defendant also may obtain necessary translation services. (Translation refers to converting written text from one language to another, while interpretation refers to rendering statements spoken in one language into statements spoken in another language.) For a discussion of obtaining translation services, see Office of Indigent Defense Services, Out-of-Court Foreign Language Interpretation and Translation for Indigent Defendants and Respondents at 4 (Oct. 11, 2012) (describing procedure for obtaining translation of attorney-client correspondence and circumstances in which translation of discovery may be appropriate), *available at* www.ncids.org/Rules%20&%20Procedures/Other%20Policies/foreign%20language%20interpreter%20policy.pdf.

For others. An interpreter may be appointed whenever the defendant's normal communication is unintelligible. *See State v. McLellan*, 56 N.C. App. 101 (1982) (defendant had speech impediment).

B. Transcripts

As a matter of equal protection, an indigent defendant is entitled to a transcript of prior proceedings when the transcript is needed for an effective defense or appeal. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *see also* G.S. 7A-450(b) (indigent defendant entitled to "counsel and the other necessary expenses of representation"). The test is "(1) whether a transcript is necessary for preparing an effective defense and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript." *State v. Rankin*, 306 N.C. 712, 716 (1982). Under this test, an indigent defendant may be entitled to a transcript of prior proceedings in the case, such as the transcript of a probable cause hearing or other evidentiary proceeding. *See generally State v. Reid*, 312 N.C. 322, 323 (1984) (per curiam) (defendant entitled to new trial where not provided with transcript of prior trial before retrial); *State v. Tyson*, ___ N.C. App. ___, 725 S.E.2d 97 (2012) (same). A sample motion for production of transcript of a probable cause hearing in a juvenile case is available on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

C. Other Expenses

Under G.S. 7A-450(b), the State has the responsibility to provide an indigent defendant with counsel and "the other necessary expenses of representation." This general authorization may provide the basis for payment of various expenses incident to representation, such as suitable clothing for the defendant.

Client Rapport and Relations

CLIENT RELATIONSHIPS

Elaine M. Gordon
Attorney & Mitigation Specialist
Raleigh, NC

High Level Felony Trg I
April, 2018

WHAT I KNOW FOR SURE

TRUST

TRUST

- is the glue of life.
- It is the most essential ingredient in effective communication.
- It is the foundational principle that holds all relationships.

Steven Covey

How You Develop Trust

THE CONCEPT OF EQUITY

DEPOSITS IN THE EMOTIONAL BANK

You can be a brilliant lawyer but if you fail to put time in with your client, it really doesn't matter.

"IF I MAKE DEPOSITS INTO AN EMOTIONAL BANK ACCOUNT WITH YOU THROUGH COURTESY, KINDNESS, HONESTY, AND KEEPING MY COMMITMENTS TO YOU, I BUILD UP A RESERVE. Your trust toward me becomes higher, and I can call upon that trust many times if I need to. I can even make mistakes and that trust level, that emotional reserve, will compensate for it…"

Steven Covey

VISITATION

IS HOW YOU MAKE DEPOSITS IN THE EMOTIONAL BANK ACCOUNT
IS HOW YOU BUILD EQUITY IN THE RELATIONSHIP
IS HOW YOU BUILD
TRUST

Listening – info about the case but also other things
Sharing - info about the case but also other things

Examples: Sussman (laughter); Bryant (laptop movies); Blankenship (birthdays); Jayne (medical issues)

"98% of life is just showing up."

Dentist sign on ceiling: "There is nothing we can do for you here to make up for what you fail to do at home."

"Your client needs to talk to and listen to someone. If *YOU* are not talking and listening to him, he will be talking and listening to other inmates."

- *Darryl Hunt, N.C. Exoneree after 18 years prison for rape and murder he did not commit*

ATTENTION

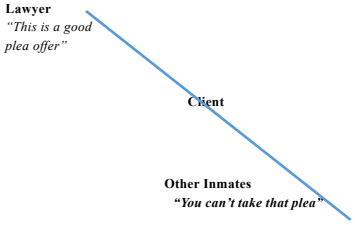
IS THE RAREST AND PURIST FORM OF GENEROSITY.

-Simone Weil

"TO FALL IN LOVE WITH ANYONE, DO THIS."

Jill Patterson

**Whose opinion has greater weight with the client?
Yours? Or his jailhouse lawyers?
If it's not you, why?**



"HAVE I EARNED THE RIGHT TO ASK YOU TO DO A THING?"

Keep this where you can see it.

HOW DO YOU SPEAK WITH YOUR CLIENT ABOUT THE CASE?
IN WAYS THAT ARE BOTH

DISCIPLINED & UNIFORM

The Deadliest Phrases in the English Language:

"This is not a capital case." OR

"This is just a second-degree case."
THIS + NO VISITATION = DEATH

(I see this frequently.)
Ex: "I haven't seen my lawyer but 3 times in 2 years and then he comes at me with this plea."

TO THIS DISCIPLINE.

BOTH LAWYERS, THE MITIGATION INVESTIGATION, THE P.I., ALL EXPERTS, FROM TEAM TO CLIENT AND FROM TEAM TO FAMILY & ALL OTHERS OF INFLUENCE

AND BEWARE THE LAW STUDENT INTERN

THE OPPORTUNITY
TO PROVIDE INFORMATION
TO CLIENT & FAMILY

"Our clients made a lifetime of bad decisions. Why do we think that in this – *the most important decision of their lives* – they can make a good decision all alone and without advice?"

What this is NOT:

- ***It's not*** **failing to investigate the case.**
- ***It's not*** **failing to litigate the issues**
- ***It's not*** **urging someone to accept a plea that s/he shouldn't take.**
- ***It's not*** **coercing someone into pleading guilty.**

What it IS:

It is **providing the client with ACCURATE INFORMATION in the clearest & simplest fashion for *this* client. Using visual, audio and experiential learning within the relationship of trust *that you have built.***

Communicating in the Best Way for This Client

Different ways of learning

Visual (DVD's): **65%-85% of folks** absorb info this way
Audio
Kinesthetic (psycho drama)

Visualization is the very soul of comprehension.

Neurophysiologists believe that fully one third of the human brain is devoted to vision and visual memory.

Roughly 85% of our knowledge is gleaned through our eyes. Since a trial lawyer must "teach" the client about his case, a combination of "show and tell" is always more effective than an endless parade of talking heads.

HEARING

SEEING

EXPERIENCING

MYTH BUSTING:
The Universal Issues & the Education of Your Client
Remind your client that "Information is Power"

Provide
ACCURATE INFORMATION
to the Client

MYTH #1:

"There is no difference between the 15 years & 30 years – my life is OVER if I take that plea!"

WHAT ARE THE DIFFERENCES
IN
PRISON CONDITIONS
BETWEEN THE 2 POSSIBLE
SENTENCES?

Differences Between N.C.'s Death Row and Life or Term of Years

Revised October 2016

Death Row	Life or Term of Years
You will NEVER leave Central Prison until the day you die.	You can transfer to facilities around the state to be close to your family or to participate in courses or programs.
You will NEVER enjoy a CONTACT visit with your loved ones (unless it's the day of your execution.)	You can have contact visits and hug your family members
Only 1 hour rec per day; no weights; No gym for death row	Hours in the rec yard; gym time with weights; access to pool tables
Stuck with older inmates there for years (set in their ways; TV control)	Contact with younger inmates
Confined always to one block; no freedom to move about the facility	Can move about more freely
You cannot take classes such as G.E.D. or college courses.	You can get your G.E.D and college degrees.
You cannot work at a job.	You can work at jobs (paint crew, maintenance, kitchen, laundry, landscaping, canteen duty,

CHART the differences between death row & LWOP conditions

Contact visits?
Phone calls?
Jobs?
Classes?

Why should your client be expected to know this information without your providing it to them?

"Don't take MY word for it; listen to someone who's been to both."
Letter from Dane Locklear

Develop a library of letters from those who experienced both.
Have one of these inmates write personal letter to client considering plea offer.

MYTH #2:
"I can't plead guilty because I'd be giving up my appeals."

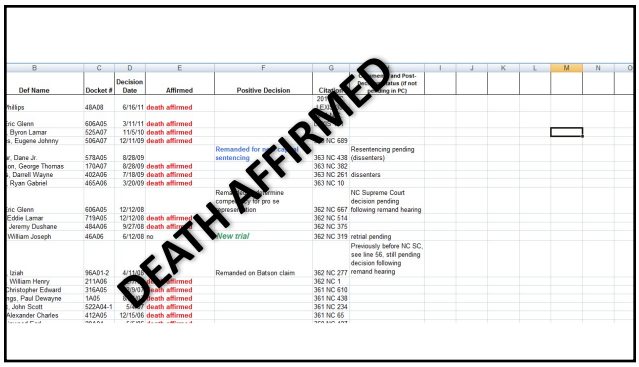
Reality: It's true that if you plead guilty you give up most of your appeals.

But what does that mean??
What are you giving up?

Develop a chart of your state capital appellate

AN EXAMPLE
FROM CAPITAL CASES
FOLLOWS
WHAT CAN YOU DEVELOP
FROM SERIOUS FELONY CASES?

Appellate Outcomes Chart from the Appellate Defenders Office



Def Name	Docket #	Decision Date	Affirmed	Positive Decision	Citation	Retrial and Post-Conviction (if not resolving in PC)
hillips	48A08	6/16/11	death affirmed		2011 NCLEXIS	
ric Glenn	606A05	3/11/11	death affirmed			
Byron Lamar	525A07	11/5/10	death affirmed			
s, Eugene Johnny	595A07	12/11/09	death affirmed		NC 689	
				Remanded for sentencing		Resentencing pending
r, Dane Jr	578A05	8/28/09			363 NC 438	(dissenters)
on, George Thomas	170A07	8/28/09	death affirmed		363 NC 392	
, Darrell Wayne	402A06	7/18/09	death affirmed		363 NC 261	dissenters
Ryan Gabriel	465A06	3/20/09	death affirmed		363 NC 10	
				Rem to determine competency for pro se representation		NC Supreme Court decision pending
ric Glenn	606A05	12/12/08			362 NC 667	following remand hearing
Eddie Lamar	719A05	12/12/08	death affirmed		362 NC 514	
Jeremy Dushane	48A06	9/27/08	death affirmed		362 NC 375	
William Joseph	48A06	6/12/08	no	New trial	362 NC 319	retrial pending
						Previously before NC SC, see line 56, still pending decision following
Iziah	96A01-2	4/11/08		Remanded on Batson claim	362 NC 277	remand hearing
William Henry	211A06		death affirmed		362 NC 1	
Christopher Edward	316A05		death affirmed		361 NC 610	
rgs, Paul Dewayne	1A05		death affirmed		361 NC 438	
, John Scott	522A04-1	5/	death affirmed		361 NC 234	
Alexander Charles	412A05	12/15/06	death affirmed		361 NC 65	

If appellate relief is given, it is most commonly a new sentencing. In other words, client cannot get better than life and he still risks sentence of death.

(Since July 1, 2001, only 6% of capital appeals in NC have resulted in the grant of a new trial. 19% resulted in new sentencings.)

DEATH ROW PHOTO BOOK:

Organized:

- **Alphabetically**
- **Chronologically**
- **By County**
- **By Who Rejected Plea Offers**
- **By Type of Offense**

Ex: Non-shooter, child death, wife/GF, multiple victims, robbery gone ba

Get law student to develop materials – the photos, the case summaries, find out whether client rejected a plea offer

Learn the stories from prior counsel.

Educating Person Closest to Client

Taking time to teach

Telling the stories of other cases

Showing films of interviews with other clients' family members

If you persuade the client to accept a plea, but fail to educate those who influence him, you are just rearranging deck chairs on the Titanic.

Example of Educating Client's Family:
Lawyer with big screen, photos, and Powerpoint at the church social hall.
State's Case with Photos; the Law; Differences in Conditions & what it means for the Family.

LEGAL AUTHORITY:
WHAT'S YOUR OBLIGATION TO YOUR CLIENT REGARDING PLEA?

2012 US Supreme Court opinions on Plea Offers
Lafler v. Cooper, 132 S. Ct., 1371 1387 (2012)
Missouri v. Frye, 132 S.Ct. 1399 (2012)

If a plea bargain has been offered a defendant has the right to effective assistance of counsel in considering whether to accept it.

THE SECOND OPINION LAWYERS

If client admires a local lawyer, see if that lawyer (properly prepared) will agree to meet with client for a second opinion.

Get highly regarded appellate lawyer to meet with him.

If client reads a book and thinks author can save him, get an email opinion
(Ex: Medication Madness author)

Making It Real: The Trial

Photos: Crime Scene & Autopsy

For client *and his family*

(We see many cases in which the client *has never been shown* the autopsy or crime scene photos.)

Making It Real: The Trial
Cross examination

In NC we have a (mock) cross examination team of two lawyers who are totally prepared on the case .

"An unprepared cross is WORSE than nothing."

Timing is critical. Make it close to trial, after client has rejected offer & rejected advice from second opinion lawyer.

Do NOT waste an opportunity to educate client about the trial experience on the theory that your client should not testify.

1. Many clients have never experienced a trial and have no clue how unpleasant it may be.
2. Even during a mock examination you will hear clients say things you have never heard before.
3. This may cause client to reconsider the plea offer.

Finally, it is preparation against the possibility that the client insists on testifying against advice of counsel and utterly unprepared.

Example: A PC client of mine was on death row 18 years for that reason.

We videotape the cross, have case consultants' review, and ask client to critique himself.

In some cases, client has asked us to share the video with family member who then urges plea.

This has had some excellent results as the plea begins to look far less painful by comparison.

Helping Client to Envision the Future

The Brooklyn Bridge Cop Known for Suicide Prevention

"What's your plan for tomorrow?"

"I don't have one."

"Let's make one together."

WHERE
will your client be if he takes the plea?

WHAT
will he do?

Albermarle (MED)

Work:	Road Squads (trash pick-up, debris clearing)
	Inside (cleaning dorms, maintaining grounds, preparing and cooking food)
Educational:	GED instruction, computer application courses, carpentry, electronics technology
	Taught by instructors from Stanly Community College Instructors
Counseling & Treatment:	Domestic violence program S.T.O.P. (Survey Think Options Prevent), Change Direction

Alexander (CLO)

Work:	Correctional Enterprise Furniture plant. (Constructs case good and upholstered furniture began in the vocational space within the prison. Catawba Valley Community College (CVCC) conducts an instruction program working with enterprise staff to train inmates in the manufacturing process.
	Specific and segregation janitorial jobs
Educational:	CVCC also provides instruction for the inmate population for basic education, GED prep, computer application, commercial cleaning and horticulture technology.
Counseling & Treatment:	Residential mental health program

Avery Mitchell (MED)

Work:	96 Department of Transportation
	Prison's kitchen, clothes house, maintenance and janitorial positions.
Educational & Vocational:	Offered through Mayland Community College.
	High Country Herald. Inmates can share information on classes, programs and activities at the prison. Graduates of the facility's GED and computer applications classes have a chance to keep their writing and computer skills sharp. There are designated editors for layout, copy, sports, religion, features and graphics. Other inmates participate as contributing writers, creating their own original material, or editing material drawn from other publications.

1

North Carolina Department of Correction

A New Leash on Life

"A New Leash on Life" is a program that allows minimum and medium custody state prisons to partner with local animal shelters, animal welfare agencies, and/or private non-profit agencies to train dogs in preparation for their adoption. In turn, the inmates are given a chance to serve the community by training dogs to be well-behaved pets.

Selected dogs are placed with inmate trainers in a prison setting for eight to twelve weeks. The inmates teach basic obedience, house training, and socialization through positive reinforcement and repetition. Dogs are taught to walk on and off the leash and to respond to basic commands.

Each prison facility partners with a local partner or sponsor, a volunteer animal trainer, and local merchants or civic organizations that can support the program with needed supplies and services.

There are currently two apprenticeship programs offered to inmates in the New Leash on Life program. In these programs inmates have the opportunity to receive certified training that will help them obtain a job upon their release from prison. To obtain apprentice certification through the Department of Labor, an inmate must complete a veterinary assistant course offered from the community college as well as 2000 hours of on the job training. The first

A New Leash on Life Facilities and Community Partners

Facility		Community Partner
Albemarle Correctional Institution Badin, NC		**Stanley County Humane Society** PO Box 1632 Albemarle, NC 28002 Sharon Gadd or Elaine Richards 704-982-7729 http://www.petfinder.com/shelters/NC399.html **Mark Thompson, Volunteer Trainer**
Bladen Correctional Center Elizabethtown, NC		**A Shelter Friend, Inc.** charlotte.dogtraininginyourhome.com 4629 Hwy 701 S Elizabethtown, NC 28337 910-876-0539
Brown Creek Correctional Institution Polkton, NC		**Carolina Pet Adoption & Welfare Society, Inc. (CPAWS)** PO Box 242861 Charlotte, NC 28224 704-283-9126 adopt@carolinaPAWS.com http://www.carolinaPAWS.com
Cabarrus Correctional Center Mt. Pleasant, NC		**Humane Society of Concord and Greater Cabarrus County** PO Box 3104 Concord, NC 28025 704-784-4434 http://www.dogsaver.org/cabarrushumane
Caledonia Correctional Institution		**Down East Animal Refuge (DEAR)**

Friday evening 6:30 p.m. 9-24-04

Dear Bugg,

What's up baby bro? As always I must be totally honest with you. Right now I sit here with Elaine Gordon, an attorney from Durham. Elaine informed me that you were offered a plea. I was asked to voice my honest opinion as to what you should do.

Tony as you well know I have always protected my family whenever possible. I would step in front of a bullet to save your life if it was possible. Unfortunately that is not an option in this situation. Therefore I must protect you in the only option available to me. I am begging you to take the plea.

Do you remember me telling you a long time ago that as long as you were alive there is hope? Well, I am not going to lie to you that shit is the last thing on my mind. I admit to having completely selfish reasons for this request. Tony you have no idea how much I love you. I do not want you to die! Mama does not want you to die. Your son does not want you to die. Your lawyers don't want you to die. Please consider what I am about to say.

It may take a while but eventually you would be sent someplace where you enjoyed the freedom to move around. Some camps have more freedom than others, and likewise security is not as strict at some. Who knows what opportunity might present itself. However this would only come into play if you are alive. Laws change all of the time. The possibility of a new law assisting you is not out of the realm of prospects for the future.

You now profess your love for and faith in God. All along you have said God would work a miracle. What if this is his miracle? Think about who and what Ron Moore stands for. Something or someone had to influence this about face he has made. Don't you think he is concerned about his image. From day one he vowed to get the death penalty. Now all of a sudden he offers a plea. It sounds like divine intervention to me.

- Power of RELATIONSHIP
- Power of INFORMATION
- Power of EXPERIENCE
- Power of HOPE

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.6 CONFIDENTIALITY OF INFORMATION

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information acquired during the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged

to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

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

Authorized Disclosure

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

Disclosure Adverse to Client

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

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

[8] Although paragraph (b)(2) does not require the lawyer to reveal the client's anticipated misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent.See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where

the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

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

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

[11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

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

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

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

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

[16] Paragraph (b) permits but does not require the disclosure of information acquired during a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be

injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. When practical, the lawyer should first seek to persuade the client to take suitable action, making it unnecessary for the lawyer to make any disclosure. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Detection of Conflicts of Interest

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

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

Acting Competently to Preserve Confidentiality

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

[20] When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the client's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality

agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

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

Lawyer's Assistance Program

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

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

Adopted by the Supreme Court: July 24, 1997

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

Ethics Opinion Notes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLIENT-LAWYER RELATIONSHIP

Search Rules

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

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

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

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

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

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

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

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

Comment

Allocation of Authority between Client and Lawyer

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

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer

should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

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

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

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

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

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

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

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

Criminal, Fraudulent and Prohibited Transactions

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

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal

alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. See Rule 4.1.

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

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

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

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

Adopted by the Supreme Court July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.3 DILIGENCE

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

Comment

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

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

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

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

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf . 27 N.C.A.C. 1B, .0122 (providing for court appointment of a lawyer to inventory files and take other protective action to protect the interests of the clients of a lawyer who has disappeared or is deceased or disabled).

Distinguishing Professional Negligence

[6] Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this rule.

[7] Conduct warranting the imposition of professional discipline under the rule is characterized by the element of intent manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

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

Adopted by the Supreme Court July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 28, 2017

Ethics Opinion Notes

RPC 48 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-48/). Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

99 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-5/). Opinion rules that whether the lawyer for a residential real estate closing must obtain the cancellation of record of a prior deed of trust depends upon the agreement of the parties.

2013 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-8/). Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

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

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.4 COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should address with the client how the lawyer and the client will communicate, and should respond to or acknowledge client communications in a reasonable and timely manner.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to

explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(f).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

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

Adopted by the Supreme Court July 24, 1997

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

Ethics Opinion Notes

RPC 48 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-48/). Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 91 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-91/). Opinion rules that an attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits.

RPC 92 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-92/). Opinion rules that an attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

RPC 99 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-99/). Opinion rules that a lawyer may tack onto an existing title insurance policy.

RPC 111 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-111/). Opinion rules that an attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim.

RPC 112 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-112/). Opinion rules that an attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability.

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

RPC 156 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-156/). Opinion rules that an attorney who has advised a client that he has been retained by the client's insurance company to represent him must reasonably inform the client and explain the matter completely when the insurance company pays its entire coverage and is "released from further liability or obligation to participate in the defense" under the provisions of G.S. §20-279.21(b)(4).

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

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

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

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

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

2013 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-8/). Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2015 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-4/). Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances,

using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

CPR 314. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

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

RPC 163 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-163/). Opinion rules that an attorney may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

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

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

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

2006 Formal Ethics Opinion 11 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-11/). Opinion rules that, outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

COUNSELOR

Search Rules

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

2011 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-4/). Opinion rules that a lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

MAINTAINING THE INTEGRITY OF THE PROFESSION

Search Rules

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on a lawyer's fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. A lawyer's dishonesty, fraud, deceit, or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partner or law firm. A lawyer who steals funds, for instance, is guilty of the most serious disciplinary violation regardless of whether the victim is the lawyer's employer, partner, law firm, client, or a third party.

[3] The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown by clear, cogent, and convincing evidence that the lawyer committed a criminal

act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act although, to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.

[4] A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in *State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. Conduct warranting the imposition of professional discipline under paragraph (d) is characterized by the element of intent or some other aggravating circumstance. The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In *State Bar v. Jerry Wilson*, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[5] Threats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass anyone associated with the judicial process including judges, opposing counsel, litigants, witnesses, or court personnel violate the prohibition on conduct prejudicial to the administration of justice. When directed to opposing counsel, such conduct tends to impede opposing counsel's ability to represent his or her client effectively. Comments "by one lawyer tending to disparage the personality or performance of another...tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand." State v. Rivera, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999). See Rule 3.5, cmt. [10] and Rule 4.4, cmt. [2].

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 5, 2015; September 28, 2017

Ethics Opinion Notes

CPR 110. An attorney may not advise a client to seek Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

CPR 168. An attorney may file personal bankruptcy.

CPR 188. An attorney may not draw deeds or other legal instruments based on land surveys made by unregistered land surveyors.

CPR 342. An attorney should not close a loan where the transaction is conditioned by the lender upon the placement of title insurance with a particular company.

CPR 369. An attorney may close a loan if the lender merely suggests rather than requires the placement of title insurance with a particular company.

RPC 127 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-127/). Opinion rules that deliberate release of settlement proceeds without satisfying conditions precedent is dishonest and unethical.

RPC 136 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-136/). Opinion rules that a lawyer may notarize documents which are to be used in legal proceedings in which the lawyer appears.

RPC 143 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-143/). Opinion rules that a lawyer who represents or has represented a member of the city council may represent another client before the council.

RPC 152 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-152/). Opinion rules that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court.

RPC 159 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-159/). Opinion rules that an attorney may not participate in the resolution of a civil dispute involving allegations against a psychotherapist of sexual involvement with a patient if the settlement is conditioned upon the agreement of the complaining party not to report the misconduct to the appropriate licensing authority.

RPC 162 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-162/). Opinion rules that an attorney may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

RPC 171 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-171/). Opinion rules that it is not a violation of the Rules of Professional Conduct for a lawyer to tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.

RPC 180 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-180/). Opinion rules that a lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

RPC 192 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-192/). Opinion rules that a lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case.

RPC 197 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-197/). Opinion rules that a prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

RPC 204 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-204/). Opinion rules that it is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

RPC 221 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-221/). Opinion rules that absent a court order or law requiring delivery of physical evidence of a crime to the authorities, a lawyer for a criminal defendant may take possession of evidence that is not contraband in order to examine, test, or inspect the evidence. The lawyer must return inculpatory physical evidence that is not contraband to the source and advise the source of the legal consequences pertaining to the possession or destruction of the evidence.

RPC 236 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-236/). Opinion rules that a lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

RPC 243 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-243/). Opinion rules that it is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

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

98 Formal Ethics Opinion 19 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-19/). Opinion provides guidelines for a lawyer representing a client with a civil claim that also constitutes a crime.

99 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-2/). Opinion rules that a defense lawyer may suggest that the records custodian of plaintiff's medical record deliver the medical record to the lawyer's office in lieu of an appearance at a noticed deposition provided the plaintiff's lawyer consents.

2000 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2000-formal-ethics-opinion-8/). Opinion rules that a lawyer acting as a notary must follow the law when acknowledging a signature on a document.

2001 Formal Ethics Opinion 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2001-formal-ethics-opinion-12/). Opinion rules that a closing lawyer may not counsel or assist a client to affix excess excise tax stamps on an instrument for registration with the register of deeds.

2003 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-5/). Opinion rules that neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

2003 Formal Ethics Opinion 11 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-11/). Opinion rules that a lawyer must deal honestly with the members of her former firm when dividing a legal fee.

2005 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-3/). Opinion rules that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations.

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

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

2008 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-4/). Opinion rules that a lawyer may issue a subpoena in compliance with Rule 45 of the Rules of Civil Procedure which authorizes a subpoena for the production of documents to the lawyer's office without the need to schedule a hearing, deposition or trial.

2008 Formal Ethics Opinion 14 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-14/). Opinion rules that it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer. .

2008 Formal Ethics Opinion 15 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-15/). Opinion rules that, provided the agreement does not constitute the criminal offense of compounding a crime and is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence, a lawyer may participate in a settlement agreement of a civil claim that includes a non-reporting provision prohibiting the plaintiff from reporting the defendant's conduct to law enforcement authorities.

2010 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-2/). Opinion rules that a lawyer may not serve an out of state health care provider with an unenforceable North Carolina subpoena and may not use documents produced pursuant to such a subpoena.

2010 Formal Ethics Opinion 14 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-14/). Opinion rules that it is a violation of the Rules of Professional Conduct for a lawyer to select another lawyer's name as a keyword for use in an Internet search engine company's search-based advertising program.

2011 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-9/). Opinion rules that a lawyer may not allow a person who is not employed by or affiliated with the lawyer's firm to use firm letterhead.

2011 Formal Ethics Opinion 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-12/). Opinion rules that a lawyer must notify the court when a clerk of court mistakenly dismisses a client's charges.

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

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

2014 Formal Ethics Opinion 7 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-7/). Opinion rules that a lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records.

2014 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-8/). Opinion rules that a lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

2014 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-9/). Opinion rules that a private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.

Goals and Method of Jury Voir Dire

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

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

Means for removal

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

(6) The juror has ***formed or expressed an opinion as to the guilt or innocence*** of the defendant. (You may ***NOT ask what the opinion is***.)

8) As a matter of conscience, ***regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law*** of North Carolina.

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

2) Peremptory Challenges § 15A-1217

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

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

Law of Jury Selection

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

Two Main Methods of Jury Selection

1) Traditional Approach or "Lecturer" Method

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

2) The "Listener" Method of Jury Selection

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

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

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

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

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

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

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

Command Superlative Analogue Technique (New Mexico Public Defenders)

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

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

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

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

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

Listener Method in Practice

Preparation

Know the case and law…Develop theory and theme

Pick the pertinent issues or areas (in that case) that you want jurors to talk about

Cannot do the same voir dire in every case…It varies with the theory of each case

Outline your questions (or offensive plays) for each area
-Superlative memory technique and follow-up (for 3-4 key topics)

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

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

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

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

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

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

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

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

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

Decision-Making Time

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

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

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

JURY SELECTION QUESTIONS

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I. GENERAL PURPOSE OF VOIR DIRE

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

"A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror." State v. Harris, 338 N.C. 211, 227 (1994).

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

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

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

II. PROCEDURAL RULES OF VOIR DIRE

Overall: The trial court has the duty to control and supervise the examination of prospective jurors. Regulation of the extent and manner of questioning during voir dire rests largely in the trial court's discretion. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995).

Group v. Individual Questions: "The prosecutor and the…defendant…may **personally question prospective jurors individually** concerning their competency to serve as jurors…." NCGS 15A-1214(c).

The trial judge has the discretion to limit individual questioning and require that certain general questions be submitted to the panel as a whole in an effort to expedite jury selection. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Same or Similar Questions: The defendant may not be prohibited from asking a question merely because the court [or prosecutor] has previously asked the same or similar question. N.C.G.S. 15A-1214(c); State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Leading Questions: Leading questions are permitted during jury voir dire [at least by the prosecutor]. State v. Fletcher, 354 N.C. 455, 468, 555 S.E.2d 534, 542 (2001).

Re-Opening Voir Dire: N.C.G.S. 15A-1214(g) permits the trial judge to reopen the examination of a prospective juror if, at any time before the jury has been impaneled, it is discovered that the juror has made an incorrect statement or that some other good reason exists. Whether to reopen the examination of a passed juror is within the judge's discretion. Once the trial court reopens the examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse such a juror. State v. Womble, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996). For example, in State v. Wiley, 355 N.C. 592, 607-610 (2002), the prosecution passed a "death qualified" jury to the defense. During defense questioning, a juror said that he would automatically vote for LWOP over the death penalty. The trial judge re-opened the State's questioning of this juror and allowed the prosecutor to remove the juror for cause.

Preserving Denial of Challenges for Cause: In order to preserve the denial of a challenge for cause for appeal, the defendant must adhere to the following procedure:
1) The defendant must have exhausted the peremptory challenges available to him;
2) After exhausting his peremptory challenges, the defendant must move (orally or in writing) to renew a challenge for cause that was previously denied if he either:
   a) Had peremptorily challenged the juror in question, or

b) Stated in the motion that he would have peremptorily challenged the juror if he had not already exhausted his peremptory challenges; and

3) The judge denied the defendant's motion for renewal of his cause challenge.

N.C.G.S 15A-1214(h) and (i).

Renewal of Requests for Disallowed Questions: Counsel may renew its requests to ask questions that were previously denied. Occasionally, a trial court may change its mind. See, State v. Polke, 361 N.C. 65, 68-69 (2006); State v. Green, 336 N.C. 142, 164-65 (1994).

III. SUBSTANTIVE AREAS OF INQUIRY

Accomplice Liability: Prosecutor properly asked about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule by the following "non-stake-out" questions in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"

"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"

"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"

Accomplice/Co-Defendant (or Interested Witness) Testimony:

It is proper to ask about prospective jurors' abilities to follow the law with respect to interested witness testimony…When an accomplice is testifying for the State, the accomplice is considered an interested witness, and his testimony is subject to careful [or the highest of] scrutiny. State v. Jones, 347 N.C. 193, 201-204 (1997). See, NCPI-Crim. 104.21, 104.25 and 104.30.

The following were proper questions (asked by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?

[According to the N.C. Supreme Court, **these 3 questions were proper and not stake-out questions**…They were designed to determine if jurors could follow the law and be impartial and unbiased. Jones, 347 N.C. at 204. The prosecutor accurately stated the law. An accomplice testifying for the State is considered an interested witness and his testimony is subject to careful scrutiny. The jury should analyze such testimony in light of the accomplice's interest in the outcome of the case. If the jury believes the witness, it should give his testimony the same weight as any other credible witness. Jones, 347 N.C. at 203-204.]

You may hear testimony from a witness who is testifying pursuant to a plea agreement. This witness has pled guilty to a lesser degree of murder in exchange for their promise to give truthful testimony in this case. Do you have opinions about plea agreements that would make it difficult or impossible for you to believe the testimony of a witness who might testify under a plea agreement? The prosecutor's inquiry merely (and properly) sought to determine whether a plea agreement would have a negative effect on prospective jurors' ability to believe testimony from such witnesses. State v. Gell, 351 N.C. 192, 200-01 (2000).

Age of Juror and Effects of It: N.C.G.S. 9-6.1 allows jurors age 72 years or older to request excusal or deferral from jury service but it does not prohibit such jurors from serving. In State v. Elliott, 360 N.C. 400, 408 (2006), the Court recognized that it is sensible for trial judges to consider the effects of age on the individual juror since the adverse effects of growing old do not strike all equally or at the same time. [Based on this, it appears that the trial court and the parties should be able to inquire into the effects of aging with older jurors.]

Circumstantial Evidence/Lack of Eyewitnesses:

Prosecutor informed prospective jurors that "*only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer.*" He then asked: "*Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?*" The court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

It was proper in first degree murder case for State to tell the jury that they will be relying upon circumstantial evidence with no witnesses to the shooting and then ask them

if that will cause any problems. State v Clark, 319 N.C. 215 (1987).

Child Witnesses: Trial judge erred in not allowing the defendant to ask prospective jurors "*if they thought children were more likely to tell the truth when they allege sexual abuse.*" State v Hatfeld, 128 N.C. App. 294 (1998)

Defendant's Prior Record: In State v Hedgepath, 66 N.C. App. 390 (1984), the trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow judge's instructions that they are to consider defendant's prior record only for purposes of determining credibility.

Defenses (i.e., Specific Defenses): A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. State v Leonard, 295 N.C. 58, 62-63 (1978).

a) Accident: Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

b) Insanity: It was reversible error for trial court to fail to dismiss juror who indicated he was not willing to return a verdict of NGRI even though defendant introduced evidence that would satisfy them that the defendant was insane at the time of the offense. State v Leonard, 295 N.C. 58,62-63 (1978); see also Vinson.

c) Mental Health Defense: The defendant has the right to question jurors about their attitudes regarding a potential insanity or lack of mental capacity defense, including questions about: "*courses taken and books read on psychiatry, contacts with psychiatrist or persons interested in psychiatry, members of family receiving treatment, inquiry into feelings on insanity defense and ability to be fair.*" U.S. v Robinson, 475 F.2d 376 (D.C. Cir. 1973); U.S. v Jackson, 542 F.2d 403 (7th Cir. 1976).

d) Self-Defense: Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

Drug-Related Context of Non-Drug Offense: In a prosecution for common law robbery and assault, there was no error in allowing prosecutor (after telling prospective jurors that a proposed sale of marijuana was involved) to inquire into whether any of them would be unable to be fair and impartial for that reason. State v Williams, 41 N.C. App. 287, disc. rev. denied, 297 N.C. 699 (1979).

The following was not a "stake-out" question and was a proper inquiry to determine the impartiality of the jurors: "*Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these*

people were out looking for drugs and involved in the drug environment, and became victims as a result of that?" State v Teague, 134 N.C. App. 702 (1999)

Eyewitness Identification: The following prosecutor's question was upheld as proper (and non-stake-out): *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

Expert Witness: *"If someone is offered as an expert in a particular field such as psychiatry, **could** you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was not an attempt to stake out jurors.

It was not an abuse of discretion for the judge to prevent defense counsel from asking jurors "*whether they **would** automatically reject the testimony of mental health professionals."* This was apparently a stake out question. State v. Neal, 346 N.C. 608, 618 (1997).

Focusing on "The Issue":
In a child homicide case, the prosecutor was allowed to ask a prospective juror "*if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

Following the Law: "The right to an impartial jury contemplates that each side will be allowed to make inquiry into the ability of prospective jurors to follow the law. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

If a juror's answers about a fundamental legal concept (such as the presumption of innocence) demonstrated either **confusion about**, or **a fundamental misunderstanding** of the principles…or **a simple reluctance to apply** those principles, its effect on the juror's inability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Hold-Out Jurors During Deliberations: Generally, questions designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to impermissible "stake-out" questions. State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001).

It is permissible, however, to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the right to stand by their beliefs in the case."* (Note that, if this permissible question is followed by the question, *"And would you do that?,"* this crosses the line into an impermissible stake-out question.) State v. Elliott, 344 N.C. 242, 262-63, 475 S.E.2d 202, 210 (1997); see also, State v. Maness, 363 N.C. 261 (2009).

Where defense counsel had already inquired into whether jurors could follow the law as specified in N.C.G.S. 15A-1235 by asking if they could *"independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. (N.C.P.I.-Crim. 101-40). State v. Maness, 363 N.C. 261 (2009).

Identifying Family Members: Not error to allow the prosecutor during jury selection to identify members of the murder victim's family who are in the courtroom. State v Reaves, 337 N.C. 700 (1994).

Intoxication: Proper for Prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. *"If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict."* State v McKoy, 323 N.C. 1 (1988).

Law Enforcement Witness Credibility: If a juror would automatically give enhanced credibility or weight to the testimony of a law enforcement witness (or any particular class of witness), he would be excused for cause. State v. Cummings, 361 N.C. 438, 457-58 (2007); State v. McKinnon, 328 N.C. 668, 675-76, 403 S.E.2d 474 (1991).

Legal Principles: Defense counsel may question jurors to determine whether they completely understood the principles of **reasonable doubt** and **burden of proof**. Once counsel has fully explored an area, however, the judge may limit further inquiry. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"The right to an impartial jury contemplates that each side will be allowed to make ***inquiry into the ability of prospective jurors to follow the law***. Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection." State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990).

Defendant Not Testifying: It is proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense. A court, however, may disallow questioning about the defendant's failure to offer evidence in his defense. State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994).

Court erred in denying the defendant's challenge for cause of juror who

repeatedly said that the defendant's failure to testify would stick in the back of my mind while he was deliberating (in response to question "*whether the defendant's failure to testify would affect his ability to give him a fair trial"*). State v Hightower, 331 N.C. 636 (1992).

Presumption of Innocence and Burden of Proof: A juror gave conflicting and ambiguous answers about whether she could presume the defendant innocent and whether she would require him to prove his innocence. The Supreme Court awarded the defendant a new trial because the trial judge denied the defendant's challenge for cause. The Supreme Court said that **the juror's answers demonstrated either confusion about, or a fundamental misunderstanding of the principles of the presumption of innocence, or a simple reluctance to apply those principles**. Regardless whether the juror was confused, had a misunderstanding, or was reluctant to apply the law, its effect on her ability to give the defendant a fair trial remained the same. State v. Cunningham, 333 N.C. 744, 754-756, 429 S.E.2d 718 (1993).

Pretrial Publicity: Inquiry should be made regarding the effect of the publicity upon jurors' ability to be impartial or keep an open mind. Mu'min, 500 U.S. 415, 419-421, 425 (1991). Although "Questions about the content of the publicity…might be helpful in assessing whether a juror is impartial," they are not constitutionally required. Id. at 425. The constitutional question is *whether jurors had such fixed opinions that they could not be impartial*, not whether or what they remembered about the publicity. It is not required that jurors be totally ignorant of the facts and issues involved. Id., 500 U.S. at 426 and 430.

It was deemed proper for a prosecutor to describe some of the "uncontested" details of the crime before he asked jurors whether they knew or read anything about the case. State v. Nobles, 350 N.C. 483, 497-498, 515 S.E.2d 885, 894-895 (1999) (ADA noted that defendant was charged with discharging a firearm into a vehicle occupied by his wife and three small children). It was not a "stake-out" question.

Racial/Ethnic Background: Trial courts must allow questions regarding whether any jurors might be prejudiced against the defendant because of his race or ethnic group where the defendant is accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups. (If this criteria is not met, racial and ethnic questions are discretionary.) Rosales-Lopez v. United States, 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). Such questions must be allowed in capital cases involving a charge of murder of a white person by a black defendant. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986).

Sexual Offense/Medical Evidence: In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was a proper, non-stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003).

Sexual Orientation: Proper for prosecutor to question jurors regarding prejudice against homosexuality for the purpose of determining whether they could impartially consider the evidence knowing that the State's witnesses were homosexual. State v Edwards, 27 N.C. App. 369 (1975).

IV. IMPROPER QUESTIONS OR IMPROPER PURPOSES

Answers to Legal Questions: Counsel should not "fish" for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). [Does this mean can counsel get judge to give preliminary instructions before voir dire, and then ask questions about the law?]

Arguments that are Prohibited: A lawyer (even a prosecutor) may not make statements during jury selection that would be improper if they were later argued to the jury. State v. Hines, 286 N.C. 377, 385, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to make improper statements during voir dire about how the death penalty is rarely enforced).

Confusing and Ambiguous Questions: Hypothetical questions so phrased to be ambiguous and confusing are improper. For example, *"Now, everyone on the jury is in favor of capital punishment for this offense…Is there anyone on the jury, because the nature of the offense, feels like you might be a little bit biased or prejudiced, either consciously or unconsciously, because of the type or the nature of the offense involved; is there anyone on the jury who feels that they would be in favor of a sentence other than death for rape?"* (see, Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975)); or, *"Would you be willing to be tried by one in your present state of mind if you were on trial in this case?"* State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Inadmissible Evidence: An attorney may not ask prospective jurors about inadmissible evidence. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Incorrect Statements of Law: Questions containing incorrect or inadequate statements of the law are improper. State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

Indoctrination of Jurors: Counsel should not engage in efforts to indoctrinate jurors and counsel should not argue the case in any way while questioning jurors. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). In order to constitute an attempt to indoctrinate potential jurors, the improper question would be aimed at indoctrinating jurors with views favorable to the [questioning party]…or…advancing a particular position. State v. Chapman, 359 N.C. 328, 346 (2005). An **example of a non-indoctrinating question** is: *Can you imagine a set of circumstances in which…your personal beliefs conflict with the law? In that situation, what would you do?* See Chapman.

Overbroad and General Questions: *"Would you consider, if you had the opportunity,*

evidence about this defendant, either good or bad, other than that arising from the incident here?" This question was overly broad and general, and not proper for voir dire. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Rapport Building: Counsel should not visit with or establish "rapport" with jurors. State v. Phillips, 300 NC 678, 268 SE2d 452 (1980).

Repetitive Questions: The court may limit repetitious questions. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975). Where defense counsel had already inquired into whether jurors could "*independently weigh the evidence, respect the opinion of other jurors, and be strong enough to ask other jurors to to respect his opinion,"* the trial judge properly limited a redundant question that was based on an Allen jury instruction. State v. Maness, 363 N.C. 261 (2009).

Stake-Out Questions:
"Staking out" jurors is improper. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995). "Staking out" is seen as an attempt to indoctrinate potential jurors as to the substance of defendant's defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"Staking out" defined***: Questions that tend to commit prospective jurors to a specific future course of action in the case***. Chapman, 359 N.C. 328, 345-346 (2005).

Counsel may not pose hypothetical questions designed to elicit in advance what the jurors' decision will be under a certain state of the evidence or upon a given state of facts...The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts. State v Vinson, 287 N.C. 326, 336-37 (1975), death sentence vacated, 428 U.S. 902 (1976).

Examples of Stake-Out Questions:

1) "*Is there anyone on the jury who feels that because the defendant had a gun in his hand, no matter what the circumstances might be, that if that-if he pulled the trigger to that gun and that person met their death as result of that, that simply on those facts alone that he must be guilty of something?"* Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

2) Improper "reasonable doubt" questions:
- a) *What would your verdict be if the evidence were evenly balanced?*
- *b) What would your verdict be if you had a reasonable doubt about the defendant's guilt?*
- *c) What would your verdict be if you were convinced beyond a reasonable doubt of the defendant's guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).
- d) The judge will instruct you that *"you have to find each element beyond a reasonable doubt. Mr. [Juror], if you hear the evidence that comes in and find three elements beyond a reasonable doubt, but you don't find on the*

fourth element, what would your verdict be?" State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 796 (2011)

3) *Whether you would vote for the death penalty […in a specified hypothetical situation…]?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

4) *If you find from the evidence a conclusion which is susceptible to two reasonable interpretations; that is, one leading to innocence and one leading to guilt, will you adopt the interpretation which points to innocence and reject that of guilt?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

5) *If it was shown…that the defendant couldn't control his actions and didn't know what was going on…,would you still be inclined to return a verdict which would cause the imposition of the death penalty?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

6) *If you are satisfied from the evidence that the defendant was not conscious of his act at the time it allegedly was committed, would you still feel compelled to return a guilty verdict?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

7) *If you are satisfied beyond a reasonable doubt that the defendant committed the act but you believed that he did not intentionally or willfully commit the crime, would you still return a guilty verdict knowing that there would be a mandatory death sentence?* State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

8) Improper Burden of Proof Questions:

a) *If the defendant chose not to put on a defense, would you hold that against him or take it as an indication that he has something to hide?*

b) *Would you feel the need to hear from the defendant in order to return a verdict of not guilty?*

c) *Would the defendant have to prove anything to you before he would be entitled to a not guilty verdict?* State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980), or

d) *Would the fact that the defendant called fewer witnesses than the State make a difference in your decision as to her guilt?* State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986).

9) Improper Insanity Questions:

a) *Do you know what a dissociative period is and do you believe that it is possible for a person not to know because some mental disorder where they actually are, and do things that they believe they are doing in another place and under circumstances that are not actually real?*

b) *Are you thinking, well if the defendant says he has PTSD, for that reason alone, I would vote that he is guilty?* State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

10) Improper "Hold-out" Juror Questions:

a) A question designed to determine how well a prospective juror would stand up

to other jurors in the event of a split decision amounts to an impermissible "stake-out." State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001). For example, *"if you personally do not think that the State has proved something beyond a reasonable doubt and the other 11 jurors have, could you maintain the courage of your convictions and say, they've not proved that?"*

b) It is permissible to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the rights to stand by their beliefs in the case."* If this permissible question is followed by the question, *"And would you do that?"* this crosses the line into an impermissible stake-out question. State v. Elliott, 344 N.C. 242, 263, 475 S.E.2d 202, 210 (1996).

c) The following hypothetical inquiry was deemed an improper stake-out question: *"If you were convinced that life imprisonment without parole was the appropriate penalty after hearing the facts, the evidence, and the law, could you return a verdict of life imprisonment without parole even if you fellow jurors were of different opinions?"* State v. Maness, 363 N.C. 261, 269-70 (2009).

11) Improper Questions about Witness Credibility:

a) *"What type of facts would you look at to make a determination if someone's telling the truth?"*

b) In determining whether to believe a witness, *"would it be important to you that a person could actually observe or hear what they said [that] they have [seen or heard] from the witness stand?"* State v. Johnson, __ N.C.App. __, 706 S.E.2d. 790, 793-94 (2011).

c) 11) *"Whether you **would** automatically reject the testimony of mental health professionals."* State v. Neal, 346 N.C. 608, 618 (1997).

Examples of NON-Stake Out Questions:

1) Prosecutor asked the jurors *"if they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor."* The Supreme Court stated, "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994)

2) Prosecutor informed prospective jurors that *"only the three people charged with the crimes know what happened to the victims…and…none of the three would testify against the others and therefore the State had no eyewitness testimony to offer."* He then asked: *Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious…to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?* Court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

3) *"Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these people were out looking for drugs and involved in the drug environment, and became victims as a result of that?"* State v Teague, 134 N.C. App. 702 (1999).

4) *"If someone is offered as an expert in a particular field such as psychiatry, could you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was NOT an attempt to stake out jurors.

5) Proper "non-stake-out" questions (by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 204, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify…pursuant to a plea arrangement, plea bargain, or "deal" with the State. Would the mere fact that there is a plea bargain with one of the State's witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court's instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant….?*

c) *After having listened to that testimony and the court's instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?*

6) Proper "non-stake-out" questions asked by prosecutor about views on death penalty from State v. Chapman, 359 N.C. 328, 344-346 (2005):

a) As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?

b) Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?

c) Can you imagine a set of circumstances in which…your personal beliefs [for or against the death penalty] conflict with the law? In that situation, what would you do?

A federal court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005), explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror* ***could find*** *(instead of would find)* ***that certain facts call for the imposition of life or death****, or 2) whether a juror* ***could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

7) The prosecutor's question, *"Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* was NOT a stake-out attempt to get jurors to not consider defendant's appearance and humanity in capital sentencing hearing. Chapman, 359 N.C. 328, 346-347 (2005).

8) Prosecutor properly asked "non-stake-out" questions about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and the felony murder rule in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

a) *"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"*

b) *"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"*

c) *"[C]ould you follow the law…under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match…that caused [the victim's] death…?"*

9) In a sexual offense case, the prosecutor asked, *"To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?"* This was NOT a stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003) (The court said that the following question would have been a stake-out if the ADA had asked it, *"If there is medical evidence stating that some incident has occurred, will you find the defendant guilty beyond a reasonable doubt*).

10) In a case involving eyewitness identification, the prosecutor asked: *"Does anyone have a per se problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?"* The Court said that this question did NOT cause the jurors to commit to a future course of action. The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony…that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

11) In a child homicide case, the prosecutor was allowed to ask a prospective juror *"if he could look beyond evidence of the child's poor living conditions and lack of motherly care and focus on the issue of whether the defendant was guilty of killing the child."* The

Supreme Court found that this was not a stake-out question. State v. Burr, 341 N.C. 263, 285-86 (1995).

JURY SELECTION IN DEATH PENALTY CASES

I. GENERAL PRINCIPLES

Both the defendant and the state have the right to question prospective jurors about their views on capital punishment…The extent and manner of the inquiry by counsel lies within the trial court's discretion and will not be overturned absent an abuse of discretion. State v. Brogden, 334 N.C. 39, 430 S.E.2d 905, 908 (1993).

A defendant on trial for his life should be given great latitude in examining potential jurors. State v Conner, 335 N.C. 618 (1995).

[C]ounsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted).

"Part of the Sixth Amendment's guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors…Voir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored." Morgan v Illinois, 504 U.S. 719, 729, 733 (1992)

Voir dire must be available ***"to lay bare the foundation"*** of a challenge for cause against a prospective juror. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so. . Morgan, 504 U.S. at 733-34.

In voir dire, "what matters is how…[the questions regarding capital punishment] might be understood-or misunderstood-by prospective jurors." For example, "a general question as to the presence of reservations [against the death penalty] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases." One cannot assume the position of a venireman regarding this issue absent his own unambiguous statement of his beliefs. Witherspoon, 391 U.S. at 515, n. 9.

The trial court **must allow a defendant to go beyond the standard "fair and impartial" question**: "As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed...It

may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." Morgan, 504 U.S. at 735-36.

It is not necessary for the trial court to explain or **for a juror to understand the process of a capital sentencing proceeding before the juror can be successfully challenged for his answers to questions.** An **understanding of the process should not affect one's beliefs regarding the death penalty**. Simpson, 341 N.C. 316, 462 SE2d 191, 202, 206 (1995).

II. Death Qualification: General Opposition to Death Penalty Not Enough

Under the "impartial jury" guarantee of the Sixth Amendment, death penalty jurors may not be excused "for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction"…, or "that there are some kinds of cases in which they would refuse to recommend capital punishment. Witherspoon, 391 U.S. at 522, 512-13.

The Supreme Court recognized that "A man who opposes the death penalty…can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror." Id., 391 U.S. at 519.

"Not all [jurors] who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors…so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137, 149 (1986). [Note that the Court in Lockhart reaffirmed its position that death-qualified juries are not conviction-prone, and it is constitutional for a death-qualified jury to decide the guilt/innocence phase. The Court rejected the "fair-cross-section" argument against death-qualified juries deciding guilt.]

"[A] ***juror is not automatically excluded from jury service merely because that juror may have an opinion*** about the propriety of the death penalty." State v. Elliott, 360 N.C. 400, 410 (2006). General opposition to the death penalty will not support a challenge for cause for a potential juror who will "conscientiously apply the law to the facts adduced at trial." Such a **juror may be properly excluded "if he refuses to follow the statutory scheme and truthfully answer the questions** put by the trial judge." State v. Brogden, 430 S.E.2d at 907-08 (1993)(citing Witt, Adams v. Texas, and Lockhart).

III. Death Qualification Rules: Witherspoon and Witt Standards

The State may excuse jurors who make it **"unmistakably clear" that (1) they**

would "automatically vote against the death penalty" no matter what the facts of the case were, or (2) "their attitude about the death penalty would prevent them from making an impartial decision" regarding the defendant's guilt. Witherspoon, 391 U.S. at 522, n. 21 (1968).

A . . . prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be **willing to consider all of the penalties** provided by state law, and that he **not be irrevocably committed against the penalty of death regardless of the facts and circumstances**..." that might emerge during the trial. Witherspoon v Illinois, 391 U.S. 510, 523 n.21 (1968).

The proper standard for excusing a prospective juror for cause because of his views on capital punishment is: **"Whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction or his oath."** Wainwright v. Witt, 469 U.S. at 424.

Note that **considerable confusion regarding the law** on the part of the juror could amount to **"substantial impairment."** Uttecht v. Brown, 551 U.S. 1, 127. S.Ct. 2218, 167 L.Ed.2d 1014, 1029 (2007).

Prospective jurors may not be excused for cause simply because of the possibility "of the **death penalty may affect** what their **honest judgment of the facts** will be or **what they may deem to be a reasonable doubt**." The fact that the possible imposition of the death penalty would **"affect" their deliberations by causing them to be more emotionally involved or to view their task with greater seriousness** is not grounds for excusal. The same rule against exclusion for cause applies to **jurors who could not confirm or deny** that their **deliberations would be affected** by their views about the death penalty or by the possible imposition of the death penalty. Adams v. Texas, 448 U.S. 38, 49-50 (1980).

The State may excuse for cause a juror if he affirmatively answers the following question: **"Is your conviction [against the death penalty] so strong that you cannot take an oath [to fairly try this case and follow the law], knowing that a possibility exists in regard to capital punishment."** Lockett v. Ohio, 438 U.S. 586, 595-96 (1978). This ruling was based on the impartiality prong of the Witherspoon standard (i.e., their attitudes toward the death penalty would prevent them from making an **impartial decision as to the defendant's guilt**.)

The N.C. Supreme Court has upheld the removal of potential jurors **who equivocate** or who state that although they believe generally in the death penalty, they indicate that they personally **would be unable or would find it difficult to vote for the death penalty**. Simpson, 341 N.C. 316, 462 S.E.2d 191, 206 (1995); State v. Gibbs, 335 NC 1, 436 SE2d 321 (1993), cert. denied, 129 L.Ed.2d 881 (1994).

The following questions **by the prosecutor** were found to be proper:

1) [Mr. Juror…], *how do you feel about the death penalty, sir, are you opposed to it or [do] you feel like it is a necessary law?*

2) *Do you feel that you could be part of the legal machinery which might bring it about in this particular case?* State v Willis, 332 N.C. 151, 180-81 (1992).

IV. Rehabilitation of Death Challenged Juror

It is not an abuse of for the trial court to deny the defendant the chance to rehabilitate a juror **who has expressed clear and unequivocal** opposition to the death penalty in response to questions asked by the prosecutor and judge **when further questioning by defendant would not have likely produced different answers**. Brogden, 334 N.C. 39, 430 SE2d 905, 908-09 (1993); see also State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992). [In Brogden, a juror said that he could consider the evidence, was not predisposed either way, and could vote for death in an appropriate case. The same juror also said his feelings about the death penalty would "partially" or "to some extent" affect his performance as a juror. The trial court **erroneously** denied the defendant the opportunity to rehabilitate this juror.]

It is **error** for a trial court to enter "**a general ruling, as a matter of law," a defendant will never be allowed to rehabilitate** a juror when the juror's answers…have indicated that the **juror may be unable to follow the law** and fairly consider the possibility of recommending a sentence of death. State v. Green, 336 N.C. 142, 161 (1994) (based on Brogdon).

V. Life Qualifying Questions: Morgan v. Illinois

"If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts were?" Morgan, 504 U.S. at 723. A juror who will automatically vote for the death penalty in every case will fail to follow the law about considering aggravating and mitigating evidence, and has already formed an opinion on the merits of the case. Id. at 504 U.S. at 729, 738.

"Clearly, the extremes must be eliminated-i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence." Morgan, 504 U.S. at 734, n. 7.

"General fairness and follow the law questions" are not sufficient. **A capital defendant is entitled to inquire and ascertain a potential juror's predeterminations regarding the imposition of the death penalty.** Morgan, 504 U.S. at 507; State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 840 (1994).

[For a good summary of Morgan, see U.S. v. Johnson, 366 F.Supp. 2d 822, 826-831 (N.D. Iowa 2005).]

Proper Questions:

1) ***As you sit here now, do you know how you would vote at the penalty phase…regardless of the facts or circumstances in the case?*** Chapman, 359 N.C. 328, 344-345 (2005).

2) ***Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?***

[According to the Supreme Court, these general questions (asked by the prosecutor, i.e., #1 and #2 herein) did not tend to commit jurors to a specific future course of action. Instead, the questions helped to clarify whether the jurors' personal beliefs would substantially impair their ability to follow the law. Such inquiry is not only permissible, it is desirable to safeguard the integrity of a fair and impartial jury" for both parties. Chapman, 359 N.C. 328, 344-345 (2005).]

3) ***Can you imagine a set of circumstances in which…your personal beliefs*** *[…for or against the death penalty…]* ***conflict with the law? In that situation, what would you do?***

[While a party may not ask questions that tend to "stake out" the verdict a prospective juror would render on a particular set of facts…, **counsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence**….A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted)…..The Supreme Court said that, although the prosecutor's questions (numbered 1-3 above) were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).]

4) ***Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994)

5) ***Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first-degree murder?*** Approved in State v Conner, 335 N.C. 618 (1994). [The gist of the above two questions (numbered 4 and 5) was to determine whether the juror was willing to consider a life sentence in the appropriate circumstances or would automatically vote for death upon conviction. Conner, 440 SE2d at 841.]

6) ***If at the first stage of the trial you voted guilty for first-degree murder, do you think that you could at sentencing consider a life sentence or would your feelings about the death penalty be so strong that you could not consider a life sentence?*** State v Conner, 335 N.C. 618, 643-45 (1994) (referring to State v Taylor).

7) ***If you had sat on the jury and had returned a verdict of guilty, would you then presume that the penalty should be death?*** State v Conner, 335 N.C. 618, 643-45 (1994). [Referring to questions used in State v Taylor, 304 N.C. at 265, would now be acceptable). Also approved in State v. Ward, 354 N.C. 231, 254, 555 S.E.2d 251, 266 (2001) when asked by the prosecutor.]

8) ***If the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned a verdict of guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?*** State v Conner, 335 N.C. 618, 643-45 (1994). [The Court recognized that questions (numbered here as 6-8) that were deemed inappropriate in State v Taylor, 304 N.C. at 265, would now be acceptable.]

9) A capital defendant **must be allowed** to ask, ***"whether prospective jurors would automatically vote to impose the death penalty in the event of a conviction."*** State v. Wiley, 355 N.C. 592, 612 (2002) (citing Morgan 504 U.S. 719, 733-736).

Improper Questions:

1) Improper questions due to "**form**" (according to Simpson, 341 N.C. 316, 462 S.E.2d 191, 203 (1995)):

a) *Do you think that a sentence to life imprisonment is a sufficiently harsh punishment for someone who has committed cold-blooded, premeditated murder?*

b) *Do you think that before you would be willing to consider a death sentence for someone who has committed cold-blooded, premeditated murder, that they would have to show you something that justified that sentence?*

2) Questions that were **argumentative, incomplete statement of the law, and "stake-outs"** are improper. Simpson, 341 N.C. at 339-340.

3) The following question was properly disallowed under Morgan because it was **overly broad and called for a legislative/policy decision**: *Do you feel that the death penalty is the appropriate penalty for someone convicted of first-degree murder?* Conner, 335 N.C. at 643.

4) Defense counsel was not allowed to ask the following questions because they were **hypothetical stake-out questions** designed to pin down jurors regarding the kind of fact scenarios they would deem worthy of LWOP or the death penalty:

a) *Have you ever heard of a case where you thought that LWOP should be the appropriate punishment?*

b) *Have you ever heard of a case where you thought that the death penalty should be the punishment?*

c) *Whether you could conceive of a case where LWOP ought to be the punishment? What type of case is that?* State v. Wiley, 355 N.C. 592, 610-613 (2002).

Case-Specific Questions under Morgan:

The court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005) addressed the issue of whether Morgan allows for case-specific questions (i.e., questions that ask whether jurors can consider life or death in a case involving stated facts). The court decided that Morgan did not preclude (or even address) case-specific questions. 366 F.Supp. 2d at 844-845. ***The essence of the Supreme Court's decision in Morgan was that, in order to empanel a fair and impartial jury, a defendant must be afforded the opportunity to question jurors about their ability to consider life and death sentences based on the facts and law in a particular case rather than automatically imposing a particular sentence no matter what the facts were.*** Therefore, the court in

Johnson found that case-specific questions (other than stake-out questions) are appropriate under Morgan. 366 F.Supp. 2d at 845-846.

In fact case-specific questions may be constitutionally required since a prohibition on such questions could impede a party's ability to determine whether jurors are unwaveringly biased for or against a death sentence. 366 F.Supp. 2d at 848.

The Johnson court explained how to avoid improper stakeout questions in framing proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror **could find** (instead of would find) **that certain facts call for the imposition of life or death**, or 2) whether a juror **could fairly consider both life and death in light of particular facts*** are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

VI. Consideration of MITIGATION Evidence

General Principles:

Pursuant to Morgan v. Illinois, capital jurors must be able to consider and give weight to mitigating circumstances. "Any juror who states that he or she will automatically **vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider mitigating evidence** and to decide if it is sufficient to preclude imposition of the death penalty." Morgan, 504 U.S. at 738, 119 L.Ed.2d at 508. Such jurors "not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." Morgan, 504 U.S. at 736, 119 L.Ed.2d at 507. **"Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause**, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." Morgan, 504 U.S. at 739, 119 L.Ed.2d at 509.

Not only must the defendant be allowed to offer all relevant mitigating circumstance, "the sentencer [must] listen-that is **the sentencer must consider the mitigating circumstances when deciding the appropriate sentence.** Eddings v Oklahoma, 455 U.S. 104, 115 n.10 (1982)

[Jurors] may determine the weight to be given relevant mitigating evidence...[b]ut **they may not give it no weight by excluding such evidence from their consideration**. Eddings v Oklahoma, 455 U.S. 104, 114 (1982)

[The] decision to impose the death penalty is a reasoned moral response to the

defendant's background, character and crime…Jurors make individualized assessments of the appropriateness of the death penalty. Penry v. Lynaugh, 109 S.Ct. 2934, 2948-9 (1988)

Procedure must require the sentencing body **to consider the character and record of the individual offender and the circumstances of the particular offense**. Woodsen v North Carolina, 428 U.S. 280, 304 (1976)

In a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique individualized judgment regarding the punishment that a particular person deserves. Turner v Murray, 476 U.S. 23, 33-34 (1985) (quoting Caldwell v Mississippi, 472 U.S. 320, 340 n.7 (1985).

Potential Inquiries into Mitigation Evidence:

[The N.C. Supreme Court] conclude[d] that, in permitting defendant to inquire generally into jurors' feelings about mental illness and retardation and other mitigating circumstances, he was given an adequate opportunity to discover any bias on the part of the juror…[That, combined with questions] asking jurors if they would automatically vote for the death penalty…and if they could consider mitigating circumstances.., satisfies the constitutional requirements of Morgan.
State v. Skipper, 337 N.C. 1, 21-22 (1994). [Note that the only restriction…was whether a juror could "consider" a specific mitigating circumstance in reaching a decision. State v. Skipper, 337 N.C. 1, 21 (1994)]

The Supreme Court had the following to say about the following question (and two other questions) originally asked by a prosecutor: "***Can you imagine a set of circumstances in which…your personal beliefs*** *[about __?]* ***conflict with the law? In that situation, what would you do?"*** Although the prosecutor's questions were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).

Note, however, the following questions were deemed improper because 1) they "fished" for answers to legal questions before the judge instructed the jury about the applicable law, and 2) the questions "staked-out" jurors about what kind of verdict they would render under certain named circumstances:

a) "*If the State is able to prove that the defendant premeditatedly and deliberately killed three people…, would you be able to fairly consider things like sociological background, the way he grew up, if he had an alcohol problem, things like that in weighing whether he should get death or LWOP?"*;

b) "*Assuming the State proves three cold-blooded P&D murders, can you conceive in your own mind the mitigating factors that would let you find your ability for a*

penalty less than death?" State v. Mitchell, 353 N.C. 309, 318-319 543 S.E.2d 830, 836-837 (2001).

The following question was allowed by the trial court: ***"Do you feel like whatever we propose to you as a potential mitigating factor that you can give that fair consideration and not already start out dismissing those and saying those don't count because of the severity of the crime."*** State v Jones, 336 N.C. 229, 241 (1994).

An inquiry into jurors' **latent bias against any type of mitigation evidence** may be appropriate. In Simpson, 341 N.C. 316, 340-341, 462 S.E.2d 191, 205 (1995), the "majority" of the following questions **were deemed improper** questions about whether jurors could consider certain mitigating circumstances due to "form" or "staking out":

a) "*Do you think that the punishment that should be imposed for anyone in a criminal case in general should be effected [sic] by their mental or emotional state at the time that the crime was committed?"*

b) *"If you were instructed by the Court that certain things are mitigating, that is they are a basis for rendering or returning a verdict of life imprisonment as opposed to death and were those circumstances established you must give them some weight or consideration, could you do that?"*

c) *"Mr. [Juror], in this case if there was evidence to support, evidence to show that the defendant was under the influence of a mental or emotional disturbance at the time of the commission of the murder and if the Court instructed you that was a mitigating circumstance, if proven, that must be given some weight, could you follow that instruction?"*

d) *"If the Court advises you that by the preponderance of the evidence that if you are shown that the capability of the defendant to conform his conduct to the requirements of the law was impaired at the time of the murder, and the Court instructed you that was a circumstance to which you must give some consideration, could you follow that instruction?"*

e) *"Do you believe that a psychologist or a psychiatrist can be successful in treating people with mental or emotional disturbances?"*

f) *"Do you personally believe, and I am talking about your personal beliefs, that if by the preponderance of evidence, that is evidence that is established, that a person who committed premeditated murder was under the influence of a mental or emotional disturbance at the time that the crime was committed, do you personally consider that as mitigating, that is as far as supporting a sentence of less than the death penalty?"*

g) *"Now if instructed by the Court and if it is supported by the evidence, could you take into account the defendant's age at the time of the commission of the crime?"*

h) *"Do you believe that you could fairly and impartially listen to the evidence and consider whether any mitigating circumstances the judge instructs you on are found in the jury consideration at the end of the case?"*

In finding "most" of the above-cited questions improper, it was important to the Supreme Court that the trial court had allowed the defense lawyers to asked jurors about their experiences with mental problems, mental health professions, and foster care. **Such questions allowed the defendant to explore whether jurors had any latent bias**

against any type of mitigation evidence. Simpson, 341 N.C. at 341-342.

See discussion of U.S. v. Johnson, 366 F.Supp. 822 (N.D. Iowa 2005) above for authority or argument that case-specific inquiry about mitigation should be allowed under Morgan.

*For more mitigation questions, see below for "specific areas of inquiry."

VII. Specific Areas of Inquiry

Accomplice Liability: It was proper for prosecutor to ask prospective juror if he would be able to recommend the death penalty for someone who did not actually pull the trigger since it was uncontroverted that the defendant was an accessory. The State could inquire about the jurors' ability to impose the death penalty for an accessory to first-degree murder. State v Bond, 345 N.C. 1, 14-17, 478 S.E.2d 163 (1996):

a) *"The evidence will show [the defendant] did not actually pull the trigger. Would any of you feel like simply because he did not pull the trigger, you could not consider the death penalty and follow the law concerning the death penalty."*

b) *"Regardless of the facts and circumstances concerning the case, you could not recommend the death penalty for anyone unless it was the person who pulled the trigger."*

Age of Defendant:

The following question was asked by defense counsel: *"[T]he defendant will introduce things that he contends are mitigating circumstances, things like his age at the time of the crime...Do you feel like you can consider the defendant's age at the time the crime was committed ...and give it fair consideration?"* The Supreme Court assumed it was error for the trial court to sustain the State's objection to this question. In finding it harmless, however, the Court stated, "[i]n the context that this question was propounded, the juror is bound to have known the circumstance to which the defendant referred was the age of the defendant." State v Jones, 336 N.C. 229, 241 (1994)

Note, however, the question *"Would you consider the age of the defendant to be of any importance in this case [in deciding whether the death penalty is appropriate]?"* was found to be a "stake-out" question in State v. Womble, 343 N.C. 667, 682 473 S.E.2d 291, 299 (1996).

Aggravating Circumstances:

The Supreme Court has held that **questions about a specific aggravating circumstance that will arise in the case amounts to a stake–out question**. State v. Richmond, 347 N.C. 412, 424, 495 S.E.2d 677 (1998)(*"could you still consider mitigating circumstances knowing that the defendant had a prior first-degree murder conviction"*); State v. Fletcher, 354 N.C. 455, 465-66 (2001)(in a re-sentencing in which

the first-degree murder conviction was accompanied by a burglary conviction, counsel asked, the State has *"to prove at least one aggravating factor, that is…the fact that the murder was part of a burglary. That's true in this case because [the defendant] was also convicted of burglary. Knowing that about this case, could you still consider a life sentence…?"*)

Cost of Life Sentence vs. Death Sentence

In State v. Elliott, 360 N.C. 400, 409-10 (2006), the Supreme Court held that "we cannot say that the trial court clearly abused its discretion" when it did not allow defense counsel to ask, *"Do you have any preconceived notions about the costs of executing someone compared to the cost of keeping him in prison for the rest of his life."* The Supreme Court admitted that the question was "relevant" but, in light of the inquiry the trial court allowed, it was not a clear abuse of discretion to disallow the question. See also, State v. Cummings, 361 N.C. 438, 465 (2007). On the other hand, a trial court may reverse its previous denial and allow the "costs" question. State v. Polke, 361 N.C. 65, 68 (2006).

Course of Conduct Aggravator (or Multiple Murders):

Prosecutor was not staking out juror when asking: *"If the State satisfied you... that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, then I take it you could give the defendant the death penalty for beating two humans to death with a hammer, is that correct?"* State v Laws, 325 N.C. 81 (1989).

Felony Murder Defined:

Prosecutor properly defined felony murder as *"a killing which occurs during the commission of a violent felony, such as _____"* (the felony in this case was discharging a firearm into an occupied vehicle). State v. Nobles, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999).

Forecast of Aggravating or Mitigating Circumstance(s):

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: **[I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show,** provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

A defendant is not entitled to put on a mini-trial of his evidence during voir dire by using hypothetical situations to determine whether a juror would cast his vote for his theory. The trial court in Cummings **allowed defense counsel to question prospective jurors about whether they had been personally involved** in any of those situations [such as domestic violence, child abuse, and alcohol and drug abuse], however, the judge **properly refused to allow defense counsel to ask hypothetical and speculative questions** that were being used to try the mitigation evidence during jury selection. State v. Cummings, 361 N.C. 438, 464-65 (2007).

Foster Care:

It was proper to ask, *Whether any jurors have had any experience with foster care?* Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995).

Gender of Defendant [or Victim?]:

The prosecutor properly asked, *"Would the fact that the Defendant is a female in any way affect your deliberations with regard to the death penalty?"* This was not a stake-out question. It was appropriate to inquire into the possible sensitivities of prospective jurors toward a female defendant facing the death penalty in an effort to ferret out any prejudice arising out of defendant's gender. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999).

HAC Aggravator:

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: [I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show, provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

Impaired Capacity (f)(6):

Could the juror consider impaired capacity due to intoxication by drugs or alcohol as a mitigating circumstance and give the evidence such weight as you believe it is due ? Would your feelings about drugs or alcohol prevent you from considering the evidence ? State v Smith, 328 N.C. 99, 127 (1991). (See, where Court found that the following was a stake-out question: *"How many of you think that drug abuse is irrevelant to punishment in this case."* State v. Ball, 344 N.C. 290, 304, 474 S.E.2d 345, 353 (1996).

Prosecuting attorney asked the jurors, *"If they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor.* The Supreme Court stated: "This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question." State v. Reeves, 337 N.C. 700 (1994).

It was proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. (*If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict.*) State v McKoy, 323 N.C. 1 (1988).

Lessened Juror Responsibility:

In closing argument and during jury selection, **it is improper for a prosecutor to make statements that lessens the jury's role or responsibility** in imposing a potential death penalty **or lessens the seriousness or reality of a death sentence**. State v. Hines, 286 N.C. 377, 381-86, 211 S.E.2d 201 (1975) (reversible error for the prosecutor to tell a

prospective juror, *"to ease your feelings [about imposing the death penalty], I might say…that one [person] has been put to death in N.C. since 1961"*; State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975), State v. Jones, 296 N.C. 495, 497-502 (1979) (it is error for *a prosecutor to suggest that the appellate process or executive clemency will correct any errors in a jury's verdict*); State v. Jones, 296 N.C. at 501-502 (prosecutor improperly discussed how *15A-2000(d) provides for an automatic appeal and how the Supreme Court must overturn a death sentence if it makes certain findings*. This had the effect of minimizing in the jurors' minds their role in recommending a death sentence).

Life Sentence (Without Parole):

During jury selection, a prospective juror indicated that he did not feel that a life sentence actually meant life (prior to LWOP statute). The trial court then instructed the jury that they should consider a life sentence to mean that defendant would be imprisoned for life and that they should not take the possibility of parole into account in reaching a verdict. The juror indicated that he would have trouble following that instruction and was excused for cause. Defense counsel requested that he be allowed to ask the other prospective jurors whether they could follow the court's instructions on parole. The trial court erroneously refused to allow the question. The Supreme Court held that **the defendant has a right to inquire as to whether a prospective juror will follow the court's instruction (i.e., life means life).** State v Jones, 336 N.C. 229, 239-40 (1994).

In several cases, the Supreme Court has upheld the refusal to allow defense counsel to ask about jurors' *"understanding of the meaning of a sentence of life without parole", "conceptions of the parole eligibility of a defendant serving a life sentence", or their feelings about whether the death penalty is more or less harsh that life in prison without parole."* State v. Neal, 346 N.C. 608, 617-18 (1997); State v. Jones, 358 N.C. 330 (2004); State v. Garcell, 363 N.C. 10, 30-32 (2009). These decisions were based on the principle that a defendant does not have the constitutional right to question the venire about parole. State v. Neal, 346 N.C. at 617.

In light of this, a safe inquiry might avoid the topic of "parole" and simply ask jurors about "their views of a life sentence for first-degree murder."

Another safe inquiry might be based on 15A-2002 which provides that "the judge shall instruct the jury…that a sentence of life imprisonment means a sentence of life without parole." There is no doubt that the jury will hear this instruction and, generally, the parties should be allowed to inquire whether jurors hold misconceptions that will affect their ability to "follow the law." **"Questions designed to measure a prospective juror's ability to follow the law are proper within the context of jury selection voir dire."** See, State v. Jones, 347 N.C. 193, 203 (1997), *citing* State v. Price, 326 N.C. 56, 66-67, 388 S.E.2d 84, 89, *vacated on other grounds*, 498 U.S. 802 (1990); State v. Henderson, 155 N.C.App. 719, 727 (2003)

A juror's misperception about a life sentence with no possibility of parole may substantially impair his or her ability to follow the law. Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). In Uttecht, despite a juror being informed four

or five times that a life sentence meant "life imprisonment without the possibility of parole," the juror continued to say that he would support the death penalty if the defendant would be released to re-offend. That juror was properly removed for cause. 167 L.E.d2d at 1025-30.

In a pre-LWOP case, the prosecutor improperly argued that the defendant could be paroled in 20 years if the jury awarded him a life sentence. The Supreme Court stated that, **"The jury's sentence recommendation should be based solely on their balancing the aggravating and mitigating factors before them. The possibility of parole is not such a factor, and it has no place in the jury's recommendation of their sentence to be imposed."** State v. Jones, 296 N.C. 495, 502-503 (1979). This principle might provide authority for inquiring into jurors' erroneous beliefs about parole to determine if they can follow the law.

Mental or Emotional Disturbance:

If the court instructs you that you should consider whether or not a person is suffering from mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow the instruction? State v Skipper, 337 N.C. 1, 20 (1994)).

The following were proper mental health related questions as found in Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995):

1) *Whether the jurors had any background or experience with mental problems in their families ?*

2) *Whether the jurors have any bias against or problem with any mental health professionals ?*

Murder During Felony Aggravator (e)(5):

Prosecutor informed jury about aggravating factors and indicated that the State *is relying upon...the capital felony was committed while the defendant was engaged, or was an aider and abettor in the commission of, or attempt to commit...any homicide, robbery, rape....* Supreme Court said that the prosecutor during jury voir dire should limit reference to aggravating factors, including the underlying felonies listed in G.S. 15A-2000(e)(5), to those of which there will be evidence and upon which the prosecutor intends to rely. Payne, 328 N.C. 377 (1991)

No Significant Criminal Record:

The following question was deemed improper as hypothetical and an impermissible attempt to indoctrinate a juror: *"Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether or not to impose the death penalty?"* State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989).

Personal Strength to Vote for Death:

Prosecutor asked: *"Are you strong enough to recommend the death penalty ?"*

State v Smith, 328 N.C. 99, 128 (1991). This repeated inquiry by prosecutor is not an attempt to see how jurors would be inclined to vote on a given state of facts. State v. Fleming, 350 N.C. 109, 125, 512 S.E.2d 720, 732 (1999).

Prosecutors were allowed to ask jurors *"whether they possessed the intestinal fortitude [or "courage", or "backbone"] to vote for a sentence of death."* When jurors equivocated on the imposition of the death penalty, prosecutors were allowed to ask these questions to determine whether they could comply with the law. State v. Murrell, 362 N.C. 375, 389-91 (2008); State v. Oliver, 309 N.C. 326, 355 (1983); State v. Flippen, 349 N.C. 264, 275 (1998); State v. Hinson, 310 N.C. 245, 252 (1984).

Religious Beliefs:

The defendant's "right of inquiry" includes "the right to make appropriate inquiry concerning a prospective juror's moral or religious scruples, morals, beliefs and attitudes toward capital punishment." State v. Vinson, 287 N.C. 326, 337, 215 S.E.2d 60, 69 (1975), death sentence vacated, 428 U.S. 902, 49 L.Ed.2d 1206 (1976). The issue is whether the prospective juror's religious views would impair his ability to follow the law. State v. Fletcher, 354 N.C. 455, 467 (2001). This right of inquiry does not extend to all aspects of the jurors' private lives or of their religious beliefs. State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625 (1989).

General questions about the effect of a juror's religious views on his ability to follow the law are favored over detailed questions about Biblical concepts or doctrines. It was held improper to ask about a juror's *"understanding of the Bible's teachings on the death penalty."* State v. Mitchell, 353 N.C. 309, 318, 543 S.E.2d 830, 836 (2001). The Defendant, however, was allowed to ask the juror about her religious affiliation and whether any teachings of her church would interfere with her ability to perform her duties as a juror. In State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625-626 (1989), sentence vacated on other grounds, 494 U.S. 1022, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990), the trial court did not abuse its discretion by not allowing defense counsel to ask a juror *"whether she believed in a literal interpretation of the Bible."*

In State v. Fletcher, 354 N.C. 455, 467, 555 S.E.2d 534, 542 (2001), defense counsel was allowed to inquire into a juror's religious affiliation and his activities with a Bible distributing group, but the trial court properly disallowed the question, whether the juror is a person *"who believes in the Biblical concept of an eye for an eye."* On the other hand, another trial court did not allow counsel to ask questions about jurors' *"church affiliations and the beliefs espoused by others [about the death penalty] representing their churches."* State v. Anderson, 350 N.C. 152, 171-172, 513 S.E.2d 296, 308 (1999).

Sympathy for the Defendant [or the Victim?]:

An inquiry into the sympathies of prospective jurors is part of the exercise of (the prosecutor's) right to secure an unbiased jury. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999). (Arguably, the same right applies to the defendant.)

Prosecutor properly asked, "*Would you feel sympathy towards the defendant simply because you would see him here in court each day…?"* Jurors may consider a defendant's demeanor in recommending a sentence. The question did not "stake out" jurors so that they could not consider the defendant's appearance and humanity. The question did not address definable qualities of the defendant's appearance and demeanor. It addressed jurors' feelings toward the defendant, notwithstanding his courtroom appearance or behavior. Chapman, 359 N.C. 328, 346-347.

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Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)
Eddings v Oklahoma, 455 U.S. 104 (1982)
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Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)
Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)
Mu'min v. Virginia, 500 U.S. 415, 111 U.S. 1899, 114 L.Ed.2d 493 (1991)
Penry v. Lynaugh, 109 S.Ct. 2934 (1988)
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Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986)
Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)
Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)
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United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005)
Uttecht v. Brown, 551 U.S. 1, 127. S.Ct. 2218, 167 L.Ed.2d 1014 (2007)

North Carolina Courts

State v. Anderson, 350 N.C. 152, 513 S.E.2d 296 (1999)
State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985) (note 6-7)
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State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994) (note 2)
State v Bond, 345 N.C. 1, 478 S.E.2d 163 (1996)
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State v. Burr, 341 N.C. 263, 285-86 (1995)
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State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (1994) (notes 1-4, 7-9, 19-21)
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State v. Cunningham, 333 N.C. 744, 429 S.E.2d 718 (1993)
State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989) (notes 5, 8)
State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978) (note 1)

State v Edwards, 27 N.C. App. 369 (1975)
State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996)
State v. Elliott, 360 N.C. 400, 628 S.E.2d 735 (2006)
State v. Fleming, 350 N.C. 109, 512 S.E.2d 720 (1999)
State v. Fletcher, 354 N.C. 455, 555 S.E.2d 534 (2001)
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State v. Gell, 351 N.C. 192 (2000)
State v. Gibbs, 335 NC 1, 436 SE2d 321 (1993), cert. denied, 129 L.Ed.2d 881 (1994)
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State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989) (notes 1-2)
State v. Payne, 328 N.C. 377 (1991)
State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980) (note 1)
State v. Polke, 361 N.C. 65 (2006)
State v Reaves, 337 N.C. 700 (1994)
State v. Richmond, 347 N.C. 412, 424, 495 S.E.2d 677 (1998)
State v. Roberts, 135 N.C. App. 690, 522 S.E.2d 130 (1999)
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State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986) (note 12)
State v Skipper, 337 N.C. 1 (1994)
State v. Simpson, 341 N.C. 316, 426 S.E.2d 191 (1995) (notes 1-10)
State v Smith, 328 N.C. 99 (1991)
State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992) (note 10)
State v. Teague, 134 N.C. App. 702 (1999)
State v Thomas, 294 N.C. 105 (1978)
State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975), death penalty vacated, 428 U.S. 902, 49 L.Ed.2d 1206 (1976) (notes 2-10)

State v. Ward, 354 N.C. 231, 555 S.E.2d 251 (2001)
State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973) (note 7)
State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975)
State v. Wiley, 355 N.C. 592 (2002)
State v Williams, 41 N.C. App. 287, disc. rev. denied, 297 N.C. 699 (1979)
State v Willis, 332 N.C. 151 (1992)
State v. Womble, 343 N.C. 667, 473 S.E.2d 291 (1996)

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

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

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

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

Basics of Batson Challenges

"OBJECT ANYWAY": Reviving Batson's Promise

Johanna Jennings
Center for Death Penalty Litigation
UNC SOG Higher-Level Felony Defense Training I
April 10, 2018

Podcast Episode:
"Object Anyway"
More Perfect
WNYC Radio
July 16, 2016

1995
Top Gun II

2018

$$\frac{\text{Black Jurors } \textbf{Struck}}{\text{Black Jurors } \textbf{Available}} \div \frac{\text{Non-Black Jurors } \textbf{Struck}}{\text{Non-Black Jurors } \textbf{Available}} = \text{“STRIKE RATIO”}$$

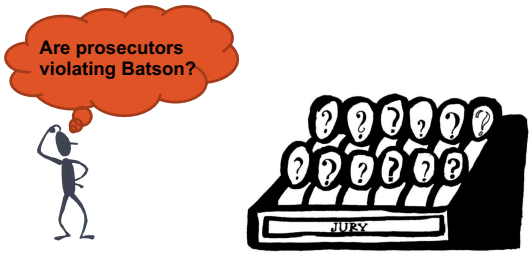
$\cong$ 2/1

WFU Jury Sunshine Project

Black/White Removal Ratios for Largest Cities in NC

Winston-Salem (Forsyth)	3.0
Durham (Durham)	2.6
Charlotte (Mecklenburg)	2.5
Raleigh (Wake)	1.7
Greensboro (Guilford)	1.7
Fayetteville (Cumberland)	1.7

So the question is not:



Prosecutors are violating Batson
ALL THE TIME

That is so old news.

North Carolina Supreme Court

Years since *Batson*	31
Batson claims heard	74
Batson reversals	0

Purposeful Discrimination Reversals

West Virginia	25%
Maryland	40%
Virginia	17%
South Carolina	33%

Friendly SCOTUS Case Law!!!

Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322 (2003)

Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231 (2005)

Snyder v. Louisiana, 552 U.S. 472 (2008)

Foster v. Chatman, 136 S.Ct. 1737 (2016)

When to use Batson?

ALWAYS

Object!

- Create appellate issue (no need to exhaust peremptories)
- Settle the case
- Get future jurors passed
- Strengthen later *Batson* objections
- Educate the court/prosecutor
- Help prosecutor check implicit bias
- Work for your client
- Alert attentive jurors to flawed, racially biased system
- There to do battle
- Right thing to do

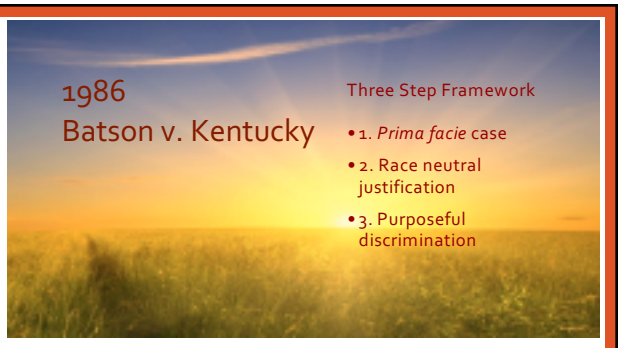
So, object anyway!

Batson Motions 101 - Essentials

- Record jury selection
- Record juror race

Batson Motions 201

- Notice of intent to object to *Batson* violations
- Discovery motion – training materials
- Memorandum in support of *Batson* objection
- Preserve state's notes*



Step 1

"not intended to be a high hurdle for defendants to cross."

State v. Hoffman, 348 N.C. 548, 553 (2008)

Step 1

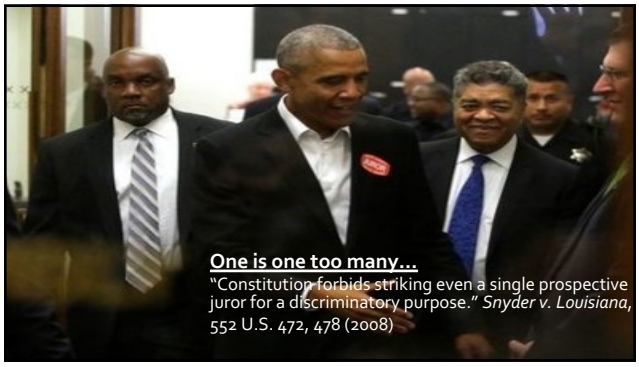
- Total Strikes
- Historical Evidence
- Strike Rate
- Prosecutor's History
- Comparative Juror Analysis
- Race of Parties
- Lack of Info/Qs
- Disparate Questions

The Defendant's prima facie burden is light…

"[A] defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005)

Strike Rate

"Circumstantial evidence of invidious intent may include proof of **disproportionate impact**. " *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (citing *Washington v. Davis*, 426 U.S. 229, 239-42 (1976)).



One is one too many…

"Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)

Prosecutor training and prior practices are relevant.

Evidence that prosecutors were trained in how to evade the strictures of *Batson* and historical evidence of prior practices of DA offices is relevant to the determination of whether race was significant in the strike decision. *See Miller-El v. Dretke*, 545 U.S. 231, 263-64

Differential Questioning

"Contrasting *voir dire* questions" posed respectively to black and white prospective jurors "indicate that the State was trying to avoid black jurors". *Miller-El v. Dretke*, 545 U.S. 231, 255

Step 2

Step 3

- Comparative Juror Analysis
- Use evidence from step 1
- Implausible and incredible reasons ≠ ok
- Prosecutor's pattern/history
- Not race-neutral, not ok.

Significant Factor, Not Sole Reason

The question before the Court is whether race is "significant in determining who was challenged and who was not." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

You don't have to disprove each and every reason.

- In *Foster v. Chatman*, after debunking three of eleven reasons given for one strike and five of eight reasons given for the other strike, the Court concluded that these two strikes were "motivated in substantial part by discriminatory intent." *Foster v. Chatman*, 136 S.Ct. at 1754.

Comparative Juror Analysis

"If prosecutor's proffered reason for striking black panelist applies just as well to otherwise similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)

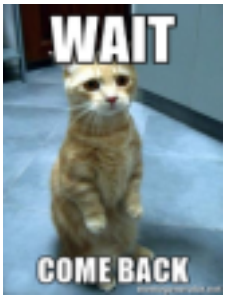
Comparative Juror Analysis

"A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential **jurors are not products of a set of cookie cutters**" *Miller-El v. Dretke*, 545 U.S. 231, 247 n.6 (2005)

The court cannot provide the reason.

Proffered reasons must "stand or fall" on their own plausibility and their pretextual nature "does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false". *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

You win! Relief?



"Reverse *Batson*"

- First, don't do it! You're not helping your client!
- Ask good questions and base your strike decisions on juror answers NOT stereotypes

Implicit bias

- What assumptions am I making about this juror?
- How would I interpret that answer if it were given by a juror of another race?

Seeking Racial Justice in Your Case, Court, and Community
January 19, 2018
NC Advocates for Justice

Reviving Batson's Promise:
Addressing The Absence of *Batson* Enforcement in North Carolina's Appellate Courts

Gretchen Engel, David Weiss, and Elizabeth Hambourger
Center for Death Penalty Litigation
Durham, NC

More than three decades ago, the United States Supreme Court ruled that it violated the Equal Protection Clause of the Fourteenth Amendment to exclude a potential juror because of race. *Batson v. Kentucky*, 476 U.S. 79 (1986). A year later, the Supreme Court of North Carolina announced, "The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice." *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987).

Since the decisions in *Batson* and *Cofield*, the North Carolina Supreme Court has never found a single instance of discrimination against a minority juror. *See* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 NC L. Rev. 1957 (2016).

The record of the North Carolina Court of Appeals is equally abysmal: that Court has also never found *Batson* discrimination against a minority juror, yet it has twice upheld findings of "reverse *Batson*" wherein the trial court determined that African-American defendants had discriminated against white citizens in jury selection. *Id*. at 1962-63; *State v. Hurd*, 784 S.E.2d 528 (2016); *State v. Cofield*, 129 N.C. App. 268 (1998).

Thus, despite reviewing more than 100 *Batson* claims, in cases in which the prosecutor has offered a reason for the strike, no North Carolina appellate court has found race discrimination against a citizen of color. Pollitt & Warren, 94 NC L. Rev. at 1961-63. North Carolina is the only state in the South with this record. The courts in our sister Southern states have not had trouble finding *Batson* violations – more than a dozen in South Carolina and a half dozen in Virginia. In Alabama, there have been more than 80 appellate reversals because of racially-discriminatory jury selection, more than 30 in Florida, 10 each in Mississippi and Louisiana, and eight in Georgia. *See Equal Justice Initiative Report, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, p. 19, found at https://eji.org/reports/illegal-racial-discrimination-in-jury-selection.

In light of the North Carolina appellate courts' *Batson* record, this paper will discuss: the reasons why more robust *Batson* enforcement is needed from our state appellate courts; the tools for *Batson* enforcement that recent U.S. Supreme Court decisions have made available; and lessons that can be gleaned from other state appellate courts that have already taken steps to address problems with weak *Batson* enforcement.

I. *BATSON* ENFORCEMENT IS NEEDED BECAUSE RACE DISCRIMINATION IN JURY SELECTION IS PERVASIVE IN NORTH CAROLINA CRIMINAL TRIALS.

Some might be tempted to think our appellate courts' record on *Batson* claims is rooted in the absence of race discrimination in North Carolina courthouses, but the data show otherwise. After the North Carolina legislature enacted the Racial Justice Act in 2009, researchers from the Michigan State University College of Law (hereafter "MSU") conducted a comprehensive analysis of hundreds of murder cases in North Carolina. The MSU study analyzed more than 7,400 peremptory strikes made by North Carolina

prosecutors in 173 capital cases tried between 1990 and 2010. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012).

The MSU study showed prosecutors across North Carolina struck 53% of eligible African-American jurors and only 26% of all other eligible jurors. Grosso & O'Brien, 97 Iowa L. Rev. at 1549. The researchers found that the probability of this disparity occurring in a race-neutral jury selection was less than one in ten trillion. *Id*. After adjusting for non-racial factors that might reasonably affect strike decisions — for example, reluctance to impose the death penalty — researchers found prosecutors struck black jurors at twice the rate they struck all other jurors. *Id*.

Another report found that, in a state where people of color make up more than a third of the population, one fifth of North Carolina's death row prisoners were sentenced to death by all-white juries. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 NC L. Rev. 2031, 2110-11, n. 356 (2010).

Racial disparities in jury selection are not confined to capital cases. A recent study conducted by Wake Forest University School of Law professors released preliminary findings that in all non-capital felony trials in North Carolina from 2011 to 2012 — which included data on 29,000 potential jurors — prosecutors struck minority potential jurors at a disproportionate rate. In these cases, prosecutors struck 16% of minority potential jurors, while they struck only eight percent of white potential jurors. In other words, like the MSU study, the Wake Forest analysis found that prosecutors

exclude black and other jurors of color at twice the rate they exclude white jurors. The Wake Forest researchers also found that, in several large North Carolina cities, including Charlotte, Durham, and Winston-Salem, prosecutors exclude minority jurors nearly three times as often as white jurors. Ronald F. Wright, Kami Chavis, and Gregory Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. __ (2018); also available on https://ssrn.com/abstract=2994288 at pp. 2-3, 21, 23-24, 26.

Likewise, a study of Durham County conducted in 1999 found the same patterns. Approximately 70 percent of African Americans were dismissed by the state, while less than 20 percent of whites were struck by the prosecution. Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695, 698-99 (1999).

II. U.S. SUPREME COURT DECISIONS HAVE PROVIDED STATE COURTS WITH NEW WAYS OF ENFORCING *BATSON* MORE ROBUSTLY.

As *Batson* has entered the 21st century, the United States Supreme Court has found purposeful discrimination by prosecutors in several decisions which highlight *Batson*'s potential to root out racial bias in jury selection. *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016). These cases, together with existing precedent, have held:

- **The test under *Batson* is not whether race is the sole factor, but whether race is significant in the decision to exercise a strike**. The question before the Court is whether race is "significant in determining who was challenged and who was not." *Miller-El II*, 545 U.S. at 252 (2005). The state supreme court explained in *State v. Waring*, 364 N.C. 443, 480 (2010), that, under *Miller-El*, a defendant need not show race is the sole factor.

- **Establishing a *Batson* violation does not require direct evidence of discrimination.** *See Batson*, 476 U.S. at 93 (noting that "circumstantial evidence," including "disproportionate impact" may establish a constitutional violation).

- **A single race-based strike violates the Constitution**. "Striking only one black prospective juror for a discriminatory reason violates a black defendant's equal protection rights, even when other black jurors are seated and even when valid reasons are articulated for challenges to other black prospective jurors." *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (citing *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989)); *see also Snyder*, 552 U.S. at 478 (citing *Lane* and finding the trial court erred in overruling petitioner's *Batson* objection as to one juror and therefore declining to consider *Batson* objection on second juror).

- **The Defendant's prima facie burden is light**. "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005). *See also id.* at 172 ("The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question."); *Miller-El II*, 545 U.S. at 240 ("[A] defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination."); *State v. Hoffman*, 348 N.C. 548, 553 (2008) ("Step one of the *Batson* analysis . . . is not intended to be a high hurdle for defendants to cross.").

- **The Defendant does not bear the burden of disproving each and every reason proffered as race-neutral**. In *Foster*, the petitioner challenged the prosecution's strikes of two African Americans. As to both potential jurors, the prosecution offered a "laundry list" of reasons why these two African Americans were objectionable. 136 S.Ct. at 1748. The Court did not analyze all of the reasons proffered by the State. Rather, after unmasking and debunking three of eleven reasons for the strike of one venire member and five of eight reasons for the other strike, the Court concluded that the strikes of these jurors were "motivated in substantial part by discriminatory intent." *Id*. at 1754, quoting *Snyder* v. *Louisiana*, 552 U.S. at 485. *See also State v. Montgomery*, 331 N.C. 559, 576-77 (1992) ("To allow an ostensibly valid reason for excusing a potential juror to 'cancel out' a patently discriminatory and unconstitutional reason would render Article 1, Section 26 [of the North Carolina Constitution] an empty vessel.") (Frye, J., Exum, C.J., and Whichard, J. concurring in the result).

- **Differential questioning is evidence of racial bias**. When jurors of different races are asked significantly more questions or different questions, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 255 ("contrasting *voir dire* questions" posed respectively to black and white prospective jurors "indicate that the State was trying to avoid black jurors").

- **An absence of questioning is evidence of racial bias**. When the juror is not questioned on the area of alleged concern, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 246 ("failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination") (internal citation omitted).

- **Disparate treatment of similarly-situated jurors is evidence of racial bias**. When prospective jurors of another race provided similar answers but were not the subject of a peremptory challenge, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.").

- **The Defendant does not have the burden of proving an exact comparison**. When comparing white venire members who were passed with jurors of color sought to be struck, the Court must not insist the prospective jurors are identical in all respects. Indeed, a "per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El II*, 545 U.S. at 247 n. 6.

- **Evidence that prosecutors were trained in how to evade the strictures of *Batson* is relevant to the determination of whether race was significant in the strike decision.** *See Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for excluding minorities from jury service); *Foster v. Chatman*, Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8 (describing North Carolina prosecution seminar in 1994 that "train[ed] their prosecutors to deceive judges as to their true motivations").

- **Historical evidence about prior practices of the District Attorney's Office must be considered as evidence of a *Batson* violation.** *Miller-El II*, 545 U.S. at 263-64 (considering policy of district attorney's office of systematically excluding black from juries, which was in place "for decades leading up to the time this case was tried").

These opinions provide tools for both criminal defense attorneys as well as the appellate courts in North Carolina to do a better job going forward of policing prosecutorial reliance on race in the selection of juries. The sample pleadings and "quick guide" accompanying this paper are tools practitioners can use to apply these holdings to their cases.

Beyond the *Batson* context, the U.S. Supreme Court has also recently emphasized the need for courts to take particular care in ensuring racial bias plays no role in criminal prosecutions.

In *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 868 (2017), for example, the defendant learned after his trial that, during deliberations, a juror had offered racial stereotypes and slurs in support of his argument that the defendant was guilty. The issue before the Court was whether it should recognize an exception to the well-established rule of evidence barring testimony about jury deliberations. After a thoughtful and comprehensive review of the Court's precedents dealing with race discrimination in our legal system, the Court answered this question in the affirmative, concluding that "there is a sound basis to treat racial bias with added precaution." 137 S.Ct. at 869. In other words, race is different, and the courts must take every measure to eliminate the pernicious and insidious effects of race discrimination on our jury system. The Supreme Court in *Pena-Rodriguez*, 137 S. Ct. at 868, observed,

> [D]iscrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979) . The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey* v. *Kemp*, 481 U.S. 279, 310 (1987) (quoting *Strauder* [*v. West Virginia*, 100 U.S. 303] at 309). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State." *Powers* v.

> *Ohio*, 499 U.S. 400, 411 (1991) ; cf. *Aldridge* v. *United States*, 283 U.S. 308, 315 (1931) ; *Buck* v. *Davis*, [137 S.Ct. 759, 778 (2017)].

In another recent case, *Buck v. Davis*, 137 S. Ct. 759 (2017), the defense attorney in the sentencing phase of a capital trial presented expert testimony that the African-American defendant was statistically more likely to be dangerous because he was black. The lower court had rejected the claim that the defendant's trial counsel was ineffective for presenting this evidence, in part because the references to it at trial were quite brief: one during direct examination and one other on cross. But the Supreme Court found counsel was ineffective and rejected this reasoning. Justice Roberts, writing for the majority, explained,

> "when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses."

137 S. Ct. at 777.

Likewise, in the *Batson* context, our appellate courts must vindicate claims of discrimination in jury selection even if the effect of that discrimination on the outcome of the trial is not readily apparent. Indeed, well-settled precedent requires reversal for *Batson* error, regardless of whether there was a prejudical effect on the outcome of trial. *See, e.g. Gov't of Vigin Islands v. Forte*, 865 F.2d 59, 63-64 (3rd. 1989).

Most recently, in *Tharpe v. Sellers*, No. 17-6075, 583 U.S. __ (2018), the Court took the remarkable step of permitting an African-American death row inmate the opportunity to reopen his federal habeas corpus proceedings on the basis that, after those proceedings concluded, a juror gave an affidavit stating that he held racist views about black citizens, but denied relying on those views in his deliberations.

The U.S. Supreme Court's consistent record over the past fifteen years of reversing cases where racial bias appeared to play a role in either jury selection or jurors' decisions should provide a clear signal to North Carolina's appellate courts that the time is now to take a more assertive approach to their enforcement of *Batson*.

III. LESSONS IN *BATSON* ENFORCEMENT FROM OTHER JURISDICTIONS.

Should the North Carolina appellate courts decide to take a fresh look at the way they implement *Batson*, they would not be alone. Appellate judges in jurisdictions beyond North Carolina have already begun to consider new ways of ensuring *Batson*'s promise is not an empty one.

A judge on the Illinois Appellate Court has offered a pointed criticism of the court system's tendency to treat *Batson* as a formality:

> [W]e now consider the charade that has become the *Batson* process. The State may provide the trial court with a series of pat race-neutral reasons of peremptory challenges… Surely new prosecutors are given a manual, probably entitled "Handy Race-Neutral Explanations" or "20 Time-Tested Race-Neutral Explanations." It might include: too old, too young, divorced, "long, unkempt hair," free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, "lived in an area consisting predominantly of apartment complexes," single, over-educated, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children same "age bracket" as defendant, deceased father and prospective juror's aunt receiving psychiatric care.

People v. Randall, 671 N.E.2d 60,65-66 (Ill. App. Ct. 1996) (Greiman, J.) (footnotes and citations omitted).

The Washington Supreme Court has likewise noted challenges inherent in the *Batson* process, observing in one case that "racism itself has changed" and, as a result, "implicit biases . . . endure despite our best efforts to eliminate them." The Washington court emphasized, "Racism now lives not in the open, but beneath the surface . . . ." *State v. Saintcalle*, 178 Wash.2d 34, 46 (2013).

As such, the Washington Supreme Court has taken seriously the flexibility the U.S. Supreme Court permitted states in implementing *Batson*. *See Batson*, 476 U.S. at 99-100 n.24 ("[W]e make no attempt to instruct [state and federal trial] courts how best to implement our holding today."); *Johnson v. California*, 545 U.S. 162, 168 (2005) (recognizing that states have "flexibility in formulating appropriate procedures to comply with *Batson*"). Specifically, the Washington court is currently in the process of considering a proposed rule that would disallow a peremptory strike if a court "determines that an objective observer could view race or ethnicity as a factor for the peremptory challenge . . . ." This rule is intended to enhance *Batson* by ensuring that "implicit, institutional, or unconscious bias" does not lead to the exclusion of potential jurors. *See* Comment 1 to Proposed New Rule GR 36, available at http://bit.ly/2lG0G1w.

Other courts around the country also begun to take a fresh look at *Batson* and better ways for enforcing its mandate. *See, e.g., People v. Gutierrez*, 2 Cal. 5th 1150, 1182-83 (2017) (Goodwin, J., concurring) (describing *Batson* as a "probablistic" standard that should eschew demonization of prosecutors); *Iowa v. Plain*, 2017 WL 2822482 at *7-8 (June 30, 2017) ("there is a general agreement that courts should address the problem of implicit bias in the courtroom.").

North Carolina courts should follow the example set by these other jurisdictions, and begin to chart their own course toward a more effective *Batson* jurisprudence. As noted, *Batson* itself envisions state courts bringing to bear their own judgment on the best ways of enforcing that decision. And our state constitution provides additional flexibility. Where appropriate, North Carolina has not hesitated to provide greater protections rooted in our state constitution. *See, e.g.*, *State v. Carter*, 322 N.C. 709 (1988) (ruling the North Carolina Constitution does not contain a good faith exception to the exclusionary rule).

In fact, in *Cofield*, our state supreme court has already held that Article I, section 26 of the North Carolina Constitution provides greater protection against jury discrimination than the United States' Constitution's equal protection clause. In *Cofield*, in the context of discrimination in the selection of the grand jury foreperson, the Court held that "Article I, section 26 of the North Carolina Constitution does more than protect individuals from unequal treatment." It ensures that the jury system, in addition to actually operating evenhandedly, "must also be *perceived* to operate evenhandedly." 320 N.C. at 302 (emphasis in original). The Court in *Cofield* emphasized that it was interpreting Article I, section 26 as providing more protection than its federal counterpart by also separately analyzing the issue under the state and federal equal protection clauses. *See* 320 N.C. at 305-08.

The *Cofield* Court turned to the North Carolina Constitution to end the practice of restricting service as a grand jury foreperson to white people. Chief Justice Exum explained:

> Our state constitutional guarantees against racial discrimination in jury service are intended to protect values other than the reliability of the outcome of the proceedings. Central to these protections, as we have already noted, is the perception of evenhandedness in the administration of

> justice. Article I, section 26 in particular is intended to protect the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case.

320 N.C. at 304 (1987); *see also id.* at 303 ("Exclusion of a racial group from jury service . . . entangles the courts in a web of prejudice and stigmatization."); *id*. at 310 (Mitchell, J., concurring in result) ("[T]he intent of the people of North Carolina [in enacting Article I, Section 26] was to guarantee absolutely unto themselves that in all cases their system of justice would be free of both the reality and the appearance of racism, sexism and other forms of discrimination in these twilight years of the Twentieth Century.").

The challenge of eliminating racial bias requires unceasing effort and commitment. And given the strength of the United States Supreme Court jurisprudence, the flexibility our courts have under both state and federal law, and the continued prevalence of prosecutorial discrimination, this should not be a difficult goal to achieve. But it will require commitment from criminal defense practitioners. We must take *Batson* seriously, we must object every time we see discrimination, and we must argue the facts and the law as strenuously as we can. Together, we can revive *Batson*'s promise in North Carolina.

The Role of Race in Jury Selection:

A Review of North Carolina Appellate Decisions

By James E. Coleman Jr. and David C. Weiss

Jury service reflects one of the most fundamental principles of American democracy—that our fates should lie in the hands of our fellow citizens. Moreover, "for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[1] That is why discrimination in jury selection on grounds of race "causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process."[2] Ultimately, race discrimination in the selection of jurors "mars the integrity of the judicial system."[3]

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In 1986, the US Supreme Court held in *Batson v. Kentucky* that it violated the Equal Protection Clause of the Fourteenth Amendment to remove a potential juror because of race.[4] A year later, in *State v. Cofield*, the NC Supreme Court emphasized our state's commitment to racial fairness in jury selection: "The people of North Carolina have declared...that they will not tolerate the corruption of their juries by racism...and similar forms of irrational prejudice."[5] These cases recognize the admirable goal of safeguarding equal treatment of citizens called for jury duty.

A 2016 study published in the *North Carolina Law Review* revealed that, in the three decades since *Batson*, the North Carolina Supreme Court has never found a single instance of discrimination against a minority juror. *See* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 NC L. Rev. 1957 (2016).

The North Carolina Court of Appeals has reviewed 42 *Batson* cases since 1986, and found no violation in 39.[6]

In one case, the court of appeals found a constitutional violation because the prosecutor failed to offer any explanation for the strikes of two African-American jurors.[7] No North Carolina appellate court has found a violation involving African-American jurors in which the prosecutor offered a reason for a strike.

The other two court of appeals cases were "reverse *Batson*" cases, in which the appellate court upheld the trial courts' finding that African-American defendants discriminated when their attorneys struck white jurors.[8] Thus, in two cases out of 114 where the appellate court heard reasons for the strikes and ruled they were discriminatory, the court found discrimination against white citizens, not against African-Americans, who have historically been excluded from jury service.

Among other southern states, appellate courts in South Carolina have found a dozen *Batson* violations since 1989, and those in Virginia have found six.[9] As of 2010, Alabama had over 80 appellate reversals because of racially-tainted jury selection, Florida had 33, Mississippi and Arkansas had ten each, Louisiana had 12, and Georgia had eight.[10]

The judicial task of enforcing *Batson* admittedly is a difficult and sensitive one. In a recent concurring opinion, Supreme Court of California Justice Goodwin H. Liu described the challenge well, noting that "brazenly unlawful [jury selection] practices are [likely] rare today." Although the societal wounds caused by racial discrimination in jury selection are no less serious today, the detection of such discrimination has become even more challenging, for "[r]arely does a record contain direct evidence of purposeful discrimination," and "courts cannot discern a prosecutor's subjective intent with anything approaching certainty." Nonetheless, Justice Liu emphasized that courts should rise to meet the challenge "in light of the serious harms" discriminatory exclusion of black jurors causes to litigants, the public, and the public's confidence in our justice system.[11]

A comprehensive study by Michigan State University College of Law researchers highlighted the scope of the challenge. That study analyzed more than 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried between 1990 and 2010.[12] The study showed prosecutors struck 53% of eligible African-American jurors and only 26% of all other eligible jurors.[13] The researchers found that the probability of this disparity occurring in a race-neutral jury selection was less than one in ten trillion.[14] After adjusting for non-racial factors that might reasonably affect strike decisions—for example, reluctance to impose the death penalty—researchers found prosecutors struck black jurors at 2.5 times the rate they struck all other jurors.[15] Indeed, another report found that, in a state where people of color make up more than a third of the population, one fifth of North Carolina's 150 death row prisoners were sentenced to death by all-white juries.[16]

Similar racial disparities have been found in non-capital cases. A recent study conducted by Wake Forest University School of Law professors released preliminary findings that in all non-capital felony trials in North Carolina from 2011 to 2012—which included data on 29,000 potential jurors—prosecutors struck non-white potential jurors at a disproportionate rate. In these cases, prosecutors struck 16% of non-white potential jurors, while they struck only eight percent of white potential jurors. Put another way, this study of 29,000 jurors found that prosecutors exclude black and other non-white jurors at twice the rate that they exclude white jurors. The study also found that in several large North Carolina cities, prosecutors exclude minority jurors nearly three times as often as white jurors.[17]

Likewise, a study of Durham County conducted in 1999 found the same patterns. Approximately 70% of African-Americans were dismissed by the state, while less than 20% of whites were struck by the prosecution.[18] As the federal courts' *Reference Guide on Statistics* recognizes, when multiple studies document the same effect, "[c]onvergent results support the validity of generalizations."[19]

Evidence of race discrimination in jury selection in North Carolina is not limited to statistics. In a 2002 capital case from Cumberland County, the prosecutor met with law enforcement officers and took notes about the jury pool. His notes described African-American prospective jurors in racial terms such as "blk. wino" or being from a "respectable blk family." Another juror had the words "blk./high drug area" written next to her name.[20]

In a 1997 Martin County case, a prosecutor wrote that a potential white juror was "good" because she would "bring her own rope." Yet another white juror was marked with a "No" because, according to the prosecutor's notes, she had a child by a "BM," or black male.[21]

In a 1994 Davie County case, a prosecutor in a capital murder trial stood accused of striking a black potential juror because of her race. Asked to explain his reasons for the peremptory strike, the prosecutor told the judge, "The victim is a black female. That juror is a black female. I left one black person on the jury already." The trial judge accepted this reasoning and overruled the *Batson* objection.[22]

At a 1994 seminar called Top Gun, prosecutors were given a list of race-neutral reasons to cite when *Batson* challenges were raised. This list titled "*Batson* Justifications," included "attitude," "body language," and a "lack of eye contact with Prosecutor"—the types of justifications prosecutors routinely give for striking black jurors in North Carolina. In an amicus brief submitted to the US Supreme Court, a group of prominent former prosecutors described this as "district attorney offices train[ing] their prosecutors to deceive judges as to their true motivations."[23] One state appellate court went so far as to call the *Batson* process a "charade" when these types of "pat race-neutral reasons" are used.[24]

The current *Batson* framework involves a three-step analysis. The first step requires the defendant to state a *prima facie* case of discrimination. The prosecution is then required to state a non-racial reason for the strike. At the third step, the court must determine, under all the circumstances, whether purposeful discrimination occurred. The ultimate burden of persuasion is on the objecting party.[25]

Many *Batson* challenges in North Carolina fail at the first step. The most common evidence used to establish a *prima facie* case is a numerical pattern of eliminating minority jurors. However, North Carolina courts routinely decline to find a *prima facie* case, even when prosecutors strike 50% or more of the qualified jurors of color. For example, in two cases the NC Supreme Court failed to find a *prima facie* case even when prosecutors struck 100% of the minority jurors.[26] In several other instances, the Court refused to find a *prima facie* case where 70% were struck.[27]

The state supreme court often uses a pattern of minority strikes as evidence that

peremptory challenges are not racially motivated. The NC Supreme Court has previously cited cases where prosecutors accepted 40 to 50%—and thus excluded 50 to 60%—of the eligible African-American jurors as "tending to refute an allegation of discrimination."[28]

While holding defendants to an exceptionally high burden in proving a *prima facie* case, the courts have given a strong benefit of the doubt to prosecutors who come forward with purportedly race-neutral reasons for the challenged strike. The courts' standard practice is to examine all of the reasons offered by the prosecution, and if at least one is race-neutral, the *Batson* challenge is overruled. For example, in a 1998 capital trial, the prosecutor struck an African-American man whom he claimed had a "rather militant animus," gave "short" and "sharp answers," and was not sufficiently "deferential" to the court. The prosecutor also expressed concern about the prospective juror's reaction to overhearing comments by a "male and female white juror." The trial judge rejected these reasons, finding first that the African-American man's responses were "appropriate" and displayed "clarity and thoughtfulness." Second, the trial judge stated that the overheard conversation was not an appropriate basis for exercising a peremptory strike. Despite refusing to find these reasons valid, let alone race-neutral, the trial judge overruled the *Batson* objection for other reasons the prosecutor proffered, namely the prospective juror's prior DUI conviction and the criminal record of his father. On appeal, the NC Supreme Court acknowledged that the prosecutor passed one white juror with a DUI conviction and another who had been convicted of breaking and entering. Nonetheless, on a record with several clearly discredited reasons, the court declined to find a *Batson* violation.[29]

Along the same lines, the NC Supreme Court has declined to demand reasonable reasons for striking minority jurors. In one case, the Court dismissed a *Batson* argument in which the prosecutor claimed to have struck a black woman because she was "physically attractive."[30] Indeed, the Court has admitted it would approve "implausible or even fantastic" reasons.[31]

In many cases, our appellate courts have offered their own race-neutral reason for the strike of an African-American juror, even when the prosecutor did not articulate it at trial. In at least 17 of its 32 cases finding no *prima facie* case, the NC Supreme Court relied on a reason that was not advanced by the prosecutor at trial. In eight of its 14 cases finding no *prima facie* case, the NC Court of Appeals did the same. The US Supreme Court has condemned this practice, explaining that "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."[32]

In practice, North Carolina courts have also declined to consider the most important evidence that could establish a *Batson* violation: the treatment of similarly-situated white jurors. The courts' practice has been to reject *Batson* claims even when the state struck African-American jurors while accepting white jurors sharing the same objectionable trait.[33]

The cases in which our courts have not found *Batson* violations include: *State v. Jackson*, where the prosecution explained that it struck two African-Americans because they were unemployed, but two unemployed whites were allowed to sit on the jury;[34] *State v. Lyons*, in which an African-American was struck because she was a nurse, while three white nurses were selected for the jury;[35] and *State v. Rouse*, where an African-American was struck for voicing moral reservations about imposing the death penalty in some cases, while three white jurors who said they would consider the death penalty only in select cases were seated.[36]

In such cases, our courts have indicated they will consider disparate treatment only if the black and white prospective jurors are identical in all respects. In a 2005 case, the US Supreme Court explained why this approach is wrong: "A per se rule that a defendant cannot win a *Batson* claim unless there is an identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."[37]

Finally, North Carolina's higher courts have consistently accepted prosecutors' subjective characterizations of African-American jurors' supposedly undesirable demeanor as justifications under *Batson*. Even when the trial judge made no findings concerning demeanor, the courts have left unchallenged prosecutors' claims that jurors were struck because they "sat with [their] arms crossed," had an "air of defiance," were "nervous" or "head-strong," did not have "good sense of herself," or had "some reluctance" in their answers.[38] These reasons—evoking those recommended in the Top Gun training handout—are largely unreviewable because a prospective juror's demeanor is not apparent on the record.

The present state of *Batson* in North Carolina is not sustainable. Courts have affirmed again and again that juries that reflect the entire population are the foundation of a criminal justice system built on the promise that every citizen has a right to be judged by a jury of peers. As Chief Justice Mark Martin acknowledged in his 2015 address to the general assembly, "[F]or the judicial branch, ensuring 'justice for all' is the most important thing that we do."[39]

This current state of affairs also matters for a very practical reason. A monochrome jury loses key insights and perspectives. Research shows that juries with two or more members of color deliberate longer, discuss a wider range of evidence, and are more accurate in their statements about cases—regardless of the race of the defendant.[40] In one study, researchers from Duke University analyzed over 700 trials over a ten-year period, and found that where juries had one or more black jurors, black and white defendants had relatively equal conviction rates. But, the Duke researchers found all-white juries convicted black defendants 81% of the time and white defendants only 66% of the time.[41]

When the US Supreme Court finally acknowledged in *Batson* that it had failed to enforce the Constitution's promise in *Swain v. Alabama*—which was *Batson's* predecessor—it shifted course. The Court created the *Batson* framework in the first place because the earlier legal standard for proving racially-motivated jury selection "placed on defendants a crippling burden of proof [that left]

prosecutors' peremptory challenges...largely immune from constitutional scrutiny."[42]

In recent years, the US Supreme Court has repeatedly refined *Batson* to make it more effective. In 2002, 2005, and 2008 the Court issued a series of opinions making clear that appellate courts are required to conduct a comparative analysis of jurors, the very same analysis that North Carolina courts previously rejected.[43] Most recently, in *Foster v. Chatman*, the US Supreme Court reinforced the need for careful scrutiny of prosecutors' decisions to exclude people of color from jury service.[44] *Foster* specifically addressed a number of aspects of North Carolina's *Batson* jurisprudence. *Foster* examined the strikes of two African-Americans and found both of them to violate *Batson*. With regard to the first juror, the Court debunked three of 11 of the prosecutor's reasons. With regard to the second juror, the prosecutor offered eight reasons for the strike and the Court rejected five of them. The US Supreme Court's approach here calls into question our courts' practice of sustaining a strike if even one reason remains standing.[45] In addition, the US Supreme Court in *Foster* rejected "implausible" and "fantastic" reasons as "pretextual."[46]

When grappling with the proper application of *Batson*, our appellate courts should also ask how they might address limitations in the current *Batson* framework. Appellate courts in other states have begun to address this very question.

In 2013, the Supreme Court of Washington acknowledged the difficulty of applying *Batson* because "racism itself has changed," yet "implicit biases...endure despite our best efforts to eliminate them. Racism now lives not in the open, but beneath the surface..."[47] The Washington court concluded it must "strengthen [its] *Batson* protections" and observed it had the ability to do so because "[t]he *Batson* framework anticipates that state procedures will vary, explicitly granting states flexibility to fulfill the promise of equal protection."[48] In a July 2017 decision, the Supreme Court of Washington returned to this subject, noting its ongoing concern that the court's "*Batson* protections are not robust enough to effectively combat racial discrimination during jury selection."[49] The Washington court exercised its "broad discretion to alter the *Batson* framework" by adopting a rule that "the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury."[50]

In his recent concurring opinion, Justice Liu of the California Supreme Court described an approach to *Batson*, grounded in US Supreme Court precedent, which seeks to provide meaningful oversight while also eschewing demonization of prosecutors, who typically discharge their duties in good faith. Justice Liu wrote that *Batson* is only a "probabilistic standard" which "is not designed to elicit a definitive finding of deceit or racism," but rather "defines a level of risk that courts cannot tolerate." Justice Liu emphasized that "the finding of a violation should [not] brand the prosecutor a liar or a bigot. Such loaded terms obscure the systemic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve."[51]

In a June 2017 decision, the Supreme Court of Iowa joined the chorus of state appellate courts addressing the ongoing influence of racial bias in the courtroom. The Iowa court observed "there is general agreement that courts should address the problem of implicit bias in the courtroom." The court "strongly encourage[d] district courts to be proactive about addressing implicit bias," and approved an antidiscrimination jury instruction.[52] The Iowa court also changed its method for determining whether the racial composition of the jury pool violated the right to a jury drawn from a fair cross-section of the community. The court explained that its prior approach was "[a] test without teeth [that] leaves the right to an impartial jury for some minority populations without protection."[53] Although this decision does not address *Batson*, it illustrates the critical role state appellate courts can play in combating both explicit and implicit racial bias in criminal prosecutions.

In future cases, the North Carolina appellate courts should not hesitate to reexamine their own jurisprudence in light of these developments, and to reverse criminal convictions based on *Batson* violations. By redeeming *Batson's* promise, appellate courts can declare to all of our citizens that the historic exclusion of African-Americans from juries is truly receding into history. It is the only way the courts can afford minority defendants juries of their peers. And it is the only way appellate courts can make clear that the consideration of race in jury selection will no longer be tolerated. ■

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David Weiss is a staff attorney with the Center for Death Penalty Litigation in Durham, where he represents death row inmates in all stages of appellate and post-conviction review. His practice has frequently involved litigation of claims under Batson v. Kentucky.

Endnotes

1. *Powers v. Ohio*, 499 US 400, 407 (1991).
2. *J.E.B. v. Alabama ex rel.*, 511 US 127, 140 (1994).
3. *Edmondson v. Leesville Concrete Company*, 500 US 614, 628 (1991).
4. 476 US 79 (1986).
5. 320 NC 297, 302 (1987).
6. *Pollitt & Warren*, 94 NC L. Rev. at 1961-62.
7. *Id.* at 1962; *State v. Wright*, 189 NC App. 346, 353-54 (2008).
8. *Id.* at 1962-63; *State v. Hurd*, 784 S.E.2d 528 (2016); *State v. Cofield*, 129 NC App. 268 (1998).
9. *See, e.g., State v. Marble*, 311 SC 23 (1992); *Hopkins v. Commonwealth*, 53 VA App. 394 (2009).
10. *See, Equal Justice Initiative Report, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, p. 19, found at bit.ly/2w3963v (hereafter cited as "EJI Report"). The EJI Report only counted *Batson* reversals in criminal cases. Tennessee has granted *Batson* relief only in civil cases. *See, e.g., Zakour v. UT Medical Group, Inc.*, 215 S.W.3d 763 (Tenn. 2007).
11. *People v. Gutierrez*, 2 Cal. 5th 1150, 1182-83 (2017) (Goodwin, J., concurring).
12. *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012). The MSU study was conducted in connection with the NC Racial Justice Act, which was enacted in 2009, amended in 2012, and repealed in 2013. S.L. 2009-464; NC Gen. Stat. §§ 15A-2010 to 2012 (modified by S.L. 2012-136, §§ 3 and 4; and repealed by S.L. 2013-154, § 5.(a)).
13. Grosso & O'Brien, 97 Iowa L. Rev. at 1549.
14. *Id.*
15. *Id.* at 1556.
16. Seth Kotch and Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 NC L. Rev. 2031, 2110-11, n. 356 (2010).
17. Ronald F. Wright, Kami Chavis, and Gregory Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue* (2017), available on SSRN at

bit.ly/2uFF0nf at pp. 2, 21, 23-24, 26; Kami Chavis, *The Supreme Court Didn't Fix Racist Jury Selection: Timothy Foster Got Justice, But Prosecutors Still Have Wide Leeway to Exclude Black Jurors*, The Nation (May 31, 2016), bit.ly/2v0tJjY.

18. Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695, 698-99 (1999).
19. Kaye, David H., and Freedman, David A., Reference Guide on Statistics (June 9, 2011). Reference Manual on Scientific Evidence, 3d ed. 2011, p. 223, Washington DC: National Academy Press.
20. *State v. Golphin, Walters, and Augustine*, Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079, pp. 51-52 (Cumberland County Superior Court, Dec. 13, 2012) (found under "More resources" at bit.ly/2v0NMP2).
21. These notes are on file with the authors.
22. This *Batson* issue was not raised on direct appeal. *See State v. Gregory*, 342 NC 580 (1996). The transcript of the *Batson* colloquy is on file with the authors.
23. Brief of Amici Curiae of Joseph diGenova, et al., found at bit.ly/2wJ4Ffo, p. 8; *Foster v. Chatman*, 136 S.Ct. 1737 (2016).
24. *People v. Randall*, 283 Ill. App. 3d 1019, 1025 (1996).
25. *Miller-El v. Cockrell*, 537 US 322, 328-29 (2003) (summarizing *Batson* framework).
26. *State v. Chapman*, 359 NC 328, 341 (2005) (three of three jurors); *State v. Williams*, 343 NC 345, 359-60 (1996) (two of two jurors).
27. *State v. Beach*, 333 NC 733, 740 (1993) (nine of 13 jurors; 70%); *State v. Davis*, 325 NC 607, 618-19 (1989) (eight of 11 jurors; 72%); *State v. Robbins*, 319 NC 465, 491-92 (1987) (seven of nine jurors; 78%).
28. *See, e.g., State v. Taylor*, 362 NC 514, 529 (2008); *State v Smith*, 328 NC 99, 121 (1991).
29. *State v. Golphin*, 352 NC 364, 429-33 (2000).
30. *State v. Barnes & Chambers*, 345 NC 184, 210-11 (1997).
31. *State v. Best*, 342 NC 502, 511 (1996).
32. *Miller-El v. Dretke*, 545 US 231, 252 (2005).
33. *See, e.g., State v. Williams*, 339 NC 1, 18 (1994) (holding "[d]isparate treatment of prospective jurors is not necessarily dispositive on the issue of discriminatory intent....Because the ultimate decision to accept or reject a given juror depends on consideration of many relevant characteristics, one or two characteristics between jurors will rarely be directly comparable."); *see also* Amanda S. Hitchcock, *"Deference Does Not By Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital Appeals*, 84 NC L. Rev. 1328, 1344-56 (2006) (explaining how the NC Supreme Court historically declined to conduct the comparative juror analysis outlined in *Miller-El*).
34. 322 NC 251, 256-57 (1988).
35. 343 NC 1, 13-14 (1996).
36. 339 NC 59, 80 (1994).
37. *Miller-El*, 545 US at 247, n. 6.
38. *State v. White*, 349 NC 535, 549 (1998) ("sat with [their] arms crossed"); *State v. Bonnett*, 348 NC 417, 435 (1998) ("air of defiance"); *State v. Smith*, 328 NC 99, 125-26 (1991) ("nervousness"); *State v. Floyd*, 115 NC App. 412, 415 (1994) ("head-strong"); *State v. Waring*, 364 NC 443, 478 (2010) (does not have "good sense of herself"); *State v. Larrimore*, 340 NC 119, 134 (1995) ("some reluctance" in juror's answers).
39. Found at bit.ly/2w3iq7z.
40. *See* Brief of Scholars on Jury Deliberations as *Amici Curiae* In Support of Defendant Guy Tobias LeGrande at 13, found under "More resources" at bit.ly/2v0NMP2.
41. *Iowa v. Plain*, No. 16-0061, 2017 WL 2822482, at *16 (Iowa June 30, 2017) (citing Shamena Anwar, et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017, 1027-28, 1032 (2012)).
42. *Batson*, 476 US at 92-93.
43. *See Miller-El v. Cockrell*, 534 US 1122 (2002); *Miller-El*, 545 US at 231; *Snyder v. Louisiana*, 552 US 472 (2008).
44. 136 S.Ct. 1737 (2016).
45. *Id.* at 1748-54.
46. *Id.* at 1752.
47. *State v. Saintcalle*, 178 Wash.2d 34, 46 (2013).
48. *Id.* at 51.
49. *City of Seattle v. Erickson*, No. 93408-8, 2017 WL 2876250, at *1 (Wash. July 6, 2017).
50. *Id.* at *6.
51. *Gutierrez*, 2 Cal 5th at 1182-83.
52. *Iowa v. Plain*, No. 16-0061, 2017 WL 2822482, at *7–8 (Iowa June 30, 2017).
53. *Id.* at 16.

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____
STATE OF NORTH CAROLINA v. DEFENDANT	) **DEFENDANT'S MOTION FOR**) **COMPLETE RECORDATION**) **OF ALL PRETRIAL AND TRIAL**) **PROCEEDINGS**)

NOW COMES the Defendant, _____, and respectfully moves the Court for an order directing the Court Reporter to take down and record all hearings on motions, all bench conferences, all jury voir dire, opening statements, closing arguments, all testimony and each and every proceeding involved in pretrial and trial proceedings in the above-numbered case. Such complete recordation is required under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19, 23, 24, and 27 of the North Carolina Constitution and N.C. Gen. Stat. § 15A-1241.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion for Complete Recordation Of All Pretrial and Trial Proceedings has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____
STATE OF NORTH CAROLINA v. DEFENDANT	) **DEFENDANT'S MOTION FOR**) **DISCOVERY OF INFORMATION**) **PERTAINING TO JURY**) **SELECTION TRAINING**)

NOW COMES the Defendant, _____, and respectfully moves the Court for an order directing the State to provide to the defense information concerning any policy or training, past or present, written or informal, regarding the use of peremptory strikes in jury selection. This information is required under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987) ("The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice."). In support of this motion, Defendant states the following:

Grounds for Motion

Evidence that training materials providing instruction on how to evade the strictures of *Batson* are available to the prosecution is unquestionably relevant to the question of whether a strike is motivated by race. In *Miller-El II*, the Court considered the following training evidence in reaching its conclusion that the Texas prosecutor had

violated *Batson*:

> A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller–El's trial.

545 U.S. at 264 (bracket in original, citation omitted).

It is notable the petitioner in *Miller-El II* did not present evidence that the attorneys who personally prosecuted his case actually studied the training manual at issue. Rather, the Supreme Court focused on the fact that the training materials were "available." Additionally, in *Miller-El II*, the discriminatory training materials predated the defendant's trial by approximately a decade. Nonetheless, the *Miller-El II* Court concluded,

> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection.

Id. at 266.

It is significant also that we know that North Carolina prosecutors have been trained in how to justify strikes of African Americans. At a 1994 seminar called *Top Gun*, prosecutors were given a list of race-neutral reasons to cite when *Batson* challenges were raised. This list, or "cheat sheet," titled "*Batson* Justifications," included "attitude," "body language," and a "lack of eye contact with Prosecutor" — the types of justifications that prosecutors routinely give for striking black jurors in North Carolina. A group of prominent former prosecutors filed a friend-of-the-court brief in *Foster v. Chatman* and described the *Top Gun* cheat sheet as an effort to "train their prosecutors to

deceive judges as to their true motivations." Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8. Unfortunately, as the existence of the *Top Gun* handout demonstrates, "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before." *Miller-El II*, 545 U.S. at 270 (Breyer, J., concurring).

Wherefore, Defendant asks the Court to enter an order directing the prosecutor to turn over to the defense all information pertaining to any policy or training, past or present, written or informal, regarding the use of peremptory strikes in jury selection.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion for Discovery of Information Pertaining to Jury Selection Training has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. __ CRS ____

STATE OF NORTH CAROLINA	)	
	)	**DEFENDANT'S MOTION**
v.	)	**TO DISTRIBUTE**
	)	**JUROR QUESTIONNAIRE**
DEFENDANT	)	

COMES NOW the Defendant, _____, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 26 of the North Carolina Constitution and respectfully moves the Court to allow the Defendant to distribute the attached questionnaire to be answered by jurors who have been called for jury duty at the time of the Defendant's trial and prior to any voir dire of those jurors. In support of this motion, the Defendant shows unto the Court:

1. The attached juror questionnaire would simplify the questioning of jurors, as well as save valuable court time by eliminating the necessity of questioning jurors concerning basic factual information.
2. A defendant may not protect his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986), in the absence of a clear record of the race of each juror examined during voir dire.
3. A questionnaire is less intrusive and more efficient than asking each juror to identify his or her race in open court and consequently is the best method of establishing a clear record. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual's race "is not always easily discernible, and the potential for error by a court reporter acting alone is great").

4. Further, the questionnaire would enable both the State and the Defendant to focus their voir dire of prospective jurors on any issues raised by the questionnaire regarding a juror's qualifications to serve in this particular case.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Distribute Juror Questionnaire has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

SUPERIOR COURT
_____ COUNTY

JUROR QUESTIONNAIRE

TO THE PROSPECTIVE JUROR:

Please answer each of the following questions as fully and as accurately as possible. There is no right or wrong answer. You should simply answer each question honestly and conscientiously. You must not discuss the questionnaire or the answers with anyone else.

Your answers will not be public knowledge, but will be given to the lawyers in the case for which you are being considered a juror. If you cannot answer a question because you do not understand it, write "DO NOT UNDERSTAND" in the space after the question. If you cannot answer a question because you do not know the answer, write "DO NOT KNOW" in the space after the question. If you need extra space to answer any question, please use the other side of the questionnaire. Be sure to indicate the number of the question you are answering.

If there is information that is so personal and private that you want to discuss with the judge and the attorneys in the judge's office, please write "I NEED TO SPEAK IN PRIVATE" and give a brief description of the information. Please keep in mind that all individual conferences are time consuming. However, if you believe such a private conference is necessary, indicate as set forth above.

This questionnaire is to be answered as though you were under oath. Your honesty in answering these questions is appreciated. Please make sure your answers are legible. Please print and use dark ink (no pencils).

The purpose of this questionnaire is to encourage your full expression and honesty, so that all parties will have a meaningful opportunity to select a fair and impartial jury to try the issues in this case. Thank you for your cooperation. It is of vital importance to the Court.

JUROR QUESTIONNAIRE

1. Full Name: _____
2. Date of Birth: _____
3. Place of Birth: _____
4. Race: _____
5. What high school did you attend? _____
6. Describe any education received after high school: _____
7. Current marital status (check one):
   ( ) Single ( ) Married ( ) Divorced ( ) Separated ( ) Widowed ( ) Living with partner
8. If you have children (including step-children), please state for each child, (1) child's sex (2) age, (3) whether child lives in your home, (4) education level of child, (5) child's occupation, (6) child's marital status:

   _____

   _____
9. Where do you live? _____
10. What are your favorite TV programs? _____

    _____
11. What is your source of news? _____

    _____
12. Please list your hobbies and favorite recreational activities: _____

    _____
13. If you attend a church or synagogue, please provide the name:

    _____
14. Are you currently (check all that apply):
    ( ) Employed, full-time ( ) Employed, part-time ( ) Unemployed
    ( ) Retired ( ) Disabled ( ) Self-Employed
    ( ) Homemaker ( ) Student
    a. How long have you been employed/unemployed/disabled/retired/etc.?: _____
    b. If you are retired, what was you last job or occupation? _____
    c. If you are unemployed, what is your customary work? _____
    d. What is your current occupation and employment? _____

    _____
15. Have you ever served on a trial jury in either Federal or State Court? _____

    _____
16. Have you or anyone close to you ever been a suspect in, arrested for, or charged with a criminal offense, including DWI and traffic tickets? _____

    _____
17. Have you or anyone close to you, including a child, ever been the victim of any crime? _____

    _____

    _____

I affirm under penalty of law that I answered truthfully and completely all questions in this questionnaire and understand that it is a violation of law not to do so.

_____ _____

Signature Date

The Jury Sunshine Project: Jury Selection Data as a Political Issue

By Ronald F. Wright, Kami Chavis, and Gregory S. Parks*

INTRODUCTION

Lawyers treat jury selection—no surprise here—as an issue to litigate. They file motions objecting to mistakes by the clerk of the court when she calls a group of potential jurors to the courthouse for jury duty. After those potential jurors arrive in the courtroom, lawyers file further motions, testing the reasons that judges give for removing a prospective juror. The lawyers also watch each other for signs that their opponents might rely on improper reasons, such as race or gender, to remove potential jurors from the case. Again, there's a motion for that. For any given case, the law of jury selection has plenty of enforcers who stand ready to litigate.

In this article, we stand outside the litigator's role and look at jury selection from the viewpoint of citizens and voters. As citizens, we believe that the composition of juries in criminal cases deserves political debate outside the courtroom. Voters should consider the jury selection habits of judges and prosecutors when deciding whether to re-elect the incumbents to those offices. More generally, jury composition offers a stress test for the overall health of local criminal justice. Conditions are unhealthy when the full-time professionals of criminal justice build juries that exclude parts of the local community, particularly when they exclude traditionally

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marginalized groups such as racial minorities. Every sector of society should participate in the administration of criminal justice.

This political problem starts as a public records problem. As we discuss in Part I of this article, limited public access to court data reinforces the single-case focus of the legal doctrines related to jury selection. Poor access to records is the single largest reason why jury selection cannot break out of the litigator's framework to become a normal topic for political debate.

The paperwork in the case file, found in the office of the clerk of the court, does record a few details about which residents the clerk called to the courthouse, which panel members the judge and the attorneys excluded from service, and the people who ultimately did serve on the jury. But many details about jury selection go unrecorded. And even more important, it is practically impossible to see any patterns across the case files in many different cases. The clerk typically does not hold the data in aggregate form or in electronically searchable form. Thus, there is no place to go if a citizen (or a news reporter or candidate for public office) wants to learn about the actual jury selection practices of the local judges or the local prosecutor's office. There is no vantage point from which one might see the whole of jury selection, rather than the selection of a single jury.[1]

Until now. As we describe in Part II, we worked with dozens of students, librarians, and court personnel to collect jury selection documents from individual case files and assembled them into a single database, which we call "The Jury Sunshine Project." The paper records, housed in 100 different courthouses, depict the work of lawyers and judges in more than 1,300 felony trials, as they decided whether to remove almost 30,000 prospective jurors. When assembled, the data offer a panorama of jury selection practices in a state court system during a single year.

In Part III, we present some initial findings from the Jury Sunshine Project to illustrate how public data might generate political debate beyond the courtroom. Our analysis shows that prosecutors in North Carolina—a state with demographics and legal institutions similar to those in many other states—exclude non-white jurors about twice as often as they exclude white

[1] For a review of periodic efforts to assemble jury selection data related to specialized categories of cases (particularly in capital cases) *see infra* Part I.D.

jurors. Defense attorneys lean in the opposite direction: they exclude white jurors a little more than twice as often as non-white jurors. Trial judges, meanwhile, remove non-white jurors for "cause" about 30% more often than they remove white jurors. The net effect is for non-white jurors (especially black males) to remain on juries less often than their white counterparts.

The data from the Jury Sunshine Project also show differences among regions and major cities in the state. Prosecutors in three major cities—Greensboro, Raleigh, and Fayetteville—accept a higher percentage of non-white jurors than prosecutors in three other cities—Charlotte, Winston-Salem, and Durham. While there may be reasons why prosecutors choose different jurors than judges or defense attorneys do, why would prosecutors in some cities produce such different results from their prosecutor colleagues in other cities?

Part IV explores the possible explanations for the racial patterns that we observed in jury selection. Some accounts of this data point to benign non-racial factors as the real explanation for the patterns we observed. Other interpretations of the data treat these patterns as a new type of proof of discriminatory intent: evidence that cuts across many cases might shed new light on the likely intent of prosecutors, defense attorneys, or judges in a single case.

A third perspective emphasizes the *effects* of exclusion from jury service. This system-wide perspective does not concentrate on what a single attorney or judge was thinking at the moment of removing a juror. Instead, what matters is how the work of all the attorneys, judges, clerks, and ordinary citizens in the courthouse forms a pattern over time. If the courtroom actors exclude a portion of the community from jury duty in a persistent and predictable way, that effect undercuts the legitimacy of local criminal justice.

Finally, in Part V we generalize from our data about the race of jurors to ask more generally how accessible public records could transform criminal justice. We believe that sunshine will open up serious community debates about what is possible and desirable in the local criminal justice system. By widening the frame of vision from a litigant's arguments about a single case, the quality of justice becomes a comparative question. For instance, voters and residents who learn about jury selection patterns will naturally ask,

"How do the jury selection practices of my local court compare to practices elsewhere?" Researchers and reporters can answer those questions with standardized public data, comparing prosecutors and judges with their counterparts in different districts.

Data-based comparisons such as these make it possible to hold prosecutors and judges directly accountable to the public, in a world where voters generally have too little information about how these public servants perform their work. When challengers raise the issue during the next re-election campaign of the chief prosecutor or the judge, and reporters write stories about the latest jury selection report, it could shape the selection of jurors across many cases.

With the help of public records—assembled to make it easy to compare places, offices, times, and crimes—the selection of juries becomes something more than an insider's litigation game of dueling motions. The patterns, visible in those public records, prompt a public debate about what the voters expect from their judges and prosecutors. It takes a democratic movement, not just a constitutional doctrine, to bring the full community into the jury box.

I. CASE-LEVEL DATA AND DOCTRINES

Every defendant has a legally enforceable right to an impartial and representative jury, so lawyers and judges raise constitutional claims during criminal and collateral proceedings to protect that right. The litigator's concerns about jury selection, however, keep the focus narrow. In this part, we review briefly some of the legal doctrines that litigators use to enforce the ideals of jury selection, noting the doctrinal emphasis on single cases.

We then show how current public records laws and the practices of jury clerks reinforce the single-case orientation of the constitutional doctrine. As a result, it is nigh impossible to view jury selection at the overall system level. The existing archival empirical studies of jury selection reflect this difficulty: they deal with specialized crimes or targeted locations, making it difficult to draw general lessons about juries and the overall health of criminal justice systems.

A. Judge Removes Jurors for Cause

Before the start of a jury trial, lawyers for the prosecution and the defense may challenge jurors for cause. The judge, responding to these objections from the attorneys, must confirm that each potential juror meets the general requirements for service, such as residency and literacy requirements.[2] At that point, the judge also evaluates possible sources of juror bias against the defendant or against the government.

The "cause" for removal might be a prospective juror's relationship with one of the parties or lawyers.[3] The judge also inquires into the prior experiences of the jurors; for instance, the judge might ask if a juror was ever a victim of a crime. A juror who brings prior knowledge about the events that the evidence will address receives special scrutiny. There is no limit to the number of jurors a judge might exclude on these grounds.[4]

These statutes and judicial opinions dealing with for-cause removals share two important features. First, the standards defer to trial judges. Appellate courts apply an "abuse of discretion" standard to these questions and rarely overturn the trial judge's decision to grant or deny a party's request to remove a juror for cause.[5] Second, the law of for-cause removal of jurors looks to one trial at a time. Any challenge to the judge's decision begins with a review of the court transcript for evidence of the individual

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[2] *See* TEX. CRIM. PROC. CODE ANN. § 35.16 (West 2016) (barring from jury service all persons with felony or misdemeanor convictions); 42 PA. CONST. STAT. § 4502 (2016) (citizens not qualified to be jurors if they are not able to read, write, speak and understand English; are not able to "render efficient jury service" due to mental infirmity; or have been convicted of a crime punishable by imprisonment of more than one year).

[3] Judges encounter special problems during for-cause removals in death penalty cases. A juror who declares that she or he would always vote to impose the death penalty, or not to impose the death penalty will be excluded for cause. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).

[4] *See* N.C. GEN. STAT. § 15A-1214(d), (e) (2016); MO. REV. STAT. § 494.470 (2016) ("A prospective juror may be challenged for cause for any reason mentioned in this section and also for any causes authorized by the law").

[5] *See* Oswalt v. State, 19 N.E.3d 241 (Ind. 2014); State v. Lindell, 629 N.W.2d 223, 240 (Wis. 2001).

juror's alleged bias. A comparison to some other juror in the same case might be relevant, but the judge's habits across many cases—or the actions of the local judiciary more generally during questions of removal—do not matter for litigators. Indeed, there are no aggregate data sources that could show how often trial judges remove jurors for cause. Litigators see this issue case by case and appellate courts normally conclude that the trial judge acted within her discretion, whatever she chose.

B. Attorneys Remove Jurors with Peremptory Challenges

After the parties argue to the judge about removals for cause, lawyers for the prosecution and defense use peremptory challenges to strike a designated number of jurors.[6] True to the name, peremptory strikes require no explanation. Perhaps one side wants to exclude jurors with certain political attitudes because the attorneys believe those jurors may not sympathize with their client's side of the case. There are only a few ways that lawyers can take their peremptory strikes too far: they may not use peremptory challenges to exclude jurors based on race, gender, or other "suspect" categories for equal protection purposes. To do so would violate the Constitution.[7]

The method for litigants to prove racial discrimination in the use of peremptory challenges has changed over the years. Under the approach laid out in *Swain v. Alabama*,[8] a party claiming discrimination had to present evidence reaching beyond the opponent's behavior in the case at hand. The defendant would need to show that "in criminal cases prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself."[9]

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[6] *See* OHIO R. CRIM. P. 24(D) ("each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases"); TENN. CODE ANN. § 40-18-118 (1995) (providing eight strikes for each side in cases punishable by imprisonment for more than one year but not death, and three for each side if crime is punishable by less than one year).

[7] *See* Batson v. Kentucky, 476 U.S. 79 (1986); Miller–El v. Dretke, 545 U.S. 231 (2005).

[8] 380 U.S. 202 (1965); Norris v. Alabama, 294 U.S. 587, 589 (1935).

[9] 380 U.S. at 223.

Two decades later, the court in *Batson v. Kentucky*[10] expanded the options for a party trying to prove intentional racial discrimination during jury selection. A litigant now may rely solely on the facts concerning jury selection in the individual case. Under this analysis, the attorneys try to reconstruct the state of mind of a single prosecutor (or a single defense attorney) who removed a prospective juror in a single trial. The relevant factual question is a familiar one in criminal court: what was the state of mind of a single actor at one moment in the past?

The *Batson* court developed an oddly detailed constitutional test: a three-step analysis (plus one prerequisite) for examining invidious racial discrimination in the use of peremptory strikes during jury selection. As a prerequisite, the litigant must identify jurors belonging to a constitutionally-relevant group, such as race, ethnicity, or gender.[11] At that point, the moving party takes the first step, by showing facts (such as disproportionate use of peremptory challenges against jurors of one race, or the nature of the questions posed on *voir dire*) to create a prima facie inference that the other attorney excluded jurors based on race.[12]

Second, the burden shifts to the non-moving party to give neutral explanations for their challenges. The explanation party cannot simply deny a discriminatory intent or assert good faith. The attorney must point to some reason other than the assumption that jurors of a particular race would be more sympathetic to the party's claims at trial.[13] Finally, in the third step, the

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[10] 476 U.S. 79 (1986).

[11] *See* United States v. Mensah, 737 F.3d 789 (1st Cir. 2013) (Asian Americans); United States v. Heron, 721 F.3d 896 (7th Cir. 2013) (recognizing circuit split and state court split on religion-based challenges); United States v. Roan Eagle, 867 F.2d 436 (8th Cir. 1989) (Native Americans); Commonwealth v. Carleton, 641 N.E.2d 1057 (Mass. 1994) (Irish Americans).

[12] *See* City of Seattle v. Erickson, No. 93408-8, 2017 WL 2876250 (Wash. July 6, 2017) (removal of only minority juror in pool can establish prima facie case); People v. Bridgeforth, 769 N.E.2d 611 (N.Y. 2016) (removal of dark-skinned juror can satisfy step one); Hassan v. State, 369 S.W.2d 872 (Tex. Crim. App. 2012) (applying step one).

[13] *See* People v. Gutierrez, 395 P.3d 186, 198 (Cal. 2017) (rejecting adequacy of proffered race-neutral reasons); State v. Bender, 152 So.2d 126 (La. 2014) (prosecutor not required to present arrest records in order to support race-neutral explanation for peremptory strike); People v. Knight, 701 N.W.2d 715 (Mich. 2005) (finding prosecutor presented adequate race-neutral reasons for excusing prospective jurors).

moving party offers reasons to believe that the other party's supposedly neutral reasons for the removal of jurors were actually a pretext. On the basis of these arguments, the court decides if the non-moving party's explanation was authentic or pretextual.

Critics immediately spotted the potential weakness of the *Batson* framework, and argued that it is too easy for attorneys to fabricate race-neutral reasons, after the fact, to exclude minority jurors.[14] Appellate courts affirm convictions even when prosecutors invoke "non-racial" reasons that correlate with race-specific behavior or stereotypes,[15] and sometimes when prosecutors rely on the race-neutral reason only for non-white jurors.[16] Some courts also uphold the use of peremptories where the attorney had mixed motives for the removal, and at least one of the motives was non-

[14] *See* Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting) ("To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd…. If such 'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination."); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229, 236 (1993) (arguing that "in almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race").

[15] *See* United States v. Herrera-Rivera, 832 F.3d 1166 (9th Cir. 2016) (finding that government's proffered reasons for striking potential juror were not pretextual, and that strike was based on juror's having criminal history and family members who used drugs); United States v. White, 552 F.3d 240, 251 (2d Cir. 2009) (court accepted that juror had "an angry look that she wasn't happy to be here"); State v. Lingo, 437 S.E.2d 463 (Ga. 1993) (prosecutor excluded male black juror who appeared "angry"); Clayton v. State, 797 S.E.2d 639, 643 (Ga. App. 2017) (State's reliance on fact that African-American prospective juror had gold teeth was not race-neutral); State v. Clifton, 892 N.W.2d 112, 296 Neb. 135 (2017) (trial court did not err in finding race-neutral prosecutor's rationale that juror had years of alcohol and crack addiction).

[16] *See* Lewis v. Bennett, 435 F. Supp. 2d 184, 191-92 (W.D.N.Y. 2006) (striking unmarried juror); State v. Collins, 2017 WL 2126704 (Tenn. App. 2017) (jurors had family members affected by drug abuse, prosecutor removed the only black juror).

racial.[17] Several studies of published opinions confirm that appellate courts rarely reverse convictions based on *Batson* claims.[18]

Judges stress the fact-specific nature of their rulings on *Batson* claims.[19] The Court's latest case involving race and juror selection, *Foster v. Chatman*,[20] reinforces this aspect of the doctrine: to use a bit of understatement, the case did not involve subtle discrimination. Documents related to the jury selection in that case showed that the prosecutors made notations about the race of several potential jurors, writing the letter "b" alongside their names,

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[17] *See* Cook v. LaMarque, 593 F.3d 810 (9th Cir. 2010) (using comparative analysis of stricken versus non-stricken jurors rather than a mixed-motive test); Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. __ (forthcoming 2018).

[18] *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1102 (2011) (examining 269 *Batson* challenges in federal court, 2000-2009); James E. Coleman Jr. & David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*. N.C. STATE BAR J. (July 2017) (comparing reversals in North Carolina to other southern states); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957 (2016).

[19] *See* Gray v. Brady, 592 F.3d 296 (1st Cir. 2010) ("whether to draw an inference of discriminatory use of peremptories is an intensely case and fact-specific question"). Despite the doctrinal emphasis on fact-specific judicial review of jury selection, the parties often present formulaic, pre-packaged arguments to explain their removal of jurors. Litigation in this area has unearthed training materials from local prosecutors' offices, listing ready-made "neutral" justifications that prosecutors might use to overcome a *Batson* challenge. *See* Commonwealth v. Cook, 952 A.2d 594 (Pa. 2008) (describing a training video for new prosecutors calling for prosecutors to strike blacks and women from juries, and explaining how to conceal discriminatory strikes). Lawyers litigating claims of racial bias in the North Carolina criminal justice system collected materials demonstrating such prosecutor training practices. *See* Catherine M. Grosso, Barbara O'Brien & George C. Woodworth, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012). In some instances, trainers specifically instruct prosecutors to exclude members of racial minority groups from juries. *See* Miller-El v. Dretke, 545 U.S. 231, 265-66 (2005) (Dallas County); Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103 (2012); Brian Rodgers, *Local DA Encourages Blocking Blacks from Juries, Wharton County Prosecutor Says*, HOUSTON CHRONICLE, Mar. 22, 2016, http://www.houstonchronicle.com/news/houston-texas/houston/article/Local-DA-encourages-blocking-blacks-from-juries-6975314.php.

[20] 136 S. Ct. 1737 (2016).

highlighting their names in green, and placing these jurors in a category labeled, "definite no's." It is hard to imagine many *Batson* claims with evidence this strong, certainly not for cases litigated after attorneys became more sophisticated in preparing for possible *Batson* claims.[21]

Since the Court decided *Batson*, critics have proposed improvements to the test.[22] Chief among them, scholars persistently call for the abolition of peremptory strikes.[23] At the end of the day, however, the *Batson* test has endured, more or less in its original form. *Batson* marks the boundaries of constitutional enforcement and that boundary does not seem likely to move any time soon.[24]

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[21] *See* Ex parte Floyd, 2016 WL 6819656 (Ala. Nov. 18, 2016) (affirming conviction after remand to reconsider in light of *Foster*, despite prosecutor use of list designating jurors by race).

[22] *See* Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. CIV. RTS. CIV. LIB. REV. 357 (2017); Scott Howe, *Deselecting Biased Juries*, 2015 UTAH L. REV. 238; Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. UNIV. L. REV. 1503 (2015); Nancy S. Marder, *Foster v. Chatman: A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137 (2017) (proposes allowing defendants to obtain more information such as prosecutor notes, or inferring discriminatory intent from discriminatory effect or practice); Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 22 (2014); *cf*. Andrew G. Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935 (2016).

[23] *See* Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) ("I continue to believe that we should reconsider *Batson*'s test and the peremptory challenge system as a whole."); Bellin & Semitsu, *supra* note 18; Charles J. Ogletree, *Just Say No!: A Proposal To Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005); Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363 (2009); David Zonana, *The Effect of Assumptions About Racial Bias on the Analysis of* Batson*'s Three Harms and the Peremptory Challenge*, 1994 ANN. SURV. AM. L. 203 (1994).

[24] *See* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501, 528 (decrying the doctrine's "useless symbolism"); Camille A. Nelson, Batson, *O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008)(arguing that "*Batson*'s promise of protection against racially discriminatory jury selection has not been realized"); Bryan Stevenson, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, HUMAN RIGHTS MAGAZINE, Fall 2010, http://www.americanbar.org/publications/human_rights_magazine_

C. Venire Selection

Litigants also sometimes object to the composition of the jury venire – the local residents whom the clerk of the court summons to the courthouse on any given day for potential jury service. Constitutional doctrine plays only a limited backstop role here, as it does with peremptory challenges.

The Supreme Court does read the Equal Protection Clause to prevent states from excluding racial groups by statute from the jury venire.[25] The Court has also recognized a defendant's right to challenge the process of creating the venire in the Sixth Amendment's promise of an impartial jury.[26] A defendant who challenges the venire must show that a distinctive group (such as a racial group) is underrepresented in the pool, meaning that its jury venire numbers are "not reasonable in relation to" the number of such persons in the community. After showing a gap between the general population and the composition of the venire, the defendant must identify some aspect of the jury selection process that causes a "systematic" exclusion of group.[27]

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home/human_rights_vol37_2010/fall2010/illegal_racial_discrimination_in_jury_selection.html.

[25] In the first case to deal with the question, Strauder v. West Virginia, 100 U.S. 303 (1880), the Court sustained an equal protection challenge to a statute excluding blacks from the jury venire. In later cases, the Court did not require the defendant to show complete exclusion of a racial group from jury service: A substantial disparity between the racial mix of the county's population and the racial mix of the venire, together with an explanation of how the jury selection process had created this outcome, would be enough to establish a prima facie case of discrimination. The government would then have to rebut the presumption of discrimination. See Turner v. Fouche, 396 U.S. 346 (1970) (underrepresentation of African Americans); Castaneda v. Partida, 430 U.S. 482 (1977) (Mexican Americans).

[26] In Taylor v. Louisiana, 419 U.S. 522 (1975), the Court held that a Louisiana law placing on the venire only those women who affirmatively requested jury duty violated the Sixth Amendment's requirement that the jury represent a "fair cross section" of the community.

[27] *See* Duren v. Missouri, 439 U.S. 357 (1979). At that point, the burden of proof shifts to the government to show a "significant state interest" that justifies use of the method that systematically excludes a group.

Statistics matter in proving the defendant's claim. State courts and lower federal courts use several different techniques to measure the gap between the presence in the population and the presence on the jury venire of a distinctive group.[28] In that sense, the litigation related to jury venires places more weight on the pattern of outcomes and less on the intent of particular actors in a single trial.[29] Nevertheless, litigators in this arena still look to a small set of trials – a single venire, typically a single day's worth of trials – for the relevant evidence. Moreover, a judicial finding for defendants who challenge the composition of the venire is rare.[30] Like the legal doctrines related to judicial removals for cause and litigant removals through peremptory challenges, the litigation surrounding the jury venire leaves most jury selection choices undisturbed – some of them troubling.[31]

D. Public Records and Past Jury Selection Studies

As we have seen, when entire segments of the community remain under-represented in jury service, constitutional doctrines provide a remedy only in the most extreme individual cases. They do so without checking the broader context of courtroom practices. Unfortunately, recordkeeping about jury selection compounds the doctrinal problem of single-case myopia.

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[28] The Court in Berghuis v. Smith, 559 U.S. 314 (2010), describes three different measures of the participation gap: the absolute disparity test, the comparative disparity test, and the standard deviation test. *See* State v. Plain, 2017 WL 2822482 (Iowa, June 30, 2017) (challenges to jury pools can be based on multiple analytical models).

[29] *See* Jessica Heyman, *Introducing the Jury Exception: How Equal Protection Treats Juries Differently*, 69 NYU ANN. SURVEY OF AMER. LAW 185 (2013).

[30] *See* United States v. Fadiga, 858 F.3d 1061 (7th Cir. 2017) (evidence that 20% of the population in the two counties that provided jurors for district court were black and that no juror on defendant's 48 person venire was black was insufficient to establish prima facie case of discrimination); United States v. Best, 214 F. Supp. 2d 897 (N.D. Ind. 2002) (jury venire did not violate Sixth Amendment fair cross-section requirement, even if percentage of African-Americans in counties from which venire was drawn was 19.6% and percentage of African-Americans on this venire was only 4.8%).

[31] *See* David M. Coriell, *An (Un)Fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463 (2015).

State courts maintain records (typically in a non-electronic format) about the construction of individual juries: which prospective jurors sat in the box, which jurors the judge removed for cause, and which jurors the two attorneys removed through peremptories.[32] But aggregate data is another thing entirely: clerks do not traditionally compile data on the rate at which parties or judges exclude minority jurors over long periods of time.[33] Even if state courts were to compile and publish their records to show jury selection practices across many cases, the case files are not fully comparable from place to place. The lack of data not only makes it difficult for litigants to ferret out racial discrimination in particular cases, but also makes it difficult to identify patterns of behavior that supervisors might address through better training and accountability.[34]

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[32] Clerks in some states also maintain a record of the order of removal. Jurisdictions vary in how much information they collect and retain about individual jurors. *See* MD. CODE ANN., COURTS AND JUDICIAL PROCEEDINGS § 8-314(a) (West 2016) ("A jury commissioner shall document each … decision with regard to disqualification, exemption, or excusal from, or rescheduling of, jury service"); MINN. GEN. R. PRACTICE, R. 814 ("names of the qualified prospective jurors drawn and the contents of juror qualification questionnaires … must be made available to the public"); 42 PA. CONS. STAT. § 4523(a) (2016) ("The jury selection commission shall create and maintain a list of names of all prospective jurors who have been disqualified and the reasons for their disqualification. The list shall be open for public inspection.").

[33] For an exception, *see* N.Y. JUD. CT. ACTS LAW § 528 (Consol. 2016) ("The commissioner of jurors shall collect demographic data for jurors who present for jury service, including each juror's race and/or ethnicity, age and sex, and the chief administrator of the courts shall submit the data in an annual report to the governor, the speaker of the assembly, the temporary president of the senate and the chief judge of the court of appeals"). We are unaware of any state that requires the clerk of the court to collect information about the removal of jurors from the venire at the case level, in all jury trials, and to report that data routinely, both at the case level and in aggregate form. *See* S.B. 576, 2017 Leg. (Cal. 2017) (requiring jury commissioner to develop form to collect specified demographic information about prospective jurors, prohibiting disclosure of the form, but also requiring jury commissioner to release biannual reports with aggregate data).

[34] The best overview of these shortcomings in the public records appears in Catherine M. Grosso & Barbara O'Brien, *A Call to Criminal Courts: Record Rules for* Batson, 105 KY. L.J. 651 (2017); *see also* Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 322 (2007) ("there is extremely little evidence available even in a full-blown *Batson* hearing to shed much light on the question of

Because of the fragmented nature of public records dealing with jury selection, researchers have not created many databases on this topic. And the limited data they have managed to collect focus on specialized crimes or on trials in a handful of locations. Comparisons across many locations, time periods, or types of crimes have not been available.

For instance, most of the efforts of scholars and litigants to collect records about jury selection at the trial court level relate to capital murder trials. Researchers have tallied jury statistics in capital cases in Pennsylvania,[35] North Carolina,[36] South Carolina,[37] and elsewhere.[38]

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whether an explanation is credible"); Peter A. Joy & Kevin C. McMunigal, *Racial Discrimination and Jury Selection*, 31 A.B.A. CRIM. JUST. 43, 45 (2016) (urging that "every jurisdiction needs to do a better job of collecting data both on the composition of the jury venires and on the use of peremptory challenges"); Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 954–56 (2011) (noting poor quality of juror data that courts maintain and report).

[35] *See* David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425 (2012); David C. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

[36] *See* Barbara O'Brien & Catherine M. Grosso, *Beyond* Batson*'s Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623 (2013); Grosso, et al., *supra* note 19.

[37] *See* Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, __ NORTHEASTERN UNIV. L. REV. __ (2017); Ann M. Eisenberg, et al., *If It Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373 (2017).

[38] *See* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 22–28 (2001); Brandon L. Garrett et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE LAW JOURNAL FORUM 417 (March 6, 2017) (survey of persons reporting for jury duty in Orange County, California, asking questions about eligibility to serve on hypothetical death penalty case); Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513 (2014) (non-archival study of 445 jury-eligible citizens in six death penalty states); Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L. J. 113 (2016) (qualitative

Other studies venture beyond capital murder trials, but remain limited to a small number of county courthouses.[39] The most comprehensive of these efforts includes a study of criminal trial juries based on records from two counties in Florida.[40] Several studies focus on the creation of the jury venire, prior to any removals by judges and attorneys.[41] Litigators – perhaps frustrated by silence from the academy – have also assembled some statistics

study of *Witherspoon* strikes in eleven Louisiana trials resulting in death verdicts from 2009 to 2013).

[39] Two non-capital studies analyze single parishes in Louisiana. *See* LOUISIANA CRISIS ASSISTANCE CENTER, BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE 2 (2003), http://www.blackstrikes.com; Billy M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?* 14 J. CRIM. JUSTICE 61 (1986) (examining data from 121 criminal trials in one Louisiana parish). Another working paper analyzes 351 jury trials from Los Angeles County, Maricopa County (Arizona), Bronx County, and Washington, D.C. *See* Jee-Yeon K. Lehmann & Jeremy Blair Smith, *A Multidimensional Examination of Jury Composition, Trial Outcomes, and Attorney Preferences* (June 2013), available at http://www.uh.edu/~jlehman2/papers/ lehmann_smith_jurycomposition.pdf.

[40] *See* Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017 (2012). Some of the single-jurisdiction studies collected data about juries for a remarkably small number of cases. *See* Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (data from 13 noncapital felony criminal jury trials in North Carolina; blacks were much more likely to be excluded by the prosecution and whites by the defense).

[41] *See* MAUREEN M. BERNER ET AL., A PROCESS EVALUATION AND DEMOGRAPHIC ANALYSIS OF JURY POOL FORMATION IN NORTH CAROLINA'S JUDICIAL DISTRICT 15B (2016), https://www.sog.unc.edu/publications/reports/process-evaluation-and-demographic-analysis-jury-pool-formation-north-carolina's-judicial-district; BOB COHEN & JANET ROSALES, RACIAL AND ETHNIC DISPARITY IN MANHATTAN JURY POOLS: RESULTS OF A SURVEY AND SUGGESTIONS FOR REFORM (2007), http://www.law.cuny.edu/academics/social-justice/clore/reports/Citizen-Action-Jury-Pool-Study.pdf; James Michael Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?* 36 LAW & POLICY 1 (2014); Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Ted Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 S.M.U. L. REV. 1813 (2001).

regarding prosecutor exclusions from juries in single counties.[42] Journalists have also assembled a few localized studies.[43]

Finally, a few studies analyze jury selection in the trial court through the lens of published opinions. Some studies use these opinions as a way to understand typical practices in trial courts, despite the selection bias problems involved.[44] Other studies based on published appellate opinions restricted their analyses to the role of appellate judges in this litigation.[45]

What is missing from the archival research on jury selection is the power to look across all criminal trials, comparing different jurisdictions and different types of trials. Without that systemic view, judges and lawyers in one county can only speculate about whether the findings of specialized studies are generalizable to their home jurisdiction. In this context, the actors who take to heart the problems that are revealed in research studies are those least capable of changing local practices.

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[42] *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf (summarizing statistics indicating racial disparities among prosecutors during jury selection for eight southern states: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee); Grosso & O'Brien, *supra* note 34 (summarizing collection of jury selection data in capital litigation context).

[43] *See* Steve McGonigle, et al. *Striking Differences*, DALLAS MORNING NEWS, Aug. 21-23, 2005 (in felony trials in Dallas County, Texas, prosecutors tended to reject African-American jurors, while defense attorneys tended to retain them).

[44] *See* Kenneth J. Melilli, *Batson in Practice: What We Have Learned about* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996) (inferring that criminal defendants make approximately 90% of *Batson* claims; only 17% of challenges with blacks as the targeted group were successful, 13% for Hispanics, and 53% for whites).

[45] *See* Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006*, 33 AM. J. CRIM. JUST. 59 (2008) (analyzing 184 race-based peremptory challenge cases, concluding that appellants rarely win such challenges); Pollitt & Warren, *supra* note 18. In light of the challenges of assembling archival data, some researchers opt instead for experimental studies. *See* Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AMER. PSYCHOLOGIST 527, 533-34 (2008).

II. THE JURY SUNSHINE PROJECT

Public data, collected routinely in the criminal courts, could expand the frame of reference. If jury selection records were published in comparable form across jurisdictions, available without physical travel between courthouses, it would become feasible to compare one prosecutor or public defender office to another, and to compare one jurisdiction to another. Such comparisons might be valuable to supervising prosecutors, judges with administrative duties, researchers, voters, or even litigants.

To demonstrate how this data collection might operate, we set a goal to learn about jury selection for all felony trials in a single year, for an entire state. We chose felony trials in 2011 in North Carolina.[46] Our main contribution to the existing public records was to connect the dots, pulling into one location the insights about public servants and public actions that are currently dispersed among paper files, voter records, and office web sites. Although each data point comes from a public record, linking them is no easy job. In our case, it became a run through an elaborate obstacle course.

A. Traveling to the Courthouses

The first obstacle on the course was to identify trial files, separating them from the much more common cases that did not produce a trial. The North Carolina Administrative Office of the Courts (NCAOC) reports the number of charges tried each year, but they do not specify which cases are resolved through trial and which end with guilty pleas, dismissals, or other outcomes.[47] NCAOC declined our request to generate a list of file numbers for

[46] We began this effort in the fall of 2012, so we chose the most recent complete year of records. The state constitution at the time guaranteed that all felony trials in the state would be tried to a jury. N.C. CONST. art. I, § 24. Only a few misdemeanor charges were decided by juries: those "appealed" from District Court to Superior Court for a trial de novo. *See* N.C. GEN. STAT. § 7A-271(b) (2016) (providing for appeals from district court to superior court).

[47] Annual case activity reports for felonies, misdemeanors, and infractions appear at http://www.nccourts.org/Citizens/SRPlanning/Statistics/CAReports_fy16-17.asp.

all cases that were resolved through jury trials in 2011, citing resource limitations.[48] We needed, therefore, a path around this obstacle.

Putting aside a few customized situations,[49] our most useful strategy relied on public data from NCAOC to specify the trial cases. NCAOC posts raw data of court dispositions in a format not easily accessible by the public. After persistent and creative efforts by the information technology staff at our law school, we were able to download this data and format it for our purposes.[50] On the basis of this NCAOC data, we generated a list of cases that led to a jury trial in each county.

In all likelihood, our lists from these various sources were incomplete. Some felony jury trials probably occurred in 2011 that never came to our attention. But based on comparisons between the number of trials we located and the number of trials that NCAOC listed in their annual reports,[51] we are confident that we obtained a strong majority of the trials for that year. There is no reason to believe that our collected trials differ from the remaining trials for any relevant characteristic.[52]

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[48] Our contact in NCAOC had cooperated with past data requests, with minimal burden on the office, but asserted that NCAOC leadership appointed by the governor elected in 2012 had instructed employees not to cooperate with this type of request. Recent litigation established the view of court records as being housed in the clerks' offices, not in a centralized file housed with the NCAOC. *See* LexisNexis Risk Data Management, Inc. v. North Carolina Administrative Office of the Courts, 775 S.E.2d 651 (N.C. 2015).

[49] A few counties (such as Guilford and Mecklenburg) maintained their own records about the cases that proceeded to trial. In those cases, we relied on the county clerk's records to identify cases that proceeded to trial. In one case (New Hanover County), our researcher focused on "thick files" in the collection as a rough proxy for the cases that went to trial. In other cases, we asked the county clerk to request from the NCAOC a list of trials for that county. NCAOC treated requests from the county Clerk of the Superior Court as a legal obligation, unlike statewide requests from scholars.

[50] We are grateful to Trevor Hughes and Matt Nelkin for their work on this project.

[51] NCAOC data tracks the number of criminal charges resolved through trials, while our database records the number of criminal trials, treating multi-charge or multi-defendant cases as a single trial. We collected jury selection data on 1,307 trials, while NCAOC listed 2,112 charges resolved by jury trial for fiscal year 2011-2012.

[52] We also plan to keep this research project open for some years, and will add further trials to the 2011 data as they come to our attention.

The typical file for a felony trial, stored in the county clerk's office, contains a jury selection form. The one-page form includes space for twelve separate jury boxes. In each box, an assistant clerk records the name of a juror seated in that box.[53] Other documents in the file indicate the judge, defense attorney, and prosecutor assigned to the case, the charges filed, the jury's verdict for each charge in the case, and the sentence that the judge imposed.

In the Fall of 2012, we conducted a pilot project in one county to test the viability of our collection plans, gathering the available file information for a few dozen trials. From that point forward, we relied on law students, law librarians, and undergraduate students to travel to most of the clerk's offices for the 100 counties in North Carolina, between early 2013 and the summer of 2015.[54] Remarkably, the clerks in 10 of the 100 counties reported that *no jury trials at all* occurred in their counties between 2011 and 2013.[55]

[53] We were disappointed to find that some clerks recorded only the fact that a prospective juror was removed from the box without indicating which courtroom actor was responsible for the removal. We coded these jurors as "Removed." The jury form also usually indicates the order of removals for any particular actor (that is, the form shows that a prospective juror was the third peremptory challenge by the defense or the fourth removal for cause by the judge) but not the overall order of removals of jurors in the voir dire process. One county (Guilford) adopted a notation that did capture this information about the overall order of removals.

[54] Based on what we learned from the pilot study, we refined a data collection protocol for students, as recorded in a codebook and standard spreadsheet. The field researchers focused on trials in 2011, but in smaller counties with very few trials per year, they also collected information for trials in 2010 and 2012. We are grateful to Elizabeth Johnson, a Reference Librarian at the School of Law, for coordinating this complex field operation. *See* Elizabeth Johnson, *Accessing Jury Selection Data in a Pre-Digital Environment*, __ AM. J. TRIAL ADVOCACY __ (forthcoming 2017).

[55] The counties with no jury trials were Bertie, Camden, Chowan, Clay, Franklin, Madison, Mitchell, Montgomery, Pamlico, and Warren.

B. Completing the Picture for Jurors, Judges, and Attorneys

The clerk in each county summons prospective jurors who reside in that county,[56] so we knew the name and county of residence of each prospective juror. Based on the research of Grosso and O'Brien in the capital trial context,[57] we also knew that North Carolina maintains open public records about jurors who are also registered voters, so we assigned a cohort of student researchers to pursue the biographical background for each juror.[58] Some prospective jurors were not present in the voter database because they were summoned for jury duty based on their driver's license,[59] but we did obtain the background information for a strong majority of the prospective juror based on the voter database.[60]

The file for each trial indicated the judge, prosecutor(s), and defense attorney(s) assigned to the case. For most of these full-time courtroom

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[56] *See* N.C. GEN. STAT. § 9-4 (2016).

[57] *See* Grosso et al., *supra* note 19.

[58] The online data for the Board of Elections provides the name, home address, gender, race, age, and party affiliation of each voter. The data is available at https://vt.ncsbe.gov/voter_search_public/. A few counties (including Mecklenburg) adopted notation techniques that included a record of each juror's race and gender within the clerk's file. Students worked on matching juror profiles with voter records between spring 2013 and summer 2016.

[59] *See* N.C.G.S. § 9-2(b) (2016) ("In preparing the master list [of prospective jurors], the jury commission shall use the list of registered voters and persons with drivers license records supplied to the county by the Commissioner of Motor Vehicles").

[60] We gave researchers a protocol to follow when deciding whether a prospective juror from the clerk's records matched a voter from the online Board of Elections records. The clerks in some offices provided us with the jury venire lists, which they maintained separately from the files for each trial; the venire lists provided home addresses for the jurors, increasing our confidence that the jurors listed in the clerk's records matched the voters listed in the voter records for the county. After clerks learned that we were asking for access to file information about jurors, some Superior Court judges issued orders prohibiting the clerks from releasing the juror venire lists to anyone other than the parties to the case. The North Carolina General Assembly also amended the statute to restrict access to the addresses and birthdates recorded on the jury venire lists. *See* N.C. GEN. STAT. § 9-4(b) (2016), Sess. Laws 2012-180, s. 4; 2013-166, s. 2.

actors, research assistants were able to identify race, gender, date of admission to the state bar (a proxy for the actor's level of experience), and the judges' date of appointment to the bench.[61].

In addition to the case-specific information about each trial and its participants, we also obtained information about each county, judicial district, and prosecutorial district.[62] These data points included census information about the population and racial breakdown of each county and case processing statistics about each prosecutorial district.

After all of the data road trips and internet searches were done, we held records for 1,306 trials.[63] This phase of the Jury Sunshine Project contains information about 29,624 removed or sitting jurors, 1,327 defendants, 694 defense attorneys, 466 prosecutors, and 129 Superior Court judges. We connected all of those bits of information into a single relational database.[64]

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[61] In some cases, this information was available from the public data stored on the site of the North Carolina State Bar regarding licensed attorneys. *See* https://www.ncbar.gov/for-lawyers/directories/lawyers/. We also learned, for defense attorneys, the office in which the attorney worked (private firm or public defender office). In North Carolina, the Public Defender service covers 16 of the judicial districts in the state. The remaining districts operate with appointed counsel. *See* N.C. GEN. STAT. § 7A-498.7 (2016). Students followed a written protocol to search in standard locations and a prescribed order for the professional biographies of the courtroom actors.

[62] North Carolina divides the state into 44 different prosecutorial districts and 30 different Superior Court districts. *See* N.C. GEN. STAT. § 7A-41 (2016). The judicial districts break into eight different divisions; judges spend six months each year in their home districts and six months traveling to other districts within the division.

[63] The NCAOC data lists a total of 2,112 charged that were resolved through trial for fiscal year 2011-2012. The breakdown of charges for individual counties suggests that we obtained the records for almost every felony trial that occurred in the state during calendar year 2011. The total number of defendants who faced trial in North Carolina in 2011 remains speculative, because each prosecutor retains the discretion to file separate counts either as separate file numbers in the office of the clerk, or as separate counts covered under a single file number.

[64] We checked the quality of the field data during the process of loading county-specific spreadsheets into the central database. Another statewide version of the data exists in spreadsheet form, as assembled by Dr. Francis Flanagan of the Wake Forest University Department of Economics. *See* Francis X. Flanagan, *Peremptory Challenges and Jury Selection*, 58 J. LAW AND ECONOMICS 385 (2015); Francis X. Flanagan, *Race, Gender, and Juries: Evidence*

III. ILLUSTRATIVE COMPARISONS OF JURY SELECTION PRACTICES

This data opens up a new universe of questions about jury selection and performance. It sheds light on simple descriptive issues about the relative contributions of judges, prosecutors, and defense attorneys in building a jury. It also allows us to compare jury practices in more serious felonies to those in the trials of lesser crimes. Because the data includes the jury's verdict on each charge,[65] we can compare outcomes for one defendant and one charge to outcomes in trials with multiple defendants and charges. It is possible to track case outcomes from juries of different ages, or those with different racial compositions. Any of these questions might prove interesting to taxpayers and voters who want to understand their criminal courts.

But you have to start somewhere. In this section, we present evidence related to racial disparities in jury service. We treat this as a demonstration project, to imagine in concrete terms the sort of public debate that might spring up when jury data becomes available in accessible form, allowing comparisons among jurisdictions.

Our first observations relate to the flow of prospective jurors through the courtroom. Table 1 indicates the contributions of each of the three courtroom actors.

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from North Carolina, unpublished draft on file with authors (2017) [hereinafter North Carolina Jury Evidence].

[65] Our field researchers entered separate codes for guilty as charged, guilty of lesser charge, mistrial, and acquittal.

TABLE 1: TOTAL JURORS REMOVED AND RETAINED

DISPOSITION	JURORS	%
Juror Retained for Service	16,744	57
Judge Removed	3,277	11
Prosecutor Removed	3,002	10
Defense Attorney Removed	4,187	14
Removed, Source Unknown	2,414	8
TOTAL	29,624	100

As Table 1 indicates, 57% of the jurors who sat in the jury box ultimately served on that jury. Defense attorneys were the most active courtroom figures, removing 14% of the total with peremptory challenges; judges removed 11% of the jurors for cause, and prosecutors exercised their peremptory challenges against 10% of the prospective jurors called into the box. Records did not indicate the source of the removals for 8% of the jurors.[66]

State statute creates a uniform framework for some aspects of the selection process.[67] At the outset, the clerk of the court randomly selects prospective jurors from the venire to seat in the jury box. The judge instructs the jury about the general nature of the upcoming trial[68] and then may ask jurors about their "general fitness and competency."[69] The parties "may personally question prospective jurors individually."[70]

The judge removes jurors for cause before the parties make their peremptory challenges, basing this decision in part on motions from the

[66] These unexplained removals were based on incomplete records in a few counties. If we assume that the courtroom actors accounted for the "unknown" removals at the same rate that they used for the recorded cases, then defense attorneys removed a total of 15% of the pool, judges excluded 12% for cause, and prosecutors removed 11%.

[67] *See* N.C. GEN. STAT. § 15A-1214 (2016).

[68] *See* N.C. GEN. STAT. § 15A-1213 (2016).

[69] *See* N.C. GEN. STAT. § 15A-1214(b) (2016).

[70] The judge sometimes removes jurors for cause before the parties ask their questions, but always remain free to remove additional jurors in light of their answers to attorney questions. Defense attorneys examine jurors only after prosecutors tender a complete set of 12 jurors. *See* § N.C. GEN. STAT. 15A-1214(e) (2016).

attorneys. The judge rules first on the prosecutor's motions and the clerk replaces any jurors removed. After that, the prosecutor exercises challenges to the twelve jurors in the box. Again, the clerk refills any empty seats before the judge and prosecutor repeat the process. The defense attorney takes the next shift, asking the judge to remove jurors for cause and striking any jurors from the group of twelve that the prosecutor and judge left in the box.[71] The judge and prosecutor again take the first turn on any replacement jurors who arrive in the box after the defense attorney is done with the first set of challenges. Local variations in this removal process and gaps in the file records leave us uncertain about the precise order of removals of jurors from any given trial.[72]

A. Demographic Differences Among Removed Jurors

Table 2 indicates the racial breakdown of jurors who were retained and removed. We identified 60% of our jurors as Caucasians, 16% as Black, and 2% as some other race (including Hispanic ethnicity).[73] The race was not indicated in our data for 22% of the jurors.[74]

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[71] When jurors are replaced at any step along the way, the initiative passes again to the judge and the prosecutor, who may remove any new juror, before the prosecutor "tenders" the newest set of retained jurors to the defense attorney. *See* N.C.S.A. § 15A-1214(d), (f). In capital cases, the process may advance one juror at a time. *See* N.C.S.A. § 15A-1214(j).

[72] For instance, it is possible for the judge and the prosecutor to retain all 12 jurors initially placed in the box, for the defense attorney to exercise all 6 of the available peremptories, and then for the judge and prosecutor to remove some of the replacement jurors for those 6 boxes. In most counties, the clerk records the order of jurors removed by each particular actor (for instance, "D3" would indicate the third juror removed by defense counsel), but not the order of removals as between parties. Only one county (Guilford) tracked the order of removal overall.

[73] The voter registration and juror records use the racial categories White, Black, Asian, Hispanic, Native American, and Other. Voters self-identify, and do not have the option of choosing more than one race. Because of the small numbers recorded in four of those categories, we combine them into a single "Other" category. Based on current census figures, available at https://www.census.gov/quickfacts/NC, we believe that these figures underestimate the number of Hispanic or Latino citizens called for jury service in felony trials today. White residents (excluding Hispanic or Latino ethnicity) comprised 65.3% of the

The data indicate that black jurors and other non-white jurors serve on juries at a slightly lower rate than white jurors. The retention rate for white jurors was 58%, while the rate for black jurors was 56% and for jurors of other races was 50%.

TABLE 2: JUROR DISPOSITION, BY RACE OF JUROR

DISPOSITION	WHITE	%	BLACK	%	OTHER	%	UNKNOWN	%
Juror Retained	10,402	58	2,628	56	324	50	3,389	53
Judge Removed	1,729	10	574	12	133	21	841	13
Prosecutor Removed	1,437	8	755	16	94	15	716	11
Defense Removed	2,960	17	288	6	63	10	876	14
Removed, Source Unknown	1,351	8	427	9	36	6	600	9
TOTAL	17,879		4,672		650		6,422	

When it comes to the race of the jurors, a remarkable pattern appears in Table 2. The data show that judges removed non-white jurors at a higher rate than they did for white jurors.[75] Then prosecutors removed non-white jurors at about twice the rate that they did for white jurors. But in the end, defense attorneys *nearly* rebalanced the levels of jury service among races by using more peremptory challenges than the judges or the prosecutors, and by

2010 population, while "Black alone" residents made up 21.5% and "Hispanic or Latino" residents 8.4% of the state population at that time.

[74] These jurors did not appear in the voter database, or appeared in the voter database with race not indicated. Jurors not appearing in the voter database were placed into the juror pool in the county based on their appearance on the list of licensed drivers. The race of licensed drivers is not publicly available data in North Carolina. If the unknown jurors were assigned a racial identity in proportion to the rest of the pool, Blacks would constitute 20% of the pool. Under this scenario, white jurors would constitute 77% of the total pool, and other races would make up 3%.

[75] The different removal rates for jurors of different races by each of the three courtroom actors are all statistically significant, using the chi-square test for significance.

using them more often against white jurors than they did against black and other non-white jurors.

To bring these racial effects into focus, we express the differences in the form of a "race removal ratio." In Table 3, we express the ratio of removal rates for black jurors to removal rates for white jurors: a ratio of exactly 1.0 would mean that the judges or attorneys remove black jurors and white jurors in exactly the same percentages.[76] A ratio above 1.0 means that the actors remove black jurors at a higher rate than they remove white jurors. Conversely, a ratio below 1.0 means that actors remove white jurors more often. We adjust the calculations for each courtroom actor to reflect the pool of jurors available at the time of that actor's removal decision.[77]

TABLE 3: REMOVAL RATIOS, BY RACE, FOR COURTROOM ACTORS

ACTOR	BLACK-TO-WHITE RATIO	OTHER-TO-WHITE RATIO
Judge	1.3	2.1
Prosecutor	2.1	2.0
Defense Attorney	0.4	0.7

Table 3 indicates that prosecutors excluded black jurors at more than twice the rate that they excluded white jurors (for a 2.1 ratio, or 20.6% to 9.7%); similarly, they used peremptory challenges against other non-white jurors at twice their rate of exclusion for white jurors (producing a 2.0 ratio, or 19.5% to 9.7%). Defense attorneys, by contrast, excluded black jurors less

[76] We calculated this ratio after excluding the removals by unknown parties and the removal of jurors of unknown race. In every case, the rate of removal of jurors of unknown race sits in between the rate of removal for white jurors and for non-white jurors.

[77] Judges have access to the entire pool. Prosecutors choose from the jurors remaining after the judge has chosen, while defense attorneys make their decisions regarding the jurors left after the prosecutors and judges have acted. There is some imprecision in this method, because after one of the parties exercises their full complement of peremptories, the clerk might place additional jurors into the box. While the attorneys may still challenge these additional jurors for cause, the removal depends on establishing the relevant legal basis for removal. The number of jurors that a party "retains" therefore includes some that the party did not actively choose.

than half as often as they excluded white jurors, with a 0.4 ratio (9.9% to 22.2%). Interestingly, the judges excluded black jurors for cause a bit more often (a 1.3 ratio, or 13.5% to 10.5%) but they excluded other non-white prospective jurors at a much higher rate (with a 2.1 ratio, or 21.7% to 10.5%).

The gender of prospective jurors complicates the selection patterns. On the whole, women and men served on juries at much the same rate. Judges, prosecutors, and defense attorneys did not differ much in their choices based on gender, at least when we look at all felony trials together.[78] When race and gender intersect, however, the courtroom actors each pursued a different strategy.

TABLE 4: TOTAL REMOVALS BY RACE AND GENDER

DISPOSITION	BLACK MALE	%	BLACK FEMALE	%	WHITE MALE	%	WHITE FEMALE	%
Juror Retained	1,011	53	1,609	58	5,028	57	5,346	59
Judge Removed	255	13	318	12	813	9	910	10
Prosecutor Removed	345	18	407	15	805	9	625	7
Defense Removed	105	6	183	7	1,438	16	1,518	17
Removed, Source Unknown	186	10	238	9	677	8	671	7
TOTAL	1,902		2,755		8,761		9,070	

Black male jurors are scarce from the outset. They make up only 6.4% of the total pool of summoned jurors (compared to 9.3% for black females). Once the selection process begins, judges and prosecutors remove black

[78] The retention rate for female jurors overall was 55%; for male jurors it was 55.4%. Judges removed 13% of females and 11.7% of males; prosecutors removed 12.1% of females and 13.8% of male jurors available to them; defense attorneys removed 21.5% of females and 20.6% of male jurors available to them.

It is possible, on the basis of Jury Sunshine Project data, to compare the treatment of male and female prospective jurors in particular categories of cases, such as sexual assault or domestic violence charges. We reserve those questions for another time, concentrating here on the insights one can gain from exploring all felony trials as a group.

males at a higher rate than other jurors. Table 5 summarizes the removal rates for each of the courtroom actors.[79]

TABLE 5: RATES OF REMOVAL OF AVAILABLE JURORS

	BLACK MALE	**BLACK FEMALE**	**WHITE MALE**	**WHITE FEMALE**
Judge	14.9%	12.6%	10.1%	10.8%
Prosecutor	23.6%	18.5%	11.1%	8.3%
Defense	9.4%	10.2%	22.2%	22.1%

Defense attorneys did not remove male and female jurors of the same race at meaningfully different rates. Prosecutors, however, used their challenges proportionally more often against black male jurors (striking 23.6% of those available in the pool at that point in the process) than they did against black female jurors (18.5% of those available). A similar, but less pronounced gap appeared in judicial removals for cause: judges removed 14.9% of the black male jurors and 12.6% of the black female jurors. All told, black males start the process underrepresented in the pool and end up comprising only 6% of the jurors who serve.[80]

B. Geographical Differences in Juror Removal Practices

Judges, prosecutors, and defense attorneys have different objectives at a trial and value different characteristics in jurors. It does not surprise us, therefore, to find that these courtroom actors produce different patterns when they choose jurors from various demographics.

[79] The percentages in Table 5 are based on the pool of jurors after excluding those with an unknown removal source. The percentages for prosecutors and defense attorneys also reflect the reduced pool of jurors available to those actors at the relevant point in the process. The differences are statistically significant, using the chi-square test. For judges, the chi-square statistic is 97.4271 and the p-value is < 0.00001.

[80] Black males make up approximately 11% of the state population overall. We note for future research the potential relevance of the race and gender of the judges, prosecutors, and defense attorneys who select the jurors.

Comparisons *within* these groups, however, is another matter. What might explain two different prosecutor offices that behave quite differently in their selection of juries? We explore this question through a comparison of the six largest cities in the state, all with populations larger than 200,000. Table 6 lists the removal ratios for the courtroom actors in the counties where those cities are located.

TABLE 6: REMOVAL RATIOS IN URBAN COUNTIES

CITY (COUNTY)	Judges Black-to-White	Judge Other-to-White	Prosecutors Black-to-White	Prosecutors Other-to-White	Defense Black-to-White	Defense Other-to-White
Winston-Salem (Forsyth)	1.6	2.7	3.0	4.0	0.6	0.8
Durham (Durham)	1.1	1.0	2.6	1.5	0.5	0.3
Charlotte (Mecklenburg)	1.0	1.9	2.5	2.3	0.3	0.5
Raleigh (Wake)	1.2	1.4	1.7	1.9	0.4	1.0
Greensboro (Guilford)	0.9	0.4	1.7	1.6	0.4	1.0
Fayetteville (Cumberland)	0.9	1.2	1.7	1.2	0.5	0.4

The prosecutor offices appear to fall into two groups. Greensboro, Raleigh, and Fayetteville all produce a removal ratio of 1.7 for black jurors; Greensboro and Durham also show relatively low removal ratios for other non-white jurors. On the other hand, the prosecutor offices in Durham, Charlotte, and Winston-Salem exclude black jurors at a higher rate than elsewhere in the state. In the most extreme case, the prosecutors in Forsyth County removed black jurors from the box three times more often than they remove white jurors: that is, among the 151 black jurors reporting for duty in felony trials, the prosecutors exercised their peremptory challenge to remove 27.5% of the jurors available to them after the judges removed some jurors

for cause. Out of 541 total white jurors, the prosecutors in Forsyth County removed 9.3% of the available candidates.

One more geographical comparison deserves our attention: the difference between urban and rural counties.[81] Despite the differences in jury selection among the six largest cities in the state, urban counties do share some features that distinguish them from rural counties. Table 7 summarizes the results.

TABLE 7: REMOVAL RATIOS, URBAN AND RURAL COUNTIES

	Judges Black-to-White	**Prosecutors Black-to-White**	**Defense Black-to-White**
Urban	1.2	2.3	0.5
Rural	0.9	1.8	0.5

It appears that the racial disparities in removal rates are most pronounced in urban counties, both for judges and for prosecutors. Defense attorneys appear to follow the same practices in urban and rural counties.

IV. PREVIEW OF A POLITICAL DEBATE

The data from the Jury Sunshine Project speak only to outcomes in the jury selection process. The numbers show what judges and attorneys did when they picked jurors but they do not show why. The competing – and complementary – explanations for these racial disparities in the jury selection process are a fitting topic for political debate.

[81] The most rural counties include the 25 counties with the lowest population densities in the state, as calculated on http://www.usa.com/rank/north-carolina-state-population-density-county-rank.htm. Among those 25 counties, 7 conducted no jury trials at all and 8 recorded generic removals without attributing them to the judge or a party. Those counties made choices about 1,598 jurors (with only a trivial number of non-white jurors aside from black jurors). The most urban counties include 11 counties with the highest population densities, covering all cities with populations more than 80,000. Those counties made choices about 13,037 jurors.

In this part, we preview the sorts of arguments that prosecutors, judges, defense attorneys, and interested community members are likely to advance during this debate. Some of these explanations for racial disparity emphasize the intent of the judges and attorneys when they exclude jurors. Others put intent to the side and ask instead about the effects of systematic exclusion on defendants and the community.

A. Intent-Based Interpretations

What might explain these patterns in jury selection? Starting with the defense attorneys, who used their removal powers at the highest rate, perhaps the simplest explanation is best: they used all the available *voir dire* clues (including the race of the prospective jurors) to seat juries who were more sympathetic to human frailty, or those who were more skeptical of local police. Perhaps the use of the jurors' race was the explicit basis for the defense attorney's choice, or maybe the race correlated with other clues, such as expressions of general respect for authority. Put another way, defense attorneys may have used race as one factor to pick a jury to win a trial.

As a matter of trial strategy, such choices are rational. Flanagan used our jury data to calculate the performance differences among juries of different racial composition. He found that juries composed of more black men were more likely to acquit any defendant. Conversely, juries with more while males were more likely to convict, particularly when the defendant was a black male.[82] Thus, it is easy to see why defense attorneys might want to save more of their peremptory challenges for white male jurors.[83]

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[82] *See* Flanagan, *North Carolina Jury Evidence*, *supra* note 64, at 13-15. Flanagan used instrumental variable regressions, using the demographic composition of the randomly selected jury pool as an instrument for the composition of the jury.

[83] There is also another possible explanation for the exclusion pattern on the defense side: perhaps defense attorneys were aware that non-white jurors were underrepresented on the venire that the clerk called to the courthouse. Their removal of white jurors, then, might have revealed an effort to restore the jury to a racial balance that better reflected the community. *See* Berner et al., *supra* note 41.

As for the judges, it is more difficult to reconstruct the reasons why they removed a higher percentage of black jurors from the venire. The 30% increase in the rate of removal among black jurors, when compared to white jurors, might reflect greater economic stresses among black jurors, such as transportation difficulties or pronounced hardship from missing days away from a job.[84]

And then there are the prosecutors. One potential explanation for the race removal ratios higher than 1.0 would be intentional strategic decisions that incorporate race.[85] Perhaps line prosecutors relied on race as a clue about the general receptiveness of jurors to a law enforcement perspective. Like the defense attorneys, the prosecutors may have relied in part on race to pick a winning jury.

It is also possible that prosecutors removed jurors based on a factor correlated with race – most prominently, jurors with a felony conviction, a prior arrest, or close family members who had negative experiences in the criminal justice system.[86] Prosecutors might have been fully aware of the disparate racial impact of these choices and regretted that unintentional side effect of their removal strategy.

Again, our data suggest that such choices by prosecutors are strategically rational. Flanagan found that for every peremptory challenge that the prosecutor uses, the conviction rate for black male defendants increases by 2 to 4%.[87]

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[84] The judges' different treatment of white jurors and non-white jurors other than African-Americans is equally puzzling. It might reflect a greater incidence of language barriers within this group, but that is speculation.

[85] *See* Michael Selmi, *Statistical Inequality and Intentional (Not Implicit) Discrimination*, 79 LAW & CONTEMP. PROBS. 199 (2016).

[86] *See* James Michael Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?* 36 LAW & POLICY 1 (2014); Vida Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violated* Batson, 34 YALE LAW & POLICY REV. 387 (2016); Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013).

[87] *See* Flanagan, *North Carolina Jury Evidence*, *supra* note 64, at 14. Among the 1,327 defendants in our database, 666 (50%) are black males and 385 (29%) are white males. The race is unknown for 71 male defendants (5%). There are 74 (6%) black female defendants and 63 (5%) white female defendants.

None of these intent-based accounts, for any of the courtroom actors, can explain jury selection choices in individual cases. Racial disparities in jury selection outcomes speak only about averages. They reveal incentives that shape the larger patterns of removal. These arguments, therefore, might not win the day in the courtroom under current constitutional doctrine. But the reasons why prosecutors and judges exclude black jurors (especially males) at a high rate could be relevant to voters and community groups outside the courtroom, as they discuss local criminal justice conditions.

B. The Effects of Juror Exclusion

A political debate about the exclusion of jurors might extend beyond the possible intent of courtroom actors. The discussion, based on data-driven comparisons of different places and actors, might also include the effects of juror exclusion.

Having a diverse jury can have life-changing implications for criminal defendants. White jurors are more likely to convict and are more likely to inflict harsh punishments on African-American defendants accused of killing white victims.[88]

The exclusion of minority jurors from service also affects the jurors themselves and the community where the trial occurs. Jury service creates a forum for popular participation in criminal justice.[89] When major segments of the community remain outside the courtroom, with other people issuing the verdicts, the legitimacy of the system suffers. Watching the jury selection process across many trials allows us to see it from the perspective of jurors and their community. Statewide statistics reveal the ways that different parts of the community find it easier or harder to serve on juries.

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[88] *See* Bellin & Semitsu, *supra* note 18, at 1082-83.

[89] *See* AKHIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012).

1. Impact on Excluded Jurors

In addition to the harm to criminal defendants, courts have long recognized that individuals who are excluded because of racial discrimination also experience a cognizable harm. For example, in *Carter v. Jury Comm'n of Greene County,* the Court noted that, "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[90]

Even when courts have declined to hold that serving on a jury is a enforceable right, they still agree that jury service is a "badge of citizenship worn proudly by all those who have the opportunity to do so and that it would, indeed, be desirable for all citizens to have that opportunity."[91] Many courts have noted that exclusion of qualified groups violates not only the constitution, but undermines "our basic concepts of a democratic society and representative government." [92] When state actors participate in this exclusion, it deepens the harm. As one court noted long ago, "[w]hen Negroes are excluded from jury service because of their color, the action of the state

[90] 392 U.S. 320, 329 (1970).

[91] *See* United States v. Conant, 116 F. Supp.2d 1015 (E.D. Wis. 2000) (stating that "While no court has yet recognized a constitutional right to serve on a jury, the possibility that such a right might exist is to be given the most careful scrutiny."

[92] *See* Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury, 622 F.2d 807 (5th Cir. 1980) (quoting Smith v. Texas, 311 U.S. 128 (1940)). "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government." *Id. See also* Cassell v. State of Texas, 339 U.S. 300, 303-304 (1950) (dissent), noting that "[q]ualified Negroes excluded by discrimination have available, in addition, remedies in courts of equity. I suppose there is no doubt, and if there is this Court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in a federal court an individual or a class action for an injunction or mandamus against the state officers responsible."

'is practically a brand upon them, affixed by the law, an assertion of their inferiority.'"[93]

2. Impact of Juror Exclusion on the Community

Another issue stemming from the exclusion of minority jurors is the detrimental impact on the community. It is a basic notion of democracy that a jury should reflect the community. A jury that is made up of representatives of all segments and groups of the community is more likely to fit contemporary notions of neutrality and a combined "commonsense judgment of laymen."[94]

The Supreme Court has long recognized the importance of the role of jury participation in our society and has explicitly examined the impact that such exclusion has on the broader community. For example, in *Taylor v. Louisiana*, the Supreme Court recognized the importance in selecting a fair representation of jury members because of its potential impact on a community.[95] The Court explained that the fair representation requirement was essential in (1) guarding against the exercise of "arbitrary power" and invoking the "commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor," (2) upholding "public confidence in the fairness of the criminal justice system" and (3) sharing the administration of justice "as a phase of civic responsibility."[96]

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[93] White v. Crook, 251 F. Supp. 401, 406 (M.D. Ala. 1966) (quoting Strauder v. State of West Virginia, 100 U.S. 303,308 (1879); *see also* Nancy Leong, *Civilizing* Batson, 97 IOWA L. REV. 1561 (2012) (proposing suits by prospective jurors to overcome informational obstacles to *Batson* challenges).

[94] *See* Hiroshi Fukurai, *Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection*, 24 J. CRIM. JUST. 71, 72 (1996).

[95] *See* Taylor v. Louisiana, 419 U.S. 522, 527 (1975).

[96] *Id*. at 538. Similarly, after the Court's decision in *Batson*, the Court decided in Powers v. Ohio, 499 U.S. 400 (1991), to expand the right to complain against discriminatory use of peremptory challenges to defendants who were not members of the same race as the excluded jurors. The harm done to the community's interests in jury service served as a key justification: "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life."

Systemic exclusion harms the community because jury service creates a forum for popular participation in criminal justice.[97] When major segments of the community remain outside the courtroom, with other people issuing the verdicts, the legitimacy of the system suffers. In *Georgia v. McCollum*, the Court explained that improper exclusion of jurors on the basis of race affects the juror, but the harm also extends to the rejected juror and beyond "to touch the entire community," [98] because discriminatory proceedings "undermine public confidence in the fairness of our system of justice."[99]

The problems related to the systemic exclusion of racial minorities on juries are particularly acute when the subject matter of the case involves racial violence. The Court has long recognized the danger that such cases might create distrust with minority communities. For example, in *McCollum*, Justice Blackmun discussed cases involving racial violence in which peremptory challenges had resulted in the striking of all black jurors:

> In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes. Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it.[100]

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[97] *See* AKHIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).

[98] 505 U.S. 42 (1992). The *McCollum* Court noted that "the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* at __ (quoting Batson v. Kentucky, 476 U.S. 79, 87 (1986)).

[99] *Id*. This is a key insight from the "procedural justice" literature. *See* Richard R. Johnson, *Citizen Expectations of Police Traffic Stop Behavior*, 27 POLICING 487, 488 (2004) (noting that studies have shown that people are more likely to "defer to the law and refrain from illegal behavior" when police treat them fairly); Tom R. Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008).

[100] *Id.* The 1980 Miami urban rebellion resulted in the death of eighteen people and $200 million in property damage and other losses. This rebellion followed the acquittal by an all-white jury of four white police officers for the beating death of a black insurance executive after a change of venue from Miami to Tampa, and after the defendants had used their peremptory challenges to exclude all black people on the jury venire. The Florida governor's

A homogenous jury, on the other hand, misrepresents modern images of a fair jury. The appearance of prejudice in the selection process of the jury leads to continuing pessimism and distrust concerning the operation of the criminal justice system among the omitted groups.[101] The excluded community perceives that it is "shut out." The court's participation in discrimination and racism undermines its moral authority as the enforcer of antidiscrimination policies.[102]

The public at large also shares an interest in "demonstrably fair trials that produce accurate verdicts."[103] Diversity itself enhances the deliberations of juries. In *Peters v. Kiff*,[104] Justice Marshall identified this contribution of a representative jury:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience. … [E]xclusion deprives the jury of a perspective on human events that may have been unsuspected importance in any case that may be presented.[105]

In sum, excluding minorities from jury selection has negative implications beyond the harms that a criminal defendant might raise in the courtroom. Like other systemic issues in the criminal justice system, visible and

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report of the disturbance specifically identified the practice of excluding blacks from juries in racially sensitive cases as a cause of the riots and a reason for blacks in Dade County to distrust the criminal justice system.

[101] Adam Benforado, *Flawed Humans, Flawed Justice*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/opinion/flawed-humans-flawed-justice.html;

[102] *See* Shanara Gilbert, *An Ounce of Prevention; A Constitutional Prescription For Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855, 1928 (1993).

[103] Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it Anyway?* 92 COLUM. L. REV. 725, 727 (1992).

[104] 407 U.S. 493 (1972).

[105] *Id.* at 499-50.

systematic barriers to jury service can erode community trust and decrease legitimacy.[106]

The accountability of judges and prosecutors to the community is also compromised when particular races, neighborhoods, ages, or other social groups, cannot contribute their fair share to the jury system. In particular, prosecutors who can exclude parts of the community from jury service effectively shield themselves from full accountability to the public.[107] They can choose for themselves which segments of the population will set their priorities in charging and resolution of cases.

Whether such disparities are the result of purposeful discrimination is difficult to prove, but even the perception that discrimination is occurring has important implications for the criminal justice system.[108] These practices deserve scrutiny outside the courtroom, beyond the confines of constitutional doctrine.

V. ACCESS TO DATA AND CRIMINAL JUSTICE REFORM

Although we chose data, for illustrative purposes, to address the question of exclusion from juries on the basis of race, we also think of jury data in broader terms. Open records deepen public understanding and engagement with criminal justice. In this part, we explain how file data, made available in searchable form that is comparable across district boundaries, can create a productive role for the public in positive criminal justice reform.

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[106] There is an ironic aspect to the Jury Sunshine Project: publication of data about uneven community access to jury service might exacerbate the problem by making it more visible. If the public debate never results in greater equality of jury service, that outcome is a sobering possibility.

[107] This compounds the other weaknesses of the electoral check on the prosecutor's performance in office. *See* Russell Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69 (2011); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

[108] *See* Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J.C.R. & SOC. JUST. 25, 30 (2011); Stephen Clark, *Arrested Oversight: A Comparative Analysis of and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 2 (2009).

A. The Analogy to Traffic-Stop Data

Constitutional doctrines such as *Batson* have not opened the door to jury service for minority groups. But is there any better (or quicker) alternative than advocating for changes in the constitutional doctrine? The American experience with traffic stops and pedestrian stops by police over the last two decades suggest that there is in fact a better way. In that setting, a frustrating and limited constitutional doctrine may be losing relevance. The increased availability of data about the patterns of police stops created a political debate that continues to shape police conduct. Through the political process, members of these communities are able to insist on changes in internal policies aimed at reduce racial profiling.

Just as in the jury selection context under *Batson,* the Supreme Court's approach to racial profiling under the Fourth Amendment allows law enforcement officials to cloak constitutionally impermissible conduct in race-neutral terms. Equal Protection jurisprudence insulates these practices from systemic reform.

The centerpiece of this evasion is *Whren v. United States*.[109] The case involved two vice squad officers' decision to stop a car. One possible ground for the stop was illegal driving (making a right turn without a signal); another plausible reason for the stop was the officers' unsupported hunch that the driver and passenger were involved in drug distribution. Which was the true reason? The Court said that it didn't matter. As long as the circumstances give officers reasonable suspicion to believe a driver violated a *traffic* law, courts treat the stop as reasonable under the Fourth Amendment.[110] An officer can use race as a basis for suspicions about criminal behavior, stop suspects of only one race, and shroud those

[109] 517 U.S. 806 (1996). *See also* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (stating that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause); Carlos Torres, et al., *Indiscriminate Power: Racial Profiling and Surveillance Since 9/11*, 18 U. PA. J. L. & SOC. CHANGE 283 (2015).

[110] Id. at 819.

discriminatory stops in race-neutral language.[111] David Harris sums up the impact of constitutional law on pretextual stops this way: a judicial finding of racial profiling is "the legal equivalent of lightning bolts hurled by Zeus."[112]

Numerous studies conducted over several decades demonstrate that law enforcement officers disproportionately select racial minorities for traffic stops, disproportionately search them during these stops, and disproportionately subject minority drivers to "stop and frisk" practices.[113] Police in Ferguson, Missouri, the site of racial unrest after a notorious police shooting of a young unarmed black man, also used race in its traffic stop strategy. While the community is only 67 percent black, the police reported in 2013 that 86 percent of its stops and 92 percent of its searches were of black people.[114]

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[111] *See* MICHAEL L. BIRZER, RACIAL PROFILING 72 (2013). A few examples confirm the limited power of Equal Protection doctrine to respond to racial profiling. In United States v. Avery, 137 F.2d 343 (6th Cir. 1997), the court turned aside the defendant's equal protection claim, and rejected statistics showing that police disproportionately targeted African-Americans because the officers had a plausible, non-racial reason for detaining the defendant. Similarly, in Bingham v. City of Manhattan Beach, 329 F.3d 723 (9th Cir. 2003), the Ninth Circuit affirmed summary judgment because appellant failed to provide evidence to refute the officer's race neutral explanation for the traffic stop. *See also* Johnson v. Crooks, 326 F.3d 995, 999–1000 (8th Cir. 2003) (denying relief because plaintiff failed to provide evidence of discrimination to counter the officer's race-neutral justification of the traffic stop).

[112] David A. Harris, *New Approaches to Ensuring the Legitimacy of Police Conduct: Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 75 (2003).

[113] *See, e.g.*, DAVID A. HARRIS, ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999) (describing statistics from Maryland and Illinois), https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways; David Barstow & David Kocieniewski, *Records Show New Jersey Policy Withheld Data on Race Profiling*, N.Y. TIMES, Oct. 12, 2000, http://www.nytimes.com/2000/10/12/nyregion/records-show-new-jersey-police-withheld-data-on-race-profiling.html.

[114] *See* Alexis C. Madrigal, *How Much Racial Profiling Happens in Ferguson?,* THE ATLANTIC, Aug. 15, 2014, http://www.theatlantic.com/technology/archive/2014/08/how-much-racial-profiling-happens-in-ferguson/378606/. Even though the department stopped blacks more frequently, they were more likely to find "contraband" on their searches of white people. More recent data related to New York City's "stop and frisk" policy tells a consistent story. Nearly 9 out of every 10 people that the New York Police Department stopped-and-frisked were completely innocent. Although blacks and Hispanics account for a little over half of the city population, 83 percent of the people stopped were black or Hispanic. *See*

Some of the earliest statistical clues about racial profiling practices came to light during litigation over constitutional claims, which routinely ended in losses for plaintiffs who wanted to change these police practices.[115] Eventually, advocates changed the venue for their arguments. They broadened their strategy and took their claims to legislatures. As a result, many states have enacted legislation to address racial profiling, including some laws that require law enforcement to collect and report data about their stop practices.

As part of a strategy to prevent racial profiling, about 18 states now require mandatory data collection in their law for all stops and searches.[116] Public agencies now make this data available to the public, sometimes through a centralized entity and at other times through individual law enforcement agencies.[117]

At that point, private individuals and groups stepped forward as intermediaries to monitor and interpret this data, making it accessible and useful for the public and for policy entrepreneurs. Researchers employed in universities produced some studies,[118] while policy advocacy organizations performed some of their own analyses.[119]

Editorial, *Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES, Aug. 12, 2013, http://www.nytimes.com/ 2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html.

[115] *See* HARRIS, *supra* note 113.

[116] See NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA App. I (Sept. 2014), http://www.naacp.org/criminal-justice-issues/racialprofiling/; Patrick McGreevy, *Brown Signs Legislation to Protect Minorities from Racial Profiling and Excessive Force*, L.A. TIMES, Oct. 4, 2015. In 1999, North Carolina became the first state to mandate racial data collection for police who stop drivers. N.C. GEN. STAT. § 114-10-1 (2016). *See also* CONN. GEN. STAT. §§ 54-1l, 54-1m (2016); R.I. GEN. LAWS § 31-21.2 (2015).

[117] Since 2002 all State Highway Patrol and police departments in North Carolina have collected the data and sent it to the North Carolina Department of Justice, which publishes the data through their website. *See* N.C. DEP'T OF PUB. SAFETY, NORTH CAROLINA TRAFFIC STOP STATISTICS, at http://trafficstops.ncsbi.gov (last visited Oct. 4, 2016).

[118] One such academic study, by Frank Baumgartner, reported that black drivers were on average 73% more likely to be searched than white drivers in North Carolina. *See* FRANK R. BAUMGARTNER, NC TRAFFIC STOPS (Univ. N.C.-Chapel Hill, 2016), https://www.unc.edu/~fbaum/traffic.htm (concluding that Hispanic drivers were 96% more likely to be searched

Journalists also found stories within these numbers. Some news outlets reported the results of academic and advocacy studies.[120] In addition, teams of reporters created their own analyses, sorting and summarizing the overwhelming databases for their readers. For instance, the *New York Times* examined police traffic stop records between 2010 and 2015. In consent searches in Greensboro, North Carolina, "officers searched blacks more than twice as often but found contraband only 21 percent of the time, compared with 27 percent of the time with whites."[121]

The collection, publication, and interpretation of traffic-stop data fundamentally changed the conversation. Advocates for collecting data on race argue that collecting the data is the best way to gather tangible evidence of widespread unconscious bias towards minorities during police traffic

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than white drivers, Black male drivers were 97% more likely to be searched, yet Black men were 10% less likely to have illegal substances than white men in probable cause searches; during consent searches, Black men were 18% less likely to have illegal substances than their white counterparts).

In a separate study based on 4.5 million traffic stop records, Sharad Goel and other researchers at Stanford University found that 5.4% of black drivers were searched, compared to 3.1% of white drivers. *See* SHARAD GOEL ET AL., TESTING FOR RACIAL DISCRIMINATION IN POLICE SEARCHES OF MOTOR VEHICLES, 13 (2016), https://5harad.com/ papers/threshold-test.pdf (revealing that in nearly every department black and Hispanic drivers were subject to a lower threshold of suspicion than their white and Asian counterparts; statewide, the thresholds for searching whites are 15%, for Asians 13%, for blacks 7%, and for Hispanics 6%).

[119] *See* Richard A. Oppel, *Activists Wield Search Data to Challenge and Change Police Policy*, N.Y. TIMES, Nov. 20, 2014. In 2015 the Southern Coalition for Social Justice published on their website an interactive map that allows a viewer to search the North Carolina stop data by police department. *See* SOUTHERN COALITION FOR SOCIAL JUSTICE, OPEN DATA POLICING NC, https://opendatapolicingnc.com (2015).

[120] *See* Tonya Maxwell, *In Traffic Stops, Disparity in Black and White*, ASHEVILLE CITIZEN-TIMES, Aug. 27, 2016, http://www.citizen-times.com/story/news/local/2016/08/27/traffic-stops-disparity-black-and-white/89096656/ (describing Stanford research, *supra* note 118).

[121] *See* Sharon LaFraniere and Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES, Oct. 25, 2015, at A1, http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html (city's driving population is 39% black, 54% of those pulled over were black). *See also* Matthew Kauffman, *Data: Minority Motorists Still Pulled Over, Ticketed at Higher Rates Than Whites*, HARTFORD COURANT, Sept. 22, 2015.

stops.[122] Compared to case studies or anecdotal evidence of an individual who is harmed due to police brutality or over-policing, statistical evidence might persuade a wider range of people.[123]

The public discussion of data also changes internal management for police departments. When the police know that data analysts and reporters are watching them work, they work more carefully. Where this transparency exists, reform advocates can target more precisely the local police practices that they suspect are most troubling. In some cases, the data will reveal no problem; in others, it might confirm for police leadership the factual basis for a complaint that once seemed amorphous or speculative.[124]

When the government collects and publishes data in a format that allows for comparisons between places, reports give the public and local police leaders a measurable benchmark for police performance. One department that stands out from other law enforcement agencies across the state – either in a positive or negative way – can reflect on the reasons for those local differences. Similarly, data collected over time may identify trends, allowing police leaders to see in a concrete way whether a new policy is working.

In sum, the move from constitutional argument in the courtroom to political argument in the public arena loosened a stalemate on the question of police traffic stops.[125] We believe that something similar can happen if

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[122] LORI FRIDELL ET AL., PERF, RACIALLY BIASED POLICING: A PRINCIPLED RESPONSE 116–17 (2001), http://fairandimpartialpolicing.com/docs/rbp-principled.pdf.

[123] *Id.* at 128. For a discussion of methodology issues in these studies, see JOYCE MCMAHON ET. AL., USDOJ, COMMUNITY ORIENTED POLICING SERVICES, HOW TO CORRECTLY COLLECT AND ANALYZE RACIAL PROFILING DATA 35 (2002), http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/HowToCorrectlyCollectAnalyzeRacialProfilingData.pdf. Critics argue that unless the record of the stop includes very specific data points, down to the cross streets where the stop occurred (which in many cases is not a required data point), there is no record of which areas of the jurisdiction are facing the most police presence. Specific location of the stop, according to this argument, is necessary to put the stop into context.

[124] Sometimes, of course, police leaders offer benign interpretations of the data and deny any need for policy changes. *See* Joey Garrison, *Nashville Police Chief Slams Racial Profiling Report as "Morally Disingenuous,"* THE TENNESEAN, Mar. 7, 2017.

[125] As a result of the *New York Times* investigation in 2015, the Greensboro police chief ordered officers to refrain from stopping drivers for minor infractions involving vehicle flaws; stops that are subject to individual officer discretion and stops for which blacks and

government agencies collect and report jury selection data, and academics, advocates, and journalists step forward to interpret and publicize that data.[126]

B. The Effects of Sunshine

The transformative power of data, in our view, is not limited to traffic stops or jury selection. We place our proposal in the larger context of using transparency to change criminal justice practices for the better. As Andrew Crespo has pointed out, the criminal courts already collect useful facts that remain hidden because they are scattered in single files or inaccessible formats.[127] An effort to assemble these facts in aggregate form could improve the courts' efforts to regulate the work of other criminal justice players, such as police and prosecutors.

Careful record keeping and transparency regarding the collected data already contributes to accountability in diverse parts of the criminal justice system. In the context of correctional institutions, transparency of data has been instrumental in ensuring fair treatment of prisoners, as Alabama and other state courts have held their state open record acts apply to prisoners.[128] While correctional institutions have been hesitant to comply,

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Hispanics were more likely to be pulled over. *See* Sharon LaFraniere & Andrew W. Lehren, *Greensboro Puts Focus on Reducing Racial Bias*, N.Y. TIMES, Nov. 11, 2015, at A20, http://www.nytimes.com/2015/11/12/us/ greensboro-puts-focus-on-reducing-racial-bias.html; Oppel, *supra* note 119 (after initially rejecting protesters' demands, the city agreed to require the police to obtain written consent to search vehicles in cases where they do not have probable cause; "Without the data, nothing would have happened," said Steve Schewel, a Durham City Council member).

[126] For an example of news coverage drawing on relevant but limited demographic information related to jury selection, see Pam Kelley & Gavin Off, *Wes Kerrick Jury Won't Mirror Mecklenburg's Diversity*, CHARLOTTE OBSERVER, July 27, 2015 (comparing jury pool in the criminal trial of a police officer who shot a suspect with overall county population demographics).

[127] *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016).

[128] *See* Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South,* 22 STAN. L. & POL'Y REV. 455, 460 (2011).

this requirement sheds light on prison deaths, suicides, beatings, and other prison conduct, hopefully giving legislature a chance to address misconduct, and holding these correctional institutions accountable.[129]

Similarly, experts have pushed for increased transparency in the context of officer-involved shootings, arguing that a lack of transparency surrounding these incidents has impeded reform. In a test of the reform power of data, President Obama signed the Death in Custody Reporting Act.[130] This law requires states and local law-enforcement agencies that receive federal money to make quarterly reports about the death of any person who is detained, arrested or incarcerated.[131] The theory is that national data will would help policy makers "identify not only dangerous trends and determine whether police use force disproportionately against minorities, but best practices, and thus ultimately develop policies that prevent more deaths."[132] The next few years should reveal whether this government-mandated reporting regime can produce more comprehensive results than the more decentralized efforts of newspapers and others in the private sector to build databases of police-involved shootings.[133]

The practical impact of jury selection data depends, in part, on the decisions of prosecutors, judges, court clerks, and others about how to use the data once it becomes available. These criminal justice professionals have the capacity to collect for themselves the jury selection statistics and to generate reports on the topic.[134] Managers in the prosecutors' office, the chief judge's chambers, or the clerk's office might be more open to the use

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[129] *Id* at 458- 63.

[130] Death in Custody Report Act, Public Law No: 113-242 (Dec. 18, 2014).

[131] *Id*.

[132] *See* Kami Chavis Simmons, *No Way to Tell Without a National Database*, N.Y. TIMES ROOM FOR DEBATE, July 13, 2016 *available at* https://www.nytimes.com/roomfordebate/2015/04/09/are-police-too-quick-to-use-force/no-way-to-tell-without-a-national-database.

[133] *See* Geoffrey P. Alpert, *Toward a National Database of Officer-Involved Shootings: A Long and Winding Road*, 15 CRIMINOLOGY & PUB. POL'Y 237 (2015); *Fatal Force*, Washington Post, https://www.washingtonpost.com/graphics/national/police-shootings/ (national database drawn from "news reports, public records, Internet databases and original reporting").

[134] *See* Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1485 & n.97 (2012) (collecting proposals that would require prosecutors to maintain jury selection statistics).

jury selection data if they were to collect it themselves. On the other hand, data collection mandated by statute, statewide regulation, or rule of procedure could produce more uniform results in different localities and allow for the sort of place-to-place comparisons that make it easier to diagnose local problems.

A sense of professionalism among judges or prosecutors might motivate them to analyze data suggesting that they depart from standard practices of their colleagues elsewhere in the state.[135] After learning about patterns in jury selection across many cases, they might change practices on their own initiative. For instance, accessible data might convince supervisors to better train prosecutors to avoid racial bias during jury selection.

In the end, though, we look to public accountability – through the ballot box or other forms of democratic input into criminal justice practices[136] – to convert jury selection data into a driver of change. The information visible to the public about how prosecutors and judges perform, compared to their peers, is historically thin.[137] Jury selection data might offer one point of accountability in world where criminal court professionals get very little feedback.

It is possible that in some places, the most politically engaged members of the community will not care about jury selection; they might even resist the idea of expanding jury participation to include every population group. But local variety is built into the criminal justice systems in the United States.[138] Voters and engaged community groups in most places, we hope,

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[135] *See* Sidney Shapiro & Ronald Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577 (2011) (analyzing the restraining power of professional norms in bureaucracies such as prosecutors' offices).

[136] *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. __ (forthcoming 2017); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

[137] *See* Russell M. Gold, *"Clientless" Prosecutors*, 52 GA. L. REV. __ (forthcoming 2017); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. UNIV. L. REV. __ (forthcoming 2017); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014).

[138] *See* Ronald F. Wright, *The Wickersham Commission and Local Control of Criminal Prosecution*, 96 MARQ. L. REV. 1199 (2013); *but cf*. William J. Stuntz, *Unequal Justice*, 112 HARV. L. REV. 1969 (2008) (describing decline of local influence in last half of twentieth century).

will value inclusive practices in their criminal courts and will expect their agents, operating in the sunshine, to deliver the results.

CONCLUSION

The fulcrum that could move jury practices sits in the office of the clerk of the court. Public employees in those offices already collect some basic background facts about prospective jurors and record the decisions by judges, prosecutors, and defense attorneys to remove jurors or to keep them. And if the clerk's office is the fulcrum, the lever to shift the entire jury selection process in the direction of greater inclusion will be public records laws, embodied in state statutes, local rules of court, and office policies.

It is startling that public courts, in an age when electronic information surrounds us on all sides, make it so difficult to track jury selection practices across different cases. It should not require hundreds of miles of driving between courthouses; access to the data should not depend on special requests for judicial approval.[139] Information about the performance of public servants in the criminal courts, in aggregate form, would be easy to collect and to publish. Jury selection goes to the heart of public participation in criminal justice: this is precisely where sunshine needs to shine first.

[139] Careful disclosure policies can protect the legitimate privacy interests of jurors, without requiring case-by-case judicial approval of jury selection information. *See* Grosso & O'Brien, *supra* note 34; Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Cases*, 49 VAND. L. REV. 123 (1996).

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. __ CRS ____

STATE OF NORTH CAROLINA	)	
	)	**DEFENDANT'S MOTION**
v.	)	**TO PRESERVE ALL NOTES,**
	)	**QUESTIONNAIRES, AND OTHER**
DEFENDANT	)	**DOCUMENTS FROM JURY SELECTION**

COMES NOW the Defendant, _____, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 26 of the North Carolina Constitution and respectfully moves the Court to enter an order directing that all notes, questionnaires, and other documents collected in preparation for voir dire or used during jury selection in this case be preserved. Defendant makes this motion based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). In support of this motion, the Defendant shows unto the Court the following.

Grounds for Motion

Defendant has a right to a jury selected without regard to race. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). If convicted, Defendant is entitled to appeal. *See* N.C. Gen. Stat. § 15A-1444. In order to vindicate Defendant's constitutional rights on appeal, Defendant must establish a full record of the constitutional violation. *See* N.C. App. R. 9. Indeed, it has long been established that is it the duty of the appellant to see that the record is properly preserved.

State v. Atkinson, 275 N.C. 288 (1969). Where a defendant does not include in the record any matter tending to support the grounds for objection, the defendant has failed to carry the burden of showing error. *State v. Duncan*, 270 N.C. 241 (1967). Assignments of error based on matters outside the record are improper and must be disregarded on appeal. *State v. Hilton*, 271 N.C. 456 (1967).

With regard to ensuring a proper record for any alleged violations of *Batson*, the following materials are unquestionably relevant to any inquiry in the appellate division concerning whether race was significant in the strike decision:

- **Jury questionnaires**. The jury questionnaires, completed by each juror questioned during voir dire, are the best record of juror race. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual's race "is not always easily discernible, and the potential for error by a court reporter acting alone is great"). In addition to including self-identification of race by each prospective juror, the questionnaires also include basic demographic information – age, gender, marital status, employment, and so on – pertinent to determining whether or not race was a factor in jury selection. *See Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 241 (2005) ("side-by-side comparisons" of black venire panelists who were struck and white panelists allowed to serve constitutes "powerful" evidence "tending to prove purposeful discrimination"); *Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008) (reversing conviction and granting *Batson* relief based on the "significant" and "particularly striking" similarities between a black venire member excused by the prosecution and two passed white venire members).

- **Prosecution notes**. The Supreme Court has made clear that the contents of the prosecution's file, including lists of jurors coded by race, highlighted racial designations, and notes on particular jurors are relevant to the *Batson* inquiry. *See Foster*, 136 S. Ct. at 1747-48 (considering prosecutor notes as evidence of discrimination); *id*. at 1749-50 (using prosecution notes to rebut prosecution's proffered explanation for strike); *id*. at 1753 (prosecutor's handwritten note "fortifies our conclusion that [the proffered reason] was pretextual"); *id*. at 1755 ("The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner. The sheer number of references to race in that file is arresting.") (record citation omitted).

- **Training materials**. Evidence that prosecutors were trained in how to evade the strictures of *Batson* is relevant to the determination of whether race was significant in the strike decision. *See Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for

excluding minorities from jury service); *Foster v. Chatman*, Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8 (describing North Carolina prosecution seminar in 1994 that "train[ed] their prosecutors to deceive judges as to their true motivations").

- **Criminal record checks**. To the extent the State bases strike decisions on the criminal records of prospective jurors or their family members, evidence that the prosecutor selectively reviewed the criminal records of certain racial groups is relevant to the *Batson* inquiry. *See Kandies v. Polk*, 385 F.3d 457, 475 (4th Circ. 2004) (denying relief on *Batson* claim and noting petitioner could have met his burden by establishing that the prosecution only discussed prospective African-American jurors with the local police department).[1]

Accordingly, Defendant asks the Court to direct the prosecution to preserve all of its jury questionnaires, notes, training materials, criminal record checks, and any other documents collected in preparation for voir dire or used during jury selection in this case.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

[1] The United States Supreme Court subsequently granted the petitioner's request for a writ of *certiorari*, vacated the judgment and remanded the case for further consideration in light of *Miller-El II*. *Kandies v. Polk*, 545 U.S. 1137 (2005).

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Preserve has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____
STATE OF NORTH CAROLINA v. DEFENDANT	) **DEFENDANT'S MOTION TO**) **PROHIBIT PEREMPTORY**) **STRIKES BASED ON RACE**))

NOW COMES the Defendant, _____, and respectfully moves the Court to prohibit the exercise of peremptory strikes motivated by race. Defendant makes this motion based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). In support of the motion, Defendant says the following:

Grounds for Motion

The United States and North Carolina Constitutions prohibit the consideration of race in exercising peremptory strikes. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987).

In addition, diverse juries have been found to focus more on the evidence, make fewer inaccurate statements, and make fewer uncorrected statements – all factors which heighten the reliability of verdicts. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1180 (2012) (discussing Samuel R. Sommers, *On Diversity and*

*Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Delib*eration, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006)).

In enforcing the constitutional mandate of *Batson* and its progeny, Defendant draws the Court's attention to the following rules set forth by the U.S. Supreme Court:

- **The test under *Batson* is not whether race is the sole factor, but whether race is significant in the decision to exercise a strike**. The question before the Court is whether race is "significant in determining who was challenged and who was not." *Miller-El II*, 545 U.S. at 252 (2005). The state supreme court explained in *State v. Waring*, 364 N.C. 443, 480 (2010), that, under *Miller-El*, a defendant need not show race is the sole factor.

- **Establishing a *Batson* violation does not require direct evidence of discrimination.** *See Batson*, 476 U.S. at 93 (noting that "circumstantial evidence," including "disproportionate impact" may establish a constitutional violation).

- **A single race-based strike violates the Constitution**. "Striking only one black prospective juror for a discriminatory reason violates a black defendant's equal protection rights, even when other black jurors are seated and even when valid reasons are articulated for challenges to other black prospective jurors." *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (citing *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989)); *see also Snyder*, 552 U.S. at 478 (citing *Lane* and finding the trial court erred in overruling petitioner's *Batson* objection as to one juror and therefore declining to consider *Batson* objection on second juror).

- **The Defendant's prima facie burden is light**. "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005). *See also id*. at 172 ("The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question."); *Miller-El II*, 545 U.S. at 240 ("[A] defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination."); *State v. Hoffman*, 348 N.C. 548, 553 (2008) ("Step one of the *Batson* analysis . . . is not intended to be a high hurdle for defendants to cross.").

- **The Defendant does not bear the burden of disproving each and every reason proffered as race-neutral**. In *Foster*, the petitioner challenged the prosecution's strikes of two African Americans. As to both potential jurors, the prosecution offered a "laundry list" of reasons why these two African Americans were objectionable. 136 S.Ct. at 1748. The Court did not analyze all of the reasons proffered by the State. Rather, after unmasking and debunking three of eleven reasons for the strike of one venire member and five of eight reasons for the other strike, the Court concluded that the strikes of these jurors were "motivated in substantial part by discriminatory intent." *Id*. at 1754, quoting *Snyder* v. *Louisiana*, 552 U.S. at 485. *See also State v. Montgomery*, 331 N.C. 559, 576-77 (1992) ("To allow an ostensibly valid reason for excusing a potential juror to 'cancel out' a patently discriminatory and unconstitutional reason would render Article 1, Section 26 [of the North Carolina Constitution] an empty vessel.") (Frye, J., Exum, C.J., and Whichard, J. concurring in the result).

- **Differential questioning is evidence of racial bias**. When jurors of different races are asked significantly more questions or different questions, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 255 ("contrasting *voir dire* questions" posed respectively to black and white prospective jurors "indicate that the State was trying to avoid black jurors").

- **An absence of questioning is evidence of racial bias**. When the juror is not questioned on the area of alleged concern, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 246 ("failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination") (internal citation omitted).

- **Disparate treatment of similarly-situated jurors is evidence of racial bias**. When prospective jurors of another race provided similar answers but were not the subject of a peremptory challenge, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.").

- **The Defendant does not have the burden of proving an exact comparison**. When comparing white venire members who were passed with jurors of color sought to be struck, the Court must not insist the prospective jurors are identical in all respects. Indeed, a "per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El II*, 545 U.S. at 247 n. 6.

- **Evidence that prosecutors were trained in how to evade the strictures of *Batson* is relevant to the determination of whether race was significant in the strike decision.** *See Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for excluding minorities from jury service); *Foster v. Chatman*, Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8 (describing North Carolina prosecution seminar in 1994 that "train[ed] their prosecutors to deceive judges as to their true motivations").

- **Historical evidence about prior practices of the District Attorney's Office must be considered as evidence of a *Batson* violation.** *Miller-El II*, 545 U.S. at 263-64 (considering policy of district attorney's office of systematically excluding black from juries, which was in place "for decades leading up to the time this case was tried").

Conclusion

Defendant asks this Court to apply these principles in adjudicating any objections under *Batson*, and thereby prohibit race discrimination in the selection of Defendant's jury.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

Certificate of Service

I hereby certify that Defendant's Motion to Prohibit Peremptory Strikes Based on Race has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

Batson Objections A Quick Guide 2018

OBJECT

to any strike you think was made based on race, gender, religion, or ethnicity

"This motion is made under the **5th, 6th and 14th Amendments to the U.S. Constitution, Art. 1, Sec. 19 and 23 of the N.C. Constitution, and my client's rights to due process and a fair trial."**

- **You can object to the first strike.** "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).
- **Your client does not have to be member of same cognizable class as juror.** *Powers v. Ohio*, 499 U.S. 400 (1991).
- **You do not need to exhaust your peremptory challenges to preserve a *Batson* claim.**

AVOID "REVERSE *BATSON*"

- Select jurors based on their answers, not stereotypes
- Check your own implicit biases
  - What assumptions am I making about this juror?
  - How would I interpret that answer if it were given by a juror of another race?

STEP ONE: PRIMA FACIE CASE

You have burden to show an inference of discrimination

***Johnson v. California*,** 545 U.S. 162, 170 (2005).

"Not intended to be a high hurdle for defendants to cross." ***State v. Hoffman*,** 348 N.C. 548, 553 (1998).

Establishing a *Batson* violation does not require direct evidence of discrimination. ***Batson v. Kentucky***, 476 U.S. 79, 93 (1986) ("Circumstantial evidence of invidious intent may include proof of disproportionate impact. ")

"All circumstances" are relevant.
Snyder, 552 U.S. at 478.

- **Calculate and give the strike pattern/disparity.** *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005).

"___% of the State's strikes have been against African Americans"

and/or

"The State has stuck ___% of African Americans and ___% of whites"

- **Give the history of strike disparities and *Batson* violations in this DA's office/prosecutor.** *Miller-El*, 545 U.S. at 254, 264. (Contact CDPL for data on your county to reference.)
- **State questioned juror differently or very little.** *Miller-El*, 545 U.S. at 241, 246, 255.
- **Juror is similar to white jurors passed (describe how).** *Foster v. Chatman,* 136 S.Ct. 1737, 1750 (2016); *Snyder,* 552 U.S. at 483-85.
- **State the racial factors in case (race of Defendant, victim, any specific facts of crime).**
- **No apparent reason for strike.**

STEP TWO: RACE-NEUTRAL EXPLANATION

Prosecutor states their reason for strike

- **Keep your ears open for reasons that are not truly race-neutral (ex: member of NAACP).**
- **Prosecutor must actually give a reason.** *State v. Wright*, 189 N.C. App. 346 (2008).
- **Court cannot suggest its own reason for the strike.** *Miller-El*, 545 U.S. at 252.

STEP THREE: PURPOSEFUL DISCRIMINATION

You now have burden to prove race was a <u>significant factor</u>

Argue the State's stated reasons are pretextual

Race does not have to be the only factor. It need only be "significant" in determining who was challenged and who was not. *Miller-El*, 545 U.S. at 252.

The defendant does not bear the burden of disproving each and every reason proffered by the State. *Foster*, 136 S. Ct. at 1754 (finding purposeful discrimination after debunking only three of eleven reasons given).

- **The reason <u>applies equally to white jurors</u> the State has passed.** *Miller-El,* 545 U.S. at 247, n.6. Jurors don't have to be identical; "would leave *Batson* inoperable;" "potential jurors are **not** products of a set of **cookie cutters**."
- **The reason is <u>not supported by the record</u>.** *Foster,* 136 S.Ct. 1737, 1749.
- **The reason is <u>nonsensical or fantastic</u>.** *Foster*, 136 S.Ct. at 1752.
- **The prosecutor <u>failed to ask the juror any questions about the topic</u> that the State now claims disqualified them.** *Miller-El,* 545 U.S. at 241.
- **State's reliance on juror's <u>demeanor</u> is inherently suspect.** *Snyder*, 552 U.S. at 479, 488.
- **A <u>laundry list</u> of reasons is inherently suspect.** *Foster*, 136 S.Ct. at 1748.
- **<u>Shifting reasons</u> are inherently suspect.** *Foster*, 136 S.Ct. at 1754.
- **State's reliance on juror's expression of <u>hardship or reluctance to serve</u> is inherently suspect.** *Snyder*, 552 U.S. at 482 (hardship and reluctance **does not bias the juror** against any one side; only causes them to prefer quick resolution, which might in fact favor the State).
- **<u>Differential questioning</u> is evidence of racial bias.** *Miller-El,* 545 U.S. at 255.
- **<u>Prosecutor training and prior practices</u> are relevant.** *Miller-El*, 545 U.S. at 263-64.

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. __ CRS _____

STATE OF NORTH CAROLINA

v.

DEFENDANT

****

NOTICE OF INTENT TO OBJECT TO THE USE OF ANY PEREMPTORY CHALLENGES IN VIOLATION OF THE LAW AND REQUEST THAT THE COURT TAKE JUDICIAL NOTICE OF PRIOR FINDINGS IN RACIAL DISPARITIES IN JURY SELECTION IN NORTH CAROLINA CRIMINAL TRIALS

****

COMES NOW THE DEFENDANT, by and through undersigned counsel, and respectfully provides notice to the State of Defendant's intent to object to the use of any peremptory challenges in violation of the Constitutions of the United States or of the State of North Carolina, or otherwise in violation of the law. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987) ("The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice.").

Further, Defendant requests that the court take judicial notice of the following studies showing racial disparities in jury selection North Carolina criminal cases, including capital cases. These studies include:

- A 2010 Michigan State University (MSU) study of North Carolina capital cases from 1990-2010. The MSU researchers analyzed more than 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried between 1990 and 2010. The study showed prosecutors struck 53 percent of eligible African-American jurors and only 26 percent of all other eligible jurors in those capital proceedings. The researchers found that the probability of this disparity occurring in a race-neutral jury selection was less than one in 10 trillion. After adjusting for non-racial characteristics that might reasonably affect strike decisions, for example, reluctance to impose the death penalty, researchers found prosecutors struck black jurors at 2.5 times the rate they struck all other jurors. The study findings are described in Grosso, Catherine and O'Brien, Barbara, *A Stubborn Legacy: the Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012), a copy of which is attached to this notice as Exhibit A.

- A 2017 study conducted by Wake Forest University School of Law professors found that in North Carolina felony trials in 2011– which included data on nearly 30,000 potential jurors in just over 1,300 cases – prosecutors struck non-white potential jurors at a disproportionate rate. In these cases, prosecutors struck non-white jurors about twice as often as they excluded white jurors. The Wake Forest findings are discussed in Wright, Ronald F. and Chavis, Kami, Parks, Gregory Scott, *The Jury Sunshine Project: Jury Seleciton Data as a Political Issue* (June 28, 2017), a copy of which is attached as Exhibit B.

- A 1999 study of the use of peremptory strikes in Durham County showed that African Americans were much more likely to be excused by the State. Approximately 70 percent of African Americans were dismissed by the State, while less than 20 percent of whites were struck by the prosecution. The Durham findings are detailed in Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County,* 23 LAW & HUM. BEHAV. 695, 698-99 (1999), a copy of which is attached as Exhibit C.

Respectfully submitted this ___ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Notice of Intent to Object to the Use of Any Peremptory Challenges in Violation of the Law Request that the Court Take Judicial Notice of Prior Findings of Racial Discrimnation in Jury Selection in North Carolina Criminal Trials has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

Addressing Race & Other Sensitive Topics in Voir Dire

Resources for Talking with Jurors About Race
Race Judicata, Newsletter of the North Carolina Public Defender Committee on Racial Equity (NC PDCORE)
June 2016

This issue of Race Judicata will focus on resources for addressing race during voir dire, a challenging endeavor for even the most experienced of criminal defense attorneys. It has never been more important for defense attorneys to consider how to approach the topic of racial attitudes during voir dire. Since the subject of race in policing, crime, and punishment figures prominently in today's public discourse, this topic will be on jurors' minds whether you discuss it or not. If you avoid the issue where it is relevant, you may increase the likelihood that implicit or explicit racial bias will play a role in the jury's determination of your client's case. Fortunately, a number of recent publications contain helpful tips for addressing this topic thoughtfully and effectively:

Jury Selection and Race: Discovering the Good, the Bad, and the Ugly by Jeff Robinson
In this piece, ACLU Deputy Legal Director and veteran criminal defense attorney Jeff Robinson explains the importance of discussing race with jurors and includes several pages of specific questions and techniques that have proven effective at getting jurors to share opinions about this sensitive subject. It also contains a memorandum of law in support of a motion for individual voir dire, sample jury instructions on racial bias, and a sample legal argument in opposition to the introduction of a defendant's immigration status.

The Northwestern Law Review recently published three articles addressing the subject of discussing race with jurors. *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson* was written by St Louis County Deputy District Public Defender Patrick C. Brayer. In it, he reflects on discussing race during voir dire in a trial that occurred just days after the killing of Michael Brown against the backdrop of protests on the streets and at the courthouse. In *Race Matters in Jury Selection*, Peter A. Joy argues that lawyers need to discuss the topics they fear the most – including race – during voir dire, and provides practical tips for doing so. He explains why it was essential for Patrick C. Brayer to talk about race with his jury and why it is important for all defense attorneys: “If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client.” In *The #Ferguson Effect: Opening the Pandora's Box of Implicit Racial Bias in Jury Selection*, Sarah Jane Forman sounds a cautionary note by examining the uncertain state of research into the efficacy of discussing implicit bias with jurors and argues that “unless done with great skill and delicacy,” this approach may backfire. Her piece reinforces the importance of careful preparation before diving into this challenging subject with potential jurors.

A New Approach to Voir Dire on Racial Bias by Cynthia Lee
In this article, law professor Cynthia Lee argues "that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection."

Talking to Jurors About Race (PowerPoint presentation) by Archana Prakash
This PowerPoint presentation, prepared by Archana Prakash of the Neighborhood Defender Service of Harlem for a training for the Wisconsin State Public Defender's Office, contains a number of questions that may be useful in facilitating rich discussions with potential jurors about race. It also contains a sample jury questionnaire and sample legal argument for individual voir dire.

Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans by Jeff Adachi
San Francisco Public Defender Jeff Adachi recently filed this motion to allow time for extended voir dire on issues of race in a case involving a Black male defendant accused of committing battery on public transportation by a White complaining witness. The motion lays out the legal authority guaranteeing the right to voir dire on racial bias "when there is a crime of violence involving a defendant and victim of different races, and there is a reasonable possibility that racial prejudice would influence the jury."

Chapter Eight of the UNC School of Government's Indigent Defense manual, *Raising Issues of Race in North Carolina Criminal Cases*, contains a section on addressing race during jury selection and at trial, with subsections on identifying stereotypes that might be at play in your trial, considering the influence of your own language and behavior on jurors' perceptions of your client, and reinforcing norms of fairness and equality.

What does Race have to do with the Presumption of Innocence?

Aside from discussing racial attitudes with potential jurors and raising *Batson* challenges where appropriate, what else can you do in jury selection to make sure that race doesn't play an improper role in the jury's evaluation of your client's case? Another strategy is to explore potential jurors' understanding of the presumption of innocence during voir dire and de-select jurors who may not be able to grant the full presumption of innocence to your client.
Many concerns have been raised by community members, social scientists, lawyers, and judges that minority defendants (and in particular, Black men) are not granted the full presumption of innocence by jurors at trial. In fact, researchers recently concluded that mock jurors responded to jury instructions on the presumption of innocence in racially biased ways.

Another study concluded the Black boys were viewed by police officers as both older and less innocent than White boys. In another study, researchers determined that study participants held implicit associations between the categories of "Black" and "guilty" and "White" and "not

guilty" and that these associations influenced their evaluation of ambiguous evidence. Parents of children of color reasonably worry that *The Presumption of Innocence Doesn't Apply to My Child*.

In *Presumed Fair? Voir Dire on the Fundamentals of our Criminal Justice System*, Professor Vida Johnson makes the case for robust voir dire on the presumption of innocence, arguing that "the studies show that instructions alone do not serve to enforce the principles that are the foundation of a fair trial." She notes that, while many jurors do not appreciate the significance or meaning of the presumption of innocence, most jurisdictions treat the right to voir dire on this subject as a matter within the trial court's discretion. Professor Johnson provides practical tips for litigators interested in conducting voir dire on this topic, and explains how social science research can be used to secure the right to voir dire on this foundational principle of criminal justice.

Federal District Judge Mark Bennett, a pioneer in the field of addressing implicit bias in the courtroom, recently authored a brief piece in The Champion on the insufficiency of standard jury instructions on the presumption of innocence: *The Presumption of Innocence and Trial Court Judges: Our Greatest Failing*. In it, he argues that trial judges "vastly overestimate the ability of lay folks to fully appreciate and apply the most important presumption in law." In a video of Judge Bennett explaining his comprehensive approach to implicit bias education in the courtroom, he describes studies (cited above) concluding that minority defendants are less likely to receive the full benefit of the presumption of innocence. During jury selection, Judge Bennett incorporates his implicit bias presentation into his discussion of the presumption of innocence. Watch the video from minutes 7:00-11:20 to hear more about Judge Bennett's efforts to ensure that all jurors serving in his courtroom fully embrace and respect the defendant's entitlement to the presumption of innocence.

-Emily Coward, Project Attorney, NC Racial Equity Network
Indigent Defense Education Group, UNC School of Government

THE NORTH CAROLINA STATE BAR

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IN THIS ISSUE

Questioning Prospective Jurors about Possible Racial or Ethnic Bias:

Lessons from Pena-Rodriguez v. Colorado

By Alyson A. Grine

Trial lawyers are familiar with the test set out in *Batson v. Kentucky* to prevent another party from seeking to exclude a prospective juror on the basis of race.[1] However, an attorney may be less clear about when he or she has a legal right or obligation to ask prospective jurors questions about race during *voir dire*. Do attorneys have a duty to explore racial bias in an effort to protect the Sixth Amendment guarantee of an impartial jury? Is asking about racial bias an effective tactic? Is it likely to expose biased views; or might it backfire, inflaming juror bias and increasing the odds that the verdict will be influenced by prejudice?

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In a recent opinion, the United States Supreme Court discussed this issue, but the justices did not all see eye to eye. Part I of this article discusses the groundbreaking opinion from the United States Supreme Court, *Pena-Rodriguez v. Colorado*, decided March 6, 2017.[2] Part II addresses the role of *voir dire* in revealing bias and protecting defendants' constitutional rights, and includes opposing views from the majority and dissenting opinions in *Pena-Rodriguez*. Part III provides a review of case law to help attorneys identify the circumstances that give rise to a right, and possibly an obligation, to ask about racial bias during *voir dire*.

A Juror is Motivated by Ethnic Bias in Voting to Convict

In the recent case of *Pena-Rodriguez v. Colorado*, the United States Supreme Court addressed a situation in which a juror reportedly stated during deliberations that he was relying on stereotypes about Latinos in voting to convict the defendant. The facts were as follows. Petitioner Pena-Rodriguez was found guilty of unlawful sexual contact and harassment. After the jury was discharged, petitioner's lawyer approached the jurors to see if they would be willing to discuss the case. Two jurors revealed that during deliber-

ations, another juror with the initials H.C. had made a number of disparaging statements about petitioner and his alibi witness. For example, according to the two jurors, H.C. said, "'I think [petitioner] did it because he's Mexican and Mexican men take whatever they want."[3] Defense counsel presented affidavits from the two jurors to the trial judge, and moved for a new trial. However, the judge denied the motion on the ground that "deliberations that occur among the jurors are protected from inquiry under [Colorado Rule of Evidence] 606(b)."[4]

Colorado's Rule of Evidence 606(b), like its federal counterpart, is a "no-impeachment" rule. Every state has a version of the rule; for example, North Carolina Rule 606(b) provides:

> Inquiry into validity of verdict or indictment. – Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.[5]

Generally speaking, the function of no-impeachment rules is to prevent attorneys from trying to overturn the jury's verdict by offering testimony from jurors about what was said during deliberations. Such rules protect the finality of jury verdicts and insulate jurors from questions about who said what in the jury room.

In *Pena-Rodriguez*, however, the Court created an exception to the no-impeachment rule. The Court held that the Sixth Amendment right to a fair trial by an impartial jury requires that the trial judge be allowed to consider, post-verdict, a juror's testimony that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict.[6] If a trial court determines that a defendant was denied his Sixth Amendment right, the court may set aside the verdict and grant a motion for a new trial. The holding was required, in the majority's view, because allowing a conviction based on racial bias to stand would violate the defendant's constitutional rights and "risk systemic injury to the administration of justice."[7]

The Role of *Voir Dire* in Revealing Racial Bias

While the principle holding of *Pena-Rodriguez* establishes an exception to the no-impeachment rule in situations where a juror makes a statement indicating that racial animus was a significant motivating factor in his or her finding of guilt, discussions of *voir dire* in both the majority opinion and the dissent remind practitioners that *voir dire* provides an important opportunity to explore whether potential jurors harbor racial biases.

Courts have recognized *voir dire* as an important mechanism for protecting defendants' trial rights. "[*Voir dire*] serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."[8] The attorneys' opportunity to question prospective jurors has been cited in support of closing the door to the jury room and refusing to allow post-verdict challenges to deliberations. Prior to the holding in *Pena-Rodriguez*, the Supreme Court declined to make exceptions to Rule 606(b), indicating that *voir dire* and other safeguards were adequate to protect defendants' trial rights. For example, in *Tanner v. US*, the Court refused to allow post-verdict inquiry where two jurors revealed after the trial that other jurors were intoxicated during the trial, identifying four existing safeguards that were in place to protect a defendant's Sixth Amendment rights: 1) jurors can be examined during *voir dire*, 2) jurors can be observed during trial by court actors, 3) jurors can observe each other and report inappropriate behavior to the judge before they render a verdict, and 4) after the trial, counsel may offer evidence of misconduct by jurors, other than through testimony of jurors.[9]

For purposes of considering whether an exception to the no-impeachment rule was required, the Court distinguished *Pena-Rodriguez* on the grounds that Sixth Amendment interests are especially pronounced where racial bias is at play and *voir dire* and the other safeguards identified in *Tanner* might not suffice in such cases. According to the majority, exploring racial bias during *voir dire* may not prove effective in that broad questions regarding attitudes about race might not expose biases, while "more pointed questions could well exacerbate whatever prejudice might exist without substantially aiding in exposing it."[10] Nevertheless, the Court recognized *voir dire* as an "important mechanism[ ] for discovering bias."[11]

In a dissenting opinion, Justice Alito, joined by Chief Justice Roberts and Justice Thomas, expressed a different view as to the effectiveness of *voir dire* in exposing biases. Justice Alito argued that the safeguards set out in *Tanner* are adequate to protect a defendant's Sixth Amendment rights, including when a juror is motivated by racial bias. Specifically, *voir dire* serves as an effective mechanism for revealing racial prejudice.

> The suggestion that *voir dire* is ineffective in unearthing bias runs counter to decisions of this Court holding that *voir dire* on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it....Thus, while *voir dire* is not a magic cure, there are good reasons to think that it is a valuable tool.[12]

In contrast to the majority's concern that all approaches to race during jury selection are necessarily problematic, Justice Alito recognized social science research suggesting that, rather than reinforcing prejudice, making race salient may cause bias to recede.[13] Justice Alito observed that not only do attorneys have tools such as questionnaires and individual questioning, but they can also avail themselves of practice

guides "replete with advice on conducting effective *voir dire* on the subject of race[,]"including a manual specific to North Carolina, *Raising Issues of Race in North Carolina Criminal Cases*.[14]

In sum, though there was some disagreement about the effectiveness and strategic desirability of addressing racial issues with potential jurors, both the majority and the dissent in *Pena-Rodriguez* recognize that racial bias is an appropriate area of inquiry during *voir dire* and an important safeguard of the right to a fair trial.[15]

When Can, Should, or Must Lawyers Discuss Racial Bias with Potential Jurors During *Voir Dire*?

As a general matter, criminal defendants have a constitutional right to *voir dire* jurors adequately. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors."[16] Further, undue restriction of the right to *voir dire* is error.[17] In certain circumstances, a defendant has a constitutional right to ask questions about race on *voir dire*. In *Pena-Rodriguez*, the Court stated: "In an effort to ensure that individuals who sit on juries are free of racial bias, [the US Supreme] Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*."[18]

The US Supreme Court has found the refusal to permit inquiry into racial attitudes a reversible error in a few different contexts.[19] In *Ham v. South Carolina*, the Court held that a black defendant, who was a civil rights activist and whose defense was that he was selectively prosecuted for marijuana possession because of his civil rights activity, was entitled to *voir dire* jurors about racial bias.[20] In *Ristaino v. Ross*, the Court held that the Due Process Clause does not create a general right in non-capital cases to *voir dire* jurors about racial prejudice, but such questions are constitutionally protected when cases involve "special factors," such as those presented in *Ham*.[21] In a plurality opinion in *Rosales-Lopez v. United States*, some members of the Court suggested that trial courts must allow *voir dire* questions concerning possible racial prejudice against a defendant when the defendant is charged with a violent crime and the defendant and victim are of different racial or ethnic groups.[22] Additionally, in a plurality opinion in *Turner v. Murray*, the Court found that defendants in capital cases involving interracial crime have a constitutional right to *voir dire* jurors about racial biases.[23] Broadly speaking, courts have stated that a trial judge must allow a defendant's request to examine jurors regarding bias "when there is a showing of a 'likelihood' that racial or ethnic prejudice may affect the jurors."[24]

The North Carolina Supreme Court has recognized that *voir dire* questions aimed at ensuring that "racially biased jurors [will] not be seated on the jury" are proper.[25] As early as 1870, the North Carolina Supreme Court found error where the court refused to allow a preliminary question regarding racial bias: "Suppose the question had been allowed, and the juror had answered, that the state of his feelings towards [African American people] was such that he could not show equal and impartial justice between the State and the prisoner, especially in charges of this character: it is at once seen that he would have been grossly unfit to sit in the jury box."[26] However, the North Carolina Supreme Court held in another case that whether to allow questions about racial and ethnic attitudes and biases is within the discretion of the trial judge.[27] In *State v. Robinson*, the North Carolina Supreme Court held that where the trial judge allowed the defendant to question prospective jurors about whether racial prejudice would affect their ability to be fair and impartial and to ask questions of prospective white jurors about their associations with black people, the trial judge did not abuse his discretion in sustaining prosecutor's objection to other questions, such as "Do you belong to any social club or political organization or church in which there are no black members?" and "Do you feel like the presence of blacks in your neighborhood has lowered the value of your property...?"[28]

Typically, in cases in which the courts have found that inquiry into racial bias was mandated, the issue was whether the trial judge erred in allowing or disallowing such questions. Does it follow that trial attorneys who are conducting *voir dire* have an affirmative duty to inquire into racial bias in order to protect their client's right to an impartial jury? Is failure to do so constitutionally deficient? Courts have been reluctant to find that failure to inquire into racial bias constitutes ineffectiveness of counsel. Such a determination would require a showing that a different result would have occurred at trial had counsel inquired into bias, a high hurdle.[29] Additionally, courts have been deferential to trial attorneys in light of the strategy judgments they must make in the heat of trial.[30] In particular, courts have been reluctant to find that counsel was deficient where the evidence did not explicitly pertain to racial issues.[31] However, ineffectiveness claims based on the failure to guard against a violation of a client's Sixth Amendment right when counsel fails to inquire into racial bias may be an emerging area of law.[32] In *Pena-Rodriguez*, the court's description of jury selection suggests that defense counsel failed to thoroughly explore issues of racial bias during *voir dire*. Instead, the defense attorney relied on general questions about potential jurors' ability to be fair. Justice Alito's dissent suggests that attorneys should probe more deeply to guard against the influence of bias, and identifies resources that may enable attorneys to do so capably.[33]

Conclusion

Precedent from the US Supreme Court supports that there is a constitutional right to inquire into racial bias during *voir dire* where the defendant has been charged with an interracial crime of violence or is raising a claim that he or she was subjected to selective enforcement or selective prosecution on account of his or her race or ethnicity. The right may also exist where racial issues are "inextricably bound up with the conduct of the trial[,]"[34] as where the theory of defense involves consideration of racial issues such as cross-racial misidentification, use of racial epithets, or racial biases of a witness. States may choose to offer greater protections than those recognized by the US Supreme Court.

To date, courts have been reluctant to find that failure to explore issues of racial bias during *voir dire* constitutes ineffectiveness of counsel. However, this may be an emerging area of law. Support exists for the proposition that inquiry into bias during *voir dire* is a best practice. For example, Justice Alito noted in *Pena-Rodriguez* that *voir dire* on race is "typically advisable in any case if a defendant requests it,"[35] and the US Supreme Court observed in *Ristaino* that "the wiser course generally is to pro-

pound appropriate questions designed to identify racial prejudice if requested by the defendant."[36]

Juror bias may be present even in a case in which it is not readily apparent that race is at issue, and it may be both appropriate and advisable for attorneys to inquire into such issues during *voir dire*. In fact, experts have suggested that "juror racial bias is most likely to occur in run-of-the-mill trials without blatantly racial issues," as jurors are less likely to guard against the influence of prejudice in such cases.[37] As Justice Alito observed in *Pena-Rodriguez*, by raising race during *voir dire*, attorneys bring concerns about bias to the jurors' awareness, which may cause them to correct for implicit racial biases.[38] Fortunately, a number of resources are available to assist attorneys in addressing the sensitive topic of racial bias during jury selection.[39] *Pena-Rodriguez* and scholarship cited therein indicate that in order to insulate jury deliberations from racial bias, it is advisable for attorneys to become proficient in exploring racial attitudes during *voir dire*.[40] ■

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Endnotes

1. *Batson v. Kentucky*, 476 US 79, 89 (1986).
2. *Pena-Rodriguez v. Colorado*, 580 US ___, 2017 WL 855760 (2017).
3. *Id.*, slip op. at 4.
4. *Id.*
5. NC Gen. Stat. § 8C-1, Rule 606(b).
6. *Pena-Rodriguez*, slip. op. at 2.
7. *Id.*, slip op. at 15-16.
8. *Mu'Min v. Virginia*, 500 US 415, 431, (1991). *See also State v. Conner*, 335 NC 618, 629 (1994) (stating that the purpose of *voir dire* examination "is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." (internal quotation marks omitted)).
9. *Tanner v. US*, 483 US 107 (1987). *See also Warger v. Shauers*, 574 US ___ , 135 S. Ct. 521 (2014) (finding that even where jurors lie during *voir dire*, the right to an impartial jury can still be protected via *Tanner* safeguards 3) and 4)).
10. *Pena-Rodriguez*, slip op. at 16 (internal citations and quotation marks omitted).
11. *Id.*, slip op. at 16.
12. *Id.*, Alito, J., dissenting, slip op. at 13-14.
13. *Id.*, Alito, J., dissenting, slip op. at 13 n.9 (citing authorities).
14. *Id.*, Alito, J., dissenting, slip op. at 12 (In footnote 8, Justice Alito identifies *Raising Issues of Race in North Carolina Criminal Cases* as an example of a manual that provides *voir dire* strategies and sample questions; he cites the manual and quotes from it as follows: A. Grine & E. Coward, *Raising Issues of Race in North Carolina Criminal Cases*, p. 8–14 (2014) (suggesting that attorneys "share a brief example about a judgment shaped by a racial stereotype" to make it easier for jurors to share their own biased views), unc.live/2nLgqNl (as last visited Mar. 3, 2017); *id.*, at 8–15 to 8–17 (suggesting additional strategies and providing sample questions)).

    Additional resources include: Jeff Robinson, *Jury Selection and Race: Discovering the Good, the Bad, and the Ugly* (unpublished materials from a joint presentation on race and jury selection) (on file with author), bit.ly/2oJOMkR; Cynthia Lee, *A New Approach to* Voir Dire *on Racial Bias*, 5 UC IRVINE L. REV. 843, 847 (2015) (In this article, Law Professor Cynthia Lee argues "that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection."), bit.ly/2oE3YTq; Jeff Adachi, Motion to Allow Reasonable & Effective *Voir Dire* on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans (sample motion), bit.ly/2nc5E6z.
15. *Pena-Rodriguez*, Alito, J., dissenting, slip op. at 13-14.
16. *Morgan v. Illinois*, 504 US 719, 729–30 (1992) (holding that capital defendant constitutionally entitled to ask specific "life qualifying" questions to the jury); *see also Rosales-Lopez v. United States*, 451 US 182, 188 (1981) (plurality opinion) ("Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."). *But cf. Mu'Min v. Virginia*, 500 US 415, 425 (1991) (emphasizing extent of trial judge's discretion in controlling *voir dire* and holding that *voir dire* questions about the content of pretrial publicity to which jurors might have been exposed are not constitutionally required). North Carolina statutes likewise give the parties the right to "personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge." G.S. 15A-1214(c); *see also* G.S. 15A-1212(9) (recognizing right to challenge for cause an individual juror who is unable to render a fair and impartial verdict). For a further discussion of *voir dire*, see 2 Julie Ramseur Lewis & John Rubin, North Carolina Defender Manual § 25.3 (*Voir Dire*) (2d ed. 2012).
17. *See State v. Conner*, 335 NC 618, 629 (1994) (holding that pretrial order limiting right to *voir dire* to questions not asked by court was error).
18. *Pena-Rodriguez*, slip op. at 14 (citing *Ham v. South Carolina*, 409 US 524 (1973); *Rosales-Lopez v. US*, 451 US 182 (1981); *Turner v. Murray*, 476 US 28 (1986)).
19. These cases are discussed at greater length in Cynthia Lee, *A New Approach to* Voir Dire *on Racial Bias*, 5 UC Irvine L. Rev. 843, 852-59 (2015), bit.ly/2p2cfgl.
20. 409 US 524 (1973).
21. 424 US 589 (1976).
22. 451 US 182 (1981). *See also Aldridge v. United States*, 283 US 308 (1931) (reversing black defendant's conviction for murder of a white policeman where trial court refused to ask prospective jurors whether they held racial prejudices).
23. 476 US 28 (1986).
24. *Turner*, 476 US at 40 (Brennan, J., concurring in part and dissenting in part) (stating that the court had declared this principle in *Rosales-Lopez*, 451 US at 190).
25. *State v. Williams*, 339 NC 1, 18 (1994) (holding there was no error in a capital case involving a black defendant and a white victim, when, during jury selection,

CONTINUED ON PAGE 27

viewed the "chicken scratch" penmanship of his doctor will appreciate the difficulty of predicting the different ways that a drug name might be interpreted. This, however, is precisely what pharmaceutical trademark attorneys must do.

In addition to assessing "traditional" trademark similarity, a pharmaceutical trademark attorney must consider potential handwriting similarity. For example, not many people would consider the trademarks AVANDIA and COUMADIN to be similar to one another, but take a look at the following prescription for AVANDIA (a medication for diabetes) and see if you can understand why the pharmacist incorrectly gave the patient COUMADIN (a blood thinner).

The challenges to a pharmaceutical trademark do not end with handwriting. The trademark attorney must also consider phonetic similarity (for telephone orders), and must be aware of medical abbreviations that should not appear in a trademark. For example, when a doctor intends for the patient to take a medication twice a day, the doctor will write the abbreviation "BID" on the prescription, as a short-hand way of telling the pharmacist how the medication should be taken. Therefore, the name of a drug should not end in "BID" in order to avoid potential misunderstanding. By the time a trademark attorney has considered all of these issues, many candidates are eliminated. In a typical name creation exercise, a drug company might go through 350 – 500 candidates in order to arrive at five to ten potentially acceptable trademarks for a new medicine.

In addition to the Patent & Trademark Office, any pharmaceutical trademark must be reviewed and approved by the FDA prior to being used in the US. Regulatory authorities in other territories, including the EU and Canada, also conduct reviews of any proposed pharmaceutical trademark, and typically reject 30–50% of the candidates they review. The next time you wonder where the name of that new medication came from, be sure to thank the trademark attorney.

Consumer Entertainment Product Trademarks – Christopher S. Thomas, Parker Poe, Raleigh

Developing a strong brand can be very expensive. A trademark, more than anything else, represents the goodwill—both as that term is used colloquially and as an accounting term of art—of the mark owner. It follows that trademarks for consumer entertainment products, especially those that are sold under well-known brands, are extremely valuable to their owners. Because of that, and because customers and fans of such products often feel a strong affinity with those brands, the owners of such marks must protect them.


Thomas

Brand owners must protect their marks from those who seek to unlawfully divert customers by falsely representing that products or services emanate from, or have been approved by, the brand owner. Protecting trademark rights from this sort of infringement is often called "policing." But brand owners also need to protect their marks and goodwill from misguided policing efforts (sometimes the result of over-zealous trademark enforcement) that can do more damage than good to the brand in the eyes of the public. This is especially true now that the recipient of an inelegant demand letter may publish it to the world using social media. Savvy brand owners and their trademark lawyers understand this.

Trademark practice involves assisting clients with the creation, clearance, adoption, and registration of brands. That part of the practice can be immensely rewarding and fun, especially seeing a new mark in use on a successful product. After a mark is registered, much of the work is in protecting the mark. It is in formulating a measured enforcement strategy—one that is consistent with the values of the brand owner and what the brand symbolizes—where a trademark lawyer can provide the most value to his or her client and their brands. ■

For more information on trademark law specialists or to learn how to become certified, visit our website at: nclawspecialists.gov.

Questioning Prospective Jurors (cont.)

the prosecutor asked whether the jurors could "put the issue of race completely out of [their minds]."

26. *State v. McAffee*, 64 NC 339, 340 (1870).
27. *See State v. Robinson*, 330 NC 1, 12–13 (1991).
28. *State v. Robinson*, 330 NC 1, 12–13 (1991).
29. *Catlin v. Henry*, 76 Fed. Appx. 818 (9th Cir. 2003) (unpublished) (holding that defense counsel did not render ineffective assistance of counsel in failing to *voir dire* potential jurors about racial bias where there was no showing of actual bias by jury and no showing that different result would have occurred if counsel would have questioned jury about bias).
30. *United States ex rel. Preston v. Ellingsworth*, 408 F. Supp. 568 (D. Del. 1975) (holding that defense counsel's refusal, despite a request by the black defendant, to ask *voir dire* questions of the jury panel concerning racial prejudice was not ineffective where counsel justified his refusal on the partial ground that prejudice was not involved in the case because two of the state's three key witnesses were black). *See also State v. Sanders*, 750 N.E.2d 90 (Ohio 2001) (holding defense attorneys' failure to inquire into racial and religious attitudes at *voir dire* was not ineffective assistance of counsel, although defendant was an African American Muslim charged with murdering a white person, as trial lawyers were in the best position to determine whether such *voir dire* was needed).
31. *See, e.g., State v. Hale*, 892 N.E.2d 864 (Ohio 2008) (holding defense counsel did not perform deficiently in failing to *voir dire* prospective jurors on racial prejudice where case did not involve an interracial murder and evidence did not raise any racial issues).
32. *Cf. Padilla v. Kentucky*, 559 US 356 (2010) (recognizing for the first time that the Sixth Amendment guarantee of effective assistance of counsel requires attorneys to inform clients whether a plea carries a risk of deportation in light of the seriousness of potential consequences).
33. *Pena-Rodriguez*, Alito, J., dissenting, slip op. at 11-14.
34. *Ristaino*, 424 US at 597.
35. *Pena-Rodriguez*, Alito, J., dissenting, slip op. at 13-14.
36. *Ristaino*, 424 US at 597 n.9.
37. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 601 (2006).
38. *Pena-Rodriguez*, Alito, J., dissenting, slip op. at 13 n.9.
39. *See supra note* xiv.
40. *Id.*

Peremptory and For Cause Challenges

Jury Selection: The Art of Peremptories and Trial Advocacy Techniques

By: James A. Davis

April 10, 2018

HIGHLIGHTS:

About James A. Davis

Mr. Davis is a North Carolina Board Certified Specialist in Federal and State Criminal Law with a trial practice in criminal, domestic, and general litigation. He is deeply committed to excellence and professionalism in the practice of law, having served on the North Carolina State Bar Specialization Criminal Law Committee, the North Carolina State Bar Board of Continuing Legal Education, and was Issue Planning Editor of the Law Review at Regent University. James also lectures at criminal, family law, and trial practice continuing legal education (CLE) programs, and is regularly designated by the Capital Defender as lead counsel in capital murders.

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MASTERING THE ART OF JURY SELECTION

This paper is derived from my original paper entitled *Modified Wymore for Non-Capital Cases* utilizing many CLEs, reading many studies, consulting with and observing great lawyers, and, most importantly, trial experience in approximately 100 jury trials ranging from capital murder, personal injury, torts, to an array of civil trials. I have had various experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, drug trafficking, and a myriad of other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious prosecution, assault and other civil jury trials. I attribute any success to those willing to help me, the courage to try cases, and God's grace. My approach to seminars is simple: <u>if it does not work, I am not interested</u>. Largely in outline form, the paper is crafted as a practice guide.

A few preliminary comments. First, trial is a mosaic, a work of art. Each part of a trial is important; however, jury selection and closing argument – the beginning and end – are the lynchpins to success. Clarence Darrow once claimed, "Almost every case has been won or lost when the jury is sworn." Public outrage decried the Rodney King, O.J. Simpson, McDonald's hot coffee spill, nanny Louise Woodward, and the 253 million dollar VIOXX verdicts, all of which had juries selected using trial consultants. After a quarter of a century, I now believe jury selection and closing argument decide most close cases. Second, I am an eclectic, taking the best I have ever seen or heard from others. Virtually nothing herein is original, and I neither make any representations regarding accuracy nor claim any proprietary interest in the materials. Pronouns are in the masculine in accord with holdings of the cases referenced. Last, like the conductor of a symphony, be steadfast at the helm, remembering the basics: Preparation spawns the best examinations. Profile favorable jurors. File pretrial motions that limit evidence, determine critical issues, and create a clean trial. Be vulnerable, smart, and courageous in jury selection. Cross with knowledge and common sense. Be efficient on direct. Perfect the puzzle for the jury. Then close with punch, power, and emotion.

I. *Voir Dire*: State of the Law

Voir dire means to speak the truth.[1] Our highest courts proclaim its purpose. *Voir dire* serves a dual objective of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). The North Carolina Supreme Court held jury selection has a dual purpose, both to help counsel determine whether a basis for challenge for cause exists and assist counsel in intelligently exercising peremptory challenges. *State v. Wiley*, 355 N.C. 592 (2002); *State v. Simpson*, 341 N.C. 316 (1995).

Case law amplifies the aim of jury selection. Each defendant is entitled to a full opportunity to face prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Thomas*, 294 N.C. 105, 115 (1978). The purpose of *voir dire* and exercise of challenges "is to eliminate extremes of partiality and assure both . . . [parties] . . . that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." *State v. Conner*, 335 N.C. 618 (1994). We all have natural inclinations and favorites, and jurors sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. Jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for a juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. *State v. Hedgepath*, 66 N.C. App. 390 (1984).

Statutory authority empowers defense counsel to "personally question prospective jurors individually concerning their fitness and competency to serve" and determine whether there is a basis for a challenge for cause or to exercise a peremptory challenge. N.C. GEN. STAT. § 15A-1214(c); *see also* N.C. GEN. STAT. § 9-15(a) (counsel shall be allowed to make direct oral inquiry of any juror as to fitness and competency to serve as a juror). In capital cases, each defendant is allowed fourteen peremptory challenges, and in non-capital cases, each defendant is allowed six peremptory challenges. N.C. GEN. STAT. § 15A-1217. Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges. *Id.*

Criminal defendants have a constitutional right under the Sixth and Fourteenth Amendments to *voir dire* jurors adequately. "[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. . . . *Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored." *Voir dire* must be available "to lay bare the foundation of a challenge for cause against a prospective juror." *Morgan v. Illinois*, 504 U.S. 719, 729, 733 (1992).[2] *See also Rosales-Lopez v. U.S.*, 451 U.S. 182, 188 (1981) (plurality opinion) ("Without an adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled.").[3]

[1] In Latin, *verum dicere*, meaning "to say what is true."
[2] This language was excised from a capital murder case. *See Morgan v. Illinois*, 504 U.S. 719 (1992).
[3] *Rosales-Lopez* was a federal charge alleging defendant's participation in a plan to smuggle Mexican aliens into the country, and defendant sought to questions jurors about possible prejudice toward Mexicans.

Now, the foundational principles of jury selection.

II. Selection Procedure

Trial lawyers should review and be familiar with the following statutes. Two sets govern *voir dire*. N.C. GEN. STAT. § 15A-1211 through 1217; and N.C. GEN. STAT. §§ 9-1 through 9-18.

- N.C. GEN. STAT. §§ 15A-1211 through 1217: Selecting and Impaneling the Jury
- N.C. GEN. STAT. §§ 9-1 through 9-9: Preparation of Jury List, Qualifications of Jurors, Request to be Excused, *et seq.*
- N.C. GEN. STAT. §§ 9-10 through 9-18: Petit Jurors, Judge Decides Competency, Questioning Jurors without Challenge, Challenges for Cause, Alternate Jurors, *et seq.*

Read and recite to jurors the pattern jury instructions.

- Pattern Jury Instructions: Substantive Crime(s) and Trial Instructions[4]
- N.C.P.I. – Crim. 100.21: Remarks to Prospective Jurors After Excuses Heard (parties are entitled to jurors who approach cases with open minds until a verdict is reached; free from bias, prejudice or sympathy; must not be influenced by preconceived ideas as to facts or law; lawyers will ask if you have any experience that might cause you to identify yourself with either party, and these questions are necessary to assure an impartial jury; being fair-minded, none of you want to be tried based on what was reported outside the courtroom; the test for qualification for jury service is not the private feelings of a juror, but whether the juror can honestly set aside such feelings, fairly consider the law and evidence, and impartially determine the issues; we ask no more than you use the same good judgment and common sense you used in handling your own affairs last week and will use in the weeks to come; these remarks are to impress upon you the importance of jury service, acquaint you with what will be expected, and strengthen your will and desire to discharge your duties honorably).
- N.C.P.I. – Crim. 100.22: Introductory Remarks (this call upon your time may never be repeated in your lifetime; it is one of the obligations of citizenship, represents your contribution to our democratic way of life, and is an assurance of your guarantee that, if chance or design brings you to any civil or criminal entanglement, your rights and liberties will be regarded by the same standards of justice that you discharge here in your duties as jurors; you are asked to perform one of the highest duties imposed on any citizen, that is to sit in judgment of the facts which will determine and settle disputes among fellow citizens; trial by jury is a right guaranteed to every citizen; you

[4] The North Carolina pattern jury instructions are sample instructions for criminal, civil, and motor vehicle negligence cases used by judges as guidance for juries for reaching a verdict. Created by the Pattern Jury Instruction Committee, eleven trial judges, assisted by the School of Government and supported by the Administrative Office of the Courts, produces supplemental instructions yearly based on changes in statutory and case law. While not mandatory, the pattern jury instructions have been cited as the "preferred method of jury instruction" at trial. *State v. Sexton*, 153 N.C. App. 641 (2002).

are the sole judges of the weight of the evidence and credibility of each witness; any decision agreed to by all twelve jurors, free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment and based on credible evidence in accord with the court's instructions, becomes a final result; you become officers of the court, and your service will impose upon you important duties and grave responsibilities; you are to be considerate and tolerant of fellow jurors, sound and deliberate in your evaluations, and firm but not stubborn in your convictions; jury service is a duty of citizenship).

- N.C.P.I. – Crim. 100.25: Precautionary Instructions to Jurors (Given After Impaneled) (all the competent evidence will be presented while you are present in the courtroom; your duty is to decide the facts from the evidence, and you alone are the judges of the facts; you will then apply the law that will be given to you to those facts; you are to be fair and attentive during trial and must not be influenced to any degree by personal feelings, sympathy for, or prejudice against any of the parties involved; the fact a criminal charge has been filed is not evidence; the defendant is innocent of any crime unless and until the state proves the defendant's guilt beyond a reasonable doubt; the only place this case may be discussed is in the jury room after you begin your deliberations; you are not to form an opinion about guilt or innocence or express an opinion about the case until you begin deliberations; news media coverage is not proper for your consideration; television shows may leave you with improper, preconceived ideas about the legal system as they are not subject to rules of evidence and legal safeguards, are works of fiction, and condense, distort, or even ignore procedures that take place in real cases and courtrooms; you must obey these rules to the letter, or there is no way parties can be assured of absolute fairness and impartiality).
- N.C.P.I. – Crim. 100.31: Admonitions to Jurors at Recesses[5] (during trial jurors should not talk with each other about the case; have contact of any kind with parties, attorneys or witnesses; engage in any form of electronic communication about the trial; watch, read or listen to any accounts of the trial from any news media; or go to the place where the case arose or make any independent inquiry or investigation, including the internet or other research; if a verdict is based on anything other than what is learned in the courtroom, it could be grounds for a mistrial, meaning all the work put into trial will be wasted, and the lawyers, parties and a judge will have to retry the case).

Relevant case law follows:

- *State v. Harbison*, 315 N.C. 175 (1985) (defendant must knowingly and voluntarily consent to concessions of guilt made by trial counsel after a full appraisal of the consequences and before any admission);
- *State v. Call*, 353 N.C. 400, 409–10 (2001) (after telling jurors the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, it is permissible to ask jurors "if they understand they have the right to stand by their beliefs in the case"); s*ee also State v. Elliott*, 344 N.C. 242, 263 (1996).

[5] N.C. GEN. STAT. § 15A-1236 (addresses admonitions that must be given to the jury in a criminal case, typically at the first recess and at appropriate times thereafter).

- *State v. Cunningham*, 333 N.C. 744 (1993) (defendant's challenge for cause was proper when juror repeatedly said defendant's failure to testify "would stick in the back of my mind"); *see also State v. Hightower*, 331 N.C. 636 (1992) (although juror stated he "could follow the law," his comment that the defendant's failure to testify "would stick in the back of [his] mind" while deliberating mandated approval of a challenge for cause).
- *Duncan v. Louisiana*, 391 U.S. 145 (1968) (held the Fourteenth Amendment guarantees a right of jury trial in all criminal cases and comes within the Sixth Amendment's assurance of a trial by an impartial jury; that trial by jury in criminal cases is fundamental to the American system of justice; that fear of unchecked power by the government found expression in the criminal law in the insistence upon community participation in the determination of guilt or innocence; and a right to trial by jury is granted to criminal defendants in order to prevent oppression by the government; providing an accused with the right to be tried by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge).

It is axiomatic that counsel should not engage in efforts to indoctrinate jurors, argue the case, visit with, or establish rapport with jurors. *State v. Phillips*, 300 N.C. 678 (1980). You may not ask questions which are ambiguous, confusing, or contain inadmissible evidence or incorrect statements of law. *State v. Denny*, 294 N.C. 294 (1978) (holding ambiguous or confusing questions are improper); *State v. Washington*, 283 N.C. 175 (1973) (finding a questions containing potentially inadmissible evidence improper); *State v. Vinson*, 287 N.C. 326 (1975) (holding counsel's statements contained inadequate or incorrect statements of the law and was thus improper). The court may also limit overbroad, general or repetitious questions. *Id. But see* N.C. GEN. STAT. § 15A-1214(c) (defendant not prohibited from asking the same or a similar question previously asked by the prosecution).

A primer on procedural rules[6]: The scope of permitted *voir dire* is largely a matter of the trial court's discretion. *See, e.g., State v. Knight*, 340 N.C. 531 (1995) (trial judge properly sustained State's objection to questions asked about victim's HIV status); *see generally State v. Phillips*, 300 N.C. 678 (1980) (opinion explains boundaries of *voir dire*; questions should not be overly repetitious or attempt to indoctrinate jurors or "stake them out"). The trial court has the duty to control and supervise the examination of jurors, and regulation of the extent and manner of questioning rests largely in the court's discretion. *State v. Wiley*, 355 N.C. 592 (2002). The prosecutor and defendant may personally question jurors individually concerning their competency to serve. N.C. GEN. STAT. § 15A-1214(c). The defendant is not prohibited from asking a question merely because the court or prosecutor has previously asked the same or a similar question. *Id.*; *State v. Conner*, 335 N.C. 618, 628–29 (1994). Leading questions are permitted. *State v. Fletcher*, 354 N.C. 455, 468 (2001). Finally, the judge has discretion to re-open examination of a juror previously accepted if, at any time before the jury is impaneled, it is discovered the juror made an incorrect statement or other good reasons exists. Once the court re-

[6] MICHAEL G. HOWELL, STEPHEN C. FREEDMAN, & LISA MILES, JURY SELECTION QUESTIONS (2012).

opens examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse the juror. *State v. Womble*, 343 N.C. 667, 678 (1996).

A common issue is an improper stake-out question. *State v. Simpson*, 341 N.C. 316 (1995) (holding staking-out jurors is improper). Our highest court has defined staking-out as questions that tend to commit prospective jurors to a specific future course of action in the case. *State v. Chapman*, 359 N.C. 328, 345–46 (2005). Counsel may not pose hypothetical questions designed to elicit what a juror's decision will be under a certain state of the evidence or a given state of facts. *State v. Vinson*, 287 N.C. 326, 336–37 (1975). Counsel should not question prospective jurors as to the kind of verdict they would render, how they would be inclined to vote, or what their decision would be under a certain state of evidence or given state of facts. *State v. Richmond*, 347 N.C. 412 (1998). My synthesis of the cases suggests counsel is in danger of an objection on this ground when the question refers to a verdict or encroaches upon issues of law. A proposed *voir dire* question is legitimate if the question is necessary to determine whether a juror is excludable for cause or assist you in intelligently exercising your peremptory challenges. If the State objects to a particular line of questioning, defend your proposed questions by linking them to the purposes of *voir dire*.[7]

Beware of reverse *Batson* challenges. Generally, race, gender and religious discrimination in the selection of trial jurors is unconstitutional. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding race discrimination); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (finding gender discrimination); U.S. CONST. amends. V and XIV (referencing due process); N.C. CONST. art. I, § 26 (no person may be excluded from jury service on account of sex, race, color, religion, or national origin). The U.S. Supreme Court established a three-step test for such challenges: 1) defendant must make a *prima facie* showing the prosecutor's strike was discriminatory; 2) the burden shifts to the State to offer a race-neutral explanation for the strike; and 3) the trial court decides whether the defendant has proven purposeful discrimination. Conversely, *Batson* also prohibits criminal defendants from race, gender, or religious based peremptory challenges, known as a reverse *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42 (1992). It is noteworthy that our appellate courts have decided over 100 cases in which defendants have alleged purposeful discrimination by prosecutors against minorities, never finding a *Batson* violation. In contrast, North Carolina appellate courts have twice upheld prosecutors reverse *Batson* challenges on the ground the defendant engaged in purposeful discrimination against Caucasian jurors. *State v. Hurd*, ___ N.C. App. ___, 784 S.E.2d 528 (2016) (trial court did not err in sustaining a reverse *Batson* challenge; defendant exercised eleven peremptory challenges, ten against white and Hispanic jurors; defendant's acceptance rate of black jurors was eighty-three percent in contrast to twenty-three percent for white and Hispanic jurors; the one black juror challenged was a probation officer; defendant accepted jurors who had strikingly similar views); *see also State v. Cofield*, 129 N.C. App. 268 (1998). Finally, should a judge find the State has violated *Batson*, the venire should be dismissed and jury selection should begin again. *State v. McCollum*, 334 N.C. 208 (1993). *But cf. State v. Fletcher*, 348 N.C. 292 (1998) (following a judge's finding the prosecutor made a discriminatory strike, he withdrew the strike, passed on the juror, the trial court found no *Batson* violation, and the N.C. Supreme Court affirmed).

[7] *See* N.C. DEFENDER MANUAL 25-17 (John Rubin ed., 2d. ed. 2012).

Certain phrases are determinative in challenges for cause. Grounds for challenge for cause are governed by N.C. GEN. STAT. § 15A-1212.

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> > (1) Does not have the qualifications required by G.S. 9-3.
> > (2) Is incapable by reason of mental or physical infirmity of rendering jury service.
> > (3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.
> > (4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
> > (5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime.
> > (6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.
> > (7) Is presently charged with a felony.
> > (8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
> > (9) For any other cause is unable to render a fair and impartial verdict.
>
> N.C. GEN. STAT. § 15A-1212.

For example, you may ask if a prospective juror would "automatically vote" for either side or a certain sentence or if a juror's views or experience would "prevent or substantially impair" his ability to hear the case. *State v. Chapman*, 359 N.C. 328, 345 (2005) (holding counsel may ask, if based on a response, if a juror would vote automatically for either side or a particular sentence); *see also State v. Teague*, 134 N.C. App. 702 (1999) (finding counsel may ask if certain facts cause jurors to feel like they "will automatically turn off the rest of the case"); s*ee also Morgan v. Illinois*, 504 U.S. 719, 723 (1992) (court approved the question "would you automatically vote [for a particular sentence] no matter what the facts were?"); *Wainright v. Witt*, 469 U.S. 412 (1985) (established the standard for challenges for cause, that being when the juror's views would "prevent or substantially impair" the performance of his duties in accord with his instructions and oath, modifying the more stringent language of *Witherspoon*[8] which required an unmistakable commitment of a juror to automatically vote against the death penalty, regardless of the evidence); *State v. Cummings*, 326 N.C. 298 (1990) (State's challenge for cause is proper against jurors whose views against the death penalty would "prevent or substantially impair" their performance of duties as jurors). Considerable confusion about the law could amount to "substantial impairment." *Uttecht v. Brown*, 551 U.S. 1 (2007).

[8] *Witherspoon v. Illinois*, 39 U.S. 510 (1968).

Other issues may include *voir dire* with co-defendants, order of questioning, challenging a juror, preserving denial of cause challenges and prosecutor objection to a line of questioning, right to individual *voir dire*, and right to rehabilitate jurors.[9] In cases involving co-defendants, the order of questioning begins with the State and, once it is satisfied, the panel should be passed to each co-defendant consecutively, continuing in this order until all vacancies are filled, including alternate juror(s). N.C. GEN. STAT. § 15A-1214(e). For order of questioning, the prosecutor is required to question prospective jurors first and, when satisfied with a panel of twelve, he passes the panel to the defense. This process is repeated until the panel is complete. N.C. GEN. STAT. § 15A-1214(d); *see also State v. Anderson*, 355 N.C. 136, 147 (2002) (finding the method by which jurors are selected, challenged, selected, impaneled, and seated is within the province of the legislature). Regarding challenges, when a juror is challenged for cause, the party should state the ground(s) so the trial judge may rule. No grounds need be stated when exercising a peremptory challenge. Direct oral inquiry, or questioning a juror, does not constitute a challenge. N.C. GEN. STAT. § 9-15(a). Preserving a denial of cause challenge or sustained objection to your line of questioning requires exhaustion of peremptory challenges and a showing of prejudice from the ruling. *See, e.g., State v. Billings*, 348 N.C. 169 (1998); *State v. McCarver*, 341 N.C. 364 (1995). The right to individual *voir dire* is found in the trial judge's duty to oversee jury selection, implying that the judge has authority to order individual *voir dire* in a non-capital case if necessary to select an impartial jury. *See State v. Watson*, 310 N.C. 384, 395 (1984) ("The trial judge has broad discretion in the manner and method of jury *voir dire* in order to assure that a fair and impartial jury is impaneled . . . ."). As to the right to rehabilitate jurors, the trial judge must exercise his discretion in determining whether to permit rehabilitation of particular jurors. Issues include whether a juror is equivocal in his response, clear and explicit in his answer, or if additional examination would be a "purposeless waste of valuable court time." *State v. Johnson*, 317 N.C. 343, 376 (1986). A blanket rule prohibiting rehabilitation is error. *State v. Brogden*, 334 N.C. 39 (1993).

III. Theories of Jury Selection

There are countless articles on and ideas about jury selection. A sampling include:

- Traditional approach: lecture with leading and closed questions to program the jury about law and facts and establish authority and credibility with the jury; a prosecutor favorite.
- Wymore (Colorado) method: *See infra text at* IV. The Wymore Method.
- Scientific jury selection: employs demographics, statistics, and social psychology to examine juror background characteristics and attitudes to predict favorable results.
- Game theory: uses mathematical algorithms to decide the outcome of trial.
- Command Superlative Analogue (New Mexico public defenders') method: focus on significant life experiences relating to the central trial issue.
- Psychodramatic (Trial Lawyers College) method: identify the most troubling aspects of the case, tell jurors and ask about the concerns, and validate jurors' answers.

[9] *See generally* N.C. DEFENDER MANUAL, *supra* note 7, at 25-1, *et seq.*

- Reptilian theory: focus on facts and behavior to make the jury angry by concentrating on the opponent's failures and resulting injuries, all intended to evoke a visceral, subliminal reaction.
- Demographic theory[10]: stereotype jurors based on race, gender, ethnicity, age, income, occupation, social status, socioeconomic status/affluence, religion, political affiliation, avocations, urbanization, experience with the legal system, and other factors.
- Listener method: learn about jurors' experiences and beliefs to predict their views of the facts, law, and each other.

Strategies abound for jury selection methods. Jury consultants and trial lawyers use mock trials, focus groups, and telephone surveys to profile community characteristics and favorable jurors. Research scientists believe – and most litigators have been taught - demographic factors predict attitudes which predict verdicts, although empirical data and trial experience militate against this approach.[11] Many lawyers believe our experience hones our ability to sense and discern favorable jurors, although this belief has marginal support in practice and is speculative at best.

I use a blend of the above models. However, I focus upon one core belief illustrated in the ethical and moral dilemma of an overcrowded lifeboat lost at sea. As individuals weaken, starve, and become desperate, who is chosen to survive? Do we default to women, children, or the elderly? Who lives or dies? Using this hypothetical in the context of a courtroom, I believe the answer is **jurors save themselves**.[12] The basic premise is that jurors, primarily on a subconscious level, choose who they like the most and connect to parties, witnesses, and court personnel who are characteristically like them. Therefore, the party - or attorney - whom the jury likes the most, feels the closest to, or has some conscious or subconscious relationship with typically wins the trial. This concept is the central tenet of our jury selection strategies.

IV. The Wymore Method

David Wymore, former Chief Trial Deputy for the Colorado Public Defender system, revolutionized capital jury selection. The Wymore method, or Colorado method of capital *voir*

[10] Research on the correlation of demographic data with voting preferences is conflicted. *See* Professor Dru Stevenson's article in the 2012 George Mason Law Review, asserting the "Modern Approach to Jury Selection" focuses on biases related to factors such as race and gender; s*ee also Glossy v. Gross*, 576 U.S. ___, 135 S. Ct. 2726 (2015) (racial and gender biases may reflect deeply rooted community biases either consciously or unconsciously). *But see* Ken Broda-Bahm, *Don't Select Your Jury Based on Demographics: A Skeptical Look at JuryQuest*, PERSUASIVE LITIGATOR (April 12, 2012), https://www.persuasivelitigator.com/2012/04/dont-select-your-jury-based-on-demographics.html (for at least three decades, researchers have known that demographic factors are very weak predictors of verdicts).

[11] *See* Ken Broda-Bahm, *supra* note 10.

[12] In panic, most people abandon rules in order to save themselves, although some may do precisely the opposite. DENNIS HOWITT, MICHAEL BILLIG, DUNCAN CRAMER, DEREK EDWARDS, BROMELY KNIVETON, JONATHAN POTTER & ALAN RADLEY, SOCIAL PSYCHOLOGY: CONFLICTS AND CONTINUITIES (1996).

dire, was created to combat "death qualified" juries[13] by utilizing a non-judgmental, candid, and respectful atmosphere during jury selection which allows defense counsel to learn jurors' views about capital punishment and imposition of a death sentence, employ countermeasures by life qualifying the panel, and thereafter teach favorable jurors how to get out of the jury room.

In summary form, the Wymore method is as follows: Defense counsel focuses upon jurors' death penalty views, learns as much as possible about their views, rates their views, eliminates the worst jurors, educates both life-givers and killers separately, and teaches respect for both groups - particularly the killers. In other words, commentators state Wymore places the moral weight for a death sentence onto individual jurors, making it a deeply personal choice.[14] Wymore himself has stated he tries to find people who will give life, personalize the kill question, and find other jurors who will respect that decision.[15]

In short, jurors are rated on a scale of one to seven using the following guidelines:

1. *Witt* excludable: The automatic life adherent. One who will never vote for the death penalty and is vocal, adamant, and articulate about it.
2. One who is hesitant to say he believes in the death penalty. This person values human life and recognizes the seriousness of sitting on a capital jury. However, this person says he can give meaningful consideration to the death penalty.
3. This person is quickly for the death penalty and has been for some time. However, he is unable to express why he favors the death penalty (e.g., economics, deterrence, etc.). He may wish to hear mitigation or be able to make an argument against the death penalty if asked, and is willing to respect views of those more hesitant about the death penalty.
4. This person is comfortable and secure in his death penalty view. He is able to express why he is for the death penalty and believes it serves a good purpose. His comfort level and ability to develop arguments in favor of the death penalty differentiates him from a number three. However, he wants to hear both sides and straddles the fence with penalty phase evidence, believing some mitigation could result in a life sentence despite a conviction for a cold-blooded, deliberate murder.
5. A sure vote for death, he is vocal and articulate in his support for the death penalty. He is not a bully, however, and, because he is sensitive to the views of other jurors, can think of two or three significant mitigating factors which would allow him to follow a unanimous consensus for life in prison. This person is affected by residual doubt.
6. A strong pro-death juror, he escapes an automatic death penalty challenge because he can perhaps consider mitigation. A concrete supporter of the death penalty who

[13] Jurors must express their willingness to kill the defendant to be eligible to serve in a capital murder trial. In one study, a summary of fourteen investigations indicates a favorable attitude toward the death penalty translates into a 44% increase in the probability of a juror favoring conviction. Mike Allen, Edward Mabry, & Drew-Marie McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 LAW AND HUMAN BEHAVIOR 715 (1998).
[14] John Ingold, *Defense Jury Strategy Could Decide Aurora Theater Shooting Trial*, THE DENVER POST (March 29, 2015), https://www.denverpost.com/2015/03/28/defense-jury-strategy-could-decide-aurora-theater-shooting-trial.
[15] *Id.*

believes it not used enough, he is influenced by the economic burden of a life sentence and believes in death penalty deterrence. Essentially, he nods his head with the prosecutor.

7. The automatic death penalty proponent. He believes in the *lex talionis* principle of retributive justice, or an eye for an eye. Mitigation is manslaughter or self-defense. Hateful and proud of it, he must be removed for cause or peremptory challenge. If the defendant is convicted of capital murder, this juror will impose the death penalty.

Wymore teaches the concepts of isolation and insulation. Isolation means that each juror makes an individual, personal judgment. Insulation means each juror understands he makes his decision with the knowledge and comfort it will be respected, he will not be bullied or intimidated by others, and the court and parties will respect his decision. In essence, every juror serves as a jury, and his decision should by right be treated with respect and dignity. These concepts are intended to equip individual jurors to stick with and stand by their convictions.

Wymore also teaches stripping, a means of culling extraneous issues and circumstances from the jurors' minds. In essence, you strip the venire of misconceptions they may have about irrelevant facts, law, defenses, or punishments as they arise. You simply strip away topics broached by jurors which are inapplicable to the case and could change a juror's mind. In a capital murder, you use a hypothetical like the following: "Ladies and gentlemen, I want you to imagine a hypothetical case, not this case. After hearing the evidence, you were convinced the defendant was guilty of premeditated, deliberate, intentional murder. He meant to do it, and he did it. It was neither an accident nor self-defense, defense of another, heat of passion, or because he was insane. There was no legal justification or defense. He thought about it, planned it, and did it. Now, can you consider life in prison?" Note the previous question incorporates case specific facts disguised as elements which avoids pre-commitment or staking out objections.

When adverse jurors offer any extraneous reason to consider life in prison, Wymore teaches to continue the process of re-stripping jurors. For example, if a juror says he would give life if the killing was accidental, thank the juror for his honesty and tell him that an accidental killing would be a defense, thus eliminating a capital sentencing hearing. Recommit the juror to his position, keep stripping, and then challenge for cause. Frankly, this process is unending and critical to success.

Wymore emphasizes the importance of recording the exact language stated by jurors. Not only does this assist with the grading process, but it serves as an important tool when you dialogue with jurors, mirroring their language back to them, whether to educate or remove.

Finally, Wymore eventually transcends jury selection from information gathering to record building, or the phase when you are developing challenges for cause by reciting their words, recommitting them to their position, and moving for removal.

V. Our Method: Modified Wymore

Our approach is a modified version of Wymore merging various strategies including the use of select statutory language[16] originating in part from the old *Allen* charge;[17] studies on the psychology of juries;[18] identifying individual and personal characteristics of the defendant, victim, and material witnesses; profiling our model jury; and a simple rating system for prospective jurors. One other fine trial lawyer has recently written, at least in part, on a non-capital, modified Wymore version of jury selection as well.[19]

Our case preparation process is as follows. First, we start by considering the nature of the charge(s), the material facts, whether we will need to adduce evidence, and assess candidly prosecution and defense witnesses. Second, we identify personal characteristics of the defendant, victim, family members, and other important witnesses, all in descending order of priority. We do the same for prosecution witnesses. Individual characteristics include age, education, occupation, marital status, children, means, residential area, socioeconomic status, lifestyle, criminal record, and any other unique, salient factor. Third, we bear in mind typical demographics like race, age, gender, ethnicity, and so forth. Fourth, we review the jury pool list, both for individuals we may know and for characteristic comparison. Finally, we prepare motions designed to address legal issues and limit evidence for hearing pretrial.[20]

We use several methods in jury selection. At the beginning, I spend a few minutes educating the jury about the criminal justice system and the jury's preeminent role, magnifying the moment and

[16] N.C. GEN. STAT. §§ 15A-1235(b)(1),(2), and (4). These subsections have language which insulate and isolate jurors, including phrases addressing the duty to consult with one another with a view to reaching an agreement if it can be done without violence to individual judgment, each juror must decide the case for himself, and no juror should surrender his honest conviction for the mere purpose of returning a verdict.

[17] *Allen v. United States*, 164 U.S. 492 (1896) (approving a jury instruction to prevent a hung jury by encouraging jurors in the minority to reconsider their position; some of the language in the instruction included the verdict must be the verdict of each individual juror and not a mere acquiescence to the conclusion of others, examination should be with a proper regard and deference to the opinion of others, and it was their duty to decide the case if they could conscientiously do so).

[18] Part of my approach includes strategies learned from David Ball, one of the nation's leading trial consultants. Mr. Ball is the author of two best-selling trial strategy books, "David Ball on Damages" and "Reptile: The 2009 Manual of the Plaintiff's Revolution," and he lectures at CLE's, teaches trial advocacy, and has taught at six law schools.

[19] *See* Jay Ferguson's CLE paper on "Transforming a Mental Health Diagnosis into Mental Health Defense," presented at the 2016 Death Penalty seminar on April 22, 2016, wherein Mr. Ferguson, addressing Modified Ball/Wymore *Voir Dire* in non-capital cases, asserts, among other points, the only goal of jury selection is to get jurors who will say not guilty, listen with an open mind to mental health evidence, not shift the burden of proof, apply the fully satisfied/entirely convinced standard of reasonable doubt, and discuss openly their views of the nature of the charge(s) and applicable legal elements and principles.

[20] As a practice tip, ask to hear all motions pre-trial and before jury selection. Knowledge of the judge's rulings may be central to your jury selection strategy, often revealing damaging evidence which should be disclosed during the selection process. Motions must precisely address issues and relevant facts within a constitutional context. If a judge refuses to hear, rule upon, or defers a ruling on your motion(s), recite on the record the course of action is not a strategic decision by the defense, thereby alerting the court of and protecting the defendant's recourse for post-conviction relief. *Strickland v. Washington*, 466 U.S. 668 (1984).

simplifying the process.[21] I often tell them I am afraid they will think my client did something wrong by his mere presence, thereafter underscoring they are at the pinnacle of public service, serve as the conscience of the community, and must protect and preserve the sanctity of trial.[22] In a sense I am using the **lecture method** to establish leadership and credibility. I then transition to the dominant method, the **listener method**, asking many open-ended group questions followed by precise individual questions. I speak to every juror, even if only to greet and acknowledge them, but more often to address specific comments, backgrounds, or engage them in areas of concern. We look closely at jurors, including their family and close friends, focusing on the characteristics we have identified, good or bad. I always address concerning issues, stripping and re-stripping per **Wymore**. We strip by using uncontroverted facts (e.g., "my client blew a .30") and by addressing extraneous issues and circumstances (i.e., inapplicable facts and defenses like "this is not an accident case") as they arise to find jurors who do not have the ability to be fair and impartial or hear the instant case. In a sense, stripping is accomplished via drawing the sting. We tell bad facts to strip bad jurors. During the entire process I am **profiling** jurors, searching for select characteristics previously deemed favorable or unfavorable. We also focus on **juror receptivity** to our presentation, looking at their individual responses, physical reactions, and exact comments. For jurors of which I am simply unsure, I fall back on **demographic** data, then using my **gut** as a final filter. Last, we isolate and insulate each juror per **Wymore**, attempting to create twelve individual juries who will respect each other in the process.

I use a simple grading scale as time management is always paramount during jury selection. As a parallel, the automatic life juror (or Wymore numbers one through three) gets a plus symbol (+), the automatic death juror (or Wymore numbers four through seven) gets a negative symbol (x), and the undetermined juror get a question mark (?). While every jury is different, I try to deselect no more than three on the first round and strive to leave one peremptory challenge, if possible, never forgetting I am one killer away from losing the trial.

I commonly draw the sting by telling the jury of uncontroverted facts, thereafter addressing their ability to hear the case. Prosecutors may object, citing an improper stake-out question as the basis. In your response, tie the uncontroverted fact to the juror's ability to follow the law or be fair and impartial. Case law supports my approach. *See State v. Nobles*, 350 N.C. 483, 497–98 (1999) (finding it proper for the prosecutor to describe some uncontested details of the crime before he asked jurors whether they knew or read anything about the case; ADA told the jury the defendant was charged with discharging a firearm into a vehicle "occupied by his wife and three small children"); *State v. Jones*, 347 N.C. 193, 201–02, 204 (1997) (holding a proper non-stake-out question included telling the jury there may be a witness who will testify pursuant to a deal with the State, thereafter asking if the mere fact there was a plea bargain with one of the State's witnesses would affect their decision or verdict in the case); *State v. Williams*, 41 N.C. App. 287,

[21] Tools that can help jurors frame the trial, remain engaged, and retain information received include the use of a "mini-opening" at the beginning of *voir dire*, or delivering preliminary instructions of the process, law, and relevant legal concepts. *See* Susan J. MacPherson & Elissa Krauss, *Tools to Keep Jurors Engaged*, TRIAL, Mar. 2008, at 33.
[22] Trial by a jury of one's peers is a cornerstone of the principle of democratic representation set out in the U.S. Constitution. U.S. CONST. amend. VI.

disc. rev. denied, 297 N.C. 699 (1979) (finding prosecutor properly allowed, in a common law robbery and assault trial, to tell prospective jurors a proposed sale of marijuana was involved and thereafter inquire if any of them would be unable to be fair and impartial for that reason). Another helpful technique is to ask the jury "if [they] can consider" all the admissible evidence, again linking the bad facts you have revealed to the juror's ability to be fair and impartial or follow the law. *State v. Roberts*, 135 N.C. App. 690, 697 (1999); *see also U.S. v. Johnson*, 366 F. Supp. 2d 822, 842–44 (N.D. Iowa 2005) (finding case specific questions in the context of whether a juror could consider life or death proper under *Morgan*). In sum, a juror who is predisposed to vote a certain way or recommend a particular sentence regardless of the unique facts of the case or judge's instruction on the law is not fair and impartial. You have the right to make a diligent inquiry into a juror's fitness to serve. *State v. Thomas*, 294 N.C. 105, 115 (1978). When you are defending a stake-out issue, argue to the extent a question commits a juror, it commits him to a fair consideration of the accurate facts in the case and to a determination of the appropriate outcome.

The prime directive: Adhere to the profile, suppressing what my gut tells me unless objectively supported.

Using the current state of the law with my "Modified Wymore" approach, please see the outline I use for jury selection attached hereto as "Exhibit A."

VI. The Fundamentals

"*While the lawyers are picking the jury, the jurors are picking the lawyer."*[23]

Voir dire is distilled to three objectives: Deselect those who will hurt you or are leaning against you;[24] educate jurors about the trial process and your case; and be more likeable than your counterpart, concentrating on professionalism, honesty, and a smart approach.

I share a three tier approach to jury selection: Core concepts that are threshold principles, fine art methods, and my personal tips and techniques.

Now for foundational principles:

- Deselect those who will hurt your client. Move for cause, if possible. Identify the worst jurors and remove them.
- Jurors bring personal bias and preconceived notions about crime, trials, and the criminal justice system. You must find out whether they lean with you or the prosecution.

[23] RAY MOSES, JURY SELECTION IN CRIMINAL CASES (1998).

[24] I have heard skilled lawyers espouse a view in favor of accepting the first twelve jurors seated. It is difficult to comprehend a proper *voir dire* in which no challenges are made as chameleons are lurking within. As a rule of thumb, never pass on the original panel seated.

- Jurors who honestly believe they will be fair decide cases based on personal bias and preconceived ideas. Bias or prejudice can take many forms: racial, religious, national origin, ageism, sexism, class (including professionals), previous courtroom experience, prior experience with a certain type of case, beliefs, predispositions, emotional response systems,[25] and more.
- Jurors decide cases based on bias and beliefs, regardless of the judge's instructions.
- There is little correlation between the similarity of the demographic factors (e.g., race, gender, age, ethnicity, education, employment, class, hobbies, or the like) of a juror and defendant and how one will vote.
- Cases are often decided before jurors hear any evidence.
- Traditional *voir dire* is meaningless.[26] Social desirability and pressure to conform inhibits effective jury selection when using traditional or hypothetical questions.[27] Asking jurors if they can put aside bias, be fair and impartial, and follow the judge's instructions are ineffective. Traditional questions grossly underestimate and fail to detect the degree of anti-defendant bias in the community.[28]
- Hypothetical questions about the justice system result in aspirational answers and have little meaning.
- You can neither change a strongly held belief nor impose your will upon a juror in the time you have in *voir dire*.[29]

[25] Recent research has highlighted the important role of emotions in moral judgment and decision-making, particularly the emotional response to morally offensive behavior. June P. Tangnet, Jeff Stuewig, & Debra J. Mashek, *Moral Emotions and Moral Behavior*, 58 ANNUAL REVIEW OF PSYCHOLOGY 345 (2007).

[26] Post-trial interviews reveal jurors lose interest and become disengaged with the use of technical terms and legal jargon, without an early and simple explanation of the case, and during a long trial. *See* MacPherson & Krauss, *supra* note 21, at 32. Studies by social scientists on non-capital felony trials reveal the following findings: (1) On average, jury selection took almost five hours, yet jurors as a whole talked only about thirty-nine percent of the time; (2) lawyers spent two percent of the time teaching jurors about their legal obligations and, in post-trial interviews assessing juror comprehension, many jurors were unable to distinguish between or explain the terms "fair" and "impartial"; and (3) one-half the jurors admitted post-trial they could not set aside their personal opinions and beliefs, although they had agreed to do so in *voir dire*. Cathy Johnson & Craig Haney, *Felony Voir Dire, an Exploratory Study of its Content and Effect*, 18 LAW AND HUMAN BEHAVIOR 487 (1991).

[27] James Lugembuhl, *Improving Voir Dire*, THE CHAMPION (Mar. 1986).

[28] *Id.*

[29] Humans have a built-in mechanism called scripting for dealing with unfamiliar situations like a trial. This mechanism lessens anxiety by promoting conforming behavior and drawing on bits and pieces of one's life experience – whether movies, television, friends or family – to make sense of the world around them. Unless you intercede, the script will be that lawyers are not to be trusted, trials are boring, people lie for gain, judges are fair and powerful, and the accused would not be here if he did not do something wrong. OFFICE OF THE STATE PUBLIC DEFENDER, JURY SELECTION (2016).

VII. Fine Art Techniques

"*The evidence won't shape the jurors. The jurors will shape the evidence."*[30]

The higher art form:[31]

- Make a good first impression. Remember primacy and recency[32] at all phases, even jury selection. There is only one first impression. Display warmth, empathy, and respect for others and the process. Show the jurors you are fair, trustworthy, and know the rules.
- Understand trial is an unknown world to lay persons or jurors. They feel ignored and are unaware of their special status, the rules of propriety, and that soon almost everyone will be forbidden to speak with them.
- Comfortable and safe *voir dire* will cause you to lose. Do not fear bad answers. Embrace them. They reveal the juror's heart which will decide your case.
- Tell jurors about incontrovertible facts or your affirmative defense(s).[33] Be prepared to address the law on staking-out the jury for a judge who restricts your approach to this area. Humbly make a record.
- Tell jurors they have a personal safety zone. Be careful of and sensitive to a juror's personal experience. When jurors share painful or emotional experiences, acknowledge their pain and express appreciation for their honesty.
- When a juror expresses bias, the best approach is counter-intuitive. Do not stop, redirect them, or segue. Immediately address and confront the issue. Mirror the answer back, invite explanation, reaffirm the position, and then remove for cause. Use the moment to teach the jury the fairness of your position.
- Use fact questions to get fact answers. Ask jurors about analogous situations in their past. This will help profile the juror.

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[30] MOSES, *supra* note 23.

[31] Ask about the trial judge and how he handles *voir dire*. Consider informing the trial judge in advance of jury selection about features of your *voir dire* which may be deemed unusual by the prosecutor or the court, thus allowing the judge time to consider the issue, preventing disruption of the selection process, and affording you an opportunity to make a record.

[32] The law of primacy in persuasion, also known as the primacy effect, was postulated by Frederick Hansen Lund in 1926 and holds the side of an issue presented first will have greater effect in persuasion than the side presented subsequently. Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors*, 19 JOURNAL OF COMMUNICATION 239 (1969). The principle of recency states things most recently learned are best remembered. Also known as the recency effect, studies show we tend to remember the last few things more than those in the middle, assume items at the end are of greater importance, and the last message has the most effect when there is a delay between repeated messages. The dominance of primacy or recency depends on intrapersonal variables like the degree of familiarity and controversy as well as the interest of a particular issue. Curtis T. Haughtvedt & Duane T. Wegener, *Message Order Effects in Persuasion: An Attitude Strength Perspective*, 21 JOURNAL OF CONSUMER RESEARCH 205 (1994).

[33] Prior to the selection of jurors, the judge must inform prospective jurors of any affirmative defense(s) for which notice was given pretrial unless withdrawn by the defendant. N.C. GEN. STAT. § 15A-1213; N.C. GEN. STAT. § 15A-905(c)(1) (notice of affirmative defense is inadmissible against the defendant); N.C.P.I. – Crim. 100.20 (instructions to be given at jury selection).

- Listen. Force yourself to listen more. Open-ended questions (e.g., "Tell us about…, Share with us…, Describe for us…," etc.) keep jurors talking, revealing life experiences, attitudes, opinions, and views. Have a conversation. Spend time discussing their personal background, relevant experiences, and potential bias. Make it interesting to them by making the conversation about them. Use the ninety/ten rule, jurors talking ninety percent of the time.
- Consider what the juror needs to know to understand the case and what you need to know about the juror.
- Seek first to understand, then to be understood.
- Personal experiences shape juror's views and beliefs and best predict how jurors view facts, law, and each other.
- Do not be boring, pretentious, or contentious.
- Look for non-verbal signals like nodding, gestures, or expressions.
- Spot angry jurors. "To the mean-spirited, all else becomes mean."[34]
- Refer back to specific answers. Let them know you were listening. Then build on the answers. Remember, a scorpion is a scorpion, regardless of one's trappings (i.e., presentation, words, or appearance).
- Deselect delicately. Tell them they sound like the kind of person who thinks before forming an opinion and the law is always satisfied when a juror gives an honest opinion, even if it is different from that of the lawyers or the judge. All the law asks is that jurors give their honest opinions and feelings. Stand and say, "We thank and respectfully excuse juror number . . . ."
- Juror personalities and attitudes are far more predictive of juror choices.
- Jury selection is about jurors educating us about themselves.

VIII. My Side Bar Tips

"*We don't see things as they are. We see them as we are."*[35]

My personal palette of jury selection techniques:

- At the very outset, tell the jury the defendant is innocent (or not guilty), be vulnerable, and tell the jury about yourself. Become one of them.
- You must earn credibility in jury selection.[36] Many jurors believe your client is guilty before the first word is spoken. Aligned with the accused, you are viewed with suspicion, serving as a mouthpiece. Start sensibly and strong. Be a lawyer, statesman,

[34] MOSES, *supra* note 23.
[35] ANAIS NIN, SEDUCTION OF THE MINOTAUR (1961).
[36] According to the National Jury Project, sixty-seven percent of jurors are unsympathetic to defendants, thirty-six percent believe it is the defendant's responsibility to prove his innocence, and twenty-five percent believe the defendant is guilty or he would not have been charged. Now known as National Jury Project Litigation Consulting, this trial consulting firm publicizes its use of social science research to improve jury selection and case presentation.

and one of them – a caring, community member. Earn respect and credibility when it counts – right at the start.

- We develop a relationship with jurors throughout the trial. Find common ground, mirroring back the intelligence and social level of the individual jurors. Be genuine. Become the one jurors trust in the labyrinth called trial.
- Encourage candor. Tell the jury there are no right or wrong answers, and you are interested in them and their views. Tell them citizens have the right to hold different views on topics, and so do jurors. Tell them you will be honest with them, asking for honest and complete answers in return. Assure them honest responses are the only thing expected of them. Reward the honest reply, even if it hurts.
- Listen to and observe opposing counsel. Purposefully contrast with the prosecutor. If he is long-winded, be precise and efficient. If he misses key points, spend time educating the jury. Entice jurors who choose early to choose you.
- Humanize the client. Touch, talk with, and smile at him.
- Remind the client continually of appropriate eye contact, posture, and perceived interest in the case.
- Beware of a reverse *Batson* challenge when there is an obvious trend by the defense using peremptory challenges based on race, gender, or religion.
- Propensity is the worst evidence.
- If jurors fear or do not understand your client or his actions, whether due to violence, mental health, or the unexplained, they will convict your client - quickly.
- Pick as many leaders[37] as possible, creating as many juries as possible. Do not pick followers: you shrink the size of the jury. Avoid young, uneducated, and apparently weak, passive, or submissive jurors. Target and engage them to sharpen your view. Remember: you only need one juror to exonerate, hang, or persuade the jury to a lesser-included verdict.
- Look for jurors who are resistant to social pressure (e.g., piercings, tattoos, etc.).
- The best predictor of human behavior is past behavior.
- Let the client exhibit manners. My paralegal, Candace Brown, is present during much of the trial, most importantly in jury selection. When it is our turn to deselect or dismiss jurors, she approaches, the defendant stands and relinquishes his chair, and we discuss and decide who to deselect. Ms. Brown also interacts with the defendant regularly during trial, recesses, and other opportunities, communicating perceived respect and a genuine concern for the client.
- Use the term fair and impartial when engaging the jaundiced juror, skewed in beliefs or position. Talk about the highest aim of a jury.
- Older women will exonerate your client in a rape or sex offense case, particularly if a young female victim has credibility issues. Conversely, beware of the grandfatherly, white knight.[38]

[37] Leaders include negotiators and deal-makers, all of whom wield disproportionate power within the group. *See* MOSES, *supra* note 23.

[38] White knights are individuals who have a compulsive need to be a rescuer. *See* MARY C. LAMIA & MARILYN J. KRIEGER, THE WHITE KNIGHT SYNDROME: RESCUING YOURSELF FROM YOUR NEED TO RESCUE OTHERS (2009).

- Fight the urge to use your last peremptory challenge. You may be left with the equivalent of an automatic death penalty juror.
- Draw the sting (i.e., strip). Tell the jury incontrovertible bad facts and your affirmative defense(s). Some jurors will react verbally, some visibly. Let the bad facts sink in. Engage the juror who reacts badly.[39] Reaffirm his commitment to your client's presumed innocence. Then tell them there is more to the story. The sting fades and loses its impact during trial.
- Use the language of the former highest aim Pattern Jury Instruction, telling jurors they have no friend to reward, no enemy to punish, but a duty to let their verdict speak the everlasting truth.
- Mirror the judge's instructions to the jury, early and often, using phrases from the judges various instructions including fair and impartial, the same law applies to everyone, they are not to form an opinion about guilt or innocence until deliberations begin, and so forth.[40] Forecast the law for them. Clothe yourself with vested authority.
- Commit the jury, individually and as a whole to principles of isolation and insulation. Ask them if they understand and appreciate they are not to do violence to their individual judgment, they must decide the case for themselves, and they are not to surrender their honest convictions merely for the purpose of returning a verdict.[41] Extract a group commitment that they will respect the personal judgment of each and every juror. Target an oral commitment from unresponsive or questionable jurors. Seek twelve individual juries. If done well, you increase your chances of a not guilty verdict, lesser-included judgment, hung jury, or a successful motion to poll the jury post-trial.
- Tell the jury the law never requires a certain outcome. Inform them that the judge has no interest in a particular outcome and will be satisfied with whatever result they decide. Emphasize the law recognizes that each juror must make his own decision.

IX. Subject Matter of *Voir Dire*

Case law on proper subject matter for *voir dire*[42] follows.

Accomplice Culpability: *State v. Cheek*, 351 N.C. 48, 65–68 (1999) (prosecutor properly asked about jury's ability to follow the law regarding acting in concert, aiding and abetting, and felony murder rule).

[39] To deselect jurors, commit the juror to a position (e.g., "So you believe . . . ."), normalize the impairment by acknowledging there are no right or wrong answers and citizens are free to have different opinions, and recommit the juror to his position (e.g., "So because of . . . , you would feel somewhat partial . . . ."), thus immunizing him from rehabilitation.
[40] N.C. GEN. STAT. § 15A-1236(a)(3), *et al*; *see also supra text* at II. Selection Procedure.
[41] N.C. GEN. STAT. §§ 15A-1235(b)(1) and (4).
[42] *See* MICHAEL G. HOWELL, STEPHEN C. FREEDMAN, & LISA MILES, JURY SELECTION QUESTIONS (2012).

Circumstantial Evidence: *State v. Teague*, 134 N.C. App. 702 (1999) (prosecutor allowed to ask if jurors would require more than circumstantial evidence, that is eyewitnesses, to return a verdict of first degree murder).

Child Witnesses: *State v. Hatfield*, 128 N.C. App. 294 (1998) (trial judge erred by not allowing defendant to ask prospective jurors "if they thought children were more likely to tell the truth when they allege sexual abuse").

Defendant's Prior Record: *State v. Hedgepath*, 66 N.C. App. 390 (1984) (trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow the judge's instructions they are to consider the defendant's prior record only for the purpose of determining credibility).

Defendant Not Testifying: *State v. Blankenship*, 337 N.C. 543 (1994) (proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense; however, the court has discretion to disallow the same).

Expert Witness: *State v. Smith*, 328 N.C. 99 (1991) (asking the jury if they could accept the testimony of someone offered in a particular field like psychiatry was not a stake-out question.

Eyewitness Identification: *State v. Roberts*, 135 N.C. App. 690, 697 (1999) (prosecutor properly asked if eyewitness identification in and of itself was insufficient to deem a conviction in the juror's minds regardless of the judge's instructions as to the law)

Identifying Family Members: *State v. Reaves*, 337 N.C. 700 (1994) (no error for prosecutor to identify members of murder victim's family in the courtroom during jury selection).

Intoxication: *State v. McKoy*, 323 N.C. 1 (1988) (proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense).

Legal Principles: *State v. Parks*, 324 N.C. 420 (1989) (defense counsel may question jurors to determine if they completely understood the principles of reasonable doubt and burden of proof; however, once fully explored, the judge may limit further inquiry).

Pretrial Publicity: *Mu'Min v. Virginia*, 500 U.S. 415, 419–21 (1991) (inquiries should be made regarding the effect of publicity upon a juror's ability to be impartial or keep an open mind; questions about the content of the publicity may be helpful in assessing whether a juror is impartial; it is not required that jurors be totally ignorant of the facts and issues involved; the constitutional question is whether jurors had such fixed opinions they could not be impartial).

Racial/Ethnic Background[43]: *Ristaino v. Ross*, 424 U.S. 589 (1976) (although the due process clause creates no general right in non-capital cases to *voir dire* jurors about racial prejudice, such questions are constitutionally mandated under "special circumstances" like in *Ham*); *Ham v. South Carolina*, 409 U.S. 524 (1973) ("special circumstances" were present when the defendant, an African-American civil rights activist, maintained the defense of selective prosecution in a drug charge); *Rosales-Lopez v. U.S.*, 451 U.S. 182 (1981) (trial courts must allow questions whether jurors might be prejudiced about the defendant because of race or ethnic group when the defendant is accused of a violent crime and the defendant and victim were members or difference races or ethnic groups); *See also Turner v. Murray*, 476 U.S. 28 (1986) (such questions must be asked in capital cases in charge of murder of a white victim by a black defendant).

Sexual Offense/Medical Evidence: *State v. Henderson*, 155 N.C. App. 719, 724–27 (2003) (prosecutor properly asked in sex offense case if jurors would require medical evidence "that affirmatively says an incident occurred" to convict as the question measured jurors' ability to follow the law).

Sexual Orientation: *State v. Edwards*, 27 N.C. App. 369 (1975) (proper for prosecutor to question jurors regarding prejudice against homosexuality to determine if they could impartially consider the evidence knowing the State's witnesses were homosexual).

Specific Defenses: *State v. Leonard*, 295 N.C. 58, 62–63 (1978) (a juror who is unable to accept a particular defense recognized by law is prejudiced to such an extent he can no longer be considered competent and should be removed when challenged for cause).

X. Other Important Considerations

It is axiomatic you must know the case facts, theory of defense, theme(s) of the case, and applicable law to conduct an effective *voir dire*. Beyond these fundamentals, I offer a few practice tips. First, every jury selection is different, tailored to the unique facts, law, and individuals before you. Second, we meet with the defendant and witnesses on the eve of trial for a last review. Often, we learn new facts, good and bad, as witnesses are sometimes impressive but are more commonly afraid, experience memory loss, present poorly, or will not testify. We re-cover the material points of trial, often illuminating important facts that require disclosure in the selection process. Last, I like to use common sense analogies and life themes to which we can all relate in my conversation with jurors.

[43] Considerations of race can be critical in any case, and *voir dire* may be appropriate and permissible to determine bias under statutory considerations of one's fitness to serve as a juror. *See generally* N.C. GEN. STAT. § 15A-1212(9) (challenges for cause may be made . . . on the ground a juror is unable to render a fair and impartial verdict). Strategically, try to show how questions on racial attitudes are relevant to the theory of defense. If the inquiry is particularly sensitive, request an individual *voir dire*. *See* N.C. DEFENDER MANUAL, *supra* note 7, at 25-18.

Look, act, and dress professionally. Make sure your client and witnesses dress neatly and act respectfully. Of all the things you wear, your expression is most important. A pleasant expression adds face value to your case.[44]

Use plain language. Distill legal concepts into simple terms and phrases.

At the outset, tell the jury they have nothing to fear. Inform them the judge, the governor[45] of the trial, will tell them everything they need to know, and the bailiffs are there for their assistance, security, and comfort. Instruct the jury they need only tell the bailiffs or judge of any needs or concerns they may have.

Be respectful of opposing counsel, not obsequious. You reap what you sow. Promote respect for the process. Be mindful of how you address opposing counsel. He is the prosecutor, not the State of North Carolina (or the government). If the prosecution invokes such authority, tell the jury you represent the citizens of this state, protecting the rights of the innocent from the power of the government.

Sun Tzu, author of *The Art of War*, provides timeless lessons on how to defeat your opponent. A fellow lawyer, Michael Waddington, in *The Art of Trial Warfare*, applies Sun Tzu's principles to the courtroom. I share a sampling for your consideration. Trial is war. To the trial warrior, losing can mean life or death for the client. Therefore, the warrior constantly learns, studies, and practices the art of trial warfare, employing the following principles: Because no plan survives contact with the enemy, he is always ready to change his strategy to exploit a weakness or seize an opportunity. He strikes at bias, arrogance, and evasive answers. He prepares quietly, keeping the element of surprise. He makes his point efficiently, knowing juries have limited attention spans and dislike rambling lawyers. He impeaches only the deserving and when necessary. He is self-disciplined, preparing in advance, capitalizing on errors, and maintaining momentum. He is unintimidated by legions of lawyers or a wealth of witnesses, knowing they are bloated prey. He sets up the hostile witness, luring misstatements and exaggerations for the attack. He does not become defensive, make weak arguments, or present paltry evidence. He focuses on crucial points, attacking the witnesses in his opponent's case. He neither moves nor speaks without reflection or consideration. He never trusts co-defendants or their counsel, for danger looms. He remains calm and composed, unflinching when speared. He neither takes tactical advice nor allows his client to dictate the trial,[46] recognizing why his client sits next to him. He is not reckless, cowardly, hasty, oversensitive, or overly concerned what others think. He prepares for battle, even in the midst of negotiation. He keeps his skills sharp with constant practice and strives to stay in optimal physical and emotional shape – for trial requires the stamina of a warrior. The trial lawyer understands mastery of the craft is an ongoing, lifetime journey.

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[44] MOSES, *supra* note 23.

[45] Judges are sometimes referenced as the governor or gatekeeper of the trial, particularly when deciding admissibility of expert evidence. *See State v. McGrady*, 368 N.C. 880 (2016) (amended Rule 702(a) implements the standards set forth in *Daubert*); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (defines the judge's gatekeeping role under FED. R. EVID. 702).

[46] *But see State v. Ali*, 329 N.C. 304 (1991) (when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, the client's wishes must control).

We summarize life experiences and belief systems via themes. The best themes are succinct, memorable, and powerful emotionally. We motivate and lure jurors to virtuosity – or difficult verdicts – through life themes. Consider the following themes (combined with argument): The first casualty of war – or trial – is innocence. Fear holds you prisoner; faith sets you free. How many wars have been fought and lives lost because men have dared to insist to be free? Did you ever think you would have the opportunity to affect the life of one person so profoundly while honoring the principles for which our forefathers fought? Stand up for freedom today; for many, freedom is more important than life itself. Partial or perverted justice is no justice; it is injustice. Stop at nothing to find the truth. You have no friend to reward and no enemy to punish. Your duty is to let your verdict speak the everlasting truth. His triumph today will trigger change tomorrow. Investigations will improve, and justice will have meaning. Trials will no longer be a rush to judgment but instead a road to justice. A trial lawyer without a theme is a warrior without a weapon.[47]

XI. Integrating *Voir Dire* into Closing Argument

At the end of closing argument, I return to central ideas covered in *voir dire*. I remind the jury the defendant is presumed innocent even now, walk over to my client and touch him – often telling the jury this is the most important day of my client's life. I then remind them they are not to surrender their honest and conscientious convictions or do violence to their individual judgment merely to return a verdict, purposefully re-isolating and re-insulating the jury before stating my theme and asking for them to return a verdict of not guilty.

XII. Summary

Prepare, research, consult, and try cases. Be objective about your case. Be courageous. Stand up to prosecutors, judges and court precedent, if you believe you are right. Make a complete record. I leave you with words of hope and inspiration from Joe Cheshire, an icon of excellence, and one of many to whom I esteem and aspire. Hear the message. Go make a difference.

> "A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little

[47] Charles L. Becton, *Persuading Jurors by Using Powerful Themes*, TRIAL 63 (July 2001).

when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end."

"The day may come when we are unable to muster the courage to keep fighting … but it is not this day."[48]

[48] THE LORD OF THE RINGS: RETURN OF THE KING (New Line Cinema 2003).

EXHIBIT A

REFERENCES

1. *Voir Dire*: 15A-1211 to 1217
2. Jury Trial Procedure: 15A-1221 to 1243
3. Bifurcation: 15A-928
4. Jury Instruction Conference: Gen. R. of Prac. 21; 15A-1231

NEED

1. Witness List
2. Jury Profile
3. Jury Pool List
4. 12 Leaders/They save themselves

VOIR DIRE

(Humble/vulnerable; Introduce/tell about self/firm/defendant; Charge; Innocent/Not guilty; Use analogy)

EXPLAIN THE PROCESS

1. Search for truth: not CSI; often slow and deliberate.
2. Ideal jury: fair and impartial cross section of community.
3. Juror service: Pinnacle of public service; conscience of community; protect/preserve process.
4. You bring life experience and common sense.
5. May be a great juror in one case but not another.
6. Judge: gatekeeper/governor of trial. Will tell us all we need to know.
7. Length of trial.

GROUP QUESTIONS

(You, close friend, family member)

8. News accounts?
9. Ever employed us? Has our firm ever been on other side of legal proceeding?
10. Ever associate with DA's? (Know/served with/visit in home/relationship to favor/disfavor?)
11. Know defendant?
12. Know victim/family?
13. Know any witnesses?
14. Ever serve on jury? (Inform of different civil/criminal burdens of proof) Verdict? Respected?
15. Ever testified as witness/participant in legal proceeding?
16. You/family/close friends in law enforcement?
17. You/family/close friends been victims of a crime/had similar experience?
18. Any strong opinions regarding this type of charge; "touched" by this type of crime; be fair and impartial?
19. Examples: MADD, Leadership Rowan, believe any use is wrong, gun owners, NRA, CCP vs. Prison Ministry, LGBT, reluctant juror

INDIVIDUAL QUESTIONS

20. Where live? Employment? Spouse? Family/children?
21. Any disability/physical/medical problems?
22. Any personal/business commitments?
22. Any specialized medical/psychological, legal/law enforcement, scientific/forensic training?

KEY POINTS

23. Supervise any employees?
24. Know anyone else on the jury panel/pool?
25. Ever serve as sworn LEO or similar capacity?
26. Military service?
27. Rescue squad/EMS/Fire Dept. service?
28. Teacher/Pastor/Church member/Government employee?
29. Serve on another jury this week?

SEE REVERSE

PROCESS OF TRIAL

30. State goes first; defense goes last; do not decide; address judge's instruction.
31. Will be objections/interruptions based on rules of evidence/procedure? Matters of law.
31. DRAW THE STING/STRIP. Cover BAD/UNDISPUTED FACTS/AFFIRMATIVE DEFENSES or IRRELEVANT ISSUES/FACTS (weapons, bad injuries, criminal record, drugs, alcohol, relationships, etc.). The law recognizes certain defenses. Not every death, injury or bad act is a crime.
32. Race/gender/religion issues? (white victim/black defendant); Batson; *Prima facie* case (raise inference?)/Race-neutral reasons/Purposeful discrimination? Judge elicit?
32. Some witnesses are everyday folks. Will anyone give testimony of LEO any greater weight solely because he wears a uniform? Judge will charge on credibility of witnesses. Promise to follow law?
33. You may hear from expert witnesses. Can you consider?
34. The charge is _____. Judge will explain the law. Burden of proof is "beyond a reasonable doubt" (fully satisfies/entirely convinces). State must prove each and every element beyond burden. Promise to hold to burden? Same burden as Murder.
35. Defendant presumed innocent. Defendant may choose, or not choose, to take the stand. He remains clothed with the presumption of innocence now and throughout this trial. Not a blank chalk board or level playing field. Will you now conscientiously apply presumption of innocence to the Defendant?
36. Must you hear from the Defendant to follow the law? Must the Defendant "prove his innocence?" You are "not to consider" whether defendant testifies. PJI - Crim. 101.30

CONCLUSION

37. You have the right to hear and see all the evidence, voice your opinion, and have it respected by others.
38. You are to "reason together…but not surrender your honest convictions" as deliberate toward the end of reaching a verdict. You are "not to do violence to your individual judgment." "You must decide the case for yourself." N.C. Gen. Stat. §15A-1235.
39. Use your "sound and conscientious judgment." Be "firm but not stubborn in your convictions." PJI – Crim. 101.40.
40. Believe the opinions of other jurors are worthy of respect? Will you?
41. No crystal ball. Do you know of any reason this case may not be good for you? Any questions I haven't asked that you believe are important?

CHALLENGES FOR CAUSE

1. Grounds. N.C.G.S. 15A-1212.
    a. Is incapable by reason of mental or physical infirmity.
    b. Has been or is a party, witness, grand juror, trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge.
    c. Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
    d. Is related by blood or marriage within the sixth degree to the defendant or victim of the crime.
    e. Has formed or expressed an opinion as to the guilt or innocence of defendant.
    f. Is presently charged with a felony.
    g. As a matter of conscience, would be unable to render a verdict with respect to the charge in accordance with the law.
    h. For any other cause is unable to render a fair and impartial verdict.

BUZZ PHRASES

1. Substantially impair? Automatically vote? St. v. Cummings, 326 N.C. 298 (1990); St. v. Chapman, 359 N.C. 328 (2005).
2. "Stake out" questions? (Hypothetical) Ask: Can you consider? St. v. Roberts, 135 N.C. App. 690 (1999).
3. Can you set aside opinion and reach decision solely upon evidence?
4. Juror statement he could follow the law but defendant's failure to testify would "stick in the back of his mind" while deliberating should have been excused for cause. *State v. Hightower*, 331 N.C. 636 (1992).

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

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Basis for Challenge for Cause. 15A-1212

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

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

The STEPS to obtain a for cause challenge

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

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

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

4) Lock the juror's biased answer into a challenge for cause basis
Switch to LEADING questions from here on
Repeat the juror's biased views and emphasize the strength of the views
If the juror tries to wiggle out or qualify the answer, strip or take away their

qualifier and repeat the essence of their views

"Your son's struggles with cocaine has caused you to have very strong and personal feelings against anyone charged with a drug crime."

5) Suggest how the bias or impairment "might" provide the grounds for challenge

First, just raise the issue…do not go for the kill

The bias may provide more than one basis for challenge [see below examples]

Use leading questions but do not be confrontational

You may have to re-validate the juror's belief and right to hold those beliefs

"Your feelings about someone charged with a drug crime might affect your ability to be a neutral juror in this case?

[or your ability to presume innocence…or may make you lean toward an opinion of guilt before the trial starts…or prevent you from considering all the evidence]"

6) Get the juror to agree that their bias will affect their ability to serve

This may be tricky…you have to go from "might affect" to "would affect"

It might take several closely worded questions quantifying the effect...from "might" to "possible" to "probable" to "likely" to "substantially", etc.

You need to discuss how every case is not a right fit for every juror

Another type of case would be better for that juror…a case not involving that bias

Do not argue with the juror…You need the juror to agree with you

You may need to praise their honesty or right to hold their beliefs

"Your views about someone charged with a drug crime would affect your ability to be a neutral juror in this case?

[or your ability to presume innocence…or may make you lean toward an opinion of guilt before the trial starts…]"

This should provide the basis for a challenge for cause but beware "rehabilitation"

7) Protect your challenged juror's answers from "rehabilitation"

Commend the juror's honesty and willingness to talk about this personal issue

Remind juror of appropriateness of having strong views

Lock juror in on strength of views and views are part of who they are

Reassure juror that there is nothing wrong with having views that differ

from lawyers, other jurors, or judge

from the rules about jury service

Note that the juror does not appear the type who change opinions for convenience

Make your Challenge for CAUSE